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Agenda item 2

Executive Summary

Note by the Secretariat

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II. Executive summary

Kuwait

1. Introduction

Overview of the legal and institutional framework of Kuwait in the context of implementation of the United Nations Convention against Corruption

Kuwait adopted the United Nations Convention against Corruption (UNCAC) on 9 December 2003, and ratified the Convention in accordance with Law No. 47 of 2006. Under article 70 of the Kuwaiti Constitution, ratified treaties “shall have the force of law” from the date of ratification and issuance. International agreements have the same legal force as domestic legislation under article 70.

The Constitution of 1962 represents the supreme law of Kuwait. Law No. 23 of 1990 provides for the structure of the judicial system in Kuwait. There is a Court of Cassation, the highest court in the country, a Court of Appeal and courts of first instance. Public prosecutors under the direction of the Attorney General handle investigation and prosecution of felonies and some misdemeanours. Judges and the public prosecution operate independently.

Kuwait has several mechanisms and oversight bodies that specialize in combating corruption offences, misuse of public funds and other matters. Legislation is currently pending in Parliament to establish a national anti-corruption agency with all the powers and authority required to engage in the prevention, detection and investigation of corruption cases.

The Public Prosecution

Brings public action on behalf of society, supervises the judicial police, enforces the criminal law, prosecutes criminal matters and executes judgements as provided for in article 166 of the Constitution.

The State Audit Bureau

Administers regulatory mechanisms, including oversight of State administrative units and apparatuses in the performance of their tasks.

The Government Performance Follow-Up Apparatus

Studies annual reports of the Audit Bureau and proposes mechanisms and recommendations to address any observations (art. 2, Decree 346/2007). In addition, this body coordinates with ministers and assists them in monitoring the performance of their ministries and government agencies under their authority.

The National Assembly’s Standing Committee for the Protection of Public Funds

This Committee, formed in accordance with article 8 of the law to protect public funds (1/93), has a mandate to study the reports of the Audit Bureau on the circumstances and status of money invested by agencies — at home or abroad — and uninvested balances. The Committee may, at the behest of the Assembly, also investigate abuses of public funds.

The Civil Service Commission

Amiri Decree No. 10 of 1960 established the Commission, an independent body, with jurisdiction to oversee enforcement of employment laws and regulations. In addition, it issued Decree No. 10 of 2002, which includes provision for the appointment of employment monitors at ministries and the administration of government bodies to provide oversight before and after administrative decisions are taken.

Financial Oversight Division of the Ministry of Finance

Ministerial Decree 57 of 2006 established the independence of the Division. This Division produces draft rules for the conduct of financial monitors and account managers, and provides technical guidance on the transaction approval process. The Central Bank also includes a Financial Investigation Unit.

National Committee to Combat Money-Laundering and Terrorist Financing

Includes representatives of the Ministries of Justice (public prosecution), Finance, Trade and Industry, Social Affairs and Labour, Foreign Affairs, and Interior; the Central Bank of Kuwait; the General Customs Administration and the Kuwait Stock Exchange. The Committee's mandate includes proposing necessary training programmes, increasing awareness of measures to counter money-laundering and terrorist financing, and coordinating member agencies and other bodies.

Central Tenders Committee

Operates as a central financial regulator, oversees and regulates public expenditures, and has jurisdiction to apply and monitor general principles of transparency and equality as conducted or proposed by the State in tenders.

2. Chapter III: Criminalization and law enforcement

2.1 Observations on the implementation of the articles under review

Bribery offences; trading in influence (articles 15, 16, 18, 21)

Articles 35 and 38 of Law No. 31 of 1970, which amended Penal Code No. 16 of 1960, make it a crime for a public official to ask or accept, for himself or a third party, a promise or a gift to perform or to abstain from any of the activities of the office. It covers both the person offering the bribe and the public official receiving it. This statute applies regardless of whether the act bribed for was actually committed and irrespective of the actual authority of the public official to perform the act. Article 41 makes active bribery a criminal offence, even if the bribe is not accepted by the public official. Article 43 defines "public official" broadly, and includes all public employees, local councils and members of organizations and associations funded, in part, by the Government. Bribery of foreign public officials has not yet been considered by Kuwait.

