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## The TPP and Malaysia: Local Impact and Implications Following the Conclusion of the Partnership Negotiations

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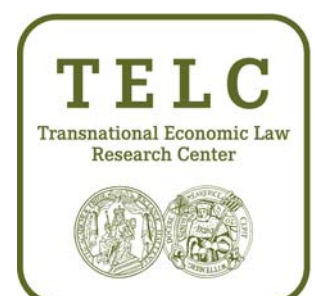
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## **The TPP and Malaysia: Local Impact and Implications Following the Conclusion of the Partnership Negotiations**

### **Introduction**

On October 5, 2015, the twelve Parties to the Trans-Pacific Partnership Agreement (“TPP” or “Agreement”)—Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam—concluded negotiations in Atlanta, Georgia, on an Agreement five years in the making. The Agreement is in part the result of extensive U.S. efforts to forge a multilateral Free Trade Agreement (“FTA”) in a number of Asian and Latin American countries, including countries within the Association of South East Asian Nations (“ASEAN”). Such an event presents a unique opportunity to turn a lens to the instant effects of this FTA on the individual economies and political situations in the countries affected. Accordingly, this policy paper will focus on one of the four ASEAN Parties to the TPP: Malaysia. It will briefly discuss Malaysia’s state-owned enterprises, the rise in the value of the Malaysian Ringgit since the conclusion of the TPP negotiations, and the US’s interest in the Straights of Malacca (which border Malaysia). Finally, it will comment on the US’s multilateral approach vis-à-vis the EU’s bilateral approach to FTAs in the ASEAN region.

The final provisions of the TPP have yet to be drafted and the Parties involved have yet to officially ratify the treaty, but the conclusion of Party ne-

gotiations has accelerated the global whirlwind of speculation regarding TPP’s significance and potential impact. The United States has seen political opposition to ratification of the Agreement arising from, among others, 2016 presidential hopefuls Bernie Sanders and Hillary Clinton, who oppose the TPP in the name of workers’ rights. Malaysia has also seen opposition from politicians, like former Prime Minister Dr. Mahathir Mohamad, who expressed the concern, among others, that Malaysia’s state-owned enterprises (almost 70% of its top firms (*See, e.g., Max Büge et al, Vox Online, State-owned enterprises in the global economy: a reason for concern?*)) would face the risk of being sued if Malaysia put the public’s interests over those of foreign investors. Nevertheless, the current administrations of both the US and Malaysia have welcomed the Agreement with praise and optimism (and the same is true of Singapore and Vietnam—Malaysia’s only ASEAN partners in the Agreement).

Rather controversially, neither the specific provisions of the TPP nor a draft of the Agreement have been made officially available to the public, even though negotiations between the Parties have been underway since 2010. Nevertheless, a draft of the Intellectual Property Chapter of the Agreement was leaked on Wikileaks in 2013, and an updated draft of the same Chapter was again leaked on 9 October 2015. These versions of the TPP, along with the general outline of the Agreement provided by the Office of the United States Trade Representative (updated after October 5, 2015), were used for reference on the points that follow.

### State-Owned Enterprises and Designated Monopolies—Is Malaysia Sacrificing for Long-term Gain?

State-Owned Enterprises (“SOEs”) exist in most of the world’s nations and are present in all of the TPP Parties. While these enterprises often play a role in providing public services in their respective nations, some SOEs are engaged in purely commercial endeavors.

The TPP sets out a framework of rules for large SOEs that are principally engaged in commercial activities. Parties agree to ensure that their SOEs conduct their activities purely as commercial entities, except when doing so would be inconsistent with a SOE’s domestic obligations to provide public services. This is an area of potential conflict, as it would seem that many public services involve private commercial transactions. However, the TPP sets up guidelines to ensure that conflicting or overlapping interests in goods and services provided to the public are parsed in their purposes so that commercial elements of providing public services remain commercial (or it would seem from US Office Trade Representative summary). The TPP also sets out non-discrimination guidelines: each TPP Party has agreed to ensure that their SOEs do not discriminate against the enterprises, goods, and services of other Parties.

