Max Planck Institute Luxembourg
for International, European and Regulatory Procedural Law

Working Paper Series


COMPLIANCE THROUGH COLLEGIALITY:
PEER REVIEW IN INTERNATIONAL LAW

37 Loyola of Los Angeles International and Comparative Law Review
(forthcoming 2015)

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ABSTRACT: Through the process of globalization international law has evolved into a law of global governance. At the same time, horizontal interaction between the states still constitutes a major part of international law. The “governance,” and the “traditional” understanding of international law fail to capture the real picture of the law beyond the state. This paper is an attempt to bring these two approaches together under the rubric of “horizontal governance.” Both a product and a promoter of horizontal governance are so called “peer reviews.” In international law, peer review is a monitoring of a country’s practices in a particular field by a team composed of staff from foreign agencies, and organized under the auspices of an international organization. International peer review operates as a dispute prevention mechanism substituting more classical compliance monitoring systems, and leading to the horizontal accountability of the involved actors. The major reason for the proliferation of the peer review mechanism is its potential to achieve state compliance in a collegial, and sovereignty-respecting way: it substitutes command with acceptability, sanctions with peer pressure, and enforcement with learning.

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Introduction

International law was created on the assumption of the equality of sovereign states.1 Through a process of political, economic and social globalization international law has evolved into a law of global governance.2 In the last twenty years, global governance has been perceived and practiced as a top-down process, whereby rules produced at the global governance level are then diffused to the domestic level of governance. This process very often has been accompanied by a hierarchical mode of interaction between the global and the domestic levels of governance. At the same time, horizontal interaction between the states still constitutes a major part of international law. The two approaches—represented in the “traditional” and the “governance” understanding of international law—fail to capture the real picture of the law beyond the state.3 The reason for this

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3 This categorization refers to the principal actors that are conceptualized by the respective approach as being the driving forces of international law. Further differentiations are possible like for example between international legal and international relations theories. International relations theories tend to focus more than legal theories on the state as the relevant unit of analysis in international law than on other actors like international organizations or non-governmental organizations; see Subsection I.B.1. Despite the fact that we have termed “traditional” approach to international law the one referring primarily to state-to-state interaction and the state as the unit of analysis in international law, this approach also includes theories that go beyond a formal analysis of international law, like for example, law and economics approaches to international law; see, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, THE LIMITS OF INTERNATIONAL LAW (2005);
asymptotic relationship between the governance and the traditional approach to international law is the co-existence of the two processes. This paper is an attempt to bring these two understandings of international law together under the rubric of “horizontal governance.”

Both a product and a promoter of horizontal governance are so-called “peer reviews.” Peer reviews are traditionally used as instruments of self-organized social groups and professions signaling some autonomy of the relevant group. In international law, peer review is a monitoring of a country’s performance or practices in a particular field by a team composed of civil servants and officials from ministries and agencies in the relevant policy field from other countries, and organized under the auspices of an international organization. Most peer reviews were established in the 1990s, and have been very well received in international regulatory practice. The major reason for this is their potential to achieve

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4 This understanding of contemporary international law is closer to the roots of international law and international relations theory than many might think; see Patrick Capps & Julian Rivers, Kant’s Concept of International Law, 16 LEGAL THEORY 229 (2010) (for a “horizontal” re-interpretation of Kant’s project); see also David Singh Grewal, The ‘Domestic Analogy’ Revisited: Hobbes on the International Order (unpublished manuscript, on file with the author) (re-interpreting Hobbes as a peace theorist of international relations that doesn’t reject international law as such).

5 There is a large variety of peer review systems also 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;” see Louis J. Virelli, III, Scientific Peer Review and Administrative Legitimacy, 61 ADMIN. L. REV. 101 (2009); see also Lars Noah, Scientific Republicanism: Expert Peer Review and the Quest for Regulatory Deliberation, 49 EMORY L.J. 1033 (2000); J.B. Ruhl & James Salzman, In Defense of Regulatory Peer Review, 84 WASH. U. L. REV. 1 (2006). Administrative peer review in US administrative law is a review of scientific information pertinent to a specific field (see Louis J. Virelli, III, Scientific Peer Review and Administrative Legitimacy, 61 ADMIN. L. REV. 101, 105 (2009)), pursuing sound science in that field (see J.B. Ruhl & James Salzman, In Defense of Regulatory Peer Review, 84 WASH. U. L. REV. 1, 21 (2006)). There are examples of scientific peer reviews also in international law; 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). The peer reviews presented here are not conducted in order to review scientific information, but in order to monitor compliance with international rules in an international regime.
compliance of the states with the rules of international law in a collegial, and sovereignty-respecting way.\footnote{This evolution in contemporary international law goes along with a general ascendance of the culture of peers in modern society such as peer-to-peer downloading and peer-to-peer source editing; see, e.g., \textit{Peer-to-Peer: Harnessing the Benefits of a Disruptive Technology} (Andy Oram ed., 2001).}

The paper is structured into three parts. Section I gives an account of the evolution of global governance into a horizontal governance process. Traditional international law, a phenomenon of horizontal interaction of states, and governance by international organizations, a phenomenon of vertical interaction of international and domestic actors, co-exist in contemporary international law creating a new type of governance. Horizontal governance will be presented through the examples of distributed administration, transnational networks and technical assistance. The transformation of global governance into horizontal governance opens up the dynamics of Comparative Administrative Law as a field of study that compares domestic systems and their interaction and does not only deal with international structures as most global governance theories do, or with state-to-state interaction as the classical international law approach does.\footnote{Comparative Administrative Law, a recently established field of research, lies in the middle of theories of globalization, both in terms of content and methodological approach; cf. Susan Rose-Ackerman & Peter L. Lindseth, \textit{Comparative Administrative Law: Outlining A Field Of Study}, 28 WINDSOR Y B ACCESS JUST 435, 436 (2010). \textit{See generally Comparative Administrative Law} (Susan Rose-Ackerman & Peter L. Lindseth eds., 2010); Susan Rose-Ackerman & Peter L. Lindseth, \textit{Comparative Administrative Law: Outlining A Field Of Study}, 28 WINDSOR Y B ACCESS JUST 435 (2010); \textit{see also} Janina Boughey, \textit{Administrative Law: The Next Frontier for Comparative Law}, 62 INT’L & COMP. L.Q. 55 (2013).} This approach has the potential of overcoming the dichotomy between theories of substance and process in international law.

Section II discusses peer review in different fields of international law. Despite its expansion in different levels and fields, the design of international peer review mechanisms may present some common features. After the first phase, during which a peer review team is formed, the team of foreign experts conducts an on-site visit. The review ends with the publication of the final report. The finalization of the report does not mean the end of the process. Peer review has a continuous character. The closing of the one peer review cycle also leads to the
opening of a new one. Peer reviews in the frame of the International Atomic Energy Agency (IAEA), the Financial Action Task Force (FATF), the African Union (AU), and the Organization for Economic Cooperation and Development (OECD)–more precisely, the peer review of the Anti-Bribery Convention– will be described. The typical regulatory environment of the peer review will also be examined. Peer review is usually embedded in international regimes that have some distinct features in comparison to more traditional forms of international law.8

Peer review performs several functions within an international regime; above all though, it is a compliance monitoring mechanism. The choice of peer review means that other better-known forms of monitoring are not being chosen by the respective international organizations. The paper moves on to compare peer review to some other forms of monitoring in international law, primarily to judicial review and hierarchical monitoring.9 This monitoring system, developed in the shadow of public international law, creates a new type of “horizontal,” or “peer accountability” between the involved actors.

Section III describes how the peer review achieves its aims. The reason behind the introduction of this monitoring system in international law is to achieve compliance with the rules of an international regime. The compliance outcome is achieved through different means and with different instruments when compared

8 See Gráinne de Búrca, Robert O. Keohane & Charles Sabel, New Modes of Pluralist Global Governance, 45 N.Y.U. J. INT’L L. & POL. 723 (2013) (presenting three modes of pluralist global governance: “Integrated International Regimes and Relations” as Mode One; “Regime Complexes and Orchestrated Networks” as Mode Two; and “Experimentalist Governance” as Mode Three. Peer review is usually to be found in experimentalist governance.).
9 Judicial review, and other forms of international dispute resolution—in contrast to what has been termed in the paper “hierarchical” or “vertical” monitoring—, has been the subject of systematic study in the last years; see generally THE SETTLEMENT OF DISPUTES IN INTERNATIONAL LAW: INSTITUTIONS AND PROCEDURES (John G. Collier & Vaughan Lowe eds., 1999); INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT (Laurence Boisson de Chazournes, Cesare Romano & Ruth Mackenzie eds., 2002); INTERNATIONAL CONFLICT RESOLUTION (Stefan Voigt, Max Albert & Dieter Schmidtchen eds., 2006); CHESTER BROWN, A COMMON LAW OF INTERNATIONAL ADJUDICATION (2007); MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS (Ruth Mackenzie, Cesare P.R. Romano & Yuval Shany eds., 2010); DIPLOMATIC AND JUDICIAL MEANS OF DISPUTE SETTLEMENT (Laurence Boisson de Chazournes, Marcelo Kohen, & Jorge E. Vizuales eds., 2013); INTERNATIONAL DISPUTE SETTLEMENT: ROOM FOR INNOVATIONS? (Rüdiger Wolfrum & Ina Gätzschmann eds., 2013); THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION (Cesare P. R. Romano, Karen J. Alter & Yuval Shany eds., 2014).
with traditional compliance mechanisms; it is compliance through collegiality: In
the peer review process, acceptability replaces command, peer pressure replaces
sanctions, and learning replaces enforcement of traditional compliance monitoring
systems.\textsuperscript{10} For this reason, it can be a more effective and more legitimate system
in order to achieve state compliance with international law.

\textbf{I. Global Governance as a Horizontal Process}

\textit{A. From vertical to horizontal governance}

Public international law is the domain of the interaction of sovereign states.
Traditionally, public international law has been perceived as the law of the
coordination of state interests and the protection of their coordinated existence.\textsuperscript{11}
The international legal order has evolved since the inception of public
international law. Interaction among states has moved beyond mere coordination
towards broader inter-state cooperation. From the public international law of co-
existence, a public international law of cooperation has grown.\textsuperscript{12} Additionally, one
of the major consequences of globalization has been the re-allocation of many
functions and powers of the nation state onto global organizations.\textsuperscript{13} The
multiplication of international organizations after World War II has propelled
international law to a further evolution. International organizations operate as

\textsuperscript{10} Command, sanctions, enforcement, and the existence of a sovereign have been identified by
John Austin as the elements of “proper” law; see John Austin, \textit{The Province of Jurisprudence
Determined} (Hackett 1954) (1832), and Subsection III.A.
\textsuperscript{11} Lotus (France v. Turkey), 1927 P.C.I.J. (ser. A.) No. 10, at 18 (Sep. 7) (“International law
governs relations between independent states. The rules of law binding upon States therefore
emanate from their own free will as expressed in conventions or by usages generally accepted as
expressing principles of law and established in order to regulate the relations between these co-
eexisting independent communities or with a view to the achievement of common aims.
Restrictions upon the independence of States cannot be presumed”).
\textsuperscript{12} Wolfgang Friedmann, \textit{The Changing Structure of International Law} 60 (1964); see also
International Law 1242 (1995); Georges Abi-Saab, \textit{Whither the International Community?}, 9
Eur. J. Int’l L. 248 (1998); see generally Martti Koskenniemi, \textit{From Apology to Utopia}
(2d ed. 2005) (on the history of the evolution of international law).
\textsuperscript{13} See Richard B. Stewart, \textit{The Global Regulatory Challenge to U.S. Administrative Law}, 37 Law
& Contemp. Probs. 695, esp. 695-97 (2005); see also Georgios Dimitropoulos, \textit{Global
Administrative Order: Towards a Typology of Administrative Levels and Functions in the Global
Legal Order}, 23 EUR. Rev. Pub. L. 433 (2011) (on the functions of the different governance
levels).
global regulators, determining domestic policies to a considerable extent. The multiplication of international organizations and the subsequent rise of their power has been the result of the evolution of global public goods from international security to trade in goods to the protection of the environment. The emergence of global public goods has introduced further actors in international law, beyond the state and international organizations. International law is now an enterprise of states, international organizations, individuals, transnational networks, private governance regimes and multinational corporations. This new phase of the evolution of international law has been described as the “international law of global governance,” the “law of globalization,” the “law of the international society,” or “world law.”

The evolution of international law is not a process of disruption and change of paradigms, but rather an evolutionary process. The best way to understand it is a “geological approach” to international law. The described phases of the

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15 The emergence of global public goods can be interpreted as an evolution of an international society; see ANDREAS PAULUS, DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT (2001); Rüdiger Wolfrum, Solidarity amongst States, in COMMON VALUES IN INTERNATIONAL LAW: ESSAYS IN HONOUR OF CHRISTIAN TOMUSCHAT 1087, 1087-88 (Pierre-Marie Dupuy, Bardo Fassbender, Malcolm N. Shaw & Karl-Peter Sommermann eds., 2006).
17 Joseph Weiler speaks about a “geology of international law,” in order to stress the stratification instead of change in the international legal order; see Joseph Weiler, The Geology of International Law, 64 HEIDELBERG J. INT’L L. 547 (2004). Weiler also describes three phases of the evolution of the international legal order: “transaction”—the phase of bilateralism in international law—; “community”—in which multilateralism and community relationships among the states make their appearance—; and the “regulatory” phase—during which international law evolves a regulatory aspect as international governance.
evolution of international law are “layers” of the geological structure of international law. As international law evolves, there is an “accretion” and enmeshment of the layers and their structures, principles and norms. International law of the first—international law of coordination—and the second layer—international law of cooperation—still exist in contemporary international law together with international law of the third layer—law of global governance—, since a major part of international law deals with the coordination of state interests and the bilateral cooperation of states. We can call international law of coordination and cooperation “horizontal” international law given the way in which international law actors interact.\textsuperscript{18} International law of the third layer creates a “vertical” relationship between international organizations and the states since international organizations regulate a major part of activities and operations in the domestic legal order.

