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**Global Administrative Law as “Enabling Law”:
How to Monitor and Evaluate
Indicator-Based Performance
of Global Actors**

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Georgios Dimitropoulos^{*}

Abstract: The piece explores the relationship between indicators and their framework and identifies the evolution of a “global regulatory system for indicators”. This is a plural system and is part of a broader change in contemporary global governance and administration, which is also signified by the use of indicators. Drawing on examples from the IMF/EU adjustment programmes, the NEPAD African Peer Review Mechanism of the African Union and the evaluation of the EU Common Agricultural Policy by the OECD, it shows that authority in the global legal order is exercised in a non-hierarchical way. Against this background, the final aim of this paper is to show that the best way to monitor performance of rule-implementation based on indicators is the peer review system and other forms of horizontal monitoring.

Keywords: indicators, monitoring, evaluation, IMF, African Union, NEPAD, experimentalism, horizontal governance, peer review

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Table of contents

Introduction.....	5
1. Indicators in Global Administration	7
1.1. <i>ADMINISTRATION THROUGH INDICATORS</i>	7
1.1.1. <i>The Nature of the Administrative Intervention through indicators</i>	7
1.1.2. <i>Monitoring Implementation</i>	8
1.2. <i>GOVERNANCE SHIFTS</i>	9
1.2.1. <i>Lessons from Experimentalist Governance</i>	9
1.2.2. <i>Lessons from Domestic Administration</i>	11
1.2.3. <i>The Reaction of the Global Administration</i>	13
1.3 <i>INDICATORS IN GLOBAL ADMINISTRATIVE REGIMES</i>	14
1.3.1. <i>The IMF/EU Adjustment Programmes</i>	14
1.3.2. <i>The NEPAD African Peer Review Mechanism</i>	17
1.3.3. <i>The EU CAP and the OECD</i>	21
2. Indicators as “Enabling Law”	22
2.1. <i>THE INTERPLAY BETWEEN LAW AND INDICATORS</i>	22
2.1.1. <i>Law in Experimentalist Regimes and Administration</i>	23
2.1.2. <i>The Functions of Indicators in Global Administrative Law</i>	25
2.2. <i>THE LEGAL NATURE OF INDICATORS AND THE ROLE OF GLOBAL ADMINISTRATIVE LAW</i>	26
3. Towards Horizontal Monitoring of Indicators.....	28
3.1. <i>GOVERNANCE BY INDICATORS AS A FORM OF HORIZONTAL GOVERNANCE</i>	28
3.2. <i>HORIZONTAL MONITORING AND EVALUATION</i>	29
Conclusion	31

Introduction

According to a recent definition, “an indicator is a named collection of rank-ordered data that purports to represent the past or projected performance of different units. The data are generated through a process that simplifies raw data about a complex social phenomenon. The data, in this simplified and processed form, are capable of being used to compare particular units of analysis (such as countries, institutions, or corporations), synchronically or over time, and to evaluate their performance by reference to one or more standards”.¹ Briefly: Indicators are collections of processed information used for various purposes. The processed information represents at the same time a simplification of the data. This function is very important in a complex world and society, in which conditions of extreme uncertainty are prevalent. “An indicator provides a transition from ambiguity to certainty; from theory to fact; and from complex variation and context to truthful, comparable numbers”.² Due to the complexity-reducing function of indicators, they are being used as a technology of governance in the sense that they provide a more certain basis for governance decisions.³ In this context, they play a very important role in global governance, where complexity and uncertainty are even greater than in domestic settings. Indicators are responses to uncertainty in global governance since they can give a specific meaning to indeterminate treaty rules and make decision-making easier.

Based on these assumptions, this paper wants to contextualize indicators within the broader frame of global governance and Global Administrative Law (GAL). The first Section describes the role of indicators in contemporary global administration. Indicators are very commonly used in regimes that can be called “experimentalist regimes”. After having identified the role of indicators in experimentalist governance, the article goes on to support the findings with evidence from the practice of the administration and administrative law theory. It draws primarily on the so called “New Administrative Law Science” (*Neue Verwaltungsrechtswissenschaft*) that has been developed in Germany for the re-interpretation of several administrative phenomena, adopting at the same time a so-called “steering approach” to law.⁴ It, moreover, draws on case studies from three different regimes that use indicators to measure performance of their actors. The financial and structural adjustment programme implemented in Greece by the International Monetary Fund (IMF) and

¹ K. E. Davis/B. Kingsbury/S. E. Merry, “Indicators as a Technology of Global Governance”, 46 *Law and Society* 71, 73-74 (2012); see also M. Ravallion, “Mashup Indices of Development”, Policy Research Paper No. 5432, World Bank. Development Research Group/Director’s office (2010).

² S. E. Merry, “Measuring the World. Indicators, Human Rights, and Global Governance”, 52 *Current Anthropology* (2011) p. S83 (S88).

³ See S. E. Merry, “Measuring the World. Indicators, Human Rights, and Global Governance”, 52 *Current Anthropology* (2011) p. S83 (S85). On complexity of situations of decision-making see N. Luhmann, “Zur Komplexität von Entscheidungssituationen”, 15 *Soziale Systeme* (2009) p. 3.

⁴ See W. Kahl, “What is ‘New’ about the ‘New Administrative Law Science’ in Germany”, 16 *European Public Law* (2010) p. 105.

the European Union (EU) uses several indicators as conditions for loan disbursement, in order to make the results produced by the Greek government and administration measurable; secondly, a recently introduced governance mechanism in the context of the African Union, the so called NEPAD African Peer Review Mechanism, makes use of indicators, in order to measure progress in several aspects of governance in Africa; thirdly, the article briefly sketches out the review of the Common Agricultural Policy of the EU by the OECD.

On that basis, Section 2. introduces the idea of GAL as “enabling law”. A re-interpretation of GAL as enabling law in the global legal order opens the window to the interpretation of the legal nature of indicators and their function for the global administration. The understanding of GAL and indicators as enabling law, gives the possibility in the third Section to give an answer to the question of how to monitor and evaluate the performance of actors in global regimes, especially when indicators are adopted by this regime. This is performance monitoring and evaluation, which is different from traditional forms of review.

Overall, the article explores the relationship between indicators and their framework and identifies the evolution of a “global regulatory system for indicators”⁵. This is a plural system and is part of a broader change in contemporary global governance and administration, which is also signified by the use of indicators. Authority in the global legal order is being increasingly exercised in a horizontal way, through non-hierarchical means.⁶ Against this background, the final aim of this paper is to show that the best way to monitor performance of implementation of global rules based on indicators is the peer review system and other forms of horizontal monitoring.

⁵ S. Cassese/L. Casini, Public Regulation of Global Indicators, in K. Davis/A. Fisher/B. Kingsbury/S. E. Merry (ed.), *Governance by Indicators* (OUP, Oxford, 2012) p. 465 (473).

⁶ This understanding of authority is based on a sociological conception of governance in general and governance at the global level. In the past, there have been attempts to re-interpret public international law under the lens of sociology; see generally O. Diggelmann, *Anfänge der Völkerrechtssoziologie – Die Konzeptionen von Max Huber und Georges Scelle im Vergleich* (Schulthess, Zürich, 2000); O. Diggelmann, “The Aaland Case and the Sociological Approach to International Law”, 18 *European Journal of International Law* (2007) p. 135; for recent approaches see M. Hirsch, “The Sociology of International Economic Law: Sociological Analysis of the Regulation of Regional Agreements in the World Trading System”, 19 *European Journal of International Law* (2008) p. 277; S. Cho, “Beyond Rationality: A Sociological Construction of the World Trade Organization”, 52 *Virginia Journal of International Law* (2012) p. 321.

1. Indicators in Global Administration

1.1. *Administration through Indicators*

1.1.1. The Nature of the Administrative Intervention through indicators

The use of indicators is a prominent feature of contemporary governance; their production and use is increasing rapidly.⁷ Already before their introduction in global governance, indicators have been used in the domestic sphere and very widely in the corporate world.⁸ The production, promulgation, use and dissemination of indicators is part of a more general function that has been actively exercised by international organisations, namely that of information management. This is a very common and characteristic feature of international organisations and is linked to the historical evolution and the current needs of global governance.⁹

Information management, and thus governance through indicators, by international organisations has an apparent administrative nature. In the domestic administrative sphere, indicators are used in the effort to rationalise administration.¹⁰ The same applies to distributed administration of global administrative regulation.¹¹ Several treaty or other types of regimes provide for the use of indicators at the implementation stage of the rules of a global regime. These governance indicators are introduced in order to measure different aspects of good governance like economic and environmental performance, corruption, the rule of law or even governance itself.¹²

Administration through indicators takes several forms. Usually, it takes the form of governance “by information” or by persuasion.¹³ Similar forms of administration are familiar to GAL, for example in the field of production and use of technical standards by international organisations or in the field of private governance. Also in the later cases, the global administrative rules exert their influence through

⁷ K. E. Davis et al., *Indicators as a Technology of Global Governance*, IILJ Working Paper 2010/2 (GAL Series) p. 1.

⁸ S. E. Merry, “Measuring the World”, 52 *Current Anthropology* (2011) p. S83

⁹ See also B. Kingsbury, “Indicators and Governance by Information in the Law of the Future”, in M. Frishman/L. Kistemaker/S. Muller/S. Zouridis (eds.), *The Law of the Future and the Future of Law* (Torkel Opsahl, Oslo, 2011) p. 495 (503).

¹⁰ See also on the example of Colombian administrative law R. Urueña, “Internally Displaced Population in Colombia”, in K. Davis/A. Fisher/B. Kingsbury/S. E. Merry (ed.), *Governance by Indicators* (OUP, Oxford, 2012) p. 249 (277).

¹¹ Benedict Kingsbury/Nico Krisch/Richard B. Stewart, *The Emergence of Global Administrative Law*, 68 *Law and Contemporary Problems* (2005) p. 15 (21-22).

¹² N. K. Dutta, *Accountability in the Generation of Governance Indicators*, in K. Davis/A. Fisher/B. Kingsbury/S. E. Merry (ed.), *Governance by Indicators* (OUP, Oxford, 2012) p. 437 (438).

