1. Introduction

The international legal system and the municipal legal systems of States are generally separate. International law treaties and decisions concerning a State need to be implemented domestically within a State as the national legal system is usually separate from the international legal system. This may be understood by examining the constitutional law provisions of a State. Municipal law cannot be pleaded as an excuse for not implementing the applicable international law in a State.

The Constitution of Malaysia has provisions on the dualist approach to international law which recognizes a two-track system for international and municipal law. The Constitution recognizes a transformation as opposed to an incorporation approach to rules of international law within Malaysia. This in effect calls for the promulgation of local laws for this purpose. Compared to Malaysia, Viet Nam has enacted the Viet Nam Law of Treaties 2016 which is a comprehensive piece of legislation that effectively negates doubts on capacity to conclude treaties and outlines the processes for treaty ratification. This Law “prescribes the conclusion, reservation, amendment and supplementation, extension, termination, renunciation, withdrawal, suspension of implementation of treaties, deposit, archival, making of certified copies, publication, registration, and organization of implementation of treaties”.

This chapter views that any solution for the South China Sea disputes going forward, on the basis of an equitable regional order for the South China Sea, will only be effective, if international law obligations are received and applied in the South China Sea States through their constitutional and municipal
law provisions as treaties and other international law rules may need to be implemented domestically in dualist States, and in case of conflict, where possible, the superiority of the standard mentioned in the international rule be upheld. Accordingly, the research objectives in this chapter are:

1. To examine the Malaysian and Vietnamese constitutional law provisions on the reception and application of international law, treaties, decisions, awards and resolutions in a State.
2. To examine the constitutional provisions on the denunciation of treaties.
3. To identify the responses of the Executive and the Judiciary towards the domestic implementation of international law in cases before the local courts in Malaysia and Viet Nam.
4. To assess if the rules of public international law are superior to the constitution.
5. To discuss Malaysia’s experience in international dispute settlement. Malaysia has implemented international decisions such as Pulau Sipadan and Pulau Ligitan,¹ and the Land Reclamation Cases² with Indonesia and Singapore. However, the decision in Pulau Batu Putih³ has faced certain difficulties in implementation. This issue is not discussed in the section on Viet Nam in this chapter.

A literature review on the topic was conducted and three authors were studied. Malcolm Evans, International Law,⁴ describes the challenges States face in the domestic implementation of international law. Ole Spiermann in International Legal Argument in the Permanent Court of International Justice,⁵ examines the relations of public and private international and comparative law and developments since 1946 that confirm their inter-relation. Thomas M.J Mollers and Andreas Heinemann in The Enforcement of Competition Law in Europe,⁶ engage in the debate on the enforcement of competition law in Europe providing insights into the reception of international law into regional and domestic law in Europe.

¹ Sovereignty over Pulau Ligitan and Pulau Sipadan, (Indonesia v. Malaysia) (Merits) 2002 ICJ 3.
² Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), (Case No. 12), Provisional Measures, ITLOS Rep. 2003.
³ Sovereignty over Pedra Branca Pulau Batu Putih, Middle Rocks and South Ledge Case (Malaysia v. Singapore) 2008 ICJ 3.
2. Constitution of Malaysia and International Law

Malaysia was granted independence within the British Commonwealth of Nations in 1957. The Malaysia Act of 1963, enacted pursuant to the Malaysia Agreement of 1963, states that Malaysia was founded as a Federation in 1963, comprising the 11 states of Peninsular Malaya, Sabah, Sarawak and Singapore. The “State of Singapore” or “Singapore” means the State of Singapore established under the State of Singapore Act 1958, of the United Kingdom. In 1965, Singapore ceded from the Federation to become the independent Republic of Singapore. The status of Sabah within the Federation has been challenged at the international fora by the Philippines and has been an issue since 1963 that Malaysia has had to address. As a former British Colony, Malaysia has been bound by colonial treaties and agreements upon independence. Malaysia is a signatory to the UN Charter and an active member of the United Nations and other international inter-governmental organisations, giving rise to a dual presence of the UN in Malaysia and Malaysia at the UN. At international law, Malaysia was considered the successor State to the Federation of Malaya. As Malaysia was formed by four states namely, Federation of Malaya, Sabah, Sarawak and Singapore, some of the earliest treaties were concluded by the British and extended to the Federation of Malaya (2 C, 45 P), North Borneo comprising Sabah and the island of Labuan, 1882-1963 (1 C, 1 P) Sarawak (1 C, 1 P) and Singapore (1946-1963). The Malaysia Agreement 1963 is the first Agreement between the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo (Sabah), Sarawak and Singapore resulting in the formation of Malaysia.

In 1963, in the case of the Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj, the issue of the establishment of the State of Malaysia arose for consideration as the consent of the Government of the State of Kelantan, one of the 11 states of the Federation of Malaya, had not been obtained. The Government of Kelantan, challenged the constitutionality of the Malaysia Agreement and the Malaysia Act, on the eve of the establishment of Malaysia and sought declarations that the Malaysia Agreement and the subsequent Malaysia Act were null and void. As highlighted above, the Malaysia Agreement was an international agreement signed by the United Kingdom, the Federation of Malaya, Singapore, Sabah and Sarawak. The Malaysia Act was enacted by the Federation of Malaya to implement the

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8 For Malaysia’s UN membership see UN website.
10 UK Command Paper 2094/1963; 2 ILM 816.
11 Act No 26 of 1963.
Malaysia Agreement. Kelantan argued that the Malaysia Act would in effect abolish the Federation of Malaya and that in any event, the proposed changes would require the consent of each of the constituent States, including Kelantan, and this was not obtained. Kelantan argued that it was essential to obtain the consent of each of the individual States of the Federation of Malaya before the arrangements for Malaysia could be lawfully implemented. Further, Kelantan pointed out that the Ruler of the State of Kelantan should have been a party to the Malaysia Agreement as there was a constitutional convention that the Rulers of the individual States should be consulted regarding any substantial changes that were made to the Constitution as happened in the instant case. In any event, Kelantan argued that the Federal Parliament had no power to legislate for the State of Kelantan in respect of any matter regarding which the State has its own legislation.

Thomson CJ, dismissed the motion, and held:

1. Is the plaintiff Government entitled to the relief it has asked for on any reasonably available construction of the 1957 Agreement?

Today the Court is sitting in exceptional circumstances. …

1. The 1957 Agreement was signed by the then Rulers of the State of Kelantan and it has not been questioned that thereby the State of Kelantan became a party to that Agreement.

2. The Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia…

3. This is neither the time nor is it the place to discuss the political philosophy of the State, the nature of sovereignty or the problems of federalism.

4. Two things which are attacked are the action of Parliament in enacting the Malaysia Act and the action of the Government in concluding the Malaysia Agreement:

By Article 2 Parliament may by law “admit other States to the Federation”. Then by Article 74, as read with the Ninth Schedule, Parliament may, without prejudice to any power to make laws conferred on it by any other Article, make laws relating to a large number of subjects. Among these are external affairs (including the making of treaties, agreements and conventions) defence, internal security and the machinery of the Government. … I cannot see that Parliament went in any way beyond its powers or that it did anything so fundamentally revolutionary as to require fulfilment of a condition which the Constitution itself does not prescribe, that is to say, a condition to the effect that the State of Kelantan or any other State should be consulted … .

The Malaysia Agreement is signed “For the Federation of Malaya” by the Prime Minister, the Deputy Prime Minister and four other members of the Cabinet. There is nothing whatsoever in the Constitution requiring consultation with any State Government or the Ruler of any State… . For the foregoing reason, I am satisfied that there is no possibility, far less probability, of the plaintiff Government making out in the substantive proceedings that either the Malaysia Act or the Malaysia Agreement is a nullity. Nor can I see any possibility, far less probability, of it being made out that the Malaysia Act is not binding on the State of Kelantan…

Tunku Sofiah Jewa has summarized the following points of law from the above examination, that:
1. it is only the Federal Government, as opposed to any State Government, that is empowered under the Constitution to enter into international agreements;
2. it is mandatory that States must be consulted in certain instances before the treaty is implemented;
3. the Federal Government is not bound by the views of the State Government during such consultations;
4. the Federal Constitution has no provision on consultation and no such obligation may be implied; and
5. the Federal Government need not get the consent of the State Government in this matter.\textsuperscript{13}

3. \textbf{International Law in Malaysia}
Malaysia’s acceptance of international law depends on six sources:
3. Membership in International Organisations.
4. Treaties.

