Participation in new-generation RTAs: How does it impact labour relations in Vietnam?

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Some of the regional trade agreements (RTAs) of which Vietnam is member can be classified as "new-generation" ones. Unlike traditional RTAs, they cover more subjects and regulate areas outside WTO agreements, such as labour standards.[1] The EU–Vietnam Free Trade Agreement (EVFTA), signed in 2019 and ratified by the EU in February 2020, and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which entered into force for Vietnam from 14 January 2019[2] are typical "new-generation" RTAs. They contain chapters dedicated to labour issues, namely, Chapter 19 of the CPTPP (Labour) and Chapter 15 of the EVFTA (Trade and Sustainable Development).

As a part of CPTPP and EVFTA, Vietnam shall be bound by the labour protection regulations provided by the above-mentioned chapters. What will be the legal impact of this situation on labour relations in Vietnam? To answer this question, firstly, the authors will offer a brief legal analysis of the labour protection regulations prescribed by these chapters. In the second part, the authors will concentrate on improvements to Vietnamese law after entering the EVFTA and the CPTPP, as reflected by the 2019 Labour Code. The authors will concentrate on analyses of Chapter 19 of the CPTPP and Chapter 15 of the EVFTA as well as on comparisons

[1] European Parliament, "Benefits of EU International Trade Agreements, European Added Value in Action (Briefing)", http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/603269/EPRS_BRI(2017)603269_EN.pdf (last accessed 20 January 2020).H. Horn, P.C. Mavroidis and A. Sapir, Beyond the WTO? An Anatomy of EU and US Preferential Trade Agreements, Brussels: Bruegel Blueprint Series, Volume VII, 2008, p. 3.

[2] The CPTPP is a trade agreement between Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam.

between Vietnam's 2012 and 2019 Labour Codes. Other provisions of new-generation RTAs and Vietnamese by-law documents are outside the scope of this article.

I. Labour protection rules in the CPTPP and EVFTA: concept and inherent limits

Concept

Labour rights regulations in new-generation RTAs, including EVFTA and CPTPP, were not invented from scratch. Their conception is inspired from ILO principles.[3]

The main component of these RTA's labour rights provisions, therefore, is a reaffirmation of the parties' commitments to their membership in the ILO and the ILO Declaration on Fundamental Principles and Rights at Work (hereby "ILO Declaration").[4] There are four principles concerning the fundamental rights at work, specified in the ILO Declaration, that are highlighted in the CPTPP[5] and the EVFTA[6]: (i) freedom of association and the effective recognition of the right to collective bargaining; (ii) the elimination of all forms of forced or compulsory labour; (iii) the effective abolition of child labour; (iv) and the elimination of discrimination with respect to employment and occupation. The affirmation of these principles goes along with the "standstill clauses", which state the parties' commitments to avoiding a "race to the bottom" for more comparative advantages in trade and investment.[7]

The reference to the ILO Declaration and its principles facilitates a conciliation between regional economic governance and labour standards.[8] It allows the integration of "soft-

[3]The CPTPP Labour Chapter and the EVFTA Trade and Sustainable Development Chapter refer to the ILO 16 times and 6 times respectively. From the beginning of the CPTPP Labour Chapter, it is specified that the labour laws regulated by the chapter are only those directly related to the internationally recognized labour rights prescribed by the ILO Declaration (Article 19.1).

[4] Article 3 of the EVFTA Trade and Sustainable Development Chapter (Multilateral Labour Standards and Agreements) and Article 19.2 of the EVFTA Labour Chapter (Statement of Shared Commitment)

[5]Article 19.3 and Article 19.6 (Labour Rights) in CPTPP, Chapter 19.

[6] Article 3.2 (Multilateral Labour Standards and Agreements) in EVFTA, chapter 15.

[7] Article 10 in EVFTA, Chapter 15; Article 19.4 in CPTPP, Chapter 19.

