TREATY-MAKING POWER IN FEDERAL STATES WITH SPECIAL REFERENCE TO THE MALAYSIAN POSITION

Since States possess international personality, they undoubtedly have the power to conclude international treaties, agreements or conventions. Nevertheless, in the context of the federal States, the issue of which organ has the capacity to make treaties or whether the component units of the federation can enter into treaties with other countries still remains a hotly debated and controversial question. The present article attempts to answer the question on the basis of international law rules and constitutional law principles. Special reference is made to the treaty-making capacity of Malaysia, which is also a federal State, in the light of the Federal Constitution, case law and the treaty-making practice. This article is written on the proposition that in Malaysia, treaty-making power is vested in the Federal Government (i.e. Yang di-Pertuan Agong, and in effect the Cabinet headed by the Prime Minister) and that the executive authorities of the component States have no power whatsoever to conclude treaties with foreign countries.

1. Introduction

A treaty may be defined as a consensual engagement which subjects of international law have undertaken towards one another, with the intent to create legal obligations under international law.[1] States may

[1] G Schwarzenberger, *International Law as Applied by International Courts and Tribunals*, vol. 1, Stevens & Sons, London, 1968, 438. See also L Oppenheim, *International Law: A Treatise*, vol. 1, Peace, 8th. ed., Longman, London, 1966, 877. This is the traditional definition of 'treaty' which is established under customary international law. However, according to Article 2(1) of the Vienna Convention on the Law of Treaties, 1969, 'treaty' means an international agreement concluded between States in written form and governed by international law.... This is not a comprehensive definition of 'treaty' because it is only meant for the purposes of the Vienna Convention and it does not reflect definition of treaty under general international law. It is only limited to a treaty between States and in written form.

enter into treaties for various purposes. Treaties are the main source of international law and whenever there is a dispute between States, the international court or tribunal has first to look into any existing treaty between the two disputing States for the determination of the case. International organizations are established by means of treaties. Regional organizations are set up through treaties. It is, therefore, no exaggeration to say that treaties are the backbone of contemporary international relations.

Which entity or organ has the power to make treaties? This is a hotly debated and much controversial question. The present article attempts to answer the question but only to the extent of ascertaining the law governing the treaty-making capacity of States, especially of federal States, on the basis of rules of international law and also constitutional law principles. Special emphasis is placed on the treaty-making capacity of Malaysia in the light of the Federal Constitution, the case law, and the treaty-making practice.

2. Treaty-making Capacity in International Law

International personality[2] is regarded by most writers as the source of treaty-making capacity. Thus Sir Gerald Fitzmaurice, in his Report on the Law of Treaties, suggested that the power to make treaties is an attribute of international personality.[3] Roberto Ago also suggests that:

> Capacity to become a party to treaties was an essential expression of international personality. For the purpose of determining whether certain entities were or were not subjects of international law, one of the tests was: Did they possess the capacity, whether limited or not, to become parties to treaties?[4]

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[2] The International Court of Justice in the Reparations Case defined international personality as "the capacity to be titular to international rights and obligations". See Reparations for Injuries Suffered in the Service of the United Nations, (1949) ICJ Rep. 174.

[3] Fitzmaurice, *Third Report on the Law of Treaties, Yearbook of the International Law Commission* (YILC), vol. 2, 1958, p 115.

[4] See comments of Roberto Ago at the May 9, 1962 Meeting of the ILC, *Yearbook of the International Law Commission* (YILC), vol. I, 1962, 61; see also DW Bowett, *The Law of International Institutions*, 2nd. ed., 1970, 132, who states that: "Posses-

In the *Reparations for Injuries Suffered in the Service of the United Nations Case,*[5] the World Court unequivocally decided that the United Nations Organisation possesses international personality and that it is a subject of international law.[6] This decision was made on the basis of certain indicia of personality and treaty-making capacity was one among others. Therefore, we may fairly conclude that treaty-making capacity is an attribute of international personality and that those which possess international personality (at present, States and public international organisations)[7] have capacity to enter into treaties.

Article 6 of the Vienna Convention on the Law of Treaties, 1969, very simply states: "Every State possesses capacity to conclude treaties". The Convention reflects customary international law in providing that States may make treaties. Capacity to make treaties is, in fact, valuable evidence of statehood.[8] According to the International Law Commission's commentary, the term "State" is used in Article 6 with the same meaning as in the Charter of the United Nations, the Statute of the International Court of Justice, the Vienna Convention on the Diplomatic Relations; i.e. it means a State for the purposes of international law.[9] A State as a person of international law should possess the following qualifications: (1) a permanent population; (2) a defined territory; (3) government; and (4) capacity to enter into relations with other States.[10]

-sion of such international personality will normally involve, as a consequence, the attribution of the power to make treaties, of privileges and immunities, and of power to undertake legal proceedings".