Articles 37 and 41 of Law No. 31 of 1997 make active and passive trading in influence a criminal offence, and conform to the requirements of the Convention. This statute encompasses both acting and refraining from acting, and does not require that influence was actually exerted or the desired results achieved, nor does

it require that the public official have the actual authority to perform the intended act.

Kuwait reported that it had not adopted legislation addressing active and passive bribery in the private sector.

Laundering of proceeds of crime; concealment (articles 23, 24)

Kuwait has adopted comprehensive criminal provisions to address money-laundering in Law No. 35 of 2002. Money-laundering is defined broadly in article 2 to include: (a) to undertake money-laundering with the knowledge that the funds were obtained from a crime; (b) to transport or to transfer, possess, acquire, use, keep, or receive monies with the knowledge that they were obtained from a crime; and (c) to conceal the truth of these monies or their source, their place, the method of disposing of them, their movements, the rights attached to them or their ownership, and knowing that the funds were acquired from a crime. The scope of this offence extends to proceeds that have been converted into other property.

A conviction for money-laundering may result in a maximum sentence of seven years and a fine of at least half of the amount of funds laundered, but not more than the total amount. In addition, all laundered funds may be confiscated and forfeited with due consideration for the rights of bona fide third parties.

Predicate offences are not enumerated so as to maximize the scope of the money-laundering provisions. Foreign offences count as predicate offences to the extent they would constitute offences in Kuwait. The definition of property includes both tangible and intangible property.

Kuwait plans to officially furnish copies of its money-laundering legislation to the Secretary-General of the United Nations in the near future.

Embezzlement; abuse of functions; illicit enrichment (articles 17, 19, 20, 22)

Articles 9 and 10 of Law No. 1 of 1993, concerning Protection of Public Funds, makes illegal the intentional, unauthorized embezzlement of public money, papers or effects held by, and entrusted to, a public official. The penalty can be up to life imprisonment. In addition, article 14 addresses both negligence and gross negligence for public sector embezzlement of entrusted funds and property. The same article addresses abuse of official functions as well, and covers a wide array of unlawful conduct wherein public officials exercise their authority improperly for the benefit of themselves or others.

Although Kuwait has not specifically criminalized illicit enrichment, it is considered that such cases are addressed by the provisions related to bribery, embezzlement and money-laundering, and provisions of the civil code regarding possession of unlawful assets. Kuwait reported that Parliament is currently considering legislation to criminalize illicit enrichment.

Obstruction of justice (article 25)

Article 138 of Law No. 16 of 1960 makes it a crime for any person to force a witness not to testify or to perjure testimony. Kuwait has not adopted provisions to make it a crime to bribe or offer an advantage to a witness in order to alter testimony. Kuwait considers that article 53 regarding accomplice liability covers

such conduct by focusing on the resultant criminal act of providing false testimony. There may be cases, however, where an affirmative criminal offence of inducing a witness to deliver false testimony would be useful, such as when a person attempts to bribe a witness, but the witness refuses.

Article 146 makes it a crime for any person to attempt, with criminal intent, by means of command, request, threat, hope or recommendation, to induce a competent judicial official to adopt procedures contrary to law or to abstain from following procedures determined by law. Article 135 makes criminal such conduct directed at law enforcement.

Liability of legal persons (article 26)

Article 12 of Law No. 35 of 2002 extends criminal liability to legal persons in relation to the offence of money-laundering. Such a conviction would not prejudice the criminal liability of natural persons who commit the same offence. Legal liability is not presently provided for in relation to other offences.

Participation and attempt (article 27)

Kuwait criminalizes aiding and abetting, as well as attempt (article 45), for both perpetrators and co-perpetrators, regardless of whether the crime has been completed. The joint participation of two or more persons in the commission of a crime is covered by articles 48 and 53. Conspiracy to commit a crime is addressed in article 56.

