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CIL RESEARCH PROJECT ON INTERNATIONAL MARITIME CRIMES

MALAYSIA'S COUNTRY REPORT

By Siti Aliza Binti ALIAS

This Country Report was prepared in response to a Questionnaire drafted for the CIL Research Project on International Maritime Crimes

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By:
Siti Aliza Binti ALIAS*

PART I: GENERAL MATTERS ON RATIFICATION AND IMPLEMENTATION OF GLOBAL CONVENTIONS

A. Malaysian Law Relating to International Treaties

1. *Constitutional framework on international law and treaties*

As is typical with constitutions that are the product of the era of decolonisation in the 1950s-1960s which do not typically contain constitutional provisions indicating the nature of the inter-relationship between international and municipal law, Malaysia as a former British colony that has adopted the legal transplants of the common law and the Westminster parliamentary government system, with autochthonous modifications, is silent on the status of international law within the constitutional order.

The Federal Constitution of Malaysia[1] (hereinafter "the Constitution") does not contain any provision which says that international law shall be deemed part of the law of the land or that treaties shall be the laws of Malaysia.

Although there is no specific provision in the Constitution, which expressly empowers a particular organ of the State with treaty-making power, there are two factors from which it can be concluded that treaty-making power in Malaysia is vested in the Federal Executive or the Federal Government.

First, eventhough the Malaysian constitution is a federal one, due to its distinct historical and political background, from Independence to the present day, it has retained the "Westminster

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[1] *Federal Constitution of Malaysia*, International Law Book Services, Kuala Lumpur.

model" as the basis for its constitutional structure.[2] However, one important difference between the Westminster constitution and the Malaysian Constitution is that in Malaysia the Constitution is supreme, and therefore the British concept of parlimentary supremacy has no application.[3]

Article 4

(1) This Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

Nevertheless, it is therefore not surprising that Malaysian practice with respect to international law as well as international treaties is quite similar to that of Great Britain. According to the British practice, treaty-making power is the prerogative power of the Crown, i.e., the Executive. Even though the Parliament has the power to pass laws to implement international treaties so that they have the force of law domestically, it is the Executive or the Cabinet that has the exclusive power of signing and ratifying international treaties. In other words, so far as treaties are concerned, the United Kingdom can be said as a dualist State[4] and applies the doctrine of transformation; hence the same is true in Malaysia. According to the "doctrine of transformation", rules of international law do not become part of domestic law unless they are transformed into it by means of an act of Parliament (an enabling statute).[5]

Secondly, the Federal Constitution does contain provisions expressing the division of power between the Federation and the component States on the one hand and between Parliament (the legislature) and the Executive on the other. If we read Article 74 together with the Federal List and the State List, the external affairs including treaties with other countries are the exclusive domain of the Federal government. Very clearly, component States of the Federation have no power whatsoever to conclude treaties with foreign States or implement them.

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2 See de Smith's classic account, now contained in Brazier, R., and de Smith, S.A., *Constitutional and Administrative Law*, 7th.ed., Penguin, London, 1993. See, also, Jones, D.S. & Iyer, T.K.K., "The Nature of Political Conventions in a Written Constitutional Order: a Comparative Perspective", (1989) 2 *Governance* 405.

3 See Harding, Andrew, *Law, Government and the Constitution of Malaysia*, Malayan Law Journal Sdn. Bhd., Kuala Lumpur, 1996, 105.

4 Jackson, J.H., "Status of Treaties in Domestic Legal System: A Policy Analysis", (1992) 86 *AJIL* 310.

5 See Brownlie, Ian, *Principles of Public International Law*, 5th.ed., 1998, pp. 42-43.

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

1. External Affairs, including –

(a) Treaties, agreements and conventions with other countries and all matters which bring the Federation into relations with other countries;

(b) Implementation of treaties, agreements and conventions with other countries; ...

We can also conclude from the wordings of Articles 74, read together with the Federal List, that the Federal Parliament has the exclusive power to make laws relating to external affairs (including treaties, agreements and conventions) and that it has the power to implement international treaties and make them operative domestically.

Article 76 of the Federal Constitution provides for power of Parliament to legislate for States in certain cases. The Article reads:

(1) Parliament may make laws with respect to any matters 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….

As such, it can be said that Article 76 (1) of the Malaysian Constitution provides the Federal Parliament with the competence to enact legislation for the purpose of implementing treaties, agreements or conventions between the Federation and any other country or any decision of any international organisations of which the Federation is a member.

It is equally clear that Parliament has no power to conclude (that is, to sign or ratify) international treaties and that such function is not entrusted to the legislature because it is the exclusive domain of the Executive according to the Westminster model of constitutional structure. There is also no formal requirement that the consent of Parliament is required before

an international agreement can be entered into, although questions of international legal obligations and domestic obligations have been debated in this forum.

In respect of the power of the Executive, Article 39 provides that: "The executive authority of the Federation shall be vested in the Yang di-Pertuan Agong and exercisable…by him or by the Cabinet or any Minister authorized by the Cabinet." Again under Article 80(1), the executive authority of the Federation extends to all matters with respect to which Parliament may make laws.[6] By virtue of the 'Federal List', matters with respective to which Parliament may make laws include "external affairs" which in turn include "treaties, agreements and conventions with other countries". Therefore, the executive authority of the Federation extends to the making or conclusion of treaties, agreements and conventions with other countries. The conclusion then is that in Malaysia the treaty-making power is vested in the executive authority of the Federation or the Federal Government.[7]

This has been reaffirmed by 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* [8]. In this case, Kelantan challenged the constitutionality of the Malaysia Agreement, which was an international treaty signed by the United Kingdom, the Federation of Malaya, Singapore, Sabah and Sarawak. The main argument made by the Kelantan Government was that the consent of the individual States of the Federation of Malaya should have been obtained before the arrangements for Malaysia can be lawfully implemented. Referring to Articles 39 and 80(1) of the Federal Constitution, the Court affirms the constitutionality of the Malaysia Agreement as follows:

> Turning now to the Malaysia Agreement, by Article 39 the executive authority of the Federation is vested in the Yang di-Pertuan Agong and is exercisable, subject to the provisions of any federal law and with certain exceptions, by him or by the Cabinet or any Minister authorized by the Cabinet. By

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6 To ascertain the precise scope of federal executive powers one must look at the Federal List. See Andrew Harding, *Law, Government and the Constitution in Malaysia*, (1996) Malayan Law Journal Sdn. Bhd., Kuala Lumpur, 107.

7 See Abdul Ghafur Hamid @ Khin Maung Sein, "Treaty-Making Power in Federal States with special refeence to the Malaysian Position", (2003) 30 *Journal of Malaysian and Comparative Law* (JMCL), 65-88.

8 [1963] MLJ 355 (Federation of Malaya High Court)

> Article 80(1) the executive authority of the federation extends to all matters with respect to which Parliament may make laws which…includes external affairs including treaties and agreements. 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. Again a power has been exercised by the body to which that power was given by the States in 1957.
>
> For these reasons, I am satisfied that there is no possibility, far less probability…that either the Malaysia act or the Malaysia Agreement is a nullity….

From this judgment, we can fairly conclude that treaty-making power in Malaysia is vested in the Federal Government (the Executive) and Parliament (the legislature) has the power to make laws to give legal effect to treaties made by the Federal Government. In other words, Parliament has the power to implement treaties or make them operative in Malaysia.

2. *The status of treaties within the domestic legal order*

An analysis of the constitutional provisions (as above) indicates that in Malaysia, like in the United Kingdom[9], the Executive possesses the treaty-making capacity while the power to give legal effect domestically to treaties rests in Parliament. For a treaty to be operative in Malaysia therefore, requires legislation by Parliament.

Following the dualist model, treaties are only domestically enforceable where they have been incorporated by statute – see *Mohd Ezam v Inspector General of Police*[10] and *Merdeka University Berhad v Government of Malaysia*[11]. This is because, if treaties are self-executing, the connotation would be that since treaties are signed by the Executive, an automatic application of treaties would be a clear violation of the doctrine of separation of powers, since law-making powers are under the sole domain of the legislative branch of the government.

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[9] See *R. v Secretary of State, ex parte Rees-Mogg* [1994] 1 All ER 457, CA; D.J Harris, *Cases and Materials on International Law*, (5th.ed., 1998), 778.
[10] [2002] 4 CLJ 309
[11] (1982) 2 MLJ 243

It has been suggested that there are treaties that can be implemented locally without any necessity for the introduction of a statute,[12] however in light of current state practice in Malaysia, this is doubtful. It is clear that treaties which affect the rights of private persons or involve changes in municipal law would definitely require legislation.

