



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

Distr.: General
2 October 2013

Original: English

Fifth session

Panama City, 25-29 November 2013

Items 2 and 6 of the provisional agenda*

**Review of the implementation of the United Nations
Convention against Corruption
International cooperation**

Regional implementation of chapter IV (International cooperation) of the United Nations Convention against Corruption

Report prepared by the Secretariat

I. Introduction, scope and structure of the report

1. In its resolution 3/1, the Conference of the States Parties to the United Nations Convention against Corruption adopted the terms of reference of the Mechanism for the Review of Implementation of the United Nations Convention against Corruption (contained in the annex to that resolution), as well as the draft guidelines for governmental experts and the secretariat in the conduct of country reviews and the draft blueprint for country review reports. The guidelines, together with the blueprint, were finalized by the Implementation Review Group at its first session, held in Vienna from 28 June to 2 July 2010.

2. In accordance with paragraphs 35 and 44 of the terms of reference of the Review Mechanism, thematic implementation reports have been prepared in order to compile the most common and relevant information on successes, good practices, challenges, observations and technical assistance needs contained in the country review reports, organized by theme, for submission to the Implementation Review Group, to serve as the basis for its analytical work.

3. The present report contains supplemental information, organized by region, to the thematic report on the implementation of chapter IV (International cooperation) of the Convention, contained in documents CAC/COSP/2013/9 and CAC/COSP/2013/10. The present report is based on information included in the

* CAC/COSP/2013/1.



review reports of 44 States parties under review in the first and second years of the first cycle of the Review Mechanism, whose review reports had been completed, or were close to completion, as at 1 September 2013.

II. Implementation of select provisions of chapter IV of the Convention, by regional group

4. Two topics were selected from the thematic implementation reports for further analysis on a regional basis. The first topic, relating to certain paragraphs of articles 44 and 46 of the Convention (see para. 5 below), was the grounds for refusal of international cooperation, particularly extradition and mutual legal assistance. The second topic, relating to article 50, was the use of special investigative techniques at the national and international levels. Further topics will be included in future regional reports.

A. Grounds for refusal of international cooperation

5. The following analysis for each of the regional groups takes into account the information provided by the 44 States parties on specific grounds for refusal of requests for extradition and mutual legal assistance provided for in their domestic legal frameworks, whether statute-based, treaty-based or both, as well as conditions for extradition and provision of assistance which, if not met, also constituted grounds for refusal. In addition, consideration is given to certain aspects that States parties are required, under the Convention, not to treat as grounds for refusal of cooperation (e.g. bank secrecy, cooperation for offences involving fiscal matters) or not to extend the application thereof as grounds for refusal to offences established in accordance with the Convention (e.g. the political offence exception). Bearing this in mind, the analysis covers different paragraphs of articles 44 and 46 of the Convention as follows: article 44, paragraphs 1, 2, 4, 8, 9 (where necessary), 11 (partially), 15 and 16; and article 46, paragraphs 1, 8, 9, 21 and 22.

Group of African States

6. In the majority of the countries belonging to the Group of African States that were under review, extradition was subject to the dual criminality requirement. In one country, dual criminality was not required in practice, but no legal document was in place to support that approach. In another country, extradition legislation authorized the conclusion of extradition agreements with other countries in relation to any offences whatsoever, irrespective of whether they constituted crimes in both countries. There was one country for which no general conclusions regarding the application of the requirement could be drawn owing to the fact that only the provisions of one bilateral treaty were reported. In another country, as a result of the strict application of the requirement, extradition could not be granted for a series of offences which were not criminalized in that country (bribery involving a foreign public official or official of a public international organization, trading in influence, illicit enrichment, bribery in the private sector and concealment).

7. In most cases, extraditable offences were defined as offences which were punishable under the law of the requesting State by imprisonment or other

deprivation of liberty for a maximum period of at least six months (in one case) or one or two years, or by a more severe penalty. If the person sought had been sentenced to imprisonment or other deprivation of liberty in the requesting State, a period of at least four to six months of such sentence should remain to be served (a requirement of two months was reported in one bilateral treaty).

8. The political offence exception to extradition was foreseen in most of the jurisdictions in the region; however, the offences covered by the Convention were not deemed to be crimes of a political character or nature. Similarly, the non-discrimination clause foreseen in article 44, paragraph 15, was integrated into the legislation of all reviewed countries in the region. As an exception, in one country there was a constitutional provision making reference to “political reasons”; no further information was provided as to what that concept included. It was assessed by the reviewers *prima facie* that the concept did not include the “substantial grounds” highlighted in the aforementioned provision of the Convention.

9. The grounds for refusal of extradition requests were stipulated in domestic laws and/or extradition treaties concluded by the countries under review. There was a wide range of such grounds, either mandatory or optional, relating to issues of administration of justice (*ne bis in idem*, statute of limitations, amnesty, pending criminal proceedings in the requested State, a decision in the requested State either not to institute or to terminate criminal proceedings, extraterritoriality, military offences) or human rights considerations (torture; cruel, inhuman or degrading treatment or punishment; expected unjust or unreasonable punishment of the person sought in the requesting State; lack of fair trial guarantees in the requesting State; judgement *in absentia*; the age, health or other personal circumstances of the person sought). The lack of assurances on behalf of the requesting State that the rule of speciality would be respected was also mentioned.

