

TI Recommendations for UNCAC Review Mechanism

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TI Recommendations for UNCAC Review Mechanism

These recommendations for a review mechanism for the United Nations Convention against Corruption (UNCAC) are prepared for consideration by the Intergovernmental Working Group on Implementation Review which will hold its first meeting in September 2008 and make recommendations to the Third Conference of States Parties in late 2009.

TI's recommendations cover the following: Section I. Mandate for action; Section II. Organisation of Review Mechanism; Section III. Review Programme for 2010 - 11; Section IV. Issues Critical to Success of Review Process. These recommendations build on extensive prior work by TI, including the Report on Follow-up Process for UNCAC submitted to UNODC on 12 September 2006 and the Recommendations for Review Mechanism for UNCAC submitted on 15 August 2007.

I. Mandate for Action

The adoption of UNCAC in 2003 was a major breakthrough, creating a truly global framework for combating corruption. Because corruption has taken on global dimensions in a global economy, there is a compelling need for UNCAC.

Experience with other anti-corruption conventions has demonstrated that implementation review mechanisms are necessary to ensure that their goals are achieved. UNCAC has the broadest and most ambitious scope of any anti-corruption convention, as well as the largest and most diverse number of parties. Therefore, an effective implementation review mechanism is even more important for UNCAC.

The first Conference of States Parties (CoSP), convened in Jordan in December 2006, decided that "effective and efficient review of the implementation of the Convention...is of paramount importance and urgent" and that "it is necessary to establish an appropriate and effective mechanism to assist in the review of implementation." The Working Group on Implementation Review has been charged with developing proposals for the review mechanism and its terms of reference for consideration at the Third CoSP.

Establishment of an effective review mechanism at the Third CoSP is an urgent priority. It is the step most necessary to enable UNCAC to move from words to deeds and build the momentum and public credibility needed to make progress in overcoming corruption.

The review mechanism will benefit individual governments, as well as promoting UNCAC's collective objectives because it:

- Permits early identification of implementation problems.
- Facilitates provision of technical assistance and coordination among donors.
- Promotes exchange of best practices and other forms of cooperation.
- Provides public recognition of progress made.

II. Organisation of Review Mechanism

The Review Mechanism should perform the following functions:

- **Policy-Making.** The Conference of States Parties should be responsible for establishing policies and priorities for the review process.
- **Managerial.** The Secretariat (UNODC) should be responsible for the day-to-day management of the review process.
- **Technical.** A Board of Experts should be established to provide technical advice and assistance to the CoSP and the Secretariat on the organisation and operation of the review process.
- **Peer Review.** Governments should designate peer reviewers for country reviews.

A. Conference of States Parties

The Conference of States Parties should be responsible for setting policies and priorities, and providing oversight of the review process. Because the CoSP only meets every two years, sufficient management responsibility should be delegated to the Secretariat to enable the review process to function efficiently between meetings. Each session of the CoSP should review what has been done in the prior period and then decide on plans for the next two years.

B. Secretariat

The Secretariat should be responsible for the day-to-day management of the review process. The Secretariat will require strong leadership and a small professional staff. Information gathering and other functions should be conducted by the Secretariat's own staff.

C. Board of Experts

A Board of Experts should be established to provide technical advice and assistance to the CoSP and the Secretariat on the organisation and operation of the review process. The Board should have 10-15 members consisting of experts in the fields covered by UNCAC's four pillars: preventive measures, criminalisation and law enforcement, international cooperation, and asset recovery. It should meet at least once a year as a group. Between such meetings small, specialised task forces for each of UNCAC's four pillars can work with the Secretariat.

Experts should be nominated by the Secretariat and approved by the CoSP, and be selected from a wide range of institutions, including governments, international organisations, and universities. They should serve for staggered five-year terms, and should be eligible for reappointment. Selection should be based on criteria of outstanding professional stature and the need for regional diversity. Experts should function in their individual capacity, not as representatives of their governments.

Active involvement of outstanding 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.

D. Peer Review Teams

Peer reviewers should generally come from two countries, one from the same region and with similar systems and institutions, and one from a different regime and with different institutions.

III. Review Programme for 2010 – 11

Substantial progress has been made by UNODC in 2007 and 2008 in gathering information on the status of implementation of selected UNCAC articles, testing methods of review through a pilot programme and developing an innovative computerised data-gathering system covering all UNCAC articles. This work provides the relevant experience needed to launch a review programme for 2010-11, subject to the following considerations:

- The review programme should be flexible, recognising that some countries and some articles will need more time for implementation than others.
- Different review methods – including self-assessment surveys, expert and peer reviews and country visits – should be employed, varying in accordance with the articles being reviewed and the stage of the review process (i.e. initial or later stages).
- The review process should be allowed to evolve over time.

TI recommends the following:

A. Continuation of Implementation Surveys

Implementation surveys conducted in 2007-08 cover fifteen articles, one quarter of UNCAC's substantive articles. Beginning in 2010 surveys of the remaining articles should be conducted. Experience from the pilot programme has shown that involvement of expert and peer reviewers produced better responses than self-assessment surveys, so such involvement should be provided for.

B. Priorities for Initial Phase of Reviews

The broad scope of UNCAC makes priority-setting essential; it will take several rounds to review all UNCAC articles. The review mechanism must establish its credibility with governments and the public, so it should not become over-extended in its initial phase.