[8]Through the Singapore Declaration, the WTOseemed to placelabour standards outside its agenda.See Brian Langille, "'And the Future is Certain. Give Us Time to Work It Out': Reflections on Labour Rights Fifty Years after the Universal Declaration

enforced" labour rights, promoted by a "sanctionless" ILO,[9] in a system of "hard-enforced" trade rules. The respect of labour rights withinthe framework of RTAs is, to a certain extent, guaranteed by the mechanism of implementation, including monitoring and dispute settlement procedures.

In terms of monitoring, according to the CPTPP, a cooperative labour dialogue is established for parties to discuss matters arising under chapter 19. A Labour Council, composed of government representatives, considers matters related to the chapter (Article 19.12). Each party has to establish contact points to facilitate communication and coordination between them (Article 19.13). For resolving disputes arising under the chapter, parties can undertake labour consultation procedures and dispute settlement procedures provided for in chapter 28 (Article 19.15). Dispute settlement decisions shall be binding.

The EVFTA also prescribes monitoring mechanisms and a review of the agreement's impact on sustainable development (Article 13). The overseeing mechanism is composed of contact points established by the Specialized Committee on Trade and Sustainable Development and representatives of all parties (Article 15). Even if the dispute settlement procedure does not seem as "formal" as that of the CPTPP, experience shows that the EU is active in implementing measures to help guarantee its RTAs partners' respect for labour protection commitments.

RTAs can have positive impacts on labour relations, as they "sometimes contain workers' rights provisions or mechanisms that over time may have an indirect impact on labour relations systems of the participating states".[10] However, it is necessary to note that these impacts are, by nature, limited.

Standards", Revue québequoise de droit international, vol. 11, no. 2, pp. xxxx and Wolfgang Plasa, Reconciling International Trade and Labour Protection: Why We Need to Bridge the Gap Between ILO Standards and WTO rules, New York: Lexington Books, 2015.

[9] See Langille, "'And the Future is Certain. Give Us Time to Work It Out'", pp. 137-147, pp. 141-142; Bob Hepple, "Does Law Matter? The Future of Binding Norms", Protecting Labour Rights as Human Rights: Present and Future of International Supervision,edited by George P. Politakis, Proceedings of the International Colloquium on the 80th Anniversary of the ILO Committee of Experts on the Application of Conventions and Recommendations, Geneva, 24–25 November 2006. Langille states that the ILO "has been historically powerless. It has no real world 'bite', no sanctions and no real incentives with which to affect behavior of the world". MeanwheHepple points out five weaknesses of the ILO framework of rule enforcement, including the absence of adversarial procedures and sanctions over violations of ILO rules.

[10] Anne Trebilcock, "Chapter 21:Labour Resources and Human Resources Management", http://www.ilocis.org/documents/chpt21e.htm (last accessed 6 April 2020).

Inherent limitations

Labour relations may be defined as "the relationship between employers and employees in industry, and the political decisions and laws that affect it",[11] or "the system in which employers, workers and their representatives and, directly or indirectly, the government interact to set the ground rules for the governance of work relationships".[12] According to Vietnam's 2012 Code of Labour, labour relation means "a social relation arising from the hiring of employment and wage payment between an employee and an employer".[13] Vietnam's 2019 Code of Labour defines labour relation as "a social relation which arises with respect to the employment and salary payment between an employee and an employer, their representative bodies and competent authorities (…)".[14] Labour relations, therefore, is a term that covers multiple aspects.

Having said that, new-generation RTAs do not regulate all aspects of labour relations but only those affecting trade and investment. The EVFTA and the CPTPP are typical examples. According to these agreements, the scope of labour protection legislation is limited to trade-related issues.[15] These agreements prohibit only the violation of labour rights in as far as these affect trade and investment.[16] This is not always easy: the claiming party needs to prove that

11Collins Online Dictionary,https://www.collinsdictionary.com/dictionary/english/labour-relations

12 Anne Trebilcock, "Chapter 21:Labour Resources and Human Resources Management", http://www.ilocis.org/documents/chpt21e.htm (last accessed 6 April 2020).

13Article 3.6 of the 2012 Labour Code.