The position is that as far as treaties are concerned, the Malaysian practice is based on the 'doctrine of transformation'. Even though the Government (Executive) has ratified a treaty and the treaty binds the Government under international law, it has no legal effect domestically unless the Legislature passes a law to give legal effect to that treaty.[13] In *PP v Narogne Sookpavit*[14], the High Court stated as follows:

> …So before a convention can come into force in Malaysia, Parliament must enact a law to that effect. The carriage by Air Act is one such example and the importation of the Geneva Convention on the Territorial Sea 1958 by the Emergency (Essential Powers) Ordinance No. 7 of 1969 is another.[15] No Malaysian statute has been cited to me to show that Article 14 had become part of Malaysian law. In fact the Ordinance just cited stops at Article 13[16] and irresistible inference must be that article 14 was not intended to be imported into this country.

However, for the avoidance of doubt, there are three (3) modes how treaties are implemented and become validly binding in the State.

Firstly, is by the enactment of an 'enabling statute', whereby the treaty provisions in its entirety are transplanted 'lock, stock and barrel' into the enabling statute, thus giving the treaty

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[12] See Heliliah Bt. Haji Yusof, "Internal Application of International Law in Malaysia and Singapore", (1969) 1 *Singapore Law Review*, 62-71, at p. 65.

[13] In respect of the 'direct application' and 'self-executing nature' of treaties in many countries, see J. H. Jackson, "Status of Treaties in Domestic Legal Systems: A Policy Analysis", (1992) 86 *AJIL* 310.

[14] [1987]2 MLJ 100 (High Court, Johore Bahru)

[15] It is actually doubtful whether the "Emergency (Essential Powers) Ordinance No. 7, 1969", was made to import the 1958 Geneva Convention on the Territorial Sea into Malaysia because the main purpose of the Ordinance was to increase the breadth of the territorial sea of Malaysia from the traditional 3 nautical miles to 12 nautical miles and it was common knowledge that the 1958 Convention failed to adopt any territorial sea limit.

[16] It is submitted that the Ordinance stops at Article 13 (i.e. it just refers to Articles 3 to 13) because its ultimate objective is to provide the breadth of the territorial sea of Malaysia as 12 nautical miles which is to be measured in accordance with Articles 3 to 13 of the 1958 Convention (these articles deal with how to delimit the territorial sea) and the Ordinance does not refer to the rest of the Convention because it has nothing to do with 'the right of innocent passage' or other so many important provisions of the Convention.

full force of law. The following are a few examples of enabling statutes made by Parliament to give legal effect to treaties concluded by Malaysia:

(1) The Geneva Conventions Act, 1962, as revised in 1993, to give legal effect to the Four Geneva Conventions for the Protection of the Victims of War of 1949;

(2) The Diplomatic Privileges (Vienna Convention) Act 1966, as amended in 1999, to give legal effect to the Vienna Convention on Diplomatic Relations 1961;

(3) The Carriage by Air Act, 1974, to give legal effect to the Warsaw Convention of 1929, as amended by the Hague Protocol of 1955 and the Guadalajara Convention of 1961;

(4) The Exclusive Economic Zone Act, 1984, to give legal effect to certain provisions of the United Nations Convention on the Law of the Sea 1982.

(5) The International Organizations (Privileges and Immunities) Act 1992, to give legal effect to the Convention on the Privileges and Immunities of the United Nations 1946.

(6) The Consular Relations (Privileges and Immunities) Act 1999, to give legal effect to the Vienna Convention on Consular Relations 1963.

In *Public Prosecutor v Orhan Olmez*[17], the Supreme Court of Malaysia applied Article 32 of the Vienna Convention on the Diplomatic Relations 1961, which has been transformed into Malaysian law by means of the Diplomatic Privileges (Vienna Convention) Act 1966[18]. Another example of the application of international treaties by the Malaysian courts through a statute made by Parliament is the case of *Regional Centre for Arbitration v Ooi Beng Choo & Anor.(No. 2)*[19]. In this case, the court referred to a subsidiary legislation known as the Kuala Lumpur Regional Centre for Arbitration (Privileges and **Immunities)** Regulations 1996 made pursuant to Sections 3 and 4 of the International Organizations (Privileges and **Immunities)** Act 1992, which was passed by Parliament to implement the Convention on the Privileges and Immunities of the United Nations, 1946, to which Malaysia is a party. Again in *MBF Capital*

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[17] [1988] 1 MLJ 13.

[18] Section 3 of the Diplomatic Privileges (Vienna Convention) Act 1966, provides that "The articles set out in the Schedule hereto (being Articles of the Vienna Convention on Diplomatic Relations signed in 1961) shall have the force of law in the Federation". According to the 'Schedule' to the Act, Articles of the Vienna Convention having the force of law in the Federation are: Articles 1, 22, 23, 24, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, and 40.

[19] [1998] 7 MLJ 193 (High Court of Kuala Lumpur).

Bhd. & Anor v Dato' Param Cumaraswamy[20], the High Court of Malaya applied the International Organizations (Privileges and **Immunities)** Act 1992 in a case involving immunity of a Special Rapporteur of the UN Human Rights Commission.

Secondly, through implementing legislations that will cater substantially to treaty obligations. Usually, such legislations will not adopt the convention 'lock, stock and barrel' but the drafting of the legislation will usually be suited to the particular needs of Malaysian society and culture (molded according to such needs). An example is the Persons with Disabilities Act 2008 to cater to the Convention on the Rights of Persons with Disabilities.

Any new Act passed need not necessarily cater to all obligations under the treaty (as such the new Act will usually not be drafted by transplanting the treaty provisions in entirety, unlike the first mode). In such cases usually Reservations are made to certain provisions of the treaty, which are commonly made in the form of Declarations.

Indeed, where Malaysia cannot (or will not, according to policy consideration of the government) conform to an obligation arising under any particular provision of a treaty that it intends to ratify, it will deploy the technique of treaty reservations to insulate domestic law from change. An example is with regards to reservations made to CEDAW, due to the conflict that may arise in several aspects of Islamic or *Syariah* law that are applicable personal laws of the Muslims in Malaysia.

Another example is in relation to The United Nations Convention on Transorganized Crimes (UNTOC), where the lead-agency is the Ministry of Home Affairs, which Malaysia signed in 2002 and ratified in 2004. The Anti Money Laundering and Anti Terrorism Financing Act 2001 (AMLATFA) was enacted in relation to some of the obligations arising under the UNTOC.

The Child Act 2001 is another example, which was passed pursuant to the Convention on the Rights of the Child (CRC)

Although the general rule is that the new Act passed will rank in pari passu with other existing legislations, however, the Act itself may provide that its provisions shall prevail over other domestic statute in the event of inconsistency, subject of course to the overriding general principle that the Constitution remains the supreme law of the land.

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[20] [1997] 3 CLJ 927 (High Court Malaya, Kuala Lumpur)

An example is the Loans (International Bank) Ordinance 1963, which expressly provides that if there is a conflict between the provisions of the Loans Agreement and any law in force in the State, the provisions of the Loans Agreement shall prevail.

Thirdly, when the government does not see it fit to adopt specific enabling legislation, amendments to existing laws will be made subsequent to accession. This is reflective of a gradualist approach, whereby the preference is not to adopt comprehensive legislation but to address such issues by amending statutes.

Again, in relation to UNTOC, since there was no legislation that was already in place when UNTOC was ratified in 2004, the government actually chose to go via the route of studying all obligations arising under the UNTOC and to consider amending applicable existing domestic laws. As such, the Penal Code was duly amended (besides the enactment of the AMLATFA).

Another important example is in relation to CEDAW, where Article 8 of the Federal Constitution has been amended.

It is to be noted that with respect to bilateral treaties, e.g. bilateral trade agreements, FTAs, etc, there will be no specific legislations enacted in relation to them i.e. it will not be given legal effect domestically (except for the giving of privileges and immunities under International Organizations). Normally what the AGC would do in relation to these is to vet existing legislations, and to advise on changing or amending the MOUs in the event that the provisions are inconsistent with any existing law.

On a last note, it needs to be emphasized that the overall operating policy of the Malaysian government is to always keep in line with its international obligations.

3. *Conflict between international law and Malaysian domestic law*

In Malaysia, the constitution is silent as to the primacy of international law over municipal law or *vice versa*. There is, therefore, a possibility of a conflict between a statute and a

rule of international law. If there is such a conflict, the general rule is that the statute shall prevail. *PP v Wah Ah Jee*[21] is illustrative of the point. The learned judge in this case stated "the Courts here must take the law as they find it expressed in the Enactments. It is not the duty of a Judge or Magistrate to consider whether the law so set forth is contrary to international law or not".