Tunku Sofiah Jewa points out that although the Federal Constitution does not contain a reference to the doctrine of incorporation, certain provisions of the Constitution do expressly relate to international law. In practice, Malaysia follows dualism.\textsuperscript{14}

\textsuperscript{13} \textit{Ibid.}, at p. 31.
\textsuperscript{14} \textit{Id.}
The Constitution of the Federation of Malaya was subsequently introduced as the Constitution of Malaysia on Malaysia Day, 16 September 1963, when the States of Sabah and Sarawak joined the Federation of Malaya. Therefore, references to Merdeka Day in these two States are substituted by a reference to Malaysia Day.

The United Kingdom Of Great Britain And Northern Ireland And Federation Of Malaya, North Borneo, Sarawak And Singapore signed an Agreement relating to Malaysia in London on 9 July 1963. After this, an Agreement amending the above-mentioned Agreement was signed at Singapore on 28 August 1963. This Agreement states that the United Kingdom of Great Britain and Northern Ireland, the Federation of Malaya, North Borneo, Sarawak and Singapore concluded an agreement relating to Malaysia. In Article I, they agreed that, “The Colonies of North Borneo and Sarawak and the State of Singapore shall be federated with the existing States of the Federation of Malaya as the States of Sabah, Sarawak and Singapore in accordance with the constitutional instruments annexed to this Agreement and the Federation shall thereafter be called “Malaysia”. Article II states that, “The Government of the Federation of Malaya will take such steps as may be appropriate and available to them to secure the enactment, by the Parliament of the Federation of Malaya, of an Act in the form set out in Annex A to this Agreement and that it is brought into operation on 31st August 1963 (and the date on which the said Act is brought into operation is hereinafter referred to as “Malaysia Day”). Article III underscores that, “The Government of the United Kingdom will submit to Her Britannic Majesty before Malaysia Day, Orders in Council, for the purpose of giving the force of law to the Constitutions of Sabah, Sarawak and Singapore as States of Malaysia which are set out in Annexes B, C and D to this Agreement”. Under Article IV, “The Government of the United Kingdom will take such steps as may be appropriate and available to them to secure the enactment by the Parliament of the United Kingdom of an Act providing for the relinquishment, as from Malaysia Day, of Her Britannic Majesty’s sovereignty and jurisdiction in respect of North Borneo, Sarawak and Singapore so that the said sovereignty and jurisdiction shall on such relinquishment vest in accordance with this Agreement and the constitutional instruments annexed to this Agreement”.

The Federal Constitution deals broadly with colonial treaties as applicable to the Federation of Malaya and the States of Sabah and Sarawak before

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15 UNTS 1970 document No. 10760, (with annexes, including the Constitutions of the States of Sabah, Sarawak and Singapore, the Malaysia Immigration Bill and the Agreement between the Governments of the Federation of Malaya and Singapore on common market and financial arrangements).
independence or Merdeka in 1957, followed by modern state practice upon independence.

An introduction to the main Articles of the Federal Constitution under discussion and transitional provisions are in order. The Federal Constitution in Article 76 (1) refers to treaty-making powers after independence and in Article 169, refers to the binding nature of colonial treaties and the binding nature of the decisions taken by an international organization as accepted by the Government of the United Kingdom before Merdeka Day.

Part XIII of the Federal Constitution provides for temporary and transitional provisions in Article 162 on existing laws. Laws enacted by the colonial power pursuant to ratification of any treaty will continue to have force subject to the provisions of Article 162 and 163 unless repealed. Article 162 reads:

162.  (1) Subject to the following provisions of this Article and Article 163*, the existing laws shall, until repealed by the authority having power to do so under this Constitution, continue in force on and after Merdeka Day, with such modifications as may be made therein under this Article and subject to any amendments made by federal or State law.

(2) Where any State law amends or repeals an existing law made by the Legislature of a State, nothing in Article 75 shall invalidate the amendment or repeal by reason only that the existing law, relating to a matter with regard to which Parliament as well as the Legislature of a State has power to make laws, is federal law as defined by Article 160.

(3) References in any existing law to the Federation established by the Federation of Malaya Agreement 1948, and its territories, and to any officer holding office under that Federation or to any authority or body constituted in or for that Federation (including any references falling to be construed as such references by virtue of Clause 135 of the said Agreement) shall be construed, in relation to any time on and after Merdeka Day, as references to the Federation (that is to say, the Federation established under the Federation of Malaya Agreement 1957) and its territories and to the corresponding officer, authority or body respectively; and the Yang di-Pertuan Agong (King) may by order declare what officer, authority or body is to be taken for the purposes of this Clause to correspond to any officer, authority or body referred to in any existing law.

(4) (Repealed).

(5) Any order made under Clause (4) may be amended or repealed by the authority having power to make laws with respect to the matter to which the order relates.
Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply it with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.

The provisions of Article 167, Clauses (1) to (5), which provided for the rights, liabilities and obligations of the colonial government were repealed by Act 25/1963, section 8, in force from 29 August 1963 and are now assumed by the Government of the Federation and States. It reads as follows:

167. (1) Subject to the provisions of this Article, all rights, liabilities and obligations of—
(a) Her Majesty in respect of the government of the Federation; and
(b) the Government of the Federation or any public officer on behalf of the Government of the Federation, shall on and after Merdeka Day be the rights, liabilities and obligations of the Federation.

(2) Subject to the provisions of this Article, all rights, liabilities and obligations of—
(a) Her Majesty in respect of the government of Malacca or the government of Penang,
(b) His Highness the Ruler in respect of the government of any State, and
(c) the Government of any State, shall on and after Merdeka Day be the rights, liabilities and obligations of the respective States.

(3) All rights, liabilities and obligations relating to any matter which was immediately before Merdeka Day the responsibility of the Federation Government but which on that date becomes the responsibility of the Government of a State, shall on that day devolve upon that State.

(4) All rights, liabilities and obligations relating to any matter which was immediately before Merdeka Day the responsibility of the Government of a State but which on that day becomes the responsibility of the Federal Government, shall on that day devolve upon the Federation.

(5) In this Article, rights, liabilities and obligations include rights, liabilities and obligations arising from contract or otherwise, other than rights to which Article 166 applies.

Article 167, clause 6 maintains that the Attorney-General shall, on the application of any party interested in any legal proceedings, other than proceedings between the Federation and a State, certify whether any right, liability or obligation is by virtue of this Article a right, liability or obligation
of the Federation or of a State named in the certificate, and any such certificate shall for the purposes of those proceedings be final and binding on all courts, but shall not operate to prejudice the rights and obligations of the Federation and any State as between themselves. The financial provisions in the Anglo-Thai Treaty of 1869 are saved in Clause 7:

(7) The Federation shall make the like annual payments as fell to be made before Merdeka Day under Article II of the Treaty made on the sixth day of May, eighteen hundred and sixty-nine, between Her Majesty of the one part and the King of Siam of the other part relative to the State of Kedah.

Article 168 on legal proceedings against Her Majesty was repealed by Act 25/1963, section 8, in force from 29 August 1963 and reads as follows:

168. (1) Subject to the provisions of this Article, any legal proceedings pending in any court immediately before Merdeka Day in which Her Majesty or any servant of Her Majesty is a party in respect of the colony or Settlement of Malacca or the colony or Settlement of Penang shall continue on and after Merdeka Day with the State of Malacca or the State of Penang, as the case may be, substituted as a party.

(2) Subject to the provisions of this Article, any legal proceedings pending in any court immediately before Merdeka Day in which the Federation Government or a State Government or any officer of either Government is a party shall continue on and after Merdeka Day with the Federation or, as the case may be, the State substituted as a party.