¹³ For the former see K. E. Davis et al., *Indicators as a Technology of Global Governance*, IILJ Working Paper 2010/2 (GAL Series) p. 20; B. Kingsbury, “Indicators and Governance by Information in the Law of the Future”, in M. Frishman/L. Kistemaker/S. Muller/S. Zouridis (eds.), *The Law of the Future and the Future of Law* (Torkel Opsahl, Oslo, 2011) p. 495 (504).

mechanisms of market, public or peer pressure¹⁴ or mechanisms of acculturation.¹⁵ Beyond these atypical forms of administration – that tend to become typical in global administration –, in other occasions, indicators are used as standards for the allocation of funds to countries and the disbursement of loans that are more typical forms of administration. In both cases, indicators are administrative interventions in their own right.¹⁶

1.1.2. Monitoring Implementation

With the gathering of data and their use in a global regime, the data mutates into an instrument of global administration and governance. Because of the primarily atypical nature of the intervention of governance by indicators, many of the recent contributions on indicators express serious concerns about this form of intervention. One principal objection to their use is that science is given prevalence over politics.¹⁷ Moreover, the use of indicators by public, international or private bodies for lending to developing countries on the basis of their performance may lead to the paradoxical situation that only those countries receive funding that have been performing well in the indicator-based assessment. On the other side, it is exactly the countries that are performing poorly that are in greater need of receiving funds and attracting investments. In other cases, different factors can lead to the choice of one indicator over the other for a particular assessment, independently of their relevance in the specific case.¹⁸ “Lack of measurement equivalence” of the evaluated units might be an additional problem.¹⁹ The use of administrative law is an obvious response in order to calm down these concerns.

One indicator relationship consists of at least two parties; the party producing or using the indicator and the other party being evaluated and compared by it.²⁰ Safeguarding principles can regulate both the production and the evaluation process.

¹⁴ See G. Dimitropoulos, *Zertifizierung und Akkreditierung im Internationalen Verwaltungsverbund*, 2012, pp. 232-236.

¹⁵ See R. Goodman/D. Jinks, “How to Influence States: Socialization and International Human Rights Law”, 54 *Duke Law Journal* (2004) p. 621; R. Goodman/D. Jinks, “International Law and State Socialization: Empirical, Conceptual, and Normative Challenges”, 54 *Duke Law Journal* (2005) p. 983.

¹⁶ K. E. Davis/B. Kingsbury, “Indicators as Interventions: Pitfalls and Prospects in Supporting Development Initiatives”. *A report prepared with support from the Rockefeller Foundation* (2011), p. 1 and *passim*; see also S. Cassese/L. Casini, Public Regulation of Global Indicators, in K. Davis/A. Fisher/B. Kingsbury/S. E. Merry (ed.), *Governance by Indicators* (OUP, Oxford, 2012) p. 465 (466-467).

¹⁷ See on the example of human rights A.J. Rosga/M. L. Satterthwaite, “The Trust in Indicators: Measuring Human Rights”, 27 *Berkeley Journal of International Law* (2009) p. 253 (311-312).

¹⁸ See A.J. Rosga/M. L. Satterthwaite, “The Trust in Indicators: Measuring Human Rights”, 27 *Berkeley Journal of International Law* (2009) p. 253 (308).

¹⁹ Jonathan Jackson et al., “Developing European Indicators of Trust in Justice”, 8 *European Journal of Criminology* (2011) p. 267 (281-282).

²⁰ See R. Urueña, “Internally Displaced Population in Colombia”, in K. Davis/A. Fisher/B. Kingsbury/S. E. Merry (ed.), *Governance by Indicators* (OUP, Oxford, 2012) p. 249 (249).

Administrative law regulates primarily the evaluation processes. An observed turn to the “audit society” is the sociological explanation for this mode of regulation.²¹ Indicators are embedded into the auditing practice of several regimes and are used in order to monitor implementation of the rules of global regimes by the second actor of the indicator relationship.²² In the human rights field, for example, “Committees” are introduced for the monitoring of implementation of the human rights treaties. This is an auditing process that runs primarily within the global or domestic administration.²³ As such, governance through indicators forms part of the surveillance function of GAL.²⁴

With the introduction of indicators at the implementation stage of a regime, monitoring takes the form of “performance assessment” or “evaluation”; this can be defined as an “assessment against a set of predetermined criteria of the economy, efficiency and effectiveness with which an organisation carries out a particular activity or range of activities. Organisations may be set regular targets on particular aspects of their performance – financial returns, efficiency, quality of services supplied, etc. – against which their performance is monitored and evaluated”²⁵. In this way, implementation is encouraged through enhanced responsibility of the actors and not enforced.

It is thus important for every regime to answer the “monitoring question”: Which means of monitoring are more effective for policy-implementation with the use of indicators? In the search for an answer to this question and before turning to the three case studies, the following subsection examines shifts and trends in contemporary governance and administration.

1.2. Governance Shifts

1.2.1. Lessons from Experimentalist Governance

Modern governance should enhance the quality of lives of governed in a quantifiable way. This is why indicators are broadly used in contemporary regimes.²⁶ The use of

²¹ M. Power, *The Audit Society* (OUP, Oxford, 1997).

²² A.J. Rosga/M. L. Satterthwaite, “The Trust in Indicators: Measuring Human Rights”, 27 *Berkeley Journal of International Law* (2009) p. 253 (256); J. V. Welling, “International Indicators and Economic, Social, and Cultural Rights”, 30 *Human Rights Quarterly* (2008) p. 933; B. Kingsbury, “Indicators and Governance by Information in the Law of the Future”, in M. Frishman/L. Kistemaker/S. Muller/S. Zouridis (eds.), *The Law of the Future and the Future of Law* (Torkel Opsahl, Oslo, 2011) p. 495 (502).

²³ There are examples of courts measuring compliance; see R. Urueña, “Internally Displaced Population in Colombia”, in K. Davis/A. Fisher/B. Kingsbury/S. E. Merry (ed.), *Governance by Indicators* (OUP, Oxford, 2012) p. 249 (*passim*).

²⁴ See Georgios Dimitropoulos, “Global Administrative Order”, 23 *European Review of Public Law* (2011) p. 433 (454-455).

²⁵ OECD, *Glossary of Statistical Terms* (OECD Publishing, Paris, 2007) p. 583.

²⁶ See R. O. Keohane, “Governance in a Partially Globalized World”, 95 *American Political Science Review* (2001) p. 1 (2).

indicators represents only one among many conditions of making governance better. Their adoption in governance can only have effects if they are embedded in governance settings that are capable of materialising the results and the knowledge condensed in the indicator.

Indicators are not the only response to uncertainty and complexity in global governance. As a response to these conditions, experimentalist regimes have emerged.²⁷ Experimentalist regimes can be found at the domestic, regional and global level of governance. The EU, for instance, makes broad use of experimentalist governance and indicators, especially in the field of the Open Method of Coordination (OMC).²⁸ At the global level, experimentalist regimes are proliferating in various fields from human rights treaties to global private governance regimes. At this level of governance, the proliferation of experimentalist structures is boosted by the need to find ways to implement the rules of the global regime without the existence of enforcement mechanisms.

In conditions of extreme uncertainty, neither the solution to a governance problem, nor the strategy to cope with it can be pre-defined.²⁹ Experimentalist-style regimes are designed in such a way that it suits the needs of contemporary governance. Governance by experiment proceeds in four steps:

1. The involved actors set collectively framework goals. Examples of such framework goals include “better government performance”, “good political governance”, “improving efficiency”, “good water quality”, “safe food”, an “adequate education”, and “sustainable forests”.
2. The goals are further elaborated and implemented by local actors. Local actors may be private actors such as firms or territorial authorities. In the GAL context, the local actors will usually be the states, but also decentralised units in the states.
3. In return of the autonomy of local implementation, the decentralised actors provide data including feedback on the goals and their implementation. Instruments of quantification of the results play a major role in this respect. Monitoring, very often takes the form of a peer review of the local units. The

²⁷ See C. F. Sabel/J. Zeitlin (eds.), *Experimentalist Governance in the European Union: Towards a New Architecture* (OUP, Oxford, 2010); G. de Búrca, “New Governance and Experimentalism: An Introduction”, *Wisconsin Law Review* (2010) 227; see also B. Kingsbury, “Indicators and Governance by Information in the Law of the Future”, in M. Frishman/L. Kistemaker/S. Muller/S. Zouridis (eds.), *The Law of the Future and the Future of Law* (Torkel Opsahl, Oslo, 2011) p. 495 (504). Strategic uncertainty is the basic background precondition of experimentalism; see W. H. Simon, “New Governance Anxieties: A Deweyan Response”, *Wisconsin Law Review* (2010) p. 727 (728-730).

²⁸ See G. de Búrca, “The Constitutional Challenge of New Governance in the European Union”, 28 *European Law Review* (2003) p. 814.

²⁹ C. F. Sabel/J. Zeitlin, “Experimentalism in Transnational Governance: Emergent Pathways and Diffusion Mechanisms”, Paper presented at the panel on “Global Governance in Transition”, Annual Conference of the International Studies Association, Montreal, March 16-19, 2011, at p. 7; see also C. L. Ford, “New Governance, Compliance, and Principles-Based Securities Regulation”, 45 *American Business Law Journal* (2008) p. 1.

major instrument for the monitoring of implementation performance of the decentralized actors is indicators.

4. Reflexivity of the regime, in the form of periodic revision of the goals in the light of knowledge gained, will also usually be an integral part of the system.

This approach responds to the widely acknowledged failures of command-and-control regulation in a turbulent and fast-moving world and is an immanent process of globalisation. For experimentalist governance, the broadest possible participation of the public, like citizens, NGOs and firms, in all stages of the experimentalist design is very important. Framing indicators in experimentalist terms is similar to the “learning by experience process” described by Sabino Cassese and Lorenzo Casini with reference to Oliver MacDonagh in framing the global indicators regime.³⁰ The reliance on local implementation with broad civil society participation and re-shaping of the goals on the basis of the insights of local experimentation operates as a learning process for the design of the indicators. Based on this learning and experience process, global regimes – and indicators – are shaped and re-shaped in a bottom-up way.³¹

1.2.2. Lessons from Domestic Administration

The move towards experimentalist forms of governance reflects also on the administration. The same needs that have shaped governance strategies at the global level of governance are partly also driving the design of domestic administration. Domestic administration is not isolated from the changing world that surrounds it; it is in communication with its environment in various ways. The reallocation and redistribution of public tasks between state, supra-state and societal actors, an effect of globalization, affects also the way domestic administration operates. It is impossible to regulate both society and public tasks today in a command-and-control way.³² For this reason, the state increasingly uses its administrative apparatus not in order to bring about mere interventions in society, but with the aim of creating free spaces for the actors.³³ Modern regulatory strategies of administration show an

³⁰ S. Cassese/L. Casini, Public Regulation of Global Indicators, in K. Davis/A. Fisher/B. Kingsbury/S. E. Merry (ed.), *Governance by Indicators* (OUP, Oxford, 2012) p. 465 (473-474).

