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Working Paper

Trade and labour rights: The case of the TPP

GEG Working Paper, No. 124

Provided in Cooperation with:

University of Oxford, Global Economic Governance Programme (GEG)

Suggested Citation: Nghia Trong Pham (2017) : Trade and labour rights: The case of the TPP, GEG Working Paper, No. 124, University of Oxford, Global Economic Governance Programme (GEG), Oxford

This Version is available at:

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GEG Working Paper 124
March 2017

Trade and Labour Rights: The Case of the TPP

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Abstract

This research investigates the implications of trade on labour rights. It examines whether the labour commitments in the TPP improve labour rights in Viet Nam or not. It evaluates the current situation of law and practice in Viet Nam using the TPP requirements as a benchmark. It finds that freedom of association is the most difficult issue for Viet Nam since it conflicts with the political system and the hierarchical, authoritarian trade union structure in Viet Nam. Due to benefits of the TPP, Viet Nam will carry out reforms needed to meet the TPP labour requirements. However, while interests are aligned on joining the TPP they will not be aligned on compliance, and the implementation of these reforms will be challenging since the fully enjoyment of freedom of association is not recognised and supported in practice. It concludes that trade can improve workers' right to freedom of association in the books of law but rarely improve their enjoyment of this right in practice.

The Global Economic Governance Programme is directed by Emily Jones and has been made possible through the generous support of Old Members of University College. Its research projects have been principally funded by the Ford Foundation (New York), the International Development Research Centre (Ottawa), and the MacArthur Foundation (Chicago).

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Introduction

As a developing country,¹ competing on cheap, labour insensitive products, Viet Nam used to oppose the inclusion of labour provisions in free trade agreements, particularly the Trans – Pacific Partnership Agreement (TPP).² From the beginning Viet Nam protested against the inclusion of a chapter on labour in the TPP, then opposed the application of binding dispute settlement mechanism on labour commitments.³ However, Viet Nam has signed the TPP⁴ which contains the strongest labour provisions of all existing FTAs. For Viet Nam, the TPP is the first FTA containing a chapter on labour commitments.⁵ The strong labour commitments of Viet Nam in the TPP has been even noted as “surprising for a communist, one-party system”.⁶

Even the TPP’s future is not certain after the United States withdrew from this agreement, the negotiation and signature of the TPP still have impacts on Viet Nam. This research examines whether the labour commitments in the TPP improve labour rights in Viet Nam or not. It evaluates the current situation of law and practice on freedom of association in Viet Nam using the TPP requirements as a benchmark. In this research, in-person discussions with officials at ministerial level are taken. Interviews are carried out with departmental officials from ministries, which involve in the process of negotiation and implementation.⁷ In addition, an online survey via Facebook from anonymous respondents helps to check the outcomes of the discussion and interviews.⁸

It finds that freedom of association is the most difficult issue for Viet Nam since it conflicts with the political system and the hierarchical, authoritarian trade union structure in Viet Nam. However, due to benefits of the TPP, Viet Nam will carry out reforms needed to meet the TPP labour requirements. This said, while interests are aligned on joining the TPP they will not be aligned on compliance and the implementation of these reforms will be very challenging since the fully enjoyment of Freedom of Association is not recognised and supported in practice. It concludes that trade can improve workers’ right to freedom of association in the books of law but rarely improve their enjoyment of this right in practice.

1. What Are Viet Nam’s Labour Commitments in the TPP?

1.1. The TPP Labour Commitments

The TPP includes 30 chapters (516 articles) covering trade and trade-related issues. The TPP spends Chapter 19 including 15 articles dealing with labour issues. In this Chapter, the

¹ Developing countries strongly resisted efforts to allow the WTO to enforce labour standards, and the meeting concluded by affirming the ILO’s role in determining and dealing with labour standards. See also Daniel Chow (2013) ‘Why China opposes Human Rights in the World Trade Organisation’, Vol. 35(1) p. 61.

² My experience as a member of the TPP labour team.

³ Fergusson et al. (2013), *TPP Negotiations and Issues for Congress*, Congressional Research Service, p. 42.

⁴ Viet Nam has recently concluded and signed TPP on February 4th 2016 with 11 other countries.⁴

⁵ The EU-VN FTA, signed on December 2, 2015, is the first FTA containing labour commitments (as a part in the Chapter on Sustainable Development) for Viet Nam.

⁶ Erwin Schweissheim (2015), *Vietnam’s Trade Agreements with the EU and the US*, FES Viet Nam.

⁷ 72: Government officials (41); Trade unions (7), VCCI and employers (10); academia (9) and member of civil organisations (5).

⁸ 147: Government officials (77); Employers (15); Trade union and Employees (30); Academics (12); Others (13)

TPP requires all Parties affirm their obligations as members of the ILO, including those stated in the ILO Declaration on Fundamental Principles and Rights at Work 1998 and Its Follow-up (Declaration), regarding labour rights within their territories.⁹ Each Party shall adopt and maintain in its statutes and regulations, and practices the following rights as stated in the ILO Declaration.¹⁰ The commitments in the Labour chapter are subject to the procedures laid out in the Dispute Settlement chapter.¹¹ This chapter also establishes a labour dialogue that Parties may choose to use to try to resolve any labour issue between them that arises under the chapter. The dialogue allows for expeditious consideration of matters and for Parties to mutually agree to a course of action to address issues.¹² It also sets up a mechanism for cooperation on labour issues, including opportunities for stakeholder input in identifying areas of cooperation and participation, as appropriate and jointly agreed, in cooperative activities.¹³ Together with above labour rights commitments, these add-on commitments have meant TPP has the strongest labour provisions of any trade agreements in history.¹⁴

In the TPP negotiation, the United States has requested, tabled, and signed labour side agreement with three other TPP members: Brunei, Malaysia and Viet Nam. These plans were not initiated at the beginning of TPP negotiation but were proposed when “almost main content of the Labour Chapter [had] been agreed”.¹⁵ Interestingly, most of the requirements in the US-VN Labour Plan derive from comments and proposals from the United States Department of Labour sent to Viet Nam government during the revision of Viet Nam’s Labour Code in 2009-2012,¹⁶ which were refused and rejected by Viet Nam. This shows the continuous efforts of the United States in improving labour rights in Viet Nam on the one hand and the concession of Viet Nam in the TPP on the other hand.¹⁷

The US-VN Labour Plan covers a wide range of issues including legal reforms, institutional reforms, and capacity building; transparency and sharing information; assessment of progress; technical assistance; and implementation and review of implementation. It requires Viet Nam to undertake several legal, institutional, and procedural reforms. This plan is subject to consultations under Article 19.15 (Labour Consultations)¹⁸ of the Labour Chapter and even though it is a bilateral agreement, the plan is a part of the TPP and it is enforceable through the same dispute settlement mechanism that apply to the TPP.¹⁹ The Plan also sets detailed schedule for implementation and review of implementation. It also provides a supporting mechanism for its implementation by Technical Assistance Program and Labour Expert Committee.²⁰

Reforms on freedom of association, specifically the right of workers to organise account for a large part of Viet Nam’s obligations, while only a few amendments of current legislation on collective bargaining and strikes as well as elimination of forced labour and elimination of

⁹ Article 19.2 of the TPP.

¹⁰ Sec. 1, Article 19.3 of the TPP. These are: Freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour and, a prohibition on the worst forms of child labour; and the elimination of discrimination in respect of employment and occupation.

¹¹ Sec. 12 Article 19.15 of the TPP.

¹² Article 19.11 of the TPP.

¹³ Article 19.10 of the TPP.

¹⁴ See also “*TPP Protecting Workers*”, <https://ustr.gov/sites/default/files/TPP-Protecting-Workers-Fact-Sheet.pdf> (last visited 8/8/2016).

¹⁵ Discussion with the Lead of U.S. TPP Labour Team.

¹⁶ According to the Labour Dialogue mechanism between the two countries. The U.S. Department of Labour sent two letters, including comments on drafts of the Labour Code in Viet Nam in 2009 and 2012.

¹⁷ This remark was confirmed in personal discussion with senior official of U.S. Department of Labour.

¹⁸ Except for the requirement to circulate the request and reply, respectively, to the other TPP Parties.

¹⁹ Part VIII of the US-VN Labour Plan.

²⁰ Sec. A2, Part 5 of the US-VN Labour plan.

discrimination at work are required, and no legal reforms on abolition of child labour are mentioned. This indicates, on one hand, the gap between Viet Nam's law and the ILO's standards on freedom of association, which will be studied in the next part of this research. On the other hand, it shows the consistency and conformity of Viet Nam's law on these issues as provided by the ILO, which may be positively impacted by the ratifications of ILO conventions.²¹ However, while child labour²² as well as forced labour²³ are still very popular in Viet Nam, this proves the approach of the United States is limited to legislation (laws on the book) rather than their implementation in reality. It also shows that the United States has more interests on freedom of association issue than other issues of the TPP labour commitments.

1.2. Viet Nam's Commitments on Freedom of Association

Viet Nam commitments on freedom of association in the TPP are provided by the ILO's standards and interpreted by the US-VN Labour Plan. Accordingly, Viet Nam is required to carry out legal reforms which include the following:

- Ensure that its laws and regulations permit workers, without distinction, employed by an enterprise to form a grassroots labour union (in Viet Nameese *Tổ chức của người lao động*) of their own choosing without prior authorisation.
- Provide in its law and practice that grassroots labour unions may, if they so choose, form or join organisations of workers, including across enterprises and at the levels above the enterprise, including the sectorial and regional levels.
- Ensure that its law will not require labour unions registered with the competent government body to have mandatory political obligations and responsibilities that are inconsistent with the labour rights as stated in the ILO Declaration.
- Ensure that it distinguishes between employees and those who have the interests of the employer, and shall prohibit employer interference with labour unions.

According to the US - VN Labour Plan, a grassroots labour union shall register with its choice of either the Viet Nam General Confederation of Labour (VGCL) or the competent government body. A grassroots labour union registered with the competent government body shall have the right autonomously to elect its representatives, adopt its constitution and rules, organise its administration, including managing its finances and assets, bargain collectively, and organise and lead strikes and other collective actions related to the occupational and socio-economic interests of the workers at its enterprise. For greater certainty, a grassroots labour union registered with the competent government body shall have no lesser rights in law and practice with regard to the labour rights as stated in the ILO Declaration 1998 than a grassroots labour union under the VGCL. Therefore, there would be two categories of labour

²¹ See Pham Trong Nghia (2005), *The Implementation of Ratified ILO Fundamental Conventions in Vietnam: Successes and Challenges*, State Practice and International Law Journal, vol.2 Issue 1.

²² In the first National Survey of Child Labour in 2012, it has shown that child labour is common in all provinces, in both rural and urban areas, in both informal and formal sectors. The Survey indicates that about 1,754,000 children aged 5-17 in Viet Nam are considered child labour, accounting for 62 percent of working children and 9.6 percent of the child population. Child labour accounts for 66.3 percent of working children in urban areas while this number for the rural areas is 61.2 percent. In urban areas, child labour accounts for 5.0 percent of the total child population, but this figure is more than double at about 11.4 percent in rural area.

²³ Although there is no official statistics on forced labour in Viet Nam, in 2011, Human Rights Watch released a shocking report on how Vietnamese citizens struggling with drug addiction were being beaten, tortured and forced to work in compulsory drug detention centres. According to this Report, Viet Nam's system of forced labour centres for people who use drugs has expanded over the last decade. In 2000, there were 56 drug detention centres across Viet Nam; by early 2011 that number had risen to 123 centres. Between 2000 and 2010, over 309,000 people across Viet Nam passed through the centres. The length of time in detention has also grown. In 2014, a study of the International Labour Rights Forum found out that forced labour in drug detention centre continues.

unions, one that registers with VGCL to be in the current trade unions system, and the other type that registers with a government competent body such as MOLISA or Ministry of Internal Affairs. After five years, Viet Nam shall provide in both law and practice that grassroots labour unions may affiliate at the levels above the enterprise, including the sectorial and regional levels.²⁴

Notably, a separate enforcement mechanism independent of the TPP will apply if the United States is dissatisfied with Viet Nam's implementation. After the five-year period, the United States has two years to assess whether Viet Nam has complied with its cross-affiliation obligation. If not, the United States may unilaterally suspend all tariffs agreed upon in the TPP that have not already occurred. If Viet Nam disagrees with the United States on whether it has fulfilled its cross-affiliation obligation, then Viet Nam may initiate dispute settlement procedures against the United States. Otherwise, the tariffs remain frozen.²⁵

Even the name of the organisation is "grassroots labour union" (*Tổ chức của người lao động*) – its legal position and function prove itself a trade union. Thus, the TPP commitments on freedom of association of Viet Nam based on the three main principles:

- I. To ensure the right to establish labour unions of workers by pluralism of trade unions at both enterprise levels and upper levels;
- II. To ensure freedom to join labour unions;
- III. To ensure the independence of the labour unions.

