



MALAYSIA WITH THE TRANS-PACIFIC PARTNERSHIP AGREEMENT: AFTERMATH OF THE UNITED STATES WITHDRAWAL FROM THE TPPA



Kamal Halili Hassan¹⁺
Muhammad Faliq Abd Razak²
Rohaida Nordin³
Rohani Abdul Rahim⁴

¹Faculty of Law, Universiti Kebangsaan Malaysia, Bangi, Selangor, 43600, Malaysia

Email: k.halili@ukm.edu.my

²Law Matriculation Centre, Universiti Teknologi Mara, Dengkil Branch, Selangor, Malaysia

^{3,4}Faculty of Law, Universiti Kebangsaan Malaysia, Bangi, 43600, Selangor, Malaysia



(+ Corresponding author)

ABSTRACT

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The Trans-Pacific Partnership Agreement (TPPA) was a very extensive and speculative trade agreement until the withdrawal of the United States. The world economic and trade bloc was of the view that the TPPA would be the greatest ever trade agreement in the 21st century that would have brought major changes to the trading, economic, and investment sectors. TPPA issues relate to trade and also for example to labour standards, the environment, government procurement, and intellectual property rights. It has major implications to existing standards and legal framework in Malaysia, particularly on labour. Several issues have arisen following the US withdrawal from the TPPA mostly on US-Malaysia Labour Consistency Plan which requires amendments to Malaysian labour laws. The discussion in this paper focuses on the impact of the TPPA-11 (TPPA, original member states minus the United States) on the 'Comprehensive and Progressive Agreement for Trans-Pacific Partnership' (CPTPP) on existing Malaysian labour laws. Does Malaysia need to amend the current set of labour laws with the application of TPP-11 and CPTPP or should Malaysia maintain the existing labour framework?

Contribution/ Originality: This paper contributes to the understanding of difficulty in implementing multi trade agreement among countries with different and distinct legal systems and economic standing.

1. INTRODUCTION

Following decades of negotiations, the Trans-Pacific Partnership (TPP) as an international trade agreement among its member states was concluded on 5th October 2015. The agreement seeks to achieve two main objectives: (i) the establishment of market-oriented international trade in various fields that could growth rapidly at the international level, and (ii) the reduction of trade and investment barriers amongst TPP member states (Capaldo *et al.*, 2016). According to estimates, the combined Gross Domestic Product (GDP) of TPP member states in 2014 amounted to \$28 trillion or 36% of global GDP of which the export sector constituted \$5.3 trillion or 23% of total global exports (Petri and Plummer, 2016). The TPP is viewed as an unique setup because of its flexibility and versatility and comprises nations of all levels of incomes and diverse systems of economic integration. The exclusivity of the TPP Agreement (TPPA) can be seen in the aspiration to achieve economic integration through

the provision of various aspects of goods, services, and investments, and involves key global issues such as the digital economy, intellectual property rights, labour, and the environment (Manaf *et al.*, 2014).

The TPP's role is in fostering cooperation at the international level and it is regarded as a new framework of trade agreements for the next generation although its impact is still yet to be assessed and analyzed (Chance, 2015). However, it will be the most valuable contribution over the long term through a new economic model. It cannot be denied that there is much doubt on the ambiguity of the main concerns of the TPPA in reference to post-negotiation statements which are very general and the diverse agendas among its member states which have national priorities, especially developing countries of the Commonwealth like Malaysia (Parra and Rollo, 2014). The TPPA will also increase the annual real income of the United States of \$131 billion or 0.5% of its GDP (Petri and Plummer, 2016). Its annual exports were estimated to increase by \$357 billion or 9.1% by 2030 when the TPP is fully implemented while Malaysia's GDP will reach \$336.9 billion (TPP Coalition, 2016). The TPP Agreement also places labour rights as one of the main agendas compared to previous or existing free trade agreements (FTA). Chapter in the TPP Agreement was negotiated to achieve high labour standards which had not been addressed in a specific chapter in any earlier trade agreements (Froman, 2016).

The TPP was formed to establish free trade with the United States in the interests of its member states. Some member states of the TPP, now known as TPP-11, are from the North American and Oceania economies such as Canada, Mexico, and Australia. These states possibly gain more benefits from the TPP-11 than from TPP-12 since they already have FTAs with the United States. Apart from that, they also might gain from potential markets such as Japan with the withdrawal of the United States from TPP-12. It is assumed that the United States will experience the largest single net loss by moving from a \$131 billion gain under TPP-12 to a \$2 billion loss under TPP11 (Petri *et al.*, 2017). This article focuses on the Labour Chapter of the TPP Agreement and analyzes the implications and legal effects on existing labour laws in Malaysia following the withdrawal of the United States. It will also explain, as a follow-up to our previous paper, the effects and position of Malaysia on its Labour Framework with the newly signed CPTPP which has not suspended the Labour Chapter of original TPP Text Agreement (Banga, 2015; TPP Coalition, 2016).

