PEER REVIEW AND THE GLOBAL ANTI-CORRUPTION CONVENTIONS: CONTEXT, THEORY AND PRACTICE

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INTRODUCTION

Global corruption is widely recognised as a "wicked problem"[1] in need of address. Corruption distorts economic growth,[2] discourages foreign investment,[3] reduces innovation and competition[4] and negatively impacts the efficient allocation of resources.[5] Corruption also contributes to inequality,[6] decreased confidence in political and legal systems and results in damage to collective social norms and values.[7] Its resilience to traditional, linear methods of regulation arises from its 'polycentric'[8] characteristics. Global co-ordination in the fight against corruption through international anti-corruption conventions is a relatively recent phenomenon. Key areas of challenge still remain. These include regulating and incentivising state compliance, and monitoring domestic implementation and enforcement of anti-corruption legislation.[9]

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1 The concept of a 'wicked problem' was established by Horst W. J. Rittel Melvin M. Webber, M.M. Policy Sci (1973), Dilemmas in a general theory of planning. See also David Lewis, Corruption: a wicked problem' Talk at Rhodes University May 2013 available at http://www.corruptionwatch.org.za/wp-content/uploads/migrated/DavidLewis-speech.pdf

2 See, e.g., Toke S. Aidt et al., Corruption and Sustainable Development (2011) 3 International Handbook on the Economics of Corruption (Susan Rose-Ackerman and Tina Soreide eds., 2011).

3 Mohsin Habib & Leon Zurawicki, 'Corruption and Foreign Direct Investment' (2002) Journal of International Business Studies 291 (2002).

4 S. L. Reiter & H. Kevin Steensma, Human Development and Foreign Direct Investment in Developing Countries: The Influence of FDI Policy and Corruption, 38 World Development 1678 (2010).

5 Organisation for Economic Growth and Development, Consequences of Corruption at the Sector Level and Implications for Economic Growth and Development (March 25, 2015).

6 Gonne Beekman et al., Corruption, Investments and Contributions to Public Goods: Experimental Evidence from Rural Liberia, 115 J. PUB. ECON. 37 (2014).

7 Sean Richey, *The Impact of Corruption on Social Trust,* 38 AM. POL. RES. 676 (2010).

8 Lon Fuller, 'The Forms and Limits of Adjudication' (1978-1979) *92 Harvard Law Review 353, cited in* Jeff King, Polycentricity and Resource Allocation: A Critique and Refinement, available at: http://www.trinitinture.com/documents/king1.pdf

9 Jan Wouters, Cedric Ryngaert and Ann Sofie Cloots, 'The International Legal Framework Against Corruption: Achievements and Challenges' 14 *Melbourne Journal of International Law* (2013) 205.

This article analyses the international anti-corruption framework and the peer review monitoring process. Peer review is 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 … comply with established standards and principles."[10] As a regulatory process, peer review has become a favoured mechanism to monitor and incentivise a state's compliance with its international obligations.[11] Regulatory areas subject to peer review are wide-ranging, they include nuclear safety via the International Atomic Energy Agency (IAEA),[12] climate change under the Kyoto Protocol [13] and human rights under the Universal Periodic Review mechanism.[14] However, despite its growing importance as a regulatory process, peer review has not been comprehensively analysed, resulting in a "literature famine" on its nature and operations.[15] Indeed, to date, there has been very limited academic discussion on peer review.[16] As a result, one aim of this article is to contribute to a stronger understanding of its process. While our focus is on peer review in the anti-corruption context, where possible, universal characteristics of the process are discussed.

The second objective of this article is to consider the merits of the peer review process in incentivising states to take action against corruption. Peer review is the mechanism for

[10] Fabrizio Pagani, 'Peer Review as a Tool for Cooperation and Change: An Analysis of the OECD Working Method' (2002) 11 *African Security Review* 15, 15.
[11] For example, peer review is used by the United Nations Environment Program, the UN Conference on Trade and Development, the UN Economic Commission for Europe, the World Trade Organization and International Accreditation Forum and the Financial Stability Board.
[12] Monica Washington, 'The Practice of Peer Review in the International Nuclear Safety Regime' (1997) 72 *New York University Law Review* 430.
[13] Xueman Wang and Glenn Wiser, 'The Implementation and Compliance Regimes under the Climate Change Convention and its Kyoto Protocol' (2002) 11 *Review of European, Comparative and International Environmental Law* 181.
[14] Lilian Chenwi, 'Revisiting South Africa's Reporting Obligations under Human Rights Treaties and Peer Review Mechanisms: Baby Strides Grinding to a Halt' (2012) 37 *African Yearbook of International Law* 186; Edward McMahon, Koto Busia, and Marta Ascherio, 'Comparing Peer Reviews: The Universal Periodic Review of the UN Human Rights Council and the African Peer Review Mechanism' (2013) 12 *African and Asian Studies* 266.
[15] Zein Kebonang, 'NEPAD: Making the APRM Work, Critique' [2005] *A Worldwide Journal of Politics* 46, 48. Georgios Dimitropoulos, 'Compliance through Collegiality: Peer Review in International Law' (MPILux Working Paper No 3, Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, 2014) 40; Zein Kebonang, 'African Peer Review Mechanism: An Assessment' (2005) 61 *India Quarterly: A Journal of International Affairs* 138, 141 Andrew Tyler, 'Enforcing Enforcement: Is the OECD Anti-Bribery Convention's Peer Review Effective? [notes]' (2011) 43 *The George Washington International Law Review* 137. Renee Ngamau,'The Role of NEPAD in African Economic Regulation and Integration' (2004) 10 *Law and Business Review in the Americans* 544.
[16] Georgios Dimitropoulos, 'Compliance through Collegiality: Peer Review in International Law' (MPILux Working Paper No 3, Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, 2014), 40.

evaluation of the *United Nations Convention against Corruption* (UNCAC),[17] the Organisation for Economic Cooperation and Development (OECD) under its Anti-bribery Convention[18] and the African Union's (AU) good governance objectives under good governance objectives under the Peer Review Mechanism (APRM).

Whilst acknowledging the criticisms of peer review, this article argues that peer review has been successful in particular contexts in increasing state compliance with these international instruments. In particular, peer review has contributed to the acceptance of anti-corruption norms and focused on the need for all countries to regulate corruption at the national level. In order to analyse the anti-corruption peer review process and its effectiveness, the article works through a number of key analytical steps. Part one discusses the nature of the peer review process, its authority in international law and its common procedural elements. Part two then locates peer review in the literature on regulatory theory. Based on the flexible and discretionary nature of the process and the manner through which it influences state compliance, it argues that peer review is a meta regulatory process. Part three then focuses on the practical effects of peer review, using the example of Australia under the OECD peer review process. It highlights the potential of peer review to not only foster formal compliance but also mutual learning and increased awareness of corruption. It argues that these indirect consequences of the process can be significant and make peer review a valuable regulatory tool in international law.

PART ONE: THE NATURE OF PEER REVIEW

Peer review has been described as:

> (T)he 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.[289]

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[17] *United Nations Convention against Corruption*, opened for signature 9 December 2003, 2349 UNTS 41 (entered into force 14 December 2005) ch VII, art 5 ('*UNCAC*').

[18] *Organisation for Economic Co-operation and Development Convention on Combating Bribery of Foreign Public Officials in International Business Transactions,* opened for signature 17 December 1997, 37 ILM 1 (entered into force 15 February 1999) ('*Anti-Bribery Convention*').

