

On the Precipice: Prospects for Free Labor Unions in Vietnam

TRẦN THỊ KIỀU TRANG*
RICHARD A. BALES**

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* ©2017 Tran Thi Kieu Trang. Tran Thi Kieu Trang is a Lecturer, Department of Labor Law, Faculty of Economic Laws, Hanoi Law University.

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I. INTRODUCTION

Vietnam (officially, the “Socialist Republic of Vietnam”) is rapidly transitioning economically, in large part due to pro-trade policies that have attracted international capital.¹ A necessary component for Vietnam to further integrate into the world economy is to develop a system of industrial relations that will ensure industrial stability and reassure international manufacturers that there is no risk of embarrassment resulting from revelations of brutal or unsafe working conditions.² Positive signs for rapid labor reform were visible as recently as early 2016 with the Trans-Pacific Partnership (“TPP”), a trade agreement intended to integrate trade among twelve countries (including Vietnam), which would have set international benchmarks and a fixed deadline for labor reform.³

Notwithstanding the death of the TPP,⁴ labor reform in Vietnam continues, as there is currently a vigorous debate within the country over which direction reform should take. Thanks to labor scholars such as Cynthia Estlund, international labor scholars have a fairly decent idea about the progress and direction of labor law reform in China;⁵ however, this is not

1. *The other Asian tiger*, THE ECONOMIST (Aug. 4, 2016), <http://www.economist.com/news/leaders/21703368-vietnams-success-merits-closer-look-other-asian-tiger> [<https://perma.cc/97VW-HYAT>].

2. See, e.g., Rana Foroohar, *Bangladesh Factory Collapse Will Force Companies to Rethink Outsourced Manufacturing*, TIME: BUSINESS (Apr. 30, 2013), <http://business.time.com/2013/04/30/bangladesh-factory-collapse-will-force-companies-to-rethink-outsourced-manufacturing/> [<https://perma.cc/8WRH-J639>]; see also James J. Brudney, *Envisioning Enforcement of Freedom of Association Standards in Corporate Codes: A Journey for Sinbad or Sisyphus?*, 33 COMP. LAB. L. & POL’Y J. 555, 559–60 (2012) (describing how multinational corporations use varied formulations of codes of corporate social responsibility (“CSR”) to invoke ILO conventions and principles in their corporate codes and the propensity of these corporations to adopt distinct approaches for their supply chains).

3. See *infra* notes 11–12 and accompanying text.

4. Vanessa Lide, *Okay, the Trans-Pacific Partnership is dead. What was it?*, WASH. POST (Jan. 23, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/01/23/okay-the-trans-pacific-partnership-is-dead-what-was-it/?utm_term=.48ee136eede8 [<https://perma.cc/Z945-MRGC>].

5. See, e.g., CYNTHIA ESTLUND, A NEW DEAL FOR CHINA’S WORKERS? (2017); Cynthia Estlund, *Will Workers Have a Voice in China’s “Socialist Market Economy”?*

true for Vietnam, which is poised to become Southeast Asia's next economic powerhouse.⁶ The purpose of this article is to fill this gap.

Part II of this article describes how the ILO and the TPP jump-started the most recent wave of labor reform in Vietnam. Part III describes the existing labor regime in Vietnam. Part IV analyzes Vietnamese labor law, specifically as compared to the ILO norms, and explains that although Vietnam has made rapid and radical progress over the last two decades, there is still room for significant improvement. Part V describes and evaluates current proposals for reform. Part VI provides a conclusion of the issues discussed.

II. BACKGROUND: THE ILO, THE TPP, AND THE IMPETUS FOR VIETNAM'S LABOR REFORM

The International Labor Organization ("ILO") is part of the United Nations ("UN"), and its mission is to promote social justice through internationally recognized labor and human rights.⁷ The ILO Declaration on Fundamental Principles and Rights at Work, adopted in 1998, commits UN Member States to respect and promote principles and rights in four categories: freedom of association and the effective recognition of the right to collective bargaining, eliminating forced or compulsory labor, abolishing child labor, and eliminating discrimination regarding employment and occupation.⁸ The ILO also has promulgated more specific labor standards in the form of Conventions.⁹ These Conventions may be ratified by Member States (at their choosing), and are enforceable only through domestic law or, if they are incorporated by treaties or trade agreements among Member States, through the enforcement mechanisms of those treaties or trade agreements.¹⁰

The Curious Revival of the Workers Congress System, 36 COMP. LAB. L. & POL'Y J. 69, 70 (2014).

