

**TREATY OF AMITY AND COOPERATION IN SOUTHEAST ASIA
INDONESIA, 24 FEBRUARY 1976**

as amended by

**THE FIRST PROTOCOL AMENDING THE TREATY OF AMITY AND
COOPERATION IN SOUTHEAST ASIA, 1987**

and

**THE SECOND PROTOCOL AMENDING THE TREATY OF AMITY AND
COOPERATION IN SOUTHEAST ASIA, 1998**

[2005] ATNIF 13

Documents tabled on 9 August 2005:

**National Interest Analysis [2005] ATNIA 14
with attachment on consultation**

Text of the proposed treaty action

**Exchange of correspondence between
the Australian Minister for Foreign Affairs
and
the Deputy Prime Minister and Minister for Foreign Affairs
of the Lao People's Democratic Republic**

Background Information: Status list of Parties

NATIONAL INTEREST ANALYSIS: CATEGORY 1 TREATY

SUMMARY PAGE

Treaty of Amity and Cooperation in Southeast Asia, Indonesia, 24 February 1976, as amended by the First Protocol amending the Treaty of Amity and Cooperation in Southeast Asia, 1987, and the Second Protocol amending the Treaty of Amity and Cooperation in Southeast Asia, 1998 [2005] ATNIF 13

Nature and timing of proposed treaty action

1. The proposed treaty action is the Treaty of Amity and Cooperation in Southeast Asia, 24 February 1976 (the Treaty), as amended by the First Protocol Amending the Treaty of Amity And Cooperation in Southeast Asia, 1987 (the First Protocol) and the Second Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia, 1998 (the Second Protocol). In accordance with Article 18(3) of the Treaty, as amended by Article 1 of the Second Protocol, the consent of all members of the Association of Southeast Asian Nations (ASEAN) is required for Australia to accede to the Treaty. On 28 July 2005 H.E Mr Somsavat Lengsavad, Deputy Prime Minister and Minister of Foreign Affairs of Laos and Chairman of the ASEAN Standing Committee, signed an instrument on behalf of All ASEAN member states declaring the consent of all ASEAN Member States to Australia's accession. The Treaty, as amended by the First and Second Protocols, is in force generally, and will enter into force for Australia immediately upon accession.

Overview and national interest summary

2. Following a decision by leaders of ASEAN States in November 2004 to establish a new regional forum, the East Asia Summit, the Government assessed it to be in Australia's national interest to seek to be an inaugural participant in the Summit. In April 2005 ASEAN Foreign Ministers identified criteria which States seeking to participate in the East Asia Summit would need to meet, one of which was that the State had acceded to the Treaty, or intended to do so.

3. Following this decision by ASEAN Foreign Ministers, the Government decided to consider accession to the Treaty. As a result of consultations between Australia and ASEAN States, a number of understandings were reached concerning the interpretation of key provisions of the Treaty. These understandings, recorded in an exchange of correspondence, provide the necessary assurance to the Government that accession to the Treaty will not affect Australia's existing rights and obligations under international agreements to which Australia is party, including the Charter of the United Nations, that the Treaty will not apply to, nor affect, Australia's relations with States outside Southeast Asia, and that the dispute resolution mechanism established by the Treaty, the High Council, would only apply to Australia if Australia so consented.

4. On 13 July 2005 the Minister for Foreign Affairs wrote to H.E. Mr Somsavat Lengsavad, Deputy Prime Minister and Minister of Foreign Affairs of Laos and Chairman of the ASEAN Standing Committee, to advise that Australia intended to accede to the Treaty. On 23 July 2005 Mr Somsavat responded in writing to Mr Downer's letter, welcoming Australia's intention to accede to the Treaty. On 26 July 2005 ASEAN Foreign Ministers announced in the communiqué issued at the conclusion of the ASEAN Ministerial Meeting in Vientiane that Australia would be a participant in the East Asia Summit.

