

**LABOUR PROVISIONS IN PREFERENTIAL TRADE AGREEMENTS:  
POTENTIAL OPPORTUNITIES OR CHALLENGES TO VIETNAM?**

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**May 2014**

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## **ABSTRACT**

In this research, we discuss the impacts of labour provisions in preferential trade agreements (PTAs) to which Vietnam is a party in aspects of politics, institutions, law and economy. We find that the impacts are a mixture of both positives and negatives. Positive effects include a more and more developed and well-established domestic labour legal framework, stronger domestic political commitment to labour reforms, more stabilized political environment, higher level of labour protection, higher wages, better working conditions and better life, higher productivity and competitiveness of goods and services and more foreign direct investment. Negative effects include potential political risks of state sovereignty weakening, reduction in competitiveness because of rising labour costs and undermined trade and economic growth resulting from trade-based sanctions in labour disputes. Both positive effects and negative effects exist as possibilities and whether they are materialized and which of them outweighs depend on reactions taken by Vietnam. Proposals for Vietnam to benefit from labour commitments include improving the domestic labour law system and efficiency of state administration and enforcement of domestic labour law, changing the economy from factor-based to efficiency-based status, making relevant institutional reforms, introducing the trade-related labour topic into the academic setting, performing studies on the impacts of labour provisions in PTAs, set up strategies and tactics in PTAs' labour negotiations, joining forces with other trade partners of the same interest, effective exploitation of cooperation mechanisms in PTAs and proposing S&D treatment for developing countries.

**Key words:** Preferential trade agreements, labour provisions, Vietnam.

## **ACKNOWLEDGEMENTS**

We would like to record our appreciation to the Swiss State Secretariat for Education, Research and Innovation, and World Trade Institute University of Bern, for granting us a valuable opportunity to delve into this interesting topic. We are also deeply grateful to Dr. Marion Jansen, International Trade Centre for her supervision. Without her crucial and useful guidance, comments and materials, we would not have finished the research. We also thank Foreign Trade University for its whole supportive, administrative and facilitating role.

## **LIST OF ABBREVIATIONS**

ASEAN	Association of South-East Asian Nations
EU	European Union
FDI	Foreign Direct Investment
FTA(s)	Free Trade Agreement(s)
GSO	General Statistics Office of Vietnam
ILO	International Labour Organization
ITO	International Trade Organization
MOLISA	Ministry of Labour, Invalids and Social Affairs of Vietnam
MUTRAP	Multilateral Trade Assistance Project
NAALC	North American Agreement on Labour Cooperation
NAFTA	North American Free Trade Agreement
PTA(s)	Preferential Trade Agreement(s)
U.S.	The United States
VCCI	Vietnam Chamber of Commerce and Industry
VND	Vietnamese Dong
WTO	World Trade Organization

## INTRODUCTION

Over the past years, Vietnam has further deepened its international economic integration process by joining a number of PTAs of which many include labour provisions. So far, Vietnam has signed free trade agreements (FTAs) with Japan and Chile. Additionally, some PTA negotiations between Vietnam and other trade partners are in progress, such as Vietnam-EU FTA, Trans-Pacific Partnership Agreement, Vietnam – Korea FTA, Vietnam and Customs Union of Russia – Belarus – Kazakhstan and Vietnam – EFTA FTA negotiations. As a member of the ASEAN, Vietnam is also part of many other PTAs and PTAs negotiations that the ASEAN involves, including ASEAN – Australia – New Zealand FTA, ASEAN – Korea FTA, ASEAN – Japan FTA, ASEAN – China FTA and ASEAN – EU FTA negotiation.<sup>1</sup> Some of them have followed the increasing trend in the inclusion of the labour issue in preferential trade agreements (PTAs) as shown by studies<sup>2</sup> when incorporating the labour issue which covers various contents, including labour movement, labour standards, labour rights, domestic labour regulations, etc. As a party to these PTAs, Vietnam must abide by the commitments which can thereby produce both opportunities and threats.

Internationally, there has been much literature on the interaction between trade and labour; however, that is not the case in Vietnam. A majority of research in Vietnam has reflected intensively on the traditional issues of PTAs but paid little attention to the non-traditional issue of labour. This fact comes from many different reasons ranging from economic, political to social ones. Vietnam's government, businesses, and society were, have and will face uncertain influences of Vietnam's labour commitments in these PTAs in both positive and negative aspects. Therefore, it is necessary to realize the potential opportunities and challenges Vietnam has and will be exposed, to increase the awareness of the government, business community and society as well as to set forth counteracting solutions at both macro and micro levels.

The research shall employ a variety of methods ranging from desk research analyzing the labour agreements covered in relevant PTAs, to survey conduction, data collection and analysis to

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<sup>1</sup> <http://www.trungtamwto.vn/fta> visited on 12th May, 2014.

<sup>2</sup> ILO (2009), *World of Work Report: The Global Jobs Crisis and Beyond*, International Institute for Labour Studies, p.75. Haberli C., Jansen M., Monteiro J.A. (2012), *Regional Trade Agreements and Domestic Labour Market Regulation*, ILO Employment Sector – Employment Working Paper No. 120, p.1.

assess the status-quo of labour standard implementation and awareness in Vietnam as well as the positive and negative effects of PTAs' labour regulations, and to analysis, synthesis and comparison methods to recommend solutions to Vietnam in the face of both challenges and opportunities arising from PTAs' labour regulation conformity.

The research is divided into three chapters. Chapter 1 provides an overview of labour provisions in PTAs relevant to Vietnam. Close attention is paid to the rationales behind and history of negotiation as well as the coverage and depth of Vietnam's labour commitments. Chapter 2 assesses the potential implications of labour provisions in PTAs pertaining to Vietnam, thereby predicting that the impacts are complex and both negatives and positives are possible. Chapter 3 recommends solutions for Vietnam to take full advantage of PTA's labour provisions, including measures of improving law, institutions and policies.

## **CHAPTER 1: OVERVIEW OF LABOUR PROVISIONS IN PREFERENTIAL TRADE AGREEMENTS RELEVANT TO VIETNAM**

Seven years after its accession to the WTO, Vietnam has entered into a higher and deeper stage of the international economic integration process. Vietnam has concluded 8 bilateral and regional PTAs and is negotiating 7 others. 8 concluded PTAs involving Vietnam are ASEAN FTA in 1992, ASEAN-China FTA in 2004, ASEAN-Korea FTA in 2006, ASEAN-Japan FTA in 2008, ASEAN-Australia-New Zealand in 2009, ASEAN-India FTA in 2009, Vietnam-Japan Economic Partnership Agreement in 2008 and Vietnam-Chile FTA in 2011.<sup>3</sup> 7 others still being negotiated include the Trans-Pacific Partnership Agreement (TPP), Vietnam-European Union (EU) FTA, Vietnam–Korea FTA, FTA between Vietnam and the Customs Union of Russia – Belarus – Kazakhstan, Vietnam–EFTA FTA negotiations, Regional Comprehensive Economic Partnership (RCEP) between ASEAN and its 6 FTA partners and ASEAN-EU FTA.<sup>4</sup> Among them, labour provisions are included in the TPP and Vietnam-EU FTA.

Within the framework of this research, several fundamental terms needs to be defined. ‘Labour provisions’ means “(i) any labour standard which establishes minimum working conditions, terms of employment or worker rights, (ii) any norm on the protection provided to workers under national labour law and its enforcement, as well as (iii) any framework for cooperation in and/or monitoring of these issues”<sup>5</sup> as defined in the World of Work Report by the International Labour Organization (ILO). Preferential trade agreements (PTAs) mean trade agreements among two or more countries to further liberalize trade among them through giving preferential access to each other. Therefore, the term ‘PTAs’ in this research does not cover unilateral arrangements such as GSP programs.

The proposal of inclusion of the labour issue in trade agreements was first set forth in the Havana Charter to establish the ITO.<sup>6</sup> However, the non-existence of the ITO manifested, *inter alia*, the failure of countries to settle the issue at the multilateral level. Since then, countries have found other ways of bilateral and regional approaches to handle the interplay between trade and labour

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<sup>3</sup> <http://www.trungtamwto.vn/fta> visited on 12th May, 2014.

<sup>4</sup> Ibid.

<sup>5</sup> ILO (2009), *World of Work Report: The Global Jobs Crisis and Beyond*, International Institute for Labour Studies, p. 64.

<sup>6</sup> Havana Charter, Chapter 2.



within trade agreements. Internationally, the first plurilateral trade agreement covering labour provisions is the North American Free Trade Agreement (NAFTA) 1994 which consists of a side labour agreement. Domestically, in Vietnam, the first trade agreement to which Vietnam is party and which covers the labour issue is expected to be the Trans-Pacific Partnership Agreement which is intended to conclude negotiations this year, 2014.

## **1. Rationales behind the participation of Vietnam in the PTAs covering labour provisions**

### ***1.1. Rationales behind the participation of Vietnam in the PTAs***

#### *a. External Rationales*

In the context that the Doha Development Round is stalled, developed countries resort to bilateral and plurilateral approaches to gain their desired achievement in trade liberalization as well as to take them as a motivation to push for success in the multilateral negotiations.

Besides, in terms of its position in global trade, the ASEAN as a whole is the main trading partner of the EU and the United States (U.S.).<sup>7</sup> And more access to the ASEAN market through PTAs is the priorities of these countries.

#### *b. Internal Rationales*

Vietnam's trade interests are threatened by the practice in which Vietnam's competitors have joined PTAs with its trade partners, gaining preferential access to these markets. To maintain its competitiveness against its competitors, Vietnam also has to follow suits, that is, joining PTAs. For Vietnam, the EU, the U.S. and Japan are its key trading partners, whereas, in Southeast Asia, other ASEAN members, including Thailand, Singapore and Indonesia... are direct competitors of Vietnam in trade in goods of agricultural products and textile and foreign direct investment (FDI) attraction. Therefore, the trade policy of Vietnam should pay special attention to the trade policy of these countries, including both its main trading partners and its competitors. Countries in Southeast Asia are aimed at by Vietnam's major trading partners, including the EU and the U.S, to negotiate FTAs as part of their trade policy since 2000 and as a means to foster the multilateral trade negotiation within the WTO framework. The EU concluded its FTA with

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<sup>7</sup> <http://ec.europa.eu/trade/policy/countries-and-regions/countries/malaysia/> visited on 7<sup>th</sup> January, 2014.

Singapore in 2012 and started FTA negotiations with Malaysia in 2010 and Thailand in 2013. The U.S. started negotiating TPP with, among others, Singapore and Brunei in 2008. As a result of these PTAs, Vietnam's competitors gain preferential treatment over its domestic producers and service suppliers in access to export markets. If Vietnam remains outside of the regional PTA negotiation and conclusion trend, it will lose its competitiveness.

It is expected that joining PTAs will be the next-step in Vietnam's international economic integration, bringing about economic growth and social development. PTAs offer Vietnam with more and preferential access to export markets, especially to main export markets, and with increasing FDI inflows. Trade with PTA partners accounts for about 60% of the total trade value of Vietnam.<sup>8</sup> Vietnam's export volume to these markets has increased by 20-30% during the 2008-2012 period in spite of the global crisis. It is hoped that the conclusion of PTAs in the 2015-2018 period will liberalize approximately 98% of tariff lines in trade partners. Apart from that, signing PTAs is considered as a long-term commitment by Vietnam's government to the stability and predictability of its investment environment, enhancing the attractiveness of the domestic investment environment. Joining PTAs is taken as a tool to support the economic transition process in Vietnam into industrialization and modernization, helps Vietnam to move up the global value chain. In addition, PTAs will be the means for Vietnam to get other important trade benefits, such as labour export and market-economy status recognition by its main trade partners, especially the U.S. and the EU.

Besides, there are other geo-political reasons for Vietnam's involvement in PTAs. The action is hoped to help Vietnam maintain its motive of trade liberalization and domestic reforms and enhance the bargaining power of Vietnam in international trade. It is also part of the strategy of foreign relation diversification and multilateralization.

The strategy of PTA participation by Vietnam is clearly manifested in a variety of state documents by political, legislative and administrative bodies. On 5<sup>th</sup> February, 2007, right after Vietnam's accession to the WTO, the 4<sup>th</sup> Meeting of the Central Executive Board of the

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<sup>8</sup> [http://socongthuong.thaibinh.gov.vn/ct/news/Lists/thuongmai/View\\_Detail.aspx?ItemID=2980](http://socongthuong.thaibinh.gov.vn/ct/news/Lists/thuongmai/View_Detail.aspx?ItemID=2980) visited on 7<sup>th</sup> January, 2014.

Communist Party of Vietnam Term X adopted Resolution No. 08-NQ/TW<sup>9</sup> on main guidelines and policies for express and sustainable socialist-oriented economic development, especially the ultimate general objectives of welfare for the people, strength for the nation, justice, democracy and civilization during the economic integration process and the specific objectives of association between economic growth and social progress and equality, and preservation of political, socio-economic stability. In addition, the Resolution clearly pointed out opportunities and challenges faced by Vietnam in the new stage of deeper and wider economic integration process. To retain the above objectives, the Resolution required concrete measures to be taken, including, *inter alia*, (1) quick and synchronic formation of components of the market economy, (2) construction of a new labour pattern, in which labourers with high quality, skills and foreign language knowledge account for a higher and higher rate, (3) increase in competitiveness of goods, and more specifically products which are predicted to negatively and largely affected by the economic integration process such as sugar cane, cotton, vegetables, meat and milk... and some highly-protected industrial products such as cement, steel, chemicals, automobile, motorbikes... and increase the added values in export goods such as footwear, textile and processed agricultural products and (4) good management of social problems arising from implementation of commitments, including the labour problem. More specifically, it is needed to (i) “build and operate effectively the social security system for residential groups to cover risks on a basis of the principle that the state, enterprises and labourers join forces and cooperate and the active role of socio-professional organizations is stimulated,”<sup>10</sup> (ii) “renew labour policies to

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<sup>9</sup> Under the Constitution of Vietnam 2013, Article 4, the Communist Party of Vietnam has the exclusive power to govern the state of Vietnam. Policies and guidelines of the Communist Party of Vietnam are the background and starting point for all policies and law of the Vietnamese government. Therefore, Resolutions adopted by the Communist Party, although being not legal documents in the legal system in Vietnam, are often cited as the first and foremost predictor of the policies and law in Vietnam. The legal system in Vietnam consists of the following documents (listed from the highest to the lowest legal validity): Constitution, Codes/Laws, Ordinances, Decrees and Circulars. Other legal documents are Resolutions, Decisions and Orders with legal validity depending on the positions of the issuers. The Constitution, Codes and Laws are issued by the National Assembly while Ordinances are issued by the Standing Committees of the National Assembly. Decrees are issued by the Government and Circulars are issued by Ministries. So far, none of the above-mentioned legal documents has provided for strategies on the participation of Vietnam in Free Trade Agreements. Therefore, the Prime Minister issued Decision No. 1051/QĐ-TTg in 2012 to give guidance to competent bodies of the Government in trade negotiation.

<sup>10</sup> Resolution No. 08-NQ/TW adopted at the 4<sup>th</sup> Meeting of the Central Executive Board of the Communist Party of Vietnam (Term X) on Main guidelines and policies for express and sustainable socialist-oriented economic development, Item 2.6, available at [http://dangcongsan.vn/cpv/Modules/News/NewsDetail.aspx?co\\_id=30668&cn\\_id=19113](http://dangcongsan.vn/cpv/Modules/News/NewsDetail.aspx?co_id=30668&cn_id=19113) visited on January 7<sup>th</sup>, 2014.

facilitate labour transition among economic regions, regions, industries, professions and enterprises in accordance with the market mechanism, develop the labour market, speed up wage reform process, and rebuild minimum wage rates,”<sup>11</sup> and (iii) “revise law and policies on labour relations, construct sound labour relations, enhance the capacity to prevent and settle labour disputes, establish and implement collective bargaining mechanism and collective and protect legitimate rights and interests of labourers.”<sup>12</sup>

On 9<sup>th</sup> August, 2012, the Prime Minister of Vietnam issued Decision No. 1051/QĐ-TTg, taking effects on the same date, on the adoption of strategies on the participation in Free Trade Agreements until 2020. *In terms of positions*, Vietnam needs to actively join FTAs to integrate with countries in the region and in the world, to capture new opportunities for fast and sustainable development, in accordance with the guideline on international integration and the implementation of objectives set forth in the Strategy on socio-economic development during the 2011-2020 period. Participation in FTAs must be in tune with the comprehensive setting of multilateral, regional and bilateral economic integration, contribute to progress in trade liberalization within the WTO and reinforce linkage among ASEAN members.

The participation in FTAs must ensure the harmonious combination of different objectives, among which, economic objectives is given priorities over others, must improve national competitiveness and ensure the exploitation of benefits from FTAs. *Objectives* of Vietnam’s FTA participation include (1) “enlargement of domestic and foreign markets to foster production and exportation, enhancement of quality of and effectiveness in investment attraction, effective exploitation of capital, science-technology resources and advance management expertise;”<sup>13</sup> (2) “improvement in the position and power of Vietnam in the international arena, better involvement in the regional and global labour division systems, good exploitation of existing advantages and creation of new advantages, assurance of the harmony between the socio-economic development target and the national defence and security target;”<sup>14</sup> (3) “support for

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<sup>11</sup> Ibid.

<sup>12</sup> Ibid.

<sup>13</sup> Decision No. 1051/QĐ-TTg dated 9<sup>th</sup> August 2012 issued by the Prime Minister of Vietnam on the adoption of strategies on the participation in Free Trade Agreements until 2020, available at <http://www.congthuongbentre.gov.vn/home/thu-tuong-phe-duyet-chien-luoc-tham-gia-cac-thoa-thuan-thuong-mai-tu-do-den-nam-2020-W909.htm> visited on 7<sup>th</sup> January, 2014.