14Article 3.5 of Vietnam's 2019 Labour Code.

15 EVFTA's chapter on Trade and Sustainable Development confirms that protection of labourregulations shall be balanced with trade interests. Article 3.1 states that "the Parties commit to consult and co-operate as appropriate on trade-related labour issues of mutual interest". The obligation to work together on trade and sustainable development is applied only to "trade-related aspects of sustainable development in order to achieve the objective of this Chapter". And the obligation to ensure transparency applies only to "measures aimed at protecting the (…) labour conditions that may affect trade or investment" (Article 12).

16 According to Article 19.5 in CPTPP, "no Party shall fail to effectively enforce its labour laws… in a manner affecting trade or investment between the Parties after the date of entry into force of this Agreement". Moreover, footnote 4 of the Agreement confirms that: "To establish a violation of an obligation under Article 19.3.1 (Labour Rights) or Article 19.3.2, a Party must demonstrate that theother Party has failed to adopt or maintain a statute, regulation or practice in a manner affecting trade or investment between the Parties". According to Article 19.4, "the Parties recognize that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in each Party's labour laws. Accordingly, no Party shall waive or otherwise derogate from, or offer to waive or otherwise derogate from, its statutes or regulations (…) in a manner affecting trade or investment between the Parties". Article 10.2 states: "A Party shall not, waive or derogate from, or offer to waive or derogate from, its environmental or labour laws, in a manner affecting trade or investment between the

Parties". Article 10.4 reads: "A Party shall not apply labour or environmental laws in a manner that would constitute a disguised restriction on trade or unjustifiable discrimination between the Parties".

there is (i) a violation of labour rights protected by the RTA; (ii) there is negative effect on trade and investment;(iii) and that a causal link between violation and effect exists.

Additionally, the "horizontal coherence" between the obligation to guarantee free trade and that to protect labour rights has to be respected. The CPTPP[17] as well as the EVFTA[18] highlight that labour standards should not be instrumentalized for protectionist trade purposes. For instance, while the importating of goods produced by forced or compulsory labour is discouraged, it is prohibited to take any initiative inconsistent with trade liberalization obligations.[19] How to maintain the balance between labour rights protection and trade liberalization purposes remains a complicated issue. Last but not least, the majority of the labour-relation provisions are not concrete and/or binding enough to guarantee their implementation.

Given these limitations, one may wonder if RTAs' provisions for the protection of labour rights will have much impact on labour relations in the parties' territories. To answer this question, we will examine the specific impacts of EVFTA and CPTPP on Vietnam's labour law.

II. The impact of new-generation RTAs on Vietnamese labour law

The legislation with the biggest influence on Vietnam's labour relations is the amendment to the 2019 Labour Code, which will enter into effect in 2021. We have asked ourselves the following questions: Is participation in new-generation RTAs the main reason why Vietnam elabourated the new Labour Code? What are the major changes to this Labour Code related to RTAs' commitments, and how will they potentially impactlabour relations?

[17]Article 19.2 of CPTPP's Labour Chapter reads: "The Parties recognize that, as stated in paragraph 5 of the ILO Declaration, labour standards should not be used for protectionist trade purposes".

[18] EVFTA Article 3.6 reads: "The Parties recognize that the violation of fundamental principles and rights at work cannot be invoked or otherwise used as a legitimate comparative advantage and that labour standard should not be used for protectionist trade purposes". Article 10.1 claims that the Parties "… recognize that it is inappropriate to encourage trade or investment by weakening the levels of protection afforded in domestic environmental or labour law". Article 10.3 states: "A Party shall not (…) fail to enforce its environmental and labour law, as an encouragement for trade and investment".

[19] The CPTPP Article 19.6 relating to Forced or Compulsory Labour imposes the obligation to discourage "the importation of goods from other sources produced in whole or in part by forced or compulsory labour, including forced or compulsory child labour". However, the footnote 6 specifies that "nothing in this Article authorizes a Party to take initiatives that would be inconsistent with its obligations under other provisions of this Agreement, the WTO Agreement or other international trade agreements".

