

# U4 Expert Answer



## Assessment methodologies of anti-corruption laws

### Query

***Please provide guidance on assessment methodologies to determine if the draft legislation is in compliance with global and regional anti-corruption frameworks. This includes any gaps in coverage and approach.***

### Purpose

The Government of Mozambique is in the process of updating its anti-corruption laws. One of the stated aims of this review is to bring national legislation into line with international obligations (UNCAC, AU, SADC).

### Content

1. Experience with conducting compliance reviews/gaps analysis
2. Key features of successful review processes
3. References

### Caveats

This expert answer focuses more specifically on UNCAC compliance reviews, as this convention is one of the broadest international instruments containing the most detailed and comprehensive set of anti-corruption measures and provisions.

### Summary

At the regional level, there are three international anti-corruption instruments that are of direct relevance to Southern African countries, including the SADC Protocol against Corruption (2001), the African Union

(AU) Convention on Preventing and Combating Corruption (2003) and the UNCAC. Although these three instruments contain similar objectives and provisions, the UNCAC constitutes the most comprehensive anti-corruption legal framework in many aspects and a good starting point to map the issues and provisions that should be covered by domestic legislation.

Confronted with the challenge of bringing domestic legislations in line with their international obligations, several countries (in Africa and beyond) have conducted compliance reviews and gap analysis to examine whether their domestic legal framework is in conformity with international and regional anti-corruption conventions' requirements. Such exercises typically rely on a broad consultative process involving important local stakeholders, coordinated by a national expert team and supported in some cases by international experts. The publication and wide dissemination of the findings to key stakeholders is also important to secure support to implement the priority areas of reforms identified through this exercise.

The compliance review can be conducted using a simple analysis tool such as a compliance matrix detailing and comparing the conventions' requirements and their corresponding provisions in the national legislation or more elaborated tools such as the

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comprehensive UNCAC self-assessment checklist that has been developed as part of the UNCAC review mechanism.

## 1 Experience with conducting compliance review/gap analysis

The implementation of international anti-corruption legal instruments such as the UN or the Africa Union conventions against corruption is a complex task, which requires integrating international standards into domestic legislation as well as introducing policies and institutional structures to implement them. Implementation more specifically implies enacting a broad range of anti-corruption laws covering criminalisation, law enforcement, prevention and international cooperation.

Emerging good practice in this area includes criminalising both active and passive forms of corruption committed within or outside the country for both the private and the public sector, and establishing adequate criminal procedures governing the detection, investigation and prosecution of cases. Beyond criminalisation and law enforcement, a comprehensive legislative anti-corruption framework also needs to cover a wide range of broader issues, many of which focus on prevention of corruption, such as access to information, conflict of interest, whistleblowing, procurement, anti-money laundering, freedom of expression, etc. (Chêne, 2010).

### Examples of government led compliance review and gap analysis processes in practice

Confronted with the challenge of bringing domestic legislation in line with the conventions' requirements, some countries have opted for conducting compliance reviews and gap analysis as a first step towards implementation. Such review exercises can also be conducted within the framework of the various conventions' review mechanisms, which exist to varying degrees for most anti-corruption conventions, in order to avoid "review" fatigue at country level. They all involve to some degree a combination of monitoring methods, including self-assessments, expert reviews, peer reviews, country visits and the publication of a report with recommendations for improvement (Chêne, M., 2008).

Review mechanisms have also been complemented in some countries by shadow reports by civil society.

A compliance review typically consists of a systematic assessment of anti-corruption regulations and their institutional functioning, examining whether the domestic legal framework is in conformity with the convention's requirements, based on a broad consultative process involving important stakeholders (GTZ, 2007a). Such gap analysis has been conducted within the framework of UNCAC implementation in country such as Indonesia, Bangladesh, Kenya as well as in a number of Arab countries.

#### *Indonesia*

Indonesia has pioneered UNCAC self-assessment processes as the first country to conduct a gap analysis in 2006, prior to ratifying UNCAC. In the absence of formal guidance and checklists, Indonesia designed its own matrix and methodology to conduct the study. The study was mandated by the Corruption Eradication Commission (KPK) to a team of Indonesian academics and international experts from the Basel Institute of Governance (GTZ, 2007b). The local team was in charge of gathering and analysing information on relevant laws, institutions and processes as well as providing access to key stakeholders while the international team provided guidance on internationally accepted good practices. Findings were completed through wide consultation with key stakeholders from government agencies, civil society, the private sector and academia. Findings were widely disseminated domestically and internationally.