[5] Reparations for Injuries Suffered in the Service of the United Nations, 1949 ICJ Rep. 174.

[6] *Ibid.,* at 178.

[7] See I Brownlie, *Principles of Public International Law*, 5th.ed., Oxford, Clarendon Press, 1998, 57-58.

[8] DJ Harris, *Cases and Materials on International Law*, 5th.ed., Stevens & Sons, London, 1998, 101 *et seq.*

[9] *Yearbook of the International Law Commission* (hereinafter YBILC), 1966, vol. 2, 192.

[10] Article 1, Montevideo Convention on the Rights and Duties of States 1933; the criteria of statehood, adopted in Montevideo Convention, are generally accepted as reflecting customary international law. See J Crawford, 'The Creation of Statehood in International Law', (1976-77) 48 BYIL 93.

The International Law Commission's Draft Articles replicates the second paragraph to Article 6 concerning federal States[11], which reads as follows:

> State members of a federal union may possess a capacity to conclude treaties if such capacity is admitted by the federal constitution and within the limits there laid down.

The Commentary to the said paragraph reads: "More frequently, the treaty-making capacity is vested exclusively in the Federal Government, but there is no rule of international law which precludes the component States from being invested with the power to conclude treaties with third States...".

The final text of the Vienna Convention, however, omitted this paragraph. The difficulty with that paragraph, which was mentioned by several delegations from the federal States, was that the Vienna Convention had been limited to treaties made by "States" and had excluded those made by other subjects of international law. It was thought that it was inconsistent to include a provision concerning units within a federal State, which could not be assimilated in general to States.[12] The Vienna Convention is limited only to international agreements concluded between 'States'.[13] This is for the sake of convenience. The fact that the Convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law does not affect the legal force of such agreements.[14] Therefore, international law does not totally bar the component states in a Federation from entering into international agreements. To the extent that these component states have the capacity to enter into relations with foreign States, they may

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[11] YBILC, 1966, vol. 2, 191.

[12] See YBILC, 1966. vol. 2, p. 192. See also DJ Harris, *Cases and Materials on International Law*, 5th.ed., 1998, p. 769.

[13] Article 2, Vienna Convention on the Law of Treaties, 1969, defines 'treaty' in these terms: "Treaty means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation...."

[14] See Article 3, *Ibid.*

possess treaty-making power. Whether or not a component state in a Federation has the capacity to enter into relations with other States depend on the Federal Constitution which is the supreme law as far as the division of power between the Federation itself and its component units are concerned.

Which official or entity of a State has authority to make treaties?

It is a matter for the domestic law of each State to decide which official or entity is competent to make international treaties on its behalf. For example, in the United Kingdom, treaties are concluded by the Crown[15] – in effect, the executive – and do not need to have approval or acceptance by Parliament.[16] The United States Constitution, Article II, Section 2, states that the President "shall have power by and with the advice and consent of the Senate to make treaties, provided two-thirds of the Senators present concur…".[17]

It must be noted that these are domestic law provisions and usually they affect the validity of the treaty in domestic law only. Under Article 46 of the Vienna Convention, a State may not claim that a violation of its internal law concerning competence to create treaties is the reason for invalidating its consent to that treaty in international law 'unless that violation was manifest and concerned a rule of its internal law of fundamental importance'. In other words, simple non-compliance with internal law is not enough to invalidate a State's consent to be bound by a treaty. If consent is given on behalf of the State by the body competent under international law to do so, then non-compliance

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[15] See *R v Secretaty of State, ex party Rees-Mogg* [1994] 1 All ER 457, CA.

[16] D Martin, *Textbook on International Law*, 4th.ed., Blackstone Press Ltd., London, 2000, 59.