10. In three countries with a common-law tradition, extradition was not denied solely on the ground that the person was a national of the requested State, and no request for extradition of a person was refused on the ground that he or she was such a national. In another country, extradition would not be granted if the person sought was a national of that country, unless the relevant extradition provisions of an applicable treaty provided otherwise.

11. In most countries, the fact that an offence was considered to involve fiscal matters did not constitute a ground for refusing an extradition request. One country under review had not refused a request for extradition on that ground, but the situation had been handled on an *ad hoc* basis and there was no legal basis for regulating the matter.

12. In the context of mutual legal assistance, dual criminality was dealt with in a more flexible manner than extradition proceedings were. Thus, it was either not required or was an optional ground for refusal, hence allowing wide discretion to the deciding authority (which in one country took into account the purpose of the Convention when the assistance requested related to corruption offences). It should be noted that, in at least one country review, the use of the African Union Convention on Preventing and Combating Corruption was reported. The Convention, in its article 8, paragraph 3, requires States parties that have not

established illicit enrichment as an offence to provide assistance and cooperation, insofar as their laws permit, to requesting States with respect to that offence.

13. One country under review reported that, while it considered dual criminality to be a requirement for international cooperation, that requirement was deemed fulfilled irrespective of whether the offence was denominated by the same terminology. However, the same country was not in a position to clarify in which cases dual criminality was required for responding to requests for mutual legal assistance and stated that it had not implemented subparagraph 9(c) of article 46. Finally, in two countries it was reported that dual criminality was not required, but that there was no legislation on the matter and therefore any questions raised were addressed as a part of court practice.

14. The grounds for refusal of mutual legal assistance requests — mandatory and optional — were stipulated in the domestic laws of and/or treaties concluded by the countries under review in the region and included the following: compromise of the sovereignty, security, ordre public, fundamental principles or other essential interests of the requested State; conflict of the request with the domestic legislation of the requested State; the offences for which assistance was requested being of a military or political nature (three cases); *ne bis in idem* issues; assistance resulting in discriminatory treatment in the requesting State or, in one case, a trial by a court of exceptional jurisdiction; lapse of time; the fact that the request would prejudice the safety of the person involved; and the fact that the measures sought would not be allowed under the domestic laws of the requested State, had the measures been subject to domestic jurisdiction.

15. Bank secrecy did not constitute an obstacle to the provision of assistance. Applicable regional instruments that expressly required States parties not to invoke bank secrecy as a justification for refusal to cooperate were also cited (African Union Convention on Preventing and Combating Corruption, the Economic Community of West African States (ECOWAS) Protocol on the Fight against Corruption). Moreover, the nature of the offence in question as a crime involving fiscal matters did not hamper the provision of assistance.

Group of Asia-Pacific States

16. The most common approach to the identification of extraditable offences in countries belonging to the Group of Asia-Pacific States that were under review was the use of a “punishment threshold” (in most cases, imprisonment or other deprivation of liberty for a maximum period of at least one year, or a more severe penalty and, for purposes of enforcement of a sentence, at least six months to be served). In one country, it was reported that the establishment of a one-year threshold of punishment would exclude certain corruption offences which carried a lesser penalty. In another country, some mandatory offences under the Convention were punishable only by fines and/or a short imprisonment term. Three countries confirmed that they could extradite a person to a country where the death penalty could be applied or life imprisonment could be imposed as a sentence. In another country, domestic legislation did not specify a minimum penalty requirement for extradition.

17. In two countries, the approach of listing extraditable offences was followed. In one of those countries, Convention-based offences other than bribery, embezzlement

and money-laundering were not included in the list, thus falling short of the requirement of the Convention to include as extraditable offences, at a minimum, the ones established as mandatory offences under the Convention.

18. As a rule, dual criminality had to be fulfilled for extradition requests to be granted and, in the majority of the countries under review, its definition was conduct-based. In one country, given that bribery of foreign public officials and illicit enrichment were not criminal offences, it was not clear how extradition requests involving those offences would be handled. In another country, the bribery of foreign officials and officials of public international organizations had not been established as an offence and therefore extradition was not possible in that regard. In a third case, active bribery of foreign public officials and embezzlement of property by public officials were not criminalized. That, in turn, could create potential problems in terms of international cooperation owing to a lack of dual criminality. In one country, the fulfilment of the dual criminality requirement was optional, in line with article 44, paragraph 2, of the Convention. Extradition could be granted in the absence of that requirement when the request for extradition was submitted through the channels of the International Criminal Police Organization (INTERPOL) or the Association of South-East Asian Nations Chiefs of Police (ASEANAPOL), and in line with the principle of reciprocity.