6. See *The other Asian tiger*, *supra* note 1.

7. See *Mission and Impact of the ILO*, INTERNATIONAL LABOUR ORGANIZATION, <http://ilo.org/global/about-the-ilo/mission-and-objectives/lang-en/index.htm> (last visited Sept. 4, 2017) [<http://perma.cc/SK9U-THVU>].

8. *ILO Declaration on Fundamental Principles and Rights at Work*, INTERNATIONAL LABOUR ORGANIZATION, <http://www.ilo.org/declaration/lang-en/index.htm> (last visited on Sept. 4, 2017) [<http://perma.cc/SK9U-THVU>].

9. *Conventions and Recommendations*, INTERNATIONAL LABOUR ORGANIZATION, <http://ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm> (last visited on Sept. 4, 2017) [<https://perma.cc/R7U3-EEN4>].

10. *Id.*

The TPP would have been a complete labor game-changer in Vietnam. As part of the overall TPP negotiations, the United States negotiated side agreements on labor protections with Vietnam, Malaysia, and Brunei (the countries with a record of ratifying the fewest ILO Conventions among the twelve prospective signatories to the TPP).¹¹ By the express terms of these side agreements, the labor laws of these three countries were required to be “newly established, changed and improved to allow independent labor unions, strikes, proper treatment of immigrants, anti-discrimination provisions, labor inspections, and the basic labor standards affecting working conditions, before [the country would be] allowed to export goods duty-free to the United States and otherwise use the provisions of the TPP.”¹² Professor Ronald Brown explains:

In the Side Agreement with Vietnam (Plan for the Enhancement of Trade and Labor Relations), Vietnam agree[d] to eight categories of detailed legislative labor reforms, including the rights of union organization and collective bargaining, strikes, prohibitions on forced labor, discrimination, and the creation of administrative institutions to effectively enforce these obligations. The Agreement states that these obligations will be enacted “prior to the entry into force of the [TPP] Agreement between the United States and Vietnam.”¹³

Although neither the TPP nor the side agreement with Vietnam is currently on the table,¹⁴ prospects for labor law reform in Vietnam nonetheless remain alive. This is perhaps a happy by-product of the TPP negotiations, or perhaps it stems in part from concerns of international investors¹⁵ or the internalization (to some degree) in Vietnam of the ILO labor norms.¹⁶ Regardless, labor law reform in Vietnam is now primarily a function of internal political considerations.

11. Ronald C. Brown, *Labor Implications of TPP: A Game Changer?*, (May 1, 2016), (Working Paper), <http://ssrn.com/abstract=2745524> [<https://perma.cc/K5PD-PSRJ>].

12. *Id.*

13. *Id.* (citing United States-Vietnam Plan for the Enhancement of Trade and Labour Relations, U.S.-Viet., art. VII 1, Feb. 4, 2016, <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labour-Relations.pdf> [<https://perma.cc/X8U7-8HMQ>]).

14. See Lide, *supra* note 4 and accompanying text.

15. CYNTHIA ESTLUND, *REGOVERNING THE WORKPLACE: FROM SELF-REGULATION TO CO-REGULATION* 93–97 (2010); Lance Compa, *Corporate Social Responsibility and Workers’ Rights*, 30 *COMP. LAB. L. & POL’Y J.* 1, 1–2 (2008).

16. James J. Brudney, *The Internationalization of Sources of Labor Law*, 39 *U. PA. J. INT’L L.* 1 (forthcoming Mar. 2017) (describing how ILO norms have positively affected the development and implementation of national labor legislation over the past twenty-five years).

III. EXISTING LABOR LAWS OF VIETNAM

In Vietnam, the right to collectively bargain and to form a collective labor agreement was codified in Labor Code 1994, and still exists in Labor Code 2012.¹⁷ Labor Code 2012 significantly expands collective bargaining, marking a milestone in the regulation of industrial relations. After five years under Labor Code 2012, the quality and quantity of collective bargaining and collective agreements in Vietnam has improved. However, it is widely recognized that the existing Labor Code falls short of international norms, providing impetus for an additional round of reform.

A. The Legislation and Practice of Collective Labor Bargaining in Vietnam

Collective bargaining is a process through which the employees (collectively) and employers discuss and negotiate their relations and interactions in the workplace, such as pay and other terms and conditions regarding work. The stated purpose of collective bargaining in Vietnam is to reach mutually harmonious and stable industrial relations, improve working conditions and efficiency, and create a fair and expeditious process for enforcing the rights and obligations of each party.¹⁸

Labor Code 2012 not only defines collective bargaining, but also fully describes the bargaining agents, the scope of bargaining, and the procedural requirements for conducting collective bargaining.¹⁹

17. Labor Code 2012 (Law N. 12/2012/QH13) (Viet.). For a general description of Labor Code 2012, see Thuy Hang Nguyen, *Vietnam*, in 2 INT'L LAB. & EMP. L. 63–64 (WILLIAM L. KELLER ET AL. ed. 2013).