It is quite obvious that *PP v Wah Ah Jee* followed the dictum in the English case of *Mortensen v Peters*[22], where it was held that:

> In this court we have nothing to do with the question of whether the legislature has or has not done what foreign powers may consider a usurpation in a question with them. Neither are we a tribunal sitting to decide whether an Act of the Legislature is *ultra vires* as in contravention of generally acknowledged principles of international law. For us an Act of Parliament duly passed by Lords and Commons and assented to by the King, is supreme, and we are bound to give effect to its terms…

This idea is based on the common law principle of the 'supremacy of an Act of Parliament' although there is a *prima facie* presumption that Parliament does not intend to legislate in breach of international law.[23] Sometimes, the statute itself might provide for the avoidance of conflict. The statute may expressly give primacy to the international obligation.[24] In any case, as a general rule, the court will upheld the statute made by the Parliament. Nevertheless, it goes without saying that if the statute is in conflict with a rule of international law, the State will, on the international scene, incur state responsibility for a breach of an international obligation.

B. Treaty Ratification and Implementation Process and Procedures

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[21] (1919) 2 F.M.S.L.R. 193. F.M.S. Supreme Court

[22] *Mortensen v Peters* (1906) 8 And (J) 93. Following the decision in *Mortensen v Peters*, several foreign masters of trawlers registered in Norway were arrested and convicted in Scotland for the same offence. They were released, however, following a series of protests by the Norwegian Government. In March 1907, a Foreign Office spokesman admitted in the House of Commons that: "the Act of Parliament as interpreted by the High Court of Justiciary is in conflict with international law".

[23] *Salomon v Commissions of Customs and Excise* [1967] 2 QB 116 (CA) per Lord Diplock; *R. v Secretary of State for the Home Department, Ex Parte Brind* [1991] 1 AC 696 (HL) per Lord Bridge.

[24] See Heliliah Bt. Hj. Yusof, "Internal Application of International Law in Malaysia", (1969) 1 Singapore Law Review, 62-71, at p. 69.

1. *Processes and Procedures*[25]

The first question to consider is what type of convention/treaty is it, in order to determine which ministry will act as the lead-agency. In other words, which ministry to act as lead agency will depend on the subject matter of the convention/treaty. For example, for the International Covenant on Civil and Political Rights (ICCPR), being a human rights convention, the Ministry of Home Affairs will be the lead-agency in relation to it. In the case of CEDAW, the Ministry of Women is the lead-agency. This determination is done according to the Ministerial Functions Act 1969[26]**.** The lead Ministry/lead agency will lead the internal bureaucratic process of ratifying a treaty.

The first step is that the lead-agency will call up an inter-agency meeting, which will involve the Attorney General's Chambers (AGC), the Ministry of Foreign Affairs (MOFA), and other relevant ministries/agencies, since usually a treaty or convention might involve cross-cutting issues that are within the purview of other ministries, besides the lead-ministry.

The AGC (i.e. the International Affairs Division (IAD)) which carries the task of advising on legal issues, will prepare a matrix in order to discuss "the possibility of Malaysia to become a party", and will bring comments on whether laws are in line (i.e, whether existing laws are sufficient to discharge the obligations under the treaty, OR whether existing laws need to be amended or a new legislation enacted instead to cater to the arising obligations).

A significant number of these inter-agency meetings will take place through-out the whole process of treaty ratification and implementation.

In the inter-agency meeting, one question that has to be decided upon is whether under any applicable existing laws, they would be sufficient to discharge the obligations arising on the state under the instrument/treaty, and if the answer is no, then whether the state would want to (1) draft a new Act to give effect to the Convention, OR (2) to amend existing laws?

If the first course is adopted, then the new Act can provide that in the event any laws is in contravention of the new Act, the new Act will prevail.

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[25] Information obtained from interview session with a Senior Federal Counsel at the International Affairs Division, Attorney General Chambers, on 2nd December 2010.
[26] Ministerial Functions Act 1969 (Act 2)

If the second course is adopted, there might be a need for the involvement of the 'Cabinet Co-Ordinating Committee on the International Agreement' (CCIA), which was established pursuant to a Cabinet meeting decision on 18 December 2002, Chaired by the Deputy Prime Minister and for which the AGC is the Secretariat responsible for arranging CCIA Meetings and preparing the papers to be discussed. The main objectives of the CCIA are (1) to protect the national interest by making a thorough assessment on the implication of multilateral, regional and bilateral international agreements which have been signed; and (2) to coordinate national policies to ensure consistency in the negotiations done at the multilateral, regional and bilateral levels. However, the involvement of CCIA will largely depend on the situational needs and. However, it is to be noted that to involve CCIA is not generally the standard practice.

More often than not, there will be no formal committee established to review a treaty, although it can be done on an ad hoc basis. The usual practice is for the members involved in the inter-agency meetings to act as an informal 'inter-agency committee' that will be responsible in reviewing the treaty and checking what would be the relevant provisions in existing laws that need to be amended. This is because, for purposes of consistency and continuation of process, it will usually be the same people who will eventually make up the members of the inter-agency meetings (from the relevant ministries and agencies). An exception can be seen in the case of the Anti-Trafficking in Person Commission which was established pursuant to Malaysia's intention to ratify the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, which was ultimately responsible in recommending the passing of the Anti Trafficking in Persons Act 2007.

Since the inter-agency committee consists of all the relevant Ministries whose ministerial function coincides with any matters under the convention, each ministry's legal advisor (who are legal advisors under AGC) will check on relevant laws under their jurisdiction, and come up with legal opinion. The AGC headquarter will in the circumstances act as lead-agency (answerable of course to the lead-ministry responsible for that particular Convention) in compiling the legal opinions of all the ministry's legal advisors, going through them and commenting on them.

Whether the first or the second course is adopted, is ultimately the policy-call of the lead-ministry.

Similarly, in making 'syor' (Recommendations) to the Cabinet on whether to be a party or not to the Convention is the policy-call of the lead-ministry, who will prepare the required Cabinet Paper (CP) to be submitted for the Cabinet's ultimate decision. This CP is prepared after the draft is first circulated to members of the inter-agency meeting, including the AGC, for their 'ulasan' (Comments) on the draft Bill. Sometimes, as with the case for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (under the United Nations Convention on Transnational Organised Crime), the AGC (IAD) will take over the drafting of the CP, giving the primary reason for giving 'syor' (Recommendations) to sign and ratify the Protocol being that the Anti Trafficking in Persons Act 2007 provides for all obligations under the Protocol (which was passed in view of signing and ratifying the Protocol).

If the first course has been adopted, then the legal advisor of the lead-ministry will then come up with the draft Act. While the drafting process for the new Act is taking place, usually Malaysia will first sign the Convention. Then after the new Act has been finalised and has come into effect, only then Malaysia will ratify the treaty.

This is the new general policy i.e. to have the legislation in place before becoming a party to a treaty, that the Malaysian government seems to be taking more and more, championed by the AGC (which they would include in each of their 'ulasan' (Comments) to a CP on whether Malaysia should be a party to a particular treaty), that is to ensure that Malaysia already has the necessary law in place, before becoming a party to a treaty or convention. This is the effect of the lesson from the CEDAW Convention (the new policy can be said to be the post-CEDAW policy), whereby Malaysia became a party without first having domestic law to cater to its obligation sunder CEDAW and has been facing international pressure (particularly from the United States) in relation to this, and in relation to its Reservations to certain provisions of CEDAW.

2. *The role of the Ministry of Foreign Affairs (MOFA)*[27]

As a preliminary note, it is to be noted that under Article 145 (2) of the Federal Constitution, it provides that, **"**It shall be the duty of the Attorney General to advise the Yang di-Pertuan Agong or the Cabinet or any Minister upon such legal matters, and to perform such other

[27] Information obtained from interview session with a Principal Assistant Secretary at the Department of Research, Treaties and International Law, Ministry of Foreign Affairs Malaysia, on 8th December 2010.

duties of a legal character, as may from time to time be referred or assigned to him by the Yang di-Pertuan Agong or the Cabinet, and to discharge the functions conferred on him by or under this Constitution or any other written law."

As such, unlike the practice in many other states, in matters concerning International Law; including legal issues concerning the application, ratification and implementation of treaties, international agreements and conventions; it is the Attorney General's Chambers (AGC), in particular the International Affairs Division (IAD) that will play a more active role as compared to the MOFA.

