



UNODC

United Nations Office on Drugs and Crime

Country Review Report of Malaysia

Review by the Philippines and Kenya of the implementation
by Malaysia of articles 15 – 42 of Chapter III.
“Criminalization and law enforcement” and articles 44 – 50 of
Chapter IV. “International cooperation” of the United Nations
Convention against Corruption for the review cycle 2012 -
2013

I. Introduction

1. The Conference of the States Parties to the United Nations Convention against Corruption was established pursuant to article 63 of the Convention to, inter alia, promote and review the implementation of the Convention.
2. In accordance with article 63, paragraph 7, of the Convention, the Conference established at its third session, held in Doha from 9 to 13 November 2009, the Mechanism for the Review of Implementation of the Convention. The Mechanism was established also pursuant to article 4, paragraph 1, of the Convention, which states that States parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and of non-intervention in the domestic affairs of other States.
3. The Review Mechanism is an intergovernmental process whose overall goal is to assist States parties in implementing the Convention.
4. The review process is based on the terms of reference of the Review Mechanism.

II. Process

5. The following review of the implementation by Malaysia of the Convention is based on the completed response to the comprehensive self-assessment checklist received from Malaysia, supplementary information provided in accordance with paragraph 27 of the Terms of Reference of the Review Mechanism and the outcome of the constructive dialogue between the governmental experts from the Philippines, Kenya and Malaysia, by means of telephone conferences and e-mail exchanges and involving the following participants.

Malaysia:

- Mr. Anthony Kevin Morais, Deputy Public Prosecutor, Legal and Prosecution, Malaysian Anti-Corruption Commission
- Mr. Nor Azmi Karim, Director of Record Management and Information Technology Division, Malaysian Anti-Corruption Commission
- Mr. Karunanithy Subbiah, Head of International Relations Branch, Policy, Research and Planning Division, Malaysian Anti-Corruption Commission
- Mr. Chuah Chang Man, Chief Senior Assistant Commissioner, International Relations Branch, Policy, Research and Planning Division, Malaysian Anti-Corruption Commission.

Kenya:

- Mr. John Kithome Tuta, Chief Legal Officer, Ministry of Justice, National Cohesion and Constitutional Affairs
- Mr. David Kaboro, Attorney, Legal Research & Documentation, Ethics and Anti-Corruption Commission
- Ms. Emily Wangari Kamau, Senior Assistant Director of Public Prosecutions, Office of the Director of Public Prosecutions
- Ms. Regina Nyaguthii Muriuki, Senior Attorney, Evidence Analysis, Ethics and Anti-Corruption Commission

The Philippines:

- Justice Mario V. Lopez, Associate Justice, Court of Appeals
- Mr. Rafael Hipolito, Acting Director, Public Assistance & Corruption Prevention Office
- Ms. Marlyn Angeles, Senior State Counsel, Department of Justice

The staff members of the Secretariat were Ms. Tanja Santucci and Ms. Constanze von Soehnen.

6. A country visit, agreed to by Malaysia, was conducted in Kuala Lumpur, Malaysia from 4 to 8 February 2013. During the on-site visit, meetings were held with the Malaysian Anti-Corruption Commission, the Attorney General's Chambers, the Royal Malaysia Police, the Financial Intelligence Unit of the Central Bank of Malaysia, the Ministry of Foreign Affairs, the Public Service Commission, and the Judiciary. The experts also met with representatives of civil society, the private sector and visited the Malaysian Anti-Corruption Academy.

III. Executive summary

1. Introduction

1.1 Overview of the legal and institutional framework against corruption of Malaysia in the context of implementation of the United Nations Convention against Corruption

7. *Malaysia signed the Convention on 9 December 2003 and ratified it on 24 September 2008. The Convention entered into force for Malaysia on 24 October 2008.*
8. *Malaysia is a constitutional monarchy based on the British Westminster model. The power to enact laws is vested in Parliament at the federal and state levels. According to article 160 of the Federal Constitution, laws include written laws, the common law, and any custom or usage having the force of law. English law has been adapted to local circumstances. Following the common law tradition, laws are constantly developed through case law. Islamic law is applicable only to Muslims and is administered by state Syariah courts in matters not related to corruption.*
9. *The institutions most relevant to the fight against corruption are the Malaysian Anti-Corruption Commission (MACC), the Attorney General's Chambers (AGC), the Royal Malaysia Police (RMP), the Royal Customs and Excise Department, the Financial Intelligence Unit of the Central Bank of Malaysia (FIU), the Ministry of Foreign Affairs, the Public Service Department (PSD), and the Judiciary.*
10. *Malaysia is a member of the ADB/OECD Anti-Corruption Initiative for Asia and the Pacific, the South East Asia Parties Against Corruption (SEA-PAC) mechanism, the Asia Pacific Economic Cooperation (APEC) Anti-Corruption and Transparency Working Group, the Asia Pacific Group (APG) on Money Laundering, the Offshore Group of Banking Supervisors, the Egmont Group of Financial Intelligence Units, the International Association of Anti-Corruption Authorities (IAACA), the International Anti-Corruption Academy (IACA), INTERPOL, and ASEANAPOL.*

2. Chapter III: Criminalization and Law Enforcement

2.1 Observations on the implementation of the articles under review

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

11. Sections 16, 17 and 21 of the Malaysian Anti-Corruption Commission Act of 2009 (MACCA) criminalize active and passive bribery. In all cases the penalty is imprisonment for up to 20 years and a fine, as defined in section 24 of MACCA.
12. Additionally, other laws regulate specific forms of bribery, namely sections 214 and 161-165 of the Penal Code and section 137 of the Customs Act 1967 (Act 235). All MACCA provisions are applicable to such “prescribed offences”, according to section 3 of MACCA.
13. MACCA uses a broad definition of “officer of a public body”, which includes members of the administration, Parliament, and judges. Also, the Penal Code definition of “public servant” is broad and includes appointed and elected officials. In both laws, public officers can also be covered under the terms “agent” and “person”. This assures a sufficiently wide application. However, the reviewers noted that a coherent simplified terminology might ensure greater legal certainty.
14. Sections 16 and 17 of MACCA also apply to active and passive bribery in the private sector and section 20 covers corruptly procuring the withdrawal of a tender.
15. Bribery of foreign public officials or officials of public international organizations is criminalized in section 22 of MACCA.
16. Although MACCA does not criminalize trading in influence expressly, the broad bribery provisions or measures on abetment can be construed in a way to cover certain such cases. Section 163 of the Penal Code comprises the taking of a gratification for the exercise of personal influence with a public servant.

Money-laundering, concealment (articles 23, 24)

17. Section 26 of MACCA makes it a crime for “any person who (...) enters into, or causes to be entered into, any dealing in relation to any property, or otherwise uses or causes to be used, or holds, receives, or conceals any property or any part thereof which was the subject matter of an offence under section 16, 17, 18, 20, 21, 22 or 23”. The application is extended to prescribed offences.
18. Sections 3 and 4 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (AMLATFA) are also applicable. AMLATFA predicate offences include serious offences, as defined in section 3 and enumerated in its second schedule. Currently, 286 offences are included. Amendments are done regularly by administrative procedure.
19. Foreign offences are deemed predicate offences if they would constitute predicate offences in Malaysia. A person can be convicted of both money-laundering and the underlying predicate offences.

20. Concealment is criminalized by section 26 of MACCA as well as sections 3 and 4 of AMLATFA.

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

21. The provisions on embezzlement and misappropriation are rather scattered. Most relevant is section 409 of the Penal Code on criminal breach of trust by a public servant, which covers the acts of dishonest misappropriation, conversion to one's own use, dishonest use, or disposal of property. Property in regard to the Penal Code includes movable as well as immovable property, funds, rights and securities. Sections 18 and 23 of MACCA can also be construed to allow the prosecution of some cases of embezzlement and misappropriation.

22. Aspects of embezzlement in the private sector are regulated in section 18 of MACCA, sections 403-409 of the Penal Code and further Penal Code provisions.

23. Abuse of functions is legislatively covered in section 23 of MACCA, which criminalizes the use of office or position by an officer of a public body for any gratification, whether for himself, his relative or associate.

24. Although illicit enrichment is criminalized, section 36 of MACCA provides that measures to pursue illicit enrichment can only be taken when an investigation on another offence under MACCA is underway. Even if the investigation of the other offence fails to show results, charges under section 36 of MACCA are possible.

Obstruction of justice (article 25)

25. Malaysia's legislation covering obstruction of justice is fragmented. The principal provision is section 48 of MACCA on obstruction of investigations and search. Applied in conjunction with section 353 of the Penal Code and sections 2 and 5 of the Abduction and Criminal Intimidation of Witnesses Act 1947, it can cover acts of employment of actual physical force. The acts of "offering, promising and giving" can be addressed under section 16 of MACCA. There are no case examples on the implementation of these provisions in practice.

Liability of legal persons (article 26)

26. Section 46 of the Companies Act imposes civil liability of legal persons. Also, the criminal liability of legal person exists. According to the Interpretation Act, the term "person" generally includes a body of persons, corporate or incorporated. Section 11 of the Penal Code defines "person" to "include ... (b) any company or association or body of persons whether incorporated or not". The limited application of those provisions was noted. MACCA establishes the same fines for natural and legal persons.

27. Participation and attempt (article 27)

28. Section 28 of MACCA regulates all forms of participation. Section 107 of the Penal Code on abetment is also relevant. The interpretative notes in the Penal Code clarify that acts

of instigating, aiding or facilitating an offence can also be subsumed under the term abetting. The same interpretation is applicable for abetting under section 28 of MACCA.

29. *Criminal attempts are legislatively covered in section 28 of MACCA, section 4 (1) (a) of AMLATFA, and section 511 of the Penal Code. Section 28 of MACCA also covers “any act preparatory to or in furtherance of the commission of any offence”.*

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

30. *The Malaysian legislation does not generally establish minimum penalties, although the severity of sanctions, criminal or non-criminal, takes into consideration the gravity of offences. According to section 145 of the Constitution, the Public Prosecutor has discretion to prosecute based on sufficient evidence vis-à-vis a reasonable possibility of conviction. Malaysia does not provide for criminal immunities.*

31. *The Criminal Procedure Code (CPC) provides for the possibility of granting bail. For MACCA offences bail is not as of right, but at the discretion of the court.*

32. *Parole can be imposed under section 46 E of the Prison Act if at least half of the term of imprisonment has been served and the person has undergone a rehabilitation programme. 120 of the 5,000 prisoners who have been released on parole since 2008 were convicted of corruption offences. There has been no breach of the terms and conditions or revocation of a parole order among those parolees.*

33. *The PSD is responsible for public service human resource policy. Pending trial, an interdiction from work or relocation of public servants is possible according to regulation 44 of the Public Officers Regulations 1993, but this has never been executed. Upon conviction, regulations 29 and 33 provide for dismissal, reduction in rank, other or no punishment, depending on the nature and seriousness of the offence. Disqualification of members of Parliament, members of the Legislative Assembly and judges is regulated by the Constitution.*

34. *Malaysia does not grant immunity to cooperating suspects, except under section 63 of MACCA in the case of cooperating co-defendants. However, the prosecution would have discretion to abstain from a prosecution, though this has not been exercised. As a general principle, cooperation can be taken into consideration as a mitigating factor during sentencing of an accused person.*

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

35. *According to Malaysia’s Witness Protection Act 2009 (Act 696), a witness, including his or her relatives, is given protection based on a threat assessment. The Act is also applicable to other persons who may require protection or assistance under the programme, including victims. Measures may encompass temporary relocation or 24-hour physical protection. Malaysia has not entered into relocation agreements with other States. The identity of participants in court proceedings can be protected through measures such as in camera proceedings. Victim impact statements are possible upon request of the victim.*

36. *The Whistleblower Protection Act 2010 (Act 711) in sections 7-10 grants confidentiality of information, immunity from civil and criminal action, and protection against detrimental action, such as termination of contracts or withholding of payments to whistleblowers and any related or associated persons, even if the disclosure does not lead to any disciplinary action or prosecution. Detrimental actions against whistleblowers are criminalized. In any proceeding, it lies on the defendant to prove that the detrimental action was not taken in reprisal for a protected disclosure.*

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

37. *Section 40 of MACCA and sections 55-56 of AMLATFA regulate the confiscation of proceeds of crime, property, equipment or other instrumentalities used in, but not destined for use in, offences. Malaysia allows for non-conviction based forfeiture under section 41 of the MACCA. Since 2009, there have been 26 such cases.*

38. *AMLATFA regulates all necessary aspects of tracing, freezing and seizure in relation to money laundering offences. MACCA further regulates relevant elements of tracing, search and seizure in sections 31 et seq., but does not include a specific freezing provision. Section 37 of MACCA could be used for some aspects of freezing by the Public Prosecutor, but is limited to movable property and monetary instruments.*

39. *In case the property has been disposed of or cannot be traced, forfeiture of the equivalent value is possible under both laws.*

40. *The provisions apply without prejudice to the rights of bona fide third parties*

41. *Bank secrecy restrictions are not a challenge to the investigation and seizure of bank, financial and commercial records, according to the Bankers' Books (Evidence) Act 1949 (Act 33), the Banking and Financial Institutions Act 1989 (Act 372), section 35 of MACCA, and sections 20 and 48-50 of AMLATFA.*

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

42. *Malaysia has no statute of limitations for criminal offences.*

43. *Previous convictions in other States are not admissible, with the exception of the Republic of Singapore, according to section 400 of the CPC, and as provided under section 76 of AMLATFA.*

Jurisdiction (article 42)

44. *Jurisdiction is regulated in sections 2-4 of the Penal Code, section 66 of MACCA and section 82 of AMLATFA. If an offence was committed by a citizen or permanent resident outside Malaysia, it may be dealt with as if it was committed in Malaysia. Jurisdiction may also be extended, according to section 82 AMLATFA and section 4 of the Penal Code, to an offence committed by any person against property of any citizen or the Government of Malaysia.*

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

45. Sections 24-25 of the Contracts Act provide for the nullification of an agreement if certain aspects of it were unlawful. Furthermore, company registrations may be revoked upon criminal conviction. The Ministry of Finance has established a register of blacklisted firms, which currently comprises 3-4 companies.

46. According to section 426 of the CPC, a court may issue an order against a convicted person to pay compensation to the victim of the offence.

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

47. MACC, which has 20 branches in Malaysia, is the lead agency responsible for the detection, prevention and investigation of corruption offences under MACCA. Reports of corruption can be filed at MACC through various channels, including a toll-free hotline.

48. The Chief Commissioner reports annually to a parliamentary Special Committee on Corruption, which advises the Prime Minister and the Commission on policy and related matters. Other special bodies are the Anti-Corruption Advisory Board and the Complaints Committee, all regulated in Part III of MACCA. There is also a Consultation and Corruption Prevention Panel and an Operations Review Panel.

49. The RMP is also responsible for the investigation of money-laundering, including predicate offences regulated in AMLATFA. MACC has memoranda of understanding (MoUs) in place with several institutions and receives reports, among others, from the Public Complaints Bureau, the FIU, and the Auditor General. From 309 suspicious transaction reports transferred to MACC in 2011, 307 were investigated and one led to a prosecution.

2.2 Successes and good practices

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

- Section 25 of MACCA establishes a duty to report any bribery transaction or attempt thereof and criminalizes non-compliance.
- Section 50 of MACCA establishes a rebuttable presumption that a gratification has been corruptly received, unless the contrary is proven. Furthermore, according to section 57 of MACCA, evidence is not admissible to show that a gratification is customary in a profession, social occasion or similar context.
- The absence of a statute of limitations helps to maximize the possibility of corruption prosecutions.
- The Operations Review Panel in MACC reviews delayed cases or cases which were transferred to DPP, but did not result in a charge. The Panel submits recommendations, but has no authoritative powers that could interfere with the DPP's discretion.
- 14 specialized anti-corruption courts have been in existence since 2011. Judges are instructed to hear cases within one year and can be held accountable for non-

compliance. Other initiatives which helped to reduce the case backlog were the introduction of pre-trial conferences and plea bargaining.

- *The institutional set-up of MACC, the Malaysian Anti-Corruption Academy (MACA) and the anti-corruption courts were deemed to constitute exemplary practices. Although many of the institutions are still relatively young, they contribute to improved investigations and prosecutions of corruption cases and should be further strengthened.*
- *Inter-agency collaboration takes place regularly at different levels. One example is the National Coordinating Committee to Counter Money Laundering (NCC), which is responsible for the development of the anti-money laundering policy and action plan. 16 institutions have established designated NCC focal points that meet quarterly to keep member institutions informed of anti-money laundering developments.*
- *Various initiatives on corruption prevention are carried out with the private sector, such as integrity pacts, monitoring committees for large projects and integrity pledges. Large Malaysian corporations regularly employ integrity officers and have no-gifts policies in place. MACC provides training for the private sector and has seconded a small number of MACC officers to large companies.*

2.3 Challenges in implementation

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

- *Monitor the implementation of UNCAC article 17 and the implementation of MACCA provisions in such cases. Malaysia may wish to integrate a consolidated offence on embezzlement, misappropriation or other diversion of property by public officials into MACCA. The same recommendation applies to embezzlement in the private sector.*
- *Consider eliminating the requirement for a prior investigation before an illicit enrichment case can be pursued.*
- *Consider criminalizing trading in influence distinctly to provide for greater legal certainty in cases of real and supposed influence.*
- *More fully address all elements on obstruction of justice in a consolidated offence.*
- *Add obstruction of justice to the predicate offences for money laundering and consider including illicit enrichment.*
- *Challenges exist regarding the establishment of mens rea for legal persons, and the reviewers welcome the possible introduction of new offences involving legal persons. Moreover, higher fines for corporations and specific civil and administrative sanctions might be useful to maximize deterrence.*
- *Enable confiscation and forfeiture of instrumentalities destined for use in corruption offences.*

- *While section 37 of MACCA could be used for freezing in the majority of corruption cases, the reviewing experts recommend specifying the legislation in this regard.*
- *Make transformed or converted property liable to confiscation.*
- *Malaysia should introduce provisions in line with article 35 of UNCAC.*
- *MACCA does not address the replacement or dismissal of the Chief Commissioner of MACC, which could pose a risk to independence. This gap is reportedly being addressed through a Constitutional amendment.*

2.4 Technical assistance needs identified to improve implementation of the Convention

52. The following forms of technical assistance could assist Malaysia in more fully implementing the Convention:

- *Model legislation and legislative drafting assistance to strengthen the implementation of provisions on the bribery of foreign public officials.*
- *Strengthening investigative skills to support the prosecution of cases involving legal persons.*
- *Summary of good practices, lessons learned and model legislation in regard to international cooperation in relocating witnesses to foreign countries.*
- *Assistance in establishing legislative or other measures on admissibility of foreign criminal convictions.*

3. Chapter III: Criminalization and Law Enforcement

53. The International Affairs Division (IAD) of the AGC is the central authority for mutual legal assistance (MLA) while the Ministry of Home Affairs (MOHA) is the central authority for extradition. Incoming extradition and MLA requests are processed slightly differently in Malaysia, as described more fully in the country review report, and the IAD plays a central role in monitoring incoming and outgoing requests. In doing so, IAD communicates with competent authorities of other States and relevant Malaysian institutions. Malaysia also liaises with foreign authorities through diplomatic and informal channels. The AGC has a website in English with a description of the extradition and MLA process, relevant legislation and treaties, contact information, and a model request form and checklist.

54. Malaysia has in place seven bilateral extradition treaties and six bilateral treaties on MLA. Malaysia is party to the regional Treaty on MLA among like-minded ASEAN Member Countries and also subscribes to the Commonwealth Schemes on MLA (Harare) and Extradition (London).

3.1 Observations on the implementation of the articles under review

Extradition (article 44)

55. *Dual criminality is a fundamental principle of Malaysian law, which is flexibly applied, considering the underlying conduct and elements of the offence. Malaysia uses the list or descriptive approach to determine extraditable offences. UNCAC offences are extraditable due to their threshold period of imprisonment or punishment (not less than one year or death). Subject to the dual criminality requirement, to the extent that not all UNCAC offences are fully criminalized, they would not be extraditable.*
56. *Malaysia accepts requests for extradition from treaty or non-treaty partners and could, in principle, accept the Convention as the legal basis for extradition upon the Minister issuing a special direction under section 3 of the Extradition Act 1992. No requests have been received or made by Malaysia solely on the basis of UNCAC. Malaysia has not refused extradition to date, although in two cases it could not execute the request. None of its outgoing requests have been refused. A warrant of arrest scheme is in place with Brunei Darussalam and the Republic of Singapore.*
57. *The estimated time from receiving an extradition request to the final decision is between six and twelve months.*
58. *Malaysian law gives the Minister discretion not to extradite citizens. Section 49(2) of the Extradition Act obliges the Minister to submit the case to the Public Prosecutor with a view to having the criminal prosecuted under Malaysian law, though there is no binding requirement on the Public Prosecutor to undertake the prosecution. The obligation to prosecute a national where extradition is refused (aut dedere aut judicare) is not established in all of Malaysia's bilateral treaties. Malaysia has extradited a national in one non-corruption related case, but has never prosecuted a national in lieu of extradition.*

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

59. *The International Transfer of Prisoners Act 2012 governs the transfer of prisoners with foreign States. Due to its recent enactment, there have been no such cases.*
60. *More formal consideration is expected to be given to enacting legislation on the transfer of criminal proceedings in the future.*

Mutual legal assistance (article 46)

61. *Malaysia can provide MLA in the absence of a treaty and could, in principle, apply UNCAC as the legal basis upon the Minister issuing a special direction under Section 18 of the Mutual Assistance in Criminal Matters Act 2002 (MACMA).*
62. *Malaysia has never refused a request for MLA. However, three of its outgoing requests in non-corruption related matters were refused on the grounds of dual criminality. Since 2009, Malaysia has received ten corruption related requests and 107 non-corruption related requests, and has made six corruption related requests and 36 non-corruption related requests. A request on the recovery of assets was pending at the time of the review.*
63. *Malaysia takes a broad approach when considering dual criminality. Because Malaysia recognizes the criminal liability of legal persons, there are no legal obstacles to rendering MLA in these cases, which are commonly received.*

64. Requests can be sent through INTERPOL in urgent circumstances, and Malaysia can act on advance copies in hard and electronic format. In urgent circumstances, Malaysia would also accept oral requests if confirmed in writing. Responses are sent directly to requesting States.
65. Malaysia has had experience with video testimony in the investigative stage of a terrorism case, though not in corruption proceedings. Foreign video evidence would be admissible under Section 90E(8) of the Evidence Act.
66. Copies of government records that are not publicly available can be provided based on a production order issued by a court of law under the MACMA, or the Attorney General may apply for a declassification of Government records in accordance with Malaysia's Official Secrets Act. A case example was cited where declassified police records were provided to a requesting State.

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

67. As noted in the introduction, Malaysia is party to a number of mechanisms and networks against corruption and money laundering at the regional and international level. Malaysian law enforcement authorities cooperate internationally through direct inter-agency contacts, MoUs, the inspector generals of police, and channels like INTERPOL, ASEANAPOL and the Egmont Group.
68. Bilateral and multilateral MoUs with foreign counterparts are in place for several institutions, including MACC (7), the FIU (35) and the RMP (9). MACC has cooperated in 38 cases (not involving formal MLA) with foreign counterparts since 2010. Three liaison officer positions are located in the MACC, the Central Bank and the RMP. Examples of the exchange of personnel and other experts by Malaysia are referenced in the report.
69. MACC, through MACA as the training provider for Malaysia's Technical Cooperation Programme, provides anti-corruption courses and capacity-building for other States. MACC also sends experts to other countries to conduct training and receives foreign attachment officers. Malaysia joined the APG's Technical Assistance Donor and Provider Group (DAP) to provide AML/CFT technical assistance and training to other countries. Joint trainings with foreign law enforcement officials are also conducted.
70. Malaysia has experience conducting joint investigations in corruption cases at the international level. Further, both MACC and RMP employ special investigative techniques in accordance with relevant law (e.g., CPC, Malaysian Security Act and MACCA) and upon request in particular cases internationally. Evidence derived therefrom is admissible in court.

3.2 Successes and good practices

71. Malaysia has developed a solid system to provide and request international cooperation, which profiles the country to be a provider of technical assistance. The following

successes and good practices in respect of the implementation of Chapter IV of the Convention are highlighted:

- *Malaysia has concluded bilateral and multilateral treaties and cooperates widely in international and regional organizations and initiatives.*
- *The review team noted the positive role of the AGC in ensuring a cooperative working relationship among different criminal justice authorities, especially in the efficient processing of MLA and extradition requests and the oversight of incoming and outgoing requests.*
- *Malaysian authorities have taken proactive steps to sensitize all relevant stakeholders, especially judicial officers, to the applicable laws, procedures and timeframes to be followed.*
- *The IAD's administrative manuals, work flow charts and checklists for extradition and MLA give administrative and legal certainty for filing and processing requests. Malaysia has published its model request form online. The documentation and procedures are conducive to facilitating international cooperation.*
- *A unique feature of IAD is the dedicated case management database for extradition and MLA requests, which allows IAD to quickly provide status updates and ensures timely, accurate and efficient execution and tracking of requests. This could be emulated by other countries.*
- *The review team positively noted Malaysia's practice of flexibly interpreting the dual criminality requirement so as to render a wide measure of assistance.*
- *Malaysia has taken necessary steps to expediting extradition procedures and simplifying evidentiary requirements.*
- *Malaysia indicated that it is able to render a wide measure of MLA to requesting States. This is borne out by the increasing number of requests it responded to over the last three years, including in corruption cases.*
- *A case was cited in which Malaysia rendered assistance in a matter that touched on national security. This would tend to show that the grounds for refusal do not impede Malaysia from complying with requests, which is commendable.*
- *Section 27(3) of MACMA gives Malaysian authorities flexibility to set appropriate timeframes in which safe conduct will be assured based on the principle of reciprocity.*
- *Malaysia has in place specialized and skilled manpower who actively cooperate with their foreign counterparts. Dedicated training, capacity building and exchange programmes, including through MACA, are among the international good practices for information exchange, cooperation and corruption prevention.*
- *The active role of MACC as an international training and assistance provider through capacity building exchange programmes, overseas training and hosting attachment*

officers is a welcome development. The direct cooperation between MACC, Malaysia's FIU and the RMP with foreign counterparts was also noted.

- *The exchange of personnel, experts and capacity building programmes help to enhance cross-border cooperation. The establishment of an MLA unit in MACC, the secondment of a MACC officer to INTERPOL, and specialized units in the RMP were also noted.*
- *Malaysian law enforcement agencies, in particular MACC, the RMP, AGC and FIU, exhibit a high level of commitment to the fight against corruption and cooperation internationally, and to fully implement the principles of the Convention, in particular at the leadership levels of the agencies.*
- *The use of joint investigations and an operational working group with Brunei Darussalam are good examples of law enforcement cooperation among countries at the policy and operational level.*
- *The wide use and application of special investigative techniques in corruption cases domestically and internationally was considered a good practice.*

3.3 Challenges in implementation

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

- *Malaysia is encouraged to make the requisite notification to the United Nations as to whether it would accept UNCAC as a legal basis for extradition.*
- *Noting that Malaysia has previously extradited its nationals, Malaysia should ensure that future treaties address the obligation to expeditiously submit cases for prosecution and that this is followed in practice.*
- *Malaysia is encouraged to comprehensively review its existing treaties to ensure that they meet all UNCAC requirements. The reviewers welcome Malaysia's indications that future extradition treaties are tailored to be consistent with UNCAC provisions.*
- *Malaysia may wish to monitor as much as possible the application of bank secrecy measures to ensure that also in future cases bank secrecy requirements do not delay the provision of MLA.*
- *Malaysia is encouraged to embrace the rendering of non-coercive assistance, taking into account its flexible application of the dual criminality principle.*
- *There has been no experience in the transfer of prisoners for providing testimony or assistance, and Malaysia should ensure that the requirements of the Convention are adhered in future cases.*
- *Malaysia is encouraged to make the requisite notifications to the United Nations as to its central authority and acceptable language for MLA.*

- *Malaysia should consider specifying in its model request form that requests for MLA are acceptable in English.*
- *Malaysia should ensure that the undertaking it requires from requesting States that a request does not have as its primary purpose the assessment or collection of tax is not interpreted in a manner contrary to the Convention.*
- *Malaysia may consider reviewing the MACMA to enable its authorities to postpone rather than refuse assistance that could prejudice a criminal matter in Malaysia, noting that the Act is interpreted and applied this way in practice.*
- *Malaysia is encouraged to review the MACMA and treaties to ensure that consultations with requesting States are held before refusing or postponing assistance.*

IV. Implementation of the Convention

A. Ratification of the Convention

73. The Convention was signed by Malaysia on 9 December 2003 (C.N.1420.2003.TREATIES-32). It was subsequently ratified on 24 September 2008 (C.N.679.2008.TREATIES-29). The Convention entered into force for Malaysia on 24 October 2008.

74. Malaysia made the following reservation at the time of ratification.

“(a) Pursuant to Article 66, paragraph 3 of the Convention, the Government of Malaysia declares that it does not consider itself bound by Article 66, paragraph 2 of the Convention; and

(b) The Government of Malaysia reserves the right specifically to agree in a particular case to follow the arbitration procedure set forth in Article 66, paragraph 2 of the Convention or any other procedure for arbitration.”

75. The implementing legislation includes:

- Federal Constitution of Malaysia
- Malaysian Anti-Corruption Commission Act 2009 (Act 694)
- Mutual Assistance in Criminal Matters Act 2002 (Act 621)
- Penal Code (Act 574)
- Criminal Procedure Code (Act 593)
- Evidence Act 1950 (Act 56)
- Whistleblower Protection Act 2010 (Act 711)
- Witness Protection Act 2009 (Act 696)
- Police Act 1967 (Act 344)
- Financial Procedure Act 1957 (Act 61)
- Customs Act 1967 (Act 235)
- Abduction and Criminal Intimidation of Witness Act 1947 (Act 191)
- Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (Act 613)
- Securities Commission Act 1993 (Act 498)

- Court of Judicature Act
- Anti-Corruption Act 1997 (Act 575)¹
- Prevention of Corruption Act 1961 (Act 57)²
- Companies Act 1965 (Act 125)
- Labuan Financial Services and Securities Act 2010 (Act 704)
- Election Offences Act 1954 (Act 5)
- Extradition Act 1992 (Act 479)
- Relevant subsidiary legislation.

Implementation of international conventions in Malaysia's legal system

76. The Federal Constitution of Malaysia does not contain any provision which says that international law shall be deemed part of the law of the land, or that treaties shall be the laws of Malaysia. Nevertheless, certain provisions of the Constitution deal with “treaty-making capacity” in Malaysia.

According to Article 74 (1) of the Federal Constitution, “Parliament may make laws with respect to any of the matters enumerated in the ‘Federal List’ or the ‘Concurrent List’. The ‘Federal List’ in the Ninth schedule includes:

“1. External Affairs, including-

- (a) Treaties, agreements and conventions with other countries and all matters which bring the Federation into relations with other countries;
- (b) Implementation of treaties, agreements and conventions with other countries;...”

77. From the wording of Article 74, read with the ‘Federal List’, it means that the Federal Parliament has the exclusive power to make laws relating to external affairs (including treaties, agreements and conventions) and it has the power to implement international treaties and make them operative domestically. In respect of the power of the Executive, Article 39 provides that:

“The executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable ... by him or by the Cabinet or any Minister authorised by the Cabinet.”

78. Again under Article 80 (1) the executive authority of the Federation extends to all matters with respect to which Parliament may make laws. By virtue of the ‘Federal List’, matters with respect to which Parliament may make laws include “external affairs”, which in turn include “treaties, agreements and conventions with other countries”. Therefore, in Malaysia the treaty-making power is vested in the executive authority of the Federation or the Federal Government.

79. Although the treaty-making power lies with the Executive, the power to give legal effect domestically to treaties rests in Parliament. To be operative, a treaty, agreement or convention therefore needs legislation by Parliament.

¹ Though repealed on 1 January 2009 by Section 73 of Act 694 but under Section 74 (1) of the Act it provides that any act done or action taken under this Act (Act 694) by an officer of the Anti-Corruption Agency established under the Anti-Corruption Act 1997 shall be deemed to have been done or taken under this Act and may accordingly be continued by the offer.

² Though repealed under Section 61 of Act 575 but Section 62 provides that any act done or action taken under this Act (Act 575) by an officer of the Anti-Corruption Agency established under the Anti-Corruption Agency Act 1982 shall be deemed to have been done or taken under this Act and may accordingly be continued by the officer.

80. The practice of courts in Malaysia in applying international treaties is based on the doctrine of transformation. In other words Malaysian courts apply international treaties as part of the Malaysia law so long as they have been transformed into domestic law by means of an act of Parliament. Thus, even though the Government (Executive) has ratified a treaty and it binds Malaysia under International Law, it has no effect domestically unless the Legislature passes a law to give legal effect to that treaty.
81. At the time of the country visit, the International Transfer of Prisoner Act 2012 (Act 754) had been passed in both houses and was awaiting to be gazetted (see explanations on the legal and institutional system of Malaysia below).

B. Legal system of Malaysia

82. Malaysia is a constitutional monarchy based on the British Westminster model, a legacy of British colonialism. At the federal level there is a bicameral legislature. The House of Representative (Lower House) called the Dewan Rakyat is composed of 194 members elected every five years in a first-past-the-post election from single-member constituencies delineated on the basis of population. The Senate (Upper House) called the Dewan Negara consists of 70 members of which 26 are indirectly elected by the states, the other 44 are appointed by the King (Yang Di-Pertuan Agong). The appointed senators represent the federal territories, sectoral groups and minorities. Executive power lies with the Prime Minister and the Cabinet. Each of the 13 States has its own legislature. The Malaysian Parliament is defined by Article 44 of the Federal Constitution as consisting of the Yang Di Pertuan Agong (King), the Dewan Negara (Senate) and the Dewan Rakyat (House of Representative). The House of Representative is where a Bill customarily originates. Once approved, it will be tabled in the Senate for another debate. The Bill, upon approval, will then be presented to the King for his consent before it is gazetted to make it a law as stated in the Government Gazette.

The Monarchy

83. The Yang di-Pertuan Agong is a constitutional head. Under Article 40 (1) of the Malaysian Federal Constitution he acts on ministerial advice except as otherwise provided. He reigns, but does not govern. As Head of State, he is the formal head of each of the three branches of government: the legislature, the executive and the judiciary. He is a component of Parliament and may not refuse assent to Bills passed by the two Houses of Parliament. As Head of the executive, he appoints the Prime Minister and members of the cabinet. As Head of the judiciary, he appoints the Chief Justice of the Federal Courts, the President of the Court of Appeal, the Chief Judge of each of the two High Courts, and all judges of the superior courts. Each component state in the federation has its own Head of State (either a Ruler or a Yang di-Pertua Negeri), an elected unicameral legislative assembly and an executive council headed by a Chief Minister called the Menteri Besar or Ketua Menteri. Like the Yang di-Pertuan Agong, each Ruler and Yang di-Pertuan Negeri is the constitutional Head of State and acts on the advice of the State Executive Council.
84. The Malaysian Constitution is a written constitution. It is modelled along the lines of the Indian Constitution which in turn is based on basic principles of British Government and Constitutional Convention. The Malaysian Constitution is described as being based upon

the Westminster Model. Article 4(1) of the Federal Constitution declares “This constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall to the extent of the inconsistency be void.” The doctrine which underlies the Federal Constitution is the doctrine of constitutional supremacy, as opposed to parliamentary supremacy.

Institutions of Government

The Yang di-Pertuan Agong

85. The Constitution provides for a “Supreme Head of the Federation” to be called the Yang di-Pertuan Agong. The Yang di -Pertuan Agong holds office for a period of five years, and is elected at the Conference of Rulers from amongst 9 Malay Rulers of States. Although it is provided that the executive authority of the Federation shall be vested in the Yang di- Pertuan Agong in the exercise of his functions under the Constitution or Federal laws, the Yang di- Pertuan Agong is to act in accordance with the advice of Cabinet. Most of the functions and duties of the Yang di- Pertuan Agong are ceremonial in nature. (See also paragraph 26)

The Executive

86. Executive power is vested in the Cabinet of Ministers which is appointed by the Yang di-Pertuan Agong to advise him. The Yang di- Pertuan Agong first appoints as Prime Minister to preside over the Cabinet, a member of the House of Representatives (the Dewan Rakyat), who in his judgment is likely to command the confidence of the majority of the members of that House. On the advice of the Prime Minister, the Yang di- Pertuan Agong then appoints other Ministers from among the members of either House of Parliament. The Cabinet is collectively responsible to Parliament.

The Legislature

87. In Malaysia, the power to enact laws is vested in Parliament at the federal level and the State Legislative Assembly at the state level. The Parliament consist of two ‘Houses’ that is, the *Dewan Negara* or Senate which is the Upper House, and the *Dewan Rakyat*, or House of Representatives, the Lower House. The Senate is composed of both elected as well as appointed members. The House of Representatives is made up of elected members.

88. Parliament’s law-making function is its most important. Article 160 of the Federal Constitution defines ‘law’, and within this definition is included written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof. The major source of the law is written law or legislation. Although it is essentially the prerogative of Parliament, the power to make laws can be delegated to other bodies by power conferred upon them by Parliament in a parent statute, and legislation made in this manner is known as delegated or subsidiary legislation.

89. As Malaysia has a written Constitution which is the supreme law of the Federation, Parliament and the State Legislative Assembly are not supreme. They can enact laws only within the limits and in the manner prescribed by the Federal and State Constitutions.

Laws enacted by Parliament are called Acts, but those enacted by the federal legislature between 1 April 1946 and 10 September 1959 are called Ordinances. Laws enacted by the State Legislature are referred to as Enactments, except in Sarawak where they are known as Ordinances. Laws promulgated by the Yang di-Pertuan Agong during an emergency proclaimed under Article 150 of the Federal Constitution are also called Ordinances.

90. There are four types of Acts:

1. Principal Act;
2. Amendment Act, which makes changes to a Principal Act;
3. Revised Act, which results from changes made by the Commissioner of Law Revision under powers conferred upon him in the Revision of Laws Act 1968; and
4. Consolidated Act, which brings together in a simple Act two or more Acts on a specific subject-matter which had been passed over a period of time.

91. The Yang di-Pertuan Agong is an integral part of Parliament and his assent is required for all laws except in circumstances when the Royal Assent is deemed to have been given after the expiry of the specified time. The Yang di-Pertuan Agong's role as a constitutional monarch does not permit him to be an active participant in parliamentary proceedings. He attends on ceremonial occasions such as the opening of parliamentary sessions and delivers the Royal Address to a joint sitting of both chambers outlining government policies. His other parliamentary duties include summoning, proroguing and dissolving Parliament. In discharging these duties he acts on the advice of the Prime Minister except that on advice of dissolution he may act on his own discretion.

The Judiciary

92. Article 121 of the Constitution states that there "shall be two courts of co-ordinate jurisdictions and status", and such inferior courts as may be provided by Federal Law. Article 121 further provides that the courts referred to shall have no jurisdiction in respect of any matter within the jurisdiction of the *Syariah* Courts.

93. The jurisdiction and powers of courts under the Malaysian hierarchy of courts are contained principally in the Court of Judicature Act 1964 for the superior courts (that is the Federal Court, the Court of Appeal and two High Courts of coordinate jurisdiction - one for West, the other for East Malaysia) and in the Subordinate Courts Act 1948 for the subordinate courts (Sessions, Magistrates' and Penghulu Courts).

94. As the administration of justice is a federal matter, these courts are federal courts vested with civil and criminal jurisdiction, and enforce both federal and state laws (the latter, though, applies only to the state concerned). Conversely, because Islamic law, Malay and native customary laws are state matters, the *Syariah* Courts (other than those in the federal territories) and the Native Courts in Sabah and Sarawak are state courts.

95. In regard to the separation of powers, in Malaysia, for instance, the Judiciary may declare as void an executive act or an Act of Parliament if either violates the Constitution. The Executive on the other hand is fettered because in theory, it is controlled by Parliament to which it is answerable. Hence, the system of separating governmental powers together with inter-branch checking can effectively prevent the concentration of power in one party. The separation of power as practiced in Malaysia is closer to the British rather than the American model in that the executive-legislative power is not separated. The fusion of

legislative and executive functions is inherent in the Westminster's style of parliamentary government. The Yang di-Pertuan Agong, who is the ceremonial executive is an integral part of Parliament. The Cabinet, appointed by the King on the advice of the Prime Minister and in whose hands the real authority rest, consists of ministers who are required by the Constitution to be members of either House of Parliament. Here, the Executive arm of the Government is an integral part of the Legislature. Malaysia practices parliamentary democracy based on the British Westminster model.

96. Being a country with a common law tradition, laws are constantly developed through cases decided by judges in courts and hence the term "case law" or "judge-made law". They are contained in judicial precedents which are reported in various series of law reports e.g. the Malaysian Law Journal. These reports are primary documentary sources. They are crucial tools of trade for lawyers, judges and academicians. Notwithstanding this, an important source of law in Malaysia is the written law. Given that Malaysia is a Federation which comprises 13 States, its written law comprises both Federal and State Laws. Malaysia's written laws consist of the following:
- The Federal Constitution, which is the supreme law of the land and together with the constitutions of the 13 States comprising the Federation.
 - Legislation enacted by Parliament and the State Assemblies under powers conferred on them by their respective constitutions and subsidiary or delegated legislations made by persons or bodies under powers conferred on them by Acts of Parliament or Enactments of State Assemblies.
97. With regards to the legislative power of the Federation and the States, Article 74(1) provides that Parliament may make laws with respect to any of the matters enumerated under the Federal List or the Concurrent List in the 9th Schedule. Article 74(2) provides that the legislature of a State may make laws with respect to any of the matters enumerated in the State List or in Concurrent List in the 9th Schedule.
98. The Federation has power and control over subject matters which can be considered essential and vital to the nation as a whole, and these are enumerated in the Federal List and they include matters such as external affairs, defence, internal security, civil and criminal law and procedure and administration of justice, citizenship, finance, trade commerce and industrial, shipping, communications and transport, education, medicine and health, labour and social security.
99. Matters which are included in the State List include Islamic law and personal and family law of persons professing religion of Islam; Malay custom; the constitution, organization and procedure of Syariah courts; land including land tenure; agriculture and forest; local government; libraries, museums, ancient and historical monuments and records and archaeological sites and remains.
100. Matters within the Concurrent List include social welfare, scholarships, protection of the wild animal and birds, town and country planning, public health, drainage and irrigation, culture and sports and housing.
101. Islamic law is also a major source of Malaysian law but it is applicable only to Muslims regardless of race. It is administered by a separate system of state *Syariah* courts.

There is no relevance in regard to anti-corruption measures, as only family and related matters are covered by its jurisdiction.

102. English law has been received in Malaysia either expressly or by implication. It is express for example, when received by virtue by section 3(1) of the Civil Law Act 1956 where the court is required to apply “in West Malaysia or any part thereof...the Common Law of England and rules of equity as administrated in England on 7th April 1956”. On the other hand, it is implied when the court interprets an instruction to decide case according to “justice and right” as implying authority to receive appropriate English law.
103. The Federal Constitution is the supreme law of the Federation. It is the fundamental law of the land, a kind of ‘higher law’ which is used as a yardstick with which to measure the validity of other laws. Any law inconsistent with the Federal Constitution may be challenged in court.
104. In the case of *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112-113 it was pointed out that the doctrine of supremacy of Parliament does not apply in Malaysia, as a written constitution is in place. The power of Parliament and of State Legislatures in Malaysia is limited by the Constitution and they cannot make any law they please.
105. The legislature is not the only organ which is subject to the Federal Constitution. The executive and the judiciary are, too. In short all institutions created by the Federal Constitution derive their powers from it are subject to its provisions. The supremacy of the Federal Constitution is set out in articles 4(1) and 162 (6) and section 73 of the Malaysia Act 1963. Article 4 (1) states: “This Constitution is the supreme law of the Federation and any law passed after Merdeka Day (independence day) which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.”

The Malaysian Legal System

106. The legal system in Malaysia is based on a set of written and unwritten laws. Among the written laws are the Federal Constitution together with the Constitutions of the thirteen states, Legislation enacted by the Parliament and State Assemblies, and delegated or subsidiary legislation made by bodies under the powers conferred on them by Acts of Parliament or State Assemblies. The unwritten laws are comprised of the principles of English common law adapted to local circumstances, case law and local customary law. Muslim law, which is limited to family and inheritance matters, is applicable only to the Muslim population and its administered by a separate system of courts.
107. The Federal Constitution provides for the exercise of powers by the Legislature, Judiciary and Executive. By virtue of Act 121 (1) of the Federal Constitution, Judicial power in the Federation is vested on two High Courts, namely, the High Court in Malaya and the High Court in Sabah and Sarawak, and in the inferior court. The Federal Court with its principal registry in Putrajaya is the highest court in Malaysia. The Chief Judge of the Federal Court heads the Malaysian judiciary and he exercises direct supervision over all courts. The President who heads the Court of Appeal and the two Chief Judges who head the High Courts in Malaya and in Sabah and Sarawak also sit in the Federal Court and are responsible to the Chief Judge. Judges are appointed by the King on the advice of the Prime Minister.

Malaysian Anti-Corruption Commission

108. Malaysia's key authority in the fight against corruption is the Malaysian Anti-Corruption Commission (MACC).
109. The MACC was established by legislation, namely the Malaysian Anti-Corruption Commission Act 2009 (Act 694) (hereinafter referred to as MACCA) and began its operations officially on 1 January 2009 replacing the Anti-Corruption Agency (ACA) of Malaysia. The functions of MACC are regulated under Part II of MACCA, in sections 4 to 12.
110. The Commission is the lead agency that is empowered under section 11 (1) of MACCA to carry out the functions specified in section 7, namely the detection, prevention and investigation of corruption offences under MACCA, to examine practices, systems and procedures of public and private bodies on ways in which corruption may be eliminated, to advise heads of public bodies of any changes in practices, systems or procedures compatible with the discharge of the duties of the public bodies, as the Chief Commissioner deems necessary to reduce the likelihood of the occurrence of corruption, and lastly to educate the public against corruption as well as to enlist and foster public support against corruption. The Chief Commissioner reports to the (Parliamentary) Special Committee on Corruption under section 11(2) of Act 694.
111. Next to MACC, the Royal Malaysia Police and the Royal Customs and Excise Department also have powers to investigate corruption-related offences as provided in sections 67 and 70 of MACCA. Inter-agency collaboration is strong and the agencies work together on a daily basis and transfer reports among each other. MACC has several memoranda of understanding (MoUs) in place with other government agencies, for instance with the Royal Customs and Excise Department, Royal Malaysia Police, and Road Transport Department. One further example of Malaysia's efforts in regard to coordination is the National Coordinating Committee to Counter Money Laundering (NCC). It was established in April 2000 to ensure adequate cooperation and information sharing among its thirteen member agencies to counter money laundering. More information on the institutional set-up and details of the inter-agency collaboration among the departments is described under articles 36 and 38 of the Convention below.

Procedures and Measures of Extradition and MLA

112. The International Affairs Division (IAD) of the Attorney General's Chambers (AGC) is the central authority for MLA, being involved in receiving, transmitting and monitoring requests, while the Ministry of Home Affairs (MOHA) previously known as Ministry of Internal Security (MIS) is the central authority for extradition cases.
113. Incoming extradition and MLA requests are processed slightly differently in Malaysia. Incoming extradition requests received through the diplomatic channel (Ministry of Foreign Affairs) are forwarded to the MOHA. The MOHA then reviews the request with the advice of the AGC to determine whether the request complies with the relevant legislation and treaty. If the requirements are met, the MOHA forwards the request to the AGC for execution. In corruption cases, the Malaysian Anti-Corruption Commission (MACC) will cooperate with the AGC to execute the request. Incoming MLA requests received through diplomatic channels (Ministry of Foreign Affairs) are forwarded to the

AGC. On the other hand, incoming MLA requests are provided directly to the AGC, which will review the request in consultation with other relevant agencies, e.g., the MACC in corruption cases. The Minister charged with the responsibility for legal affairs is involved only for requests that are not based on a treaty, in which case the Minister must issue a special direction that the MACMA applies to the case. Once the AGC decides to proceed with the case, the IAD will process the request with the cooperation of the Prosecution Division of the AGC and the relevant law enforcement agency (again the MACC in corruption cases). All incoming extradition and MLA requests are kept confidential.

114. Outgoing extradition and MLA requests are handled in a similar fashion to incoming requests. Outgoing extradition requests are drafted by a law enforcement agency (e.g., the MACC in corruption cases) and forwarded to the MOHA, which will review the request with the assistance of the AGC. If the MOHA decides that the request meets the requirements of a relevant treaty and that there is sufficient evidence to support the request, it will send the request to the foreign state through the diplomatic channel. On the other hand, outgoing MLA requests are drafted by the AGC with the cooperation of the prosecutors and investigators involved in the case before they are sent through the diplomatic channel. The MOHA is not involved.
115. The IAD also plays a central role in monitoring all incoming and outgoing extradition and MLA requests. In doing so, the IAD communicates with the competent authorities of the requested State as well as the relevant Malaysian officials in the MOHA, the Ministry of Foreign Affairs, and law enforcement agencies (e.g., the MACC). Malaysia also liaises with foreign authorities through diplomatic and informal channels on case-specific and general matters.
116. To help foreign authorities prepare requests to Malaysia, the AGC has a website in English with a description of the extradition and MLA process, the relevant legislation and treaties, contact information, and a Model Request Form and Checklist.
117. To discharge these responsibilities, the IAD is staffed with legally qualified officers who are fluent in Malay and English. Qualified translators are available if necessary. Training on extradition and MLA is provided to officials in the IAD as well as law enforcement officers, prosecutors and judges through training programs organized by the Judicial and Legal Services Training Institute. Officials are bound by the Official Secrets Acts 1972 (Act 88) to maintain the confidentiality of requests.
118. Malaysia provides particular measures to deal with urgent requests. Requests for provisional arrest may be transmitted outside the diplomatic channel, such as via Interpol or other police channels. Urgent MLA requests must still be transmitted through the diplomatic channel. However, the AGC will begin to prepare executing a request based on an advance copy of the request while waiting for the formal request to arrive through the diplomatic channel. The Royal Malaysia Police (RMP) may provide additional assistance at the police level. The RMP and its counterparts in Indonesia, Singapore and Thailand meet annually to share information on transnational crime. The agency also cooperates closely with law enforcement agencies in Australia, Germany, New Zealand, the Netherlands, and the United States.

C. Previous assessments of anti-corruption measures

119. The effectiveness of anti-corruption measures has been assessed by international organizations and various national institutions, including the Malaysian Anti-Corruption Commission itself.
120. Public Perception of Corruption: Between 2007 and 2012 there were three surveys on public perception of corruption in Malaysia commissioned by the Malaysian Anti-Corruption Commission in collaboration with the National University of Malaysia (Universiti Kebangsaan Malaysia). However, the results of these surveys were not published. The scope of the surveys covers as follows:
- compromising attitude towards corruption
 - level of confidence towards MACC
 - support towards the efforts shown by MACC
 - efficiency towards the efforts shown by MACC
 - willingness to come forward in reporting corruption offences
 - perception on the level of corruption in the country
121. MACC's Publicity Efforts
- National Integrity Perception: The Institute of Integrity Malaysia (IIM) has conducted yearly surveys on the National Integrity Perception Index between 2006 and 2011 (except 2010). The results of these surveys are also for Government policy making purposes.
 - Transparency International Indices: The effectiveness of Malaysia's anti-corruption measures has been assessed by Transparency International using the following indices: Corruption Perception Index since 1995; Bribe Payers Index since 1999 and Global Corruption Barometer since 2003.
 - Asia Pacific Group on Money Laundering (APG): In 2007 an APG Mutual Evaluation Report on Malaysia against the FATF 40 Recommendations (2003) and 9 Special Recommendations was conducted.
 - ADB/OECD Anti-Corruption Initiative for Asia and the Pacific: A Thematic Review Report "The Criminalisation of Bribery in Asia and the Pacific", Framework and Practices in 28 Jurisdictions, was prepared by the Anti-Corruption Division, Directorate for Financial and Enterprises Affairs, OECD: Criminalisation of Bribery in Malaysia, pages 325-345.
122. Generally, the reviewing experts note with appreciation that Malaysia's self-assessment was completed very thoroughly by Malaysia. The information was provided in a way that is easy to understand, and the supporting authorities were well explained. Also, a number of attachments were provided to facilitate a review of the full sources of cited authorities. The information provided gives a good overview of the legal, institutional and administrative framework for the relevant provisions of UNCAC. Moreover, the reviewers noted positively that Malaysia began the process of compiling the requisite information already one year before the Government was officially notified of the beginning of the review. This fact, together with repeated references to the Convention and the review process by authorities the review team met with during the country visit, such as the judiciary, the Royal Malaysia Police and the Attorney General's Chambers, underscore Malaysia's high-level commitment to fully implementing the Convention and to cooperate in the review process. Further, the detailed statistics that were provided and apparently

readily available as to the implementation of the provisions under review in both chapters of the Convention contribute to effectively tracking the implementation of the Convention in Malaysia.

D. Implementation of selected articles

Chapter III. Criminalization and law enforcement

Article 15 Bribery of national public officials

Subparagraph (a)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(a) Summary of information relevant to reviewing the implementation of the article

123. Malaysia reported that the State has adopted measures in respect of active bribe-giving to a public official. Sections 16 (b), 17 (b) and 21 of MACCA reflect the spirit of article 15 of the Convention.

OFFENCES OF BRIBERY OF NATIONAL PUBLIC OFFICIALS UNDER MACCA:

A. Section 16 (b) of MACCA*:

Any person who by himself, or by or in conjunction with any other person-

- (a) corruptly solicits or receives or agrees to receive for himself or for any other person; or
- (b) **corruptly gives, promises or offers to any person** whether for the benefit of that person or of another person,
any gratification as an inducement to or a reward for, or otherwise on account of-
 - (A) any person doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place; or
 - (B) any officer of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place, in which the public body is concerned, commits an offence.

*Section 16 (b) of MACCA is in pari materia with section 10(b) of the Anti-Corruption Act 1997 (Act 575) and section 3(b) of the Prevention of Corruption Act 1961(Act 57)

B. Section 17 (b) of MACCA**:

Offence of a person who by himself, or by or in conjunction with any other person **corruptly gives or agrees to give or offers any gratification** to any agent as an inducement or a reward for doing or forbearing to do, or for having done or forborne to do any act in relation to his principals affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principals affairs or business.

** Section 17 (b) of MACCA is in pari materia as section 11(b) ACA 1997 (Act 575) and section 4 (b) PCA 1961 (Act 57)

Where in proceedings against any person for any offence under this provision it is proved that he corruptly gave, agreed to give or offered any gratification to any agent as an inducement or a reward for doing or for forbearing to do any act or for showing or forbearing to show any favour or disfavour to any

person having reason to believe or suspect that the agent had the power, right or opportunity so to do, show or forbear and that the act, favour or disfavour was in relation to his principals affairs or business, he is guilty of this offence notwithstanding that the agent had no power, right, or opportunity or that the act, favour or disfavour was not in relation to his principals affairs or business: **Section 19 (2) Malaysian Anti-Corruption Act 2009 (Act 694)**

C. Section 21 of MACCA - Bribery of officer of public body:

Any person who **offers to an officer of any public body**, or being an officer of any public body solicits or accepts, any gratification as an inducement or a reward for-

- (a) the officer voting or abstaining from voting at any meeting of the public body in favour of or against any measure, resolution or question submitted to the public body;
- (b) the officer performing or abstaining from performing or aiding in procuring, expediting, delaying, hindering or preventing the performance of, any official act;
- (c) the officer aiding in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or
- (d) the officer showing or forbearing to show any favour or disfavour in his capacity as such officer, commits an offence, notwithstanding that the officer did not have the power, right or opportunity so to do, show or forbear, or accepted the gratification without intending so to do, show or forbear, or did not in fact so do, show or forbear, or that the inducement or reward was not in relation to the affairs of the public body.

Note: Section 21 of MACCA is in pari materia with section 14 ACA 1997 (Act 575) and section 9 PCA 1961 (Act 57)

124. Furthermore, Malaysia cited section 214 and 161 to 165 of the Penal Code in regard to bribery of national public officials as well as section 137 of the Customs Act 1967 (Act 235).

125. If an act is punishable under both MACCA and the other penal law provisions, the offender will be charged under one law only. Invariably, corruption offences will be dealt with under MACCA. It must be borne in mind that most of the relevant Penal Code offences are “prescribed offences” under MACCA. This means that their investigation falls under the authority of the Malaysian Anti-Corruption Commission (MACC). As MACCA has specific regulations which cover corruption offences, the relevance of the offences regulated in the Penal Code and the Customs Act is very limited. Cases of active bribery, such as section 214 of the Penal Code, which covers offences of “*offering gift or restoration of property* in consideration of screening offender” would be instances of prosecution under the Penal Code rather than MACCA. This offence is often offered as an alternative charge to one under section 17 (b) of MACCA.

Section 3 of MACCA:

“offences under this Act” includes a prescribed offence;

“prescribed offence” means

- (a) any offence as under any written law as specified in the Schedule;
- (b) an offence punishable under section 137 of the Customs Act 1967 (Act 235);
- (c) an offence under Part III of the Election Offences Act 1954 (Act 5);
- (d) an attempt to commit any of the offences referred to in paragraphs (a) to (c); or
- (e) an abetment of or a criminal conspiracy to commit (as those terms are defined in the Penal Code) any of the offences referred to in paragraphs (a) to (c), whether or not the offence is committed in consequence thereof;

Section 67 of MACCA

Notwithstanding any other written law to the contrary, the provisions of this Act shall apply to a prescribed offence regardless of whether the prosecution or any other proceedings in respect of such offence are instituted or taken by an officer of the Commission, or a police officer or customs officer, or any other officer having powers to investigate, prosecute or take any proceedings in respect of such offence.

Prescribed offences are according to the Schedule, offences punishable under sections 161, 162, 163, 164, 165, 213, 214, 215, 384, 385, 386, 387, 388, 389, 403, 404, 405, 406, 408, 409, 417, 418, 419, 420, 465, 466, 467, 468, 469, 471, 472, 473, 474, 475, 476 and 477 A of the Penal Code.

126. Active bribery is committed by corruptly giving, offering or promising any gratification to a public official. The act of promising, giving or offering to the public official can be done by the person himself or in conjunction with another person.

127. In *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No.2)* [1997]1 MLJ at page 22, the Federal Court discussed the word "corrupt" and referred to *Lim Kheng Kooi v R* [1957] MLJ 199 whereby "corrupt" means doing an act knowing that the act done is wrong, doing with evil feelings and evil intentions, purposely doing an act which the law forbids. "Corrupt" is a question of intention. If the circumstances show that the person has done or has omitted to do was moved by an evil intention or a guilty mind then he is liable.

Definition of public officer

128. MACCA does not use the word "public official" but "agent" and "officer of a public body," which are defined in section 3 of MACCA.

Section 3 of MACCA: "Agent" is defined under section 3 of the Malaysian Anti-Corruption Act 2009 (Act 694) "as any person employed by or acting for another and includes an officer of a public body or an officer serving in or under any public body, a trustee, an administrator or executor of the estate of a deceased person, a subcontractor, and any person employed by or acting for such trustee, administrator or executor or subcontractor."

Whereas the term "officer of a public body" is defined as "any person who is a member, an officer, an employee or a servant of a public body, and includes a member of the administration, a member of Parliament, a member of a State Legislative Assembly, a judge of the High Court, Court of Appeal or Federal Court, and any person receiving any remuneration from public funds, and, where the public body is a corporation sole, includes the person who is incorporated as such;"

A Public Body is defined as follows:

- (a) the Government of Malaysia;
- (b) the Government of a State;
- (c) any local authority and any other statutory authority
- (d) any department, service or undertaking of the government of Malaysia; the Government of a State, or local authority;
- (e) any society registered under section 7(1) of the Societies Act 1966;
- (f) any branch of a registered society under section 12 of the Societies Act 1966;
- (g) any sports body registered under section 17 of the Sports Development Act 1997;
- (h) any co-operative society registered under section 7 of the Co-operative Societies Act 1993;
- (i) any trade union registered under section 12 of the Trade Unions Act 1959
- (j) any youth society registered under section 9 of the Youth Societies and Youth Development Act 2007;
- (k) any company or subsidiary company over which or in which any public body as referred to in paragraphs (a),(b),(c),(d),(e),(f),(g),(h),(i) or (j) has controlling power or interest; or
- (l) any society, union, organization or body as the Minister may prescribe from time to time by order published in the Gazette.

Section 21 of the Penal Code (Act 574) defines "public servants" as follows: -

- (a) every Commissioned Officer in the Malaysian Arm Forces;
- (b) every Judge;
- (c) every Officer of a Court whose duty it is, as such officer, to investigate on any matter of law or fact, or to make, authenticate, or keep an account, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order in the Court, and every person authorized by a Court to perform any of such duties;
- (d) every juryman or assessor assisting a Court or public servant

- (e) every arbitrator or other person to whom any cause or matter has been referred for decision or report by any Court, by any other competent public authority;
- (f) every person who holds office by virtue of which he is empowered to place or keep any person in confinement;
- (g) every officer of Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect the public health, safety or convenience;
- (h) every officer whose duty it is, as such officer, to take, receive, keep or expend any property, on behalf of Government, or to execute any revenue process, or to investigate, or to report on any matter affecting the pecuniary interests of Government, or to make, authenticate, or keep any document relating to the pecuniary interests of Government, or to prevent the infraction of any law for the protection of pecuniary interests of Government, and every officer in the service in the pay of Government, or remunerated by fees or commission for the performance of any public duty;
- (i) every officer whose duty it is, as such officer, to take, receive, keep or expend any property, to make any survey or assessment, or to levy any rate or tax for any secular common purpose of any village, town or district, or to make, authenticate or keep any document for the ascertaining of the rights of the people of any village own or district;

Explanation 1—Persons falling under any of the above descriptions are public servants, whether appointed by the Government or not.

Explanation 2—Wherever the words “public servant” occur, they shall be understood of every person who is in actual possession of the situation of a public servant, whatever legal defect there may be in his right to hold that situation.

129. The Penal Code regulations on offences committed by public servants are not far reaching. Under the Anti-Corruption Act 1997 (Act 575) which replaced the Prevention of Corruption Act 1961 (Act 570), it is not just "public servants" who are subject of corruption cases but also "(an) officer of a public body" which means "any person who is a member, an officer, an employee or a servant of a public body, and includes a member of the administration, a member of Parliament, a member of the State Legislative Assembly, a Judge of the High Court, Court of Appeal, or Federal Court, and any person receiving any remuneration from public funds, and, where the public body is a sole corporation, includes the person who is incorporated as such.

Definition of Gratification

130. MACCA and the Penal Code (Act 574) do not use the term “undue advantage” but “gratification”. Gratification is defined under section 3 of MACCA.

Section 3 of MACCA defines “gratification” as follows: -

- (a) money, donation, gift, loan, fee, reward, valuable security, property or interest in property being property of any description whether movable or immovable, or any other similar advantage;
- (b) any office, dignity, employment, contract of employment or services, any agreement to give employment or render services in any capacity;
- (c) any payment, release, discharge or liquidation of any loan, obligation or other liability, whether in whole or in part;
- (d) any valuable consideration of any kind, any discount, commission, rebate, bonus, deduction or percentage;
- (e) any forbearance to demand any money or money's worth or valuable thing;
- (f) any other service or favour of any description, such as protection from any penalty or disability incurred or apprehended or from any action or nature, whether or not already instituted, and including the exercise or the forbearance from the exercise or the forbearance from the exercise of any right or any official power or duty; and
- (g) any offer, undertaking or promise, whether conditional or unconditional, of any gratification within the meaning of any of the preceding paragraphs (a) to (f).

131. The Penal Code does not have a specific definition of the term gratification, but includes under section 161 the note that gratification “is not restricted to pecuniary gratifications or gratifications estimable in money”.

132. Gratification could also include immaterial benefits as provided in case examples submitted by Malaysia in regard to this review (e.g. sexual favours). Malaysia explained that the definition of gratification would therefore come within the scope of the interpretation of the term “undue advantage” as provided for in paragraphs 196 and 197 of the Legislative Guide for the Implementation of UNCAC and would include tangible, intangible, pecuniary and non-pecuniary advantages.
133. In order to assist the prosecution in cases involving the above mentioned offences, the legislature has provided a compelling presumption that has to be invoked once the essential ingredients have been established by the prosecution.

Section 50 - Presumption in certain offences of MACCA

- (1) Where in any proceedings against any person for an offence under **section 16, 17, 18, 20, 21, 22 or 23** it is proved that any gratification has been received or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered, by or to the accused, the **gratification shall be presumed to have been corruptly received** or agreed to be received, accepted or agreed to be accepted, obtained or attempted to be obtained, solicited, given or agreed to be given, promised, or offered as an inducement or a reward for or on account of the matters set out in the particulars of the offence, **unless the contrary is proved.**
 - (2) Where in any proceedings against any person for an offence under **section 161, 162, 163 or 164** of the Penal Code, it is proved that such person has accepted or agreed to accept, or obtained or attempted to obtain any gratification, such person shall be presumed to have done so as a motive or reward for the matters set out in the particulars of the offence, **unless the contrary is proved.**
 - (3) Where in any proceedings against any person for an offence under **section 165** of the Penal Code it is proved that such person has accepted or attempted to obtain any valuable thing without consideration or for a consideration which such person knows to be inadequate, such person shall be presumed to have done so with such knowledge as to the circumstances as set out in the particulars of the offence, **unless the contrary is proved.**
 - (4) Where in any proceedings against any person for an offence under paragraph **137(1) (b) of the Customs Act 1967**, it is proved that any officer of customs or other person duly employed for the prevention of smuggling has accepted, agreed to accept or attempted to obtain any bribe, gratuity, recompense, or reward, such officer or person shall be presumed to have done so for the neglect or non-performance of his duty as set out in the particulars of the offence, **unless the contrary is proved.**
134. The giving of an undue advantage to an “entity” is covered through the interpretation of the term “person” according to the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) which define the word “person” to “include a body of persons, corporate or unincorporated” while section 11 of the Penal Code defines “person” to “include any company or association or body of persons whether incorporated or not”. The above definitions thus cover both natural and legal persons.
135. The Malaysian concept of “corrupt” is reflected in the UNCAC concept of intent, as described further under article 28 of the Convention below.
136. In *PP vs Datuk Haji Harun bin Haji Idris No. 2 1977 1MLJ 15*, p18, it was held that the gravamen of the offence is soliciting a gratification as an inducement to do any official act or conduct. This need not be proved by explicit evidence, but may be inferred from surrounding circumstances. Just as a corrupt solicitation may be inferred from surrounding circumstance, such as evidence of payment received in response to the request made, so an inducement can be inferred from acts or conduct from the relevant circumstances.
137. In regard to section 19 (2) of MACCA, Malaysia explained that on a charge of receiving bribes it is not necessary to prove that the favour had been shown. The

prosecution has merely to prove that the accused person did receive a bribe as an inducement to show favour. There is no requirement to prove that the accused actually showed favour in consequence of having received the bribe.

138. Below are two case examples decided under the old Act which contained a similar provision to section 50 of MACCA:

139. See Abdul Rahman bin Suhaimi v PP [2010] MLJU 874 where it was held as follows:

“...Over and above this, the serial numbers of the recovered money (P12) tallied with the serial numbers noted in the marked notes list (P11) which was signed by SP5 who received the money from SP13 before the meeting with the accused at Gerai Makan Asmah. The accused and Azizan came to the food-stall in the Pajero as shown in P2AD and AE. SP5 was the one who put the RM500 inside the fold of P7 (which belonged to the accused) before it was given to the accused who accepted and held it in his left hand before getting up to leave. It was to me erroneous to therefore submit that it was doubtful whether the accused had received and accepted the payment.

The learned trial judge rightly went on to invoke the section 42 presumption. In addition, the vein of the discussion on 20.12.1999 between the accused, SP3 and Azizan clearly indicated the corrupt intention shown by the accused which culminated in the payment of RM400 on 24.12.1999 and RM500 on 24.1.2000. These two payments were consistent with the accused’s agreement on 20.12.1999 for a lump sum payment of six months.”

140. Public Prosecutor v Selvarajoo a/l Ramachandran & Anor [2009] 8 MLJ 411

“It was incumbent upon the trial judge to invoke the statutory presumption under s 14 of the Act. The court had already found it to be proved that: (i) the respondents were agents of the Government of Malaysia; and (ii) that the gratification had been accepted by the respondents. Applying the principle laid down in Public Prosecutor v Yuvaraj [1969] 2 MLJ 89 the presumption was raised that the gratification was accepted corruptly as an inducement or reward to refrain from taking action against SP3 for the alleged offence. The burden imposed on an accused to rebut the presumption is that of a party to a civil case to prove his case on a balance of probabilities (see paras 28-29); Public Prosecutor v Yuvaraj [1969] 2 MLJ 89 followed, Public Prosecutor v Gurbachan Singh [1964] MLJ 141 and Thavanathan a/l Bala Subramaniam v Public Prosecutor [1997] 2 MLJ 401 referred.”

141. The burden of proof imposed on the accused to rebut the presumption is that of a party to a civil case, to prove his case on a balance of probabilities. This is a higher burden for the accused to rebut than the ordinary burden placed on the accused to create a reasonable doubt. The principles are laid out in Public Prosecutor v Yuvaraj [1969] 2 MLJ 89: “Whether in a prosecution under section 4(a) of the Prevention of Corruption Act, 1961, a presumption of corruption having been raised under section 14 of the said Act the burden of rebutting this presumption can be said to be discharged by a defence as being reasonable and probable or whether that burden can only be rebutted by proof that the defence is on such fact (or facts) the existence of which is so probable that a prudent man would act on the supposition that it exists (section 3 Evidence Ordinance).”

142. Malaysia provided examples of cases on the implementation of the provision. The case law referred to below was decided prior to the enactment of MACCA. The case law made reference to the Prevention of Corruption Act 1961 (Act 57) and the Anti-Corruption Act 1997 (Act 575) (hereinafter referred to as ACA 1997). Both these Acts contain similar provisions as regards the requirements of article 15 (a) of the Convention and sections 16

(b), 17 (b) and 21 of MACCA. MACCA repealed the ACA 1997 while the ACA 1997 repealed the Prevention of Corruption Act 1961 (Act 57) (*see section 73 of MACCA*).

143. The term “gratification” under the Prevention of Corruption Act 1961 and the Anti-Corruption Act 1997 are almost identical with the definition of “gratification” under section 3 of the Malaysian Anti-Corruption Act 2009.

144. Several offences under MACCA have been created where an officer of a public body and other members of the community may be charged for offences relating to gratification where the language is broader than in the Penal Code and covers a wider range of acts which are punishable. Unlike the comparative leniency of punishments provided in the Penal Code under section 24 of MACCA and section 16 of the previous Anti-Corruption Act 1997, any person who is found guilty of an offence under section 16 or 17 of MACCA is liable on conviction to imprisonment for a term not exceeding 20 years and a fine not less than five times the sum or value of the gratification which is the subject matter of the offence. With the advent of specific laws against corruption since 1961, fewer cases of corruption are prosecuted under the Penal Code.

Section 16(b) (B) MACCA*

* Section 10(b) (bb) ACA 1997/ Section 3(b) (ii) PCA 196

145. Poh Kim Yong v Public Prosecutor [2009] 1LNS 1533

In this case, the Appellant had been charged in the Sessions Court for an offence under s. 10 (b) (bb) of the Anti Corruption Act 1997 (hereinafter referred to as the Act). The learned Sessions Court Judge had found him guilty on the grounds that there was a prima facie case when the Appellant had given RM 6000 to the police; and that the money was given as a bribe; and that the bribe was for the purpose of releasing two persons in police custody. The learned Sessions Court Judge referred to s. 42 (1) of the Act, which imposes a presumption on the Appellant that he had given a bribe unless proven otherwise by the Appellant on a balance of probabilities.

146. **Section 17 (b) MACCA****

**Section 11 (b) ACA 1997/ Section 4 (b) PCA 1961

Kim Yiik Kwok v Public Prosecutor [2005] 1 LNS 75

“That you on 27th July 1998 at about 11.25am at King Ming Enterprise Lot 387 Jalan Pujut Padang Kerbau in the District of Miri in the Miri Division in the State of Sarawak did corruptly give to an agent of the Government of Malaysia namely INSPECTOR 1317 SAHARAM BIN IBRAHIM attached to Battalion Ke-12 Pasukan Gerakan Am Miri a gratification to wit cash RM 3000.00 as inducement for forbearing to do an act in relation to his principal’s affairs to wit to refrain from taking action against Endri Sisiwanto and Siti Komariah who were alleged to have committed offences under section 39(b) Immigration Rules 1963, Nurul Khoiriyah who was alleged to have committed an offence under section 15(c) Immigration Act 1959/63 and yourself who was alleged to have committed an offence under section 55 B (1) Immigration Act 1959/63 and that you have committed an offence under section 11(b) Anti-Corruption Act 1997 and punishable under section 16 of the same Act (Laws of Malaysia Act 575)”.

147. Deputy Public Prosecutor v Ganasan [2009] 1 LNS 1349

The charge against Appellant/Accused read as follows: “That you, on 9th March 2003, at about 10.45 p.m., at Information Office Parit Buntar Police Station, Kerian, in the District of Kerian, in the state of Perak had corruptly given a gratification of RM 620.00 cash, to an agent of the Government of Malaysia, namely Police Sergeant 56231 Said bin Ishak of the Royal Malaysia Police, attached to the Parit Buntar Police Station District of Kerian, as an inducement for forbearing to do an act in relation to his principal’s affairs, to wit, to refrain from taking action against you, for an alleged extortion offence under section 385 Penal Code in relation to Parit Buntar Report No: 447/2003, and that you have thereby committed an offence under section 11(b) Anti- Corruption Act 1997 (Law of Malaysia Act 575) and punishable under section 16 of the same Act.”

148. Ng Kok Lian & Anor V Public [1983] 2 MLJ 379

In this case the appellants had been convicted for the offence of giving a bribe to a public officer. Their appeal to the High Court was dismissed. Leave was given to refer the following questions for the determination of the Federal Court:

- (1) Whether a witness alleging that he had been given gratification by the accused is, prima facie, an accomplice?
- (2) If the answer to question (1) above is in the positive, whether there is a duty on the part of the trial court to determine whether having regard to the circumstances of the case, such a witness is or is not an accomplice?

Held: The answer to question No. (1) is in the negative and there was therefore no need to deal with question (2). Thus in every case when the issue is raised that a witness is an accomplice the court must study the evidence and make the necessary finding. There can be no rule of law or evidence that a witness is automatically an accomplice just because of his actus reus. To be an accomplice the witness who received the bribe must be the one who was abetting the offence of giving it committed by the accused, the giver. Only then would the receiver be regarded as particeps criminis. This means that just as the giver as a principal offender requires mens rea, so does an accomplice witness who received the gratification. If he received the gratification innocently or without any corrupt motive or if he did not receive it at all, although it was given to him, as far as he is concerned the gift did not change its character to become an illegal gratification just because the giver (the accused) gave it with corrupt motive or with evil intention. Thus in every case when the issue is raised that a witness is an accomplice the court must study the evidence and make the necessary finding. There can be no rule of law or evidence that a witness is automatically an accomplice just because of his actus reus. The whole idea is completely contrary to the basic concept of criminal liability.

149. In regard to statistical data, Malaysia referred to Table 1 (Annex 1).³

(b) Observations on the implementation of the article

150. The reviewing experts are of the opinion that Malaysia has fully implemented the provision.

151. They agree that the definitions of agent, officer of a public body, and public body in MACCA are wide enough to comply with the definition of public official in article 2 of the Convention.

³ This information is collected for the relevant legislation of MACCA and the Penal Code (Act 574). All the data are collected through the Record and Management and Information Technology Division of the Malaysian Anti-Corruption Commission.

152. The definition of public servant in the Penal Code was discussed in more detail during the country visit. Section 21 of the Penal Code, especially under subparagraph (h) and (i), extends to a wide array of persons and includes, for example, “every officer in the service in the pay of Government or remunerated by fees or commission for the performance of any public duty”. Malaysia explained that this would include appointed as well as elected officers. The reviewing experts were of the impression that the Penal Code definition was slightly narrower than the definitions in MACCA and questioned if persons who perform a public function or service without remuneration and persons who work for a public enterprise were covered by the definition in section 21 of the Penal Code. As the scope of the Penal Code definition of public servant is only of relevance in regard to the implementation of article 17 of UNCAC through section 409 of the Penal Code, and in regard to article 18 (b) of UNCAC through section 165 of the Penal Code⁴, this matter is discussed in more detail under the implementation of the relevant UNCAC articles in this report.

153. During the country visit, Malaysia explained that there was no absolute prohibition of receiving of gifts. However, all gifts have to be reported in accordance with section 25 (1) and (3) of MACCA (quoted below). If a gift is received and not reported, is always deemed to have been received corruptly. Malaysia also pointed to section 57 of MACCA which states that, “In any civil or criminal proceedings under this Act, evidence shall not be admissible to show that any such gratification as is mentioned in this Act is customary in any profession, trade, vocation or calling or on a social occasion.” The reviewing experts were satisfied with the explanations provided by Malaysia on this matter.

MACCA

Section 25 (1) and (3)

(1) Any person to whom any gratification is given, promised, or offered, in contravention of any provision of this Act shall report such gift, promise or offer together with the name, if known, of the person who gave, promised or offered such gratification to him to the nearest officer of the Commission or police officer.

(2) Any person who fails to comply with subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding ten years or to both.

(3) Any person from whom any gratification has been solicited or obtained, or an attempt has been made to obtain such gratification, in contravention of any provision of this Act shall at the earliest opportunity thereafter report such soliciting or obtaining of, or attempt to obtain, the gratification together with the full and true description and if known, the name of the person who solicited, or obtained, or attempted to obtain, the gratification from him to the nearest officer of the Commission or police officer.

(4) Any person who fails, without reasonable excuse, to comply with subsection (3) commits an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding two years or to both.

154. The experts were of the view that the establishment of the rebuttable presumption in section 50 of MACCA, which is relevant for most corruption offences, is a good example of a measure that can increase the possibility of successful prosecutions. Once the accused fails to rebut the presumption on the balance of probabilities it is still upon the prosecution to prove its case beyond reasonable doubt.

⁴ Malaysia also cited Penal Code provisions in regard to some other UNCAC offences. However, in all those cases also MACCA provisions were relevant and generally override the Penal Code provisions.

155. In regard to the question if the commission of active bribery by “indirectly giving promising or offering of an undue advantage (...)” was sufficiently covered in sections 16 (b) and 17 (b) of MACCA, the reviewing experts referred to explanations provided in the UNCAC Legislative Guide. Although these explanations do not address article 15 (a) specifically, they refer to the notion of the “indirect” commission of an offence. In regard to article 15 (b) the following is stated: “The solicitation or acceptance must be by the public official or through an intermediary, that is, directly or indirectly.” (Paragraph 210). Furthermore, “The undue advantage does not have to be given immediately or directly to a public official of the State. It may be promised, offered or given directly or indirectly. A gift, concession or other advantage may be given to some other person, such as a relative or political organization” (paragraph 284). Against this backdrop the experts noted that the formulation in section 16 (b) and 17 (b) of MACCA “any person who by himself, or by or in conjunction with another person” was sufficient. This was discussed with and confirmed by Malaysia.
156. Section 21 of MACCA regulates specific cases in which a gratification is offered to an officer of any public body for the purpose of achieving one of the acts defined in points (a) to (d). The wider supplementary regulations in sections 16 (b) and 17 (b) of MACCA allow the coverage of all other cases. The penalty for sections 21, 16 and 17 is the same as specified in section 24 of MACCA.
157. The reviewing experts also took note of the statistics provided by Malaysia for the three years 2009 to 2011. In regard to section 16 (b) (A) and (B) of MACCA, a total of 11 cases had been investigated during this time, but no prosecution or conviction had followed as all those cases were still under investigation. Malaysia may wish to explore if the operational value of this provision could be increased. In regard to section 17 (b), 51 cases had been investigated and 125 convictions were obtained. No cases in regard to section 21 of MACCA were reported.

Article 15 Bribery of national public officials

Subparagraph (b)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

(a) Summary of information relevant to reviewing the implementation of the article

158. Malaysia explained that the forms of passive bribery regulated in article 15 (b) of the Convention were provided for in sections 16(a), 17(a) and 21 of MACCA. The forms of passive bribery include soliciting, receiving, agreeing to receive, agreeing to accept, and attempting to obtain any gratification for oneself or another. There are also offences in the Penal Code that reflect the spirit of article 15 (b) of the Convention, namely, sections 161, 162, 163, 165 and 215.

A. Section 16 (a) of MACCA*:

Any person who by himself, or by or in conjunction with any other person-

- a. corruptly **solicits or receives or agrees to receive** for himself or for any other person; or
- b. corruptly gives, promises or offers to any person whether for the benefit of that person or of another person,
any gratification as an inducement to or a reward for, or otherwise on account of-
- i. any person doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place; or
- ii. any officer of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place, in which the public body is concerned, commits an offence.

*Section 16 (b) of MACCA is in pari materia with section 10(b) of the Anti-Corruption Act 1997 (Act 575) and section 3(b) of the Prevention of Corruption Act 1961(Act 57)

B. Section 17 (a) of MACCA - Offence of giving or accepting gratification by agent

A person commits an offence if-

- (a) being an agent, he corruptly **accepts or obtains, or agrees to accept or attempts to obtain**, from any person, for himself or for any other person, any gratification as an inducement or a reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business;

*Section 17 (a) of MACCA is in pari materia with section 11(a) of the Anti-Corruption Act 1997 (Act 575) and section 4 (a) of the Prevention of Corruption Act 1961 (Act 57)

C. Section 21 of MACCA

Any person who offers to an officer of any public body, or being an officer of any public body **solicits or accepts, any gratification** as an inducement or a reward for-

- (a) the officer voting or abstaining from voting at any meeting of the public body in favour of or against any measure, resolution or question submitted to the public body;
- (b) the officer performing or abstaining from performing or aiding in procuring, expediting, delaying, hindering or preventing the performance of, any official act;
- (c) the officer aiding in procuring or preventing the passing of any vote or the granting of any contract or advantage in favour of any person; or
- (d) the officer showing or forbearing to show any favour or disfavour in his capacity as such officer, commits an offence, notwithstanding that the officer did not have the power, right or opportunity so to do, show or forbear, or accepted the gratification without intending so to do, show or forbear, or did not in fact so do, show or forbear, or that the inducement or reward was not in relation to the affairs of the public body.

*Section 21 of MACCA is in pari materia to section 14 of the Anti-Corruption Act 1997 (Act 575) and section 9 of the Prevention of Corruption Act 1961 (Act 57)

159. A "public officer" would constitute "a person" under section 16 of MACCA.
160. In Public Prosecutor v Datuk Haji Harun bin Haji Idris (No.2) [1997]1 MLJ at page 22 the Federal Court discussed the word "corrupt" and referred to Lim Kheng Kooi v R [1957] MLJ 199, whereby "corrupt" means doing an act knowing that the act done is wrong, doing with evil feelings and evil intentions, purposely doing an act which the law forbids.
161. "Corrupt" is a question of intention. If the circumstances show that the person who has acted or omitted to act was moved by an evil intention or a guilty mind, then he is liable.
162. Further, where in proceedings against any person for any offence under this provision it is proved that he or she corruptly solicited, accepted, obtained or agreed to accept or attempted to obtain any gratification as an inducement or a reward for doing or for forbearing to do any act or for showing or forbearing to show any favour or disfavour to any person, the person commits an offence notwithstanding that he had no power, right, or opportunity so to do so or that he accepted the gratification without intending so to do, he did not in fact so do, show or forbear; or the act, favour or disfavour was not in relation to

his principals affairs or business: **Section 19 (1) Malaysian Anti-Corruption Act 2009 (Act 694).**

163. Malaysia further cited sections 161 to 163, 165 and 215 of the Penal Code as well as section 137 of the Customs Act 1967 (Act 235).

164. In order to assist the prosecution in cases involving the above mentioned offences, the legislature has provided a compelling presumption in section 50 of the MACC that has to be invoked once the essential ingredients have been established by the prosecution, as described above.

165. Malaysia provided examples of cases on the implementation of the provision. The case law referred to below was decided prior to the enactment of MACCA and made reference to the Prevention of Corruption Act 1961 (Act 57) and the Anti-Corruption Act 1997 (Act 575). Both these acts contain similar provisions as regards the requirement of article 15 of the Convention and sections 16 (a), 17 (a) and 21 of MACCA. The term “gratification” under the Prevention of Corruption Act 1961 and the Anti-Corruption Act 1997 are almost identical to the definition of “gratification” under section 3 of the Malaysian Anti-Corruption Act 2009.

Section 16 (a) (A) or section 16 (a) (B) of MACCA*

* Section 10 (a) (aa) or section 10 (a) (bb) of the Anti- Corruption Act 1997 (Act 575) or section 3 (a) (i) or section 3 (a) (ii) of the Prevention of Corruption Act 1961(Act 57)

166. Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 15

The accused was charged with three charges of corruption. It was alleged that the accused as Menteri Besar, Selangor: (a) solicited the sum of \$ 250,000 for UMNO as an inducement to obtain the approval of the Executive Council in respect of an application for a piece of State land; (b) being a member of a public body accepted for UMNO the sum of \$ 25,000 as an inducement to obtain such approval; (c) accepted for UMNO the sum of \$ 225,000 as an inducement to obtain such approval. It was also alleged that the accused was a member of a public, body, namely, the Government of Selangor, or alternatively that he was an agent of the Ruler of the State of Selangor.

167. Bakri bin Mohamad AH v Public Prosecutor [2009] MLJU 509

This appeal is against the order of acquitted and discharge of the appellant without his defence being called on the first charge of soliciting for sexual favours.

The appeal by the Public Prosecutor was allowed and it was ordered that the appellant be brought before the learned SCJ for his defence to be called on the said charge.

168. Mazlan Bin Osman v Public Prosecutor [2011] MLJU 1273

The 1st count charged him under s 10(a) (bb) of the Act, in his capacity as an agent of the Government of Malaysia, to wit, C/Insp 1/13537 Mazlan Bin Osman, with the commission of the offence of corruptly soliciting for himself a gratification from PW6, to wit, a sum of RM 1,600.00 in cash as an inducement for allegedly closing the investigation file in respect of a criminal intimidation case involving PW6s girlfriend upon PW6s wife. The offence under s 10(a) (bb) of the Act is punishable under s 16 of the Act with imprisonment for a term of not less than fourteen days and not more than twenty years and a fine of not less than five times the sum or value of the gratification which is the subject matter of the offence where such gratification is capable of being valued or is of a pecuniary nature, or ten thousand ringgit, whichever is the higher. The appellant was alleged to have

committed the offence on 7 July 2006 at about 11.45 a.m. at the Cheras police district headquarters, in the Federal Territory of Kuala Lumpur.

The 2nd count charged him under s 11(a) of the Act, in his capacity as an agent of the Government of Malaysia, to wit, C/Insp 1/13537 Mazlan Bin Osman, for having committed the offence of corruptly receiving for himself a gratification, to wit, a sum of RM 1,200.00 in cash as an inducement for allegedly closing the investigation file in respect of a criminal intimidation case involving PW6s girlfriend upon PW6s wife.

169. PP v. Dato Saidin Thamby [2012] 4 CLJ 15.

170. Seelan a/l Muthaven v Public Prosecutor [2002] 3 MLJ 640

When it closed its case, the prosecution had proved the two ingredients of the offence under s 4(a) of the Act to which s 14 of the Act applied, that is: (i) a gratification was accepted by the appellant; and (ii) the appellant was at the time of acceptance of the gratification in the employment of a public body. Upon proof of those two ingredients, the existence of the third ingredient that the gratification was paid or given or received corruptly as an inducement or reward for doing or forbearing to do an act in relation to the affairs is to be presumed unless the contrary is proved. Moreover, in the present case, there was direct evidence clearly establishing that the gratification could not have been accepted not corruptly (see p 649D-H). Granted, that the appellant might have said to the complainant in the telephone conversation before they met that he could not help the complainant. But whether the appellant could or could not help was not the issue. The appellant accepted a gratification other than legal remuneration. A public servant has no business to accept gratification other than legal remuneration. The acceptance of gratification other than legal remuneration must be explained. As said, the explanation was neither reasonable nor probable.

171. Public Prosecutor v Zainal Ismail & Ors [2009] 3 CLJ 554

This was the Public Prosecutor's appeal against the decision of the High Court reversing the conviction entered against the respondents by the sessions court. The facts were that the respondents solicited sums of money from one Mohamad Azni (PW6), a Singaporean, in consideration of not taking action against him for failing to declare dutiable goods entering Malaysia from Singapore. The goods were carried in a lorry driven by PW3. According to PW3, he was approached by the respondents who were customs officers demanding a sum of money from him so as not to take action against him for the non-declaration of the goods at the customs complex in Johor Bahru. PW3 then contacted PW6 who was the owner of the goods concerned. When PW6 arrived at the complex, the respondents made more monetary demands on him. It transpired that PW6 lodged a report with the Anti-Corruption Agency in Johor Bahru the next day and that led to the ambush and arrest of the respondents by the Anti-Corruption Agency officers at a planned meeting. The sessions judge convicted the respondents on four charges and sentenced them accordingly. The respondents appealed to the High Court on the ground that there was no proper evaluation of the evidence of PW3 and PW6 by the sessions judge. The High Court allowed the appeal. The learned judge considered PW3 and PW6 to be accomplices wanting of corroboration. The Public Prosecutor now appealed.

Held (allowing the Public Prosecutor's appeal) Per Gopal Sri Ram JCA delivering the judgment of the court:

(1) PW3 was not an accomplice. He was not interested in the goods that were said to be dutiable and undeclared. He was merely the driver of the lorry in which the goods were carried. He had no interest in the subject matter in the discussion that had taken place. He

was merely there as an observer. His role in the whole incident was the fact that a demand had been made on him which he promptly conveyed to PW6. His acts and conduct taken as a whole did not render him an accomplice. He did not participate in any offence. Further, it was not reasonable to regard his evidence with suspicion. In addition, PW3 did not fall within that class of persons who were at best not reliable witnesses and whose evidence called for corroboration. The approach taken by the sessions judge to the evidence of PW3 was correct. She was entitled to act upon it without requiring any corroboration at all. (paras 7 & 8)

(2) It was plain that PW6 was acting under duress when he negotiated with the respondents and when he went about raising the first payment demanded. It was in evidence that threats had been made against his family. His identity card had also been seized. In the circumstances, it could not be said that his conduct when taken as a whole amounted to an 'infamous conduct' so as to take him out of the protection of the statute, ie, s. 18 of the Act. Further, a witness who participated in an offence under duress ought not to be treated as an accomplice. Therefore, PW6's evidence did not require corroboration. Even if it did, there was ample corroboration available on the evidence adduced herein. (paras 9, 10 & 11)

(3) There was no question that the prosecution had, at the close of the whole case proved the four charges against the respondents beyond reasonable doubt. The evidence supported the inference that the respondents committed the offence jointly. In the circumstances, a reasonable tribunal armed with the facts and evidence of the case and properly directing itself would have arrived at the same conclusion as the sessions judge. (paras 12 & 14)

172. Baharudin Ahmad v Public Prosecutor [2010]3 CLJ 59

The accused was an officer of a public body, that was, Yang Dipertua, Majlis Perbandaran Kangar. The accused was charged with four principal amended charges which were (a) the accused on his own behalf solicited gratification for himself, that was, 3%, from the 10 million from one Nik Mokhtar Nik Hassan (SP1) as an inducement to himself as officer of a public body with promise for the approval of the proposal and assistance in ensuring the smooth running of the joint venture mixed housing development project which was an offence under s. 10(a)(bb) of the Anti-Corruption Act 1997; (b) the accused had agreed to receive gratification of RM25,000 as reward for the signing of the joint venture agreement which was an offence under s. 11(a) ACA; (c) that the accused had agreed to receive gratification of RM60,000 consisting of RM30,000 cash and RM30,000 in cheque as an inducement or reward which was an offence under s. 11(a) ACA and (d) the accused had accepted or obtained for himself a golf set for which the accused gave no consideration for it and that the valuable thing was known to the accused to have been concerned in a proceeding, or which had a connection with the official function of himself which was an offence under s. 165 of the Penal Code. The Sessions Court judge found the accused guilty and convicted the accused on all the four principal amended charges. Dissatisfied with the whole judgment of the Sessions Court judge, the accused appealed. The prosecution appealed against the sentences of fines which were not in accordance with s. 16(b) of the ACA 1997.

Section 17 (a) MACCA⁵

173. De Silva v Public Prosecutor [1964] MLJ 81

⁵ Section 11 (a) of the Anti-Corruption Act 1997 or Section 4 (a) of the Prevention of Corruption Act 1961 (Act 57).

The appellant, an Inspector in the Health Department, was charged under section 4 of the Prevention of Corruption Act for receiving four sums of money as inducement for doing an act in relation to his principals affairs to wit assisting the complainant in obtaining a hawkers licence. He was convicted and sentenced to 6 months imprisonment on each charge. On appeal it was argued that the learned President (a) failed to apply the appropriate test in respect of the defence application under section 124(2) of the Criminal Procedure Code for the use of the complainants statement to the police to impeach his credit; (b) erred in law in rejecting the evidence of good character of the appellant; (c) failed to apply his mind to the admitted vindictiveness of the complainant; (d) failed to direct his mind to the contradictions and discrepancies in the evidence. Held:

(1) the acts of the appellant were acts in relation to his principals affairs within the meaning of section 4 of the Prevention of Corruption Act;

(2) the procedure as regards discrediting a witness by reference to his previous statement to the police is cumbersome and slow and therefore should not be used unless the apparent discrepancy is material to the issue. *Muthusamy v Public Prosecutor* [1948] MLJ 57 followed;

(3) there was no evidence to justify the third ground of appeal;

(4) the contradictions and discrepancies or even demonstrable falsehoods in the evidence of a witness are not sufficient reason for rejecting the whole of the evidence of such witness. The proper approach is to view the evidence with suspicion and to treat it with caution. *Khoo Chye Hin v Public Prosecutor* [1961] MLJ 105 followed.

174. Rattan Singh v Public Prosecutor [1971] 1 MLJ 162

The appellant was tried in the Sessions court, Port Dickson, on a charge of corruptly accepting an illegal gratification. He was convicted and fined \$ 1,500 in default to six months imprisonment by the learned president. Against this conviction he has now appealed. The learned public prosecutor has also filed a cross-appeal against inadequacy of sentence. The charge reads as follows:- 'That you on the 7th day of November, 1968, at about 7.30 p.m. at your quarters PWD. No. 215 Cunningham Road, Port Dickson, in the District of Port Dickson, in the State of Negri Sembilan, being an agent of the Government of Malaysia, to wit a Chief Inspector of Police, did corruptly accept a gratification, to wit a sum of \$ 200/- cash from one Ng Ngee Ng Ah Kam (m) as an inducement for forbearing to do an act in relation to your principals affairs, to wit not to proceed with the prosecution of the said Ng Ngee Ng Ah Kam on a charge of house breaking and theft by night under section 457 Penal Code; alternatively dishonestly retaining stolen property under section 411.

175. Public Prosecutor v Jamil bin Mahmod & Anor [1998] 4 MLJ 681.

176. Public Prosecutor v Md Nor bin Hamid [2004] 5 MLJ 97

The public prosecutor appealed against the decision of the sessions court judge to acquit and discharge the accused without calling for his defence on charges under s 4(a) of the Prevention of Corruption Act 1961 or the alternative charge under s 165 of the Penal Code and s 11(a) of the Anti Corruption Act 1997, or the alternative charge under s 165 of the Penal Code. The charge under s 4(a) of the Prevention of Corruption Act 1961 (the first charge) was that the accused, a public servant had corruptly accepted gratification for himself, cash to the sum of RM849 from the complainant SP5, to buy a handphone as an inducement in ensuring that the supervision of the maintenance works of the Graha Maju building be carried out without any problem. The charge under s 11(a) of the Anti Corruption Act 1997 (the second charge) was that the accused, a public servant had

corruptly accepted gratification for himself, cash to the sum of RM270 from the complainant SP5, as an inducement in ensuring that the supervision of the maintenance works of the Graha Maju building be carried out without any problem.

In respect of the first charge, the trial judge found that the prosecution had failed to prove that the accused had accepted the valuable thing in the form of cash amounting to RM849 from the complainant SP5 who was not present when the accused made the purchase of the handphone at the price of RM849, as a result of which the trial judge found that the sum of RM849 was not proved to have originated from SP5 or SP5's company.

On the second charge, the trial judge found that the marked notes of RM270 in the form of trap money were found on the accused who accepted them from SP5. However, the trial judge doubted that this was given to the accused as gratification, on the ground that the prosecution had failed to prove that the accused had demanded the said sum from SP5 as gratification and inducement to the accused in relation to the affairs of the accused's principal.

Held, allowing the appeal; setting aside the order of acquittal on the second principal charge and ordering the respondent to enter his defence on the second principal charge:

(1) In relation to the first charge, the two witnesses SP5 and SP6 testified to different sums of money which resulted in serious material contradictions which the prosecution must resolve but had not done so. Therefore, the decision of the trial judge was affirmed in relation to the first principal or alternative charge that the prosecution had failed to prove a prima facie case and to acquit and discharge the accused without calling the defence on the first principal or alternative charge (see paras 17-18).

(2) In relation to the second principal or alternative charge, for the purposes of adducing evidence in order to establish the offence under s 11(a) of the Anti Corruption Act 1997, Part VI of the Anti Corruption Act 1997, contains specific mandatory provisions to invoke presumptions in favour of the prosecution, in particular s 42(1) of the Anti Corruption Act 1997, which are identical to s 4(a) and s 14 of the Prevention of Corruption Act 1961 (see paras 20-23).

(3) For the purposes of establishing a prima facie case under s 11(a) of the Anti Corruption Act 1997, the prosecution has to prove: (1) a gratification has been accepted by the accused; (2) at the time of the acceptance, the accused is a member of a public body (see para 25); *Pendakwa Raya Iwn Zakaria bin Mansor* [1997] 5 MLJ 505 ; *Public Prosecutor v Yuvaraj* [1969] 2 MLJ 89 and *Attan bin Abdul Gani v Public Prosecutor* [1970] 2 MLJ 143 followed.

(4) Once it was proved that the money had been given and received by the accused, the presumption arose that the money had been given and received corruptly as an inducement or reward, and it was for the accused to give an innocent explanation which the court considered more likely than not that it was true, ie on a balance of probabilities the test applied in civil proceedings (see para 26); *Thavanathan a/l Balasubramaniam v Public Prosecutor* [1997] 2 MLJ 401 followed.

(5) The trial judge fell into a serious error in requiring the prosecution to prove the ingredient of solicitation or demand, when it has never been an ingredient under s 11(a). The solicitation or demand of the trap money by the accused is not an ingredient, but acceptance is (see para 27); *Public Prosecutor v Jamil bin Mahmud & Anor* [1998] 4 MLJ 681 followed.

Rosli Mahat v Public Prosecutor [2004] 1 LNS 604

This is an appeal by the appellant accused (the accused) against the decision of the learned Sessions court judge (the trial judge) who had on 11 April 2003 found the accused guilty and convicted him on the following charge:- That you on 28.12.1999 at about 2.15 p.m. at the 32 Km. Car Wash, Jalan Paya Rumpit, Masjid Tanah, in the District of Alor Gajah, Melaka, as an agent of the Government of Malaysia, to wit, Police L/Kpl No. 92215 on duty in the Crime Prevention Unit of the Police Station in Masjid Tanah, Alor Gajah, Melaka did corruptly accept for yourself a gratification, to wit, cash RM200 from one Mohd Sani bin Mohd Hassan as inducement to you for forbearing to take legal action against him who was alleged to have sold pirated compact disc and for deleting his name which was said to be listed in the Alor Gajah Police Station for commercial crime and motorcycle of fence and that you have thereby committed an offence under s. 11(a) of the Anti Corruption Act 1997, punishable under s. 16 of the same Act (Laws of Malaysia Act 575). The accused was convicted by the High Court.

Saiful Idzam Sulaiman v Public Prosecutor [2004] 2 CLJ 121

This was an appeal by the appellant against his conviction for an offence under s. 11(a) of the Anti-Corruption Act 1997 (the Act). The facts showed that the appellant, an investigating officer with the police force, had the authority to retain an identity card (IC) of a person under remand. The appellant was said to have agreed to accept a sum of RM500 from the complainant for the return of his IC after the complainant was released from remand in connection with drug related offences. The complainant then lodged a report with the Anti-Corruption agency and the officers therein laid a trap that led to the arrest of the appellant. The trial judge was satisfied that the appellant was an agent within the meaning of the Act and that there was payment and as such he should be convicted. In the present appeal, the main issue was whether the trial judge erred when he failed to address the question of whether the presumption in s. 42(1) of the Act (that the money was presumably corruptly accepted) was rebutted.

[4] The court held that the appeal was dismissed, subject to substitution of period of imprisonment. With regard to sentence, since the appellant was a first time offender the sentence of twenty-four months imprisonment was substituted with a sentence of eighteen months. (p. 151 d-f)

177. Malaysia referred to Table 1 (Annex 1).

(b) Observations on the implementation of the article

178. The reviewing experts are of the opinion that Malaysia has fully implemented the provision.

179. The provisions of principal relevance for the implementation of the provision are Sections 16 (a), 17 (a) and 21 of MACCA. Section 21 of MACCA regulates specific cases in which a gratification is solicited or accepted by an officer of any public body as an inducement or reward for carrying out one of the acts defined in points (a) to (d). The wider supplementary regulations in sections 16 (a) and 17 (a) of MACCA allow coverage of all other cases of passive bribery. The penalty for sections 21, 16 and 17 is the same as specified in section 24 of MACCA.

180. Furthermore, section 161 of the Penal Code criminalizes the taking of a gratification, other than legal remuneration, in respect of an official act by a public servant. Section 161 is also applicable to “someone expecting to be a public servant”. Although the MACCA

offence would be the principal one and override section 161 of the Penal Code in most cases, the reviewing experts pointed out that this formulation was an interesting possibility to further expand the scope of the passive bribery offence. The phrase “someone expecting to be a public servant” would be interpreted to cover a situation whereby a person expecting to be appointed to a public office obtains money from another as the price or favour to be shown to that other person in the exercise of his or her functions in that office. It must be proved that he gave the other party reason to believe that he was about to obtain the position. It must also be proved that he himself expected to obtain the position. In practice, the provision would probably be applied only to persons who, after having obtained the expected position, are found guilty of the previous corrupt transaction and to persons who, having obtained the expected office have acted officially in the corrupt manner previously promised. See application of section 161 of the Penal Code in the case of Public Prosecutor v. You Kong Lai [1985] 1 MLJ 298.

181. The reviewing experts also observed the statistics provided by Malaysia for the three years 2009 to 2011. In regard to section 16 (a) (A) there had been 34 cases under investigation, 4 prosecutions and 7 convictions. In regard to section 16 (a) (B) there had been 24 cases under investigation, 16 prosecutions and 10 convictions. For section 17 (a) the number of investigations had been very high with 806 cases. 93 cases had been prosecuted and 20 convictions had been achieved. No cases in regard to section 21 of MACCA were reported. The experts advise Malaysia to monitor the implementation of this section to assess its operational value.

182. Malaysia added that out of the 806 cases investigated between 2009 and 2011, most of the investigations are still ongoing; some of the investigations have led to non-criminal sanctions such as disciplinary action; some of the investigations have led to no prosecution, due to the lack of evidence, such as reluctant witnesses or untraceable witnesses. In respect of the low conviction rate, it was explained that this could be attributed to a misappreciation of the law and facts by the trial judge and would be subject to appeal; witnesses for the prosecution having proved to be hostile or reluctant to give evidence in court; and witnesses who could not be traced before and during the trial.

(c) Successes and good practices

183. The experts noted the establishment of the rebuttable presumption in section 50 of MACCA. According to this section, once it has been proved that a gratification has been received it shall be presumed that it was corruptly received, unless the contrary is proved. This is a good example of a measure that can increase the possibility of successful and effective prosecutions.

Article 16 Bribery of foreign public officials and officials of public international organizations

Paragraph 1

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that

the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

(a) Summary of information relevant to reviewing the implementation of the article

184. Malaysia explained that the offence of bribery of “foreign public officials” had been introduced in 2009 to reflect the provisions of article 16 of UNCAC.

185. The definition of “foreign public officials” and “officer of a public international organization” is comprised in the interpretation section of MACCA, section 3. The interpretation of “foreign public officials” is identical to article 2 (b) of the Convention.

186. So far, Malaysia does not have any reported cases of bribery of foreign public officials. However, there are investigations pending in respect of this offence. Malaysia remains committed to upholding the importance of this provision. As part of its commitment, Malaysia has been invited as an ad-hoc observer to the OECD Convention against Foreign Public Bribery since 2010. Malaysia has also hosted the ADB-OECD seminar on the Bribery of Public Officials in 2010.

187. Malaysia cited the following legislation in regard to paragraph 1 of article 16 of UNCAC:

Section 22 - Bribery of foreign public officials

Any person who by himself, or by or in conjunction with any other person **gives, promises or offers, or agrees to give or offer, to any foreign public official**, or being a foreign public official, solicits, accepts or obtains, or agrees to accept or attempts to obtain whether for the benefit of that foreign public official or of another person, any gratification as an inducement or reward for, or otherwise on account of

1. the foreign public official using his position to influence any act or decision of the foreign state or public international organization for which the official performs any official duties;
2. the foreign public official performing, having done or forborne to do, or abstaining from performing or aiding in procuring, expediting, delaying, hindering or preventing the performance of, any of his official duties; or
3. the foreign public official aiding in procuring or preventing the granting of any contract for the benefit of any person commits an offence, notwithstanding that the foreign public official did not have the power right or opportunity so to do, show or forbear, or accepted the gratification without intending so to do, show or forbear, or did not in fact so do, show or forbear, or that the inducement or reward was not in relation to the scope of his official duties.

commits an offence, notwithstanding that the foreign public official did not have the power, right or opportunity so to do, show or forbear, or accepted the gratification without intending so to do, show or forbear, or did not in fact so do, show or forbear, or that the inducement or reward was not in relation to the scope of his official duties

* Note: **Foreign Public Official** is defined under **section 3 of MACCA** as follows:

- (a) any person who holds a legislative, executive, administrative or judicial office of a foreign country whether appointed or elected;
- (b) any person who exercises a public function for a foreign country, including a person employed by a board, commission, corporation, or other body or authority that is established to perform a duty or function on behalf of the foreign country; and
- (c) any person who is authorized by a **public international organization** to act on behalf of that organization.

188. In order to assist the prosecution in cases involving the above mentioned offences, the legislature has provided a compelling presumption that has to be invoked once the essential ingredients have been established by the prosecution (section 50 described above).

See references to *PP v Yuwaraj* [1969] 2 MLJ 89, *ibid* on the burden of proof for the accused to rebut the presumption on section 50 of MACCA.

189. There is no case law with regard to this section of MACCA, as this is a new legal provision which came into force on 1 January 2009. However, Malaysia is serious about implementing this provision by being actively involved in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions as an ad-hoc observer since 2010 and a Cabinet paper has been prepared by the MACC to seek the Cabinet's approval for the MACC to be a regular observer. In addition, Malaysia, through its Malaysian Anti-Corruption Academy (MACA), has conducted a joint MACC-OECD seminar on the bribery of foreign public officials from 27-29 June 2012.

190. Malaysia referred to Table 1 (Annex 1).

(b) Observations on the implementation of the article

191. The provision is implemented by section 22 of MACCA. The reviewing experts note that Malaysia's law includes both foreign public officials and officials of a public international organization.

192. Furthermore, the reviewing experts point out that due to the lack of precedence no review of the practical application of these measures was possible. The reviewing experts therefore propose that Malaysia should monitor the implementation of this provision.

Article 16 Bribery of foreign public officials and officials of public international organizations

Paragraph 2

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

(a) Summary of information relevant to reviewing the implementation of the article

193. Malaysian has cited the following domestic laws in relation to the implementation of the provision under review.

Section 22 of MACCA - Bribery of foreign public officials

Any person who by himself, or by or in conjunction with any other person gives promises or offers, or agrees to give or offer, to any foreign public official, or **being a foreign public official, solicits, accepts or obtains, or agrees to accept or attempts to obtain** whether for the benefit of that foreign public official or of another person, any gratification as an inducement or reward for, or otherwise on account of

- (a) the foreign public official using his position to influence any act or decision of the foreign state or public international organization for which the official performs any official duties;
- (b) the foreign public official performing, having done or forborne to do, or abstaining from performing or aiding in procuring, expediting, delaying, hindering or preventing the performance of, any of his official duties; or
- (c) the foreign public official aiding in procuring or preventing the granting of any contract for the benefit of any person commits an offence, notwithstanding that the foreign public official did

not have the power right or opportunity so to do, show or forbear, or accepted the gratification without intending so to do, show or forbear, or did not in fact so do, show or forbear, or that the inducement or reward was not in relation to the scope of his official duties.

commits an offence, notwithstanding that the foreign public official did not have the power, right or opportunity so to do, show or forbear, or accepted the gratification without intending so to do, show or forbear, or did not in fact so do, show or forbear, or that the inducement or reward was not in relation to the scope of his official duties

* Note: **Foreign Public Official** is defined under **section 3 of MACCA** as follows:

- (a) any person who holds a legislative, executive, administrative or judicial office of a foreign country whether appointed or elected;
- (b) any person who exercises a public function for a foreign country, including a person employed by a board, commission, corporation, or other body or authority that is established to perform a duty or function on behalf of the foreign country; and
- (c) any person who is authorized by a **public international organization** to act on behalf of that organization.

194. In order to assist the prosecution in cases involving the above mentioned offences, the legislature has provided a compelling presumption that has to be invoked once the essential ingredients have been established by the prosecution (section 50, described above).

195. There are no case examples for this section of MACCA, as it is a new legal provision which came into force on 1 January 2009.

196. Malaysia referred to Table 1 (Annex 1).

(b) Observations on the implementation of the article

197. The reviewing experts note that the provision is implemented by section 22 of MACCA. However, no cases have been investigated and prosecuted so far which would enable the review of the practical application of these measures.

198. The reviewing experts acknowledge that Malaysia has reported the need for technical assistance to reconcile this provision with Malaysia's obligations set out in the Diplomatic Privileges Act and the International Organizations Act.

199. The reviewing experts refer to the Legislative Guide, which provides that the provisions of article 16 do not affect any immunities that foreign public officials or officials of public international organizations may enjoy under international law. As the interpretative notes indicate: "The States Parties noted the relevance of immunities in this context and encourage public international organizations to waive such immunities in appropriate cases" (A/58/422/Add.1, para. 23; see also art. 30, para. 2, regarding immunities of national public officials).

(c) Challenges related to article 16

200. Malaysia has identified following challenges and issues in fully implementing the provision under review:

- 1. Inadequacy of existing normative measures (Constitution, laws, regulations, etc.);
- 2. Specificities in its legal system.

(d) Technical assistance needs related to article 16

201. Malaysia indicated that technical assistance is needed to reconcile this provision with Malaysia's obligation set out in the Diplomatic Privileges (Vienna Convention Act 1966) and International Organization (Privileges and Immunities) Act 1992 (Act 485). The following forms of technical assistance, if available, would assist it in better implementing the article under review:

1. Model legislation;
2. Legislative drafting.

Article 17 Embezzlement, misappropriation or other diversion of property by a public official

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

(a) Summary of information relevant to reviewing the implementation of the article

202. Malaysia indicated that there are provisions in MACCA and the Penal Code to reflect the spirit of article 17 of UNCAC. Provisions for cheating, intention to mislead, criminal breach of trust, misappropriation, theft, and forgery are some of the penal provisions embodied in its criminal jurisprudence.

203. Malaysia cited the following domestic laws in relation to implementation of article 17 of UNCAC:

Offences under MACCA:

Section 18 -Offence of intending to deceive principal by agent*

A person commits an offence if he gives to an agent, or being an agent he uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested, and which he has reason to believe contains any statement which is false or erroneous or defective in any particular, and is intended to mislead his principal.

*This Section is similar to section 11 (c) of the Anti-Corruption Act 1997(Act 575) and section 4 (c) of the Prevention of Corruption Act 1961 (Act 57)

23. Offence of using office or position for gratification

- (1) Any officer of a public body, who uses his office or position for any gratification, whether for himself, his relative or associate, commits an offence.
- (2) For the purposes of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for any gratification, whether for himself, his relative or associate, when he makes any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.
- (3) For the avoidance of doubt, it is declared that, for the purposes of subsection (1), any member of the administration of a State shall be deemed to use his office or position for gratification when he acts contrary to subsection 2(8) of the Eighth Schedule to the Federal Constitution or the equivalent provision in the Constitution or Laws of the Constitution of that State.
- (4) This section shall not apply to an officer who holds office in a public body as a representative of another public body which has the control or partial control over the first-mentioned public body in respect of any matter or thing done in his capacity as such representative for the interest or advantage of that other public body.

Offences under the Penal Code (Act 574) as follows:

Section 403-Dishonest misappropriation of movable property, or converting it to one's own use

Whoever dishonestly misappropriates, or converts to his own use, or causes any other person to dispose of, any property, shall be punished with imprisonment for a term which shall not be less than six months and not more than five years and with whipping and shall also be liable to fine.

Section 404 - Dishonest misappropriation of property possessed by a deceased person at time of his death

Whoever dishonestly misappropriates, or converts to his own use or causes any other person to dispose of property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment for a term which shall not be less than six months and not more than five years and with whipping, and shall also be liable to fine; and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment shall not be less than one year and not more than ten years and with whipping, and shall also be liable to fine.

Section 405- Criminal breach of trust

Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust.

Section 406 - Punishment of criminal breach of trust

Whoever commits criminal breach of trust shall be punished with imprisonment for a term which shall not be less than one year and not more than ten years and with whipping, and shall also be liable to fine.

Section 409 - Criminal breach of trust by public servant or agent

Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or an agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which shall not be less than two years and not more than twenty years and with whipping, and shall also be liable to fine.

Section 409A - Defence not available

It is no defence for any offence prescribed in sections 403, 404, 405, 406, 407, 408 and 409 to show that the property was openly appropriated or that the appropriation was duly recorded and entered in the books and accounts of any company or association or body of person whether incorporated or not.

It is worthwhile noting that there is a presumption in cases where there is a criminal breach of trust of public servants or agents wherein there is a **presumption of dishonest intention** as stated in the circumstances laid out in (a) and (b) sub (1) to (3) of section 409B. Please refer to the case of **Public Prosecutor v Hj Maamor bin Hj Abdul Manap [2002] 6 MLJ 668** where the trial judge held that in the absence of direct evidence to establish dishonest intention, the prosecution was entitled to rely the presumption of dishonest misappropriation as provided for in section 409 B. However such a presumption can only be raised when the prosecution proves that the accused had misappropriated the sums of money involved.

Section 409B - Presumption

- a. Where in any proceeding it is proved-
 - (a) for any offence prescribed in sections 403 and 404, that any person had misappropriated any property; or
 - (b) for any offence prescribed in sections 405, 406, 407, 408 and 409, that any person entrusted with property or with dominion over property had-
 - (i) misappropriated that property;
 - (ii) used or disposed of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract, express or implied which he had made touching the discharge of such trust; or
 - (iii) suffered any person to do any of the acts described in subparagraph (i) or (ii) above, it shall be presumed that he had acted dishonestly until the contrary is proved.
- b. The presumption under subsection (1) shall apply mutatis mutandis to the Offences prescribed in

sections 109 and 511 of the Code in relation to any of the offences referred to in that section.

204. It was explained that the word “whoever” covers both private individuals and public officials.

205. The offence of Criminal Breach of Trust (CBT) by a public servant or agent under section 409 serves to enhance the punishment for the offence if committed by public servants or agents. Agents would include agents in private institutions. The rationale is that the duties of public servants or agents involve an element of trust, and a breach of trust by such persons may often induce serious public and private harm.

206. The presumptions enacted under section 409B of the Penal Code assist the prosecution in establishing the offence of criminal breach of trust against a public servant or agent.

207. Malaysia furthermore cited sections 378, 417, 418, 420, 463, 465, 467, 468, 471, 472, 473, 474, 475, 476, 477 A of the Penal Code.

208. Malaysia provided the following examples of cases on the implementation of the provision.

209. **Section 18 of the MACCA***

*Section 11(c) of the Anti-Corruption Act 1997 (Act 575) or section 4(c) of the Prevention of Corruption Act 1961 (Act 57)

Sulfee bin Alias v Public Prosecutor [2006] 7 CLJ 375

The appellant herein was convicted by the Sessions Court Judge and sentenced to one year imprisonment and a fine of RM25,000 or in default six months imprisonment in respect of an offence under s. 11(c) of the Anti Corruption Act 1997 (the Act). The appellant was an administrative assistant with SMK Bako (the school) and was therefore an agent of the government of Malaysia. On 18 December 2000, at the Jabatan Akauntan Negara's office (JAN), he had certified on a Paramount Enterprises invoice (the said invoice) that the said company had supplied the 20 rolls of linoleum floor mat (the floor mats) when the same had not been supplied and had done so with knowledge of the falsity of the said certification and with the intention to deceive the government. The appellant, in appealing against conviction and sentence, contended that (a) the trial judge had erred in law and in fact when she failed to rule that the charge preferred against the appellant was incomplete, defective and bad in law; (b) the trial judge had misdirected herself on the issue of burden of proof in assessing the evidence of the prosecution's witnesses; (c) the trial judge concluded that a prima facie case was made out by the prosecution which was riddled with infirmities, uncertainties and material contradiction which gave rise to gaps in the prosecution's case; (d) that the trial judge had wrongly allowed evidence of conversations between PW2 and PW11 to be admitted when such evidence was hearsay; (e) the trial judge wrongly admitted exh. P18 as evidence; (f) the trial judge erred in law and in fact when she made findings that the appellant had the intention to deceive his principal from his conduct; (g) the trial judge made a wrong finding on the cheque exh. P8 by commenting on the giving of the cheque to the appellant by PW2 as giving rise to sufficient credible evidence against the appellant when there was no evidence to show that the appellant cashed the cheque; (h) the trial judge erred in law in her application of s. 73 Evidence Act 1950 in comparing the appellant's signature in exh. P7 and exh. P15; (i) that since the respondent was relying on s. 73 of the Evidence Act 1950 the same provision applied as far as PW11's signature on LPO No. 713280; (j) the trial judge had misdirected herself on the appellant's defence

which was an unsworn statement from the dock and (k) that there was irregularity in the trial in calling PW11. The issues that arose were (i) whether there were merits in the grounds of appeal submitted and (ii) whether this court should interfere with the sentence imposed by trial judge.

The trial judge affirmed the finding of guilt, conviction and sentence.

210. Voon Ah Shoon v Public Prosecutor [1979] 2 MLJ 131

The appellant in this case was an Administrative Assistant in the Education Department, Sarawak. He was in charge of tenders and supplies. On July 1, 1971 the department issued purchase orders for the supply of articles to a college. Before the said equipment had been supplied, the appellant instructed the firm's proprietor to submit bills in respect of the said equipment. On December 13, 1971 the appellant, though knowing that the equipment had not been received by the college certified the receipts on both the local purchase orders to the effect that the articles in the local purchase orders had been handed to him in good condition. After certifying the said orders, the appellant handed them to the accounts clerk in his department for payment of the equipment allegedly received by him. On December 20, 1971 the said proprietor received payment for the said equipment alleged to have been supplied to the college. The appellant was charged and convicted for having committed an offence under section 4(c) of the Prevention of Corruption Act, 1961. His appeal was dismissed.

211. Chandrasekaran & Ors v Public Prosecutor [1971] 1 MLJ 153

[1] One Chandrasekaran, a checking clerk attached to the Accountant-Generals Department was convicted on two charges of knowingly using as genuine forgeries of two treasury vouchers to the value of \$ 207,630 in contravention of section 4(c) of the Prevention of Corruption Act, 1961 and sentenced to 3 years imprisonment and fined \$ 2,000. The evidence established that the said vouchers had been forged. He has not appealed. The appellants, both police officers attached to the Special Branch, were charged and convicted of abetting Chandrasekaran under section 4(c) read with section 11(a) of the Act. The first appellant was sentenced to 2 years imprisonment and fined \$ 2,000 while the second appellant was sentenced to 2 years plus a fine of \$ 2,000. If they are guilty then I must say that their conduct was iniquitous in the highest degree, deserving the strongest condemnation by every man in this country, for it is essential to the welfare of society that policemen should uphold the law rather than break it when corrupted by greed. A fourth person P.W. 55 was also charged for abetment but the court allowed him to give evidence for the prosecution under section 19 of the Act and at the end of the case he was given a certificate of indemnity.

[2] This case discloses a conspiracy which was carefully planned, deliberately and boldly carried out. Undoubtedly a number of others were concerned in the conspiracy and the modus operandi clearly indicates that they were assured of co-operation from Chandrasekaran in the Accountant-Generals Department.

[3] The gist of the prosecution case against Chandrasekaran was this. Two forged treasury vouchers, purportedly emanating from the trade division of the Ministry of Commerce and Industry for the purchase of insecticide worth \$ 111,889.50 and \$ 95,740.50 from Messrs. Kee Cheong of No. 43A, Kampong Dollah, Kuala Lumpur, together with forged supporting documents, were presented to the Accountant-Generals Department for payment. Chandrasekaran was the only clerk concerned with the detailed checking and he approved them. It is quite clear that, but for Chandrasekaran's connivance in the fraud, the two vouchers could not possibly have been approved. Chandrasekaran's conduct provides ample evidence of his guilt, for it cannot be reconciled with his

innocence. I am thus perfectly satisfied that he had been rightly convicted.

Section 405 r/w Section 406 Penal Code (Criminal Breach of Trust)

212. Datuk Haji Harun bin Haji Idris & Ors v Public Prosecutor [1978] 1 MLJ 240

Section 409 Penal Code (Criminal Breach of Trust by Public Servant or agent)

213. This provision imposes liability on public servants or agents who commit criminal breach of trust of property over which they have entrustment or dominion. There must be proof of dishonest intention of wrongful retention of the property.

214. Tan Tek Seng v Public Prosecutor [1990] 3 CLJ 196

The appellant was charged with 2 counts of criminal breach of trust under s. 409 of the Penal Code. The breach of trust related to his position as the headmaster of a primary school; the monies misappropriated being the unpaid salary of the school gardener who had failed to report for work for several months. The appellant was charged and sentenced and is now appealing against that conviction and sentence. Held:

[1] The prosecution, in establishing criminal breach of trust, is not obliged to prove the precise mode of conversion, misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion.

[2] The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted, if proved, may in the light of other circumstances, justifiably lend to an inference of dishonest misappropriation or conversion.

[3] Conviction of a person for the offence of criminal breach of trust may be proved where the person concerned is unable to account or renders an explanation for his failure to account which is untrue. In such circumstances, an inference of misappropriation with dishonest intent may readily be made.

[4] It is clear on the facts of this case that the prosecution had established a prima facie case against the appellant.

[5] On the facts of this case, there was not much criminality in the appellant's action and the offences were committed under extenuating circumstances. It is a borderline case suitable for the exercise of s. 173A of the Criminal Procedure Code - see *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 56.

215. Public Prosecutor v Vijaya Raj [1981] 1 MLJ 43

This is an appeal against the decision of the lower court in acquitting the respondent, a former headmaster of three charges of misappropriation of school funds. The respondent's duty as ex officio Secretary to the Board of managers of the school was to maintain account books, collect moneys and issue cheques on behalf of the school. With the implicit trust of the chairman of the Board, he had complete control over the financial affairs of the school. As regards the first two charges, it was proved by the prosecution that the respondent had issued two cheques for \$ 127.77 and \$ 225.00 respectively unaccompanied by any voucher. The cheques for \$ 127.77 was paid to Wearne Brothers as monthly instalments towards the hire-purchase of his wife car. A third cheque for the sum of \$ 1,964.00 filled up in the respondent's own handwriting and endorsed by the chairman constituted the subject matter of the third charge. The respondent was acquitted on the first two charges at the close of the prosecution case on July 15, 1978. Defence was called in respect of the third charge only, on which he was finally acquitted on November 6, 1978. The appellant filed an appeal on November 14, 1978 on all the charges. Held:

- (1) the discretion for intervention would only be proper on an application by the person debarred from appealing. As no such applications had been made in this case, the court could not overlook the strict formalities and requirements laid down under section 307(1) (ix) of the Criminal Procedure Code. Both appeals were therefore incompetent;
- (2) on the whole, the learned President in this case had failed to take proper consideration of facts which were immensely material towards the determination of the respondent's intention and consequently, the prosecution's case. Had he weighed the evidence he would have arrived at a different conclusion entirely;
- (3) it is the duty of the court on appeal to review all evidence presented before the lower court and, if it feels that certain material facts have been missed or improperly considered by the presiding President or magistrate, then it should not hesitate from performing its duty as a judge of facts to consider and weigh those facts and decide whether those facts could have altered their judgment in one way or other;
- (4) the order of acquittal in respect of the third charge should be set aside and substituted with that of conviction.

216. Public Prosecutor v Hj Maamor bin Hj Abdul Manap [2002] 6 MLJ 668

In the absence of any direct evidence to establish a dishonest intention, the prosecution was entitled to rely on s 409B of the Penal Code to raise the presumption of dishonest misappropriation. However, before the presumption can be activated, the prosecution must first prove that the accused had misappropriated the sums of money involved. In the instant case, there was no evidence of this ingredient. Accordingly, the presumption invoked by the learned sessions court judge under s 409B to show that the misappropriation was dishonest cannot be sustained (see p 678D, H-I).

217. Gnanasegaran Pararajasingam v Public Prosecutor [1997] 3 MLJ 1

(Per Mahadev Shankar JCA) The appellants submission that the clients money lost its identity when it merged with money already in the client account, and thus the complainant could be paid with money from any number of client accounts was fallacious. The Solicitors Account Rules 1978 r 3(2) permits a solicitor to maintain more than one clients account, but r 7(a) (i) permits the withdrawal of a clients money for the payment to or on behalf of the client. Hence, any money put into the account could only be withdrawn to pay the complainants or to their order. To use the clients money to settle a solicitors liability to some other client is a criminal offence (see pp 15D -E, I and 16A).

218. Malaysia also referred to a ruling with a contrasting argumentation.

Public Prosecutor v Hussin Mohd Rejab [1994] 3 CLJ 93

The respondent, the Chairman of a company, was charged under s. 409 of the Penal Code in the Sessions Court. At the end of the prosecution's case the learned Sessions Court Judge, after holding that the prerequisites of entrustment and dishonest intention had not been satisfactorily made out, acquitted and discharged the respondent. The prosecution appealed, contending that the learned Sessions Court Judge's finding was wrong as evidence of entrustment could be found in the evidence of several witnesses. Held:

[1] Unless the contrary is shown, the proper authority having control over a company's assets, including cash, is the Board of Directors and not any one Director in his individual capacity. A Manager of a firm cannot be liable for breach of trust where there is no personal entrustment to him.

[2] While the Court was satisfied that there was some degree of interference or influence exercised by the respondent over his staff, the evidence did not necessarily imply the element of entrustment. Based on the evidence adduced it was difficult to come to a

definite conclusion as to who was actually in charge of the financial aspect of the company.

[3] Looking at the recorded evidence on dishonest intention, it would appear that no conclusive finding can be drawn from the witnesses and in the circumstances it was quite proper for the learned Sessions Court Judge to find, as he did, that the money advanced to the respondent was in the nature of a loan.

I now turn to the next issue on dishonest intention. To prove s. 409, the prosecution must not only prove entrustment but it must also show that the respondent had committed breach of trust in respect of the property so entrusted. Criminal Breach of Trust as defined under s. 405 requires the prosecution to prove dishonest misappropriation, conversion or disposal of property. The learned Sessions Court Judge found that the money was requested by the respondent as an advance or a loan and that he had done so openly and in keeping with the normal procedure. As against this, the prosecution argued that there was no such provision for a loan. I have looked at recorded evidence on this issue and it would appear that no conclusive finding can be drawn from the witnesses. Some of whom seem to think that he could not, others were not sure and PW6 seems to think that the respondent could do so as Pasaraya Baitulmal Sendirian Berhad is related to Baituimal Wilayah Persekutuan. The documentary evidence was of no assistance. In such circumstances it was proper for the learned Sessions Court Judge to find, as he did, that the money was in the nature of a loan. The question that may be asked is whether an advance is a loan. In *Lincolnshire Sugar Co. Ltd v. Smart* [1937] AC 697, Lord Macmillan said:

I agree that the word "advance" is ambiguous and may either refer to prepayments of what will become due in future or be a polite euphemism for loans. Again in *Bronester Ltd v. Priddle* [1961] 3 All ER 471 Lord Justice Holroyd Pearce held that: When someone says: "I am going to make you an advance", I think they are saying: "We will let you have it as a loan or on an implied understanding that if the event does not occur which makes it legally payable, we must have it back. A loan creates a debt and failure to pay a debt is not Criminal Breach of Trust. *Satyabrata Bhattacharya* 1976 Cr. L.J. 446.

I am aware that the respondent had used his official position to cause the money to be paid to him and there is a possibility of an offence under the Emergency Essential Powers Ordinance having been committed, but the mere conduct of the respondent in influencing his officers into making the payment of an "advance" to him is not necessarily a criminal breach of trust. The learned Sessions Court Judge had arrived at the conclusion that the respondent was not acting dishonestly after hearing the evidence of several prosecution witnesses. It is an inference drawn from findings of fact to which I find insufficient reason to interfere with.

219. *Mohamed Abdullah And Swee Kang v PP* [1988] 1 MLJ 167

Malaysia also cited parts of the above mentioned case. It is described in more detail under article 30, paragraph 1 of the Convention.

220. Malaysia referred to Table 1 (Annex 1) for statistics on implementation.

(b) Observations on the implementation of the article

221. In regard to sections 18 and 23 of MACCA, the reviewing experts are of the opinion that these sections might be construed to allow the prosecution of some cases of embezzlement and misappropriation. No case examples have been provided in regard to section 23 of MACCA that would allow a more detailed review of the possibilities to use this provision for cases of embezzlement or misappropriation.

222. The reviewing experts consider section 409 of the Penal Code on criminal breach of trust by a public servant or agent the most relevant provision for the implementation of article 17 of the Convention. Section 409 covers the acts of dishonest misappropriation, conversion to one’s own use, dishonest use, or disposal of property.

223. During the country visit Malaysia provided the following statistics on the implementation of sections 403, 405 and 409 of the Penal Code.

Investigation of cases under sections 403, 405 and 409 of the Penal Code												
Year	Investigation			Arrest			Charge			Conviction		
Section	403	405	409	403	405	409	403	405	409	403	405	409
2010	0	3	15	0	0	8	0	0	5	0	0	0
2011	0	1	22	2	0	5	1	0	1	0	0	1
2012	0	1	8	2	0	3	2	0	4	0	0	0
Total	0	5	45	4	0	16	3	0	10	0	0	1

224. Article 17 of the Convention requires that property, public or private funds, or securities or any other thing of value should be covered. Malaysia explained that property in regard to the Penal Code would include movable as well as immovable property, funds, rights and also securities. The reviewing experts are satisfied with this explanation.

225. In regard to the term public servant, it was discussed if this would satisfy the requirements of article 2 of the Convention. Sections 21 (h) and (i) of the Penal Code extend to a wide array of persons and include for example “every officer in the service in the pay of Government, or remunerated by fees or commission for the performance of any public duty”. Malaysia explained that this would include appointed as well as elected officers. The reviewing experts questioned if persons who work for a public enterprise and persons who perform a public function or service without remuneration were covered by the definition of section 21 of the Penal Code.

226. In this discussion, Malaysia stressed that section 409 of the Penal Code was also applicable to “agents” and that officers who work for a government entity could either be covered by the definition in section 21 or under the term agent.

Section 402 A of the Penal Code “agent” includes “any corporation or other person acting or having been acting or desirous or intending to act for or on behalf of any company or other person whether as agent, partner, coowner, clerk, servant, employee, banker, broker, auctioneer, architect, clerk of works, engineer, advocate and solicitor, accountant, auditor, surveyor, buyer, salesman, trustee executor, administrator, liquidator, trustee within the meaning of any Act relating to trusteeship or bankruptcy, receiver, director, manager or other officer of any company, club, partnership or association or in any other capacity either alone or jointly with any other person and whether in his own name or in the name of his principal or not;”

227. Furthermore, Malaysia explained that the specific tasks defined in section 21 of the Penal Code were also covered when conducted without pay. As sections 18 and 23 of MACCA could also be used for the pursuit of relevant cases, Malaysia stressed that there were no gaps that would limit the application below the standard of article 2 of the Convention.

228. The reviewing experts acknowledge this explanation and came to the conclusion that in its totality the various sections of the Penal Code and MACCA would implement the provision.

229. However, in light of the abovementioned discussion, the reviewing experts advise Malaysia to monitor the implementation of article 17 of UNCAC with the objective to assess: a) if the definition of public servant would allow the investigation and prosecution of all relevant cases of embezzlement, misappropriation and diversion and b) the operational value of MACCA provisions in such cases. Considering the numerous separate provisions, Malaysia may even wish to integrate a consolidated offence into MACCA.

Article 18 Trading in influence

Subparagraph (a)

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;

(a) Summary of information relevant to reviewing the implementation of the article

230. Malaysia reported that MACCA has provisions that could be construed to reflect articles 18 (a) and (b) of UNCAC. However, sections 161 to 165 and 214 of the Penal Code are more reflective of article 18 (a) of UNCAC if considered in conjunction with abetment.

231. Malaysia referred to the following domestic laws in relation to implementation of subparagraph (a) of article 18 UNCAC:

Section 16 subsection (b) (A) and (B), section 17 subsection (b), and section 21 in conjunction with the definitions of section 3 of MACCA. (See above).

232. Abetment of an offence punishable with imprisonment under section 116* and section 164** of the Penal Code should be considered in the context of the provisions of sections 161, 162, 163 and 165 of the Penal Code as it reflects the provisions of subparagraph (a) of article 18.

***Section 116 - Abetment of an offence punishable with imprisonment**

Whoever abets an offence punishable with imprisonment shall, if that offence is not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment for a term which may extend to one-fourth part of the longest term provided for that offence or with such fine as is provided for that offence or with both; and if the abettor or the person abetted is a public servant, whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment for a term which may extend to one-half of the longest term provided for that offence or with such fine as is provided for the offence or with both.

ILLUSTRATIONS

- (a) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B refuses to accept the bribe. A is punishable under this section.
- (b) A instigates B to give false evidence. Here, if B does not give false evidence, A has nevertheless

committed the offence defined in this section, and is punishable accordingly.

(c) A, a police officer, whose duty it is to prevent robbery, abets the commission of robbery. Here, though the robbery is not committed, A is liable to one-half of the longest term of imprisonment provided for that offence, and also to fine.

(d) B abets the commission of a robbery by A, a police officer, whose duty it is to prevent that offence. Here, though the robbery is not committed, B is liable to one-half of the longest term of imprisonment provided for the offence of robbery, and also to fine.

****Section 164 - Punishment for abetment by public servant of the offences above defined**

Whoever, being a public servant, in respect of whom either of the offences defined in sections 162 and 163 is committed, abets the offence, shall be punished with imprisonment for a term which may extend to three years or with fine or with both.

ILLUSTRATION

A, is a public servant. B, A's wife, receives a present as a motive for soliciting A to give an office to a particular person. A abets her doing so. B is punishable with imprisonment for a term not exceeding one year, or with fine, or with both. A is punishable with imprisonment for a term which may extend to three years or with fine or with both.

Section 161 of the Penal Code (Act 574) - Public servant taking a gratification, other than legal remuneration, in respect of an official act

Whoever, being or expecting to be a public servant, accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, other than legal remuneration, as a motive or reward for doing or forbearing to do any official act, or for showing or forbearing to show, in the exercise of his official functions, favour or disfavour to any person, or for rendering or attempting to render any service or disservice to any person, with the Government, or with any member of the Cabinet or of Parliament or of a State Executive Council or Legislative Assembly, or with any public servant, as such, shall be punished with imprisonment for a term which may extend to three years or with fine or with both.

Section 162 of the Penal Code (Act 574) - Taking a gratification in order, by corrupt or illegal means, to influence a public servant

Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by corrupt or illegal means, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Government, or with any member of the Cabinet or of Parliament or of a State Executive Council or Legislative Assembly, or with any public servant, as such, shall be punished with imprisonment for a term which may extend to three years or with fine or with both.

Section 163 of the Penal Code (Act 574) - Taking a gratification, for the exercise of personal influence with a public servant

Whoever accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gratification whatever, as a motive or reward for inducing, by the exercise of personal influence, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Government, or with any member of the Cabinet or of Parliament or of a State Executive Council or Legislative Assembly, or with any public servant, as such, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.

Section 165 of the Penal Code (Act 574) - Public servant obtaining any valuable thing, without consideration, from person concerned in any proceeding or business transacted by such public servant.

Whoever, being a public servant, **accepts or obtains, or agrees to accept or attempts to obtain,** for himself or for any other person, any valuable thing, without consideration, or for a consideration which he knows to be inadequate from any person whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted, or about to be transacted, by such public servant, or having any connection with the official functions of himself or of any public servant to whom he is subordinate, or from any person whom he knows to be interested in or related to the person so concerned, shall be punished with imprisonment for a term which may extend to two years, or with fine, or with both.

Section 214 of the Penal Code (Act 574) - Offering gift or restoration of property in consideration of screening offender

Whoever gives or causes, or offers or agrees to give or cause, any gratification to any person, or to restore or cause the restoration of any property to any person, in consideration of that person's concealing an offence, or of his screening any person against any person for the purpose of bringing him to legal punishment, shall, if the offence is punishable with death be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine; and if the offence is punishable with imprisonment for life, or with imprisonment which may extend to ten years, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment not extending to ten years, shall be punished with imprisonment for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence or with fine or with both.

