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JOINT STANDING COMMITTEE ON TREATIES

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**JOINT STANDING COMMITTEE ON
TREATIES**

Monday, 12 September 2005

Members: Mrs May (*Acting Chair*), Mr Wilkie (*Deputy Chair*), Senators Bartlett, Mason, Santoro, Sterle, Trood and Wortley and Mr Adams, Mr Johnson, Mr Keenan, Ms Panopoulos, Mr Ripoll, Mr Bruce Scott and Dr Southcott

Members in attendance: Senators Trood and Wortley and Mr Adams, Mrs May and Mr Wilkie

Terms of reference for the inquiry:

To inquire into and report on:

Treaties tabled on 9 August 2005

WITNESSES

BIRD, Ms Gillian, Deputy Secretary, Department of Foreign Affairs and Trade 1

**BLISS, Mr Michael, Director, International Law Group and Transnational Crime Section, Legal
Branch, International Organisations and Legal Division, Department of Foreign Affairs and
Trade 1**

**JENNINGS, Mr Mark Brandon, Senior Counsel, Office of International Law, Attorney-
General’s Department 1**

**THWAITES, Mr Michael Jonathan, Executive Director, Treaties Secretariat, Legal Branch,
International Organisations and Legal Division, Department of Foreign Affairs and Trade..... 1**

**WOOD, Ms Lynette, Director, ASEAN Burma and Cambodia Section, Mainland South-East
Asia and South Asia Branch, South and South-East Asia Division, Department of Foreign Affairs
and Trade..... 1**

Committee met at 10.04 am

BLISS, Mr Michael, Director, International Law Group and Transnational Crime Section, Legal Branch, International Organisations and Legal Division, Department of Foreign Affairs and Trade

BIRD, Ms Gillian, Deputy Secretary, Department of Foreign Affairs and Trade

THWAITES, Mr Michael Jonathan, Executive Director, Treaties Secretariat, Legal Branch, International Organisations and Legal Division, Department of Foreign Affairs and Trade

WOOD, Ms Lynette, Director, ASEAN Burma and Cambodia Section, Mainland South-East Asia and South Asia Branch, South and South-East Asia Division, Department of Foreign Affairs and Trade

JENNINGS, Mr Mark Brandon, Senior Counsel, Office of International Law, Attorney-General's Department

Treaty of Amity and Cooperation in Southeast Asia

ACTING CHAIR (Mrs May)—Good morning. I declare open this meeting of the Joint Standing Committee on Treaties. As part of the committee's ongoing review of Australia's international treaty obligations, the committee will today review the second of two treaties tabled in parliament on 9 August 2005. I welcome witnesses from various departments who will be joining us for discussion on the Treaty of Amity and Cooperation in Southeast Asia. I thank witnesses for being available for this hearing. Before I proceed, I would like to acknowledge the presence of the Deputy High Commissioner for Malaysia, Mr Mukundan, and welcome him and his staff to today's proceedings. Thank you for joining us this morning.

I should also remind witnesses that these proceedings are being televised and broadcast by the Department of Parliamentary Services. Should this present any problems for witnesses, it would be helpful if any issues could be raised at this time. We will now take evidence on the Treaty of Amity and Cooperation in Southeast Asia as amended by the 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.

I call the witnesses to the table. Although the committee does not require you to give evidence under oath, I should advise you that this hearing is a legal proceeding of the parliament and warrants the same respect as proceedings of the House and the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. Do you wish to make any introductory remarks before we proceed to questions?

Ms Bird—Yes, I would like to. Chair, distinguished members of the committee, there has been considerable interest in the government's recent decision to accede to the ASEAN Treaty of Amity and Cooperation. I am conscious that you each have before you the national interest analysis, which sets out in detail the reasons for the government's decision to accede to the treaty. However, I thought it would be useful to highlight the key considerations which led the

government to take the decision to accede and the understandings we have reached with ASEAN on interpretation of the treaty.

The government's decision to examine accession to the treaty was triggered by ASEAN's decision to set three criteria for membership of the East Asia Summit, a new leaders grouping which has the potential to be an important mechanism to pursue closer integration on economic and strategic issues in the region. The criteria for participation were decided in April this year at an ASEAN foreign ministers retreat in Cebu, the Philippines. Three criteria were established to determine which states, other than ASEAN plus three—China, Japan and the Republic of Korea—would be invited to participate in the East Asia Summit. Australia already met two of these criteria—namely, full ASEAN dialogue partner status and substantive relations with ASEAN. The third criterion was that a state be party to, or intend to become a party to, the Treaty of Amity and Cooperation. The government therefore decided to give consideration to becoming a party to the treaty.

