

Subject to Legal Review for Accuracy, Clarity and Consistency

November [-], 2015

The Honorable Mustapa Mohamed
Minister of Trade and Industry
Ministry of Trade and Industry
Kuala Lumpur, Malaysia

Dear Minister Mustapa Mohamed:

I have the honor to confirm that the United States of America and Malaysia have reached agreement with respect to the “Malaysia – United States Labour Consistency Plan”, a bilateral instrument in accordance with Chapter 19 of the TPP Agreement attached to this letter.

I have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an agreement between our two Governments. This agreement shall enter into force on the date of entry into force of the TPP Agreement between our two governments.

Sincerely,

Ambassador Michael B. G. Froman

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[-] November 2015

The Honorable Michael Froman
United States Trade Representative
600 17th Street, NW
Washington, DC 20508

Dear Ambassador Froman:

I am pleased to receive your letter of [*insert date*], which reads as follows:

I have the honor to confirm that the United States of America and Malaysia have reached agreement with respect to the “Malaysia – United States Labour Consistency Plan”, a bilateral instrument in accordance with Chapter 19 of the TPP Agreement attached to this letter.

I have the honor to propose that this letter and your letter in reply confirming that your Government shares this understanding shall constitute an agreement between our two Governments. This agreement shall enter into force on the date of entry into force of the TPP Agreement between our two governments.

I have the honor to confirm that the understanding referred to in your letter is shared by my Government, and that your letter and this letter in reply shall constitute an agreement between our two governments.

Sincerely,

MUSTAPA MOHAMED
Minister of Trade and Industry

Malaysia – United States Labour Consistency Plan

This Plan shall create rights and obligations only as between the Governments of Malaysia and the United States.

I. Preamble

The Governments of Malaysia and the United States:

ACKNOWLEDGING that each Party commits under Chapter 19 (Labour) to obligations concerning its labour law and practice, including with regard to its statutes and regulations and the labour rights as stated in the ILO Declaration;

ENDEAVORING to co-operate with each other and, recognizing as members of the ILO the governments may utilize the technical resources of the ILO in fulfilling the commitments of this Plan;

UNDERTAKE through this Plan the following specific commitments consistent with those obligations.

II. Legal Reforms

Consistent with its obligations under Chapter 19 (Labour), Malaysia shall enact the following legal reforms, and other changes that may be required to ensure consistency across its Acts, regulations and other measures.

A. Union Organization and Collective Bargaining

Judicial Review

1. Malaysia shall:
 - (a) ensure that trade unions have a right to judicial review of administrative decisions regarding trade union registration; suspension, withdrawal or cancellation of trade union registration; and determinations of strike illegality;
 - (b) amend the relevant sections of the Trade Union Act 1959 (ACT 262) to provide that where a trade union seeks judicial review of an administrative determination to suspend, withdraw or cancel trade union registration, the decision will be automatically stayed, pending that judicial review; and

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- (c) amend relevant sections of Act 262 to clarify that decisions of the Minister are subject to judicial review (relevant sections of current law include Sections 18(7) and 71A(4)).

Government discretion in registering trade unions

2. Malaysia shall:

- (a) amend relevant sections of Act 262 to remove discretion of the Director General of Trade Unions (DGTU) to refuse to register a trade union when another exists, and to remove the discretion of the DGTU to refuse registration because the trade union is likely to be used for unlawful purposes contrary or inconsistent with its objects and rules (relevant sections of current law include Section 12(2) and Section 12(3)(a));
- (b) amend the implementing regulations to Act 262 to limit the discretion of the DGTU and to clarify that “unlawful” refers only to serious breaches of law (relevant sections of current law include Section 12(3)(b), Section 12(3)(c), Section 12(3)(d) and Section 12(3)(e)(i)); and
- (c) amend relevant sections of Act 262 to limit the DGTU’s discretion to deny registration of a union due to the proposed union’s name to only exceptional circumstances, such as creating a threat to public order or inflaming sensitivities related to race or religion (relevant sections of current law include Section 12(3)(e)(ii)).

Government discretion to cancel trade union registration

3. Malaysia shall:

- (a) amend relevant sections of Act 262 and its implementing regulations to remove the discretion of the DGTU to cancel a trade union’s registration and to clarify that “unlawful” refers only to serious breaches of law (relevant sections of current law include Sections 15(1)(b)(ii) and Section 15(1)(b)(iii));
- (b) amend relevant sections of Act 262 to limit the discretion of the DGTU to cancel a union’s registration (relevant sections of current law include Section 15(1)(b)(iv)); and
- (c) amend the implementing regulations to Act 262 to limit cancellation of a trade union’s registration only to serious breaches of law (relevant sections of current law include Section 15(1)(b)(v)).

