

**National Interest Analysis [2011] ATNIA 2**

**with attachment on consultation**

**Third Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia,  
done at Hanoi on 23 July 2010**

**[2010] ATNIF 39**



## **NATIONAL INTEREST ANALYSIS: CATEGORY 2 TREATY**

### **SUMMARY PAGE**

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##### **Nature and timing of proposed treaty action**

1. The proposed treaty action is to ratify the Third Protocol done at Hanoi on 23 July 2010 (the Third Protocol) Amending the Treaty of Amity and Cooperation in Southeast Asia, done at Denpasar on 24 February 1976 (the Treaty). Australia acceded to the Treaty on 10 December 2005, as amended by the Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia done at Manila on 15 December 1987 (the First Protocol), and the Second Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia done at Manila on 25 July 1998 (the Second Protocol). The Third Protocol amends the types of High Contracting Parties that can accede to the Treaty to include regional organisations whose members are only sovereign states.

2. Pursuant to Article 3 of the Third Protocol, the Third Protocol will enter into force on the date that the last instrument of ratification of the High Contracting Parties is deposited with the Secretariat of the Association of Southeast Asian Nations (ASEAN).

##### **Overview and national interest summary**

3. The purpose of the Third Protocol is to allow accession to the Treaty by regional organisations, such as the European Union, whose members are only sovereign states (Article 18, paragraph 3). All High Contracting Parties to the Treaty signed the Third Protocol amending the Treaty in Hanoi, Vietnam, on 23 July 2010.

4. As a High Contracting Party to the Treaty, Australia was asked by ASEAN to approve the Third Protocol. Australia first acceded to the Treaty when, at a Foreign Ministers' meeting in April 2005, ASEAN made it a condition for participation in the East Asia Summit (EAS). It was considered to be in the national interest to accede to the Treaty, as part of Australia's efforts to deepen engagement with ASEAN and to demonstrate Australia's initiative to have a strong and productive presence in Southeast Asia.

5. The changes to the Treaty under the Third Protocol are minor and have wide support from both ASEAN and non-ASEAN High Contracting Parties to the Treaty. ASEAN actively encourages wide accession to the Treaty by non-ASEAN members, which it considers very important. While accession to the Treaty is a condition for participation in the EAS, it does not guarantee entry to the EAS. There are many signatories to the Treaty that are not members of the EAS. It would reflect poorly on Australia's engagement with ASEAN to appear to block the Third Protocol's minor amendments to the Treaty.

## **Reasons for Australia to take the proposed treaty action**

6. 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 further strengthening Australia's relations with ASEAN Member States, both individually and collectively, and has undertaken a wide range of initiatives in each of the above fields to achieve this objective.

7. Some examples of Australia's engagement with ASEAN include: Australia's status as ASEAN's first dialogue partner (since 1974); its active engagement with ASEAN through the ASEAN Post Ministerial Conference; the conclusion of the Agreement Establishing ASEAN–Australia–New Zealand Free Trade Area; and the appointment of an Australian Ambassador to ASEAN. Australia's engagement has also included 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 memoranda of understanding and as a founding member of the ASEAN Regional Forum.

8. Being a High Contracting Party to the Treaty is part of Australia's efforts to strengthen relations with ASEAN Member States. Among other things, the High Contracting Parties to the Treaty pledge to promote "perpetual peace, everlasting amity and cooperation among their peoples" (Article 1), as well as to cooperate in economic, social, cultural, technical and scientific fields (Article 4). The Treaty also establishes a High Council as a mechanism to resolve disputes, although this Council has never been convened (Article 14).

9. As a High Contracting Party to the Treaty, Australia was asked by ASEAN to approve a Third Protocol amending the Treaty, to be signed and ratified by all current High Contracting Parties. The signing of the Third Protocol was scheduled to take place in July 2009. The Government sought and received Executive Council authority to sign the Third Protocol in July 2009. Signing of the Third Protocol did not go ahead that year, as some High Contracting Parties to the Treaty had not been able to complete their domestic requirements for signature. On 23 July 2010, the Third Protocol amending the Treaty was signed during the ASEAN and EAS related meetings in Hanoi, Vietnam.