The treaty is a foundation document for ASEAN member states and has considerable symbolic importance. It aims to promote peace, amity and cooperation between states parties. It also establishes a mechanism for the settlement of disputes between states parties to the treaty—the high council, although the high council has not been convened to date. There were a number of aspects of the treaty which required clarification. Officials therefore conducted a range of consultations with ASEAN states, enabling a number of understandings to be reached between Australia and ASEAN 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; the treaty will not apply to nor affect Australia's relations with states outside South-East Asia; and the dispute settlement mechanism established by the treaty, the high council, would apply only to a situation affecting Australia if Australia so consented. These understandings were recorded through an exchange of correspondence. On 13 July Mr Downer wrote to his Lao counterpart, Mr Somsavat, in the latter's capacity as Chairman of the ASEAN Standing Committee. Mr Somsavat responded on 23 July and accepted Australia's intention to accede on that basis. To confirm Australia's intention to accede to the treaty, Mr Downer signed a document to that effect at a ceremony in Vientiane on 28 July. At the same ceremony, Mr Somsavat signed a document on behalf of all ASEAN member states that confirmed ASEAN's consent to Australia's accession to the treaty as required by article 18 of the treaty.

I should note that the government took the decision to accede to the treaty before completion of parliamentary consideration of the treaty in order to ensure that Australia received an invitation to participate in the East Asia Summit as an inaugural member. To have deferred the decision on accession or the communication of that decision to ASEAN states would have entailed the substantial risk that Australia would not have received an invitation to participate in the East Asia Summit as an inaugural member. We appreciate the committee's understanding on this point.

Following the conclusion of the tabling period for the treaty and your committee's report 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. My colleagues and I would be very happy to answer any questions from the chair or members of the committee.

ACTING CHAIR—Thank you for those opening comments.

Mr WILKIE—Welcome to our distinguished guests. It is great to have you here at this very important meeting. From my perspective, as a member of the Labor Party, it is a pity there are not more coalition members here. If we were not here, we would not have had a quorum to continue this meeting. Given the importance of this treaty, I find that rather disappointing. A question to the department: I know there are some other states that have provided similar understandings in the treaty prior to accession to the Treaty of Amity and Cooperation. What sorts of provisions did they ask for in their undertakings?

Ms Bird—A number of the other non-ASEAN states that are party to the treaty undertook a similar process to ours of consultation with ASEAN states to clarify the obligations of becoming a party to the treaty. I should say that that was of benefit to us, because we were able to talk to those other non-ASEAN party states about their consultations. That assisted our own process.

Similar issues to those I have outlined were raised by a number of other non-ASEAN states parties, particularly Korea and Japan. As we understand, they reached similar understandings. Perhaps the key point of difference with our own process is that, because of our parliamentary treaties process, it was important that our understandings be recorded in a document that we could make public to this committee. We made that very clear in our consultations with ASEAN. Hence our understandings are recorded in that exchange of correspondence, which we have tabled formally before this committee.

Mr WILKIE—Given that Korean and Japan had put in those provisions quite a long time ago, what held up Australia from doing the same thing?

Ms Bird—As I indicated, the government's decision to consider accession was triggered by the decision in Cebu to set the three criteria for participation in the East Asia Summit. Once that decision was taken, we undertook consultations not only with the ASEAN states but also with Japan and Korea to find out how they had dealt with their accession process.

Mr WILKIE—It is a pity we waited until we finally decided to go down the path of agreeing to the treaty before we started those sorts of negotiations. It was always the case that we should have been party to this treaty and it does not appear that we were looking at ways of getting around the particular issues that the government had.

Ms Bird—As I indicated in my opening statement, there were a number of longstanding concerns which the government had about this treaty which needed to be worked through before a decision could be taken on accession. That process was completed fairly quickly, in fact. The decision on criteria was set down in Cebu in April. We reached our understandings and recorded them in an exchange of correspondence in July. It was a question of a couple of months. It was interesting: in our discussions with Japan and Korea, for example, it had taken each of those about 12 months to work through the same issues.

