

Combating corruption the soft way

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Valorisation addendum

INTRODUCTION

Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life, and allows organised crime, terrorism and other threats to human security to flourish.

Kofi Annan (2003)

This statement by former UN Secretary-General Kofi Annan at the adoption ceremony of the UNCAC underscores the need for international, collective action against corruption. Often blamed for many of today's socio-economic problems, corruption is extremely hard to fight. First of all, it is a rather hidden crime; often, both the bribe-payer and bribe-taker have an incentive to engage in corrupt activity and, thus, have few reasons to report to the authorities. Second, corruption bears many transnational implications. For instance, for asset recovery or investigations into foreign bribery cases, international coordination among different jurisdictions is necessary. Third, even though anticorruption has developed into a global norm, the way it is defined has many cultural and normative connotations attached to it (e.g. Johnston, 2005). What is perceived as an obvious case of corruption in some cultures might be viewed completely differently in other cultural contexts. This makes it difficult to take collective action at the international level.

As outlined in Chapter 1 of this dissertation, the findings of this study do not answer the question of how to fight corruption more effectively. They do, however, yield important insights into the instruments that are typically used to monitor states' anticorruption performance and compliance with their anticorruption legal obligations: peer reviews amongst states. This study's findings have advanced our understanding of the factors that are likely to affect the authority of peer reviews. If we are to improve global compliance with international anticorruption (and other) norms, such insights into the authority of peer reviews are crucial. Thus, the societal significance of this study can be differentiated along two lines: its relevance for peer review as a monitoring instrument and, though more indirectly, for the global fight against corruption. The sections that follow reflect upon these two lines and subsequently spell out several policy recommendations. The chapter concludes with discussing the actors to which the findings of this study might be most relevant and useful and elaborates on the efforts that have been made to reach out to these audiences.

PEER REVIEW AS A MONITORING INSTRUMENT

This dissertation formed part of a five-year NWO-funded research project on the authority of peer reviews amongst states: *No Carrots, No Sticks – How do Peer Reviews among*

States Develop Authority in Global Governance? In this project, the findings on the authority of the three peer reviews selected as case studies for the dissertation are compared to peer reviews in three other policy fields (human rights, macro-economic governance, and sustainable development) and in four international organisations (the OECD, the WTO, the UN, and the Council of Europe). The aim of the project is to shed light on the organizational-, institutional-, and policy-specific conditions under which peer reviews develop authority.

The pertinence of research on peer review is underscored by the widespread use of peer reviews (as evidenced by the number of IOs employing the instrument outlined above) and the costs of this instrument. Considerable financial and human resources are invested in peer reviews; for instance, the costs of the UNCAC peer review total approximately \$3.8 million, annually (United Nations 2015c). Additionally, national administrations incur significant financial and administrative costs to coordinate their own review and to attend and prepare for plenary sessions. Consequently, the questions emerge of whether this money is well spent and whether peer review has developed into a meaningful policy instrument. Peer review, as a non-binding monitoring instrument, might be easier to agree upon than more binding forms of agreement, which explains its widespread use. However, this of course does not automatically render the instrument meaningful.

The findings of this study show that, when appropriately devised and carried out, peer reviews can bear authority. Several institutional design and organisational factors appear to play a role in the formation of authority and hence can be taken into consideration when devising a new peer review or improving existing ones. These factors are discussed in further detail in the section titled 'policy implications' below. The dissertation's findings also bear relevance in light of recent attempts to expand the use of peer review, such as to monitor states' implementation of the UN Treaty on Organized Crime (UNTOC), but also to revise existing peer reviews. A few years ago, the OECD, for instance, issued calls for public comments to solicit views on how to organise the WGB's Phase 4 evaluations. The public, civil society, the private sector, and other international organisations were asked to provide input on what they consider the most pertinent areas to review, on the steps that could be taken in case of continued noncompliance with the Anti-Bribery Convention, and on how to improve the visibility of the peer review, amongst others (OECD, 2014a).