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Cancellation of registration when two or more unions exist

4. Malaysia shall amend relevant sections of Act 262 to remove the discretion of the DGTU to cancel a union's registration when two or more unions exist, and replace it with a process for determining representation of workers for the purposes of collective bargaining in a particular establishment, trade, occupation, or industry (relevant sections of current law include Section 15(2)).

Discretion to suspend a union

5. Malaysia shall amend the implementing regulations to Act 262 to clarify that "purposes prejudicial to or incompatible with...public order" shall not include the exercise of protected trade union activity (relevant sections of current law include Section 18(1)).

Restrictions on formation of unions in "similar" trades, occupations or industries

6. Malaysia shall amend relevant sections of Act 262, to remove the limitation on forming a union in only a "similar" trade, occupation or industry (relevant sections of current law include Section 2, Section 32 and Section 33).

Restrictions on formation of, and affiliation with, union federations or confederations in "similar" trades, occupations or industries

7. Malaysia shall amend relevant sections of Act 262 to remove the limitation on forming or affiliating with a union federation or confederation in only a "similar" trade, occupation or industry (relevant sections of current law include Section 72 and Section 74).

Affiliation with international unions

8. Malaysia shall amend relevant sections of Act 262 to remove the DGTU's discretion in allowing trade unions to affiliate with an international union, and may provide that a union establish member consent through secret ballot vote of its members with a quorum, as established by the union's constitution or by-laws, in order to affiliate with an international union (relevant sections of current law include Section 76A, Section 76B and Section 76C).

Restrictions on trade union membership and leadership (dismissed, suspended or retired workers)

9. Malaysia shall amend relevant sections of Act 262 to remove the prohibitions on dismissed, suspended and retired workers remaining as union members (relevant sections of current law include Section 26(1A) and Section 26(1)(a)).

Trade union leadership

10. Malaysia shall:

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- (a) amend relevant sections of Act 262 to allow non-citizens to run for election to union office if they have been legally working in Malaysia for at least three years (relevant sections of current law include Section 28(1)(a));
- (b) amend relevant sections of Act 262 by deleting the term “employee of a political party” to remove that restriction on membership of the executive of a trade union (relevant sections of current law include Section 28(1)(c1));
- (c) issue implementing regulations to Act 262 to establish that the meaning of “of any offence” is limited only to offences directly relevant to the integrity required to exercise trade union office, such as a breach of fiduciary duty (relevant sections of current law include Section 28(1)(d)); and
- (d) amend relevant sections of Act 262 consistent with the above changes (relevant sections of current law include Section 30).

Collective bargaining

11. Malaysia shall amend relevant sections of the Industrial Relations Act 1967 (Act 177) to remove broad restrictions on the scope of collective bargaining, including the restrictions on terms and conditions of employment (relevant sections of current law include Section 13(3)).

Strikes

12. Malaysia shall amend relevant sections of Act 262 to provide for a quorum requirement in an enterprise union strike vote as two-thirds of the members and the consent of 50 percent plus 1 of the member votes cast (relevant sections of current law include Section 25A(1)(a));

13. Malaysia may establish after consulting with domestic stakeholders, a reasonable quorum requirement for a strike vote for non-enterprise unions and federations that would not hinder industrial level action; and

14. Malaysia shall amend the implementing regulations of Act 262 to limit the discretion of the DGTU in determining whether a strike would contravene provisions of law (relevant sections of current law include Section 40(6)).

Limitations on strike issues

15. Malaysia shall amend relevant sections of Act 177 to remove limitations on strikes on any matters covered by Act 177, Section 13(3) (relevant sections of current law include Section 44(e)).

Penal sanctions for peaceful strikes

16. Malaysia shall amend relevant sections of Act 177 to remove penal sanctions for peaceful strikes, regardless of whether such strikes are inconsistent with IRA provisions (relevant sections of current law include Section 46, Section 47 and Section 48).

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Administrative discretion in dispute resolution

17. Malaysia shall amend relevant sections of Act 177, including by deleting “of his own motion or”, to remove administrative discretion to intervene in a trade dispute without the request of the parties (relevant sections of current law include Section 19(2) and Section 26(2)).

Representation in administrative or judicial hearings

18. Malaysia shall:

- (a) amend relevant sections of Act 177 to allow employers, trade unions and trade unionists to choose their representatives in administrative hearings, including in proceedings regarding dismissals (relevant sections of current law include Sections 19B(2), Section 20(6) and Section 20(7));
- (b) amend relevant sections of Act 177 to remove restrictions on representations in proceedings involving trade disputes (relevant sections of current law include Section 19B(1)(b)); and
- (c) amend relevant sections of Act 177 to require only that representatives meet minimum qualifications essential to their responsibilities (relevant sections of current law include Section 27(1)).