ACTING CHAIR—Ms Bird, is it fair to say that you worked through those issues in a shorter period of time very mindful of the summit happening in December?

Ms Bird—We very much had that in mind, yes.

Senator TROOD—Thank you all for coming and offering to give evidence this morning. It is very helpful to the committee. Picking up on the deputy chair's point: are the Korean and Japanese reservations publicly known? They are obviously accessible to you, but are they in a public document?

Ms Bird—As far as we have been able to ascertain they are not made available publicly in the same way our exchange of correspondence has been.

Senator TROOD—Is that true of the Chinese ones as well?

Ms Bird—We are not aware of the Chinese having worked out any understandings on the terms of their accession.

Senator TROOD—Could I explore with you how important you think this process is going to be. Obviously, we have been determined to make sure that we put ourselves in a position so that we can attend the summit. I assume the department and agencies are working out what might happen at the summit. Could you share with us the expectations you have at this stage as to how the summit will proceed, how important it is going to be and the kinds of things that might be on its agenda et cetera?

Ms Bird—As Mr Downer has indicated, we are looking forward very much to the East Asia Summit. We do think it has the potential to be a really significant new regional grouping, which we hope will take forward regional economic and strategic cooperation. It is still very much in the early days of preparation for the first summit. Malaysia, as host, obviously has a key role and has begun consultations with the members which will make up the East Asia Summit as to a possible agenda for that meeting. At this stage, the Malaysians, as hosts, are looking at a fairly broad-ranging discussion. This will be the first time that those 16 countries have got together at leaders level, but the ambition is very high and we will look at both strategic and economic issues.

Senator TROOD—We are talking here about economic issues and strategic issues obviously relating to East Asia, but of course it includes India, so it extends beyond East Asia. Have you thought through any specific questions in relation to strategic and economic issues? I can think of half-a-dozen issues that fall into each of those buckets that might be on the agenda. Has the Australian position been clarified on that yet or have you conceptualised our position?

Ms Bird—We are still in the process of talking, particularly to other potential participants in the East Asia Summit, about that agenda. We would not want to be too prescriptive at this stage. We think it is very important that leaders are able to address whatever the big issues of the day are for the region. As you said, there are a number of those that one can think of now. Terrorism obviously is a big issue. Regional pandemics are an issue that has got a lot of attention of late, so there are a range of issues that could be addressed. I think we will be careful not to tie leaders' hands too much and to allow them to have a real exchange of views on those big issues.

Senator TROOD—A summit of course is not an organisation; it is not an institution. Have you turned your mind to the possibility that at some point down the track the summit may be institutionalised in some way? Would you favour that development were it to occur?

Ms Bird—Issues that are still being looked at include how frequently the East Asia Summit will meet and what preparatory processes there might need to be. All of that is still being worked out at the moment. We are looking at making sure that leaders, when they get together, are able to have the sort of exchange that I have mentioned and look at the really big issues of the day, but how that preparatory process will be shaped and how frequently leaders will meet is something that probably will be decided at the first meeting by leaders themselves.

Senator TROOD—Is that true also of the leadership of the summit, if I can put it in those terms? Who will take the process forward? Kuala Lumpur is obviously hosting the first of the meetings. Is it anticipated, for example, that all the meetings will be held in ASEAN states, or will that be shared around amongst the members? Do you have an idea at this stage as to how that will evolve?

Ms Bird—That is another of the issues that is still being worked through. Whether it will always be hosted in an ASEAN state or whether non-ASEAN states parties will on occasion be able to host is again the sort of issue I would anticipate would be finally resolved by the summit itself.

Senator TROOD—We have a burgeoning number of regional organisations, some of which of course are better established than others. Some of the commentary on this in the public domain and in the academic domain, of course, has raised questions about how this summit process, if it becomes institutionalised, might relate to other institutions or organisations around the region—APEC, for example. What is the Australian view of that at the moment, if indeed there is one?

Ms Bird—It is a very interesting point because there are a number of different groupings which have in some cases overlapping memberships and some overlapping agendas. So it is a real challenge to make sure that each of these groupings has, really, its own rationale and purpose. From the Australian perspective, APEC remains an extremely important regional grouping. The ASEAN regional forum is also very important on the security side. So we are keen to ensure that the East Asia Summit, however the agenda develops and whatever its frequency, is able to consider issues in a way that value adds to what the other groups are doing. We think it is very important that each of them has a very clear purpose. We think that can be done, but it is something that will be worked out over, I think, the next few years.

