

Chapter 9

Malaysia's Participation in the Trans-Pacific Partnership Negotiations: Reflections for the Future

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1. INTRODUCTION

Malaysia's participation in the Trans Pacific Partnership (TPP) negotiations (March 2010 to October 2015) was *sui generis*, something unique and never before attempted, despite the country having concluded five regional and six bilateral regional trading arrangements. In its TPP negotiations, the country had to venture far beyond its comfort zone and usual *modus operandi* due to the comprehensive, complex and multidimensional nature of the agreement.

Consequently, the TPP resulted in a series of 'firsts' for Malaysia. The market access and text disciplines demanded reached far behind the country's borders and carried significant implications for its system of national governance. It had to successfully achieve acceptable negotiating outcomes, while parrying strong pressures from other participants, notably the United States (US) and allaying fears and distrust among domestic constituents.

Following the executive order of US President Donald Trump on 23 January 2017 to withdraw from the deal, followed by official notification by the US Trade Representative (USTR) to New Zealand, the official TPP depository, on 30 January 2017, the TPP is ended. It is highly uncertain whether the TPP can be reformulated without the US or whether a similar agreement can take its place. There are even doubts whether countries will want to stand firm on their agreements without US participation and not be tempted to backslide.

As an aside, the US may have pulled out of the TPP but its consumer market remains the world's largest. US trade policy will, for better or worse, continue to matter to the world economy. President Trump campaigned on a platform of bilateral negotiation of trade deals and it is expected that his administration will follow-through on this. The frequent use of the word 'tariffs' by a sitting US President must send cold chills down the spines of US trading partners.

Regardless of the outcomes, Malaysia's five-year seven-months experience in TPP negotiations may offer interesting and possibly valuable reflections, both for itself and countries wishing to negotiate any future agreements. The exact details about exactly what was agreed are now less relevant but still important to the overall narrative. It is

the political economy of the approach and the treatment of key issues, however, that may hold the most lessons.

This chapter proceeds to provide key facts and context of Malaysia's TPP participation [2] before moving to the motivations and strategic considerations behind the decision [3] and the need for domestic economic and social reforms [4]. Having decided to participate, the organization and coordination of negotiators becomes particularly important and perspectives are given [5].

Malaysia had to agree to wide-ranging and simultaneous negotiations prior to being accepted as a TPP country. Being a small and already a relatively open economy was advantageous but it had its fair share of problematic issues [6]. These included negotiating, for the first-time, government procurement [6.1], the related issue of state-owned enterprises [SOEs] [6.2], labour standards [6.3], intellectual property rights [6.4], investor-state dispute settlement (ISDS) [6.5], and sensitive products such as motorcars, rice, alcohol and tobacco [6.6].

For one of only a few times in Malaysian economic history, a trading agreement was placed under public scrutiny and actively opposed by special interest groups, political parties and non-governmental organizations (NGOs). (Both times involved the US.) The government had to respond to the criticisms with new initiatives [7]. The chapter ends with overall reflections and conclusions [8].

2. KEY FACTS & CONTEXT OF MALAYSIA'S TPP PARTICIPATION

The TPP was a plurilateral economic partnership agreement involving Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the US and Vietnam. In total, these 12 countries accounted for roughly 38 per cent of world gross domestic product (GDP) and 25 per cent of world trade, with the largest contributors being the US and Japan. All 12 countries have multiple regional or bilateral trading arrangements but agreements that traversed the Pacific Ocean were far fewer than within their respective regions, i.e. North America and East Asia countries.

The TPP originated in 2006 as the Transpacific Strategic Economic Partnership Agreement (otherwise known as the Pacific-4 or P-4) with Brunei, Chile, New Zealand and Singapore. This subsequently expanded with the inclusion of the US in 2008 (initially only in financial services), followed by Australia, Peru and Vietnam in 2009. The first formal round of negotiations was held in March 2010 in Melbourne, Australia. Malaysia joined the third round of negotiations held in Brunei in October of that year, while Mexico and Canada entered the TPP during the 15th round in 2012. Japan was the last to join in the 18th round in 2013.

Touted as a ‘21st century’ or ‘gold standard’ agreement, the TPP addressed market access, text disciplines (or rules) and administrative arrangements.¹ Its 30 chapters included trade in goods, trade in services, investment, government procurement, intellectual property rights, competition policy, state-owned enterprises, electronic commerce and telecommunications, along with crosscutting issues such as environment, labour, regulatory coherence and transparency and anti-corruption, all in one agreement.

Negotiations were on a single undertaking basis, that is, every one of the chapters had to be agreed or the entire TPP could not be concluded. This was obviously a strategy to reach a comprehensive agreement. The fact that so many diverse issues were incorporated in one negotiation, all of which had to be concluded simultaneously, placed great pressure on negotiators and trade ministers.