Abetment of section 137 of the Customs Act 1967 (Act 235) Penalty for offering or receiving bribes

(1) If any officer of customs or other person duly employed for the prevention of smuggling-

(a) makes any collusive seizure or delivers up or makes any agreement to deliver up or not to seize any vessel or aircraft or other means of conveyance, or any goods liable to seizure;

(b) accepts, agrees to accept, or attempts to obtain, any bribe, gratuity, recompense or reward for the neglect or non-performance of his duty; or

(c) conspires or connives with any person to import or export or is in any way concerned in the importation or exportation of any goods liable to customs duties or any goods prohibited to be imported or exported for the purpose of seizing any vessel, aircraft or conveyance or any goods and obtaining any reward for such seizure or otherwise, every such officer so offending shall be guilty of an offence against this Act and shall, on conviction, be liable to imprisonment for a term not exceeding *five years or to a fine not exceeding *ten thousand ringgit or to both such imprisonment and fine, and shall be interdicted from holding office in the public service of the Federal Government or the Government of any State, and every person who gives or offers or promises to give or procures to be given any bribes, gratuity, recompense or reward to, or makes any collusive agreement with, any such officer or person as aforesaid to induce him in any way to neglect his duty or to do, conceal or connive at any act whereby any of the provisions of any other law relating to imports or to exports may be evaded, shall be guilty as an abettor and so punishable under this Act.

233. Malaysia provided examples of cases on the implementation of the provision. The case law referred to below was decided prior to the enactment of MACCA. The case law made reference to the Prevention of Corruption Act 1961 (Act 57) and the Anti-Corruption Act 1997 (Act 575). Both these Acts contain similar provisions as regards the requirements of article 15(a) of the Convention and sections 16 (b), 17 (b) and 21 of MACCA. The term “gratification” under the Prevention of Corruption Act 1961 and the Anti-Corruption Act 1997 are almost identical with the definition of gratification under section 3 of the Malaysian Anti-Corruption Act 2009.

Section 16 (b) (B) of MACCA⁶

234. Poh Kim Yong v Public Prosecutor [2009] 1 LNS 1533

In this case, the Appellant had been charged in the Sessions Court for an offence under s. 10 (b) (bb) of the Anti-Corruption Act 1997 (hereinafter referred to as the Act). The learned Sessions Court Judge had found him guilty on the grounds that there was a prima facie case when the Appellant had given RM6000 to the police; and that the money was given as a bribe; and that the bribe was for the purpose of releasing two persons in police custody. The learned Sessions Court Judge referred to s. 42 (1) of the Act, which imposes a presumption on the Appellant that he had given a bribe unless proven otherwise by the Appellant on a balance of probabilities.

Section 17 (b) of MACCA⁷

⁶ Section 10 (b)(bb) of the Anti-Corruption Act 1997 (Act 575) or Section 3 (b) (ii) of the Prevention of Corruption Act 1961(Act 57).

235. Public Prosecutor v Chia Yong Hee [1997] 2CLJ Supp 263

The respondent had wanted to change the by-laws of a certain registered society and submitted an application therefor to PW1, an officer attached to the Department of the Registration of Societies, Malaysia. The respondent then informed PW1 that he was also sending, together with the application, RM200 in cash. PW1 reported the matter to the Anti Corruption Agency (the ACA), and at the latter's behest made a telephone call to the respondent asking the respondent as to what the RM200 was for. The respondent told PW1 that the money was "untuk budak-budak". This conversation was recorded on tape by the ACA. The respondent was charged with an offence under s. 4(b) Prevention of Corruption Act 1961. At the trial, the prosecution sought to tender the tape that recorded the conversation aforesaid, but it was ruled inadmissible by the learned Sessions Judge. The prosecution then tendered an amended charge wherefore a charge under s. 165 Penal Code read with s. 116 thereof was preferred against the respondent. The learned Judge, however, acquitted the respondent without calling for his defence.

236. Kee Yiik Kwok v Public Prosecutor [2005] 1LNS 75

The appellant was convicted in the Sessions Court at Miri on an amended charge that reads:- "That you on 27th July 1998 at about 11.25am at King Ming Enterprise Lot 387 Jalan Pujut Padang Kerbau in the District of Miri in the Miri Division in the State of Sarawak did corruptly give to an agent of the Government of Malaysia namely INSPECTOR 1317 SAHARAM BIN IBRAHIM attached to Battalion Ke-12 Pasukan Gerakan Am Miri a gratification to wit cash RM3000.00 as inducement for forbearing to do an act in relation to his principal's affairs to wit to refrain from taking action against Endri Sisiwanto and Siti Komariah who were alleged to have committed offences under section 39(b) Immigration Rules 1963, Nurul Khoiriyah who was alleged to have committed an offence under section 15(c) Immigration Act 1959/63 and yourself who was alleged to have committed an offence under section 55 B (1) Immigration Act 1959/63 and that you have committed an offence under section 11(b) Anti-Corruption Act 1997 and punishable under section 16 of the same Act (Laws of Malaysia Act 575)".

237. Public Prosecutor v You Kong Lai [1985] 1 MLJ 298

In this case the facts alleged by the prosecution were that the licence of a night club had been cancelled and the Board of Directors of the Club made every effort to get the licence renewed. Direct approaches by them to the authorities were of no avail. The accused informed one of the directors that he could help in the matter. Accused told the director that the District Officer wanted \$ 30,000/-. After some bargaining the amount was lowered to \$ 25,000/- and the accused was given \$ 15,000/- in cash and a post-dated cheque for \$ 10,000/-. The accused then purported to get in touch with the District Officer and subsequently the licence was renewed. The District Officer who gave evidence for the prosecution said he did not know the directors of the night club and he was not asked whether he knew the accused. There was therefore no evidence to show that the District Officer was in any way involved with the activities of the accused. The District Officer had renewed the licence, as the police authorities, to whom an appeal had been made by the club, had informed him that they had no objections to the renewal of the licence. The post-dated cheque was paid into the accused's bank account. The accused was charged under section 3(a) (ii) of the Prevention of Corruption Act, 1961. At the end of the

⁷ Section 11 (b) of the Anti-Corruption Act 1997 (Act 575) or Section 4(b) of the Prevention of Corruption Act 1961 (Act 57).

prosecution case the learned President of the Sessions Court acquitted the accused on the ground that the prosecution had failed to prove that the District Officer had in fact been induced to renew the licence by reason of the corrupt payment. The Public Prosecutor appealed. Held:

(1) upon a proper construction of section 3(a) (ii) of the Prevention of Corruption Act as applied to the facts of this case it was not necessary for the prosecution to prove that the District Officer was in fact induced to renew the licences by reason of the payment of the gratification;

(2) the evidence led by the prosecution in this case went to show not only that the accused solicited the payments in question but also that he actually received the moneys. There was therefore some evidence on each essential element of the offence and the defence should have been called;

(3) the prosecution evidence if unrebutted can only lead to the conclusion that the accused was acting in complicity with somebody in the District Office, not necessarily the District Officer against whom there was no evidence on the record;

(4) in view of the unsatisfactory manner in which the records were kept in this case, a re-trial should be ordered before another President of the Sessions Court.

238. Ng Kok Lian & Anor V Public [1983] 2 MLJ 379

In this case the appellants had been convicted for the offence of giving a bribe to a public officer this case the appellant appealed against his conviction of offences of taking gratifications as a public servant in contravention of section 161 of the Penal Code. It was alleged that the. Their appeal to the High Court was dismissed. Leave was given to refer the following questions for the determination of the Federal Court: -

(1) Whether a witness alleging that he had been given gratification by the accused is, prima facie, an accomplice?

(2) If the answer to question (1) above is in the positive, whether there is a duty on the part of the trial court to determine whether having regard to the circumstances of the case, such a witness is or is not an accomplice?

Held: The answer to question No. (1) is in the negative and there was therefore no need to deal with question (2). Thus in every case when the issue is raised that a witness is an accomplice the court must study the evidence and make the necessary finding. There can be no rule of law or evidence that a witness is automatically an accomplice just because of his actus reus.

239. In regard to section 161 Penal Code Malaysia cited the case of Rauf bin Haji Ahmad v Public Prosecutor [1950]1MLJ 190 ease refer to for further information on this case).

240. Malaysia referred to Table 1 (Annex 1).

(b) Observations on the implementation of the article

241. Malaysia has considered criminalizing trading in influence.

242. The reviewing experts acknowledge the explanations of Malaysia that it might be possible to cover some cases of trading in influence through the general bribery provisions of section 16 (b) of MACCA or regulations on abetment of the passive trading in influence offence. However, the experts are of the opinion that the notion of trading in influence is not distinctly reflected and noted that there were no case examples on active

trading in influence. Malaysia may wish to consider criminalizing active trading in influence more distinctly to provide for greater legal certainty in these cases.

Article 18 Trading in influence

Subparagraph (b)

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.

(a) Summary of information relevant to reviewing the implementation of the article

243. Malaysia cited the following domestic laws in relation to the implementation of subparagraph (b) of article 18 of UNCAC.

Section 16 (a) (A) and (B), 17 (a), 21 and 3 of MACCA. See above.

Section 161, 162, and 165 of the Penal Code (Act 574). See above.

Section 163 of the Penal Code (Act 574) - Taking a gratification, for the exercise of personal influence with a public servant

Whoever **accepts or obtains, or agrees to accept or attempts to obtain**, from any person, for himself or for any other person, any gratification whatever, as a motive or reward **for inducing, by the exercise of personal influence**, any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person, or to render or attempt to render any service or disservice to any person with the Government, or with any member of the Cabinet or of Parliament or of a State Executive Council or Legislative Assembly, or with any public servant, as such, shall be punished with imprisonment for a term which may extend to one year or with fine or with both.

Section 213 of the Penal Code (Act 574) - Taking gifts, etc., to screen an offender from punishment

Section 215 of the Penal Code (Act 574). See above.

Section 137 of the Customs Act 1967 (Act 235). See above.

244. Malaysia provided the following examples of cases on the implementation of the provision.

Section 165 Penal Code (Act 574)

245. Mohamed Ramly Bin Haji Rasip v Public Prosecutor [1941] 1 MLJ 31, Sergeant Rajendran S Balakrishnan v. PP [2011] 1 LNS 6, Zaini Nyak Othman v Public Prosecutor [1999] 4 CLJ 765, and Public Prosecutor v Rosman Abdul Wahab [2006] 4 CLJ 615

Section 17 (a) of MACCA⁸

246. Public Prosecutor v Md Noor bin Hamid [2004] 5 MLJ 97

Please see description of the case above under article 15 (b) of the Convention.

⁸ Section 11(a) of the Anti-Corruption Act 1997 (Act 575) or Section 4(a) of the Prevention of Corruption Act 1961 (Act 57).

247. Rosli Mahat v Public Prosecutor [2002] 1 LNS 116

248. Sergeant Rajendran S Balakrishnan v. Public Prosecutor [2011] 1 LNS 6 , Ibid.

Section 16 (a) (B) of MACCA⁹

249. Rosli Mahat v Public Prosecutor [2002] 1 LNS 116, Ibid.

250. Public Prosecutor v Noordin Abu Bakar [2008] 8 CLJ 504 and PP v Jamil Mahmod & Anor [1998] 4 MLJ 681

251. Public Prosecutor v You Kong Lai [1985] 1 MLJ 298

In this case the facts alleged by the prosecution were that the licence of a night club had been cancelled and the Board of Directors of the Club made every effort to get the licence renewed. Direct approaches by them to the authorities were of no avail. The accused informed one of the directors that he could help in the matter. Accused told the director that the District Officer wanted \$ 30,000/-. After some bargaining the amount was lowered to \$ 25,000/-and the accused was given \$ 15,000/- in cash and a post-dated cheque for \$ 10,000/-. The accused then purported to get in touch with the District Officer and subsequently the licence was renewed. The District Officer who gave evidence for the prosecution said he did not know the directors of the night club and he was not asked whether he knew the accused. There was therefore no evidence to show that the District Officer was in any way involved with the activities of the accused. The District Officer had renewed the licence, as the police authorities, to whom an appeal had been made by the club, had informed him that they had no objections to the renewal of the licence. The post-dated cheque was paid into the accused's bank account. The accused was charged under section 3(a) (ii) of the Prevention of Corruption Act, 1961. At the end of the prosecution case the learned President of the Sessions Court acquitted the accused on the ground that the prosecution had failed to prove that the District Officer had in fact been induced to renew the licence by reason of the corrupt payment. The Public Prosecutor appealed. Held:

(1) upon a proper construction of section 3(a) (ii) of the Prevention of Corruption Act as applied to the facts of this case it was not necessary for the prosecution to prove that the District Officer was in fact induced to renew the licences by reason of the payment of the gratification;

(2) the evidence led by the prosecution in this case went to show not only that the accused solicited the payments in question but also that he actually received the moneys. There was therefore some evidence on each essential element of the offence and the defence should have been called;

(3) the prosecution evidence if unrebutted can only lead to the conclusion that the accused was acting in complicity with somebody in the District Office, not necessarily the District Officer against whom there was no evidence on the record; in view of the unsatisfactory manner in which the records were kept in this case, a re-trial should be ordered before another President of the Sessions Court.

252. Malaysia referred to Table 1 (Annex 1).

⁹ Section 10 (a) (bb) of the Anti-Corruption Act 1997 (Act 575) or Section 3 (a) (ii) of the Prevention of Corruption Act 1961 (Act 57).

(b) Observations on the implementation of the article

253. The reviewing experts are of the opinion that Malaysia has considered criminalizing trading in influence.
254. Section 163 of the Penal Code implements passive trading in influence in cases of personal influence. The aspect of supposed influence is not touched upon and could pose a challenge. Section 163 does not only apply to public officials but to every person.
255. The influence must be exercised with a view to obtaining an undue advantage from an administration or public authority of the State party. Section 163 provides that the influence must be exercised to induce any public servant to do or to forbear to do any official act, or in the exercise of the official functions of such public servant to show favour or disfavour to any person. The experts are of the opinion that this definition might be more restrictive than article 18 (b) of the Convention.
256. Against this backdrop, Malaysia elaborated that also sections 16 (a) and 17 (a) of MACCA could be construed to allow for the prosecution of trading in influence cases and pointed out the case of Public Prosecutor v You Kong Lai [1985] 1 MLJ 298. The aspect of supposed influence could be covered through the application of section 19 of MACCA. The reviewing experts are satisfied with this explanation.

Article 19 Abuse of Functions

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

(a) Summary of information relevant to reviewing the implementation of the article

257. Malaysia cited section 23 of MACCA in regard to the implementation of article 19 of UNCAC. Even though the phrase “abuse of functions or positions” is not addressed in section 23, the phrase “using office or positions for gratification” reflects the spirit of article 19 of UNCAC.

MACCA Section 23 - Offence of using office or position for gratification which states as follows:

- (1) Any officer of a public body who uses his office or position for any gratification whether for himself, his relative or associate, commits an offence.
- (2) For the purposes of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for gratification whether, for himself, his relative or associate, when he makes any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.
- (3) For the avoidance of doubt, it is declared that, for the purposes of subsection (1), any member of the administration of a State shall be deemed to use his office or position for gratification when he acts contrary to subsection 2(8) of the Eighth Schedule to the Federal Constitution or the equivalent provision in the Constitution or Laws of the Constitution of that State.
- (4) This section shall not apply to an officer who holds office in a public body as a representative of another public body which has the control or partial control over the first-mentioned public body in respect of any matter or thing done in his capacity as such representative for the interest or advantage of that other public body.

258. A similar provision as the offence under section 23 of MACCA was included in section 15 of the Anti-Corruption Act 1997 (Act 575).

259. There is a presumption under section 23 (2) MACCA, which reads as follows:

“(2) For the purposes of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for gratification whether, for himself, his relative or associate, when he makes any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.”

260. The effect of this compelling presumption is that, once the prosecution has established the essential elements, that the accused is an officer of a public body who has made a decision or taken any action in relation to any matter in which the said officer, or any relative or associate of his, has an interest, whether directly or indirectly, then the accused bears the burden of rebutting the presumption that he has used his office or position for any gratification, whether for himself, his relative or associate.

261. Further, reference is made to the presumption in subsection (3) of the section 23 that reads as follows:

“For the avoidance of doubt, it is declared that, for the purposes of subsection (1), any member of the administration of a State shall be deemed to use his office or position for gratification when he acts contrary to subsection 2(8) of the Eighth Schedule to the Federal Constitution or the equivalent provision in the Constitution or Laws of the Constitution of that State.”

262. For purposes of this provision, a “relative” and “associate” are defined in section 3 of the Act: “relative” in relation to a person, means-

- (a) a spouse of the person;
- (b) a brother or sister of the person;
- (c) a brother or sister of the spouse of the person;
- (d) a lineal ascendant or descendant of the person;
- (e) a lineal ascendant or descendant of a spouse of the person;
- (f) a lineal descendant of a person referred to in paragraph (b);
- (g) the uncle, aunt or cousin of the person; or
- (h) the son-in-law or daughter-in-law of the person;

‘associate’, in relation to a person, means-

- (a) any person who is a nominee or an employee of such person;
- (b) any person who manages the affairs of such person;
- (c) any organisation of which such person, or any nominee of his, is a partner, or a person in charge or in control of, or has a controlling interest in, its business or affairs;
- (d) any corporation within the meaning of the Companies Act 1965 [Act 125], of which such person, or any nominee of his, is a director or is in charge or in control of its business or affairs, or in which such person, alone or together with any nominee of his, has or have a controlling interest, or shares to the total value of not less than thirty per centum of the total issued capital of the corporation; or
- (e) the trustee of any trust, where-
 - (i) the trust has been created by such person; or

(ii) the total value of the assets contributed by such person to the trust at any time, whether before or after the creation of the trust, amounts, at any time, to not less than twenty per centum of the total value of the assets of the trust;”

263. Prior to the enactment of the Anti-Corruption Act 1997 (Act 575), acts of abuse of functions were criminalized under section 2 (1) of the Emergency (Essential Powers) Ordinance No. 22/1970. Under the said section, the term “corrupt practice” is used. Section 2 (1) of the said Ordinance uses the term “corrupt practice” as follows: “any member of the administration or any Member of Parliament or the State Legislative Assembly or any public officer, who while being such a Member or officer commits any corrupt practice shall be guilty of an offence and shall be liable on conviction to imprisonment for a term not exceeding fourteen years or to a fine not exceeding twenty thousand ringgit or to both such imprisonment and fine. Section 2 (2) provides that, “For the purpose of this section- ‘corrupt practice’ means any act done by any ‘Member or officer referred to in subsection (1) in his capacity as such Member or officer, whereby he has used his public position or office for his pecuniary or other advantage; and without prejudice to the foregoing, in relation to a Member of a State Legislative Assembly includes any act which is contrary to the provision of subsection (8) of section 2 of the Eighth Schedule of the Federal Constitution or the equivalent provision in the Constitution of a State””.
264. “Member of the administration” for purposes of section 23 of MACCA has the meaning assigned to it in Article 160 (2) of the Federal Constitution;
265. “Member of the Legislative Assembly” includes a public who is a member of the State Executive Council by virtue of his office;
266. “Public officer” has the meaning assigned to it in section 2 of the Prevention of Corruption Act. 1961.
267. Section 2 (8) of the Federal Constitution provides as follows: “A member of the Executive Council shall not engage in any trade, business or profession connected with any subject or department for which he is responsible and shall not be, as long as he is engaged in any trade, business or profession, take part in any decision of the Executive Council relating to that trade, business or profession or in any decision likely to affect his pecuniary interests therein.”
268. Malaysia provided the following examples of cases on the implementation of the provision.
269. **Section 23 of MACCA**¹⁰

Abdul Hadi Bokhari v Public Prosecutor [2009] 1 LNS 1678

The appellant faced four charges in the Sessions Court under section 15(1) of the Anti Corruption Act 1997. The offence that he allegedly committed was that as an officer of public body (Sarawak Electricity Supply Corporation (SESCO)) he had used his office, as Acting Station Manager attached to Sg, Merah Power Station, for gratification by issuing and approving Local Purchase Requisitions (LPR) to Syarikat Citra Murni whose owner is his own brother in law. The four charges are in respect of different LPRs.

¹⁰ Section 15 of the Anti-Corruption Act 1997 (Act 575); Section 2(1) of the Emergency (Essential Powers) Ordinance No.22/1970.

Amended Charges:

Amended 1st Charge: That you on the 30th August 2002, at the office of Sg. Merah Power Station, in the District of Sibul, in the Sibul Division, in the State of Sarawak, being an officer of a public body namely Sarawak Electricity Supply Corporation (SESCO) Acting Station Manager, attached to Sg. Merah Power Station, did use your office for a gratification, namely, that you have issued and approved the Local Purchase Requisition PO, No: 4500011642 to Syarikat Citra Murni to perform the work, to wit, Supply Equipment, Tool and Labour for re-allocate engine auxiliaries from Engine Room Sg. Merah P/S to Sg. Merah Store amounting RM2,800.00, in which your relative, Halemi Bin Ismawi who is your brother-in law has an interest in, to wit, Halemi Bin Ismawi is the sole proprietor of the said company, and that you have thereby committed an offence under section 15(1) of the Anti-Corruption Act 1997 and punishable under section 16 of the same Act. (Laws of Malaysia Act 575).

Amended 2nd Charge: That you on the 3rd September 2002, at the office of Sg. Merah Power in the District of Sibul, in the Sibul Division, in the State of Sarawak, being an officer of a public body namely Sarawak Electricity Supply Corporation (SESCO) Acting Station Manager, attached to Sg. Merah Power Station, did use your office for a gratification, namely, that you have selected and approved the Local Purchase Requisition PO No: 4500011961 to Syarikat Citra Murni to perform the work, to wit, Supply Labour, Tool and Equipment to pump DFO in Matu amounting RM950.00, in which your relative, Halemi Bin Ismawi who is your brother-in-law has an interest in, to wit, Halemi Bin Ismawi is the sole proprietor of the said company, and that you have thereby committed an offence under section 15(1) of the Anti-Corruption Act 1997 and punishable under section 16 of the same Act. (Laws of Malaysia Act 575).

Amended 3rd Charge: That you on the 12th July 2002, at the office of Sg. Merah Power Station, in the District of Sibul, in the Sibul Division, in the State of Sarawak, being an officer of a public body namely Sarawak Electricity Supply Corporation (SESCO) Acting Station Manager, attached to Sg. Merah Power Station, did use your office for a gratification, namely, that you have selected Syarikat Citra Murni to perform the work, to wit, Handling & Transportation of Jam Ak Ambun Household from SESCO Bakun RS P/S to SESCO Ng. Mujong amounting RM4,880.00, in which your relative; Halemi Bin Ismawi who is your brother-in- law has an interest in, to wit, Halemi Bin Ismawi is the sole proprietor of the said company, and that you have thereby committed an offence under section 15(1) of the Anti-Corruption Act 1997 and punishable under section 16 of the same Act. (Laws of Malaysia Act 575).

Amended 4th Charge: That you on the 15th January 2003, at the office of Sg. Merah Power Station, in the District of Sibul, in the Sibul Division, in the State of Sarawak, being an officer of a public body namely Sarawak Electricity Supply Corporation (SESCO) Acting Station Manager, attached to Sg. Merah Power Station, did use your office for a gratification, namely, that you have issued and approved the Local Purchase Requisition PO No: 4500024622 to Syarikat Citra Murni to perform the work, to wit, Transportation & Handling of SESCO Properties at Paloh P/S amounting RM1,900.00, in which your relative, Halemi Bin Ismawi who is your brother-in-law has an interest in, to wit, Halemi Bin Ismawi is the sole proprietor of the said company, and that you have thereby committed an offence under section 15(1) of the, Anti Corruption Act 1997 and punishable under section 16 of the same Act. (Laws of Malaysia Act 575).

270. Public Prosecutor v Amir Dagang [2009] 10 CLJ 448

The respondent (accused in the lower court) was charged with eight separate charges under s. 15(1) of the Anti-Corruption Act 1997 (the Act). The crux of the eight charges

was that the respondent as an officer of a public body, namely, Headmaster of Sekolah Kebangsaan Sungai Anib 1 (the School), Sandakan, had used his office for gratification when he appointed Nurakmal Enterprise, which was jointly owned by him and his wife, as the school's supplier of various goods and services through several local purchase orders (LPOs). The respondent was, after a full trial, acquitted and discharged without being called upon to give his defence on the grounds that the appellant had failed to make out a *prima facie* case on the eight charges. The learned trial judge found that based on the minutes of meeting of Jawatankuasa Kewangan of the School, the respondent had declared his interest in the company and that the members of AJK Kewangan were aware of it. The respondent merely suggested that the company be appointed for convenience to speed up the supply, but it was the members of the Jawatankuasa Kewangan that appointed the company as the supplier. On this basis the learned trial judge found that the respondent had rebutted on the balance of probability the presumption under s. 42 of the Act that he used his office for gratification. The learned judge also found that the failure in calling the complainant P. Ganeson and other investigating officers had deprived the court of conducting a maximum evaluation of all the evidence in determining whether there was a *prima facie* case or otherwise. The Public Prosecutor appealed against the acquittal and discharge.

Held (allowing appeals; ordering for defence to be called):

(1) It was incumbent upon the prosecution to prove the following ingredients for the purpose of establishing a *prima facie* case: (i) that the respondent was a public officer, namely, a Headmaster of the School; and (ii) that the respondent used his office for gratification by appointing Nurakmak Enterprise, a company belonging to him and his wife for supplying/repairing works at the School under the LPOs. Upon proof of the above ingredients, the statutory presumption under s. 15(2) of the Act would be invoked and it will therefore be presumed that the respondent had used his office for gratification. The appellant had proven the first ingredient. (paras 13, 14 & 16)

(2) The signing of the eight LPOs and giving of the invoices to issue the LPOs constituted taking actions in relation to matters in which the respondent and his wife had an interest. The learned trial judge therefore had erred in deciding that the appellant had failed to make out a *prima facie* case. (para 20)

(3) The learned trial judge had not fully taken into consideration the significant material fact that the respondent being the Headmaster was the most senior member in the Jawatankuasa Kewangan. After having proposed the company to be the supplier and disclosing that the company belonged to his wife, he did not disqualify himself and let the other senior officers in the School to take over the meeting. He remained physically present throughout the meeting and during the decision making. The respondent should have declared his interest as well as disqualified himself during the meeting to avoid conflict of interest in view that the company was owned by him and his wife. Failure to do so is regarded in law as to have used his public position or office for his pecuniary or other advantage. (paras 26, 27, 37 & 39)

(4) Even without the statutory presumption, the appellant had adduced ample credible evidence to show that the respondent had used his position as Headmaster of the School for gratification. Accordingly, the learned trial judge had erred by deciding that the appellant failed to make out a *prima facie* case and that the respondent had rebutted the presumption on the balance of probability. (para 50)

(5) The report made by P. Ganeson was not the first information report. If P. Ganeson were called, his evidence would have amounted to hearsay evidence as he was not directly involved in any manner in the commission of the offences under appeal. The non-calling of P. Ganeson and the investigating officers had not created a gap in the case of

the prosecution as alleged. (paras 54 & 56)

271. The following five cases were offences under section 2 (1) of the Emergency (Essential Powers) Ordinance 22 of 1970. These provisions were repealed in 2011. However, these cases were decided prior to the introduction of section 23 of MACCA and section 15 of the Anti-Corruption Act 1997. Reference has been made to these cases simply because if the facts were presented today they would be dealt with under section 23 of MACCA.

272. Haji Abdul Ghani Ishak & Anor v Public Prosecutor [1981] 2 MLJ 230

In this case the first appellant was convicted on the following charge-

“That you on 2nd October 1974 in the State Executive Council, Malacca, in the District of Melaka Tengah, in the State of Melaka, being a member of the Administration, to wit a member of the Executive Council, Melaka, committed corrupt practice in that you while being such a member used your office for your pecuniary advantage, namely participated in the deliberation for approving an application for State land in the Mukim of Kuala Linggi, Alor Gajah, Melaka prepared by one Mohd. Noor bin Baba and submitted in the name of Kipah binti Othman on 2nd March 1974 and in respect of such land in which you were engaged in business likely to affect your pecuniary interest therein, and that you have thereby committed an offence punishable under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970.”

The evidence against the first appellant was largely circumstantial but there was also direct evidence. The second appellant was charged with abetment of the offence and the evidence against him was circumstantial. The learned trial judge convicted the appellants and they appealed. The main grounds of appeal of the first appellant was (a) that the charge was bad for duplicity as it combined three known offences by importing the provisions of Article 7(10) of the Malacca State Constitution; (b) that the learned judge came to the wrong conclusion that there was already a business existing in respect of the land when the Executive Council met to approve the grant and that the 1st accused was already engaged in the business.

Held:

(1) in the amended charge there was only one offence of committing corrupt practice and the rest of the charge dealt with particularizations. The particularizations could not have embarrassed or prejudiced the first appellant and the technical irregularity did not cause a miscarriage of justice;

(2) the learned trial judge was justified in this case in holding that there was a business existing on the date the Executive Council decision was made;

(3) although the evidence against the first appellant was largely circumstantial, there was also direct evidence against the first appellant and the conviction of the first appellant must be upheld;

(4) the evidence against the second appellant on the other hand was purely circumstantial and on the evidence there was insufficient material to show that the second appellant abetted the commission of the principal offence. The appeal of the second appellant must therefore be allowed.

273. Public Prosecutor v Dato Waad bin Mansor [2005] 2 MLJ 101

The appellant was charged for three offences of committing corrupt practice under s 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 (the Ordinance). At all relevant times, the respondent was a member of the Dewan Undangan Negeri (ADUN) and Majlis Mesyuarat Kerajaan (MMK) and the Tampin District Land Committee. The respondent had on all three occasions sat with the said committees in approving the land

application submitted by Syarikat Teraju Nusantara Sdn Bhd (Teraju Nusantara), which was set up, inter alia by his wife. The respondent was also involved with the members of Teraju Nusantara to subsequently sell the approved land to a third party where the respondent was paid RM150,000. The learned High Court judge acquitted and discharged the respondent on all charges. The Public Prosecutor appealed to the Court of Appeal. The Court of Appeal allowed the Public Prosecutor's appeal and convicted the respondent on all three amended charges. The respondent was sentenced to a fine of RM15,000 in default six months imprisonment on each amended charge. The Public Prosecutor appealed again, this time against the sentences imposed by the Court of Appeal. Held, allowing the appeal, substituting the fine with sentence of two years imprisonment on each amended charge:

(1) The very purpose for which the Ordinance was designed was to curb corrupt practices of members of the administration which could by itself threaten the security of the country (see para 43). Every form of corrupt practice that falls within the definition of the Ordinance is a threat to national security, even though they may not be threats to public order, a factor which the Court of Appeal had overlooked in its judgment (see para 44). By stating that the crime of corruption stands in a league of its own and cannot be equated with the heinous crimes of murder, rape, robbery, criminal breach of trust etc, the Court of Appeal had certainly underplayed the effect of corruption in our society (see para 46).

(2) From the sequence of events that took place, ie from the inception of Teraju Nusantara, the application and approval of the land for quarry [*101] purposes and finally the sale of Teraju Nusantara, it was obvious that it was a well thought out scheme by the respondent. There was clear evidence of premeditation and his part to commit a corrupt act (see para 69). The parts played by the respondent in his capacity as an ADUN and a member of the MMK in the series of meetings held to consider and approve the application of Teraju Nusantara for quarry operations showed that financial advantage was foremost in the mind of the respondent. This fact was clearly supported by the evidence of the sale of the land to a third party five months after the final approval was obtained (see para 70).

(3) In cases of corruption it is difficult to envisage a situation where public interest does not require the principle of deterrence to predominate (see para 71). The Court of Appeal had placed much emphasis on the fact that the respondents political career was destroyed, the positions he once held lost and possibly never to be recovered and his good name tarnished. These certainly should not have an overwhelming effect on the sentencing process as held by the Court of Appeal (see para 73). The aim of the Ordinance is to bring to book renegade politicians and public servants who abuse their positions. The effect of any punishment imposed is to deter politicians and public servants from conducting their public affairs in a corrupt manner (see para 74).

(4) In cases involving corruption, imprisonment would be a proper sentence unless there were extenuating circumstances against the imposition of such a sentence. There were none in this case (see para 76).

274. Public Prosecutor v Datuk Hj. Sahar Arpan [1999] 3 CLJ 427

Datuk Hj Sahar Arpan, formerly the State Assemblyman (ADUN) for Durian Tunggal and a member of the Melaka State Executive Council (EXCO), faced three charges of having committed corrupt practice pursuant to s. 2(1) of the Emergency (Essential Powers) Ordinance 1970 (the Ordinance). Sometime in February 1994, the accused, already an ADUN and an EXCO member, bought a company called Ivory Heights Sdn Bhd (Ivory Heights). Ivory Heights had sought to carry out an aquaculture project in Melaka and for

that had applied for two parcels of state lands in Bertam and Bachang respectively (the said land). On 7 September 1994 the EXCO deliberated on the application and approved the same. Thereafter, Ivory Height applied to change the lease of the said land from 60 years to 99 years, and the EXCO, having deliberated on the matter on 21 December 1994, accordingly extended the lease period of the said land. Ivory Heights then applied to expand the approved area of the land in Bertam from 3.3718 hectares to 3.6204 hectares and the land in Bachang from 6.8230 hectares to 7.2019 hectares. Again, the EXCO, following its meeting and deliberations on 23 August 1995, approved the said Ivory Heights' application. The facts showed however that the accused, in his capacity as an EXCO member, was present at all the three EXCO meetings aforesaid, and had never declared his interest in Ivory Heights nor left the meeting room at all the relevant times. It was also evident that, initially, Ivory Heights' application for the said land was opposed inter alia by the State Fisheries Department, but the latter subsequently changed its stand when the accused intervened and said that the applications were submitted by his 'anak buah'. The facts also evinced that Ivory Heights, or the said land, was subsequently disposed off by the accused, with the result that at least RM500,000 had passed hands and been paid to the accused. Before the learned judge, the accused raised a defence, inter alia, that the RM500,000 was payment for the sale of his lands at Macap (lots 2253 and 2484 transaction), supposedly bought by one Othman bin Kassim. In the circumstances, a question arose as to whether the accused, on the facts, had committed corrupt practice within the meaning accorded to that term by s. 2(2) of the Ordinance.

Held:

[1] The phrase member of the administration as defined in art. 160(2) of the Federal Constitution includes a member of the State Executive Council. In law, members of administration having an interest in the matter under discussion at an EXCO meeting must declare their said interest. Consequently, the members silence at the meeting is insufficient.

[2] The term corrupt practice as defined in s. 2(2) of the Ordinance, just like pecuniary advantage, must be given a liberal interpretation. The expression pecuniary refers to the benefits obtained by a person which may be valued in monetary terms and it includes a financial debt or obligation which is released, reduced, evaded, deferred or redeemed partially or wholly, immediate receipt of benefits, credit or cash and/or benefit. Pecuniary advantage at the very least means a gain or benefit which may be valued in monetary terms, personally beneficial to the accused person even though someone else may derive direct benefit from it.

[3] On the facts, there was substantial evidence pointing to the accused's ownership of Ivory Heights. Considering the incredibly large number of times the accused got involved with Ivory Heights, right from the word go, the court cannot be expected to be naïve and believe that his contributions to the company were mere helping hands normally given by State Assemblymen or EXCO members to the people or to people in their constituents. The evidence also points to the fact that the accused was totally aware of the events that took place in and around Ivory Heights, and was always in command of the situation. The accused was indeed the alter ego of Ivory Heights.

[4] EXCO papers came within the definition of 'official secrets' in s. 2 of the Official Secrets Act 1972 and were accorded total protection unless waived. However, once the documents were produced and tendered as evidence, the full effect of the provisions of the Evidence Act 1950 must be complied with. Where the papers were tendered as evidence by the secretary of the State Executive Council, as happened here, it means that the state government had waived the privilege or protection.

[4a] It is clear, upon perusing the Exco papers, that the accused was present on all the dates and meetings in question. It was also clear that the accused, apart from not leaving the sessions, had also not declared his interest in the applications by Ivory Heights. And the facts further showed that, notwithstanding the objection of two major government departments to the applications, the applications by Ivory Heights were still successful. Clearly, the intimidating presence of the accused had a profound influence over those meetings. In the circumstances, his said presence could be construed as an abuse of his public position.

[5] Pursuant to s. 155(2) of the Evidence Act 1950, the credit of a witness may only be impeached by resorting to his previous statements and nothing more. Sub-provisions (a), (b) and (c) of s. 155 were mutually exclusive and therefore does not entertain the consideration of any other evidence, or for that matter the rest of the evidence. Also, an immediate finding may be made at the conclusion of the impeachment proceeding. In the circumstances of this case, it is appropriate to impeach the credit of PW15 and PW16 at the end of the impeachment proceedings, without waiting for the close of the prosecution's case.

[6] The chain of evidence systematically produced by the prosecution had successfully retraced the RM500,000 received by the accused, all the way back to the cheque of RM737,671.50 issued by Messrs. S.K. Khoo and of course connected to the Ivory Heights transactions. The accelerated payments received by the accused, later credited into those LUTH's accounts, were certainly a pecuniary advantage as envisaged by the Ordinance, obtained by virtue of his position as a Member of the Administration. The scope of the term "advantage" is certainly wide enough to include the benefits obtained by the accused.

[7] The lots 2253 and 2484 transaction was not a genuine transaction. If it were, then after the alleged deposit payment of RM67,000, Othman Kassim ought to still pay the accused the balance sum of RM607,500. But strangely, Othman Kassim was blatantly oblivious of his financial predicament and made no attempt whatsoever to seek financial assistance. The accused, conversely, behaved as if it were he who was in dire need of financial assistance. Clearly, the very conduct of these two personalities defied logic. Their conduct only fortified the finding that lots 2253 and 2482 transaction was but a concocted story, manufactured by Othman Kassim and the accused to enrich themselves. It was a story activated to camouflage the accused's corrupt practice, more so when lots 2253 and 2484 only had a collective value of RM74,000.

[8] Othman Kassim is a participes crimines in respect of the charges against the accused. That notwithstanding, an accomplice is a competent witness against an accused person and a conviction is not fatal merely because it proceeds upon the uncorroborated testimony of an accomplice pursuant to s. 133 of the Evidence Act 1950. An accomplice's evidence stands on the same footing as any other evidence and the court is competent to sieve such testimony and to receive only the relevant part, after sufficient scrutiny has taken place.

[9] The computer-printouts relating to the banking transactions had been properly tendered by the prosecution and were admissible in evidence. Over and above that of s. 90A of the Evidence Act which permits the introduction of computer documents, and strengthened by s. 90C which overrides the Banker's Books Act, the prerequisites of ss. 3, 4 and 5 of the Banker's Books (Evidence) Act 1949 had clearly been complied with, as Bank Negara had given its requisite consent. In the event, the copies of the original books of the banks and their entries could be receivable at the trial, as prima facie evidence of the entries of related matters, transactions and accounts stated therein. [9a] The printout from the computer herein was not a copy or an extract from any document

but an original document. This court therefore had no hesitation in admitting the relevant statements of accounts of the accused. Even though the same were many times removed from the first produce of the initial computer, the on-line system of the relevant institutions ensured the authenticity of the data as no information had been tampered. By the same token, the documents produced by the registrar of companies, tendered by the prosecution, were also primary evidence, and therefore admissible.

[10] The accused's testimony depended totally on mere postulations and unsupported assertions. None of the pertinent parts were however corroborated by documentary or oral evidence. On the contrary, the prosecution's witnesses have remained unimpeached, apart from Md Yusof and Jaini, thus leaving their evidence unaffected. The total effect of this finding is that the prosecution's case has remained un rebutted. With such proliferation of evidence, the court is left with no alternative but to declare that the prosecution has proven all the three charges against the accused beyond reasonable doubt.

[Accused convicted as charged; sentenced to two years imprisonment and RM20,000 fine, in default six months imprisonment, on each of the charges; sentences to run concurrently from date of sentence.]

275. Public Prosecutor v Mohamed Muslim [1989] 1 MLJ 245

In this case the accused was at all material times a member of the Kedah State Executive Council. He made an application for land and was allotted a piece of land. The application was approved by the Land Committee and then forwarded to the Executive Council. At the meeting of the Executive Council which approved the application the accused was present. The accused was charged with the offence of corrupt practice under section 2(1) of the Emergency (Essential Powers) Ordinance, 1970. Held:

- (1) the physical presence of the accused at the Executive Council meeting which passed his application for land was sufficient in the circumstances for him to be regarded in law to have used his public position or office for his pecuniary or other advantage;
- (2) the act complained of is amply covered by the first limb of the definition of corrupt practice in section 2 of the Emergency (Essential Powers) Ordinance, No. 22 of 1970 and the offence was therefore committed;
- (3) having regard to the extenuating circumstances in this case the accused would be sentenced to 1 day imprisonment and a fine of \$ 2,000.

276. Nunis v Public Prosecutor [1982] 2 MLJ 114

In this case the applicant, the Penang State Fire Chief recommended to the Chairman, Lembaga Pengurus Kerajaan Tempatan, the purchase of certain equipment from a firm wholly owned by his brother in law at a price higher than the price for which they could be obtained from another firm. He was charged under section 2(1) of the Emergency (Essential Powers) Ordinance, 1970 but was acquitted by the President of the Sessions Court, Penang. On appeal, Abdul Hamid F.J. set aside the order of acquittal and substituted an order of conviction and sentenced the applicant to two years imprisonment. He held (i) the words 'other advantage' should be given a very wide meaning on the facts of each case. The other advantage need not necessarily be pecuniary in nature; (ii) it was clear from the evidence in this case that the applicant abused his public position when he assisted or gave aid to his brother-in-law. It was beneficial to him personally that by so doing he could provide benefits to close members of his family; (iii) the learned President therefore erred in law when he acquitted the applicant and the appeal must be allowed and the order of acquittal set aside. The applicant applied for leave to refer a question of law to the Federal Court as to the construction of

the words 'other advantage' in section 2(2) of the Emergency (Essential Powers) Ordinance, 1970 and in particular whether it refers only to some form of property whether moveable or immovable, corporeal or incorporeal.

Held, dismissing the application: the construction of the words in question in the statutory provision for which leave is sought under section 66 of the Courts of Judicature Act, 1964, would be a mere matter of applying the relevant provision to the factual circumstances of any particular case. These must of necessity vary from case to case and therefore the question raised is not one of law of public interest.

277. Malaysia referred to Table 1 (Annex 1).

(b) Observations on the implementation of the article

278. The reviewing experts are of the view that Malaysia has largely criminalized the abuse of functions in line with the Convention. However, where the Convention addresses an undue advantage for a public officer himself or herself or for another person or entity, section 23 of MACCA only regulates cases in which the gratification has been obtained by the officer "for himself, his relative or associate". This formulation is wide enough to include various individuals who commonly fall within the purview of offences committed under section 23 but still does not reach the full scope of Article 19 of UNCAC.

279. In regard to the failure to perform an action Malaysia explained that section 32 of the Penal Code would be applied which states that *acts done extend also to illegal omissions*.

Section 32 Penal Code: Words referring to acts include illegal omissions

In every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions

Section 33 Penal Code: "Act" and "omission"

The word "act" denotes as well a series of acts as a single act: the word "omission" denoted as well a series of omissions as a single omission.

280. In regard to case examples the reviewing experts note that, according to the statistics provided by Malaysia from 2009 to 2011, there have been 137 investigations and 4 prosecutions but no convictions under section 23 of MACCA. Insofar as the lack of prosecution of cases under section 23 of MACCA is concerned, of the 137 investigations being carried out, some of the investigations are still ongoing.

(c) Successes and good practices

281. The experts highlight the presumption established under section 23 (2) of MACCA. Similar to the presumption under section 50 of MACCA, this was considered an effective measure to increase the possibility of successful prosecutions of corruption offences. Its effect is to shift the burden of proof to the accused, once the prosecution can establish that an officer of a public body has made a decision or taken action in relation to any matter in which the said officer, or any relative or associate of his, has an interest, whether directly or indirectly. The accused then bears the burden of rebutting the presumption that he has used his office or position for any gratification, whether for himself, his relative or associate.

Article 20 Illicit Enrichment

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

(a) Summary of information relevant to reviewing the implementation of the article

282. Malaysia referred to section 36 (3) of MACCA.

283. However, this particular provision does not operate independently, but as an upshot in the course of investigations of corrupt offences against public officials. From the tenor of section 36 (1) and (3) MACCA, in the course of investigations against a public official, if there are reasonable grounds to believe that the said official under investigation is in possession of property in excess of his present or past emoluments, the onus lies on him to explain such excess.

284. Malaysia cited section 36 (3) of MACCA, which states as follows:

Section 36 - Powers to obtain information

(1) Notwithstanding any written law or rule of law to the contrary, an officer of the Commission of the rank of Commissioner or above, if he has reasonable ground to believe, based on the investigation carried out by an officer of the Commission, that any property is held or acquired by any person as a result of or in connection with an offence under this Act, may by written notice-

(a) require any person suspected of having committed such offence to furnish a statement in writing on oath or affirmation-

(i) identifying every property, whether movable or immovable, whether within or outside Malaysia, belonging to him or in his possession, or in which he has any interest, whether legal or equitable, and specifying the date on which each of the properties so identified was acquired and the manner in which it was acquired, whether by way of any dealing, bequest, devise, inheritance, or any other manner;

(ii) identifying every property sent out of Malaysia by him during such period as may be specified in the notice;

(iii) setting out the estimated value and location of each of the properties identified under subparagraphs (i) and (ii), and if any of such properties cannot be located, the reason therefor;

(iv) stating in respect of each of the properties identified under subparagraphs (i) and (ii) whether the property is held by him or by any other person on his behalf, whether it has been transferred, sold to, or kept with any person, whether it has been diminished in value since its acquisition by him, and whether it has been mingled with other property which cannot be separated or divided without difficulty;

(v) setting out all other information relating to his properties, business, travel, or other activities as may be specified in the notice; and

(vi) setting out all his sources of income, earnings or assets;

(b) require any relative or associate of the person referred to in paragraph (1)(a), or any other person whom the Public Prosecutor has reasonable grounds to believe is able to assist in the investigation, to furnish a statement in writing on oath or affirmation-

(i) identifying every property, whether movable or immovable, whether within or outside Malaysia, belonging to him or in his possession, or in which such person has any interest, whether legal or equitable, and specifying the date on which each of the properties identified was acquired and the manner in which it was acquired, whether by way of any dealing, bequest, devise, inheritance, or any other manner;

(ii) identifying every property sent out of Malaysia by him during such period as may be specified in the notice;

(iii) setting out the estimated value and location of each of the properties identified under subparagraphs (i) and (ii), and if any of such properties cannot be located, the reason therefor;

(iv) stating in respect of each of the properties identified under subparagraphs (i) and (ii) whether

- the property is held by him or by any other person on his behalf, whether it has been transferred, sold to, or kept with any person, whether it has been diminished in value since its acquisition by him, and whether it has been commingled with other property which cannot be separated or divided without difficulty;
- (v) setting out all other information relating to each of the properties identified under subparagraphs (i) and (ii), and the business, travel, or other activities of such person; and
 - (vi) setting out all the sources of income, earnings or assets of such person; and
- (c) require any officer of any bank or financial institution, or any person who is in any manner or to any extent responsible for the management and control of the affairs of any bank or any financial institution, to furnish copies of any or all accounts, documents and records relating to any person to whom a notice may be issued under paragraph (a) or (b).
- (2) Every person to whom a notice is sent by the Public Prosecutor under subsection (1) shall, notwithstanding any written law or rule of law to the contrary, comply with the terms of the notice within such time as may be specified therein, and any person who wilfully neglects or fails to comply with the terms of the notice shall be guilty of an offence and shall on conviction be liable to imprisonment for a term of not less than fourteen days and not more than twenty years and to a fine not exceeding one hundred thousand ringgit.
- (3) **Where the Public Prosecutor has reasonable grounds to believe** that any officer of a public body who has been served with the written notice referred to in subsection (1) owns, possesses, controls or holds any interest in any property which is excessive, having regard to his present or past emoluments and all other relevant circumstances, the Public Prosecutor may by written direction require him to furnish a statement on oath or affirmation explaining how he was able to own, possess, control or hold such excess **and if he fails to explain satisfactorily such excess**, he shall be guilty of an offence and shall on conviction be liable to-
- (a) imprisonment for a term of not less than fourteen days and not more than twenty years; and
 - (b) a fine which is not less than five times the value of the excess, if the excess is capable of being valued, or ten thousand ringgit, whichever is the higher.
- (4) Every person to whom a direction is sent by the Public Prosecutor under subsection (3) shall, notwithstanding any written law or rule of law to the contrary, comply with the terms of the direction within such time as may be specified in the direction, and if such person wilfully neglects or fails to comply with such direction, he shall be guilty of an offence and shall on conviction be liable to-
- (a) imprisonment for a term of not less than fourteen days and not more than twenty years; and
 - (b) a fine which is not less than five times the value of the excess, if the excess is *The issue of illicit enrichment is reflected in both these provisions wherein the said provisions do not stand alone but must be read together with the other provisions in section 36(1).
- (5) Every person to whom a notice or direction is sent by the Public Prosecutor under this section shall be legally bound to state the truth and shall disclose all information which is within his knowledge, or which is available to him, or which is capable of being obtained by him.
- (6) Where any person discloses any information or produces any accounts, documents or records, in response to a notice under subsection (1), such person, his agent or employee, or any other person acting on his behalf or under his direction, shall not, by reason only of such disclosure or production, be liable to prosecution for any offence under or by virtue of any law, or to any proceeding or claim by any person under or by virtue of any law or under or by virtue of any contract, agreement or arrangement, or otherwise.
- (7) Subsection (6) shall not bar, prevent or prohibit the institution of any prosecution for any offence-
- (a) as provided by this section;
 - (b) of giving false evidence in relation to any statement on oath or affirmation furnished to the Public Prosecutor pursuant to this section; or
 - (c) provided for in section 19.

285. Malaysia explained that there are no reported cases, only an ongoing trial in the subordinate court.

286. In regard to statistics, Malaysia referred to Table 1 (Annex 1).

(b) Observations on the implementation of the article

287. The reviewing experts observe that Malaysia has fully implemented the article. Malaysia does not have constraints in regard to its Constitution or fundamental principles of its legal system to criminalize illicit enrichment.
288. During the country visit, the specific manner in which Malaysia has criminalized illicit enrichment was discussed. It was noted that measures to pursue illicit enrichment can only be taken when an investigation of another offence under MACCA is underway. Even if the investigation of the other offence fails to show results, charges under section 36 of MACCA are still possible. The reviewing experts were of the view that Malaysia may wish to consider eliminating the prior investigation requirement, so that measures under section 36 can be taken irrespective of an investigation of another corruption offence.
289. Malaysia provided further information on the asset declaration system. Malaysia's Regulation 10, Public Officers (Conduct & Discipline) Regulations 1993 and Service Circular No. 3 of 2002 mandate the submission of a list of asset on a 5-year basis or whenever new assets are acquired.
290. All officers are required to make these declarations. "Officer" means an officer of the civil service in the permanent, temporary or contract category. "Ownership of property" means property owned by the officer or his spouse or child or held by any person on behalf the spouse or child. The declaration has to be made in regard to any property. "Property" means property that has been designated by the Director General of Public Service in accordance with the Malaysian Government Gazette PU (B) 559 dated 30 November 1995 as follows:
- (a) In respect of immovable property:
 - Land, including land occupied under temporary occupation licence;
 - All types of dwellings such as houses, flats, apartments or condominiums;
 - Buildings, including the shop lots or store spaces, office spaces or kiosks; and
 - (b) In respect of movable property:
 - Any form of cash anywhere deposited or saved;
 - Shares, stocks, debentures, bonds or other securities;
 - Any form of license or trade, business or commercial permit;
 - Any other movable property including all types of motor vehicles, jewellery, club memberships, home furniture and sport equipment the purchase price of which exceeds more than 6 months emoluments or RM 10,000.00 whichever is lower.

Article 21 Bribery in the private sector

Subparagraph (a)

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(a) Summary of information relevant to reviewing the implementation of the article

291. Malaysia indicated that private sector bribery in its active and passive form is addressed in the Malaysian legislation, particularly in sections 16 and 17 of MACCA.

292. The phrase "any person" in section 16 includes persons in the private sector, whereas the term "agent" in section 17 includes private agents by its definition. For a definition of the term "agent", section 3 of MACCA reads as follows: "any person employed by or acting for another, and includes an officer of a public body or an officer serving in or under any public body, a trustee, an administrator, or executor of the estate of a deceased person, a subcontractor, and any person employed by or acting for such trustee, administrator or executor, or subcontractor." The definitions of "agent" under MACCA and "person" under the Interpretations Acts 1948 and 1967 cover chief executive officers and directors of companies.

293. Malaysia explained that MACCA and the Penal Code (Act 574) do not have the term "undue advantage" in their scope but use the term "gratification" instead. In regard to the definition of "gratification" according to section 3 of MACCA, reference is made to the explanations given above.

294. The term "gratification" in the Penal Code (Act 574), on the other hand, is not restricted to pecuniary gratifications, or gratifications estimable in money. It is submitted that the definition of "gratification" comes within the scope of the interpretation of the term "undue advantage", as provided in paragraphs 196 and 197 of the Legislative Guide for the Implementation of UNCAC.

295. Malaysia cited the following legislation in relation to the implementation of article 21 of UNCAC:

Sections 16 (b) (A), 17 (b) of MACCA. See above.

296. Malaysia provided the following examples of cases on the implementation of the provision.

Section 16 (b) (A) of MACCA¹¹

297. Lim Kheng Kooi & Anor v Regina [1957] MLJ 199

This is a joint appeal by Lim Kheng Kooi and Ramanathan Chettiar against conviction recorded by the learned President of the Sessions Court sitting at Penang on the 1st March, 1957 under section 3(b) of the Prevention of Corruption Ordinance, 1950. The 1st appellant was charged with the principal offence in each of three charges of corruption; the 2nd appellant was charged with abetting each of those offences respectively. The appellants were tried together.

298. Malaysia referred to Table 2 (Annex 2) for statistics. From 2009 to 2011 there were a total of 22 convictions under section 16 (b) (A) and section 17 (b). Furthermore, Malaysia presented the tables below:

¹¹ Section 10 (b) (aa) of the Anti-Corruption Act 1997 (Act 575) or Section 3 (b) (i) of the Prevention of Corruption Act 1961 (Act 57).

STATISTICS ON NUMBER OF ARREST			
Category	2010	2011	2012
Public Sector	293	323	288
Politician	4	2	3
Private Sector	102	145	105
Public	545	448	304

STATISTICS ON NUMBER OF CHARGES			
Category	2010	2011	2012
Public Sector	131	95	119
Politician	1	3	1
Private Sector	56	48	38
Public	193	151	187

(b) Observations on the implementation of the article

299. The reviewing experts are of the opinion that Malaysia has fully implemented the provision.

Article 21 Bribery in the private sector

Subparagraph (b)

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

(a) Summary of information relevant to reviewing the implementation of the article

300. Malaysia has cited the following legislation.

Sections 16 (a) and 17 (a) of MACCA. See above.

Section 20 (b) of MACCA - Corruptly Procuring Withdrawal of Tender

A person-

- (a) who, with intent to obtain from any public body a contract for performing any work, providing any service, doing anything, or supplying any article, material or substance, offers any gratification to any person who has made a tender for the contract, as an inducement or a reward for his withdrawing the tender; or
- (b) who solicits or accepts any gratification as an inducement or a reward for his withdrawing a tender made by him for such contract, commits an offence.

301. Malaysia provided the following examples of cases on the implementation of the provision.

Public Prosecutor v Chan Kit Tong Sally [1991]1 MLJ 358

In this case the complainant one, Tan Chong Hin, had booked a low cost house from Sally Development. The respondent who owned the majority of the share capital of the company told the complainant that in addition to the approved price of the house he would have to pay \$ 15,000 as under counter money. A trap was laid and the money was paid over to the respondent in her office. She was arrested and charged under s 3(1)(i) of the Prevention of Corruption Act 1961. She was convicted in the sessions court and sentenced to one days imprisonment and fined \$ 6,000 or in default one years imprisonment and ordered to pay a penalty of \$ 15,000. On appeal to the High Court the conviction was quashed. Two questions were reserved for the determination of the Supreme Court as follows:

- (a) whether in a prosecution under the Prevention of Corruption Act 1961 under counter money as the term is used in the circumstances of the case is a gratification within the meaning assigned to it under s 2 of the Prevention of Corruption Act 1961;
- (b) if the answer to the above is in the affirmative then whether the person receiving such gratification in the circumstances described in the case received it corruptly.

Held, answering both questions in the affirmative:

- (1) The interpretation of gratification in the Prevention of Corruption Act 1961 is wide enough to include the sum of \$ 15,000 paid as under counter money. The person who receives the gratification need not be a public officer.
- (2) In the light of the evidence in this case and having regard to the provisions of the Prevention of Corruption Act 1961, both the questions under reference should be answered in the affirmative.
- (3) The conviction, sentence and penalty as ordered by the learned sessions judge are restored.

302. Malaysia referred to Table 2 (Annex 2).

(b) Observations on the implementation of the article

303. The reviewing experts are of the opinion that Malaysia has fully implemented the provision.

Article 22 Embezzlement of property in the private sector

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally in the course of economic, financial or commercial activities, embezzlement by a person who directs or works, in any capacity, in a private sector entity of any property, private funds or securities or any other thing of value entrusted to him or her by virtue of his or her position

(a) Summary of information relevant to reviewing the implementation of the article

304. Malaysia referred to section 18 of MACCA when read in conjunction with the definition of “agent”, which reflect certain aspects of article 22 of UNCAC. However, the provisions of the Penal Code are more pertinent and relevant to the offence of “embezzlement” as enshrined in article 22.

305. Malaysia cited the following legislation:

Section 18 of MACCA - Offence of intending to deceive principal by agent*

A person commits an offence if he gives to an agent, or being an agent he uses with intent to deceive his principal, any receipt, account or other document in respect of which the principal is interested, and which he has reason to believe contains any statement which is false or erroneous or defective in any particular, and is intended to mislead his principal.

*This section is similar to section 11 (c) of the Anti-Corruption Act 1997(Act 575) and section 4 (c) of the Prevention of Corruption Act 1961 (Act 57)

Section 403 - Dishonest misappropriation of movable property, or converting it to one's own use

Whoever dishonestly misappropriates, or converts to his own use, or causes any other person to dispose of, any property, shall be punished with imprisonment for a term which shall not be less than six months and not more than five years and with whipping and shall also be liable to fine.

Section 404 of the Penal Code (Act 574) - Dishonest misappropriation of property possessed by a deceased person at time of his death

Whoever dishonestly misappropriates, or converts to his own use or causes any other person to dispose of property, knowing that such property was in the possession of a deceased person at the time of that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment for a term which shall not be less than six months and not more than five years and with whipping, and shall also be liable to fine; and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment shall not be less than one year and not more than ten years and with whipping, and shall also be liable to fine.

Section 405 of the Penal Code (Act 574) - Criminal breach of trust

Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust.

Section 406 of the Penal Code (Act 574) - Punishment of criminal breach of trust

Whoever commits criminal breach of trust shall be punished with imprisonment for a term which shall not be less than one year and not more than ten years and with whipping, and shall also be liable to fine.

Section 408 - Criminal breach of trust by clerk or servant

Whoever, being a clerk or servant, or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which shall not be less than one year and not more than ten years and with whipping, and shall also be liable to fine.

Section 409 - Criminal breach of trust by public servant or agent Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or an agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which shall not be less than two years and not more than twenty years and with whipping, and shall also be liable to fine.

Section 409A - Defence not available

It is no defence for any offence prescribed in sections 403, 404, 405, 406, 407, 408 and 409 to show that the property was openly appropriated or that the appropriation was duly recorded and entered in the books and accounts of any company or association or body of person whether incorporated or not.

Section 409B - Presumption

- (1) Where in any proceeding it is proved-
- (a) for any offence prescribed in sections 403 and 404, that any person had misappropriated any property; or
 - (b) for any offence prescribed in sections 405, 406, 407, 408 and 409, that any person entrusted with property or with dominion over property had-
 - (i) misappropriated that property;

- (ii) used or disposed of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract, express or implied which he had made touching the discharge of such trust; or
 - (iii) suffered any person to do any of the acts described in subparagraph (i) or (ii) above, it shall be presumed that he had acted dishonestly until the contrary is proved.
- (2) The presumption under subsection (1) shall apply mutatis mutandis to the Offences prescribed in sections 109 and 511 of the Code in relation to any of the offences referred to in that section.

306. Furthermore, Malaysia referred to sections 417, 418, 420, 463/465, 467, 468, 471, 474, and 477A of the Penal Code. (see under Article 17 of UNCAC)

307. Malaysia provided the following examples of cases on the implementation of the provision.

Section 18 of MACCA

Public Prosecutor v Subahir Salmin [2009] 1 LNS 730

Section 403 Penal Code (Act 574)

Public Prosecutor v Khairuddin Hj Musa [1981] CLJ 86

The accused, a credit controller of Bank Rakyat, Kuala Lumpur pleaded guilty to a charge for CBT of RM20,000 under s. 408 and to three other charges of dishonest misappropriation on three different occasions of RM35,000, RM24,975 and RM50,000 amounting to RM109,975 under s. 403. He was sentenced to one days imprisonment and fined a sum of RM2,000 in default two months on the CBT charge and on the misappropriation charges he was sentenced to one days imprisonment and a fine of RM3,000 in default three months for the RM50,000 and on the two other charges to one days imprisonment and a fine of RM2,000 in default two months on each count.

Section 405 Penal Code (Act 574)

In Fawziah Hodlings v Metramac Corporation Sdn Bhd & Anor Appeal [2006] 1 MLJ

505 the Court of Appeal said per Gopal Sri Ram, JCA, that: In this context, it is clearly wrong to treat even a private limited company with only two shareholders any different from any other company. An intentional misappropriation of such a company's property, movable or immovable is a criminal breach of trust within section 405 of the Penal Code and, if the misappropriation is done by directors, as was the case here, it is the aggravated form of criminal breach of trust under section 409 (see *Public Prosecutor v Datuk Harun* [1997] 1 MLJ 180). I need do no more than quote from the judgement of Chua J in *Tay Choo Wah v Public Prosecutor* [1976] 2 MLJ 95 where his Lordship said: The sooner directors realize that the Companies Act applies to private companies whether family or not the better it is. A company is not a mere puppet of the directors and the people interested in the proper and lawful conduct of the company are not just the directors and the shareholders. All sorts of people have a legitimate and proper interest in the well - being and preservation of the assets and properties of the company, like creditors and persons having dealings with the company. (Emphasis added).

Section 406 Penal Code (Act 574)

Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors [1978] 1 MLJ 240

For details on the case please see above under Article 17 of the Convention.

Section 408 Penal Code (Act 574)

Public Prosecutor v Chew Chee Wah [1996] 1CLJ 94

CRIMINAL PROCEDURE: Sentencing - Offence of criminal breach of trust by clerk or servant - Offence "shall be punished by imprisonment" - Whether binding-over order appropriate - Section 294(i) Criminal Procedure Code - Section 408 Penal Code.

The respondent was charged for criminal breach of trust of cash and cheques worth RM45,544.90 punishable under s. 408 of the Penal Code. He pleaded guilty and after considering the probation report and mitigation by his Counsel, the learned Magistrate bound over the respondent in the sum of RM3,000 cash for a period of 3 years. The respondent, a sales executive, pocketed collections totalling RM45,544.90 belonging to his employer over a period of two weeks after he was employed. When the police arrested him, a sum of RM1,010 was seized from the respondent, which amount was restored to his employer. The respondent was 20 years 4 months and 16 days old at the time of the offence. The public prosecutor appealed against the sentence imposed by the learned Magistrate, arguing that the sentence was manifestly disproportionate to the offence in view of the minimal custodial sentence of one (1) year under the amended s. 408 of the Penal Code. The respondent argued that he was a first offender having a good family background and had pleaded guilty and that he should be given a chance to be a good citizen as a term of imprisonment would do him no good.

[1] Held: The respondent was not a youthful offender under s. 294(i) of the CPC and could be bound over.

[2] The words "shall be punished with imprisonment" in s.408 Penal Code require the Court to impose imprisonment, even for a day. However s. 294(i) of the CPC could be applied as it allows for suspension of any sentence.

[3] The respondent had acted in a calculative manner to collect the sums without thought for its consequences. To accede to the respondent's plea for a non custodial sentence would open the floodgates and white collar offenders would flout the law with impunity. A sojourn in prison for the minimal term as allowed by s. 408 Penal Code would certainly do good to the respondent and the order of whipping would serve as a firm reminder that crime does not pay. [Appeal allowed. Respondent sentenced to one (1) year imprisonment and 2 strokes of the whip].

Public Prosecutor v Khairuddin Hj Musa [1981] CLJ 86, Ibid.

Section 409 Penal Code (Act 574)

Periasamy Sinnappan v Pendakwa Raya [1996] 3 CLJ 187

In the Sessions Court, the first appellant, the chief executive officer of the Co-operative Central Bank Limited (the Bank), was charged with three counts of criminal breach of trust under the old s. 409 Penal Code (i.e. prior to its amendment in 1993), while the second appellant, a subordinate officer of the first appellant, was charged with abetment of the offences under s. 109 of the Code read with s. 409 thereof.

Section 420 Penal Code (Act 574)

Loh Liang Gun & anor v Public Prosecutor [2007] 5 MLJ 159

The first appellant was a marketing officer of Hong Leong Finance and it was his duty to interview hire purchase applicants to ensure that their particulars in the proposal forms were correct. The first appellant was charged for the offence of cheating by dishonestly inducing the staff of Hong Leong Finance to believe that the particulars contained in 10 sets of proposal forms for hire purchase loans for vehicles in the applicants names respectively were true and correct and to deliver 10 payments totaling RM440,000 to Shen Hua Used Car Trading Co (the used car company), which belonged to the second appellant. It was

alleged that the first appellant had by his recommendations on the proposal forms falsely represented to Hong Leong Finance that all the particulars provided by the first appellant had been checked and verified by him to be true and correct. It was further alleged that acting upon the first appellants recommendations and false representations, Hong Leong Finance through the branch manager (PW3) had been induced and had approved the hire-purchase loans. Both appellants were convicted and sentenced by the George Town Sessions Court judge (the trial judge). Their appeals to the Penang High Court judge had been dismissed. Thus their appeals Orders appealed against Convicted on 10 counts of cheating under s 420 of the Penal Code and sentenced to four years imprisonment on each of the first five counts; and five years imprisonment each on the rest, all the 10 sentences to run concurrently.

Section 463/465 Penal Code (Act574)

Public Prosecutor v Yeoh Teck Chye & Lim Hong Pung & Anor v PP [1981]2 MLJ 176, *Ibid.*

Section 468 Penal Code (Act 574)

Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180

This case involves the joint trial of the three accused firstly on a charge preferred against all three of them for jointly committing forgery for the purpose of cheating under section 468 of the Penal Code, and secondly on a charge against the 2nd accused for criminal breach of trust under section 406 of the Penal Code and a joint charge against the 1st and 3rd accused under sections 109 and 406 of the Penal Code for abetment of the criminal breach of trust charge against the 2nd accused.

The charges read:

1. As against all three accused, That you jointly on or about the 5th day of May, 1975 at Bank Kerjasama Rakyat Malaysia Berhad at No. 140 Jalan Ipoh, Kuala Lumpur, in the Federal Territory of Kuala Lumpur forged a certain document, to wit, Minutes of Investment Committee of Bank Kerjasama Rakyat Malaysia Berhad resolving that (a) three million ordinary shares of Dunlop Estates Berhad, and (b) M\$1 million Debenture Stocks of Kuala Lumpur Kepong Berhad be lodged at the First National City Bank, Jalan Ampang, Kuala Lumpur for the purpose of securing Letters of Credit requirements of Tinju Dunia Sendirian Berhad for amounts not exceeding M\$6.5 million, intending that it shall be used for the purpose of cheating and that you thereby committed an offence punishable under section 468 of the Penal Code.
2. As against the 2nd accused, That you on or about the 5th day of May, 1975, at Kuala Lumpur in the Federal Territory, being entrusted with dominion over certain property, to wit, three million ordinary shares of Dunlop Estates Berhad and MS1 million Debenture Stocks of Kuala Lumpur Kepong Berhad belonging to the Bank Kerjasama Rakyat Malaysia Berhad committed criminal breach of trust and that you thereby committed an offence punishable under section 406 of the Penal Code.
3. As against the 1st and 3rd accused, That you jointly on or about the 5th day of May, 1975, at Kuala Lumpur in the Federal Territory, abetted the commission of the offence of criminal breach of trust of certain property, to wit, three million ordinary shares of Dunlop Estates Berhad and MS1 million Debenture Stocks of Kuala Lumpur Kepong Berhad belonging to Bank Kerjasama Rakyat Malaysia Berhad by one Datuk Abu Mansor bin Mohd. Basir which offence was committed in consequence of your abetment and that you thereby committed an offence punishable under sections 109 and 406 of the Penal Code.

Section 471 Penal Code (Act574)

Public Prosecutor v Yeoh Teck Chye & Lim Hong Pung & Anor v PP [1981]2 MLJ 176, *Ibid.*

Accused 3 was tried on two charges of forgery as follows:

“First Charge: That you on or about 4th March, 1976 at Bank Buruh (Malaysia) Bhd., Jalan Gereja, in the Federal Territory, Kuala Lumpur, dishonestly used as genuine a certain document, to wit, a Bank Buruh (Malaysia) Bhd. Application Form to open an Individual Account, i.e. Account No. 11-1574 dated 4th March, 1976 which you had reason to believe at the time you used it to open a current account with the said Bank, to be forged document and that you have thereby committed an offence punishable under section 465 and section 471 of the Penal Code .

Second Charge: That you on or about 10th June, 1976, at Bank Buruh (Malaysia) Bhd., Jalan Gereja, in the Federal Territory, Kuala Lumpur, dishonestly used as genuine a certain document, to wit, a Bank Buruh (Malaysia) Bhd. Application Form to open an Individual Account, i.e. Account No. 11-1897 dated 10th June, 1976 which you had reason to believe at the time you used it to open a current account with the said Bank, to be forged document and that you have thereby committed an offence punishable under sections 465 and 471 of the Penal Code.”

308. Malaysia referred to Table 2 (Annex 2).

(b) Observations on the implementation of the article

309. The reviewing experts are satisfied with the explanations and case examples provided by Malaysia and are of the opinion that Malaysia has fully implemented the provision.

310. In case Malaysia would consider adopting a consolidated offence of embezzlement, misappropriation and or other diversion of property by a public official (article 17 of the Convention) into MACCA, as suggested by the reviewing experts in regard to article 17, Malaysia may wish to proceed in the same way for embezzlement in the private sector.

Article 23 Laundering of proceeds of crime

Subparagraph 1 (a) (i)

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(a) Summary of information relevant to reviewing the implementation of the article

311. Malaysia reported that section 26 of MACCA reflects the spirit of article 23. Further to this, the predicate offences enumerated in the Schedule of MACCA reflect paragraph 2 of article 23 of the Convention (more details are provided below).

312. Furthermore, Malaysia referred to section 4 of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (hereinafter referred to as AMLATFA) and the accompanying predicate offences enumerated in the Second Schedule of AMLATFA.

313. Malaysia cited the following legislation in relation to article 23 of UNCAC:

Section 26 of MACCA - Dealing with, using, holding, receiving or concealing gratification or advantage in relation to any offence

Any person who, whether within or outside Malaysia, whether directly or indirectly, whether on behalf of himself or on behalf of any other person, enters into, or causes to be entered into, any dealing in relation to any property, or otherwise uses or causes to be used, or holds, receives, or conceals any property or any part thereof which was the subject matter of an offence under section 16, 17, 18, 20, 21, 22 or 23 commits an offence and shall on conviction be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding seven years or to both.

Note: "Dealing" under MACCA includes:

- (a) any purchase, sale, loan, charge, mortgage, lien, pledge, caveat, **transfer**, delivery, assignment, subrogation, transmission, gift, donation, trust, settlement, deposit, withdrawal, transfer between accounts, or extension of credit;
- (b) any agency or grant of power of attorney; and
- (c) any act which results in any right, interest, title or privilege, whether present or future or whether vested or contingent, in the whole or in part of any property being conferred on any person.

Section 4 of AMLATFA - Offence of Money Laundering

- (1) Any person who-
 - (a) engages in, or attempts to engage in; or
 - (b) abets the commission of, money laundering commits an offence and shall on conviction be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or to both.
- (2) A person may be convicted of an offence under subsection (1) irrespective of whether there is a conviction in respect of a serious offence or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence.

Under section 3 "money laundering" means the act of a person who-

- (a) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;
- (b) acquires, receives, possesses, disguises, **transfers, converts**, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or
- (c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity,
where-
 - (aa) **as may be inferred from objective factual circumstance**, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or
 - (bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful authority.

Section 411 Penal Code - Dishonestly receiving stolen property

Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment for a term which may extend to five years or with fine or with both; and if the stolen property is a motor vehicle or any component part of a motor vehicle as defined in section 379A, shall be punished with imprisonment for a term of not less than six months and not more than five years, and shall also be liable to fine.

Section 410 of the Penal Code defines "Stolen Property"

Property the possession whereof has been transferred by theft, or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust or cheating has been committed, is designated as stolen property, whether the transfer has been made or the misappropriation or breach of trust or cheating has been committed within or without Malaysia. But if such

property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.

The expression 'stolen property' includes any property into or for which the same has been converted or exchanged and anything acquired by such conversion or exchange whether immediately or otherwise.

314. There must be an element of knowledge in order for a person to be liable under section 26 of MACCA. This is evident from a reading of section 26 of MACCA and the case of PP vs Gan Kiet Bend [2011] 8 CLJ 151. Knowledge may be inferred from factual circumstances. Although only regulated specifically under section 4 of AMLATFA, the same is valid for section 26 of MACCA.

315. Malaysia provided the following examples of cases on the implementation of the provision:

Public Prosecutor v. Gan Kiat Bend & Another Case [2011] 8 CLJ 951

There were two cases before the sessions court judge in which both the accused were jointly tried on money laundering charges under s. 4(1) of the Anti-Money Laundering Act 2001 (AMLA) (now known as the Anti-Money Laundering and Anti-Terrorism Financing Act 2001). The accused in the first case (first accused) was said to have represented a landowner by the name of Boh Chin Chye (BCC) who purportedly owned lots 22203 and 22204. The first accused had entered into a sale and purchase transaction of the said lots with a part time property broker (SP6) who allegedly was working together with the accused in the second case (second accused). The said lots were purchased by SP6 and the second accused for RM2.5 million. Subsequently the said lots were sold for RM9 million to a company called B & G Intertrade. However, the said lots could not be transferred to the said company due to a fraud that was later discovered. The purchase price of RM9 million was banked into the account of a law firm called Syed Ibrahim & Co which had been approached by both the accused to deal with the sale and purchase of the said lots. Syed Ibrahim & Co paid out RM8.4 million into SP6's current account with Standard Chartered Bank and retained the balance sum as its legal fees. SP6 testified that he had paid out a sum of money to both the accused upon their instructions and was left with a remaining sum of RM1.7 million out of which RM500,000 was utilized for settling his personal matters. The balance of RM1.2 million had been seized and frozen by the authorities. SP6 testified that both accused did not instruct him at any one time to pay BCC. The Director of Pejabat Tanah dan Galian Selangor (PTG) testified that the manual title did not show BCC as the owner of the said lots although the computerized title of the said lots displayed BCC as the owner. The manual title in fact showed that lot 22203 was owned by a company called Rahim Enterprise Sdn Bhd whilst lot 22204 was jointly owned by one Tan Eye Teong, one Tan Lian Hua and a company called Improvest Sdn Bhd. There was no memorandum of transfer in Form 14A of the National Land Code to support any change of ownership in the said titles. The owners of the said lots had lodged police reports claiming that the said lots had been unlawfully transferred to BCC and that they had not entered into any transaction with BCC. That led to the cases against both the accused.

The issues that arose for determination was whether the three elements under s. 4(1) AMLA was proved to establish the commission of the offences by both accused: (1) whether they had received or used the monies; (2) whether the monies received or used were proceeds of an unlawful activity; and (3) whether it could be inferred from the objective factual circumstance that they knew or had reason to believe that the monies were proceeds from an unlawful activity. Held (convicting and sentencing both accused):

(1) There was sufficient credible evidence to establish the first element of the offence,

i.e., the offending act of receiving or using the monies in all charges against both the accused. The movement of monies had been explained by SP6 and had been supported by the various witnesses and banking documents. Further, both the accused had not disputed it. (para 10)

(2) (...)

(3) Both accused had dishonestly used false or forged documents pertaining to the said lots as genuine so as to make a wrongful gain for themselves. The title to the said lots, being forged, fell within the term "false documents" under s. 470 Penal Code. The commission of a serious offence under s. 471 had been proved by the prosecution. The offence of cheating under s. 420 Penal Code had also been made out. (paras 24 & 26)

(4) The sequence of events showed that the money laundering offences were committed between November 2003 and January 2004. Section 467 Penal Code, however, was inserted as a serious offence on 30 September 2004 which brought into question the validity of the AMLA charges against both accused. Section 2 AMLA specifically allowed the application of "serious offence, unlawful activity or foreign serious offence whether committed before or after the commencement of AMLA. AMLA too did not state that the prosecution must be instituted after the serious offence had been listed. To also contend that s. 467 did not apply to AMLA on the basis that it was not listed as a serious offence at the time the money laundering offences were committed would run counter to the purpose of AMLA as stated in its preamble. It followed that s. 467 Penal Code was applicable as a serious offence in relation to a charge under s. 4(1) AMLA. The AMLA charges also did not offend art. 7(1) of the Federal Constitution based on the relevant authorities. (para 28)

(5) (...)

(6) The prosecution witnesses were credible witnesses without any motive and thus their evidence was acceptable. On the other hand, the first accused appeared to be an untruthful witness as during examination in chief he could read and understand the documents referred to him but in cross-examination he pretended not to be able to read anything in English and Bahasa Melayu except for the numbers. Further, the first accused used BCC's name instead of his own as BCC was a simpleton. BCC's statement that he had never gone to Syed Ibrahim & Co's office and that he had not known of the use of his identity card for the transactions involving the said lots were accepted. (paras 43, 44, 46)

Public Prosecutor v Ong Seh Sen [2010] 7 CLJ 233

The appellant was sentenced to two years imprisonment and imposed a penalty fine of RM1 million or in default 12 months imprisonment for an offence under s. 4(1) of the Anti-Money Laundering Act 2001 (AMLA). He had pleaded guilty to the offence. He was found to have forged 75 invoices belonging to a company owned by him as a cover up to account for the proceeds of an illegal betting on the English Premier League matches. The proceeds amounted to a sum of RM 1,372,359 which was banked into the company's bank account with Maybank. Out of that sum, RM1 million was expended by the appellant.

Mohd Riezuan bin Jalil & Ors v Bank Negara Malaysia [2009] MLJU 1815

The 1st and 2nd Plaintiffs had been charged with a total of 222 criminal charges under section 4(1) of AMLA, with 162 against the first Plaintiff and 62 against the 2nd Plaintiff. They were also each charged with an offence under section 25(1) of BAFIA.

316. Malaysia referred to Table 5 (Annex 3).

(b) Observations on the implementation of the article

317. The reviewing experts are of the opinion that Malaysia has fully implemented the provision.

318. During the country visit, Malaysia also explained initiatives that were taken at the national level to coordinate and facilitate the fight against money laundering. A National Coordinating Committee to Counter Money Laundering (NCC) has been established in April 2000, which functions as the platform for inter-agency exchange to counter money laundering at the national level. The NCC consists of 16 different agencies, namely the Central Bank of Malaysia, Ministry of Finance, Attorney General's Chambers, Ministry of Foreign Affairs, Ministry of Home Affairs, Royal Malaysia Police, Malaysian Anti-Corruption Commission, National Drug Agency, Royal Malaysian Customs, Labuan Offshore Financial Services Authority, Securities Commission, Companies Commission of Malaysia, and the Inland Revenue Board, Registrar of Societies, Immigration Department and the Ministry of Domestic Trade, Cooperatives and Consumerism. It enables its members to be informed of any new or developing money laundering techniques. More information on the NCC is provided in this report under article 38 of UNCAC.

Article 23 Laundering of proceeds of crime

Subparagraph 1 (a) (ii)

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(a) Summary of information relevant to reviewing the implementation of the article

319. Malaysia referred to section 26 of MACCA and section 4 of AMLATFA.

320. Malaysia cited the following legislation in regard to subparagraph 1(a) (ii) of article 23 of UNCAC.

Section 26 of MACCA - Dealing with, using, holding, receiving or concealing gratification or advantage in relation to any offence

Any person who, whether within or outside Malaysia, whether directly or indirectly, whether on behalf of himself or on behalf of any other person, enters into, or causes to be entered into, any dealing in relation to any property, or otherwise uses or causes to be used, or holds, receives, or **conceals** any property or any part thereof which was the subject matter of an offence under section 16, 17, 18, 20, 21, 22 or 23 commits an offence and shall on conviction be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding seven years or to both.

Note: "Dealing" under MACCA includes:

- (a) any purchase, sale, loan, charge, mortgage, lien, pledge, caveat, transfer, delivery, assignment, subrogation, transmission, gift, donation, trust, settlement, deposit, withdrawal, transfer between accounts, or extension of credit;
- (b) any agency or grant of power of attorney; and
- (c) any act which results in any right, interest, title or privilege, whether present or future or whether vested

or contingent, in the whole or in part of any property being conferred on any person.

Section 4 of AMLATFA. See above.

Section 3 of AMLATFA:

“money laundering” is the act of a person who-

- (a) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;
- (b) acquires, receives, possesses, **disguises**, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or
- (c) **conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership** of, proceeds of any unlawful activity, where-
 - (aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or
 - (bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity;

“serious offence” means-

- (a) any of the offences specified in the Second Schedule;
- (b) an attempt to commit any of those offences; or
- (c) the abetment of any of those offences;

“foreign serious offence” means an offence-

- (a) against the law of a foreign State stated in a certificate purporting to be issued by or on behalf of the government of that foreign State; and
- (b) that consists of or includes an act or activity which, if it had occurred in Malaysia, would have constituted a serious offence;

Section 411 and 410 Penal Code (quoted above).

321. Malaysia provided the following examples of cases on the implementation of the provision.

1. Public Prosecutor v Gan Kiat Beng & Another Case [2011] 8 CLJ 951, *Ibid.* (quoted under subparagraph 1 (a) (i) of article 23).
2. Public Prosecutor v Ong Seh Sen [2010] 7 CLJ 233, *Ibid.* (quoted under subparagraph 1 (a) (i) of article 23).
3. Mohd Reizuan bin Jalil & Ors v. Bank Negara Malaysia, *Ibid.* (quoted under subparagraph 1 (a) (i) of article 23).

322. Malaysia referred to Table 5 (Annex 3).

(b) Observations on the implementation of the article

323. The reviewing experts are of the opinion that Malaysia has fully implemented the provision.

Article 23 Laundering of proceeds of crime

Subparagraph 1 (b) (i)

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) *Subject to the basic concepts of its legal system:*

(i) *The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;*

(a) Summary of information relevant to reviewing the implementation of the article

324. Malaysia cited section 26 of MACCA and section 4 of AMLATFA.

Section 26 of MACCA - Dealing with, using, holding, receiving or concealing gratification or advantage in relation to any offence

Any person who, whether within or outside Malaysia, whether directly or indirectly, whether on behalf of himself or on behalf of any other person, **enters into, or causes to be entered into, any dealing** in relation to any property, or otherwise **uses or causes to be used, or holds, receives, or conceals** any property or any part thereof which was the subject matter of an offence under section 16, 17, 18, 20, 21, 22 or 23 commits an offence and shall on conviction be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding seven years or to both.

Note: "Dealing" under MACCA **includes:**

- (a) any purchase, sale, loan, charge, mortgage, lien, pledge, caveat, transfer, delivery, assignment, subrogation, transmission, gift, donation, trust, settlement, deposit, withdrawal, transfer between accounts, or extension of credit;
- (b) any agency or grant of power of attorney; and
- (c) any act which results in any right, interest, title or privilege, whether present or future or whether vested or contingent, in the whole of in part of any property being conferred on any person.

Section 4 of AMLATFA - Offence of Money Laundering

(1) Any person who-

- (a) engages in, or attempts to engage in; or
 - (b) abets the commission of, money laundering commits an offence and shall on conviction be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or to both.
- (2) A person may be convicted of an offence under subsection (1) irrespective of whether there is a conviction in respect of a serious offence or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence.

Under section 3 "money laundering" means the act of a person who-

- (a) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;
- (b) **acquires**, receives, **possesses**, disguises, transfers, converts, exchanges, carries, disposes, **uses**, removes from or brings into Malaysia proceeds of any unlawful activity; or
- (c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity, where-
 - (aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or
 - (bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful authority.

325. Furthermore, Malaysia referred to certain provisions in the Penal Code, which are predicate offences in MACCA and AMLATFA that also reflect the spirit of article 23, subparagraph 1(b) (i).

326. Malaysia cited the following legislation in regard to subparagraph 1(b)(i) of article 23 of UNCAC:

Sections 41, 412, 413, 414 of the Penal Code (Act 574)

411. Dishonestly receiving stolen property

Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment for a term which may extend to five

years or with fine or with both; and if the stolen property is a motor vehicle or any component part of a motor vehicle as defined in section 379A, shall be punished with imprisonment for a term of not less than six months and not more than five years, and shall also be liable to fine.

413. Habitually dealing in stolen property

Whoever habitually receives or deals in property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.

414. Assisting in concealment of stolen property

Whoever voluntarily assists in concealing or disposing of or making away with property which he knows or has reason to believe to be stolen property, shall be punished with imprisonment for a term which may extend to seven years or with fine or with both; and if the stolen property is a motor vehicle or any component part of a motor vehicle as defined in section 379A, shall be punished with imprisonment for a term of not less than six months and not more than seven years, and shall also be liable to fine.

Any act of receiving of stolen property which is not covered by sections 411, 412 and 413 is covered under section 414 of the Penal Code (Act 574). See Abdul Manap v PP [1967] 1MLJ 182

Section 410 of the Penal Code defines “Stolen Property” See above.

Section 403 of the Penal Code -Dishonest misappropriation of property

Whoever dishonestly misappropriates, or converts to his own use, or causes any other person to dispose of, any property, shall be punished with imprisonment for a term which shall not be less than six months and not more than five years and with whipping and shall also be liable to fine

Sections 51 (5) and 51(6) of AMLATFA

Seizure of immovable property

51. (1) Where the Public Prosecutor is satisfied on information given to him by an investigating officer that any immovable property is the subject matter of an offence under subsection 4(1) or a terrorism financing offence or evidence of the commission of such offence or is terrorist property, such property may be seized, and the seizure shall be effected-

(a) by the issue of a Notice of Seizure by the Public Prosecutor setting out the particulars of the immovable property which is seized in so far as such particulars are within his knowledge, and prohibiting all dealings in such immovable property;

(b) by publishing a copy of such Notice in two newspapers circulating in Malaysia, one of which shall be in the national language and the other in the English language; and

(c) by serving a copy of such Notice on the Land Administrator or the Registrar of Titles, as the case may be, in Peninsular Malaysia, or on the Registrar of Titles or Collector of Land Revenue, as the case may be, in Sabah, or on the Director of Lands and Surveys or the Registrar responsible for land titles, as the case may be, in Sarawak, of the area in which the immovable property is situated.

(2) The Land Administrator, the Collector of Land Revenue, the Director of Lands and Surveys, the Registrar of Titles or the Registrar responsible for land titles, as the case may be, referred to in subsection (1) shall immediately upon being served with a Notice of Seizure under that subsection endorse the terms of the Notice of Seizure on the document of title in respect of the immovable property in the Register at his office.

(3) Where an endorsement of a Notice of Seizure has been made under subsection (2), the Notice shall have the effect of prohibiting all dealings in respect of the immovable property, and after such endorsement has been made no dealing in respect of the immovable property shall be registered, regardless whether it was effected before or after the issue of such Notice or the making of such endorsement.

(4) Subsection (3) shall not apply to a dealing effected by an officer of a public body in his capacity as such officer, or otherwise by or on behalf of the Federal Government of Malaysia or the Government of a State, or a local authority or other statutory authority.

(5) Any person who contravenes subsection (2) or (3) or does any act which results in, or causes, a contravention of subsection (2) or (3) commits an offence and shall, on conviction, be liable to a fine not exceeding twice the value of the property in respect of which the Public Prosecutor's order had been contravened, or one million ringgit, whichever is the higher, or to imprisonment for a term not exceeding one year or to both, and, in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.

(6) Where a Notice of Seizure has been issued under subsection (1), a registered proprietor of the immovable property which is seized under such Notice, or any other person having any interest in such immovable property, who has knowledge of such Notice, and who knowingly enters into any agreement with any person to sell, transfer, or otherwise dispose of or deal with, the whole or any part of such immovable property, commits an offence and shall, on conviction, be liable to a fine not exceeding twice the value of such property, or one million ringgit, whichever is the higher, or to imprisonment for a term not exceeding one year or to both, and, in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.

327. A person who enters or causes to enter into any dealing in relation to any property which is the subject matter of an offence under MACCA, is liable.

328. All forms of participation in the offence under section 26 of MACCA are governed under section 28 of MACCA, while the extraterritorial aspect of this offence is governed by section 66 of MACCA.

329. On dual criminality reference is made to the fundamental principles of Malaysia's legal system laid out under chapter IV of UNCAC in this report below.

330. Malaysia provided the following examples of cases on the implementation of the provision.

Public Prosecutor v Gan Kiat Bend & Another Case [2011]8 CLJ 951, *Ibid.* (quoted above under subparagraph 1 (a) (i) of article 23)

Mohd Riezuan bin Jalil & Ors v Bank Negara Malaysia [2009] MLJU 1815, *Ibid.* (quoted above under subparagraph 1 (a) (i) of article 23).

331. Malaysia referred to Table 5 (Annex 3).

(b) Observations on the implementation of the article

332. The reviewing experts are of the opinion that Malaysia has fully implemented the provision.

Article 23 Laundering of proceeds of crime

Subparagraph 1 (b) (ii)

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) Subject to the basic concepts of its legal system:

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

(a) Summary of information relevant to reviewing the implementation of the article

333. Malaysia cited provisions in MACCA, AMLATFA and the Penal Code where the various participations in a crime are reflected.

Section 4 of AMLATFA - Offence of Money Laundering

(1) Any person who-

(a) engages in, or attempts to engage in; or

(b) abets the commission of, money laundering commits an offence and shall on conviction be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or to both.

(2) A person may be convicted of an offence under subsection (1) irrespective of whether there is a conviction in respect of a serious offence or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence.

Under section 3 “money laundering” means the act of a person who-

(a) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;

(b) **acquires**, receives, **possesses**, disguises, transfers, converts, exchanges, carries, disposes, **uses**, removes from or brings into Malaysia proceeds of any unlawful activity; or

(c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity, where-

(aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or

(bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful authority.

Section 28 of MACCA - Attempts, preparations, abetments, and criminal conspiracies punishable as offence

(1) Any person who-

(a) **attempts** to commit any offence under this Act;

(b) does **any act preparatory to or in furtherance** of the commission of any offence under this Act; or

(c) **abets** or is engaged in a criminal **conspiracy** to commit an offence under this Act; commits such offence and shall on conviction be liable to the punishment provided for such offence.

(2) Any provision of this Act which contains a reference to an offence under any specific provision of this Act shall be read as including a reference to an offence under subsection (1) in relation to the offence under that specific offence.

(3) Paragraph (1) (a) shall not apply where an attempt to do any act is expressly made under this Act, and paragraph (1)(c) shall not apply to the case of an abetment of an offence as provided under section 164 of the Penal Code.

PENAL CODE (Act 574)

Section 34- Each of several persons liable for an act done by all, in like manner as if done by him alone

When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

Section 35- When such an act is criminal by reason of its being done with a criminal knowledge or intention

Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

Section 37- Co-operation by doing one of several acts constituting an offence

When an offence is committed by means of several acts, whoever intentionally **cooperates** in the commission of that offence **by doing any one of those acts**, either singly or jointly with any other person, commits that offence.

Section 38- Several persons engaged in the commission of a criminal act, may be guilty of different offences

Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

Section 107 - Abetment of a thing

A person abets the doing of a thing who-

- (a) instigates any person to do that thing;
- (b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
- (c) intentionally aids, by any act or illegal omission, the doing of that thing.

Section 108-Abettor

** Abetment of an offence, however, is distinct from the offence itself. Abetment of a Penal Code offence is a distinct offence punishable under section 109 of the Penal Code.*

A person abets an offence who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Section 108A- Abetment of offences outside Malaysia

A person abets an offence within the meaning of this Code who, in Malaysia, abets the commission of any act without and beyond Malaysia which would constitute an offence if committed in Malaysia.

Section 109- Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment

Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Section 110- Punishment of abetment if the person abetted does the act with a different intention from that of the abettor

Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

Section 116 -Abetment of an offence punishable with imprisonment

Whoever abets an offence punishable with imprisonment shall, if that offence is not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment for a term which may extend to one-fourth part of the longest term provided for that offence or with such fine as is provided for that offence or with both; and if the abettor or the person abetted is a public servant, whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment for a term which may extend to one-half of the longest term provided for that offence or with such fine as is provided for the offence or with both.

Section 120 A r/w 120 B - Punishment of criminal conspiracy

120A. When two or more persons agree to do, or cause to be done-

- (a) an illegal act; or
- (b) an act, which is not illegal, by illegal means, such an agreement is designated a criminal conspiracy: Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

120B. (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for a term of two years or upwards shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence. (2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment for a term not exceeding six months or with fine or with both.

It has been held that there is no offence of conspiracy to commit corruption in Malaysia pursuant to section 120 B (1) of the Penal Code. See the case of Public Prosecutor v Ottavio Quattrocchi [2003] 1

MLJ 223. However the provisions of section 28 of the Malaysian ACC 2009 made special reference to committing criminal conspiracy to commit an offence under the Act. This specific provision overrides the general provision of section 120 B (1) Penal Code.

334. Malaysia explained that acts of participation and facilitating are covered under section 28 of MACCA and equally these acts can be covered under sections 107 – 120 (a) of the Penal Code.

335. The following examples of cases on the implementation of the provision were provided:

See Public Prosecutor v. Gan Kiat Bend & Another Case [2011]8 CLJ 951, *Ibid.*
(quoted above under Article 23 1 (a) (i) of UNCAC / Paragraph 249)

Mohd Riezuan bin Jalil & Ors v Bank Negara Malaysia [2009] MLJU 1815 Ibid Subpara 1 (a) (i) of Article 23

Public Prosecutor v Shahar Yusof & Ors & Anor Cases [2009] 1LNS 352

Sharif Bungsu b Sharif Zen & Nordin b Salle v Public Prosecutor [1991]MLJU 645

Public Prosecutor v Datuk Haji Harun bin Haji Idris & Ors [1977] 1 MLJ 180.

This case involves the joint trial of the three accused firstly on a charge preferred against all three of them for jointly committing forgery for the purpose of cheating under section 468 of the Penal Code, and secondly on a charge against the 2nd accused for criminal breach of trust under section 406 of the Penal Code and a joint charge against the 1st and 3rd accused under sections 109 and 406 of the Penal Code for abetment of the criminal breach of trust charge against the 2nd accused. The charges read:

1. As against all three accused, That you jointly on or about the 5th day of May, 1975 at Bank Kerjasama Rakyat Malaysia Berhad at No. 140 Jalan Ipoh, Kuala Lumpur, in the Federal Territory of Kuala Lumpur forged a certain document, to wit, Minutes of Investment Committee of Bank Kerjasama Rakyat Malaysia Berhad resolving that (a) three million ordinary shares of Dunlop Estates Berhad, and (b) M\$1 million Debenture Stocks of Kuala Lumpur Kepong Berhad be lodged at the First National City Bank, Jalan Ampang, Kuala Lumpur for the purpose of securing Letters of Credit requirements of Tinju Dunia Sendirian Berhad for amounts not exceeding M\$6.5 million, intending that it shall be used for the purpose of cheating and that you thereby committed an offence punishable under section 468 of the Penal Code.

2. As against the 2nd accused, That you on or about the 5th day of May, 1975, at Kuala Lumpur in the Federal Territory, being entrusted with dominion over certain property, to wit, three million ordinary shares of Dunlop Estates Berhad and MS1 million Debenture Stocks of Kuala Lumpur Kepong Berhad belonging to the Bank Kerjasama Rakyat Malaysia Berhad committed criminal breach of trust and that you thereby committed an offence punishable under section 406 of the Penal Code.

3. As against the 1st and 3rd accused, That you jointly on or about the 5th day of May, 1975, at Kuala Lumpur in the Federal Territory, abetted the commission of the offence of criminal breach of trust of certain property, to wit, three million ordinary shares of Dunlop Estates Berhad and MS1 million Debenture Stocks of Kuala Lumpur Kepong Berhad belonging to Bank Kerjasama Rakyat Malaysia Berhad by one Datuk Abu Mansor bin Mohd. Basir which offence was committed in consequence of your abetment and that you thereby committed an offence punishable under sections 109 and 406 of the

Penal Code.

Lim Kheng Kooi & Anor v Regina [1957] 1 MLJ 199

This was an appeal against the conviction of the first appellant on three charges of corruption and of the second appellant on charges of abetment of that corruption. The appellants were tried together. The principal ground of appeal urged on behalf of the appellants was that the learned President of the Sessions Court was wrong in calling on the appellants to enter on their defense as no prima facie case had been shown against them at the end of the prosecution case. It was also urged on behalf of the second appellant that the learned President was wrong in not granting the application of the appellants for a separate trial. Held:

- (1) as the learned President found that there was a prima facie case against the first and second appellants, he was not wrong in calling upon them to enter on their defenses;
- (2) the learned President had a discretion whether to order a separate trial or not and in the circumstances of the case the exercise of the discretion in refusing separate trials did not result in any miscarriage of justice.

**Haji Abdul Ghani bin Ishak & Anor v Public Prosecutor [1981] 2 MLJ 153

Case against 1st accused: At the conclusion of the prosecution case I was satisfied beyond reasonable doubt that a case of corrupt practice had been made out by the prosecution against the 1st accused not only in respect of using his public position for his pecuniary advantage but also for actual profit contrary to Article 7(10) of the State Constitution. I was also satisfied that an amendment of the charge at the stage should be desirable to bring it in line with the proven facts. Accordingly I framed an amended charge as follows: That you on 2nd October, 1974 in the State Executive Council, Malacca, in the District of Melaka Tengah, in the State of Melaka, being a member of the Administration, to wit a member of the Executive Council, Melaka, committed corrupt practice in that you while being such a member used your office for your pecuniary advantage, namely, participated in the deliberation for approving an application for State land in the Mukim of Kuala Linggi, Alor Gajah, Melaka, prepared by one Mohd. Noor bin Baba and submitted in the name of one Kipah bte Othman on 2nd March, 1974 and in respect of such land in which you were engaged in business you did take part in a decision likely to affect your pecuniary interest therein, and that you have thereby committed an offence punishable under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970,

[61] and I called upon the 1st accused to enter his defense.

Case against 2nd accused:

[63] To succeed in their charge of abetment against 2nd accused, the prosecution will have to, in addition to the proving of the case against 1st accused, show that he instigated, conspired or aided the 1st accused in the commission of the offence. He must be shown to have knowledge of the consequence of his act -- National Coal Board v Gamble [1958] 1 QB 11, 18 and intention to aid.

[64] I find the following evidence pertinent towards drawing the correct inference against the 2nd accused. On or about February 23, 1974 he dictated and asked his niece Kipah to type out a letter of application for a piece of land with the tracing obtained by 1st accused annexed to it. Such an act would have been perfectly legitimate had it not been for the fact that it was the 1st accused who chose the area and obtained the tracing of the proposed hatchery and not himself. He would appear therefore to be carrying into effect the step next to the one begun by the 1st accused. Then, following this event, he

went about to contact businessmen in Singapore to put forth the plan for the proposed prawn hatchery using the land applied for as the consideration for the large capital, expertise and shares negotiated for himself, 1st accused and his other nominees. It was not disputed that when the negotiations were first commenced, the land was [*237] a long way off from official consideration, let alone approval. Yet the 2nd accused was confident of the outcome in favor of the applicant. In the undisputed words of one of the investors (PW23):

"In 1974 the 2nd accused approached me with an idea to set up some venture. The venture was about a piece of land ... Accused 2 said it was a good land and would be given as a concession to a Bumiputra.

[65] The same witness also testified at a later stage that 2nd accused said Page 16 2 MLJ 230, *236; [1981] 2 MLJ 230 " he would get the land. and that when I was introduced to 1st accused I had the impression that the land was not given but going to be given. This conduct of the 2nd accused is sufficient, to my mind, not only to denote that he was aiding the 1st accused in getting the application before the Executive Council but also by his extraordinary show of confidence, he had shown that he knew or must have known that the 1st accused would exert his official influence to get it approved.

[66] Another incriminating inference could be drawn from his keeping the records of the project in a file (D14) in his General Enterprise office, allowing the company's address to be used as a postal address and taking the 1st accused into partnership of the company.

[67] His conduct above and his apparent interest in the company as well as his solicitation of shares for the 1st accused have led me to the unequivocal inference that he was abetting the 1st accused in both ways by aiding and conspiracy. I am satisfied beyond reasonable doubt that the prosecution had made out a case against the 2nd accused as well. A consequential amendment to the charge against this accused was necessary in view of the amendment made to the charge against the 1st accused. In exercise of my powers under section 158 of the Criminal Procedure Code I amended the charge to read as follows: That you on the 2nd October, 1974 in the District of Melaka Tengah, in the State of Melaka, abetted the commission of an offence of corrupt practice by one Haji Abdul Ghani bin Ishak who, while being a member of the Administration, to wit a member of the State Executive Council, Melaka, participated in the deliberation in the said Council for approving an application for State land in the Mukim of Kuala Linggi, Alor Gajah, Melaka, in which the said Haji Abdul Ghani bin Ishak had a pecuniary advantage and in respect of which he was engaged in business, which offence was committed in consequence of your abetment in that the application for the said land was prepared by you and submitted by one Kipah binti Othman and that you thereby committed an offence punishable under section 109 of the Penal Code and section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 ."

Public Prosecutor v Datuk Tan Cheng Swee & Ors [1979] 1 MLJ 166¹²

The 1st accused in this case is charged with three counts under section 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970. The 2nd accused is charged with abetting the 1st accused on the 1st and 2nd charges under section 109 of the Penal Code while the 3rd and 4th accused are charged with abetting the 1st accused on all the three charges.

¹² Even though these cases relate to a legislation that has been repealed the principles laid out on 'abetment' are applicable even today.

336. Malaysia referred to Table 5 (Annex 3).

(b) Observations on the implementation of the article

337. The reviewing experts share the view that Malaysia has fully implemented the provision. They observed that all different forms of participation covered by article 23, subparagraph 1 (b) (ii) of UNCAC are covered under MACCA. Malaysia explained that section 28 of MACCA was a catch-all provision that included participation, conspiracy, attempt and abetment, as well as any act in furtherance thereof. Abetting would include facilitation and counselling of the offence.

338. In regard to AMLATFA, only attempts and abetting are regulated. The other forms of participation in and association with or conspiracy are not covered. Malaysia explained that AMLATFA is considered the primary source of law for money laundering offences. However, the Penal Code is used as a supplement when referring to certain matters, such as criminal participation, not found in AMLATFA.

Article 23 Laundering of proceeds of crime

Subparagraph 2 (a) and (b)

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;

(a) Summary of information relevant to reviewing the implementation of the article

339. Malaysia cited section 26 of MACCA and section 4 of AMLATFA, which apply to predicate offences as per their respective Schedules. Malaysia cited the predicate offences enshrined in the Schedule of MACCA and AMLATFA.

340. The “prescribed offences” are defined under section 3 (a), (b), (c), (d), and (e) of MACCA and “serious offences” are defined under section 3 of AMLATFA.

341. The “prescribed offences” are included under section 3 of MACCA, as per articles 15 and 16 of UNCAC.

342. The “serious offences” under section 3 of AMLATFA are defined as follows:

- (a) any of the offences specified in the SECOND SCHEDULE;
- (b) any attempt to commit any of those offences; or
- (c) the abetment of any of those offences.

343. Offences (predicate) specified in the SECOND SCHEDULE which are within the range of criminal offences established in accordance with UNCAC are as follows:

1. MACCA:-

- Section 16- Offence of accepting gratification

- Section 17- Offence of giving or accepting gratification by agent
- [Section 18- offence of intending to deceive principal by agent]
- Section 19- Acceptor or giver of gratification to be guilty notwithstanding that purpose was not carried out or not in relation to principal's affairs or business.
- Section 20- Corruptly procuring withdrawal of tender
- Section 21- Bribery of officer of public body
- Section 22- Bribery of foreign public officials
- Section 23- Offence of using office or position for gratification
- Section 26- Dealing with, using, holding, receiving or concealing gratification or advantage in relation to offence
- Section 28-Attempts, preparations, abetments and criminal conspiracies punishable as offence

2. Penal Code (Act 574):-

- Section 161 - Public servants taking a gratification, other than legal remuneration, in respect of an official act.
- Section 162 - Taking a gratification in order, by corrupt or illegal means, to influence a public servant
- Section 163 -Taking a gratification, for the exercise of personal influence with a public servant
- Section 164 - Punishment for abetment by Public Servant of the offences defined above (Sections 162 and 163).
- Section 165 - Public servant obtaining any valuable thing, without consideration, from person concerned in any proceeding or business transacted by such public servant.
- Section 213 - Taking gifts, etc. to screen an offender from punishment.
- Section 214 - Offering gift or restoration of property in consideration of screening offender.
- Section 215 - Taking gift to help to recover stolen property etc.
- Section 379 - Theft
- Section 381- Theft by clerk or servant in possession of master
- Section 384- Extortion
- Section 385- Putting in fear of injury in order to commit extortion
- Section 386- Extortion by putting a person in fear of death or grievous hurt
- Section 387- Putting person in fear of death or grievous hurt in order to commit extortion
- Section 388- Extortion by threat of accusation of an offence punishable with death , or imprisonment, etc
- Section 389- Putting person in fear of accusation of offence in order to commit extortion
- Section 403 Dishonest misappropriation of property.
- Section 404 - Dishonest misappropriation of property possessed by a deceased person at time of his death.
- Section 405 - Criminal Breach of Trust
- Section 406 - Punishment of criminal breach of trust
- Section 407- Criminal breach of trust by carrier etc.
- Section 408 - Criminal breach of trust by clerk or servant.
- Section 409 - Criminal breach of trust by public servant or agent
- Section 415- Cheating
- Section 416- Cheating by personation
- Section 418- Cheating with the knowledge that wrongful loss may be thereby caused to a person whose interest the offender is bound to protect
- Section 420- Cheating and dishonestly inducing delivery of property
- Section 421- Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors
- Section 422-Dishonest or fraudulent preventing from being made available for his creditors a debt or demand due to the offender
- Section 423- Dishonest or fraudulent execution of deed of transfer containing a false statement of consideration
- Section 465- Forgery
- Section 466- Forgery of a record of a Court, or a public Register of Births, etc.
- Section 467- Forgery of a valuable security or will
- Section 468- Forgery for the purpose of cheating
- Section 471- Using as genuine a forged document

- Section 472- Making or possessing a counterfeit seal, plate, etc with intent to commit forgery punishable under section 467
- Section 473- Making or possessing a counterfeit seal, plate, etc, with intent to commit forgery punishable otherwise
- Section 474- Having in possession of a valuable security or will known to be forged, with intent to use it as genuine
- Section 475- Counterfeiting a device or mark used for authenticating documents described in section 467
- Section 476-Counterfeiting a device or mark used for authenticating documents other than those described in
- Section 467 or possessing counterfeit marked material.
- Section 477A- Falsification of accounts

344. Malaysia provided the following examples of cases on the implementation of the provision.

Public Prosecutor v Segaran a/s Mathavan [2009] 9 MLJ 957

In Public Prosecutor v Segaran a/l S Mathavan [2009] 9 MLJ 597, the accused was charged for nine charges under s 420 of the Penal Code and three charges under s 4 (1)(a) of AMLATFA.

Public Prosecutor v Ong Seh Sen [2010] 7 CLJ 233, Ibid.

In this case, the accused pleaded guilty to an offence under section 4(1) of Anti-Money Laundering Act 2001 (now known as AMLATFA). He was found to have forged 75 invoices belonging to a company owned by him to cover up to account for the proceeds of an illegal betting on the English Premier League matches.

Public Prosecutor v Gan Kiat Bend & Another Case [2011] 8 CLJ. Ibid.

Both the accused in these cases were jointly tried on money laundering charges under section 4(1) of the Anti-Money Laundering Act 2001 (now known as AMLATFA). The money laundered was obtained through of offences of forgery under sections 465, 467 and 471 as well as offence of cheating under section 420 Penal Code, all of which are predicate offences under the Second Schedule of the AMLATFA 2001

345. Mohd Riezuan bin Jalil & Ors v Bank Negara Malaysia [2009] MLJU 1815 Ibid.

The 1st and 2nd Plaintiffs had been charged with a total of 222 criminal charges under section 4(1) of AMLA, with 162 against the first Plaintiff and 62 against the 2nd Plaintiff. They were also each charged with an offence under section 25(1) of BAFIA.

346. Malaysia referred to Table 3 (Annex 4).

(b) Observations on the implementation of the article

347. The reviewing experts are of the opinion that Malaysia has implemented the provision.

348. Malaysia follows a “list approach” in regard to the predicate offences rather than a “serious crime” or “all crime” approach. The current list of predicate offences in the Second Schedule of AMLATFA comprises 286 offences in total. Despite the list approach, it was explained that there is sufficient flexibility, as any amendments or additions to the list can be done by way of an administrative procedure that can be carried out by the Minister of Finance. Section 85 of AMLATFA provides that “The Minister of Finance may, by order published in the *Gazette*, amend the First and Second Schedules.”

This is done regularly to keep the list updated. The “serious crime” approach had been considered, but was not adopted, as many administrative offences would have become predicate offences due to their high penalties.

349. The experts noted that Malaysia should also add obstruction of justice to the predicate offences for money laundering and consider including illicit enrichment.

Article 23 Laundering of proceeds of crime

Subparagraph 2 (c)

2. *For purposes of implementing or applying paragraph 1 of this article:*

(c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(a) Summary of information relevant to reviewing the implementation of the article

350. Regarding the extraterritorial aspect of article 23 subparagraph 2 (c), Malaysia cited the following legislation:

Section 66 of MACCA - Liability for offences outside Malaysia

- (1) The provisions of this Act shall, in relation to citizens and permanent residents of Malaysia, have effect outside as well as within Malaysia, and when an offence under this Act is committed in **any place outside Malaysia by any citizen or permanent resident**, he may be dealt with in respect of such offence as if it was committed at any place within Malaysia.
- (2) Any proceedings against any person under this section which would be a bar to subsequent proceedings against such person for the same offence if such offence was committed in Malaysia shall be a bar to further proceedings against him under any written law relating to the extradition of persons, in respect of the same offence, outside Malaysia.

Section 82 of AMLATFA - Jurisdiction

- (1) Any offence under this Act-
 - (a) on the high seas on board any ship or on any aircraft registered in Malaysia;
 - (b) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; or
 - (c) **by any citizen or any permanent resident in any place outside and beyond the limits of Malaysia** may be dealt with as if it had been committed at any place within Malaysia.
- (2) Notwithstanding anything in this Act, no charge as to any offence shall be inquired into in Malaysia unless a diplomatic officer of Malaysia, if there is one, in the territory in which the offence is alleged to have been committed certifies that, in his opinion, the charge ought to be brought in Malaysia; and where there is no such diplomatic officer, the sanction of the Public Prosecutor shall be required.
- (3) Any proceedings taken against any person under this section which would be a bar to subsequent proceedings against that person for the same offence if the offence had been committed in Malaysia shall be a bar to further proceedings against him under any written law relating to extradition or the surrender of fugitive criminals in force in Malaysia in respect of the same offence in any territory beyond the limits of Malaysia.
- (4) For the purposes of this section, the expression ‘permanent resident’ has the meaning assigned by the Courts of Judicature Act 1964 [Act 91].

Sections 3 of Penal Code (Act 574)-Punishment of offences committed beyond, but which by law may be tried within Malaysia

Any person liable by law to be tried for an offence committed beyond the limits of Malaysia, shall be dealt with according to the provisions of this Code for any act committed beyond Malaysia, in the same manner as if such act had been committed within Malaysia.

Section 6 of the Extradition Act 1992 (Act 479)

- (1) A fugitive criminal shall only be returned for an extradition offence.
- (2) For the purpose of this Act, an extradition offence is an offence, however described, including fiscal offences-
 - (a) which is punishable under the laws of a country referred to under paragraph 1(2)(a) or 1(2)(b), with imprisonment for not less than one year or with death and,
 - (b) which, if committed within the jurisdiction of Malaysia is punishable under the laws of Malaysia with imprisonment for not less than one year or with death. Provided that, in case of an extraterritorial offence, it so punishable under the laws of Malaysia if it took place in corresponding circumstances outside Malaysia.
- (3) An offence shall also be an extradition offence if it consists of an attempt or a conspiracy to commit, an abetment of the commission of, any offence described in subsection (2).

Section 32 of the Extradition Act 1992 (Act 479)

In this Part (referring to Part VII of the Act) an extraditable offence is an offence however described, including fiscal offences, which is punishable under the laws of Malaysia with imprisonment for not less than one year or with death.

Section 4 of the Penal Code - Extension of Code to extra-territorial offences.

- (1) The provisions of Chapters VI and VIA shall apply to any offence committed-
 - (a) by any citizen or any permanent resident on the high seas on board any ship or any aircraft whether or not such ship or aircraft is registered in Malaysia;
 - (b) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia;
 - (c) by any person against a citizen of Malaysia;
 - (d) by any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia, including diplomatic or consular premises of Malaysia;
 - (e) by any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;
 - (f) by any stateless person who has his habitual residence in Malaysia;
 - (g) by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or
 - (h) by any person who after the commission of the offence is present in Malaysia, as if the offence had been committed in Malaysia.
- (2) In this section-
 - (a) "offence" includes every act done outside Malaysia which if done in Malaysia, would be an offence punishable under this Code;
 - (b) "permanent resident" has the meaning assigned by the Courts of Judicature Act 1964.

Section 127 A of the Criminal Procedure Code- Liability for offences committed out of Malaysia

- (1) Any offence under Chapters VI and VI A of the Penal Code, or any offence under any of the written laws specified in the Schedule to the Extra-Territorial Offences Act 1976 or any offence under any other written law the commission of which is certified by the Attorney-General to affect the security of Malaysia committed, as the case may be,-
 - (a) on the high seas on board any ship or any aircraft registered in Malaysia;
 - (b) by any citizen or any permanent resident on the high seas on board any ship or any aircraft whether or not such ship or aircraft is registered in Malaysia;
 - (c) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia;
 - (d) by any person against a citizen of Malaysia;
 - (e) by any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia, including diplomatic or consular premises of Malaysia;
 - (f) by any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;
 - (g) by any stateless person who has his habitual residence in Malaysia;
 - (h) by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or
 - (i) by any person who after the commission of the offence is present in Malaysia, may be dealt with

as if it had been committed at any place within Malaysia: Provided-

(i) that notwithstanding anything in any of the preceding sections of this Chapter no charge as to any such offence shall be inquired into in Malaysia unless a diplomatic officer, if there is one, in the territory in which the offence is alleged to have been committed certifies that, in his opinion, the charge ought to be inquired into in Malaysia; and where there is not diplomatic officer, the sanction of the Public Prosecutor shall be required:

(ii) that any proceedings taken against any person under this section which would be a bar to subsequent proceedings against that person for the same offence if the offence had been committed in Malaysia shall be a bar to further proceedings against him under any written law relating to extradition or the surrender of fugitive criminals in force in Malaysia in respect of the same offence in any territory beyond the limits of West Malaysia.

- (2) For the purposes of this section the expression "permanent resident" has the meaning assigned by the Courts of Judicature Act 1964.

351. Malaysia provided the following examples of cases on the implementation of the provision.

Public Prosecutor v Ottavio QUATTROCCHI [2004] 3 MLJ 149, Federal Court

The Government of the Republic of India had made a request for the extradition of the respondent, an Italian residing in Malaysia, accusing him of the commission of the offences of criminal conspiracy read with s 420 (cheating and dishonestly inducing delivery of property) of the Indian Penal Code 1860 and s 5(2) read with s 5(1)(d) (criminal misconduct) of the Prevention of Corruption Act 1947 within the jurisdiction of the Republic of India. The Malaysian Minister of Home Affairs issued a special direction under s 3 of the Extradition Act 1992 (the Act) to apply the provisions of the Act to the extradition of the respondent and, by order under s 12(3) of the Act, authorized the magistrate to issue a warrant for the apprehension of the respondent. The said warrant of apprehension was subsequently issued by the magistrate and the respondent was arrested. At the sessions court, the respondent's counsel contended that the respondent's arrest was illegal in view of the absence of charges in the proceedings. The sessions court judge held that the general wording of the offences did not amount to sufficient notice to the respondent of the grounds of his arrest and therefore, his arrest was illegal. The appellant promptly applied for a review of the order made by the sessions court judge pursuant to s 37 of the Act. The High Court judge held that failure to supply the court and the respondent with the charges was fatal. The High Court judge accordingly confirmed the order of discharge made by the sessions court judge and dismissed the appellants application. (*see Public Prosecutor v Ottavio QUATTROCCHI [2003] 1MLJ 225*) .Before the Court of Appeal, the main issue raised was whether, in an extradition proceeding, there was a right of appeal from the decision of the High Court to the Court of Appeal. The Court of Appeal held that the decision was not appealable and struck out the appeal. (*see Public Prosecutor v Ottavio QUATTROCCHI [2003] 3 MLJ 123*) This was the appellants appeal to the Federal Court against the decision of the Court of Appeal. In this appeal, the issue to consider was whether there was a right of appeal to the Federal Court under s 87(1) of the Courts of Judicature Act 1964 (CJA) and in view of s 37(6) of the Act which provides that any such order of the High Court shall be final and conclusive. Held, dismissing the appeal:

The court was in agreement with the Court of Appeal in its findings. There was no right of appeal to the Federal Court in view of s 87(1) of the CJA and s 37(6) of the Act (see para 99).

352. Malaysia referred to Table 4 (Annex 4).

(b) Observations on the implementation of the article

353. The reviewing experts note that Malaysia has implemented the provision.

Article 23 Laundering of proceeds of crime

Subparagraph 2 (d)

2. For purposes of implementing or applying paragraph 1 of this article:

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(a) Summary of information relevant to reviewing the implementation of the article

354. Malaysia indicated that it has furnished the relevant copies and referred to the attached laws.

(b) Observations on the implementation of the article

355. The reviewing experts are satisfied with the explanation provided and are of the view that Malaysia implemented the provision.

Article 23 Laundering of proceeds of crime

Subparagraph 2 (e)

2. For purposes of implementing or applying paragraph 1 of this article:

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.

(a) Summary of information relevant to reviewing the implementation of the article

356. Malaysia explained that section 4 (2) AMLATFA 2001 provides that the prosecutor may decide to charge an individual for the predicate offence as well as for the laundering of the proceeds of the predicate offence. Self-laundering may be prosecuted in Malaysia.

357. The provision of subparagraph 2(e) of article 23 UNCAC, as explained in the Legislative Guide, does not apply in Malaysia as there is no bar for a prosecution of a serious or foreign serious offence under section 4(2) of AMLATFA:

Section 4 of AMLATFA

(1) Any person who-

(a) engages in, or attempts to engage in; or

(b) abets the commission of, money laundering, commits an offence and shall, on conviction, be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or to both.

(2) A person may be convicted of an offence under subsection (1) irrespective of whether there is a conviction in respect of a serious offence or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence.

Under section 3 “money laundering” means the act of a person who-

- (a) engages, directly or indirectly, in a transaction that involves proceeds of any unlawful activity;
- (b) **acquires**, receives, **possesses**, disguises, transfers, converts, exchanges, carries, disposes, **uses**, removes from or brings into Malaysia proceeds of any unlawful activity; or
- (c) conceals, disguises or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of any unlawful activity, where-
 - (aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or
 - (bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful authority.

“foreign serious offence” means an offence-

- (a) against the law of a foreign State stated in a certificate purporting to be issued by or on behalf of the government of that foreign State; and
- (b) that consists of or includes an act or activity which, if it had occurred in Malaysia, would have constituted a serious offence;

358. Malaysia provided the following examples of cases on the implementation of the provision.

Public Prosecutor v Ong Seh Sen [2010] 7 CLJ 233

The appellant was sentenced to two years imprisonment and imposed a penalty fine of RM1 million or in default 12 months imprisonment for an offence under s. 4(1) of the Anti-Money Laundering Act 2001 (now known as AMLATFA). He had pleaded guilty to the offence. He was found to have forged 75 invoices belonging to a company owned by him as a cover up to account for the proceeds of an illegal betting on the English Premier League matches. The proceeds amounted to a sum of RM1,372,359 which were banked into the company's bank account with Maybank. Out of that sum, RM1 million was expended by the appellant.

Public Prosecutor v Segaran a/s Mathavan [2009] 9 MLJ 957

In Public Prosecutor v Segaran a/l S Mathavan [2009] 9 MLJ 597, the accused was charged for nine charges under s 420 of the Penal Code and three charges under s 4 (1)(a) of AMLATFA.

Public Prosecutor v Gan Kiat Bend & Another Case [2011] 8 CLJ. Ibid.

Both the accused in these cases were jointly tried on money laundering charges under section 4(1) of the Anti-Money Laundering Act (now known as AMLATFA). The money laundered was obtained through offences of forgery under sections 465, 467 and 471 as well as offence of cheating under section 420 Penal Code, all of which are predicate offences under the Second Schedule of the AMLATFA 2001

359. Malaysia explained that no further data was available.

(b) Observations on the implementation of the article

360. The reviewing experts are satisfied with the explanation provided and are of the view that Malaysia has implemented the provision.

Article 24 Concealment

Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

361. Malaysia referred to section 4 of AMLATFA 2001, in particular to section 4(2) and section 26 of MACCA.

362. Moreover, Malaysia referred to general Penal Code offences that reflect the spirit of article 24. Further, the predicate offences under AMLATFA 2001 should be considered.

363. Malaysia cited the following legislation:

Section 26 of MACCA - Dealing with, using, holding, receiving or concealing gratification or advantage in relation to any offence

Any person who, whether within or outside Malaysia, whether directly or indirectly, whether on behalf of himself or on behalf of any other person, enters into, or causes to be entered into, any dealing in relation to any property, or otherwise uses or causes to be used, or holds, receives, or **conceals** any property or any part thereof which was the subject matter of an offence under section 16, 17, 18, 20, 21, 22 or 23 commits an offence and shall on conviction be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding seven years or to both.

Under section 3 of MACCA,

“Dealing” includes-

- (a) any purchase, sale, loan, charge, mortgage, lien, pledge, caveat, transfer, delivery, assignment, subrogation, transmission, gift, donation, trust, settlement, deposit, withdrawal, transfer between accounts, or extension of credit;
- (b) any agency or grant of power of attorney; and
- (c) any act which results in any right, interest, title or privilege, whether present or future or whether vested or contingent, in the whole of or in part of any property being conferred on any person.

Section 4 of AMLATFA

(1) Any person who-

- (a) engages in, or attempts to engage in; or
 - (b) abets the commission of, money laundering, commits an offence and shall, on conviction, be liable to a fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or to both.
- (2) A person may be convicted of an offence under subsection (1) irrespective of whether there is a conviction in respect of a serious offence or foreign serious offence or that a prosecution has been initiated for the commission of a serious offence or foreign serious offence.

Under section 3 of AMLATFA

“money laundering” means the act of a person who-

- (a) engages, directly or indirectly, in any transaction that involves proceeds of an unlawful activity;
- (b) acquires, receives, possesses, disguises, transfers, converts, exchanges, carries, disposes, uses, removes from or brings into Malaysia proceeds of any unlawful activity; or
- (c) **conceals, disguises** or impedes the establishment of the true nature, origin, location, movement, disposition, title of, rights with respect to, or ownership of, proceeds of an unlawful activity, where
 - (aa) as may be inferred from objective factual circumstance, the person knows or has reason to believe, that the property is proceeds from any unlawful activity; or
 - (bb) in respect of the conduct of a natural person, the person without reasonable excuse fails to take reasonable steps to ascertain whether or not the property is proceeds from any unlawful activity.

“serious offence” means-

- (a) any of the offences specified in the Second Schedule;

- (b) an attempt to commit any of those offences; or
- (c) the abetment of any of those offences;

“foreign serious offence” means an offence-

- (a) against the law of a foreign State stated in a certificate purporting to be issued by or on behalf of the government of that foreign State; and
- (b) that consists of or includes an act or activity which, if it had occurred in Malaysia, would have constituted a serious offence;

Malaysia referred further to sections 410, 411 and 413 of the Penal Code. See above.

364. Malaysia provided the following examples of cases on the implementation of the provision.

Section 413 Penal Code.

Goh Khiok Phiong v Regina [1954] 1 MLJ 223

The appellant, Goh Khiok Phiong, is a business man of some standing who owns a fleet of lorries and carries on a transport business in and around Kuching. The name of his business is Meng Hong and his lorries are referred to as Meng Hong lorries. The appellant was charged and convicted of the offence of habitually receiving stolen property contrary to Section 413 of the Penal Code, Cap. 61 of the Laws, and the particulars of the offence were set out as follows:--

“That you on or about the 28th day of November, 1953, at Kuching **were an habitual receiver of property**, to wit, petrol belonging to the Public Works Department of the Government of Sarawak which you had reason to believe to be stolen property and that you thereby committed an offence punishable under section 413 of the Penal Code.- It would be necessary to prove at least three prior acts of receiving, that is to say, four acts of receiving in all before it could fairly be said that the accused was an habitual receiver. It is not necessary that the accused should have been convicted of receiving but it is necessary that the proof of these prior acts should be as convincing as if he had been convicted, for it is those acts which determine the applicability of the offence under s. 413 of the Penal Code and the enhanced penalty provided therefor.”

365. Malaysia referred to Table 7 (Annex 5).

(b) Observations on the implementation of the article

366. The reviewing experts note that section 26 of MACCA and section 4 of AMLATFA sufficiently implement the article.

Article 25 Obstruction of Justice

Subparagraph (a)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;

(a) **Summary of information relevant to reviewing the implementation of the article**

367. Malaysia reported that any form of gratification or criminal intimidation offered or used to hamper the course of justice is captured under MACCA and the Penal Code.

368. Malaysia cited the following legislation:

A. MACCA

Section 16 of MACCA. See above.

Section 48 of MACCA - Obstruction of investigation and search.

Any person who-

- (a) refuses any officer of the Commission access to any premises, or fails to submit to a search by a person authorized to search him under this Act;
- (b) assaults, obstructs, hinders or delays any officer of the Commission in the execution of his duty under this Act;
- (c) fails to comply with any lawful demand, notice, order or requirement of an officer of the Commission in the execution of his duty under this Act;
- (d) omits, refuses or neglects to give to an officer of the Commission any information which may reasonably be required of him and which he is empowered to give;
- (e) fails to produce to, or conceals or attempts to conceal from, an officer of the Commission any book, document, or article, in relation to which such officer has reasonable grounds for suspecting that an offence under this Act has been or is being committed, or which is liable to seizure under this Act;
- (f) rescues or endeavours to rescue or causes to be rescued any thing which has been duly seized;
- (g) destroys any thing to prevent the seizure thereof, or the securing of the thing. Or
- (h) **interferes with, puts fear into, threatens or abducts or attempts to interfere with, put fear into, threaten or abduct any person involved in an investigation under this Act** commits an offence.

Punishment for offences under section 48 of MACCA is provided under section 69 of the Act which states: Every person convicted of an offence under this Act for which no penalty is specifically provided shall be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding two years or to both.

B. Penal Code

Section 200 of the Penal Code (Act 574)-Using as true any such declaration known to be false

Whoever corruptly uses or attempts to use as true any such declaration knowing the same to be false in any material point, shall be punished in the same manner as if he gave false evidence.

Explanation-A declaration which is inadmissible merely upon the ground of some informality, is a declaration within the meaning of sections 199 and 200.

Section 201 of the Penal Code (Act 574) -Causing disappearance of evidence of an offence committed, or giving false information touching it, to screen the offender

Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear with the intention of screening the offender from legal punishment, or with the knowledge that he is likely thereby to screen the offender from legal punishment, or with that intention or knowledge gives any information respecting the offence which he knows or believes to be false, shall, if the offence which he knows or believes to have been committed is punishable with death, be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine; and if the offence is punishable with imprisonment for life or with imprisonment which may extend to ten years, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine; and if the offence is punishable with imprisonment for any term not extending to ten years, shall be punished with imprisonment for a term which may extend to one-fourth part of the longest term of the imprisonment provided for the offence or with fine or with both.

ILLUSTRATION

A, knowing that B has murdered Z, assists B to hide the body with the intention of screening B, from punishment. A is liable to imprisonment for seven years, and also to fine.

Section 209 of the Penal Code (Act 574) - Giving false information respecting an offence committed

Whoever, knowing or having reason to believe that an offence has been committed, gives any information respecting that offence which he knows or believes to be false, shall be punished with imprisonment for a term which may extend to two years or with fine or with Explanation-In sections 201 and 202 and in this section the word 'offence' includes any act committed at any place out of Malaysia which if committed in Malaysia would be punishable under any of the following sections, namely, 302, 304, 382, 384, 385, 386, 387, 388, 389, 392, 393,394, 395, 396, 397, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460.

Section 503 of the Penal Code (Act 574) - Criminal intimidation

Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Section 506 of the Penal Code (Act 574) - Punishment for criminal intimidation

Whoever commits the offence of criminal intimidation shall be punished with imprisonment for a term which may extend to two years or with fine or with both; and if the threat is to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment for a term which may extend to seven years or with fine or with both.

Section 507 of the Penal Code (Act 574) - Criminal intimidation by an anonymous communication

Whoever commits the offence of criminal intimidation by an anonymous communication, or by having taken precautions to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment for a term which may extend to two years, in addition to the punishment provided for the offence by section 506.

ABDUCTION AND CRIMINAL INTIMIDATION OF WITNESSES ACT 1947

Section 2 (1) In this Act, unless the subject or context otherwise requires—

“abduction”, “abetment”, “attempt”, “criminal intimidation”, “extortion”, “giving false evidence” and “fabricating false evidence” with their grammatical variations and cognate expressions have the same meaning as in the Penal Code [Act 574]; “criminal proceeding” includes any criminal trial or inquiry before a Court or tribunal having criminal jurisdiction, and an inquest or inquiry into a death, and a police investigation under the Criminal Procedure Code [Act 593].

(2) For the purposes of this Act, the course of justice is impeded if any person from whom is required any evidence, testimony, statement or information in or for the purposes of any criminal proceeding, ceases to be available to give such evidence, testimony, statement or information, or withholds such evidence, testimony, statement or information, or gives or fabricates false evidence

Section 4 -Abduction impeding the course of justice

Whoever abducts any person so that the course of justice is thereby impeded shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to fine.

Section 5- Criminal intimidation to impede the course of justice

Whoever commits criminal intimidation-

- (a) with intent to impede the course of justice; or
- (b) so that the course of justice is thereby impeded,

shall be punished with imprisonment which may extend to ten years and shall also be liable to fine.

COMMUNICATION AND MULTIMEDIA ACT 1998 (Act 588)

Section 233. Improper use of network facilities or network service ,etc.

(1) A person who-

- (a) by means of any network facilities or network service or applications service knowingly-
 - (i) makes, creates or solicits ; and
 - (ii) initiates the transmission of;

any comment, request, suggestion, or other communication which is obscene, indecent, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person; or
(b) initiates a communication using any applications service, whether continuously, repeatedly or otherwise, during which communication may or may not ensue, with or without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at any number or electronic address, commits an offence.

(2) A person who knowingly-

(a) by means of a network service or applications service provides any obscene communication for commercial purposes to any person; or

(b) permits a network service or applications service under the person's control to be used for an activity describe in paragraph (a), commits an offence.

(3) A person who commits an offence under this section shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or imprisonment for a term not exceeding one year or to both and shall also be liable to a further fine of one thousand ringgit for every day during which the offence is continued after conviction

369. Malaysia referred to Table 8 (Annex 6).

(b) Observations on the implementation of the article

370. The reviewing experts are of the opinion that the legislation covering obstruction of justice as defined in article 25 (a) of UNCAC is fragmented. They take note of the explanations of Malaysia that the acts of “offering, promising and giving” can be covered through the direct application of section 16 of MACCA. Apart from this, the principal provision is section 48 (h) of MACCA. The section does not regulate the employment of actual physical force, but Malaysia confirmed that in such cases section 48 of MACCA could be applied in conjunction with section 353 of the Penal Code and sections 2 and 5 of the Abduction and Criminal Intimidation of Witnesses Act 1947 to cover this aspect. Moreover, the reviewers noted that section 48(h) is limited to interference with participants in an investigation and does not address such conduct in the course of judicial proceedings. While it was explained during the country visit that by implication and through use of sections 2 and 5 of the Abduction and Criminal Intimidation of Witnesses Act 1947 this provision could also be extended to formal proceedings, in the interest of greater legal certainty it is recommended that Malaysia adopt measures to fully address the requirements of the provision in a consolidated manner.

371. The reviewing experts note that currently there are no case examples which would allow an assessment of the practical implementation of this provision.

Article 25 Obstruction of Justice

Subparagraph (b)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.

(a) Summary of information relevant to reviewing the implementation of the article

372. Malaysia cited the following legislation in relation to the implementation of subparagraph (b) of article 25 UNCAC:

Section 48 of MACCA-Obstruction of investigation and search

Any person who-

- (a) refuses any officer of the Commission access to any premises, or fails to submit to a search by a person authorized to search him under this Act;
- (b) assaults, obstructs, hinders or delays any officer of the Commission in the execution of his duty under this Act;
- (c) fails to comply with any lawful demand, notice, order or requirement of an officer of the Commission in the execution of his duty under this Act;
- (d) omits, refuses or neglects to give to an officer of the Commission any information which may reasonably be required of him and which he is empowered to give;
- (e) fails to produce to, or conceals or attempts to conceal from an officer of the Commission any book, document, or article, in relation to which such officer has reasonable grounds for suspecting that an offence under this Act has been or is being committed, or which is liable to seizure under this Act;
- (f) rescues or endeavours to rescue or causes to be rescued any thing which has been duly seized;
- (g) destroys any thing to prevent the seizure thereof, or the securing of the thing. or
- (h) interferes with, puts fear into, threatens or abducts or attempts to interfere with, put fear into, threaten or abduct **any person involved in an investigation** under this Act commits an offence.

Punishment for offence under section 48 of MACCA is provided under section 69 of the Act which states: Every person convicted of an offence under this Act for which no penalty is specifically provided shall be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding two years or to both.

Section 34 of AMLATFA

Any person who-

- (a) refuses any investigating officer access to any premises, or fails to submit to the search of his person;
- (b) assaults, obstructs, hinders or delays an investigating officer in effecting any entrance which he is entitled to effect;
- (c) fails to comply with any lawful demands of any investigating officer in the execution of his duties under this Part;
- (d) refuses to give to an investigating officer any property, document or information which may reasonably be required of him and which he has in his power to give;
- (e) fails to produce to, or conceal or attempt to conceal from, an investigating officer, any property, record, report or document, which the investigating officer requires;
- (f) rescues or attempts to rescue any thing which has been duly seized;
- (g) furnishes to an investigating officer as true any information which he knows or has reason to believe to be false; or
- (h) before or after any search or seizure, breaks or otherwise destroys any thing to prevent its seizure, or the securing of the property, record, report or document, commits an offence and shall, on conviction, be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding one year or to both, and, in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.

Section 189 of the Penal Code (Act 574) - Threat of injury to a public servant

Whoever holds out any threat of injury to any public servant, or to any person in whom he believes that public servant to be interested, for the purpose of inducing that public servant to do any act, or to forbear or delay to do any act, connected with the exercise of the public functions of such public servant, shall be punished with imprisonment for a term which may extend to two years or with fine or with both

Section 353 of Penal Code (Act 574)-Using criminal force to deter a public servant from discharge of his duty

Whoever assaults or uses criminal force to any person being a public servant in the execution of his duty as such public servant, or with intent to prevent or deter that person from discharging his duty as such public servant, or in consequence of anything done or attempted to be done by such person in the lawful discharge of his duty as such public servant, shall be punished with imprisonment for a term which may extend to two years or with fine or with both.

Section 228 of the Penal Code (Act 574)-Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding

Whoever intentionally offers any insult or causes any interruption to any public servant, while such public servant is sitting in any stage of a judicial proceeding, shall be punished with imprisonment for a term which may extend to six months or with fine which may extend to two thousand ringgit or with both.

373. No case examples were provided.

374. Malaysia referred to Table 8 (Annex 6).

(b) Observations on the implementation of the article

375. The reviewing experts note that Malaysia has implemented the provision under review. Article 48 of MACCA covers most aspects of the provision. Additionally, Penal Code provisions, specifically section 228, are applicable at any stage of judicial proceedings. In regard to the use of physical force, section 353 of the Penal Code could be applied in conjunction with section 48 of MACCA.

376. The reviewing experts note that currently there are no case examples which would allow an assessment of the practical implementation of this provision. Malaysia may wish to monitor the implementation of this provision.

Article 26 Liability of legal persons

Paragraph 1 and 2

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.

2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.

(a) Summary of information relevant to reviewing the implementation of the article

377. Malaysia explained that its domestic laws establish the liability of legal persons for participation in criminal offences. Section 3 of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) defines the word “person” to “include a body of persons, corporate or unincorporated”, while section 11 of the Penal Code defines “person” to “include ... (b) any company or association or body of persons whether incorporated or not”. The above definitions cover both natural as well as legal persons like corporations, proprietorships, firm or unincorporated associations. Its definition is not exhaustive and must be taken to include an artificial or juridical person.

