



**AGREEMENT ON TRADE IN SERVICES OF THE
FRAMEWORK AGREEMENT ON COMPREHENSIVE
ECONOMIC CO-OPERATION BETWEEN THE
ASSOCIATION OF SOUTHEAST ASIAN NATIONS AND
THE PEOPLE'S REPUBLIC OF CHINA**

The Governments of Brunei Darussalam ("Brunei Darussalam"), the Kingdom of Cambodia ("Cambodia"), the Republic of Indonesia ("Indonesia"), the Lao People's Democratic Republic ("Lao PDR"), Malaysia, the Union of Myanmar ("Myanmar"), the Republic of the Philippines ("Philippines"), the Republic of Singapore ("Singapore"), the Kingdom of Thailand ("Thailand") and the Socialist Republic of Viet Nam ("Viet Nam"), Member Countries of the Association of Southeast Asian Nations (collectively, "ASEAN" or "ASEAN Member Countries", or individually, "ASEAN Member Country"), and the People's Republic of China ("China"),

RECALLING the Framework Agreement on Comprehensive Economic Co-operation ("the Framework Agreement") between ASEAN and China (collectively, "the Parties", or individually referring to an ASEAN Member Country or to China as a "Party") signed by the Heads of Government/State of ASEAN Member Countries and China in Phnom Penh on the 4th day of November 2002;

RECALLING Articles 4 and 8(3) of the Framework Agreement on conclusion as expeditiously as possible of the negotiations of the agreement on trade in services so as to progressively liberalise and eliminate substantially all discrimination and/or prohibition of new or more discriminatory measures with respect to trade in services between the Parties, and to expand the depth and scope of

such trade with substantial sectoral coverage beyond those undertaken by the ASEAN Member Countries and China under the World Trade Organisation ("WTO") General Agreement on Trade in Services;

STRIVING to enhance co-operation in services between the Parties in order to improve efficiency and competitiveness, as well as to diversify the supply and distribution of services of the respective service suppliers of the Parties, for implementation in accordance with the timeframes to be mutually agreed by the Parties to the Framework Agreement taking into account the sensitive sectors of the Parties, and with special and differential treatment and flexibility for the newer ASEAN Member Countries of Cambodia, Lao PDR, Myanmar and Viet Nam;

RECOGNISING the right of the Parties to regulate, and to introduce new regulations, on the supply of services in the territories of the Parties in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development of services regulation within the Parties, the particular need of the Parties to exercise this right,

HAVE AGREED AS FOLLOWS:

PART I: DEFINITIONS AND SCOPE

Article 1 Definitions

For the purposes of this Agreement:

- (a) "a service supplied in the exercise of governmental authority" means any service which is supplied neither

on a commercial basis, nor in competition with one or more service suppliers;

(b) “commercial presence” means any type of business or professional establishment, including through

(i) the constitution, acquisition or maintenance of a juridical person, or

(ii) the creation or maintenance of a branch or a representative office,

within the territory of a Party for the purpose of supplying a service;

(c) “direct taxes” comprise all taxes on total income, on total capital or on elements of income or of capital, including taxes on gains from the alienation of property, taxes on estates, inheritances and gifts, and taxes on the total amounts of wages or salaries paid by enterprises, as well as taxes on capital appreciation;

(d) “GATS” means the General Agreement on Trade in Services;

(e) “juridical person” means any legal entity duly constituted or otherwise organised under applicable law, whether for profit or otherwise, and whether privately-owned or governmentally-owned, including any corporation, trust, partnership, joint venture, sole proprietorship or association;

(f) “juridical person of another Party” means a juridical person which is either:

(i) constituted or otherwise organised under the law of that other Party, and is engaged in substantive

business operations in the territory of that Party or any other Party; or

(ii) in the case of the supply of a service through commercial presence, owned or controlled by:

1. natural persons of that Party; or

2. juridical persons of that other Party identified under subparagraph (i);

(g) a juridical person is:

(i) "owned" by persons of a Party if more than 50 per cent of the equity interest in it is beneficially owned by persons of that Party;

(ii) "controlled" by persons of a Party if such persons have the power to name a majority of its directors or otherwise to legally direct its actions;

(iii) "affiliated" with another person when it controls, or is controlled by, that other person; or when it and the other person are both controlled by the same person;

(h) "measure" means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form;