As is usual in trade negotiations, a great deal of time and energy was spent by some parties to secure higher standards of market access and text disciplines commitments and, by others, exemptions, exclusions (or carve-outs), non-conforming measures (NCMs) and transition (or phase-out) periods. Malaysia obviously fell into the latter category. The dynamics of TPP negotiations was different from what the country was used to; the most major being the role of the US as participant and major interlocutor of the process.

Given the high-stakes and dynamic nature of the negotiations, there was a need for confidentiality so that final negotiating positions would not be disclosed and opposition groups could not use the information to try and scuttle the deal before it was finalized. This is true not only for the TPP but all strategic and sensitive negotiations, regardless of whether public or private. This need for confidentiality, however, was pounced on by opponents to sow the seeds of mistrust and doubt in the minds of the public.

Opponents to the TPP included not only political parties and NGOs but also groups whose business interests would be affected by economic reforms and liberalization. The latter could be private or government-linked companies (GLCs). In the pursuit of the goal of opposing the TPP, there was an informal if awkward coalition of disparate interest groups that would not have been aligned under normal circumstances. Opposition political parties and NGOs seeking change and good governance, for example, found themselves in the same camp as GLCs and special interest groups.

The government was caught in a bind since it was bound by non-disclosure rules since no final outcomes had been determined in many areas. Many negotiators, if not most, felt under-appreciated as they were given scant recognition and credit for

¹ The full agreement can be accessed at <https://www.mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/text-of-the-trans-pacific-partnership>.

attempting to negotiate in the country's national interest, often at great personal sacrifice over the five plus years.

3. MOTIVATIONS AND STRATEGIC CONSIDERATIONS

The general motivations for Malaysia's TPP participation were clear. The inability of the World Trade Organization's (WTO) Doha Development Round to be concluded was certainly one of the macro reasons. Apart from market access, the TPP would also have provided an additional layer of economic security against any rising trend in protectionism and provide access to dispute settlement mechanisms in the event that it did.

The TPP would have given Malaysia better market access to countries with which it had no agreements, namely, Canada, Mexico, Peru and, importantly, the US. Even though the issue of tariff barriers is no longer the most important aspect of EPAs, Malaysia's exports of palm oil, textile and apparel and electrical and electronic products were expected to gain market share.

As a plurilateral (or limited participation) agreement, the TPP was theoretically more advantageous to negotiate compared to bilateral ones where large states can exert greater bargaining power and pressure. Malaysia was also able to participate early enough so that it had the scope to defend its national interests. Finally, there was undoubtedly a competitive element: Vietnam's participation in the TPP was a significant incentive both from the aspects of trade diversion and investment competition.

Then there were also geopolitical motivations. Prior to the TPP, regional trading arrangements tended to be seen mainly, if not solely, as economic in nature while being recognized as important complements to foreign policy. Rather than mere complements, however, EPAs in Asia can be seen as:

*“the most visible and tangible manifestation of regional (bilateral) interstate relations”. ... Divergences in worldviews, national interests and levels of power make it difficult and sensitive for states of the region to address political-security issues. EPAs have become a well-established way to avoid direct confrontation, work around problems, and engage in constructive interstate activities”.*²

It is in the interest of countries that are not especially large or powerful to pursue a policy of hedged economic interdependence by participating in EPAs with different sets of participating countries even if it means multiple, duplicate and different standards of market access and disciplines (i.e. the infamous 'spaghetti bowl' effect). It is the configuration rather than the quality of the trading standards that are

² Steven C.M. Wong, 'Hedged economic interdependence in Asia' in Francois Godement (Ed.), *How Do Asian See Their Future*, European Council on Foreign Relations: London; 13 April 2015

important, which is why they can simultaneously pursue different agreements with varying standards of comprehensiveness.

Prior to 2010, Malaysia had been content to work within the confines of ASEAN and ASEAN plus its Dialogue Partners. There were two proposals before it, namely the East Asia Free Trade Area (EAFTA) and the larger Comprehensive Economic Partnership for East Asia (CEPEA). EAFTA involved the ten ASEAN member states and China, Japan and South Korea while CEPEA also included Australia, New Zealand and, importantly, India. China backed the EAFTA and Japan the latter.

Faced with the choice, ASEAN came up with its own initiative, the Regional Comprehensive Economic Partnership (RCEP), in 2011 but, as it turned out, with the same participants as the CEPEA. It remains a matter of debate as to how exactly much influence the start of the TPP negotiations had in moving the RCEP proposal forward. In any case, by the start of RCEP negotiations in May 2013, TPP negotiations were already well underway and there were constant references to, and comparisons between, the two.

For Malaysia, the opportunity to participate in TPP was considered too important to pass up. Malaysia had been unable to conclude free trade negotiations (FTA) with the US that were initiated in 2006 and ended in 2008. The TPP represented a second bite of the cherry as the US-Malaysia FTA could be superseded by the TPP.

Malaysia-US relations under then US President George W. Bush had been reluctant and cagey given the latter's Afghanistan and Middle East Policies. His successor, Barack Obama in 2009, offered a far more conciliatory and inviting face of the US and Malaysian Prime Minister Najib Abdul Razak, who assumed office a few months after Mr. Obama, was able to establish good rapport with him. Malaysia saw the US as an important investor, technology provider and security partner, and did not consider having good relations with both China and the US as being inconsistent. At the bilateral level, Malaysia cemented strategic partnerships with both China (2013) and the US (2014).

