

Recommendations for Review Mechanism for UN Convention Against Corruption



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DECISIONS BY FIRST CONFERENCE OF STATES PARTIES

The First Conference of States Parties (CoSP), held in Jordan in December 2006, decided that:

- "Effective and efficient review of the implementation of the Convention...is of paramount importance and urgent."
- "It is necessary to establish an appropriate and effective mechanism to assist in the review of implementation...."

The CoSP called for an open-ended intergovernmental expert working group to make recommendations to the Second CoSP on the appropriate mechanism and on the terms of reference for such mechanism. This working group is scheduled to meet in August 2007 and the Second CoSP will take place at the end of January 2008.

The CoSP decided that the review mechanism should be:

- Transparent, efficient, non-intrusive, inclusive and impartial;
- Should not produce any form of ranking;
- Provide opportunities to share good practices and challenges;
- Complement existing international and regional review mechanisms in order to cooperate with them and avoid duplication of effort.

This document provides Transparency International's (TI) recommendations on the review mechanism and the terms of reference.

OVERVIEW OF RECOMMENDATIONS

A. Review Mechanism

The **Conference of States Parties** has overall responsibility for the establishment of an effective implementation review mechanism and its terms of reference and for establishing policies and priorities for the review process.

The **Secretariat** should be responsible for the day-to-day management of the review process.

A **Board of Experts** should be established consisting of outstanding experts from around the world, with expertise relating to each UNCAC chapter: preventive measures, criminalisation and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange. The Board should provide advice and assistance to the CoSP and the Secretariat in the planning and conduct of reviews.

Review Teams should be established to conduct country reviews.

B. Terms of Reference

For 2008-09 The Second CoSP in early 2008 should provide for the following:

- Continuation of information-gathering and development of implementation tools
- Promotion of implementation of the asset recovery chapter, of key articles of the preventive measures chapter, and of mandatory articles of the criminalisation and law enforcement chapter
- Continuation of pilot programmes to develop methodologies for country reviews
- Cooperation with donor agencies to promote technical assistance for developing countries
- Development of procedures for cooperation with monitoring organisations for other conventions

For 2010-14 The Third CoSP should launch a programme of country reviews, covering key articles from each UNCAC chapter, with the goal of completing one round of reviews of all parties by the end of 2014.

C. Funding

Adequate and dependable funding will be essential for the success of the review process. While the initial phase can be funded by voluntary contributions, longer term funding should come from the regular UN budget.

D. Transparency and Public Participation

The review process should be transparent with active involvement of civil society and the private sector.

REVIEW MECHANISM

The key components of the review mechanism should be the CoSP, the Secretariat, a Board of Experts and Review Teams. The review process for a convention with more than 60 substantive articles and ultimately more than 140 parties presents formidable management challenges. Realistic priority-setting is essential, particularly in the early years to avoid over-taxing the mechanism and the parties. The review process should be allowed to evolve over time as experience develops.

A. Role of Conference of States Parties

The Secretariat should be responsible for setting basic policies and priorities, and providing oversight of the review process. Because the CoSP meets every two years, a cycle should evolve whereby the CoSP reviews what has been done in the prior period and then decides on plans for the next two years. The Bureau of the CoSP should provide guidance to the Secretariat between CoSP meetings and can play an important role in maintaining a well-functioning relationship between the CoSP and the Secretariat.

B. Role of Secretariat

The Secretariat should be responsible for the day-to-day management of the review process. The experience of the United Nations Office on Drugs and Crime (UNODC) with the negotiation of UNCAC and its subsequent evolution provides highly relevant background for managing the review process.

The Secretariat will require strong leadership and a small professional staff. Currently, UNODC has a staff of seven, which supports both UNCAC and the UN Convention on Transnational Organized Crime (UNTOC). The Working Group on Bribery of the Organisation for Economic Cooperation and Development (OECD) and the Council of Europe Group of States Against Corruption (GRECO) have conducted well-managed monitoring programmes with staffs of eight to ten professionals. Because of its larger membership and broader scope, the size of the Secretariat staff can be expected to become somewhat larger over time.

C. Board of Experts

Purpose A Board of Experts consisting of persons of outstanding professional stature from around the world should be established in 2008 to provide advice and assistance to the CoSP and the Secretariat. Active involvement of distinguished experts would strengthen the quality of the review process, enhance its objectivity, and increase its public credibility. The experts, working on a part-time basis, would increase and diversify the resources available for the review process and enable the Secretariat to function with a small full-time staff. The Board should have about 20 members, sufficient to provide the necessary professional and regional diversity and still be able to function efficiently as a group.