Reasons for Australia to take the proposed treaty action

5. Australia has had strong, friendly and mutually beneficial relations with Member States of ASEAN, both individually and collectively, across a wide range of sectors – in the political sphere, through economic and trade links, on security matters, in the cultural and educational fields, and through strong and enduring people-to-people links. The Government is committed to the further strengthening of Australia's relations with ASEAN states, both individually and collectively, and has undertaken a wide range of initiatives in each of the above fields to achieve this objective. Some examples of this include Australia's status as ASEAN's first dialogue partner (since 1974), its active engagement with ASEAN through the ASEAN Post Ministerial Conference, the commencement of negotiations on an ASEAN – Australia-New Zealand Free Trade Agreement, and the establishment of strong regional cooperation mechanisms on transnational issues, including regional consultations on people smuggling issues, the establishment of a network of bilateral counter-terrorism MOUs, and as a founding member of the ASEAN Regional Forum.

6. Australia was presented with a new opportunity to further strengthen ties with both ASEAN States and other regional States, including Japan, the Republic of Korea and China in November 2004, when the leaders of ASEAN States took a decision to establish a new regional forum, the East Asia Summit. The East Asia Summit represents an important new forum for dialogue between leaders in the region and to address issues facing the region. It comes at a time of particular dynamism in East Asia. The participants at the East Asia Summit will account for 49% of the world's population, and over 21% of world trade. Although the shape and objectives of the Summit remain to be finalised, it has the potential to be an important mechanism to pursue closer regional integration on economic and strategic issues. It is directly relevant to Australia's interests to have a seat at the table from the outset, and have the opportunity to contribute to the Summit's development.

7. Following the announcement by ASEAN of the decision to establish the East Asia Summit, the Government decided that it would be in the national interest to secure participation in the Summit. It was decided that Australia should engage in discussions with ASEAN States and other relevant States to express interest in participation in the first meeting of the Summit, to be held in Kuala Lumpur in December 2005, and subsequent meetings, and to explore options for securing such participation.

8. ASEAN States further elaborated their vision for the East Asia Summit at an ASEAN Foreign Ministers' retreat in Cebu, The Phillipines, in April 2005. That meeting identified three criteria which states other than ASEAN, China, Japan and the Republic of Korea (the ASEAN plus three) would be required to meet to receive an invitation to participate in the East Asia Summit: a State would be required to be a full dialogue partner of ASEAN; to have substantive relations with ASEAN; and to be party to, or intend to become a party to, the Treaty.

9. Australia met two of these three criteria, being a full dialogue partner of ASEAN and having substantive relations with ASEAN States. However Australia was not party to the Treaty, and had not previously expressed an intention to become party to the Treaty. Given that this was an essential criterion for participation in the East Asia Summit, the Government decided to give consideration to becoming party to the Treaty.

10. The Treaty is an important document for ASEAN Member States. When adopted in 1976, it established the principles which were to guide the relations of the original six Member

States of ASEAN with each other. The Treaty aims to promote peace, amity and cooperation between States Parties. It does so through a range of provisions which are set out below. It also establishes a mechanism for the settlement of disputes between States Parties to the Treaty, the High Council (although that body has never been convened). The Treaty also has considerable symbolic importance for ASEAN States, and is often referred to by those States as a foundation for their cooperation and interaction.

11. Although the Treaty was initially open to ratification only by the original Member States of ASEAN, it was amended in 1987 by the First Protocol to permit additional States in Southeast Asia to accede to the Treaty, to permit States outside Southeast Asia to accede to the Treaty with the consent of the Southeast Asian States then party to the Treaty, and to specify the circumstances in which States outside Southeast Asia could participate in the High Council. The Treaty was amended again in 1998 by the Second Protocol in order to expand the category of Southeast Asian States the consent of which is required to permit States outside Southeast Asia to accede to the Treaty, so as to reflect the expansion of ASEAN. Since 1998, it has been a diplomatic objective of ASEAN States to encourage other States in the region to accede to the Treaty (to date, China, India, Japan, Mongolia, New Zealand, Pakistan, Papua New Guinea, Republic of Korea and Russia have acceded).

