INTERNATIONAL ANTI-BRIBERY EFFORTS AND ITS IMPACT ON MALAYSIAN COMPANIES

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Corruption is an insidious plague that has a wide range of corrosive effects on societies. It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and threats to human security to flourish.

- Former United Nations (UN) Secretary General, Kofi Annan (UN 2004, p iii).[1]

Introduction

In recent times, the progress of globalisation and the consequent growth in corporate activities beyond national borders have been the main cause for the steady increase in the volume of international business transactions that companies engage in.[2] For economic reasons, many of these companies have now ceased to operate in a singular manner and have opted for decision-making structures which are decentralised. Operating beyond their domestic borders and venturing into multiple countries obviously requires companies to take the necessary steps and precautions to prepare themselves to adhere to the individual and differing set of norms and rules which govern their foreign counterparts. Of the many problems faced by a

1 Press Release SG/SM/8977 GA/10200 SOC/CP/271- Secretary-General Lauds Adoption by General Assembly of United Nations Convention against Corruption: New Instrument Described as New Framework for Action against 'Insidious Plague' (*United Nations*, 31 October 2003) <http://www.un.org/News/Press/docs/2003/sgsm8977.doc.htm> accessed 25 November 2011.

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2 Evidence of this can be seen in the WTO International Trade Statistics 2009, 2010 and 2011 <http//:www.wto.org/English/res-e/statis_e/its2012.e.pdf> accessed 25 November 2011.

company intending to operate or navigate in an unfamiliar environment, the most apparent are dealing with the wide variety of cultural, legal, financial and accounting complexities and obligations. To resolve these issues, many companies have and are becoming increasingly reliant on intermediaries and foreign subsidiaries who act as local agents to facilitate them, as it is impossible for each multi-national company to have direct representation in all countries and markets in which they operate. As competition mounts within the global market, these agents may engage in bribery and corruption by their own volition and conceal these crimes from the principal. In some cases however, a principal may intentionally commit bribery and does so through an intermediary so as to distance itself from the crime and increase its chance of evading prosecution. The same agents may be used for both legitimate and illegitimate reasons. Regardless of the modus used in the commission of these corrupt practices, these are committed to ensure that the company's survival and sustainability itself. The very nature of transnational companies is currently being used as a camouflage to exacerbate challenges such as detection, investigation and prosecution of bribery offences - resulting in bribery becoming a concealed and complex crime. From the legal and regulatory perspective, many countries presently find that their legal systems are ill-equipped to address these corporate wrongdoings. Be that as it may, it is undeniable that much effort has been taken and is still underway globally to impose corporate liability for bribery offences and to criminalise corruption. The fast pace at which these developments have been occurring is reflective of the severity of the problems being faced and the dire need to ensure that companies cannot hide behind the corporate veil and commit offences with impunity

The article addresses the issue whether Malaysian companies are well equipped to deal with and prevent corporate bribery. As a country still in its infancy, admittedly Malaysia may not have laws which are advanced as in other mature jurisdictions such as the United States and the United Kingdom. As such, this article highlights the strengths and weaknesses of the existing anti-bribery law in Malaysia to determine the extent the law effectively curbs corrupt corporate

practices committed both within and outside its borders. Further, as the law merely prescribes a minimum standard to be complied with, it may not always be all encompassing or even readily move with the needs of time. These lacunas, if they exist, are usually filled by industry good practices and procedures. In this respect, this article also examines the current practices observed by companies in Malaysia and provides several recommendations which can be adopted to establish or improve on anti-bribery policies already being observed by Malaysian companies in combatting corporate bribery. Some of the peripheral issues discussed along the way are the current global anti-bribery trends and specific anti-bribery regimes which have been established in the United States of America and the United Kingdom, as comparable to evaluate the state of Malaysian law in regard to bribery.

International Efforts to Regulate and Criminalise Bribery

Before assessing the effectiveness of the Malaysian anti-bribery laws in regards to corporations, it is first, worthwhile looking at global efforts which have been established to curb and control bribery. The ensuing paragraphs examine the authorities, their efforts and the laws which have been implemented in countries such as the United States and the United Kingdom as points of reference or benchmark against which to compare Malaysian laws.

At the forefront of the global effort to broaden the scope of corporate liability for bribery is the Organization for Economic Co-operation and Development (hereinafter referred to as "OECD") and the United Nations.

The OECD Anti-Bribery Convention and the United Nations Convention Against Corruption (hereinafter referred to as "UNCAC") have prompted state parties to outlaw bribery of both national and foreign public officials and to move towards adopting those norms into domestic law.[3] The signing of these Conventions

[3] United Nations Office on Drugs and Crime, *United Nations Convention Against Corruption*, <http://www.unodc.org/documents/treaties/UNCAC/Publications/Convention/08-50026_E.pdf> accessed 15 June 2011.

is a highly significant development in the global anti-corruption movement and is the impetus behind the recent anti-bribery legislation proposed or enacted in countries such as the United Kingdom, India and China. Over 150 countries have now acceded to the OECD Anti-Bribery Convention, thereby becoming state parties and have enacted domestic legislation in accordance with the Convention. All OECD member countries and several non-member countries, including Brazil and Russia, have adopted the Convention, which establishes legally binding standards to criminalize the bribery of foreign public officials.[4]

The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997 Convention)

The OECD was founded in 1961 to stimulate economic progress and world trade and has since developed guidelines to attack both sides of the equation - the giving and the receiving of bribes. In 1997, the United States and 33 other countries signed the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (hereinafter referred to as "1997 Convention").[5]

Article 1 of the 1997 Convention requires member states to take measures to:

> ...establish that it is a criminal offence under its law for any person intentionally offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of

[4] OECD, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, <http://www.oecd.org/dataoecd/4/18/38028044.pdf> accessed 15 June 2011.

[5] Malaysia is not amongst the 34 OECD member states or a signatory to the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.

> official duties, in order to obtain or retain business or other improper advantage in the conduct of international business...

Member states are also required to undertake the necessary measures to establish that:

> ...complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign official shall be a criminal offence...

Article 5 of the 1997 Convention requires that investigation and prosecution of matters of foreign bribery:

> ...not be influenced by considerations of national economic interest, the potential effect upon relations with another State of the identity of the natural or legal persons involved.