Functions The Board should meet at least once a year as a group. Its functions should include providing advice to the CoSP and the Secretariat on the organisation and planning of the review process. Given the breadth and complexity of UNCAC, much of the Board's work should be performed through small, specialised task forces for each UNCAC chapter (preventive measures, criminalisation and law enforcement, international cooperation, asset recovery, and technical assistance and information exchange) made up of members of the Board of Experts. The Board should collaborate with the Secretariat in planning reviews, including selection of countries and articles to be reviewed. The Board's task forces should review country reports prepared by country review teams.

Composition The Board should consist of experts in the fields covered by each of UNCAC's chapters. Experts should be selected from a wide range of institutions, including governments, international organisations, universities, professional organisations, civil society and the private sector. It should include persons experienced with the monitoring programmes of other anti-corruption conventions. Experts should function in their individual capacity, not as representatives of their governments or of other organisations with which they are affiliated. In view of the importance of the work to the success of UNCAC, many experts may be interested in contributing their time on a pro-bono basis.

Appointment Members of the Board of Experts should be nominated by the Secretariat and approved by the CoSP or its Bureau. They should serve for staggered five-year terms, and should be eligible for reappointment. Selection should be based on outstanding professional stature and the need for regional diversity.

D. Review Teams

Country reviews should be conducted by small review teams, selected by the Secretariat in consultation with the Board of Experts. Review teams should be composed of experts with the appropriate professional and regional expertise, including but not limited to public officials. Participation by members of the Secretariat and of the Board of Experts would be desirable to build experience and consistency. Because the public credibility of reviews depends on their objectivity, reviewers should not be citizens of the country being reviewed and should not be nominated or approved by that government.

E. Other Monitoring Organisations

The First CoSP decided that the UNCAC review mechanism "should complement existing international and regional review mechanisms in order... to cooperate with them and avoid duplication of effort." The monitoring mechanisms of other anticorruption conventions should be regarded as important building blocks of a system for combating international corruption for which UNCAC can provide the unifying international framework.

Arrangements for cooperation between the UNCAC Secretariat and the other monitoring organisations should be established promptly. This should include exchanges of information from prior reviews as well as plans and schedules for further reviews. Because the experience and resources of the other monitoring organisation vary substantially, arrangements for closer collaboration, such as joint review processes, will have to be worked out individually with each organisation, and can be expected to evolve over time. The discussion in Section III, Terms of Reference, includes suggestions for a prompt start to cooperation (Section III-A-7) and for more extensive longer-term collaboration (Section III-B-2).

TERMS OF REFERENCE

A. Work in 2008-09

1. Information Gathering

Based on the results obtained from the self-assessment checklist circulated in the Spring of 2007, and the related pilot programme, the Secretariat should develop recommendations to the Second CoSP for additional information gathering on the status of implementation to be conducted in 2008-09.

- A second checklist should be distributed in 2008 covering additional articles, in particular Articles 6-14, of the chapter on preventive measures. These are crucially important for capacity building to fight corruption.
- Experience should be developed for enhancing the quality of responses, going beyond the 2007 checklist and pilot programmes.
- The plans of the Secretariat for developing a software package to facilitate reporting on implementation by the parties appear promising and should be carried forward.
- The Secretariat, in consultation with the Board of Experts, should prepare a report for the Third CoSP summarising and evaluating the information gathering experience.

2. Pilot Programmes for Country Reviews

- Pilot programmes for country reviews should be carried out in 2008-09 covering selected articles from each chapter of UNCAC. Such pilot programmes should be designed to provide useful information for the conduct of subsequent country reviews, including experience with different methodologies. An important objective should be to develop methodologies that are effective without being overly burdensome, and that take advantage of and avoid duplication with other monitoring programmes.
- Participation in pilot programmes by governments should be voluntary, however, a sufficiently diverse group of governments should be encouraged to participate to provide meaningful results.
- Participation in country reviews by civil society and private-sector representatives should be considered an essential part of the review process.
- The Secretariat, in consultation with the Board of Experts, should prepare a report to the Third CoSP, including recommendations regarding methodologies.