The US - VN Labour Plan acts as specific interpretation of the ILO standards on freedom of association and provides guidelines for their implementation in Viet Nam. However, some of its interpretation does not fit with the notion of standards provided by the ILO. In the ILO's jurisprudence, freedom of association consists of both the right of workers to organise and the right of employers to organise. However the US - VN Labour Plan only refers to the right to organise of workers.

The ILO provides that the monopoly of trade union is not a violation of ILO standards if this is the result of unity within trade union movement, which come from the desire of workers and for the advantage of workers.²⁶ Which means there are two options for a State with monopoly system of trade unions to be in conformity with the ILO: (i) make sure that this is the result of unity within trade union movement; or (ii) ensure the establishment of other trade unions. However, the US - VN Labour Plan did not give Viet Nam the chance to try the first option. The "mis-interpretation" of ILO standards shows the strong commitment of the TPP, which may be explained by the intention and effort to impose pluralism of trade unions in Viet Nam by the United States.

The plan not only provides a specific interpretation and guidelines for implementing ILO standards on fundamental workers' rights, especially freedom of association, it also contains very detailed steps and resources for implementation. This shows a strong attempt by the United States in imposing and forcing Viet Nam to implement its labour commitments that would make it impossible for Viet Nam to find reasons for not implementing, or for violating, these commitments. It is considered as a real historic moment for countries like Viet Nam and the workers in those countries because these countries will have to make very significant changes to their systems.²⁷

²⁴ Sec. 2, Part VII of the US-VN Labour Plan.

²⁵ Part VIII of the US-VN Labour Plan.

²⁶ ILO, *Digest*, p. 67, para. 319 (International Labour Office 2006).

²⁷ See *Why Obama Says TPP Is Historic for Workers — and why US Labour Unions Hate It*, <http://www.vox.com/2015/11/12/9716400/tpp-labour-vietnam> (last visited 11/11/ 2016).

2. How Do Viet Nam's Legal Framework and Practice Fit with the Labour Commitments on Freedom of Association?

Freedom of association is a basic right of Viet Nameese people stipulated in the Constitution and enshrined in law. The first Constitution of Viet Nam – the Constitution 1946 – provides that “Viet Nameese citizen shall have the right to freedom of association”.²⁸ This right has been recognised in the following Constitutions of 1959,²⁹ 1980³⁰ and 1992.³¹ Article 25 of the current Constitution 2013 specifies that citizens have freedom of expression, press, accessing information, meeting, association, and assembly. However, when this constitutional right is promulgated and enforced by specific acts, it shows inconformity with the TPP's requirements, particularly trade union pluralism and independence.

The first law on trade unions, enacted in 1957, provided that all waged workers should have the right to join trade union.³² This right was granted to both intellectual and manual workers.³³ After 55 years, the right to organise is defined for the first time by the Trade Union Law 2012 (TUL 2012). According to this Law, trade union rights consists of two elements: (i) the right of workers to establish, participate in and operate trade unions and trade union members; and (ii) the rights of Trade Union organisations as prescribed by law and provisions of competent authorities.³⁴ The Labour Code 2012 (LC 2012) also provides for the right of workers to form, join, or participate in union activities in order to protect their legal rights and benefits,³⁵ though it requires that the exercise of this provision must be in accordance with the TUL 2012.

2.1. The Monopoly of Trade Union System

According to the ILO, workers have the right to establish organisations of their own choosing without previous authorisation, which implies, in particular, effectively the possibility of creating, if the workers so choose, more than one workers' organisation per enterprise.³⁶ In the TPP, Viet Nam commits to ensure that its laws and regulations permit workers employed by an enterprise, without distinction, to form a grassroots labour union (in Viet Nameese *Tổ chức của người lao động*) of their own choosing without prior authorisation. Therefore, if domestic law does not authorize the establishment of a second union in an enterprise, it is not in conforming with ILO standards and TPP commitments.

In Viet Nam, the monopoly of the trade union system is imposed by law. Workers do not enjoy the true right to organise, and they cannot choose to establish or to join trade unions of their own choosing because there is only one legally recognised system of trade unions. The organisation of trade union is prescribed by the Charter of Vietnamese Trade Union adopted by VGCL. In addition to trade unions at enterprises, the primary trade unions are constituted in state agencies, political organisations, socio-political organisations, profession-socio-

²⁸ Article 10 of the Constitution 1946.

²⁹ Article 25 of the Constitution 1959.

³⁰ Article 67 of the Constitution 1980.

³¹ Article 69 of the Constitution 1992.

³² Article 1 of the TUL 1957.

³³ The classification of workers into “intellectual workers” and “manual workers” was also recognised in the Preamble of the LC 1994 but not in the LC 2012.

³⁴ Sec. 1 Article 4 of the TUL 2012.

³⁵ Sec. 2, Article 7 of the LC 2012.

³⁶ Case No. 1840, Report No. 302, para. 351; Case No. 1581, Report No. 327, para. 109; Case No. 2327, Report No. 337, para. 198.

political organisation, and professional-social organisations employing labourers. Grassroots trade unions are also formed in foreign agencies or organisations, and international organisations operating in the Viet Nam.³⁷

From the ILO's view point, the monopoly of trade union system imposed by law or the unity of trade union is created through legislation is not compatible and is a violation of the right to organise of workers.³⁸ From the United States perspectives, workers in Viet Nam *do not* have the right to freely form and join an independent union of their choosing at an individual workplace, to organise across enterprises, or to form vertical umbrella organisations, i.e., affiliate with confederations. Efforts to form independent worker organisations have led to people being beaten and jailed.³⁹

2.1.1. Monopoly in the Structure

The Vietnamese trade union system is monopoly and has a four-level hierarchy:⁴⁰

- I. the central and highest level is the VGCL;
- II. the second level is the province level trade unions including province level Confederations of Labour, national sectorial trade unions, and corporate trade unions under VGCL;
- III. the third level is the upper level trade unions includes district level Confederations of Labour, trade unions in Ministries of Government, local sectorial trade unions; trade unions in industrial zones; and trade unions in SOEs under provinces' management;
- IV. the lowest level is grassroots trade unions.

³⁷ Article 7 of the TUL 2012.

³⁸ CFA: Case No. 2348, Report No. 338, para. 995; Case No. 1963, Report No. 320, para. 220; Case No. 2067, Report No. 324, para. 998.

³⁹ Committee on Ways & Means Report to 114th Congress Feb 1, 2016.

⁴⁰ Article 9 of the Charter of Vietnamese Trade Unions.

Province-level Confederation of Labour is established in every province in Viet Nam. National sectorial trade unions are not arranged in accordance with the administrative organisation of the State, but are under the line management of the relevant ministry.⁴⁵ By December 2015, there were 63 province-level Confederations of Labour in Viet Nam. At the same time, there were 20 national sectorial trade unions including the Confederation of Trade Unions of the Armed Forces, the Confederation of Trade Unions of the Police, and the Confederation of Trade Unions of Government Officials.⁴⁶ A district-level Confederation of Labour is established in every district, amounting to 6,713 by end of 2015. Besides district-level Confederations of Labour, upper grassroots-level trade unions include 375 local sectorial trade unions and 35 industrial zone and export processing zone trade unions,⁴⁷ and trade unions in Ministries and under Governmental organisations.⁴⁸ Grassroots trade unions, at the bottom, are established in enterprises, state agencies and other units. Grassroots trade unions are managed by trade union leaders who are elected by their members with a term of 2.5 years.⁴⁹ By December 2009, there were 99,577 grassroots trade unions in Viet Nam, and this number had been increased to 121,590 by the end of 2015.⁵⁰

According to the law, VGCL and trade union associations are entitled to join international trade union organisations which have similar objectives.⁵¹ However, according to the Charter of Vietnamese Trade Unions, only VGCL has the right to join international trade unions associations.⁵² None of the other associations of trade unions can join international trade union associations.⁵³

This regulation in Viet Nam is a violation of the requirement of ILO standards. ILO standards provide that workers' organisations have the right to establish and join federations and confederations; federations and confederations of workers organisations have the right to affiliate with international organisations of workers.⁵⁴ In addition, the ILO requires that trade unions have the right to draw up their constitution and rules.⁵⁵ On the contrary, in Viet Nam, because of the monopoly trade unions system, all trade unions must comply with the Charter of Vietnamese Trade Unions promulgated by the VGCL. Their right to discuss and draft their own constitution and rules provided by the ILO is implemented, on their behalf, by the VGCL.

2.1.2. Monopoly in the Enterprise

The monopoly of the trade union system in Viet Nam is expressed not only in terms of structure systems at a national level but also in terms of trade union existence at a grassroots level. In addition to the single system of trade unions connected with the totally dominant role of the VGCL, only one grassroots trade union is recognised and set up in a unit. Once established, grassroots trade union can only affiliate with other trade unions (in other enterprises) under the umbrella of the upper level trade union, which is affiliated to, and under, the umbrella of the VGCL. Thus, there is only a single system of trade unions from the

⁴⁵ For example: National Postal Trade Union is under the supervision of Ministry of Information and Telecommunication; National Education Trade Union is under the supervision of Ministry of Education and Training. Leaders of these organisations are staff of the relevant Ministries.

⁴⁶ Report No. 17/BC-TLĐ dated 9/3/2010 of VGCL.

⁴⁷ Report No. 04/BC-TLĐ dated 13/1/2016 of VGCL.

⁴⁸ Report No. 04/BC-TLĐ dated 13/1/2016 of VGCL.

⁴⁹ 20 ministries (excepted for the armed forces and the police) and 8 under governmental organisations.

⁵⁰ Report No. 04/BC-TLĐ dated 13/1/2016 of VGCL.

⁵¹ Sec. 3, Article 1 of the TUL 2012.

⁵² Sec. 6, Article 34 of the Charter of Vietnamese Trade Unions.

⁵³ However, in practice, there has been one sectorial trade unions have been members international trade unions, the Viet Nam National Union of Post and Telecom workers joined the UNI (the Global Union for skills and services) on 28/8/2008.

⁵⁴ Article 5 of the Convention No. 87.

⁵⁵ Article 3 of the Convention No. 87.

enterprise level to the national level. This regulation does not conform with TPP commitments as Viet Nam commits to provide in its law and practice that grassroots labour unions may, if they so choose, form or join organisations of workers, including across enterprises and at the levels above the enterprise, including the sectorial and regional levels.

In cases where there is no trade union at an enterprise, if the workers set up a trade union, this must be approved by, and affiliated to, the upper level trade union. If a trade union has been established in an enterprise, workers cannot set up another trade union, and they can only exercise their right to organise by joining the single existing trade union. It has been reported that attempts to establish trade union independent from the VGCL or its affiliates is suppressed, illegal, and sanctioned.⁵⁶

The term “trade union” in English translates as *Cong doan* in Vietnamese. There is only one *Cong doan* at grassroots level (enterprise, organisation, etc) which represents workers and no other *Cong doan* coexists with this only *Cong doan*. If another trade union is established when a *Cong doan* already exists, that trade union will not be called *Cong doan* and will not be recognised as a trade union. Every *Cong doan* is affiliated to the upper level trade union, which is under the umbrella of the VGCL. Therefore, the right to establish and to join a trade union is interpreted as the right to form and to join the monopoly *Cong doan*.

In Viet Nam, the typical way of setting up a trade union is top-down not bottom-up, where the upper level trade union contacts the employer to collaborate in establishing a trade union. Thereafter, the employer nominates, then the upper level trade union appoints, a senior human resource director who becomes the trade union leader. Thus, the consent and desire of workers are usually ignored in the establishment of trade unions.

Most of the above analysis show Viet Nam’ current trade union system is not in conformity with the ILO standards, requirements of the TPP and particularly the US - VN Labour Plan. It has been argued that “There has to be recognition that Viet Nam and its laws and practices are totally out of compliance with basic international labour standards. If you try to form an independent union, you can be thrown in jail.”⁵⁷

According to the US - VN Labour Plan, Viet Nam shall provide in its law and practice that grassroots labour unions may, if they so choose, form or join organisations of workers, including across enterprises and at the levels above the enterprise, including the sectorial and regional levels, consistent with the labour rights as stated in the ILO Declaration no later than five years from the date of entry into force of the TPP Agreement. In order to meet these requirements, the above legislations imposing monopoly system of trade unions must be revised or repealed to ensure the establishment of other trade union systems in Viet Nam.