In 2009, the 1997 Convention was updated to include recommendations on bribery related tax measures. The level of global anti-corruption enforcement is currently at an all-time high. In a recent annual report released by the OECD,[6] the Working Group on Enforcement of the 1997 Convention reported that 210 individuals and 90 entities have been sanctioned under criminal proceedings for foreign bribery in 14 States Parties between the time the Convention entered into force in 1999 and the end of 2011. At least 66 of the sanctioned individuals were sentenced to prison for foreign bribery. At least 42 individuals and 93 entities have been sanctioned in criminal, administrative and civil cases for other offences related

[6] OECD Working Group on Bribery: 2011 Data on Enforcement of Anti-Bribery Convention <http://www.oecd.org/daf/anti-bribery/AntiBriberyAnnRep2011.pdf> accessed on 12 January 2012.

to foreign bribery, such as money laundering or accounting, in 4 States Parties. Approximately 300 investigations are ongoing in 26 States Parties to the Anti-Bribery Convention. Prosecutions are ongoing against 158 individuals and 13 entities in 13 Parties for offences under the Convention.

United Nations Convention Against Corruption (UNCAC)

In 2003, delegates from all over the world convened to sign the UNCAC. The UNCAC seeks to promote principles of fairness, responsibility, equality and integrity. Whilst the UNCAC contains a number of similar themes to the 1997 Convention, the UNCAC also requires member states to actively promote the prevention of corruption and not merely prosecute against the offences. Further, the UNCAC outlines the responsibilities of member states in preventing corruption not only in the private sector but also in the public sector. It has 130 parties and 140 signatories.[7] The UNCAC gives member states the responsibility to determine the standard of compliance with UNCAC and the extent to weave the Convention into national law. In December 2005, the United Nations committed to denouncing foreign bribery. This commitment formed part of the UNCAC.

Foreign Bribery Legislation

Two of the most formidable anti-bribery legislation the world has to reckon with are the Foreign Corrupt Practices Act (hereinafter referred to as "FCPA") enacted in the United States in 1977 and United Kingdom's Bribery Act 2010. Other countries who have quickly followed suit in order to comply with a number of multilateral anti-corruption conventions are India and China, both of which have either proposed or enacted new anti-bribery legislation. From Malaysia's perspective, a country heavily dependent on trade to sustain its economic growth, it is a matter of utmost importance that Malaysia presents a legally conducive environment to attract

[7] Malaysia, as a member state of the United Nations, is a signatory to the UNCAC.

foreign investment inflow. Compliance with these foreign anti-bribery legislation to create and maintain a bribery free controlled environment is imperative for Malaysian companies for several obvious reasons. Firstly, Malaysia has had a long standing and strong trade relations with the abovementioned countries. Compliance with the legislative effort of these countries will promote continuance of the trade relationships and further enhance the relationship which will ultimately ensure the economic growth of the nation. Secondly, Malaysian multinational companies must be vigilant and acutely aware of these legislation as they may have direct impact on their operations, even if their application have limited activity in the US or the UK. Thirdly, it is a widely known fact that non-US companies have frequently been targets of US enforcement actions. Finally, the reality of the matter is that UK and US trade partners would be reluctant to go forward on any deal with a Malaysian company which cannot or will not certify that it is now or will be FCPA or UK Bribery Act-compliant.

United States

The birth of the FCPA is most often credited to be the result of the US Senate Banking Committee's 1975 investigation into the Lockheed Aircraft bribery scandal.[8] The Committee found that Lockheed had paid hundreds of millions of dollars through "consultants" to government officials in Saudi Arabia, Japan, Italy and the Netherlands. The Committee identified that the bribes paid to foreign entities had violated as many as nine US laws, including the Internal Revenue Code; the Foreign Assistance Act; the Bank Secrecy Act; the Travel Act; and the Racketeer Influenced and Corrupt Organisations (hereinafter referred to as "RICO") Act. However, the Banking Committee discovered that the bribes merely constituted peripheral violations of these laws. In addition, the Committee found

[8] *Lockheed's Defiance: A Right to Bribe?* (*Time*, 18 August 1975) <http://www.time.com/time/magazine /article /0,9171,917751-1,00.html> accessed 25 November 2011.

that no legislation existed which specifically outlawed the payment of bribes to foreign entities.

The FCPA was a ground-breaking legislation and many believed it would have an enormous impact on the way US businesses operated, particularly in international trade.[9] In essence, the introduction of the FCPA meant that US companies were now prohibited by law from paying bribes to foreign government officials in order to procure business. The legislation provided penalties for both companies and individuals found in breach of its provisions.

In essence, under the FCPA, it is unlawful to commit acts, commit acts in furtherance of, or provide authorisation of any offer, payment, promise to pay, gift, or to provide anything of value to a foreign official for the purposes of:

- Influencing any act or decision of the foreign official in his official capacity;
- Inducing the foreign official to do or omit any act in violation of their lawful duty; or
- Securing any improper advantage.

According to the US Department of Justice (hereinafter referred to as "USDOJ"), the FCPA potentially applies to any individual, company, director, employee or agent, whose actions satisfy at least one criterion of the acts' following three subsets:

- Practices by 'Domestic Concerns' – being any individual who is a citizen, national or resident of the US, or any company, partnership, sole proprietorship or

[9] US Department of Justice, *US Department of Justice 2011, Foreign Corrupt Practices Act-Anti bribery provisions* (*Justice*, 17 November 2011) <www.justice.gov/criminal/fraud/fcpa/docs/lay-persons-guide.pdf> accessed 25 November 2011.

other business organisation or trust, which has the US as its principal place of business;

• Practices by 'Issuers' – being any company have issued securities registered in the US, or any company that is required by the Security and Exchange Commission (hereinafter referred to as "SEC") to file periodic reports; and

• Persons other than Issuers or Domestic Concerns - any person other than an issuer or domestic concern that whilst in the territory of the US, makes such an act, promise or offer.

One of the few defences available under the FCPA, is the defence that such acts, promises of offers were lawful under the written law or regulation of the country which the foreign official represents.

