TPPA and Southeast Asian Labour

Impact on UNI Global 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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UNI Global is the global union federation representing workers in a wide array of service sectors. In Malaysia the National Liaison Council is made up of 15 unions: AMCO, KEPAIM, Johor Port Union, PTP, PNMB, Proton Edar, DiGi Telecommunications, DHL Global Forwarding, CSEU, ASTRO Executive, AGRO Bank, BERNAS, SUTE, RENNGO and PKNS.

Services are widely represented throughout the TPPA's chapters and rules, including the chapters on Cross Border Trade in Services (Chapter 10), Financial Services (Chapter 11), telecommunications (Chapter 13), and electronic commerce (Chapter 14). This discussion will focus on service liberalisation, financial stability, and regulation designed to suit the expanding digital economy.

Cross-border supply of services

The liberalization of the cross-border supply of services is a continuation of the general direction pursued by the General Agreement on Trade in Services. That agreement covered four modes of supply for cross-border service delivery, listed in the box to the right.

TPPA continues a similar schema, with the first 3 modes dealt with in Chapter 10 and the fourth mode dealt with in Chapter 12 (Temporary Movement of Natural Persons). Unlike in the GATS, service delivery in the TPPA is regulated through a negative list, meaning that Governments have to list what they don't want to be included in the chapter's coverage. This means states have to specify very detailed exclusions to maintain policy flexibility for particular services or respond to new developments, such as with issues like climate change or a global financial crisis.[1]

4 modes of service delivery

- Mode 1: Service delivered within the territory of the Member, from the territory of another member (cross-border supply)
- Mode 2: Service delivered outside the territory of a member, in the territory of another member, to a service consumer of the member (consumption abroad)
- Mode 3: Service delivered within the territory of the Member, through the commercial presence of a supplier (Commercial presence)
- Mode 4: Service deliverd within the territory of a Member, with supplier present as a natural person (presence of a natural person)

Market access provisions (Article 10.5(a)) prevent governments from regulating the number of service suppliers, operations or numbers employed in particular services (an issue in all services where staffing numbers are critical). Detailed obligations regarding the domestic regulation of services are to ensure that regulations for licensing, qualifications and technical standards are "reasonable" (Art 10.8-9) and proceed without delay (Art 10.6-8).

Financial regulations and capital controls

As pointed out in Section 2, one of the core early motivations for TPPA for the US was to liberalise trade in services with the so-called 'P4' group of countries. Similar liberalisation measures are believed to be currently under negotiation through the Trade-in-Services Agreement (TiSA), which also features a number of TPPA countries.[2] There is real cause for concern about the impact of these regulations on the banking and finance sectors in Malaysia.

For Malaysia and other Southeast Asian countries the memory of the 1997-8

1. Dr Patricia Ranald, AFTINET initial summary of TPPA Chapter 10 (Cross-Border Trade in Services and Annexes I and II, Non-Conforming Measures (NCMs) on services and investment. Available at: http://aftinet.org.au/cms/sites/default/files/AFTINET%20proofed%20summary%20Services%20Chapter%2010%20and%20annexes.pdf
2. Australia, Canada, Chile, Japan, Mexico, New Zealand and the United States are involved in both negotiations.

Asian Financial Crisis still lingers. Real GDP growth fell from 7.3% in 1997 to -7.4%. In 1998, the stock exchange's value fell by over three-quarters and a property bubble burst, leaving confidence in the economy at all time lows.[3] The number of workers retrenched, 83,865, was more than four times the year before, while a sharp rise in inflation stretched household budgets across the country.[4] The impact amongst Malaysia's large population of undocumented migrant workers was, for whom job security is extremely tenuous, was also likely significant. The public sector budget was slashed by 18%, while megaprojects were cancelled and postponed.[5]

The restoration of Malaysia's growth rate is at least partially attributable to the upswing in the electronics components sector. However Malaysia boldly rejected an IMF aid package and, after a period of uncertainty, implemented selective capital control measures, as volatile flows were nullifying attempts to revive the economy. The measures (non-convertibility, pegging to the US dollar and a requirement that short-term capital stay on-shore for at least twelve months) eliminated the offshore market for the ringgit, momentarily stemmed capital flight and short-selling. The temporary measures, along with expansionary fiscal policy gave the real economy space to recover.