#### *Bangladesh*

As a first step towards UNCAC implementation, Bangladesh conducted a gap analysis in 2007 with the view to comparing existing laws and practices and the Convention's provisions and identifying gaps and capacity needs in domestic legislation. In terms of **process**, an inter-ministerial committee was formed led by the Secretary Ministry of Law, Justice and Parliamentary Affairs and the study was conducted in partnership with experts from the Institute of Governance Studies at BRAC University. An orientation and methodology workshop was held, followed by desk research, focus group discussions and interviews with technical specialists in government ministries and departments. The report was completed in January 2008 (GTZ, 2008).

In terms of **content and structure**, the study reviews laws and regulations following the UNCAC chapters, including prevention, criminalisation and law enforcement, international cooperation, and asset recovery (Government of Bangladesh, 2008). The study uses a thematic approach, each chapter consisting of a narrative report and a matrix focusing on key areas of concerns in the specific context of Bangladesh. Key priorities identified in the orientation workshop include anti-corruption policies and measures, public sector integrity, public procurement and management of finances, enforcement issues, international cooperation including mutual legal assistance and extradition, and asset recovery focusing on money laundering and proceeds of crime.

In terms of **dissemination of findings**, a needs assessment workshop took place in 2008 to develop an UNCAC implementation strategy with high level representatives from various key ministries and government institutions and civil society.

### Kenya

The Kenyan compliance review took place in 2007. It was led by an Oversight Committee (OC) composed of the Ministry of Justice, the Kenyan Anti-Corruption Commission (KACC), the GTZ Good Governance Support Project and at a later stage, the Ministry of Foreign Affairs (Schulz, J., 2010). The OC established a technical committee composed of government institutions, civil society, the International Commission of Jurists, the private sector and GTZ. The OC decided to use the Indonesian matrix and mandated external consultants to provide comments, including international expert from the Basel Institute on Governance. The technical committee was divided into teams according to their specialisation and the various UNCAC chapters. The draft report was sent to national and international experts as well as circulated to a cross section of stakeholders in government, civil society, religious organisations, private sector and academia. The draft report was updated accordingly, edited, published and disseminated at the UNCAC Conference of State Parties (UNDP, 2010).

The Kenyan experience demonstrated the benefits of having the institutions in charge of implementation conducting the review instead of outsourcing it to international consultants. However, in spite of the participatory approach used, key stakeholders such as the parliament were not included, potentially reducing valuable support for reform (Schulz, J., 2010).

### Arab countries

A number of countries in the Arab world have also used UNCAC self-assessment checklist, supported by the Arab Governmental Expert Group on UNCAC self-assessment – a regional mechanism established to improve the capacity of Arab countries to implement UNCAC through training and technical support. In 2009, 10 countries had responded to the checklist. Some countries have been especially successful in conducting an inclusive assessment process (Repucci, S, 2009).

**Morocco** for example established coordination and drafting committee to complete the process, comprising representatives from the Ministry of Justice, Ministry of Economy and Finance, Ministry of Public Sector Modernisation, Ministry of General and Economic Affairs and the Central Agency for the Prevention of Corruption. **Kuwait** was the first country in the region to formally involve civil society actors in the national committee conducting the assessment. **Yemen** established a national committee to conduct the self-assessment process and indirectly involved non-governmental actors through the Supreme National Authority for Combating Corruption. A national working group was established to develop and support the implementation of the national anti-corruption strategy.

### Parallel reporting by civil society

NGOs can participate in the monitoring process of anti-corruption conventions or produce alternative reports. So-called 'shadow' reporting provides civil society perspective on the state obligations and progress made towards the domestication of international conventions.

Such an approach has been used in **Venezuela** for example, by *Transparencia Venezuela* who used a "traffic light format" as a visual way of presenting the progress made (or the absence thereof) in the implementation of the Inter-American Convention. It highlights the recommendations provided through the OAS anti-corruption follow up mechanism in yellow, red or green according to the progress of implementation. It also identifies which government actors should be contacted for follow-up for each recommendation. Venezuela has received a total of 113 recommendations, of which 97 have not seen any progress (red), 12 have shown some progress (yellow) and 4 were adequately implemented (green) (Erquicia, M., 2010).

