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Possible reform of Investor-State dispute settlement (ISDS)

Submission from the Government of Kuwait

Note by the Secretariat

This note reproduces a submission received on 14 October 2019 from the Government of Kuwait in preparation for the thirty-eighth session of the Working Group. The submission is reproduced as an annex to this Note in the form in which it was received.

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Annex

To begin with, allow us to express our utmost gratitude and appreciation to the members of Working Group III for their tireless efforts to find optimal solutions to problems and obstacles in the investor-State dispute settlement system (ISDS). We wish them success in finding successful and effective solutions and mechanisms to resolve these difficulties.

In reviewing the agenda for this session, we noted specifically the topic of document A/CN.9/WG.III/WP.167: *Possible reform of investor-State dispute settlement (ISDS): Background information on a code of conduct for arbitrators*.

We decided to provide the members taking part in this session and the Working Group with an extremely brief account of the experience of Kuwait in laying the groundwork for drafting code of conduct for Government officials and staff. We will then move on to the topic of a code of conduct for arbitrators. We hope this will be instructive in shedding light on certain factors and behaviours unique to certain member States that stem from environmental, political, ideological and social considerations. Codes of conduct must be designed in ways consistent with the specificities of each UNCITRAL Member State and display flexibility and transparency in order to meet high standards and be effective.

I. The Kuwaiti experience in drafting a code of conduct for Government officials and staff

In the wake of the trend towards globalization, trade liberalization and privatization, developed and developing States alike have launched programmes and policies to expand the role of the private sector and reduce dependence on the public sector for the production of goods and services.

In keeping with our Emir's commitment to transforming Kuwait into a financial and commercial hub, encouraging foreign investment, contributing to economic development projects and expanding the country's investment base, the Government of Kuwait has enacted legislation and implementing regulations to create a healthy business environment that attracts foreign investment. A prerequisite for that is to raise standards of efficiency and quality and promote transparency in the public sector.

In December 2006, the Government of Kuwait submitted a request to the World Bank for assistance and technical advice on various matters related to transparency, integrity and anti-corruption. On 19 February 2007, a preliminary memorandum of understanding was signed. The Cabinet adopted Decision No. 726 (2007), which included a number of important provisions designed

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to formulate an expanded governance, integrity and anti-corruption agenda. That resolution created the Government Performance Monitoring System under the Cabinet, which it mandated to oversee operations with the following three focuses:

1. Ensuring that the personal interests of officials do not interfere with their public functions, and drafting a code of conduct for Government officials and staff;
2. Promoting Government transparency;
3. Strengthening anti-corruption measures.

Here, we focus on the code of conduct for Government officials and staff.

II. Code of conduct

A steering committee was formed comprising representatives from various ministries and Government institutions as well as certain civil society institutions (such as the Kuwait Transparency Society and Kuwait Economic Society) to provide oversight and strategic guidance for this agenda. Following consultations between the steering committee (the Kuwaiti Working Group) and the World Bank, agreement was reached on standards for the Kuwait governance and integrity programme, which comprises a set of components to enable the State of Kuwait to fulfil its obligations under the United Nations Convention against Corruption and to develop legal and institutional arrangements based on best practices at the global level and in the Middle East and North Africa region that could be used to establish best practices to promote integrity and transparency at the national level.

Discussions held in Kuwait in January 2009 between the Kuwaiti team and the World Bank produced the following conclusions:

Codes of conduct in developing and least developed countries often consist of general guidelines for particular professions that are not usually addressed by law, such as medicine, law or accountancy. However, in developed States, codes of conduct are usually included in binding laws that provide for deterrent penalties.

Many developed States have instituted general principles for the conduct of officials and staff of public agencies and parliaments that are adopted by ethics committees established by the State or drafted in consultation with the public authorities of the State.

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General rules must be identified and legislated to govern the conduct of individuals in their relationships with others. Common standards must be developed to govern relations among staff themselves, between staff and the agency they work for, and between staff and clients of that agency. The law should set a time frame for all agencies to institute codes of conduct.

After further discussion, consensus was reached that a code of conduct for Government officials and staff was needed as a first step, to be developed further subsequently. Codes of conduct would eventually be drafted for other categories, including such private sector professionals as doctors, lawyers, staff of commercial and investment companies, judges, arbitrators, members of parliament, and members of other professions that do not have codes of conduct.

