

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

Lan Ah Nguyen, Hao Duy Phan and Jessye Freeman

I. Introduction

As a part of the Project on ‘Integration through Law: the ASEAN Way in a Comparative Context’ (Research Group on ‘The ASEAN Legal Order: The Legal Regimes of ASEAN and that of its Member States’), this paper focuses on Vietnam, exploring the ways in which and the extent to which international law in general and ASEAN law in particular is received and given effect in the Vietnamese domestic system.

In order to arrive at that goal, in the first part, the paper sets the context for further analysis and discussion on the role and application of international law and ASEAN law in Vietnam by drawing an overview of the Vietnamese legal system. The second part assesses the current status of international law in the Vietnamese legal system. It considers whether and to what extent customary international law and treaties are recognised and applied in the country’s legal system. The third part focuses on how ASEAN instruments are perceived and implemented in Vietnam. The paper concludes that Vietnam’s formal law is very receptive to international law and ASEAN instruments, although this receptiveness has not resulted in any high uptake of international law by domestic courts. It identifies a number of areas of concerns in relation to the conclusion and implementation of treaties as well as the application of international law in the Vietnamese legal system. Finally, it offers some suggestions as to how they may be addressed.

II. Findings

1. Overview of the Vietnamese Legal System

Vietnam generally follows the civil law model with certain influence from legal philosophy of Confucianism and Marxism and a modern concept of law-based state. Under the guidance of the Communist Party, the National Assembly is the country’s primary legislative body which has the authority to promulgate Constitution and laws. Other subordinated legal documents namely ordinances, orders, decrees, decision, resolutions, circulars, etc. could be enacted by other state agencies. The highest force document in the legal system is the Constitution which has been developed through four versions and sets out the principles for the country’s political system. Accordingly, Vietnam has a stable political system led by the Communist Party and a state power exercised through the legislature, the executive and the judiciary. The court system is established to be accountable to the National Assembly and composed of the Supreme People’s Court, the local People’s Courts, the Military Tribunals and other tribunals established by law. Legal education in Vietnam has a relatively short history after the

country was united and international law has only risen in recent year as a specialized major in Vietnam's legal education.

2. International Law in the Vietnamese Legal System

Although the 1992 Constitution is silent over the relationship between international law and domestic law, Vietnamese legal documents, especially those adopted in recent years, seem to suggest that Vietnam follows the monist approach. The 2005 Law on Conclusion, Accession and Implementation of Treaties (2005 Treaty Law) contains very detailed provisions on the conclusion and implementation of treaties in Vietnam. In its provisions, treaties might be directly applied provided that they are clear and specific enough for direct implementation. In case of conflict between a treaty to which Vietnam is a party and a domestic legal document, the treaty prevails. Treaties that are not clear enough for direct implementation would be incorporated into the domestic systems via specific legislation. Treaties in Vietnam are well defined and distinguished from international agreements. The procedures and processes for treaties making, ratification and implementation are also clearly promulgated. There are different mechanisms to ensure the Government in general and state agencies, government ministries and other State-controlled institutions in particular are aware of and implement the obligations the state has committed. These mechanisms include (i) publication and dissemination of treaties; (ii) planning the implementation of treaties; (iii) direct implementation of treaties; (iv) indirect implementation of treaties and (v) reporting, supervision and compliance monitoring. International customary law might also be directly applied in certain areas such as criminal, civil, commercial, investment and arbitration. However, Vietnamese courts still has a very low uptake of international law. The lack of familiarity, combined with the pro-domestic law tradition, may well be main reason for this situation.

3. Implementation of ASEAN Instruments

With respect to ASEAN treaties, there is no legal difference in Vietnam's treatment in terms of procedures for treaty conclusion and implementation in the framework of ASEAN and with other countries. A closer look at two ASEAN treaties, namely the Agreement on Privileges and Immunities of ASEAN and the Agreement on the Common Effective Preferential Tariff Scheme (CEPT) for the ASEAN Free Trade Area (AFTA), is conducted as cases study for ASEAN treaties' implementation in Vietnam. The paper finds that the former was directly implemented while the latter required promulgation of new legal documents for its implementation. With respect to other categories of ASEAN instruments, Vietnam does not seem to have any clear procedure. Depending on the subject matter addressed in the documents, recommending agencies might ask for opinions from certain relevant agencies. Recommendations to adopt these documents are usually submitted to the Prime Minister and are not published on the Official Gazette or included in the Ministry of Foreign Affairs' Yearbook of Treaties.

Vietnam's procedures for implementing ASEAN treaties and instruments are undertaken in accordance with the 2005 Treaty Law and the 2009 the Rules of Procedure on Work and Coordination among

Relevant Agencies Participating in ASEAN Cooperation. Under the Rules of Procedure, in order to implement decisions of the ASEAN Summit and ASEAN instruments, the ASEAN National Secretariat would be in charged of coordinating all relevant agencies. All agencies have the obligation of providing information and consultation while implementing decisions of the ASEAN Summit and ASEAN cooperation activities. A reporting mechanism is also established according to which relevant participating agencies would submit reports on the progress of their activities to the community lead agencies on a quarterly basis or upon request by the lead agencies.