2.2. The Compulsory Unionisation

Freedom of association includes the right to join *and* the right not to join an association. The Universal Declaration of Human Rights, while recognising the right to freedom of association, states that “No one may be compelled to belong to an association.”⁵⁸ At the Conference which adopted Convention No. 87, the ILO refused to include a provision stipulating the right not to join an association,⁵⁹ leaving it to each Member State to decide whether it is

⁵⁶ See Human Rights Watch (2000), *Not Yet a Workers’ paradise: Vietnam’s Suppression of the Independent Workers’ Movement*, Human Rights Watch Organisation.

⁵⁷ U.S. Congressman Sander Levin of Michigan cited by “Trans-Pacific Partnership won’t improve workers’ rights in Asia, critics warn”. Available at <https://www.theguardian.com/us-news/2015/may/21/trans-pacific-partnership-obama-trade-deal-asia-workers> (last visited 2/5/2016)

⁵⁸ Article 20(2) of the Universal Declaration of Human Rights.

⁵⁹ ILO (1947) *Provisional Record of Proceedings, 30th Session*, ILO, Geneva, p. 571. See also Virginia Leary (1996) “The Paradox of Workers’ Rights as Human Rights” in *Human Rights, Labour Rights, and International Trade*, eds. Lance Compa and Stephen Diamond, University of Pennsylvania Press,

appropriate to guarantee the right of workers not to join a trade union or to authorise, and where necessary, to regulate the use of union security clauses in practice.⁶⁰ However, according to the ILO, union security clauses imposed by law, which appear to result in a trade union monopoly system contrary to the principles of freedom of association.⁶¹

In Viet Nam, although employers are prohibited from coercing workers to establish, join, or operate a trade union,⁶² the law clearly denies the right of workers not to organise. Workers cannot relinquish the right to organize, on the contrary, they have been obliged to be represented in enterprises in Viet Nam since the adoption of the Labour Code 1994. This code required establishment of trade unions in the case of newly established enterprises, after six months from the date of commencement of the operation. For enterprises operating without them, trade unions must be set up within six months since this Code came into effect (1 January 1995).⁶³ In cases where no trade union is established after a period of six months, the upper grassroots trade union will appoint an interim trade union to represent workers in the enterprises. This interim trade union has all the rights of a trade union. Leaders of the interim trade union are workers in the enterprise or officials of the upper grassroots trade union.⁶⁴ This trade union represents all workers in the enterprise and is under the control and supervision of the upper grassroots trade union.

The first stepping stone for the creation of multi-trade unions in Viet Nam by allowing the establishment of representatives of workers in an enterprise where no trade union has been established was proposed in the first draft of the LC 2012. This draft also allowed the creation and existence of organisations of workers' representative in parallel with the traditional trade union system.⁶⁵ However, this progressive provision was rejected in the second draft, which clearly maintained the monopoly of the trade union system in Viet Nam. Finally, the compulsory establishment of grassroots trade unions was repealed by the LC 2012. Interestingly, instead of setting out a deadline for the establishment of grassroots trade unions, the LC 2012 authorises the upper grassroots level trade union to exercise the rights of grassroots trade unions.⁶⁶ This means in non-unionised enterprises, workers are represented by the upper grassroots level trade unions whether workers authorize this representation or not.⁶⁷

Accordingly, the upper grassroots level trade unions represent and protect the lawful and legitimate rights and interests of workers; participate in negotiating, signing, and monitoring the implementation of collective bargaining agreements, wage scales and wage tables, work norms, wage payment regulations and bonus regulations, internal work regulations and regulations on democracy at the workplaces, agencies or organizations; participate in resolving labour disputes; conduct social dialogue and cooperation with employers to build harmonious, stable, and progressive labour relations in the enterprise, agency, or organization.⁶⁸ The upper grassroots trade unions are also obligated to mobilize employees to join trade unions and establish grassroots trade unions at enterprises.⁶⁹

By these regulations, all workers in Viet Nam are represented either by grassroots trade unions in enterprises or by upper level trade unions. However, the legitimacy of upper level

Philadelphia, pp. 22-47, p. 35; Harold Dunning (1998) "The Origin of Convention No. 87 on Freedom of Association and the Right to Organise", *International Labour Review*, vol. 137, No. 2, pp. 149-167.

⁶⁰ ILO (1959) 43rd Session Report of the Committee of Experts, Report III (part IV), (para. 36).

⁶¹ ILO (2006) *Digest*, p. 76 (para. 363). See also CFA: Case No. 1963, Report No. 320, para. 220.

⁶² Sec 2, Article 190 of the LC 2012.

⁶³ Article 153 of the LC 1994.

⁶⁴ Decree No. 96/2006/ND-CP dated 14/9/2006 of the Government.

⁶⁵ Article 206 of the first Draft of the new Labour Code.

⁶⁶ Sec 3, Article 188 of the LC 2012.

⁶⁷ According to TUL 2012, upper grassroots trade unions can only represent workers in non-unionised enterprises when workers request.

⁶⁸ Sec. 1, Article 188 of the LC 2012.

⁶⁹ Sec. 2, Article 189 of the LC 2012.

trade unions in representing workers in nonunionized enterprises is controversial when they are not authorised by the workers. Many other issues may arise. For example, because officials from upper level trade unions are not workers at enterprises, how they know the desires and needs of workers? While most of upper level trade union official are also government officials working at the district level confederation of labour with a limited number,⁷⁰ can they deal with thousand enterprises in a district?⁷¹

In practice, while trade unions have been declining in most developed countries, their numbers have been increasing in Viet Nam. By 2012, there were 7.9 million trade union members accounting for 15.8 percent of the workforce. By 2015, with enormous effort of VGCL, the total member of trade unions was increased to 8,948,964, accounting for about 16.3 percent of the workforce. At the same time, the number of trade union members in state sector has declined while the number of members in non-State sector has risen. This is explained by the reduction in the number of SoEs, as well as the shift in job creation from state to private sector. This also shows the efforts of VGCL in increasing the coverage of trade unions in non-State sector. However, the State sector still accounts for 69.7 percent of the total grassroots trade unions and 46.1 percent of the total trade union members.⁷²

While the number of trade union members has been rising, the percentage of unionised enterprises has been declining. In 2009, 20 percent of private enterprises and 40 percent of FDI enterprises were unionised.⁷³ In 2015, only 39,093 grassroots trade unions established in non-State enterprises,⁷⁴ which means only about 10 percent of non-State enterprises have trade unions.⁷⁵ Therefore, despite support to establish trade union by the State, the low coverage of trade unions in non-State enterprises can be explained both by the establishment of new non-State enterprises and also be explained by the ignorance of workers on the role of trade unions. The reasons for later may be the weakness and impotence of trade unions in protecting workers' rights and interests, which result from the monopoly of the trade union system and the dependence of trade unions. It can be justified by the weakness of VGCL and its affiliates in communicating its role to workers and in promoting the establishment of trade unions in enterprises. But it can be the unexpected consequence of the compulsory representation when workers do not find any incentives in establishing grassroots trade union as they are automatically represented by the upper level trade unions.

In order to be in compliance with ILO standards and TPP commitments, legislation imposing the compulsory representation of upper trade unions must be abolished and replaced with legislation that allows workers to be free to join or not to join trade unions at all levels.

2.3. The Dependence of Trade Unions in Viet Nam

The independence of trade unions is a vital foundation for the full enjoyment of the right to organise. The ILO requires that trade unions must be independent from authorities in both organisational operation and financial issues; trade unions must also be independent from employers in carrying out their activities. The US-VN Labour Plan also specifies that Viet Nam shall ensure that it distinguishes between employees and those who have the interests of the employer, and shall prohibit employer interference with labour unions.

⁷⁰ According to Decision No. 50/QD-TLD dated 4/1/2013 of the Board of Chairmen of VGCL, a district level confederation of labour has from 4 to 15 officials.

⁷¹ E.g. District level 10 of Hochiminh city has more than 13,000 enterprises; District level has more than 8,000 enterprises.

⁷² Report No. 04/BC-TLD dated 13/1/2016 of VGCL.

⁷³ Report No. 146/BC-BLDTBXH dated 31/12/2009 of MOLISA.

⁷⁴ Report No. 04/BC-TLD dated 13/1/2016 of VGCL.

⁷⁵ According to statistics, by 2015, there are about more than 400,000 non-State enterprises in Vietnam.

Presently, trade unions in Viet Nam are defined as socio-political organisations of the working class and labourers.⁷⁶ This means trade unions have two main functions: protecting rights and interests of workers, and that of a socio-political organisation. In the first instance, trade unions are largely dependent on employers, while the latter creates strong reliance and dependence of trade unions on the State.

2.3.1. Dependence on Employers

In an enterprise, the trade union is dependent on the employer in both establishment and operation. The employer often nominates and then the upper level trade union appoints a senior human resource director who becomes the trade union leader. Because of that, the trade union is primarily a tool of the employers. In practice, it has been established that workers in Viet Nam have tended to view trade unions as part of management rather than representative of their views.⁷⁷

In addition, most trade union leaders are also employees in the enterprise; they are dependent on the employer for salary, terms of contract, and other interests. The law provides that a person who carries out trade union activities on a full-time basis and receives a wage from trade union funds and shall be insured by the employer with collective welfare benefits, just like other employees of the enterprise.⁷⁸

According to VGCL regulations, a full time trade union official should be stationed in a workplace using 1,000 workers or more, with another full time trade union official provided for every 1,500 workers (with no more than seven officials in total).⁷⁹ This means that all trade union leaders in all enterprises employing fewer than 1,000 workers are part-time leaders, and therefore paid by their employers. In Viet Nam, most enterprises are SMEs employing fewer than 300 workers, thus 95 percent of the trade union leaders in enterprises are not working full-time.⁸⁰ These leaders are not paid by the trade union fund as they do not meet the requirement of the above regulation. In this context, it is very difficult for their activities to be independent and separated from the interests of the employers.

The law requires all employers to contribute to a trade union fund. In the past, only employers at unionised enterprises were obliged to contribute trade union fees. Since the TUL 2012 took effect in 2013, all employers in enterprises, regardless of whether they have trade unions or not, have to contribute to the Trade Union Fund. The amount is two percent of wage budgets of employers.⁸¹ The legal obligation of employers to pay a trade union fee is a unique characteristic of legislation on labour relations in Viet Nam, existing only in China and Viet Nam. Interestingly, at the time of drafting, the author of the VGCL was not able to explain why it is two percent not one percent or three percent in its Proposal to the NA.⁸² This requirement has two negative effects on the right to organise of workers. Firstly, it discourages workers from joining trade unions because if they are non-unionised workers they do not have to pay trade union membership fees, whilst still being represented and protected by upper level trade unions. Secondly, it increases the dependence of trade unions on financial support from employers.

⁷⁶ Article 10 of the Constitution 2013.

⁷⁷ Colin Fenwick and Thomas Kring, *Rights at Work: An Assessment of the Declaration's Technical Cooperation in Select Countries*, p. 43 (para. 175), http://www.carnegieendowment.org/files/Declaration_report.pdf (last visited 15 April 2015).

⁷⁸ Sec. 3, Article 193 of the LC 2012.

⁷⁹ Decision No. 1617/QĐ-TLĐ dated 31/12/2014 of VGCL.

⁸⁰ Source: Speech of Mr. Nguyen Duc Chinh, Vice President of VGCL, <http://www.tienphong.vn/Tienphong/Index.aspx?ArticleID=174974&ChannelID=104> (last visited 22/4/2015).

⁸¹ Article 26 of the TUL 2012.

⁸² See Document No. 317/TTr-TLĐ dated 9/3/2010 of VGCL.

The ILO standards on freedom of association provides that acts which are designed to promote the establishment of workers' organisations under the domination of employers' organisations, or support workers' or other organisations by financial or other means, with the object of placing such organisations under the control of employers' or employers' organisations shall be deemed acts of interference.⁸³ However, law and practice in Viet Nam provide for the close dependence of trade unions on employers regarding financial issues.