18. Bộ Luật Lao Động Việt Nam [LABOR CODE] (2012), art. 66 (Viet.), <https://www.ilo.org/dyn/natlex/docs/MONOGRAPH/91650/114939/F224084256/VNM91650.pdf> [hereinafter LABOR CODE 2012] [<http://perma.cc/AT6X-7CC6>].

Collective bargaining is the discussion and negotiation between the worker's collective and the employer in order to:

1. Build harmonious, stable and progressive labour relations;
2. Establish new working conditions as the basis for the signing of a collective bargaining agreement;
3. Resolve obstacles and difficulties in the implementation of the rights and of obligations of each party in labour relations.

19. *Id.* at ch. 5, § 2, 3.

1. The Bargaining Agents

In Vietnam, under Labor Code 2012, two permissible bargaining agents exist: the trade union and the employer.²⁰ No other bargaining agents—i.e., independent unions—are allowed.

On the employee side, trade unions are the only bodies permitted to represent employees' interests and to bargain on their behalf.²¹ Vietnam has a single system of employee representatives—trade unions falling under the umbrella of the Vietnam General Confederation of Labor (“VGCL”), which is directed by the Communist Party of Vietnam.²² Under Labor Code 2012, no other employee group is entitled to be a party to collective bargaining other than VGCL and its members.²³ VGCL is the only recognized national representative organization of employees in Vietnam; all local unions are created by the higher-level VGCL union and are registered under the confederation.²⁴ The bargaining agent representing the employees will either be an occupation-based union or an umbrella union, depending on whether collective bargaining is conducted at the enterprise level (with a single-employer) or at the sectoral level (covering an entire sector of the economy).²⁵ The singular system of employee representation in Vietnam does not comply with the core ILO standard of freedom of association because the Labor Code forbids employees from forming independent trade unions outside the VGCL.²⁶

On the employer side, the bargaining agent usually is the employer itself, the employer's representative if the bargaining is conducted at the enterprise level, or a representative organization of the employer if bargaining is conducted at the sectoral level.²⁷ At the national level, there are three

20. *Id.* art. 73, § 1.

21. *Id.* art. 10, 69 (discussing right to work of workers and Representatives of the parties to the collective bargaining).

22. See ERWIN SCHWEISSHELM, TRADE UNION IN TRANSITION—CHANGING INDUSTRIAL RELATIONS IN VIETNAM 1–2 (2014), https://www.fes.de/gewerkschaften/common/pdf/2014_09Vietnamese_TU_in_Transition.pdf [<https://perma.cc/3SST-JNL4>].

23. LABOR CODE 2012, art. 73.

24. CHARTER OF VIETNAM TRADE UNION art. 9, <http://www.ilo.org/dyn/natlex/docs/MONOGRAPH/94503/128468/F448597516/VNM94503%20Eng2> [<https://perma.cc/L6B7-QJDV>]; see also Erwin Schweisshelm, *Trade Unions in Transition – Changing Industrial Relations*, Friedrich-Ebert-Stiftung (Sept. 2014), https://www.fes.de/gewerkschaften/common/pdf/2014_09Vietnamese_TU_in_Transition.pdf [<https://perma.cc/Y6NE-3CSR>].

25. A sectoral-level agreement covers all workers in a sector of the economy. It contrasts to enterprise bargaining where agreements cover individual firms.

26. Peter A. Petri, Michael G. Plummer & Fan Zhai, *The Trans-Pacific Partnership and Asia-Pacific Integration: A Quantitative Assessment*, EAST-WEST CENTRE WORKING PAPERS, ECON. SERIES No.119 (Oct. 24, 2011) at 51; Thanh Nguyen Thi, *Vietnam in the TPP Negotiations and Challenges It May Face* (2014), <http://ssrn.com/abstract=2515161>.

27. LABOR CODE 2012, art. 87.

representative organizations of employers: the Vietnam Chamber of Commerce and Industry (“VCCI”), the Vietnam Cooperative Alliance (“VCA”), and the Vietnam Association of Small and Medium Enterprises (“VASME”).²⁸ These organizations do not legally or practically represent all employers in Vietnam—many employers fall outside the scope of these organizations’ representation.