MOFA's role is relegated to the mere signing (*According to the Malaysian practice, it is the Prime Minister himself or, the Foreign Minister, or any Cabinet Minister specially authorized to do so, usually sign or ratify international treaties.) and depositing of the instrument of accession with the UN Secretary General, unless of course if MOFA is the designated lead-agency responsible for a particular treaty, then it will play the more active role of a lead-agency in the process. However, MOFA will always be involved in inter-agency meetings called by the lead-agency. Since MOFA determines the external policies of Malaysia, usually its function is more in briefing the members of the inter-agency meetings as to what has transpired at UN and the government's current policy in relation to the matter.

It is to be noted that where AGC will give advice from legal aspect, MOFA's role is less of an 'advisory' nature but more in giving MOFA's 'views' on whether to be a party to a treaty or not based on political considerations.

C. Criminal Jurisdiction of National Courts

Section 22 of the Courts of Judicature Act 1964[28] sets out the criminal jurisdiction of the Malaysian High Court:

> **Section 22. Criminal jurisdiction.**
> (1)The High Court shall have jurisdiction to try —
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> (a) all offences committed —

[28] Courts of Judicature Act 1964 (Act 91)

(i) within its local jurisdiction;
(ii) on the high seas on board any ship or on any aircraft registered in Malaysia;
(iii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;
(iv) by any person on the high seas where the offence is piracy by the law of nations; and

(b) offences under Chapter VI and VIA of the Penal Code [*Act 574*], and under any of the written laws specified in the Schedule to the Extra-Territorial Offences Act 1976 [*Act 163*], or offences under any other written law the commission of which is certified by the Attorney General to affect the security of Malaysia committed as the case may be, —

(i) on the high seas on board any ship or on any aircraft registered in Malaysia;
(ii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;
(iii) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia;
(iv) by any person against a citizen of Malaysia;
(v) by any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia located outside Malaysia, including diplomatic or consular premises of Malaysia;
(vi) by any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;
(vii) by any stateless person who has his habitual residence in Malaysia;
(viii) by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or
(ix) by any person who after the commission of the offence is present in Malaysia.

(2)The High Court may pass any sentence allowed by law.

PART II: IMPLEMENTATION OF GLOBAL CONVENTIONS TO WHICH MALAYSIA IS A PARTY

A. 1982 United Nations Convention on the Law of the Sea (UNCLOS)

1. *Lead agency*

The overall co-ordinating lead agency for matters relating to UNCLOS would be the Ministry of Foreign Affairs. There is no central ministry dealing with all UNCLOS issues, instead it is done on an inter-agency basis, where the Ministry of Foreign Affairs deals with the overall treaty-related policy making issues, and involving also the Ministry of Transport, National Security Council under the Prime Minister's Department (which will lead on UNLCOS issues pertaining

chiefly on enforcement) as well as other enforcement agencies such as the Malaysian Maritime Enforcement Agency.

2. *Piracy*

Article 101 of UNCLOS provides for the definition of piracy as follows:

> Article 101: Piracy consists of any of the following acts:
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> (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
> (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
> (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
>
> (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
>
> (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

Unlike the position in many states where there are statutes for the prevention and punishment of the crime of piracy, there is no corresponding statute in Malaysia. Therefore, the punishment of piratical acts can only be dealt with under the Malaysian Penal Code[29]. The relevant provisions of the Penal Code that can be used to punish piratical acts are the general provisions on offences of robbery (section 390 and 392), gang-robbery (section 391 and 395), and gang-robbery with murder (section 396).

> **Section 390. Robbery.**
>
> (1) In all robbery there is either theft or extortion.
>
> (2) Theft is "robbery", if, in order to commit theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender, for that end, voluntarily causes or attempts to cause to any person death, or hurt, or wrongful restraint, or fear of instant death, or of instant hurt, or of instant wrongful restraint.

[29] Penal Code (Act 574)

(3) Extortion is "robbery", if the offender, at the time of committing the extortion, is in the presence of the person put in fear and commits the extortion by putting that person in fear of instant death, of instant hurt, or of instant wrongful restraint to that person or to some other person, and, by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Section 391. Gang-robbery.

When two or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and of persons present and aiding such commission or attempt, amount to two or more, every person so committing, attempting, or aiding, is said to commit "gang-robbery".

Section 392. Punishment for robbery.

Whoever commits robbery shall be punished with imprisonment for a term which may extend to fourteen years, and he shall also be liable to fine or to whipping.

Section 395. Punishment for gang-robbery.

Whoever commits gang-robbery shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to whipping.

Section 396. Gang-robbery with murder.

If any one of two or more persons, who are conjointly committing gang-robbery, commits murder in so committing gang-robbery, every one of those persons shall be punished with death or imprisonment for a term which may extend to thirty years, and, where the punishment is not death, shall also be liable to whipping.

3. *Jurisdiction over acts of piracy*

The relevant domestic law provision giving universal jurisdiction to the Malaysian High Courts over acts of piracy would be section 22 (1) (a) (iv) of the Courts of Judicature Act 1964:

Section 22. Criminal jurisdiction.

(1)The High Court shall have jurisdiction to try —

(a) all offences committed —

(i) within its local jurisdiction;
(ii) on the high seas on board any ship or on any aircraft registered in Malaysia;
(iii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;
(iv) by any person on the high seas where the offence is piracy by the law of nations; ...

B. 1979 International Convention Against the Taking of Hostages (Hostage Taking Convention)

1. *Lead agency*

As the Hostage Taking Convention deals with a national security subject matter, the relevant lead agency responsible for overseeing the convention and for the overall implementation of obligations under the convention into national law would be the Ministry of Home Affairs. As is expected, this also requires inter-agency inputs (under the co-ordination of the lead agency) from the Ministry of Foreign Affairs, Ministry of Transport, and National Security Council (under the Prime Minister's Department).

2. *Offences and penalties under the Hostage Taking Convention (Article 1 and 2)*

Article 1 and 2 of the Hostage Taking Convention provides as follows:

ARTICLE 1

1. Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") in order to compel a third party, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention.

2. Any person who:

(a) Attempts to commit an act of hostage-taking, or

(b) Participates as an accomplice of anyone who commits or attempts to commit an act of hostage-taking likewise commits an offence for the purposes of this Convention.

ARTICLE 2

Each State Party shall make the offences set forth in Article 1 punishable by appropriate penalties which take into account the grave nature of those offences.

Malaysia acceded to the Hostage Taking Convention on 29 May 2007, after the amendment to the Malaysian Penal Code, by virtue of the insertion of section 374A, had come into force, which caters to Malaysia's obligation to provide in our domestic law for offences and penalties under the convention. This approach is pursuant to the more recent policy of the Malaysian government to ensure that the relevant laws are in place before Malaysia undertakes any obligations under an international convention.

It can be seen (below) that section 374A is drafted substantially in the wordings of Article 1 of the convention.

Section 374A. Hostage-taking.

Whoever seizes or detains and threatens to kill, to injure or to continue to detain another person ("the hostage") to compel the Government of Malaysia of the Government of any State in Malaysia, any other government, or any international organization or any other person or group of persons to do or refrain from doing any act as an explicit or implicit condition for the release of the hostage shall be punished--

(a) if the act results in death, with death; and

(b) in any other case, with imprisonment for a term of not less than seven years but not exceeding thirty years, and shall also be liable to fine.

As can be seen from the provision, it does not specifically provide for offences for attempts and abetment in relation to hostage taking. Therefore, in Malaysia it has to be dealt with under the general provisions on abetment (under Chapter V of the Penal Code) and attempts (under Chapter XXIII of the Penal Code).

3. *Jurisdiction*

As Malaysia has chosen to make offences under the Hostage Taking Convention offences under our domestic law via inclusion in the Penal Code, the jurisdiction of the Malaysian courts over such offences can be seen from the provision of the Penal Code itself:

Section 2. Punishment of offences committed within Malaysia.

Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within Malaysia.

Section 3. Punishment of offences committed beyond, but which by law may be tried within Malaysia.

Any person liable by law to be tried for an offence committed beyond the limits of Malaysia, shall be dealt with according to the provisions of this Code for any act committed beyond Malaysia, in the same manner as if such act had been committed within Malaysia.

Also, the general criminal jurisdiction of the Malaysian High Courts is provided for under section 22 of the Courts of Judicature Act 1964:

Section 22. Criminal jurisdiction.