The causal link between Vietnam's participation in new-generation RTAs and the elabouration of the 2019 Labour Code has been confirmed many times by members of Vietnamese government, National Assembly and ILO representatives.[20]

It is necessary to note that, according to the 1998 ILO Declaration, all ILO Members, even if they have not ratified all the relevant international labour conventions, commit to respect, promote, and realize the fundamental principles and rights at work. Being an ILO Member,[21] Vietnam is bound by this obligation. However, only after its participation in new-generation RTAs, have these principles triggered major changes to Vietnam's Labour Code. It is also acknowledged that as a result of participating in new-generation RTAs, Vietnam is going to participate in more ILO core conventions[22]. In this study, we will focus only on improvements in the 2019 Labour Code.

Is the reason for reforming the Vietnamese Labour Code to adapt to obligations emerging from EVFTA and CPTPP? If so, what might be the potential impact of this "reform" on labourrelations in Vietnam? In order to answer to these questions, firstly, we will review some provisions in the 2019 Labour Code relating to fundamental principles and rights at work. Second, to find out if these provisions are really "new" or whether they just repeat the 2012 Labour Code, we will compare the 2019 with the 2012 Labour Code. Third, we will evaluate these provisions' impact on labour relations in Vietnam.

Provisions relating to the principle of eliminating all forms of forced or compulsory labour

According to the 2019 Labour Code, "forced labour" refers to "the use of force or threat to use force or a similar practice to force a person to work against his/her will". This Code

[20] ILO, "ILO chucmung Viet Nam va EUkyhiepdinhthuongmaitu do" ["ILO Congratulates Vietnam and the EU on the Signing of the Free Trade Agreement"], 30 June 2019,

https://www.ilo.org/hanoi/Informationresources/Publicinformation/newsitems/WCMS_711974/lang--vi/index.htm

(last accessed 26 February 2020).

[21] Vietnam has been an ILO Member from 1950 to 1976, 1980 to 1985, and again since 1992.

[22] Until today, Vietnam ratified six ILO Core Conventions. Vietnam's National Assembly voted for the ratification of ILO Convention 98 on the Right to Organize and Collective Bargaining in June 2019. Convention 105 on The Abolition of Forced Labour and Convention 87 on Freedom of Association and Protection of the Right to Organize are expected to be ratified by Vietnam in 2020 and 2023, respectively. See ILO, "ILO chucmung Viet Nam va EUkyhiepdinhthuongmaitu do" ["ILO Congratulates Vietnam and the EU on theSigning of the Free Trade Agreement"], 30 June 2019, https://www.ilo.org/hanoi/Informationresources/Publicinformation/newsitems/WCMS_711974/lang--vi/index.htm (last accessed 26 February 2020).

contains at least 6 provisions related directly to the elimination of forced or compulsory labour. However, half of these provisions repeat those already existingin the 2012 Labour Code. An improvement may be found in Article 35.2, according to which employees have the right to unilaterally terminate an employment contract without prior notice if he/she is "forced to work against his/her will".[23]

Provisions relating to the effective abolition of child labour

Of the eight provisions concerning child labour abolitiondirectly, four repeat existing provisions in the 2012 Labour Code.[24] Many provisions are general[25] or need to be further specified by the MOLISA.[26] According to Decision 24/QD/TTg of the Prime Minister (issued on 06 January 2020), three decrees will be issued before the 15 September 2020 to clarify different aspects of labour law concerning minor employees.

Just like the 2012 Labour Code, the 2019 Labour Code employs the term "minor labour" in provisions specifying Vietnam's obligation to abolish child labour. While one can raise questions about the differences or similarities between these two terms (child labour vs. minor labour), it should be noted that the 2019 Labour Code contains some new provisions. First, in introducing the term "minor employees", it offers a classification based on age (Article 143). This classification allows the regulation of child labour abolition in a more methodical way. Second, employers have more obligations towards minor employees: they must obtain a health certificate proving that employees under 15 years old are healthy enough for the assigned work and they must provide regular health check-upsat 6-month intervals for these minor employees. Third, the law specifies the jobs people under 13-years old are allowed to perform (Article 145). Fourth, employers shall not employ minors from 15 to 18 years old for

[23] According to the 2012 Labour Code, in the case of forced labour, the employee has to give three days notice before unilaterally terminating an employment contract (Article 37.1.c).