United Kingdom

The Bribery Act became law on 1 July 2011. The legislation applies to all companies, partnerships and individuals based in the UK, as well as foreign companies and individual businesses in the UK. The legislation makes it absolutely clear that commercial organisations are responsible for policing their own garden as well as the remotest areas of their operations to ensure that nothing illegal is taking place. The enactment of this new legislation was triggered by two main factors. The pre-2010 anti-bribery laws were said to be complicated and utterly confusing as a result of piecemeal development over more than 100 years.[10] Another significant factor that prompted the enactment of the new legislation was the collapse in 2006 of the investigation by the Serious Fraud Office in the Al Yamamah arms deal between BAE Systems and the Saudi Arabian government. Consequently, a series

[10] In June 2009, the then Secretary of State for Justice, Jack Straw aptly described the old law as, "It is widely acknowledged that UK's statutory criminal law on bribery is old and anachronistic. It dates back o before the First World War – then Britain was one of the first countries to legislate against any form of corruption. It has never been consolidated, and contains inconsistencies of both language and concept. The exact scope of the common law offence is similarly unclear. The result is a bribery law which is difficult to understand for the public and difficult to apply for prosecutors and the courts".

of reports presented by the OECD's Working Group on Bribery in 2003, 2005, 2007 and 2008 heavily criticized UK's failure to bring its anti-bribery law in line with its international obligations under the OECD Convention.

The Bribery Act 2010 is intentionally robust, being wide in both scope and jurisdictional effect and imposing significant penalties. It is widely regarded as the toughest anti-corruption legislation anywhere in the world. In keeping with the US FCPA, the current global benchmark, the UK Bribery Act makes bribery of foreign public officials an offence and extends beyond company employees to include the behaviour of third parties acting on behalf of a company. However, in certain respects the UK Act goes further than the FCPA. The Act covers all bribery, not just those that involve public officials. It bans facilitation payment and business promotional expenditures made to expedite routine governmental actions.[11] It also makes it a corporate offence for failure to prevent bribery and makes it an offence not only to give but also to receive a bribe.[12] Section 6 of the UK Act provides a stand-alone offence which is modelled after the OECD Anti-Bribery Convention. An offence is committed where a person gives or offers any financial or other advantage to a foreign public official, either directly or indirectly with the intention of influencing the foreign official in his capacity as a foreign public official and to obtain or retain business or an advantage in the conduct of business.

The UK Act introduces a new strict liability offence under section 7 for companies and partnerships for failing to prevent bribery. This new corporate offence places a burden of proof on companies to show they have adequate procedures in place to prevent bribery. The offence only applies to a 'relevant commercial organisation' and it is this definition that provides the wide jurisdictional scope of the offence, which is the concern of many parties. A 'relevant commercial organisation' is defined to cover both companies incorporated in the UK, irrespective of where they carry on business and overseas companies

[11] See Bribery Act 2010 (UK), ss 1, 6 and 7
[12] ibid ss 1 and 2.

that carry on business, or part of their business, in the UK.[13] What constitutes carrying on business in the UK is not clear and has been the subject of much discussion. It is anticipated that an organization will need to have a 'demonstrable business presence in the UK' to fall with the ambit of that definition and being listed on the UK Stock Exchange or having a subsidiary in the UK may not suffice. This perhaps, is a question better posed to the courts to determine. As such, the position remains uncertain for overseas companies. It is clear that the Act has a wide territorial scope and therefore overseas companies, such as those in Malaysia must ensure they understand and are prepared for the UK Act.

A company is guilty of an offence under section 7 of the UK Act if an 'associated person carries out an act of bribery in connection with its business'. A person will be associated with the company where that person performs services for or on behalf of an organization (this could include an employee, subsidiary, agents or intermediary).[14] However, the definition is broad enough to also cover, contractors, sub-contractors, suppliers and joint venture partners. The broad scope of this definition means that organisations can commit an offence under the Act as a result of the actions of a person over whom the company has very limited control.

Given the wide scope of the UK Act, the UK Government felt that it was essential that companies wishing to prevent bribery be informed of the adequate procedures which they must put in place to ensure that they can rely on the defence. On 30 March 2011, the UK Government introduced the Guidance to the UK Act.[15] The Guidance sets out six principles, which were not prescriptive but instead intended to provide flexible, proportionate and risk based approach. The Guidance is clearly an important element in determining what constitutes 'adequate

[13] (n 11) s 7(5).
[14] (n 11) s 8.
[15] Bribery Act 2010 (UK): Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010) Ministry of Justice <http://www.justice.gov.uk/downloads/legislation/bribery-act_2010_guidance.pdf> accessed 17 June 2011.

procedures'. These principles are briefly as follows – 1) Setting up of proportionate procedures to counter the risks that are faced by the company; 2) Ensure top-level commitment to combat bribery; 3) To conduct bribery risk assessment on a periodical basis; 4) To conduct appropriate due diligence on its associated persons, as it may be liable under the Act for their actions; 5) To communicate and train employees and where appropriate, other associated persons, on the organisation's policies and procedures; 6) To monitor and review the their procedures to ensure that they are adequate and proportionate to prevent bribery.

The UK Bribery Act also provides for strict penalties[16] for active and passive bribery by individuals as well as companies.

The Global Anti-Bribery Trends

The year 2012 saw an enormous effort being taken to prevent corruption and bribery all around the world. The recent legislative activity in countries such as the UK, India and China demonstrate a number of emerging anti-corruption trends. The OECD Anti-Bribery Convention and the UN Convention Against Corruption have prompted these countries to accept international anti-corruption norms and to move towards adopting those norms into domestic law. There has thus been a convergence of global anti-corruption norms toward the outlawing of bribery, both public and private, in commercial business transactions.