2. TPP-11 WITHOUT THE UNITED STATES

TPPA was concluded as a trade agreement among 12 Pacific Rim nations beginning from the Pacific-4 (P4) and later enlarged with the formation of TPP. Members of the original TPP were Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Viet Nam. The agreement was signed on 4 February 2016 in Auckland, New Zealand but has not yet entered into force. On 23 January 2017, President Trump signed a Presidential Memorandum withdrawing the United States from the TPP (United States Trade Representative, 2018). As it stands, the agreement cannot come into force without the United States because it accounts for 60% of the combined GDP of the 12 TPP members. In light of the US withdrawal from the TPP, until now the agreement is yet to be enforced, leaving the remaining 11 member states grappling to enforce it. The 11 member countries met on 21 May 2017 on the sidelines of the APEC MRT Meeting in Hanoi, Vietnam and affirmed the economic and strategic importance of TPP, particularly as a vehicle for regional economic integration. Negotiators from the 11 countries met over several rounds to find ways to implement the TPPA (Ministry of International Trade and Industry, 2018).

The Office of the United States Trade Representative (USTR) issued a letter to the signatories of the TPPA informing that the United States had formally withdrawn from the agreement as per the guidance from its president. The letter emphasized the commitment of the United States to free and fair trade and encourages future discussions on "measures designed to promote more efficient markets and higher levels of economic growth" (USTR, 2018). The TPP agreement signed on February 2016 still cannot be enforced even without the United States without minor adjustments to it. Several remaining members of TPP indicated initial interest at a meeting in

Vina del Mar, Chile, in March 2017. Prime Minister of Japan Shinzo Abe said that the TPP will be meaningless with the non-existence of the United States. However, due to fading possibility of the return of United States to the TPP, Japan as leader of the TPP-11 appointed its deputy foreign minister as the chief negotiator for the TPP without the United States. The remaining TPP countries have held several meetings throughout 2017 including in Toronto and Hanoi in May, Hakone in July, and Sydney in August. Japanese leadership in the TPP has improved its outlook but several challenges remain (Petri *et al.*, 2017).

The negotiations proceed without the United States for adjustment on some of the provisions on the original TPP mostly focusing on the controversial aspect such as the eight-year data-exclusivity protection for biologic drugs advocated by the United States which were suspended through the CPTPP. Also some of the provisions which US negotiators fought for would now need to be removed. Result of the negotiated agreement may generate and even boost stronger benefits for others to join since the agreement is structured on the basis of a “living agreement” with an accession clause designed to attract new members. Indonesia, Korea, the Philippines, Taiwan, and Thailand have expressed interest in membership following the conclusion of the negotiations. At one stage, China also expressed interest and its membership, though controversial, would generate especially large benefits for all (Petri *et al.*, 2017).

Several bilateral FTAs between Europe with countries in this region such as Japan and Malaysia may allow for potential partners to be included in the newly designed TPP. The remaining 11 members of TPP and possibly 16 with the new members could be viewed as different phases of a TPP path based on additional standards of the economies of Indonesia, Korea, the Philippines, Taiwan, and Thailand. For the United States, the implications are more negative.

The United States would forego the benefits of greater participation in the integration of a very dynamic region. In addition, newly emerging forms of regional integration would exclude the United States. Direct economic losses would be modest at first, but greater costs would follow as large economies such as China, India, and Japan begin to shape regional rules on trade, investment, intellectual property, the digital economy, state-owned enterprises, labour, and so on to their own advantage. Ultimately, by creating stronger Asian economies and markets, regional integration will encourage the United States to revisit its engagement with the Asia-Pacific (Petri *et al.*, 2017).

The TPP is also seen as a means to check China's economic ascendancy arising from the high levels of production and the strong exports of Chinese-made goods. Currently, China is a leading nation in the production of many goods and services. In addition, in the effort to lower production costs, many European branded goods manufacturers are outsourcing their products to Chinese companies. Consequently, China has high potential to become an economic super-power and this is of much concern to the United States (United States Department of Labor, 2015). Thus, the TPP will provide a new platform for the United States to create barriers on the movement of China in the world economy (Muhammad and Kamal, 2017). TPP member states would benefit from the economic perspective since the TPP has the potential for allowing trading under it that would reap economic growth amongst member states. Nevertheless, several major challenges remain and the Labour Framework should be addressed immediately to ensure that Malaysia as one of the state parties must be in a position of compliance with its obligations under the Labour Chapter of the TPPA.

