TPPA and Southeast Asian Labour

Impact on BWI Sectors Malaysia

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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The Building and Wood Workers International (BWI) is the global union federation for workers in the construction, wood and forestry, building materials and allied sectors. The BWI has 8 affiliates in Malaysia – Malay Forest Officers' Union (MFOU), Malaysian Technical Services Union (MTSU), PKNS Employees Union (PKNS), Sabah Timber Industries Employees Union (STIEU), the Timber Employees' Union Peninsular Malaysia (TEUPM), Timber Industries Employees' Union of Sarawak (TIEUS), the Union of Employees in Construction Industry (UECI) and the Union of Forestry Employees Sarawak (UFES).

Industry outlook

The Malaysian construction has grown 11.6% between 2010 and 2014. contributing 4.4% to GDP in that year. Investment in the construction sector has rebounded sharply since the GFC, growing 80% from 2012 (RM1.61 billion) to 2013 (RM 2.89 billion). The Malaysian construction sector has already been largely liberalised, and therefore Malaysian contractors are already in a position where they are competing against international competitors. Foreign contractors are winning a growing proportion of these contracts – growing 1.7 times between 2012-2014 (from 14.8% to 25.6%). The economic impact of TPPA will continue these trends but hardly amplify them.

According to the PWC analysis the construction sector can expect a 0.13% GDP increase attributable to the reduction of tariffs by 2027. The study also makes estimations regarding the growth contribution from removing non-tariff measures, arguing that if these are cut by 25% sectoral growth will reach 0.6% and if cut by 50% it will reach 1.04%. As we have argued in Section 3, these figures are extremely difficult to quantify and should be treated with a high degree of caution. PWC argue that local contractors will benefit from cheaper machinery and general contractors will maintain their competitiveness, however specialised contractors will experience increased competition and labour costs will likely increase (see below). Thus in their view the impact is largely neutral.

While timber exports used to make up a significant proportion of Malaysian exports. The wood and forestry sector's contribution to GDP has declined to 1.4% in 2014, and a growing proportion of this is coming from furniture manufacturing. Almost half (46%) of timber-based exports go to TPPA countries (particularly Japan) and these exports are expected to grow, although PWC's estimate of 5% growth in exports to Japan annually seems overly optimistic, considering the generally low tariffs in the sector.

Labour

Construction is a significant employer in Malaysia. According to the ISIS study it employs 1,268,000 workers (5.77% of the labour force), while the PWC reports says "construction services" employs 9% of the Malaysian labour force. The sector relies heavily on temporary foreign workers. The growth in documented workers – from 20% in 2010 to 35% in 2013 – doesn't take account for the presence of undocumented workers. The wood and forestry sector on the other only accounts for around 200,000 workers in Malaysia, and has been falling at a rate of 5.6% over the last five years as logging activities have declined.

Wages in the sector are low,[1] and the large presence of foreign workers in the sector no doubt helps restrain wage growth. Industry structure is also likely a factor, given most (88.5%) of the active contractors in the construction sector are small and medium enterprises.BWI unions are looking to expand their membership to gain further strength in the construction industry and its associated supply chains, and therefore it is important to survey changes in the sector. In forestry and construction the strengthening of labour rights is a positive step, however the significance of these changes should not be overstated. As we argue in Section x the likelihood that these will be implemented effective is low, however our unions must do our best to capitalise on these potential changes.

State-led development

Malaysia has long practiced a state-centric form of development. Part of the recent growth in the construction sector has been spurred on by Government infrastructure spending – around RM 138 billion of development fund money was allocated towards expanding physical infrastructure under the 10th Malaysian Plan, while a further RM 20 billion from the facilitation fund was allocated towards promoting attracting private investments, including 52 public-private partnership projects worth RM 63 billion. These include a tolled highway, a coal electricity generation plant and a number of major rail projects. State support remains critical to develop the Malaysian construction industry.

Participation in the TPPA will require Malaysia to partially liberalise government procurement of construction services with TPPA partners over a certain threshold value. Malaysia has initially secured a higher threshold of SDR 63 million (~RM 315 million) for construction procurement projects - only 0.7% of government contracts for construction services in 2014 would be covered. Over a 20 year period the threshold will drop to SDR14 million (RM 70 million), and in 2014 2.8% of government construction contracts were over RM 100 million. The largest class of contractor (G7, with a financial limit over RM10 million) will be exposed to greater competition, while smaller contractors will remain unaffected. For government procurement contracts covering construction, the Malaysian Government has secured a minimum of 30% Bumiputera participation.

The ISIS study notes that the construction industry has traditionally played an important role in steering countries out of crisis situations, where the state's preferential use of SOEs can maintain stability and employment. This has been preserved for a 25 year period after entry into force.