(3) Any legal proceedings pending in any court immediately before Merdeka Day in which the Federation Government or any officer thereof is a party shall, if the subject matter falls within the executive authority of a State, be continued on and after that day with that State substituted as a party.

(4) Any legal proceedings pending in any court immediately before Merdeka Day in which a State or any officer thereof is a party shall, if the subject matter falls within the executive authority of the Federation, be continued on and after that day with the Federation substituted as a party.

(5) The Attorney-General shall, on the application of any party to any proceedings referred to in this Article, certify whether the Federation or a State is in accordance with this Article to be substituted as a party in those proceedings, and any such certificate shall, for the purpose of those proceedings, be final and binding on all courts, but shall not operate to prejudice the rights and obligations of the Federation and any State as between themselves.
The term “treaty” is not defined in the Federal Constitution nor in Article 160 (1) which states that the Interpretation and General Clauses Ordinance 1948\textsuperscript{16} as in force immediately before Merdeka Day shall, to the extent specified in the Eleventh Schedule, apply for the interpretation of this Constitution as it applies for the interpretation of any written law within the meaning of that Ordinance, but with the substitution of references to the \textit{Yang di-Pertuan Agong} for references to the High Commissioner. Clause 2 provides that unless the context otherwise requires, the following expression, \textit{inter alia}, have the meaning hereby respectively assigned to it:

“Commonwealth country” means any country recognized by the \textit{Yang di-Pertuan Agong} to be a Commonwealth country; and “part of the Commonwealth” means any Commonwealth country, any colony, protectorate or protected state or any other territory administered by the Government of any Commonwealth country.

The present definition of “Commonwealth country” was substituted by Act 31/1965, subsection 2(2), in force from 1 July 1965. The earlier definition, as it stood at the date of repeal, read as follows:

“Commonwealth country” means the United Kingdom, Canada, Australia, New Zealand, India, Pakistan, Ceylon, Ghana, Nigeria, Cyprus, Sierra Leone, Tanganyika and any other country declared by Act of Parliament to be a Commonwealth country and “part of the Commonwealth” means any Commonwealth country, any colony, protectorate or protected state, or any other territory administered by the Government of any Commonwealth country.

Article 169 of the Federal Constitution provides that for all international treaties, agreements or conventions entered into, before Merdeka Day, between Her Majesty or her predecessors or the Government of the United Kingdom on behalf of the Federation or any part thereof and another country shall be deemed to be a treaty, agreement or convention between the Federation of Malaya and that other country. Article 169 (b) states that any decision taken by an international organization and accepted before \textit{Merdeka} Day by the Government of the United Kingdom on behalf of the Federation or any part thereof shall be deemed to be a decision of an international organization of which the Federation is a member. Article 169 (c) states that in relation to the States of Sabah and Sarawak paragraphs (a) and (b) shall apply with the substitution of references to Malaysia Day for the references to Merdeka Day.

\textsuperscript{16}Malayan Union, 7 of 1948
Malaysia is a signatory to the Vienna Convention on the Law of Treaties 1969 (VCLT).\(^{17}\) However, Malaysia is not a State party to the Vienna Convention on Succession of States in Respect of Treaties 1978.\(^{18}\) In Malaysia there are uncertainties in relation to the concept of *jus cogens*, the validity of reservations to human rights treaties and the effect of purported withdrawals without notice.\(^{19}\)

On the relationship between treaties and custom, the courts in Malaysia have not had the opportunity to rule on the opposability or non-opposability of treaties that Malaysia is not party to, where treaties or provisions in treaties have been recognized as custom. A potential area where this could be an issue is in the context of the 1966 covenants, namely, the International Covenant on Civil and Political Rights (ICCPR)\(^ {20}\) and the International Covenant on Economic, Social, and Cultural Rights (ICESCR).\(^ {21}\)

5. **Constitutional Provisions Relating to Treaties**
A treaty is neither defined under the Constitution nor in the Interpretation of Statutes Act 1948 & 1967. The phrases “law” and “State law” are defined in the latter Act. 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.” “State law means—

(a) any law in operation in a State or any part thereof immediately before Merdeka Day, being a law relating to a matter with respect to which the Legislature of the State has power to make laws; and
(b) a law made by the Legislature of a State”.

Article 2 of the 1969 VCLT defines a treaty as “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”. In the *Maritime Delimitation and Territorial Questions Case*\(^ {22}\) between Qatar and Bahrain, the ICJ held that even Minutes of meetings may enumerate the commitments to which parties have consented creating rights and obligations for the parties in international law, constituting an international agreement.

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\(^{17}\) (1980) UKTS 58.
\(^{19}\) Tunku Sofiah Jewa, Note 12 at p. 497.
\(^{20}\) 999 UNTS 171, 6 ILM 368 (1967).
\(^{21}\) 993 UNTS 3, 6 ILM 368 (1967).
Generally, two questions arise in relation to treaty-making powers, whether:

1. the Federal or constituent State Government has the power to enter into treaties or if it is a joint exercise between the two Governments; and
2. the State Government has to consent to the treaty or the State Government has to be consulted in certain cases before the Federal Government commits to an international agreement.

The four relevant Articles of the Federal Constitution that deal with the power to make laws on international rules, are found in Article 74 (1) read with the Federal List, Article 76 (1), 76 (2) and 169. Article 74 (1) provides that, without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List which consists of external affairs. This includes treaties, agreements and conventions with other countries and all matters which bring the Federation into relations with any other country; implementation of treaties, agreements and conventions with other countries; diplomatic, consular and trade representation; international organisations; participation in international bodies and implementation of decisions taken there; extradition; fugitive offenders; admission into, and emigration and expulsion from, the Federation; passports; visas; permits or entry or other certificates; quarantine; foreign and extra-territorial jurisdiction; pilgrimages to places outside Malaysia; war and peace; alien enemies and enemy aliens; enemy property; trading with an enemy; war damage, admiralty jurisdiction; federal citizenship and naturalization; aliens; shipping, navigation and fisheries (including shipping and navigation on the high seas and in tidal and inland waters; ports and harbours; foreshores; lighthouses and other provisions for the safety of navigation; maritime and estuarine fishing and fisheries; excluding turtles; light dues; and wrecks and salvage).


The Federal Constitution of Malaysia in relation to external treaty-making powers provides in Article 76 (1) for the power of Parliament to legislate for States for matters enumerated in the Second List in certain cases such as implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member or for the purpose of promoting uniformity of the laws of two or more States; or where requested by the Legislative Assembly of any State:
Power of Parliament to legislate for States in certain cases:

76. (1) Parliament may make laws with respect to any matter enumerated in the State List, but only as follows, that is to say:

(a) for the purpose of implementing any treaty, agreement or convention between the Federation and any other country, or any decision of an international organization of which the Federation is a member; or

(b) for the purpose of promoting uniformity of the laws of two or more States; or

(c) if so requested by the Legislative Assembly of any State.

However, Article 76 (2) restricts the provisions of Article 76 (1) as Article 76 (2) provides that the provisions of Article 76 (1) do not apply to Article 76 (2) where it concerns, for instance, Islamic matters, customs of Malays and native customs and laws until the State Government in Sabah or Sarawak has been consulted:

No law shall be made in pursuance of paragraph (a) of Clause (1) with respect to any matters of Islamic law or the custom of the Malays or to any matters of native law or custom in the States of Sabah and Sarawak and no Bill for a law under that paragraph shall be introduced into either House of Parliament until the Government of any State concerned has been consulted.

The entry into force clause for the law mentioned in Article 76 (1) is provided for in Article 76 (3):

Subject to Clause (4), a law made in pursuance of paragraph (b) or paragraph (c) of Clause (1) shall not come into operation in any State until it has been adopted by a law made by the Legislature of that State, and shall then be deemed to be a State law and not a federal law, and may accordingly be amended or repealed by a law made by that Legislature.