3. COMPREHENSIVE AND PROGRESSIVE AGREEMENT FOR TRANS-PACIFIC PARTNERSHIP (CPTPP)

Ministers of the remaining 11 member states concluded the way forward to implement the TPP on 9-10 November 2017 in Da Nang, Vietnam and agreed on the text of the agreement, which has been renamed the Comprehensive and Progressive Agreement for the Trans-Pacific Partnership (CPTPP). The CPTPP will incorporate and adopt the original of TPP agreement but several provisions will be suspended while maintaining

the high standards and comprehensive nature of the Agreement. Negotiations on CPTPP were concluded on 23 January 2018 in Tokyo, Japan and the signing took place on 8 March 2018 in Santiago, Chile. The eleven countries in the CPTPP are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Viet Nam. To facilitate the negotiations, the TPP Ministers set the following guiding principles:

1. Maintain momentum and act decisively in a timely manner
2. Maintain the high standards and balance of the TPPA
3. Prevent the unravelling of the agreement
4. Maintain the commercial and strategic interests of all participants
5. Facilitate the implementation of the agreement by all original signatories

The CPTPP will be a free trade agreement involving the 11 countries in the Asia-Pacific region. It is deemed progressive because it goes beyond reducing costs for businesses. It includes commitments to safeguard high labour and environmental standards across the Asia-Pacific region and for state parties to make laws to protect the rights of labour and preserve the environment. The concluded CPTPP enters the global trade dimension on trade agreements at a time of uncertainty in the global trading system. The uncertainty, particularly in Asia, reflects ambiguousness on the direction and future of the United States in the region as an international leader on trade rules and institutions. The significance of the CPTPP can be seen in the policy implications for the United States after it withdrew from the TPP agreement in January 2017. The CPTPP also suspends some important and significant provisions upheld by the United States such as on investment and Intellectual Property Rights compared to the original of TPP text agreement. It is expected that the United States would face some challenges with the existence of CPTPP such as:

1. Should the United States seek entry into the CPTPP, how difficult would it be to re-establish the suspended provisions?
2. Will other countries seek to join the CPTPP? If so, how will this affect US trade patterns with those countries?
3. How will the absence of the US from the two major potential regional trade initiatives affect its broader influence in the Asia-Pacific region?

The CPTPP has led to the opportunities and possibilities of new members joining it. Some suspended provisions under the CPTPP were a concern of states interested in becoming signatories of trade agreements with United States (stated in the Annex II - List of Suspended Provisions of CPTPP, 2018). According to the Annex II of the CPTPP, the Labour Chapter was not suspended by this agreement and the incorporation of labour standards in TPP will be maintained in the CPTPP. Since the Chapter 19 of TPP agreement on labour chapter is not listed in the Annex II of CPTPP, the side letter of the United States with Brunei, Vietnam, and Malaysia is not enforceable with the withdrawal of the United States. Thus, the standards adopted by the Labour Chapter in the TPP remain. Another concern is whether states will be committed to amending labour laws which contradict and are not in compliance with International Labour Standards as adopted by the respective chapters. This might be one of the challenges in enforcing the CPTPP.

4. LABOUR CHAPTER IN THE TRANS-PACIFIC PARTNERSHIP AGREEMENT

One of the controversial issues involving TPP member states relates to the scope and provisions established specifically to preserve the rights of workers. Previously, strong proponents of workers' rights such as Trade Unions and Non-Governmental Organizations (NGOs) expressed their concerns on the risk of failing to protect and implement the rights of workers including consultation of workers which could lead to employment at low levels and poor working conditions. This will cause workers to compete in unhealthy conditions and be discriminated against when they need to compete on the basis of low labour standards in terms of employment practices in the workplace (Fergusson *et al.*, 2015). The TPP's labour provisions aim to address concerns over the

violation of workers' rights in terms of protection affected by the FTA. The TPP incorporates labour provisions in trade agreements which are subject to the procedures and processes of the DSM chapter in the TPP agreement. The TPP imposes several labour obligations on the parties by adoption and enforcement of laws consistent with the fundamental principles of international labour standards. TPP member states are also responsible for enforcing labour laws to conform to the requirements of trade and investment. In other words, they are prohibited to set aside or reduce the standards as agreed and stated in the agreement to attract trade and foreign investment (Fergusson *et al.*, 2015).

