

This is a submission made by the Consumers' Association of Penang and Third World Network on 28 May 2018 to the new government of Malaysia that won the country's general elections on 9 May 2018

THE IMPORTANCE OF TRADE AND INVESTMENT AGREEMENTS AND THE NEED TO REFORM THE INSTITUTIONAL ARRANGEMENTS GOVERNING THEIR NEGOTIATIONS AND THE AGREEMENTS

Memorandum submitted to the Committee for Institutional Reforms by the Consumers' Association of Penang (CAP) and the Third World Network (TWN)

I: Importance of Trade and Investment Agreements and Negotiations

There is a misconception that trade agreements are only or mainly about opening markets of other countries so that Malaysia can sell more exports. While this may be the nature of trade agreements in the past, the new “trade agreements” are about much more than just trade *per se*.

In the World Trade Organisation (WTO), they also cover services, intellectual property rights and investment measures (though not the full range of investment issues).

In new “free trade agreements”, they often also cover the full range of investment issues; government procurement; competition policy; ecommerce and most recently state-owned enterprises. This is in addition to merchandise trade, services and intellectual property.

The agreements that Malaysia has signed, especially the Trans-Pacific Partnership (TPP) and its new variant the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), have very important implications for many economic, social and even political aspects of Malaysian policy. For example:

- The investment chapter in some agreements requires the country to open its doors to foreign investments of all types (including short-term speculative funds), restricts the use of “performance requirements” like conditions on technology transfer or use of local labour and management; and gives immense protection to investors, including enabling them to sue the government in foreign tribunals for loss of future profits if government policies change or if the terms of a contract are re-negotiated. For the new government, which is planning policy changes in many areas, this has serious implications.
- The government procurement chapter requires the country to open up to foreigners the business of supplying goods and services to government and of bidding for government projects, while prohibiting preferences to be given to local companies. There are a few exemptions such as for projects below a certain level, or a grace

period of a few years before full implementation. But by and large, local companies and vendors will find it much more difficult in future to obtain business opportunities from government and its agencies.

- The competition chapter of many US and European free trade agreements (FTAs) require the national government to distance itself from government agencies and local government -linked companies, in order to provide a “level playing field” for large foreign companies to better penetrate the Malaysian market.
- The state owned enterprise (SOE) chapter in the TPP has the objective of placing obstacles to the operations of nationally owned government-linked companies (GLCs). Its immediate aims are to open the procurement business of SOEs and to restrict the assistance that governments can provide to SOEs. The longer term aim could be to drastically reduce the role and activities of SOEs or GLCs and perhaps eliminating them. This would be in line with increasing the opportunity of large foreign companies to obtain more market share in the domestic economy. All this has serious implications for Malaysia where many GLCs play important economic and social roles.
- The intellectual property (IP) chapter expands and extends the terms of monopoly of owners of IP, which are mainly foreign companies, through providing more privileges to owners of patents, copyright, etc. This especially has serious implications for health-care of Malaysians as the tighter IP rules will tend to further raise the already high cost of patented medicines, and for a longer period, while enabling more products to be patented. The IP chapter also requires Malaysia to join an international treaty UPOV 1991, which would prevent farmers from freely using, and from exchanging or selling seeds that are protected under the treaty; and this will raise the cost of seeds used by farmers for planting. Joining UPOV 1991 would require Malaysia to remove its existing fair law on plant varieties protection which gives fair rights to local farmers.
- The trade component of FTAs also has the potential to cause difficulties for local companies and producers, including farmers and small and medium enterprises, because the FTAs require tariffs to be eliminated for a majority of products. Some companies may benefit from having higher demand for their exports. However, in net terms (increase in exports compared to imports) Malaysia could gain little or even be a loser, according to some studies, including a cost-benefit analysis on TPP done for the government. The claimed large benefits are usually highly exaggerated due to unrealistic assumptions in the models, as many critiques have pointed out.

At the WTO, developed countries have been leading attempts to also introduce new issues that are for their benefit. These include E-Commerce, the proposals for which would hamper efforts of the developing countries (like Malaysia) to develop their own national capacities to participate in the digital economy.

In addition to FTAs and WTO, Malaysia is also a signatory to many bilateral and regional investment agreements. These require the country to open up to foreign companies and funds to enter and establish themselves; to restrict conditions or performance requirements; and many require that investors be protected including through arbitration in foreign tribunals which can require the government to pay compensation of millions or even billions of

ringgit,¹ if the investor shows it would lose that amount of profit opportunity because of changes in government policy or changes in contract terms. Tribunals such as the World Bank's International Centre for Settlement of Investment Disputes (ICSID) have made many controversial judgments which have significantly discredited the investor-state dispute settlement (ISDS) process. Many countries including Indonesia,² India³ and South Africa⁴ have phased out their bilateral investment treaties (BITs) that contain ISDS because of their negative experiences with these treaties. However, Malaysia has retained its BITs and is not making use of the opportunity to phase them out. Malaysia is now vulnerable to cases being taken by foreign investors of countries that have signed investment treaties with the country.

NOTE: The above is a summary of the implications of the contents and substance of trade negotiations and agreements. CAP and TWN can provide many more details and analyses of the substance. This Memo however focuses mainly on the process and institutional aspects, which are presented below, together with proposals.

II: INADEQUATE INSTITUTIONAL ARRANGEMENTS

Despite the serious implications of trade and investment agreements, there is still little public awareness in Malaysia of their content, negotiation process and implications. Also, it is untransparent how the decision is made for Malaysia to enter into negotiations with other countries, through bilateral FTAs (like the ones with Japan, Australia) or regional FTAs (like the Regional Comprehensive Economic Partnership (RCEP), or mega FTAs (like TPP and its successor CPTPP). The process of negotiations in these FTAs is also clouded in mystery to the public.

What is known is that once a decision is made to enter negotiations for an agreement, one Ministry, the Ministry of International Trade and Industry (MITI) is in overall charge of the whole process. On some issues, another Ministry maybe asked to take charge or to co-ordinate with MITI (for example, the Ministry of Finance on government procurement or on state owned enterprises). In some issues where a Ministry has a major stake or interest (for example Ministry of Health on intellectual property (IP) issues relating to medicines), it may be consulted and may take a position.

