U.S. Accession to the Association of Southeast Asian Nations' Treaty of Amity and Cooperation (TAC)

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Summary

On July 22, 2009, during Secretary of State Hillary Rodham Clinton's visit to Southeast Asia, the United States acceded to the Association of Southeast Asian Nations' (ASEAN) Treaty of Amity and Cooperation (TAC), one of the 10-nation organization's core documents, as had been amended by the 1987 and 1998 TAC Protocols. The move came less than six months after Secretary of State Clinton announced in Jakarta that the Obama Administration would launch its formal interagency process to pursue accession. This report analyzes the legal and diplomatic issues involved with accession to the TAC.

ASEAN is Southeast Asia's primary multilateral organization. Its 10 member-nations include over 500 million people. Collectively, ASEAN is one of the United States' largest trading partners, constituting about 5%-6% of total U.S. trade. Geographically, Southeast Asia includes some of the world's most critical sea lanes, including the Straits of Malacca, through which pass a large percentage of the world's trade. The TAC was first negotiated in 1976 and subsequently amended to allow non-regional countries to accede. Fifteen countries have done so, including U.S. allies Japan, South Korea, and Australia, as well as China, Russia, and India.

Within ASEAN, accession to the TAC by non-members often is seen as a symbol of commitment to engagement in Southeast Asia, and to the organization's emphasis on multilateral processes. The United States is the last major Pacific power to have acceded. The fact that the United States was not a party to the TAC had been one of many pieces of evidence that Southeast Asian leaders cited in arguing that the United States neglected Southeast Asia generally, and ASEAN specifically. Southeast Asian leaders generally have welcomed the Obama Administration's move, which seems to be designed to boost the United States' standing in Southeast Asia by expanding the multilateral component of U.S. policy in the region. Some U.S. and Southeast Asian officials and analysts say that expanding U.S. engagement with ASEAN will help boost Southeast Asia's political stature, particularly as China seeks to continue expanding its influence in the region.

The major concern with accession is whether the TAC's emphasis on non-interference in other countries' domestic affairs will constrain U.S. freedom of action, particularly its ability to maintain or expand sanctions on Burma. Proponents of accession often note that Australia has imposed and expanded financial and travel restrictions on Burma since it acceded in 2005. Canberra's restrictions are far less extensive than the sanctions the United States maintains on Burma. The Administration and ASEAN negotiated and exchanged side letters designed to alleviate these concerns. Other objections to accession included arguments that it will accord greater legitimacy to the ruling Burmese junta; a view that ASEAN is insufficiently "action-oriented"; and a belief that the TAC is an untested, arguably ineffectual agreement.

One issue for U.S. policymakers was whether accession to the TAC should take the form of a treaty, subject to the advice and consent of the Senate, or whether the President already has sufficient authority to enter the TAC without further legislative action being necessary. Ultimately, after consulting with selective offices in the Senate, the Administration decided that accession would take the form of an executive agreement, which does not require Senate approval.

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Introduction

On July 22, 2009, in Phuket, Thailand, Secretary of State Hillary Rodham Clinton and representatives from the 10-member Association of Southeast Asian Nations' (ASEAN) signed the Instrument of Extension and the Instrument of Accession to ASEAN's Treaty of Amity and Cooperation (TAC). Secretary Clinton was in Thailand to attend the annual ASEAN Regional Forum Foreign Ministerial. The move came less than six months after she had announced, during a visit to Jakarta, that the Obama Administration would launch its formal interagency process to pursue accession.[1] One of ASEAN's pillars, the TAC was first negotiated in 1976 and subsequently amended to allow non-regional countries to accede.[2] The Administration's move is designed to symbolically boost the United States' standing in Southeast Asia by expanding the multilateral component of U.S. policy in the region. Following consultations with selective offices in the Senate, the Administration decided that accession would take the form of an executive agreement, which does not require Senate approval.

The debate over whether the United States should accede to the TAC raised at least three issues for the Obama Administration and the Congress:

1. how would accession to the TAC advance U.S. interests in Southeast Asia?
2. would accession to the TAC constrain U.S. policy in Southeast Asia, particularly with respect to Burma?
3. should the Administration send the TAC to the Senate for ratification?

Periodically, Congressional measures have called attention to ASEAN and/or called for upgrading U.S. engagement with ASEAN. In the 109th Congress, the Senate passed by unanimous consent S. 2697 (Lugar), the United States Ambassador for ASEAN Affairs Act, which mandated the naming of an Ambassador to the organization. None of the congressional measures dealing with U.S. engagement with ASEAN mentioned U.S. accession to the TAC.

Overview of U.S. Interests in the TAC, ASEAN, and Southeast Asia

Motivations for and Reservations Against Acceding to the TAC

The Obama Administration's primary motivation for acceding to the TAC appears to have been to send a signal that the United States seeks to upgrade its presence in Southeast Asia.[3] Many leaders

[1] State Department, "United States Accedes to the Treaty of Amity and Cooperation in Southeast Asia," press release, July 22, 2009 (hereinafter "State Dept. press release"); State Department, "Beginning a New Era of Diplomacy in Asia. Remarks With ASEAN Secretary General Dr. Surin Pitsuwan," press release, February 18, 2009, http://www.state.gov/secretary/rm/2009a/02/119422.htm. ASEAN's 10 members are Brunei Darussalam, Burma (Myanmar), Cambodia, Indonesia, Laos, Malaysia, Philippines, Singapore, Thailand, and Vietnam.

[2] Treaty of Amity and Cooperation in Southeast Asia, done on February 24, 1976 in Bali, Indonesia (hereinafter "TAC"), available at http://www.aseansec.org/1217.htm.

[3] See State Dept. press release, *supra* footnote 1.

in the region have felt neglected by the United States in recent years.[4] ASEAN leaders have long viewed the TAC not only as a constitutional document for the organization, but also as establishing guiding principles that have built confidence among members, thereby contributing to maintaining regional peace and stability.[5] Accession to the TAC by non-members often is seen as a symbol of their commitment to engagement in Southeast Asia and the organization's emphasis on multilateral processes. As shown in **Table 1**, prior to July 2009, the United States was the only major Pacific power that had not joined the TAC; traditionally, the U.S. presence in Southeast Asia has been organized primarily along bilateral lines.

Table 1. The 16 Non-ASEAN Countries that Have Acceded to the TAC

Papua New Guinea (5 July 1989)	Pakistan (2 July 2004)	New Zealand (28 July 2005)	Sri Lanka (30 July 2007)
China (8 October 2003)	Republic of Korea (27 November 2004)	Australia (10 December 2005)	Bangladesh (30 July 2007)
India (8 October 2003)	Russian Federation (29 November 2004)	France (13 January 2007)	Democratic People's Republic of Korea (24 July 2008)
Japan (2 July 2004)	Mongolia (28 July 2005)	Timor-Leste (13 January 2007)	United States (22 July 2009)

Source: Adapted by CRS from ASEAN Secretariat website, Jakarta, in English February 18, 2009.

Additionally, acceding to the TAC is also one of the three requirements for joining the East Asia Summit (EAS), a four-year old forum that features an annual meeting among the heads-of-state of the ASEAN members, China, Japan, South Korea, India, Australia, and New Zealand. The other two requirements are dialogue partnership and significant economic relations with ASEAN, both of which the United States already meets. It is unclear whether the Obama Administration plans to join the EAS, or to what extent U.S. participation would be resisted by EAS members, particularly China and Malaysia, which in the past have voiced reservations with U.S. participation. Australia's accession to the TAC in 2005, which reversed years of official policy, was primarily motivated by Canberra's desire to be a founding member of the EAS.

Joining the TAC had been proposed by many in the Asia policy community for several years, and the idea was debated in the George W. Bush Administration. Objections to joining the TAC included arguments that the TAC's emphasis on non-interference in domestic affairs (particularly in Articles 2, 10, and 13) would constrain U.S. freedom of action, particularly its ability to penalize Burma; a concern that the treaty would undermine U.S. security agreements with Asian allies, notably Japan, South Korea, and Australia; a belief that acceding would accord greater legitimacy to the ruling Burmese junta; a view that ASEAN is insufficiently "action-oriented"; and a belief that the TAC is an ineffectual, largely symbolic agreement.

Proponents of accession countered that the decisions by U.S. allies Australia, South Korea, and Japan to accede to the TAC should negate concerns that the TAC would constrain U.S. policy and/or undermine U.S. alliances. As discussed in detail below, as part of their accession

[4] For instance, in introducing Secretary of State Clinton during her visit to the ASEAN Secretariat, ASEAN Secretary General Surin Pitsuwan said, "your visit shows the seriousness of the United States to end its diplomatic absenteeism in the region." State Department, "Beginning a New Era of Diplomacy in Asia," press release, February 18, 2009.