Despite the fact that Malaysia had not making a binary choice between the US and China, a great was said and written, informed and otherwise, about Malaysia's 'distancing' from China, one of Malaysia's most important markets and partner. Negotiating the TPP would also said to lead to the loss of sovereignty and an over-dominance of the US and its corporations. (If this were true, Malaysia should not be a party to any international agreement.) These factually inaccurate and politically and/or ideologically motivated statements did not seem to make them any less palatable to opponents and the public at large.

The logic of hedged economic interdependence or a balancing of benefits was precisely in Malaysia's national interests was lost or drowned out in domestic TPP

discussions.³ Now that the US has abandoned the TPP, Malaysia's national interests have not significantly improved. If anything, they are greater risk and will remain so until such time as a strong trading regime is in place and the US becomes a cooperative participant of the world trading system.

Going forward, it seems clear that the geopolitical effects of EPAs will need to be given more consideration, especially where major powers are concerned. EPA negotiations can no longer be considered to be the responsibility of trade officials and economists and relegated to back rooms processes. They will need to be assessed through geopolitical lenses although, admittedly, it may be difficult for governments to publicly address relationship issues openly and objectively in public. Inter-state relations are primarily addressed with the instrument of diplomacy, especially if these relations are tense or highly interdependent.

4. DOMESTIC ECONOMIC AND SOCIAL REFORMS

Economic literature highlights how EPAs such as the TPP can act as a *deus ex machina* or an external means to break domestic political and administrative gridlocks in implementing economic and social reforms. In the case of at least one TPP participating country, Vietnam, the SOE Chapter was openly talked as a means to accelerate domestic reforms of its institutions. In many if not most cases, however, the politically sensitive nature of these reforms means that they cannot be publicly announced as primary motivations for liberalization.

In Malaysia's case, such reforms were recognized as necessary for the country to be competitive to reach high-income status, especially as its trade and investment engine had been such important sources of growth but were faltering. Although the need for economic reforms and better governance was generally recognized, however, they did not figure prominently as arguments used to gain support for the TPP.

This follows the psychological predispositions of loss and risk aversion; avoidance of losses and risks are much preferred to the promise of gains.⁴ These behavioral

³ The term 'balancing of benefits' was used in the Institute of Strategic and International Studies (ISIS) Malaysia's report entitled *National Interest Analysis of Malaysia's Participation in the Trans-Pacific Partnership*, ISIS Malaysia: Kuala Lumpur, 3 December 2015. This can be accessed at the Malaysian Ministry of International Trade and Industry's (MITI) website at <http://fta.miti.gov.my/>.

⁴ See, the seminal article by Daniel Kahneman & Amos Tversky (1992), 'Advances in prospect theory: Cumulative representation of uncertainty', *Journal of Risk and Uncertainty*: 5 (4): 297–323.

phenomena can be seen in most FTAs or EPAs but were brought to new levels in the TPP negotiations. This causes a fundamental asymmetry in the nature of discussions and debates that the best prepared reports and analyses are unable to counter.

Countries seeking to participate in ambitious EPAs should also not underestimate the capacity of state institutions and officials themselves to form a part of the opposition to them. In some respects, they form an even more powerful lobby than those outside the system. Depending on the political leadership and governance structures of the countries concerned, some SOEs may actively block negotiations by refusing to provide information, propose or adapt negotiating mandates or even actively participate in negotiations.

They may constantly use their positions of influence to appeal to the top leadership to be excluded on the grounds that they serve critical social interests. In doing so they put the negotiations at risk. It is difficult for government officials or even ministers to gain the cooperation of powerful ministers, ministries and state institutions, even as external party pressures on the top policy makers are considerable.

Inevitably, political deadlocks and institutional stymieing will have to be referred to a higher authority, typically the Prime Minister or President. Depending on how decisive and reform-minded he or she is, these may be broken and resolved in whole or in part, or postponed through consultations. The back loading of issues adds to the difficulties of EPA negotiations and increases the risk that they cannot be concluded.

No elected politician can afford to be seen as being insensitive to domestic concerns or caving-in to foreign demands. Again, there is a fundamental asymmetry as opposition politicians and other critics can follow a populist and critical line and do not have the burden of proof nor bear the responsibilities of failure to conclude.

The opposition, however, do not have everything their way. They typically base their opposition on the TPP's negative impact on social welfare (e.g. higher prices, job losses and lower incomes) but these are construed in very parochial terms.

The most immediate beneficiaries of trade liberalization are consumers and this can be demonstrated in tangible and non-theoretical terms. The thing about the aggregate estimates of social welfare is that they are intermediated in a way that is difficult for the non-economic professional, let alone the man-in-the-street to understand. For the future, the unpacking of these technical documents so that the gains from the trade can tangibly be shown to benefit Malaysian consumers would seem to be important.