2. *The Scope of Collective Bargaining*

The scope of collective bargaining encompasses five general topics: (i) baseline salaries, bonuses, allowances (for sickness, birthdays, and marriages), and salary increases; (ii) working hours, overtime, and break times; (iii) procedural protection for employees (such as hiring procedures, conditions under which an employee may be transferred, and severance payments); (iv) occupational safety and health; and (v) other subjects of concern to both parties.²⁹ This section of Labor Code 2012 is designed to give the parties wide latitude over negotiating the terms and conditions of employment. If the collective bargaining negotiations conclude successfully then these five general topics will likely provide the framework of the resulting collective bargaining agreement.

3. *The Principles of Collective Bargaining*

Collective bargaining theoretically is predicated on the principles of goodwill, equality, cooperation, openness, and transparency.³⁰ However, just as “good faith bargaining” is difficult to define in American labor law,³¹ these terms are equally elusive in both theory and practice in Vietnam.

28. See VIET NAM CHAMBER OF COMMERCE AND INDUSTRY, <http://e.vcci.com.vn/> (last visited Nov. 11, 2017); VIETNAM COOPERATIVE ALLIANCE, <http://www.vca.org.vn/> (last visited Nov. 11, 2017); VIET NAM ASSOCIATION OF SMALL AND MEDIUM ENTERPRISES, <http://vinasme.vn/default.aspx?kLang=en> (last visited Nov. 11, 2017).

29. *Id.* art. 70.

30. *Id.* art. 67.

31. See *NLRB v. Katz*, 369 U.S. 736 (1962) (imposing the duty to bargain in good faith); *Employer/Union Rights and Obligations*, NLRB, <https://www.nlr.gov/rights-protect/employerunion-rights-and-obligations> (“There are hundreds, perhaps thousands, of NLRB cases dealing with the issue of the duty to bargain in good faith.”) [<https://perma.cc/A34W-FXQV>].

4. The Procedural Requirements of Collective Bargaining

The procedure of collective bargaining includes three stages: (i) requesting collective labor bargaining, (ii) preparing for collective labor bargaining, and (iii) conducting collective labor bargaining.³² These procedures were promulgated for the first time in Labor Code 2012 and they signify the important status of collective bargaining as well as the enhanced role of industrial relations in Vietnam. Before 2012, Labor Code 1994 did not regulate the process of collective bargaining. Instead, the Code focused on regulating the individual employment relationship between an employer and individual employees, such as by setting minimum employment standards.³³ Thus, Labor Code 2012, although noncompliant with modern ILO standards,³⁴ was a major step forward in Vietnam's recognition of workers' *collective* rights and interests.

In the stage of requesting collective bargaining, each party has the right to request bargaining and to propose the scope of negotiations.³⁵ Once a party calls for collective bargaining, the other party must accept and engage in collective bargaining.³⁶ As described above, the principle of "goodwill" is a statutory requirement of the bargaining process.³⁷ Usually, this process is initiated by the employees' representative.³⁸

In the stage of preparing for collective bargaining, Labor Code 2012 prescribes the time limits for the actors to prepare for negotiations.³⁹ For

32. LABOR CODE 2012, art. 71.

33. See Bộ Luật Lao Động Việt Nam [LABOR CODE] (1994), art. 56, 68, 69 (Viet.), <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/38229/64933/E94VNM01.htm> [hereinafter LABOR CODE 1994] (discussing minimum wages, working hours, and limitations of overtime.) [<https://perma.cc/6T64-DYBF>].

34. See *infra* III.B.

35. LABOR CODE 2012, art. 71.

36. *Id.* art. 68.

37. *Id.* art. 67.

38. Labor, and not management, initiates the collective bargaining process for two reasons. First, the fee associated with the collective bargaining process will be arranged and paid by the employer, who is usually not in any hurry to pay this fee. LABOR CODE 2012, art. 71.2 ("The employer shall be responsible for arranging the negotiation meetings at the time and venue agreed on by both parties."). Second, a collective agreement will presumably provide better wages and working conditions for employees, and employers are in no hurry to initiate a process with such an outcome.

39. *Id.* art. 71.