Finally Article 76 (4) allows Parliament for the purpose only of ensuring uniformity of law and policy, to make laws with respect to land tenure, the relations of landlord and tenant, registration of titles and deeds relating to land, transfer of land, mortgages, leases and charges in respect of land, easements and other rights and interests in land, compulsory acquisition of land, rating and valuation of land, and local government; and paragraph (b) of Clause (1) and Clause (3) shall not apply to any law relating to any such matter.23

23 Art. 74
See Art. 159(4)(b).
Clause (2)
The words “Without prejudice to any power to make laws conferred on it by any other Article,” were inserted by Act 25/1963, subsection 2(2), in force from 31-08-1957.
Article 76 (1) has to be read with Article 169 discussed under colonial treaties whereby colonial agreements made before independence shall continue to bind Malaysia. (See also case of the *Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj*, discussed above)

7. **Ratification Process and Practice**

The executive division of the Government of Malaysia, that is, the Legal Division of the Ministry of Foreign Affairs, is responsible for the following functions:

i. drafting and/or vetting bilateral and multilateral agreements, treaties and conventions which fall(s) within the purview of the Ministry;

ii. vetting of Instruments of Ratification/Accession/Notification in respect of treaties, conventions and other legal instruments to which Malaysia intends to become a party to;

iii. attending international conferences and meetings, particularly where there are legal issues to be discussed, or generally to provide legal advice to the delegation on matters arising, when required; and

iv. to negotiate/deliberate on behalf of the Government of Malaysia at bilateral/multilateral conferences/meetings.

What these treaties are and how they are classified are not known. Other points of law and procedure that are not clear are:

- the stage at which vetting occurs;
- the process by which the delegates for a particular meeting are chosen as Full Plenipotentiary powers for treaty ratification have to been given to such person; and
- the process by which negotiators are selected for the meetings as this too involves the grant of Plenipotentiary powers for treaty ratification.

Tunku Sofiah Jewa opines that treaties to which Malaysia is a party may require subsequent legislation in which case they become the law of the

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Art. 75
See Art. 76a(2) & 162(2).

Art. 76
See Art. 159(4)(b) & 160(2), definition of “federal purposes”.


Clause (1)(b): See Art. 95d.


25 Tunku Sofiah Jewa, Note 12 at p. 45.
land, as soon as the legislation is enacted. The author cites the Malaysia Act, which was adopted by the Malaysian Parliament, pursuant to Article 2 of the Malaysia Agreement. As mentioned earlier, this Agreement was concluded on 9 July 1963 between the UK, the Federation of Malaya, North Borneo, Sarawak and Singapore, where it states that “the Government of the Federation of Malaya will take such steps as may be appropriate and available to them to secure the enactment by the Parliament of the Federation of Malaya of an Act in the form set out in Annex A to this Agreement...”. Sometimes a declaration of Proclamation is also required in addition to the adoption of subsequent legislation. For example, Article III of the Independence of Singapore Agreement concluded between Singapore and Malaysia on 7 August 1965 states, “The Government of Malaysia will declare by way of proclamation … that Singapore is an independent and sovereign State separate from and independent of Malaysia and recognized as such by the Government of Malaysia”.  

Tunku Sofiah Jewa is of the view that in certain instances the adoption of an Act of Parliament may be necessary when the treaty is silent on the matter. The author cites the example of the Warsaw Convention 1929 (concerning the unification of certain rules relating to international transportation by air) by which Malaysia, as a result of a devolution treaty with Great Britain became a party retroactively on 4 July 1936. The author points out that Article 37 (1) of the Convention states that as soon as the Convention is ratified by five States, it will come into force on the 19th day after the deposit of the fifth instrument of ratification. The author underscores that there is no stipulation on the adoption of subsequent legislation by any signatory State. Nevertheless, while Malaysia was under British control, several enactments incorporating the 1929 Warsaw Convention in the various constituent States of Malaysia were passed. Furthermore, since 1929 the Warsaw Convention was amended several times. The Malaysian Parliament enacted the Carriage by Air Act 1974 which incorporated the Hague Protocol of 1955 and thereafter the Guadalajara Convention of 1961. However, in Dato’ Param Cumarasamy’s case, *Difference Relating To Immunity From Legal Process Of A Special Rapporteur Of The Commission On Human Rights*, the Federal Court took a restrictive view of international law.

8. International Dispute Settlement

8.1 Sabah

In the Malaysia-Philippines dispute over Sabah, the Manila Accord, 31 July 1963, an international agreement, signed by President Soekarno of Indonesia,

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26 Tunku Sofiah Jewa, Note 12 at p. 46 for the Proclamation.
27 Tunku Sofiah Jewa, Note 12 at p. 47.
Access to Justice

President Macapagal of the Philippines and the Prime Minister of Malaysia Tunku Abdul Rahman Putra Al–Haj of the Federation of Malaya, provides in Paragraph 12:29

The Philippines made it clear that its position on the inclusion of North Borneo in the Federation of Malaysia is subject to the final outcome of the Philippines claim to North Borneo. The Ministers took note of the Philippines claim and the right of the Philippines to continue to pursue it in accordance with international law and the principle of the pacific settlement of disputes. They agree that the inclusion of North Borneo in the Federation of Malaysia would not prejudice either the claim or any right thereunder. Moreover, in the context of their close association, the three countries agreed to exert their best endeavours to bring their claim to a just and expeditious solution by peaceful means, as negotiation, conciliation, arbitration or judicial settlement as well as other peaceful means of the parties’ own choice, in conformity with the Charter of the United Nations and the Bandung Declaration.

After a UNGA referendum, on 16 September 1963, Sabah joined Malaya, Singapore and Sarawak to form the new Federation of Malaysia whereas the Philippines severed diplomatic relations with Malaysia. At the 1297th Plenary Meeting of the UNGA (19th session), the Philippines representative remarked:30

So far as the Philippines is concerned, we are prepared to normalize our relations with Malaysia as soon as it agrees to the settlement of our claim to North Borneo by the ICJ. We hope that Malaysia will eventually welcome this proposal, which demonstrates our readiness to accept the compulsory jurisdiction of the International Court and to abide by the rule of law in international relations.31

The Malaysian Representative quoted paragraph 12 of the Manila Accord in reply.

…I do not need to remind you that Sabah is not an empty tract of land or an uninhabited territory in Antarctica. It has a population.

These two governments should try now by the process of conciliation, arbitration, mediation, and everything available to them under the Charter, to find a solution to the problem, a problem that is going to affect the lives, the livelihood and the happiness of half a million and more people. Therefore, the Malaysian Government’s position has been this: we agree that we should exhaust every possibility. We have five choices open to

29 Tunku Sufiah Jewa, Note 12 at p. 43.
30 Tunku Sofiah Jewa, Note 12 at p. 47.
31 Tunku Sofiah Jewa, Note 12 at p. 43.
us and you now limit us to one choice. That simply is the position that I wish to make clear. It is not as if we were unwilling to go to the ICJ. It is that we first want to know what is it that she shall go to the ICJ about, and secondly, why have you withdrawn all the four choices open to us?

Though Philippines has accepted the compulsory jurisdiction of the Court under Article 36 of the Statute of the ICJ, Malaysia has not accepted the compulsory jurisdiction of the Statute of the ICJ. Malaysia has refused to submit the Sabah dispute to the ICJ. Instead, the Cobbold Commission of Enquiry was set up and the UN Report of the United Nations Team is included here.

MALAYSIA
Report of the Inter-Governmental Committee, 1962*

Presented to Parliament by the Secretary of State for Commonwealth Relations and Secretary of State for the Colonies by Command of Her Majesty
February 1953

MALAYSIA
Report of the Inter-Governmental Committee

On August 1st, 1962 the British Government and the Government of the Federation of Malaya jointly announced their decision in principle that, subject to the necessary legislation, the proposed Federation of Malaysia should be brought into being by 31st August, 1963.

They also announced that an Inter-Governmental Committee would be established, on which the British, Malayan, North Borneo and Sarawak Governments would be represented. The task of this Committee was to work out the future constitutional arrangements and the form of the necessary safeguards for North Borneo and Sarawak. The Chairman of the Inter-Governmental Committee was the Marquess of Lansdowne, the Minister of State for Colonial Affairs.

The Inter-Governmental Committee held a preparatory Plenary meeting in Jesselton on the 30th August, 1962. The final Plenary meetings of the Committee were held in Kuala Lumpur on the 18-20th December, 1962.

