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Review of implementation of the United Nations Convention against Corruption

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

Thematic report prepared by the Secretariat

Summary

The present thematic report contains information on the implementation of chapter IV (International cooperation) of the United Nations Convention against Corruption (the Convention) by States parties under review in the first year of the first cycle of the Mechanism for the Review of Implementation of the Convention (Review Mechanism), established by the Conference of the States Parties to the Convention in its resolution 3/1.

I. Implementation of chapter IV

A. Introduction and scope and structure of the report

1. In its resolution 3/1, the Conference adopted the terms of reference of the Review Mechanism, contained in the annex to that resolution, as well as the draft guidelines for governmental experts and the secretariat in the conduct of State party reviews and the draft blueprint for State party review reports, contained in the appendix to the annex to resolution 3/1, which were finalized by the Implementation Review Group at its first session, held in Vienna from 28 June to 2 July 2010.

* CAC/COSP/IRG/2011/1.



2. In accordance with paragraphs 35 and 44 of the terms of reference of the Review Mechanism, the present report has 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 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 information on the implementation of chapter IV (International cooperation) of the Convention by States parties under review in the first year of the first cycle of the Review Mechanism. It is based on information included in review reports of nine State parties that had been completed, or were close to completion, at the time of drafting.¹

B. Implementation of chapter IV (International cooperation)

Extradition

4. All States parties under review regulated extradition in their domestic legal systems, most of them in their code of criminal procedure or special laws on international cooperation. In one case, no domestic regulation existed apart from limited extradition-related provisions in the country's Constitution. In another case, national legislation on extradition was in place, but only with respect to money-laundering offences, thus indicating a "compartmentalized" approach to extradition. This approach is likely to be confirmed with the adoption, by the same State party, of an anti-corruption bill which will contain extradition-related provisions limited to the area of corruption. Not all States parties, however, regulated extradition with the same level of detail. Some relied more heavily than others on provisions contained in extradition treaties.

5. A significant difference among the States parties stemmed from their belonging to different legal systems: whereas the Constitution of some of them allowed for the direct application of duly ratified international treaties, other States parties could only enforce treaties by enacting implementing legislation. Accordingly, most States parties belonging to the first category did not need to adopt detailed implementing legislation by virtue of the fact that the extradition-related provisions of the Convention had become an integral part of their domestic legislation. One State party confirmed compliance with most provisions of the Convention by referring to very similar or equivalent provisions to be found in a regional treaty on corruption to which it was Party.

6. The majority of States parties considered as extraditable only those offences which are punished by deprivation of liberty for a period of at least one year or more. As a result, whenever offences based on the Convention were punishable with a lesser penalty, extradition would not be possible. It was noted that this situation might be addressed by increasing the applicable penalties to ensure that all conducts criminalized in accordance with the Convention become extraditable. In one bilateral treaty, the threshold for making offences extraditable was a period of deprivation of liberty of at least two years.

¹ Country reviews completed or close to completion as at 15 August 2011.

7. Regarding “accessory offences” (those included in the extradition request without reaching the prescribed punishability threshold) some States parties made them extraditable if the main offence for which extradition was requested satisfied the minimum penalty requirement. One State party stated that it could not grant extradition for “accessory offences” and another one that the issue was not regulated in its legal system.

8. Dual criminality appeared as a standard condition for granting extradition, the only exception being the surrender of fugitives in execution of the European Arrest Warrant. The majority of States parties set out this condition explicitly in their domestic legislation, with the exception of two, which applied it in practice. The dual criminality principle was generally interpreted in a flexible manner, in accordance with article 43 (2) of the Convention which deems the principle fulfilled regardless of the terminology used to denominate the offence in question. Only the Government of one State party expressed an interest in modifying its legislation to remove the dual criminality requirement for some or all of the offences set forth in its penal laws, thus indicating the intention to align itself with article 44 (2) of the Convention. In one case, the full criminalization of all offences based on the Convention was recommended as a way to ensure that the absence of the dual criminality requirement would no longer constitute an obstacle to the surrender of suspected offenders.

9. Most States parties under review had an exhaustive list of grounds for refusal in their legislation except for one, which deduced them from general principles of international law whenever the extradition request was not based upon a treaty. Only one State party made a distinction between compulsory and optional grounds for refusal, while another one took the approach of listing a few grounds for refusal directly in its Constitution.