There have also been a significant number of enactments of regulations related to bribery of foreign public officials (hereinafter referred to as "FPOs"). 7 out of 11 OECD and UNCAC signatory-countries have either criminalized bribery of FPOs or clarified the scope of the existing legislation to cover FPOs. This reflects the increasingly international nature of business, and the fact that much of the previous anti-bribery legislation has been designed to cover only domestic corruption. In addition, there has also been the introduction of corporate liability. A

[16] (n11) s 11.

number of countries have adopted measures to establish the liability of legal persons for bribery offences. While a majority have adopted legislation introducing criminal liability of legal persons, others such as Russia have only established administrative liability. The Brazilian government on the other hand, has proposed legislation introducing administrative and civil liability for legal entities for bribery. Next, is the marked escalation in the sanctions and penalties imposed on offenders. Countries such as Russia, Israel, Spain, Turkey, Ukraine and the UK have adopted stronger penalties for corruption related offences.[17] Most countries punish bribery offences with fine and/or an imprisonment sentence. Some countries have limited monetary sanctions which are often determined in relation to the amount paid as bribe. To complement the fines and prison terms, some countries have enacted regulations disqualifying offenders with contracting with public administration (for instance, Chile), restricting them from occupying positions in the government (for instance, Russia) or cancelling decisions taken as a result of corruption offences (for instance, Ukraine). With respect to the issue of extra-territoriality, this principle is incorporated into many laws, such that bribes that are paid overseas can be prosecuted in a company's home jurisdiction. Likewise, jurisdiction is typically extended in whole or part to foreign owned or listed company. The legal community has expressed some concern about the use of extra-territorial provisions as they present the risk of potential manipulation. A final trend is the extension of legislation to agents and intermediaries to cover loopholes that were previously exploited. Section 7 of the UK Bribery Act, for example, covers 'associated persons' connected with a company, to prevent companies from out-sourcing the payment of debts.

Further, anti-bribery legislation have moved toward stricter standards. Many, if not all, of the recent anti-corruption laws are generally broader in scope than the US FCPA 1977. The UK Bribery Act is broader than the FCPA in several

[17] Transparency International, *Trends in Anti-Bribery Laws* <www.transperancy.org/files/content/corruptionqas/24_Trends_FinalReport_in_Anti-Bribery_laws.pdf> accessed 4 January 2012.

ways, and the anti-corruption laws recently proposed or enacted in the India and China stand apart from the FCPA in their general lack of affirmative defences or exceptions. These laws also seek to impose harsher fines than those under the FCPA and impose potentially unlimited fines in India and China.

A final trend is the move towards global cooperation in anti-corruption enforcement. The anti-bribery laws recently enacted in China and that recently proposed in India both provide for international exchange of investigative information in enforcing their laws. Companies should therefore expect to see greater international cooperation in corruption investigations, with countries like India and China both seeking information from and providing information to other countries' enforcement authorities.

Transparency International, a key player in the global effort to stir the worlds collective conscience to stop corruption, recently measured the extent to which public sector corruption is perceived to exist in some 183 countries in the Corruption Perception Index (hereinafter referred to as "CPI") 2011. In general, the 2011 CPI indicated that while no country has a perfect score, two thirds of the 183 countries ranked in the 2011 index score below 50, on a scale from 0 (perceived to be highly corrupt) to 100 (perceived to be very clean) - showing that public institutions need to be more transparent, and powerful officials more accountable. Denmark, Finland and New Zealand tied for first place with scores of 90, helped by strong access to information systems and rules governing the behaviour of those in public positions. Afghanistan, Myanmar, North Korea and Somalia once again remained at the bottom rung of the CPI. In these countries the lack of accountable-leadership and effective public institutions underscore the need to take a much stronger stance against corruption.[18] Countries at the top of the Index were generally characterised as having a transparent and responsive public sector and strong

[18] Transparency International, *Corruption Perception Index 2011* <http://cpi.transparency.org/cpi2012/results > accessed 11 January 2012.

institutions including the judiciary. It also indicated that there were reliable means of holding public officials to account.

The Global Corruption Barometer 2010, the world's largest public opinion survey on corruption from Transparency International, also found that in too many countries, the institutions people rely on to fight corruption and other crime are themselves untrustworthy. One in four say they do not trust any institution, most of all to fight corruption. Political parties were identified as being the most corrupt in the world. 8 out of 10 respondents to the survey stated that political parties are corrupt or extremely corrupt, followed by the public service, the judiciary, parliament and the police.

A Transparency International press release on 1 December 2011,[19] reported a growing outcry over corrupt governments for failing to protect citizens from corruption, be it abuse of public resources, bribery or secretive decision-making. This clearly showed how citizens felt about their leaders and public institutions who were found to be neither transparent nor sufficiently accountable. Huguette Labelle, the Chair of Transparency International reported that while awareness of corruption was on the rise, so was the sophistication of the techniques used to profit from it. He said that the size of the illicit economy, estimated at US$1.3 trillion by Global Financial Integrity, provided an unacceptable hiding place for bribes, tax evasion and the laundering of embezzled or misallocated public funds. Every year that went by without reform of the global financial architecture was a year in which it remained possible to profit from corruption with impunity.[20]

[19] Transparency International Press Release, 'A crisis in governance: Protests that marked 2011 show anger at corruption in politics and public sector' <http://cpi.transparency.org/cpi2011/press/#en > accessed 12 December 2011.

[20] Transparency International Press Release, 'Anti-Corruption Day Statement by Hugueete Labelle, Chair of Transparency International' <www.transperancy.org/news/pressrelease/20111209_ac_day> accessed on 12 December 2011.

Malaysia's Anti-Bribery Score Card

Malaysia signed and ratified the UNCAC on 9 December 2003 and 24 September 2008 respectively and has been a member of Asia Pacific Group on Money Laundering since 2000. It is also a member of the Association of Anti-Corruption Agencies and the Asia-Pacific Economic Cooperation Anti-Corruption and Transparency Experts Task Force. It endorsed the OECD Anti-Corruption Initiative for Asia Pacific and the Anti-Corruption Action Plan for Asia and the Pacific on 30 November 2001.

Transparency International 2011's Bribe Payers Index ranked 28 leading international and regional exporting countries, measured by the likelihood of their firms to commit bribery abroad. Malaysia, according to the Index, recorded a rate of 7.6 over 10, with 10 indicating the perception that companies from that country is unlikely to engage in bribery when doing business abroad, and 0 indicating that that country is likely to pay bribes. Malaysia scored well below the global average of 7.8 for the 28 countries, ranking at 15 together with Hong Kong, Italy and South Africa.