(1)The High Court shall have jurisdiction to try —

(a) all offences committed —

(i) within its local jurisdiction;
(ii) on the high seas on board any ship or on any aircraft registered in Malaysia;
(iii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;
(iv) by any person on the high seas where the offence is piracy by the law of nations; and

(b) offences under Chapter VI and VIA of the Penal Code [*Act 574*], and under any of the written laws specified in the Schedule to the Extra-Territorial Offences Act 1976 [*Act 163*], or offences under any other written law the commission of which is certified by the Attorney General to affect the security of Malaysia committed as the case may be, —

(i) on the high seas on board any ship or on any aircraft registered in Malaysia;
(ii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;

(iii) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia;
(iv) by any person against a citizen of Malaysia;
(v) by any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia located outside Malaysia, including diplomatic or consular premises of Malaysia;
(vi) by any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;
(vii) by any stateless person who has his habitual residence in Malaysia;
(viii) by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or
(ix) by any person who after the commission of the offence is present in Malaysia.

(2)The High Court may pass any sentence allowed by law.

Furthermore, as the offences are concerning national security, the Extra-Territorial Offences Act 1976[30] may also be relevant:

Section 2. Extra-territorial effect of offences committed outside Malaysia.

(1) *(a)* ...

(b) any offence under any other written law the commission of which is certified by the Attorney General to affect the security of the Federation,
shall, if such act is done or such offence is committed, as the case may be,-

(i) on the high seas on board any ship or on any aircraft registered in Malaysia;
(ii) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft;
(iii) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia,

be punishable as an offence under the relevant written law as if such act or offence were done or committed in Malaysia.

4. *Applicability to maritime crimes*

There is nothing in section 374A of the Penal Code to indicate that it cannot be applicable to the taking of crew-members hostage on board a ship.

[30] Extra-Territorial Offences Act 1976 (Act 163)

C. 1999 International Convention for the Suppression of the Financing of Terrorism (1999 Terrorism Financing Convention)

1. *Lead agency*

As the Terrorism Financing Convention deals with a national security subject matter, the relevant lead agency responsible for overseeing the convention and for the overall implementation of obligations under the convention into national law would be the Ministry of Home Affairs. As is expected, this also requires inter-agency inputs (under the co-ordination of the lead agency) from the Central Bank of Malaysia (being Bank Negara Malaysia, "BNM") (under the purview of the Ministry of Finance), and National Security Council (under the Prime Minister's Department). Besides the BNM, other important enforcement and supervisory/regulatory agencies that may be relevant would be the Securities Commission, the Companies Commission of Malaysia, and the Labuan Offshore Financial Services Authority, among others.

2. *Offences and Penalties under the 1999 Terrorism Financing Convention (Article 2 together with the Annex and Article 4)*

Article 2 (1) and Article 4 of the Terrorism Financing Convention provides as follows:

> **ARTICLE 2**
>
> 1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out:
>
> (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or
>
> (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.

ARTICLE 4

Each State Party shall adopt such measures as may be necessary:

(a) To establish as criminal offences under its domestic law the offences set forth in article 2;

(b) To make those offences punishable by appropriate penalties which take into account the grave nature of the offences.

Malaysia acceded to the Terrorism Financing Convention on 29 May 2007, after the amendment to the Malaysian Penal Code, by virtue of the insertion of Chapter VIA (Offences Relating to Terrorism), had come into force, which caters to Malaysia's obligation to provide in our domestic law for offences and penalties under the convention. This approach is pursuant to the more recent policy of the Malaysian government to ensure that the relevant laws are in place before Malaysia undertakes any obligations under an international convention.

Chapter VIA of the Penal Code deals with "suppression of terrorist acts and support for terrorist acts" by the creation of offences under sections 130C – 130M, and "suppression of financing of terrorist acts" by the creation of offences under sections 130N – 130T. Section 130B is the definition section for the chapter.

It can be seen below that the wordings of section 130N is substantially similar to the wordings of Article 2 (1) of the Terrorism Financing Convention. The elements of the crime of providing or collecting property for terrorist acts under section 130N are almost the same as the elements under Article 2 (1).

Section 130N. Providing or collecting property for terrorist acts.

Whoever, by any means, directly or indirectly, provides or collects or makes available any property intending, knowing or having reasonable grounds to believe that the property will be used, in whole or in part, to commit a terrorist act shall be punished--

(a) if the act results in death, with death; and

(b) in any other case, with imprisonment for a term of not less than seven years but not exceeding thirty years, and shall also be liable to fine,

and shall also be liable to forfeiture of any property so provided or collected or made available.

The differences between the provision of the Malaysian Penal Code and the Terrorism Financing Convention would be:

(a) Section 130N uses the terms “provides, collects or makes available”, while Article 2 (1) only uses the terms “provides or collects”.

(b) Section 130N uses the term “property”, while Article 2 (1) uses the term “funds”. The term “property” under section 130N is defined in section 130B (1) as follows:

"property" means--
(a) assets of every kind, whether corporeal or incorporeal, moveable or immovable, tangible or intangible, however acquired; or

(b) legal documents or instruments in any form, including electronic or digital, evidencing title to, or interest in, such assets, including bank credits, traveller's cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit;

(c) Whilst Article 2 (1) makes it an offence the financing of an act which constitutes an offence under the specified treaties listed in the annex or any other act “intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act”; section 130N makes it an offence the financing of “terrorist activities”, where “terrorist activities” is defined under section 130B (2) as follows (read with section 130B (3)):

(2) For the purposes of this Chapter, "terrorist act" means an act or threat of action within or beyond Malaysia where—

(a) the act or threat falls within subsection (3) and does not fall within subsection (4);

(b) the act is done or the threat is made with the intention of advancing a political, religious or

ideological cause; and

(c) the act or threat is intended or may reasonably be regarded as being intended to—

(i) intimidate the public or a section of the public; or
(ii) influence or compel the Government of Malaysia or the Government of any State in Malaysia, any other government, or any international organization to do or refrain from doing any act.;

(3) An act or threat of action falls within this subsection if it—
(a) involves serious bodily injury to a person;
(b) endangers a person's life;
(c) causes a person's death;
(d) creates a serious risk to the health or the safety of the public or a section of the public;
(e) involves serious damage to property;
(f) involves the use of firearms, explosives or other lethal devices;
(g) involves releasing into the environment or any part of the environment or distributing or exposing the public or a section of the public to—
(i) any dangerous, hazardous, radioactive or harmful substance;
(ii) any toxic chemical; or
(iii) any microbial or other biological agent or toxin;
(h) is designed or intended to disrupt or seriously interfere with, any computer systems or the provision of any services directly related to communications infrastructure, banking or financial services, utilities, transportation or other essential infrastructure;
(i) is designed or intended to disrupt, or seriously interfere with, the provision of essential emergency services such as police, civil defence or medical services;
(j) involves prejudice to national security or public safety;
(k) involves any combination of any of the acts specified in paragraphs (a) to (j);

and includes any act or omission constituting an offence under the Aviation Offences Act 1984 [Act 307].

(d) The scope of "suppression of financing of terrorist acts" under the Malaysian Penal Code is also much wider that the Terrorism Financing Convention, as it also makes it an offence the providing of services for terrorist purposes (section 130O), the arranging for retention or control of terrorist property (section 130P), the dealing with terrorist property (section 130Q), the intentional omission to give information about terrorist property

(section 130R), the intentional omission to give information relating to terrorism financing offence (section 130S), and for the offences by body corporate (section 130T).

Section 130O. Providing services for terrorist purposes.

(1) Whoever, directly or indirectly, provides or makes available financial services or facilities--

(a) intending that the services or facilities be used, or knowing or having reasonable grounds to believe that the services or facilities will be used, in whole or in part, for the purpose of committing or facilitating the commission of a terrorist act, or for the purpose of benefiting any person who is committing or facilitating the commission of a terrorist act; or

(b) knowing or having reasonable grounds to believe that, in whole or in part, the services or facilities will be used by or will benefit any terrorist, terrorist entity or terrorist group,

shall be punished--

(aa) if the act results in death, with death; and
(bb) in any other case, with imprisonment for a term of not less than seven years but not exceeding thirty years, and shall also be liable to fine.

(2) For the purposes of subsection (1), "financial services or facilities" includes the services and facilities offered by lawyers and accountants acting as nominees or agents for their clients.

Section 130P. Arranging for retention or control of terrorist property.

Whoever knowingly enters into an arrangement that facilitates the acquisition, retention or control by or on behalf of another person of terrorist property by concealment, by a removal out of jurisdiction, by transfer to a nominee or in any other way shall be punished with imprisonment for a term which may extend to thirty years, and shall also be liable to fine and to forfeiture of any property so acquired, retained or controlled.

(1) Whoever knowingly deals, directly or indirectly, in any terrorist property shall be punished with imprisonment for a term which may extend to twenty years, or with fine and shall also be liable to forfeiture of any property so dealt with.