[5] *See* Michael Bliss, "Amity, Cooperation, and Understanding(s): Negotiating Australia's Entry into the East Asia Summit," 26 Australian Book of Int'l L. 63, 79 (2006).

negotiations, Australia and South Korea both signed side letters with ASEAN that were designed to alleviate similar concerns. (See **Appendix B**.) Along the same lines, Japan reached an understanding with ASEAN prior to its accession to the TAC. Following the Australian and South Korean model, the Obama Administration negotiated and exchanged side letters with the Chairman of ASEAN (who in July 2009 was the Thai Foreign Minister) designed to prevent the TAC from constraining U.S. foreign policy actions.

During the debate over accession, Australia's October 2007 promulgation of targeted financial and travel restrictions on over 400 members of the Burmese regime in the aftermath of the regime's September 2007 crackdown against peaceful protesters was cited as evidence that the TAC would not necessarily constrain U.S. policy. Australia, like Japan, has generally followed a policy of quiet engagement of Burma, seasoned with occasional public criticisms and targeted penalties. Canberra's restrictions against the Burmese regime are not nearly as expansive as U.S. sanctions.[6] During its first weeks in office, the Obama Administration announced it would initiate a review of U.S. policy toward Burma. During her February 2009 visit to Asia, Secretary Clinton said that neither sanctions nor the engagement strategies pursued by ASEAN members were working.[7]

U.S. Interests in Southeast Asia

One of the world's largest regional groupings, ASEAN is Southeast Asia's primary multilateral organization. Its 10 member-nations include over 500 million people. Geographically, Southeast Asia includes some of the world's most critical sea lanes, including the Straits of Malacca, through which pass a large percentage of the world's trade. The straits also are important routes for U.S. naval deployments around the globe, including the Middle East and South Asia. Southeast Asia has served as a center and a base for terrorist operations by radical Islamist groups, including Al Qaeda, though the threat posed by such indigenous groups appears to have been significantly reduced since the middle of the decade. The region is a key source and transmission point for many of the world's "human security" problems, including smuggling, narcotics trafficking, piracy, human trafficking, and the spread of contagious diseases such as avian influenza.

Southeast Asia is home to Indonesia, the world's most populous Muslim nation, which is important to the United States for its size, its democratic example for other majority-Muslim countries, and its status as one of the world's largest carbon emitters, largely by virtue of the rapid pace of deforestation. U.S. relations with Malaysia, another core majority-Muslim ASEAN member, also have global and regional importance because of Malaysia's democratic and economic example (it is a middle income country) and because of its attempts to mediate long-running conflicts between Christian and Muslim factions in the southern Philippines.[8] The region

[6] For more on Australia's policy toward Burma, see Australian Department of Foreign Affairs and Trade, *Burma Country Brief—March 2009*; Andrew Selth, "Burma's 'Saffron Revolution' and the Limits of International Influence," *Australian Journal of International Affairs*, vol. 62, no. 3 (September 2008). For more on U.S. policy toward Burma, see CRS Report RL33479, *Burma-U.S. Relations*, by (name redacted), and CRS Report RS22737, *Burma: Economic Sanctions*, by (name redacted) and (name redacted).

[7] State Department, "Working Toward Change in Perceptions of U.S. Engagement Around the World; Roundtable with Traveling Press," Seoul, South Korea, February 20, 2009.

[8] For more, see CRS Report RL33878, *U.S.-Malaysia Relations: Implications of the 2008 Elections*, by (name redac ted), and CRS Report RL33233, *The Republic of the Philippines: Background and U.S. Relations*, by (name redacted) and (name redacted).

also includes two formal U.S. treaty allies with functioning, although sometimes troubled, democracies—Thailand and the Philippines—as well as another close U.S. security partner, Singapore.

Furthermore, diplomatically and strategically, Southeast Asia is the site of a contest for influence among China, the United States, and to a lesser extent Japan. China in particular has expanded its presence and influence in Southeast Asia since the early 2000s. Some commentators have argued that Beijing's increased presence has jeopardized U.S. influence. Others contest this assertion, arguing that the U.S. and China are not locked in a "zero sum" situation in Southeast Asia, that some of China's actions since 2007 have made some Southeast Asians wary of Beijing's actions, and/or that Chinese diplomacy in Southeast Asia is perceived as successful because China has tended to prioritize areas of mutual agreement while putting off issues that are more difficult to resolve.[9] Regardless of whether U.S. interests are materially threatened, China's increased presence in Southeast Asia has made many Southeast Asian leaders eager for a strong U.S. presence in the region.[10] Indeed, one factor motivating the United States' increased engagement with ASEAN in the 2000s has been the desire to support Southeast Asia's political stature as China expands its influence in the region.

U.S.-ASEAN Economic Relations

Collectively, ASEAN is a major U.S. trading partner. Total trade between the United States and the 10 ASEAN countries in 2008 totaled $178 billion. If ASEAN were treated as a single trading partner, it would rank as the fourth largest U.S. export market (at $68.2 billion) and the fifth largest source of U.S. imports (at $110.2 billion) in 2008.[11] Since 2005, between 5%-6% of total U.S. exports by value have been shipped to the ASEAN market, slightly more than exports to Japan. Over the same period, ASEAN has been the source for about 5%-6% of total U.S. imports. ASEAN's share of U.S. trade has fallen since 1995, when it was the destination for nearly 7% of U.S. exports and the source of 8.5% of U.S. imports, by value.[12]

Many analysts who see China as a growing power in East Asia point to the surge in its trade with ASEAN countries vis-a-vis that with the United States. **Table 2** compares Chinese and U.S. trade with ASEAN for 1995, 2005, and 2008.[13] Over this period, China's trade with ASEAN has expanded sharply in terms of trade volume, percentage increase, and size relative to U.S. trade levels.[14]

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[9] For a summary of this debate, see CRS Report RL32688, *China-Southeast Asia Relations: Trends, Issues, and Implications for the United States*, by (name redacted) and (name redacted).

[10] *See* Bates Gill et al., *Strategic Views on Asian Regionalism: Survey Results and Analysis*, Center for Strategic and International Studies, Washington, DC, 2009.

[11] These rankings would fall to 5th and 6th respectively, if the 27 countries that make up the European Union are treated as a single trading entity.

[12] Compiled by CRS from U.S. Dept. of Commerce, Bureau of Census via World Trade Atlas.

[13] The global economic crisis has sharply diminished U.S. and Chinese trade with ASEAN in 2009. From January-August 2009, U.S. and Chinese exports to ASEAN were down 30.6% and 18.3%, respectively, over the same period in 2008. U.S. and Chinese imports from ASEAN were down 21.9% and 24.0%, respectively. During this period, ASEAN accounted for 8.6% of China's exports and 5.0% of U.S. exports; it also accounted for 10.3% of China's imports and 5.9% of U.S. imports. These data indicate that the relative importance of ASEAN to China as a trading partner has continued to grow (in the case of exports) or remain steady (in the case of imports) in 2009, but for the United States, the importance of ASEAN trade (both exports and imports) has declined.

[14] This is in line with China's overall trade trends. Between 1995 and 2008, China's global exports and imports rose by (continued...)

Table 2. U.S. and Chinese Trade with ASEAN: Selected Years

	1995	2005	2008	2008/1995 % change
China's Exports to ASEAN ($millions)	10,474	55,459	114,139	989.7
U.S. Exports to ASEAN ($millions)	39,676	49,637	68,151	71.8
China's Exports to ASEAN as a Percent of Total Exports (%)	7.0	7.3	8.0	—
U.S. Exports to ASEAN as a Percent of Total Exports (%)	6.8	5.5	5.2	—
China's Imports From ASEAN ($millions)	9,901	75,017	116,933	1,081.0
U.S. Imports From ASEAN ($millions)	62,176	98,915	110,157	77.2
China's Imports From ASEAN as a Percent of Total (%)	7.5	11.4	10.3	—
U.S. Imports From ASEAN as a Percent of Total (%)	8.4	5.9	5.3	—
China's Total Trade With ASEAN ($millions)	20,375	130,476	231,072	1,034.1
U.S. Total Trade With ASEAN ($millions)	101,852	148,522	178,308	75.1
China's Total Trade With ASEAN as a % of its Total Trade (%)	7.3	9.2	9.0	—
U.S. Total Trade With ASEAN as a % of its Total Trade (%)	7.7	5.8	5.2	—

Source: World Trade Atlas.

Note: Based on official Chinese (PRC) and U.S. trade data. Current dollars.

Table 3 provides trade data on the importance of the United States, as well as of China, from ASEAN's perspective (i.e., using ASEAN trade data). These data indicate that:

- From 1995 to 2007, the share of ASEAN's imports that came from China increased from 2.2% to 12.7%, while the share that came from the United States dropped from 14.6% to 9.6%.
- From 1995 to 2008, the share of ASEAN exports that went to China rose from 2.1% to 9.7%, while the share of ASEAN's exports that went to the United States fell from 18.5% to 11.5%.