[17] However, the President may make 'executive agreements'. These are treaties in an international law sense but differ from "treaties" in United States constitutional law in that they are made by the President alone; they are not subject to approval by the United States Senate. There is no express provision for executive agreements in the Constitution; the power to make them is implied. See DJ Harris, *Cases and Materials on International Law*, 5th.ed., 1998, p. 779.

with internal law is largely irrelevant. This was certainly the position adopted by Judge Huber in the *Rio Martin Case*[18]. It was also the approach of the World Court, in the *Eastern Greenland Case*[19], where the majority implicitly rejected Norway's claim that its Foreign Minister was not competent under internal law to make a binding undertaking on its behalf. Again, in the *Maritime Delimitation and Territorial Questions Case (Qatar v Bahrain)*[20], the World Court rejected the argument that the 'Doha Minutes' were not a treaty, deciding that it was irrelevant that the Bahrain Foreign Minister claimed to have no constitution authority to conclude a treaty *per se*.[21]

The question whether under international law any particular person is entitled to act on behalf of the State is governed by the doctrine of "full powers"[22]. Article 7(1) of the Vienna Convention states:

> A person is considered as representing a State for the purpose of ... expressing the consent of the State to be bound by a treaty if:
> (a) he produces appropriate full powers; or
> (b) it appears from the practice of the States concerned that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.

In any case, under Article 7(2), certain persons are, due to their status, deemed to be representing their State without presenting full

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[18] *Rio Martin Case* (1926) 2 RIAA 615.

[19] *Legal Status of Eastern Greenland Case*, (1933) PCIJ Rep., Ser. A/B, No. 53.

[20] *Maritime Delimitation and Territorial Questions (Qatar v Bahrain)*, 1994 ICJ Rep. 112.

[21] These cases are in accord with the general principle expressed in Article 27 of the Vienna Convention that a State cannot invoke its domestic law as an excuse for non-fulfilment of its obligations under a treaty.

[22] The term "full powers" is defined in Art. 2(1)(c) of the Vienna Convention as "a document emanating from the competent authority of a State designating a person or persons to represent a states for negotiating, adopting or authenticating the text of a treaty, for expressing the consent of the State to be bound by a treaty, or for accomplishing any other act with respect to a treaty". For a detailed study of full powers, See M Jones, *Full Powers and Ratifications* (1946). On the origins of modern full powers see O'Connell, 'A Cause C'elebre in the History of Treaty-Making', (1967) 42 BYIL 23.

powers.

By virtue of their functions and without having to produce full powers, the following are considered as representing their State:

(a) Heads of States, Heads of Government[23] and Ministers for Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
(b) Heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited: and
(c) Representatives accredited by States to an international conference or to an international organization or one of its organs, for the purpose of adopting the text of a treaty in that conference, organization or organ.

The Vienna Convention, therefore, lays down rules by which we are to determine who is competent under international law to conclude a treaty on behalf of a State. If these conditions are met, then the treaty will be valid irrespective of the position in domestic law.

3. Treaty-making Capacity in Domestic Law

It is clear that according to international law States possess treaty-making capacity. However, each State has its own constitutional law provisions to determine which organ of the State in fact exercises treaty-making power. In the United Kingdom, for example, the making of treaties is a prerogative power of the Crown, i.e., the Executive.[24] It is the Crown, which issues full powers or other authority to negotiate and sign treaties and which ratifies treaties if this is called for.[25] Approval by the Parliament is not required.

So far as constitutional structures are concerned, States can be divided into two broad categories: (1) unitary States; and (2) federal States.[26] Since Malaysia is a federal State, our main concern here is

[23] See, for example, *The Prevention of Genocide Convention Case (Bosnia-Herzegovina v Yugoslavia (Serbia and Montenegro)*, (1993) 32 ILM 888.

[24] See *R. v Secretary of State, ex parte Rees-Mogg* [1994] 1 All E.R. 457, CA

[25] L McNair, *Law of Treaties*, Clarendon Press, Oxford, 1961, 97.

[26] D.P.O'Connell, *International Law*, vol. 1, Stevens & Sons, London, 1970, 295.

to make an analytical and comparative study of the treaty-making capacity of the federal States.

There are two main types of federal States.[27] First, there are federal States, notably, Germany, Switzerland, the Russian Federation, and the United States of America, in which the component units of the federation are granted a limited capacity to conclude treaties or international agreements.[28] In these federations, the federal government usually retains the primary responsibility for treaty-making, but it shares it with the components units. Second, there are federal States, which forms the vast majority, in which the power to conclude and implement treaties is the sole responsibility of the federal government. There exists, to be sure, an internal division of legislative power in many of these federations, but internationally they act as virtually unitary States.[29] Some federal States, notably Australia, falls somewhere in between these two types insofar as the power to conclude treaties has been granted exclusively to the federal government[30], but the power to implement them is shared by the component units and the federal government. Technically speaking, Canada, as a result of the *Labour Conventions Case* of 1937, falls into this category, since the Judicial Committee of the Privy Council suggested that the power to implement treaties is shared by the Provinces and the federal government.[31]

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[27] See, Morin, *Canadian Bar Review*, vol. 45, 1967, p. 478.