The various quantitative estimates of the benefits of the TPP also typically have one thing in common: Welfare gains are largely from the internal reforms (commonly grouped under the generic term 'non-tariff barriers') rather than from tariff reductions

themselves.⁵ Some opponents of the TPP argued that economic reforms could be undertaken unilaterally and without having to reach onerous legal obligations. They ignore the fact that if external pressures were not needed, economic reforms could and would be implemented; the fact that they are not makes this argument almost oxymoronic.

5. ORGANIZATION OF NEGOTIATION PROCESSES AND MANDATES

Countries that clearly accept the need for economic reforms and see the TPP as an instrument towards achieving it would have found negotiations very easier than those that did not. The conundrum for countries such as Malaysia is that while the country was prepared to make significant changes, it also wanted to limit these in many areas wherever possible for political, social and institutional reasons. This obfuscated negotiations even more than necessary and would otherwise been the case.

It does not help if the so-called 'red lines' in negotiating mandates are set at unrealistically high levels and/or acceptable outcomes are not realistically concretized. These waste a great deal of time and energy and make an already difficult task even more so. Granted, there was much to be learned in the first-time negotiation of difficult and sensitive areas. These, however, also complicated the negotiations, especially as the TPP negotiating clock wound down.

Like other TPP participating countries, Malaysia's Chief Negotiator (CN) was a Senior Director-level official of MITI (essentially third in the ministry hierarchy), supported by a Free Trade Agreement Coordination Section, that was later upgraded into the Strategic Negotiation Division. He reported to his Minister who, in turn, reported to Prime Minister and Cabinet who made the final decisions on mandates.

The CN managed 19 Lead Negotiators (LNs) drawn from the relevant ministries and agencies of the government, many of whom had little previous experience in negotiating international agreements. This was not unexpected given that previous trade negotiations were much less extensive and managed mainly by the Ministry of International Trade and Industry (MITI).

⁵ See, for example: Peter Petri and Michael Plummer, 'The Economic Effects of the Trans-Pacific Partnership: New Estimates', *Peterson Institute of International Economics, Working Paper Series 16-2*, January 2016 <http://piie.com/publications/wp/wp16-2.pdf>; also, PwC Advisory Services, *Study on the Economic Impact of the TPP on the Malaysian Economy and Selected Key Sectors*, Final Report, December 2005, available at <http://fta.miti.gov.my/>.

The CN's task of coordinating LNs across a large number of ministries, departments and agencies, each of who had their own reporting structures, did not pose as large a problem as it could have but this is not to say that it did not. The CN's job often involved trying to gain the cooperation of the other governmental participants on difficult issues.

Over time, LNs grew to be well acquainted with details and intricacies of the chapter they were negotiating but, lacking any real discretionary power, some were forced (or just found it easier) to be passive through really no fault of their own. Not surprisingly, a great deal depended on the personality and proactivity of the LNs.

At the start of TPP negotiations, the various ministries, departments and agencies sought approval for their own negotiation mandates from the Malaysian Cabinet. Cabinet had to decide on many such mandates, which tended to be defensive, set low tolerances for movement and were not responsive to the vicissitudes of negotiations. Cabinet, which is made up of the same ministers, defended their respective proposed mandates. Midway through the negotiations, ministerial mandates began to be coordinated through the CN and this made the process a lot more responsive and efficient.

If there is one thing that the TPP negotiations emphasized, it was on the need for a well-functioning and effective civil service. An *ad hoc* assembled team might not be expected to fare well against countries that had teams of professional, well-trained and motivated and experienced negotiators. This proved otherwise in Malaysia's case although whether this is due more to design or fortune is something that could be debated.

Malaysia's CN remained from the inception of TPP negotiations to its conclusion, receiving a promotion in the process. Some key LNs, however, were promoted or transferred to other ministries and/or functions during the negotiations. Mid-level officers then had to be enlisted and put in charge of negotiations. It was a tribute that to these officers that they were able to rise to the challenge and displayed competence. This nevertheless brings into sharp focus public administrative procedures that enable officers to continue with their negotiating responsibilities while not losing out on promotions and seniority.

6. MANAGING PROBLEMATIC ISSUES

Malaysian went into the TPP as a relatively open and trade-dependent country, albeit with no experience in negotiating issues that had previously been treated as out-of-bounds. The major market access issues were in the area of GP and SOEs, which were brought for the first time, and in compliance with text disciplines, notably labour standards, ISDS and IPR. In contrast, sensitive products such as motor vehicles, rice, steel, alcohol and tobacco posed less of a problem as it was made clear at the outset that these products had to be brought within the ambit of the TPP and could not be exempted.

6.1 *Government Procurement*

The opening up of GP would have been challenging enough without it being complicated by going to the heart of the long-standing Bumiputera policy that Malaysia has been in place since the early 1970s. Quite apart from the original intention to assist the development of the Bumiputera community and bring them up to par with the others, this policy was emblematic of the United Malay National Organisation (UMNO), the dominant partner in the ruling Barisan Nasional (BN) coalition.