The claim of this paper is that a further, fourth layer has been added to the existing horizontal and vertical layers of international law. The new layer mixes the pre-existing layers in several fields of international law and governance; it frames coordination and cooperation of domestic bodies, including governments and subnational entities, which now act under the coordination of international bodies. We call this “horizontal governance.”\textsuperscript{19} Horizontal governance is the result of the mixing of the various layers of international law and of the heavy

\textsuperscript{18} See Oliver Gerstenberg, \textit{What International Law Should (Not) Become. A Comment on Koskenniemi}, 16 EUR. J. INT’L. L. 125, 128 (2005) (speaking about an “accomodationist” or “contractualist” view of international law with an exclusive position for the state within an “entirely horizontalized global legal order”). Based on this horizontal understanding of international law, international law has been designed on the example of private law; see HERSCH LAUTERPACH, PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW (1927).

\textsuperscript{19} The term “peer governance” has also been used in literature concerning the governance of the internet; see http://p2pfoundation.net/Peer_Governance (last accessed July 30, 2014); David R. Johnson, Susan P. Crawford & John G. Palfrey, Jr., \textit{The Accountable Internet: Peer Production of Internet Governance}, 9 VA J.L. & TECH 9 (2004). The term has also been used for the description of the relationships between domestic legal orders from a private international law point of view; see ALEX MILLS, THE CONFLUENCE OF PUBLIC AND PRIVATE INTERNATIONAL LAW: JUSTICE, PLURALISM AND SUBSIDIARITY IN THE INTERNATIONAL CONSTITUTIONAL ORDERING OF PRIVATE LAW (2009); Alex Mills, \textit{Towards a Public International Perspective on Private International Law: Variable Geometry and Peer Governance} (unpublished paper, on file with the author). The proposed term “horizontal governance” and the term “peer governance” will be used interchangeably in this article.
reliance of international organizations on domestic institutions for the pursuance of their goals.\textsuperscript{20}

Horizontal governance is also to a large extent the result of the transformation of the global economy. Globalization, after breaking down domestic hierarchies, breaks down global hierarchies, both political and economic ones, and leads to the emergence of new actors that co-exist in a horizontal way next to one another. International organizations exist next to sovereign states, private actors, including NGOs and multinational corporations, appear next to public institutions like international organizations and state institutions. This changes the way governance is exercised both at the domestic and the international level. As a consequence, horizontal governance is not only an approach that refers to the relationship between countries, but also between international regimes. The fragmented international regimes are not fully independent of one another but co-exist in the horizontal governance frame.\textsuperscript{21}

International law as an evolutionary and geological process is also reflected in the literature of international law and globalization. One strand of the literature addresses international law in the more traditional sense of horizontal state interaction. At the same time, significant portion of the literature describes the process of the evolution of international law towards global governance.\textsuperscript{22} This


\textsuperscript{22} A major part is played by theories of global constitutionalism, whereas Global Administrative Law literature has been gaining ground since 2004, on the former see, e.g., Alec Stone Sweet & Jud Mathews, \textit{Proportionality Balancing and Global Constitutionalism}, 47 COLUM. J.
strand of the literature, the “global governance literature,” deals with the issue of the evolution of governance mechanisms within international law. The more traditional approach fails to capture the significance of the multiplication of international and other global organizations and their influence in almost every field of human life; the global governance approach fails to capture the exact role and function of the state in the globalization process. The concept of horizontal governance better captures the reality of law beyond the state, because it brings together the elements of horizontal and vertical interaction.

B. Giving Substance to Process

1. Comparative administrative law as a resource for international law

The continuous transformation of international law has consequences for enforcement of international rules and compliance of states with international law. Section III will deal extensively with the issue of compliance through peer review; the features of compliance through peer review are very characteristic for horizontal governance overall. Horizontal governance is a multi-polar process, which makes compliance with international rules even more difficult. The structures of domestic constitutional and administrative law will usually obstruct the implementation of international policies and rules; alternative rule-making and compliance mechanisms need to be developed in order to accommodate global and domestic diversity. There is a need for international, but also comparative constitutional and administrative law to better balance expertise, accountability and the protection of individual rights.23

Over the years of the evolution of international law and international relations, especially after World War II, several theories have been evolved in order to explain enforcement of international law and compliance of states and other international actors with international law.\(^{24}\) They can be divided into the “interest-based,” and the “norm-based” theories of international law.\(^{25}\) For the interest-based theories, states are unitary actors engaging in instrumental behavior in the pursuit of a given national interest.\(^{26}\) International law under this approach can primarily motivate compliance through sanction. For the norm-based theories, states are motivated by ideas and norms, whereas their interests are constructed by these norms.\(^{27}\) The later approach as has been evolved in the field of international law, initially under the pioneer work of the New Haven School of International Law,\(^{28}\) usually now takes the form of “legal process theories.”\(^{29}\) As a result of this historical evolution of the theories of international law and politics, process is


usually presented as opposed to interest and substance, and at the same time, international law as opposed to international politics.  

Horizontal governance goes partly beyond the divide between theories of substance and theories of process in international law. This transcendence requires a mix of resistance induced by domestic constitutional traditions, on the one hand, with some degree of reconciliation to demands of efficient problem solving on the other. International law of horizontal governance takes into account domestic administrative and constitutional specificities, and accommodates global and domestic diversity. In a purely horizontal state-to-state setting, states can decide on their own whether to comply with international rules. In a vertical governance setting, it is the international rules that set the standards for state behavior and compliance. In a horizontal governance setting, it is the best practices and solutions of other states that support domestic policymaking and compliance through international coordination in order to overcome global problems. For this reason, comparative administrative law becomes very important for the study of international law and governance; it has the instruments to operationalize the transition from vertical to horizontal governance and accountability. I will now refer to some examples of how administrative law is being used as a resource for international law, and how process produces substance in horizontal governance settings.

2. Examples of horizontal governance
   a. International organizations and “distributed administration”

   Domestic bodies very often operate as the implementation agents of international law and of the policies of international organizations. Global

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30 Compare LOUIS HENKIN, HOW NATIONS BEHAVE (2d ed. 1979) with MORGENTHAU, supra note 26.
31 I owe this observation to Professor Harold Koh.
33 See PAOLA COLETTI, EVIDENCE FOR PUBLIC POLICY DESIGN: HOW TO LEARN FROM BEST PRACTICE (2013).
34 Boughey, supra note 7 at 56.
35 See supra fn. 6 (for references to comparative administrative law literature); see also supra fn. 22 (for reference to global administrative law).
36 See also Hathaway & Shapiro, supra note 20.
administrative law (GAL) literature captures this function of international and domestic law under the label of “distributed administration.” Distributed administration is domestic administration implementing international rules and policies. As will be described further down in relation to peer review, international regimes “delegate” implementation of international rules to domestic bodies. This delegation does not always leave countries much room to select the domestic authority that is going to perform this function. The choice of the competent body is pre-specified by the functions it has to perform, which are laid down in the relevant international document. For example, in the context of nuclear safety, “nuclear regulatory authorities” shall be designated by the Member States of the International Atomic Energy Agency in order to implement the respective international law. The same applies in the frame of the Financial Action Task Force and the anti-money laundering regime with the “Financial Intelligence Units” (FIUs), but also in several other regulatory fields such as food safety, "Designated National Authorities" (DNA) of the Kyoto Protocol to the UN Framework Convention on Climate Change, health, under the UN Convention on the Rights of Persons with Disabilities, and the OECD.

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37 Distributed administration is one of the five basic types of international regulatory regimes, together with international organizations, transnational networks, hybrid public-private and private regulatory bodies; see Benedict Kingsbury et al., supra note 22, at 21-22; Stewart, supra note 13, at 701-702.

38 See Section I IAEA, Code of Conduct on the Safety and Security of Radioactive Sources, Vienna (2004), IAEA/COD/E0C/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”).

39 See Recommendation 26.1 of the FATF Recommendations (“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”).

40 “National Codex Contact Points” (NCCP) in the framework of the Codex Alimentarius.

41 “Designated National Authorities” (DNA) of the Kyoto Protocol to the UNFCCC.

42 See Article 44 WHO Constitution and Article 4(1) of the 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”).

43 Article 33 of the UN Convention on the Rights of Persons with Disabilities; see Gráinne de Búrca, The European Union in the Negotiation of the UN Disability Convention, EUR. L. REV. 174, 184-186 (2010).
Even though the bodies of distributed administration are formally designated by national governments, they are functionally embedded into an international regime, serving global goals. The designated domestic bodies operate as “satellites” of international organizations and serve as channels of communication for the purpose of facilitating international cooperation for the implementation and compliance monitoring with rules of the respective international regime. As a result, the international policies are not left unimplemented, but become enforced through a complicated process of transnational interactions.

b. Transnational networks

Horizontal governance very often occurs within international bodies. The best example of horizontal governance of this type are the transnational networks that have gained the attention of several scholars in the last years. Either government, or administrative officials may be represented in the networks. For example, the Group of Twenty (G20) brings together Heads of State and Ministers of nineteen powerful countries and the European Union in a forum, where they take common decisions primarily on international economic cooperation; in the International Competition Network (ICN), officials from domestic competition authorities are represented. These networks have mainly planning and

42 See James Salzman, Decentralized Administrative Law in The Organization For Economic Cooperation And Development, 68 LAW & CONTEMP. PROBS. 189, 212-17 (2005) (with reference to the “National Contact Points” (NCPs)).
43 This can be described as “integrated administration;” see Herwig C. H. Hofmann & Alexander Türk, The Development of Integrated Administration in the EU and its Consequences, 13 EUR. L. J. 253 (2007); 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 L. J. 2013 (2008); cf. also Benedict Kingsbury et al, supra note 22, at 31.
44 See also Richard B. Stewart, Administrative Law In the Twenty-First Century, 78 N.Y.U. L. REV. 437, 455 (2003) (presenting “horizontal arrangements” in GAL); Mario Savino, An Unaccountable Transgovernmental Branch: The Basel Committee, in GLOBAL ADMINISTRATIVE LAW, supra note 22, at § 2.7, 65 (differentiating between horizontal transgovernmental networks—that are not constituencies of international organizations,—and vertical networks—that have been established as constituencies of an international organization).
46 www.g20.org (last accessed July 30, 2014).
47 www.internationalcompetitionnetwork.org (last accessed July 30, 2014).
rulemaking powers. Moreover, some agencies within international organizations—like, e.g., the Intergovernmental Panel on Climate Change (IPCC) established by the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) and endorsed by the UN General Assembly—, and committees—like, e.g., the SPS and the TBT-Committees of the World Trade Organization—, also operate as horizontal governance structures. There are no hierarchical relationships among the domestic bodies represented in the international bodies, reproducing the model of one representative from each country that international organizations use in their internal structure. The difference between these bodies and international organizations is that they may not be established by a formal international treaty as international organizations, and/or they may be composed of representatives of domestic authorities, and not diplomats.

This horizontal regulatory process gathers peer bodies represented by domestic officials and is driven by the need to meet with peers from other legal orders in order to regulate transnational issues. According to Bignami, transnational networks are becoming the primary institutions for cross-national policymaking. The process of their interactions produces international policies, and secures the compliance of the domestic bodies with international law.

c. Technical assistance
One of the best examples of horizontal governance, but also of how process produces substance, is technical assistance. A large part of non-compliance in the EU results from capacity limitations of the EU Member States. This finding applies equally in the international realm. Technical assistance is a relatively new field of international law that has been developed to support the monitoring or lending operations of international organizations by improving the capacities of

50 Francesca Bignami, *Individual Rights and Transnational Networks*, in COMPARATIVE ADMINISTRATIVE LAW, supra note 7, at 632, 632.
the states.\textsuperscript{52} It promotes international best practices that evolved in domestic practice and can take the form of technical studies with a description of legal and factual situations that exist in a country and proposals for reforms, training courses, seminars, workshops, and online advice and support.

Technical assistance is a form of horizontal governance in two different ways. First, technical assistance is replacing much of hierarchical decisionmaking, which makes up most of international reform programs worldwide. Currently, it accounts for about one-quarter of the IMF’s operating budget.\textsuperscript{53} Moreover, there are two forms of technical assistance: assistance provided by the staff of the international organization; and assistance provided by staff of administrative agencies of other countries, whereas the international organization may operate as the forum for the provision of the assistance. A prominent example of the second type is the Task Force for Greece (TFGR), which is composed of staff of EU Member States and provides technical assistance to the Greek government in order to fulfill its obligations under the lending program that the country has agreed upon with the IMF, the European Commission and the European Central Bank.\textsuperscript{54} This second form of technical assistance is one of the paradigmatic cases of horizontal governance, and of the way how the technical assistance process produces domestic compliance with international policies.

II. Peer Review in International Law

A. Peer review design

Peer review is a proliferating compliance mechanism of international law that can be found in different international regimes. This Section gives several examples of peer reviews in different fields of international governance. Despite the variety of the mechanisms, peer reviews across international regimes present many common features. Design and functions of the peer review mechanism will

be presented, also in comparison to other compliance monitoring systems. This
Subsection closes with the description of the typical regulatory environment of the
peer review systems, the so called “New Governance” or “experimentalist”
regimes that include elements of decentralization, transparency, broad
participation, and reflexivity in their design.

1. Common features of peer review systems

a. Definition of international peer review

In order to monitor the implementation of international rules by domestic
actors, several international organizations have introduced a compliance
monitoring mechanism that involves a review by peers. Peer review in
international law is an examination of one country’s, or domestic body’s
performance in a particular area by other countries, or domestic bodies. The
evaluation process is conducted by agency officials of a governmental body or
other authority in the relevant policy field and in their capacity as representatives
of a body of a different legal order, and is coordinated by an international
institution. In practice, the relevant ministries and regulatory authorities in the
respective policy fields are involved. The peer reviewers conduct examinations of
documentation, participate in discussions with the reviewed authorities and
possibly third parties, and carry out on-site visits to the peer reviewed country.
The purpose of the peer review is the monitoring of the conformance of one
domestic legal order with international norms.

