

ISSUES CONCERNING THE IMPLEMENTATION OF THE UNITED NATIONS CONVENTION AGAINST CORRUPTION

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The United Nations Office on Drugs and Crime (UNODC) is the guardian of the United Nations Convention against Corruption (UNCAC), the first legally binding global anti-corruption instrument. The Convention was adopted by the United Nations General Assembly in its resolution 58/4 of 31 October 2003. It entered into force in record time on 14 December 2005, ninety days after the date of deposit of the thirtieth instrument of ratification, pursuant to article 68 of the Convention.

UNCAC obliges States that have ratified or acceded to it to prevent and criminalize corruption, promote law enforcement and international cooperation, cooperate for the recovery of stolen assets, and enhance technical assistance and information exchange. UNODC facilitates the ratification or accession, and implementation of the Convention, as well as supports States parties in devising coherent responses to prevent and combat corruption in accordance with UNCAC. To date, the Convention has 154 States parties. The last country to accede was Vanuatu on 12 July 2011.

The Conference of the States Parties to UNCAC was established, pursuant to article 63 of the Convention, to improve the capacity of and cooperation between States parties to achieve the objectives of the Convention, and to promote and review its implementation. The Conference now meets every two years. Its first session was held in Amman, Jordan in December 2006; the second in Nusa Dua, Indonesia in January 2008; and the third in Doha, Qatar in November 2009. The fourth session has just taken place in Marrakesh, Morocco from 24 to 28 October 2011. The Rules of Procedure provide for the manner in which the Conference is to be carried out (i.e. representation of States parties, Secretariat, languages, conduct of business, decision-making). UNODC is the Secretariat of the Conference whose functions are specified in article 64 of the Convention.

Already at its first session, the Conference of the States Parties to UNCAC decided on the necessity to establish a mechanism or mechanisms to assist the Conference in reviewing the implementation of UNCAC. In order to determine the terms of reference for such a body, an Open-ended Intergovernmental Working Group on Review of the Implementation of UNCAC was established and held five meetings between 2007 and 2009. In its landmark resolution 3/1, the Conference adopted the Terms of Reference of the Mechanism for the Review of Implementation of UNCAC (UNCAC Review Mechanism). The Mechanism was established in accordance with article 63, paragraphs 1 and 7 of the Convention, which, *inter alia*, give a mandate to the Conference to promote and review the implementation of the Convention, and allow for the establishment of, if necessary, any appropriate mechanism or body to assist in such effective implementation.

The Implementation Review Group was established to have an overview of the review process in order to identify challenges and good practices, and to consider technical assistance requirements in order to ensure effective implementation of the Convention. At its first session, from 28 June to 2 July 2010, the Implementation Review Group adopted the Guidelines for Governmental Experts and the Secretariat in the Conduct of Country Reviews (Guidelines), including the Blueprint for Country Review Reports and Executive Summaries.

Pursuant to article 4, paragraph 1 of UNCAC, States parties are to carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of

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States, and non-intervention in the domestic affairs of other States. These principles apply, *inter alia*, to the UNCAC Review Mechanism, whereby it is to be conducted in a non-political and non-selective manner. The Mechanism, an intergovernmental process, is to: (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 to promote universal adherence to the Convention; (g) base its work on clear, established guidelines for the compilation, production and dissemination of information; (h) identify difficulties encountered by States parties in fulfilling their UNCAC obligations and good practices in implementing the Convention; (i) be of a technical nature and promote constructive collaboration, *inter alia*, in preventive measures, asset recovery and international cooperation; and (j) complement existing international and regional review mechanisms. The Mechanism takes into account the levels of development of States parties, as well as diverse judicial, legal, political, economic and social systems and differences in legal traditions.

The UNCAC reviews are to be conducted in a spirit of constructive collaboration, dialogue and mutual trust. The review process is ongoing and gradual, and applicable to all States parties. It consists of 2 review cycles of five years each. During the first cycle, chapter III (Criminalization and law enforcement) and chapter IV (International cooperation) are to be reviewed, and in the second cycle, to start in 2015, chapter II (Preventive measures) and chapter V (Asset recovery). The selection of States parties participating in the review process in a given year of a review cycle is to be carried out by the drawing of lots at the beginning of each review cycle. At its first session, from 28 June to 2 July 2010, the Implementation Review Group drew lots for countries under review for all four years in the first cycle of the UNCAC Review Mechanism in order to allow countries to plan for their reviews. In conducting the drawing of lots for the States parties under review, consideration was given to the proportionality of the number of States parties from each regional group participating in the review process in a given year to the size of that regional group and the number of its members that are States parties to the Convention. A State party selected for review in a given year may, with a reasonable justification, also defer participation to the following year of the review cycle. While in the first year of the current cycle of the UNCAC Review Mechanism, there were 27 States under review due to the decision of several States parties to make use of their right to defer their review, the second year is charged with 41 States under review.

