

Proposal for Terms of Reference for the UNCAC Review Mechanism

A. Background

1. In the original text of the United Nations Convention against Corruption (hereinafter “UNCAC” or “the Convention”) there is no concrete provision for the establishment of a mechanism or a body (bodies) reviewing the implementation of the Convention. In the absence of a central enforcement agency in international law there is consequently currently no mechanism or body that reviews the implementation of the UNCAC.

2. According to Article 63, paragraph 1 UNCAC, however, a Conference of States Parties (hereinafter “COSP”) was established, *inter alia*, to promote and review its implementation. Pursuant to Article 63, par. 7 UNCAC, “(...) *the Conference of States Parties shall establish, if it deems it necessary, any appropriate mechanism or body to assist in the effective implementation of the Convention*”. The wording “if it deems it necessary” leaves the COSP some margin of discretion on whether to establish an UNCAC review mechanism.

3. In its first session in December 2006 in Jordan, the COSP agreed on the urgent need to establish an appropriate and effective mechanism to assist in the review of the implementation of the Convention. At the very same meeting, the COSP also established an Open-ended Intergovernmental Working Group on Review of the Implementation of the UNCAC to establish appropriate mechanisms or bodies for reviewing the implementation of the Convention as well as terms of reference (TOR) of such mechanisms or bodies (Resolution 1/1).

4. At its second meeting in January-February 2008 in Indonesia, the COSP identified a range of characteristics and principles these mechanism(s) or body (bodies) should comply with and tasked the Working Group to prepare TOR for a review mechanism for consideration, action and possible adoption by the Conference at its third session thereby taking these characteristics and principles into account (Resolution 2/1).

5. Resolution 2/1 also requests States parties and signatory States to submit proposals to the Working Group for the TOR. This should be done no later than 1 July 2008. Governments thereby should formulate their proposals “*possibly by elaborating on their understanding of how these [characteristics and] principles could translate into the terms of reference of the full-fledged review mechanism.*”¹

6. According to these characteristics and principles as expressed in the COSP Resolutions 1/1 and 2/1 the UNCAC review mechanism should

- *be transparent, non-intrusive, inclusive and impartial*
- *not produce any form of ranking*
- *provide opportunities to share good practices and challenges*
- *complement existing international and regional review mechanisms in order that the Conference may, as appropriate, cooperate with them and avoid duplication of effort*
- *reflect the objective to assist States parties in the effective implementation of the Convention*
- *take into account a balanced geographical approach*
- *be non-adversarial and non-punitive and promote universal adherence to the Convention*
- *base its work on clear, established guidelines for the compilation, production and dissemination of information, including addressing issues of confidentiality and submission of the outcome to the Conference, which is the competent body to take action on such outcome*
- *identify, at the earliest stage possible, difficulties encountered by parties in the fulfilment of their obligations under the Convention and good practices adopted in efforts by States parties to implement the Convention*

¹ See UNODC, Invitation to submit proposals to the Working Group on Review of the Implementation of the UNCAC on the terms of reference of the review mechanism, CU 2008/39 (A), 29 April 2008, at p. 2.

•be of a technical nature and promote a constructive collaboration, inter alia, in preventive measures, asset recovery and international cooperation

Proposed Terms of Reference

B. Basic Conditions for the UNCAC Review Mechanism

7. In recognition of the statement '*if not complied with, any legal norm becomes meaningless*²', recognizing the absence of a central international enforcement agency in international law and recognizing the experience with other anti-corruption conventions confirming the need for an intergovernmental monitoring process, the establishment of a strong, efficient and effective mechanism reviewing the implementation of the Convention is of utmost importance and should have a high priority on the agenda of the Conference of the States Parties.

8. The COSP should adopt at its third session in Doha, 2009, a resolution establishing a strong, efficient and effective mechanism mandated with reviewing the implementation of the UNCAC by its States parties. The mechanism should be operational latest six months after the adoption of the resolution by the COSP. Within this period, the mechanism as established by the COSP should adopt rules of procedure in order to become fully operational.

9. The mechanism should be particularly based on proposals and conclusions stemming from the work of the Open-ended Intergovernmental Working Group on Review of the Implementation of the UNCAC. In particular, the mechanism should reflect the "*list of characteristics and principles of the review mechanism in accordance with Conference resolution 1/1 and 2/1*" sent by UNODC to the States parties. The mechanism should also take into account experiences and best practices arising from the pilot project carried out by UNODC in cooperation with certain member states as well as experiences and best practices from evaluation mechanisms existing in other regional and international anti-corruption regimes.

