

THAILAND'S ACCESSION TO THE CP TPP RECOMMENDATIONS FROM EUROPEAN ASSOCIATION FOR BUSINESS & COMMERCE (EABC).

Executive Summary

EABC was formed in late 2011 by a consortium of European chamber of commerce in Thailand, and European business (MNCs and SMEs). Acting as a 'EuroCham Thailand', with 12 working groups covering many industries, EABC is the voice of European business in Thailand. It is funded by its own members and by revenue from events. EABC publishes the European Business Position Paper approximately every two years (most recent is the 2019/2020 paper, published late 2019).

EABC promotes free trade, economic development, ease of doing business, the 'Thailand 4.0 goal' and European-Thai trade and investment. EABC does not take protectionist approach but welcomes competition on fair terms.

EABC considers that acceding to the CP TPP will be overall net positive for Thailand's economy and for the livelihood of businesses operating in Thailand; that being part of CP TPP will see Thailand better positioned strategically and will be a good protection against trade diversion.

EABC recognizes that different views have emerged on certain topics and has aimed to address these.

Summary of key benefits

- Import tariff removal and trade facilitation
- Reduced regulatory barriers, services liberalization
- Enhancement of environment, labour treatment
- Removal or reduction of import tariffs for Thai exports to Mexico and Canada (the only two economies where Thailand does not have an FTA)
- Enhances Thailand's position in digital development
- Access to public procurement but in ways which offer some protection to local SMEs
- Strengthen regional trade in the Asia Pacific region.
- Positive outcomes in Intellectual Property, Pharma and Agriculture
- Existing members have a stronger say in other members joining. If Thailand joins, it would have those privileges.

Summary of downside in not being part of CP TPP.

- Lesser opportunity for productivity enhancement and quality of economic growth
- Lower economic growth
- Trade diversion – other states' members contemplating investment are likely to find other economies more attractive.

EABC appreciates that there are possible windows of time for acceding to CP TPP. EABC encourages pursuing this at the earliest opportunity. EABC stands ready to make further contributions to address any specific issues.

Thailand's access to the CP TPP – Thailand being a member

EABC considers that acceding to the CP TPP will be overall net positive for Thailand's economy and will see Thailand better positioned strategically. The areas about which concern has been expressed are addressed.

Joining CP TPP would require in some cases, further development of law, regulations and practices. This has been the case for many of the nine members of CP TPP.

A summary of recommendations for the eight key topics is at the end of this document. A Thai version of the Executive Summary is provided separately.

1. ECONOMICS

According to the Bolliger & Co report ¹, done in 2019, Thailand GDP would be positively impacted by 0.07-0.22%, or US\$251-755 million, with investment growing by 5.14-6.66%, or \$4.8-6.2 billion. Exports would increase 3.47-4.63% or \$8.8-11.7 billion.

Without CP TPP membership, Thailand was estimated to lose between \$859 million and \$3.5 billion, or 0.25% and 1.01% of GDP, with investment down 0.49-2.11% or \$460.6 million to \$1.97 billion. Exports would to fall 0.19-0.75% or \$470 million to \$1.9 billion.

These are pre COVID estimates and obviously multiple factors would now impact those estimates.




In mid January 2020, at the launch of the TEM (Thailand Economic Monitor) World Bank forecast 2.7% growth for 2020 (a modest uptick from 2019 out-turn of 2.4%). The expected advance to being a higher income economy was noted; to achieve that in the expected time frame would mean an even higher sustained growth rate. Remedies recommended including enhancing FDI (eg via service sector liberalisation) and productivity enhancements. These have been crowded out by immediacy of survival measures, but are even more needed now, CP TPP would be one very positive contribution.