THE GLOBAL FIGHT AGAINST CORRUPTION

The past decade has witnessed a rapid expansion of anticorruption conventions and instruments on the global level. In the absence of an international oversight body that can enforce implementation of these conventions, peer reviews are amongst the few options

to monitor states' compliance and to motivate them to take action. Additionally, the reports produced by means of peer review provide one of the main sources of information on states' anticorruption activities. The EU, for instance, uses the GRECO evaluation reports to assess states' eligibility to join the EU. Therefore, already just for their presumed value as a source of information on states' anticorruption efforts, research into the peer reviews employed in this field is highly relevant.

It is, however, important to mention that the link between an authoritative peer review and reduced corruption levels in member states (or improved anticorruption performance, for that matter) is extremely difficult to establish. Even if peer reviews are largely authoritative and manage to induce states to implement their international anticorruption commitments, it is not clear whether the implementation of these anticorruption norms also has the intended effect of reducing corruption. The suggested legal reform might not suffice to effectively cut down on corruption. Hence, this research into the authority held by peer reviews only represents one piece of a larger, complex puzzle concerning the battle against corruption. To make any claims about the contribution of peer reviews to states' anticorruption performance (i.e. the effectiveness of peer reviews to curtail corruption), several other aspects need clarification. For instance, *what is the link between peer review authority and member states' compliance with international anticorruption norms?* And, *how does member states' compliance with international norms relate to their effectiveness in curbing corruption?* While this inquiry has only focused on the authority of the instruments used to monitor compliance, it nevertheless marks an important step in anticorruption research. As mentioned before, almost all multilateral anticorruption conventions and legal instruments are monitored by the instrument of peer review. This study has shown that the instrument of peer review can bear authority in the global fight against corruption, but that the degree of authority is contingent on several factors, which can subsequently be taken into consideration when devising a peer review.

POLICY RECOMMENDATIONS

At a time when the usefulness of peer review is being debated and aspirations to replicate the instrument in other organisations and policy areas surface, the following subsections discuss the broader implications of the study's findings for policy-making purposes. It starts off with some general reflections and recommendations on issues to consider when devising a peer review. Subsequently, it sets forth recommendations for the UNCAC peer review. The decision to focus on the UNCAC peer review specifically is motivated by two reasons. First, this study found that this peer review bears the least authority, especially when compared to the GRECO. Second, two issues are presently debated by the participants in this peer review and this section formulates recommendations to address

these issues: a follow-up monitoring instrument for this peer review and the transparency of the Implementation Review Group to the broader public.

General reflections and recommendations on peer review as a monitoring instrument

As it is often unfeasible to reach an agreement on more binding monitoring arrangements, peer reviews have developed into popular review instruments. One of the questions policy-makers face is how to develop a peer review that is able to exert some pressure on its member states and is more than just a ‘talking shop’, whilst maintaining its non-binding character. The WGB as well as the GRECO are good examples of peer reviews that are able to do this. Though the peer reviews do not have any enforcement power, states feel compelled to implement reform, especially in the WGB. Therefore, if the aim is to devise a peer review that yields a sufficient level of authority to put pressure on member states to implement reform (without forcing them), it is advisable to establish a peer review that has the following institutional design features in place: (1) country evaluation reports are discussed in plenary sessions, (2) these plenary sessions are closed off from the public gaze, and (3) states’ implementation of review recommendations is monitored (i.e. there is a system in place for follow-up monitoring). In addition, the authority of the peer review may be enhanced by consulting with a variety of stakeholders and by involving mostly national anticorruption experts as compared to diplomats.

In addition to several institutional design features that can be considered when devising a peer review, the findings of this study underscore the importance of equality amongst the peers. In the WGB, several states are felt to have a disproportional influence on the dynamics in the discussions, though this need not necessarily be a bad thing. This study showed that the advocacy role assumed by the United States (US) is an important reason for why states feel the need to implement recommendations. Still, there are several options that could be considered if the ambition is to enhance the equality of treatment in the peer review. These options include a limit on the number of delegates that states can send to the peer review plenary sessions (e.g., a maximum of two delegates per country) as well as to leave more time in meetings to go through the evaluation reports paragraph by paragraph. Several delegates, particularly from smaller administrations, indicated that they struggle to prepare in detail for the various country reports discussed in these meetings and, hence, have more difficulties participating in the debate. Large states, such as the US, can send a larger number of delegates, each of which prepares in detail for a country report and, therefore, can have more impact on the discussions in plenary sessions. This might foster inequality, as during these plenary sessions the provisional country reports are discussed and recommendations are subsequently formulated.

