



Conference of the States Parties to the United Nations Convention against Corruption

Distr.: General
26 August 2010

Original: English

Implementation Review Group

Resumed first session

Vienna, 29 November-1 December 2010

Item 7 of the provisional agenda*

Other matters

Legal Opinion from the Office of Legal Affairs

Note by the Secretariat

At its first meeting, held in Vienna from 28 June to 2 July 2010, the Implementation Review Group of the United Nations Convention against Corruption discussed the matter of participation of observers in the meetings of the Group (CAC/COSP/IRG/2010/7, paras. 53-56). In the light of those discussions, the Group requested the Secretariat to seek a legal opinion from the Office of Legal Affairs of the Secretariat and to circulate that opinion so that it could be considered at a resumed session of the Group (CAC/COSP/IRG/2010/7, paras. 57-58). Accordingly, the relevant documents are hereby reproduced below.

* CAC/COSP/IRG/2010/1/Add.1.



I. Request from the Implementation Review Group for a legal opinion

From: Dimitri Vlassis

Secretary, Conference of the States Parties to the United Nations Convention against Corruption

To: Peter Taksøe-Jensen

Assistant Secretary-General for Legal Affairs

Subject: Request for legal opinion from the Implementation Review Group of the Conference of the States Parties to the United Nations Convention against Corruption

1. The United Nations Convention against Corruption, in its article 63, paragraph 7, foresees mechanisms to monitor the implementation of the Convention.
2. At its third session, held in Doha in November 2009, the Conference of the States Parties to the United Nations Convention against Corruption adopted its resolution 3/1, containing the terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption establishing the Implementation Review Group as an open-ended intergovernmental group of States parties, which should operate under the authority of and report to the Conference. The Conference decided that the functions of the Implementation Review Group should be to have an overview of the review process in order to identify challenges and good practices and to consider technical assistance requirements in order to ensure effective implementation of the Convention.
3. At the first session of the Implementation Review Group, held in Vienna from 28 June to 2 July 2010, a discussion took place with respect to the possibility of having observers take part in meetings of the Group. In particular, one opinion was expressed that the definition of the Implementation Review Group as an “open-ended intergovernmental group of States parties”, contained in paragraph 42 of the terms of reference, meant that only States parties to the Convention were allowed to attend its sessions and that the Conference of the States Parties had already pronounced itself on the matter. (For ease of reference, para. 42 of the terms of reference states that “*The Implementation Review Group shall be an open-ended intergovernmental group of States parties. It shall operate under the authority of and report to the Conference.*”) It was added that a decision on the participation of observers rested with the Implementation Review Group or the Conference of the States Parties, as appropriate. In this respect, it was further suggested that the Implementation Review Group might consider establishing subgroups allowing the participation of observers.
4. Other participants noted that paragraph 42 of the terms of reference did not explicitly exclude the participation of observers in the sessions of the Implementation Review Group. It was stressed that the rules of procedure of the Conference of the States Parties would apply to the Implementation Review Group as a subsidiary body of the Conference and an integral part of the Review Mechanism, and that therefore the participation of observers was to be treated

according to rules 16 and 17 of the rules of procedure. It was added that intergovernmental organizations had been allowed in the past to attend meetings of the Open-ended Intergovernmental Working Group on Technical Assistance established by the Conference of the States Parties, and that such a decision was in line with the general approach of the Convention, requesting that meetings of the Implementation Review Group should be inclusive and transparent.

5. In response, it was noted that rules 16 and 17 of the rules of procedures of the Conference of the States Parties applied only to participation in the plenary, while the Implementation Review Group was not a plenary body. However, that interpretation of the rules of procedure was not unanimous. For ease of reference, rules 16 and 17 read as follows:

Rule 16

Participation of entities and intergovernmental organizations

1. Subject to prior written notification to the Secretary-General, representatives of entities and organizations that have received a standing invitation from the General Assembly to participate as observers in the sessions and work of all international conferences convened under its auspices, representatives of United Nations bodies, specialized agencies and funds, as well as representatives of functional commissions of the Economic and Social Council, shall be entitled to participate as observers in the deliberations of the Conference.
2. Representatives of any other relevant intergovernmental organization may also apply to the bureau for observer status, which shall be accorded unless otherwise decided by the Conference.
3. Without taking part in the adoption of decisions on substantive and procedural matters, whether by consensus or by vote, at the Conference, such entities and organizations may:
 - (a) Attend plenary meetings of the Conference;
 - (b) Deliver statements at such meetings at the invitation of the President in consultation with the bureau;
 - (c) Receive the documents of the Conference; and
 - (d) Submit their views in writing to the Conference.