Essential services

19. Malaysia shall amend relevant sections of Act 177, including the First Schedule – Essential Services, to limit the range of industries in which strikes are prohibited on the basis that the industries are essential services, consistent with the rights as stated in the ILO Declaration.

Subcontracting and outsourcing

20. Malaysia shall:

- (a) ensure that the use of subcontracting or outsourcing is not used to circumvent the rights of association or collective bargaining;
- (b) amend the implementing regulations to the Employment Act 1955 (Act 265), Section 2A; Sabah Labour Ordinance (Cap. 67), Section 2A; and Sarawak Labour Ordinance (Cap. 76), Section 2A, to provide guidance for the identification of the appropriate “employer(s)” for purposes of ensuring meaningful associational and other rights for workers who are provided to a principal either by a labour outsourcing company or a contractor-for-labour; and
- (c) require that subcontracting and outsourcing arrangements be made in writing, and be subject to verification by the Ministry of Human Resources.

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B. Forced Labour

Protections against the withholding of passports

1. Malaysia shall:
 - (a) amend the implementing regulations to the Passport Act 1966 (Act 150) to reinforce that retaining a worker's passport by his or her employer is illegal. Such regulations shall include requiring that foreign workers are fully informed of their right to retain their own passports and informing workers that they retain the right to access their passports at any time, without delay or approval of any other individual and without consequence to their status and relationship with their employer or recruitment agency;
 - (b) amend the implementing regulations to Act 150 to require that private employers that utilize foreign workers in their operations (either through a direct employment relationship or through an employment agency) provide to each foreign worker a notice informing workers of their right to retain their passport and information on how to report violations of this right. Private employers with more than 10 foreign workers and recruitment agencies also shall post a notice to this effect;
 - (c) amend the Workers' Minimum Standards of Housing and Amenities Act 1990 (Act 446) so that it covers all sectors (beyond only plantations) and to require that private employers or recruitment agencies that provide housing to foreign workers provide secure facilities (for example, personal lockers) for the storage and safekeeping of workers' passports and other valuables. These facilities must allow workers to access their passports at any time and without prior authorization; and
 - (d) effectively enforce relevant laws and regulations to investigate and prosecute employers and recruitment agencies that retain employee passports.

Foreign worker recruitment practices, contracts and fees

2. Malaysia shall:
 - (a) ensure that all entities that recruit foreign workers, whether a recruitment agency or a direct employer, are covered by the sections of the Private Employment Agencies Act of 1981 (Act 246), including provisions regarding limitations on the recruitment fees charged to a foreign worker;
 - (b) amend relevant laws and regulations to provide that any government levies charged for employment of foreign workers are the obligation of the employer, rather than the foreign worker;

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- (c) amend its laws and regulations to provide that large-scale, repeated or egregious violations of labour law are punishable by a denial of future quota requests of the offending employer or by a revocation of the license of offending recruitment agency;
- (d) ensure that any Memorandum of Understanding regarding the recruitment of foreign workers between Malaysia and a government of a country that provides such workers will require that recruitment agencies and employers provide foreign workers a valid written contract in their own language, including their terms of work, prior to their entrance into Malaysia; and
- (e) amend relevant sections of Act 265 to prohibit contract substitution.

Trafficking and forced labour victim protection services

3. Malaysia shall:

- (a) issue necessary regulations to the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (Act 670) to allow victims of trafficking to move freely to and from shelters; provide victims of trafficking access to legal counsel of their choice; allow victims of trafficking to work and find new employment under clearly established procedures; enable non-governmental organizations to own and operate shelters for trafficking victims; and
- (b) waive any fees associated with the required pass provided through the Labour Department for foreign workers who are involved in an investigation of violations of labour law (other than forced labour, covered above) to remain in Malaysia and seek alternative employment.

Foreign worker housing and freedom of movement

4. Malaysia shall:

- (a) amend the implementing regulations to Act 446 to require that private employers or recruitment agencies that provide housing for foreign workers provide notice informing workers, in a language that they understand, of their right to freedom of movement under Malaysian law and information on how to report violations of this right. Private employers with more than 10 foreign workers and recruitment agencies shall also be required to post the notice on their premises visible to workers; and
- (b) amend the implementing regulations to Act 446 to require that private employers or recruitment agencies, which provide housing for foreign workers provide a notice, in a language the workers understand, informing those workers of their right to acceptable housing conditions under this Act and information on how to report violations of their right to acceptable housing conditions. Private employers with

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more than 10 foreign workers and recruitment agencies shall also be required to post the notice on their premises visible to workers.

C. Child Labour

Malaysia shall:

- (a) issue a list of hazardous types of work prohibited for persons under 18 years of age.
- (b) amend the implementing regulations to the Children and Young Persons (Employment) Act 1966 (Act 350), Sabah Labour Ordinance (Cap. 67) and Sarawak Labour Ordinance (Cap. 76) to ensure that a minimum age of at least 13 is established for admission to light work.