There is also a lack of awareness of Ministries and agencies on how many chapters can affect them. For example, 12 ministries can be affected by the TPP ecommerce chapter. Were they all briefed about its implications and consulted and did they all consent to it? It is possible the e-commerce negotiator may not have realised that all the other Ministries were affected. It is also possible that not many of the affected Ministries saw the e-commerce text before the negotiations were concluded and it was made public, and it is also doubtful if they were consulted or agreed to it.

There does not seem to be a high-level coordinating committee of all relevant Ministries and agencies, to take stock of the overall situation and position of the negotiations of particular

¹ Eg see <http://investmentpolicyhub.unctad.org/ISDS/FilterByAmounts>

² <http://investmentpolicyhub.unctad.org/IIA/CountryBits/97#iiaInnerMenu>

³ <http://investmentpolicyhub.unctad.org/IIA/CountryBits/96#iiaInnerMenu>

⁴ <http://investmentpolicyhub.unctad.org/IIA/CountryBits/195#iiaInnerMenu>

FTAs. And when the negotiations reach a climax, requiring trade-offs between one issue and others, it is usually MITI that is in charge, and the opportunities for other Ministries to play leadership roles, even on issues most pertinent to them, are limited. The Cabinet itself is seldom briefed adequately and in many FTAs or on negotiations in the WTO or on investment agreements, most members of the Cabinet are often in the dark.

The absence of consultation is even more evident where Parliament and state and local governments are concerned. Except for the TPP, where there was very high public interest, Parliamentarians were not involved in consultations on FTAs, WTO or investment agreements. State governments and local are hardly briefed at all, and their views are not sought on most issues, even though the agreements may have implications for them.

Where the public is concerned, the lack of information, consultation and participation in the process of negotiations and decision-making is very pronounced. In recent years, there has been much greater public interest, especially on the TPP. Because of the vocal protests by many non-governmental organisations (NGOs), the previous government held consultations with NGOs. However these TPP consultations were yet most inadequate and Malaysia signed on to the TPP without the text being made public until later. Moreover when the CPTPP replaced the TPP, there was again no consultation with the public (nor was Parliament kept informed). The text of the CPTPP was not made public before the negotiations were concluded. In the case of the RCEP, which is now being negotiated, again there is no public consultation and the texts of the drafts have not been made public.

In relation to the WTO, it is very unclear how decisions are being made as to the positions Malaysia takes in the negotiations. For example, Malaysia has joined in the negotiations held at plurilateral level on electronic commerce and on investment facilitation, although many other countries have decided not to do so on the ground that this is against the multilateral nature of the WTO and that the proposals being put forward by the advocates are not in the interests of developing countries. Do all the relevant Ministries know about these WTO negotiations or even about the issues being negotiated and their implications? Was the Cabinet informed and did it take decisions? What is clear is that the public is kept in the dark.

As to the bilateral and regional investment agreements, once again there is little or no information provided to Parliament or to the public as to their content or the negotiations taking place. It is not clear whether the Cabinet knew/knows about these agreements.

Failure to adequately consult the public on trade and investment agreements and negotiations in the recent past includes the following example: The former Minister of International Trade and Industry promised to consult stakeholders on the way forward with the Trans-Pacific Partnership (TPP) after President Trump said the USA would not ratify.⁵ No consultations were held and the previous Malaysian government decided to sign the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)⁶ which merely temporarily suspended a few of the many TPP provisions which are extremely problematic for Malaysia.

This is an unfortunate situation, where the institutional mechanisms for negotiations and conclusion of trade agreements have failed in terms of transparency and public participation, despite these agreements having such important implications for public policy. There should therefore be vast improvements and even an overhaul in institutional arrangements.

⁵ http://www.miti.gov.my/miti/resources/Media_Release_-_Response_to_the_US_Withdrawal_from_the_TPPA.pdf

⁶ <http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/Pages/trans-pacific-partnership-agreement-tpp.aspx>

III: PROPOSALS FOR INSTITUTIONAL REFORM

Urgency needed in carrying out reform

The lack of public consultation and even the lack of consultation within the government and with state governments and Parliament should not continue. The situation is urgent because government officials are currently negotiating several agreements, even when the new government is not yet fully formed, and there is no guidance from the not-yet-announced Minister of Trade or from other relevant Ministers nor from the Cabinet.

The current and on-going negotiations include:

- The Regional Comprehensive Economic Partnership (RCEP),⁷
- A Malaysian-European Union Free Trade Agreement (FTA),⁸
- An FTA between Malaysia with the European Free Trade Association (EFTA, made up of Iceland, Liechtenstein, Norway and Switzerland⁹)¹⁰
- New rules at the World Trade Organization (WTO) including on restricting the ability to regulate services (domestic regulation disciplines), investment facilitation (which can also restrict the ability to regulate) and ecommerce (which can undermine regulations in about 12 different government ministries¹¹).
- Malaysia has signed many bilateral and regional investment treaties. Some more may be in the pipeline for negotiation and signing.

In addition:

- Malaysia has signed and needs to decide whether to ratify the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP).¹² The previous government also announced it would proceed with changing 18 national laws to comply with the CPTPP. Efforts to change these laws should be halted as there is no decision yet whether Malaysia will ultimately remain in the CPTPP.
- Some existing FTAs have built in mandates for further negotiation. For example, the Japan-ASEAN FTA has no services or investment rules, but it requires services and investment negotiations.¹³ According to the Indonesian Ministry of Trade, those negotiations were concluded in 2017 and the new services and investment chapters are scheduled to be signed in August/September 2018.¹⁴
- It is not known if Malaysia is also negotiating any investment treaties or the expansion of any existing investment treaties such as the ASEAN Comprehensive Investment Agreement (ACIA) because this information is not on the Ministry of International Trade and Industry (MITI) website.