(i) "measures by Parties" means measures taken by

(i) central, regional or local governments and authorities; and

- (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;
- (j) “measures by Parties affecting trade in services” include measures in respect of
 - (i) the purchase, payment or use of a service;
 - (ii) the access to and use of, in connection with the supply of a service, services which are required by the Parties to be offered to the public generally;
 - (iii) the presence, including commercial presence, of persons of a Party for the supply of a service in the territory of another Party;
- (k) “monopoly supplier of a service” means any person, public or private, which in the relevant market of the territory of a Party is authorised or established formally or in effect by that Party as the sole supplier of that service;
- (l) “natural person of another Party” means a natural person who resides in the territory of that other Party or elsewhere, and who under the law of that other Party:
 - (i) is a national of that other Party; or

- (ii) has the right of permanent residence¹ in that other Party, in the case of a Party which accords substantially the same treatment to its permanent residents as it does to its nationals in respect of measures affecting trade in services, as notified after the entry into force of this Agreement provided that no Party is obliged to accord to such permanent residents treatment more favourable than would be accorded by that other Party to such permanent residents. Such notification shall include the assurance to assume, with respect to the permanent residents, in accordance with its laws and regulations, the same responsibilities that other Party bears with respect to its nationals;
- (m) "person" means either a natural person or a juridical person;
- (n) "sector" of a service means,
 - (i) with reference to a specific commitment, one or more, or all, subsectors of that service, as specified in a Party's Schedule,
 - (ii) otherwise, the whole of that service sector, including all of its subsectors;
- (o) "services" includes any service in any sector except services supplied in the exercise of governmental authority;

¹ In the case of Indonesia, Lao PDR, Thailand, Viet Nam and China, natural person of another Party shall be limited to a natural person who resides in the territory of that other Party or elsewhere and who under the law of that other Party is a national of that other Party. Therefore, in line with the principle of reciprocity, this Agreement shall not apply to the permanent residents of Indonesia, Lao PDR, Thailand, Viet Nam, and China. Once any of these Parties enacts its domestic law on the treatment of permanent residents of another Party or non-party, there shall be negotiations on the issue of whether to include permanent residents in the coverage of natural person under this Agreement in respect of that Party.

- (p) “service consumer” means any person that receives or uses a service;
- (q) “service of another Party” means a service which is supplied,
 - (i) from or in the territory of that other Party, or in the case of maritime transport, by a vessel registered under the laws of that other Party, or by a person of that other Party which supplies the service through the operation of a vessel and/or its use in whole or in part; or
 - (ii) in the case of the supply of a service through commercial presence or through the presence of natural persons, by a service supplier of that other Party;
- (r) “service supplier” means any person that supplies a service;²
- (s) “supply of a service” includes the production, distribution, marketing, sale and delivery of a service;
- (t) “trade in services” is defined as the supply of a service
 - (i) from the territory of a Party into the territory of any other Party (“cross-border”);
 - (ii) in the territory of a Party to the service consumer of any other Party (“consumption abroad”);

² Where the service is not supplied directly by a juridical person but through other forms of commercial presence such as a branch or a representative office, the service supplier (i.e. the juridical person) shall, nonetheless, through such presence be accorded the treatment provided for service suppliers under this Agreement. Such treatment shall be extended to the presence through which the service is supplied and need not be extended to any other parts of the supplier located outside the territory where the service is supplied.

- (iii) by a service supplier of a Party, through commercial presence in the territory of any other Party (“commercial presence”);
- (iv) by a service supplier of a Party, through presence of natural persons of a Party in the territory of any other Party (“presence of natural persons”);
- (u) “qualification procedures” means administrative procedures relating to the administration of qualification requirements; and
- (v) “qualification requirements” means substantive requirements which a service supplier is required to fulfil in order to obtain certification or a license.

Article 2

Scope

1. This Agreement applies to measures³ by the Parties affecting trade in services.
2. This Agreement shall not apply to:
 - (a) services supplied in the exercise of governmental authority within the territory of each Party;
 - (b) regulations or requirements governing the procurement by governmental agencies of services purchased for governmental purposes and not with a view to commercial resale or with

³ The exclusion of taxation measures by the Philippines from the scope of this Agreement shall be further discussed by all Parties before the entry into force of the Agreement.

a view to use in the supply of services for commercial sale.

PART II: OBLIGATIONS AND DISCIPLINES

Article 3 Transparency

Article III of the GATS is, *mutatis mutandis*, incorporated into and shall form an integral part of this Agreement.

Article 4 Disclosure of Confidential Information

Article III *bis* of the GATS is, *mutatis mutandis*, incorporated into and shall form an integral part of this Agreement.