¹ Commissioned by DTN, MOC

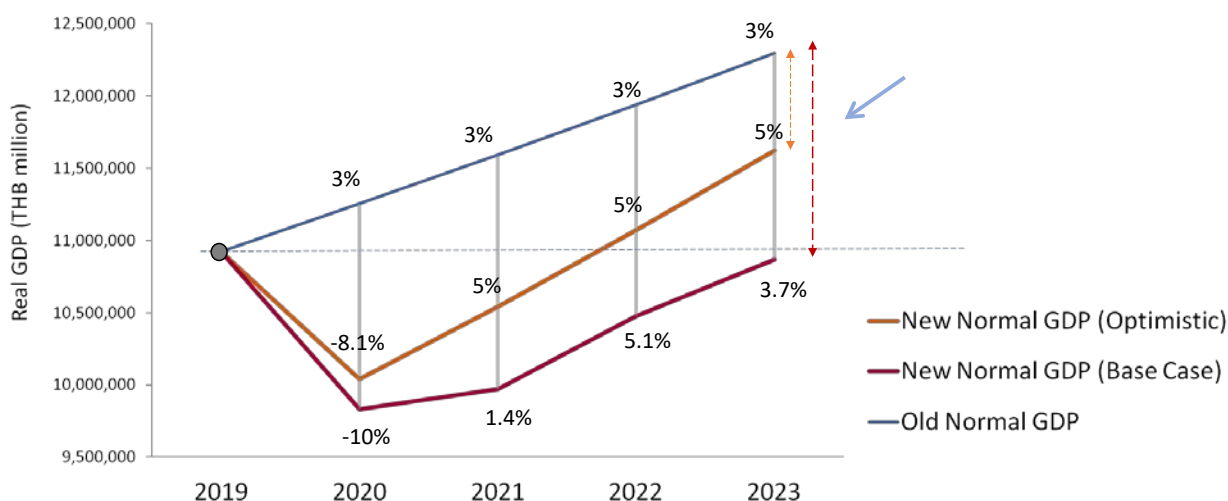
Estimated downturn for 2020:

2020 Thailand's GDP

Analysts forecast deep contraction for Thailand's economy this year

Analysts	2020 Thai GDP (YoY)	As of
 Fiscal Policy Office (FPO)	-8.5	30 Jul
 The World Bank	-5.0	30 Jun
 Bank of Thailand (BOT)	-8.1	24 June
 Siam Commercial Bank (SCB)	-8.7	13 Jul
 Kasikorn Bank (KBank)	-6.0	2 Jun
 Bank of Ayudhya	-10.3	6 Jul
 International Monetary Fund (IMF)	-7.7	24 Jun

The economy is expected to start to recover in 2021, but with no V-shape change (in this chart, base case 1.4% growth, optimistic case 5% growth for 2021).



Source: Dr. Charl Kengchon, Executive Chairman, Kasikorn Research Center (BOI/JFCCT webinar 5 March 2020).

Given that Thailand's effective entry would not come into force until 2021 or later, this chart thus shows relevant economic growth forecasts.

Quality of growth is also relevant – which would be due to efficiency (or productivity gains) not just higher inputs. Quality of growth would see enhanced skills, forces for digitisation and improvement to Ease of Doing Business.

2. CROSS BORDER TRADE IN SERVICES

Service sector liberalization has long been a means of moving from middle income trap. Currently the Foreign Business Act imposes restrictions on foreign participation in a number of service sectors. While approval via a Foreign Business Licence is available and with BOI promotion via a Foreign Business Certificate, there are other barriers to entry for services.

Subject	Effect	Regulatory source
Business activities of entities (eg companies) with more than 49% foreign shareholding	Restricts the business activity of the company using three lists.	Foreign Business Act AD 1999. Foreign Business Licence (s.7) Under IPA (the basis of BOI promotion), a slightly different process applies – a Foreign Business Certificate (s. 12)
Professions which may not be undertaken by foreigners	Prohibits foreigners (individuals) from carrying out 39 professions. JFCCT has identified 8 of interest	AD 1979 Decree; April AD 2020 Notification
Professional licensing or permits at sector or individual professional level.	An additional barrier which is often overlooked by regulatory moves to liberalise professions.	Various sector or profession-specific laws – eg Engineers Act, Accountants Act, Lawyers Act which typically set up a professional licensing authority.