Each State party is reviewed by two other States parties. The State party under review is to also be actively involved in the review. The Terms of Reference prescribe that one of the two reviewing States parties be from the same geographical region as the State party under review and if possible, to have a similar legal system. This selection is carried out at the beginning of each year of the review cycle, and by the end of a cycle, each State party must have undergone its own review and performed a minimum of one review and a maximum of three reviews. In order to coordinate the review process, each State party is to appoint up to 15 governmental experts and the State party under review needs to appoint a focal point.

Reviews can be broadly broken down into three phases. The first phase is where a State party under review is to complete its self assessment checklist (Omnibus software) through broad stakeholder participation. Rather than using paper-based questionnaires, UNODC developed a user-friendly computer-based application to gathering information on a country's implementation of UNCAC. During this initial phase, an introductory conference call is also organized to introduce the review team and staff of the Secretariat assigned to the review, agree on a timetable, possible division of labour and the language(s) of the review. This phase concludes with the submission by the State party under review of their response to the self assessment checklist. Of the States parties under review in the first year, 26 responses to the checklist were received and one is pending due to the late confirmation of its readiness to undergo review. From the second year, two complete and one partial response to the checklist have been received. During the first year, several States indicated that they required longer to complete the checklist for reasons such as technical constraints and the need for inter-agency coordination. The average length of time required to complete the checklist was 19 weeks, which is longer than the envisaged eight weeks, and the length ranged between 250 and 300 pages.

The second phase starts with the distribution of the self assessment response to the reviewing experts who are to conduct a desk review. In the first year, many reviewing experts stated that they would need an extension of the foreseen one month to thoroughly review the information received. The average time taken was from one to two months.

THE 14TH UNAFEI UNCAC TRAINING PROGRAMME
VISITING EXPERTS' PAPERS

The third phase is then a phase of active dialogue among the State party under review and the reviewing experts, including the Secretariat, based on the outcome of the desk review. This dialogue can be carried out in various ways, through a second conference call, and then either a joint meeting in Vienna or a country visit. In the first year, 21 country visits and one joint meeting in Vienna were held; one further country visit and three joint meetings are under consideration. In the second year, out of the 28 reviews where direct dialogue has been discussed, 21 country visits have been requested, six are under consideration and one State party under review has requested a joint meeting in Vienna. This phase culminates in an agreement among reviewing and reviewed States on the country report and executive summary. As of 14 October 2011, seven executive summaries were available for the Implementation Review Group.

Various UNCAC reviews are carried out in different languages of the United Nations and such language combinations have proven to be a challenge due to the time associated with translating the necessary information. In the first year, 13 country pairings were in one language, 13 in two languages and only 1 in three languages. In the second year, 15 country pairings are being carried out in one language, 21 in two languages and 5 in three languages. For example, the time required to translate the self assessment response was: from two to four weeks for 8 country reviews; from four to six weeks for 3; and from six to eight weeks for 2.

Ideally, the agreement of the country reports and executive summaries should be reached at 6 months. However, due to the delays encountered, as described above, at least within 9 to 10 months would be the ideal time-frame for the country reviews.

As stipulated in the Terms of Reference of the UNCAC Review Mechanism, the confidentiality of all of the information received is of paramount importance. The executive summaries are available to the Implementation Review Group for information purposes only, and States parties under review are encouraged to publish their country reports.

The role of the Secretariat in the UNCAC Review Mechanism, as provided for in the Terms of Reference and Guidelines, is to perform all tasks required for the Mechanism to function efficiently, which can include providing technical and substantive support as required. The Guidelines further stated that the Secretariat is to also organized training workshops for reviewing and reviewed States parties. In the first year, eight training workshops were held with over 200 participants, while in the second year, nine training workshops were held with also over 200 experts. As mentioned above, staff members of the Secretariat are assigned to each country review, and the two staff members tend to be selected based on the agreed upon working languages of the review.

There are various lessons learned from the first year of the UNCAC Review Mechanism, which are highlighted in a note prepared by the Secretariat, entitled 'Overview of the review process' for the fourth session of the Conference of the States Parties. It touches upon the issues mentioned above, and states that the Conference may wish to provide guidance to the Implementation Review Group on how to effectively carry out its functions, in particular, in overseeing the review process and within the timeline prescribed by the Terms of Reference and Guidelines, as well as call on States parties involved in the review process to comply with such timelines, as well as prepare for their own reviews.

An area that has been integrally linked to the review process is also that of technical assistance. Already, the Convention in articles 60, 61 and 62 of chapter VI (Technical assistance and information exchange) emphasizes the crucial importance of technical assistance in order to ensure full implementation of UNCAC. The Terms of Reference of the UNCAC Review Mechanism also specify that it is to help States parties to identify and substantiate specific needs for technical assistance, and generally, promote the provision of technical assistance under the Convention. Furthermore, the decision of the Conference to merge the functions of the Open-ended Intergovernmental Working Group on Technical Assistance into the work of the UNCAC Review Mechanism has set the stage for ensuring that needs identified through the reviews are brought to the attention of the Implementation Review Group and to potential technical assistance providers.