Another strength of peer review lies is its adaptability as a "compliance mechanism … [across] different international regimes."[19] As Dimitropoulos notes, it is a "collegial" mechanism that "operates in a sovereignty-respecting way".[20] Peer reviews are generally not one-off and their effectiveness relies on "value sharing, commitment, mutual trust, and credibility".[21]

In the international context, peer review generally operates in either of two ways. One is as mechanism to review states' progress towards implementing an international convention and "monitoring … state compliance with [treaty] provisions".[22] This is the most common way in which peer review operates in the anti-corruption context. For example, the purpose of peer review under the UNCAC is to assess states' compliance with the objective of "prevent[ing] and combat[ing] corruption" in line with specific articles of the convention.[23] Such articles include for example bribery of public and foreign officials and the officials of international organisations, embezzlement, money laundering and obstruction of justice. Similarly in other contexts, peer review is used to evaluate the progress of a state or group of states towards achieving broad international objectives.[24] In the context of corruption, for which a singular definitional standard is elusive,[25] international anti-corruption conventions sometimes adopt aspirational and non-specific language in order to assist with ratification. For example, the African Peer Review Mechanism (APRM) is considered one of the most comprehensive supra-national review mechanisms. It began as an initiative of the New Partnership for Africa's Development (NEPAD) and through the constitution African Union. Whilst the APRM does not mention corruption specifically, review of a state's anti-corruption policies is part of its

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[19] Ibid 19.
[20] Georgios Dimitropoulos, 'Compliance through Collegiality: Peer Review in International Law' (MPILux Working Paper No 3, Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, 2014), 7.
[21] Fabricio Pagani, *Peer Review as a Tool for Co-Operation and Change*, 11 AFR. SEC. REV. 15, 15 (2002), 21.
[22] Renee Ngamau,'The Role of NEPAD in African Economic Regulation and Integration' (2004) 10 *Law and Business Review in the Americans* 544.
[23] *UNCAC* art 1(a); UNCAC Art 12, para 1.
[24] The OECD also conducts country reviews of states' policies and practice in areas including education, health, governance and corruption. In each context, the process measures states' progress based on specific benchmarks, indicators and standards, although reviews in different areas may be conducted at the same time.
[25] For example, corruption has been defined as "any deviation from an ideal ethical standard": John Sandage, "Keynote Speech: Global Corruption and the Universal Approach of the United Nations Convention against Corruption" 53 Osgoode Hall Law Journal (2016) 7, 8; the World Bank defines corruption as the "abuse of public office for private gain": The World Bank Group, "Helping Countries Combat Corruption: The Role of the World Bank" online: http://wwwl.worldbank.org/publicsector/anticorrupt/corruptn/cor02.htm. However, the World Bank's definition appears to exclude consideration of private corruption in the corporate sphere. This type of corruption is recognised as a type of corruption without the interaction of any public office and potentially no benefit to the individual employee: See Peter Fleming and Stelois C Zyglidopoulous, *Charting Corporate Corruption: Agency, Structure and Escalation* (Edward Elgar, 2009) 5.

broader mandate, to review the progress of member states towards "political stability, high economic growth, sustainable development and accelerated economic integration."[26] The APRM adopts ninety-one indicators across four areas to assess this broad objective. Anti-corruption measures are included within assessments on democratic and political governance, with the general mandate being, "a constitutional political order in which…responsive public service are realised to ensure sustainable development".[27]

The authority of peer review

Although peer review operates in a number of different international contexts, there has been little discussion on the authority supporting peer review. The notion of authority in international law is a "highly contested concept" due to state sovereignty.[28] However most scholars agree that authority is "one of the bases of obligation in international law"[29] arising from the external "perception [by states]…that [a mechanism] has come into being in accordance with the right process."[30] As a regulatory mechanism, peer review aims to influence state behaviour by monitoring and reviewing its compliance with international obligations.[31] However, unlike treaties, which bind state parties under *pacta sunt servanda*,[32] or custom, whereby an obligation is manifested through the combination of state practice and *opinio juris*,[33] the authority of peer review is not based in binding treaty provisions or custom. Therefore, it is important to ask why do states feel obligated to engage with processes of anti-corruption peer review?

One argument is that, whilst peer review is not specifically referred to in treaties, it derives its authority from "framework conventions".[34] For example, Article 63 s 4(e) of UNCAC requires

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[26] Kebonang, above n 3.
[27] AU/NEPAD 2003b, 5, in page 25, The African Peer Review Mechanism (APRM) as a Tool to Improve Governance? At https://www.die-gdi.de/uploads/media/Studies_45.2009.pdf
[28] Hitoshi Nasu and Kim Rubenstein, 'Introduction' in Hitoshi Nasu and Kim Rubenstein (eds), *Legal Perspectives on Security Institutions* (Cambridge University Press, 2015) 1, 17.
[29] Schachter, Oscar, 'Towards a Theory of International Obligation' (1967) 8 *Virginia Journal of International Law* 300, 301
[30] Thomas M Franck, 'Legitimacy in the International System' (1988) 82 *American Journal of International Law* 705, 706.
[31] Dimitropoulos, above n 1.
[32] *Vienna Convention on the Law of Treaties*, signed 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 36.
[33] James Crawford, 'Brownlie's Principles of Public International Law' (Oxford University Press, 8th ed, 2012) 25.
[34] Nele Matz-Lück, 'Framework Conventions as a Regulatory Tool' (2009) 1 *Goettingen Journal of International Law* 439.

states to implement a general monitoring and compliance mechanism to "review periodically the implementation of this Convention", but does not specify what the process of review will be.[35] Similarly, the Article 12 of the OECD Anti-Bribery Convention requires parties to set up a "programme of systematic follow-up to monitor and promote …[the convention's] full implementation."[36] The APRM relies on the NEPAD which was established under the African Union Constitution (AU Constitution). Whilst the AU Constitution makes no reference to corruption, there are however references to "good governance" in the preamble, the objectives (Article 3) and the principles (Article 4). Together, the AU Constitution's broad language channels a unity of purpose by its members, and drives of a collective commitment by its members on good governance. As a consequence, the African Union Convention on Preventing and Combating Corruption (AU Anti-Corruption Convention) was passed only after the AU Constitution and it is the AU Anti-Corruption Convention which requires review "on the process made by each state Party in compl[iance]".[37] Therefore, when state consensus on monitoring and compliance is elusive in the agreement of anti-corruption treaties with monitoring obligations such as peer review, framework conventions allow states to first enter into a generalised treaty with additional "detailed protocols …for specific regulat[ions]" later on. [38] Each step in the process increases the degree of subject matter specificity, implementation protocols and monitoring processes, adding to the externally authoritative status of the final peer review process.

This multi-tiered approach is reflected in practice. Under each of the above instruments, it has been necessary for member states to decide which review process is most appropriate for monitoring progress under the framework conventions. Peer review was agreed to under the UNCAC in the 2009 Doha Resolution 3/1. This resolution sets out how reviews will take place, including details on review standards, cycle and procedure.[39] The APRM was established through the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance, put forward at the 38th Ordinary Session of the Organisation of African Unity (the

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[35] *UNCAC* art 63 s 4(e).
[36] *Anti-Bribery Convention* art 12.
[37] Indeed, empirical evidence reveals that upon signing of the AU Constitution, African states have adopted almost as many treaties in ten years as the preceding thirty-seven: See, Ratification of the African Union Treaties by Member states: Law, Policy and Practice. *Tiyanjana Maluwa* Melbourne Journal of International law (2012) 13 , 636, 637.
[38] Nele Matz-Lück, 'Framework Conventions as a Regulatory Tool' (2009) 1 *Goettingen Journal of International Law* 439, 440.
[39] *Doha Resolution*, UN Doc CAC/COSP/2009/158, 8.

predecessor to the AU). Supplementing this declaration is a 2003 Memorandum of Understanding (MOU) which states that participating members of the AU will "accept the principles of the [APRM] … and commit themselves to their implementation."[40] The MOU references the APRM base document, which sets out the operational characteristics of the APRM, including the nature of reviews, their frequency and the role of country visits.[41] A guideline paper was also created which contains an anti-corruption standard, indicators and criteria.[42]

These decisions by member states to adopt peer review add legitimacy to the process. They evidence the collective consent of states and their "shared confidence in the process."[43] The International Court of Justice notes that "consent to the text of …resolutions ... may be understood as acceptance of the validity of the rule."[44] As one diplomat involved in negotiating the UNCAC stated, consensus is reached when "we are all equals and we all have an interest in the implementation of the Convention."[45] Studies have suggested a key factor influencing states' level of compliance with a treaty is their engagement in the negotiations leading up to the treaty.[46] For example, Benvenisti suggests that whether states view treaties as legitimate (and therefore, comply with them) is linked to the states' level of participation during its negotiation.[47] Higher levels of compliance resulted when there was initially a wide disparity of views which then resulted in consensus. Considering whether a similar argument applies to support compliance with peer review, it is interesting to note that initially there was "insufficient political consensus" on the nature of peer review under UNCAC.[48] Disagreement existed on issues such as the degree of intrusion the review process should have into state affairs. One group of states advocated for "controlled review", arguing that reviews should not

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[40] Art 18, APRM MOU; Adejoke Babington-Ashaye, 'The African Peer Review Mechanism at Ten: From Lofty Goals to Practical Implementation' (2014) 19 *African Yearbook of International Law* 21, 23; NEPAD, 'Memorandum of Understanding on the African Peer Review Mechanism' (Memorandum of Understanding NEPAD/HSGIC/03- 2003/APRM/MOU, NEPAD 9 March 2003). The MOU is the accession document for the APRM.
[41] Art 18, APRM MOU
[42] Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism *NEPAD/guideline*
[43] Pagani 13.
[44] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United states) (Judgment)* [1986] ICJ Rep 14, 100.
[45]Ibid 437.
[46] Eyal Benvenisti & Moshe Hirsch, The Impact Of International Law On International Cooperation (Cambridge Univ. Press 2004),
[47] Ibid.
[48] Robert Leventhal, 'International Law and the Fight against Corruption' (2008) 102 *American Society of International Law* 203, 206.

include on-site visits, publication of reports, or the participation of civil society.[49] Other states supported an "open review", considering these features were a necessary part of "collecting and analysing information on implementation."[50] In the third session of the Conference of State Parties (CoSP) at Doha, consensus was ultimately reached through compromise. Member states adopted a peer review process requiring the mandatory publication of reports, but only once all parties had agreed on the wording and content of the report.

