

**Collegial Rule-Implementation:
Peer Reviews in Global Administrative Law**

– Global Fellows Forum/NYU –

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Abstract

Despite the significant shift of regulatory power from the nation state to international, regional and other global organizations like transnational networks and private governance regimes, many global administrative functions remain national. Implementation of the global rules is one of the most important functions that domestic administrations perform in the global

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legal order. In order to monitor this global function, several global organizations have introduced *peer review mechanisms*. Peer review in Global Administrative Law (GAL) is an examination of one national administrations' performance or practices in a particular area by other national administrations (the peers). Civil servants and officials from ministries and agencies in the relevant policy field from other countries are involved in this evaluation process.

Peer review in GAL is an instrument for the monitoring of domestic implementation of global rules. At the same time, it is a means of bringing national executives in contact with each other. Through globalization and its subsequent breaking of the national frames, the phenomenon of self-regulation of the administration emerges in the global administrative order. Despite the fact that globalization frees domestic administration from its domestic constraints and national controls such as parliamentary, governmental, fiscal control and judicial review, it imposes at the same time new constraints on national administrative bodies. They are global administrative constraints. Global administrative self-organization leads also to new forms of accountability in the global legal order.

The research is structured into three parts: In the first part, a general theory of peer review is presented and four specific fields are analyzed (nuclear safety, anti-money laundering, conformity assessment and anti-corruption). The second part examines the phenomenon of global administrative self-organization and the third explores the accountability potential enclosed in the peer review structures.

Introduction

Despite the significant shift of regulatory power from the nation state to international, regional and other global organizations like transnational networks and private governance regimes, many global administrative functions remain national. Implementation of the global rules is one of the most important functions that domestic administrations perform in the global legal order. In order to monitor this global function, several global organizations like the UN Environment Program (UNEP), the UN Conference on Trade and Development (UNCTAD), the UN Economic Commission for Europe, the International Monetary Fund (IMF) and the African Union have introduced *peer review mechanisms*. Peer review in Global Administrative Law (GAL) is an examination of one national administrations' performance in a particular area by other national administrations (the peers). Civil servants and officials from ministries and agencies in the relevant policy field from other countries are involved in this evaluation process.

There is a large variety of peer review systems in the domestic legal orders. Examples range from the editorial peer review in scientific journals and grant funding peer review to so called "administrative" or "scientific peer reviews".¹ Administrative peer review in US administrative law is a review of scientific information pertinent to a specific field² pursuing sound science in that field.³ Peer review in GAL has a different meaning.⁴ It is conducted by agency officials of a governmental body or other administrative authority in their capacity as representatives of the administration of another domestic legal order. The peer review is not conducted in order to review scientific information, but in order to control the implementation of the norms of the respective regime. It is an administrative-technical rather than a scientific review process.

Peer review in GAL is an instrument for the monitoring of domestic implementation of global rules. At the same time, it is a means of bringing national executives in contact with each other. Peer reviews are usually used as instruments of self-organized social groups and professions signaling some autonomy of the relevant group. Global peer review enhances the

¹ Louis J. Virelli, III, *Scientific Peer Review and Administrative Legitimacy*, 61 ADMIN. L. REV. 101 (2009); see also J.B. Ruhl/James Salzman, *In Defense of Regulatory Peer Review*, 84 WASH. U. L. REV. 1 (2006); Lars Noah, *Scientific Republicanism: Expert Peer Review and the Quest for Regulatory Deliberation*, 49 EMORY L.J. 1033 (2000).

² Virelli, *supra* note 1, at 105.

³ Ruhl/Salzman, *supra* note 1, at 21.

⁴ There are examples of scientific peer reviews also at the global level; see, e.g., Nuclear Energy Agency (OECD), *Safety of Geological Disposal of High-level and Long-lived Radioactive Waste in France. An International Peer Review of the "Dossier 2005 Argile" Concerning Disposal in the Callovo-Oxfordian Formation*, NEA No. 6178 (2006).

autonomy of participating domestic bodies, as the authorities involved in the peer assessment achieve connections to their peers from abroad and the global bodies. Through globalization and its subsequent breaking of the national frames, the phenomenon of self-regulation of the administration emerges in the global administrative order. Despite the fact that globalization frees domestic administration from its domestic constraints and national controls such as parliamentary, governmental, fiscal control and judicial review, it imposes at the same time new constraints on national administrative bodies. They are global administrative constraints. Global administrative self-organization leads also to new forms of accountability in the global legal order.

The research is structured into three parts: Section A discusses peer reviews in four fields of GAL: a peer review provided by an international organization, the International Atomic Energy Agency, in the field of nuclear safety; a peer review hosted by a transnational network, the Financial Action Task Force, in the field of anti-money laundering; a peer review hosted by a private governance regime, the International Accreditation Forum, in the field of conformity assessment; and a peer review organized by the Organization for Economic Cooperation and Development in the field anti-corruption. Before the case-specific analysis, some elements of a general theory of peer review are presented. Section B examines the phenomenon of global administrative self-organization in its different dimensions; section C explores the accountability potential enclosed in the peer review structures.

A. The design of the peer review mechanism

I. Procedural design

In spite of being utilized in different regulatory fields, global peer review mechanisms present some common features.⁵ There are some general rules, in the sense of standardized global best practices applied to all peer reviews. In most cases, the peer review procedure is a formalized process. It uses two sets of standards: A set of substantive standards against which the performance of the reviewed body is measured (“assessment standards”) and a set of procedural standards that forms the basis of the peer review process (“procedure standards”). Both assessment and procedure standards are usually laid down in a document of secondary global

⁵ See also Monica J. Washington, *The Practice of Peer Review in the International Nuclear Safety Regime*, 72 N.Y.L. SCH. L. REV. 430, 446 (1997).

law. There are “harder” and “softer” forms of peer review.⁶ In the case of hard reviews, the review is obligatory for the reviewed body and is also linked to binding consequences for this body. In the case of soft reviews, the peer assessment is neither obligatory for the reviewed authority nor does it have binding consequences.⁷

Global peer reviews are in most cases organized under the auspices of a global organization. Tripartite structures are thus formed: the review process is a joint operation involving the reviewed administrative body, the examining administrative bodies (forming the review team), and officials and staff from the hosting and/or other global organization. The object of review is in most cases countries. In practice, the relevant ministries and regulatory authorities in the respective fields are involved. There are review systems that directly involve the administrative authorities concerned.

The experts conducting the review act as representatives of the administrative authority of another state. They are civil servants from ministries and agencies in the relevant policy field. The peer reviewers conduct examinations of documentation, participate in discussions with the reviewed authorities and probably third parties, and carry out on-site missions to the peer reviewed country. The peer review process is usually divided into three phases: The *first phase* is the preparatory phase, in which the peer review team is formed. The recruitment of an international team of experts is an important ingredient in the peer review process, whereas reviewer independence and objectivity is a fundamental feature of peer review. After the team has been formed, the review team sends a questionnaire to the reviewed country in order to gather some general information on the status of the legal order of the reviewed country. In some peer review systems, there is a requirement of a prior self-assessment of the reviewed authority. The *second phase* includes on-site visits of the members of the peer review committee. The visiting teams that evaluated the documentation based on the questionnaire carry out inspections and study audits. During their stay – the duration of which varies –, the peer reviewers meet with the reviewed bodies in order to gather further information on the status of the reviewed legal order but also on the actual implementation of the international rules. In the *third phase*, the review team drafts a report that has to be submitted to the host global organization. The report

⁶ OECD Policy Brief Peer Review: a Tool for Co-operation and Change, January 2007, 6.

⁷ See Philipp Dann, *Accountability in Development Aid Law: The World Bank, UNDP and Emerging Structures of Transnational Oversight*, 44 ARCHIV DES VÖLKERRECHTS 381 (2006) (peer reviews in the development aid sector operate on a voluntary basis).

describes and analyses the measures taken by the country or administrative body in order to comply with the international standards. It outlines the performance and shortcomings of the country/authority reviewed and offers recommendations on how to strengthen certain aspects of the national system such as suggestions for improvements. It also assesses the country's level of compliance with the respective international standards. The team compares and measures the domestic results against international standards, indicators, guidance and probably good practice elsewhere. The third phase can also involve a commenting sub-phase. This can include the reviewed country, other departments of the global organization and in some cases also other actors such as the civil society. The report is made public by the global organization that hosts the process. In some cases, follow-up reviews examine whether the state has acted on the peers' advice and whether the situation has improved.

