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ASIAN SERVICES EMPLOYEES TRADE UNION COUNCIL

TPPA and Southeast Asian Labour

Impact on PSI 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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Impact on PSI Sectors Malaysia

The Malaysian civil service provides stable and secure employment to around 1.6 million workers (~11% of the labour force), however a growing budget deficit has put pressure to reduce this employment and lower wages and conditions. TPP will add to those pressures, placing restrictions on how public funds can be spend as well as potentially tightening public budgets.

Health

Biologics - The longer monopoly protections conferred on medicines through intellectual property provisions in trade agreements have long been a subject of condemnation by public health, development and trade union campaigners. These protections clearly constitute a restriction on trade, rather than a liberalisation of trade. Proponents argue that Malaysia's existing patent period and data exclusivity provisions are already the same as that of the TPPA, however it will have to change its laws on biologics. What is not mentioned is the fact TPPA freezes those previous policy decisions, removing the ability of the Government to revise downwards the extent of protection.

The TPPA is the first trade agreement to include binding monopoly rights on data for biologic medicine. The final deal that was secured by Australia involves a combination of five years of data exclusivity from the date of marketing approval, 'other measures', and the contribution of 'market circumstances' to effective market protection, which must 'deliver a comparable outcome' to the eight years protection in Option (a).¹

Governments such as NZ and Malaysia have both claimed that option (b) allows their current regime to continue unchanged, however this is legally contestable. If implemented this interpretation may be challenged under the state-state dispute settlement procedure, as well as under the Committee on Intellectual Property Rights and the TPP Commission. Prior to implementation, this interpretation may also be challenged through the US Certification process (See Section 8). Such challenges have already been foreshadowed by comments from Republican Party Senator Orrin Hatch, chair of the Senate Finance Committee,² and the US Trade Representative.³ On top of this, there is a requirement for negotiations to begin in 10 years to revisit the period of protection and the mechanism of option (b), which will likely ratchet upwards to a greater degree of protection.

Transparency Annex - The Transparency Annex on pharmaceuticals increases industry leverage over decisions regarding bulk purchasing of pharmaceuticals in Malaysia. This includes in areas such as contesting decisions on funding, and creating campaigns to develop support for the funding of new medicines.

Tobacco Control - Tobacco is widely used in Malaysia and puts significant strain on the public health system, as well as public health workers. According to a 2015 study by the Ministry of Health Malaysia approximately 22.8% of the population aged over 15 were smokers, including 43% of men (4.85 million) and 1.4% of women (143,566). 60% of smokers smoke over 15+ cigarettes a

Will Meds cost more?

If TPPA is implemented, the cost of pharmaceuticals will rise, putting greater strain on the public health budget and limiting its efficacy. What has been achieved in the text regarding new biologics medicines is subject to intense political pressure by the US pharmaceutical lobby and is open to attack in a state-state dispute.

1. Article 18.51.1(b)

2. Hatch has been vigorously pushing for 12 years of data protection for biologics. See Adam Behsudi "Hatch: Obama willing to dance on TPP" 6 June 2016. <http://www.politico.com/tipsheets/morning-trade/2016/06/hatch-obama-willing-to-dance-on-tpp-214854>

3. On 18 March 2016 the USTR made specific reference to addressing concerns about pharmaceuticals and biologics using the mechanisms available. 'Froman Signals Openness to Fixing TPP Problems without Reopening Text', Inside US Trade, 18 March 2016.

day.⁴ Malaysia became a party to the WHO Framework Convention on Tobacco Control in December 2005, and practices a multi-pronged strategy to bring down tobacco usage. Under the current National Strategic Plan for Tobacco Control (2015-2019), based on the World Health Organisation's MPOWER approach,⁵ it is aiming for a tobacco and smokefree Malaysia. These efforts are proving somewhat effective, with overall smoking rates dropping from 23.1% in 2011 to 22.8% in 2015 (although it is a matter of some concern that smoking rates amongst women are rising).