12. Following the Government's decision to consider accession to the Treaty, officials embarked on a range of consultations with ASEAN States on the question of Treaty accession, and the interpretation of the key provisions of the Treaty, so as to address a number of issues which had been identified with aspects of the Treaty. Through these consultations a number of understandings were reached between Australia and ASEAN States concerning the interpretation of key provisions of the Treaty. These understandings provide the necessary assurance to the Government that accession to the Treaty will not affect Australia's existing rights and obligations under international agreements to which Australia is party, including the Charter of the United Nations, that the Treaty will not apply to, nor affect, Australia's relations with States outside Southeast Asia, and that the dispute resolution mechanism established by the Treaty, the High Council, would only apply to Australia if Australia so consented. These understandings were recorded through an exchange of correspondence, the Foreign Minister, Mr Alexander Downer MP, writing to H.E. Mr Somsavat Lengsavad, Deputy Prime Minister and Minister for Foreign Affairs, of the Laos People's Democratic Republic, in the latter's capacity as Chairman of the ASEAN Standing Committee, on 13 July 2005, and Mr Somsavat writing in response to Mr Downer on 23 July 2005, accepting Australia's intention to accede on that basis.

13. In his letter of 13 July 2005, Mr Downer advised Mr Somsavat of the Australian Government's decision to accede to the Treaty following the completion of Australia's domestic treaty process. Mr Downer informed Mr Somsavat at this time of the Government's intention to accede so as to ensure that this information was before the ASEAN Foreign Ministers at their meeting on 25-27 July in Vientiane, Laos, at which the ASEAN Foreign Ministers were to take a decision on which States would be invited to participate in the East Asia Summit. While this time constraint meant that the Government was required to take the decision on accession, and to announce that decision publicly, thought not to take binding treaty action, before the Treaty action had been tabled in Parliament or considered by the Joint Standing Committee on Treaties (JSCOT), to have deferred the decision on accession, or the communication of that decision to ASEAN States, would have meant that Australia would have been unable to demonstrate that it met all three of the "Cebu criteria", and so would have carried the substantial risk that Australia would not have received an invitation to participate in the East Asia Summit as an inaugural member. Mr Somsavat, in his reply of 23 July 2005 to Mr Downer's letter, acknowledged that letter and welcomed Australia's intention to accede to the Treaty.

14. Following that exchange of correspondence (attached), which confirmed for Australia its understandings of key provisions of the Treaty, Mr Downer signed a document entitled “Declaration of Intention to Accede to the Treaty of Amity and Cooperation in Southeast Asia by Australia” at a ceremony during the ASEAN Post Ministerial Conference in Vientiane, Laos on 28 July 2005. At the same ceremony Mr Somsavat signed, on behalf of all ASEAN Member States, a document entitled “ASEAN Declaration of Consent to the Accession to the Treaty of Amity and Cooperation in Southeast Asia by Australia”, which declared “the consent of all the States in Southeast Asia to the accession to the treaty by Australia”, so fulfilling the requirements of Article 18(3) of the Treaty, as amended by Article 1 of the Second Protocol.

15. Following the conclusion of Parliamentary consideration of the Treaty, and the issuance of any report by the Joint Standing Committee on Treaties, the Government intends to deposit an instrument of accession to the Treaty before the first meeting of the East Asia Summit, which is due to be held in Kuala Lumpur on 14 December 2005.

