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ref: TOR for the UNCAC review mechanism

## **The United Nations Convention against Corruption Comments on the need for and the possible structure of an effective review mechanism**

### *General remarks*

In the space of only a few short years, the United Nations Convention against Corruption (UNCAC) has been signed and ratified by well over a hundred member states. This speaks well of the widespread political commitment of the international community to coming to grips with the problem.

Finland, as one of the many nations that have been actively involved in the negotiation and now in the implementation of the UNCAC, is convinced that this widespread commitment can be realized only if the Conference of the States Parties is able to design and adopt an effective mechanism for the review of implementation. It is not enough that countries ratify the UNCAC, nor is it enough that countries adopt enabling legislation. What is also needed in each and every State Party is a combination of the appropriate internal structures and procedures, identification and training of the persons responsible for implementation domestically and locally, sufficient resourcing, effective networking not only among the relevant authorities but also with civil society and the private sector, and the raising of awareness on all levels and in all the relevant sectors. Achieving this can best be done through constant international dialogue and the mobilization of the necessary political will, both internationally and nationally.

### *Purpose of the review of implementation*

The review of implementation of the UNCAC serves both the States Parties and the Conference of the States Parties.

The primary beneficiary of the review is the individual State Party, which can be better informed of progress made and difficulties encountered.

The Conference of the States Parties, in turn, can use information produced by the review of implementation to identify cross-cutting difficulties that may require joint action, ranging from discussions on whether and how these difficulties can be overcome through international cooperation, to whether the UNCAC itself needs to be amended. The review can also play a key role in identifying priorities for technical assistance.

### *The process of review of implementation*

An effective review of implementation consists of four main steps:

- (1) self-assessment by the individual State Party;
- (2) dialogue among experts on specific issues of concern, including both successes and challenges;
- (3) the formulation of the report and possible recommendations on the basis of steps (1) and (2); and
- (4) follow-up on the success of action taken on the basis of the recommendations.

The **self-assessment stage** is the basis for the entire process. The State Party is obviously in the best position to form an over-all view of progress in implementation by the relevant authorities and by the other stakeholders. The State Party may wish to request the assistance of the Secretariat, experts from other States Parties, or other stakeholders, in preparation of the self-assessment.

The self-assessment stage, however, should not remain the sole basis for the review of implementation. The tentative results of the self-assessment should be opened up to wider discussion among the relevant authorities, academia, civil society and the private sector. The viewpoint of these other stakeholders usefully supplements the perspective of the authorities, providing new insight to the nature of challenges encountered and to possible ways forward. Such wider discussion should also strengthen the cooperation with these other stakeholders, thus further improving implementation.

Furthermore, it is Finland's experience that the self-assessment stage may unnecessarily be constrained by possible unawareness of the persons conducting the self-assessment that certain challenges do in fact exist, and of different ways in which challenges can be met. For example, these persons may be unaware of how a certain challenge has been met in other States Parties, and of the possibility that these other approaches can be successfully adapted to his or her legal, economic and social system.

For this reason, the self-assessment stage should be followed by a **focused dialogue among experts** on certain key themes. The experts may be from the same State Party (and include, for example, academic experts) or they can come from another State Party. The reason that such a dialogue should seek to focus, as noted, on certain themes is that the identification of these themes would determine what experts are included in the dialogue, and how the experts prepare and conduct the dialogue.

It is Finland's considered opinion that such a dialogue among experts, as used for example within the framework of the OECD, Greco / the Council of Europe, and the European Union, is the single most useful part of any process of review of implementation. The expert(s) representing the State Party can provide information on what measures have been taken or are being planned, and on the statutory, regulatory and institutional environment. The other experts in the dialogue may, based on their own experience, raise questions regarding the approach taken in the State Party and may suggest alternative approaches. The process almost inevitably gives the experts of the State Party concerned a better understanding of the over-all status of implementation, and of what further measures can and should be taken. Furthermore, the exchange of information contributes toward improving international cooperation in the field of anti-corruption and facilitates the identification of global and /or regional best practices

Although the dialogue among experts may be done by correspondence or video conferencing, on-site visits provide the best possibility for extensive discussions with a wide range of experts, practitioners and other stakeholders in the State Party in question. For example, it is primarily through on-

site visits that outside experts may receive a better understanding of how legislation is applied in practice, how it is interpreted by the courts and administrative authorities, whether sufficient use is made of these articles in practice, and how the authorities charged with enforcement actually operate – all questions which are difficult for the authorities of the State Party in question to encapsulate in their self-assessment.

The experts should be duty bound to keep information provided in the course of a review confidential, unless otherwise agreed with the State Party concerned.

The **formulation of the report and possible recommendations** would be done by the experts in cooperation with representatives of the State Party concerned. Wherever possible, input from representatives of the other relevant stakeholders would also be taken into consideration. The recommendations would primarily be addressed to the State Party in question. Issues requiring international cooperation, however, would primarily be addressed to the Conference of the States Parties.