The TPPA requires countries to take responsibility for adopting and maintaining the fundamental rights of workers in their respective domestic laws as provided in the ILO Declaration on Fundamental Principles and Rights at Workplace. Employees shall have the right to trade unions, collective bargaining, and freedom from forced labour and child labour, and free from any form of discrimination in employment. The TPP aims to adopt the 1998 ILO Declaration as obligations of member states and to ensure their domestic laws and enforcement are consistent with prescribed international standards. The harmonization of labour standards in the TPP will have major implications for the developing countries involved, such as Malaysia, Mexico, Peru, and Vietnam. If any state party to the TPP fails to preserve the fundamental rights of workers, it will be subject to the processes and procedures of the Dispute Settlement Mechanism (DSM) under the TPP Agreement (USDL, 2015).

No	Specific Labour Rights Protected under the TPPA
1	Protect the freedom to form unions and bargain collectively.
2	Eliminate any form of exploitative child labour and forced labour.
3	Protect against employment discrimination.
4	Require laws on acceptable conditions of work related to minimum wages, hours of work, and occupational safety and health.
5	Combat trade in goods made by forced labour in countries inside and outside TPP.
6	Establish a transparent and responsive process in allowing labour unions, advocates, and other stakeholders to raise concerns regarding any TPP country's adherence to labour commitments.
7	Mexico is also developing its parallel labour reforms, including better protection, collective bargaining, and reforming its system for administering labour justice.
8	TPP includes the strongest labour provisions of any trade agreement in history.
9	TPP renegotiates NAFTA, putting fundamental labour rights at the core of the agreement, and making those rights fully enforceable through the same type of dispute settlement as other obligations, including the option to impose trade sanctions.
10	These rights include freedom of association, the right to collective bargaining, prohibitions on and effective elimination of child and forced labour, and protection against employment discrimination. For the first time in a trade agreement, the TPP requires countries to adopt laws on minimum wages, hours of work, and occupational safety and health.
11	TPP puts into place the largest expansion of enforceable labour rights in history, more than quadrupling the number of people outside the United States that are covered by enforceable labour provisions. This expansion helps to make it more likely that strong labour provisions in trade agreements will become the new global standard.
12	Prevent the degradation of labour protections in export processing zones.
13	TPP requires each member country to establish a public submission process to allow labour unions, advocates, and other stakeholders raise specific concerns on any TPP country's adherence to the commitments under the labour chapter.
14	By bringing enforceable commitments on fundamental labour rights into trading relationships with TPP countries, the TPP expands the fight for decent work around the world and creates a fairer environment for labour.

Source: United States Trade Representative (2016)

The TPP provides that the main principle of work as provided by the ILO shall be adopted by maintaining domestic legislation in line with international labor standards. The TPPA also establishes a separate side letter, the Labour Consistency Plan, between Vietnam, Malaysia and Brunei respectively with the United States and these side letters are now not enforceable with the withdrawal of United States. Initially, the side letters were needed due to the concerns of the United States towards potential states neglecting to provide protection to labour. There are

several impacts to be considered if labour standards do not comply with the TPP, for example using forced labour, and they include banning imports from infringing states. The TPP contributes directly to improving the situation of workers by obliging member states to comply with international labour standards.

The TPP helps to improve conditions on the ground in TPP countries by using binding and fully enforceable obligations. The following table describes how the TPP protects the rights of workers.

5. REMAINING TPP MEMBER STATES WITH INTERNATIONAL LABOUR ORGANIZATION (ILO)

The Labour Chapter of the TPP explicitly provides that member states are obliged to accept and adopt labour rights as enshrined in the ILO Declaration, 1998. This declaration preserves and protects the fundamental rights of workers. Labour rights as embodied in the declaration are protecting workers rights by way of elimination of all kinds of injustices such as forced labour, child labour, freedom of association, elimination of discrimination in employment, right to safety and health at the workplace, right to minimum wage, and working hours. The ILO provides 8 Fundamental Conventions relating to workers' rights. The table below outlines the obligations of the remaining TPP member states under the Fundamental Convention. Fundamental Conventions of International Labour Organization (ILO) as Key Pillar on Labour Standards for the Remaining 11 TPP Member States.