The Report from the Better Work Viet Nam program noted multiple instances of employer interference with worker activities. The report noted 62 percent of factories discriminated against or interfered with the activities of the trade union. Similarly, the data revealed that management staff continued to sit on trade union executive committees in approximately 45 percent of factories, which could undermine the function of the union as a legitimate representative voice for the workforce. The report also noted seven percent of factories had cases of direct and overt management interference in union activities (eight employers had actually "tried" to interfere), and some were found to have prevented workers from meeting without management present.⁸⁴ Thus, Viet Nam law and practice resulting in the dependence of trade unions on employers do not conform to the ILO standards on freedom of association.

The US-VN Labour Plan provides "Viet Nam shall ensure that its law provides that a grassroots labour union registered with the competent government body is entitled to collect and manage its membership dues and to receive the grassroots union share of the two percent trade union fee paid by the employer on a non-discriminatory basis." Which means that the grassroots labour unions will also receive a relevant percent of the trade union fee. This misinterpretation and inconsistency of the Plan compared with the ILO standards makes labour unions dependent on employers, and would make them impotent in protecting workers' rights and interests. This may contribute to the argument that the United States just focuses on imposing pluralism of trade union in Viet Nam rather than the improvement of workers' rights in the reality.

2.3.2. Dependence on the State

Being a socio-political organisation, trade unions in Viet Nam are also heavily dependent on the Party and the State. Trade unions are recognised in law as large political and social organisations of the working class, voluntarily established under the leadership of the Party. It is a part of the political system of Viet Nam and therefore, accountable to the leadership of the Party; their functions are a part of State administration.⁸⁵ The function of trade unions as socio-political organisations in Viet Nam provided by the Constitution include: (i) Participating in state administration and socio-economic management; (ii) Participating in the control, inspection, and supervision of the activity of State bodies, organisations, units, and enterprises with respects to the matters concerning the rights and duties of the workers; and (iii) Propagandising, mobilising learning, development of abilities and professional skills, conformity of law, and defence of the Fatherland among the workers.⁸⁶

One of principles of organisation and operation of trade unions is "to be organised and operated under the charter of Vietnamese Trade Union in accordance with lines, guidelines, policies of the Party and law of state."⁸⁷ The VGCL, at the highest level of trade unions, is one of the socio-political organisations that forms the basis of Viet Nam's political system.⁸⁸

⁸³ Sec. 2, Article 2 of the Convention No. 98.

⁸⁴ Better Work Vietnam: Garment Industry 8th Compliance Synthesis Report, July 2015.

⁸⁵ Article 1 of the TUL 2012; Preamble of the Charter of Vietnamese Trade Unions.

⁸⁶ Article 10 of the Constitution 2013.

⁸⁷ Article 6 of the TUL 2012.

⁸⁸ Article 9 of the Constitution 2013. Others are: the Viet Nam Peasant Society, the Ho Chi Minh Communist Youth Union, the Viet Nam Women's Union and the Viet Nam Veteran Union.

VGCL still perceives itself as a transmission belt of the Party.⁸⁹ The President of VGCL is ranked equally to ministerial level and is a member of the CPV Central Committee. At province and district levels, the Confederations of Labour are organised in accordance with the State's administration. The presidents of the province and district level Confederations are members of the relevant CPV Committees. They are normally ranked equivalently to the level of directors of labour department at province or district levels. Thus, there is no clear dividing line between the responsibilities of the CPV, State agencies and trade unions in Viet Nam.⁹⁰ The trade union system in Viet Nam is closely integrated with the Party and State structures at all levels. Its own organisation is the same as the structure of the CPV and the State, its bodies at all levels collaborating closely with the local labour department under the supervision of the Party and the State.

In relation to the State, the State's budget is the main source of funding for confederations of trade unions in Viet Nam.⁹¹ According to the law, because VGCL is a socio-political organisation in Viet Nam, its expenditure is legally covered by the State.⁹² All officials of VGCL, province level Confederation of Labour and district level Confederation of Labour are State officials, working for, and receiving salaries and benefits from, the State.⁹³ While the right to of workers to organise can be protected only if it is based on financial independence of trade unions,⁹⁴ that the regulation of Viet Nam makes trade unions financially dependent on public body is also not in conformity with the requirements of the ILO and, in consequence, the TPP.

This dependent position prevents trade unions from being able to establish themselves as independent representatives of their workers. This argument is reinforced by the fact that no complaint by a trade union of Viet Nam has been sent to the ILO Committee on Freedom of Association (CFA) since Viet Nam re-joined the ILO in 1992.⁹⁵ The State's action regarding legislation does not, in many aspects, conform with the CILS on freedom of association and collective bargaining.

The dependence of trade unions in Viet Nam has both negative and positive consequences. Firstly, it creates conflict for trade unions between protecting the rights and interests of workers, on the one hand, and fulfilling trade unions' duties as a socio-political organisation, particularly as organs of the States, on the other. Conflicts occur in cases of trade unions in State agencies and SOEs. To protect the rights and interests of their members, trade unions in State agencies cannot fight against employers who are also State representatives; on the contrary, their role is mainly foster implementation of the law as a transmission belt of the Party and an extension of the State. In Viet Nam, issues for collective bargaining are not limited by law. Subjects of bargaining include: Wage, bonus, allowance and pay rise; time of working and time of rest; overtime work, breaks between shifts; employment security for the employees; occupational safety and health; the implementation of the internal working regulations. In addition, both parties can negotiate on any other issues of their concern.⁹⁶ The standards provided by law are minimum standards and the State encourages the parties

⁸⁹ Erwin Schweisshelm, *Trade Unions in Transition – Changing Industrial Relations in Vietnam*, (FES 2014).

⁹⁰ Simon Clarke, Chang Hee Lee and Do Quynh Chi (2007) "From Rights to Interests: The Challenge of Industrial Relations in Vietnam", *Journal of Industrial Relations*, vol. 49, No. 4, pp. 545-568.

⁹¹ Sec. 3, Article 26 of the TUL 2012; Article 37 of the Charter of VGCL.

⁹² Article 10 of the Law on State Budget 2002; sec. 7 Article 8 of the Law on State Budget 2015 (taking effect from 01 January 2017).

⁹³ Article 4 of the Law on State Officials 2008.

⁹⁴ CFA: Case No. 1793, Report No. 3000, para 267; Case No. 1865, Report No. 304, para 248.

⁹⁵ The South Viet Nam joined the ILO in 1950 and had ratified 22 Conventions. After uniting the country in 1975, the Government repealed all international treaties of the South Vietnam, and did not take over the South Viet Nam ILO member status. The new Viet Nam joined the ILO in 1980 and withdrew in 1985 for many reasons, especially financial reason as Viet Nam reported at that time that it was unable to pay its annual dues of about five million USD.

⁹⁶ Article 70 of the LC 2012.

to sign a collective agreement which provides employees with more favourable conditions than those stipulated in laws.⁹⁷ However, in practice, due to the dependence of trade unions, the content of collective agreements is just a duplicate of the law; they rarely include anything above than the minimum standards provided by law.⁹⁸ In collective bargaining, trade unions are weak in their demands for improved rights and interests for employees, which have been discussed in the previous section. Furthermore, the collective bargaining process does not start from the need of the employees. While asking employers to obey the law is the most important issues for employees, they do not think of demanding further rights and interests for the employees. This also shows the top-down process in collective bargaining in Viet Nam. Secondly, it provides trade unions with the right to participate and raise their voices to Government authorities at all levels. The President of the VGCL is entitled to attend meetings of the Government. Presidents of Confederations of labour at all levels are encouraged to attend meetings of parallel State bodies, units, and organisations concerned when the matters being discussed at those meetings relate to the rights, obligations, and interests of workers.⁹⁹ Trade unions can use this unique position to raise their voice, power, and influence in the process of law and policy making in Viet Nam. According to the LC 2012, the Government must consult VGCL when promulgating regulations relating to various issues such as: minimum wages, wage scales, overtime working hours, national labour protection, occupational diseases, and social insurance. Moreover, VGCL can propose drafts of law to the NA.¹⁰⁰ Since 1992, VGCL has participated in drafting more than 250 laws and ordinances of the NA and the Standing Committee of the NA.¹⁰¹

It is clear that in Viet Nam, trade unions are not independent from the State and employers. The dependence of the trade unions on the State and the employers in terms of organisational structure and finance does not conform to the ILO standards on freedom of association and the right to organise. Because of this dependence, trade unions' interests do not coincide with workers' interests. When workers' contributory fee is not the main income of the trade union, it is very difficult for the trade union to act totally to protect rights and interests of workers. Trade unions can only function properly when they are financially independent from both the State and the employers.

The monopoly and dependence of trade unions imposed by law are violation of freedom of association and the right to organise of workers. This fact is recognised by the United States Department of State,¹⁰² the International Trade Union Confederation (ITUC),¹⁰³ and has been criticized by several human rights organisations.¹⁰⁴ This also shows Viet Nam's legislation and practice are absolutely inconsistent with the ILO standards as well as the TPP commitments on freedom of association of workers.

In order to conform to the TPP, many regulations must be repealed, abolished or revised to ensure that employees and employers, without distinction whatsoever, have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation. Firstly, the monopoly of trade union system imposed by law must be repealed or abolished. Reforms of the trade union system may require reforms in the political regime because it has been argued that if there is no democracy at the political level, there will not be any right for workers and employers to freely

⁹⁷ Sec. 1, Article 4 of the LC 2012.

⁹⁸ Simon Clarke, Chang Hee Lee and Do Quynh Chi (2007) "From Rights to Interests: The Challenge of Industrial Relations in Vietnam", *Journal of Industrial Relations*, vol. 49, No. 4, pp. 545-568. See also Colin Fenwick and Thomas Kring (2007) *Rights at Work: An Assessment of the Declaration's Technical Cooperation in Select Countries*, p. 42, para. 173.

⁹⁹ Article 13 of the TUL 2012.

¹⁰⁰ Article 84 of the Constitution 1992, Article 12 of the LUL 2012.

¹⁰¹ Document No. 317/TTr-TLD dated 9/3/2010 of VGCL.

¹⁰² See U.S. Department of State "Country Report on Human Right and Practice" 2015.

¹⁰³ ITUC Survey of violation of Trade Union Rights 2014.

¹⁰⁴ Freedom House, Human Rights Watch....

join the organisation of their own choosing and to exercise their legitimate activities.¹⁰⁵

Secondly, the dependence of trade union on the Party and the State in terms of personnel and financial issues must be reduced. The support from the State budget for trade unions including salaries for trade union officials must be abolished. The reliance of trade union systems and the grassroots trade unions on employers must be removed. Trade union funds must be independent from both the State and employers.

3. What Are the Domestic Views on TPP Labour Commitments on Freedom of Association?

In this research, interviews were conducted with government officials from different ministries, members of the NA, people from VGCL, VCCI, employers, academics, and members of civil organisations [72 interviewees: Government officials including ministerial level/ political level and senior departmental level/ senior bureaucrats level (41); Trade unions (7), VCCI and employers (10); academia (9) and member of civil organisations (5)]. In addition to interviews, an online survey via Facebook received more than 147 responses [Government officials (77); Employers (15); Trade union and Employees (30); Academics (12); Others (13)] that supports the outcomes of the interviews.

The purpose of the interviews and survey was to examine awareness and viewpoints of the TPP in general, and on the implementation of labour commitments of the TPP, particularly the commitments on freedom of association and collective bargaining.

3.1. Awareness and General View of the TPP

The TPP is very popular in Viet Nam, nearly 100 percent of respondents report that they were aware of the TPP, with public media the main source of information about it.¹⁰⁶ 72 percent of the interviewees and 63.2 percent of survey respondents are aware of the labour provisions in the TPP, but only a half of them know that these provisions refer to the ILO Declaration of 1998.

In Viet Nam, the TPP is not considered solely a trade agreement but also a political-economic instrument. While the relationship between Viet Nam and China has not been as warm as in the past due to the tension in the South China Sea,¹⁰⁷ with the United States. “pivot to Asia” strategy, most of interviewees hoped the TPP will help Viet Nam grow closer to the United States and the West. They believed the TPP would help to boost not only economic development but also security. This supports the argument that the base of United States trade policy is that they are frequently driven by a large extent by diplomatic and security goals.¹⁰⁸ A PEW Survey in 2015 shows that 69 percent of Vietnamese think it is

¹⁰⁵ Karen Curtis, *Democracy, Freedom of Association and the ILO*,

http://training.ilo.org/ils/ils_freedom/training_materials/english/curtis.pdf (last visited 15/4/2015).

¹⁰⁶ Google trend shows that users in Viet Nam started searching for “Hiep dinh TPP” – “The TPP” since 2010 (when Viet Nam formally join the negotiation) and reached the peak in November 2015 (when the text of the agreement was released).