Peer review can be found in various international treaties and regimes like the
United Nations Environment Program (UNEP), the UN Conference on Trade and
Development (UNCTAD), the UN Economic Commission for Europe, and the
World Trade Organization. In the field of human rights, the United Nations also
established a peer monitoring process, the Universal Periodic Review (UPR).
Especially in global financial regulation, there is a constant multiplication of peer
reviews for the monitoring of the implementation of international financial

55 A peer review operates in the WTO Trade Policy Review Mechanism; see Sam Laird, The
WTO’s Trade Policy Review Mechanism – From Through the Looking Glass, 22 THE WORLD
ECONOMY 741 (1999).
56 See UN General Assembly Resolution 60/251, March 15, 2006.
standards. The Financial Stability Board (FSB) has recently introduced an ambitious program for the control of FSB standards.\textsuperscript{57} Roberta Romano proposes to use a similar review mechanism for the control of the implementation of the Basel Committee standards.\textsuperscript{58} There are similar proposals for the introduction of peer review for the promotion of the United Nations Millennium Development Goals.\textsuperscript{59}

Regional organizations have also introduced peer review. Most prominently, the EU uses peer reviews in the frame of the Open Method of Coordination (OMC).\textsuperscript{60} Similar peer review systems have been recently introduced into the new EU financial regime by the three Regulations adopted so as to deal with the systemic deficiencies of the EU financial architecture.\textsuperscript{61} They involve domestic competent authorities in the monitoring of the implementation of the respective financial regulations. The African Union is working on a big project for the revigoration of regional governance based on the New Partnership for Africa’s Development (NEPAD) African Peer Review Mechanism (APRM).\textsuperscript{62} The Organization for Economic Co-operation and Development (OECD) is the greatest promoter of peer review internationally and uses the system for various tasks from development assistance to anti-corruption.

Also at the domestic level, there are attempts to introduce a similar type of review engaging the regional subdivisions of the states. Especially federal states

\textsuperscript{58} Roberta Romano, For Diversity in the International Regulation of Financial Institutions: Critiquing and Recalibrating the Basel Architecture, Draft: August 14, 2013.
can use peer review as an instrument of promoting a healthy competition among the authorities of domestic constituencies.\textsuperscript{63} Beyond the public sector, peer monitoring is also used to monitor performance of private bodies by other private bodies.\textsuperscript{64}

Before moving to the description of the design of the peer review system, it has to be noted that some form of peer review also emerges among international bodies; there are still no rules and procedures for this type of monitoring. For example, after the H\textsubscript{1}N\textsubscript{1} pandemic (swine flu), the Parliamentary Assembly of the Council of Europe heavily criticized the World Health Organization (WHO) for its response to the crisis.\textsuperscript{65} A further example of peer review by international organizations is the report of the OECD concerning the agricultural policies of the OECD member states, the last review cycle of which contained a very detailed report on the EU Common Agricultural Policy including several reform proposals of the EU policies.\textsuperscript{66}

\textbf{b. Phases and procedures}

International peer review mechanisms in different fields of international law present many common features.\textsuperscript{67} There are some rules in the sense of standardized global best practices that apply generally to all peer reviews. The peer review is usually laid down in an international document and includes two sets of standards: “assessment standards” against which the performance of the

\textsuperscript{63} See http://www.nggovernorsforum.org/policy/state-peer-review-mechanism/#.U9nzt_mSxHU (last accessed July 30, 2014) (on the State Peer Review Mechanism (SPRM) in Nigeria, a project 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 in Nigeria).


\textsuperscript{66} See Bruno Carotti & Georgios Dimitropoulos, \textit{Horizontality as a Global Strategy for Accountability: The OECD Reviewing the EU CAP, in GLOBAL ADMINISTRATIVE LAW}, supra note 22, at Ch. I.E.5.

\textsuperscript{67} See also Monica J. Washington, \textit{The Practice of Peer Review in the International Nuclear Safety Regime}, 72 N.Y.L. SCH. L. REV. 430, 446 (1997).
reviewed body is measured, and “procedural standards” that form the basis of the peer review process.

International peer reviews are in most cases hosted by an international organization. A form of soft tripartism is thus created: The review process is a joint operation involving the reviewed body, the reviewing bodies forming the peer review team, and officials and staff from the hosting and/or other international organizations. There are “harder” and “softer” forms of peer review. In the case of hard reviews, the review is obligatory for the reviewed country or domestic body and may also be linked to binding consequences for this body. Some peer reviews may even be pre-conditions for membership to an international organization. In the case of soft reviews, the peer assessment is not obligatory for the reviewed country and may also not include binding negative consequences for non-conformity.

The peer review process is usually divided into three phases. The first phase is preparatory, during which the peer review team is formed. The recruitment and the composition of the team is a highly important aspect of the mechanism. The experts are expected to be independent and objective. De facto, economically powerful countries may be in the position to control the review process. The most obvious way to overcome such problems of vertical accountability within the peer review team is to diffuse power with the formation of relatively large reviewing teams from several jurisdictions. After the team has been formed, it sends a questionnaire to the relevant domestic body in order to gather some general information on the status of the legal order of the reviewed country. In some peer

69 This is the case for example with the International Accreditation Forum (IAF). IAF is a private international body that gathers accreditation bodies from around the world. It currently has 62 members. For more information see www.iaf.nu (last accessed July 30, 2014).
72 But see Stiglitz, supra note 64, at 361 (“With large groups there is a free rider problem–each would prefer that others expend the energy required to monitor and incur the ill will that would result from reporting offenders who have misused the funds lent to them”).
review systems, there is a requirement of a prior self-assessment of the reviewed authority.

In the second phase, an on-site visit of the members of the peer review committee is conducted. This includes interviews, inspections and study audits based on the evaluated information that the team gathered from the responses to the questionnaires. The duration of the stay varies. During their stay, the peer reviewers meet with the reviewed bodies in order to gather further information on the status of the reviewed legal order and also on the actual implementation of the international rules. Some peer reviews entail the participation of civil society organizations during this phase.

In the third phase, the review committee drafts a report that has to be submitted to the international organization that hosts the review. The report has three elements: a) A description of the domestic legal order with regard to the status of the international rules in the scrutinized field. The report describes and analyses the measures taken by the country in order to comply with the international standards; b) an assessment of the findings concerning the reviewed body or country’s level of compliance with the respective international standards. The assessment is based on international standards, indicators, guidance and good practice elsewhere; c) the peer review report will typically also include recommendations for improvements. Based on the description and the assessment, it outlines the performance and shortcomings of the country/authority reviewed and makes recommendations on how to strengthen and improve the domestic system. The third phase may also involve a commenting sub-phase, during which the reviewed country, other departments of the international organization and in some cases, other actors such as civil society may give their opinions on the report. The report may then be made public by the international organization that hosts the process. The participation of large and different teams in the peer review process may lead to inconsistent and incoherent reports. International organizations have attempted to deal with this problem by providing a supervisory role for the Secretariat of the relevant international organization during the
drafting stage. A major part of the success or failure of the overall process will thus depend on the influence of the Secretariat.

Peer reviews are not one-off events. Most peer reviews are continuous processes and include follow-up reviews that examine whether the country has acted on the advice of the peers and whether the domestic situation has improved, and several cycles of review.

2. Peer review in international regimes

Peer reviews are embedded in different international regimes as compliance monitoring systems. This subsection presents first the peer monitoring system of the International Atomic Energy Agency, and then that of the Financial Action Task Force; the former is a classic international organization, whereas the latter is a transnational network. None of the two regimes includes a court for dispute resolution, and rely solely on peer review in order to prevent disputes. The paper moves one to describe a peer monitoring system at the African regional level of governance, which was institutionalized as a response to the general dissatisfaction against the operations of the International Financial Institutions in the African Continent. The Chapter closes with the discussion of the peer review activities of the Organization for Economic Co-operation and Development, which is the major promoter of peer review in international law. In order to illustrate the peer monitoring functions of this organization, the peer monitoring system of the Anti-Bribery Convention will also be presented.

a. The IAEA Integrated Regulatory Review Service

The International Atomic Energy Agency (IAEA) is an international organization working closely with the United Nations and has 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, self-assessment systems, and 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. The Agency offers, for example, Legal and Governmental Infrastructure (LGI) peer review services providing advice and assistance to member states in order to strengthen and enhance the effectiveness of their regulatory infrastructure for nuclear, radiation, radioactive waste, transport safety and security of radioactive sources, and foster effective, independent domestic regulatory bodies. The Integrated Regulatory Review Service (IRRS) offers a comprehensive review of all aspects of LGI. The IRRS measures domestic regulatory technical and policy approaches against IAEA safety standards. 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.

The IRRS process is divided into different phases and is coordinated by the Agency. The peer review has a non-binding character, in the sense that the interested government itself invites IAEA to organize the review. The Integrated

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73 See, e.g., the Review of Accident Management Programmes (RAMP) and the Safety Assessment Capacity and Competency Review (SAC).
74 For example, in the context of the Periodic Safety Review Service (PSR).
76 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).
77 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.
Regulatory Review Service Guidelines\textsuperscript{79} and the Guidelines for IAEA International Regulatory Review Teams (IRRTs)\textsuperscript{80} include guidance for the host country and the reviewers, in order to ensure the consistency and comprehensiveness of the regulatory review process. The IRRS process recognizes the variety of domestic organizational structures and regulatory processes from country to country that depends on national legal and administrative systems and traditions, the size and structure of each nuclear and radiation protection program, the financial resources available to the regulatory body, and other social customs and cultural traditions.

The initial scope and topic areas of the review are based on a modular approach and are determined by the inviting 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. The peer review is usually preceded by a self-assessment of the national regulatory infrastructure, based on the Self-Assessment Tool (SAT). Upon the request for assessment, the Agency appoints an international team of experts from other member states of IAEA and from the Agency. The experts participate either as reviewers or observers. For example, in an 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 of the IAEA and an IAEA administrative assistant.\textsuperscript{81} The domestic authority provides the report of the Self-Assessment and a collection of so called Advance Reference Material (ARM) for the team to review. 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 staff from the domestic authority, inspections and direct observation of their working practices. The inspections and other activities take place at the premises of the reviewed authority but the team may also

\textsuperscript{80} IAEA, Guidelines for IAEA International Regulatory Review Teams (IRRTs), IAEA Services Series No. 8, Vienna (2002).
conduct technical visits in power plants. Depending on the scope of the mission, and the programs that have to be reviewed, the number of reviewers may vary from 10 to 20 members, whereas the mission may last from 5 to 15 days. 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 missions form an integral part of the IRRS, and typically last 5 to 10 days.

**b. The FATF Mutual Evaluations Program**

The Financial Action Task Force (FATF) also holds a peer review mechanism for the monitoring of the implementation of the international policies and standards against money laundering and terrorist financing that it develops. FATF is a transnational regulatory network of 34 countries from all parts of the world and some regional organizations, the so-called FATF-Style Regional Bodies (FSRBs).

The Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Mutual Evaluations Program (MEP) has been introduced for the assessment of the adequacy of a country’s AML/CFT framework. The members of the FATF and FSRBs participate in the FATF MEP, whereas the MEP is the main instrument through which the FATF and FSRBs monitor progress made by their members when implementing the FATF rules. The system provides a mechanism to assess the conformity of the national legislative and implementation measures against the FATF Recommendations, i.e. the *International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation*, which are usually referred to as the 40+9 FATF Recommendations.

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

83 The current version of the FATF Recommendations is from 2012, and have replaced the earlier versions of 1990, 1996, 2003, and 2004. The 40 Recommendations concerning money laundering are divided into seven sections and include the following categories: 1. Assessing risks & applying a risk-based approach; 2. National cooperation and coordination; 3. Money laundering offence; 4.
The *AML/CFT Methodology* lays down the procedures that guide the assessment of a country's compliance with the FATF standards. The Methodology differentiates between “technical compliance,” which is the formal transposition of the Recommendations into the domestic legal order, and “effectiveness,” which is the extent to which the defined outcomes are achieved in practice. 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 member countries of the FATF, the FATF Secretariat, and probably other international organizations like the IMF, and from different fields of expertise covering several aspects of the fight against money laundering and financing of terrorism. Based on a questionnaire directed to domestic authorities, the assessment team gathers the important material that will guide it through the rest of the process. The second phase involves an on-site visit of the evaluation team. During the mission, the team meets with officials and representatives of all relevant government agencies and the private sector. At least

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The latest version of the *AML/CFT Methodology* is from 2013; see FATF, Methodology for Assessing Technical Compliance with the FATF Recommendations and the Effectiveness of AML/CFT Systems, February 2013; see also FATF, Procedures for the FATF Fourth Round of AML/CFT Mutual Evaluations, June 2014; cf. 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).

FATF, AML/CFT Evaluations and Assessments, *supra* note 84, at Nr. 13, 14.
7-8 days of meetings is required for countries with developed AML/CFT systems. The assessment team will usually consist of 4 expert assessors, with at least one legal, one financial, and one law enforcement expert, and also members of the FATF Secretariat. The assessors are confirmed by the President through the Secretariat based on a pool of assessors that have been proposed by the FATF members, and their selection is based on some predefined criteria. Joint evaluations made up of assessors and Secretariat from the FAFT and the FSRBs, and IMF or World Bank led assessments are also possible. For example, the latest evaluation of the anti-money laundering and combating the financing of terrorism regime of the United States has been conducted during the years 2005 and 2006 and was published in 2006. It was a joint evaluation of the FATF and the Asia Pacific Group (APG), and included two on-site visits. The assessment team was comprised of experts from the FATF and the APG, and included experts in criminal law, law enforcement, and regulatory issues. It was led by the Executive Secretary of the FATF, and the Head of the APG Secretariat. It moreover included the Deputy Head of the Dutch FIU, an Adviser of the UK Financial Services Authority, the Director of the Central Bank of Malaysia—which is the FIU of Malaysia—, a Senior Legal Adviser at the Attorney-General’s Department of Australia, the Head of Section of the Swiss Federal Finance Administration, an Administrator of the FATF Secretariat, and a Belgian Deputy Attorney-General. 45 federal authorities, 23 state authorities, 13 national associations and self-regulatory organizations, and 16 entities of private sector representatives have been consulted.