10. Most States parties could not reject a request on the sole ground that the offence involved fiscal matters. In two cases, lack of legislation or practice left a degree of uncertainty as to whether an extradition request might be refused on this ground.

11. Concerning the so called “non discrimination” clause as set forth in article 44 (13) of the Convention, the majority of States parties could grant extradition when there were grounds to believe that the request had been formulated with a view to persecuting the person sought on account of his or her gender, race, religion, nationality, ethnic origin or political opinions. A few States parties did not make any reference to this ground, and in two cases the risk of discrimination based on gender was not considered. In two cases, the legislation did not make any reference to the “non discrimination” clause.

12. All of the States parties’ legislation specifically listed the commission of a political offence among the grounds for refusal. One State party mentioned that this was the most common cause of rejection of incoming requests (together with the circumstance that the prosecution of the offence was statute-barred). However, all of the States parties shared the same approach not to define the notion of “political offence” in legislative terms. As a result, decisions on whether to reject an extradition request upon this ground are taken on an ad hoc basis. In one case, the Constitution mentioned that extradition was not allowed for “political reasons”, an expression that the reviewers found to be ambiguous as to its actual scope of

application. There was no indication or record that corruption-related offences had been or would be considered political in nature in any of the States parties.

13. Five States parties reported that, as a matter of principle, they could not extradite their own nationals unless this possibility was explicitly envisaged in applicable treaties. All of them but one specified that any refusal to grant extradition based on this ground would trigger a domestic prosecution, in accordance with article 44 (11) of the Convention. On the other hand, none of them appeared to allow the temporary surrender of nationals on condition that they would be returned after trial to serve the sentence imposed in the requesting State, as envisaged in article 44 (12). Instead, all except one appeared to be able to enforce a foreign sentence whenever they rejected an extradition request (sought for enforcement purposes) on nationality grounds.

14. Generally, with regard to the legal bases for receiving or sending extradition requests, States parties following the “continental/civil law” model were in a position to extradite without a treaty, typically on the basis of reciprocity, while countries belonging to the “common law” tradition required the previous existence of a treaty. However, the distinction between the two groups was not always clear-cut: for example, one State party from the “common law” group noted that, although in principle a treaty basis would be needed, it was possible to extradite on an ad hoc basis through Gazette notification.

15. None of the States parties highlighted any legal obstacle to the possibility of using the Convention as the basis for extradition. At the same time, it emerged that the Convention was not widely utilized in practice for this purpose. One State party argued that bilateral treaties generally provided a more comprehensive and detailed regulation of extradition matters than the Convention did. Another State party offered a different explanation, namely that domestic practitioners generally lacked knowledge about the possibility to use the Convention as a concrete legal tool for international cooperation.

16. In the field of extradition, all States parties relied to a greater or lesser extent on treaties (whether bilateral or regional). Regional treaties took the form either of fully-fledged extradition conventions or conventions on corruption containing some specific provisions on extradition. In general, bilateral treaties tended to be concluded with States parties of the same region or those speaking the same language. In one case, it was recommended that the Convention be extensively used as a legal basis for extradition as a way to compensate for the very limited number of bilateral treaties in place.

17. On plans to conclude new treaties to enhance the effectiveness of extradition, the majority of the States parties stated their general willingness to explore possibilities in this regard. One State party highlighted its current policy to prioritize negotiations with those States parties in which there was a high presence of its own nationals. Overall, and despite the fact that most States parties did not require treaties as a condition to extradite, a number of recommendations were issued encouraging to continue exploring the possibility to negotiate additional extradition treaties.

18. As to the average duration of extradition proceedings, two States parties provided information pointing to substantial differences in this regard, with one

State party mentioning an average length of two to three months and the other of seven months.

19. Lack of uniformity was also noted in terms of the evidentiary threshold that requesting States parties must satisfy in order to have their extradition requests accepted. The spectrum ranged from one State party not requiring any sort of evidence about the commission of the offence to others setting relatively high evidentiary standards. The latter were expressed in terms of “probable cause” or “prima facie case”. A number of recommendations were addressed to these States parties with a view to introducing a lower burden of proof in extradition cases, and thus make it easier for requesting States parties to formulate an acceptable extradition request.

20. Two States parties provided for a simplified extradition proceeding on condition, among others, that the sought person consented to his or her transfer. A third one indicated that such procedure would become applicable in its own legal system once a regional agreement on extradition came into force.