D. Employment Discrimination

Malaysia shall amend relevant sections of the Act 265, Cap. 67 and Cap. 76 to prohibit discrimination, in respect of employment and occupation, including by amending Act 265, Section 34, 35 and 36, and relevant sections in Cap. 67 and Cap. 76 to remove the prohibitions on employment of women in certain occupations.

III. Institutional Reforms and Capacity Building

Malaysia shall undertake necessary institutional changes and capacity building to implement the amended statutes and regulations, including: establishing new administrative functions, procedures and mechanisms; expanding and adequately training labour inspectors and relevant criminal system authorities to effectively enforce the amended statutes and regulations; and providing the necessary resources to implement these changes.

A. Enforcement of Labour Laws and Protections

1. Malaysia shall:

- (a) allocate resources necessary for the effective enforcement of its labour laws, including additional labour officer and dedicated inspector positions needed to enforce the new laws and practices resulting from this Plan;
- (b) revise internal inspection and other enforcement procedures for the labour inspectorate to ensure effective enforcement of the new and existing legal provisions, including the prohibition on employers retaining passports of employees, and train all relevant personnel on the reformed procedures and new provisions;

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- (c) develop, in coordination with the ILO, a training program for labour inspectors and plan for increased labour inspections targeted at addressing forced labour and practices that increase workers' vulnerability to forced labour, including violations of laws governing recruitment fees, recruitment practices, withholding of passports or other identity documents, contract substitution, wage payments below the legally required amount and unlawful deductions, withholding of workers' wages in escrow, and living conditions of foreign workers, including restrictions on movement; and
- (d) require the Enforcement Agencies Integrity Commission (EAIC) to report biannually statistics on the number of complaints received, investigations conducted and final disposition or remediation of those investigations that involve foreign workers (broken down by government agency and type of violation).

IV. Transparency and Sharing of Information

A. Public Comment

Consistent with its existing procedures, Malaysia shall provide for public comment the draft legal instruments that result from this Plan and publicly post final legal instruments on the applicable agency website.

B. Collaboration

Malaysia and the United States intend to collaborate on the development of the relevant reforms and instruments that result from this Plan.

C. Outreach and Education

To inform and educate stakeholders, including employers and workers, of their rights and responsibilities under Malaysian law, Malaysia shall launch an outreach program on the legal and institutional changes that result from this Plan, as well as related remedies and courses of action available to enforce those rights.

V. Government to Government Mechanism

1. The United States and Malaysia shall regularly assess progress in implementing this Plan, including follow-up enforcement and application of the amended laws and regulations and institutional reforms, and, to this end, agree to establish a standing bilateral Senior Officials Committee (SOC) comprising senior officials from the Office of the U.S. Trade Representative

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and the Department of Labor for the United States and from the Ministry of International Trade and Industry and the Ministry of Human Resources for Malaysia to monitor, assess and facilitate rapid response to any concerns about compliance with and implementation of the legal and institutional reforms under this Plan.

2. The United States and Malaysia shall designate the responsible senior officials prior to entry into force of this Agreement between the United States and Malaysia and promptly inform the other Party of any subsequent changes.

3. The SOC shall meet, in person or by any technological means available, annually for seven years after the date of entry into force of this Agreement between the United States and Malaysia. SOC members shall be supported by technical-level officials, who shall meet as necessary. At the request of either Malaysia or the United States, the SOC shall continue to meet annually thereafter or as Malaysia and the United States otherwise agree.

4. At the request of either Malaysia or the United States, the SOC shall convene within 30 days to address any concerns with regard to compliance with or implementation of this Plan. Either Malaysia or the United States may request an ILO review and report on any such concern, in order to inform the discussions of the SOC and determinations of any actions necessary to address concerns.

VI. Technical Assistance

Malaysia and the United States shall endeavor to secure funding for technical assistance programming to directly facilitate implementation of the legal and institutional reforms in this Plan. Malaysia shall request the cooperation, advice and technical assistance of the ILO to help in such implementation and endeavor to conclude the negotiation of an agreement with the ILO for this purpose.

VII. Implementation

1. Malaysia shall enact the legal and institutional reforms in Parts II and III of this Plan prior to the date of entry into force of the TPP Agreement as between the United States and Malaysia, except as otherwise provided for in this Plan.

2. This Plan shall be subject to consultations under Article 19.5 (Labour Consultations) of the Labour Chapter, except that with respect to paragraphs 2 and 3, the requirement to circulate the request and reply, respectively, to the other TPP Parties, shall not apply; and paragraph 4 shall not apply.

3. This Plan shall be subject to dispute settlement under Chapter 28 (Dispute Settlement) of the TPP Agreement, except for Article 28.13 (Third Party Participation), which shall not apply.