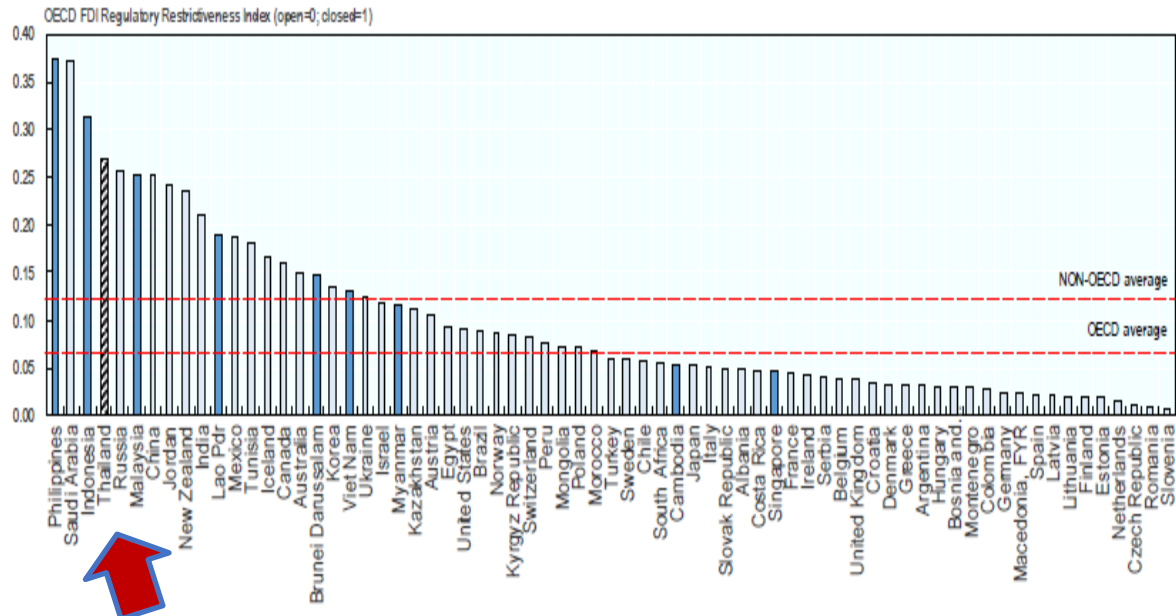
The four modes of service delivery are also relevant. The CP TPP would not require removal of all such barriers but would be a positive means of service sector liberalization.

3. REGULATORY CHANGES

Being part of CP TPP will require certain regulatory changes, with safeguards. The business community has long proposed such changes, including via fast track regulatory reform. It should be easier to do business in Thailand due to being part of CP TPP . Thus changes to Thailand’s customs rewards scheme would likely be needed and would removal of regulatory barriers.

OECD's Regulatory Restrictiveness Index (shown as part of OECD's Investment Policy Review)

Figure 5.3. OECD FDI Regulatory Restrictiveness Index, 2018



4. DIGITAL ECONOMY

As Thailand's economy grows and develops, greater emphasis on higher-end services is both expected and needed. Thus the 'Thailand 4.0' vision is in line with global developments towards 4IR or Industry 4.0. This has a number of dimensions:

- i) Data flows account for great value in cross border trade. Data flows are valuable in their own right and also in how they support investment and trade in goods and services.
- ii) Thailand's digital economy has many positive developments with enabling laws in place, and is moving in the right direction, but digitising business and in particular government has been slow.
- iii) Much is made of Thailand's geographically central position in S E Asia. This is an obvious positive factor for the goods trade. However, to be a regional hub, a Digital economy needs telecoms infrastructure (hard and soft) with leading domestic broadband services, digitized processes including eCommerce, ePayments and eGovernment (or Digital Government).
- iv) Thailand is party to various digital instruments (agreements and other), but most do not have the kind of imperatives for action which CP TPP has
- v) Acceding to CP TPP would thus spur Thailand's digital development which is a key part of plans to move from Upper Middle Income Economy status to High Income economy. Thailand would fall behind if not part of an FTA where others are using leading digital processes in all aspects of business, commerce and government interaction. This includes interoperability in trade terms.