⁷ The last negotiating round finished on 8 May 2018 in Singapore, <http://dfat.gov.au/trade/agreements/negotiations/rcep/Pages/regional-comprehensive-economic-partnership.aspx> and the next negotiating round will be 25-29 June 2018 in Tokyo, <http://asean.org/calendar/official-meetings/>

⁸ <http://ec.europa.eu/trade/policy/countries-and-regions/countries/malaysia/>

⁹ <http://www.efta.int/about-efta/the-efta-states>

¹⁰ <http://www.efta.int/free-trade/ongoing-negotiations-talks/malaysia>

¹¹ See for example https://www.wto.org/english/thewto_e/minist_e/mc11_e/documents_e.htm.

¹² <http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/Pages/trans-pacific-partnership-agreement-tpp.aspx>

¹³ Art 50-51, <http://www.mofa.go.jp/policy/economy/fta/asean/agreement.html>.

¹⁴ http://ditjenppi.kemendag.go.id/assets/files/publikasi/doc_20180511_ongoing-and-upcoming-negotiations4.pdf

Proposals for Reform

[Please also see Annex on Good Practices in Transparency in Trade and Investment Negotiations]

CAP and TWN propose that the following reforms be undertaken.

1. The government should consider establishing an Inter-Ministerial Committee on Trade Negotiations comprising Ministers and senior officials of relevant Ministries affected by issues included in trade and investment negotiations (as a number of other countries have done¹⁵). It should be preferably chaired by the Prime Minister, as issues involving different views of different Ministries are bound to emerge. The Committee would provide the time and space for the various Ministries to study the issues under negotiations and to present their views. Decisions on whether to enter a negotiation, or join an agreement can be taken by the Committee. Positions to take on the scope and content of the treaty and during the negotiations should also be discussed and decided on by the Committee, and also any trade offs as well as on the final texts.
2. A permanent Parliamentary Committee on Trade Policy and Negotiations should be established as other countries such as Australia do¹⁶. It should be provided detailed information by the government on on-going negotiations and it should contribute inputs into the government decision-making process as well as be consulted before important decisions are made, including the conclusion of negotiations and whether to join a trade or investment treaty.
3. A Consultative Committee should be established made up of NGOs, businesses and experts, which will receive detailed information on trade and investment negotiations and treaties, and which will provide inputs to the government. Eg in Austria, trade unions and farmers etc are included in coordination meetings on trade¹⁷ and the USA includes civil society and businesses in its cleared advisers¹⁸.
4. There should be established a proper inter-ministerial process before (re whether to negotiate an FTA based on the past FTAs of the other country (eg the EU)) and during (ie with updates after each round so Ministries can insist on any red lines before the next round etc) trade and investment (eg BIT) negotiations so that all ministries are consulted about all relevant chapters. Each Ministry that is affected by the treaty and its negotiations should have a unit which should consult all the other divisions in the ministry and update them after each negotiating round.
5. There should be a proper process to consult all sub-national governments (ie state and local governments) before (re whether to negotiate an FTA based on the past FTAs of the

¹⁵ Eg Austria: <http://unctad.org/meetings/es/Presentation/ditc-ted-Nairobi-24082015-WTO-luth.pdf>.

¹⁶ Eg see https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Treaties,
https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade,

¹⁷ <http://unctad.org/meetings/es/Presentation/ditc-ted-Nairobi-24082015-WTO-luth.pdf>.

¹⁸ See <https://ustr.gov/about-us/advisory-committees> eg <https://ustr.gov/about-us/advisory-committees/labor-advisory-committee-lac>.

other country (eg the EU)) and during (ie with updates after each round so subnational governments can insist on any red lines before the next round etc) trade and investment (including BITs) negotiations so all subnational governments are consulted about all relevant chapters/proposals (for example, domestic regulation disciplines at the WTO).

- a. The above is the minimum. Other countries go further, eg the USA has a special cleared advisor committee of subnational governments¹⁹ and Canada has its provincial governments attend the FTA negotiations and consults its local governments: *'[W]e had briefing sessions with the provinces before every negotiating session so that they could understand what would be expected and what our strategy was. ... We had a debriefing session every evening after the negotiations were finished to tell them exactly what had been achieved, to get their reactions, and to make sure we had their support on an ongoing basis. On many issues we would take them into the room and have a debate on what Canada's position should be. When we first went to Brussels, there were up to 60 provincial and territorial representatives who came with us... We met them individually if they had one-on-one concerns' and negotiators worked with and consulted municipal governments as well.*²⁰
 - b. If the new Malaysian government has promised Sabah and Sarawak more autonomy, then it is very important they are fully consulted as above. Eg Sabah has just banned the export of logs²¹ and this may not be permitted in some FTAs and if Sabah wanted to have high export taxes on logs instead, that may also be banned/restricted by some trade agreements.
6. All trade/investment negotiators (from whichever Ministry including environment, health, agriculture etc) should be briefed about what the negotiating history is and be required to keep verbatim notes of the negotiating history and file them with a central government ministry so that after that official has retired/moved overseas etc, the negotiating history can still be found to defend Malaysia in disputes, to do least worst implementation etc.
 7. Since trade agreements are legally enforceable, if the chapter negotiator does not have a law degree, a government lawyer (eg from AGC/the line ministry) should attend that chapter with the negotiator (preferably the same lawyer for each round so they know the issues). The same applies to any WTO/BIT negotiations.
 8. There should be no incentives/key performance indicators/promotions/bonuses for staff dealing with trade policy and negotiations, and for negotiators, based on concluding a trade/investment agreement. Their objective should be to work towards defending the national interests, and not to conclude trade negotiations. Staff who stand up for the national interest and as a result there is no harmful agreement should be rewarded, rather than staff who are part of negotiations or who are present when a harmful agreement is concluded. Malaysian negotiators which did not keep all the relevant divisions etc in their ministry informed of the implications should not be rewarded with promotions after a bad agreement is concluded for being so good at rushing it through without consulting others who might have slowed it down/objected. Also, diligent negotiators who fought

¹⁹ <https://ustr.gov/about-us/advisory-committees/intergovernmental-policy-advisory-committee-igpac>

²⁰ http://publications.gc.ca/site/archievee-archived.html?url=http://publications.gc.ca/collections/collection_2014/parl/x75-1/XC75-1-1-412-2-eng.pdf

²¹ <http://www.theborneopost.com/2018/05/23/logs-export-from-sabah-banned/>

for Malaysia's national interest should not be seen as obstructionist and slowing down the conclusion of the bad agreement and thus not given promotions etc).