(...continued)

860% and 757%, respectively. U.S. exports and imports rose by 123% and 182%, respectively. For instance, in 1995, U.S. exports to ASEAN were nearly three times those of China, but in 2008, China's exports exceeded those of the United States by 75%. In 1995, U.S. imports from ASEAN were more than six times those of China, but in 2008, China's imports exceeded those of the United States by 6%. As the table shows, ASEAN's economic importance to China has increased; from 1995 to 2008, ASEAN's share of China's total trade rose from 7.3% to 9.0%. On the other hand, the importance of ASEAN for U.S. trade has declined over this period: from 6.8% to 5.2% for U.S. exports, and from 8.4% to 5.3% for imports.

According to ASEAN official data, in 2008 (the latest year in which comprehensive ASEAN trade data are available), its top trading partners (excluding intra-ASEAN trade) were Japan (11.4% of total), the European Union (11.8%), China (11.3%), and the United States (10.6%). The United States was ASEAN's third largest export market and its fourth largest source of imports, while China was ASEAN's fourth largest export market and its largest source of imports.

Table 3. ASEAN Trade with the United States and China, Selected Years, as a Percent of Total ASEAN Trade

ASEAN Imports (% of total)					
	1995	2000	2006	2007	2008
United States	14.6	14.0	9.8	9.6	9.6
China	2.2	5.2	11.5	12.7	12.9

ASEAN Exports (% of total)					
	1995	2000	2006	2007	2008
United States	18.5	18.0	12.9	12.3	11.5
China	2.1	3.5	8.7	9.1	9.7

Sources: ASEAN Secretariat, World Trade Atlas, Asian Development Bank, and International Monetary Fund.

The United States is a bigger source of ASEAN's foreign direct investment (FDI) than China (although the European Union and Japan are the two largest investors). During 2006-2008, cumulative U.S. FDI flows to ASEAN were $12.8 billion (or 8.2% of the total), making the United States ASEAN's third largest source of FDI (excluding FDI flows from other ASEAN countries). Over this period, China's FDI flows to ASEAN totaled $3.5 billion or 1.9% of the total, making China the ninth largest source of ASEAN's FDI. In 2008, U.S. FDI flows to ASEAN totaled $3.0 billion versus $619 million from China. (See **Table 4**.)

Table 4. FDI Flows to ASEAN From the EU, Japan, the United States, and China: 2006-2008

($ millions and % of total)

	2008		2006-2008 (Cumulative)	
	Value	Percent of Total[a]	Value	Percent of Total[a]
European Union	13,125	27.0	42,180	27.0
Japan	7,157	14.7	25,768	16.5
United States	3,013	6.2	12,777	8.2
China	619	1.3	3,520	1.9
Total outside FDI flows to ASEAN[a]	48,619	—	156,076	—

Source: ASEAN Secretariat.

a. Data excludes intra-ASEAN FDI flows.

ASEAN's History and Evolution

Established in 1967 with five original members, ASEAN has evolved from its original Cold War-era goal of containing Chinese and Vietnamese communism.[15] Increasingly, ASEAN is a vehicle for Southeast Asian nations to resolve problems through the "ASEAN way" of informal, consensus-based, and confidence-building efforts rather than through binding commitments or agreements. Since the early 1990s, ASEAN also has been playing a leading role in moving the countries of East Asia toward organizing into cooperative multilateral arrangements. ASEAN often takes the lead in building multilateral institutions because it is viewed as less threatening than China or Japan.[16] Some analysts speculate that this role of neutral convener may be losing some of its utility, as evidenced by the first-ever standalone China-Japan-South Korea tripartite summit in December 2008. Follow-on summits are expected. Previously, the leaders of the three countries had met only on the sidelines of the annual ASEAN "Plus Three" gathering.

ASEAN's consensus-based decision-making and policy of non-interference in members' affairs have led some commentators, particularly from outside the region, to dismiss the organization as a mere "talk shop." They cite ASEAN's ineffectiveness in dealing with transnational issues like drug trafficking, human trafficking, wildlife trafficking, and illegal logging. ASEAN also has not appeared to play a role in some conflicts among members, such as the 2008 and 2009 border skirmishes between Thailand and Cambodia.[17] Indeed, frustrations with ASEAN's internal procedures, continued difficulties with Burma, and the expansion of non-ASEAN regional groupings in Asia have led some prominent Southeast Asians to publicly call attention to ASEAN's limitations.[18]

However, many Southeast Asians contend that ASEAN has been critical to fostering stability, reducing conflict, and promoting trade and economic growth. In the 2000s, some ASEAN members—particularly Indonesia and the Philippines—have pushed to expand the organization's powers. These moves often have been resisted by other members, particularly Vietnam, Cambodia, and Burma. For instance, in 2008, ASEAN adopted a new charter, early drafts of which included provisions for sanctions and a system of compliance monitoring for ASEAN agreements. However, these items eventually were stripped from the charter.[19] In July 2009, ASEAN's Foreign Ministers approved the creation of the organization's first-ever human rights body. The ASEAN Intergovernmental Commission on Human Rights is designed to focus on promoting human rights. The body, launched in October 2009, will not have the power to penalize human rights violations and/or violators.

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[15] ASEAN's founders were Indonesia, Malaysia, the Philippines, Singapore, and Thailand. Brunei joined in 1984, Vietnam in 1995, Laos and Burma in 1997, and Cambodia in 1999.

[16] For more, see CRS Report RL33653, *East Asian Regional Architecture: New Economic and Security Arrangements and U.S. Policy*, by (name redacted).

[17] For more on U.S.-ASEAN relations generally and the debate over TAC accession specifically, see Satu Limaye, "United States-ASEAN Relations on ASEAN's Fortieth Anniversary: A Glass Half Full," *Contemporary Southeast Asia*, Vol. 29, No. 3 (2007); Ellen Frost, "Re-Engaging with Southeast Asia," Japanese Institute of Global Communications Commentary, July 28, 2006, http://www.glocom.org/debates/20060728_frost_re/index.html; and Richard Cronin, "The Second Bush Administration and Southeast Asia," July 2007, http://www.stimson.org/pub.

[18] See Jusuf Wanandi, "Remodeling Regional Architecture," PacNet #13, February 18, 2009.

[19] For a brief summary of ASEAN's evolution and the debate over the charter, see Julie Ginsberg, "ASEAN: The Association of Southeast Asian Nations," February 25, 2009, Council on Foreign Relations website, http://www.cfr.org.

Overview of TAC Provisions

The TAC establishes general principles governing the relations between State parties, with the intention of promoting "perpetual peace, everlasting amity and cooperation" within Southeast Asia.[20] Towards this end, it provides a mechanism for the pacific settlement of regional disputes between TAC parties. As drafted in 1976, the TAC was open to ratification by the five original members of ASEAN, and was only open to accession by other Southeast Asian States. The TAC was subsequently amended in 1987 to permit the accession of States outside Southeast Asia with the consent of the five ASEAN members, and to establish rules concerning when States outside Southeast Asia could participate in the agreement's dispute-settling mechanism.[21] The TAC was further amended in 1998 to reflect the expansion of ASEAN to 10 members, and to make accession to the TAC by any additional States outside Southeast Asia contingent upon the approval of all 10 ASEAN members.[22]

Article 1 of the TAC announces that the purpose of the agreement is to promote peace and cooperation among the parties. Article 2 provides that in their relations with one another, parties shall be guided by six principles:

- 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 means;
- Renunciation of the threat or use of force; and
- Effective cooperation among themselves.

While TAC Article 2 describes these principles as "fundamental," it does not specify that they are the sole principles that may inform relations between parties.

TAC Article 3 obliges parties to endeavor to develop and strengthen their mutual relations and fulfill their obligations under the agreement in good faith.[23]

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[20] TAC, art. 1.

[21] Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia, done on December 15, 1987, in Manila, Philippines, available at http://www.aseansec.org/1218.htm. While States outside Southeast Asia may accede to the TAC, membership in ASEAN is limited to Southeast Asian States.

[22] Second Protocol Amending the Treaty of Amity and Cooperation in Southeast Asia, done at Manila, Philippines, July 25, 1998, available at http://www.aseansec.org/702.htm.