## UNCAC review tools and resources

As one of the broadest instruments against corruption, UNCAC review tools constitute a good starting point to map the issues and provisions that should be covered by domestic legislation.

### *The Indonesian Anti-Corruption Commission's matrix*

The Indonesian Anti-Corruption Commission (KPK) has developed a matrix for comparing the Indonesian legislation with the provisions of the UNCAC (KPK, 2006). This matrix entails six columns, as follows:

- UNCAC: Article of the UNCAC in chronological order,
- Contents: Description of the articles' provisions
- Indonesian laws and regulations: Relevant current national legislation;
- Analysis: Comparison of UNCAC with national legislation, pointing out to differences
- Other aspects to be concerned: Other aspects that are not strictly of legal comparative nature but refer to existing practices.
- Recommendations

### *UNCAC self-assessment checklist.*

In 2006, the Conference of State Parties requested UNDOC to develop an experimental self-assessment checklist to gather information on countries efforts to implement UNCAC. The checklist was completed in 2007 and initially focussed on 15 articles of UNCAC.

This checklist was later reviewed and expanded to other articles of the convention, leading to the endorsement of a comprehensive computer-based UNCAC self-assessment checklist. This comprehensive checklist has been developed by UNODC as part of the review mechanism for the Convention. It is a user-friendly application that can be downloaded from the [UNODC website](#), detailing all technical requirements of the UNCAC. Each state provides its own information, maximising its ownership of the process. 15 state parties were invited to test this checklist in 2009, which was finally presented and endorsed in the Conference of State parties in November 2009. The use of this checklist allows UNODC to compile detailed information on compliance rates and technical assistance needs against selected articles of the convention. It also allows for cross-referencing to other anti-corruption related treaties (Repucci, S., 2009).

## *UNODC legislative and technical guides*

**Legislative guide:** This guide was developed by UNODC based on a broad participatory process involving a group of experts from all geographical regions and representing the various systems of law, as well as observers from relevant United Nations entities and other international organisations. The objective of the guide is to assist States seeking to ratify and implement the Convention by identifying legislative requirements, issues arising from those requirements and various options available to States as they develop and draft the necessary legislation (UNODC, 2006).

**Technical Guide:** The objective of this technical Guide is to provide anti-corruption practitioners and authorities with relevant technical advice, tools and examples of good practices to make the articles of the Convention operational. It complements the Legislative Guide for the Implementation of the Convention which was drafted for use mainly by legislators and policymakers in States preparing for the ratification and implementation of the Convention. Therefore the two Guides have to be considered jointly. (UNODC, 2009)

## *Comparative analysis of the anti-corruption instruments relevant to Southern African countries*

There are three international anti-corruption instruments that are of direct relevance to Southern African countries, including the SADC Protocol against Corruption (2001), the African Union (AU) Convention on Preventing and Combating Corruption (2003) and the UNCAC. These three instruments contain similar objectives and provisions. While there are differences between the three, there are not substantive and complement each other, adding to the range of measures that should be adopted to fight corruption. The Institute of Security Studies has developed a handbook targeting lawyers, legal drafters and policy makers that provides a detailed comparative analysis of these three regional instruments to support their simultaneous implementation process (Institute of Security Studies, 2004):

**Objectives:** the three instruments broadly share the same objectives, namely to promote and strengthen anti-corruption mechanisms, facilitate and regulate cooperation among State parties and harmonise their policies and domestic legislation relating to the prevention, punishment and eradication of corruption. In



particular, the objectives of the SADC protocol and the AU convention are almost identical, while the UNCAC emphasises international cooperation and technical assistance.

**Acts of corruption prohibited:** The three instruments require Member States to criminalise a number of corruption related offences under its domestic law and contain similar provisions – with different levels of details - in terms of prohibiting active and passive corruption, diversion of property by a public officials, private sector corruption, undue influence, laundering of proceeds of crime, etc. In addition, the AU and the UN conventions also contain provisions that are not specifically mentioned by the SADC Protocol such as illicit enrichment, funding of political parties, embezzlement, misappropriation or other diversion of property by a public official, obstruction of justice. In terms of bribery of foreign officials, the AU Convention does not such a provision, while the prohibition in the UN Convention is broader than the prohibition in the SADC Protocol.