Interviews conducted by Joutsen and Graycar after the Conference indicated that both group of states supported the final agreement.[51] It is arguable that the discussions and negotiations on the final elements of the peer review process increased its legitimacy, as well as improving familiarity with its technical elements. This includes the indices and criteria which form part of the standards of review. Corruption is a complex issue and the UNCAC peer review process was the culmination of three sessions of the CoSP and a subsequent meeting of an inter-governmental expert working group.[52] Such technical expertise played a valuable role in the final adoption of the review mechanism and in framing its specific criteria of reference. In the words of one participant, "the role of the technocrats was largely to indicate what options were to be found in the peer review model and to allay the concerns of those [diplomats] who are less familiar with the concept."[53]

Common elements of the anti-corruption peer review process

Whilst there are differences in the application of the anti-corruption peer review processes, there are also key similarities. First, the processes focus primarily on a state's implementation and enforcement of their obligations under the anti-corruption conventions. For example, phase 1 of the OECD Anti-Bribery Convention peer reviews looks at what legislation a member country had introduced to implement the Convention. Phase 2 considers whether a country is applying the legislation and in particular what structures are in place to enforce these laws. Phase 3, which is permanent cycle of peer review, focuses on enforcement of the law. Similarly,

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[49] Matti Joutsen and Adam Graycar, 'When Experts and Diplomats Agree: Negotiating Peer Review of the UN Convention against Corruption' (2012) 18 *Global Governance* 425, 432.
[50] Ibid.
[51] Matti Joutsen and Adam Graycar, 'When Experts and Diplomats Agree: Negotiating Peer Review of the UN Convention against Corruption' (2012) 18 *Global Governance* 425, 436.
[52] See generally, Matti Joutsen and Adam Graycar, 'When Experts and Diplomats Agree: Negotiating Peer Review of the UN Convention against Corruption' (2012) 18 *Global Governance* 425, 432.
[53] Matti Joutsen and Adam Graycar, 'When Experts and Diplomats Agree: Negotiating Peer Review of the UN Convention against Corruption' (2012) 18 *Global Governance* 425, 436.

the APRM good governance indicators call for the review of a state's "ratification and implementation of International [Anti-Corruption] Codes" [54] and "[e]nactment and enforcement of effective …anti-money laundering laws."[55]

Second, the peer review process is conducted at a state-to-state level. In other words, reviewing states assess the activities of other states, rather than the activities of organisations or regulators within those states. In this sense, "the ultimate addressee of the regulation is the state itself."[56] This distinguishes peer review from "globalised regulation"[57] which focuses on regulating domestic agencies and increasing the global interconnectivity of state regulators.[58] Whilst anti-corruption peer review may indirectly consider the activities of domestic regulators and agencies, it does not specifically focus upon them. For example, peer review under UNCAC includes the review of a state's regulation of its anti-corruption body (if there is one) against the criteria of independence, specialisation in corruption, the provision of adequate resources and training.[59]

Third, the review process usually involves three groups of actors; the state undergoing the review, the state(s) undertaking the review and the review host. The review host is usually a special reviewing body or an international organisation's secretariat. For the OECD review under the Anti-bribery Convention, the host is the Working Group on Bribery in International Business Transactions (the working group). The working group carries the overall responsibility for monitoring enforcement and implementation of the Convention's objectives. With UNCAC the secretariat is expressly given power to set review standards, techniques and

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[54] Samuel Makinda and Wafula Okumu, *The African Union: Challenges of Globalisation, Security and Governance* (Routledge, 2008) 69. See also, NEPAD Secretariat, 'African Peer Review Mechanism (APRM): Base Document' (Base Document, NEPAD, 9 March 2003) ('*APRM Base Document*'); Magnus Killander, 'The African Peer Review Mechanism and Human Rights: The First Reviews and the Way Forward' (2008) 30 *Human Rights Quarterly* 41.

[55] Ibid.

[56] Mathias Koenig-Archibugi, 'Global Regulation' in Robert Baldwin, Martin Cave, and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press 2010) 407, 409.

[57] Sol Picciotto, 'Introduction: Reconceptualising Regulation in the Era of Globalization' (2002) 29 *Journal of Law and Society* 1, 5.

[58] See, eg, Kanishka Jayasuriya, 'Globalization, Law and the Transformation of Sovereignty: The Emergence of Global Regulatory Governance' (1999) 6 *Indiana Journal of Global Legal Studies* 425, 427; Andrew T Guzman, 'Introduction – International Regulatory Harmonization' (2002) 3 *Chicago Journal of International Law* 271; Jacob K Cogan, 'The Regulatory Turn in International Law' (2011) 52 *Harvard International Law Journal* 322, 362.

[59] Criminal Law Convention on Corruption, opened for signature 27 January 1999, ETS No 173 (entered into force 1 July 2002) ('Criminal Law Convention') art 20; UNCAC art 6.2.

"all [other] tasks required for the efficient functioning of the mechanism".[60] It organizes questionnaires, country visits and other procedural aspects of the review process.

Fourth, the review process usually occurs in stages. Initially, the reviewed state undertakes a self-assessment (involving the completion of a series of questionnaires) on the extent of its compliance with anti-corruption standards and obligations. Its response, usually presented in the form of a "national report", is then reviewed by the other states (its peers).[61] During this second stage, experts from the reviewing countries will often visit the country being reviewed to gather further information and meet with public officials and members of civil society. For the OECD, expert visits to the reviewing country are mandatory.[62] For UNCAC, the visits are either optional or carried out at the request of the state being reviewed. [63] Subsequently, a report is prepared by the reviewing states on the degree of compliance by the state with its international obligations and submitted to the host body. [64] The report usually has three elements: a description of the domestic legal order in the area being reviewed, an assessment of the country's level of compliance with international standards, indicators, guidance and good practice elsewhere; and recommendations for improvements.[65]

The reports are "non-binding in the strictly legal sense" [66] and contain no sanctions or penalties for non-compliance. This is because the reviews are not undertaken by "a superior body that…hand[s] down… punishment[s]."[67] State parties are not compelled to implement the recommendations and there are no "compulsory methods" such as specific performance, state responsibility or the threat of sanctions to enforce compliance. [68] Nonetheless, as will be discussed below, the lack of formal enforcement mechanisms does not necessarily undermine

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[60] *Doha Resolution*, Res 3/1, 3rd sess, UN Doc CAC/COSP/2009/15, ch V.
[61] See, eg, Washington 467.
[62] OECD, 'OECD Anti-Bribery Convention Phase 3: Monitoring Information Resources' (Information Resources Manual, OECD, 17 December 2009).
[63] *Report of the Conference of the states Parties to the United Nations Convention against Corruption on its third session, held in Doha from 9 to 13 November 2009*, Res 3/1, 3rd sess, UN Doc CAC/COSP/2009/158 (1 December 2009) 16 ('*Doha Resolution*').
[64] Georgios Dimitropoulos, 'Compliance through Collegiality: Peer Review in International Law' (MPILux Working Paper No 3, Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, 2014) 24.
[65] Georgios Dimitropoulos, 'Compliance through Collegiality: Peer Review in International Law' (MPILux Working Paper No 3, Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law, 2014), 24.
[66] Kebonang 163.
[67] Pagani 16.
[68] Rein A Mullerson, 'Monitoring Compliance with International Human Rights Standards' in W. E. Butler (ed) *Control over Compliance with International Law* (Martinus Nijhoff Publishers, 1990) 125.

peer review's effectiveness.[69] This is because peer review relies upon voluntary participation and can result in reputational consequences where there is non-compliance. However, before discussing this aspect of peer review, it is useful to consider how peer review functions as a meta-regulatory process.