Finally, care should be taken that the instrument of peer review does not fall victim to its own success. Though peer review might generally be an appreciated instrument, an

increase in monitoring fatigue reported in this study suggests that each new peer review may pose a threat to the authority of existing ones. Several state delegates indicated that they perceive the peer review exercises as a burden on national administrations and had seemingly lost enthusiasm for the review exercises. This leads to a decreasing quality of responses to the self-assessment checklists and dwindling enthusiasm and engagement in the peer review. Though each time a new peer review is established it is stated explicitly that it should not duplicate existing efforts, but rather complement them, this is hard to realise in practice¹⁶⁶. As Christos Giakoumopoulos, Director of Monitoring, DG Human Rights, and Legal Affairs at the Council of Europe, asserts: ‘Avoiding duplication is very easy to declare and quite complex to achieve’ (2009, p. 27). More care should be taken to avoid an overlap in review exercises. The GRECO and the WGB, for instance, clearly touch upon different reviewing themes. However, the UNCAC peer review covers many—though not all—of the topics that are also under review by the MESICIC, the WGB, and the GRECO. When considering peer review as a monitoring instrument in a certain policy field, it is advisable to reflect on whether the instrument is already employed in this policy field and whether this new peer review would involve the same states (and target the same government departments and officials) as the existing peer reviews. If so, options should be explored to broaden the scope of existing monitoring arrangements and review a wider range of issues, rather than establish an entirely new peer review. Another possibility is to enlarge the membership of existing peer reviews, though care should be taken that this does not affect the practical conduct of the peer review exercises too much—for instance, opportunities to discuss individual country reports in detail during plenary sessions should not be compromised. As indicated by several interviewed officials, the size of the UNCAC peer review’s membership is deemed too large to allow for a systematic discussion of each member state’s evaluation report in plenary sessions.

Policy recommendations for the UNCAC peer review

Whilst conducting the interviews for this study, possible reforms related to the UNCAC peer review were regularly brought up: (1) the establishment of a system for follow-up monitoring, and (2) what to do in terms of the transparency of plenary sessions for the broader public. As these issues largely dominate the debate on how to proceed with the UNCAC peer review, this subsection reflects upon them in light of this study’s discussion on the authority of peer reviews.

As to the first area for reform, to enhance the authority of the UNCAC peer review, the establishment of a system for follow-up monitoring is recommended. The analyses in Chapters 5 and 6 showed that follow-up monitoring is very much appreciated in the WGB

¹⁶⁶ One of the guiding principles of the peer review of the UNCAC is that the mechanism shall: ‘Complement existing international and regional review mechanisms in order that the Conference may, as appropriate, cooperate with those mechanisms and avoid duplication of efforts’ (United Nations, 2011, p. 5).

and the GRECO, and that it enhances the authority of these instruments. Follow-up monitoring is understood as the monitoring of states' implementation of the recommendations made (rather than just the anticorruption legal instruments under review). It pushes states to act on these recommendations and avoids the possibility of backsliding on the policy agenda. Furthermore, follow-up monitoring is recognised to contribute to the fairness and consistency of the peer reviews, by providing an opportunity to return to the performance of states evaluated earlier in the review process. In the UNCAC peer review, there appears to be rather broad agreement that a system for follow-up monitoring would benefit the mechanism. However, state delegates are still debating how such a system would function. Considering their different sizes, the models of follow-up monitoring in the GRECO and the WGB cannot simply be exported to the UN context. In the UNCAC peer review, a full review of all member states' compliance with the whole convention takes approximately ten years. Clearly, this is too long to develop an effective system for follow-up monitoring; it makes rather little sense to monitor states' compliance with recommendations they received ten years earlier.

