

Draft terms of reference of the mechanism for the review of implementation of the United Nations Convention against Corruption

Rolling text¹

Note:

The Open-ended Intergovernmental Working Group on Review of the Implementation of the United Nations Convention against Corruption decided in its meeting on 15-17 December 2008, to proceed with discussions on document CAC/COSP/WG.1/2008/7 containing “Draft terms of reference of the mechanism for the review of implementation of the United Nations Convention against Corruption” in informal consultations. The Secretariat is making this document available to the informal consultations to take place on 26-27 February 2009 in the form of a “rolling text” in English only, reflecting progress made by the Working Group in the aforementioned meeting. Subsequent to the informal consultations, the “rolling text” will be submitted as an official document for translation into all official languages to be available for the next session of the Working Group which will take place from 11-13 May 2009.

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¹ Interim version of document CAC/COSP/WG.1/2008/7 reflecting progress achieved at the meeting of the Working Group on Review of Implementation of the United Nations Convention against Corruption at its meeting on 15-17 December 2008.

Preamble

Recalling article 4, paragraph 1, of the United Nations Convention against Corruption² which states that States parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of other States.

I. [Composition] [Definition]

Option 1

1. The Mechanism for the Review of Implementation of the United Nations Convention against Corruption (hereinafter “the Mechanism”) shall be composed of the review process and the Implementation Review Group. The review process shall be guided by paragraphs 2-11 below and be carried out in accordance with paragraphs 12-40 below. The composition and functions of the Implementation Review Group are described in paragraphs 41-44 below.

Option 2

1. Delete paragraph 1.

II. Guiding principles

2. The Mechanism shall:
 - (a) Be transparent, efficient, non-intrusive, inclusive and impartial;
 - (b) Not produce any form of ranking;
 - (c) Provide opportunities to share good practices and challenges;
 - (d) Assist States parties in the effective implementation of the Convention;
 - (e) Take into account a balanced geographical approach;
 - (f) Be non-adversarial and non-punitive and shall promote universal adherence to the Convention;
 - (g) Base its work on clear, established guidelines for the compilation, production and dissemination of information, including addressing issues of confidentiality and the submission of the outcome to the Conference, which is the competent body to take action on such outcome;
 - (h) Identify, at the earliest stage possible, difficulties encountered by States parties in the fulfilment of their obligations under the Convention and good practices adopted in efforts by States parties to implement the Convention;
 - (i) Be of a technical nature and promote constructive collaboration, *inter alia*, in preventive measures, asset recovery and international cooperation.

² United Nations, *Treaty Series*, vol. 2349, No. 42146.

- (j) Complement existing international and regional review mechanisms in order that the Conference of the States Parties to the United Nations Convention against Corruption may, as appropriate, cooperate with them and avoid duplication of effort;

The Mechanism shall have the following characteristics:

3. [The Mechanism shall [be an intergovernmental process], be driven by States parties [and be action-oriented.]]
4. In conformity with Article 4 of the Convention, the Mechanism shall not serve as an instrument for interfering in the domestic affairs of States parties but shall respect the principles of equality and sovereignty of States Parties and the review process shall be conducted in a non-political and non-selective manner.
5. The Mechanism shall promote the implementation of the Convention by States parties, as well as cooperation among States Parties.
7. [The Mechanism shall [promote transparency and participation] and [be transparent and participatory] and provide opportunities [for experts³] to meet and exchange views and ideas, thus contributing to strengthening cooperation among States parties in preventing and fighting corruption.]
8. The Mechanism shall take into account the levels of development of States parties, as well as diversities in judicial, legal political, economic and social systems and differences in legal traditions.
9. The review of implementation of the Convention is an ongoing and gradual process. Consequently, the Mechanism shall endeavour to adopt a progressive and comprehensive approach and shall be based on an overview of the status of implementation of the Convention.

III. Relationship [of the Review Mechanism] with the Conference of the States Parties

10. The review of implementation of the Convention shall be under the [ultimate/ supreme/ exclusive] authority of the Conference of the States Parties in accordance with article 63 of the Convention.

[11. The Conference shall have [the final/ ultimate responsibility] [exclusive competence] for the establishment of policies and priorities, as well as for the final approval and the issuance of implementation reports [and [recommendations] [observations]]. The Mechanism shall operate under the [authority], [oversight] and guidance of the Conference and be subject to a periodic evaluation of its performance and its compliance with the present terms of reference.]