The technical assistance needs identified by States parties under review in the first year, based on their response to the self assessment checklist were contained in a note prepared by the Secretariat, entitled 'Integrating technical assistance in the review process' and based on the country reports, in a note, entitled 'Technical assistance needs of Chapters III and IV of the United Nations Convention against Corruption:

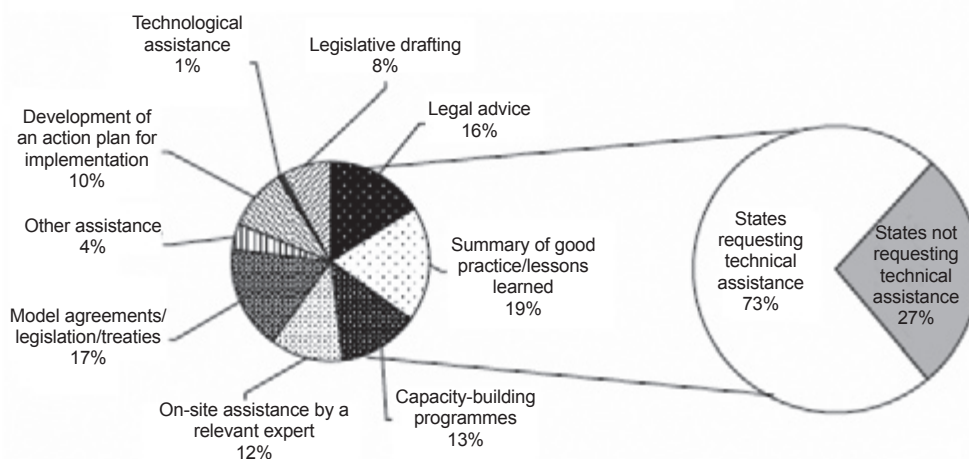
Statistical data’.

Various priority areas of technical assistance have emerged. For chapter III (Criminalization and law enforcement), these areas enter around cooperating offenders, witnesses and reporting persons (article 32, 33 and 37), foreign bribery and bribery in the private sector (article 16 and 21), prosecution, adjudication and sanctions (article 30), and freezing, seizure and confiscation (article 31). For chapter IV, these are extradition (article 44), mutual legal assistance (article 46) and law enforcement cooperation (article 48).

Of interest were also the global technical assistance needs for both chapters III and IV. In order of priority, these were: (1) a summary of good practices and lessons learned; (2) model legislation, treaty, arrangement or agreement; (3) on-site assistance by an anticorruption or relevant expert; (4) legal advice; and (5) the development of an action plan for implementation. This is highlighted below in the figure. Therefore, an early conclusion might be that reporting States parties with technical assistance needs require the greatest assistance with examples (i.e. summary of good practices and lessons learned) and models on how to implement the chapters under review, which would ideally be supported through the guidance of a relevant advisor and legal advice that takes into account a long term strategy (i.e. action plan for implementation).

When addressing such technical assistance needs, the approach endorsed by the Conference of the States Parties to UNCAC in resolution 3/4, entitled ‘Technical assistance to implement the United Nations Convention against Corruption’ is of importance. The Conference endorsed a country-led and country-based, integrated and coordinated technical assistance programme of delivery.

Global Technical Assistance Needs for Chapters III and IV



The Secretariat has sought to provide the Implementation Review Group with guidance on how such needs might be addressed through a note it prepared on ‘Possible technical assistance activities to respond to needs identified by States Parties during the first year of the first cycle of the Implementation Review Mechanism’. This sets out a range of technical assistance initiatives envisaged to meet the needs identified through the UNCAC Review Mechanism. Based on the preliminary analysis on technical assistance needs, and on the recommendations of the Implementation Review Group, it appears that meeting the technical assistance needs of States in connection with the implementation of chapters III and IV might be accomplished through a three-tiered approach: at the global level; at the regional level; and at the country level. Such an approach offers considerable opportunity to maximize impact, effectiveness and coherence in programming. This approach would be in line with the endorsement by the Conference of a country-led and country-based technical assistance strategy, while taking into full account global and regional trends that require a broader perspective.

It is further to be noted that the two areas of asset recovery and prevention, for which the review of implementation will commence in 2015, are subject to two intergovernmental working groups of the Conference of the State Parties to UNCAC. States parties have given a mandate to these working groups to structure its work in a way which will best allow for the groups to assist States in implementing the chapter II (Preventive measures) and chapter V (Asset recovery), and in preparing the review of these chapters.