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

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Consideration of proposals for terms of reference for a mechanism for reviewing the implementation of the United Nations Convention against Corruption

Proposals and contributions received from Governments for the terms of reference of a mechanism for reviewing the implementation of the United Nations Convention against Corruption

Background paper prepared by the Secretariat

Addendum

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II. Proposals and contributions received from States parties to the United Nations Convention against Corruption

A. Kuwait

1. In accordance with the limits of their competences in applying the law and combating crime, the competent authorities in Kuwait consider that resolution 2/1 of the Conference of the States Parties to the United Nations Convention against Corruption at the second session, which arose from article 63 of the United Nations Convention against Corruption[1] and which was ratified by the Government of Kuwait in accordance with its law No. 47/2006 of 4 December 2006, only contributes to setting in motion the process of implementing the Convention so as to achieve the required purpose. It is hoped that the Government of Kuwait will adopt domestic legislation promoting the principles and objectives of the Convention in order to combat corruption in all its forms.

B. Hungary

2. The review should be conducted by experts. The Government of Hungary suggests that the experts be nominated by Member States and selected by the Secretariat on the basis of professional experience, knowledge of languages and specialized expertise. The Secretariat should draw up a list of experts and make that list public. The Secretariat should accept an equal number of nominations from all Member States and the selection procedure should be transparent. The list of experts should be approved by the Conference or by other means, provided that it is duly recorded.

3. The Government of Hungary suggests that half of the experts reviewing a State should come from the same continent as the State under review. No expert may participate in more than one review unless no other suitable candidate is available. The review should also be followed by at least one staff member of the Secretariat, whose task it should be to ensure that the rules are followed and that the same level of expectations is set for all States.

4. The State under review should choose which of the six official languages of the United Nations is to be used in the review.

5. The reports of the review should be made public, on condition that the State under review agrees. The recommendations made in the report should be communicated to the Conference.

6. During the review, the reports of other intergovernmental bodies may also be taken into account (see the work of the Working Group on Bribery in International Business Transactions of the Organization for Economic Cooperation and Development and the work of the Group of States against Corruption of the Council of Europe), as long as they were not published more than five years prior to the review.

[1] United Nations, *Treaty Series*, vol. 2349, No. 42146.

7. The first round of reviews should be made in writing, thus enabling numerous reviews to take place concurrently. The Government of Hungary maintains a flexible position.

C. Indonesia

8. In line with the position of the Group of 77 and China, the Government of Indonesia is of the view that the Conference should be the sole body responsible for reviewing the implementation of the Convention. Therefore, any review mechanism or body that is established would have to be subsidiary to the Conference. The Government of Indonesia is also of the view that the final recommendations and decisions contained in any report on the review of the implementation of the Convention would have to be made by the Conference and not by the review mechanism. All reports should be submitted to the Conference for its consideration. The Conference should be the only body competent to approve and issue implementation review reports. The reports should be based on information provided by States parties (and, where appropriate, by signatory States) on their respective implementation status; such information should be used for analytical purposes only and is not to be disclosed to any person or entity without the prior consent of the State concerned. The reports should not be used for any other political or economic purposes, including trade-related purposes.

9. Furthermore, in line with the position of the Group of 77 and China, the Government of Indonesia supports the view that the review mechanism should be part of an ongoing process and that it should adopt a gradual approach. Any such mechanism should: preclude overly hasty decisions; avoid bringing about political difficulties; avoid creating a form of selectiveness among States parties (or, as appropriate, among States signatories); ensure that States enjoy equal footing; be transparent and participatory; comply with the obligations set forth in the Convention in a manner consistent with the principle of State sovereignty; analyse important issues such as asset recovery and shortcomings on technical assistance; be subject to periodic evaluation by the Conference; and be funded from the regular budget of the United Nations.

1. The way forward: a mechanism for review

10. In line with the characteristics and principles adopted by the Group of 77 and China, and bearing in mind Conference resolutions 1/1 and 2/1, the Government of Indonesia is of the view that a review mechanism could be established on the basis of those characteristics and principles. In practical terms, it is more feasible to create or establish a mechanism than a body to review the implementation of the Convention. That would also support the view that the Conference should be the sole body responsible for reviewing implementation.