The Committee has now agreed on its Report which is attached.

*[Reproduced from Command Paper 1954, with the permission of the Controller of Her Majesty's Stationery Office. Annex B, relating to the civil service, and Annex D, listing the meetings of the Inter-Governmental Committee, have not been reproduced.]*
Excerpt:
On 12 August 1963, the Secretary-General announced the assignment of eight members of the Secretariat, headed by Laurence V. Michelmore as his representative, to serve on the United Nations Malaysia Mission. The Mission left New York on 13 August 1963 and arrived in Kuching, Sarawak, at noon on 16 August. The Mission was divided into two teams, each comprising four officers, one to remain in Sarawak and the other to work in Sabah (North Borneo). Both teams remained until 5 September. Observers from the Federation of Malaya and the United Kingdom were present throughout all of the hearings conducted by the Mission. Observers from the Republic of Indonesia and from the Philippines arrived only on 1 September and attended hearings in the two territories on 2, 3 and 4 September.

On 14 September 1963, the final conclusions of the Secretary-General with regard to Malaysia were made public. These conclusions were based upon a report submitted to the Secretary-General by the Mission. This report stated that it had been understood that by the “fresh approach” mentioned in the terms of reference established in the request to the Secretary-General, a referendum, or plebiscite, was not contemplated. The Mission had considered that it would be meaningful to make a “fresh approach” by arranging consultations with the population through elected representatives, leaders and the representatives of political parties as well as non-political groups, and with any other persons showing interest in setting forth their views. During the Mission’s visits to various parts of the two territories, it had been possible to consult with almost all of the “grass roots” elected representatives. Consultations were also held with national and local representatives of each of the major political groups and with national and local representatives of ethnic, religious, social and other groups, as well as organizations of businessmen, employers and workers in various communities and social groups.

As far as the specific questions which the Secretary-General was asked to take into consideration were concerned, the members of the Mission concluded, after evaluating the evidence available to them, that: (a) in the recent elections Malaysia was a major issue throughout both territories and the vast majority of the electorate understood the significance of this; (b) electoral registers were properly compiled; (c) the elections were freely and impartially conducted with active and vigorous campaigning by groups advocating divergent courses of action; (d) the votes were properly polled and counted; and (e) the number of instances where irregularities were alleged seemed within the normal expectancy of well-ordered elections.
The Mission came to the conclusion that the number of persons of voting age detained for political offences or absent from the territories when voting took place was not sufficient to have affected the result.

The Mission also gave careful thought to the reference in the request to the Secretary-General that, “he ascertain prior to the establishment of the Federation of Malaysia, the wishes of the people of Sabah (North Borneo) and Sarawak within the context of General Assembly Resolution 1541 (XV), Principle IX of the Annex”. After considering the constitutional, electoral and legislative arrangements in Sarawak and Sabah (North Borneo), the Mission came to the conclusion that the territories had “attained an advanced stage of self-government with free political institutions so that its people would have the capacity to make a responsible choice through informed democratic processes”. Self-government had been further advanced in both territories by the declaration of the respective Governors that, as from 31 August 1963, they would accept unreservedly and automatically the advice of the respective Chief Ministers on all matters within the competence of the State and for which portfolios had been allocated to Ministers. The Mission was further of the opinion that the participation of the two territories in the proposed Federation, could be regarded as the “result of the freely expressed wishes of the territory’s peoples acting with full knowledge of the change in their status, their wishes having been expressed through informed and democratic processes, impartially conducted and based on universal adult suffrage”. Their participation was approved by their legislative bodies, as well as by a large majority of the people through free and impartially conducted elections in which the question of Malaysia was a major issue and fully appreciated as such by the electorate.

8.1.1. Conclusions of Secretary-General
In submitting his own conclusions, the Secretary-General said he had given consideration to the circumstances in which the proposals for the Federation of Malaysia had been developed and discussed. The Secretary-General also noted the possibility that people progressing through the stages of self-government might be less able to consider in an entirely free context, the implications of such changes in their status than a society which had already experienced full self-government and determination of its own affairs. He had also been aware, he said, that the peoples of the territories concerned were still striving for a more adequate level of educational development. Taking into account the framework within which the Mission’s task had been performed, he had come to the conclusion that the majority of the peoples of Sabah (North Borneo) and of Sarawak had given serious and thoughtful consideration to their future and

32 A/RES/1541 (1960).
to the implications for them of participation in a Federation of Malaysia. He believed that the majority of them had concluded that they wished to bring their dependent status to an end and to realize their independence through freely chosen association with other peoples in their region with whom they felt ties of ethnic association, heritage, language, religion, culture, economic relationship, and ideals and objectives. Not all of those considerations were present in equal weight in all minds, but it was his conclusion that the majority of the peoples of the two territories wished to engage, with the peoples of the Federation of Malaya and Singapore, in an enlarged Federation of Malaysia through which they could strive together to realize the fulfilment of their destiny.

The Secretary-General referred to the fundamental agreement of the three participating Governments and the statement by the Republic of Indonesia and the Republic of the Philippines that they would welcome the formation of the Federation of Malaysia provided that the support of the people of the territories was ascertained by him, and that, in his opinion, complete compliance with the principle of self-determination within the requirements of General Assembly Resolution 1541(XV), Principle IX of the Annex, had been ensured. He had reached the conclusion, based on the findings of the Mission that on both of those counts there was no doubt about the wishes of a sizeable majority of the people of those territories to join in the Federation of Malaysia.

8.1.2. Recognition of the State of Malaysia
The Federation of Malaysia was proclaimed on 16 September 1963. On 17 September, at the opening meeting of the General Assembly’s eighteenth session, the representative of Indonesia took exception to the fact that the seat of the Federation of Malaya in the Assembly Hall was being occupied by the representative of the Federation of Malaysia. Indonesia had withheld recognition of the Federation of Malaysia for certain reasons and reserved the right to clarify its position on the question of Malaysia at a later stage.

Recognition of Malaysia was also withheld by the Republic of the Philippines. During the general debate at the eighteenth session, both Indonesia and the Philippines expressed their reservations about the findings of the United Nations Malaysia Mission. The representatives of the United Kingdom and of the Federation of Malaysia replied to the Indonesian and Philippine charges and upheld the findings of the United Nations Malaysian Mission. On 12 December, during the meeting of the Credentials Committee, the Union of Soviet Socialist Republics (as it was then known) supported the Indonesian position with regard to the seating of the representatives of Malaysia in the General Assembly. A proposal by the Chairman of the Credentials Committee

33 Tunku Sofiah Jewa, Note 12.
that the Committee find the credentials of all representatives in order was nonetheless approved.  

8.2. Differences with Indonesia and Singapore

Malaysia has been a party before the ICJ and the International Tribunal on the Law of the Sea in the past decade in the following cases,

Case concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia) (Merits).  

Case concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia v. Singapore), Provisional Measures.  


Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore).  

The Case concerning Sovereignty Over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia) dealt with the issue of sovereignty over two islands called Pulau Ligitan and Pulau Sipadan in the Celebes Sea, off the north-east coast of the island of Borneo. The Court found, by sixteen votes to one, that “sovereignty over Pulau Ligitan and Pulau Sipadan belongs to Malaysia”. The ICJ has announced that in the Pedra Branca Case, the Malaysian Request on 30 June 2017, for Interpretation of the Judgment of 23 May 2008 was discontinued. In a letter dated 28 May 2018, the Co-Agent of Malaysia notified the Court that the Parties had agreed to discontinue the proceedings in the case. A copy of that letter was communicated to the Agent of Singapore who, by a letter dated 29 May 2018, confirmed his Government’s agreement to the discontinuance of the proceedings. On 29 May 2018, the Court made an Order recording the discontinuance, following the agreement of the parties, of the proceedings instituted on 30 June 2017 by Malaysia against Singapore, and directed the removal of the case from the Court’s list.

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35 2002 ICJ 3.

36 Land Reclamation by Singapore in and around the Straits of Johor, Note 2.

37 Advisory Opinion, Note 28.

38 2008 ICJ 3.