Rule 17

Participation of non-governmental organizations

1. Relevant non-governmental organizations having consultative status with the Economic and Social Council may apply to the bureau for observer status, which should be accorded unless otherwise decided by the Conference.
2. Other relevant non-governmental organizations may also apply to the bureau for observer status. The secretariat shall circulate as a document a list of such organizations with sufficient information at least thirty days prior to the Conference. If there is no objection to a non-governmental organization, observer status should be accorded unless otherwise decided by the

Conference. If there is an objection, the matter will be referred to the Conference for a decision.

3. Without taking part in the adoption of decisions on substantive and procedural matters, whether by consensus or by vote, at the Conference, such non-governmental organizations may:

(a) Attend plenary meetings of the Conference;

(b) Upon the invitation of the President and subject to the approval of the Conference, make oral statements or provide written reports at such meetings through a limited number of representatives on questions relating to their activities; and

(c) Receive the documents of the Conference.

6. In the light of the above, the Implementation Review Group requested the secretariat of the Conference and the Implementation Review Group to seek a legal opinion on the matter from the Office of Legal Affairs of the Secretariat and circulate the opinion to the States parties. The opinion should ideally cover all entities that are not States parties but might be interested in participating in the Implementation Review Group, and in particular signatory States that have not yet ratified the Convention; intergovernmental organizations, including those in the United Nations system, such as the United Nations Development Programme; regional economic integration organizations, such as the European Union, which is a party to the United Nations Convention against Corruption; and non-governmental organizations. The illustration of precedents and practice from other treaty bodies, in particular those dealing with review mechanisms, would be most appreciated.

7. Please note that we are aware of the opinion on the “Possibility of States not members of the Commission on Sustainable Development holding office in an open-ended intergovernmental group of experts” (published in *United Nations Juridical Yearbook*, 1999, Part II, chap. VI, p. 417), where it was indicated that the established practice of the United Nations with respect to the use of the term “open-ended” is not uniform and thus it was not possible to choose between available options by legal analysis.

8. The full text of the terms of reference of the Implementation Review Group is available online at <http://www.unodc.org/unodc/en/treaties/CAC/CAC-COSP-session3-resolutions.html>, and that of the rules of procedure of the Conference of the States Parties is available online at http://www.unodc.org/pdf/crime/convention_corruption/cosp/07-80230_Ebooke.pdf.

9. Unfortunately, the matter is rather time-sensitive since, in order to submit the opinion for translation with a view to circulating it at the next meeting of the Implementation Review Group, we would need to receive it by the end of July.

10. I remain at your disposal for any further clarification.

II. Interoffice memorandum dated 5 August 2010 from Daphna Shraga, Principal Legal Officer in charge of the Office of the Legal Counsel, to Dimitri Vlassis, Secretary, Conference of the States Parties to the United Nations Convention against Corruption, relating to the request from the Implementation Review Group for a legal opinion

1. I wish to refer to your memorandum to Taksøe-Jensen dated 15 July 2010 concerning the activities of the Implementation Review Group, an intergovernmental group of States parties established under the United Nations Convention against Corruption, and which operates under the authority of the Conference of the States Parties. In particular, you indicate that the Implementation Review Group seeks advice on whether observers, including States that have not yet ratified the Convention, intergovernmental organizations and non-governmental organizations, can participate in the activities of the Implementation Review Group. Our views are as follows.

Establishment of the Mechanism and Implementation Review Group

2. By way of background, the Implementation Review Group was established by resolution 3/1, adopted by the Conference in November 2009, as part of a Mechanism for the Review of the Implementation of the Convention. The terms of reference of the Mechanism are set out in the annex to that resolution.

3. Paragraph 10 of the annex provides that the “review of implementation of the Convention and the Mechanism shall be under the authority of the Conference, in accordance with article 63 of the Convention”, which authorizes the Conference to agree upon activities, procedures and methods of work in order to achieve the Convention’s objectives.