<sup>14</sup> Ibid.

and boosting the reform of policies and institutional establishment for economic development, improvement in capacity of responsiveness to global market changes and participation in the global production network and value chain;”<sup>15</sup> and (4) “reinforcement and creation of competitiveness to exploit benefits from ratified FTAs and active participation in new FTAs.”<sup>16</sup>

The Decision also set 8 *main tasks*, including (1) attraction of high technology, increase in market shares and efficiency in exportation, ultimate exploitation of national potentials and competitive advantages in international economic relations, (2) fostering economic transitions, initiation of economic restructuring, corporate restructuring, promotion of competitiveness of products, enterprises and the economy, fasten the effective participation of Vietnam in global production networks and value chains; (3) creation of essential premises and factors in development of high-quality human resources, integrated and modern infrastructure system to improve growth quality, export efficiency, investment effectiveness and maximal mobilization of resources domestically and overseas for harnessing national potentials and advantages to speed up the industrialization and modernization process and (4) attainment of social objectives, creation of jobs and increases in income for the people. Different from other developed countries like the U.S. or the EU, Vietnam does not set forth job creation as an objective but just as the task to achieve other final objectives in PTA participation.

The selection of trade partners in FTA negotiations and signing must be on scientific bases, accord with the participation capacity of Vietnam, give severe priorities to benefits from trade in goods, trade in services and investment attraction in FTA signing to foster economic growth.<sup>17</sup>

In conclusion, the participation of Vietnam in more and more PTAs with deeper and wider commitments is the active and firm position and process of Vietnam for the long-term socio-economic targets. The wise and selective participation in PTAs is expected to protect and foster essential economic and social interests of Vietnam. The viewpoint of both the ruling Communist Party in Vietnam and the government are consistent at the three levels of guidelines, objectives and tasks. And Vietnam gives priority to economic interests over social interests, including labour issues.

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<sup>15</sup> Ibid.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

## ***1.2. Rationales behind the participation of Vietnam in labour provision commitments under PTAs***

Up to now, Vietnam has just shown its official viewpoint on negotiations of new-generation PTAs but failed to express its official position on the labour issue in these agreements. More specifically, its guidelines, strategies and objectives in labour negotiations are unstated. Hence, the history of development in viewpoint of Vietnam on the labour issue is also not clear-cut and has not been documented as in other developed countries like the U.S. or the EU. Therefore, it can be inferred that its guidelines, strategies and objectives in general PTA negotiations also hold for the labour issue in PTAs. However, it has not been spoken out whether Vietnam is for or against the inclusion of labour provisions in PTAs and their subject-matters. In addition, no official viewpoints on the issue of relevant actors have been found: as our research points out, neither Trade Unions nor Vietnam General Confederation of Labour has had official statements about their stance or recommendations to the government regarding PTA labour negotiations. So far, the Vietnam Chamber of Commerce and Industry (VCCI) – representative of the corporate community in Vietnam – has just expressed their view on the labour negotiation in TPP only, not in PTAs in general.<sup>18</sup> According to the VCCI, because of both advantages and disadvantages faced by Vietnam in TPP's labour negotiation, the tendency of improvement in rights and interests of labourers and sustainable development of enterprises regarding human resources, Vietnam should apply the approach to the labour issue in TPP as follows: (1) supporting/approving fundamental rights of labourers in TPP in accordance with the existing law and future development of labour law in Vietnam and (2) protesting against the subject-matters going far beyond the rights of labourers, especially those that intrude upon the sovereignty of the state.<sup>19</sup> It can be seen that the viewpoint is quite general, abstract and incomprehensive.

Although being active in further international economic integration in general and PTA negotiations in particular, the introduction of the labour issue within PTA frameworks has not been the intention of Vietnam but taken as a pre-condition to PTA negotiation conclusion as

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<sup>18</sup> See more at VCCI, WTO Center of VCCI, EU-Vietnam MUTRAP III (2012), *Recommendation on Negotiation Plans of the Labour and Labour Dispute Settlement Chapter in the Trans-Pacific Partnership Agreement*, available at <http://www.trungtamwto.vn/sites/default/files/tpp/attachments/INTA-2012-1-TPP3%20Khuyen%20nghi%20ve%20lao%20dong%20trong%20TPP.pdf>

<sup>19</sup> Ibid, p.6.

insisted by Vietnam's trade partners. This is proven by the most eminent practice that if Vietnam's trade partners do not request the inclusion of the labour issue in PTAs, then the agreements are silent on this issue. Typical examples are PTAs involving ASEAN. None of them cover any labour provision. The practice can be attributable to the following reasons. Firstly, Vietnam is still a developing country and economic objectives are given priorities over other social objectives in policy-making process in general and PTA-relating policy-making in particular. This position is explicitly specified in Decision No. 1051/QĐ-TTg mentioned above where the economic development objective precedes the sustainable development objective and the job creation task comes last in the rank of 8 tasks. Secondly, Vietnam fears losing competitiveness because of PTA labour commitments. Vietnam bases its competitiveness on cheap, low-skilled labour. Maybe, in Vietnam's viewpoint, observance of labour commitments can involve costs in the short term, raising compliance costs and reducing the competitiveness of Vietnam's domestic labourers compared with foreign labourers. In addition, exportation and foreign direct investment – two of the key drivers of Vietnam's economic development can be threaten by trade sanctions imposed by PTA partners as a result of labour violation claims. In other words, Vietnam is also afraid of the protectionist purpose of PTA labour provisions. Although Vietnam may gain long-term benefits when new national competitiveness is created based on high-skilled labour and the nation holds higher position in the global labour divisions and value chains, it is not supposed to be the right moment and the right place to discuss the labour issue at this point of time. Lastly, domestic political concerns that PTA labour commitments make Vietnam to waive its state sovereignty to some extent and self-limit its autonomy in the labour issue. In addition, compliance with labour commitments in PTAs may undermine the strategic alliance between the Communist Party and the working class, labourers – the underlying contributing factor in the successful governance of the Communist Party according to the Marxism and Leninism – the ideology of the Party.<sup>20</sup> Therefore, to remove barriers to changes in Vietnam's attitude towards the labour issue in PTAs, there is need for supportive studies fully reflecting on the issue from different perspectives.

## **2. Labour issue in PTAs relevant to Vietnam**

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<sup>20</sup> Constitution of Vietnam 2013, Article 4, Section 1.

All PTAs involving Vietnam at present share a common feature that Vietnam has a lower negotiation power and implementation capacity than its trade partners. Therefore, labour provisions under PTAs are shaped more by its trade partners than by Vietnam.

### **2.1. Rationales behind their inclusion**

In the labour issue, developed countries are the strong demandeurs. The inclusion of the issue in the twenty-first century PTAs must be attributed to the continuous, persistent and inexhaustible effort of these countries. Historically, the introduction of the trade-relating labour issue dates back to the late nineteenth century.<sup>21</sup> The labour issue has been proposed to be included in trade agreements multilaterally by developed countries for several occasions but none of them succeed, including the Havana Charter of the International Trade Organization, Uruguay Round (1986-1994) to form the WTO, WTO conferences in 1996 and in 1999 and the Doha Development Round in 2001.<sup>22</sup>

Based on the preamble of PTAs covering labour provisions to which trade partners of Vietnam are parties, the objectives/rationales of trade partners of Vietnam for their favour of inclusion of labour issues in PTAs can be inferred. They can be grouped into the following: prevention of unfair trade practice, reinforcement of internationally recognized labour principles, assurance of equality and sustainable development.

Trade can be harmed by unfair trade practices. The practice of loosening (applied) labour standards and regulations for the purpose of FDI attraction and trade proliferation are referred to as ‘social dumping’ by some developed countries, especially by their domestic trade unions and import-competing industries. Their argument goes as follows: Facing international trade competition, businesses in both export and import industries and countries tend to lower production costs through, among others, degrading applied labour standards. If not remedied, the practice by one or more countries will lead others to weaken their labour standards and regulations to remain their competitiveness – a ‘race to the bottom’ which ends up with a ‘lose-

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<sup>21</sup> In 1890, the United States prohibited imports produced by prisoners. In 1897, the United Kingdom issued the same decision on similar grounds. See more at Busse M. (2000), *Do Labour Standards Affect Competitive Advantage? Evidence for Labour-Intensive Goods*, Centre for International Economic Studies, Discussion Paper No. 0142, p. 5.

<sup>22</sup> Ibid.



lose' situation. The countries, especially developed countries, which refuse to relax applied labour standards, will lose jobs to others, leads to increase in unemployment which brings about more and more pressures on governments in these countries. The inclusion of labour commitments in PTAs to prohibit the practice is hoped to prevent trade distortion and ensure a level playing field and more employment for developed countries. For example, countries are legally permitted to place quantitative restrictions or market access restrictions on its trade partners who have lowered (applied) domestic labour standards for competition purpose in international trade. This reasoning was initiated right from the very first proposal to associate labour with trade – The Havana Charter – and is repeated commonly by developed countries nowadays.

Confirmation of well-established and internationally recognized principles in labour field is also an objective of parties to PTAs. The labour issue in PTAs centers on many fundamental human right principles. Although promotion of these principles are within mandates of the institutional framework such as the United Nations and the ILO, the fact that these frameworks lack enforcement powers and tools and the observance depends on voluntariness of state members is often cited by developed countries to support the advent of a new trade-related framework for these principles. It is argued that, by making commitments to compliance with specified labour principles, accompanied by necessary measures, parties to PTAs supplement existing labour institutions by making the enforcement more viable.

Although trade brings about welfare, economic theories point out that distribution of welfare from trade is not equal and not everyone is better off. The theory based on the abundance of production factors states that industries using intensively factors of endowment will be better off, while the others will be worse off. Hence, trade increases inequality among groups in society. The inclusion of labour issues in PTAs is expected to attenuate the problem.

The inclusion of labour issue in PTAs also ensures that trade and economic growth are not at the expense of social development. Countries party to PTAs confirms necessary commitments to assure that trade and social development go hand in hand and are mutually supportive and that social development from trade, including better labour conditions, sustains.

## 2.2. *Labour negotiation histories and results in PTAs relevant to Vietnam*

Labour negotiations in recent PTAs in general and PTAs relevant to Vietnam in particular are very controversial, time-consuming and, in many cases, the stumbling block to PTA negotiation conclusions. This comes from different or even conflicting stances of negotiating countries and also from the significant and sensitive nature of the matter.

### a. *Trans-Pacific Partnership Agreement*

By the first quarter of 2014, 12 countries<sup>23</sup> which are parties to the Trans-Pacific Partnership Agreement (TPP) had conducted 18 negotiation rounds<sup>24</sup> and 3 meetings among chief negotiators and failed to conclude the negotiation by the deadline of October 2013 in Indonesia.<sup>25</sup> Objectives of TPP negotiations cover the formation of a 21<sup>st</sup>-century agreement to enhance trade and investment among state parties, foster “innovation, economic growth and development and”<sup>26</sup> assist the creation of new jobs and the maintenance of existing ones.<sup>27</sup> TPP is evaluated as a “21<sup>st</sup>-century Agreement” or a “high-standard Agreement” because, among others, non-traditional issues, including labour and environment, are covered while it is not the case for other trade agreements negotiated at the same time as the beginning of TPP. Labour negotiations in TPP are in both bilateral and multilateral methods. Besides, civil social organizations are encouraged to involve in and contribute opinions to the negotiations.

Because of the confidentiality of negotiations, official information of labour proposals by parties and labour negotiation results is limited, causing difficulties in approaching the matter. The labour issue is among the most controversial and sophisticated in TPP because of huge gaps among negotiating parties in economic development, income per capital, political and social setting... Apart from the TPP, most of other PTAs involving TPP parties have labour provisions. However, most of provisions aim at encouraging parties to perform their labour commitments, rather than at establishing legally binding commitments and the official, general dispute settlement mechanism is not applicable or applicable with restrictions to labour disputes.

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<sup>23</sup> See the list at <http://www.ustr.gov/tpp> last visited on 12<sup>th</sup> March, 2014.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid.

<sup>26</sup> <http://www.ustr.gov/about-us/press-office/fact-sheets/2011/november/united-states-trans-pacific-partnership> visited on March 12<sup>th</sup> 2014.

<sup>27</sup> Ibid.

Although TPP negotiations have not officially come to an end, based on the view points of negotiating parties on the labour issue, especially those of the United States - the most active party in this issue, predictions of the potential labour negotiation results can be inferred. It is now known for sure that there is a chapter of labour included in TPP and the labour issue will be referred to in the preamble of the agreement.

### ***Viewpoints of developed countries***

*Viewpoint of the United States:* Among parties to TPP, the U.S. is the biggest and most important trade partner, having the decisive voice and role in the successful close of the negotiation. The U.S. is very active in proposing their priorities, including the labour issue, in TPP. Throughout negotiation rounds, the U.S has tried to insert their core values into TPP, including labour rights, transparency and environment protection. In the view of the U.S., TPP has a great influence on its economic development and the U.S. participates in TPP with the hope of improving its strengths and values, maintaining and creating jobs for U.S employees and ensuring sustainable development for the U.S.<sup>28</sup> Among developed countries, the U.S. seems to be the strongest demandeur in the labour issue. Since 2007, all PTAs to which the U.S. has negotiated and signed covers substantive and procedural provisions on labour in the labour chapter governing rights and obligations of state parties and dispute settlement among them. This approach is supported by proponents in the U.S on the grounds that failure to improve and implement labour rights can be exploited by employers in other countries in the form of low labour standards application to cut production costs, harming the competitiveness of U.S. employment.

The ultimate reason for the U.S.'s approach to the matter lies in U.S. trade balance and political situation. After two office terms of the U.S President Bush, the U.S. prolonging and increasing trade deficits caused U.S. Congress to condemn trade policies of the Bush administration. In 2006, after winning the election held in the middle of the second term of President Bush, the Democratic Party introduced their conservative view on trade policies, including the effort to reinforce labour and environment standards in trade agreements. The New Trade Policy Template came out on 10<sup>th</sup> May 2007 as a result of negotiation between the Democratic and Republic Parites over the U.S. trade policies. The Template is applicable not only to the then on-

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<sup>28</sup> Ibid.

going PTA negotiations<sup>29</sup> but also to any future PTAs involving the U.S. and covers six trade-related issues among which labour is the first to be mentioned.<sup>30</sup> More specifically, the Template stipulates that (1) FTAs must cover “internationally-recognized labour principles... in the ILO Declaration on Fundamental Principles and Rights at Work,”<sup>31</sup> (2) violations of the standards will be exposed to the resolution mechanism applied universally to both trade and labour commitments and sanctions consist of monetary penalties and trade sanctions based on trade loss calculation.<sup>32</sup>

The Template is a breakthrough compared to other previously applied labour models by the U.S. such as the NAFTA model or U.S. 2002 Trade Act. Firstly, the Template requires the inclusion of labour chapter as part of the agreement rather than as a side-agreement as NAFTA. Secondly, labour commitments in PTAs are legally binding obligations rather than non-binding promises. Thirdly, compliance is not limited domestic labour law but expanded to international labour standards. Fourthly, the dispute settlement mechanism will be applied uniformly to infringement of both trade and labour obligation. Finally, remedies consist of monetary fines and trade sanctions.

Throughout TPP negotiations, the U.S. has made labour proposals. Some contents of its proposals are consistent with the Template and similar to labour provisions in FTAs with Peru, Panama, Colombia and Korea. More specifically, the U.S. requests other TPP state parties (1) to implement and enforce five fundamental standards under the 1988 ILO Declaration<sup>33</sup> and (2) to apply TPP’s dispute settlement mechanism to labour commitment violations, i.e. no differentiation between labour violations and other trade violations – this is the most controversial issue.<sup>34</sup> However, other contents of U.S. proposals, especially the one submitted at the end of December 2011, go well beyond the scope of the Template. More specially, the U.S. requests TPP state parties to (1) perform specific measures to ensure the implementation of the five principles stipulated in the 1988 ILO Declaration, including enacting regulations on

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<sup>29</sup> Including FTAs between the U.S. and Peru, Panama, Columbia and Korea.

<sup>30</sup> The other five issues are environment, investment, government procurement, intellectual properties and seaport securities. Available at <http://www.asil.org/insights070529.cfm> visited on 14th June 2013.

<sup>31</sup> Bipartisan Agreement on Trade Policy, available at [http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset\\_upload\\_file127\\_11319.pdf](http://www.ustr.gov/sites/default/files/uploads/factsheets/2007/asset_upload_file127_11319.pdf).

<sup>32</sup> Ibid.

<sup>33</sup> World Trade Online, 1/5/2012.

<sup>34</sup> Ibid.

minimum wages, working hours, occupation health and safety, reduction of products manufactured by using child labour and (2) implement domestic labour law in export-processing zones and free trade areas.<sup>35</sup> The U.S also shows the tough and non-negotiable attitude toward their intensive labour protection.

*View point of Canada:* Generally, Canada endorses labour regulations as mandatory obligations in trade agreements. In the NAALC – the side Agreement annexed to the NAFTA, Canada agreed on the inclusion of compulsory labour obligations regarding labour rights and monetary penalties regarding investment-related labour violations. According to Canada, if TPP provides for binding labour obligations then sanctions should cover monetary penalties as those in NAALC. Its view comes from the reasoning that, in the opinion of Canada, trade sanctions on a large scale do not benefit labour-right violated employees, but the introduction of monetary penalties and the exploitation of fines for relevant initiatives to improve the labour conditions in violating countries benefit employees more.

*Viewpoint of Mexico:* Although being a party to NAFTA, Mexico does not seem to share views with Canada but with the U.S., i.e. Mexico supports the inclusion of labour commitments as compulsory obligations and available remedies compose of both monetary and trade sanctions. However, the new Mexican administration has been elected so it will be more challenging to forecast Mexican's viewpoint on this issue.

#### *Viewpoint of Australia and New Zealand*

In terms of the labour issue, Australia and New Zealand share some views in common: although both of them have applied high labour standards domestically, but, recently they object to the inclusion of labour provisions as legal binding obligations on the grounds that it can force some TPP parties especially developing countries to give up their efforts to join TPP and that their objection to the U.S. labour proposals can be used as a negotiation strategy to force the U.S. to conclude the discussion of agriculture product access.