[23] Even in the absence of this express language, customary international law establishes that parties to an agreement must execute their obligations in good faith. See Restatement (Third) of Foreign Relations § 321 (1987) (recognizing that "every international agreement in force is binding upon the parties to it and must be performed by them in good faith"); Vienna Convention on the Law of Treaties, entered into force Jan. 27, 1980, 1155 U.N.T.S. 331 (hereinafter "Vienna Convention"), arts. 26, 31. Although the United States has not ratified the Vienna Convention, it recognizes it as generally signifying customary international law. See, e.g., Fujitsu Ltd. v. Federal Exp. Corp., 247 F.3d 423 (2nd Cir. 2001) ("we rely upon the Vienna Convention here as an authoritative guide to the customary international law of treaties ... [b]ecause the United States recognizes the Vienna Convention as a codification of customary international (continued...)

TAC Articles 4-9 outline party obligations concerning mutual cooperation. Articles 4 and 5 provide that parties shall promote and strengthen active cooperation in the economic, social, technical, scientific and administrative fields on the basis of equality, non-discrimination and mutual benefit. Articles 6 and 7 provide that parties shall collaborate (including through the use of international and regional organizations outside Southeast Asia) to accelerate the region's economic growth, including through promotion of greater use of parties' agriculture and industries, the expansion of trade, and the improvement of economic infrastructure. Article 8 states that parties shall strive to achieve cooperation in the form of training and research facilities in the social, cultural, technical, scientific and administrative fields. Article 9 provides that parties shall retain regular contacts with one another on international and regional matters with a view towards coordinating their policies.

TAC Article 10 provides that no party shall "in any manner or form participate in any activity which shall constitute a threat to the political and economic stability, sovereignty, or territorial integrity of another High Contracting Party." The agreement does not elaborate on the types of activity constituting a "threat" to the political or economic stability, sovereignty, or territorial integrity of another party, or what type of conduct is intended to be barred by the agreement's prohibition on "participat[ion] in any activity" constituting a threat to another party. Presumably, prohibited activity would have to be of a particularly severe nature to constitute a threat to the stability, sovereignty, or integrity of another TAC party.[24]

TAC Articles 11 and 12 provide that parties shall endeavor to promote national and regional resilience.

TAC Articles 13-17 concern the pacific settlement of disputes between parties. Article 13 states that parties shall act in good faith to prevent disputes from arising between them. Parties are obliged to "refrain from the threat or use of force," and are instead called upon to settle disputes "through friendly negotiations." Towards that end, Article 14 establishes a High Council, composed of a ministerial level representative of each State party, to resolve disputes. As amended by the 1987 Protocol, the dispute settlement system established by Article 14 is only applicable to State parties outside Southeast Asia when those States are "directly involved in the dispute to be settled."

TAC Article 15 states that in cases where disputes cannot be settled via direct negotiation between TAC parties, the High Council shall take cognizance of the matter and recommend an appropriate means of settlement, such as good offices, mediation, inquiry, or conciliation. The High Council may also, with the consent of the parties to the dispute, act as a committee for mediation, inquiry, or conciliation. When necessary, the Council shall also recommend appropriate measures to

(...continued)

law ... and [it] acknowledges the Vienna Convention as, in large part, the authoritative guide to current treaty law and practice") (internal citations omitted).

[24] For example, the practice of TAC parties in their mutual relations, and more generally in the context of international State practice, suggests that economic sanctions are not typically viewed as an impermissible threat to the sovereignty or integrity of another State. See generally Note, "Economic Sanctions" 11 U. Miami Int'l & Comp. L. Rev. 115 (2003) (discussing legality of economic sanctions under international law). See also Australian Dept. of Foreign Affairs and Trade, "Australian Autonomous Sanctions: Burma," at http://www.dfat.gov.au/un/unsc_sanctions/burma.html (listing sanctions imposed by Australia, a party to the TAC, against Burma, a fellow TAC party and also a member of ASEAN).

prevent further deterioration of the situation. TAC parties are not legally compelled to abide by the High Council's recommendations.

TAC Article 16 limits application of Article 15 to instances where all parties to the dispute agree to its application. Perhaps for this reason, the High Council has never been convened to resolve a dispute arising under TAC.[25]

TAC Article 17 states that nothing in the agreement precludes parties from seeking recourse pursuant to the modes of peaceful settlement contained in Article 33(1) of the U.N. Charter. Article 33(1) of the Charter provides that U.N. Member States that are parties to a dispute threatening international peace and security shall "seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, [and may] resort to regional agencies or arrangements, or other peaceful means of their own choice." TAC Article 17 also states that parties are encouraged to resolve disputes through friendly negotiations "before resorting to the other procedures provided for in the Charter of the United Nations."[26] This language appears intended to ensure that TAC's dispute-resolution requirements are not interpreted as violating Article 103 of the U.N. Charter, which provides that Member States' obligations under the U.N. Charter override any conflicting obligations under other international agreements.

TAC Articles 18-20 relate to treaty ratification and accession, entry into force, and the authoritative text of the agreement. As amended by the 1987 and 1998 Protocols, Article 18 provides that accession of any State outside Southeast Asia is subject to the consent of all the States in Southeast Asia, which the agreement expressly lists as the 10 current members of ASEAN. Article 19 describes the procedure by which TAC entered into force. Article 20 notes that the treaty is drawn in the equally authoritative language of all contracting parties. A common English text has also been agreed upon, with any divergent interpretation of the common text to be settled by negotiation.

The TAC does not contain provisions concerning withdrawal from the agreement by a State party, the agreement's relationship to other multilateral or bilateral agreements to which TAC parties may belong,[27] or the remedies available to a party in the event that its rights under the agreement are violated by another party and neither direct negotiation by the parties nor the assistance from the High Council resolves the violation. These matters would presumably be handled in accordance with customary practice, absent evidence of a contrary understanding by TAC parties.[28]

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[25] See Bliss, *supra* footnote 5, at 79 (noting that "the High Council has never actually convened to consider a dispute under the Treaty").

[26] For example, the U.N. Charter established the International Court of Justice (ICJ), which serves as the "principle judicial organ of the United Nations." U.N. Charter, art. 92. The ICJ may settle international legal disputes between States, and also provide advisory opinions on legal matters referred to it by the U.N. Security Council, General Assembly, or other authorized U.N. bodies. See generally id. at chpt. XIV; Statute of the International Court of Justice, 59 Stat. 1055, T.S. No. 993 (1945), at chpts. II, IV. Each U.N. Member State "undertakes to comply" with any ICJ decision in a case to which it is a party. U.N. Charter, art. 94.

[27] Although TAC Article 17 describes the agreement's relationship with Article 33(1) of the U.N. Charter, it does not explain the agreement's relationship with the U.N. Charter as a whole. For discussion of the TAC's relationship with the U.N. Charter, see *infra* at "Right to Individual and Collective Self-Defense" and "Relationship Between the TAC and Other Agreements Concerning Human Rights, Trade, Terrorism, Transnational Crime, and Other Matters."

[28] See Vienna Convention, arts. 31-32 (describing general rules for treaty interpretation).

Negotiation of Accession to the TAC

TAC Article 18, as amended, requires the consent of all ASEAN members before candidate States may accede to the agreement. Formal exchanges of correspondence and consultation between ASEAN members and candidates for accession to the TAC are generally made between the candidate and the ASEAN Chairman. In some instances, a candidate will sign a declaration signifying its intent to accede to the TAC contingent upon completion of any necessary domestic procedures.[29] If all ASEAN Members consent to a candidate's proposed accession to the TAC, the Chairman is authorized to sign a preliminary declaration of consent to accession on behalf of ASEAN Members.[30] The accession process is completed once all ASEAN foreign ministers sign an instrument formally consenting to the candidate party's accession to the TAC,[31] and the candidate party signs and submits the instrument of accession.[32] The instrument of accession is typically signed and deposited by the acceding State's foreign minister.

Negotiations regarding accession to the TAC may raise issues related to the interpretation and application of the agreement's provisions. In many cases, a party will attach a reservation, declaration, or understanding to an agreement at the time of accession or ratification when questions or concerns arise regarding an agreement's potential application. The TAC does not contain a provision barring this practice. However, ASEAN members have historically been unwilling to permit an acceding State to make a reservation or declaration upon accession.[33]

Some States seeking to accede to the TAC have instead sought to reach common understandings with ASEAN members regarding the interpretation of certain TAC provisions, and have recorded these shared understandings in an exchange of notes ("side letters") with the ASEAN Chairman prior to acceding to the TAC.[34] Although these side letters are not understood to amend or modify the TAC, they may serve as important interpretative guidance as to the meaning of its provisions. The Vienna Convention on the Law of Treaties, which is recognized as an authoritative guide to treaty law and practice, states that "any instrument which was made by one or more parties in

[29] See Declaration of Intention to Accede to the Treaty of Amity and Cooperation in Southeast Asia by Australia, signed July 28, 2005, available at http://www.aseansec.org/17624.htm; Declaration on Accession to the Treaty of Amity and Cooperation in Southeast Asia by Japan, signed December 25, 2003. As discussed *infra*, whether U.S. accession to the TAC requires further action by the legislative branch (e.g., the Senate providing advice and consent to accession) may be an issue for U.S. policymakers. In general, it appears that States with presidential or semi-presidential systems of government that have acceded to the TAC have not submitted the agreement to their legislative bodies for approval prior to accession.