**Sanctions:** In terms of sanctions, contrary to the UNCAC, neither the SADC Protocol nor the AU Convention deals with sanctions or penalties in case of the commission of an offence or non-compliances with prescribed measures.

**Preventative measures:** The SADC Protocol, the AU Convention and the UN Convention all urge State Parties to adopt specific measures in order to prevent and combat corrupt activities. All three instruments require the adoption of a wide range of preventative measures such as standards of conduct in the public sector, systems of government and procedures for hiring, procurement and management of public goods and services, government revenue collection and control systems, access to information, etc. In addition, the UN Convention contains various other preventative measures that are not specifically covered by the SADC Protocol or the AU Convention relating to preventive anti-corruption policies and practices, conditions of service of civil servants and non-elected public officials, the judiciary and prosecution services, prevention of money laundering and public reporting.

**Extradition:** The provisions of the UN Convention pertaining to extradition are spelled out in much more detail than the provisions of the SADC Protocol and the AU Convention. The ISS handbook therefore recommends rather implementing the provisions of the UN Convention.

**Asset recovery:** One of the highlights of the UN Convention is the provision for asset recovery, which is not specifically covered by the two other instruments.

**Judicial cooperation and mutual legal assistance:** The provisions of the SADC Protocol and the AU Convention are similar to provisions of the UN Convention, but UNCAC deals in much more detail with related matters.

**Cooperation measures:** Apart from cooperation measures such as extradition, mutual legal assistance and asset recovery, UNCAC contains certain specific measures relating to cooperation with law enforcement authorities and between national and international authorities that are not covered by the SADC Protocol and the AU Convention, including cooperation with law enforcement authorities, cooperation between national authorities, cooperation between national authorities and the private sector and international cooperation.

## 2 Key features of successful review processes

### Review mechanisms/processes

#### *Overview*

As illustrated in the examples above, the review exercise is usually conducted as a participatory exercise involving all relevant stakeholders through round tables or steering committees. A national expert team is typically in charge of the implementation of the compliance review and coordinates the consultation process. More specifically, its mandate includes gathering information and analysing the relevant legislation, based on dialogue with the various stakeholders. The national team can be composed of legal experts and representatives from law reform institutions, universities, professional bodies, government institutions and civil society. An international expert team can also support the national team's work through several rounds of review and coaching of the national expert team, providing guidance on internationally accepted good practice, while the national team provides knowledge of the local legislation and procedures and access to key stakeholders (GTZ, 2007a).

The compliance review can be conducted using a simple analysis tool such as a compliance matrix

detailing and comparing the conventions' requirements and their corresponding provisions in the national legislation (as per the Indonesian example described above) or more elaborated tools such as the comprehensive UNCAC self-assessment check-list (see below). Beyond the bureaucratic exercise, the quality of the stakeholder dialogue and the thorough analysis of the prevailing legal regulations are key to the success of the compliance exercise.

*Steps involved in conducting gap analysis: the example of UNCAC self-assessments*

Based on the Bangladesh, Indonesia, Kenya and in a number of Arab countries experiences, UNDP has developed a guidance note on UNCAC self-assessment methodologies that outlines two preliminary steps and six successive phases for conducting such an exercise (UNDP, 2010). Such methodology can be applied to other conventions and international instruments.

At the preliminary stage, it is important to **designate a lead agency/focal point** or working group to take the lead on conducting the assessment and in doing so, ensure high-level endorsement of the exercise. Criteria for designating the lead agency include political clout to support the assessment and reform process, nature of responsibilities and expertise and exposure to international work. Depending to the country context, the assessment process may be led by the office of the President, the Prime Minister, the Attorney General, the Justice Department or the Anti-Corruption Commission.

Then, **the establishment of a Steering Committee** involving high level representatives of the main government institutions involved will facilitate inter-governmental consultation as well as representatives from Parliament, civil society, academia and the private sector. The chairperson of the Steering Committee is typically from the lead agency and in charge of managing the consultation process.

Once these preliminary steps are completed, UNDP's guidance note recommends the following phases:

**Initial stakeholder workshop** to launch and plan the process: All relevant stakeholders can be brought together to agree on the methodology, assign responsibilities and ensure cooperation of all involved parties. This workshop also provides an opportunity to identify an inclusive and multi-disciplinary team of technical experts who will undertake the review.