21. According to most States parties, the main due process guarantees for the benefit of the sought person were enshrined in their Constitution. Although these guarantees appeared to be applicable to the conduct of criminal proceedings, they were normally considered to be extendable to other judicial procedures, including extradition. Only one State party explicitly mentioned the applicability of relevant human rights conventions, including the International Covenant on Civil and Political Rights, while providing a list of rights applicable in the course of extradition, which include the right to a defence counsel and to an interpreter, as well as the right to appeal the court ruling imposing preliminary detention and the court order authorizing extradition.

22. All States parties had measures in place to ensure the presence of the sought person at extradition proceedings. Custody, in particular, could invariably be ordered upon request. One State party reported that local courts were empowered to consider the legality of detention during extradition proceedings in the same way as they would do for pretrial custody.

23. There appeared to be no uniform interpretation and application of the requirement set forth in article 44 (17) of the Convention, i.e. consultation with the requesting State before refusing extradition. Some States parties considered that no implementing legislation would be needed, either because they regarded the duty of consultation as part of international comity or because they interpreted this provision of the Convention as being directly applicable and self-executing in their own legal system. One State party took a considerably different approach by arguing that the prosecutor, in his/her capacity as representative of the requesting State before the extradition authorities, was implicitly bound to keep the requesting State informed of all of his/her actions. In two cases, lack of both legislation and practice resulted in non-implementation of the requirement.

24. Some of the States parties under review provided statistics and figures about the number of extradition requests made and received over the past few years, including the percentage of granted requests. However, the data provided was of a general nature and did not provide an overview of how many extradition cases were handled concerning corruption-related offences.

Transfer of sentenced persons

25. Most States parties could rely on the necessary legal framework to carry out transfer of sentenced persons in accordance with article 45 of the Convention, notably via bilateral and regional agreements.

26. The number of treaties concluded on this matter by the States parties varied considerably. Whereas one State was bound by 28 bilateral agreements covering transfer of sentenced persons, another one mentioned only two. Similarly to what was observed in relation to extradition, a tendency was detected to conclude relevant agreements with neighbouring States or States which share the same language.

27. In two cases no agreement was in place, with one State party arguing that its national legislation barred such transfers when the person concerned was serving a sentence under any conviction within its territory until discharge. However, the same State expressed the intention to change such legislation in order to ensure compliance with the Convention.

28. Outside of any treaty framework, most States parties indicated that they were in a position to transfer sentenced persons on the basis of domestic laws. In one case this possibility was limited to persons sentenced for money-laundering or drug-related offences. However, the same State specified that, in practice, all transfers had taken place through treaties. Another State party specifically mentioned reciprocity and dual criminality as conditions to execute transfers. Only one State party reported that it had used the diplomatic channel twice to transfer sentenced persons.

Mutual legal assistance

29. The extent and scope of regimes of mutual legal assistance in the States reviewed varied. Two States had adopted specific domestic legislation regulating mutual legal assistance. Five States reported that, in the absence of comprehensive domestic legislation on the matter, mutual legal assistance was provided on the basis of multilateral and bilateral treaties. In three cases, it was noted that mutual legal assistance could be afforded even in the absence of treaties, based on principles such as reciprocity.

30. The regulatory framework of mutual legal assistance, like in the case of extradition, was influenced by the nature of the legal system of States. In States where the direct application of treaties was permitted, the provisions of the Convention that are self-executing would apply without the need for specific implementing legislation. In States where implementing legislation was required to enact international treaties, the provisions of the Convention would not be applicable without the adoption of enabling laws.

31. Four States were able to grant mutual legal assistance in relation to offences for which legal persons may be held liable. In two of those States the principle of criminal liability of legal persons was not established, but mutual legal assistance was possible because dual criminality was not required. One country indicated that mutual legal assistance would not be granted with respect to offenders that were legal persons. Four countries did not provide any information in this respect.

32. The purposes for which mutual legal assistance may be requested according to article 46 (3) of the Convention were to a large extent covered by domestic legislation in three States reviewed, whereas four States indicated that the purposes were specified in the applicable bilateral or multilateral mutual legal assistance treaties. In most States, asset recovery in accordance with chapter V of the Convention was not explicitly listed among the purposes for which mutual legal assistance might be requested.

