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ASIAN SOLIDARITY EMPLOYEES TRADE UNION COUNCIL

TPPA and Southeast Asian Labour Malaysia Implementation

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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Malaysia's Implementation

The TPPA was signed on 5 February 2016 in Auckland, New Zealand by all twelve TPPA parties. Signing an international agreement like TPPA means that the governments involved have indicated an intention to be bound by the Government, however its implementation still hangs in the balance. It will not come become binding on a state until that state has completed its necessary domestic processes and provisions for entry into force, contained in Article 30.5 of the agreement.

Under Article 30.5, there are three ways by which the TPPA could come into force:

1. If all signatories complete their domestic processes to approve the agreement coming into force and notify the Depositary in writing within two years of signing, the TPPA comes into force 60 days after the last country notifies.
2. If not all original signatories have notified completion of their processes after two years (i.e. February 2018), but at least six signatories that collectively account for at least 85% of the GDP of the original signatories (as at 2013) have done so, the TPPA would come into force after 60 days.
3. If 2 years pass without the second option being met, the agreement comes into force 60 days after the date when 6 or more parties comprising 85% of GDP notified.

The 85% threshold referred to in options two and three effectively means the US and Japan (the two largest economies that together make up almost 80% of the original signatories' GDP), with Canada, Australia and Mexico also likely required. The remaining economies are virtually irrelevant to the process of ratification.

The Malaysian ratification process

According to public statements from the Minister for International Trade and Industry Datuk J Jayasiri the Malaysian Government wants to reach ratify the TPPA in 2018.¹

In Malaysia the negotiation, signing and ratification of international treaties is the preserve of the Executive and parliamentary approval is not required. This notwithstanding, as a result of significant public pressure the Malaysian Government sought parliamentary endorsement to demonstrate the strength of its mandate. On 28 January 2016 Dewan Negara (the Malaysian Senate) passed a motion approving the TPPA, which was required ahead of the 5 February 2016 signing ceremony held in Auckland. The Malaysian Government has identified 18 pieces of legislation that need to be changed to bring the TPPA and the bilateral US-Malaysia Labour Consistency Plan (see **section x**) into force.

The Ministry has formed a National Committee to monitor the implementation of the TPPA. Part of that includes a Consultative Committee to gather feedback from stakeholders (including NGOs) and to assess the impacts of its

1. Amir Hisyam Rasid 'Malaysia amending 18 laws in preparation for TPPA ratification' *New Straits Times Online* (24 September 2016) <http://www.nst.com.my/news/2016/09/175727/update-malaysia-amending-18-laws-preparation-tpa-ratification>

implementation. To date the public consultation work undertaken by the Consultative Committee, in terms of engaging with the labour movement, is only very limited. Considering the importance of this agreement for Malaysian workers, we believe that more must be done to engage workers in the implementation process.

Certification

The provisions for entry into force of the TPPA are specifically designed to enable the US to impose a veto process, either collectively or on a country-by-country basis.² Under the 'Fast Track' legislation that was passed by US Congress in June 2015 the US must "certify" that the other parties to the negotiation have implemented the changes that the US sees as necessary to comply with the TPPA. It is the chairs of the House and Senate committees that act as gatekeepers in this context.

Sec 4. (a) (2) of the Bipartisan Congressional Trade Priorities and Accountability Act of 2015 states:

Prior to exchanging notes providing for the entry into force of a trade agreement, the United States Trade Representative shall consult closely and on a timely basis with Members of Congress and committees as specified in paragraph (1), and keep them fully apprised of the measures a trading partner has taken to comply with those provisions of the agreement that are to take effect on the date that the agreement enters into force.

In previous US free trade agreements US expectations have exceeded what is written in the actual text itself. The common pattern that has developed in other US FTA negotiations is that the US requires its negotiating partners to submit its proposed implementing legislation for scrutiny, whereupon a further process of negotiation may ensue.³ While states retain the sovereign right to reject the US' interpretation the US will likely refuse to certify compliance and withhold the benefits secured from the US under the broader agreement itself.