Country	Freedom of Association		Forced Labour		Discrimination		Child Labour	
	C087	C098	C029	C105	C100	C111	C138	C182
Australia	1973	1973	1932	1960	1974	1973	X	2006
Brunei	X	X	X	X	X	X	2011	2008
Canada	1972	2017	2011	1959	1972	1964	2016	2000
Chile	1999	1999	1933	1999	1971	1971	1999	2000
Vietnam	X	X	2007	X	1997	1997	2003	2000
Singapore	X	1965	1965	1965, denounce 1979	2002	X	2005	2001
Peru	1960	1964	1960	1960	1960	1970	2002	2002
New Zealand	X	2003	1938	1968	1983	1983	X	2001
Mexico	1950	X	1934	1959	1952	1961	2015	2000
Malaysia	X	1961	1957	1958, denounce 1990	1997	X	1997	2000
Japan	1965	1953	1932	X	1967	X	2000	2001

Source: Fundamental Conventions, International Labour Organization (ILO) 2018

There is no single text in the TPP agreement that requires a member state to ratify the Fundamental Convention in order to comply with obligations for trade and investment purposes. However, the TPP adopts the 1998 Declaration ("C098") which has as its basic principles the protection of workers' rights and labour standards that must be complied with by member states. The United States has only ratified two of the 8 Fundamental Conventions and has the highest potential to gain more from the TPP compared to Malaysia which has ratified 6 of the conventions. The condition imposed by the TPPA for member states to amend their relevant legislations in line with the ILO Declaration 1998 is intended to safeguard the welfare and rights of workers.

As TPP member states were influenced by the United States' labour administration, the effectiveness of the current conditions can be questioned now that the United States has withdrawn from the TPPA. Nevertheless, labour standards as adopted will lead to questions on their impact and effectiveness before implementation and enforcement in reference to previous trade agreements which have failed to protect workers' rights when highlighting the Bipartisan Agreement of 10 May 2007 (Drake *et al.*, 2015; Isaacs and Schott, 2016).

According to the International Trade Union Confederation (ITUC), Malaysia is in the category of states that do not guarantee protection of workers' rights while the United States is seen as systematically violating workers' rights. The ITUC is tasked with assisting states at by providing appropriate ratings at the international level. It rates countries by categorizing them on a Global Rights Index. The following table shows the position of TPP member states based on the ITUC assessment on the violation of workers' rights for 2015-2017.

Rank and Ratings of Countries on Violations of Workers' Rights

2015			2016			2017		
No	Country	Ranking	No	Country	Ranking	No	Country	Ranking
1	Australia	3	1	Australia	3	1	Australia	3
2	Canada	3	2	Canada	2	2	Canada	2
3	Chile	3	3	Chile	3	3	Chile	3
4	Singapore	3	4	Singapore	3	4	Singapore	3
5	Peru	4	5	Peru	3	5	Peru	4
6	Mexico	4	6	Mexico	4	6	Mexico	5
7	Brunei	Not Indexed	7	Brunei	Not Indexed	7	Brunei	Not Indexed
8	Vietnam		8	Vietnam	5	8	Vietnam	5
9	Malaysia	5	9	Malaysia	4	9	Malaysia	4
10	Japan	2	10	Japan	2	10	Japan	2
11	New Zealand	2	11	New Zealand	2	11	New Zealand	2

Source: International Trade Union Confederation (2015;2016;2017)

Ratings	ITUC Assessment towards Countries
5+	No guarantee of rights due to the breakdown of the rule of law
5	No guarantee of rights
4	Systematic violations of rights
3	Regular violations of rights
2	Repeated violations of rights
1	Irregular violations of rights

Source: ITUC (2015;2016;2017)

The table clearly shows that most TPP member states violate the rights of their workers, the only difference being the level of violations. The United States is a key actor and major contributor to the effectiveness of TPP as well as would gain much from TPP trade. Then, what would be the position of TPP-11 with the absence of United States particularly on labour standards? Will it be effective or defective? As reported by the ITUC, TPP member states indexed at good and best are Canada, New Zealand, and Japan whilst Malaysia improved with positive changes from 'no guarantee of rights' to 'systematic violations of rights' from 2015 to 2016 and 2017. Based on the table above, the patterns of labour standards incorporated in the TPP are no longer pro-US as Malaysia, Mexico, Vietnam, and Brunei have no legal effect on their side letter with the United States in amending some of their domestic laws specifically labour legislation to maintain and protect workers' rights. This will create problems for some remaining TPP member states such as Malaysia, Mexico, Brunei, and Vietnam which have rampant discriminatory labour practice and do not protect workers' rights (Treat, 2015).