Reflecting upon these limitations, the following two design options could be considered for the UNCAC peer review: (1) written follow-up monitoring, and (2) oral follow-up monitoring. As to the first option, member states would be requested to provide a written follow-up to their peers on the efforts they have made to implement recommendations. To maintain the momentum of the peer review, about two years after the adoption of the report seems a reasonable time frame for this. Follow-up monitoring should not only be launched after all countries have completed their first review. The second option relates to oral follow-up, which is a less ambitious alternative to, or potential augmentation of, written follow-up monitoring. State delegates could be regularly requested to present their progress on the implementation of the review recommendations during the plenary sessions¹⁶⁷. It is true that states currently take the floor at UNCAC plenary sessions to report on their progress, but this is voluntary and often largely one-sided. In these presentations, states can in principle only focus on their achievements and ignore their shortcomings (which several interviewed officials in fact perceived to be the case). More critical question-and-answer sessions therefore seem crucial to ensure that the complete story is put on the table. One could think of the format of the OECD's *Tour de Table* in this regard as potentially a good model for the organisation of these oral follow-up sessions.

The second area for reform pertains to the transparency of the UNCAC peer review to the broader public, a highly sensitive issue. To reiterate, contrary to the GRECO and the WGB, the closed-door setting of the UNCAC peer review's plenary sessions has attracted a great deal of criticism, mostly from WEOG and GRULAC officials. This section sets forth two mutually exclusive recommendations that would address the question of

¹⁶⁷ This is different from a regular review cycle in the sense that states do not have to undergo another country visit and formal assessment by the reviewing team as regards their implementation of review recommendations.

transparency to make the UNCAC peer review more authoritative: (1) to make the peer review more open to the peers, *or* (2) to make it more open to the public. To substantiate these recommendations, this study showed that the WGB and the GRECO have attracted less criticism on their closed doors mostly because this institutional design feature is seen to serve an instrumental function in the peer review process; it stimulates open debate amongst technical experts on anticorruption and hence plays a role in fostering peer pressure. In the UNCAC peer review, in contrast, a considerable number of delegates consider this not to be the case. Notwithstanding the peer review's closed doors, there is much less of a free and frank exchange of views amongst state delegates on sensitive issues. To make the peer review more authoritative, discussing individual country reports in plenary represents one option to make the peer review more open to the peers. This gives states insight into other states' performance, provides opportunities for direct dialogue, and fosters horizontal accountability amongst the peers. This is also the case in the GRECO and the WGB—by enhancing the information exchange amongst the peers within plenary sessions, the closed doors of these sessions become easier to justify. If it is not possible to create more transparency for the peers, the peer review is recommended to increase its transparency for the broader public and hence advance possibilities for vertical accountability between states, their citizens, and civil society. One possibility, for instance, is to allow civil society and academics to attend these sessions. Another possibility is to webcast these meetings. Increased transparency for the public might bolster the perceived legitimacy of the monitoring instrument—both internally and externally. Potential downsides related to this reform should however be acknowledged; for instance, increased transparency for the public might promote diplomatic posturing of state delegates in plenary sessions.

DISSEMINATION ACTIVITIES

The key audiences of this study include policy-makers at the international and the national level, more specifically, the officials who are directly involved in the peer reviews as Secretariat members, diplomats, member state delegates, or evaluators. In addition, the findings of the study might also be relevant for the international organisations organising these peer reviews and member states participating in them. Many officials who were invited to participate in the study (through interviews or by filling out the survey) are also well-placed to advance and implement policy reform. Hence, various events and outreach activities were organized to raise awareness about the research project and to present the findings of the study. These events include a presentation at the Dutch Ministry of the Interior (October 2015), awareness-raising activities at the Council of Europe on the margins of the 68th session of the GRECO (June 2015, together with Thomas Conzelmann), and a presentation and luncheon at the UN Human Rights Council in Geneva (June 2015, together with Valentina Carraro and Thomas Conzelmann). Various

other luncheons and outreach activities are scheduled to take place at the OECD in the second half of 2017.

In addition to the abovementioned activities, the larger research project operates its own website¹⁶⁸. The website provides information on the research project, the research team, and project publications. It also lists various events and conferences that are attended or organized by members of the research team and provides the contact details of the researchers. Leaflets were aimed at raising attention about the research project and the website. These leaflets were distributed at the international organisations hosting the peer reviews under study and were provided to interviewees.

¹⁶⁸ <http://fasos-research.nl/peer-reviews/>. Last accessed June 22, 2017.