39 Request for Interpretation of the Judgment of 23 May 2008 in the case concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge,
Prior to these cases, international law in Malaysia has largely been what its municipal law has dictated it to be.\(^{40}\)

9. **Stipulations relating to International Law in Viet Nam’s Constitution and the Law of Treaties**

Five provisions of the Constitution of Viet Nam deal with rules of international law. These are Articles 12, 70, 88, 96 and 98.

Article 12 provides that the Socialist Republic of Viet Nam in the implementation of its foreign policy, multilateralization and diversification of external relations, shall abide by the Charter of the United Nations and treaties to which it is a contracting party. Article 70 highlights that the National Assembly is entrusted with, among others, the power to ratify, or decide on the accession to, or withdrawal from, treaties related to war, peace, national sovereignty or the membership of the country in international and regional organizations, treaties on human rights and other treaties that are not consistent with the laws or resolutions of the National Assembly.\(^{41}\)

Article 88 mandates the President with the duty and power, amongst others, to decide on the negotiation and conclusion of treaties in the name of the State.\(^{42}\)

Article 96 entrusts the Government with the general power to negotiate and conclude treaties in the name of the State, as authorized by the President and to decide on the conclusion, accession, ratification, or withdrawal from, treaties in the name of the Government.\(^{43}\) Under Article 98, the Prime Minister who is elected by the National Assembly from among its deputies, has, amongst others, the power to decide and direct the negotiation, conclusion, accession, or ratification of treaties within the scope of the tasks and powers of the Government and to organize the implementation of treaties to which Viet Nam is a contracting party.\(^{44}\)

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9.1. The Constitution

This legislation comprises 10 chapters spread over 84 Articles. A significant section of the law of treaties is found in Chapter II, entitled “Conclusion Of A Treaty” where Section 1 outlines the rules on the Negotiation Of A Treaty. Section 2 deals with the Proposal For Signing Of A Treaty. Section 3 sets out rules on the Full Powers For Negotiation And Signing Of A Treaty and Credentials For Participation In An International Conference. Section 4 speaks of the Organization Of The Signing Ceremony Of A Treaty, Section 5 deals with Treaty Ratification, Section 6 Approval of a Treaty and Section 7 on Accession to a Treaty. A sampling or two of each of the rules in these Sections is given below. Following a brief discussion on conflicts between treaties and the constitution, this chapter discusses Articles 17 and 18 of Section 1 based on their relevance.

9.2.1. Conflicts between Treaty and the Constitution
In a conflict between a treaty and the Constitution, the Viet Nam Treaties Act 2016, Article 3 states that the Constitution prevails. Article 3 sets out the principles of conclusion and implementation of a treaty. It has four sub-sections and provides that the treaty is not to be contrary to Viet Nam’s Constitution. The treaty must respect the national independence, sovereignty and territorial integrity of the State and ensure fundamental principles of international law. The treaty must also be consistent with Viet Nam’s national interests and conform with its foreign policy. The new treaty has to comply with other treaties to which Viet Nam is a contracting party. However, in conflicts between treaty and municipal law, Article 6 of the Treaties Act 2016 states in the context of conflicts between treaties and provisions of domestic law, the treaty shall prevail. Article 6 paragraph 2 refers to the power of the National Assembly, the President or the Government to decide on the consent to be bound by the treaty and the application of the treaty to agencies, organizations and individuals. Significantly, Article 7 of the Treaties Act 2016 refers to the supervision of the conclusion and implementation of a treaty:

1. The National Assembly, the National Assembly Standing Committee, the Ethnic Council and the Committees of the National Assembly, National Assembly deputies’ delegations and individual National Assembly deputies shall, within the ambit of their respective tasks and powers, supervise the conclusion and implementation of a treaty.

45 This Law was passed on April 9, 2016, by the XIIIth National Assembly of the Socialist Republic of Viet Nam at its 11th session.
2. The order and procedures for supervising the conclusion and implementation of a treaty must comply with the law on the National Assembly’s supervision activities.

9.2.2. Articles 17 and 18
In Chapter 2, Section 2, Article 17.4 states that the dossier submitted for proposal for signing of a treaty must contain a report on the assessment of the compatibility between the treaty proposed for signing and other treaties in the same field to which the Socialist Republic of Viet Nam is a contracting party. The rest of the provisions in Article 17 concern:
1. The submitting agency’s report with the contents prescribed in Article 16 of this Law.
2. Examination opinions of the Ministry of Foreign Affairs, appraisal opinions of the Ministry of Justice and opinions of relevant agencies and organizations; report on responses to and acceptance of opinions of relevant agencies and organizations and proposed handling measures; a proposed plan for implementation of the treaty.
3. A report on the assessment of political, defense, security, socio-economic and other impacts of the treaty.
4. …
5. A report on the assessment of the conformity of the treaty with Vietnamese law.
6. The text of the treaty.

The responsibilities of the Ministry of Foreign Affairs for examining a treaty are set out in Article 18:
Article 18.2.b states that in the examination of the proposed treaty, the Ministry of Foreign Affairs shall also assess the conformity of the treaty with the fundamental principles of international law;
Article 18.2.c refers to the assessment of the conformity of the treaty with the national interests and foreign policy of the Socialist Republic of Viet Nam; and
Article 18.2.d refers to the assessment of the compatibility between the treaty proposed for signing and other treaties in the same field to which the Socialist Republic of Viet Nam is a contracting party.
The other provisions of Article 18.1 and 18.2 are:
1. The Ministry of Foreign Affairs shall examine a treaty within 15 days after receiving a complete dossier under Article 19 of this Law or within 30 days in case a treaty examination council is established under Clause 3 of this Article.
2. Contents of examination of a treaty:
a/ The necessity and purpose of signing the treaty on the basis of assessing the relations between the Socialist Republic of Viet Nam and the foreign contracting party;
(b) – (d) ...

dd/ The title, form, the name under which the treaty shall be signed, the authority to sign the treaty, the language, effect, wording techniques of the treaty;

e/ The observance of the order and procedures for proposing the signing of the treaty;

g/ The consistency between the Vietnamese text and the foreign-language text of the treaty.

Article 18.3. states that “In case a treaty has important and complicated contents, the Minister of Foreign Affairs shall establish a council for examining the treaty. A treaty examination council must be composed of representatives from the Ministry of Foreign Affairs, the Ministry of Justice, the Governmental Office and relevant agencies and organizations”.

9.2.3. Articles 8 - 12

Section 1, Article 8 identifies the competence of the entities or persons who are entitled to propose the negotiation of a treaty. Article 8.1 refers to the Supreme People’s Court, the Supreme People’s Procuracy, the State Audit Office of Viet Nam, a ministry, a ministerial-level agency or a government-attached agency (proposing agency) who, within the ambit of its tasks and powers, request international cooperation and propose to the Government for submission to the President the negotiation of a treaty in the name of the State, or propose to the Prime Minister the negotiation of a treaty in the name of the Government.

Article 8.2. states that the Ministry of Foreign Affairs shall assume the prime responsibility for, and coordinate with the Ministry of National Defense, the Ministry of Public Security and relevant agencies and organizations in, proposing the negotiation of a treaty on war, peace or national sovereignty.46

Article 9, deals with the preparation for negotiation of a treaty. Article 9.1 provides that the proposing agency shall prepare the negotiation of a treaty and perform the following tasks:

a/ Making a preliminary assessment of political, national defense, security, socio-economic and other impacts of a treaty;

b/ Conducting a preliminary review of current laws and other treaties in the same field to which the Socialist Republic of Viet Nam is a contracting party and comparing with the main contents of the treaty expected to be negotiated; and

c/ Consulting the Ministry of Foreign Affairs, the Ministry of Justice

and relevant agencies and organizations before submitting to a competent state agency to decide the negotiation of a treaty.