The government was able to claim that the principle of Bumiputera preference policies had not been abandoned even though it was clear that they would be circumscribed and that the *status quo* would change. The introduction of reducing thresholds meant that the sanctity of a policy that was once unquestionable was now subjected to limits. The threshold for goods and services procured by the government, for example, would be reduced from relatively high initial levels to internationally accepted ones within 9 years.

For construction projects, similarly high thresholds were subject to reduction although a certain percentage of the contracts above the threshold, and thus liberalized, continued to be reserved for social purposes, including award to Bumiputera contractors. In construction, Malaysia was able to negotiate a 20-year transition and, critically, won a carve-out for public-private partnership (PPP) projects, including build-operate-transfer and public works concessions. The delay in introducing competitive bidding and awards and the carve-out of PPP projects was a great disappointment to more reform-minded Malaysians.

There were other indications that GP was an area where other participating countries were sensitive and not as forceful as they could have been. The country was allowed to apply price preferences for Bumiputera suppliers, depending on the value of purchases and the source countries, gained a long transition of 25 years for exemption of economic stimulus programs and won concessions for independent review of supplier complaints and dispute settlement.

While a relatively modest start, Malaysia's first experience with liberalizing GP was, nevertheless, an important one. The danger of being forced to make deep and unacceptable concessions at the start has to be balanced against the benefits of progressive liberalization. Whether the country will be willing to continue to include GP in future EPAs and the extent to which it is prepared to go is unknown at this time. Much will probably depend on the negotiating partners involved, as well as the domestic political situation and leadership at the time. From an economic viewpoint, the opportunity to reap substantial welfare gains from competition and pricing has, at best, been put on hold or, at worst, lost.

6.2 *State-Owned Enterprises*

Like the GP Chapter, SOEs were similarly allowed to offer preferential treatment to Bumiputera suppliers within prescribed limits. Only SOEs that were not specifically

excluded and had turnover above certain turnover thresholds had to submit to disciplines. These are referred to as covered (or applicable) SOEs.

The turnover threshold started at SDR 500 million (around RM3 billion), reducing to SDR 200 million after five years from Entry into Force (EIF or the day the TPP becomes a legal document). Covered SOEs were still able to reserve up to 40 per cent of their procurement but not only for Bumiputera but SMEs and enterprises from Sabah and Sarawak as well. Petronas was given a higher starting threshold of 70 per cent for these purposes but this reduced to 40 per cent over five years. In return, Petronas liberalized 12 types of goods and services, opening them up to TPP countries on EIF.

In addition to the above, covered SOEs had to practice non-discriminatory treatment (NDT) in the domestic market and could not receive non-commercial assistance (NCA) overseas. (SOEs were, however, allowed to receive NCA within Malaysia.) They also had to be transparent in their domestic procurement and overseas activities and it was mandatory for them to provide data if complaints were lodged against them.

SOEs naturally argued bitterly against these disciplines being applied to them by appealing to their social and economic development responsibilities. Even the transparency requirement was seen as highly onerous and adversely affecting SOE performance. The irony is that SOEs were supposed to have completed their ten-year Government-Linked Company (GLC) Transformation Plan (GLCTP) in 2015. This was supposed to turn them into “high performing” and “globally competitive” entities. Indeed, many of them have and are successfully competed in foreign markets, including in TPP countries.

With the exception of Petronas, other covered SOEs were not prepared to make any concessions even at the final deadline of TPP negotiations. This was a reflection of deep-seated instincts to remain sheltered from competition rather than an indication of how successful the GLCTP actually was. Their many powerful and well-endowed positions was also have been important factor.

In any case, the large number of SOE carve-outs and the high turnover thresholds should have been sufficient to give further impetus and the finishing touches to the GLCTP. As a result, all that negotiators were able to secure was a so-called “peace clause” that exempted them from dispute settlement for two-years from EIF pending the introduction of SOE reform legislation. This is expected to be an issue that will continue to exercise governments in future EPA negotiations.

6.3 Labour Standards

One of the most challenging aspects of the TPP for Malaysia was the requirement for the country to fully conform to International Labor Organization (ILO) standards, namely, its 1998 Declaration on Fundamental Principles and Rights at Work, as well as comply with the US Labor Consistency Plan (LCP). The LCP was a US-Malaysia bilateral side-letter agreement attached to the Labour Chapter of the TPP and contained detailed legislative changes that needed to be made.

The 1998 Declaration contains four principles, namely freedom of association and the effective recognition of the right to collective bargaining, elimination of all forms of forced or compulsory labour, effective abolition of child labour, and the elimination of discrimination in respect of employment and occupation.

In essence, the problem was that Malaysia has to start from relatively low standards to meet its obligations before EIF. Certainly, moving to higher labour standards would have been positive for the country's workers and international image. Without having negotiated a transition phase, however, it would have to make, debate and pass the necessary amendments to at least eight laws and proceed to set-up the institutional infrastructure and administrative procedures before February 2018. The latter include setting up database of workers that enable monitoring and spot checks to be conducted. Only then would it have fulfilled its obligations and the US administration could certify its compliance to the US Congress.