(2) For the purposes of subsection (1), "deals in" includes--

(a) acquiring or possessing any terrorist property;
(b) entering into or facilitating, directly or indirectly, any transaction in respect of terrorist property;
(c) converting, concealing or disguising terrorist property; or
(d) providing any financial or other services in respect of any terrorist property to or for the benefit of, or at the direction or order of, any terrorist, terrorist entity or terrorist group.

Section 130R. Intentional omission to give information about terrorist property. Whoever--

(a)having possession, custody or control of any terrorist property; or

(b) having information about any transaction or proposed transaction in respect of any terrorist property,

intentionally omits to give any information respecting that matter, which he is legally bound to give, shall be punished with imprisonment for a term which may extend to seven years or with fine or with both.

Section 130S. Intentional omission to give information relating to terrorism financing offence. Whoever knowing or having reason to believe that any offence punishable under section 130N, 130O, 130P or 130Q has been or will be committed intentionally omits to give any information respecting that offence, which he is legally bound to give, shall be punished with imprisonment for a term which may extend to seven years or with fine or with both.

The provisions above can also cater to offences covering participation as an accomplice, organization or contribution to the commission of an offence under Article 2 (5) of the Terrorism Financing Convention. However, in relation to attempts regards must be given to the general provision of Chapter XXIII of the Penal Code on “attempts to commit offences” under the Penal Code.

Besides the said provisions of Chapter VIA of the Penal Code, Malaysia had also amended the original Anti Money Laundering Act 2001 (AMLA) with the Anti Money Laundering and Anti Terrorism Financing Act 2001 (AMLATFA), specifically to counter the

financing of terrorism in order to facilitate Malaysia's accession to the Terrorism Financing Act. As a result of this, Malaysia is now able to freeze the assets of terrorists pursuant to the United Nations Security Council Resolutions 1267 and 1373.

AMLA came into force on 15 January 2001 with effect of criminalizing money laundering in Malaysia. It is a comprehensive statute which covers tracing, freezing, forfeiture and confiscation of proceeds of crime. It also imposes a legal duty to report of suspicious transactions. Before the amendment, AMLA consisted of only ninety-two (92) sections with two (2) schedules. With the amendment new provisions were inserted in Part VIA, which covers suppression of terrorism, financing terrorism financing offences, and freezing, seizure and forfeiture of terrorist property.

The Amendment Act amended the title of the Act from AMLA to AMLATFA. All references to AMLA in any written law or document shall be construed as referring to AMLATFA. The amendments were published as law on 23 December 2003. With the amendments, the anti-money laundering mechanism was extended to include reporting of suspected terrorism financing activities, measures for the detection and prevention of terrorism financing, freezing, seizure and forfeiture of terrorist property, new predicate offences; and empowerment of the Minister of Home Affairs, Malaysia to declare specified entities and related properties to be frozen, seized or forfeited under the Act. AMLATFA gives certain agencies authority to trace, seize and ultimately confiscate criminally derived wealth and enabling inter government exchange of information with counterparts in other countries.

These amendments came into force on 6 March 2007. Other domestic legislation was also amended in tandem with AMLATFA policies through the Subordinate Courts (Amendment) Act 2004; the Courts of Judicature (Amendment) Act 2004; and the Criminal Procedure Code (Amendment) Act 2006.

It is important to note that section 3 of the AMLATFA, provides the definition of "serious offences" under the Act:

> "serious offence" means-
>
> *(a)* any of the offences specified in the Second Schedule;

(b) an attempt to commit any of those offences; or

(c) the abetment of any of those offences;

The 2nd Schedule to AMLATFA (on "serious offences") provides for predicate offences to which the prohibition under AMLATFA shall be applicable to. However, these predicate offences are offences under Malaysian domestic law, and there is no reference made under the 2nd Schedule to any international convention that Malaysia is a party to which establishes offences under the convention. This is because, as a dualist state, Malaysia always require a domestic implementing legislation before a provision of a treaty can become part of the law of the land in Malaysia, thus to be recognised as an "offence" under Malaysian law, it must be pursuant to a Malaysian statute. Therefore, the 2nd Schedule refers to the offence of hostage taking under section 374A of the Penal Code as one of the predicate offence (thus, covering any person who finances hostage taking offences, in line with the Hostage Taking Convention). SUA offences cannot be said to be covered, as Malaysia is not a party to the SUA Convention (see Part III below).

3. *Jurisdiction*

As Malaysia has chosen to make offences under the Terrorism Financing Convention offences under our domestic law via, inter alia, inclusion in the Penal Code, the jurisdiction of the Malaysian courts over such offences can be seen from the provision of the Penal Code itself:

Section 2. Punishment of offences committed within Malaysia.

Every person shall be liable to punishment under this Code and not otherwise for every act or omission contrary to the provisions thereof, of which he shall be guilty within Malaysia.

Section 3. Punishment of offences committed beyond, but which by law may be tried within Malaysia.

Any person liable by law to be tried for an offence committed beyond the limits of Malaysia, shall be

dealt with according to the provisions of this Code for any act committed beyond Malaysia, in the same manner as if such act had been committed within Malaysia.

However, offences under Chapter VIA have a special treatment under the Penal Code, whereby section 4 of the Penal Code provides for extra basis of jurisdiction, as follows:

Section 4. Extension of Code to extraterritorial offences.

(1) The provisions of Chapter VI and VIA shall apply to any offence committed-

(a) by any citizen or any permanent resident on the high seas on board any ship or on any aircraft whether or not such ship or aircraft is registered in Malaysia;
(b) by any citizen or any permanent resident in any place without and beyond the limits of Malaysia;
(c) by any person against a citizen of Malaysia;
(d) by any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia located outside Malaysia, including diplomatic or consular premises of Malaysia;
(e) by any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;
(f) by any stateless person who has his habitual residence in Malaysia;
(g) by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or
(h) by any person who after the commission of the offence is present in Malaysia,

as if the offence had been committed in Malaysia.

(2) In this section-

(a) "offence" includes every act done outside Malaysia which, if done in Malaysia, would be an offence punishable under this Code;
(b) "permanent resident" has the meaning assigned by the Courts of Judicature Act 1964 [*Act 91*].

Also, in relation to the AMLATFA, section 82 (1) of the Act specifically deals with the issue pertaining to jurisdiction:

Section 82. Jurisdiction.

(1) Any offence under this Act-

(a) on the high seas on board any ship or on any aircraft registered in Malaysia; *(b)* by any citizen or any permanent resident on the high seas on board any ship or on any aircraft; *(c)* by any citizen or any permanent resident in any place outside and beyond the limits of Malaysia;
(d) by any person against a citizen of Malaysia;
(e) by any person against property belonging to the Government of Malaysia or the Government of any State in Malaysia located outside Malaysia, including diplomatic or consular premises of Malaysia;
(f) by any person to compel the Government of Malaysia or the Government of any State in Malaysia to do or refrain from doing any act;
(g) by any stateless person who has his habitual residence in Malaysia;
(h) by any person against or on board a fixed platform while it is located on the continental shelf of Malaysia; or
(i) by any person who after the commission of the offence is present in Malaysia.

may be dealt with as if it had been committed at any place within Malaysia.

D. 2000 UNITED NATIONS CONVENTION ON TRANSNATIONAL ORGANIZED CRIME (UNTOC)

1. *Lead agency*

As UNTOC deals with a national security subject matter, the Ministry of Home Affairs is the national focal point and coordinating Ministry (or the lead agency). As is expected, this also requires inter-agency inputs (under the co-ordination of the lead agency), involving the Ministry of Foreign Affairs, the Ministry of Women, Family and Community Development, the Ministry of Human Resource, the Ministry of Transport, the Ministry of Information, Attorney General's Chambers, Inspector General of Police, Director General of Immigration, Director General of Customs, Director General of the Malaysian Maritime Agency, Malaysian Human Rights

Commission (SUHAKAM) and the National Security Council (under the Prime Minister's Department), due to the wide-ranging possibility of cross-cutting issues under UNTOC.

2. *Offences and penalties under UNTOC*

Malaysia signed UNTOC on 26 September 2002 and subsequently ratified the Convention during the 59th United Nations General Assembly on 24 September 2004. Malaysia is also a party to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, a Protocol supplementing UNTOC as the umbrella convention.

The related legislations implementing Malaysia's obligations under UNTOC that are relevant are again the AMLATFA and Chapter VIA of the Malaysian Penal Code.

Chapter VIA, which was inserted into the Penal Code via section 5 of the Penal Code (Amendment) Act 2003[31], deals with offences relating to terrorism. The amendment to the Penal Code was done in view of Malaysia becoming a party to UNTOC, again in line with the Malaysian government's policy to ensure laws are in place before committing as a state party to an international convention.