PART TWO: PEER REVIEW AS A META-REGULATORY PROCESS

As the discussion above demonstrates, at its core, peer review is a regulatory process that "attempt[s] to control, order or influence the behaviour of others."[70] Unlike other regulatory processes, with peer review the state is the subject of the regulation.[71] While much has been written on the different types of national regulation that exist within the modern "regulatory state",[72] international regulatory mechanisms such as peer review have received relatively little attention.[73] Drawing upon existing research, however, it is argued that peer review is a meta-regulatory process that facilitates and enables self-regulation within the regulatory entity that it targets. In particular, peer review provides states with considerable discretion in deciding how they meet their international commitments. Compliance is defined as "the degree to which a state behaves in a manner that conforms to its …[treaty] obligations."[74]

State discretion

A key characteristic of meta-regulation is that the body being regulated is the "source of their own constraint".[75] The meta-regulatory framework generally involves a significant level of legal abstraction, allowing the regulated entity to make its own determination on how best to achieve compliance.[76] Similarly with peer review, states have considerable discretion when deciding how to comply with their international obligations. This is because, as the regulated entity, states possess "greater knowledge of and information about their own operations."[77] As

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[69] See Ch 3 generally.
[70] Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, 25.
[71] Mathtias Koenig-Archibugi, above n 56, 409.
[72] See especially Michael Moran, 'Review Article: Understanding the Regulatory state' (2002) 32 *British Journal of Political Science* 391 for an in depth discussion of regulatory theory as applied to the modern regulatory state.
[73] For example, the book Christine Parker et al, *Regulating Law* (Oxford University Press, 2004) contains twelve chapters, of which only one is dedicated to regulatory frameworks in international law.
[74] Brett Frischmann, A Dynamic Institutional Theory of International Law, 51 BUFF. L. REV. 679, 693 (2003).
[75] Cary Coglianese and Evan Mendelson, 'Meta-regulation and Self-regulation' in Robert Baldwin, Martin Cave, Martin Odge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 146, 151.
[76] Ibid.
[77] Ibid.

Brunelle-Quraishi notes, "[t]he manner in which a state will interpret a given obligation is closely if not inextricably linked to its cultural practices and domestic legal system, which determines how it will implement the treaty."[78] This gives states the flexibility to develop their own strategies[79] based on their particular legislative and regulatory environments,[80] and "national priorities and cultural and institutional specificities."[81] It is important to note that the discretion afforded under peer review is not limitless, states do not have discretion over "whether [or not] to develop those systems in the first place."[82] Under the UNCAC states must legislate for key anti-corruption offences: states "shall adopt" criminal provisions for bribery, embezzlement, and money laundering.

Therefore, state discretion only extends to certain aspects of the review process. Under UNCAC for example, individual states can determine the "shape and content of [their] internal systems,"[83] as well as "[the] specific operational details"[84] of their anti-corruption legislation. Chapter V of the UNCAC requires state parties to compel financial institutions to identify and register their customers in high-value accounts. However, chapter V does not specify a uniform standard. In developing countries where banks are often state owned and overloaded with administrative burdens,[85] "excessive bureaucracy…provides the breeding ground for corrupt activities in developing countries."[86] In such cases, a simpler approach may be adopted and resources allocated in more effective areas in addressing corruption. On the other hand, developed countries with private banks may already possess sufficient verification of identity checks for all customers. In such cases, the flexibility and discretion given to states means that such identification systems may be interpreted in the self-assessment process as sufficient to satisfy the review criteria.

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[78] Ophelie Brunelle-Quraishi, 'Assessing The Relevancy and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis' (2011) 2 *Notre Dame Journal Of International and Comparative Law* 101, 133.
[79] Ali Hajigholam Saryazdi, *Basic Preconditions of Anti-corruption Strategies,* International Studies Journal Vol 4 No 4 29, 35.
[80] Note that this flexibility is also inherent in other peer-review measures: For example, the IAEA's *Nuclear Safety Convention* initially sets a "broad based agreement," such that the only obligations are the submission and reviewing of national reports (*Nuclear Safety Convention* art 20). It also "intentionally" leaves out details of how the review process is to be carried out, (Washington, above n 19, 455) in particular the form and content of the self-assessment reports.
[81] *Doha Resolution*, Res 3/1, 3rd sess, UN Doc CAC/COSP/2009/15, 36.
[82] Ibid.
[83] Ibid.
[84] Ibid 153.

A further example of the flexibility provided for under anti-corruption conventions is that of facilitation payments. Facilitation payments have been described as "bribery loop-holes" that "do not usually involve injustice on the part of a payer however … may lead to a certain moral callousness."[87] Under UNCAC there is no consensus on whether facilitation payments constitute an act of corruption. It demonstrates the type of conceptual difficulties a "comprehensive treaty" such as the UNCAC faces.[88] What constitutes a small facilitation payment in one country may be considered an act of corruption in another.[89] Perkins recognises the spectrum of approaches that can be adopted to facilitation payments, including outlawing them altogether, allowing them and partial solutions in between.[90] This disparity of approaches is reflected in the positions adopted by the United States, where the Foreign Corrupt Practices Act allows facilitation payments,[91] and the UK where the Bribery Act expressly prohibits such payments. In such examples, state discretion allows for peer review to have a higher degree of adaptability (where appropriate) to domestic social, cultural and political differences.

Lastly, it is worthwhile to highlight that the flexibility of approach extends to the medium in which the anti-corruption legislation is contained. While a majority of states have located the offence of foreign bribery in their criminal code,[92] other states have enacted specific legislation[93] or included the offence in commercial statutes. Japan for example inserted the foreign bribery offence in its *Unfair Competition Prevention Law* as part of "ensuring fair competition in international business transactions".[94]

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[87] *Antonio Argandona, The United Nations Convention Against Corruption and its Impact on International Companies 9 (Univ. of Navarra IESE Bus. Sch., Working Paper No. 656, 2006)*

[88] [#]

[89] Bert Denolf, *Journal of World Investment and Trade* (2008) 249, 253.

[90] Ivan Perkins, 21 Cardozo Journal of International and Comparative Law (2012) 325. See, also, *The Foreign Corrupt Practices Act: It's Time to Cut Back the Grease and Add Some Guidance,* 28 B.C. INT'L & COMP. L. REv. 379 (2005); ILLUMINATING CORRUPTION PATHWAYS: MODIFYING THE FCPA'S "GREASE PAYMENT" EXCEPTION TO GALVANIZE ANTI-CORRUPTION MOVEMENTS IN DEVELOPING NATIONS,

[91] 15 U.S.C. §§ 78dd-1(b) (2006).

[92] E.g., see Australia, Bulgaria, Finland, France, Hungary, Iceland, Italy, Luxembourg, Mexico, Norway and Switzerland.

[93] E.g., see Canada, Greece, Germany, Korea and the United States.

[94] Page 8, MID-TERM STUDY OF PHASE 2 REPORTS (OECD). Although note that this approach has been subsequently criticised by the working group in Japan's phase 2 follow up report as the Unfair Competition Prevention Law does not adequately align with the purpose of punishing the bribery of foreign officials.