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86 FATF, Procedures for the FATF Fourth Round, supra note 84, at 10.
87 Id. at 6.
88 The criteria are: (i) Their relevant operational and assessment experience; (ii) language of the evaluation; (iii) the nature of the legal system (civil law or common law) and institutional framework; and (iv) specific characteristics of the jurisdiction (e.g. size and composition of the economy and financial sector, geographical factors, and trading or cultural links), in order to ensure that the assessment team has the correct balance of knowledge and skills; see FATF, Procedures for the FATF Fourth Round, supra note 84, at 6.
In the third phase, the team drafts the Mutual Evaluation Report (MER).\footnote{FATF, AML/CFT Evaluations and Assessments, supra note 84, at Nr. 9.} The preparation of the AML/CFT evaluation report is also based on the AML/CFT Methodology and the evaluation team is supported during the drafting process by the Secretariats of the FATF and FSRBs, in order to ensure consistency of the reports. 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 of several issues that help define the context within which the relevant domestic AML/CFT regime operates. The information obtained in the preparatory phase, during the on-site visits, and 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 their implementation and effectiveness, and the regulatory and other systems in place in order to deter and punish money laundering and the financing of terrorism. Beyond 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. The rating of compliance is made according to four levels of compliance that are stipulated in the AML/CFT Methodology.\footnote{The levels are: Compliant (C), Largely Compliant (LC), Partially Compliant (PC), Non-Compliant (NC).} From the 40+9 Recommendations’ ratings of compliance, the US has been found to be Compliant with 15, Largely Compliant with 28, Partly Compliant with 2, and Non-Compliant with 4 Recommendations. The report provides also recommendations on how to strengthen certain aspects of the system addressing each of the areas of weakness.\footnote{FATF, AML/CFT Evaluations and Assessments, supra note 84, at Nr. 30.} The MERs are made public by the FATF.
c. The NEPAD African Peer Review Mechanism

The New Partnership for Africa’s Development African Peer Review Mechanism (NEPAD APRM) is a relatively new governance scheme mechanism introduced by the African Union (AU). It invites all member countries of the AU to participate on a voluntary basis in a mutual review of a broad variety of policies that are grouped in four focus areas: democracy and political governance, economic governance, corporate governance, and socio-economic development. A country formally joins by ratifying the Memorandum of Understanding on the African Peer Review Mechanism.93 The aim of the scheme is to promote implementation of high governance standards in a self-governance and self-monitoring mode at the regional—“continental” in AU parlance—level.94 It is thus a unique example of South-to-South peer review and marks a paradigm shift in political, economic and social governance in the African continent.95 The review by peer bodies was introduced due to negative experiences of monitoring by the World Bank, the EU, bilateral donors and western NGOs.96 The African Development Bank (ADB), the United Nations Economic Commission for Africa (ECA) and the United Nations Development Programme (UNDP) are its three main strategic partners. Currently, 33 member countries out of the 54 members of the African Union participate in the APRM, 14 of which have already been reviewed.

The review process is set out in the Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism document, which was adopted in 2003,97 and elaborates an interesting taxonomy of rules for the assessment and

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94 NEPAD, Memorandum, supra note 93, at Nr. 7.
96 Id. at 7-8.
evaluation of the policies of the participating countries. For each of the four governance fields it provides for key objectives, standards and codes, criteria and indicators. Key objectives are guiding political and legal principles, which are then made more specific and concrete by the standards, codes, and criteria of their adoption. At the bottom of this toolkit “… indicators are used as the means by which it is determined whether the criteria have been met.”98 The standards and codes are not used as legal standards in the classical sense, but as assessment tools, i.e., as references as to how countries govern their affairs and the extent of their application.99 A Questionnaire has been introduced with questions focusing on what the country has done with regard to the objectives, standards and codes, how it does it and with what results.

The Questionnaire states that the objectives in the four focus areas need to be achieved in a measurable way.100 The Objectives, Standards, Criteria and Indicators document lists therefore several quantitative and qualitative indicators in each field. They are not supposed to be used as indicators themselves, but rather as models for the elaboration of country-specific indicators. As the countries might lack the relevant expertise, the Questionnaire guides the countries in the review process. The Questionnaire is quite lengthy and complex comprising 58 questions and 183 indicators. They are not exhaustive and the states can use their own indicators in order to measure performance.

A Committee of Participating Heads of State and Government (APR Forum) is the highest decision making authority in the APRM; a Panel of Eminent Persons (APR Panel) oversees the review process to ensure integrity, it considers reports and makes recommendations to the APR Forum. The APRM Panel includes professors, lawyers and diplomats; the continental APRM Secretariat provides technical, coordinating and administrative support for the APRM; an ad-hoc Country Review Mission Team (CRM Team) visits member states to review progress and produce an APRM Report concerning each specific country.

98 NEPAD, Objectives, supra note 97, at Nr. 1.10.
99 NEPAD, Questionnaire: Country Self-Assessment for the African Peer Review Mechanism, 1.
100 Id.
The APRM proceeds in two main phases that are further divided into five steps. The first phase begins with the sending out of the Questionnaire. The country should conduct a self-assessment that leads to the preparation of a Country Self-Assessment Report (CSAR). National Focal Points—namely high-level officials, usually Ministers, reporting directly to the Head of State or Government—are responsible for the management of the process internally. The Focal Point is also responsible to develop a National Programme of Action (NPoA) with the participation of all stakeholders, including trade unions, women, youth, civil society, the private sector, rural communities and professional associations.

The actual peer review of the participating country takes place in the second phase of the APRM. The CRM Team, led by a member of the APRM Panel, conducts the performance monitoring. This phase ends with a debate and approval of the Country Review Report by the APRM Forum, i.e., at the highest political level. Based on the Country Review Report and the NPoA, the countries publish every year a review assessing their progress.

The APRM is a very good example towards horizontal governance in international law. Despite the political nature of the process, APRM signifies a change in the conception of the exercise of governance in Africa. Peer monitoring with the use of indicators is in the self-understanding of the mechanism contrasted to the conditionality system used by the International Financial Institutions. The system respects the differences of historical context and stages of development of the participating countries, so they can start from different baselines, whereas they are not expected to reach the highest level of performance at the same time. The continental Secretariat is currently trying to cultivate an understanding that the APRM is not a punitive mechanism but a system of promoting good governance.

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101 See NEPAD, Guidelines for Countries to Prepare for and to Participate in the APRM.
102 See NEPAD, Objectives, supra note 97, at Nr. 1.3.
103 NEPAD, Memorandum, supra note 93, at Nr. 22.
104 Experience from the reviews shows that the peer review is a political process that can be highly contested; see AfriMAP, supra note 95, at vii.
105 See AfriMAP, supra note 95, at 7-8.
106 See NEPAD, Questionnaire, supra note 99, at 7.
through self-control, and systematic mutual learning through information-sharing. The potential of peer learning—especially with respect to the APRM Forum—is also recognized by involved NGOs. Learning will evolve with the greater involvement of the civil society in the process, whereas, at the same time, the APRM has operated in several occasions as a civic participation mobilizer.

d. The umbrella function of the OECD

The OECD has been using peer reviews since the creation of the organization. OECD peer review is a state-to-state governance mechanism that usually involves delegates from the public administration and not representatives of the government or diplomats. The mechanism is managed by internal Committees of the organization. OECD peer reviews cover a wide range of topics such as economics, governance, education, health, environment and energy. Even though peer assessments, like Environmental Performance Reviews (EPR) and Development Assistance Committee (DAC) Peer Reviews or the peer review in the context of the OECD Anti-Bribery Convention, are based on the same concept, there are different legal documents with distinct procedures that regulate the respective fields. Because of the range of the fields and the possibility of non-

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108 NEPAD, Objectives, supra note 97, at Nr. 1.6, 1.7.
109 AfriMAP, supra note 95, at viii.
111 Pagani et al., supra note 71 (see id. 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”); see also Markku Lehtonen, Deliberative Democracy, Participation, and OECD Peer Reviews of Environmental Policies, 27 Am. J. Evaluation 185 (2006).
OECD members to request peer reviews,\textsuperscript{112} 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 international regimes. The basic structural elements of the OECD peer reviews are exemplified in the OECD Anti-Bribery Convention.

The OECD does not have a universal membership policy, and operates as a “rich man’s club.”\textsuperscript{113} The more homogenous membership of the OECD gives the organization the possibility to achieve solutions that the international community as a whole could not have reached otherwise.\textsuperscript{114} This applies also to the case in point, the OECD Anti-Bribery Convention (ABC).\textsuperscript{115} 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 Transactions\textsuperscript{116} and monitored through a rigorous mutual evaluation system.\textsuperscript{117} The national legal orders are monitored vis-à-vis the ABC and the Anti-Bribery Recommendation.\textsuperscript{118}

\textsuperscript{113} See Salzman, supra note 44, at 191.
\textsuperscript{114} But see David Singh Grewal, Network Power and Global Standardization: The Controversy over the Multilateral Agreement on Investment, 36 METAPHILOSOPHY 128 (2005) (on the failed attempt to introduce a Multilateral Agreement on Investment).
\textsuperscript{115} OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, December 18, 1997, 37 I.L.M. 1, 4; see Salzman, supra note 44, at 193.
\textsuperscript{116} Art. 12 ABC.
\textsuperscript{117} Transparency International calls this the “gold standard” of monitoring; see Andrew Tyler, Enforcing Enforcement: Is the OECD Anti-Bribery Convention’s Peer Review Effective?, 43 GEO. WASH. INT’L L. REV. 137 (2011).
The mutual evaluation process is divided into three phases that present some common elements, and is hosted by the Working Group on Bribery.\textsuperscript{119} The principal objective of Phase 1 is to evaluate the adequacy of a country’s legislation to implement the Convention, \textit{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 Phase 2, 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. Phase 3 has been introduced as a permanent cycle of peer review, in order to control enforcement of the ABC, the Anti-Bribery Recommendation and recommendations from Phase 2.

The peer review is not a voluntary process since each member country is examined in turn. In principle, each country takes part in the evaluations of two other countries, whereas two countries are appointed each time to lead the examination. 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 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 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.

\textsuperscript{119} See, \textit{e.g.}, OECD, Revised Guidelines for Phase 2 Reviews, DAF/INV/BR/WD(2005)12/REV3 (2006).
and the police, tax and other responsible authorities. This may include informal exchanges with representatives of the private sector and civil society. As peer review is primarily an intergovernmental process, business and civil society groups are not invited to participate in the formal evaluation process.

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. The evaluated country has an opportunity to comment on the preliminary report but cannot block the Group’s decision to adopt the 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.

3. Regulatory environment

Peer review is very often embedded in a broader “regulatory environment,” or governance context, which is different from traditional regulatory regimes and dispute resolution systems. This is usually referred to as “New Governance” or “experimentalist governance.” Broad participatory goal-setting, decentralized

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120 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.

121 See generally Gráinne de Búrca, New Governance and Experimentalism: An Introduction, WIS. L. REV. 227 (2010); Charles Sabel & Jonathan Zeitlin, Experimentalist Governance, in THE OXFORD HANDBOOK OF GOVERNANCE (David Levi-Faur ed., 2012). Experimentalist structures are proliferating at the domestic—see, e.g., Charles F. Sabel & William H. Simon, Minimalism and Experimentalism in the Administrative State, 100 GEO. L.J. 53 (2011)—, the regional—see, e.g., de Búrca, supra note 60 (on the EU Open Method of Coordination, which is a very commonly used example of experimentalist governance), and the international—see Gráinne de Búrca et al., supra note 8, at 739; Gráinne de Búrca, Robert O. Keohane & Charles Sabel, Global Experimentalist Governance, 44 BRIT. J. POL. SCI. 477 (2014)–level of governance; see also Benedict Kingsbury, Indicators and Governance by Information in the Law of the Future, in THE LAW OF THE FUTURE AND THE FUTURE OF LAW 495, 504 (Sam Muller, Stavros Zouridis, Morly Frishman & Laura
implementation, information gathering, performance monitoring, peer review of both successes and failures, revision of goals, consultations and deliberative comparison of experience are central characteristics of experimentalist regimes.

At the international level, experimentalist regimes are proliferating in various fields from human rights treaties\textsuperscript{122} to global private governance regimes.\textsuperscript{123} The proliferation of experimentalist structures in international law is boosted by the need to find ways to implement the rules of a regime in the absence of enforcement mechanisms. Governance by experiment proceeds in four steps:\textsuperscript{124}

i) The involved actors collectively set framework goals like “better government performance,” “good political governance,” “improving efficiency,” “good water quality,” “safe food,” “adequate education,” or “sustainable forests.”

ii) The goals are further elaborated and implemented by local actors. Local actors may be private actors such as companies or territorial authorities. In international law, the local actors will usually be the states, but also decentralized units of states like the above-described “satellites” of international organizations.

iii) In return for autonomy of local implementation, the decentralized actors provide information and data including feedback on the implementation of the framework goals. The production of the data is usually based on instruments of quantification of the implementation results, like indicators. Monitoring of this type usually takes the form of a peer review of the decentralized units.

\textsuperscript{122} See Gráinne de Búrca, The European Union in the Negotiation of the UN Disability Convention, 35 EUR. L. REV. 174 (2010).


\textsuperscript{124} See also Gráinne de Búrca et al., supra note 8, at 739; Gráinne de Búrca et al., supra note 121, at 483-85 (mentioning five identifying features of experimentalist governance: inclusive stakeholder participation in a non-hierarchical process; articulation of agreed common problems, and establishment of a framework understanding, setting open-ended goals; devolution to lower-level or local actors with contextualized knowledge, and implementation of the framework goals by them; continuous feedback, reporting, and monitoring; established practices, usually involving peer review, for revision of rules and practices).
iv) Reflexivity of the regime, in the form of periodic revision of the goals in the light of knowledge gained, will also usually be an integral part of the system.

Experimentalist governance creates a regulatory environment that is equipped to escape both hierarchical imposition of rules and the creation of disputes among the involved parties. This is achieved through the collaborative approach adopted both at the rulemaking and the implementation stage that accommodates the diversity of the participating actors. Since implementation informs rulemaking, potential disputes are instead avoided and solved in advance through consultation and dialogue.

B. Peer Review Functions

Peer review is a mechanism with many uses; above all, it is a compliance monitoring mechanism. In the following pages, some other forms of monitoring in international law—some of which are known from the domestic legal orders while others are commonly found in international law—are discussed, whereas an overall assessment of these mechanisms in comparison to the peer review is also made. Peer review blends elements from other monitoring mechanisms, whereas the new mix combines two fundamental features of compliance monitoring, independence and participation, in a unique way for international law. The hybrid features of the peer evaluation process lead also to a new form of accountability in international, namely “horizontal” or “peer accountability.” This type of accountability goes beyond any other known mechanism of public or private accountability.