19. Political offences were excluded from the scope of extraditable offences, but most countries explicitly confirmed that corruption-related offences were not considered or treated as offences of a political nature. With regard to one country, national authorities were called on to adopt clear guidelines to fully ensure that certain cases were not deemed political offences under the new extradition legislation. Some countries provided more information on legislation or court practice pertaining to the delineation of the concept of “political offence” and the exclusion of certain crimes from its scope. In three of those countries, domestic legislation explicitly provided that international undertakings through the conclusion of bilateral or multilateral treaties sufficed for permitting extradition for offences which would otherwise be considered crimes of a political nature.

20. In five jurisdictions with a common-law tradition and one jurisdiction with a civil-law system, no explicit or absolute prohibition of the extradition of nationals was found. In one country, there was no relevant reference in the legislation, whereas in the other five countries the extradition of nationals was optional and could be denied either on the ground of nationality or owing to other circumstances. In the rest of the jurisdictions in the region, the domestic laws stipulated that nationality was a ground for refusal of extradition.

21. Grounds for refusal, both mandatory and optional, were prescribed in a detailed manner in the legal system of the countries under review and included the following: the possible imposition of a sentence of life imprisonment (two States) or the death penalty (two States); lapse of time; amnesty; judgement in absentia in the requesting State; granting of asylum in the requested State (one State); no assurances for respecting the rule of speciality (three States); *ne bis in idem* issues; military offences (three States); incompatibility with humanitarian considerations (one State); proceedings before an extraordinary court in the requesting State (one State); age or other personal circumstances of the person sought (one State); and pending proceedings in the requested State. In most instances, the grounds for refusal were enshrined in the domestic legislation of the countries under review,

whereas in one country they were foreseen in the bilateral extradition treaties it had concluded because of a lack of specific legislation. Interestingly, in one country, the principle of national sovereignty — typically invoked in mutual legal assistance cases — was reported to be considered in extradition matters. An additional ground for refusing extradition in a country with a common-law tradition was the lack of sufficient evidence to establish a prima facie case that the person sought had committed the offence.

22. The non-discrimination clause foreseen in article 44, paragraph 15, of the Convention was widely recognized in the region (with one exception). Moreover, in one country, while no evidence was present that an individual had ever been extradited for purpose of prosecution on account of his or her sex, race, religion, nationality, ethnic origin or political opinions, no domestic provisions or international instruments were cited to substantiate that empirical finding.

23. Consideration of an offence as involving fiscal matters did not prevent the granting of requests for extradition and mutual legal assistance. That had been observed either through the non-reference to fiscal offences among the grounds for refusal of such requests or through explicit reference in the legislation and/or treaties that assistance should not be denied for matters such as taxation, duties and customs. In one country, decisions regarding the provision of assistance in relation to fiscal offences rested with the Attorney General, which made such decisions on a discretionary, case-by-case basis.

24. In most countries, the fulfilment of dual criminality was not required for mutual legal assistance or was foreseen as an optional condition (with one exception: a country where dual criminality was a sine qua non condition for affording assistance, although in practice flexibility was demonstrated with regard to cooperation with INTERPOL and ASEANAPOL, provided that the independence, sovereignty and territorial integrity of the country involved were not affected). In one country, the absence of dual criminality was listed among the optional grounds for refusing requests for mutual legal assistance. In that connection, it was found that the effective implementation of article 46 of the Convention might be achieved if the discretion to require dual criminality was limited to assistance involving coercive measures. At the same time, and in relation to non-coercive measures for which assistance could be provided, exchange of data and information was cited in one country as a specific example of such measures. In another country, however, despite the allegedly flexible application of the dual criminality requirement, it was confirmed that, with respect to non-coercive action or measures, assistance would not be rendered in the absence of dual criminality. The direct applicability of article 46, paragraph 9, of the Convention was reported in one country. In another country, new legislation on mutual assistance in criminal matters was enacted after the country visit of the review team. The effectiveness of the implementation of its provisions was to be tested in future.

25. The following grounds for refusal of requests for mutual legal assistance were reported in the country reviews that had been completed: failure to comply with the terms and requirements of the applicable treaty; conflict with the domestic legislation of the requested State; requests that were prejudicial to sovereignty, security or national interests; the de minimis nature of the offence (three countries); safe conduct, namely a lack of assurances that the evidence requested would not be used, except with the consent of the competent authority of the requested State, for a

matter other than the criminal matter in respect of which the request had been made (two countries); requests that were prejudicial to the safety of the person concerned (three countries); pending proceedings in the requested State; granting the request might result in manifest unfairness or denial of human rights (one country); granting the request might result in the imposition of life imprisonment in the requesting State (one country) or the death penalty (two countries), unless assurances to the contrary were provided; exceptions for political and military offences (extension from extradition law and practice) (three countries); requests that constituted a “threat to public interest” (as reported in one country without, however, further explanation to clarify the meaning of the term); and *ne bis in idem* issues. In one case, the relevant provisions of the Riyadh Arab Agreement on Judicial Cooperation were reported to be applicable.