To New Zealand, as a result of the participation in the Memorandum of Understanding on Labour Cooperation 2006, it favours the template in which labour commitments are just stimulating and encouraging. On the 3<sup>rd</sup> June 2005, together with Brunei, Chile and Singapore,

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<sup>35</sup> Inside US Trade, 12<sup>th</sup> December, 2012, [www.insidetrade.com](http://www.insidetrade.com), p. 4.

New Zealand reached an agreement on the labour issue – the Memorandum of Understanding on Labour Cooperation.<sup>36</sup> The Memorandum consisted of six articles and one attachment of the 1998 ILO Declaration. In substantive provisions, the four state parties made reference to the ILO Declaration, international labour commitments, refrainment from trade protectionist purpose, state autonomy and public awareness improvement in the labour field.<sup>37</sup> However, the wording of declarative nature in Article 2 such as “... shall work to ensure...”, “... recognize...” and “... shall promote...” gave rise to no legally binding obligations. Procedural provisions set up frameworks of cooperation, institutions and consultation.<sup>38</sup> In addition, labour agreements between New Zealand and other non-TPP state parties do not recognize labour commitments as legally binding but just political commitments.<sup>39</sup>

To Australia, nearly all trade agreements to which it is a party contain no provisions on labour. The only agreement that does not follow suit is the FTA with the U.S. in 2004. Because both Australia and the U.S. are modern developed industrialized countries with similar development level and average wage and have recognized fundamental labour principles and working rights, the labour issue is not a stumbling block in their FTA negotiation. In Chapter 18 on labour, both committed to the implementation of their domestic labour law and disputes over the enforcement of labour commitments between the two countries shall be governed by the dispute settlement mechanism under the FTA. Chapter 21 on dispute settlement gives priority to consultation. In case consultation fails to solve the dispute, a panel shall be established and award damages, if necessary. Therefore, it is most likely that Australia will support or propose a labour chapter similar to Chapter 18 of AUSFTA.

### ***Viewpoints of developing countries***

To almost countries, including developing countries, social policies in general and labour policies in particular are among the most sensitive. Therefore, most FTAs involving developing countries have provisions regulating that the official dispute settlement mechanism shall not be

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<sup>36</sup> <http://www.mfat.govt.nz/Trade-and-Economic-Relations/2-Trade-Relationships-and-Agreements/Trans-Pacific/0-history.php> visited on 12th May, 2014.

<sup>37</sup> Memorandum of Understanding on Labour Cooperation of the Trans-Pacific Strategic Economic Partnership Agreement, Article 2.

<sup>38</sup> Ibid, Article 3, 4 and 5.

<sup>39</sup> For example, see Labour Agreement between New Zealand and Thailand 2005, Section 4.1 stipulates that the agreement is not legally binding on the parties.

applied to the labour matter either explicitly or implicitly by prioritizing the application of domestic standards. Some FTAs set up a special consultation mechanism to avoid applying the official litigation procedure. The other FTAs, if allowing the application of the official dispute settlement mechanism, stipulate that it is the last resort when other alternatives fail to settle labour conflicts among parties.

*Viewpoint of Peru:* Peru signed FTA with the U.S. in 2007 which includes a labour chapter. As stated above, this FTA follows the Template adopted by the U.S. in 2007, hence, it can be inferred that the viewpoint of Peru on the labour issue in TPP will be the same as the labour chapter in FTA between them and the U.S. and similar to the U.S. 2007 Template.

*Viewpoint of Brunei:* The fact that Brunei, in 2006, joined the Memorandum of Understanding on Labour Cooperation shows that Brunei favors the proposal that encourages rather than legally obligates parties to (1) uphold their domestic labour standards, (2) ensure the compatibility between domestic labour standards and international standards, (3) refrain from using labour standards as trade protection tools, and (4) refrain from relaxing labour standards for investment attraction. Besides, Brunei rejects the application of dispute settlement mechanism to the labour matter.<sup>40</sup>

*Viewpoint of Vietnam:* So far, Vietnam has not reached any labour arrangement included in trade agreements with any TPP state party. In addition, neither Vietnam's government nor its TPP negotiation team has given any official and public statement on its viewpoint or guideline or objectives in TPP labour negotiation. However, like Brunei, Vietnam protests against the application of binding dispute settlement mechanism to labour commitments.<sup>41</sup>

For other developing countries, there is no official information about their views on labour negotiations in TPP.

### ***Scenarios of labour negotiation results in TPP***

There are huge gaps among TPP state parties in terms of size, development stages and incomes per capita, as a result, they hold divergent stances in negotiations in general and in labour in particular, requiring tremendous efforts and time. Therefore, it is a huge challenge to make

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<sup>40</sup> Fergusson et al. (2013), *TPP Negotiations and Issues for Congress*, Congressional Research Service, p. 42.

<sup>41</sup> Ibid.

predictions of TPP labour negotiation outcomes. Nevertheless, based on the above analysis of positions and proposals of TPP state parties throughout the 18 negotiation rounds, some possibilities of labour negotiation results can be foreseen. Regardless of what scenario comes true, it is known for sure that the preamble to the TPP agreement shall mention the labour issue and the inter-link between labour and trade. Besides, the TPP agreement shall include a separate chapter on labour.<sup>42</sup> The labour chapter will absolutely covers regulations obligating or allowing cooperation and technical assistance. Hence, scenarios of labour negotiation outcomes differ from each other mainly in scope and depth of labour commitments in the labour chapter.

Regarding the scope of application, there are two possibilities: labour provisions in TPP apply only to trade-related labour issues or they apply to labour issues in general, no matter whether the issues pertain to trade or not. In fact, there are other international frameworks more efficient than the TPP in resolving pure labour issues, such as, the ILO, the General System of Preferences, policies of international development financial organizations (the World Bank, Asian Development Bank...). Accordingly, the second possibility is less likely to happen. In other words, chances are that labour provisions in TPP aim at handling trade-related concerns of state parties: assurance of fair trade and linkage between trade liberalization and labour condition improvement. However, the first possibility has two cases: TPP labour provisions apply to labour issues relating to trade relations in which all parties must be TPP state members or to trade relations in which at least one state party is a TPP member. So far, it is not clear whether the former or the latter has been favoured because of the scarcity of information on the position of negotiating state parties on this issue. However, because TPP state members have been or will be parties to other PTAs covering labour issues, so there is a very good chance that the former will dominate.

Regarding legal validity, as stated above, there are also two possibilities: labour commitments are legally binding obligations with which state parties have to comply<sup>43</sup> or labour commitments are not legally binding on state parties but there are mechanisms to ensure cooperation, coordination and conversations in matters of mutual interests of parties. Under the pressure from the U.S. and in the context that other developed countries consents to or do not object to the

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<sup>42</sup> The Framework TPP Agreement adopted in November 2011 expressly confirms that the Agreement will cover a chapter on labour.

<sup>43</sup> Similar to those in NAFTA and the four latest FTAs involving U.S.



legally binding validity of labour commitments, there are greater chances that the first possibility will take place, legally obligating state parties to comply with labour commitments. Furthermore, remedies available to labour commitment violations may be fixed in two ways: (1) only monetary penalties are available,<sup>44</sup> or (2) both monetary penalties and trade sanctions are available depending on trade losses from which violated parties suffer.<sup>45</sup>

Regarding substantive provisions, there are five possibilities: (1) state parties commit to not lowering their existing national labour standards for the purpose of export or investment proliferation, or (2) state parties commit to effective implementation and enforcement of their existing domestic labour law, or (3) state parties commit to progressive improvements of their domestic labour standards, or (4) state parties commit to internationally recognized labour standards or (5) combination of two or more preceding possibilities. The first option is usually applied in FTAs among developed countries which have applied and are applying high and similar labour standards domestically. However, joining TPP are countries with different development levels and diverse labour standard systems, therefore, the first possibility is less likely to exist or exist independently. The second and third possibilities barely bring about any practical implementation. Regarding the second possibility, state parties just commit to maintaining the standstill status of their domestic legal system without any secured future improvement. And the unambiguity of the wording of provision in the third possibility makes it hard to determine whether efforts have been made by state parties to upgrade labour standards. If the fourth possibility comes true, the U.S. will succeed in inserting into the agreement most of the proposed contents of the December, 2011 proposal, obligating other states to obey the five fundamental principles in the 1988 ILO Declaration<sup>46</sup> and imposing measures to ensure the enforcement.<sup>47</sup> It is most likely that the last possibility will happen under the pressure of the U.S. and huge divergences among state parties.

In terms of procedural regulations, there are two possibilities. The first possibility is that the general official dispute settlement procedure in TPP will not apply to labour disputes, but instead

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<sup>44</sup> Similar to the corresponding template in NAALC.

<sup>45</sup> Similar to the corresponding template in FTAs between the U.S. and Peru, Panama, Colombia and Korea.

<sup>46</sup> Similar to the corresponding template in FTAs between the U.S. and Peru, Panama, Colombia and Korea.

<sup>47</sup> Similar to the proposal by the U.S. in November, 2011.

apply a special dispute settlement procedure,<sup>48</sup> including cooperation, consultation and supervision... mechanisms. The second possibility is that the general official dispute settlement procedure in TPP will apply to labour disputes in the same way as to trade disputes. Because of the sensibility of the labour issue, it is less likely that labour disputes are resolved in the same way as trade dispute and exposed to the same dispute settlement procedure. Therefore, there is less chance for the second possibility to take place. However, this is a complicated issue and making predictions is a huge challenge.

TPP is hoped to be a “21<sup>st</sup>-century Agreement” or a “high-standard Agreement”; therefore, it is very likely that labour provisions in TPP will cover the widest and deepest commitments ever compared to any ratified trade agreements so far. There are great chances that most of contents of the proposal by the U.S. in November, 2011 will be inserted into the final agreement. Although state parties to TPP have increased in number and largely differ from each other and it is not easy for the U.S. to impose their labour view and standards on the other and other parties will absolutely require the U.S. to make some concessions on the issue, for the U.S., labour negotiations in TPP have certain advantages: (1) all TPP state parties base their development on their integration into global trade, (2) all TPP state parties have the strongest favour of trade liberalization, (3) all TPP state parties have make commitments to the conclusion of a “comprehensive and high-standard agreement”<sup>49</sup> and (4) the U.S. has rich experience in resolving discrepancy among state parties due to their regular negotiation practice with countries of dissimilar development levels.

*b. Vietnam-EU FTA*

Vietnam-EU FTA negotiation was officially launched on 26<sup>th</sup> June, 2012 and is planned to come to conclusion by May, 2014 prior to the election of the European Parliament. So far, by the end of November, 2013, five negotiation rounds have taken place. The first three rounds mainly focused on information exchange among the two parties. During the fourth round in July, 2013, the two parties discussed substantive issues for the first time. The fifth negotiation round started

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<sup>48</sup> Similar to the corresponding templates in NAALC and FTAs between the U.S. and Peru, Panama, Colombia and Korea.

<sup>49</sup> <http://www.ustr.gov/tpp> visited on 7<sup>th</sup> January, 2014.

on 4<sup>th</sup> November 2013 in Vietnam, revolving on 4 important topics including the trade and sustainable development one.

Although Vietnam-EU FTA negotiation has not come to an end, the labour provisions covered in the FTA can be logically forecast based on the analysis of the relevant labour provisions in other preceding PTAs involving Vietnam and the EU which have been concluded. Indeed, with regard to the labour issue, the EU, not Vietnam, is the demandeur, therefore, the final version of the labour provisions will be driven more by the EU and reflect more of the EU's intention.

EU trade policies in PTAs were first fully reflected in three seminal EC documents: "Global Europe: Competing in the World" in 2006, "Trade, Growth and World Affairs in 2010"<sup>50</sup> and "Trade: A Key Source of Growth" in 2013. According to the 2006 and 2010 Communications, the three top objectives of the EU by 2020 are smart, sustainable and inclusive growth,<sup>51</sup> through more growth, more jobs and lower consumer prices.<sup>52</sup> The EU has made a strong commitment to sustainable development, that is, development of investment and trade relations must not be to the detriment of social values, including labour values and economic and social development should be mutually supportive rather than mutually exclusive.<sup>53</sup>

So far, the EU is a party to a number of PTAs covering the labour issue, including EU-South Africa FTA 2000, EU-Chile FTA 2003, EU-CARIFORUM FTA 2008, EU-Korea FTA 2009, EU-Peru 2010 taking effect since 2013, EU-Singapore FTA 2012 and EU-Columbia-Peru FTA in 2012. In addition, some other on-going PTA negotiations involving the EU also cover the labour issue, such as EU-India FTA started in 2007, CEFTA with Canada started in 2009, FTA with Malaysia in 2010, Trans-Atlantic Trade and Investment Partnership with the U.S. in 2013, FTA with Japan in 2013 and Thailand in 2013.<sup>54</sup> It is quite clear that the inclination of the EU to the inclusion of labour provisions in PTAs began in 2000.

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<sup>50</sup> European Commission (2010), *Trade, Growth and World Affairs*, p. 4.

<sup>51</sup> European Commission (2006), *Europe 2020: A strategy for smart, sustainable and inclusive growth*, [http://ec.europa.eu/eu2020/index\\_en.htm](http://ec.europa.eu/eu2020/index_en.htm).

<sup>52</sup> European Commission (2010), *Trade, Growth and World Affairs*, p. 5.

<sup>53</sup> <http://trade.ec.europa.eu/doclib/press/index.cfm?id=974> visited 7<sup>th</sup> January, 2014.

<sup>54</sup> European Commission (2013), *Memo: The EU's Free Trade Agreements – Where are We*, available at <http://ec.europa.eu/trade/policy/countries-and-regions/agreements/> visited 10 December, 2013.

Different from the PTAs to which the U.S. is a party, in FTAs involving the EU, the labour issue is normally included in the Trade and Sustainable Development Chapter, instead of a separate Labour Chapter. This practice started with EU-Korea FTA 2009. The Trade and Sustainable Development Chapter regarding the labour issue in these FTAs covers four major contents: (1) general commitments to the application of fundamental labour standards of the ILO and its relevant meeting agenda, including the commitments of the ratification and effective implementation of all conventions of the ILO which have already been passed and not limited to the conventions on fundamental labour standards; (2) recognition of the autonomy of parties in the domestic regulations while still ensuring the high level of labour protection and commitment of neither exemption from nor modification of labour standards at the expense of trade and investment among the relevant parties; (3) surveillance mechanism based on the monitoring of the community involving civil societies in parties. Each party shall establish a civil society advisory group consisting of representatives from businesses and labour unions. The groups shall meet annually to discuss the enforcement of sustainable development aspects. Cooperation and surveillance activities will be carried out by a board/committee;<sup>55</sup> and (4) the mechanism to settle the conflicts is run by an independent Panel of Experts.<sup>56</sup> Different from the U.S., the EU tends to prefer promotional provisions in PTAs.

On the EU part, bilateral FTAs with individual South East Asian countries are taken as the replacement for the EU-ASEAN FTA which was stopped in 2009 after two fruitless negotiation years. In the Southeast Asian region, in addition to the FTA negotiation with Vietnam, the EU finished its FTA negotiation with Singapore in 2012, and started FTA negotiations with Malaysia and Thailand in December, 2010 and March, 2013 respectively. Therefore, the reflection of labour provisions in these FTAs can give useful hints to project the labour provisions in the future Vietnam-EU FTA. Indeed, the EU has tried to make the FTA with Singapore as an example to FTAs with other ASEAN countries.<sup>57</sup>

In EU- Singapore FTA, the labour issue is mentioned right at the Preamble as follows: the EU and Singapore are “determined to strengthen their economic, trade, and investment relations in

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<sup>55</sup> See EU-Korea FTA, Article 13.12.

<sup>56</sup> Ibid, Article 13.15.2.

<sup>57</sup> European Commission (2010), *Civil Society Meeting: EU-ASEAN SIA Position Paper*, p. 1, available at [http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc\\_146357.pdf](http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146357.pdf).

accordance with the objective of sustainable development, in its economic, social ... dimensions, and to promote trade and investment in a manner mindful of high levels of ... labour protection and relevant internationally recognised standards and agreements to which they are Parties.”<sup>58</sup> The labour issue is regulated in Chapter 13 on Trade and Sustainable Development. Both the EU and Singapore confirm “their commitment to developing and promoting international trade and their bilateral trade and economic relationship in such a way as to contribute to sustainable development,”<sup>59</sup> “recognise that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development”<sup>60</sup> and “underline the benefit of cooperation on trade-related social and environmental issues as part of a global approach to trade and sustainable development.”<sup>61</sup> The agreement prevents the potential of weakening or reduction of domestic labour law protection to foster trade or investment and the practice of using labour standards for trade protectionism.<sup>62</sup> The agreement stresses the objective of enhancing the trade relations and cooperation among the two parties in a sustainable development increasing manner.<sup>63</sup> In terms of substantive rules, the autonomy of the parties in self-determining its labour protection level as well as in adopting or modifying its relevant laws and policies in accordance with the labour principles of internationally recognized standards and agreements are realized. The agreement provides for the obligation to continue to improve labour law and policies and to make efforts to provide and encourage high levels of labour protection.<sup>64</sup> The parties value “full and productive employment and decent work for all as a key element of sustainable development... and as a priority objective of international cooperation”<sup>65</sup> and try to improve “the development of international trade in a way that is conducive to full and productive employment and decent work for all.”<sup>66</sup> The parties bear the obligation of regard for, improvement of and effective implementation of the four principles of fundamental rights at work, including (1) “the freedom of association and the

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<sup>58</sup> Preamble to EU-Singapore FTA.

<sup>59</sup> EU-Singapore FTA, Article 13.1.1.

<sup>60</sup> Ibid, Article 13.1.2.

<sup>61</sup> Ibid, Article 13.1.2.

<sup>62</sup> Ibid, Article 13.1.3.

<sup>63</sup> Ibid, Article 13.1.4.

<sup>64</sup> Ibid, Article 13.2.2.

<sup>65</sup> Ibid, Article 13.3.2.