**Data collection:** Once the methodology, responsible parties and deadlines have been agreed upon, the expert team starts collecting data and information, including relevant laws, regulations and policies. It is recommended that the exercise covers the entire convention rather than selected provisions or thematic areas. This can be done using a matrix or the UNCAC self-assessment checklist (see below). Data collection can be done by combining a process of documents gathering and stakeholder consultations. Focus discussions such as thematic panels, public or parliamentary hearings can help clarify gaps and technical assistance needs, validate information that has been collected during desk analysis and gain further insights into the implementation of existing laws, regulations and institutional processes.

**Analysing and drafting of the reports:** Once the data has been collated and entered into the UNCAC assessment checklist, a self-assessment report can be generated as well as a summary report to ensure that the findings can be easily understood by policy makers, in close collaboration between the national and international experts. The report should then be submitted to the Steering Committee.

**Validation workshop and finalisation of the reports:** The next step of the process ideally consists in finalising the report and substantiating the findings through a validation workshop, which can potentially bring together the group of participants that attended the initial stakeholder workshop. Beyond discussing the results, this workshop can provide a good opportunity to establish priorities for an UNCAC implementation plan. Based on the workshop outcome, the expert team will produce a final self-assessment report and submit it to the steering committee for endorsement.

**Publication and dissemination of the reports:** The final report should then be disseminated to all relevant stakeholders, including law makers and parliamentarians, representatives from government, private sector and civil society and published on the website of the lead agency and other institutions charged with the fight against corruption.

**Follow up:** Once the assessment has been completed, the Steering Committee can play an important role in the reform process.

**Schedule and costs:** According to UNDP self-assessment schedule, the whole process can be completed within 25 weeks. UNDP guidance note

provides a detailed schedule of the various phases and activities of the review process in its appendix. In terms of costs, GTZ estimates the costs of such exercise to amount between € 60.000 and € 100.000. These estimates cover the team of national experts – which is expected to work three months to draft the matrix which then will need to be reviewed and revised as well international experts – expected to work about 4 days per assignment, including attending a conference/workshop at the end of the exercise. Adequate resources also need to be allocated to the printing and dissemination costs (GTZ, 2007a).

### Lessons learnt on how to design such review exercise

A few lessons emerge from the experience of conducting compliance reviews (Repucci, s. 2009 and Schulz, J., 2010). In general terms, effective monitoring requires serious commitment by government, adequate resource and expertise, an independent secretariat and full civil society participation and access to documents and information. More specifically:

**Ownership:** The compliance review should be undertaken as a country led initiative, promoting government accountability to a government's own citizen rather than to an outside body. Using a voluntary self-assessment approach to the gap analysis can help in this regard and be used as a tool for spurring anti-corruption reform.

**Benefits of an inclusive process:** The examples above illustrate the benefits that adopting an inclusive approach to the review bring to the process. Such an approach has the capacity of both increasing ownership and the capacity of stakeholders. It is also a way to gain support for anti-corruption reform beyond the review process. In some countries, the self-assessment process was led by the executive, with little input from Parliament, the Judiciary or non-state actors, limiting opportunities to secure buy-in for reform.

**Level of involvement with high level leadership:** There are divergent views about the level of engagement of high level officials. While "technical" staff may have limited powers of persuasion when it comes to implementing recommendations, it is important to protect the review process from excessive politicisation which may undermine the critical dimension of the exercise. In Kenya for example, Ministers and Permanent Secretaries were simply invited to validate drafts in stakeholder meetings.

**External expertise:** Legal instruments such as UNCAC cover such a wide range of topics that the technical expertise may be lacking within the country. The recourse to external consultants can help provide insight into international good practice, provided they are instructed to comment and give advice rather than provide content for ownership reasons.

**Capacity constraints:** Local capacity constraints may impede effective data collection and validation, including lack of data, insufficient time or lack of relevant knowledge. As such, reporting on how information was obtained and validated can act as red flags for reviewers and should be recorded in the checklist.

**De jure versus de facto information:** The exercise should aim at not only collecting de jure but also de facto information to assess, whether beyond the passing of laws, whether and how they are enforced in practice.

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