11. In designing such a mechanism, which is meant to support the work of the Conference, attention should be paid to the characteristics mentioned above, according to which the mechanism should be geographically balanced, treat States equally, and be transparent and participatory. Doing so would lead to the creation of a lean and efficient mechanism. A regional mechanism is thus foreseen to evaluate and analyse implementation of the Convention. However, such a regional approach

should not be based on any existing regional mechanism or body, for the Convention is a global treaty that is far-reaching and broad in scope. Therefore, the Government of Indonesia proposes that the review mechanism align itself with the current profile of the regional offices and the regional centre of the United Nations Office on Drugs and Crime (UNODC).

12. Currently, UNODC has nine regional offices and one regional centre, all of which would need to be strengthened and empowered. The task of the regional offices and of the centre should be to analyse reports related to fulfilling the commitments of the State parties (and signatory States, as appropriate). The reports should be based on information provided by States parties (and signatory States, as appropriate) through the self-assessment checklist. In drafting the report, staff at the regional office and at the regional centre should enter into a dialogue and establish a channel of communication with the States parties (and signatory States, as appropriate), which could possibly lead to country missions being conducted by one or more experts from the regional offices and the regional centre.

13. In order to be able to analyse the information provided by States parties (and signatory States, as appropriate) the regional offices and the regional centre should be equipped with the necessary tools. At the moment, such tools can be obtained by consulting the *Legislative Guide for the Implementation of the United Nations Convention against Corruption*.[2] The Government of Indonesia, which supports the view that the mechanism should lead a gradual process, underscores that the legislative guide should, as a matter of priority, be used to identify gaps between national legislation and the provisions of the Convention. To kick off the process, the regional offices and the regional centre should conduct gap analyses in the States covered by them. The process should be carried out with the agreement of the States concerned, in particular with regard to the substance of and analysis contained in the report.

14. Once reports have been compiled and agreed upon by all the States reviewed by a given regional office or by the regional centre, it is suggested that a meeting of the States parties and States signatories concerned take place to promote regional identity, participation and a sense of ownership, to share good practices and challenges, and to further the regional perspective of the process. Such a meeting is considered necessary for the establishment of a culture of dialogue and for providing the opportunity to the States concerned to look into and discuss, in an open and frank manner, progress made by States in the implementation of the Convention (including in identifying good practices and meeting challenges). Such a dialogue would also enable a better understanding of the needs of States covered by a given regional office or by the regional centre. The meeting should be facilitated by staff of a regional office or the regional centre and should be open to those States covered by the office or centre hosting the meeting. The report of the meeting should be submitted to the Conference together with the reports of the States covered by the regional offices or the regional centre concerned, based on the decision of the meeting itself. Therefore, the meeting should be held before the following session of the Conference.

15. That would mean that the Conference would not deal with individual State reports. In any event, that would be almost impossible given that the Conference

[2] United Nations publication, Sales No. E.06.IV.16.

meets for only five days every two years. The Conference should focus on the regional reports submitted by States through the regional offices and the regional centre.

2. Challenges

16. If the proposal made by the Government of Indonesia is accepted, there would be a need to strengthen the capacity of the regional offices and the regional centre of UNODC since currently some regional offices may not have the expertise to undertake the proposed activities.

17. Strengthening the capacity and increasing the expertise of the regional offices and the regional centre would have an impact on the budget. However, such capacity-building activities should be funded from the regular budget of the United Nations.

18. Existing assessment tools are limited in scope. The *Legislative Guide for the Implementation of the United Nations Convention against Corruption* can only be utilized for carrying out gap analyses. That means that the technical guidelines for the implementation of the Convention need to be finalized so that they can be utilized as a tool for carrying out an in-depth assessment.