¹⁰⁷ Its reclamation and construction projects can significantly expand its naval and air power projection capabilities. With airstrips and likely future military bases, China can easily launch an attack on nearby Vietnamese forces, harass Vietnamese fishing and patrol boats, and even hamper Viet Nam’s access to the high seas. In addition, China has imposed annual fishing bans and persuaded international oil companies from conducting business with Viet Nam. The oil rig crisis in 2014 was arguably the most serious confrontation between Beijing and Hanoi since the 1979 border war.

¹⁰⁸ Claude Barfield (2012) ‘The United States and East Asian Regionalism: Competing Paths to Integration’, XVI(2) International Journal of Korea Studies 157, at 161-162.

important to have strong economic ties with United States while only 18 percent think strong economic relations with China is important.¹⁰⁹

Positions on the TPP are different between political level and senior bureaucrats officials. Most senior level government officials agree that joining the TPP would enable Viet Nam to participate in international standards and rule setting. They believe that the TPP would boost GDP and exports, as well as provide a firm condition to protect the country's sovereignty, and might better serve domestic legitimacy and regime security. In their opinions, the TPP has geo-political impacts on Viet Nam. While some top leaders shared the same above view on the positive impacts of the TPP, others are concerned that a TPP led by the United States is not solely economically motivated. Some wondered about the relationship between Viet Nam and China, as China is excluded from the TPP, and the United States wants to use the TPP as a strategy to contain China in Asia Pacific region. They worry that the implementation of TPP commitments, particularly the labour commitments might undermine the stability of the current political system. In their opinions, Viet Nam should not scarify everything for the TPP.

However, the former PM supports the TPP, and the conclusion of the TPP was cited as a major success of the Government in tenure from 2011-2016.¹¹⁰ In the most recent speech, the PM stated that "the TPP respected the political regimes of each country, and included a requirement to fully abide by countries' laws in line with international commitments exclusive of defence and security terms". He recognised that the challenges of implementation are also huge, ranging from improving the legal system to workforce training, and capacity building for cadres, technical and legal experts. He noted that labour and union issues also present new challenges and requirements for the operation of the VGCL and the whole political system of the country.¹¹¹

The CPV Central Committee has approved the TPP. It is planned that the TPP will be submitted to the National Assembly for ratification in 2016.¹¹² According to the law, the NA is not entitled to revise the TPP¹¹³ and ratification of this Agreement is just a matter of time. The only option that Viet Nam has in order to implement the TPP is reforming domestic legislation before the TPP comes in force.

3.2. The Most Challenging Labour Commitment is Freedom of Association and Collective Bargaining

Labour provisions of TPP are also generally popular. However, about one third of interviewees were not aware that the labour chapter in the TPP comes from the NA. Thus, they would be in the passive position when being submitted the final negotiation results in the next few months.¹¹⁴ Due to the Party's approval, they would find it hard to reject the ratification. At the same time, 55.55 percent interviewees in academia did not know about the inclusion of labour provisions in the TPP. This may explain for the lack of research on TPP labour issues.

¹⁰⁹ Pew Research Center (2015) *Spring 2015 Global Attitudes Survey Report*.

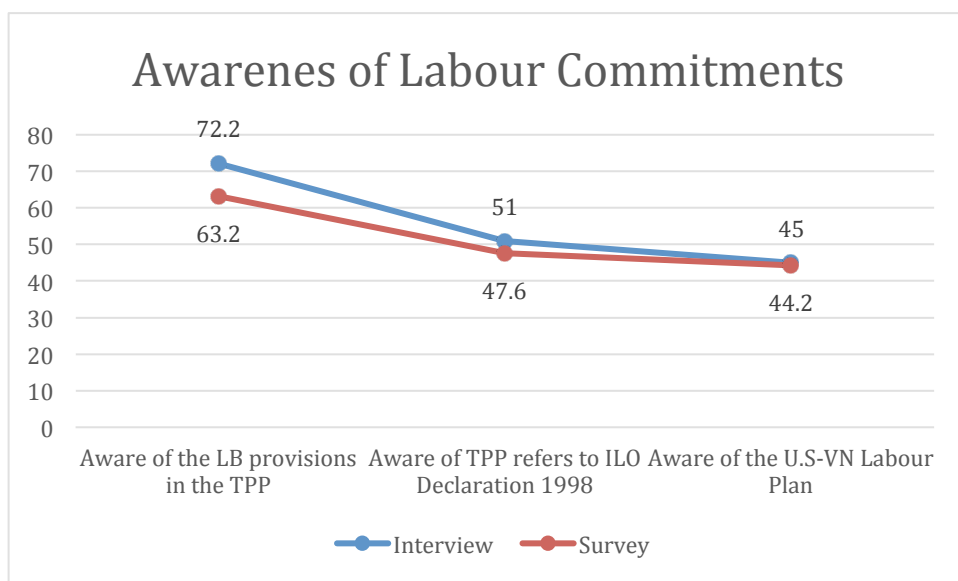
¹¹⁰ Report No. 82/BC-CP dated 21/3/2016 on the performance of tasks of the Government and the Prime Minister in the Tenure 2011-2016 submitted to the National Assembly.

¹¹¹ "PM talks about future actions following official TPP signing" available at <http://news.chinhphu.vn/Home/PM-talks-about-future-actions-following-official-TPP-signing/20162/26668.vgp> (last visited 3/5/2016).

¹¹² However, this has been taken out of the October 2016 Session.

¹¹³ See Law on the Signatory and Implementation of International Treaties 2005 and the Law on International Treaties 2016.

¹¹⁴ In fact, NA members are uninformed of the government's labour proposals in FTAs.



More than 50 percent of respondents were not aware of the US-VN Labour Plan. For those who are aware, they got to know the US-VN Labour Plan through daily work as mass media rarely mentioned it specifically. This outcome is supported by the fact that while interviewees from Government agencies such as MOLISA, the Ministry of Industry & Trade, and the National Assembly, who involve in the TPP by their daily duties, account for more than 60 percent of those aware of this side agreement, interviewees from academia, employers, and trade unions were the least aware of the US-VN Labour Plan. This outcome demonstrates the lack of public participation as well as information dissemination on the labour commitments of the TPP in general and of the US-VN Labour Plan specifically.

In practice, the Government, and even leader of VGCL referred to the obligations provided by the Labour Plan as if these obligations were provided by the TPP. Even in the official Report to the NA,¹¹⁵ the Government stated that the TPP would give Viet Nam five years from the date the agreement takes effect (seven years from the signature) to ensure the establishment of upper level labour unions.¹¹⁶ In fact, this period of five years is provided by the US-VN Labour Plan, and not by the TPP. Senior officials explained that “it is due to leadership...why we did not mention the US-VN Labour Plan” or claimed it is a technical issue and tried not to answer why the Government does not publicly mention the Labour Plan. Other officials tried not to mention the US-VN Labour Plan but refer to it as a part of the TPP.¹¹⁷ This shows the intention to keep the US-VN Labour Plan as low profile as possible. This might result from the belief that obligations arise from the TPP would be more easily accepted by the NA or the majority of the Party, as well as people, than obligations imposed by the United States in the US-VN Labour Plan. This also shows the difference in the viewpoints of both public and leaders on the labour provisions of the TPP.

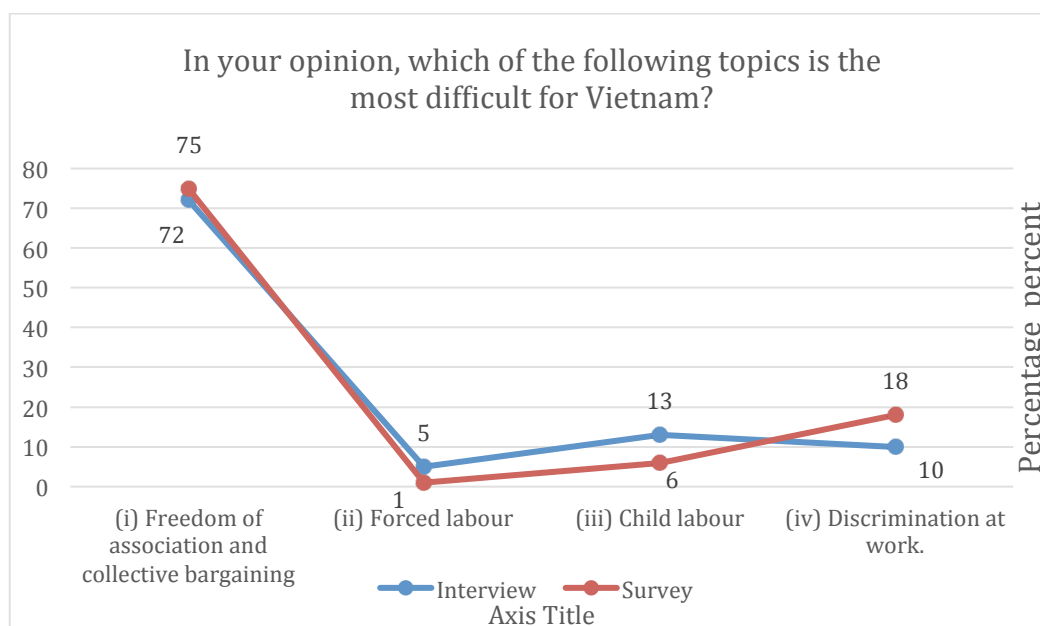
Freedom of association and collective bargaining are the most challenging topic for Viet Nam as identified by more than 70 percent respondents. Political system, the dependence and impotence of trade unions, the insufficient legal system are identified the main obstacles for implementing TPP commitments on freedom of association and collective bargaining. It was

¹¹⁵ Report No. 79/BC-CP dated 18/3/ 2016 of the Government on the TPP Negotiation submitted to the National Assembly.

¹¹⁶ Part III (4) of Report No. 79/BC-CP dated 18/3/ 2016 of the Government on the TPP Negotiation submitted to the National Assembly.

¹¹⁷ Discussion with top leaders of relevant ministries.

even suggested that the plurality of trade unions may lead to instability of the political system, also mentioned by a top leader of VGCL.¹¹⁸



Only about 10 percent consider discrimination at work a problem, and less than 10 percent report that forced labour or child labour is a challenging issue. These responses may be explained by the impacts of ratification and implementation of relevant ILO conventions in Viet Nam. By end of 2015, Viet Nam had ratified 21 out of the total 189 ILO Conventions, of which five are fundamental Conventions regarding the elimination of discrimination in employment (Conventions Nos. 100 & 111), elimination of forced labour (Convention No. 29), and abolition of child labour (Conventions Nos. 138 & 182). Under Viet Nam law, ratified treaties (such as ILO Conventions) are a part of Viet Nam's legal system and provisions of ratified Conventions are direct sources of law.¹¹⁹ The ratification and implementation of these conventions has made domestic law and practice incompatible with the TPP requirements, which are reflected in the respondents' answers. On the contrary, Viet Nam has not ratified Conventions nos. 87 and 98 of the ILO on freedom of association and collective bargaining. The previous analysis shows how insufficient the domestic legal framework for freedom of association – most respondents found this to be the most challenging for Viet Nam.

3.3. Domestic Stake Holders' Positions on the TPP Labour Commitments

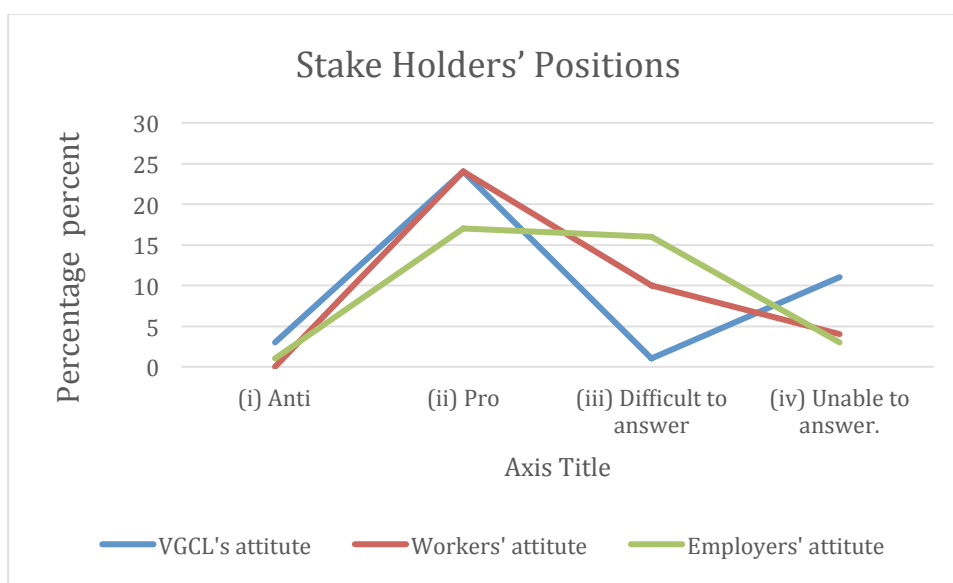
The TPP not only receives support from the Government but also from two main stakeholders: VGCL and VCCI. At the first National Industrial Relations Forum in 2016, Vietnamese Government, VGCL and VCCI expressed their firm commitments to improving the country's industrial relations laws, institutions and practices in line with labour requirements of new free trade deals, including the TPP. They declared that "We are committed to working with various stakeholders to respect, promote and realize the principles enshrined in the ILO 1998 Declaration on Fundamental Principles and Rights at Work,

¹¹⁸ Presentation of Vice Chairman of VGCL at Workshop on the TPP held by the Committee on Foreign Affairs, NA on 3/4/ 2016.