Article 71. Process for collective negotiation

1. The preparatory process for collective bargaining is stipulated as follows:
 - a. At least 10 days before the negotiation meeting, at the request of the worker's collective, the employer shall provide information on the operation and business situation, with the exception of business secrets, technological secrets of the employer.
 - b. Collecting comments of the workers[.] The representative of the worker's collective shall solicit comments directly from the worker's

example, the Labor Code provides that the party initiating collective bargaining must provide written notice of the proposed components of bargaining to the other side at least five working days before bargaining begins.⁴⁰

In the stage of conducting the collective bargaining, the employer is responsible for costs related to the bargaining process.⁴¹ In common practice, as a part of the collective bargaining process, the time and place of bargaining is mutually agreed by both sides. Negotiations are formally recorded in a set of minutes containing the entire scope of negotiations, the language agreed to, and the signatures of the bargaining representatives of each party.⁴² If the negotiations conclude successfully, the result will be a collective agreement. If the parties cannot reach an agreement, there might be a labor collective dispute. For example, when the two parties cannot reach an agreement in setting out new working conditions, such as the employees wishing to raise the minimum wage of the enterprise, a collective labor dispute of interest will occur. The parties' dispute will be resolved through the mediation

collective or indirectly through a congress of the workers' delegates on the workers' proposals to the employer and employer's proposals to the worker's collective.

- c. Notification of issues for collective bargaining. No later than 05 working days prior to the start of the negotiation meeting, the party which has requested collective bargaining must notify the other party of the proposed issues for negotiation, in writing.
2. The process of collective bargaining is stipulated as follows:
 - a. Organization of negotiation meetings[.] The employer shall be responsible for arranging the negotiation meetings at the time and venue agreed on by both parties. Minutes of the negotiation meetings must be taken and these must specify the issues which have been agreed upon by the two parties, as well as a tentative time for signing an agreement on these issues; and issues that remain controversial.
 - b. Minutes of the negotiation meetings must be signed by the representative of the worker's collective, the employer and the preparer of the minutes.
3. Within 15 days from the conclusion of the collective bargaining meetings, the representative of the worker's collective must widely and publicly disseminate the minutes of the negotiation meeting to the worker's collective for their information and organize a vote for workers to approve on the agreed issues.
4. In case the negotiation does not succeed, either party may request to continue the negotiation or may initiate the labour dispute settlement procedures as prescribed in this Code.

40. *Id.*

41. *Id.* art. 83.

42. *Id.* art. 71.

process, first with the Labor Mediator.⁴³ If mediation fails, the dispute will go to Labor Arbitration Council which, despite its name, is not binding on the parties. After 5 days has passed, even if the Council records a successful mediation, the employee's representatives are free to initiate agreements if one of the parties does not execute the agreement that has been reached.⁴⁴ In Vietnam, a strike is only recognized as legal if it arises from a collective labor interest dispute.⁴⁵

B. The Legislation and Practice of Collective Agreements in Vietnam

1. Laws on Collective Agreements

A collective agreement is a written agreement made between the parties (an employer and a trade union of employees) which sets forth the working conditions agreed to through the collective bargaining process.⁴⁶ The collective agreement is the outcome of negotiations between the parties, and reflects the expectations and concerns of each party. In Vietnam, there are three types of collective agreements: (1) collective agreements at the enterprise level, (2) collective agreements at the sectoral level, and (3) other types of collective agreements.⁴⁷

The contents of the collective agreement mirror the scope of collective bargaining negotiations described above.⁴⁸ The specific terms of the collective agreement are valid so long as they: (1) fall within the five scope-of-bargaining points described above, (2) meet minimum legal labor standards that do not otherwise violate the law, and (3) provide terms and conditions of employment for workers that meet the minimum standards set by the labor laws.⁴⁹ If the collective bargaining is the process, the collective agreement is the end result.

After the process of bargaining, and assuming that the parties have agreed on the terms of a collective agreement, the agreement does not become binding until it is ratified. Ratification requires both publication with the government and approval by the members. Under Labor Code 1994, ratification required obtaining the approval of the proper governmental authority.⁵⁰ Labor Code 2012 removed this requirement and instead requires that the

43. *Id.* art. 203.2.

44. *Id.* art. 206.3.

45. *Id.* art 215. A strike that arises from a collective labor dispute regarding rights is illegal.

46. *Id.* art. 73. The parties to the collective agreement are the same as those that participated in collective bargaining: the employer (or its representative) and the labor union (necessarily the VGCL or a subdivision thereof) representing the workers.

47. *Id.*

48. *See supra* III.A.2.

49. *Id.*

50. *See* LABOR CODE 1994, § 48.

employer merely sends a copy of the collective agreement to the proper governmental authority.⁵¹ If it is an enterprise-level collective agreement, ratification requires approval of more than 50% of the enterprise labor union.⁵² If it is a sectoral collective agreement, ratification requires approval of the Executive Committee of the sectoral labor unions.⁵³ The Labor Code does not regulate the ratification of other types of collective agreements such as multiple employer collective agreements or regional collective agreements.