26. Bank secrecy did not represent a problem with regard to affording assistance either by virtue of the provisions of domestic laws or the explicit provisions of applicable regional instruments (e.g. the Association of South-East Asian Nations (ASEAN) Treaty on Mutual Legal Assistance in Criminal Matters) or on the basis of the practice followed. In one country, although the code of criminal procedure authorized access to bank documents, the transmission of such information, even to domestic authorities, depended on prior consent by the central bank. In another country, while bank secrecy restrictions did not appear to pose a challenge to the rendering of assistance involving bank and financial records, in practice a production order needed to be sought from the court to disclose account information under the applicable provisions of the country’s banking act. In that regard, the authorities of that country were encouraged to ensure the monitoring of the process for the lifting of bank secrecy to prevent potential delays and ensure that the full scope of assistance could be rendered in cases involving legal persons. In the context of another review, while it was noted that, in principle, bank secrecy would not be a basis for declining a request for mutual legal assistance, provisions of conditionality attached to the legislation and the need to meet the requirement of authorization by the prosecutor were indicative of only partial implementation of article 46, paragraph 8. Finally, although one country had not refused a request for mutual legal assistance based on bank secrecy requirements, it had not put in place any legislative provisions that could be used to construe bank secrecy as a ground for the refusal of such requests.

Group of Eastern European States

27. The prevailing trend in the countries belonging to the Group of Eastern European States that were under review was to respect the condition of dual criminality in extradition proceedings. In countries that were States members of the European Union, basic corruption crimes were included in a list of offences for which no verification of the dual criminality requirement was needed, based on the provisions of the Council of the European Union framework decision on the European arrest warrant.

28. The “minimum penalty requirement” approach was widely used for the identification of extraditable offences (in the vast majority of cases, one year of imprisonment, or a more severe punishment, and four or six months of sentence to be served if extradition was requested for enforcement purposes).

29. The grounds for refusal did not differ from the ones foreseen in the legislation of the countries mentioned earlier: political asylum (three countries); lapse of time; military offences; death penalty (lack of assurances not to impose it); *ne bis in idem* issues; adjudication of the case before an extraordinary court in the requesting State; anticipated torture or inhuman or degrading treatment or punishment; judgements rendered in absentia; age, health or personal circumstances of the person sought (one country); amnesty; pending proceedings for the same offence in the requested State; and extraterritoriality. Failure to comply with reciprocity was also reported as a ground for refusal in one country. An analogous application of a typical ground for refusal of such requests (harmful effects to the sovereignty, security or other essential interests of the requested State) was also highlighted. Non-compliance with specific evidentiary standards (sufficient evidence excluding reasonable doubt that the person sought had committed the offence) was reported in two countries as a ground for refusal. Consistently, the non-discrimination clause provided for in article 44, paragraph 15, of the Convention was applied, meaning that, if there were any suspicions of discriminatory treatment or punishment in the requesting State, then extradition was denied on that ground. The crime for which extradition was requested being considered a fiscal offence was not included among the grounds for refusal.

30. The exclusion of political offences from the scope of extradition was consistently reported, together with legislative action to provide for exceptions to that exclusion and also in relation to offences that the countries under review were bound by international treaties to engage in international cooperation to combat. No cases of considering corruption offences as political crimes were reported.

31. Extradition was prohibited on the grounds of nationality in most jurisdictions by virtue of either constitutional provisions or provisions of domestic legislation. A substantial departure from that approach was reported with regard to surrender procedures among States members of the European Union based on the European arrest warrant process. In one case, the prohibition against extraditing nationals related only to military offences. In another case, extradition of a national was allowed only if the person sought was also a citizen of the requesting State and had no residence in the requested State. In one country, bilateral agreements with neighbouring countries were reported that allowed the extradition of nationals for certain offences.

32. The grounds for refusal of requests for mutual legal assistance were found not to be in deviation from those enumerated in article 46, paragraph 21, of the Convention. In addition, the offence for which assistance was requested being of a political or military nature was also reported as a ground for denial, as it was considered (in one country) as part of the *ordre public* of the country. In another country, grounds for refusal additionally included amnesty, statutory limitation, mental disturbance of the offender, pending criminal proceedings or a decision to terminate the case. Other grounds for refusal applicable in some jurisdictions were anticipated discriminatory treatment of the person in the requesting State and the principle of *ne bis in idem*.

33. Dual criminality was generally foreseen as a condition for providing assistance. In some jurisdictions, the condition of dual criminality was applied strictly, without exception, whereas in others it was applied in an optional manner to allow for assistance with regard to non-coercive measures (in one case, if conditions

of reciprocity were satisfied) or “in conformity with the international agreements” of the requested State. There were three notable exceptions: in two countries, dual criminality was not required at all; another country did not require dual criminality, as a rule, in proceedings relating to mutual legal assistance and applied this condition only in prescribed cases relating to fiscal offences.