378. In general, a corporation is in the same position in relation to criminal liability as a natural person and may be convicted of offences including those requiring mens rea. There are, however, crimes which a corporation is incapable of committing or of which a corporation cannot be found guilty as a principal; nor can a corporation be convicted of a crime for which death, physical punishment or imprisonment are the only penalties.

379. However, this area of the law has not been explored comprehensively. As such, there is a dearth of authority in this area of the law in connection with corporate liability for offences of corruption in Malaysia.

380. Malaysia cited the following measures.

Liability of Legal Persons in MACCA

By virtue of the Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) the word “**person**” is defined as to **include a body of persons, corporate or unincorporated**. Hence in this context, the word “person” is both the natural and legal person.

381. Malaysia also referred to an article on “Criminal Liability of Corporations in Malaysia” [1982] CLJ 225 (a copy of which was provided to the reviewers). This article, and subsequent scholarly articles, are referred to for information only.

382. In addition, Malaysia is considering the possibility of introducing a new offence following the **UK Bribery Act 2010** (sections 7, 14 and 15); Article 2 of the **OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions** and Part 2.5 of the **Australian Criminal Code 1995**.

383. Section 24 of MACCA makes it an offence for “any person” to contravene sections 16, 17, 18, 20, 21, and 22.

384. Malaysia cited the following laws:

Liability of Legal Persons under AMLATFA

Similarly, section 4 of AMLATFA makes it an offence for “any person” to contravene section 4 (1) of the Act.

Section 87 of AMLATFA provides as follows:

- (1) Where an offence is committed by a body corporate or an association of persons, a person-
 - (a) who is its director, controller, officer, or partner; or
 - (b) who is concerned in the management of its affairs,at the time of the commission of the offence, is deemed to have committed that offence unless that person proves that the offence was committed without his consent or connivance and that he exercised such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his function in that capacity and to the circumstances.
- (2) An individual may be prosecuted for an offence under subsection (1) notwithstanding that the body corporate or association of persons has not been convicted of the offence.
- (3) Subsection (1) shall not affect the criminal liability of the body corporate or association of persons for the offence referred to in that subsection.
- (4) Any person who would have committed an offence if any act had been done or omitted to be done by him personally commits that offence and shall on conviction be liable to the same penalty if such act had been done or omitted to be done by his agent or officer in the course of that agent's business or in the course of that officer's employment, as the case may be, unless he proves that the offence was committed without his knowledge or consent and that he took all reasonable precautions to prevent the doing of, or omission to do, such act.

Liability of legal persons under the Companies Act 1965 (Act 125) Definition of “company”, “corporation” and “foreign company”

According to section 4 of the Companies Act 1965, the term “company” means a company incorporated to the this Act or pursuant to any corresponding previous enactment. And the term “corporations” means any body corporate formed or incorporated or existing within Malaysia and includes any foreign company but does not include-

- (a) any body corporate that is incorporated within Malaysia and is by notice of the Minister published in

the Gazette declared to be a public authority or an instrumentality or agency of the Government of Malaysia or of any State or to be a body corporate which is not incorporated for commercial purposes;

(b) any corporation sole;

(c) any society registered under any written law relating to co-operative societies; or (d) any trade union registered under any written law as a trade union.

The term "foreign company" means-

(a) a company, corporation, society, association or body incorporated outside Malaysia; or (b) an unincorporated society, association, or other body which under the law of its place of origin may sue or be sued, or hold property in the name of the secretary or other officer of the body or association duly appointed for that purpose and which does not have its head office or principal place of business in Malaysia.

Section 364 (1) - False and misleading statements

(1) Every corporation which advertises, circulates or publishes any statement of the amount of its capital which is misleading or in which the amount of nominal or authorized capital is stated without the words 'nominal' or 'authorized', or in which the amount of capital or authorized or subscribed capital is not stated but the amount of paid-up capital or the amount of any charge on uncalled capital is not stated as prominently as the amount of authorized or subscribed capital is stated, and every officer of the corporation who knowingly authorizes, directs, or consents to the advertising, circulation or publication shall be guilty of an offence against this Act;

(2) Every person who in any return, report, certificates, balance sheet or other document required by or for the purposes of this Act makes or authorizes the making of a statement false or misleading in any material particular knowing it to be false or misleading or intentionally omits or authorizes the omission or accession of any matter or thing thereby making the document misleading in a material shall be guilty of an offence under this Act; (para 98)

Penalty: Imprisonment for ten years or two hundred and fifty thousand ringgit or both.

Liability of legal persons under the Criminal Procedure Code

Under section 35 (3) of the Criminal Procedure Code (Act 593) summons may be served on the secretary or other like officer of the corporation.

35. Summons how served

(1) The summons shall if practicable be served personally on the person summoned by showing him the original summons and by tendering or delivering to him a copy thereof under the seal of the Court.

(2) Every person on whom a summons is so served shall if so required by the serving officer sign a receipt for the copy thereof on the back of the original summons.

(3) In the case of a corporation the summons may be served on the secretary or other like officer of the corporation.

385. Malaysia provided the following examples of cases on the implementation of the provision.

Timbalan Pendakwa Raya v Tay High Kuan & Anor[2009]8MLJ 724

Yue Sang Cheong Sdn Bhd v Public Prosecutor [1973] 2 MLJ 77

In the Sessions Court at Kuala Lumpur the applicant, **a limited company, was charged under [*77] section 135(1) (d) of the Customs Act 1967** with knowingly having in its possession on August 17, 1970 eighteen cases of rock sugar the import of which was prohibited under the Customs (Prohibition of Imports) Order 1969. Being convicted of the offence the applicant was fined the sum of \$ 1,620, which was the minimum fixed by law, as the learned president quite properly took into account the fact that this was the very first occasion in about 20 years of trading that the company had transgressed the law. Its appeal against conviction was dismissed by the High Court. There upon,

application was made by the company to refer the following questions of law for the decision of this court under section 66 of the Courts of Judicature Act 1964, namely-

(1) Whether a limited company charged under section 135(1) (d) of the Customs Act, 1967 can be guilty of such criminal offence without proof of mens rea of its agents or officers.

(2) If the answer to (1) is in the negative, whether it is relevant to consider the relative importance of the agents or officers of the limited company whose knowledge is to be imputed to the company.

[2] There is no necessity to deal with these questions separately. The word 'knowingly' in section 135(1) (d) clearly imports mens rea for proof of guilt. In section 3 of the Interpretation Act 1967 'person' includes a body of persons corporate or unincorporated. The answer to the first question, therefore, must be in the negative.

[3] As to the second question I think the House of Lords decision in Tesco Ltd v Nattrass [1972] AC 154 provides a ready answer. It is neatly summed up in the following passage of the speech by Lord Diplock at page 199: "In my view, therefore, the question: what natural persons are to be treated in law as being the company for the purpose of acts done in the course of its business, including the taking of precautions and the exercise of due diligence to avoid the commission of a criminal offence, is to be found by identifying those natural persons who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company."

386. Malaysia further referred for information only to the following articles: "Criminal Liability of Corporations in Malaysia" by Yashwant Rai Vyas [1982] CLJ 225 and "Criminal Liability of Companies Survey", Lex Mundi Publication by Lim Chee Wee (2008).

387. Malaysia referred to Table 9 (Annex 7) for statistics.

(b) Observations on the implementation of the article

388. The reviewing experts are of the view that Malaysia has sufficiently implemented the provision, as criminal and civil liability of legal persons exists in the Malaysian legal system.

389. Section 46 of the Companies Act imposes civil liability. As for the criminal liability of natural persons, appropriate provisions are found in section 87 of AMLATFA and section 140 of the Customs Act imputing liability on the responsible officers of the legal entity. Section 364(1) of the Companies Act punishing false and misleading statements specifically refers to a corporation and its responsible officers.

390. Sections 4 (Money laundering) and 87 of AMLATFA may cover legal entities, but the liability is imputed, not on the body corporate or association of persons, but on the responsible officer. Malaysia stated that they might consider revisiting this area of the law.

391. The principles laid out in Tesco Supermarket Ltd v. Nattrass [1971] 2 ALL.ER page 127 have been considered in terms of the knowledge/directing minds of the directors.

392. The experts share the view of Malaysia that challenges exist in regard to the establishment of mens rea and welcome the plans of Malaysia to address this through law reform. To that end, Malaysia highlighted that steps are being taken to introduce a new offence along the lines of the UK Bribery Act 2010, the OECD Convention on Bribery and Part 2.5 of the Australian Criminal Code 1995 on corporate liability.

Article 26 Liability of legal persons

Paragraph 3

3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.

(a) Summary of information relevant to reviewing the implementation of the article

393. Malaysia indicated that the domestic laws establish the liability of legal persons for participation in offences, as section 3 of the Malaysian Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) Act (388) defines the word “person” to “include a body of persons, corporate or unincorporated” while section 11 of the Criminal Procedure Code defines a “person” to “include any company or association or body of persons whether incorporated or not.” The above definitions cover both natural and legal persons, provided it is established that the natural persons had the necessary mens rea in the commission of the offence. Reference is made to the summary in article 26 paragraphs (1) and (2) above.

394. **Liability of natural persons vis-à-vis legal persons under MACCA:** Although there are no specific provisions in MACCA for criminal liability of legal persons, Malaysia’s legal stand on criminal liability is clear. Reference was made for information to the article on “Criminal Liability of Corporations in Malaysia” [1982] CLJ 225 and the “Criminal Liability of Companies Survey” Lex Mundi Publications 2008 (cited above).

395. Section 11 of the Criminal Procedure Code provides a definition of “person” which includes any company or association or body of persons whether incorporated or not. As clearly stated in the section, the word “person” includes both a natural person (a human being, whether a man, woman or child) as well as an artificial person like a corporation or even a proprietorship, like a firm or unincorporated association. Its definition is not exhaustive and must be taken to include an artificial or juridical person. The Interpretation Acts 1948 and 1967 (Consolidated and Revised 1989) defines “person” as to include a body of persons, corporate or unincorporated

Sections 16, 17, 23, and 3 of MACCA. See above.

Liability of natural persons vis-à-vis legal persons under AMLATFA. See above.

Section 87 of AMLATFA. See above.

Liability of natural persons vis-à-vis legal persons under the Companies Act 1965 (Act 125):

Section 46 -Civil liability for misstatements in prospectus

(1) Subject to this section, each of the following persons shall be liable to pay compensation to all persons who subscribe for or purchase any shares or debentures on the faith of a prospectus for any loss or damage sustained by reason of any untrue statement therein, or by reason of the wilful non-disclosure therein of any matter of which he had knowledge and which he knew to be material , that

is to say every person who-

- (a) is a director of the corporation at the time of the issue of the prospectus,
 - (b) authorized or caused himself to be named and is named in the prospectus as a director or as having agreed to become a director either immediately or after an interval of time;
 - (c) is a promoter of the corporation; or
 - (d) authorized or caused the issue of the prospectus.
- (2) Notwithstanding anything in subsection (1), where the consent of an expert is required to the issue of a prospectus and he has given that consent, he shall not by reasons only thereof be liable a person who has authorized or cause the issue of the prospectus except in respect of an untrue statement purporting to be made by him as an expert, and the inclusion in the prospectus of a name of a person as trustee for debenture holders, auditor, banker, advocate or stock or share broker shall not for that reason alone be construed as an authorization by such person of the issue of the prospectus.
- (3) No person shall be so liable if he proves-
- (a) that having consented to become a director of the corporation, he withdrew his consent before the issue of the prospectus, and that it was issued without his authority or consent;
 - (b) that the prospectus was issued without his knowledge or consent and he gave reasonable public notice thereof forthwith after he became aware of its issue;
 - (c) that after the issue of the prospectus and before allotment or sale thereunder he, becoming aware of any untrue statement therein, withdrew his consent and gave reasonable public notice of the withdrawal and of the reason therefor; or
 - (d) that-
 - (i) as regards every untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, he had reasonable ground to believe, and did up to the time of the allotment or sale of the shares or debentures believe, that the statement was true;
 - (ii) as regards every untrue statement purporting to be a statement made by an expert or to be based on a statement made by an expert or contained in what purports to be a copy of or extract from a report or valuation of an expert, it fairly represented the statement, or was a correct and fair copy of or extract from the report or valuation, and he had reasonable ground to believe and did up to the time of the issue of the prospectus believe that the person had given making the statement was competent to make it and that that person had given the consent required by section 45 to the issue of the prospectus and had not withdrawn that consent before delivery of a copy of the prospectus for registration , or to that persons knowledge, before any allotment or sale thereunder; and
 - (iii) as regards every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, it was a correct and fair representation of the statement or copy of or extract from the document.
- (4) Subsection (3) shall not apply in the case of a person liable , by reason of his having given a consent required of him by section 45, as a person who has authorized or caused the issue of the prospectus in respect of an untrue statement purporting to have been made by him as an expert;
- (5) A person who apart from this subsection would under subsection (1) be liable, by reason of his having given a consent required of him by section 45, as a person who has authorized the issue of a prospectus in respect of an untrue statement purporting to be made by him as an expert shall not be liable if he proves-
- (a) that, having given his consent under section 45 to the issue of the prospectus , he withdrew it in writing before a copy of the prospectus was lodged with the Registrar;
 - (b) that , after a copy of the prospectus was lodged with the Registrar and before allotment or sale thereunder, he, on becoming aware of the untrue statement withdrew his consent in writing and gave reasonable public notice of the withdrawal and of the reason therefor ; or
 - (c) that he was competent to make the statement and that he had reasonable ground to believe and did up to the time of the allotment or sale of the shares or debentures believe that the statement was true;
- (6) Where -
- (a) the prospectus contains the name of a person as a director of the corporation, or as having agreed to become a director, and he has not consented to become a director or has withdrawn his consent before the issue of the prospectus, and has not authorized or consented to the issue thereof; or
 - (b) the consent of a person is required under Sec.45 to the issue of the prospectus and he either has not given that consent or has withdrawn it before the issue of the prospectus the directors of the corporation except any without knowledge or consent the prospectus was issued and any other person who authorized or caused the issue thereof shall be liable to indemnify the person who authorized or caused the issue thereof shall be liable to indemnify the person so named or whose consent was so required against all damages, costs and expenses to which he may be made liable by reason of his

name having been inserted in the prospectus or of the inclusion therein of a statement purporting to be made by him as an expert, or in defending himself against any action or legal proceeding brought against him in respect thereof.

Section 47 -Criminal liability for statement in prospectus

(1) Where in a prospectus there is any untrue statement or wilful non-disclosure, any person who authorised or caused the issue of the prospectus shall be guilty of an offence against this Act unless he proves either that the statement or non-disclosure was immaterial or that he had reasonable ground to believe and did, up to the time of the issue of the prospectus, believe the statement was true or the non-disclosure immaterial. Penalty: imprisonment for five years or one hundred thousand ringgit or both.

(2) A person shall not be deemed to have authorised or caused the issue of a prospectus by reason only of his having given the consent required by this Division to the inclusion therein of a statement purporting to be made by him as an expert.

Section 364 (2)- False and misleading statements

(1) Every corporation which advertises, circulates or publishes any statement of the amount of its capital which is misleading or in which the amount of nominal or authorized capital is stated without the words 'nominal' or 'authorized', or in which the amount of capital or authorized or subscribed capital is not stated but the amount of paid-up capital or the amount of any charge on uncalled capital is not stated as prominently as the amount of authorized or subscribed capital is stated, and every officer of the corporation who knowingly authorizes, directs, or consents to the advertising, circulation or publication shall be guilty of an offence against this Act;

(2) Every person who in any return, report, certificates, balance sheet or other document required by or for the purposes of this Act makes or authorizes the making of a statement false or misleading in any material particular knowing it to be false or misleading or intentionally omits or authorizes the omission or accession of any matter or thing thereby making the document misleading in a material shall be guilty of an offence under this Act; (para 98)

Penalty: Imprisonment for ten years or two hundred and fifty thousand ringgit or both.

Section 364A- False reports

(1) An officer of a corporation who, with intent to deceive, makes or furnishes or knowingly with wilfully authorizes or permits the making or furnishing of, any false or misleading statement or report to-

(a) a director, auditor, member, debenture holder or trustee for debenture holders of the corporation;;

(b) in the case of a corporation that is subsidiary, an auditor of the holding company;

(c) a prescribed Stock Exchange whether within or without Malaysia or an officer thereof;

(d) the Securities Commission established under the Securities Commission Act 1993 relating to the affairs of the corporation shall be guilty of an offence against this Act. Penalty: Imprisonment for ten years and fifty thousand ringgit or both

(2) In subsection (1) 'officer' includes a person who at any time has been an officer of the corporation.

Section 366 - Fraudulently inducing persons to invest money

(1) Any person who, by any statement, promise or forecast which he knows to be misleading, false or deceptively or by any dishonest concealment of material facts or by the reckless making of any statement, promise or forecast which is misleading, false or deceptive, induces or attempts to induce another person to enter into or offer to enter into-

(a) any agreement for or with a view to acquiring, disposing of, subscribing in or underwriting marketable securities or lending or depositing money to or with any corporation; or

(b) any agreement the purpose or pretended purpose of which is to secure a profit to any of the parties from the yield of marketable securities or by reference to fluctuations in the value of marketable securities

shall be guilty of an offence against this Act.

Penalty: Imprisonment for ten years or two hundred and fifty thousand ringgit or both.

(2) Conspiracy

Any person guilty of conspiracy to commit any offence against subsection (1) shall be punishable as if he had committed such offence.

(3) Obtaining payment of money, etc; to company by false promise of director, member etc; of company

Whoever being an officer or agent of any corporation by any deceitful means or false promise and with intent to defraud, causes or procures any money to be paid or any chattel or marketable security to be delivered to that corporation or to himself or any other person for the use of benefit or on account of that corporation shall be guilty of an offence against this Act.

Penalty: Imprisonment for seven years or thirty thousand ringgit or both.

(4) Evidence of financial position of company

Upon the trial of a charge for any offence against this section the opinion of any properly qualified auditor or accountant as to the financial position of any company at any time or during any period in respect of which he has made an audit or examination of the affairs of the company according to recognized audit practice shall be admissible either for the prosecution or for the defence as evidence of the financial position of the company at the time or during that period notwithstanding that the opinion is based in whole or in part on book-entries, documents or vouchers or on written or verbal statements by other persons.

Section 131 A. Interested director not to participate or vote

(1) Subject to section 131, a director of a company who is any way, whether directly or indirectly, interested in a contract entered into or proposed to be entered into by the company, unless the interest is one that need be disclosed under section 131, shall be counted only to make a the quorum at the board meeting but shall not participate in any discussion while the contract is being considered at the board meeting and shall not vote on the contract or proposed contract.

(2) Subsection (1) shall not apply to-

- (a) a private company unless it is a subsidiary to a public company;
- (b) a private company which is wholly-owned subsidiary of a public company, in respect of any contract or proposed contract to be entered into by the private company with the holding company or with another wholly-owned subsidiary of that same holding company;
- (c) any contract or proposed contract of indemnity against any loss which any director may suffer by reason of becoming or being a surety for a company;
- (d) any contract or proposed contract entered into or to be entered into by a public company or a private company which is a subsidiary of a public company, with another company in which the interest of the director consists solely of-
 - (i) in him being a director of the company and the holder of shares not more than the number or value as is required to qualify him for the appointment as a director; or
 - (ii) in him having an interest in not more than five per centum of its paid up capital.

(3) Where a contract or proposed contract is entered into in contravention of subsection (1) the contract or proposed contract shall be voidable at the instance of the company except if it is in the favour of any person dealing with the company for a valuable consideration and without any actual notice of the contravention;

(4) a director who knowingly contravenes this section shall be guilty of an offence against this Act.

Penalty: imprisonment for five years or one hundred and fifty thousand ringgit or both. .

Section 368. Fraud by officers

Every person who while an officer of a company-

- (a) has by deceitful or fraudulent or dishonest means or by means of any other fraud induced any person to give credit to the company;
- (b) with intent to defraud creditors of the company , has made or caused to be made any gift or transfer of or charge on, or has caused or connived at the levying of any execution against, the property of the company; or
- (c) with intent to defraud creditors of the company, has concealed or removed any part of the property of the company since or within two months before the date of any unsatisfied judgement or order for payment of money obtained against the company shall be guilty of an offence against this Act

Penalty: Imprisonment for ten years or two hundred and fifty thousand ringgit or both.

Liability of natural persons vis-à-vis legal persons under the section 140 r/w section 137 of the Customs Act 1967 (Act235):-

Section 137. Penalty for offering or receiving bribes

(1) If any officer of customs or other person duly employed for the prevention of smuggling-

- (a) makes any collusive seizure or delivers up or makes any agreement to deliver up or not to seize any vessel or aircraft or other means of conveyance, or any goods, liable to seizure;
- (b) accepts, agrees to accept, or attempts to obtain, any bribe, gratuity, recompense or reward for the neglect or non-performance of his duty; or
- (c) conspires or connives with any person to import or export or is in any way concerned in the importation or exportation of any goods liable to customs duties or any goods prohibited to be imported or exported for the purpose of seizing any vessel, aircraft or conveyance or any goods and obtaining any reward for such seizure or otherwise, every such officer so offending shall be guilty of an offence against this Act and shall, on conviction, be liable to imprisonment for a term not exceeding *five years or to a fine not exceeding *ten thousand ringgit or to both such imprisonment and fine, and shall be interdicted from holding office in the public service of the Federal Government or the Government of any State, and every person who gives or offers or promises to give or procures to be given any bribes, gratuity, recompense or reward to, or makes

any collusive agreement with, any such officer or person as aforesaid to induce him in any way to neglect his duty or to do, conceal or connive at any act whereby any of the provisions of any other law relating to imports or to exports may be evaded, shall be guilty as an abettor and so punishable under this Act.

(2) Any officer of customs who is found when on duty to have in his possession any monies in contravention of any departmental regulations issued in writing shall be presumed, until the contrary is proved, to have received the same in contravention of paragraph (1) (b).

(3) If an officer of customs has reasonable suspicion that another officer of customs junior in rank to him has in his possession any money received in contravention of paragraph (1) (b) he may search such other officer.

Section 140-Offences by bodies of persons and by servants and agents

(1) Where an offence against this Act or any regulation made thereunder has been committed by a company, a firm, a society, an association or other body of persons, any person who at the time of the commission of the offence was a director, manager, secretary or other similar officer or a partner of the company, firm, society, association or other body of persons or was purporting to act in such capacity shall be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he exercised all such diligence to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances.

(2) Where any person would be liable under this Act to any punishment, penalty or forfeiture for any act, omission, neglect or default he shall be liable to the same punishment, penalty or forfeiture for every such act, omission, neglect or default of any clerk, servant or agent, or of the clerk or servant of such agent provided that such act, omission, neglect or default was committed by such clerk, or servant in the course of his employment or by such agent when acting on behalf of such person or by the clerk or servant of such agent when acting in the course of his employment in such circumstances that had such act, omission, neglect or default been committed by the agent his principal would have been liable under this section.

396. Malaysia provided the following case example on the implementation of the provision.

Yue Sang Cheong Sdn Bhd v Public Prosecutor [1973] 2 MLJ 77 (see above)

397. Malaysia referred also for information to the article “Company Directors and Offences under the Companies Act in Malaysia and Singapore” by Yashwant Rai Vyas [1989] 1 CLJ (Rep) (cited above).

398. Malaysia further referred to Table 9 (Annex 7). Statistics were also provided in Table 10 (Annex 13).

(b) Observations on the implementation of the article

399. The reviewing experts are satisfied with the explanations provided by Malaysia.

Article 26 Liability of legal persons

Paragraph 4

4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

(a) Summary of information relevant to reviewing the implementation of the article

400. Malaysia made reference to the information provided under paragraphs (1) and (2) of article 26.

401. With regards to the Malaysian stand on punishment of legal persons, reference was made for information only to the article “Criminal Liability of Corporations in Malaysia” [1982] CLJ 225 (quoted above).

402. Sanctions against legal persons are regulated in the following laws:

Section 24 of MACCA

Section 4 (1) of AMLATFA

Section 2 of the Penal Code (Act 574)-Punishment of offences committed within Malaysia

Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within Malaysia.

Section 3 Penal Code (Act 574)-Punishment of offences committed beyond, but which by law may be tried within Malaysia

Any person liable by law to be tried for an offence committed beyond the limits of Malaysia, shall be dealt with according to the provisions of this Code for any act committed beyond Malaysia, in the same manner as if such act had been committed within Malaysia.

Section 364 (1) of the Companies Act 1965 (Act 125)- False and misleading statements

(1) Every corporation which advertises, circulates or publishes any statement of the amount of its capital which is misleading or in which the amount of nominal or authorized capital is stated without the words ‘nominal’ or ‘authorized’, or in which the amount of capital or authorized or subscribed capital is not stated but the amount of paid-up capital or the amount of any charge on uncalled capital is not stated as prominently as the amount of authorized or subscribed capital is stated, and every officer of the corporation who knowingly authorizes, directs, or consents to the advertising, circulation or publication shall be guilty of an offence against this Act;

Penalty: Imprisonment for ten years or two hundred and fifty thousand ringgit or both.

403. Reference was further made to Table 9 (Annex 7).

(b) Observations on the implementation of the article

404. Currently, MACCA establishes the same fines for natural persons as for legal persons. Although fines can go up to a maximum of five times the amount of the gratification, the reviewers observed that those penalties might not be dissuasive enough for large corporations. Higher fines for corporations, as well as specific civil and administrative sanctions might be useful to maximize the deterrent effect.

405. Section 24 of MACCA establishes a penalty of imprisonment *and* a fine for corruption offences (emphasis added). During the country visit, Malaysia explained that in cases where the law provides for a punishment of both imprisonment and a fine (such as in section 24 of MACCA), instead of imprisonment *or* a fine or both, the imprisonment would not be impossible on a legal entity.

406. The Ministry of Finance operates a so called “black-list” of entities that are ineligible for public contracts. It was explained that currently three or four companies are listed following their criminal conviction. Moreover, **Treasury Circular No. 6 of 2010** states that if a company, regardless of its status, is found guilty of a criminal offence, or if any of the directors of the company are found guilty, then the registration of the said company is revoked instantly, regardless of the status of the company. These measures are further discussed under article 34 of the Convention below.

(c) Challenges related to article 26

407. Malaysia has identified the following challenges and issues in fully implementing the article under review:

1. Limited capacity, e.g., knowledge and investigative skills.
2. Other issues: lack of expertise in detecting, investigating and prosecuting offences under the Convention which involve a corporation and proving the knowledge of the corporations regarding the commission of these offences by its officers.

408. The reviewing experts acknowledge the limitations of domestic laws, technical knowledge and expertise in detecting, investigating and prosecuting corruption offences involving legal entities, as well as identifying and proving the participation of responsible officers hinders the effective implementation and imposition of liability. Technical assistance may be useful.

(d) Technical assistance needs related to article 26

409. Malaysia has indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision in matters concerning the investigation and prosecution of offences under the Convention against legal persons:

1. Legal advice;
2. On-site assistance by an anti-corruption expert.

410. None of these forms of technical assistance has been provided to Malaysia to-date.

Article 27 Participation and attempt

Paragraph 1

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

411. Malaysia referred to MACCA, AMLATFA and the Penal Code, as well as the following laws:

Section 16 of MACCA*

Any person who by himself, or by or **in conjunction with any other person-**

- (a) corruptly solicits or receives or agrees to receive for himself or for any other person; or
- (b) corruptly gives, promises or offers to any person whether for the benefit of that person or of another person, any gratification as an inducement to or a reward for, or otherwise on account of-
 - (A) any person doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place; or
 - (B) any officer of a public body doing or forbearing to do anything in respect of any matter or transaction, actual or proposed or likely to take place, in which the public body is concerned, commits an offence.

* Section 10 of the Anti-Corruption Act 1997 (Act 575) / Section 3 of the Prevention of Corruption Act 1961(Act 57)

Section 22 of MACCA*

Any person who by himself or himself or **in conjunction with any other person** gives, promises or offers, or agrees to give or offer to any foreign public official, or being a foreign public official solicits, or obtains, agrees to accept or attempts to obtain, whether for the benefit of that foreign public official or of another person any gratification as an inducement or reward or otherwise on account of -

- (a) the foreign public official using his position to influence any act or decision of the foreign state or public international organization for which the official performs any official duties;
 - (b) the foreign public official performing, having done or forborne to do, or abstaining from performing or aiding in procuring, expediting, delaying, hindering or preventing the performance of , any of his official duties; or
 - (c) the foreign public official aiding in procuring or preventing the granting of any contract for the benefit of any person
- commits an offence

Section 28 of MACCA¹³

1) Any person who-

- (a) **attempts** to commit an offence under this Act;
 - (b) does any act preparatory to or in furtherance of the commission of any offence under this Act; or
 - (c) **abets** or is engaged in a **criminal conspiracy** to commit any offence under this Act, Commits such offence and shall on conviction be liable to the punishment for such offence.
- (2) Any provision of this Act which contains a reference to an offence under any specific provision of this Act shall be read as including a reference to an offence under subsection (1) in relation to the offence under that specific provision.
- (3) Paragraph (1) (a) shall not apply where an attempt to do any act is expressly made an offence under this Act, and paragraph (1) (c) shall not apply to the case of abetment of an offence as provided for under section 164 of the Penal Code.

Section 4 (1) of AMLATFA

Any person who-

- (a) engages in, or attempts to engage in; or
- (b) abets the commission of money laundering, commits an offence.

Section 137 of the Customs Act 1967 (Act 235)

137. (1) If any officer of customs or other person duly employed for the prevention of smuggling-

- (a) makes any collusive seizure or delivers up or makes any agreement to deliver up or not to seize any vessel or aircraft or other means of conveyance, or any goods liable to seizure;
- (b) accepts, agrees to accept, or attempts to obtain, any bribe, gratuity, recompense or reward for the neglect or nonperformance of his duty;
- (c) conspires or connives with any person to import or export or is in any way concerned in the importation or exportation of any goods liable to customs duties or any goods prohibited to be imported or exported for the purpose of seizing any vessel, aircraft or conveyance or any goods and obtaining any reward for such seizure or otherwise, every such officer so offending shall be guilty of an offence against this Act and shall, on conviction, be liable to imprisonment for a term not exceeding *five years or to a fine not exceeding *ten thousand ringgit or to both such imprisonment and fine, and shall be interdicted from holding office in the public service of the Federal Government or the Government of any State, and every person who gives or offers or promises to give or procures to be given any bribes, gratuity, recompense or reward to, or makes any collusive agreement with, any such officer or person as aforesaid to induce him in any way to neglect his duty or to do, conceal or connive at any act whereby any of the provisions of any other law relating to imports or to exports may be evaded, shall be guilty as an abettor and so punishable under this Act.

PENAL CODE (Act 574) provisions as follows:

Section 34- Each of several persons liable for an act done by all, in like manner as if done by him alone
When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

Section 35-When such an act is criminal by reason of its being done with a criminal knowledge or

¹³ Section 20 Anti-Corruption Act1997 (Act 575) / Section 18 Prevention of Corruption Act1961 (Act 57).

intention. Whenever an act, which is criminal only by reason of its being done with a criminal knowledge or intention, is done by several persons, each of such persons who joins in the act with such knowledge or intention, is liable for the act in the same manner as if the act were done by him alone with that knowledge or intention.

Section 37- Co-operation by doing one of several acts constituting an offence

When an offence is committed by means of several acts, whoever intentionally cooperates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence.

Section 38- Several persons engaged in the commission of a criminal act, may be guilty of different offences. Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act.

Section 107 - Abetment of a thing

A person abets the doing of a thing who-

- (a) instigates any person to do that thing;
- (b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
- (c) intentionally aids, by any act or illegal omission, the doing of that thing.

Section 108 –Abettor

A person abets an offence who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Section 108A- Abetment of offences outside Malaysia

A person abets an offence within the meaning of this Code who, in Malaysia, abets the commission of any act without and beyond Malaysia which would constitute an offence if committed in Malaysia.

Section 109- Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.

Section 110- Punishment of abetment if the person abetted does the act with a different intention from that of the abettor. Whoever abets the commission of an offence shall, if the person abetted does the act with a different intention or knowledge from that of the abettor, be punished with the punishment provided for the offence which would have been committed if the act had been done with the intention or knowledge of the abettor and with no other.

Section 116 -Abetment of an offence punishable with imprisonment. Whoever abets an offence punishable with imprisonment shall, if that offence is not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment for a term which may extend to one-fourth part of the longest term provided for that offence or with such fine as is provided for that offence or with both; and if the abettor or the person abetted is a public servant, whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment for a term which may extend to one-half of the longest term provided for that offence or with such fine as is provided for the offence or with both.

Section 118 - Concealing a design to commit an offence punishable with death or imprisonment for life. Whoever, intending to facilitate, or knowing it to be likely that he will thereby facilitate, the commission of an offence punishable with death or imprisonment for life or imprisonment for a term which may extend to twenty years, voluntarily conceals, by any act or illegal omission, the existence of a design to commit such offence, or makes any representation which he knows to be false respecting such design, shall, if that offence is committed, be punished with imprisonment for a term which may extend to seven years, or if the offence is not committed, with imprisonment for a term which may extend to three years, and, in either case, shall also be liable to fine.

Section 120A - Definition of criminal conspiracy

When two or more persons agree to do, or cause to be done-

(a) an illegal act; or

(b) an act, which is not illegal, by illegal means, such an agreement is designated a criminal conspiracy:

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Section 120B - Punishment of criminal conspiracy

(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for a term of two years or upwards shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.

(2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment for a term not exceeding six months or with fine or with both.

Section 164- Abetment of offences under section 162 and section 163 Penal Code Whoever, being a public servant, in respect of whom either of the offences defined in sections 162 and 163 is committed, abets the offence, shall be punished with imprisonment for a term which may extend to three years or with fine or with both.

412. Malaysia highlighted that under section 28 of MACCA, a person who attempts, abets or conspires to commit an offence under MACCA shall on conviction be equally liable to the punishments provided for under the Act. There have been instances whereby, on conviction and upon mitigation, a court has meted out a punishment that was commensurate with the degree of culpability of the offender.

413. The inter-link between MACCA and the Penal Code was also elaborated. Certain Penal Code offences, listed in the Schedule in MACCA, are prescribed offences. MACCA provisions, such as section 28 of MACCA, are applicable to these offences.

414. Sufficient case examples on the implementation of the provision were presented and discussed.

415. Malaysia referred to Table 6 (Annex 3).

(b) Observations on the implementation of the article

416. The reviewing experts are of the opinion that Malaysia has implemented the provision. Section 28 of MACCA sufficiently regulates the various forms of participation. In the Penal Code the relevant section is 107 on abetment. The interpretative notes comprised in the Penal Code clarify that the acts of instigating, aiding or doing anything in order to facilitate an offence can also be subsumed under the term abetting. The same interpretation would be used for abetting under section 28 of MACCA. In regard to money laundering, the observations under UNCAC article 23 1 (b) (ii) are referred to.

417. Malaysia explained that MACCA does not distinguish between first and secondary parties in regard to liability. The persons who committed the offence, whether as principal, accomplice or accessory, will be held equally liable with the same degree of culpability. Nevertheless, it should be noted that the courts are in a position to make a judgment based on the circumstances of the individual case and can mitigate punishment accordingly. Malaysia elaborated in this regard that courts, when deciding on an appropriate sentence of participants in a crime, will look into the degree of culpability of a

participant. A participant who merely has a peripheral role in the commission of an offence may obtain a lesser sentence than a person who actively participated in the commission of an offence. The peripheral role would include merely removing articles or instrumentalities used in the commission of the crime. Courts may also consider whether those who played a peripheral role were doing so under any form of pressure from their superior officers

Article 27 Participation and attempt

Paragraph 2

2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

418. There are specific provisions as reflected in MACCA, AMLATFA and the Penal Code.

Section 17 (a), 22 and 28 of MACCA

Section 4(1) (a) of AMLATFA

Any person who-

- (a) engages in, or attempts to engage in; or
- (b) abets the commission of money laundering, commits an offence

Section 511 of the Penal Code (Act 574) - Punishment for attempting to commit offences punishable with imprisonment

Whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of such offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence:

Provided that any term of imprisonment imposed shall not exceed one-half of the longest term provided for the offence

419. Malaysia provided the following examples of cases on the implementation of the provision.

Attempt to commit an offence under section 4(a) of the Prevention of Corruption Act 1961

Mohd Ali Jaafar v Public Prosecutor [1998]4 MLJ 210

The appellant was found guilty by the sessions court judge (the judge) for soliciting sexual favours from the complainant at the Immigration Office, Melaka under s 3(a) (ii) of the Prevention of Corruption Act 1961 (the Act) -- the first charge -- and for attempting to obtain sexual favours from her under s4(a) of the Act -- the second charge. He was convicted on both the charges and sentenced to three years imprisonment in respect of the first charge and 1 year imprisonment in respect of the second charge.

Attempt to commit an offence under section 11(a) of the Anti-Corruption Act 1997

PP v Jamil bin Mahmud & Anor [1998]4 MLJ 681

Offence under section 420 of the Penal Code r/w 511 of the Penal Code.

Teh Ah Quay v Public Prosecutor [1953]1 MLJ 12

The appellant was charged with and convicted of an offence of cheating contrary to section 420 of the Penal Code. The facts were as follows: On January 28th about 10 persons were playing a game of cards in the back portion of a coffee-shop. A police Lieutenant in the Criminal Intelligence Representative at Klang came and raided the shop. Some days later a Chinese, who stated he was a police Inspector, went to the shop and questioned one Lim Thong Chong, the coffee-shop keeper, about the gambling. Thong Chong was very worried and someone suggested to him he should see the appellant, which he did. He told the appellant his worries and 3 or 4 days later the appellant, according to the evidence, said he wanted \$ 400 to settle the person who raided the shop. Thong Chong then reported the matter to an A.S.P. in the anti-corruption branch. As a result, \$ 400 in ten-dollar notes were marked and, according to Thong Chong, they were handed to the appellant. This evidence was corroborated by one Leow Her Hia. Subsequently, the appellant was arrested and searched and two marked ten-dollar notes were found in his possession.

Held: the evidence did not support the conviction but the appellant could and should have been convicted of the offence of attempting to cheat.

420. Malaysia referred to Table 6 (Annex 3).

(b) Observations on the implementation of the article

421. The reviewing experts are of the view that Malaysia has implemented the provision.

Article 27 Participation and attempt

Paragraph 3

3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

422. Malaysia referred to the response provided above under article 27 paragraph 2. Moreover, Malaysia cited the following laws:

Section 28 of MACCA¹⁴

1) Any person who-

(d) attempts to commit an offence under this Act;

(e) **does any act preparatory to or in furtherance of the commission of any offence** under this Act; or

(f) abets or is engaged in a criminal conspiracy to commit any offence under this Act, Commits such offence and shall on conviction be liable to the punishment for such offence.

(4) Any provision of this Act which contains a reference to an offence under any specific provision of this Act shall be read as including a reference to an offence under subsection (1) in relation to the offence under that specific provision.

(5) Paragraph (1) (a) shall not apply where an attempt to do any act is expressly made an offence under this Act, and paragraph (1) (c) shall not apply to the case of abetment of an offence as provided for under section 164 of the Penal Code.

Section 4(1) (a) of AMLATFA. See above.

¹⁴ Section 20 Anti-Corruption Act1997 (Act 575) / Section 18 Prevention of Corruption Act1961 (Act 57).

Section 511 of the Penal Code (Act 574) - Punishment for attempting to commit offences punishable with imprisonment. See above.

423. Malaysia provided the following examples of cases on the implementation of the provision.

PP v Kee Ah Bah [1979] 1 MLJ 26

On April 25, 1973, three customs officers were laying in wait at the export gate at the Johore Bahru Causeway for motor-car J.K. 3856. At about 5.30 p.m. the car was seen leaving the immigration check point and approaching the customs checkpoint. The first officer on seeing the car signaled the others to be on the alert. One was at the export gate near the check point, and the other was at the emergency gate which was further up the export gate and was about the beginning of the causeway leading to the border between Johore and Singapore in the middle of the causeway. The officer manning the emergency gate on being alerted closed the gate. The car was then about 10 yards from the check point. There were two cars ahead of it. The officer at this gate signaled the respondent who was driving to stop. But the respondent reversed and made a U-turn, ignoring the first officers shout to stop. With a revolver in his hand, the officer leapt on to the bonnet of the moving car and tried to get into it by smashing the windscreen with his revolver. In the process, the revolver was thrown into the car and the officer off the car. The car got away through a gap in the kerb beside the road. The gap was after the immigration point leading to a road back to town. The car was later found and the respondent was taken to the police station. The revolver was recovered when the respondent led them to a spot where he had thrown it. The car was taken to customs and in it were found 21 bags of tin ore, 2 in the boot, 3 under the seat, and 16 in a special compartment between the back rest of the rear seat of the car and the engine. The car was a Volkswagen with an engine at the back. The prosecution appealed against the acquittal of the respondent. The learned President held that the respondent had no case to answer on a charge of having been knowingly concerned in an attempt at fraudulent evasion of export duty on 21 bags of tin ore weighing 9.45 piculs, an offence under section 135(1)(e) and punishable under section 135(1)(i) of the Customs Act, 1967. [*26] Held, setting aside the acquittal:

- (1) a person could only be convicted of an attempt to commit in the circumstances where the steps taken by him in order to commit the offence, if successfully accomplished, would have resulted in the commission of that offence;
- (2) acts remotely leading to the commission were not to be considered as an attempt to commit but acts immediately leading to the commission of the offence or acts immediately connected with the commission of the offence constituted an attempt to commit that offence;
- (3) the customs had the right to examine a vehicle after it left the immigration point, because after that point the traveler must be said to be in the course of leaving the country, and if he had the goods, then they were in the course of being exported;
- (4) the remote acts, i.e. preparatory to or as showing intention to commit the offence, would be the making of the secret compartments in the car, the obtaining and loading of the tin-ore into the car, and the driving up to the immigration check point to present his travel documents;
- (5) the immediate acts were that he was within the area of the customs check point; he failed to stop when called upon to do so; and he reversed the car and drove off;
- (6) all the evidence, the immediate acts and the prevailing circumstances, considered as a whole, constituted the offence of attempt at fraudulent evasion of export duty.

TAN CHIN KENG V PP [1964] MLJ 316

The appellant and another were charged "That you on 26.11.63 at about 11.30 a.m. at the Goh Lian Huat Coffee Shop, Bunga Raya Road, Malacca, in the State of Malacca did attempt to extort money a sum of \$ 720.00 from one Wong Kak Sin by threatening to put the said Wong Kak Sin in fear of injury to wit, that you will smash up his shop if the said Wong Kak Sin did not pay up the demand and that you have thereby committed an offence punishable under section 385 of the Penal Code Cap. 45," and each convicted and sentenced to one year's imprisonment and six strokes of the rattan. On appeal against conviction and sentence it was contended that (i) the charge was bad for duplicity as it was not clear whether the appellant was charged with an offence of attempted extortion under section 384 of the Penal Code read with section 511 thereof or with an offence of putting a person in fear of injury under section 385, (ii) where the prosecution invokes the aid of section 34 it is necessary to frame a charge under that section. Held:

- (1) though the charge was not happily framed, it was possible to make out what it alleged, namely, that the appellant and another put the complainant in fear of injury in order to the committing of extortion; there was therefore no question of the duplicity of the charge;
- (2) there was nothing in the charge to indicate to the appellant with sufficient clarity that what the prosecution proposed to establish against him was not that he demanded any money from or threatened the complainant with injury but that he and others were acting together with a common intention to put the complainant in fear of injury with a view to committing the extortion and that in furtherance of the common intention of all of them the complainant was put in such fear. Per Ismail Khan J.: "Where the charge is one of attempted extortion it should be framed under section 385 of the Penal Code and not under section 384 read with section 511."

Thangiah & Anor v PP [1977] 1 MLJ 79

In this case the first appellant was a senior conductor of the estate while the second appellant was a field worker who worked directly under the supervision of the first appellant. The first appellant was responsible for the bags of fertiliser taken out of the store. Both the appellants had only a day earlier taken back to the store in the first appellants car 4 bags of fertiliser out of the 11 bags which were not used for the day. They returned to the place with the car between 6.30 p.m. and 7.00 p.m. when they were stopped from loading the remaining 7 bags into the car. Both the appellants were convicted under sections 381 and 511 of the Penal Code read together with section 34 of the Code. They appealed against the decision of the learned magistrate. Held:

- (1) the mere forming of an intention to commit a crime and making preparations for its commission are not criminal acts and are not punishable under the law. There must be some further overt act on the part of the offender which is directed towards the actual commission of the crime and which is immediately and not remotely connected with the crime in order to constitute an attempt within the meaning of section 511 of the Penal Code;
- (2) the appellants might well have had the intention to steal the bags and might well have come prepared to take them away for their own use. But this was insufficient to constitute an attempt to steal. The overt acts of the appellants fell short of the actual attempt to steal as the acts were not immediately connected with the offence of theft. ...There are four stages in every crime. First, an intention to commit the crime, secondly, the preparation for its commission, thirdly, the attempt to commit it and finally, the actual commission of the crime. The mere forming of an intention to

commit a crime and making preparations for its commission are not criminal acts and are not punishable under the law. There must be some further overt act on the part of the offender which is directed towards the actual commission of the crime and which is immediately and not remotely connected with the crime in order to constitute an attempt within the meaning of section 511 of the Penal Code. If the attempt succeeds the crime is completed and the offender will face a charge for the substantive offence. On the other hand a crime is not completed if something should happen when the attempt to commit it is being made breaking the chain of events which if not for the intervening interruption would have led to the consummation of the crime. In such an event the offender will be liable under section 511 of the Penal Code.

424. Principles of sentencing for cases of “attempt” are elaborated in the case of *Winston Rajah v PP* [1999]1CLJ 315.

425. In the case of *Re: Ooi Chan Onn* [1965] 1 MLJ 77, his Lordship Ong J said, *inter alia*,: “... In my opinion, a person convicted of attempted theft is convicted of the offence of an attempt, which must be clearly distinguished from the offence of actual or completed theft. The punishment for the offence of attempted theft is laid down in s. 511 of the Penal Code, which provides that the offence of an attempt shall be punished with such punishment as is provided for the completed offence but that any term of imprisonment shall not exceed one-half of the longest term provided for the offence. This means that whatever the penalty provided for an offence, the attempt to commit such offence is similarly punishable, except that as regards imprisonment, the term imposed shall not exceed half of the maximum term provided for the completed offence.”

426. A similar view was also expressed in the case of *Munah bte Ali v. Public Prosecutor* [1958] MLJ 159 where his Lordship Thomson CJ in his dissenting judgment at p. 161 said: It will be observed that s. 511 does not define an attempt. It only states what attempts are themselves offences. It says in effect that before an attempt is itself an offence it must satisfy two conditions. The first of these is that it must be an attempt to commit an offence punishable by the Code or by any other written law. The other is that there must be an act towards the commission of the offence. It follows that the provision of s. 511, although general in nature, should be considered on its own instead of merely reading it as an appendix to another provision. Moreover, the offence of attempt does have its own ingredients as may be noted from what Lord Parker CJ said in *Davey v. Lee* [1967] 3 WLR 105 at p. 108.

427. Malaysia referred to Table 6 (Annex 3).

(b) Observations on the implementation of the article

428. Malaysia has criminalized the preparation for an offence. Section 28 of MACCA specifically includes “any act preparatory to or in furtherance of the commission of any offence”. The experts acknowledge that, through this provision in MACCA, preparatory acts to most corruption offences could be covered.

429. Section 4 of AMLATFA and section 511 of the Penal Code, however, do not go beyond the act of attempt.

Article 29 Statute of limitations

Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

(a) Summary of information relevant to reviewing the implementation of the article

430. Malaysia explained that there is no statute of limitations for the commencement of criminal proceedings, whether for offences established in accordance with the Convention or crimes generally.

(b) Observations and Successes and good practices

431. Malaysia has implemented the provision. The absence of a statute of limitations for corruption-related and criminal offences provides for the possibility to commence proceedings at any time and is therefore in accordance with the spirit of the Convention. It also constitutes a good practice, conducive to the full prosecution of corruption cases.

Article 30 Prosecution, adjudication and sanctions

Paragraph 1

1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.

(a) Summary of information relevant to reviewing the implementation of the article

432. Malaysia cited the following laws relating to punishments imposed on findings of guilt for offences established in accordance with the Convention.

433. For most corruption offences, the relevant provision in MACCA which establishes sanctions in section 24. The general penalty provision is section 69.

Penalty for offences under sections 16, 17, 18, 20, 21, 22, 23

Section 24

(1) Any person who commits an offence under sections 16, 17, 20, 21, 22, and 23 shall upon conviction be liable to -

- (a) imprisonment for a term not exceeding twenty years and
- (b) a fine not less than five times the sum or value of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is a pecuniary nature, or then thousand ringgit, whichever is the higher.

(2) Any person who commits an offence under section 18 shall upon conviction be liable to -

- (a) imprisonment for a term not exceeding twenty years and
- (b) a fine not less than five times the sum or value of the false or erroneous or defective material particular, where such false or erroneous or defective material particular is capable of being valued or is a pecuniary nature, or then thousand ringgit, whichever is the higher.

General penalty

Section 69 - Every person convicted for an offence under this Act for which no penalty is specifically provided shall be liable to a fine not exceeding ten thousand ringgit or imprisonment for a term not exceeding two years or both.

434. The relevant provisions per UNCAC offence are listed below:

Bribery of national public sector officials (Article 15)

(1) Section 24 of MACCA

(2) Penal Code Act 574

Section 161- Imprisonment which may extend to three years or with fine or with both.

(3) Customs Act 1967 (Act 235)

Section 137-Imprisonment not exceeding five years and a fine not exceeding ten thousand ringgit or to both such imprisonment and fine and shall be interdicted from holding office in the public service of the Federal Government and Government of any State.

Bribery of foreign public sector officials and officials of public international organizations (Article 16)

(1) Section 24 of MACCA

Embezzlement, misappropriation or other diversion of property by a public official (Article 17)

(1) Section 24 of MACCA

(2) Penal Code Act 574:-

- Section 403-Dishonest misappropriation of property
Imprisonment for a term which shall not be less than six months and not more than five years and with whipping and shall also be liable to fine.
- Criminal breach of trust
Imprisonment for a term not more than ten years and with whipping and shall be liable to fine.
- Section 409-Criminal breach of trust by public servant or agent
Imprisonment for a term which shall not be less than two years and not more than twenty years and with whipping and shall be liable to fine.

Trading in Influence (Article 18)

(1) Penal Code Act 574-

- Section 162- Imprisonment for a term not exceeding three years or fine or both
- Section 163-Imprisonment for a term not exceeding one year or fine or both

(2) Section 24 of MACCA

Abuse of functions (Article 19)

(1) Section 24 of MACCA

Illicit enrichment by a public official (Article 20)

Section 36(1) r/w 36 (3) of MACCA-

- a) imprisonment for a term not exceeding twenty years and
- b) a fine which is not less than five times the value of the excess, if the excess is capable of being valued, or ten thousand ringgit, whichever is the higher

Bribery of private sector decision-makers (Article 21)

(1) Section 24 of MACCA

Embezzlement by persons working in private sector entities (Article 22)

(1) Section 24 of MACCA

(2) Offences under the Penal Code

- Section 403-Dishonest misappropriation of property
Imprisonment for a term which shall not be less than six months and not more than five years and with whipping and shall also be liable to fine.
- Section 405 r/w Section 406-Criminal breach of trust
Imprisonment for a term not exceeding ten years and with whipping and shall also be liable to fine.
- Section 408-Criminal breach of trust by clerk or servant
Imprisonment for a term which shall not be less than one year and not more than fourteen years and with whipping, and shall be liable to fine.

Laundering the proceeds of corruption (Article 23)

(1) MACCA

- Section 26 - Fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding seven years or to both.

(2) AMLATFA

- Section 4-Fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or both

Concealment or continued retention of the proceed of crime (Article 24)

(1) MACCA

- Section 26-Fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding seven years or to both.

(2) AMLATFA

- Section 4 -Fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or both.
- Section 18 - opening account using false name-Fine not exceeding one million ringgit or imprisonment for a term not exceeding one year or both

Obstruction of justice (Article 25)

(1) MACCA

- Section 48 r/w Section 69
Fine not exceeding ten thousand ringgit or imprisonment for a term not exceeding two years or both.

(2) AMLATFA

- Section 34-Fine not exceeding one million ringgit or imprisonment for a term not exceeding one year or both, and in the case of continuing offence, to a further fine of one thousand ringgit for each day during which the offence continues after conviction.

(3) Penal Code Act 574

- Section 189-Threat of injury to a public servant-
Imprisonment for a term which may extend to two years or fine, or both
- Section 213-Taking gift to screen offender from punishment
Imprisonment for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence or fine or both.
- Section 214 -Offering gift in consideration of screening offender
Imprisonment for a term which may extend to one-fourth part of the longest term of imprisonment provided for the offence or fine or both.
- Section 216 -Harbouring an offender who escaped custody

- Imprisonment for a term which may extend to three years or fine, or both
- Section 217-Public servant disobeying a direction of law with intent to save a person from punishment, or property from forfeiture-
Imprisonment for a term which may extend to two years, fine or both
- Section 218-Public servant framing an incorrect correct record or writing with intent to save a person from punishment, or property from forfeiture-
Imprisonment for a term which may extend to three years, or fine or both
- Section 221-Intentional omission to apprehend on the part of a public servant bound by law to apprehend
Imprisonment for a term which may extend to two years with or without fine
- Section 222-Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of a Court
Imprisonment for a term which may extend to seven years, with or without fine
- Section 223-Escape from confinement negligently suffered by a public servant. Imprisonment for a term which may extend to two years, or fine, or both
- Section 225-Resistance or obstruction to the lawful apprehension of another person-
 - (a) shall be punished with imprisonment for a term which may extend to two years or with fine or with both;
 - (b) if the person to be apprehended, or the person rescued, or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with imprisonment for a term which may extend to twenty years, shall be punished with imprisonment for a term which may extend to three years, and shall also be liable to fine;
 - (c) if the person to be apprehended or rescued, or attempted to be rescued, is charged with or liable to be apprehended for an offence punishable with death, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine;
 - (d) if the person to be apprehended or rescued, or attempted to be rescued, is liable, under the sentence of a Court, or by virtue of a commutation of such a sentence, to imprisonment for a term of ten years or upwards, shall be punished with imprisonment for a term which may extend to seven years, and shall also be liable to fine;
- Section 225 A- Public servant omitting to apprehend or suffering other persons to escape in cases already provided for
 - (a) if he does so intentionally, with imprisonment for a term which may extend to three years , or with fine, or with both; or
 - (b) if he does so negligently, with imprisonment for a term which may extend to two years, or with fine, or with both.
- Section 503 r/w Section 506 (Criminal intimidation)-Imprisonment for a term which may extend to two years or fine or both; and if the threat is to cause death or grievous hurt, or to cause the destruction of property by fire or to cause an offence punishable for a term which may extend to seven years, or to impute unchastity of a woman shall be punishable for a term which may extend to seven years, or with fine or both.
- Section 507-Criminal intimidation by an anonymous communication - Imprisonment for a term which may extend to two years in addition to the punishment provided under section 506

(4) Abduction and Criminal Intimidation of Witness Act 1947

- Section 4-Imprisonment for a term which may extend to fourteen years or fine, or both
- Section 5-Imprisonment for a term which may extend to ten years or fine, or both

Participation and attempt (Article 27)

(1) MACCA

Section 28 of MACCA¹⁵

- 1) Any person who-
 - (g) attempts to commit an offence under this Act;
 - (h) does any act preparatory to or in furtherance of the commission of any offence under this Act; or
 - (i) abets or is engaged in a criminal conspiracy to commit any offence under this Act, Commits such offence and **shall on conviction be liable to the punishment for such offence.**
- (6) Any provision of this Act which contains a reference to an offence under any specific provision of this

¹⁵ Section 20 Anti-Corruption Act1997 (Act 575) / Section 18 Prevention of Corruption Act1961 (Act 57).

Act shall be read as including a reference to an offence under subsection (1) in relation to the offence under that specific provision.

- (7) Paragraph (1) (a) shall not apply where an attempt to do any act is expressly made an offence under this Act, and paragraph (1) (c) shall not apply to the case of abetment of an offence as provided for under section 164 of the Penal Code.

(2) Penal Code Act 574

- Sections 162,163 r/w Section 164-Imprisonment which may extend to three years or fine or to both
- Section 511 - Punishment for attempting to commit offences punishable with imprisonment
Whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of such offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence:
Provided that any term of imprisonment imposed shall not exceed one-half of the longest term provided for the offence.
- Section 108 A - Abetment in Malaysia of offences outside Malaysia
A person abets an offence within the meaning of this Code who, in Malaysia, abets the commission of any act without and beyond Malaysia which would constitute an offence if committed in Malaysia.
- Section 109 of the Penal Code-Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment
Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with the punishment provided for the offence.
- Section 120B of the Penal Code- Punishment of criminal conspiracy
 - (1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for a term of two years or upwards shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence.
 - (2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment for a term not exceeding six months or with fine or with both.

(3) AMLATFA

- Section 4 -Fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or both.

435. Malaysia referred for information only to the article, "Principles of Sentencing as applied to offences relating to Bribery and Corruption [1976] 2 MLJ xcvi by Low Hop Beng, and to the Magistrates' Court Handbook MLJ 1994 page 180-181- sentencing principles in breach of trust cases.

436. Furthermore, Malaysia provided the following examples of cases on the implementation of the provision.

Examples of Implementation - offences of corruption

In the case of Public Prosecutor v Dato Waad bin Mansur [2005] 2 MLJ paragraph 101 it was held by the Federal Court as follows: the offence of corruption, if unabated is far more reaching in consequences than crimes of robbery, criminal breach of trust or rape. Therefore, the sentences imposed for such offences of corruption should be deterrent in nature so as to reflect the gravity of the offence.

The dicta of the judge in PP v Dato Waad bin Mansur [2005] 2 MLJ p 425 was followed in the case of Public Prosecutor v Shahar bin Yusof & Ors and other appeals [2009] 8 MLJ 309:- Applying the same principle in Dato Waad, I am of the opinion that where the three accused persons preying on innocent couples such as SP1 and SP2, whilst doing

their routine crime prevention rounds. Instead of protecting members of the public, they abused their positions and power, and took the opportunity which arose in the course of their employment and duties, to put fear into SP 1 and SP 2 regarding possible prosecution for the offence of *khalwat* in order to solicit RM3,000 for a corrupt purpose i.e. to enrich themselves lawfully. I believe that a deterrent sentence should be imposed so that other members of the police force would abhor committing such crimes.

In Nunis v Public Prosecutor [1982] 2 MLJ 114 : It was held that - In passing sentence I have taken into consideration the submission made by Mr. Balasundra counsel for the respondent mentioned, in his plea for mitigation, that the respondent was arrested in 1976 and the charge has been hanging over his head for at least six years and also the fact that all this while the respondent has been interdicted from service. It must however be observed that the respondent has committed a very serious offence. Perhaps it would also be appropriate to say that if there is a hope for the country to have a clean and efficient administration it is essential that members of the administration should not be corrupt. Offences for corrupt practices committed by a public officer, Members of Parliament and Assemblymen must therefore be dealt with severely. Public interest demands it.

Examples of Implementation- Criminal Breach of trust cases

Public Prosecutor v Mohammad Abdullah Ang Swee Kang [1987] 2 MLJ 368

In this case the accused had pleaded guilty to a charge of criminal breach of trust by an agent acting as such. The accused was the managing director of the Malayan Overseas Investment Corporation (MOIC), a joint-venture company formed to co-operate with each other for the purpose of investing overseas. One of the parties to the joint venture was MAA Holdings Sdn Bhd (MAA) which owned 13.4% of the equity of MOIC. The accused and his wife owned shares in MAA amounting to one-third of its equity. MAA also held 20% of the equity in Narspro Sdn. Bhd, (NARSPRO) a joint venture company to establish rubber manufacturing factories. NARSPRO had ordered machinery from Taiwan costing US\$ 220,000. They had paid a deposit of US\$ 66,000 and they needed to open letters of credit for the balance. However NARSPRO did not have the financial means nor credit facilities to do so. The accused then agreed to authorize MOIC's bankers to open letters of credit in the name of MOIC for the benefit of NARSPRO. When the machinery arrived in Penang, NARSPRO did not have the money. The letters of credit had been opened in the name of MOIC and the accused instructed a sum of \$ 338,808.80 to be paid by the bankers of MOIC. The payment was not made for the benefit of MOIC and it was made without the knowledge or approval of the Board of Directors of MOIC. The amount of \$ 338,808.80 together with bank interest had since been repaid to MOIC by NARSPRO. Held:

- (1) any judge who comes to sentence in a breach of trust case ought always to apply the two factors which operate in this type of case: the retributive factor in order to show the courts disapproval or abhorrence on behalf of the community, of this type of criminal conduct, and the deterrent factor so as to discourage likely offenders;
- (2) in breach of trust cases a term of immediate imprisonment is inevitable save in any exceptional circumstances or where the amount of money obtained is small. The sentencing court should impose a sufficiently substantial term of imprisonment to mark publicly the gravity of the offence;
- (3) in this case after considering all the matters in the case and after having given the appropriate discount for the plea of guilty the court sentenced the accused to eight years imprisonment plus a fine of \$ 100,000 in default a further 6 months imprisonment.

In Public Prosecutor v Tee An Chuan [1987] 2 MLJ 372 it was held that - " Any judge who comes to sentence in a breach of trust case ought to apply two factors which operate in this kind of case. They are: the retributive factor: to show the Courts disapproval or abhorrence , on behalf of society of this type of criminal conduct; the deterrent factor: to discourage likely offenders.

Public Prosecutor v Muthu Lingam [1986] 1 MLJ 432

In this case the respondent who was a sales representative of a company was given the sum of \$ 100,000 by the complainant so that he could open an account with the company in her name. Instead the respondent paid the money into his own savings account with the Hongkong and Shanghai Bank. It was only eight days later that the respondent put the money into the clients account of the company after the complainant had discovered that the money had not been paid into her trading account with the company. The respondent was charged for the offence of criminal breach of trust by an agent acting as such under section 409 of the Penal Code. He was convicted and sentenced to a days imprisonment and fined \$ 3000 in default six months. The Public Prosecutor appealed against the inadequacy of the sentence. Held:

- (1) the two factors which operate in a case of this kind are retribution and deterrence. Public interest demands that crimes of this sort must be punished severely and discouraged;
- (2) the sentence of 1 days imprisonment should be enhanced to three years. The fine is to remain

Public Prosecutor v Khairuddin Hj.Musa [1981] CLJ 234

The accused, a credit controller of Bank Rakyat, Kuala Lumpur pleaded guilty to a charge for CBT of RM20,000 under s. 408 and to three other charges of dishonest misappropriation on three different occasions of RM35,000, RM24,975 and RM50,000 amounting to RM109,975 under s. 403. He was sentenced to one days imprisonment and fined a sum of RM2,000 in default two months on the CBT charge and on the misappropriation charges he was sentenced to one days imprisonment and a fine of RM3,000 in default three months for the RM50,000 and on the two other charges to one days imprisonment and a fine of RM2,000 in default two months on each count. The records of this case were called for revision by Mohd. Azmi J with a view to determine the propriety of sentence passed by the President, Sessions Court, Kuala Lumpur. In assessing sentence, the learned President had taken into consideration that the accused had pleaded guilty, he had made full restitution of the money misappropriated, he was a first offender, there was mismanagement in the Bank at the material time and that the accused had not profited from the crime. Held:

- [1] In assessing sentence, a Court has the discretion to be lenient and merciful provided there are extenuating circumstances, and it is in the public interest to do so. Apart from the full restitution by the accused there were no actual extenuating circumstances in this case to warrant a lenient sentence.
- [2] Public interest demands that cases of this nature involving person in positions of trust, particularly in financial institutions, be dealt with severely in the hope that would be-offenders are deterred. The sentence passed by the lower Court did not reflect the gravity of the offences and would only encourage others to commit the same offence with impunity.

This was a proper case where the Court should exercise its revisionary power and enhance the sentence at least on the CBT charge.

437. In regard to **non-criminal sanctions**, Malaysia cited the following:

173A of the Criminal Procedure Code (Act 593) -Power to discharge conditionally or unconditionally

- (1) Notwithstanding anything contained in section 173, the Court shall have the powers contained in this section.
- (2) When any person is charged before the Court with an offence punishable by such Court, and the Court finds that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment or that it is expedient to release the offender on probation, the Court may, without proceeding to record a conviction, make an order either-
 - (a) dismissing the charge or complaint after an admonition or a caution to the offender as to the Court seems fit; or
 - (b) discharge the offender conditionally on his entering into a bond with or without sureties, to be of good behaviour and to appear for the conviction to be recorded and for sentence when called upon at any time during such period, not exceeding three years, as may be specified in the order.
- (3) The Court may, in addition to any such order, order the offender to pay such compensation for injury or for loss (not exceeding the sum of fifty ringgit) or to pay the costs of the proceedings as the Court thinks reasonable or to pay both compensation and costs.
- (4) An order under this section shall for the purpose of revesting or restoring stolen property, and of enabling the Court to make such order as to the restitution or delivery of property to the owner and as to the payment of money upon or in connection with the restitution or delivery, have the like effect as a conviction for an offence committed in respect of such property.
- (5) If the Court is satisfied by information on oath that the offender has failed to observe any of the conditions of his bond, it may issue a warrant for his apprehension.
 - (6) Any offender when apprehended on any such warrant shall, if not immediately brought before the Court having power to sentence him, be brought before a Magistrate who may-
 - (a) either remand him by warrant until the time at which he is required by his bond to appear for judgment or until the sitting of a Court having power to deal with his original offence whichever shall first happen; or
 - (b) admit him to bail with a sufficient surety conditioned on his appearing for judgment.

The offender when so remanded may be committed to prison and the warrant of remand shall order that he shall be brought before the Court before which he was bound to appear for judgment or to answer as to his conduct since his release.

438. Malaysia also referred to Annex 8 (Tables 14 and 15) as well as to Annex 14.

(b) Observations on the implementation of the article

439. The reviewing experts are of the opinion that Malaysia has implemented the provision. The severity of sanctions, criminal or non-criminal, reasonably equate to the gravity of corruption offences under Malaysian domestic laws. The experts note, though, that there is no regulation in regard to a minimum sentence. In the discussion with the reviewers, Malaysia pointed out that the country might develop guidelines for the application of sanctions. In regard to sanctions for legal persons, the reviewers referred to the observations under article 26, paragraph 4 of the Convention.

Article 30 Prosecution, adjudication and sanctions

Paragraph 2

2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of

their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

440. Malaysia explained that Malaysian law does not provide for criminal immunities. Only on a functional level, jurisdictional immunities/privileges for public officials in the execution of their public duties are regulated, provided that it is done without *mala fide*.

(b) Observations on the implementation of the article

441. The reviewing experts are of the opinion that Malaysia has implemented the provision.

Article 30 Prosecution, adjudication and sanctions

Paragraph 3

3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

(a) Summary of information relevant to reviewing the implementation of the article

442. Malaysia indicated that prosecutorial discretion is provided for in the Constitution of Malaysia. The Public Prosecutor has the sole discretion to institute, conduct or discontinue any criminal proceedings.

443. Under section 376 of the Criminal Procedure Code, the Attorney General shall be the Public Prosecutor and shall appoint Deputy Public Prosecutors (DPP), who shall be alter egos of the Public Prosecutor and may exercise all the rights and discretionary powers vested in or exercisable by the Public Prosecutor.

444. There are internal guidelines formulated to control and govern the prosecutorial discretion of the Deputy Public Prosecutor. These guidelines are generally called *Public Prosecutor Guidelines*. Information as to whether and how the prosecution of corruption cases is regulated in those guidelines could not be provided.

445. The role of MACC is purely to investigate all corruption offences referred to it by various means. This investigation is conducted independently and the powers of investigation are derived from MACCA. On completion of the investigations, the Investigation Papers are sent for evaluation to the Deputy Public Prosecutor, which means to alter egos seconded to the MACC. If there is sufficient evidence *vis-à-vis* a reasonable possibility of conviction, the Public Prosecutor will prefer charges and issue a consent to prosecute. The prosecutors inform MACC about the decision whether to prosecute or not.

446. Malaysia also explained that an independent Operation Review Panel had been formed, which scrutinizes reports about investigations and prosecutions (more details on the Panel are provided under article 36 of UNCAC). The Panel has no authoritative powers but can, for instance, submit a recommendation to the DPP if a case has not been followed up or has been dismissed and the Panel disagrees with this decision. This has

happened in the past. However, the final discretion whether to prosecute or not remains fully with the DPP.

447. The following measures are referred to.

Article 145 (3) of the Federal Constitution

Attorney General

The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial.

Prosecution of Offences under section 58 of MACCA and section 93 of AMLATFA

Every offence under section 49 (1) of MACCA and section 90 of AMLATFA is a seizable offence for the purpose of the Criminal Procedure Code F.M.S. Cap.6, which defines 'seizable offence' as a case in which a police officer may ordinarily arrest without warrant according to the third column of the First Schedule.

Section 58 of MACCA: Prosecution of offences

A prosecution for an offence under this Act shall not be instituted except by or with the consent of the Public Prosecutor.

Section 93 of AMLATFA: Prosecution

No prosecution for an offence under this Act shall be instituted except by or with the written consent of the Public Prosecutor.

A 'consent' requires deliberation of the facts by the Public Prosecutor before he exercises his prosecutorial discretion to prosecute or not.

For distinction between "consent" and "sanction": see *Abdul Hamid v PP* [1956] MLJ 231 and *PP v Tiong Ching Heng* [1990] 3 MLJ 51 and 52.

To deter the commission of offences, please refer to sanctions under paragraph 110 above as well as provisions for forfeiture of property under sections 40 and 41 and section 36(3) of MACCA and also sections 55 and 56 of AMLATFA:

Forfeiture of property upon prosecution for an offence under section 40 of MACCA:

(1) In any prosecution for an offence under this Act, the court shall make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence where-

- (a) the offence is proved against the accused; or
- (b) the offence is not proved against the accused but the court is satisfied-
 - (i) that the accused is not the true and lawful owner of such property; and
 - (ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

(2) Where the offence is proved against the accused but the property referred to in subsection (1) has been disposed of, or cannot be traced, the court shall order the accused to pay as a penalty a sum which is equivalent to the amount of the gratification or is, in the opinion of the court, the value of the gratification received by the accused, and any such penalty shall be recoverable as a fine.

Forfeiture of property where there is no prosecution for an offence under section 41 of MACCA:

(1) Where in respect of any property seized under this Act there is no prosecution or conviction for an offence under this Act, the Public Prosecutor may, before the expiration of eighteen months from the date of the seizure, apply to a Sessions Court Judge for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under this Act.

(2) The Judge to whom an application is made under subsection(1) shall cause to be published a notice in the Gazette calling upon any person who claims to have an interest in the property to attend before the Court on a date specified in the notice, to show cause as to why the property should not be forfeited.

(3) Where the Judge to whom an application is made under subsection (1) is satisfied-

- (a) that the property is the subject matter of or was used in the commission of an offence under this Act; and

- (b) there is no purchase in good faith for valuable consideration in respect of the property, he shall make an order for the forfeiture of the property.
- (4) Property in respect of which no application is made under subsection (1) shall, at the expiration of eighteen months from the date of its seizure, be released to the person from whom it was seized.

Section 36 (3) of MACCA provides as follows:-

(3) Where the officer of the Commission of the rank of Commissioner and above has reasonable grounds to believe that any officer of a public body who has been served with the written notice referred to in subsection (1) owns, possesses, controls or holds any interest in any property which is excessive, having regard to his present or past emoluments and all other relevant circumstances, such officer of the Commission may by written direction require him to furnish a statement on oath or affirmation explaining how he was able to own, possess, control or hold such excess and if he fails to explain satisfactorily such excess, he commits an offence and shall on conviction be liable to-

- (a) imprisonment for a term not exceeding twenty years; and
- (b) a fine which is not less than five times the value of the excess, if the excess is capable of being valued, or ten thousand ringgit, whichever is the higher.

(4) Every person to whom a direction is sent by such officer of the Commission under subsection (3) shall, notwithstanding any written law or rule of law to the contrary, comply with the terms of the direction within such time as may be specified in the direction, and if such person willfully neglects or fails to comply with such direction, he commits an offence and shall on conviction be liable to-

- (a) imprisonment for a term not exceeding twenty years; and
- (b) a fine which is not less than five times the value of the excess, if the excess is capable of being valued, or ten thousand ringgit, whichever is the higher.

Forfeiture of property upon prosecution for an offence under section 55 of AMLATFA

(1) Subject to section 61, in any prosecution for an offence under subsection 4(1) or a terrorism financing offence, the court shall make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence or which is proved to be terrorist property where-

- (a) the offence is proved against the accused; or
- (b) the offence is not proved against the accused but the court is satisfied-
 - (i) that the accused is not the true and lawful owner of such property; and
 - (ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

(2) Where the offence is proved against the accused but the property referred to in subsection (1) has been disposed of, or cannot be traced, the court shall order the accused to pay as a penalty a sum which is equivalent to, in the opinion of the court, the value of the property, and any such penalty shall be recoverable as a fine.

(3) In determining whether the property is the subject matter of an offence or has been used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property the court shall apply the standard of proof required in civil proceedings.

Forfeiture of property where there is no prosecution under section 56 of AMLATFA

(1) Subject to section 61, where in respect of any property frozen or seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.

(2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied-

- (a) that the property is the subject matter of or was used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property; and
- (b) that there is no purchaser in good faith for valuable consideration in respect of the property.

(3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.

(4) In determining whether or not the property has been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence or is terrorist property, the court shall apply the standard of proof required in civil proceedings.

448. Furthermore, Malaysia provided the following examples of cases on the implementation of the provision.

Public Prosecutor v Tiong Ching Heng [1990] 3MLJ 51

The respondent was charged before the learned sessions court judge under s 3(a)(ii) of the Prevention of Corruption Act 1961 (the Act). The respondent claimed trial and at the end of the case for the prosecution, the learned judge acquitted the respondent without calling for his defence. Section 26(1) of the Act provides that a prosecution under the Act shall not be instituted except by or with the consent of the prosecutor. In this case there was such a consent. There was nothing wrong with it except for a misspelled name. The deputy public prosecutor under whose hand the consent was given was called as a witness. He testified that the mistake was a typographical error. The respondent attacked the validity of this consent. He submitted that it was insufficient for the deputy public prosecutor merely to rely on the brief facts or any information given by the investigating officer. The learned judge accepted this submission and acquitted and discharged the respondent without calling for his defence. The learned judge said that the trial was a nullity because the learned deputy public prosecutor did not study the investigation papers but instead issued his consent based on information given to him by the investigating officer. Held, allowing the public prosecutor's appeal:

- (1) Where the prosecutor himself testifies in the trial expressly to correct a mistake in spelling, his consent is implied in his action.
- (2) All that was required was the consent of the prosecutor. The prosecutor was not required in law to come forward and explain how he came to give such consent.
- (3) The consent was valid and the trial should proceed.

Abdul Hamid v Public Prosecutor [1956] 1 MLJ 231 - Distinction between consent and sanction.

In this case the Judge held that to establish an offence under section 3 of the Prevention of Corruption Ordinance, 1950, it is not necessary to show that the favour sought was within the power of the accused, but the favour shown must then have been within the power of the accused's principal. There is an essential difference between a sanction and a consent. A prosecution can be sanctioned without any deep consideration of the particular case: full consideration is required for consent since "consent" is an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side. A sanction is therefore no evidence of consent. The very general words "rights and powers" appearing in section 376(iii) of the Criminal Procedure Code are sufficient to permit a Deputy Public Prosecutor to consent to a prosecution under the Prevention of Corruption Ordinance. Where there are other offences of the same kind which are all part of one and the same transaction evidence thereof is properly admissible. There is no requirement in section 173(m)(2) of the Criminal Procedure Code that the finding of "Guilty" shall be formally recorded unless the accused pleads guilty. It is sufficient if the record shows clearly that the Court did find the accused guilty.

449. Malaysia also referred to Table 11 (Annex 9).

(b) Observations on the implementation of the article

450. The reviewing experts are fully satisfied with the explanations provided by Malaysia. It was explained during the country visit that there is no system of judicial review in place

in Malaysia whereby a person aggrieved by a decision not to prosecute could file a complaint in such matter.

(c) Successes and good practices

451. The reviewing experts also would like to acknowledge Malaysia's engagement to assure effective and efficient prosecution. The establishment of an independent Operation Review Panel that does not influence the independence and discretion of the public prosecution, but which has the possibility to scrutinize the measures taken and to make recommendations, is a noteworthy support mechanism.

Article 30 Prosecution, adjudication and sanctions

Paragraph 4

4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

(a) Summary of information relevant to reviewing the implementation of the article

452. Malaysia explained that the principles of granting bail in Malaysia at the onset of the trial, during the trial, on conclusion of the trial and on appeal, are covered in domestic laws as follows.

Conditions imposed in connection with decisions on release pending trial or appeal:

- (i) Defendants are released pending trial or appeal upon sufficient security (Court Bail) deposited with the Court. The quantum of bail is based on guidelines.
- (ii) Depending upon circumstances and gravity of offences (amount involved, personality or status or occupational background) with additional condition to surrender passport and travel documents.

Bail Pending Trial:

- (i) Reference is made with particular attention to provisions of bail under sections 310, 387, 388, 389, 390, 391 and Warrant of Arrest under section 392 of the Criminal Procedure Code (Act 593) as well as provisions as to bonds under section 404 of the said Criminal Procedure Code (Act 593).
- (ii) Reference is made to the case: *KWK (a CHILD) v Public Prosecutor* [2003] 4 MLJ 479 (quoted below).

Criminal Procedure Code

Section 2- Interpretation -

“bailable offence” means an offence shown as bailable in the First Schedule or which is made bailable by any other law for the time being in force and “non-bailable offence” means any other offence;

Section 310- Appeal specially allowed in certain cases

A Judge may, on the application of any person desirous of appealing who may be debarred from so doing upon the ground of his not having observed some formality or some requirement of this Code,

permit an appeal upon such terms and with such directions to the Magistrate and to the parties as the Judge shall consider desirable, in order that substantial justice may be done in the matter.

Section 387-When person may be released on bail

- (1) When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court and is prepared at any time while in the custody of the officer or at any stage of the proceedings before the Court to give bail, that person shall be released on bail by any police officer in charge of a police station or by any police officer not under the rank of Corporal or by that Court.
- (2) The police officer or the Court, if he or it thinks fit, may instead of taking bail from that person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided.

Section 388-When person accused of non-bailable offence may be released on bail

- (1) When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the officer in charge of the police district or by that Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life: Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.
- (2) If it appears to such officer or Court at any stage of the investigation, inquiry or trial, as the case may be, that there are no reasonable grounds for believing that the accused has committed a non-bailable offence, but there are sufficient grounds for further inquiry into his guilt, the accused shall, pending such inquiry, be released on bail, or at the discretion of that officer or Court, on the execution by him of a bond without sureties for his appearance as hereinafter provided.
- (3) An officer or a Court releasing any person on bail under subsections (1) or (2) shall record in writing the reasons for so doing.
- (4) If at any time after the conclusion of the trial of a person accused of a non-bailable offence and before judgment is delivered, the Court is of opinion that there are reasonable grounds for believing that the accused is not guilty of the offence, it shall release the accused, if he is in custody, on the execution by him of a bond without sureties for his appearance to hear judgment delivered.
- (5) Any Court may at any subsequent stage of any proceeding under this Code cause any person who has been released under this section to be arrested and may commit him to custody.

Section 389-Amount of bond

The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case as being sufficient to secure the attendance of the person arrested, but shall not be excessive; and a Judge may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or Court be reduced or increased.

Section 390-Bond to be executed

- (1) Before any person is released on bail, or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by that person, and when he is released on bail by one or more sufficient sureties, conditioned that person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police officer or Court, as the case may be.
- (2) If the case so requires the bond shall also bind the person released on bail to appear when called upon at the High Court or other Court to answer the charge.

Section 391-Person to be released

- (1) As soon as the bond has been executed the person for whose appearance it has been executed shall be released and when he is in prison the Court admitting him to bail shall issue an order of release to the officer in charge of the prison, and that officer, on receipt of the order, shall release him.
- (2) Nothing in this section, section 387 or 388 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

Section 392-When warrant of arrest may be issued against person bailed

If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court admitting him to bail may issue a warrant of arrest directing that the

person released on bail be brought before it, and may order him to find sufficient sureties, and on his failing so to do may commit him to prison.

Section 404 - Procedure on forfeiture of bond

(1) Whenever-

(a) it is proved to the satisfaction of the Court by which a bond under this Code has been taken; or
(b) when the bond is for appearance before a Court, it is proved to the satisfaction of that Court, that the bond has been forfeited the Court shall record the grounds of such proof and may call upon any person bound by the bond to pay the penalty thereof or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid the Court may proceed to recover the same by issuing a warrant for the attachment and sale of property belonging to that person.

(3) The warrant may be executed within the local limits of the jurisdiction of the Court which issued it, and it shall authorize the distress and sale of any property belonging to that person without such limits when indorsed by a Magistrate within the local limits of whose jurisdiction the property is found.

(4) If the penalty is not paid, and cannot be recovered by the attachment and sale, the person so bound shall be liable, by order of the Court which issued the warrant, to imprisonment in the civil prison for a term which may extend to six months.

(5) The Court may, at its discretion, remit any portion of the penalty mentioned, and enforce payment in part only.

(6) Nothing in this section shall be deemed to prevent the penalty, or any portion of it, of any bond under this Code being recovered under the provisions of the law relating to civil procedure in force for the time being.

Other provisions that comply with this paragraph of Article 30 includes section 313(2) pertaining to appeal without the presence of the appellant and section 315 of the Criminal Procedure Code (Act 593) for the arrest of the respondent in certain cases.

Section 313. Procedure at hearing

(1) When the appeal comes on for hearing the appellant, if present, shall be first heard in support of the appeal, the respondent, if present, shall be heard against it, and the appellant shall be entitled to reply.

(2) If the appellant does not appear to support his appeal the Court may consider his appeal and may make such order thereon as it thinks fit:

Provided that the Court may refuse to consider the appeal or to make any such order in the case of an appellant who is out of the jurisdiction or who does not appear personally before the Court in pursuance of a condition upon which he was admitted to bail, except on such terms as it thinks fit to impose.

Section 315. Arrest of respondent in certain cases

When an appeal is presented against an acquittal a Judge may issue a warrant directing that the accused be arrested and brought before him, and may commit him to prison pending the disposal of the appeal or admit him to bail.

Bail Pending Appeal:

This is provided for under section 56 and section 88 Courts of Judicature Act 1964 (Act 91).

Section 56 - Appeals out of time and formal defects

The Court of Appeal may in its discretion, on the application of any person desirous of appealing who may be debarred from so doing by reason of his not having observed some formality or some requirement of this Act, permit an appeal upon such terms and with such directions as it may consider desirable in order that substantial justice may be done in the matter, and may, for the purpose, enlarge any period of time prescribed in section 51 or section 53.

Section 88 - On appeal against acquittal, accused may be arrested

Where an appeal is presented against an acquittal, the Federal Court may issue a warrant directing that the accused be arrested and brought before it and may remand him to prison pending the disposal of the appeal or admit him to bail. *Re Kwan Wah Yip & Anor* [1954] 1 MLJ 146 b

453. Malaysia explained that currently there were no specific examples of bail applications in corruption cases. However, reference was made to the case of *Public Prosecutor v. Dato' Seri Anwar bin Ibrahim* [1998] 4MLJ 481 on general principles governing bail.

Public Prosecutor v Dato Seri Anwar bin Ibrahim [1998] 4 MLJ 387

The accused, Dato Seri Anwar Ibrahim, a former Deputy Prime Minister and Minister of Finance of Malaysia, was charged with five counts of corrupt practices under s. 2(1) of the Emergency (Essential Powers) Ordinance No 22 of 1970 (the Ordinance) and five offences under s. 377B of the Penal Code. The accused claimed trial to all the ten charges. The prosecution then applied for the first four charges under the Ordinance to be tried together in accordance with s. 165 of the Criminal Procedure Code (the CPC). As the defence did not object to this, the application was allowed. In the course of the proceedings, the accused made an oral application to be released on bail in respect of all the ten charges. The grounds advanced in support of the application were: (i) that the detention of the accused under the Internal Security Act 1960 (the ISA) was no bar to his application for bail; (ii) that the good social status of the accused was a reason for bail to be granted; (iii) that the poor health of the accused required constant medical attention; (iv) that there was no danger of the accused absconding; (v) that there was no danger of the accused tampering with the prosecution's witnesses; that bail would facilitate the preparation of the accused's defence; and that there was a strong likelihood of the accused being in detention or prison for a long period as the charges preferred against him were many and serious. The defence concluded that the accused was prepared to have conditions attached to his bail and that if they were breached the bail could be revoked. Held:

[1] The granting of bail to the accused in the face of his detention under the ISA is not an exercise in futility. The accused can be released from detention under the ISA at any time by the police, in which event he would continue to be remanded till he moves the court for bail. His application for bail, hence, can be considered on the merits notwithstanding that he is presently subject to detention under the ISA.

[2] The law relating to bail is governed by ss. 387, 388 and 389 of the CPC. Section 387 speaks of bailable offences whereby an accused is entitled to bail as a matter of right. Under ss. 388 and 389, which respectively deal with non-bailable offences and the High Court's power to admit a person to bail, however, bail can be granted at the discretion of the court.

[3] By virtue of the First Schedule to the CPC, the offences of sodomy and corrupt practices are non-bailable offences. That being so, bail in respect of the offences is at the discretion of the court and not a matter of right. In any event, the accused may also be admitted to bail pursuant to s. 389 of the CPC. There was no material placed before the court to show that the accused would not get appropriate medical treatment while in detention. In the circumstances, there is no merit in the argument that bail ought to be granted on medical grounds. On the facts, there is also no merit in the contention that the accused would languish in detention unnecessarily, as an early hearing date has been set by the court.

[5] The accused's respectable social status, per se, is not a sufficient ground for granting bail. The accused was charged with offences which are serious in nature. Indeed, the charges under the Ordinance strike at the very core of the administration of justice. Clearly, offences of this nature will affect the wider interest of the community at large, particularly in the light of the exalted position occupied by the accused. The social status of the accused, in the circumstances, cannot operate in his favour.

[6] An allegation of tampering with witnesses is a matter of serious concern in bail applications. In this case, police reports have been made by witnesses who allegedly had been tampered with and no challenge has been mounted against the reports. A police report has also been made alleging that the accused is likely to set up false evidence in

support of his defence, and this report, likewise, has also not been challenged. These apart, it was also evident that the defence has not addressed itself to the vulnerability of the lesser standing witnesses to tampering. In the circumstances, the court can only agree with the contention of the prosecution that the witnesses may be tampered with if the accused is released on bail. This is a cogent reason for refusing bail.

[7] Bearing in mind the findings aforesaid, the question of releasing the accused on bail with conditions attached does not at all arise.

[Application dismissed. Bail refused.]

KWK (a Child) v Public Prosecutor [2003] 4 MLJ 479

KWK (the subject) a child within the meaning of the Child Act 2001 (the Act) was found guilty of an offence of murder under s 302 of the Penal Code on 1 July 2003. The subject was ordered to be detained at the pleasure of the Yang di-Pertuan Agong pursuant to s 97(2) of the Act. Notices of appeal were filed against the orders made. An application for a stay of execution made in the High Court was dismissed on 7 August 2003. The subject then filed a motion for a stay of execution (the motion) in the Court of Appeal on 11 August 2003 which was heard on 18 August 2003. At the hearing of the motion, learned counsel for the subject advanced several grounds in support of the motion.

Firstly, it would take time for the appeal to be heard. This delay would make it incongruous for the Board of Visitors to make their recommendation as provided by s 97(4) of the Act. Secondly he stated that the appeal involved a novel point of law. Thirdly, the education of the subject would be hampered, the probation report was favourable to the subject, the subject was a first offender and there was no possibility of the subject being involved in similar or other offences. Counsel also said that an early hearing date for the subject over other cases pending would infringe art 8(1) of the Federal Constitution. Held, dismissing the motion:

(1) Section 57 of the Courts of Judicature Act 1964 provides that an appeal shall not operate as a stay of execution though the court has a discretion to grant a stay. As the grant of a stay is only an exception to the general rule there must be special or exceptional circumstances before the discretion can be exercised in favour of an applicant. The factors that may constitute special circumstances to justify the grant of a stay of execution after conviction are (a) the gravity or otherwise of the offence; (b) the length of the term of imprisonment; in comparison with the length of time which is likely to take for the appeal to be heard; (c) whether there are difficult points of law involved; (d) whether the accused is a first offender or has previous convictions; (e) whether the accused would become involved again in another offence whilst at liberty and (f) whether the security imposed will ensure [*479] the attendance of the appellant before the appellate court (see p 488H -I, 489F -I).

(2) The offence of murder under s 302 of the Penal Code for which the subject has been found guilty was a very serious one. However, the court did not suggest that in very serious offences, there could be no stay. The graver the offence the less likely it may be for the discretion to be exercised in favour of a stay (see p 490E).

(3) A conviction resulting from a trial must be taken, until the contrary is shown, to have been properly conducted and without error of law. The error, if any, must be an obvious defect on the face of the record. The records were not before the court and it was therefore not possible for the court to be in a position to detect any error. The point of law raised by learned counsel was one that required detailed argument and was not one which was an obvious defect on the face of the record. (see p 490G -491A).

(4) The sentence imposed on the subject in this case was for an indeterminate period. It was dependent on the recommendation that may be made by the Board of Visitors

pursuant to s 97(4) of the Act. It was therefore not possible to predict the length of the subject's detention. Therefore, the length of time likely to take for the appeal to be heard was more significant in this case. It may take about a year or so for a criminal appeal from the High Court to be heard. That could not be said to be an unreasonable period of time to wait for the hearing of the appeal (see p 491C -D, F-G).

(5) The subject may also apply to the President of the Court of Appeal for an early hearing date who may, perhaps, be guided by s 95(3) of the Act which provides that the High Court shall, in all criminal appeals originating from a court for children, make its final decision within twelve months after the notice of appeal has been filed. This would not conflict with art 8(1) of the Federal Constitution. Rule 22 of the Rules of the Court of Appeal 1994 specifically empowers the President of the Court of Appeal to order the early hearing of an appeal (see p 491G -H).

(6) The objection of learned counsel grounded on s 97(4) of the Act was devoid of any merit. The court did not see how the Board of Visitors would be hampered from carrying out its functions even if the appeal was pending. They continued to function at this stage and may even recommend that the subject be released. On the contrary if the subject was released on bail now his rights under s 97(4) of the Act would be delayed. This would be prejudicial to an earlier release of the subject (see p 492D -E).

(7) The effect that the detention would have on the education of the subject warranted consideration. The Act itself provides, by its s 95(2), that an appeal shall not operate as a stay of execution unless it is otherwise ordered. This meant that there may be instances when a stay of execution shall not be granted to a child. [*480] It would obviously be for the reason that in such cases the other circumstances must prevail over the interests of a child. This in turn would mean that the Act must have had in contemplation the fact that when a stay of execution is not granted there will necessarily be a disruption in the normal life of a child which would include his education. The education of a child cannot therefore be treated as having an over-riding effect in an application for stay. The disruption of the education of the subject could not have an over-riding effect on the facts of this case (see p 492E -G, 493C).

Kwan Wah Yip v Public Prosecutor [1954] 1 MLJ 146 b

A stay of execution should not be granted unless there are special reasons for so doing, and the mere fact that a notice of appeal has been given is no sufficient reason. The granting of bail pending appeal by the Lower Court being a matter of discretion a Magistrate may, apart from the accused's statement that he intends to appeal, find in the circumstances of the case before him reasons which would justify the granting of bail. The considerations which should guide the Subordinate Courts in granting or refusing bail pending appeal in cases where a term of imprisonment has been imposed are the gravity or otherwise of the offence; the length of the term of imprisonment in comparison with the length of time which is likely to take for the appeal to be heard; whether there are difficult points of law involved; whether the accused is a first offender or has previous convictions; the possibility of his becoming again involved in similar or other offences whilst liberty; and whether the security imposed will ensure the attendance of the appellant before the appellate Court.

(b) Observations on the implementation of the article

454. The reviewing experts are satisfied with the explanations provided by Malaysia.

455. Malaysia specified that MACCA offences are considered non-bailable offences, which means that bail is not as of right, but at the discretion of the court. To that end, if the accused who is charged with a MACCA offence satisfies the court on bail requirements, bail can be granted to the accused.

Article 30 Prosecution, adjudication and sanctions

Paragraph 5

5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.

(a) Summary of information relevant to reviewing the implementation of the article

456. Malaysia explained that the conditions to release persons convicted of criminal offences are provided for in section 45 of the Prison Act 1995 (Act 537) upon: (a) the expiration of a prisoner's term of sentence; (b) payment of a fine; (c) pardon; (d) commutation; or (e) remission of a sentence.

457. Annex 12 shows the release of prisoners under section 45 of Prison Act 1995 according to the offences.

458. In 2008, parole was introduced and regulated in the Prison Act. According to section 46 E subsection (3), a prisoner shall only be eligible to be considered for parole: (a) if he is sentenced to a minimum of one year imprisonment for any offence other than the offences prescribed in the Fourth Schedule; (b) subject to subsection (7) after he has served at least half of his term of imprisonment without taking into account the remission of sentence granted to him under section 44; and (c) after he has undergone a rehabilitation programme approved by the Commissioner General while serving his sentence of imprisonment.

459. Section 46 F provides for matters for the Parole Board to take into account before issuing a parole order. In deciding whether or not to release a prisoner on parole, the Parole Board (a) examines and evaluates the parole dossiers received from a prison officer in respect of such prisoner and any other report prepared by any prison officer in relation to an application for release on parole of such prisoner and (b) shall have regard to the following matters:

- (i) the need to protect the safety of the community;
- (ii) the need to maintain public confidence in the administration of justice
- (iii) the nature and circumstances of the offence to which the sentence of the prisoner relates;
- (iv) the prisoner's criminal record;
- (v) the risk of the prisoner re-offending if he is released on parole;
- (vi) the likelihood of the prisoner being able to adapt to normal community life;
- (vii) the likely effect on the victim of the prisoner and the victim's family if the prisoner is released on parole;
- (viii) in the case of a foreign prisoner, the availability of parole system or other similar system in his country; and
- (ix) such other matters as the Parole Board considers relevant.

FOURTH SCHEDULE: [Subsection 46E (2)]
OFFENCES NOT ELIGIBLE FOR PAROLE RELEASE

1. Penal Code [Act 574]

- The whole of Chapter VI
- The whole of Chapter VIA
- Section 194
- Paragraph 225(e)
- Paragraph 304(a)
- Section 364
- Section 374A
- Section 376
- Section 376B
- Section 377B
- Section 377C
- Section 377E
- Section 388
- Section 460

2. Kidnapping Act 1961 [Act 365]

- Section 3

3. Firearms (Increased Penalties) Act 1971 [Act 37]

- Section 3
- Section 3A
- Section 4
- Section 5
- Section 7

4. Dangerous Drug Act 1952 [Act 234]

- Section 6B

5. Internal Security Act 1960 [Act 82]

- Section 57
- Section 59

460. Most of the offences listed under the Fourth Schedule of subsection 46E (2), Prison Act 1995 (Offences Not Eligible for Parole Release) are criminal offences amounting to murder, physical harm and offences which may impact national security and public safety. Corruption offences, on other hand, are offences with neither physical harm nor victims directly involved.

461. Based on Malaysia's observations, supervision is easier for parolees convicted under corruption because of:

- (i) Better acceptance by families and the public;
- (ii) Better reintegration into the society;
- (iii) Employers are more confident in providing jobs opportunity;
- (iv) Better compliance to terms and conditions; and
- (v) High involvement in intervention programmes organized by parole officer / government agencies or NGOs.

462. From 2008 to January 2013, there has been no breach of the terms and conditions, or revocation, of a parole order among parolees convicted of corruption.

(b) Observations on the implementation of the article

463. Malaysia has implemented the provision.

464. During the country visit, the reviewing experts met with a parole officer, who explained that in 2008, 600 prison officers had been selected to serve as parole officers. An international exchange to build up the capacities of new parole officers was organized with New South Wales, Australia. Parole officers work as mentors for the parolees and also with the communities to foster the reintegration into society.

465. Since 2008, 5000 prisoners have been released on parole. Amongst those were 120 persons convicted of corruption offences.

(c) Successes and good practices

466. The reviewers see the efforts of Malaysia in the area of parole as an effective practice. The capacity building provided for new parole officers and the efforts to reintegrate offenders into society are very positive examples. The experts were also impressed with the level of detail furnished by Malaysia in this area, such as statistics on the number of persons convicted for corruption who were released on parole.

Article 30 Prosecution, adjudication and sanctions

Paragraph 6

6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.

(a) Summary of information relevant to reviewing the implementation of the article

467. This provision relates to situations where a public official has been accused of an offence but not convicted of it. It was explained that the presumption of “innocent until proven guilty” is part of Malaysia’s criminal jurisprudence and its adversarial criminal legal system. While awaiting trial or the outcome of a trial, measures may be taken in respect of this public official who is accused of an offence.

468. The Public Service Department (PSD) is the central department responsible for formulating policy in regards to human resource matters of the Public Service, including appointment, promotion, dismissal of personnel and disciplinary matters. Public Service is defined in section 132 of the Federal Constitution and includes: (a) the armed forces, (b) the judicial and legal service; (c) the general public service of the Federation; (d) the police force; (e) the railway service; (f) the joint public services mentioned in Article 133; (g) the public service of each State; and (h) the education service.

469. Relocation pending the outcome of a trial is done administratively when the Head of Department receives a report from the court informing that a corruption charge has been filed against the officer. In such a case, the officer can either be relocated internally within the same department or externally, to another department.

470. Pending the outcome of a trial, only an interdiction is allowed under Regulation 44 of the Public Officers (Conduct and Discipline) Regulations 1993 [P.U.(A)395/1993]. If a

person is interdicted by the appropriate Disciplinary Authority, the officer shall be entitled, unless and until he has been suspended or dismissed, to receive not less than half of his emoluments as the appropriate Disciplinary Authority deems fit.

471. The order of interdiction is not mandatory. Thus, the Disciplinary Authority shall take into account a few factors as provided under subregulation 44(4) of the said Regulations to make such order. The order of interdiction may be made effective from the date the person was arrested or from the date the summons were served on him.

472. Malaysia cited procedures set out under the following legislation:

A. Public Officers (Conduct & Discipline) Regulations 1993 (Laws of Malaysia P.U. (A) 395/1993)
Under P.U. (A) 395/1993 the word "officer" means a member of the public service of the Federation. However for disciplinary actions against officers of the State Government and Local Government Authority the provisions of P.U. (A) 1993 are either fully adapted and/or applied with certain modifications. As regards officers of Government Owned Companies or Government Linked Companies, or any other undertaking of the Government, disciplinary control are based on their own individual disciplinary regulations.

Disciplinary action could include relocation of the officer or suspension of the officer pending the outcome of the trial.

B. Statutory Bodies Disciplinary Regulations (Second Schedule) under section 5 of the Statutory Bodies (Discipline and Surcharge) Act 2000 (Act 605) This Act is to provide for matters relating to the discipline of, and the imposition of surcharge on, officers of statutory bodies incorporated by federal law, and for matters connected therewith.

Under section 3 of Act 605 the term, "statutory body" means a body, by whatever name called, incorporated by federal law for the purposes of the Federal Government but does not include a local authority.

Under section 5 of Act 605- The Regulations shall apply in respect of the discipline of officers of a statutory body.

"Regulations" means the Regulation in the Second Schedule.

C. Judges Code of Ethics 2009 P.U.(B) 201/2009 :

Application:

Para 2 (1) This Code is intended to state the basic standards to govern the conduct of all judges and to provide guidance to judges in setting and maintaining high standards of personal and judicial conduct.

Para 2 (2) This Code shall apply to a judge throughout the period of his service.

The word "judge" means a judge of the Federal Court, the Court of Appeal, the High Court and includes a Judicial Commissioner. Under Para 4 (2) of P.U.(B) 201/2009: The breach of any provision prescribe in this Code shall render a judge liable to disciplinary proceedings in accordance with the provisions of this Code.

Para 16 of P.U.(B) 201/2009 provides for the Types of Sanction:

If the Committee is satisfied that the complaint is proven, the Committee may impose any one of the following sanctions:

- (a) the recording of an admonition to the judge; or
- (b) the suspension of the judge from his office for such period not exceeding one year.

473. As far as the Public Service Department (PSD) is concerned, there have been no cases of removal, suspension or reassignment of a public officer pending an investigation of corruption charges.

474. Malaysia referred also to Table 11 (Annex 9).

(b) Observations on the implementation of the article

475. The reviewing experts note that Malaysia has implemented the provision. They note also that the Public Service Department is responsible for the oversight and administration of the public service, as defined in section 132 of the Federal Constitution. Pending trial, the interdiction of a public servant is possible although not mandatory, according to Regulation 44 of the P.U. (A) 395/1993. Alternatively, the officer can be relocated.
476. Furthermore, the Public Service Department explained that suspension upon conviction was possible whether or not the officer files an appeal to the higher court. The Disciplinary Authority may suspend the officer from work only upon conviction by any criminal court. If an officer is suspended, he is not entitled to receive any emolument throughout the period of his suspension. However, Regulation 28(6) of P.U.(A)395/1993 makes it mandatory for any officer who has been convicted of a criminal offence to be suspended, whether or not the officer files an appeal to the higher court. Suspension is provided for under Regulation 45 of the Public Officers (Conduct and Discipline) Regulations 1993 [P.U.(A)395/1993].
477. During the country visit, in meetings with the Malaysian Royal Police, it was explained that according to section 8 of the Police Act, a police officer who was the subject of a criminal investigation would be interdicted from work if this was required to safeguard the public interest. Other possibilities would be the transfer to another work place.

Article 30 Prosecution, adjudication and sanctions

Subparagraph 7 (a)

7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:

(a) Holding public office; and

(b) Holding office in an enterprise owned in whole or in part by the State.

(a) Summary of information relevant to reviewing the implementation of the article

478. Although the term “disqualification” is not used in the Malaysian context, the option of dismissal is given when the appropriate Disciplinary Authority imposes such punishment under subregulation 33(1) (a) of the P.U. (A) 395/1993.
479. Factual disqualification may also arise in the context of the appointment of new officers into the public service. Subparagraph 20(1)(b)(i) of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012 states that any person who is to be appointed to the public service shall make a statutory declaration under the Statutory Declarations Act 1960 [Act 13] that he does not have any criminal record. If the officer is found to have any criminal record, he is ineligible for appointment by the appointing authority based on the declaration.

480. Reappointment of ex-officers: In the case of officers who have been terminated or dismissed from the public service, Regulation 9 of the Public Officers (Appointment, Promotion and Termination of Service) Regulations 2012 states that a person who has been terminated from public service or dismissed shall not be reappointed to the public service except with the special permission of the Commission.

DISQUALIFICATION OF PUBLIC OFFICIALS IS PROVIDED FOR UNDER THE FOLLOWING ARTICLE OF THE FEDERAL CONSTITUTION AND GENERAL ORDER

1. Article 135 (2) of the Federal Constitution- dismissal or reduction in rank of member of the public services

2. Public Officers (Conduct and Discipline) Regulations 1993 P.U.(A) 395 of 1993 :-

Under P.U. (A) 395/1993 the word 'convicted' or 'conviction', in relation to an officer, means a finding by court under any written law that such officer is guilty of a criminal offence. The word 'criminal offence' under Regulation 3 means any offence involving fraud or dishonesty or moral turpitude.

Regulation 29- Responsibility of Head of Department if officer is convicted of criminal offence-

- (1) Where criminal proceedings against an officer result in his conviction and he does not appeal against such conviction, or where his appeal against the conviction has been dismissed or where the Public Prosecutor's appeal against his acquittal results in his conviction, his Head of Department shall immediately obtain a copy of the court's decision from the Registrar, Deputy Registrar or Senior Assistant Registrar of the court by which he was convicted or his appeal is dismissed.
- (2) Upon receipt of the decision referred to in subregulation (1), the Head of Department shall immediately forward it to the appropriate Disciplinary Authority having jurisdiction to impose a punishment of dismissal or reduction in rank together with the officer's record of service and the recommendation of the Head of Department that-
 - (a) the officer should be dismissed or reduced in rank ;
 - (b) the officer should be punished with any punishment other than dismissal or reduction in rank ;
 - (c) the service of the officer should be terminated in the public interest ; or
 - (d) no punishment should be imposed,

Depending on the nature and seriousness of the offence committed in relation to the degree of disrepute which the conviction has brought to the public service.

Regulation 33. Consideration of Disciplinary Authority in cases of conviction and detention

- (1) If, after considering the report, the records of service and the Head of Department's recommendation forwarded to it under subregulation 29 (2), the appropriate Disciplinary Authority is of the opinion that-
 - (a) the officer should be **dismissed** or reduced in rank, the Disciplinary Authority shall impose the punishment of dismissal or reduction in rank, as it deems appropriate ;
 - (b) the offence of which the officer was convicted does not warrant a punishment of dismissal or reduction in rank but warrants the imposition of a lesser punishment, the Disciplinary Authority shall impose upon the officer any one or more of the punishment other than dismissal or reduction in rank as specified in regulation 38 as it deems appropriate ; or
 - (c) no punishment should be imposed on the officer, the Disciplinary Authority shall acquit him.

Regulation 35 (2). If the Chairman of the Disciplinary Authority referred to in paragraph (1)(a) or (b) determines that the disciplinary offence complained of is of a nature which warrants a punishment of dismissal or reduction in rank, he shall refer the case to the Disciplinary Authority which has the power to impose such punishment.

Regulation 37 (1) If it is determined under subregulation 35(2) that the disciplinary offence complained of against an officer is of a nature that warrants a punishment of dismissal or reduction in rank, the Chairman of the appropriate Disciplinary Authority to which the case is referred shall consider all available information.

Regulation 37 (2) If it appears to the Chairman of the appropriate Disciplinary Authority that there exists a prima facie case against the officer, the Chairman of the appropriate Disciplinary Authority shall-

- (a) direct that a charge containing the facts of the disciplinary offence alleged to have been committed by the officer and the grounds on which it is proposed to dismiss the officer or reduce his rank be sent to

the officer and

(b) require the officer to make, within a period of twenty-one days from the date he is informed by notice in accordance with regulation 52 of the charge, a written representation containing the grounds upon which he relies to exculpate himself.

Regulation 37(3) If, after considering the representation made pursuant to subregulation (1) the appropriate Disciplinary Authority is of the opinion that the disciplinary offence committed by the officer does not warrant a punishment of dismissal or reduction in rank, the appropriate Disciplinary Authority may impose upon the officer any of the lesser punishments specified in regulation 38 as it deems appropriate.

Regulation 37(4) If the officer does not make any representation within the period specified in paragraph (2)(b), or if the officer makes such a representation but the representation does not exculpate himself to the satisfaction of the appropriate Disciplinary Authority, the Disciplinary Authority shall then proceed to consider and decide on dismissal or reduction in rank of the officer.

Regulation 37(5) if the appropriate Disciplinary Authority is of the opinion that the case against the officer requires further clarification, the Disciplinary Authority may establish an Investigation Committee for the purpose of obtaining such further clarification.

Regulation 37C (1) If, in the course of an investigation by the Investigation Committee, further grounds for dismissal of the officer under investigation are disclosed, the Investigation Committee shall inform the appropriate Disciplinary Authority of the further grounds.

Regulation 37D If after considering the officers representation and the report of the Investigation Committee, if any, the appropriate Disciplinary Authority-

(a) finds the officer guilty of the disciplinary offence alleged to have been committed by him and that the officer should be dismissed or reduced in rank, the Disciplinary Authority shall impose the punishment of dismissal or reduction in rank, as it deems appropriate.

Regulation 38. Types of disciplinary punishments

If an officer is found guilty of a disciplinary offence, any one or any combination of two or more of the following punishments, depending upon the seriousness of the offence, may be imposed on the officer:

- (a) warning;
- (b) fine;
- (c) forfeiture of emoluments;
- (d) deferment of salary movement;
- (e) reduction of salary;
- (f) reduction in rank; or
- (g) **dismissal**

Regulation 49. Termination in the public interest

(1)Notwithstanding any provision in these Regulations, where the Government finds or where representation are made to the Government that it is desirable that the service of an officer be terminated in the public interest, the Government may call for a full report from the Head of Department in which the officer is or has been serving.

(2)The report referred to in subregulation (1) shall contain particulars relating to the work and conduct of the officer and the comments, if any, of the Head of Department.

(3)If, after considering the report received under subregulation (1), the Government is satisfied that, having regard to the condition of the service, the usefulness of the officer to the service, the work and conduct and conduct of the officer and all the other circumstances of the case, it is desirable in the public interest so to do, the Government may terminate of the service of the officer with effect from such date as the Government shall specify.

(4)It shall be lawful for the appropriate Disciplinary Authority to recommend to the Government that the service of an officer be terminated in the public interest notwithstanding that disciplinary proceedings has not been carried out under any of the provisions of these Regulations; and the Government may so terminate the service of such officer;

(5)Notwithstanding any thing in these Regulations and any other laws to the contrary, in terminating the service of any officer in the public interest under this Regulation, such officer may not be given any opportunity of being heard and an officer whose service has been terminated in the public interest under this

Regulation shall not for the purpose of Article 135 (2) of the Federal Constitution, be regarded as having been dismissed regardless of whether such termination of the service of the officer involved an element of punishment or was in connection with conduct in relation to his office which the Government regards as unsatisfactory or blameworthy.

DISQUALIFICATION OF OFFICERS OF STATUTORY BODIES IS PROVIDED FOR BY THE STATUTORY BODIES DISCIPLINARY REGULATIONS OF THE STATUTORY BODIES (DISCIPLINE AND SURCHARGE) ACT 2000 (ACT 2000)

B. By virtue of the SECOND SCHEDULE [section 5] STATUTORY BODIES DISCIPLINARY REGULATIONS under the Statutory Bodies (Discipline and Surcharge) Act 2000 (Act 605):-

Section 2 - Application

- (1) This Act shall apply to all statutory bodies except the statutory bodies listed in the First Schedule.
- (2) Notwithstanding subsection (1), the statutory bodies listed in the First Schedule shall ensure that disciplinary provisions applicable to their officers conform as closely as their incorporating law and organizational and remuneration systems permits to the provisions in the Regulations.

Section 4- Interpretation

“officer” means a person who is employed on a permanent, temporary or contractual basis by a statutory body, and is paid emoluments by the statutory body, and includes a person who is seconded to any subsidiary corporation or company of the statutory body or other statutory body or any Ministry, department or agency of the Federal Government or any department or agency of the Federal Government or any department or agency of the Government of any State or any company in which the Federal Government or the Government of any State has an interest.

“statutory body” means a body, by whatever name called, incorporated by federal law for the purposes of the Federal Government, but does not include a local authority.

PART IV - OFFICERS SUBJECT TO CRIMINAL PROCEEDINGS, ETC.

27. Procedure where criminal proceedings are instituted against an officer

(1) An officer shall immediately inform his Head of Department if any criminal proceedings are instituted against him in any court.

(2) Where it comes to the knowledge of the Head of Department of an officer from any source that criminal proceedings have been instituted in any court against the officer, the Head of Department shall obtain from the Registrar, Deputy Registrar or Senior Assistant Registrar of the court in which the proceedings were instituted a report containing the following information:

- (a) the charge or charges against the officer;
- (b) if the officer was arrested, the date and time of his arrest;
- (c) whether or not the officer is on bail; and
- (d) such other information as is relevant.

(3) Upon receipt of the report referred to in subregulation (2), the Head of Department shall forward the report to the appropriate Disciplinary Committee together with his recommendation as to whether or not the officer should be interdicted from duty.

(4) Upon consideration of the report and the Head of Department's recommendation forwarded to it under subregulation (3), the appropriate Disciplinary Committee may, if it deems fit, interdict the officer from the exercise of his duties.

(5) Upon the completion of the criminal proceedings against the officer, his Head of Department shall obtain from the Registrar, Deputy Registrar or Senior Assistant Registrar of the court before whom the case was disposed of and

forward to the appropriate Disciplinary Committee-

- (a) the decision of that court; and
- (b) information relating to appeals, if any, filed by that officer or the Public Prosecutor.

(6) Where criminal proceedings against an officer result in his conviction, appropriate Disciplinary Committee having the jurisdiction to impose a punishment of dismissal or reduction in rank shall, whether or not the officer appeals against the conviction, suspend the officer from the exercise of his duties with effect from the date of his conviction pending the decision of the Disciplinary Committee under regulation 28.

(7) Where criminal proceedings against an officer result in his acquittal and there is no appeal by or on behalf of the Public Prosecutor against such acquittal, the officer shall be allowed to resume his duties and

he shall be entitled to receive any emoluments which had not been paid during the period of his interdiction as well as the annual leave to which he was entitled during the period of his interdiction.

(8) Where the criminal proceedings against the officer result in his acquittal and an appeal is lodged by the Public Prosecutor, the appropriate Disciplinary Committee having the jurisdiction to impose a punishment of dismissal or reduction in rank shall decide whether or not the officer should continue to be interdicted until the appeal is determined.

(9) Where criminal proceedings against an officer result in his conviction but on appeal the officer is acquitted, the officer shall be allowed to resume his duties and he shall be entitled to receive any emoluments which had not been paid during the period of his interdiction or suspension or both as well as to any annual leave to which he was entitled during the period of his interdiction or suspension or both.

(10) Where criminal proceedings against an officer result in his acquittal but on appeal the officer is convicted, the appropriate Disciplinary Committee having the jurisdiction to impose a punishment of dismissal or reduction in rank shall suspend the officer from the exercise of his duties with effect from the date of his conviction pending the decision of the Disciplinary Committee under regulation 28.

(11) For the purpose of this regulation, the word 'acquittal' includes a discharge not amounting to an acquittal.

28. Responsibility of Head of Department if officer is convicted of criminal offence

(1) Where criminal proceedings against an officer result in his conviction and he does not appeal against such conviction, or where his appeal against the conviction has been dismissed or where the Public Prosecutor's appeal against his acquittal results in his conviction, his Head of Department shall immediately obtain a copy of the court's decision from the Registrar, Deputy Registrar or Senior Assistant Registrar of the court by which he was convicted or his appeal is dismissed.

(2) Upon receipt of the decision referred to in subregulation (1), the Head of Department shall forward it to the appropriate Disciplinary Committee having the jurisdiction to impose a punishment of dismissal or reduction in rank together with the officer's Records of Service and the recommendation of the Head of Department that-

- (a) the officer should be dismissed or reduced in rank;
- (b) the officer should be punished with any punishment other than dismissal or reduction in rank;
- (c) the service of the officer should be terminated in the public interest; or
- (d) no punishment should be imposed, depending on the nature and seriousness of the offence committed in relation to the degree of disrepute which the conviction has brought to the statutory body.

(3) If, after considering the report, the Records of Service and the Head of Department's recommendation forwarded to it under subregulation (2), the appropriate Disciplinary Committee is of the opinion that-

- (a) the officer should be dismissed or reduced in rank, the Disciplinary Committee shall impose the punishment of dismissal or reduction in rank, as it deems appropriate;
- (b) the offence of which the officer was convicted does not warrant a punishment of dismissal or reduction in rank but warrants the imposition of a lesser punishment, the Disciplinary Committee shall impose upon the officer any one or more of the punishments other than dismissal or reduction in rank as specified in regulation 40 as it deems appropriate; or

- (c) no punishment should be imposed on the officer, the Disciplinary Committee shall acquit him.

(4) Where a punishment other than dismissal has been imposed on an officer or where no punishment has been imposed on him, the appropriate Disciplinary Committee shall direct the officer to resume his duties.

29. Disciplinary action shall not be taken until criminal proceedings are completed

(1) Where criminal proceedings have been instituted against an officer and are still pending, no disciplinary action shall be taken against the officer based on the same grounds as the criminal charge in the criminal proceedings.

(2) Nothing in subregulation (1) shall be construed so as to prevent disciplinary action from being taken against the officer during the pendency of such criminal proceedings if the action is based on any other ground arising out of his conduct in the performance of his duties.

DISQUALIFICATION OF MEMBERS OF PARLIAMENT IS PROVIDED FOR UNDER Clause (1) paragraph (e); Clause (3) and Clause 4 of ARTICLE 48 OF THE FEDERAL CONSTITUTION-

Article 48

(1) Subject to the provisions of this article, a person is disqualified for being a member of either House of Parliament if-(e) he has been convicted of an offence by a court of law in the Federation (or, before Malaysia Day, in the territories comprised in the State of Sabah or Sarawak or in

Singapore) and sentenced to imprisonment for a term not less than one year or to a fine of not less than two thousand ringgit and has not received a free pardon;

(2) (...)

(3) The disqualification of a person under paragraph (d) or (e) of Clause (1) may be removed by the Yang di-Pertuan Agong and shall, if not so removed, cease at the end of the period of five years beginning with the date on which the return mentioned in the said paragraph (d) was required to be lodged, or, as the case may be, the date on which the period convicted as mentioned in the said paragraph e was imposed on such person and a person shall be disqualified under paragraph (f) of Clause (1) by reason only of anything done by him before he became a citizen.

(4) Notwithstanding anything contained in the foregoing provisions of this Article, where a member of either House of Parliament becomes disqualified from continuing to be a member thereof pursuant to paragraph (e) of Clause (1) or under a federal law made in pursuance of Clause (2)-

(a) the disqualification shall take effect upon the expiry of fourteen days from the date on which he was-
(i) convicted and sentenced as specific in the aforesaid paragraph (e) ; or (ii) convicted of an offence or proved guilty of an act under a federal law made in pursuance of Clause (2) ; or

(b) if within the period of fourteen days specified in paragraph (a) an appeal or any other court proceeding is brought in respect of such conviction or sentence, or in respect of being convicted or proved guilty, as the case may be, the disqualification shall take effect upon the expiry of fourteen days from the date on which such appeal or proceeding is disposed of by the court ; or

(c) if within the period specified in paragraph (a) or the period after the disposal of the appeal or other court proceeding specified in paragraph (b) there is filed a petition for a pardon, such disqualification shall take effect immediately upon the petition being disposed of.

DISQUALIFICATION FOR MEMBERSHIP OF LEGISLATIVE ASSEMBLY is provided under the section 6 (1)(e) of the Eight Schedule [Article 71] of the Federal Constitution :

6 (1) Subject to the provisions of this section, a person is disqualified for being a member of the Legislative Assembly if-

(e) he has been convicted of an offence by a court of law in the Federation (or, before Malaysia Day, in the territories comprised in the State of Sabah or Sarawak or in Singapore) and sentenced to imprisonment for a term not less than one year or to a fine of not less than two thousand ringgit and has not received a free pardon;

DISQUALIFICATION OF JUDGES

In Malaysia the removal of judges is by a process as provided in Article 125 (4) of the Federal Constitution. According to this Article the Prime Minister or the Chief Justice after consulting the Prime Minister may represent to the King that a judge ought to be removed on the ground of-

- Any breach of the code of ethics, namely, the Judges' Code of ethics 2009 P.U.(B) 201/2009 or
- Inability, from infirmity of body or mind or any other cause to properly discharge the functions of his office.

The representation shall be referred to a tribunal appointed by the King and the judge may be removed from office on the recommendation of such tribunal.

481. The responsibility of the Court is merely to convict on the evidence adduced. Thereafter, the process of disqualification follows and it is dependent on the various authorities wherein the public official was attached to. See *Zainal Bin Hashim V Mohamed Haniff Bin Omar & Anor* [1975] 2 MLJ 262 and *Tan Tek Seng V Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261.

482. In regard to officers employed by a public enterprise, Malaysia highlighted the following provisions.

A. By virtue of the provisions of the Public Officers (Conduct and Discipline) Regulations 1993)

Under section 3 of the Malaysian Anti-Corruption Commission Act 2009 (Act 694) the words-
'officer of a public body' as any person who is a member, an officer , an employee or a servant of a public body, and includes a member of the administration, a member of Parliament, a member of the State Legislative Assembly, a judge of the High Court, Court of Appeal or Federal Court and any

person receiving any remuneration from public funds, and where the public body is a corporation sole, includes the person who is incorporated as such,

public body' includes -

- (a) the Government of Malaysia;
- (b) the Government of a State;
- (c) any **local authority** *and **any other statutory authority****
- (d) any department, service or undertaking of the government of Malaysia; the Government of a State, or local authority; any society registered under section 7(1) of the Societies Act 1966;
- (e) any branch of a registered society under section 12 of the Societies Act 1966;
- (f) any sports body registered under section 17 of the Sports Development Act 1997;
- (g) any co-operative society registered under section 7 of the Co-operative Societies Act 1993;
- (h) any trade union registered under section 12 of the Trade Unions Act 1959
- (i) any youth society registered under section 9 of the Youth Societies and Youth Development Act 2007;
- (j) any company or subsidiary company over which or in which any public body as referred to in paragraphs (a), (b), (c), (d), (e), (f), (g), (h), (i) or (j) has controlling power or interest; or
- (k) any society, union, organization or body as the Minister may prescribe from time to time by order published in the Gazette.

Hence a person holding office in an enterprise owned wholly or partly by the State may be deemed to be an officer of a public body and subject to provisions on conduct and discipline established by that said enterprise.

* "local authority" has the same meaning assigned to it in section 2 of the Local Government Act 1976 (Act 171)

Section 2 - Local Government Act 1976 (Act 171) defines: 'local authority', means any City Council, Municipal Council or District Council, as the case may be, and in relation to the Federal Territory means the Commissioner of the City of Kuala Lumpur appointed under section 3 of the Federal Capital Act 1960 (Act 190)

** "statutory authority" means an authority, whether consisting of a single person or a body of persons, established by Federal or State law and exercising powers, discharging duties or performing functions conferred upon the authority by any Federal or State law.

Summary of cases:

In the case of **Tan Tek Seng**, the plaintiff, a teacher, convicted for criminal breach of trust by a public servant under s 409 of the Penal Code. On appeal, the High Court bound over the plaintiff conditionally upon his entering into a bond to be of good behaviour for a period of three years under s 173A(ii)(b) of the Criminal Procedure Code. The defendant, the Education Service Commission ("the Commission"), then decided to dismiss the plaintiff because "with the said conviction, [the plaintiff] had lowered the reputation of the civil service". The sole question to be decided was for the Court at the appeal stage was whether the binding over order made by the High Court under s 173A (ii) (b) of the CPC could be construed as a "conviction" under orders 3, 33 and 35 of the GO.

The court held that the word "conviction" is not defined in the CPC but is defined in order 3 of the GO to include "a finding or an order involving a finding of guilt by a criminal court in Malaysia". While no conviction is recorded when a court orders a binding over under s 173A (ii) (b) of the CPC, the court before so ordering must first find that the charge has been proved. Since the court must first find that the charged has been proved, that would necessarily mean that there must also be a concurrent finding of guilt, which fell within the ambit of the definition of 'conviction' in order 3 of the GO.

The Court reduced the punishment to the punishment of reduction in rank.

483. In **Zainal's case** the plaintiff who was a police constable had been convicted on his plea of guilty on a charge under section 353 of the Penal Code. Disciplinary proceedings were taken against him and eventually he was dismissed by the Chief Police Officer, Selangor. The power to dismiss constables had been delegated by the Police Force Commission to the Chief Police Officer. Power to appoint a police constable had not been so delegated to the Chief Police Officer. The plaintiff applied for a declaration *inter alia* that his dismissal was void and inoperative. The court held that the Chief Police Officer was not delegated with the power to appoint but merely with the power to dismiss. In the absence of the power to appoint, the dismissal by the Chief Police Officer was therefore in violation of Article 135(1) of the Federal Constitution and therefore void.

484. Dismissal due to convictions of corruption:

In year 2009: 4 officers

In year 2010: 8 officers

Note: These figures are based on statistics received from the Ministries/Department/States and Local Authorities

485. Case example of dismissals: Malaysian Airline System Berhad

YEAR	OFFENCE CATEGORY	Total
1998	Bribes	2
2001	Bribes	3
2003	Bribes	1
2004	Bribes	1
2005	Bribes	1
2009	Bribes	2
2011	Bribes	1
2012	Bribes	2
Grand Total		13

486. Malaysia also referred to Table 11 (Annex 9).

(b) Observations on the implementation of the article

487. The reviewing experts note that Malaysia has implemented the provision insofar as public officials can be disqualified under P.U. (A) 395/1993 and the same is applicable to Members of Parliament, according to Article 47 and 48 of the Federal Constitution.

488. The Public Service Department explained that officers holding office in an enterprise owned in whole or in part by the State were not under the scope of public service personnel for which the PSD was responsible. Therefore, the above-mentioned options of dismissal, disqualification, etc. would not apply to them. Employees of fully or partially State-owned enterprises, though not within the purview of the Public Service Department (PSD), have their own rules, regulations and mechanisms with regard to disciplinary action against employees, such as in the Malaysian Airlines case briefly referred to during the country visit.

489. The Royal Malaysian Police (RMP), in a meeting during the country visit, explained that the board of the RMP would decide on cases of dismissal and take the decision based on the gravity of the offence. In regard to corruption offences it had been a matter of

practice that a conviction of a police officer would always lead to dismissal from the service.

Article 30 Prosecution, adjudication and sanctions

Paragraph 8

8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.

(a) Summary of information relevant to reviewing the implementation of the article

490. Malaysia explained that the following regulations of the Public Officers (Conduct & Discipline) Regulations 1993 and Statutory Bodies Disciplinary Regulations - Second Schedule (section 5) of the Statutory Bodies (Displace and Surcharge) Act 2000 (Act 605) apply.

491. Those provisions apply to all criminal offences including any offences under the Convention as far as they come within the ambit of criminal offences in Malaysia. The provision is meant to avoid double jeopardy action in the context where action is taken against an officer based on the same grounds.

A. Public Officers (Conduct & Discipline) Regulations 1993

Regulation 30- Disciplinary action shall not be taken until criminal proceedings are completed

30 (1) Where criminal proceedings have been instituted against an officer and are still pending, no disciplinary action shall be taken against the officer based on the same grounds as the criminal charge in the criminal proceedings

30 (2) Nothing in subregulations (1) shall be construed so as to prevent disciplinary action from being taken against the officer during the pendency of such criminal proceedings if the action is based on any other ground arising out of his conduct in the performance of his duties.

Disciplinary regulations other than criminal offences under the Public Officers (Conduct & Discipline) Regulations 1993 are as follows:

Regulation 4 - General code of conduct

Regulation 4A- Sexual harassment

Regulation 5 - Outside employment

Regulation 6 - Dress etiquette

Regulation 7 - Drug (dangerous drug)

Regulation 8 - Presents, etc

Regulation 9 - Entertainment

Regulation 10 - Ownership of property

Regulation 11- Maintaining a standard of living beyond emoluments and legitimate private means

Regulation 12- Borrowing Money

Regulation 13- Serious pecuniary indebtedness

Regulation 14- Report of serious pecuniary indebtedness

Regulation 15- Lending Money

Regulation 16- Involving in the futures market

Regulation 17- Lucky, draws, etc

Regulation 18- Publication of books, etc based on classified official information.

Regulation 19- Making public statements

Regulation 20- Prohibition on acting as editor, etc, in any publications

Regulation 21 - Taking part in politics.

B. Statutory Bodies Disciplinary Regulations -Second Schedule (section 5) of the Statutory Bodies (Discipline and Surcharge) Act 2000 (Act 605)

Disciplinary action shall not be taken until criminal proceedings are completed

29. (1) Where criminal proceedings have been instituted against an officer and are still pending, no disciplinary action shall be taken against the officer based on the same grounds as the criminal charge in the criminal proceedings.

(2) Nothing in subregulation (1) shall be construed so as to prevent disciplinary action from being taken against the officer during the pendency of such criminal proceedings if the action is based on any other ground arising out of his conduct in the performance of his duties.

492. In the year 2010, disciplinary action under the Public Officers (Conduct and Discipline) Regulations 1993 was taken against a total number of 4777 public officials, compared to 3419 in the year 2009. See Annex 9 on Disciplinary Action Taken Year 2010 and Year 2009.

493. Statistics of disciplinary action taken in the years 2010 and 2009 based on convictions for corruption related cases are as follows.

Year	Disciplinary Action Taken		
	Based on corruption related cases	Other Offences	Total
2009	10	3409	3419
2010	38	4739	4777

(b) Observations on the implementation of the article

494. The reviewing experts conclude that Malaysia has implemented the provision.

Article 30 Prosecution, adjudication and sanctions

Paragraph 10

10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

495. Regarding the rehabilitation and eventual reintegration of convicted offenders into society, Malaysia cited the following provisions of the Prison Act 1995 (Act 537):

Section 44. Remission of sentence.

- (1) With a view to encouraging good conduct and industry and to facilitate reformatory treatment, a prisoner sentenced to imprisonment of more than one month, shall be entitled to be granted a remission of his sentence.
- (2) All or any part of the remission for which a prisoner may be entitled may, on commission of an offence under section 50 or an offence relating to parole, be cancelled by the Commissioner General: Provided that in no case shall any forfeiture exceed the amount of remission earned at the time of commission of the offence.
- (3) The Commissioner General may restore to a prisoner all or any part of a remission which the prisoner has forfeited during his sentence.
- (4) A prisoner who is awarded a remission of part of his sentence shall be discharged upon the expiration of so much of his sentence as shall remain after deducting from it such part.

Section 46C. Powers of Parole Board

- (1) With a view to encouraging good conduct and industry and to facilitate reformatory treatment of a prisoner, a Parole Board shall have the following powers:

- (a) to make a decision whether to release on parole a prisoner who applies for parole;
 - (b) to suspend or revoke a Parole Order;
 - (c) to add or vary any conditions of a Parole Order;
 - (d) to hold an inquiry on any matters related to parole;
 - (e) to examine any prisoner for the purposes of soliciting additional information related to a parole application or for any other reason that the Parole Board deems fit; and
 - (f) to exercise and perform such other functions and duties as the Minister may determine.
- (2) A Parole Board may establish a secretariat as it deems necessary or expedient to assist it in the performance of its functions and duties and the exercise of its powers under this Act.

Section 46 K. Duties of parolee

It shall be the duty of a parolee-

- (a) to report to a parole officer at such time and date as such parole officer may from time to time direct;
- (b) to reside at the place specified in the Parole Order;
- (c) to seek the permission of a parole officer if the parolee wants to visit a place outside the parole district where the parolee is serving his parole;
- (d) to enter into employment arranged or agreed by the parole officer;
- (e) to undergo any programmes for his rehabilitation as may be organized or directed by a parole officer;
- (f) to comply with the conditions of the Parole Order; and
- (g) to comply with any other conditions, instructions and directions as may be given by the Parole Board or a parole officer.

Section 48. Scheme for prisoners to engage in employment.

- (1) For the purpose of enabling prisoners, other than the prisoners referred to in section 49, to take up gainful employment whilst they are serving their sentences, the Minister may introduce a scheme and such prisoners may upon their own election participate in the scheme.
- (2) A prisoner taking up employment under a scheme referred to in subsection (1)-
- (a) may, despite an order made by a court for the committal of the prisoner, be taken daily beyond the limits of the prison to perform work; and
 - (b) shall, at all times be deemed to be in prison and subject to all the same incidents as if he were actually in prison.

496. The provisions of the Criminal Procedure Code in regard to paragraph 10 of article 30 are as follows: section 173A and section 294 of the Criminal Procedure Code refer to extenuating circumstances under which an offence was committed. This refers to the facts and the evidence which are extenuating in character. It does not refer to extenuating circumstances of the offender as such.

Section 173A. Power to discharge conditionally or unconditionally

- (1) Notwithstanding anything contained in section 173, the Court shall have the powers contained in this section.
- (2) When any person is charged before the Court with an offence punishable by such Court, and the Court finds that the charge is proved, but is of opinion that, having regard to the character, antecedents, age, health or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment or that it is expedient to release the offender on probation, the Court may, without proceeding to record a conviction, make an order either-
- (a) dismissing the charge or complaint after an admonition or a caution to the offender as to the Court seems fit; or
 - (b) discharge the offender conditionally on his entering into a bond with or without sureties, to be of good behaviour and to appear for the conviction to be recorded and for sentence when called upon at any time during such period, not exceeding three years, as may be specified in the order.
- (3) The Court may, in addition to any such order, order the offender to pay such compensation for injury or for loss (not exceeding the sum of fifty ringgit) or to pay the costs of the proceedings as the Court thinks reasonable or to pay both compensation and costs.
- (4) An order under this section shall for the purpose of revesting or restoring stolen property, and of

enabling the Court to make such order as to the restitution or delivery of property to the owner and as to the payment of money upon or in connection with the restitution or delivery, have the like effect as a conviction for an offence committed in respect of such property.

(5) If the Court is satisfied by information on oath that the offender has failed to observe any of the conditions of his bond, it may issue a warrant for his apprehension.

(6) Any offender when apprehended on any such warrant shall, if not immediately brought before the Court having power to sentence him, be brought before a Magistrate who may-

(a) either remand him by warrant until the time at which he is required by his bond to appear for judgment or until the sitting of a Court having power to deal with his original offence whichever shall first happen; or

(b) admit him to bail with a sufficient surety conditioned on his appearing for judgment.

(7) The offender when so remanded may be committed to prison and the warrant of remand shall order that he shall be brought before the Court before which he was bound to appear for judgment or to answer as to his conduct since his release.

See Tan Tek Seng v Public Prosecutor [1990] 3 CLJ 196

Section 294. First offenders

(1) When any person not being a youthful offender has been convicted of any offence punishable with imprisonment before any Court if it appears to the Court that regard being had to the character, antecedents, age, health or mental condition of the offender or to the trivial nature of the offence or to any extenuating circumstances under which the offence was committed it is expedient that the offender be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond with or without sureties and during such period as the Court may direct to appear and receive judgment if and when called upon and in the meantime to keep the peace and be of good behaviour.

(2) The Court may, if it thinks fit, direct that the offender shall pay the costs of the prosecution or some portion of the same within that period and by such instalment as may be directed by the Court. Section 432 shall be applicable to any direction made under this subsection.

(3) If a Court having power to deal with the offender in respect of his original offence, or any Court of summary jurisdiction, is satisfied by information on oath that the offender has failed to observe any of the conditions of his bond, it may issue a warrant for his apprehension.

(4) Any offender when apprehended on any such warrant shall, if not immediately brought before the Court having power to sentence him, be brought before a Magistrate, and the Magistrate may either remand him by warrant until the time at which he is required by his bond to appear for judgment or until the sitting of a Court having power to deal with his original offence, or may admit him to bail with a sufficient surety conditioned on his appearing for judgment.

(5) The offender, when so remanded, may be committed to prison and the warrant of remand shall order that he be brought before the Court before which he was bound to appear for judgment or to answer as to his conduct since his release.

See Public Prosecutor v Lim Chau Siu [1951] 1LNS 99

497. Furthermore, Malaysia provided the following examples of cases on the implementation of the provision.

Examples of section 173A of the Criminal Procedure Code

Public Prosecutor v Mohamed Fathi bin Haji Ahmad [1979] 2 MLJ 75

[10] I next deal with the subsequent conduct of the case. After the accused had pleaded guilty to the charge, the learned counsel made a plea in mitigation to which the learned Deputy Public Prosecutor said he was not pressing for sentence. In the event the learned Magistrate did not record a conviction and proceeded to bind over the accused to be of good behaviour for a period of three years in the sum of \$ 10,000 in one surety under section 173A of the Criminal Procedure Code. I called this case for revision to satisfy myself as to the propriety of this order.

[11] The power of a court to discharge an offender conditionally is subject to certain conditions which may be briefly summarised as follows:

(i) Regard to character, antecedents, age, health or mental condition of the person charged;
or

(ii) The trivial nature of the offence; or

(iii) The extenuating circumstances under which the offence was committed.

[12] Under the first head the only thing that was said of the accused is that he had no previous conviction. Under the second head, this offence is far from trivial. Under the third head, the only excuse he had was that he was pressed for money. There is nothing extenuating about that. It is different if the accused was an underpaid cashier entrusted with large sums of money and had in a moment of weakness succumbed to the temptation to steal his employer's money. Here the offences committed by the accused were deliberate and sophisticated, committed several times, over a period of time, involving a large sum of money. The warrants were specially printed to achieve his illegal purpose and the crime was perpetrated by exploiting the weaknesses of a complicated financial arrangement involving several parties. In my view an order under section 173A of the Criminal Procedure Code is inappropriate and manifestly inadequate in this case.

[13] The object of a sentence is to punish the offender and the sentence should be sufficiently adequate to deter the offender from repeating the offence and at the same time to act as a deterrent to others who might be disposed to commit such an offence. We have developed a comprehensive banking system in this country but this achievement is based on mutual trust and integrity of the parties. What the accused has done here is to shake the confidence of bankers in dealing with customers who are in business like the accused and put honest businessmen in greater hardships to finance their trade. Courts must now appreciate that commercial crime is a very serious offence.

It affects our international standing abroad and our trade relations with other countries. It affects the government's efforts at

expanding the economy. Millions of ringgit are lost every year due to falsifications and forgeries committed by persons like the accused. Losses suffered by banks through commercial crime is much more than by robberies at the point of a gun.

[14] In all the circumstances of this case, I set aside the order under section 173A of the Criminal Procedure Code and substitute therefore a conviction under section 471 read with section 465 of the Penal Code and sentence the accused to a fine of \$ 10,000 in default two years imprisonment.

Shanmuganathan v Public Prosecutor [1967] 1 MLJ 204

The appellant was convicted of having committed criminal breach of trust of \$ 150 cash, an offence punishable under section 408 of the Penal Code and sentenced to 4 months imprisonment. He was 24 years old and had no previous convictions. From the facts it appeared that it was not probable that a series of breaches of trust could have been committed by the appellant without the knowledge of the other employees. After the breaches of trust the appellants father had paid a sum of \$ 2,500 to make good the amount alleged to have been misappropriated by the appellant. He appealed against the sentence. Held: in view of the circumstances of the case, particularly the appellants age and clean record, the sentence of imprisonment was not an appropriate one. Accordingly, he should be released on a bond under section 173A of the Criminal Procedure Code to be of good behaviour for a period of one year with one surety in the sum of \$ 1,000.

Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261

The appellant, who was a senior assistant of a primary school in Johor, was entrusted by the Johor Education Department (the department) with a sum of RM 3,179 which constituted the unpaid salary of the school's gardener who had not turned up for work for

several months. When the department asked for the return of the money, the appellant told them that it had been sent to them. He had in fact kept it with him. However, he did send the money to the department eventually. The appellant was then charged with two counts of criminal breach of trust by a public servant under s 409 of the Penal Code (FMS Cap 45) (the Penal Code). The sessions court convicted the appellant and sentenced him to six months imprisonment. On appeal, the Muar High Court affirmed the finding of guilt. However, it made an order which had the effect of setting [*261] aside the conviction and punishment: it bound the appellant over to be of good behaviour for a period of three years in the sum of RM 5,000 without sureties under s 173A(ii)(b) of the Criminal Procedure Code (FMS Cap 6) (the Code). Thereafter, the department wrote to the Education Service Commission (the first respondent), recommending that the appellant be reduced in rank and salary to those of an ordinary teacher. The first respondent, however, decided to dismiss the appellant under General Orders 33 and 35(1) of the Public Officers (Conduct and Discipline) (Chapter D) General Orders 1980 (the 1980 GO). Dissatisfied, the appellant instituted proceedings in the Johor Bahru High Court, and sought declarations that his dismissal was null and void and that he was still a member of the education service, on the grounds, inter alia, that: (i) there was no ground for his dismissal under the General Orders since he had not been convicted of a criminal offence; and (ii) the first respondent was in breach of the rules of natural justice for not affording the appellant a reasonable opportunity of being heard pursuant to art 135(2) of the Federal Constitution (the Constitution); and (iii) the decision of the first respondent was harsh and unfair having regard to all circumstances of the case. The respondents argued that the appellant was not entitled to the hearing under proviso (a) of art 135(2), as he was a person who was dismissed 'on the ground of conduct in respect of which a criminal charge has been proved against him. The Johor Bahru High Court upheld the dismissal. The appellant appealed to the Court of Appeal.

Held, by a majority of 2:1, allowing the appeal in part (NH Chan JCA dissenting):

(1) (Per Gopal Sri Ram JCA) The appellants counsels submission that the decision of the first respondent was harsh and unfair was not raised in the court below. Ordinarily, this court would not permit an appellant to argue a point taken in this fashion. However, the category of cases in which a fresh point may be permitted to be argued is not closed: it depends upon where the justice of a case lies. Having considered all the relevant material, it was concluded that the point raised ought to be considered in the interests of justice. No objection was taken by senior federal counsel at the hearing, and no new evidential point was involved (see pp 277I and 278A-D); *Luggage Distributors (M) Sdn Bhd v Tan Hor Teng* [1995] 1 MLJ 719 followed.

(2) (Per Gopal Sri Ram JCA) The word appearing in para (a) in the proviso to art 135(2) of the Constitution is 'proved and not convicted'. In a case where a binding over order is made under s 173A of the Code, there must first be a plea or a finding of guilt which will result in the offence being proved [*262] within the terms of para (a) of the proviso to art 135 (2) of the Constitution. In this case, the Muar High Court did uphold the finding of guilt. Accordingly, the protection afforded by art 135 was withdrawn. The Johor Bahru High Court was correct in holding that the appellant was not entitled to a hearing before his dismissal (see p 292B-D).

(3) (Per Gopal Sri Ram JCA) A member of the public service who has been bound over under s 173A of the Code may be subject to disciplinary punishment of either dismissal or reduction in rank under General Orders 33 and 35 of GO 1980 (see p 293E).

(4) (Per Gopal Sri Ram JCA) A public servant against whom a criminal charge has been proved, may or may not be dismissed solely in reliance on that ground, depending on the particular facts of each case. The relevant disciplinary authority must peruse the record

of the criminal proceedings, take into account all the relevant circumstances of the case, including any departmental report or recommendation. If it decides the public servant has committed misconduct, then it must go on to decide which of the several punishments prescribed by General Order 36 it ought to impose (see p 298A-C).

(5) (Per Gopal Sri Ram JCA) In undertaking the above two separate and distinct tasks, the relevant disciplinary authority need not afford the public servant an opportunity to be heard because that right is lost by the operation of para (a) of the proviso to art 135(2) of the Constitution (see p 298D).

(6) (Per Gopal Sri Ram JCA) The doctrine of procedural fairness, which is the product of the combined effect of arts 8 (1) and 5 (1) of the Constitution, does not require that a public servant be given the right to make representations upon the issue of punishment in a case to which proviso of art 135(2) applies (see p 298F).

(7) (Per Gopal Sri Ram JCA) Nevertheless, the disciplinary authority must, when deciding what punishment it ought to impose on the particular public servant, act reasonably and fairly. If it acts arbitrarily or unfairly or imposes a punishment that is disproportionate to the misconduct, then its decision is liable to be quashed or set aside (see p 298E).

(8) (Per Gopal Sri Ram JCA) The first respondent ought to have considered the several factors set out by the Muar High Court and the recommendation of the department. Taking into account all the relevant factors of the case, the order of dismissal was too severe a punishment to impose on the appellant (see p 300D). [*263]

(9) (Per Gopal Sri Ram JCA) The appellant has also prayed for 'further or other relief as this Honourable court thinks fit in his statement of claim. As such, this court should award the appellant such relief as was appropriate in the circumstances of the case. There was no inconsistency between the relief this court propose to award to the appellant and the other relief he has expressly claimed in the present case (see pp 300I and 301); Rohana bte Ariffin v Universiti Sains Malaysia [1989] 1 MLJ 487, Lim Eng Kay v Jaafar bin Mohamed Said [1982] 2 MLJ 156, Cargill v Bower (1878) 10 Ch D 502 and Mokhtar v Arumugam [1959] MLJ 232 followed.

(10) (Per Gopal Sri Ram JCA) Having regard to all the circumstances of the case, the appellant ought not to have the declarations and these are accordingly refused. Instead, an order was made reducing the appellant in rank in the manner appearing in the department's letter dated 10 April 1990, with effect from the date of his dismissal. All arrears of salary and other emoluments accruing to the reduced rank from that date until to-day were to be paid to the appellant (see p 302G).

(11) (Per NH Chan JCA, dissenting) In the present case, proviso (a) of art 135(2) applied to the appellant, as he was dismissed 'on the ground of conduct in respect of which a criminal charge [had] been proved against him. Therefore, the appellants claim that his dismissal had infringed natural justice in that he was not afforded an opportunity to be heard must necessarily fail (see p 305F).

(12) (Per NH Chan JCA) The appellants case for judicial review, according to his statement of claim, was based on art 135(2) of the Constitution only. It was not founded on the basis that the penalty of dismissal was unwarranted in the present case and that a lesser penalty should have been imposed on him. That ground was never raised in his pleadings nor did he do so at the trial (see p 305H).

(13) (Per NH Chan JCA) The correct test was to determine whether it was reasonable for the appellants employers to dismiss him on those facts. When considering the reasonableness of what a reasonable employer would have done, the court (whether it be the High Court, Court of Appeal or, the Industrial Court) must not substitute its own views as to what was the appropriate penalty (for the employees misconduct) for the view

of the particular employer concerned (see pp 306-307); *Watling & Co Ltd v Richardson* [1978] ICR 1049, *Rolls-Royce Ltd v Walpole* [1980] IRLR 343, *British Leyland UK Ltd v Swift* [1981] IRLR 91 and *Iceland Frozen Foods v Jones* [1983] ICR 17 followed. [*264]

(14) It was reasonable for the employers in the instant case to have reasonably taken the view that dismissal was the appropriate penalty. The offence for which the appellant had been found guilty of was a grave one for which a reasonable employer might reasonably take the view that that in itself was gross misconduct and that it was quite reasonable to dismiss him (see p 308D).

Per curiam:

(1) (Per Gopal Sri Ram JCA) When the constitutionality of State action is called into question on the ground that it infringes a fundamental right, the test to be applied is whether that action directly affects the fundamental rights guaranteed by the Constitution or that its inevitable consequence on the fundamental rights is such that it makes their exercise ineffective (see p 283B); *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697 followed.

(2) (Per Gopal Sri Ram JCA) The requirement of fairness which is the essence of art 8(1), when read together with art (1) of the Constitution, goes to ensure not only that a fair procedure is adopted in each case based on its own facts, but also that a fair and just punishment is imposed according to the facts of a particular case (see p 290A).

Example of First Offender

Public Prosecutor v Lim Chau Siu [1951] 1 LNS 99

In this case the respondent (accused) was charged before the Circuit Magistrate at Kluang, under regulation 5(2) of the Emergency (Rubber Control) Regulations, 1949, with being in possession of about 9 katties of scrap rubber. The learned Magistrate found the respondent guilty and convicted her as charged. He sentenced her to be bound over to be of good behavior for one year with cash security in the sum of \$250 or in default one year's simple imprisonment. His reasons for so doing are given in his grounds of judgment as follows:-

(a) The accused is a first offender for consideration under section 294 of the Criminal Procedure Code. (b) The accused though a married woman has, her husband being a detainee at Majidi Camp under the Emergency Regulations, to feed 6 children ranging from the age of 14 years to 2 years.

(b) Observations on the implementation of the article

498. The reviewing experts are satisfied with the explanations provided by Malaysia.

Article 31 Freezing, seizure and confiscation

Subparagraph 1 (a)

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

(a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;

(a) Summary of information relevant to reviewing the implementation of the article

499. Regarding the forfeiture of proceeds of crime on conviction of a person for an offence established in accordance with the Convention and forfeiture in situations where there is no prosecution or conviction, Malaysia cited the laws below. Instances where there can be forfeiture without prosecution are where there is insufficient evidence to prosecute, though there is overwhelming evidence that the seizures made during the investigation, were proceeds of corruption. This together with an admission from the suspects may cause the Public Prosecutor to file an order for forfeiture in lieu of prosecution.

A. Confiscation of proceeds of crime under MACCA

The provisions Malaysia has mentioned relate to processes in the law to forfeit proceeds of crime upon conviction for an offence under the Act or where there is no prosecution it is proven that the property has been obtained as a result of or in connection with an offence under MACCA.

Offence under the Act is defined in section 3 of MACCA and includes prescribed offences as provided for in the Schedule.

Section 40-Forfeiture of property upon prosecution for an offence

(1) In any prosecution for an offence under this Act, the court shall make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence where- (a) the offence is proved against the accused; or (b) the offence is not proved against the accused but the court is satisfied -

(i) that the accused is not the true and lawful owner of such property; and

(ii) that no other person is entitled to the property as purchaser in good faith for valuable consideration.

(2) Where the offence is proved against the accused but the property referred to in subsection(1) has disposed of, or cannot be traced, the court shall order the accused to pay as penalty a sum which is equivalent to the amount of gratification or is, in the opinion of the court, the value of the gratification received by the accused, and any such penalty shall be recoverable as a fine.

Section 41-Forfeiture of property where there is no prosecution for an offence -

(1) Where in respect of any property seized under this Act there is no prosecution or conviction for an offence under this Act, the Public Prosecutor may, before the expiration of eighteen months from the date of seizure, apply to a Sessions Court Judge for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under this Act.

(2) The Judge to whom an application is made under subsection (1) shall cause to be published a notice in the Gazette calling upon any person who claims to have an interest in the property to attend before the Court on a date specified in the notice, to show cause as to why the property should not be forfeited.

(3) Where the Judge to whom an application is made under subsection (1) is satisfied-

(4) that the property is the subject matter of or was used in the commission of an offence under this Act; and

(5) there is no purchase in good faith for valuable consideration in respect of the property'

(6) he shall make an order for the forfeiture of the property.

(7) Property in respect of which no application is made under subsection (1) shall, at the expiration of eighteen months from the date of its seizure, be released to the person from whom it was seized

B. Confiscation of Proceeds of Crime under AMLATFA

Forfeiture of property upon prosecution of an offence under AMLATFA

There two situations where forfeiture can take place:-

Section 55-Forfeiture of Property upon prosecution for an offence

(1) Subject to section 61, in any prosecution for an offence under subsection 4(1) or a terrorism financing offence, the court shall make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence or which is proved to be terrorist property where-

(a) the offence is proved against the accused;

(b) the offence is not proved against the accused but the court is satisfied -

(i) that the accused is not the true and lawful owner of such property; and

- (ii) that no other person is entitled to the property as purchaser in good faith for valuable consideration.
- (2) Where the offence is proved against the accused but the property referred to in subsection (1) has been disposed of, or cannot be traced, the court shall order the accused to pay as penalty a sum which equivalent to, in the opinion of the court, the value of the property, and any such penalty shall be recoverable as fine.
- (3) In determining whether the property is the subject-matter of an offence or has been used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property the court shall apply the standard of proof required in civil proceedings.

Section 56-Forfeiture of property where there is no prosecution

- (1) Subject to section 61, where in respect of any property frozen or seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.
- (2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied-
- (a) that the property is the subject matter of or was used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property; and
- (b) that there is no purchaser in good faith for valuable consideration in respect of the property.
- (3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.
- (4) In determining whether or not the property has been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence or is terrorist property, the court shall apply the standard of proof required in civil proceedings.

C. Confiscation of Proceeds of Crime Under the Criminal Procedure Code (Act 593) for offences that fall out of the ambit of MACCA and AMLATFA.

Section 406A. Court shall consider manner of disposal of exhibits

- (1) At the conclusion of any proceedings under this Code the Court shall consider in what manner the exhibits shall be disposed of and may make any order for that purpose in accordance with law.
- (2) If the Court makes no order as to the disposal of the exhibits they shall be handed to the police officer in charge of the proceedings and may be dealt with by the police in accordance with the provisions of this Chapter as if the Court had made an order or orders to that effect:
Provided that if the police are at any time in doubt as to the proper manner of disposing of any exhibit, or if any person claims delivery to him of any exhibit and the police refuse such delivery, the police or that person may apply summarily to the Court which determined the case and the Court shall make such order regarding the disposal of the exhibit as may be proper.

Section 407. Order for disposal of property regarding which offence committed

- (1) Any Court may if it thinks fit impound any property or document produced before it under this Code.
- (2) During or at the conclusion of any inquiry or trial in any criminal Court the Court may make such order as it thinks fit for the custody or disposal of any property or document whatsoever produced before it or in its custody or the custody of the police or of any public servant regarding which any offence appears to have been committed or which has been used for the commission of any offence. The power herein conferred upon the Court shall include the power to make an order for the forfeiture or confiscation or for the destruction or for the delivery to any person of such property, but shall be exercised subject to any special provisions relating to forfeiture, confiscation, destruction or delivery contained in the written law under which the conviction was had.
- (3) In this section the term 'property' includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

500. Furthermore, Malaysia provided the following examples of cases on the implementation of the provision.

Freezing of Property under section 44 of AMLATFA 2001

Khor Peng Chai & Ors v. Bank Negara Malaysia & Another [2011] 1 LNS 216

[1] This is an application by the Applicants for leave to commence judicial review for the following relief:-

(a) a declaration that the section 44 of Anti-Money Laundering Act, 2001 (‘AMLA’) violates Article 8(1) of the Federal Constitution and is accordingly illegal, null and void and of no legal effect;

(b) an order of certiorari to quash the decision of the 1st Respondent in issuing or causing to be issued the said freezing notices dated 28.7.2010 pursuant to s. 44 of the AMLA

(c) consequential to these, an order for 1st Respondent to revoke the said freezing orders dated 28.7.2010 including issuing notices to all the financial institutions where the respective accounts, being the subject matter of the said freezing orders are maintained.

(d) any other relief and / or order deemed just and appropriate.

(e) costs.

[14] The purpose of section 44 of AMLA is to assist in investigation where there are reasonable grounds to suspect that an offence under section 4 (1) of AMLA has been / is being / is about to be committed. The issuance of the order dated 28.7.2010 by the 1st Respondent is to facilitate investigation and to secure and preserve evidence for the purpose of criminal prosecution under section 4 (1) of AMLA by freezing the Applicants accounts. When it is read together with section 50 of AMLA, it also provides avenue for the 1st Respondent, via the Public Prosecutor, to secure and to preserve the evidence in relation to the commission of such offence, for the purpose of criminal prosecution under section 4 (1) of AMLA.

[15] The court must be very slow to interfere with the enforcement matter of a statutory body and in so doing, refraining them from carrying out their responsibilities. In the realm of administration of criminal justice in Malaysia, the approach is two pronged, i.e., investigation of crimes and the prosecution of criminal cases in court. The investigation of crime is the responsibility of the enforcement agency whilst the prosecution is solely in the hands of Attorney-General, who has the power exercisable at his discretion to institute, conduct or discontinue any criminal proceedings (see Article 145 (3) of the Federal Constitution and section 376 of the Criminal Procedure Code. Nevertheless, the discretion by the Attorney-General can only be exercised based on the outcome of the investigation undertaken by the relevant enforcement agency. Upon receipt of the result of investigation from enforcement agency, the Attorney-General will decide whether to institute prosecution against a perpetrator of crime. If the investigation reveals insufficient evidence to prosecute the suspect, the Attorney-General will choose not to prosecute. The decision to prosecute is solely legal, with public interest as the paramount consideration. Section 44 of AMLA is clearly part of the investigation of crimes in the administration of criminal justice in Malaysia.

Forfeiture of Property without prosecution under section 56 (1) AMLATFA 2001

Pendakwa Raya lwn. Abdul Aziz Abdullah [2011]6 CLJ 700 [2010] 1 LNS 1822

501. Malaysia referred to Table 12 (Annex 10).

(b) Observations on the implementation of the article

502. Confiscation/forfeiture of proceeds of crime is sufficiently regulated in section 40 of MACCA. The reviewing experts also appreciate that Malaysia allows for non-conviction based forfeiture under section 41 of MACCA. It was reported that since 2009, there have been 26 such cases.

Article 31 Freezing, seizure and confiscation

Subparagraph 1 (b)

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

(b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

503. Malaysia referred to the information provided above under article 31 subparagraph 1 (a). Moreover, Malaysia referred to the definition of “property” in MACCA and in AMLATFA 2001. The Malaysian domestic laws enabling confiscation of property, equipment or other instrumentalities used in offences established in accordance with the Convention are as follows:

A. Provisions under MACCA

Section 3 of the Act defines

- a. “property”, to mean “real or personal property of every description, including money, whether situated in Malaysia or elsewhere, whether tangible or intangible, and includes interest in any such real or personal property”;
- b. "monetary instrument", to mean “coin or currency of Malaysia or any other country, traveller’s cheque, personal cheque, bank cheque, money order, investment security or negotiable instrument in bearer form or otherwise in such form that title thereto passes upon delivery or upon delivery and endorsement”.

Section 40-Forfeiture of property upon prosecution for an offence [in pari materia with section 36 of the Anti-Corruption Act 1997 (Act 575)]

(1) In any prosecution for an offence under this Act, the court shall make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence where-

- (a) the offence is proved against the accused; or
- (b) the offence is not proved against the accused but the court is satisfied-
 - (i) that the accused is not the true and lawful owner of such property; and
 - (ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

(2) Where the offence is proved against the accused but the property referred to in subsection (1) has been disposed of, or cannot be traced, the court shall order the accused to pay as a penalty a sum which is equivalent to the amount of the gratification or is, in the opinion of the court, the value of the gratification received by the accused, and any such penalty shall be recoverable as a fine.

Section 41-Forfeiture of property where there is no prosecution for an offence [in pari materia with section 37 of the Anti-Corruption Act 1997 (Act 575)]

(1) Where in respect of any property seized under this Act there is no prosecution or conviction for an offence under this Act, the Public Prosecutor may, before the expiration of eighteen months from the date of the seizure, apply to a Sessions Court Judge for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under this Act.

(2) The Judge to whom an application is made under subsection (1) shall cause to be published a

notice in the Gazette calling upon any person who claims to have an interest in the property to attend before the Court on a date specified in the notice, to show cause as to why the property should not be forfeited.

(3) Where the Judge to whom an application is made under subsection (1) is satisfied-

(a) that the property is the subject matter of or was used in the commission of an offence under this Act; and

(b) there is no purchase in good faith for valuable consideration in respect of the property, he shall make an order for the forfeiture of the property.

(4) Property in respect of which no application is made under subsection (1) shall, at the expiration of eighteen months from the date of its seizure, be released to the person from whom it was seized.

B. Provisions under AMLATFA

Section 3 of the Act defines:-

"proceeds of an unlawful activity" as "any property derived or obtained, directly or indirectly, by any person as a result of any unlawful activity;

"property" means-

(a) assets of every kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, however acquired; or

(b) legal documents in any form, including electronic or digital assets, including bank credits, traveller's cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit.

"unlawful activity" means any activity which is related, directly or indirectly, to any serious offence or any foreign offence

"serious offence" means -

(a) any of the offences specified in the Second Schedule

(b) an attempt to commit any of those offences; or

(c) the abetment of any of those offences

"foreign serious offence" means an offence-

(a) against the law of a foreign State stated in a certificate purporting to be issued by or on behalf of the government of that foreign State; and

(b) that consists of or includes an act or activity which, if it had occurred in Malaysia would have constituted a serious offence;

55-Forfeiture of property upon prosecution for an offence

(1) Subject to section 61, in any prosecution for an offence under subsection 4(1) or a terrorism financing offence, the court shall make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence or which is proved to be terrorist property where-

(a) the offence is proved against the accused; or

(b) the offence is not proved against the accused but the court is satisfied-

(i) that the accused is not the true and lawful owner of such property; and

(ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

(2) Where the offence is proved against the accused but the property referred to in subsection (1) has been disposed of, or cannot be traced, the court shall order the accused to pay as a penalty a sum which is equivalent to, in the opinion of the court, the value of the property, and any such penalty shall be recoverable as a fine.

(3) In determining whether the property is the subject matter of an offence or has been used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property the court shall apply the standard of proof required in civil proceedings.

56. Forfeiture of property where there is no prosecution

(1) Subject to section 61, where in respect of any property frozen or seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such

property had been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.

(2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied-

(a) that the property is the subject matter of or was used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property; and

(b) that there is no purchaser in good faith for valuable consideration in respect of the property.

(3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.

(4) In determining whether or not the property has been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence or is terrorist property, the court shall apply the standard of proof required in civil proceedings.

C. Provisions under the Criminal Procedure Code (Act 593)

Section 3 of the Interpretation Acts 1948 and 1967, defines 'movable property' as 'all property other than immovable property'.

Movable property is defined in section 22 of the Penal Code as :

The words 'movable property' are intended to include corporeal property of every description, except land and things attached to the earth, or property fastened to anything which is attached to the earth.

Immovable property is defined in section 22 of the Penal Code to include land or any interest in, right over or benefit arising or to arise out of the land. Refer to the case of *Rex v Lim Soon Gong & Ors* [1939] MLJ 10

407. Order for disposal of property regarding which offence committed

(1) Any Court may if it thinks fit impound any property or document produced before it under this Code.

(2) During or at the conclusion of any inquiry or trial in any criminal Court the Court may make such order as it thinks fit for the custody or disposal of any property or document whatsoever produced before it or in its custody or the custody of the police or of any public servant regarding which any offence appears to have been committed or which has been used for the commission of any offence. The power herein conferred upon the Court shall include the power to make an order for the forfeiture or confiscation or for the destruction or for the delivery to any person of such property, but shall be exercised subject to any special provisions relating to forfeiture, confiscation, destruction or delivery contained in the written law under which the conviction was had.

(3) When a Judge makes such order, and cannot through his own officers conveniently deliver the property to the person entitled to it, he may direct that the order to be carried into effect by a Magistrate.

(4) A Court making an order under this section in respect of any property or document shall direct whether the order is to take effect immediately or at any future date or on the happening of any future contingency and shall, except when the property is livestock or subject to speedy and natural decay, include in that order all necessary directions and conditions to ensure that the property or document will be produced as and when required for the purposes of the inquiry or trial during or at the conclusion of which such order is made or for the purposes of any appeal or further criminal proceedings resulting from such inquiry or trial.

(5) In this section the term 'property' includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

407A. Disposal of seized articles

(1) Notwithstanding any provisions, the Public Prosecutor may apply to the Court for the disposal of any articles specified in subsection (2) at any time after the case management.

(2) The following seized articles may be disposed of under this section:

(a) dangerous drugs seized under the Dangerous Drugs Act 1952;

(b) clandestine drug laboratories or premises;

(c) valuable goods;

(d) cash money;

(e) noxious, deleterious, corrosive, explosive, dangerous, toxic, flammable, oxidizing, irritant,

- harmful, poisonous, psychotropic and decay substance;
- (f) video compact disc, optic discs, films, and other similar devices;
 - (g) publications, books and other documents;
 - (h) vehicles, ships, and other forms of conveyance;
 - (i) equipment and machineries;
 - (j) timber and timber products;
 - (k) rice, food, and other perishable items; and
 - (l) other articles as may be determined by the Public Prosecutor that may be vulnerable to theft, substitution, constraints of proper storage space, high maintenance, costs or any other considerations as the Public Prosecutor deems relevant;
- (3) The Court shall make an order for the disposal of the articles specified in the application made by the Public Prosecutor under subsection (1) with the consent of the accused subject to the following procedures being complied with:
- (a) an inventory of the articles containing the description, markings and other particulars which clearly identifies the articles has been made by the officer who seized the articles, and the Magistrate or Judge having the trial jurisdiction has certified that the inventory is correct;
 - (b) photograph of the articles have been taken in the presence of a Magistrate or Judge having the trial jurisdiction, and the Magistrate or Judge has certified that the photographs are true;
 - (c) where possible, representative samples of the articles have been taken in the presence of a Magistrate or Judge having the trial jurisdiction, and the Magistrate or Judge has certified that the representative samples are the correct samples of the articles; and
 - (d) where the articles are video compact discs, optic discs, films and other similar devices, the articles have been played for a Magistrate or Judge having the trial jurisdiction so as to ascertain the contents of the articles, and the Magistrate or Judge has certified that the contents of the articles are correct.

408. Direction instead of order

Instead of himself making an order under section 407 a Judge may direct the property to be delivered to a Magistrate, who shall, in such cases, deal with it as if it had been seized by the police and the seizure had been reported to him in the manner hereinafter mentioned.

504. Furthermore, Malaysia provided the following examples of cases on the implementation of the provision.

Tan Khing Hung v Public Prosecutor [1996] 4 MLJ 316

The appellant was charged under s 292(a) of the Penal Code (FMS Cap 45) (the Penal Code) for publicly exhibiting an obscene laser disc film. He pleaded guilty to the charge. The prosecution tendered exhs P2-P12 which the appellant admitted were used in the commission of the offence. The magistrate accepted the plea of guilty and convicted the appellant on the charge. **He fined the appellant the sum of RM2,000, in default 2 months imprisonment. In exercise of his powers under s 407(2) of the Criminal Procedure Code (FMS Cap 6) (the CPC), he ordered exhs P2-P8 and P10 which was equipment used in exhibiting the film to be forfeited and to be retained by the police for disposal, on the ground that all those exhibits were used for the commission of the offence.** This appeal was against the order of forfeiture of exhs P2-P8 and P10. The first ground of appeal was that the order made against the exhibits ought to be in accordance with s 411 of the CPC and not under s 407(2) thereof as the offence committed by the appellant was one under s 292 of the Penal Code. The second ground of appeal concerned the legality of the order as the owner of the things forfeited was not given the right of being heard before the order was made.

Held, dismissing the appeal and affirming the sentence and the order of forfeiture made by the magistrate:

- (1) Exhibits P2-P8 and P10 were not copies of the obscene laser disc in respect of which the conviction was made and therefore s 411 of the CPC would not apply in respect of them. The power of the court under s 407(2) of the CPC to, inter alia, forfeit property which has been used for the commission of any offence shall be exercised subject to any special

provisions relating to forfeiture, confiscation, destruction or delivery contained in the written law under which the conviction was had. There are, however, no special provisions in the Penal Code relating to forfeiture, confiscation, destruction or delivery of exhibits which would require the magistrate to pay attention to before making the order he made in this case. In the circumstances, the magistrate was right in invoking s 407(2) of the CPC in dealing with the exhibits, particularly exhs P2-P8 and P10 (see pp 320H -I, 321B -C, G.) [*316]

(2) The court has to act under s[407(2)] of the CPC to release the property to its true owner if satisfied that the offence has been committed without his consent, knowledge and connivance. Only if there were before the magistrate evidence of the true owner would it be incumbent upon him to hold an inquiry to ascertain the right of the true owner over the exhibits before making the order of forfeiture. However, in the present case there was only the information that the exhibits were on loan and no particulars of the true legal owner or his identity or his possible rights or interest in the exhibits were given. As such information was lacking, the magistrate was right in the exercise of his discretion under s[407(2)] of the CPC without first holding the requisite inquiry (see pp 322H -I, 323A -B; *Chung Khiaw Bank Ltd v PP* [1968] 2 MLJ 196 followed).

Mohd. Shahrul Hisyam Sakri v Public Prosecutor [2010] 4 CLJ 760

The public prosecutor/respondent, by way of three separate applications against the appellants, had applied for certain seized property to be forfeited to the Malaysian Government under s. 37(3)(a) of the Anti-Corruption Act 1997 (Act).

The applications were based on an investigation of a case in which the respondent was satisfied that the money seized from the appellants pertained to the offence of corruption under s. 11(b) of the Act i.e., the offence of giving or agreeing to accept gratification. The appellants filed show cause affidavits giving grounds why the seized money should not be forfeited. The Judicial Commissioner (JC), after considering the respondent's supporting affidavit and the affidavit filed by the appellants, and the submissions adduced, concluded that each appellant had failed to discharge the burden of proof placed upon them. The appellants had failed to provide acceptable explanations as to why the seized money should not be forfeited to the Government. Accordingly, the respondent's applications against the appellants were allowed, and these three appeals arose from the JC's decision. Counsel for the appellants submitted that the respondent's failure to file an affidavit-in-reply to refute the assertions in the appellants' affidavits meant an admission to the contents of said affidavits. Held (dismissing the appeals)

Per Zaleha Zahari JCA delivering the judgment of the court:

- (1) The respondent was obliged to file an affidavit-in-reply if the matter raised was within the respondent's knowledge. If the matter raised was not within the respondent's knowledge, the respondent need not reply and such failure would not amount to an admission of the matter adduced in the affidavits in question. It fell to the court to appraise and consider the matter adduced in reaching its decision. The word "satisfied" in the context of an application like this was a question of fact and subjective consideration.
- (2) It was clear in the pleaded cases that the JC had given due and careful consideration to the respondent's case and the appellants' explanation and the documents adduced. The appellants' explanation that the money seized from them was personal money without any supporting proof was insufficient to discharge the obligation placed upon them explaining why the seized money should not be forfeited. The JC did not err when deciding to distrust the explanation given by the

appellants. There was no misdirection or misreading of the evidence adduced. Therefore, it was inappropriate for the court in the appellate stage to interfere with the findings of the said decision. The JC had exercised his discretion correctly when he allowed the respondents' applications, and his findings should not be disturbed.

Public Prosecutor Iwn Abdul Aziz Abdullah [2011] 6 CLJ 700

505. Malaysia referred to Table 12 (Annex 10).

(b) Observations on the implementation of the article

506. The reviewing experts are of the view that Malaysia has partially implemented the provision. Confiscation and forfeiture of instrumentalities is regulated in section 40 of MACCA and section 55 of AMLATFA. Missing in the laws is the notion of instrumentalities which are destined to be used in a corruption offence. It is recommended that Malaysia address this aspect.

Article 31 Freezing, seizure and confiscation

Paragraph 2

2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.

(a) Summary of information relevant to reviewing the implementation of the article

507. Malaysia referred to MACCA, AMLATFA, Criminal Procedure Code (CPC) and Mutual Assistance in Criminal Matters Act 2002 (MACMA). Malaysia's domestic laws to enable the identification, tracing, freezing or seizure of proceeds of crime and property, equipment or other instrumentalities are as follows:-

A. MACCA

Section 31 – Power of search and seizure

- a. Whenever it appears to the Public Prosecutor or an officer of the Commission of the rank of Chief Senior Assistant Commissioner or above as authorized by the Public Prosecutor upon information, and after such inquiry as he thinks necessary, that there is reasonable cause to suspect that in any place there is any evidence of the commission of an offence under this Act, he may by written order direct an officer of the Commission to –
 - (a) enter any premises and there search for, seize and take possession of, any book, document, record, account or data, or other article;
 - (b) inspect, make copies of, or take extracts from, any book, document, record, account or data;
 - (c) search any person who is in or on such premises, and for the purpose of such search detain such person and remove him to such place as may be necessary to facilitate such search, and seize and detain any article found on such search;
 - (d) break open, examine, and search any article, container or receptacle; or
 - (e) stop, search, and seize any conveyance.
- b. Whenever it is necessary so to do, an officer of the Commission exercising any power under subsection (1) may –

- (a) break open any outer or inner door or window of any premises and enter thereinto, or otherwise forcibly enter the premises and every part thereof;
- (b) remove by force any obstruction to such entry, search, seizure or removal as he is empowered to effect; or
- (c) detain any person found in or on any such premises, or in any conveyance, searched under subsection (1), until such premises or conveyance has been searched.
- c. Whenever it appears to an officer of the Commission that there is reasonable cause to suspect that there is concealed or deposited in any place any evidence of the commission of any offence under this Act and such officer has reasonable grounds for believing that, by reason of delay in obtaining a written order of the Public Prosecutor or an officer of the Commission of the rank of Chief Senior Assistant Commissioner or above under subsection (1), the object of the search is likely to be frustrated, he may exercise in and in respect of such place, all the powers mentioned in subsections (1) and (2) as if he were directed to do so by an order issued under subsection (1).
- d. No person shall be searched under this section except by a person who is of the same gender as the person to be searched.

Section 33 -Seizure of movable property

- (1) In the course of an investigation into an offence under this Act any movable property which any officer of the Commission of the rank of Assistant Superintendent or above has reasonable grounds to suspect to be the subject matter of an offence or evidence relating to the offence shall be liable to seizure.
- (2) A list of all movable property seized pursuant to subsection (1) and of the places in which they are respectively found shall be prepared by the officer of the Commission effecting the seizure and signed by him.
- (3) A copy of the list referred to in subsection (2) shall be served on the owner of such property or on the person from whom the property was seized as soon as possible.
- (4) Where any movable property liable to seizure under subsection (2) is in the possession, custody or control of a bank, subsections (1), (2) and (3) shall not apply and the provisions of section 37 shall apply thereto.

Section 34 -Further provisions relating to seizure of movable property

- (1) Where any movable property is seized under this Act, the seizure shall be effected by removing the movable property from the possession, custody or control of the person from whom it is seized and placing it under the custody of such person or authority and at such place as an officer of the Commission of the rank of Assistant Superintendent or above may determine.
- (2) Where it is not practicable, or it is otherwise not desirable, to effect removal of any property under subsection (1), the officer referred to in that subsection may leave it at the premises in which it is seized under the custody of such person as he may detail for the purpose.
- (3) Notwithstanding subsection (1), when any movable property, including any movable property referred to in subsection (6), has been seized under this Act, an officer of the Commission of the rank of Superintendent or above, other than the officer who effected the seizure, may at his discretion-
 - (a) temporarily return the movable property to the owner thereof, or to the person from whose possession, custody or control it was seized, or to such person as may be entitled thereto, subject to such terms and conditions as may be imposed, and, subject, in any case, to sufficient security being furnished to ensure that the movable property shall be surrendered on the demand being made by the officer who authorized the release and that such terms and conditions, if any, shall be complied with; or
 - (b) return the movable property to the owner thereof, or to the person from whose possession, custody or control it was seized, or to such person as may be entitled thereto, with liberty for the person to whom the movable property is so returned to dispose of the property, such return being subject to security being furnished in an amount not less than an amount which represents the open market value of such property on the date on which it is so returned.
- (4) Where any person to whom movable property is temporarily returned under paragraph (3)(a) fails to surrender such property on demand or comply with any term or condition imposed under that paragraph-
 - (a) the security furnished in respect of such property shall be forfeited; and
 - (b) that person commits an offence and shall on conviction be liable to a fine of not less than two times the amount of the security furnished by him, and to imprisonment for a term not exceeding two years.
- (5) Where an order of forfeiture is made by the court in respect of property returned under paragraph (3) (b), such forfeiture shall be effected by forfeiting the security furnished by the person to whom the property was returned.
- (6) When any movable property seized under this Act consists of money, shares, securities, stocks,

debentures or any chose-in action, in the possession or under the custody or control of any person other than the person against whom the prosecution is intended to be taken, the seizure shall be effected by an officer of the Commission of the rank of Assistant Superintendent or above serving an order on such person-

(a) prohibiting him from using, transferring, or dealing with such property; or
(b) requiring him to surrender the property to an officer of the Commission of the rank of Assistant Superintendent or above in the manner and within the time specified in the order.

(7) Where any movable property seized is liable to speedy decay or deterioration, or is property which cannot be maintained without difficulty, or which is not practicable to be maintained, and which cannot be dealt with under subsection (3), an officer of the Commission of the rank of Superintendent or above may sell or cause to be sold the property and shall hold the proceeds of the sale, after deducting therefrom the costs and expenses of the maintenance and sale of the property, to abide the result of any proceedings under this Act.

Section 37- Order not to part with, deal in, movable property in bank, etc.

(1) Where the Public Prosecutor is satisfied on information given to him by an officer of the Commission that any movable property, including any monetary instrument or any accretion thereto, which is the subject matter of an offence under this Act or evidence in relation to the commission of such offence, is in the possession, custody or control of a bank, he may, notwithstanding any other written law or rule of law, by order direct the bank not to part with, deal in, or otherwise dispose of such property or any part thereof until the order is revoked or varied.

(2) A bank or any agent or employee of a bank shall not, on account of such compliance, be liable to any prosecution under or by virtue of any law or to any proceeding or claim by any person under or by virtue of any law or under or by virtue of any contract, agreement, or arrangement, or otherwise.

(3) A person who fails to comply with an order of the Public Prosecutor under subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding two times the amount which was paid out in contravention of the Public Prosecutor's order or fifty thousand ringgit, whichever is the higher, and to imprisonment for a term not exceeding two years.

Section 38-Seizure of immovable property

(1) Where the Public Prosecutor is satisfied on information given to him by an officer of the Commission that any immovable property is the subject matter of an offence under this Act or evidence of the commission of such offence, such property shall be liable to seizure and the seizure shall be effected-

(a) by the issue of a Notice of Seizure by the Public Prosecutor setting out therein the particulars of the immovable property which is seized in so far as such particulars are within his knowledge, and prohibiting all dealings in such immovable property;

(b) by publishing a copy of such Notice in two newspapers circulating in Malaysia one of which shall be in the national language and the other in the English language; and

(c) by serving a copy of such Notice on the Land Administrator or the Registrar of Titles, as the case may be, in Peninsular Malaysia, or on the Registrar of Titles or Collector of Land Revenue, as the case may be, in Sabah, or on the Director of Lands and Surveys or the Registrar responsible for land title, as the case may be, in Sarawak, of the area in which the immovable property is situated.

(2) The Land Administrator, the Collector of Land Revenue, the Director of Lands and Surveys, the Registrar of Titles or the Registrar responsible for land title, as the case may be, referred to in subsection (1) shall immediately upon being served with a Notice of Seizure under subsection (1) endorse the terms of the Notice of Seizure on the document of title in respect of the immovable property in the Register at his office.

(3) Where an endorsement of a Notice of Seizure has been made under subsection (2), the Notice shall have the effect of prohibiting all dealings in respect of the immovable property, and after such endorsement has been made no dealing in respect of the immovable property shall be registered, regardless whether it was effected before or after the issue of such Notice or the making of such endorsement.

(4) Subsection (3) shall not apply to a dealing effected by an officer of a public body in his capacity as such officer, or otherwise by or on behalf of the Government of Malaysia or the Government of a State, or a local authority or other statutory authority.

(5) Any person who contravenes subsection (2) or (3) or does any act which results in, or causes, a contravention of subsection (2) or (3) commits an offence and shall on conviction be liable to a fine not exceeding twice the value of the property in respect of which the Public Prosecutor's order had been contravened, or fifty thousand ringgit, whichever is the higher, and to imprisonment for a term not exceeding two years.

(6) Where a Notice of Seizure has been issued under subsection (1) it shall be an offence for the registered proprietor of the immovable property which is seized under such Notice, or for any other person having any interest in such immovable property, who has knowledge of such Notice, to knowingly enter into any agreement with any person to sell, transfer, or otherwise dispose of or deal with, the whole or any part of such immovable property.

Section 39- Prohibition of dealing with property outside Malaysia Where the Public Prosecutor is satisfied that any property is the subject matter of an offence under this Act or was used in the commission of the offence, and such property is held or deposited outside Malaysia, he may make an application by way of an affidavit to a Judge of the High Court for an order prohibiting the person by whom the property is held or with whom it is deposited from dealing with the property.

Section 43-Intercept communication/ postal article

(1) Notwithstanding the provisions of any other written law, the Public Prosecutor or an officer of the Commission of the rank of Commissioner or above as authorized by the Public Prosecutor, if he considers that it is likely to contain any information which is relevant for the purpose of any investigation into an offence under this Act, may, on the application of an officer of the Commission of the rank of Superintendent or above, authorize any officer of the Commission-

- (a) to intercept, detain and open any postal article in the course of transmission by post;
- (b) to intercept any message transmitted or received by any telecommunication; or
- (c) to intercept, listen to and record any conversation by any telecommunication, and listen to the recording of the intercepted conversation.

(2) When any person is charged with an offence under this Act, any information obtained by an officer of the Commission in pursuance of subsection (1), whether before or after such person is charged, shall be admissible at his trial in evidence.

(3) An authorization by the Public Prosecutor or an officer of the Commission of the rank of Commissioner or above as authorized by the Public Prosecutor under subsection (1) may be given either orally or in writing; but if an oral authorization is given, the Public Prosecutor or the officer of the Commission of the rank of Commissioner or above as authorized by the Public Prosecutor shall, as soon as practicable, reduce the authorization into writing.

(4) A certificate by the Public Prosecutor or the officer of the Commission of the rank of Commissioner or above as authorized by the Public Prosecutor stating that the action taken by an officer of the Commission in pursuance of subsection (1) had been authorized by him under that subsection shall be conclusive evidence that it had been so authorized, and such certificate shall be admissible in evidence without proof of signature thereof.

(5) No person shall be under any duty, obligation or liability, or be in any manner compelled, to disclose in any proceedings the procedure, method, manner or means, or any matter related thereto, of anything done under paragraph (1)(a), (b) or (c).

(6) For the purpose of this section, 'postal article' has the same meaning as in the Postal Services Act 1991 [Act 465]. Surrender of travel documents

B. AMLATFA

Section 38- Seizing of property, record, report or document

An investigating officer may seize, take possession of and retain for such duration as he deems necessary, any property, record, report or document produced before him in the course of an examination under paragraph 32(2) (a) or (b), or search of the person under subsection 33(1), for ascertaining whether anything relevant to the investigation is concealed, or is otherwise, upon such person.

Section 44- Freezing of Property

(1) Subject to section 50, where an enforcement agency, having the power to enforce the law under which a serious offence is committed, has reasonable grounds to suspect that an offence under subsection 4(1) or a terrorism financing offence has been, is being or is about to be committed by any person, it may issue an order freezing any property of that person or any terrorist property, as the case may be, wherever the property may be, or in his possession, under his control or due from any source to him.

An order under subsection (1) may include-

- (a) an order to direct that the property, or such part of the property as is specified in the order, is not to be disposed of, or otherwise dealt with, by any person, except in such manner and in such circumstances, if any, as are specified in the order; and
- (b) an order to authorize any of its officers to take custody and control of the property, or such part of

the property as is specified in the order if the enforcement agency is satisfied that the circumstances so require.

(3) The enforcement agency in making the order under subsection (1) may give directions to the person named or described in the order as to-

- (a) the duration of the order;
- (b) the disposal of that property, for the purpose of-
 - (i) determining any dispute as to the ownership of or other interest in the property or any part of it;
 - (ii) its proper administration during the period of the order;
 - (iii) the payment of debts incurred in good faith due to creditors prior to the order;
 - (iv) the payment of money to that person for the reasonable subsistence of that person and his family; or
 - (v) the payment of the costs of that person to defend criminal proceedings against him; or
- (c) the manner in which the property should be administered or dealt with.

(4) An order made under subsection (1) may direct that the person named or described in the order shall-

- (a) be restrained, whether by himself or by his nominees, relatives, employees or agents, from selling, disposing of, charging, pledging, transferring or otherwise dealing with or dissipating his property;
- (b) not remove from or send out of Malaysia any of his money or property; and
- (c) not leave or be permitted to leave Malaysia and shall surrender any travel documents to the Director General of Immigration within one week of the publication of the order.

(5) An order made under subsection (1) shall cease to have effect after ninety days from the date of the order, if the person against whom the order was made has not been charged with an offence under this Act or a terrorism financing offence, as the case may be.

(6) An enforcement agency shall not be liable for any damages or cost arising directly or indirectly from the making of an order under this section unless it can be proved that the order under subsection (1) was not made in good faith.

(7) Where an enforcement agency directs that frozen property be administered or dealt with, the person charged with the administration of the property shall not be liable for any loss or damage to the property or for the cost of proceedings taken to establish a claim to the property or to an interest in the property unless the court before which the claim is made finds that the person charged with the administration of the property has been negligent in respect of the administration of the property.

Section 45-Seizure of movable property

(1) In the course of an investigation into an offence under subsection 4(1) or a terrorism financing offence, an investigating officer may, upon obtaining approval from an investigating officer senior in rank to him, seize any movable property which he has reasonable grounds to suspect to be the subject matter of such offence or evidence relating to such offence or to be terrorist property.

(2) A list of all movable property seized pursuant to subsection (1) and of the places in which they are respectively found shall be prepared by the investigating officer effecting the seizure and signed by him.

(3) A copy of the list referred to in subsection (2) shall be served as soon as possible on the owner of such property or on the person from whom the property was seized.

(4) This section shall not apply to any movable property liable to seizure under subsection (2) which is in the possession, custody or control of a financial institution.

Section 46-Further provisions relating to seizure of movable property

(1) Where any movable property is seized under this Act, the seizure shall be effected by removing the movable property from the possession, custody or control of the person from whom it is seized and placing it under the custody of such person, and at such place, as the investigating officer may determine.

(2) Where it is not practicable, or it is otherwise not desirable, to remove any property under subsection (1), the investigating officer may leave it at the premises in which it is seized under the custody of such person as he may determine for the purpose.

(3) Notwithstanding subsection (1), when any movable property, including any movable property referred to in subsection (6), has been seized under this Act, an investigating officer, other than the investigating officer who effected the seizure, upon obtaining approval from an investigating officer senior in rank to him, may-

- (a) temporarily return the movable property to its owner, or to the person from whose possession, custody or control it was seized, or to such person as may be entitled to it, subject to such terms and conditions as may be imposed, and subject in any case, to sufficient security being furnished to ensure that the movable property shall be surrendered on demand being made by the investigating officer who

authorized the release and that such terms and conditions, if any, shall be complied with; or
(b) return the movable property to the owner, or to the person from whose possession, custody or control it was seized, or to such person as may be entitled to the movable property, with liberty for the person to whom the movable property is so returned to dispose of the movable property, such return being subject to security being furnished in an amount which is not less than an amount which represents the open market value of that property on the date on which it is so returned.

(4) Where any person to whom movable property is temporarily returned under paragraph (3)(a) fails to surrender the movable property on demand or comply with any term or condition imposed under that paragraph-

(a) the security furnished in respect of such movable property shall be forfeited; and

(b) that person commits an offence and shall, on conviction, be liable to a fine of not less than two times the amount of the security furnished by him or to imprisonment for a term not exceeding two years or to both, and, in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.

(5) Where an order of forfeiture is made by the court in respect of movable property returned under paragraph (3) (b), such forfeiture shall be effected by forfeiting the security furnished by the person to whom the property was returned.

(6) When any movable property seized under this Act consists of money, shares, securities, stocks, debentures or any chose-in-action in the possession or under the custody or control of any person other than the person against whom the prosecution is intended to be taken, the seizure shall be effected by an investigating officer serving an order on such person-

(a) prohibiting him from using, transferring, or dealing with such property; or

(b) requiring him to surrender the property to an investigating officer in the manner and within the time specified in the order.

Where any movable property seized is liable to speedy decay or deterioration, or is property which cannot be maintained without difficulty, or which is not practicable to maintain, and which cannot be dealt with under subsection (3), an investigating officer may sell or cause the property to be sold and shall hold the proceeds of the sale, after deducting the costs and expenses of the maintenance and sale of the movable property, to abide by the result of any proceedings under this Act.

Section 50- Freezing of movable property in financial institution

(1) Where the Public Prosecutor is satisfied on information given to him by an investigating officer that any movable property, including any monetary instrument or any accretion to it, which is the subject matter of an offence under subsection 4(1) or a terrorism financing offence or evidence in relation to the commission of such offence or which is terrorist property, is in the possession, custody or control of a financial institution, he may, notwithstanding any other law or rule of law, after consultation with Bank Negara Malaysia, the Securities Commission or the Labuan Offshore Financial Services Authority, as the case may be, by order direct the financial institution not to part with, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied.

(2) A financial institution or any agent or employee of a financial institution shall not, on account of complying with an order of the Public Prosecutor under subsection (1), be liable to any prosecution under any law or to any proceedings or claim by any person under any law or under any contract, agreement, or arrangement, or otherwise.

(3) Any person who fails to comply with an order of the Public Prosecutor under subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding two times the amount which was parted with, dealt in or otherwise disposed of in contravention of the Public Prosecutor's order or one million ringgit, whichever is the higher, or to imprisonment for a term not exceeding one year or to both, and, in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.

(4) In this section, monetary instrument includes the domestic currency or any foreign currency, travellers' cheque, personal cheque, bank cheque, money order, investment security or negotiable instrument in bearer form or otherwise in such form that title to it passes upon delivery or upon delivery and endorsement.

Section 51- Seizure of immovable property

(1) Where the Public Prosecutor is satisfied on information given to him by an investigating officer that any immovable property is the subject matter of an offence under subsection 4(1) or a terrorism financing offence or evidence of the commission of such offence or is terrorist property, such property may be seized, and the seizure shall be effected-

(a) by the issue of a Notice of Seizure by the Public Prosecutor setting out the particulars of the

immovable property which is seized in so far as such particulars are within his knowledge, and prohibiting all dealings in such immovable property;

(b) by publishing a copy of such Notice in two newspapers circulating in Malaysia, one of which shall be in the national language and the other in the English language; and

(c) by serving a copy of such Notice on the Land Administrator or the Registrar of Titles, as the case may be, in Peninsular Malaysia, or on the Registrar of Titles or Collector of Land Revenue, as the case may be, in Sabah, or on the Director of Lands and Surveys or the Registrar responsible for land titles, as the case may be, in Sarawak, of the area in which the immovable property is situated.

(2) The Land Administrator, the Collector of Land Revenue, the Director of Lands and Surveys, the Registrar of Titles or the Registrar responsible for land titles, as the case may be, referred to in subsection (1) shall immediately upon being served with a Notice of Seizure under that subsection endorse the terms of the Notice of Seizure on the document of title in respect of the immovable property in the Register at his office.

(3) Where an endorsement of a Notice of Seizure has been made under subsection (2), the Notice shall have the effect of prohibiting all dealings in respect of the immovable property, and after such endorsement has been made no dealing in respect of the immovable property shall be registered, regardless whether it was effected before or after the issue of such Notice or the making of such endorsement.

(4) Subsection (3) shall not apply to a dealing effected by an officer of a public body in his capacity as such officer, or otherwise by or on behalf of the Federal Government of Malaysia or the Government of a State, or a local authority or other statutory authority.

(5) Any person who contravenes subsection (2) or (3) or does any act which results in, or causes, a contravention of subsection (2) or (3) commits an offence and shall, on conviction, be liable to a fine not exceeding twice the value of the property in respect of which the Public Prosecutor's order had been contravened, or one million ringgit, whichever is the higher, or to imprisonment for a term not exceeding one year or to both, and, in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.

(6) Where a Notice of Seizure has been issued under subsection (1), a registered proprietor of the immovable property which is seized under such Notice, or any other person having any interest in such immovable property, who has knowledge of such Notice, and who knowingly enters into any agreement with any person to sell, transfer, or otherwise dispose of or deal with, the whole or any part of such immovable property, commits an offence and shall, on conviction, be liable to a fine not exceeding twice the value of such property, or one million ringgit, whichever is the higher, or to imprisonment for a term not exceeding one year or to both, and, in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.

Section 52- Special provisions relating to seizure of business

(1) Where an enforcement agency has reason to believe that any business-

(a) is being carried on by or on behalf of any person against whom prosecution for an offence under subsection 4(1) or a terrorism financing offence is intended to be commenced;

(b) is being carried on by or on behalf of a relative or an associate of such person;

(c) is a business in which such person, or a relative or associate of his, has an interest which amounts to or carries a right to not less than thirty per centum of the entire business; or

(d) is a business over which such person or his relative or associate has management or effective control, either individually or together, the enforcement agency may seize the business in the manner provided under this Part or by an order in writing-

(aa) direct the extent and manner in which the business may be carried on; (bb) specify any person to supervise, direct or control the business, including its accounts, or to carry on the business or such part of it as may be specified;

(cc) direct that all or any proportion of the proceeds or profits of the business be paid to the Accountant General and retained by him pending further directions in respect of it by the enforcement agency;

(dd) prohibit any director, officer or employee or any other person from being in any manner involved in the business with effect from the date of the letter of prohibition; or

(ee) direct that the premises where the business was carried on to be closed and, if necessary or expedient, placed under guard or custody.

(2) Where an order is made by an enforcement agency under subsection (1), it may include in the order, or may subsequently give any further direction orally or in writing of an ancillary or consequential nature, or which may be necessary, for giving effect to, or for the carrying out of, the order.

(3) An order under subsection (1) may at any time be varied or revoked by an enforcement agency and where it so varies or revokes the order, it may give any direction of an ancillary or consequential nature, or which may be necessary, for giving effect to, or for the carrying out of, such variation or revocation.

(4) Subject to subsection (5), neither the Federal Government nor any person shall, in consequence of any order under subsection (1) be responsible for the payment of any money, dues, debts, liabilities or charges payable to any person in respect of the business, or in respect of any movable or immovable property owned, possessed, occupied or used, by any person in relation to the business.

(5) Where a person is carrying on any activities of the business in pursuance of an order under subsection (1), he shall be responsible for the payment of the wages of such employees of the business as are engaged in performing any work in relation to those activities for the period during which such person carries on those activities and such wages shall be paid out of the profits derived from such activities or, if there are no such profits or if such profits are insufficient, from the assets and the properties of the business.

(6) In this section-

(a) 'wages' means the wages payable under the contract of employment between the employee and the business;

(b) 'business' means any business registered under any written law providing for the registration of businesses and includes a corporation incorporated or registered under the Companies Act 1965 and an associate of that company as defined in section 3.

Section 53- Prohibition of dealing with property outside Malaysia Where the Public Prosecutor is satisfied that any property is the subject matter of an offence under subsection 4(1) or a terrorism financing offence or was used in the commission of the offence or is terrorist property, and such property is held or deposited outside Malaysia, he may make an application by way of an affidavit to a Judge of the High Court for an order prohibiting the person by whom the property is held or with whom it is deposited from dealing with the property.

Section 67- Property Tracking

(1) Where the competent authority or an enforcement agency, as the case may be, has reason to believe that a person is committing, has committed or is about to commit an offence under this Act, the competent authority or enforcement agency, as the case may be, may order-

(a) that any document relevant to identifying, locating or quantifying any property, or identifying or locating any document necessary for the transfer of the property, belonging to, or in the possession or under the control of that person or any other person, be delivered to it; or

(b) any person to produce information on any transaction conducted by or for that person with the first-mentioned person.

(2) Any person who does not comply with an order under subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding one year or to both, and, in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.

C. Criminal Procedure Code (Act 593)

Section 20 - search of persons arrested

20. Whenever a person is arrested-

(a) by a police officer under a warrant which does not provide for the taking of bail or under a warrant which provides for the taking of bail but the person arrested cannot furnish bail; or

(b) without warrant or by a private person under a warrant and the person arrested cannot legally be admitted to bail or is unable to furnish bail, the police officer making the arrest or, when the arrest is made by a private person, the police officer to whom such private person hands over the person arrested may search such person and place in safe custody all articles other than necessary wearing apparel found upon him, and any of those articles which there is reason to believe were the instruments or the fruits or other evidence of the crime may be detained until his discharge or acquittal.

Section 51- summons to produce documents or other things

51. (1) Whenever any Court or police officer making a police investigation considers that the production of any property or document is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before that Court or officer, such Court may issue a summons or such officer a written order to the person in whose possession or power such property or document is believed to be requiring him to attend and produce it or to produce it at the time and place

stated in the summons or order.

(2) Any person required under this section merely to produce any property or document shall be deemed to have complied with the requisition if he causes the property or document to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed to affect the provisions of any law relating to evidence for the time being in force or to apply to any postal article, telegram or other document in the custody of the postal or telegraph authorities.

Section 52- procedure as to postal articles, etc.

52. (1) If any such postal article, telegram or other document is in the opinion of a Judge or a Sessions Court Judge wanted for the purpose of any investigation, inquiry, trial or other proceeding under this Code, the Judge or Sessions Court Judge may require the postal or telegraph authorities to deliver that postal article, telegram or other document to such person as he may direct.

(2) If any such postal article, telegram or other document is in the opinion of the Public Prosecutor wanted for any such purpose he may require the postal or telegraph authorities to cause search to be made for and to detain that document pending the orders of a Judge or a Sessions Court Judge.

Section 54- When search warrant may be issued

54. (1) Where-

(a) any Court has reason to believe that a person to whom a summons under section 51 or a requisition under subsection 52(1) has been or might have been addressed will not or would not produce the property or document as required by the requisition;

(b) that property or document is not known to the Court to be in the possession of any person; or

(c) the Court considers that the purposes of justice or of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection, the Court may issue a search warrant and the person to whom that warrant is directed may search and inspect in accordance with the warrant and the provisions herein contained.

(2) Nothing herein contained shall authorize any Court other than the High Court to grant a warrant to search for a postal article, telegram or other document in the custody of the postal or telegraph authorities.

(3) A search warrant shall ordinarily be directed to the Chief Police Officer of the State in which it is issued and to some other officers to be designated by name therein, and all or any of those police officers may execute the warrant.

(4) The Court issuing a search warrant may direct it to any person or persons by name, not being police officers, and all or any one or more of those persons may execute the warrant.

Section 56- Magistrate may issue search warrant authorizing search for evidence of offence

56. If a Magistrate, upon information and after such inquiry as he thinks necessary, has reason to believe that anything upon, by or in respect of which an offence has been committed, or any evidence or thing which is necessary to the conduct of an investigation into any offence, may be found in any place, he may, by warrant, authorize the person to whom it is directed to enter, with such assistance, as may be required, and search the place for any such evidence or thing, and, if anything searched for is found, to seize it and bring it before the Magistrate issuing the warrant, or some other Magistrate, to be dealt with in accordance with law.

Section 62- Search without warrant

62. (1) If information is given to any police officer, not below the rank of Inspector that there is reasonable cause for suspecting that any stolen property is concealed or lodged in any place and he has good grounds for believing that by reason of the delay in obtaining a search warrant the property is likely to be removed, that officer by virtue of his office may search in the place specified for specific property alleged to have been stolen.

(2) A list of the property alleged to have been stolen shall be delivered or taken down in writing with a declaration stating that such property has been stolen and that the informant has good grounds for believing that the property is deposited in that place.

(3) The person from whom the property was stolen or his representative shall accompany the officer in the search.

Section 116-Search by police officer

116. (1) Whenever a police officer making a police investigation considers that the production of any document or other thing is necessary to the conduct of an investigation into any offence which he is authorized to investigate and there is reason to believe that the person to whom a summons or order under

section 51 has been or might be issued will not or would not produce the document or other thing as directed in the summons or order or when the document or other thing is not known to be in the possession of any person, the officer may search or cause search to be made for the same in any place.

(2) That officer shall, if practicable, conduct the search in person.

(3) If he is unable to conduct the search in person and there is no other person competent to make the search present at the time, he may require any officer subordinate to him to make the search, and he shall deliver to the subordinate officer an order in writing specifying the document or other thing for which search is to be made and the place to be searched, and the subordinate officer may then search for the thing in that place.

(4) The provisions of this Code as to search warrants shall, so far as may be, apply to a search made under this section.

Section 435 -Power of police to seize property suspected of being stolen

435. Any member of the police force may seize any property which is alleged or may be suspected to have been stolen, or which is found under circumstances which create suspicion that an offence has been committed, and such member, if subordinate to the officer in charge of the nearest police station, shall immediately report the seizure to that officer.

D. Banking And Financial Institutions Act 1989 (Act 372)

Section 82 -Appointment of investigating officers, their powers, functions and duties

(1) For the purposes of this Part, the Bank may appoint any officer or employee of the Bank or any person appointed under subsection 3(3) to be an investigating officer.

(2) Subject to subsection (3), an investigating officer appointed under subsection (1) shall have all the powers, functions, and duties conferred on an investigating officer under this Act, and where such investigating officer is not an officer or employee of the Bank, he shall, in relation to such powers, functions and duties-

(a) be subject to; and

(b) enjoy such rights, privileges, protections, immunities and indemnities as may be specified in, the provisions of this Act, the Central Bank of Malaysia Act 1958 or other written law applicable to an officer or employee of the Bank as if he were an officer or employee of the Bank.

(3) An investigating officer shall be subject to the direction and control of the Governor, or of such other officer of the Bank as may be authorized by the Governor to act on behalf of him, and of any other investigating officer or officers superior to him in rank, and shall exercise his powers, perform his functions, and discharge his duties referred to in subsection (2) in compliance with such directions, instructions, conditions, restrictions or limitations as the Governor, or an officer of the Bank authorized to act on behalf of him, or an investigating officer superior in rank, may specify orally or in writing, either generally, or in any particular case or circumstance.

Section 83-Powers of entry, search and seizure

(1) Where an investigating officer is satisfied, or has any reason to believe, that any person has committed an offence under this Act, he may, if in his opinion it is reasonably necessary to do so for the purpose of investigating into such offence-

(a) enter any premises and there search for, seize and detain any property, book or other document;

(b) inspect, make copies of, or take extracts from, any book or other document so seized and detained;

(c) take possession of, and remove from the premises, any property, book or other document so seized and detained;

(d) search any person who is in, or on, such premises, and for the purpose of such search detain such person and remove him to such place as may be necessary to facilitate such search, and seize and detain any property, book or other document found on such person;

(e) break open, examine, and search, any article, container or receptacle; or

(f) stop, detain or search any conveyance.

(2) An investigating officer may if it is necessary so to do-

(a) break open any outer or inner door of such premises and enter therein to;

(b) forcibly enter such premises and every part thereof;

(c) remove by force any obstruction to such entry, search, seizure, detention or removal as he is empowered to effect; or

(d) detain all or any persons found on any premises, or in any conveyance, searched under subsection (1) until such premises or conveyance have been searched.

(3) A list of all things seized in the course of a search made under this section and of the premises in

which they are respectively found shall be prepared by the investigating officer conducting the search and signed by him.

(4) The occupant of the premises entered under subsection (1), or some person on his behalf, shall in every instance be permitted to attend during the search, and a copy of the list prepared and signed under this section shall be delivered to such occupant or person at his request.

(5) An investigating officer shall, unless otherwise ordered by any court-

(a) on the close of investigations or any proceedings arising therefrom; or (b) with the prior written consent of any officer of the Bank authorized by the Governor to act on his behalf for this purpose, or of any investigating officer superior to him in rank, at any time before the close of investigations, release any property, book or other document seized, detained or removed by him or any other investigating officer, to such person as he determines to be lawfully entitled to the property, book or other document if he is satisfied that it is not required for the purpose of any prosecution or proceedings under this Act, or for the purpose of any prosecution under any other written law.

(6) A record in writing shall be made by the officer effecting any release of any property, book or other document under subsection (5) in respect of such release specifying therein in detail the circumstances of, and the reason for, such release.

(7) Where the investigating officer is unable to determine the person who is lawfully entitled to the property, book or other document or where there is more than one claimant to such property, book or other document, the investigating officer shall report the matter to a Magistrate who shall then deal with the property, book or other document as provided for in subsections 413(2), (3) and (4), sections 414, 415 and 416 of the Criminal Procedure Code

Section 84-Search of person

(1) An investigating officer may search any person whom he has reason to believe has on his person any property, book or other document, or other article whatsoever, necessary, in his opinion, for the purpose of investigation into any offence under this Act, and for the purpose of such search may detain such person for such period as may be necessary to have the search carried out, which shall not in any case exceed twenty-four hours without the authorization of a Magistrate, and may remove him in custody to such place as may be necessary to facilitate such search.

(2) An investigating officer making a search of a person under subsection (1) may seize, detain, or take possession of any property, book or other document, or article, found upon such person for the purpose of the investigation being carried out by him.

(3) No female person shall be searched under this section or under section 83 except by another female.

Section 87-Power to examine persons

87. (1) Where an investigating officer suspects any person to have committed an offence under this Act, he may, if in his opinion it is reasonably necessary to do so for the purposes of investigation into such offence-

(a) order any person orally or in writing to attend before him for the purpose of being examined orally by the investigating officer in relation to any matter which may, in the opinion of the investigation officer, assist in the investigation into the offence;

(b) order any person orally or in writing to produce before the investigating officer books, other documents, property, articles, or things which may, in the opinion of the investigating officer, assist in the investigation into the offence; or

(c) by written notice require any person to furnish a statement in writing made on oath or affirmation setting out therein all such information which may be required under the notice, being information which, in the opinion of the investigating officer, would be of assistance in the investigation into the offence.

(2) A person to whom an order under paragraph (1) (a) or (b), or a written notice under paragraph (1) (c), has been given shall comply with the terms of such order or written notice, as the case may be, and, in particular-

(a) a person to whom an order under paragraph (1)(a) has been given shall attend in accordance with the terms of the order to be examined, and shall continue to so attend from day to day as directed by the investigating officer until the examination is completed, and shall during such examination disclose all information which is within his knowledge, or which is available to him, or which is capable of being obtained by him, in respect of the matter in relation to which he is being examined, whether or not any question is put to him with regard thereto, and where any question is put to him he shall answer the same truthfully and to the best of his knowledge and belief, and shall not refuse to answer any question on the ground that it tends to incriminate him or his spouse;

(b) a person to whom an order has been given under paragraph (1)(b) shall not conceal, hide, destroy, alter, remove from or send out of Malaysia, or deal with, expend, or dispose of, any book, other

document, property, article, or thing specified in the order, or alter or deface any entry in any such book or other document, or cause the same to be done, or assist or conspire to do the same; and

(c) a person to whom a written notice has been given under paragraph (1) (c) shall, in his statement made on oath or affirmation, furnish and disclose truthfully all information required under the notice which is within his knowledge, or which is available to him, or which is capable of being obtained by him, and shall not fail to furnish or disclose the same on the ground that it tends to incriminate him or his spouse.

(3) A person to whom an order or a notice is given under subsection (1) shall comply with such notice or order and with subsection (2) in relation thereto, notwithstanding the provisions of any written law, whether enacted before or after the commencement of this Act, or of any oath, undertaking or requirement of secrecy, to the contrary, or of any obligation under any contract, agreement or arrangement, whether express or implied, to the contrary.

(4) Where any person discloses any information or produces any property, book, other document, article, or thing, pursuant to subsections (1) and (2), neither the first mentioned person, nor any other person on whose behalf or direction or as whose agent or employee, the first mentioned person may be acting, shall, on account of such disclosure or production, be liable to any prosecution for any offence under or by virtue of any law, or to any proceeding or claim in any form or of any description by any person under or by virtue of any agreement or arrangement, or otherwise howsoever.

(5) An investigating officer may seize, take possession of and retain for such duration as he deems necessary, any property, book, other document, article or thing produced before him in the course of an investigation under subsection (1), or search the person who is being examined by him under paragraph (1)(a), or who is producing anything to him under paragraph (1)(b), for ascertaining whether anything relevant to the investigation is concealed, or is otherwise, upon such person.

(6) An examination under paragraph (1) (a) shall be reduced into writing by the investigating officer and shall be read to and signed by the person being examined, and where such person refuses to sign the record, the investigating officer shall endorse thereon under his hand the fact of such refusal and the reasons therefor, if any, stated by the person examined.

(7) The record of an examination under paragraph (1)(a), or a written statement on oath or affirmation made pursuant to paragraph (1)(c), or any property, book, other document, article or thing produced under paragraph (1)(b) or otherwise in the course of an examination under paragraph (1)(a) or under a written statement on oath or affirmation made pursuant to paragraph (1)(c), shall, notwithstanding any written law or rule of law to the contrary, be admissible in evidence in any proceedings in any court-

(a) for, or in relation to, an offence under this Act;

(b) for, or in relation to, any other matter under this Act; or

(c) for, or in relation to, any offence under any other written law, regardless whether such proceedings are against the person who was examined, or who produced the property, book, other document, article or thing, or who made the written statement on oath or affirmation, or against any other person.

Section 99-Other permitted disclosures

Section 97 shall not apply to the disclosure of any information or document-

(a) which the customer, or his personal representative, has given permission in writing to disclose;

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(b) in a case where the customer is declared bankrupt, or, if the customer is a corporation, the corporation is being or has been wound up, in Malaysia or in any country, territory or place outside Malaysia;

(c) where the information is required by a party to a bona fide commercial transaction, or to a prospective bona fide commercial transaction, to which the customer is also a party, to assess the creditworthiness of the customer relating to such transaction, provided that the information required is of a general nature and does not enable the details of the customer's account or affairs to be ascertained;

(d) for the purposes of any criminal proceedings or in respect of any civil proceedings-

(i) between a licensed institution and its customer or his guarantor relating to the customer's transaction with the institution; or

(ii) between the licensed institution and two or more parties making adverse claims to money in a customer's account where the licensed institution seeks relief by way of interpleader;

(e) where the licensed institution has been served a garnishee order attaching moneys in the account of the customer;

(f) to an external bureau established, or to an agent appointed, by the licensed institution with the prior written consent of the Bank;

(g) where such disclosure is required or authorized under any other provision of this Act;

(h) where such disclosure is authorized under any Federal law to be made to a police officer

investigating into any offence under such law and such disclosure to the police officer being, in any case, limited to the accounts and affairs of the person suspected of the offence; or

(i) where such disclosure is authorized in writing by the Bank.

(2) In any civil proceedings under paragraph (1)(b) or (d) where any information or document is likely to be disclosed in relation to a customer's account, such proceedings may, if the court, of its own motion, or on the application of a party to the proceedings, so orders, be held in camera and in such case, the information or document shall be secret as between the court and the parties thereto, and no such party shall disclose such information or document to any other person.

(3) Unless the court otherwise orders, no person shall publish the name, address or photograph of any parties to such civil proceedings as are referred to in subsection (2), or any information likely to lead to the identification of the parties thereto, either during the currency of the proceedings or at any time after they have been concluded.

E. Banker's Book (Evidence) Act 1949(Act33)

Section 7- Court or Judge may order inspection

(1) On the application of any party to a legal proceeding the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings.

(2) An order under this section may be made either on or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed unless the Court or Judge otherwise directs

508. The Mutual Assistance in Criminal Matters Act 2002 is provided for because it remains as part of the legal landscape to enable identification, tracing, freezing or seizure, albeit, on a request.

F. Mutual Assistance in Criminal Matters Act 2002 (Act 621)

Section 31. Request for enforcement of foreign forfeiture order

(1) The appropriate authority of a prescribed foreign State may request the Attorney General—

(a) to assist in the enforcement and satisfaction of a foreign forfeiture order made in any judicial proceedings institute in that prescribed foreign State against property that is reasonably believed to be located in Malaysia; or

(b) where a foreign forfeiture order may be made in judicial proceedings which have been or are to be instituted in that prescribed foreign State, to assist in the restrainin of dealing in any property that is reasonably believed to be located in Malaysia and against which the order may be enforced or which may be available to satisfy the order.

(2) On receipt of a request referred to in subsection (1), the Attorney General may—

(a) in the case of paragraph (1)(a), act or authorize the taking of action under section 32 and the regulations made pursuant to section 44; or

(b) in the case of paragraph (1)(b), act or authorize the taking of action under the regulations made pursuant to section 44, and in that event section 32 and the regulations made pursuant to section 44 shall apply accordingly.

Section 32. Registration of foreign forfeiture order

(1) The Attorney General or a person authorized by him may apply to the High Court for the registration of a foreign forfeiture order.

(2) The High Court may, on an application referred to in subsection (1), register the foreign forfeiture order if it is satisfied—

(a) that the order is in force and not subject to further appeal in the prescribed foreign State;

(b) where a person affected by the order did not appear in the proceedings in the prescribed foreign State, that the person had received notice of such proceedings in sufficient time to enable him to defend those proceedings; and

(c) that enforcing the order in Malaysia would not be contrary to the interests of justice.

(3) For the purpose of subsection (2), the High Court shall take into consideration a certificate referred to in section 34 if tendered.

(4) The High Court shall revoke the registration of a foreign forfeiture order if it appears to the High Court that the order has been satisfied by payment of the amount due under it or by the person against whom it was made serving imprisonment in default of payment or by other means.

(5) Where an amount of money, if any, payable or remaining to be paid under a foreign forfeiture order registered in the High Court under this section is expressed in a currency other than that of Malaysia, the amount shall, for the purpose of any action taken in relation to that order, be converted into the currency of Malaysia on the basis of the Bank's exchange rate prevailing on the date of registration of the order.

(6) For the purposes of subsection (5), a certificate issued by the Bank and stating the exchange rate prevailing on a specified date shall be admissible in any judicial proceedings as evidence of the facts so stated.

(7) In this section, "appeal" includes—

(a) any proceedings by way of discharging or setting aside a judgment; and

(b) an application for a new trial or a stay of execution.

Section 33. Proof of orders, etc., of prescribed foreign State

(1) For the purposes of sections 31 and 32 and the regulations made pursuant to section 44—

(a) any order made or judgment given by a court of a prescribed foreign State purporting to bear the seal of that court or to be signed by any person in his capacity as a judge, magistrate or officer of the court, shall be deemed without further proof to have been duly sealed or to have been signed by that person, as the case may be; and

(b) a document, duly authenticated, that purports to be a copy of any order made or judgment given by a court of a prescribed foreign State shall be deemed without further proof to be a true copy.

(2) A document is duly authenticated for the purpose of paragraph (1)(b) if it purports to be certified by any person in his capacity as a judge, magistrate or officer of the court in question or by or on behalf of the appropriate authority of that prescribed foreign State.

Section 34. Evidence in relation to proceedings and orders in prescribed foreign State

(1) For the purposes of sections 31 and 32 and the regulations made pursuant to section 44, a certificate purporting to be issued by or on behalf of the appropriate authority of a prescribed foreign State stating that—

(a) judicial proceedings have been instituted and have not been concluded, or that judicial proceedings are to be instituted, in that prescribed foreign State;

(b) a foreign forfeiture order is in force and is not subject to appeal;

(c) all or a certain amount of the sum payable under a foreign forfeiture order remains unpaid in that prescribed foreign State, or that other property recoverable under a foreign forfeiture order remains unrecovered in that prescribed foreign State;

(d) a person has been notified of any judicial proceedings in accordance with the law of that prescribed foreign State; or

(e) an order, however described, made by a court of that prescribed foreign State has the purpose of—

(i) recovering, forfeiting or confiscating—

(A) payments or other rewards received in connection with an offence against the law of that prescribed foreign State that is a foreign serious offence, or the value of the payments or rewards; or

(B) property derived or realized, directly or indirectly, from payments or other rewards received in connection with such an offence or the value of such property; or

(ii) forfeiting or destroying, or forfeiting or otherwise disposing of, any drugs or other substance in respect of which an offence against the corresponding drug law of that prescribed foreign State has been committed, or which was used in connection with the commission of such an offence, shall, in any proceedings in a court, be received in evidence without further proof.

(2) In any such proceedings, a statement contained in a duly authenticated document, which purports to have been received in evidence or to be a copy of a document so received, or to set out or summarize evidence given in proceedings in a court in a prescribed foreign State, shall be admissible as evidence of any fact stated in the document.

(3) A document is duly authenticated for the purposes of subsection (2) if it purports to be certified by any person in his capacity as a judge, magistrate or officer of the court in the prescribed foreign State, or by or on behalf of an appropriate authority of that prescribed foreign State.

(4) Nothing in this section shall prejudice the admissibility of any evidence, whether contained in any document or otherwise, which is admissible apart from by virtue of this section.

Section 35. Request for search and seizure

(1) The Attorney General may, on the request of the appropriate authority of a prescribed foreign State, assist in obtaining any thing by search or seizure.

(2) Where, on receipt of a request referred to in subsection (1), the Attorney General is satisfied that-

- (a) the request relates to a criminal matter in that prescribed foreign State in respect of a foreign serious offence; and
 - (b) there are reasonable grounds for believing that the thing to which the request relates is relevant to the criminal matter and is located in Malaysia, the Attorney General, or an authorized officer directed by him, may apply to the court for a warrant under section 36 in respect of premises specified by the Attorney General.
- (3) An application for a warrant referred to in section 36 in respect of any thing in the possession of a financial institution shall be made to the High Court.
- (4) An application for a warrant referred to in section 36 shall specify with sufficient particulars the thing in the possession of a financial institution.

Section 36. Search warrant

- (1) On an application referred to in section 35, the court may issue a warrant authorizing an authorized officer to enter and search the premises specified by the Attorney General if the court is satisfied that-
- (a) an order made under section 23 in relation to any thing on the premises has not been complied with; or
 - (b) the conditions in subsection (2) are fulfilled.
- (2) The conditions referred to in paragraph (1) (b) are-
- (a) that there are reasonable grounds for suspecting that a person specified in the request has committed or has benefited from a foreign serious offence;
 - (b) that there are reasonable grounds for believing that the thing to which the application relates-
 - (i) is likely to be of substantial value, whether by itself or together with another thing, to the criminal matter in respect of which the application is made; and
 - (ii) does not consist of or include items subject to legal privilege; and
 - (c) that the court is satisfied that it is not contrary to the public interest for the warrant to be issued.
- (3) A warrant issued under this section shall be subject to such conditions as the court may specify in the warrant.

Section 37. Additional powers of person executing search warrant, etc.

- (1) Where an authorized officer has entered premises in the execution of a warrant issued under section 36, he may seize and retain any thing that is specified in the warrant, other than items subject to legal privilege.
- (2) An authorized officer may photograph or make a copy of any thing seized under subsection (1).
- (3) Where an authorized officer seizes any thing or takes a photograph or makes a copy of any thing under a warrant, he shall inform the Attorney General and shall, unless the Attorney General otherwise directs, immediately send the thing or the photograph or copy of the thing to the appropriate authority of the prescribed foreign State concerned.
- Any person who hinders or obstructs an authorized officer in the execution of a warrant issued under this section commits an offence and shall on conviction be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both.

509. Furthermore, Malaysia provided the following examples of cases on the implementation of the provision.

Public Prosecutor v Raymond Chia Kin Chwee & Anor [1985] 2 MLJ 436

Section 51 of the Criminal Procedure Code is a general provision to be invoked at any stage of an inquiry, investigation or trial or other proceeding under the Code. From the language it is plain that that section enables the Court or police officer (as the case may be) if it or he considers that the production of any document or material is necessary or desirable, to issue a summons (in the case of the Court) or a written order (in the case of the police officer) to the person in whose possession or power the material or document is believed to be requiring such person to attend and produce the material or document at the time and place as stated in the summons or written order. The first thing to note is that the problem posed before this Court arose out of a criminal proceeding for an offence of forgery under sections 467 and 471 of the Penal Code and therefore the Court which must consider whether the production of the material or document asked for is necessary or

desirable is the Court before which the trial was pending or in which the trial was proceeding.

Mohd Riezuan bin Jalil & Ors v Bank Negara Malaysia [2009] MLJU 1815

The orders being challenged were initially made under section 44, as noted earlier, and again it became necessary to appreciate the wide scope of section 44 on “Freezing of property”. This particular statutory provision reads:

“44. Freezing of Property

(1) Subject to section 50, where an enforcement agency, having the power to enforce the law under which a serious offence is committed, has reasonable grounds to suspect that an offence under subsection 4 (1) or a terrorism financing offence has been or is being or is about to be committed by any person, it may issue an order freezing any property of that person or any terrorist property, as the case may be, whenever the property may be, or in his possession, under his control or due from any source to him”. By subsection (5), an order made under subsection (1) above shall cease to have effect after 90 days from the date of the order, if the person against whom the order was made has not been charged with any offence under this Act or a terrorism financing offence, as the case may be.

"By subsection (6), an enforcement agency shall not be liable for any damages or cost arising directly or indirectly from the making of an order under this section unless it can be proved that the order under subsection (1) was not made in good faith. The statutory provisions referred to the commission of a serious offence being the foundation upon which the freezing order could be made on reasonable grounds to suspect an offence under section 4(1) had been committed. It was evident there was an overlap, given the statutory formula, between BNM's power under BAFIA and its power under section 44 of AMLA. Counsel for BNM, in the course of his submission, referred to the definition of serious offence in section 3 of AMLA, which referred inter alia to any of the offences specified in the Second Schedule. The Second Schedule included, in addition to the section 4(1) offence under AMLA, offences under the Anti Corruption Act 1997 and an offences under BAFIA. Out of the four offences under BAFIA, the section 25 offence of receiving, taking or acceptance of deposits prohibited except under and in accordance with a valid license granted under subsection (4) is included. Thus, given the wide scope of section 4(1) and section 44(1) of AMLA, Defendants counsel was correct to conclude that it was lawful for the freezing order to have been made by BNM.

510. Malaysia referred to Table 12 (Annex 10).

(b) Observations on the implementation of the article

511. The reviewing experts are of the view that Malaysia has partially implemented the provision. AMLATFA regulates all necessary aspects of tracing, freezing and seizure in relation to money laundering and terrorism offences.

512. Also, MACCA regulates relevant aspects of tracing, search and seizure in sections 31 et seq. of MACCA. Freezing is not specifically regulated, although section 37 of MACCA could be used for some aspects of freezing by the Public Prosecutor. However, section 37 is limited to movable property and monetary instruments which, while they may cover the majority of corruption cases, may not be sufficient for all types of cases. The reviewing experts recommend specifying the legislation in this regard.

513. During the country visit, Malaysia provided further information on the value of properties seized and forfeited in 2012

Properties	Value of properties seized (RM)				Value of properties forfeited (RM)			
	MACCA	No of cases	AMLATFA	No of cases	MACCA	No of cases	AMLATFA	No of cases
Cash	29,235,052	98	3,025,510	1	2,388,382	56	190,149	2
Share	-	-	5,333,657	3				
Vehicle	5,718,829	6	-	-	160,000	1	-	-
Landed properties			-	-	-	-	-	-
Perishable items	-	-	-	-	-	-	-	-
Others	58,823	15	-	-	-	-	-	-
Total	35,012,704	119	8,359,167	4	2,548,382	57	190,149	2

Article 31 Freezing, seizure and confiscation

Paragraph 3

3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

514. Malaysia indicated to have partially implemented the provision and explained that it has no provisions for the administration of frozen or seized assets but merely provisions for confiscated assets.

515. A bill for the establishment of a Central Authority to administer assets that have been seized and are yet to be forfeited is currently being drafted. However there is a Standard Operation Procedure on the manner in which seized items are to be handled prior to forfeiture.

516. Legislative measures are as follows:

Provisions under AMLATFA

Section 58-Vesting of forfeited property in the Federal Government

(1) Where any property is forfeited under this Act, the property shall vest in the Government free from any right, interest or encumbrance of any person except a right, interest or encumbrance which is held by a purchaser in good faith for valuable consideration and which is not otherwise null and void under any provision of this Act.

(2) Where any person who holds any encumbrance to which the property is subject claims that he holds the encumbrance as a purchaser in good faith for valuable consideration and that the encumbrance is not otherwise null and void under any provision of this Act, and the Federal Government disputes such claim, the Public Prosecutor may apply to the Sessions Court to determine the question and the court shall determine the question after giving an opportunity to be heard to the person holding the encumbrance and hearing the reply of the Public Prosecutor to any representations which may be made before that court by the person holding the encumbrance.

(3) Where any property is vested in the Federal Government under subsection (1), the vesting shall take effect without any transfer, conveyance, deed or other instrument and where any registration of such vesting is required under any law, the authority empowered to effect the registration shall do so in

the name of such public officer, authority, person or body as the Public Prosecutor may specify.

(4) Where the property vested in the Federal Government under subsection (1) is immovable property, the vesting shall upon production to the Registrar of Titles or the Land Administrator, in Peninsular Malaysia, or to the Registrar of Titles or the Collector of Land Revenue, in Sabah or the Registrar of Titles or the Director of Lands and Surveys, as the case may be, in Sarawak of the order of the court forfeiting the immovable property, or in the case of property forfeited under subsection 55(1), a certificate of the Public Prosecutor certifying that it has been forfeited, be registered in the name of the Federal Lands Commissioner.

Section 62- Disposition of forfeited property

Whenever property that is not required to be destroyed and that is not harmful to the public is forfeited under section 55 or 56, the court or an enforcement agency may, in accordance with the law-

- (a) retain it for official use, or transfer it to the Federal Government; or
- (b) sell it and transfer the proceeds from such sale to the Federal Government.

517. No examples or reports were available.

(b) Observations on the implementation of the article

518. The reviewing experts acknowledge that, while the provision is implemented, Malaysia has drafted a bill to establish a central authority for the administration of such property and welcome the adoption of the bill. Currently, the administration of confiscated property is only regulated by Standard Operating Procedures, and every agency is responsible for the administration of such property.

Article 31 Freezing, seizure and confiscation

Paragraph 4

4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

(a) Summary of information relevant to reviewing the implementation of the article

519. Malaysia indicated that it has provisions primarily in sections 40 and 41 of MACCA and sections 55 and 56 of AMLATFA that specifically deal with properties that have been “transformed”.

520. The Malaysian laws as regards freezing, seizure or confiscation of property stipulated below apply to any property, transformed or converted, so long as it is the subject matter of an offence under MACCA or AMLATFA.

A. The provisions under MACCA

Seizure of proceeds movable property suspected to be the subject matter of an offence or relating to the offence under the Act is carried out under section 33 of the Act;

Order not to part with, deal in, movable property, including any monetary instrument or any accretion to it which is the subject matter of an offence, in bank, etc., is carried out under section 37 of the Act.

Seizure of proceeds immovable property which is the subject matter of an offence under the Act is

carried out under section 38 of the Act;

Prohibition of dealing with property being the subject matter of an offence under this Act, outside of Malaysia, is dealt with under section 39 of the Act;

Forfeiture of property proven to be subject matter of the offence or that such property has been obtained as a result of or in connection with an offence under this Act is carried out under **section 40 and section 41 of the Act.**

Section 40 - Forfeiture of property upon prosecution for an offence

(1) In any prosecution for an offence under this Act, the court shall make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence where-

- (a) the offence is proved against the accused; or
- (b) the offence is not proved against the accused but the court is satisfied-
 - (i) that the accused is not the true and lawful owner of such property; and
 - (ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

(2) Where the offence is proved against the accused but the property referred to in subsection (1) has been **disposed of, or cannot be traced**, the court shall order the accused to pay as a penalty a sum which is **equivalent to the amount** of the gratification **or is, in the opinion of the court, the value of the** gratification received by the accused, and any such penalty shall be recoverable as a fine.

Section 41 - Forfeiture of property where there is no prosecution for an offence

(1) Where in respect of any property seized under this Act there is no prosecution or conviction for an offence under this Act, the Public Prosecutor may, before the expiration of eighteen months from the date of the seizure, apply to a Sessions Court Judge for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under this Act.

(2) The Judge to whom an application is made under subsection (1) shall cause to be published a notice in the Gazette calling upon any person who claims to have an interest in the property to attend before the Court on a date specified in the notice, to show cause as to why the property should not be forfeited.

- (3) Where the Judge to whom an application is made under subsection (1) is satisfied-
- (a) that the property is the subject matter of or was used in the commission of an offence under this Act; and
 - (b) there is no purchase in good faith for valuable consideration in respect of the property, he shall make an order for the forfeiture of the property.

(4) Property in respect of which no application is made under subsection (1) shall, at the expiration of eighteen months from the date of its seizure, be released to the person from whom it was seized.

B. The provisions under AMLATFA

Freezing of property suspected to be in relation to the commission of a serious offence under subsection 4(1) of the Act is carried out under section 44 of the Act;

Seizure of movable property suspected to be the subject matter of an offence under subsection 4(1) of the Act is carried out under section 45 of the Act;

Freezing of moveable property, including any monetary instrument or any accretion to it, which is a subject matter of an offence under subsection 4(1) of the Act, in financial institution is carried out under section 50 of the Act.

Seizure of immovable property being the subject-matter of an offence under subsection 4(1) of the Act is carried out under section 51 of the Act;

Prohibition of dealing with property being the subject-matter of an offence under subsection 4(1) is carried out under section 53 of the Act;

Forfeiture of property proven to be subject-matter of an offence or that such property has been obtained as a result or in connection with an offence under subsection 4(1) of the Act is dealt with under section

55 and section 56 of the Act;

Vesting of forfeited property in the Federal Government is carried out under section 58 of the Act.

Disposition of forfeited property under **section 55 or 56 is dealt with under section 62 of the Act.**

Section 55 - Forfeiture of property upon prosecution for an offence

(1) Subject to section 61, in any prosecution for an offence under subsection 4(1) or a terrorism financing offence, the court shall make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence or which is proved to be terrorist property where-

- (a) the offence is proved against the accused; or
- (b) the offence is not proved against the accused but the court is satisfied-
 - (i) that the accused is not the true and lawful owner of such property; and
 - (ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

(2) Where the offence is proved against the accused but the property referred to in subsection (1) has been **disposed of, or cannot be traced**, the court shall order the accused to pay as a penalty a sum which is **equivalent to, in the opinion of the court, the value of the property**, and any such penalty shall be recoverable as a fine.

(3) In determining whether the property is the subject matter of an offence or has been used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property the court shall apply the standard of proof required in civil proceedings.

Section 56 - Forfeiture of property where there is no prosecution

(1) Subject to section 61, where in respect of any property frozen or seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.

(2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied-

- (a) that the property is the subject matter of or was used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property; and
- (b) that there is no purchaser in good faith for valuable consideration in respect of the property.

(3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.

In determining whether or not the property has been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence or is terrorist property, the court shall apply the standard of proof required in civil proceedings.

521. Malaysia referred to Table 12 (Annex 10).

(b) Observations on the implementation of the article

522. The reviewing experts are of the opinion that Malaysia has not implemented the provision. No regulations in regard to transformed or converted property exist. Currently, only section 40 of MACCA and section 55 of AMLATFA regulate forfeiture cases and address the possibility of forfeiting the equivalent value of property in case the property has been disposed of or cannot be traced. The reviewing experts recommend including such provisions in MACCA and AMLATFA.

Article 31 Freezing, seizure and confiscation

Paragraph 5

5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

(a) Summary of information relevant to reviewing the implementation of the article

523. The issue of intermingled property vis-à-vis lawful property is provided for, not specifically but in a general context, under sections 55 and 56 of AMLATFA 2001 and sections 40 and 41 of MACCA. The rights of a bona fide purchaser are protected in such instances.

A. The provisions of AMLATFA

Section 55- Forfeiture of property upon prosecution for an offence

(1) Subject to section 61, in any prosecution for an offence under subsection 4(1) or a terrorism financing offence, the court shall make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence or which is proved to be terrorist property where-

- (a) the offence is proved against the accused; or
- (b) the offence is not proved against the accused but the court is satisfied-
 - (i) that the accused is not the true and lawful owner of such property; and
 - (ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

(2) Where the offence is proved against the accused but the property referred to in subsection (1) has been disposed of, or cannot be traced, the court shall order the accused to pay as a penalty a sum which is equivalent to, in the opinion of the court, the value of the property, and any such penalty shall be recoverable as a fine.

(3) In determining whether the property is the subject matter of an offence or has been used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property the court shall apply the standard of proof required in civil proceedings.

Section 56-Forfeiture of property where there is no prosecution

(1) Subject to section 61, where in respect of any property frozen or seized under this Act there is no prosecution or conviction for an offence under subsection 4(1) or a terrorism financing offence, the Public Prosecutor may, before the expiration of twelve months from the date of the freeze or seizure, apply to a judge of the High Court for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence, as the case may be, or is terrorist property.

(2) The judge to whom an application is made under subsection (1) shall make an order for the forfeiture of the property if he is satisfied-

- (a) that the property is the subject matter of or was used in the commission of an offence under subsection 4(1) or a terrorism financing offence or is terrorist property; and
- (b) that there is no purchaser in good faith for valuable consideration in respect of the property.

(3) Any property that has been seized and in respect of which no application is made under subsection (1) shall, at the expiration of twelve months from the date of its seizure, be released to the person from whom it was seized.

(4) In determining whether or not the property has been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence or is terrorist property, the court shall apply the standard of proof required in civil proceedings.

Section 61 - Bona fide third parties

(1) The provisions in this Part shall apply without prejudice to the rights of bona fide third parties.

(2) The court making the order of forfeiture under section 55 or the judge to whom an application is made under subsection 56(1) shall cause to be published a notice in the Gazette calling upon any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited.

(3) A third party's lack of good faith may be inferred, by the court or an enforcement agency, from the

objective circumstances of the case.

- (4) The court or enforcement agency shall return the property to the claimant when it is satisfied that-
- (a) the claimant has a legitimate legal interest in the property;
 - (b) no participation, collusion or involvement with respect to the offence under subsection 4(1) or a terrorism financing offence which is the object of the proceedings can be imputed to the claimant;
 - (c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had knowledge, did not freely consent to its illegal use;
 - (d) the claimant did not acquire any right in the property from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and
 - (e) the claimant did all that could reasonably be expected to prevent the illegal use of the property.

B. The provisions of MACCA

Section 40-Forfeiture of property where there is no prosecution

(1) In any prosecution for an offence under this Act, the court shall make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence where-

- (a) the offence is proved against the accused; or
- (b) the offence is not proved against the accused but the court is satisfied-
 - (i) that the accused is not the true and lawful owner of such property; and
 - (ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

(2) Where the offence is proved against the accused but the property referred to in subsection (1) has been disposed of, or cannot be traced, the court shall order the accused to pay as a penalty a sum which is equivalent to the amount of the gratification or is, in the opinion of the court, the value of the gratification received by the accused, and any such penalty shall be recoverable as a fine.

Section 41-Forfeiture of property where there is no prosecution for an offence

(1) Where in respect of any property seized under this Act there is no prosecution or conviction for an offence under this Act, the Public Prosecutor may, before the expiration of eighteen months from the date of the seizure, apply to a Sessions Court Judge for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under this Act.

(2) The Judge to whom an application is made under subsection (1) shall cause to be published a notice in the Gazette calling upon any person who claims to have an interest in the property to attend before the Court on a date specified in the notice, to show cause as to why the property should not be forfeited.

(3) Where the Judge to whom an application is made under subsection (1) is satisfied-

- (a) that the property is the subject matter of or was used in the commission of an offence under this Act; and
- (b) there is no purchase in good faith for valuable consideration in respect of the property, he shall make an order for the forfeiture of the property.

(4) Property in respect of which no application is made under subsection (1) shall, at the expiration of eighteen months from the date of its seizure, be released to the person from whom it was seized.

524. Malaysia referred to Table 12 (Annex 10).

(b) Observations on the implementation of the article

525. The observations under article 30, paragraph 4, are referred to.

Article 31 Freezing, seizure and confiscation

Paragraph 6

6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such

proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

(a) Summary of information relevant to reviewing the implementation of the article

526. Malaysia referred to the information provided in regard to article 31 paragraph 4 of the Convention.

The provision under review is complied with in accordance to the following provisions of AMLATFA:

Section 59-Pecuniary orders

(1) Upon application by an enforcement agency to a Sessions Court, a pecuniary penalty order may be made against a person from whom property is forfeited in respect of **benefits derived** by the person from the commission of an offence under subsection 4(1) or a terrorism financing offence or from terrorist property.

(2) Where-

(a) an application is made to a court for an order under subsection (1) in respect of benefits derived by a person from the commission of an offence under subsection 4(1) or a terrorism financing offence or from terrorist property; and

(b) the court is satisfied that the person derived benefits from the commission of that offence, the court may, if it considers it appropriate, assess in accordance with the manner prescribed by the Minister of Home Affairs by order published in the Gazette, the value of the benefits so derived and order that person to pay to the Federal Government a pecuniary penalty equal to the amount.

(3) Where a forfeiture order has been made under sections 55 and 56 against any property that is proceeds of an offence under subsection 4(1) or a terrorism financing offence or of terrorist property, the pecuniary penalty to be paid under subsection (2) shall be reduced by an amount equal to the value of the property as at the time of making the order under subsection (2).

In determining whether or not any benefit is derived from an offence under subsection 4(1) or a terrorism financing offence or from terrorist property the court shall apply the standard of proof required in civil proceedings.

(b) Observations on the implementation of the article

527. The reviewing experts note that Malaysia has sufficiently implemented the provision, though no cases were provided.

Article 31 Freezing, seizure and confiscation

Paragraph 7

7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

(a) Summary of information relevant to reviewing the implementation of the article

528. Malaysia's legislative measures in relation to the implementation of paragraph 7 of article 31 are as follows:

A. Provision under section 7 of the Bankers' Books (Evidence) Act 1949 (Act 33):

Section 7 - Court or Judge may order inspection

(1) On the application of any party to a legal proceeding the Court or a Judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of

such proceedings.

(2) An order under this section may be made either on or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed unless the Court or Judge otherwise directs.

B. Provisions under section 99 (d) and (h) of the Banking and Financial Institutions Act 1989 (Act 372) -Other permitted disclosures:

(1) Section 97 [Secrecy] shall not apply to the disclosure of any information or document-

(a) which the customer, or his personal representative, has given permission in writing to disclose;

(b) in a case where the customer is declared bankrupt, or, if the customer is a corporation, the corporation is being or has been wound up, in Malaysia or in any country, territory or place outside Malaysia;

(c) where the information is required by a party to a bona fide commercial transaction, or to a prospective bona fide commercial transaction, to which the customer is also a party, to assess the creditworthiness of the customer relating to such transaction, provided that the information required is of a general nature and does not enable the details of the customer's account or affairs to be ascertained;

(d) for the purposes of any criminal proceedings or in respect of any civil proceedings-

(i) between a licensed institution and its customer or his guarantor relating to the customer's transaction with the institution; or

(ii) between the licensed institution and two or more parties making adverse claims to money in a customer's account where the licensed institution seeks relief by way of interpleader;

(e) where the licensed institution has been served a garnishee order attaching moneys in the account of the customer;

(f) to an external bureau established, or to an agent appointed, by the licensed institution with the prior written consent of the Bank;

(g) where such disclosure is required or authorized under any other provision of this Act;

(h) where such disclosure is authorized under any Federal law to be made to a police officer investigating into any offence under such law and such disclosure to the police officer being, in any case, limited to the accounts and affairs of the person suspected of the offence; or

(i) where such disclosure is authorized in writing by the Bank.

(2) In any civil proceedings under paragraph (1)(b) or (d) where any information or document is likely to be disclosed in relation to a customer's account, such proceedings may, if the court, of its own motion, or on the application of a party to the proceedings, so orders, be held in camera and in such case, the information or document shall be secret as between the court and the parties thereto, and no such party shall disclose such information or document to any other person.

(3) Unless the court otherwise orders, no person shall publish the name, address or photograph of any parties to such civil proceedings as are referred to in subsection (2), or any information likely to lead to the identification of the parties thereto, either during the currency of the proceedings or at any time after they have been concluded.

Section 97. Secrecy

(1) No director or officer of any licensed institution or of any external bureau established, or any agent appointed, by the licensed institution to undertake any part of its business, whether during his tenure of office, or during his employment, or thereafter, and no person who for any reason, has by any means access to any record, book, register, correspondence, or other document whatsoever, or material, relating to the affairs or, in particular, the account, of any particular customer of the institution, shall give, produce, divulge, reveal, publish or otherwise disclose, to any person, or make a record for any person, of any information or document whatsoever relating to the affairs or account of such customer.

(2) This section shall not apply to any information or document which at the time of the disclosure is, or has already been made, lawfully available to the public from any source other than the licensed institution, or to any information which is in the form of a summary or collection of information set out in such manner as does not enable information relating to any particular licensed institution or any particular customer of the licensed institution to be ascertained from it.

(3) No person who has any information or document which to his knowledge has been disclosed in contravention of subsection (1) shall in any manner howsoever disclose the same to any other person.

C. Provisions under section 35 and section 36 of MACCA as follows:

Section 35- Investigation of share, purchase account etc.

(1) Notwithstanding the provisions of any other written law or any rule of law, the Public Prosecutor or an officer of the Commission of the rank of Commissioner or above as authorized by the Public Prosecutor, if he is satisfied that it is necessary for the purpose of any investigation into an offence under this Act, may authorize in writing an officer of the Commission to exercise in relation to any bank specified in the authorization all the powers of investigation set out in subsection (2).

(2) An officer of the Commission authorized under subsection (1) may, in relation to the bank in respect of which he so authorized -

(a) inspect and take copies of any bankers book, bank account or any document belonging to or in the possession, custody or control of the bank;

(b) inspect and take copies of any share account, purchase account, expense account or any other account of any person kept in the bank;

(c) inspect the contents of any safe deposit box in the bank or

(d) request for any other information related to any document, account or article referred to in paragraphs (a), (b) and (c).

(3) Notwithstanding anything in subsection (2), an officer of the Commission authorized under subsection (1) may take possession of any book, document, account, title, securities or cash to which he has access under that subsection where in his opinion-

(a) the inspection of them, the copying of them, or the taking of extracts from them, cannot reasonably be undertaken without taking possession of them; they may be interfered with or destroyed unless he takes possession of them; or c) they may be needed as evidence in any prosecution for an offence under this Act or any other written law.

Section 36-Powers to obtain information

(1) Notwithstanding any written law or rule of law to the contrary, an officer of the Commission of the rank of Commissioner and above, if he has reasonable ground to believe, based on the investigation carried out by an officer of the Commission, that any property is held or acquired by any person as a result of or in connection with an offence under this Act, may by written notice-

(a) require that person to furnish a statement in writing on oath or affirmation-

(i) identifying every property, whether movable or immovable, whether within or outside Malaysia, belonging to him or in his possession, or in which he has any interest, whether legal or equitable, and specifying the date on which each of the properties so identified was acquired and the manner in which it was acquired, whether by way of any dealing, bequest, devise, inheritance, or any other manner;

(ii) identifying every property sent out of Malaysia by him during such period as may be specified in the notice;

(iii) setting out the estimated value and location of each of the properties identified under subparagraphs (i) and (ii), and if any of such properties cannot be located, the reason therefor;

(iv) stating in respect of each of the properties identified under subparagraphs (i) and (ii) whether the property is held by him or by any other person on his behalf, whether it has been transferred, sold to, or kept with any person, whether it has been diminished in value since its acquisition by him, and whether it has been commingled with other property which cannot be separated or divided without difficulty;

(v) setting out all other information relating to his properties, business, travel, or other activities as may be specified in the notice; and

(vi) setting out all his sources of income, earnings or assets;

(b) require any relative or associate of the person referred to in paragraph (1)(a), or any other person whom the officer of the Commission of the rank of Commissioner and above has reasonable grounds to believe is able to assist in the investigation, to furnish a statement in writing on oath or affirmation-

(i) identifying every property, whether movable or immovable, whether within or outside Malaysia, belonging to him or in his possession, or in which such person has any interest, whether legal or equitable, and specifying the date on which each of the properties identified was acquired, whether by way of any dealing, bequest, devise, inheritance, or any other manner;

(ii) identifying every property sent out of Malaysia by him during such period as may be specified in the notice;

(iii) setting out the estimated value and location of each of the properties identified under subparagraphs (i) and (ii), and if any of such properties cannot be located, the reason therefor;

(iv) stating in respect of each of the properties identified under subparagraphs (i) and (ii) whether the property is held by him or by any other person on his behalf, whether it has been transferred, sold to, or kept with any person, whether it has been diminished in value since its acquisition by him, and whether it has been commingled with other property which cannot be separated or divided

without difficulty;

(v) setting out all other information relating to each of the properties identified under subparagraphs(i) and (ii), and the business, travel, or other activities of such person; and

(vi) setting out all the sources of income, earnings or assets of such person; and

(c) require any officer of any bank or financial institution, or any person who is in any manner or to any extent responsible for the management and control of the affairs of any bank or any financial institution, to furnish copies of any or all accounts, documents and records relating to any person to whom a notice may be issued under paragraph (a) or (b)

(...)

(6) Where any person discloses an information or produces any accounts, documents or records, in response to a notice under subsection (1), such person, his agent or employee, or any other person acting on his behalf or under his direction, shall not, by reason only of such disclosure or production, be liable to prosecution for any offence under or by virtue of any law,

Section 37 – Order not to part with, deal in, movable property in bank, etc. (see above)

D. Provisions under AMLATFA as follows:

Secrecy obligations overridden

*20. The provisions of this Part shall have effect notwithstanding any obligation as to secrecy or other restriction on the disclosure of information imposed by any written law or otherwise.

Section 49- Public Prosecutor's powers to obtain information

(1) Notwithstanding any law or rule of law to the contrary, the Public Prosecutor, if he has reasonable grounds to believe, based on the investigation carried out under this Act, that an offence under subsection 4 (1) or a terrorism financing offence has been committed, may by written notice-

(2) An officer of any financial institution, or any person who is in any manner or to any extent responsible for the management and control of the affairs of any financial institution, shall furnish a copy of all accounts, books, records, reports or documents relating to any person to whom a notice may be issued under subsection (1).

(3) Every person to whom a notice is sent by the Public Prosecutor under subsection (1) shall, notwithstanding any law or rule of law to the contrary, comply with the terms of the notice within such time as may be specified in the notice, and any person who willfully neglects or fails to comply with the terms of the notice commits an offence and shall, on conviction, be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding one year or to both, and, in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.

(4) Every person to whom a notice or direction is sent by the Public Prosecutor under this section shall be legally bound to state the truth and shall disclose all information which is within his knowledge, or which is available to him, or which is capable of being obtained by him.

(5) Where any person discloses any information or produces any accounts, books, records, reports or documents in response to a notice under subsection (1), such person, his agent or employee, or any other person acting on his behalf or under his direction, shall not, by reason only of such disclosure or production, be liable to prosecution for any offence under any law, or to any proceedings or claim by any person under any law or under any contract, agreement or arrangement, or otherwise.

E. Provisions under sections 35, 36, 37 and 38 of the Mutual Assistance in Criminal Matters Act 2002 (Act 621)

Section 23. Production order for criminal matters

(1) Where a request is made by the appropriate authority of a prescribed foreign State that any particular thing or description of a thing in Malaysia be produced for the purpose of any criminal matter in that prescribed foreign State, the Attorney General or a person duly appointed by him may apply to the court for an order under subsection (3).

(2) An application for an order under subsection (3) in relation to any thing in the possession of a financial institution shall be made only to the High Court.

(3) If, on such an application, the court is satisfied that the conditions referred to in subsection (4) are fulfilled, it may make an order that the person who appears to the court to be in possession

of the thing to which the application relates shall—

(a) produce the thing to an authorized officer for him to take away; or

(b) give an authorized officer access to the thing, within seven days of the date of the order or such other period as the court considers appropriate.

(4) The conditions referred to in subsection (3) are—

(a) that there are reasonable grounds for suspecting that a specified person has committed or benefited from a foreign serious offence;

(b) that there are reasonable grounds for believing that the thing to which the application relates—

(i) is likely to be of substantial value, whether by itself or together with another thing, to the criminal matter in respect of which the application was made; and

(ii) does not consist of or include items subject to legal privilege; and

(c) that the court is satisfied that it is not contrary to the public interest or to any written law for the thing to be produced or access to it to be given.

(5) The proceedings referred to in subsection (3) may be conducted in the presence or absence of the person to whom the criminal proceedings in the prescribed foreign State relates or of his legal representative, if any.

(6) No person who is required by an order under this section to produce or make available any thing for the purposes of any criminal proceedings in a prescribed foreign State shall be required to produce any thing that the person could not be compelled to produce in the proceedings in that prescribed foreign State. (7) A duly certified foreign law immunity certificate is admissible in proceedings under this section as *prima facie* evidence of the matters stated in the certificate.

Section 24. Supplementary provisions regarding production order

(1) Where a court orders a person under section 23 to give an authorized officer access to any thing on any premises, the court may, on the same or subsequent application of an authorized officer, order any person who appears to it to be entitled to grant entry to the premises to allow an authorized officer to enter the premises to obtain access to the thing.

(2) Where any material to which an order under section 23 relates consists of information contained in or accessible by means of any data equipment—

(a) an order under paragraph 23(3)(a) shall have effect as an order to produce the material in a form which can be taken away and which is visible, legible and comprehensible; and

(b) an order under paragraph 23(3)(b) shall have effect as an order to give access to the material in a form which is visible, legible and comprehensible.

(3) A person is not excused from producing or making available any thing by an order under section 23 on the ground that—

(a) the production or making available of the thing might tend to incriminate the person or make the person liable to a penalty; or

(b) the production or making available of the thing would be in breach of an obligation, whether imposed by law or otherwise, of the person not to disclose the existence of the contents of the thing.

(4) An order under section 23—

(a) shall not confer any right to the production of, or of access to, items subject to legal privilege; and

(b) shall have effect notwithstanding any obligations as to secrecy or other restrictions upon the disclosure of information imposed by law or otherwise.

(5) An authorized officer may photograph or make copies of any thing produced or to which access is granted pursuant to an order made under section 23.

(6) Where an authorized officer takes possession of any thing under an order made under section 23 or takes any photograph or makes any copy of the thing pursuant to subsection (5), he shall inform the Attorney General and shall, unless the Attorney General otherwise directs, immediately send the thing or the photograph or copy of the thing to the appropriate authority of the prescribed foreign State concerned.

(7) In this section, “data equipment” means any equipment which—

(a) automatically processes information;

(b) automatically records or stores information;

(c) can be used to cause information to be automatically recorded, stored or otherwise processed on other equipment, wherever situated;

(d) can be used to retrieve information whether the information is recorded or stored in the equipment itself or in other equipment, wherever situated; or

(e) can be used to carry out any combination of the functions specified in paragraphs (a) to (d).

Section 25. Immunities in compliance of production order

(1) No civil or criminal action, other than a criminal action for an offence under section 26, shall lie against any person for—

- (a) producing or giving access to any thing if he had produced or given access to the thing in good faith in compliance with an order made against him under section 23; or
- (b) doing or omitting to do any act if he had done or omitted to do the act in good faith and as a result of complying with such an order.

(2) A person who complies with an order made under section 23 shall not be treated as being in breach of any restriction upon the disclosure of information or thing imposed by law, contract or rules of professional conduct.

Section 26. Failure to comply with production order

Any person who—

- (a) without reasonable excuse contravenes or fails to comply with an order under section 23; or
- (b) in purported compliance with such an order, produces or makes available to an authorized officer any material known to the person to be false or misleading in a material particular without—
 - (i) indicating to the authorized officer that the material is false or misleading and the part of the material that is false or misleading; or
 - (ii) providing correct information to the authorized officer if the person is in possession of, or can reasonably acquire, the correct information, commits an offence and shall on conviction be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both.

35. Request for search and seizure

(1) The Attorney General may, on the request of the appropriate authority of a prescribed foreign State, assist in obtaining any thing by search or seizure.

(2) Where, on receipt of a request referred to in subsection (1), the Attorney General is satisfied that—

- (a) the request relates to a criminal matter in that prescribed foreign State in respect of a foreign serious offence; and
- (b) there are reasonable grounds for believing that the thing to which the request relates is relevant to the criminal matter and is located in Malaysia, the Attorney General, or an authorized officer directed by him, may apply to the court for a warrant under section 36 in respect of premises specified by the Attorney General.

(3) An application for a warrant referred to in section 36 in respect of any thing in the possession of a financial institution shall be made to the High Court.

(4) An application for a warrant referred to in section 36 shall specify with sufficient particulars the thing in the possession of a financial institution.

36. Search warrant

(1) On an application referred to in section 35, the court may issue a warrant authorizing an authorized officer to enter and search the premises specified by the Attorney General if the court is satisfied that—

(a) an order made under section 23 in relation to any thing on the premises has not been complied with; or

(b) the conditions in subsection (2) are fulfilled.

(2) The conditions referred to in paragraph (1)(b) are—

(a) that there are reasonable grounds for suspecting that a person specified in the request has committed or has

benefited from a foreign serious offence;

(b) that there are reasonable grounds for believing that the thing to which the application relates—

(i) is likely to be of substantial value, whether by itself or together with another thing, to the criminal matter in respect of which the application is made; and

(ii) does not consist of or include items subject to legal privilege; and

(c) that the court is satisfied that it is not contrary to the public interest for the warrant to be issued.

(3) A warrant issued under this section shall be subject to such conditions as the court may specify in the warrant.

37. Additional powers of person executing search warrant, etc.

(1) Where an authorized officer has entered premises in the execution of a warrant issued under section 36, he may seize and retain any thing that is specified in the warrant, other than items subject to legal privilege.

(2) An authorized officer may photograph or make a copy of any thing seized under subsection (1).

(3) Where an authorized officer seizes any thing or takes a photograph or makes a copy of any thing under a warrant, he shall inform the Attorney General and shall, unless the Attorney General otherwise directs, immediately send the thing or the photograph or copy of the thing to the appropriate authority of the prescribed foreign State concerned.

(4) Any person who hinders or obstructs an authorized officer in the execution of a warrant issued under this section commits an offence and shall on conviction be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both.

38. Immunities in respect of authorized officer executing search warrant

(1) No civil or criminal action shall lie against any person for-

(a) producing or giving access to any thing if he had produced or given access to the thing in good faith in compliance with a warrant issued under section 36; or

(b) doing or omitting to do any act if he had done or omitted to do the act in good faith and as a result of complying with such a warrant.

(2) A person who complies with a warrant issued under section 36 shall not be treated as being in breach of any restriction upon the disclosure of any information or thing imposed by law, contract or rules of professional conduct.

529. Furthermore, Malaysia provided the following examples of cases on the implementation of the provision.

CITY GROWTH SDN & ANOR v THE GOVERNMENT OF MALAYSIA [2006] 1 MLJ 581

The applicants sought leave to commence proceedings under O 53 r 3 of the Rules of the High Court 1980 (the RHC) for an order of certiorari to quash an order dated 5 July 2004 made by the deputy public prosecutor and served on Hong Leong Bank Bhd (the Hong Leong order) and EON Bank Bhd (the EON Bank order) (collectively referred to as the said orders). The said orders purport to effect a seizure of, inter alia, movable property in the banking accounts of the applicants pursuant to s 50(1) of the Anti-Money Laundering Act 2001 (AMLA). The crucial question that needed determination was whether the said orders of the deputy public prosecutor pursuant to s 50(1) of AMLA was decision reviewable by way of judicial review. Held, dismissing the application for leave:

(1) The order of the deputy public prosecutor is not reviewable under O 53 of the RHC. Section 50(1) of AMLA is part and parcel of the investigation process into an offence under s 4(1) of AMLA. **In order to facilitate the investigation into the offence of money laundering, the law has provided with the Public Prosecutor the power to assist the investigating officer. Clearly, s 50(1) of AMLA was enacted to enable the Public Prosecutor or his deputy to make an order of seizure of movable properties in the possession of the financial institutions by ordering the financial institutions not to part, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied. Thus, by issuing the said orders, the deputy public prosecutor was merely exercising a function under AMLA (see para 12).**

(2) Otherwise if all decisions and action of public authority of this nature are amendable to courts review, then the government machinery may not be able to function smoothly. The investigation process of all law enforcement agencies will be open to constant judicial review (see para 15).

530. Regarding the number of suspicious transaction reports (STRs) received from domestic reporting authorities, the Central Bank of Malaysia provided the following

statistics: 12,787 (2009); 16,636 (2010); 27,857 (2011); 7,962 (January to April 2012). Regarding the number of STRs exchanged with Bank or competent authorities of foreign States: 1,486 (2009); 1,029 (2010); 2,324 (2011) and 991 (Jan-April 2012). Regarding money laundering criminal prosecutions / convictions:

- Prosecutions: 106 money laundering cases (from 2004-December 2010); 18 cases (2011); 3 cases (as at March 2012)
- Convictions: 15 convictions (from 2004-December 2010); 13 convictions (2011); 2 convictions (as at March 2012).

No information was available on the number of STRs received from Bank/ FIU or competent authorities of other States.

(b) Observations on the implementation of the article

531. The reviewing experts note that Malaysia has sufficiently implemented the provision and that bank secrecy restrictions are not a challenge in regard to the investigation and seizure of bank, financial and commercial records, according to the regulations in the Bankers' Books (Evidence) Act 1949 (Act 33), the Banking and Financial Institutions Act 1989 (Act 372), MACCA and AMLATFA, as well as the Mutual Assistance in Criminal Matters Act 2002 (Act 621) as cited in the response of Malaysia.

532. Through the order of a judge on application of any party to a legal proceeding, or upon request by a Public Prosecutor or an officer of the MACC of the rank of Commissioner or above, such records have to be made available or can be seized.

533. During the country visit, Malaysian officials reported that bank and financial records are routinely requested. Such information can also be provided according to the Mutual Assistance in Criminal Matters Act to requesting countries (see also article 46, paragraph 2 below). Malaysia is encouraged to continue to ensure that bank secrecy requirements do not unduly hinder the objectives of the Convention. This may be done through monitoring.

Article 31 Freezing, seizure and confiscation

Paragraph 8

8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.

(a) Summary of information relevant to reviewing the implementation of the article

534. Regarding the ability of officers of the Commission to question and require a suspect/offender to demonstrate the origins of suspicious property, Malaysia cited the following laws.

A. Provisions under MACCA:

Section 36 -Powers to obtain information

(1) Notwithstanding any written law or rule of law to the contrary, an officer of the Commission of the rank of Commissioner and above, if he has reasonable ground to believe, based on the investigation carried

out by an officer of the Commission, that any property is held or acquired by any person as a result of or in connection with an offence under this Act, may by written notice-

- (a) require that person to furnish a statement in writing on oath or affirmation-
- (i) identifying every property, whether movable or immovable, whether within or outside Malaysia, belonging to him or in his possession, or in which he has any interest, whether legal or equitable, and specifying the date on which each of the properties so identified was acquired and the manner in which it was acquired, whether by way of any dealing, bequest, devise, inheritance, or any other manner;
 - (ii) identifying every property sent out of Malaysia by him during such period as may be specified in the notice;
 - (iii) setting out the estimated value and location of each of the properties identified under subparagraphs (i) and (ii), and if any of such properties cannot be located, the reason therefor;
 - (iv) stating in respect of each of the properties identified under subparagraphs (i) and (ii) whether the property is held by him or by any other person on his behalf, whether it has been transferred, sold to, or kept with any person, whether it has been diminished in value since its acquisition by him, and whether it has been commingled with other property which cannot be separated or divided without difficulty;
 - (v) setting out all other information relating to his properties, business, travel, or other activities as may be specified in the notice; and
 - (vi) setting out all his sources of income, earnings or assets;
- (b) require any relative or associate of the person referred to in paragraph (1)(a), or any other person whom the officer of the Commission of the rank of Commissioner and above has reasonable grounds to believe is able to assist in the investigation, to furnish a statement in writing on oath or affirmation-
- (i) identifying every property, whether movable or immovable, whether within or outside Malaysia, belonging to him or in his possession, or in which such person has any interest, whether legal or equitable, and specifying the date on which each of the properties identified was acquired, whether by way of any dealing, bequest, devise, inheritance, or any other manner;
 - (ii) identifying every property sent out of Malaysia by him during such period as may be specified in the notice;
 - (iii) setting out the estimated value and location of each of the properties identified under subparagraphs (i) and (ii), and if any of such properties cannot be located, the reason therefor;
 - (iv) stating in respect of each of the properties identified under subparagraphs (i) and (ii) whether the property is held by him or by any other person on his behalf, whether it has been transferred, sold to, or kept with any person, whether it has been diminished in value since its acquisition by him, and whether it has been commingled with other property which cannot be separated or divided without difficulty;
 - (v) setting out all other information relating to each of the properties identified under subparagraphs (i) and (ii), and the business, travel, or other activities of such person; and
 - (vi) setting out all the sources of income, earnings or assets of such person; and
- (c) require any officer of any bank or financial institution, or any person who is in any manner or to any extent responsible for the management and control of the affairs of any bank or any financial institution, to furnish copies of any or all accounts, documents and records relating to any person to whom a notice may be issued under paragraph (a) or (b).

(2) Every person to whom a notice is sent by the officer of the Commission of the rank of Commissioner and above under subsection (1) shall, notwithstanding any written law or rule of law to the contrary, comply with the terms of the notice within such time as may be specified therein, and any person who willfully neglects or fails to comply with the terms of the notice commits an offence and shall on conviction be liable to imprisonment for a term not exceeding five years and to a fine not exceeding one hundred thousand ringgit.

(3) Where the officer of the Commission of the rank of Commissioner and above has reasonable grounds to believe that any officer of a public body who has been served with the written notice referred to in subsection (1) owns, possesses, controls or holds any interest in any property which is excessive, having regard to his present or past emoluments and all other relevant circumstances, such officer of the Commission may by written direction require him to furnish a statement on oath or affirmation explaining how he was able to own, possess, control or hold such excess and if he fails to explain satisfactorily such excess, he commits an offence and shall on conviction be liable to-

- (a) imprisonment for a term not exceeding twenty years; and
- (b) a fine which is not less than five times the value of the excess, if the excess is capable of being valued, or ten thousand ringgit, whichever is the higher.

(4) Every person to whom a direction is sent by such officer of the Commission under subsection (3) shall, notwithstanding any written law or rule of law to the contrary, comply with the terms of the direction within such time as may be specified in the direction, and if such person willfully neglects or fails to comply with such direction, he commits an offence and shall on conviction be liable to-

- (a) imprisonment for a term not exceeding twenty years; and
 - (b) a fine which is not less than five times the value of the excess, if the excess is capable of being valued, or ten thousand ringgit, whichever is the higher.
- (5) Every person to whom a notice or direction is sent by an officer of the Commission of the rank of Commissioner and above under this section shall be legally bound to state the truth and shall disclose all information which is within his knowledge, or which is available to him, or which is capable of being obtained by him.
- (6) Where any person discloses an information or produces any accounts, documents or records, in response to a notice under subsection (1), such person, his agent or employee, or another person acting on his behalf or under his direction, shall not, by reason only of such disclosure or production, be liable to prosecution for any offence under or by virtue of any law, or to any proceeding or claim by any person under or by virtue of any law or under or by virtue of any contract, agreement or arrangement, or otherwise.
- (7) Subsection (6) shall not bar, prevent or prohibit the institution of any prosecution for any offence-
- (a) as provided by this section;
 - (b) of giving false evidence in relation to any statement on oath or affirmation furnished to an officer of the Commission of the rank of Commissioner and above pursuant to this section; or
 - (c) provided for in section 27.

B. Provisions under AMLATFA:

49. Public Prosecutor's powers to obtain information

- (1) Notwithstanding any law or rule of law to the contrary, the Public Prosecutor, if he has reasonable grounds to believe, based on the investigation carried out under this Act, that an offence under subsection 4(1) or a terrorism financing offence has been committed, may by written notice-
- (a) require any person suspected of having committed such offence;
 - (b) any relative or associate of the person referred to in paragraph (a); or
 - (c) any other person whom the Public Prosecutor has reasonable grounds to believe is able to assist in the investigation, to furnish a statement in writing on oath or affirmation-
 - (aa) identifying every property, whether movable or immovable, whether in or outside Malaysia, belonging to him or in his possession, or in which he has any interest, whether legal or equitable, and specifying the date on which each of the properties so identified was acquired and the manner in which it was acquired, whether by way of any dealing, bequest, devise, inheritance, or any other manner;
 - (bb) identifying every property sent out of Malaysia by him or on his behalf during such period as may be specified in the notice;
 - (cc) setting out the estimated value and location of each of the properties identified under paragraphs (aa) and (bb), and if any of such properties cannot be located, the reason for it;
 - (dd) stating in respect of each of the properties identified under paragraphs (aa) and (bb) whether the property is held by him or by any other person on his behalf, whether it has been transferred, sold to, or kept with any person, whether it has been diminished in value since its acquisition by him, and whether it has been commingled with other property which cannot be separated or divided without difficulty;
 - (ee) setting out all other information relating to his property, business, travel, or other activities as may be specified in the notice; and
 - (ff) setting out all his sources of income, earnings or property.
- (2) An officer of any financial institution, or any person who is in any manner or to any extent responsible for the management and control of the affairs of any financial institution, shall furnish a copy of all accounts, books, records, reports or documents relating to any person to whom a notice may be issued under subsection (1).
- (3) Every person to whom a notice is sent by the Public Prosecutor under subsection (1) shall, notwithstanding any law or rule of law to the contrary, comply with the terms of the notice within such time as may be specified in the notice, and any person who willfully neglects or fails to comply with the terms of the notice commits an offence and shall, on conviction, be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding one year or to both, and, in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.
- (4) Every person to whom a notice or direction is sent by the Public Prosecutor under this section shall be legally bound to state the truth and shall disclose all information which is within his knowledge, or which is available to him, or which is capable of being obtained by him.
- (5) Where any person discloses any information or produces any accounts, books, records, reports or documents in response to a notice under subsection (1), such person, his agent or employee, or any other

person acting on his behalf or under his direction, shall not, by reason only of such disclosure or production, be liable to prosecution for any offence under any law, or to any proceedings or claim by any person under any law or under any contract, agreement or arrangement, or otherwise.

(6) Subsection (5) shall not bar, prevent or prohibit the institution of any prosecution for any offence as provided by this section or the giving of false information in relation to any statement on oath or affirmation furnished to the Public Prosecutor pursuant to this section.

(4) In determining whether or not the property has been obtained as a result of or in connection with an offence under subsection 4(1) or a terrorism financing offence or is terrorist property, the court shall apply the standard of proof required in civil proceedings.

535. Furthermore, Malaysia provided the following examples of cases on the implementation of the provision.

PP lwn Abdul Aziz Abdullah [2011] 6 CLJ 700

536. Malaysia also referred to cases where an offender had been required to demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation.

PP lwn Abdul Aziz Abdullah [2011] 6 CLJ 700

PP v Tan Sri Muhammad Muhammad Taib [1999] 6 CLJ 135

The defendant, the former Menteri Besar (Chief Minister) of the State of Selangor, was charged under s. 25(2) of the Prevention Act 1961 (PCA) for failing to declare certain land properties registered in his and his wife's name respectively. The defendant argued that the prosecution failed to adduce any evidence that the notice issued to the defendant pursuant to s. 25(1)(a) of the PCA 1961 was issued in the course of any investigation or proceeding. As this was a necessary part of the prosecution evidence, the prosecution case must therefore fail. On the other hand, the prosecution argued that the court could presume that the issue of the notice was regularly made in accordance with s. 25 of the PCA by virtue of s. 114(e) of the Evidence Act 1950. Apart from the above, the defendant argued that as the beneficial ownership of the properties concerned had been disposed off, it could not be said that the said properties still belonged to him. Therefore, it could not be said that he had willfully neglected or failed to declare them within s. 25(2) of the PCA. Held:

[1] Unless the notice had been set aside, it must be presumed at this stage of the prosecution case, that the act of the Deputy Public Prosecutor in issuing it had been regularly performed and the notice regularly issued in the course of an investigation or proceeding. The notice itself having been produced, and stating clearly that it was issued pursuant to s. 25(1) (a) of the PCA, was sufficient evidence of the existence of an investigation. It was not necessary to proceed behind the notice unless there was evidence suggesting it was improperly or irregularly issued.

[2] It was clear that there was neglect or failure to declare the properties concerned. But to constitute an offence under s. 25(2) of the PCA, the neglect or failure must be willful. Whether the act was willful or not was something especially within the knowledge of the defendant and s. 106 of the Evidence Act 1950 was relevant in this respect. The burden was upon the defendant to prove that there was some other intention.

[3] Under the National Land Code 1965, the registered proprietor has an indefeasible right, including that of exclusive possession, and in view of s. 110 of the Evidence Act 1950, it is upon the registered proprietor to prove that he is not actually the owner.

[4] Equitable ownership may be separate from legal ownership. The strong presumption of ownership upon a registered proprietor is rebuttable by evidence showing

otherwise. In this instance, the testimony of the defendant and his wife that they had parted with all beneficial interest in the respective properties was corroborated by the unshaken testimony of the transferees.

[5] By virtue of s. 182A (iii) of the Criminal Procedure Code, the prosecution had not proved its case beyond reasonable doubt. [Order of acquittal.]

PP v Kow Yew Lee @ Ah Kow [1995] 1 CLJ 706

The accused was charged with an offence of failing to comply with the requirements of a notice under s. 25 of the Prevention of Corruption Act 1961 (the Act) issued by the DPP at the request of the Anti Corruption Agency (ACA). At the close of the case for the prosecution, the learned Sessions Court Judge acquitted the accused, holding that the prosecution had failed to make out a prima facie case due to the following:

- (1) there were doubts that the copy of the notice (Ex. P1) had the same contents as the original notice as there were several cancellation marks in the said exhibit;
- (2) no explanation was given by the prosecution with regard to the several cancellation marks appearing in P1;
- (3) the heading to P1 refers to a non-existent Act, namely "The Prevention of Corruption Act No:57 of 1971";
- (4) exhibit P4 was introduced contrary to the provisions of s. 66 of the Evidence Act 1950, namely, no notice was given by the prosecution of its intention to introduce secondary evidence;
- (5) the DPP concerned (PW1) did not give sufficient consideration to the notice when he issued it.

On appeal by the prosecution, the question that arose was whether the prosecution had established, that a valid and lawful notice was issued under s. 25(1) of the Act, that the respondent was served with such a notice and, whether the respondent willfully disregarded the requirements of the notice. During the course of the trial, after the prosecution had closed its case, the prosecution applied to recall certain witnesses. The learned Sessions Court Judge allowed the application and treated this part of the case as an "enquiry". The further question that arose was whether there was any provision in the Criminal Procedure Code (the Code) providing for the holding of an "enquiry". Held:

[1] From the evidence adduced by the prosecution it could not be seen how the Sessions Court Judge could come to the conclusion that PW1 did not give sufficient consideration when he issued the notice. PW7 had brought the letter (P4) from the ACA when he met PW1. P4 is an official letter and it bore the reference numbers of the ACA's general correspondence file and the relevant investigation papers. PW9 gave evidence that the investigation papers were opened based upon a police report.

[2] In the circumstances, the learned Judge's decision that PW1 had not given sufficient consideration when he issued the notice to the respondent was grossly against the weight of evidence as there was nothing to suggest that PW1 had issued the notice without considering the merits of the application. Further there was no material to show that PW1 had exercised his discretion unlawfully nor was there anything to show that he had abused his power in issuing the notice to the respondent.

[3] The effect of allowing an application to recall witnesses after the prosecution had closed its case would be that the trial should simply proceed as if the prosecution had not closed its case. The holding of an "enquiry" is an irregularity as it is not provided for in the Criminal Procedure Code. Nevertheless the irregularity of holding the "enquiry" was curable by s. 422 of the Code as it had not occasioned a failure of justice.

[4] In the circumstances the evidence adduced at the "enquiry" formed part of the prosecution case and the said evidence clearly showed that there were no cancellation

marks when P1 was introduced as an exhibit. In any event the respondent was not prejudiced by the cancellation marks as his writing and signature appears on it and furthermore he has been served with the original copy.

[5] The error in quoting the year of the Act in the notice as "1971" rather than "1961" was not material and neither was it so defective or misleading so as to occasion a failure of justice and vitiate the notice. Following the principle enunciated in the case of Lee Chiang Seng & 9 Ors. v. PP, that a mistake as to a matter of form, namely, an incorrect citation of an Act, is not so defective as to vitiate the conviction, the error in naming the year of the Act is not so defective as to vitiate the notice issued by the DPP under the Act. It is clear that there is only one Prevention of Corruption Act and that it was revised in 1971. In the circumstances it could not be said that the error in naming the year of the Act had created a doubt in the prosecution's case.

[6] Although it is true that the letter P4 is a carbon copy, it is still a public document as defined under s. 74 of the Evidence Act 1950 and is certainly admissible under s. 65 of the same Act. In the circumstances, no notice as contemplated by s. 66 of the Evidence Act needed to be given when P4 was introduced.

[7] **The prosecution evidence had shown that the respondent had failed to comply with the terms of the notice when he willfully neglected or failed to include the existence and details of cash in a joint savings account with Public Finance Berhad when he submitted a statutory declaration pursuant to the notice issued to him under s. 25 of the Act.**

[8] An appeal is merely a continuation of the trial and throws open all the evidence to reexamination in order to determine whether or not the various findings of the trial Court are correct. From a review of the record of appeal and the grounds of decision of the Sessions Court Judge, it was clear that the learned Judge's decision was grossly against the weight of evidence. The prosecution case clearly showed that they had established the charge against the respondent beyond reasonable doubt. March 1995

[Order of acquittal reversed. Respondent ordered to be called to enter upon his defense.

Case remitted back to Sessions Court for continuation of trial before the same Judge]

(b) Observations on the implementation of the article

537. The reviewing experts note that Malaysia has sufficiently implemented the provision.

Article 31 Freezing, seizure and confiscation

Paragraph 9

9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

(a) Summary of information relevant to reviewing the implementation of the article

538. Malaysia referred to its response to article 31 paragraph (5) regarding the protection of rights of bona fide third parties.

A. Provisions under AMLTFA

Section 61. Bona fide third parties

(1) The provisions in this Part shall apply without prejudice to the rights of bona fide third parties.

(2) The court making the order of forfeiture under section 55 or the judge to whom an application is made under subsection 56(1) shall cause to be published a notice in the Gazette calling upon any third party who claims to have any interest in the property to attend before the court on the date specified in the notice to show cause as to why the property shall not be forfeited.

(3) A third party's lack of good faith may be inferred, by the court or an enforcement agency, from the objective circumstances of the case.

(4) The court or enforcement agency shall return the property to the claimant when it is satisfied that-

- (a) the claimant has a legitimate legal interest in the property;
- (b) no participation, collusion or involvement with respect to the offence under subsection 4(1) or a terrorism financing offence which is the object of the proceedings can be imputed to the claimant;
- (c) the claimant lacked knowledge and was not intentionally ignorant of the illegal use of the property, or if he had
- (d) knowledge, did not freely consent to its illegal use; the claimant did not acquire any right in the property from a person proceeded against under circumstances that give rise to a reasonable inference that any right was transferred for the purpose of avoiding the eventual subsequent forfeiture of the property; and
- (e) the claimant did all that could reasonably be expected to prevent the illegal use of the property

B. Provisions under MACCA

Section 40 - Forfeiture of property upon prosecution for an offence

(1) In any prosecution for an offence under this Act, the court shall make an order for the forfeiture of any property which is proved to be the subject matter of the offence or to have been used in the commission of the offence where-

- (a) the offence is proved against the accused; or
- (b) the offence is not proved against the accused but the court is satisfied-
 - (i) that the accused is not the true and lawful owner of such property; and
 - (ii) that no other person is entitled to the property as a purchaser in good faith for valuable consideration.

(2) Where the offence is proved against the accused but the property referred to in subsection (1) has been disposed of, or cannot be traced, the court shall order the accused to pay as a penalty a sum which is equivalent to the amount of the gratification or is, in the opinion of the court, the value of the gratification received by the accused, and any such penalty shall be recoverable as a fine.

Section 41 - Forfeiture of property where there is no prosecution for an offence

(1) Where in respect of any property seized under this Act there is no prosecution or conviction for an offence under this Act, the Public Prosecutor may, before the expiration of eighteen months from the date of the seizure, apply to a Sessions Court Judge for an order of forfeiture of that property if he is satisfied that such property had been obtained as a result of or in connection with an offence under this Act.

(2) The Judge to whom an application is made under subsection (1) shall cause to be published a notice in the Gazette calling upon any person who claims to have an interest in the property to attend before the Court on a date specified in the notice, to show cause as to why the property should not be forfeited.

(3) Where the Judge to whom an application is made under subsection (1) is satisfied-

- (a) that the property is the subject matter of or was used in the commission of an offence under this Act; and
- (b) there is no purchase in good faith for valuable consideration in respect of the property, he shall make an order for the forfeiture of the property.

(4) Property in respect of which no application is made under subsection (1) shall, at the expiration of eighteen months from the date of its seizure, be released to the person from whom it was seized.

Provisions under the Criminal Procedure Code

Section 413 CPC Procedure by police on seizure of property

(1) The seizure or finding by any police officer of property taken under section 20 or alleged or suspected to have been stolen or found under circumstances which create suspicion of the commission of any offence shall be immediately reported to a Magistrate, who shall make such order as he thinks fit respecting the delivery of the property to the person entitled to the possession of it, or, if that person cannot be ascertained, respecting the custody and production of the property.

(2) If the person so entitled is known the Magistrate may order the property to be delivered to him on

such conditions, if any, as the Magistrate thinks fit, and shall in that case cause a notice to be served on that person informing him of the terms of the order and requiring him to take delivery of the property within such period from the date of the service of the notice (not being less than forty-eight hours) as the Magistrate may in the notice prescribe.

(3) If that person is unknown the Magistrate may direct that the property be detained in police custody, and the Chief Police Officer shall, in that case, issue a public notification specifying the articles of which the property consists and requiring any person who has any claim to it to appear before him and establish his claim within

six months from the date of the public notification: Provided that, where it is shown to the satisfaction of the Magistrate that the property is of no appreciable value, or that its value is so small as, in the opinion of the Magistrate, to render impractical the sale, as hereinafter provided, of the property, or as to make its detention in police custody unreasonable in view of the expense or inconvenience that would thereby be involved, the Magistrate may order the property to be destroyed or otherwise disposed of, either on the expiration of such period after the publication of notification above referred to as he may determine or immediately as he thinks fit.

(4) Every notification under subsection (3) shall, if the value of the property amounts to fifty ringgit, be published in the Gazette.