[28] LD Marzo, *Component Units of Federal States and International Agreements*, Sijthoff & Noordhoff, Netherlands, 1980, p. 21.

[29] Ibid, p. 22. Marzo was doubtful whether India, Burma, Libya, South Africa, Mexico and Venezuela are, or really were, federations except on article. So far as Burma (Myanmar) is concerned, what Marzo referred to would be the 1947 Constitution of the Union of Burma, which virtually came to an end with the military coup of 1962. In Burma, there was also the 1974 Constitution of the Socialist Republic of the Union of Burma, which definitely was not a federal constitution in character.

[30] See *Tasmanian Dams case* (*Common Wealth of Australia v State of Tasmania*) (1983) 158 CLR 1, in which the High Court of Australia held that the Federal Government had power under the Australian Constitution to make a legislation prohibiting the construction of dams in certain areas of the State of Tasmania, in accordance with the Convention for the Protection of World Cultural and Natural Heritage, 1972, to which Australia was a Party.

[31] *A.G. for Canada v A.G. for Ontario*, (1937) AC 326.

3.1 Federal States in which Component Units are Permitted Limited or Qualified Capacity to Make Treaties

Even though it is true that Germany, Switzerland, Russian Federation and the United States of America have greatly centralized the treaty-making power, the component units have either through constitutional provisions, delegation by the federal government, or practice, acquired a limited, qualified capacity to conclude international agreements. We shall now consider some examples from these federal States.

An example of a federal State in which units within the federation have the power to make treaties is Germany. Germany's Basic Law was adopted in 1949. Article 32(3) of the Basic Law reads: "Insofar as the *La`nder*[32] have power to legislate, they may, with the consent of the Federal Government, conclude treaties with foreign States".

Switzerland is one of the oldest existing federations. Article 8 of the Swiss Constitution which gives the primary responsibility for treaty-making to the Confederation reads:

> The Confederation has the sole right to declare and conclude peace, and to make alliances and treaties, particularly customs and commercial treaties, with foreign States.

Article 9, which grants the Cantons the power to conclude treaties 'exceptionally' and over a limited number of subject matter, reads:

> Exceptionally, the cantons retain the right to conclude treaties with foreign States in respect of matters of public economy, frontier relations, and police; nevertheless such treaties must not contain anything prejudicial to the Confederation or the rights of other Cantons.

Under the new Constitution of the Russian Federation, relations with foreign States and the conclusion of international treaties fall within the jurisdiction of the federal Government.[33] This means that the

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[32] The term "La`nder" means provinces or component states of the Federation of Germany.

[33] Article 71(k), The Constitution of the Russian Federation, 1993 as cited in Danilenko, G.M., The New Russian Constitution and International Law, (1994) 88 AJIL 451, at 453.

federal Government has primary competence on issues regarding the conclusion of treaties. At the same time, the Constitution provides that the constituent republics and provinces of the Russian Federation have the right to establish their own "international and foreign economic relations" with foreign States.[34] This provision may imply that the component units of the Russian Federation are granted limited treaty-making powers, at least for matters over which they have exclusive jurisdiction.[35]

Let us now consider the situation in the United States of America. The extent to which the "states' have a treaty-making power depends on the interpretation one gives to Articles I (10) and II (2) of the Constitution of the USA. Article I (10), which at the same time specifies and restricts the agreement-making power of the states, reads in part:

> No state shall enter into any Treaties, Alliances or Confederation... No state shall, without the consent of Congress, enter into any agreement or compact with another state, or with a Foreign Power.

The article allows "agreements" and "compacts" with "Foreign Powers" provided the Congress has consented to, but prohibits the conclusion of "treaties". This wording, it has been suggested, allows states to conclude agreements relating to boundary questions and matters of "non-political" nature, but prohibits them from establishing political and military relationships with Foreign Powers.[36]

Article II (2) states that "the President shall have the power, by and with advice and consent of the Senate, to make treaties...". Several decisions of the US Supreme Court, based partly on the wording of these articles, have argued that the federal government alone has the capacity to conclude treaties with foreign States.[37] Therefore, it is

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[34] Article 71(o), *Ibid.*

[35] GM Danilenko, 'The New Russian Constitution and International Law', (1994) 88 AJIL 451, at 454.