1. Peer review and other forms of monitoring

a. Judicial review

Judicial review by a third, independent party is the prototype review system of every domestic legal order. Judicial review is not a common feature of international regimes. The International Court of Justice (ICJ) does not operate

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125 See also Pagani et al., supra note 71, at 9-10 (distinguishing between peer review and other compliance mechanisms, namely judicial proceedings, fact-finding missions and reporting and data collection).

126 See, e.g., Eyal Benvenisti & George W. Downs, Toward Global Checks and Balances, 20 CONST. POL. ECON. 366, 373-74 (2009).
as a universal court, and has no mandatory jurisdiction. States are usually reluctant to concede power to international judicial bodies to perform obligatory judicial review in order to retain their influence over the final result; influence which is guaranteed by the traditional methods of dispute resolution through diplomacy. The success story of the European Convention for Human Rights (ECHR) and the European Court of Human Rights (ECtHR) proves this anxiety of states true. Since the abolition of the European Commission of Human Rights and the institutionalization of direct access of individuals to the ECtHR, the Court has determined a large part of human rights law in Europe with a fundamental influence on domestic jurisdictions. A similar evolution can be traced in the work of the WTO after 1995 with its dispute resolution system, and in the World Bank with the World Bank Inspection Panel. Despite this fear of the international courts, there is a more recent trend of judicialization in international law.\textsuperscript{127} This is also evinced in the institutionalization of Administrative Tribunals like the UN, the World Bank and the IMF Administrative Tribunal for the resolution of internal disputes of these institutions.\textsuperscript{128}

In comparison to dispute resolution by a court, peer review creates a cooperative process of dealing with international problems. Judicial review is


\textsuperscript{128} See generally INTERNATIONAL ADMINISTRATIVE TRIBUNALS IN A CHANGING WORLD 193, 199 (Spyridon Flogaitis ed., 2008); Chiththaranjan F. Amerasinghe, International Administrative Tribunals, in THE OXFORD HANDBOOK OF INTERNATIONAL ADJUDICATION 316 (CESARE P.R. ROMANO, KAREN J. ALTER & YUVAL SHANY eds., 2014).
retrospective, whereas peer review is continuous. Peer review anticipates future issues, and aims at achieving consensus amongst the participating actors before a dispute even arises and does not involve traditional sanctions for non-compliance. On the other hand, it raises concerns about the neutrality of the process. This concern can be dealt with by assuring a strong and active role for the international organization that hosts the peer review. The participation of the staff of the international organization can reduce the incidence of fake reviews and also possible problems of internal mismatch of power in the peer review team. The international organization does not operate as a hierarchical body in this process; it rather operates as a watchdog and facilitates the cooperation of peer bodies.

b. “Soft review”

Classic international law provides room for states to engage in diplomacy and politics. Given the initial absence of judicial review, several “soft review” mechanisms can be found in international law. Under soft review both more traditional and more modern forms of review can be classified. The classic dispute resolution–or dispute prevention and avoidance–mechanisms of international law are negotiation, conciliation and mediation or other managed conflict prevention such as good offices and enquiry. Horizontal governance reframes these instruments in new terms within international treaties. International arbitration is also a category of its own in international law; especially international investment arbitration has evolved into a competitor system to both domestic and

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130 See also Lehtonen, supra note 111, at 195.

131 The role of a coordinating “center” rather than of the leader is envisaged for the international organization; see Christie L. Ford, Toward a New Model For Securities Law Enforcement, 57 ADMIN. L. REV. 757, 814-17 (2005) (speaking about “The Need for a Center” in experimentalist regimes on the example of the SEC); see also Cristie L. Ford, New Governance, Compliance, and Principles-Based Securities Regulation, 45 AM. BUS. L. J. 1, 54-59 (2008) (on the role of third parties, or “tripartism” in experimentalist governance structures).


international courts. Similar Alternative Dispute Resolution (ADR) mechanisms like arbitration, mediation, and ombudspersons have also been introduced in the internal operation of international organizations for the resolution of internal conflicts. As a separate category within soft review, we can classify further dispute resolution systems like compliance mechanisms that can be found in international treaties such as the Montreal Protocol and the Kyoto Protocol.

Exactly as peer monitoring, soft review doesn’t include formal sanctions in case of breach of law either. Despite its soft nature and powers, all the described forms of this type of review remain a form of vertical control since they involve a third reviewer. Moreover, soft review may usually prove to be ineffective given the fact that it gives no incentives to achieve sufficient contact, cooperation and cultural approximation between the involved state bureaucracies. Although many of the instruments of soft review may be preferable over international judicial review, there is no assurance that states will not resort to litigation if there is such a possibility. As a result, soft review has some of the deficiencies of the

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136 One example is the Compliance Advisor/Ombudsman (CAO) of the private arm of the World Bank that bears great resemblance to the World Bank Inspection Panel; see http://www.cao-ombudsman.org/about/ (last accessed July 30, 2014).


140 See Mark Kantor, Negotiated Settlement of Public Infrastructure Disputes, in NEW DIRECTIONS IN INTERNATIONAL ECONOMIC LAW: IN MEMORIAM THOMAS WALDE 199-222 (Todd Weiler & Freya Baetens eds., 2011).
peer review without many of its advantages such as the promotion of collegiality, cooperation and mutual learning.  

c. Self-evaluation

Self-evaluation by countries or domestic authorities is a widely used instrument of international monitoring. For example, National Capacity Self Assessment (NCSA) projects assist developing countries to assess capacity to meet requirements under the three UN climate protection conventions. Since the evaluated countries themselves control the process, self-evaluation doesn’t raise sovereignty concerns, whereas it creates incentives to increase their capacities through their own means. Partiality is a self-evident deficiency of self-reporting, as countries may be eager to present a very bright picture of the domestic status so as to protect themselves from external or internal scrutiny. At the same time, there will always be some third party shadow reporting mechanism—like reporting by an international organization—to offset some of the partiality concerns.

Self-evaluation is a valuable monitoring tool of international law since it helps countries improve their capacity-building; but, it is not sufficient. As we have observed, it is often combined with a peer review, which takes into account the result of the self-evaluation process.

d. International reporting

International law employs also some forms of hierarchical supervision. This is different from hierarchical supervision in domestic administrative law. Hierarchical monitoring in international law usually takes the form of external reporting by international organizations; the international organizations cannot substitute the decisions of the states in case of breach of international law. For example, several international organizations like the UN, the IMF and the World

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141 ADR mechanisms can better serve for the resolution of internal disputes of international organizations like disputes that arise among staff members.

Bank publish country assessments, where they give data on a country’s performance in a specific field, discuss the implementation of the relevant international law, and future prospects of the country in the field.\textsuperscript{143} Some international organizations engage in this activity with regard to non-member countries. The OECD, for example, has expanded the practice of international reporting to non-members of the organization,\textsuperscript{144} and even to policies of the European Union.\textsuperscript{145}

External reporting is performed by the international organization itself, and doesn’t usually share any of the advantages of peer review. Depending also on the composition of the team that conducts the review, it may prove a highly independent operation, and also very beneficial to the reviewed state, since the reviewing international organization may have gathered a very good amount of expertise in the relevant policy field.

e. Public scrutiny

Because of the lack of other forms of monitoring, many international organizations have chosen to introduce public scrutiny in their operations. They thus have created websites in several languages in order to increase their transparency, and have introduced notice-and-comment procedures creating institutional structures for public participation, and thus allowing for NGOs and other private players to scrutinize and co-shape their decisions.\textsuperscript{146} At the same time, they use transparency and public participation as a way to enhance their legitimacy.

Transparency and public scrutiny is an indispensable form of review for any governance system that wants to respect democracy and rule of law standards. It

\textsuperscript{143} From the plethora see only the joint IMF and World Bank “Reports on Standards and Codes” (ROSCs) (http://www.worldbank.org/ifa/rosc_more.html).

\textsuperscript{144} OECD, Agricultural Policy Monitoring and Evaluation. OECD Countries and Emerging Economies (2011) (assessing OECD member countries and selected key emerging economies like Brazil, China, Russia, South Africa, and Ukraine).


can be combined with peer review and complement the technical exercise of the peer review process. Some international organizations involve public participation in the peer review process in order to enhance transparency of the peer review. Increasingly, civil society, representatives from business organizations and labor unions are invited to contribute to reviews. Nonetheless, the public scrutiny process may become adversarial and polarized and thus run against the results of a cooperative process such as the peer review.\textsuperscript{147} The need for transparency needs to be made compatible with the danger that domestic bodies would then refrain from requesting peer reviews.\textsuperscript{148}

It is very often the case that the proposals of the peer review reports remain unimplemented. This has bad reputational effects for the peer review system as a whole.\textsuperscript{149} Public scrutiny is very important in this respect since it may trigger implementation. Opening the possibility of civil society to participate in the peer review process, and making the final report public can create domestic political pressures leading to an eventual compliance of states with the provisions of international law.

2. A hybrid system of control: Beyond judicial and vertical review

Peer review can perform several functions.\textsuperscript{150} International law has taken up a policymaking and rulemaking role in the current construction of the international legal order, whereas the domestic legal orders increasingly perform the role of executing international policies and rules. The peer review has been set up in most international regimes in order to promote implementation of international rules, and more broadly, compliance with the rules of the respective international regime, through the use of the monitoring efforts of peer authorities from

\textsuperscript{147} 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).

\textsuperscript{148} This applies primarily to voluntary peer review mechanisms; see also Washington, supra note 67, at 452. In some international regimes, states may even choose not to join the respective international organization that uses the peer review in the fear of being exposed to domestic and international public scrutiny.

\textsuperscript{149} See Manby, supra note 110, at 2.

abroad.\textsuperscript{151} Additionally, since global governance is functionally and nationally fragmented,\textsuperscript{152} international rules are not implemented in a harmonized way in all regulatory regimes and states; peer review can contribute to the discovery of new solutions through experimentation, and thus some regulatory convergence of domestic legal orders through the diffusion of best practices.\textsuperscript{153} Finally, the promotion of good governance and development is the declared objective of the African Peer Review Mechanism.\textsuperscript{154} Implementation and compliance, regulatory convergence, dissemination of best practice and good governance are the result of a broader function of peer review: compliance monitoring.

The monitoring mechanisms presented in the previous section can be classified under two broad categories: judicial review exercised by a neutral third party, on the one hand, and “vertical supervision” exercised externally by international institutions, on the other. At first sight, it may seem that review through peers is only a second best solution in comparison to these other forms of review, especially judicial review. I want to establish why peer review presents a golden mean for monitoring compliance with international law, and thus provide an account for why it is proliferating in international law.

International governance involves many different actors performing various functions. The coexistence of multiple actors may lead to possible clashes between actors having different interests and goals. Peer review offers a regulatory design for international regimes that goes beyond classic forms of dispute resolution. It is a hybrid form of review that combines and mixes elements


\textsuperscript{152} See, e.g., 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 INTERNATIONAL ADMINISTRATIVE TRIBUNALS, supra note 128, at 199.

\textsuperscript{153} See Joint Group on Trade and Competition, Peer Review: Merits and Approaches in a Trade and Competition Context (6 June 2002) (on peer review as a tool for convergence).

\textsuperscript{154} Chukwumerije, supra note 62.
of the other monitoring mechanisms and systems.\textsuperscript{155} Moreover, peer review is a hybrid between internal and external systems of control.\textsuperscript{156} Peer pressure, which usually operates as an internal system of control, is externalized through the formal use of the peer review as a compliance monitoring system in an international regime. As a hybrid system of control, peer review presents a compromise between different forms of review, especially between vertical supervision and judicial review. These hybrid features have become very popular in international law. As a hybrid review mechanism, peer review achieves a good mix of two fundamental values of dispute prevention and resolution, namely independence and stakeholder participation. The following table of monitoring systems in international law tries to picture different monitoring systems based on their performance in the variables “independence” and “participation.”\textsuperscript{157}

At the same time, peer review operates in a different way than other forms of review. In comparison to other forms of monitoring it is non-adversarial and operates in a non-confrontational spirit.\textsuperscript{158} it is a collegial process.\textsuperscript{159}

\begin{footnotes}
\item[155] Cf. also Susan Rose-Ackerman & Peter L. Lindseth, \textit{Comparative Administrative Law: An Introduction}, in \textit{COMPARATIVE ADMINISTRATIVE LAW, supra note 7}, at 1, 1 (“Recent developments have also strained another familiar distinction–between justice and administration”).
\item[156] W. Michael Reisman, \textit{SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR} 1-2 (1992) (“In sociolegal arrangements, controls may be internalized or externalized or combinations of both techniques may be used. Internal legal systems of control have ranged from devices such as reliance on supranational intervention (for example, by the use of oaths or rituals), on the inculcation and demonstrable application of craft skills, on collegiate decision structures in which tasks and roles are distributed among a number of participants, on insistence on manifest reasoning, and on peer pressure. External controls have included such devices as checks and balances exercised by coequal or coordinate decision entities or on complex hierarchical arrangements, each successive level providing some supervision and potential review and rectification of the work of the preceding. Hierarchical configurations of control are animated, in part, by the desire to control the preceding levels. Controls effected by balances may dispense with hierarchies; they depend, for their effectiveness, on power parities. For several centuries the international political system used this mechanism of ‘balance of power’ as its control device. Although the language of mechanics and hydraulics is often used in these discussions, all legal controls, one should remember, must be effected by people”).
\item[157] In order to do so, I have quantified them on a scale from 1-10, and assigned them scores for both variables.
\item[158] See Washington, \textit{supra note 67}, at 430-31 (for the nuclear safety regime).
\item[159] \textit{id.} at 459-64; \textit{see also id.} at 464 (in the context of the peer review in the nuclear safety regime, Washington speaks about “Enforcement Through Collegiality”).
\end{footnotes}
Table of compliance monitoring systems in international law:

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<th>Independence</th>
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<tr>
<td>Domestic Courts</td>
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<tr>
<td>Central Judicial Review (e.g., WTO quasi-judicial system, ITLOS)</td>
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<tr>
<td>Inspection Panels with access for third parties (e.g., World Bank Inspection Panel)</td>
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<td>Central Review – Independent Experts (e.g., UNFCCC/KP)</td>
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<th>Compliance Mechanisms</th>
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<td>Central Review – Central Staff (e.g., IMF) Peer review without public scrutiny Peer Review with public scrutiny</td>
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<td>Public Scrutiny (e.g., Aarhus Convention)</td>
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<th>Participation</th>
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There are also downsides to the use of peer review in international regimes. Collegial spirit can potentially lead to a race to the bottom of the monitoring quality of the control standards. Traditional forms of review, especially judicial review, rely on independence, impartiality, objectivity, and neutrality for successful review. The peer review does not operate under these standards. Nonetheless, the “peer culture” can preclude several concerns if the relevant mentality is cultivated in the peer collegium. As can be observed in environments like universities, if trust, mutuality and interdependence are created in the peer groups, this may lead to better overall results and increased effectiveness of the system. For this reason, the presence of at least some kind of third party is necessary.