9. Officials selected to attend negotiations should be knowledgeable, diligent and active before, during and after the negotiations.
10. It is worthwhile considering establishing a team or group of expert negotiators, some of who are not necessarily from the government service, who are given the task of undertaking some of the negotiations as part of their service to the nation. These experts should have knowledge of the issues involved, and skills in negotiations. They would be given a brief by the Minister and senior officials in charge of policy and negotiating positions. There are precedents where a knowledgeable university academic or a known expert in particular areas have been asked to be a negotiator or even chief negotiator during negotiations involving a treaty or potential treaty, and where the expert has performed excellently. Based on this experience, the government should consider making more use of local experts in negotiations.
11. Officials in government service that undertake negotiations and who have done a good job should be valued for their experience, knowledge and expertise and should not be subjected to the normal civil service transfer system. Under the system, an official who takes time to gather experience and then becomes an expert after three years is liable to be transferred to another Ministry or department. It is important that good trade negotiators can remain with their issue and not be re-posted every 3 years and then new staff have to get familiar with the topic every 3 years etc. Australia during the TPP negotiations kept their negotiators from being posted overseas as did Jordan in its WTO accession negotiations so they had institutional memory. It is also important to keep them during the post-negotiating implementation period if possible so that they can assist in interpreting the treaty and in drafting the new laws that need to be put in place in the best possible manner.
12. The trade ministry should announce (eg on its website) all the trade and investment agreements it is negotiating (including those it is expanding or updating). Eg Canada announces the FTAs and bilateral investment treaties (BITs) it is negotiating,²² whereas MITI does not seem to announce the BITs it is negotiating/expanding²³.
13. The trade ministry should announce (including online) the dates and location and which chapters/issues will be negotiated for all negotiating rounds. This should be done as soon as the information is known to the Ministry. This is to enable stakeholders including Parliamentarians, NGOs and businesses to ask questions and provide inputs for the negotiations. For example EFTA announces the approximate date of the next round of FTA negotiations.²⁴ In contrast, the ASEAN Coordinating Committee on services and related meetings took place recently (in May 2018 in Singapore, as announced by

²² <https://www.international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/index.aspx?lang=eng>

²³ It only has those in force here: <http://www.miti.gov.my/index.php/pages/view/771?mid=167>.

²⁴ Eg see <http://www.efta.int/Free-Trade/news/EFTA-and-Ecuador-hold-second-round-negotiations-502126>, <http://www.efta.int/Free-Trade/news/EFTA-and-Philippines-hold-third-round-negotiations-61321>, <http://www.efta.int/free-trade/free-trade-news/2013-03-11-efta-indonesia-6th-rnd-free-trade-negotiations>

ASEAN.²⁵ Australia and New Zealand have been announcing information on the negotiations for TPP and RCEP on their Trade Ministry website.

14. The trade ministry should put full texts of all its concluded trade/investment agreements online as soon as possible. Malaysia's side letters for the CPTPP still do not seem to be online; each country puts their own side-letters online, so they are not available from anywhere else. How can NGOs and other stakeholders give inputs on the CPTPP when the side letters are not even available?
15. The texts of all chapters should be given to all ministries and all subnational governments and all parliamentarians after each negotiating round. If necessary they can sign a non-disclosure agreement.
16. When parliament/subnational governments/ministries are given the entire final trade/investment agreement text to see if they agree with it, they should also be given:
 - a. A comparison of Malaysia's existing trade/investment commitments to show what is new (or has been given to one country but now is being given to all of CPTPP etc). Otherwise they each have to do that analysis themselves and it takes a lawyer months and wastes time for each recipient to do it themselves when the negotiators already had to do it to be able to negotiate).
 - b. The entire negotiating history of the treaty. Otherwise, given the deliberate ambiguity in many of these treaties, it will not be known to the reader (the policy maker, a future negotiator, the NGOs, or analysts) what is the possible meaning of the text.
17. There should be training sessions for the line ministries, subnational governments, parliamentarians etc on the implications of the trade/investment provisions above, otherwise when the text is sent to them, they would not understand the implications of the proposed text (which may be on domestic regulation discipline, investment provisions etc) since they don't know the jurisprudence.
18. When Malaysia hosts negotiating rounds, it should have stakeholder consultations of the type Malaysia did during the TPP negotiations. This should be institutionalised not left to adhoc decisions. For example, such consultations have not occurred with Malaysia's EU or EFTA negotiating rounds, even though the EU has had such consultations in its other FTA negotiations with other countries²⁶).
19. Malaysia should publish the full negotiating history as soon as it is allowed to (eg the TPP requires waiting four years after it comes into force²⁷) so that CSOs can advise on the least worst implementation given the negotiating history etc.
20. Malaysia should publish its proposals in trade/investment negotiations the way the EU, Switzerland and Norway do. (See Annex below for best practices in transparency/stakeholder consultations in trade/investment negotiations). (See also a 2005 compilation of UN practices re CSO consultations which also has useful ideas: <https://unngls.org/index.php/publications/guides-on-the-un-system/28-un-system-engagement-with-ngos-civil-society-the-private-sector-and-other-actors-a-compendium>)

²⁵ <http://asean.org/calendar/official-meetings/>

²⁶ Eg see Indonesia-EUFTA, http://trade.ec.europa.eu/doclib/docs/2018/march/tradoc_156642.pdf.