Most significantly for Malaysia (and apparently for many ASEAN non-Parties), the TPP requires Parties to provide their courts with jurisdiction over commercial activities of foreign SOEs in their territory, and to ensure that administrative bodies regulating both SOEs and private companies do

so in an impartial manner. TPP Parties agree to not cause adverse effects to the interests of other TPP Parties in providing non-commercial assistance to SOEs, or injury to another Party’s domestic industry by providing non-commercial assistance to an SOE that produces and sells goods in that other Party’s territory. Should a breach of these obligations arise, Parties agree to liability in foreign courts, and agree to allow foreign SOEs to bring lawsuits in domestic courts.

The liability provisions of the TPP have sparked hesitation in states with a large percentage of SOEs (which constitutes most of ASEAN) that exposure to liability to foreign interests will hurt both domestic public interests and the commercial interests of domestic enterprises that are less developed or powerful than some foreign enterprises. Malaysian Prime Minister Najib Razak and his staff insist that the latest draft of the TPP provides adequate safeguards for Malaysia’s SOEs, but there is still widespread speculation that this exposure is part of a larger strategy to make Malaysia’s domestic enterprises more competitive by 2025 (Universiti Teknologi Malaysia, *Comprehensive Development Plan ii (2014-2025) Iskandar Malaysia*, UTM News Portal), perhaps at the expense of immediate success in 2015. At any rate, current speculations project the potential impact of the TPP on Malaysian economy to be a 5% boost by 2025, placing it second only to Vietnam in terms of projected Party benefit.

The current Malaysian administration has, on numerous occasions, expressed a desire to jumpstart innovation and competition in Malaysian markets. By exposing nationalized local practices to

foreign commercial interests and competition, some commentators have argued, the administration aims to houseclean stagnant SOE practices that are too politically risky to explicitly eradicate. Nevertheless, Malaysia's International Trade and Industry Minister, Mr. Mustapa, insists that Malaysia's two largest SOEs—Khazanah Nasional and Petroliaam Nasional Bhd (Petronas)—are “largely exempted” from the TPP (*See* The Star Online, *Khazanah and Petronas mostly 'exempted' from TPP – minister*, 7 October 2015). Khazanah, Petronas, and their subsidiaries comprise the vast majority of Malaysia's SOEs.

### **Malaysian Ringgit Immediately Rises Against U.S. Dollar, but is TPP the Cause?**

The Malaysian Ringgit made its biggest single-day jump against the USD in 17 years (3.8%) on the day that it was announced that TPP negotiations had concluded (Market Realist). Amidst falling oil prices and the declining value of palm oil, the currency has been steadily losing value since late 2014, and most rapidly since August 2015 (XE Currency Charts (MYR/USD)). The gains last week and since constitute the first significant gains in at least five months.

The value of Malaysia's currency is heavily linked to its palm oil and crude oil exports (both industries are owned by the state). Throughout 2015, the prices of both commodities have plummeted, and market experts in Malaysia have advocated for the TPP as a way to expand the export markets for Malaysian palm oil, particularly in the United States. The price of crude palm

oil in Malaysia has been plummeting since 2011, from 1089 USD per metric ton in July 2011 to 551 per metric ton in August 2015 (YCharts). This near-halving of the price of crude palm oil—due to a combination lagging demand and government efforts to maintain production—has a strong correlation with the steady decline of the Ringgit during the same period, but is offset by hikes in crude oil prices, which have an even stronger bearing on the currency (IndexMundi). The global plunge in oil prices in 2015 combined with charges of government corruption (including an alleged syphoning of over USD 700 million of public funds into Prime Minister Razak's personal accounts (*See*, e.g., The Gaurdian, *Najib Razak at risk of isolation amid Malaysian corruption scandal*, 9 October 2015)) have likely also been drivers of the currency's rapid decline, especially since August. Nevertheless, Malaysian commentators are optimistic that the increased market demand for palm oil brought on by the TPP will reverse the Ringgit's downward trend, and the last week seems to substantiate this optimism.

