TPPA and Southeast Asian Labour

Malaysia Labour

The Trans-Pacific Partnership Agreement (TPPA) is a trade, investment and economic integration that involves 12 Asia-Pacific countries, including Vietnam and Malaysia. The concluded agreement is around 6000 pages long, comprising 30 chapters, multiple annexes, appendixes general notes and side agreements. Trade unions, environmental, development and public health campaigners have all raised issues with various parts of the TPPA, and large-scale protests have animated much of the public discourse in other parts of the world. The deal's proponents have pointed to the economic gains, while arguing that the safeguards negotiated into the agreement will protect the public interest.

The technical legalistic jargon of the Agreement make it largely impenetrable for working class people to engage with it on a meaningful level. This project aims to address that issue, presenting information based on text, secondary analyses. The project has been funded by Friedrich Ebert Stiftung's Singapore Office, research has been undertaken by the Building and Wood Workers' International Asia-Pacific Regional Office, and consultation has taken place with union leaders through the ASETUC network.

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Workers in many TPPA countries face extremely poor conditions of work, low wages, poor to non-existent health and safety standards and negligible protection. According to the International Trade Union Confederation's Global Rights Malaysia has a ranking of 4 (indicating systematic violations of rights).[1]

Critics have long argued that trade and investment liberalisation can further drive down labour standards, creating a race to the bottom in wages and conditions.[2] On a purely economic level, the reduction of labour rights can create unfair competition in a marketplace, engendering an incentive to deregulate labour markets and repress trade union organising. The opposite view would hold that the implementation of labour standards is a fundamentally protectionist exercise.

The TPPA's two major labour-related instruments, the Labour Chapter and the US-Malaysia Labour Consistency Plan, seek to adress these concerns in some manner. However the obligations contained are ultimately far too vague and the enforcement mechanism provided far too weak to be useful.

Labour chapters in FTAs

Since 1994, the United States has demanded the inclusion of some form of labour provisions in all of its bilateral and regional free trade agreements. This began with the North American Agreement on Labour Cooperation (NAALC), which complemented NAFTA, and has continued since then.[3] Unfortunately, these provisions have consistently disappointed unions and labour organisations and the labour provisions in the TPP are similarly disappointing.

In 2007 the US adopted the so-called "May 10 Standard" or "model" labour protection language to safeguard international labour standards. This language is embodied by reference to the fundamental declaration,[4] as well enforcement mechanisms and sanctions. It is argued that the strength of the US model is that it wed trade liberalisation to international labour norms.[5] For the first time the May 10 Standard's unitary enforcement mechanism allowed trade sanctions to be brought for violations of labour rights.

While a step forward, trade union confederations and global union federations have criticised the US model as being too weak and practically unenforceable. In 2012 an alternative trade union movement model labour and dispute resolution chapter was proposed,[6] that was endorsed by labour centres in Australia (ACTU), Canada (CSN and CLC), Japan (RENGO), Malaysia (MTUC), Mexico (UNT), New Zealand (NZCTU), Peru (CATP, CGTP and CUT), Singapore (NTUC), and the US (AFL-CIO). The TPP labour chapter that has appeared in the final text fails to respond to those recommendations, continuing the trend of vague obligations married to a high evidential standard, and relying on a state-state dispute settlement mechanism.

Many will argue that the presence of a labour chapter that at least tries to improve standards but fails (or only achieves marginally) is still better than nothing. We do not agree with this analysis. Where trade in industries in which labour rights violations occur is facilitated or expanded by trade agreements, a poorly designed labour chapter nonetheless provides legitimacy to that

1. http://www.ituc-csi.org/IMG/pdf/survey_ra_2016_eng.pdf
2. See e.g. Anuradha RV and Nimisha Singh Dutta 'Trade and Labour under the WTO and FTAs' Centre for WTO Studies. Available at: http://wtocentre.iift.ac.in/Papers/Trade%20Labour%20Study.pdf
3. The other US FTAs with labour rights are US-Israel, NAALC/NAFTA, US-Cambodia Textile Agreement, US-Jordan, US-Singapore, US-Chile, CAFTA-DR, US-Australia, US-Colombia, US-Bahrain, US-Morocco, US-Panama, US-Korea, US-Peru, US-Oman.
4. EU FTAs, on the other hand, include specific reference to the ILO Core Conventions themselves. It is believed that the reference to the Fundamental Declaration is included (rather than the conventions) because the US has ratified only three of the eight core conventions, however it is bound by the Fundamental Declaration by virtue of being an ILO member state.
5. Page 8 http://www.eastwestcenter.org/sites/default/files/filemanager/pubs/pdfs/7-5Brown-rev20160510.pdf
6. http://www.ituc-csi.org/the-union-proposal-for-the-labour?lang=en

agreement, while simultaneously wasting the time of the those workers and unions that attempt to engage with it.