IV. Review process

A. Goals

³ This concept may require further clarification.

12. The principal goals of the review process shall be:
- (a) [To provide the Conference with factual, [reliable, and uniform] information on the status of implementation of the Convention;]
 - (b) To review [the level of] compliance with the Convention by States parties, [including] [and] [the level of] international cooperation provided and received by States parties in accordance with the provisions of the Convention;
 - (c) To help States parties identify and substantiate specific needs for technical assistance and to promote and facilitate the provision of technical assistance.
 - (d) To promote and facilitate international cooperation in the prevention of and the fight against corruption, including in the area of asset recovery;
 - (e) To identify successes and challenges of States parties in implementing and using the Convention
 - (f) To promote and facilitate the exchange of information, practices and experiences gained in the implementation of the Convention.

B. Conduct of the review

14. The Mechanism shall be applicable to all States parties. It shall gradually cover the implementation of the entire Convention. The phases and cycles of the review process, as well as the scope, thematic sequence and details of such review, shall be established by the Conference.⁴ The Conference shall also determine the duration of each review cycle and decide on the number of States parties that shall participate in each year of the review cycle.

15. The review of all States that are parties at the start of a review cycle should be completed before a new review cycle begins. In exceptional cases, the Conference may decide to launch a new review cycle. No State party shall repeat the review process within the same review cycle, without prejudice to the ability of a State party to provide new information.

16. The selection of States parties participating in a given year of each review cycle shall be carried out by drawing lots within UN regional groups in the beginning of each review cycle. [Without prejudice to the readiness and ability of each State party to participate in the review process in a given year should be taken into account] or [A state, selected for review in any particular year may defer participation to the next year of a review cycle.] The number of States from each regional group participating in any given calendar year shall be proportionate to the size of the regional group in question and the number of its members that are States parties to the Convention.

⁴ Proposals related to these matters are contained in the note by the Secretariat on the draft elements for the terms of reference of a mechanism for reviewing the implementation of the United Nations Convention against Corruption (paras. 69 to 84). The secretariat believes that such matters may be more appropriately addressed in the resolution by which the Conference will establish the mechanism and adopt its terms of reference. Their inclusion in the terms of reference was not considered appropriate because it would entail including a level of detail that would require periodic revisions of the terms of reference.

17. Each State party shall provide to the secretariat the information required by the Conference on the compliance with and implementation of the Convention, using the self assessment checklist developed by the secretariat and endorsed by the Conference as an initial step for that purpose. States parties shall provide complete, up-to-date, accurate and timely responses.
18. Assistance in the preparation of the responses to the checklist shall be provided by the secretariat to States parties requesting such assistance.
19. Each State party shall appoint [competent] focal points who coordinate that State party's participation in its review process. Each State party shall endeavour to appoint focal points who possess the required substantive expertise on the provisions of the Convention under review.
20. For the review of each State party, a review team shall be established composed of [[at least][a maximum] of [two][three] [governmental] [appointed /seconded] experts from] two States parties, [which will work directly with the designated focal points of the State under review.] [One member of the review team shall be a representative of the State under review.] [One member of the review team shall be a representative of a State party of the same region as the State party concerned, with a legal system similar to that of the State party concerned.] The selection of these [representatives of States] [governmental experts] shall be carried out by drawing lots, on the understanding that States parties shall not undertake mutual reviews. The composition of the review team shall be subject to the consent of the State party concerned. The State party concerned may request that the drawing of lots be repeated up to two times.

Option 1

21. The review team, assisted by the secretariat, shall carry out a desk review of the checklist response of the State party concerned. Such desk review shall entail a preliminary analysis of the response, focused on the identification of normative gaps and a constructive, non-adversarial and non-intrusive dialogue between the review team and the focal points appointed by the State party concerned, pursuant to paragraph 20 above. The desk review shall involve and be facilitated by the secretariat and employ means of communication such as conference calls, videoconferences and e-mail exchanges, as appropriate and feasible. There shall be full

Option 2

21. The secretariat shall carry out a desk review of the checklist response of the State party concerned. Such desk review shall entail an analysis of the response focused on the identification of normative gaps.

21. The review team, assisted by the secretariat, shall carry out a desk review of the checklist response of the State party concerned. Such desk review shall entail a preliminary analysis of the response, focused on the identification of normative gaps and a constructive, non-adversarial and non-intrusive dialogue between the review team and the focal points appointed by the State party concerned, pursuant to paragraph 20 above. The desk review shall involve and be facilitated by the secretariat and employ means of communication such as conference calls, videoconferences and e-mail exchanges, as appropriate and feasible. There shall be full openness between the experts and the State party concerned at all stages of the process.