Article 5 Domestic Regulation

1. In sectors where specific commitments are undertaken under Part III, each Party shall ensure that all measures of general application affecting trade in services are administered in a reasonable, objective and impartial manner.
2. (a) Each Party shall maintain or institute as soon as practicable judicial, arbitral or administrative tribunals or procedures which provide, at the request of an affected service supplier, for the prompt review of, and where justified, appropriate remedies for, administrative decisions affecting trade in services. Where such procedures are not independent of the agency entrusted with the

administrative decision concerned, the Party shall ensure that the procedures in fact provide for an objective and impartial review.

- (b) The provisions of subparagraph (a) shall not be construed to require a Party to institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system.

3. Where authorisation is required for the supply of a service on which a specific commitment under this Agreement has been made, the competent authorities of each Party shall:

- (a) in the case of an incomplete application, at the request of the applicant, identify all the additional information that is required to complete the application and provide the opportunity to remedy deficiencies within a reasonable timeframe;
- (b) at the request of the applicant, provide without undue delay, information concerning the status of the application; and
- (c) if an application is terminated or denied, to the maximum extent possible, inform the applicant in writing and without delay the reasons for such action. The applicant will have the possibility of resubmitting, at its discretion, a new application.

4. With the objective of ensuring that measures relating to qualification requirements and procedures, technical standards and licensing requirements do not constitute unnecessary barriers to trade in services, the Parties shall jointly review the results of the negotiations on disciplines on these measures, pursuant to Article VI.4

of GATS, with a view to their incorporation into this Agreement. The Parties note that such disciplines aim to ensure that such requirements are, *inter alia*:

- (a) based on objective and transparent criteria, such as competence and the ability to supply the service;
 - (b) not more burdensome than necessary to ensure the quality of the service;
 - (c) in the case of licensing procedures, not in themselves a restriction on the supply of the service.
5. (a) In sectors in which a Party has undertaken specific commitments under Part III, pending the incorporation of the disciplines referred to in paragraph 4 of this Article, that Party shall not apply licensing and qualification requirements and technical standards that nullify or impair its obligation under this Agreement in a manner which:
- (i) does not comply with the criteria outlined in subparagraphs 4(a), (b) or (c) of this Article; and
 - (ii) could not reasonably have been expected of that Party at the time the specific commitments in those sectors were made.
- (b) In determining whether a Party is in conformity with the obligation under paragraph 5(a) of this Article, account shall be taken of international

standards of relevant international organisations⁴
applied by that Party.

6. In sectors where specific commitments regarding professional services are undertaken, each Party shall provide for adequate procedures to verify the competence of professionals of any other Party.

Article 6 Recognition

1. For the purposes of fulfilment of their respective standards or criteria for the authorisation, licensing or certification of service suppliers, each Party may recognise the education or experience obtained, requirements met, or licenses or certifications granted in another Party. Such recognition, which may be achieved through harmonisation or otherwise, may be based upon an agreement or arrangement between the Parties or the relevant competent bodies or may be accorded autonomously.
2. Two or more Parties may enter into, or encourage their relevant competent bodies to enter into, negotiations on recognition of qualification requirements, qualification procedures, licensing and/or registration procedures for the purposes of fulfilment of their respective standards or criteria for the authorisation, licensing or certification of service suppliers.
3. A Party that is a party to an agreement or arrangement of the type referred to in paragraph 1 of this Article, whether existing or future, shall afford adequate opportunity for other interested Parties to negotiate

⁴ The term "relevant international organisations" refers to international bodies whose membership is open to the relevant bodies of at least all Parties of this Agreement.

their accession to such an agreement or arrangement or to negotiate comparable ones with it. Where a Party accords recognition autonomously, it shall afford adequate opportunity for any other Party to demonstrate that education, experience, licenses, or certifications obtained or requirements met in that other Party's territory should be recognised.

4. A Party shall not accord recognition in a manner which would constitute a means of discrimination between countries in the application of its standards or criteria for the authorisation, licensing or certification of services suppliers, or a disguised restriction on trade in services.

Article 7

Monopolies and Exclusive Service Suppliers

1. Each Party shall ensure that any monopoly supplier of a service in its territory does not, in the supply of the monopoly service in the relevant market, act in a manner inconsistent with that Party's obligations under specific commitments.
2. Where a Party's monopoly supplier competes, either directly or through an affiliated company, in the supply of a service outside the scope of its monopoly rights and which is subject to that Party's specific commitments, the Party shall ensure that such a supplier does not abuse its monopoly position to act in its territory in a manner inconsistent with such commitments.
3. If any Party has reason to believe that a monopoly supplier of a service of any other Party is acting in a manner inconsistent with paragraph 1 or 2 of this

Article, that Party may request the Party establishing, maintaining or authorising such supplier to provide specific information concerning the relevant operations.