Under Article 29.5 Parties may elect to exclude measures relating to tobacco control from ISDS claims, both prior to and during proceedings. This carve-out is clearly the result of concerted pressure from campaigners around the world voicing their opposition to ISDS claims that used the Philip Morris v Australia and Philip Morris v Uruguay claims as examples of the dangers of ISDS. It should be noted that this proposal is much weaker than that initially proposed by the Malaysian Government, which proposed the exclusion of tobacco from all parts of the Agreement except the tariff chapters. The carve-out does not apply to state-state disputes seeking to enforce obligations in a variety of other chapters, or other other process rules in the chapters on transparency and regulatory coherence that empower the tobacco industry to exercise leverage over policy decisions (in explicit contravention of the FCTC).

What is an SOE?

The chapter defines a SOE as an enterprise engaged in commercial activities in which the state either:

- a) Directly owns more than 50% of share capital,
- b) Controls more than 50% of voting rights, or
- c) Holds the power to appoint a majority of members of the board of directors

State-owned enterprises

The TPPA is the first trade and investment agreement that has a chapter on state-owned enterprises (SOEs), and proponents hail it as a key innovation. The controversial chapter was one of the last to be concluded, and was the subject of intense lobbying by the US that see SOEs as being fundamentally unfair to US service providers seeking to compete in offshore markets. SOEs often rely on some form of state assistance, be it direct (like subsidies, grants, loans or similar at reduced rates) or indirect (such as regulatory benefits). SOEs are also used by states to satisfy certain social criteria, such as sustaining employment, embedding labour standards and so on. In Malaysia this notion is animated by the Bumiputera agenda.

Critics of the deal have pointed to this chapter of evidence that one of TPPA's core motivations is to isolate China, as China's large SOEs – particularly in the construction and heavy manufacturing industries – remain one of China's key commercial advantages. President Obama made reference to this point of difference in a May 2016 Washington Post article, proudly proclaimed the fact that the RCEP "...won't prevent unfair competition among government-subsidised, state-owned enterprises."⁶

The issue of how trade and investment agreements affect state-owned enterprises is a prickly area for countries like Malaysia, which is home to some 200 SOEs, the largest of which are among the biggest in the world.⁷ As of 2014 government-linked companies accounted for more than 36% of the market capitalization of the Bursa Malaysian and more than 50% of the capitalization of the Kuala Lumpur Composite Index.

The main rules in this chapter require SOEs to operate like a private business, employing purely commercial considerations when they buy and sell goods or services (Article 17.4). If 'non-commercial assistance' is provided (either directly or indirectly) and that causes 'adverse effects' to another party's interest they

4. <http://www.iku.gov.my/images/IKU/Document/REPORT/NHMS2015-VolumeV.pdf>

5. The MPOWER approach deploys six key strategies: Monitor use and prevention policies, Protect people from smoke, Offer help to quit, Warn about the dangers, Enforce banks on advertising, promotion and sponsorship, and Raise taxes.

6. https://www.washingtonpost.com/opinions/president-obama-the-tpp-would-let-america-not-china-lead-the-way-on-global-trade/2016/05/02/680540e4-0fd0-11e6-93ae-50921721165d_story.html?utm_term=.01843a586a1b

7. According to a 2012 OECD report, 8 of the top 2000 largest companies in the world are Malaysian SOEs <http://www.oecd.org/officialdocuments/>

may be challenged (Article 17.6). Where a SOE has a public mandate to deliver a good or service it doesn't have to apply purely commercial considerations, but it still may not preference local services or suppliers (Article 17.4.1(a)). Administrative bodies regulating SOEs must exercise regulatory discretion impartially in relation to the entity it is regulating (17.5.2). Governments must respond to specific information requests and provide extensive information if a dispute is initiated (17.10).