6. TPP-11 WITH MALAYSIAN LABOUR LAWS

The TPP agreement contains provisions for protecting the rights and welfare of workers, such as minimum wage and health and safety standards which have been implemented by the Malaysia. Requirements for foreign workers and expatriate to enter Malaysia will always be governed by provisions as provided by existing laws and regulation. The labour standards introduced and adopted under the Labour Chapter of the TPP are an enhancement of labour standards and would improve the governing labour framework in Malaysia. This standard is on the basis of the Fundamental Conventions of the ILO Declaration 1998 to protect the fundamental rights of labour with

indirect legal effects, problems, and major challenges as well as obstacles in enforcing TPP-Labour Standards with existing labour framework in Malaysia. This scenario will lead to a lack of monitoring and supervision together with enforcement since the United States withdrawal from the TPP has created problems on labour issues which are quite challenging and considered as major to countries such as Malaysia, Brunei, Vietnam, and Mexico. This will affect the implementation and monitoring of the Labour Chapter of the TPP (Speagle, 2011).

Obligations under Labour Chapter of TPP	Current Practices in Malaysia	Impact on Malaysian Laws	
		Positive	Negative
Freedom of Association			
Formation of many trade unions allowed in similar industries.	Only one association allowed per industry.		✓
Workers cannot be restricted in holding positions in the association.	Foreign workers are allowed to hold any position in any organization.		✓
Workers allowed to join several trade unions.	Formation of trade union only for occupation, trade, and similar industries.		✓
Forced Labour			
Malaysia needs to eliminate any kind of forced labour and amend any labour laws relating to it.	Malaysia does not comply as a whole in regard to this right. There are several elements of forced labour in labour legislation such as the Employment Act 1955, Labour Ordinance of Sabah, Labour Ordinance of Sarawak.	✓	
Child Labour			
Child labour must be eliminated and is prohibited under the TPP's Labour Chapter.	Malaysia needs to amend several laws in compliance with the TPP such as Labour Ordinance of Sabah, Labour Ordinance of Sarawak and Child Act.	✓	
Elimination of Discrimination in Employment			
Malaysia must eliminate any forms of discrimination and amend any laws that discriminate against workers.	Malaysia does not comply with this position. There are several elements of discrimination in labour legislation such as the Employment Act 1955.	✓	
Adopt and Maintain Regulations related to Minimum Wage, Working Hours, Safety and Health at Work Place			
Malaysia must adopt and protect labour rights according to these 3 categories.	Malaysia should fulfil obligations by passing new legislation such as Minimum Wages Order and Employment Act in line with Department of Safety and Health.	✓	

Enforcement aspects were emphasized as an important part of the TPPA particularly as stated in its Labour Chapter. Member states' obligations are not limited to the enforcement aspect, but also include the provision of labour officers for enforcement with an adequate budget (MITI, 2018). Obligations imposed by the Labour Chapter are in relations to trade and investment practices which are subject to the ILO Declaration 1998. The following table shows the differences between the labour standards of TPP with the current labour law practiced in Malaysia.

1. Study on Potential Economic Impact of TPPA on the Malaysian Economy and Selected Key Economic Sectors Unit Peneraju Agenda Bumiputera (TERAJU) and PwC Advisory Services Sdn Bhd (PwC, 2015).
2. National Interest Analysis of Malaysia's Participation in the Trans-Pacific Partnership, Institute of Strategic and International Studies (ISIS) Malaysia (Firdaos *et al.*, 2015).

7. IMPLICATIONS OF TPPA FOR MALAYSIA'S LABOUR LAWS

Currently, TPP member states are in the process of improving their domestic laws and labour administration by amending relevant laws to protect their workers' rights in line with ILO Declaration 1998. The principle of non-

discrimination is applied when all sorts of injustices and discrimination will be eliminated such as forced and child labour, and any relevant laws for labour shall comply with standards on a sound working environment, right of association with trade unions, elimination of any form of employment related discrimination, safety and health at work, and maintaining minimum wage and working hours. Compliance with labour standards will ensure better protection, whereby good working conditions will enhance productivity and healthy competition among workers.

Malaysia has to amend several labour laws to ensure compliance with the TPP agreement. This would benefit Malaysia in the long run as they would improve public perception of Malaysian labour standards. There are clear loopholes and differences in current Malaysian practices that are in conflict with obligations under the TPP. In the meantime, the TPP agreement allows Malaysia to implement provisions and domestic legislation for worker protection based on Article 19.3.2. The amendments will result in nine laws in matters relating to forced labour and freedom of association. Consent to allow the establishment of unions would have a negative impact on many employers in Malaysia (Malaysian Employers Federation, 2014). Most companies do not have trade unions and employees are not allowed to be involved in trade unions and collective bargaining. Therefore, the government is advised to examine and evaluate all related risks in allowing the right of association among workers and how this could be managed by having appropriate approaches (Firdaos *et al.*, 2015).