Relevant chapters include 13 (Telecommunications), 14 (eCommerce) and 10 (Cross Border Services trade). EABC has analysed these and considers that any necessary change in order to be part of CP TPP would be achievable.

5. INTELLECTUAL PROPERTY RIGHTS

The CP TPP in its Chapter 18 establishes a common set of rules on intellectual property protection and enforcement, which aim to encourage investment in new ideas, support creative and innovative industries, address and prevent piracy and counterfeiting, and promote the dissemination of information, knowledge and technology.

The CP TPP is fully consistent with Thailand's modern intellectual property framework, based on provisions of the World Trade Organization's Agreement on Trade-Related Aspects of Intellectual Property (TRIPS Agreement). Thai IP laws will not be substantially modified by any the provisions contained in the CP TPP in particular taking into consideration the upcoming proposed amended set of legislation for copyright, designs and patents.

The CP TPP provisions need to be read carefully and as a whole to be clearly understood. Some provisions relating to Investor State Dispute Settlement (ISDS), pharmaceutical and agricultural products, compulsory licensing, data exclusivity and geographical indications have been pointed out by some, who tend to forget about existing TRIPS Agreement provisions and flexibilities which remain untouched.

- a. Will the Intellectual Property Chapter of the CP TPP be subject to Investor-State Dispute Settlement (ISDS)?

No. The Intellectual Property Chapter of the CP TPP cannot be directly enforced via ISDS. An ISDS dispute under the CP TPP could only be brought in relation to intellectual property where there has been an alleged violation of a commitment in the Investment Chapter.

- b. Will CP TPP restrict access to medicines and generic medicines in particular?

No. The Agreement could be applied with flexibility to allow manufacturers of generic drugs to use the patented invention to obtain marketing approval, for example from public health authorities, without the patent owner's permission and before the patent protection expires. Generic producers can register in preparing the use of the products, then market their versions as soon as the patent expires. With this, the notification system to the patent owners and appropriate mechanisms related to infringement of applicable patents would be established. This provision is clearly found in CP TPP and TRIPS that are allowed as "regulatory exception".

Flexibilities already granted under the TRIPS agreement such as the right for researchers to use a patented invention for research, in order to understand the invention more fully are left untouched by the CP TPP.

Regarding concerns about food safety and need for Thailand to ratify the UPOV Convention when joining the CP TPP, please refer to our Agriculture section below.



Overall the CP TPP does not contain any provision which would restrict the ability of generic drug manufacturers to import, produce locally or produce for export generic drugs as further explained in our **Pharmaceutical section below**. The CP TPP will not limit Thai farmers in accession to traditional and existing plant varieties as further explain in our **Agriculture section below**.

c. Will the CP TPP grant longer protection for patents?

No. Patent term of 20 years is not adjusted by the CP TPP and there are no provisions of the CP TPP that would require a change to Thailand's 20 years patent term.

Article 18.46 only indicates that *“If there **are unreasonable delays** in a Party’s issuance of patents, that Party shall provide the means to, and at the request of the patent owner shall, adjust the term of the patent to compensate for such delays”*. An unreasonable delay would be five years from date of filing of a patent application in the country or three years from requesting substantive examination.

The Thai patent office- with fewer exceptions than some years ago- is fully capable of performing substantive examination of patents within three years. The Department of Intellectual Property added many patent examiners to its patent office division some years ago and the overall backlog of patent applications and pendency have greatly been reduced.

Overall the proposed system of CP TPP will be beneficial for Thailand as it will accelerate the prosecution time for patent applications - something helpful not only for patentees (so that they can start collecting royalties and enforce their rights) but also third parties (who have a need to know if a patent application has been granted or rejected).