D. Mali

19. The following proposals are made regarding the mandate. The review mechanism should:

(a) Help States to establish effective systems for affording mutual legal assistance, with a view to facilitating judicial prosecution in cases of transborder corruption;

(b) Devise a means for helping States to recover funds transferred abroad illegally by corrupt persons;

(c) Carry out on-the-spot verifications of the effective implementation of the recommendations contained in the reports on control structures as regards corruption;

(d) Be authorized to request the assistance of the control service or services existing in the country;

(e) Verify the correct application of the provisions of the various legislative and regulatory texts relating to corruption and financial crimes in States parties;

(f) Make use of the results of the work of the International Monetary Fund in States parties relating to the correct use of the national budget, community budgets and related budgets as regards receipts and expenditure;

(g) Consider the creation of an instrument to facilitate coordination between the review mechanism and the already existing international and regional mechanisms;

(h) Make proposals and recommendations to the competent body with a view to improving good governance in Member States and facilitating the implementation of the provisions of the Convention;

(i) If necessary, propose the creation and organization, and suggest modalities for the operation of units in Member States for combating corruption and handling all related information.

20. Limits should be placed on the operation of the mechanism. The review mechanism should:

(a) Avoid ranking States parties according to how well they implement the provisions of the Convention;

(b) Not make any accusations;

(c) Not include the possibility of punishment;

(d) Guarantee the confidentiality of the results.

E. Mauritius

21. With regard to the review mechanism on the implementation of the Convention, the Government of Mauritius proposes that the United Nations set up teams of lead examiners comprising nationals from various States who would have the task of reviewing and assessing the implementation of the Convention by States parties. The teams of lead examiners would also make recommendations on action to be taken by States parties.

1. Mode of assessment

22. A team of lead examiners should obtain information from Member States by means of questionnaires and draw up a draft assessment report to be returned to the States under review for comments. The reports should be reviewed in light of those comments before undergoing a thorough technical analysis by a subcommittee of experts.

2. Committee of experts

23. Each Member State should appoint a representative who is fully acquainted with the issues pertaining to the implementation of the Convention in his or her own country. Those representatives and all the lead examiners should form the committee of experts.

3. Subcommittee of experts

24. A subcommittee of experts, comprised of representatives of five States parties and no more than three lead examiners, should be set up. The lead examiners on the subcommittee should be involved in assessing implementation of the Convention and in drafting the initial report mentioned above, on one or more of the five Member States represented in the subcommittee. At subcommittee meetings, each State party present could express its opinion on the report presented by the lead examiners in relation to the State under review. The lead examiners should take into

consideration the comments made and the discussions held by the State representatives. Should all five State representatives disagree with the findings of the lead examiners, the lead examiners would have to review their assessment.

4. Approval of the review reports

25. The findings of the subcommittee of experts should then be presented to the committee of experts, which should be responsible for approving the reports.

5. Periodic assessment

26. A decision on when the next assessment should take place should be made following the approval of the review report.

F. Morocco

1. General framework of the review mechanism

27. The review mechanism should complement the work of the Conference and its fundamental objective should be to help States to implement the Convention. It should operate in coordination with existing regional and international mechanisms, avoiding duplication of effort. Its work should be impartial, transparent and non-intrusive. All States concerned should enjoy equal footing and the mechanism should avoid ranking States on the basis of efforts made to combat corruption.

2. Regulatory framework

28. Representation within the review mechanism should be based on the principle of equitable geographical distribution among groups of States. The Conference should be the only authority competent to approve and publish reports arising from a review. The mechanism should have an established budget guaranteeing the effectiveness, continuity and impartiality of its work and it should be subject to periodic assessment by the Conference, which will verify that the mechanism fulfils the tasks assigned to it.

3. Operational framework

29. The review mechanism should operate on the basis of clearly defined objectives, drafting questionnaires to be filled in by States parties, talking with governmental and non-governmental organizations and, with the permission of the States concerned, conducting country visits. All its reports should be transmitted for approval to the Conference but they should not be circulated other than to the States parties or used for any reason other than to promote the application of the provisions of the Convention. The mechanism should aim to gradually harmonize the assessment work that it undertakes and avoid imposing upon States parties the recommendations of other States. Furthermore, the work of the mechanism should not be restricted to following up on the application of the Convention by States parties but should also include the study and assessment of related matters concerning asset recovery and technical assistance.

