



Advocacy on investment treaty negotiations

Lessons from Malaysian civil society

Fauwaz Abdul Aziz



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Acronyms

| | |
|---------------|---|
| ACCCIM | Associated Chinese Chamber of Commerce Industry of Malaysia |
| ASEAN | Association of Southeast Asian Nations |
| BANTAH | Badan Bertindak Bantah TPPA (Action Movement Opposing the TPPA) |
| BIT | Bilateral investment treaty |
| EPF | Employees Provident Fund |
| EU | European Union |
| FTA | Free Trade Agreement |
| FTA Coalition | People's Coalition against FTAs |
| IIED | International Institute for Environment and Development |
| JERIT | Oppressed Peoples' Network |
| MITI | Malaysia's Ministry of Internal Trade and Industry |
| MP | Member of Parliament |
| MTEM | Majlis Tindakan Ekonomi Melayu (Malay Economic Action Council) |
| MTUC | Malaysian Trades Union Congress |
| NEP | New Economic Policy |
| NGO | Non governmental organisation |
| SME | Small and medium enterprises |
| TPPA | Trans-Pacific Partnership Agreement |
| TWN | Third World Network |
| UK | United Kingdom |
| US | United States |

Abstract

Over the past few years the Malaysian government has embarked on several bilateral and regional negotiations to conclude major trade and investment treaties with large economies outside of ASEAN, including the proposed Trans-Pacific Partnership with the US and other countries. Given the far-reaching implications that these negotiations can have and the high stakes and political complexities involved, advocating on investment treaties requires developing effective alliances and well thought-out strategies. In 2013, 52 non-governmental organisations, trade associations and civil society groups established a coalition to raise public awareness and develop advocacy about the Trans-Pacific Partnership. This publication distils lessons learned from that experience.

1. Malaysia and investment treaty negotiations

Having signed bilateral investment treaties with 71 countries since the 1960s¹, and having concluded major regional investment treaties in connection with its membership of the Association of Southeast Asian Nations (ASEAN)², Malaysia has been a longstanding player in international investment treaty-making. Over the past few years, however, the Malaysian government has embarked on several bilateral and regional negotiations for the conclusion of major free trade agreements (FTA) with major economies outside of ASEAN.

These proposed agreements include investment chapters that are effectively equivalent to investment treaties. Like most investment treaties, these investment chapters would contain provisions to protect and possibly liberalise investment by firms of one state into the other state. They would also allow investors to bring disputes with the host state to international arbitral tribunals.

In 2006, the Malaysian government announced that it would begin negotiations for an FTA with the United States (US). The potential scale and implications of this negotiation changed significantly in 2010, when the Malaysian government announced that it would enter negotiations for a new FTA, the Trans-Pacific Partnership Agreement (TPPA), which in addition to the US now includes a total of twelve states around the Pacific Rim. In 2010, the Malaysian government also declared its intention to negotiate an FTA with the EU.

These proposed agreements with the EU and US cover an extraordinarily broad set of issues and can bring about deep changes in a wide range of national policies. Just as importantly, the negotiations aim at concluding reciprocal treaties, including with some very large, high-income economies, with potentially major reverberations for middle-income state parties.

Aware of the far-reaching implications that these treaty negotiations can have, civil society in Malaysia have mobilised to scrutinise and advocate on the FTAs. The investment chapters of these proposed FTAs featured prominently in civil society concerns and advocacy strategies. After the launch of the negotiations with the US in 2006, a number of civil society organisations formed the People's Coalition against FTAs (the FTA Coalition).

Members of the FTA Coalition included health advocacy groups, grassroots workers' organisations, socio-economic and consumer advocacy organisations, environmental groups and representatives of Malaysian opposition parties. Many of these groups mobilised their various constituent groups and the wider public, and organised talks, forums, gatherings and protests. The FTA Coalition also included

1 See <http://investmentpolicyhub.unctad.org/IIA/>. Not all of these treaties have entered into force.

2 Particularly the ASEAN Comprehensive Investment Agreement of 2009.

groups that contributed to expert research and analysis, briefing sessions and open as well as confidential letters and memoranda to national and state legislators, senior civil servants and the trade negotiators.