Obligations

16. The Treaty sets out a range of principles and norms to guide the relations between States Parties to the Treaty, and establishes a mechanism for the settlement of disputes between States Parties to the Treaty. As stated above, the Treaty was initially open to ratification only by the original members of ASEAN. It was amended in 1987 by the First Protocol to permit additional States in Southeast Asia to accede to the Treaty, to permit States outside Southeast Asia to accede to the Treaty with the consent of the Southeast Asian States then party to the Treaty, and to specify the circumstances in which States outside Southeast Asia could participate in the High Council. The Treaty was amended again in 1998 by the Second Protocol in order to expand the category of Southeast Asian States the consent of which is required to permit States outside Southeast Asia to accede to the Treaty, so as to reflect the expansion of ASEAN.

17. Article 2 of the Treaty provides a number of fundamental principles which shall guide the relations between the States Parties to the Treaty. These principles include mutual respect for sovereignty, independence, equality, territorial integrity 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 disputes by peaceful means; and the renunciation of the threat or use of force.

18. Article 3 of the Treaty provides that States Parties shall endeavour to develop and strengthen the ties between them, and shall fulfil in good faith the obligations assumed under the Treaty.

19. Articles 4, 5, 6, 7, 8 and 9 provide that States Parties shall take a range of actions to promote and strengthen active cooperation in the economic, social, technical, scientific and administrative fields.

20. Article 10 of the Treaty provides that States Parties shall not participate in any activity which shall constitute a threat to the political or economic stability, sovereignty, or territorial integrity of another State Party.

21. Articles 11 and 12 provide that States Parties shall endeavour to cooperate to promote national and regional resilience.

22. Articles 13, 14, 15, 16 and 17 relate to the pacific settlement of disputes between States Parties to the Treaty, and establish a regional mechanism for dealing with disputes.
23. Article 13 provides that States Parties shall, in the event that a dispute arises between them, refrain from the threat or use of force, and shall resolve such disputes through negotiations.
24. Article 14, as amended by the First Protocol, provides that, in order to resolve disputes, the States Parties shall constitute a High Council comprising a ministerial level representative of each of the States Parties. The Article as amended states that this provision applies to States Parties outside Southeast Asia only in cases where that State is directly involved in the dispute to be settled.
25. Article 15 provides that, in the event that dispute cannot be resolved through direct negotiations, the High Council shall take cognisance of the dispute, and recommend to the parties to the dispute an appropriate means of settlement. With the consent of the parties to the dispute, the High Council may also perform a mediation, inquiry or conciliation function. The High Council may also, where deemed necessary, recommend appropriate measures for the prevention of a deterioration of the dispute or situation.
26. Article 16 provides that Article 15 does not apply to a dispute unless all the parties to the dispute agree to its application to that dispute.
27. In order to ensure that Australia's understandings of key provisions of the Treaty, and the obligations which these impose upon States Parties, are shared by ASEAN members, Australian officials undertook extensive discussions with ASEAN counterparts on the Treaty. Those discussions greatly assisted the Government in deciding whether to accede to the Treaty. The shared understandings reached through those discussions are recorded in the exchange of correspondence between the Foreign Minister and H.E. Mr Somsavat Lengsavad, Deputy Prime Minister and Minister for Foreign Affairs of the Lao People's Democratic Republic, in the latter's capacity as Chairman of the ASEAN Standing Committee, on 13 July 2005. This exchange of correspondence is attached for information. Consistent with Article 31 of the Vienna Convention on the Law of Treaties ([1974] ATS 2), the exchange of correspondence is to be regarded as part of the context of Australia's accession to the Treaty.
28. The first understanding articulated in Mr Downer's letter of 13 July 2005 is that Australia's accession to the Treaty will not affect Australia's obligations under other bilateral or multilateral agreements. This provides an assurance that nothing in the Treaty is to be interpreted in a manner inconsistent with Australia's treaty commitments, including on security matters. In particular, this ensures that Australia's existing security agreements are unaffected, including the Security Treaty between Australia, New Zealand and the United States [1952] ATS 2 (the ANZUS Treaty), and the Five Powers Defence Arrangements [1971] ATS 21.
29. The second understanding articulated in Mr Downer's letter of 13 July 2005 is that the Treaty is to be interpreted in accordance with the Charter of the United Nations, and that Australia's accession will not affect Australia's rights and obligations under the Charter of the United Nations. This understanding ensures that the provisions of Article 2 of the Treaty stating that States Parties shall be guided in their relations with one another by the fundamental principle of "non-interference in the internal affairs of other States Parties" does not affect Australia's rights and obligations under the Charter of the United Nations. This includes the right and obligation as a member of the United Nations to fulfil the purposes of the United Nations set out