C. Reviewing the UNCAC in two phases

10. The mechanism should be a combined process of self-assessment, group and expert review. Especially following the monitoring mechanism of the *OECD Convention on Combating Bribery of Foreign Officials in International Business Transactions* and the monitoring activities of the *Group of States against Corruption (GRECO)* of the *Council of Europe (CoE)* anti-corruption instruments, the UNCAC review mechanism should be divided into **two phases**:

11. **In a first phase**, the compliance of the existing legal and regulatory framework with the provisions of the UNCAC should be analysed. This should be done so for all States Parties from 2010 to 2014.

- a) For this purpose, the Secretariat should **prepare a questionnaire** with questions to *all* provisions contained in the UNCAC – mandatory and non-mandatory. (If it is not feasible to include *all* provisions of the UNCAC in the questionnaire, a particular focus on specific provisions should be made. In this case, focus should be put on the mandatory provisions of the Convention. The newly established *Board of Experts to Review the Implementation of the UNCAC* should have the competence to decide on which provisions to include in the questionnaire and should elaborate a list of particularly important provisions that are to be

² See Nicola Bonucci, Monitoring and Follow-Up, in Mark Pieth, Luccinda A. Low, Peter J. Cullen (eds.), *The OECD Convention on Bribery – A Commentary*, pp. 445-475, at p. 448.

investigated in all countries – details still have to be specified. Additional provisions should be selected according to the specific situation and needs in the countries that will be reviewed. In the end, however, all provisions should be included: the remaining provisions should be investigated after a – still to be specified – certain period).

- b) **Countries** should be **reviewed according to a list** that should be established at an early stage by the *Board of Experts to Review the Implementation of the UNCAC*. The list should include detailed schedules, reflect a regional balance and countries should be chosen in a non-intrusive manner. The list should be published on the website of UNODC.
- c) Selected experts in the countries under review should be tasked with answering these questions and preparing a **self-assessment report** that should be sent to the Secretariat (“**national experts**”). The Secretariat as well as the *Board of Experts* should provide the national experts with technical or substantive support and should be responsible for coordinating the efforts of the national experts.
- d) This process should be **inclusive** and should permit third parties (in particular representatives of the judiciary, certain ministries – e.g. MoJ, Mol, civil society and the private sector) to submit relevant information (formal channels for third parties to submit information should be established).
- e) When gathering information for the self-assessment report, national experts should also take into account already existing information from monitoring bodies of other regional and international anti-corruption instruments.³ This process should be coordinated by the Secretariat as well as the Board of Experts. For this purpose, **cooperation groups** at the Board of Experts, consisting of a maximum of two experts for each monitoring body, should be established (the coordination groups should also elaborate a document comparing in detail mutuality and differences of the different anti-corruption instruments).
- f) **Difficulties** encountered by parties in the fulfilment of their obligations under the Convention as well as technical assistance needs should be identified at an early stage.
- g) The reports should be written in one of the official **languages** of the United Nations. One of the major difficulties encountered by reviewing experts in the context of the pilot project has been difficulties due to language. The Secretariat should thus provide at an early stage necessary translations of the reports and other relevant documents.
- h) Two to three **international experts** (one expert from the region, one expert from a different region and potentially a third expert) should be selected by the Secretariat and the *Board of Experts* to analyse the report of the country experts (“**reviewing experts**” or “**review groups**”). They should enter in an active dialogue with the country under review and its national experts and request additional information if necessary. In close cooperation with the national experts, they should **finalize the report**.

³ This includes information from the following monitoring bodies (the list is not exhaustive): the OECD Working Group on Bribery, the Group of States against Corruption (GRECO) monitoring the Council of Europe Anti-Corruption instruments, the Secretariat and the Committee of Experts of the Inter-American Convention against Corruption, the Steering Group and Secretariat both reviewing the ADB/OECD Anti-Corruption plan for Asia and the Pacific, the Advisory Board and the Executive Council of the African Union Convention on Preventing and Combating Corruption or the monitoring bodies of the African Peer Review Mechanism (APRM).