II. Peer reviews in global regimes

1. Nuclear safety: IAEA

The International Atomic Energy Agency (IAEA) is an independent international organization working closely with the United Nations with the aim of promoting the peaceful use of nuclear energy and of inhibiting its use for any military purpose, including nuclear weapons. In order to safeguard the implementation of its rules and help its member countries comply with the nuclear safety regime, IAEA has introduced several types of review, including review by the Agency itself,⁸ self-assessment systems,⁹ such as peer review mechanisms. Peer reviews are embedded into a more general framework of safety and security review, evaluation and appraisal services that are provided by IAEA on the request of its members in order to implement the standards of the Agency.¹⁰

The Agency offers Legal and Governmental Infrastructure (LGI) peer review services that are aimed at providing advice and assistance to member states in order to strengthen and enhance the effectiveness of their regulatory infrastructure and foster effective, independent regulatory

⁸ See, e.g., the *Review of Accident Management Programmes (RAMP)* and the *Safety Assessment Capacity and Competency Review (SAC)*.

⁹ E.g., in the context of the *Periodic Safety Review Service (PSR)*.

¹⁰ Peer reviews are grounded on Article III IAEA Statute (see IAEA, *Integrated Regulatory Review Service (IRRS) to Germany*, Bonn, Stuttgart, 28 November 2008, p. i); see also Requirement 14 IAEA, *IAEA Safety Standards for protecting people and the environment. Governmental, Legal and Regulatory Framework for Safety, General Safety Requirements Part 1* (No. GSR Part 1).

bodies.¹¹ We are going to focus on the *Integrated Regulatory Review Service (IRRS)* that offers a comprehensive review of all aspects of the LGI.¹² The IRRS measures domestic regulatory technical and policy issues against IAEA safety standards.¹³ Other legally non-binding instruments such as the Code of Conduct on the Safety and Security of Radioactive Sources and the Code of Conduct on the Safety of Research Reactors can be included in the review upon request of the member states. It is designed to strengthen and enhance the effectiveness of the national regulatory infrastructure of States for nuclear, radiation, radioactive waste and transport safety and security of radioactive sources. The service focuses on legislative and governmental responsibilities, responsibilities and functions of the regulatory body, organization of the regulatory body, authorization process, regulations and guides, review and assessment, inspection and enforcement and management systems.

The IRRS process is divided into different phases and is coordinated by the agency. The review is also based on IAEA standards. The *Integrated Regulatory Review Service Guidelines*¹⁴ include guidance for the host country and reviewers to ensure the consistency and comprehensiveness of the regulatory review process. The IRRS process recognizes that organizational structure and regulatory processes vary from country to country depending on national legal and administrative systems, the size and structure of the nuclear and radiation protection program, financial resources available to the regulatory body, social customs and cultural traditions. The peer review has a nonbinding character, in the sense that the interested government invites IAEA to organize the review. The initial scope and topic areas of the review are based on a modular approach and determined by the member state in response to an IAEA questionnaire. Scope and topic areas are discussed with the Agency and can evolve during the mission, taking into account any newly identified issues.

¹¹ Examples of national regulatory bodies include the United States Nuclear Regulatory Commission (U.S.NRC), the Canadian Nuclear Safety Commission (CNSC) and the German Gesellschaft für Anlagen- und Reaktorsicherheit mbH (GRS).

¹² The IAEA had previously offered five distinct peer review services applicable to a member state's LGI, namely reviews based on regulatory, radiation and transport safety, nuclear security and emergency preparedness. With the IRRS the IAEA decided to follow an integrated approach.

¹³ Examples of IAEA safety standards: 1) No. GS-R-1 Legal and Governmental Infrastructure for Nuclear, Radiation, Radioactive Waste and Transport Safety; 2) No. GS-R-3 – The Management System for Facilities and Activities; 3) No. GS-G-1.1 – Organization and Staffing of the Regulatory Body for Nuclear Facilities; 4) No. GS-G-1.2 – Review and Assessment of Nuclear Facilities by the Regulatory Body; 5) No. GS-G-1.4 – Documentation for Use in Regulatory Nuclear Facility.

¹⁴ IAEA, *Guidelines for IAEA International Regulatory Review Teams (IRRTs)*, IAEA Services Series No. 8, Vienna (2002).

Usually the peer review is preceded by a self-assessment of the national regulatory infrastructure, based on the Self-Assessment Tool (SAT). The national authority provides the report of the Self-Assessment and a collection of so called Advance Reference Material (ARM) for the team to review. Upon the request, the Agency appoints an international team of experts from other member states of IAEA and from the Agency. They participate either as reviewers or observers.¹⁵ In the second phase of the review, the review team carries out an examination of a state's regulatory apparatus that includes discussions, interviews with national authority staff, inspections and direct observation of their working practices. The inspections and other activities take place at the premises of the authority but the team may also participate in technical visits at power plants. The process ends with a report of findings and recommendations of the expert team. The report provides advice and assistance to strengthen and enhance the effectiveness of the regulatory infrastructure. Follow-up mission are also usually carried out.

2. Anti-money laundering: FATF

Peer review mechanisms are also embedded into new global financial regimes. The Financial Action Task Force (FATF) is an intergovernmental body that comprises 34 member states from all parts of the world and 2 regional organizations (the so called FATF-style regional bodies – FSRBs). The FATF develops and promotes policies to protect the global financial system against money laundering and terrorist financing. It isn't a formal international organization, but a transnational network of regulatory officials. In order to achieve its goals, it has institutionalized a new form of control of the implementation of its standards. It has introduced and sustains a peer review system.

The Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) mutual evaluations program has been introduced for the assessment of the adequacy of a country's AML/CFT framework. Participants of the FATF mutual evaluations program are the members of the FATF and FSRBs.¹⁶ This multilateral peer review is the main instrument through which the FATF and FSRBs monitor progress made by their members when implementing the FATF rules.

¹⁵ For example, in IRRS Mission to the US, the IRRS Review Team consisted of 17 senior regulatory experts (14 reviewers and 3 observers) from 14 IAEA member states, 3 staff members from the IAEA and an IAEA administrative assistant (*see* IAEA, *Integrated Regulatory Review Service (IRRS) Mission to the United States of America*, IAEA-NS-IRRS-2010/02, Washington D.C., 17 to 29 October 2010).

¹⁶ The participating national authorities are called Financial Intelligence Units (FIUs); domestic examples include the US Financial Crimes Enforcement Network (FinCEN); the UK Serious Organised Crime Agency (SOCA); the German Zentralstelle für Verdachtsanzeigen-FIU; and the Korea Financial Intelligence Unit;

The system provides the way to assess the conformity of the national legislative and implementation measures against the FATF standards. The FATF standards are the “Forty Recommendations 2003” and the “Nine Special Recommendations on Terrorist Financing 2001” (“FATF 40+9 Recommendations”). The FATF 40+9 Recommendations include rules that need to be followed by member countries in order to comply with the FATF regime.

The “AML/CFT Methodology 2004” lays down the procedures that guide the assessment of a country’s compliance with the FATF standards.¹⁷ The peer review process is divided into three phases. In the preparatory phase, the FATF forms an evaluation team. The team consists of experts from different countries members of the FATF and experts of the IMF and from different fields of expertise covering several aspects of the fight against money laundering and the financing of terrorism.¹⁸ During this phase, important material is gathered by the assessment team based on a questionnaire directed to national authorities. The second phase involves an on-site mission of the evaluation team and is the most important phase of the mutual evaluations program. During the AML/CFT assessments mission, the assessment team meets with officials and representatives of all relevant government agencies and the private sector. In the third phase, the mutual evaluation team drafts the Mutual Evaluation Report (MER).¹⁹ The report is discussed in the FATF/FSRB Plenary Meeting that is also attended by the assessors. The MER describes, analyzes and provides general information on the examined country and gives an overview on several issues that help to define the context within which the AML/CFT regime operates. The preparation of the AML/CFT evaluation report is also based on the AML/CFT Methodology 2004. The Secretariats of the FATF and FSRBs assist the evaluation team in the drafting of the MER and ensure consistency of the reports. The information obtained in the preparatory phase, during the on-site visit such as other verifiable information subsequently provided by the authorities is the basis, on which the assessors review the adequacy of a country’s AML/CTF institutional framework, including the relevant AML/CFT laws, regulations, guidelines and other requirements such as their implementation and effectiveness, and the regulatory and other systems in place to deter and punish money laundering and the financing of terrorism. Beyond

¹⁷ FATF, *FATF, Methodology for Assessing Compliance with the FATF 40 Recommendations and the FATF 9 Special Recommendations*, 27 February 2004 (updated as of February 2009); see also FATF, *AML/CFT Evaluations and Assessments. Handbook for Countries and Assessors* (2009); FATF, *Key Principles for Mutual Evaluations and Assessments* (http://www.fatf-gafi.org/document/34/0,3746,en_32250379_32236963_45572898_1_1_1_1,00.html).