Capital controls

A February 2012 letter initiated by the Global Development and Environment Institute at Tufts University recommended the removal of provisions restricting the use of capital controls in the TPPA. The letter was sent to all TPPA Trade Ministers, and was signed by over 100 economists (including Jagdish Bhagwati, Dani Rodrik and Robert Wade). The letter is available here: http://www.ase.tufts.edu/gdae/policy_research/tppaletter.html

While Malaysia's approach was viewed with condemnation by the international financial community at the time, following the global financial crisis there has been a shift of global consensus. The IMF research department, for example, has more recently supported a variety of forms of capital controls,[6] and the IMF formal position has also changed. It is our position that capital controls form an important part of a country's toolkit for maintaining macroeconomic stability, particularly in times of an economic crisis.

Financial crises affect workers in the finance and banking sector in a very direct way. It is workers that lose out first when banks collapse, or cut their staffing numbers to reduce their overheads and weather the storm. For workers who keep their jobs, there is immense strain on wages and conditions, making the process of collective bargaining much more difficult. It also has a psychological impact. Bank workers often have high sales targets to meet that induce stress, and at times of economic crisis – when consumers stop spending and businesses stop borrowing – the likelihood of meeting those targets plummets.

Unfortunately, the freedom to impose capital controls is ignored in the drafting of the TPPA. Article 9.8 requires governments to "permit all transfers relating to a covered investment to be made freely and without delay into and out its territory", imposing a near blanket ban on capital controls or financial transactions taxes. The inclusion of a "temporary safeguard" provision (Article 29.3) would do little to protect government's ability to regulate speculative destabilising capital flows.[7] Breach of these provisions can open a country up to the possibility of an investor-state dispute, meaning the country may also be required to compensate a foreign investor if it results in a significant reduction of the value of their investment. This kind of a claim could exacerbate the initial crisis, further damaging investor confidence.

The fourth industrial revolution

TPPA and other similar trade and investment agreements are at the forefront of what is being called the 'fourth industrial revolution' – the radical reorganization of capital through digital platforms and technology-enabled global supply

3. Mohamed Ariff and Syarisi Yanti Abubakar "The Malaysian Financial Crisis: Economic Impact and Recovery Propsects" December 1999. Available at: http://www.ide.go.jp/English/Publish/Periodicals/De/pdf/99_04_03.pdf
4. Ibid, at 420.
5. Id., at 421.
6. Blanchard, O., Dell'Ariccia, G., & Mauro, P. (2013). Rethinking Macro Policy II: Getting Granular (Staff Discussion Note No. SDN/13/03). Washington DC, USA: International Monetary Fund. Retrieved from http://www.imf.org/external/pubs/cat/longres.aspx?sk=40477.0
7. Public Citizen "TPP Financial Stability Threats Unveiled: It's Worse Than We Thought" (October 2015), page 2. Available at: https://www.citizen.org/documents/analysis-tpp-financial-services-chapter-november-2015.pdf

chains. Some analysts are now referring to the provision of services through the digital domain as the 'fifth mode' of service delivery.[8] The dominant players in this domain – Uber, Ali Baba, Amazon, DHL and so forth – want to be able to operate seamlessly across the world. The expansion of this model – which has included extreme flexibilisation of labour, the development of the 'gig economy' - has grave implications for workers' wellbeing and their ability to organise.

TPPA's e-commerce chapter (Chapter 14) takes some steps in this direction. The main thrust of the chapter is around minimising the ability of state to regulate cross-border transactions that take place online. Accordingly it casts a wide net, applying broadly "to measures adopted or maintained by a Party that affect trade by electronic means" (Art 14.2.2). Article 14.11.2, for example, requires Parties to allow the cross-border transfer of data (including personal information) to a country or territory without consideration for the degree of data protection. Data storage may be outsourced to any TPPA jurisdiction without limitation. Similarly, states lose the ability to regulate the location of computing facilities (Art 14.13), a rule which by and large benefits US businesses because most major companies that heavily use cloud-based services are currently located in the US. In terms of the protection personal information, states are required to have a "legal framework" to address this, but little else (Article 14.8.2).

This is an important and developing area of where international trade law is trying to second-guess the development of international commerce. At the same time, workers are stuck in the middle, with little in the way of legal protections. It is critical for us to ensure that the kind of legal victory that has just taken place in the UK regarding the legal definition of uber drivers (as employees entitled to receive the London Living Wage) isn't frustrated by the development of this area of law.

8. See e.g. UNTCAD 'Global Services Forum" July 2016 http://unctad14.org/Documents/tdinf69_en.pdf