Article 9.2. provides that the consulted agencies and organizations referred to in Article 9.1.(c) shall give written replies within 15 days after receiving a dossier for opinion. The competence to decide on negotiation of a treaty is vested in the President and the Prime Minister in Article 10. Article 10.1 states that the President shall decide on, authorize, advocate and conclude the negotiation of a treaty in the name of the State. Article 10.2 provides that the Prime Minister shall decide on, authorize, advocate and conclude the negotiation of a treaty in the name of the Government. The preparation of a dossier that is submitted for negotiation of a treaty, as given in Article 11, must comprise the following documents:

a/ The submitting agency’s report, which clearly states the necessity, requirements and purpose of the negotiation of a treaty; major contents of the treaty, preliminary assessment of political, national defense, security, socio-economic and other impacts of the treaty, result of the preliminary review of current laws and other treaties in the same field to which the Socialist Republic of Viet Nam is a contracting party, comparing with the main contents of the treaty to be negotiated; proposal for and authorization of the negotiation; and

b/ Opinions of the Ministry of Foreign Affairs, the Ministry of Justice and relevant agencies and organizations; report on responses to and acceptance of opinions of agencies and organizations and proposed handling measures.

2. In case of proposing the completion of the negotiation of a treaty, the dossier submitted must have a draft treaty with a negotiation completion plan.

Article 12 deals with the organization of the negotiation of a treaty by the Government and the Prime Minister; and the duty to coordinate with relevant agencies:

1. The Government shall organize the negotiation of a treaty in the name of the State under the mandate of the President. The Prime Minister shall organize the negotiation of a treaty in the name of the Government.

2. Pursuant to the decision of the agency prescribed in Article 10 of this Law, the proposing agency shall assume the prime responsibility for, and coordinate with relevant agencies and organizations in, elaborating and proposing to the Prime Minister a negotiation plan, the draft treaty of the Vietnamese side, and members of the negotiation delegation.
3. The proposing agency shall preside over consultations with organizations representing those directly affected by the treaty in the course of negotiation.

4. The proposing agency shall promptly report to the Prime Minister issues arising in the course of negotiation and proposed handling measures.

5. The President and the Government shall report to the National Assembly and the National Assembly Standing Committee the negotiation of a treaty under the National Assembly’s ratification competence.

9.2.4. Articles 13 - 21

Section 2, Article 13 sets out the competence to propose the signing of a treaty. Article 13.1 refers to an agency in Article 8 that shall propose the decision on the signing of a treaty in the name of the State to the Government for submission to the President or propose the Government to decide on the signing of a treaty in the name of the Government. Article 13.2 stresses that the proposing agency shall collect opinions from relevant agencies and organizations, examination opinions from the Ministry of Foreign Affairs, and appraisal opinions from the Ministry of Justice before signing the treaty. Where there is no change of opinion on the proposed treaty, Article 13.3 requires the proposing agency to collect examination opinions from the Ministry of Foreign Affairs and appraisal opinions from the Ministry of Justice, without having to consult other relevant agencies and organizations. In Article 14, the authority of the National Assembly Standing Committee to give an opinion on the signing of a treaty is stated.

1. Before deciding to sign a treaty that contains provisions which are different from or new to the laws and resolutions of the National Assembly or contains provisions which are contrary to an ordinance or a resolution of the National Assembly Standing Committee, or a treaty whose implementation requires amendment and supplementation, annulment or promulgation of a law or resolution of the National Assembly or an ordinance or a resolution of the National Assembly Standing Committee, the agency competent to decide on signing treaties prescribed in Clauses 1 and 2, Article 15 of this Law shall submit it to the National Assembly Standing Committee for opinion. This provision shall not apply to a treaty falling within the National Assembly’s ratification competence prescribed in Clause 1, Article 29 of this Law.

2. Based on opinions of the National Assembly Standing Committee, the President or the Government shall decide on signing a treaty.

The President has the power to decide on signing a treaty in the name of the State. This is given in Article 15. Article 15.3 states that such a decision must be made in writing with the following contents:
a/ the title, form and the name in which the treaty shall be signed;
b/ the representative and his/her competence to sign the treaty;
c/ reservations, acceptance of or objection to reservations made by a foreign contracting party, the statement with respect to a multilateral treaty;
d/ responsibilities of the proposing agency, the ministry of foreign affairs and relevant agencies and organizations; and
dd/ the decision on direct application of the whole or part of the treaty; the decision or proposal to amend and supplement, annul or promulgate legal documents for the implementation of the treaty.

This provision shall not be applied to a treaty subject to ratification or approval prescribed in Articles 28 and 37 of this Law.

Article 16 requires vital information on a proposal to sign a treaty. These are:
1. The necessity, requirements and purpose of the proposal for the signing of the treaty.
2. Main contents of the treaty.
3. The title, form and the name in which the treaty shall be signed, the signatory, the language, entry into force and manner of entry into force, duration of validity and provisional application of the treaty.
4. Rights and obligations of the Socialist Republic of Viet Nam arising from the treaty.
5. Evaluation of the observance of the principles prescribed in Article 3 of this Law.
6. Proposal on reservations, acceptance or objection to reservations made by the foreign contracting party, the statement with respect to a multilateral treaty.
7. Assessments on the direct application of the whole or part of the treaty or on the amendment and supplementation, annulment or promulgation of legal documents for the implementation of the treaty.
8. Issues on which the proposing agency and relevant agencies and organizations, and the Vietnamese and the foreign contracting party still hold different opinions, and proposed handling measures.

Article 20 sets out the responsibilities of the Ministry of Justice for appraisal of a treaty within 20 days after receiving a complete dossier prescribed in Article 21 or within 60 days in case an appraisal council is established under Clause 3 of this Article. Article 20.2 appraises a treaty by examining:

b/ the compatibility with Vietnamese law;
c/ the possibility of direct application of the whole or part of the treaty; and
d/ by request to amend and supplement, annul or promulgate legal documents for the implementation of the treaty.

9.2.5. Article 22
Section 3 titled Full Powers for Negotiation and Signing of a Treaty Credentials for Participation in an International Conference, comprises a single article, Article 22. Article 22.1 provides that the “head of a delegation for negotiation and signing of a treaty in the name of the State shall be authorized in writing by the President”. Article 22.2 states that, “the head of a delegation for negotiation of a treaty in the name of the Government shall be authorized in writing by the Prime Minister. The person signing a treaty in the name of the Government shall be authorized in writing by the Government”. Article 22.3 points out that, “the head of a delegation to an international conference shall be mandated in writing by the Prime Minister. In case it is required to mandate members of a Vietnamese delegation to participate in an international conference in accordance with the rules of the conference, the proposing agency shall submit the case to the Government for decision”. Article 22.4 on signing a treaty reads: “A person authorized to negotiate or sign a treaty or mandated to participate in an international conference must be a leader of the proposing agency or must be nominated by the proposing agency to a competent agency for decision”. Alternatively, Article 22.5 refers to the designation of a competent agency where the head of a delegation for negotiation has not been appointed: “In case of not appointing the head of a delegation for negotiation, a person for signing a treaty or participating in an international conference abroad, after having reached agreement with the Ministry of Foreign Affairs, the proposing agency shall propose a competent agency to authorize or mandate the head of the diplomatic mission or the head of the representative agency at an international organization or another representative to be the head of the delegation for negotiation, the person for signing the treaty or participating in such international conference”. Finally, Article 22.6 reminds that, “The issuance of Full Powers and credentials must comply with Article 63 of this Law.”

9.2.6. Articles 23 - 27
Section 4, on the Organization of the Signing Ceremony of a Treaty, comprises Articles 23 to 27. Article 23 refers to “Check and comparison of the text of a treaty”: Before initialing or signing a treaty, the proposing agency shall coordinate with the Ministry of Foreign Affairs and related state agencies in checking and comparing the text in Vietnamese and the text in a foreign
language to ensure the accuracy of the contents and the uniformity of the form of the texts of the treaty. Article 24.1 states that the proposing agency shall coordinate with the Ministry of Foreign Affairs in completing the signing procedures and finalizing the text of the treaty and organizing the signing ceremony of the treaty as agreed upon with the foreign contracting party. In paragraph 2, where a competent state agency has decided to approve the signing of a treaty but finds it impossible to organize the signing of such treaty, the proposing agency shall promptly report the case to the Government, proposing handling measures and at the same time, notify the Ministry of Foreign Affairs for coordination. Paragraph 3 considers the eventuality where there are changes to the name under which a treaty shall be signed. In such cases, the proposing agency shall propose the signing of the treaty again in accordance with Section 2 of this Chapter. Other noteworthy provisions relate to Article 25 on signing of a treaty during a visit by a high-level delegation, Article 26 on responsibility to send the text of a treaty after its signing and Article 27 on exchange of instruments constituting a treaty. The exchange of instruments constituting a treaty must comply with Articles 8 to 26 of this Law.