While the specific concerns of the individual members of the FTA Coalition varied, one issue that featured prominently involved concerns that the FTAs, and the national treatment provisions included in their proposed investment chapters, would restrict scope for Malaysia's longstanding affirmative action policies for disadvantaged groups. Of particular concern here were the Bumiputera community, made up of Malay and other indigenous groups, who had been geographically, educationally and economically marginalised during colonial rule to mainly rural areas and agricultural occupations. The framers of the Federal Constitution thus sought to ensure Bumiputeras were granted a place in the mainstream social and economic development in independent Malaysia: Article 153(1) of the Constitution, while recognising the equality and "legitimate interests of other communities", enabled the reservation of education, public sector and business licensing opportunities for Bumiputeras. Legislation was also put in place to restrict land alienation.

Following the racial riots of May 1969, the government formulated a more concrete regime of affirmative action programmes, called the New Economic Policy (NEP), that expanded and intensified the vision of Article 153 and stipulated, for instance, a percentage of the capital of private limited companies to be reserved for Bumiputeras on preferential terms. Considerable resources were also spent to vastly promote the educational, professional, managerial, industrial and business position of Bumiputeras and their ownership of equity and assets.

Over the years, Bumiputera attainments have plateaued – especially in terms of representation in professional and managerial positions. The unintended consequences of the NEP, furthermore, have become increasingly clear, including in relation to opportunities for corruption and rent-seeking in licensing and asset distribution practices (Lee, 2012).

Even so, eliminating affirmative action policies and practices *in toto* had never been seriously deliberated, primarily because Bumiputeras – for reasons beyond the scope of this report – have remained at the bottom, compared to the other ethnic communities, on many fronts. It was seriously doubtful, furthermore, that eliminating affirmative action completely would lead to socially desirable outcomes (Lee, 2011). And irrespective of the merits and demerits of the affirmative action policies, the concern was that international negotiations would jeopardise these policies without adequate, inclusive national debate in Malaysia.

Because of the political leverage of the Bumiputeras, and the leverage of racial politics in Malaysia, generally, these concerns proved particularly pressing, and they ultimately forced the Malaysian government to rethink its approach to the negotiation of the Malaysia-US FTA. After several delays, talks were suspended indefinitely in 2009.

With negotiations with the US put on hold, the FTA Coalition wound down its activities. But in 2010, the Malaysian government announced that Malaysia would enter negotiations for the TPPA. Besides Malaysia, current negotiating states for this mega-treaty include Australia, Brunei, Canada, Chile, Japan, Mexico, New Zealand, Peru, Singapore, the US and Vietnam. Later that same year, the government also declared its intention to negotiate the FTA with the EU.

The FTA Coalition regrouped and remobilised. The proposed TPPA and EU-Malaysia FTA were not substantially different from previous FTA negotiations. There were some differences, however, between the circumstances of the previous campaign on the Malaysia-US FTA and the conditions surrounding the proposed TPPA, which demanded a different tact.

First, a new government in Malaysia announced a wave of liberalisations to attract foreign investment, including waiving the 30% Bumiputera corporate equity requirement for listed companies and its reduction to 12.5% for initial public offerings (the requirement remained for “strategic industries” such as telecommunications, water, ports and energy). Other affirmative action policies were “moderated” and made more “market-friendly”, such as Bumiputera quotas in housing projects and education scholarships, while institutions that had served as platforms to promote Bumiputera entrepreneurship – such as the Ministry of Entrepreneurship and Cooperative Development – were dismantled and their functions decentralised.

Second, the administration of US President Barack Obama brought significantly more weight to bear on the TPPA than his predecessor President Bush was able to do on the Malaysia-US FTA. Obama treated the TPPA as a major trade policy initiative in the Asia-Pacific and as a priority in US global political, economic and military considerations.

