

# Third Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia

## Introduction

- 3.1 The proposed treaty action comprises minor amendments to the *Treaty of Amity and Cooperation in Southeast Asia* (the Treaty of Amity), done at Denpasar, Bali, on 24 February 1976.<sup>1</sup>
- 3.2 Australia was asked to accede to the Treaty of Amity by the Association of South East Asian Nations (ASEAN) as a condition of participation in the East Asia Summit (EAS) in April 2005. ASEAN has actively promoted accession to the Treaty to non-ASEAN members.<sup>2</sup>
- 3.3 The purpose of the Third Protocol is to broaden the category of High Contracting Parties under the Treaty of Amity to allow for accession by regional organisations representing sovereign states. The amendments also update limitations on dispute resolution powers to cover new non-regional High Contracting Parties.<sup>3</sup>
- 3.4 Australia signed the Third Protocol on 23 July 2010 during the ASEAN and EAS meeting in Hanoi, Vietnam. As at 9 December 2010, there were

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1 *Treaty of Amity and Cooperation in Southeast Asia*, done at Denpasar, Bali, 24 February 1976 (entered into force 21 June 1976).

2 *National Interest Analysis* (NIA) [2011] ATNIA 2, Third Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia, done at Hanoi on 23 July 2010 [2010] ATNIF 39, paras 4, 5.

3 Article 3, see NIA, para. 12.

26 High Contracting Parties which are signatories to the Protocol, comprising 10 ASEAN and 16 non-ASEAN member states.<sup>4</sup>

- 3.5 According to the *National Interest Analysis*, Australia's ratification of the Third Protocol is of strategic importance to ensure continued beneficial engagement between Australia and ASEAN Member States. It will also underpin ASEAN's growing engagement with nations beyond the Asia-Pacific region, in particular, in the European Union (EU).<sup>5</sup>
- 3.6 ASEAN has specifically requested that Australia approve the amendments introduced by the Third Protocol.<sup>6</sup>

## The Treaty of Amity and international engagement

- 3.7 The Treaty of Amity is an agreement between ASEAN Member States, which sets out the fundamental principles governing their relationship.<sup>7</sup> These require:
- mutual respect for the independence, sovereignty, equality, territorial integrity, and national identity of all nations;
  - the right of every State to lead its national existence free from external interference, subversion or coercion;
  - non-interference in the internal affairs of one another;
  - settlement of differences or disputes by peaceful manner;
  - renunciation of the threat or use of force; and
  - a commitment to effective co-operation among themselves.<sup>8</sup>

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4 The Association of South East Asian Nations (ASEAN) states are: Brunei Darussalam, Cambodia, Indonesia, Laos, Malaysia, Myanmar, Republic of the Philippines, Singapore, Thailand and Vietnam. The non-ASEAN states are Australia, Bangladesh, People's Republic of China, Democratic People's Republic of Korea, East Timor, France, India, Japan, Mongolia, Pakistan, Papua New Guinea, Republic of Korea, Russian Federation, Sri Lanka, Turkey and the United States of America.

5 NIA, paras 3–6.

6 NIA, para. 4.

7 The ASEAN was established in 1967 on the signing of the ASEAN Declaration by founding members Indonesia, Malaysia, the Philippines, Singapore and Thailand. *Association of South East Asian Nations (ASEAN)*, Overview <<http://www.asean.org/64.htm>> viewed 13 May 2011.

8 *Treaty of Amity and Cooperation in Southeast Asia*, Article 2, and see ASEAN, Overview <<http://www.asean.org/64.htm>> viewed 13 May 2011.

3.8 While primarily focussed on regional co-operation, ASEAN has actively encouraged multilateral engagement with other nations through accession to the Treaty of Amity. The Preamble to the Treaty of Amity, at paragraph 5, recognises:

...the need for cooperation with all peace-loving nations, both within and outside Southeast Asia, in the furtherance of world peace, stability and harmony.