[36] AC Weinfeld, 'What did the Framers of the Federal Constitution Mean by 'Agreements' and 'Compacts'?' (1936) 3 *University of Chicago Law Review*, 464. See also Rodgers, (1967) 61 AJIL 1022.

[37] See, for example, *Holmes v Jennison* (1840) 39 US 540. For the role of the Senate in treaty-making, see Glennon, M.J., 'The Senate Role in Treaty Ratification', (1983) 77 AJIL 257.

not surprising that many writers suggest that the agreement-making power of the "states' in the USA is insignificant and that "states" are effectively excluded from treaty process.[38]

3.2 Federal States with Completely Centralized Treaty-making Capacity

In the majority of federal States, the federal government is granted monopoly on foreign relations, explicitly or implicitly, through the division of legislative or executive authority. Thus in most States, (with the possible exception of Argentina) the constitution contains express provisions giving the international relations or treaty-making power to the Congress, the federal government or the President. [39]

In most Latin American federations and South Africa the treaty-making power seems to be bound to the location of executive power in the State. In all of these federations the President as the executive head of State of the federal government is empowered, usually with the approval of the Congress, to conclude treaties and maintain relations with foreign States.[40] In the South African Constitution, in Article 16(i), the executive government of the republic with regard to "any aspect of its domestic or foreign affairs" is vested in the State President acting on the advice of the Executive Council".[41] Similarly, Article 83 of the Brazilian Constitution empowers the President to "maintain relations with foreign States" and to "conclude international treaties, conventions and acts subject to the approval of the National Congress".[42] The Mexican Constitution goes further than most others, and in fact explicitly forbids the Member States from entering into foreign relations. Article 117 of the Constitution prohibits the states from making

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[38] L Wildhaber, *Treaty-making Power and Constitution: An International and Comparative Study*, Helbing and Lichtenhahn, Basel, 1971, 334. Hendry, J.M., *Treaties and Federal Constitutions*, Public Affairs Press, Washington, 1955, 41. Ghosh, *Treaties and Federal Constitutions: Their Mutual Impact*, 1961, 59.

[39] The list of such States include the following: Austria, Australia, Brazil, India, Mexico, South Africa, Venezuela, and Yugoslavia. See Luigi Di Marzo, above n. 29, p. 23.

[40] *Ibid.*, p 24.

[41] A Peaslee, *Constitutions of Nations*, vol. 1, p 814.

[42] *Ibid.*, vol. 4, p 169.

"any alliance, treaty or coalition with another state or with foreign powers".[43]

Some federal States historically have been heavily influenced by the United Kingdom, where the capacity to negotiate and conclude treaties falls entirely to the executive arm of government.[44] These countries are Australia, Burma[45], Canada, India, Malaysia, Nigeria, Pakistan, the United Arab Emirates, and the United States of America although the US constitution does provide for participation by the Senate. The constitutions of a number of these countries, including Burma, India, Malaysia, Nigeria, and Pakistan, provide for treaty implementation by the legislative branch, but not treaty-making. [46]

4. Treaty-making Capacity in Malaysia

Unlike the constitutions of many States, the Federal Constitution of Malaysia[47] is silent as far as treaty-making power is concerned. There is no specific provision in the Constitution, which expressly empowers a particular organ of the State with treaty-making power. However, there are two factors from which we can conclude that treaty-making power in Malaysia is vested in the Federal Executive or the Federal Government.

First, although the Malaysian constitution is a federal one, due to its distinct historical and political background, from *Merdeka* to the present day, it has retained the "Westminster model" as the basis for

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[43] *Ibid.*, p. 940.

[44] The Right Honourable The Lord Templeman, *"Treaty-making and the British Parliament", in The Making and Operation of Treaties: A Comparative Study*, Riesenfeld & Abbott eds., 1994, at 153-159.

[45] The Constitution of the Union of Burma, 1947, Government Printing Press, Rangoon, 1948. This Constitution is no longer in force since 1962 due to the Military takeover. In 1974, a new constitution was adopted which again is not in use now.

[46] J Yoo, " Participation in the Making of Legislative Treaties: The United States and Other Federal Systems", [2003] 41 *Columbia Journal of Transnational Law*, 455, at 463.

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

its constitutional structure.[48] Therefore, it is 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 describe as a dualist State[49] and applies the doctrine of transformation[50]; so also is Malaysia.