8. ACTIONS TAKEN BY THE GOVERNMENT OF MALAYSIA

To-date, there have been a series of responses from respective ministries in relation to calls for amending the country's labour laws in light of the TPPA. In the initial stage the government announced that eight labour laws will be amended aimed at improving labour standards. This is based on the required labour standards to ensure that Malaysia will be on par with other TPP member states. In the meantime, Malaysia aims to improve the welfare of foreign workers by upholding and protecting their rights. For instance, according to the minister of Human Resources foreign workers will have the right to join and hold positions in trade unions (MEF, 2014; MITI, 2018).

The second phase of the government's response was that Malaysia aimed to review nine labour legislations in two stages by April 2017 to comply with the TPP's Labour Chapter. The first stage involved labour legislation amendments to make them in line with the ILO Declaration 1998 while the second relates to enforcement and monitoring. The amendments comprise more than 30 provisions relating to workers regardless of the sectors. Key players in the labour sector are urged to fully utilize opportunities in understanding and making it beneficial to them (TPP Coalition, 2016).

Under the third stage the government announced that amendments to the laws would proceed even without TPPA as a means to independently improve them regardless of whether the United States would continue to pursue the TPPA agenda. Malaysia would still amend its labour laws as part of the process to comply with TPPA even if the TPP might not be enforced due to the uncertainty of the United States leadership. The ministry was committed to move forward and the amendments will take place based on the presumption that the TPP would be ratified in early 2018 (PwC, 2015).

The fourth stage regarding the labour laws amendments are the uncertainties relating the TPPA especially with the uncertainty in the direction of the new US administration. Currently, the government of Malaysia was urged by the Malaysian Trade Union Congress (MTUC) to keep moving as progressive steps for the amendments are needed. The MTUC was of the view that the implementation of TPP in the early of 2018 would not take place due to the uncertainty and before the remaining TPP member states could apply the CPTPP as an option to further implement the TPPA. At this stage, whether the TPPA is enforced or not, MTUC urged the government to work towards the amendments which they believe will bring tremendous change and improvements to the labour framework in Malaysia and provide greater protection to local and foreign workers (Rafael *et al.*, 2015).

The government of Malaysia will soon table amendments of the nine laws that would enhance the labour sector. Even though uncertainties surround the trade pact, they will still be tabled to facilitate Malaysia's

membership in the TPP. Despite the withdrawal of the United States, the amendments will take place. As of now, the Ministry of Human Resources is studying the amendments which would also take into consideration proposals from related parties. Malaysia is firm in its stance, and the ministry will ensure that progress on improving the country's labour laws will not be jeopardized by the United States or any other parties. The ministry has also stated that the amendments are aimed at making labour laws in Malaysia in line with the Fundamental Convention of the ILO. Officials also said that the ministry will ensure that the law coincides with current needs and developments. What could be done by the government for now is to provide 90 days for maternity leave compared to the current 60 days. Apart from that, there will also be continuous discussions with stakeholders. Based on the above, it can be seen that the government of Malaysia is committed to amending related labour laws to comply with the Labour Chapter under the TPPA. Anyway, there are still challenges for Malaysia in moving forward towards enhancing the labour sector to gain benefits from the TPP-11.

9. MAJOR ISSUES AND CHALLENGES FOR THE MALAYSIAN LABOUR FRAMEWORK

The labour force is the main factor of production in an economy especially in the manufacturing and services sectors. Effective productivity translates into greater revenues derived from the sources of production processes (Mohd Yusri *et al.*, 2013). The adoption of the ILO Declaration 1998 seeks to eliminate sanctions for TPP member states towards the formation of trade unions¹ and to allow collective bargaining² rights. This will allow greater productivity even though domestic laws are still applicable and effective as labour resolution mechanisms. This is the position which the government of Malaysia should be aware of in implementing the TPP. Risks of disruption to productivity are high if the government is unable to come up with strong action and enforcement in addressing problems presented by the presence of foreign workers in Malaysia (Zulkipli, 2016). Illegal immigrants may be able to compromise and participate with legalized friends for positions in trade unions and this has the potential for causing social unrest (The Associated Chinese Chambers of Commerce and Industry of Malaysia (ACCCIM), 2015).