539. Furthermore, Malaysia provided the following examples of cases on the implementation of the provision.

540. PP lwn Abdul Aziz Abdullah [2011] 6 CLJ 700

Ski Leasing Sdn Bhd v PP [1996] 5 MLJ 184

The appellant claims to be the owner of three vehicles which were leased to one Pulumaju Sdn Bhd and upon default made by them, the three vehicles were seized by the appellant from the custody of one Peter Chia. Two of the vehicles were hired by the second respondent while the other one by the third respondent to the said Peter Chia. Three days later Peter Chia and another made a police report of the seizure. The appellant, through their servant also made a police report. Based on these reports, the police made a constructive seizure of the vehicles. The police thereafter reported the seizure to the magistrate. The magistrate, acting under s 413 of the Criminal Procedure Code (the CPC) ordered that the vehicles be delivered temporary in possession of the second and third respondent on the condition that a bond be deposited. The appellant now appeals against that decision of the magistrate. The issues before the court were (i) whether the seizure was lawful despite being carried out under s 20 of the CPC which was not applicable; (ii) who was entitled to the possession of the property seized; and (iii) whether there was a right of appeal from the magistrate's order.

Held, setting aside the magistrate's order and allowing the appeal:

(1) In this case there was sufficient ground for the police to suspect that an offence may have been committed as a result of the allegation that the chassis numbers had been tampered with. Therefore, it matters not that the police were erroneous in stating that the matter came under s 20 of the CPC since there was also the allegation that there was cheating which allegation would embody dishonesty, an element of cheating. The police were therefore justified in seizing and reporting the seizure of the vehicles to the magistrate pursuant to s. 413 of the CPC (see p 188F-G).

(2) The fact that the appellant was last in possession was enough to tilt the balance in favour of the appellant, especially so when the second and third respondents were not able to establish that the possession by the appellant just before seizure by the police was unlawful, it being the law that the vehicles should normally be returned to the person from whom they were seized (see p 190A-C); [*184] UMBC Finance Bhd lwn Amtek Motors Sdn Bhd & Satu Lagi [1993] 4 CLJ 428 followed.

(3) An order made by a magistrate under s 413 of the CPC can be appealed against or can

be revised by the High Court. In any event, s 307 of the CPC does allow an appeal against an order of a magistrate made under s 413 (see p 192D); UMBC Finance Bhd lwn Amtek Motors Sdn Bhd & Satu Lagi [1993] 4 CLJ 428 distinguished.

Hii Su Choo v Gading [1998] 1 MLJ 720

The respondent had alleged that a jar belonging to her late husband -- which was in the possession of the appellants (the applicants) -- was stolen in 1986. An inquiry under s 413 of the Criminal Procedure Code (FMS Cap 6) (the CPC) was held by the magistrate after which it was ordered that the jar be delivered to the respondent unconditionally. The applicants filed a notice of appeal against the order of the magistrate. It was submitted that s 413 of the CPC concerns possession and it was not for the criminal court to decide who was the rightful owner. The applicants alleged that they purchased the jar in 1986 from a shop and a receipt was issued. They were in possession of the jar immediately prior to the seizure by the police. It was argued that the jar should be returned to them pending the disposal of the case by the police. It was also argued that if there was any claim by the respondent, the matter should be referred to a civil court. Held, aside the order of the magistrate and ordering that the jar be delivered to the applicants:

The duty of the magistrate under s 413(1) of the CPC is to make an inquiry as to the person entitled to possession and to order possession to be given to him. The magistrate deciding the case under this section should not decide any question of title but must confine his order only to question of possession. In the present case, the applicants were bona fide purchasers of the jar. There was nothing to suggest that the possession of the jar by the applicants was dishonest or unlawful. Accordingly, the applicants were the persons entitled to the possession of the jar. Therefore, the magistrate was wrong in ordering that the jar be given to the respondent as the magistrate had gone into the issue of who had title (ownership) of the jar. The issue of whether the respondent had positively identified the jar not produced in court as the one reportedly stolen from her late husband involved question of title and the proper forum to adjudicate on it is a civil court (see pp 724C-I and 725A); Lakshmi Chand v Gopikisan AIR 1936 Bom 171 followed. Obiter: There is no right of appeal in respect of an inquiry under s 413 of the CPC. Therefore, the hearing of this appeal should be by way of revision under s 325 of the CPC.

(b) Observations on the implementation of the article

541. The reviewing experts note that Malaysia has sufficiently implemented the provision.

Article 32 Protection of witnesses, experts and victims

Paragraph 1

1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.

(a) Summary of information relevant to reviewing the implementation of the article

542. Malaysia has enacted provisions for the protection of witnesses, whistleblowers and informers and cited the following legislative measures:

Witness Protection Act 2009 (Act 696)

Section 2 - Interpretation

witness means-

- (a) a person who has given or who has agreed to give evidence on behalf of the Government in a criminal proceeding;
- (b) a person who has given or who has agreed to give evidence, otherwise than as mentioned in paragraph (a), in relation to the commission or possible commission of an offence;
- (c) a person who has provided any information, a statement or assistance to a public officer or an officer of a public authority in relation to an offence;
- (d) a person who, for any other reason, may require protection or assistance under the Programme; or
- (e) a person who, because of his relationship to or association with any of the persons referred to in paragraphs (a) to (d), may require protection or assistance under the Programme.

Whistleblower Protection Act 2010 (Act 711)

Section 7 - Whistleblower protection

A whistleblower shall, upon receipt of the disclosure of improper conduct by any enforcement agency under section 6, be conferred with whistleblower protection under this Act as follows:

- (a) protection of confidential information;
 - (b) immunity from civil and criminal action; and
 - (c) protection against detrimental action, and for the purpose of paragraph (c), the protection shall be extended to any person related to or associated with the whistleblower.
- (2) A whistleblower protection conferred under this section is not limited or affected in the event that the disclosure of improper conduct does not lead to any disciplinary action or prosecution of the person against whom the disclosure of improper conduct has been made.
- (3) This Act does not limit the protection conferred by any other written law to any person in relation to information given in respect of the commission of an offence.

Section 8 - Protection of confidential information

- (1) Any person who makes or receives a disclosure of improper conduct or obtain confidential information in the course of investigation into such disclosure shall not disclose the confidential information or any part thereof.
- (2) Subject to subsection (3), confidential information shall not be disclosed or be ordered or required to be disclosed in any civil, criminal or other proceedings in any court, tribunal or other authority.
- (3) If any books, documents or papers which are in evidence or liable to inspection in any civil, criminal or other proceedings in any court, tribunal or other authority whatsoever contain any entry in which any whistleblower is named or described or which might lead to his discovery, the court, tribunal or other authority before which the proceeding is had shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the whistleblower from discovery, but no further.
- (4) Any person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding ten years or to both.

Section 9 - Immunity from civil and criminal action

Subject to subsection 11(1), a whistleblower shall not be subject to any civil or criminal liability or any liability arising by way of administrative process, including disciplinary action, and no action, claim or demand may be taken or made against the whistleblower for making a disclosure of improper conduct.

Section 10 - Protection against detrimental action

- (1) No person shall take detrimental action against a whistleblower or any person related to or associated with the whistleblower in reprisal for a disclosure of improper conduct.

Abduction and Criminal Intimidation of Witness Act 1947 (Act 191)

Section 5 - Criminal intimidation to impede the course of justice

Whoever commits criminal intimidation-

- (a) with intent to impede the course of justice; or
- (b) so that the course of justice is thereby impeded, shall be punished with imprisonment which may extend to ten years and shall also be liable to fine.

Specific provisions for protection of informers and information under section 65 of MACCA

Section 65-Protection of informers and information

- (1) Subject to subsection (2), where any complaint made by an officer of the Commission states that the complaint is made in consequence of information received by the officer making the complaint, the information referred to in the complaint and the identity of the person from whom such information is received shall be secret between the officer who made the complaint and the person who gave the information, and everything contained in such information, identity of the person who gave the information and all other circumstances relating to the information, including the place where it was given, shall not be disclosed or be ordered or required to be disclosed in any civil, criminal or other proceedings in any court, tribunal or other authority.
- (2) If any book, paper or other document, or any visual or sound recording, or other matter or material which is given in evidence or liable to inspection in any civil, criminal or other proceedings in any court, tribunal or other authority as are referred to in subsection (1) contains any entry or other matter in which any person who gave the information is named or described or shown, or which might lead to his discovery, the court before which the proceedings are held shall cause all such parts thereof or passages therein to be concealed from view or to be obliterated or otherwise removed so far as is necessary to protect such person from discovery.
- (3) Any person who gives the information referred to in subsection (1) knowing that the information is false commits an offence and shall on conviction be liable to imprisonment for a term not exceeding ten years, and shall also be liable to a fine not exceeding one hundred thousand ringgit; and for the purposes of any investigation into, or prosecution of, any offence under this subsection, subsections (1) and (2) shall not apply.

Specific provisions for protection of informers and information under section 5 of AMLATFA

Section 5-Protection of informers and information

- (1) Where a person discloses to an enforcement agency his knowledge or belief that any property is derived from or used in connection with money laundering or any matter on which such knowledge or belief is based-
 - (a) if he does any act in contravention of subsection 4(1) and the disclosure relates to the arrangement concerned, he does not commit an offence under that subsection if the disclosure is made-
 - (i) before he does the act concerned, being an act done with the consent of the enforcement agency; or
 - (ii) after he does the act, but the disclosure is made on his initiative and as soon as it is reasonable for him to make it;
 - (b) notwithstanding any other written law, the disclosure shall not be treated as a breach of any restriction on the disclosure of information imposed by any law, contract or rules of professional conduct; and
 - (c) he shall not be liable for damages for any loss arising out of-
 - (i) the disclosure; or
 - (ii) any act done or omitted to be done in relation to the property in consequence of the disclosure.
- (2) Where any information relating to an offence under this Act is received by an officer of the competent authority or reporting institution, the information and the identity of the person giving the information shall be secret between the officer and that person and everything contained in such information, the identity of that person and all other circumstances relating to the information, including the place where it was given, shall not be disclosed except for the purposes of subsection 8(1) or section 14.

Specific provisions to criminalize criminal intimidation under section 503 r/w section 506 of the Penal Code (Act 574)

Section 503-Criminal intimidation

Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

Section 506-Punishment for Criminal Intimidation

Whoever commits the offence of criminal intimidation shall be punished with imprisonment for a term which may extend to two years or with fine or with both; and if the threat is to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment for a term which may extend to seven years or with fine or with both.

543. Furthermore, Malaysia provided the following examples of cases on the implementation of the provision.

PHANG YONG FOOK V PP [1988] 1MLJ 267 wherein it was held that it can be established that there is harassment, tampering and witness intimidation then courts may be invited to revoke the bail of the accused. In this case, the applicant had been charged in the Sessions Court with abetting the offence of criminal breach of trust and also for committing the offence itself. He was released on bail in the sum of \$ 1 million in four sureties pending his trial. At the commencement of the trial, the prosecution sought for an order to revoke the bail. **It was alleged that the applicant had been harassing and tampering with witnesses.** After hearing the learned Deputy Public Prosecutor and counsel for the applicant, the learned Sessions Judge made an order revoking the applicant's bail. The applicant applied to the High Court for an order that he be admitted to bail. Held:

- (1) the considerations for cancellation of bail are different from those for granting bail. Power to take back accused has to be exercised with care and circumspection in appropriate cases, when by a preponderance of probabilities, it is clear that the accused is interfering with the cause of justice by tampering with witnesses;
- (2) even when evidence is adduced in support of an application to cancel the bail granted to an accused person, the court should not allow the application without giving the accused person an opportunity to be heard first;
- (3) in this case, the learned Deputy Public Prosecutor only made vague allegations of harassment, tampering with witnesses and intimidation in support of his application to revoke the bail in the court below. There was no oral or documentary evidence or even an affidavit to support the allegations;
- (4) the revocation order must therefore be set aside and the applicant be released on bail on the terms of the bail bond executed by him and his sureties.

DATO MAHINDAR SINGH S/O HARCHARAN SINGH V MAJLIS PEGUAM [1995] 2 MLJ 309

The plaintiff vide letter dated 1 December 1994, replied to the said query, giving details of the progress of his appeal against the order of conviction for an offence under s 5 of the Abduction and Criminal Intimidation of Witnesses Act 1947, the details of which do not concern me here. Suffice for me to say that, after several adjournments, the appeal was set down for hearing on the 12th of this month before the Temerloh High Court. I have been informed that the hearing did not go on as scheduled, and no new date has been given for the hearing of the said appeal.

DATO SERI ANWAR BIN IBRAHIM v Public Prosecutor [1999] 1 MLJ 321

Held, dismissing the appeal: (Per Lamin PCA) It was not the intention of Parliament that any decision of the High Court on any matter would be appealable to the Court of Appeal. The matter of bail may very well be extraneous to the issues to be determined in the main case. What are appealable, as intended by the current definition of the word decision in s 3 of the Act, are those decisions of the High Court that have the effect of finally disposing

of the rights of the parties. The very nature of bail possesses no element of finality. It is a mechanism for temporary relief from confinement. An appeal on the matter of bail was incompetent to be laid before this court and therefore, should be rightly dismissed (see p 326C -E).

(1)(Per Lamin PCA). The court took into consideration the kind of situation that could prevail if the appellant was free to move about when the trial was not in session. The police would have no option but to deploy extra manpower more than what could be seen around the court building since the commencement of the trial, at the expense of public fund, in order to maintain peace and order. This sort of situation must be treated as another factor to be considered by any court as a ground for refusing bail (see p[326G - H).

(2)(Per NH Chan JCA) section 50 of the Act provides for criminal appeals from any decision of the High Court to the Court of Appeal but those appeals -- since the amendment to s 3 of the Act in 1998 -- are now to be confined only to decisions which would have the effect of finally disposing of the rights of the parties. This new definition of 'decision' in the amendment does not include a [*321] judgment or order which does not deal with the final rights of the parties on the matters in dispute. Whether the matter of bail is appealable will depend on whether the order refusing bail to the appellant is a ruling made in the course of a trial or hearing of any cause or matter which finally disposes of the right of the parties. If bail was refused during the process of the appellants trial, then it is not appealable as such refusal will not have the effect of determining his rights. In the present case, a decision made pending the trial of the charges against the appellant was not a decision that had the effect of finally determining the rights of the appellant. It was only the outcome of the trial that would have the effect of finally disposing of his rights. That being so, the order of the High Court in refusing to admit the appellant to bail was not appealable to this court (see pp 329C, H, 334F -G and 335F -G).

(3)(Per NH Chan JCA) Ordinarily, an appellate court will not interfere with the discretion exercised by a lower court on a matter relating to bail. This court would not be justified to interfere with the discretion exercised by the judge below simply because this court may have come to a different conclusion on similar material, as that would be substituting this courts discretion for that of the judge below. In the present case, the court below was informed of the reasons to refuse bail by the tendering of some police reports in court. Since this court was unable to see if those police reports contained merely vague and general allegations, the judge was presumed to have rightly exercised his discretion (see pp 340F -I and 341B -C).

Obiter:

(Per NH Chan JCA) **A vague and general allegation that the accused, if released, will intimidate witnesses or tamper with the evidence is not a sound reason for refusing bail. There must be some material put before the court to substantiate the apprehension raised on behalf of the prosecution (see p 340C -D).**

544. Malaysia has given protection to eight witnesses under the Witness Protection Programme between April 2010 and 30 March 2012.

545. Malaysia's Witness Protection Act is silent about the duration of the trial. All witnesses protected by Malaysian's Witness Protection Unit are still under protection even though for some of them, the trial has come to the end and the accused was convicted. As

for the outcome of the cases, one is pending appeal to the higher court while the rest of the cases are still in continued hearing stages.

546. No information on the estimated cost per protected person was available.

547. The information and complaints received on acts of corruption is recorded and stored by the Record and Information Technology Division of MACC. Thereafter, the Information Review Committee reviews the information received. This Committee meets on a daily basis. If there are reports of threats or intimidation on witnesses or informants, depending on the severity of the threats, the witnesses may be placed under the custody of the Witness Protection Unit under the Prime Minister's Department. The Witness Protection Unit initially started operating with only four officers and a lack of funds. However, the resources were upgraded in the last years and the unit by now has 54 officers.

548. Malaysia explained that the Malaysian Anti-Corruption Commission provides "safe houses" for its key prosecution witnesses as regards their safety from potential intimidation or physical threats. Witnesses are given protection in hotels and other designated safe houses maintained by the Commission. Malaysia referred to the attached Standard Operating Procedures on Witness Protection. Witnesses are given protection in hotels and other designated safe houses maintained by the Commission. These "safe houses" would be designated before and during the trial for the said witnesses. The witnesses would be provided with food and refreshments and a witness allowance during the entire stay.

549. Malaysia provided statistics in Table 13 (Annex 11).

(b) Observations on the implementation of the article

550. The reviewing experts are of the view that the provision is implemented. They welcome the support provided by Malaysia and were satisfied with the explanations provided by Malaysia on the Witness Protection Act and its application.

551. During the country visit in a meeting with a representative of the witness protection unit, it was discussed if the protections would only start when criminal proceedings had begun, as per the definition of a witness in section 2. Malaysia explained that a wider application, also in the investigative stage was possible. Although the Convention does not prescribe details of the measures to be taken in this regard, the experts consider that such an extension of the protections would be recommendable and conducive to enhance the fight against corruption in Malaysia.

Article 32 Protection of witnesses, experts and victims

Subparagraph 2 (a)

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(a) Summary of information relevant to reviewing the implementation of the article

552. Malaysia highlighted that currently a witness, including his or her relatives who require protection, are given protection based on a threat assessment done by the investigation officer. The protections include temporary relocation, 24-hour protection and other measures.

553. Protection given to a “protected witness” can be divided into three stages: pre-trial protection, during trial and post-trial protection. The types of protection given are determined based on the threat assessment, which may include one or more of the following elements:

- Change of identity
- Court security operation
- Escort to attend court
- Permanent relocation whether with/without change of identity
- Temporary accommodation with guard protection
- Temporary safe accommodation
- Reassurance.

554. The cost involved in every case is different depending on the type of protection

555. Malaysia cited the following laws:

Section 13 of the Witness Protection Act 2009 (Act 696)

Section 13-Action where a witness is included in the Programme

(1) The Director General shall take such actions, as he considers necessary and reasonable, to protect the safety and welfare of a participant.

(2) The action may include-

- (c) providing accommodation for the participant;
- (d) relocating the participant;
- (e) applying for any document necessary to allow the participant to establish a new identity;
- (f) providing transport for the transfer of the property of the participant;
- (g) providing payment equivalent to the remuneration that the participant was receiving before being included in the Programme including any increment to the remuneration which the participant would have been entitled to, if he was not included in the Programme;
- (h) where the participant is unemployed before being included in the Programme, providing payments to the participant for the purpose of meeting the reasonable living expenses of the participant including, where appropriate, living expenses of the family of the participant and providing, whether directly or indirectly, other reasonable financial assistance;
- (i) providing payments to the participant for the purpose of meeting costs associated with relocation;
- (j) providing assistance to the participant in obtaining employment or access to education;
- (k) providing other assistance to the participant with a view to ensuring that the participant becomes self-supporting; and
- (l) any other action that the Director General considers necessary.

(3) Notwithstanding any written law to the contrary, there shall be no relocation of any participant by the Director General under paragraph (2)(b)-

- (a) to the State of Sabah from any place outside the State of Sabah; and
- (b) to the State of Sarawak from any place outside the State of Sarawak.

(4) Where the Director General makes a request to any person, having the power or duty under any other written law to issue birth certificate, identity card, marriage certificate or any other document relating to the identity of a participant, to issue a new document necessary to allow the participant to establish a new identity, such person shall comply with the request.

(5) The Director General shall not apply for any document to allow a participant to establish a new identity under paragraph (2)(c) unless he has obtained a written consent from the participant.

(6) The Director General may permit his officer to use assumed names in carrying out their duties in relation to the Programme and to carry documentation supporting those assumed names.

Section 65 of MACCA

Section 65. Protection of informers and information

(1) Subject to subsection (2), where any complaint made by an officer of the Commission states that the complaint is made in consequence of information received by the officer making the complaint, the information referred to in the complaint and the identity of the person from whom such information is received shall be secret between the officer who made the complaint and the person who gave the information, and everything contained in such information, identity of the person who gave the information and all other circumstances relating to the information, including the place where it was given, shall not be disclosed or be ordered or required to be disclosed in any civil, criminal or other proceedings in any court, tribunal or other authority.

(2) If any book, paper or other document, or any visual or sound recording, or other matter or material which is given in evidence or liable to inspection in any civil, criminal or other proceedings in any court, tribunal or other authority as are referred to in subsection (1) contains any entry or other matter in which any person who gave the information is named or described or shown, or which might lead to his discovery, the court before which the proceedings are held shall cause all such parts thereof or passages therein to be concealed from view or to be obliterated or otherwise removed so far as is necessary to protect such person from discovery.

(3) Any person who gives the information referred to in subsection (1) knowing that the information is false commits an offence and shall on conviction be liable to imprisonment for a term not exceeding ten years, and shall also be liable to a fine not exceeding one hundred thousand ringgit; and for the purposes of any investigation into, or prosecution of, any offence under this subsection, subsections (1) and (2) shall not apply.

Section 5 and section 6 of AMLATFA

Section 5. Protection of informers and information

(1) Where a person discloses to an enforcement agency his knowledge or belief that any property is derived from or used in connection with money laundering or any matter on which such knowledge or belief is based-

(a) if he does any act in contravention of subsection 4(1) and the disclosure relates to the arrangement concerned, he does not commit an offence under that subsection if the disclosure is made-

- (i) before he does the act concerned, being an act done with the consent of the enforcement agency; or
- (ii) after he does the act, but the disclosure is made on his initiative and as soon as it is reasonable for him to make it;

(b) notwithstanding any other written law, the disclosure shall not be treated as a breach of any restriction on the disclosure of information imposed by any law, contractor rules of professional conduct; and

(c) he shall not be liable for damages for any loss arising out of-

- (i) the disclosure; or
- (ii) any act done or omitted to be done in relation to the property in consequence of the disclosure.

(2) Where any information relating to an offence under this Act is received by an officer of the competent authority or reporting institution, the information and the identity of the person giving the information shall be secret between the officer and that person and everything contained in such information, the identity of that person and all other circumstances relating to the information, including the place where it was given, shall not be disclosed except for the purposes of subsection 8(1) or section 14.

Section 6. Restriction on revealing disclosure under section 5

(1) No person shall, subject to subsection (2)-

(a) reveal that a disclosure was made under section 5;

(b) reveal the identity of any person as the person making the disclosure; or

(c) answer any question if the answer would lead, or would tend to lead, to the revealing of any fact or matter referred to in paragraph (a) or (b).

- (2) Subsection (1) shall not apply to a witness in any civil or criminal proceedings-
- (a) for an offence under subsection 4(1) or subsection (3) of this section; or
 - (b) where the court is of the opinion that justice cannot fully be done between the parties without revealing the disclosure or the identity of any person as the person making the disclosure.
- (3) No person shall publish in writing or broadcast any information, including a report of any civil or criminal proceedings but excluding information published for statistical purposes by a competent authority or the Government, so as to reveal or suggest-
- (a) that a disclosure was made under section 5; or
 - (b) the identity of any person as the person making the disclosure.
- (4) Subsection (3) shall not apply in respect of proceedings against the person making the disclosure for an offence under subsection 4(1) or subsection (1).
- (5) If information is published or broadcast in contravention of subsection (3), each of the following persons, namely-
- (a) in the case of publication as part of a newspaper or periodical publication, any proprietor, editor, publisher and distributor of the newspaper or periodical publication;
 - (b) in the case of a publication otherwise than as part of a newspaper or periodical publication, any person who publishes it and any person who distributes it;
 - (c) in the case of a broadcast, any person who broadcasts the information and, if the information is contained in a programme, any person who transmits or provides the programme and any person having functions in relation to the programme corresponding to those of the editor of a newspaper or periodical publication, commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both, and, in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.
- (6) In this section, 'broadcast' includes any broadcast by radio, film, videotape, television or electronic media.

556. Malaysia reported that examples of implementation cannot be revealed due to security reasons.

557. The Witness Protection Act 2009 has been in force since April 2010. As of March 2012, the number of witnesses who have been placed under the Witness Protection programme by the Witness Protection Unit of the Prime Minister's Department are as follows:

- Malaysian Anti-Corruption Commission cases- 2 persons
- Royal Malaysia Police cases- 6 persons

(b) Observations on the implementation of the article

558. The reviewing experts are of the view that Malaysia has fully implemented the provision.

Article 32 Protection of witnesses, experts and victims

Subparagraph 2 (b)

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

(a) Summary of information relevant to reviewing the implementation of the article

559. Malaysia cited the following legislative measures:

**Chapter XXV of the Criminal Procedure Code (Act 593)
Section 272B: Evidence through live video or live television links**

- (1) Notwithstanding any other provision of this Code or the Evidence Act 1950, a person, other than the accused, may, with leave of the court, give video or live evidence through a live video or live television link in any trial or inquiry, if it is expedient in the interest of justice to do so.
- (2) The Court may, in the exercise of its power under subsection (1), make an order on any or all of the following matters:
 - (a) the persons who may be present at the place where the witness is giving evidence;
 - (b) that a person be excluded from the place while the witness is giving evidence;
 - (c) the persons in the courtroom who must be able to be heard, or seen and heard, by the witness, and by the persons with the witness;
 - (d) the persons in the courtroom who must not be able to be heard, or seen and heard, by the witness and by the persons with the witness;
 - (e) the persons in the courtroom who must be able to see and hear the witness and the persons with the witness;
 - (f) the stages in the proceedings during which a specified part of the order is to have effect;
 - (g) the method of operation of the live video or live television link system including compliance with such minimum technical standards as may be determined by the Chief Justice; and
 - (h) any other order the court considers necessary in the interest of justice.
- (3) The Court shall not give leave under subsection (1) or make an order under subsection (2) if, in the opinion, of the Court, to do so would be inconsistent with the courts duty to ensure that the proceedings are conducted fairly to the parties to the proceedings. Evidence given by a witness through live video or live television link by virtue of this section shall be deemed for the purposes of sections 193,194,195,196,205 and 209 of the Penal Code as having been given in the proceedings in which it is given.
- (4) Where a witness gives evidence in accordance with this section, he shall for the purposes of this Code and the Evidence Act 1950 be deemed to be giving evidence in the presence of the Court, the accused person or his advocate, as the case may be.
- (5) Where any video or live evidence given under this section is recorded on any medium, electronic or otherwise such recording shall form part of the record.

560. Below are statistics on the number of witnessess admitted into the Witness Protection Programme since the establishment of the Witness Protection Unit in Malaysia.

Year	Number of Witnesses
2010	2
2011	2
2012	4

(b) Observations on the implementation of the article

561. The reviewing experts are of the view that Malaysia has fully implemented the provision.

Article 32 Protection of witnesses, experts and victims

Paragraph 3

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

562. Malaysia explained that the Witness Protection Programme was relatively new since it was only started in 2010. Therefore, Malaysia has not come up with agreements or arrangements with other States for the relocation of witnesses. It is also noted that the system in Malaysia is still being developed and a goal is to send the agents of the Witness Protection Unit abroad to learn and to improve their skills in protecting witnesses from the experiences of countries like Hong Kong and Australia.

(b) Observations on the implementation of the article

563. The reviewing experts note that Malaysia has no agreements with other States in regard to the relocation of witnesses.

Article 32 Protection of witnesses, experts and victims

Paragraph 4

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

(a) Summary of information relevant to reviewing the implementation of the article

564. Malaysia provided the following information.

“Witness” in the Witness Protection Act 2009 is defined as:

- (a) a person who has given or who has agreed to give evidence on behalf of the Government in a criminal proceeding;
- (b) a person who has given or who has agreed to give evidence, otherwise than as mentioned in paragraph (a), in relation to the commission or possible commission of an offence;
- (c) a person who has provided any information, a statement or assistance to a public officer or an officer of a public authority in relation to an offence;
- (d) **a person who, for any other reason, may require protection or assistance under the Programme;** or
- (e) a person who, because of his relationship to or association with any of the persons referred to in paragraphs (a) to (d), may require protection or assistance under the Programme.

565. Statistics on the number of witnesses placed under the Witness Protection Programme by the Witness Protection Unit of the Prime Minister's Department are provided above.

(b) Observations on the implementation of the article

566. The reviewing experts are of the opinion that Malaysia has implemented the provision. The Witness Protection Act does not preclude victims and comprises a clause that protection may be available to “a person who, for any other reason, may require protection or assistance under the Programme”, which would cover victims of corruption cases.

Article 32 Protection of witnesses, experts and victims

Paragraph 5

5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

(a) Summary of information relevant to reviewing the implementation of the article

567. The issue of victim impact statement has been recently introduced into Malaysia's domestic legislation. This provision has just been introduced into the Criminal Procedure Code via Criminal Procedure Act (Amendment) 2010 and (Amendment) 2012 (Act A1422).

For summary trials by Magistrates - section 173 (m)(ii) - Procedure in summary trials.

Provided that before the Court passes sentence, the Court shall, upon the request of the victim of the offence or victims family, call upon the victim or a member of the victims family to make a statement on the impact of the offence on the victim or his family; and where the victim or a member of the victims family is for any reason unable to attend the proceedings after being called by the court, the court may at its discretion admit a written statement of the victim or a member of the victims family..

For trials before the High Court - section 183A of Criminal Procedure Code - Victims impact Statement

(1) Before the court passes sentence according to law under section 183, the Court shall, upon the request of the victim of the offence or the victims family, call upon the victim or a member of the victims family to make a statement on the impact of the offence on the victim or his family.

Where the victim or a member of the victims family is for any reason unable to attend the proceedings after being called by the Court under subsection (1), the Court may at its discretion admit a written statement of the victim or a member of the victims family...

568. No data is yet available on this issue, as Victim Impact Statements has just been introduced into our legislation.

(b) Observations on the implementation of the article

569. The reviewing experts are satisfied with the explanations provided by Malaysia and acknowledge the new legislation.

(c) Challenges related to article 32

570. Malaysia has identified the following challenges and issues in fully implementing the provision under review:

1. Other issues: International cooperation in relocating witnesses to foreign countries, considering the fact that the Malaysian peninsula is small in size and States within the peninsula are easily accessible. Relocating in foreign country within the ASEAN region is more easily done.

(d) Technical assistance needs related to article 32

571. Malaysia has indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

- Summary of good practices/lessons learned;
- Model legislation.

Article 33 Protection of reporting persons

Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

572. Malaysia indicated that there are provisions within its domestic legislation for the protection and confidentiality of bona fide informants.

Section 29 subsection (4) of MACCA:

Section 29. (1) Every report relating to the commission of an offence under this Act may be made orally or in writing to an officer of the Commission, and if made orally it shall be reduced into writing and read over to the person making the report; and every report, whether in writing or reduced into writing, shall be signed by the person making the report:

Section 29. (4) A report made under subsection (1) shall be kept secret and shall not be disclosed by any person to any person other than officers of the Commission and the Public Prosecutor until an accused person has been charged in court for an offence under this Act or any other written law in consequence of such report, unless the disclosure is made with the consent of the Public Prosecutor or an officer of the Commission of the rank of Commissioner and above.

Section 65 of MACCA:

65. (1) Subject to subsection (2), where any complaint made by an officer of the Commission states that the complaint is made in consequence of information received by the officer making the complaint, the information referred to in the complaint and the identity of the person from whom such information is received shall be secret between the officer who made the complaint and the person who gave the information, and everything contained in such information, identity of the person who gave the information and all other circumstances relating to the information, including the place where it was given, shall not be disclosed or be ordered or required to be disclosed in any civil, criminal or other proceedings in any court, tribunal or other authority.

(2) If any book, paper or other document, or any visual or sound recording, or other matter or material which is given in evidence or liable to inspection in any civil, criminal or other proceedings in any court, tribunal or other authority as are referred to in subsection

(3) contains any entry or other matter in which any person who gave the information is named or described or shown, or which might lead to his discovery, the court before which the proceedings are held shall cause all such parts thereof or passages therein to be concealed from view or to be obliterated or otherwise removed so far as is necessary to protect such person from discovery.

(4) Any person who gives the information referred to in subsection (1) knowing that the information is false commits an offence and shall on conviction be liable to imprisonment for a term not exceeding ten years, and shall also be liable to a fine not exceeding one hundred thousand ringgit; and for the purposes of any investigation into, or prosecution of, any offence under this subsection, subsections (1) and (2) shall not apply.

Section 5 of AMLTAFSA

Protection of informers and information

(1) Where a person discloses to an enforcement agency his knowledge or belief that any property is derived from or used in connection with money laundering or any matter on which such knowledge or belief is based-

(a) if he does any act in contravention of subsection 4(1) and the disclosure relates to the arrangement concerned,

he does not commit an offence under that subsection if the disclosure is made-

(i) before he does the act concerned, being an act done with the consent of the enforcement agency; or
(ii) after he does the act, but the disclosure is made on his initiative and as soon as it is reasonable for him to make it;

(b) notwithstanding any other written law, the disclosure shall not be treated as a breach of any restriction on the

disclosure of information imposed by any law, contract or rules of professional conduct; and

(c) he shall not be liable for damages for any loss arising out of-

(i) the disclosure; or

(ii) any act done or omitted to be done in relation to the property in consequence of the disclosure.

(2) Where any information relating to an offence under this Act is received by an officer of the competent authority or reporting institution, the information and the identity of the person giving the information shall be secret between the officer and that person and everything contained in such information, the identity of that person and all other circumstances relating to the information, including the place where it was given, shall not be disclosed except for the purposes of subsection 8 (1) or section 14.

Restriction on revealing disclosure under section 5

(1) No person shall, subject to subsection (2)-

(a) reveal that a disclosure was made under section 5;

(b) reveal the identity of any person as the person making the disclosure; or

(c) answer any question if the answer would lead, or would tend to lead, to the revealing of any fact or matter referred to in paragraph (a) or (b).

(2) Subsection (1) shall not apply to a witness in any civil or criminal proceedings-

(a) for an offence under subsection 4(1) or subsection (3) of this section; or

(b) where the court is of the opinion that justice cannot fully be done between the parties without revealing the disclosure or the identity of any person as the person making the disclosure.

(3) No person shall publish in writing or broadcast any information, including a report of any civil or criminal proceedings but excluding information published for statistical purposes by a competent authority or the Government, so as to reveal or suggest-

(a) that a disclosure was made under section 5; or

(b) the identity of any person as the person making the disclosure. Subsection (3) shall not apply in respect of proceedings against the person making the disclosure for an offence under subsection 4(1) or subsection (1).

(5) If information is published or broadcast in contravention of subsection (3), each of the following persons, namely-

(a) in the case of publication as part of a newspaper or periodical publication, any proprietor, editor, publisher and distributor of the newspaper or periodical publication;

(b) in the case of a publication otherwise than as part of a newspaper or periodical publication, any person who publishes it and any person who distributes it;

(c) in the case of a broadcast, any person who broadcasts the information and, if the information is contained in a programme, any person who transmits or provides the programme and any person having functions in relation to the programme corresponding to those of the editor of a newspaper or periodical publication, commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding one year or to both, and, in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.

(6) In this section, broadcast includes any broadcast by radio, film, videotape, television or electronic media.

Section 24 of AMLATFA

Protection of persons reporting

(1) No civil, criminal or disciplinary proceedings shall be brought against a person who-

(a) discloses or supplies any information in any report made under this Part; or

(b) supplies any information in connection with such a report, whether at the time the report is made or afterwards; in respect of-

(aa) the disclosure or supply, or the manner of the disclosure or supply, by that person, of the information referred to in paragraph (a) or (b); or

(bb) any consequences that follow from the disclosure or supply of that information, unless the information was disclosed or supplied in bad faith.

(2) In proceedings against any person for an offence under this Part, it shall be a defence for that person to show that he took all reasonable steps and exercised all due diligence to avoid committing the offence.

Whistleblower Protection Act 2010 (Act 711)

Section 9. Immunity from civil and criminal action

Subject to subsection 11(1), a whistleblower shall not be subject to any civil or criminal liability or any liability arising by way of administrative process, including disciplinary action, and no action, claim or demand may be taken or made against the whistleblower for making a disclosure of improper conduct.

Section 10. Protection against detrimental action

(1) No person shall take detrimental action against a whistleblower or any person related to or associated with the whistleblower in reprisal for a disclosure of improper conduct.

(2) A whistleblower may make a complaint to any enforcement agency of any detrimental action committed by any person against the whistleblower or any person related to or associated with the whistleblower.

(3) A person is deemed to take detrimental action against a whistleblower or any person related to or associated with the whistleblower if-

(a) the person takes or threatens to take the detrimental action because-

(i) a whistleblower has made a disclosure of improper conduct; or

(ii) the person believes that a whistleblower has made or intends to make a disclosure of improper conduct; or

(b) the person incites or permits another person to take or threaten to take the detrimental action for any reason under subparagraph (a)(i) or (ii).

(4) Nothing in this section shall affect the whistleblower protection to an employee in the private body either at law or under a collective agreement or employment contract.

(5) No person acting or purporting to act on behalf of any public body or private body shall-

(a) terminate a contract;

(b) withhold a payment that is due and payable under a contract; or refuse to enter into a subsequent contract, solely for the reason that a party to the contract or an employee or employer of a party to the contract has made a disclosure of improper conduct to any enforcement agency relating to the public body or private body.

(6) Any person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding fifteen years or to both.

(7) In any proceedings, it lies on the defendant to prove that the detrimental action shown to be taken against a whistleblower or any person related to or associated with the whistleblower is not in reprisal for a disclosure of improper conduct.

Whistleblower Protection Act 2010 (Act 711)

Section 7 - Whistleblower protection

(1) A whistleblower shall, upon receipt of the disclosure of improper conduct by any enforcement agency under section 6, be conferred with whistleblower protection under this Act as follows:

(a) protection of confidential information;

(b) immunity from civil and criminal action; and

(c) protection against detrimental action, and for the purpose of paragraph (c), the protection shall be extended to any person related to or associated with the whistleblower.

(2) A whistleblower protection conferred under this section is not limited or affected in the event that the disclosure of improper conduct does not lead to any disciplinary action or prosecution of the person against whom the disclosure of improper conduct has been made.

(3) This Act does not limit the protection conferred by any other written law to any person in relation to information given in respect of the commission of an offence.

Section 8 - Protection of confidential information

(1) Any person who makes or receives a disclosure of improper conduct or obtain confidential information in the course of investigation into such disclosure shall not disclose the confidential information or any part thereof.

(2) Subject to subsection (3), confidential information shall not be disclosed or be ordered or required to be disclosed in any civil, criminal or other proceedings in any court, tribunal or other authority.

(3) If any books, documents or papers which are in evidence or liable to inspection in any civil, criminal or other proceedings in any court, tribunal or other authority whatsoever contain any entry in which any whistleblower is named or described or which might lead to his discovery, the court, tribunal or other authority before which the proceeding is had shall cause all such passages to be concealed from view or to be obliterated so far as is necessary to protect the whistleblower from discovery, but no further.

(4) Any person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding ten years or to both.

Section 9 - Immunity from civil and criminal action

Subject to subsection 11(1), a whistleblower shall not be subject to any civil or criminal liability or any liability arising by way of administrative process, including disciplinary action, and no action, claim or demand may be taken or made against the whistleblower for making a disclosure of improper conduct.

Section 10 - Protection against detrimental action

(1) No person shall take detrimental action against a whistleblower or any person related to or associated with the whistleblower in reprisal for a disclosure of improper conduct.

573. Malaysia provided statistics in Table 13 (Annex 11).

(b) Observations on the implementation of the article

574. The reviewing experts note that Malaysia has implemented the provision.

Article 34 Consequences of acts of corruption

With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.

(a) Summary of information relevant to reviewing the implementation of the article

575. Regarding civil legislation that deals with this particular provision, Malaysia reported that its domestic provisions does not deal with corruption per se, but in a general form with unlawful objects or illegal consideration.

576. Blacklisting for up to five years against companies, consultant firms, shareholders and board of directors of companies that engage in acts of corruption or abuse of process is possible under Treasury Circular No. 6 of 2010: Disciplinary Action against Companies and Consultant Firms Registered with the Ministry of Finance (quoted below).

577. The Malaysian legislative provisions and measures to take remedial action to consequences of corruption are as follows:

A. Contracts Act 1950 (Act 136)- sections 24 illustrations (f) & (j), and section 25

Section 24. What considerations and objects are lawful, and what not,

The consideration or object of an agreement is lawful unless-

- (a) it is forbidden by law;
- (b) it is of such a nature that, if permitted, it would defeat any law
- (c) it is fraudulent;
- (d) it involves or implies injury to the person or property of another, or
- (e) the court regards it as immoral, or opposed to public policy

In each of the above cases, the consideration or object of an agreement is said to be lawful. Every agreement or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

“Object” which is unlawful:

Illustration (e): A, B, and C enter into an agreement for the division among them of gains acquired or to be acquired, by fraud. The agreement is void as its object is unlawful. Illustration (h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful

“Consideration” which is unlawful

Illustration (f): A promises to obtain for B an employment in the public service, and B promises to pay RM1000 to A. The agreement is void as its object is unlawful. Illustration (j) A, who is B's advocate, promises to exercise his influence, as such, with B in favour of C, and C promises to pay RM1000 to A. The agreement is void, because it is immoral.

Section 25. Agreements void if considerations and objects unlawful in part

If any part of a single consideration for one or more objects, or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Illustration

A promises to superintend, on behalf of B, a legal manufacturer of indigo and an illegal traffic in other articles. B promises to pay to A a salary of RM10,000 a year. The agreement is void, the object of A's promise and the consideration for B's being in part unlawful.

B. Section 6 (5) of the Whistleblowers Protection Act 2010 (Act 711) Any provision in any contract of employment shall be void in so far as it purports to preclude the making of a disclosure of improper conduct.

“improper conduct” is defined under section 2 to mean “any conduct which if proved, constitutes a disciplinary or a criminal offence”.

C. Section 340 National Land Code

(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.

(2) The title or interest of any such person or body shall not be indefeasible-

(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy,

(b) where registration was obtained by forgery, or by means of an insufficient or void instrument; or

(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.

(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection (2)-

(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and

(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:

Provided that nothing in this subsection shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

(4) Nothing in this section shall prejudice or prevent-

(a) the exercise in respect of any land or interest of any power of forfeiture or sale conferred by this Act or any other written law for the time being in force, or any power of avoidance conferred by any such law; or

(b) the determination of any title or interest by operation of law.

D. Treasury Circular No. 6 of 2010: Disciplinary Action against Companies and Consultant Firms Registered with the Ministry of Finance

Under this Circular (para 4.3.1) Criminal Offence means "a company/consultant firm or any member of the Board of Directors or members of its administration has committed and convicted of any criminal offence by a court of law. "

Examples of criminal offence include corruption, cheating and criminal breach of trust.

Paragraph 5 of the Circular spells out the different types of Disciplinary Action / Punishment that may be taken against a company/consultant firm including its members of the Board of Directors/shareholders :

5.1 Letter of warning

5.2 Cancellation of registration area code

5.3 Suspension of registration

5.4 Deregistration

5.5 Blacklisting up to five years against companies consultant firms shareholders / board of directors.
5.6 Cancellation of Bumiputera status.
As for directors/shareholders who have been convicted of a criminal offence the punishment is deregistration of the company/consultant firm. Application for a new registration can only be made after the period of imprisonment has been served.

578. **Treasury Circular No. 6 of 2010** states that if a company, regardless of its status is found guilty of a criminal offence or if any of the directors of the said company are found guilty, then the registration of the said company is revoked instantly, regardless of the status of the company.

579. Furthermore, Malaysia provided the following examples of cases on the implementation of the provision, but indicated that there were no cases involving rescission of contracts due to acts of corruption.

580. Alcatel Sdn.Bhd Malaysia was blacklisted after its agent was charged with bribery in 2011.

Ooi Woon Chee & Anor v Dato See Teow Chuan & Ors [2012] 2 MLJ 713 deals with the principle of contracts which are void for illegality. In this instance there was an allegation of a bribe being offered.

[38] We find that no bribe was ever paid. It is the alleged solicitation for the bribe that is the complaint. The solicitation to Gold Pomelo had no nexus or effect on the acceptance of the highest bid by Can-One and caused no loss to company. In the absence of the solicitation tainting the Can-One agreement, the allegation even if true can have no effect on the validity of the said agreement and whether or not it should be completed. On this point in [1917] 2 Ch 71 it was held at pp 87-88:

... I was very much surprised to hear that when a contract, obtained by the giving of a bribe, had been affirmed by the person who had a primary right to affirm it, not being an illegal contract, the courts of equity could be so scrupulous that they would refuse any relief not connected at all with the bribe. I was glad to find that it was not the case, because I think it is quite clear that the passage in *Dering v Earl of Winchelsea* (1) which has been referred to show that equity will not apply the principle about clear hands unless the depravity, the dirt in question on the hand, has an immediate and necessary relation to the equity sued for. In this case the bride has no immediate relation to rectification, if rectification were asked, or to rescission in connection with a matter not in any way connected with the bride. Therefore that point, which was argued with great strenuousness by counsel for the defendant Hatt, appears to me to fail, and we have to consider the merits of the case.

[39] We are of the view the Court of Appeal erred in law in holding that serious questions have been raised about the alleged secret meetings and illegal gratification solicited by one of the liquidators, and must be investigated and answered. There is no effect on the award to Can-One.

[40] The crux of the complaint made by the respondents is that the liquidators requested for a secret meeting with Jason See on 24 January 2009 and on 2 February 2009 for the purpose of soliciting gratification from Dato See to sell the shares at between RM1.50 to RM1.58. However the liquidators contended that the meeting on 24 January 2009 was requested by Jason See further to the meeting on 23 January 2009 to deliver a letter from Gold Pomelo dated 24 January 2009 to the liquidators, declining to raise their offer to

RM1.68 per KJCFB share. The meeting on 2 February 2009 was initiated by Jason See to inform the liquidators that Gold Pomelo was considering making a revised offer of RM1.55 per share. It did make the offer on 6 February 2009.

[41] Jason See and Dato See said that they were astonished and disgusted by the solicitation. But no complaint was made by Jason See and/or Dato See after the first alleged secret meeting on 24 January 2009. There is no quantum stipulated for the illegal gratification sought. Instead, Jason See requested for and met with the liquidators again on 2 February 2009 and 6 February 2009. In addition, Gold Pomelo proceeded to revise its offer price to RM1.55 per share and submitted the revised offer on 6 February 2009. The complaint of improper conduct and fraud was only made on 2 March 2009 and 3 March 2009 (approximately a month later), after the announcement that Can-One was awarded the sale.

For the reasons above stated it is our considered view the learned judicial commissioner had rightly held that the allegation of solicitation is devoid of merit.

(b) Observations on the implementation of the article

581. The reviewing experts are satisfied with the explanations provided by Malaysia. They note that the Malaysian legislation comprises, for instance, sections 24 and 25 of the Contracts Act, which provide for the nullification of agreements if certain aspects of the agreement were unlawful. Furthermore, the registration of companies is revoked upon conviction in a criminal case. The Ministry of Finance has further established a register of blacklisted firms, which currently comprises three or four companies.

Article 35 Compensation for damage

Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.

(a) Summary of information relevant to reviewing the implementation of the article

582. The recovery of damages resulting from corrupt acts through civil proceedings was permissible under section 30 of the Prevention of Corruption Act 1961 (Act 57). Unfortunately, this provision was overlooked when drafting the current MACCA. A proposal has been made to reintroduce a similar section in the current MACCA. The section of the previous Act reads:

30 (1) Where any gratification has in contravention of this Act been given by any person to an agent, the principal may recover as a civil debt the amount or the money value thereof either from the agent or from the person who gave the gratification to the agent, and no conviction or acquittal of the defendant in respect of an offence under this Act shall operate as a bar to proceedings for the recovery of such amount or money or value

(2) Nothing in this section shall be deemed to prejudice or affect any right which any principal may have under any written law or rule of law to recover from his agent any money or property.

583. In the criminal context, however, there are limited references to payment of costs or compensation to the prosecution or its witnesses. See section 426 of the Criminal Procedure Code:

Section 426 of the Criminal Procedure Code (Act 593) :

426. Order for payment of costs of prosecution and compensation

(1) The Court before which an accused is convicted of an offence -

(a) In its discretion, may make an order for the payment by the convicted accused of the cost of his prosecution or any part thereof as may be agreed by the Public Prosecutor; or

(b) Where -

(i) the prosecution of the convicted accused involves evidence obtained pursuant to a request made under the Mutual Assistance in Criminal Matters Act 2002 [Act 621]; or the accused has obtained pecuniary gain, upon the application of the Public Prosecutor, shall make an order for the payment by the convicted accused of the cost of his prosecution or any part thereof, the sum of which is to be fixed by the Court as may be agreed by the Public Prosecutors.

(1 A) Without prejudice to subsection (1), the Court before which an accused is convicted of an offence shall, upon the application of the Public Prosecutor, make an order against the convicted accused for the payment by him, or where the convicted accused is a child, by his parent or guardian, of a sum to be fixed by the Court as compensation to a person who is the victim of the offence committed by the convicted accused in respect of the

injury to his person or character, or loss of his income or property, as a result of the offence committed.

(1 B) Where the person who is the victim of the offence is deceased, the order of compensation shall be made to a representative of the deceased person.

(1 C) The Court shall, in making an order under subsection (1 A), take into consideration the following factors:

- (a) the nature of the offence;
- (b) the injury sustained by the victim;
- (c) the expenses incurred by the victim;
- (d) the damage to, loss of, property suffered by the victim;
- (e) the loss of income incurred by the victim;
- (f) the ability of the convicted accused to pay; and
- (g) any other factors which the Court deems relevant.

(1 D) For the purpose of making an order under subsection (1A), the Court may hold an inquiry as it thinks fit.

(2) The Court shall specify the person to whom any sum in respect of costs or compensation as aforesaid is to be paid, and section 432 [except paragraph (1)(d)] shall be applicable to any order made under this section.

(3) The Court may direct that an order for payment of costs, or an order for payment of compensation, shall have priority, and, if no direction is given, an order for payment of costs shall have priority over an order for payment of compensation.

(4) To the extent of the amount which has been paid to a person, or to the representatives of a person, under an order for compensation, any claim of such person or representatives for damages sustained by reason of the crime or offence shall be deemed to have been satisfied, but the order for payment shall not prejudice any right to a civil remedy for the recovery of any property or for the recovery of damages beyond the amount of compensation paid under the order.

(5) Every order made under this section by a Magistrate shall be appealable to the High Court.

In Malaysia a party can recover monies paid as a result of gratification as a civil debt provided they are bona fide parties who are not involved in the act of corruption they may initiate legal action within 6 years for damages caused as a result of corruption through the following measures:

Amendment to section 11 of the Criminal Procedure Code - Public, when assist Magistrate, Justice of the Peace and Police.

(1) The Court before which an accused is convicted of an offence -

(a) in its discretion, may make an order for the payment by the convicted accused of the cost of his prosecution or any part thereof as may be agreed by the Public Prosecutor; or

(b) where -

(i) the prosecution of the convicted accused involves evidence obtained pursuant to a request made under the Mutual Assistance in Criminal Matter Act 2002 [Act 621] or

(ii) the accused has obtained pecuniary gain, upon the application of the Public Prosecutor, shall make an order for the payment by the convicted accused of the cost of his prosecution or any part thereof, the sum of which is to be fixed by the Court as may be agreed by the Public Prosecutor...

584. The following cases were cited.

See R v Lim Cheng Soo [1946] 51

Mohamed Johan Mutalib v Public Prosecutor

In this case the accused had pleaded guilty to three charges of offences of using as genuine a forged document. He was sentenced to a term of two years imprisonment on each charge, the sentences to run consecutively. **In addition he was ordered after completion of his imprisonment "to pay government a fine of \$3,000 on each charge by monthly instalments of \$100 in default four months' imprisonment in respect of each instalment."** The court took into consideration two other offences but no record was made that the consent of the prosecutor and the accused was obtained. Held:

(1) the sentence of fine was illegal as it contravened section 283 of the Criminal Procedure Code in that the total term of imprisonment in default might amount to 30 years;

(2) section 426 of the Criminal Procedure Code which enables the court to make an order for the payment of compensation to "any person or to the representatives of any person injured" does not contemplate an order in favour of the Government;

(3) before outstanding offences could be taken into account the consent of the prosecutor and the accused must be obtained and this fact included in the record but this was not done in this case;

(4) the fine and sentence in default should be set aside and the sentences of two years' imprisonment should be ordered to run concurrently.

(b) Observations on the implementation of the article

585. The reviewing experts note that Malaysia has not implemented the provision. They recommend that Malaysia introduce provisions to enable entities or persons who have suffered damage from acts of corruption to initiate legal proceedings to obtain compensation.

586. Furthermore, Malaysia should ensure that the laws apply to both natural and legal persons. The reviewing experts pointed out that in the case of Mohamed Johan v. Public Prosecutor 1978 1 MLJ [213] in relation to section 426 of the Criminal Procedure Code, it was stated that orders for compensation relate only to persons who are victims of crimes.

Article 36 Specialized authorities

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

(a) Summary of information relevant to reviewing the implementation of the article

587. Malaysia's key authority in the fight against corruption is the Malaysian Anti-Corruption Commission (MACC). <http://www.sprm.gov.my/index.php?&lang=en>

588. The MACC was established by legislation, namely MACCA, and began its operations officially on 1 January 2009 replacing the Anti-Corruption Agency (ACA) of Malaysia. The functions of MACC are regulated under Part II of MACCA, in sections 4 to 12.
589. The Commission is a multi-purpose agency that is empowered under section 11 (1) of MACCA to carry out the functions specified in section 7, namely the detection, prevention and investigation of corruption offences under MACCA, to examine practices, systems and procedures of public and private bodies on ways in which corruption may be eliminated, to advise heads of public bodies of any changes in practices, systems or procedures compatible with the discharge of the duties of the public bodies, as the Chief Commissioner deems necessary to reduce the likelihood of the occurrence of corruption, and lastly to educate the public against corruption as well as to enlist and foster public support against corruption. The Chief Commissioner reports to the (Parliamentary) Special Committee on Corruption under section 11(2) of Act 694.
590. Next to MACC, the Police Force and the Customs also have powers to investigate corruption-related offences. These are addressed in sections 67 and 70 of MACCA. Inter-agency collaboration with MACC is strong and the agencies work together on a daily basis and transfer reports. More information on the details of the inter-agency collaboration is described under article 38 of the Convention.
591. MACC is an organization under the Prime Minister's Department in regard to finance and staffing. The everyday business of MACC is carried out autonomously by MACC officers under the supervision of the Chief Commissioner without interferences from any other party.
592. The Chief Commissioner is the head of MACC. He is appointed by His Majesty the Seri Paduka Baginda Yang Di Pertuan Agong (the King) under section 5(1) of MACCA upon the advice of the Prime Minister of Malaysia.
593. Reports of corruption can be filed at MACC through various channels, either personally at one of the offices, through the Complaints Management System on the website of MACC, by email, regular mail, fax, SMS or phone call. MACC operates a toll-free reporting hotline at 1-800-88-6000. Anonymous reports are acceptable.
594. In regard to the independence of the MACC, Malaysia explained the following: The Malaysian Anti-Corruption Commission was established independent of the Legislature, the Executive and the Judiciary by virtue of the establishment of five oversight bodies, as enshrined under Part III, sections 13 to 15 of MACCA as well as by administrative order. The Anti-Corruption Advisory Board, the Special Committee on Corruption, the Complaints Committee, the Operations Review Panel and the Consultation and Corruption Prevention Panel are formed to closely watch over the activities of the Malaysian Anti-Corruption Commission to ensure transparency and integrity in the carrying out of its duties. They report to Parliament as well as to the Prime Minister on the activities and performance of the Commission on a quarterly and annual basis with their advice, comments and recommendations in regards the further improvement of the Commission in its mission in combating and preventing corruption, abuse of powers and other related malpractice in the public as well as the private sectors.

595. Malaysia cited the following legislation.

MACCA

Part II

The Malaysian Anti-Corruption Commission

Section 4. Establishment of the Malaysian Anti-Corruption Commission

The Malaysian Anti-Corruption Commission is established.

Section 5. Appointment of the Chief Commissioner

(1) The Yang di-Pertuan Agong shall, on the advice of the Prime Minister, appoint a Chief Commissioner of the Malaysian Anti-Corruption Commission for such period and on such terms and conditions as may be specified in the instrument of appointment.

(2) Where the Chief Commissioner is appointed from among members of the public services, the period of appointment of the Chief Commissioner shall not extend beyond the date of his compulsory retirement from the public service, but where he so attains the age of compulsory retirement he may be reappointed as Chief Commissioner by the Yang di-Pertuan Agong, on the advice of the Prime Minister, on contract for such period and on such terms and conditions as may be specified in the instrument of appointment.

(3) The Chief Commissioner shall, during the period of his appointment as set out in the instrument of appointment, hold office at the pleasure of the Yang di-Pertuan Agong, subject to the advice of the Prime Minister.

(4) The Chief Commissioner shall, during his term of office as such, be deemed to be a member of the general public service of the Federation for purposes of discipline.

(5) The Chief Commissioner shall be responsible for the direction, control and supervision of all matters relating to the Commission.

(6) The Chief Commissioner shall have all the powers of an officer of the Commission and shall have such powers of a Deputy Public Prosecutor as authorized by the Public Prosecutor for the purposes of this Act.

(7) The Chief Commissioner shall, before assuming the duties and responsibilities of his office, make in such manner as he may declare to be most binding on his conscience before the Yang di-Pertuan Agong such declaration as may be prescribed by the Minister by rules made under section 71.

(8) There shall be issued to the Chief Commissioner a certificate of appointment in the form of an authority card as evidence of his appointment.

(9) The person holding office as the Director General of the Anti-Corruption Agency appointed under subsection 3(2) of the Anti-Corruption Act 1997 [Act 575] immediately before the commencement of this Act shall, upon the commencement of this Act, be deemed to have been appointed Chief Commissioner under subsection (1) for the remainder of the period of his appointment under the 1997 Act, and the requirements of subsection (7) shall be deemed to have been satisfied.

Section 6. Appointment of other officers of the Commission

(1) There shall be appointed such number of Deputy Chief Commissioners, Commissioners, Deputy Commissioners, Chief Senior Assistant Commissioners, Senior Assistant Commissioners, Assistant Commissioners, Senior Superintendents, Superintendents, Chief Senior Assistant Superintendents, Senior Assistant Superintendents and Assistant Superintendents of the Commission as may be necessary for the purpose of carrying into effect the provisions of this Act.

(2) There shall be appointed such number of junior officers of the Commission as may be necessary to assist the Commission in carrying into effect the provisions of this Act.

(3) All officers and junior officers of the Commission shall be members of the general public service of the Federation.

(4) Every officer and junior officer of the Commission shall have such powers as may be provided for him under this Act and shall be subject to the direction, control and supervision of the Chief Commissioner or any other officer of the Commission superior to him in rank, and shall exercise his powers, perform his functions, and discharge his duties in compliance with such directions or instructions as may be specified orally or in writing by the Chief Commissioner or any other officer of the Commission superior to him in rank.

(5) Every officer of the Commission appointed under subsection (1) shall on first joining the Commission and before assuming the duties and responsibilities of his office make in such manner as he may declare to be most binding on his conscience before an officer of the Commission of the rank of Senior Superintendent or above such declaration as may be prescribed by the Minister by rules made under section 71.

(6) A certificate of appointment in the form of an authority card shall be issued to every officer and junior officer of the Commission, and such card shall be signed by the Chief Commissioner and shall be prima facie evidence of the appointment under this Act.

(7) Upon the commencement of this Act, every person holding an appointment under the Anti-Corruption Act 1997 shall be deemed to be an officer of the Commission appointed under this section and the requirements of subsection (5) shall be deemed to have been satisfied, and every such officer shall hold such title of office as may be determined by the Minister by notification in the Gazette.

Section 7. Functions of officers of the Commission

The officers of the Commission shall have the following functions:

- (a) to receive and consider any report of the commission of an offence under this Act and investigate such of the reports as the Chief Commissioner or the officers consider practicable;
- (b) to detect and investigate-
 - (i) any suspected offence under this Act;
 - (ii) any suspected attempt to commit any offence under this Act; and
 - (iii) any suspected conspiracy to commit any offence under this Act;
- (c) to examine the practices, systems and procedures of public bodies in order to facilitate the discovery of offences under this Act and to secure the revision of such practices, systems or procedures as in the opinion of the Chief Commissioner may be conducive to corruption;
- (d) to instruct, advise and assist any person, on the latter's request, on ways in which corruption may be eliminated by such person;
- (e) to advise heads of public bodies of any changes in practices, systems or procedures compatible with the effective discharge of the duties of the public bodies as the Chief Commissioner thinks necessary to reduce the likelihood of the occurrence of corruption;
- (f) to educate the public against corruption; and
- (g) to enlist and foster public support against corruption.

Section 8-Production of authority card

Every officer and junior officer of the Commission when acting under this Act shall, on demand, declare his office and produce to the person against whom he is acting or from whom he seeks any information the authority card issued to him under this Act.

Section 9. Officer deemed to be always on duty

Every officer of the Commission shall, for the purposes of this Act, be deemed to be always on duty when required to perform his duties or functions and may perform the duties or functions and exercise the powers conferred on him under this Act or under any other written law at any place within or outside Malaysia.

Section 10. Powers of officers of the Commission

- (1) In addition, and without prejudice, to the powers, duties and functions conferred under this Act-
 - (a) an officer of the Commission shall have, for the purposes of this Act, all the powers and immunities of a police officer appointed under the Police Act 1967 [Act 344]; and
 - (b) a junior officer of the Commission shall have, for the purposes of this Act, all the powers and immunities of a prison officer of the rank of sergeant and below under the Prison Act 1995 [Act 537] when escorting and guarding persons in custody of the Commission and those of a police officer of the rank of sergeant and below appointed under the Police Act 1967.
- (2) Without prejudice to the generality of subsection (1)-
 - (a) an officer of the Commission of the rank of Superintendent and above shall have all the powers of a police officer of the rank of Assistant Superintendent of Police and above; and
 - (b) a Chief Senior Assistant Superintendent, a Senior Assistant Superintendent and an Assistant Superintendent of the Commission shall have all the powers of a police officer of the rank of Inspector and above.
- (3) Where in the course of any investigation or proceedings in court in respect of the commission of an offence under this Act by any person, there is disclosed an offence under any other written law, not being an offence under this Act, regardless whether the offence is committed by the same person or any other person, the officer of the Commission responsible for the investigation or proceedings, as the case may be, shall notify the Public Prosecutor or an officer of the Commission of the rank of Commissioner or above who may issue such directions as he thinks fit.
- (4) For the purpose of this Act-

(a) where an order, a certificate or any other act is required to be given, issued or done by an officer in charge of a Police District under any written law, such order, certificate or act may be given, issued or done by a senior officer of the Commission, and for such purpose, the place where the order, certificate or act was given, issued or done shall be deemed to be a Police District under his charge;

(b) an officer of the Commission shall have all the powers conferred on an officer in charge of a police station under any written law, and for such purpose the office of such officer shall be deemed to be a police station.

(5) For the avoidance of doubt, it is declared that for the purposes of this Act an officer of the Commission shall have all the powers of a police officer of whatever rank as provided for under the Criminal Procedure Code [Act 593] and the Registration of Criminals and Undesirable Persons Act 1969 [Act 7], and such powers shall be in addition to the powers provided for under this Act and not in derogation thereof, but in the event of any inconsistency or conflict between the provisions of this Act and those of the Criminal Procedure Code, the provisions of this Act shall prevail.

Section 11. Duties of officers of the Commission

(1) It shall be the duty of the Chief Commissioner and the officers of the Commission to carry out their functions as specified in section 7.

(2) The Chief Commissioner shall make an annual report on the activities of the Commission to the Special Committee on Corruption.

Section 12. Standing orders

The Chief Commissioner may issue administrative orders to be called 'Standing Orders', not inconsistent with the provisions of this Act, on the general control, training, duties and responsibilities of officers and junior officers of the Commission, and for such other matters as may be necessary or expedient for the good administration of the Commission or for the prevention of the abuse of power or neglect of duty, and generally for ensuring the efficient and effective functioning of the Commission.

Five Oversight Bodies:

1) Anti-Corruption Advisory Board - section 13 of MACCA

(1) The Commission shall be advised by an advisory board to be known as the Anti-Corruption Advisory Board.

(2) The Advisory Board shall consist of-

(a) at least seven members who shall be appointed by the Yang di-Pertuan Agong on the advice of the Prime Minister; and

(b) the Chief Commissioner as ex-officio member.

(3) The members appointed by the Yang di-Pertuan Agong shall be persons of integrity who have rendered distinguished public service or have achieved distinction in the professions.

(4) The term of office of members appointed by the Yang di-Pertuan Agong shall be three years and such member shall not hold office for more than two terms either continuously or otherwise. (5) The Advisory Board shall have the following functions:

(a) to advise the Commission on any aspect of the corruption problem in Malaysia;

(b) to advise the Commission on policies and strategies of the Commission in its efforts to eradicate corruption;

(c) to receive, scrutinise and endorse proposals from the Commission towards the efficient and effective running of the Commission;

(d) to scrutinise and endorse resource needs of the Commission to ensure its effectiveness;

(e) to scrutinise the annual report of the Commission before its submission to the Special Committee on Corruption; and

(f) to submit its comments to the Special Committee on Corruption as to the exercise by the Commission of its functions under this Act.

2) Special Committee on Corruption - section 14 of MACCA

(1) There shall be a committee to be known as the Special Committee on Corruption which shall have the following functions:

(a) to advise the Prime Minister on any aspect of the corruption problem in Malaysia;

(b) to examine the annual report of the Commission;

(c) to examine the comments of the Anti-Corruption Advisory Board as to the exercise by the Commission of its functions under this Act; and

(d) to seek clarifications and explanations on the annual report of the Commission and the comments of the Anti-Corruption Advisory Board.

(2) The Special Committee shall consist of seven members, to be appointed by the Yang di-Pertuan Agong, who shall be drawn both from the members of the Senate and the House of Representatives, none of whom shall be a member of the administration.

(3) The members to be appointed under subsection (2) shall be the members of the Senate and the House of Representatives nominated by the Leader of the House of Representatives.

(4) The term of office of members of the Special Committee shall be three years but a member shall not hold office for more than two terms either continuously or otherwise.

(5) The Special Committee shall make an annual report on the discharge of their functions to the Prime Minister who shall lay a copy of that annual report before each House of Parliament.

3) Complaints Committee - Section 15 of MACCA

(1) There shall be a complaints committee which shall have the following functions:

(a) to monitor the handling by the Commission of complaints of misconduct which is non-criminal in nature against officers of the Commission; and

(b) to identify any weaknesses in the work procedures of the Commission which might lead to complaints and where it considers appropriate to make such recommendations as to the work procedures of the Commission as it deems fit.

(2) The Minister shall appoint not more than five persons, whom he deems fit and proper, to be members of the Complaints Committee.

Two other committees are set up by administrative order to monitor the activities of the Malaysian Anti-Corruption Commission. Those are as follows:

4) Operation Review Panel:

(a) consist of at least 7 members appointed by the Prime Minister and 3 ex-officio members. The members are drawn from those who have specialised skills and representing relevant professional bodies;

(b) the term of office of members shall be 2 years and not exceeding 3 terms.

The functions of the Operation Review Panel:

(a) to receive and obtain explanation on statistics of investigation papers every quarter of the year from the Commission;

(b) to receive and scrutinize reports on investigation papers every quarter of the year from the Commission;

(c) To receive and scrutinize reports on prosecution every quarter of the year from the Legal and Prosecution Division within the Malaysian Anti-Corruption Commission;

(d) To receive and scrutinize reports on investigation papers that consume more than 12 months of the investigation process;

(e) To receive and scrutinize reports on investigation papers that have been submitted to the Public Prosecutor but which do not have any response from the latter after 6 months of the submission;

(f) to receive and scrutinize reports on contradictory views between the Public Prosecutor and the Commission;

(g) to obtain further clarification in the meeting of Operation Review Panel pertaining to matters related to para (c),(d), (e) and (f) above;

(h) to advise and facilitate the Commission towards effectiveness in investigation process; and

(i) to submit annual report and comments of the Panel on the investigation activities to the Prime Minister

5) Consultation and Corruption Prevention Panel:

(a) consist of at least 7 members appointed by the Prime Minister and 3 ex-officio members.

(b) the term of office of members shall be 2 years but not exceeding 3 terms

Functions of the Consultation and Corruption Prevention Panel:

(a) to scrutinize and recommend to the Commission on the priority areas of practices, systems, and work procedures in the public and private sectors that are prone to corruption ;

(b) to scrutinize and enhance reports prepared by the Commission on recommendation to plug loopholes in the said practices, systems and work procedures of the Public and Private sectors;

(c) to formulate and establish best practices from time to time ;

(d) to advise the Commission on dissemination of anti-corruption messages through the community relation programmes and to obtain public support on anti-corruption drive;

(e) to scrutinize the anti-corruption programmes carried out by the Commission and to recommend

ways to enhance them;

- (f) to monitor from time to time the attitude and perception of the public on corruption and the efforts taken by the Commission;
- (g) to assist the Commission as key-communicator in obtaining support from the public, mass media and other sectors towards the anti-corruption programmes carried out by the Commission;
- (h) to scrutinize, analyse and recommend to the Anti-Corruption Advisory Board on the ways to enhance the effectiveness of corruption prevention programmes ; and
- (i) to present annual report on the progress of the corruption prevention programmes carried out by the Commission to the Prime Minister.

596. In regard to measures adopted to ensure the independence of the MACC, Malaysia reported that the appointment of the Chief Commissioner was by the Yang di-Pertuan Agong (the King) upon the advice of the Prime Minister, as per section 5 (3) of MACCA. The powers of the Chief Commissioner include the powers of a Deputy Public Prosecutor for purposes of the Act, as provided in section 5 (6) of MACCA.

597. Malaysia further provided the following information on how staff is selected and trained. Staff of the Malaysian Anti-Corruption Commission is recruited by the MACC. The recruitment process includes fresh applications as well as secondments from other government agencies. The categories of staff include officers and junior officers, as per sections 6, 7 and 10 of MACCA.

598. Training of officers and staff of the Malaysian Anti-Corruption Commission is organized by the Malaysian Anti-Corruption Academy (MACA). More information on the Academy is provided below as well as in the observations section.

- **Basic Training:** All new recruits (officers of the Commission) are required to undergo a basic training course at the MACA for a period of three months before being assigned to their respective stations/divisions.
- **On-the-job Training:** Forming part of the basic training, new recruits who have been assigned to respective stations and/or divisions will undergo a mentor-mentee programme at the respective stations/divisions.
- **Advanced/ Intensive Courses (Local and International):** Follow-up training needs and other advanced intensive courses for each officer are determined by the Policies, Research and Corporate Centre of the MACA in compliance with the Public Service Human Resources Training Policy under Service Circular No.6/2005, which makes it compulsory for every public officer to attend a minimum of seven days' training per year.

Training in this area also includes attending and participating in seminars, conferences, symposia, lectures, forums, conventions, visual and media presentations, workshops, and monthly departmental meetings.

Also included in this area are training and attachments to other agencies, both locally (e.g. MACA, Institute of Public Administration, Police Academy) and abroad (e.g. ICAC Hong Kong, FBI, and INTERPOL) sponsored by the Malaysian Anti-Corruption Commission and/or the Federal Government's Department of Civil Services.

In relation to this, the MACA is conducting Certified Integrity Officers Course for certain selected officers. The MACA is also the coordinating agency for a Master's

Degree in Social Science (Corruption Studies) conducted at the Federal University of Malaysia.

- **Self-improvement courses:** These include reading scientific/research reports, accredited courses sponsored/recognized by Institute of Public Administration Malaysia/Government Agencies/Ministries. Officers are also given study leave to facilitate or further their tertiary education (e.g. degrees/Master's degree).

(b) Observations on the implementation of the article

599. The reviewing experts positively acknowledge the establishment and work of MACC. In regard to its independence, they note the formulation in section 5 (3) of MACCA: "The Chief Commissioner shall, during the period of his appointment as set out in the instrument of appointment, hold office at the pleasure of the Yang di-Pertuan Agong, subject to the advice of the Prime Minister". Besides this section, MACCA does not further specify any details about the replacement or dismissal of the Chief Commissioner. The reviewing experts observe that this provision could pose a challenge in regard to the independence of the Commissioner, should there be an unfavourable decision based upon the advice of the Prime Minister.

600. Malaysia explained that the various supervisory committees include, among other representatives, members of civil society and the private sector. The reviewing experts welcomed this initiative as a means to foster the involvement of all stakeholders in the prevention and fight against corruption.

601. During the country visit, senior MACC officials agreed with the reviewing experts that the appointment of the Chief Commissioner and his replacement or dismissal are not sufficiently regulated and pointed out that a Constitutional amendment would address these aspects.

602. Malaysian officials explained that MACC has eleven divisions at the Headquarters level and a total of 20 branches in the 13 States of Malaysia. Details on the Malaysian Anti-Corruption Academy are provided below.

603. 36 Prosecutors of the DPP are currently seconded to work directly at MACC. It was noted that this helps to expedite investigation and prosecutions and is a successful example of collaboration. After completion of the investigation, cases are transferred to the DPP for prosecution if sufficient evidence is available for a charge. The discretion to prosecute remains fully with the DPP, according to section 145 of the Constitution.

604. In addition, the Operations Review Panel discusses all cases which are older than one year, all cases which have been transferred to the DPP if they have not been answered within 6 months as well as all cases which were transferred to DPP, but did not result in a charge. The Panel then has the opportunity to make recommendations to the DPP.

Royal Malaysian Police

605. The Royal Malaysian Police (RMP) is also responsible for the investigation of money-laundering offences, including predicate offences regulated in AMLATFA. In this regard, the RMP can issue freezing orders and take other measures according to

AMLATFA. Exchanges with MACC take place on a daily basis and reports are transferred from one institution to the other. Although MACC offers many possibilities for the public to make reports, some corruption reports are filed directly at the Police. These are then transferred to MACC in a procedure that was observed to function effectively in practice. If the RMP receives a complaint about alleged corrupt behaviour of a police officer, such cases are also transferred to MACC. Depending on the investigation requirements of individual cases, RMP and MACC can set up joint task-forces.

**Reports received from and referred to Malaysian Royal Police by MACC
Year 2009 - 2012**

No	Report	2009	2010	2011	2012	Total
1	Received from RMP	9	42	51	37	139
1	Referred to RMP	1	0	2	2	5

Specialized Anti-Corruption Courts

606. During the country visit, the experts learned that in 2011 Malaysia established specialized courts to adjudicate corruption offences. These courts try the offences regulated in MACCA including prescribed offences. In total, 14 specialized anti-corruption courts exist throughout the country, one in every State and one in the capital. There are three specialized anti-corruption judges stationed in the court in Kuala Lumpur and at least one judge at each of the other courts. The judges have undergone special training to prepare them for the new task.

607. The reason for the creation of specialized anti-corruption courts was the culminating backlog of cases. Moreover, a speedy trial will increase the probability of a conviction, taking into account factors such as the memory of witnesses, undue influence of witnesses, risks of tempering with evidence, etc. At the time of the review, the backlog had been reduced and the objective of the specialized courts was to complete cases within one year, particularly if they are of public interest. As per practice directions of the Chief Justice, judges are instructed to try cases within the prescribed timeframe of one year, and it was explained during the country visit that judges can be held accountable for not trying cases within this period. Other initiatives to reduce the backlog, were the introduction of pre-trial conferences and plea bargaining.

608. The Malaysian Government Transformation Programme (GTP), unveiled on 28 January 2010, is an effort by Malaysia's current Government to address seven key areas concerning the people of the country. It is expected to contribute to making the country a developed and high-income nation as per its Vision 2020. Amongst the six National Key Results Areas (NKRAs) is not only the objective to reduce crime (NKRA 1), but also the Fight against Corruption (NKRA 2). One of the indicators to measure success in the fight against corruption of relevance for the judiciary is the percentage of cases tried and completed within one year.

Year	Incoming cases	Completed cases	Target	Actual achievement
2010			30 %	36,8%
2011	434	328	70 %	75,6 %
2012	516		70 %	Not yet calculated

Note: MACC calculates the number of cases per person. For this reason there might be a difference in numbers to the numbers of cases reported by the Courts.

Year	MACC cases tried in court	Conviction rate
2011	520	75 %
2012	400	85 %

609. To further improve capacity building in the area of anti-corruption, Malaysia may wish to strengthen the exchange of all actors in the criminal justice sector and to extend capacity building initiatives of MACA to the judiciary through joint seminars or training events.

Malaysian Anti-Corruption Academy

610. During the country visit, Malaysia invited the reviewing experts to the Malaysian Anti-Corruption Academy (MACA) and to observe the graduation of a cadet of new MACC recruits from MACA. The reviewers were impressed with the various training programmes held at MACA and the academic facilities, including rooms for moot court, training of officers on investigative interviewing, and videoconferencing facilities.
http://maca.sprm.gov.my/portal/index.php?page=MAIN_PAGE&language=1

Financial Intelligence Unit

611. The FIU is situated in the Central Bank of Malaysia and is the competent authority under AMLATFA. It currently has approximately 70 staff members, and among its core functions are to receive, analyze and disseminate financial intelligence reports. There are 38,000 reporting institutions in Malaysia. Reporting institutions are institutions which carry out any of the activities listed in the First Schedule of AMLATFA, for instance banks, insurance companies, lawyers, casinos, accountants etc. Compliance with the reporting obligations can be enforced by the Central Bank according to sections 22 and 23 of AMLATFA.

(c) Successes and good practices

612. The reviewers are of the opinion that Malaysia's commitment to the fight against corruption, including at the highest level of Government through the Government Transformation Programme, is noteworthy. This includes also the operations of its specialized anti-corruption bodies, which exhibit this commitment at all levels (including the heads of the departments and agencies met with during the country visit). The institutional set-up of the Malaysian Anti-Corruption Commission, the Academy and the specialized anti-corruption courts was deemed to be conducive to the fight against corruption at the national and international level and to constitute an exemplary practice that could be emulated by other countries. Although many of the institutions are still relatively young, the reduction of case backlog and the increasing number of investigations and convictions in corruption cases are considered successful measures that should be fostered and strengthened.

613. An additional good practice is the Operations Review Panel, which reviews cases that are older than one year, cases that have been transferred to the DPP but were unanswered within six months, as well as cases that were transferred to DPP but did not result in a

charge. The functions of this independent panel were deemed to be a positive oversight measure to ensure follow-up and the effective prosecution of corruption cases.

614. Furthermore, the reviewing experts noted favorably the existence of fourteen specialized anti-corruption courts throughout the country, which they considered to be a positive measure to help reduce case backlog and strengthen the effective adjudication of corruption cases. Malaysia should further consider monitoring the functioning of these courts and judgments rendered in corruption cases.

Article 37 Cooperation with law enforcement authorities

Paragraph 1

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.

(a) Summary of information relevant to reviewing the implementation of the article

615. Malaysia has established measures to encourage offenders to supply information, including measures that can be regarded as providing a form of criminal immunity to witnesses.

616. Section 52 of MACCA provides for evidence of accomplices or agents provocateur to be admissible in Court.¹⁶

Section 52. Evidence of accomplice and agent provocateur

(1) Notwithstanding any written law or rule of law to the contrary, in any proceedings against any person for an offence under this Act-

(a) no witness shall be regarded as an accomplice by reason only of such witness having-

(i) accepted, received, obtained, solicited agreed to accept or receive, or attempted to obtain any gratification from any person;

(ii) given, promised, offered or agreed to give any gratification; or

(iii) been in any manner concerned in the commission of such offence or having knowledge of the commission of the offence;

(b) no agent provocateur, whether he is an officer of the Commission or not, shall be presumed to be worthy of credit by reason only of his having attempted to commit, or abet, having abetted or having been engaged in a criminal conspiracy to commit, such offence if the main purpose of such attempt, abetment or engagement was to secure evidence against such person; and

(c) any statement, whether oral or written, made to an agent provocateur by such person shall be admissible as evidence at his trial.

(2) Notwithstanding any written law or rule of law to the contrary, a conviction for any offence under this Act solely on the uncorroborated evidence of any accomplice or agent provocateur shall not be illegal and no such conviction shall be set aside merely because the court which tried the case has failed to refer in the grounds of its judgement to the need to warn itself against the danger of convicting on such evidence.”

617. Section 63 of MACCA - Examination of offenders¹⁷ provides as follows:

¹⁶ This provision is in pari materia with Section 44 of the Anti-Corruption Act 1997 (Act 575) and similar to Section 18 of the Prevention of Corruption Act 1961 (Act 57).

“(1) Whenever two or more persons are charged with an offence under this Act the court may, on an application in writing by the Public Prosecutor, require one or more of them to give evidence as a witness or witnesses for the prosecution.

(2) Any person referred to in subsection (1) who refuses to be sworn or to be affirmed to answer any lawful question shall be dealt with in the same manner as witnesses so refusing may by law be dealt with by the court.

(3) Every person required to give evidence under subsection (1) who, in the opinion of the court, makes a true and full discovery of all things as to which he is lawfully examined, shall be entitled to receive a certificate of indemnity under the seal of the court stating that he has made a true and full discovery of all things as to which he was examined, and such certificate shall be a bar to all legal proceedings against him in respect of all such things.

(4) An application by the Public Prosecutor under subsection (1) may be presented to the court by the officer conducting the prosecution.”

A similar provision to the above mentioned law is also provided for under subsections (1) and (2) of section 69 of AMLATFA, which state as follows:

“(1) Notwithstanding any written law or rule of law to the contrary, in any proceedings against any person for an offence under this Act no agent provocateur, whether he is an officer of an enforcement agency or not, shall be presumed to be worthy of credit by reason only of his having attempted to commit, or abet, having abetted or having been engaged in a criminal conspiracy to commit, such offence if the main purpose of such attempt, abetment or engagement was to secure evidence against such person.

(2) Notwithstanding any written law or rule of law to the contrary, a conviction for any offence under this Act solely on the uncorroborated evidence of any agent provocateur shall not be illegal and no such conviction shall be set aside merely because the court which tried the case has failed to refer in the grounds of its judgement to the need to warn itself against the danger of convicting on such evidence.”

618. Both these provisions override section 114 (b) of the Evidence Act (Act 56):

“114. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

Illustrations

The court may presume— ...

(b) that an accomplice is unworthy of credit unless he is corroborated in material particulars;”...

619. Section 133 of the Evidence Act 1950:

“An accomplice shall be a competent witness against an accused person and a conviction is not illegal merely if it proceeds upon the uncorroborated testimony of an accomplice.”

620. Malaysia provided the following examples of implementation.

Shaiful Idzam Sulaiman v PP [2004] 2 CLJ 121

This was an appeal by the appellant against his conviction for an offence under s. 11(a) of the Anti-Corruption Act 1997 (‘the Act’). The facts showed that the appellant, an investigating officer with the police force, had the authority to retain an identity card (‘IC’) of a person under remand. The appellant was said to have agreed to accept a sum of RM500 from the complainant for the return of his IC after the complainant was released from remand in connection with drug related offences. The complainant then lodged a report with the Anti-Corruption agency and the officers therein laid a trap that led to the arrest of the appellant. The trial judge was satisfied that the appellant was an agent within the meaning of the Act and that there was payment and as such he should be convicted. In the present appeal, the main issue was whether the trial judge erred when he

¹⁷ This provision is in pari materia with repealed Section 52 of the Anti-Corruption Act 1997 and similar to Section 19 of the Prevention of Corruption Act 1961 (Act57)

failed to address the question of whether the presumption in s. 42(1) of the Act (that the money was presumably corruptly accepted) was rebutted.

Held: [1] The complainant was not an accomplice. Having reported to the Anti-Corruption Agency, he was a partisan witness. The evidence showed that he had become an informer who had participated in leading to the corrupt payment. (p 137 b-c) In my view compared to s. 18 of the 1961 Act, the new s. 44(1) of the Act 1997 is wider in scope and has been extended to several other categories of persons besides the giver. Again however the use to which the section is to be put is for purposes of the treatment of the evidence. The change from s. 18 of the 1961 Act to s. 44(1) of the Act compels me to dwell on certain passages in the judgment delivered by Salleh Abas CJ (as he then was) in Ng Kok Lian's case. To my mind, what was stated by the learned judge then has been given (it is not known whether intentionally or unintentionally) statutory recognition... The relevant passage that I wish to cite relates to the part where the learned judge traced the history of s. 18(1) of the Act in which he described it as the re-enactment of s. 13(3) of the Prevention of Corruption Ordinance 1950 which was wholly replaced by the 1961 Act. The discussion in that case was clearly on a rule of presumption in the context of the evidence of a person who may be an accomplice. However what is interesting to note is that Salleh Abas FCJ in that case went on to a lengthy discourse on the issue of an accomplice and the excerpts of his judgment that I wish to cite is as follows:

We have traced the history of the provision and analyzed its effect upon the existing law as to the accomplice's evidence at length. This is done for no other purpose than to show that the provision does not change the law as to accomplice's evidence at all. The limited modification or an exception referred to by Taylor J is nothing more than a legislative design to obviate the practical difficulties which the prosecution used to encounter prior to the passing of the 1950 Ordinance because of the ever increasing readiness of the courts to hold a giver of a bribe to be an accomplice irrespective of the circumstances in which it was given. This provision, therefore, serves as a reminder to the courts of their duty to examine the evidence of the witness who gives the bribe closely before arriving at a decision that he is an accomplice, and not to automatically apply the rule as to an accomplice's evidence as was done by the Kuala Langat magistrate in Public Prosecutor v. Hajl Ismail & Anor. (supra). As a receiver of a bribe is not within the provision, surely his credibility should be judged in the same way as that of a giver prior to the enactment of the provision in 1950. In any case even after the provision was passed, it being only a limited modification, and the rule as to accomplice's evidence not being abolished, we cannot see any reason why a witness to whom a bribe is given should be less believed than his counter-part, the giver. It is for this reason, we think, that Syed Sheh Barakbah J thought that it made no difference whether the witness is the receiver or the payer; the central question being always whether he is an accomplice, irrespective of the part he played in the transaction. The court must therefore approach his evidence in the same way and not come to an automatic conclusion as in Hajl Ismail's case (supra) that he is an accomplice just because counsel said so. There can be no automatic application of the rule as the accomplice's evidence to any witness nor could a witness be prima facie an accomplice without first examining his evidence to find out whether he is an accomplice or not; least of all to be held an accomplice just because money was given to him or because he received it. To be an accomplice the witness who received the bribe must be the one who was abetting the offence of giving it committed by the accused, the giver. Only then would the receiver be regarded as *particeps criminis*. This means that just as the giver as a principal offender requires *mens rea*, so does an accomplice witness who

received the gratification. If he received the gratification innocently or without any corrupt motive or if he did not receive it at all, although it was given to him, as far as he is concerned the gift did not change its character to become an illegal gratification just because the giver (the accused) gave it with corrupt motive or with evil intention. Thus in every case when the issue is raised that a witness is an accomplice the court must study the evidence and make the necessary finding. There can be no rule of law or evidence that a witness is automatically an accomplice just because of his actus reus. The whole idea is completely contrary to the basic concept of criminal liability. A cursory examination of decided cases in Malaya and Singapore clearly shows that the question whether a receiver is an accomplice or not depends entirely upon the facts of the particular case. I find that the analytical reasoning in that judgment appears to have crystallized into legislative language in the form of s. 44(1)(a) and (b) of the 1997 Act (...)

The law in Malaysia which deals with the evidence of an accomplice is found in s. 114 illustration (b) and s. 133 of the Evidence Act 1950. The inception of s. 44(1) is not, in my view, intended to introduce a radical change in the law. However as expressed above, the judgment of Salleh Abas CJ elucidates the approach that a witness for the prosecution is not to be labeled as an accomplice automatically. Since in a bribery case there has to be a giver and a receiver the facts and circumstances of each case will have to be carefully scrutinized in order glean what role each one has contributed in perpetrating what appears to be a form of illegal bargain since s. 11(a) itself refers to a gratification “as an inducement or reward for doing or forbearing”. Hence both the giver and receiver of the gratification cannot automatically be regarded as accomplices as if so it would render the whole object of s. 11(a) of the 1997 Act sterile. In the present appeal since the appellant as receiver is being charged, therefore with regard to s. 44(1) of the 1997 Act the evidence of the prosecution has to be viewed in the context of s. 44(1) sub-para. (a)(ii), (iii) and (b) and (c).

Public Prosecutor v Dato Haji Azman bin Mahalan [2010] 6 MLJ 833

The evidence of the prosecution's witnesses remained steadfast and unimpeached even assuming that SP1 was an accomplice, under s 133 of the evidence act 1950, he would still be a competent witness against the respondent whose conviction was not illegally merely because it proceeded upon SP1's uncorroborated evidence. Regardless of SP1's status, due to the abundance of evidence to substantiate his evidence on the gratification payment, the prosecution had successfully established a prima facie case against the respondent on the first charge.

(b) Observations on the implementation of the article

621. The reviewing experts were satisfied with the explanations provided by Malaysia. They noted furthermore that measures on plea bargaining are in place in the Criminal Procedure Code.

Article 37 Cooperation with law enforcement authorities

Paragraph 2

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

622. Malaysia reported that cooperation is regarded as a form of mitigation when sentencing such accused persons.

623. No case law directly on this point was reported. However, it was explained that there is a general principle in sentencing laws that cooperation in the investigation or prosecution of a case would be considered as a factor in the sentencing process leading to a reduction in the eventual sentence. See *PP v Soh Soo Yang & anor* [2001] 5 MLJ 356. Other cases are also referred to below.

Public Prosecutor v Soh Soo Yang & anor [2001] 5 MLJ 356. [41]

The first accused had not only cooperated with police investigations and given information, but had also pleaded guilty. A guideline was set out in *Mohamed Abdullah Ang Swee Kang v PP* [1988] 1 MLJ 167 where Mohamed Azmi SCJ said at p 171, it is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence. [42] That case gave recognition to a principle first appearing in *Sau Soo Kim v PP* [1975] 2 MLJ 134. Any such discount must however take into consideration the seriousness of the offence and difficulty of solving it. That discretion always remains with the court: *Lee Say & Ors v PP* [1985] 2 CLJ 155. Although upon questioning, the first accused told the police of his involvement, that was on 22 June 1999, fully five days after the event. He was arrested at 5.30pm, five hours after the body of his aunt was found. Taking into account these factors, a discount of one third would put too high a value to his cooperation, and convenience to investigators and the court against the loss of a life. A discount of 20% is the maximum that is appropriate in the circumstances. [43] Giving a discount of 20% and rounding off the result to the nearest round number, I had arrived at the sentences of 13 years and nine years for the first and second accused. Pursuant to the discretion under s 282(d) of the Criminal Procedure Code, I had ordered the sentences to take effect from the date of arrest.

Mohamed Abdullah Ang Swee Kang v Public Prosecutor [1988] 1 MLJ 167. 4)

In this case, the appropriate sentence if the appellant had claimed trial would have been around eight years, regard had been given to the amount of money defalcated and the other circumstances of the case. It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence. In this particular case, apart from the plea of guilt, the sentence must also be discounted to reflect the full restitution and other mitigating factors. The sentence imposed on the appellant was therefore manifestly excessive and should be reduced to four years' imprisonment; (...) [15] In this appeal, certainly a sentence of immediate imprisonment for the offence of CBT involving a sum of considerable magnitude had to be imposed and had to be one that should be sufficiently long to signify the gravity of the offence. But on the length of the sentence, we had come to the conclusion, as indeed was the initial finding of the learned judge himself, that a term of between 3 and 4 years would be fair and adequate on the basis of *Khairuddin and Muthu Lingam*, and on the principles laid down in *Barrick*. For determining the length of custodial sentence in pleading-guilty cases, the test to be adopted could be found in *R v Boyd* (1980) 2 Cr App R (S) 234; *Thomas Encyclopaedia of Current Sentencing Practice* p 1061 where Cumming-Bruce L.J. said: "The policy of the courts is that where a man

does plead guilty, which does give rise to public advantage and avoids the expense and nuisance of a trial, which may sometimes [*170] be a long one, the court encourages pleas of guilty by knocking something off the sentence which would have been imposed if there had not been a plea of guilty. So one asks oneself, if there had been a plea of not guilty, and he had been convicted, what would have been the appropriate sentence? The answer to that is that the appropriate sentence in these circumstances would not have been more than three years. That points to the fact that this sentence was rather on the heavy side, because it did not give sufficient allowance for the plea of guilty." [16] When we asked ourselves the same question here, the appropriate sentence if the appellant had claimed trial would have been around eight years, regard being had to the amount of money defalcated and the other circumstances of the case. Clearly on this test, the sentence imposed on the appellant was manifestly excessive. It is generally accepted that the extent of the reduction on account of a plea of guilty would be between one-quarter and one-third of what otherwise would have been the sentence. In this particular case, apart from the plea of guilty, the sentence must also be discounted to reflect the full restitution made and the other mitigating factors. Although the learned judge indicated in his judgment that he had given the necessary discounts, they were not reflected at all in the sentence imposed. We were satisfied from his judgment that the learned judge had imposed the eight years' sentence purely on the basis of extending twice as long the English guidelines found in *Barrick* and the sentence imposed in *Davies*, without regard to the particular facts of this case and without giving the appellant any or sufficient credit for all the mitigating circumstances. The recommended prison terms in *Barrick* were not meant for pleading-guilty cases. If the learned judge had not fallen into error in misreading the facts and the law in *Barrick* and *Davies*, he would probably have found that a four-year sentence would adequately fit the crime which by any standard was severe enough to satisfy the justice of this case. In our view, the fact that our Penal Code had prescribed a longer maximum sentence for section 409 offences than for similar crimes in England did not justify the imposition of a sentence more severe than what the gravity and circumstances of the offence would warrant. It was wrong in principle to double without any good reason what would otherwise be an adequate and fair period of imprisonment. Since full restitution had been made and the appellant had not enriched himself personally by the crime, we found no purpose in imposing a fine in addition to custodial sentence. [17] Bearing in mind all those matters, we have allowed this appeal by reducing the sentence imposed on the appellant to four years' imprisonment from the date of his arrest, and by setting aside the fine of \$ 100,000.00.

(b) Observations on the implementation of the article

624. The reviewing experts are satisfied with the explanation provided by Malaysia. Although the case examples discuss only the mitigation of punishment in regard to a plea of guilty, the experts, after discussion during the country visit, are of the opinion that similar factors could be taken into account by judges in regard to the mitigation of punishment absent a guilty plea in cases of substantial cooperation in the investigation and prosecution. The reviewing experts recommend that, should such cases arise in the future, similar steps are taken into consideration.
625. During the country visit, the reviewing experts were informed that plea bargaining had been introduced in Malaysia. Malaysia pointed to section 172 c of the Criminal Procedure Code on Plea Bargaining:

- (1) An accused charged with an offence may make an application for plea bargaining in the Court in which the offence is to be tried.
- (2) The application under subsection(1) shall be in Form 28A of the Second Schedule and shall contain –
 - (a) A brief description of the offence that the accused is charged with;
 - (b) A declaration by the accused stating that application is voluntarily made by him after understanding the nature and extent of the punishment provided under the law for the offence that the accused is charged with; and
 - (c) Information as to whether the plea bargaining applied for is in respect of the sentence or the charge for the offence that the accused is charged with.
- (3) Upon receiving an application made under subsection(1), the Court shall issue a notice in writing to the Public Prosecutor and to the accused to appear before the Court on a date fixed for the hearing of the application.
- (4) When the Public Prosecutor and accused appear on the fixed date for the hearing of the application under subsection (3), the Court shall examine the accused *in camera*-
 - (a) where the accused is unrepresented, in the absence of the Public Prosecutor
 - (b) where the accused is represented by an advocate, in the presence of his advocate and the Public Prosecutor,
- (5) Upon the Court being satisfied that the accused has made the application voluntarily, the Public Prosecutor and the accused shall proceed to mutually agree upon a satisfactory disposition of the case.
- (6) If the Court is of the opinion that the application is made involuntarily by the accused, the Court shall dismiss the application and the case shall proceed before another Court in accordance with the provisions of the Code.
- (7) Where a satisfactory disposition of the case has been agreed upon by the accused and the Public Prosecutor, the satisfactory disposition shall be put into writing and signed by the accused, his advocate if the accused is represented, and the Public Prosecutor, and the Court shall give effect to the satisfactory disposition as agreed upon by the accused and the Public Prosecutor.
- (8) In the event that no satisfactory disposition has been agreed upon by the accused and the Public Prosecutor under this section, the Court shall record such observation and the case shall proceed before another Court in accordance with provisions of the Code.
- (9) In working out a satisfactory disposition of the case under subsection (5), it is the duty of the Court to ensure that the plea bargaining process is completed voluntarily by the parties participating in the plea bargaining process.

Article 37 Cooperation with law enforcement authorities

Paragraph 3

3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

- (a) **Summary of information relevant to reviewing the implementation of the article**

626. There is no specific provision which grants immunity from prosecution to a cooperating suspect, except under section 63 of MACCA in the case of cooperating co-defendants. However, the Public Prosecutor may exercise his discretion under section 376 of the Criminal Procedure Code whether to charge the offender or otherwise.

627. Malaysia cited the following provisions of law:

Article 145 (3) of the Federal Constitution

“The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.”

Section 376 of the Criminal Procedure Code

“(1) The Attorney General shall be the Public Prosecutor and shall have the control and discretion of all criminal prosecutions and proceedings under this Code.”

628. Malaysia referred to the following cases:

Saiful Idzam Sulaiman v PP [2004] 2 CLJ 121

Thavanathan Balasubramaniam [1997] 2 MLJ 401

Chandrasekaran & Or v PP [1971] 1 MLJ 153

629. Malaysia also referred to Section 63 of MACCA (quoted above), which provides for criminal immunity. Further, Malaysia referred to subsections (1) and (2) of Section 69 of AMLATFA, which are quoted under paragraph 1 of the article above.

630. Malaysia cited the case of Shaiful Idzam Sulaiman v PP [2004] 2 CLJ 121 (quoted above). The following additional cases were cited.

631. Thavanathan Balasubramaniam [1997] 2 MLJ 401

In this case PW4 was an accomplice who had cooperated with the Anti-Corruption Agency in connection with the applicant's arrest. The applicant was initially tried on two charges of corruption under ss 3(a)(i) and 4(a)(i) respectively of the Prevention of Corruption Act 1961 ('the PCA'), before the sessions respectively of the Prevention of Corruption Act 1961 ('the PCA'), before the sessions court. According to the facts, the complainant, one Wong Sow Ying ('PW2 ') was charged in the applicant's court under the Common Gaming Houses Act 1953. Apparently, the applicant told one Ong Leong Chuan, an interpreter of the court ('PW4 '), that the case could be discharged if there was an offer of RM15,000. PW4 communicated this to PW2 who then enlisted the assistance of her son's employer ('PW3 ') to negotiate the payment of the said amount. Owing to a failure in finalizing the negotiation, PW3 reported the matter to the anti-corruption agency. PW4, who was subsequently arrested, agreed to co-operate with the anti-corruption agency. Ultimately, the applicant was arrested. [50] We shall now deal with the defense contentions but in slightly different order from that in which they were presented to us. Before us, learned counsel for the accused contended that the learned appellate judge: (1) was wrong in holding that PW4 Ong was not an accomplice; and: (2) had misdirected himself by finding that there was corroboration when there was none. [51] We decline to entertain contention (1) above, but would, for the purpose of this case, treat PW4 Ong as an accomplice. We decline for two reasons: firstly, on 4 May 1994, this court composed of a different panel had, under an application pursuant to the then s 66 of the Courts of Judicature Act 1964, given leave to refer the question now under consideration, but had not granted leave to refer the following question, i.e.: Whether the character of a self-confessed accomplice assumes the character of an ordinary

independent witness merely because the Investigating Agency intervenes by arresting him and insists that he completes the acts he had earlier undertaken to do as an accomplice. [52] Appropriateness of the phrasing of the question in the light of the facts and circumstances of the case apart, to deal with the contention canvassed now would, in effect, be entertaining what had been disallowed to be referred by this court earlier. This we would not do; secondly, we did not have the benefit of hearing on the issue since counsel for both sides did not advance [*417] any argument on the point. In our view, the interest of justice is served if we, as indicated earlier, treat PW4 Ong an accomplice.

Chandrasekaran & Or v PP [1971] 1 MLJ 153

This was an appeal against the conviction of the appellants on charges under the Prevention of Corruption Act, 1961. The evidence showed that there was a conspiracy to defraud the Government by means of forged vouchers. The appellants were charged with and convicted of abetment of the offence of defrauding the Government. On appeal it was argued, inter alia: (1) the learned president was wrong in treating a witness who had been originally charged with the appellants and who had given evidence under section 19 of the Prevention of Corruption Act, 1961, as a "peripheral accomplice"; (2) there was no or insufficient corroboration of the evidence of the witness; (3) the statements made by the second appellant which had been rejected by the learned president on the ground that they had been obtained by compulsion, was wrongly admitted under section 27 of the Evidence Ordinance; (4) typewriting evidence was wrongly admitted in this case; (5) evidence of the subsequent conduct of the second appellant was wrongly admitted; (6) the learned president was wrong in denying the first appellant his statutory right to a copy of a statement by a witness to the police for the purpose of cross-examination. Held, dismissing the appeal: (1) as the witness had given evidence against a co-accused in the hope of receiving a pardon, his evidence must be closely scrutinized and must meet the twin tests of credibility and corroboration, i.e. he has to satisfy the court not only that his evidence is in general credible but also that there is independent corroboration in material particulars; (2) although the learned president had appeared to treat the witness as a peripheral accomplice he in fact treated him as an accomplice and stressed the need for corroboration. The learned president had not misdirected himself in the law and there was no irregularity, but if there was, such irregularity had not occasioned any failure of justice; (3) the evidence of the witness in this case fully incriminated the first appellant and there was also in this case sufficient evidence in corroboration connecting or tending to connect the first appellant with the crime; (4) the statement made by the second appellant relating to the discovery of the typewriter was admissible under section 27 of the Evidence Ordinance; (5) the expert evidence on typewriting was admissible in this case under section 45 of the Evidence Ordinance; (6) evidence of the subsequent conduct of the second appellant was admissible under section 8 of the Evidence Ordinance; (7) as the learned president had referred to the police statement of the witness and had come to the conclusion that there was no material for serious challenge to the credibility or reliability of the witness, he had rightly rejected the application for a copy of the statement to be supplied to the first appellant.

Datuk Haji Wasli bin Mohd Said v Public Prosecutor [2010] MLJU 1518. [8]

Further, what the Applicant was to testify during the trial would have been recorded in his statement to the prosecution. If he refused to testify what had been recorded he could be treated as a hostile witness. Or he could be charged for making a false statement in addition to the charges already made against him. There was no need to make any

promise to him to ask him to say what had been recorded in his statement. The allegation that the Attorney-General had asked him to agree to admit that he had bribed Datuk Yong Teck Lee and the SLDB Board members would mean that this piece of evidence was not in his statement and might not be true otherwise there would be no necessity to ask him to agree to testify as such, with the promise to drop the 100 charges against him. If the Applicant had agreed to testify as such when it was not in his statement recorded by the prosecution in order to incriminate another so that the charges against him would be withdrawn, and he had subsequently testified as such in order to save himself from prosecution, then he would have been involved in an act to pervert the course of justice. In such a case he should not come to seek the aid of the court to enforce the promise which he alleged was made to him for the court will not condone such an illegal act. From the affidavits before the court there were some doubts whether the promise was made to him. [9] S. 52 (3) ACA provides for a certificate to be issued which will bar all legal proceedings against him. It was submitted that there was a miscarriage of justice because the provisions of s. 52 were not brought to the attention of the court by the prosecution so that the Applicant had been deprived of his right to the certificate. That hearing was in a High Court, a court of coordinate jurisdiction to this court. This court does not have the jurisdiction to review the decision made in another High Court. [10] Before such a certificate was to be issued, the court hearing the trial must come to a finding that he had made a true and full discovery of all things as to which he was lawfully examined and was entitled to receive the certificate of indemnity. Such a finding could only be made by the court before which the Applicant had appeared as a witness to give his evidence. No such certificate had been given by that court and this court is not in any position to give such a certificate nor any immunity granted under such a certificate. The Applicant should either apply to that court for the certificate to be issued or appeal against the decision in the event that court had refused to issue the certificate. [11] The next issue is whether prosecution of the 100 charges against the Applicant should be struck out or be stayed because of the protection given to him by the trial judge pursuant to s.132 of the Evidence Act. [12] s.132 (2) of the Evidence Act provides that no answer which a witness shall be compelled by the court to give shall subject him to any arrest or prosecution, or be proved against him in any criminal proceedings, except a prosecution for giving false evidence by that answer s.132 (2) of the Evidence Act 1950 does not provide a blanket protection from all and any prosecution. It only protects a person from arrest or prosecution in connection or arising from what he is compelled to answer to questions put to him in court which will or may incriminate him. Such answers also cannot be proved against him in any criminal proceedings. [13] Under s. 132, the answers the Applicant gave in the Tan Sri Kasitah Gaddam's trial which have incriminated or might have incriminated the Applicant relating to any offence which might have been committed by the Applicant cannot be used to arrest or charge the Applicant for that alleged offence arising from what he had said or testified or be used as evidence against him in any subsequent trials or proceedings, except a prosecution for giving false evidence by that answer. The notes of proceedings annexed to the affidavit in support as exhibits showed that the extent of the protection under s.132(2) of the Evidence Act 1950. had been explained to him by the learned trial judge during the proceedings.

(b) Observations on the implementation of the article

632. The reviewing experts are of the view that Malaysia has provisions in regard to the granting of immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of a corruption offence. They note further that

theoretically the prosecution would have the discretionary possibility to abstain from a prosecution in such cases, but that this has not happened so far.

Article 37 Cooperation with law enforcement authorities

Paragraph 4

4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

633. Malaysia provides protection for cooperating witnesses under the Witness Protection Act 2009 or administratively in the form of "safe houses" for witnesses who require protection during the trial in which they are to give evidence. Malaysia explained that the Malaysian Anti-Corruption Commission provides "safe houses" for its key prosecution witnesses as regards their safety from potential intimidation or physical threats. Witnesses are given protection in hotels and other designated safe houses maintained by the Commission. Malaysia referred to the Standard Operating Procedures on Witness Protection.

(b) Observations on the implementation of the article

634. The reviewing experts are of the opinion that Malaysia has fully implemented the provision. They point to the Witness Protection Act 2009, which extends protection not only to witnesses but, in a broad definition, also to "a person who, for any other reason, may require protection or assistance under the Programme". This is considered to include prosecution witnesses.

Article 37 Cooperation with law enforcement authorities

Paragraph 5

5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

635. Malaysia reported that it has not implemented the provision under review.

(b) Observations on the implementation of the article

636. The reviewing experts agree with Malaysia that this non-mandatory provision is not implemented and note that Malaysia may consider entering into such agreements or arrangements in the future.

Article 38 Cooperation between national authorities

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:

(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or

(b) Providing, upon request, to the latter authorities all necessary information.

(a) Summary of information relevant to reviewing the implementation of the article

637. As regards the reporting or giving of information on corruption offences, subsections (1) and (3) of section 25 of the MACCA apply.

“Section 25 (1) and (3) provide as follows:

(1) Any person to whom any gratification is given, promised, or offered, in contravention of any provision of this Act shall report such gift, promise or offer together with the name, if known, of the person who gave, promised or offered such gratification to him to the nearest officer of the Commission or police officer.

(2) Any person who fails to comply with subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding ten years or to both.

(3) Any person from whom any gratification has been solicited or obtained, or an attempt has been made to obtain such gratification, in contravention of any provision of this Act shall at the earliest opportunity thereafter report such soliciting or obtaining of, or attempt to obtain, the gratification together with the full and true description and if known, the name of the person who solicited, or obtained, or attempted to obtain, the gratification from him to the nearest officer of the Commission or police officer.

(4) Any person who fails, without reasonable excuse, to comply with subsection (3) commits an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding two years or to both.

638. As regards the reporting or giving of information on offences under article 23 of UNCAC, sections 8 and 9 of AMLATFA apply.

Section 8-Provisions relating to the Competent Authority

(1) The Minister of Finance may, upon the recommendation of the competent authority, who shall consult the relevant supervisory authority of a reporting institution, by order published in the Gazette, invoke any or all of the provisions of Part IV in respect of that reporting institution.

(2) For the avoidance of doubt, it is declared that a competent authority may exercise its powers under this section in respect of reporting institutions carrying on any or all of the activities listed in the First Schedule, and shall-

(a) receive and analyze information and reports from any person, including reports issued by reporting institutions under section 14;

(b) send any report received under paragraph (a) or any information derived from any such report to an enforcement agency if it is satisfied or has reason to believe or suspect that a transaction involves proceeds of an unlawful activity or a serious offence is being, has been or is about to be committed; and

(c) send any information derived from an examination carried out under Part IV to an enforcement agency if it has reason to suspect that a transaction involves proceeds of an unlawful activity or a serious offence is being, has been or is about to be committed.

(3) The competent authority may-

(a) compile statistics and records;

(b) give instructions to a reporting institution in relation to any report or information received under section 14;

(c) make recommendations to the relevant supervisory authority, enforcement agency and reporting institutions arising out of any report or information received under subsection (2); and

(d) create training requirements and provide training for any reporting institutions in respect of their transactions and reporting and record-keeping obligations under Part IV.

Section 9-Authorization to release information

(1) Subject to subsection (2), the competent authority may, in writing, authorize any enforcement agency or its designated officers to have access to such information as the competent authority may specify for the purposes of performing the enforcement agency's functions.

(2) In respect of any information received from a reporting institution carrying on any business activity listed under Part II of the First Schedule, the competent authority shall authorize Labuan Offshore Financial Services Authority or its designated officers to have access to that information.

(3) The competent authority may, in writing, authorize the Attorney General or his designated officer to have access to such information as the competent authority may specify for the purpose of dealing with a foreign State's request in relation to mutual assistance in criminal matters.

639. Further ways to facilitate and encourage the reporting by public officials are listed below (resources of public complaints):

- Referrals by the Public Complaints Bureau to the Malaysian Anti-Corruption Commission;
- Referrals by Heads of Departments to the Malaysian Anti-Corruption Commission
- Reports of the Auditor General;
- Committee on Integrity and Governance- Prime Minister's Directive No. 1 of 2009;
- Whistleblower Protection Act 2010 (Act 711).

640. There is also an initiative to reward public officers who report a corruption offence if the investigation and prosecution lead to a conviction.

641. In regard to interagency collaboration, Malaysia reported that cooperation between public authorities and investigating and prosecuting authorities in Malaysia exists through:

- The formation of the National Coordinating Committee to Counter Money Laundering (NCC), which functions as the platform for the exchange of information pertaining to the commission of offences in accordance with UNCAC articles 15, 21 and 23. The NCC is an inter-agency committee specially set up to counter money laundering at the national level. It was established in April 2000 to ensure adequate cooperation and information sharing among the different agencies. The NCC consists of 16 different agencies, namely, the Central Bank of Malaysia, Ministry of Finance, Attorney General's Chambers, Ministry of Foreign Affairs, Ministry of Home Affairs, Royal Malaysia Police, Malaysian Anti-Corruption Commission, Royal Malaysian Customs, Labuan Financial Services Authority, Securities Commission, Companies Commission of Malaysia, Inland Revenue Board, Ministry of International Trade and Industry, Registrar of Societies, Immigration Department and the Ministry of Domestic Trade, Cooperatives and Consumerism. It enables its members to be informed of any new or developing money laundering techniques. The NCC has adopted a set of Terms of Reference to guide its activities as follows:
 - Develop national policy on measures to counter money laundering;
 - Coordinate national policies with regional and international initiatives;
 - Agree on action plan for the countering of money laundering in Malaysia;

- Ensure Malaysia complies with its membership requirements in the Asia Pacific Group on Money Laundering and paragraph 15 of the United Nations Political Declaration and Action Plan Against Money Laundering, that is to have anti-money laundering legislation in place by year 2003;
- Develop and ensure proper implementation of measures to counter money laundering based on internationally accepted standards, i.e., the 40 + 9 Recommendations of the Financial Action Task Force;
- Identify and remedy any overlap or discrepancy between the existing and proposed measures to counter money laundering;
- Monitor the effectiveness of measures that have been implemented;
- Liaise with foreign governments and international organizations or bodies on matters relating to money laundering which includes terrorism.

Each NCC member agency is responsible for, inter alia, researching matters relating to money laundering, sharing of information and reporting on progress. Each NCC member agency nominates a person to act as the central contact point for all communications between NCC member agencies and the NCC to keep abreast of any developments in the country relating to money laundering efforts. In addition, the NCC meets every quarter to discuss the implementation of AMLATFA. NCC is complimented by working groups on technical matters.

- Various Memoranda of Understanding (MoU) exist between MACC and other government agencies of all levels, for instance with the Royal Customs and Excise Department, Royal Malaysia Police, and Road Transport Department.

642. Regarding examples of implementation, Malaysia referred to information received by MACC from the Public Complaints Bureau, the Police, the FIU, and the Auditor General.

643. Statistical data was provided by the FIU during the country visit as presented below. In 2012, for instance, 309 STRs were transferred to MACC, of which 307 were investigated and one led to a prosecution. The FIU cannot administratively freeze transactions for a temporary period of time based on STRs, but requires a freezing order to be issued by a competent authority. Normally this is achieved very quickly, as stated by representatives of the FIU during the country visit.

STRs/Financial Intelligence Disclosed

STRs/Financial intelligence	2009	2010	2011		2012	
STRs received from Domestic reporting institutions	12,787	16,37	27,857		26,920	
Requests for information from FIU/Competent authorities of other States	N/A	N/A	With MoU	No MoU	With MoU	No MoU
			44	27	50	55
Financial intelligence received from FIU/Competent authorities of other States	N/A	N/A	11		44	
Financial intelligence exchanged with FIU/Competent authorities of other States	2	34	38		165	

STRs disclosed to domestic law enforcement authorities	1,484	995	2,286	2,976
Of which:				
MACC	136	26	212	309
No of STRs investigated by MACC			146	307
No of STRs led to prosecution			1	1
Financial intelligence disclosed			125	67
No of subjects involved			1,508	1,645

644. Experts from MACC pointed out that there was a Financial Services Bill in process according to which MACC could require information directly from banks without having to go via the Central Bank (Schedule 11 / permitted disclosure). As soon as the bill will be in force, no more production order will be necessary for domestic purposes. Nevertheless, it may be recommended that the Central Bank be notified as a matter of course whenever an order for information is given to a bank. This information might also assist the Central Bank in monitoring illegal banking activities.

645. Collaboration with the Malaysian Royal Police is strong and happens at the operational level on a daily basis (more details have been described under article 36 of the Convention above).

(b) Observations on the implementation of the article

646. The reviewing experts are of the opinion that Malaysia has fully implemented the provision. In regard to article 38 (a), the reviewing experts note that a duty to report has been established in section 25 of MACCA and sections 8 and 9 of AMLATFA. Section 25 of MACCA requires every person who has given or solicited a bribe to report the bribe and criminalizes the omission of such reports. Section 25 applies to any person, including public officials, and provides for criminal sanctions including up to two years' imprisonment for a failure to report.

647. In the meeting with FIU representatives, some remaining challenges were discussed. Despite the high level of inter-agency collaboration, effective coordination could still be up-scaled. One option might be the embedding of financial intelligence officers in the law enforcement agencies and vice-versa to contribute to capacity building and effective exchange.

(c) Successes and good practices

648. The high level of cooperation not only on a day-to-day level but also through the NCC (including the large number of agencies represented in the NCC) are considered to be good examples of inter-agency collaboration that contribute to strengthening the investigation and prosecution of corruption offences.

Article 39 Cooperation between national authorities and the private sector

1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.

2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

649. Malaysia reported that cooperation between the Malaysian Anti-Corruption Commission (MACC) and the private sector is encouraged through:

- MoUs between MACC and Government-owned companies (covering the implementation of anti-corruption plans and strategies and the establishment of codes of ethics);
- Participation of MACC in the tender /procurement exercises of large development projects, e.g. Mass Rapid Transport;
- National Key Result Areas Integrity PACTS;
- The establishment of the National Key Result Areas wherein fighting corruption in the public and private sector is a key initiative;
- The MACC has introduced corporate integrity pledges with the private sector wherein there is a commitment from the private sector to fight corruption in the private sector.

650. Many of the above mentioned initiative deal with the prevention of corruption, capacity building and joint initiatives. The increased exchange and collaboration also contributes to encouraging the reporting of corruption offences. During the third Meeting of the Working Group on Prevention to the Conference of States Parties to UNCAC, Malaysia has given a presentation on its initiatives, namely the Integrity Pacts, the Mega Project Monitoring Committees and the Integrity Pledge. http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup4/2012-August-27-29/Presentations/MALAYSIA_3rd_OIWG_Meeting_on_Prevention.pdf

651. The Institute of Integrity Malaysia is another institution that engages with the private sector on issues of combating corruption. This Institute was set up in 2004 and its purpose is:

- To conduct research related to the integrity of institutions and that of the community
- To organize conferences, seminars and forums
- To elicit opinions from various sectors on the progress made or on the obstacles faced in implementing integrity
- To publish and circulate printed materials as well as formulating and implementing training and education programmes
- To recommend new policies for the enhancement of integrity and ethics
- To advise the government on strategies and programmes in enhancing integrity ; and
- To establish networking with international organizations

652. Malaysia reported that it has criminalized the non-reporting of bribery transactions by citizens and permanent residents in section 5 of MACCA, as noted under article 38 of UNCAC above.

653. Section 66 of MACCA provides that the laws in relation to corruption apply to any person living in West or East Malaysia:

“(1) The provisions of this Act shall, in relation to citizens and permanent residents of Malaysia, have effect outside as well as within Malaysia, and when an offence under this Act is committed in any place outside

Malaysia by any citizen or permanent resident, he may be dealt with in respect of such offence as if it was committed at any place within Malaysia.

(2) Any proceedings against any person under this section which would be a bar to subsequent proceedings against such person for the same offence if such offence was committed in Malaysia shall be a bar to further proceedings against him under any written law relating to the extradition of persons, in respect of the same offence, outside Malaysia.”

654. In addition to the above, Malaysia has the following legislation to encourage its nationals to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with the Convention:

Whistleblower Protection Act 2010 (Act 711), sections 6 and 7

“Section 6 - Disclosure of improper conduct

(1) A person may make a disclosure of improper conduct to any enforcement agency based on his reasonable belief that any person has engaged, is engaging or is preparing to engage in improper conduct: Provided that such disclosure is not specifically prohibited by any written law.

(2) A disclosure of improper conduct under subsection (1) may also be made-

(a) although the person making the disclosure is not able to identify a particular person to which the disclosure relates;

(b) although the improper conduct has occurred before the commencement of this Act;

(c) in respect of information acquired by him while he was an officer of a public body or an officer of a private body; or

(d) of any improper conduct of a person while that person was an officer of a public body or an officer of a private body.

(3) A disclosure of improper conduct under subsection (1) may be made orally or in writing provided that the authorized officer, upon receiving any disclosure made orally, shall as soon as it is practicable, reduce it into writing.

(4) A disclosure made in relation to a member of Parliament or a State Legislative Assembly shall not amount to a breach of privilege.

(5) Any provision in any contract of employment shall be void in so far as it purports to preclude the making of a disclosure of improper conduct.

Section 7 - Whistleblower Protection

(1) A whistleblower shall, upon receipt of the disclosure of improper conduct by any enforcement agency under section 6, be conferred with whistleblower protection under this Act as follows:

(a) protection of confidential information;

(b) immunity from civil and criminal action; and

(c) protection against detrimental action, and for the purpose of paragraph (c), the protection shall be extended to any person related to or associated with the whistleblower.

(2) A whistleblower protection conferred under this section is not limited or affected in the event that the disclosure of improper conduct does not lead to any disciplinary action or prosecution of the person against whom the disclosure of improper conduct has been made.

(3) This Act does not limit the protection conferred by any other written law to any person in relation to information given in respect of the commission of an offence.”

Witness Protection Act 2009 (Act 696), section 7

“Section 7 - Application for inclusion in the Programme

(1) Any witness may apply to the Director General to be included in the Programme.

(2) An enforcement agency may, with the written consent of a witness, apply to the Director General that the witness be included in the Programme.

(3) If a witness is under eighteen years of age, a parent or guardian of the witness may apply on his behalf to be included in the Programme.

(4) Upon receipt of an application under this section, the Director General may provide interim protection and assistance to a witness.

“witness” means-

(a) a person who has given or who has agreed to give evidence on behalf of the Government in a criminal proceeding;

(b) a person who has given or who has agreed to give evidence, otherwise than as mentioned in paragraph

(a), in relation to the commission or possible commission of an offence;

- (c) a person who has provided any information, a statement or assistance to a public officer or an officer of a public authority in relation to an offence;
- (d) a person who, for any other reason, may require protection or assistance under the Programme; or
- (e) a person who, because of his relationship to or association with any of the persons referred to in paragraphs (a) to (d), may require protection or assistance under the Programme.”

(b) Observations on the implementation of the article

655. The reviewing experts were satisfied with the explanations provided by Malaysia and welcome the initiatives with the private sector and the preventive aspects of this work.

656. During the country visit, meetings were held with representatives of the private sector and civil society. These representatives highlighted improvements that had been achieved since the establishment of MACC, such as the simplification of some bureaucratic procedures and more awareness on the topic of anti-corruption in the private sector. However, civil awareness of corruption could be increased, as there was a need to provide clearer guidance on proper and improper conduct. Despite the existence of the Whistleblower Protection Act, many people were still hesitant to report corruption. It was expressed that more transparency on the possibilities to report and the follow-up would help in this regard.

(c) Successes and good practices

657. It was explained that large corporations in Malaysia now regularly employ integrity officers and have a no-gifts policy. MACC provides training for the private sector and even has a small number of MACC officers seconded to large companies.

658. The reviewing experts welcome the initiatives MACC conducts with the private sector and the preventive aspects of this work.

Article 40 Bank secrecy

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

(a) Summary of information relevant to reviewing the implementation of the article

659. Malaysia indicated that it has introduced laws in relation to bank secrecy in line with the spirit of the Convention.

660. The Malaysian legislation in relation to article 40 is provided below. Section 35 of MACCA overrides bank secrecy and allows for inspections of movable property including bank accounts belonging to or in the possession, custody or control of the bank.

A. Provisions under MACCA

“Section 35- Investigation of share, purchase account, etc.

(1) Notwithstanding the provisions of any other written law or any rule of law, the Public Prosecutor or an officer of the Commission of the rank of Commissioner or above as authorized by the Public Prosecutor, if he is satisfied that it is necessary for the purpose of any investigation into an offence under this Act, may

authorize in writing an officer of the Commission to exercise in relation to any bank specified in the authorization all the powers of investigation set out in subsection (2).

(2) An officer of the Commission authorized under subsection (1) may, in relation to the bank in respect of which he is so authorized-

(a) inspect and take copies of any banker's book, bank account or any document belonging to or in the possession, custody or control of the bank;

(b) inspect and take copies of any share account, purchase account, expense account or any other account of any person kept in the bank;

(c) inspect the contents of any safe deposit box in the bank; or

(d) request for any other information related to any document, account or article referred to in paragraphs (a), (b) and (c).

(3) Notwithstanding anything in subsection (2), an officer of the Commission authorized under subsection (1) may take possession of any book, document, account, title, securities or cash to which he has access under that subsection where in his opinion-

(a) the inspection of them, the copying of them, or the taking of extracts from them, cannot reasonably be undertaken without taking possession of them;

(b) they may be interfered with or destroyed unless he takes possession of them; or

(c) they may be needed as evidence in any prosecution for an offence under this Act or any other written law.

(4) Any person who wilfully fails or refuses to disclose any information or to produce any account, document or article as are referred to in subsection (1) commits an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding two years or to both.

(5) Where any person discloses any information or produces any account or document or article to an authorized officer of the Commission, neither the first-mentioned person nor any other person on whose behalf or direction or as whose agent or employee, the first-mentioned person may be acting shall, on account of such disclosure or production, be liable to any prosecution, except a prosecution for an offence under section 27, for any offence under or by virtue of any law, or to any proceeding or claim by any person under or by virtue of any law, or under or by virtue of any contract, agreement or arrangement, or otherwise.

B. Provisions under AMLATFA

Secrecy obligations overridden

***20.** The provisions of this Part shall have effect notwithstanding any obligation as to secrecy or other restriction on the disclosure of information imposed by any written law or otherwise.

**Note*—Invoked pursuant to section 8 of this Act on institutions carrying on banking business, finance company business, merchant banking business and Islamic banking business w.e.f. 15 January 2002—see P.U. (A) 20/2002.

“Section 48. Investigation powers in relation to financial institution.

(1) Notwithstanding the provisions of any other written law or any rule of law, the Public Prosecutor, if he is satisfied that it is necessary for the purpose of any investigation into an offence under subsection 4(1) or a terrorism financing offence, may authorize in writing an investigating officer to exercise in relation to any financial institution specified in the authorization all the powers of investigation set out in Part V and in subsection (2).

(2) An investigating officer authorized under subsection (1) may, in relation to the financial institution in respect of which he is so authorized-

(a) inspect and take copies of any book, record, report or document belonging to or in the possession, custody or control of the financial institution;

(b) inspect and take copies of any share account, purchase account, expense account or any other account of any person kept in the financial institution;

(c) inspect the contents of any safe deposit box in the financial institution; or

(d) request for any other information relating to any record, report, document, account or article referred to in paragraphs (a), (b) and (c).

(3) Notwithstanding anything in subsection (2), an investigating officer authorized under subsection (1) may take possession of any account, book, record, report, document, title, securities or cash to which he has access under that subsection where in his opinion-

(a) the inspection of them, the copying of them, or the taking of extracts from them, cannot reasonably be undertaken without taking possession of them;

- (b) they may be interfered with or destroyed unless he takes possession of them; or
- (c) they may be needed as evidence in any prosecution for an offence under subsection 4(1), a terrorism financing offence or an offence under any other written law.
- (4) Any person who wilfully fails or refuses to disclose any information or to produce any account, book, record, report, document or article under subsection (2) to the investigating officer authorized under subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding one year or to both, and, in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.
- (5) Where any person discloses any information or produces any account, book, record, report, document or article to an investigating officer authorized under subsection (1), neither the first-mentioned person nor any other person on whose behalf or direction or as whose agent or officer the first-mentioned person may be acting shall, on account of such disclosure or production, be liable to any prosecution for any offence under any law, or to any proceedings or claim by any person under any law, or under any contract, agreement or arrangement, or otherwise.

Section 49. Public Prosecutor's powers to obtain information.

- (1) Notwithstanding any law or rule of law to the contrary, the Public Prosecutor, if he has reasonable grounds to believe, based on the investigation carried out under this Act, that an offence under subsection 4(1) or a terrorism financing offence has been committed, may by written notice-
 - (a) require any person suspected of having committed such offence;
 - (b) any relative or associate of the person referred to in paragraph (a); or
 - (c) any other person whom the Public Prosecutor has reasonable grounds to believe is able to assist in the investigation, to furnish a statement in writing on oath or affirmation-
 - (aa) identifying every property, whether movable or immovable, whether in or outside Malaysia, belonging to him or in his possession, or in which he has any interest, whether legal or equitable, and specifying the date on which each of the properties so identified was acquired and the manner in which it was acquired, whether by way of any dealing, bequest, devise, inheritance, or any other manner;
 - (bb) identifying every property sent out of Malaysia by him or on his behalf during such period as may be specified in the notice;
 - (cc) setting out the estimated value and location of each of the properties identified under paragraphs (aa) and (bb), and if any of such properties cannot be located, the reason for it;
 - (dd) stating in respect of each of the properties identified under paragraphs (aa) and (bb) whether the property is held by him or by any other person on his behalf, whether it has been transferred, sold to, or kept with any person, whether it has been diminished in value since its acquisition by him, and whether it has been commingled with other property which cannot be separated or divided without difficulty;
 - (ee) setting out all other information relating to his property, business, travel, or other activities as may be specified in the notice; and
 - (ff) setting out all his sources of income, earnings or property.
- (2) An officer of any financial institution, or any person who is in any manner or to any extent responsible for the management and control of the affairs of any financial institution, shall furnish a copy of all accounts, books, records, reports or documents relating to any person to whom a notice may be issued under subsection (1).
- (3) Every person to whom a notice is sent by the Public Prosecutor under subsection (1) shall, notwithstanding any law or rule of law to the contrary, comply with the terms of the notice within such time as may be specified in the notice, and any person who willfully neglects or fails to comply with the terms of the notice commits an offence and shall, on conviction, be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding one year or to both, and, in the case of a continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.
- (4) Every person to whom a notice or direction is sent by the Public Prosecutor under this section shall be legally bound to state the truth and shall disclose all information which is within his knowledge, or which is available to him, or which is capable of being obtained by him.
- (5) Where any person discloses any information or produces any accounts, books, records, reports or documents in response to a notice under subsection (1), such person, his agent or employee, or any other person acting on his behalf or under his direction, shall not, by reason only of such disclosure or production, be liable to prosecution for any offence under any law, or to any proceedings or claim by any person under any law or under any contract, agreement or arrangement, or otherwise.

(6) Subsection (5) shall not bar, prevent or prohibit the institution of any prosecution for any offence as provided by this section or the giving of false information in relation to any statement on oath or affirmation furnished to the Public Prosecutor pursuant to this section.

Section 50. Seizure of movable property in financial institution

(1) Where the Public Prosecutor is satisfied on information given to him by an investigating officer that any movable property, including any monetary instrument or any accretion to it, which is the subject matter of an offence under subsection 4(1) or a terrorism financing offence or evidence in relation to the commission of such offence or which is terrorist property, is in the possession, custody or control of a financial institution, he may, notwithstanding any other law or rule of law, after consultation with Bank Negara Malaysia, the Securities Commission or the Labuan Offshore Financial Services Authority, as the case may be, by order direct the financial institution not to part with, deal in, or otherwise dispose of such property or any part of it until the order is revoked or varied.

(2) A financial institution or any agent or employee of a financial institution shall not, on account of complying with an order of the Public Prosecutor under subsection (1), be liable to any prosecution under any law or to any proceedings or claim by any person under any law or under any contract, agreement, or arrangement, or otherwise.

(3) Any person who fails to comply with an order of the Public Prosecutor under subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding two times the amount which was parted with, dealt in or otherwise disposed of in contravention of the Public Prosecutor's order or one million ringgit, whichever is the higher, or to imprisonment for a term not exceeding one year or to both, and, in the case of continuing offence, to a further fine not exceeding one thousand ringgit for each day during which the offence continues after conviction.

(4) In this section, "monetary instrument" includes the domestic currency or any foreign currency, travellers' cheque, personal cheque, bank cheque, money order, investment security or negotiable instrument in bearer form or otherwise in such form that title to it passes upon delivery or upon delivery and endorsement."

C. Section 99(1)(h) Banking and Financial Institution Act 1989 (Act 373)

"Section 99-Other Permitted disclosures

(1) Section 97 shall not apply to the disclosure of any information or document- ...

(h) where such disclosure is authorized under any Federal law to be made to a police officer investigating into any offence under such law and such disclosure to the police officer being, in any case, limited to the accounts and affairs of the person suspected of the offence;"

D. Provisions under the Labuan Financial Services and Securities Act 2010 (Act 704), sections 145, 177 and 178.

Section 145 Powers of the Authority

(1) For the purpose of this Act and the proper conduct of the business of any exchange under section 134 and in addition to any other powers accorded to it under this Act, the Authority may-

(a) at any time investigate or enquire into any transaction involving the purchase or sale of securities entered into by any person whether directly or indirectly to ascertain if that person has used dishonest, unfair or unethical devices or trading practices whether such devices or trading practices constitute an offence under this Act or any other written law or an infringement of any of the rules or otherwise;

(b) require any such person to submit detailed information of any transaction, involving the purchase or sale of securities;

(c) require the production of, inspect and make copies or printouts of or take extracts from any document record or thing related to-

(i) the business or affairs of an exchange;

(ii) any dealing in securities;

(iii) any advice, report or analysis concerning securities; or

(iv) the accounts or records of any person concerned in any capacity with the matters referred to in subparagraph (i).(ii) or (iii) and any audit of, or report of an auditor or concerning, the same or

(d) whenever the Authority considers it necessary, examine by way of on-site inspections, the affairs or business of any market participants, which shall include listing sponsors and trading agents, for the purpose of-

(i) assessing whether the market participant is carrying out its permitted activities in accordance with this Act, any regulations made under this Act and or any other applicable law;

- (ii) confirming that the provisions of the Anti-Money Laundering and Anti-Terrorism Financing Act 2001 are being complied with; and
- (iii) carrying out the functions of the Authority;
- (e) with the authority of a search warrant issued by the court to that effect and with or without the assistance of such persons as the Authority may require unless the Authority has reasonable grounds for believing that, by reason of the delay in obtaining the search warrant, the object of any entry is likely to be frustrated, and in such instance without a warrant-
- (i) break into and search any premises, place or item therein on or in which the Authority has reason to suspect there may be any document, record or thing the production of which was required by virtue of this section but not produce in compliance with such requirement; or
- (ii) take possession of or secure against interference any document, record or thing the production of which was required.
- (2) The Authority may in writing authorise any other person to assist it to perform functions under this Act.
- (3) A person who -
 - (a) fails to comply with a requirement made under subsection (1) ;
 - (b) in purported compliance with a requirement made under subsection(1) furnishes information or makes a statement that is false or misleading in a material particular; or
 - (c) obstructs or hinders the Authority or another person in the exercise of any power under subsection (1), commits an offence and shall, on conviction, be liable to a fine not exceeding ten million ringgit or to imprisonment for a term not exceeding five years or to both.
- (4) The powers conferred under this section are in addition to, and not in derogation of, any other powers conferred by law.

Section 177 Examination and inspection of books and documents of licensed entities

- (1) The Authority may from time to time
 - (a) examine and inspect the books or other documents, accounts, and transactions of any licensed entity; or
 - (b) obtain from any licensed entity, require any licensed entity to provide access to the Authority to, or require any licensed entity to furnish, any information or copies of any records, books or other documents relating to the business of such licensed entity being carried on under this Act which, in the opinion of the Authority, are necessary to enable it to ascertain compliance with the provisions of this Act;
- (2) The Authority may approve the home supervisory authority of a licensed entity to conduct the activities referred to in paragraphs (1) (a) and (b).
- (3) Every director or officer of a licensed entity shall extend his co-operation and inspection carried out under paragraph (1) (a).

Section 178. Secrecy

- (1) No person who for any reason has access to any record, book, register, correspondence or other document, material or information whatsoever relating to the affairs or accounts of the following persons, shall disclose to any other person, or make a record for any person of any such record, book, register, correspondence or other document, material or information:
 - (a) a mutual fund under Part III;
 - (b) any customer of a Labuan trust company or a Labuan private trust company under Part V;
 - (c) any customer of a bank licensee under Part VI;
 - (d) any policy owner under Part VII;
 - (e) an exchange established under Part IX;
 - (f) a self-regulatory organization established under Part X; and
 - (g) any licensed entity under this Act.
- (2) Subsection (1) shall not apply to-
 - (a) any disclosure lawfully required under section 28B of the Labuan Financial Services Authority Act 1996 or under section 22 of the Labuan Business Activity Tax Act 1960;
 - (b) any disclosure required under an order of the court made upon an ex-parte application, provided that the person disclosing the relevant information, provided that the person disclosing the relevant information shall notify the person affected by the order and upon receipt of such notification, the affected person may file in the necessary application to the court to contest the order or otherwise comply with the order accordingly;
 - (c) information relating to a mutual fund under Part III, with the prior consent of the mutual fund and its investors concerned;
 - (d) information relating to a customer of a Labuan Trust company or a Labuan private trust company under Part V with the prior written consent of the customer;
 - (e) information relating to a customer of a bank licensee under Part VI, with the prior written consent of the customer of the customer or his personal representative;

- (f) information relating to a policy owner under Part VII , with the prior written consent of the policy owner or his personal representative or in the course of placement of reinsurance business;
- (g) information relating to a licensed entity , with the prior written consent of the licensed entity.
- (3) No person who has any record, book, register, correspondence or other document, material or information which to his knowledge has been disclosed in contravention of subsection (1) shall in any manner howsoever disclose the same to any other person.
- (4) All proceedings, except criminal proceedings, relating to a contravention of this section shall be commenced in any Court under the provisions of this Act and any appeal therefrom shall, unless the Court otherwise orders, be heard in camera and no details of the proceedings shall be published by any person without leave of the Court;
- (5) Subject to subsection (6) nothing in this section shall limit any powers conferred upon the Court or a judge thereof by the Banker's Book (Evidence) Act 1949 or prohibit obedience to an order made under that Act.
- (6) Section 7 of the Bankers' Book (Evidence Act) 1949 shall not apply to a bank under Part VI, its directors or officers;
- (7) A person who contravenes subsection (1) commits an offence and shall , on conviction be liable to a fine not exceeding one million ringgit or to imprisonment for a term not exceeding three years or both.

(b) Observations on the implementation of the article

661. The reviewing experts note that Malaysia has sufficiently implemented the provision and that bank secrecy restrictions are not a challenge in regard to investigation and seizure of bank, financial and commercial records according to the regulations, according to the Bankers Books (Evidence) Act 1949 (Act 33), the Banking and Financial Institutions Act 1989 (Act 372), MACCA, and AMLATFA, as cited in the response of Malaysia.
662. Malaysian officials reported that bank and financial records are routinely requested and received. Such information can also be provided according to the Mutual Assistance in Criminal Matters Act to requesting countries (see also article 46, paragraph 2 of the Convention), though in practice a production order must be sought from the court to disclose account information under the applicable provisions of the Banking Act. Malaysia is encouraged to continue to ensure that bank secrecy requirements do not unduly hinder the objectives of the Convention. This may be done through monitoring.