[30] See Australian Department of Foreign Affairs and Trade, Report to the Joint Standing Committee on Treaties, "National Interest Analysis of Treaty of Amity and Cooperation with Southeast Asia" (2005) (hereinafter "Australian Analysis of TAC"), at 1, 3, available at http://www.aph.gov.au/House/committee/jsct/9august2005/treaties/tac_nia.pdf.

[31] See, e.g., Instrument of Extension of the Treaty Of Amity And Cooperation In Southeast Asia to India, October 8, 2003, available at http://www.aseansec.org/15280.htm; Instrument of Extension of the Treaty of Amity and Cooperation in Southeast Asia to Republic of Korea, November 27, 2004, available at http://www.aseansec.org/16625.htm.

[32] See, e.g., Instrument of Accession to the Treaty Of Amity And Cooperation In Southeast Asia by the Russian Federation, November 29, 2004 , available at http://www.aseansec.org/16638.htm; Instrument of Accession to the Treaty Of Amity And Cooperation In Southeast Asia by the People's Republic of China, October 8, 2003, available at http://www.aseansec.org/15271.htm.

[33] Bliss, *supra* footnote 5, at 80-81.

[34] See generally id. See also **Appendix A** (side letter from United States to ASEAN Chairman); **Appendix B** (side letters between Australia and ASEAN).

connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty" may be relied upon to assist in interpreting the underlying treaty.[35]

The United States memorialized its understanding of certain TAC requirements during communications with the ASEAN Chairman regarding its proposed accession. This side letter is attached as **Appendix A**. Similar communications appear to have been made by Australia, South Korea, Japan, and New Zealand when they acceded to the TAC. Most of these communications have not been made publicly available. However, the side letters memorializing understandings reached by Australia with ASEAN members during the TAC accession process are attached as **Appendix B**.

Form of U.S. Accession to the TAC

One of the most notable issues that U.S. policymakers were required to consider when contemplating whether to join the TAC was the form that U.S. accession should take. Legally binding international agreements entered into by the United States take the form of either a treaty or an executive agreement.[36] If an agreement is entered into as a treaty, the Senate must provide its advice and consent by a two-thirds majority for the agreement to become "the Law of the Land."[37] The great majority of international agreements that the United States enters into are not treaties but executive agreements—agreements made by the executive branch that are not submitted to the Senate for its advice and consent. Depending upon the circumstances, authority to enter an executive agreement may derive from different sources, including from a statute enacted by Congress which authorizes the Executive to enter the agreement (a congressional-executive agreement), or pursuant to the Executive's constitutional authority in a given area (sole executive agreement).[38] There are a number of provisions in the Constitution that may confer

[35] Vienna Convention, art. 31.

[36] Not every international agreement entered by the United States is intended to be legally binding. In some cases, the United States makes "political commitments" to foreign States. Although these commitments are non-legal, they may nonetheless carry significant moral and political weight. The Executive has long claimed the authority to enter such agreements on behalf of the United States without congressional authorization, asserting that the entering of political commitments by the Executive is not subject to the same constitutional constraints as the entering of legally binding international agreements. See generally Robert E. Dalton, Asst. Legal Adviser for Treaty Affairs, *International Documents of a Non-Legally Binding Character*, State Department, Memorandum, March 18, 1994, available at http://www.state.gov/documents/organization/65728.pdf (discussing U.S. and international practice with respect to non-legal, political agreements); Duncan B. Hollis and Joshua J. Newcomer, "'Political' Commitments and the Constitution," 49 VA. J. INT'L L. 507 (2009) (discussing U.S. political commitments made to foreign States and the constitutional implications of the practice). Obligations contained in political commitments may resemble those found in legally binding agreements. For example, the 1975 Helsinki Accords, a Cold War agreement signed by 35 nations, contains provisions concerning territorial integrity, peaceful settlement of disputes, implementation of confidence-building measures, scientific and economic cooperation, and cultural exchange that resemble provisions found in the TAC. However, whereas the obligations contained in the TAC are intended to be legally binding upon parties, those contained in the Helsinki Accords were intended to be political, rather than legal, commitments. See Dalton, *supra*, at 5 ("Clearly, the intent of the parties was that [the Helsinki Accords were] a politically binding not a legally binding document."); ASEAN Public Affairs Office, "ASEAN Knowledge Kit," March 2005, at 1, available at http://www.aseansec.org/TAC-KnowledgeKit.pdf (describing the TAC as being "originally conceived as a legally-binding code of inter-State conduct among Southeast Asian countries").

[37] U.S. Const., art II, § 2; art. VI, § 2.

[38] There are three types of *prima facie* legal executive agreements: (1) congressional-executive agreements, in which Congress has previously or retroactively authorized an international agreement entered into by the Executive; (2) executive agreements made pursuant to an earlier treaty, in which the agreement is authorized by a ratified treaty; and (3) sole executive agreements, in which an agreement is made pursuant to the President's constitutional authority (continued...)

limited authority upon the President to promulgate sole executive agreements, including his Commander-in-Chief authority and power in the area of foreign affairs.[39] Ultimately, the executive branch opted to accede to the TAC as a sole executive agreement, presumably because the agreement is deemed to focus solely upon relations between TAC parties and impose no requirements upon parties' domestic activities.[40]

Arguably, U.S. accession to the TAC could have taken the form of a treaty, with accession being subject to the advice and consent of the Senate, or an executive agreement. Agreements concerning friendly relations, consultation, and cooperation between countries have taken both forms. The United States has concluded numerous agreements which concern amity or friendly relations between parties as treaties.[41] However, these agreements have traditionally focused on different matters than the TAC. Agreements concerning amity and cooperation that have taken the form of treaties generally focus on the rights afforded to each party's nationals in the territory of the other State party.[42] In contrast, the ASEAN TAC appears to focus exclusively on State-to-State relations. It does not appear that the TAC is intended to afford parties' nationals with individually enforceable rights in the territory of other TAC parties, or otherwise modify a State's internal practices.

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without further congressional authorization. The Executive's authority to promulgate the agreement is different in each case. For further discussion, see CRS Report RL32528, *International Law and Agreements: Their Effect Upon U.S. Law*, by (name redacted), and CRS Report RL34362, *Congressional Oversight and Related Issues Concerning the Prospective Security Agreement Between the United States and Iraq*, by (name redacted), (name redacted), and (name redacted).

[39] U.S. Const. art. II, § 1 ("The executive power shall be vested in a President of the United States of America ..."), § 2 ("The President shall be commander in chief of the Army and Navy of the United States ..."), § 3 ("he shall receive ambassadors and other public ministers ..."). Courts have recognized foreign affairs as an area of very strong executive authority. See United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); American Ins. Ass'n v. Garamendi, 539 U.S. 396, 413-417 (2003).

[40] The Foreign Assistance Act of 1961 (P.L. 87-195), as amended, and related legislation provide statutory authority for a broad range of executive agreements in matters including security and economic cooperation, and appear to serve as a legal authority supporting a substantial number of executive agreements entered into in recent decades. See Oona A. Hathaway, "Treaties' End: The Past, Present, And Future Of International Lawmaking In The United States," 117 YALE L.J. 1236at 1256 n. 40 (2008) (noting that a plurality of executive agreements entered since 1980 have involved matters addressed in the Foreign Assistance Act). Arguably, even if the TAC was interpreted to impose duties upon parties to positively engage in cooperative activities, such activities might already be authorized, in whole or in part, under existing U.S. law. The decision by the Executive to characterize accession to the TAC as being effectuated via sole executive agreement suggests an understanding that the TAC focuses upon external relations between TAC parties, and does not impose more concrete requirements upon States (e.g., legally obliging parties to provide financial or other types of assistance to ASEAN Members).

[41] See, e.g., Treaty of Friendship, Commerce and Navigation between the United States and the Republic of Korea, 8 U.S.T. 2217, November 7, 1957; Treaty of Friendship, Commerce and Navigation between the United States and Japan, 4 U.S.T. 2063, October 30, 1953; Treaty of Peace, Amity, Navigation, and Commerce between the United States and Colombia, 9 Stat. 881, June 10, 1848.

[42] See id. Other considerations may also affect the decision to enter an agreement of amity and cooperation as a treaty. For example, in 1976 the United States ratified a treaty with Spain entitled a "Treaty of Friendship and Cooperation," which included provisions concerning U.S. basing rights and the status of U.S. forces in Spain. The decision to enter the agreement as a treaty rather than as an executive agreement was primarily motivated by Senate concern over the Executive entering into a defense agreement with the unpopular Franco regime without first obtaining the advice and consent of the Senate. Following the end of the Franco regime and Spain's admittance into NATO, agreements between the United States and Spain covering the same issues as the 1976 treaty have been concluded as executive agreements. See *infra* at footnote 45.