Malaysia also faces challenges in complying with the Labour Chapter under the TPPA on the amendment to the nine laws related to labour issues. The nine laws (Firdaos *et al.*, 2015) are:

1. Employment Act 1955
2. Trade Unions Act (TUA) 1959
3. The Child and Young Persons (Employment) Act 1966
4. Passport Act 1966 (the Implementation and Regulations)
5. Industrial Relations Act 1967
6. The Sabah Labour Ordinance (Cap 67)
7. The Sarawak Labour Ordinance (Cap 76)
8. Private Employment Agencies Act 1981
9. Minimum Standards of Housing and Amenities Act, 1990

Current provisions that need amendments in respect of trade union issues are as follows:

1. Duty to register trade unions
2. Needs union membership in the industry and similar jobs
3. The discretion of the Director General (DG) and the Minister for registration, suspension and revocation of the union, conditions and obstacles strike,
4. The right of workers to form and join trade unions,

¹Potential effects which might be occur are similar to the case of the National Union of Plantation Workers vs Dynamic Plantations in 2002 involving discrimination in wage increments to foreign workers according to Sec 17 (1) Industrial Relations Act 1967 in Industrial Court.

² A one-week impact study at *Plantation Groups* estimated that worker productivity disruptions will cost Malaysia an estimated US\$300 million. Refer to *Bloomberg MAA Market Review 2014, PwC Analysis* for 10 days impact on productivity disruption in automotive sector.

5. Protection of migrant workers and social workers,
6. Discrimination in employment.

The ILO's Committee on Freedom of Association has criticized the government of Malaysia on certain matters of labour rights and freedom of association as being contrary to ILO conventions (Hassan, 1996;2002). Hence this can be used as the basis for amendments to Malaysia's labour laws to ensure compliance with TPPA provisions. ILO labour standards violated by Malaysia are mostly based on convention No.C087 which Malaysia has as yet not ratified. Examples of provisions relating to trade unions which clearly contradict the convention and should be amended are as follows:

Section of Trade Union Act (TUA)	Subject Matter	Article of ILO Convention No 87
Section 8	Compulsory registration for Trade Union	Art. 2
Section 12(2) & (3)	The discretionary power of the Director-General to refuse registration of trade unions	Art. 2
Section 15	Revocation of certificate of trade union by the Director General	Art. 4
Section 17	Suspension of a trade union branch by the Director-General	Art. 4
Section 18	Suspension of trade union by the Minister	Art. 4

In addition, Malaysia is also responsible for improving and strengthening the enforcement of its legal and administrative system based on several aspects of labour as follows:

1. Improve labour productivity source
2. Improve labour inspection and monitoring system
3. Review the procedures for enforcement and labour inspection
4. Promote and provide training or programmes with the ILO to improve the labour monitoring system

In addition, Malaysia has to formulate an effective plan of action to increase awareness and understanding of workers of their rights in ensuring that Malaysia adheres to the TPP-Labour Standards as negotiated among TPP member states. Malaysian negotiators' actions on compromising domestic policies and laws have produced major challenges to the government because it comes with commitment and obligation (Gallagher *et al.*, 2013). As a result, with the amendments to the labour laws, either directly or indirectly, the Malaysian labour framework might follow and will be influenced by the Labour Standards based on the ILO Declaration 1998 as adopted by the TPP for trade purposes and will greatly facilitate the administration and management of labour over the long run. Trends and patterns in Malaysian labour laws will involve changes as they will allow foreign or local workers to establish trade unions. The big question is on labour standards of the TPP. This is because issues on the effectiveness of enforcement and commitment to amend several sets of labour laws will have to be done without United States' participation since the Labour Consistency Plan adopted as a Side Letter between Malaysia and the United States will no longer be operational.

10. CONCLUSION

There are both positive and negative impacts on Malaysia's labour laws especially in regard to issues of association and collective bargaining. Also major complications will be faced by the government if foreign workers are allowed to establish their own union. The possibility of foreign workers holding high positions in existing trade unions will be a new and major challenge to the government on how to cater to their rights specifically in any possible mechanism. The adoption of the TPPA will eliminate several provisions on existing Malaysian legislation related to trade unions and industrial relations which clearly provides discretionary powers of the executive in relation to the issues above. This scenario is alien to the current culture and the political system of this country. It

is undeniable that in the long-term, TPPA has the greatest positive potential in allowing the government of Malaysia to amend its labour laws and transform the labour administrative systems. However, in the short-term amending several labour laws in order to comply with the 1998 ILO Declaration will have negative impacts. There are a total of nine legislations related to labour issues which should be taken into account and any amendments to them will have direct and indirect costs and consequences.

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