It is unclear, however, whether the news on the TPP had any causal effect on the Ringgit's rise, even though the rise began shortly after the TPP negotiations were concluded. According to Malaysia's Department of Statistics, the balance of trade for the month of August came in significantly higher at 10.9 billion Ringgit, beating market expectations by a long shot. The increase in trade surplus was down to an increase in exports by 4.1% and an unexpected contraction of 6.1% in imports. The Malaysian Ringgit has also benefited from the speculated rise in the price of crude oil—nearly 5% on October 6,

2015. Finally, a general rise in Malaysian stock prices (FTSE KLCI)—while sporadically underway since a long-time low in August—seems to have normalized into a faster and steadier rise since slightly before the negotiations concluded (Trading Economics, Malaysian Stock Market).

### **The Strategic Importance of the Malaccan Straits—Is the U.S. Leveraging the Agreement with Malaysia for Bargaining Power with China?**

The Malaccan Straits are of strategic importance for world trade and regional development. They are vulnerable to social, political and natural disasters, but also bear great opportunities for economic and social development (See Hans-Dieter Evers and Solvay Gerke, *The Strategic Importance of the Straits of Malacca for World Trade and Regional Development*, Working Paper Series 17, Center for Development Research, Department of Political and Cultural Change, University of Bonn (2006)). Most European trade with China and Japan is shipped through the Straits of Malacca, and most of the energy requirements of Japan depend on oil shipments from the Gulf states through the Straits. Moreover, the Straits have, for centuries, connected the Indian subcontinent with East and Southeast Asia as well as Europe with China as a trade-route alternative to the Northern “Silk Road.” The states bordering the Straits—Indonesia, Thailand, Malaysia, and Singapore—form the core of the ASEAN region, and the ASEAN region constitutes 40 percent of global GDP (so does the TPP).

In this context, many experts on US-

China relations have long considered the TPP essential to the US goal of demonstrating its presence before an expansionist China (Akbar Ahmed, Ryan Grim, Laura Barron-Lopez, *Why Is The U.S. Desperate To OK Slavery In Malaysia?*, Huffington Post, 26 May 2015). In recent years, China has expanded not only its trade presence but also its military presence in the vicinity of ASEAN, and the Obama administration has likely pushed the TPP as a way to prevent China from dominating the region. To that end, the US Congress reinstated the president’s fast-track Trade Promotion Authority (“TPA”) in March to ensure that the US could institute rapid and smart responses to China’s rise, and presumably, to pave the way for the TPP (See Kevin Crow, *The TPA in 2015: A Quick Look at the Latest Incarnation of the U.S. President’s “Fast Track” Trade Negotiation Authority*, Policy Papers on Transnat’l Econ. L. No. 43, Transnational Economic Law Research Center at Martin Luther University Halle-Wittenberg (June, 2015)).

Malaysia plays an essential role in this matrix because of its proximity to the Malaccan Straits. Last year, roughly 60 percent of foreign commerce and 85 percent of China’s imported oil passed through the Straits. The US already has a strong presence in the region (it keeps Naval vessels in the ports of Singapore and Malaysia has offered to house US military aircraft), but the TPP may nevertheless be viewed as a reaffirmation of the US’s commitment to Malaysia—especially in light of the fact that Indonesia (the other major border to the Straits) is not a Party to the TPP (according to data from the United States Department of Defense). Indeed, some have speculated that

such motives drove the US to redefine prohibitions related to the human trafficking of Parties to the TPP so that Malaysia would not be excluded from the Agreement.