In 2010, Malaysia scored poorly with a score of 4.4 and a ranking at 56th position out of 178 countries surveyed; and in 2011, scored 4.3 with a ranking at 60th place out of 182 countries according to the survey under Transparency International Corruption Perceptions Index (CPI).[21]

The recent Global Corruption Barometer 2010/2011 conducted by Transparency International shows that 46% of the respondents felt that the level of corruption in Malaysia has increased in the past three years. However 48% felt that the government's effort to fight corruption was effective. 22% perceived it as

[21] This report ranks countries base on how corrupt their public sector is perceived to be. A county's score indicates the perceived level of public sector corruption on a scale of 0-10, where 0 means that a country is perceived as highly corrupt and 10 means that a country is perceived as very clean. A country's rank indicates its position relative to the other country included in the index. See <http://www.transparency.org/cpi2010/results> and <http://www.transparency.org/cpi2011/results> respectively, accessed 14 July 2012.

ineffective while another 32% said that it was neither effective nor ineffective. Public officials or civil servants and the business or private sector both received scores of 3.3, with 1 being not corrupt at all and 5 being highly corrupt.

On the overall, the data clearly indicates that Malaysia had taken effective measures to ensure that bribery was under control until 2010. However, this position has deteriorated rapidly in the past few years. Given that Malaysia has not fared well in the surveys and that some of its biggest trading partners have been rated as highly corrupt on TI's 2010 CPI, it is highly probable that Malaysian companies are regularly exposed to at least the possibility of foreign bribery.

Reported incidences of foreign bribery in Malaysia to date merely represent the tip of the iceberg. The succeeding paragraphs contain brief accounts of two high-profiles cases involving bribery of government officials in Malaysia. In 2010, the United States' Securities and Exchange Commission (hereinafter referred to as "SEC") charged the Paris-based telecommunications giant, Alcatel-Lucent SA for violating the FCPA by paying bribes to foreign governmental officials to illicitly win business in Costa Rica, Honduras, Malaysia and Taiwan. Alcatel-Lucent SA has since admitted to the charges and paid a whopping fine of US$137million to resolve the US criminal and civil probes. In 2011, a former employee of telecommunications company, Alcatel Network Systems (M) Sdn Bhd was charged with giving a RM25000 bribe to a Telekom Malaysia (hereinafter referred to as "TM") officer, in a case linked to the Alcatel-Lucent's admission in 2010 that it had bribed government officials to win a US$85 million (RM255 million) contract. The SEC's civil complaint titled *The Malaysia Bribery Scheme* was eight paragraphs long and reported that 'from October 2004 to February 2006, Alcatel bribed government officials in Malaysia to obtain confidential information relating to a public tender that Alcatel ultimately won, the result of which yielded a

telecommunications contract valued at approximately US$85 million.' [22] Consequently, former Alcatel Network Systems regional customer account leader, Radziah Ani, was accused for giving a RM25000 bribe to Telekom Malaysia assistant manager, Mohd Asri Idris, on 17 February 2006 to obtain information on a tender related to TM's then-subsidiary Celcom Malaysia's 3G mobile services. Radziah pleaded not guilty in the Sessions Court. If convicted, Radziah faces 20 years' jail and a fine of not less than five times the amount of the bribe, or RM10000, whichever is higher. In March 2011, the Malaysian Anti-Corruption Commission (hereinafter referred to as "MACC") had asked TM to either blacklist or suspend dealings with Alcatel-Lucent over the bribery case involving TM and the French telecommunications giant.

Another scandal involved Securency International Pty Ltd and Note Printing Australia (hereinafter referred to as "NPA") - subsidiaries of the Reserve Bank of Australia - which allegedly bribed foreign officials in Malaysia to win banknote contracts. The MACC conducted joint investigations with the Australian Federal Police (hereinafter referred to as "AFP") in which six Australian executives from the two banknote companies, and two Malaysians were arrested in July 2011. Abdul Kayum, who was also an arms dealer, was charged with giving bribes amounting to RM100000 through a middleman to former Bank Negara's Assistant-Governor, Mohamad Daud Dol Moin for help in procuring a polymer note printing contract. Daud was alleged to have received the bribe to procure the contract, which saw NPA and Securency International awarding a RM95 million contract to print the RM5 polymer notes. Abdul Kayum was charged under Section 11 (a) of the Malaysian Anti-Corruption Act 1997 facing an imprisonment sentence of up to 20 years and a fine of five times the bribe amount. Daud was charged with accepting the RM100,000 bribe from Abdul Kayum to help secure the contract. Daud faces the same punishement if convicted under Section 11(a). Both men, accused of

[22] See Case 1:10-cv-24620-XXXX Document1 Entered on FLSD Docket 12/27/2010, 2 <http://www.sec.gov/litigation/complaints/2010/comp21795.pdf> accessed 13 May 2011.

giving and receiving two bribes of RM50000 each between 1 December 2004 and 16 February 2005, had pleaded not guilty.[23]

The Malaysian Anti-Corruption Commission Act 2009: Are We There Yet?

The Anti-Corruption Act 1997 used to be the predominant legislation used in the government's fight against corruption. It established the former Anti-Corruption Agency (hereinafter referred to as "ACA") and provided for offences and penalties for private and public sector corruption, including active and passive bribery, extortion, attempted corruption, abuse of office, corruption through agents, corruption in public procurement, and electoral corruption. In December 2008, the government introduced a new and improved anti-corruption bill to Parliament, the Malaysian Anti-Corruption Commission Act 2009 (hereinafter referred to as "MACCA"), which was enacted on 1 January 2009 and repealed the Anti-Corruption Act 1997 as well as the structure and mandate of the ACA, which was replaced by the MACC. The MACCA is supported by a myriad of legislation including the Customs Act 1967, the Excise Act 1967, the Anti-Money Laundering and Anti-Terrorism Financing Act 2001, the Whistleblower Protection Act 2010 and the Penal Code 1936.[24] The MACCA focuses on both the supply side of the corrupt transaction and also the solicitation, receipt of bribes by a foreign public official in Malaysia, which encompasses the demand-side of the transaction and in this respect, is in line with the requirements of the UNCAC. Sections 21 and 22 of the MACCA deal with domestic and foreign bribery respectively. Sections 16, 17, 18 and 23 of the MACCA cover additional offences which are not bribery offences per se but may apply in cases of bribery in some instances. For the purposes of this article, four aspects of the MACCA relating to foreign corporate bribery issues will be addressed and concluded with recommendations for improvements.