<sup>66</sup> Ibid.

effective recognition of the right to collective bargaining;”<sup>67</sup> (2) “the elimination of all forms of forced or compulsory labour;”<sup>68</sup> (3) the effective abolition of child labour;”<sup>69</sup> and (4) “the elimination of discrimination in respect of employment and occupation.”<sup>70</sup> In addition, the parties bear the duty of effectively implementation of ILO Conventions ratified by them and “make continued and sustained efforts towards ratifying and effectively implementing the fundamental ILO conventions and they will exchange information in this regard.”<sup>71</sup> “The Parties will also consider the ratification and effective implementation of other ILO conventions, taking into account domestic circumstances. The Parties will exchange information in this regard.”<sup>72</sup>

Base on EU-Singapore FTA consideration, EU-Vietnam FTA’s labour most likely contains the followings: importance of sustainable development in the preamble and the commitment of both the EU and Vietnam to taking into consideration the need of economic and social consistency, commitment to the objective of decent work (covering core labour standards, full and productive employment, occupational safety, dialogues and equality element), measures taken by Vietnam to ratify the rest unratified ILO core labour conventions because Vietnam fails to ratified all of the ILO core labour conventions, labour-standard lowering prevention clause to prohibit the practice of undermining of employees’ rights for FDI and trade proliferation purposes, especially in export processing zones. In addition, EU-Vietnam FTA is most likely to provide for prohibition of using the protection of labour rights of employees as excuses for trade protectionism, a mechanism of information exchange, consultation and review to facilitate and monitor implementation of labour commitments. Chances are that there will be a disconnection between labour violations and trade sanctions. Labour claims are exempted from the single and uniformly-applied dispute resolution mechanism which is available to other trade-related claims.

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<sup>67</sup> Ibid, Article 13.3.3.

<sup>68</sup> Ibid.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> Ibid, Article 13.3.4.

<sup>72</sup> Ibid.

## CHAPTER 2: POTENTIAL IMPLICATIONS OF LABOUR PROVISIONS IN PREFERENTIAL TRADE AGREEMENTS RELEVANT TO VIETNAM

### 1. Characteristics of Vietnam's economy and employment

Vietnam is a developing, middle-income country in the South East Asian region. By 2014, GDP of Vietnam was VND 3,584,261 billion, equivalent to USD 170.5 billion.<sup>73</sup> In 2013, goods export and import volumes reached USD 132.2 and 131.3 billion respectively.<sup>74</sup> Services exports and imports totaled USD 10.5 and 13.2 billion respectively.<sup>75</sup> The ratios of total exports and imports to GDP were 83.7% and 84.8% correspondingly. The EU is the biggest export market of Vietnam with the volume of USD 24.4 billion, the U.S. comes second with USD 23.7 billion, ASEAN comes third with USD 18.5 billion, Japan comes fourth at USD 13.6 billion, China places fifth at USD 13.1 billion and Korea USD 6.7 billion.<sup>76</sup>

Pattern of goods and services exports and imports of Vietnam reflects its economic development and competitiveness which are based on the endowment of labour factor and contribute low added values. In terms of exports, heavy industries and minerals account for 44.3%, light industries 38.1%, agriculture and forestry and fishing 5.1%.<sup>77</sup> Among light industry and agricultural products, textile, clothing and food are main exports.<sup>78</sup> In terms of imports, production materials total 92%, of which machinery, equipment, tools and transportation means account for 36.7%, accessories and fuels 55.3%. Besides, consumption goods count the rest 8%. In 2013, Vietnam ranked 70<sup>th</sup> out of 148 economies in the Global Competitiveness Index, compared to 70<sup>th</sup> out of 144 economies in 2012.<sup>79</sup> As a factor-driven economy,<sup>80</sup> Vietnam's competitiveness come mainly from the contribution of institutions, infrastructure, macroeconomic stability, working force in good health and with fundamental education,<sup>81</sup> and

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<sup>73</sup> <http://www.gso.gov.vn/default.aspx?tabid=413&thangtk=12/2013> visited on 7th January, 2014.

<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> Ibid.

<sup>77</sup> Ibid.

<sup>78</sup> WTO (2013), *Trade Policy Review: Vietnam*, p. 25

<sup>79</sup> World Economic Forum (2013), *Global Competitiveness Report 2013-2014*, p. 15, available at <http://www.weforum.org/reports/global-competitiveness-report-2013-2014>.

<sup>80</sup> Ibid, p. 11

<sup>81</sup> Ibid, p. 10

Vietnam has competitive advantages in producing and trading in low-price and unskilled-labour-intensive goods and services.<sup>82</sup>

Vietnam has a huge population of labour force but a low notified unemployment rate. By the end of 2013, the population of Vietnam was over 90 million.<sup>83</sup> By 1/1/2014, the labour force of full 15 years old or above was around 53.65 million, equivalent to 59.6% of the population.<sup>84</sup> The labour force within the labour age is 47.49 million, of which 53.9% is male and 46.1% is female.<sup>85</sup> 46.9% of the labour force work in agriculture, 21.1% in industry and the rest of 32% in services.<sup>86</sup> Employment in the unofficial area accounted for 34.2%, of which 47.4% and 28.6% was in the urban and rural areas respectively. The unemployment rate of people within the labour age range in 2013 was 2.18%, of which the ratio was 3.59% and 1.54% in the urban and rural areas respectively.<sup>87</sup> The underemployment rate of labour force in working age was 2.75% in 2013, of which the ratio was 1.48% and 3.31% in the urban and rural areas respectively.<sup>88</sup> In 2013, the unemployment rate was 6.36% among labourers within the 15-24 year old range, 1.21% among labourers 25 years old or above. This increasing tendency resulted from production difficulties.

## **2. Assessment of status-quo of labour law and its implementation in Vietnam**

In order to comprehensively and fully evaluate potential impacts of labour commitments of Vietnam under PTAs, it is necessary to reflect on the status-quo of law on labour standards, labour rights and their implementation in Vietnam.

### **2.1. Legal Framework for Labour Rights**

So far, Vietnam has ratified 20 ILO Conventions, including Convention No. 6, 14, 27, 29, 45, 80, 81, 100, 111, 116, 120, 122, 123, 124, 138, 144, 155, 182, 186 and Maritime Labour Convention.<sup>89</sup> Despite the fact that Vietnam fails to ratify ILO Convention 87 on Freedom of

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<sup>82</sup> Ibid.

<sup>83</sup> <http://www.gso.gov.vn/default.aspx?tabid=413&thangtk=12/2013> visited on 7th January, 2014.

<sup>84</sup> Ibid.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid.

<sup>87</sup> GSO (2014), *Statistical Handbook 2013*, Statistics Publishing House, p. 49.

<sup>88</sup> Ibid, p.50.

<sup>89</sup> [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:103004](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103004) visited 9th January, 2014.



Association and Protection of the Right to Organize, Convention 98 on Right to Organize and Collective Bargaining 1949 and Convention 105 on Abolition of Force Labour,<sup>90</sup> these three conventions, among others, are considered compulsory and universally applicable to all ILO Member states. Hence, Vietnam has to observe all of the above-mentioned conventions.

Domestically, labour rights are regulated in both legislations and delegated legislations in Vietnam. The Constitution of Vietnam 2013, the legal document of the highest validity, revised and approved by the National Assembly of Vietnam on 28<sup>th</sup> November, 2013, recognizes fundamental rights of equality and non-discrimination,<sup>91</sup> rights to employment, choice of career, jobs and workplace, ensures safe and fair working conditions, rights to payment and holidays and prohibits discrimination and child labour.<sup>92</sup> But the Constitution also provides for restrictions of such rights on the grounds of national defence, national security, order, social safety, social ethics and health of the community.<sup>93</sup>

Of lower validity, the Labour Code of Vietnam 2012 “specifies the labour standards; the rights, obligations and responsibilities of employees, employers, labour representative organizations and employers’ representative organizations in the labour relation and other relations directly related to the labour relation and state management of labour.”<sup>94</sup> In terms of *freedom of association*, although Vietnam has not ratified ILO Convention 87,<sup>95</sup> the Code regulates the rights of employees to “establish, join and participate in activities of the Union, professional organizations and other organizations as prescribed by law.”<sup>96</sup> The Union has the right to “the representative role, protection of legitimate and proper rights and interests of trade union members and employees, participation, negotiation, signing and supervision of the implementation of collective labour agreement, salary scale, payroll, labour norms and salary payment regulation, bonus regulation, labour rules and democracy regulations at enterprises, agencies and organizations, participation in and support of labour dispute settlement; dialogue and cooperation with employers to build harmonious and progressive labour relations at the

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<sup>90</sup> Ibid.

<sup>91</sup> Constitution of Vietnam 2013, Article 16.

<sup>92</sup> Ibid, Article 35.

<sup>93</sup> Ibid, Article 14, Section 2.

<sup>94</sup> Labour Code of Vietnam 2012, Article 1.

<sup>95</sup> [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:103004](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:103004) visited 9th January, 2014.

<sup>96</sup> Ibid, Article 5, Section 1(c).

enterprises, agencies and organizations.”<sup>97</sup> Workers in Vietnam, except for those in certain areas, have the right to strikes.<sup>98</sup> These areas do not cover export-processing zones but just those essential to the national economy in which strikes threaten national security, defence, health and public order. Strikes can be implemented only for the reason of collective labour disputes over interests<sup>99</sup> and must be at least 3 days after the release of unsuccessful mediation minutes by the Industrial Arbitration Council.<sup>100</sup> In case of successful mediation, the time span must be 5 days and either of the dispute parties fails to perform the mediation agreement.<sup>101</sup> Strikes must be conducted through three steps: collecting opinions of the labour collective, making decisions on strikes and striking.<sup>102</sup> Violations of law on strikes, industrial actions and lock-outs will be punished by civil, administrative and criminal penalties, depending on their severity.<sup>103</sup>

In terms of *collective bargaining*, it is defined as the practice in which “the labour collective makes discussion and negotiation with the employer for the purposes of building harmonious, stable and progressive labour relations; establishing new working conditions as a basis for signing the collective labour agreements; and settling the problems and difficulties in implementing the rights and obligations of each party in the labour relations.”<sup>104</sup> The collective bargaining regulations require elements of “goodwill, equality, cooperation, openness and transparency.”<sup>105</sup> Both the labour collective and the employer have the right to require collective bargaining.<sup>106</sup> Representative of the parties, contents, procedure and formality of collective bargaining have been regulated clearly.<sup>107</sup>

In terms of *non-discrimination*, the Code prevents “discrimination by sex, race, social class, marital status, belief, religion, discrimination against HIV sufferers, disabled people or against

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<sup>97</sup> Ibid, Article 18, Section 1.

<sup>98</sup> List of these areas can be seen at Decree No. 41/2013/NĐ-CP dated 8<sup>th</sup> May 2013 by the Government.

<sup>99</sup> The term ‘collective labour disputes over interests’ is defined in Labour Code of Vietnam 2012, Article 3, Section 9.

<sup>100</sup> Labour Code of Vietnam 2012, Article 209, Section 2.

<sup>101</sup> Labour Code of Vietnam 2012, Article 206, Section 3.

<sup>102</sup> Labour Code of Vietnam 2012, Article 211.

<sup>103</sup> Labour Code of Vietnam 2012, Article 233. Under Decree No. 95/2013/ND-CP, fines ranging from VND 1 to 2 million (around USD 50-100) can be awarded against employees for violation of strike regulations. In case of violations by employers, fines range from VND 3 to 5 million (equivalent to around USD 150-250).

<sup>104</sup> Ibid, Article 66.

<sup>105</sup> Ibid, Article 67.

<sup>106</sup> Ibid, Article 68.

<sup>107</sup> Ibid, Article 69, Section 1(b), Article 70 and Decree No. 196/CP dated 31<sup>st</sup> December 1994 and Decree No. 93/2002/NĐ-CP.

the reasons for establishing, joining and participate in the Union activities.”<sup>108</sup> Employees have the right to “work, independently select works, vocations, get vocational training and improvement without discrimination.”<sup>109</sup>

In terms of *child labour*, there is no uniform definition of child labour in the legal system of Vietnam; the Labour Code introduces the concept of ‘junior labourers’ and stipulates that junior labourers are employees who are full 15 years old<sup>110</sup> and under 18 years old<sup>111</sup> and outlaws illegal utilization of junior labourers.<sup>112</sup> Employment of labourers under 13 years old is strictly prohibited with some exceptions.<sup>113</sup> Labourers in the 13-15 group age can be employed for light work only.<sup>114</sup> Junior labourers can be employed for work in accordance with their health to ensure their physical, mental and personality development.<sup>115</sup> The Code bans the employment of junior labourers in heavy, hazardous, dangerous work or in workplaces or for work negatively affecting their personality.<sup>116</sup> Upper limit of the working hour number for junior labourers is 8 hours per day and 40 hours per week.<sup>117</sup> That for labourers under 15 years old is 4 hours per day and 20 hours per week and no overtime or night shift is allowed.<sup>118</sup> In terms of *coercive labour*, the Code forbids the practice<sup>119</sup> which is defined as “the use of force, the threat to use force or other tricks to coerce other people to work involuntarily.”<sup>120</sup>

Regarding labour rights, the Code has stipulated a quite comprehensive system of regulations. In terms of *minimum wages*, the Code stipulates that wages of employees are restricted to the lowest level of minimum wage rates fixed by the Government.<sup>121</sup> Minimum wage rates have to sufficiently cover the bare living expenses of the employee performing the most basic work and

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<sup>108</sup> Ibid, Article 8, Section 1.

<sup>109</sup> Ibid, Article 5, Section 1(a).

<sup>110</sup> Ibid, Article 3, Section 1.

<sup>111</sup> Ibid, Article 161.

<sup>112</sup> Ibid, Article 8, Section 7 and Article 120.

<sup>113</sup> Ibid, Article 164, Section 3.

<sup>114</sup> Ibid, Article 164, Section 1. The list of light works is made by MOLISA.

<sup>115</sup> Ibid, Article 162.

<sup>116</sup> Ibid, Article 163. The list of the work and workplaces is made by MOLISA and Ministry of Health. Examples include those listed in Labour Code of Vietnam 2012, Article 163, Section 4 and Article 165.

<sup>117</sup> Ibid, Article 163, Section 2.

<sup>118</sup> Ibid, Article 163, Sections 2 and 3.

<sup>119</sup> Ibid, Article 8, Section 3 and Article 106, Section 2(a).

<sup>120</sup> Ibid, Article 3, Section 10.

<sup>121</sup> Ibid, Article 90, Section 1.

his family.<sup>122</sup> Taking into consideration the bare living expenses, socio-economic situation and labour prices in the labour market, Vietnam's Government decideds on region-based minimum wage rates while the National Wage Council has the duty of making relevant proposals.<sup>123</sup> The National Wage Council plays an advisory role and operates on the tripartism, including the state, the employee and the employer.<sup>124</sup> In terms of *working hours*, 8 hours and 48 hours are the ceiling limit of regular working time for a day and a week respectively.<sup>125</sup> In case of workweek-based employment, the law fixes the upper limit of a regular workweek at 10 hours per day and 48 hours per week but the 40-hour workweek practice by employers are encouraged.<sup>126</sup> The upper limit reduces to 6 hours per day for heavy, hazardous or dangerous work.<sup>127</sup> Night shifts start at 22 p.m and end at 6 a.m the following day. The law also sets the limit for overtime working hours.<sup>128</sup> Wages paid for overtime work will be from 50% to 120% higher than the regular wages depending on the timing of the overtime work.<sup>129</sup> In terms of *work safety and hygiene*, the Code stipulates the obligation of work safety and hygiene of not only employers but also employees.<sup>130</sup>

To settle labour disputes, the Code provides for the compulsoriness of the conciliation procedure initiated by either industrial conciliators or industrial arbitration councils except for certain cases.<sup>131</sup> Civil, administrative and criminal sanctions can be awarded in labour disputes, depending on severity.<sup>132</sup>

In addition, there are around 90 Decrees issued by the Government, 25 Decisions by the Prime Minister, 200 Circulars and Decisions by relevant Ministers specifying and guiding in detail the

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<sup>122</sup> Ibid, Article 91, Section 1.

<sup>123</sup> Ibid, Article 91, Section 2.

<sup>124</sup> Ibid, Article 92, Section 1.

<sup>125</sup> Ibid, Article 104, Section 1.

<sup>126</sup> Ibid, Article 104, Section 2.

<sup>127</sup> Ibid, Article 104, Section 3.

<sup>128</sup> Ibid, Article 106, Section 2(b) and Article 107.

<sup>129</sup> Ibid, Article 97.

<sup>130</sup> Ibid, Article 138.

<sup>131</sup> Ibid, Article 199, 201, 204 and 206. Regulated in detail in Circular No. 08/2013/TT-BLĐTBXH.

<sup>132</sup> In terms of the administrative sanctions, see Decree No. 95/2013/NĐ-CP dated 22<sup>nd</sup> August 2013 by the Government of Vietnam.

implementation of the Labour Code.<sup>133</sup> Therefore, it can be concluded that Vietnam has, *de jure*, ensured the fundamental rights of employees at work.

## ***2.2. Implementation of Labour Law in Vietnam***

MOLISA is the governmental body at the central level responsible for employment and labour. The Ministry consists of Department of Gender Equality, Department of Work Safety, and Ministerial Inspection. Department of Gender Equality formulates long-term and annual strategies, programs, plans, projects, proposals, national objectives of gender equality, provides guidelines and monitors the implementation of state and ministerial regulations on gender equality.<sup>134</sup> Department of Work Safety formulates long-term and annual strategies, programs, plans, projects and promulgates work safety, working conditions, national programs of work safety and hygiene, provides guidelines and monitors the implementation of state and ministerial regulations on work safety, work hygiene and work protection, updates, statistics and reports on labour accidents.<sup>135</sup> Ministerial Inspection has the duties of supervision of labour law enforcement, labour accidents and infringement of labour safety and hygiene, resolution of labour claims and accusation in accordance with law and of handling, in accordance with its competence, and making recommendations of labour law violations.<sup>136</sup> In addition, there are corresponding responsible bodies at province-level Departments of Labour, Invalids and Social Affairs.