Malaysia's labour force stood at 14.8 million in 2016, of which around 12 per cent comprised legal foreign workers on temporary work visas and another 12 per cent (or more) who are undocumented. Less than 10 per cent of this total is unionized and even fewer engage in any form of collective wage bargaining. The occurrence of industrial action, which legally has to be authorized, is rare.

Malaysian employers have thus operated in a relaxed labour environment, one where labour has little bargaining power and labour unrest is largely unknown, for the past six decades. It was expected that companies would have to make significant adjustments both in terms of management of industrial relations and upward wage adjustments.

Following the signing of the TPP on 4 February 2016, preparations were made to comply with the detailed labour requirements. The proposed legal amendments, however, were not presented to the two sittings of the 2016 Parliament. This is believed to be because there was uncertainty as to whether the US would ratify the TPP, as US Trade Representative officials had led the government to believe in visits that they made during the year.

An officer of the Malaysian Ministry of Human Resources in November 2016, however, announced to a seminar of textile and apparel manufacturers that the proposed changes would proceed and to be prepared. There has been no further information on the matter following the January 2017 US exit from the TPP.

There are reasons to believe that US pressure on Malaysia's labour standards will continue. The 2016 US Trafficking in Persons (TIP) Report compiled each year by the US State Department placed Malaysia among the Tier 2 (Watch List) group of companies. Most of the requirements to maintain or improve Malaysia's position are contained in the LCP and under a US administration whose election pledge was to protect US workers, these pressures are not expected to let up.

Employers are obviously not keen to see these changes made. Key sectors such as manufactured exports, construction, recreational services and commodities continue

place high demand on foreign labour as they are less expensive than local workers. An attempt by the government to introduce an Employers Mandatory Commitment (EMC) which included, among other things, the banning of the practice of employers forcing foreign workers to pay for their foreign worker levies was strongly opposed and the government was forced to postpone implementation for a year.

6.4 *Investor-State Dispute Settlement*

Prior to the TPP, ISDS was largely a little known, much less understood, subject with the exception of certain NGOs and opponents who used highly-publicized international examples to make the point that ISDS was undesirable as it would “compromise Malaysia’s sovereignty.”

Cases included *Philip Morris v. Uruguay*, where the plaintiff sought arbitration against the government for enacting strict public laws and *Philip Morris v. Australia*, after the latter introduced strict laws regarding the sale of tobacco products and the world’s first plain paper packaging. Frequently highlighted was the fact that US corporations have won most of their ISDS cases. [In the case of *Phillip Morris v. Australia*, however, taken under the Hong Kong-Australia Bilateral Investment Treaty (BIT), the arbitrators’ decision in 2015 was that they had no jurisdiction to hear the case, resulting in a win for Australia.]

In actual fact, there has been some form of arbitration procedure in over 60 bilateral investment agreements that Malaysia has signed. ISDS has been painted as something unique to the TPP, one-sided rather than reciprocal in nature, and strongly favouring the US. Under the TPP, investors had the choice of seeking arbitration in two established processes, one under the United Nations Commission on International Trade Law (UNCITRAL) and the other, the International Centre for the Settlement of Investment Disputes (ICSID), which is part of the World Bank. That these are multilateral bodies and accessible to all its members had little apparent traction.

The dominant narrative was that ISDS was an instrument used by the multinational corporations of advanced countries to frustrate the governments of the states that the former invested in. To be sure, there are legitimate public policy concerns with the use of ISDS. In the TPP, ISDS is automatic by virtue of having signed the agreement and the definitions of investment and investors are wider than before. Those not familiar with dealing TPP-like EPAs would do well to examine the legal coverage of both these definitions.

If these were not problematic enough, the wider implications of ISDS for legal systems, especially ones based on English common law and its traditions, have also to be taken into account. The case against ISDS, however, was neither as one-sided nor clear-cut as had been made out by many of its opponents. This was not the only issue, but certainly one of the more important ones, to be subject to public policy discussion with limited information and ideological lenses.

Yet, there was really no question on the part of negotiators of not accepting ISDS as this would have meant abandoning the TPP altogether. The only real solution,

therefore, was to reach negotiating outcomes that would manage its more unacceptable aspects. It is a tribute to negotiators that many of the much criticized aspects of ISDS were factored in the negotiations.

The Investment Chapter, for example, provides clearer guidelines as to what ‘fair and equitable treatment’ and ‘indirect expropriation’ meant. Chapter provisions also safeguarded the right of governments to regulate investment activities on environmental, health and other grounds. Non-discriminatory actions intended to protect public welfare were not tantamount to expropriation. There was also a specific carve-out to prevent tobacco regulation from being challenged.