²⁷ <http://keionline.org/sites/default/files/tpp-10feb2011-us-text-ipr-chapter.pdf>

21. If Malaysia is going to negotiate BITs, they should review all Malaysia's existing ones and its ISDS cases and best practices worldwide in safeguarding host government regulatory and policy space (including by Slovakia,²⁸ India,²⁹ Indonesia, Brazil,³⁰ the EU³¹) etc and develop a new model BIT based on this review, which should also invite inputs from civil society.
22. The new government should review positions taken by Malaysia so far in current trade/investment negotiations to see if they need to be changed. The motto in trade negotiations is 'nothing is agreed until everything is agreed', so it can still be changed until the day of signing, as can be seen in the last minute changes to the TPP by various countries. This review should include any decisions which have been made regarding the scope of the negotiations (i.e. the issues and chapters of the treaty), the content of the proposed and agreed texts, the implications of the proposals and the Malaysian positions. The review should be with reference to whether the proposals are in line with the economic, social and political objectives of the country, what are the implications of the proposals, and what changes if any are required to the positions Malaysia has taken.
23. With regard to the CPTPP, which the previous government signed but not yet ratified, it should be noted that it has not yet come into force and Malaysia has not yet implemented it. A review should be made of the CPTPP and what policy the government should have towards it. Meanwhile, the previous government identified 18 laws that need to be amended as part of the compliance process to implement the CPTPP, and measures have already been taken to prepare for the amendments. This process of law amendments should be put on hold. The proposed amendments should be made public.

Consumers' Association of Penang
10 Jalan Masjid Negeri
11600 Penang
Tel 04 2266159
Contact Person: Haji S.M. Mohamed Idris, President
Email: smmohdidris@gmail.com

Third World Network
131 Jalan Macalister
10400 Penang
Tel 04 2266159
Contact Person: Ms Chee Yoke Ling, Director of Programmes
Email: yokeling@twnetwork.org

²⁸ Eg see Slovakia-Iran BIT, <http://investmentpolicyhub.unctad.org/IIA/CountryBits/191#iiaInnerMenu>

²⁹ <http://investmentpolicyhub.unctad.org/Download/TreatyFile/3560>

³⁰ <http://investmentpolicyhub.unctad.org/Download/TreatyFile/4786> which has been used in a number of its new BITs, eg see <http://investmentpolicyhub.unctad.org/IIA/CountryBits/27#iiaInnerMenu>

³¹ Eg Canada-EU FTA: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154329.pdf

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Introduction

There have been a variety of types and levels of stakeholder involvement in free trade agreement (FTA) negotiations. Some of these have been noted below based on quick selected desk research/personal knowledge, therefore this is not a comprehensive list of stakeholder engagement etc in trade/investment negotiations. Comparisons have also been made below to when the same issue is being negotiated at a multilateral forum such as the World Trade Organization (WTO) or World Intellectual Property Organization (WIPO).

See also <https://www.ombudsman.europa.eu/en/cases/decision.faces/en/58668/html.bookmark> and http://tjm.org.uk/documents/reports/TJM_SecuringDemocracyInUKTradePolicy_2017_web.pdf.

This note does not include the process once an FTA has been concluded (eg parliaments considering FTAs/the implementing legislation for FTAs often have their own submission and consultation process).

Although it is not the focus of this note, various governments coordinate between their different ministries and regulatory agencies as well. One example is in Appendix 1.

Stakeholder processes during negotiating rounds

Stakeholders inside the negotiating rooms

In the EU Economic Partnership Agreement (EPA) negotiations with West Africa, civil society and private sector representatives have been allowed into the negotiations and they then publish information about what was being negotiated.³²

When the same issue (intellectual property) is negotiated at WIPO, stakeholders (whether intergovernmental organisations, civil society, industry associations etc³³) can attend the negotiations as observers³⁴ and speak after governments have spoken. For the negotiations of the treaties involving stronger copyright protection than the WTO requires, even unaccredited members of the public were allowed to attend the negotiations in Geneva.³⁵

Stakeholders in side rooms

A number of countries negotiating FTAs have used 'side rooms' in/near the negotiating venue where civil society, the private sector and parliamentarians sit during negotiations and are updated and consulted. For example:

- The Chile-USFTA had three side rooms (for businesses, trade unions and small and medium enterprises) so they could be informed and consulted throughout each negotiating round.³⁶
- The Dominican Republic and Central American Free Trade Agreement (DR-CAFTA) had side rooms for civil society (CSOs) and the private sector and briefings were held 'as often as three times a day during a negotiation round, about the specific issues which had been addressed or agreed in the different negotiation groups. These side rooms were open for every person who wanted to attend, and regardless of whether the person was a member of the private sector or civil society'³⁷.
- In the Andean-USFTA negotiations, the side rooms included the private sector, civil society, academics etc.³⁸
 - In the Colombia-USFTA: 'The "side room" and the "room of Congress" were other important components of the transparency policy of the negotiation. Employers, legislators, unions, representatives of the departments and municipalities, ethnic minorities, NGOs, among others, had daily information about the progress of the negotiations, with detailed reports of each of the tables. Of course, these were also consulted in decision-making at the tables, when necessary. . . The Government financed the participation of representatives of ethnic groups for the ninth round of negotiations, in order to ensure their attendance at the "side room."³⁹
- The Canadian negotiators were observed talking regularly to their stakeholders during TPP negotiating rounds.