¹¹⁹ See Pham Trong Nghia (2014) *Implementation of ILO Core Conventions in Vietnam: Opportunities & Challenges*, National Politic Publishing House, Hanoi.

including efforts to consider the possibility to ratify the remaining core conventions of the ILO.”¹²⁰

Most interviewees believed that the VGCL and workers (at least 61 percent) would support the TPP even though the TPP creates many challenges for the VGCL. This outcome endorses the statements of the VGCL Chairman and senior officials on domestic media. However, this shows a change in the VGCL’s viewpoint towards the TPP, as my personal experiences showed that that VGCL did not support the TPP at the beginning of the negotiations.¹²¹ In fact, Viet Nam has given a lot of reciprocity in TPP labour negotiations, particularly in the US-VN Labour Plan. At first, Viet Nam only accepted the existence of one union at an enterprise, and this union could neither go on strike nor affiliate with others at a higher level. However, Viet Nam has been pushed back and finally accepted almost all demands from the United States.¹²²



While the employer organisation (the VCCI) supports the inclusion of fundamental rights of workers in TPP,¹²³ this research shows that only 46 percent of interviewees believed that employers would support the TPP, and 43 percent of them found it difficult to judge the

¹²⁰ The joint statement was issued by the Ministry of Labour, Invalids and Social Affairs (MOLISA), the Viet Nam General Confederation of Labour (VGCL) and Viet Nam Chamber of Commerce and Industry (VCCI) at the first National Industrial Relations Forum co-organised with the International Labour Organisation (ILO) on 19/4/ 2016 in Hanoi.

¹²¹ See “New Challenges of Labour Issues in the TPP”. Available at <http://vovgiaothong.vn/xa-hoi/nhung-diem-moi-ve-lao-dong-va-cong-doan-trong-tpp/134708> (last visited 10/4/2016). It is said that the Chairman of VGCL supported TPP as he supported the PM.

¹²² Discussion with top leaders of VGCL.

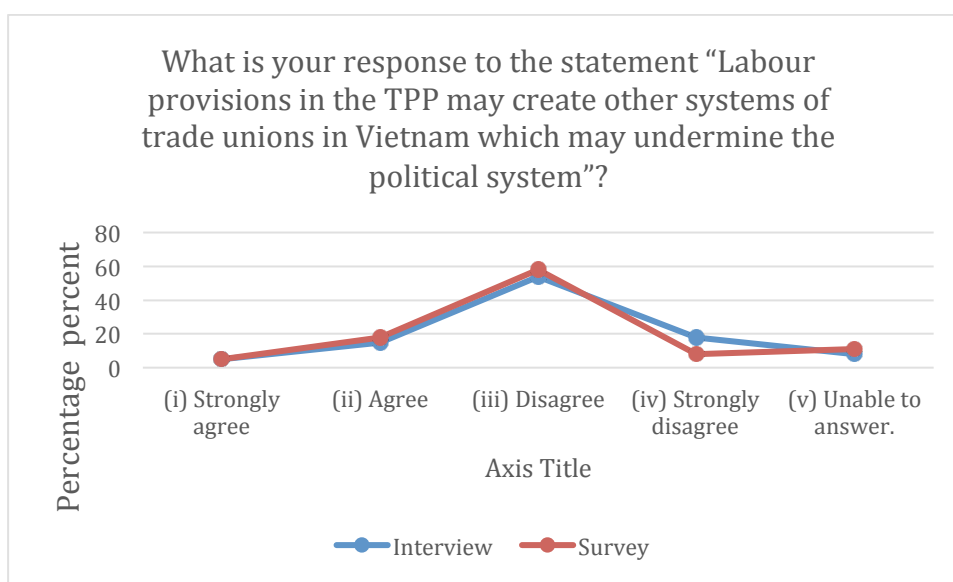
¹²³ According to the VCCI, because of both advantages and disadvantages faced by Viet Nam in TPP’s labour negotiation, the tendency of improvement in rights and interests of labourers and sustainable development of enterprises regarding human resources, Viet Nam should apply the approach to the labour 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 Viet Nam and (2) protesting against the subject-matters going far beyond the rights of labourers, especially those that intrude upon the sovereignty of the state. 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-TTP3 percent20Khuyen percent20nghi percent20ve percent20lao percent20dong percent20trong percent20TPP.pdf](http://www.trungtamwto.vn/sites/default/files/tpp/attachments/INTA-2012-1-TTP3%20Khuyen%20nghi%20ve%20lao%20dong%20trong%20TPP.pdf) (last visited 12/2/2016).

opinions of employers. This reflects the lack of information and research on employers' view of the TPP in Viet Nam.

3.4. Political Support for the TPP Labour Commitments

Political support for the TPP is high. About 72 percent of interviewees believe that labour provisions could not undermine the political system. Many of them stated that Viet Nam has been well prepared for the TPP, the establishment of other trade unions would benefit workers, thus foster economic development and finally increase political stability. Some argue that the negative impacts of the TPP could be adjusted by legal instruments. Others consider these are two separate issues and not linked to each other. Interviewees from Ministry of Industry & Trade (in charge of FTA negotiation) believed there would be “safety lock” for the implementation. This argument was supported by some Party Office officials who reported that related ministries were working on the “safety lock” in the process of domestic reforms.

On the contrary, 20 percent of interviewees believe that labour provisions in the TPP may create other systems of trade unions in Viet Nam, which may undermine the political system. Among them are 50 percent from the trade union, which can be explained by their interest in the monopoly of the trade union system. The other 50 percent are state officials, most of whom are Party members. They worry that pluralism in trade unions will lead to pluralism in politics because the current ruling CPV emerged from worker movement; therefore, if Viet Nam allows other trade union systems it may lead to the establishment of other political parties beside the CPV. Most importantly, in recent times, free trade unions have been essential to the emergence and consolidation of democracy in Poland, Chile, Nigeria, the Philippines, Serbia, South Africa, and many other countries, which would be a huge loss for the political regime in Viet Nam. They worried that could happen in Viet Nam if pluralism in trade unions is accepted and implemented.



Some respondents fear that the ambiguity of freedom of association principle and its implementation could undermine the dominant role of the existing trade union network in Viet Nam and give birth to counterparts, weakening the intervention and control of the state of Viet Nam. Others thought the existence of an independent trade union system would be considered a problem for the political system. At the same time, expressing a personal view

on the political aspect of the TPP is still considered sensitive, with about 10 percent of respondents unable to address their views on this issue.

In practice, signing the TPP puts strong pressure on, and has resulted in, domestic legislation reform. Right after the signature of the TPP, the PM proposed that “to ensure the success of international integration and effective implementation of the FTAs, especially the TPP and the Viet Nam-EU FTA, there must be resolutions of the Party and the National Assembly as well as the action plans of the Government, sectors and the business community”. Currently, the Government is in the process of drafting an action plan, each related ministry, including MOLISA, is drafting its own action plan to implement the national plan in the field of MOLISA’s responsibilities. At the same time, the Ministry of Justice is leading a working group to review all legal documents that need to be revised or expelled to make domestic law conform with the TPP. In addition, the VGCL is in the process of making a roadmap for the implementation of TPP labour commitments, which is scheduled for submission to the Politburo in 2016 for approval. Furthermore, the revision of the current Labour Code has been to put in the legislative agenda of the NA.¹²⁴

3.5. Benefits Are Main Drivers for Strong Labour Commitments in the TPP

The overall benefits of the TPP were stated the main reasons for Viet Nam to accept very strong labour commitments of the TPP.¹²⁵ It has been estimated that Viet Nam would receive many economic benefits from the TPP and the EU-VN FTA. For the TPP, it is believed that Vietnamese exporters will have greater access to larger, more dynamic, and faster-growing markets.¹²⁶ Additionally, the TPP would improve Viet Nam’s competitiveness on the global market by solidifying its participation in lucrative trading blocs. The Government also reported that according to the World Bank, Viet Nam would receive the most benefits among 12 TPP members in terms of GDP and export growth. It is estimated that by 2030, 10 percent will be added on Viet Nam GDP growth while 30 percent will be added on export.¹²⁷ The EU-VN FTA is also expected to bring many benefits to Viet Nam, including reducing at least 90 percent of tariff lines on Viet Nam’s exports to the EU to zero, and increasing EU capital sources for Viet Nam. The EU-VN FTA will also be an important boost for Viet Nam’s exports, with 501 million consumers and over US\$17,000 billion of GDP.¹²⁸ Besides the above benefits, there are other geo-political reasons for Viet Nam’s involvement in the TPP. It is hoped that this will help Viet Nam maintain its aim of trade liberalization, domestic reforms, and enhance the bargaining power of Viet Nam in international trade – in fact, to help set the rules for international trade. Furthermore, joining the TPP is part of the strategy of foreign relation diversification and multilateralization. Strong commitments and successful implementation of the TPP will bring Viet Nam close to the West in terms of ideology, security, economy and trade. That will help to reduce the dependence of Viet Nam on its aggressive neighbour, China.

In this research, about 87 percent of interviewees believed that due the benefits of the TPP on domestic renovations, Viet Nam would do all the reform needed to fully implement the labour commitments of the TPP. Viet Nam should use the TPP challenges as a golden opportunity to transform out-dated industrial relations into effective and modern industrial system which could serve Vietnamese business, Vietnamese workers, and Vietnamese society. This outcome is supported by a 2015 PEW Survey, showing that 89 percent of

¹²⁴ The Law on Revision of the Labour Code was scheduled to be adopted in 2017 with a view for the TPP to take effect from 2018.

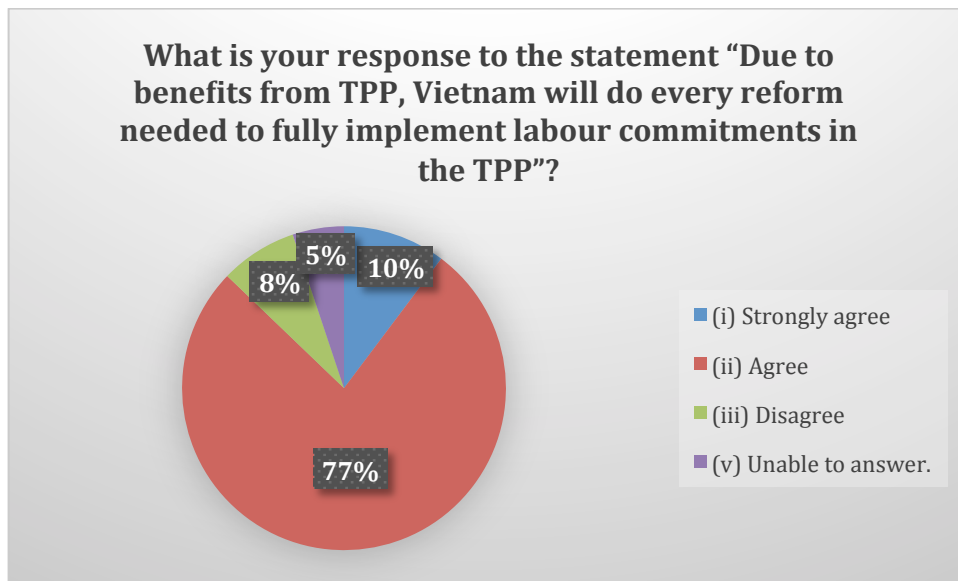
¹²⁵ Interview with the Lead of U.S. TPP Labour Team.

¹²⁶ Which are home to more than 792 million people and 40 percent of world trade.