34. No particular problems were found with respect to the obligation not to decline assistance on the grounds of bank secrecy. Moreover, in all jurisdictions, offences being of a fiscal nature did not represent an impediment to the provision of assistance. This was achieved through explicit domestic provisions, the application of regional instruments (e.g. the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters) or the direct applicability of the Convention (in one country).

Group of Latin American and Caribbean States

35. In the countries belonging to the Group of Latin American and Caribbean States that were under review, extraditable offences were defined in legislation by using the threshold of punishment (imprisonment of one year or a sentence to be served of six months or, in one country, one year). As reported by one country, if the offence provided for alternative sanctions to imprisonment, such as disqualification or suspension of rights or fines, such an offence was not extraditable. In general, extradition was subject to the dual criminality requirement. A case of a subregional agreement authorizing a departure from that rule was noted.

36. In most countries, there were no constitutional or legal limitations regarding the extradition of nationals, which was allowed provided that the applicable treaties permitted it. Notably, in one case, the matter was regulated in the opposite manner: extradition was possible unless otherwise foreseen in applicable treaties. In another country, a national of a requested State whose extradition was sought might choose to be prosecuted by the authorities of the requested State, unless a treaty applied in that country which made the extradition of nationals mandatory.

37. The grounds for refusal of an extradition request related to the nature of the offence (military and political offences, but not fiscal ones). In one country, the political offence exception to extradition might not be applicable in relation to certain offences if the requested State had assumed an international obligation to “extradite or prosecute” (*aut dedere aut judicare*). Other grounds for refusal referenced human rights considerations (anticipated discriminatory treatment or punishment, torture or any other inhuman or degrading treatment or penalties, application of the death penalty) or were linked to the administration of justice (lapse of time, lack of sufficient evidence that the person sought had committed the offence). In one country, a typical ground for refusing a request for mutual legal assistance was reported to also be applicable in extradition proceedings (protecting the national sovereignty, security, ordre public or other essential interests of the requested State).

38. Dual criminality was either not required to render assistance or foreseen only in relation to coercive measures (e.g. search and seizure, interception of mail or telephone calls). Bank secrecy was not found to be an obstacle to compliance with obligations relating to mutual legal assistance. Grounds for denying assistance did not include the offences being fiscal ones and were mostly found in applicable

treaties, which referred to cases in which the requested action was contrary to the domestic legislation of the requested State. Lack of reciprocity was also reported as a ground for refusal.

Group of Western European and other States

39. The definition of extraditable offences by using the minimum penalty threshold (imprisonment of one or two year(s)) and by requiring dual criminality were common features in the jurisdictions of the Group of Western European and other States that were under review. The latter condition did not need to be fulfilled in relation to the European arrest warrant procedures among States members of the European Union. Two countries noted that the criminalization of all mandatory Convention offences reduced the concerns stemming from the application of the dual criminality requirement.

40. The exception to extradition for political and military offences was commonly found in the domestic laws of the countries involved. In one country, it was noted that the direct applicability of the Convention ensured that none of the offences covered by it would be considered political offences. Other grounds for refusal included the principle of *ne bis in idem*, suspicions that the non-discrimination clause would not be respected, possible application of the death penalty, judgements rendered in absentia, adjudication of the case by an extraordinary court in the requesting State, lack of assurances that the rule of speciality would be respected, incompatibility with humanitarian considerations and the “personal circumstances” of the person sought, and lack of assurances that fundamental human rights would be respected. In two countries, the fulfilment of certain evidentiary standards was reported as a condition for granting a request for extradition.

41. Divergent approaches were reported with regard to the extradition of nationals. In three countries, there was no prohibition against extraditing nationals, whereas in other countries such an action was not possible. The surrender of nationals was possible for countries bound by the framework decision on the European arrest warrant.

42. Dual criminality was either not required or was considered an optional ground for refusal in the context of mutual legal assistance. In the latter case, such assistance could take place even in the absence of dual criminality if it involved non-coercive powers (e.g. taking voluntary witness statements, conducting surveillance without a warrant, obtaining criminal records, obtaining publicly available material, effecting service of documents). However, as reported by one country, a request for assistance involving coercive measures might be granted, even in the absence of dual criminality, if the assistance was requested for the exoneration of a person pursued, or for the prosecution of offences constituting sexual acts with minors. In one country, assistance was provided only in relation to serious offences punished by a deprivation of liberty of more than a year.

43. Generally, the grounds for refusal of requests for mutual legal assistance were in line with article 46, paragraph 21, of the Convention. Additionally, lack of reciprocity was reported in one country as a ground for denying assistance.

44. Bank secrecy was not regarded as a ground for refusing requests for mutual legal assistance. In one country, that was founded on the concept of the direct applicability of the relevant provision of the Convention. However, in one country,

banking secrecy might be lifted by order of a judicial authority only in cases in which the offence referred to in the request also constituted an offence under the laws of the requested State (dual criminality).