³² See for example

http://endacacid.org/latest/index.php?option=com_content&view=article&id=286:negociations-de-l-accord-de-partenariat-economique-ape-entre-l-union-europeenne-et-l-afrique-de-l-ouest-session-technique-de-negociation-accra-14-18-novembre-2011&catid=179:compte-rendu-ape&Itemid=961

³³ <http://www.wipo.int/export/sites/www/members/en/docs/observers.pdf>

³⁴ <http://www.wipo.int/about-wipo/en/observers/>

³⁵ http://www.keionline.org/misc-docs/4/attachment1_transparency_ustr.pdf

³⁶ 'Beyond the Barricades: The Americas Trade and Sustainable Development Agenda', edited by Marie-Claire Cordonier Segger and Maria Leichner Reynal, Routledge, 2018

³⁷ http://siteresources.worldbank.org/INTTRADERESEARHC/Resources/Costa_Rica_case_study.pdf

³⁸ 'Lawyers and the Construction of Transnational Justice', Edited by Yves Dezalay, Bryant Garth, Routledge, 2012

³⁹

http://www.mincit.gov.co/englishmin/loader.php?!Servicio=Documentos&IFuncion=verPdf&id=61604&name=RECORD_TLC_USA-OCTUBRE_11_English.pdf&prefijo=file

Stakeholder consultations during the negotiating rounds

Different types of stakeholder consultations have been held in different FTA negotiating rounds. For example:

- In the Trans-Pacific Partnership (TPP) negotiations, every TPP country which hosted a formal negotiating round (ie except for Canada, Japan and Mexico which joined late) had stakeholder involvement by civil society, academics and the private sector which included some combination of:⁴⁰
 - Negotiations stopping so that negotiators could attend powerpoint presentations by stakeholders for up to 15 minutes each to the negotiators of relevant chapters
 - Stakeholders having tables with their materials which negotiators would walk past and could ask stakeholders about
 - Stakeholders having access to the negotiators during their morning/afternoon tea breaks (in the Chile round)
 - Stakeholders being invited to the opening reception/cocktails with negotiators to interact informally.
- In Regional Comprehensive Economic Partnership (RCEP):
 - a number of host countries have held stakeholder consultations with chief negotiators and chapter negotiators from all RCEP countries.⁴¹ The New Zealand round stakeholder consultation included the Minister and was also online so those not physically present could participate.⁴² In the most recent round in South Korea, this involved a break in the negotiations for stakeholders to enter the negotiating rooms to give presentations to the negotiators of a number of chapters.⁴³
 - In some negotiating rounds, stakeholders were also able to have lunch with the negotiators and talk to them during the tea breaks.

Stakeholder processes at a national level including before and after rounds

In person

In the CAFTA-DR USFTA, ‘As not every interested person could travel to the negotiation rounds held overseas, COMEX opted to organize an open “side room” in San Jose, before and after each round of negotiations. During the year that the DR-CAFTA negotiations lasted, more than 60 side room meetings were organized.’⁴⁴

In the Colombia USFTA:

‘As for the indigenous peoples, a socialization process was held in coordination with National Indigenous Organizations, ONIC, OPIAC, and CIT. Six workshops were conducted in the macro-regions of the Orinoco, Amazon, West, and the North Andes.

• As for the Afro-Colombian and island communities, 12 meetings were held in the framework of the Consultative Committees at the Departmental, Regional, and District levels, in Bogota, Caldas, San Andres, Antioquia, Santander, Putumayo, Chocó, Nariño, Risaralda, the Caribbean region, Cauca, and Valle del Cauca. . .

⁴⁰ Eg see <http://dfat.gov.au/trade/agreements/tpp/news/Pages/news.aspx>

⁴¹ Eg see <http://dfat.gov.au/trade/agreements/rcep/news/Pages/twelfth-round-of-negotiations-17-29-april-2016-perth-australia.aspx>, <http://dfat.gov.au/trade/agreements/rcep/news/Pages/sixteenth-round-of-negotiations.aspx>

⁴² <https://www.mfat.govt.nz/assets/FTAs-in-negotiations/RCEP/Regional-Comprehensive-Economic-Partnership-Round-13.pdf>

⁴³ <http://dfat.gov.au/trade/agreements/rcep/news/Pages/twentieth-round-of-negotiations-17-28-october-2017-songdo-incheon-korea.aspx> and <https://www.mfat.govt.nz/assets/FTAs-in-negotiations/RCEP/recep-round20-incheon.pdf>

⁴⁴ http://siteresources.worldbank.org/INTTRADERESEARHC/Resources/Costa_Rica_case_study.pdf

In total, 50 meetings developed around exclusive ethnic groups. These included workshops, briefings, and meetings with representatives of organizations. These meetings took place in over fifteen towns in the country and in the context of negotiation rounds, at the national and international levels.

- The Chief Negotiator held or attended nearly a 1,000 meetings. The Minister attended more than 750. As for the Vice Minister of Trade, he attended 250. Additionally, President Uribe led a community council on the FTA on November 12, 2005, and upon completion of the negotiation, a conference on the Subject, on the night of March 1, 2006. At both events, the President, along with several ministers and the chief negotiator, discussed the contents of the Agreement with the public.
- At the conclusion of each round, the negotiating team provided an account of the work performed, at the Plaza of the Artisans, where a total of 5,091 people attended.’⁴⁵

In Costa Rica, ‘A second instance of consultation established especially for the DR-CAFTA negotiations was a series of meetings with enterprises and producer associations who wanted to participate in the consultation process. Only in the sectors of agriculture and manufactures, COMEX held 360 meetings with representatives of more than 900 enterprises and 57 associations of producers, covering 49 different productive sectors. In the area of services and investment, COMEX consulted 87 associations and 27 private institutions. Third, in addition to the sectorial consultation process, on a regular basis COMEX maintained a permanent dialogue with major representative organizations.’⁴⁶

Australia holds public consultations on the FTAs it is negotiating in the capital city of each state or by teleconference.⁴⁷

Online/by phone

Costa Rica in the CAFTA-DR USFTA: ‘a permanent hotline to answer questions from the public was set up through internet, leading to respond more than an average of 20 requests on a daily basis;’⁴⁸

(Cleared) advisors

A number of countries have expert advisory groups of people selected by the government⁴⁹ for that FTA, or for all trade/investment negotiations and who are required to keep the information they learnt confidential. These are often a mix of private sector and civil society and the US has subnational government advisors⁵⁰ as well. For example:

- The USA’s cleared advisor system of standing cleared advisors in various specialist committees⁵¹ who cover all trade/investment negotiations: <https://ustr.gov/about-us/advisory-committees>. They receive classified information about the trade negotiations and comment on US proposals etc.⁵²
- The EU’s system of advisory groups for each FTA, eg for TTIP: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1019>
- In Costa Rica ‘even before the DR-CAFTA negotiations were launched, the Law constituting COMEX established the Foreign Trade Advisory Council, comprising representatives of each of the main producers’ associations, unions, and cooperatives. The Council is a permanent instance of dialogue between the Minister of Foreign Trade and