Industrial Arbitration Councils are established by Presidents of provincial People's Committees.<sup>137</sup> The head of the Council is the head of the provincial executive body in the labour field,<sup>138</sup> while the secretary and other members of the Council are representatives from province-level trade unions and employers' representative organizations.<sup>139</sup> The operation of the

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<sup>133</sup> MOLISA (2011), *Report on the Summary and Assessment of 15 years of Implementation of Labour Code*, p. 2.

<sup>134</sup> Decision No. 798/QĐ-LĐTBXH dated 23<sup>rd</sup> May, 2013 issued by MOLISA.

<sup>135</sup> Decision No. 948/QĐ-LĐTBXH dated 25<sup>th</sup> June, 2013 issued by MOLISA.

<sup>136</sup> Labour Code of Vietnam 2012, Article 237.

<sup>137</sup> Provincial People's Committees are the executive state bodies at the provincial level. The Government is the executive state body at the central level. Labour Code of Vietnam 2012, Article 199, Section 1.

<sup>138</sup> Provincial executive state bodies in the labour field are Departments of Labour, Invalids and Social Affairs in provinces. The corresponding body at the central level is MOLISA. Labour Code of Vietnam 2012, Article 199, Section 1.

<sup>139</sup> Labour Code of Vietnam 2012, Article 199, Section 1.

Council is facilitated by provincial People's Committees in all aspects including financing.<sup>140</sup> Therefore, similar to trade unions, the Councils are closely linked to the state. Contribution of the Councils is quite restricted, proven by the number of settled labour disputes. During the 1998-2008 period, the Councils nationwide settled 5 labour disputes and awarded VND 1.7 billion benefits to employees. This results partly from the unawareness of employees of the conciliation roles of the Councils and partly from the disqualification of labour conciliators.

*a. Freedom of Association*

By the end of June, 2013, over 8 million workers (over 15% of the workforce) are unionized and there were 115,242 union entities<sup>141</sup> which were affiliated with the Vietnam General Confederation of Labour. There is no independent trade union. Contributions of the Trade Union includes, firstly, their participation in the development of policy and law of employment relations in the forms of directly drafting the documents or indirectly submitting opinions via fora with state administration bodies. Secondly, the Trade Union has organized the promulgation, education and consultation in labour law for employees through booklets, training courses, labour law contests... 47 legal consultancy centers and offices, 394 legal consultancy groups with some 1,000 legal counselors at 56 provincial and sectoral labour associations have been established, providing free legal counseling services for 50,000 employees.<sup>142</sup> Thirdly, the Trade Union has participated in and cooperated with state competent bodies of labour, invalids and social affairs to examine the compliance status with labour law and trade union law, discover, handle and correct violations at provinces and enterprises which have established grassroots-level labour unions, spotting inconsistencies and obstacles to the conformities to propose appropriate labour law revisions.

However, the regulation on freedom of association has not comprehensively and effectively implemented. A majority of enterprises have no trade union. The corresponding ratios in private and foreign-direct-investment companies are 80% and 60% respectively.<sup>143</sup> The ratio of enterprises having no trade union is high even in large cities: 88% in Hanoi, 87.3% in Vinh Phuc,

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<sup>140</sup> Labour Code of Vietnam 2012, Article 199, Section 4.

<sup>141</sup> <http://www.congdoanvn.org.vn/shortnews.asp> visited on 7th January, 2014.

<sup>142</sup> MOLISA (2011), *the Summary and Assessment of 15 years of Implementation of Labour Code*, p.28.

<sup>143</sup> *Ibid*, p. 29.

98% in Da Nang, 70% in Ba Ria Vung Tau and 50% in Ho Chi Minh City.<sup>144</sup> For established trade unions, they fail to perform or perform not very well their mandates and duties in accordance with labour and trade union law. Their activities are limited, not substantive, focusing mainly on encouragement of employees to help them recover from illness, injuries, bad-luck events. None strike so far has involved trade union. In many cases, the trade union has no idea of on-going strikes. During the 1995-2013 period, there were 5,003 strikes, of which 355 strikes were in 2013.<sup>145</sup> On average, there were 263 strikes every year. Notably, all of 1995-2004 period strikes and a majority of strikes from 2004 on have so far been illegal for spontaneity or lack of the trade union involvement or leadership or sequence inconsistency. Trade union has no balanced bargaining power with the employer or, otherwise, even silent/inactive on protection of labour interest, including monitoring the labour law compliance, commanding employers to settle employees' request, negotiating and signing collective bargaining agreements, requesting information from employers about business situation, advantages and disadvantages. This status has resulted from different factors. Firstly, the trade union is not associated with the interest of employees, thereby, not the real representative of employees. Trade union staffs get paid by the employer and enterprise. Therefore, employees have no trust in the Trade Union. Secondly, trade union staffs are short in number and unqualified. They are not equipped with necessary expertise. Many of them are not specialized in the field but perform the duties as the auxiliary activities. Thirdly, there is no protection mechanism for trade union staffs. Therefore, in case of conflicts between employees and employers, trade union staffs are often reluctant to act on behalf of employees to protest directly against their bosses in order to keep their benefits and interests intact.

Furthermore, the regulation that the Trade Union has the exclusive power of representation of employees is most likely to be challenged by other trade partner as the infraction of the freedom of association commitment. Constitutionally, the Communist Party of Vietnam is recognized as “the pioneer group of the working class, labour people and the nation of Vietnam, the loyal

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<sup>144</sup> Ibid.

<sup>145</sup> Calculation of the author based on statistics posted at <http://www.molisa.gov.vn/news/detail2/tabid/371/newsid/58618/language/vi-VN/Default.aspx?seo=Nhung-nhiem-vu-trong-tam-cua-nganh-Lao-dong-%E2%80%93Thuong-binh-va-Xa-hoi-nam-2014> and <http://tcldxh.vn/ArticlesDetail/tabid/193/cateid/12/id/9559/language/vi-VN/Default.aspx> visited on 7<sup>th</sup> January, 2014.

representative of the working class and of the whole nation and the leader of the state and society of Vietnam.”<sup>146</sup> “The Trade Union of Vietnam is the socio-political organization of the working class and labour people, formed on the basis of free will, representing labour people, tending and protecting legitimate rights and interests of labour people, participating in state administration, socio-economic management, joining the checking, inspection and supervision of state bodies, organization and businesses in matters of rights and interests of labour people, mobilizing labour people to education, expertise improvement and compliance with state regulations.”<sup>147</sup> Vietnam’s Trade Union always has a close alliance with the government and the Communist Party – the sole ruling party in Vietnam. The Communist Party of Vietnam gains the indirect control over the Trade Union through its nominees for leaders of the Union and has given endorsement of the Trade Union throughout the history of Trade Union. Despite the organizational independence between the Communist Party of Vietnam and the Trade Union, i.e. these two organizations operate based on their own charter of incorporation, they have in common the views on all important issues in that the Party governs the Union through guidelines and the Union has the duty of fulfillment of the Party’s policies and participates in the development of the Party. The Communist Party and the Trade Union officials often hold dual positions: leaders of the Trade Union are always active members of the Communist Party. So, the freedom of association has not been de facto ensured in Vietnam.

*b. Right to Bargaining Collectively*

Similar to the previous principle, the collective bargaining principle has not been de facto implemented effectively either. Around 25-30% of enterprises have collective bargaining agreements while the corresponding ratio for state-owned enterprises is 100%.<sup>148</sup> The ratio of collective bargaining agreement established in private enterprises and FDI enterprises are very low. Many of them are just for the purpose of registration, not for practical purpose in that they involve no real negotiation, no participation or consultation with the trade union or employees as required. Their contents are self-drafted by employers, mainly based on the duplication of the law, having few provisions more favorable for employees. No sectoral collective bargaining agreement has been established.

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<sup>146</sup> Constitution of Vietnam 2013, Article 4, Section 1.

<sup>147</sup> Constitution of Vietnam 2013, Article 10.

<sup>148</sup> MOLISA (2011), *Report on the Summary and Assessment of 15 years of Implementation of Labour Code*, p.15.



There are some contributing factors to the situation. The first factor is that many private enterprises do not have grassroots trade unions. Moreover, in most cases, both employers and employees fail to have full understanding of the significance of collective bargaining agreements. In addition, the competent authorities fail to provide detailed guidelines on the procedural and substantive issues of sectoral collective bargaining agreements, causing difficulties in implementation for relevant parties. Besides, there is a lack of clear sectoral classifications, establishment of employer associations, consistent sector-level trade unions to facilitate the agreement formation.

*c. Child labour*

By 2012, Vietnam has more than 18.3 million people from full 5 years old to under 18 years old, equivalent to 20.7% of the then population, of which 52.3% are male and 47.4% are female.<sup>149</sup> Among these 18.3 million people, 52.8% are in the 5-11 years old range, 22.5% in 12-14 years old range, 24.7% in 15-under 18 years old range.<sup>150</sup> Almost children in Vietnam have experienced schooling: almost every child under 6 years old has had access to kindergartens and over 90% of children in the 6-17 years old range have had access to formal education or training. The other 10% is not having access and among which 4.7% has no access at all.

Vietnam is now facing the problem of child labour which adversely affects future development of children and labour quality. It has 1.75 million child labourers from 5 years old to under 18 years old, equivalent to around 9.6% of the children.<sup>151</sup> Among which, 15-17 years old children account for 60% and 59.8% are male.<sup>152</sup> Regarding their geographical distribution, about 85% of them inhabit in the rural areas.<sup>153</sup> Over 67% of child labourers work in the agricultural sector, the others work in manufacturing (15.7%) and services sectors (16.7%), including construction,

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<sup>149</sup> MOLISA, GSO and ILO (2014), *Vietnam National Child Labour Survey 2012 – Main Findings*, ILO, p.2.

<sup>150</sup> Ibid.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

<sup>153</sup> The statistics is cited from MOLISA, GSO and ILO (2014), *Vietnam National Child Labour Survey 2012 – Main Findings*, ILO. Within the framework of the survey, the concept ‘child labourers’ means children from 5 year old to under 18 years old “engaged in activities of economic production, trading and services for consumption or sale that can be paid or unpaid, part-time or full time, occasional or regular, legal or illegal and at least one hour on any day during the reference week. Engagement in household chores is excluded.” And “not all working children are identified as child labourers. Those engaged in light work for an accepted duration of time or in work excluded from the prohibition list are not child labourers. Only work classified as having a negative impact on the physical and psychological development and the dignity of children is defined as child labourers.” See the definition at MOLISA, GSO and ILO (2014), *Vietnam National Child Labour Survey 2012 – Main Findings*, ILO, p.8.

hotels and restaurants,...<sup>154</sup> 55% of child labourers do not go to school and 5% of them have never go to school.<sup>155</sup> Besides, many working children have experienced long working hours: over 42 hours weekly for 32.4% child labourers cause most of them to give up their schooling.<sup>156</sup> In their work, the majority of 81% of child labourers are exposed to high risks of accidents, intensively high temperatures and hazardous environment and around 75% of child labourers are now exploited in work prohibited by law.<sup>157</sup> This fact is attributed to the adverse impact of the economic growth which has widened the living condition gap among a variety of regions and communities and sharply changed the social and familial values which then affecting the young generation of the society.

*d. Minimum wages*

Although Vietnam started regulating minimum wage rates right after its independence,<sup>158</sup> the most eminent breakthrough in the minimum wage rate development was marked in 1993. In terms of coverage, employees under the influence of minimum wage rate regulation have expanded over time. At present, the existing regulations on minimum wages apply to enterprises, cooperatives, cooperative groups, farms, family households and labourer-employing individuals, agencies and organizations. In terms of the value of minimum wage, over 20 years from 1993, the minimum wage rates in Vietnam has been modified 14 times. The fact that, during the past years, minimum wage rates have been increased nearly once every year, shows the concern of the State of Vietnam about their significance in ensuring the minimal living standards for labourers. Since 2008, the minimum wage is required to increase every year. The minimum wages increased by up to 49%, to 2 million VND in important industrial field in 2011.<sup>159</sup> Since October, 2011, there is no divergence between minimum wages applicable to employees in domestic enterprises and foreign-invested ones.<sup>160</sup> Nowadays, the minimum wages of Vietnam range from VND 1,900,000 (around USD 100) to VND 2,700,000 (around USD 120) applicable

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<sup>154</sup> Ibid.

<sup>155</sup> Ibid.

<sup>156</sup> Ibid, p.3

<sup>157</sup> Ibid.

<sup>158</sup> Decree 29/SL, Article 58 dated 12<sup>th</sup> March 1947 by the President of Vietnam.

<sup>159</sup> WTO (2013), *Trade Policy Review Vietnam*, p. 25.

<sup>160</sup> Decree No. 70/2011/NĐ-CP dated 22<sup>rd</sup> August 2011, under which region-based minimum wage rates varied from VND 1,400,000 to 2,000,000, equivalent to USD 700-1,000. After that, under Decree No. 103/2012/NĐ-CP, minimum wage rates ranged from VND 1,650,000 to 2,350,000, equivalent to around USD 800-1,200.

to four different groups of geographical zones in the private sector.<sup>161</sup> In the state sector, the basic wage rate of VND 1,150,000 has been applied since 15<sup>th</sup> August 2013,<sup>162</sup> equivalent to 42.6%-60.5% of the geographical-zone-based minimum wage rates.

Minimum wage rates are low and insufficient to reproduce the simplest labour efforts and expand labour efforts and falls short of covering bare living costs for employees. Although the nominal minimum wage rates increase over time, the real minimum wage rates decrease in that growth rates of minimum wages fail to catch up with inflation rates: during the 1994-2009 period, nominal wage rates went up by 225% whereas inflation rate was 245%.<sup>163</sup> At present, in the private sector, the minimum wage rates cover just 62%-69% of employees' bare living needs.<sup>164</sup> Recently, MOLISA has proposed the Government to postpone minimum wage rate increases to VND 2,600,000 to 3,400,000 during the 2014-2015 period for 3 or 4 years on the ground of corporate difficulties as a result of economic crisis.<sup>165</sup> Despite the region-based minimal wage rates have increased by some 15% on average last time, the increasing rate is well below that proposed by the Vietnam General Confederation of Labour (30%) which, if approved, could cover just 80% of the minimal living costs of labourers.<sup>166</sup> And Vietnam fails to establish sector-based minimum wage rates, thereby causing unreasonable gaps in wages among enterprises in the same sector. In the state sector, the basic wage rate covers 36-41% of the employees' bare living costs,<sup>167</sup> and its planned increase in 2013 to VND 1,300,000 was delayed indefinitely because of state budget shortage.

That calculation and determination of minimum and basic wage rates fail to base on supply-demand law in the labour market and reality of labour lives result from different reasons. In the

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<sup>161</sup> Article 3, Section 1, Decree No. 182/2013/ND-CP dated 14<sup>th</sup> November 2013.

<sup>162</sup> Decree 66/2013/ND-CP dated 27<sup>th</sup> June 2013 by the Government on the basic wage rate for state officials, civil servants and armed forces.

<sup>163</sup> MOLISA (2011), *Report on the Summary and Assessment of 15 years of Implementation of Labour Code*, p.17.

<sup>164</sup> Report from MOLISA at Meeting held by the Committee on Social Affairs of the National Assembly of Vietnam on 12<sup>th</sup> April 2013. See more at [http://daibieunhandan.vn/ONA\\_BDT/NewsPrint.aspx?newsId=294424](http://daibieunhandan.vn/ONA_BDT/NewsPrint.aspx?newsId=294424) visited on 27<sup>th</sup> March 2014.

<sup>165</sup> <http://vneconomy.vn/20130423024111918P0C9920/de-nghi-gian-lo-trinh-dieu-chinh-luong-toi-thieu.htm> visited on the 12th May, 2014.

<sup>166</sup> <http://www.baomoi.com/Nguoi-lao-dong-chat-vat-voi-muc-luong-toi-thieu/47/12651487.epi> visited 12th December 2013.

<sup>167</sup> Report from MOLISA at Meeting held by the Committee on Social Affairs of the National Assembly of Vietnam on 12<sup>th</sup> April 2013. See more at [http://daibieunhandan.vn/ONA\\_BDT/NewsPrint.aspx?newsId=294424](http://daibieunhandan.vn/ONA_BDT/NewsPrint.aspx?newsId=294424) visited on 27<sup>th</sup> March 2014.

private sector, it is due to the non-functioning tri-partism. The National Wage Council was established on 6<sup>th</sup> August 2013, comprising of 15 members, of which 5 are representatives from MOLISA, 5 are from Vietnam General Confederation of Labour, the other 5 from Vietnam Chamber of Commerce and Industry, Vietnam Association of Small and Medium Enterprises and Association of Industries using a large number of employees at the central level.<sup>168,169</sup> Although the tripartite mechanism is highly appreciated by both the government and the ILO as an effective tool to establish harmonious and cooperative labour relations, indeed this mechanism is just symbolic and is not expected to bring substantive changes in minimum wage determination because all of the representatives are member of the Communist Party and the operation of their organizations is regularly influenced by the state of Vietnam and the Communist Party of Vietnam. In the state sector, the ineffectiveness of basic wage rate regulations stems from the unavailability of state spending for state-sector employees. So far, the employed population in the state sector has accounted for around 10.2% of the whole national employed population.<sup>170</sup> It was estimated that the planned increase in the basic wage rate by over 13% in 2013 would place a financial burden of VND 60,000 billions on the state budget which experienced a VND 162,000 billion deficit.<sup>171</sup>

*e. Working hours*

Most enterprises apply the 48-hour workweek, and only some apply the 44- or 40-hour workweek. However, many enterprises infringe upon the overtime work limit, especially export-oriented enterprises in the garment, sea-food processing industries which are in passive position of meeting tight deadlines set by their importing counterparts: some 70% of enterprises in these industries have broken the law by letting employees to work overtime for some 300-700 hours and some of them do not pay for the extra working hours.<sup>172</sup>

*f. Work Safety and Hygiene*

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<sup>168</sup> Decision No. 1055/QĐ-TTg dated 3 July 2013 by the Prime Minister of Vietnam on the Establishment of the National Wage Council.