45. Fiscal offences were not included among the grounds for refusing requests for mutual legal assistance. However, the legislation in one country stipulated that a request was inadmissible if the proceedings related to an offence that appeared to be aimed at reducing fiscal duties or taxes, or violated regulations concerning currency, trade or economic policy. Nevertheless, that same country had provided mutual legal assistance in tax evasion cases.

B. Special investigative techniques

46. Article 50 of the Convention obliges States parties to take or consider taking measures at both the national and international levels. Paragraph 1 foresees that States shall take such measures as may be necessary to allow for the appropriate use by their competent authorities of controlled delivery and, where they deem appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations within their territories, and to allow for the admissibility in court of evidence derived therefrom. Those obligations are binding for each State party “to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law”. Paragraph 1 structurally belongs more to the provisions on law enforcement of chapter III than to international cooperation, despite its systematic position in chapter IV of the Convention. To review implementation of the provision, reviewers considered in most country reports the national legislation on the powers of their investigative authorities and on evidence admissible in criminal proceedings. Article 50, paragraph 1, points to three special investigative techniques in particular: controlled delivery is mentioned as a necessary element, whereas surveillance and undercover operations are mentioned as examples of further techniques (“such as”). That leaves open the possibility to foresee more special investigative techniques, although only a few country reports mentioned additional ones. It was also not considered a gap in implementation if States categorized special investigative techniques in different ways. In some countries, for example, controlled delivery was considered to be part of undercover operations rather than a separate category.

47. A quantitative analysis of the number of times permission was granted for the use of special investigative techniques and the admissibility of evidence derived from them in court demonstrated significant regional diversity. The following numbers reflect information on permission granted for any of the three investigation techniques mentioned above (controlled delivery, electronic surveillance and undercover operations). A particular investigation technique was counted only if it was generally applicable for the offences established in accordance with the Convention:

- (a) Group of Eastern European States: 27 (average: 2.7 per country);
- (b) Group of Western European and other States: 17 (average: 2.4 per country);

- (c) Group of Asia-Pacific States: 19 (average: 1.4 per country);
- (d) Group of African States: 9 (average: 1 per country);
- (e) Group of Latin American and Caribbean States: 3 (average: 0.6 per country).

48. The information drawn from the current sample therefore suggests that the investigative authorities in the Group of Eastern European States and in the Group of Western European and other States have broader legal authorization to use special investigative techniques than those in other regions. Latin American investigators could use the smallest number of special investigative techniques. Eastern Europe was also the only region in which some country reports contained reference to further special investigative techniques or more specific forms of the three techniques already mentioned (see below).

49. The available information also points to differences between common-law and civil-law countries. However, the quantitative difference between the two types of countries was not significant: in common-law jurisdictions, an average of 1.9 special investigative techniques per country was foreseen; in civil-law jurisdictions, the average was 1.6. A more significant difference involved the legislative techniques and the proceedings used. Civil-law systems generally required an explicit legislative authorization. Their legislation therefore regulated the nuances of the techniques allowed, the kind of crime or person to which they could be applied, the limitations of their use and the process for their authorization in criminal cases. In approximately 50 per cent of the civil-law countries for which such information was available, the use of special investigative techniques required the specific authorization of a judge. Once the evidence was obtained according to the legal basis, it was admitted during the pretrial phase and the trial phase without any separate procedural step. In common-law countries, special investigative techniques were often considered to be part of the general evidence-gathering work carried out by investigators, and were generally allowed without judicial authorization. Although many common-law countries had legislation in place to regulate the objects and proceedings relating to such techniques, decisions regarding their admissibility were taken in the context of evidentiary rules on the use of information obtained through special investigative techniques at trial. In some countries, even if the evidence resulting from special investigative techniques was not admissible as evidence, it could still be used as intelligence and as a basis for building evidence.

50. Paragraphs 2 to 4 of article 50 of the Convention address specific obligations in the field of international cooperation. State parties are encouraged to conclude appropriate bilateral or multilateral agreements or arrangements for using special investigative techniques in the context of cooperation at the international level (para. 2). In the absence of such agreements or arrangements, decisions to use special investigative techniques at the international level should be made on a case-by-case basis (para. 3). Finally, paragraph 4 provides details on the use of controlled delivery at the international level, setting out how that technique may, with the consent of the States parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or to be removed or replaced in whole or in part.

51. Although only a few countries reported statistics on the matter, case examples suggested that the same regional trends prevailed in the international use of special investigative techniques as with regard to national legislation. Mostly, States that accepted special investigative techniques in their national systems also provided cooperation for their use internationally. Another regional difference is shown by the regional instruments mentioned as measures taken to implement paragraph 2 of the article. Countries referred to, inter alia, the ECOWAS Protocol on the Fight against Corruption; the Convention implementing the Schengen Agreement of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic on the gradual abolition of checks at their common borders (art. 40); the 2000 Council of the European Union Act establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union (arts. 12 (controlled deliveries), 14 (covert investigations) and 17-22 (interception of telecommunications)); and the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters of 1959 (arts. 17 (cross-border observations), 18 (controlled delivery) and 19 (covert investigations)). States parties also referred to relevant United Nations conventions, in particular the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (art. 11) and the United Nations Convention against Transnational Organized Crime (art. 20).