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (articles 30, 37)

Penal Code No. 16 of 1960 requires a criminal sentence to be proportional to the severity of the crime, allowing the judge to impose a suitable punishment while respecting the minimum and maximum punishments allowed by law.

Immunity from prosecution is addressed by article 111 of the Constitution and laws pertaining to the judiciary and National Assembly. Certain public employees may be given procedural immunity from investigation, prosecution or lawsuit, including members of the National Assembly and ministers. No investigative or legal procedure may be brought against them except with the agreement of the National Assembly. This also applies to the Public Prosecution and judges, whose criminal accountability is only permitted after the agreement of the High Council of Judges following the request of a public prosecutor.

Measures to ensure that a defendant appears in court are set forth in several provisions of Law No. 17 of 1960 (Law of Preliminary Proceedings and Criminal Trials), which include measures to issue a summons, require a defendant to provide a guarantee of appearance, provide a right to defence and order consequences for the failure to appear.

Articles 87, 88 and 91 of Penal Code No. 16 of 1960 permit conditional release if a person has completed at least three quarters of the term of imprisonment. A person released early may be monitored to ensure compliance with conditions of release, and subject to reincarceration for violations. Articles 85-90 of the Law for the

Organization of Prisons, Law No. 26 of 1962, concern the need to reform and reintegrate prisoners into society after the end of their imprisonment.

Kuwaiti law details instances in which public officials may be removed (temporarily or permanently) or suspended from office as a consequence of the commission of an array of crimes, including corruption offences. This can include suspension from public service during a period of investigation, pending the outcome of the criminal case. Reassignment of the convicted public official is not, however, among the possible consequences. In addition, a felony conviction bars a person from serving in public service or on a public contract, while a misdemeanour conviction bars public service for one to five years. For misdemeanour crimes implicating issues of honesty — which include corruption offences — a person only becomes eligible for re-employment after an adequate showing of rehabilitation.

Under article No. 27 of Decree-Law No. 15 of 1979, criminal accountability does not prevent the public employee from being subject to disciplinary punishment.

Persons who participate in criminal activity are encouraged to provide useful information and assistance to law enforcement. If such assistance is provided prior to investigation or the crime being committed, the prosecutor may elect to grant the person amnesty from prosecution in exchange for cooperation. A judge may take into account the circumstances of the offence, including the defendant's cooperation with law enforcement, in determining the appropriate punishment.

Protection of witnesses and reporting persons (articles 32, 33)

Kuwait has provisions that prohibit persons from torturing or forcing a witness or expert to alter testimony, with public officials subject to enhanced penalties. Although there are no express provisions that facilitate protective measures for witnesses or victims, the presiding judge is given broad discretion to apply such measures. In addition, the court may impose procedural rules to protect a witness from irrelevant questions or attempts at intimidation, and provide for shielding a witness's identity, permitting testimony via video link or other means, and ensuring that the victim's concerns are heard at relevant points in the criminal proceedings. Victims are treated as witnesses under Kuwaiti legislation.

The Parliament in Kuwait is currently considering legislation to provide protection to persons reporting instances of corruption from unjustified treatment or retaliation. Some protections already exist in the reporting of money-laundering offences, as well as in applicable laws of public service.

Freezing, seizing and confiscation; bank secrecy (articles 31, 40)

Law No. 16 of 1960 provides measures for the freezing, seizing and confiscation of property or instrumentalities associated with UNCAC crimes. Article 78 authorizes the sentencing court to order forfeiture of criminal property in all misdemeanour and felony cases. Confiscation and forfeiture shall be carried out without prejudice to the rights of bona fide third parties.

Articles 24 and 25 of Law No. 1 of 1993 contain provisions specific to money-laundering that authorize the Attorney General to identify, freeze and confiscate criminal funds. These powers extend to members of the person's immediate family. Other legislation applies more broadly to permit the seizure of

financial records and other materials to facilitate the identification and tracing of proceeds of crime.