Third, an unprecedented secrecy has distinguished the TPPA negotiations even compared to other trade talks, such that no member of the public, whether civil society or elected public representatives – not even national lawmakers – were allowed access to the proposed texts of the TPPA in order to limit any hindrances to the negotiations. Like in the US, a few lawmakers who have sought to see the texts have been given limited access to the negotiating texts but on a “read and retain” basis: in a highly secured room, without any accompanying staff, without any taking of notes, photographs or digital copies, and subject to signing a Non-Disclosure Agreement.

Fourth, the importance that the US has given to the proposed TPPA appears to have led even the opposition political parties – apart from the occasional lip service made to address civil society concerns (Sipalan, 2013; Anwar, 2013; Aw, 2013) and aside from the few MPs in the opposition parties who lent their individual voices to the campaign – to maintain a muted position on the TPPA. It appears that political parties *per se* on both sides of the political divide – in competition to gain US support – have been careful not to say or do anything that might alienate the US

government administration, hence the absence of any expression of opposition to the substance of the TPPA.

This is especially clear when compared to the previous campaign on the Malaysia-US FTA, when parliamentarians from all the opposition parties expressed clear and visible positions. While 44 Malaysian opposition legislators signed up to a 2014 petition calling for the TPPA negotiating texts to be made public,³ and though the number was significant relative to those from other TPPA countries, very few of those parliamentarians have been actively involved or outspoken in the TPPA campaign.

Given the high stakes and political complexities involved, it was clear that advocating on the proposed TPPA, including its investment chapter, required developing effective alliances and well thought-out strategies.

3 The petition and the list of signatories is available at www.tppmfsfortransparency.org/.

2. The tool: building a coalition for advocacy and influence

To respond to these challenges, in 2013, 52 non-governmental organisations (NGOs), trade associations and civil society groupings established Badan Bertindak Bantah TPPA (Action Movement Opposing the TPPA, BANTAH). The new coalition set itself two main objectives: i) to raise public awareness of the issues associated with the TPPA; and ii) if there was no stopping the government's resolve to sign, then at least to ensure that Malaysia would carefully think through the costs and the benefits of the TPPA.

In addition to the organisations that made up the earlier FTA Coalition, BANTAH included ethnic-based organisations, religious movements, human rights organisations, youth groups, women's groups, indigenous peoples' organisations, civic rights groups, trade associations and unions, peasant groups such as farmers' and fishermen's organisations, student activist groups, among many others.

BANTAH sought to leverage the collective strength of a coalition of coalitions, whose individual organisations had a membership of hundreds of thousands of people across the country. Led mainly by the Malay Economic Action Council (known by its Malay-language acronym, MTEM, itself made up of Malay trade and economic associations primarily representing micro-, small- and medium-scale businesses), the Malaysian AIDS Council (an umbrella organisation supporting and coordinating the efforts of NGOs working on HIV and AIDS issues in Malaysia) and the grassroots and workers coalition Oppressed Peoples' Network (known by its acronym JERIT), BANTAH was supported by the data and analysis prepared by national and as well as international NGOs, such as Third World Network (TWN).

To pursue its objectives, BANTAH deployed several approaches and tactics. A first set of approaches involved challenging the values underlying the TPPA. "Development" has for decades been driven in Malaysia by low wages in the oil, palm oil and rubber industries, but has done very little to transform the fortunes of those states that produce the bulk of those commodities: Kelantan, Terengganu, Sabah and Sarawak remain the poorest states in Malaysia (Social Watch Report, 2014).

Malaysia has made commendable advancements over the decades, including transforming from an agricultural producer to an industrial manufacturing exporter; reducing poverty and illiteracy; vastly improving health standards; and moderating ethnic disparities.

But it is also faced with a set of both new and recurring crises that are rooted in the past and accentuated by the challenges of the present.