This runs the risk of democratic backlash, as the concessions demanded by the US could push further than the given Government's democratic mandate stretches. For example, following the conclusion of the Australia-US FTA, the Australian Government submitted the US Free Trade Agreement Implementing Act, which the US considered had not adequately implement the relevant provisions of the Agreement. Correspondence between Australian and US officials show that the USTR insisted on more restrictive interpretations, preventing Australia from providing new exceptions or limitations. These changes were embodied in a new piece of legislation, the Copyright Legislation Amendment Bill 2004, changes that were made without rigorous public consultation with stakeholders or experts.⁴

Certification and Human Rights

Years after the signing of the US-Peru FTA (but prior to ratification), Democrats on the Ways and Means Committee submitted written demands to the Peruvian Government demanding specific changes to labour, forestry and other laws. The Peruvian Government granted the President special authority for a 180-day period, during which 98 laws were issued under that authority (including, critics allege, changes not required under the FTA). Leading opposition parties and civil society groups called for a nationwide stoppage to protest this authority. Unions objected to changes to the small and medium enterprise law that removed workers' entitlements. New rules around investment in resource industries in the Amazon basin led to a bitter stand-off between state forces and indigenous communities that had blocked a highway, ending in the massacre of more than 30 people (now known as the Bagua Massacre). Wikileaks cables showed that days before the US officials warned the Peruvian Government that too lenient an approach towards the indigenous pressures would have 'implications' for the FTA.

2. 'U.S. Official: TPP Designed to Accommodate U.S. Certification Requirement', Inside US Trade, 4 March 2016.

3. See Jane Kesley, Certification memorandum, available at: <http://tpnocertification.org/wp-content/uploads/2014/08/Certification-memorandum.pdf>

4. For a full timeline of this episode go to : <http://tpnocertification.org/wp-content/uploads/2015/03/AUS-FTA-certification-memo-Feb-2015>.

There are a number of matters that are consistently referred to around which certification demands are likely to focus on for most TPPA countries: the data exclusivity period for biologics medicines (see PSI section), the option for a party to block investor-state disputes over a tobacco control measure (see PSI section) and the lack of a restriction on localisation requirements for financial data and servers.

Certification is particularly relevant to unions in Malaysia and Vietnam because, as mentioned in [section x on Labour], there is no independent benchmarking to ensure compliance with the LCPs negotiated alongside the TPPA. Given the prevalence of lobbying within the US political system this can result in more favourable, or more restrictive arrangements for labour rights. For instance, US unions sought additional changes to Peru's labour laws beyond what US officials considered necessary to satisfy the labour requirements of the US-Peru FTA. On the other hand we have at times seen certification present itself as a missed opportunity for civil society, such as in the case of the Colombia Labour Action Plan, which was certified before full implementation was achieved.

Parliamentarians from five TPPA countries (Australia, Canada, Japan, Malaysia and New Zealand) signed a letter urging their governments to protect sovereign lawmaking and to resist attempts by other TPPA parties to influence the drafting of their laws prior to the agreement coming into force.⁵

The US political process

Since the signing of the TPPA in February 2016, most signatories have been slow to implement the legal changes required under the deal and embark on the ratification process, since the US' ratification is required for the agreement to enter into force (as per article 30.5). And, with the US elections looming in November 2016 and both the Republican Presidential candidate Donald J Trump and Democrat Presidential candidate Hilary R Clinton professing their stated opposition to the deal as it currently stands, the future for the TPPA looks, at least for now, mired in doubt and confusion.

As a result of the passage of Fast Track authority, the Congressional oversight of the TPPA is restricted to a yes or no vote for each House. The drawn-out approval procedure for Fast Track authority itself does shed some light on the difficulties that the next President will face in getting the deal approved. On first attempt in 2014 it failed in the Senate, where a supermajority was required in the initial vote. After some heavy legislative manouvering and deal-making it succeeded in a second vote by a single vote. The legislation was then blocked at first instance in the House of Representatives. After another bout of deal-making and redrafting the legislation was passed by a narrow majority of 218-208 in the House and 60-38 in the Senate, with the Democratic Party President relying on Republican votes. At last count, if 5 House votes shift, TPP will not pass.

5. The Malaysian MPs that signed the letter were Yang Berhormat Tuan Wong Chen, Yang Berhormat Dr Michael Jeyakumar Devaraj, Yang Berhormat Puan Nurul Izzah binti Anwar, and Yang Berhormat Senator Tuan Syed Shahir bin Syed Mohamud. The letter can be found here: <http://pacific.scoop.co.nz/2015/05/lawmakers-call-on-nations-to-protect-pacific-sovereignty-over-tpp-drive/>