TPPA's Labour chapter

Chapter 19 of the TPPA on Labour presents some minor changes to the May 10 Standard, however they are only minimal and they will likely not have a material impact on the ability of workers and unions to address labour rights violations. The core "enforceable" provisions of the chapter are contained in Article 19.3. Article 19.3.1 requires each party to "adopt and maintain in its statutes and regulations, and practices thereunder", stating the rights under the ILO Declaration (freedom of association and collective bargaining, forced and compulsory labour, child labour, and discrimination).[7] This is distinct to the EU approach in its trade agreements, which reference the individual conventions, thus setting a higher degree of protection and precision.

19.3 governs both labour rights and certain "acceptable conditions of work". 19.3.2 states that parties must also "adopt and maintain statutes and regulations, and practices thereunder, governing acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health." This list of conditions falls short of recommendations made by the ITUC to include conditions around worker representatives, termination of employment, compensation in cases of occupational injuries and illnesses, and social security and retirement.[8] And, while parties are not to derogate from labour standards (19.4(b)), labour standards are not to be used for protectionist purposes (19.2.2).

On the face of it these obligations seem to provide strong protection for labour rights. Exhibiting evidence of violations of these rights, however, is insufficient to trigger a claim under the chapter's dispute machinery. As footnote 4 notes, establishing a violation of one of these obligations requires the Party to not only "demonstrate that the other Party has failed to adopt or maintain a statute, regulation or practice", but it must be "in a manner affecting trade or investment between the Parties." The obligations contained in 19.3.2 are even more problematic, on the basis that there are no standards for these requirements, meaning the minimum wage could be set at effectively nothing, maximum working hours could be set at 23 hours a day, and so on. To make matters worse, footnote 5 explicitly states that the satisfaction of these obligations is "as determined by that Party." In other words, states are empowered to determine whether they have adequately complied with the provision themselves.

The ITUC argues that the chapter's non-derogation (19.4(b)) obligation is drafted weakly. By excluding the clause "acceptable conditions of work" (19.3.2) from its scope it allows a country to weaken its wage, hour and health and safety laws to attract trade and investment without sanction. Secondly, states are entitled to weaken their laws related to a fundamental right to attract trade and investment, so long as they are not weakened to the point where they are inconsistent with that the minimum right. In other key areas the deal is also lacking. For example, the provisions with regard to forced labour only requires parties to "discourage" trade in such goods "through methods it considers appropriate" (Article 19.6).

Proponents of the deal have noted that TPPA contains "enforceable" labour rights, however the AFL-CIO argue that the proper yardstick ought to be

7. This is distinct to the EU approach in its trade agreements, which reference the individual conventions, thus setting a higher degree of protection and precision.
8. http://www.ituc-csi.org/IMG/pdf/trans_pacific.pdf
9. http://www.ituc-csi.org/IMG/pdf/trans_pacific.pdf

whether there are sufficient provisions to provide confidence that they will actually be enforced.[10] Past experience indicates that there is little evidence that these cases ever reach a resolution. The first ever labour case brought under a free trade agreement, filed under the Central American Free Trade Agreement's labour chapter, regarding Guatemala's legal compliance, is now more than eight years old, and still no ruling has been issued.[11] That case, filed by AFL-CIO and six Guatemalan unions, alleged that the Guatemalan government had failed to prevent repression of union activity, blacklisting, violence and intimidation (including the assassination of two union officers). Like that trade agreement, the TPPA's labour chapter has no mechanism requiring parties to advance to the next stage of dispute settlement when an earlier stage proves in effective (Article 19.5). There are no deadlines for public submissions, so claims may also suffer from similar endless "administrative delays" (Article 19.9). This same issue arose in a claim filed regarding labour violations in Honduras, in which petitioners have waited for two and half years for an initial report.

Labour Consistency Plan

Concern regarding the labour rights record of Malaysia were raised in a May 2014 letter signed by Democrats and Republicans, called on the Obama Administration to "refrain from validating such woefully inadequate labor norms and the final agreement should be withheld until these countries embrace the need to reform their labor laws and move aggressively to implement them."[12] Up until 2015 Malaysia had sat in the "Tier 3 watchlist" (i.e. the worst) of the US' annual 'Trafficking in Persons' report. In June 2015 it was bumped up to Tier 2 (despite few changes to their regimes or practices), which critics argued was designed to make it seem like Malaysia was improving its practices and help implement the deal.