## **Obligations**

10. The Third Protocol amending the Treaty does not impose any additional obligations for Australia under the Treaty.

11. Article 1 of the Third Protocol amends Article 18, paragraph 3 of the Treaty to provide that the Treaty shall be open for accession by regional organisations whose members are only sovereign States.

12. Article 2 of the Third Protocol amends Article 14, paragraph 2 of the Treaty. Article 14, as amended by the First Protocol, provides that, in order to resolve disputes, the High Contracting Parties shall constitute a High Council comprising a ministerial level representative of each of the High Contracting Parties. Article 14, paragraph 2 as amended by the Third Protocol, states that this provision shall apply to any of the High Contracting Parties outside

Southeast Asia only in cases where that High Contracting Party is directly involved in the dispute to be settled through regional processes.

### **Implementation**

13. No changes to Australian legislation are required to implement the provisions of the Third Protocol.

### **Costs**

14. No financial costs to the Australian Government are associated with the ratification of the Third Protocol.

### **Regulation Impact Statement**

15. The Office of Best Practice Regulation, Department of Finance and Deregulation has been consulted and confirms that a Regulation Impact Statement is not required.

### **Future treaty action**

16. The Treaty does not make express provision for amendments to the Treaty. However, Article 39 of the Vienna Convention on the Law of Treaties (the VCLT) provides that a treaty may be amended at any time by agreement between the parties. The Treaty has already been amended on two occasions through the adoption and entry into force of the First and Second Protocols. Additional amending Protocols agreed between the High Contracting Parties would be subject to Australia's domestic treaty-making process, including tabling in Parliament and consideration by the Joint Standing Committee on Treaties (JSCOT). The provisions of any additional amending Protocol would follow the model of the First, Second and Third Protocols, and so would not be binding upon any High Contracting Parties unless that High Contracting Party has ratified or acceded to that Protocol.

### **Withdrawal or denunciation**

17. The Treaty and the First, Second and Third Protocols do not make express provision for a High Contracting Party to withdraw from or denounce the Treaty. However it could be implied from the nature of the Treaty, which covers amity and cooperation matters, that a High Contracting Party has the right to withdraw or denounce the Treaty, as envisaged by Article 56 of the VCLT.

18. Withdrawal or denunciation of the Treaty would be subject to Australia's domestic treaty-making process, including tabling in Parliament and consideration by JSCOT.

### **Contact details**

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South-East Asia Division  
Department of Foreign Affairs and Trade



## **ATTACHMENT ON CONSULTATION**

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#### **CONSULTATION**

##### Commonwealth Government departments

19. The Third Protocol amending the Treaty, as amended by the Protocol and Second Protocol, concerns Australia's relations with other High Contracting Parties to the Treaty. The ratification of the Third Protocol is therefore primarily a decision for the Minister for Foreign Affairs, as it is a matter of foreign policy. In June 2009, the then Minister for Foreign Affairs, the Hon Stephen Smith MP, wrote to the then Prime Minister, the Hon Kevin Rudd MP to advise the Prime Minister of his intention to agree to sign the Third Protocol. As the changes contained in the Third Protocol are of a technical nature, and do not directly affect other Commonwealth departments, wider consultation did not take place.

##### State and Territory Governments

20. Notwithstanding the fact that the Third Protocol does not directly affect State and Territory Governments, representatives of each State and Territory were consulted through the Commonwealth-State-Territory Standing Committee on Treaties. This provided the opportunity for all States and Territories to comment on the ratification of the Third Protocol and the content of the National Interest Analysis. No substantive responses were received.

21. The Third Protocol was approved for signature by the Federal Executive Council on 9 July 2009.