22. The review team members may request the State party concerned to provide clarifications or additional information or address supplementary questions related to the review. The State party concerned shall [endeavour to] provide responses to supplementary questions, clarifications or additional information requested in a timely and complete manner.

23. The programme and schedule of the desk reviews shall be established by the secretariat in consultation with the review team and the experts

21. The secretariat shall carry out a desk review of the checklist response of the State party concerned. Such desk review shall entail an analysis of the response focused on the identification of normative gaps.

22. The secretariat may enter into a constructive, non-adversarial and non-intrusive dialogue with the [representatives of States] [governmental experts] by way of conference calls, videoconferences and e-mail exchanges, as required, to request the State party concerned to provide clarifications or additional information, or address supplementary questions related to the review. The State party concerned shall [endeavour to] provide responses to supplementary questions, clarifications or additional information requested in a timely and complete manner.

23. The programme and schedule of the desk reviews shall be established by the secretariat in consultation with the State party concerned and allow sufficient

23. The programme and schedule of the desk reviews shall be established by the secretariat in consultation with the review team and the experts of the State party concerned and allow sufficient time and capacity to address all issues relevant to the review. Reviews shall not last longer than [three] [six] months.

24. The review team shall have a nominal leader to be responsible for communication and liaison between the review team and the State party.

25. Review teams shall conduct reviews using a set of guidelines to be developed by the secretariat.

26. The desk review shall lead to the elaboration of a draft report.

27. The State party concerned and the review team, in consultation with the secretariat, may decide, on the basis of the draft report, to complement the desk review with a country visit focused on the identification of policy gaps, possible actions and technical assistance priorities. Such country visits shall be conducted in accordance with such terms and conditions [as agreed upon by the State party concerned] [as agreed by reviewers] [as agreed by reviewers and the State party concerned]. The secretariat shall provide support for planning and implementation for, and participate in, country visits. The [secretariat] [Implementation Review Group] shall prepare [a model methodology] [guidelines] on the conduct of country visits. So that a country visit can be carried out efficiently, the

23. The programme and schedule of the desk reviews shall be established by the secretariat in consultation with the State party concerned and allow sufficient time and capacity to address all issues relevant to the review. Reviews shall not last longer than [three] [six] months.

Delete paragraph 24.

Delete paragraph 25.

Same as option 1.

27. The State party concerned and the secretariat, on the basis of the draft report [may decide to complement] [shall complement] the desk review with a country visit by the secretariat [if the State party and the secretariat deem it necessary]. Such country visit shall be conducted on such terms and conditions [as agreed upon by the State party concerned] [as agreed by secretariat and the State party concerned]. The [secretariat] [Implementation Review Group] shall provide planning and implementation support to country visits.

Alternative: Delete paragraph 27.

27. The State party concerned and the review team, in consultation with the secretariat, may decide, on the basis of the draft report, to complement the desk review with a country visit focused on the identification of policy gaps, possible actions and technical assistance priorities. Such country visits shall be conducted in accordance with such terms and conditions [as agreed upon by the State party concerned] [as agreed by reviewers] [as agreed by reviewers and the State party concerned]. The secretariat shall provide support for planning and implementation for, and participate in, country visits. The [secretariat] [Implementation Review Group] shall prepare [a model methodology] [guidelines] on the conduct of country visits. So that a country visit can be carried out efficiently, the secretariat shall ensure the availability of all documentation and information in a language in which the members of the review team and the secretariat are proficient.

Alternative: The team of experts may carry out an on-site visit to the State party concerned, unless otherwise agreed. The State party concerned and the review team shall identify issues to be discussed during the visit and decide whom to meet (e.g. relevant stakeholders, including representatives of civil society).

28. In the conduct of the desk review [and country visit, if applicable], in addition to the information provided through the self-assessment checklist and any supplementary information provided by the Government, the

27. The State party concerned and the secretariat, on the basis of the draft report [may decide to complement] [shall complement] the desk review with a country visit by the secretariat [if the State party and the secretariat deem it necessary]. Such country visit shall be conducted on such terms and conditions [as agreed upon by the State party concerned] [as agreed by secretariat and the State party concerned]. The [secretariat] [Implementation Review Group] shall provide planning and implementation support to country visits.