33. Spontaneous transmission of information to foreign authorities and the modalities thereof, envisaged in articles 46 (4) and 46 (5) of the Convention, were not specifically regulated in the domestic legislation of the States reviewed. Four States noted, however, that even if not foreseen, spontaneous transmission was possible since not explicitly prohibited, and one State had even designated a specific authority empowered to transmit information without prior request.

34. The principles established in articles 46 (6) and 46 (7) of the Convention were generally accepted among the States reviewed. In States where direct application of treaties was not permitted, legislation was required to ensure that mutual legal assistance provisions of the Convention were applied in the absence of bilateral or multilateral mutual legal assistance treaty.

35. In most States reviewed requests for mutual legal assistance could not be declined on the ground of bank secrecy, although in some cases access to bank records had to be duly authorized by prosecuting or judicial authorities.

36. The majority of States reviewed provided that dual criminality was not a requirement for granting mutual legal assistance. Among those, one State noted that in the absence of dual criminality, assistance would be rendered only for non-coercive measures. It should be noted that in three cases the reviewers were not provided with a clear response on the matter, whereas only one State indicated that dual criminality was required, without specifying whether assistance would be granted when involving non-coercive measures.

37. Four States indicated that they applied the provisions of articles 46 (10), 46 (11) and 46 (12) of the Convention on transfer of detainees for purposes of identification, if the matter was not regulated by specific bilateral or multilateral mutual legal assistance treaties. This appeared to be the case in all States whose legal systems permit direct application of treaties, although the answers provided were not always precise.

38. Central authorities enabled to receive requests of mutual legal assistance had been designated by all but one State, while the notification to the Secretary-General was missing in two cases. In most cases, the authority designated was the Ministry of Justice, and only two States had designated the Ministry of Home Affairs and the Ministry of Foreign Affairs respectively. Only in two cases, was a specific department within the designated Ministry identified.

39. Four States required for requests for mutual legal assistance to be submitted through diplomatic channels. Another State indicated that such requirement was included in a number of applicable bilateral treaties on mutual legal assistance. In one case, it was accepted that the request of mutual legal assistance be addressed directly to the competent authority from which assistance was sought. Most States reported that, in urgent circumstances, requests addressed through INTERPOL were

acceptable, even though in some cases subsequent submission through official channels was required.

40. Six States reviewed have provided information on the languages acceptable for incoming requests. In three cases, the official language of the State was the sole acceptable, whereas in two cases requests formulated in English would also be accepted. One State accepted requests in five languages in addition to the two official ones. Three States indicated that oral requests would be acceptable, and two of them affirmed that so would be requests submitted by electronic mail; in two cases, subsequent formalization in writing was explicitly required. Most States confirmed that their legislation did not hinder the request for additional information subsequent to the receipt of the request for assistance.

41. Hearing of witnesses by videoconference as provided for by article 46 (18) of the Convention was permissible under the domestic law of four States. However, only one of these countries reported having had requests of mutual legal assistance involving a hearing through videoconference.

42. The rule of specialty of information or evidence supplied, established in article 46 (19) of the Convention, was respected in most of the States reviewed, although no information on cases of implementation had been provided. Similarly, a majority of States indicated expressly that they ensured confidentiality of the fact and substance of the request.

43. As far as grounds of refusal of mutual legal assistance were concerned, the majority of States indicated that their legislation did not provide for grounds other than those listed in the Convention, and that the request would not be refused on the sole ground that the offence also involved fiscal matters. Most States would also provide the reasons for refusal of a mutual legal assistance request.

44. According to the information provided by States, the average time needed for a response to a mutual legal assistance request ranged from one to six months. It was generally accepted that requests submitted by States with a common legal, political or cultural background would be responded to more rapidly.

45. Most States indicated that nothing in their domestic legislation would prohibit consultations with the requesting State party before refusing or postponing a request, but only one example of such consultation was provided. No cases of postponement of execution of requests due to interference with ongoing investigations were reported.

46. Safe conduct of witnesses, envisaged in article 46 (27) of the Convention, was addressed in the majority of States, either in relevant multilateral or bilateral treaties or in their domestic legislation.

47. With respect to costs associated to mutual legal assistance requests, the general rule was that these would be covered by the requested State. No arrangements contradicting this principle were recorded. Further, most States indicated that documents available to the general public would be provided to the State requesting mutual legal assistance, but only two States had expressly addressed the possibility to provide documents not publicly available. In one of the latter States, all documents in possession of the authorities were by virtue of the law public, and thus potentially available to requesting countries.