¹⁸ Nr. 13, 14 FATF, *AML/CFT Evaluations and Assessments*, *supra* note 17.

¹⁹ Nr. 9 FATF, *AML/CFT Evaluations and Assessments*, *supra* note 17.

reporting on the findings of a country's AML/CFT regime, the evaluators assess the anti-money laundering and counter-terrorist financing framework and determine the level of compliance with the FATF 40+9 Recommendations of the country under scrutiny.²⁰ The report provides also recommendations on how to strengthen certain aspects of the system addressing each of the areas of weakness.²¹ The MERs are made public by the FATF.

Similar peer review systems have been recently introduced into the new EU financial architecture by the three Regulations adopted to deal with the systemic deficiencies of the EU financial regime. They involve national competent authorities in the supervision of the implementation of the respective financial laws.²²

3. Conformity assessment: IAF

In order to support implementation mainly of world trade law and international environmental law, conformity assessment structures have been established worldwide.²³ Their aim is to guarantee harmonized implementation of global standards in the respective fields. Conformity assessment means primarily certification and accreditation. Certification is an act of a private party assessing the conformity of a product or service with specified sets of standards. Accreditation is an act of a governmental body assessing the conformity of the private certification body against some sets of standards.²⁴ Certification and accreditation bodies have evolved methods for a worldwide quality assurance of their services with the aim of achieving an

²⁰ The rating of compliance is made according to the four levels of compliance that are stipulated in the AML/CFT Methodology 2004: (Compliant (C), Largely Compliant (LC), Partially Compliant (PC), Non-Compliant (NC).

²¹ Nr. 30 FATF, *AML/CFT Evaluations and Assessments*, *supra* note 17.

²² See e.g. Article 8(1)(e) Regulation (EU) No 1093/2010 of the European Parliament and of the Council of 24 November 2010 establishing a European Supervisory Authority (European Banking Authority), amending Decision No 716/2009/EC and repealing Commission Decision 2009/78/EC; see also Reg. 1094/2010 (EIOPA) and 1095/2010 (ESMA) (all published in: OJEU L 331, Dec. 15, 2010).

²³ See generally GEORGIOS DIMITROPOULOS, ZERTIFIZIERUNG UND AKKREDITIERUNG IM INTERNATIONALEN VERWALTUNGSVERBUND, Tübingen (2011).

²⁴ Accreditation bodies are usually governmental bodies whereas the principle of one accreditation body per country applies. The two most prominent exceptions from this rule are USA and Japan, where we find more than one, public and private, bodies (in the US: US American National Standards Institute-American Society for Quality National Accreditation Board (ANAB); American National Standards Institute (ANSI); American Association for Laboratory Accreditation (A2LA); International Accreditation Service (IAS)). In the EU, the principle of one national accreditation body per country is based on Regulation (EC) No 765/2008 of the European Parliament and of the Council of 9 July 2008 setting out the requirements for accreditation and market surveillance relating to the marketing of products and repealing Regulation (EEC) No 339/93, OJ EU, L 218/30, Aug. 13, 2008. Examples include the Comité Français d'Accréditation (COFRAC), the United Kingdom Accreditation Service (UKAS), the Italian Ente Italiano di Accreditamento (ACCREDIA) and the German Deutsche Akkreditierungsstelle (DAKKS).

equivalent level of implementation of the requirements of the accreditation and certification standards.

Accreditation has a global reach, as it assesses the conformity of certification bodies with global ISO/IEC standards for the worldwide circulation of goods and services. For this reason, the accreditation bodies have created global and regional transnational networks of accreditation officials. On the global level there are two global networks of accreditation bodies, the International Accreditation Forum (IAF) and the International Laboratory Accreditation Cooperation (ILAC). In order to have national accreditation certificates and certificates of the certification bodies accepted worldwide, they have set up Mutual/Multilateral Recognition Arrangements (MRA/MLA). Accreditation body members of *e.g.* IAF are admitted to the IAF MLA only after evaluation of their operations by an evaluation team of accreditation bodies.²⁵ The peer assessment is binding for accession to the MLA and if the result is positive, the validity of the accreditation certificates is recognized transnationally by the other signatories of the MLA.

Peer evaluation is conducted by domestic accreditation bodies under the auspices of IAF. The IAF standards regulate the peer assessment process.²⁶ The accreditation body has to apply for membership. The preliminary phase includes the control of formal requirements such as if the accreditation body is member of IAF or ILAC. After the acceptance of the application an Evaluation Team Leader (TL) and an evaluation team is appointed by the IAF or ILAC MLA Management Committee (MC), whereas it is normal practice of the organizations that evaluators come from as many members as possible. The MC informs the accreditation body that has to supply the relevant documents to the team. The peer evaluation team assesses whether the applicant member complies with both the global standards ISO/IEC 17011 and the IAF Guidelines. Already in this phase a Pre-evaluation visit and preliminary report may be considered as necessary. A full evaluation has to follow that includes an on-site evaluation with information collection and witnessing. The accreditation body under review has the opportunity

²⁵ See Nr. 2.1 f., 4.2 c. and 5.3, 5.4. IAF Memorandum of Understanding (MoU) (on the peer evaluation system of IAF).

²⁶ See IAF/ILAC, *IAF/ILAC Multi-Lateral Mutual Recognition Arrangements (Arrangements): Requirements and Procedures for Evaluation of a Single Accreditation Body*, IAF/ILAC-A2:07/2010 (see article 1.2.11: Peer Evaluation: A structured process of evaluation of a Regional Group or accreditation body by representatives of accreditation bodies. NOTE: In ISO/IEC 17040, instead of peer evaluation the term peer assessment is used and is defined slightly differently); IAF, *IAF Guidance on Completing Peer Evaluation Reports. For the IAF Multilateral Recognition Arrangement*, Issue 1 (FG_PER_1), IAF-GM-02-001; see also ISO/IEC 17040, *Conformity assessment – General requirements for peer assessment of conformity assessment bodies and accreditation bodies*.

to comment on and discuss the evaluation team's findings and recommendations. TL provides to the Secretariat of the MC the final report, the corrective action response and the recommendations of the evaluation team. The recommendation might include a follow-up visit or Re-evaluation to verify corrective actions. The organization takes then the decision whether the accreditation body shall be accepted to the MLA. The accreditation body has the right to appeal against the final decision.

IAF and ILAC have linked the existing MLAs of regional accreditation groups to their MLAs in order to complete world-wide coverage. Their recognition is also based on an evaluation of their MLA by a team of assessors from other IAF and ILAC member regional groups and accreditation bodies.²⁷ The regional groups also have similar mechanisms for the evaluation of their members.²⁸

The certification bodies have established similar peer review mechanisms at the global and regional levels.²⁹

4. OECD

a. The umbrella function of the OECD

Peer review has been used by the Organization for Economic Cooperation and Development (OECD) since the creation of the organization.³⁰ The OECD is a classical intergovernmental organization. Even though it uses the peer review as a state-to-state governance mechanism, the peer review mechanisms are managed by internal Committees of the Organization and involve in most cases not representatives of governments but representatives of the administration. OECD

²⁷ IAF has granted special recognition to the MLA programs of three Regional Accreditation Groups: the European Co-operation for Accreditation (EA), the Inter-American Accreditation Cooperation (IAAC) and the Pacific Accreditation Cooperation (PAC).

²⁸ The EU has adopted the European evaluation system of EA; *see* articles 10, 11 and 19(1) Reg. 765/2008. The European Commission supervises the peer evaluations that are organized by EA.

²⁹ *E.g.* the *IQNet Peer Review System* of the International Certification Network (IQNet Association) and the *IECEE Peer Assessment Program* in the context of the International Electrotechnical Commission (IEC).