Lack of sanctions

Peer review aims to gain compliance through voluntary action rather than through traditional command and control mechanisms.[95] Compulsion is a central aspect of command and control approaches. It exists when a regulator commands the regulatory target to do or refrain from doing an action under threat of negative consequences. Generally, non-compliance results in the imposition of fines, sanctions, or the withholding of subsidies or regulatory exemptions.[96] In contrast, with anti-corruption peer review, neither the reviewing states nor the review host have any power to sanction non-compliance. The product of the review process is a report that highlights areas where a state's compliance is sub-optimal and could be improved.[97] Recommendations are also provided on particular areas of improvement. These recommendations however are non-binding. While non-compliance may result in negative publicity or reputational damage for the reviewed state, there is no punishment imposed.[98] Practically, states are no worse off and there is no direct "reprimand or consequence that will put the violator in a worse position."[99]

The lack of direct sanctions is considered to be important in ensuring a state's "national sovereignty and territorial jurisdiction"[100] are respected. It also does not mean that peer review cannot achieve compliance indirectly. This is because peer review relies "substantially on … goodwill and cooperation"[101] amongst the regulated entities. Sinclair argues that self-regulatory processes promote cooperation through a sense of "moral commitment".[102] Charlesworth and Chinkin note that international law "relies primarily on self-regulation".[103] State sovereignty requires a system of regulation that operates via "coordination rather than subordination."[104] The peer review process is thus treated primarily as a "discussion among

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[95] Darren Sinclair, 'Self-Regulation Versus Command and Control? Beyond False Dichotomies' (1997) 19 *Law and Policy* 529, 534.
[96] Coglianese and Mendelson, above n 75, 150; Arie Freiberg, *The Tools of Regulation* (The Federation Press, 2010) 181.
[97] Andrew Tyler, 'Enforcing Enforcement: Is the OECD Anti-Bribery Convention's Peer Review Effective? [notes]' (2011) 43 *The George Washington International Law Review* 137.
[98] Freiberg, above n 204.
[99] Richard Macrory, *Regulation, Enforcement and Gvernance in Environment Law* (London: Cameron May, 2008) 37.
[100] Alejandro Posadas 'Combating Corruption under International Law' (2000) 10 *Duke Journal of Comparative and International Law* 345, 375.
[101] Sinclair, above n 95, 534.
[102] Ibid.
[103] Hilary Charlesworth and Christine Chinkin, 'Regulatory Frameworks in International Law' in Christine Parker et al (eds), above n 248.
[104] Frédéric Mégret, 'International Law as Law' in James Crawford and Martti Koskenniemi (eds), *The Cambridge Companion to International Law* (Cambridge University Press, 2012) 64, 67.

equals".[105] It is founded on the collective cooperation of states, manifested in forms such as mutual education, information and technology sharing and mutual peer pressure (discussed further below).[106]

Recursivity

A distinctive aspect of peer review is its recursive nature. Recommendations and norms on tackling corruption circulate upwards and downwards, as well as horizontally. It is a process through which "[each layer of regulation] regulates each other through various combinations of horizontal and vertical influence."[107] In particular, whilst peer review operates vertically under an international convention, the actual review process is predominantly horizontal in nature. The states being regulated are connected to the other states that are reviewing them. This differs from traditional regulatory mechanisms where the interaction occurs mostly through a top down approach, with a regulatory authority threatening to impose sanctions on the target in order to change the target's behaviour. With peer review, national initiatives and norms on how to tackle corruption circulate upwards to the review host and the international community as well as sideways to the other states, including the reviewing states and other interested jurisdictions. New strategies and norms are then generated that can spread quickly through the regulated states.

This horizontal aspect of peer review is integral to the success of the mechanism. First it allows for functional equivalence. Functional equivalence in comparative law holds that despite theoretical, dogmatic or institutional differences between different jurisdictions, it is possible to compare functionally identical or similar results. The OECD Anti-bribery Convention explicitly adopts this approach, with the official commentaries stating that "(t)his Convention seeks to assure a functional equivalence among the measures taken by the Parties to sanction bribery of foreign public officials, without requiring uniformity or changes in fundamental principles of the Party's legal system."[108] The effect, as Pieth notes, is that

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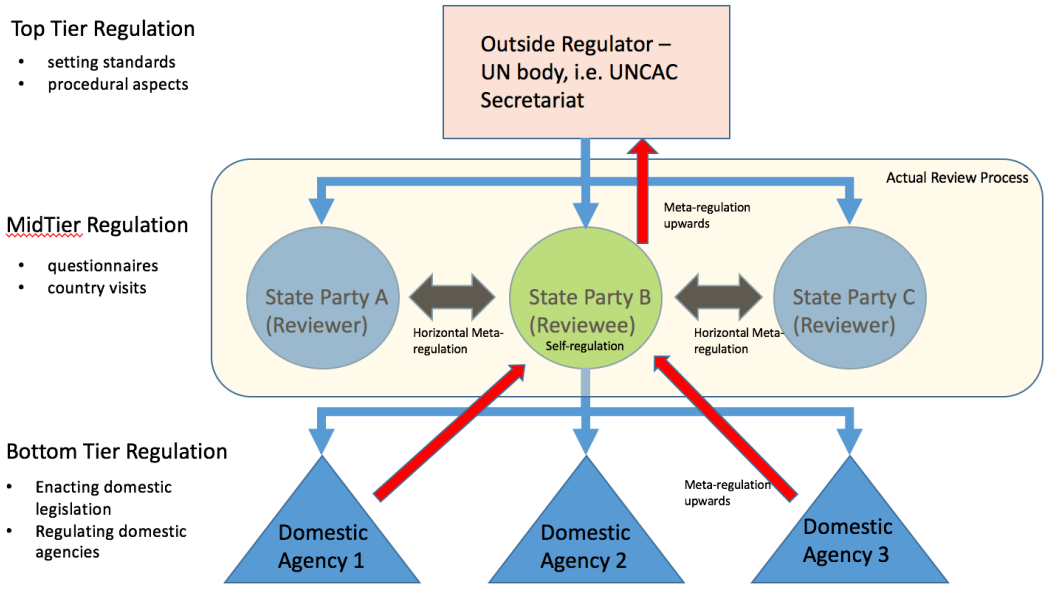
[105] Kebonang 140.
[106] See Ch3(B), (C).
[107] Colin Scott, Nicola Lacey and John Braithwaite, 'Introduction' in Parker et al (eds), 6.
[108] Commentaries on the Convention on Combating Bribery of Foreign Public Official in International Business transactions, Doc. Ref. DAFFE/IME/BR(97)20. See also, Gemma Aiolfi and Mark Pieth, 'How to Make a Convention Work: the Organisation for Eco- nomic Co-operation and Development Recommendation and Convention on Bribery as an Example of a New Horizon in International Law', in Cyrille Fijnaut and Leo Huberts (eds), Corruption, Integrity and Law Enforcement, 349, 351-3.

> (A)ttention is drawn to the overall workings of systems rather than individual institutions. The assumption is that each legal system has its own logic and is not necessarily determined by the legal texts alone … [Emphasis is placed on] the overall effects produced by a country's legal system rather than the individual rules."[109]

Second, the horizontal nature of the peer review process emphasises the importance of state sovereignty. It creates a framework that recognises horizontal "equality" rather than vertical "supremacy" with states as "political entities equal in law."[110] For example, under UNCAC reviewing states must "observe and carry out the reviews in a manner consistent with principles of sovereign equality and territorial integrity of states" and respect the principle of "non-intervention in the domestic affairs of other states."[111] The effect is to emphasize that the review process is carried out amongst entities equal in standing.



Peer review as a *review* process

Whilst all regulatory tools are "attempts to change the behaviour of others in order to address a collective problem,"[112] they do this in different ways. Some regulatory tools are transactional,

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[109] http://www.oas.org/juridico/english/pieth2000.htm.
[110] *Reparation for Injuries Suffered in the Service of the United Nations Case (Advisory Opinion)* [1949] ICJ Rep 240, 256.
[111] *Doha Resolution*, UN Doc CAC/COSP/2009/15 app cl 2.
[112] Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation and Governance* 137, 139.

where regulation "occurs through the direct interaction between parties via contract…or other financial agreement[s]."[113] Others regulate through the "conferral of protected rights" or the enforcement of prohibitive rules.[114] In contrast, the peer review process is an "informational"[115] regulatory tool that seeks increased compliance through three phases of review.

The first phase of review incorporated within the process is the initial self-assessment. For example, the UNCAC review process begins with a self-evaluation checklist that the reviewed state must complete on the extent of its domestic compliance with the convention objectives.[116] This includes reporting on the existence and implementation of national legislation, as well as on institutional initiatives. The intended effect of the self-assessment is to encourage the reviewed state to identify strengths and weaknesses in its own domestic laws, policies and enforcement.[117] It focuses primarily on self-assessment of the extent of "formal compliance" with domestic legislative implementation.[118]

In phase two, the process involves the review of a state's activities by its peers. The goal of this phase is to evaluate the "practical, substantive application" of the compliance measures.[119] Phase two therefore serves as a "feedback loop"[120] where common issues and problems are identified.[121] In the third phase, the reviewing states provide recommendations to the reviewed state for achieving greater compliance with the relevant anti-corruption obligations.[122] This phase may take the form of a series of follow-up reports or the reviewing state may engage in "active dialogue" with its peers with the aim of reaching an agreement on the final report.[123] Additional meetings and site visits may be required in order to reconcile any differences in opinion.