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 Federation and have nothing to do with the component States. Very clearly, component States of the Federation have no power whatsoever to conclude treaties with foreign States or implement them.

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[48] 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, DS Jones, & TKK Iyer, 'The Nature of Political Conventions in a Written Constitutional Order: a Comparative Perspective', (1989) 2 *Governance* 405. 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 parliamentary supremacy has no application. See also Harding, Andrew, Law, *Government and the Constitution of Malaysia*, Malayan Law Journal Sdn. Bhd., Kuala Lumpur, 1996, 105.

[49] JH Jackson, 'Status of Treaties in Domestic Legal System: A Policy Analysis', (1992) 86 AJIL 310.

[50] 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). According to the "doctrine of incorporation", rules of international law as such are deemed to be part of domestic law; they are deemed to be automatically incorporated into domestic law without the necessity of a legislation. For a more elaborated explanation, see I Brownlie, *Principles of Public International Law*, 5th.ed., 1998, pp 42-43.

Article 74
Subject Matter of Federal and State Laws
(1) ...Parliament may make laws with respect to any of the matters enumerated in the Federal List...(that is to say the First ... List set out in the Ninth Schedule).

The First List (List 1) in the Ninth Schedule is the 'Federal List'.

Ninth Schedule
List 1 – Federal List

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;

From the wording of Article 74 and the Federal List read together, it is crystal clear that the Federal Parliament has exclusive power to make laws relating to external affairs (including treaties, agreements and conventions)[51] and that it has the power to implement international treaties and make them operative domestically. It is equally clear that Parliament has no power to conclude (that is, to sign or ratify) international treaties and that that function is not entrusted to the legislature because it is the exclusive domain of the Executive according to the Westminster model of constitutional structure.

In respect of the power of the Executive, we need to examine the following provisions of the Federal Constitution:

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[51] 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....

Article 39
Executive authority of Federation
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....

Article 80
Distribution of executive power
(1) Subject to the following provisions of this Article the executive authority of the Federation extends to all matters with respect to which Parliament may make laws...

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. This is the exclusive power of the executive authority of the Federation and no such power can be exercised by the executive authorities of the component States.

The conclusion then is that in Malaysia treaty-making power is vested in the executive authority of the Federation or the Federal Government. This has been reaffirmed by the landmark case of *The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj.*[52]

The facts of the case are as follows: On July 9, 1963 the Governments of the Federation of Malaya, United Kingdom, North Borneo, Sarawak and Singapore signed the Malaysia Agreement whereby Singapore, Sarawak and North Borneo would federate with the existing States of the Federation of Malaya (including Kelantan) and after that the Federation would be called "Malaysia". The Federal Parliament then passed the Malaysia Act to implement the Malaysia Agreement. On September 10 the Government of the State of Kelantan initiated proceedings requesting the court to declare that the Malaysia Agreement and the Malaysia Act were null and void. It was argued on behalf

[52] [1963] MLJ 355.

of the State of Kelantan, among others, that the Ruler of Kelantan should have been a party to the Malaysia Agreement; that constitutional convention required consultation with Rulers of individual States as to substantial changes to be made to the Constitution.

The two main issues to be determined by the learned judge were whether the action of the Parliament in enacting the Malaysia Act was legal and whether the action of the Government in concluding the Malaysia Agreement was legal. The second issue squarely relates to the treaty-making capacity of Malaysia and hence our main concern here. The following are the words of the learned judge in this regard:

> 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 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.
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> 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.

6. Conclusion

International personality is the source of treaty-making power. Conversely, treaty-making power is an attribute of international personality. According to the current status of international law, only States and international organizations possess the capacity to make treaties. Neither private individuals nor transnational corporations can have such capacity.

So far as federal States are concerned, there is no doubt that the federal Government has the capacity to sign and ratify treaties with foreign countries. Then the question would arise as to the capacity in this matter of the component units of the federation. Whether member States of a federation have treaty-making power or not depends on the Federal Constitution and they can have limited capacity to the extent laid down therein. After studying constitutions of 24 federal States, the writer has concluded that in a majority of federal States the component units have no power at all to conclude treaties with foreign countries and that in some of the federal States a limited power of treaty-making is entrusted to the component units.