3.9 In 1987 a first Protocol to the Treaty allowed for the formal accession of non-member High Contracting Parties to the agreement, on consent of the other Member States.<sup>9</sup> The Second Protocol updated the ASEAN membership as at 28 July 1998.<sup>10</sup>

3.10 The convening of the first EAS in Kuala Lumpur on 14 December 2005 represented a further advance for international engagement with ASEAN. Major North Asian countries Japan, Korea, China and India, as well as Australia and New Zealand, were for the first time invited to participate in ASEAN's dialogue of co-operation.<sup>11</sup>

3.11 The Committee was informed that being a signatory to the Treaty of Amity is one of three preconditions to participation in the EAS. Members must also be a dialogue partner with ASEAN and have a substantial relationship with the association.<sup>12</sup>

3.12 As a dialogue partner with ASEAN since 1974, Australia was able to participate in the inaugural EAS, seen as a watershed for Australian engagement with the region. Mr John Fisher, Department of Foreign Affairs and Trade, advised :

Essentially, it [the EAS] became a forum through which Australia could play a key role and provide assistance to regional integration, including ensuring that to the extent possible that regional integration proceeds in a way which is consistent with our interests and the region's interests.<sup>13</sup>

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9 *Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia*, done at Manila, Philippines, 15 December 1987, Article 1.

10 *Second Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia*, done at Manila, Philippines, 25 July 1998, Article 1.

11 Mr Fisher, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 25 February 2011, p. 27.

12 Mr Fisher, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 25 February 2011, p. 28.

13 Mr Fisher, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 25 February 2011, p. 28

- 3.13 The EU, a regional organisation, now wishes to accede to the Treaty of Amity. This has ASEAN's support and has been listed as a priority in the 2007 *Nuremberg Declaration on EU-ASEAN Enhanced Partnership 'Plan of Action'*.<sup>14</sup>
- 3.14 The Committee was advised that the inclusion of regional organisations under the Third Protocol to the Treaty of Amity can be expected to foster closer engagement between ASEAN Member States and the EU, as the former achieve greater economic significance.<sup>15</sup>
- 3.15 At this time, however, no other regional organisation has indicated an intention to accede to the Treaty.<sup>16</sup>

## Obligations under the Third Protocol

- 3.16 The Third Protocol does not contain any additional obligations, but modifies and expands on those in the Treaty of Amity in three articles:
- Article 1 – amends Article 18, paragraph 3 of the Treaty of Amity to provide for accession of 'regional organisations whose members are only sovereign States'.<sup>17</sup>
  - Article 2 – amends Article 14, paragraph 2 of the Treaty of Amity to provide that High Contracting Parties outside of South-East Asia may participate in dispute resolution only if involved in the matter under dispute.<sup>18</sup>
  - Article 3 – determines that the Protocol shall be subject to ratification and shall come into force on the date the last instrument of ratification of the High Contracting Parties is deposited.
- 3.17 The Committee notes that Article 2 is a minor amendment in terminology to reflect the new membership, for regional organisations. The use of 'High Contracting Party' adjusts the First Protocol (1987) amendment to Article 14 to exclude representatives of the new non-regional member

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14 Mr Fisher, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 25 February 2011, p. 26.

15 Mr Fisher, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 25 February 2011, p. 26.

16 Mr Fisher, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 25 February 2011, p. 26.

17 NIA, para. 10.

18 NIA, para. 12.

'States' from participating in the Ministerial Council established for ASEAN dispute resolution.<sup>19</sup>

- 3.18 The Committee was advised that this exclusion is considered a proper limitation on the role of Australia and other non-ASEAN members, as ASEAN seeks to take a more active part in negotiation of regional disputes.<sup>20</sup>

## Implementation

- 3.19 Amendments to the Treaty of Amity require the consent of all Member States. The proposed changes to the Treaty of Amity are positive, but in effect minor, and are supported by both ASEAN and non-ASEAN High Contracting Parties.
- 3.20 As no additional obligations are imposed under the Protocol, legislation changes are not required and there are no financial costs associated with the Protocol.<sup>21</sup>

## Conclusion

- 3.21 The Committee is pleased to see the ASEAN is consolidating ties beyond the region.
- 3.22 The Committee supports the proposal to open accession to regional organisations under the *Treaty of Amity and Cooperation in South East Asia*, and recommends binding treaty action be taken.

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19 NIA, para. 12.

20 The recent dispute between Thailand and Cambodia regarding a temple site on the Thai-Cambodia border was cited as an example. Indonesia, as ASEAN chair, intervened. See Mr Fisher, Department of Foreign Affairs and Trade, *Committee Hansard*, Canberra, 25 February 2011, p. 28.

21 NIA, para. 13.

**Recommendation 2**

**The Committee supports the *Third Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia* and recommends binding treaty action be taken.**