

**International and ASEAN Law in the ASEAN 10 National Jurisdictions:  
The Reception of International Law in the Legal System of Malaysia**

*Siti Aliza Alias, Salona Lutchman*

This report provides an overview of the Malaysian legal system, in particular the reception of international law in Malaysia. The purpose of the report is to determine what procedures are required for Malaysia to adopt ASEAN law (Charter and other obligations) within its domestic legal system. ASEAN's aspirations are discussed and it is concluded that the strength of ASEAN is dependent on the compliance of member states, including Malaysia.

The report is based on mainly desk top research. Aliza Alias conducted interviews with Ms. Edora Ahmad, Senior Federal Counsel, International Affairs Division, Attorney General's Chambers, on 2<sup>nd</sup> December 2010; Ms. Nurhalida Khalil and Ms. Prisheela Prakas, Principal Assistant Secretaries, Department of Research, Treaties and International Law, Ministry of Foreign Affairs Malaysia, on 8<sup>th</sup> December 2010 in order to obtain information on Malaysian treaty ratification and implementation processes.

The Federal Constitution of Malaysia is silent on the question of whether international law is to be part of the law of the land, or how the state organs of Malaysia (the legislative, executive and judiciary) have to apply international law. By analyzing the law relating to the interpretation of international law in Malaysia, the following conclusions are made:

- Customary international law must be implemented domestically by statutory provision; or by implication as part of the Common Law of England.
- Parliament has the power to implement treaties or make them operative in Malaysia, as Malaysia is a dualist state and requires transformation of treaty obligations through statutes in order to be implemented domestically.

There are three modes in which treaties and/or treaty obligations can be implemented and become validly binding in Malaysia:

- The First Mode, is by the enactment of an enabling statute;
- The Second Mode is through implementing legislations;
- The Third Mode is when amendments are made to existing laws subsequent to accession. This method is used when the government does not see it fit to adopt specific enabling legislation.
- Another possible mode is through employing the means of Subsidiary Legislations.

There is no known judicial decision of the Malaysian courts whereby the 'Charming Betsy' doctrine has been applied. However, the practice in Malaysia, following the practice of the courts in the United Kingdom, is that whenever municipal and international rules of interpretation differ in matters involving international law, the latter rules would prevail.

When national legislation conflicts with international law, the common law principle of the 'supremacy of an Act of Parliament' is applicable and the legislation will be upheld. There is however a *prima facie* presumption that Parliament does not intend to legislate in breach of international law.

Two case studies are discussed to show treaty implementation and the following concerns are raised:

- The Third Mode (gradualist approach) may lead to uncertainties in determining the enforcement of international law domestically;
- Due to the slow pace at which the Third Mode incorporates international law into the domestic legal framework, it can lead to the state incurring pressure from international treaty monitoring bodies for not complying with their obligations timeously;
- There is inconsistent legislative practise in the implementation of treaties leading to uncertainty.

ASEAN creates a new constitutional order among member states based on the principles of human rights, democracy and constitutional government. These values are to be interpreted in light of the South-East Asian (ASEAN) values of non-intervention, respect for sovereignty and territorial integrity. ASEAN is committed to the creation of the ASEAN Economic Community (AEC) by 2015.

The following recommendations are made:

- Malaysia ought to adopt the doctrine of incorporation in implementing customary international law;
- An ASEAN Act should be passed giving effect to all ASEAN law and agreements in Malaysia;
- Malaysia should comply with the new constitutional order created by the ASEAN Charter, as well as its obligations to create the AEC, as it would be to its own benefit in the long term to have a politically and economically resilient ASEAN.