<sup>169</sup> At present, this organization is the Vietnam Cooperative Alliance.

<sup>170</sup> GSO (2014), *Statistical Handbook 2013*, Statistics Publishing House, p. 33.

<sup>171</sup> <http://congdoanthainguyen.org.vn/Shop.cn/ChiTietTinTuc/kinh-te---xa-hoi/chinh-phu-xin-gian-lo-trinh-tang-luong/5380?username=congdoanthainguyen> visited on 12<sup>th</sup> May 2014.

<sup>172</sup> MOLISA (2011), *Report on the Summary and Assessment of 15 years of Implementation of Labour Code*, p.19.

Violations of work safety regulations are still frequent, especially in agriculture and traditional craft zones.<sup>173</sup> In 2013, there were 6,700 labour accidents nationwide, causing 6,887 casualties among them one third is female and 627 are deaths.<sup>174</sup> The fact results from the irresponsibility of both employers and employees. 60% of employers have not provided adequate conditions of labour safety for employees.<sup>175</sup> Many employees lack knowledge, skills and activeness in maintaining their own work safety.

### **3. Exploration of the interplay between trade liberalization and the labour regime in Vietnam from theoretical and empirical perspectives**

To make this research section more applicable and practical to Vietnam – a developing country with competitive advantages in unskilled-labour-intensive goods, this section limits the reflection to relevant studies on developing countries.

#### **3.1. From theoretical perspectives**

##### *a. Impacts of trade on labour regime*

Many theoretical studies done by researchers outside Vietnam have proven the interaction between trade and labour, although not in Vietnam in particular, in the region. Conclusions driven from studies can be divergent in many aspects. The followings are some remarkable conclusions.

Firstly, according to Heckscher-Ohlin-Samuelson theorem, trade benefits domestic industries which intensively use the factors with which the country is endowed and harms the domestic industries which intensively use the other factors.<sup>176</sup> Therefore, in Vietnam - a developing country endowed with low-skilled labour, domestic industries which intensively use low-skilled labour such as agriculture and textile will benefit from trade openness and be scaled up, whereas other industries intensively use high-skilled labour and capital will lose and be scaled down. The number and wages of labour in the former industries increases while the latter suffers decreases.

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<sup>173</sup> Ibid, p.23.

<sup>174</sup> Statement made by the Head of the Department of Labour Safety of MOLISA at the Press Conference of MOLISA on 26<sup>th</sup> February 2014, available at <http://www.nongnghiep.vn/nongnghiepv/vi-vn/25/121576/Nghe-Viec/Hon-60-chu-su-dung-vi-pham-ve-an-toan-lao-dong.html> visited on 12th May 2014.

<sup>175</sup> Ibid.

<sup>176</sup> Heckscher-Ohlin-Samuelson theorem.

Secondly, the European Commission (2008) points that, for both developed and developing countries, the more open the economy, the more improved the enforcement of the fundamental rights at work.<sup>177</sup> However, the study shows that, for developing countries, the benefits do not flow naturally from trade openness, but they require the existence of supporting policies to improve the labour situation. Therefore, it can be argued that trade policies and labour policies are mutually supportive and the benefits of each cannot be realized without the presence of improvement in the other.<sup>178</sup> In this aspect, some other studies point to the contrary. Brown et al. (1996) find that trade may degrade labour conditions in that, in the face of global competition, enterprises move their business from countries with high labour standards, depriving them of employments, thereby driving down wages, forcing these countries to loosen their costly labour standards.<sup>179</sup>

Lastly, according to Bhagwati (1995) and Cigno A. et al. (2002), for countries with low labour standards, trade restrictions are bad for labour.<sup>180</sup> Therefore, labour violations in developing countries should not be punished by trade sanctions.

However, there are other adverse arguments. Some argue that trade liberalization harms labour standards and labour rights. In the face of competition in international trade, businesses will raise their competitiveness by cutting costs including labour costs through applying lower labour standards. This practice is more common in developing countries which compete on a basis of goods and services prices and of which competitive advantages come from low labour costs. Then, the practice spreads to developed countries, causing the “race-to-bottom” situation. In addition, in the past, countries often protect their domestic industries by tariffs. Nowadays, as a result of tariff liberalization in trade agreements, more and more tariff lines decrease over time, forcing countries to resort to non-tariff protection tools behind the border, including domestic

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<sup>177</sup> European Commission (2008), *The Use, Scope and Effectiveness of Labour and Social Provisions and Sustainable Development Aspects in Bilateral and Regional Free Trade Agreements*, p. 30.

<sup>178</sup> Ibid.

<sup>179</sup> Brown D. K., Deardorff A. V., and Stern R. M. (1996), “International Labour Standards and Trade: A Theoretical Analysis” in *Fair Trade and Harmonization: Prerequisites for Free Trade?*, Economic Analysis, Vol. 1, Cambridge, MA: MIT Press.

<sup>180</sup> Bhagwati J. (1995), *Trade Liberalization and ‘Fair Trade’ Demands: Addressing the Environment and Labour Standards Issues*, *The World Economy*, Vol. 18, No. 6, p. 745-759. Cigno A., Rosati F. and Guarcello L. (2002), *Does Globalization Increase Child Labour*, *World Development*, Vol. 30, No. 9, p. 1579-1589.

regulations in general and domestic labour law in particular. Countries can raise labour requirements applicable to imports and/or relax those applicable to exports.

*b. Impacts of labour provisions under PTAs on trade and economy*

Similar to studies on effects of trade on labour, those on effects of labour provisions on trade have drawn distinct conclusions. Flanagan (2003) is in favour of the conclusion that competitiveness and trade performance of countries suffer because compliance with labour standards involves costs.<sup>181</sup> Otherwise, some studies show that enhanced and effectively-implemented labour standards and regulations as a result of labour commitments in PTAs have positive impacts on trade, productivity and innovation. The channels through which labour standards influence trade, productivity and innovation are described differently. Kochan and Nordland (1989) and Brown et al. (1996) argue that, to cover the cost resulted from the implementation of labour standards, businesses will increase their productivity through innovation, which in turns improve their competitiveness.<sup>182</sup> Furthermore, Brown et al. (1996) claim that compliance with labour standards does not entail costs at all time, but can yield improved labour supply and/or productivity.<sup>183</sup>

Other studies focus on finding the relation between labour standard lowering and trade. Luinstra (2004) evidences that degrading applied labour standards harms competitiveness because fewer motives are given to human capital development.<sup>184</sup>

### **3.2. From empirical perspectives**

*a. Impacts of trade on labour regime*

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<sup>181</sup> Flanagan R. J. (2003), "Labour Standards and International Competitive Advantage," *International Labour Standards: Globalization, Trade and Public Policy*, Stanford, CA: Stanford University Press.

<sup>182</sup> Kochan T. A. and Nordland W. (1989), "Reconciling Labour Standards and Economic Goals: An Historical Perspective", U.S. Department of Labour, Office of International Economic Affairs, Bureau of International Labour Affairs. Washington DC: U.S. Governing Printing Office, 1989. Brown D. K., Deardorff A. V., and Stern R. M. (1996), "International Labour Standards and Trade: A Theoretical Analysis" in *Fair Trade and Harmonization: Prerequisites for Free Trade?*, Economic Analysis, Vol. 1, Cambridge, MA: MIT Press.

<sup>183</sup> Brown D. K., Deardorff A. V., and Stern R. M. (1996), "International Labour Standards and Trade: A Theoretical Analysis" in *Fair Trade and Harmonization: Prerequisites for Free Trade?*, Economic Analysis, Vol. 1, Cambridge, MA: MIT Press.

<sup>184</sup> Luinstra A. (2004), "Labour Standards and Trade", Presentation at World Bank Workshop on Product and Process Standards, available at [http://siteresources.worldbank.org/INTRANETTRADE/Resources/Topics/Standards/standards\\_pubs\\_luinstra\\_laborstandards.pdf](http://siteresources.worldbank.org/INTRANETTRADE/Resources/Topics/Standards/standards_pubs_luinstra_laborstandards.pdf).

Not all theories about interaction between trade and labour are proven in reality. Many empirical studies done by researchers outside Vietnam have shown explicitly dominant implications of trade on labour. Salem and Rozental (2012) confirm that trade is good for labour in that it increases incomes: export expansion lifts up incomes, providing more opportunities for employees to better protected industries, creating more international intense pressure for labour compliance.<sup>185</sup> Likewise, OECD (2012), studying the Asian and Pacific region, concludes that the more open the economy, the more improved the enforcement of the fundamental rights at work, including less violation of rights to freedom of collective bargaining, significantly declining gender discrimination, decreasing child labour and forced labour and better union rights.<sup>186</sup> In addition, the more open the economy, the more liberal the labour market.<sup>187</sup> But, for Asian countries, the concrete impacts of trade liberalization on the labour markets depend on different factors including their labour market institutions and supply-demand relations.<sup>188</sup> Similarly, based on the reflections of statistics of labour law observation in Cambodian apparel factories, Brown D. et al. (2011) find the positive relation between the exposure to reputation-sensitive buyers in apparel-exporting factories and the degree of labour law conformity in these factories.<sup>189</sup> However, Haberli et al. (2012), by studying subjects of 90 developed and developing countries during the 1980-2005 time span, affirm that after the taking effects of PTAs, the weakening of labour protections is more likely to the case in high-income rather than in low- or middle-income countries.<sup>190</sup>

*b. Impacts of labour provisions under PTAs on trade performance*

In terms of the interaction between labour and trade, different empirical studies show different results. Aggarwal (1995) and Raynauld and Vidal (1998) point out no interplay between labour standard violations and competitiveness, FDI and share of global trade by looking at ten trade

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<sup>185</sup> Salem S. and Rozental F. (2012), *Labour Standards and Trade: A Review of Recent Empirical Evidence*, United States International Trade Commission: Journal of International Commerce and Economics, p. 18.

<sup>186</sup> OECD (2012), *Policy Priorities for International Trade and Jobs*, (ed.), D. Lippoldt, e-publication, available at: [www.oecd.org/trade/icite](http://www.oecd.org/trade/icite), p. 337.

<sup>187</sup> Ibid.

<sup>188</sup> Ibid.

<sup>189</sup> Brown D. et al. (2011), *Labour Law Compliance and Human Resource Management Innovation: Better Factories Cambodia*, Better Work Discussion Paper Series: No.1.

<sup>190</sup> Haberli C., Jansen M. and Monteiro J. A. (2012), *Regional Trade Agreements and Domestic Labour Market Regulation*, Employment Sector, Employment Working Paper No. 120, ILO Geneva.



partners of the United States with low labour standards.<sup>191</sup> Nevertheless, Mah (1997) find out the negative relations between labour standards and trade by pointing out that trade union rights violations and discrimination lead to export increase in developing countries.<sup>192</sup> Bakhshi and Kerr (2010), by examining 48 developing countries, find that competitiveness of goods, especially unskilled-labour-intensive goods, is improved minimally by loosening obedience of principles of freedom of association and abolishment of forced labour, and remains intact if compliance with principles of child labour and discrimination is lowered.<sup>193</sup> Moreover, different labour standards have different impacts on labour costs, productivity, competitiveness and trade: compliance with working hours, work safety and health regulations has both negative outcomes of labour cost increases and positive ones of productivity increase due to better employee health and less accidents; elimination of discrimination raises labour supply, diminishes labour costs and better off competitiveness; abolishment of forced labour dwindles low-skilled labour in the short term but raised skilled labour and productivity in the long term because the previously untrained children later, after schooling and training, join the labour force.<sup>194</sup>

Other studies focus on finding the relation between labour standard lowering and trade. Salem and Rozental (2012) find no connection between poor labour standards and improved trade.<sup>195</sup> In addition, pure labour commitments on paper do not make labour conditions better off; they do when they are associated with effective implementation and positive incentives.<sup>196</sup>

#### **4. Analysis of the possible positive and negative impacts of the PTAs' labour regulations on Vietnam**

PTAs involving Vietnam and containing labour provisions have neither successfully concluded negotiation nor entered into force; therefore, their potential implications will be analyzed on a

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<sup>191</sup> Aggarwal M. (1995), *International Trade, Labour Standards, and Labour Market Conditions: An Evaluation of Linkages*, Research Division, Office of Economics Working Paper No. 95-06-C. Washington, DC, US International Trade Commission, June. Raynauld A. and Vidal J. P. (1998), *Labour Standards and International Competitiveness: A Competitive Analysis of Developing and Industrialized Countries*, Cheltenham, Edward Edgar.

<sup>192</sup> Mah J. S. (1997), *Core Labour Standards and Export Performance in Developing Countries*, World Economy, Vol. 20, No. 6, pp. 773-785.

<sup>193</sup> Bakhshi S. and Kerr W. A. (2010), *Labour Standards as a Justification for Trade Barriers: Consumer Concerns, Protectionism and the Evidence*, The Estey Centre Journal of International Law and Trade Policy 11, No. 1.

<sup>194</sup> Ibid.

<sup>195</sup> Salem S. and Rozental F. (2012), *Labour Standards and Trade: A Review of Empirical Evidence*, United States International Trade Commission, Journal of International Commerce and Economics, p. 4.

<sup>196</sup> Ibid.

basis of reflections of those of other PTAs from which countries in the similar situations like Vietnam have suffered.

#### ***4.1. Positive impacts of PTAs' labour regulations on Vietnam***

##### **a. In terms of Law**

As a result of compliance with PTA labour provisions, the labour legal framework of Vietnam get more and more developed and well-established. Part of the reason for the de facto ineffective implementation of domestic labour law in Vietnam is the incomprehensive and inconsistent legal framework. Regarding the right to freedom of association, the non-existence of protection mechanisms for trade union staffs refrains them from acting effectively on behalf of employees to protest directly against their bosses in case of conflicts between employees and employers. Regarding the right to bargaining collectively, the competent authorities fail to provide detailed guidelines on the procedural and substantive issues of sectoral collective bargaining agreements, causing difficulties in implementation for relevant parties. Besides, there is no sufficiently clear sectoral classification, establishment of employer associations, consistent sector-level trade unions to facilitate the agreement formation. Regarding the minimum and basic wage rate regulations, law-makers need to do further work to secure the proper functioning of the tripartism. Furthermore, there is an inconsistency between the Labour Code 2012 and regulations on the basic wage rate in that state-sector employees are being practically discriminated disfavouredly when they are subject to the de facto minimum wage rates lower than employees in the private sector. Therefore, to comply with the commitment to effective domestic labour law enforcement under PTAs, it is imperative for Vietnam to revise and supplement its labour legal regulations. In addition, ratification of the remaining unratified ILO Conventions on fundamental labour rights and principles and the potential progressive improvement in domestic labour law also contribute to this end results. Besides internal efforts by Vietnam, external cooperation mechanism and technical assistance under PTAs will also make contributions.

##### **b. In terms of Politics**

Labour commitments under PTAs can help Vietnam to overcome persistent domestic political objections to carry out faster and more efficient labour reform. Because of the political regime in Vietnam, the labour regime in general and trade union matter in particular are of sensitive nature,

and, among others, the determinant of existence of the present government. The pressure from foreign states, trade unions, NGOs and human right organizations because of their concerns about low applied labour standards in Vietnam and the threat of sanctions cause Vietnamese government, as well as enterprises, to take measures to sustain good reputation in labour administration.

Effective implementation of labour law in Vietnam which follows from the commitment under PTAs also helps Vietnam to stabilize its political environment. As pointed above, although the number of labour disputes in Vietnam remains quite low, it tends to increase over time, especially in the FDI area and they have not been well-settled and the ultimate rationales behind them have not been completely corrected. It is hoped that labour commitments by Vietnam under PTAs will remedy the problem, providing proper protection for labourers in Vietnam and effectively reduce strikes and labour disputes.

c. In terms of Institutions

Labour commitments under PTAs will help Vietnam to increase its effective implementation of domestic labour law. Regarding domestic labour law, in spite of its quite well-established status, its enforcement is mainly symbolic, not associated with improved working conditions and workers' rights. Among the most challenging PTA labour commitments is the effective domestic labour law obligation. The difficulty comes mainly from institutional weaknesses. The Trade Union in Vietnam is under-developed and fails to fulfill its representative duties. In terms of collective bargaining, the low quantity and ratio of the agreements mentioned above result partly from the absence or inefficiency of trade unions in private enterprises which account for the majority of enterprises in Vietnam. The fact is also due to low bargaining position and no real voice of trade unions in negotiation. Therefore, the question is how to improve the institutional capacity of the trade union in Vietnam to contribute to effective implementation of labour law. Vietnam's poor capacity of labour inspection will be improved by technical assistance from its trade partners. Furthermore, the mechanism of labour violation complaints accessible by both private and public parties strengthens the dispute settlement capacity of the labour authority in Vietnam and creates political pressure on Vietnam's government to deal with existing labour enforcement problems.

d. In terms of Economy

Commitments to PTA labour provisions do not conflict with but support the achievement of the objectives and facilitate the tasks set by Vietnam in international economic integration process, more specifically the objective of sustainable development and the task of job creation and income improvement for the people.<sup>197</sup> It is very clear that commitments to the labour obligation made by Vietnam under PTAs, even in passive position, are crucial for conclusion of PTA negotiations and for the success of trade by Vietnam. Without the commitments to the guideline of labour inclusion in PTAs or to labour obligations, as insisted by its main trading partners, it is most likely that Vietnam could never finish the PTA negotiations, thereby gaining no economic benefits from them. As mentioned above, Vietnam is so reluctant and also under the pressure from its main trading partners to include labour issue in PTAs, so labour commitments under PTAs, among other things, are considered as the trade-offs by Vietnam in return for economic gains. By this way, Vietnam can take advantage of endorsement from the constituencies and political parties in the trading partner countries.

Compliance with labour standards and labour rights will ensure higher level of labour protection in Vietnam, help workers in Vietnam will have higher wages, better working conditions and better life, which in turn lead to higher productivity and competitiveness. For example, when Vietnam has fully and efficiently implemented the sectoral collective agreement mechanism, it will, as pointed out by the ILO, gain sound labour market development, spur the active role of parties to labour relations, inhibit labour disputes and strikes. Moreover, because of the significant of minimum wage rates as an important component of the wage regime and its driving and basic role in the whole wage system, if Vietnam succeeds in fixing and operating a reasonable and efficient minimum wage rate mechanism, it stimulates labourers' effectiveness and productivity, makes them more protected, prevents potential labour disputes, attracts FDI, fosters economic growth and development and stabilizes labour relations and the socio-political situation.