Group of African States

52. Two States members of the Group of African States, both common-law countries, permitted all mentioned special investigative techniques, although one State did not yet have a clear regulation on the admissibility of evidence derived from such techniques. Both countries had used special investigative techniques successfully at the national and international levels for investigating different offences, one of them in corruption cases. One country had concluded four relevant bilateral agreements on police cooperation, but could also cooperate without a treaty basis. Requests had in some cases met with delays owing to the lack of a mechanism regulating the costs of such cooperation. The other country had no specific agreement but could use special investigative techniques within the regular police cooperation mechanisms such as the Southern African Regional Police Chiefs Cooperation Organization or INTERPOL.

53. Three countries permitted selected special investigative techniques for cases involving corruption. Two countries used limited forms of surveillance, although one of them only for cases involving money-laundering. Both countries had no experience with the use of such techniques for international cooperation, except for some case-by-case arrangements on drug-related cases. One country had recently regulated controlled delivery in its national legislation, both at the national and international levels, in a manner that took into account the elements of article 50, paragraph 4, of the Convention. It had one bilateral agreement with another country and provided statistics demonstrating that requests for controlled delivery inside its territory had already been received and implemented before the recent national legislation entered into force, on the basis of the 1988 Convention.

54. Four countries did not permit the use of special investigative techniques and indicated that they neither had concluded any relevant bilateral agreements nor

possessed any experience with the application of such techniques at the international level on a case-by-case basis. However, in one of those States, draft legislation for the implementation of article 50, paragraph 1, was under consideration. Another country referred to a regional instrument and indicated that the Convention could be applied directly for the use of special investigative techniques on a case-by-case basis (art. 50, para. 3).

55. Although some of the reports did not indicate which authorities were authorized to use special investigative techniques, the available information suggests that they were used by police forces and anti-corruption authorities, generally without a judicial order.

Group of Asia-Pacific States

56. Three States members of the Group of Asia-Pacific States allowed all mentioned special investigative techniques at the national level. One of them considered it necessary to put in place new legislation on the admissibility in court of evidence obtained through such techniques, based on the manner in which the evidence had been obtained and not, as currently, on its relevance. In another country, the use of special investigative techniques at the international level was possible only at the request of countries with which it had treaties regarding mutual legal assistance. In one country, it was stated that priority should be given to capacity-building regarding special investigative techniques at the national level, and that international agreements to that effect should later be concluded and swiftly implemented.

57. Approximately half of the countries allowed for one or two special investigative techniques. Three countries permitted only surveillance. In one of them, it was noted that, given the established record of collaboration with foreign counterparts on a case-by-case basis, it was not necessary to conclude formal cooperation agreements. One of them had cooperated on a case-by-case basis with two other countries, and the third country did not provide information on any experience at the international level. Another country allowed surveillance and undercover operations and used them in corruption cases, while controlled delivery was not permitted for corruption offences. The same country had concluded several bilateral agreements on the matter within the region and could not provide cooperation in the absence of an agreement or arrangement. Two countries permitted controlled delivery and surveillance, but did not provide specific information on the admissibility of evidence obtained through the use of undercover operations. One of them had in place several bilateral agreements on the use of controlled delivery and provided statistics on cross-border controlled delivery of goods or funds in a number of cases; these figures related to all offences and not specifically to corruption. The other country could use either an agreement between two police agencies or the Convention as a legal basis; however, no cases had been presented.

58. Three States parties did not allow the use of special investigative techniques at the national level. Further, although the law enforcement authorities of a fourth country were not precluded from using special investigative techniques, that power was not specified in the law and there were no clear guidelines on their use. Such evidence would not be directly admissible but could be used to build direct evidence. Those four countries had also not concluded agreements and had not cooperated on the use of special investigative techniques on a case-by-case basis.

59. Special investigative techniques, where allowed in the region, were at the disposal of police forces, anti-corruption bodies or prosecutors, generally without judicial authorization. In one country, wiretapping was carried out by the police because the anti-corruption body did not have the equipment, expertise or experience to do it. In another country, the anti-corruption authority had even broader authority to intercept communications than the police.

Group of Eastern European States

60. As mentioned before, the situation in the States members of the Group of Eastern European States was unique, with nearly uniform permission of all special investigative techniques in the 10 countries under review. Only three country reports did not contain information on all three mentioned techniques; even in those reports, information was omitted on only one technique, without specifying whether that technique was allowed or forbidden.

61. Some countries regulated investigative powers that went beyond the three techniques mentioned in the Convention, or specified certain features of them in more detail. Examples were the infiltration of criminal groups, the incorporation of a legal person or the creation of a secret organization, the installation of software in computer systems, the creation of situations that led to the obtaining of illegal computer data, and the monitoring of Internet activity. One country specifically regulated simulated bribe-giving and bribe-taking as a form of controlled delivery.