Representatives of the Kuwait Civil Service Commission have indicated that problems having to do with the conduct of officials towards both the public and their colleagues have been on the rise in recent years. There has been an estimated tenfold increase in the number of disciplinary cases submitted to the Commission compared to 10-15 years ago. There is evidently a greater sensitivity to unethical behaviour among Government officials, that is to say, officials are more inclined to raise objections to unethical behaviour. However, at the same time, there was a widespread perception among officials that such behaviour is becoming more common.

Attitudes differed among members of the Working Group towards problems with the behaviour of public-sector employees. Some felt that the primary problem was work discipline issues, such as failure to deliver prompt service, provide information, protect confidential information and maintain work standards. They felt those were the primary problems with respect to decision making. Others felt that corruption and related conduct were the most important problems, and in particular patronage, nepotism and abuse of office. All agreed that it would be desirable to have a code that clarified the standards of conduct expected from public officials and staff that would help to rein in bad behaviour including but not limited to the following:

- Failure to comply with work rules, which partially reflects excessive job security;
- Hiring and promotion based on family, party or sectarian considerations rather than competence and experience;
- Unfair workload distribution;
- Accepting gifts;

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- Abuse of office, financially or professionally, for illicit material gain;
- Bribery and fraud;
- Failure to respect confidentiality of information;
- Lack of transparency, including failure to ensure access to non-confidential information;
- Failure to be forthcoming in annual declarations on not engaging in prohibited activities;
- Failure on the part of some senior officials to comply with work rules, thereby setting a bad example for subordinates.

III. Sources of the draft code of conduct

The draft code of conduct was formulated using the following sources:

1. Model provisions/optimal behaviour

Numerous provisions, or at least issues to be addressed, were formulated by adopting or amending provisions from the model code of conduct for public officials of the Council of Europe, which was the most detailed code of conduct published by an international organization at that time. A large number of the articles having to do with conflicts of interest, accepting gifts and responding to inappropriate offers were taken from that model code. Although the overall objectives of codes of conduct may be similar, their actual contents are less similar because some countries need to address certain topics and behaviours more than others. In addition, such codes must be grounded in differing ethical traditions depending on context. In response to that need, several provisions of the code were reformulated or amended, including some that were taken from the model code.

In addition, in order to address behaviour and problems specific to the State of Kuwait, two additional sources were used.

2. Existing regulations

With a view to situating the Code within the existing legal framework, the Working Group tried to make sure that the code took into account topics addressed in the Civil Service Code and other codes and regulations, and in particular articles 26-32 of Decree No. 15 (1979), which were embellished in greater detail in the draft code. That included the following:

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- Proper performance of duties;
- Proper treatment of the public;
- Compliance with official working hours;
- Faithful and sincere implementation of legal directives;
- Upholding the dignity of office and conducting oneself with proper respect;
- Prohibition of transactions or business dealings with Government agencies (prohibition of sale or lease to the affiliated agency / work / contracts with third parties);
- Refraining from abuse of office for personal advantage or for nepotism, patronage or cronyism;
- Respecting confidentiality of information.

3. Problems specific to Kuwait

Discussions with the Civil Service Commission, the World Bank and the Kuwaiti Working Group concluded that it was important to formulate a code of conduct and regulations for conflicts of interest that took into account a number of issues that require particular attention in Kuwait. Such issues reflected the fact that Kuwait is a small eastern society in which personal relationships and family and kinship connections are paramount. It is those ties of blood and lineage that constitute the primary locus for conflict of interest in the State of Kuwait.

IV. Nepotism and patronage on the basis of family, religious, sectarian or partisan political considerations: the primary cause of conflicts of interest

Conflict of interest is any conduct or situation whereby material or moral advantage is gained by any entity or an official representative thereof, in any form, that is in conflict with the performance of the official duties of the entity or its representative.

The purpose of prohibiting conflicts of interest, whether actual or potential, is to prevent damage to the interests, reputation or integrity of others, whether they be natural persons, entities or

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Government or private institutions. That is accomplished by complying with legislative requirements and administrative mechanisms in force.