Furthermore, goods and services from Vietnam become more competitive and can avoid potential boycotts for labour reasons by consumers in export markets. In markets like the United

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<sup>197</sup> Decision No. 1051/QĐ-TTg dated 9<sup>th</sup> August 2012 issued by the Prime Minister of Vietnam on the adoption of strategies on the participation in Free Trade Agreements until 2020.

States and the European Union, consumers have long tradition of making consumption decisions on the basis of social values, including labour protection of workers. More and more consumers in these countries take into account the labour practice in the exporting countries when deciding whether or not to buy the imported goods. Being produced and supplied in conformity with labour commitments under PTAs with these main trade partners, goods and services exported from Vietnam persuade the consumers in importing countries of their recognition of and compliance with labour standards and the prevention of the possibility of harming labour rights for the purpose of trade and investment proliferation.<sup>198</sup>

In addition, obedience of labour commitments under PTAs reduces the risk of being found dumping as well as decreases the dumping margin (if any) in anti-dumping cases filed by importing trade partners against Vietnam's exports. At its accession to the WTO, Vietnam accepted the non-market economy status for 12 years at the latest of 2018.<sup>199</sup> This acceptance yields the increase in anti-dumping cases against Vietnam's exports, the finding of dumping practice and the dumping margin. Vietnam has made effort to gain the market status recognition from its trade partners. However, until early 2013, only some 40 trade partners<sup>200</sup> have recognized the status and neither the US nor the EU has recognized. Among the six criteria set by the United States for the recognition of the market economy status is "the extent to which wage rates in the foreign country are determined by free bargaining between labour and management."<sup>201</sup> In Vietnam, the existence of the Trade Union set up and directed by the State and its involvement in the development of wage policies prove the control of the State over the wage determination, thereby influence the free bargaining between the labour and the employers. By effectively implementing the commitments, Vietnam can meet the requirement, fostering the recognition of its market economy status by the United States. This is also the case in Vietnam-EU trade relations. In addition, although the term of social dumping is not officially referred to in PTAs, by preventing Vietnam from strengthening its competitiveness by weakening labour

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<sup>198</sup> The similar effect of reputation-sensitive buyers on factories' labour law compliance has been analyzed in empirical studies. For example, see Brown D. et al. (2011), *Labour Law Compliance and Human Resource Management Innovation: Better Factories Cambodia*, Better Work Discussion Paper Series: No.1.

<sup>199</sup> Protocol on the Accession of the Socialist Republic of Vietnam.

<sup>200</sup> WTO (2013), *Trade Policy Review Vietnam*, p. 33. These partners include ASEAN Members, Angola, Argentina, Australia, Belarus, Chile, China, Germany, India, Japan, Korea, Mozambique, New Zealand, Russia, Nicaragua, Panama, Peru, South Africa, Ukraine, Venezuela, EFTA State members.

<sup>201</sup> 19 USC §1677.

standards, Vietnam's trade partners clearly aim at the objective of social dumping prevention. By making commitment to the issue, Vietnam can avoid the social dumping practice and its potential negative impacts.

In terms of foreign direct investment, it can be argued that compliance with the obligation of effective domestic labour law implementation will help Vietnam to attract more FDI. The existing prevalence of illegal strikes in Vietnam, as stated above, causes disorders in the involving enterprises and provinces, destroys corporate production plans, and thereby drives down their revenue and profits which in turn cuts down employee's incomes. That practice roots partly in the commonly unpunished labour law violations by employers, in the inactiveness of the Trade Union, and employees' labour-law ignorance. For those reasons, strikes often start on a small or medium scale, but get complex and end up with a large scale, causing huge losses. The reduction of labour conflicts and maintenance of labour peace, as a result of strict and effective labour-law compliance by employers, trade unions and employees, helps to attract more investors. In addition, the competitiveness of Vietnam in FDI attraction which derives from stable political environment will also be reinforced by a sound system of labour market and regulations.<sup>202</sup>

#### ***4.2. Negative impacts of the PTAs' labour regulations on Vietnam***

##### *a. In terms of Politics*

With labour provisions in TPP and Vietnam-EU FTA, Vietnam has, for the first time ever, faced the labour issue within the framework of preferential trade agreements. This leads to severe domestic concerns from interested players about potential political risks to which Vietnam will be exposed. As in other countries, in Vietnam, the labour issue is traditionally taken as domestic affairs, therefore, making labour commitments in PTAs will limit state sovereignty and the more and deeper the labour commitments, the less sovereignty the state has over the labour matter. As forecast above, the two PTAs involving labour provisions to which Vietnam is a party are expected to contain high-standard labour commitments; hence, the fear of state sovereignty is not

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<sup>202</sup> Studies have shown the driving role of political and business settings in FDI attraction in developing countries like Vietnam. For example, see Singh H. and Jun K. W. (1999), *Some New Evidence on Determinants of Foreign Direct Investment in Developing Countries*, Policy Research Working Papers, and Demirhan E. and Masca M. (2008), *Determinants of Foreign Direct Investment Flows to Developing Countries: A Cross-Sectional Analysis*, Prague Economic Papers, No. 4, 2008.

irrational. Moreover, some argue that vague labour commitments in PTAs can be explained in a way which is against the state sovereignty of Vietnam and interfere the domestic affairs of Vietnam.<sup>203</sup> For example, it is feared that the ambiguity of freedom of association principle and its implementation can undermine the dominant role of the existing trade union network in Vietnam and give birth to their counterparts, weakening the intervention and control of the state of Vietnam through the Vietnam General Confederation of Labour in the labour field and forcing the state to take into account conflicting interests of different interest groups, including the corporate and labour communities, making policy- and law-making procedures more costly and time-consuming.

*b. In terms of Institutions*

As a developing country, labour regulations are under-developed and fail to be effectively implemented. The capacity of the Vietnamese government to effectively enforce labour regulation, monitoring businesses and sanction them (if necessary) is very limited in terms of both institution and finance. TPP and Vietnam-EU FTAs are the first time Vietnam has experienced the labour issue in trade agreements, therefore all interested players, including the state, corporate community and labour community lack or even have no capacity, human resources, financial resources and experience in harmoniously resolving the interlink between trade and labour.

In addition, the fact that Vietnam may make different labour commitments under different PTAs causes fragmentations and difficulties for Vietnam to implement its commitments systematically.

*c. In terms of Law*

It is clear that many labour commitments in PTAs are too general to have direct effects. Vietnam will face huge law-making workload to internalize/ transform these regulations into Vietnam legal systems and to issue detailed guidelines. It will cost time, money and efforts of Vietnam.

*d. In terms of Economy*

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<sup>203</sup> See more at VCCI, WTO Center of VCCI, EU-Vietnam MUTRAP III (2012), *Recommendation on Negotiation Plans of the Labour and Labour Dispute Settlement Chapter in the Trans-Pacific Partnership Agreement*, available at <http://www.trungtamwto.vn/sites/default/files/tpp/attachments/INTA-2012-1-TPP3%20Khuyen%20nghi%20ve%20lao%20dong%20trong%20TPP.pdf>

d1. Labour cost increases because of PTA labour commitments lead to competitiveness undermining

Besides core labour standards which are considered as not raising labour costs directly but can do so indirectly, labour rights including minimum wages, working hours, safety and healthy can increase labour wages. By effectively enforcing the regulations on freedom of collective bargaining and freedom of association, the bargaining power of trade union and employees increases compared to that of the employers, as a result, wages and other fringe benefits paid to employees go up, increase the labour cost. Therefore, labour compliance costs in enterprises increases. As a developing country with rich endowment of cheap, low-skilled labour, Vietnam and its exporting industries are threatened to lose competitiveness in international trade. Although some studies point out the positive of effective labour law implementation on innovation, productivity and trade, such reasoning depends on the assumption of high capacity of innovation of businesses which is not the case in Vietnam. It is most likely that in a non-innovation-based economy, businesses will lose their share and be out of the market because of labour law implementation costs before being able to compensate cost increases by innovation.

Losing competitiveness because of increased labour costs can drive down export volume and then economic growth and income per capita. In addition, Vietnam's FDI attraction based on low-labour-cost competitiveness will suffer. In the past, the surge of FDI into Vietnam was argued to partly come from labour cost increases in China. If labour costs in Vietnam rise, Vietnam may witness quick FDI outflow to neighbor countries with competitiveness based on labour costs such as Laos and Cambodia.<sup>204</sup>

d2. Negligible negative implications of PTAs' labour dispute settlement mechanism on trade

As mentioned above, the inclination of Vietnam to the objection of labour inclusion in PTAs and the status-quo of its labour regime lead to the forecast that Vietnam stands a greater chance to break its labour commitments than its trade partners, especially developed countries. In other words, it is foreseen that developed countries, such as the U.S. or the EU, will be the main user

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<sup>204</sup> Impacts of labour costs on FDI attraction in developing countries like Vietnam have been proven. For example, see Singh H. and Jun K. W. (1999), *Some New Evidence on Determinants of Foreign Direct Investment in Developing Countries*, Policy Research Working Papers, and Demirhan E. and Masca M. (2008), *Determinants of Foreign Direct Investment Flows to Developing Countries: A Cross-Sectional Analysis*, Prague Economic Papers, No. 4, 2008.



of the labour dispute settlement mechanism under PTAs (if any) as complainants against Vietnam and Vietnam will frequently play the respondent role.

It can be argued that, in the short term, the adverse effect of labour dispute settlement mechanisms in PTAs on Vietnam is neither of substantive nor considerable nature. Despite the concern that the dispute settlement mechanism under PTAs can be used for protectionist purpose, evidence shows that this negative effect has not been present yet.<sup>205</sup> This conclusion comes from the operation of labour dispute settlement mechanisms set in other already-taken-effects PTAs. For example, according to statistics from United States Department of Labour, within the framework of NAFTA, since its entry into force in 1994 to March, 2010, 37 claims have been submitted under NAALC.<sup>206</sup> Among the 37 claims, 4 ended up with withdrawal by the submitters before the completion of hearings or the review process, 10 went to the hearings stage, 14 reached ministerial-level consultations, but none of them concluded in the final stage which ultimately results in penalties.<sup>207</sup> This is also the situation of labour cases submitted under other PTAs although, it is provided that, in case of violation of labour provisions under PTAs, the winning state party can impose fines or trade sanction or withdrawal of trade concessions, depending on types of penalties available under PTAs. This fact is thanks in part to the good will of state parties to disputes not to resort to this final option but to give the priority to other dispute settlement options. Therefore, from empirical perspectives, the trade interests of the violated party remain intact. Hence, in the short term, trade interests of Vietnam are less likely to be negatively affected by PTA-labour provision violation claims filed by its trade partners. In addition, the ambiguity of labour commitments in PTAs can cause certain challenges to the resort to dispute settlement mechanisms. However, the long-term effect can be more severe because the potential for penalties still exist, especially when either of the disputing parties acts in bad faith.

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<sup>205</sup> ILO (2013), *Social Dimensions of Free Trade Agreements*, International Institute for Labour Studies, p. 56

<sup>206</sup> <http://www.dol.gov/ilab/programs/nao/status.htm> visited 24 November 2013. Among them, 21 were against Mexico and 2 against Canada. All of the 9 cases filed with the Mexican were against the US. 6 submissions have been filed in Canada, of which 3 against Mexico and 4 against the US.

<sup>207</sup> Ibid.

## **CHAPTER 3: RECOMMENDATIONS FOR VIETNAM TO TAKE FULL ADVANTAGE OF LABOUR PROVISIONS IN PREFERENTIAL TRADE AGREEMENTS**

Whether Vietnam benefits or loses more from PTAs' labour provisions depends on the measures it takes in response, including improvement in domestic labour regulations, institutional reforms, reasonable negotiation strategies... Without the necessary domestic reforms, Vietnam cannot materialize the opportunities or can even worsen the problems caused by labour provisions under PTAs. In addition, although agreeing on the objectives pursued by labour provisions in PTAs, Vietnam should make efforts to ensure that the design of labour provisions are for legitimate, not protectionist purposes and that the measures allowed under PTAs are necessary to achieve the objectives stated by parties in the preamble. This chapter focuses on recommending solutions to Vietnam to take best advantage of PTAs' labour commitments.

### **1. Solutions to minimize costs/challenges and maximize benefits/opportunities from the compliance with PTAs' labour provisions**

#### ***1.1. Improving the domestic labour law system***

In terms of collective bargaining, it is imperative to complement legal provisions and introduce rigid penalties for collective bargaining violations. Violation of collective bargaining regulation is very prevalent, therefore rigid penalties, including fines, need to be introduced in case fake collective bargaining agreement drafted only by the employer not by the labour collective. Besides, the competent authorities need to supplement detailed regulations on sectoral collective bargaining agreements to facilitate them, including regulations on the selection of the representative for each parties, contents of the agreements, procedure of negotiation and signing of the sectoral agreement, submission of the agreements. They should make necessary revision of unreasonable regulations on collective bargaining agreements by making them straight-forward, easy to implement, focusing on substantive matters to assure better rights and interests of employees than stipulated in law. In addition, initiatives are needed to encourage enterprises in the same sectors such as textile, garment and seafood processing to reach sectoral collective bargaining agreements on certain issues such as minimum wages, working hours, social insurance which are then taken as good examples of their kinds to persuade other enterprises in the same sector to join the agreement.

In terms of minimum wages, there is a need for reforms in regulations on minimum wage determination. It is necessary to shift from the existing mechanism in which minimum wages are determined by the government based on the proposal and sequence recommended by the National Wage Council, the Trade Union and on the balance of the state budget, into the mechanism in which the independence of the National Wage Council is enhanced and the voice of the labour representative is strengthened. To make the tripartite mechanism of the National Wage Council work, it is necessary to make the Trade Union and representative organizations of employers, including VCCI and Vietnam Cooperative Alliance... truly independent of the government. Besides, trade unions at all levels need to function properly, especially in consulting about and proposing minimal wage rate increases to cover bare living costs of labourers. They also need to foster the supervision and monitoring of collective labour agreements, cooperate with employers to construct payrolls, monitor payment of wages and fringe benefits to employees to secure the compliance, to claim strict punishment from competent authorities against minimum wage violations, to recommend preferential loans to labourers and to cooperate with competent authorities to provide labourers with access to reasonable utilities, including electricity, water, housing and daycare. In addition, to avoid unreasonable wage differences among enterprises in the same sector, sector-based minimum wage rates need to be developed on a basis of general minimum wage rates, region-based minimum wage rates, labour productivity, corporate affordability and labour supply-demand relations in individual sectors agreed upon by representatives of both employees and employers and stated in sectoral labour agreements.

Delegated legislations on the implementation should be drafted in details and issued on time. That legislations on labour have not been effectively implemented comes partly from the fact that the government and other subordinate bodies fail to issue documents to guide their application. The practical invalidity of legislations due to the absence of delegated legislations should be corrected by fixing deadlines for responsible agencies to issue delegated legislations.

Internationally, Vietnam should set up detailed plans and take necessary steps to ratify remaining unratified ILO core labour conventions.

## ***1.2. Improving efficiency of state administration and enforcement of domestic labour law***

As the majority of developing countries, Vietnam has failed to enforce its labour law effectively because of lacks of capacity, resources and political willingness. Measures need to be taken to improve the situation.

Firstly, it is needed to transform the Trade Union from a socio-political organization into a social organization and staffs of trade union get paid from the funds set up by employees, not by the state or employers as present, making the Trade Union completely independent and separate from the state. This will lift the limitations which otherwise would be placed on the options available to the workers. This change in institutions will ensure that the permanent interests of workers are taken into considerations in decisions of the government. This is a huge challenge and takes enormous political commitment from the government of Vietnam. From the beginning of the history of trade union in Vietnam, Trade Union has been considered as the assistant organization of the Communist Party and as the effective tool for the Party to govern the working class and the state. The linkage between the Communist Party and the Trade Union of Vietnam is among the determinants shaping the success of the socialist course in Vietnam. The Trade Union in Vietnam has a close, aligned relationship with the government. The Trade Union of Vietnam is considered as the link between the Communist Party and the working class as a whole. The implementation of this recommendation can weaken the linkage between the state, government and the Trade Union and threaten the sole ruling position of the Communist Party in Vietnam.

Secondly, for established trade unions, at the corporate level, the selection of the heads of trade unions, their wages and benefits should be associated with the interest of employees to improve the effectiveness of trade unions. The Trade Union's capacity strengthening will help to deal comprehensively and effectively with many problems Vietnam faces. **Regarding strikes**, the position and contribution of the Trade Union must be improved. Trade Union should introduce new, diverse and flexible methods and procedure for collective labour disputes to be settled efficiently through negotiations and conciliation. Trade Unions should carry out regular training of employees in labour law to upgrade their compliance, foster the negotiation and signing of collective labour agreements and organize regular conversations with corporate management every three months. In addition, Trade Union needs to spend more effort on the construction of close and harmonious relationship between labourers and employers. **Regarding collective bargaining**, Trade Union staff must be educated and trained on a regular basis in knowledge and

skills of collective bargaining organization and negotiation. Materials supporting the training should be widely available to Trade Union staff. Grassroots trade unions should oversee and facilitate the performance of collective bargaining agreements and report infringement to employers and competent state agencies. Competent state authorities, including MOLISA and Department of Labour, Invalidity and Social Affairs in provinces supervise and assess the operation of collective bargaining negotiation, signing and implementation. **Regarding dispute settlement**, Trade Union staff needs to have good understanding of new aspects, if any, of labour dispute settlement mechanism under PTAs to efficiently join claim resolutions.

Thirdly, it is required to foster the building of trade union at enterprises or the Representative Board of the labour collective so that there is competent body to negotiate collective bargaining agreement with the employer.