- i) A proposal was made that international experts should commit themselves to not disclose any information on the review process. Until the final publication of the reports, the public should not be informed about the process of analysing country efforts to implement the Convention. The reason for this lies in the fact that countries reviewed under the pilot project proved to be much more cooperative when the public was not informed about every step taken. This issue, however, should be further discussed.
- j) In order to complement existing international and regional review mechanisms and to **avoid duplication of efforts**, the reviewing experts should take into account UNCAC-*relevant* information, analyses and recommendations from existing monitoring bodies of other regional and international anti-corruption instruments. Here, too, the newly established **cooperation groups** should be particularly tasked with coordinating these efforts. The review groups should be permitted to take this information into account. They should not, however, be bound by the conclusions reached by other bodies.
- k) The reports should **not produce any form of ranking**. However, reports should contain **recommendations and action plans** addressed to the countries under review in order to bring them in compliance with the provisions of the UNCAC. The recommendations and action plans should be non-punitive and should identify needs for technical assistance. They should focus on the overall objective of the reviewing mechanism that is to assist States parties in the efficient and effective implementation of the UNCAC as well as the promotion of universal adherence.
- l) The **final reports** should be **discussed at the Board of Experts**, which should be composed of around 20 experts (details to be specified) from all over the world meeting four times a year. Experiences suggest that these meetings should be held in camera. During these meetings countries also **good practices as well as challenges** in the implementation of the Convention should be discussed. In particular, issues of international cooperation and asset recovery might be ideally discussed at these meetings.
- m) After discussing the reports, they should be presented to the **COSP for adoption**. The adopted final reports should then be **made public** on the website of UNODC.
- n) A **follow-up mechanism** should be established. Countries reviewed should be legally obliged to implement the recommendations and action plans mentioned in the report and should prepare **progress reports** sent to the Secretariat. The progress should then be discussed at the following COSP.
- o) If a country is not willing to implement or has not sufficiently implemented the recommendations in a sufficient manner, a public statement *might* be published.

12. In a **second phase**, the practical implementation of the provisions should be analysed. This should be done for all countries from 2014 to 2018.

- a) For this purpose, **more detailed questionnaires** focusing on the practical implementation should be formulated and sent to the countries under review.
- b) Again, **national experts** should be selected and tasked with answering the questions, drafting a report and submitting the report to the Secretariat. This process should be inclusive: third parties (in particular civil society and the private

sector) should also be permitted to submit information. The national experts might differ from those of the Phase 1 report.

- c) Again, **Review groups** should be established consisting of a maximum of three international experts that might (but need not necessarily) be the same as the reviewing experts (there should be in any case a regional balance).
- d) The pilot project revealed that accomplished **country visits** brought a significant added value to the review. Country visits should hence – however, only with the consent of the country reviewed and by no way intruding the national sovereignty of the country reviewed – be aspired wherever it is likely that they might bring an added value to the review.
- e) Here, too, the newly established **cooperation groups** should be tasked with supporting the national experts and the review groups in avoiding duplication of efforts and gathering relevant information from monitoring bodies of other anti-corruption instruments.
- f) The whole process should be of a technical nature, transparent and should include as many actors as possible (including inputs from civil society and the private sector).
- g) The review groups in close cooperation with experts from the countries under review should then **finalise the reports**.
- h) Here, too, the reports should first be **discussed in the Board of Experts**. This forum should also be used for sharing good practices as well as challenges in the context of implementing the Convention.
- i) The final reports including **recommendations and action plans** should then be presented at the COSP for adoption. After having adopted the reports, they should be published on the website of UNODC.
- j) Again, a follow-up process should be established for the implementation of the recommendations and action plans. For this purpose, countries reviewed should elaborate progress reports that should be presented at the following COSP.
- k) If a country has not sufficiently implemented the recommendations and action plans, here, too, a statement might be published.

D. Institutional Setting

13. The mechanism should be composed of **three major actors**:

- a) The Conference of States Parties (COSP)
- b) The Secretariat
- c) A Group of Experts Reviewing the Implementation of the UNCAC

14. The **COSP**

- d) Should be responsible for establishing the mechanism, for its terms of reference and the policies and priorities of the mechanism.

- e) The COSP should additionally be tasked with the further development of the review mechanism as well as serve as a platform to share good practices, challenges and information on anti-corruption issues in the context of the implementation of the UNCAC.
- f) Finally, the COSP should serve as a diplomatic tool in order to remind States parties to implement recommendations made in the final reports. Recommendations should be non-punitive and neither the recommendations nor discussions within the COSP should produce any form of ranking.

15. The **Secretariat** should be based by UNODC and should be

- g) Principally responsible for the day-to-day management.
- h) The Secretariat should upon request provide any technical and substantive support to countries under review.
- i) The Secretariat should also be responsible for the coordination of activities among the different actors responsible for reviewing the Convention. For this purpose, States parties should submit to the Secretariat the names of one or more persons as contact points for the communication with the experts as well as with the Secretariat and the review teams.

16.A **Group of Experts** reviewing the Implementation of the UNCAC should be established.