Article 41 Criminal record

Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

663. Malaysia has partly implemented the article. Malaysia referred to the following legislation:
- **Section 253 Criminal Procedure Code- Procedure where there are previous convictions.**
 “Where the accused charged with an offence committed after a previous conviction for any offence the procedure hereinbefore laid down shall be modified as follows:
 (a) the part of the charge stating the previous conviction shall not be read out in Court, nor shall the accused be asked whether he has been previously convicted as alleged in the charge unless and until he has either pleaded guilty to or been convicted of the subsequent offence;

(b) if he pleads guilty to or is convicted of the subsequent offence, he shall then be asked whether he has been previously convicted as alleged in the charge;

(c) if he answers that he has been so previously convicted the Court may proceed to pass sentence on him accordingly, but if he denies that he has been so previously convicted or refuses to or does not answer such question the Court shall inquire concerning such previous conviction.

"offence" means any act or omission made punishable by any law for the time being in force."

664. Interpretation Act 1948/1967 defines "law" as follows:

"law" includes written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or in any part thereof;

665. These provisions are taken to mean that Malaysia accepts only previous convictions in Malaysia and not from other States. However, reference is made to the following additional provisions.

- **Section 400 of the Criminal Procedure Code - How previous conviction or acquittal may be proved (emphasis added).**

"(1) In any inquiry, trial or other proceeding under this Code a previous conviction or acquittal or an order directing any person to be under the supervision of the police may be proved in addition to any other mode provided by any law for the time being in force-

(a) by an extract certified under the hand of the officer having the custody of the records of the Court whether of Malaysia or the Republic of Singapore in which that conviction or acquittal was had to be a copy of the sentence or order; or

(b) in case of a conviction either by a certificate signed by the officer in charge of the prison in Malaysia or the Republic of Singapore in which the punishment or any part of it was inflicted, or by production of the warrant of commitment under which the punishment was suffered, together with, in each of those cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

(2) In case the officer in charge of any prison shall state in any certificate signed by him that the finger prints which appear on the certificate are those of the person to whom the certificate relates, that certificate shall be evidence of the fact so stated.

(3) Every Court shall presume to be genuine every document purporting to be a certificate of conviction and purporting to be signed by the officer in charge of any prison in Malaysia or the Republic of Singapore, and shall also presume that the officer by whom the document purports to be signed was when he signed it the officer in charge of the prison mentioned in that document."

- **Proof of conviction and acquittal for offences under AMLATFA (emphasis added).**

"Sec.76. (1) For the purposes of any proceedings under this Act, the fact that a person has been convicted or acquitted of an offence by or before any court in Malaysia or by a foreign court shall be admissible in evidence for the purpose of proving, where relevant to any issue in the proceedings, that he committed or did not commit that offence, whether or not he is a party to the proceedings, and where he was convicted whether he was so convicted upon plea of guilt or otherwise.

(2) The court shall accept the conviction referred to in subsection (1) as conclusive unless-

(a) it is subject to review or appeal that has not yet been determined;

(b) it has been quashed or set aside; or

(c) the court is of the view that it is contrary to the interests of justice or the public interest to accept the conviction as conclusive.

(3) A person proved to have been convicted of an offence under this section shall be taken to have committed the act and to have possessed the state of mind, if any, which at law constitute that offence.

(4) Any conviction or acquittal admissible under this section may be proved-

(a) in the case of a conviction or acquittal before a court in Malaysia, by a certificate of conviction or acquittal, signed by the Registrar of that court; or

(b) in the case of a conviction or acquittal before a foreign court, by a certificate or certified official record of proceedings issued by that foreign court and duly authenticated by the official seal of a Minister of that foreign State, giving the substance and effect of the charge and of the conviction or acquittal. "

666. Malaysia explained that during sentencing, the DPP will tender the previous conviction of the accused as evidence.

(b) Observations on the implementation of the article

667. The reviewing experts were satisfied with the explanations provided by Malaysia. Malaysia only recognizes previous convictions in Malaysia and not from other States, with the exception of Singapore, according to section 400 of the Criminal Procedure Code. Furthermore, section 76 of AMLATFA considers the use of convictions by a foreign court.

(c) Challenges related to article 41

668. Malaysia has identified the following challenges and issues in fully implementing the provision under review:

1. Specificities in its legal system: Malaysia indicated that there are challenges in establishing specific legislative or other measures on getting proof of the convicted accused person's previous conviction in another country.

(d) Technical assistance needs

669. Malaysia has indicated that the following forms of technical assistance, if available, would assist it in better implementing the provision under review:

1. Model legislation: Malaysia indicated that it may require assistance in establishing specific legislative or other measures on getting proof of the convicted accused person's previous conviction in another country.

670. While such assistance has already been provided, Malaysia did not provide further details from whom such model legislation was received.

Malaysia indicated that the extension and/or expansion of such assistance would help it better implement the article under review.

Article 42 Jurisdiction

Subparagraph 1 (a)

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

- (a) The offence is committed in the territory of that State Party; or*

(a) Summary of information relevant to reviewing the implementation of the article

671. The Penal Code of Malaysia provides in section 2 for the punishment of offences committed within Malaysia

Section 2. Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within Malaysia.

Section 66 of MACCA

The provisions of this Act shall, for citizens and permanent residents of Malaysia, have effect outside as well as within Malaysia, and when an offence under this Act is committed in any place outside Malaysia by any citizen or permanent resident he may be dealt with in respect of such offence as if it was committed at any place within Malaysia.

672. For the purposes of the Sessions Court, section 59 of MACCA read together with section 59 of the Subordinate Courts Act 1948 (Act 92) are applicable. For the purposes of the High Court, section 60 of Act 694 read together with section 22(1)(a)(i) of the Courts of Judicature Act 1964, Revised 1972 (Act 91) are applicable. The provisions are set forth below.

A. MACCA

“Section 59. Jurisdiction of the Sessions Court

59. Notwithstanding the provisions of the Subordinate Courts Act 1948 [Act 92], a prosecution for an offence under this Act shall be commenced in the Sessions Court.

Section 60. Trial by High Court on a certificate by the Public Prosecutor

60. (1) Notwithstanding the provision of section 417 of the Criminal Procedure Code and subject to subsection (5), the Public Prosecutor may in any particular case triable in the Sessions Court for an offence under this Act, issue a certificate specifying the High Court in which the proceedings are to be instituted or transferred and requiring that the accused person be caused to appear or be produced before such High Court.

(2) The power of the Public Prosecutor under subsection (1) shall be exercised by him personally.

(3) The certificate of the Public Prosecutor issued under subsection (1) shall be tendered to the Sessions Court whereupon the Sessions Court shall transfer the case to the High Court specified in the certificate and cause the accused person to appear or be brought before such Court as soon as may be practicable.

(4) When the accused person appears or is brought before the High Court in accordance with subsection (3), the High Court shall fix a date for his trial which shall be held in accordance with the procedure under Chapter XX of the Criminal Procedure Code.

(5) This section shall apply to all cases before the Sessions Court to try offences under this Act, whether the proceedings are instituted before or after the coming into operation of this Act, provided that the accused person has not pleaded guilty and no evidence in respect of the case against him has begun to be adduced.”

B. Subordinate Courts Act 1948 (Act 92)

“Section 59. Constitution and territorial jurisdiction of Sessions Courts

(1) The Yang di-Pertuan Agong may, by order, constitute so many Sessions Courts as he may think fit and shall have power, if he thinks fit, to assign local limits of jurisdiction thereto.

* (2) Subject to this Act or any other written law, a Sessions Court shall have jurisdiction to hear and determine any civil or criminal cause or matter arising within the local limits of jurisdiction assigned to it under this section, or, if no such local limits have been assigned, arising in any part of Peninsular Malaysia.

(3) Each Sessions Court shall be presided over by a Sessions Court Judge appointed by the Yang di-Pertuan Agong on the recommendation of the Chief Judge.

(4) Sessions Courts shall ordinarily be held at such places as the Chief Judge may direct, but should necessity arise they may also be held at any other place within the limits of their jurisdiction.

*NOTE—For jurisdiction of Sessions Court in Sabah and Sarawak—see P.U. (A) 357/1980.”

Section 85. Criminal jurisdiction of First Class Magistrate

Subject to limitations contained in this Act a First Class Magistrate shall have jurisdiction to try all offences for which the maximum term of imprisonment provided by law does not exceed ten years imprisonment or which are punishable with fine only and offences under sections 392 and 457 of the Penal Code.

Section 88. Criminal jurisdiction of Second Class Magistrate

A Second Class Magistrate shall only have jurisdiction to try offences for which the maximum term of imprisonment provided by law does not exceed twelve months' imprisonment of either description or which are punishable with fine only:

Provided that if a Second Class Magistrate is of the opinion that in the circumstances of the case, if a conviction should result, the powers of punishment which he possesses would be inadequate, he shall take the necessary steps to adjourn the case for trial by a First Class Magistrate.

Section 63. Criminal jurisdiction

63. A Sessions Court shall have jurisdiction to try all offences other than offences punishable with death.

C. Courts of Judicature Act 1964 (Act 91)

“Section 22. Criminal jurisdiction

(1) The High Court shall have jurisdiction to try-

(a) all offences committed-

(i) within its local jurisdiction;

(ii) on the high seas on board any ship or on any aircraft registered in Malaysia;

(iii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;

(iv) by any person on the high seas where the offence is piracy by the law of nations; and

(b) offences under Chapter VI of the Penal Code [Act 574], and under any of the written laws specified in the Schedule to the Extra-Territorial Offences Act 1976 [Act 163], or offences under any other written law the commission of which is certified by the Attorney General to affect the security of Malaysia committed as the case may be,-

(i) on the high seas on board any ship or on any aircraft registered in Malaysia;

(ii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; or

(iii) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia.

(2) The High Court may pass any sentence allowed by law.”

(b) Observations on the implementation of the article

673. The reviewing experts note that Malaysia has implemented the provision.

Article 42 Jurisdiction

Subparagraph 1 (b)

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

(a) Summary of information relevant to reviewing the implementation of the article

674. Sections 22(1)(a)(ii), 22(1)(a)(iii), 22(1)(b)(i) and 22(1)(b)(ii) of the Courts of Judicature Act 1964 (Act 91) are applicable. Section 66 of MACCA and section 82 of AMLATFA were also referred to.

A. Courts of Judicature Act 1964 (Act 91)

“Section 22. Criminal jurisdiction.

(1)The High Court shall have jurisdiction to try -

(a) all offences committed – (...)

(ii) on the high seas on board any ship or on any aircraft registered in Malaysia;

(iii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; ...

(b) offences under Chapter VI and VIA of the Penal Code [Act 574], and under any of the written laws specified in the Schedule to the Extra-Territorial Offences Act 1976 [Act 163], or offences under any other written law the commission of which is certified by the Attorney General to affect the security of Malaysia committed as the case may be, -

(i) on the high seas on board any ship or on any aircraft registered in Malaysia;

(ii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; ...”

B. MACCA

“Section 66. Liability for offences outside Malaysia.

(1) The provisions of this Act shall, in relation to citizens and permanent residents of Malaysia, have effect outside as well as within Malaysia, and when an offence under this Act is committed in any place outside Malaysia by any citizen or permanent resident, he may be dealt with in respect of such offence as if it was committed at any place within Malaysia.

(2) Any proceedings against any person under this section which would be a bar to subsequent proceedings against such person for the same offence if such offence was committed in Malaysia shall be a bar to further proceedings against him under any written law relating to the extradition of persons, in respect of the same offence, outside Malaysia.”

C. AMLATFA

“Section 82. Jurisdiction

(1) Any offence under this Act-

- (a) on the high seas on board any ship or on any aircraft registered in Malaysia;
- (b) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;
- (c) by any citizen or any permanent resident in any place outside and beyond the limits of Malaysia;
- (d) by any person against a citizen of Malaysia;
- (e) by any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia located outside Malaysia, including diplomatic or consular premises of Malaysia;
- (f) by any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;
- (g) by any stateless person who has his habitual residence in Malaysia;
- (h) by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or
- (i) by any person who after the commission of the offence is present in Malaysia, may be dealt with as if it had been committed at any place within Malaysia.

(2) Notwithstanding anything in this Act, no charge as to any offence shall be inquired into in Malaysia unless a diplomatic officer of Malaysia, if there is one, in the territory in which the offence is alleged to have been committed certifies that, in his opinion, the charge ought to be brought in Malaysia; and where there is no such diplomatic officer, the sanction of the Public Prosecutor shall be required.

(3) Any proceedings taken against any person under this section which would be a bar to subsequent proceedings against that person for the same offence if the offence had been committed in Malaysia shall be a bar to further proceedings against him under any written law relating to extradition or the surrender of fugitive criminals in force in Malaysia in respect of the same offence in any territory beyond the limits of Malaysia.

(4) For the purposes of this section, the expression “permanent resident” has the meaning assigned by the Courts of Judicature Act 1964 [Act 91].”

D. Penal Code

“Section 4. Extension of Code to extra-territorial offences.

(1) The provisions of Chapters VI and VIA shall apply to any offence committed-

- (a) by any citizen or any permanent resident on the high seas on board any ship or any aircraft whether or not such ship or aircraft is registered in Malaysia;
- (b) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia;
- (c) by any person against a citizen of Malaysia;
- (d) by any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia, including diplomatic or consular premises of Malaysia;
- (e) by any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;
- (f) by any stateless person who has his habitual residence in Malaysia;
- (g) by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or
- (h) by any person who after the commission of the offence is present in Malaysia, as if the offence had been committed in Malaysia.

(2) In this section-

- (a) "offence" includes every act done outside Malaysia which if done in Malaysia, would be an offence punishable under this Code;
- (b) "permanent resident" has the meaning assigned by the Courts of Judicature Act 1964.”

(b) Observations on the implementation of the article

675. The reviewing experts note that Malaysia has implemented the provision.

Article 42 Jurisdiction

Subparagraph 2 (a)

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(a) The offence is committed against a national of that State Party; or

(a) Summary of information relevant to reviewing the implementation of the article

676. Section 4(1)(c) of the Penal Code is referred to. However, this section only applies in relation to offences provided in Chapters VI and VIA of the Penal Code (Offences Against the State and Offences Relating to Terrorism). Section 66 of MACCA and section 82 of AMLATFA are also referred to.

A. Penal Code

“Section 4. Extension of Code to extraterritorial offences.

(1) The provisions of Chapter VI and VIA shall apply to any offence committed-
...(c) by any person against a citizen of Malaysia;”

B. MACCA

“Section 66. Liability for offences outside Malaysia.

(1) The provisions of this Act shall, in relation to citizens and permanent residents of Malaysia, have effect outside as well as within Malaysia, and when an offence under this Act is committed in any place outside Malaysia by any citizen or permanent resident, he may be dealt with in respect of such offence as if it was committed at any place within Malaysia.

(2) Any proceedings against any person under this section which would be a bar to subsequent proceedings against such person for the same offence if such offence was committed in Malaysia shall be a bar to further proceedings against him under any written law relating to the extradition of persons, in respect of the same offence, outside Malaysia.”

C. AMLATFA

“Section 82. Jurisdiction

82. (1) Any offence under this Act-

(a) on the high seas on board any ship or on any aircraft registered in Malaysia;

(b) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;

(c) by any citizen or any permanent resident in any place outside and beyond the limits of Malaysia;

(d) by any person against a citizen of Malaysia;

(e) by any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia located outside Malaysia, including diplomatic or consular premises of Malaysia;

(f) by any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;

(g) by any stateless person who has his habitual residence in Malaysia;

(h) by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or

(i) by any person who after the commission of the offence is present in Malaysia, may be dealt with as if it had been committed at any place within Malaysia.

(2) Notwithstanding anything in this Act, no charge as to any offence shall be inquire into in Malaysia unless a diplomatic officer of Malaysia, if there is one, in the territory I which the offence is alleged to have been committed certifies that, in his opinion, the charge ought to be brought in Malaysia; and where there is no such diplomatic officer the sanction of the Public Prosecutor shall be required.

(3) Any proceedings taken against any person under this section which would be a bar to subsequent proceedings against that person for the same offence if the offence had been committed in Malaysia shall be a bar to further proceedings against him under an written law relating to extradition or the surrender of

fugitive criminals in force in Malaysia in respect of the same offence in any territory beyond the limits of Malaysia.

(4) For the purposes of this section, the expression “permanent resident” has the meaning assigned by the Courts of Judicature Act 1964 [Act 91].”

(b) Observations on the implementation of the article

677. The reviewing experts note that Malaysia has implemented the provision.

Article 42 Jurisdiction

Subparagraph 2 (b)

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or

(a) Summary of information relevant to reviewing the implementation of the article

678. Section 4(1)(a), (b) and (f) of the Penal Code is cited. However, these provisions only apply in relation to offences provided in Chapters VI and VIA (Offences Against the State and Offences Relating to Terrorism) of the Penal Code only. Section 66 of MACCA and section 82 of AMLATFA are also cited.

A. Penal Code

“Section 4. Extension of Code to extraterritorial offences.

(1) The provisions of Chapter VI and VIA shall apply to any offence committed-

(a) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft whether or not such ship or aircraft is registered in Malaysia;

(b) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia; ...

(f) by any stateless person who has his habitual residence in Malaysia;”

B. MACCA

“Section 66. Liability for offences outside Malaysia.

(1) The provisions of this Act shall, in relation to citizens and permanent residents of Malaysia, have effect outside as well as within Malaysia, and when an offence under this Act is committed in any place outside Malaysia by any citizen or permanent resident, he may be dealt with in respect of such offence as if it was committed at any place within Malaysia.

(2) Any proceedings against any person under this section which would be a bar to subsequent proceedings against such person for the same offence if such offence was committed in Malaysia shall be a bar to further proceedings against him under any written law relating to the extradition of persons, in respect of the same offence, outside Malaysia.

C. AMLATFA

“Section 82. Jurisdiction

(1) Any offence under this Act-

(a) on the high seas on board any ship or on any aircraft registered in Malaysia;

(b) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;

(c) by any citizen or any permanent resident in any place outside and beyond the limits of Malaysia;

(d) by any person against a citizen of Malaysia;

(e) by any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia located outside Malaysia, including diplomatic or consular premises of Malaysia;

(f) by any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;

(g) by any stateless person who has his habitual residence in Malaysia;

(h) by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or

(i) by any person who after the commission of the offence is present in Malaysia, may be dealt with as if it had been committed at any place within Malaysia.

(2) Notwithstanding anything in this Act, no charge as to any offence shall be inquired into in Malaysia unless a diplomatic officer of Malaysia, if there is one, in the territory in which the offence is alleged to have been committed certifies that, in his opinion, the charge ought to be brought in Malaysia; and where there is no such diplomatic officer, the sanction of the Public Prosecutor shall be required.

(3) Any proceedings taken against any person under this section which would be a bar to subsequent proceedings against that person for the same offence if the offence had been committed in Malaysia shall be a bar to further proceedings against him under any written law relating to extradition or the surrender of fugitive criminals in force in Malaysia in respect of the same offence in any territory beyond the limits of Malaysia.

(4) For the purposes of this section, the expression "permanent resident" has the meaning assigned by the Courts of Judicature Act 1964 [Act 91]."

(b) Observations on the implementation of the article

679. The reviewing experts note that Malaysia has implemented the provision.

Article 42 Jurisdiction

Subparagraph 2 (c)

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or

(a) Summary of information relevant to reviewing the implementation of the article

680. Malaysia referred to section 66 of MACCA, section 82 of AMLATFA, and sections 3-4 of the Penal Code (quoted above).

(b) Observations on the implementation of the article

681. The reviewing experts note that Malaysia has not implemented the provision.

Article 42 Jurisdiction

Subparagraph 2 (d)

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

(d) The offence is committed against the State Party.

(a) Summary of information relevant to reviewing the implementation of the article

682. Section 4 of the Penal Code is applicable to offences under Chapters VI and VIA of the Penal Code. Chapter VI provides for offences against the State. Malaysia also cited

section 127 A of the Criminal Procedure Code (Liability for offences committed out of Malaysia).

A. Penal Code

“Section 4. Extension of Code to extra-territorial offences.

(1) The provisions of Chapters VI and VIA shall apply to any offence committed-

- (a) by any citizen or any permanent resident on the high seas on board any ship or any aircraft whether or not such ship or aircraft is registered in Malaysia;
- (b) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia;
- (c) by any person against a citizen of Malaysia;
- (d) by any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia , including diplomatic or consular premises of Malaysia;
- (e) by any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;
- (f) by any stateless person who has his habitual residence in Malaysia;
- (g) by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or
- (h) by any person who after the commission of the offence is present in Malaysia, as if the offence had been committed in Malaysia.

(2) In this section-

- (a) "offence" includes every act done outside Malaysia which if done in Malaysia, would be an offence punishable under this Code;
- (b) "permanent resident" has the meaning assigned by the Courts of Judicature Act 1964.”

B. Criminal Procedure Code

“Section 127 A. Liability for offences committed out of Malaysia

(1) Any offence under Chapters VI and VI A of the Penal Code, or any offence under any of the written laws specified in the Schedule to the Extra-Territorial Offences Act 1976 or any offence under any other written law the commission of which is certified by the Attorney-General to affect the security of Malaysia committed, as the case may be,-

- (a) on the high seas on board any ship or any aircraft registered in Malaysia;
- (b) by any citizen or any permanent resident on the high seas on board any ship or any aircraft whether or not such ship or aircraft is registered in Malaysia;
- (c) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia;
- (d) by any person against a citizen of Malaysia;
- (e) by any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia , including diplomatic or consular premises of Malaysia;
- (f) by any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;
- (g) by any stateless person who has his habitual residence in Malaysia;
- (h) by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or
- (i) by any person who after the commission of the offence is present in Malaysia, may be dealt with as if it had been committed at any place within Malaysia:

Provided-

(i) that notwithstanding anything in any of the preceding sections of this Chapter no charge as to any such offence shall be inquired into in Malaysia unless a diplomatic officer, if there is one, in the territory in which the offence is alleged to have been committed certifies that, in his opinion, the charge ought to be inquired into in Malaysia; and where there is not diplomatic officer, the sanction of the Public Prosecutor shall be required:

(ii) that any proceedings taken against any person under this section which would be a bar to subsequent proceedings against that person for the same offence if the offence had been committed in Malaysia shall be a bar to further proceedings against him under any written law relating to extradition or the surrender of fugitive criminals in force in Malaysia in respect of the same offence in any territory beyond the limits of West Malaysia.

(2) For the purposes of this section the expression " permanent resident" has the meaning assigned by the Courts of Judicature Act 1964.”

(b) Observations on the implementation of the article

683. The reviewing experts note that Malaysia has implemented the provision.

Article 42 Jurisdiction

Paragraph 3

3. For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.

(a) Summary of information relevant to reviewing the implementation of the article

684. Malaysia cited section 49 of the Extradition Act 1992, section 66 of MACCA, Section 82 of AMLATFA, section 4(2)(a) of the Penal Code, section 127 A of the Criminal Procedure Code and sections 85, 88 and 63 of the Subordinate Courts Act 1948, as well as section 22 of the Courts of Judicature Act 1964 (all quoted above).

Extradition Act 1992

“Section 49. Discretion in respect of return of certain fugitive criminals.

(1) The Minister may, in his discretion, refuse the surrender or the return of a fugitive criminal if -

(a) the fugitive criminal is a citizen of Malaysia; or

(b) the extradition offence is one in respect of which the courts in Malaysia have jurisdictions

(2) Where the extradition is refused under subsection (1), the Minister shall, if courts in Malaysia have jurisdictions over the extradition offence, submit the case to the public prosecutor with a view to having the fugitive criminal prosecuted under the laws of Malaysia.”

(b) Observations on the implementation of the article

685. The reviewing experts note that Malaysia has implemented the provision.

Article 42 Jurisdiction

Paragraph 4

4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.

(a) Summary of information relevant to reviewing the implementation of the article

686. Malaysia cited section 49 of the Extradition Act 1992, section 66 of MACCA, section 82 of AMLATFA, section 4(2)(a) of the Penal Code, section 127 A of the Criminal Procedure Code and sections 85, 88 and 63 of the Subordinate Courts Act 1948, as well as section 22 of the Courts of Judicature Act 1964 (all quoted above).

(b) Observations on the implementation of the article

687. The reviewing experts note that Malaysia has implemented the provision. The Extradition Act 1992 requires the Minister to submit a case for prosecution where

extradition of a fugitive criminal is refused and the offence is one in respect of which the courts of Malaysia have jurisdiction. Malaysian courts would have jurisdiction over acts committed outside Malaysia where the offender is in Malaysia as described above.

Section 49 of Act 479 provides that:

“... (2) Where extradition is refused under subsection (1), the Minister shall, if courts in Malaysia have jurisdiction over the extradition offence, submit the case to the Public Prosecutor with a view to having the fugitive criminal prosecuted under the laws of Malaysia.”

Article 42 Jurisdiction

Paragraph 5 and 6

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.

(a) Summary of information relevant to reviewing the implementation of the article

688. Malaysia has in place seven bilateral extradition treaties with: Great Britain and Siam (1911), Indonesia (1974), USA (1997), Hong Kong (1995), Australia (2005), India and Korea. It has also entered into six bilateral treaties on mutual legal assistance with Hong Kong, Australia, USA, Korea, India and the UK, and is also a party to the regional Treaty on Mutual Legal Assistance in Criminal Matters among like-minded ASEAN Member Countries (with 10 States).

(b) Observations on the implementation of the article

689. The reviewing experts took note of the explanations provided and also of the answers in chapter IV of the Convention below in regard to coordination of actions with competent authorities of other States.

Chapter IV. International cooperation

690. A general observation regarding the implementation of Chapter IV of the Convention is that most of the laws cited, and all the treaties that were provided to the reviewers, were enacted before Malaysia ratified the Convention. For example, the Extradition Act is dated 1992 while the Mutual Assistance in Criminal Matters Act is dated 2002. It was explained during the country visit that both Acts are currently under review to continue to bring them in line with international principles, including the Convention. Malaysia therefore had already introduced many of the measures required by UNCAC even before the promulgation of the Convention.
691. It is also noteworthy that Malaysia, like most common law countries, espouses the dualist approach to the application of international norms in the domestic arena, meaning that treaties once ratified have to be domesticated through local legislation so that they may have the force of law. The situation is generally different in civil law countries, which apply the monist approach, whereby treaties assume legal force upon ratification.
692. When ratifying and implementing international treaties, Malaysia first considers if its domestic legislation is in line with the international obligations. Once it has ratified a treaty, Malaysia will enact or amend its legislation, if necessary, to conform to the treaty and to domesticate it.
693. With respect to bilateral treaties, two general processes are followed.
- a) In respect of countries with which Malaysia does not have any existing treaties, pursuant to section 3 of the Extradition Act and section 18 of the Mutual Assistance in Criminal Matters Act, a special direction must be issued by the responsible Minister to give an incoming request the force of law. Such a special direction is issued by the Minister of Home Affairs for extradition and the Minister charged with the responsibility for legal affairs, and can be issued subject to any restrictions, limitations, exceptions, modifications, adaptations, conditions or qualifications as the Minister may specify in the direction. A special direction enables the incoming request to be executed in accordance with Malaysia's domestic law, i.e., the Extradition or Mutual Assistance in Criminal Matters Act. The procedure is provided for in sections 18 and 3 of the Extradition Act and the Mutual Assistance in Criminal Matters Act, respectively.
 - b) For countries with which Malaysia has an existing bilateral treaty, once the treaty has been published in the official Gazette, the provisions of the respective domestic acts (Extradition, Mutual Assistance in Criminal Matters) become applicable to any incoming requests by virtue of an order of the Minister designating the country a "prescribed foreign State" under section 2 of the Extradition Act and section 17 of the Mutual Assistance in Criminal Matters Acts. Such an order may further contain any restrictions, limitations, exceptions, modifications, and adaptations, conditions or qualifications as in the case of non-treaty countries that the Minister may specify. A special direction is not required in respect of treaty countries. The procedure is provided for in sections 17 and 2 of the Extradition Act and Mutual Assistance in Criminal Matters Act, respectively.

694. In respect of multilateral treaties such as UNCAC, a special direction by the Minister is required for the domestic legislation (the Extradition Act and Mutual Assistance in Criminal Matters Act) to be applicable in relation to a request from a State party under such treaty. While no such directions have been made under UNCAC to date, it was explained that the Attorney General's Chambers would submit an appropriate recommendation to the Minister to make such designation, which could be done fairly quickly.
695. It was explained during the country visit that, for purposes of mutual legal assistance, the limitations and conditions that have been applied by the Minister in respect of special directions have been of an administrative nature (i.e., related to costs and safe conduct). Similarly for extradition, the restrictions have related inter alia to the rule of specialty. It was further explained that Minister's discretion has not been exercised in a manner as to defeat the objectives of the Acts. Malaysia may wish to monitor the application of these provisions to ensure that in future cases this power is applied in a consistent manner.
696. Malaysia has in place seven bilateral extradition treaties with: Great Britain and Siam (1911), Indonesia (1974), USA (1997), Hong Kong (1995), Australia (2005), India and Korea. It has also entered into six bilateral treaties on mutual legal assistance with Hong Kong, Australia, USA, Korea, India and the UK, and is also a party to the regional Treaty on Mutual Legal Assistance in Criminal Matters among like-minded ASEAN Member Countries (with 10 States).
697. The reviewers' overall impression in respect of Malaysia's implementation of UNCAC articles 44 and 46 is that the country established some good practices and has developed a solid system to render and request international cooperation especially in the region, which profile the country to be a provider of technical assistance to other countries. Other examples include the work flow processes and systems that are in place to render international cooperation, as described further in this chapter.
698. The reviewers have also noted the emphasis on the dual criminality requirement especially in respect of extradition.
699. The reviewers appreciate the fact that Malaysia has concluded bilateral and multilateral treaties and has cooperated in international and regional organizations and initiatives, and are convinced there are some good practices which other countries can learn from Malaysia in this respect.
700. From the information and documentation supplied, Malaysia substantially follows the common law legal system. Malaysia subscribes to the Commonwealth Schemes on Mutual Legal Assistance (also known as the Harare Scheme) and Extradition (London Scheme), which are relevant for purposes of demonstrating the implementation of articles 44 and 46 of UNCAC. It was explained that the principles expounded in both these schemes are reflected in the mutual assistance in criminal matters treaties and the extradition treaties entered into by Malaysia.
701. Extradition and mutual legal assistance requests are processed at the federal level, as these criminal issues fall within the mandate of the federal government according to the law of Malaysia. In addition, items 1(a) and 1(b) of List 1 – Federal List, Ninth Schedule of the Federal Constitution provide, among others, that matters relating to external affairs

are within the purview of the Federal Government. Item 1(e) of List 1 – Federal List, Ninth Schedule of the Federal Constitution specifically provides that extradition matters are within the purview of the Federal Government. Item 4 of List 1 – Federal List, Ninth Schedule of the Federal Constitution, provides that civil and criminal law and procedure and the administration of justice, (i.e. all criminal matters) are within the purview of the Federal Government. Mutual legal assistance and extradition are mainly done or executed by institutions at the federal level. However, even though extradition and MLA come within the purview of the Federal Government, it does not preclude Malaysian Anti-Corruption Commission (MACC) officers in the States from taking part in the execution of international cooperation matters. MACC is also existent in all States in Malaysia and these officers can be mobilized to assist in international cooperation matters relating to corruption. As noted below, the Attorney General is the central authority for mutual legal assistance while the Minister of Home Affairs is the central authority for extradition.

Article 44 Extradition

Paragraph 1

1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

(a) Summary of information relevant to reviewing the implementation of the article

702. The provision under review, which is the dual criminality requirement, has been implemented through the following measures:

1. Section 5 of the Extradition Act 1992 (Act 479) defines a fugitive criminal as "any person who is accused of or convicted of an extradition offence committed within the jurisdiction of another country and is, or is suspected to be, in some part of Malaysia."

2. Section 6 of the Extradition Act 1992 (Act 479) describes an extradition offence as follows:

"6. (1) A fugitive criminal shall only be returned for an extradition offence.

(2) For the purposes of this Act, an extradition offence is an offence, however described, including fiscal offences-

(a) which is punishable, under the laws of a country referred to under paragraph 1(2)(a) or 1(2)(b), with imprisonment for not less than one year or with death; and

(b) which, if committed within the jurisdiction of Malaysia, is punishable under the laws of Malaysia with imprisonment for not less than one year or with death:

Provided that, in the case of an extraterritorial offence, it is so punishable under the laws of Malaysia if it took place in corresponding circumstances outside Malaysia.

(3) An offence shall also be an extradition offence if it consists of an attempt or a conspiracy to commit, or an abetment of the commission of, any offence described in subsection (2)."

703. Malaysia reported that the basis of the concept of dual criminality is that an offence must be recognized, criminalized and punishable under Malaysian laws. This concept goes to the very core of the fundamental rights acknowledged in the federal Constitution under Article 5(1) concerning liberty of the person i.e., "No person shall be deprived of his life or personal liberty save in accordance with law."

704. Malaysia adopts a liberal and broad approach when looking at whether an offence fulfills the dual criminality requirement. Malaysia would focus on the acts, conduct and elements of crimes, rather the strict categorization of the offence. It should be noted that in the determination of the dual criminality requirement involving matters of international cooperation, section 6(2) of the Extradition Act provides that:

Section 6(2), Extradition Act

(2) For the purpose of this Act, an extradition offence is an offence, however described (emphasis provided), including fiscal offences –

(a) Which is punishable, under the laws of a country referred to under paragraph 1(2)(a) or 1(2)(b), with imprisonment for not less than one year or with death; and

(b) Which, if committed within the jurisdiction of Malaysia, is punishable under the laws of Malaysia with imprisonment for not less than one year or with death:

Provided that, in the case of an extraterritorial offence, it is so punishable under the laws of Malaysia if it took place in corresponding circumstances outside Malaysia.

705. There have been no recent cases where the issue of dual criminality has been raised in court as the main issue. Further, there is a decision by the Malaysian court which requires the extradition offence to be specifically framed to the equivalent offence in Malaysia and produced in court during the extradition proceedings. In 2003, in the case of *Public Prosecutor v Ottavio Quattrocchi [2003] 1 MLJ 225*, whilst referring to section 6 of the Act 479, the Court held as follows:

“[27] As provided by s 6(1) of the Act itself a fugitive criminal shall only be returned for an extradition offence. In my opinion, therefore, the prosecution should not undertake an extradition inquiry in respect of an offence committed in another country if it is unable to identify the corresponding local law. It can thus be appreciated with ease the folly of conducting an extradition inquiry only to realize at the end that it is not an extradition offence.”

The decision of the Court in *Quattrocchi* has shown the position of Malaysia in implementing the dual criminality requirement as provided under section 6 of the Act 479.

706. The requirement of dual criminality has been reflected in the Extradition Treaties entered into between Malaysia and foreign countries (described more fully under UNCAC paragraph 18) as follows:

(i) Article 2 of the Extradition Treaty between Great Britain and Siam:

“Extradition offences

The crimes or offences for which the extradition to be granted are the following:-

1. Murder, or attempt, or conspiracy to murder.
2. Manslaughter.
3. Assault occasioning actual bodily harm. Malicious wounding or inflicting grievous bodily harm.
4. Counterfeiting or altering money, or uttering counterfeit or altered money.
5. Knowingly making any instrument, tool, or engine adapted or intended for counterfeiting coin.
6. Forgery, counterfeiting, or altering or uttering what is forged or counterfeited or altered.
7. Embezzlement or larceny.
8. Malicious injury to property, by explosives or otherwise, if the offence be indictable.
9. Obtaining money, goods or valuable securities by false pretences.
10. Receiving money, valuable security, or other property, knowing the same to have been stolen, embezzled, or unlawfully obtained.
11. Crimes against bankruptcy law.
12. Fraud by a bailee, banker, agent, factor, trustee, or director, or member or public officer of any company made criminal by any law for the time being in force.
13. Perjury, or subornation of perjury.

14. Rape.
15. Carnal knowledge, or any attempt to have carnal knowledge, of a girl under the age of puberty, according to the laws of the respective countries.
16. Indecent assault.
17. Procuring miscarriage, administering drugs, or using instruments with intent to procure the miscarriage of a woman.
18. Abduction.
19. Child-stealing.
20. Abandoning children, exposing or unlawfully detaining them.
21. Kidnapping and false imprisonment.
22. Burglary or house-breaking.
23. Arson.
24. Robbery with violence.
25. Any malicious act done with intent to endanger the safety of any person in a railway train.
26. Threats by letter or otherwise, with intent to extort.
27. Piracy by law of nations.
28. Sinking or destroying a vessel at sea, or attempting or conspiring to do so.
29. Assaults on board ship on the high seas, with intent to destroy life, or do grievous bodily harm.
30. Revolt, or conspiracy to revolt, by two or more persons on board a ship on the high seas against the authority of the master.
31. Dealing in slaves in such a manner as to constitute a criminal offence against the laws of both States.

Accessories

Extradition is to be granted for participation in any of the aforesaid crimes, provided such participation be punishable by the laws of both Contracting Parties.

Other offences

Extradition may also be granted at the discretion of the States applied to in respect of any other crime for which, according to the law of both of the Contracting Parties for the time being in force, the grant can be made.”

(ii) Article 2 of the Treaty between the Government of the Republic of Indonesia and the Government of Malaysia relating to Extradition

“Extraditable Crimes

- (1) Extradition shall be granted in respect of crimes listed in the Annex to this Treaty.
- (2) Crimes provided for in paragraph (1) of this Article include abetment and attempt to commit such crimes.

ANNEX REFERRED TO IN ARTICLE 2 LIST OF EXTRADITABLE CRIMES

- (1) Murder and attempt to murder.
- (2) Culpable homicide not amounting to murder or manslaughter.
- (3) Rape.
- (4) Abduction and Kidnapping.
- (5) Causing bodily hurt.
- (6) Wrongful confinement.
- (7) Buying or disposing of any person as a slave or habitually dealing in slaves.
- (8) Offences punishable under the laws relating to women and girls.
- (9) Housebreaking, theft and other related offences.
- (10) Robbery.
- (11) Forgery and related offences.
- (12) Embezzlement and criminal misappropriation.
- (13) Cheating.
- (14) Fraud.
- (15) Bribery and Corruption.
- (16) Extortion or attempt to commit extortion.
- (17) Offences relating to currency notes, coins and Government stamps.
- (18) Smuggling.
- (19) Arson.

- (20) Offences punishable under the laws relating to dangerous drugs.
- (21) Piracy by law of nations.
- (22) Sinking or destroying a vessel at sea, or attempting or conspiring to do so.
- (23) Assault on board a ship on the seas with intent to destroy life or to cause grievous hurt.
- (24) Revolt or conspiracy to revolt by two or more persons on board a ship on the high seas against the authority of the master.
- (25) Perjury, giving, fabricating and using false evidence.
- (26) Unlawful destruction of or injury to property.
- (27) Any other offences added from time to time to this annex upon agreement by both parties.”

(iii) Article 2(1) of the Agreement between the Government of Hong Kong and the Government of Malaysia for the Surrender of Fugitive Offenders (relevant provisions set forth below):

“(1) Surrender of fugitive offenders shall be granted for an offence coming within any of the following descriptions of offences in so far as it is according to the laws of both Parties punishable by imprisonment for not less than one year or by a more severe penalty:...

- (xiii) an offence relating to the possession or laundering of proceeds obtained from the commission of any offence for which surrender may be granted;
- (xiv) cheating, criminal breach of trust or obtaining property or pecuniary advantage by deception;
- (xv) housebreaking or burglary, theft and handling or receiving stolen property; ...
- (xviii) embezzlement or criminal misappropriation;
- (xix) criminal breach of trust;
- (xx) fraud, conspiracy to commit fraud or to defraud;
- (xxi) an offence of criminal conspiracy;
- (xxii) an offence against bankruptcy laws;
- (xxiii) an offence against companies and securities;
- (xxiv) an offence relating to fiscal matter, taxes or duties, notwithstanding that the law of the requested Party does not impose the same kind of tax or duty or does not contain a tax, duty or customs regulation of the same kind as the law of the requesting Party;
- (xxv) counterfeiting, forgery and related offences;
- (xxvi) an offence against the laws relating to bribery and corruption;
- (xxvii) perjury; attempting to pervert the course of justice; ...
- (xxxvii) any offence for which fugitive offenders may be surrendered under any International Convention binding on both Parties.

(2) Where surrender of a fugitive offender is requested for the purpose of carrying out a sentence, a further requirement shall be that in the case of a period of imprisonment at least six months remains to be served.

(3) For the purposes of this Article, in determining whether an offence is an offence punishable under the laws of both Parties the totality of the acts or omissions alleged against the person whose surrender is sought shall be taken into account without reference prescribed by the law of the requesting Party.

(4) For the purposes of paragraph (1) of this Article, an offence shall be an offence according to the laws of both Parties if the conduct constituting the offence was an offence against the law of the requesting Party at the time it was committed and an offence against the law of the requested Party at the time the request for surrender is received.”

(iv) Article 2(3) of the Extradition Treaty between the Government of Malaysia and the Government of the United States of America

“3. For the purposes of this Article, an offense shall be an extraditable offense:

- (a) whether or not the laws in the Contracting States place the offense within the same category of offenses or describe the offense by the same terminology; or
- (b) whether or not the offense is one for which United States federal law requires the showing of such matters as interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court.

4. If the Requested State considers that the offense was committed within its jurisdiction, it may deny extradition. For purposes of this paragraph, jurisdiction means the territory of the Requested State, its air space and territorial waters, and any vessels or aircraft registered in that State if such aircraft or vessel is on the high seas or in flight. If extradition is denied pursuant to this paragraph, the Requested State shall submit the case to its competent authorities for the purpose of prosecution.

5. If the offense has been committed outside the territory of the Requesting State, extradition shall be granted if the laws of the Requested State provide for punishment of an offense committed outside its territory in similar circumstances, and if the requirements of extradition under this Treaty are otherwise met. If the laws of the Requested State do not so provide, the executive authority of the Requested State may, in its discretion, deny extradition.”

(v) Article 2(4) of the Government of Malaysia and the Government of Australia

“4. For the purposes of this Article, in determining whether an offence is an offence punishable under the laws of both Parties:

(a) shall not matter whether the laws of the Parties place the acts or omissions constituting the offence within the same category of offences or describe the offence by the same terminology;

(b) the totality of the acts or omissions alleged against the person whose extradition is sought shall be taken into account and it shall not matter whether, under the laws of the Parties, the constituent elements of the offence differ.”

(vi) Article 2(1) of the Extradition Treaty between the Government of Malaysia and the Government of the Republic of India:

“Extraditable Offences

2(1) An offence shall be an extraditable offence if it is punishable under the laws of the Contracting States by a term of imprisonment for a period of not less than one year or with death.

2(2) An offence shall also be an extraditable offence if it consists of an attempt or a conspiracy to commit or an abetment of the commission of any offence described in paragraph 1.”

(b) Observations on the implementation of the article

707. Section 5 of the Extradition Act defines a fugitive criminal as “any person who is accused of or convicted of an extradition offence committed within the jurisdiction of another country...” It was explained that the words “committed within the jurisdiction of another country” would include a situation where the offending conduct was committed within the territory of Malaysia but the other country has criminalized such conduct by its citizens even when committed abroad, provided that the offending conduct was also criminalized in Malaysia both when committed within Malaysia and abroad (i.e. Malaysia would have extraterritorial jurisdiction over the offending conduct).

708. Dual criminality is flexibly applied, looking at the underlying conduct and elements of the offence. It was noted that with respect to the existing extradition treaties, Malaysia uses either a listing or descriptive approach. In both situations, the dual criminality requirement has to be satisfied.

Article 44 Extradition

Paragraph 2

2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.

(a) Summary of information relevant to reviewing the implementation of the article

709. Malaysia indicated that it has not implemented this non-mandatory provision.

710. The requirement of dual criminality in domestic law of Malaysia under section 6 of the Act 479 must be satisfied without any exception. The text is as cited above. The

extradition treaties entered by Malaysia all require dual criminality, as stated under UNCAC paragraph 1 above.

711. As described above, Malaysia adopts a liberal and broad approach when looking at whether an offence fulfills the dual criminality requirement, focusing on the conduct and elements of crimes, rather the strict categorization of offences.

712. Based on Malaysia's experience, in almost all instances incoming extradition request from foreign States do meet the threshold dual criminality and minimum penalty requirements.

(b) Observations on the implementation of the article

713. The reviewers are in agreement with Malaysia that the country has not adopted and implemented article 44(2).

714. Nonetheless, the review team positively noted Malaysia's practice of flexibly interpreting the dual criminality requirement so as to render a wide measure of assistance.

Article 44 Extradition

Paragraph 3

3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.

(a) Summary of information relevant to reviewing the implementation of the article

715. Malaysia indicated that it has not implemented this non-mandatory provision.

716. A threshold requirement related to the minimum period of imprisonment or punishment is a condition precedent pursuant to section 6 of the Act 479, and provisions to that effect are also provided in the Treaties entered into between Malaysia and foreign countries. For an extradition request which contains several offences, only offences that fulfill the threshold requirement will be allowed.

717. As provided under section 6 of the Act 479, Malaysia requires dual criminality and the threshold requirements must be fulfilled. If Malaysia receives a request containing several offences, extradition will only be granted for the offences which meet the threshold requirement. If a fugitive criminal were to be tried for an offence other than the offence for which extradition was granted it would be a breach on the rule of speciality. The rule of speciality has been incorporated in all of Malaysia's extradition treaties as follows:

(i) Extradition Treaty between Great Britain and Siam

"Article VI

Trial after surrender to be limited to extradition offence

A person surrendered can in no case be detained or tried in the State to which the surrender has been made, for any other crime or on account of any other matters than those for which the extradition shall have taken

place, until he has been restored or had an opportunity of returning to the State by which he has been surrendered.”

(ii) Treaty between the Government of Malaysia and the Government of the Republic of Indonesia Relating to Extradition

“Article 8

Rule of Speciality

A person who has been extradited shall not be prosecuted, sentenced or detained for any crime committed prior to his surrender other than for which he was extradited except in the following cases:

- (a) when the requested Party which surrendered him consents. A request for consent shall be submitted to the requested Party, accompanied by the documents mentioned in Article 15. Consent shall be given when the offence for which it is requested is itself subject to extradition in accordance with the provisions of Article 2 of this Treaty; and
- (b) when the person, having had an opportunity to leave the territory of the Party to which he has been surrendered, has not done so within 45 days of his final discharge, or has returned to that territory after leaving it.”

(iii) Extradition Treaty between the Government of Malaysia and the Government of the United States of America

“Article 16

Rule of Speciality

1. A person extradited under this Treaty may not be detained, tried or punished in the Requesting State except for:

- (a) The offence for which extradition has been granted or any lesser offence proved by the facts on which the first mentioned extradition was grounded
- (b) any offence committed after the extradition of the person; or
- (c) an offence for which the executive authority of the Requested State has consented to the person’s detention, trial, or punishment. For the purpose of this subparagraph:
 - (i) the Requested State may require the submission of the documents specified in Article 7; and
 - (ii) the person extradited may be detained by the Requesting State for ninety (90) days, or for such longer time as the Requested State may authorize, while the request is being processed.”

(iv) Agreement between the Government of Malaysia and the Government of Hong Kong for the Surrender of Fugitive Offenders

“Article 17

Rule of Speciality

A fugitive offender who has been surrendered shall not be proceeded against, sentenced or kept in custody with a view to the carrying out of a sentence for any offence committed prior to his surrender other than -

- (a) the offence in respect of which his return is ordered;
- (b) any lesser offence however described disclosed by the facts in respect of which his return was ordered provided such an offence is an offence for which he can be returned under this Agreement;
- (c) any other offence being an offence for which surrender may be granted under this Agreement in respect of which the Requested Party may consent to his being dealt with, unless he has first had an opportunity to leave the jurisdiction of the Party to which he has been surrendered and he had not done so within forty days of his having been free to leave the jurisdiction or has returned to that jurisdiction having left it.”

(v) Treaty between the Government of Malaysia and the Government of Australia on Extradition

“Article 13

Rule of Speciality

2. Subject to paragraph 3, a person extradited under this Treaty shall not be detained or tried, or be subjected to any other restriction of her or his personal liberty, in the territory of the Requesting Party for any offence committed before her or his extradition other than:

- (c) an offence for which extradition was granted or any other extraditable offence of which the person could be convicted upon proof of the facts upon which the request for extradition was based, provided that the offence does not carry a penalty which is more severe than that which could be imposed for the offence for which extradition is sought; or
- (d) any other extraditable offence in respect of which the Requested Party consents.”

(vi) Extradition Treaty between the Government of Malaysia and the Government of the Republic of India

“Article 19

Rule of Speciality

1. A person extradited under this Treaty shall not be detained, tried or punished in the Requesting State or subjected to any other restriction of personal liberty except for –

- (a) the offence for which extradition has been granted;
- (b) any lesser offence proved by the facts on which his extradition was based;
- (c) any offence committed after the extradition of the person; or
- (d) any other offence in respect of which the executive authority of the Requested State consents. For the purpose of this subparagraph:
 - (i) the Requested State may require the submission of the documents specified in Article 8; and
 - (ii) the person extradited may be detained by the Requesting State for ninety (90) days, or for such longer time as the Requested State may authorize, while the request is being processed.”

(b) Observations on the implementation of the article

718. The reviewers agree with the answer given that Malaysia has not implemented article 44(3). Dual criminality is a fundamental principle of Malaysian law.

Article 44 Extradition

Paragraph 4

4. Each of the offences to which this article applies shall be deemed to be included as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.

(a) Summary of information relevant to reviewing the implementation of the article

719. The legal basis for extradition is the Act 479 as well as the Treaties entered into between Malaysia and foreign countries. In principle Malaysia would accept the Convention as the legal basis for extradition upon the Minister issuing a special direction under section 3 of the Extradition Act 1992, as described in the introduction to chapter IV of this report. The execution of the assistance would then be processed in accordance with the Extradition Act 1992. There has been no experience in making or receiving requests solely on the basis of the Convention.

720. Malaysia’s Act 479 states that a political offence is a ground for refusal which is open to the fugitive criminal to raise and challenge. Section 8(a) provides that a person shall not be surrendered if the offence for which his return is sought is of a political character. However, there is an exception to this general rule in section 9(b) of the Act 479, which provides specifically that if Malaysia and the requesting country are parties to a multilateral treaty, such as UNCAC, the fugitive criminal sought for such political offences may be surrendered nonetheless. Sections 8(a) and 9 are as follows:

“8. A fugitive criminal shall not be surrendered to a country seeking his return-

(a) if the offence in respect of which his return is sought is of a political character or he proves to the satisfaction of the Sessions Court before which he is brought or of the Minister that the warrant for his return has in fact been made with a view to try or punish him for an offence of a political character;”

“9. For the purposes of paragraph 8(a), any of the following offences shall not be held to be offences of a political character in relation to a country which has made corresponding provisions in its laws:

(a) murder or other wilful crime against the person of a Head of State or a member of the Head of State’s immediate family;

(b) an act which, under a multilateral treaty to which Malaysia and the country seeking the return of the fugitive criminal are parties, constitutes an offence for which a person will be extradited or prosecuted notwithstanding the political character or motivation of such act;

(c) any attempt, abetment or a conspiracy to commit any of the foregoing offences.”

721. Section 9(b) is in respect of exceptions to political offences where under a multilateral treaty to which Malaysia is a party such offences constitute an extraditable offence notwithstanding the political character or motivation of such act. However, the application of section 9(b) would depend on whether Malaysia criminalizes the said offence. Although section 9(b) of Act 479 gives recognition to multilateral treaties, the application is only limited to political offences.

722. The exception involving offences of a political character is also reflected in the Treaties entered into between Malaysia and foreign countries as follows:

(i) Articles III and V of the Extradition Treaty between Great Britain and Siam;

“Subjects

III. Either Government may, at its absolute discretion, refuse to deliver up its own subject to the other Government.

Political offences

V. A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is deemed by the Party on whom the demand is made to be one of a political character, or if he prove that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character.”

(ii) Article 3 of the Treaty between the Government of the Republic of Indonesia and the Government of Malaysia relating to Extradition;

“Political Crimes

(1) Extradition shall not be granted if the crime in respect of which it is requested is regarded by the requested Party as a political crime.

(2) The taking or attempted taking of the life of a Head of State or a member of his family shall not be deemed to be a political crime for the purposes of this Treaty.”

(iii) Articles 6(1)(a) and 6(2)(a), (b) and (c) of the Agreement between the Government of Hong Kong and the Government of Malaysia for the Surrender of Fugitive Offenders - - This Article deals with restrictions on surrender pertaining to political offence and punishment of the fugitive criminal on account of his race, religion, nationality and political opinions;

“6.(1) A fugitive offender shall not be surrendered if the requested Party has substantial grounds for believing –

(a) that the offence of which that person is accused or was convicted is an offence of a political character; ...

(2) For the purposes of this Agreement, the following offences shall not be considered to be of a political character:

(a) murder or other wilful crime against the person of the Head of State of Malaysia, or, in the case of Hong Kong, the Head of State whose Government is responsible for its foreign affairs, or in either case of a member of the Head of State’s immediate family;

- (b) any offence which is not to be regarded as an offence of a political character by virtue of an international agreement binding on both Parties;
- (c) an attempt or conspiracy to commit or participate in, any such offences.”

(iv) Article 4(1) and 4(2) of the Extradition Treaty between the Government of Malaysia and the Government of the United States of America - This Article deals with restrictions on surrender pertaining to political and military offences;

“1. Extradition shall not be granted if the offense for which extradition is requested is a political offense.

2. For the purpose of this Treaty, the following offenses shall not be considered to be political offenses:...

(b) an offense for which both Contracting States have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution;” or

(c) an attempt or conspiracy to commit, or aiding or abetting, counseling or procuring the commission of or being an accessory before or after the fact to, such offenses.”

(v) Article 3(1) of the Government of Malaysia and the Government of Australia - This Article deals with restrictions on surrender pertaining to political and military offences and punishment of the fugitive criminal on account of his race, colour, sex, language, religion, nationality, ethnic origin, political opinion or other status;

“1. Extradition shall not be granted in any of the following circumstances:

(a) if the Requested Party determines that the request was politically motivated or regards the offence for which extradition is requested as a political offence. For the purposes of this Treaty, the following offences shall not be considered to be political offences:

(i) the murder or attempted murder of a Head of State of one of the Parties, or a member of the Head of State’s family;

(ii) an offence for which both Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution; or

(iii) an attempt or conspiracy to commit, or aiding or abetting, counseling or procuring the commission of or being an accessory before or after the fact to, such offences;”

(b) if there are substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of that person’s race, colour, sex, language, religion, nationality, ethnic origin, political opinion or other status, or that that person’s position may be prejudiced for any of those reasons;

(c) if the offence for which extradition is requested is regarded by the Requested Party as an offence under military law, but not an offence under the ordinary criminal law of the Requested Party;

(d) if, in respect of the offence for which the extradition of the person is requested:

(i) the person has been acquitted or pardoned under the laws of the Requested Party or a third state;

(ii) the person has undergone the punishment provided by the laws of the Requested Party or a third state; or

(iii) the person has been convicted under the laws of the Requested Party or a third state;

(e) if the person, on being extradited to the Requesting Party, would be liable to be tried or sentenced in that Party by a court or tribunal that has been specially established for the purpose of trying the person’s case; or

(f) if it may place the Requested Party in breach of its obligations under international treaties. ...”

(vi) Article 6(1)(a) and 6(2) of the Extradition Treaty between the Government of Malaysia and the Government of the Republic of India.

“Restrictions on Surrender

6(1) A fugitive offender shall not be surrendered if the Requested State is satisfied that-

(a) the offence of which that person is accused of or was convicted is an offence of a political character; or

6(2) For the purposes of this Treaty, the following offences shall not be considered to be of a political character-

(a) murder or other willful crime against the person of a Head of State or Head of Government of one of the Contracting States, or a member of his immediate family;

(b) an offence for which the Contracting States have the obligation pursuant to a multilateral/international treaty to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution; or an attempt, abetment or a conspiracy to commit any of the foregoing offences.”

(b) Observations on the implementation of the article

723. As noted above, Malaysia uses the list or descriptive approach to determine extraditable offences. UNCAC offences are extraditable by reason of the threshold period of imprisonment or punishment; however, subject to the dual criminality requirement, to the extent that not all UNCAC offences are fully criminalized, they would not be extraditable.

724. In principle, Malaysia would accept the Convention as the legal basis for extradition upon the Minister issuing a special direction under section 3 of the Extradition Act 1992. Assistance pursuant to the UNCAC request would then be provided in accordance with the Act. Accordingly, UNCAC could also be used as the basis for outgoing requests. As described under paragraph 6(a) of article 44 below, Malaysia is encouraged to make the requisite notification to the United Nations as to whether it would accept UNCAC as a legal basis for cooperation on extradition.

725. Moreover, section 9(b) of the Extradition Act makes reference to multilateral treaties to which Malaysia is a party, and in fact removes the political offence conditionality where such multilateral treaty makes the provision. UNCAC would fit the criteria under section 9(b) of the Extradition Act.

Article 44 Extradition

Paragraph 5

5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

(a) Summary of information relevant to reviewing the implementation of the article

726. For Malaysia, the legal basis for extradition requests is the Extradition Act 1992 (Act 479). Malaysia does not make extradition conditional on the existence of a treaty and may consider a request from non-treaty partners. Section 3 of Act 479 provides for the Minister of Home Affairs to issue a special direction for Act 479 to be applicable to such requests.

“Special direction of the Minister applying this Act where no order has been made under section 2
3. Where a country in respect of which no order has been made under section 2 makes a request for the extradition thereto of a fugitive criminal, the Minister may personally, if he deems it fit to do so, give a special direction in writing that the provisions of this Act shall apply to that country in relation to the extradition thereto of that particular fugitive criminal.”

(b) Observations on the implementation of the article

727. Malaysia reported that no requests have been made to or by Malaysia for offences under the UNCAC. However, the statistics for non-corruption offences for 2010-2012 are as follows:

Year	Request Received		Request Made
	Treaty Partner	Non-treaty Partner	
2010	4	5	0
2011	5	14	0
2012	5	11	0

728. It was explained that the low number of outgoing requests made by Malaysia is due in part to the warrant of arrest scheme that is in place with neighboring States of Brunei Darussalam and the Republic of Singapore, which obviates the need for formal extradition requests to those countries.

729. Malaysia has not refused extradition in any cases to date, although in one case it could not comply with a request following a court decision in *Public Prosecutor v Ottavio Quattrocchi* [2003] 1 MLJ 223 imposing certain conditions barring the execution of the request, and in another case the subject had left the jurisdiction. No outgoing requests by Malaysia have been refused by other countries.

Article 44 Extradition

Paragraph 6

6. *A State Party that makes extradition conditional on the existence of a treaty shall:*

(a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

(b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

(a) Summary of information relevant to reviewing the implementation of the article

730. Malaysia indicated that it has not implemented the provision.

731. Malaysia has not made the relevant notification to the United Nations.

732. Malaysia does not make extradition conditional on the existence of a treaty. The request for extradition can be made either by a treaty partner or a non-treaty partner. As described under UNCAC paragraph 5 above, the Special Direction of the Minister under section 3 of the same Act would enable the application of Act 479 in relation to extradition thereto in both circumstances

733. The full list of extradition treaties is included in the introduction to chapter IV above and under UNCAC paragraph 18 below.

(b) Observations on the implementation of the article

734. The existence of a treaty is not a precondition to grant assistance for purposes of extradition in accordance with section 3 of Act 479.

735. Malaysia is encouraged to send the aforementioned information to the Chief, Treaty Section, Office of Legal Affairs, Room M-13002, United Nations, 380 Madison Ave, New York, NY 10017 and copy the Secretary of the Conference of the States Parties to the United Nations Convention against Corruption, Corruption and Economic Crime Branch, United Nations Office on Drugs and Crime, Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria (uncac.cop@unodc.org).

Article 44 Extradition

Paragraph 7

7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

(a) Summary of information relevant to reviewing the implementation of the article

736. Section 6 of the Extradition Act 1992 (Act 479) provides for the dual criminality requirement and minimum period of imprisonment or punishment (quoted under UNCAC paragraph 1 above). As a result, corruption offences that are criminalized under Malaysian law and punishable by imprisonment for at least one year or death are extraditable.

737. The penalties for corruption cases provided under the Malaysian Anti-Corruption Act 2009 (Act 694) are imprisonment and fines. On the basis of the offences prescribed under MACCA and the other prescribed offences under other penal laws in Malaysia, all the offences under UNCAC would meet the required threshold and would be considered as extraditable offences under Act 479.

(b) Observations on the implementation of the article

738. Subject to the dual criminality requirement, to the extent that not all UNCAC offences are fully criminalized, they would not be extraditable. Otherwise, all UNCAC offences would be considered as extraditable by reason of their period of imprisonment or punishment.

Article 44 Extradition

Paragraph 8

8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

(a) Summary of information relevant to reviewing the implementation of the article

739. As noted above, the threshold requirement for corruption offences to be extraditable is provided in section 6 of the Extradition Act 1992 (Act 479), which establishes the dual criminality requirement and minimum period of imprisonment or punishment.

740. For the restrictions on the return of fugitive criminals, section 8 provides as follows:

“8. A fugitive criminal shall not be surrendered to a country seeking his return-

- (a) if the offence in respect of which his return is sought is of a political character or he proves to the satisfaction of the Sessions Court before which he is brought or of the Minister that the warrant for his return has in fact been made with a view to try or punish him for an offence of a political character;
- (b) if the request for his surrender although purporting to be made for an extradition offence was in fact made for the purpose of prosecuting or punishing the person on account of his race, religion, nationality or political opinions;
- (c) if he might be prejudiced at his trial or punished or imprisoned by reason of his race, religion, nationality or political opinions;
- (d) if prosecution for the offence in respect of which his return is sought is, according to the law of that country, barred by time;
- (e) unless provision is made by the law of that country, or in the extradition arrangement with that country, that a fugitive criminal who has not had a reasonable opportunity of leaving that country shall not be detained or tried in that country for any offence committed prior to his return, other than the extradition offence proved by the facts on which his surrender or return is based or any lesser offence proved by the facts on which that return was grounded unless the consent of the appropriate authority in the requested country has been obtained; or
- (f) unless provision is made by the law of that country, or in the extradition arrangement with that country, that a fugitive criminal who has not had a reasonable opportunity of leaving that country shall not be extradited to another country for trial or punishment for any offence that is alleged to have been committed or was committed before the fugitive criminal’s return to the first mentioned country unless the consent of the appropriate authority in the requested country has been obtained.”

741. The threshold requirement and the restrictions on the return of fugitive criminals are reflected in the Treaties entered into between Malaysia and foreign countries.

742. Regarding grounds upon which extradition requests have been refused, Malaysia explained that it will always consider extradition requests received from foreign countries. All the extradition requests received by Malaysia thus far have fulfilled the threshold requirement and Malaysia has not refused extradition in any cases to date. No outgoing requests by Malaysia have been refused by other countries.

(b) Observations on the implementation of the article

743. During the country visit it was explained that, although in respect of UNCAC offences there are no offences punishable by death in Malaysia, Malaysia would nonetheless extradite a person to a country where the death penalty could be applied. This is in line with the Extradition Act, which provides for the minimum period of imprisonment of one year up to the death penalty for an offence to be extraditable.

Article 44 Extradition

Paragraph 9

9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

(a) Summary of information relevant to reviewing the implementation of the article

744. Malaysia reported that, although the Act 479 requires the prima facie standard to be applicable for extradition cases, section 4 of the Act provides that the prima facie requirement may be dispensed with for Malaysia's treaty partners. Once the direction of the Minister of Home Affairs under section 4 of Act 479 has been given i.e. to dispense with the prima facie standard, the procedures under section 20 of Act 479 would be applicable wherein the extradition proceedings are simplified.

745. For Brunei Darussalam and the Republic of Singapore, Part V of Act 479 provides a simplified procedure for extradition requests, the warrant of arrest scheme.

746. Section 22 of Act 479 further provides simplified procedures for the fugitive criminal to waive the committal proceeding.

Section 4 of Act 479

"Direction of the Minister to apply procedure in section 20

4. Where the binding arrangement which has been entered into between Malaysia and any country for the extradition of fugitive criminals contains a provision for the prima facie requirement to be dispensed with either generally or in relation to a class or classes of offences, the Minister may give a direction in writing that the procedure specified in section 20 shall apply to such cases."

Section 20 of Act 479

"Procedure before Sessions Court where a special direction has been given under section 4

20. (1) Where a direction has been given by the Minister under section 4, the Sessions Court shall-

- (a) after hearing any representation made in support of the extradition request;
 - (b) upon the production of supporting documents in relation to the offence;
 - (c) upon being satisfied that the alleged act or omission of the fugitive criminal would, if it had taken place in Malaysia, constitute an offence under the laws of Malaysia;
 - (d) if the fugitive criminal does not satisfy the Court that there are substantial grounds for believing that-
 - (i) the offence is an offence of a political character, or that the proceedings are being taken with a view to try or punish him for an offence of a political character;
 - (ii) prosecution for the offence in respect of which his return is sought is barred by time in the country which seeks his return;
 - (iii) the offence is an offence under military law which is not also an offence under the general criminal law;
 - (iv) the fugitive criminal has been acquitted or pardoned by a competent tribunal or authority in the country which seeks his return or in Malaysia;
 - (v) the fugitive criminal has undergone the punishment provided by the law of the country which seeks his return or of Malaysia in respect of the extradition offence or any other offence constituted by the same conduct as that which constitutes the extradition offence;
 - (e) upon being satisfied that the fugitive is not accused of an offence, nor undergoing a sentence in respect of an offence, in Malaysia, other than the extradition offence in respect of which his return is sought, commit the fugitive criminal to prison to await the order by the Minister for his surrender.
- (2) In the proceedings before the Sessions Court under subsection (1) the fugitive criminal is not entitled to adduce, and the Court is not entitled to receive, evidence to contradict the allegation that the fugitive criminal has done or omitted to do the act which constitutes the extradition offence for which his return is sought.
- (3) In this section, "supporting documents" means-
- (a) any duly authenticated warrant for the arrest of the fugitive criminal issued by the country which seeks his return or any duly authenticated copy of such warrant;
 - (b) any duly authenticated document to provide evidence of the fugitive criminal's conviction or sentence or the extent to which a sentence imposed has not been carried out;
 - (c) a statement in writing setting out a description of, and the penalty applicable in respect of, the offence and a duly authenticated statement in writing setting out the conduct constituting the offence."

Section 25 of Act 479

“25. Application to Brunei Darussalam and Singapore.

(1) This Part applies in relation to Brunei Darussalam and the Republic of Singapore.

(2) In this Part, "offence" means a seizable offence or an offence punishable, on conviction, with imprisonment for a term exceeding six months under the law of Brunei Darussalam or the Republic of Singapore.”

Section 26 of Act 479

“26. Endorsement of warrant issued in Brunei Darussalam or Singapore.

Where, under the provisions of any law in force in Brunei Darussalam or the Republic of Singapore, a judicial authority has issued a warrant authorising the arrest of a person accused or convicted of an offence and that person is or is believed to be in Malaysia, a Magistrate in Malaysia may, if satisfied that the warrant was duly issued in Brunei Darussalam or Singapore, endorse the warrant, and the warrant may then be executed on that person as if it were a warrant lawfully issued in Malaysia under the provisions of the Criminal Procedure Code.”

Section 27 of Act 479

“27. Warrant executed in Brunei Darussalam or Singapore deemed to be validly executed in Malaysia.

Where, under the provisions of any law in force in Brunei Darussalam or the Republic of Singapore corresponding to section 26, a warrant issued by a Magistrate or a Magistrate's Court in Malaysia has been endorsed by a Magistrate in Brunei Darussalam or the Republic of Singapore and executed on the person named in the warrant, the warrant shall for the purposes of this Act be deemed to have been as validly executed as if the execution had been effected in Malaysia.”

Section 28 of Act 479

“28. Transfer of persons to Brunei Darussalam or Singapore.

Where a warrant has been executed in Malaysia pursuant to section 26, the person arrested shall be produced as soon as possible before a Magistrate in Malaysia, who shall, if satisfied that he is the person specified in the warrant, direct that the arrested person be transferred forthwith in custody to the appropriate court in Brunei Darussalam or the Republic of Singapore; and any such person shall, while in such custody, be deemed for all purposes to be in lawful custody;

Provided that such Magistrate may, if for reasons to be recorded by him he is satisfied that it is in the interests of justice to do so and if the case is one in which bail may lawfully be granted, release the person arrested on bail conditional on his appearing before the appropriate court in Brunei Darussalam or the Republic of Singapore at a time to be specified in the bond and bail bond.”

747. It was explained that the prima facie requirement can be dispensed with as provided under section 4 of Act 479 where there exists a similar provision in a binding arrangement on extradition between Malaysia and another country. Under the bilateral extradition treaties to which Malaysia is a party, the dispensation of the prima facie requirement would encompass generally to all extraditable offences

748. Malaysia reported that, although no request has been received pertaining to offences under the Convention, for other cases received from treaty partners, Malaysia has simplified the evidentiary requirements by dispensing the prima facie standard as provided under section 4 and the treaties, and where the fugitive criminal waived the committal proceedings.

749. Malaysia further referred to the following Annexes:

1. Extradition Work Flow Chart (Annex 15);
2. Extradition Checklist (Annex 16); and
3. Extradition Manual (Annex 17).

The above work processes have been adopted to ensure that the processing of extradition requests as reflected in Act 479 is successfully implemented.

750. Malaysia explained that based on their experience with extradition cases, the estimated time from receiving a request to the final decision is between six and twelve months.

(b) Observations on the implementation of the article

751. The provision is implemented. The sections of the Extradition Act cited do show that the procedures and evidentiary threshold for processing of extradition requests are fairly simplified. The reviewers are also satisfied that the treaties entered into by Malaysia provide for simplified procedures for extradition; e.g., Article 4(6) of the Treaty Between the Government of Australia and the Government of Malaysia on Extradition expressly provides that “Neither Party shall require, as a condition to extradition pursuant to this Treaty, that the other Party prove a prima facie case against the person sought”.

752. The rules for extradition with Brunei Darussalam and the Republic of Singapore in section 25 of Act 479 dispense with the requirement for a treaty with those jurisdictions and are equally binding on them.

753. The administrative documents provided by Malaysia, viz. the Extradition Work Flow Chart, Extradition Checklist, and Extradition Manual, which are included in Annexes 15-17 to this report, further support the conclusion that in fact a simplified procedure and practice, as provided in the law and treaties, is followed.

(c) Successes and good practices

754. Malaysia has taken necessary steps to expediting extradition procedures and simplifying evidentiary requirements in the processing of extradition requests. The Extradition Manual, Work Flow Chart and Extradition Checklist give administrative and legal certainty for lodging and processing extradition requests; similar procedures are also in place for mutual legal assistance requests. The Malaysian authorities have furthermore taken proactive steps to sensitize all relevant stakeholders, especially the judicial officers, of the applicable law and procedures and the relevant timeframes to be followed. The relevant documentation and procedures in place are considered to be a good practice that could be emulated by other countries.

755. As noted with respect to mutual legal assistance under article 46(1) below, the review team noted the positive role of the Attorney General’s office in ensuring a cooperative working relationship of the different criminal justice authorities, especially in the processing of mutual legal assistance and extradition requests.

Article 44 Extradition

Paragraph 10

10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

(a) Summary of information relevant to reviewing the implementation of the article

756. Section 13(1)(b) of Act 479 provides as follows:

“13. (1) Where a fugitive criminal is in or suspected of being in or on the way to Malaysia, the Magistrate-
(a) shall, on receipt of an order made under subsection 12(3), issue a warrant for the apprehension of such fugitive criminal; or
(b) may, where no order has been made under subsection 12(3), issue a provisional warrant for the apprehension of such fugitive criminal on such information and evidence and under such circumstances as would, in his opinion justify the issue of a warrant if the offence had been committed or the fugitive criminal convicted in Malaysia.
(2) For the purposes of paragraph (1)(b), information contained in an international notice issued by the International Criminal Police Organisation (INTERPOL) in respect of a fugitive criminal may be considered by the Magistrate in deciding whether a provisional warrant should be issued for the apprehension of a fugitive criminal.”

757. Section 16(1) of Act 479 provides as follows:

“16. Procedure in respect of fugitive criminal apprehended on a provisional warrant.
(1) A fugitive criminal who is apprehended on a provisional warrant shall be brought before any Magistrate who shall, in the case where the Minister has not received any requisition for the return of the fugitive criminal, order that the fugitive criminal be remanded in custody for such reasonable period of time as with reference to the circumstances of the case he may fix, and for this purpose, the Magistrate shall take into account any period in the relevant extradition arrangement relating to the permissible period of remand upon provisional arrest of a fugitive criminal.
(2) Upon receipt of the order of the Minister signifying that a requisition has been made for the return of the fugitive criminal, the Magistrate shall order-
(a) that the case be transmitted to the Sessions Court; and
(b) that his remand under subsection (1) be extended until his appearance before the Sessions Court.
(3) The Magistrate shall, where he has not received from the Minister within such period of time as he may fix under subsection (1) an order signifying that a requisition has been made for the return of the fugitive criminal, order that the fugitive criminal be discharged.”

758. Section 18 of Act 479 provides as follows:

“18. Powers and jurisdiction of Sessions Court.
A Sessions Court shall have the powers and jurisdiction to inquire into an extradition matter brought before it in accordance with the procedure specified under this Act.”

759. The provisions on provisional arrest are also reflected in the Treaties entered into between Malaysia and foreign countries as follows:

(i) Article IX of the Extradition Treaty between Great Britain and Siam:

“Provisional arrest

IX. When either of the Contracting Parties considers the case urgent, it may apply for the provisional arrest of the criminal and the safe keeping of any objects relating to the offence.

Such request will be granted, provided the existence of a sentence or warrant of arrest is proved, and the nature of the offence of which the fugitive is accused is clearly stated.

The warrant of arrest to which this Article refers should be issued by the competent authorities of the country applying for extradition. The accused shall on arrest be sent as speedily as possible before a competent Magistrate.”

(ii) Article 9 of the Treaty between the Government of the Republic of Indonesia and the Government of Malaysia relating to Extradition:

“Provisional Arrest

(1) In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested Party shall decide the matter in accordance with its law.

(2) The request for provisional arrest shall state that the documents mentioned in Article 15 exist and that it is intended to send a request for extradition. It shall also state for what crime extradition will be requested and when and where such crime was committed and shall so far as possible give a description of the person sought.

(3) A request for provisional arrest shall be sent in Indonesia, to the National Central Bureau (N.C.B.) Indonesia/Interpol, and in Malaysia to the Inspector-General of Police, either through the diplomatic channels or direct by post or telegraph or through the International Criminal Police Organization (INTERPOL).

(4) The requesting authority shall be informed without delay the result of its request.

(5) Provisional arrest may be terminated if, within a period of 20 days after arrest, the requested Party has not received the request for extradition and the documents mentioned in Article 15.

(6) Release shall not prejudice re-arrest and extradition if a request for extradition is received subsequently.”

(iii) Article 8 of the Agreement between the Government of Hong Kong and the Government of Malaysia for the Surrender of Fugitive Offenders;

“(1) In urgent circumstances the person sought may, in accordance with the law of the requested Party, be provisionally arrested on the application of the competent authorities of the requesting Party. The application for provisional arrest shall contain an indication of intention to request the surrender of the person sought and a statement of the existence of the warrant of arrest had the offence been committed, or the person sought to be convicted, within the jurisdiction of the requested Party.

(2) An application for provisional arrest may be forwarded through the same channels as a request for surrender or through the International Criminal Police Organisation (INTERPOL).

(3) The provisional arrest of the person sought shall be terminated upon the expiration of forty-five days from the date of his arrest if the request for his surrender shall not have been received. This provision shall not prevent the re-arrest or surrender of the person sought if the request for his surrender is received subsequently.”

(iv) Article 11 of the Extradition Treaty between the Government of Malaysia and the Government of the United States of America;

“1. In case of urgency, a Contracting State may request the provisional arrest of the person sought pending presentation of the request for extradition. A request for provisional arrest may be transmitted through the diplomatic channel or directly between the United States Department of Justice and the Attorney General’s Chambers, Malaysia. The facilities of the International Criminal Police Organization (INTERPOL) may be used to transmit such a request.

2. The application for provisional arrest shall contain:

(a) a description of the person sought;

(b) the location of the person sought, if known;

(c) a brief statement of the facts of the case, including, if possible, the time and location of the offense;

(d) a description of the laws violated;

(e) a statement of the existence of a warrant of arrest or a finding of guilt or judgment of conviction against the person sought; and

(f) a statement that a request for extradition for the person sought will follow.

3. On receipt of the application, the Requested State shall take appropriate steps to secure the arrest of the person sought. The Requesting State shall be notified without delay of the disposition of its application and the reasons for any denial.

4. A person who is provisionally arrested may be discharged from custody upon the expiration of sixty (60) days from the date of provisional arrest pursuant to this Treaty if the executive authority of the Requested State has not received the formal request for extradition and the supporting documents required in Article 7. Upon the application of the Requesting State, this period may be extended for up to an additional thirty (30) days after the expiration of the sixty (60) day period.

5. The fact that the person sought has been discharged from custody pursuant to paragraph (4) of this Article shall not prejudice the subsequent rearrest and extradition of that person if the extradition request and supporting documents are delivered at a later date.

(v) Article 8 of the Government of Malaysia and the Government of Australia;

“1. In case of urgency, a Party may request the provisional arrest of the person sought pending presentation of the request for extradition.

2. The request for provisional arrest shall contain:

- (a) a description of the person sought, including, if possible, a photograph or fingerprints;
 - (b) the location of the person sought, if known;
 - (c) a statement or description of the offences allegedly committed by the person, or of which the person has been convicted;
 - (d) a concise statement of the facts of the case, including a statement of the acts or omissions alleged to constitute each offence and, if possible, the time and location of each offence;
 - (e) a copy of a warrant of arrest or a statement of a finding of guilt or judgment of conviction against the person sought;
 - (f) a statement of the punishment that can be, or has been, imposed for the offences; and
 - (g) a statement that a request for extradition for the person sought will follow.
3. A request for provisional arrest shall be made in writing or, where possible, by any means capable of producing a written record and transmitted directly between the Attorney-General's Department of Australia and the Attorney General's Chambers of Malaysia and by means of the facilities of the International Criminal Police Organisation (INTERPOL).
4. On receipt of the request for provisional arrest, the Requested Party shall take appropriate steps to secure the arrest of the person sought. The Requesting Party shall be promptly notified of the result of its request and the reason for any denial.
5. A person arrested under the request for provisional arrest may be discharged upon the expiration of 60 days from the date of that person's provisional arrest if a request for extradition, supported by the documents specified in Article 4, has not been received.
6. The discharge of a person pursuant to paragraph 5 of this Article shall not prevent the institution of proceedings to extradite the person sought if the extradition request is subsequently received."

(vi) Article 9 of the Extradition Treaty between the Government of Malaysia and the Government of the Republic of India.

"Article 9

Provisional Arrest

1. In case of urgency, a Contracting State may request the provisional arrest of the person sought pending presentation of the request for extradition. An application for provisional arrest may be forwarded through the diplomatic channels as specified in Article 8 or through the International Criminal Police Organisation (INTERPOL).
2. The application for provisional arrest shall contain –
- (a) a description of the person sought;
 - (b) the location of the person sought, if known;
 - (c) a statement of the facts of the case, including the offence alleged to have been committed and the time and place of the commission of the offence;
 - (d) a description of the laws violated;
 - (e) a copy of, or a statement of the existence of; a warrant of arrest or a finding of guilt or judgment of conviction against the person sought; and
 - (f) a statement that a request for extradition for the person sought will follow.
3. On receipt of the application, the Requested State shall take appropriate steps to secure the arrest of the person sought. The Requesting State shall be notified without delay of the disposal of its application and the reasons of any denial.
4. A person who is provisionally arrested may be discharged from custody upon the expiration of sixty (60) days from the date of provisional arrest pursuant to this Treaty if the executive authority of the Requested State has not received the formal request for extradition and the supporting documents required under Article 8. Upon application of the Requesting State, this period may be extended up to an additional thirty (30) days.
5. The discharge of the person from custody pursuant to paragraph 4 of this Article shall not prevent the subsequent re-arrest and extradition of that person if the extradition request and supporting documents are subsequently received at a later date."

760. Although no request has been received pertaining to offences under the UNCAC, Malaysia has received requests for provisional arrest. Upon application by the prosecution

and upon issuance of a provisional warrant of arrest by the courts, the fugitive criminals will be detained in custody for a reasonable period or a period proscribed by the specific Extradition Treaty until Malaysia receives a full extradition request.

(b) Observations on the implementation of the article

761. The reviewers are satisfied fully with the response of Malaysia to this provision. They find that Malaysia has effective measures that allow for urgent action to be taken for provisional arrest of a fugitive criminal and for ensuring his or her presence at the extradition proceedings. They also find that Malaysia has said that there have been many practical cases where such requests have been received and provisional arrest was done immediately. A simplified procedure for extradition requests, the warrant of arrest scheme, is followed with Brunei Darussalam and the Republic of Singapore, pursuant to Part V of Act 479.

Article 44 Extradition

Paragraph 11

11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

(a) Summary of information relevant to reviewing the implementation of the article

762. Section 49 of Act 479 provides that:

“Discretion in respect of return of certain fugitive criminals

49. (1) The Minister may, in his discretion, refuse the surrender or the return of a fugitive criminal if-

(a) the fugitive criminal is a citizen of Malaysia; or

(b) the extradition offence is one in respect of which the courts in Malaysia have jurisdiction.

(2) Where extradition is refused under subsection (1), the Minister shall, if courts in Malaysia have jurisdiction over the extradition offence, submit the case to the Public Prosecutor with a view to having the fugitive criminal prosecuted under the laws of Malaysia.”

763. Section 49 of Act 479 gives the Minister the discretion to refuse to extradite a fugitive criminal who is a citizen of Malaysia. If the Minister exercises the discretion and thereby refuses the surrender or return of a fugitive criminal who is a citizen of Malaysia, then section 49(2) of the Extradition Act requires the Minister to submit the case to the Public Prosecutor with a view to having the fugitive criminal prosecuted under the laws of Malaysia if the courts of Malaysia have jurisdiction over the extradition offence.

764. The grave nature of the alleged offences committed by the subjects and the likelihood of a successful prosecution due to the fact that the evidences and witnesses are available in the Requesting State are the main considerations in granting a request for extradition of a national.

765. When a criminal case is submitted to the Public Prosecutor, the Public Prosecutor is required to view into the matter. Cases to the Public Prosecutor will always be submitted expeditiously. In accordance with Article 145(3) of the federal Constitution and section 376(1) of the Criminal Procedure Code, the Attorney General as the Public Prosecutor will exercise his power under these provisions and shall have discretion to decide whether to institute, conduct or discontinue any criminal proceedings. This power is applied equally to all classes of offences irrespective of the gravity of the offence. The provisions are provided below.

Article 145(3) of the federal Constitution

“(3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial.”

Section 376(1) of the Criminal Procedure Code [Act 593]

“The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.”

766. This provision is also reflected in the Treaties entered into between Malaysia and foreign countries as follows:

(i) Article 2 of the Extradition Treaty between Great Britain and Siam:

“The crimes or offences for which the extradition to be granted are the following:-

1. Murder, or attempt, or conspiracy to murder.
2. Manslaughter.
3. Assault occasioning actual bodily harm. Malicious wounding or inflicting grievous bodily harm.
4. Counterfeiting or altering money, or uttering counterfeit or altered money.
5. Knowingly making any instrument, tool, or engine adapted or intended for counterfeiting coin.
6. Forgery, counterfeiting, or altering or uttering what is forged or counterfeited or altered.
7. Embezzlement or larceny.
8. Malicious injury to property, by explosives or otherwise, if the offence be indictable.
9. Obtaining money, goods or valuable securities by false pretences.
10. Receiving money, valuable security, or other property, knowing the same to have been stolen, embezzled, or unlawfully obtained.
11. Crimes against bankruptcy law.
12. Fraud by a bailee, banker, agent, factor, trustee, or director, or member or public officer of any company made criminal by any law for the time being in force.
13. Perjury, or subornation of perjury.
14. Rape.
15. Carnal knowledge, or any attempt to have carnal knowledge, of a girl under the age of puberty, according to the laws of the respective countries.
16. Indecent assault.
17. Procuring miscarriage, administering drugs, or using instruments with intent to procure the miscarriage of a woman.
18. Abduction.
19. Child-stealing.
20. Abandoning children, exposing or unlawfully detaining them.
21. Kidnapping and false imprisonment.
22. Burglary or house-breaking.
23. Arson.
24. Robbery with violence.
25. Any malicious act done with intent to endanger the safety of any person in a railway train.
26. Threats by letter or otherwise, with intent to extort.
27. Piracy by law of nations.
28. Sinking or destroying a vessel at sea, or attempting or conspiring to do so.
29. Assaults on board ship on the high seas, with intent to destroy life, or do grievous bodily harm.
30. Revolt, or conspiracy to revolt, by two or more persons on board a ship on a high seas against the authority of the master.

31. Dealing in slaves in such a manner as to constitute a criminal offence against the laws of both States.

Extradition is to be granted for participation in any of the aforesaid crimes, provided such participation be punishable by the laws of both Contracting Parties.

Extradition may also be granted at the discretion of the States applied to in respect of any other crime for which, according to the law of both of the Contracting Parties for the time being in force, the grant can be made.”

(ii) Article 4(1) of the Treaty between the Government of the Republic of Indonesia and the Government of Malaysia relating to Extradition:

“4(1) Each party shall have the right to refuse extradition of its nationals.”

(iii) Article 3 of the Agreement between the Government of Hong Kong and the Government of Malaysia for the Surrender of Fugitive Offenders;

“(1) The Government of Malaysia reserves the right to refuse the surrender of its nationals. The Government of Hong Kong reserves the right to refuse the surrender of nationals of the state whose Government is responsible for its foreign affairs.

(2) Where the requested Party exercises this right, the requesting Party may request that the case be submitted to the competent authorities of the requested Party in order that proceedings for prosecution of the person may be considered.”

(iv) Article 3 of the Extradition Treaty between the Government of Malaysia and the Government of the United States of America;

“1. Neither Contracting State shall be bound to extradite its own nationals but the executive authority of the Requested State shall have the power to extradite such persons if, in its discretion, it be deemed proper to do so.

2. If extradition is not granted for an offense pursuant to paragraph (1), the Requested State shall, at the request of the Requesting State and if the laws of the Requested State so allow, submit the case to its competent authorities for the purpose of prosecution.”

(v) Article 3(3)(a) of the Government of Malaysia and the Government of Australia; and

“3. Extradition may be refused in any of the following circumstances:

(a) if the person whose extradition is requested is a national of the Requested Party. Where the Requested Party refuses to extradite a national of that Party it shall, if the other Party so requests and the laws of the Requested Party allow, submit the case to the competent authorities with a view to having the person prosecuted under the laws of the Requested Party in respect of all or any of the offences for which extradition has been requested;”

(vi) Article 3(1) of the Extradition Treaty between the Government of Malaysia and the Government of the Republic of India:

“3(1) Extradition of own national is permissible under this Treaty.”

767. Malaysia has allowed an extradition request involving a Malaysian national.

(b) Observations on the implementation of the article

768. The domestic law of Malaysia does not impose an absolute prohibition against extradition of citizens; it only gives the Minister discretion to refuse to extradite the fugitive criminal who is a citizen. If the Minister declines to exercise this discretion, the citizen may in fact be extradited. The reviewers further note that in fact the Act entitles the Minister to refuse to extradite a fugitive criminal where the offence is one in respect of which the courts of Malaysia have jurisdiction. However, again this is only discretionary and not a prohibition against extradition.

769. While section 49(2) of the Extradition Act obliges the Minister to submit the case to the Public Prosecutor with a view to having the fugitive criminal prosecuted under the laws of Malaysia, the Act does not pronounce a binding requirement on the Public Prosecutor to actually undertake the prosecution.
770. Moreover, section 49(2) of the Extradition Act does not include the words “without undue delay” or expeditiously, as provided for in article 44(11) of UNCAC.
771. It is further noted that the obligation to prosecute a national where extradition is refused (*aut dedere aut judicare*) is not established in all of Malaysia’s bilateral treaties. For example, under article 3 of the treaty with Hong Kong, “the requesting Party *may request* that the case be submitted to the competent authorities of the requested Party” for prosecution but there is no corresponding obligation on the requested State. An obligation to submit the case for prosecution is also not addressed in the cited provisions of the treaties with: 1) Great Britain and Siam; 2) Indonesia; and 3) India, in cases where extradition is refused.
772. Malaysia reported that it has received one request for extradition of a national for a non-corruption related offence, in which it extradited the national. Malaysia has never prosecuted a national in lieu of extradition. It was explained during the country visit that the decision whether or not to extradite a national revolves around the gravity of the alleged offences committed by the subjects and the likelihood of a successful prosecution due to logistical and financial considerations as to where it is more feasible to prosecute the person. In the cited case, the evidence, witnesses and documents were located abroad and Malaysia extradited the person. It was explained that Malaysian authorities would cooperate with foreign authorities in the prosecution of nationals in future cases where extradition is refused.
773. The provision is partially implemented. Although the Act provides for the obligation to submit the case for prosecution, certain treaties do not correspond fully to the provision under review. Noting that Malaysia has previously extradited its nationals, Malaysia should ensure that future treaties address the obligation to expeditiously submit cases for prosecution in accordance with the requirements of the provision under review and that this is followed in practice.
774. Nonetheless, the reviewers noted Malaysia’s apparent willingness to extradite its nationals.

Article 44 Extradition

Paragraph 12

12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

775. Act 479 does not provide for a Malaysian national who has been surrendered to the requesting State to be returned to serve his or her sentence.

776. The International Transfer of Prisoners Act 2012 [Act 754] governs the transfer of prisoners from a foreign State to Malaysia or vice versa for the purpose of execution of a sentence. It provides in section 16 that the enforcement of a foreign sentence shall be governed by Malaysian law.

International Transfer of Prisoners Act 2012 [Act 754]

“Part VI

Enforcement of Punishment

16. The enforcement of the sentence of imprisonment or order of confinement in a prison imposed upon any prisoner who is transferred to Malaysia shall be governed by the laws of Malaysia.”

(b) Observations on the implementation of the article

777. Although it is noted that Malaysian law does not condition the extradition or surrender of nationals on the return of the person to Malaysia to serve the sentence imposed, the newly enacted International Transfer of Prisoners Act 2012 [Act 754] contains a provision on the enforcement in Malaysia of a foreign sentence in accordance with Malaysian law, which is considered to be consistent with the provision under review.

778. Act 754 was drafted by the Ministry of Home Affairs together with the Attorney General’s Chambers and given Royal Assent on 20 December 2012. At the time of the country visit, the Act had obtained the necessary approval of both houses of Parliament and the date of entry into force was to be gazetted in the immediate future.

Article 44 Extradition

Paragraph 13

13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.

(a) Summary of information relevant to reviewing the implementation of the article

779. Malaysia indicated that it has not implemented the provision.

780. Although Malaysia may refuse the extradition of nationals as provided in Act 479, it would consider the enforcement of a sentence imposed by the requesting State against a national as provided in the legislation on the transfer of prisoners. Such transfer may be refused on the grounds provided for under section 7(2).

International Transfer of Prisoners Act 2012 [Act 754]

“7. Conditions for transfer

...

- (2) For the transfer of a prisoner to or from Malaysia, the Minister may refuse the application for transfer or may not grant his consent to the transfer if –
- (a) the prisoner has been sentenced to death;
 - (b) such transfer would affect the sovereignty, security, public order or other essential public interests of Malaysia;
 - (c) such transfer of the prisoner would impose an excessive burden on the resources of Malaysia; or
 - (d) such transfer would require steps to be taken that would be contrary to any written law.”

781. It was noted that, although the Act had been passed by Parliament at the time of the country visit, the date of entry into force was to be gazetted in the immediate future.

(b) Observations on the implementation of the article

782. The reviewers are satisfied with Malaysia’s response in this part.

Article 44 Extradition

Paragraph 14

14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

(a) Summary of information relevant to reviewing the implementation of the article

783. Malaysia reported that the fair treatment of the subject at all stages of the proceedings is guaranteed by the Federal Constitution of Malaysia:

(i) Article 5 Liberty of the person.

“(1) No person shall be deprived of his life or personal liberty save in accordance with law.”

(ii) Article 7 Protection against retrospective criminal laws and repeated trials.

“(1) No person shall be punished for an act or omission which was not punishable by law when it was done or made, and no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed.

(2) A person who has been acquitted or convicted of an offence shall not be tried again for the same offence except where the conviction or acquittal has been quashed and a retrial ordered by a court superior to that by which he was acquitted or convicted.”

(iii) Article 8 Equality.

“(1) All persons are equal before the law and entitled to the equal protection of the law.”

(iv) Article 9 Prohibition of banishment and freedom of movement.

“(1) No citizen shall be banished or excluded from the Federation.”

784. The fair treatment of fugitive criminals is also guaranteed by section 36 of the Act 479, which allows for the application for habeas corpus by a fugitive criminal.

785. In Malaysia’s previous cases (although the cases did not involve offences under UNCAC), all the fugitive criminals were represented by a counsel of their choice. The cases proceeded up to the Federal Court, the highest court in Malaysia.

(b) Observations on the implementation of the article

786. The reviewers are satisfied with the response given by Malaysia to this part.

Article 44 Extradition

Paragraph 15

15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person's sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person's position for any one of these reasons.

(a) Summary of information relevant to reviewing the implementation of the article

787. Sections 8(b) and (c) of Act 479 state the restrictions on the return of fugitive criminals:

“8. A fugitive criminal shall not be surrendered to a country seeking his return-

(b) if the request for his surrender although purporting to be made for an extradition offence was in fact made for the purpose of prosecuting or punishing the person on account of his race, religion, nationality or political opinions;

(c) if he might be prejudiced at his trial or punished or imprisoned by reason of his race, religion, nationality or political opinions;”

788. The provisions of section 8 are also reflected in the following Treaties:

(i) Article V of the Extradition Treaty between Great Britain and Siam - This Article deals with restrictions on surrender pertaining to political offences:

“A fugitive criminal shall not be surrendered if the offence in respect of which his surrender is demanded is deemed by the Party on whom the demand is made to be one of a political character, or if he prove that the requisition for his surrender has in fact been made with a view to try or punish him for an offence of a political character. “

(ii) Article 3 of the Treaty between the Government of the Republic of Indonesia and the Government of Malaysia relating to Extradition - This Article deals with restrictions on surrender pertaining to political offences:

“(1) Extradition shall not be granted if the crime in respect of which it is requested is regarded by the requested Party as a political crime.

(2) The taking or attempted taking of the life of a Head of State or a member of his family shall not be deemed to be a political crime for the purpose of this Treaty.”

(iii) Article 6 of the Agreement between the Government of Hong Kong and the Government of Malaysia for the Surrender of Fugitive Offenders - This Article deals with restrictions on surrender pertaining to political offence and punishment of the fugitive criminal on account of his race, religion, nationality and political opinions;

“6.(1) A fugitive offender shall not be surrendered if the requested Party has substantial grounds for believing –

(a) that the offence of which that person is accused or was convicted is an offence of a political character; ...

(2) For the purposes of this Agreement, the following offences shall not be considered to be of a political character:

(a) murder or other wilful crime against the person of the Head of State of Malaysia, or, in the case of Hong Kong, the Head of State whose Government is responsible for its foreign affairs, or in either case of a member of the Head of State's immediate family;

(b) any offence which is not to be regarded as an offence of a political character by virtue of an international agreement binding on both Parties;

(c) an attempt or conspiracy to commit or participate in, any such offences.

(3) Surrender for an offence shall also be refused if the person whose surrender is sought cannot under the laws of the other Party be prosecuted or punished for that offence.”

(iv) Article 4 of the Extradition Treaty between the Government of Malaysia and the Government of the United States of America - This Article deals with restrictions on surrender pertaining to political and military offences;

“1. Extradition shall not be granted if the offense for which extradition is requested is a political offense.

2. For the purpose of this Treaty, the following offenses shall not be considered to be political offenses:...

(b) an offense for which both Contracting States have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution;” or

(c) an attempt or conspiracy to commit, or aiding or abetting, counseling or procuring the commission of or being an accessory before or after the fact to, such offenses.

3. Notwithstanding the terms of paragraph (2) of this Article, extradition shall not be granted if the executive authority of the Requested State determines that the request was politically motivated.

4. The executive authority of the Requested State may refuse extradition for offenses under military law which are not offenses under ordinary criminal law.”

(v) Article 3 of the Government of Malaysia and the Government of Australia - This Article deals with restrictions on surrender pertaining to political and military offences and punishment of the fugitive criminal on account of his race, colour, sex, language, religion, nationality, ethnic origin, political opinion or other status;

“1. Extradition shall not be granted in any of the following circumstances:

(a) if the Requested Party determines that the request was politically motivated or regards the offence for which extradition is requested as a political offence. For the purposes of this Treaty, the following offences shall not be considered to be political offences:

(i) the murder or attempted murder of a Head of State of one of the Parties, or a member of the Head of State’s family;

(ii) an offence for which both Parties have the obligation pursuant to a multilateral international agreement to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution; or

(iii) an attempt or conspiracy to commit, or aiding or abetting, counseling or procuring the commission of or being an accessory before or after the fact to, such offences;”

(b) if there are substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of that person’s race, colour, sex, language, religion, nationality, ethnic origin, political opinion or other status, or that that person’s position may be prejudiced for any of those reasons;

(c) if the offence for which extradition is requested is regarded by the Requested Party as an offence under military law, but not an offence under the ordinary criminal law of the Requested Party;

(d) if, in respect of the offence for which the extradition of the person is requested:

(i) the person has been acquitted or pardoned under the laws of the Requested Party or a third state;

(ii) the person has undergone the punishment provided by the laws of the Requested Party or a third state; or

(iii) the person has been convicted under the laws of the Requested Party or a third state;

(e) if the person, on being extradited to the Requesting Party, would be liable to be tried or sentenced in that Party by a court or tribunal that has been specially established for the purpose of trying the person’s case; or

(f) if it may place the Requested Party in breach of its obligations under international treaties.

2. In cases in which a person could be subject to capital punishment in the Requesting Party but would not be subject to capital punishment in the Requested Party for the same offence under the laws of the Requested Party, no request for extradition shall be submitted without prior consultation and agreement by both Parties to make such a request.

3. Extradition may be refused in any of the following circumstances:

(a) if the person whose extradition is requested is a national of the Requested Party. Where the Requested Party refuses to extradite a national of that Party it shall, if the other Party so requests and the laws of the Requested Party allow, submit the case to the competent authorities with a view to having the person prosecuted under the laws of the Requested Party in respect of all or any of the offences for which extradition has been requested;

(b) if the offence for which extradition is requested is regarded under the laws of the Requested Party as having been committed in whole or in part within its jurisdiction;

- (c) if a prosecution in respect of the offence for which extradition is requested is pending in the Requested Party against the person whose extradition is requested;
- (d) if the competent authorities of the Requested Party have decided not to prosecute the person for the offence in respect of which extradition is sought; or
- (e) if the surrender is likely to have exceptionally serious consequences for the person whose extradition is sought, particularly because of her or his age or state of health.”

(vi) Article 6 of the Extradition Treaty between the Government of Malaysia and the Government of the Republic of India - This Article deals with restrictions on surrender pertaining to political offences, military offences and trivial cases:

“1. A fugitive offender shall not be surrendered if the Requested State is satisfied that-

- (a) the offence of which that person is accused of or was convicted is an offence of a political character; or
- (b) if the prosecution for the offence in respect of which his return is sought is, according to the laws of the Requesting State barred by time.

2. For the purposes of this Treaty, the following offences shall not be considered to be of a political character-

- (a) Murder or other willful crime against the person of a Head of State or Head of Government of one of the Contracting States, or a member of his immediate family;
- (b) an offence for which the Contracting States have the obligation pursuant to a multilateral/international treaty to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution; or
- (c) an attempt, abetment or a conspiracy to commit any of the foregoing offences.

3. The executive authority of the Requested State may refuse extradition –

- (a) For offences under military law which are not offences under ordinary criminal law; or
- (b) If it appears by reason of-
 - (i) the trivial nature of the case; or
 - (ii) the application for the return not being made in good faith or in the interests of justice or being made for political reasons or for any other reason, it would, having regard to all the circumstances, be unjust or oppressive to return the person to the Requesting State.”

789. Furthermore, under sections 19 and 20 of Act 479, the fugitive criminal may raise the said grounds as defences during the hearing of the committal proceeding at the court.

Section 19 of Act 479

“Procedure before Sessions Court

19. (1) Where the fugitive criminal is brought before the Sessions Court, the Sessions Court shall receive any evidence tendered by or on behalf of the fugitive criminal to show –

...

- (i) that the request for his surrender was made for the purpose of prosecuting or punishing him on account of his race, religion, nationality or political opinions, or that he might be prejudiced at his trial or punished or imprisoned by reason of his race, religion, nationality or political opinions.”

790. Malaysia has not received a request where it was considered that the fugitive criminal was being sought on account of his race, religion, nationality or political opinion.

791. There have been no recent court or other cases where extradition was refused on such grounds, either by Malaysia or by another country with respect to Malaysia’s outgoing extradition requests.

(b) Observations on the implementation of the article

792. The reviewers find that the cited section 8(b) of the Extradition Act does provide some relevant grounds for refusal to extradite. The section provides as grounds for refusal the prosecution or punishment on account of one’s race, religion, nationality or political opinions. All those grounds are mentioned in article 44(15) and hence are relevant for implementation of the provision. Section 8(c) of the Act further implements the part of

article 44(15) which refers to a request where the fugitive criminal would be caused prejudice to his/her position on account of that person's sex, race, religion, nationality, ethnic origin or political opinions.

793. While the cited provisions of Malaysia's treaties with Great Britain and Siam (1911), Indonesia, Hong Kong, the United States and India are limited to politically motivated requests, and further the treaty with Hong Kong does not cover discrimination on the grounds of gender, it was explained during the country visit that more recent treaties such as Korea and Australia (article 3, from 2005) contain broader grounds for refusal based on discriminatory purposes. This was welcomed by the reviewers and Malaysia is encouraged to undertake a comprehensive review of its existing treaties to ensure that they meet all UNCAC requirements in this respect.

Article 44 Extradition

Paragraph 16

16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

(a) Summary of information relevant to reviewing the implementation of the article

794. Section 6(2) of Act 479 makes express provision for fiscal offences:

“6. (1) A fugitive criminal shall only be returned for an extradition offence.

(2) For the purposes of this Act, an extradition offence is an offence, however described, including fiscal offences-

(a) which is punishable, under the laws of a country referred to under paragraph 1(2)(a) or 1(2)(b), with imprisonment for not less than one year or with death; and

(b) which, if committed within the jurisdiction of Malaysia, is punishable under the laws of Malaysia with imprisonment for not less than one year or with death:

Provided that, in the case of an extraterritorial offence, it is so punishable under the laws of Malaysia if it took place in corresponding circumstances outside Malaysia.”

795. Section 32 of Act 479 makes provision for the minimum penalty requirement:

“In this Part, an extraditable offence is an offence however described, including fiscal offences, which is punishable under the laws of Malaysia with imprisonment for not less than one year or with death.”

796. There have been no examples of cases involving fiscal offences or cases in which extradition involving fiscal matters was granted.

(b) Observations on the implementation of the article

797. The reviewers are in agreement with the assessment of Malaysia. It is clear that the Extradition Act of Malaysia has expressly provided for the inclusion of fiscal offences as extraditable offences, and hence Malaysia has legislatively fully implemented article 44(16) of the UNCAC.

798. There have been no cases involving such requests.

Article 44 Extradition

Paragraph 17

17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

(a) Summary of information relevant to reviewing the implementation of the article

799. Malaysia may request further information from a requesting State if the information provided earlier was not sufficient.

800. Reference is made to the following Annexures:

1. Extradition Work Flow Chart (Annex 15);
2. Extradition Checklist (Annex 16); and
3. Extradition Manual (Annex 17).

Malaysia explained that it is apparent from the above annexures that the consultation and dialogue mechanism forms part of the work flow when processing requests for extradition, and it is applied uniformly without exception as a rule of practice.

801. The following treaty provisions were also cited.

(i) Articles 10 and 20 Extradition Treaty between the Government of Malaysia and the Government of the United States of America

“Article 10

Additional Documentation

1. If the Requested State considers that the documents furnished in support of the request for the extradition of a person sought are not sufficient to fulfil the requirements of this Treaty, that State shall request the submission of necessary additional documents. The Requested State may set a time limit for the submission of such documents, and may grant a reasonable extension of the time limit upon application of the Requesting State setting forth reasons therefor.

Article 20

Consultation

The United States Department of Justice and the Attorney General’s Chambers of Malaysia may consult with each other directly or through the facilities of INTERPOL in connection with the processing of individual cases and in furtherance of maintaining and improving procedures for the implementation of this Treaty.”

(ii) Articles 7 and 18 Treaty between the Government of Malaysia and the Government of Australia on Extradition

“ARTICLE 7

ADDITIONAL INFORMATION

1. If the Requested Party considers that the information furnished in support of a request for extradition is not sufficient in accordance with this Treaty to enable extradition to be granted, that Party may request that additional information be furnished within such time as it specifies. The Requested Party may set a time limit for the submission of such information, and may grant a reasonable extension of the time limit upon application of the Requesting Party setting forth reasons for such extension.

ARTICLE 18

CONSULTATION

(1) For the purpose of promoting the most effective use of this Treaty, the Parties shall consult, at times mutually agreed upon by them, concerning the interpretation, application or implementation of this Treaty either generally or in relation to a particular case.

(2) The Parties may develop such practical measures as may be necessary to facilitate the implementation of this Treaty.”

(iii) Article 15 Extradition Treaty between the Government of Malaysia and the Government of the Republic of India

“The Ministry of external Affairs of the Republic of India and the Attorney General’s Chambers of Malaysia may consult with each other directly or through the facilities of INTERPOL in connection with the processing of each particular request and in furtherance of maintaining and improving procedures for the implementation of this Treaty.”

(iv) Article 9 of the Agreement Between the Government of Hong Kong and the Government of Malaysia for the Surrender of Fugitive Offenders

“Article 9

Additional Documentation

(1) If the requested Party considers that the documents furnished in support of the request for the surrender of a person sought are not sufficient to fulfil the requirements of this Agreement, that Party shall request the submission of necessary additional documents. The requested Party may set a time limit for the submission of such documents, and may grant a reasonable extension of the time limit upon application of the requesting Party setting forth reasons therefor.

802. There were no examples of recent cases or relevant exchanges with requesting States for the offences under the Convention. However, for other extradition requests, the Attorney General's Chambers (AGC) of Malaysia, upon perusing the request, has directly consulted the central authorities of the requesting State regarding the additional information/documents required for the AGC to make the necessary decision on a request. Extensive consultations were held recently among others with the United States of America and Australia in handling extradition requests from those States.

(b) Observations on the implementation of the article

803. Malaysia has not cited a domestic law which provides for the consultations and dialogue required by the Article before refusing extradition, and such an obligation is also not uniformly established in the cited treaty provisions, which in some cases provide for permissive consultations (e.g., India). However, Malaysia has said that this aspect is an established practice in its extradition procedures. It has referred to the Extradition Manual, Extradition Checklist and Work Flow Chart and also says that the Attorney General’s Chambers of Malaysia routinely consults directly with a requesting State each time it receives and peruses a request for extradition.

804. Generally, the reviewers are in agreement that this provision can be implemented through an established practice and administrative procedure without the necessity of express legislation, as long as there is no contrary provision in the Constitution and/or legislation. At the same time, however, the reviewers note that the provision is a mandatory requirement of the UNCAC. Therefore, in their view, a high degree of proof is required to show that a practice which complies with the provision has gained the force of law through long usage, is clear, and is applied uniformly without exception. This appears to be the case in Malaysia, based on the information provided and discussions had with Malaysian authorities during the country visit.

805. Malaysia explained that a refusal to extradite would usually be preceded by a dialogue or negotiations with the requesting State, which are held administratively.

806. The reviewing experts welcome indications that Malaysia is undertaking efforts to review and renegotiate, as required, its existing treaties.

Article 44 Extradition

Paragraph 18

18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

(a) Summary of information relevant to reviewing the implementation of the article

807. Currently Malaysia has in place seven bilateral extradition treaties with the following countries:

- (i) Extradition Treaty between Great Britain and Siam 1911;
- (ii) Treaty between the Government of the Republic of Indonesia and the Government of Malaysia relating to Extradition 1974;
- (iii) Agreement between the Government of Hong Kong and the Government of Malaysia for the Surrender of Fugitive Offenders 1995;
- (iv) Extradition Treaty between the Government of Malaysia and the Government of the United States of America 1997;
- (v) Extradition Treaty between Government of Malaysia and the Government of Australia 2005;
- (vi) Extradition Treaty between the Government of Malaysia and the Government of the Republic of India 2012; and
- (vii) Extradition Treaty between the Government of Malaysia and the Government of Korea 2013.

808. Malaysia has also identified a few other States for purpose of entering into new treaties on extradition.

(b) Observations on the implementation of the article

809. The reviewers agree with Malaysia that the country has made some good effort to enter into bilateral treaties. Most of these treaties were concluded by Malaysia long before the promulgation of the UNCAC, and therefore their provisions may not be specifically tailored to comprehensively deal with matters of extradition under UNCAC. Although the treaties cited are only seven in number, this is the same trend with many countries that seek to conclude treaties mainly with those States with which they are in close geographic proximity or countries with which they have historical or economic ties.

810. The reviewing experts welcome indications that Malaysia is undertaking efforts to review and renegotiate, as required, its existing treaties, in particular the older treaties with Great Britain and Siam, Indonesia and Hong Kong. They further welcome Malaysia's indications that all future extradition treaties are tailored to be consistent with UNCAC provisions.

Article 45 Transfer of sentenced persons

States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.

(a) Summary of information relevant to reviewing the implementation of the article

811. The International Transfer of Prisoners Act 2012 [Act 754] governs the the transfer of prisoners from foreign States to Malaysia or vice versa. The newly enacted law was drafted by the Ministry of Home Affairs together with the Attorney General's Chambers and given Royal Assent on 20 December 2012. A copy was provided to the reviewers during the country visit. At the time of the country visit, the Act had obtained the necessary approval of both houses of Parliament and the date of entry into force was to be gazetted in the immediate future.

(b) Observations on the implementation of the article

812. The Act paves the way for the conclusion of bilateral and multilateral transfer of prisoners between Malaysia and other countries.

813. It is noted that the Act provides that the Minister may declare a foreign State a prescribed foreign State if a treaty or other agreement is in force that the other country will reciprocate in case a request is made by Malaysia (section 4). By virtue of the designation, the Act would apply to such a treaty country.

814. The provision under review is implemented.

Article 46 Mutual legal assistance

Paragraph 1

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

815. The provision under review, which is to grant the widest measure of mutual legal assistance, has been implemented through the following measures:

1. Section 3 of the Mutual Assistance in Criminal Matters Act 2002 (Act 621):

“3. The object of this Act is for Malaysia to provide and obtain international assistance in criminal matters, including-

- (a) providing and obtaining of evidence and things;
- (b) the making of arrangements for persons to give evidence, or to assist in criminal investigations;
- (c) the recovery, forfeiture or confiscation of property in respect of a serious offence or a foreign serious offence;
- (d) the restraining of dealings in property, or the freezing of property, that may be recovered in respect of a serious offence or a foreign serious offence;
- (e) the execution of requests for search and seizure;

- (f) the location and identification of witnesses and suspects;
- (g) the service of process;
- (h) the identification or tracing of proceeds of crime and property and instrumentalities derived from or used in the commission of a serious offence or a foreign serious offence;
- (i) the recovery of pecuniary penalties in respect of a serious offence or a foreign serious offence; and
- (j) the examination of things and premises.”

2. Section 4 of the Mutual Assistance in Criminal Matters Act 2002 (Act 621):

“(1) This Act does not prevent the provision or obtaining of international assistance in criminal matters to or from the International Criminal Police Organization (INTERPOL) or any other international organization.

(2) This Act does not prevent the provision or obtaining of international assistance in criminal matters to or from any foreign State other than assistance of a kind that may be provided or obtained under this Act.

(3) This Act does not prevent the provision or obtaining of international assistance in criminal matters under any other written law.”

3. Article 1(1) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries):

“1. The Parties shall, in accordance with this Treaty and subject to their respective domestic laws, render one another the widest possible measure of mutual legal assistance in criminal matters, namely investigations, prosecutions and resulting proceedings.”

4. Article (1)(1) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“1. The Parties shall, in accordance with this Treaty and in conformity with their respective laws, grant each other the widest measure of mutual assistance in connection with investigations, prosecutions and proceedings related to criminal matters over which the Requesting Party has jurisdiction at the time the assistance is requested.”

5. Article (1)(1) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters:

“1. The Parties shall, in accordance with this Treaty, render to one another the widest measure of mutual legal assistance in connection with investigations and proceedings pertaining to criminal matters.”

6. Article (1)(1) of the Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters:

“1. The Parties shall, in accordance with the provision of this Agreement in conformity with their respective domestic laws, render to one another the widest measure of mutual legal assistance in connection with investigations, prosecutions and proceedings that pertain to offences over which the Requesting Party has jurisdiction at the time the assistance is requested.”

816. It was explained that section 3 of Act 621 is broad and provides a non-exhaustive list of possible measures of mutual legal assistance. Formal mutual assistance is available for any form of assistance as captured by the law, including compulsive measures. Subparagraphs (a)-(j) are merely illustrative of the kind of assistance that may be provided. Section 4 of the Act further allows for informal cooperation with law enforcement agencies and, in section 4(2), makes it clear that the Act does not prevent the provision or obtaining of other forms of international assistance in criminal matters than the assistance specified in the Act.

817. It was further explained that there are no hurdles in granting the widest measure of assistance in criminal matters in respect of section 18 of Act 621, because assistance can be rendered to non-treaty partner States with the issuance of a special direction under section 18 of the Act, as further described in the introduction to Chapter IV of this report.

818. Malaysia has entered into six bilateral treaties on mutual legal assistance with Hong Kong, Australia, USA, Korea, India and the UK, as well as the regional Treaty on Mutual Legal Assistance in Criminal Matters among like-minded ASEAN Member Countries (with 10 States).

(b) Observations on the implementation of the article

819. Malaysia provided the following statistics on mutual legal assistance.

Year	Requests Received	Requests Made
Since 2009	4 corruption related requests 25 non-corruption related requests	2 corruption related requests 13 non-corruption related requests
2010	1 corruption related request 19 non-corruption related requests	3 corruption related requests 17 non-corruption related requests
2011	3 corruption related requests 29 non-corruption related requests	1 corruption related request 6 non-corruption related requests
2012	2 corruption related requests 34 non-corruption related requests	
Total	10 corruption related requests 107 non-corruption related requests	6 corruption related requests 36 non-corruption related requests

820. Malaysia reported during the country visit that it has never refused to execute a request for mutual legal assistance. However, three of its outgoing requests in non-corruption related matters have been refused by other countries (Australia, Singapore and the UK) on the grounds that the request did not satisfy the strict list approach followed by the requested State.

821. The reviewers were of the view that the law, treaties and statistics provided by Malaysia support the view that the country has fully implemented the provision.

(c) Successes and good practices

822. Malaysia has indicated that it is able to render a wide measure of mutual legal assistance to requesting States. This seems to be borne out by the increasing number of requests it has responded to over the last three years, including in corruption cases.

Article 46 Mutual legal assistance

Paragraph 2

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.

(a) Summary of information relevant to reviewing the implementation of the article

823. Malaysia cited the following measures:

1. Article 1(1) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries):

“1. The Parties shall, in accordance with this Treaty and subject to their respective domestic laws, render one another the widest possible measure of mutual legal assistance in criminal matters, namely investigations, prosecutions and resulting proceedings.”

2. Article (1)(1) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“1. The Parties shall, in accordance with this Treaty and in conformity with their respective laws, grant each other the widest measure of mutual assistance in connection with investigations, prosecutions and proceedings related to criminal matters over which the Requesting Party has jurisdiction at the time the assistance is requested.”

3. Article (1)(1) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters:

“1. The Parties shall, in accordance with this Treaty, render to one another the widest measure of mutual legal assistance in connection with investigations and proceedings pertaining to criminal matters.”

(b) Observations on the implementation of the article

824. The reviewers observed that the cited measures do not address mutual legal assistance involving legal persons. It was clarified during the country visit that, because Malaysia recognizes the criminal liability of legal persons, there are no legal obstacles to rendering mutual legal assistance where a request involves a legal person. It was explained during the country visit that the most common incoming requests for assistance related to legal persons involve requests to obtain bank account and financial records and to verify data from the corporate register.

825. Furthermore, while bank secrecy restrictions do not appear to be a challenge to rendering assistance involving bank and financial records (as further described under article 40 of UNCAC in this report), in practice a production order must be sought from the court to disclose account information under the applicable provisions of the Banking Act. It was reported during the country visit that in practice the application for a production order is done ex parte by the central authority and such orders are routinely and expeditiously granted. The disclosure of banking information is permitted under sections 24(4)(b) and 25 of Act 621. Further, section 20 of AMLATFA overrides the secrecy obligation.

826. During the country visit, Malaysian officials reported that bank and financial records are routinely requested and such information is provided by Malaysia to requesting countries. During the country visit, a case example was provided where a bank and account details were availed pursuant to a production order. The case involved alleged fraud committed in the requesting country by an investment company. Malaysia provided the requested bank account information as well as details of the company’s registration and IP address pursuant to the request.

827. Malaysia may wish to monitor the application of these measures as much as possible to ensure that also in future cases bank secrecy requirements do not delay the realization

of the objectives of the provision under review and that full scope of assistance can be rendered in cases involving legal persons.

Article 46 Mutual legal assistance

Paragraph 3

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

- (a) Taking evidence or statements from persons;*
- (b) Effecting service of judicial documents;*
- (c) Executing searches and seizures, and freezing;*
- (d) Examining objects and sites;*
- (e) Providing information, evidentiary items and expert evaluations;*
- (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;*
- (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;*
- (h) Facilitating the voluntary appearance of persons in the requesting State Party;*
- (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;*
- (j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;*
- (k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.*

(a) Summary of information relevant to reviewing the implementation of the article

828. Malaysia cited the following measures:

(a) Taking evidence or statements from persons:

1. Section 3(a) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621):

“3. The object of this Act is for Malaysia to provide and obtain international assistance in criminal matters, including-

(a) providing and obtaining evidence and things;”

2. Article 1(2)(a) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries):

“2. Mutual assistance to be rendered in accordance with this Treaty may include:

(a) taking of evidence or obtaining of voluntary statements from persons.”

3. Article (1)(3)(a) and (b) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“3. Such assistance shall consist of:

(a) taking of evidence, including testimony, documents, records and things, by way of judicial process;

(b) taking of voluntary statements of persons;”

4. Article (1)(2)(a) and (b) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters:

“2. Mutual assistance to be rendered in accordance with this Treaty shall include:

- (a) taking of evidence, including testimony, documents, records and items, by way of judicial process;
- (b) taking of voluntary statements of persons;”

5. Article (1)(2)(c) of the Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters:

“2. Assistance shall include: ...

- (c) obtaining statements and evidence from persons.”

(b) Effecting service of judicial documents:

1. Section 3(g) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621):

“3. The object of this Act is for Malaysia to provide and obtain international assistance in criminal matters, including- ...

- (g) the service of process;”

2. Article 1(2)(c) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries):

“2. Mutual assistance to be rendered in accordance with this Treaty may include: ...

- (c) effecting service of judicial documents.”

3. Article (1)(3)(i) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“3. Such assistance shall consist of: ...

- (i) effecting service of judicial and related documents;”

4. Article (1)(2)(e) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters:

“2. Mutual assistance to be rendered in accordance with this Treaty shall include: ...

- (e) effecting service of judicial documents;”

5. Article (1)(2)(b) of the Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters:

“2. Assistance shall include: ...

- (b) serving of judicial documents.”

(c) Executing searches and seizures, and freezing:

1. Section 3(d) and (e) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621):

“3. The object of this Act is for Malaysia to provide and obtain international assistance in criminal matters, including ...

- (d) the restraining of dealings in property, or the freezing of property, that may be recovered in respect of a serious offence or a foreign serious offence;
- (e) the execution of request for search and seizure;”

2. Article 1(2)(d) and (h) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries):

“2. Mutual assistance to be rendered in accordance with this Treaty may include: ...

(d) executing searches and seizures;
(h) the restraining of dealings in property or the freezing of property derived from the commission of an offence and instrumentalities of crime.”

3. Article (1)(3)(e) and (f) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“3. Such assistance shall consist of:...

(e) executing search and seizure;

(f) identifying, locating, restraining dealings in and forfeiting the instruments derived from or used in the commission of an offence and proceeds of crime:”

4. Article (1)(2)(f) and (h) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters:

“2. Mutual assistance to be rendered in accordance with this Treaty shall include: ...

(f) executing searches and seizures;

(h) freezing and forfeiting assets or property and collecting fines:”

5. Article (1)(2)(d) and (h) of the Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters:

“2. Assistance shall include: ...

(d) executing requests for search and seizure;

(h) identifying, tracing, restraining, seizing, recovering, forfeiting and confiscating proceeds and instrumentalities of criminal activities;”

(d) Examining objects and sites:

1. Section 3(j) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621):

“3. The object of this Act is for Malaysia to provide and obtain international assistance in criminal matters, including-

(j) the examination of things and premises.”

2. Article 1(2)(e) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries):

“2. Mutual assistance to be rendered in accordance with this Treaty may include: ...

(e) examining objects and sites;”

3. Article (1)(3)(j) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“3. Such assistance shall consist of: ...

(j) examining objects and sites, to the extent that it is not inconsistent with the laws of the Requested Party; and”

4. Article (1)(2)(g) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters:

“2. Mutual legal assistance to be rendered in accordance with this Treaty shall include: ...

(g) locating and identifying persons or items or things and examining objects and sites;”

5. Article (1)(2)(j) of the Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters:

“(2) Assistance shall include: ...

(j) examining objects and sites;”

(e) Providing information, evidentiary items and expert evaluations:

There is no similar provision per se to subparagraph 3(e) of article 46 in Act 621 or any previous treaties entered by Malaysia. However, for Malaysia, this type of assistance is covered under the assistance of providing/obtaining evidence and things.

1. Sections 3(a) and (b) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621):
“3. The object of this Act is for Malaysia to provide and obtain international assistance in criminal matters, including-

- (a) providing and obtaining of evidence and things;
- (b) the making of arrangements for persons to give evidence, or to assist in criminal investigations;”

2. Article 1(2)(e) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries):

“2. Mutual assistance to be rendered in accordance with this Treaty may include: ...

- (e) examining objects and sites;”

3. Article (1)(3)(j) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“3. Such assistance shall consist of: ...

- (j) examining objects and sites, to the extent that it is not inconsistent with the laws of the Requested Party; and”

4. Article (1)(2)(g) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters:

“2. Mutual legal assistance to be rendered in accordance with this Treaty shall include: ...

- (g) locating and identifying persons or items or things and examining objects and sites;”

5. Article (1)(2)(j) of the Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters:

“(2) Assistance shall include: ...

- (j) examining objects and sites; and”

(f) providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records:

1. Section 3(a) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621):

“3. The object of this Act is for Malaysia to provide and obtain international assistance in criminal matters, including-

- (a) providing and obtaining of evidence and things;”

2. Article 1(2)(f) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries):

“2. Mutual assistance to be rendered in accordance with this Treaty may include: ...

- (f) providing originals or certified copies of relevant documents, records and items of evidence;”

3. Article (1)(3)(c) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“3. Such assistance shall consist of: ...

- (c) providing relevant documents and records, including bank, financial, corporate or business records;”

4. Article (1)(2)(c) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters:

“2. Mutual legal assistance to be rendered in accordance with this Treaty shall include: ...

(c) providing documents, records and items or things;”

5. Article (1)(2)(g) of the Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters:

“(2) Assistance shall include: ...

(g) providing information, documents, articles and records (including judicial and official records and bank, financial, corporate and business records);”

(g) Identifying or tracing proceed of crime, property, instrumentalities or other things for evidentiary purposes:

1. Section 3(h) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621):

“3. The object of this Act is for Malaysia to provide and obtain international assistance in criminal matters, including-

(h) the identification or tracing of proceeds of crime and property and instrumentalities derived from or used in the commission of a serious offence or a foreign serious offence;”

2. Article 1(2)(g) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries):

“2. Mutual assistance to be rendered in accordance with this Treaty may include: ...

(g) identifying or tracing property derived from the commission of an offence and instrumentalities of crime;”

3. Article (1)(3)(f) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“3. Such assistance shall consist of: ...

(f) identifying, locating, restraining dealings in and forfeiting the instruments derived from or used in the commission of an offence and proceeds of crime”

4. Article (1)(2)(i) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters:

“2. Mutual legal assistance to be rendered in accordance with this Treaty shall include: ...

(i) identifying or tracing proceeds of crime and property and instrumentalities derived from or used in the commission of an offence;”

5. Article (1)(2)(h) of the Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters:

“(2) Assistance shall include: ...

(h) identifying, tracing, restraining, seizing, recovering, forfeiting and confiscating proceeds and instrumentalities of criminal activities;”

(h) Facilitating the voluntary appearance of persons in the requesting State Party:

1. Section 3 (b) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621):

3. “The object of this Act is for Malaysia to provide and obtain international assistance in criminal matters, including -...

(b) the making of arrangements for persons to give evidence, or to assist in criminal investigations;”

2. Section 27(2)(c) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621):

“27(2) The Attorney General may assist in making arrangements for the travel of the person to the prescribed foreign State pursuant to a request referred to in subsection (1) if the Attorney General is satisfied that—

...

(c) the person concerned has freely consented to attend as requested;”

3. Article 1(2)(b) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries):

“Mutual assistance to be rendered in accordance with this Treaty may include: ...

(b) making arrangements for persons to give evidence or to assist in criminal matters;

4. Article 1(3)(h) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“Such assistance shall consist of: ...

(h) seeking the consent of persons and making arrangements for such persons to give evidence or to assist in criminal investigations in the Requesting Party and, where such persons are in custody, arranging for their contemporary transfer to the Requesting Party;”

5. Article 1(2)(d) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters:

“Mutual legal assistance to be rendered in accordance with this Treaty shall include: ...

(d) making arrangements for persons to give evidence or to assist in criminal investigations, including the transfer of persons in custody;

6. Article 1(2)(e) and (f) of the Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters:

“Such assistance shall include: ...

(e) facilitating the attendance of persons to give evidence or assistance in relation to criminal matters;”

(f) arranging the temporary transfer of persons in custody to give evidence or assistance in relation to criminal matters;”

(i) Any other type of assistance that is not contrary to the domestic law of the requested State Party:

1. Section 3 of the Mutual Assistance in Criminal Matters Act 2002 (Act 621) of Malaysia, which provides a non-exhaustive list of the types of assistance that may be provided and requested:

“3. The object of this Act is for Malaysia to provide and obtain international assistance in criminal matters, including –

(a) providing and obtaining of evidence and things;

(b) the making of arrangements for persons to give evidence, or to assist in criminal investigations;

(c) the recovery, forfeiture or confiscation of property in respect of a serious offence or a foreign serious offence;

(d) the restraining of dealings in property, or the freezing of property, that may be recovered in respect of a serious offence or a foreign serious offence;

(e) the execution of requests for search and seizure;

(f) the location and identification of witnesses and suspects;

(g) the service of process;

(h) the identification or tracing of proceeds of crime and property and instrumentalities derived from or used in the commission of a serious offence or a foreign serious offence;

(i) the recovery of pecuniary penalties in respect of a serious offence or a foreign serious offence; and

(j) the examination of things and premises.”

2. Article 1(2)(k) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries):

“Mutual assistance to be rendered in accordance with this Treaty may include: ...

(k) the provision of such other assistance as may be agreed and which is consistent with the objects of this Treaty and the laws of the Requested Party.”

3. Article 1(3)(k) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“Such assistance shall consist of: ...

(k) other assistance consistent with the objects of this Treaty which is not inconsistent with the laws of the Requested Party.”

4. Article 1(2)(j) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters:

“Mutual legal assistance to be rendered in accordance with this Treaty shall include: ...

(k) any other form of assistance not prohibited by the laws of the requested state.”

5. Article 1(2)(k) of the Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters:

“Such assistance shall include: ...

(k) other assistance consistent with the objects of this Agreement which is not inconsistent with the laws of the Requested Party.”

(j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention:

1. Section 3 (d) and (h) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621) of Malaysia:

“3. The object of this Act is for Malaysia to provide and obtain international assistance in criminal matters, including - ...

(d) the restraining of dealings in property, or the freezing of property, that may be recovered in respect of a serious offence or a foreign serious offence; ...

(h) the identification or tracing of proceeds of crime and property and instrumentalities derived from or used in the commission of a serious offence or a foreign serious offence;”

2. Article 1(2)(g) and (h) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries):

“Mutual assistance to be rendered in accordance with this Treaty may include: ...

(g) identifying or tracing property derived from the commission of an offence and instrumentalities of crime;

(h) the restraining of dealings in property or the freezing of property derived from the commission of an offence that may be recovered, forfeited or confiscated;

3. Article 1(3)(f) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“Such assistance shall consist of: ...

(f) identifying, locating, restraining dealings in and forfeiting the instruments derived from or used in the commission of an offence and proceeds of crime ”

4. Article 1(2)(h) and (i) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters:

“Mutual legal assistance to be rendered in accordance with this Treaty shall include: ...

(h) freezing and forfeiting assets or property and collecting fines;

(i) identifying or tracing proceeds of crime and property and instrumentalities derived from or used in the commission of an offence;”

5. Article 1(2)(h) of the Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning Mutual Legal Assistance in Criminal Matters:

“Such assistance shall include: ...

(h) identifying, tracing, restraining, seizing, recovering, forfeiting and confiscating proceeds and instrumentalities of criminal activities;”

(k) The recovery of assets, in accordance with the provisions of chapter V of this Convention:

1. Section 3 (c), (d) and (i) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621) of Malaysia:

“The object of this Act is for Malaysia to provide and obtain international assistance in criminal matters, including - ...

(c) the recovery, forfeiture or confiscation of property in respect of a serious offence or a foreign serious offence;

(d) the restraining of dealings in property, or the freezing of property, that may be recovered in respect of a serious offence or a foreign serious offence; ...

(i) the recovery of pecuniary penalties in respect of a serious offence or a foreign serious offence;”

2. Article 1(2)(h) and (i) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries):

2. “Mutual assistance to be rendered in accordance with this Treaty may include: ...

(h) the restraining of dealings in property or the freezing of property derived from the commission of an offence that may be recovered, forfeited or confiscated; ...

(i) the recovery, forfeiture or confiscation of property derived from the commission of an offence;”

3. Article 1(3)(f) and (g) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“Such assistance shall consist of: ...

(f) identifying, locating, restraining dealings in and forfeiting the instruments derived from or used in the commission of an offence and proceeds of crime;

(g) recovering pecuniary penalties in respect of an offence;”

4. Article 1(2)(i) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters:

“Mutual legal assistance to be rendered in accordance with this Treaty shall include: ...

(i) identifying or tracing proceeds of crime and property and instrumentalities derived from or used in the commission of an offence;”

5. Article 1(2)(h) of the Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning Mutual Legal Assistance in Criminal Matters:

“Such assistance shall include: ...

(h) identifying, tracing, restraining, seizing, recovering, forfeiting and confiscating proceeds and instrumentalities of criminal activities;

(b) Observations on the implementation of the article

829. It was clarified that the use of the term “serious offence” in sections 3(c), (d), (h) and (i) would cover UNCAC offences.

830. In addition to statistics on the number of requests for mutual legal assistance made and responded to by Malaysia (provided under paragraph 1 of article 46 above), Malaysia reported that it has received a request on the recovery of assets which, due to some

technical difficulties was made under a different legislation (AMLATFA). The request was still under consideration at the time of the country visit.

831. Although the particular requirements of this provision may not be specifically addressed in Malaysia's law and treaties, the country under review has nevertheless demonstrated that it is able and willing to afford the types of assistance enumerated in the provision under review.

Article 46 Mutual legal assistance

Paragraph 4

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

832. Malaysia indicated that the spontaneous transmission of information is not precluded under the Mutual Assistance in Criminal Matters Act 2002 (Act 621) of Malaysia. However, Act 621 provides in section 4 that it does not prevent the provision or obtaining of international assistance to or from the International Criminal Police Organisation (INTERPOL) or any other international organization.

Section 4 of the Mutual Assistance in Criminal Matters Act 2002 (Act 621):

“(1) This Act does not prevent the provision or obtaining of international assistance in criminal matters to or from the International Criminal Police Organization (INTERPOL) or any other international organization.

(2) This Act does not prevent the provision or obtaining of international assistance in criminal matters to or from any foreign State other than assistance of a kind that may be provided or obtained under this Act.

(3) This Act does not prevent the provision or obtaining of international assistance in criminal matters under any other written law.”

833. No examples were given in which Malaysia has spontaneously shared information.

(b) Observations on the implementation of the article

834. The Mutual Assistance in Criminal Matters Act does not pre-empt Malaysia from providing information informally in criminal matters. As a matter of practice Malaysian law enforcement authorities, in particular the FIU, the police and the MACC, indicated that they regularly transmit information relating to criminal matters to their counterparts in other countries. Examples of information sharing platforms through which this is done include interagency memoranda of understanding (MoUs), INTERPOL, ASEANAPOL and the Egmont Group of Financial Intelligence Units.

Article 46 Mutual legal assistance

Paragraph 5

5. *The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.*

(a) Summary of information relevant to reviewing the implementation of the article

835. As indicated in the previous paragraph, Malaysian law enforcement authorities, in particular the FIU, the police and the MACC, regularly transmit information relating to criminal matters to their counterparts in other countries as a matter of practice. No examples of implementation in practice were available.

(b) Observations on the implementation of the article

836. Based on the meetings held during the country visit, it appears that, if Malaysia received such information spontaneously from another country, it would adhere to the attendant conditions, such as confidentiality.

Article 46 Mutual legal assistance

Paragraph 8

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

(a) Summary of information relevant to reviewing the implementation of the article

837. Malaysia cited the following measures:

1. Article 3(5) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries):

“Assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions or that the offence is also considered to involve fiscal matters.”

2. Article 4(4) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“Assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions or that the offence is also considered to involve fiscal matters.”

3. Article 3(3) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters:

“Assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions or that the offence is also considered to involve fiscal matters.”

4. Articles (1)(2)(g) and 1(3) of the Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters:

“(2) Assistance shall include: ...

(g) providing information, documents, articles and records (including judicial and official records and bank, financial, corporate and business records);

...

(3) In the case of requests related to the investigation of taxation offences assistance shall be refused if the primary purpose of the investigation is the assessment or collection of tax.”

(b) Observations on the implementation of the article

838. Reference is made to the observations and example of implementation concerning bank secrecy under paragraph 2 of article 46 of UNCAC above, and under paragraph 22 of article 46 below concerning fiscal matters.

Article 46 Mutual legal assistance

Paragraph 9

(a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1;

(b) States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

(c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

(a) Summary of information relevant to reviewing the implementation of the article

839. The absence of the dual criminality element is a mandatory ground for refusal under section 20(1)(f) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621) of Malaysia and also provides grounds for refusal under Malaysia’s Mutual Legal Assistance Treaties.

840. As far as possible, Malaysia strives to grant requests, wherein as a rule of practice Malaysia consults the requesting State to provide alternative charges in order to fulfill the dual criminality requirement. In considering the request and in trying to facilitate the fulfillment of the dual criminality requirement, Malaysia adopts a liberal and broad approach when looking at whether an offence fulfills the dual criminality requirement, focusing on the conduct and elements of crimes, rather the strict categorization of offences.

841. While formal mutual assistance is available for any form of assistance as captured by the law including compulsive measures, Malaysia would not render non-coercive assistance in the absence of dual criminality.

842. Malaysia cited the following measures:

1. Section 20(1)(f) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621) of Malaysia:

“A request by a prescribed foreign State for assistance under this Part shall be refused if, in the opinion of the Attorney General - ...

(f) the request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Malaysia, would not have constituted an offence against the laws of Malaysia;”

2. Article 3(1)(e) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries):

“The Requested Party shall refuse assistance if, in its opinion- ...

(e) the request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in the Requested Party, would not have constituted an offence against the laws of the Requested Party, except that the Requested Party may provide assistance in the absence of dual criminality if permitted by its domestic laws;”

3. Article 4(1)(f) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“Assistance shall be refused if- ...

(f) the request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in the Requested Party, would not have constituted an offence against the laws of the Requested Party, except that the Requested Party may provide assistance in the absence of dual criminality if permitted by its domestic laws;”

4. Article 3(1)(e) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters:

“The Central Authority of the requested state may refuse assistance if, in the opinion of the Central Authority of the requested state-

(e) the request relates to an act or omission that, if it had occurred in the requested state, would not have constituted an offence against the laws of the requested state punishable under the laws of that state by deprivation of liberty for a period of one year or more, or by a more severe penalty;”

5. Article 4(1)(g) of the Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters:

“The Requested Party shall refuse assistance if: ...

(g) the acts or omission alleged to constitute the offence would not, if they had taken place within the jurisdiction of the Requested Party, have constituted an offence against the law of the Requested Party;”

843. There have been no cases where Malaysia has refused to provide mutual legal assistance.

(b) Observations on the implementation of the article, successes and good practices

844. Although Malaysia requires the observance of the dual criminality requirement, the country has indicated that it takes a broad approach when considering requests. The implementation is done administratively. During the country visit, the review team established that Malaysia has never refused a request, including on the grounds of dual criminality. Further, dual criminality is a fundamental principle of Malaysian law, as in many other countries, and it was explained that incoming requests ordinarily satisfy these conditions.

845. The review team positively noted Malaysia’s practice of flexibly interpreting the dual criminality requirement so as to render a wide measure of assistance. However, with respect to non-coercive assistance, it was explained during the country visit that Malaysia would not render such assistance in the absence of dual criminality. Taking into account Malaysia’s flexible application of the dual criminality principle and the mandatory nature

of this UNCAC requirement, Malaysia is encouraged to also embrace the rendering of non-coercive action so as to fully implement article 46(9)(b).