Fourthly, mechanisms to ensure labour law compliance at the micro level by enterprises need to be improved. Effective implementation of labour law originates from the practice of enterprises. To change the practice of enterprises, it is imperative to first improve their awareness and understanding of labour law. Nowadays, Vietnam aims at the objective that at least 70% of employees and 90% of employers are educated in labour law.<sup>208</sup> To achieve this, state officials at different levels need to update themselves with changes in labour law; educators and reporters need to be educated to qualify for the task. In addition, the approaches, means and contents of labour law promulgation also need to be more diverse and attractive.

At the macro-level, it is needed to strengthen the labour inspection force. Labour law violations are very prevalent while the number of labour inspector is minimal and insufficient to supervise the compliance at all enterprises.<sup>209</sup> Raising the quantity of labour law inspectors is necessary but, in the context that Vietnam suffers from public debts and plans to cut costs by, among other things, reducing the number of state staffs, it is more imperative to improve the quality and qualification of labour law inspectors to raise their effectiveness. Besides, methods of labour

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<sup>208</sup> Project 31 by MOLISA on Promulgation of Law among Employees and Employers in different corporate forms, Phase 2 (2013-2016).

<sup>209</sup> For example, in Binh Duong Province, 12 inspectors are responsible for supervision in 18,000 enterprises. Statement at Meeting on Labour, Wages and Labour Law Training held on 25<sup>th</sup> and 26<sup>th</sup> November 2013 in Ho Chi Minh City. See at <http://www.molisa.gov.vn/news/detail/tabid/75/newsid/58245/language/vi-VN/Default.aspx?seo=Tap-trung-danh-gia-ket-qua-ve-mot-so-linh-vuc-cua-nganh-Lao-dong-%E2%80%93-Thuong-binh-va-Xa-hoi> visited 7<sup>th</sup> January 2014.

inspection need to be innovated, combining regular with irregular and unexpected checking to reduce the disguise responses from enterprises, have a correct view of their compliance and timely correction of violations. It is vital that Vietnam should take advantage of capacity building and technical assistance available in PTAs. Studies have showed that in countries with low labour standards like Vietnam, the threat of sanction is not sufficient for enforcement but it must associated with technical and financial assistance.<sup>210</sup>

In addition, it is necessary to make information of labour compliance widespread among domestic consumers and increase their preference over products manufactured in compliance with labour law. While such mechanism to spur compliance of export products with labour law is already in place because of the well-established preference of foreign consumers and the information transparency in export markets, it is not the case in the domestic market. Competent authorities should make public information of labour law compliance of businesses and carry out promulgation campaigns to improve awareness and change consumption habits of consumers.

### ***1.3. Changing the economy from factor-based to efficiency-based***

Positive influences of labour standards on trade, productivity and competitiveness can be activated through the operation of innovation; therefore Vietnam needs to develop more efficient production to compete by product quality not by prices. In other words, labour policies must not stand alone but should be supported by economic, trade and social policies. In order to make changes, Vietnam needs to assure “higher education and training, goods market efficiency, labour market efficiency, financial market development, technological readiness and market size.”<sup>211</sup>

### ***1.4. Making relevant institutional reforms***

It is imperative for Vietnam to overcome its institution limitations to deal with labour problems arising from PTAs. Vietnam needs to increase its transparency and effective governance in labour. In addition, Vietnam needs to step-by-step set up the regular dialogues and strong collaboration practice among different stakeholders in the labour field. It is proven that solutions

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<sup>210</sup> ILO (2013), *Social Dimensions of Free Trade Agreements*, International Institute for Labour Studies, p.102. Elliott K. A. and Freeman R. B. (2003), *Can Labour Standards Improve under Globalization?*, Washington DC: Institute for International Economics.

<sup>211</sup> World Economic Forum (2013), *Global Competitiveness Index*, p. 9, available at <http://www.weforum.org/reports/global-competitiveness-report-2013-2014>

to many labour problems take the involvement and joint forces of both the public and private sectors. For example, the effective implementation of domestic labour law requires the independence of the judicial system on the one hand, and voluntariness in compliance by enterprises and attitude of civil society towards corporate practice on the other hand. This measure becomes imperative due to the fact that the business and civil society in Vietnam have not been adequately consulted to contribute to the formation of the government's approach to labour issues in PTAs, including the government's position, negotiation strategy, proposals and commitments. That they are unaware of the PTAs' labour negotiation results as a result of confidential negotiation methods and their voice is not heard in the strategy planning and agreement negotiation stages causes uncooperation during the implementation period. The collaboration mechanism needs to start from the PTA pre-negotiation period to collect views on their necessity to receive greater public acceptance.

### ***1.5. Introducing the trade-related labour topic into the academic setting***

It is imperative that the topic of labour provisions under PTAs and their impacts should be discussed more intensively within the framework of education not only for students but also among researchers, experts and trade- and labour-policy makers. As stated above, TPP and Vietnam-EU FTA are the first PTAs to which Vietnam is a party to cover labour issues. Therefore, Vietnam is in severe need of qualified human resources in the trade and labour combined field. In terms of the academic aspect, up to now, in Vietnam, there is no course at either undergraduate or graduate programs specializing intensively in the trade-related labour topic.<sup>212</sup> Most of them focus on the discipline of trade or labour separately and fail to provide inter-disciplinary course on the trade-related labour subject. This is the case not only of formal education but also of informal education. Short-training courses concerning international trade still center on traditional issues, instead of non-traditional trade-related topic as the labour issue. This will adversely impact the quality of future human resources regarding this cross-cutting issue in both public sector (competent state bodies in international trade, ministries and departments) and private sector (law firms, trade unions, enterprises...). In the long term, it will

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<sup>212</sup> At present, in Vietnam, institutions educating in International Trade and International Trade Law include Hanoi Law University, Law Faculty-National University, Foreign Trade University, Vietnam Trade Union University, National Economics University, Vinh University, Hue University, Ho Chi Minh University of Law, University of Economics and Law, Can Tho University.

badly influence the quality and efficiency of state policies in the field. Furthermore, research by domestic experts on this topic is also negligible. The access to outside references on this topic is limited. Domestic experts need external technical and financial assistance to delve into the issue.

In addition, there is a need for education and training in labour negotiation skills for relevant parties, include undergraduate and graduate students majoring in international trade, law and policy and labour, trade union officials, government officials in trade and labour fields. This helps Vietnam to build its qualified human resources for future PTA negotiations. This also promises that Vietnam's PTA negotiators, regardless of their expertise, have a comprehensive and profound understanding of both trade and labour concerns, taking into consideration of these concerns in every negotiation stage.

## **2. Empirical experience and lessons from other countries**

The first lesson to learn is the carrying out of studies on the impacts of free trade agreements in general and labour provisions in particular on society. Countries like the EU or the U.S. have carried out such studies since 1999 and 2002 respectively.<sup>213</sup> In these countries, the studies are required under their law; the publication and public comments of the study/report are the next step. Although Vietnam has carried out studies of such kind, these studies have only focused on the impacts of trade and other traditionally trade-related commitments. None of them cover the aspect of labour provisions. Therefore, the studies should be compulsory under the law or regulation in Vietnam and expanded to cover the new trade-related topic of labour and the practice of impact studies for pre-, during and post-PTA negotiation periods should be sustained. Players in the civil society, including the business, trade unions and NGOs must join the assessment. The assessment need to be performed repeatedly and revised over time. The assessment should contain both economic and social implications of PTAs and its results are recommendations of measures to be taken by players.

In addition, Vietnam also needs to guarantee the involvement of civil society and key stakeholders in trade policy on labour issues. The mechanism for the involvement takes the form of consultation.

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<sup>213</sup> See more at European Commission (2008), *The Use, Scope and Effectiveness of Labour and Social Provisions and Sustainable Development Aspects in Bilateral and Regional Free Trade Agreements*, p. 71.



### 3. Strategies toward future PTAs' labour negotiation rounds and future PTAs

Vietnam needs to set up its strategies and tactics in PTAs' labour negotiations. Under the existing mechanism, even the National Assembly of Vietnam is uninformed of the government's labour proposals in PTAs and in the passive position when being submitted to with the final negotiation results which are normally not rejected because of huge sunk costs. Vietnam needs to clearly determine its limits on labour negotiation, i.e. what are the minimum and maximum labour concessions that Vietnam can make. In addition, Vietnam also needs to find out the upper and lower labour negotiation thresholds of its trade partners to determine whether the negotiation is feasible. This saves Vietnam from losing time and money on unsuccessful negotiation, or if otherwise, from bad negotiation outcomes which are well beyond its tolerance thresholds. In order to do this, the National Assembly of Vietnam or more specifically the Communist Party should discuss and approve the template for trade policy in Vietnam, providing guideline for, *inter alia*, labour negotiation in PTAs which Vietnam is negotiating and signing. The template should cover the objectives of labour negotiations, labour rights and standards to which Vietnam can make commitments, and other substantive and procedural labour provisions Vietnam expect and can tolerate. The template will be used as the basis for the National Assembly's supervision of PTA negotiation conducts of the government and for the National Assembly's ratification of PTA negotiation results. In addition, the template helps the government get well prepared and have a stronger bargaining positions compared with other trade partners.

Vietnam, if standing alone, will face tremendous difficulties or even impossibilities in influencing the ultimate outcomes of labour negotiations, especially in regional trade agreements like the TPP. To overcome the challenge, Vietnam should find out other trade partners with the same interest<sup>214</sup> in the labour issue, joining force with them to draft and recommend joint proposal in negotiation. This will give more weight to Vietnam's labour proposals. Trade partners having the same interest as Vietnam consist of not only developing countries which have the economic and social development status-quo in common with Vietnam but also certain specific developed countries. The fact that not every developed country favours each other in every detail of their labour proposals can be exploited by Vietnam. For example, the principle of freedom of association is also not strongly supported by Australia as proven in the Australia-

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<sup>214</sup> In TPP labour negotiations, these countries include developing countries like Chile, Peru, Malaysia and Brunei.

United States FTA 2005 which is of declarative rather than substantive nature.<sup>215</sup> Vietnam can cooperate with Australia on this issue.

In a lower bargaining position than its trade partners and conceptualizing labour commitments as the inevitable concessions in return for trade and economic benefits, Vietnam needs to turn these commitments into a gain, not just a loss. *Firstly*, Vietnam should try to persuade its trade partners to prefer positive sanctions than negative ones, i.e. the approach of more trade preferences available in case of the labour regulation compliance should be prioritized over the approach of more trade restrictions in case of labour regulation violations. Practically, the great experience of Cambodia in the United States-Cambodia Textile Agreement 1999 can be cited to support Vietnam's requirement. All of the improvement in labour law compliance in Cambodian textile-exporting factories did not come from any agreement-included negative sanction but stemmed from the positive sanction of quota increases. Theoretically, many studies have pointed out that negative sanctions are not enough and positive ones might result in compliance, especially in developing countries.<sup>216</sup> This is because labour provision implementation is best warranted by the voluntariness of the business which is fostered by the award of preferences or privileges in return for compliance.<sup>217</sup> Vietnam should request its trade partners to provide better treatments, including market access (e.g. higher quotas), trade facilitation (e.g. lesser required licenses) only to enterprises which comply with labour standards. This mechanism will prevent free-riders and increase the compliance ratio industry-wide. This approach should apply to export-oriented industries in Vietnam, including textile and cloth, seafood and agricultural products. To benefit from the mechanism, Vietnam has to set up a system to monitor and report labour standard improvements and compliance practice to its trade partners. Therefore, the side-effect of the implementation of this mechanism improves the compliance monitoring and

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<sup>215</sup> VCCI, WTO Center of VCCI, EU-Vietnam MUTRAP III (2012), *Recommendation on Negotiation Plans of the Labour and Labour Dispute Settlement Chapter in the Trans-Pacific Partnership Agreement*, available at <http://www.trungtamwto.vn/sites/default/files/tpp/attachments/INTA-2012-1-TPP3%20Khuyen%20nghi%20ve%20lao%20dong%20trong%20TPP.pdf>

<sup>216</sup> Polaski S. (2003), "Protecting Labour Rights through Trade Agreements: An Analytical Guide," *University of California Davis Journal of International Law and Policy* 10 No. 13, p. 13-25. Doumbia Henry C. and Gravel E. (2006), "Free Trade Agreements and Labour Rights: Recent Developments," *ILO Labour Review*, 145, No. 3, p. 185-206. Berik G. and Van der Meulen R. Y. (2010), "Options for Enforcing Labour Standards: Lessons from Bangladesh and Cambodia," *Journal of International Development* 22, p. 56-85.

<sup>217</sup> This is proven through the good practice of positive approach included in US-Cambodia Textile Agreement 1999 in which higher quotas are granted to factories complying labour standards.

reporting capacity as transparency in Vietnam. In Cambodia – a neighboring country with similar labour setting to Vietnam, the Better Factories Cambodia Program has been conducted since 2001 as a result of the United States-Cambodia Textile Agreement 1999 to provide monitoring, training and advisory services with the mission of making contribution “to building the economy of Cambodia and reducing poverty by reporting on working conditions and providing guidance to factory management and workers that help them make workplace.”<sup>218</sup> More than 400 apparel factories in Cambodia have been monitored by the Program.<sup>219</sup> Afterwards, the Better Work Program has been established globally since 2009 on a basis of cooperation between the ILO and the International Finance Corporation for the purpose of improving labour standard compliance and global competitiveness.<sup>220</sup> The Program has been so far carried out in seven countries, including Vietnam.<sup>221</sup> Vietnam should take the Better Work program into consideration in the formation of its monitoring and reporting mechanism of labour law compliance under PTAs. In Vietnam, the Better Work Vietnam Program started in 2009 to improve the labour standard compliance and competitiveness of the Vietnam’s apparel industry and the ILO plays the monitoring role.<sup>222</sup> In the initial 5-year phrase, the Program has just focused its monitoring services in more than 700 factories in Ho Chi Minh City and its neighbourhood.<sup>223</sup> Vietnam should cooperate with the program to exploit its technical and financial capacity and to benefit from its findings and contributions in labour standard compliance assessment.

*Secondly*, in terms of dispute settlement mechanism, Vietnam should try to assure that the mechanism is not abused for protectionist purpose. As analyzed in Chapter 2, although the potential negative impact of the dispute settlement clause in PTAs is minimal, it does exist. Vietnam should suggest that cases in which a developing country is the respondent will give priority to other alternatives (e.g. good offices and mediation) and make compulsory pre-panel steps (e.g. negotiation and consultation) as a more pleasant way out of disputes. Sanctions are the last resort after the other alternatives have been exhausted. The panel method should be conducted with impartiality by bilateral panels with the involvement of impartial experts such as

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<sup>218</sup> [http://betterfactories.org/?page\\_id=5082](http://betterfactories.org/?page_id=5082) and [http://betterfactories.org/?page\\_id=29](http://betterfactories.org/?page_id=29) visited on 14<sup>th</sup> May, 2014.

<sup>219</sup> [http://betterfactories.org/?page\\_id=90](http://betterfactories.org/?page_id=90) visited on 14<sup>th</sup> May, 2014.

<sup>220</sup> [http://betterwork.org/global/?page\\_id=300](http://betterwork.org/global/?page_id=300) visited on 14<sup>th</sup> May, 2014.

<sup>221</sup> [http://betterwork.org/global/?page\\_id=314](http://betterwork.org/global/?page_id=314) visited on 14<sup>th</sup> May, 2014.

<sup>222</sup> [http://betterwork.org/vietnam/?page\\_id=5](http://betterwork.org/vietnam/?page_id=5) visited on 14<sup>th</sup> May, 2014.

<sup>223</sup> [http://betterwork.org/vietnam/?page\\_id=32](http://betterwork.org/vietnam/?page_id=32) visited on 14<sup>th</sup> May, 2014.

ILO experts, not by national courts, to prevent the intervention of interested government or companies and ensure its legitimacy. Additionally, Vietnam should propose, during PTA negotiations, that trade-related sanctions, such as cuts in market access, are only available to systematic violations, not to random or one-off infringement by governmental parties to PTAs.

*Thirdly*, based on its own needs, Vietnam should propose appropriate and detailed measures to make the cooperation mechanisms workable for Vietnam. Evidence shows that, so far, cooperation mechanisms under existing already effect-taking PTAs have been just normative and not substantive because of their vagueness. Details need to be added on participants (representatives from government, business, trade unions), frequency, contents (e.g. labour standards, work safety, labour relations), binding nature of cooperation mechanisms, venue (to save costs for developing countries). The participation of international agencies, such as the ILO, should be encouraged.

*Lastly*, as a developing country, Vietnam should require the inclusion of special and differential treatment with regard to labour provisions as exceptions to general rules. Longer implementation periods should be given to developing countries. In the case of Vietnam, it will need extension of time limits to fulfill the obligation of effective domestic labour law implementation. In addition, developing countries like Vietnam should be exempted from certain labour obligations. The choice of dispute settlement methods should be at the discretion of developing countries. Additional time-limit should be allowed for developing countries to file their submissions. A lower upper limit of fines will be awarded in case of finding against developing countries. Fines paid by developing countries will be collected to a fund solve the relevant labour problems in those developing countries.

## CONCLUSION

Based on analyzing of movements of negotiating state parties to the TPP and EU-Vietnam FTA as well as comparable PTAs containing labour provisions, the future of labour provisions in these two PTAs can be foreseen. It is concluded that labour commitments in TPP will be very demanding while those in EU-Vietnam FTA share much in common with their counterpart in EU-Singapore FTA.

Because of the possibility of both positive and negative influences of labour provisions in PTAs on Vietnam, Vietnam needs to take comprehensive measures to gain the most from its commitments. Recommendations to Vietnam involve improving the domestic labour law system and efficiency of state administration and enforcement of domestic labour law, changing the economy from factor-based to efficiency-based, making relevant institutional reforms, introducing the trade-related labour topic into the academic setting, performing studies on the impacts of labour provisions in PTAs, set up strategies and tactics in PTAs' labour negotiations, joining forces with other trade partners of the same interest, effective exploitation of cooperation mechanisms in PTAs and proposing S&D treatment for developing countries.

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