³⁰ OECD, *Peer Review. An OECD Tool for Co-Operation and Change*, SG/LEG(2002)1, Paris (2003) (*see ebd.*, at 7: "Peer review can be described as the systematic examination and assessment of the performance of a State by other States, with the ultimate goal of helping the reviewed State improve its policy making, adopt best practices, and comply with established standards and principles. The examination is conducted on a non-adversarial basis, and it relies heavily on mutual trust among the States involved in the review, as well as their shared confidence in the process. When peer review is undertaken in the framework of an international organization – as is usually the case – the Secretariat of the organization also plays an important role in supporting and stimulating the process. With these elements in place, peer review tends to create, through this reciprocal evaluation process, a system of mutual accountability"); Markku Lehtonen, *Deliberative democracy, participation, and OECD peer reviews of environmental policies*, 27 AMERICAN JOURNAL OF EVALUATION 185 (2006).

peer reviews cover a wide range of topics like economics, governance, education, health, environment and energy. Even though peer assessments, like Environmental Performance Reviews (EPR) and Development Assistance Committee (DAC) Peer Reviews, are based on the same concept, there are different normative documents with distinct procedures that regulate the respective fields.

Because of the range of the fields and of the possibility of non-OECD members requesting peer reviews, the OECD can serve in the future as a “platform” for the creation of a standardized model of peer review and for the operation of peer reviews in several regulatory regimes.

b. The OECD Anti-Bribery Convention

The OECD has not a universal membership policy. It operates as a “rich man’s club”. This feature gives the organization the possibility to achieve solutions that the international community as a whole couldn’t have reached. This applies also to the case in point, the OECD Anti-Bribery Convention (ABC).³¹ The aim of this Convention is to combat international corruption by making bribery of foreign public officials a crime, preventing tax deductions for bribes, prohibiting corruption in contracts funded by development assistance programs, and creating effective company rules on accounting and auditing to reveal practices of bribery. Its implementation is managed by the OECD Working Group on Bribery in International Business Transactions³² and monitored through a rigorous mutual evaluation system.³³

The mutual evaluation process is divided into three phases. The national legal orders are tested vis-à-vis the ABC and the 1997 Revised Anti-Bribery Recommendation.³⁴ The principal objective of Phase 1 is to evaluate the adequacy of a country’s legislation to implement the Convention, i.e. to assess whether the legal texts through which the OECD Anti-Bribery Convention is implemented meet the standard set by the Convention. In the second phase, the Committee assesses whether a country is applying this legislation effectively. It studies the structures put in place in order to enforce the laws and rules implementing the ABC and to assess their application in practice. The focus of monitoring is broadened to encompass the non-criminal

³¹ OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, December 18, 1997, 37 I.L.M. 1, 4; see James Salzman, *Decentralized Administrative Law in The Organization For Economic Cooperation And Development*, 68 LAW & CONTEMP. PROBS. 189, 193 (2005).

³² Art. 12 ABC.

³³ Transparency International calls this the “gold standard” of monitoring.

³⁴ See OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and Related Documents*, Paris (2011) (<http://www.oecd.org/dataoecd/4/18/38028044.pdf>).

law aspects of the 1997 Revised Anti-Bribery Recommendation. Phase 3 has been adopted as a permanent cycle of peer review, in order to control enforcement of the ABC, the 1997 Revised Anti-Bribery Recommendation and recommendations from Phase 2.

All three phases present some common elements.³⁵ The Working Group on Bribery hosts the evaluation. The peer review is not a voluntary process since each member country is examined in turn, whereas two countries are appointed each time to lead the examination. In principle, each country takes part in the evaluations of two other countries. The lead examiner countries choose the experts that take part in the process. The examined country replies to an evaluation questionnaire concerning information on implementation of the Convention and the 1997 Revised Anti-Bribery Recommendation. The examiners prepare a provisional report on the country's performance that is evaluated by the Working Group on Bribery. The information provided by the examined countries must include information on all relevant laws, regulations, judicial precedent, other treaties, the constitution and also on the legal implementation of the Convention and the 1997 Revised Anti-Bribery Recommendation. Lead examiners and OECD Secretariat examine the replies to ensure they are complete and, if necessary, requests additional information from the examined country. Phases 2 and 3 also include on-site visits. On-site visits by the lead examiners and OECD Secretariat are conducted in order to obtain information on enforcement and prosecution and to talk with the officials of the judicial system and the police, tax and other responsible authorities.³⁶ This can include informal exchanges with representatives of the private sector and civil society.

The examiners together with the Working Group on Bribery should at the end of the process draft a report. The reports are based on the replies to the questionnaires, information obtained during the on-site visit, independent research carried out by the lead examiners and Secretariat and information developed by other OECD bodies. The entire group of countries party to the Convention is invited to participate in the evaluation. As peer review is primarily an intergovernmental process, business and civil society groups are not invited to participate in the

³⁵ See, e.g., OECD, *Revised Guidelines for Phase 2 Reviews*, DAF/INV/BR/WD(2005)12/REV3, Paris (2006).

³⁶ See, e.g., OECD, *United States: Phase 3 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Revised Recommendation on Combating Bribery in International Business Transactions*. Report approved and adopted by the Working Group on Bribery in International Business Transactions on 15 October 2010. The following US Government bodies were visited during the on-site visit: Department of Justice (DOJ), Securities and Exchange Commission (SEC), Department of State, Department of Commerce, Federal Bureau of Investigation (FBI), Internal Revenue Service (IRS), and Office of Special Counsel.

formal evaluation process. The evaluated country has an opportunity to comment on the preliminary report but cannot block the Group's decision to adopt report. The report can be adopted by consensus or can reflect differences in opinion among participants in the Working Group. It includes an evaluation of the examined country's performance and recommendations for improvement.

III. The "nature" of the peer review

In view of the fact that increased use of peer review will undeniably impose costs on agencies,³⁷ we have to decide whether the peer review is a legitimate and effective tool to promote its declared goals.

1. Functions

Monitoring: The peer review is a new form of global governance that performs several functions. First of all, every peer review mechanism has an administrative-technical function: to monitor the conformity of a national executive with a set of predefined global standards.

Good governance: Global peer reviews have at the same time a quality control function. The peer review mechanism can contribute to promoting good governance in the global legal order. The promotion of good governance and development in Africa is the declared objective of the African Peer Review Mechanism (APRM) that is conducted under the auspices of the African Union.³⁸

Harmonized implementation: In the context of contemporary global multi-level administration, every administrative level has separate functions. As the levels beyond the state have taken up a governance and a rule-making role, the traditional domestic administrative level performs increasingly an executing role of the global rules. As GAL is functionally and nationally fragmented,³⁹ it is not implemented in a harmonized way in all regulatory regimes and

³⁷ In the context of the ABC, each country bears the costs of translating their implementing legislation into one of the two official languages of the OECD, whereas the examined country also bears the costs associated with filling out the questionnaire and reviewing the legislation and related reports. The costs of the on-site visits countries acting as lead examiners bear the costs of travel and expenses for one to three experts from their countries for each country they evaluate.

³⁸ Okezie Chukwumerije, *Peer Review and the Promotion of Good Governance in Africa*, 32 N.C. J. INTL L. & COM. REG. 49 (2006).

³⁹ See Benedict Kingsbury/Richard B. Stewart, *Legitimacy and Accountability in Global Regulatory Governance: The Emerging Global Administrative Law and the Design and Operation of Administrative Tribunals of International Organizations*, in: SPYRIDON FLOGAITIS (ed.), *INTERNATIONAL ADMINISTRATIVE TRIBUNALS IN A CHANGING WORLD*, London 193, 199 (2008).

states. Because of these disparities in the implementation of the global rules, the peer reviews have been set up in several regimes in order to promote compliance with the rules of the respective regime.⁴⁰ It is a means for improving implementation of global rules using the efforts of relevant authorities from abroad.⁴¹ At the same time, as it is impossible to gather the implementation function at the global level – as it is the case with rule-making –, peer review is used as a tool for worldwide regulatory harmonization of domestic implementation.⁴²

Overall, the peer review process creates a forum that promotes cooperation and the building of consensus.⁴³ Compliance and harmonized implementation are promoted through legal instruments like on-site visits of the review team but also through non-legal tools.⁴⁴ Peer review as a means of encouraging adherence to global standards is based on collegiality that is accompanied by peer pressure and public scrutiny. The unraveling of compliance and enforcement weaknesses by the peers can increase the acceptability of the outcome by the reviewed party and lead to more effective implementation.