3. Asset Recovery

The Working Group on Asset Recovery, established in accordance with Resolution 1/4 of the First CoSP, should initiate pilot programmes in 2008-09. Priority should be given to programmes promoting improved cooperation between authorities of requesting and requested states, particularly expedited action to recover assets, and providing legal and technical expertise to requesting states.

- It would be useful to form a subgroup consisting of (i) several requesting countries whose former leaders had deposited substantial funds in foreign banks, and (ii) leading banking centres, such as Switzerland, the UK and the US. This group should explore the development of uniform expedited procedures for the identification, freezing and repatriation of the proceeds of corruption.
- In many countries extensive litigation is likely to be required before funds can be repatriated. Arrangements need to be developed for providing adequate funding for legal expenses of requesting states.
- Consideration should also be given to developing arrangements for utilising frozen funds tied up in protracted litigation in the country from which such funds were taken. The funds could be put to use by the World Bank or other financial institutions active in the country, subject to court-approved arrangements until the conclusion of litigation.

4. Preventive Measures

A programme should begin in 2008–09 to promote effective implementation of the articles of the preventive measures chapter because of their importance for building capacity for combating corruption.

5. Development of Implementation Tools

The development of models of good practice should be a high priority. This should include preparation of checklists for preparing effective implementing legislation, model laws and administrative procedures, as well as their dissemination through regional workshops. Substantial work has already been done by the Secretariat. This work should be carried out in a collaboration between the Secretariat and the Board of Experts. Help should also be obtained from the secretariats for other anti-corruption conventions, which have developed implementation tools.

6. Technical Assistance

The Working Group on Technical Assistance established by the First CoSP will hold its initial meeting in October 2007. Secretariat cooperation with donor organisations to promote technical assistance for developing countries in support of UNCAC implementation must continue to be a high priority during 2008–09.

7. Cooperation with Other Monitoring Organisations

The first phase of cooperation with other monitoring organisations, exchanging information on experience and plans should begin in 2008.

- The Secretariat should initiate the organisation of a coordinating group with the monitoring organisations for the other conventions.
- The coordinating group should meet regularly, at least annually, to discuss their plans for reviews, including issues and countries to be reviewed.
- Liaison representatives should be designated to maintain contacts between meetings of the coordinating group.
- The coordinating group should make arrangements for exchanging information from prior reviews, including access to reports and other data, and should explore possibilities for conducting joint reviews.
- The coordinating group should exchange information on experts, including substantive fields of expertise as well as regional experience.

8. Development of Plans for Next Phase

During 2008-09, the Secretariat, in collaboration with the Board of Experts, should develop plans for action by the Third CoSP for ongoing reviews beginning in 2010. Some suggestions are provided in section III B.

B. Work in 2010-14

1. Country Reviews

Beginning in 2010, country reviews should become the principal area of work. One round of country reviews of all parties should be completed by the end of 2014. Such reviews should include:

- Country visit by review team focusing on key articles from each UNCAC chapter
- Preparation by review team of draft country report, including action plan for correcting deficiencies
- Submission of draft report to country reviewed for its comments
- Review of country report and country comments by Board of Experts and adoption of final report
- Publication of final country report and action plan

Country visits are indispensable for issues where a reliable assessment requires input from different sources of information, including not only government officials, but also civil society and the private sector. Country visits enable reviewers to conduct probing exchanges to assess the reliability of differing inputs. Country visits also can promote public interest in UNCAC and its implementation.

Articles to be Reviewed

The Secretariat and the Board of Experts should make recommendations to the Third CoSP on the articles to be reviewed for the period 2010-14, taking into account the results of the information-gathering programmes conducted in 2008-09. Based on current conditions, priority should be given to:

- Articles most likely to achieve timely results in curbing corruption. Examples of success will be important for maintaining support for UNCAC implementation.
- Articles from the preventive measures chapter that are necessary to build capacity to combat corruption.
- Issues requiring international cooperation that cannot be effectively addressed by regional conventions, including asset recovery, mutual legal assistance and cross-border bribery and extortion.
- Different priorities may be appropriate for different countries. For example, for some countries, the preventive measures necessary for capacity-building may deserve priority over criminal law enforcement.