Transfer of criminal proceedings

48. Three States noted that their legal system did not contain any provision regulating the transfer of criminal proceedings between States. Such possibility was addressed in general terms in a regional instrument signed but not yet ratified by one State; another State provided in its domestic legislation for such a possibility among States parties to a regional international organization when money-laundering offences were involved. In three States the possibility to transfer proceedings was foreseen in domestic legislation or bilateral or multilateral treaties in general terms for all criminal matters, but no such transfer had taken place. In one case it was argued that transfer of criminal proceedings was a routine practice, without concrete examples of implementation. No information was provided as to whether States considered the possibility of transferring to one another proceedings for the prosecution of corruption-related offences established in accordance with the Convention.

Law enforcement cooperation

49. Channels of communication between competent anti-corruption authorities and services were reported to be more frequent at the regional level, be it at the bilateral level, under the regulatory framework of regional international organizations, or within regional networks such as ARINSA and CARIN. In the context of regional cooperation, tools such as secure databases for the sharing of information among law enforcement authorities had been developed.

50. Membership to INTERPOL was generally regarded as facilitating law enforcement cooperation at the broader international level. However, it was noted by reviewers that INTERPOL could not replace direct channels of communication between law enforcement authorities, agencies and services of other States, which appeared to be rare beyond the regional context.

51. Exchange of information appeared to be a common feature among Financial Intelligence Units (FIUs), as six States indicated actual or developing engagement between their units and foreign FIUs, mainly through conclusion of Memorandums of Understanding or membership to the Egmont Group.

52. With respect to measures of cooperation in enquiries concerning offences covered by the Convention, it was noted that most States reviewed did not provide information on their specific regulation or implementation, but rather provided an overview of the general legal framework within which such measures could be taken. Two States provided information on inquiries effectively conducted in cooperation with other States. Similarly, no information was provided by reviewed States on specific measures regarding supply of items or substances for analytical purposes and means or methods used to commit offences covered by the Convention.

53. Regarding coordination through exchange of personnel or experts, only one State had explicitly confirmed the posting of police liaison officers to other countries or international organizations.

54. Conclusion of bilateral or multilateral agreements or arrangements on direct cooperation between law enforcement authorities appeared to be part of the practice of a majority of States, as most countries indicated that they had entered or were

considering entering into such agreements, predominantly with countries in the same region or language community. Only three States mentioned explicitly that they used the Convention as basis for mutual cooperation in respect of offences covered by the Convention.

55. Cooperation in response to offences committed through the use of modern technology was not established among the States reviewed. Eight States had not provided specific information on modalities of cooperation to respond to such offences, whereas only one State mentioned as a means of cooperation the establishment of a permanently available focal point in the framework of a regional treaty addressing all forms of cybercrime.

Joint investigations

56. Only three States among those reviewed were parties to bilateral or multilateral agreements or arrangements allowing for the establishment of joint investigative bodies. Another two States mentioned that their legal systems and practice allowed requesting and conducting joint investigations on a case-by-case basis, and confirmed that they had done so on a number of occasions. Four States neither had concluded bilateral or multilateral agreements in view of carrying out joint investigations nor had they undertaken such endeavour on an ad hoc basis. None of the States reviewed had provided cases of joint investigations into offences established according to the Convention.

Special investigative techniques

57. Special investigative techniques were regulated in the legislation of five States reviewed; however, in two cases the utilization of such techniques was authorized solely with respect to specific criminal offences which did not include corruption-related offences. In four other States existing domestic provisions did not cover the use of special investigative techniques, but two of those States among those had noted that special investigative techniques would be allowed under draft legislative provisions under discussion at the time of the review.

58. International agreements or arrangements mentioned in article 50 (2) of the Convention had been concluded by three countries, usually involving counterparts in the same region or members of the same regional international organization. Among the six States that had not concluded such agreements, one State reported that it would be possible to use special investigative techniques if requested by States with whom a treaty on mutual legal assistance in criminal matters has been concluded.

59. The information provided by reviewed States further suggested that special investigative techniques could be used at the international level in the absence of relevant international agreements and on a case-by-case basis only in four States. Among those, two States noted that they would make such use only in case of reciprocity.