Senator TROOD—So you do not see this necessarily evolving as a kind of umbrella organisation for the region? You see it as another part of the regional architecture—is that right?

Ms Bird—I think we see it as another piece of the puzzle, yes.

Senator WORTLEY—Will Australia's action of signing TAC affect the Five Power Defence Arrangements, ANZUS and other such agreements?

Ms Bird—No.

Senator WORTLEY—That was a very clear answer!

Mr WILKIE—Could you expand on that. Why will it not have an impact?

Ms Bird—That issue is covered by the first understanding set out in the exchange of correspondence between Mr Downer and Mr Somsavat, which was that our accession to the treaty will not affect Australia's obligations under other bilateral or multilateral agreements. That obviously includes ANZUS and FPDA and other treaties to which we are a party.

Mr WILKIE—What legal status then do the understandings have?

Ms Bird—The exchange of correspondence?

Mr WILKIE—Yes.

Ms Bird—They form part of this formal treaties process, so they are part of the documentation that surrounds Australia's accession to the treaty and are thus very important documents in that sense.

Mr WILKIE—Are they consistent with international and/or domestic law?

Ms Bird—We do not require any legislative action to put into effect our accession to the treaty.

Mr ADAMS—The original treaty was signed about 1987—the protocols were brought together.

Ms Bird—Yes.

Mr ADAMS—They were about the fundamental principles to guide the relations between the state parties—a mutual respect for sovereignty, independence, equity, territorial integrity et cetera. All those points are pretty well laid down, I think, in the UN charter. They are the ones we all agree to. These principles do not interfere with any other policies that Australia has at the moment?

Ms Bird—Not when you read the treaty alongside the understandings we have reached with ASEAN, no.

Mr ADAMS—And those understandings are in the correspondence you talk about?

Ms Bird—In the exchange of correspondence, yes.

Mr ADAMS—In the East Asia Summit, will trade be on the agenda? Is the agenda set yet?

Ms Bird—The agenda is still being worked through, but we anticipate it will look at strategic as well as economic issues, yes.

Mr ADAMS—Who does the secretarial work for the East Asia Summit?

Ms Bird—The first summit is being hosted by Malaysia, so Malaysia, as host, has a key role in the preparations for that meeting. I think the ASEAN secretariat is also assisting, but it is Malaysia, as host, that has the key role.

Mr ADAMS—The high council is the body set up to resolve disputes—and there have not been any disputes since 1987?

Ms Bird—The treaty was established in 1976.

Mr ADAMS—Right.

Ms Bird—But the high council has not actually been convened in the 30 years the treaty has been in existence.

Mr ADAMS—So there have been no disputes?

Ms Bird—There probably have been disputes, but they have been dealt with bilaterally or through other means. The high council, as such, has not been invoked.

ACTING CHAIR—So no disputes have been passed through or recommended through to that high council?

Ms Bird—The high council has never been convened.

ACTING CHAIR—Were that to happen, have we got a representative there?

Ms Bird—One of the understandings we reached covers a situation where there might be a dispute in which Australia was involved. If that were the case, we would be consulted on whether the high council would be convened. If we agreed to it being convened, we would also then be part of the high council for that dispute, yes.

Mr ADAMS—In relation to 1987 and 1998 and the expansion there, the non-ASEAN states worked out who was allowed to go—what was the change in 1998?

Ms Bird—In 1987, it opened it up for accession to other states in South-East Asia, and also states outside South-East Asia. In 1998, it determined which states could agree on new states parties, and basically the 10 ASEAN states are the ones who decide on whether or not a non-ASEAN country can accede to the treaty.

Mr ADAMS—And the 10 have maintained that position?

Ms Bird—Yes.

Mr ADAMS—Have we got a list of those states?

Ms Bird—Yes. I could just quickly read those out. There are the 10 ASEANs and then, in addition to the 10 ASEANs, you have Papua New Guinea, China, India, Japan, Pakistan, the Republic of Korea, Russia, Mongolia and New Zealand.

Senator TROOD—I would like to come back to a couple of other things. Are you anticipating at this stage that the members will expand beyond those who are intending to be there in December at the summit?