Malaysia is a Federal State. According to the Federal Constitution, the treaty-making capacity is the exclusive privilege of the Federal Government. Even though Federal Parliament has the power to implement treaties domestically, treaty-making power is vested in the Federal Executive composed of *Yang di-Pertuan Agong* and the Cabinet headed by the Prime Minister. According to the Malaysian practice, it is the Prime Minister himself[53] or, the Foreign Minister[54], or any Cabinet Minister specially authorized to do so, who will usually sign or ratify international treaties. The component states of the Federation have no capacity at all to make treaties, conventions or agreements with foreign States although they may enter into agreements, within the confines laid down in the Federal Constitution, among themselves or with the Federal Government.

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[53] See Appendix 1 for an example of the Malaysian practice of the Prime Minister himself, as Head of government, signed an important international treaty.

[54] See Appendix 2 for an example of the Malaysian practice of the Foreign Minister signing and ratifying a special agreement, which is a bilateral treaty, to submit a dispute before the International Court of Justice.

APPENDIX 1

Treaty of Amity and Cooperation in Southeast Asia
[ASEAN Treaty]
24 February 1976

The High Contracting Parties

SOLEMNLY AGREE to enter into a Treaty of Amity and Co-operation as follows:

DONE at Denpasar, Bali, this twenty-fourth day of February in the year one thousand nine hundred and seventy-six.

For the Republic of Indonesia:

SOEHARTO
President

For the Republic of Singapore:

LEE KUAN YEW
Prime Minister

For Malaysia:

DATUK HUSEIN ONN
Prime Minister

For the Kingdom of Thailand:

KUKRIT PRAMOJ
Prime Minister

For the Republic of the Philippines:

FERDINAND E. MARCOS

APPENDIX 2

INTERNATIONAL COURT OF JUSTICE
SPECIAL AGREEMENT

FOR SUBMISSION TO THE INTERNATIONAL COURT OF JUSTICE OF

THE DISPUTE BETWEEN INDONESIA AND MALAYSIA CONCERNING SOVEREIGNTY OVER PULAU LIGITAN AND PULAU SIPADAN

JOINT NOTIFICATION, DATED 30 SEPTEMBER 1998, ADDRESSED TO THE REGISTRAR OF THE COURT

New York, 30 September 1998.

On behalf of the Government of the Republic of Indonesia and the Government of Malaysia, and in accordance with Article 40, paragraph 1, of the Statute of the International Court of Justice, we have the honour to transmit to you:

(1) a certified true copy of the Special Agreement for Submission to the International Court of Justice of the Dispute between the Republic of Indonesia and Malaysia concerning Sovereignty over Pulau Ligitan and Pulau Sipadan, signed at Kuala Lumpur on 31 May 1997;
(2) a certified true copy of the ProcVerbal of the Exchange of Instruments of Ratification between the Republic of Indonesia and Malaysia, signed at Jakarta on 14 May 1998.

(Signed) ALI ALATAS
Minister for Foreign Affairs of the Republic of Indonesia.

(Signed) DATO' SERI ABDULLAH HAJI AHMAD BADAWI
Minister for Foreign Affairs of Malaysia

1. SPECIAL AGREEMENT

The Government of the Republic of Indonesia and the Government of Malaysia, hereinafter referred to as "the Parties";

Considering that a dispute has arisen between them regarding sovereignty over Pulau Ligitan and Pulau Sipadan;
Desiring that this dispute should be settled in the spirit of friendly relations existing between the Parties as enunciated in the 1976 Treaty of Amity and Co-operation in Southeast Asia; and

Desiring further, that this dispute should be settled by the International Court of Justice (the Court),

Have agreed as follows:

Article 1
Submission of Dispute

The Parties agree to submit the dispute to the Court under the terms of Article 36, paragraph 1, of its Statute.

.....

In witness whereof the undersigned, being duly authorized thereto by their respective Governments, have signed the present Agreement.

Done in four originals in the English language at Kuala Lumpur on the thirty-first day of May 1997.

For the Government of the Republic of Indonesia,	For the Government of Malaysia,
(Signed) ALI ALATAS, Minister for Foreign Affairs.	(Signed) DATUK ABDULLAH AHMAD BADAWI,Minister for For eign Affairs.

2. PROC VERBAL OF EXCHANGE OF INSTRUMENTS OF RATIFICATION

The undersigned have met today for the purpose of exchanging the Instruments of Ratification of the Special Agreement for Submission to the International Court of Justice of the Dispute between Indonesia and Malaysia concerning Sovereignty over Pulau Ligitan and Pulau Sipadan signed at Kuala Lumpur, Malaysia, on the 31st of May, 1997.

These Instruments, having been examined and found to be in due form, have been exchanged today.