After concluding the collective agreement, the employer must within 10 days deliver a copy to the Department of Labor, Invalids and Social Affairs (for enterprise collective agreements) or to the Ministry of Labor, Invalids and Social Affairs (for sectoral collective agreements).⁵⁴ Simultaneously, the employer must announce the presence of a collective agreement to every company employee.⁵⁵ The collective agreement will then be in effect for one to three years starting from the agreed upon date written in the agreement or the date of execution.⁵⁶ The duration of first enterprise collective agreements may be less than one year,⁵⁷ giving the parties time to determine whether a collective agreement will work properly in the enterprise or not. If the parties subsequently agree to amend the collective agreement, they may do so after three months (for agreements with a duration of less than one year) or six months (for agreements with a duration of one to three years).⁵⁸

2. The Practice of Concluding Collective Agreement in Vietnam

Collective agreements have been negotiated in Vietnam since 1994.⁵⁹ At that time, Labor Code 1994 mentioned the term “collective bargaining,” but did not define the term, specify who the bargaining agents were, or regulate the process of bargaining as a whole.⁶⁰ These gaps left the parties to negotiate these terms themselves.⁶¹ Thus, many enterprises have considerable collective bargaining experience. However, most collective agreements have been

51. LABOR CODE 2012, art. 75.
52. *Id.* art. 74.
53. *Id.*
54. *Id.* art. 75.
55. *Id.* art. 74.
56. *Id.* art. 77.
57. *Id.*
58. *Id.*
59. *See* LABOR CODE 1994, ch. 5.
60. *See id.*
61. *See id.*

negotiated at the enterprise level; only a few sectoral or multi-enterprise collective agreements have been negotiated since 2012.

a. Enterprise Collective Agreement

Enterprise collective agreements account for the majority of collective agreements in Vietnam, compared with sectoral collective agreements or multi-enterprise collective agreements. The majority of these agreements either involve state-owned enterprises (“SOEs”), companies in which SOEs have an equity stake, or companies that began as SOEs but have since been privatized by selling equity shares to the public.⁶² There is a high prevalence of collective agreements with SOE-related companies because when Vietnam first recognized collective agreements in Labor Code 1994, most companies were state-owned.⁶³ As recently as 2013, SOEs still accounted for approximately 40% of Vietnam’s gross domestic product.⁶⁴ According to statistics provided by the VGCL, as of the end of 2015, Vietnam had 25,396 enterprise collective agreements, accounting for 75.72% of all companies with labor unions, but for less than 5% of total companies in Vietnam.⁶⁵

Some collective agreements have been signed recently with large corporations and foreign-invested companies.⁶⁶ However, almost no collective agreements have been signed with small and medium-sized companies. Only six enterprises without labor unions have successfully signed collective agreements—if

62. For example, a private company might have started out a subsidiary of, or a joint venture with, a state-owned company, but the state-owned company later sold its shares to a private-sector entity.

63. See ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, STRUCTURAL POLICY CHALLENGES FOR SOUTHEAST ASIAN COUNTRIES 12 (2013), <https://www.oecd.org/countries/vietnam/Viet%20Nam.pdf> [<https://perma.cc/3A82-S94Q>] (purporting that around 1996, there were about 12,000 SOEs).

64. INDEXMUNDI, *Vietnam Economy Profile* (2017), http://www.indexmundi.com/vietnam/economy_profile.html [<https://perma.cc/BR34-HC2G>] (cited in Thi, *supra* note 26, at n.76).

65. According to the Ministry of Planning and Investment, by the end of 2015, there were 535,920 enterprises in Vietnam. See MINISTRY OF PLAN. & INV., CHỈ TIÊU KINH TẾ - XÃ HỘI NAM (SOCIO-ECONOMIC INDICATORS IN 2015) (2015). Tổng liên đoàn lao động Việt Nam [Vietnam General Confederation of Labour], Sơ kết giữa nhiệm kỳ thực hiện Chương trình: Nâng cao chất lượng thương lượng, ký kết và thực hiện có hiệu quả thỏa ước lao động tập thể [Midterm Review: Enhance the Quality of Bargaining, Concluding and Executing Collective Agreement], No. __/BC-TLĐ, 5 (2016) (on file with author) [hereinafter VGCL Midterm Review]. For more accessible and further support, please see U.S. DEPT. OF LABOR, INDEPENDENT EVALUATION: USDOL’S TECHNICAL COOPERATION PORTFOLIO PROMOTING WORKERS’ RIGHTS IN VIETNAM (2015); Nguyen Thu Ha, *General Situation on Enterprise Registration in January 01*, MINISTRY OF PLAN. & INV. (Feb. 2, 2016, 1:56 AM), <https://dangkykinhdoanh.gov.vn/NewsandUpdates/tabid/91/ArticleID/2593/-TINH-HINH-CHUNG-VE-DANG-KY-DOANH-NGHIEP-THANG-01-2016.aspx> [<https://perma.cc/B69U-6ECD>].