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161 Ford, *New Governance, supra* note 131, at 471 (“At a minimum, the monitorship story here points to features that have to be incorporated in order to translate self-regulation, especially of the pre-emptive variety, to truly enforced self-regulation or co-regulation. Above all, it would be essential to reinject meaningful contestation and diversity. Without structural avenues for intervention by those with allegiances truly ‘outside the circle,’ we should anticipate seeing closed, non-diverse, and ultimately unaccountable systems”).
A peer review may also be extremely time-consuming—probably even more than judicial review—and needs to be repeated periodically. It is also very costly for the relevant actors to take part in the review process, either as reviewers or reviewed parties. For example, in the context of the Anti-Bribery Convention of the OECD, 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. With respect to 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.

Despite these negative features of the peer review process, it can be expected that it will continue to proliferate as a compliance monitoring mechanism in international law. A very important reason for this is that—despite the potential long-term fundamental changes it can induce in domestic legal orders—it has no major direct impact, and only minimal short-term effects on state sovereignty. It strengthens domestic orders by promoting change and reform through them. Moreover, the non-interventionist approach of peer review gives a sense of respect for the respective domestic legal order, and legal and political culture and institutions. Peer review does not pursue an international harmonization of the domestic legal systems, but rather accommodates diversity, aiming to maximize their compatibility.\(^{162}\)

Additionally, it can be expected that peer review, as a form of collegial compliance process, will be more effective in resolving various complex, polarized and highly contentious matters like the ones mentioned above.\(^{163}\) Only

\(^{162}\) In the ABC, this approach is called “functional equivalence;” see Commentary 2 to the OECD Anti-Bribery Convention. Cf. also Amy Kapczynski, Harmonization and its Discontents: A Case Study of TRIPS Implementation in India’s Pharmaceutical Sector, 97 CALIF. L. REV. 1571 (2009) (on harmonization and flexibility in the Agreement of Trade-Related Aspects of Intellectual Property Rights of the WTO).

peers will usually have the same knowledge to evaluate the actions of other domestic bodies, especially in complicated and technical fields, and not a court or a hierarchical body.\textsuperscript{164} For this reason, peer review may be better suited to solve problems in more technical fields. In more political fields, the experience of the African Peer Review Mechanism shows that some peer reviews may become politicized and polarized.\textsuperscript{165} This doesn’t mean that peer reviews should remain restricted to more technical sectors, since they can increase mutual trust through horizontal socialization. Peer reviews may in these cases need to be focused on more specific questions and not deal with too broad subjects.

Finally, peer review is a more inclusive process, as it engages several actors and not only the third party operating as the judge in the case of judicial review or the higher authority as in the case of vertical supervision. It thus brings more information into the dispute resolution process, which might help anticipate or resolve the issues at hand.\textsuperscript{166}

3. Peer accountability

Through economic and legal globalization, domestic bodies from different regulatory sectors have become embedded into a variety of international regulatory regimes. Domestic governmental bodies thus circumvent domestic politics and follow policymaking directives and act according to rules and standards that are stipulated at the levels of governance beyond the state. As they leave their geographical boundaries, they also partly free themselves from several domestic constraints and controls; parliamentary control, hierarchical, and fiscal

\textsuperscript{164} PHEDON NIKOLAIDES ET AL., IMPROVING POLICY IMPLEMENTATION IN AN ENLARGED EUROPEAN UNION: THE CASE OF NATIONAL REGULATORY AUTHORITIES 46 (2003); see also Ruhl & Salzman, supra note 5, 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").

\textsuperscript{165} AfriMAP, supra note 95, at vii.

\textsuperscript{166} Information disclosure is one of the most important elements of regulatory policy; see, e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, A Behavioral Approach to Law and Economics, 50 STAN. L. REV. 1471, 1533- (1998); Cass R. Sunstein, The Storrs Lectures: Behavioral Economics and Paternalism, 122 YALE L.J. 1826 1834 (2013); see also van Aaken, supra note 3, at 528-29.
control and, above all, domestic judicial review, tend to diminish.\textsuperscript{167} This is illustrated by the participation of domestic authorities in transnational networks, where they co-stipulate regulatory standards at the international level that they are then supposed to implement internally. They thus apply norms that are not generated, and not even endorsed by domestic parliaments. As they escape domestic processes, like the US Administrative Procedure Act notice-and-comment process, they also escape domestic judicial review. On the other hand, global embeddedness of domestic authorities makes them increasingly loyal to their global counterparts. As if domestic and international law operated as communicating vessels, the loss of controls at the domestic level leads to an increase of controls at the international one.\textsuperscript{168} Compliance monitoring becomes thus one of the most important functions of international organizations in contemporary international governance.\textsuperscript{169} But, control is being transferred from the domestic legislative and the judicial branch to a newly created globally integrated executive branch. For this reason, new accountability models need to be developed. The peer review thus has a very important role to play if international organizations choose to introduce it. It functions as an alternative to other forms of review, especially judicial review and vertical supervision.\textsuperscript{170, 171}

International peer reviews are one such accountability mechanism that compensates to a large extent for the gradual decline of domestic control.\textsuperscript{172} Despite the fact that globalization frees domestic bodies from their constraints and controls like parliamentary, governmental, fiscal control and judicial review, peer


\textsuperscript{168} See also Benedict Kingsbury et al, supra note 22, at 51-52 (2005).

\textsuperscript{169} Dimitropoulos, supra note 13, at 454-55.

\textsuperscript{170} According to Martin Shapiro, “there are a number of (partial) alternatives to judicial review for policing delegated legislation;” see Martin Shapiro, Judicial Delegation Doctrines: The US, Britain, and France, in THE POLITICS OF DELEGATION 172, 199 (Mark Thatcher & Alec Stone Sweet eds., 2003).

\textsuperscript{171} In international law there are forms of review that lie between judicial and vertical review, like for example, the review exercised by “compliance committees.”

review imposes new constraints on domestic bodies. How is this new constraint imposed? Peer review is usually used as an instrument of self-organized social groups and professionals like lawyers, doctors and academics, to signal some professional autonomy for the relevant group.\textsuperscript{173} International peer reviews enhance the autonomy of participating domestic bodies towards other sectors of the administration and the other branches of government.\textsuperscript{174} At the same time, this increases their interdependence, as the authorities involved in the peer assessment achieve connections with their peers from abroad and the international organizations. This leads to a partial self-organization of the participating actors, which creates a distinct type of accountability in international law.\textsuperscript{175} This accountability model goes beyond the “delegation,” and the “participation” model of accountability in international law.\textsuperscript{176} Horizontal interaction enhances interdependence of the international players and creates an international system of “mutual responsibility.”\textsuperscript{177} It works as a system of control among domestic bodies and creates obligations to justify their actions towards their peers from abroad, in a similar way as checks and balances operate in domestic legal orders.\textsuperscript{178}

\textsuperscript{174} See Lehtonen, \textit{supra} note 111, at 193.
\textsuperscript{175} The expressed aim of the African Peer Review Mechanism is self-governance of the African countries; see Chukwumerije, \textit{supra} note 62, at 98-101; \textit{cf. also} Tyler, \textit{supra} note 117, at 165 (“self-reinforcing cycle’’); \textit{see also id.} at 168 (“The self-reinforcing cycle is as much a reason for the Convention’s failures as it is for its successes’’). The introduction of the peer review in international law is a sign for the overall increase of the self-organization of domestic bodies at the international level of governance; \textit{cf. SLAUGHTER, supra} 47, at 196-98 (speaking about ”A Propensity for Self-Regulation” in the context of transgovernmental networks); Thomas Vesting, \textit{The Autonomy of Law and the Formation of Network Standards}, 5 GERMAN L. J. 639 (2004); Thomas Vesting, \textit{The Network Economy as a Challenge to create New Public Law (beyond the State)}, in \textit{PUBLIC GOVERNANCE IN THE AGE OF GLOBALIZATION} (Karl-Heinz Ladeur ed., 2004); Christian Tietje, \textit{Internationalisiertes Verwaltungshandel}, 39 RECHTSTHEORIE 255, 275 (2008).
\textsuperscript{176} See Ruth W. Grant & Robert O. Keohane, \textit{Accountability and Abuses of Power in World Politics}, 99 AM. POL. SCI. REV. 29, 30-33 (2005); \textit{see also} Robert O. Keohane, \textit{Governance in a Partially Globalized World}, 95 AM. POL. SCI. REV. 1, 9 (2001) (”Accountability is not necessarily electoral, so it is essential to explore other forms of it if we are to increase accountability in global governance”).
\textsuperscript{177} Guillermo O’Donnell, \textit{Delegative Democracy}, 5 JOURNAL OF DEMOCRACY 55, 62 (1994); \textit{see also} Stiglitz, \textit{supra} note 64, at 353 (on the artificial creation of interdependence relationships through peer review).
\textsuperscript{178} \textit{See also} Benvenisti & Downs, \textit{supra} note 126, at 375-379; \textit{SLAUGHTER, supra} 47, at 253-55. \textit{Cf. also} Ford, \textit{New Governance, supra} note 131, at 479, 482-83. A similar model of horizontal accountability applies also within the EU, as prescribed by the ”Meroni doctrine” of the European
According to Richard Stewart there are five accountability mechanisms applicable to public or private governance: electoral, hierarchical, supervisory, fiscal and legal. These forms of accountability both presuppose and lead to vertical relationships between the bodies that are involved in the accountability architecture. But, in the international sphere, horizontal relationships are prevalent. Peer review leads to a deliberate departure from the conventional models of accountability. As domestic controls are being substituted by horizontal controls by peers, traditional mechanisms of accountability leave space for new accountability models. With its different understanding of compliance, peer review creates a different form of accountability that comes very close to managerial accountability. But, accountability through peer review is also different from managerial accountability since peer review creates and promotes horizontal relationships among the participating bodies.

In international law, where there are no defined centers of authority, no global demos, and usually no courts with compulsory jurisdiction, international regimes are evolving the peer review mechanism in order to horizontally monitor the actors involved in the horizontal governance process. As a result of this interaction, a new type of peer or horizontal accountability rises.

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180 See Jerry L. Mashaw, Judicial Review of Administrative Action: Reflections Balancing Political, Managerial and Legal Accountability, Revista DIREITOGV 1(special issue 1), 153, 156.

181 In the domestic context, the idea of “horizontal accountability” has been proposed by Guillermo O’Donnell for the structural improvement of democracies in some countries of Latin America and Eastern Europe; see O’Donnell, supra note 177, at 62; Guillermo O’Donnell, Horizontal Accountability in New Democracies, in The Self-Restraining State 29, 30 (Andreas Schedler, Larry Jay Diamond & Marc F. Plattner eds., 1999); see also Grant & Keohane, supra note 176, at 37 (“Peer accountability arises as the result of mutual evaluation of organizations by their counterparts. NGOs, for example, evaluate the quality of information they receive from other NGOs and the ease of cooperating with them. Organizations that are poorly rated by their peers are likely to have difficulty in persuading them to cooperate and, therefore, to have trouble achieving their own purposes”); see also id. at 39; Rick Stapenhurst & Mitchell O’Brien, Accountability in Governance (note written for the World Bank) (http://siteresources.worldbank.org/PUBLICSECTORANDGOVERNANCE/Resources/AccountabilityGovernance.pdf, last accessed July 30, 2014); OECD-DAC/UNECA, Development
Horizontal accountability operates in a different way than the classical forms of vertical accountability. In horizontal accountability, the domestic authorities are controlled by peer constituencies and not by a higher authority, or a demos, or a court. Additionally, accountability towards peers doesn’t have the static form of vertical accountability. It is an on-going process with open-ended goals and aims at continuous self-improvement of the participants; as such it is more dynamic than judicial review and hierarchical supervision;\textsuperscript{182} it creates a form of dynamic accountability that is achieved in the process of mutual learning and correction.\textsuperscript{183}

For all these reasons, it can be better adapted to dynamic international governance settings, where conditions of extreme uncertainty are prevalent.\textsuperscript{184}


\textsuperscript{183}Cohen & Sabel, \textit{supra} note 151, at 778; see \textit{id.} 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”); Charles F. Sabel & William H. Simon, \textit{Epilogue: Accountability without Sovereignty, in LAW AND NEW GOVERNANCE IN THE EU AND THE US 394, 400 (Gräinne de Búrca & Joanne Scott eds., 2006) (“Peer review is the answer of new governance to the inadequacies of principal-agent accountability”).

\textsuperscript{184}See Charles F. Sabel & Jonathan Zeitlin, Experimentalism in Transnational Governance: Emergent Pathways and Diffusion Mechanisms, Paper presented at the panel on “Global Governance in Transition”, Annual Conference of the International Studies Association, Montreal, March 16-19, 2011, 7 (“Under conditions of strategic uncertainty, such regimes have a number of salient advantages over conventional forms of hierarchical governance, most notably their capacity to accommodate diversity, promote recursive learning, and regularly revise their goals and procedures in response to implementation experience. These features are especially desirable in
taking thus advantage of the fragmented character of the international legal order. It can be applied in all fields of international law, as peer relationships are present in almost all aspects of international governance. The transnational networks are very characteristic examples of places where horizontal accountability grows beyond peer review. The domestic actors that participate in the transnational networks are de facto obliged to domestically implement the decisions and standards that they have commonly set since they are held accountable towards their peers in the periodic meetings of the networks. Even if the model of peer or horizontal accountability cannot completely substitute other forms of accountability, it can compensate to some extent the absence of the vertical forms of accountability in international law.

III. Compliance through Peer Review

Enforcement is a central issue in international law. For many international law scholars, there is a correlation between the quality of international law as law and the existence of mechanisms for its enforcement. A book by Jack Goldsmith and Eric Posner has reinvigorated the discussion about the nature and quality of international law.