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[113] Freiberg, above n 8.
[114] Robert Baldwin and Martin Cave, *Understanding Regulation: Theory Strategy and Practice* (Oxford University Press, 1999) 34.
[115] Arie Freiberg, 'Re-stocking the Regulatory Tool-kit' [2010] *Jerusalem Forum on Regulation and Governance* 1, 4.
[116] Kebonang 139.
[117] *UNCAC Implementation Report,* UN Doc CAC/COSP/2013/CRP.7.
[118] Tyler, above n 97, 152.
[119] Tyler, above n 97, 152.
[120] Ibid.
[121] *UNCAC Implementation Report,* UN Doc CAC/COSP/2013/CRP.7.
[122] Jan Richter and Gretta Fenner, 'Guidance Note: UNCAC Self-assessments, Going Beyond the Minimum' (Note, United Nations Development Programme, October 2010) 9 ('*UNCAC Guidance Note*').
[123] Dimitri Vlassis, 'Issues Concerning the Implementation of the United Nations Convention against Corruption' (Resource Materials Series No 86, United Nations Asia and Far East Institute, March 2012) 125.

As a review process, peer review has certain limitations. One is that peer review does not operate as a *de novo* review process. [124] Reviewing states do not undertake an examination of the problem of corruption within the target jurisdiction to see if it conforms to international assessments. Rather, the process is to "certify" the state's response to corruption against the criteria and standards that form part of the review process.[125] Similarly, the purpose of expert visits under UNCAC or the OECD Anti-bribery Convention is to substantiate the claims made by the reviewed countries in their initial report and to evaluate these responses in practice.[126] Whilst the experts will "review the country's effectiveness in enforcing the laws" and identify weaknesses that the laws expose,[127] they will not necessarily offer new solutions. This is an inherent limitation of peer review as a review process, the review outcome is dictated by the criteria set. As such, the peer review process performs an evaluative, verification and authentication function that validates the reviewed state's legislative responses, rather than attempting to solve any of the deeper problems that might exist. Understanding this inherent limitation in peer review's design is important as it affirms the process as an informational based review tool.

Other limitations include the lack of direct sanctions for non-compliance (discussed further below) and the specific scope of the review, which is limited by the terms of the framework convention.

PART THREE: PEER REVIEW IN PRACTICE

The complexities of the review process and the time required for indirect compliance pressures to operate (for example, peer pressure and reputational sanctions) means the process of change under peer review can be slow. It can take time for changes to domestic law to occur, and even longer for enforcement to eventuate. In addition, the time between review cycles varies. The UNCAC peer review for example is undertaken in five-year cycles, and each cycle only reviews two chapters of the Convention. Thus, the first review cycle in 2010 only assessed

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[124] David A Kronick, 'Peer Review in 18th-Century Scientific Journalism' (1990) 263 *Journal of the American Medical Association* 1321, 1321.
[125] Sheila Jasanoff, *The Fifth Branch: Science Advisors as Policymakers* (Harvard University Press, 1998) 241.
[126] OECD Secretariat, *The OECD Anti-Bribery Convention and the Working Group on Bribery*, OECD < http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/Anti-Bribery_Convention_and_Working_Group_Brief_ENG.pdf>.
[127] Abhay Nadipuram, 'Is the OECD the Answer? It's Only Part of the Solution' (2013) 38 *The Journal of Corporation Law* 635, 643.

states' compliance with chapter III (criminalization and law enforcement) and chapter IV (international cooperation), with the subsequent two chapters, chapter II (preventive measures) and chapter V (asset recovery) reviewed in cycles starting 2015. [128] In contrast, reviews under the OECD Anti-bribery convention

Some of the fiercest criticisms of the peer review process however relate to its lack of direct enforcement mechanisms.[129] This has been described as a "glaring deficiency"[130] in the OECD Anti-bribery Convention's otherwise "gold-standard". [131] However, international anti-corruption conventions have gained significant momentum towards more comprehensive implementation in recent years.[132] The OECD Anti-Bribery Convention to date has promoted 29 nations to adopt significant anti-bribery laws. Together, these countries make up for the majority of the world's economic activity. In addition, there have been four new signatories to the convention, with ten state parties been categorised as having moderate levels of enforcement. The UNCAC peer review process has also resulted in significant anti-corruption innovations, including co-operation between regulators and mutual prosecutions. As such, the soft pressure for compliance appear to be working, at least within the international anti-corruption context. The fifth session of the UNCAC Conference of State Parties in 2013 specifically addressed the "state of implementation" of the convention by forty-four state parties.[133] By aggregating the peer review reports of these countries, it was clear that many states had made "significant commitments" towards implementing many of the requirements including Articles 15 and 16 (dealing with the criminalization of bribery).[134]

By early 2017, all of the 41 OECD member states were participating in the peer review process.[135] The OECD Anti-bribery peer review monitoring process is slated to continue until at least 2024.[136]

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[128] Vlassis, above n 123, 126.
[129] Kebonang 163.
[130] Andrew Tyler, 'Enforcing Enforcement: Is the OECD Anti-Bribery Convention's Peer Review Effective? [notes]' (2011) 43 *The George Washington International Law Review* 137, 167,
[131] page 63, International Regulatory Co-operation and International Organisations: The Cases of the OECD and IMO (2014).
[132] Deirk Hanschel, 'The Enforcement Authority of International Institutions' in Armin Von Bogdandy et al (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010) 843, 844.
[133] *UNCAC Implementation Report,* UN Doc CAC/COSP/2013/CRP.7.
[134] Ibid 3.
[135] Around 2000 means initiating the review from 1999-2002. See Appendix 1.
[136] Monitering Schedule 2016-2024, OECD

The importance of peer pressure

Compliance does appear to be increasing through a range of indirect means such as persuasion, incentives and disincentives.[137] Underlying all of these is peer pressure. The international anti-corruption framework is premised upon a cooperative model. As Tyler argues, once a critical mass of countries complying with the conventions is reached, peer review carries the potential to drastically drive the last of the remaining states to implementation of their obligations.[138]

One key factor driving peer pressure is that under both the UNCAC and the OECD Anti-bribery convention, the review procedure is conducted by at least one neighbouring state of the reviewed country.[139] This results in greater pressure on that country to increase their compliance and to remedy any inadequacies highlighted through the review process.[140] It can also increase the commitment of reviewing countries that are acting against corruption, as they have an economic interest in pressuring other countries in their region to operate in a corruption-free manner so their businesses are not at a disadvantage when operating overseas.[141] This is because combating corruption is a prisoner's dilemma type situation.[142] The more comprehensive a state's national anti-corruption legislation is, the greater its economic incentive to pressure non-compliant countries and trading partners to adopt a comparative level of anti-corruption drive. Conversely, and by the same logic, peer pressure may also work in the opposite way if a large number of countries within a region are not adhering to anti-corruption measures. In this context there may be disincentives for countries to enforce anti-corruption laws due to the loss of competitive advantage for their businesses that are operating overseas.

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[137] Deirk Hanschel, 'The Enforcement Authority of International Institutions' in Armin Von Bogdandy et al (eds), *The Exercise of Public Authority by International Institutions* (Springer, 2010) 843, 844.

[138] Andrew Tyler, 'Enforcing Enforcement: Is the OECD Anti-Bribery Convention's Peer Review Effective? [notes]' (2011) 43 *The George Washington International Law Review* 137, 169.

[139] *Doha Resolution*, Res 3/1, 3rd sess, UN Doc CAC/COSP/2009/15, ch IV cl 1.19.

[140] See, e.g., John Macrae, *Underdevelopment and the Economics of Corruption: A Game Theory Approach,* World Development, 10(8), 677, (1982).

[141] See, e.g. Steven Salbu, 'Bribery in the Global Market: A Critical Analysis of the Foreign Corrupt Practices Act' (1997) 54 *Washington & Lee Law Review* 229 for some general criticisms of the FCPA. For resistance on similar grounds such as in Australia due to the OECD convention, see JSCT, OECD Convention on Combating Bribery and Draft Implementing Legislation, (June 1998, 16th Report).