⁴⁵

http://www.mincit.gov.co/englishmin/loader.php?!Servicio=Documentos&lFuncion=verPdf&id=61604&name=RECORD_TLC_USA-OCTUBRE_11_English.pdf&prefijo=file

⁴⁶ http://siteresources.worldbank.org/INTTRADERESEARCh/Resources/Costa_Rica_case_study.pdf

⁴⁷ Eg see <http://dfat.gov.au/trade/agreements/tpp/news/Pages/update-on-the-fourth-round-of-trans-pacific-partnership-agreement-tpp-negotiations.aspx> and for TISA: <http://dfat.gov.au/trade/agreements/trade-in-services-agreement/pages/trade-in-services-agreement.aspx>

⁴⁸ http://siteresources.worldbank.org/INTTRADERESEARCh/Resources/Costa_Rica_case_study.pdf

⁴⁹ Eg <https://www.trade.gov/itac/become-an-advisor.asp>

⁵⁰ <https://ustr.gov/about-us/advisory-committees/intergovernmental-policy-advisory-committee-igpac>

⁵¹ Eg different industries: <https://www.trade.gov/itac/>

⁵² <https://www.trade.gov/itac/documents/ITAC-OpsManual-2014-18.pdf>

the private sector on trade issues. Consequently, once the DR-CAFTA negotiations started, this instance became one of the main channels of dialogue, at a political level, between COMEX and the leaders of the productive sector.⁵³

Submissions

A number of governments have a submission process for comments on FTAs being negotiated including:

- Australia⁵⁴ eg for RCEP⁵⁵
- Canada, eg for FTA with India: <http://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/india-inde/cepa-apeg/cepa-consult-apeg.aspx?lang=eng>
- Costa Rica for the CAFTA-DR USFTA: ‘a public invitation to all citizens to comment on any aspect of the DR-CAFTA was issued through main national newspapers’⁵⁶
- EU: http://trade.ec.europa.eu/consultations/index.cfm#_tab_2017
- New Zealand eg for its EUFTA: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/eu-fta/>
- USA, eg for TPP: <https://ustr.gov/about-us/policy-offices/press-office/blog/2012/july/share-your-voice-help-ustr-set-tpp-negotiating-priorities-canada-mexico>

Provision of documentation and websites containing the party’s own mandates, proposed texts, draft schedules, summaries of meetings

Countries releasing their own proposals

A number of countries have been releasing their own proposals during trade negotiations (since this does not require the consent of other Parties). For example:

- The European Union (EU) has been systematically releasing the texts of their proposals in trade agreements in the last few years⁵⁷ and its negotiating directives for the Transatlantic Trade and Investment Partnership (TTIP) and Trade In Services Agreement (TISA)⁵⁸.
- Norway⁵⁹ and Switzerland⁶⁰ have also been releasing their proposals and scheduled offers in the TISA
- Many countries have published their model bilateral investment treaties which are used as a basis for negotiating their bilateral investment treaties/FTA investment chapters: <http://investmentpolicyhub.unctad.org/IIA/IiasByCountry#iiaInnerMenu>

Consolidated negotiating texts released during negotiations

Consolidated negotiating texts of trade/investment agreements incorporating the positions of all Parties have been officially released a number of times during a number of negotiations including:

- The Free Trade Area of the Americas (FTAA): http://www.ftaa-alca.org/ftaadrafts_e.asp

⁵³ http://siteresources.worldbank.org/INTTRADERESEARCh/Resources/Costa_Rica_case_study.pdf

⁵⁴ <http://dfat.gov.au/trade/agreements/Pages/public-consultations.aspx>

⁵⁵ <http://dfat.gov.au/trade/agreements/rcep/submissions/Pages/submissions.aspx>

⁵⁶ http://siteresources.worldbank.org/INTTRADERESEARCh/Resources/Costa_Rica_case_study.pdf

⁵⁷ <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1395>

⁵⁸ http://trade.ec.europa.eu/doclib/docs/2015/october/tradoc_153846.pdf

⁵⁹

https://www.google.com/search?q=tisa&as_epq=&as_oq=&as_eq=&as_nlo=&as_nhi=&lr=lang_en&cr=&as_qdr=all&as_sitesearch=regjeringen.no&as_occt=any&safe=images&as_filetype=pdf&as_rights=

⁶⁰

https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Internationaler_Handel_mit_Dienstleistungen/TISA/Schweiz_und_TiSA.html

- The Anti-Counterfeiting Trade Agreement (ACTA): <https://ustr.gov/issue-areas/intellectual-property/anti-counterfeiting-trade-agreement-acta/previous-acta-texts>
- The Multilateral Agreement on Investment (MAI)⁶¹

The WTO negotiates many of the same issues as the FTAs, such as goods trade facilitation and services domestic regulation disciplines and the 164 Members of the WTO⁶² have agreed to regularly release consolidated negotiating texts (and most country proposals).⁶³

In the WIPO negotiations of intellectual property treaties such as those which were agreed on stronger copyright protection, the draft negotiating texts are made public, including on the WIPO website.⁶⁴

Allowing parliamentarians etc access to negotiating texts

Members of the European Parliament⁶⁵ and EU member states are given the consolidated negotiating texts of trade and investment agreements.