Alternative: Delete paragraph 27.

28. In the conduct of the desk review, in addition to the information provided through the self-assessment checklist and any supplementary information provided by the Government, relevant, up-to-date and credible

28. In the conduct of the desk review [and country visit, if applicable], in addition to the information provided through the self-assessment checklist and any supplementary information provided by the Government, the review team may consider relevant, up-to-date and credible information available from sources such as the following:

(a) Other existing [anti-corruption] review mechanisms in which the State party concerned participates;

(b) Competent intergovernmental organizations;

(c) Non-governmental organizations [duly accredited in accordance with the rules of procedure of the Conference], other civil society organizations, the private sector and professional associations;

(d) The media.

29. The use of and weight given to additional information considered pursuant to paragraph 27 shall be subject to [the consent of the State party concerned] [the provision to the State party concerned of the opportunity to respond⁵].

30. The members of the review teams and the secretariat shall ensure that all information obtained in the course of the review process is used only for analytical purposes and to promote the effective implementation of the Convention and the appropriate functioning of the Mechanism.

28. In the conduct of the desk review, in addition to the information provided through the self-assessment checklist and any supplementary information provided by the Government, relevant, up-to-date and credible information available from other existing [anti-corruption] review mechanisms in which the State party concerned participates may be considered.

Delete paragraph 29.

30. The secretariat shall ensure that all information obtained in the course of the review process is used only for analytical purposes and to promote the effective implementation of the Convention and the appropriate functioning of the Mechanism.

⁵ The use of information requires further extensive discussion. One issue that requires close attention is how to ensure that the concerns of the State party under review are fully met.

31. The members of the review teams and the secretariat shall not disclose any of the information obtained in the course of, or used in, the review process [unless the State party concerned provides its prior consent].

32. In accordance with articles 5 and 13 of the Convention, the Mechanism shall provide representatives of civil society and the private sector with formal channels for making contributions to the review process, in line with rule 17 of the rules of procedure of the Conference of the States Parties.⁶

33. The costs associated with the participation of experts [from developing countries] in the review teams shall be borne by the Mechanism in accordance with paragraph 49 below.⁷

34. The secretariat shall organize periodic training courses, including induction training, for experts who participate in the review process either as members of review teams or as focal points appointed by States parties pursuant to paragraph 19 above, in order to increase their capacity to participate in the review process.

31. The secretariat shall not disclose any of the information obtained in the course of, or used in, the review process [unless the State party concerned provides its prior consent].

Delete paragraph 32.

33. The costs associated with the participation of experts from the State party concerned [from developing countries] in meetings of the Implementation Review Group shall be borne by the Mechanism in accordance with paragraph 49 below.⁷

Same as option 1.

⁶ Inclusion of this paragraph may make subparagraph 28 (c) redundant.

⁷ The secretariat intends to prepare and submit to the Working Group cost estimates in relation with this paragraph, as well as with the other components of the Mechanism. The secretariat is also in the process of collecting information, for submission to the Working Group, on the funding modalities of other review mechanisms.

C. Outcome of the review process

Option 1

35. [The reviewers shall prepare a draft report and submit it to the State party concerned for comments. A constructive dialogue shall take place between the State party concerned and reviewers.] [The State party concerned and the review team, assisted by the secretariat, shall prepare a [country review report] [review outcome report] containing agreed [conclusions and recommendations] [observations].] The report shall be prepared based on a blueprint developed by the secretariat to ensure consistency. The [conclusions and recommendations] [observations] shall highlight successful experiences deriving from implementation and identify good practices employed in such implementation. They shall also address the strengths and weaknesses of relevant mechanisms in the State party concerned [identify gaps recognized by the State party and highlight successful experiences and good practices and ways and means and actions necessary to remedy such gaps]. The report shall further include priorities and actions identified by the State party to improve implementation of the Convention and technical assistance needs for that purpose.

Option 2

35. The secretariat shall compile the [conclusions and recommendations] [observations] contained in the country reports and prepare a [thematic] [aggregate] report for submission to the Implementation Review Group. The report shall include an account of problems faced by States in using the Convention [in particular in the areas of international cooperation and asset recovery]. The [summary] [aggregate] report shall address chapters II, III, IV, V and VI of the Convention.

Option 1

36. The [review outcome] [summary] [aggregate] reports shall be submitted to the [Implementation Review Group] for its consideration. The [Implementation Review Group] shall submit to the Conference [summary reports] [the approved reports] focusing on achievements and gaps in implementation as well as on ways and means of addressing such gaps and technical assistance requirements for that purpose.