Article 46 Mutual legal assistance

Paragraph 10

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:

(a) The person freely gives his or her informed consent;

(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate.

(a) Summary of information relevant to reviewing the implementation of the article

846. Malaysia cited the following measures:

(a) The person freely gives his or her informed consent:

1. Section 28 read together with section 27(2)(c) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621):

“28. (1) Where a request by the appropriate authority of a prescribed foreign State under section 27 relates to-

(a) a prisoner within the meaning of section 2 of the Prison Act 1995 [Act 537]; or

(b) a person under detention in a prescribed institution, ...

27. (1) The appropriate authority of a prescribed foreign State may request the Attorney General to assist in arranging the attendance in that prescribed foreign State of a person in Malaysia for the purpose of giving evidence or assistance in relation to a criminal matter in that prescribed foreign State.

(2) The Attorney General may assist in making arrangements for the travel of the person to the prescribed foreign State pursuant to a request referred to in subsection (1) if the Attorney General is satisfied that-

(c) the person concerned has freely consented to attend as requested;”

2. Regulations 18(3) and (4) of the Mutual Assistance in Criminal Matters Regulations 2003 (P.U. (A) 194):

“(3) When the prisoner or person under detention is produced at the date, time and place specified in the request issued under subregulation (1), the Attorney General or an authorised officer shall inform the prisoner or person under detention, in the presence of his legal representative, if any, of his rights and liabilities if he consents to travel to the prescribed foreign State to give evidence or assist in the criminal matter to which the request relates, including the following matters: ...

(4) The consent given by the prisoner or person under detention for the purposes of subregulation (3) shall be given by the prisoner or person under detention himself in writing.”

3. Article 15(1) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“(1)The Requested Party, may upon request and where not inconsistent with its laws, temporarily transfer a person in custody in the Requested Party, subject to the consent of the person, to the Requesting Party to assist in investigations or to give evidence in proceedings related to a criminal matter in the Requesting Party.

(b) The competent authorities of both States Parties agree, subject to such conditions as those States Parties may deem appropriate:

1. Section 27(3)(a) - (d) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621):
“(3) The matters in relation to which undertakings are to be given by the appropriate authority are-

(a) that the person shall not-

(i) be detained, prosecuted or punished for any offence against the law of the prescribed foreign State that is alleged to have been committed, or that was committed, before the person’s departure from Malaysia;

(ii) be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that had occurred, before the person’s departure from Malaysia; or

(iii) be required to give evidence or assistance in relation to any criminal matter in the prescribed foreign State other than the criminal matter to which the request relates, unless the person has left the prescribed foreign State or the person has had the opportunity of leaving the prescribed foreign State and has remained in the prescribed foreign State otherwise than for the purpose of giving evidence or assistance in relation to the criminal matter to which the request relates;

(b) that any evidence given by the person in the criminal proceedings to which the request relates, if any, will be inadmissible or otherwise disqualified from use in the prosecution of the person for an offence against the law of the prescribed foreign State, other than for the offence of perjury or contempt of court in relation to the giving of that evidence;

(c) that the person will be returned to Malaysia in accordance with arrangements agreed to by the Attorney General; and

2. (d) such other matters as the Attorney General thinks appropriate.”

3. Article 16(2) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters

“2. While the person transferred is required to be held in custody under the laws of the Requested Party, the Requesting Party shall hold that person in custody and shall return that person in custody to the Requested Party at the conclusion of the matter in relation to which transfer was sought or at such earlier time as the person’s presence is no longer required.”

847. No examples of the transfer of prisoners for purposes of providing testimony or assistance in obtaining evidence for investigations, prosecutions or judicial proceedings were provided.

(b) Observations on the implementation of the article

848. The reviewers are in agreement that Malaysia has legislatively implemented this non-mandatory provision. During the country visit it was explained there has been no experience in the transfer of prisoners for purposes of providing testimony or assistance.

Article 46 Mutual legal assistance

Paragraph 11

11. For the purposes of paragraph 10 of this article:

(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

(a) Summary of information relevant to reviewing the implementation of the article

849. Malaysia cited the following measures:

(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred:

1. Section 28(1) - (2) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621)

“28. (1) Where a request by the appropriate authority of a prescribed foreign State under section 27 relates to-

(a) a prisoner within the meaning of section 2 of the Prison Act 1995 [Act 537]; or

(b) a person under detention in a prescribed institution, the Attorney General may assist in arranging the transfer of such person into the custody of an officer of the prescribed foreign State for the purpose of transporting such person from Malaysia to the prescribed foreign State and, after that, to be detained in that prescribed foreign State under the custody of such authority as may be lawful in that prescribed foreign State and produced from time to time under custody before the appropriate authority or court in the prescribed foreign State before which he is required to attend as a witness.

(2) Immediately upon his further attendance being dispensed with by the appropriate authority or court in the prescribed foreign State before which his attendance is required, the person shall be transported in the custody of an officer of the prescribed foreign State to Malaysia and returned into the custody of a Malaysian officer having lawful authority to take him into custody and he shall, after that, continue to undergo the imprisonment or detention which he was undergoing prior to the transfer of his custody under subsection (1).

2. Article 15(2) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters

“2. While the person transferred is required to be held in custody under the laws of the Requested Party, the Requesting Party shall hold that person in custody and shall return that person in custody to the Requested Party at the conclusion of the matter in relation to which transfer was sought or at such earlier time as the person’s presence is no longer required.”

3. Article 15(2) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries)

“2. While the person transferred is required to be held in custody under the law of the Requested Party, the Requesting Party shall hold the person in custody and shall return that person in custody to the Requested Party at the conclusion of the matter in relation to which transfer was sought or at such earlier time as the person’s presence is no longer required.”

(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties:

1. Section 28(2) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621)

“(2) Immediately upon his further attendance being dispensed with by the appropriate authority or court in the prescribed foreign State before which his attendance is required, the person shall be transported in the custody of an officer of the prescribed foreign State to Malaysia and returned into the custody of a Malaysian officer having lawful authority to take him into custody and he shall, after that, continue to undergo the imprisonment or detention which he was undergoing prior to the transfer of his custody under subsection (1).”

2. Article 11(2) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters

“2. The requesting Party shall hold the person in custody, unless otherwise authorized by the requested Party, and shall return that person in custody to the requested Party at the conclusion of the matter, or as soon as circumstances permit or otherwise agreed by both Central Authorities.”

3. Article 15(2) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries)

“2. While the person transferred is required to be held in custody under the law of the Requested Party, the Requesting Party shall hold the person in custody and shall return that person in custody to the Requested Party at the conclusion of the matter in relation to which transfer was sought or at such earlier time as the person’s presence is no longer required.”

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person:

1. Article 15(4) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters

“4. The Requesting Party shall not require the Requested Party to initiate extradition proceedings for the return of the persons transferred.”

2. Article 16(3) of the Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters

“(3) The Requesting Party shall not require the Requested Party to initiate proceedings for the surrender of the persons transferred.”

3. Article 11(3) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters

“3. The requesting Party shall not require the requested Party to initiate extradition or any other proceedings for the return of the person transferred.”

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred:

1. Section 11(3) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621)

“(3) The period during which such person was under foreign custody under this section shall count towards the period of his imprisonment or detention in Malaysia.”

2. Article 15(5) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries)

“5. The period during which such person was under the custody of the Requesting Party shall count towards the period of his imprisonment or detention in the Requested Party.”

3. Article 15(5) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters

“5. The period during which such person was under the custody of the Requesting Party shall count towards the period of his imprisonment or detention in the Requested Party.”

850. No examples of implementation were provided.

(b) Observations on the implementation of the article

851. The reviewers agree that Malaysia has legislatively implemented the provision and noted the absence of any examples of implementation. Should such a case arise in the

future, Malaysia should ensure that the requirements of the transfer set out in this provision are adhered to.

Article 46 Mutual legal assistance

Paragraph 12

12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

(a) Summary of information relevant to reviewing the implementation of the article

852. Malaysia cited the following measure:

1. Section 27(3)(a) - (d) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621):

“(3) The matters in relation to which undertakings are to be given by the appropriate authority are-

(a) that the person shall not-

(i) be detained, prosecuted or punished for any offence against the law of the prescribed foreign State that is alleged to have been committed, or that was committed, before the person’s departure from Malaysia;

(ii) be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that had occurred, before the person’s departure from Malaysia; or

(iii) be required to give evidence or assistance in relation to any criminal matter in the prescribed foreign State other than the criminal matter to which the request relates, unless the person has left the prescribed foreign State or the person has had the opportunity of leaving the prescribed foreign State and has remained in the prescribed foreign State otherwise than for the purpose of giving evidence or assistance in relation to the criminal matter to which the request relates;

(b) that any evidence given by the person in the criminal proceedings to which the request relates, if any, will be inadmissible or otherwise disqualified from use in the prosecution of the person for an offence against the law of the prescribed foreign State, other than for the offence of perjury or contempt of court in relation to the giving of that evidence;

(c) that the person will be returned to Malaysia in accordance with arrangements agreed to by the Attorney General; and

(d) such other matters as the Attorney General thinks appropriate.”

853. No examples of implementation were provided.

(b) Observations on the implementation of the article

854. The reviewers are satisfied with the response given by Malaysia on this provision and are in agreement that Malaysia has legislatively implemented the provision. Should such a case arise in the future, Malaysia should ensure that the requirements of the transfer set out in this provision are adhered to.

Article 46 Mutual legal assistance

Paragraph 13

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region

or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent Authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

(a) Summary of information relevant to reviewing the implementation of the article

855. Malaysia cited section 19(1) and (2) read together with section 4(1) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621):

“19. (1) A request by a prescribed foreign State to Malaysia for assistance in a criminal matter under this Part shall be made to the Attorney General.

(2) A request under subsection (1) shall be made through the diplomatic channel.”

“4. (1) This Act does not prevent the provision or obtaining of international assistance in criminal matters to or from the International Criminal Police Organisation (INTERPOL) or any other international organisation.”

856. The Attorney General’s Chambers is the central authority for mutual legal assistance in Malaysia. Malaysia has not made the relevant notification of its central authority to the United Nations.

(b) Observations on the implementation of the article

857. Malaysia is encouraged to send the aforementioned information to the Chief, Treaty Section, Office of Legal Affairs, Room M-13002, United Nations, 380 Madison Ave, New York, NY 10017 and copy the Secretary of the Conference of the States Parties to the United Nations Convention against Corruption, Corruption and Economic Crime Branch, United Nations Office on Drugs and Crime, Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria (uncac.cop@unodc.org).

858. Malaysia reported that requests can be sent through INTERPOL in urgent circumstances, rather than through diplomatic channels, and that it can act on advance copies of requests in hard and electronic format without having to wait for the original request to be transmitted through diplomatic channels. Further, once the evidentiary materials are obtained from the executing agencies, the Attorney General’s Chambers will transmit such evidence to the requesting State without going through the diplomatic channels.

(c) Successes and good practices

859. The Attorney General’s office has a dedicated unit on international cooperation (International Affairs Department, IAD) that is well equipped in terms of experienced and skilled staff comprising approximately 70 staff members, resources, as well as facilities.

860. There is a positive working relationship between the central authority for mutual legal assistance (the IAD), MACC, the police and the FIU. In the execution of requests, the IAD works closely with investigators from various law enforcement agencies in preparing and responding to mutual legal assistance requests. The FIU, for example, regularly provides bank and financial records in response to mutual legal assistance requests, and even provides early notifications to reporting institutions to alert them to an upcoming request in order to provide a timely response. The review team noted the positive role of the IAD in ensuring a cooperative working relationship of the different criminal justice authorities, especially in the processing of MLA and extradition requests.
861. In terms processing outgoing requests, the interagency cooperation enhances efficiency. Specifically, requests are drafted by dedicated officials in the central authority in close consultation with investigating officers at MACC and other agencies.
862. The IAD's work processes in handling incoming and outgoing requests are set out in the MLA Manual (particularly Forms AGC 1 and 2), the MLA Work Flow Chart and the MLA Checklist. These documents are included in Annex 18-19 to this report. Malaysia has also adopted a Model Request Form/template for MLA requests that is available online.¹⁸ The reviewers consider the work flow processes for extradition and MLA (as provided in the Manual, Work Flow Chart and Checklist) as well as the Model Request Form to be a good practice that is conducive to facilitating international cooperation.
863. A unique feature of the IAD is the dedicated case management database for extradition and MLA requests. The review team noted with appreciation Malaysia's innovative way of processing MLA requests, which ensures accuracy, efficiency and timeliness of execution and facilitates international cooperation. Malaysia's IAD has developed an IT database and information management system (ILMS), a case tracking database known as the International Affairs Division Tracking System (IADTRAC), and has imposed ISO certification (ISO 9001:2008) as a quality management process. Under this database, specific timelines for the handling and execution of MLA and extradition requests must be met and the work flows are specifically regulated. Alerts are sent to the supervising officer if a file has not been updated every two days. Incoming requests are tracked in the database from the day the request is registered. The system allows IAD to quickly respond to requests for status updates, and it was explained that steps were under development at the time of the country visit to make the database accessible to foreign missions that would be able to directly access the database to obtain status updates on the processing of their requests. This service would be available on the website of IAD.¹⁹
864. The review team commended Malaysia for this innovation, which was noted as a good practice, and encouraged Malaysia to consider sharing this innovative process with other countries which could emulate such tracking methods, including through international fora, conferences and working groups.
865. The positive working relationship between IAD as the central authority, MACC, the police and FIU in the execution and preparing of requests, as well as the exchange of personnel and expertise (e.g., DPP to MACC, police to MACC, and DPP to the Attorney General's office/IAD), was also noted as a positive practice.

¹⁸ <http://www.agc.gov.my/pdf/agcprofile/int/Mutual/FORM%20AGC%202-rev%202-16112010.pdf>

¹⁹ Status of Latest Cases: <http://www.agc.gov.my>.

Article 46 Mutual legal assistance

Paragraph 14

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

(a) Summary of information relevant to reviewing the implementation of the article

866. All the Treaties entered into between Malaysia and foreign States specify that requests are to be made in the English language:

- Articles 5(1) and 6(3) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries)
- Article 5(3) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters
- Article 5(3) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Assistance in Criminal Matters
- Article 5(3) of the Treaty between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People's Republic of China concerning Mutual Assistance in Criminal Matters
- Article 5(2) of the Treaty between the Government of Malaysia and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Assistance in Criminal Matters
- Article 24 of the Treaty between the Government of Malaysia and the Government of the Republic of India on Mutual Assistance in Criminal Matters

867. For non-treaty partners, the forms under the Mutual Assistance in Criminal Matters Regulations 2003 and Model Request Form/template for MLA²⁰ are in English. Further, AGC Forms 1 and 2 for incoming requests are in the English language.

868. The general provisions in making requests are provided under section 19 of MACMA, Regulations 5 and 11 of the Mutual Assistance in Criminal Matters Regulations 2003.

869. Malaysia has not made the relevant notification of the acceptable language to the United Nations. Thus far, Malaysia has not faced any challenges concerning language.

(b) Observations on the implementation of the article

870. Malaysia is encouraged to send the aforementioned information to the Chief, Treaty Section, Office of Legal Affairs, Room M-13002, United Nations, 380 Madison Ave, New York, NY 10017 and copy the Secretary of the Conference of the States Parties to the United Nations Convention against Corruption, Corruption and Economic Crime

²⁰ <http://www.agc.gov.my/pdf/agcprofile/int/Mutual/FORM%20AGC%202-rev%202-16112010.pdf>

Branch, United Nations Office on Drugs and Crime, Vienna International Centre, P.O. Box 500, 1400 Vienna, Austria (uncac.cop@unodc.org).

871. As indicated under paragraph 13 above, requests can be sent through INTERPOL in urgent circumstances, rather than through diplomatic channels, and Malaysia reported that it can act on advance copies in hard and electronic format without having to wait for the original request to be transmitted through diplomatic channels. In urgent circumstances, Malaysia would also accept an oral request if confirmed in writing, and this is also provided in the treaties concluded between Malaysia and foreign States.

872. Malaysia should consider specifying in its model request form that requests for mutual legal assistance can be made in English.

Article 46 Mutual legal assistance

Paragraphs 15 and 16

15. A request for mutual legal assistance shall contain:

- (a) The identity of the authority making the request;*
- (b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;*
- (c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;*
- (d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;*
- (e) Where possible, the identity, location and nationality of any person concerned; and*
- (f) The purpose for which the evidence, information or action is sought.*

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

(a) Summary of information relevant to reviewing the implementation of the article

873. The Model Request form to Malaysia is available online at: <http://www.agc.gov.my/pdf/agcprofile/int/Mutual/FORM%20AGC%202-rev%202-16112010.pdf>.

874. Section 19 of the Mutual Assistance in Criminal Matters Act 2002 (Act 621) provides for the content of requests made to the Attorney General.

“(1) A request by a prescribed foreign State to Malaysia for assistance in a criminal matter under this Part shall be made to the Attorney General.

(2) A request under subsection (1) shall be made through the diplomatic channel.

(3) Every request shall-

(a) specify the purpose of the request and the nature of the assistance being sought;

(b) identify the person or authority that initiated the request; and

(c) be accompanied by-

(i) a certificate from the appropriate authority of that prescribed foreign State that the request is made in respect of a criminal matter within the meaning of this Act;

(ii) a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;

(iii) where the request relates to-

- (A) the location of a person who is suspected to be involved in or to have benefited from the commission of a foreign serious offence; or
- (B) the tracing of property that is suspected to be connected with a foreign serious offence, the name, identity, nationality, location or description of that person, or the location and description of the property, if known, and a statement setting forth the basis for suspecting the matter referred to in subsubparagraph (A) or (B);
- (iv) a description of the offence to which the criminal matter relates, including its maximum penalty;
- (v) details of the procedure which that prescribed foreign State wishes Malaysia to follow in giving effect to the request, including details of the manner and form in which any information or thing is to be supplied to that prescribed foreign State pursuant to the request;
- (vi) where the request is for assistance relating to an ancillary criminal matter and judicial proceedings to obtain a foreign forfeiture order have not been instituted in that prescribed foreign State, a statement indicating when the judicial proceedings are likely to be instituted;
- (vii) a statement setting out the wishes of that prescribed foreign State concerning the confidentiality of the request and the reason for those wishes;
- (viii) details of the period within which that prescribed foreign State wishes the request to be met;
- (ix) if the request involves a person travelling from Malaysia to that prescribed foreign State, details of allowances to which the person will be entitled, and of the arrangements for security and accommodation for the person while he is in that prescribed foreign State pursuant to the request;
- (x) any other information required to be included with the request under any treaty or other agreement between Malaysia and that prescribed foreign State, if any; and
- (xi) any other information that may assist in giving effect to the request or which is required under the provisions of this Act or any regulations made under this Act.
- (4) Failure to comply with subsection (3) shall not be a ground for refusing assistance.

(b) Observations on the implementation of the article

875. The review team positively noted that Malaysia has published its Model request form online.
876. The reviewers have perused section 19(3) of the Mutual Assistance in Criminal Matters Act 2002, and have found that the matters listed in paragraph 15 of article 46 of the UNCAC have been included in one form or another. They, therefore, agree that Malaysia has implemented paragraph 15.
877. In respect of paragraph 16, the reviewers agree that Malaysia has implemented it, since it requires additional information beyond the matters listed in paragraph 15. The additional information areas are listed in the model request form and section 19(3) of the Act.
878. The reviewers note that the model request form and section 19 of the Act both refer to requests made to Malaysia. Malaysia indicated that it complies with Form 1 of the Model Request Form also with respect to outgoing requests.
879. The article is fully implemented.

Article 46 Mutual legal assistance

Paragraph 17

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

(a) Summary of information relevant to reviewing the implementation of the article

880. Malaysia cited the following measures:

1. Section 3 of the Mutual Assistance in Criminal Matters Act 2002 (Act 621) of Malaysia, which provides a non-exhaustive list of the types of assistance that may be provided and requested:

“3. The object of this Act is for Malaysia to provide and obtain international assistance in criminal matters, including –

- (a) providing and obtaining of evidence and things;
- (b) the making of arrangements for persons to give evidence, or to assist in criminal investigations;
- (c) the recovery, forfeiture or confiscation of property in respect of a serious offence or a foreign serious offence;
- (d) the restraining of dealings in property, or the freezing of property, that may be recovered in respect of a serious offence or a foreign serious offence;
- (e) the execution of requests for search and seizure;
- (f) the location and identification of witnesses and suspects;
- (g) the service of process;
- (h) the identification or tracing of proceeds of crime and property and instrumentalities derived from or used in the commission of a serious offence or a foreign serious offence;
- (i) the recovery of pecuniary penalties in respect of a serious offence or a foreign serious offence; and
- (j) the examination of things and premises.”

2. Section 19(3)(c)(v) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621) provides for the content of requests made to the Attorney General.

“(3) Every request shall-

(c) be accompanied by-

(v) details of the procedure which that prescribed foreign State wishes Malaysia to follow in giving effect to the request, including details of the manner and form in which any information or thing is to be supplied to that prescribed foreign State pursuant to the request;”

3. Article 7(1) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries):

“1. Requests for assistance shall be carried out promptly, in the manner provided for by the laws and practices of the Requested Party. Subject to its domestic laws and practices, the Requested Party shall carry out the request in the manner specified by the Requesting Party.”

4. Article 7(1) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“1. Requests for assistance shall be carried out promptly, in accordance with the laws and procedures of the Requested Party and, insofar as it is not incompatible with those laws and procedures, in the manner requested by the Requesting Party.”

5. Article 6(2) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters:

“2. Requests shall be executed in accordance with the laws of the requested state except to the extent that this Treaty provides otherwise. Procedures specified in the request shall be followed except to the extent that those procedures cannot lawfully be followed in the requested state. Where neither the Treaty nor the request specifies a particular procedure, the request shall be executed in accordance with the appropriate procedure under the laws applicable for criminal investigations or proceedings in the requested state.”

6. Article 7(2) of the Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters:

“Requests shall be executed in accordance with the law of the Requested Party and, to the extent not prohibited by the law of the Requested Party, in accordance with the directions stated in the request so far as practicable.”

7. Article 6(2) of the Treaty between the Government of Malaysia and the Government of the United Kingdom of Great Britain and Northern Ireland on Mutual Assistance in Criminal Matters

“Article 6

Execution of Requests

(2) The Requested Party shall comply with the formalities and procedures indicated by the Requesting Party in the request, including in particular in relation to authentication, provided that such formalities and procedures are not contrary to the domestic law of the Requested Party.”

8. Article 7(1) of the Treaty between the Government of Malaysia and the Government of the Republic of India on Mutual Assistance in Criminal Matters

“Article 7

Execution of Requests

(1) Requests for assistance shall be carried out promptly, in the manner provided for by the laws and practices of the Requested Party. To the extent permitted by its laws and practices, the Requested Party may carry out the request in the manner specified by the Requesting Party.”

(b) Observations on the implementation of the article

881. The reviewers are in agreement that Malaysia appears to have implemented the provision. The treaties cited do confirm the requirement of executing requests in accordance with domestic law of the requested State. The reviewers also note that Malaysia has enacted the Mutual Assistance in Criminal Matters Act 2002 whose objects include, inter alia, the execution of requests by Malaysia, as stated in section 3 of the Act.

882. The UNCAC provision also refers to the execution of requests in accordance with the procedures specified in the request, where possible. The treaties cited by Malaysia address this requirement, and section 19(3)(c)(v) of the Mutual Assistance in Criminal Matters Act 2002 allows a foreign State to provide details of the procedure it wishes Malaysia to follow in giving effect to the request.

883. It appears that Malaysia closely adheres to the requested procedures, including in keeping with requested timelines and status updates. The provision is implemented.

Article 46 Mutual legal assistance

Paragraph 18

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

(a) Summary of information relevant to reviewing the implementation of the article

884. Malaysia cited the following measures:

1. Article 11(3) of the Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries):

“3. Nothing in this Article shall prevent the use of live video or live television links or other appropriate communications facilities in accordance with the laws and practices of the Requested Party for the purpose of executing this Article if it is expedient in the interests of justice to do so.”

2. Article 13(5) of the Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters:

“5. Nothing in this Article shall prevent the use of live video or live television links or other appropriate communication facilities in accordance with the laws and procedures of the Requested Party for the purpose of executing this Article if it is expedient in the interests of justice to do so.”

3. Article 8(6) of the Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters:

“6. For the purpose of executing a request for the taking of testimony, the Parties may agree on a case by case basis to the use of live video or television links or other appropriate communications facilities in accordance with the laws and procedures of the requested state if it is expedient and in the interests of justice to do so.”

4. Article 11 of the Agreement between the Government of Malaysia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters:

“11. Taking of testimony by video or television link

The Parties may agree on a case by case basis to the use of live video or television links or other appropriate communications and multimedia facilities in accordance with the law and procedure of the Requested Party for the purpose of executing this Agreement if it is expedient in the interest of justice to do so”

885. Section 272B of the Evidence Act 1950 [Act 56] also provides for the taking of evidence via video links. In addition, section 90E(8) of the Evidence Act 1950 states that where the testimony has been made by means of video or other means which permit the virtual presence of the person in Malaysia, that testimony shall be deemed to have been given in Malaysia. The amendment is to accommodate the admissibility of evidence by way of video link.

(b) Observations on the implementation of the article

886. The requirements of the provision are implemented through the Mutual Assistance in Criminal Matters Act 2002, Evidence Act 1950 and the quoted treaties. The reviewers find that there are two sections of the Mutual Assistance in Criminal Matters Act which make reference to that taking of evidence in the territory of the requested State on behalf of the requesting State. These are:

1. Section 22(2)(a) of the Act, which empowers the Attorney General to authorize a hearing to be conducted within the territory of Malaysia in respect of a request from a foreign State.

2. Section 8(1)(a) of Act, which empowers the Attorney General to request for evidence to taken by appropriate authorities in the territory of the foreign State.

The above two sections, however, do not explicitly provide for video link. They also do not give authority for the proceedings to be conducted by the judicial authorities of the requesting State Party. The treaties, however, make reference to video and television links.

887. During the country visit it was explained that Malaysia has had experience with video testimony in the investigative stage of a terrorism case with Indonesia, though not during a corruption proceeding. Evidence obtained from video conferences that is received by Malaysia from a foreign country would be admissible in Malaysia under section 90E(8) of the Evidence Act.

888. The provision is implemented.

Article 46 Mutual legal assistance

Paragraph 19

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

(a) Summary of information relevant to reviewing the implementation of the article

889. Malaysia follows the rule of specialty, but may facilitate the disclosure of exculpatory information or evidence where required to do so by domestic law. No examples of implementation were provided.

(b) Observations on the implementation of the article

890. The reviewers are of the view that Malaysia has implemented this provision. They note the following:

1. Section 20(1)(j) of the Mutual Assistance in Criminal Matters Act 2002 provides for refusal of a request if the requesting State fails to give an undertaking that the assistance requested will not be used for any matter other than that for which request was made.
2. Section 8(3) of the Act seems to limit the use of evidence obtained through mutual legal assistance to criminal proceedings to which the request relates.
3. The Model Form for Request to Malaysia has a clause 7.2(a) by which the requesting State Party gives a mandatory undertaking that the thing requested will not be used for a matter other than the criminal matter in respect of which the request was made.
4. All the treaties submitted by Malaysia contain clauses which require that the requesting States will not use the evidence obtained for any purposes other than that for which the assistance was sought, unless the prior consent of the requested State Party is sought and obtained (Rule of specialty).

891. During the country visit it was explained that Malaysia follows the rule of specialty. Information that is exculpatory to an accused must be disclosed under domestic law in certain circumstances, as provided in the national legislation (i.e., in cases of murder). However, the Mutual Assistance in Criminal Matters Act 2002 does not address the issue of the disclosure of exculpatory evidence, and no cases have raised this issue.

892. The provision is implemented.

Article 46 Mutual legal assistance

Paragraph 20

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

(a) Summary of information relevant to reviewing the implementation of the article

893. Malaysia cited the following measures:

1. Mutual Assistance in Criminal Matters Act 2002 (Act 621) (Section 19(3)(c)(vii)).

(3) Every request shall—...

(c) be accompanied by— ...

(vii) a statement setting out the wishes of that prescribed foreign State concerning the confidentiality of the request and the reason for those wishes;

2. Treaty on Mutual Legal Assistance in Criminal Matters (among Like-Minded ASEAN Member Countries) (Article 9).

“1. The Requested Party shall, subject to its domestic laws, take all appropriate measures to keep confidential the request for assistance, its contents and its supporting documents, the fact of granting of such assistance and any action taken pursuant to the request. If the request cannot be executed without breaching confidentiality requirements, the Requested Party shall so inform the Requesting Party, which shall then determine whether the request should nevertheless be executed.

2. The Requesting Party shall, subject to its domestic laws, take all appropriate measures to-

(a) keep confidential information and evidence provided by the Requested Party, except to the extent that the evidence and information is needed for the purposes described in the request; and

(b) ensure that the information and evidence is protected against loss and unauthorized access, use, modification, disclosure or other misuse.”

3. Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters (Article 9).

“1. The Requested Party shall, upon request, use its best endeavours to keep confidential the request for assistance, the contents of the request and its supporting documents, the fact of granting such assistance and any action taken pursuant to the request. If the request cannot be executed without breaching the confidentiality requirements stated in the request, the Requested Party shall so inform the Requesting Party which shall then determine whether the request should nevertheless be executed.

2. The Requesting Party shall, upon request, use its best endeavours to keep information and evidence provided by the Requested Party confidential, except to the extent that evidence and information is needed for the investigation, prosecution or proceedings related to a criminal matter describe in the request.

3. The Requesting Party shall not, without the prior written consent of the Requested Party and subject to such terms and conditions as the Requested Party considers necessary, use or transfer information or evidence provided by the Requested Party nor anything derived from such information or evidence, for purposes other than those stated in the request.

4. Notwithstanding paragraph 3, in cases where the charge is altered, the information or evidence provided may, with the prior written consent of the Requested Party, be used in so far as the offence, as charged, is an offence in respect of which mutual assistance could be provided under this Treaty.”

4. Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters (Article 7)

“Article 7. Limitations on use of evidence obtained and protection of confidentiality

1. The requesting Party shall not, without the consent of the requested Party and subject to such terms and conditions as the requested Party considers necessary, use or transfer information or evidence provided by the requested Party for investigations or proceedings pertaining to a criminal matter other than those stated in the request.

2. The requested Party shall, upon request and to the extent permitted by its laws, use its best efforts to keep confidential the request for assistance, its contents and its supporting documents, the fact of granting of such assistance and any action taken pursuant to the request. If the request cannot be executed without breaching the confidentiality requirements stated in the request, the requested Party shall so inform the requesting Party, which shall then determine whether the request should nevertheless be executed.

3. The Central Authority of the requested state may request that information or evidence furnished under this Treaty be kept confidential or be used only subject to terms and conditions it may specify. If the requesting Party accepts the information or evidence subject to such conditions, the requesting Party shall use its best efforts to comply with the conditions.

4. Nothing in this Article shall preclude the use or disclosure of information to the extent that there is an obligation to do so under the Constitution of the requesting state in a criminal prosecution. The requesting Party shall notify the requested Party in advance of any such proposed disclosure.

5. Information or evidence, the contents of which have been disclosed in a public judicial or administrative proceeding, may thereafter be used for any purpose.”

5. Agreement between the Government of Malaysia and the Government of Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters (Article 9):

“Article 9- Protection of Confidentiality and Restriction on Use of Evidence and Information

“(1) The Requested Party shall, upon request and to the extent permitted by its law, use its best endeavours to keep confidential the request for assistance, its contents and its supporting documents, the fact of granting of such assistance and any action taken pursuant to the request. If the request cannot be executed without breaching the confidentiality requirements stated in the request, the Requested Party shall so inform the Requesting Party, which shall then determine whether the request should nevertheless be executed.

(2) The Requesting Party shall, upon request and to the extent permitted by its law, keep confidential evidence and information provided by the Requested Party, except to the extent that the evidence and information is needed for the investigation and criminal proceedings described in the request.”

(b) Observations on the implementation of the article

894. The reviewers are in agreement that Malaysia’s domestic law, as well as the treaties cited, make provisions for confidentiality requests by a requesting State party.

895. During the country visit the review team noted that Malaysia strictly adheres to confidentiality conditions. For example, the content of incoming requests and related documents are not appended to any applications made by Malaysia before a Malaysian court.

896. There have been no cases where Malaysia has been unable to comply with a confidentiality request, although there has been a case where the issue came up in an outgoing request. Malaysia indicated that it would consult with the other State if it were unable to adhere to confidentiality limitations.

897. The provision is implemented.

Article 46 Mutual legal assistance

Paragraph 21

21. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;

(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;

(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;

(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

(a) Summary of information relevant to reviewing the implementation of the article

898. The following provisions were cited:

1. Section 20 of the Mutual Assistance in Criminal Matters Act 2002 (Act 621):

“(1) A request by a prescribed foreign State for assistance under this Part shall be refused if, in the opinion of the Attorney General - ...

(a) the appropriate authority of that prescribed foreign State has, in respect of that request, failed to comply with the terms of any treaty or other agreement between Malaysia and that prescribed foreign State;

(b) the request relates to the investigation, prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political nature;

(c) the request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Malaysia, would have constituted a military offence under the laws of Malaysia which is not also an offence under the ordinary criminal law of Malaysia;

(d) there are substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing or otherwise causing prejudice to a person on account of the person’s race, religion, sex, ethnic origin, nationality or political opinions;

(e) the request relates to the investigation, prosecution or punishment of a person for an offence in a case where the person—

(i) has been convicted, acquitted or pardoned by a competent court or other authority in that prescribed foreign State; or

(ii) has undergone the punishment provided by the law of that prescribed foreign State, in respect of that offence or of another offence constituted by the same act or omission as the first-mentioned offence;

(f) the request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Malaysia, would not have constituted an offence against the laws of Malaysia;

(g) the facts constituting the offence to which the request relates does not indicate an offence of sufficient gravity;

(h) the thing requested for is of insufficient importance to the investigation or could reasonably be obtained by other means;

(i) the provision of the assistance would affect the sovereignty, security, public order or other essential public interest of Malaysia;

(j) the appropriate authority fails to undertake that the thing requested for will not be used for a matter other than the criminal matter in respect of which the request was made;

(k) in the case of a request for assistance under sections 22, 23, 24, 25 and 26 or sections 35, 36, 37 and 38, the appropriate authority fails to undertake to return to the Attorney General, upon his request, any thing obtained pursuant to the request upon completion of the criminal matter in respect of which the request was made;

(l) the provision of the assistance could prejudice a criminal matter in Malaysia; or

(m) the provision of the assistance would require steps to be taken that would be contrary to any written law.
(2) Paragraph (1)(j) shall not apply where the failure to undertake that the thing requested for will not be used for a matter other than the criminal matter in respect of which the request was made is with the consent of the Attorney General.

(3) A request by a prescribed foreign State for assistance under this Part may be refused by the Attorney General—

(a) pursuant to the terms of any treaty or other agreement between Malaysia and that prescribed foreign State;

(b) if, in the opinion of the Attorney General, the provision of the assistance would, or would be likely to, prejudice the safety of any person, whether that person is within or outside Malaysia;

(c) if, in the opinion of the Attorney General, the provision of the assistance would impose an excessive burden on the resources of Malaysia; or

(d) if that foreign State is not a prescribed foreign State and the appropriate authority of that foreign State fails to give an undertaking to the Attorney General that the foreign State will, subject to its laws, comply with a future request by Malaysia to that foreign State for assistance in a criminal matter.

(4) Without prejudice to paragraph (3)(c), if there is a request for assistance by a prescribed foreign State and the Attorney General is of the opinion that the expenses involved in complying with the request or continuing to effect the assistance requested for is of an extraordinary or substantial nature, the Attorney General shall consult with the appropriate authority of the prescribed foreign State on the conditions under which the request is to be effected or under which the Attorney General is to cease to give effect to it, as the case may be.”

2. Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries) (Article 3).

“1. The Requested Party shall refuse assistance if, in its opinion -

(a) the request relates to the investigation, prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, an offence of a political nature;

(b) the request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in the Requested Party, would have constituted a military offence under the laws of the Requested Party which is not also an offence under the ordinary criminal law of the Requested Party;

(c) there are substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, punishing or otherwise causing prejudice to a person on account of the person's race, religion, sex, ethnic origin, nationality or political opinions;

(d) the request relates to the investigation, prosecution or punishment of a person for an offence in a case where the person -

(i) has been convicted, acquitted or pardoned by a competent court or other authority in the Requesting or Requested Party; or

(ii) has undergone the punishment provided by the law of that Requesting or Requested Party, in respect of that offence or of another offence constituted by the same act or omission as the first-mentioned offence;

(e) the request relates to the investigation, prosecution or punishment of a person in respect of an act or omission that, if it had occurred in the Requested Party, would not have constituted an offence against the laws of the Requested Party except that the Requested Party may provide assistance in the absence of dual criminality if permitted by its domestic laws;

(f) the provision of the assistance would affect the sovereignty, security, public order, public interest or essential interests of the Requested Party;

(g) the Requesting Party fails to undertake that it will be able to comply with a future request of a similar nature by the Requested Party for assistance in a criminal matter;

(h) the Requesting Party fails to undertake that the item requested for will not be used for a matter other than the criminal matter in respect of which the request was made and the Requested Party has not consented to waive such undertaking;

(i) the Requesting Party fails to undertake to return to the Requested Party, upon its request, any item obtained pursuant to the request upon completion of the criminal matter in respect of which the request was made;

(j) the provision of the assistance could prejudice a criminal matter in the Requested Party; or

(k) the provision of the assistance would require steps to be taken that would be contrary to the laws of the Requested Party.

2. The Requested Party may refuse assistance if, in its opinion -

(a) the Requesting Party has, in respect of that request, failed to comply with any material terms of this Treaty or other relevant arrangements;

(b) the provision of the assistance would, or would be likely to prejudice the safety of any person, whether that person is within or outside the territory of the Requested Party; or

(c) the provision of the assistance would impose an excessive burden on the resources of the Requested Party.

3. For the purposes of subparagraph 1 (a), the following offences shall not be held to be offences of a political nature:

(a) an offence against the life or person of a Head of State or a member of the immediate family of a Head of State;

(b) an offence against the life or person of a Head of a central Government, or of a Minister of a central Government;

(c) an offence within the scope of any international convention to which both the Requesting and Requested Parties are parties to and which imposes on the Parties thereto an obligation either to extradite or prosecute a person accused of the commission of that offence; and

(d) any attempt, abetment or conspiracy to commit any of the offences referred to in subparagraphs (a) to (c).

4. The Requested Party may restrict the application of any of the provisions made under paragraph 3 according to whether the Requesting Party has made similar provision in its laws.

5. Assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions or that the offence is also considered to involve fiscal matters.

6. The Requested Party may postpone the execution of the request if its immediate execution would interfere with any ongoing criminal matters in the Requested Party.

7. Before refusing a request or postponing its execution pursuant to this Article, the Requested Party shall consider whether assistance may be granted subject to certain conditions.

8. If the Requesting Party accepts assistance subject to the terms and conditions imposed under paragraph 7, it shall comply with such terms and conditions.

9. If the Requested Party refuses or postpones assistance, it shall promptly inform the Requesting Party of the grounds of refusal or postponement.

10. The Parties shall, subject to their respective domestic laws, reciprocate any assistance granted in respect of an equivalent offence irrespective of the applicable penalty.”

3. Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters (Article 4).

4. Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters (Article 3).

“1. The Central Authority of the requested state may refuse assistance if, in the opinion of the Central Authority of the requested state-

(a) the request relates to a political offence;

(b) the request relates to an offence under military law that if it had occurred in the requested state would not be an offence under ordinary criminal law in the requested state;

(c) there are substantial grounds for believing that the request was made for the purpose of investigating, prosecuting, or punishing a person on account of the person’s race, religion, sex, ethnic origin, nationality or political opinions;

(d) the request relates to the investigation or prosecution of a person for an offence in a case where the person has been convicted or acquitted by a court in the requested state in respect of the same offence;

(e) the request relates to an act or omission that, if it had occurred in the requested state, would not have constituted an offence against the laws of the requested state punishable under the laws of that state by deprivation of liberty for a period of one year or more, or by a more severe penalty;

(f) the execution of the request would prejudice the sovereignty, security, public order or other essential interest of the requested state;

(g) the Central Authority of the requesting state has, in respect of that request, failed to comply with any material terms of this Treaty or failed to agree to reasonable conditions imposed under paragraph 4 of this Article;

(h) the facts constituting the offence to which the request relates do not indicate an offence of sufficient gravity;

(i) the item or thing requested is of insufficient importance to the investigation or could reasonably be obtained by other means.

2. Without prejudice to any other offences which satisfy dual criminality, a request that relates to an offence identified in the Annex to this Treaty shall not be refused pursuant to subparagraph (1)(e) of this Article as the Parties have determined that dual criminality exists for such offences. The Annex to this Treaty may be modified by the Parties by an exchange of notes.
3. Assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions or that the offence is also considered to involve fiscal matters.
4. Before denying assistance pursuant to this Article, the Central Authority of the requested state shall consult with the Central Authority of the requesting state to consider whether assistance can be given subject to such conditions as it deems necessary. If the requesting Party accepts assistance subject to these conditions, it shall comply with the conditions.
5. If the Central Authority of the requested state refuses assistance, it shall promptly inform the Central Authority of the requesting state of the grounds of refusal.”

899. As indicated above, Malaysia has never refused to execute a request for mutual legal assistance. However, three of its outgoing requests in non-corruption related matters have been refused by other countries (Australia, Singapore and the UK) on the grounds that the request did not satisfy the strict list approach followed by the requested State.

(b) Observations on the implementation of the article, successes and good practices

900. Section 20 of the Mutual Assistance in Criminal Matters Act 2002 provides for several circumstances where Malaysia may and must refuse to give mutual legal assistance. The treaties also have clauses which provide for the refusal of assistance. Malaysia has said that there have been no cases where it has refused to give assistance.

901. During the country visit, the reviewers were informed of a case in which Malaysia was able to render assistance on a matter that touched on its State security. This would tend to show that the grounds for refusal do not impede Malaysia from complying with requests, which is commendable.

Article 46 Mutual legal assistance

Paragraph 22

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

(a) Summary of information relevant to reviewing the implementation of the article

902. Malaysia cited the following measures:

1. Mutual Assistance in Criminal Matters Act 2002 (Act 621) (Section 20(3)(a))
“(3) A request by a prescribed foreign State for assistance under this Part may be refused by the Attorney General—
(a) pursuant to the terms of any treaty or other agreement between Malaysia and that prescribed foreign State;”
2. Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries) (Article 3(5)).
“5. Assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions or that the offence is also considered to involve fiscal matters.”
3. Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters (Article 4(4)).

“4. Assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions or that the offence is also considered to involve fiscal matters.”

4. Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters (Article 3(3)).

“3. Assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions or that the offence is also considered to involve fiscal matters.”

903. No examples of implementation were provided.

(b) Observations on the implementation of the article

904. During the country visit the review team was informed that fiscal offences are not included in the Act or treaties as offences for which Malaysia is precluded from giving assistance, and further that fiscal offences satisfy the dual criminality requirement. Malaysia would therefore be able to render assistance in cases involving fiscal matters. As further proof of this, Malaysia confirmed that it has complied with a request involving a case of tax evasion.

905. The reviewers’ attention has been drawn to Malaysia’s Model Request Form for Mutual Legal Assistance, which at clause 7.1(f) requires the requesting State to give a mandatory undertaking that the request does not have as its primary purpose the assessment or collection of tax. A similar provision is also included in Article 1(3) of the Treaty with the Government of the Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters (quoted under paragraph 8 above). It was explained that this undertaking is only necessary when the investigation concerns offences relating to taxation. It does not appear, however, that these provisions preclude Malaysia from rendering assistance in tax cases, as it has done in the case example referred to in the previous paragraph, particularly since the treaty with Hong Kong specifically addresses assistance for purposes of “providing information, documents, articles and records (including judicial and official records and bank, financial, corporate and business records)”. Nonetheless, Malaysia should ensure that this undertaking is not interpreted in a manner contrary to the purposes of the provision under review in future cases.

Article 46 Mutual legal assistance

Paragraph 23

23. Reasons shall be given for any refusal of mutual legal assistance.

(a) Summary of information relevant to reviewing the implementation of the article

906. Malaysia cited the following measures:

1. Mutual Assistance in Criminal Matters Act 2002 (Section 20) (quoted under paragraph 21 of UNCAC above).

2. Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries) (Article 3(9)).

“9. If the Requested Party refuses or postpones assistance, it shall promptly inform the Requesting Party of the grounds of refusal or postponement.”

3. Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters (Article 7(7)).

“7. If the Requested Party refuses or postpones assistance, it shall promptly inform the Requesting Party of the decision not to comply in whole or in part with the request and the reasons for that decision.”

4. Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters (Articles 3(5) and 6(7)).

“5. If the Central Authority of the requested state refuses assistance, it shall promptly inform the Central Authority of the requesting state of the grounds of refusal.

7. The Central Authority of the requested state shall promptly inform the Central Authority of the requesting state of the outcome of the execution of the request. If execution of the request is denied, delayed or postponed, the Central Authority of the requested state shall inform the Central Authority of the requesting state of the reasons for the denial, delay or postponement.”

5. Agreement between the Government of Malaysia and the Government of Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters (Articles 4(5) and 7(4)).

“(5) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority –

(a) shall promptly inform the Requesting Party of the reason for considering denial or postponement; and
(b) shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.”

(4) The Requested Party shall promptly inform the Requesting Party of a decision not to comply in whole or in part with a request for assistance and the reason for that decision.”

907. No examples of implementation were provided.

(b) Observations on the implementation of the article

908. The reviewers noted that the cited treaties point towards a framework or practice where the requesting State informs or could inform the requesting State of the reasons for refusal. The reviewers were further of the view that, while section 20 of the Mutual Assistance in Criminal Matters Act provides a list of grounds upon which the Attorney General could refuse a request, an obligation to provide reasons for refusing mutual legal assistance is not addressed in the Act. However, the reviewers examined the MLA Work Flow Chart included in Annex 18 to this report, which confirms that Malaysia furnishes a requesting State with reasons for refusing the request (Step 11).

909. The provision is adequately implemented.

Article 46 Mutual legal assistance

Paragraph 24

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of

the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

(a) Summary of information relevant to reviewing the implementation of the article

910. Malaysia cited the following measures. Similar provisions are also included in the treaties with India (article 4(9)) and the United Kingdom.

1. Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries) (Articles 7(1) and (3)).

“1. Requests for assistance shall be carried out promptly, in the manner provided for by the laws and practices of the Requested Party. Subject to its domestic laws and practices, the Requested Party shall carry out the request in the manner specified by the Requesting Party.

3. The Requested Party shall respond as soon as possible to reasonable inquiries by the Requesting Party concerning progress toward execution of the request.”

2. Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters (Article 7(1)).

“1. Requests for assistance shall be carried out promptly, in accordance with the laws and procedures of the Requested Party and, insofar as it is not incompatible with those laws and procedures, in the manner requested by the Requesting Party.

6. The Requested Party shall promptly inform the Requesting Party of circumstances, when they become known to the Requested Party, which are likely to cause a significant delay in responding to the request.”

3. Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters (Article 6(1) and 6(4)).

“1. The Central Authority of the requested state shall promptly execute the request or, when appropriate, shall transmit it to the authority having jurisdiction to do so. The competent authorities of the requested state shall do everything in their power to execute the request. The courts of the requested state shall have authority to issue subpoenas, search warrants or other orders necessary to execute the request.

4. The Central Authority of the requested state shall respond within a reasonable period to reasonable inquiries by the Central Authority of the requesting state concerning progress toward execution of the request.”

4. Agreement between the Government of Malaysia and the Government of Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters (Articles 7(1) and (6))

“(1) The Central Authority of the Requested Party shall promptly execute the request or arrange for its execution through its competent authorities.

(6) The Central Authority of the Requested Party shall respond within a reasonable period to reasonable inquiries by the Central Authority of the Requesting Party concerning progress toward execution of the request.”

911. There is no corresponding provision in the Mutual Assistance in Criminal Matters Act 2002 (Act 621). However, in practice Malaysia provides for such status and progress reports. Further, the Attorney General’s Chambers has established an IT database and information management system (ILMS), the International Affairs Division Tracking System (IADTRAC) and ISO compliance to provide status and progress updates of each case to requesting States.

912. Malaysia indicated that on average, it requires one week from the time of receipt to respond to a request for mutual legal assistance.

(b) Observations on the implementation of the article

913. Reference is made to the observations under paragraph 13 of article 46 above on IAD's work processes and oversight in executing incoming and outgoing requests for extradition and MLA, as well as its case management database that allows IAD to quickly respond to requests for status updates and ensures timely execution and tracking of requests.

914. The reviewers are in agreement that the treaties entered into by Malaysia provide that requests for assistance shall be executed promptly by the requested State. They also have provisions which require the requested State to respond as soon as possible to reasonable enquiries by the requesting State concerning progress toward execution of the request, even though the corresponding provisions are not included in the Mutual Assistance in Criminal Matters Act 2002.

915. The provision is implemented.

Article 46 Mutual legal assistance

Paragraph 25

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

(a) Summary of information relevant to reviewing the implementation of the article

916. Malaysia cited the following measures:

1. Mutual Assistance in Criminal Matters Act 2002 (Sections 20(3)(a) and 20(1)(1)).

Section 20(3)(a)

"20.(3) A request by a prescribed foreign State for assistance under this Part may be refused by the Attorney General—

(a) pursuant to the terms of any treaty or other agreement between Malaysia and that prescribed foreign State;

20. (1) A request by a prescribed foreign State for assistance under this Part shall be refused if, in the opinion of the Attorney General—

(1) the provision of the assistance could prejudice a criminal matter in Malaysia;"

2. Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries) (Article 3(6)).

"6. The Requested Party may postpone the execution of the request if its immediate execution would interfere with any ongoing criminal matters in the Requested Party."

3. Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters (Article 7(2)).

"2. The Requested Party may postpone the execution of the request if its immediate execution would interfere with any ongoing investigation, prosecution or proceedings related to a criminal matter in the Requested Party."

4. Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters (Article 6(5)).

"5. If the Central Authority of the requested state determines that execution of a request would interfere with an ongoing investigation or proceeding pertaining to a criminal matter in that state, it may postpone execution, or make execution subject to conditions determined necessary after consultations with the Central

Authority of the requesting state. If the requesting Party accepts the assistance subject to the conditions, it shall comply with the conditions.”

5. Agreement between the Government of Malaysia and the Government of Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters (Article 4(4)).

“The Requested Party may postpone assistance if the execution of the request would interfere with or prejudice an ongoing investigation or prosecution in the Requested party.”

(b) Observations on the implementation of the article

917. We are in agreement that there are provisions in the treaties which allow the requested State Party to postpone execution of a request on the ground that it interferes with ongoing criminal matters in the requested State Party.

918. It is noted that section 20(1) (l) of the Mutual Assistance in Criminal Matters Act 2002 provides for the mandatory refusal, rather than postponement, of assistance where “the provision of the assistance could prejudice a criminal matter in Malaysia.” Though the provision under review is not a mandatory one, Malaysia may consider reviewing the Mutual Assistance in Criminal Matters Act 2002 to enable its authorities to postpone assistance under these circumstances rather than to refuse. The IAD indicated that they indeed interpret the domestic provision of the Act so as to provide for the postponement rather than outright refusal of assistance on these grounds.

919. During the country visit the review team was given an example of a request for banking records not involving a corruption matter where a domestic investigation in Malaysia was ongoing. The Malaysian authorities consulted with the requesting State and postponed the execution of the request until the domestic prosecution was over. It was considered that the request was not prejudicial to their investigation. This case seems to suggest that Malaysia interprets its domestic provision in line with the spirit of the Convention.

Article 46 Mutual legal assistance

Paragraph 26

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

(a) Summary of information relevant to reviewing the implementation of the article

920. Malaysia has cited the following measures:

1. Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries) (Article 3(7) and (8)).

“7. Before refusing a request or postponing its execution pursuant to this Article, the Requested Party shall consider whether assistance may be granted subject to certain conditions.

8. If the Requesting Party accepts assistance subject to the terms and conditions imposed under paragraph 7, it shall comply with such terms and conditions.”

2. Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters (Article 7(4) and (5)).

“4. Before postponing the execution of a request pursuant to this Article, the Requested Party shall consider whether assistance may be granted subject to certain conditions.

5. If the Requesting Party accepts assistance subject to the terms and conditions imposed under this Article, it shall comply with such terms and conditions.”

3. Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters (Article 3(4)).

“4. Before denying assistance pursuant to this Article, the Central Authority of the requested state shall consult with the Central Authority of the requesting state to consider whether assistance can be given subject to such conditions as it deems necessary. If the requesting Party accepts assistance subject to these conditions, it shall comply with the conditions.”

4. Agreement between the Government of Malaysia and the Government of Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters (Article 4(5)(b) and 4(6)):

“(5) Before denying or postponing assistance pursuant to this Article, the Requested Party, through its Central Authority—

(b) shall consult with the Requesting Party to determine whether assistance may be given subject to such terms and conditions as the Requested Party deems necessary.”

(6) If the Requesting Party accepts assistance subject to the terms and conditions referred to in paragraph (5)(b), it shall comply with those terms and conditions.”

921. There is no corresponding provision in the Mutual Assistance in Criminal Matters Act 2002 (Act 621). However, consultation takes place in practice before refusing or postponing a request for assistance, as further detailed in the MLA Manual, the MLA Work Flow Chart and the MLA Checklist included in Annex 18-19 to this report. It is apparent from these annexes that the consultation mechanism forms part of the work flow when processing requests for MLA and is applied uniformly without exception as a rule of practice.

(b) Observations on the implementation of the article

922. The reviewers agreed that the treaties entered into by Malaysia have provisions which provide for consultations between the requested State and the requesting State prior to refusing assistance. Their recommendation to Malaysia in this regard is to domesticate these treaty provisions into the domestic legislation, given the mandatory nature of the provision.

923. It was noted that an updated version of the Work Flow Chart for MLA provided after the country visit imposes an obligation on Malaysia to consult with a requesting State at the stage prior to refusing a request for mutual legal assistance. General consultations in the execution of requests are also provided for.

924. Malaysia indicated that it consults with requesting States before refusing or postponing assistance uniformly and without exception as a matter of practice. The case cited under paragraph 25 of article 46 above is an example of such consultations before postponing a request.

925. The provision seems to be partially implemented as a matter of practice. Malaysia is encouraged to review its Mutual Assistance in Criminal Matters Act 2002 (Act 621) and

treaties (both existing and future) to ensure that such consultations are held before refusing or postponing assistance.

Article 46 Mutual legal assistance

Paragraph 27

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

(a) Summary of information relevant to reviewing the implementation of the article

926. Malaysia cited the following measures:

1. Mutual Assistance in Criminal Matters Act 2002 (Act 621) (Section 27(3)).

“(3) The matters in relation to which undertakings are to be given by the appropriate authority are—

(a) that the person shall not—

(i) be detained, prosecuted or punished for any offence against the law of the prescribed foreign State that is alleged to have been committed, or that was committed, before the person’s departure from Malaysia;

(ii) be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that had occurred, before the person’s departure from Malaysia; or

(iii) be required to give evidence or assistance in relation to any criminal matter in the prescribed foreign State other than the criminal matter to which the request relates, unless the person has left the prescribed foreign State or the person has had the opportunity of leaving the prescribed foreign State and has remained in the prescribed foreign State otherwise than for the purpose of giving evidence or assistance in relation to the criminal matter to which the request relates;

(b) that any evidence given by the person in the criminal proceedings to which the request relates, if any, will be inadmissible or otherwise disqualified from use in the prosecution of the person for an offence against the law of the prescribed foreign State, other than for the offence of perjury or contempt of court in relation to the giving of that evidence;

(c) that the person will be returned to Malaysia in accordance with arrangement agreed to by the Attorney General; and

(d) such other matters as the Attorney General thinks appropriate.”

2. Section 11(1) of the Mutual Assistance in Criminal Matters Act 2002 (Act 621)

“(1) A person who is in Malaysia pursuant to a request made under section 9 shall not-

(a) be detained, prosecuted or punished in Malaysia for any offence that is alleged to have been committed, or that was committed, before his departure from the foreign State concerned pursuant to the request;”

3. Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries) (Article 16).

“1. Subject to paragraph 2, where a person is present in the Requesting Party pursuant to a request made under Article 14 or 15 of this Treaty -

(a) that person shall not be detained, prosecuted, punished or subjected to any other restriction of personal liberty in the Requesting Party in respect of any acts or omissions or convictions for any offence against the law of the Requesting Party that is alleged to have been committed, or that was committed, before the person’s departure from the Requested Party;

(b) that person shall not, without that person's consent, be required to give evidence in any criminal matter in the Requesting Party in the Requesting Party other than the criminal matter to which the request relates; or

(c) that person shall not be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that had occurred, before the person's departure from the Requested Party.

2. Paragraph 1 shall cease to apply if that person, being free and able to leave, has not left the Requesting Party within a period of 15 consecutive days after that person has been officially told or notified that his presence person is no longer required or, having left, has voluntarily returned.

3. A person who attends before a competent authority or court in the Requesting Party pursuant to a request made under Article 14 or 15 of this Treaty shall not be subject to prosecution based on such testimony except that that person shall be subject to the laws of the Requesting Party in relation to contempt of court and perjury.

4. A person who does not consent to attend in the Requesting Party pursuant to a request made under Article 14 or 15 of this Treaty shall not by reason only of such refusal or failure to consent be subjected to any penalty or liability or otherwise prejudiced in law notwithstanding anything contrary in the request."

4. Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters (Article 16).

"1. Subject to paragraph 2, where a person is present in the Requesting Party pursuant to a request made under Article 14 or 15 of this Treaty:

(a) that person shall not be detained, prosecuted, punished or subjected to any other restriction of personal liberty in the Requesting Party in respect of any acts or omissions or convictions for any offence against the laws of the Requesting Party that is alleged to have been committed, or that was committed, before the departure of the person from the Requested Party;

(b) that person shall not, without the consent of that person, be required to give evidence in any proceedings or to assist in any investigation in the Requesting Party other than the proceedings or investigation to which the request relates; and

(c) that person shall not be subject to any civil suit in respect of any act or omission which preceded the person's departure from the Requested Party.

2. Paragraph 1 of this Article shall cease to apply if that person, being free and able to leave, has not left the Requesting Party within a period of 15 days after that person has been officially notified that the presence of the person is no longer required or, having left, has voluntarily returned.

3. Evidence taken under Article 14 or 15 of this Treaty shall not be admitted or otherwise used in any prosecution of the person for an offence against the laws of the Requesting Party except for the prosecution of the person for contempt, perjury or the making of a false declaration.

4. A person who does not consent to attend in the Requesting Party pursuant to a request made under Article 14 or 15 of this Treaty shall not, by reason thereof, be liable to any penalty or be subjected to any coercive measure notwithstanding anything to the contrary in the request or in any document accompanying the request."

5. Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters (Article 12).

"Article 12. Safe conduct

1. The Central Authority of the requesting state may, in its discretion, determine that a person attending in the requesting state pursuant to Article 10 or 11 shall not be subject to service of process or be detained or subjected to any restriction of personal liberty by reason of any acts or convictions that preceded his departure from the requested state. Nothing in this Article shall preclude the requesting Party from holding a person in custody pursuant to Article 11(2).

2. The safe conduct provided for by this Article shall cease seven days after the Central Authority of the requesting state has notified the Central Authority of the requested state that the person's presence is no longer required, or when the person, having left the requesting state, voluntarily returns to that state. The Central Authority of the requesting state may, in its discretion, extend this period up to fifteen days if it determines that there is good cause to do so."

6. Agreement between the Government of Malaysia and the Government of Hong Kong Special Administrative Region of the People's Republic of China concerning Mutual Legal Assistance in Criminal Matters (Article 17).

"SAFE CONDUCT

(1) Where a person is present in the Requesting Party pursuant to a request made under Article 15 or 16 of this Agreement—

(a) that person shall not be detained, prosecuted, punished or subjected to any other restriction of personal liberty in the Requesting Party in respect of any acts or omissions or convictions for any offence against the law of the Requesting Party that is alleged to have been committed, or that was committed, before the person's departure from the Requested Party;

(b) that person shall not be subjected to any civil suit (being a civil suit to which the person could not be subject if he were not in the Requesting Party) in respect of any act or omission of the person that is alleged to have occurred, or that had occurred, before the person's departure from the Requested Party.

(2) Paragraph (1) shall not apply if the person, not being a person in custody transferred under Article 16, and being free to leave, has not left the Requesting Party within a period of 15 consecutive days after being notified that his presence is no longer required, or having left the Requesting Party, has returned.

(3) A person who consents to give evidence under Article 15 or 16 shall not be subjected to prosecution based on his testimony, except for perjury or contempt of court.

(4) A person who consents to provide assistance pursuant to Article 15 or 16 shall not be required to provide assistance in any proceedings other than the proceedings to which the request relates.

(5) A person who does not consent to provide assistance pursuant to Article 15 or 16 shall not by reason thereof be liable to any penalty or coercive measure by the courts of the Requesting Party or Requested Party.”

927. No examples of implementation were provided.

(b) Observations on the implementation of the article

928. The reviewers are in agreement that Malaysia has implemented this provision. The Act and the treaties entered into by Malaysia contain provisions that protect witnesses and experts from being detained, prosecuted or punished for any offences alleged to have been committed before their departure from the requested State.

929. During the country visit the review team was informed that section 27(3) of the Act gives Malaysian authorities flexibility to set appropriate timeframes in which safe conduct will be assured based on the principle of reciprocity. This was considered by the Malaysian authorities to be a good thing. Malaysia's treaties generally contain the 15-day safe conduct period. While there were no cases where the safe conduct provisions have been invoked, Malaysia appears to have adequately implemented this provision.

Article 46 Mutual legal assistance

Paragraph 28

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

(a) Summary of information relevant to reviewing the implementation of the article

930. Malaysia cited the following measures:

1. Mutual Assistance in Criminal Matters Act 2002 (Act 621) (Section 20(4)).

“(4) Without prejudice to paragraph (3)(c), if there is a request for assistance by a prescribed foreign State and the Attorney General is of the opinion that the expenses involved in complying with the request or continuing to effect the assistance requested for is of an extraordinary or substantial nature, the Attorney

General shall consult with the appropriate authority of the prescribed foreign State on the conditions under which the request is to be effected or under which the Attorney General is to cease to give effect to it, as the case may be.”

2. Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries) (Article 25).

“Article 25. Costs

1. The Requested Party shall assume all ordinary expenses of fulfilling the request for assistance except that the Requesting Party shall bear –

- (a) the fees of counsel retained at the request of the Requesting Party;
- (b) the fees and expenses of expert witnesses;
- (c) the costs of translation, interpretation and transcription;
- (d) the expenses associated with conveying any person to or from the territory of the Requested Party and the fees, allowances and expenses payable to that person concerned while that person is in the Requesting Party pursuant to a request made under Article 14 or 15 of this Treaty; and
- (e) the expenses associated with conveying custodial or escorting officers.

2. The cost of establishing live video or television links or other appropriate communication facilities, the costs related to the servicing of live video or television links or other appropriate communications facilities, the remuneration of interpreters provided by the Requested Party and allowances to witnesses and their traveling expenses in the Requested Party shall be refunded by the Requesting Party to the Requested Party, unless the Parties mutually agree otherwise.

3. If during the execution of the request it becomes apparent that expenses of an extraordinary or substantial nature are required to fulfill the request, the Parties shall consult to determine the terms and conditions under which the execution of the request is to be effected or continued.”

3. Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters (Article 23)

“1. Unless otherwise agreed between the Parties, the Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceedings arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.

2. The Requested Party shall assume all ordinary expenses of fulfilling the request for assistance except that the Requesting Party shall bear :

- (a) the expenses associated with conveying any person to or from the territory of the Requested Party, and the fees, allowances or expenses to that person while that person is in the Requesting Party pursuant to a request made under Article 14 or 15 of this Treaty; and
- (b) the expenses associated with conveying custodial or escorting officers;
- (c) the fees of counsel retained at the request of the Requesting Party;
- (d) the fees and expenses of expert witnesses; and
- (e) costs of translation, interpretation and transcription.

2. Unless the Parties mutually agree otherwise, the Requesting Party shall refund to the Requested Party the costs associated with the use of live video or live television links or other appropriate communication facilities, including:

- (i) establishment and servicing costs;
- (ii) the remuneration of interpreters provided by the Requested Party and
- (iii) allowances to witnesses and their traveling expenses in the Requested Party.

3. If during the execution of the request it becomes apparent that expenses of an extraordinary or substantial nature are required to fulfill the request, the Parties shall consult to determine the terms and conditions under which the execution of the request is to be effected or continued.”

4. Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters (Article 19).

“1. The requested Party shall assume all ordinary expenses of fulfilling the request for assistance, except that the requesting Party shall bear -

- (a) the fees of other counsel retained at the request of the requesting Party;
- (b) the fees and reasonable expenses of expert witnesses;
- (c) the costs of translation, interpretation and transcription;
- (d) the expenses associated with conveying any person to or from the territory of the requested state and any fees, allowances and expenses payable to the person concerned while that person is in the requesting state pursuant to a request made under Article 10 or 11 of this Treaty; and

(e) the travel expenses of custodial or escorting officers as agreed between the Parties.

2. The costs of utilizing live video or television links or other appropriate communications facilities shall be borne by the requesting Party, unless the Parties mutually agree otherwise.

3. If during the execution of the request it becomes apparent that resources, including expenses, of an extraordinary or substantial nature are required to fulfill the request, the Parties shall consult to determine the terms and conditions under which the execution of the request is to be effected or continued.”

5. Agreement between the Government of Malaysia and the Government of Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters (Article 22):

“Article 22

Representation and Expenses

(1) The Requested Party shall make all necessary arrangements for the representation of the Requesting Party in any proceeding arising out of a request for assistance and shall otherwise represent the interests of the Requesting Party.

(2) The Requested Party shall assume all ordinary expenses of executing a request within its boundaries, except:

(a) fees of counsel retained at the request of the Requesting Party;

(b) the fees and expenses of expert witnesses;

(c) the costs of translation, interpretation and transcription; and

(d) travel expenses and allowances of persons who travel between the Requesting and Requested Parties.

(3) If during the execution of the request it becomes apparent that expenses of an extraordinary or substantial nature are required to fulfill the request, the Parties shall consult to determine the terms and conditions under which the execution of the request may continue.

(4) The cost of establishing live video or television links or other appropriate communications and multimedia facilities, the costs related to the servicing of live video or television links or other appropriate communications and multimedia facilities, the remuneration of interpreters provided by the Requested Party and allowances to witnesses and their travelling expenses in the Requested Party shall be refunded by the Requesting Party to the Requested Party, unless the Parties mutually agree otherwise.”

931. No examples of implementation were provided.

(b) Observations on the implementation of the article

932. The reviewers have perused section 20(4) of the Mutual Assistance in Criminal Matters Act 2002 and the respective treaties cited by Malaysia, and are in agreement that Malaysia has implemented this provision.

Article 46 Mutual legal assistance

Paragraph 29

29. The requested State Party:

(a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

(a) Summary of information relevant to reviewing the implementation of the article

933. Malaysia cited the following measures:

1. Treaty on Mutual Legal Assistance in Criminal Matters (Among Like-Minded ASEAN Member Countries) (Article 13).

“1. The Requested Party shall provide the Requesting Party with copies of documents and records that are open to public access as part of a public register or otherwise, or that are available for purchase by the public.

2. The Requested Party may provide the Requesting Party with copies of any official document or record in the same manner and under the same conditions as such document or record may be provided to its own law enforcement or judicial authorities.”

2. Treaty between the Government of Malaysia and the Government of Australia on Mutual Assistance in Criminal Matters (Article 18).

“1. The Requested Party shall provide to the Requesting Party copies of publicly available documents or records in the possession of government departments and agencies.

2. The Requested Party may, subject to its domestic laws and practices, provide the Requesting Party with copies of any documents or records in the possession of government departments and agencies that are not publicly available. The Requested Party may in its discretion deny, entirely or in part, a request pursuant to this paragraph.”

3. Treaty between the Government of Malaysia and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters (Article 9).

“1. The requested Party shall provide the requesting Party with copies of publicly available records, including documents or information in any form, in the possession of government departments and agencies in the requested state.

2. The requested Party may, to the extent permitted by its laws, provide the requesting Party with copies of any records, including documents or information in any form, that are in the possession of a government department or agency in the requested state but that are not publicly available. The requested Party may in its discretion deny, entirely or in part, a request pursuant to this paragraph.

3. Records produced in the requested state pursuant to this Article shall, upon request, be authenticated, in the case of requests by Malaysia, as required under Malaysian laws and specified in the request, and in the case of requests by the United States of America, by use of Form C or Form D, as the case may require, appended to this Treaty.”

4. Agreement between the Government of Malaysia and the Government of Hong Kong Special Administrative Region of the People’s Republic of China concerning Mutual Legal Assistance in Criminal Matters (Article 14):

“Article 14

Publicly Available and Official Documents

(1) The Requested Party shall provide the Requesting Party with copies of publicly available documents, including documents or information in any form, in the possession of government departments and agencies in the Requested Party.

(2) The Requested Party may, to the extent permitted by its law, provide the Requesting Party with copies of any records, including documents or information in any form, that are in the possession of a government department or agency in the Requested Party but that are not publicly available. The Requested Party may in its discretion deny, entirely or in part, a request pursuant to this paragraph.”

(b) Observations on the implementation of the article

934. Concerning subparagraph (a) of the UNCAC provision, the reviewers agree that the treaties do in fact make provision requiring the requested State to provide to the requesting State copies of the publicly available documents or records in the possession of government departments and agencies. Although there is no specific corresponding provision in the Act, the reviewers are of the view that the treaties provide some good basis to believe that Malaysia has a practice which allows for the provision of such records.

935. Concerning subparagraph (b), the reviewers have perused the treaties entered into by Malaysia for mutual legal assistance, and find that there indeed are provisions which seem to provide for the availing of records that are not publicly available. For example, reference is made to Article 9(2) of the treaty between Malaysia and the United States of America, and Article 13(2) of the ASEAN treaty. The reviewers agree that some of the treaties entered into by Malaysia give discretion to provide government records that are not publicly available.
936. During the country visit the review team noted that Malaysia may provide copies of government records that are not available to the general public on the basis of a production order issued by a court of law under the Mutual Assistance in Criminal Matters Act 2002 (Act 621). Another option is that the Attorney General may apply to the appropriate authority for a declassification of Government records in accordance with the provisions of the Official Secrets Act of Malaysia. The Malaysian authorities gave an example of a case where Malaysian police records were declassified in this manner and then provided to a requesting State.
937. The provision is implemented.

Article 46 Mutual legal assistance

Paragraph 30

30. States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.

(a) Summary of information relevant to reviewing the implementation of the article

938. Malaysia has entered into six bilateral treaties on mutual legal assistance with Hong Kong, Australia, USA, Korea, India and the UK, as well as the regional ASEAN Treaty on Mutual Legal Assistance in Criminal Matters Among Like-Minded ASEAN Member Countries (with 10 States).

(b) Observations on the implementation of the article, successes and good practices

939. The reviewers have seen copies of several bilateral treaties and a copy of the multilateral treaty entered into by Malaysia for mutual legal assistance. They note that several of the treaties were entered into long before the promulgation of the Convention, which underscores the importance Malaysia attaches to the transnational investigation and prosecution of crime.
940. It is noted that section 18 of the Mutual Assistance in Criminal Matters Act 2002 enables Malaysia to give mutual legal assistance even in absence of a bilateral treaty with the requesting State Party. Moreover, in principle Malaysia could apply the UNCAC as the legal basis for mutual legal assistance upon the Minister issuing a special direction under section 18 of the Mutual Assistance in Criminal Matters Act, as described in the introduction to chapter IV of this report. The execution of the assistance would then be processed in accordance with the Mutual Assistance in Criminal Matters Act.

941. Malaysia has implemented this provision.

Article 47 Transfer of criminal proceedings

States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

(a) Summary of information relevant to reviewing the implementation of the article

942. Malaysia indicated that it has not implemented the article.

(b) Observations on the implementation of the article

943. While the International Transfer of Prisoners Act 2012 [Act 754] had been passed by Parliament at the time of the country visit and was to be gazetted in the immediate future, the Act did not appear to make provision for the transfer of criminal proceedings.

944. Officials in the Attorney General's Chambers explained that internal consultations were held on the need to enact legislation on the transfer of proceedings. The officials further explained that a first step had been the enactment of the Transfer of Prisoners law and that more formal consideration would be given to the enactment of an appropriate law on the transfer of proceedings in the future.

Article 48 Law enforcement cooperation

Paragraph 1

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

(b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

(i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;

(ii) The movement of proceeds of crime or property derived from the commission of such offences;

(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;

(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

945. Malaysia indicated that its law does not prohibit informal direct communication.

946. The Malaysian Anti-Corruption Commission has signed bilateral and multilateral Memoranda of Understanding (MoU) with the following competent authorities that provide for, *inter alia*, direct law enforcement cooperation between MACC and foreign agencies:

- MoU with Anti-Corruption Bureau, Brunei
- MoU with Commission on Human Rights and Administrative Justice of Ghana
- MoU with Government Inspectorate of Vietnam
- MoU with Authority Control Agencies of Egypt
- MoU with Republic of Kyrgyzstan
- MoU with National Anti-Corruption Commission (NACC) Thailand.
- Through the South East Asia Parties Against Corruption (SEA-PAC) mechanism: Anti-Corruption Bureau Brunei, Corrupt Practices Investigation Bureau Singapore, Corruption Eradication Commission Indonesia, Government Inspectorate of Vietnam, National Anti-Corruption Commission Thailand, Anti-Corruption Agency of the Philippines, Anti-Corruption Agency of Laos, Anti-Corruption Unit of Cambodia.

It was explained that an MoU is not a pre-requisite for the sharing of information and for the MACC to extend its cooperation to other States.

947. For offences of money laundering, the Government of Malaysia has established cooperation by being a member of the following international and regional organizations:

1. The Asia-Pacific Group on Money Laundering
2. The Offshore Group of Banking Supervisors
3. Egmont Group of Financial Intelligence Units.

948. Section 10 of AMLATFA governs the exchange of information with foreign FIUs via formal channels where the Central Bank of Malaysia (BNM)/FIU has reasonable grounds that the information would be relevant relates to an investigation or the prosecution of a money laundering or a terrorism financing offence. Before any information is disclosed to the foreign FIU, BNM/FIU has to be satisfied that the appropriate undertaking for safeguarding the information has been given and the information will not be used as evidence in any proceedings.

949. As at 2 May 2012, the BNM/FIU had signed 35MoUs on the sharing of financial intelligence with the FIUs of the following countries:

- Australia (2002),
- Indonesia (2003),
- Philippines (2004),
- Thailand (2005),
- China (2006),
- South Korea (2007),
- Japan (2007),
- United Kingdom (2007),
- Sweden (2007),
- United States of America (2007),
- Chile (2007),
- Sri Lanka (2008),
- Brunei Darussalam (2008),
- Peru (2008),
- Bangladesh (2008),
- Canada (2008),
- India (2008),
- Cambodia (2009),
- New Zealand (2009),
- Hong Kong (2009),
- Singapore (2009),
- Cook Islands (2009),
- Vietnam (2009),
- France (2009),
- Mauritius (2009),
- Mongolia (2010),
- Fiji (2010),
- Qatar (2010),
- Solomon Islands (2010),
- Nigeria (2010),
- United Arab Emirates (2010),
- Nepal (2010),
- Macao (2011),
- Papua New Guinea (2011), and
- Turkey (2012).

950. Malaysia provided the following statistics on direct law enforcement cooperation (“Non-MLA”) and formal mutual legal assistance (“MLA”) by Malaysia from 2010-2012. It was explained that the statistics relating to formal mutual legal assistance in the tables below are also included in the statistics provided under article 46 of UNCAC above. Moreover, the numbers on direct law enforcement cooperation relate to assistance provided by MACC to its counterpart anti-corruption agencies in other countries. Police-to-police cooperation is not included.

In sum, the statistics on only Non-MLA (direct) law enforcement cooperation by MACC to other countries are as follows.

Year	Non-MLA
2010	18
2011	16
2012	4

**DIRECT LAW ENFORCEMENT COOPERATION BY MACC AND
MUTUAL LEGAL ASSISTANCE BY MACMA BRANCH
FOR THE YEARS 2010-2012**

The requests below pertain only to the investigation of corruption offences unless indicated with (*)

DIRECT LAW ENFORCEMENT COOPERATION BY MACC AND MUTUAL LEGAL ASSISTANCE ON INVESTIGATION BY MACMA BRANCH FOR THE YEAR 2010					
<i>No.</i>	<i>MLA</i>	<i>Non-</i>	<i>MLA & Non-</i>	<i>Requesting</i>	<i>Requested State</i>

		<i>MLA</i>	<i>MLA</i>	<i>State</i>	
1.	-	√	-	MACC (MACC HQ)	SINGAPORE (CPIB SINGAPORE)
2.	-	√	-	CPIB SINGAPORE	MALAYSIA
3.	-	√	-	MACC (MACC HQ)	NEW ZEALAND (INTERPOL)
4.	-	√	-	CPIB SINGAPORE	MALAYSIA
5.	-	√	-	MACC (MACC State)	THAILAND (National Anti-Corruption Commission & Consulate Office Songkhla)
6.	-	√	-	MACC (MACC State)	BRUNEI (ACB BRUNEI)
7.	-	√	-	ACB Brunei	MALAYSIA
8.	-	-	√	MACC (MACC HQ)	HONG KONG & CHINA
9.	-	√	-	CPIB SINGAPORE	MALAYSIA
10.	-	√	-	CPIB SINGAPORE	MALAYSIA
11.	-	√	-	CPIB SINGAPORE	MALAYSIA
12.	-	√	-	CPIB SINGAPORE	MALAYSIA
13.	-	-	√	MACC (MACC HQ)	SINGAPORE
14.	-	√	-	MACC (MACC HQ)	SINGAPORE
15.	-	√	-	MACC (MACC State)	BRUNEI (ACB BRUNEI)
16.	-	√	-	MACC (MACC HQ)	SINGAPORE (CPIB SINGAPORE)
17.	-	√	-	MACC (MACC State)	THAILAND (National Anti-Corruption Commission & Consulate Office Songkhla)
18.	√	-	-	MACC (MACC HQ)	UAE (Dubai)
19.	-	√	-	MACC (MACC HQ)	INDIA (New Delhi)
20.	-	√	-	ACB Brunei	MALAYSIA
21.	-	√	-	CPIB SINGAPORE	MALAYSIA
*22.	√	-	-	MACC (MACC HQ)	SINGAPORE & AUSTRALIA

*Note MLA Request pertaining to Anti-Money Laundering Offences.

The requests below pertain only to investigation of corruption offences unless indicated with (*)

DIRECT LAW ENFORCEMENT COOPERATION BY MACC AND MUTUAL LEGAL ASSISTANCE ON INVESTIGATION BY MACMA BRANCH FOR THE YEAR 2011					
<i>No.</i>	<i>MLA</i>	<i>Non- MLA</i>	<i>MLA & Non- MLA</i>	<i>Requesting State</i>	<i>Requested State</i>
1.	-	√	-	INTERPOL	MALAYSIA

				SINGAPORE	
2.	-	√	-	MACC (MACC HQ)	THAILAND (NACC) & SINGAPORE (CPIB)
3.	-	√	-	ACB Brunei	MALAYSIA
*4.	√	-	-	MACC (MACC HQ)	SINGAPORE
5.	-	√	-	MACC (MACC HQ)	SOUTH KOREA
6.	-	√	-	ACB Brunei	MALAYSIA
7.	-	√	-	ICAC HONG KONG	MALAYSIA
8.	-	√	-	MACC (MACC HQ)	TIMOR-LESTE (INTERPOL)
9.	-	√	-	ACB Brunei	MALAYSIA
10.	-	√	-	MACC (MACC HQ)	SINGAPORE (CPIB)
11.	-	√	-	MACC (MACC HQ)	SINGAPORE (INTERPOL) & INDONESIA (INTERPOL)
12.	-	√	-	KPK INDONESIA	MALAYSIA
13.	-	√	-	INTERPOL SINGAPORE	MALAYSIA
14.	-	√	-	MACC (MACC STATE)	INDONESIA (KPK)
15.	-	√	-	MACC (MACC STATE)	INDONESIA (INTERPOL)
16.	-	√	-	CPIB SINGAPORE	MALAYSIA
17.	-	√	-	MACC (MACC HQ)	SINGAPORE (CPIB)

* Note MLA Request pertaining to Anti-Money Laundering Offences.

All requests below pertain only to investigation of corruption offences.

DIRECT LAW ENFORCEMENT COOPERATION BY MACC AND MUTUAL LEGAL ASSISTANCE ON INVESTIGATION BY MACMA BRANCH FOR THE YEAR 2012					
<i>No.</i>	<i>MLA</i>	<i>Non- MLA</i>	<i>MLA & Non- MLA</i>	<i>Requesting State</i>	<i>Requested State</i>
1.	-	√	-	MACC (MACC HQ)	INDIA (CENTRAL BUREAU INVESTIGATION of INDIA, NEW DELHI)
2.	-	√	-	ICAC HONG KONG	MALAYSIA
3.	√	-	-	HONG KONG	MALAYSIA
4.	-	√	-	TRINIDAD & TOBAGO	MALAYSIA
5.	-	√	-	ACB Brunei	MALAYSIA

951. Malaysia indicated that it has a database through which information can be shared. In addition to INTERPOL's I-24/7 database, MACC is given access to law enforcement databases of the Malaysian Road Transport Department, the National Registration Department, Companies Commission of Malaysia, Employees Provident Fund and Immigration Department of Malaysia.

952. Regarding subparagraph 1(c), Malaysia reported that information that is provided by the BNM/FIU is usually in the form of intelligence only based on the analysis of STRs/CTRs received from domestic reporting institutions (RIs). In respect of domestic reporting of Suspicious Transaction Reports/Cash Transaction Reports (STRs/CTRs), the MACC has entered into an MoU with the Central Bank of Malaysia that provides for the secure and rapid exchange of information concerning corruption offences.

953. Regarding subparagraph 1(d) Malaysia cited the MoU of the SEA-PAC mechanism as well as the agreements of the BNM/FIU, and provided the following information:

a. Exchange of information for corruption offences:

The exchange of information with other State Parties as regards specific means and methods offences of corruption is provided for under bilateral and multilateral agreements/MoUs between the Malaysian Anti-Corruption Commission (MACC) and other regional anti-corruption agencies and authorities of Brunei Darussalam, Singapore, and Indonesia as well as the SEA-PAC mechanism.

Note: Under section 29 (4) of MACCA, the disclosure of information received by the Commission to any person is made only with the consent of the Public Prosecutor or an officer of the Commission of the rank of Commissioner and above.

b. Exchange of information on offences of money laundering:

This is provided for under sections 9 and 10 of AMLATFA:

“Section 9. Authorisation to release information

(1) Subject to subsection (2), the competent authority may, in writing, authorize any enforcement agency or its designated officers to have access to such information as the competent authority may specify for the purposes of performing the enforcement agency’s functions.

(2) In respect of any information received from a reporting institution carrying on any business activity listed under Part II of the First Schedule, the competent authority shall authorize Labuan Offshore Financial Services Authority or its designated officers to have access to that information.

(3) The competent authority may, in writing, authorize the Attorney General or his designated officer to have access to such information as the competent authority may specify for the purpose of dealing with a foreign State’s request in relation to mutual assistance in criminal matters.

Section 10. Disclosure to corresponding authority of foreign State.

(1) The Minister may enter into an agreement or arrangement, in writing, with the government of a foreign State regarding the exchange, between the competent authority and any corresponding authority of that foreign State, of information that the competent authority or the corresponding authority has reasonable grounds to suspect would be relevant to the investigation or the prosecution of a money laundering offence or a terrorism financing offence or an offence that is substantially similar to either offence.

(2) The competent authority may enter into an agreement or arrangement, in writing, with a corresponding authority of a foreign State regarding the exchange, between the competent authority and that corresponding authority, of information that the competent authority or the corresponding authority has reasonable grounds to suspect would be relevant to the investigation or the prosecution of a money laundering offence or a terrorism financing offence or an offence that is substantially similar to either offence.

(3) Notwithstanding any other written law or rule of law, the competent authority may communicate any information reported to it under section 14 to a corresponding authority of a foreign State if-

(a) the competent authority has reasonable grounds to suspect that the information would be relevant to the investigation or prosecution of a money laundering offence or a terrorism financing offence or an offence that is substantially similar to either offence; and

(b) either-

(i) the Minister has, in accordance with subsection (1), entered into an agreement or arrangement with that foreign State regarding the exchange of such information; or

(ii) the competent authority has, in accordance with subsection (2), entered into an agreement or arrangement with that corresponding authority regarding the exchange of such information, under which the

corresponding authority of the foreign State has agreed to communicate to the competent authority, upon the competent authority's request, information received by the corresponding authority that corresponds to any information required to be reported to the competent authority under section 14; and

(c) the competent authority is satisfied that the corresponding authority has given appropriate undertakings-

(i) for protecting the confidentiality of any thing communicated to it; and

(ii) for controlling the use that will be made of it, including an undertaking that it will not be used as evidence in any other proceedings.

(4) The competent authority shall record in writing the reasons for all decisions made under paragraph (3)(a) to communicate any information.

(5) In this section, "corresponding authority", in relation to a foreign State, means the authority of that foreign State responsible for receiving information that corresponds to any information required to be reported to a competent authority under section 14."

954. Regarding subparagraph 1(e) Malaysia cited the MoU of the SEA-PAC mechanism. Malaysia reported that in its law enforcement authorities, there are three liaison officer positions established by bilateral/unilateral agreements. These positions are located in the Malaysian Anti-Corruption Commission, the Central Bank of Malaysia and the Royal Malaysia Police as follows:

A. For the Malaysian Anti-Corruption Commission:

Director, Policy Research and Planning Division for the Anti-Corruption Agency Malaysia (now the Malaysian Anti-Corruption Commission):

i) Head of International Relation Branch of Malaysian Anti-Corruption Commission (for matters pertaining to UNCAC, APEC, Foreign Delegations etc.)

ii) Head of Mutual Assistance In Legal Criminal Matters Unit of Malaysian Anti-Corruption Commission (for matters pertaining to MLA)

iii) INTERPOL Secondment of Malaysian Anti-Corruption Commission officer at INTERPOL

B. For the Central Bank of Malaysia:

Director Financial Intelligence Unit.

C. For the Royal Malaysia Police/INTERPOL National Central Bureau (NCB) for Malaysia:

Inspector General Royal Malaysia Police.

The liaison officers have the following tasks:

1. The tasks of the liaison officers in the MACC are to:

- handle mutual legal assistance matters.
- handle all the attachment/ training/ officials visits/ presenting papers/ exchange information
- act as secretariat for APEC ACT WG / IAACA/ SEA-PAC / ADB OECD / UNCAC / INTERPOL on policy as requested by any country.

2. The tasks of the Financial Intelligence Unit (FIU) of the Central Bank of Malaysia are to enforce the Anti-Money Laundering Act 2001 and to cooperate with other countries in the global fight against money laundering and other serious crimes. Besides that, the FIU's function is to carry out the roles and functions set out in the Anti-Money Laundering Act, spearhead national efforts in combating money laundering and serious crimes by providing value added contributions to national and international supervisory/enforcement agencies, formulate and implement comprehensive national anti-money laundering regime, promote awareness of money laundering and terrorism financial issues and the AMLA, and act as Secretariat to, and coordinate, the NCC's initiatives.

3. The National Central Bureau (NCB) / INTERPOL Malaysia is the designated contact point for the INTERPOL General Secretariat, regional bureau and other member countries requiring assistance with overseas investigations and the location and apprehension of fugitives.

Examples of the exchange of personnel and other experts by Malaysia are as follows:

- SEA-PAC has participated in a capacity-building exchange programme at the Malaysian Anti-Corruption Academy (MACA) since the Academy was established. In addition, Malaysia also sent its officer for attachment to SEA-PAC countries.
- The Malaysian Anti-Corruption Commission, through the MACA as the training provider for the Malaysian Technical Cooperation Programme (MTCP), provides courses on anti-corruption capability and capacity-building training for other States. In addition MACA in collaboration with UNDP has developed anti-corruption capability and capacity-building training courses for the OIC member countries.
- Malaysia also joined the Asia Pacific Group (APG)'s Technical Assistance Donor and Provider Group (DAP) to provide AML/CFT technical assistance and training to Cambodia, Lao PDR, Myanmar and Vietnam to expedite their implementation of the global AML/CFT standards. The assistance provided under the DAP programme mainly relates to establishing financial units as well as formulating and implementing comprehensive national AML/CFT programmes.

955. Regarding subparagraph 1(f) Malaysia reported that there are no restrictions as regards information exchange on the early identification of offences covered by the Convention.

1. It is not necessary that an act of corruption has been committed to constitute an offence under MACCA. Attempts and acts preparatory to or in furtherance of the commission of any offence are offences themselves. Hence, information gathered or reported to the MACC regarding such attempts or preparatory acts of corruption offences may be exchanged with other States according to the bilateral MoUs MACC has entered into with its counterparts.

- Under section 28 (a) and (b) of MACCA, any person who does any act preparatory to or in furtherance of the commission of any offence under Act 694 commits an offence.

“Attempts, preparations, abetments and criminal conspiracies punishable as offence

28. (1) Any person who-

(a) attempts to commit any offence under this Act;

(b) does any act preparatory to or in furtherance of the commission of any offence under this Act; or

(c) abets or is engaged in a criminal conspiracy to commit any offence under this Act, commits such offence and shall on conviction be liable to the punishment provided for such offence.

(2) Any provision of this Act which contains a reference to an offence under any specific provision of this Act shall be read as including a reference to an offence under subsection

(1) in relation to the offence under that specific provision.

(3) Paragraph (1)(a) shall not apply where an attempt to do any act is expressly made an offence under this Act, and paragraph (1)(c) shall not apply to the case of an abetment of an offence as provided for under section 164 of the Penal Code.”

2. It is an obligation to report suspicious transactions under AMLATFA:

- Under Regulation 2 of the Anti-Money Laundering and Anti-Terrorism (Reporting Obligations) Regulations 2007, upon invocation of paragraph 14 (b) of AMLATFA, a reporting institution shall promptly report to the competent authority (namely, the FIU of the Central Bank of Malaysia) any attempted transaction or transactions where the identity of the persons involved, the transaction itself or circumstances concerning that

transaction, gives any officer or employee of the reporting institution reason to suspect that the transaction involves proceeds of an unlawful activity, regardless of the amount of the transaction. Such information may be used for purpose of dealing with a foreign State's request in relation to mutual assistance in criminal matters under section 9 (3) of Act 613 or exchanged with other FIUs of corresponding foreign States under section 10 of Act 613.

AMLATFA

9. Authorization to release information

(1) Subject to subsection (2), the competent authority may, in writing, authorize any enforcement agency or its designated officers to have access to such information as the competent authority may specify for the purposes of performing the enforcement agency's functions.

(2) In respect of any information received from a reporting institution carrying on any business activity listed under Part II of the First Schedule, the competent authority shall authorize Labuan Offshore Financial Services Authority or its designated officers to have access to that information.

(3) The competent authority may, in writing, authorize the Attorney General or his designated officer to have access to such information as the competent authority may specify for the purpose of dealing with a foreign State's request in relation to mutual assistance in criminal matters.

10. Disclosure to corresponding authority of foreign State

(1) The Minister may enter into an agreement or arrangement, in writing, with the government of a foreign State regarding the exchange, between the competent authority and any corresponding authority of that foreign State, of information that the competent authority or the corresponding authority has reasonable grounds to suspect would be relevant to the investigation or the prosecution of a money laundering offence or a terrorism financing offence or an offence that is substantially similar to either offence.

(2) The competent authority may enter into an agreement or arrangement, in writing, with a corresponding authority of a foreign State regarding the exchange, between the competent authority and that corresponding authority, of information that the competent authority or the corresponding authority has reasonable grounds to suspect would be relevant to the investigation or the prosecution of a money laundering offence or a terrorism financing offence or an offence that is substantially similar to either offence.

(3) Notwithstanding any other written law or rule of law, the competent authority may communicate any information reported to it under section 14 to a corresponding authority of a foreign State if-

(a) the competent authority has reasonable grounds to suspect that the information would be relevant to the investigation or prosecution of a money laundering offence or a terrorism financing offence or an offence that is substantially similar to either offence; and

(b) either-

(i) the Minister has, in accordance with subsection (1), entered into an agreement or arrangement with that foreign State regarding the exchange of such information; or

(ii) the competent authority has, in accordance with subsection (2), entered into an agreement or arrangement with that corresponding authority regarding the exchange of such information, under which the corresponding authority of the foreign State has agreed to communicate to the competent authority, upon the competent authority's request, information received by the corresponding authority that corresponds to any information required to be reported to the competent authority under section 14; and

(c) the competent authority is satisfied that the corresponding authority has given appropriate undertakings-

(i) for protecting the confidentiality of any thing communicated to it; and

(ii) for controlling the use that will be made of it, including an undertaking that it will not be used as evidence in any other proceedings.

(4) The competent authority shall record in writing the reasons for all decisions made under paragraph (3)(a) to communicate any information. (5) In this section, "corresponding authority", in relation to a foreign State, means the authority of that foreign State responsible for receiving information that corresponds to any information required to be reported to a competent authority under section 14.

NOTE: Raw STRs are usually not given to the foreign FIU; instead detailed analysis of the STR is usually provided, and this includes information, findings based on

database and whether the subject is currently investigated by any law enforcement authorities in Malaysia.

Malaysia further cited the Anti-Money Laundering and Anti-Terrorism Financing (Reporting Obligations) Regulations 2007, Appendix II: International Federation of Accountants Paper on Anti-Money Laundering March 2004 (2nd Edition)- LIST OF INDICATORS OF POSSIBLE MONEY LAUNDERING adopted by Malaysian financial reporting institutions to report suspicious transactions.

Malaysia reported that covered entities for purposes of the FIU's Suspicious Transaction Reports are: financial institutions from the conventional, Islamic and offshore sectors; offshore listing sponsors and trading agents; stock and futures brokers; wholesale money changers; unit trust, investment fund, and futures fund managers; money lenders and pawnbrokers; money remitters; charge account and credit card issuers; insurance financial advisers; e-money issuers; leasing and factoring businesses; lawyers, public notaries, accountants, and company secretaries; licensed casinos and gaming outlets; registered estate agents; trust companies, and dealers in precious metals and stones.

Regarding the number of STRs received from domestic reporting authorities and time frame: 12,787 (2009); 16,636 (2010); 27,857 (2011); 7,962 (January to April 2012).

Number of STRs exchanged with Bank or competent authorities of foreign States and time frame: 1,486 (2009); 1,029 (2010); 2,324 (2011) and 991 (Jan-April 2012).

Money Laundering Criminal Prosecutions / Convictions:

- Prosecutions: 106 money laundering cases (from 2004-December 2010); 18 cases (2011); 3 cases (as at March 2012)
- Convictions: 15 convictions (from 2004-December 2010); 13 convictions (2011); 2 convictions (as at March 2012).

Assets forfeited: criminally: \$ 178,000 (from 2004 - December 2010); civilly: \$ 16.2 million (from 2004-December 2010). (Data for 2011 and 2012 are not available).

3. Malaysia has also entered into an Agreement on the Exchange and Establishment of Communication Procedures 2002, which provides for the exchange of information among the governments of the Republic of Philippines, the Republic of Indonesia and Malaysia to prevent the committing or furthering of all money laundering-related activities, among others.

(b) Observations on the implementation of the article

956. The MoUs cited are a good example of measures to enhance cooperation under subparagraph (1). The reviewers were satisfied, following discussions during the country visit with officials of the Malaysian Anti-Corruption Commission (MACC), that there is no need for an express provision in MACCA, which empowers the MACC to cooperate with foreign governments, agencies and international organizations, so that such MoUs are not challenged. Malaysian law enforcement authorities can and do regularly cooperate through MoUs, the inspector generals of police, and channels like INTERPOL and ASEANAPOL.

957. The introduction of the Malaysian Anti-Corruption Commission in this article is a welcome development, and the active role of the Commission in international cooperation

was noted. The direct cooperation between Malaysia's FIU and foreign FIUs as well as between MACC and other foreign counterparts was also noted.

958. Regarding subparagraph 1(d), the reviewers are in agreement that the cited MoUs and sections of AMLATFA provide a good avenue for the kind of cooperation referred in this subparagraph. The reviewers were satisfied following the country visit that the Malaysian law enforcement authorities can utilize existing channels of communication like MoUs, police chiefs and INTERPOL/ASEANAPOL for the exchange of information regarding specific means and methods used to commit offences, including the use of false identities, forged, altered or false documents and other means of concealing activities, either expressly or by necessary implication.

959. Regarding subparagraph 1(e), the reviewers find the establishment of a mutual assistance in criminal matters unit, and the secondment of an officer of the Commission to INTERPOL, as relevant for the implementation of this subparagraph. The capacity building exchange programmes are also relevant. The reviewers were satisfied, following the country visit, with the extent of cooperation between the MACC, the Central Bank's Financial Intelligence Unit, and the Royal Malaysia Police, on the one hand, and similar institutions of other States. They were also informed of the specialized units in the Royal Malaysia Police, as described further below.

960. Also regarding subparagraph 1(e), the reviewers note that the exchange of personnel and experts and capacity building exchange programmes help to enhance cross-border cooperation, especially for cooperation with agencies outside the South-East Asia region. They also encourage a common approach to address common issues or challenges.

961. It was explained, for example, that the FIU cooperates with competent agencies in two ways: first there is a sharing of information that comes into the possession of the FIU and affects the jurisdiction of another country; and secondly, cooperation with other FIUs in ongoing matters, including through the EGMONT network, which is also a source of information for outgoing requests. The FIU has in place 35 MoUs with other FIUs that allow it to engage in direct communication and exchange of information.

The following statistics on FIU-to-FIU cooperation were provided during the country visit.

Year	Incoming requests for exchange of information from other FIUs	
2011	27 requests from FIUs where no MoU was in place	44 requests from FIUs where MoUs were in place
2012	55 requests from FIUs where no MoUs were in place	50 requests from FIUs where MoUs were in place

Year	Outgoing Requests by Malaysia's FIU for exchange of information with other FIUs
2011	11
2012	44

962. Regarding the Royal Malaysia Police (RMP), it was reported that RMP has nine MoUs in place with ASEAN counterparts (Singapore, Indonesia, Thailand, Philippines,

Brunei, Cambodia, Vietnam, Laos and Myanmar), and with China, USA, Australia, UK, Iran and Bangladesh. An MoU with Korea is under negotiation and one with India is in the process of ratification. The RMP also engages in direct police-to-police cooperation in areas like narcotics and counter-terrorism through its National Central Bureau for INTERPOL. The RMP also receives and posts liaison officers with embassies and missions in other countries, in areas like narcotics and counter-terrorism, with countries such as Australia, Canada, New Zealand, Indonesia and Taiwan. RMP officers, like MACC and other law enforcement offices, also regularly participate in international conferences, seminars, exchange programmes and working groups. Joint trainings with foreign law enforcement officials are also conducted.

963. MACC regularly hosts and participates in international conferences, seminars, exchange programmes and working groups. MACC, through the Malaysian Anti-Corruption Academy (MACA), hosts and exchanges international staff through capacity and skills training programmes. MACC sends experts to other countries to train their officers, as it has done in Fiji for the Fiji anti-corruption commission. MACC also receives attachment officers from ACB Brunei, Indonesia's Corruption Eradication Commission (KPK), Vietnam's Government Inspectorate, and Bhutan's Anti-Corruption Commission. MACC further conducts customized training in the MACA, as it has done for the members of the European Union Police Mission (Eupol) in Afghanistan and Kazakhstan's anti-corruption agency. The MACA has also hosted trainings on the UNCAC Implementation Review Mechanism for governmental experts and focal points in two consecutive years, and has hosted annual meetings of the International Association of Anti-Corruption Authorities (IAACA) and the OECD/ADB Anti-Corruption Initiative. It will also host the upcoming meeting of SEAPAC. As further described below, the Anti-Corruption Bureau (ACB) of Brunei Darussalam and MACC regularly work together and have established an operational Working Group that meets annually on operative and case-related matters. The Chief Commissioner of MACC has been selected as a member of the Board of Governors of the International Anti-Corruption Academy (IACA) and as a Deputy Chairman of the Board, and MACC is also a member of IAACA. Statistics on cooperation between MACC and foreign counterparts and MoUs are included above.

964. Regarding subparagraph 1(f), the reviewers agree that the laws and institutions cited by Malaysia fulfill the requirement of this subparagraph, as they are capable of providing for early detection of crimes. The reviewers were further satisfied following the country visit that the Malaysian institutions exchange information and coordinate their activities with external agencies, or at least have in place the mechanism for such coordination and exchange of information whenever necessary.

965. Regarding specific examples of case related cooperation between Malaysia and foreign law enforcement agencies, the Royal Malaysia Police informed the review team of a specialized unit in the police that enforces the Dangerous Drugs (Forfeiture of Assets) Act. A case example was cited in which a drug trafficking offence had taken place outside of Malaysia. The Malaysian police conducted a domestic investigation at the request of the foreign jurisdiction under section 43 of the Act. In particular, assets from the offence located in Malaysia were pursued and confiscated. Similar cases were investigated at the request of authorities in Thailand, Singapore and Hong Kong, in which assets were seized based on a domestic investigation.

(c) Successes and good practices

966. Malaysia demonstrates that it has in place dedicated, specialized and skilled manpower who actively cooperate with their foreign counterparts. Dedicated training, capacity building and exchange programmes with other States, including through the Malaysian Anti-Corruption Academy centre of learning, are among the international good practices for information exchange, international cooperation, and the prevention of corruption domestically and internationally. The Malaysian law enforcement agencies, in particular MACC, the Royal Malaysia Police, the Attorney General's Chambers and the FIU, exhibit a high level of commitment to the fight against corruption and cooperation internationally, and to fully implement the principles of the Convention, in particular at the leadership levels of the agencies, and this commitment is reflected at all levels of the organizations.

967. The operational working group with Brunei is a good case example of how law enforcement cooperation among countries at the policy and operational level can enhance the fight against corruption which transcends boundaries.

Article 48 Law enforcement cooperation

Paragraph 2

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

(a) Summary of information relevant to reviewing the implementation of the article

968. Malaysia has not used the Convention as a legal basis for mutual law enforcement cooperation. However, in principle Malaysia could accept the Convention in the same manner as for extradition and mutual legal assistance, as described in the introduction to chapter IV of this report. The execution of the assistance would then be processed in accordance with Malaysian legislation, namely, the Mutual Assistance In Criminal Matters Act 2002 (Act 621) and Extradition Act 1992 (Act 479), and the Summons and Warrants (Special Provisions) Act 1971 (Act 25). In addition, the Malaysian Anti-Corruption Commission has also entered into bilateral and multilateral arrangements with other anti-corruption agencies, as noted above.

969. Regarding cooperation with international and regional organizations, Malaysia is a member of the following:

- (a) Asia Pacific Economic Cooperation (APEC) Anti-Corruption and Transparency Working Group (ACT);
- (b) Asia-Pacific Group on Money Laundering (APGML).
- (c) APG Technical Assistance Donor and Provider Group (DAP)
- (d) Offshore Group of Banking Supervisors
- (e) Egmont Group of Financial Intelligence Units.

970. Other initiatives for promoting cooperation in which Malaysia is involved include the following:

- (a) INTERPOL
- (b) ADB/OECD Anti-Corruption Initiative for Asia and the Pacific
- (c) International Association of Anti-Corruption Authorities (IAACA)
- (d) Anti-Corruption Agency Forum Members (Malaysia, Korea, Hong Kong, Australia, Philippines, Indonesia).

971. As noted above, the BNM/FIU has signed 35 MoUs on the sharing of financial intelligence with foreign FIUs, and the Malaysian Anti-Corruption Commission has entered into bilateral and multilateral MoUs with foreign competent authorities.

(b) Observations on the implementation of the article

972. The reviewers are satisfied that the Malaysian Anti-Corruption Commission, Royal Malaysia Police and the Financial Intelligence Unit have entered into MoUs for direct law enforcement cooperation. Some copies of the MoUs were provided to the reviewers during the country visit.

Article 48 Law enforcement cooperation

Paragraph 3

3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.

(a) Summary of information relevant to reviewing the implementation of the article

973. Cooperation through the use of modern technology is provided by virtue of the following provisions:

1. Section 43 of MACCA pertaining to the Commission's power to intercept communications:

43. Power to intercept communications

(1) Notwithstanding the provisions of any other written law, the Public Prosecutor or an officer of the Commission of the rank of Commissioner or above as authorized by the Public Prosecutor, if he considers that it is likely to contain any information which is relevant for the purpose of any investigation into an offence under this Act, may, on the application of an officer of the Commission of the rank of Superintendent or above, authorize any officer of the Commission-

- (a) to intercept, detain and open any postal article in the course of transmission by post;
- (b) to intercept any message transmitted or received by any telecommunication; or
- (c) to intercept, listen to and record any conversation by any telecommunication, and listen to the recording of the intercepted conversation.

(2) When any person is charged with an offence under this Act, any information obtained by an officer of the Commission in pursuance of subsection (1), whether before or after such person is charged, shall be admissible at his trial in evidence.

(3) An authorization by the Public Prosecutor or an officer of the Commission of the rank of Commissioner or above as authorized by the Public Prosecutor under subsection (1) may be given either orally or in writing; but if an oral authorization is given, the Public Prosecutor or the officer of the Commission of the rank of Commissioner or above as authorized by the Public Prosecutor shall, as soon as practicable, reduce the authorization into writing.

(4) A certificate by the Public Prosecutor or the officer of the Commission of the rank of Commissioner or above as authorized by the Public Prosecutor stating that the action taken by an officer of the Commission in pursuance of subsection (1) had been authorized by him under that subsection shall be conclusive evidence that it had been so authorized, and such certificate shall be admissible in evidence without proof of signature thereof.

(5) No person shall be under any duty, obligation or liability, or be in any manner compelled, to disclose in any proceedings the procedure, method, manner or means, or any matter related thereto, of anything done under paragraph (1)(a), (b) or (c).

(6) For the purpose of this section, "postal article" has the same meaning as in the Postal Services Act 1991 [Act 465].

974. The following examples of implementation were provided:

- Between 17 and 19 February 2009, in a joint operation code named "Ops Jarum," the MACC cooperated with ACB Brunei to install concealed cameras in vehicles to record bribe transactions between undercover officers/undercover agents and Customs officials of Brunei. The case is further described under article 49 of UNCAC below.
- Between 12 and 26 May 2005, the MACC under "Ops Narko" assisted ACB Brunei to conduct polygraph tests against 12 individuals comprising of officers of the Brunei Anti-Narcotics Bureau and prison inmates to ascertain the veracity of their statements given to ACB Brunei officers investigating drug cases.

(b) Observations on the implementation of the article

975. The Royal Malaysia Police has a commercial crime unit that deals with cross-border investigations. During the country visit, a case example was given of a joint operation among the Taiwanese, Chinese and Malaysian police involving "spoofing," an economic crime where one person or programme successfully masquerades as another by falsifying data and thereby gains an illegitimate advantage. A syndicate from China and Taiwan had established its base in Malaysia where the spoofing occurred. On referral from the foreign authorities, the Royal Malaysia Police investigated the case under Malaysian law in a joint investigation with police from Taiwan and China. The suspects were deported under the Immigration Act.

976. The reviewers agree that Malaysia has demonstrated that there are legal measures in place that enable the implementation of this provision. Following the country visit the reviewers were satisfied that Malaysia can also cooperate with other States to respond to offences committed through a variety of cyber and electronic means and other modern technologies.

Article 49 Joint investigations

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

(a) Summary of information relevant to reviewing the implementation of the article

977. Malaysia reported that there is no specific provision for the setting up of joint investigative bodies under the Malaysian Anti-Corruption Act 2009 (Act 694). MACC has entered into a bilateral agreement for joint investigations with the Anti-Corruption Bureau (ACB) of Brunei Darussalam. There have been nine joint investigations between MACC and ACB Brunei from 2004 until 2012.

978. Concerning examples, in 2003 the MACC and ACB set up an "Operational Working Group" to meet high-level annually on policy issues, as well as a subworking group on operational or case-related issues. In a case in 2009 where MACC had submitted an official request to the ACB in Brunei Darussalam, to assist a MACC investigation by providing copies of documents from the Brunei Customs Department and arranging to record a statement from a Brunei Customs Officer. The evidence from the Brunei Custom Department was required as to completion of the MACC case. The case involved a company in Malaysia (ABC Sdn. Bhd.) submitting false documents regarding declaration of "Application Permit To Transship of Goods" for 15 units of containers (goods valued at RM10,000 for each container) to the Malaysia Custom Department. According to the contents of those documents, all the goods were only to be in transit to the District of Miri, Sarawak before being forwarded to a company owned by the same company in Brunei Darussalam. Later, evidence from Brunei Darussalam showed that all the goods had not been forwarded to Brunei Darussalam. Further, there was no existing company or firm of that particular name registered in Brunei Darussalam, and the address of the company, as stipulated in that particular customs document in Brunei Darussalam, was also falsified. Further investigation found that the purpose of doing this was that the company would be exempt from customs taxes by the Malaysia Custom Department. The case was concluded in a short period with collaboration from ACB, Brunei Darussalam. Finally, an instruction was given by the Deputy Public Prosecutor that a "Departmental Report" should be issued to the Malaysian Custom Department due to the internal weakness of systems and procedures in that department to detect any falsified customs documents. Some of the perpetrators were also charged with bribery of customs officials.

979. The Operational Working Group (OWG) empowers the setting up of joint investigative bodies between Malaysia and Brunei Darussalam. The OWG comprises officers from the investigation and intelligence divisions of MACC and ACB Brunei. As part of their joint investigations, Brunei and Malaysia conducted "Ops Jarum", a joint investigation to cripple the practice of accepting bribes in oil smuggling syndicates from Kuala Belait (Brunei) to Miri (Sarawak), through the Sungai Tujuh border post. A summary of the "Ops Jarum" investigation is as follows.

- Information received said that customs officials from Brunei Darussalam were accepting bribes from a syndicate involved in the smuggling of petrol and diesel from Brunei to Sarawak. Based from this information, a joint investigation team between ACU Brunei and MACC was set up.
- An intelligent-based investigation began with the use of two undercover MACC officers. The operation took place from 17 until 19 February 2009 and resulted in the arrest of 34 customs officers from Brunei. 21 of them were charged in the Brunei court and the rest of them have faced departmental action.

980. Between 2004 and 2012, nine joint investigation teams had been set up between Brunei and Malaysia:

1. Ops Pusing – 2004

2. Ops Satellite – 2004 – 2006
3. Ops Scar – 2008
4. Ops Jarum – 2008-2009
5. Ops Toll – 2008
6. Ops Kepak – 2009
7. Ops Cobra – 2010 - 2011
8. Ops Sewa – 2011
9. Ops 2K – 2011

(b) Observations on the implementation of the article

981. It is noted that Malaysia has experience conducting joint investigations in corruption cases at the international level. The operation with Brunei, which lasted three days and involved the use of special investigative techniques, is an illustration of this. The annual meetings of the Operational Working Group to review the need for establishing joint investigative teams in specific cases are also evidence of the implementation of this article.

982. The Royal Malaysia Police has a commercial crime unit that deals with cross border investigations. A case example of a joint operation among the Taiwanese, Chinese and Malaysian police involving the economic crime of “spoofing” is described under article 48 of UNCAC above.

(c) Successes and good practices

983. The observations made above are considered to be a good practice in the fight against corruption at the international level.

Article 50 Special investigative techniques

1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.

2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

(a) Summary of information relevant to reviewing the implementation of the article

984. Among the special investigative techniques provided under the law is section 43 of MACCA, which provides for the power to intercept communications. In addition, section 52²¹ allows the usage of undercover agents in any corruption investigation. The evidence of accomplices and agents provocateur is admissible in court under section 52 of MACCA.

985. As far as the FIU of the Central Bank of Malaysia is concerned, the Central Bank is an administrative FIU and the staff of the FIU does not engage in undercover operations.

986. A summary of certain cases is provided below.

• Abdul Rahman Suhaimi v Public Prosecutor [2012]1 CLJ 310

There was adequate evidence within the context of the first charge pertaining to the facts that the accused 'agreed to accept' the payment. Solicitation was not an ingredient of the charge. (para 4)

(2) Although the sessions judge did not specifically find whether SP3 was an accomplice, the evidence showed that SP3 was more of an agent provocateur. Whether a payer or a receiver was an accomplice depended entirely upon the facts of each particular case (Ng Kok Lian & Anor v. PP, rehd). A complainant was not an accomplice but a partisan witness if he reported to the Anti-Corruption Agency and an informer if he had participated in leading to the corrupt payment (Shaiful Idzam Sulaiman v. PP; Teja Singh & Mohamed Nasir v. PP, foll). He was also not an accomplice if he made himself an agent for the prosecution before the actual commission of the offence (Sathasivam and Two Ors v. PP, foll). (paras 8-12)

(3) The evidence showed that SP3 had made himself an agent for the prosecution for the purpose of disclosing corrupt practices and in the case involving the accused, it was before the actual perpetration of the offence. Hence, SP3's evidence did not require corroboration of the kind required of an accomplice. SP3's evidence was also amply corroborated by evidence. In addition, s. 44 of the Act was the lynchpin for the prosecution. (paras 13 & 14)

(4) There was overwhelming and convincing evidence that money did pass from SP3 to the accused who accepted it. The trial judge did not err in finding that the defence, being one of mere denial, was not probably true and failed to rebut the 312 [2012] 1 CLJ s. 42 presumption under the Act. Neither did the defence mount to an innocent explanation which the court could consider more likely than not to be true. (para 20)

(5) The inclusion of s. 34 of the Penal Code in the first charge did not occasion any miscarriage or failure of justice against the accused although the accused was the only one indicted on the first charge. Although Azizan who took part in the discussion on 20 December 1999 was not charged, it was entirely up to the discretion of the Public Prosecutor who to charge for the commission of an offence. Further, following the Court of Appeal decision in Msimanga Lesaly v. PP, s. 34 of the Penal Code did not create a substantive offence but was merely a rule of evidence to infer joint responsibility for a criminal act performed by a plurality of persons. From the line of defence taken by the accused, it was clear the he fully appreciated the nature of the prosecution's case without implicating Azizan or any other person. The inclusion of s. 34 in the first charge did not render the charge bad as it did not affect the nature and essence of the charge against the accused based on the evidence adduced against him. A conviction would be upheld despite the misdirection when the appellate court was satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. In the circumstances, there was sufficient evidence to support the conviction under the first charge and the error had not occasioned a failure of justice (PP v. Ishak Hj Shaari & Other Appeals, foll). (paras 21-24)

(6) On the consecutive sentences imposed, the sessions judge applied the right sentencing principles. However, as the offences under the second and third charges were a follow-up from the first charge and within the one transaction rule, the consecutive sentences should be substituted with concurrent sentences

²¹ Previously Section 44 of the repealed Anti-Corruption Act 1997 and Section 18 of the Prevention of Corruption Act 1961.

(Bachik Abdul Rahman v. PP, foll). That would be fair taking into consideration that the appellant was totally deprived of all his benefits and entitlements upon his conviction and that at the time of conviction, being 49 years of age, he was already near retirement. The concurrent sentences would be sufficient enough punishment and retribution to the accused apart from sending a strong deterrent signal to other would-be offenders of the same mind. (paras 27-29)

- Ng Kok Lian & Anor v. Public Prosecutor [1983]2 CLJ 247

The appellants were tried by the President, Sessions Court, Kuala Lumpur for giving a bribe to a public officer a sum of \$400 in Singapore currency, an offence under s. 3(b)(ii) of the Prevention of Corruption Act 1961 and were convicted and sentenced. The first appellant was sentenced to 3 months' imprisonment and fined RM4,000, and the second appellant was sentenced to one month's imprisonment and fined RM1,000. The appellants were convicted on the evidence of PW8, the public officer concerned to whom the appellants were alleged to have given the bribe. The appellants contended that PW8 was an accomplice because they were victims of PW8's fabrication and that "PW8 was the offender and culprit" and further his evidence was not corroborated. Therefore the appellants submitted that they should be entitled to an acquittal. Their appeal to the High Court against conviction and sentence was dismissed. They then applied for leave to refer to the Federal Court a number of questions of law which they thought were of public interest. But the Federal Court gave leave to raise only the question, whether the witness was, prima facie, an accomplice and if yes, whether there was a duty on the part of the trial Court to determine that such a witness was or was not an accomplice.

- Thavanathan Balasubramaniam v Public Prosecutor [1997] 3CLJ 150

The applicant, formerly a Magistrate attached to one of the Magistrate's Courts in Kuala Lumpur, was charged in the Sessions Court with two offences under ss. 3(a)(i) and 4(a) respectively of the Prevention of Corruption Act 1961 ('the Act'), for corruptly soliciting and accepting for himself a sum of RM15,000 as an inducement to acquit and discharge one Wong Sow Ying ('PW2') of a certain offence. The gratification was allegedly solicited and accepted by the applicant from PW4 through one Por Choo Aik ('PW3'). The facts showed that PW2 was charged before the applicant for an offence under s. 4A(a) of the Common Gaming Houses Act, 1953. Apparently, the applicant informed PW4, an interpreter of the Court, that PW2 could be discharged if there was an offer of RM15,000. A meeting then took place between the applicant, PW3 and PW4 at the Grand Pacific Hotel, Kuala Lumpur. Evidence inter alia showed that at the meeting, the applicant was smiling and nodding his head when PW3 and PW4 were discussing in Hokkien about the settlement of the gaming case. PW3 later reported the matter to the Anti Corruption Agency ('ACA') whereupon PW4 was apprehended by the ACA. PW4 agreed to co-operate with the ACA and undertook to see the applicant in his chambers to hand over to him RM15,000 of marked currency notes. This PW4 did, and the applicant was consequently arrested and charged as above. Testimonies given by the ACA officers ('PW5 and PW6') showed that in the chambers, the applicant was seen holding and dropping the money on the floor. The learned Sessions Judge acquitted the applicant of both charges without calling for the defence, ruling that no prima facie case had been made out against the applicant. On appeal, the High Court affirmed the acquittal respecting the first charge but allowed the appeal on the second charge under s. 4(a) ('the accepting charge'). However, following remittal for trial of the accepting charge to the Sessions Court, the applicant was again acquitted and discharged by the trial Court. The prosecution appealed whereupon the appellate Judge, allowing the appeal, convicted the applicant and sentenced him to three years' imprisonment and a fine of RM5,000 in default 12 months' imprisonment. The appellate Judge, in convicting the applicant aforesaid, took into account inter alia the evidence of the applicant smiling and nodding his head when he was meeting PW3 and PW4 at the coffee house of the Grand Pacific Hotel, Kuala Lumpur. This apart, the appellate Judge had also considered two passages in the judgment of the learned trial Judge, wherein the said trial Judge respectively (i) explained why PW3 reported the matter to the ACA and (ii) disclosed how PW4 turned a prosecution witness. The applicant alleged that the appellate Judge, in referring to these evidence, had improperly reopened the evidence on which the applicant had been acquitted, and so applied to refer the following question to the Federal Court under s. 66 Courts of Judicature Act 1964, to wit, "whether it is open to a second appellate Court to analyse, comment and take into account the evidence on a charge of which an accused person had been acquitted to support the conviction on a second remaining charge". The application was allowed and hence the hearing hereof. Before the Federal Court, the applicant repeated the allegation aforesaid. That apart, he also contended that the appellate Judge (i) was wrong in holding that PW4 was not an accomplice (ii) had misdirected himself by finding that there was corroboration. Evidence further showed that in the course of arguing the question referred, the point was raised as to the extent to which the evidence adduced at the trial could be reviewed.

The applicant argued that once a question of reference was allowed, the reference was a re-hearing and an applicant was entitled to deal with the entire evidence. The primary issues that arose were:

- (i) whether the evidence adduced at the trial below is open to review by the present Court; and if so
- (ii) whether the evidence pointed to a wrong conviction, such that the conviction ought to be reconsidered or corrected by the Federal Court.

987. Concerning bilateral or multilateral agreements or arrangements for using special investigative techniques at the international level, Malaysia cited MACCA, as well as the Operational Working Group (OWG) between ACB Brunei and MACC referred to above, which provides for special investigative techniques such as the use of undercover operations.

988. Malaysia indicated that it has not implemented paragraph 3 and does not, in the absence of an agreement or arrangement, use special investigative techniques at the international level.

989. Regarding the methods of special investigations (paragraph 4), Malaysia indicated that section 43 of MACCA provides for the power to intercept communications.

“43. Power to intercept communications

(1) Notwithstanding the provisions of any other written law, the Public Prosecutor or an officer of the Commission of the rank of Commissioner or above as authorized by the Public Prosecutor, if he considers that it is likely to contain any information which is relevant for the purpose of any investigation into an offence under this Act, may, on the application of an officer of the Commission of the rank of Superintendent or above, authorize any officer of the Commission-

- (a) to intercept, detain and open any postal article in the course of transmission by post;
- (b) to intercept any message transmitted or received by any telecommunication; or
- (c) to intercept, listen to and record any conversation by any telecommunication, and listen to the recording of the intercepted conversation.

(2) When any person is charged with an offence under this Act, any information obtained by an officer of the Commission in pursuance of subsection (1), whether before or after such person is charged, shall be admissible at his trial in evidence.

(3) An authorization by the Public Prosecutor or an officer of the Commission of the rank of Commissioner or above as authorized by the Public Prosecutor under subsection (1) may be given either orally or in writing; but if an oral authorization is given, the Public Prosecutor or the officer of the Commission of the rank of Commissioner or above as authorized by the Public Prosecutor shall, as soon as practicable, reduce the authorization into writing.

(4) A certificate by the Public Prosecutor or the officer of the Commission of the rank of Commissioner or above as authorized by the Public Prosecutor stating that the action taken by an officer of the Commission in pursuance of subsection (1) had been authorized by him under that subsection shall be conclusive evidence that it had been so authorized, and such certificate shall be admissible in evidence without proof of signature thereof.

(5) No person shall be under any duty, obligation or liability, or be in any manner compelled, to disclose in any proceedings the procedure, method, manner or means, or any matter related thereto, of anything done under paragraph (1)(a), (b) or (c).

(6) For the purpose of this section, “postal article” has the same meaning as in the Postal Services Act 1991 [Act 465].”

(b) Observations on the implementation of the article

990. Both MACC and the Royal Malaysia Police make use of special investigative techniques in accordance with their domestic law (e.g., Criminal Procedure Code, Malaysian Security Act, and MACCA) and upon request in particular cases (such as the joint investigation with Brunei mentioned above). These techniques can and are regularly employed in accordance with domestic law and procedures.

991. During the country visit, it was explained that evidence derived from electronic or other forms of surveillance and undercover operations is admissible in court as follows:
- Section 52 of MACCA (evidence of accomplice and agent provocateur) (quoted above)
 - Case of Mohd Ali Jaafar (admissibility of intercept communications)
 - All other evidence derived from surveillance and undercover operations is routinely admitted if the chain of custody is established, the activity was conducted in accordance with law and the quality of the evidence is substantially high.
992. It was further explained during the country visit that there are no issues concerning the admissibility in court of electronic and other evidence derived from special investigative techniques, which are admissible in a court of law in Malaysia under section 52 of MACCA and in accordance with the case authority (Mohd Ali Jaafar) cited above. The explanation given by the Malaysian authorities regarding the admissibility of evidence derived from special investigative techniques was deemed to be satisfactory.
993. Authorization from the Director of Public Prosecution is required to conduct wiretaps and, if obtained, evidence derived therefrom can be admissible if the technique was conducted lawfully. MACC has experience in conducting special investigative techniques internationally.
994. The provision under review specifically mentions controlled deliveries. The competent authorities in Malaysia are permitted to and have used controlled deliveries in narcotics cases.
995. During the country visit the review team was informed that Malaysian law enforcement authorities have entered into MoUs with ASEAN police agencies which allow the use of special investigative techniques, as well as a pending MOU with the police in India.
- (c) Successes and good practices**
996. The wide use and application of special investigative techniques in investigating corruption cases at the domestic and international level was noted and considered to be a good practice.