Ms Bird—That is another open question at the moment. Certainly the first summit will be those 16 participants. It will be up to the 16 participants to in a sense consider whether others might at some stage join. We anticipate that the three criteria laid down by ASEAN foreign ministers in Cebu at the summit will continue to be the criteria that will determine whether other states can join the East Asia Summit.

Senator TROOD—Are there any other natural participants of whom you are aware, lining up and wishing to become members?

Ms Bird—We understand there might be interest from others. I am not sure that it would be appropriate for me to mention them here, but I think it is a grouping that has attracted considerable interest. I would anticipate that other countries might seek to join. But, as I said, those three criteria established in Cebu will continue to be the ones that determine whether other states become parties.

Senator TROOD—Can you add anything to this, Mr Bliss?

Mr Bliss—No. Not at all. I think that is entirely the situation.

Senator TROOD—I was wondering whether or not there has been an expression of American opinion or policy on the matter and whether you could share that with the committee?

Ms Bird—I am not aware of the United States having said anything publicly about the East Asia Summit. I may be wrong. I am not sure if there is anything particular I can usefully add for this committee. I think they are following with interest what is happening. It is a new grouping. They would also, like others, be interested in its development.

Senator TROOD—Have they expressed any views to the department about it?

Ms Bird—We have talked to the United States about this and about a number of other issues. I think they understand why we are a member and they think that is a good thing.

ACTING CHAIR—Just in leading up to the summit in December and the pulling together of agenda items for the summit, where do you think Australia would like to see some of the focus? What sorts of agenda items would you like to see discussed at the summit? Has any consideration been given to that area?

Ms Bird—We are certainly looking at that and consulting with the ASEAN members of the East Asia Summit in particular and also the other key parties. As I said, we are not wanting to be too prescriptive at this stage. We would like to see it have a fairly general agenda, which would

allow leaders to look at whatever the big issues of the day are. Certainly, from our perspective, issues such as counter-terrorism will be very important. But there might be other issues that leaders could also usefully address. That is something we will be continuing to look at in the months leading up to the summit.

ACTING CHAIR—You would expect to be making some recommendations towards that agenda?

Ms Bird—Yes, certainly. We would expect to be—and we are being—consulted by the hosts, the Malaysians.

Mr WILKIE—Further to that, obviously with ASEAN meetings agreement is reached by consensus of the group before it goes forward. Do you envisage any recommendations coming out of the forum and what sort of process would take place to pass those?

Ms Bird—Sorry, I missed that question.

Mr WILKIE—I am wondering if there would be any outcomes coming out of the forum—for example, resolutions to do with the matters discussed? In an ASEAN forum, an agreement would be reached by consensus and then that would proceed.

Ms Bird—Right.

Mr WILKIE—Have you any idea about how that would operate at the forum—whether there would be decisions made, and how would those decisions be achieved?

Ms Bird—You mean at the East Asia Summit itself?

Mr WILKIE—Yes.

Ms Bird—We would anticipate that leaders would probably reach some sort of agreement on key issues or looking at ways ahead, and we would expect those to be recorded in a document, yes.

Mr WILKIE—So it would be similar to an ASEAN summit.

Ms Bird—I am not sure it would be similar to an ASEAN summit but, yes, some sort of outcomes document would be anticipated, yes.

Mr WILKIE—Given that it is such an important treaty for Australia, particularly as we will now be able to participate in that summit, what other consultations took place in relation to the agreement?

Ms Bird—As I indicated, there was an extensive series of consultations at officials level. Mr Downer was very actively engaged with his counterparts in the months leading up to the decision to accede and obviously there was also consultation within government to enable a decision to be reached.

Mr WILKIE—Was there any need to discuss it with the states?

Ms Bird—There is no legislative action coming out of this. My understanding is that, through your parliamentary treaties process, there will be consultations with the states and territories.

ACTING CHAIR—And in fact we have had some responses back from the different states. I thank each and every one of you for your time this morning. We are all going to be watching with interest as this goes forward, particularly for our country and being a party to the treaty. We will, of course, be watching with interest the summit in December. On behalf of the committee, I thank you for your time this morning.

Resolved (on motion by **Mr Wilkie**):

That this committee authorises publication, including publication on the parliamentary database, of the transcript of the evidence given before it at public hearing this day.

Committee adjourned at 10.34 am