The recommendations should be designed to remedy gaps in implementation and the possible need for technical assistance, but should also seek to identify priorities for further action.

The purpose of the **follow-up stage** is to ensure that the recommendations have been implemented as required, and that they have led to the desired result. The purpose would not be to establish a ranking among States Parties, but rather to help the State Party in question in evaluating its own progress in achieving the goals that it had set.

The process of implementation itself, and the review of implementation, should be seen as a continuous activity. The first cycle of review of implementation should of course be as thorough as possible in order to identify and help to respond to challenges in implementation. However, resource or technical considerations may limit the scope of the review; after all, the UNCAC covers a very broad scope. Further review cycles might usefully focus on specific and particularly vexing issues, thus providing a gradual and “stepped” approach to implementation.

#### *The review of implementation and the role of the Conference of the States Parties*

Finland fully supports the resolutions adopted by the two sessions of the Conference of the States Parties. In particular, Finland notes that according to resolution 1/1, the Conference has determined that the mechanism for review of implementation should

- (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) complement existing international and regional review mechanisms in order that the Conference of the States Parties may, as appropriate, cooperate with them and avoid duplication of effort.

It is our view that the process of review outlined above is fully in keeping with these criteria. In particular, we stress that in order to be sufficiently open and constructive, the dialogue among experts requires voluntary participation by the State Party in question. We are aware that concerns have been raised in this connection by some States Parties regarding the issue of sovereignty. We do not see any conflict whatsoever with the principle of full respect for sovereignty, since we assume that the dialogue would be organized on the request of, and with the full cooperation of, the State Party in question.

The self-assessment and the dialogue among experts should be based on adequate and credible information. This information would primarily be provided by the State Party in question, but be

supplemented by credible information from other sources. In order to ensure complementarity with, and avoid of overlap with, existing review mechanisms, the information produced by these review mechanisms should be used wherever possible and, in the spirit of Article 63(5) of the UNCAC, information provided by other sources, such as academic research, should also be used in the self-assessment and as a basis for the dialogue among experts. The State Party concerned would, of course, have the right to comment on information obtained from other sources.

For a variety of reasons, some (perhaps even most) of the experts used in the dialogue stage should come from countries with a similar legal, economic and social situation. However, it is Finland's experience that an expert representing a different legal, economic and social situation may be able to provide new insights for the consideration of the experts representing the State Party in question. Thus, the ideal composition of an expert mission would include experts both from countries with a similar legal, economic and social situation, and from other countries.

As noted above, the primary beneficiary of the review of implementation is the State Party in question. Consequently, the report and recommendations should be addressed to this State Party. Summaries of the report and recommendations would be submitted by the Secretariat to the Conference of the States Parties. We would also strongly advocate publication of the report and recommendation, with the agreement of the State Party in question, in order to allow for the possibility of wider discussion. We are aware, however, that some degree of confidentiality may contribute to a more candid review process, and thus that publication could in exceptional cases be selective, limited to certain portions of the report.

#### *The role of the Secretariat*

The Secretariat should be mandated to assist the mechanism. This assistance could include for example the following:

- continuing to assist States Parties in preparation of the self-assessment;
- helping States Parties in identifying experts for the dialogue phase of the review, and otherwise facilitating initial contacts between the State Party in question and the experts;
- formulation of guidelines for standard reports in order to ensure their conformity with decisions of the Conference of the States Parties;
- providing a tentative timetable for the performance of reviews;
- helping the experts in the preparation of the report and the recommendations;
- helping to resolve possible questions regarding the credibility of any information submitted in the course of the review;
- preparation of a summary of reports for the consideration of the Conference of the States Parties.

#### *Conclusions*

On the basis of the foregoing, Finland is of the view that

- (1) the Conference of the States Parties should decide on the establishment of an appropriate mechanism to assist in the effective implementation of the Convention;
- (2) this mechanism should be in line with all decisions taken by the Conference of the States Parties, in particular resolutions 1/1 and 2/1;
- (3) the mechanism should consist of four main steps:
  - (a) self-assessment by the individual State Party;
  - (b) focused dialogue among experts on specific issues of concern, including both successes and challenges. Where possible, such dialogue should involve on-site visits;

- (c) the formulation of the report and possible recommendations on the basis of steps (a) and (b); and
  - (d) follow-up on the success of action taken on the basis of the recommendations.
- (4) information produced by existing review mechanisms should be used wherever possible;
  - (5) information provided by other sources, such as academic research, should also be used in the self-assessment and as a basis for the dialogue among experts;
  - (6) the States Parties should seek to promote the involvement of representatives of academia, civil society and the private sector in the review of implementation, for example in a discussion on the basis of the self-assessment, and in the formulation of possible recommendations for further action;
  - (7) the Conference of the States Parties should seek to identify cross-cutting difficulties that may require joint action and to identify priorities for technical assistance;
  - (8) the reports should in general be made public, with the agreement of the State Party in question. The decision on the publication of the report is to be made by the Conference of the States Parties.