Collectively, these rules represent a process of corporatisation for these SOEs, where they are effectively prevented from acting in the way SOEs normally do. Corporatisation often creates an avenue to privatisation, as SOEs seek better access to finance than the state can provide or more flexibility in other areas. Kelsey describes this process in a paper on TPPA's SOE chapter:

One of the first steps usually taken by fully commercial SOE boards is to strip the labour force through redundancies ... leaving the SOE with a misleadingly healthy balance sheet. Ongoing cost cutting means further redundancies, contracting out and union-busting operations in the name of increasing productivity and efficiencies. Particular workforces that are affected by these tactics ... tend never to recover their place as productive workers in the privatised economy. Meanwhile, private sector employment practices ensure that management are rewarded on private sector pay scales, with incentives linked to performance indicators that are often crudely commercial and short-term.⁸

Malaysia has negotiated some key exemptions that will soften the impact of this transition. For the first five years it has a higher coverage threshold of 500 million IMF SDR before reverting to the Chapter's standard of 200 million SDR (~US\$ 376 million). Over these thresholds, TPP restricts the Government's ability to carry out social obligations and offer preferential treatment to Bumiputera suppliers, which will be subject to a maximum – initially of 70%, and then by five years of 40%, of a SOE's budget.⁹ Many of Malaysia's SOEs are owned or controlled by Khazanah Nasional Berhad, which is exempted from disputes for two years from entry into force. Permodalan Nasional Berhad (a state-owned fund management company intended to promote share ownership among Bumiputera) and Lembaga Tabung Haji (the Malaysian hajj pilgrims fund board) are both expressly excluded from the Chapter under Annex 17-F. Petronas has also been given special rights, such as being allowed to reserve up to 70% of upstream procurements for Malaysian enterprises.

Tax Justice

Public service workers rely on the integrity of the national tax system to ensure they are gainfully employed. However by their very definition, free trade agreements are designed to limit the state's capacity to collect revenue by reducing a certain kind of tax - tariffs (i.e. border taxes). Theoretically the reduction of tariffs is supposed to promote sufficient economic development that allows states to implement more effective forms of taxation, such as income taxes or capital gains taxes. An IMF analysis of empirical data demonstrates the limitations of this approach, noting that through other forms of taxation states can at best hope to regain 70 cents in the dollar of what they would have otherwise earned. For the total tax take to come out higher following tariff reduction significant taxable economic benefits would have to accrue

8. Jane Kelsey 'The risks of disciplines on State-Owned Enterprises in the Proposed Trans-Pacific Partnership Agreement' (2012). Available at: <https://itsourfuture.org.nz/wp-content/uploads/2013/09/Kelsey-TPP-SOE-paper.pdf>

9. This carve-out must be shared amongst Bumiputera enterprises, enterprises based in Sabah and Sarawak and small and medium enterprises.

which, as Section 2 demonstrates, are nowhere to be found in even the rosier economic predictions.

This problem is also exacerbated by the presence and threat of ISDS claims, that tend towards fiscal austerity and put pressure on public budget. However investors are now using ISDS provisions to apply further pressure. A growing number of investor-state cases have challenged government tax decisions, including the withdrawal of previously granted tax breaks to MNEs and the imposition of higher taxes on profits from oil and mining. According to a recent report from the Transnational Institute, foreign investors have already sued at least 24 countries over tax-related disputes, in more than 40 separate tax-related suits.¹⁰ The question of compliance in this area of law is particularly difficult to gauge. Lawyer Matthew Davie argues that “[s]tates face real difficulties in determining, in advance, whether they will be the subject of a successful investment claim in relation to their taxation policies.”¹¹ His article concluded that the number of tax-related ISDS cases will rise in the future.

10. Clair Provost “Taxes on trial: How trade deals threaten tax justice” (February 2016) The Transnational Institute. Available at: <https://www.tni.org/files/publication-downloads/taxes-on-trial.pdf>

11. Matthew Davie, “Taxation-Based Investment Treaty Claims,” *Journal of International Dispute Settlement*, 11 February 2015, <http://jids.oxfordjournals.org/content/6/1/202.abstract>