Chapter VIA deals with, inter alia, the suppression of terrorist acts and support for terrorist acts, under which several offences are created, which are, the offence of committing terrorist acts (section 130C), the offence of providing devices to terrorist groups(section 130D) , the offence of recruiting persons to be members of terrorist groups or to participate in terrorist acts (section 130E), the offence of providing training and instruction to terrorist groups and persons committing terrorist acts (section 130F), the offence of inciting, promoting or soliciting property for the commission of terrorist acts (section 130G), the offence of providing facilities in support of terrorist acts (section 130H), the offence of directing activities of terrorist groups (section 130I), the offence of soliciting or giving support to terrorist groups or for the commission of terrorist acts (section 130J), the offence of harbouring persons committing terrorist acts (section 130K), the offence of criminal conspiracy(section 130L), and the offence of intentional omission to give information relating to terrorist acts (section 130M) .

[31] Penal Code (Amendment) Act 2003 (Act 1303)

Many of the provisions talk about the involvement in a “terrorist group”, which has been defined under the Penal Code (in section 130B) as follows:

> "terrorist group" means--
> *(a)* an entity that has as one of its activities and purposes the committing of, or the facilitation of the commission of, a terrorist act; or
>
> *(b)* a specified entity under section 66B or section 66C of the Anti-Money Laundering Act 2001 [*Act 631*];
>
> "entity" means a person, group, trust, partnership or fund;

Under the Anti-Money Laundering Act 2001 (AMLATFA), a specified entity has been defines as follows:

> "specified entity" means an entity in respect of which an order under section 66B has been made, or is deemed by reason of the operation of subsection 66C(2) to have been made, and is for the time being in force;

Section 66B of the AMLATFA provides for the declaration of specified entities by the Minister of Home Affairs, and section 66 C provides for orders for implementation of measures to give effect to Security Council resolutions.

These might be the only provisions relevant to Article 5 of UNTOC on criminalization of participation in an organized criminal group i.e. by referring to a “terrorist group” under the Penal Code (and AMLATFA).

Article 5 (1) of UNTOC provides as follows:

> **ARTICLE 5. CRIMINALIZATION OF PARTICIPATION IN AN ORGANIZED CRIMINAL GROUP**
>
> 1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
>
> (a) Either or both of the following as criminal offences distinct from those involving the attempt or completion of the criminal activity:
>
> (i) Agreeing with one or more other persons to commit a serious crime for a purpose relating directly or indirectly to the obtaining of a financial or other material benefit and, where required by domestic law,

involving an act undertaken by one of the participants in furtherance of the agreement or involving an organized criminal group;

(ii) Conduct by a person who, with knowledge of either the aim and general criminal activity of an organized criminal group or its intention to commit the crimes in question, takes an active part in:

(a) Criminal activities of the organized criminal group;

(b) Other activities of the organized criminal group in the knowledge that his or her participation will contribute to the achievement of the above-described criminal aim;

(c) Organizing, directing, aiding, abetting, facilitating or counselling the commission of serious crime involving an organized criminal group.

Malaysia does not have a specific legislation or provision dealing specifically with participation in an organized criminal group. Besides the recent legislating of the provisions as discussed above, the reason for this is perhaps Malaysia feels that this can also be covered by the general provision under the Malaysian Penal Code on criminal acts done in furtherance of a 'common intention' (section 34 of the Penal Code).

In relation to the other relevant Malaysian domestic legislation on UNTOC, AMLA (now AMLATFA) came into force on 15 January 2001 with effect of criminalizing money laundering in Malaysia. It is a comprehensive statute which covers tracing, freezing, forfeiture and confiscation of proceeds of crime. It also imposes a legal duty to report of suspicious transactions.

Section 4 of AMLATFA creates the offence of money laundering in Malaysia:

Section 4. Offence of money laundering.

(1) Any person who-

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

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

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

Section 3 of AMLATFA defines “money laundering” as follows:

"money laundering" means the act of a person who-

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

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

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

where-

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

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

"unlawful activity" means any activity which is related, directly or indirectly, to any serious offence or any foreign serious offence;

"serious offence" means-

(a) any of the offences specified in the Second Schedule;

(b) an attempt to commit any of those offences; or

(c) the abetment of any of those offences;

"foreign serious offence" means an offence-

(a) against the law of a foreign State stated in a certificate purporting to be issued by or on behalf of the government of that foreign State; and

(b) that consists of or includes an act or activity which, if it had occurred in Malaysia, would have constituted a serious offence;

Article 6 of UNTOC provides for the offence of laundering of proceeds of crime:

ARTICLE 6. CRIMINALIZATION OF THE LAUNDERING OF PROCEEDS OF CRIME

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

(a)

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

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

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

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

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

Again, the 2nd Schedule to AMLATFA (on "serious offences") provides for predicate offences to which the prohibition under AMLATFA shall be applicable to. These predicate offences are offences under Malaysian domestic legislations. Please refer to the Second Schedule to the AMLATFA appended to this report.

Pursuant also to its obligations under UNTOC, particularly under the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (a Protocol supplementing UNTOC as the umbrella convention), Malaysia has enacted a comprehensive Anti-Trafficking in Persons Act 2007[32], which came into full force effective 28 February 2008.

3. *Jurisdiction*

As Malaysia has chosen to make offences under UNTOC offences under our domestic law via, inter alia, inclusion in the Penal Code, the jurisdiction of the Malaysian courts over such offences can be seen from the provision of the Penal Code itself, namely, section 2, 3, and 4 (specifically dealing on jurisdiction for offences under Chapter IV and IVA). While in relation to the AMLATFA, section 82 (1) of the Act specifically deals with the issue pertaining to jurisdiction. Please refer to the discussion on jurisdiction while discussing Malaysia's implementation of the Terrorism Financing Convention (above).

E. Extradition and Mutual Legal Assistance

1. *Extradition*

The Extradition Act 1992[33] provides the legal basis for extradition to and from Malaysia. The Act provides for extradition pursuant to an extradition treaty or a Special Direction of the Minister charged with the responsibility for fugitive criminals.

Where a request for extradition or provisional arrest is made by a State that does not have an extradition treaty with Malaysia (a non-treaty partner), the relevant Minister may, where the requirements of the Extradition Act 1992 have been fulfilled, issue a Special Direction to enable the request to be executed in accordance with the Act.

[32] Anti-Trafficking in Persons Act 2007 (Act 670).

[33] Extradition Act 1992 (Act 479)

Malaysia does not use the stand-alone legal regimes in international Conventions as the legal basis for extradition and instead gives effect to its international obligations through the Special Direction mechanism under the Extradition Act 1992 for convention State Parties that are non-treaty partners of Malaysia.

Section 2. Order of the Minister.

(1) Where a binding arrangement has been entered into between Malaysia and any country for the extradition of fugitive criminals, the Minister may, by order to be published in the *Gazette* reciting or embodying the terms of such arrangement, direct that the provisions of this Act shall apply to that country subject to any restriction, exception, modification, adaptation, condition or qualification contained in the order.

(2) Where any arrangement referred to in this section is revoked or lapses, the Minister shall, by order published in the *Gazette*, forthwith certify that fact; and any such order shall be conclusive evidence that the arrangement referred to therein has been revoked or has lapsed, as the case may be, and shall not be questioned in any legal proceedings whatsoever.

(3) Any order made under this section shall be laid before each House of Parliament as soon as may be after it is made.

(4) An order made under this section shall be conclusive evidence that the arrangement therein referred to complies with the provisions of this Act, and that this Act applies in the case of the country mentioned in the order, and the validity of such order shall not be questioned in any legal proceedings whatsoever.

Section 3. Special direction of the Minister applying this Act where no order has been made under section 2.

Where a country in respect of which no order has been made under section 2 makes a request for the extradition thereto of a fugitive criminal, the Minister may personally, if he deems it fit to do so, give a special direction in writing that the provisions of this Act shall apply to that country in relation to the extradition thereto of that particular fugitive criminal.

Under the Extradition Act, an "extraditable offence" is defined under section 5 as an offence described in section 32:

> **Section 32. Extraditable offences.**
>
> In this Part, an extraditable offence is an offence however described, including fiscal offences, which is punishable under the laws of Malaysia with imprisonment for not less than one year or with death.

Clearly, as long as domestic law has criminalizes convention offences (as discussed above), then such offences would be an extraditable offence. Again, this is in line with Malaysia's dualist approach to international treaties and conventions.