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In addition, due to anti-corruption peer review's reliance on soft-enforcement, it is more vulnerable to external factors which affect a countries ability to effectively translate recommendations for change into action. These external factors can include political instability,[143] technical difficulties and resource issues.[144] For example, a major issue affecting the APRM is sensitivities created by the involvement of "Participating Heads of state and Government". [145] This means that states are reluctant to criticise and speak out on the shortcomings of its neighbours with the result that "African leaders lack the moral authority to keep one another in check." [146] Other factors can include technical challenges in implementation due to the "formulation of criminalization provisions… [and] the incorporation of particular elements in complex procedural structures."[147] On a more rudimentary level, even translation issues have hindered some domestic efforts at legislative implementation. [148] In such cases, it is important to view the peer review process as one of "an evolving process of legislative change."[149]

One of the most important issues driving compliance is whether the final peer review reports are publicised. As Brunelle-Quraishi notes, transparency and public scrutiny are indispensable for any governance system that wants to respect democracy and the rule of law.[150] Publically available reviews carry reputational sanctions. It is well established that reputation affects state behaviour and therefore state compliance.[151] Burgstaller notes that reputational sanctions act as a "motivator"[152] to influence states towards compliance. This is because a state's reputation has value including increasing the willingness for future cooperation from other states.[153] Thus,

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[143] Richard Damania, Per G Fredriksson and Muthukumara Mani, 'Persistence of Corruption and Regulatory Compliance Failures: Theory and Evidence' (Working Paper, International Monetary Fund, September 2003).
[144] Eduard Jordaan, 'Grist for the Sceptic's Mill: Rwanda and the African Peer Review Mechanism' (2007) 25 *Journal of Contemporary African Studies* 331.
[145] Ravi Kanbur, 'The African Peer Review Mechanism (APRM): An Assessment of Concept and Design' (2004) 31 *South African Journal of Political Studies* 157, 160.
[146] Jonas, above n 446.
[147] *state of Implementation of the United Nations Convention against Corruption: Criminalization, Law Enforcement and International Cooperation*, 5th sess, UN Doc CAC/COSP/2013/CRP.7 (25 November 2013) 132 ('*UNCAC Implementation Report*').
[148] Ibid.
[149] Ibid 132. (??? – not ibid) [*UNCAC Implementation Report,* UN Doc CAC/COSP/2013/CRP.7.]
[150] Ophelie Brunelle-Quraishi, 'Assessing The Relevancy and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis' (2011) 2 *Notre Dame Journal Of International and Comparative Law* 101, 138
[151] Markus Burgstaller, 'Amenities and Pitfalls of a Reputational Theory of Compliance with International Law' (2007) 75 *Nordic Journal of International Law* 39, 69.
[152] Ibid.
[153] Ibid.

whenever a state fails on a commitment, it "compromises … its reputation as a reliable partner."[154]

Risk of regulatory ritualism

In spite of peer review's ability to drive change through peer pressure, a limitation lies in the process' risk of regulatory ritualism. Regulatory ritualism is defined as the "acceptance of institutionalized means for securing regulatory goals, while losing all focus on achieving the goals or outcomes themselves."[155] In the context of human rights and the Universal Periodic Review mechanism (UPR), ritualism manifests itself in a state's emphasis on "participation [in]…reports and meetings"[156] whilst not "alter[ing]…their commitment to human rights standards in day-to-day governance." [157] Practically, there is a focus upon "empty ceremony",[158] the recognition of "paper rights" as opposed to the "actual realisation" of practical rights.[159] In anti-corruption peer review, the risk of regulatory ritualism is also present. It has been suggested that for human rights, some cultures are "inhospitable to ideas of human rights and that [they] are at a primitive stage in developing human rights ideas."[160] Similarly, corruption is also a cultural issue which requires a corresponding behavioural and mindset change. In some eastern nations, a gift-giving culture together with the centuries old practice of generous hospitability can make corrupt behaviour resilient to change. Similarly, when the OECD Anti-Bribery Convention was in its first stages of negotiations, France and Germany still treated bribes as tax deductable expenses.[161] As such, cultural factors make corruption an issue especially sensitive to the risk of ritualism.

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[154] George Downes and Michael Jones, 'Reputation, Compliance and International Law' (2002) 31 *Journal of Legal Studies* 95, 100.

[155] John Braithwaite, Toni Makkai and Valerie Braithwaite, *Regulating Aged Care: Ritualism and the New Pyramid* (Edward Elgar, 2007) 7.

[156] Charlesworth and Larkin (eds), above n 10.

[157] Ryan Goodman and Derek Jinks, 'International Law and state Socialization: Conceptual, Empirical, and Normative Challenges' (2005) 54 *Duke Law Journal* 983, 994; See, also, Hilary Charlesworth, 'Swimming to Cambodia: Justice and Ritual in Human Rights after Conflict' (2010) 29 *Australian Yearbook of International Law* 1.

[158] Walter Kalin, 'Ritual and Ritualism at the Universal Periodic Review: a Preliminary Appraisal' in Charlesworth and Larkin (eds), above n 25, 28.

[159] Jeff Corntassel, 'Partnership in Action? Indigenous Political Mobilization and Co-optation during the First UN Indigenous Decade (1995-2004)' (2007) 29 *Human Rights Quarterly* 137, 162.

[160] *Charlesworth, Swimming to Cambodia, Justice and ritual in human rights after conflict, AYIL, page 11 citing C Hughes, 'Human Rights Out of Context (or, Translating the Universal Declaration into Khmer)' in White and Klaasen, B Kondoch, 'Human Rights Law and UN Peace Operations in Post-Conflict Situations' in N D White and D Klaasen (eds), The UnitedNations, Human Rights and Post-ConflictSituations(2005) 19, 200.*

[161] Barbara Crutchfield George, Kathleen A. Lacey, & Jutta Birmele, *The 1998 OECD Convention: An Impetusfor Worldwide Changes in Attitudes Toward Corruption in Business Transactions, 37 American Business Law*

The effect of ritualism is that it robs peer review of its practical effectiveness, whilst allowing states to remain engaged with the process. The UNCAC self-assessment questionnaire provides a useful illustration. It is a very formalistic and procedural process. For the reviewing state, it is largely an administrative exercise. There is no immediate effect on existing domestic law. The questionnaire requires the reviewed country to self-access their domestic response in targeting corruption. Country responses average approximately 250 to 300 pages, [162] in which corresponding domestic legislation is quoted verbatim.[163] Assuming this effect flows through the rest of the process, what ultimately results is an "implementation gap", [164] what Charlesworth calls a "distorted account of reality,"[165] whereby states end up throwing in everything but the kitchen sink at their self-assessment reports without a consideration of their practical effects. For example, the APRM has been described as a "beauty contest, there to appease donors for desperately needed funds"[166] and a "cosmetic exercise without effect in the real world of policy and decision-making."[167] Ultimately, ritualism in the process derives it of its effectiveness, it allows states to engage with peer review while bringing their domestic laws "into conformity with regulation… [with] little effect on day-to-day-lives."[168]

Broader benefits of peer review

Despite its limitations, the peer review process carries broader benefits. It drives its agenda through raising public awareness and facilitating mutual learning. These ancillary effects arguably make peer review a powerful and innovative regulatory mechanism.

It is well established that greater inclusion of participants instils a sense of ownership or support for the particular international mechanism.[169] All anti-corruption peer reviews are open to

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Journal 485, 496 (2000); PLENARY KEYNOTE: A CONVERSATION WITH ANGEL GURRIA, Am. Soc'y Int'l L. Proc., 477, 479

[162] Vlassis, above n 123, 124.

[163] See, eg, UNODC, 'Self-Assessment Report: Chapter 3 – Criminalisation and Law Enforcement and Chapter 4 – International Cooperation: Australia' (Report, United Nations Office on Drugs and Crime) 292.

[164] Philippa Webb, 'The United Nations Convention Against Corruption: Global Achievement or Missed Opportunity?' (2005) 8(1) *Journal of International Economic Law* 191, 227.

[165] Charlesworth, above n 1.

[166] Chris Landsberg, 'The African Peer Review Mechanism' (2012) 43 *Africa Insight* 104, 116.

[167] Bronwen Manby, 'Was the APRM Process in Kenya a Waste of Time? Lessons that Should be Learned for the Future' (Document, Open Society Institute, April 2008) 3.

[168] Carol A Heimer, 'Performing Regulation: Transcending Regulatory Ritualism in HIV Clinics' (2012) 46 *Law and Society Review* 853, 854.