2. Other review mechanisms

Peer review is not a classic form of review. Before turning to its nature, we will briefly discuss some other types of review in the global legal order. Some of them are known from the domestic level whereas others are more characteristic to the global level.⁴⁵

Judicial review: The prototype of review of (domestic) administrative bodies is judicial review. It is based on the logic that a neutral third party reviews the actions of the administration. Judicial review is not that expanded in the global legal order.⁴⁶ The International Court of Justice does not operate as a universal court. States are usually afraid of conceding power to international judicial organs to perform this type of review as it becomes more difficult for them to control the result. This has been observed in the context of the European Convention for

⁴⁰ See OECD, *Peer review*, *supra* note 30, at 18; Washington, *supra* note 5, at ... (peer review as a compliance tool in nuclear safety regime.).

⁴¹ See Joshua Cohen/Charles F. Sabel, *Global Democracy?*, 37 NYU J. INT'L L. & POL. 763, 790 (2005).

⁴² On peer review as a tool for convergence see Joint Group on Trade and Competition, *Peer Review: Merits and Approaches in a Trade and Competition Context*, 6 June 2002; OECD Policy Brief Peer Review: a Tool for Co-operation and Change, January 2007, 2.

⁴³ Washington, *supra* note 5, at 445 (in the context of the nuclear safety regime).

⁴⁴ See Salzman, *supra* note 31, at 205.

⁴⁵ See also OECD, *Peer review*, *supra* note 30, at 9-10 (distinguishes peer reviews from other compliance mechanisms, namely judicial proceedings, fact-finding missions and reporting and data collection).

⁴⁶ See also Eyal Benvenisti/George W. Downs, *Toward Global Checks and Balances*, 20 CONST. POLIT. ECON. 366, 373-374 (2009).

Human Rights. Since the abolition of the European Commission of Human Rights and the institutionalization of direct access of individuals to the European Court of Human Rights (ECHR), a large part of human rights law in Europe has been determined by the ECHR. A similar evolution can be traced in the WTO with its quasi-judicial system and the World Bank with the World Bank Inspection Panel. Some international organizations like the UN, the World Bank and the IMF have created Administrative Tribunals for the review of their internal rules and procedures.

Soft review: Because of the peculiarities of the global legal order, several organizations have introduced “softer” forms of review. Review through soft organs includes mediation⁴⁷ and most prominently the Ombudsman, like the Compliance Advisor/Ombudsman (CAO) of the private arm of the World Bank that bears great resemblance to the World Bank Inspection Panel. As with peer review, soft review does not include formal sanctions in case of breach of law. Despite its soft nature and powers it is a form of vertical control, as it involves a third reviewer. As a result, it has some of the deficiencies of the peer review without the advantages of mutual learning and the promotion of collegiality and cooperation. It can serve better for the resolution of internal matters of international organizations.

Self-evaluation/reporting: Self-evaluation and self-reporting by the countries or the administrative authorities themselves is a broadly used instrument of global administrative monitoring. It leaves space to the national authorities/countries, thereby not touching upon sovereignty questions. Partiality is a self-evident deficiency of the self-evaluation system, as countries tend to give wrong data in order to protect themselves from external scrutiny. A way to overcome impartiality is the combination of self-evaluation with peer review, as it is often the case in the preliminary phase of the peer review. The OECD ABC includes elements of both self and mutual evaluation.

International external reporting: Several international organizations like the UN, the OECD, the IMF and the World Bank publish several types of country assessments.⁴⁸ External reporting by international organizations is a very common form of review in the global administrative order. It bears some resemblance to the peer review, as also the latter involves a global organization in its process. On the other hand, external reporting is performed by the

⁴⁷ <http://www.un.org/en/ombudsman/medservices.shtml> (for the UN mediation system).

⁴⁸ From the plethora see only the joint IMF and World Bank “Reports on Standards and Codes” (ROSC) (http://www.worldbank.org/ifa/rosc_more.html).

international organization itself and it is a type of hierarchical administrative control of domestic administrations. The OECD has recently expanded this form of hierarchical control to review the agricultural policies of countries that are not members of the OECD,⁴⁹ and the agricultural policies and reforms of the EU.⁵⁰ In the last case, we are faced with a control mechanism between hierarchical and peer review.

Public scrutiny: One very important means of review in the global legal order is public scrutiny. This is an indispensable form of review for every administration that needs to comply with democratic and rule of law standards. Several global organizations have institutionalized forms of pressure from the public and mainly NGOs, including increasingly traditional intergovernmental organizations such as the OECD.⁵¹ Public scrutiny can be combined with peer review. It can operate as a complement to it. Some global organizations involve public participation in the peer review process in order to enhance transparency. Nonetheless, the public scrutiny process is an adversarial process that can run against the results of a cooperative process such as the peer review.⁵²

3. A collegial review

A middle way: Monitoring and surveillance is one of the most important functions of GAL.⁵³ GAL operates to a very large extent through the dissemination of information and the issuance of reports and reviews by global organizations and the states. In this context, peer review is a means of administrative supervision. It is a global administrative mechanism that evolved – as many other forms of global administration – in the shadow of public international law. It may seem at first sight that review through peers is only a second best solution in comparison to other forms of review and especially judicial review. Still, it is in several cases a golden mean for monitoring and compliance in the global legal order, as it is a hybrid form of review that combines and mixes elements of other review types.

⁴⁹ OECD, *Agricultural Policy Monitoring and Evaluation. OECD Countries and Emerging Economies*, Paris (2011) (assessing OECD member countries and selected key emerging economies like Brazil, China, Russia, South Africa and Ukraine).

⁵⁰ OECD, *Evaluation of Agricultural Policy Reforms in the European Union*, Paris (2011).

⁵¹ See Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 68 (2005) (on notice-and-comment procedures at the global level).

⁵² See Philip J. Harter, *Assessing the Assessors: The Actual Performance of Negotiated Rulemaking*, 9 N.Y.U. ENVTL. L.J. 32 (2002) (stating that the adversarial nature of public participation as a non-consensus process – as opposed to negotiated rulemaking – does not always have optimal outcomes).

⁵³ Georgios Dimitropoulos, *Global Administrative Order. Towards a Typology of Administrative Levels and Functions in the Global Legal Order*, 23 European Review of Public Law, 433, 454-455 (2011).

One of the most important problems of modern (administrative) law is its implementation. Modern regulatory approaches try to find new innovative ways for the law to be implemented. The same applies to international law and Global Administrative Law. The situation is aggravated in these fields where some of the traditional structures and conceptions remain. Sovereignty is still a sensitive matter for many states. One of the techniques applied by global regulators in order to overcome these structural deficiencies is the peer review model. It applies a collegial and cooperative method for the monitoring of domestic implementation instead of hierarchical control that could be accused as an intervention in national politics and sovereignty, and instead of judicial review by an international court that is completely uncontrolled by the states. As a result, it is a type of review that is very well suited for a legal order with the features of the global legal order; this explains its recent expansion in several global regulatory fields and regimes.

Mutual learning: In describing the mechanics of the review process we have to consider that peer review operates in a non-confrontational spirit.⁵⁴ This regulatory technique is a form of experimentalist governance that promotes horizontal relationships among national executives.⁵⁵ It is a collegial process,⁵⁶ a new form of cooperative rule-implementation that involves and requires mutual learning of the participants⁵⁷ and the promotion of technology transfer among domestic executives. It serves an educational function as participating actors discuss problems and different approaches and provides an opportunity for countries and domestic administrations to learn from the experiences and approaches of others.

Achieving open-ended goals: Time is an essential matter of the peer review. It deals with time in a different way than other forms of review. In comparison to hierarchical control it is a

⁵⁴ See Washington, *supra* note 5, at 430-431 (for the nuclear safety regime).

⁵⁵ Michael C. Dorf/Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

⁵⁶ Washington, *supra* note 5, at 459-464; *see also ebd.* at 464 (in the context of the peer review in the nuclear safety regime, Washington speaks about “‘Enforcement’ Through Collegiality”).