186 See Stewart, supra note 46, at 446 (on the complementarity of accountability models in GAL).

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traditional features of law (or “rules properly so called”) as identified by John
Austin, but achieves the compliance result through various juridical and extra-
juridical instruments. In this Section, I will explain how the rules of peer review
compensate for the absence of the traditional characteristics of a legal rule. Peer
review puts in place a multivariate process for the promotion of its objectives.
Compliance is not forced but encouraged through collegial and cooperative
interaction, the evolution of peer culture and the creation of relationships based on
trust.

A. Enforcement, compliance and beyond

Many authors take the existence of enforcement mechanisms as a prerequisite
for the acceptance of international law as “law.” This understanding of
international law goes back to John Austin and Jeremy Bentham, who have
defined law and international law in strict, positivist terms. Austin defines all
law as commands that are backed by the power of state enforcement and
sanctions, and considers the existence of a sovereign as a prerequisite for the
existence of law. Under his strict definition of law, there is no place for
international law as law: since at the international level there is no sovereign and
there are no enforcement mechanisms, there cannot be any law; both
classical and international law are merely “positive morality.” Bentham’s
strict divide between domestic and international law accentuated the issue.
International law was then definitely considered to be a different species of
norms. Also H.L.A. Hart, despite rejecting the idea that legal obligation includes

189 See AUSTIN, supra note 10.
190 See see Salzman, supra note 44, at 193, 205. The on-site visits of the review team, for example,
remind of “inspections” that are to be found in several fields of EU law; see THOMAS VON
DANWITZ, EUROPÄISCHES VERWALTUNGSRECHT 622-23 (2008).
191 D’Amato explicitly traces the source of the command-and-control understanding of law from
Hobbes to Bentham and Austin; see ANTHONY D’AMATO, JURISPRUDENCE: A DESCRIPTIVE AND
192 AUSTIN, supra note 10, at 11-12, 125-29; see generally Jack Goldsmith & Daryl Levinson, Law
193 See Koh, Why Do Nations Obey, supra note 29, at 2608-2609 (on Bentham’s contribution to
the division between domestic and international law).
coercive sanctions, excludes international law from the “mature” legal systems since it lacks a rule of recognition.\textsuperscript{194}

This understanding of international law has had a great influence especially on Anglo-American scholars of international law and international relations.\textsuperscript{195} According to Hans Morgenthau, for example, law is only really law when accompanied by authoritative interpretation and enforcement.\textsuperscript{196} Also scholars that accept the quality of international law as law agree with the importance of enforcement for international law, and attempt to replace the common understanding of (physical) enforcement with different concepts of non-physical enforcement.\textsuperscript{197}

In this vain, there have been several responses in support of the legal quality of international law. Anthony D’Amato, for example, presents several arguments to support this position.\textsuperscript{198} D’Amato first presents what could be called “(non-)enforcement” arguments. The basic tenure of the (non-)enforcement arguments is that even a large part of domestic law is unenforceable; in the domestic disputes where the US is involved as a party and loses a case, the government only complies with the court’s judgment because it wants to comply.\textsuperscript{199} D’Amato goes on to say that people in the domestic legal order do not obey domestic law


\textsuperscript{195} Hathaway and Shapiro mention, among others, Sir Thomas Holland and William Edward Hearn as followers of Austin; see Hathaway & Shapiro, supra note 20, at 263.

\textsuperscript{196} MORGENTHAU, supra note 26; see also, e.g., John R. Bolton, \textit{Is There Really “Law” in International Affairs?}, 10 TRANSNAT’L L. & CONTEMPT. PROBS. 1 (2000) (for a more recent critique of international law as law. Bolton presents the following arguments against the approach of international law as law—adopting a definition similar to the one of Austin, but without a reference to Austin: - it has no coherent framework similar to a constitution; - at the international level, there is no popular sovereignty or public accountability; - there are no agreed upon authoritative sources; - there are no remedies for wrongdoings or judicial mechanisms; - treaties are moral and political commitments, but not legal ones); cf. also Robert H. Bork, \textit{The Limits of “International Law,” in THE NATIONAL INTEREST IN INTERNATIONAL LAW AND ORDER 38} (R. James Woolsey ed., 2003).


\textsuperscript{199} Id. at 1293 (with reference to Fisher, \textit{Bringing Law to Bear on Governments}, 74 HARV. L. REV. 1130 (1961); see also Andrew T. Guzman, \textit{Rethinking International Law as Law}, 103 AM. SOC’Y INT’L L. PROC. 155, 155 (2009).
because of fear of the power of the state, but because the rules are generally perceived to be “right, just, or appropriate.” Additionally, the author makes the statement that “law indeed is something that is opposed to force.” The concept of justice and not of enforcement is the defining characteristic of law. Not even the “potential for enforcement” is a defining element of law. Mechanisms like social disapproval work better to discourage people from disobeying. Especially in international law, social disapproval works as a sanction. As a result, the usual notions of enforcement cannot be appropriately applied to the state, and more broadly, physical coercion is not a necessary component of law.

D’Amato also presents a “verbal” argument. Since the major, and especially the most important, part of the communication between governments is self-consciously conducted in legal terms, international law has to be law.

Lastly, this commentator presents a “reciprocal entitlements” or “reciprocal-violation-of-a-different-entitlement” argument. In the end, international law is enforceable in the same way as domestic law is. His concept of enforcement is one that does not necessarily include physical force, but reciprocal entitlements. Reciprocal entitlements are basically countermeasures for wrongdoings committed by another state. Tit-for-tat is not restricted in the boundaries of one regime, but can include countermeasures in a different regime (“tit-for-a-different pattern”). Consequently, according to this view, it is legal to deter the violation of an entitlement by threatening a counter-violation of the same or a different entitlement.

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201 *Id.* at 1297.
202 This view is partly in contrast with his “Reciprocal Entitlements” argument, which is presented further down in the text.
204 *Id.* at 1301-1303.
205 See *id.* at 1308 (“As a construct of international law, a nation is nothing more nor less than a bundle of entitlements, of which the most important ones define and secure its boundaries on a map, while others define its jurisdictional competency and the rights of its citizens when they travel outside its borders”).
Oona Hathaway and Scott Shapiro also accept the understanding that enforcement is a *conditio sine qua non* for a norm to be a legal rule. For example, Professors Hathaway and Shapiro state from the outset that “international law has mechanisms of law enforcement and these mechanisms give states reason not to violate the law,” and substitute physical enforcement with “outcasting.” This enforcement technique of international legal institutions uses the states to enforce their rules by denying the disobedient states the benefits of social cooperation and membership in the respective international regime.

The understanding of international law as enforceable rules still lives also in the softer version of the requirement for “compliance” in international law. At the same time, most contemporary arguments against the “enforcement theory” are to be drawn from “compliance theories.” Under compliance theories, rule-observance and not (physical or non-physical) enforcement is important for the characterization of international law. Compliance can be defined as the degree to which state behavior conforms to what an agreement prescribes or proscribes. Following this definition, compliance and non-compliance are a spectrum, and not a dichotomy.

There are some scholars that go even beyond compliance in order to perceive and describe the impact of international law in domestic legal orders. Robert Howse and Ruti Teitel, for example, say that even for domestic law, the question of compliance is obsolete, and give an account of how international law is

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206 Hathaway & Shapiro, supra note 20, at 256.
208 Oran R. Young, Compliance and Public Authority: A Theory with International Applications 104 (1979).
209 von Stein, supra note 207, at 478.
210 Howse & Teitel, supra note 188, at 128.
important today beyond enforcement and beyond compliance. According to them, compliance is inadequate for understanding how international law produces normative effects; interpretation and cross-regime impact is rather important:

“A fundamental flaw of compliance studies is that they abstract from the problem of interpretation: interpretation is pervasively determinative of what happens to legal rules when they are out in the world, yet ‘compliance’ studies begin with the notion that there is a stable and agreed meaning to a rule, and we need merely to observe whether it is obeyed.”

The multiplication of peer reviews is a proof of the fact that international law has moved beyond the model of enforcement and partly also beyond compliance in the strict sense. Peer monitoring systems circumvent the problem of enforcement through a different understanding of rule-observance. In the peer review frame, compliance is not to be perceived as a one-off process, but as a continuous process of moving towards the achievement of the desired goal. Peer review is an institutionalized “transnational legal process.” In the beginning of the process, there is no threat of sanction, and at the end of the process, there is no sanction for non-compliance. Rather, compliance is continuously incentivized.

B. The foundations and instruments of compliance

According to Austin, law is a command, enforceable by a sovereign through the threat of the sanction. The rules of the peer review do not qualify as law according to Austin, not only because they are international, but also because they wouldn’t qualify as law even if they were domestic rules. Peer review as a novel compliance mechanism is based on different foundations of authority than traditional enforcement and compliance systems. Since these systems are

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211 Howse & Teitel, supra note 188.

212 Id.

213 Koh, Transnational Legal Process, supra note 29.

214 See also E. Donald Elliott, TQM-ing OMB: Or Why Regulatory Review Under Executive Order 12,291 Works Poorly and What President Clinton Should Do About It, 57 LAW & CONTEMP. PROBS 167, 170 (1994) (“to be effective, a system of regulation must create compliance incentives for regulated parties, rather than rely on corrective action and oversight”).

directed towards mutual assistance of the involved institutions and not sanctions, the authority of the involved actors is founded not on power but on confidence and trust that are promoted through the horizontal interaction of the involved bodies. This presupposes also a different understanding on how the law operates.

By creating a new type of horizontal accountability between the involved domestic actors, in the peer review process, acceptability replaces command, peer pressure replaces enforcement and learning replaces the sanctions that formal monitoring systems usually require and involve. It thus reverses the conditions of formality of international governance. The question becomes not whether there is a formal enforcement mechanism in the system, but how and to what extent compliance has been promoted.

1. Acceptability, not (only) command

Even though the norms of the peer review could be interpreted as commands, they are not commands in the traditional understanding of an obligation to obey. The actors involved in the process do not (only) comply because they are commanded to do so, but also for other reasons; most importantly: because they may want to do so! Peer review creates a forum that promotes cooperation and the

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216 Based on the concept of peer accountability, O’Donnell speaks of a “network of institutionalized power relations;” see O’Donnell, supra note 177, at 62.
218 Acceptability, peer pressure, and learning naturally interact with one another. For example, peer pressure and reputation are important for predicting future behavior, and not for punishing past actions; see Rachel Brewster, Unpacking the State’s Reputation, 50 HARV. INT’L L.J. 231 (2009).
building of consensus among the peers. It creates discourses and communities of the actors of the respective regimes; and thus it enhances deliberation for the respective compliance measures. In this frame of inter-institutional and inter-personal socialization, the unraveling of compliance weaknesses by the peers can increase the acceptability of the outcome by the reviewed party and lead to more effective implementation. In the words of the Financial Stability Board: “The FSB, working through the Standing Committee on Standards Implementation, will foster a race to the top, wherein encouragement from peers motivates all countries and jurisdictions to raise their level of adherence to international financial standards.”

Overall, peer review as a means of encouraging adherence to international standards is based on collegiality. The collegial nature of the process increases the probability of countries accepting the review, whereas acceptance promotes the implementation of the international rules. One can see the virtues of the cooperative and consensual approach in comparison to hierarchical control in the field of anti-money laundering. Some developing countries have refused to participate and others to publish the “Reports on the Observance of Standards and Codes” (ROSCs) that are conducted by the IMF and the World Bank; on the other side, all the participating countries of the Financial Action Task Force accept the publication of the peer review reports.

2. Peer pressure, not sanctions

Traditional enforcement systems try to coerce rule-conformity through sanctions. Peer review is a non-punitive system since it does not include sanctions.
for non-compliance. Other mechanisms are set in place to ensure compliance. In light of the collegial character of the review, peer reviews exert their influence through peer pressure. Peer pressure is based on reputation, and gives the possibility to the assessing and assessed actors to shape the way they are perceived by the relevant community. This also creates a “threat of exclusion,” a threat to be “outcasted” from the relevant system or regime.

The threat of exclusion works as a substitute for sanctions for non-complying countries, and can exert very strong compliance pressure to the participating actors. Similar mechanisms, like for example “market pressure,” are very common in other fields of international law, where they achieve very strong compliance results. Good examples are the voluntary ISO and Codex Alimentarius standards. Compliance with these standards becomes in practice almost compulsory for the actors participating in the relevant markets. Market pressure exerted through the threat of exclusion from global markets makes compliance de facto compulsory. This factual situation has been taken up by the “Agreement on the Application of Sanitary and Phytosanitary Measures” (SPS Agreement) and the “Agreement on Technical Barriers to Trade” (TBT Agreement) of the World Trade Organization that have translated the factual

225 The disclosure of important documents by the domestic authorities and the on-site visits by the peer review team produces some form of threat for sanctions.
226 Lehtonen, supra note 111, at 189.
227 See Washington, supra note 67, at 446; see also Grant & Keohane, supra note 176, at 37 (“public reputational accountability”); see generally Rachel Brewster, Reputation in International Relations and International Law Theory, in INTERDISCIPLINARY PERSPECTIVES, supra note 24, at 524.
228 See JONATHAN MERCER, REPUTATION AND INTERNATIONAL POLITICS (1996) (making the argument that reputation is a perception-based concept).
229 Cohen & Sabel, supra note 151, at 764; see also Brewster, supra note 227, at 536 (“Reputation works through exclusion: the state with a poor reputation is either excluded from deals, or it is charged a high price of admission”).
230 Hathaway & Shapiro, supra note 20.
need into a juridical presumption of conformity with the Agreements in case of conformity and compliance with the standards.\textsuperscript{234} Public pressure operates in the same way in international law. For example, international human rights committees use public pressure as an instrument of compliance.\textsuperscript{235} They achieve this result through the publication of their reports and reviews. Public scrutiny is also an important element of the peer review process. The systems requiring the publication of the final report are multiplying since its publication transforms peer pressure into public pressure. Publication of the report can lead to greater public scrutiny of the activities of the domestic bodies. This may work either as a “name and shame”\textsuperscript{236} or as “name and encourage” process. This type of pressure leads to implementation and compliance without the need for formal coercion.\textsuperscript{237}

3. Learning, not enforcement

The horizontal socialization of the state actors produces a reason to comply with the norms beyond acceptability and peer pressure, which is the most distinctive feature of this monitoring mechanism. In contrast to all other compliance monitoring mechanisms, peer review involves and requires mutual learning from the participating actors.\textsuperscript{238} The educational function of the peer

\textsuperscript{234} See Article 3.2. SPS Agreement; Article 2.5 TBT Agreement.
\textsuperscript{235} See generally Harold Hongju Koh, How Is International Human Rights Law Enforced?, 74 IND. L.J. (1397) (on peer and public pressure in the transnational legal process of the implementation of human rights).
\textsuperscript{236} See, e.g., Edward F. Greene & Joshua L. Boehm, The Limits of “Name-And-Shame” in International Financial Regulation, 97 CORNELL L. REV. 1083 (2012); see also Hathaway, supra note 25 (on shaming and its “collateral consequences”).
\textsuperscript{237} See Keohane, supra note 176, at 9, 10-11.
\textsuperscript{238} See FATF, AML/CFT Evaluations and Assessments, supra note 84, at Nr. 29; IAEA, IRRS to Germany, supra note 75, 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”); AfriMAP, supra note 95, at viii: (“[The APRM Forum] has the potential for peer learning and influence that can move Africa towards deeper economic and political integration”). Learning is a very important feature of experimentalist governance; see generally Charles F. Sabel, Learning by Monitoring: The Institutions of Economic Development, in RETHINKING THE DEVELOPMENT EXPERIENCE: ESSAYS PROVOKED BY THE WORK OF ALBERT O. HIRSCHMAN 231 (Lloyd Rodwin & Donald A. Schöen eds., 1994); Dorf & Sabel, supra note 172, at 283; Sabel & Zeitlin, supra note 150; see also Benedict Kingsbury et al, supra note 22, at 58-59 (2005) (discussing experimentalism and mutual learning as a form of GAL). Cooney and Lang have developed a similar idea on “continuous learning” in the context of “adaptive governance;” see Rosie Cooney & Andrew T.F. Lang, Taking Uncertainty Seriously: Adaptive Governance and International Trade, 18 EUR. J. INT’L L. 523
review gives incentives, both to participate in the peer review and to comply with the results of the final report.