¹²⁷ See Report No. 79/BC-CP dated 18/3/2016 of the Government.

¹²⁸ Source: Viet Nam Chamber of Commerce and Industry (VCCI).

Vietnamese think the TPP would be a good thing, while only two percent consider the TPP not good for the country.¹²⁹



These benefits were identified as the main drivers for Viet Nam to join the TPP. Viet Nam will overcome challenging domestic legal reforms to meet the requirements labour commitments, particularly, commitments on freedom of association despite the inconformity of both domestic law and practice. This shows the importance of incentives in forcing authoritarian leaders to sign human right FTAs.¹³⁰

Even through, strong labour commitments may result in negative impacts on political regime as explained above, TPP labour commitments will also have economic, legal and political benefits for Viet Nam by themselves. According to the World Bank, ensuring freedom of association and collective bargaining can go a long way towards promoting labour market efficiency and better economic performance.¹³¹ If the right to organise and collective bargaining is recognised, promoted and protected, it will ensure stability of employment relationships, which plays an important role in maintaining social and political stability of countries. Consequently, socio-political stability can foster economic growth and, in turn, economic growth is an advantage for attracting FDI.¹³² Furthermore, it has been proved that the implementation of core international labour standards, including standards on freedom of association would neither incur extra labour expenses nor undermine a country's economy.¹³³

The legal benefits of incorporating the TPP commitments on freedom of association and collective bargaining into Viet Nam can be measured by its promotion and protection of the relevant right, which is recognised in Article 25 of the Constitution 2013. On the one hand, this provision shows that, the right to freedom of association in Viet Nam is considered together with other rights, such as right to freedom of speech, freedom of the press, and the right to demonstration. On the other hand, this provision also provides that the right to freedom of association is not an absolute right when its “practice shall be provided by the

¹²⁹ Pew Research Center (2015) Spring 2015 Global Attitudes Survey Report.

¹³⁰ Emilie M. Hafner-Burton (2009) *Forced to be Good*, Cornell University Press: London.

¹³¹ World Bank (2005) *World Development Report 2005: A Better Investment Climate for Everyone*, World Bank, p. 141.

¹³² Nicholas Billington (1999) “The Location of Foreign Direct Investment: An Empirical Analysis”, *Applied Economics*, vol. 31, No. 1, pp. 65-76.

¹³³ Pham Trong Nghia (2009) “The Impacts of Implementing the Core International Labour Standards on National Competitiveness”, *Viet Nam Legislation Studies Journal*, vol 145, p. 46.

law.” However, the current legal framework is neither sufficiently comprehensive, nor facilitative of freedom of association. In practice, no indication that progress had been made until when Viet Nam participated in the TPP and the EU-VN FTA. Since 1992, a draft of the Law on Associations has been under consideration in Viet Nam, mostly by a drafting committee convened by the Ministry of Home Affairs. The draft has been the subject of intense debates and was submitted to the NA for discussion in October 2015 but has not been adopted. In the lack of domestic legislation, the TPP labour commitments on freedom of association play an important role in protecting values and rights provided by the Constitution. Firstly, they help to fill the gap within current regulations by being the direct source of Viet Nam’s law. These provisions contribute to protecting freedom of association provided by the Constitution. Secondly, they create momentum for the actions of the Government in ratifying ILO relevant Conventions nos. 87 & 98. Ratification will generate energy for enforcement and implementation of domestic regulations on the right to freedom of association protected by the Constitution, and enhances implementation in practice by imposing an obligation of enforcement on the State and through the supervising mechanism of the ILO.

Political benefits can be measured by the potential to enable Viet Nam to achieve political aspirations in terms of democracy, human resource and foreign relations. Some argue that integration and change is a must. The labour commitments of the TPP would help Viet Nam to overcome persistent domestic political objections to carry out faster and more efficient labour reform. The view from leaders is that the TPP can create pressure and commitments to lock-in political reforms in Viet Nam. Firstly, incorporating the TPP commitments on freedom of association furthers democracy, which contributes to express the Party and State’s aim in Viet Nam to build a more democratic and civilised society. Moreover, freedom of association and collective bargaining as mentioned are a means to achieve industrial democracy, which is one of the bases for social democracy. For example, in relation to the right to organise and collective bargaining, implementing this right allows employees and employers to participate more in policymaking. It gives employees a voice with which to express their aspirations, strengthens their position in collective bargaining, and enables them to participate in the framing and implementing of economic and social policy.¹³⁴ Secondly, incorporation and implementation of the TPP commitments on freedom of association plays an important part in the success of developing human resource. The United Nations has recognised that freedom of association is essential to the improvement of employees’ lives and their economic well-being.¹³⁵ Furthermore, the right to freedom of association allows solidarity among employees, while the right to collective bargaining provides procedures that allow employees to demand improved rights and interests. These rights empower employees in the negotiating process and protect employees from being exploited. They enable employees to make demands for other interests, including skills training and education. These contribute to protecting employees, promoting employees’ rights and interests, and developing employees’ skills and qualifications. Thirdly, incorporating and implementing the TPP’s commitments on freedom of association demonstrates Viet Nam’s active role in the field of protecting and promoting inherent human rights at work. It contributes to making Viet Nam more reliable and more respected in international relations. It enables Viet Nam to avoid severe criticism from foreign countries¹³⁶

¹³⁴ Centre for Global Development (2007) *Labour Standards*,
<http://www.globaldevelopmentmatters.org/qa-Labour-standards.asp#4> (last visited 15/12/2015).

¹³⁵ ILO (1948) “The ILO and the Problem of Freedom of Association and Industrial Relations”,
International Labour Review, vol. 58, No. 5, pp. 575-600.

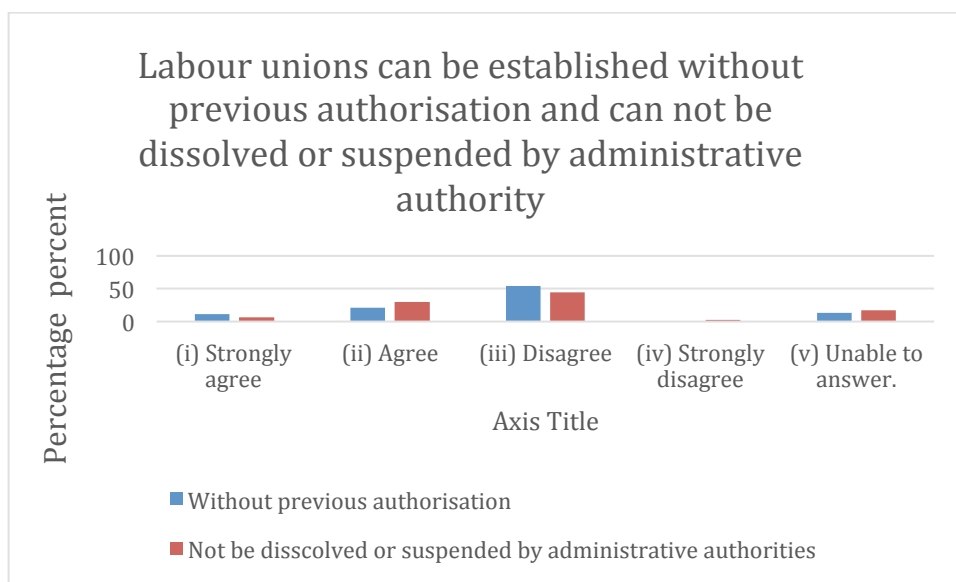
¹³⁶ In the discussion of National Report of the Socialist Republic of Viet Nam under the Universal Periodic Review of the United Nations Human Rights Council 2009, Viet Nam received 41 comments from other Member States of the United Nations. Many of them blamed Viet Nam for failure in recognising, protecting and promoting freedom of speech, freedom of religion and, freedom association including the right to organise and collective bargaining.

and foreign organisations¹³⁷ relating to allegations of human rights and employees' rights. In addition, incorporation and implementation of the ILO Conventions on freedom of association and collective bargaining into Viet Nam demonstrates Viet Nam's active role as a Member State of the ILO, and increases the status of Viet Nam within the ILO, which helps Viet Nam avoid criticism arising from the supervisory mechanism of the ILO.

3.6. Freedom of Association Is Not Fully Recognised

The US-VN Labour Plan requires Viet Nam ensure that its laws and regulations permit workers, without distinction, employed by an enterprise to form a grassroots labour union (in Vietnamese *Tổ chức của người lao động*) of their own choosing without prior authorisation. In the ILO's jurisprudence, workers have the right to establish trade unions without "previous authorisation", which means that workers and employers can establish their organisations without the requirement that they have to obtain any kind of previous authorisation. Such authorisation could concern the formation of the trade union organisation itself, the need to obtain approval of the constitution or rules of the organisation or authorisation for taking steps prior to the establishment of the organisation.¹³⁸

In this research, more than 90 percent of respondents in both interviews and online survey believe that worker should have the right to establish trade unions of their own choosing and workers should also have the right to elect their representative with full freedom. However, in terms of "previous authorisation", only 33 percent of interviewees agree with the TPP commitments. At the same time, more than 54 percent of them request that the establishment of trade unions must have previous authorisation of competent Government bodies in accordance with procedure provided by law. This request does not conform to the ILO's standards on freedom of association, and is in violation of the TPP labour commitments. This shows the challenge is not only legal reform, but also implementation because previous authorisation would give government bodies the opportunity to deny or delay the registration of trade unions, making the registration process painfully long and violating the right to organise of workers.



¹³⁷ Such as: Human Right Watch, Amnesty International, International Trade Union Congress, etc.

¹³⁸ CFA: Case No. 1894, Report No. 308 para. 536; Case No. 1987, Report No. 313, para. 111; Case No. 2038, Report No. 318, para. 530; Case No. 2090, Report No. 324, para. 200; Case No. 2140, Report No. 329, para. 295; Case No. 2225, Report No. 332, para. 377; Case No. 2268, Report No. 333, para. 733; and Case No. 2282, Report No. 334, para. 638.

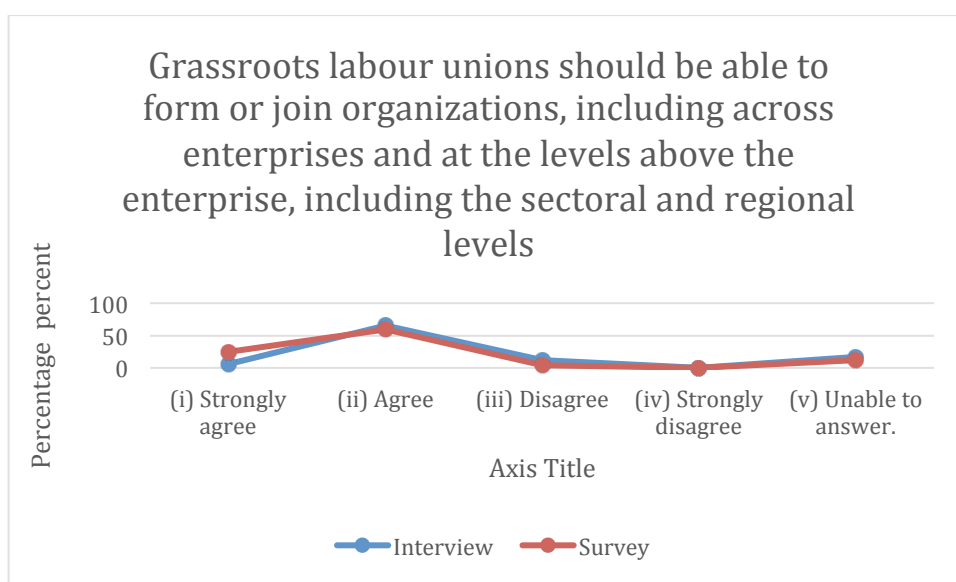
The ILO secures the right to organise by prohibiting national authorities from dissolving or suspending workers' and employers' unions.¹³⁹ The ILO considers that dissolution of a union should be undertaken as the last resort, and after exhausting other possibilities with less serious effects for the organisation as a whole.¹⁴⁰ The decision to dissolve organisations should be freely and voluntarily taken by workers and employers concerned.¹⁴¹ Viet Nam law is silent on dissolving or suspending trade unions. However, the right to suspend and dissolve trade unions is recognised in the Charter of Vietnamese Trade Unions. According to this, the decision to dissolve organisations is freely and voluntarily taken by trade unions; and a higher level trade union has the right to dissolve a lower level trade union. From personal experience, there has been no case where a trade union was suspended or dissolved in Viet Nam except for cases where the enterprise was dissolved.