Even where situations of conflict of interest do not necessarily involve wrong behaviour, they can be detrimental to the work and integrity of their staff and the entities they represent. The major factors that produce such situations are the tendency to pursue personal interest; nepotism and cronyism based on family relationship, friendship or partnership; and enmity and hatred towards another person.

Various specialized bodies employ a wide variety of measures when drafting policies to prevent conflict of interest, with a view to helping their officials and staff to identify situations actions that constitute a conflict of interest and enabling management to monitor compliance with those policies.

Kuwait is a developing State where family and clan reign supreme and ties of kinship (blood and marriage) are paramount. In that respect, it resembles most States in the Middle East region. Such a situation can be a major obstacle to progress and development. Conflict of interest resulting from nepotism, patronage and cronyism is a feature of tribal society. On the one hand, it can expedite tasks and facilitate the pursuit of material and moral self-interest. However, it can also lead to the transformation of civic institutions into cliquish and partisan entities that exclude certain groups, thereby undermining their credibility and creating a lack of confidence owing to their work being affected by decisions taken on the basis of personal and family connections instead of standards of qualification and expertise.

In a society dominated by certain aspects of extreme ethnic, sectarian, religious, and even political loyalties, one sometimes sees negative behaviours that interfere with the performance of obligations, the fulfilment of responsibilities and the taking of public and private decisions in a Government work environment, an independent work environment or a commercial or investment-related work environment. That necessitates remedial intervention in the form of strict, targeted, and precise laws to rein in cronyism and nepotism, and mechanisms and means to address and end such behaviour, strengthen the values of honesty, impartiality and independence, and instil standards of integrity, competence and transparency.

V. Means and mechanisms to address conflict of interest and implement the code of conduct

(a) Various ways of avoiding conflict of interest

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- *The moral aspect*. It might happen that an official is exposed to situations or must take actions that involve a conflict between his personal interest and the public interest. Ethical considerations are the basic guarantee against the abuse by an official of his position and authority. For that reason, mechanisms must be put in place to draw attention to and provide training for situations that might involve suspicion of conflict of interest. Material and moral incentives may also be provided to protect the official against any temptation to abuse his office. The official must also disclose any conflict of interest and avoid taking on any tasks that involve a suspicion of conflict of interest.

- *The legal aspect*. The law alone is not a sufficient guarantee against conflicts of interest. However, a clear legal formulation that contains a definition of conflict of interest, identifies situations in which a Government official must disclose information about a function he is performing, and sets forth clear penalties in case of violation are an important first step to avoiding conflict of interest. Such legal provisions provide civil society activists with a tool for raising awareness and drawing attention to legal and social issues related to conflict of interest.

- *The reputation and credibility of officials*. An official's reputation can be affected by any suspicion of conflict of interest, even when he has made a correct decision. The principles of transparency and clarity must be adhered to in the reasoning behind decisions. It is incumbent upon the official to self-monitor in order to avoid getting into any situation that might damage his integrity, reputation or credibility.

- *Reputation and credibility of the agency or institution*. Suspicions of conflict of interest raise doubts about institutions as a whole, not just officials and staff. Therefore, attention must be paid to implementation of monitoring measures to guarantee that an institution's actions are untainted so as to maintain public's confidence.

(b) Disclosure of a conflict of interest

Disclosure of any information that might be deemed to involve conflict of interest or which might give rise to a suspicion of conflict of interest is the best way for an official to avoid culpability and doubts. Even where the information disclosed is not enormously significant, such disclosures unquestionably provide reassurance in colleague interactions and building trust. In other cases, such disclosure – where it involves family relations or material or moral interest – might lead to the official being barred from engaging in a particular function, but it earns the respect of colleagues and ensures the credibility of the institution.

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The Kuwaiti Constitution contains a number of articles that address conflicts of interest. The Code of Civil and Commercial Procedure contains provisions on the disqualification, recusal and removal of judges. They include the following:

- *Article 58*: A judge, attorney general, prosecutor or court employee may not act as the agent of parties to a legal proceeding, whether verbally, in writing or in an advisory capacity, even if the case is being tried in a different court from the one that person is affiliated with. Otherwise, the action is not valid.

  However, they are permitted to do so on behalf of persons of whom they are the legal representative, their spouses, and their ascendants and descendants to the second degree.