[24] Article 4.7 on state labourpolicies, Article 8.7 on forbidden acts, Article 113.1.b) on annual leave of minor employees, and Article 146 on the working hours of minor employees.

[25] Article 4.7 on state labourpolicies, Article 8.7 on forbidden acts, and Article 143 on the definition of minor employees.

[26] See Article 143.3 relating to the list of light works for persons aged 13 to 15, Article 145.4 on obligations of employers while employing persons under 15 and Article 147.3 on other works and workplaces harmful to the development of persons between 15 and 18.

production, sale of alcohol, tobacco and neuro-stimulants and other narcotic substances, or to work at lottery agents, and gaming centers (Article 147).

Provisions relating to the elimination discrimination in employment and occupation

Article 3.8 of the 2019 Labour Code defines labour discrimination as "discrimination on the grounds of race, skin color, nationality, ethnicity, gender, age, pregnancy, marital status, religion, opinion, disability, family responsibility, HIV infection, establishment of or participation in trade union or internal employee organization in a manner that affects the equality of opportunity of employment."

Of the six provisions concerning directly the elimination of discrimination with respect to employment and occupation, three repeat the existing provisions of the 2012 Labour Code[27] and another three only provide for general principles.[28] Some improvements in comparison to the 2012 Labour Code may be found in articles 3.8, 175.1 and 179.2.c). In defining "labour discrimination", Article 3.8 adds some new grounds, like nationality, ethnicity, age, pregnancy, opinion, and family responsibility. Article 175.1 and Articlee 179.2.c) prohibit labour discrimination and the obstruction of the freedom of association, and they provide that this form of discrimination may be grounds for a collective labour dispute.

Provisions related to the freedom of association and the effective recognition of the right to collective bargaining

Freedom of association and the right to collective bargaining are fundamental human rights and core ILO values. The respect for them has a major impact on working and living conditions while also helping to promote democracy, sound labour market governance, and decent conditions at work.[29] Freedom of association is often defined as the right "to establish and to

[27]See Article 5.1.a on the rights of employees, including the right to suffer no discrimination, Article 8.1 on forbidden actions, and Article 90.1 on no gender discrimination relating to salaries.

[28]See Article 3.8 on the definition of labour discrimination, Article 5.1.a) on the rights of employees, and Article 8.1 on forbidden actions.

[29] ILO Director General, "Freedom of Association in Practice: Lessons Learned. Global Report under the Follow-Up to the ILO Declaration on Fundamental Principles and Rights at Work", International Labour Conference, 97th Session, 2008, Report I (B), ILO, Geneva, p. ix.

join organizations of their choice to promote and defend their respective interests”.[30] In this study, we will focus on freedom of association and the right to collective bargaining of employees, who are in principle more vulnerable than their employers in labour relations.

There are many provisions of the 2019 Labour Code that contribute to reducing the major obstacles to freedom of association and collective bargaining rights.[31] Most remarkably, for the first time, the new Labour Code marks a step forward for the elimination of trade unions’ monopoly over labour organizing. Within enterprises, employees may choose their preferred representative bodies, if legal conditions are satisfied. While the 2012 Labour Code mentioned only trade unions as legitimate internal representatives of employees,[32] the 2019 Labour Code highlights that employee representative bodies include internal trade unions and internal employee organizations.[33] The consequence is an extension of the role traditionally reserved for trade unions to all employee representative bodies in enterprises.