4. The provisions of this Article shall also apply to cases of exclusive service suppliers, where a Party, formally or in effect,
 - (a) authorises or establishes a small number of service suppliers; and
 - (b) substantially prevents competition among those suppliers in its territory.

Article 8 Business Practices

1. The Parties recognise that certain business practices of services suppliers, other than those falling under Article 7, may restrain competition and thereby restrict trade in services.
2. Each Party shall, at the request of any other Party (the "Requesting Party"), enter into consultations with a view to eliminating practices referred to in paragraph 1 of this Article. The Party addressed (the "Requested Party") shall accord full and sympathetic consideration to such a request and shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. The Requested Party shall also provide other information available to the Requesting Party, subject to its domestic law and to the conclusion of satisfactory agreement concerning the safeguarding of its confidentiality by the Requesting Party.

Article 9 Safeguards

1. The Parties note the multilateral negotiations pursuant to Article X of the GATS on the question of emergency safeguard measures based on the principle of non-discrimination. Upon the conclusion of such multilateral negotiations, the Parties shall conduct a review for the purpose of discussing appropriate amendments to this Agreement so as to incorporate the results of such multilateral negotiations.

2. In the event that the implementation of this Agreement causes substantial adverse impact to a service sector of a Party before the conclusion of the multilateral negotiations referred to in paragraph 1 of this Article, the affected Party may request for consultations with the other Party for the purposes of discussing any measure with respect to the affected service sector. Any measure taken pursuant to this paragraph shall be mutually agreed by the Parties concerned. The Parties concerned shall take into account the circumstances of the particular case and give sympathetic consideration to the Party seeking to take a measure.

Article 10 Payments and Transfers

1. Except under the circumstances envisaged in Article 11, a Party shall not apply restrictions on international transfers and payments for current transactions relating to its specific commitments.

2. Nothing in this Agreement shall affect the rights and obligations of any Party who is a member of the International Monetary Fund under the Articles of

Agreement of the Fund, including the use of exchange actions which are in conformity with the Articles of Agreement of the Fund, provided that a Party shall not impose restrictions on any capital transactions inconsistently with its specific commitments regarding such transactions, except under Article 11 or at the request of the Fund.

Article 11
Restrictions to Safeguard the Balance of Payments

Where a Party is in serious balance of payments and external financial difficulties or threat thereof, it may adopt or maintain restrictions on trade in services in accordance with Article XII of the GATS.

Article 12
General Exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between Parties where like conditions prevail, or a disguised restriction on trade in services, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Party of measures:

- (a) necessary to protect public morals or to maintain public order;⁵
- (b) necessary to protect human, animal or plant life or health;

⁵ The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

- (c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:
 - (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
 - (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;
 - (iii) safety;
- (d) inconsistent with Article 19, provided that the difference in treatment is aimed at ensuring the equitable or effective⁶ imposition or collection of direct taxes in respect of services or service suppliers of other Parties;

⁶ Measures that are aimed at ensuring the equitable or effective imposition or collection of direct taxes include measures taken by a Party under its taxation system which:

- (i) apply to non-resident service suppliers in recognition of the fact that the tax obligation of non-residents is determined with respect to taxable items sourced or located in the Party's territory; or
- (ii) apply to non-residents in order to ensure the imposition or collection of taxes in the Party's territory; or
- (iii) apply to non-residents or residents in order to prevent the avoidance or evasion of taxes, including compliance measures; or
- (iv) apply to consumers of services supplied in or from the territory of another Party in order to ensure the imposition or collection of taxes on such consumers derived from sources in the Party's territory; or
- (v) distinguish service suppliers subject to tax on worldwide taxable items from other service suppliers, in recognition of the difference in the nature of the tax base between them; or
- (vi) determine, allocate or apportion income, profit, gain, loss, deduction or credit of resident persons or branches, or between related persons or branches of the same person, in order to safeguard the Party's tax base.

Tax terms or concepts in subparagraph (d) of Article 12 and in this footnote are determined according to tax definitions and concepts, or equivalent or similar definitions and concepts, under the domestic law of the Party taking the measure.

- (e) provided that the difference in treatment is the result of an agreement on the avoidance of double taxation or provisions on the avoidance of double taxation in any other international agreement or arrangement by which the Party is bound.

Article 13 Security Exceptions

Nothing in this Agreement shall be construed:

- (a) to require any Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or
- (b) to prevent any Party from taking any action which it considers necessary for the protection of its essential security interests, including but not limited to:
 - (i) action relating to fissionable and fusionable materials or the materials from which they are derived;
 - (ii) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;
 - (iii) action taken so as to protect critical communications infrastructure from deliberate attempts intended to disable or degrade such infrastructure;