⁵⁷ *See also* Nr. 29 FATF, *AML/CFT Evaluations and Assessments*, *supra* note 17; IAEA, *IRRS to Germany*, *supra* note 10, at p. ii (“The IRRS is neither an inspection nor an audit but is a *mutual learning mechanism* that accepts different approaches to the organization and practices of a national regulatory body, considering the regulatory technical and policy issues, and that contributes to ensuring a strong nuclear safety regime”); *see generally* Dorf/Sabel, *supra* note 55, at 283 (on experimentalism and mutual learning as a form of governance); *see also* Benedict Kingsbury/Nico Krisch/Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS 15, 58-59 (2005) (discussing experimentalism and mutual learning as a form of GAL).

form of *ex post* evaluation.⁵⁸ Peer review shares this feature with judicial review. On the other side, peer review is a more dynamic process than judicial review.⁵⁹ It is an on-going process with open-ended goals and aiming at continuous self-improvement of the participants. Moreover, it is a more inclusive process, as it engages several actors and not only the third body operating as the judge.

Technical knowledge: What about objectivity, neutrality and impartiality of the review? Collegiality can also have a dark side. Collegial spirit can potentially lead to a race to the bottom in the monitoring quality of the standards of control. Despite that fears, interdependency in the context of peer reviews can create opposite results. The “peer culture”⁶⁰ can also lead to the amelioration of the results if a mentality of “being better” is cultivated in the peer collegium. As we can observe in environments such as universities, if trust, mutuality and interdependency are created in the peer collegiums, this leads to better overall results and increased effectiveness of the system.

Additionally, it can be expected that the peer review as a form of collegial rule-implementation will be more effective in resolving various complex, polarized and highly contentious matters such as the ones mentioned above.⁶¹ The collegial process is also promoted through technical knowledge in a specified technical field. “Only peers have the same knowledge to evaluate the agent’s explanations”⁶².

IO as a third party: The fear of mutual interdependence is also being tackled in the practice of the peer review in making use of the actual forum, in which they operate. The impartiality problem can be dealt with and restored through the intermediation of the global organization. The participation of the global organization in the process of the peer review provides for the

⁵⁸ See Karl-Heinz Ladeur, *The Emergence of Global Administrative Law and Transnational Regulation*, IILJ Working Paper 2011/1 (History and Theory of International Law Series) (www.iilj.org), 27 (observing a shift from hierarchical control to *ex post* evaluation in modern administrative law).

⁵⁹ See Dann, *supra* note 7, at 384.

⁶⁰ Neil W. Hamilton, *The Ethics of Peer Review in the Academic and Legal Professions*, 42 S. TEX. L. REV. 227, 229, 231, 232-236 (2001).

⁶¹ See Harter, *supra* note 52, at 38-39 (analyzing negotiated rulemaking); see Negotiated Rulemaking Act (NRA), 5 U.S.C. 561-570 (1994 & Supp. IV 1998) (“negotiated rulemaking” in the context of the US legal order).

⁶² PHEDON NIKOLAIDES ET AL., *IMPROVING POLICY IMPLEMENTATION IN AN ENLARGED EUROPEAN UNION: THE CASE OF NATIONAL REGULATORY AUTHORITIES*, Maastricht 46 (2003); see also Ruhl/Salzman, *supra* note 1, at 21 (“Judicial review of agency decisions ensures a close review by an ostensibly unbiased party, but it cannot approach the same level of expertise provided by peer review”).

third party that can guarantee neutrality and impartiality,⁶³ without taking over the role of the leader of the review process. Peer review does not mean self-evaluation.

Sanction: In addition, the process does not always run smooth for the reviewed party. Peer reviews exert their influence through peer pressure.⁶⁴ In light of the collegial character of the peer review, peer pressure and the consequent “threat of exclusion”⁶⁵ from the relevant system or regime work as a sanction for non-complying countries.⁶⁶ Threat of exclusion as an efficient sanction mechanism is very well known from other fields of GAL, where “market pressure” has very strong compliance effects. For example, the voluntary ISO or Codex Alimentarius standards become almost compulsory in practice through market pressure and the threat of exclusion from global markets. Moral pressure and market pressure as new types of sanctions lead to implementation and compliance without the need of enforcement.

Lastly, the publication of the report transforms the peer pressure into public pressure. The reports can be a very powerful means of reform if they gain broad public acceptance.⁶⁷

B. Peer review as a form of global administrative self-organization

I. Self-organization: Horizontal and vertical dimensions

Peer reviews are usually used as instruments of self-organized social groups and professions like lawyers, doctors and academics signaling some professional autonomy of the relevant group.⁶⁸ Global peer review enhances the autonomy of participating national bodies towards other sectors of the administration and the other branches of government,⁶⁹ as the authorities involved in the peer assessment achieve connections to their peers from abroad and the global administrative bodies. This is part of a broader phenomenon that accompanies legal globalization. The introduction of the peer review in GAL is a sign for the increasing self-

⁶³ See also Lehtonen, *supra* note 30, at 195.

⁶⁴ Lehtonen, *supra* note 30, at 189.

⁶⁵ Cohen/Sabel, *supra* note 41, at 764.

⁶⁶ Washington, *supra* note 5, at 446; see also Ruth W. Grant/Robert O. Keohane, *Accountability and Abuses of Power in World Politics*, 99 AMERICAN POLITICAL SCIENCE REVIEW 29 (2005) (“public reputational accountability”); Matthias Goldmann, *The Accountability of Private vs. Public Governance “by Information”*, 58 RIVISTA TRIMESTRALE DI DIRITTO PUBBLICO 41 (2008)

⁶⁷ The reports of the so called “Wickersham Commission on Law Observance and Enforcement” are considered as the initiator of many reforms in U.S. administrative law.

⁶⁸ See, e.g., Hamilton, *supra* note 60, at 229.

⁶⁹ See Lehtonen, *supra* note 30, at 193 (2006).

organization of the national administrative authorities and the global administrative system in general.⁷⁰ Global administrative self-organization has a horizontal and a vertical dimension.

Horizontal self-organization is achieved in organizational structures that gather national administrative bodies,⁷¹ such as mainly transnational networks (e.g. the International Competition Network – ICN) but also agencies (e.g. the Intergovernmental Panel on Climate Change (IPCC)) and committees (e.g. the SPS or the TBT-Committee of the WTO).⁷² This horizontal regulatory process gathers peer administrative bodies represented by national officials and is driven by the need of meeting with peers from other legal orders in order to regulate transnational issues.⁷³ There are no hierarchical relationships among the national administrative bodies.

One of the major consequences of globalization has been the re-allocation of many functions and powers of the nation state onto global organizations.⁷⁴ Global organizations operate as global regulators.⁷⁵ They regulate national policies to a very large extent and, as a result, they play the role of the global regulator of domestic administrations. From the viewpoint of national administration this is a form of external regulation. If we observe national administration in the

⁷⁰ The expressed aim of the African Peer Review Mechanism is self-governance of the African countries; see Okezie Chukwumerije, *Peer Review and the Promotion of Good Governance in Africa*, 32 N.C. J. INT'L L. & COM. REG. 49, 98-101 (2006). Gunther Teubner, departing from a general systems theory approach, has evolved a theory of self-regulation of the actors of the global level. The legal system is perceived as a global (sub-)system of the global (meta-)system of world society. Global Administrative Law can be perceived as a subsystem of the global legal system; see only Gunther Teubner, *Global Bukovina: Legal Pluralism in the World-Society*, in: ID. (ed.), GLOBAL LAW WITHOUT A STATE, Aldershot 3 (1997); see also Thomas Vesting, *The Network Economy as a Challenge to create New Public Law (beyond the State)*, in: KARL-HEINZ LADEUR (ed.), PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION, Ashgate (2004) (administration as a global system); *id.*, *The Autonomy of Law and the Formation of Network Standards*, 5 GERMAN LAW JOURNAL (2004); see also Ladeur, *supra* note 58, at 13 (with reference to Christian Tietje, *Internationalisiertes Verwaltungshandeln*, 39 RECHTSTHEORIE 255, 275 (2008)); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER, Princeton, Oxford 196-198 (2004) (speaking about “A Propensity for Self-Regulation” in the context of government networks).

⁷¹ See also WOLFGANG WEISS, DER EUROPÄISCHE VERWALTUNGSVERBUND, 146, 148 and 137-138 (2010) (“Selbstregulierungsgremien” at the EU level).

⁷² See Richard B. Stewart, *Administrative Law In the Twenty-First Century*, 78 N.Y.U. L. REV. 437, 455 (2003) (presenting such “horizontal arrangements”); Mario Savino, *An Unaccountable Transgovernmental Branch: The Basel Committee*, in: Sabino Cassese *et al.*, GAL Casebook, 2 eds., 2008, § 2.7, at 65 (differentiates between horizontal transgovernmental networks – that are not constituencies of international organizations – and vertical networks – that have been established as constituencies of an international organization).