Articles 24 and 28 of Law No. 1 of 1993 address procedures for dealing with goods and money which have been impounded, seized or confiscated. In addition, article 28 renders invalid any transactions carried out with funds associated with the crimes of money-laundering and misuse of public money, without prejudice to the rights of bona fide third parties. Forfeited property may be destroyed, sold or auctioned.

In Kuwait, all financial establishments and national organizations must provide records of transactions, finance and trade upon demand to one of the national organizations dedicated to or legally governing such matters. Under article 77 of the Criminal Procedure Code, bank secrecy is not grounds for legally refusing to comply.

Statute of limitations; criminal record (articles 29, 41)

Pursuant to Law No. 16 of 1990, the limitations period for criminal proceedings for felonies is 10 years from the date of the offence, and 5 years for misdemeanours. For the purpose of penal sanction, the limitations period is 20 years for felonies (30 for sentences of execution) and 10 years for misdemeanours. With regard to money-laundering, however, there is no limitations period. Article 8 provides for suspension of the limitations period when the accused fails to appear for criminal proceedings, which requires a reissuance of the order of arrest.

Through mutual information exchange, Kuwait considers relevant criminal cases in other jurisdictions in criminal corruption proceedings, either at the investigation or sentencing stages.

Jurisdiction (article 42)

Article 11 of Law No. 16 of 1960 establishes jurisdiction over all criminal offences committed within the territory of Kuwait. This article also extends jurisdiction to persons outside of Kuwait who commit an act or are an accessory to a crime committed within the territory of Kuwait.

Article 12 of the same law applies to cases involving an individual Kuwait refuses to extradite on the sole basis that the person is a national of Kuwait. In such cases, the person will be prosecuted in Kuwait.

Consequences of acts of corruption; compensation of damage (articles 34, 35)

Law No. 7 of 2008, Decree 105 of 1980, and articles 2 and 3 of Law No. 25 of 1996, allow the State to annul contracts if the other party commits any unlawful act, such as fraud or bribery. These provisions permit confiscation of deposits paid and facilities erected as compensation due as a result of the annulment. This extends to private contracts under relevant civil provisions.

Article 227 of the Decree for Law No. 67 of 1980 requires any person who causes by his wrongful act damage to another to compensate him for the damage caused, even if indiscriminate.

Specialized authorities and inter-agency coordination (articles 36, 38, 39)

Kuwait has several specialized offices that work in the area of anti-corruption and law enforcement. These are detailed above, and have incorporated into their enacting legislation provisions to guarantee their investigative and operational independence.

Reporting crimes to law enforcement is a legal requirement upon all individuals and institutions. Article 3 of Law No. 35 of 2002 on money-laundering facilitates and encourages the cooperation of individuals, financial institutions and the private sector to detect and report money-laundering.

2.2 Successes and good practices

Overall, the following successes and good practices in implementing Chapter III of the Convention are highlighted:

- Specific provisions to address embezzlement by public officials of public funds and property, including intentional conduct, as well as negligence and gross negligence.
- Regulations of banking system with an emphasis on prevention, detection and interdiction of money-laundering.
- Extensive provisions to suspend or remove public officials suspected or accused of UNCAC offences, with severe consequences upon conviction.

2.3 Challenges in implementation, where applicable

The following steps could further strengthen existing anti-corruption measures:

- Continue progress on the development and implementation of a comprehensive anti-corruption strategy, including through the establishment of the Commission of Integrity or similar anti-corruption body.
- Adopt legislation to make active bribery of foreign public officials a criminal offence. Consider adopting legislation to make passive bribery of foreign public officials a criminal offence.
- Consider adopting legislation to make bribery in the private sector a criminal offence in alignment with article 21 of the UNCAC.
- Continue to consider the need for legislation to make illicit enrichment a criminal offence.
- Consider expanding the scope of the crime of obstruction of justice to include efforts to bribe or offer an advantage to a witness in order to alter testimony.
- Consider extending the scope of liability of legal persons to other UNCAC offences to the extent consistent with the legal principles of Kuwait.
- Continue to consider appropriate measures to provide protection to persons who, in good faith and on reasonable grounds, report UNCAC offences to the competent authorities.