ISDS in the construction industry

The construction industry often involves large capital investments and can also generate large returns, so it is no surprise that it is being increasingly targeted by the global ISDS industry. According to a 2015 ICSID (the jurisdiction in which two-thirds of ISDS claims are filed) analysis the construction industry accounts for 7% of all ICSID cases, and 8% of cases registered in 2015.[2] 7 of the 70 cases – ten percent – filed in 2015 related to the construction sector, up from five cases in 2014.[3] Many of these cases challenge environmental and

1. The average daily wage for local skilled labour is between RM72.30 and RM105.80, whilst foreign skilled workers earn between RM61.60 and RM94.30. The average daily wage for semi-skilled local labour is between RM70.20 and RM101.30, whilst semi-skilled foreign labour earns between RM59.30 and RM89.20.
2. International Centre for Settlement in Disputes, pages 12 and 26. https://icsid.worldbank.org/apps/ICSIDWEB/resources/Documents/ICSID%20Web%20Stats%202015-2%20(English).pdf
3. UNCTAD International Investment Arbitration Note 2 "Investor-State Dispute Settlement Review of Developments in 2015" (June 2016). http://investmentpolicyhub.unctad.org/Upload/ISDS%20Issues%20Note%202016.pdf

land use regulations, however they have flow on effects for workers and employment in the construction and associated sectors.

One concerning trend to do with the growth of ISDS in the construction industry is the growth in the number of claims have targeted post-Arab Spring countries under attack by international investors regarding decisions taken by their former regimes. Austrian firm Strabang SE and and Turkish firm Tefken Holdings have both taken claims against the new Libyan Government.[4] The most disturbing precedent established in the construction industry is ***Al Kharafi v Libya***. In 2013 a tribunal ordered the Libyan Government to pay $US935 million to an investor whose land leasing arrangement and approval for a tourism project was annulled by the Ministry of Economy. The vast majority of the award - US$900 million – was ordered for “lost profits” from “real and certain lost opportunities” The investor had only invested US$5 million into the project, and construction hadn’t even started yet.[5]

Considering the growth of speculative funding of the ISDS industry mentioned in (section x), the growth of ISDS claims in the construction industry is a concerning development. Where construction firms are able to continue to have a return on capital without engaging in the real economy means a potential for restricted development of employment in that sector. Fewer contracts means fewer new jobs in the sector, meaning increasing competition amongst workers to keep the cost of labour down. Further, the inability of Governments to effectively regulate property markets under other TPPA rules could lead to a boom-and-bust dynamic of property investment. This has a clear impact on the development of stable employment in the construction industry, however there is also likely to be a multitude of new attempts to claim lost profits when asset values fall.

The future of Malaysian forestry

The Malaysian forestry sector is largely liberalised, however the state permit system – applied in an opaque manner – still acts as a major deterrent to foreign investment. The damage that has already been done to forests in Borneo – where some estimate 80% of Sabah and Sarawak’s forests have been heavily impact by logging – have put the sector’s long-term viability into doubt. The Government is proposing to plant 375,000 hectares from 2006-2020, however the rate of deforestation is troubling.Stopping illegal forestry is critical to the long-term sustainability of the Malaysian forestry sector.

A number of the TPPA’s provisions aim to deal with the issues of illegal logging and forest management. Article 20.17.1 demands parties “affirm the importance of combating the illegal take of, and illegal trade in, world fauna and flora, and acknowledge that this trade undermines sustainable management of those resources…”. Under this section Parties are not required to prohibit illegal logging, only acknowledge that it is a problem. Under 20.17.4(b) Parties are to commit to “maintain or strengthen government capacity and institutional framework or to promote sustainable forest management and wild fauna and flora conservation…”. The section is equivocal as to whether a country like Malaysia, which currently has laws around illegal logging and sustainable forest management, would have to take any further action to comply with the provision.

Article 20.15 concerns the issue of climate change, which is of critical

4. James MacDonald and Dyfan Owen Ashurst “The Effects on Arbitration of the Arab Spring” (20 April 2016. http://globalarbitrationreview.com/insight/the-middle-eastern-and-african-arbitration-review-2016/1036966/the-effects-on-arbitration-of-the-arab-spring
5. Diana Rosert “Awards and Decisions” Investment Treaty News (19 January 2014). http://www.iisd.org/itn/2014/01/19/awards-and-decisions-14/

importance to the forestry industry. However the article is altogether toothless because it does not impose any obligations on parties, merely demanding “recognition” and “cooperation” (including with regard to deforestation and forest degradation”.

The TPPA could have made serious steps in stopping the illegal trade in Malaysian timber. It is well-understood, for example that much of the illegal timber exported from Malaysia ends up in Japan, and TPPA could have required the implementation of much stronger verification mechanisms in Japan. While these kinds of demands could be assessed through certification (see section x), it is highly unlikely that this would happen, given the already shaky ground on which the deal sits and the list of issues US politicians already want addressed through that mechanism.

12. Paul Krugman, ‘Trade and Trust’, New York Times, 22 May 2015, http://www.nytimes.com/2015/05/22/opinion/paul-krugman-trade-and-trust.html
13. ‘Robert Reich: This very bad deal with make Wall Street Richer and Bust the Rest of America’, 17 February 2015, http://www.alternet.org/robert-reich-very-bad-deal-will-make-wall-street-richer-and-bust-restamerica?akid=12801.38156.
14. Joseph Stiglitz, ‘In 2016, let’s hope for better trade agreements and the death of the TPP’, The Guardian, 10 January 2016, https://www.theguardian.com/business/2016/jan/10/in-2016-better-trade-agreements-trans-pacific-partnership