The proposed system will reduce legal uncertainties and overall number of “patent pending” which are always a major issue for any potential licensee or user of a patented technology. Thailand will be brought closer to other IP offices in the region such as Singapore or Vietnam. This will enhance Thailand’s competitiveness for international investment in intellectual property assets compared with other countries including in the region.

d. Will the CP TPP change Thailand’s regime of parallel imports?

No. The CP TPP does not modify the current regime of international exhaustion of Thailand. Parallel imports will still be allowed under the CP TPP regime.

e. Will the CP TPP reduce Thailand’s ability to impose compulsory licenses (CL)?

No. Some have pointed to Article 9.8 of the Agreement: (Expropriation and Compensation) and its ANNEX 9-B (Expropriation limitations) and claim that it is inconsistent with the overarching WTO TRIPS Agreement.

This reading is erroneous. When considering the provisions of expropriation and compensation (Expropriation and Compensation CP TPP Clause 9.8), it is clear that Clause 9.8.5 stipulates that this clause does not apply to (1) the issuance of compulsory licenses measures in accordance with TRIPS agreement or (2) Withdrawal of the exemption or

granting of intellectual property rights under the Intellectual Property Article (TPP Agreement Article 18) and the TRIPS Agreement.

The CP TPP articles 18.6 and 18.41 further confirm the rights of the Parties to use the flexibilities granted under the TRIPS and Doha Declaration. CL would not be affected, in compliance with WTO TRIPS agreement.

See Article 18.6: *“The obligations of this Chapter do not and should not prevent a Party from taking measures to protect public health. Accordingly, while reiterating their commitment to this Chapter, the Parties affirm that this Chapter can and should be interpreted and implemented in a manner supportive of each Party’s right to protect public health and, in particular, to promote access to medicines for all. Each Party has the right to determine what constitutes a national emergency or other circumstances of extreme urgency, it being understood that public health crises, including those relating to HIV/AIDS, tuberculosis, malaria and other epidemics, can represent a national emergency or other circumstances of extreme urgency”.*

See Article 18.41: *“The Parties understand that nothing in this Chapter limits a Party’s rights and obligations under Article 31 of the TRIPS Agreement, any waiver or any amendment to that Article that the Parties accept”.*

It can be concluded that It is possible to implement compulsory license measures consistent with Article 31 of the TRIPS agreement without Thailand being subject to being sued under the investment clause.

f. Will the CP TPP modify the Thai Copyright Law?

No. The CP TPP does not require an increase in the term of copyright protection in Thailand. The CP TPP does not require internet service providers (ISPs) to monitor, report or penalize copyright infringement. The CP TPP appears fully in line with current and planned future Copyright Act revisions.

g. Will the CP TPP impact trademark licensing and use of a trademark?

Yes in a positive way. The CP TPP eliminates the requirement for recording (registering) a trademark license to establish the validity of such license. The CP TPP also expressly indicates that the use of a trademark by its licensee shall inure to the benefit of the trademark owner. This change will open more possibilities for licensing and therefore for Thailand to license in trademarks as well as increasing overall the framework for trademark licensing in Thailand.

The CP TPP also grants protection to sound trademarks which Thailand already protects since its law Trademark Act revision in 2017.

h. Will the CP TPP enhance the protection of Geographical indications in Thailand?

Yes. The provisions protecting geographical indications are very beneficial to owners of Geographical Indications since protection for GIs is possible under collective trademark protection and sui generis law (see Article 18.19 and Section E of Article 18). Thailand has

already adopted a sui generis protection system and has granted protection to more than one hundred Thai geographical indications, mainly agricultural and handicraft products. Thailand's rich heritage of quality agricultural products is well protected and Thai consumer will also be better protected from counterfeit food products. Although the CP TPP will not impact much of the already existing large protection for GIs in Thailand, the fact that neighboring countries of Thailand, where Thai GI products are exported will benefit Thai GI producers.