Review Schedule

- The timing of reviews for particular countries will require flexibility. A reasonable balance is needed between giving countries enough time for implementation, while ensuring collective momentum.
- A system of country reviews focusing on a selected number of articles means that additional rounds of reviews will be needed.
 - The alternative of reviewing all articles of the Convention in a single country review appears impractical, given the very broad scope of UNCAC. Reviews covering all articles in a single visit would be extremely burdensome for the country being reviewed and would require unwieldy review teams to cover all the required fields of expertise.
 - Reviewing all articles in a single visit would also make prioritisation impossible.

2. Collaboration with Other Monitoring Organisations

The second phase of closer collaboration with other monitoring organisations, including exploration of opportunities for joint review processes, should begin as promptly as possible. There is a clear common interest because all monitoring programmes have limited resources and need to establish priorities. Each can monitor only a limited number of countries and a limited number of issues in any year. Because all monitoring organisations need to establish priorities, it would be useful to take into account the priorities of the other organisations. A mutually-beneficial process for collaboration can be developed by considering the comparative advantages of different organisations.

Arrangements for collaboration will have to be worked out individually with each monitoring organisation because they are in different stages of evolution and there are differences in resources and areas of interest. The objective of collaboration should be to allocate limited resources in a cooperative and cost-effective way. Different arrangements for different issues would be appropriate, taking into account the interests and capabilities of the regional monitoring organisations. Such arrangements will need to be reviewed periodically to reflect developing experience with UNCAC implementation and with the regional conventions.

CRITICAL ISSUES FOR REVIEW PROCESS

A. Funding

Adequate and dependable multi-year funding for the Secretariat is essential. This should be provided from the regular UN budget. Preparatory work in 2007-08, especially pilot projects, could be conducted using voluntary contributions from interested governments and organisations. The longer-term review process, however, should be funded from the UN budget, for the following reasons:

- **Fairness** Because voluntary contributions will come primarily from a limited number of developed countries, developing countries are likely to be concerned that a review process will be influenced by these countries and that will not be fair to developing countries.
- **Dependability** Staffing and planning a long-term programme will require dependable funding. OECD experience demonstrates that it would be unrealistic to expect to secure dependable funding through voluntary contributions.
 - The first phase of the OECD monitoring programme, which cost less than €500,000 per year, was funded by voluntary contributions, primarily from the US and the UK. As soon as the second phase got underway, with annual costs of €1-1.5million, it became clear that it could not be funded through voluntary contributions. The programme floundered until an agreement was reached for funding through the regular OECD budget.
 - If the OECD – the club of the wealthy countries – could not fund a review programme with voluntary contributions, it would seem even less likely that the UNCAC programme could be funded with voluntary contributions.

B. Transparency and Public Participation

Strong worldwide public concern about corruption has been the key driver behind the adoption and rapid ratification of UNCAC. The same public interest should be harnessed to promote effective implementation. This means that the review process should be transparent with formal opportunities for participation by civil society and the private sector. A process limited to governments reviewing governments behind closed doors will have far less public credibility than a more broad-based process and will be less effective in achieving UNCAC's basic objective of overcoming corruption.

Transparent Review Process

- Questionnaires sent to governments should be made public.
- Governments should be encouraged to make their responses public.
- Reports on country reviews should be made public in final form. Publication provides the best assurance that improvements will be made.

Civil Society and Private Sector Participation

- Civil society and the private sector should play an active role in supporting UNCAC implementation, including promoting support for an effective review process; participation in the reviews; helping to publicise the conclusions; and promoting the adoptions of reforms recommended by the reviews.
- Civil society organisations (CSOs) should conduct their own assessments of implementation, supplementing official reviews, and also evaluating and reporting on the effectiveness of official reviews. CSOs have taken such actions in support of OECD and other anti-corruption conventions. Such a CSO role is likely to be even more important for UNCAC and should be an important part of the review process.
- Civil society and private sector organisations should be provided formal channels for making written submissions to the review process and participating in consultations.

C. Promoting Consistent Implementation of UNCAC Provisions

The review process can play an important role in promoting consistent implementation of UNCAC provisions. Consistency is important to the success of UNCAC in the global economy, for the following reasons:

- Assists prosecutors in the application of UNCAC's articles on mutual legal assistance and money laundering
- Helps to ensure a level playing field for international business transactions by facilitating compliance by companies doing business in multiple jurisdictions
- Makes it easier for citizens to hold governments and private actors accountable

Consistency can be promoted by publishing guides to compliance, as has already been started by the Secretariat. The Secretariat should also publish official commentaries on potentially ambiguous provisions, as has been done by the OECD Working Group on Bribery.

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