³¹ See also R. C. Casiple, “Emerging Framework and Approach in Determining ESC Rights-Standards and Indicators: A Philippine Grassroots Experience”, *Article presented at the Second Global Forum on Human Development*, Rio de Janeiro, 9-11 October 2000 (<http://www.portal-stat.admin.ch/iaos2000/casiple_final_paper.doc>, visited on 9 May 2012).

³² See W. Hoffmann-Riem, “‘Wir stehen am Beginn eines europäisierten Verwaltungsrechts’. Allein mit Befehl und Zwang kann der Staat nicht mehr regieren”, 40 *Zeitschrift für Rechtspolitik* (2007) p. 101; see also Christie L. Ford, “Toward a New Model For Securities Law Enforcement”, 57 *Administrative Law Review* (2005) p. 757, 759 (using examples from the SEC).

³³ M. Eifert, “Regulierungsstrategien”, in W. Hoffmann-Riem/E. Schmidt-Aßmann/A. Voßkuhle (eds.), *Grundlagen des Verwaltungsrechts* (2nd ed., München, Beck, 2012 – to be referenced as: GVWR) I § 19 Rn. 125 *et seq.*

increased reliance and trust upon the ability of both private and public actors to solve their problems in an independent and self-responsible way.³⁴

At the same time, the state and other forms of public authority haven't abandoned completely their traditional role of safeguarding the common good.³⁵ This just takes place in a different way than it did in the past. This is one of the reasons that most modern states have been undergoing strategies of re-regulation.³⁶ Modern regulatory strategies set the general rule-of-law frame, in order to let societal and public actors unfold their activity in a self-regulatory mode. They, moreover, create cooperative relationships between the administration and the citizens for the delivery of public goods³⁷ using a mix of forms of cooperation ranging from self-regulation to external sovereign regulation.³⁸

In an effort to locate these changes, German administrative law scholarship has evolved the concept of the "safeguarding state" (*Gewährleistungsstaat*).³⁹ The safeguarding state is the post-modern evolution of the welfare state, a type of state that makes use of the forces of privates for the delivery of the public good. Based on the paradigm of the safeguarding state, a "safeguarding administration" (*Gewährleistungsverwaltung*)⁴⁰ emerges; it has the primary function of regulating the multiple interactions of the public and private actors and streamlining their cooperation.⁴¹ A major objective of these strategies is to create trust among the actors.⁴² Because of the increasing involvement of privates in the activities of the administration, safeguarding administration pursues the common good in collaboration with private parties.⁴³ This leads to a sharing of the responsibility for

³⁴ Cf. also K.-H. Ladeur, "Die rechtswissenschaftliche Methodendiskussion und die Bewältigung des gesellschaftlichen Wandels", 64 *Rabel Journal of Comparative and International Private Law* (2000), p. 60 (esp. 100, 101).

³⁵ H. Schulze-Fielitz, "Grundmodi der Aufgabenwahrnehmung", *GVwR I*, § 12 Rn. 53.

³⁶ W. Hoffmann-Riem, "Tendenzen in der Verwaltungsrechtsentwicklung", 50 *Die Öffentliche Verwaltung* (1997) p. 433 (435); re-regulation is contrasted with "de-regulation".

³⁷ M. Eifert, "Regulierungsstrategien", *GVwR I* § 19 Rn. 37.

³⁸ See L. Michael, "Formen- und Instrumentenmix", *GVwR II* § 41.

³⁹ See G. F. Schuppert (ed.), *Der Gewährleistungsstaat – Ein Leitbild auf dem Prüfstand* (Nomos, Baden-Baden, 2005); cf. also N. Gilbert and B. Gilbert, *The Enabling State: Modern Welfare Capitalism in America*, (OUP, New York, 1989); W. Hoffmann-Riem, "From Providing to Enabling: Staat und Informationsgesellschaft", *Kommunikation & Recht* (1999) p. I.

⁴⁰ A. Voßkuhle, "Beteiligung Privater an der Wahrnehmung öffentlicher Aufgaben und staatliche Verantwortung", 62 *Vereinigung der Deutschen Staatsrechtslehrer* (2003) p. 266 (304 *et seq.*); cf. also H. Schulze-Fielitz, "Grundmodi der Aufgabenwahrnehmung", *GVwR I* § 12 Rn. 51 *et seq.*; see also E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungs idee* (Springer, Berlin, 2004) 3. Ch. Rn. 114 *et seq.*; F. Schoch, "Gewährleistungsverwaltung: Stärkung der Privatrechtsgesellschaft?", 27 *Neue Zeitschrift für Verwaltungsrecht* (2008) p. 241.

⁴¹ M. Eifert, "Regulierungsstrategien", *GVwR I* § 19 Rn. 52 *et seq.*

⁴² See on the example of independent authorities G. Majone, "Mutual Trust, Credible Commitments and the Evolution of Rules for a Single European Market", *EUI Working Paper RSC 1* (95), pp. 19 *et seq.*

⁴³ E. Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungs idee* (Springer, Berlin, 2004) 3. Ch. Rn. 116.

the delivery of the public good between the administration and the involved private parties. The administration undertakes a “safeguarding responsibility” (*Gewährleistungsverantwortung*), which lies between the comprehensive “responsibility to fulfill” (*Erfüllungsverantwortung*) and the reduced “responsibility to back up” (*Auffangverantwortung*).⁴⁴

1.2.3. The Reaction of the Global Administration

The trends that have been identified in experimentalist governance and domestic administration can be also traced in the context of global administration. Global administration has evolved elements of this type of administration that was described as safeguarding administration.⁴⁵ With the emergence of *global* public goods⁴⁶ and the consequent reallocation of public tasks onto the global level of governance, the states are not in the actual position of safeguarding the public good by their own means. This loss of authority on the part of the state is complemented by the increase of the safeguarding responsibility of global organizations: Safeguarding of public goods does not only take place through the cooperation between state and society, but also through the cooperation between global and domestic administration and the cooperation between international organizations and private parties.⁴⁷

When an international organisation uses indicators, it partly shifts responsibility from the regulator – the international organization itself – to the actors of society or other actors – the subject of regulation –.⁴⁸ Individuals and countries are made responsible for their own behavior in their effort to comply with the measures of performance articulated in an indicator.⁴⁹ The global regulator restrains herself to the

⁴⁴ On these types of state responsibility see W. Hoffmann-Riem, “Tendenzen in der Verwaltungsrechtsentwicklung”, 50 *Die Öffentliche Verwaltung* (1997) p. 433; Schmidt-Aßmann, *Das allgemeine Verwaltungsrecht als Ordnungs idee* (Springer, Berlin, 2004) 3. Ch. Rn 109 *et seq.*

⁴⁵ See also H. T. Weiß, *Die rechtliche Gewährleistung der Produktsicherheit* (Nomos, Baden-Baden, 2008) p. 244 (making reference to a “safeguarding public international law” – *Gewährleistungsverölkerrecht* – and a “safeguarding responsibility” of the states under WTO law – especially the TBT and the SPS Agreements – for the safeguarding of the common good by the standardisation organisations).

⁴⁶ C. Tietje, “Das Recht ohne Rechtsquellen?”, 24 *Zeitschrift für Rechtssoziologie* (2003) p. 27 (39 *et seq.*); see also I. Kaul/P. Conceição/K. Le Goulven/R. U. Mendoza (eds.), *Providing Global Public Goods. Managing Globalization*, (OUP, Oxford, 2003); S. Barrett, *Why cooperate?* (OUP, Oxford, 2007).

⁴⁷ See also C. Tietje, “Begriff, Geschichte und Grundlagen des Internationalen Wirtschaftssystems und Wirtschaftsrechts”, in C. Tietje (ed.), *Internationales Wirtschaftsrecht* (De Gruyter, Berlin, 2009) § 1 Rn. 135: “Hieraus erwächst die Notwendigkeit, den Schutz und die gerechte Verteilung globaler öffentlicher Güter verstärkt durch kooperative Anstrengungen staatlicher, intermediärer und nicht-staatlicher Akteure zu gewährleisten”. Every level of administration and every actor has its own share in the contribution of the fulfillment of the common responsibility. There are no clearly defined structures of responsibility; cf. E. Pache, “Verantwortung und Effizienz in der Mehrebenenverwaltung”, 66 *Vereinigung der Deutschen Staatsrechtslehrer* (2007) p. 106 (135).

⁴⁸ S. E. Merry, “Measuring the World”, 52 *Current Anthropology* (2011) p. S83 (S88).