6. PUBLIC HEALTH & PHARMCEUTICALS

On concerns related to intellectual property aspects of pharmaceuticals we refer to the previous section Intellectual Property Rights as many of the issues are relevant to Public Health and access to medicines.

On concerns with respect to the sustainability of Thailand's Universal Health Coverage and access to medicines; the National List of Essential Medicines (NLEM) which ensures availability of therapeutics to the public gratis; consists in the majority of unbranded genericized products.

Provisions in the CP TPP on public procurement should expand the availability of supplies of quality genericized therapeutics creating greater competition and procurement choice available to all healthcare facilities thereby favouring patients' choice and an efficient market mechanism.

Issues manifesting in product shortages in a commodities market center on an imbalance between supply and demand; the CP TPP will liberalise the supply side which will favour the healthcare sector in the long run both with respect to price stability and supply availability.

Innovative products with intellectual property protection represent a minority in the National List of Essential Medicines. Inclusion of such products in the National List require negotiated mutual agreements between the suppliers and the NLEM Sub Committee to ensure sustainable access post inclusion.

In addition, the prescribing and dispensing of such innovative products are currently strictly governed by clinical guidelines thereby curtailing the population to which the products are essential. Provisions in the CP TPP will not affect the gratis access by patients to the innovative medicines included in the NLEM.

Existing ring-fenced disease specific funds already exist for three disease groups of importance to the Government; each receives additional augmentations to ensure access to therapies. Funds range from of THB 3.5 Billion ringfenced for 332,000 registered patients, THB 9.4 Billion for 61,000 patients and THB 1 Billion for 3 Million patients; similar mechanisms can be equitably developed for patients requiring access to innovative medicines which remains a minority constituency in the NLEM.

Notwithstanding, in the mid to long term, the aspiration to attract FDI and technology transfer in the healthcare and bio pharmaceutical sector both of which require strong respect for intellectual property rights and a vibrant liberal market mechanism; can only be



better served by participation and negotiation in a modern 21st century Free Trade Agreement such as the CP TPP which is designed to create an attractive environment for both investment and trade in the innovative healthcare sector.

The withdrawal of the US from the TPP had the effect of suspending in the CP TPP 20 commitments in the former agreement, including two rules on pharmaceutical patents. The situation about generic drugs is covered in the Intellectual Property section above.

7. AGRICULTURE

With Thailand as a member of CP TPP, farmers will be able to export more agricultural products to world markets. However, if farmers consider that some products are not able to compete, Thailand can reserve the product and request an adjustment period. DTN has analysed which food products would be benefitted and which could be affected.

One concern related to CP TPP is about the requirement in acceding to UPOV 1991 (International Union for the Protection of New Varieties of Plants). UPOV was established by the International Convention for the Protection of New Varieties of Plants. The Convention was adopted in Paris in 1961 with the current version revised in 1991, commonly referred to as UPOV 1991. UPOV's mission is to provide and promote an effective system of plant variety protection, with the aim of encouraging the development of new varieties of plants, for the benefit of society.

UPOV 1991 has an important role to play as it provides a system that enables plant breeders to protect their innovations and obtain a return on investment in developing varieties that meet the needs of farmers and consumers. This, in turn, encourages research and development, especially for Thai breeders to continue investing in their plant breeding programs. UPOV supports the plant breeding landscape by enabling a diverse range of breeders and breeding programs to thrive, while also ensuring that the latest developments in plant breeding are available to farmers and growers around the world with the effective use of plant breeders' rights under the UPOV system.

New varieties of plants with features such as improved yield, resistance to plant pests and diseases, salt and drought tolerance, or better adaptation to climatic stress will benefit farmers in increasing productivity and product quality in agriculture, whilst minimizing the pressure on the natural environment. Due to the continual evolution of new pests and diseases as well as changes in climatic conditions and users' needs, there is a on-going, ever-present demand by farmers/growers for new plant varieties and development by breeders of such new plant varieties.