Option 2

36. The review outcome reports shall be submitted to the Conference for its consideration. Only the Conference shall be competent to approve and issue implementation review reports.

Option 1

37. The review outcome reports shall be made public [on the condition that the State party concerned agrees].

Option 2

37. Only the [approved] summary report [of the Implementation Review Group] shall be made public as an official document of the Conference.

38. The mechanism shall contain follow-up procedures for each approved [outcome] [summary] [aggregate] report.

39. States parties shall submit periodic reports on the progress achieved in the implementation of their action plans addressing gaps in the implementation of the Convention. Each report shall be reviewed by the review team, which shall make recommendations to the Implementation Review Group.

40. The follow-up procedure shall be used to review whether the technical assistance priorities identified in the outcome reports have received adequate attention from the international cooperation community.

V. Implementation Review Group

41. The Implementation Review Group shall be a [mechanism] [subsidiary body] of the Conference and shall operate under the authority of, and report to, the Conference. The rules of procedure of the Conference shall apply, mutatis mutandis, to the Implementation Review Group.⁸

Option 1

42. The Implementation Review Group shall be composed of 13 members possessing expertise in the areas covered by the Convention. The members of the Group shall serve in their individual capacity and not as representatives of Governments.

Option 2

42. The Implementation Review Group shall be composed of [10] [15] [20] experts in the areas covered by the Convention, from States parties of all regions [on the basis of equitable geographical distribution]. All States parties shall enjoy equal standing in the Implementation Review Group. The members of the Implementation Review Group shall be nominated by the secretariat and be approved by the Conference. They shall be selected from a wide range of institutions, including governmental institutions, international organizations and universities. Their selection shall be based on the criterion of professional excellence and reflect regional diversity. The experts shall work independently and not as representatives of their respective Governments.

Option 3

42. The Implementation Review Group shall be an open-ended group of States parties [and signatories]. It shall operate under the authority of and report to the Conference.

Option 4

42. The Implementation Review Group shall be composed of [40] [60] governmental experts appointed by States parties on the basis of equitable geographical distribution. Each regional group shall be allotted a position on

⁸ Consideration may be given to the development of more detailed rules of procedure (or guidelines) for the Group if generic reference to the application of the rules of procedure of the Conference to the Implementation Review Group, mutatis mutandis, is deemed insufficient.

the Implementation Review Group [in proportion to its number of members and the number of States parties in the regional group] [equal distribution]. [Representatives of the States parties participating in the review process and representatives of the respective review teams [shall be present when the reports of the States concerned are discussed] [shall also participate in the Implementation Review Group if they are not already members].]

43. The members of the Implementation Review Group shall be elected by the Conference for [two-][four-] year terms. The Conference shall establish an appropriate rotation of the members of the Implementation Review Group to ensure that all States parties have an equal standing in the Mechanism.

44. The Implementation Review Group shall hold meetings [once] [twice] [three or four times] a year in Vienna. It shall [consider review outcome reports received from [...] and prepare] and submit [summary] [thematic] [aggregate] reports on the review of implementation to the Conference for its consideration and action.

VI. Secretariat

45. The secretariat of the Conference shall be the secretariat of the Mechanism.

46. The secretariat shall be responsible for the day-to-day management of the Mechanism and provide, upon request, technical and substantive support to States parties in the course of the functioning of the Mechanism. The secretariat shall be responsible for preparing the preliminary analyses and initial desk reviews.

47. The secretariat shall act as an objective third party and ensure equal treatment of States parties throughout the review process. The secretariat shall also seek to ensure that the review outcome reports are impartial, streamlined and consistent and fulfil all tasks [mandated to it] [identified] in the present terms of reference and any other tasks required for the efficient functioning of the Mechanism.

48. Adequate financial and human resources must be provided to the secretariat to enable it to perform the functions assigned to it in the present terms of reference in an efficient manner.

VII. Funding

Option 1

49. The requirements of the Mechanism and its secretariat shall be funded from the regular budget of the United Nations.

Option 2

49. The requirements of the Mechanism and its secretariat shall be funded by the States parties through assessed contributions to be determined on the basis of the United Nations scale of assessment.

Option 3

49. The requirements of the Mechanism and its secretariat shall be funded through voluntary contributions by States parties, which shall be free of conditions and influence.