in Article 1 of the Charter of the United Nations, including “to achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedom for all without distinction as to race, sex, language or religion”. This provision of the Charter of the United Nations, together with the longstanding practice of States, including States Parties to the Treaty, makes clear that nothing in the Treaty is to be interpreted as preventing a State Party from engaging on or commenting upon issues of international interest arising within another State Party to the Treaty.

30. This understanding also ensures that, notwithstanding the provisions of Article 2 of the Treaty requiring “the renunciation of the threat or use of force”, Australia’s rights and obligations under the Charter of the United Nations in respect of the use of force remain unaffected, including the provisions of Article 51 of the Charter of the United Nations permitting the use of force by a State in self-defence.

31. The third understanding articulated in Mr Downer’s letter of 13 July 2005 is that the Treaty will not apply to, nor affect, Australia’s relations with the States outside Southeast Asia. This includes Australia’s relations with States outside Southeast Asia which are also Party to the Treaty. This understanding clarifies that, notwithstanding the fact that, by virtue of the First Protocol, the Treaty is now open to accession by States outside Southeast Asia and that a number of such States, including China, India, Japan, Mongolia, New Zealand, Pakistan, Papua New Guinea, Republic of Korea, and Russia, have so acceded, the geographical focus of the Treaty remains on Southeast Asia. Accordingly, for non-ASEAN States Parties, the Treaty governs the relations of each of the non-ASEAN States Parties with ASEAN States Parties, rather than with each other.

32. The final understanding articulated in Mr Downer’s letter of 13 July 2005 is that Article 14 and 16 of the Treaty (as amended by the First Protocol) effectively provide that, when a State outside Southeast Asia which is Party to the Treaty is directly involved in a dispute, the agreement of that State Party is required before the High Council can be convened. Should that State consent to the High Council being convened, that State will be entitled to participate in the High Council. This understanding clarifies that the High Council could not consider or seek to resolve a dispute in which Australia was directly involved unless Australia first agreed to the convening of the High Council for that purpose. Further, Australia would be entitled to participate in the High Council’s deliberations in respect of any dispute in which Australia was directly involved. It is worth noting the High Council has never been convened.

33. Mr Downer’s letter of 13 July 2005 notes the understandings of key provisions of the Treaty set out in the letter are “on a non-prejudice basis to ASEAN”. This phrase was included at the request of ASEAN States to reflect the fact that it is not usual ASEAN practice to record understandings of the Treaty in a public document upon the accession of a State to the Treaty. The phrase does not qualify the shared understandings of key provisions of the Treaty reached with ASEAN States set out in Mr Downer’s letter of 13 July 2005. It is also important to note that ASEAN States agreed to Australia recording these understandings in the formal exchange of correspondence of which Mr Downer’s letter of 13 July 2005 formed part, and consented to Australia’s accession to the Treaty on that basis.

Implementation

34. As the obligations imposed upon Australia by the Treaty relate to the general conduct of relations with other States, no changes to Australian legislation are required to implement the provisions of the Treaty as amended by the First and Second Protocols.

Costs

37. The costs associated with Australia's accession to the Treaty, as amended by the First and Second Protocols, are nil.

Regulation Impact Statement

38. The Office of Regulation Review (Productivity Commission) has been consulted and confirms that a Regulation Impact Statement is not required.