- *Article 102*: A judge shall be disqualified for hearing a case, even if none of the litigants registers an objection, in the following cases:

  - He is the spouse, relative or in-law of one of the parties up to the fourth degree.

  - He or his spouse has outstanding litigation with one of the parties or the spouse of one of the parties.

  - He is involved in the personal business of one of the parties as an agent, guardian or trustee or presumptive heir; is the husband of one of the parties' guardians or caretakers; is related by blood or marriage up to the fourth degree to such trustee or guardian, or a member of the Board of Directors or a director of the relevant company who has a personal interest in the case.

  - He, his wife, a relative or an in-law, even if that person is his agent, guardian or caretaker, has an interest in the pending case.

  - He and one of the judges of the chamber are related through blood or marriage up to the fourth degree, or he and the prosecutor or one of the parties' attorneys are related by blood or marriage up to the second degree.

  - He has advised or pleaded on behalf of one of the parties to the case, or written about it, even before he became a judge; or has previously heard the case as a judge, expert or arbitrator; or has testified as a witness in the case.

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- He has filed suit seeking compensation from the party requesting recusal or filed a report against him with the competent authority.

- Article 103: Any action or ruling by a judge in the situations mentioned in the preceding article shall be null and void, even if the parties agreed to it. If such judgment is nullified by an appeals chamber, a party may request that that judgment be vacated and the appeal reheard before an appeals chamber that does not include the counsellor who was the source of the original nullification.

- Article 104: A judge may be recused for one of the following reasons

  - He or his spouse has a case similar to the case he is hearing, or one of them became involved in litigation with one of the parties or their spouses after the initiation of the case pending before him, provided such litigation was not filed for the purpose of having him recused from the case pending before him.

  - His divorced spouse with whom he has a child, or one of his relatives by blood or marriage has pending litigation with one of the parties to the case or their spouse, provided such litigation was not filed after the initiation of the case pending before him for the purpose of having him recused.

  - One of the parties works for him.

  - He habitually dines or lives with one of the parties, or received a gift from the party before or after the case was filed.

  - There is a hostility or a friendship between him and one of the parties that is likely to prevent him from judging impartially.

Act No. 10 (1996) concerning amendments to Decree-Law No. 23 (1990) concerning the regulation of the judiciary provides as follows:

- *Article 25*: A judge or prosecutor may not be awarded medals or decorations of any kind while serving in his post. It is not permitted to combine the post of judge with engaging in commerce or any activity inconsistent with the dignity and independence of the judiciary.

  The Supreme Judicial Council may prohibit a judge from engaging in any activity it feels is inconsistent with the duties and proper function of his post.

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A judge may be appointed to carry out judicial or legal work outside of his post or additional to it. That is by decision of the Minister of Justice with the approval of the Supreme Judicial Council.

- *Article 26*: A judge may not, without the approval of the Supreme Judicial Council, serve as an arbitrator, even without pay and even if the dispute is not before the courts, unless he is related to one of the parties by kinship or marriage up to the fourth degree.

(c) Code of conduct and ethics for professions or Government work

It has become customary in many States to formulate “codes of conduct" or "ethical guidelines" for Government work. That is an official document issued by the Government specifying practices and ethical principles that are expected to be followed by Government officials, and those which are to be avoided and might on occasion make them liable to accountability and penalties. Such codes serve to raise awareness, but also define the responsibilities and role of Government officials. The public should be informed and aware of their contents.

In order for a code of conduct to achieve the desired objectives, it is not only important for the contents to be drafted with care. Effective implementation requires at a minimum several factors, including but not limited to the following:

- Prior to its adoption, a draft code should be submitted to those who will be subject to its provisions so they can be consulted about the contents and their observations noted. That increases awareness of and connection with the code, thereby providing a sense of ownership, and the feeling that it is their personal weapon that provides them with protection, support, status and respect.

- A party should be identified to assume responsibility for implementing the code’s provisions, overseeing formulation of the code of conduct for each institution or Government department, responding to queries, providing instruction to staff, making the training curriculum available for an institution’s training staff, receive and process complaints and notices of alleged violations of the code from officials and the public, and take part as needed in disciplinary measures in cases of violation of provisions of the code or other regulations.

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Responsibility to comply with the laws falls on officials and those in similar positions. Responsibility might also fall on a central agency or entity established to implement the rules and provisions of the code of conduct.