The United States has concluded several international agreements as executive agreements that address one or more issues covered by the ASEAN TAC—e.g., cooperation on matters involving security, economics, and science and technology.[43] In a few instances, the United States has entered international agreements of similar breadth to the TAC (and in some cases greater breadth) by way of executive agreement. For example, in 1982, the United States concluded an executive agreement with Spain in order to "promote their cooperation in the common defense, as well as … economic, scientific, and cultural cooperation."[44] Beyond establishing a general framework for relations in these areas, the agreement also contained specific provisions related to basing rights, defense procurement, the status of U.S. forces in Spain, and the establishment of joint committees to promote cooperation on economic, scientific, and cultural matters.[45]

The form that U.S. accession to the TAC would take was the subject of discussion between the executive and legislative branches. One issue that was discussed was the significance of the agreement being titled the *Treaty* of Amity and Cooperation.[46] Although agreements similar to the TAC have often been entered via executive agreements, none of these agreements referred to themselves as "treaties." An examination of official compendiums of international agreements and other sources by CRS found only a single agreement currently in force at the time of U.S. accession to the TAC which, although referring to itself as a "treaty," was concluded by the United States via executive agreement[47]—the Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure.[48]

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[43] See, e.g., Agreement Relating to Scientific and Technological Cooperation between the United States and Turkey, TIAS 12185, June 14, 1994; General Agreement for Economic, Technical and Related Assistance between the United States and El Salvador, 13 U.S.T. 266, January 16, 1962; Agreement of Cooperation between the United States and Liberia, 10 U.S.T. 1598, July 8, 1959 (pledging cooperation in furthering economic development of Liberia and consulting on appropriate action in event that Liberia's security is threatened).

[44] Agreement on Friendship, Defense and Cooperation Between the United States and Spain, with Complementary Agreements, 34 U.S.T. 3885, entered into force May 14, 1983, at art. 1.

[45] In 1970, the Nixon Administration concluded an executive agreement with Spain which contained provisions concerning bilateral cooperation on economic, scientific, agricultural, and other matters, and also established more significant military ties between the countries than had previously existed. Agreement of Friendship and Cooperation between the United States America and Spain, 21 U.S.T. 1677, entered into force September 26, 1970. Several Senators voiced opposition to the agreement, arguing that it should have been presented to the Senate as a treaty. This opposition appeared to be primarily based on the military commitments made by the agreement, rather than with regard to the agreement's provisions concerning cooperation in non-military matters. The Senate thereafter passed S.Res. 469 (91st Cong.), which expressed the sense of the Senate that nothing in the executive agreement with Spain should be deemed a national commitment by the United States. In 1976, the Senate gave its advice and consent to ratification of the Treaty of Friendship and Cooperation with Spain, which included provisions relating to U.S. basing rights and the status of U.S. forces in Spain. Treaty of Friendship and Cooperation between the United States and Spain, with Supplementary Agreements, 27 U.S.T. 3005, entered into force September 21, 1976. Following the end of the Franco regime and Spain becoming a member of NATO, the United States concluded the 1982 agreement, discussed *supra* at page 14. Despite taking a different form, the 1982 executive agreement is similar in scope to the 1976 treaty.

[46] 155 CONG. REC. S8029-S8030 (July 23, 2009) (hereinafter "Senators' Letter to State Department") (letter to Secretary of State Clinton from Senators Mitch McConnell, John Kerry, and Richard Lugar discussing State Department's congressional consultations regarding the TAC).

[47] This examination involved an electronic database search of several legal treatises and law review articles which discuss executive agreements, as well as a review of international agreements contained in the 2009 edition of *Treaties in Force*, a State Department publication compiling treaties and other agreements to which the United States is currently a party. It should be noted that this review did not consider any agreements that are classified or no longer in force.

[48] Budapest Treaty on the International Recognition of the Deposit of Microorganisms for the Purposes of Patent Procedure, with Regulations, 32 U.S.T. 1241, entered into force August 19, 1980. As the title of the agreement suggests, the Budapest Treaty is a technical agreement which established an international system for microorganism (continued...)

Although the TAC refers to itself as a "treaty," it is important to distinguish the meaning of this term in the context of international law, in which "treaty" and "international agreement" are synonymous terms for all binding agreements,[49] and "treaty" in the context of domestic American law, in which the term more narrowly refers to a particular subcategory of binding international agreements.[50] In other words, the fact that the TAC uses the word "treaty" in its title does not necessarily mean that it must take the form of a "treaty" for purposes of U.S. law. Perhaps to prevent confusion, U.S. negotiators have generally avoided using the term "treaty" whenever drafting language of an international agreement which is unlikely to be presented to the Senate for its advice and consent. Because the United States did not participate in the drafting of the TAC, it was not involved in the decision to entitle it a "treaty."

Shortly after the United States acceded to the TAC by way of executive agreement, Senator Mitch McConnell submitted into the *Congressional Record* a July 10, 2009, letter to Secretary of State Hillary Clinton that had been signed by Senator McConnell as well as Senators John Kerry and Richard Lugar, the Chairman and Ranking Member of the Senate Foreign Relations Committee, respectively.[51] In the letter, written prior to U.S. accession to the TAC, the Senators expressed their view that "it is consistent with U.S. practice for the United States to accede to the TAC as an executive agreement."[52] However, the Senators also expressed their belief that, while the TAC could properly be entered as a sole executive agreement, other agreements labeled "treaties" should generally be submitted to the Senate for its advice and consent. Specifically, the letter stated:

> We note that the title of the agreement refers to the agreement as a "treaty," and we are unaware of any precedent for the United States acceding to an agreement styled as a "treaty" without the advice and consent of the Senate as provided for in Article II, Section 2 of the Constitution. At the same time, we are mindful that other factors apart from the formal name of the agreement could suggest that it is consistent with U.S. practice for the United States to accede to the TAC as an executive agreement. Of particular importance, the agreement is largely limited to general pledges of diplomatic cooperation and would [generally] not appear to obligate the United States to take (or refrain from taking) any specific action … We also note that the United States did not take part in the negotiations among ASEAN

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samples to be deposited for purposes of patent procedure. The Executive participated in the drafting of the Budapest Treaty with the intent to submit the final agreement to the Senate for its advice and consent to treaty ratification. However, following consultation with the Senate Committee on Foreign Relations, the agreement was instead handled as an executive agreement. See generally State Department, Digest of U.S. Practice in Int'l Law: 1977, at 788-789; Digest of U.S. Practice in Int'l Law: 1980, at 408-410. The State Department described the President's independent power with respect to the conduct of foreign relations and the statutory authority granted to the Patent and Trademark Office as providing the legal basis for the conclusion and implementation of the agreement. Digest of U.S. Practice in Int'l Law: 1980, *supra*, at 409. See also 35 U.S.C. § 6 (1980) (authorizing the Commissioner on Patents and Trademarks to "superintend and perform all duties required by law respecting the granting and issuing of patents and the registration of trademarks," and "to carry on programs and studies cooperatively with foreign patent offices and international intergovernmental organizations, or … authorize such programs and studies to be carried out").

[49] Vienna Convention, art. 2.

[50] It should be noted, however, that the term "treaty" is not always interpreted under U.S. law to refer only to those agreements described in Article II, § 2 of the Constitution. See Weinberger v. Rossi, 456 U.S. 25 (1982) (interpreting statute barring discrimination except where permitted by "treaty" to refer to both treaties and executive agreements); B. Altman & Co. v. United States, 224 U.S. 583 (1912) (construing the term "treaty," as used in statute conferring appellate jurisdiction, to also refer to executive agreements).

[51] Senators' Letter to State Department, *supra* footnote 46 .

[52] Id. at S8030.

> countries leading up to the conclusion of the TAC in 1976, or in the decision to characterize it as a treaty. In light of these unique considerations, we will not object to the Department's plan to accede to the TAC as an executive agreement. We continue to believe, however, that the use of the term "treaty" in the title of an agreement will generally dictate that Senate advice and consent will be required before the United States may accede to the agreement. In this regard, treatment of the TAC as an executive agreement should not be considered a precedent for treating future agreements entitled "treaties" as sole executive agreements. To ensure our understanding that the process surrounding this agreement is not misinterpreted in the future as a precedent, we will submit this letter into the Congressional Record. We would also request that the State Department include it in the next edition of the Digest of United States Practice in International Law.[53]

If Congress believes that accession to the TAC via sole executive agreement is inappropriate, or disagrees with the manner in which the Executive implements TAC requirements, it has several tools available by which it may address these concerns. For example, Congress could enact new legislation that modifies or repudiates U.S. adherence to or implementation of the agreement. It could require the Executive to submit information to Congress or congressional committees regarding U.S. implementation of its TAC commitments. Congress could also limit or prohibit appropriations necessary for the Executive to implement the provisions of the TAC, or condition such appropriations upon the Executive implementing the agreement in a particular manner.