⁴⁹ S. E. Merry, “Measuring the World”, 52 *Current Anthropology* (2011) p. S83 (S85).

role of the watchdog of the implementation process. This is a new form of “meta-control”;⁵⁰ in the human rights field, this new distribution of competences is called “monitoring the monitoring” or “rule at a distance”.⁵¹ Administrative law scholarship speaks about “control of control” or “control of the controllers”.⁵²

1.3 Indicators in Global Administrative Regimes

1.3.1. The IMF/EU Adjustment Programmes

a. The legal frame: Because of sovereign debt problems in Greece, Ireland and Portugal, the International Monetary Fund (IMF) and the European Union (EU) have introduced fiscal and structural adjustment programmes. The field of the interplay between the IMF and the EU is a new ground for international, EU and global administrative law. The IMF, like the other International Financial Institutions (IFIs), advise governments on austerity and other policies aiming at macro-economic stabilisation and monitoring economic performance towards meeting these targets. In the Eurozone, the member states of the EU have received the funding jointly by the IMF and the Euro area states, represented by the European Commission and the European Central Bank (ECB). Greece has signed with the IMF, the European Commission and the ECB two sets of Memoranda of Understanding (MoUs) that are subdivided into three more specific Memoranda: the Memorandum of Economic and Financial Policies (MEFP); the Technical Memorandum of Understanding (TMU); the Memorandum of Understanding on Specific Economic Policy Conditionality. The MoUs are multi-year policy programmes with the final aim for Greece to regain market access. The focus of this subsection is on the second Greek adjustment programme for the period 2012-2015.

b. Indicators in the regime: The basic lines of the 2012-2015 fiscal and structural measures are set out in the MEFP.⁵³ With regard to administration reform, the major effort of the programme is to introduce the principle of performance-oriented operation in the Greek administration. For this reason, several economic performance indicators have been introduced. The MoUs include two types of indicators. In the area of fiscal and financial adjustment, the indicators are specified directly in the MoU. These indicators have been specified after consultation with the Ministry of Finance of Greece and limited consultation with other domestic officials. Annexed to the MEFP, there are tables laying down indicators for the monitoring of the programme and performance evaluation of the Greek government and administration. The TMU sets out the understandings regarding the definitions of the indicators

⁵⁰ F. Reimer, *Qualitätssicherung* (Nomos, Baden-Baden, 2010) pp. 392 *et seq.*

⁵¹ See A.J. Rosga/M. L. Satterthwaite, “The Trust in Indicators: Measuring Human Rights”, 27 *Berkeley Journal of International Law* (2009) p. 253 (304 *et seq.*).

⁵² See M. Eifert, “Die geteilte Kontrolle. Die Beteiligung Privater an der Rechtentwicklung”, 39 *Die Verwaltung* (2006) p. 309 (329 *et seq.*).

⁵³ The Memoranda for the 2012-2015 period will be jointly referred to as “Memorandum II”.

subject to quantitative targets.⁵⁴ The indicators are included in three types of measures: In Quarterly Performance Criteria and Indicative Targets (Table 1) that are classical conditionalities typically included in similar programmes; in Prior Actions (Table 2) that are *ex ante* conditions; and, in Proposed Structural Benchmarks (Table 3) that are non-binding measures. Especially in the field of tax collection and performance of tax administration progress, the measures are being closely monitored against agreed indicators like measurements of tax revenues and tax arrears collected (Table 1 of TMU). For example, in the area “tax audits and collection of large taxpayers”, the “number of completed risk-based full-scope audits” (indicator) is 150 audits until end-June and 300 audits until end-December 2012 (target).⁵⁵

Regulation through indicators is embedded into the conditionality scheme of the programme. As a result, the programme is composed of a mix of traditional *ex post* conditions, *ex ante* conditions and conditions with indicators. The indicators do not replace conditionalities but complement them.⁵⁶ Meeting the targets of the indicators is a condition for the approval of the disbursement of the financial aid.

Moreover, in an effort to improve the ownership of the programme by the Greek government, Memorandum II includes several obligations for the production and promulgation of domestic indicators by the Greek government and administration itself. They concern the measurement of performance especially in the field of structural reforms.⁵⁷ The structural reform agenda includes several fields like reform of tax and revenue administration, judicial reform, legislation for closed professions and product markets. In order to accelerate efforts to improve structural reform management, oversight and monitoring, a new “Directorate of Planning, Management and Monitoring of Reforms” shall be established in the Ministry of Finance.⁵⁸ This Directorate will start publishing monitoring indicators on a quarterly basis, first for key structural reform initiatives, like, *e.g.*, key performance indicators for the tax department,⁵⁹ and progressively for each reform initiative. All indicators need to be made accessible online on the website of the government.

As the Greek administration was largely lacking the relevant expertise for the production of domestic indicators, the European Commission has set up a new body, the Task Force for Greece (TFGR), to support the country in this effort.⁶⁰ The TFGR shall mobilize relevant expertise from EU member states and international

⁵⁴ See Memorandum II, p. 35.

⁵⁵ Memorandum II, p. 48

⁵⁶ See the mix of measures proposed in Memorandum II, pp. 13-14.

⁵⁷ See, *e.g.*, Memorandum II, p. 25, 93; see also OECD, *OECD Economic Surveys. Greece* (OECD Publishing, Paris, 2011) p. 10.

⁵⁸ Memorandum II, p. 25, 93.

⁵⁹ Memorandum II, p. 57.

⁶⁰ See European Commission, *Questions and Answers on the Task Force for Greece* (MEMO/11/599, Brussels, 2011) p. 2. The Memorandum takes this initiative into account; see Memorandum II, pp. 25, 93.

organisations.⁶¹ It provides technical assistance (TA) to Greece in an effort to boost development, among other fields, in the field of data collection and development of accountability and performance indicators in various areas spanning from tax administration reform⁶² to court system reform.⁶³

c. Performance evaluation: The MoUs provide for a mix of self-reporting by the Greek state and third-party reporting and control. Control of the implementation of the programme and performance evaluation is performed by a joint IMF/European Commission/ECB staff team, the so-called “troika”, through quarterly reviews, quantitative performance criteria, indicative targets and structural benchmarks.⁶⁴ Especially for performance and indicator-based evaluation, the TMU describes the methods to be used in assessing performance and the information requirements to ensure adequate monitoring of the targets. As an overall monitoring and reporting requirement for the Greek government, performance under the programme is being monitored from data supplied by the Ministry of Finance, the General Accounting Office and the Bank of Greece to the EC, ECB and IMF.⁶⁵

The adjustment programme follows a regulatory and monitoring technique that could be characterized as command-and-control regulation. It sets rigid goals that need to be achieved like the commitment that the government will achieve a general government primary surplus of four and a half percent of GDP by 2014.⁶⁶ On-the-ground implementation doesn’t play a determining role in the re-framing of the goals. Despite the fact that the programme provides for some revision clauses,⁶⁷ revision in practice has led to the introduction of new austerity measures. There is no structural built-in mechanism to take into account negative results by recession caused by the implementation of the programme itself.

The whole system is structured in such a way that it hinders learning for the recipient administration and for the troika itself. The European Commission has identified the problem of this vertical approach to financial and structural adjustment and has established the TFGR. The primary purpose of this body is the coordination of the provision of TA by drawing on external assistance from detached experts of the member states of the EU. Already 20 states have been subscribed as possible TA providers in various policy fields whereas some member states act as “domain leaders” in the provision of technical assistance.⁶⁸

⁶¹ TFGR/COM, Second Quarterly Report of the Task Force for Greece (Brussels, 2012) p. 2.

⁶² TFGR/COM, Second Quarterly Report of the Task Force for Greece (Brussels, 2012) p. 13.

⁶³ TFGR/COM, Second Quarterly Report of the Task Force for Greece (Brussels, 2012) p. 26.

⁶⁴ See Memorandum II, p. 3, 26.

⁶⁵ Memorandum II, p. 46.

⁶⁶ Memorandum II, p. 6.

⁶⁷ Memorandum II, p. 3.

⁶⁸ For example, on January 6, 2012, France and Greece in collaboration with the TFGR signed a specific trilateral “Memorandum of Understanding” paving the way for the concrete implementation of the central administration reform. These processes include several characteristics of experimentalist governance. The Memorandum includes a *roadmap* detailing the main steps, responsibilities and timing for delivering the reform. The French experts have already started providing concrete technical

This new structure for the administration of the programme and performance evaluation of the reform activity softens the threat of the non-disbursement of the loan. The TFGR team together with foreign officials from peer administrations is a step towards non-hierarchical administration of the programme and non-hierarchical performance measurement.⁶⁹ The TFGR should gather best practices from foreign experts, whereas it is clearly stated that “lessons learned in successfully implementing and concluding these projects will be applied to the remaining 7000 plus projects as part of the overall streamlining of the structural fund management and control system”.⁷⁰ The domestic indicators that are going to be adopted by the Greek administration in cooperation with the seconded foreign officials and the TFGR have thus to be informed by previous on-the-ground implementation.

Horizontal evaluation and monitoring has produced concrete results, among others prominently, EUR 946m was collected in tax arrears compared to the initial target of EUR 400m. Moreover, the backlog of tax cases pending in court has been reduced by 15 per cent in four months and should be reduced by 80 per cent by the end of 2012.

1.3.2. The NEPAD African Peer Review Mechanism

a. The legal frame: A new governance mechanism introduced by the African Union (AU) confirms the tendency towards horizontal approaches to global governance. The New Partnership for Africa’s Development African Peer Review Mechanism (NEPAD APRM) is a relatively new governance scheme that is indicator-based. It invites all member countries of the AU to participate on a voluntary basis in a mutual review of a broad variety of policies that are grouped in four focus areas: democracy and political governance, economic governance, corporate governance and socio-economic development. A country formally joins by ratifying the Memorandum of Understanding on the African Peer Review Mechanism.⁷¹ The aim of the scheme is to promote implementation of high governance standards in a self-governance and self-monitoring mode at the regional – “continental” in AU parlance – level.⁷² It is thus a unique example of South-to-South peer review and marks a paradigm shift in political, economic and social

assistance to assist Greek authorities in *defining the methodology* of the reform. The German government has also started providing TA for administrative reform at decentralised, local and regional levels with the aim of developing and agreeing on a *concrete roadmap for reform* at this level; see TFGR/COM, *Second Quarterly Report of the Task Force for Greece* (Brussels, 2012) p. 15.

⁶⁹ The motto “We are working for Greece with the Greeks!” appeared in the TFGR, *Q&A on the Task Force for Greece and its Second Quarterly Report* (MEMO/12/184, Brussels, 2012) p. 2.

⁷⁰ TFGR/COM, *Second Quarterly Report of the Task Force for Greece* (Brussels, 2012) p. 32.

⁷¹ Memorandum of Understanding on the African Peer Review Mechanism (NEPAD/HSGIC/03-2003/APRM/MOU, 2003); see generally O. Chukwumerije, “Peer Review and the Promotion of Good Governance in Africa”, 32 North Carolina Journal of International Law and Commercial Regulation (2006) p. 49.