⁷³ See Kal Raustiala, *The Architecture Of International Cooperation: Transgovernmental Networks and the Future Of International Law* 43 VA. J. INT'L L. 1 (2002).

⁷⁴ See Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 LAW & CONTEMP. PROBS. 695, esp. 695-697 (2005); see also Dimitropoulos, *supra* note 53, *passim* (on the functions of the administrative levels).

⁷⁵ See Sabino Cassese, *Administrative Law without the State? The Challenge of Global Regulation*, 37 N.Y.U. J. INT'L L. & POL. 663 (2005).

“integrated global administrative space”⁷⁶ as part of a globally *integrated administration*,⁷⁷ we are faced with a different form of global *administrative* self-organization. Vertical self-organization presents some elements of hierarchization among global organizations and national authorities.

II. Self-implementation: Domestic administrations as “satellites” of global law

Distributed administration represents one of the five basic types of international regulatory regimes, together with international organizations, transnational networks, hybrid public-private and private regulatory bodies.⁷⁸ Distributed administration is domestic administration fulfilling global purposes. One of the main functions of distributed administration is implementation as in several regulatory fields, what remains for the national administrative level is the function of implementation. In the context of the peer review the global regimes “delegate” monitoring and implementation of the global rules to the domestic level. Despite this delegation, the states are not free to choose the authority that is going to perform this function as their choice is pre-specified by the functions it has to perform. For example, in the context of nuclear safety, “nuclear regulatory authorities”⁷⁹ are designated in order to apply the respective law. The same applies in the field of AML,⁸⁰ and conformity assessment such as in several other regulatory fields like food safety,⁸¹ climate protection⁸² and most prominently global health law⁸³ and the

⁷⁶ Kingsbury/Krisch/Stewart, *supra* note 57, at 31.

⁷⁷ See H. C. H. Hofmann/A. Türk, *The Development of Integrated Administration in the EU and its Consequences*, 13 EUROPEAN LAW JOURNAL 253 (2007) (on the concept of integrated administration); see also Sabino Cassese, *L'Unione Europea Come Organizzazione Pubblica Composita*, 10 RIVISTA ITALIANA DI DIRITTO PUBBLICO COMUNITARIO 987 (2000) (on the concept of composite administration); Armin von Bogdandy/Philipp Dann, *International Composite Administration*, 9 GERMAN LAW JOURNAL 2013 (2008).

⁷⁸ Kingsbury/Krisch/Stewart, *supra* note 57, at 21-22; Stewart, *supra* note 74, at 701-702.

⁷⁹ See Section I IAEA, *Code of Conduct on the Safety and Security of Radioactive Sources*, Vienna (2004), IAEA/CODEOC/2004: “‘regulatory body’ means an entity or organization or a system of entities or organizations designated by the government of a State as having legal authority for exercising regulatory control with respect to radioactive sources, including issuing authorizations, and thereby regulating one or more aspects of the safety or security of radioactive sources”.

⁸⁰ See Recommendation 26.1: “Countries should establish an FIU [Financial Intelligence Unit] that serves as a national centre for receiving (and if permitted, requesting), analysing, and disseminating disclosures of STR and other relevant information concerning suspected ML or FT activities. The FIU can be established either as an independent governmental authority or within an existing authority or authorities”.

⁸¹ National Codex Contact Points (NCCP) in the framework of the Codex Alimentarius.

⁸² Designated National Authorities (DNA) of the Kyoto Protocol to the UNFCCC.

⁸³ See article 44 WHO Constitution and article 4(1) International Health Regulations: “Each State Party shall designate or establish a National IHR Focal Point and the authorities responsible within its respective jurisdiction for the implementation of health measures under these Regulations”.

OECD.⁸⁴ The designated bodies serve as channels of communication for the purpose of facilitating international cooperation for the implementation and monitoring of the rules of the respective regime.

Even though they are designated by the national governments, the national contact points are functionally embedded into a global regime, serving global goals. These national administrative authorities mutate into parts of the global administration. The designated bodies operate as satellites of the global organizations, as they are set up for the establishment of a direct contact between the domestic and the global administrative levels and, above all, for the direct contact of national administrations with each other.

III. Self-control: Global controls in the place of national controls

Through legal and administrative globalization domestic administrations become embedded into several global regulatory regimes. As they leave their geographical boundaries, they are also freed from several domestic constraints and control mechanisms. Traditional controls like parliamentary, governmental/hierarchical and fiscal control and, above all, national judicial review tend to diminish.⁸⁵ Domestic administrations circumvent national politics and follow policymaking directives that are stipulated at the levels beyond the state. Parliamentary control of the administration and hierarchical control become also more limited. This is illustrated by the above-mentioned transnational networks like the ICN. National competition authorities like the Competition Bureau of Canada, the French Autorité de la Concurrence and the German Bundeskartellamt co-stipulate regulatory standards at the global level that are supposed to be implemented by the same authorities operating at the domestic level. This phenomenon is aggregated in the field of accreditation, in which accreditation authorities like the Joint Accreditation System of Australia and New Zealand (JAS-ANZ), the German Deutsche Akkreditierungsstelle (DAkkS) and the Korea Accreditation System (KAS) apply private standards stipulated by themselves and by ISO/IEC, both for their internal organization and for the processes followed by them when they accredit a certification body. National competition authorities and accreditation bodies apply thus norms that are not generated and not even endorsed by national parliaments. As they avoid national processes like notice-and-comment

⁸⁴ See Salzman, *supra* note 31, at 212-217 (National Contact Points (NCPs)).

⁸⁵ See Stewart, *supra* note 51, at 69-71; Benedict Kingsbury, *The Concept of "Law" in Global Administrative Law*, 20 EUR. J. INT'L. L. 23, 32-33 (2009); see also Eyal Benvenisti, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167, 170 (1999) ("exit options").

procedures of the US Administrative Procedure Act, they also avoid domestic judicial review. In addition, a large number of rules and norms are being stipulated by regional/supranational – like NAFTA and the EU – and global organizations, whereas state parliaments have only a mediating role in the implementation of these rules.

On the other hand, global embeddedness makes them increasingly more loyal to their global counterparts. As administration frees itself from domestic public law frameworks, new forms of governance of the administrative bodies evolve. National administrative authorities obey more and more to global rules and to authorities of the upper levels. Despite the partial emancipation from the domestic context of controls, the attachment to the global context leads to global controls. The described peer reviews compensate to a large extent for the gradual diminishing of national control mechanisms.⁸⁶ The breaking of the frame of the national boundaries and restrictions has led to a change in the regulatory instruments of the administration. Global controls differ from traditional ones. They are not imposed externally – parliament, government, court of auditors, court –, but take the form of instruments of self-restraint, of self-control. The administration as a whole, conceived as a global multi-layered but at the same time globally integrated administration, evolves self-regulatory administrative control instruments.

The overall picture of contemporary administration is thus not a picture of an unregulated and free-of-controls administration. The national legal order and the global legal order operate as communicating vessels. The loss of controls at the national level leads to an increase of controls at the global level. The reason for this equilibrium is the nature of modern administrative law. Administrative controls are inscribed into the DNA of modern administrative law and GAL has the same DNA.⁸⁷

Nonetheless, we have to note that controls are being transferred from the legislative and the judicial branch to a newly created globally integrated executive branch. For this reason, new accountability models need to be developed.

C. Peer accountability

There is a bidirectional relationship between peer reviews and accountability. Peer reviews generate a new form of accountability in the global legal order. At the same time, the peer review

⁸⁶ See also Dorf/Sabel, *supra* note 55, at 356 (describing similar responses by national peer administrations).

⁸⁷ Kingsbury/Krisch/Stewart, *supra* note 57, at 51-52.

process needs to be legitimated as an administrative process that includes the conduct of administrative activities in the territory of foreign states.