Economic insecurity and inequality remain widespread (EPF, 2013). Only 20% of Malaysians earn a “middle” monthly income of RM4,000–RM7,500; 62% of the 6.5 million workers who are active contributors to the mandatory retirement Employees Provident Fund (EPF) scheme earn less than RM2,000 per month; and 96% earn less than RM6,000 a month (EPF, 2013). One in five Malaysian households earns a total of RM2,000 per month (Department of Statistics Malaysia, 2013), 53% of all individuals have no financial assets, 25% have no property assets, and 12% own no wealth (Abdul Khalid, 2014). A former Federal Territory minister acknowledged in October 2009 that a family living in Kuala Lumpur with a monthly income of RM3,000 or less is “almost at the poverty line” (Kong and Shari, 2009).

In this context, BANTAH raised fundamental questions about whether signing up to the TPPA, including its investment protection and liberalisation provisions, would take Malaysia in the right direction in terms of development pathways.

BANTAH also cooperated closely with civil society and trade associations in other TPPA countries to strengthen the coalition’s understanding and analysis of the specific provisions of the proposed TPPA, and to coordinate actions so as to more effectively apply pressure on governments. A particularly important area of cooperation involved bringing proposed TPPA provisions to public scrutiny, and explaining the implications that those provisions may have for people’s lives and the environment in Asia-Pacific countries.

Among the multiple issues covered, BANTAH brought to light and critiqued the proposed investment chapter, after the draft text was leaked to the public⁴. BANTAH expressed concern about several provisions of the draft investment chapter, including very broad definitions of “investment” and “investor”, which would bring considerable economic activity within the scope of the TPPA; and a number of openly worded investment protection standards that raised concerns about restrictions on national regulatory space.

BANTAH also expressed strong concerns about the investor-state arbitration provisions included in the proposed TPPA investment chapter. The proposed TPPA would allow investors to bring alleged breaches of the investment chapter to investor-state arbitration, i.e. the mechanism whereby disputes between an investor and the host state are settled by an international arbitral tribunal.

While investor-state arbitration has been a part of Malaysia’s BITs with some 70 other countries since the 1960s, BANTAH argued that the geographic and subject-matter scope of the TPPA investment chapter would bring exposure to arbitration to entirely new levels. In addition, BANTAH felt that the arbitration system tends to favour private, commercial interests over governments and public concerns; that there is no justification for granting foreign investors redress mechanisms that are not available to domestic firms including small-scale producers; and that

4 The text can be accessed at www.citizenstrade.org/ctc/wp-content/uploads/2012/06/tppinvestment.pdf.

consenting to investor-state arbitration based on loosely formulated investment protection standards constituted a major surrender of sovereignty.

Given the political weight of considerations around the affirmative action policies, discussed above, one important aspect of BANTAH's critique was the potential effects of the TPPA's proposed investment chapter on the Bumiputera economy. While not denying the mismatch between the aims of the NEP and the realities and outcomes of its implementation (a mismatch which could be addressed through unilateral reform, rather than through a binding international treaty), BANTAH argued that the TPPA investment chapter would end the affirmative action policies that constitute part of Malaysia's social contract, without much space for deliberation at local and national levels.

In conducting this advocacy, BANTAH addressed several issues of direct relevance to land and natural resources. Examples of the questions raised by BANTAH through its advocacy included the following:

- Could the Malaysian government face investor-state arbitration for breach of the national treatment clause in the proposed TPPA investment chapter if national policy restricted the purchase of Bumiputera land reserves or native customary land by foreign investors?
- Could the government face investor-state arbitration if it were to put in place a land reform programme for local small-scale farmers?
- Could the government face investor-state arbitration if it were to terminate an existing land concession and return the land to local communities, for example if the investor fails to comply with agreed terms and conditions?

BANTAH pursued multiple strategies to get the message out, including open talks and public fora; closed-door briefings, workshops, discussions and presentations, including at venues where official TPPA negotiations were taking place; press conferences and media interviews; writing letters to relevant government ministries; disseminating posters and other awareness-raising materials; organising protests, gatherings, rallies and demonstrations at strategic locations; writing articles on issues related to trade and investment agreements, and rebutting pro-TPPA articles; and writing memos targeting government officials.