⁷² Nr. 7 Memorandum of Understanding on the African Peer Review Mechanism (NEPAD/HSGIC/03-2003/APRM/MOU, 2003).

governance.⁷³ The review by peer bodies was introduced due to negative experience of monitoring by the World Bank, the EU, bilateral donors and western NGOs.⁷⁴ The African Development Bank (ADB), the United Nations Economic Commission for Africa (ECA) and the United Nations Development Programme (UNDP) are its three main strategic partners.

b. Indicators in the regime: The review process is set out in a document adopted in 2003.⁷⁵ The document *Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism* elaborates an interesting taxonomy of rules for the assessment and evaluation of the policies of the participating countries. For each of the four governance fields it provides for key objectives, standards and codes, criteria and indicators. Key objectives are guiding political and legal principles. They are made more concrete by standards and codes that are legal texts and criteria of their adoption. At the bottom of this classification “... indicators are used as the means by which it is determined whether the criteria have been met”⁷⁶. The standards and codes are not used as legal standards in the classical sense, but as assessment tools, as references as to how countries govern their affairs and the extent of their application.⁷⁷ A Questionnaire has been introduced with questions focusing on what the country has done with regard to the objectives, standards and codes, how it does it and with what results, and the indicators are the type of evidence that is expected in the responses of the countries.

The Questionnaire clearly states that the objectives in the four focus areas need to be achieved in a measurable way.⁷⁸ The *Objectives, Standards, Criteria and Indicators* document lists therefore several types of indicators in each field. They are not supposed to be used as indicators themselves, but rather as models for the elaboration of country-specific indicators. As the countries lack the relevant expertise, the Questionnaire guides the countries in the review process. The Questionnaire is quite lengthy and complex comprising 58 questions and 183 indicators. They are not exhaustive and the states can use their own indicators in order to measure performance.⁷⁹ Moreover, the documents contain a mix of both

⁷³ AfriMAP, *The African Peer Review Mechanism* (OSISA, Johannesburg, 2010) pp. 7-8.

⁷⁴ AfriMAP, *The African Peer Review Mechanism* (OSISA, Johannesburg, 2010) pp. 7-8 (naming the Freedom House).

⁷⁵ See NEPAD, *Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism* (NEPAD/HSGIC-03-2003/APRM/Guideline/OSCI, 2003). Despite the adoption of indicators, there is a strong resistance on the part of African countries to scores and rankings; see B. Manby, “Afrimap: On not Using Indicators to Score Progress in Governance”, Paper presented at the Second World Forum on Statistics, Knowledge and Policy: Measuring and Fostering the Progress of Societies, organised by the OECD in Istanbul, Turkey, 27-30 June 2007, p. 2.

⁷⁶ Nr. 1.10 NEPAD, *Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism* (NEPAD/HSGIC-03-2003/APRM/Guideline/OSCI, 2003).

⁷⁷ NEPAD, Questionnaire, Country Self-Assessment for the African Peer Review Mechanism, p. 1.

⁷⁸ NEPAD, Questionnaire, Country Self-Assessment for the African Peer Review Mechanism, p. 1.

⁷⁹ African-“owned” indicators promoting self-governance in Africa are also the Ibrahim Index of African Governance of the Mo Ibrahim Foundation.

quantitative and qualitative indicators. For the quantitative indicators, the respondents should reply by giving the value of the indicator, whereas for the qualitative indicators, a brief statement should be provided.

The same structure applies to all four pillars of the APRM. A common question in all pillars is to present evidence of domestic compliance with international legal texts – the standards and codes –, and/or other measures related to them. This should include the experiences faced towards compliance.⁸⁰ Specific questions are then posed with regard to the objectives. The answer is to be given again on the basis of a set of indicators like the “key sources of conflict between a country and the neighbouring countries” as a response to the question “what are the recent or on-going conflicts in your country and the sources of these”.

In the pillar political, democratic and good governance, the Standards and Codes are further divided into “International Instruments and Standards” and “Regional Instruments and Standards”. For example, concerning the question if “A Guaranteed Framework of Equal Citizen Rights” is in place, Objective 1 is “Preventing and reducing intra- and inter-state conflicts with particular attention to the extent to which the country under review strives to sustain peace and security within its borders and to contribute to peace and stability in its neighbourhood”⁸¹. The “existence of effective early, formal or informal, systems” in a country or at the regional level of this country is suggested as an indicator. The Questionnaire mentions that indicators in the focus area Democracy and Political Governance are not accessible to quantitative measurement, but their focus is on qualitative evaluation.⁸²

In the focus area Economic Governance and Management, assessment is based on both quantitative and qualitative indicators. Examples of quantitative indicators are the “average inflation rate over the past five years”, the “real GDP growth over the past five years”, the “Debt Service Ratio” and the “Fiscal Deficit”, as indicators for the evaluation of the macro-economic policies. In other fields, like the assessment of the effectiveness and transparency of the public administration, the soundness of public finance management and the effectiveness of fiscal decentralisation, the Questionnaire lists only qualitative indicators due to the complexity of the subject matter.⁸³ In the focus area Corporate Governance, the same structure is kept; here, mostly quantitative indicators apply. In the fourth and last focus area, Socio-Economic Development, a mix of quantitative and qualitative indicators is used, whereas the purpose is to measure progress in the most important aspects of socio-economic development.⁸⁴

c. Evaluating performance: A Committee of Participating Heads of State and Government (APR Forum) is the highest decision making authority in the APRM; a

⁸⁰ Almost all questions are not posed in a yes-or-no way; they rather focus on progress.

⁸¹ NEPAD, Questionnaire, Country Self-Assessment for the African Peer Review Mechanism, p. 18.

⁸² NEPAD, Questionnaire, Country Self-Assessment for the African Peer Review Mechanism, p. 22.

⁸³ NEPAD, Questionnaire, Country Self-Assessment for the African Peer Review Mechanism, p. 44.

⁸⁴ NEPAD, Questionnaire, Country Self-Assessment for the African Peer Review Mechanism, p. 78.

Panel of Eminent Persons (APR Panel) oversees the review process to ensure integrity, it considers reports and makes recommendations to the APR Forum. The APRM Panel includes professors, lawyers and diplomats; the continental APRM Secretariat provides technical, coordinating and administrative support for the APRM; an ad-hoc Country Review Mission Team (CRM Team) visits member states to review progress and produce an APRM Report concerning each specific country. Currently 33 member countries out of the 54 members of the African Union participate in the APRM, 14 of which have already been reviewed.

The APRM proceeds in two main phases that are further divided into five steps.⁸⁵ The first phase begins with the sending out of the Questionnaire. The country should conduct a self-assessment that leads to the preparation of a Country Self-Assessment Report (CSAR). Responsible for the management of the process at the domestic level are national Focal Points, namely high-level officials, usually Ministers, reporting directly to the Head of State or Government. The Focal Point is also responsible to develop a National Programme of Action (NPoA)⁸⁶ with the participation of all stakeholders, including trade unions, women, youth, civil society, private sector, rural communities and professional associations.⁸⁷

The actual peer review of the participating country takes place in the second phase of the APRM. The CRM Team, led by a member of the APRM Panel, conducts indicator-based performance monitoring. This phase ends with a debate and approval of the Country Review Report by the APRM Forum, i.e., at the highest political level. Experience from the reviews shows that the peer review is a political process that can be highly contested.⁸⁸ Based on the Country Review Report and the NPoA, the countries publish every year a review assessing their progress.

Despite the political nature of the process, APRM signifies a change in the conception of how governance is exercised in Africa. Peer monitoring with the use of indicators is in the self-understanding of the mechanism contrasted to the conditionality system used by the IFIs.⁸⁹ The system respects the differences of historical context and stages of development of the participating countries, so they can start from different baselines and are not expected to reach the highest level of performance at the same time.⁹⁰ The continental Secretariat is currently trying to cultivate an understanding that the APRM is not a punitive mechanism but a system

⁸⁵ See in detail the Guidelines for Countries to Prepare for and to Participate in the APRM.

⁸⁶ See Nr. 1.3 NEPAD, Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism (NEPAD/HSGIC-03-2003/APRM/Guideline/OSCI, 2003).

⁸⁷ Nr. 22 *MoU on the African Peer Review Mechanism* (NEPAD/HSGIC/03-2003/APRM/MOU, 2003).

⁸⁸ AfriMAP, *The African Peer Review Mechanism* (OSISA, Johannesburg, 2010) p. vii.

⁸⁹ See AfriMAP, *The African Peer Review Mechanism* (OSISA, Johannesburg, 2010) pp. 7-8.

⁹⁰ On these statements see NEPAD, Questionnaire, Country Self-Assessment for the African Peer Review Mechanism, p. 7.

of promoting good governance through self-control⁹¹ and systematic mutual learning through information-sharing.⁹² The potential of peer learning – especially with respect to the APRM Forum – is also recognized by involved NGOs.⁹³ Learning will evolve with the greater involvement of the civil society in the process, whereas, at the same time, the APRM has operated in several occasions as a civic participation mobilizer.⁹⁴

1.3.3. The EU CAP and the OECD

a. The legal frame: One of the major activities of the OECD is the evaluation of state policies. The OECD has also started performing evaluations of other global organisations. This case study does not intend to give a full account of the relationships between the EU and the OECD but to present a snapshot of the emerging relations of global organisations. There is no actual legal frame for this activity.

The OECD evaluates domestic agricultural policies on the basis of indicators that the organisation has produced and promulgated. While evaluations of policies are published in an annual report and in country-specific reports,⁹⁵ the organisation assesses the Common Agricultural Policy (CAP) of the EU, which is the first common policy adopted by the EU under the Treaty of Rome. Already in 2003, the OECD had published an analysis of the 2003 CAP Reform, aiming at describing agricultural reform at the EU level.⁹⁶ In 2011, it published an “Evaluation of Agricultural Policy Reforms in the European Union”, analysing reforms and changes of EU CAP over the period 1986-2010.⁹⁷ The assessment addresses the impact of agricultural policy reforms on the economic and environmental performance of agriculture with an overall evaluation and proposals for the future evolution of the EU CAP.

b. Indicators in the regime: The evaluation is based on the principles for policy reform established by the agricultural Ministers in OECD countries. The principal

⁹¹ A. Shifa, African Peer Review Mechanism: Progress Update, Presentation by Mr. Assefa Shifa, Chief Executive Officer, APRM Secretariat at the Fourth Ordinary Session of the Pan-African Parliament Midrand, South Africa, 19 May 2011, p. 7.