In response to such criticisms the US has negotiated a 'Labour Consistency Plan' ('LCPs') with Malaysia to buttress the labour chapter. It is intended to bring Malaysian labour laws in line with the rights delineated in the 1998 ILO Declaration on the Fundamental Rights and Principles at Work ('the fundamental declaration'). The LCPs contain detailed obligations regarding the changes required to that country's existing labour laws to ensure compliance. While this is a novel and potentially powerful tool, it suffers from many of the same deficiencies that similar previous mechanisms have also exhibited.

The US-Malaysia demands the implementation of certain targeted legislative reforms to liberalise the formation, organisation and registration of trade unions (II.A.1-10), the collective bargaining framework (II.A.11), the right to strike (II.A.12-16), and access to remedies (II.A.17-18). It also has provisions covering issues of forced labour and trafficking (II.B.1-4), child labour (II.C) and employment discrimination (II.D). Finally there are some vaguely-defined sections on enforcement (III.A), transparency between the US and Malaysia (IV.A-C) and Implementation (VII). While there are some truly valuable demands amongst the provisions of this Labour Consistency Plan, many of the obligations are poorly defined and subject to an wide breadth of possible interpretation.

One of the core problems with the labour consistency plan is that it fails to include measurable benchmarks or an independent evaluation to determine whether its criteria have been met. These leaves it open to the immense commercial pressures experienced by other countries in the implementation of labour consistency plans, such as in the US-Colombia agreement. To hurry

10. AFL CIO TPP labour rights report
11. http://www.politico.com/tip-sheets/morning-shift/2016/06/guatemala-labor-case-drags-on-campaign-staffs-and-the-overtime-rule-mcdonalds-mulls-outsourcing-214905
12. Letter to USTR Michael Froman from 153 House Democrats, 29 May 2014, http://democrats.edworkforce.house.gov/sites/democrats.edworkforce.house.gov/files/documents/5.29.14-TPPLettertoFroman.pdf

the deal along success was declared prematurely and the US "certified" the agreement (see **section x**), while union repression has remained a consistent feature of the labour force. A complaint filed by AFL/CIO and four Colombian unions in May 2016 alleged that threats and acts of violence against trade unionists in Colombian were neither properly investigated nor prosecuted, noting that since entry into force 99 Colombian workers and their advocates had been killed while trying to exercise their rights, with a further six kidnapped and 955 death threats.[13]

Migrant worker concerns

Immigration has been a core concern for many countries in the Asia-Pacific, particularly so for Malaysia, which currently has around 4 million migrant workers, only half of whom are documented. This influx of cheap labour has been of huge benefit to capital, however migrant workers have little in the way of practically exercisable rights.

Chapter 12 concerns 'Temporary Entry for Business Persons', which is accompanied by a series of Annexes detailing the parties' commitments under the chapter. The scope of this chapter (12.2) does not create any new labour mobility, it is restricted to employers hiring internationally or moving employees across borders. The chapter is intended to promote the movement of international business people to facilitate the cross-border flow of trade and investment, and accordingly it exhibits no strong connection to the labour chapter itself, no the rights of migrant workers.

Rules around migrant workers feature in the Labor Consistency Plan. For instance Malaysia is required to amend sections of Acts 262 to allow non-citizens to run for election to union office if they have been legally working in Malaysia for at least 3 years. Rules around trafficking require the Government to ensure free movement to and from shelters, access to chosen legal counsel, allowing victims to work and find new employment under clearly established procedures, and enable NGOs to own and operate shelters. Again, while we support these measures, the existing problems with the LCP, with regard to a lack of benchmarking and no clear mechanism to ensure effective implementation, we believe that these areas will be of little practical benefit to protect the rights of exploited migrant workers.

Labour Rights Advisory Committee (LAC) on Trade Negotiations and Trade Policy position:

The LAC is a statutory body comprising 19 American union leaders established under the US Trade Act 1974 to assess the impact of trade policy on trade unions. Its assessment of the TPPA is as follows:

> The primary measure of the success of our trade policies should be increasing jobs, rising wages and broadly shared prosperity, not higher corporate profits and increased offshoring of American's jobs and productive capacity. Trade rules that enhance the already formidable economic and political power of global corporations – including ISDS, excessive monopoly right for pharmaceutical products, and deregulation financial services and SPS rules – will continue to undermine working bargaining power, here, and abroad, as well as weaken democratic processes and regulatory capacity across all 12 TPP countries.[13]

13. http://in.reuters.com/article/us-usa-colombia-trade-labor-idINKCN0Y71G8
14. https://ustr.gov/sites/default/files/Labor-Advisory-Committee-for-Trade-Negotiations-and-Trade-Policy.pdf