Country Report for the Review of Malaysia
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Annex 1

TABLE 1-ARTICLES 15,16,17,18,19&20 (Public Official)															
	2009					2010					2011				
MALAYSIAN ANTI-CORRUPTION COMMISSION ACT 2009 (ACT 694)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)
Section 16 - Offence of accepting gratification															
Sec 16 (a)(A)	16	1	0	0	0	4	3	0	0	1	14	0	7	0	3
Sec 16 (a)(B)	5	0	0	0	0	15	4	0	0	0	4	12	10	0	0
Sec 16 (b)(A)	1	0	0	0	0	2	0	0	0	1	2	0	0	0	0
Sec 16 (b)(B)	1	0	0	0	0	0	0	0	0	0	5	0	0	0	0
Section 17 - Offence of giving or accepting gratification by agent															
Sec 17 (a)	184	4	0	0	0	279	48	3	0	0	343	41	17	0	4
Sec 17 (b)	10	0	0	0	0	18	3	1	0	0	23	1	125	1	0
Section 18 - Offence of Intending to deceive principal by agent															
	89	2	0	0	0	135	3	0	0	0	144	1	5	0	0
Section 21- Bribery of officer of public body															
	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Section 22 - Bribery of foreign public officials	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Section 23 - Offence of using office or position for gratification	49	0	0	0	0	0	0	0	0	0	88	4	0	0	0
Section 36 (3)- Failure to explain excess property	0	0	0	0	0	2	0	0	0	0	4	1	0	0	0
	2009					2010					2011				
ANTI CORRUPTION ACT 1997 (ACT 575)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)
Section 10 - Offence of accepting gratification															
Sec 10 (a)(aa)	0	2	2	1	0	1	1	6	1	0	0	3	15	0	0
Sec 10 (a)(bb)	0	7	8	4	3	0	5	9	0	10	1	1	10	0	1
Sec 10 (b)(aa)	1	0	0	0	0	0	0	0	0	0	0	0	2	0	0
Sec 10 (b)(bb)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Section 11- Offence in giving or accepting gratification by agent															
Sec 11 (a)	30	50	24	26	7	3	22	28	38	0	6	5	32	0	2
Sec 11 (b)	1	1	0	1	1	0	0	1	0	0	0	1	8	0	0

Sec 11 (c)	64	14	4	7	1	22	21	23	14	0	5	2	9	0	0
Section 13- Corruptly procuring withdrawal of tender															
Sec 13 (a)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 13 (b)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Section 14- Bribery of officer of public body	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Section 15- Offence of using office or position for gratification	22	8	1	2	0	6	1	4	1	0	6	5	1	0	0
Section 32(3)- Failure to explain excess property	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	2009					2010					2011				
PREVENTION OF CORRUPTION ACT 1961 (ACT 57)															
	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)
Section 3- Punishment of corruption															
Sec 3 (a)(i)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 3 (a)(ii)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 3 (b)(i)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 3 (b)(ii)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Section 4- Punishment of corrupt transactions with agents															
Sec 4 (a)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 4 (b)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 4 (c)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Section 7- Corruptly procuring withdrawal of tenders	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Section 8- Bribery of member of legislature	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Section 9- Bribery of member of public body	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	2009					2010					2011				
PENAL CODE (ACT 574)															
	Cases	Prosecuted	Convicted	A&D (dna)	A&D (dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted		A&D
Sec 161- Public servant taking a gratification, other than legal remuneration in respect of an official act	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Sec 162 - Taking a gratification in order, by corrupt or illegal means, to influence a public servant	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 163 - Taking a gratification, for the exercise of personal influence with a public servant	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 165 - Public servant obtaining any valuable things, without consideration, from person concerned in any proceeding or business transacted by such public servant	1	0	1	5	0	1	0	0	0	0	0	6	2	0	0
Sec 213 - Taking a gift, etc., to screen an offender from punishment	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 214 - Offering gift or restoration of property in consideration of screening offender	0	0	0	0	0	0	0	0	0	0	0	0	22	0	0

Sec 215 - Taking a gift to help to recover stolen property, etc	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 379 - Theft	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 403 - Dishonest misappropriation of property	2	0	0	0	0	0	0	0	0	0	0	1	2	0	0
Sec 404 - Dishonest misappropriation of property possessed by a deceased person at the time of his death	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 405 - Criminal breach of trust	3	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 406 - Punishment of criminal breach of trust	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 409 - Criminal breach of trust by public servant or agent	4	3	1	1	0	8	2	0	25	0	0	3	2	0	0
Sec 417 - Cheating	1	0	0	0	0	0	2	0	0	0	0	0	1	0	0
Sec 418 - Cheating with knowledge that wrongful loss may be thereby	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0

caused to a person whose interest the offender is bound to protect															
Sec 420 - Cheating and dishonestly inducing delivery of property	3	2	0	2	1	0	1	1	2	0	0	1	3	0	2
Sec 465 - Punishment for forgery	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 467 - Forgery of a valuable security or will	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 468 - Forgery for the purpose of cheating	0	1	1	0	0	0	0	0	0	0	0	0	0	0	0
Sec 471 - Using a genuine a forged document	1	0	0	2	0	0	0	0	0	0	0	0	1	0	0
Sec 472 - Making a possessing a counterfeit seal, plate, etc., with intent to commit a forgery punishable under section 467	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 473 - Making a possessing a counterfeit seal, plate, etc., with intent to commit a forgery	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

punishable otherwise															
Sec 474 - Having possessing of a valuable security or will known to be forged, with intent to use it as genuine.	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 475 - Counterfeiting a device or mark used for authenticating document described in section 467, or possessing counterfeit marked material	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 476 - Counterfeiting a device or mark used for authenticating documents other than those described in section 467 or possessing counterfeit marked material	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 477 A - Falsification of accounts	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
	2009					2010					2011				

CUSTOMS ACT 1967 (ACT 235)															
	Cases	Prosecuted	Convicted	A&D (dna)	A&D (dnaa)	Cases	Prosecuted	Convicted	A&D (dna)	A&D (dnaa)	Cases	Prosecuted	Convicted		A&D
Sec 137 (b) - Penalty for offering or receiving bribes	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

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Annex 2

TABLE 2-ARTICLES 21 & 22 (Private Sector)															
	2009					2010					2011				
MALAYSIAN ANTI-CORRUPTION COMMISSION ACT 2009 (ACT 694)	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa
Section 16 (a)(A)-soliciting or receiving gratification	30	0	0	0	0	25	3	0	0	0	0	0	0	0	0
Sec 16 (b)(A)- giving, promising or offering gratification	4	0	0	0	0	3	0	0	0	0	4	2	0	0	0
Sec 17(a)-accepting gratification by agent	24	1	0	0	0	17	2	0	0	0	24	0	0	0	0
Sec 17 (b)-giving or agreeing to give or offering gratification to agent	12	3	0	0	0	28	20	10	0	0	42	16	12	1	0
Sec 20 (a) - Corruptly withdrawal of tender by offering gratification	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Sec 20 (b)-Corruptly withdrawal of tender by soliciting/accepting gratification	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Section 18-Offence of intending to deceive principal by agent	55	0	0	0	0	79	0	0	0	0	74	0	0	0	0
ANTI CORRUPTION ACT 1997 (ACT 575)	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa
Section 10 (a)(aa)-soliciting or receiving gratification	4	16	0	10	6	0	3	10	9	1	0	1	2	0	0
Sec 10 (b)(aa)-giving, promising or offering gratification	6	2	0	1	1	0	0	0	0	0	0	1	0	0	0
Section 11(a)- accepting gratification by agent	5	3	1	2	0	1	1	1	1	0	0	0	0	0	0
Sec 11 (b)-giving or agreeing to give or offering gratification to agent	0	7	5	5	1	0	4	5	4	0	0	3	2	0	0
Section 11 (c)-offence of intending to deceive principal	24	10	1	0	0	10	0	2	2	0	0	3	3	0	0

Sec 13 (a)- corruptly withdrawal of tender by offering gratification	0	0	0	0	0	0	0	0	0	0	11	5	4	0	0
Sec 13 (b)-corruptly withdrawal of tender by soliciting /accepting gratification	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
PREVENTION OF CORRUPTION ACT 1961 (ACT 57)	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa
Sec 3(a) (i)-soliciting, receiving or agree to receive gratification	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 3 (b)(i)-giving, promising or offering gratification	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 4(a)-accepting gratification by agent	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Sec 4 (b)-giving gratification to agent	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 4(c)-offence of intending to deceive principal by agent	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 7(a)- corruptly procuring withdrawal of tender by offering gratification	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 7(b)-corruptly procuring withdrawal of tender by soliciting/accepting gratification	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
PENAL CODE (ACT 574)	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa
Sec 379 - Theft	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 403 - Dishonest misappropriation of property	0	0	0	0	0	0	0	0	0	0	0	1	1	0	0

Sec 404 - Dishonest misappropriation of property possessed by a deceased person at the time of his death	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 405 - Criminal breach of trust	1	0	0	0	0	1	0	0	0	0	0	0	0	0	0
Sec 406 - Punishment of criminal breach of trust	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 408 - Criminal breach of trust clerk or servant	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 409 - Criminal breach of trust by public servant or agent	1	0	0	0	0	5	0	0	0	0	6	0	0	0	0
Sec 417 - Punishment for cheating	1	0	0	0	0	0	0	0	0	0	0	3	0	0	0
Sec 418 - Cheating with knowledge that wrongful loss may be thereby caused to a person whose interest the offender is bound to protect	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Sec 420 - Cheating and dishonestly inducing delivery of property	2	2	0	0	1	0	0	0	0	0	1	3	1	0	0
Sec 465 - Punishment for forgery	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0
Sec 467 - Forgery of a valuable security or will	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0
Sec 468 - Forgery for the purpose of cheating	0	1	0	0	0	0	0	0	1	0	0	0	0	0	0
Sec 471 - Using a genuine a forged document	1	0	0	0	1	0	0	0	0	0	0	0	0	0	0
Sec 474 - Having possessing of a valuable security or will known to be forged, with intent to use it as genuine.	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 477 A - Falsification of accounts	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Annex 3

TABLE 5-ARTICLE 23 -subparagraph 1 (a)(i)/subparagraph 1 (a)(ii) / Subparagraph 1(b) (i)															
	2009					2010					2011				
	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)
MALAYSIAN ANTI-CORRUPTION COMMISSION ACT 2009 (ACT 694)															
Sec 26 - Dealing with, using, holding, receiving or concealing gratification or advantage in relation to any offence under Section 16,17,18,20,21,22 or 23	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ANTI-CORRUPTION ACT 1997 (ACT575)															
Sec 18-Dealing with, using, holding, receiving or concealing gratification or advantage in relation to an offence under Section 10,11,13,14 or 15	166	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ANTI-MONEY LAUNDERING & ANTI-TERRORISM FINANCING ACT 2001 (ACT 613)															
Sec 4 (1)(a) -engages in money laundering	6	1	0	0	1	5	1	1	0	0	27	2	0	0	0
Sec 51 (5)- contravening Sec 51 (2) or Sec 51 (3)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 51 (6)- contravening Sec 51 (1)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
PENAL CODE															

Sec 403 - Dishonest misappropriation of property	2	0	0	0	0	0	0	0	0	0	0	2	2	0	0
Sec 405 - Criminal breach of trust	5	0	0	0	0	3	0	0	0		1	0	0	0	0
Sec 406 - Punishment of criminal breach of trust	2	0	0	0	0	1	0	0	0	0	0	0	0	0	0
Sec 411 - Dishonestly receiving stolen property	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 412 - Dishonestly receiving property stolen in the commission of a gang-robbery	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 413 - Habitually dealing in stolen property	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 414 - Assisting in concealment of stolen property	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

TABLE 6 -ARTICLE 23 -subparagraph 1 (b) (ii) & ARTICLE 27 Para 1, 2, 3 & ARTICLE 28

	2009					2010					2011				
MALAYSIAN ANTI-CORRUPTION COMMISSION ACT 2009 (ACT 694)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)
Section 28 - Attempts, preparation, abetments and criminal conspiracies of offences under Sec 16,17,18,20,21,22 and 23	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0
ANTI-CORRUPTION ACT 1997 (ACT 575)															
Section20- Attempts, preparation, abetments, and criminal conspiracies of offences under Sec 10,11,13,14 or 15	0	0	0	1	0	0	0	0	1	0	0	0	0	0	0
Prevention of Corruption Act 1961 (Act57)															

Section 2- attempt and abetment of offences under Sec 3,4,5,7,8 or 9	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ANTI-MONEY LAUNDERING AND ANTI-TERRORISM FINANCIAL ACT 2001 (ACT 613)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)
Sec 4 (1)- Offences of money laundering	0	1	0	0	1	5	1	1	0	0	27	0	0	0	0
Sec 82 - Jurisdiction	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
EXTRADITION ACT 1992 (ACT 479)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)
Sec 6	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 32	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
PENAL CODE (ACT 574)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)
NOTE: ONLY APPLY TO PENAL CODE OFFENCES UNDER ARTICLES 15,16,17,18,19,21,22,23,25															
Sec 34 - Each of several persons liable for an act done by all, in like manner as if done by him alone	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 35 - When such an act is criminal by reason of its being done with a criminal knowledge or intention	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 37 - Co-operation by doing one of several acts constituting an offence	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Sec 38 - Several person engaged in the commission of a criminal act, may be guilty of different offences	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 108A - Abetment of offences outside Malaysia	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 109 - Punishment of abetment if the act abetted is committed in consequence, and where no express provision is made for its punishment	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 110 - Punishment of abetment if the person abetted does the act with a different from that of the abettor	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 116 - Abetment of an offence punishable with imprisonment	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 120 A - Punishment of criminal conspiracy	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Annex 4

TABLE 3- ARTICLE 23- Subparagraph 2(a) and 2(b)															
PRESCRIBED OFFENCES UNDER THE MALAYSIAN ANTI-CORRUPTION COMMISSION ACT 2009 (ACT 694)	2009					2010					2011				
	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)
Sec 137 Customs Act 1967 (Act 235)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Part III of the Election Offences Act	0	0	0	0	0	2	0	0	0	0	0	0	0	0	0
Penal Code Offences Specified in the Schedule as follows:															
Sec 161- Public servant taking a gratification, other than legal remuneration in respect of an official act	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0
Sec 162 - Taking a gratification in order, by corrupt or illegal means, to influence a public servant	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 163 - Taking a gratification, for the exercise of personal influence with a public servant	0	0	1	0	0	0	0	1	0	0	0	0	0	0	0

Sec 164 - Punishment for abetment by Public Servant of the offences defined above (Section 162 and Section 163)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 165 - Public servant obtaining any valuable things, without consideration, from person concerned in any proceeding or business transacted by such public servant	1	0	1	0	0	0	0	1	2	0	1	6	8	0	0
Sec 213 - Taking a gift, etc., to screen an offender from punishment	0	1	1	0	0	1	0	0	0	0	0	0	0	0	0
Sec 214 - Offering gift or restoration of property in consideration of screening offender	0	4	10	0	0	0	6	9	0	0	0	7	22	0	0
Sec 215 - Taking a gift to help to recover stolen property, etc	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 384 - Extortion	0	0	0	0	0	0	0	0	0	0	0	1	0	0	1
Sec 385 - Putting person in fear of injury in order to commit extortion	0	0	0	0	0	0	3	1	0	0	1	0	0	0	0
Sec 386 - Extortion by putting a person in fear of death or grievous hurt	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 388 - Extortion by threat of accusation of an offence punishable with	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

death, imprisonment, etc															
Sec 389 - Putting person in fear of accusation of offence, in order to commit extortion	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 403 - Dishonest misappropriation of property	2	0	0	0	0	0	0	0	0	0	0	2	2	0	0
Sec 404 - Dishonest misappropriation of property possessed by a deceased person at the time of his death	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 405 - Criminal breach of trust	5	0	0	0	0	4	0	0	0	0	1	0	0	0	0
Sec 406 - Punishment of criminal breach of trust	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 409 - Criminal breach of trust by public servant or agent	9	3	1	1	0	4	5	0	25	0	22	4	2	0	0
Sec 417 - Cheating	1	0	0	0	0	0	0	0	0	0	0	4	1	0	0
Sec 418 - Cheating with knowledge that wrongful loss may be thereby caused to a person whose interest the offender is bound to protect	0	0	0	0	0	0	4	0	0	0	0	0	1	0	0
Sec 419 - Punishment for cheating	0	0	0	0	0	0	1	0	0	0	0	2	0	0	0
Sec 420 - Cheating and dishonestly	9	7	1	3	3	1	3	3	4	1	1	8	3	0	2

inducing delivery of property															
Sec 465 - Punishment for forgery	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0
Sec 466 - Forgery of a record of a Court, or a public Register of Birth	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 467 - Forgery of a valuable security or will	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0
Sec 468 - Forgery for the purpose of cheating	2	3	1	0	0	1	0	0	2	0	0	1	0	0	0
Sec 471 - Using a genuine a forged document	1	1	0	2	2	0	0	0	0	0	3	1	1	0	0
Sec 472 - Making a possessing a counterfeit seal, plate, etc., with intent to commit a forgery punishable under section 467	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 473 - Making a possessing a counterfeit seal, plate, etc., with intent to commit a forgery punishable otherwise	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 474 - Having possessing of a valuable security or will known to be forged, with intent to use it as genuine.	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Sec 475 - Counterfeiting a device or mark used for authenticating document described in section 467, or possessing counterfeit marked material	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 476 - Counterfeiting a device or mark used for authenticating documents other than those described in section 467 or possessing counterfeit marked material	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 477 A - Falsification of accounts	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Serious Offences under Anti-Money Laundering and Anti-Terrorism Financing Act 2001 (Act 613) as follows:															
1. Malaysian Anti-Corruption Commission Act 2009 (Act 2009)															
Section 16 - Offence of accepting gratification	145	7	2	0	0	116	34	8	2	0	0	0	0	0	0
Section 17 - Offence of giving or accepting gratification by agent	278	8	3	0	0	652	200	74	1	0	0	0	0	0	0

Section 18 - Offence of Intending to deceive principal by agent	166	0	0	0	0	240	9	0	0	0	0	0	0	0	0
Section 19 - Acceptor or giver of gratification to be guilty notwithstanding that purpose was not carried out or not in relation to principle's affairs or business	1	3	2	0	0	0	1	2	2	0	0	0	0	0	0
Section 20 - Corruptly procuring withdrawal of tender	0	0	0	1	0	0	0	0	1	0	0	0	0	0	0
Section 21- Bribery of officer of public body	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Section 22 - Bribery of foreign public officials	0	0	0	0	0	0	0		0	0	0	0	0	0	0
Section 23 - Offence of using office or position for gratification	64	0	0	0	0	66	0	0	0	0	0	0	0	0	0
Sec 26 - Dealing with, using, holding, receiving or concealing gratification or advantage in relation to any offence.	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 28 - Attempts, preparation, abetments and criminal conspiracy	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0
2. Penal Code															

Sec 161- Public servant taking a gratification, other than legal remuneration in respect of an official act	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 162 - Taking a gratification in order, by corrupt or illegal means, to influence a public servant	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 163 - Taking a gratification, for the exercise of personal influence with a public servant	0	0	1	0	0	0	0	1	0	0	0	0	0	0	0
Sec 164 - Punishment for abetment by Public Servant of the offences defined above (Section 162 and Section 163)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 165 - Public servant obtaining any valuable things, without consideration, from person concerned in any proceeding or business transacted by such public servant	1	0	1	5	0	1	6	1	2	0	0	0	0	0	0
Sec 213 - Taking a gift, etc., to screen an offender from punishment	0	1	1	0	0	0	0	0	0	0	0	0	0	0	0
Sec 214 - Offering gift or restoration of property in consideration of	0	4	10	0	0	0	6	9	0	0	0	0	0	0	0

screening offender															
Sec 215 - Taking a gift to help to recover stolen property, etc	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 379 - Theft	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 381 - Theft by clerk or servant in possession of master	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 384 - Extortion	0	0	0	0	0	0	3	1	0	0	0	0	0	0	0
Sec 385 - Putting person in fear of injury in order to commit extortion	0	0	0	0	0	1	0	0	0	0	0	0	0	0	0
Sec 386 - Extortion by putting a person in fear of death or grievous hurt	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 388 - Extortion by threat of accusation of an offence punishable with death, imprisonment, etc	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 389 - Putting person in fear of accusation of offence, in order to commit extortion	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 403 - Dishonest misappropriation of property	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 404 - Dishonest misappropriation of property possessed by a deceased person at the time of his death	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Sec 405 - Criminal breach of trust	5	0	0	0	0	3	0	0	0	0	0	0	0	0	0
Sec 406 - Punishment of criminal breach of trust	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 409 - Criminal breach of trust by public servant or agent	9	30	1	1	0	15	5	0	25	0	0	0	0	0	0
Sec 417 - Cheating	1	0	0	0	0	0	4	0	0	0	0	0	0	0	0
Sec 418 - Cheating with knowledge that wrongful loss may be thereby caused to a person whose interest the offender is bound to protect	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 420 - Cheating and dishonestly inducing delivery of property	9	7	1	3	3	1	5	3	4	1	0	0	0	0	0
Sec 421 - Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 422 - Dishonest or fraudulent preventing from being made available for his creditor a debt or demand due to the offender	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 423 - Dishonest or fraudulent execution of deed of transfer containing a false of consideration	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Sec 465 - Punishment for forgery	0	0	1	0	0	0	0	0	0	0	0	0	0	0	0
Sec 466 - Forgery of a record of a Court, or a public Register of Birth	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 467 - Forgery of a valuable security or will	0	0	0	0	0	0	0	0	2	0	0	0	0	0	0
Sec 468 - Forgery for the purpose of cheating	2	3	1	0	0	0	0	0	2	0	0	0	0	0	0
Sec 471 - Using a genuine a forged document	1	1	0	2	2	0	0	0	0	0	0	0	0	0	0
Sec 472 - Making a possessing a counterfeit seal, plate, etc., with intent to commit a forgery punishable under section 467	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 473 - Making a possessing a counterfeit seal, plate, etc., with intent to commit a forgery punishable otherwise	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 474 - Having possessing of a valuable security or will known to be forged, with intent to use it as genuine.	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 475 - Counterfeiting a device or mark used for authenticating document described	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

in section 467, or possessing counterfeit marked material															
Sec 476 - Counterfeiting a device or mark used for authenticating documents other than those described in section 467 or possessing counterfeit marked material	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 477 A - Falsification of accounts	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

TABLE 4-ARTICLE 23- Subparagraph 2 (c)

	2009					2010					2011				
MALAYSIAN ANTI-CORRUPTION COMMISSION ACT 2009 (ACT 694)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)	Cases	Prosecuted	Convicted	(dna)	(dnaa)
Section 66- Liability for offences outside of Malaysia	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ANTI-MONEY LAUNDERING AND ANTI-TERRORISM FINANCING ACT 2001(ACT 613)															

Sec.82 - Jurisdiction	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
PENAL CODE															
Sec.3-Punishment of offences committed beyond , but which by law may be tried within Malaysia	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
EXTRADITION ACT 1992 (ACT 479)															
Sec.6	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

UNNO

Annex 5

TABLE 7-ARTICLE 24 (Offence of concealment or continued retention of property by persons not involved in crimes but know that the property is the result of offences)

	2009					2010					2011				
	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa
MALYSIAN ANTI-CORRUPTION COMMISSION ACT 2009 (ACT 694)															
Section 26-Dealing with, using, holding, receiving or concealing gratification or advantage in relation to any offence	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ANTI-MONEY LAUNDERING AND ANTI-TERRORISM FINANCING ACT 2001 (ACT 613)															
Section 4-Offence of money laundering	6	1	0	0	1	5	1	1	0	0	0	0	0	0	0
PENAL CODE															
Section 411- Dishonestly receiving stolen property	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Section 413- Habitually dealing in stolen property	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Annex 6

TABLE 8-ARTICLE 25 (use of physical force, threats, or intimidation or the promise, offering, or giving of an undue advantage to induce false testimony or the production of evidence in a proceeding)															
	2009					2010					2011				
	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa
MALAYSIAN ANTI-CORRUPTION COMMISSION ACT 2009 (ACT 694)															
Section 16 - Offence of giving, promising, or offering gratification															
Sec .16 (b)(A)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec .16 (b)(B)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Section 21-Bribery of officer of public body	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Section 48 - Obstruction of investigation and search	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ANTI-CORRUPTION ACT 1997 (ACT 575)	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa
Section 10-Offence of giving, promising or offering gratification															
Sec. 10 (b) (aa)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec. 10 (b) (bb)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Section 14- Bribery of officer of public body	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Section 29- Obstruction of investigation and search	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
PREVENTION OF CORRUPTION ACT 1961	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa

(ACT57)															
Section 3- Offence of giving, promising or offering gratification															
Sec.3 (b) (i)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec.3 (b) (ii)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Section 9 - Bribery of member of public body	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Section 10- Obstruction of search	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
PENAL CODE (ACT 574)	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa
Sec 189 - Threat of injury to a public servant	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 200 - Using as true any such declaration known to be false	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 201 - Causing disappearance of evidence of an offence committed, or giving false information touching it, to screen the offender	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 209 - Giving false information respecting an offence committed	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Sec 228 - Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 353 - Using criminal force to deter a public servant from discharge of his duty	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 506 - Punishment for criminal intimidation	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 507 - Criminal intimidation by an anonymous communication	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ANTI-MONEY LAUNDERING AND ANTI-TERRORISM FINANCIAL ACT 2001 (ACT 613)	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	A&D dna	A&D dnaa	Cases	Prosecuted	Convicted	dna	dnaa
Section 34-Obstruction to exercise of powers by an investigating officer	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
ABDUCTION AND CRIMINAL INTIMIDATION OF WITNESS ACT 1947	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	A&D dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa
Section 4 - Abduction impeding the course of justice	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
COMMUNICATIONS AND MULTIMEDIA ACT 1998 (ACT	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa

588)															
Section 233 - Improper use of network facilities or network service	0	0	0	0	0	0	1	1	0	0	0	0	0	0	0

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Annex 7

TABLE 9-ARTICLE 26 - Paragraph 1 & 2 (Liability of Legal Persons)												
	2009				2010				2011			
MALAYSIAN ANTI-CORRUPTION COMMISSION ACT 2009 (ACT 694)	Cases	Prosecuted	Convicted	A&D	Cases	Prosecuted	Convicted	A&D	Cases	Prosecuted	Convicted	A&D
Sec. 16 - Offence of accepting gratification	0	0	0	0	0	0	0	0	0	0	0	0
Sec.17- Offence of giving or accepting gratification by agent	0	0	0	0	0	0	0	0	0	0	0	0
Sec.23- Offence of using office or position for gratification	0	0	0	0	0	0	0	0	0	0	0	0
Anti-Corruption Act 1997 (Act 575)	Cases	Prosecuted	Convicted	A&D	Cases	Prosecuted	Convicted	A&D	Cases	Prosecuted	Convicted	A&D
Sec.10- Offence of accepting gratification	0	0	0	0	0	0	0	0	0	0	0	0
Sec. 11 (a)Offence of accepting gratification by agent	0	0	0	0	0	0	0	0	0	0	0	0
Sec.11 (b)-Offence of giving gratification to agent	0	0	0	0	0	0	0	0	0	0	0	0
PREVENTION OF CORRUPTION ACT 1961 (ACT 57)												
Sec.3- Punishment of corruption	0	0	0	0	0	0	0	0	0	0	0	0
Sec.4 (a)-offence of offering gratification to agents	0	0	0	0	0	0	0	0	0	0	0	0
Sec.4 (b)-offence of intending to deceive principal by agents	0	0	0	0	0	0	0	0	0	0	0	0

CUSTOMS ACT 1967 (ACT 235)	Cases	Prosecuted	Convicted	A&D	Cases	Prosecuted	Convicted	A&D	Cases	Prosecuted	Convicted	A&D	
Sec 137 - Penalty for offering or receiving bribes	0	0	0	0	0	0	0	0	0	0	0	0	
Sec 140 - Offences by bodies of persons and by servants and agents	0	0	0	0	0	0	0	0	0	0	0	0	
COMPANIES ACT 1965 (ACT125)	Cases	Prosecuted	Convicted	A&D	Cases	Prosecuted	Convicted	A&D	Cases	Prosecuted	Convicted	A&D	
Sec 46 - Civil liability for misstatement in prospectus	0	0	0	0	0	0	0	0	0	0	0	0	
Sec 47 - Criminal liability for statement	0	0	0	0	0	0	0	0	0	0	0	0	
Sec 131A - Interest director not to participate or vote	0	0	0	0	0	0	0	0	0	0	0	0	
Sec 364(A) - False reports	0	0	0	0	0	0	0	0	0	0	0	0	
Sec 364(1) - False and misleading statements	0	0	0	0	0	0	0	0	0	0	0	0	
Sec 366 - Fraudulently inducing persons to invest money	0	0	0	0	0	0	0	0	0	0	0	0	
Sec 368 - Fraud by officers	0	0	0	0	0	0	0	0	0	0	0	0	
					0	0	0	0	0	0	0	0	
ANTI-MONEY LAUNDERING AND ANTI-TERRORISM FINANCIAL ACT 2001 (ACT 613)	Cases	Prosecuted	Convicted	A&D	Cases	Prosecuted	Convicted	A&D	Cases	Prosecuted	Convicted	A&D	
Sec 4 - Offences of money laundering	0	0	0	0	0	0	0	0	0	0	0	0	

Sec 87-Offence committed by any person acting in an official capacity	0	0	0	0	0	0	0	0	0	0	0	0
PENAL CODE (ACT 574)	Cases	Prosecuted	Convicted	A&D	Cases	Prosecuted	Convicted	A&D	Cases	Prosecuted	Convicted	A&D
Sec 379 - Theft	0	0	0	0	0	0	0	0	0	0	0	0
Sec 403 - Dishonest misappropriation of property	0	0	0	0	0	0	0	0	0	0	0	0
Sec 404 - Dishonest misappropriation of property possessed by a deceased person at the time of his death	0	0	0	0	0	0	0	0	0	0	0	0
Sec 405 - Criminal breach of trust	0	0	0	0	0	0	0	0	0	0	0	0
Sec 406 - Punishment of criminal breach of trust	0	0	0	0	0	0	0	0	0	0	0	0
Sec 408 - Criminal breach of trust clerk or servant	0	0	0	0	0	0	0	0	0	0	0	0
Sec 409 - Criminal breach of trust by public servant or agent	0	0	0	0	0	0	0	0	0	0	0	0
Sec 417 - Punishment for cheating	0	0	0	0	0	0	0	0	0	0	0	0
Sec 418 - Cheating with knowledge that wrongful loss may be thereby caused to a person whose interest the offender is bound to protect	0	0	0	0	0	0	0	0	0	0	0	0
Sec 420 - Cheating and dishonestly inducing delivery of property	0	0	0	0	0	0	0	0	0	0	0	0
Sec 465 - Punishment for forgery	0	0	0	0	0	0	0	0	0	0	0	0

Sec 467 - Forgery of a valuable security or will	0	0	0	0	0	0	0	0	0	0	0	0
Sec 468 - Forgery for the purpose of cheating	0	0	0	0	0	0	0	0	0	0	0	0
Sec 471 - Using a genuine a forged document	0	0	0	0	0	0	0	0	0	0	0	0
Sec 474 - Having possessing of a valuable security or will known to be forged, with intent to use it as genuine.	0	0	0	0	0	0	0	0	0	0	0	0
Sec 477 A - Falsification of accounts	0	0	0	0	0	0	0	0	0	0	0	0

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Tables 14 and 15 - Article 30 para 1

STATISTICS ON FINES IMPOSED - CORRUPTION OFFENCES

RM	2009	2010	2011	2012
< RM 10,000.00	5	61	106	58
RM 10,001-RM15,000	0	4	6	5
RM15001-RM20,000	0	8	11	2
RM20,001-RM25,000	0	1	5	2
RM25,001-RM30,000	0	3	2	3
RM30,001-RM 60,000	0	2	3	1
RM60,001-RM90,000	0	4	2	2
RM90,001-RM1,000,000	0	0	17	3
> 1 Mil	0	0	0	0
TOTAL	5	83	152	76

STATISTICS ON IMPRISONMENT IMPOSED - CORRUPTION OFFENCE

	2009	2010	2011	2012
< 1 week	0	32	77	40
1 week - 1 year	5	44	67	25
1 year - 3 years	0	5	9	3
3 years- 6 years	0	1	6	0
6 years- 9 years	0	0	0	0
9 years - 12 years	0	0	0	0
> 12 years	0	0	0	0
TOTAL	5	82	159	68

Unit Statistik

Bahagian Pengurusan Rekod & Teknologi Maklumat

Suruhanjaya Pencegahan Rasuah Malaysia

18.05.2012

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TABLE 11-ARTICLE 30- Para 6,7,8

OFFENCES	YEAR 2009			
	Federal Authorities	Civil Service	Local Authorities	TOTAL
Absent from Duty	85	85	210	1078
Drug Offence				
Dangerous Drug Act 1952	7	6	7	62
Drug Addiction Act (Treatment and Rehabilitation)	0	0	0	2
Breach of code of conduct				
Gift / Entertainment	1	2	0	7
Ownership property	0	0	0	78
Maintaining a standard of living beyond emoluments and legitimate private means	0	1	0	3
Serious pecuniary indebtedness	5	49	3	63
Outside Employment	1	7	0	11
Making Public Statement	0	0	0	1
Taking part in Politics	0	1	1	2
Sexual Harassment	0	4	0	10
Court Cases	11	12	13	169
Others	1	2	5	12
Disloyalty	1	1	1	3
Using public position for personal advantage	4	9	3	49

Disrepute or bring discredit to the public service	11	18	14	216
Lack efficiency or industry	1	39	2	63
Being dishonest or untrustworthy	16	61	36	226
Being irresponsible	16	174	156	779
Bringing outside influence	0	11	0	14
Insubordination	28	70	11	378
Negligent in performing his duties	16	70	7	165
Conduct himself in such a manner as is likely to bring his private interest into conflict with his public duty	4	2	14	28
Total Breach of code of conduct	97	455	244	1921
TOTAL	208	624	483	3419
	YEAR 2010			
OFFENCES	Federal Authorities	Civil Service	Local Authorities	
Absent from Duty	66	188	291	1971
Drug Offence				
Dangerous Drug Act 1952	8	9	13	121
Drug Addiction Act (Treatment and Rehabilitation)	0	2	1	12
Breach of code of conduct				
Gift / Entertainment	0	1	0	2
Ownership property	0	0	0	76
Maintaining a standard of living beyond emoluments and legitimate private means	0	0	0	0
Serious pecuniary indebtedness	13	40	2	70

Outside Employment	7	2	1	13
Making Public Statement	0	0	0	4
Taking part in Politics	0	0	0	1
Sexual Harassment	0	1	0	7
Court Cases	27	15	18	376
Others	2	0	0	2
Disloyalty	0	2	2	4
Subordinate his public duty to his private interests	1	6	0	8
Conduct himself in such a manner as is likely to bring his private interest into conflict with public duty	0	5	1	11
Using public position for personal advantage	2	21	16	105
Disrepute or bring discredit to the public service	1	21	9	186
Lack efficiency or industry	3	191	3	276
Being dishonest or untrustworthy	21	67	51	362
Being irresponsible	5	73	19	262
Bringing outside influence	0	0	1	11
Insubordination	187	140	28	667
Negligent in performing his duties	29	79	5	230
Total Breach of code of conduct	249	605	135	2122
TOTAL	372	863	461	4777

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TABLE 12- ARTICLE 31-Measures to Enable Confiscation of Proceeds of Crime												
	2009				2010				2011			
	SEIZURE	Amount Seized	FORFEITURE	Amount Forfeited	SEIZURE	Amount Seized	FORFEITURE	Amount Forfeited	SEIZURE	Amount Seized	FORFEITURE	Amount Forfeited
Malaysian Anti-Corruption Commission Act 2009 (Act 694)/Anti-Corruption Act 1997 (Act 575)												
	70	RM6,542,519.00	34	RM1,440,522.64	139	RM10,460,544	5	RM209,400.00	56	RM1,277,897.00	9	RM272,633.00
ANTI-MONEY LAUNDERING AND ANTI-TERRORISM FINANCING ACT 2001 (ACT 613)	SEIZURE	Amount Seized/Frozen	FORFEITURE	Amount Forfeited	SEIZURE	Amount Seized/Frozen	FORFEITURE	Amount Forfeited	SEIZURE	Amount Seized/Frozen	FORFEITURE	Amount Forfeited
	2	NIL	2	RM 25,000.00	2	RM31,709,651.59	1	RM400,000.00	40	RM23,075,175.46	2	RM4,605,000.00
PENAL CODE OFFENCES	CASES	Amount Seized	DISPOSAL	Amount Disposed	CASES	Amount Seized	DISPOSAL	Amount Disposed	CASES	Amount Seized	DISPOSAL	Amount Disposed
Sec 161- Public servant taking a gratification, other than legal remuneration in respect of an official act	0	0	0	0	0	0	0	0	0	0	0	0

Sec 162 - Taking a gratification in order, by corrupt or illegal means, to influence a public servant	0	0	0	0	0	0	0	0	0	0	0	0
Sec 163 - Taking a gratification, for the exercise of personal influence with a public servant	0	0	0	0	0	0	0	0	0	0	0	0
Sec 164 - Punishment for abetment by Public Servant of the offences defined above (Section 162 and Section 163)	0	0	0	0	0	0	0	0	0	0	0	0
Sec 165 - Public servant obtaining any valuable things, without consideration, from person concerned in any proceeding or business transacted by such public servant	0	0	0	0	0	0	0	0	0	0	0	0
Sec 213 - Taking a gift, etc., to screen an offender from punishment	0	0	0	0	0	0	0	0	0	0	0	0
Sec 214 - Offering gift or restoration of property in consideration of screening offender	0	0	0	0	0	0	0	0	0	0	0	0
Sec 215 - Taking a gift to help to recover stolen property, etc	0	0	0	0	0	0	0	0	0	0	0	0
Sec 379 - Theft	0	0	0	0	0	0	0	0	0	0	0	0

Sec 381 - Theft by clerk or servant in possession of master	0	0	0	0	0	0	0	0	0	0	0	0
Sec 384 - Extortion	0	0	0	0	0	0	0	0	0	0	0	0
Sec 385 - Putting person in fear of injury in order to commit extortion	0	0	0	0	0	0	0	0	0	0	0	0
Sec 386 - Extortion by putting a person in fear of death or grievous hurt	0	0	0	0	0	0	0	0	0	0	0	0
Sec 388 - Extortion by threat of accusation of an offence punishable with death, imprisonment, etc	0	0	0	0	0	0	0	0	0	0	0	0
Sec 389 - Putting person in fear of accusation of offence, in order to commit extortion	0	0	0	0	0	0	0	0	0	0	0	0
	0	0	0	0	0	0	0	0	0	0	0	0
Sec 403 - Dishonest misappropriation of property	0	0	0	0	0	0	0	0	0	0	0	0
Sec 404 - Dishonest misappropriation of property possessed by a deceased person at the time of his death	0	0	0	0	0	0	0	0	0	0	0	0
Sec 405 - Criminal breach of trust	0	0	0	0	0	0	0	0	0	0	0	0
Sec 406 - Punishment of criminal breach of trust	0	0	0	0	0	0	0	0	0	0	0	0

Sec 409 - Criminal breach of trust by public servant or agent	0	0	0	0	0	0	0	0	0	0	0	0
Sec 417 - Cheating	0	0	0	0	0	0	0	0	0	0	0	0
Sec 418 - Cheating with knowledge that wrongful loss may be thereby caused to a person whose interest the offender is bound to protect	0	0	0	0	0	0	0	0	0	0	0	0
Sec 420 - Cheating and dishonestly inducing delivery of property	0	0	0	0	0	0	0	0	0	0	0	0
Sec 421 - Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors	0	0	0	0	0	0	0	0	0	0	0	0
Sec 422 - Dishonest of fraudulent preventing from being made available for his creditor a debt or demand due to the offender	0	0	0	0	0	0	0	0	0	0	0	0
Sec 423 - Dishonest or fraudulent execution of deed of transfer containing a false of consideration	0	0	0	0	0	0	0	0	0	0	0	0
Sec 465 - Punishment for forgery	0	0	0	0	0	0	0	0	0	0	0	0
Sec 466 - Forgery of a record of a Court, or a public Register of Birth	0	0	0	0	0	0	0	0	0	0	0	0

Sec 467 - Forgery of a valuable security or will	0	0	0	0	0	0	0	0	0	0	0	0
Sec 468 - Forgery for the purpose of cheating	0	0	0	0	0	0	0	0	0	0	0	0
Sec 471 - Using a genuine a forged document	0	0	0	0	0	0	0	0	0	0	0	0
Sec 472 - Making a possessing a counterfeit seal, plate, etc., with intent to commit a forgery punishable under section 467	0	0	0	0	0	0	0	0	0	0	0	0
Sec 473 - Making a possessing a counterfeit seal, plate, etc., with intent to commit a forgery punishable otherwise	0	0	0	0	0	0	0	0	0	0	0	0
Sec 474 - Having possessing of a valuable security or will known to be forged, with intent to use it as genuine.	0	0	0	0	0	0	0	0	0	0	0	0
Sec 475 - Counterfeiting a device or mark used for authenticating document described in section 467, or possessing counterfeit marked material	0	0	0	0	0	0	0	0	0	0	0	0
Sec 476 - Counterfeiting a device or mark used for authenticating documents other than those described in section 467 or possessing counterfeit marked material	0	0	0	0	0	0	0	0	0	0	0	0

Sec 477 A - Falsification of accounts	0	0	0	0	0	0	0	0	0	0	0	0
	2009				2010				2011			
Customs Act 1967 (Act 235)	CASES	Amount Seized	DISPOSAL	Amount Disposed	CASES	Amount Seized	DISPOSAL	Amount Disposed	CASES	Amount Seized	DISPOSAL	Amount Disposed
Section 137(b) Penalty for offering or receiving of bribes	0	0	0	0	0	0	0	0	0	0	0	0

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TABLE13- ARTICLE 32 & 33 -Witness Protection																	
	2009					2010						2011					
Offences under the Malaysian Anti-Corruption Commission Act 2009 (Act 694)/Anti-Corruption Act 1997 (Act 575)	Witness Protection Act 2009	Abduction and Criminal Intimidation of Witness Act 1947	Sec.65 Malaysia n Anti-Corruption Commission Act 2009	Sec.5 Anti-Money Laundering and Anti-Terrorism Financing Act 2001	Sec.5 03 Penal Code	Witness Protection Act 2009	Whistleblower Protection Act 2010	Abduction and Criminal Intimidation of Witness Act 1947	Sec.65 Malaysia n Anti-Corruption Commission Act 2009	Sec.5 Anti-Money Laundering and Anti-Terrorism Financing Act 2001	Sec.5 03 Penal Code	Witness Protection Act 2009	Whistleblower Protection Act 2010	Abduction and Criminal Intimidation of Witness Act 1947	Sec.65 Malaysia n Anti-Corruption Commission Act 2009	Sec.5 Anti-Money Laundering and Anti-Terrorism Financing Act 2001	Sec.5 03 Penal Code
	0	0	0	0	0	0	0	0	0	0	0	0	5	0	0	0	0
Offences under the ANTI-MONEY LAUNDERING AND ANTI-TERRORISM FINANCING ACT 2001 (ACT 613)	Witness Protection Act 2009	Abduction and Criminal Intimidation of Witness Act 1947	Sec.65 Malaysia n Anti-Corruption Commission Act 2009	Sec.5 Anti-Money Laundering and Anti-Terrorism Financing Act 2001	Sec.5 03 Penal Code	Witness Protection Act 2009	Whistleblower Protection Act 2010	Abduction and Criminal Intimidation of Witness Act 1947	Sec.65 Malaysia n Anti-Corruption Commission Act 2009	Sec.5 Anti-Money Laundering and Anti-Terrorism Financing Act 2001	Sec.5 03 Penal Code	Witness Protection Act 2009	Whistleblower Protection Act 2010	Abduction and Criminal Intimidation of Witness Act 1947	Sec.65 Malaysia n Anti-Corruption Commission Act 2009	Sec.5 Anti-Money Laundering and Anti-Terrorism Financing Act 2001	Sec.5 03 Penal Code
	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

PENAL CODE OFFENCES	Witness Protection Act 2009	Abduction and Criminal Intimidation of Witness Act 1947	Sec.65 Malaysia Anti-Corruption Commission Act 2009	Sec.5 Anti-Money Laundering and Anti-Terrorism Financing Act 2001	Sec.5 03 Penal Code	Witness Protection Act 2009	Whistleblower Protection Act 2010	Abduction and Criminal Intimidation of Witness Act 1947	Sec.65 Malaysia Anti-Corruption Commission Act 2009	Sec.5 Anti-Money Laundering and Anti-Terrorism Financing Act 2001	Sec.5 03 Penal Code	Witness Protection Act 2009	Whistleblower Protection Act 2010	Abduction and Criminal Intimidation of Witness Act 1947	Sec.65 Malaysia Anti-Corruption Commission Act 2009	Sec.5 Anti-Money Laundering and Anti-Terrorism Financing Act 2001	Sec.5 03 Penal Code
Sec 161- Public servant taking a gratification, other than legal remuneration in respect of an official act	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 162 - Taking a gratification in order, by corrupt or illegal means, to influence a public servant	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 163 - Taking a gratification, for the exercise of personal influence with a public servant	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Sec 164 - Punishment for abetment by Public Servant of the offences defined above (Section 162 and Section 163)	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 165 - Public servant obtaining any valuable things, without consideration , from person concerned in any proceeding or business transacted by such public servant	0	0	0	0	0	3	0	0	0	0	0	0	0	0	0	0	0
Sec 213 - Taking a gift, etc., to screen an offender from punishment	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 214 - Offering gift or restoration of property in consideration of screening offender	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 215 - Taking a gift to help to recover	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

stolen property, etc																	
Sec 379 - Theft	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 381 - Theft by clerk or servant in possession of master	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 384 - Extortion	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 385 - Putting person in fear of injury in order to commit extortion	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 386 - Extortion by putting a person in fear of death or grievous hurt	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 388 - Extortion by threat of accusation of an offence punishable with death, imprisonment, etc	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 389 - Putting person in fear of accusation of offence, in order to commit extortion	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Sec 403 - Dishonest misappropriation of property	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 404 - Dishonest misappropriation of property possessed by a deceased person at the time of his death	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 405 - Criminal breach of trust	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 406 - Punishment of criminal breach of trust	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 409 - Criminal breach of trust by public servant or agent	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 417 - Cheating	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 418 - Cheating with knowledge that wrongful loss may be thereby caused to a person whose interest the offender is bound to	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

protect																		
Sec 420 - Cheating and dishonestly inducing delivery of property	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 421 - Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 422- Dishonest of fraudulent preventing from being made available for his creditor a debt or demand due to the offender	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 423 - Dishonest or fraudulent execution of deed of transfer containing a false of consideration	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Sec 465 - Punishment for forgery	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 466 - Forgery of a record of a Court, or a public Register of Birth	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 467 - Forgery of a valuable security or will	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 468 - Forgery for the purpose of cheating	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 471 - Using a genuine a forged document	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 472 - Making a possessing a counterfeit seal, plate, etc., with intent to commit a forgery punishable under section 467	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 473 - Making a possessing a counterfeit seal, plate, etc., with intent to commit a forgery punishable	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

otherwise																		
Sec 474 - Having possessing of a valuable security or will known to be forged, with intent to use it as genuine.	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 475 - Counterfeiting a device or mark used for authenticating document described in section 467, or possessing counterfeit marked material	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 476 - Counterfeiting a device or mark used for authenticating documents other than those described in section 467 or possessing counterfeit marked material	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Sec 477 A - Falsification of accounts	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Customs Act 1967 (Act 235)	2009					2010					2011						
Section 137(b) Penalty for offering or receiving of bribes	Witness Protection Act 2009	Abduction and Criminal Intimidation of Witness Act 1947	Sec.65 Malaysia Anti-Corruption Commission Act 2009	Sec.5 Anti-Money Laundering and Anti-Terrorism Financing Act 2001	Sec.503 Penal Code	Witness Protection Act 2009	Whistleblower Protection Act 2010	Abduction and Criminal Intimidation of Witness Act 1947	Sec.65 Malaysia Anti-Corruption Commission Act 2009	Sec.5 Anti-Money Laundering and Anti-Terrorism Financing Act 2001	Sec.503 Penal Code	Witness Protection Act 2009	Whistleblower Protection Act 2010	Abduction and Criminal Intimidation of Witness Act 1947	Sec.65 Malaysia Anti-Corruption Commission Act 2009	Sec.5 Anti-Money Laundering and Anti-Terrorism Financing Act 2001	Sec.503 Penal Code
	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Annex 12

Article 30 para 5 - TABLE 1-Prison Act 1955- Section 45- Release of prisoners			
	2009	2010	2011
Expiration of his terms of sentence			
Malaysian Anti-Corruption Commission Act 2009	6	37	82
Anti-Money Laundering and Anti-Terrorism Financing Act	11	10	13
Penal Code	20387	17154	16095
Payment of fine			
Malaysian Anti-Corruption Commission Act 2009	0	15	23
Anti-Money Laundering and Anti-Terrorism Financing Act	1	0	1
Penal Code	521	543	828
Pardon			
Malaysian Anti-Corruption Commission Act 2009	-	-	-
Anti-Money Laundering and Anti-Terrorism Financing Act	-	-	-
Penal Code	-	-	-
Commutation			
Malaysian Anti-Corruption Commission Act 2009	-	-	-
Anti-Money Laundering and Anti-Terrorism Financing Act	-	-	-
Penal Code	-	-	-
Remission of sentence (Sec.44)			
Malaysian Anti-Corruption Commission Act 2009	6	37	82
Anti-Money Laundering and Anti-Terrorism Financing Act	11	10	13
Penal Code	20387	17154	16095
TOTAL	20926	17759	17042

Annex 13

TABLE 10-ARTICLE 26 - Paragraph 3 (Liability of Natural Persons)

	2009					2010					2011				
	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa	Cases	Prosecuted	Convicted	dna	dnaa
MALAYSIAN ANTI-CORRUPTION COMMISSION ACT 2009 (ACT 694)															
Sec. 16 - Offence of accepting gratification	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec.18 - Offence of Intending to deceive principal by agent	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec.20 - Corruptly procuring withdrawal of tender	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec.21- Bribery of officer of public body	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec.22 - Bribery of foreign public officials	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec.26 - Dealing with, using, holding, receiving or concealing gratification or advantage in relation to any offence	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Anti-Corruption Act 1997 (Act 575)	Cases	Prosecuted	Convicted	A&D dna	A&D dnaa	Cases	Prosecuted	Convicted	A&D dna	A&D dnaa	Cases	Prosecuted	Convicted		A&D
Sec.10- Offence of accepting gratification	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Sec. 11 (b)Offence of giving or accepting gratification by agent	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec.11 (c)-Offence of intending to deceive principal by agent	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec.13- Corruptly procuring withdrawal of tender	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec.14- Bribery of officer of public body	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec.18 - Dealing with, using, holding, receiving or concealing gratification or advantage in relation to any offence	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
PREVENTION OF CORRUPTION ACT 1961 (ACT 57)	Cases	Prosecuted	Convicted	A&D dna	A&D dnaa	Cases	Prosecuted	Convicted	A&D dna	A&D dnaa	Cases	Prosecuted	Convicted		A&D
Sec.3- Punishment of corruption	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec.4 (b)-offence of offering gratification to agents	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec.4 (c)-offence of intending to deceive principal by agents	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec.7 - Corruptly procuring withdrawal of tenders	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Sec.9- Bribery of member of public body	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
CUSTOMS ACT 1967 (ACT 235)	Cases	Prosecuted	Convicted	A&D dna	A&D dnaa	Cases	Prosecuted	Convicted	A&D dna	A&D dnaa	Cases	Prosecuted	Convicted		A&D
Sec 137 - Penalty for offering or receiving bribes	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 140 - Offences by bodies of persons and by servants and agents	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
COMPANIES ACT 1965 (ACT125)	Cases	Prosecuted	Convicted	A&D dna	A&D dnaa	Cases	Prosecuted	Convicted	A&D dna	A&D dnaa	Cases	Prosecuted	Convicted		A&D
Sec 46 - Civil liability for misstatement in prospectus	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 47 - Criminal liability for statement	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 131A - Interest director not to participate or vote	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 364(A) - False reports	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 364(1) - False and misleading statements	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 366 - Fraudulently inducing persons to invest money	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 368 - Fraud by officers	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

ANTI-MONEY LAUNDERING AND ANTI-TERRORISM FINANCIAL ACT 2001 (ACT 613)	Cases	Prosecuted	Convicted	A&D dna	A&D dnaa	Cases	Prosecuted	Convicted	A&D dna	A&D dnaa	Cases	Prosecuted	Convicted		A&D
Sec 4 - Offences of money laundering	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
PENAL CODE (ACT 574)	Cases	Prosecuted	Convicted	A&D dna	A&D dnaa	Cases	Prosecuted	Convicted	A&D dna	A&D dnaa	Cases	Prosecuted	Convicted		A&D
Sec 379 - Theft	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 403 - Dishonest misappropriation of property	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 404 - Dishonest misappropriation of property possessed by a deceased person at the time of his death	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 405 - Criminal breach of trust	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 406 - Punishment of criminal breach of trust	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 408 - Criminal breach of trust clerk or servant	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 409 - Criminal breach of trust by public servant or agent	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 417 - Punishment for cheating	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Sec 418 - Cheating with knowledge that wrongful loss may be thereby caused to a person whose interest the offender is bound to protect	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 420 - Cheating and dishonestly inducing delivery of property	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 465 - Punishment for forgery	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 467 - Forgery of a valuable security or will	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 468 - Forgery for the purpose of cheating	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 471 - Using a genuine a forged document	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 474 - Having possessing of a valuable security or will known to be forged, with intent to use it as genuine.	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0
Sec 477 A - Falsification of accounts	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0

Annex 14

SANCTIONS FOR OFFENCES ESTABLISHED IN ACCORDANCE WITH UNCAC IN MALAYSIA

Article 15 a) and b) - Bribery of National Public Sector Officials

No.	Legislation	Offence	Description of Offence	Punishment
1	Malaysian Anti-Corruption Commission Act 2009	Section 21 Section 16 Section 17	Bribery of officer of public body Offence of accepting gratification Offence of giving or accepting gratification by agent	a)Imprisonment for a term not exceeding twenty years; and b)a fine not less five times the sum or value of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is a pecuniary nature, or ten thousand ringgit, which ever is the higher
2	Penal Code (Act 574)	Section 161	Public servant taking a gratification , other than legal remuneration, in respect of an official act	Imprisonment which may extend to three years or with fine or with both
3	Customs Act 1967	Section 137	Penalty for offering or receiving bribes	Imprisonment not exceeding five years and fine and shall be interdicted from holding office in the public service of the Federal Government of any State.

Article 16, Paragraph 1 and 2 - Bribery of foreign public sector officials and officials of public international organizations

No.	Legislation	Offence	Description of Offence	Punishment
1	Malaysian Anti-Corruption Commission Act 2009	Section 22	Bribery of foreign public officials	a)Imprisonment for a term not exceeding twenty years; and b) a fine not less five times the sum or value of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is a pecuniary nature, or ten thousand ringgit, whichever is the higher.

Article 17 - Embezzlement, misappropriation or other diversion of property by a public official

No.	Legislation	Offence	Description of Offence	Punishment
1	Malaysian Anti-Corruption Commission Act 2009	Section 18 Section 23	Offence of intending to deceive principal by agent Offence of using office or position for gratification	a) Imprisonment for a term not exceeding twenty years; and b) a fine not less five times the sum or value of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is a pecuniary nature, or ten thousand ringgit, whichever is the higher (for Section 23) or b) a fine not less than five times the sum or value of the false or erroneous or defective material particular, where such false or erroneous or defective material particular is capable of being valued or is a pecuniary nature, or ten thousand ringgit, whichever is the higher (for Section 18)
2	Penal Code (Act 574)	Section 403	Dishonest misappropriation of property	Imprisonment for a term which shall not be less than six months and not more than five years and with whipping and shall also be liable to fine.
3	Penal Code (Act 574)	Section 404	Dishonest misappropriation of property possessed by a dead person at the time of his death	Imprisonment for a term which shall not be less than six months and not more than five years and with whipping and shall also be liable to fine.
4	Penal Code (Act 574)	Section 405	Criminal breach of trust	Imprisonment for a term not exceeding ten years and with whipping and shall also be liable to fine.
5	Penal Code (Act 574)	Section 409	Criminal breach of trust by public servant or agent	Imprisonment for a term which shall not be less than two years and not more than twenty years and with whipping and shall be liable to fine.

Article 18 a) and b) - Trading in Influence

No.	Legislation	Offence	Description of Offence	Punishment
1	Penal Code (Act 574)	Section 162	Taking a gratification in order, by corrupt or illegal means, to influence a public servant	Imprisonment for a term not exceeding three years or fine or both
2	Penal Code (Act 574)	Section 163	Taking a gratification, for the exercise of personal influence with a public servant	Imprisonment for a term not exceeding one year or fine or both

3	Malaysian Anti-Corruption Commission Act 2009	Section 16 Section 17	Offence of accepting gratification Offence of giving or accepting gratification by agent	(a) imprisonment for a term not exceeding twenty years; and (b) a fine not less than five times the sum or value of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is a pecuniary nature, or then thousand ringgit, whichever is the higher
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Article 19 - Abuse of Function

No.	Legislation	Offence	Description of Offence	Punishment
1	Malaysian Anti-Corruption Commission Act 2009	Section 23	Offence of using office or position for gratification	(a) imprisonment for a term not exceeding twenty years; and (b) a fine not less than five times the sum or value of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is a pecuniary nature, or then thousand ringgit, whichever is the higher

Article 20 - Illicit enrichment by a public official

No.	Legislation	Offence	Description of Offence	Punishment
1	Malaysian Anti-Corruption Commission Act 2009	Section 36 (3)	Failure to explain satisfactorily, by an officer of public body, excess property owned, possessed, controlled or held in interest	a) imprisonment for a term not exceeding twenty years; and b) a fine which is not less than five times the value of the excess, if the excess is capable of being valued, or ten thousand ringgit, whichever is the higher.

Article 21 - Bribery of private sector decision-makers

No.	Legislation	Offence	Description of Offence	Punishment
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1	Malaysian Anti-Corruption Commission Act 2009	Section 16	Offence of accepting gratification	(a) imprisonment for a term not exceeding twenty years; and (b) a fine not less than five times the sum or value of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is a pecuniary nature, or then thousand ringgit, whichever is the higher
		Section 17	Offence of giving or accepting gratification by agent	
		Section 20	Corruptly procuring withdrawal of tender	

Article 22 a) and b) - Embezzlement by persons working in the private sector entities

No.	Legislation	Offence	Description of Offence	Punishment
1	Penal Code (Act 574)	Section 378	Theft	Imprisonment for a term which may extend to seven years or with fine, or with both
2	Penal Code (Act 574)	Section 403	Dishonest misappropriation of property	Imprisonment for a term which shall not be less than six months and not more than five years and with whipping and shall also be liable to fine.
3	Penal Code (Act 574)	Section 404	Dishonest misappropriation of property possessed by a dead person at the time of his death	Imprisonment for a term which shall not be less than six months and not more than five years and with whipping and shall also be liable to fine
4	Penal Code (Act 574)	Section 405	Criminal breach of trust	Imprisonment for a term not exceeding ten years and with whipping and shall also be liable to fine.
5	Penal Code (Act 574)	Section 408	Criminal breach of trust by clerk or servant	Imprisonment for a term which shall not be less than one year and not more than fourteen years and with whipping, and shall be liable to fine.
6	Penal Code (Act 574)	Section 415 r/w Section 417-	Punishment for cheating	Imprisonment for a term which may extend to five years or with fine, or with both.
7	Penal Code (Act 574)	Section 418	Cheating with knowledge that wrongful loss may be thereby caused to a person whose interest the offender is bound to protect.	Imprisonment for a term which may extend to seven years, or with fine, or with both

8	Penal Code (Act 574)	Section 419	Cheating by personation	Imprisonment for a term which may extend to seven years, or with fine, or with both
9	Penal Code (Act 574)	Section 420	Cheating and dishonestly inducing delivery of property	Imprisonment for a term which shall not be less than one year and not more than ten years and with whipping and shall also be liable to fine
10	Penal Code (Act 574)	Section 465	Punishment for forgery	Imprisonment for a term which may extend to two years or with fine, or with both
11	Penal Code (Act 574)	Section 466	Forgery of a record of a court or a public register of births	Imprisonment for a term which may extend to seven years and shall also be liable to fine
12	Penal Code (Act 574)	Section 467	Forgery of valuable security or will	Imprisonment for a term which may extend to twenty years and shall also be liable to fine
13	Penal Code (Act 574)	Section 468	Forgery for the purpose of cheating	Imprisonment for a term which may extend to seven years and shall also be liable to fine
14	Penal Code (Act 574)	Section 471	Using as genuine a forged document	Imprisonment for a term which may extend to two years or with fine, or with both
15	Penal Code (Act 574)	Section 474	Having in possession of a valuable security or will know to be forged with intent to use it as genuine	Imprisonment for a term which may extend to twenty years and shall also be liable to fine
16	Penal Code (Act 574)	Section 477A	Falsification of accounts	Imprisonment for a term which may extend to seven years or with fine or with both

Article 23 - Laundering the proceeds of corruption

No.	Legislation	Offence	Description of Offence	Punishment
1	Malaysian Anti-Corruption Commission Act 2009	Section 26	Dealing with, using, holding, receiving or concealing gratification or advantage in relation to any offence	Fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding seven years or to both.

2	Anti-Money Laundering and Anti-Terrorism Financing Act 2001(Act 613)	Section 4 (1)	Offence of money laundering	Fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or both
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Article 24 - Concealment or continued retention of the proceed of crime

No.	Legislation	Offence	Description of Offence	Punishment
1	Malaysian Anti-Corruption Commission Act 2009	Section 26	Dealing with, using, holding, receiving or concealing gratification or advantage in relation to any offence	Fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding seven years or to both.
2	Anti-Money Laundering and Anti-Terrorism Financing Act 2001(Act 613)	Section 4(1)	Offence of money laundering	Fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or both
3	Anti-Money Laundering and Anti-Terrorism Financing Act 2001(Act 613)	Section 18	Opening account using false name	Fine not exceeding one million ringgit or imprisonment for a term not exceeding one year or both

Article 25 - Obstruction of justice

No.	Legislation	Offence	Description of Offence	Punishment
1	Malaysian Anti-Corruption Commission Act 2009	Section 16	Offence of accepting gratification	(a) imprisonment for a term not exceeding twenty years; and (b) a fine not less than five times the sum or value of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is a pecuniary nature, or then

		Section 48	Obstruction of investigation and search	thousand ringgit, whichever is the higher Fine not exceeding ten thousand ringgit or imprisonment for a term not exceeding two years or both.
2	Anti-Money Laundering and Anti-Terrorism Financing Act 2001(Act 613)	Section 34	Obstruction to exercise of powers by an investigating officer	Fine not exceeding one million ringgit or imprisonment for a term not exceeding one year or both, and in the case of continuing offence, to a further fine of one thousand ringgit for each day during which the offence continues after conviction.
3	Penal Code (Act 574)	Section 189	Threat of injury to a public servant	Imprisonment for a term which may extend to two years or fine, or both
4	Penal Code (Act 574)	Section 503 r/w Section 506	Criminal intimidation	Imprisonment for a term which may extend to two years or fine or both; and if the threat is to cause death or grievous hurt, or to cause the destruction of property by fire or to cause an offence punishable for a term which may extend to seven years, or to impute unchastity of a woman shall be punishable for a term which may extend to seven years, or with fine or both.
5	Penal Code (Act 574)	Section 323	Voluntarily causing hurt	Imprisonment for a term which extend to one year, or with fine which may extend to two thousand ringgit, or with both
6	Penal Code (Act 574)	Section 507	Criminal intimidation by an anonymous communication	Imprisonment for a term which may extend to two years in addition to the punishment provided under Section 506
7	Abduction and Criminal Intimidation of Witness Act 1947	Section 4	Abduction impeding the course of justice	Imprisonment for a term which may extend to fourteen years or fine, or both
8	Abduction and Criminal Intimidation of Witness Act 1947	Section 5	Criminal intimidation to impede the course of justice	Imprisonment for a term which may extend to ten years or fine, or both

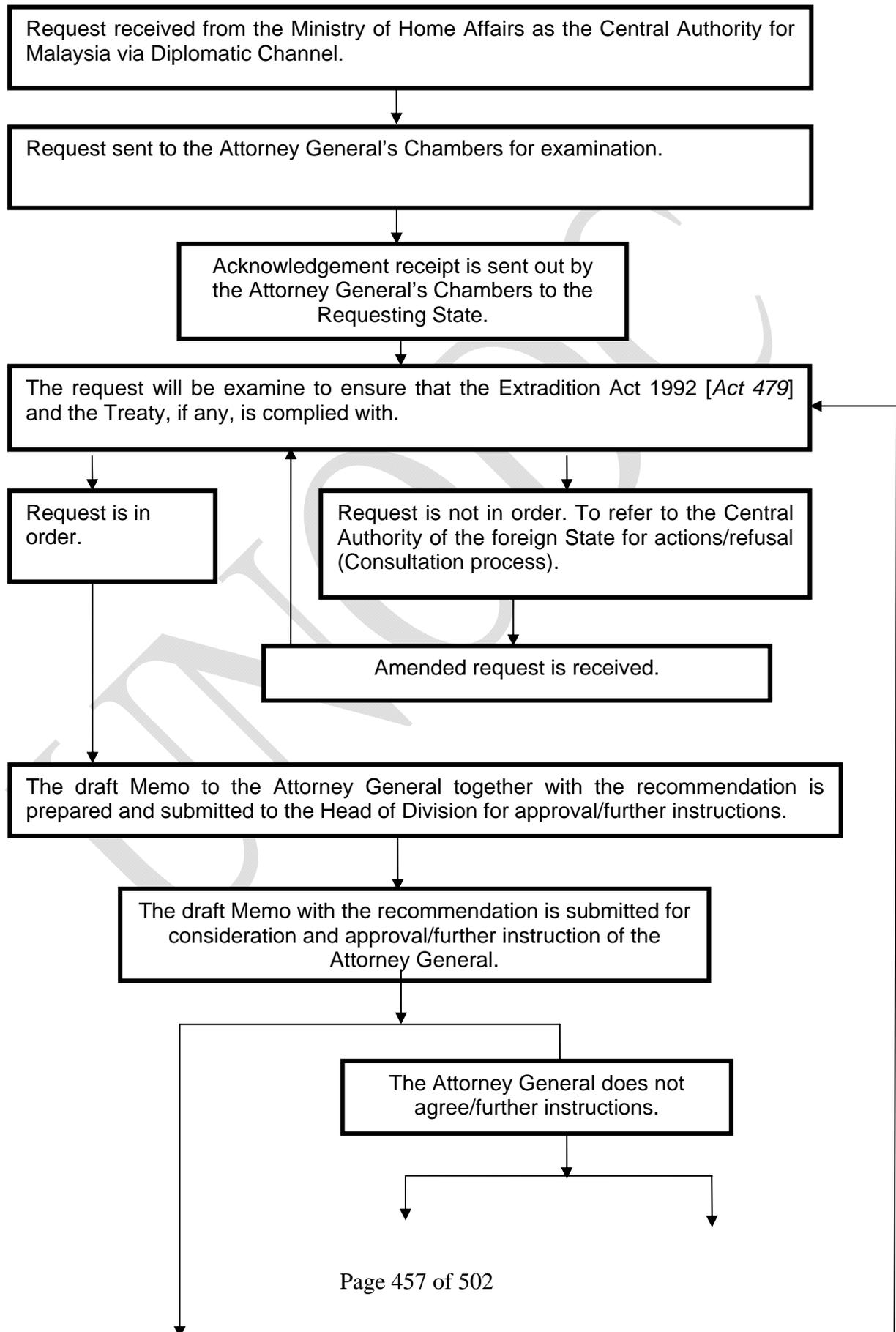
Article 26 – Same penalty frame as for natural persons, but for legal persons only fine is applicable.

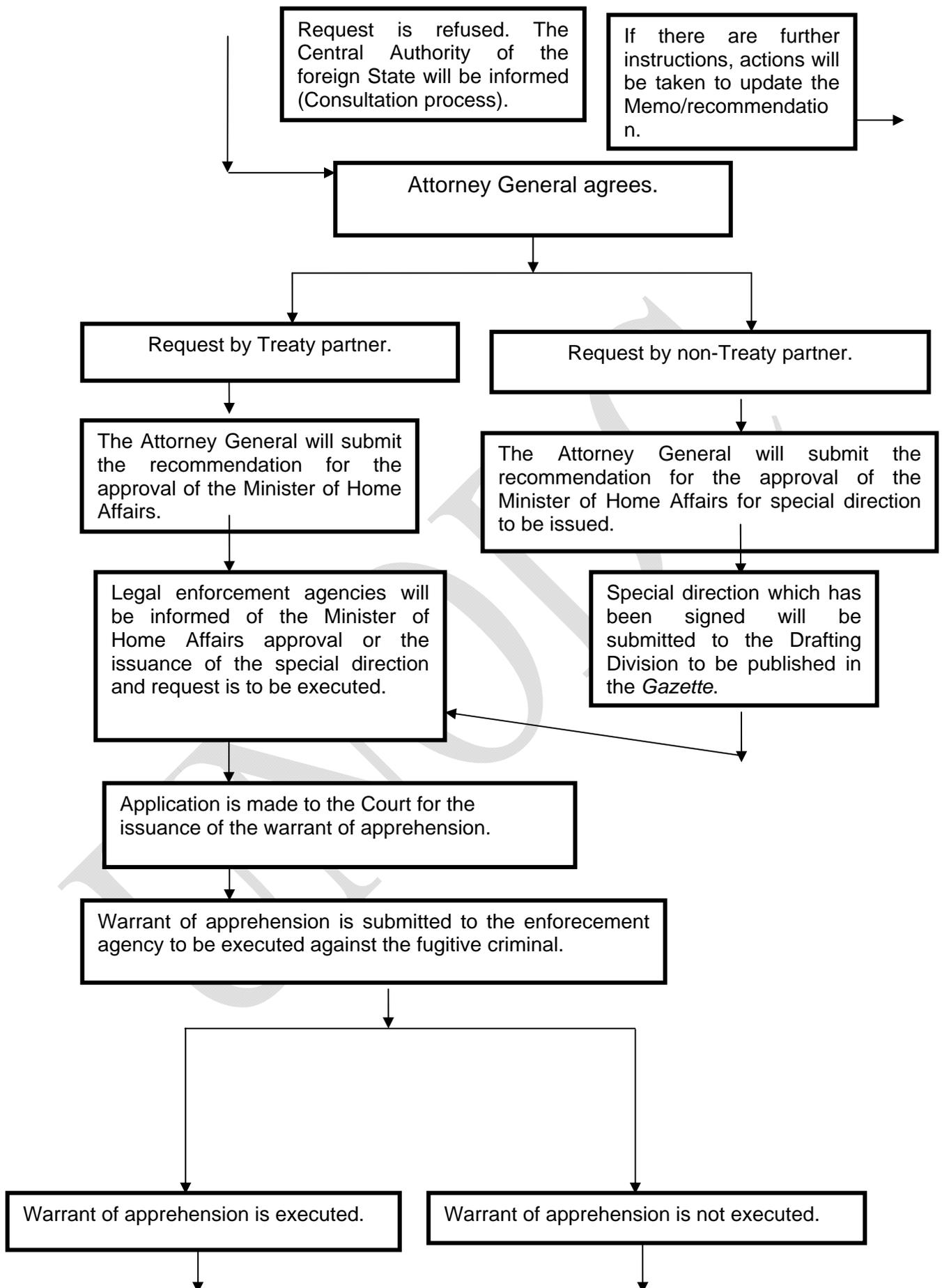
Article 27 - Participation and attempt

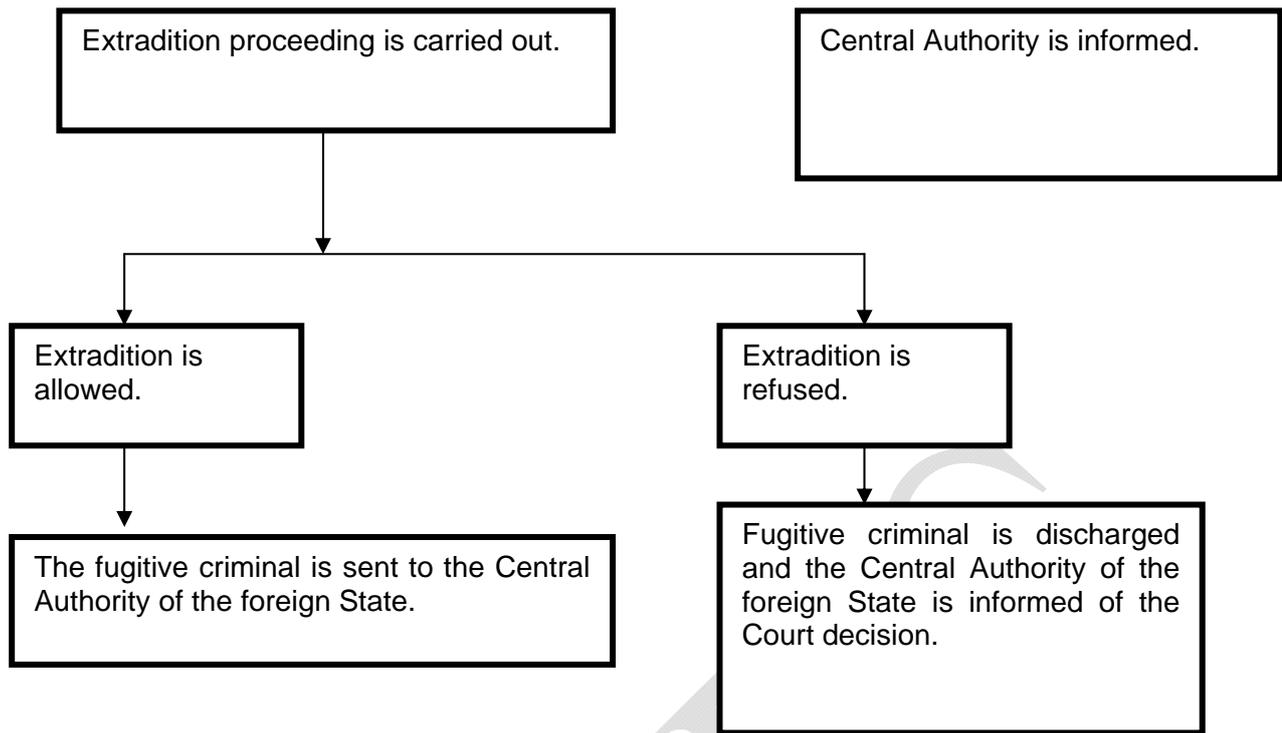
No.	Legislation	Offence	Description of Offence	Punishment
1	Malaysian Anti-Corruption Commission Act 2009	Section 28	Attempts, preparations, abetments and criminal conspiracies punishable as offence	(a) imprisonment for a term not exceeding twenty years; and (b) a fine not less than five times the sum or value of the gratification which is the subject matter of the offence, where such gratification is capable of being valued or is a pecuniary nature, or then thousand ringgit, whichever is the higher
2	Penal Code Act 574	Sections 162,163 r/w Section 164	Punishment for abetment by public servant of the offences above defined in 162 and 163	Imprisonment which may extend to three years or fine or to both
3	Penal Code Act 574	Section 511	Punishment for attempting to commit offences punishable with imprisonment	Whoever attempts to commit an offence punishable by this Code or by any other written law with imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of such offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence: Provided that any term of imprisonment imposed shall not exceed one-half of the longest term provided for the offence.
4	Penal Code Act 574	Section 108 A	Abetment in Malaysia of offences outside Malaysia	A person abets an offence within the meaning of this Code who, in Malaysia, abets the commission of any act without and beyond Malaysia which would constitute an offence if committed in Malaysia.
5	Penal Code Act 574	Section 109	Punishment of abetment if the act abetted is committed in consequence, and where no express provision is	Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such

			made for its punishment	abetment, be punished with the punishment provided for the offence.
6	Penal Code Act 574	Section 120B	Punishment of criminal conspiracy	(1) Whoever is a party to a criminal conspiracy to commit an offence punishable with death, imprisonment for a term of two years or upwards shall, where no express provision is made in this Code for the punishment of such a conspiracy, be punished in the same manner as if he had abetted such offence. (2) Whoever is a party to a criminal conspiracy other than a criminal conspiracy to commit an offence punishable as aforesaid shall be punished with imprisonment for a term not exceeding six months or with fine or with both.
7	Anti-Money Laundering and Anti-Terrorism Financing Act 2001(Act 613)	Section 4(1)	Offence of money laundering includes any person who (a) engages in, or attempts to engage in; or (b)abets the commission of money laundering	Fine not exceeding five million ringgit or to imprisonment for a term not exceeding five years or both.

FLOW CHART OF WORK PROCESSES FOR EXTRADITION REQUESTS FROM FOREIGN COUNTRIES TO MALAYSIA







Annex 16

CHECKLIST REQUEST FOR EXTRADITION TO MALAYSIA							
Desk officer: Supervising officer: Date of receipt of request:							
PART 1 – PERUSAL AND VETTING OF REQUEST AS REQUIRED UNDER THE EXTRADITION ACT 1992 [Act 479]	Please fill up the status of action below						
<u>Request (Provisional Warrant of Arrest)</u>							
A. <u>Treaty/Non-treaty [s. 2(a) & (b)]</u>							
1. Open new file	<table style="width: 100%; border: none;"> <tr> <td style="width: 60%;"></td> <td style="text-align: center; width: 20%;">YES</td> <td style="text-align: center; width: 20%;">NO</td> </tr> <tr> <td></td> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> </table>		YES	NO		<input type="checkbox"/>	<input type="checkbox"/>
	YES	NO					
	<input type="checkbox"/>	<input type="checkbox"/>					
If No, state reason:							
2. Update request into the Extradition Tracking System	<table style="width: 100%; border: none;"> <tr> <td style="width: 60%;"></td> <td style="text-align: center; width: 20%;"><input type="checkbox"/></td> <td style="text-align: center; width: 20%;"><input type="checkbox"/></td> </tr> </table>		<input type="checkbox"/>	<input type="checkbox"/>			
	<input type="checkbox"/>	<input type="checkbox"/>					
3. If Treaty based, request for Provisional Warrant of Arrest (PWA) is subject to treaty and Act 479	<table style="width: 100%; border: none;"> <tr> <td style="width: 60%;"></td> <td style="text-align: center; width: 20%;"><input type="checkbox"/></td> <td style="text-align: center; width: 20%;"><input type="checkbox"/></td> </tr> </table>		<input type="checkbox"/>	<input type="checkbox"/>			
	<input type="checkbox"/>	<input type="checkbox"/>					
4. If Non-treaty based, request for PWA is subject to Act 479	<table style="width: 100%; border: none;"> <tr> <td style="width: 60%;"></td> <td style="text-align: center; width: 20%;"><input type="checkbox"/></td> <td style="text-align: center; width: 20%;"><input type="checkbox"/></td> </tr> </table>		<input type="checkbox"/>	<input type="checkbox"/>			
	<input type="checkbox"/>	<input type="checkbox"/>					
B. <u>Diplomatic channel [s. 12(1)]</u>							
<ul style="list-style-type: none"> • Through Ministry of Foreign Affairs • Through Ministry of Home Affairs • Directly from Requesting State 							
1. Issue acknowledgment letters within 4 working days after the date of receipt to:-	<table style="width: 100%; border: none;"> <tr> <td style="width: 60%;"></td> <td style="text-align: center; width: 20%;">YES</td> <td style="text-align: center; width: 20%;">NO</td> </tr> <tr> <td></td> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> </table>		YES	NO		<input type="checkbox"/>	<input type="checkbox"/>
	YES	NO					
	<input type="checkbox"/>	<input type="checkbox"/>					
<ul style="list-style-type: none"> • Ministry of Foreign Affairs (MOFA) • Ministry of Home Affairs (MOHA) 	<table style="width: 100%; border: none;"> <tr> <td style="width: 60%;"></td> <td style="text-align: center; width: 20%;"><input type="checkbox"/></td> <td style="text-align: center; width: 20%;"><input type="checkbox"/></td> </tr> </table>		<input type="checkbox"/>	<input type="checkbox"/>			
	<input type="checkbox"/>	<input type="checkbox"/>					

<ul style="list-style-type: none"> Requesting State (Embassy/High Commission) 	<input type="checkbox"/> <input type="checkbox"/> If No, state reason:								
<p>C. <u>Notification to/Feedback from agencies for further input</u></p> <p>1. Memo/Letters to agencies to be issued within <u>7 working days</u> to –</p> <ul style="list-style-type: none"> Prosecution Division & Research Division (if necessary depending on complexity) Investigating Agencies Regulating Agencies 	<table border="0"> <tr> <td style="text-align: center;">YES</td> <td style="text-align: center;">NO</td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> </table>	YES	NO	<input type="checkbox"/>					
YES	NO								
<input type="checkbox"/>	<input type="checkbox"/>								
<input type="checkbox"/>	<input type="checkbox"/>								
<input type="checkbox"/>	<input type="checkbox"/>								
<p>D. <u>Extradition offence (threshold) [s. 6(2)(a)]</u></p> <p>1. Determine whether it is an extradition offence (threshold)</p> <ul style="list-style-type: none"> Offence punishable with imprisonment for not less than one year or death in both the Requesting and Requested States 	<table border="0"> <tr> <td style="text-align: center;">YES</td> <td style="text-align: center;">NO</td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> </table> <p>If No, state reason: </p>	YES	NO	<input type="checkbox"/>	<input type="checkbox"/>				
YES	NO								
<input type="checkbox"/>	<input type="checkbox"/>								
<p>E. <u>Nationality [s. 5 & s.49(1)(a)]</u></p> <p>1. Determine the nationality of the subject.</p> <ul style="list-style-type: none"> If Malaysian national, Minister may refuse the request. If refused, the Minister shall submit the case to the PP for the fugitive criminal to be prosecuted under the laws of Malaysia 	<table border="0"> <tr> <td style="text-align: center;">YES</td> <td style="text-align: center;">NO</td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> </table>	YES	NO	<input type="checkbox"/>	<input type="checkbox"/>				
YES	NO								
<input type="checkbox"/>	<input type="checkbox"/>								
<p>F. <u>Dual criminality [s. 6(2)(b)]</u></p> <p>1. Determine whether it fulfills the requirement of dual criminality, i.e. foreign offence is a recognized offence under the law of Malaysia</p>	<table border="0"> <tr> <td style="text-align: center;">YES</td> <td style="text-align: center;">NO</td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> </table>	YES	NO	<input type="checkbox"/>	<input type="checkbox"/>				
YES	NO								
<input type="checkbox"/>	<input type="checkbox"/>								

<p>2. If necessary and depending on complexity of request, to send Memo to Prosecution Division and Research Division requesting feedback on dual criminality</p> <p>3. Determine whether or not there is any pending prosecution or action taken against the fugitive criminal</p> <p>4. Determine whether or not Malaysia has jurisdiction against the offence in which the extradition is requested</p>	<p>If No, state reason: </p> <p><input type="checkbox"/> <input type="checkbox"/></p> <p><input type="checkbox"/> <input type="checkbox"/></p> <p><input type="checkbox"/> <input type="checkbox"/></p>
<p>G. <u>Specialty undertaking [s. 8(e)]</u></p> <p>1. Determine whether the undertaking of specialty is provided</p> <p>2. If not, request for undertaking from Requesting State</p>	<p>YES NO</p> <p><input type="checkbox"/> <input type="checkbox"/></p> <p><input type="checkbox"/> <input type="checkbox"/></p>
<p>H. <u>Reciprocity undertaking [Common practice]</u></p> <p>1. For non-treaty, determine whether undertaking of reciprocity is provided</p> <p>2. If not, request for undertaking of reciprocity from Requesting State</p> <p>3. For treaty partners, no necessity to seek for an undertaking of reciprocity as the treaty itself is the basis of reciprocity</p>	<p>YES NO</p> <p><input type="checkbox"/> <input type="checkbox"/></p> <p>If No, state reason: </p> <p><input type="checkbox"/> <input type="checkbox"/></p> <p><input type="checkbox"/> <input type="checkbox"/></p>
<p>I. <u>Contents of Request [s. 13(1)(b) for PWA] [s. 12 for Full Request]</u></p>	<p>YES NO</p>

1. For PWA, to determine-

Information and evidence justifying the issuance of a warrant, including:

- Warrant of apprehension
- Charging documents
- Certificate of conviction and sentence
- Particulars of the fugitive criminal
- Facts of the case
- Law under which the fugitive criminal is accused of or convicted

Information in INTERPOL Red Notice may be considered

2. For Full Request, to determine-

- Warrant of apprehension
- Charging documents
- Certificate of conviction and sentence
- Particulars of the fugitive criminal
- Facts of the case
- Law under which the fugitive criminal is accused of or convicted
- Sworn statement of Investigating Officer and/or witnesses
- Evidence to justify the issuance of warrant of apprehension

*Note: if applicable, send letter to the Requesting State within 2 weeks to explain and advise accordingly

J. Grounds of refusal [s. 8, s. 19(1), s. 49]

	YES	NO
1. Offence of insufficient gravity [s. 6(2)]	<input type="checkbox"/>	<input type="checkbox"/>
2. Offence in which his return is sought is of a political character [s. 8(a)]	<input type="checkbox"/>	<input type="checkbox"/>
3. Request causing prejudice based on race, religion, nationality or political opinions [s.8(b)]	<input type="checkbox"/>	<input type="checkbox"/>
4. Prosecution for the offence is barred by time [s. 8(d)]	<input type="checkbox"/>	<input type="checkbox"/>
5. Undertaking of specialty [s.8(e)]	<input type="checkbox"/>	<input type="checkbox"/>
6. Request relates to a military offence which is also not an offence under the general criminal law [s. 19(1)(e)]	<input type="checkbox"/>	<input type="checkbox"/>
7. Dual criminality [s. 19(1)(f)]	<input type="checkbox"/>	<input type="checkbox"/>
8. Requirement of extra-territorial jurisdiction [s. 6(2)(b)]	<input type="checkbox"/>	<input type="checkbox"/>
9. Return of the fugitive criminal would not be in accordance with the provision of Act 479 [s. 19(1)(g)]	<input type="checkbox"/>	<input type="checkbox"/>
10. Double jeopardy [s.19(1)(h)]	<input type="checkbox"/>	<input type="checkbox"/>
11. The fugitive criminal is a citizen of Malaysia [s. 49(1)(a)]	<input type="checkbox"/>	<input type="checkbox"/>
12. Request relates to offence which the courts in Malaysia have jurisdiction [s. 49(1)(b)]	<input type="checkbox"/>	<input type="checkbox"/>
13. Undertaking of reciprocity [Common practice]	<input type="checkbox"/>	<input type="checkbox"/>
<p><i>*Note: If applicable, send letter to the Requesting State within 2 weeks for consultation and to explain and advise accordingly.</i></p>		
K. <u>Reminder</u> Send reminder to the relevant agencies if no feedback is received every 6 weeks or when necessary	YES <input type="checkbox"/>	NO <input type="checkbox"/>
PART 2 – APPROVAL OF REQUEST		

A. <u>Memo to AG</u>	YES	NO
1. To give opinion on our ability to execute the request and to make recommendations	<input type="checkbox"/>	<input type="checkbox"/>
2. If non-treaty based request, to recommend Special Direction to be issued	<input type="checkbox"/>	<input type="checkbox"/>
3. Attach copies of:		
• Diplomatic Note	<input type="checkbox"/>	<input type="checkbox"/>
• Request	<input type="checkbox"/>	<input type="checkbox"/>
• Letter from MOHA/MOFA	<input type="checkbox"/>	<input type="checkbox"/>
• Feedback/input	<input type="checkbox"/>	<input type="checkbox"/>
• Other relevant documents/information	<input type="checkbox"/>	<input type="checkbox"/>
• Draft letter to Minister	<input type="checkbox"/>	<input type="checkbox"/>
• Draft Special Direction (in both languages; English & Bahasa)	<input type="checkbox"/>	<input type="checkbox"/>
4. Once AG has given approval, send SD to Minister for signature	<input type="checkbox"/>	<input type="checkbox"/>
5. Receipt of signed SD from Minister	<input type="checkbox"/>	<input type="checkbox"/>
6. Gazette SD by sending a Memo to the Drafting Division (*Note: Send immediately upon receipt of SD)	<input type="checkbox"/>	<input type="checkbox"/>
7. Inform the Requesting State and send a copy of the signed SD for information to:		
• Requesting State	<input type="checkbox"/>	<input type="checkbox"/>
• Executing agency	<input type="checkbox"/>	<input type="checkbox"/>
8. In case of treaty based request, to give opinion to the AG on the ability to execute the request and to make recommendations	<input type="checkbox"/>	<input type="checkbox"/>
9. Attach copies of:		

<ul style="list-style-type: none"> • Diplomatic Note • Request • Letter from MOHA/MOFA • Feedback/input • Other relevant documents/information <p>10. Inform the Requesting State of decision</p> <p><i>*Note: Immediate after completion of Part 1</i></p>	<table border="0"> <tr><td><input type="checkbox"/></td><td><input type="checkbox"/></td></tr> </table>	<input type="checkbox"/>																	
<input type="checkbox"/>	<input type="checkbox"/>																		
<input type="checkbox"/>	<input type="checkbox"/>																		
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<input type="checkbox"/>	<input type="checkbox"/>																		
<input type="checkbox"/>	<input type="checkbox"/>																		
<p>PART 3 – EXECUTION OF REQUEST</p>																			
<p>A. <u>Part IV Act 479</u></p> <ol style="list-style-type: none"> 1. Prepare application for PWA and supporting affidavit [s. 13(1)(b)] 2. File application to magistrate for PWA to be issued and obtain hearing date. To get an immediate hearing/ a short hearing date, the application should be submitted with certificate of urgency 3. IAD makes preparations for hearing of application. Consultation with Prosecution Division, if necessary 4. On hearing date, IAD and Prosecution Division represent Requesting State to argue application 5. Arrest Warrant issued by Magistrate court. To submit Form D (Arrest Warrant) 	<table border="0"> <thead> <tr> <th></th> <th>YES</th> <th>NO</th> </tr> </thead> <tbody> <tr> <td>1.</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>2.</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>3.</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>4.</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> <tr> <td>5.</td> <td><input type="checkbox"/></td> <td><input type="checkbox"/></td> </tr> </tbody> </table>		YES	NO	1.	<input type="checkbox"/>	<input type="checkbox"/>	2.	<input type="checkbox"/>	<input type="checkbox"/>	3.	<input type="checkbox"/>	<input type="checkbox"/>	4.	<input type="checkbox"/>	<input type="checkbox"/>	5.	<input type="checkbox"/>	<input type="checkbox"/>
	YES	NO																	
1.	<input type="checkbox"/>	<input type="checkbox"/>																	
2.	<input type="checkbox"/>	<input type="checkbox"/>																	
3.	<input type="checkbox"/>	<input type="checkbox"/>																	
4.	<input type="checkbox"/>	<input type="checkbox"/>																	
5.	<input type="checkbox"/>	<input type="checkbox"/>																	

6. Magistrate to report issuance of the provisional warrant together with the relevant documents to the Minister [letter prepared by IAD] [s. 14(1)]. To prepare minutes/report of the attendance in court	<input type="checkbox"/>	<input type="checkbox"/>
7. Warrant sent to RMP for execution.	<input type="checkbox"/>	<input type="checkbox"/>
8. RMP able or unable to execute PWA. If able brings the fugitive criminal before Magistrate for transmission of case to the Sessions Court and for a remand order [s. 16(2)(a) and (b)]. Prepare the order for Magistrate to sign in English and Malay.	<input type="checkbox"/>	<input type="checkbox"/>
9. Fugitive criminal remanded until full requisition papers received [s. 16(1)(a) and (b)]	<input type="checkbox"/>	<input type="checkbox"/>
10. Deals with application for bail, if any [s. 44]	<input type="checkbox"/>	<input type="checkbox"/>
11. IAD informs MOHA/Requesting State of arrest and request for full requisition papers be sent within period specified by Magistrate	<input type="checkbox"/>	<input type="checkbox"/>
12. Requisition papers received or not received. If not received the fugitive criminal will be discharged by the Magistrate [s. 16(3)]	<input type="checkbox"/>	<input type="checkbox"/>
13. If requisition papers received within prescribed period, action taken to execute request	<input type="checkbox"/>	<input type="checkbox"/>
B. <u>Requisition for extradition [Receipt of Full Request]</u>		
1. IAD vets request to ascertain that Act 479 and treaty requirements fulfilled. To ensure that the request contains:	YES	NO
• Warrant of apprehension	<input type="checkbox"/>	<input type="checkbox"/>
• Charging documents	<input type="checkbox"/>	<input type="checkbox"/>
• Certificate of conviction and sentence	<input type="checkbox"/>	<input type="checkbox"/>
• Particulars of the fugitive criminal	<input type="checkbox"/>	<input type="checkbox"/>
• Facts of the case	<input type="checkbox"/>	<input type="checkbox"/>
• Law under which the fugitive criminal is accused of or convicted	<input type="checkbox"/>	<input type="checkbox"/>

<ul style="list-style-type: none"> • Sworn statement of Investigating Officer and/or witnesses 	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> • Evidence to justify the issuance of warrant of apprehension 	<input type="checkbox"/>	<input type="checkbox"/>
2. Memo to Prosecution Division notifying request and seek feedback, if necessary	<input type="checkbox"/>	<input type="checkbox"/>
3. Memo to AG seeking instructions	<input type="checkbox"/>	<input type="checkbox"/>
4. IAD prepares the Minister's Order to Proceed (OTP) issued under s. 12(3) and submit it to MOHA for further action (Form B)	<input type="checkbox"/>	<input type="checkbox"/>
5. Once signed OTP received from MOHA, IAD prepares application for warrant of arrest (WA) and supporting affidavits	<input type="checkbox"/>	<input type="checkbox"/>
6. IAD files application in Magistrate's Court and obtain hearing date	<input type="checkbox"/>	<input type="checkbox"/>
7. IAD makes preparations for hearing of application. Consultation with Prosecution Division, when necessary	<input type="checkbox"/>	<input type="checkbox"/>
8. On hearing date, IAD and Prosecution Division represent Requesting State to argue application	<input type="checkbox"/>	<input type="checkbox"/>
9. Magistrate issues WA on application and production of OTP	<input type="checkbox"/>	<input type="checkbox"/>
10. IAD gives WA to RMP for execution	<input type="checkbox"/>	<input type="checkbox"/>
11. RMP successfully execute WA	<input type="checkbox"/>	<input type="checkbox"/>
12. RMP brings fugitive criminal before Magistrate for order to transmit case to Session Court and for remand order [s. 17(a)]	<input type="checkbox"/>	<input type="checkbox"/>
13. IAD and Prosecution Division deals with application for bail if any before the Sessions Court	<input type="checkbox"/>	<input type="checkbox"/>
14. IAD and Prosecution Division make preparations for committal hearing and represents Requesting State at committal hearing before Session Court. [s. 19]	<input type="checkbox"/>	<input type="checkbox"/>

15. If on hearing date, fugitive criminal waives right to hearing [s. 22] –	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> • Proceedings and determination under s. 22 undertaken by court 	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> • Court issues Committal Order under s. 22(2) to commit the fugitive criminal to prison while awaiting for the Surrender Warrant from the Minister 	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> • Inform MHA and the foreign State that the fugitive criminal had waived the proceedings 	<input type="checkbox"/>	<input type="checkbox"/>
16. Minister issue surrender warrant if Session Court accept the waiver [s. 22(3)(b)]	<input type="checkbox"/>	<input type="checkbox"/>
17. If no waiver, proceed with committal hearing before Sessions Court [s. 19]	<input type="checkbox"/>	<input type="checkbox"/>
18. If Session Court satisfied with the application, to -	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> • Commit the fugitive criminal to prison 	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> • Allow 15 days to lapse before his extradition to give opportunity for fugitive criminal to file a writ of habeas corpus under Part VIII 	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> • If no habeas corpus application filed within specified time, Minister will issue a surrender warrant 	<input type="checkbox"/>	<input type="checkbox"/>
Fugitive criminal returned to Requesting State accordingly	<input type="checkbox"/>	<input type="checkbox"/>
PART 4 – FOLLOW UP ACTIONS		
A. <u>Monthly Report</u>	YES	NO
1. Update Monthly Report, Extradition Tracking System and Register on every action taken	<input type="checkbox"/>	<input type="checkbox"/>
B. <u>Liaison/Meeting</u>		
Coordinate meeting with all relevant agencies when necessary		

1. Contact or hold meeting with the relevant agencies when necessary	YES <input type="checkbox"/>	NO <input type="checkbox"/>
C. <u>Notification/Inquiry</u> 1. Update Requesting State on action/status when necessary: <ul style="list-style-type: none"> • Communicate with the Requesting authority regarding the progress of Request (may be directly or through the Embassy/High Commission) • Inquire if no answer or feedback is made to our inquiry for clarification 	YES <input type="checkbox"/> <input type="checkbox"/>	NO <input type="checkbox"/> <input type="checkbox"/>

UNODC

EXTRADITION MANUAL

1. THE MAIN LAWS

- Extradition Act 1992 [Act 479]

- Subsidiary Legislation

- Extradition (Republic of Indonesia) Order 1992 [*P.U. (A) 270/1992*]
- Extradition (Thailand) Order 1992 [*P.U. (A) 169/1992*]
- Extradition (Thailand) Order 1960 [*LN 305/1960*]
- Extradition (United States) Order 1997 [*P.U. (A) 213/1997*]
- Extradition (Hong Kong) Order 1997 [*P.U. (A) 250/2000*]
- Extradition (Australia) Order 2006 [*P.U. (A) 38/2006*]
- Extradition (Hong Kong) (Amendment) Order 1992 [*P.U. (A) 334/2007*]
- Extradition (India) Order 2010 [*P.U. (A) 233/2010*]

2. COMMENCEMENT

2.1 The handling of an extradition matter commences upon receipt of either of the following request:

- (i) a request for a provisional warrant of arrest pending a full extradition request; or
- (ii) a full request for extradition.

3. REQUEST FOR PROVISIONAL WARRANT OF ARREST TO MALAYSIA (MODEL FORM AGC-EX1-A)

(Please refer to flow chart Attachment 1)

3.1 Originator

For treaty partners, requests for provisional warrant of arrest are usually made by the foreign state to the designated Central Authority as provided for in the treaty:

- USA – United States Department of Justice
- Hong Kong – Attorney General's Chambers

- Thailand – Ministry of Home Affairs
- Indonesia – Ministry of Justice
- Australia – Attorney General’s Department
- India – Ministry of External Affairs

For non-treaty countries, information contained in an international notice issued by the International Criminal Police Organization (INTERPOL) in respect of a fugitive criminal may be considered by the Magistrate in deciding whether a provisional warrant should be issued for the apprehension of a fugitive criminal.

3.2 The Work Process

3.2.1 Upon receipt of the documents for the request for provisional warrant of arrest, verify:

- (a) whether treaty partner or non-treaty partner;
- (b) transmission of the request;
- (c) contents of the request;

A. Treaty Partner

For treaty partner, the supporting documents or the particulars to be included in the request for provisional warrant will normally be identified in the said treaty itself, such as—

- i. Original or copy of the charging document;
- ii. Original or copy of warrant of arrest has been attached;
- iii. Particulars of the fugitive criminal’s identity and probable location;
- iv. Particular of the facts of the offence;
- v. Evidence relied upon;
- vi. The provisions of the law, the essential elements of the offence and the punishment;

- vii. An assurance that extradition request will be sent;
- viii. Undertaking of specialty.

B. Non-Treaty Partner

In the event that Malaysia has no binding arrangement with the country which made the request, to consider items i – viii above and to advise the Ministry of Home Affairs to issue a Special Direction to give effect to the request (Section 3 of Act 479). The form used for Special Direction is as in Form A.

(If the particulars and information received are insufficient to require better and further particulars and information from the requesting authority – consultation mechanism)

- 3.2.2 If the above matters are satisfied, the Royal Malaysia Police (RMP) will be notified of the request and the RMP's assistance will be sought to locate the fugitive criminal.
- 3.2.3 The Notice of Application and the Supporting Affidavit to make an application for the issuance of the provisional warrant of apprehension to the Magistrate Court will be prepared.
- 3.2.4 To prepare a Memo to the Attorney General for further instructions.
 - Treaty Partner – to accede.
 - Non-Treaty Partner – to advise the Minister to issue a Special Direction under section 3.
- 3.2.5 Upon agreement by the Attorney General or issuance of a Special Direction under section 3 and upon confirmation on the location of the fugitive criminal, notice of application to be filed.
- 3.2.6 Upon obtaining the provisional warrant of arrest, transmit the provisional warrant of arrest to the RMP for execution.
- 3.2.7 Upon execution, to produce the fugitive criminal before the Magistrate Court and to apply for an order to remand the fugitive criminal in custody for such reasonable period of time as with reference to the circumstances of the case he may fix, and for

this purpose the Magistrate shall take into account any period in the relevant extradition treaty relating to the permissible period of remand upon provisional arrest of a fugitive criminal and to request for a mention date on the last day of the remand period.

3.2.8 Upon receipt of the full request, to produce the fugitive criminal before the Magistrate Court and request for the case to be transferred to the Sessions Court.

(Upon receipt of the full request, the work process described in paragraph 4 below applies).

4. FULL EXTRADITION REQUEST TO MALAYSIA (MODEL FORM AGC-EX1-B)

4.1 Transmission of Documents

A request for extradition shall be made in writing and sent through the diplomatic channel.

However, in urgent circumstances, an advance copy is sometimes transmitted to Chambers to enable initial work to be carried out. The advance copy is only to facilitate the work in the interest of expediting the request. It is not to be treated as an official request.

4.2 Work Process

4.2.1 Upon receipt of the documents by Chambers from the Ministry of Home Affairs, to verify:

- (a) whether treaty partner or non-treaty partner;
- (b) transmission of the request;
- (c) whether pursuant to provisional arrest request or a full request;

(if pursuant to provisional arrest request, please refer to paragraph 4.2.6 below)

- (d) contents of the request;

A. Treaty Partner

For treaty partner, the supporting documents or the particulars to be included in the request will be identified in the said treaty itself, such as—

- i. Original or copy of the charging document;
- ii. Original or copy of warrant of arrest has been attached;
- iii. Particulars of the fugitive criminal's identity and probable location;
- iv. Particular of the facts of the offence;
- v. Evidence relied upon;
- vi. The provisions of the law, the essential elements of the offence and the punishment;
- vii. Undertaking of specialty (if stated in the Treaty).

B. Non-Treaty Partner

For non-treaty partner, besides the particulars listed in items i to vii above, additional requirement on undertaking or reciprocity is required.

- (e) to determine whether the requisition documents had been authenticated in accordance with section 24;
- (f) to determine whether the conditions of Act 479 and/or Treaties are fulfilled;

(If the particulars and information received are insufficient to request for better and further particulars and information from the requesting authority – consultation mechanism).

4.2.2 Upon receipt of the full request, to notify the RMP to locate the fugitive criminal. If necessary, to issue a Memo to the Prosecution Division for second opinion and highlight issues which require its input.

4.2.3 Upon receiving all the required information, to prepare a Memo to the Attorney General for further instruction –

- (a) to advise the Minister to accede or refuse the request;
- (b) if to accede, to request the Minister to issue—
 - an Order under section 12(3) of Act 479 and a Direction under section 4 of Act 479 if the request is received from a treaty partner;
 - a Special Direction under section 3 of Act 479 and an Order under section 12(3) if the request is received from a non-treaty partner; or
 - an Order under section 16 of Act 479 if the request is originated from provisional warrant of arrest request.

4.2.4 Upon issuance of the Order under section 12(3) by the Minister, to apply to a Magistrate Court for a warrant of apprehension.

4.2.5 Upon issuance of the warrant of apprehension, to transmit the warrant to the RMP for execution.

4.2.6 Upon execution or upon the issuance of the Order by the Minister under section 16 of Act 479, to produce the fugitive criminal before the Magistrate Court and to apply for the said case to be transferred to the Sessions Court.

5. EXTRADITION PROCEEDINGS

5.1 Jurisdiction

The power and jurisdiction of the Sessions Court to hear extradition matter is provided under section 18 of Act 479.

5.2 Procedures

There are three different procedures envisaged under Act 479—

- (i) a full enquiry under section 19 of Act 479 where a prima facie standard of proof is required;
- (ii) a full enquiry under section 20 of Act 479 where the Minister has issued a written direction under section 4 of

Act 479 to dispense with the standard of proof of prima facie;

- (iii) a simplified procedure where the fugitive criminal informs the court that he consent to a waiver of committal proceedings under section 22 of Act 479.

5.3 The Work Process

5.3.1 Upon obtaining the order to transfer the case from the Magistrate Court to the Sessions Court, to file a Notice of Application at the Sessions Court for a committal order supported by the affidavits from the relevant officers as follows:

- (a) Senior Federal Counsel;
- (b) Arresting Officer; and
- (c) other relevant officers.

5.3.2 On the mention date, to produce the fugitive criminal before the Sessions Court. To advise the Court on the appropriate procedure to be applied. To tender the Direction issued under section 4 of Act 479 if the procedure under section 20 is to be applied.

5.3.3 To file further affidavit/s in support of the application, if necessary.

5.4 The Extradition Hearing

A. Hearing under section 19 or 20 of Act 479

5.4.1 The hearing of the extradition case is based on affidavits evidence filed by the parties.

5.4.2 Under section 19(2) of Act 479, the Sessions Court is empowered to receive any other evidence to show that the fugitive criminal should not be returned.

5.4.3 The Parties are normally be instructed to file written submissions together with bundle of authorities.

5.4.4 Upon hearing the submissions, the Sessions Court will make its decision whether to discharge the fugitive criminal or to issue and order of committal against the fugitive criminal.

5.4.5 If the Sessions Court decided to issue the order of committal, the fugitive criminal will be detained in prison pending the issuance of the order to surrender by the Minister.

B. Hearing under section 22 of Act 479

5.4.6 The fugitive criminal may inform the Sessions Court that he consents to a waiver of the committal proceedings.

5.4.7 The Sessions court is required to follow the procedures provided under section 22(1)(a) and (b) in order to ascertain that the said waiver is given voluntarily and to advise the fugitive criminal on the effect of such consent.

5.4.8 Upon such advice, if the fugitive criminal still consents to the waiver, the Sessions Court shall commit the fugitive criminal to prison to await for the issuance of the warrant of surrender from the Minister.

C. Application for a Writ of Habeas Corpus under section 36 of Act 479

5.4.9 Upon issuance of the committal order by the Sessions Court, the fugitive criminal may apply to the High Court for a writ of habeas corpus under section 36 of Act 479.

5.4.10 The Attorney General's Chambers of Malaysia (AGC), upon receiving the Notice of Application for a writ of habeas corpus from the fugitive criminal, is required to file the affidavits in reply to oppose the said application. The said affidavits will be deposed by the following officers;

- (a) Senior Federal Counsel;
- (b) Arresting Officer;
- (c) officer from the Prison department; and
- (d) any other relevant officer.

5.4.11 Parties are then required to file written submissions and bundle of authorities at the High Court.

5.4.12 The said application will be heard by a High Court Judge.

5.4.13 Upon the decision made by the High Court Judge, the aggrieved party (Appellant) may file an appeal against the said decision to the Federal Court.

5.4.14 Upon receiving a written decision/records of appeal from the High Court, the Appellant is required to file a petition of appeal setting out the grounds of appeal.

5.4.15 Parties are required to file written submissions and bundle of authorities at the Federal Court.

5.4.16 Upon the final determination by the Federal Court—

- if the fugitive criminal is discharged, he will be released from the detention under Act 479; or
- if the fugitive criminal is committed, he will be further detained pending the issuance of order of surrender by the Minister.

D. Application for Review under section 47 of Act 479

5.4.17 If the Sessions Court discharged the fugitive criminal upon hearing under section 19 or 20 of Act 479, the Public Prosecutor, upon the said decision, gives to the Sessions Court a notice of his intention to review the said decision at the High Court. The said Notice shall operate as a stay of the said order of discharged.

5.4.18 Upon such notice, the Sessions Court may grant bail to the fugitive criminal pending the determination of the review by the High Court.

5.4.19 AGC is required to inform the Requesting Party of the said decision and to seek further instructions as to whether to proceed with the review or otherwise.

5.4.20 Upon receiving instruction to proceed from the Requesting Party, AGC is required to file the application to review at the High Court within 10 days from the order of discharged. The said review is limited to questions of law only.

5.4.21 Upon receiving all the required documents from the Sessions Court under section 37(4) of Act 479, parties are required to file written submissions and bundle of authorities at the High Court.

5.4.22 Upon the determination by the High Court—

- if the decision of the Sessions Court is confirmed, the fugitive criminal shall be discharged; or
- if the decision of the Sessions Courts is quashed and is substituted with a committal order, the fugitive criminal will be committed to prison pending the issuance of order to surrender by the Minister.

The decision of the High Court shall be final and conclusive.

6. SURRENDER

- 6.1 Upon final determination of the committal order, AGC will inform the Requesting Party of the said decision and will request particulars of the officer(s) in charge to receive the fugitive criminal.
- 6.2 Upon receiving the said particulars, AGC will advise the Minister to issue the surrender order under section 21(2) or section 22(3) of Act 479 to authorize the surrender of the fugitive criminal to the said authorized officer(s) of the Requesting Party.
- 6.3 Upon receiving the said order of surrender from the Minister, AGC will consult with the RMP and the Requesting Party on the appropriate time/place of surrender.
- 6.4 Upon agreement, RMP will assist the Requesting Party in the process of surrender.
- 6.5 The process of surrender is to take place within 3 months or the period prescribed by the treaty after the date of committal order or after the final determination of the Court's decision. The Minister may, upon an application by the fugitive criminal or on his behalf, order such fugitive criminal to be discharged unless sufficient cause is shown to the contrary.

REQUEST FROM MALAYSIA

7. ORIGINATOR

- By Legal Enforcement Agency

- By Prosecution Division

8. DETERMINATION OF TYPE OF REQUEST

Upon receiving a request from the originator, the International Affairs Division of the AGC (the IAD) is required to determine whether it is for provisional warrant of arrest or a full request.

9. REQUEST FOR PROVISIONAL WARRANT OF ARREST BY MALAYSIA (MODEL FORM AGC-EX1-C)

(Please refer to flow chart Attachment 1)

9.1 Work Process

9.1.1 Upon receipt of the request from the originator, the IAD to verify—

- (a) whether treaty partner or non-treaty partner;
- (b) contents of the request;
 - i. Original or copy of the charging document;
 - ii. Original or copy of warrant of arrest has been attached;
 - iii. Particulars of the fugitive criminal's identity and probable location;
 - iv. Particular of the facts of the offence;
 - v. Evidence relied upon;
 - vi. The provisions of the law, the essential elements of the offence and the punishment;
 - vii. An assurance that extradition request will be sent;
 - viii. Undertaking of specialty.

(If the particulars and information received from the originator are insufficient, to request better and further particulars and information from the originator)

9.1.2 The IAD to prepare a draft provisional warrant of arrest request and submit it to the originator for consideration.

9.1.3 Upon approval from the originator, the IAD will finalize the draft request including all the supporting documents, and prepare a Memo the Attorney General for approval.

- 9.1.4 Upon approval, the provisional warrant of arrest request will be transmitted to the Requested Party *via* diplomatic channel or direct transmission, as required either under Act 479 or relevant extradition treaty.
- 9.1.5 Communication will be made with the central authority of the Requested Party on any matter arising thereafter.
- 9.1.6 The IAD to liaise with the originator in preparing the full extradition request pending confirmation/response from the Requested Party.
- 9.1.7 To submit the full extradition request to the Requested Party upon confirmation of the arrest of the fugitive criminal within the stipulated time provided under the relevant extradition treaty or as requested by the Requested Party (process of preparing full extradition request is as provided under paragraph 10 below).

10. **FULL EXTRADITION REQUEST BY MALAYSIA (MODEL FORM AGC-EX1-D)**

(Please refer to flow chart Attachment 1)

10.1 **Work Process**

- 10.1.1 Upon receipt of the request from the originator, AGC to verify—
- (a) whether treaty partner or non-treaty partner;
 - (b) whether a new request or pursuant to provisional warrant of arrest request;
 - (c) contents of the request;
 - i. Original or copy of the charging document;
 - ii. Original or copy of warrant of arrest has been attached;
 - iii. Particulars of the fugitive criminal's identity and probable location;
 - iv. Particular of the facts of the offence;
 - v. Evidence relied upon;
 - vi. The provisions of the law, the essential elements of the offence and the punishment;
 - vii. Undertaking of specialty;

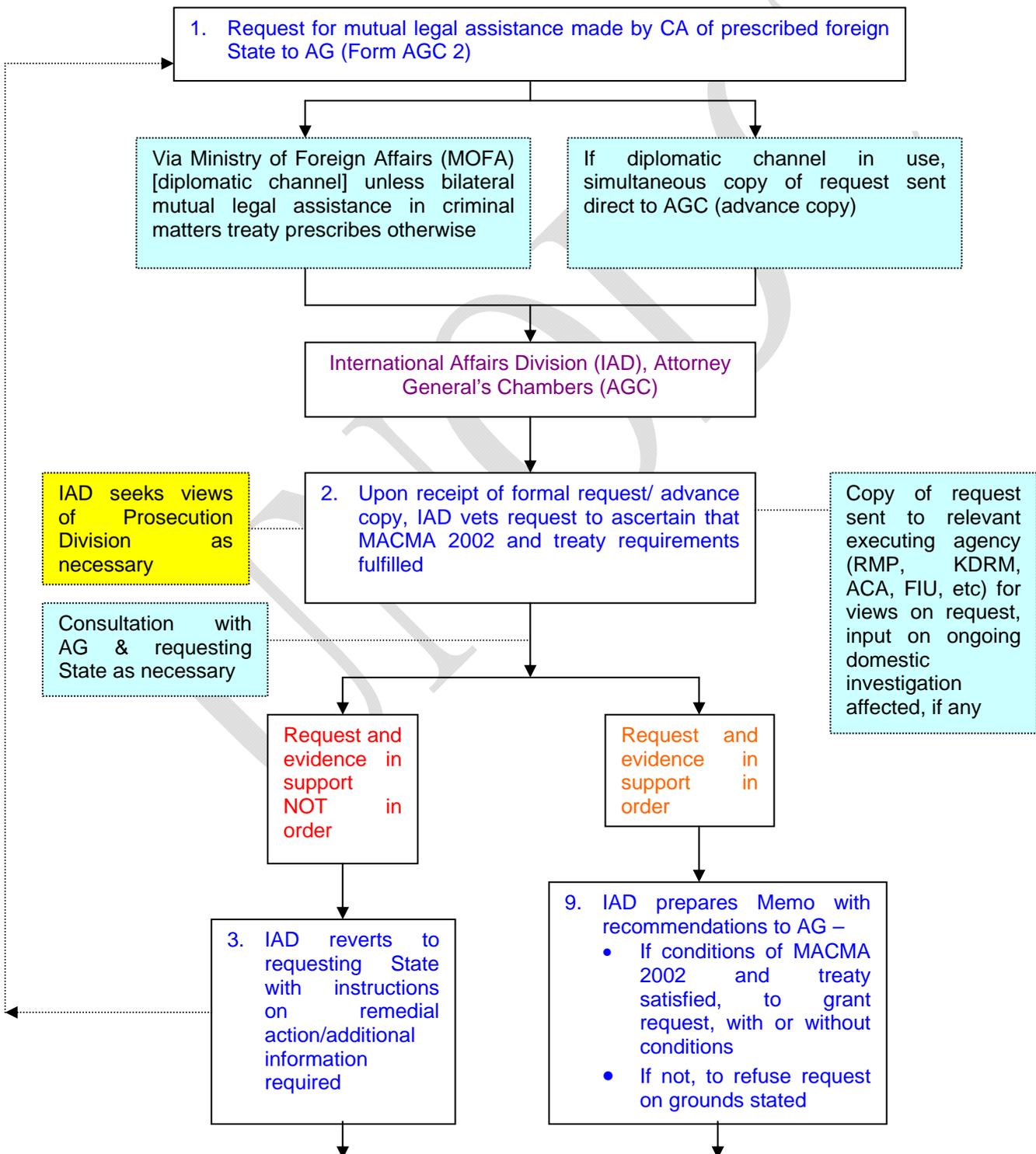
viii. Undertaking or reciprocity.

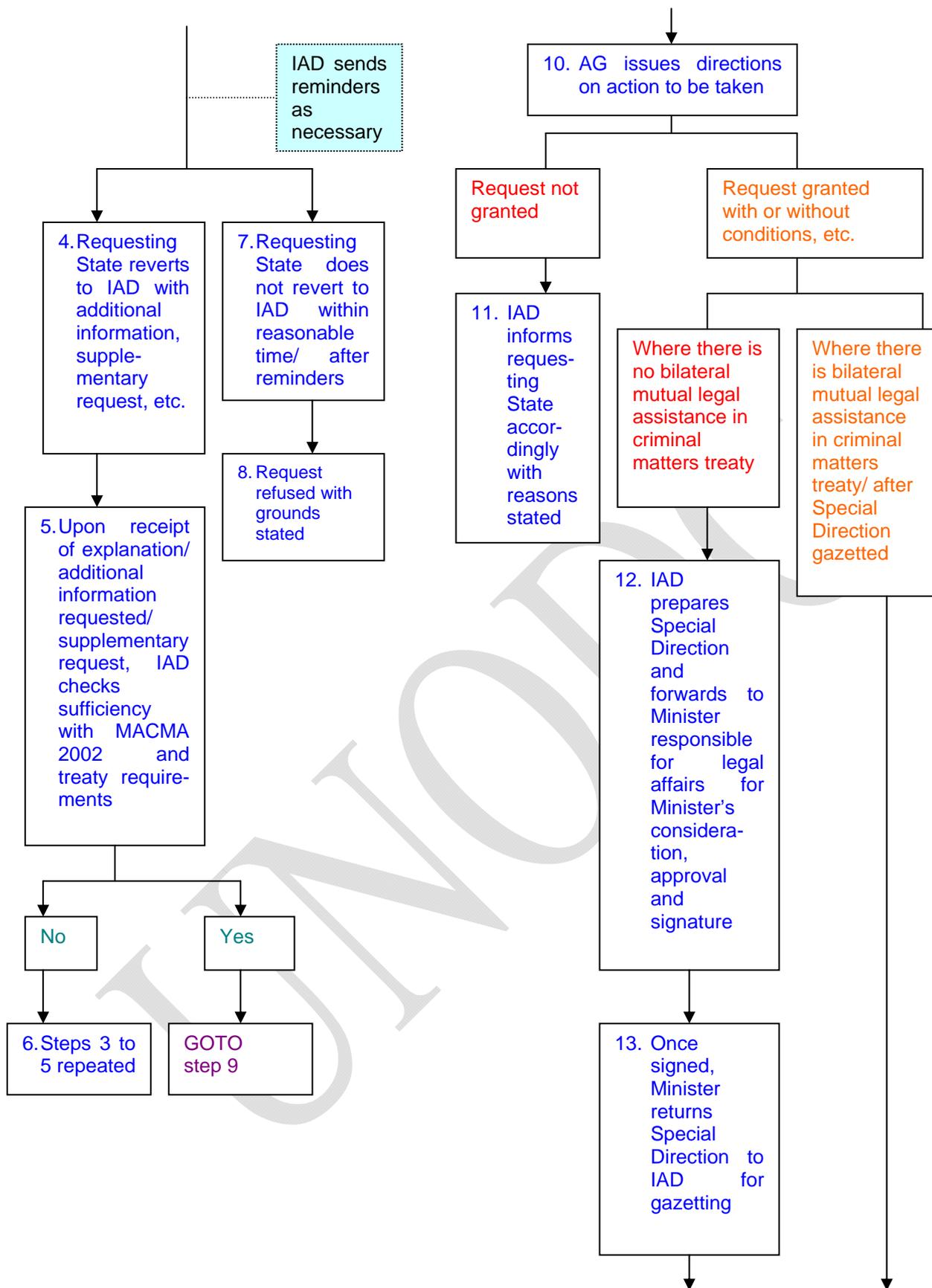
(If the particulars and information received from the originator are insufficient, to request better and further particulars and information from the originator)

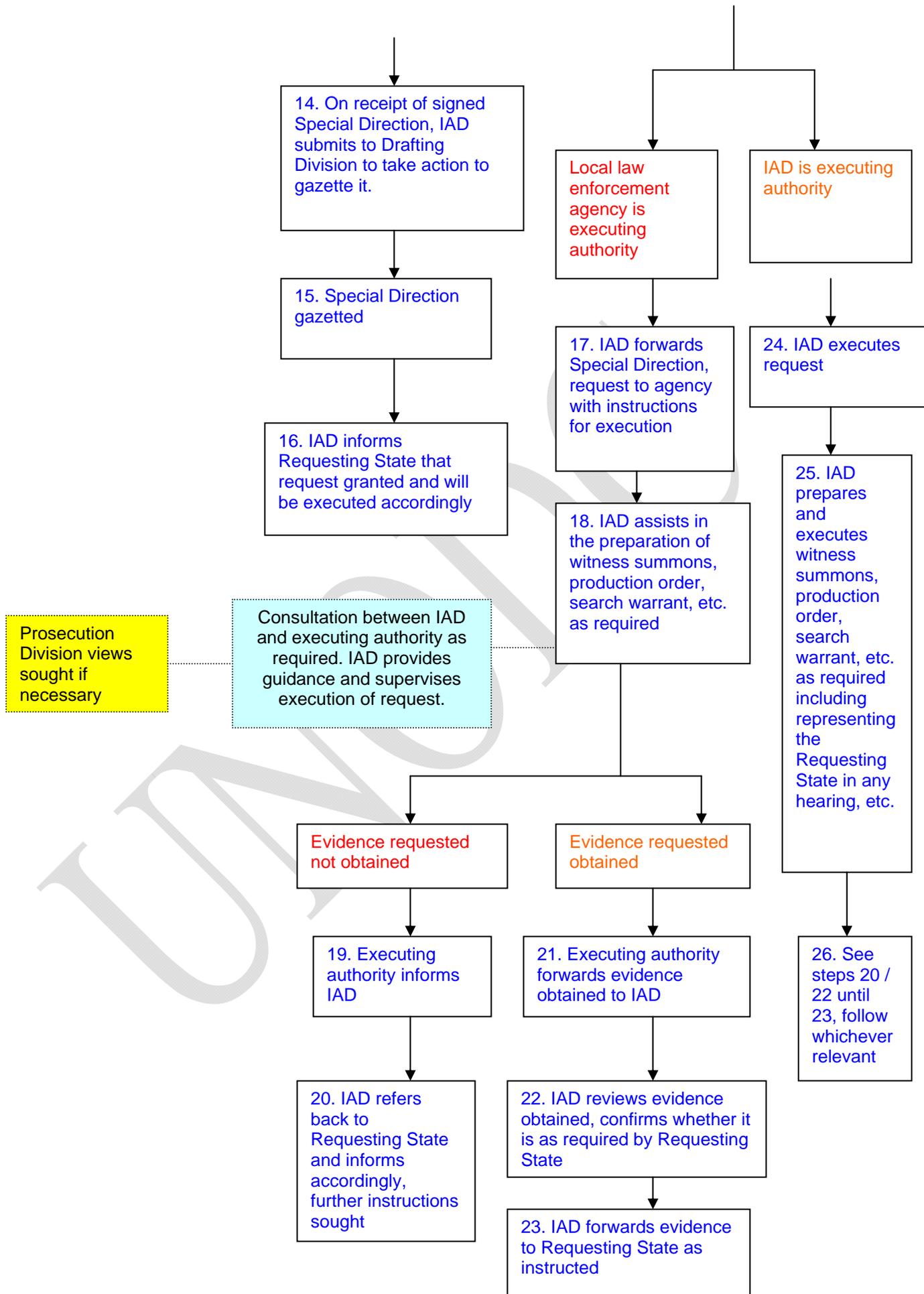
- 10.1.2 The IAD to prepare a draft request and submit it to the originator for consideration. A consultation/discussion may be convened, if necessary.
- 10.1.3 Upon approval of the originator, The IAD will finalize the draft request including all the supporting documents and prepare a Memo to the Attorney General for approval.
- 10.1.4 Upon approval by the Attorney General, the draft request will be sent to the Minister of Home Affairs for the Minister's consideration and approval.
- 10.1.5 Upon approval and signature by the Minister, the request to be submitted to the Requested Party through the diplomatic channel.
- 10.1.6 The IAD will communicate with the central authority of the Requested Party on any matters arising thereafter, including further input and surrender.

MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS

OVERVIEW OF WORK PROCESSES FOR EXECUTION OF MUTUAL LEGAL ASSISTANCE REQUESTS TO MALAYSIA UNDER THE MUTUAL ASSISTANCE IN CRIMINAL MATTERS ACT 2002 AND RELEVANT MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS TREATIES







Annex 19

NOTE:
FOR INTERNAL CIRCULATION AND
TO BE USED AS A GUIDELINE ONLY

**CHECKLIST I
REQUEST FOR MUTUAL ASSISTANCE IN CRIMINAL MATTERS FROM
MALAYSIA**

Desk officer:
Supervising officer:
Ref no: JPN(R) 152/185/29/____ (Re _____)
: _____)
Date of receipt of request:

<p>PART 1 – Received application from local agencies/ Prosecution Division</p>											
<p>A. <u>Perusal and advise as required under the provision of MACMA</u></p>											
<p>1. Open new file.</p>	<table style="width: 100%; border: none;"> <tr> <td style="width: 50%; text-align: center;">YES</td> <td style="width: 50%; text-align: center;">NO</td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> </table> <p>Reason:</p>	YES	NO	<input type="checkbox"/>	<input type="checkbox"/>						
YES	NO										
<input type="checkbox"/>	<input type="checkbox"/>										
<p>2. Update the request into the MACMA Tracking System.</p>											
<p>3. Consultations with the local agencies.</p>	<table style="width: 100%; border: none;"> <tr> <td style="width: 50%; text-align: center;"><input type="checkbox"/></td> <td style="width: 50%; text-align: center;"><input type="checkbox"/></td> </tr> </table>	<input type="checkbox"/>	<input type="checkbox"/>								
<input type="checkbox"/>	<input type="checkbox"/>										
<p>4. Prosecution Division –</p> <ul style="list-style-type: none"> • Type the purpose of the request • Advise on preparing of draft request • Provide Form AGC 2 	<table style="width: 100%; border: none;"> <tr> <td style="width: 50%; text-align: center;"><input type="checkbox"/></td> <td style="width: 50%; text-align: center;"><input type="checkbox"/></td> </tr> <tr> <td style="width: 50%; text-align: center;"><input type="checkbox"/></td> <td style="width: 50%; text-align: center;"><input type="checkbox"/></td> </tr> <tr> <td style="width: 50%; text-align: center;"><input type="checkbox"/></td> <td style="width: 50%; text-align: center;"><input type="checkbox"/></td> </tr> <tr> <td style="width: 50%; text-align: center;"><input type="checkbox"/></td> <td style="width: 50%; text-align: center;"><input type="checkbox"/></td> </tr> <tr> <td style="width: 50%; text-align: center;"><input type="checkbox"/></td> <td style="width: 50%; text-align: center;"><input type="checkbox"/></td> </tr> </table>	<input type="checkbox"/>									
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<p>B. <u>Treaty/Non-treaty</u></p>	<p>↓</p> <table style="width: 100%; border: none;"> <tr> <td style="width: 50%; text-align: center;">YES</td> <td style="width: 50%; text-align: center;">NO</td> </tr> </table>	YES	NO								
YES	NO										
<p>1. If treaty based request, request is subject to treaty.</p>	<table style="width: 100%; border: none;"> <tr> <td style="width: 50%; text-align: center;"><input type="checkbox"/></td> <td style="width: 50%; text-align: center;"><input type="checkbox"/></td> </tr> </table>	<input type="checkbox"/>	<input type="checkbox"/>								
<input type="checkbox"/>	<input type="checkbox"/>										
<p>2. If non-treaty based request, request is subject to</p>	<table style="width: 100%; border: none;"> <tr> <td style="width: 50%; text-align: center;"><input type="checkbox"/></td> <td style="width: 50%; text-align: center;"><input type="checkbox"/></td> </tr> </table>	<input type="checkbox"/>	<input type="checkbox"/>								
<input type="checkbox"/>	<input type="checkbox"/>										

MACMA.																																									
PART 2 – Vetting of request																																									
<p>A. <u>Criminal matter</u></p> <p>1. Offence is a serious offence if committed in Malaysia.</p> <p>2. Offence punishable with imprisonment for not less than one year or death in both Requesting and Requested State.</p>	<table border="0"> <tr> <td style="text-align: center;">YES</td> <td style="text-align: center;">NO</td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> </table>	YES	NO	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>																																		
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<p>B. <u>Undertakings</u></p> <p>1. Reciprocity</p> <p>2. Specialty.</p> <p>3. Return.</p> <p>4. Safe conduct.</p>	<table border="0"> <tr> <td style="text-align: center;">YES</td> <td style="text-align: center;">NO</td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> <tr> <td colspan="2">Reason:</td> </tr> <tr> <td colspan="2">.....</td> </tr> <tr> <td colspan="2">.....</td> </tr> <tr> <td colspan="2">.....</td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> <tr> <td colspan="2">Reason:</td> </tr> <tr> <td colspan="2">.....</td> </tr> <tr> <td colspan="2">.....</td> </tr> <tr> <td colspan="2">.....</td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> <tr> <td colspan="2">Reason:</td> </tr> <tr> <td colspan="2">.....</td> </tr> <tr> <td colspan="2">.....</td> </tr> <tr> <td colspan="2">.....</td> </tr> <tr> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> <tr> <td colspan="2">Reason:</td> </tr> <tr> <td colspan="2">.....</td> </tr> <tr> <td colspan="2">.....</td> </tr> </table>	YES	NO	<input type="checkbox"/>	<input type="checkbox"/>	Reason:			<input type="checkbox"/>	<input type="checkbox"/>	Reason:			<input type="checkbox"/>	<input type="checkbox"/>	Reason:			<input type="checkbox"/>	<input type="checkbox"/>	Reason:		
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<p>5. Cost</p>	<p>.....</p> <p><input type="checkbox"/> <input type="checkbox"/></p> <p>Reason:</p> <p>.....</p> <p>.....</p> <p>.....</p>
<p>C. <u>Grounds for refusal</u></p> <p>1. Dual criminality i.e. foreign serious offence.</p> <p>2. Sentence of offence i.e. death penalty/corporeal punishment.</p>	<p>YES NO</p> <p><input type="checkbox"/> <input type="checkbox"/></p> <p><input type="checkbox"/> <input type="checkbox"/></p>
<p>PART – 3 APPROVAL OF REQUEST</p>	
<p>1. Memo to AG.</p>	<p>YES NO</p> <p><input type="checkbox"/> <input type="checkbox"/></p>
<p>PART 4 – TRANSMISSION OF REQUEST</p>	
<p>1. Submit letter to MOFA for onwards submission to the Requested State with simultaneous advance copy to the Central Authority of the Requested State.</p>	<p>YES NO</p> <p><input type="checkbox"/> <input type="checkbox"/></p> <p>Reason:</p> <p>.....</p> <p>.....</p> <p>.....</p>

NOTE:
FOR INTERNAL CIRCULATION AND
TO BE USED AS A GUIDELINE ONLY

CHECKLIST II
REQUEST FOR MUTUAL ASSISTANCE IN CRIMINAL MATTERS TO
MALAYSIA

Desk officer:
Supervising officer:
Ref no: JPN(R) 152/185/29/____ (Re
:_____)
Date of receipt from agency:

PART 1 – PERUSAL AND VETTING OF REQUEST AS REQUIRED UNDER THE MUTUAL ASSISTANCE IN CRIMINAL MATTERS ACT 2002 [Act 621]				
A. <u>Treaty/Non-treaty [s.17 & 18]</u>				
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	YES	NO		
1. Open new file	<table style="width: 100%; border: none;"> <tr> <td style="width: 60%;"></td> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> </table>		<input type="checkbox"/>	<input type="checkbox"/>
	<input type="checkbox"/>	<input type="checkbox"/>		
	Reason:			
2. Update request into the MLA Tracking System	<input type="checkbox"/>	<input type="checkbox"/>		
3. Treaty based (request is subject to treaty and Act 621)	<input type="checkbox"/>	<input type="checkbox"/>		
4. Non-treaty based (request is subject to MACMA)	<input type="checkbox"/>	<input type="checkbox"/>		
B. <u>Diplomatic channel [s.19(2)]</u>				
1. Acknowledgement letter sent within 4 days to:-	<table style="width: 100%; border: none;"> <tr> <td style="width: 60%;"></td> <td style="text-align: center;">YES</td> <td style="text-align: center;">NO</td> </tr> </table>		YES	NO
	YES	NO		
• Ministry of Foreign Affairs	<input type="checkbox"/>	<input type="checkbox"/>		
	Reason:			

<ul style="list-style-type: none"> Requesting state (Embassy/High Commission) 	<input type="checkbox"/> <input type="checkbox"/> Reason:															
<p>C. <u>Notification to/Feedback from agencies</u></p> <p>1. Memo/Letters to be issued within <u>7 days</u> to –</p> <ul style="list-style-type: none"> Prosecution Division & Research Division (if necessary depending on complexity) Investigating Agencies Regulating Agencies 	<table border="0"> <tr> <td></td> <td style="text-align: center;">YES</td> <td style="text-align: center;">NO</td> </tr> <tr> <td></td> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> <tr> <td></td> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> <tr> <td></td> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> </table>		YES	NO		<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>			
	YES	NO														
	<input type="checkbox"/>	<input type="checkbox"/>														
	<input type="checkbox"/>	<input type="checkbox"/>														
	<input type="checkbox"/>	<input type="checkbox"/>														
<p>E. <u>Foreign serious offence/serious offence (threshold) [s.2]</u></p> <p>1. Whether offence is a serious offence if committed in (Malaysia)</p> <p>2. Whether offence is punishable with imprisonment for not less than one year or death in both Requesting and Requested States.</p>	<table border="0"> <tr> <td></td> <td style="text-align: center;">YES</td> <td style="text-align: center;">NO</td> </tr> <tr> <td></td> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> <tr> <td></td> <td colspan="2">Reason:</td> </tr> <tr> <td></td> <td style="text-align: center;"><input type="checkbox"/></td> <td style="text-align: center;"><input type="checkbox"/></td> </tr> <tr> <td></td> <td colspan="2">Reason:</td> </tr> </table>		YES	NO		<input type="checkbox"/>	<input type="checkbox"/>		Reason:			<input type="checkbox"/>	<input type="checkbox"/>		Reason:	
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<p>E. <u>Criminal Matters [s.2]</u></p> <p>1. Determine if request relates to a criminal matter in a foreign State.</p>	<p>YES NO</p> <p><input type="checkbox"/> <input type="checkbox"/></p> <p>Reason:</p> <p>.....</p> <p>.....</p> <p>.....</p>
<p>F. <u>Dual criminality [s.2]</u></p> <p>1. Determine whether it fulfills the requirement of dual criminality i.e foreign serious offence is a recognized offence under the Malaysian law.</p> <p>2. If necessary and depending on complexity of request, to send Memo to Prosecution Division and Research Division requesting feedback on dual criminality.</p>	<p>YES NO</p> <p><input type="checkbox"/> <input type="checkbox"/></p> <p>Reason:</p> <p>.....</p> <p>.....</p> <p>.....</p> <p><input type="checkbox"/> <input type="checkbox"/></p>
<p>G. <u>Specialty undertaking [s.20(1)(j)]</u></p> <p>1. For non-treaty, determine whether the undertaking of reciprocity is provided.</p> <p>2. If not, request for undertaking from Requesting State.</p>	<p>YES NO</p> <p><input type="checkbox"/> <input type="checkbox"/></p> <p><input type="checkbox"/> <input type="checkbox"/></p>
<p>H. <u>Undertaking to return [s.20(1) (k)]</u></p> <p>1. Determine whether undertaking is provided.</p>	<p>YES NO</p> <p><input type="checkbox"/> <input type="checkbox"/></p>

	Reason:
2. If not, request for undertaking from Requesting state (Exception: Undertaking not necessary if copies of things and not the original are requested)	<input type="checkbox"/> <input type="checkbox"/>
I. <u>Reciprocity undertaking [s.20(3)(d)]</u>	YES NO
1. Determine whether undertaking is provided.	<input type="checkbox"/> <input type="checkbox"/>
	Reason:
2. If not, request for undertaking from Requesting state (Exception: Undertaking not necessary if copies of things and not the original are requested)	<input type="checkbox"/> <input type="checkbox"/>
3. For treaty partners, no necessity to seek for an undertaking of reciprocity as the treaty itself is the basis of reciprocity	<input type="checkbox"/> <input type="checkbox"/>
J. <u>Contents of Request [s.19]</u>	YES NO
1. Request to the Attorney General [s.19(1)]	<input type="checkbox"/> <input type="checkbox"/>
2. Purpose and nature of the Request [s.19(3)(a)]	<input type="checkbox"/> <input type="checkbox"/>
3. Identity of the Requesting authority [s.19(3)(b)]	<input type="checkbox"/> <input type="checkbox"/>
4. Certification from the appropriate authority that the request relates to a criminal matter [s.19(3)(c)(i)]	<input type="checkbox"/> <input type="checkbox"/>
5. Description of the criminal matter including summary of the relevant facts and laws [s.19(3)(c)(ii)]	<input type="checkbox"/> <input type="checkbox"/>
6. Description of the person or property and grounds of suspicion [s.19(3)(c)(iii)]	<input type="checkbox"/> <input type="checkbox"/>
7. Description of the offence and its maximum penalty [s.19(3)(c)(iv)]	<input type="checkbox"/> <input type="checkbox"/>
8. Details of the procedure required to be adhered to	<input type="checkbox"/> <input type="checkbox"/>

[s.19(3)(c)(v)]		
9. Statement as to the institution of judicial proceeding if the Request relates to ancillary criminal matter of foreign forfeiture order [s.19(3)(c)(vi)]	<input type="checkbox"/>	<input type="checkbox"/>
10. Confidentiality [s.19(3)(c)(vii)]	<input type="checkbox"/>	<input type="checkbox"/>
11. Time frame [s.19(3)(c)(viii)]	<input type="checkbox"/>	<input type="checkbox"/>
12. Information on allowances, security arrangement and accommodation if Request relates to attendance of a witness [s.19(3)(c)(ix)]	<input type="checkbox"/>	<input type="checkbox"/>
13. Any other relevant information based on the treaty/agreement or provisions of MACMA or regulations [s.19(3)(c)(x) & (xi)]	<input type="checkbox"/>	<input type="checkbox"/>
	*Note: If not provided, send letter to Requesting State to explain and advise accordingly	
K. <u>Mandatory grounds of refusal [s.20(1)]</u>	YES	NO
1. Failure to comply with the provision of the treaty/agreement [s.20(1)(a)] (applicable to treaty partners only)	<input type="checkbox"/>	<input type="checkbox"/>
2. Request relates to an offence of a political nature [s.20(1)(b)]	<input type="checkbox"/>	<input type="checkbox"/>
3. Request relates to a military offence which is also not an offence under the ordinary criminal law [s.20(1)(c)]	<input type="checkbox"/>	<input type="checkbox"/>
4. Request causing prejudice based on race, religion, sex, ethnic origin, nationality or political opinions [s.20(1)(d)]	<input type="checkbox"/>	<input type="checkbox"/>
5. Double jeopardy [s.20(1)(e)]	<input type="checkbox"/>	<input type="checkbox"/>
6. Dual criminality [s.20(1)(f)]	<input type="checkbox"/>	<input type="checkbox"/>
7. Offence of insufficient gravity [s.20(1)(g)]	<input type="checkbox"/>	<input type="checkbox"/>
8. Insufficient importance or availability of other means [s.20(1)(h)]	<input type="checkbox"/>	<input type="checkbox"/>
9. Affecting sovereignty, security, public order or other essential public order in Malaysia [s.20(1)(i)]	<input type="checkbox"/>	<input type="checkbox"/>

<p>10. Undertaking of specialty [s.20(1)(j)]</p> <p>11. Undertaking to return the things obtained after completion of the criminal matter upon request of the Attorney General on Request relating to ss.24, 26, 35, 36, 37 and 38 [s.20(1)(k)]</p>	<p><input type="checkbox"/> <input type="checkbox"/></p> <p><input type="checkbox"/> <input type="checkbox"/></p>
<p>12. Prejudicial to a criminal matter in Malaysia [s.20(1)(l)]</p> <p>13. Required steps to be taken would be contrary to any written law [s.20(1)(m)]</p>	<p><input type="checkbox"/> <input type="checkbox"/></p> <p><input type="checkbox"/> <input type="checkbox"/></p> <p>*Note: If applicable, send letter to Requesting State to explain and advise accordingly</p>
<p>L. <u>Discretionary grounds of refusal</u> [s.20(3)]</p> <p>1. Pursuant to terms of treaty/agreement [s.20(3)(a)] (applicable to treaty partners only)</p> <p>2. Prejudicial to the safety of any person whether within or outside Malaysia [s.20(3)(b)]</p> <p>3. Assistance would impose excessive burden on the resources of Malaysia [s.20(3)(c)]</p> <p>4. No undertaking of reciprocity from a non-prescribed foreign State excessive burden on the resources of Malaysia [s.20(3)(d)] (applicable to non-treaty partners only)</p>	<p>YES NO</p> <p><input type="checkbox"/> <input type="checkbox"/></p> <p><input type="checkbox"/> <input type="checkbox"/></p> <p><input type="checkbox"/> <input type="checkbox"/></p> <p><input type="checkbox"/> <input type="checkbox"/></p> <p>*Note: If applicable, send letter to Requesting State to explain and advise accordingly</p>
<p>M. <u>Reminder</u></p> <p>1. Send reminder to the relevant agencies if no feedback is received every 6 weeks or when necessary</p>	<p>YES NO</p> <p><input type="checkbox"/> <input type="checkbox"/></p>
<p>PART 2 – APPROVAL OF REQUEST</p>	
<p>A. <u>Memo to AG</u></p> <p>1. To give opinion on our ability to execute the request and to make recommendations</p>	<p>YES NO</p> <p><input type="checkbox"/> <input type="checkbox"/></p>

2. If non-treaty based request, to recommend Special Direction to be issued	<input type="checkbox"/>	<input type="checkbox"/>
3. Attach copies of:		
• Diplomatic Note	<input type="checkbox"/>	<input type="checkbox"/>
• Request	<input type="checkbox"/>	<input type="checkbox"/>
• Letter to MOFA	<input type="checkbox"/>	<input type="checkbox"/>
• Feedback/input	<input type="checkbox"/>	<input type="checkbox"/>
• Other relevant documents	<input type="checkbox"/>	<input type="checkbox"/>
• Draft letter to Minister	<input type="checkbox"/>	<input type="checkbox"/>
• Draft Special Direction	<input type="checkbox"/>	<input type="checkbox"/>
4. In case of treaty based request, to give opinion to the AG on the ability to execute the request and to make recommendation	<input type="checkbox"/>	<input type="checkbox"/>
5. Attach copies of:		
• Diplomatic Note	<input type="checkbox"/>	<input type="checkbox"/>
• Request	<input type="checkbox"/>	<input type="checkbox"/>
• Letter to MOFA	<input type="checkbox"/>	<input type="checkbox"/>
• Feedback/input	<input type="checkbox"/>	<input type="checkbox"/>
• Other relevant documents	<input type="checkbox"/>	<input type="checkbox"/>
*Note: Immediate after completion of Part 1.		
B. <u>Submit Special Direction to Minister</u>	YES	NO
1. Once AG has given approval, send SD to Minister for signature	<input type="checkbox"/>	<input type="checkbox"/>
2. Receipt of signed SD from Minister	<input type="checkbox"/>	<input type="checkbox"/>
3. Gazette SD by sending a Memo to the Drafting Division (send immediately upon receipt of SD)	<input type="checkbox"/>	<input type="checkbox"/>

<p>4. Simultaneously, send a copy of the signed SD for information to:</p> <ul style="list-style-type: none"> • Requesting State • Executing agency 	<input type="checkbox"/>	<input type="checkbox"/>
PART 3 – EXECUTION OF REQUEST		
C. <u>Taking of Evidence [s.22]</u>		
	YES	NO
<p>1. Locate the witness from whom statement is required to be recorded (RMP)</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>2. Prepare Memo to Ag for an <u>Authorisation to Take Evidence</u> in accordance with Form 9 of MACMR 2002</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>3. Prepare affidavit in support of the application</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>4. File application to the relevant Session Court</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>5. On the 1st mention date, fixed a date of the hearing/recording of the statement of the witness and apply for a subpoena for the witness to attend the hearing</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>6. Inform the RMP of the hearing date and to serve the subpoena for the witness to attend the hearing</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>7. Apply for a gag order to the Court before the commencement of the proceedings</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>8. Record statement of the witness before the Judge on oath. Questions as provided by the Requesting State</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>9. Apply to the Judge for an Order in accordance with Form 10 of MACMR and Notes of Evidence</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>10. Transmit to Requesting State</p>	<input type="checkbox"/>	<input type="checkbox"/>
B. <u>Production Order [s.23 MACMA & Reg. 16 MACMR]</u>		

<ol style="list-style-type: none"> 1. Obtained confirmation from BNM of the financial account/transaction 2. Prepare Memo to AG for the Authorisation to Apply for PO 3. File application for PO to the relevant High Court in accordance with Form 13 of MACMR 2002 with supporting affidavit 4. Inform the bank/financial institution of the hearing date of the PO 	<p>YES</p> <input type="checkbox"/>	<p>NO</p> <input type="checkbox"/>
<ol style="list-style-type: none"> 5. On the hearing of the PO, apply for a gag order before commencement of the proceedings 6. Court to grant PO in accordance with Form 14 of the MACMR 2002 7. Serve PO to the relevant financial institution for them to prepare the documentations as required 8. Upon receiving the documentation from the financial institution, transmit the same to the Requesting State via Diplomatic channel 	<input type="checkbox"/>	<input type="checkbox"/>
<p><u>C. Attendance of person [s.27 MACMA & Reg. 17 MACMR]</u></p> <ol style="list-style-type: none"> 1. Liaise with RMP on the location of the witness 2. Obtained the witness' consent to travel and attend in the prescribed foreign State as requested in the request 3. Arrange with the prescribed foreign State matters pertaining to the witness' accommodation, fees, allowances, expenses, security, rights, obligations and the effect or consequences of his consent 	<p>YES</p> <input type="checkbox"/>	<p>NO</p> <input type="checkbox"/>
<p><u>D. Enforcement of Foreign Forfeiture Order (FFO) [s.31 & 32 MACMA & Reg. 28 MACMR]</u></p> <ol style="list-style-type: none"> 1. Study request and prepare Memo to AG for authorization, if AG does not authorize the enforcement of the FFO, inform the Requesting State 	<p>YES</p> <input type="checkbox"/>	<p>NO</p> <input type="checkbox"/>

with the reasons for refusal		
2. If AG authorizes, Authorisation in accordance with Form 30 will be issued for an <i>ex parte</i> application for the registration of the FFO to the High Court	<input type="checkbox"/>	<input type="checkbox"/>
3. Application should be supported with: <ul style="list-style-type: none"> • A statement stating the name, the authority of the prescribed foreign State making the request • Affidavits verifying the facts relied on • A copy of the sealed authenticated copy of the FFO 	<input type="checkbox"/>	<input type="checkbox"/>
4. If the Judge in Chambers is satisfied that the requirements of section 32, 33 and 34 MACMA have been satisfied, the Court will then register the FFO and issue a warrant for its enforcement in accordance with Form 31. Undertakings may be required in respect of the payment of damages or costs. If the application is refused, then the Requesting State will be informed accordingly	<input type="checkbox"/>	<input type="checkbox"/>
5. The authorized officer will proceed to enforce the FFO as if it were a forfeiture order issued by the High Court. The warrant must be executed within a period of 12 months unless renewed by the High Court	<input type="checkbox"/>	<input type="checkbox"/>
6. If the Court revokes the FFO or if it is not possible to recover the property that is subject to the FFO, the Requesting State shall be informed of the reasons thereto	<input type="checkbox"/>	<input type="checkbox"/>
7. If the property has been recovered, to inform the Requesting state of the same and initiate proceedings to forfeit and vest it in the Government of Malaysia without prejudice to the rights of the <i>bona fide</i> 3 rd parties	<input type="checkbox"/>	<input type="checkbox"/>
8. To issue public notification in the Gazette specifying the articles of the property and requiring any person who has any claim within 6 months from the publication	<input type="checkbox"/>	<input type="checkbox"/>

<p>9. If there is no claim made, the property will be sold and net proceeds will pass and become vested with the Government of Malaysia. If there is a claim made to the property, the Requesting State will be informed and seek further instructions</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>10. If sharing of the assets is made in the Treaty, the AG will liaise with the Requesting State on the sharing of assets</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>E. <u>Service of Process [s.40 MACMA & Reg. 34 MACMR]</u></p>		
	<p>YES</p>	<p>NO</p>
<p>1. Study the request and prepare Memo to AG for authorization, if AG does not authorize the execution of the request, inform the Requesting State with the reasons for refusal</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>2. If AG authorizes, authorization in accordance with Form 39 of MACMR will be issued to RMP or an officer of a relevant agency to effect the service of the process</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>3. If the service cannot be affected, the authorized agency or RMP will send an affidavit of non-service in Form 39</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>4. If the service has been affected, the authorized officer or authorized agency will send the affidavit of service in Form 40</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>5. Transmit the affidavit to the Requesting State</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>F. <u>Search Warrant & Seizure [s.35 MACMA & Reg. 32 MACMR]</u></p>		
	<p>YES</p>	<p>NO</p>
<p>1. Study the request and prepare Memo to AG for authorization, if AG does not authorize the execution of the request, inform the Requesting State with the reasons for refusal</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>2. If AG authorizes, authorization in accordance with Form 37 of MACMR will be issued to RMP or an</p>	<input type="checkbox"/>	<input type="checkbox"/>

<p>officer of a relevant agency to effect the service of the process</p>		
<p>3. The application should be made to a subordinate court, unless if the request pertains to a thing in the possession of a financial institution, a PO to be made to the High Court</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>4. To inform the Requesting State/Court if there are representatives to be present during the proceedings</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>5. Court may issue the order, if a foreign immunity certificate is tendered by the person to whom the proceedings in the Requesting State relates or to whom the PO is issued</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>6. If application for warrant is issued and things searched for under the warrant cannot be found, to inform the Requesting State</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>7. To inform AG of the seizure of thing under the warrant and register the seizure and inform the Requesting State</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>8. If the AG so directs, the thing to be sent to IAD and after checking the item seized and cataloging them to ensure the chain of evidence, the thing will be sent via diplomatic channel to the Requesting State with a transmission note stating whether the thing to be returned to Malaysia</p>	<input type="checkbox"/>	<input type="checkbox"/>
<p>PART 4 – FOLLOW UP ACTIONS</p>		
<p>A. <u>Monthly Report</u></p>		
<p>1. Update Monthly Report, MLA Tracking System and Register on every action taken</p>	<p>YES <input type="checkbox"/></p>	<p>NO <input type="checkbox"/></p>
<p>B. <u>Liaison/Meeting</u></p>		
<p>1. Contact or hold meeting with the relevant agencies when necessary:</p>	<p>YES</p>	<p>NO</p>
<ul style="list-style-type: none"> • To identify the nature of assistance requested 	<input type="checkbox"/>	<input type="checkbox"/>
<ul style="list-style-type: none"> • To advise the steps to be taken 	<input type="checkbox"/>	<input type="checkbox"/>