Malaysia has bilateral extradition treaties with Thailand, Indonesia, Hong Kong SAR, USA and Australia. Malaysia is also supportive of the efforts to negotiate and conclude the ASEAN Extradition Treaty as envisaged in the Bangkok Declaration 1967 and the Vientiane Action Programme.

State	Name of treaty	Signature date	Effective date
Kingdom of Thailand	Extradition treaty between Great Britain and Siam	4 March 1911	14 March 1911
Indonesia	*Treaty for Mutual Surrender of Fugitive Criminals between Malaysia and the Republic of Indonesia*	7 June 1974	11 August 1975
United States of America	*Extradition Treaty between the Government of Malaysia and the Government of the United States of America*	3 August 1995	16 June 2001
Hong Kong SAR	*Agreement between the Government of Hong Kong and the Government of*	11 Jan 1995	2 June 1997

	Malaysia for the Surrender of Fugitive Offenders *Protocol Supplementary to the Agreement between the Government of Malaysia and the Government of Hong Kong for the Surrender of Fugitive Offenders, done at Hong Kong on 11 January 1995*	17 October 2006	1 November 2007
Australia	*Extradition Treaty between the Government of Malaysia and the Government of the United States of America*	15 November 2005	28 December 2006

Table 1: Countries with which Malaysia has extradition treaties

2. *Mutual legal assistance*

Mutual assistance in criminal matters is the formal process by which Malaysia requests and renders assistance in the collection of evidence to be used in a criminal matter, e.g. an investigation or criminal proceedings. Mutual assistance is generally required when compulsive measures or legal sanctions are required to obtain the evidence, e.g. through the issue and enforcement of court orders.

The legal basis for mutual assistance in Malaysia is the Mutual Assistance in Criminal Matters Act 2002[34] or applicable Mutual Assistance in Criminal Matters Treaties (MLATs). Malaysia does not use the stand-alone legal regimes in international conventions as the legal basis for mutual assistance and instead gives effect to its international obligations through special directions under the Mutual Assistance in Criminal Matters Act for convention State Parties that do not have bilateral MLATs with Malaysia.

Countries with which Malaysia has existing Mutual Legal Assistance Treaties are gazetted as "prescribed foreign countries" under section 17 of the Act. Such countries may be rendered assistance in accordance with the terms of the relevant Treaty and the Act.

[34] Mutual Assistance in Criminal Matters Act 2002 [Act 621]

Section 17. Prescribed foreign State.

(1) The Minister may, for the purposes of this Part, by order declare a foreign State to be a prescribed foreign State if there is in force a treaty or other agreement between Malaysia and that foreign State under which that foreign State has agreed to provide assistance in criminal matters to Malaysia.

(2) An order under subsection (1) may provide that the provisions of this Part shall apply to the foreign State subject to such restrictions, limitations, exceptions, modifications, adaptations, conditions or qualifications as are specified in the order, and in that event the provisions of this Part shall apply accordingly.

(3) An order made under subsection (1) shall be conclusive evidence that the arrangement referred to in the order complies with this Act, and that this Act applies in the case of the foreign State referred to in the order, and the validity of the order shall not be questioned in any legal proceedings.

(4) The Minister may by a subsequent order vary or revoke any order previously made under this section.

Bilateral treaties on mutual assistance in criminal matters have been concluded with Australia, the United States of America and Hong Kong SAR. Negotiations on such treaties with other interested States are continuing. Malaysia initiated and led the negotiation on the Treaty on Mutual Legal Assistance in Criminal Matters among like-minded ASEAN Member Countries which was concluded on 29 November 2004. The Treaty has been signed by all 10 ASEAN Member Countries and ratified by Singapore, Malaysia, Vietnam, Brunei and Lao PDR as at 1 October 2007.

Countries which are not gazetted as prescribed foreign countries under the Act (non-treaty partners) may still be rendered assistance upon the Minister's Special Direction issued under section 18 of the Act. Malaysia generally requires an appropriate undertaking of reciprocity stating that the country will comply with a future request by Malaysia to that country for similar assistance in a criminal matter involving an offence that corresponds to the foreign offence for which assistance is sought.

Section 18. Special direction of Minister.

If a foreign State in respect of which no order has been made under section 17 makes a request for mutual assistance in a criminal matter under this Act, the Minister may, on the recommendation of the Attorney General, give a special direction in writing that this Act shall apply to that foreign State in relation to the requested mutual assistance subject to any restriction, limitation, exception, modification, adaptation, condition or qualification contained in the direction.

Section 4(2) of the Act makes it clear that the Act does not prevent the provision or obtaining of international assistance in criminal matters to or from any foreign State other than the assistance of a kind that may be provided or obtained under the Act (e.g. through treaty). However, mutual assistance under the Act is currently limited to foreign States and does not extend to international organizations (e.g. the ICC).

Section 3 of the Act lists the types of assistance available under the Act. This includes:

- providing and obtaining of evidence and things;
- the making of arrangements for persons to give evidence, or to assist in criminal investigations;
- the recovery, forfeiture or confiscation of property in respect of a serious offence or a foreign serious offence;
- the restraining of dealings in property, or the freezing of property, that may be recovered in respect of a serious offence or a foreign serious offence;
- the execution of requests for search and seizure;
- the location and identification of witnesses and suspects;
- the service of process;
- the identification or tracing of proceeds of crime and property and instrumentalities derived from or used in the commission of a serious offence or a foreign serious offence;
- the recovery of pecuniary penalties in respect of a serious offence or a foreign serious

offence; and

- the examination of things and premises.

In relation to the AMLATFA (applicable for both the Terrorism Financing Convention and UNTOC), section 9 (3) mentions on access to information for purposes of dealing with another State's request for mutual assistance in criminal matters.

Section 9. Authorization to release information.

(1) Subject to subsection (2) , the competent authority may, in writing, authorize any enforcement agency or its designated officers to have access to such information as the competent authority may specify for the purposes of performing the enforcement agency's functions.

(2) In respect of any information received from a reporting institution carrying on any business activity listed under Part II of the First Schedule, the competent authority shall authorize Labuan Offshore Financial Services Authority or its designated officers to have access to that information.

(3) The competent authority may, in writing, authorize the Attorney-General or his designated officer to have access to such information as the competent authority may specify for the purpose of dealing with a foreign State's request in relation to mutual assistance in criminal matters.

PART III: CONVENTIONS WHICH MALAYSIA IS NOT A PARTY TO

A. 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) and Protocol of 2005 to 1988 Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Protocol)

The lead agency currently studying the possibility of Malaysia becoming a party to SUA and the SUA Protocol is the National Security Council of the Prime Minister's Department (particularly the maritime division), together with other agencies. In general, it is the interdiction provisions

that are being studied by all related agencies, where these regimes provides for interdiction of foreign vessels on the high seas by State Parties upon receiving the consent of the flag state, thereby getting around the exclusive flag state jurisdiction.

Article 8 of the SUA Convention provides that:

ARTICLE 8

2 The following text is added as article 8bis of the Convention:

Article 8bis

...

5. Whenever law enforcement or other authorized officials of a State Party ("the requesting Party") encounter a ship flying the flag or displaying marks of registry of another State Party ("the first Party") located seaward of any State's territorial sea, and the requesting Party has reasonable grounds to suspect that the ship or a person on board the ship has been, is or is about to be involved in the commission of an offence set forth in article 3, 3bis, 3ter or 3quater, and the requesting Party desires to board

(a) it shall request, in accordance with paragraphs 1 and 2 that the first Party confirm the claim of nationality, and

(b) if nationality is confirmed, the requesting Party shall ask the first Party (hereinafter referred to as "the flag State") for authorization to board and to take appropriate measures with regard to that ship which may include stopping, boarding and searching the ship, its cargo and persons on board, and questioning the persons on board in order to determine if an offence set forth in article 3, 3bis, 3ter or 3quater has been, is being or is about to be committed, and

(c) the flag State shall either:

(i) authorize the requesting Party to board and to take appropriate measures set out in subparagraph (b), subject to any conditions it may impose in accordance with paragraph 7; or

(ii) conduct the boarding and search with its own law enforcement or other officials; or

(iii) conduct the boarding and search together with the requesting Party, subject to any conditions it may impose in accordance with paragraph 7; or

(iv) decline to authorize a boarding and search.

The requesting Party shall not board the ship or take measures set out in subparagraph (b) without the express authorization of the flag State.

However, Malaysia is currently in the process of drafting amendments to the Penal Code, Criminal Procedure Code and Malaysia Maritime Enforcement Agency Act 2004 to give effect to the requirements of SUA and the SUA Protocol, in line with the government's policy to have laws already in place before becoming a party to an international convention.