⁹² Nr. 1.6, 1.7 NEPAD, Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism (NEPAD/HSGIC-03-2003/APRM/Guideline/OSCI, 2003).

⁹³ AfriMAP, *The African Peer Review Mechanism* (OSISA, Johannesburg, 2010) p. viii.

⁹⁴ B. Manby, “Was the APRM process in Kenya a waste of time? Lessons that should be learned for the future”, Open Society Institute. Africa Governance Monitoring and Advocacy Project (AfriMAP), (2008) p. 3.

⁹⁵ See OECD (2011), *Agricultural Policies in OECD Countries and Emerging Economies* (Paris, 2011).

⁹⁶ OECD, *Analysis of the 2003 CAP Reform* (AGR/CA/APM(2003)16/FINAL, Paris, 2004).

⁹⁷ OECD, *Evaluation of Agricultural Policy Reforms in the European Union* (Paris, 2011). See in detail B. Carotti/G. Dimitropoulos, “Horizontality as a Global Strategy for Accountability: The OECD Reviewing the EU CAP”, in S. Cassese et al., *GAL Casebook* (3rd ed., IRPA, Rome, 2012), at I.E.5.

evaluation tool is indicators produced by the OECD.⁹⁸ These include the Consumer Support Estimate (CSE), the General Services Support Estimate (GSSE), the Market Price Support (MPS), the Nominal Assistance Coefficient (NAC), the Nominal Protection Coefficient (NPC), the Producer Support Estimate (PSE), the Single Commodity Transfers (SCT) and the Total Support Estimate (TSE). Some of them are aggregated indicators. The OECD uses additional indicators that are not specific to agriculture, called “contextual” indicators that are also listed at the end of the report.

c. Evaluating performance: The Evaluation report states some structural deficits of the CAP based on the OECD indicators and makes recommendations concerning the introduction of more efficient and effective policy measures. One of the major claims of the report is to set specific policy objectives, make the targets measurable and corresponding to each objective. The overall objectives should be made clearer and statistical information needs to be improved.

The only basis for the assessment is indicators produced and chosen by the OECD. The evaluation does not take into account other factors that may have shaped EU policies like historical evolution of the CAP or accession policies. These recommendations may have a strong impact on the EU, re-directing the focus towards market efficiency and neglecting other concerns, since the EU had launched in November 2010 a revision of the CAP. In the meantime, the EU has published its own first indicator-based analysis of the CAP.⁹⁹

As global organisations evolve a self-understanding of independency from the states in the global legal order, it is expected that horizontal review of global actors will increase. This tendency is supported by the general lack of formal review mechanisms, like courts, at this level of governance. At the same time, it is expected that indicator-based evaluation will also increase, in order to make these activities appear more legitimate. In the future, GAL has a prominent role to play in this field, as the strategy of horizontality enhances interdependence of the global players and creates a global administrative system of mutual responsibility.

2. Indicators as “Enabling Law”

2.1. The Interplay between Law and Indicators

⁹⁸ OECD, *Evaluation of Agricultural Policy Reforms in the European Union* (Paris, 2011), p. 16; all indicators with their definitions are enlisted *ibid.* at ANNEX I.A2, pp. 75-79; *see also ibid.* at ANNEX II.A1, pp. 274-275 for sources and definitions of contextual indicators.

⁹⁹ C. Lavalle/C. Baranzelli/S. Mubareka/C. Rocha Gomes/R. Hiederer/F. Batista e Silva/C. Estreguil, *Implementation of the CAP Policy Options with the Land Use Modelling Platform. A First Indicator-Based Analysis*. JRC Scientific and Technical Reports (Publications Office of the European Union, Luxembourg, 2011).

2.1.1. Law in Experimentalist Regimes and Administration

Law is traditionally connected to such values and principles like hierarchy, coerciveness, stability, rigidity, formality and the stabilisation of expectations. Governance through indicators does not fit in the frame of this traditional description of law. As has been described above, some international, regional and domestic legal regimes depart from “the model of formalist law strictly enforced by a court” and incorporate several experimentalist characteristics like indicators and peer reviews.¹⁰⁰

As a result of these changes, a dynamic and richer understanding of law and new forms of governance, like indicators, is necessary.¹⁰¹ There have been some attempts to describe the nature and functions of the law beyond the state in the discussions concerning experimentalism and New Governance.¹⁰² Walker and de Búrca have identified a tripartite framework for the analysis of the relationship between law and experimentalist governance: the separation orientation, the absorption orientation and the mutual penetration orientation.¹⁰³ This article subscribes to the mutual penetration orientation. In this context, normativity has a different meaning and function, namely that of “reflexive universalisability”.¹⁰⁴ Law is broad enough to be informed by social reality and, at the same time, it can produce results applicable to all social actors. In these regimes, law and rule-making are constantly under review, changing, shaping and being shaped by the on-the-ground implementation experience and the measurements and evaluations on the basis of the indicators.¹⁰⁵ This legal frame might include “hard” law, “soft” law, “prophylactic rules” and “penalty defaults”.¹⁰⁶ Whereas the role of formalisation in old-style regimes is to constrain decision-making

¹⁰⁰ See C. Overdevest/J. Zeitlin, “Assembling an Experimentalist Regime: Transnational Governance Interactions in the Forest Sector”, Revised draft, September 2011, p. 8.

¹⁰¹ N. Walker/G. de Búrca, “Reconceiving Law and New Governance”, 13 *Columbia Journal of European Law* (2006-2007) p. 519 (525); B. Kingsbury, “Indicators and Governance by Information in the Law of the Future”, in M. Frishman/L. Kistemaker/S. Muller/S. Zouridis (eds.), *The Law of the Future and the Future of Law* (Torkel Opsahl, Oslo, 2011) p. 495 (508).

¹⁰² See the in-depth analysis of N. Walker/G. de Búrca, “Reconceiving Law and New Governance”, 13 *Columbia Journal of European Law* (2006-2007) p. 519; see also J. Scott/D. Trubek, “Mind the Gap: Law and New Approaches to Governance in the European Union”, 8 *European Law Journal* (2002) p. 1; M. Wilkinson, “Three Conceptions of Law: Towards a Jurisprudence of Democratic Experimentalism”, *Wisconsin Law Review* (2010) p. 673.

¹⁰³ N. Walker/G. de Búrca, “Reconceiving Law and New Governance”, 13 *Columbia Journal of European Law* (2006-2007) p. 519 (521-523).

¹⁰⁴ N. Walker/G. de Búrca, “Reconceiving Law and New Governance”, 13 *Columbia Journal of European Law* (2006-2007) p. 519 (534-535).

¹⁰⁵ See D. Trubek/L. Trubek, “The World Turned Upside Down: Reflections on New Governance and the Transformation of Law”, *Wisconsin Law Review* (2010) p. 719 (721); W. H. Simon, “New Governance Anxieties: A Deweyan Response”, *Wisconsin Law Review* (2010) p. 727 (735).

¹⁰⁶ B. C. Karkkainen, “‘New Governance’ in Legal Thought and In the World: Some Splitting as Antidote to Overzealous Lumping”, 89 *Minnesota Law Review* (2004) p. 471.

to terms laid down in an authoritative way in the past, the role of formalisation in new-style regimes is to make practice transparent for the future.¹⁰⁷

Administrative law theory again supports the evidence of experimentalist governance. As has been described above, administrative law responds to the needs of new modes of governance. Because of the increasing loss of trust in the effectiveness of traditional command-and-control administrative law (*Ordnungsrecht*),¹⁰⁸ modern administrative law has been forced by societal changes to adapt to the new challenges. Beyond the traditional function of law as a yardstick for control by the courts, law in the safeguarding state has an “enabling function” for the administration (“*Bereitstellungsfunktion des Rechts*”).¹⁰⁹ This is a general function of law, not confined to administrative law; private law, penal law and public law as a whole form part of this transformation. Hoffmann-Riem describes this function of law as follows:¹¹⁰

In most cases, the state does not intervene in the societal process producing itself desirable outcomes – be it through output-oriented commands or the provision of services –, but through the provision of a framework, in which the society can settle its affairs in the way that serves the most the common good in a self-responsible way (*Bereitstellungsfunktion des Rechts*)... The prototype for a mere framework responsibility is private law – primarily the Civil Law Code. From a functional perspective, penal law and administrative offence law form part of this [change]... Also in administrative law, the state does not always emerge as a guarantor of concrete outcomes. Rather, it concentrates in many cases on the steering of the conduct of third parties – *i.e.*, of private parties or by the state created or with state functions entrusted ‘satellites’ (*Trabanten*) –, and mainly through the formation of frameworks (*Rahmensetzung*) and structuring provisions (*strukturierende Vorgaben*), and the same applies to the goals of their activity. It does not guarantee the fulfillment of specific tasks in a specific way, but steers the possibility of the pursuit and achievement of goals oriented towards the common good (‘enabling’ instead of ‘providing’)....

Bringing the ideas of law in experimentalist governance and this approach to administrative law together, we can identify a transformation of (global)

¹⁰⁷ W. H. Simon, “New Governance Anxieties: A Deweyan Response”, *Wisconsin Law Review* (2010) p. 727, 735.

¹⁰⁸ A. Voßkuhle, “Neue Verwaltungsrechtswissenschaft”, *GVwR* I § 1 Rn. 10, 12.

¹⁰⁹ See G. F. Schuppert, “Verwaltungsrechtswissenschaft als Steuerungswissenschaft”, in E. Schmidt-Aßmann/W. Hoffmann-Riem/G. F. Schuppert (eds.), *Reform des Allgemeinen Verwaltungsrechts* (Nomos, Baden-Baden, 1993) p. 65 (96 *et seq.*); G. F. Schuppert, *Verwaltungswissenschaft* (Nomos, Baden-Baden, 2000) p. 455 *et seq.*; see also G. F. Schuppert, “Verwaltungsorganisation und Verwaltungsorganisationsrecht als Steuerungsfaktoren”, in W. Hoffmann-Riem/E. Schmidt-Aßmann/A. Voßkuhle (eds.), *GVwR* I § 16 Rn. 10 *et seq.*; W. Hoffmann-Riem, “Tendenzen in der Verwaltungsrechtsentwicklung”, 50 *Die Öffentliche Verwaltung* (1997) p. 433 (441-442); W. Hoffmann-Riem, “Innovationssteuerung durch die Verwaltung”, 33 *Die Verwaltung* (2000) p. 155 (166-167); A. Voßkuhle, “Neue Verwaltungsrechtswissenschaft”, *GVwR* I § 1 Rn. 24.; M. Eifert, “Regulierungsstrategien”, in W. Hoffmann-Riem/E. Schmidt-Aßmann/A. Voßkuhle (eds.), *GVwR* I § 19 Rn. 148 *et seq.*

¹¹⁰ W. Hoffmann-Riem, “Tendenzen in der Verwaltungsrechtsentwicklung”, 50 *Die Öffentliche Verwaltung* (1997) p. 433 (441 *et seq.*) (translation by the author).