III. Recommendations

While Vietnam's law is receptive to international law, there remains a very low uptake of international law by the Vietnamese judicial bodies in practice. And although various legal documents have been adopted and institutional arrangements have been made to promote the conclusion and implementation of treaties, certain legal and institutional problems still exist. First, in relation to domestic implementation of treaty obligations, the procedure to directly apply treaties may need to be further clarified. There is no guidance on the explicit criteria to determine whether a treaty or which parts or provisions therein are 'explicit and specific' enough for direct implementation. Nor is there established procedure on how courts and state agencies would directly apply treaties. Furthermore, no legal provision exists to require decisions on direct implementation be published. In practice, the current publication of treaties in force on the Official Gazette or the Yearbook of Treaties only contains the text of those treaties and does not include information on whether these treaties may be directly applicable or not. As a result, not all judges are aware of the direct applicability of treaties to rely on in their deliberations. Similarly, lawyers and individuals do not know whether a treaty may be directly applied to invoke it before courts. These issues need to be addressed and clarified either in the upcoming revised Treaty Law or in a legal document jointly drafted by the Ministry of Foreign Affairs and other relevant agencies.

Second, the definition of treaties as provided in the 2005 Treaty Law and the definition and the status of international agreements as provided in the 2007 International Agreements Ordinance may be further clarified to avoid possible confusion for Vietnamese state agencies as well as their external counterparts. Under the 2005 Treaty Law, an agreement is considered a treaty as long as it is concluded in the name of the state or the government of Vietnam. In other words, political documents issued by heads of state or government may be subject to treaty procedure although they do not create legal rights and obligations upon Vietnam. Under the 2007 International Agreements Ordinance, international agreements are defined as written agreements concluded in the name of a central state agency, a provincial-level agency or an organisation's central body and are binding upon only the concluding agencies, not the Vietnamese state or government. Questions can arise regarding how to separate the responsibilities of the state and the government from those of relevant agencies when all of them are involved, to different extent, in the process of concluding and implementing international agreements. Questions may also be raised as to whether international agreements are higher or under sub-law

documents and in case there is a conflict between an international agreement and one of these legal documents, which shall prevail. These potential sources of confusion may need to be addressed when Vietnam reviews and considers revising the 2005 Treaty Law and the 2007 International Agreements Ordinance in the future.

Third, division of work in the ratification of treaties may need to be clarified as well. According to the 2005 Treaty Law, both the National Assembly and the President are empowered to ratify treaties made in the name of the State. It is not clear which body will ratify what types of treaty, except for treaties signed by the President with other heads of state which are ratified by the National Assembly. When the National Assembly ratifies a treaty, it produces a detailed, resolution-type explanatory document. The President, on the other hand, only releases a short 'decision'. Thus, it would seem that in practice, for the sake of efficiency, most treaties would be directed to the President for ratification. In any case, the types of treaty subject to ratification by the National Assembly and those subject to Presidential ratification should be clarified.

Fourth, in relation to the competence of the Prime Minister when it comes to treaties, the 2005 Treaty Law may be amended to authorise the Prime Minister to make decisions regarding the conclusion of treaties. As provided in the 2005 Treaty Law, the Government, not the Prime Minister, is the institution that makes decisions on treaty conclusion, accession and implementation. According to the 2001 Law on Organisation of the Government, in order for the Government to make a decision on any matter, a meeting of all members of the Government must be convened or written opinions from all members of the Government must be obtained. In practice, however, it is impossible to convene meetings that have all members of the Government to consider every treaty. Instead, in order to increase efficiency, the decisions to negotiate, sign, approve, accede, amend and supplement treaties are made by the Prime Minister on behalf of the Government. The amended Treaty Law should further address the role of the Prime Minister in concluding and implementing treaty.

Fifth, while the 2005 Treaty Law is very specific and comprehensive, the procedure and the timeframe for concluding and ratifying treaties sometimes may be repetitive. To negotiate a treaty, for instance, the recommending agency has to seek opinions from the Ministry of Foreign Affairs, Ministry of Justice and all relevant agencies and organisations before submitting the recommendations to the Government. To sign the treaty, the recommending agency must again ask for examining opinions from the Ministry of Foreign Affairs, evaluating opinions from the Ministry of Justice and opinions from other relevant agencies. After being signed, the treaty may be subject to approval and the same procedure of getting opinions from other agencies. Actual practice on the ground requires a 'fast track' procedure be developed. To increase efficiency and avoid having to duplicate efforts, bilateral treaties whose content remains the same would be eligible for fast tracking. For treaties that are subject to approval, recommending agencies would be able to ask for opinions from relevant agencies and recommend the Government to make decision on signing and approval at the same time.

Sixth, with regards to ASEAN instruments, a clear domestic procedure should be established for concluding and implementing those ASEAN instruments that are not treaties. Guidelines should also be developed for state agencies to conduct domestic procedures for concluding international agreements by ASEAN. With the entry into force of the ASEAN Charter, ASEAN now has the legal personality to conclude international agreements with other countries and international organisations. In fact, many international agreements by ASEAN as an international organisation have been already concluded. This type of agreements should be distinguished from those treaties to which Vietnam is a party. There is not yet any domestic procedure available for this type of treaties nonetheless and many state agencies tend to consider these documents as treaties of Vietnam and therefore apply the 2005 Treaty Law.

Last but not least, it is important to raise awareness of international law among judges, government officials, lawyers, law students and the general public. Although the 2005 Treaty Law permits direct implementation of treaties, since the Law's entry into force on 1 January 2006, no case has been recorded in which a Vietnamese court has cited a treaty as a basis of its decision. The primary reason for this rare reference to international law is arguably a lack of familiarity. Vietnamese authorities need to work to promote the awareness of international law and issue guidelines on direct application of treaties. The Ministry of Foreign Affairs needs to make its treaty database available online and accessible to the public. The Ministry of Justice needs to include sessions on application of international law in its lawyers training programs. Questions on application of international law should be added to the bar exams. Law schools should attach more attention to international law in their curricula. For their part, lawyers need to cite or refer to treaties more frequently in courts. As the country integrates more deeply into the international community and when courts' awareness and familiarity of international law increases, they will probably be more open and receptive to international law.