I. Accountability through peer review

Peer review creates and promotes horizontal control relationships among national governments, ministries and administrative bodies. It works as a system of control among national executives and creates obligations to justify their actions towards their peers from abroad. As domestic controls are being substituted by horizontal controls by peers, traditional mechanisms of accountability leave space to new models of accountability. Beyond the proposed bottom up and top down approaches to accountability in the global legal order, new accountability mechanisms have to respond to an accountability need towards domestic foreign and global constituencies.⁸⁸ The idea behind peer accountability is to discover the accountability potential that lies in the horizontal relations of the global administrative players. In the domestic context, the idea of “horizontal accountability” has been proposed by *Guillermo O’Donnell* for the structural improvement of democracies in some of the countries of Latin America and Eastern Europe.⁸⁹ This idea applies also in the global legal order where there are no defined centers of authority and global demos to hold the global players accountable.⁹⁰

Peer relations evolve not only among national executives but also among global organizations, for example, between the Council of Europe and the World Health Organization

⁸⁸ Charles F. Sabel/William H. Simon, *Epilogue: Accountability without Sovereignty*, in GRÁINNE DE BÚRCA/JOANNE SCOTT (ed.), *LAW AND NEW GOVERNANCE IN THE EU AND THE US*, Oxford 394, 400 (2006) (“Peer review is the answer of new governance to the inadequacies of principal-agent accountability”).

⁸⁹ Guillermo O’Donnell, *Delegative Democracy*, 5 *JOURNAL OF DEMOCRACY* 55, 62 (1994); *id.*, *Horizontal Accountability in New Democracies*, in: A. SCHEDLER, L. DIAMOND, M. PLATNER (ed.), *THE SELF-RESTRAINING STATE*, Boulder, London 29, 30 (1999); *see also* Rick Stapenhurst/Mitchell O’Brien, *Accountability in Governance* (note written by for the World Bank) (<http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf>) (“The prevailing view is that institutions of accountability, such as parliament and the judiciary, provide what is commonly termed horizontal accountability, or the capacity of a network of relatively autonomous powers (i.e., other institutions) that can call into question, and eventually punish, improper ways of discharging the responsibilities of a given official. In other words, horizontal accountability is the capacity of state institutions to check abuses by other public agencies and branches of government, or the requirement for agencies to report sideways. Alternatively, vertical accountability is the means through which citizens, mass media and civil society seek to enforce standards of good performance on officials”).

⁹⁰ Cohen/Sabel, *supra* note 41, at 778. The peer review model is according to Cohen/Sabel, *ibd.*, a substitute for principal-agent accountability and at the same time a “form of dynamic accountability”, which “becomes the key to ‘anomalous’ administrative law” [meaning also GAL]; *see ibd.*, at 790: “peer accountability governance model”; SLAUGHTER, *supra* note 70, at 193-195, esp. at last para., 253 et seq., 196 et seq.; Benvenisti/Downs, *supra* note 46, at 375-379 (having in mind mostly mutual judicial review of the other regime/IO); *see also* Dann, *supra* note 7, at 393-394, 397-398 (2006); (on peer accountability structures in the context of development aid).

(WHO) in the case of WHO's response during the H1N1 pandemic⁹¹ or between the OECD and the EU in the case of the OECD reviewing the agricultural policy of the EU.⁹² Other forms of governance, like transnational networks, agencies, committees that are populated by representatives of national executives, also evolve horizontal accountability relationships among the participants.⁹³

Horizontal accountability operates in a different way than the classical forms of vertical accountability. In the horizontal relations, the global players are controlled by peer constituencies and not by a higher authority that is usually inexistent in the global legal order, nor by a global demos that is also inexistent in the current stage of evolution of the global legal order or a global civil society that in many cases doesn't have access to the processes and decisions of the global bodies. Horizontality enhances interdependence of the global players and creates a global administrative system of "mutual responsibility" and "accountability".⁹⁴ This leads to the creation of a network of institutionalized power relations⁹⁵ with the aim of implementing the rules of the respective global regime. Accountability towards peers doesn't also have the static form of vertical accountability towards higher constituencies. As the peer review process itself, peer accountability is an on-going process; it creates a form of dynamic accountability⁹⁶ that is achieved in a process of mutual learning and correction.⁹⁷ Improper behavior is sanctioned through peer pressure and exclusion. The process occurring among peers entails thus elements of checks and balances.⁹⁸ A similar model of horizontal accountability applies also within the EU, as prescribed by the *Meroni* doctrine of the European Court of Justice. It is expressed in the terms of an "institutional equilibrium" of the primary organs of the EU.⁹⁹

⁹¹ Abby Deshman, *Horizontal Review between International Organizations: Why, How, and Who cares about Corporate Regulatory Capture*, EUR. J. INT'L L. (forthcoming 2012).

⁹² See OECD, *supra* note 50.

⁹³ NIKOLAIDES ET AL., *supra* note 62, at 46-47.

⁹⁴ O'Donell, *Delegative Democracy*, *supra* note 89, at 62; OECD, *Peer review*, *supra* note 30, at 7 ("system of mutual accountability").

⁹⁵ O'Donell, *Delegative Democracy*, *supra* note 89, at 62.

⁹⁶ Cohen/Sabel, *supra* note 41, at 778, 781; Sabel/Simon, *supra* note 88, at 400.

⁹⁷ Cohen/Sabel, *supra* note 41, at 781 ("Peer review and the dynamic accountability it affords is a modality of deliberative coordination. The idea of deliberative polyarchy is thus to have a mix of flexibility for adjustment to distinct conditions along with a discipline of comparison/learning that respects a norm of accountability"); see also Lehtonen, *supra* note 30, at 189; *id.* *OECD Environmental Performance Review Programme: Accountability (for Learning?)* 11 EVALUATION 169 (2005).

⁹⁸ Benvenisti/Downs, *supra* note 46, at 375-379; SLAUGHTER, *supra* note 78, at 253-255.

⁹⁹ Andrew Moravcsik, *The European Constitutional Compromise and the Neofunctionalist Legacy*, 12 JOURNAL OF EUROPEAN PUBLIC POLICY 349 (2005) ("constitutional equilibrium").

The model peer or horizontal accountability cannot substitute completely the other forms of accountability, but can compensate for the absence of public participation in some aspects of global administration.¹⁰⁰ It can be applied in all fields of GAL, as peer relationships are present in almost all aspects of global administration. It takes the nature of the global legal order into account, taking also advantage of its fragmented character. This is a pragmatic approach to accountability of global bodies but at the same time a normative one, as it is based on existing control structures such as peer reviews and transnational networks.

II. Legitimacy of the peer review

Legitimacy concerns of the peer review have implications for the institutional design of the peer assessments. In terms of substantive legitimacy and vertical accountability of the global peer review mechanisms, it should be noted that increasingly civil society, business and labor are invited to contribute to reviews. The peer review enhances deliberation for the respective implementation measures, especially through the publication of the report.¹⁰¹ In terms of transparency, it is crucial that the final report is made public. On the other hand, there is the danger that domestic administrations would refrain from requesting peer reviews.¹⁰²

In terms of procedural legitimacy of the peer reviews, a sound legal framework for the operation of the peer review is indispensable for its success. The peer reviews are in need of “hard”, formalized procedures. Moreover, the choice of the examiners is very important. Some degree of participation of the reviewed country and authority shall be guaranteed. The global organizations could also consider the institutionalization of a review of the final result. In more general terms, a standardized model for global administrative peer reviews as presented in the project is needed. Even though the OECD is not a universal organization it can take on the role of evolving a universal framework for peer reviews and of providing a global infrastructure for the global peer assessments.¹⁰³

Conclusion

Peer review is a new form of global governance. Even though globalization is usually conceived as a top down process, it reveals its horizontal dimensions. Horizontal review can

¹⁰⁰ Stewart, *supra* note 72 at 446 (on the complementarity of accountability models in GAL).

¹⁰¹ Lehtonen, *supra* note 30, at 186.

¹⁰² That applies only to voluntary peer review mechanisms; *see also* Washington, *supra* note 5, at 452.

¹⁰³ On the modelling of the peer reviews on the example of OECD reviews *see* OECD, *Peer review*, *supra* note 30; *see also supra* A.I.

improve the monitoring and implementation performance of global law and at the same time produce new forms of accountability. The horizontal approach innovates the regulatory tools of Global Administrative Law that can operate as an initiator of regulatory innovation in domestic administrative law. Especially federal states can use peer review as an instrument of promoting a healthy competition among the authorities of domestic constituencies.¹⁰⁴

¹⁰⁴ See <http://allafrica.com/stories/201111030694.html> (presenting the States Peer Review Mechanism (SPRM) in Nigeria, supported by the Nigeria Governors Forum (NGF) in collaboration with the World Bank, the United Kingdom's Department for International Development (DFID) and the Canadian Embassy).