66. See e.g., VGCL Midterm Review, *supra* note 65.

the company does not have a labor union at the enterprise level, the representative of the employee is automatically the labor union at the higher level (for example, district federations of labor or industrial unions) and as a result, the higher-level labor union may negotiate and sign the agreement.⁶⁷ Moreover, according to the VGCL-provided statistics, approximately 25% of enterprises have a labor union but have not signed a collective agreement.⁶⁸ This may be the result of the ineffective representation of workers by state-dominated labor unions under the auspices of the VGCL. Because Vietnamese law does not currently permit workers to form a labor union independent of the VGCL, and workers do not necessarily trust the VGCL to represent their interests, they may see little to be gained by negotiating a collective agreement.

b. Sectoral Collective Agreements

Sectoral collective agreements have been utilized in Vietnam only since 2012. Labor Code 1994 introduced the idea of sectoral collective agreement, but provided no guidance on how to execute.⁶⁹ Additionally, it is very difficult to form a sectoral collective agreement in Vietnam because enterprise working conditions vary considerably from region to region. According to the VGCL, by the end of 2015 there were only a few sectoral collective agreements, including agreements covering the rubber industry, Vietnam's Postal Corporation, Vietnam National Textile and Garment Group, and textile companies in Binh Duong province.⁷⁰

c. Other Type of Collective Agreements

Multi-employer collective agreements by definition cover employers in the same province or employers that share a common business line. The bargaining and concluding collective agreements are carried out in five geographic regions⁷¹ under the technical and financial supervision of ILO Vietnam. By the end of 2016, three collective agreements had been signed: the collective agreement of four travel companies in the city of Da Nang, the collective agreement of four textile companies in Ho Chi Minh City

67. VGCL Midterm Review, *supra* note 65, at 5.

68. *Id.*

69. See Labor Code 1994, *supra* note 33.

70. VGCL Midterm Review, *supra* note 65, at 7.

71. These regions include the areas surrounding Hai Phong city, Da Nang city, Ho Chi Minh city, and the Binh Duong and Dong Nai provinces. *Id.* at 8.

District 12, and the collective agreement of five electronics companies in the city of Hai Phong.⁷² The multi-employer collective agreement has the potential to develop significantly in Vietnam because its contents are flexible enough to accommodate both the working conditions of employees and the requirements of the companies.

The scope of enterprise-level collective bargaining has expanded significantly. Previously, a collective agreement typically covered only salaries and working hours, but now an agreement may also set out welfare regimes such as holiday arrangements; allowances for sickness, birthdays, and marriages; commercial health insurance; etc. In contrast, the scope of sectoral collective agreements and multi-employer collective agreements mostly focuses on wages and working hours. For instance, the collective agreement of the textile companies in Binh Duong Province requires that the minimum wage be at least 3% higher than the regional minimum wage, and requires that the gap between two salary grades in the same pay scale be at least 6%.⁷³

IV. ANALYSIS: SIGNS OF PROGRESS AND RECOMMENDATIONS FOR FURTHER REFORM

A. Radical and Rapid Progress

Vietnamese labor law has progressed radically since 1994. Labor Code 2012 created a fairly comprehensive legal framework for collective bargaining and collective agreements. It governs the identity of the parties, the scope and the process of collective bargaining, and the final collective agreement.⁷⁴

Vietnam also has made progress in offering different varieties of collective agreements and respecting the right of each party to negotiate. For example, in Labor Code 1994, there were only two types of collective agreements which are collective agreements at the enterprise level and sectoral level,⁷⁵ whereas Labor Code 2012 offers three types of collective agreements,

72. See Press Release, Int'l Labour Org., Multi-employer collective bargaining offers workers, employers new opportunities (Jan. 14, 2016), http://www.ilo.org/hanoi/Information/resources/Publicinformation/Pressreleases/WCMS_443059/lang—en/index.htm (press release regarding the Da Nang multi-employer collective agreement) [<https://perma.cc/F9KK-W7KN>]; *Signing Ceremony of Multi-Employer Collective Bargaining Agreement of 04 Korean-Invested Companies*, INTERNATIONAL LABOUR ORGANIZATION, http://www.ilo.org/hanoi/Whatwedo/Event/sandmeetings/WCMS_494940/lang—en/index.htm (last visited Nov. 9, 2017) [<https://perma.cc/HR9G-MYQU>].