BANTAH, in close collaboration with other social and activist groups, also organised a nation-wide roadshow on the TPPA that saw open-air fora in 14 separate events across the country, addressing audiences as diverse as farmers and fishermen's associations, alumni associations of prominent educational institutions and social and political activists. Attendance at these forums ranged from two dozen people – in the less successful events – to an audience of about 2,500 in the northern state of Kelantan.

In addition, BANTAH disseminated information, research and analyses to targeted individuals, organisations and the public at large through a dedicated website as well as social media platforms such as Facebook and Twitter, and e-mail blasts,

press releases, editorials and letters to the editors of online and print news organisations.

A particularly helpful lobbying and educational tool that crystallised much of BANTAH's concerns and that substantiated and framed the coalition's arguments was a 120-page document that detailed the ways in which the TPPA could potentially affect Malaysians. From investment, government procurement, state-owned enterprises and market access and Malaysian SMEs, to intellectual property and medicine, agriculture and the entertainment industry, to "regulatory coherence" and labour, the document showed TPPA's far-reaching and wide-ranging implications for Malaysians, generally, and the Bumiputera community, in particular, by way of the legal, regulatory and policy changes that signing the TPPA could lead to.

The report was published in 2014 as a book *TPPA: Malaysia is not for Sale* (Basri *et al.*, 2014), and has since been sold and distributed by BANTAH to the public and to community leaders, academics, experts, policy-makers and politicians. The book also provided the basis for BANATH's "training of trainers" sessions. Given the fluidity of the TPPA negotiations over proposed provisions and other details of the eventual agreement, efforts are continuously made to update and amend the contents of the book so as to remain relevant in the years to come (Basri *et al.*, 2014).

3. Results so far

Arguably, BANTAH's campaign has achieved much in terms of volume of activity, extent of the outreach and concrete impact. While Malaysia previously negotiated and signed investment treaties with very little public scrutiny, BANTAH's TPPA campaign succeeded to some extent in raising public awareness and increasing engagement with treaty making on the part of many Malaysians. Many people in Malaysia are now aware that important negotiations are taking place, even if they may know very little beyond broad-brush descriptions of concerns. There is also greater public awareness of issues associated with investor-state arbitration, even though the specifics are highly technical and beyond the reach of most.

BANTAH succeeded also in moving many individuals and organisations to speak up on the proposed TPPA, whether in the form of letters to the government, statements to newspapers and online news outlets, or remarks made at events organised by Malaysia's Ministry of Internal Trade and Industry (MITI).

As a result of BANTAH's outreach, complaints about lack of consultation and concerns about the content of the proposed TPPA investment chapter came not only from activists and campaigners, but also from industry bodies such as Bumiputera-based organisations or the Associated Chinese Chambers of Commerce and Industry of Malaysia. BANTAH was told by MITI officials that "never had the ministry encountered so much bad publicity over an FTA as during BANTAH's TPPA campaign".

As a result of its campaigning, BANTAH was offered the opportunity to share its concerns with the top leaders of the government – from the Prime Minister and other top ministers to the highest economic policy-making and legal advisors such as the National Economic Action Council and the Attorney-General's Chamber; senior government officials at both state and federal levels; Members of Parliament and members of the Bi-Partisan Parliamentary Caucus on the TPPA; through to top government representatives and diplomats from TPPA countries, such as Australia, Canada, New Zealand and the United States. BANTAH had two meetings with the US Trade Representative, three meetings with the Assistant US Trade Representative for Southeast Asia and the Pacific, and four meetings with the US ambassador to Malaysia.

The Parliamentary Caucus on the TPPA was an additional arena where the TPPA was debated amongst Members of Parliament and government officials. There was significant cooperation between BANTAH and the opposition members of the Caucus, specifically, that led to greater scrutiny of the government's handling of the TPPA negotiations. The Caucus itself organised a number of events on the TPPA, such as a roundtable discussion on the TPPA involving embassies of countries involved in the negotiations, together with senior officials of the

Malaysian government involved in the talks. The Caucus also hosted a delegation of trade experts who gave talks and lectures and engaged in discussions with parliamentarians, members of government, media, trade unions and NGOs linked to BANTAH.