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[23] See <http://www.traceinternational2.org/compendium/view.asp?id=162> accessed 15 November 2011.

[24] Ss 161 and 165 of the Penal Code 1936 cover passive bribery while active bribery is covered under ss 109 and 116 Penal Code 1936.

Bribery of FPOs

Malaysia criminalises any act of corruption committed by any person or his agent and the bribing of foreign public officials. The offence of bribing an FPO falls under section 22 of the MACCA which provides:

> 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 organisation 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.

The provision follows fairly closely the language that is found in international instruments and thus the offence satisfies many aspects of the international standards. Essentially it covers the modes of the offence - offer, promise, give, solicit and accept a bribe - as well as bribery through intermediaries and bribery that benefit third parties. The offence is not limited to foreign bribery in international business transactions and goes beyond the international standards in this respect.

However, two matters require clarification at this juncture. Firstly, the term "FPO" as set out in section 3 of the MACCA[25] does not clearly cover persons performing public functions for a public enterprise or agency. Although the definition appears to be non-exhaustive as it includes only specific classes of official, there is no certainty that the definition includes persons performing public functions and functions for a public enterprise or agency. Secondly, there is no definition of a "foreign country" in this section. Therefore it is unclear whether the term includes all levels and subdivisions of government, from national to local, and is not limited to states but includes any organized foreign area or entity, such as an autonomous territory.

[25] "foreign public official" includes—
(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.

Liability of Legal Persons for Bribery

In theory, Malaysia may impose criminal liability against legal persons for bribery. The MACCA bribery offence applies against any 'persons'. Although the Act does not define 'person', section 3 of the Interpretation Acts of 1948 and 1967 provides that 'person' includes a body of persons, corporate or unincorporated. Whether corporate criminal liability for bribery is actually imposed in practice is unclear. To date, there is no reported case law in which a company has been prosecuted for a criminal offence in Malaysia. Neither is there anything in the Penal Code which indicates when a company is considered to have committed a crime. There is no guidance on when acts or omissions of a natural person may attribute to a legal person, whose acts or omissions may trigger liability, or whether the conviction of a natural person is a prerequisite to convicting a legal person. Should Malaysian courts be confronted with the issue of liability of legal persons, they may well apply UK case law, given the country's common law history. The leading case is the well-known House of Lords decision in *Tesco Supermarkets Ltd v Nattrass*.[26] In *Tesco Supermarkets*, it was held that a company would be liable for bribery only if the fault element of the offence is attributed to someone who is the company's "directing mind and will". Essentially, it must be proven that the company's "directing mind and will" must be a person or group of persons within the company who are not just agents or employees of the company and whose thoughts and actions are the very actions of the company itself. In arriving at this decision the House of Lords referred to identification theory which Denning LJ invoked in the case of *HL Bolton (Engineering) Ltd. v TJ Graham and Sons Ltd*.[27] His Lordship stated:

> A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the

[26] [1972] AC 153.
[27] [1957] 1 QB 159.

> centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.[28]

However, the application of the "identification" doctrine will not be without difficulties especially in cases of corporate bribery. Firstly, the doctrine requires guilty intent to be attributed to a very senior officer of the company, and anything lesser would not suffice. Secondly, no liability may be imposed even if senior management knowingly failed to prevent the employee from committing bribery, or if the lack of supervision or control by senior management made the commission of the crime possible. Thirdly, the doctrine requires the requisite criminal intent to be found in a single person with the directing mind and will. The doctrine completely ignores the realities of the modern multinational companies which makes it difficult to identify a single decision maker.

Jurisdiction to Prosecute Bribery

Section 2 of the Penal Code provides the territorial jurisdiction to prosecute MACCA bribery offences which are committed in Malaysia. However the MACCA does not clearly provide for jurisdiction to prosecute offences that are committed "partly" in Malaysia. Neither is it indicative of what part or how much of an offence must take place in Malaysia before territorial jurisdiction arises.

[28] ibid 172.

According to section 66 of the MACCA,[29] Malaysia also has jurisdiction to prosecute its citizens and permanent residents for offences committed 'within and beyond the limits of Malaysia'. Dual criminality is not required.[30] However and more importantly, Malaysia does not appear to have nationality jurisdiction to prosecute legal persons. Section 66 provides nationality jurisdiction to prosecute only 'citizens and 'permanent residents'. Logically only natural and non-legal persons can be 'citizens'. Under section 3 of the Courts of Judicature Act 1964, 'permanent resident' is defined as 'a person who has permission granted without limit of time under any federal law to reside in Malaysia, and includes persons treated as such under any written law relating to immigration.' This definition appears to contemplate only natural and not legal persons.

Sanctions for Bribery

The maximum available sanctions against legal persons for commission of active or passive foreign bribery under section 22 of the MACCA is imprisonment of 20 years and a fine of RM10000 or at least five times the value of the gratification promised or given, whichever is higher. This clearly does not meet the international standards. It is submitted that a maximum fine of five times the value of the bribe will, in most cases be substantially smaller than the profits gained from a contract obtained through bribery. Such a maximum sanction is neither effective nor proportionate or dissuasive.

[29] S 66(1) provides: 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.
S 66(2) provides: 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.

[30] ibid s 66(2).

Section 40 of the MACCA permits a court to confiscate 'any property which is proved to be the subject matter of the offence or to have been used in the used in the commission of the offence'. This would allow a court to confiscate the bribe as property used in the commission of the offence. The confiscation of the proceeds of the bribery is however unclear. The 'subject matter of the offence' is not defined and hence may not necessarily cover the direct and indirect proceeds of the bribery. The availability of administrative sanctions for bribery is unclear. The MACCA does not contain provisions to disqualify persons convicted of bribery from engaging in certain activities.

The succeeding paragraph sets out Table 1 which provides a comparison between Malaysia's MACCA and the US FCPA 1977 and UK Bribery Act 2010 to determine to what extent are the provisions of the MACCA synonymous with these legislation.