Additionally, this would become more important in the current situation of COVID-19 since many countries globally are facing challenges in food security especially where supply chains have been disrupted. Supporting the development of new varieties of plants is an important response to achieving food security and agricultural sustainability, especially also in a context of climate change and global population growth.

Thai researchers and Thai farmers will benefit from this plant variety protection system which will protect only the "new" plant varieties and encourage research and development



of improved plant varieties that will consequently benefit Thai farmers to increase yields and enhance quality in their produces as well as to efficiently cope with current agricultural challenges from unfavorable climate conditions, pests and plant diseases contributing to sustainable agriculture and food security in the country.

This protection will not limit the farmers in relation to traditional and existing plant varieties. Farmers can collect seeds in native species groups. Original breed wild varieties of plants of all kinds, including herbs and unprotected commercial varieties can continue to be grown as now.

Additionally, this will not impact to the farmers in replanting seed for the protected new plant varieties on their own farms or further development without the needs for any authorization of the breeders (UPOV 1991 Article 15). In addition, this does not restrict the ability of farmers to grow and sell harvested products of protected varieties without any authorization of breeders if the seeds of protected varieties are legally obtained, unless, the selling of seed and propagating materials that will be required the authorization from breeders.

On additional concerns related to genetically modified organisms (GMO) and impact to conservation and sustainable use of biodiversity or biological diversity, CP TPP does not force members' markets to be open to GMO products. There is also no prohibition or reduction of Access and Benefit-Sharing (ABS). Thailand is a member of the Convention on Biological Diversity (CBD). Thailand has laws regarding access and sharing of benefits. Many economies are also members of both UPOV1991 and the CBD, such as Japan and Canada, as are European economies.

8. PUBLIC PROCUREMENT

CP TPP requires that foreign companies can participate in state supply. EABC sees this as overall positive for the economy and government procurement. However a threshold limit or via a 'handicapping' process which can be set in order to protect local SMEs. The government procurement market can be adjusted for up to 25 years. Adjustments have been included for Vietnam and Malaysia for example.

Summary of Key Points

See Executive Summary for Key Benefits of joining and Downside of not joining.

1. Economics : Pre COVID 19 estimates show a net positive outcome, and downside without CP TPP. Preparing for the post COVID 19 world needs FDI stimulus which the CP TPP would bring. The negative impact of trade diversion is also relevant.

2. Cross border trade in services. EABC does not hide its long-standing support for service sector liberalization with a variety of benefits for the economy, Thai consumers (business, government and individual).

3. Regulatory Changes. The Fast Track Regulatory Reform (or Guillotine) project showed significant benefit to Thailand's economy and its participants. Reduction of regulatory overhead and changes to support CP TPP obligations and benefits are a necessary part. But there would be time to make some of the needed adjustments.

4. Digital – Being geographically central is not very relevant for leadership in the digital economy. Other factors are. Data flows to support trade, and development of the digital economy would be enhanced by accession to the CP TPP.

5. Intellectual Property Rights. Entering CP TPP would strengthen Thailand's robust but developing IP system. The CP TPP aims to encourage investment in new ideas, support creative and innovative industries, address and prevent piracy and counterfeiting, and promote the dissemination of information, knowledge and technology. The details of various aspects of IP Rights are in this part 5.

6. Public health and Pharma. Taking into account various safeguards, accession to CP TPP would be of benefit to Thailand. For example, provisions in the CP TPP on public procurement should expand the availability of supplies of quality genericized therapeutics creating greater competition and procurement choice available to all healthcare facilities thereby favouring patients' choice and an efficient market mechanism.

7. Agriculture. With Thailand as a member of CP TPP, farmers will be able to export more agricultural products to world markets. However, if farmers consider that some products are not able to compete, Thailand can reserve the product and request an adjustment period. Other aspects of agriculture, including how UPOV 1991 works, are in the section.

8. Procurement. EABC sees foreign participation in public procurement as positive. But to protect SMEs for some time, specific deferrals are possible.

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