4. Coordination with national mechanisms

30. In view of the fact that the aims of such a review mechanism would essentially be to assist in the effective implementation of the requirements of the Convention and that those aims are entirely in harmony with the competences of the Instance centrale de prévention de la corruption (which, as stipulated in the recent decree concerning it, is responsible for coordinating and overseeing policies on the prevention of corruption, following up on their implementation, gathering and publishing information on corruption and participating in international cooperative efforts in that field), the Government of Morocco believe that it is appropriate for the international review mechanism and the Instance centrale de prévention de la corruption, once it has been fully set up, to cooperate, with respect for the separation of the competences of the two bodies. The diversity of the composition of the general assembly of the Instance centrale de prévention de la corruption, which is composed of representatives of the administration and relevant authorities from civil society organizations and the private sector, should be kept in mind. That would provide substantive capabilities for conducting the review work of the review mechanism.

G. Nigeria

31. The review mechanism should assess the status of implementation of the Convention by:

(a) Analysing, in accordance with the rules of procedure for the Conference and pursuant to article 63, paragraph 6, of the Convention, the information provided by: States parties (through the self-assessment checklist); United Nations bodies, specialized agencies or other competent international organizations; regional and subregional bodies; and non-governmental organizations. The information should be analysed with a view to ensuring that the provisions of the Convention are adequately implemented by States parties and that remedial measures are recommended;

(b) Analysing the procedures in place for incorporating the Convention into the domestic law of States once these have become parties to the Convention;

(c) Identifying weaknesses in national anti-corruption legislation and preventive policies in line with the relevant provisions of the Convention, as well as in international cooperation in the areas of mutual legal assistance, extradition and asset recovery and by contributing to correcting such situations and weaknesses;

(d) Maintaining an ongoing dialogue with States parties and States signatories (on the premise that the self-assessment checklist has been completed) on the implementation of the Convention, on difficulties experienced in fully applying the provisions of the Convention and on any apparent violation of the Convention. Through such dialogue, the mechanism should also propose appropriate remedial measures to States parties, assist them in complying with their obligations and, to that end, recommend, where appropriate, the provision of technical assistance. Such dialogue is to be pursued through regular consultations and through missions arranged in agreement with the States parties concerned;

(e) Presenting annual reports to draw the Conference's attention to important issues and challenges faced by States parties in the implementation of the Convention. The annual report could be supplemented by technical reports on key issues and themes contained in the Convention;

(f) Compiling and disseminating strategies for assisting States parties in navigating through legal procedures in cases of asset recovery and mutual legal assistance;

(g) Drawing the attention of the Conference and other established bodies of the Conference to the technical assistance needs of States parties;

(h) Compiling and disseminating successful practices in fighting corruption, including case laws submitted by States parties and States signatories.

H. Panama

32. With regard to the reaffirmation made by the Conference in its resolution 2/1 that any review mechanism established to assist States parties in the effective implementation of the Convention should be transparent, efficient, non-intrusive, inclusive and impartial, the Government of Panama believes that each State party should establish a national mechanism permitting the participation of society in accordance with article 13 of the Convention. Such a national mechanism should consider how to ensure that the information provided is not used to produce any kind of classification or ranking.

33. With regard to the provision that any review mechanism should provide opportunities to share good practices and challenges, the Government of Panama proposes that the review mechanism should include a system enabling States parties to post and access information about experiences relating to good practices, challenges, difficulties of national legislation, typical cases and any other information that might assist them in implementing the Convention effectively. Such a system could be hosted on the Secretariat's website and be designed along the lines of the portal used by public institutions in Panama to manage information on good practices (www.setransparencia.gob.pa/sibupraip).

34. With regard to the provision that any review mechanism should complement existing international and regional review mechanisms, the Government of Panama proposes the designation of an entity to liaise between the mechanism or the Secretariat and other relevant international and regional mechanisms.

35. It is the view of the Government of Panama that any such review mechanism should be of a constructive and technical nature and that it should promote collaboration, inter alia, for taking preventive measures, recovering assets and fostering international cooperation. The Government of Panama proposes that cooperation in drafting model legislation on international cooperation be promoted. Such legislation should cover matters connected with the recovery of assets and the restitution of property where appropriate, without criminal conviction, as set out in article 54 of the Convention.