- The code should be announced to the public.

- The code of conduct should be flexible and consistent with the latest developments. If it becomes evident that some provisions are not suitable and require amendment, that should be done through a straightforward procedures. That is one reason why codes of conduct are formulated in the form of executive orders, decrees, and the like.

VI. The purpose of submitting the working paper

Perhaps the Working Group and the session participants are wondering what the purpose is of submitting this working paper on the experience of Kuwait in drafting a code of conduct for Government officials and staff when the topic at hand is background information on a code of conduct for arbitrators and consideration of document A/CN.9/WG.III/WP.167.

That document states the following:

> II: General Observations/(C) observations
>
> 9. As noted by UNCITRAL at its forty-eighth session, arbitral tribunals and each of their members could be bound by diverse ethical standards depending on the nationality of the arbitrators, affiliation with bar associations as well as the place of arbitration. Therefore, multiple norms may apply at the same time, without any clear indication on which shall prevail in case of conflict. In addition, increased regulation of the arbitral procedure and increased transparency of the process also have an impact on parties' expectations in relation to the conduct of arbitrators . . .
>
> 12. In that light, the Working Group may wish to consider that the development of a code of conduct could aim at providing a uniform approach to requirements applicable to investor-State dispute settlement (ISDS) tribunal members and to give more concrete content to broad ethical notions and standards used in the applicable instruments, including the ICSID Convention, investment treaties, applicable laws and applicable rules. This would be in line with the preference expressed by the Working Group that one general

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code is preferable to numerous institution-specific codes. In addition, such a code could apply to the different options for reform being considered by the Working Group.

13. In particular, a code of conduct could aim at: (i) clarifying the content of the standards, thereby furthering harmonization and clarification of the different existing requirements; (ii) ensuring that all stakeholders understand the thresholds for when independence, impartiality and integrity would be impaired; (iii) developing requirements for qualification; (iv) determining the mechanisms for disclosure, and the sanctions in case of non-compliance; (v) as far as arbitrators are concerned, providing clarity on their roles, in particular regarding the question of double -hatting and repeat appointments; and (vi) as far as adjudicators (i.e., full-time adjudicators in a standing mechanism) are concerned, establishing requirements in a fashion that would be consistent with those of international courts, taking also into account requirements found in the existing ISDS regime.

Conclusion

It is clear from the preceding paragraphs that the Working Group would prefer a single code to multiple separate codes for different institutions. That is a desirable goal in our view as well. However, it presents an extremely difficult challenge, because different States have varying degrees of development and different orientations and intellectual, economic and social ideologies. In addition, patterns of behaviour differ from one society to another, and present ethical conundrums that vary in severity from one society to another. Certain factors might create conflicts of interest in a particular society that do exist in other societies.

In view of the preceding, we must work to develop theories that apply to most types, cases, manifestations and behaviours that constitute or create potential for conflict of interest, thereby ensuring codes of conduct that are flexible, workable and effective in any time and place.

Referring again to document A\CN.9/WG.III/WP.167, we note that it lists the following subject to be covered in a code of conduct:

- Independence and impartiality;
- Integrity;
- Diligence and efficiency;

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- Confidentiality;
- Competence;
- General disclosure obligations.

The Working Group addressed many situations that fall into these categories and pose risks of conflict of interest. However, we noted that it did not mentioned the issue of patronage, cronyism and nepotism, which are widespread in societies founded on kinship relationships, as is the case in Kuwait and other States like it.

It also did not bring up the possibility of a judge's or arbitrator's decision being influenced by sectarian, ethnic or religious considerations or influences stemming from political or social trends and ideologies.

Such factors create an environment rife with potential conflicts of interest and consequently affect the impartiality, fairness and independence of arbitrators and judges.

Possibly, the Working Group has neglected to turn its attention to these issues because they are not among the major factors that cause conflicts of interest in their societies. That is entirely understandable. Nevertheless, we felt that we should highlight certain issues, express our desire that they should be paid attention to, and explore the possibility that they might be included among the problems that might affect arbitrators and detract from the integrity and independence of the rulings they issue. They should be addressed in a code of conduct for arbitrators that, we believe, will from the moment it is issued constitute a successful and effective instrument for addressing and correcting many problems in the arbitration of investor-State disputes, thereby promoting an environment conducive to investments in States and companies alike.