Potential Implications of TAC Accession for U.S. Law

While the TAC may impose obligations upon parties in their mutual relations as a matter of *international law*, its requirements do not appear to be of the kind that would create binding federal law enforceable by U.S. courts.[54] Many of the agreement's clauses address parties' obligations in non-specific terms—e.g., requiring parties to "endeavor to develop and strengthen … ties" and "achieve the closest cooperation on the widest scale."[55] Such clauses appear to lack the precision necessary to be considered legally enforceable, though they may nonetheless carry political or moral weight for TAC parties.[56] More broadly, while the agreement establishes guidelines for parties in their relations with one another, it does not expressly require parties to modify any of their existing domestic laws, even if such laws arguably conflict with the principles espoused by the TAC.[57] Instead, the TAC expressly calls on parties to resolve any dispute

[53] Id.

[54] *See* Medellin v. Texas, 128 S.Ct. 1346, 1356 (2008) ("This Court has long recognized the distinction between treaties that automatically have effect as domestic law, and those that—while they constitute international law commitments—do not by themselves function as binding federal law.").

[55] TAC, arts. 4, 8.

[56] 22 C.F.R. § 181.2(a) (State Department regulation listing specificity of agreement as part of criteria used to determine whether it is legally binding); Congressional Research Service, *Treaties And Other International Agreements: The Role Of The United States Senate, A Study Prepared For The Senate Comm. On Foreign Relations* (Comm. Print 2001), at 52.

[57] Indeed, at least two TAC parties, Australia and France (as a member of the European Union), have imposed sanctions upon Burma, another TAC party and an ASEAN member, even though such measures could arguably be interpreted as being contrary to the principles of the TAC. See Australian Dept. of Foreign Affairs and Trade, *supra* footnote 24; European Union Council Regulation (EC) No.194/2008 (2008), available at http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:066:0001:0087:EN:PDF. See also Senators' Letter to State Department, (continued...)

between them through diplomatic means. Accordingly, it does not appear that U.S. accession to TAC would have the effect of modifying or limiting the enforcement of existing domestic laws, though the United States would have an obligation under customary international law to execute its obligations under the TAC in good faith.[58]

Nonetheless, the TAC may have implications for U.S. policies, at least as a matter of international law. Some States that have acceded to the TAC, including the United States, negotiated side letters that address the issues discussed in the following sections.

Right to Individual and Collective Self-Defense

TAC Article 2 provides that a "fundamental" guiding principle in the relationship between parties is the "renunciation of the threat or use of force." This prohibition is similar to that contained in Article 2(4) of the U.N. Charter, which bars U.N. Member States "from the threat or use of force against the territorial integrity or political independence of any state." Unlike the U.N. Charter, however, the TAC does not provide an express exception to this bar in cases where force is used in self-defense.

Even in the absence of a TAC provision recognizing parties' right to use force in self-defense, there is good reason to believe that the agreement is not intended to abrogate this right. Although TAC Article 2 lists six fundamental guiding principles in relations between TAC parties, including renunciation of the threat or use of force, it does not specify that these are the sole principles that may guide relations between State parties. Article 51 of the U.N. Charter recognizes that Members possess "the inherent right of individual or collective self-defense if an armed attack occurs." A nation's right to defend itself from attack is believed by many to be a peremptory norm (*jus cogens*),[59] and accordingly any provision of an international agreement that derogated from this principle would not be legally binding.[60] As such, it seems reasonable to interpret the TAC in a manner that would not be inconsistent with well-established principles concerning a nation's right to defend itself. Nonetheless, in negotiations concerning accession to the TAC, some States have found it necessary to exchange side letters in which it was made clear that parties to the TAC did not interpret the agreement as modifying parties' rights and obligations under the U.N. Charter, including as they relate to the right to self-defense.

Related considerations might be raised with respect to the TAC's effect upon U.S. security arrangements. The United States is a party to numerous bilateral and multilateral security arrangements, including some which oblige parties to assist in the defense of any party that is attacked.[61] Some TAC parties with security arrangements with the United States acceded to the

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supra footnote 51, at S8030 ("the agreement is largely limited to general pledges of diplomatic cooperation and would not appear to obligate the United States to take (or refrain from taking) any specific action [with limited exception").

[58] Restatement, *supra* footnote 23, at § 321; Vienna Convention, arts. 26, 31.

[59] See generally Carin Kahgan, "*Jus Cogens* and The Inherent Right to Self-Defense," 3 ILSA J. Int'l & Comp. L. 767 (1997) (discussing State and scholarly views).

[60] Vienna Convention, art. 53.

[61] See, e.g., North Atlantic Treaty, 63 Stat. 2241, entered into force August 24, 1949; Security Treaty Between Australia, New Zealand and the United States of America, 3 U.S.T. 3420, entered into force April 29, 1952; Mutual Defense Treaty Between the United States of America and the Republic of the Philippines, 3 U.S.T. 3947, entered into force August 27, 1952; Mutual Defense Treaty Between the United States of America and the Republic of Korea, 5 (continued...)

TAC after reaching an understanding with ASEAN members that the TAC was not intended to affect other agreements to which they were parties.[62] Prior to acceding to the TAC, the United States exchanged side letters reflecting its understanding that nothing in the TAC would affect its existing bilateral or multilateral relationships, its rights and obligations under the U.N. Charter, or its ability to take actions it "considers necessary to address a threat to its national interests."[63]

Relationship Between the TAC and Other Agreements Concerning Human Rights, Trade, Terrorism, Transnational Crime, and Other Matters

The TAC might also be interpreted as having implications for U.S. policy on matters occurring in the territory of another party to the agreement, if the policy is interpreted as violating the TAC parties' obligations concerning non-interference. TAC Article 2 provides that relations between parties shall be guided by the principle of "non-interference in the internal affairs of one another." This obligation could be interpreted as being a narrowly circumscribed requirement, prohibiting parties from actively attempting to undermine other parties' sovereignty or territorial integrity.[64] However, it is possible that some countries might argue that the prohibition is more broadly applicable to TAC party activities towards one another, including, for example, criticism of another party's domestic human rights record.[65] It is also possible that some countries may argue that the TAC bars the imposition of economic or other sanctions upon a TAC party on account of that party's domestic activities. This issue may be of particular concern for the United States on account of its stringent economic sanctions regime against Burma, a member of ASEAN whose consent is necessary for U.S. accession.

State practice arguably conflicts with the view that the TAC is intended to deter parties from commenting upon or engaging on matters of international interest that arise within the territory of another TAC party.[66] Indeed, some TAC parties have adopted specific measures, including economic sanctions, to deter human rights violations and other practices occurring in the territory of another party. For example, as mentioned above, both Australia and France, which are each

(...continued)

U.S.T. 2368, entered into force November 17, 1954; Treaty of Mutual Cooperation and Security Between the United States of America and Japan, 11 U.S.T. 1632, entered into force June 23, 1960.

[62] See **Appendix B** (concerning mutual understandings reached between Australia and ASEAN members). In side letters exchanged prior to South Korea's accession to the TAC, the U.S.-South Korean military alliance was specifically listed as an example of an agreement that would not be affected by the TAC. A letter from the ASEAN Chairman that memorialized this understanding is on file with the authors of this report.

[63] **Appendix A**.

[64] See Bliss, *supra* footnote 5, at 77 (comparing principle of non-interference contained in TAC with the principles espoused in the U.N. Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations).

[65] See id. (noting that Burma, a party to the TAC, had responded to criticism of its human rights record by the U.N. Human Rights Commission by claiming such criticism was a "blatant attempt to interfere" in Burma's domestic affairs).

[66] See Australian Analysis of TAC, *supra* footnote 30, at 6 (claiming that "the longstanding practice of States, including States Parties to the [TAC]... 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").

parties to the TAC, have imposed sanctions upon Burma.[67] Nonetheless, it is possible that U.S. sanctions policy may become an issue of contention with some TAC members.