Table 1: Comparison Table of Legislative provisions in the FCPA, UKBA and MACCA

Provision	FCPA	UKBA	MACCA
Who is being bribed	Only bribes (anything of value) paid or offered to a 'foreign official' are prohibited	Not limited to 'foreign officials' Prohibits bribes paid to any person to act to induce them to act 'improperly'	Not limited to 'foreign officials' Prohibits gratification or reward paid to any person to act or forebear to act or to induce another to act or forebear to act
Nature of advantage	Payment must be 'to obtain or retain business'	Focus is on improper action rather than business nexus, except in case of corporate liability	Payment is not restricted to business nexus
'Active offence' or 'Passive offence'	Only the act of payment, rather than the receipt/acceptance is prohibited	Creates 2 offences: 1. Offence of bribing another – 'active offence' 2. Offence of being bribed – 'passive offence'	Prohibits giving and accepting gratification or reward

Provision	FCPA	UKBA	MACCA
Corporate strict liability	Strict liability only under accounting provisions for public companies ie.failure to maintain adequate systems of internal controls	Creates a new strict liability offence for failure of a commercial organization to prevent bribery, subject to defence of having 'adequate procedures' in place designed to prevent bribery	Does not impose liability on companies
Jurisdiction	US companies and citizens, foreign companies listed on the US Stock Exchange or any person acting while in the US	Individuals who are UK nationals or ordinarily resident in the UK and organisations that are either established in the UK or conduct some part of their business in the UK	Individuals who are citizens of Malaysia or ordinarily resident in Malaysia or any person acting while in and outside of Malaysia
Business promotion expenditures	Affirmative defence for reasonable and bona fide expenditures directly related to the business promotion or contract performance	No similar defence. But arguably such expenditures are not improper and therefore not a violation under the Act	No similar defence
Allowable under local laws	Affirmative defence if payment is lawful under written laws or regulations of a foreign country	No violation is permissible under written laws or foreign country. Applies only in case of bribery of foreign public official. Otherwise a factor to be considered	No violation is permissible
Facilitation payments	An exception for payment to a foreign official to expedite or secure the performance of a routine non-discretionary government action	No facilitation payments exception	No facilitation payment exception
Civil or criminal enforcement	Both civil and criminal proceedings can be brought by the DOJ and SEC	Criminal enforcement only by the SFO	Criminal enforcement by Officer of MACC or Police Officer or Customs Officer or other authorized officer

Provision	FCPA	UKBA	MACCA
Potential penalties	Bribery: Individuals – max imprisonment of 5 years and fine up to US$250,000 Companies – Fine up to US$2 m Books and records or internal control violations: Individuals – max 20 years imprisonment and fine up to $5 m Companies – Fine up to $25m	Individuals – Max 10 years imprisonment and unlimited fines Companies – Unlimited fines	Up to 20 years imprisonment and fine up to 5 times the sum or value of the gratification Minimum – RM10000

The Corporate Integrity Pledge and Anti-Corruption Principles for Corporations

The Anti-Corruption Principles was introduced in 2011 by the Malaysian Prime Minister as part of the anti-corruption effort, in line with the objectives of the *National Key Result Area of Fighting Corruption* under the *Government Transformation Programme*.[31] It sets out the principles for corporations to adopt to demonstrate their business commitment towards creating an environment that is fair, transparent and free from corruption. It also represents the key nexus between reforms taking place in the public sector and the continued improvements taking place in the private sector to drive the nation's progress towards becoming a developed nation. The Principles state that a company must:

1. Commit to promote values of integrity, transparency and good governance.
2. Strengthen internal systems that support corruption prevention.
3. Comply with laws, policies and procedures relating to fighting corruption
4. Fight any form of corrupt practices.
5. Support corruption prevention initiatives by the Malaysian government and MACC.

[31] See <http://www.cism.my/cismv2/uploads/files/Anti_Corr_Msian_Principles_Final-1.pdf > accessed on 20 May 2011.

Malaysian companies have additionally been encouraged to sign the *Corporation Integrity Pledge* to uphold the Principles. In doing so, companies voluntarily take the first in a longer term programme to create an effective system to increase integrity in the Malaysian corporate sector by practicing good governance including anti-corruption measures. The long term programme is intended to see companies gradually moving towards self-assessment, identifying gaps and action plans to close them and eventually report on anti-corruption measures in line with the *UN Reporting Guidance on 10th Principle Against Corruption*.[32]

Recommendations for Improvement

Legislative and Regulatory Amendments

Given that most of the provisions found within the MACCA remain untested in foreign bribery cases, it is somewhat a challenging task, identifying the necessary amendments to the provision. Nevertheless, legislative clarification and amendments would be useful to strengthen the MACCA in the following areas:

- Bribery of Foreign Officials

  It is suggested that a foreign bribery offence should cover bribery of persons performing public functions for a foreign public enterprise or agency and thereby include a definition of 'foreign country' that explicitly covers all levels and subdivisions of government.

- Liability of Legal Persons for Bribery

  To ensure that legal persons can be held liable for bribery, Malaysia could consider either one of these two approaches, either:

  a. the level of authority of the person whose conduct triggers the liability of the legal person is flexible and reflects a wide variety of decision-making systems in legal persons; or

[32] See <http://www.issuu.com/transparencyinternational/docs/2009-ungc-reporting-guidance-en?e=2496456/2117779> accessed 21 July 2011.

b. liability is triggered when persons with the highest level of authority offers, promises or gives a bribe to an official or fails to prevent a lower level person from bribing an official including through a failure to supervise him by failing to implement an adequate internal control, ethic and compliance programmes or measures.

- Jurisdiction for Prosecuting Bribery

  To ensure overall jurisdictional basis for prosecuting bribery, it is suggested that Malaysia should consider including in the MACCA a provision on nationality jurisdiction to prosecute non-resident individuals and legal persons for bribery and jurisdiction to prosecute bribery offences that take place partly in Malaysia.

- Sanctions for Bribery

  To ensure an effective regime in practice, Malaysia must consider amending the current law to firstly, ensure that the maximum available sanctions all bribery offences against legal persons are effective, proportionate and dissuasive. The power to confiscate both direct and indirect proceeds of bribery for all bribery offences and imposition of additional administrative sanctions for must be included in the MACCA.