***Comment: U.S. and E.U. FTA Approaches in ASEAN: Is the TPP's Multilateralism Superior to Bilateral Agreements?***

In April 2015, the EU Trade Commissioner announced the intention to “jumpstart” the EU-ASEAN trade negotiations, which have been stalled for many years. However, the failures of previous attempts to forge a multilateral ASEAN agreement have prompted the Commissioner to engage in bilateral FTAs with individual nations, rather than pursue a multilateral agreement mirroring the TPP and the TTIP, but between the EU and ASEAN. Some commentators have argued (in part) that, because the TPP negotiations are now complete, and because many EU-ASEAN FTAs are still lingering, the multilateral approach of the US in forging an FTA in ASEAN is superior to the EU’s bilateral approach (See Nikos Lavranos, *It’s Asia Stupid! The Race Between the EU and the US for Concluding Free Trade Agreements in Asia*, Kluwer Arbitration Blog). However, this is not necessarily the case.

In fact, it would appear that most of the countries in ASEAN have taken what might be called a “wait and see” approach to the TPP. Indonesia, for example, as an early negotiator, decided to opt out of TPP negotiations in part due to potential exposure of Indonesia’s SOEs—which comprise roughly 70% of the top 10% of Indonesian firms—to potentially costly lawsuits in

foreign jurisdictions. Other ASEAN members, such as Thailand and Brunei, have not joined in part due to concerns that some of their trade policies would be considered protectionist under the TPP (James Hookway and Natasha Brereton-Fukui, *Trade Is Also Key to Influence in East Asia*, *The Wall Street Journal*, 28 June 2013). Indeed, while many other ASEAN members have expressed interest in joining the Agreement, presently only 3 of ASEAN’s 10 members are Parties to the TPP, leaving the US without any FTA in much of the ASEAN region (not to mention non-ASEAN TPP absentees such as China and India). Bilateral FTAs may prove to be more effective to the EU in the long run because they offer each of the politically, socially, and economically diverse countries in ASEAN the opportunity to craft an agreement tailored to their needs. If, as it has been claimed, the EU and the US are in a “race” to gain FTAs with the entirety of ASEAN, the EU’s bilateral approach may yet prove to be superior. The conclusion of the TPP negotiations is not necessarily an indication that the US is winning the race for FTAs with ASEAN as ASEAN is not collectively on board with the TPP.

***Conclusion***

The conclusion of the TPP negotiations presents a unique opportunity to turn a lens on the immediate effects of FTAs on local economies, as observed above. Even while the official text of the Agreement has yet to be published (or drafted for that matter), several instant ramifications seem to be emerging in Malaysia. The degree to which the Agreement has affected currency value, the prices of stocks, and the political

situation are matters of speculation, but there is a strong correlation between recent positive changes in these areas (at least as far as the Malaysian economy is concerned) and the conclusion of the negotiations. Nevertheless, there is a danger that Malaysian companies will be exposed to litigation through the TPP, which may prove harmful to the public's interest, especially because so many of Malaysia's largest firms are state-owned. Indeed, due to this and other (what might be termed "protectionist") concerns, most ASEAN nations have taken a cautious (if open-minded) approach to potential TPP membership, which calls into question assertions that a multilateral agreement such as the TPP is truly the fastest and most effective way for the US or the EU to assert a presence in the ASEAN region, and in South Asia more generally.

For general reference, *see* Wikileaks, "Secret TPP Treaty: Advanced Intellectual Property Chapter for all 12 nations with negotiating positions," *available at* <https://wikileaks.org/tpp/static/pdf/Wikileaks-secret-TPP-treaty-IP-chapter.pdf> (last accessed 11 October 2015); Wikileaks, "TPP Treaty: Intellectual Property Rights Chapter, Consolidated Text (October 5, 2015)," *available at* <https://wikileaks.org/tpp-ip3/Wikileaks-TPP-IP-Chapter/WikiLeaks-TPP-IP-Chapter-051015.pdf> (last accessed 11 October 2015); Office of the United States Trade Representative, "Summary of the Trans-Pacific Partnership Agreement," *available at* <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/october/summary-trans-pacific-partnership> (last accessed 11 October 2015).

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