I. United States of America

1. Overall goals of the reviews

(a) Establishing goals for review

36. The terms of reference should establish clear goals for reviews conducted by the review mechanism. That is different from establishing goals for the Conference. The goals of the latter are set forth in the Convention.

(b) Primary goals of reviews

37. The primary goals of reviews conducted by the mechanism should initially be the following: (a) to ensure an active and participative Conference by providing information on how particular articles and portions of the Convention are being implemented; (b) to nurture dialogue between States on the successes and challenges they encounter in implementing and using particular articles or portions of the Convention; and (c) to identify potential opportunities for support or assistance.

2. End product of the reviews

(a) Producing a two-part written report

38. In order to meet the three primary goals mentioned in paragraph 36 above, each review should result in a two-part report. The first part should consist of a factual narrative that describes what States are doing to implement each article under review. The second part should be a set of "observations" in which the reviewers would identify the following: (a) achievements and gaps in implementation; (b) potential opportunities for support or assistance; and (c) priorities for the State under review with regard to implementation of the Convention.

(b) Constructive observations

39. The observations should not be pronouncements on what particular States must do to implement the Convention; rather, they should be viewed as constructive ideas for strengthening implementation, identifying priorities for implementation and helping the Conference identify successes and challenges in implementing specific articles or portions of the Convention.

(c) Follow-up

40. The Government of the United States of America envisions that States would periodically provide updates on the issues raised in the observations.

3. Procedures for producing the end product

(a) Reviews by two States

41. Each State should be reviewed by experts from two other States.

(b) Experts

42. Each participating State should establish, by notification to the Secretariat, a "pool" or "roster" of experts to be called upon depending on the provisions under review. The list should specify the substantive expertise that the experts possess. Each participating State should be asked to nominate at least two experts.

(c) Starting point for reviews

43. Experts should begin the review process by reviewing the responses provided by the State under review to the self-assessment checklist. In the future, the starting point could be the relevant responses to the self-assessment toolkit currently being developed by UNODC.

(d) Articles reviewed

44. At first, the mechanism should focus on reviewing a subset of provisions, to be determined by the Conference, without prejudice to the possibility of reviewing other provisions of the Convention at a later stage.

(e) Role of the Secretariat

45. The Secretariat should play a vital role in ensuring coordination and information exchange between and among States. The Secretariat could facilitate the review work of the experts, who would ultimately be responsible for conducting the various reviews. The Secretariat could, among other things: help facilitate dialogue (through conference calls, videoconferences etc.); help keep work on schedule; ensure consistency in the conduct and end product of each review; and conduct a broader analysis of the gathered information, for consideration by the Conference (as it did, for example, for the information gathered through the self-assessment checklist).

(f) Extent of reviews

46. The goal of the review is to gather sufficient information and insight to prepare a final report (the end product), together with observations, agreed to by the State under review and the reviewing experts. At a minimum, each State should be required to undergo a desk review by the relevant experts. A desk review could involve a dialogue between the State under review and the reviewing experts, facilitated by various means of communication, including conference calls, videoconferences, face-to-face meetings and e-mail exchanges, as appropriate.

4. Use and distribution of information

(a) Seeking a balance

47. The review process should provide States parties with some confidence that they could provide candid information on implementation without fear that such information would become publicly disseminated without their consideration. At the same time, it should also be considered that the Convention processes should model the principles of the Convention, including transparency, and global anti-corruption efforts would benefit from the dissemination of information regarding the successes and challenges encountered by States in the course of implementing the Convention.

(b) Information used in reviews

48. Supplementary information could be taken from multiple sources, including civil society, and not simply from the responses to the checklist or the self-assessment toolkit and the dialogue with representatives of the State under review. The State under review should have every opportunity to respond to the information gathered from other sources.

5. Relationship to existing review mechanisms

(a) Incorporating information into the reviews

49. Procedures for any review mechanism should clearly state that information gathered by other existing multilateral review mechanisms should be made available to reviewers and be used, as appropriate, in the review process.

(b) The Secretariat and coordination

50. UNODC should actively coordinate with other existing multilateral review mechanisms.

6. Funding the reviews

Adequate funding from voluntary contributions

51. States parties could and should easily provide sufficient and continual voluntary funding, free of conditions or influence, to support a review mechanism as outlined above.