Legislation Division
Legal Advice and Legislation Department
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Extract from the code of conduct drafted by the World Bank in cooperation with the Government Performance Follow-up Agency of the Cabinet as part of the Governance and Integrity Programme of Kuwait, including draft provisions on conflicts of interest:

1. Conflicts of interest

In the absence of detailed legal provisions regulating conflict of interest, the following provisions should guide the conduct of public officials:

(a) Conflicts of interest arise from situations where a public official has private interests that interfere with or give the appearance of interfering with the impartial and objective performance of his official tasks.

(b) Without prejudice to existing or future laws, the private interests of a public official shall include any benefit to himself, his family, his relations, his friends, or any entities with which he has business or political relations, including any related financial or civil liabilities.

(c) Public officials must comply with the letter and spirit of all existing regulations on conflict of interest, including regarding the prohibited activities listed in articles 25 and 26 of Decree No. 15 (1979) concerning the civil service, the declarations required from senior officials and supervisors that they are refraining from activities prohibited under article 26 of that Decree, and any other decisions issued by the Civil Service Commission concerning which commercial activities civil service officials are permitted to engage in. In the absence of any other comprehensive regulations on conflict of interest, public officials should comply with the following provisions:

(d) Public officials must:

- Exercise caution about any actual or potential conflict of interest;
- Take reasonable steps to avoid such conflicts, including removing themselves from situations where they might be suspected of having interests, or divesting themselves of such interests;
- Disclose any such conflict to a superior the moment they become aware of it;

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- Comply with any final decision or instructions to remove themselves from situations where they might be suspected of having interests, or divesting themselves of such interests.

(e) A public official should not engage in any activity or transaction, or take on any position or function, whether paid or unpaid, that is incompatible with the proper performance of his duties as a public official. If it is unclear whether or not the activity is consistent with proper performance of the duties, officials must seek guidance from their superiors.

(f) In compliance with the provisions of the law, public officials must notify and obtain the approval of the public agency for which they work to engage in certain activities, whether paid or unpaid, or to accept certain posts or positions outside their work in public service.

(g) Candidates for public service employment or new public service posts must declare any potential conflict of interest prior to taking up a post. Such matters must be resolved prior to appointment.

(h) The aforementioned officials should refrain, for a suitable period of time, from taking on a task, providing any services or accepting any post within the hierarchy of any company that has a business relationship with an agency within which he was exercising regulatory or discretionary authority as part of his public post, and from acquiring an interest in the property of such a company.

2. Accepting gifts or benefits and how to respond to inappropriate offers

(a) Public officials must comply with the letter and the spirit of any legal and regulatory provisions on the acceptance of gifts and benefits. In the absence of other regulations addressing the acceptance of gifts and other benefits, public officials must comply with the following rules:

(b) Public officials should not demand or accept gifts, favours, hospitality or any other benefits for themselves or their families, close relatives and friends, or persons or organisations with whom they have or have had business or political relations which may influence or appear to influence the impartiality with which they carry out their duties or may be or appear to be a reward relating to their duties. This does not include conventional hospitality or minor gifts.

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(c) Where public officials are in doubt whether they can accept a gift or hospitality, they should seek the advice of their superior.

(d) If refusal of a gift would be considered an affront or not practicable, the public official should turn the gift over to the Government agency that that he or she works for.

3. Reaction to inappropriate offers

(a) If a public official is offered a gift, advantage or benefit that he or she is not permitted to accept under the Act or any other laws or regulations, he or she must take the following steps for his or her protection:

- He or she must refuse the gift, benefit or advantage offered.
- He or she must try to identify the person who made the offer.
- He or she must identify eyewitnesses, if possible, such as colleagues who work nearby.
- He or she should avoid prolonged communications. However, knowing why the offer was made could be useful as evidence. If it is not possible to refuse or return the gift, he or she must turn it over to a more senior official or to the legal department of the agency for which he or she works.
- An official record of the incident should be made as soon as possible, preferably in an official memorandum.
- A report on the incident should be submitted as soon as possible to his or her immediate superior and legal department, and/or directly to a law enforcement agency.
- He or she should continue to work normally, including on the matter in connection with which he or she was offered the undue benefit.

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