Clearly, heated opposition to ISDS, including among US lawmakers itself, had had an effect on the ISDS. What emerged, while not addressing all the concerns surrounding it, nevertheless made it more palatable than would otherwise have been the case. The TPP draft of this provision could, in fact, be a starting point for agreements that absolutely require the inclusion of automatic ISDS. Otherwise, it should remain an option for parties to resort to in the event of dispute.

6.5 Intellectual Property Rights

As a net technology importer, Malaysia recognized the need for better IPR standards. The country had acceded to the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and certain aspects of its national legislation and patent protection system went further than what was required under the Agreement (TRIPS Plus). This, plus other related agreements and domestic legislation, meant that TPP participation was less problematic compared to if it were not as developed.

The IPR Chapter was another difficult one that called into question the need for balanced outcomes. Malaysia patent registration and marketing system is generally timely and therefore there was no significant threat of patent term extensions. At the same time, it had certain features that were compatible with the systems of other negotiating members and these would have to be negotiated.

One of the earliest issues to be raised against the TPP was the effect that higher IPR standards would have on pharmaceutical products, including life-saving drugs. This was by no means the only controversial issue in the IPR Chapter but it was certainly one of the most visceral and emotive, especially for those of the public who were sufferers such as those with HIV+. The claim that US FTAs had led to higher prices in partner countries was one of the rallying cries against the TPP but seemed to go practically unchallenged.

To be sure, there were reasons to have strong suspicions. It was known that the USTR had taken into account the interests of large multinational corporations. It did not help that the initially highly demanding set of US demands for the IPR Chapter of the TPP – an early draft of the text was released by Wikileaks – made it difficult to defend against the accusations.

The released text, which, it must be emphasized, was still under negotiation at that time and far from being settled. If accepted, it would have required extensive rewriting of patent protection, thereby placing an onerous burden on countries in terms of coverage, extension, linkage and data exclusivity, among others. As it turned out, at the conclusion of negotiations of the chapter, many of the more stringent and objectionable provisions had been dropped. This raises the difficult issue of transparency: Should preliminary negotiating text be released to the public as many opponents of EPAs demand or would be a hindrance to conclusion? Should information about negotiating mandates and red lines be openly shared or would this make it impossible to negotiate?

These questions are extremely difficult and unlikely to be settled in a formulaic manner. The public does have a right to know about measures but the fact that negotiating positions are moving targets and not final until conclusion did not make matters easy.

The effects of higher IPR standards were still basically presumptive and needed to be carefully studied. The highly technical nature of the arguments, combined with the demand for intensive microeconomic information, such as pricing, did not make this an easy task. (Most, if not all, pharmaceutical companies regard pricing of their products as proprietary information.)

From the available evidence, it just could not be concluded that higher IPR standards was the main or even a significant factor in escalating drug prices. Certainly, stricter patent rules or data exclusivity (DE) terms would be onerous on, and delay the entry of, cheaper generic manufacturers. This is, however, a separate argument, one that makes assumptions about if and whether they generic manufacturers are able to produce, particularly in relation to newer and more sophisticated biologic drugs (biosimilars).

At the conclusion of the IPR Chapter negotiation, it was apparent that there was a form of compromise with respect to the DE requirement of five plus 3 years for biologic (or large molecule) drugs. Malaysia had wanted the DE to be the same as for applied to small molecules, i.e. five years, while US negotiators had wanted a period of straight 12 years. Indeed, subsequent visits by Republican Congressional legal counsels and staffers indicated as much, attributing the blame for not securing this provision to the Democrat administration.

On the domestic side, 'the five plus 3' would have been regarded as disappointing to those seeking to manufacture biosimilars, Malaysia retained its 18-month access window safeguard, whereby registration of a drug has to be made within this period from the time it is first made in the home country. This helped ensure that the DE period was not unduly prolonged. There was also not much impact from patent term extension as Malaysia's approving and patenting bodies are relatively efficient at processing patent and medicine applications. There is no impact from patent linkage since local authorities will not be required to reject generic medicine applications.

6.6 *Sensitive products*

Trade in goods were bilaterally negotiated and resulted in high tariff line coverage, 85 per cent of tariff lines in the case of Malaysia on the TPP's EIF. The rest were subject to various transition or phase-out periods, some as long as 16 years, mainly on motor vehicles, cables, alcohol, rice and tobacco. Previously, such products would have been excluded altogether.

The national car projects, notably Proton, initiated in 1983, in particular, were obstacles to previous FTA negotiations and exempted until the Malaysia-Japan FTA and subsequently Malaysia-Australia FTA. Over time, quiet liberalization of the sector and the declining fortunes of Proton have greatly lessened the quantitative impact of further liberalization. (The company continues to operate at a loss and require state support in the form of soft loans.)

The issue of the national car, while declining over time, is, nevertheless, still a politically live one both from the perspective of national pride, as well as a bellwether for Malaysia's Bumiputera policy. The lack of further liberalization of this sector will continue to have significant welfare consequences as a result of higher car prices (and loans) as well as the drain on state resources despite its privatization.