2.4 Technical assistance needs identified to improve implementation of the Convention

- Good practices/lessons learned and model legislation with regard to articles 16 (Bribery of foreign public officials), 21 (Bribery in the private sector), 26 (Liability of legal persons), 31 (8) (Freezing, seizure and confiscation), 32 (Protection of witnesses, experts and victims) and 37 (Cooperation with law enforcement authorities).

3. Chapter IV: International cooperation

3.1 Observations on the implementation of the articles under review

Extradition; transfer of sentenced persons; transfer of criminal proceedings (articles 44, 45, 47)

Extradition in Kuwait is principally governed by bilateral agreements. Kuwait presently has several bilateral extradition treaties in force. Kuwait is also a party to several multilateral conventions that deal with extradition. Kuwait confirmed that it considers the UNCAC to operate as a legal basis for cooperation on extradition with respect to UNCAC offences, although this has not yet been applied in practice.

Dual criminality is a prerequisite for extradition, applied flexibly so that extradition is possible where a similar offence exists under Kuwaiti legislation. The offence for which extradition is sought must be punishable by at least 12 months imprisonment where the individual has yet to be tried or at least 6 months where the individual has already been sentenced. Subject to these requirements, Kuwait is able to extradite for any criminal offence, including attempt, conspiracy, incitement or participation.

To request extradition, the requesting country must provide relevant duly authenticated documentation, warrant for arrest or evidence of conviction or sentence, and a statement setting out the alleged conduct constituting the offence. The date, the place of the commission of the acts, the legal characterization of the offences, a certified copy of the applicable law, and a summary of evidence against the person to be extradited must also be provided. Where the request for extradition relates to a person not yet sentenced, the evidence must justify arrest and committal for trial had the offence been committed in Kuwait.

Extradition must be refused for political offences. However, bilateral agreements between Kuwait and other States have narrowly defined what constitutes a political offence, specifically excluding offences within the scope of international conventions by which both States are bound. Consequently, extradition could not be refused on this basis for UNCAC offences. Requests cannot be refused on the ground that the offence involves fiscal matters.

Kuwait does not extradite its own nationals. Where such a request is made, the case will instead be submitted for prosecution to the competent domestic authorities, provided the act committed is also an offence under Kuwaiti law. Where the extraditable offence was committed in Kuwait, a legal presumption exists that prosecution will be brought under Kuwaiti law in preference to extradition. All procedural rights provided to Kuwaiti individuals are also provided to foreign nationals subject to extradition proceedings.

Where a Kuwaiti national is convicted and sentenced in a foreign jurisdiction, Kuwait will not enforce the sentence imposed by the foreign court. In such circumstances, a Kuwaiti court must retry the case and apply any consequent sanctions.

Due process is observed at all stages in extradition. Bilateral agreements specifically provide that an extradited individual shall not be tried or punished except for the offence for which extradition was sought.

In exceptional cases, provisional arrest is permitted under existing extradition treaties. Where Kuwait agrees to extradite, the normal procedure is to arrest and detain the person to ensure presence at extradition hearings, unless the requesting State declares that detention is not necessary prior to extradition.

Kuwait is bound by several mutual legal and judicial cooperation agreements relating to transfer of convicted persons, including with the Islamic Republic of Iran, Egypt, the Republic of Korea and Turkey. These agreements apply to those convicted of UNCAC offences as well as other criminal offences. Transfer of convicted persons is only possible where an international instrument is in place.

Mutual legal assistance (article 46)

Kuwait is party to several bilateral and multilateral agreements in relation to mutual legal assistance. The bilateral agreement between Kuwait and India on Mutual Legal Assistance in criminal matters provides a broad basis for assistance in relation to criminal matters and meets all UNCAC requirements. While there are few domestic provisions that address mutual legal assistance in Kuwait, the bilateral and multilateral agreements have full legal status.