(administrative) law into what could be called “enabling law”.¹¹¹ Enabling law is opposed to traditional “providing law”. It is a new type of law that creates frameworks and structuring provisions for the actors, both private and public, for the self-responsible fulfillment of their activities.¹¹² It enables them to operate and achieve their goals or the goals set by the public institutions, instead of giving them detailed instructions as to how to achieve the declared framework objectives. It creates opportunities, regulates by incentives and provides the conditions to constantly improve performance using, *inter alia*, indicators and benchmarks.

2.1.2. The Functions of Indicators in Global Administrative Law

Indicators form part of this concept of Global Administrative Law and serve some of its enabling functions. Some of the functions of indicators can be subsumed under the broad category of the enabling functions. Above all, indicators serve the function of simplifying social phenomena.¹¹³ This is a key feature making them functionally different from unprocessed data. Data simplification makes decision-making in a complex and uncertain world easier. Indicators use past experience in the form of simplified processed data in order to shape the conditions for future decisions. In this way, they stabilise normative expectations – a feature they share with law –¹¹⁴ and enable simplification of decision-making.

Secondly, indicators are used as evaluation tools.¹¹⁵ Classic forms of law are used as a yardstick to assess compliance against a legal standard; on the other side, performance of an actor with reference to a standard is usually evaluated using indicators.¹¹⁶ As has been presented in the case studies, indicators enable the administration to provide an account of the degree of compliance towards full realisation of the regime goals. They, thus, enable performance evaluation.

Thirdly, indicators are very often embedded in country assessments conducted by international organisations like the OECD, the World Bank and the IMF. They are

¹¹¹ N. Walker/G. de Búrca, “Reconceiving Law and New Governance”, 13 *Columbia Journal of European Law* (2006-2007) p. 519 (531-532) name the “enabling” and “facilitative” functions of law as dimensions of functional-sociological conceptions of law. *See also* G. de Búrca, “Rethinking Law in Neofunctionalist Theory”, 12 *Journal of European Public Policy* (2006) p. 310 (esp. 318-323). The concept of enabling law does not deny the other functions of law but embeds them into the enabling frame of the governance regimes.

¹¹² *See also* N. Walker/G. de Búrca, “Reconceiving Law and New Governance”, 13 *Columbia Journal of European Law* (2006-2007) p. 519 (527-528).

¹¹³ K. E. Davis et al., “Indicators as a Technology of Global Governance”, 46 *Law and Society* (2012) p. 71, (76-77).

¹¹⁴ N. Luhmann, *Law as a Social System* (OUP, Oxford, 2004) pp. 142 *et seq.*

¹¹⁵ K. E. Davis et al., Indicators as a Technology of Global Governance, IILJ Working Paper 2010/2 (GAL Series) pp. 5-6; S. Cassese/L. Casini, Public Regulation of Global Indicators, in K. Davis/A. Fisher/B. Kingsbury/S. E. Merry (ed.), *Governance by Indicators* (OUP, Oxford, 2012) p. 465 (467).

¹¹⁶ K. E. Davis et al., Indicators as a Technology of Global Governance, IILJ Working Paper 2010/2 (GAL Series) p. 3.

also commonly used as a metric of performance for comparisons in benchmarking.¹¹⁷ The simplified and processed data enable global and other administrative bodies to compare units of analysis like countries, institutions, international organisations and corporations, at the time of the analysis, in the past and for the future.¹¹⁸

Fourthly, indicators are usually embedded in on-going processes, in order to measure, monitor and testify progress of particular actors. They are “measurement mechanisms that are tied to the goal of *improvement*”¹¹⁹. This is, for example, the role played by the Annual Progress Reports, reporting progress of implementation of the NPoA. Being used as metrics of an on-going process, they enable constant improvement of the evaluated actors.

2.2. *The Legal Nature of Indicators and the Role of Global Administrative Law*

The description of the interplay between new forms of governance and law does not give an answer to the question of the legal nature of the phenomenon itself. It has been implied above that indicators have some kind of legal nature. Indicators are not mere facts. Data are fact. The collection and further use of data for governance purposes and their embeddedness into a global regime changes the quality of this data. Indicators are usually taken for granted and decisions based on them are less scrutinised.¹²⁰ Indicators can be compared to soft law and technical standards.¹²¹ They exert the same type of impact as soft law and have in several respects the same characteristics as technical standards.

Global Administrative Law is a relatively new type of law that has departed from traditional international law, partly based on international law sources, partly based on new sources such as private contracts and informal agreements. Therefore, it is open to the adoption of new legal phenomena. This contribution proposes to locate global juridical phenomena, like indicators, alongside technical standards and soft law, in a continuum, with facts – like information-sharing by an international secretariat –, at the one end of the spectrum and “classical” law – like treaty rules –,

¹¹⁷ See also the definition of benchmark in OECD, *Glossary of Statistical Terms* (OECD Publishing, Paris, 2007) p. 63.

¹¹⁸ See A. Fisher, From Diagnosing Under-Immunization to Evaluating Health Care Systems, in K. Davis/A. Fisher/B. Kingsbury/S. E. Merry (ed.), *Governance by Indicators* (OUP, Oxford, 2012) p. 217 (220, 224).

¹¹⁹ (Emphasis added); A.J. Rosga/M. L. Satterthwaite, “The Trust in Indicators: Measuring Human Rights”, 27 *Berkeley Journal of International Law* (2009) p. 253 (285).

¹²⁰ A. Fisher, From Diagnosing Under-Immunization to Evaluating Health Care Systems, in K. Davis/A. Fisher/B. Kingsbury/S. E. Merry (ed.), *Governance by Indicators* (OUP, Oxford, 2012) p. 217 (217-218, 228-229).

¹²¹ R. Urueña, “Internally Displaced Population in Colombia”, in K. Davis/A. Fisher/B. Kingsbury/S. E. Merry (ed.), *Governance by Indicators* (OUP, Oxford, 2012) p. 249 (255). The indicators can induce new standard-setting processes; see K. E. Davis et al., Indicators as a Technology Of Global Governance, IILJ Working Paper 2010/2 (GAL Series) pp. 8-9.

at the other.¹²² As has been observed in the presented legal regimes, indicators cover the gap between a legal rule and its factual implementation. This place of indicators in a specific regime provides them with a legal normativity, since they exert some degree of bindingness – even though a reduced one in some cases –.¹²³ In the case of the APRM, for instance, its participants have the obligation to improve their performance towards progressively meeting the objectives of the regime. This is their legal obligation and the meeting of this obligation is tested with the use of indicators.

Assessing the legal nature of indicators requires an *ad hoc* judgment. This judgment depends on the surrounding legal framework of the indicator. The placement of indicators closer to law is linked to a process of juridification of the indicator based on GAL principles and a process of “administratisation” of the facts.¹²⁴ Both experimentalist governance and GAL provide the relative pool of legal instruments that leads to the juridification of indicators. Experimentalist governance and GAL have several principles in common: Transparency, participation and (peer) accountability are key features of experimentalist governance,¹²⁵ exactly as of GAL.¹²⁶

Global Administrative Law has a constitutive role in the juridification process of indicators in the global legal order. If some conditions are fulfilled, then indicators acquire a legal nature. The process proceeds in three steps. The first step is the adoption – production, use, promulgation – of an indicator by an institution that has *de iure* or *de facto* regulatory power in a specific governance frame. Moreover, a proceduralisation process needs to take place. Since proceduralisation occurs in the frame of the enabling nature of GAL, principles like legality, fairness, reason-giving and review need to be adapted accordingly. Indicator-production is a sophisticated process of data processing that takes place within the institution that uses the indicators or by other institutions, with or without a mandate of the organization that uses them. Except for the production, it is also decisive for the nature of the indicator that its use takes place in a certain procedural framework. There is no bindingness

¹²² See also G. Dimitropoulos, *Zertifizierung und Akkreditierung im Internationalen Verwaltungsverbund* (Mohr Siebeck, Tübingen, 2012) pp. 278 *et seq.* (with regard to standards and certificates). Against the binary distinction between law/non-law also N. Walker/G. de Búrca, “Reconceiving Law and New Governance”, 13 *Columbia Journal of European Law* (2006-2007) p. 519 (esp. at 536-537).

¹²³ Standards and indicators lie very close to each other in this spectrum; in most cases standards lie closer to legal normativity and indicators closer to facts.

¹²⁴ S. Cassese, “‘Le Droit tout Puissant et Unique de la Société’: Paradoxes of Administrative Law”, 22 *European Review of Public Law* (2010) p. 171, 178 speaks about the administratization of civil law.

¹²⁵ See J. Cohen/C. F. Sabel, “Directly-Deliberative Polyarchy”, 3 *European Law Journal* (1997) 313; J. Cohen/C. F. Sabel, “Global Democracy?”, 37 *NYU Journal of International Law and Politics* (2005) 763.