US Members of Congress were able to access the TPP text during negotiations in secure reading rooms in the Congress.⁶⁶

'reading rooms'

'On June 4, 2004, the Colombian 'Ministry made the "reading room" available to the public. This was a name given to the space for electronic consultation of documents and texts related to the progress of the FTA negotiation, between the Andean Community (CAN) and the United States. The purpose was to bring the negotiations to public scrutiny, so that the principle of transparency was upheld. The "Reading Room" was conducted from the Ministry's headquarters in Bogota. Then, it operated in parallel in Medellin, Cali, and Barranquilla.'⁶⁷

Reports of negotiating rounds

A number of countries release summaries of negotiating rounds with varying levels of detail. For example:

- Australia: eg for RCEP: <http://dfat.gov.au/trade/agreements/rcep/news/Pages/news.aspx>
- Costa Rica in the CAFTA-DR USFTA negotiations: 'more than 2 daily reports on the evolution of each round of negotiations were released through main mass media'⁶⁸
- The EU: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1395>
- New Zealand: eg for RCEP: <https://www.mfat.govt.nz/en/trade/free-trade-agreements/agreements-under-negotiation/rcep/regional-comprehensive-economic-partnership-negotiating-rounds/>

Negotiating history

The negotiating history has been published for a number of trade and investment agreements. For example:

⁶¹ <https://www.citizen.org/article/mai-proposals-and-propositions-0>

⁶² https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm

⁶³ <https://docs.wto.org/gtd/Default.aspx?pagename=WTODerestriction&langue=e>, eg for trade facilitation: https://www.wto.org/english/tratop_e/tradfa_e/tradfa_negoti_docs_e.htm.

⁶⁴ http://www.keionline.org/misc-docs/4/attachment1_transparency_ustr.pdf and http://www.keionline.org/misc-docs/4/attachment2_transparency_ustr.pdf

⁶⁵ https://www.eff.org/files/2017/01/10/trade_for_the_digital_age_download.pdf

⁶⁶ <https://www.brown.senate.gov/newsroom/press/release/following-administrations-refusal-to-make-trans-pacific-trade-agreement-text-accessible-brown-to-block-nominee-to-key-trade-post>, <https://www.brown.senate.gov/newsroom/press/release/brown-to-president-obama-access-to-text-of-trans-pacific-partnership-agreement-must-come-before-intent-to-sign>.

⁶⁷

http://www.mincit.gov.co/englishmin/loader.php?!Servicio=Documentos&IFuncion=verPdf&id=61604&name=RECORD_TLC_USA-OCTUBRE_11_English.pdf&prefijo=file

⁶⁸ http://siteresources.worldbank.org/INTTRADERESEAR/RESOURCES/Costa_Rica_case_study.pdf

- The negotiating history for the North American Free Trade Agreement (NAFTA) is available at <http://www.naftaclaims.com/commission.html>.
- Drafts and chair's notes etc for the Multilateral Agreement on Investment (MAI) are available at: <http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm>
- In the Colombia-USFTA: 'On May 8, 2006, the Ministry made the draft of the Free Trade Agreement between Colombia and the United States available to the public, at www.tlc.gov.co. This was the so-called "White Paper of Negotiation," a database published on the Internet with over eight thousand documents. This contained all of the interactions between the negotiating teams and the political, economic and social players of the negotiation. Beyond its historical value, as a detailed record of the negotiation of the FTA,'⁶⁹

Appendix 1 – CAFTA-DR USFTA: Costa Rica's intragovernment coordination

This occurred at the ministerial and technical levels. For example:

'A second working level was Ministerial, where COMEX requested the President to constitute an advisory group comprising other Ministers who in one way or another, were related to the matters subject to negotiation. . . The Ministerial advisory group, which was presided by the Minister of Foreign Trade, was comprised by the Minister of Foreign Affairs, the Minister of Agriculture, the Minister of Commerce and Industry and the Minister of Finance. When required to comment on specific issues, other Ministers were invited to participate. For instance, some intellectual property matters were discussed with the Minister of Health, while the chapters on labor and environment were consulted with the Minister of Labor and the Minister of Energy, Mining and Natural resources respectively. In the case of the financial services chapter, in addition to the Minister of Finance, the President of the Central Bank was also consulted.

The third working level within the Costa Rican organizational structure set up for the DR-CAFTA negotiations was technical. Each of the five Lead negotiators in charge of representing Costa Rica in the negotiation groups had the responsibility to organize and set up the network of contacts and working relationship with the diverse government agencies related to the subject matter under his/her responsibility. In the case of the negotiation of the financial services chapter, COMEX contacted the Central Bank, the Ministry of Finance and the three existing supervisory authorities for the financial sector in Costa Rica, i.e. SUGEF, SUPEN and SUGEVAL – and a later stage, the INS. . .

Despite having the specialized personnel on financial services, the staff of the regulatory authorities was much less familiarized with the objectives, contents and terminology used in international trade agreements. Thus, one of the main tasks COMEX had to undertake was to train the staff of the other agencies on this particular subject.

The working scheme established between COMEX, the Central Bank and the Supervisory Institutions entailed interaction at three different levels. First, a technical working group comprising staff from all the institutions involved was established. This working group met regularly not only for purposes of training the officials of the regulatory agencies on the purpose, contents and terminology used in financial services chapters, but also, to have the staff of the other institutions discuss and evaluate the negotiation road map COMEX had previously prepared for the DR-CAFTA negotiation on financial services and later, to review the negotiation texts. The way the different agencies distributed their responsibilities would be as follows: COMEX would be responsible for leading the negotiation, with the technical support of the different regulatory agencies

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http://www.mincit.gov.co/englishmin/loader.php?!Servicio=Documentos&!Funcion=verPdf&id=61604&name=RECORD_TLC_USA-OCTUBRE_11_English.pdf&prefijo=file

in each of their respective fields of expertise, i.e. SUGEF for banking issues, SUGEVAL for matters related to securities and SUPEN for matters related to pensions. The Central Bank would be consulted on all the issues covered by the chapter, in particular prudential safeguards. Under this scheme, no decision on the financial services chapter was ever taken without having the regulatory agencies involved.

In addition to participating in the technical working group, a second level of interaction between COMEX and the regulatory agencies was through the negotiation rounds. The staff of the regulatory institutions was invited to be part of the Costa Rican delegation to the negotiation rounds. .

Besides the two previously referred instances, there was a third level of interaction between COMEX and the regulatory agencies, and it was a direct communication channel that was opened between the Lead negotiator of the DR-CAFTA Negotiation Group and the Heads of the regulatory authorities. COMEX would directly and regularly brief the latter on the overall evolution of the negotiations.'