The Ministry of Justice is the central authority for mutual legal assistance in criminal matters, and processes requests in conformity with established procedures and evidentiary requirements.

Bank secrecy laws are not a barrier to the provision of mutual legal assistance by Kuwait, and it was reported that no request for bank or commercial documents by another State has ever been rejected on this basis.

Dual criminality is not required for Kuwait to provide mutual legal assistance. The Ministry of Justice also provides assistance on an ad hoc basis, absent a treaty. Mutual legal assistance may be provided in the form of evidence via videoconference from a court in Kuwait to a foreign court. Kuwait highlighted a recent example of cooperation with the United Kingdom of Great Britain and Northern Ireland in this regard.

A request must be refused if granting the request would prejudice the sovereignty, security or national interest of Kuwait. Where Kuwait is considering refusing a request, it is obliged, under bilateral agreements, to request further information and clarification from the requesting State with a view to facilitating the request before officially refusing.

Information relating to criminal matters can be transmitted on an informal basis. Kuwait complies with foreign requests to keep information confidential, and will not use any material received from another State for the purposes of a proceeding or investigation for any other purpose without the approval of the State that supplied

the information. Kuwaiti law, through bilateral agreements, meets the standards of UNCAC article 46 (27) regarding safe conduct.

Generally, Kuwait will bear the ordinary and reasonable costs of executing a request. Bilateral agreements stipulate that each party will bear their own costs.

Although there is no domestic legislation regarding the transfer of criminal proceedings, there is no prohibition against such a transfer taking place, subject to authorization by judicial authorities.

Law enforcement cooperation; joint investigations; special investigative techniques (articles 48, 49, 50)

Law enforcement cooperation with foreign authorities is provided through both the Ministry of the Interior and the Public Prosecutor's Office based on bilateral assistance agreements, the INTERPOL network and on an ad hoc basis. Aside from a limited legal basis for mutual legal assistance under money-laundering legislation, no detailed domestic framework for the provision of law enforcement cooperation exists. This does not, however, appear to have prevented Kuwait from providing such cooperation in practice.

Although there are no specific domestic legislative provisions designed to facilitate the establishment of joint investigations between law enforcement authorities, or examples of such joint investigations having taken place, there is no prohibition to the establishment of such joint operations if necessary for a specific investigation.

Kuwait uses special investigation techniques in both domestic investigations and international cooperation. Where such techniques are to be used as part of cooperation with a foreign law enforcement agency, an agreement must first be in place between the two agencies, and authorization must be given by the Public Prosecutor's Office. The Penal Code provides that such techniques must not unduly affect or harm the rights of individuals.

3.2 Successes and good practices

Overall, the following successes and good practices in implementing Chapter IV of the Convention are highlighted:

- Kuwait's most recent bilateral agreements, both in relation to extradition and mutual legal assistance, provide a comprehensive framework for cooperation in relation to UNCAC offences.
- Kuwait offers a broad level of mutual legal assistance upon request, including on an ad hoc basis and without the requirement of dual criminality.
- Kuwait takes a broad and flexible approach to the issue of dual criminality in the context of extradition proceedings.
- Kuwait provides expedited assistance to requesting States regarding extradition and mutual legal assistance, making use of networks such as INTERPOL.

3.3 Challenges in implementation, where applicable

The following steps could further strengthen existing anti-corruption measures:

- Continue to review existing bilateral agreements in relation to extradition and mutual legal assistance adopted prior to Kuwait's ratification of the Convention to ensure that they reflect UNCAC standards.
- Continue with efforts to develop a comprehensive domestic legal framework in relation to extradition, mutual legal assistance and international cooperation in law enforcement.

3.4 Technical assistance needs identified to improve implementation of the Convention

- Good practices/lessons learned with regard to article 44 (2) (Extradition) and article 47 (Transfer of criminal proceedings).
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