In this research, about only 36 percent of interviewees agree with the ILO and believe that workers' organisation shall not be liable to be dissolved or suspended by competent administrative authorities. On the contrary, more than 47 percent of them propose to grant the right to suspend and dissolve trade unions to administrative authorities, particularly in cases where trade unions violate the law or infringe other people's interests. This is a violation of ILO standards on freedom of association, which shows the challenges of legal reforms and implementation in the future.

3.7. Trade Union Pluralism is Widely Accepted

According to the TPP, Viet Nam shall provide in its law and practice that grassroots labour unions may, if they so choose, form or join organisations of workers, including across enterprises and at the levels above the enterprise, including the sectoral and regional levels.

More than 75 percent of interviewees and 84 percent online survey respondents agree that there should be more than one trade union per enterprise. However, more than 50 percent of employers oppose this right of workers. This may be explained by concerns that strong unions may result in more demands of workers for better salaries, working conditions and thus increase labour cost for employers. Some employers even argued that "there should be only one representative of workers in one enterprise. If there are more than ones, it is difficult to determine rights and obligations between them."



¹³⁹ Article 4 of the Convention No. 87.

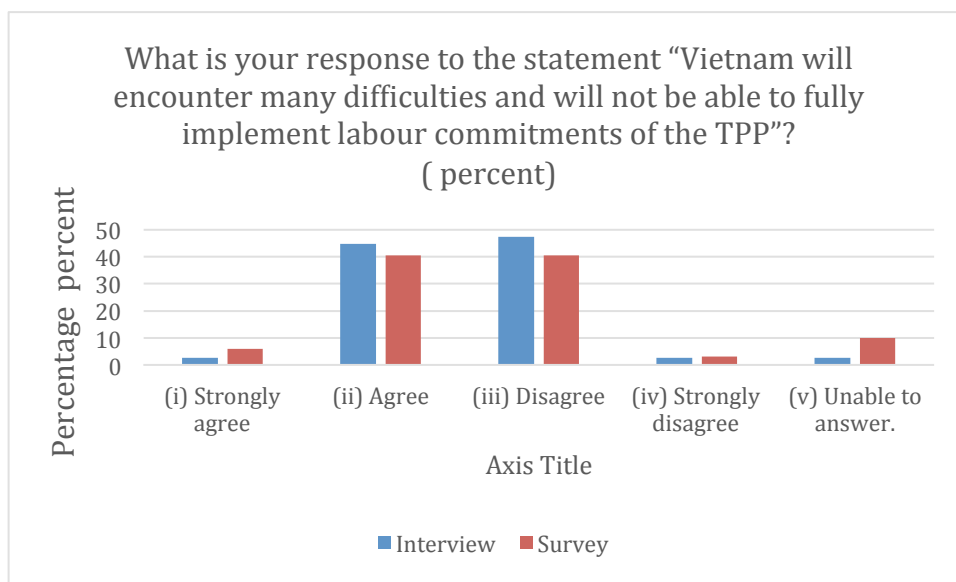
¹⁴⁰ ILO (2006) *Digest*, p. 137 (para. 699). See also Case No. 1935, Report No. 315, para. 22; Case No. 1581, Report No. 327, para. 110; and Case No. 2181, Report No. 329, para. 760.

¹⁴¹ *Ibid*, p. 137(para. 679).

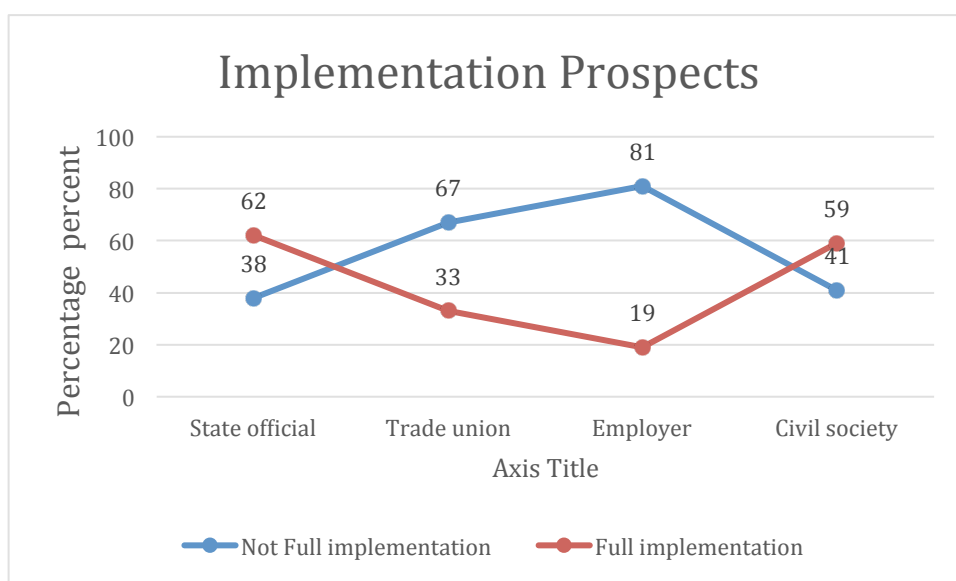
In regards to affiliations of labour unions at higher level, about 71 percent of interviewees and 84 percent of online respondents agree that labour unions can affiliate at upper levels including sectorial and regional levels. This signals the perception and desire for change as well as the feasibility of implementation of the TPP labour commitments in Viet Nam. All of interviewees from trade unions support the establishment of other systems, which reveals the change in viewpoint of trade union officials on the TPP and on trade union pluralism as they used to opposing the pluralism of trade unions in Viet Nam. Furthermore, it shows the pressures put on trade union officials as it is very difficult for them to express opposite voice once their Chairman has decided to support the TPP. On the other hand, both the interview and online survey show more than 10 percent of respondents most of them are government officials are not able to give their answers these “sensitive questions”.

3.8. Implementation of TPP Labour Commitments Will Be Very Challenging

Political will for reform is strong but implementation of the labour commitments is very uncertain. Firstly, freedom of association is not fully recognised. Most of respondents required that trade unions must be “pre-authorisation” and could be “dissolved by state authorities”, which will make not only legal reforms but also implementation very challenging. Furthermore, while most respondents supported reforms, it is striking in both the interviews and the online survey that the prospects of implementation were much divided. Only half of respondents believe that Viet Nam will be able to fully implement labour commitment of the TPP. The other half suggest that Viet Nam will encounter difficulties and would not be able to fully implement these commitments because of different leaders’ views, institutional failure, enforcement mechanism, capacity, and corruption. This opposite position indicates the gap between political will and legislation reforms on the one hand, and implementation and enforcement of these reforms in practice on the other.



Perspectives on implementation are also different between different groups. State officials and interviewees from civil society are more optimistic about the full implementation of TPP labour commitments, while 81 percent of employers and 67 percent of trade union officials do not believe that Viet Nam would be able to fully implement TPP labour provisions. Trade unions and employers are the stake-holders who actually implement law and regulations, this outcome signals a gap between the policy making level and the grassroots implementation level.



The challenges of implementation of TPP labour commitments are also recognised by top leaders. Implementation is also concerned by the U.S. Committee of Ways and Means, which stated that “The labour plan reflect the enormity of the changes required for Viet Nam to comply with the TPP’s labour obligations ... Changes of this enormity and in the context of a communist structure, present some real concerns as to the reality of implementation”.¹⁴² Furthermore, it has been argued that developing countries only commit to human rights provisions in FTAs but never intend to apply. This may also happen in Viet Nam in the case of the TPP.

After discussing the TPP in a session held in January 2016, the Party Central Committee announced that it endorsed the importance of the TPP to Viet Nam and approved the content of the negotiated TPP Agreement. Viet Nam Constitution 2013 says that “The Communist Party of Viet Nam is the force leading the State and society”.¹⁴³ Thus, the approval of the Party Central Committee opened the door for the signing of the TPP by the Government and it will ultimately result in the ratification of the National Assembly of Viet Nam in the near future. Furthermore, the revision of the current Labour Code has been to put in the legislative agenda of the NA to be adopted in 2017. However, after the United States withdrawn from this FTA, this labour law reform has been delayed to 2018.¹⁴⁴ This contributes to show the implication and strong linkage between the TPP and domestic legal reforms in Viet Nam.

¹⁴² U.S. Committee of Ways and Means (2016) *TPP Issue Analysis: Worker Rights, 114th Congress Report*.

¹⁴³ Article 4 of the Constitution 2013.

¹⁴⁴ Source: Agenda of the National Assembly.

4. Concluding Remarks

1. Though Viet Nam has implemented economic reforms in an effort to develop a more open market economy where workers play an important role, Viet Nam still hesitates to create sufficient legal framework for workers to enjoy the right to organise and collective bargaining. This shows less correlation between economic development and workers' fundamental rights, particularly freedom of association. In addition, the denial of freedom of association by Viet Nam since the adoption of ILO Declaration 1998 and the abandonment of opportunities to upgrade domestic law on freedom of association in the adopted Labour Code 2012, the TUL 2012 and the Constitution 2013 have shown the lack of enforcement of labour rights by ILO mechanism, the US-VN Labour Dialogue.
2. Viet Nam has not been able to defend its labour objectives in TPP negotiations and is obliged to participate in the TPP with the strongest labour provisions of on-going FTAs. This shows that Viet Nam did not have any influence on labour rights negotiation in the TPP. This contributes to the finding¹⁴⁵ that developing countries lack the economic advantage to bargain, and have no choice but to accept the conditions imposed by countries that are more powerful. This also shows that developing countries, like Viet Nam, face many well-known structural, economic and political constraints in negotiations. In order to overcome these constraints and play a better role in such negotiations, in addition to good preparation, Viet Nam need to involve a wide range of policy and decision makers in order to maximise its influence on trade negotiation.¹⁴⁶
3. Freedom of association is identified the most challenging issue for Viet Nam since it conflicts with the political system and the hierarchical, authoritarian trade union structure. In order to conform to the TPP, many regulations must be repealed, abolished, or revised to ensure that employees and employers, without distinction whatsoever, have the right to establish and, subject only to the rules of the organisation concerned, join organisations of their own choosing without previous authorisation.
4. Strong political will for reforming freedom of association contributes to recognising the importance of incentives that explain why authoritarian leaders are willing to sign human right FTAs. It also supports argument¹⁴⁷ that when they offer enforceable standards that tie material benefits of integration to conformity with human rights principles, trade agreements can be reasonably effective in changing behaviours of some perpetrators and helping reformers.
5. While interests are aligned on joining the TPP, they will not be aligned on compliance and the implementation of these reforms will be very challenging since the full enjoyment of freedom of association is not supported. While pluralism of trade unions is supported in general but when it comes to details, specific requirements of the ILO standards (also the TPP requirements) on "previous authorisation" and "dissolvement" will not be recognised or implemented. This signals that although strong commitments have been made, this level of reforms and implementation will be very challenging. It contributes to the argument that no worker in the global

¹⁴⁵ Christina David (2006) "Do WTO Rules Create a Level Playing Field for Developing Countries? Lessons From Peru and Vietnam." In John Odell ed. *Negotiating Trade: Developing Countries in the WTO and NAFTA*. Cambridge: Cambridge University Press, pp.219-256.

¹⁴⁶ Emily Jones (2013) *Negotiating Against the Odds: A Guide for Trade Negotiators from Developing Countries*, Palgrave Macmillan: London.

¹⁴⁷ Emilie M. Hafner-Burton (2009) *Forced to be Good*, Cornell University Press: London.

economy has won the right to form an independent union and to bargain collectively because of the enforcement of workers' rights provision in a trade agreement.¹⁴⁸

6. Even if TPP does not come into effect, the negotiation and signing of this FTA still benefits Viet Nam. The TPP has provided momentum for domestic reforms in both economic structure and legislation. The TPP provided an incentive to improve the competitiveness of enterprises. The TPP raised the awareness of state officials, employers, trade unions, workers, and the public regarding Viet Nam's economic integration strategy as well as the implications of FTAs. More importantly, Viet Nam's experience in the TPP has shown its active economic integration policies and strong commitment to reforms, which clearly signals the opportunity for other multilateral FTAs or a bilateral FTAs with strong labour provisions in the future.

¹⁴⁸ AFL-CIO (2015) *Report on the Impacts of the Trans-Pacific Partnership*. Available at <http://www.aflcio.org/Issues/Trade/Trans-Pacific-Partnership-Free-Trade-Agreement-TPP/Report-on-the-Impacts-of-the-Trans-Pacific-Partnership> (last visited 8/9/2016).

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