9.2.7. Articles 28 - 34

In Section 5 on Ratification of a Treaty, Article 28 considers treaties that are subject to ratification:

1. a treaty that contains provisions that it is subject to ratification;
2. a treaty in the name of the State; and
3. a treaty in the name of the Government which contains provisions contrary to a law or resolution of the National Assembly.

Article 29 refers to ratification competence of the National Assembly and the President, and contents of a document of ratification of a treaty

1. The National Assembly shall ratify the following treaties:
   a/ a treaty on war, peace or national sovereignty of the Socialist Republic of Viet Nam;
   b/ a treaty on the establishment of or participation in an international or a regional organization if the establishment of, participation in or withdrawal from such organization affects national fundamental policies on foreign relations, defense, security, socio-economic development, financial and monetary issues;
   c/ a treaty on change, restriction or termination of human rights or fundamental rights and obligations of citizens as prescribed by a law or resolution of the National Assembly;
   d/ a treaty containing provisions which are contrary to a law or

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International Law in Malaysia and Viet Nam

resolution of the National Assembly; and

a treaty directly signed by the President with the Head of another State.

2. The President shall ratify the treaties prescribed in Article 28 of this Law, except those prescribed in Clause 1 of this Article.

3. A document of ratification of a treaty must contain the following contents:
   a/ the title, time and place of signing the treaty which is ratified;
   b/ contents of reservations to, acceptance of or objection to reservations made by the foreign contracting party; the statement with respect to a multilateral treaty and other necessary issues;
   c/ the decision on direct application of the whole or part of the treaty; the decision or proposal to amend and supplement, annul or promulgate laws and resolutions of the National Assembly and ordinances and resolutions of the National Assembly Standing Committee for the implementation of the ratified treaty;
   d/ the responsibilities of the proposing agency, the Ministry of Foreign Affairs and other relevant agencies and organizations in completing the procedures for ratifying, and organizing the implementation of, the treaty; and
   dd/ the full text of the treaty in Vietnamese in an annex. In case a treaty is signed in a foreign language, in the annex must be the full text of the treaty in one of the signed languages and its Vietnamese translation.

Some other important Articles are: Article 30 on proposal for ratification of a treaty, Article 31 regarding a dossier submitted for ratification of a treaty, Article 32 on scope of verification of a treaty, Article 33 regarding competence to verify a treaty and Article 34 on dossier of proposal for verification of a treaty.

9.2.8. Articles 37 - 40

Article 37 of Section 6 which deals with Approval of a Treaty, provides for the different types of treaties that are subject to approval. It states that,

Except the cases under the National Assembly’s ratification competence, the following treaties are subject to approval:
1. A treaty in the name of the Government which contains a provision requiring the approval or the completion of legal procedures in order to become effective according to each country’s regulations;

Article 38 provides for the approval, competence and contents of a document of approval of a treaty and Article 39 for proposal for approval of a treaty. Article 40 refers to a dossier that is submitted for approval of a treaty. A dossier submitted to the Government for approval of a treaty must comprise documents similar to those of a dossier submitted for ratification of a treaty prescribed in Article 31 of this Law.

9.2.9. Articles 41 - 46
Article 41 of Section 7 on Accession to a Treaty, deals with the competence to propose accession to a treaty,\(^{50}\) and Article 42 authorises the National Assembly Standing Committee to give opinions on the accession to a treaty. Article 43 gives the National Assembly, the President and the Government competence to decide on accession to a treaty. In Article 44, the order and procedures for the National Assembly to decide on the accession to a treaty must comply with those applicable to the ratification of a treaty prescribed in Articles 32 through 36. Article 46 states that it is the responsibility of the proposing agency to send to the Ministry of Foreign Affairs the text of the treaty, within 15 days after receiving the decision on the accession to the treaty from a competent agency.

Other provisions of this legislation deal with Chapter III - Reservations to a Treaty (Articles 47-51); Chapter IV - Entry into Force, Amendment and and Supplementation and Extension of a Treaty (Articles 52-56); Chapter V - Deposit, Keeping Custody, Making of Certified Copies and Publication of a Treaty (Articles 57-62); Chapter VI - “Diplomatic Procedures” (Articles 63-69); Chapter VII - Summary Order and Procedures (Articles 70-75); Chapter VIII - Organization of the Implementation of a Treaty (Articles 76-80); Chapter IX - State Management of Treaty (Articles 81-83); and Chapter X - Implementation Provision (Article 84).

9.3 Presentation at the Workshop “Dispute Settlement under the 1982 Law of the Sea Convention” by Dr. Vu Hai Dang from Viet Nam\(^{51}\)

Viet Nam started to participate in the negotiations of the UNCLOS since 1977, at its 3\(^{rd}\) Conference, session 6. At the time, Viet Nam’s interest was the protection of the national sovereignty of States at sea and the equality between States, irrespective of size, in enjoying the sea.


\(^{51}\) The presentation was made in a personal capacity.
In 1982, Viet Nam was one the first 130 States that signed the UNCLOS and in 1994, one of the first 119 States that ratified this Convention. On 23 June 1994, the National Assembly of Viet Nam issued the ratification decree for the UNCLOS. In South-East Asia, Viet Nam, Philippines and Indonesia were the first States to ratify this important Convention.

9.3.2. UNCLOS rules in national law
As early as 12 May 1977, the government of Viet Nam issued the Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone, and the Continental Shelf. According to this Statement, Viet Nam has a 12-nautical mile territorial sea, 24-nautical mile contiguous zone, 200-nautical mile exclusive economic zone, and 200-nautical mile continental shelf. With this Statement, Viet Nam became the first South-East Asian country to have a 200-nautical mile exclusive economic zone.

In 1982, the government of Viet Nam issued the Statement on the Baseline to measure the breadth of the territorial sea of Viet Nam. This baseline system consists of 12 basepoints, covering most of the coastline of mainland Viet Nam, running from the historic waters between Viet Nam and Cambodia to Viet Nam’s island of Con Co, at the entry to the Gulf of Tonkin.

In 2002, Viet Nam’s National Assembly approved the Law on National Border. The main purpose of this law is to provide regulations relating to the national border, the legal status of national border, the legal status, management, and protection of the contiguous zone, exclusive economic zone and continental shelf of Viet Nam. The Law on National Border provides for definitions of the baseline, contiguous zone, exclusive economic zone, continental shelf, maritime border line, innocent passage, and historic waters.

In 2012, the National Assembly of Viet Nam adopted the Law on Maritime Zones of Viet Nam. This law provides a comprehensive legal framework for the status of different sea and islands areas under the sovereignty, sovereign rights and jurisdiction of Viet Nam. It comprises stipulations on Viet Nam’s baseline, internal waters, territorial seas, contiguous zone, economic zone, continental shelf, islands and archipelagoes of Viet Nam; the undertaking of activities in Viet Nam’s maritime zones, and the management and protection of Viet Nam’s sea and islands.

Article 4 (3) of this Law states that the State is to resolve disputes relating to the sea and islands with other countries by peaceful means, in conformity with the 1982 Convention, international law and practice.
9.3.3. Best way forward: dispute settlement of the South China Sea Issues

Viet Nam welcomes the issue of the South China Sea Arbitration Award by the Arbitral Tribunal established in accordance with the Annex VII of the 1982 Convention. Viet Nam strongly supports the resolution of the disputes in the South China Sea by peaceful means, including diplomatic and legal processes and by refraining from the use or threat to use force, in accordance with international law, including the 1982 Convention. Viet Nam also supports the maintenance of peace and stability in the region, maritime security and safety, freedom of navigation and overflight in the South China Sea, and respect for the rule of law in the seas and oceans.