Rice is similarly a product whose impact is more political than it is substance-wise. Malaysia is a net rice importer and therefore any liberalization increases rather decreases its food security. Political support by rural farmers, however, remains important for the government and any actions that can be interpreted as taking away (such as tariff removal) or not giving them priority can be a liability.

Few Malaysians truly understand the rice production and marketing system and the issue was one of those that played up during the US-Malaysia Free Trade Agreement talks in the mid-2000s. In the case of the TPP negotiations, the issue was not similarly highlighted. Malaysian imports of rice from TPP countries would not have much impact on the domestic market given the different preferences and tastes and the long transition periods made it substantively a non-issue.

The elimination of tariffs on pork over 15 years, a potential religiously sensitive product, was also not made an issue. For alcohol and tobacco, tariffs had also to be eliminated over 15 years but the government retained indefinite control over pricing and distribution through excise duty and restricting distribution licenses distribution. There was a strong domestic lobby to have tobacco products removed from the TPP altogether but despite the support of some key members this was not possible. (The 'slippery slope' argument whereby exemption of one product would lead to demands for more products to be included was one of the commonly cited reasons.)

7. GOVERNMENT RESPONSES AND INITIATIVES

Malaysia's participation in the TPP was one of only a few times that an economic agreement met with vociferous public opposition. Even then, the concerted domestic

pressure this time around was, in many respects, unprecedented. (Both cases involved the US.) While there were indications that the government had expected some resistance, as was occurring in a number of other TPP participating countries, the organization and intensity was not expected, both from outside as well as inside the system. Amidst demands for information, analyses and consultations in decision-making, the government had to respond, which it did by taking a number of unprecedented actions.

The first was to broaden political engagement. A bipartisan Parliamentary Caucus for the TPP was established. The Trade Minister regularly briefed the Caucus on developments in the TPP negotiations. As was to be expected, opposition Members of Parliament used this platform to voice out on aspects of the TPP while government members did not voice strong support. Indeed, some among the latter seemed to have private reservations about it.

Even more consequential was the political decision to subject the final TPP agreement to a vote in the Malaysian Parliament. Under the Malaysian Federal Constitution, the power to sign international agreements rests with the Executive or Cabinet. The role of Parliament is to pass or reject the legislation that needs to be amended. In the case of the TPP, Parliament was called back for a special sitting and a vote was taken on whether to sign the TPP and to subsequently ratify it. It was passed in the Lower House (Dewan Rakyat) by a vote of 127-84 or pretty much along party lines.

The second was to increase the amount of public information and analyses. Three government studies were commissioned to assess the implications of the TPP on Malaysia. The first was to analyze the impact on the Bumiputera community. A unit under the Prime Minister's Department responsible for advancing the Bumiputera agenda was given the responsibility, which it outsourced to a private consulting firm.

Subsequent to this, the MITI commissioned the same private consulting firm to do a quantitative study on the potential economic impact of the TPPA on the Malaysian economy and selected sectors. This involved a computable general equilibrium (CGE) trade model with certain modifications to take into account capital movement. Finally, ISIS Malaysia was tasked by the Malaysian Cabinet to do a national interest analysis on Malaysia's participation in the TPP. A dedicated framework and process was established for this purpose. The latter two studies were later released as public documents. In this way, the government showed that it was committed to a thorough objective analysis.

Third, the government committed itself to a punishing schedule of over 600 public engagements involving closed-door stakeholder consultations, briefings and town hall sessions as an outreach program. These continued even after the Parliamentary vote was taken. In addition, Malaysia followed the lead of other TPP countries by appointing cleared advisors to provide feedback and advise on implementation matters. Given developments after the TPP was signed, uncertainties as to whether it would be approved by the US Congress meant that implementation was delayed and the cleared advisors were not really put to work.

8. REFLECTIONS & CONCLUSIONS

The TPP itself may be regarded as a failure, having been scrapped by the incoming US administration but Malaysia and other the other TPP participating countries can lay claim to have successfully concluded negotiations. The results of the work that went into it will not bear fruit and the consequences, many of them negative, will need to be ascertained and managed. The experience and lessons learned through the process may prove extremely valuable for the future, especially if the TPP is anywhere close to the type of agreements that will be signed.

It is unlikely that EPAs will revert to those of previous eras and become less complex over time. Nor is it very likely that they can remain free of demands for stakeholder consultation, information disclosure and transparency and public engagement. Governments will need to be more holistic, prepared and capable when embarking on EPA agreements. It might also be naïve to expect that the opposition to globalization and trade liberalization will disappear any time soon.

If anything, the anti-globalization movement is gaining momentum and may have to fully run its course before such institutional arrangements will be considered. It may also be too much to expect measured, informed and rational debate to be the hallmark of such negotiations. The overly narrow focus on a clutch of negatives will, no doubt, continue to dominate the trade agenda, as will impractical ideological worldviews.

Malaysia will need to conclude high quality EPAs with as many countries as possible if it is to secure its economic future. These will necessarily have to go beyond the norms and its experience with TPP negotiations offers rich lessons with which to do so.