The United States and most other parties to the TAC are also parties to international agreements that obligate or permit members to take action to deter specified activities arising in other countries, including with regard to matters involving unfair trade practices, transnational criminal activity, international terrorism, and gross human rights violations.[68] Further, all TAC parties are members of the United Nations, and may be required to comply with Security Council resolutions imposing economic sanctions upon a particular country (including, potentially, another party to TAC).[69] In addition, Article 1 of the U.N. Charter provides that one of the purposes of the organization is "to achieve international cooperation ... in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." This language arguably imposes a right and obligation upon U.N. Members to abide by these principles in their relations with other States.[70] Some States acceding to TAC have exchanged side letters with ASEAN Members to clarify the parties' mutual understanding that the TAC is not intended to prevent parties from exercising rights and obligations under other international agreements, including the U.N. Charter. Side letters exchanged by the United States prior to its accession to the TAC also reflect this understanding regarding the TAC's relationship with other agreements.[71]

Application of the TAC to U.S. Relations with Other TAC Parties Outside Southeast Asia

Although the TAC was "originally conceived as a legally-binding code of inter-State conduct among Southeast Asian countries,"[72] it was subsequently amended to permit the accession of States located outside Southeast Asia. Since that time, several non-Southeast Asian States have acceded to the TAC (see **Table 1**).

While some provisions of the TAC clearly focus on parties' obligations with respect to the region of Southeast Asia,[73] other provisions of the agreement could be interpreted as being applicable to

[67] See *supra* footnote 57.

[68] See, e.g., Convention on the Prevention and Punishment of Genocide, entered into force January 12, 1951, 78 U.N.T.S. 277; Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, entered into force November 11, 1990, Treaty Doc. 101-4, 1988 U.S.T. LEXIS 194; Convention For Suppression of Financing Terrorism, entered into force April 10, 2002, Treaty Doc. 106-49, 2000 U.S.T. LEXIS 131; Agreement Establishing the World Trade Organization, entered into force January 1, 1995.

[69] U.N. Charter, art. 41.

[70] See International Convention on Civil and Political Rights, entered into force March 23, 1976, 999 U.N.T.S. 171, at Preamble (recognizing "the obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms"); Australian Analysis of TAC, *supra* footnote 70, at 6-7 (suggesting that U.N. Charter Article 1 gives Member States that right and obligation to engage on and comment upon issues of international importance, including human rights concerns, occurring in the territory of another State).

[71] **Appendix A** ("the United States' accession to the Treaty does not affect the United States' rights and obligations under other bilateral or multilateral agreements …").

[72] ASEAN Public Affairs Office, *supra* footnote 36, at 1. See also Bliss, *supra* footnote 5, at 79.

[73] See TAC, art. 6 ("The High Contracting Parties shall collaborate for the acceleration of the economic growth in the region in order to strengthen the foundation for a prosperous and peaceful community of nations in Southeast Asia.").

relations between parties outside the region as well.[74] In acceding to the TAC, some States outside Southeast Asia, including the United States, exchanged side letters to clarify their mutual understanding with ASEAN Members that the agreement was not intended to govern relations between TAC parties outside Southeast Asia, but only TAC parties' relations with Southeast Asian States.[75]

Participation in the High Council

As previously discussed, when the TAC was amended to permit accession by States outside Southeast Asia, it limited their participation in the High Council to instances where the State was directly involved in the dispute to be settled. In contrast, Southeast Asian States are permitted to participate in all High Council meetings, regardless of whether they are parties to the dispute to be settled. The purpose of this limitation appears to have been to ensure that the focus of the TAC remained on Southeast Asia.[76]

In acceding to the TAC, Australia exchanged side letters with ASEAN members clarifying each side's understanding of the rights of States outside Southeast Asia pursuant to TAC Articles 14 and 16. The letters reflected the shared understanding that the High Council could not resolve a dispute in which a State outside Southeast Asia was directly involved without the State's consent, and that if the State agreed to the High Council being convened, it would be permitted to participate in the Council. The United States did not include a similar clarification in its side letter with the ASEAN Chairman.

[74] See id., art. 10 ("Each High Contracting Party shall not in any manner or form participate in any activity which shall constitute a threat to the political and economic stability, sovereignty, or territorial integrity of another High Contracting Party.").

[75] See **Appendix A** ("The Treaty will not apply to, or affect, U.S. relationships with states outside of Southeast Asia."); **Appendix B** ("Further, the Treaty will not apply to, nor affect, Australia's relationships with states outside South-East Asia.").

[76] See Bliss, *supra* footnote 5, at 78-79.

Appendix A. Side Letter from United States to ASEAN Concerning U.S Accession to the TAC and Mutual Understandings Concerning the Agreement

DEPARTMENT OF STATE

WASHINGTON

July 15, 2009

Excellency:

I have the honor to refer to the Treaty of Amity and Cooperation in Southeast Asia, done at Denpasar, Bali, Indonesia, on February 24, 1976, as amended, (the Treaty), and am pleased to inform you that the Government of the United States of America has decided to accede to the Treaty in accordance with Article 18.

The Government of the United States greatly appreciates the assistance it has derived from the discussions that U.S. officials have had with ASEAN counterparts regarding the Treaty. The U.S. Government, upon acceding to the Treaty, has the further honor to make the following statements. The Treaty will not apply to, or affect, U.S. relationships with states outside of Southeast Asia. The United States' accession to the Treaty does not affect the United States' rights and obligations under other bilateral

His Excellency
Kasit Piromya,
Minister of Foreign Affairs of the Kingdom of Thailand
and Chairman of the ASEAN Coordinating Council,
Bangkok.

DIPLOMATIC NOTE

or multilateral agreements and, noting Article 10, does not limit actions taken by the United States that it considers necessary to address a threat to its national interests. The Treaty will be interpreted in conformity with the United Nations Charter, and the United States' accession does not affect the United States' rights and obligations arising from the Charter of the United Nations.

I have the further honor to note that the United States' accession to the Treaty, which supports the integrity of the Treaty's purpose to promote perpetual peace, everlasting amity and cooperation among the peoples of the High Contracting parties, will further strengthen our substantive ties with ASEAN.

Accept, Excellency, the renewed assurances of my highest consideration.

Hillary Rodham Clinton

Appendix B. Side Letters Between Australia and ASEAN Concerning Australia's Accession to the TAC and Mutual Understandings Concerning the Agreement

THE HON ALEXANDER DOWNER MP

MINISTER FOR FOREIGN AFFAIRS
PARLIAMENT HOUSE
CANBERRA ACT 2600

13 JUL 2005

H.E. Mr Somsavat Lengsavad
Deputy Prime Minister and Minister of Foreign Affairs
Lao People's Democratic Republic

Your Excellency

I have the honour to inform Your Excellency that Australia has decided to accede to the Treaty of Amity and Cooperation in South East Asia (the Treaty), in accordance with Article 18.

The Australian Government is pleased to note that Australia's accession to the Treaty will provide further confirmation of the strong friendship, close ties and extensive common interests and objectives which Australia shares with ASEAN Member countries, both individually and collectively.

The Australian Government's decision to accede to the Treaty has been greatly assisted by the extensive discussions which Australian officials have had with ASEAN counterparts on the Treaty. In that context, the Australian Government, in taking the decision to accede to the Treaty, is pleased to note the following understandings of key provisions of the Treaty, on a non-prejudice basis to ASEAN. First, Australia's accession to the Treaty would not affect Australia's obligations under other bilateral or multilateral agreements. Second, the Treaty is to be interpreted in conformity with the United Nations Charter, and Australia's accession would not affect Australia's rights and obligations arising from the Charter of the United Nations. Further, the Treaty will not apply to, nor affect, Australia's relationships with states outside South-East Asia. Finally, Articles 14 and 16 of the Treaty effectively provide that, when a state outside South-East Asia 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 the High Council be convened, that state would be entitled to participate in the High Council.

The Australian Government is pleased to note that it will lodge a formal instrument of accession to the Treaty following completion of Australia's domestic treaty process, including the necessary consultation with Parliament.

I thank you for your assistance with this matter, and look forward to receiving your reply.

Yours sincerely
SIGNED
Alexander Downer

LAO PEOPLE'S DEMOCRATIC REPUBLIC

Peace, Independence, Democracy, Unity, Prosperity

Deputy Prime Minister,
Minister for Foreign Affairs

Vientiane, 23 July 2005

Excellency,

I would like to express my thanks for Your Excellency's letter dated 13 July 2005 addressed to me as Chairman of the 38th ASEAN Standing Committee, concerning the intention of Australia to accede to the Treaty of Amity and Cooperation in Southeast Asia.

We believe that Australia's accession to the Treaty of Amity and Cooperation in Southeast Asia would further contribute to the strengthening of cooperation between ASEAN and Australia, particularly in the promotion of peace, security and cooperation in the region.

I look forward to receiving Australia's formal instrument of accession to the Treaty.

Yours sincerely,

SIGNED

Somsavat LENGSAVAD
Chairman of the 38th ASEAN Standing Committee

To: His Excellency Alexander Downer MP
Minister of Foreign Affairs
Parliament House
Canberra ACT 2600
AUSTRALIA

CC: - All ASEAN Foreign Ministers
- Secretary-General of ASEAN

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