UNCAC reviews should initially concentrate on articles where UNCAC has a unique worldwide role, particularly preventive measures, international cooperation and asset recovery and then move to articles where cooperation with other organisations would be productive. The following provisions should have high priority for 2010-11:

Preventive Measures. UNCAC's Preventive Measures Chapter is crucial to enable governments to strengthen their capability to combat corruption. Because implementation of these provisions will take considerable time, implementation reviews should begin in 2010-11. The selection of articles to be reviewed should be made on a country-by-country basis, based on their needs and priorities.

International Cooperation. Inadequate cooperation among governments has been a major obstacle to the fight against international corruption. Effective cooperation is essential because corrupt companies, corrupt officials and money launderers have no difficulty operating across national borders. UNCAC is in a unique position to address this issue, unlike regional conventions, with limited geographical scope, which cannot do so effectively. Implementation review of Chapter IV International Cooperation, and particularly Article 46 on Mutual Legal Assistance, should be conducted in 2010-11.

Asset Recovery. This is another field in which UNCAC has a unique role. Previous efforts to recover assets have been inefficient and often ineffective. Priority should be given to programmes promoting improved cooperation between authorities of requesting and requested states, particularly expedited procedures for freezing, confiscating and repatriating stolen assets. The cost of litigation has been a major barrier to asset recovery. Arrangements need to be developed for providing adequate funding of legal expenses for poor requesting states. Because donor organisations are reluctant to become involved in deciding what cases should be funded an independent body may have to be created to supervise such litigation.

Consistent implementation of UNCAC's asset recovery provisions is essential to prevent stolen money from flowing to countries with weak implementation, particularly those that retain banking secrecy laws.

Criminalisation and Law Enforcement. A number of key articles should be selected for review in 2010-11. Examples include: Article 15 *Bribery of national public officials*, Article 16 *Bribery of foreign public officials and officials of public international organizations*, Article 23 *Laundering of proceeds of crime*, and Article 26 *Liability of legal persons*.

C. Country Reviews

Experience with other conventions has shown that country visits are the most effective form of review for issues that require weighing inputs from different sources of information, including government officials, civil society and the private sector. Country visits also promote public interest in UNCAC and its implementation.

Country visit should begin in 2010-11, focusing on the articles proposed in Section III-B above. As noted in section II-C, above, they should include peer reviewers, from a similar and a different country. Members of the Secretariat should participate in country reviews to ensure consistency. Reviewers should not include citizens of the country being reviewed and should not be nominated or approved by that government.

Voluntary or Mandatory Participation. A drawback of voluntary participation is that countries most in need of country reviews may be least likely to volunteer. A drawback of mandatory participation is that reviews of countries that don't want to be reviewed may not be productive. On balance, it seems desirable to start country reviews in countries that volunteer. As experience with reviews grows, future CoSPs can review the pros and cons of voluntary or mandatory participation.

D. Development of Implementation Tools

The development of models of good practice should be a high priority. This should include preparation of checklists for implementing legislation, model laws and administrative procedures, as well as their dissemination through regional workshops. Considerable work in this area has already been done by the Secretariat.

IV. Critical Issues for Success of Review Process

A. Funding

Adequate and dependable multi-year funding for the review process is essential. This should be provided from the regular UN budget. Experience with other conventions demonstrates that it would be unrealistic to expect to secure dependable funding for staffing and planning a long-term programme through voluntary contributions. Because voluntary contributions would come primarily from a limited number of developed countries, concern could arise that the review process may be influenced by these countries and may not be fair to developing countries.

Technical assistance programmes should be funded using contributions from interested governments and donor organisations. See Section IV-D below.

B. Transparency and Civil Society Participation

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 opportunities for participation by civil society and the private sector. A process limited to governments reviewing other governments behind closed doors will have far less public credibility and will be less effective in building public support for effective implementation.

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

- Article 13 Participation of Society calls on governments to promote active participation by groups outside the public sector, such as civil society and non-governmental organisations. It would be inconsistent with the principle of Article 13 not to provide similar participation in the UNCAC review process.
- Civil society and the private sector should be provided with formal channels for making written submissions and for participating in consultations with reviewers. They should help to publicise the conclusions and promote adoptions of reforms recommended by the reviews.
- Civil society organisations (CSOs) should conduct their own assessments of implementation and evaluate the effectiveness of official reviews. CSOs have taken such actions in support of other anti-corruption conventions. Such a CSO role is likely to be even more important for UNCAC.

C. Cooperation with Other Review Programmes

Arrangements for cooperation between the UNCAC Secretariat and the review mechanisms of other anti-corruption conventions should be established promptly. Cooperation among review organisations is essential because many UNCAC parties are also parties to other conventions and there is widespread concern about duplicative reviews.

Coordinating Group. The Secretariat should initiate the organisation of a coordinating group with the monitoring organisations for the other conventions.

- The coordinating group should meet at least annually to discuss plans for reviews, including issues emerging from reviews already carried out.

- 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. Consideration should be given to other ways to avoid duplicative reviews and reduce costs, such as assistance with updating prior reviews.

D. Technical Assistance

The self-assessment surveys conducted by UNODC indicate that there is a large demand for technical assistance. Such assistance is critical to the success of UNCAC. Many donors already fund governance programmes relevant to UNCAC implementation. However substantially greater assistance and increased coordination among donors will be needed. This should become a high priority for UNDP, the World Bank, regional multilateral development banks and bilateral donors. The Secretariat must play an active role to encourage adequate funding and effective coordination.

E. Promoting Consistent Implementation

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 and facilitates compliance by companies doing business in multiple jurisdictions.
- Makes it easier for citizens to hold governments and private actors accountable.

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Transparency International is the civil society organisation leading the global fight against corruption. For more information go to:
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