Other unprecedented “wins” include:

- A significant intensification in dialogue between government and civil society. From about two TPPA-related meetings between the government and civil society in 2011, and three meetings in 2012, the number of meetings with at least one government ministry or body increased to *at least* 13 in 2013.
- MITI’s “open day” fora on the TPPA to brief the public about the latest developments in the negotiations and to solicit feedback on issues of public concern.
- The government’s promise to produce and disclose cost-benefit analyses and a “national interest analysis” of the TPPA.
- The government’s agreement to appoint “cleared advisors” on the TPPA from industry, trade associations, trade unions, civil society as well as academics and other experts on a voluntary, non-remunerative basis.
- Malaysia’s proposal to “carve out” all measures related to tobacco, given concerns raised by recent investor-state arbitrations against states that enacted legislation to discourage smoking.

On a number of points, BANTAH helped to shore up the position of the government in thematic areas for which the government was facing considerable pressure at the negotiating table. On the investment chapter, this included BANTAH support to the government over issues such as carve-outs, exclusion of pre-establishment commitments, and investor-state arbitration.

Despite BANTAH’s efforts, however, there remained many problems associated with the process over the proposed TPPA in Malaysia. Particularly important issues include:

- Continued and widespread lack of transparency, as the substance of the negotiations remains shrouded in secrecy and plagued by misrepresentation.
- “Consultations” with stakeholders during the “open day” fora and “engagements” with civil society organisations, trade associations and other stakeholders have remained one-way briefings on the general outline of issues – details of Malaysia’s positions on various aspects of the negotiations remain undisclosed.
- Major stakeholders have only been “engaged” at the tail-end of the negotiations, raising questions as to whether public inputs are indeed taken into account in the negotiations. More generally, it is difficult for the public to understand

how Malaysia's positions on specific issues are formed and which inputs the government takes on board.

- Five years after Malaysia began to negotiate the TPPA, there is still no comprehensive and in-depth cost-benefit analysis or national interest study done or disclosed on the possible effects of TPPA on Malaysia, despite promises to do so.
- BANTAH's repeated requests for a "structured engagement" with MITI to enable regular and systematic dialogue on the TPPA have failed to materialise, despite government promises to follow up.
- Overall, the impression is that MITI is determined to sign the TPPA regardless of the concerns raised, the costs on the public at large, and the uncertainty and inadequacy of the benefits of the TPPA.

4. Lessons learnt

The campaigning issues that BANTAH selected were clear, and the goals were simple and well-defined: either bring Malaysia's involvement in the deal to a halt; or – given the top leadership's intent to sign anyway – mitigate the extent of the restrictions on national policy space that Malaysia would face as a result of the TPPA as a whole, and its investment chapter in particular. Yet, lack of financial and human resources aside, BANTAH faced considerable challenges, not least because it is difficult to develop informed advocacy strategies in contexts where the texts being negotiated are shrouded in secret, and leaked texts become rapidly out of date.

Understanding power relations within government and beyond proved critical to develop effective advocacy. At key junctures, BANTAH members conducted a "power analysis" to identify lines of influence among Malaysian decision- and policy-makers over TPPA negotiations. However, the exact relationships between factions in the political and bureaucratic hierarchies of the Malaysian government often proved difficult to grasp from the outside, not least because those lines were shifting after the major political changes that occurred following the general elections of 2008 and 2013. More generally, Malaysian political culture, which values the maintenance of public order, decorum and public loyalty over overt displays of discord and breaking of rank, makes it difficult for outsiders to identify potential allies in government.

The ability to develop "apolitical" political activism was a key factor in BANTAH's achievements. While BANTAH members were fully aware of the political issues underlying decisions about TPPA negotiations, they made it clear early on that they would not want to be seen as taking lines in relation to party politics.

In this respect, the BANTAH experience differed considerably from the earlier FTA Coalition, which included opposition parties. Particularly in the politically sensitive environment in place since the 2008 general elections, many BANTAH members felt that they did not want to be accused of being "sponsored" by the political opposition, and thereby lose the trust or the attention of the public or of either set of political groupings.