¹²⁶ B. Kingsbury/N. Krisch/R. B. Stewart, “The Emergence of Global Administrative Law”, 68 *Law and Contemporary Problems* (2005) p. 15; S. Cassese, *The Global Polity* (Global Law Press, Sevilla, 2012); see also K. E. Davis/B. Kingsbury/S. E. Merry, “Indicators as a Technology of Global Governance”, 46 *Law and Society* 71, 88-89 (2012).

stemming from the use of the indicators in the EU CAP case, since the evaluation of the OECD does not take place within a legal frame, nor does it follow any procedural rules. The third step has to do with the existence of democratic principles in the regime. A “democratisation” process needs to accompany proceduralisation. Since indicators are expressions of experimentalist governance, democratic principles need to be perceived in such terms. Transparency and public participation need to be in place, at least in some degree.¹²⁷ Accountability mechanisms also play a major role. These mechanisms will usually enable the global administrative bodies to be held accountable towards peer bodies; it is peer accountability. Moreover, global regimes can be informed by the experimentalist concept of democratic governance that indicators can’t be applied in a harmonised way across all jurisdictions. They need to be implemented in a decentralised way and locally adapted.¹²⁸

3. Towards Horizontal Monitoring of Indicators

3.1. Governance by Indicators as a Form of Horizontal Governance

Governance, functions and membership of most international organisations created after World War II were shaped and reflect the geopolitical realities of the time.¹²⁹ Evidence from theory and practice of international governance testifies a change of this paradigm towards new forms of governance and administration. International organisations like the OECD have changed their functions in order to find a new place in the global legal order.¹³⁰ The NEPAD APRM is a fresh effort to renovate overall governance in Africa. The IMF has changed its conditionality policy in 2002 and 2009 towards more flexible conditions with increased domestic ownership of programmes that are better tailored to the needs of each country.¹³¹ Similar tendencies have been presented in the IMF/EU adjustment programme for Greece.

¹²⁷ On transparency and participation (efforts) in the development of health indicators see A. Fisher, From Diagnosing Under-Immunization to Evaluating Health Care Systems, in K. Davis/A. Fisher/B. Kingsbury/S. E. Merry (eds.), *Governance by Indicators* (OUP, Oxford, 2012) p. 217 (239-240).

¹²⁸ Jackson et al. propose in the field of indicators of justice for Europe a three-level approach with the use of “primary indicators”, “secondary indicators” and “country indicators”; see J. Jackson et al., “Developing European Indicators of Trust in Justice”, 8 *European Journal of Criminology* (2011) p. 267.

¹²⁹ See on the IFIs D. D. Bradlow, “The Reform of the Governance of the IFIs”, in H. Cissé/D. D. Bradlow/B. Kingsbury (eds.), *International Financial Institutions and Global Legal Governance*, 3 *The World Bank Legal Review* (2012) p. 37 (37, 39-40); on GAL dimensions of international organizations see B. Kingsbury/L. Casini, “Global Administrative Law Dimensions of International Organizations Law”, 6 *International Organizations Law Review* (2009) p. 319.

¹³⁰ See J. Salzman, “Decentralized Administrative Law in the Organization for Economic Cooperation and Development”, 68 *Law and Contemporary Problems* (2005) p. 189.

¹³¹ IMF, *IMF Factsheet. IMF Conditionality* (<<http://www.imf.org/external/np/exr/facts/pdf/conditio.pdf>>, visited on 9 May 2012), at pp. 3-4; see IMF, *Guidelines on Conditionality. Prepared by the Legal and Policy Development and Review Departments*. Approved by Timothy F.

In global governance, regulation is usually exercised not in a command-and-control way, but by means of non-hierarchical forms of governance. Governance and regulation do not take the form of a vertical relationship of the involved actors, but that of a horizontal relationship among equals. Indicators are an expression of *horizontal governance*. At the same time, they promote horizontality in global governance. Indicators and other new forms of governance do not exert their influence in the way traditional top-down governance instruments do.¹³² Since only similar things and units can be compared,¹³³ indicators create a horizontal relationship among the participating actors. They facilitate and promote governance by self-management and performance improvement rather than command and sanctioning.¹³⁴ Governance by indicators is a form of horizontal governance. In the toolkit of international organizations, the indicator performance-based model is supposed to replace top-down conditionality models.¹³⁵

3.2. *Horizontal monitoring and evaluation*

The turn to horizontal governance is accompanied by a turn to new forms of monitoring and review in the global legal order. Horizontal governance favors horizontal monitoring. Horizontal monitoring means that the review function of the activities of one body is performed by a body that is at the same level as the reviewed one and not by a hierarchical body. The most prominent form of horizontal monitoring is the “peer review”.¹³⁶ Recent prominent examples of horizontal monitoring mechanisms are the Universal Periodic Review (UPR) in the human rights field¹³⁷ and the political review of the activities of the World Health Organisation by the Parliamentary Assembly of the Council of Europe.¹³⁸

Horizontal monitoring favours the use of indicators accompanied by performance evaluation since governance by indicators and horizontal monitoring are part of the

Geithner and François Gianviti (2002); IMF, *Operational Guidance to IMF Staff on the 2002 Conditionality Guidelines*, Revised (2010).

¹³² R. Urueña, “Internally Displaced Population in Colombia”, in K. Davis/A. Fisher/B. Kingsbury/S. E. Merry (ed.), *Governance by Indicators* (OUP, Oxford, 2012) p. 249 (256).

¹³³ See ECOSOC, “The New International Economic Order and the Promotion of Human Rights. Realization of Economic, Social and Cultural Rights”, *Progress Report Prepared by Mr. Danilo Türk, Special Rapporteur* (U.N.Doc. E/CN.4/Sub.2/1990/19, 1990) at nr. 7.

¹³⁴ S. E. Merry, “Measuring the World”, 52 *Current Anthropology* (2011) p. S83 (S85).

¹³⁵ See S. E. Merry, “Measuring the World”, 52 *Current Anthropology* (2011) p. S83 (S91).

¹³⁶ On peer reviews see OECD, *Peer Review. An OECD Tool for Co-Operation and Change* (SG/LEG(2002)1, Paris, 2003); Georgios Dimitropoulos, “Collegial Rule-Implementation: Peer Reviews in Global Administrative Law”, *Paper presented at the Hauser Global Fellows Forum/NYU*, December 6, 2011.

¹³⁷ See UN General Assembly Resolution 60/251 (2006).

¹³⁸ A. C. Deshman, “Horizontal Review between International Organizations: Why, How, and Who Cares about Corporate Regulatory Capture”, 22 *European Journal of International Law* (2011) p. 1089.

same evolution, namely the emergence of horizontal governance. In 2001, the OECD decided to incorporate the indicators produced by itself in the field of sustainable development in the various economic, social and environmental peer reviews like the Environmental Performance Reviews (EPRs) and the economic surveys that are organised under its auspices.¹³⁹ In order to avoid and correct the malfunctions of the adjustment programme in Greece and in the pursuit of its implementation, the programme turns to peer administrations of the member states. The turn to peers is supposed to increase pressure and provide a helping hand to the Greek government to implement the programme. The core element of the review system of the APRM is indicators. The review of the EU CAP by the OECD is another example of two peer organisations reviewing each other and using indicators.

The use of indicators in peer reviews and other forms of horizontal monitoring and accountability is expected to increase since it has some advantages over traditional forms of review like vertical supervision by hierarchical bodies and judicial review.¹⁴⁰ In terms of the functions of indicators as identified above, implementation and performance of administrative bodies based on indicators can be best monitored in a horizontal way. First of all, hierarchical monitoring and judicial review are usually tailored to judging compliance. Most the peer reviews and other forms of horizontal monitoring are designed as instruments of performance evaluation. Secondly, peer reviews involve several actors in the monitoring process and not just one judging authority. This process facilitates comparison. Thirdly, peer reviews are usually used as a periodic reporting process over time. Compliance monitoring with treaty rules based on indicators presupposes an on-going process of testing new results and comparing them with old ones. The indicator makes much more sense if it is used to show adaptation and amelioration over time. Fourthly, hierarchical supervision and judicial review are static *ex post* reviews based on a policing process of past action. They lead to sanctions for the violator of the legal standard. The peer review is a non-adversarial and consensual way of monitoring and evaluation. Compliance with the regime is not enforced through sanctions but encouraged through collegial and cooperative interaction, peer culture, peer pressure, acculturation and the creation of trust relationships. The last point is also the most important one; peer reviews promote learning through the collaborative interaction of the participating units. Learning is also a very distinctive feature of indicators in policy-making and policy evaluation.¹⁴¹ Their aim is to promote mutual assistance

¹³⁹ M. Lehtonen, “Mainstreaming Sustainable Development in the OECD through Indicators and Peer Reviews”, 16 *Sustainable Development* (2008) p. 241.

¹⁴⁰ See also S. Cassese, “New Paths for Administrative Law: A manifesto”, 10 *International Journal of Constitutional Law* (2012) p. 603 (606).

¹⁴¹ A. A. Hezri/S. R. Dovers, “Sustainability Indicators, Policy and Governance”, 60 *Ecological Economics* (2006) p. 86 have identified four types of learning in the use of indicators: instrumental, governmental, social and political; see also M. Lehtonen, “Mainstreaming Sustainable Development in the OECD through Indicators and Peer Reviews”, 16 *Sustainable Development* (2008) p. 241 (246).

through recursive learning in an effort to improve performance and promote capacity-building of the evaluated units.

Conclusion

The use of indicators in global governance reveals some general trends as to how governance and administration at the global level is exercised and shaped. In most cases, Global Administrative Law is not an imperative instrument of a superior authority imposing obligations to obey. It usually takes the form of an enabling law that creates frameworks and opportunities for the participating actors and promotes mutual learning among actors and different jurisdictions.¹⁴² Indicators form part of the enabling nature of GAL. Governance and administration through indicators as a form of horizontal governance does not express itself in terms of power but in terms of cooperation and trust.¹⁴³ This form of governance promotes modes of horizontal accountability of the participating actors. Despite the concerns expressed in the use of indicators as a technology of governance, the shift towards governance by indicators can make global governance more legitimate.¹⁴⁴

¹⁴² See also M. Eifert, "Comparative Public Administration and Comparative Law as a Resource for Learning", in M. Eifert/J.O. Puschel, *National Electronic Government* (Routledge, London, 2004) p. 1 (6-8).

¹⁴³ See, e.g., Nr. 1.7 NEPAD, *Objectives, Standards, Criteria and Indicators for the African Peer Review Mechanism* (NEPAD/HSGIC-03-2003/APRM/Guideline/OSCI, 2003).

¹⁴⁴ See R. O. Keohane, "Governance in a Partially Globalized World", 95 *American Political Science Review* (2001) p. 1 (9, 10-11): "...for global governance to be legitimate, global institutions must facilitate persuasion rather than coercion or reliance on sanctions as a means of influence".