Chapter XIII is dedicated entirely to discussing employees’ representative bodies. Every employee has the right to establish, join, and participate in employee representative bodies. Trade unions and other internal employee organizations have equal rights and obligations (Article 170). This provision reinforces the elimination of trade union’s monopoly: employees may participate in any representative body to protect their interest.[34] Different aspects of establishing and the functioning of employee representative bodies,[35] the obligations of employers[36], and the rights of the representative body’sboard of directors[37] relating to their freedom of association are detailed here. The provisions help to eliminate restrictions on the establishment of organizations or the right to join them as well as interference in the functioning of these organizations and discrimination against the organizations’ members.

[30]Ibid.

[31] About obstacles to freedom of association and collective bargaining, see ibid.

[32]Article 3.4 of the 2012 Labour Code.

[33]Article 3.3 of the 2019 Labour Code.

[34]See Nguyen Thi Bich, “Some New Points Relating to Internal Representative Organizations of Employees Provided by the 2019 Labour Code and Forecasts of Impacts on Enterprises”, Vietnamese Journal of Legal Sciences, 2020.

[35]Article 172-174 of the 2019 Labour Code.

[36]Article 175 and 177 of the 2019 Labour Code.

[37]Article 176 of the 2019 Labour Code.

Many provisions of the 2019 Labour Code extend the role and rights of trade unions in collective bargaining to employee representative bodies.[38] In addition, the Code contains new rules promoting the role as well as the obligations of employee representative bodies relating to collective bargaining.[39] These provisions, which are sufficiently detailed and binding, will contribute to eliminating the restrictions on collective bargaining and undue restrictions on the right to strike. Therefore, they enable a more effective protection of employees' rights.

The protection of the freedom of association and the rights to collective bargaining is one of the biggest challenges for Vietnam, as the Vietnamese legal framework on this issue remains poor.[40] In this context, the 2019 Labour Code represents a big step forward by introducing the legal foundation for the promotion of freedom of association in Vietnam.

Conclusion

In summary, the labour protection regulations covered by new-generation RTAs, including EVFTA and CPTPP, tend to cover only those aspects of labour relations that affect trade and investment. However, it is reasonable to conclude that the participation in new-generation RTAs has positive impacts on labour relations in Vietnam. It remains necessary to survey the implementation of the new Labour Code and the labour rights commitments of new-generations RTAs. Some questions that persist include: How will the new Code be specified in documents and implemented in the practice? Will this implementation induce any risk for the Vietnamese government to be sued by foreign investors, using investor-state dispute

[38]Article 6.1.c), Article 69, Article 202, Article 203, Article 205, and Article 211 of the 2019 Labour Code.

[39] There are many new provisions specifying the scope of employeerepresentative bodies, such as: to request collective bargaining (Article 70.1); to decide time and location for casting votes on a draft collective bargaining agreement in case of a sectoral collective bargaining (Article 76.3); to request a competent authority to issue a decision to extend the scope of part or all of the collective bargaining agreement to other enterprises in the same field or sector within an industrial park, economic zone, export-processing zone or hi-tech zone (Article 84.1); to give permission that an enterprise may join or withdraw from a sectoral collective bargaining agreement or multi-enterprise collective bargaining agreement (Article 85); to organize and lead a strike (Article 196.3.b and Article 198);and to call a strike (Article 199). A strike is considered illegal if not organized by a representative body of employees entitled to organize a strike (Article 204.2). Employee representatives are to be paid for the time spent participating in collective bargaining meetings (Article 70.2). However, employee representative bodies are also responsible for their actions: they shall pay compensation if an illegal strike causes damage to the employer (Article 217.2).

[40]See Le Thi Thuy Huong, "The Implementation of Labour Commitments in Free Trade Agreements and Some Challenges for Vietnam", Vietnamese Journal of Legal Sciences, 2019, pp. 41-49.

settlement mechanisms? To answer these, further research is needed in the future. At the moment, however, the adoption of the 2019 Labour Code as well as the rapid elabouration of by-law documents to facilitate its implementation[41] demonstrate Vietnam's serious efforts to respect its RTAs commitments, reform its labour law framework, and develop harmonious labour relations.