Having taken this path, however, also meant that BANTAH was deprived of the political energy that had captured the imagination and devotion of many Malaysians since the general elections of 2008. This was reflected in the limited turnout achieved at events that did not involve the mobilisation of youth groups, particularly, that were linked to opposition political parties. When the latter were involved, however, bigger audiences were achieved, such as the 2,500 who came to a particular rally on the TPPA in the northern state of Kelantan. Only a small number of

social and political activists were ready to devote their energies to the “dry” issues of socio-economics divorced from party-political struggles.

BANTAH's influence appeared to wane after the initial year, during which BANTAH raised significant concerns about the potential effects of the proposed TPPA. As BANTAH was not an organisation with its own staff, board, funders and permanent members, it did not possess the power of research, analysis, outreach and influence needed to sustain the pressure at the ambitious levels established during the first year of activity. The need to “translate” the technical legal jargon of trade and investment agreements into a language that the common man and woman could understand required considerable energy that was difficult to sustain in the longer term.

Building a broad political support base for the campaign's aims was a key enabling factor for BANTAH's achievements. Enlisting the support of MTEM and Bumiputera economic associations was a major step forward, especially among Malaysian politicians cognisant of the weight the businesses represented carried. Of course, bringing together diverse political constituencies was no easy task.

Convincing civil society organisations that the technicalities of a trade and investment agreement being negotiated overseas had any relation to their “traditional” human rights or sustainable development concerns proved at times an uphill struggle, and so did persuading non-Bumiputera associations to agree to positions that appeared to favour Bumiputeras.

In this respect, using the “ethnic card” to get the attention of the ethnicity-based government coalition proved a doubled-edged sword: although BANTAH raised many concerns about the potential effects of the TPPA for all ethnic communities in Malaysia, its concern that the TPPA might force a dismantling of the pro-Bumiputera affirmative action policies drew much attention in quarters that were resentful of these affirmative action policies. This is possibly one of the reasons why BANTAH's membership did not extend beyond the 52 with which it originally started.

The Associated Chinese Chamber of Commerce and Industry of Malaysia (ACCCIM) was perhaps one of the very few organisations that was prepared to stand together with MTEM and BANTAH on issues of common concern – such as the need for transparency, consultation, and fair play for small and medium-scale and other Malaysian businesses in the face of foreign investors.

Another challenge in building a political support base related to the existence of single-issue organisations or groupings within BANTAH. This made the coalition vulnerable to “divide and rule” tactics, for example when the government satisfied the tobacco control groups within BANTAH by proposing that tobacco be completely carved out from all measures related to it. It later transpired that this carve-out proposal was in danger of becoming “diluted”, but its very existence created uncertainty and took wind from the BANTAH's campaigning sail.

Similarly – aside from JERIT – there was limited success in getting other trade and workers unions to come actively on board the BANTAH campaign. The Malaysian Trades Union Congress (MTUC), for example, has preferred to work outside of the BANTAH network and with regional and international unions to campaign on the labour dimensions of the TPPA.

At the time of writing, the TPPA negotiations had still not been concluded. EU envoys have stated that negotiations with Malaysia for a EU-Malaysia FTA would start as soon as the TPPA is “settled”. BANTAH’s emphasis on the importance of transparency, participation and empowerment is likely to be of continued relevance for time to come. And the many unresolved issues raised by the campaign so far mean that the debate has only just begun.

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Advocacy on investment treaty negotiations: lessons from Malaysian civil society

Over the past few years the Malaysian government has embarked on several bilateral and regional negotiations to conclude major trade and investment treaties with large economies outside of ASEAN, including the proposed Trans-Pacific Partnership with the US and other countries. Given the far-reaching implications that these negotiations can have and the high stakes and political complexities involved, advocating on investment treaties requires developing effective alliances and well thought-out strategies. In 2013, 52 non-governmental organisations, trade associations and civil society groups established a coalition to raise public awareness and develop advocacy about the Trans-Pacific Partnership. This publication distils lessons learned from that experience.

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