- j) The Group of Experts should be **composed** of about 20 anti-corruption experts coming from States parties all over the world. They should be selected from a wide range of institutions, including governments, international organisations, universities, civil society or the private sector (the list is not exhaustive) and should represent a regional diversity.
- k) There should be at least one expert for each of the major chapters of the UNCAC (prevention, criminalisation and law enforcement, international cooperation, asset recovery, technical assistance and information management).
- l) The experts should be nominated by the Secretariat and approved by the COSP (simple majority). States parties as well as other relevant actors should be permitted to submit proposals to the Secretariat.
- m) Experts should be selected for a maximum period of five years, renewable once.
- n) They should act in their personal capacity, be impartial and independent from any undue influence.
- o) Information on the experts as well as on their selection process should be made public (principle of transparency).
- p) The principal **tasks** of the group of experts should be coordination and advisory activities with/to the COSP and the Secretariat with respect to the planning and organisation of the review process, cooperation with other monitoring organisations, the selection of countries (and, if necessary, articles) to be reviewed, and, most importantly, the selection of experts for the conduct of reviews in the selected partner countries.

- q) The selection of countries as well as the conduct of reviews should be based on the principles of non-intrusiveness and should take into account the accomplishment of monitoring activities by other monitoring mechanisms so as to avoid duplication of work. Cooperation groups should be established in order to coordinate with existing monitoring mechanisms.
- r) Countries will be reviewed in a given order specified by the Expert Group and made public on the website of UNODC.
- s) For the conduct of reviews, the Group of Experts should establish ad hoc review groups (up to three experts, regional balance, see at page 3), tasked with analysing the draft country reports. They should act in their personal capacity, be independent, impartial, should have appropriate professional knowledge and regional expertise.
- t) Relevant information from evaluation bodies of other regional or international anti-corruption instruments should be taken into account. For this purpose cooperation groups should be established specifically tasked with the coordination with other monitoring bodies.
- u) The review groups should be responsible for the finalisation of the country reports including their recommendations. The reports should then be discussed at the Group of Experts before submitting and discussing them at the COSP.
- v) Relevant information (as far as feasible), in particular the selection of countries, time frames for submission of information, final reports should be made public on the anti-corruption website of UNODC (principle of transparency).
- w) Six months after the establishment of the UNCAC review mechanism, the group of experts should adopt **rules of procedure**.

E. Information gathering

17. Information gathering should be based on information and experiences gained from the self assessment checklist circulated in the spring of 2007, the related pilot programme, relevant information from other monitoring bodies and third parties.

18. Questionnaires should be distributed to the countries chosen for review (different questionnaires for both phases).

19. These questionnaires should contain questions to the implementation of *all* mandatory as well as non-mandatory provisions.

20. During this process, countries reviewed should be provided with the opportunity to express difficulties encountered by parties in the fulfilment of their obligations under the Convention as well as good practices adopted in efforts by States parties to implement the Convention.

21. Every country reviewed should submit to the Secretariat a complete and updated self-assessment report with answers to all questions (mandatory and non-mandatory).

22. Every country reviewed should also submit to the Secretariat the names of one or more persons as points of contact for the communication with the reviewing experts and the Secretariat, including their contact details.

23. Non-governmental organisations and other relevant third parties should be entitled to make submissions to the Secretariat in order to provide additional information.

24. Information related to the country that is the product of existing multilateral review mechanisms should also be consulted. Experts should thereby aim at complementing existing international and regional review mechanisms in order that the Conference may, as appropriate, cooperate with them and avoid duplication of effort.

F. Funding

25. The UNCAC review mechanism should be adequately funded from the regular UN budget (details, however, still have to be specified).

G. Transparency

26. Transparency should be one of the major principles of the review mechanism.

27. In particular, the list of countries to be reviewed, questionnaires for both phases as well as the final reports should be made public on the website of UNODC. In addition, Governments should be encouraged to publish their responses.

H. Civil Society and Private Sector Participation

28. The mechanism should provide both actors with formal channels to make written and oral submissions to relevant periods of both phases.

29. It is particularly important that during the accomplishment of country reviews both actors should be consulted.

References (inter alia)

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This includes, *inter alia*, in particular the following documents:

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10. Conference of the States Parties to the UN Convention against Corruption, Canada, Norway, Portugal, Switzerland and United States of America: draft resolution, CAC/COSP/2008/L.6, 28.1.2008.

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12. Conference of the States Parties to the UN Convention against Corruption, Self-assessment of the implementation of the United Nations Convention against Corruption: analytical report of the Secretariat, CAC/COSP/2008/2.

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14. Transparency International, Effectively Monitoring the United Nations Convention against Corruption (UNCAC), Policy Position, #01/2008, available at <http://www.transparency.org/content/download/28888/436039/> (last visited 08.07.2008).

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