Future treaty action

39. The Treaty does not make express provision for the making of amendments to the Treaty. However the Treaty has been amended on two occasions through the adoption of the First and Second amending Protocols. It remains open to the States Parties to the Treaty, as amended by the First and Second Protocols, to further amend the Treaty through the adoption of additional amending protocols. The provisions of any additional amending Protocol would follow the model of the First and Second Protocols, and so would not be binding upon any State unless that State first ratified or acceded to that Protocol.

40. Future treaty action, including the ratification or accession by Australia of any additional amending Protocol to the Treaty, would be subject to Australia's domestic treaty process, including tabling and consideration by JSCOT.

Withdrawal or denunciation

41. The Treaty and the First and Second Protocols do not make express provision for a Party to withdraw from or denounce the Treaty. However it could be implied from the nature of the Treaty that a State Party has the right to withdraw or denounce the Treaty, as envisaged in Article 56 of the Vienna Convention on the Law of Treaties 1974 ([1974] ATS 2).

42. Withdrawal or denunciation would be subject to Australia's domestic treaty process, including tabling and consideration by JSCOT.

Contact details

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**TREATY OF AMITY AND COOPERATION IN SOUTHEAST ASIA
INDONESIA, 24 FEBRUARY 1976**

as amended by

**THE FIRST PROTOCOL AMENDING THE TREATY OF AMITY AND
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**THE SECOND PROTOCOL AMENDING THE TREATY OF AMITY AND
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[2005] ATNIF 13

CONSULTATION

1. The Treaty, as amended by the First and Second Protocols, concerns Australia's relations with other States Parties to the Treaty. It is therefore primarily a matter of foreign policy, and the Minister for Foreign Affairs and his Department has taken the lead in the consultations with other States which led to the Australian Government's decision to accede to the Treaty.

2. Notwithstanding the fact that the Treaty does not directly affect State and Territory Governments, State and Territory Governments of Australia are being consulted through the Commonwealth, States and Territories Standing Committee mechanism as they have a part to play in the economic, social, technical, scientific and administrative fields covered by the Treaty, and in links between Australia and the Governments and peoples of ASEAN Member States and other States Parties to the Treaty.

Status List of Parties

Treaty of Amity and Cooperation in Southeast Asia (Denpasar, 24 February 1976)

Entry into force generally: 21 June 1975

Party	Date of ratification/accession/acceptance
Brunei Darussalam	06 June 1987
Cambodia	25 July 1995
India	08 October 2003
Indonesia	21 April 1976
Lao, PDR	17 July 1996
Malaysia	21 June 1976
Mongolia	28 July 2005
Myanmar	10 July 1996
New Zealand	28 July 2005
Papua New Guinea	10 August 1989
People's Republic of China	08 October 2003
Philippines	08 April 1976
Republic of Korea	27 November 2004
Russian Federation	29 November 2004
Singapore	17 April 1976
Thailand	21 May 1976
Vietnam	30 May 1996

Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia (Manila, 15 December 1987)

Entry into force generally: 02 July 1988

Party	Date of ratification/accession/acceptance
Brunei Darussalam	19 April 1988
Cambodia	06 December 1999
India	08 October 2003
Indonesia	02 July 1988
Malaysia	27 January 1988
People's Republic of China	08 October 2003
Philippines	10 June 1988
Singapore	23 March 1988
Thailand	01 July 1988
Vietnam	30 May 1995

**Second Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia
(Manila, 25 July 1998)**

Entry into force generally: 06 December 1999

Party	Date of ratification/accession/acceptance
Brunei Darussalam	25 May 1999
Cambodia	06 December 1999
India	08 October 2003
Indonesia	29 September 1999
Lao, PDR	09 July 1999
Malaysia	08 January 1999
Myanmar	23 April 1999
Papua New Guinea	17 July 2000
People's Republic of China	08 October 2003
Philippines	24 November 1988
Singapore	20 November 1998
Thailand	24 May 1999
Vietnam	09 April 1999