In witness whereof, the undersigned have signed the present ProcVerbal.

Done at Jakarta, this fourteenth day of May, in the year one thousand nine hundred and ninety-eight, in duplicate.

For the Government of
the Republic of Indonesia,
(Signed) NUGROHO
WISNUMURTI,

Director-General for Political Affairs,
Department of Foreign Affairs
of theRepublic of Indonesia.

For the Governmentof Malaysia,
(Signed) DATO' ZAINAL ABIDIN
BIN ALIAS,

Ambassador of Malaysia
to the Republic of Indonesia.

Annex 1

INSTRUMENT OF RATIFICATION OF INDONESIA

Whereas, the "Special Agreement between the Government of the Republic of Indonesia and the Government of Malaysia for Submission to the International Court of Justice of the Dispute between Indonesia and Malaysia concerning Sovereignty over Pulau Ligitan and Pulau Sipadan" was signed by the Minister for Foreign Affairs of the Republic of Indonesia and the Minister for Foreign Affairs of Malaysia at Kuala Lumpur, Malaysia, on 31 May 1997;

And whereas, the Government of the Republic of Indonesia, in accordance with Article 6, paragraph 1, of the Agreement, and having examined and considered the aforesaid Agreement, has decided to ratify the said Agreement;

Now therefore, be it known, that the Government of the Republic of Indonesia do hereby confirm and ratify the said Agreement and undertake to perform and carry out all the stipulations therein contained;
In witness whereof, this Instrument of Ratification is signed and sealed by the Minister for Foreign Affairs of the Republic of Indonesia;

Done at Jakarta this fourth day of May in the year one thousand nine hundred and ninety-eight.

(Signed) ALI ALATAS
Minister for Foreign Affairs
of the Republic of Indonesia.

Annex 2
INSTRUMENT OF RATIFICATION OF MALAYSIA

Whereas, the Special Agreement for Submission to the International Court of Justice of the Dispute between Malaysia and Indonesia con-

cerning Sovereignty over Pulau Ligitan and Pulau Sipadan was signed at Kuala Lumpur on the thirty-first day of May, in the year one thousand, nine hundred and ninety-seven;

And whereas, the Government of Malaysia in accordance with Article 6 of the Agreement has decided to ratify the said Agreement;

Now therefore, the Government of Malaysia, having considered the said Agreement, hereby confirms and ratifies the same and undertakes faithfully to perform and carry out all the stipulations therein contained. In witness thereof, this Instrument of Ratification is signed and sealed by the Minister of Foreign Affairs, Malaysia.

Done at Kuala Lumpur this 24th day of April, in the year one thousand, nine hundred and ninety-eight.

(Signed) DATO' SERI ABDULLAH HAJI AHMAD BADAWI
Minister for Foreign Affairsof Malaysia

Abdul Ghafur @ Khin Maung Sein*

* Associate Professor,
Ahmad Ibrahim Kulliyyah of Laws,
International Islamic University Malaysia.

IMMUNITY OF THE ADVOCATE AND SOLICITOR

An advocate and solicitor owes a general duty of care to her client. This duty arises under the law of contract as well as tort.[1] Once a client engages an advocate and solicitor to act on her behalf, the retainer of the advocate and solicitor by the client gives rise to a contractual relationship between the advocate and solicitor and the client. Consequently, an action based on contract may be brought by a client against an advocate and solicitor for failure to exercise due care in the conduct of the client's case.[2] Likewise, where an advocate and solicitor is engaged by a client, the law of torts imposes a duty of care on the advocate and solicitor towards her client. The case of *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[3] indicates that a duty of care is imposed on persons exercising professional skills. Liability for negligence arises from a professional relationship where there has been a breach of the duty of care by the professional.

Nevertheless, it has been accepted that in certain limited situations an advocate and solicitor enjoys immunity from liability for negligence. Such immunity from liability is based on grounds of public policy. The immunity of barristers from liability was established in the landmark decision of *Rondel v Worsley.*[4]

Rondel v Worsley

In the case of *Rondel v Worsley*, the accused was charged with causing grievous bodily harm to one Manning. He obtained the ser-

[1] See for instance *Ngeoh Soo Oh v G Rethinasamy* [1983] CLJ 663; *Ali bin Jais v Linton Albert* [1999] 6 MLJ 304; *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39.

[2] See for instance *Ali bin Jais v Linton Albert* [1999] 6 MLJ 304; *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39.

[3] [1964] AC 465.

[4] [1967] 3 All ER 993