62. That high level of compliance was mirrored by considerable experience in the use of special investigative techniques at the international level. Some domestic laws specifically foresaw the use of such techniques for international cooperation. The relevant agreements of the Council of Europe, the European Union and the Schengen acquis were referred to by their respective member States or States parties. Half of the countries also had bilateral agreements on law enforcement cooperation with regulations on the use of special investigative techniques in place, and one country had bilateral agreements to that effect under development. In the absence of specific agreements, some States could use special investigative techniques on a case-by-case basis or on the basis of reciprocity.

63. Half of the States members of the Group had cooperated with other States through the use of special investigative techniques in corruption cases. In a recent operation between two neighbouring countries, cross-border surveillance techniques helped to detect and arrest customs officers on bribery accusations. Another country mentioned successful cooperation with two States, while yet another identified three corruption cases in which such cooperation had been carried out. One of the cases was a major sports betting case in which five countries had cooperated through a joint investigation team, using surveillance techniques. One country had two practical cases of application in the investigative stage, but information on them remained confidential. One country had received a request by another country that was in a different region and had a different legal system; although there was no treaty or agreement between the two countries, the request was implemented in compliance with the requirements of the requesting country, since it did not contradict national legislation in the requested State. In just over half of the countries, a court order was required for such cooperation, although some countries could dispense with that requirement in urgent cases.

Group of Latin American and Caribbean States

64. As mentioned above, special investigative techniques were allowed only to a limited extent in the States members of the Group of Latin American and Caribbean States. One State allowed the use of undercover agents, as long as they acted within the limits of the law, whereas the use of agents provocateurs was forbidden for corruption offences. Another State allowed surveillance techniques. A third State regulated controlled delivery and, under certain conditions, video surveillance; those conditions included that the investigation concerned a crime that had a national impact or effects that went beyond one judicial district, or that the conduct was linked to organized crime. In that country, the legislation also foresaw that all investigative techniques permitted at the national level could also be used for the purposes of international cooperation.

65. Two States did not allow special investigative techniques at all, although one of them had introduced such techniques for cases involving drug trafficking and money-laundering. The other country could assist other States parties with such techniques on a case-by-case basis, as long as the results were not used before a national court.

66. Special investigative techniques for the purposes of international cooperation had not yet been used for anti-corruption investigations. It was, however, noted that the 1988 Convention or the Inter-American Convention on Mutual Assistance in Criminal Matters could be used as a legal basis for that purpose. One State had a bilateral protocol with another country in the region on controlled delivery. One country indicated that cooperation on a case-by-case basis was not precluded.

Group of Western European and other States

67. Among the seven States parties under review that belonged to the Group of Western European and other States, five allowed all three forms of special investigative techniques mentioned in the Convention in their legislation, and another country had regulated two of them while allowing the third technique in practice. One of the States, however, specified that certain forms of cross-border delivery were not allowed, especially when they involved the interrogation of individuals. In one of those countries, interception techniques could be used for the purpose of gathering intelligence, but evidence gathered in that way was not admissible in criminal trials; however, this was not perceived to have a major impact on the ability to prosecute crime, including corruption. One country did allow for special investigative techniques, but only for drug-related offences and organized crime, not in corruption cases.

68. Although a treaty base usually was not necessary, country reports referred to the relevant instruments of the European Union, the Council of Europe and the Schengen acquis. Some countries had relevant bilateral agreements with law enforcement agencies in other States or relevant provisions in agreements on joint investigative teams. One country mentioned that covert investigations were possible only on the basis of a request for mutual legal assistance. In another country, the use of special investigative techniques was generally done on a case-by-case basis, and no specific treaties had been concluded.

69. Although not all country reports provided detailed information on the authorization procedures for special investigative techniques, the available

information suggested that in common-law countries a judicial authorization was not needed, while civil-law countries tended to require one.

70. Some countries reported on their institutional arrangements to allow for the use of special investigative techniques for international cooperation. One country reported on a programme that included a team of full- and part-time covert personnel that operated nationally and, with the agreement of other States, internationally. The same country participated in the international working group on undercover operations, which included 25 law enforcement agencies. Another country participated in projects in the framework of the Comprehensive Operational Strategic Planning for the Police initiative of the European Union. The same country reported that international arrangements on the use of special investigative techniques were normally covered by a specific memorandum of understanding and supporting legislation or treaties.

71. Several States provided examples of the use of special investigative techniques for the purpose of international cooperation. These included corruption cases on the basis of phone surveillance data, and two corruption cases involving controlled delivery. Further, one country assisted, upon the request of another country in the same regional group, in the deployment of a national of the requesting country within its jurisdiction in a covert role to obtain surveillance material relating to an international corruption investigation. A covert operation witness met with individuals from various countries who were engaged in the sale and promotion of military hardware. All suspects were invited to a meeting in the requesting country, where the suspects were arrested and charged.