4. These objectives include, under article 63, paragraph 4 of the Convention, facilitating the exchange of information among States parties on patterns and trends in corruption and on successful practices for preventing and combating corruption, reviewing periodically the Convention’s implementation and making recommendations to improve the Convention and its implementation.

5. In addition, article 63, paragraph 7, provides that “the Conference of the States Parties shall establish, if it deems necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention.”

6. The purpose of the review process is accordingly to assist States parties in their implementation of the Convention (resolution 3/1, annex, para. 11).

7. In accordance with the resolution and procedures set out in the annex, all States parties provide information to the secretariat of the Conference on their compliance with the Convention, based upon a “comprehensive self-assessment checklist” prepared by the secretariat of the Conference in consultation with States parties. In addition, States parties participate in a review conducted by two other States parties on their compliance with the Convention. The reviewing States parties then prepare a country review report, in close cooperation and coordination with the State party under review. The country review report is finalized upon agreement

between the reviewing States parties and the State party under review (resolution 3/1, paras. 6-9 and annex, section IV).

8. The Secretariat, based upon the country review report, is then required to “compile the most common and relevant information on successes, good practices, challenges, observations and technical assistance needs contained in the technical review reports and include them, organized by theme, in a thematic implementation report and regional supplementary agenda for submission to the Implementation Review Group” (resolution 3/1, annex, para. 35).

Functions of the Implementation Review Group

9. The functions of the Implementation Review Group as part of the Mechanism are set out in both paragraph 5 of the resolution and paragraphs 42 to 44 of the annex. They include evaluating the terms of reference of the Mechanism, identifying challenges encountered during the country reviews, considering technical assistance requirements in order to ensure effective implementation of the Convention, reviewing thematic implementation reports (referred to above) and submitting recommendations and conclusions to the Conference for its consideration and approval concerning the review process.

Participation of observers in the activities of the Implementation Review Group

10. Under article 63, paragraph 3, of the Convention, the Conference “shall adopt rules of procedure and rules governing the functioning of the activities set forth in this article, including rules concerning the admission and participation of observers, and the payment of expenses incurred in carrying out those activities.”

11. Pursuant to article 63, paragraph 3, the Conference has adopted rules of procedure. Rule 2 of those rules provides as follows concerning their scope of application:

1. These rules of procedure shall apply to any session of the Conference in accordance with article 63 of the Convention.
2. **These rules shall apply, mutatis mutandis, to any mechanism or body that the Conference may establish in accordance with article 63 of the Convention, unless it decides otherwise.** (Emphasis added.)

12. The Conference, when establishing the Implementation Review Group under the resolution, did not indicate that there should be special procedures for its activities or specifically give the Implementation Review Group the authority to decide upon its own rules of procedure for the conduct of its work. Therefore, the rules of the Conference apply to the Implementation Review Group as a subsidiary body that the Conference has established in accordance with article 63 of the Convention.

13. Section V of those rules concerns the participation of observers in the Conference and deals with the participation of four separate groups of observers, i.e. signatories, non-signatories, intergovernmental organizations and non-governmental organizations. It would thus be advisable that the Implementation Review Group apply the provisions of section V to its activities, mutatis mutandis.

14. Bearing in mind the above, it is also important to refer to the previous practice of other bodies and mechanisms created by the Conference in accordance with article 63 of the Convention.

15. In this connection, it is important to recall that by paragraph 10 of the resolution, the Conference decided that the Implementation Review Group “shall be in charge of following up and continuing the work previously undertaken by the Open-ended Intergovernmental Working Group on Technical Assistance.” It would thus be important to review the practices of that open-ended Working Group to determine whether observers participated in its meetings in accordance with the provisions of section V of the rules. We note from paragraph 4 of your memorandum that intergovernmental organizations had previously been allowed to participate in that Working Group’s activities as observers.

16. In conclusion, we would recommend that in the light of the concerns expressed in your memorandum, the Implementation Review Group take a decision on the participation of observers that is consistent with both the rules and prior practice. Alternatively, the Implementation Review Group could revert to the Conference of the States Parties and request the Conference to take a decision concerning the participation of observers in the activities of the Implementation Review Group.