Adoption of a Zero Tolerance to Bribery Policy

The enactment of multiple anti-bribery laws highlights the lurking dangers for companies with even minimal international business activities, let alone those subject to regulation in multiple jurisdictions. Although the global regulatory picture may look exceedingly complex, there are common themes running through all of these global enforcement regimes. Taking all of the factors described above into account, what should a Malaysian multinational company's anti-corruption programme contain? Because companies must assess the corruption risk of each jurisdiction in which they do business, there is no one-size-fits-all compliance approach. On the other hand, to tailor a company's anti-corruption program to each individual country in which it does business is impractical.

Therefore, the only way for a company to function in the current global anti-corruption environment is to adopt a policy prohibiting *all* bribery. The clear trend is toward a zero-tolerance policy - under a number of new laws, companies face liability for both public and commercial bribery. The most efficient and simple way to cover the overlap is to comply with the strictest standard - those that prohibit all forms of bribery. Companies, and those that advise them, should be in the process of modifying their compliance programs, taking a more streamlined and unified approach toward bribery. A no-tolerance policy is the most effective way to comply on a global scale.

Corporate Self-Regulation

From the financial perspective, the combined costs of bribes, legal costs and potential fines associated with a prosecution for a foreign bribery offence are likely to outweigh the corporate profits or advantage obtained as a result of paying bribes. In addition to this, are the potentially significant reputational and personal costs. However, amendments of legislative and regulatory nature alone may not act as an effective deterrent for companies from participating in foreign bribery. It is submitted that corporate self-regulation would act equally well in combating bribery. Logically speaking, if there is no financial incentive for companies to partake in such activities, they are more likely to self-regulate. Nevertheless, in order to be effective, self-regulation needs to operate, not only within an individual company, but also at the industry level. Astute business people are commonly aware of significant details of what transpires within their industry, including the action of their competitors. If a company is aware that a competitor pays bribes and it does not, it clearly places the company at a competitive disadvantage. Ideally, in such a situation, the company would support the self-regulation of the industry by providing information about the suspected bribes to the relevant industry body and to the law enforcement authorities. Such self-regulation helps to ensure a level playing field for all in the industry.

It is therefore recommended that both large and small institutions implement proportionate measures written within their organizations. In this respect, Malaysia must introduce bribery prevention policies and procedures along the lines of the UK Bribery Act 2010 Guidance[33] including:

- The promotion of an organizational culture that demonstrates intolerance for foreign bribery and related white collar offences such as fraud. Such a culture needs to be implemented with a genuine commitment from top level management down. The culture must be well communicated to all staff and business partners and should be supported by a demonstrated hardball response to anyone within the organisation who is involved in such unethical behavior.
- The development and communication of dedicated reporting lines for foreign bribery and fraud, including employee protection mechanisms such as an externally operated whistleblower programme.
- The implementation of mechanisms for the organization to report suspected activities to law enforcement authorities.
- Due diligence to be applied at all levels including for those at the CEO and CFO level.
- Risk audits for foreign bribery to be conducted across the organisation, including an analysis of international markets in which their companies operate or intends to operate in.

Companies must accordingly shift their compliance focus away from foreign public officials. Instead of assessing risk based on contact with foreign government officials, companies must conduct more generalised risk assessment. Instead of compliance training focusing on the bribery of foreign public officials, companies must instil in their employees a "no bribery of anyone under any circumstances" policy. Failure to take these steps will result in exposure to massive corruption liability on a global scale.

[33] See (n15).

Therefore it is suggested that an effective system must be set in place to prevent such conduct. The *OECD Good Practice Guidance on Internal Controls, Ethics and Compliance*[34] is one such guideline which is addressed at companies directly. It is meant to be flexible in that it can be adapted to companies of different sizes, including SMEs and according to the different levels of corruption risk that they face in their operations. The Good Practice Guidance underlines the need for a proper risk assessment, to ensure that measures for preventing corruption are effective. It is also essential that the risks are regularly monitored, re-assessed and adapted to ensure their continuing relevance. In addition, there are several good practices that companies should consider including in their system of corporate compliance, such as:

- Strong and visible support by senior management;
- Independent oversight controls;
- Application of measures to all entities that a company effectively controls and third parties, including agents, consultants, suppliers, and joint venture partners;
- Rules on gifts, hospitality and entertainment expenses, and political contributions;
- Appropriate incentives for complying with the measures and disciplinary procedures for violations;
- Effective guidance and training measures for all staff;
- Safe and confidential channels for reporting wrongdoing; and
- Periodic reviews and assessment of the measures to identify any vulnerable aspects of the business which could fall foul of the law.

[34] The Good Practice Guidance was adopted on 18 February 2010 by the OECD Council as an integral part of the Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in international Business Transaction of 26 November 2009. See <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44176910.pdf> accessed 25 July 2011.

Recognising that SMEs have limited resources for developing adequate controls, the *Good Practice Guidance* encourages business organisations and professional associations to assist them by disseminating relevant information, providing training, and providing advice on carrying out due diligence and resisting extortion and solicitation for bribes.

Conclusion

Bribery poses such a serious threat to the economy that it is the primary cause of economic drag in most countries. It should be treated as priority by businesses and actively managed to avoid prosecution. And given the current climate of economic austerity and the fact that Asian markets are expected to play a leading role in the global economy over the next decade, it is a paramount task for the government, the industry and companies to constantly ask how effectively to mitigate risk in markets that are highly competitive and which industries or companies frequently suffer from weak control environments. Companies in Malaysia must constantly be aware of methodologies and tools available to take proactive steps to minimise anti-bribery risks and adopt policies that are not only look good on paper but also work well in practice. Because there are at present innumerable overlapping anti-bribery provisions, and because the trend is toward stricter standards, the only way to effectively comply is to prohibit bribery in all forms and in all countries in which a company conducts business. Companies that have yet to adopt a compliance programme need to develop and effectively deploy local compliance programmes and tools that meet with global best practices and deal with challenges in order to mitigate the risks of fraud, bribery and corruption. Malaysian multinational companies that already have a programme in place, must immediately review their corruption risk in the light of the existing global anti-corruption trends and re-examine their compliance programmes before determining the next step in making the necessary enhancements and modifications to those programs.