Learning takes place through formal mechanisms, but also through the informal interaction during the meetings of the peers, and is achieved at two levels. First, at the level of the countries and domestic authorities that take part in the process. The primary learning effect is in the reviewed country, and leads to the identification of appropriate domestic strategies that could be adopted in the countries that participate in the review process; but learning is also achieved for the reviewing countries. The members of the peer review team that participate in the process can also learn from success and failure of the reviewed country. This is achieved through the exchange of views with the representatives of the reviewed country and the other members of the peer review team on their experiences and approaches. Learning from mistakes and positive results, creates incentives even for the countries with good regulatory frameworks and good compliance results to participate in the peer review. Thus, peer reviews stimulate horizontal learning across several jurisdictions through recursive learning on the basis of states’ experience in implementation of the international rules.

Second, peer review doesn’t only involve representatives of the countries, but also representatives of international organizations. Additionally, peer review is almost never a one-off event. It is a continuous process that involves several


See also Reddy & Heuty, supra note 59, at 403; Pagani et al., supra note 71, at 18 (“Peer review is a mutual learning process in which best practices are exchanged. The process can therefore serve as an important capacity building instrument— not only for the country under review, but also for countries participating in the process as examiners, or simply as members of the responsible collective body”).

Pagani et al., supra note 71, at 18.

It will be difficult though for the peer review to exclude, on a short-term basis, cases where there will be competition among peers, in order, for example, to attract investors to their own jurisdiction through efficient decisionmaking by the domestic bodies. This will gradually happen with the evolution of trust relationships among the peers.

Pagani et al., supra note 71, at 14 (“This process allows also the creation of a shared knowledge base benefiting to all countries via the identification of best practices or policies that work”).
review cycles. As soon as one cycle has come to its end, the reviewed country and domestic authority have to prepare, improve and increase efforts so that they present better results in the next review cycle. The reporting and review cycles of peer review provide an institutional frame for the integration of on-the-ground experiences in implementation and for the participation of states in shaping the revised framework for the governance system as a whole. Rulemaking is thus informed by rule-implementation and compliance is informed by practice. The learning experience is accomplished even if the reviewed country doesn’t comply with the result of the final report and the international standards since all the involved actors and the system can learn from success and failure of the reviewed actors. Institutional learning through the diffusion of best practices is achieved one way or another.

C. The legitimacy and effectiveness of peer review

Peer reviews generate a new form of accountability in the international legal order. At the same time, the peer review process needs to be legitimated as an international administrative process that involves activities by government authorities in the territory of foreign states. Increased legitimacy and effectiveness of the peer review will lead to increased compliance with its results. Peer reviews raise concerns on their substantive, procedural and social legitimacy. Legitimacy concerns of the peer review have implications for the institutional design of the peer assessments. Peer review cannot preach constant evolution and improvement and practice stability and inefficiency. The states that practice the peer review and the international organizations that are committed to its promotion should contribute to its constant improvement. Comparative administrative law brings together a great source of information and comparative knowledge on different regulatory systems that could be utilized to help the peer review process improve, and increase its legitimacy.

The most obvious concern raised by peer review is that of impartiality and objectivity. Can the controlled be at the same time the controllers? But, peer

243 Pagani et al., supra note 71, at 18.
review is based on a different model of governance, and operates under different conditions in comparison to other review mechanisms. In horizontal settings, learning and respect for diversity have prevalence over other qualities:

“Under conditions of strategic uncertainty, such regimes have a number of salient advantages over conventional forms of hierarchical governance, most notably their capacity to accommodate diversity, promote recursive learning, and regularly revise their goals and procedures in response to implementation experience. These features are especially desirable in transnational settings, and provide a workable architecture for reconciling cooperative regulation [...] with increased space for national and regional policy alternatives”

One further concern is that of the consistency of the reviews, and the final reports. Additionally, vertical accountability problems of the reviewers might arise given the different power dynamics in world politics. This is closely connected to the expertise of the participating reviewers given that not all countries can dispatch experienced and competent staff to conduct the reviews. All these aspects are related to the composition of the peer review team. Peer reviews are in need of a strong coordinator of the domestic representatives, neutralizing power relationships and complementing for the possible lack of expertise on the part of some countries. As a result, a major part of the success or failure of the regime, and of the substantive legitimacy and effectiveness of the peer review will depend on the role of the Secretariat of the international organization that supports the peer review process.

Despite the appearance of a technical exercise, the peer review might become politically contested. This is the case for example in the APRM, especially within the first APRM building block—which aims at improving politics in the African countries—, and peer reviews are conducted by fellow heads of state.

244 Sabel & Zeitlin, supra note 184, at 7.
245 AfriMAP, supra note 95, at vii.
246 The APRM consists of some institutions that are to be found in other peer review systems as well, and others that are unique to the APRM. This is the case for the first two of the in total four APRM bodies: the Committee of Participating Heads of State and Government (APR Forum), which is the highest decision making authority in the APRM, and the Panel of Eminent Persons (APR Panel), which oversees the review process to ensure integrity, considers reports and makes recommendations to the APR Forum. The APRM Secretariat provides secretarial, technical, coordinating and administrative support for the APRM, and the Country Review Mission Team
order to achieve substantive legitimacy in these cases, international peer reviews need to strike the right balance between expertise, specialization, and contextualization. The peer reviews do not necessarily need to be focused on technical issues. But, all-encompassing reviews should be divided thematically into more specific issue areas in order to have the possibility to set up competent peer review teams. The need for contextualization becomes again apparent in the APRM, where there is very often no communication between the peer review efforts in one field, and other similar efforts of relevant international organizations, or other reform efforts in other fields.  

From a financial and logistics point of view, peer review proves often to be inefficient. The peer review mechanism is difficult to be established, peer review takes time to be implemented, whereas it also takes time before its results start showing. Additionally, there is a need for a great amount of financial and human resources in order to conduct it. This may severely damage the legitimacy of the process. Overall, compliance with the recommendations of the peer review report is very important for the success of the system, and its legitimacy.

One of the most useful insights of comparative analysis is the role of transparency and public participation in the production of more effective public policies and in increasing the acceptability and legitimacy of the regulatory process. At the intersection between substantive, procedural and social legitimacy of the peer review, there is sometimes lack of civil society participation in the peer review process, despite the fact that increasingly civil society is invited to contribute to reviews. International organizations have to go the extra mile in this respect and introduce broader public participation in all phases of the peer evaluation process. Additionally, the peer review enhances

Manby, supra note 110, at 3; see also id. at 2; AfriMAP, supra note 95, at viii ("Doubts about the utility of the APRM are being fuelled by the apparent lack of integration of the plan of action (PoA) into other national planning processes").

Rose-Ackerman & Lindseth, Comparative Administrative Law: Outlining A Field Of Study, supra note 7, at 442-43.

Manby, supra note 110, at 3.
deliberation for the respective compliance measures, especially through the publication of the report.\textsuperscript{250} For this reason, it is important that the final report is made public. On the other hand, there is the danger that domestic administrations might then refrain from requesting peer reviews.\textsuperscript{251}

There is also a need for at least some minimum safeguards for the promotion of procedural legitimacy. The peer review reports, and all relevant and preparatory decisions, including the decision on the specific composition of the teams should be justified. The maximum involvement of the reviewed country in the process should also be guaranteed.\textsuperscript{252} The institutionalization of a review of the final report could also be considered. Yet, the framework for the conduct of peer review cannot be a legal framework in the traditional sense, since peer review follows different paths of governance. In the place of an extremely formalized process, one could think of standardized modules that could be individualized and used by the parties that design the peer review process based on their needs.\textsuperscript{253} Even though the OECD is not a universal organization it can take on the role of evolving a universal framework for the conduct of peer reviews and providing a platform and global infrastructure for the international peer assessments.\textsuperscript{254}

There is also a need to improve some aspects of the social legitimacy of the peer review. The soft form of the intervention through peer review in the foreign legal order creates different conditions for the social legitimacy of the peer review in comparison to hierarchical intervention.\textsuperscript{255} At the same time, increased

\textsuperscript{250} Lehtonen, \textit{supra} note 111, at 186.

\textsuperscript{251} This applies to voluntary peer review mechanisms; \textit{see} Washington, \textit{supra} note 67, at 452.


\textsuperscript{254} \textit{See Pagani et al., supra} note 71 (on the modeling of the peer reviews on the example of OECD reviews); \textit{see also supra} II.A.2.d.

\textsuperscript{255} \textit{See Keohane, supra} note 176, at 9, 10-11 (2001) (“[…] [F]or global governance to be legitimate, global institutions must facilitate persuasion rather than coercion or reliance on sanctions as a means of influence”); \textit{cf. also} Sabino Cassese & Lorenzo Casini, \textit{Public Regulation of Global Indicators, in GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH}}
substantive and procedural legitimacy is bound to increase also its social legitimacy. More concretely, the choice of the examiners, and the degree of participation of the reviewed country in the process after the onsite visit are very important for success and social legitimacy.

Lastly, accountability through peer review, like other forms of horizontal accountability could eventually lead to new forms of democracy. For example, experimentalist theories show that principal-agent models of legitimacy and accountability can be substituted by deliberative polyarchy as a new form of democracy. Deliberative polyarchy is the result of the multiple interactions of various actors within horizontal governance regimes, and has a destabilizing effect on the overall regime with the potential of democratization. This can be exemplified on the FATF and its first- and second-order membership. The core of the FATF membership is comprised of 36 member countries, whereas the periphery of 8 regional organizations, all of them covering practically the whole globe. The core has the authority of policy-making and standard-setting, whereas the periphery is only empowered to implement the rules of the core. This is partly a hegemonic structure. But, the peer review mechanism leads to a dynamic function of the whole system. The experimentalist structure of the FATF leaves great room for a democratic destabilization effect induced by the periphery and exerted on the core and from the core back to the periphery. The partial

Quotations and Rankings 465, 470 (Kevin Davis, Angelina Fisher, Benedict Kingsbury & Sally Engle Merry eds., 2012) (“On the other hand, ‘voluntary’ indicators might in fact be sustained by non-regulatory forms of accountability and compliance, based on market or reputational pressures, for instance, which may in turn strengthen the legitimacy attached to the consensus.”)

256 See Tom R. Tyler, Why People ObeY The Law (2d d. 2006).
257 See Joshua Cohen & Charles Sabel, Directly Deliberative Polyarchy, 3 EUR. L. J. 313 (1997); Brassett et al., supra note 123, at 5-7, 19-21; see id. at 6 (“The scheme is ‘deliberative’ in the sense that questions are decided by argument about the best ways to address problems, not simply exertions of power, expressions of interest, or bargaining from power positions on the basis of interests” [with reference to Cohen & Sabel, supra note 151, at 779]. The scheme is a ‘polyarchy’ because of ‘its use of situated deliberation within decision-making units and deliberative comparisons across those units to enable them to engage in a mutually disciplined and responsive exploration of their particular variant of common problems’ [with reference to id. at 780]).
258 Sabel & Zeitzin, supra note 150, at 312-23 (“democratizing destabilization”), see also Brassett et al., supra note 123, at 7-8, 22-24.
experimental democratization of the hegemonic FATF structure is demonstrated by the accession of India into the core of the regime in 2010.

**Conclusion**

Peer review is a smart and innovative way to promote compliance with international rules through collegiality. It also produces a new form of peer or horizontal accountability of the involved actors towards other actors at the same level as the scrutinized ones. Horizontal accountability structures are expected to increase in the international realm since they have several advantages over traditional forms of review like vertical supervision by hierarchical bodies and judicial review by a neutral third party.\(^{259}\)

At the same time, peer review is a new form of governance, embedded in the framework of what has been described in the article as horizontal governance. Peer review offers a regulatory design for international dispute prevention and resolution that goes beyond deference to the domestic sphere, and more “formal” forms of international dispute resolution. Even though globalization is usually conceived as a top down process, it reveals its horizontal dimensions. The horizontal approach innovates the regulatory tools of international law and can operate as an initiator of regulatory innovation in the domestic legal orders as well. The horizontal socialization process brought about by the peer review, and the other forms of horizontal governance has thus the potential to lead to an overall re-invention of international law.

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\(^{259}\) See also Cassese, *supra* note 181, at 606.