[169] Basic preconditions for anti-corruption strategies, *Ali Hajigholam Saryazdi.*

public consultation through various stakeholders. The OECD Anti-bribery and UNCAC reviews both allow for and encourage the "material participation by both private sector and civil society."[170] Past reports reveal participation from the financial sector, trade associations, multinational enterprises, the accounting profession as well as traditional stakeholders such as civil society groups, international organisations and the media.[171] Similarly, the APRM's National Governing Council seeks consultation from academics, the private sector as well as the public sector in the country review process. Allowing the broader public to participate increases the level of "goodwill" and adds legitimacy, gained from making the review process as "open and transparent as possible."[172]

Peer review also carries benefits through the publication of review reports and their effect on the public. The APRM adopts a ranking system of each state relative to neighbouring states. This increases the level of public interaction and media coverage, as well as invoking a sense of nationalistic pride for the well-performing states whilst shaming those that consistently underperform. The OECD Anti-Bribery Convention reports are made available online.[173] The UNCAC peer review reports are confidential and this lack of transparency has been criticised as a major limitation.[174] Indeed, an increasing proportion of countries are recognising this lack of transparency and consenting to publication.[175] Additionally, whenever there is a significant lack of progress in a country, the review administrator may seek further engagement with the public through press releases and public statements.[176] In practice, statements by the OECD working group on a country's progress has often generated significant media attention. This is especially so where there already exists a "rich domain of [domestic] public policy".[177] Lastly, peer review benefits mutual learning between states. During the evaluative and monitoring

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[170] Mark Pieth, Lucinda Loaw and Nicola Bonucci, *The OECD Convention on Bribery: A Commentary* (Cambridge University Press, 2007) 31.
[171] OECD Working Group on Bribery, 'Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Poland' (Report, OECD, June 2013) 62.
[172] Herbert and Gruzd, above n 23.
[173] Available from <http://www.oecd.org/investment/countryreportsontheimplementationoftheoecdanti-briberyconvention.htm>.
[174] *Doha Resolution*, *Res* 3/1, 3rd sess, UN Doc CAC/COSP/2009/15, 10; Ophelie Brunelle-Quraishi, 'Assessing The Relevancy and Efficacy of the United Nations Convention against Corruption: A Comparative Analysis' (2011) 2 *Notre Dame Journal Of International and Comparative Law* 101, 138.
[175] Gillian Dell and Marie Terracol, 'Using the UN Convention Against Corruption to Advance Anti-Corruption Efforts: A Guide' (Guide, Transparency International, 2004) 28.
[176] OECD Working Group on Bribery, *Argentina seriously non-compliant with key articles of Anti-Bribery Convention, says OECD* (18 December 2014) OECD < http://www.oecd.org/newsroom/argentina-seriously-non-compliant-with-key-articles-of-anti-bribery-convention.htm>.
[177] Ravi Kanbur, 'The African Peer Review Mechanism (APRM): An Assessment of Concept and Design' (2004) 31 *South African Journal of Political Studies* 157, 162.

phases, any inadequacies in the country's laws or regulations are likely to be identified between the reviewing parties. Peer review provides a forum whereby "policies can be explained and discussed, information sought and concerns expressed."[178] For example, the implementation of domestic anti-corruption laws and the rate of actual prosecutions will vary depending on how each state addresses corruption under limited prosecutorial resources. The APRM expressly recognises the "sharing of experiences and reinforcement of successful and best practice[s]".[179] Under the UNCAC reviews, the reviewee state is usually from similar legal systems,[180] thus allowing for the "develop[ment] of responses…appropriate for local country contexts."

In addition to between states, mutual learning also extends to subsequent cycles. As each reviewed states becomes the reviewer, it brings on the various successes and failures of implementation in its own country.[181] This effect is compounded in subsequent reviewing cycles and consequently, participants become more informed through each cycle. Further along the track, lessons learnt are then incorporated into subsequent working group conferences that extend even across different conventions. For example, the recent UNCAC CoSP on the topic of settlements in transnational bribery and the recovery of stolen assets draws upon the 395 consolidated cases of settlement in foreign bribery offences from the OECD anti-corruption peer reviews.[182] Another way through which the peer review process facilitates broader mutual learning is by consolidating the knowledge from all review countries within a review cycle into a set of broader standards or recommendations to be adopted by the secretariat. For example, the results of the OECD's anti-corruption peer review process is acknowledged to have directly contributed to the *Good Practice Guidance on Internal Controls, Ethics and Compliance*.[183] The cross-collaboration of information transfer from peer review thus results in the dissemination of standards and recommendations arising from the shared learning of the overall review process.

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[178] Shanker Singham, *A General Theory of Trade and Competition: Trade Liberalisation and Competitive Markets* (Cameron May, 2007) 68.
[179] *APRM Base Document* para 3.
[180] *Doha Resolution*, UN Doc CAC/COSP/2009/15, 8; *UNCAC Guidance Note*.
[181] Ibid 66.
[182] Settlements and other alternative mechanisms in transnational bribery cases and their implications for the recovery and return of stolen assets, page 5.
[183] Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (Annex 2) (26 November 2009) (OECD)

Lastly, the potential for learning extends the review process. For many African nations, the "process of benchmarking," the "use of objective criteria and quantitative indicators" is conceptually new.[184] Peer review provides a means to learn not only *from* the process, but also *of* the process. For example, when certain African nations had "limited access to information on APRM"[185] the United Nations Economic Commission for Africa (an official technical partner of the APRM) have set forth informational guidelines on the process.[186] Similarly, the UNCAC Technical Guidelines arose out of the efforts of two group meetings of experts involved with the UNCAC peer review process.[187]

CONCLUSION

It is clear that the global anti-corruption agenda relies upon a concerted effort by all nations. International conventions such as the UNCAC and the OECD Anti-bribery convention are currently at the forefront of global efforts. Peer review serves as the primary monitoring and compliance mechanism under such instruments. Peer review is an undeniably complex regulatory mechanism. Its theoretical basis is underpinned by multi-faceted regulatory concepts and its effectiveness is not well understood, largely due to a lack of research into its effects. All this has contributed to it being described as "notoriously elusive"[188] in its characterisation.

What we have set out to demonstrate is that the peer review process is capable of definition. Chapter one established that peer review arises in two contexts; under framework conventions or international body. It further demonstrated that the process has distinct and identifiable procedural elements. Peer review is effective in international law due to the consensual nature of its formation process. Chapter two located anti-corruption peer review in the regulatory literature as a meta-regulatory process. It operates as an informational-based regulatory tool with verification and authentication functions. Lastly, chapter three examined anti-corruption peer review's practical effects. In particular, it demonstrated the means by which the peer

[184] Chukwumerijet, above n, 75 citing Kempe Hope, 'Toward Good Governance and Sustainable Development: The African Peer Review Mechanism' (2005) 18(2) *Governance* 283, 305.
[185] The Role of Parliament in APRM Information on how parliamentarians can participate in APRM (2011), page 1.
[186] Ibid.
[187] Dimitri Vlassis et al, 'Technical Guide to the United Nations Convention Against Corruption' (Guide, United Nations Office on Drugs and Crime, 2009) iii.
[188] Jonas, above n, 429.

review process is able to drive domestic anti-corruption legislative and regulatory change. It identified the broader benefits of peer review; that of mutual learning and the raising of public awareness.

Overall, this article has demonstrated that peer review is a powerful and effective regulatory mechanism in the fight against international corruption. Despite a lack of formal compliance or enforcement measures, it remains an authoritative process and therefore offers a compelling alternative to hard law. It is unique in the way in which it engages states in their anti-corruption efforts, its ability to drive consensus and cooperation. Its capacity for state discretion in its operation allows it to regulate in spite of corruption's cultural and idiosyncratic hurdles. Despite all this, the process is without its limitations. It has been criticised for its formalistic nature and potential for regulatory ritualism. Nonetheless, peer review can be viewed as a qualified success in influencing states to come together and effectively tackle the problem of corruption in a holistic way. As of 2017, most of the key review processes are in their early to mid-life stages. In coming years, the impact of anti-corruption peer review will undoubtedly be more widely appreciated and the results of that process made clearer. For now, the fight against corruption continues and part of that fight requires the accurate monitoring of state implementation. Regulatory peer review fulfils this function, in a way that no other comparative mechanism comes close to.