73. Vietnam General Confederation of Labour, *supra* note 65.

74. LABOR CODE 2012, § 3.

75. Enterprise collective agreement and sectoral collective agreement. See LABOR CODE 1994, ch. 5.

adding “other type of collective agreements.”⁷⁶ Additionally, according to Labor Code 2012, the employer needs only to inform the proper governmental authority about the collective agreement.⁷⁷ Additionally, the collective agreement is effective on the signing date unless another date is specified in the agreement.⁷⁸

Labor Code 2012 also broadened the scope of collective bargaining and collective agreements, covering not only the basics such as wages, hours, and working conditions, but also anything that the parties mutually agree to bargain on, so long as those topics are not otherwise proscribed by law.⁷⁹

B. Recommendations for Reform

1. Freedom to Choose Bargaining Representatives

Labor Code 2012 restricts both employees and employers in their respective abilities to choose their bargaining representatives. Only labor unions under the VGCL may represent employees. This limitation does not satisfy the core ILO standards on the right to freedom of association,⁸⁰ which in turn obstructs Vietnam in concluding contemporary free-trade agreements. In addition, because there is a unitary labor union consolidated under the VGCL, there is no competition among labor unions, and unions are not as effective at representing workers as they would be if there was competition between unions in representation elections. As a general theory under ILO Convention 98, workers should be free to choose between a labor union integrated under the VGCL and a competing independent labor union, or be free to establish their own independent bargaining representative if the options are unsatisfactory. Additionally, the employee representative should

76. Enterprise collective agreements, sectoral collective bargaining agreements, and other types of collective bargaining agreements as regulated by the Government. LABOR CODE 2012, art. 73.

77. *Id.* art. 75 (a copy must be submitted within 10 days of date of signing).

78. *Id.* art. 74.

79. *Id.* art. 70.

80. The ILO standard for freedom of association can be found in the Convention 98 of the International Labor Organization. *See* Right to Organise and Collective Bargaining Convention (No. 98), adopted July 1, 1949, 96 U.N.T.S. 257. The critical provision of this Convention is Article 2, Section 1, which provides: “Workers’ and employers’ organisations shall enjoy adequate protection against any acts of interference by each other or each other’s agents or members in their establishment, functioning or administration.” *Id.*, available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C098.

have the right to act independently or in conjunction with other employees' organizations, and should have the freedom to join the VGCL or not.

On the employer side, VCCI, VCA, and VASME are exclusive employer representatives, but these organizations do not cover every employer in Vietnam. These three organizations are not established by the vote from the employers but by administrative decisions. Moreover, the three organizations are not parallel with the VGCL because none of them (either individually or collectively) represent all of the employers, while the VGCL is the sole worker's representative in Vietnam. This creates mismatches in employer and employee representation. Just as employees should have the right to form their own independent labor organizations, employers should have the right to form independent employer associations for the purpose of collective bargaining.

2. Independence from Both Management and the State

Currently, as described above, Vietnamese labor unions often are dependent on, if not dominated by, management representatives of the companies with whom the unions are negotiating. Moreover, the VGCL, as an organization of the Communist Party, is by law, as well as in practice, an arm of the government. From the perspective of the ILO and multi-national corporations and unions, the involvement of the government creates major conflicts of interest, especially since many large employers are government-owned. A labor union, like the VGCL, is unlikely to put the interests of the workers first when negotiating with state-owned enterprises, which still make up a large proportion of Vietnamese companies.

Many Westerners with a perspective of independent labor organizations engaging in what is often zero-sum bargaining on behalf of workers against privately owned employers, may not appreciate the philosophical reasons behind why Vietnamese management and government have in recent history been so closely intertwined with Vietnamese labor organizations. Since Vietnam's independence, Vietnam has been (and still is) a socialist country in which many companies are owned and run by the government on behalf of the people—the essence of socialism. From this perspective, there is no conflict of interest when management, labor, and the state are intertwined, because they are all representing the peoples' interests.

In recent years, however, many Vietnamese SOEs⁸¹ have converted into private companies or sold shares on the private equity markets, and Vietnam

81. As of the end of 2015, there were 652 companies registered as SOEs in Vietnam. See Nguyen Vu, *Số doanh nghiệp Nhà nước giảm gần 2/3 sau 5 năm* [The Number of State-Owned Enterprises Fell by Nearly Two-Thirds After Five Years], VNECONOMY (Oct. 26,

has welcomed an influx of foreign capital and manufacturers which now account for a large and growing share of the Vietnamese economy. This does not indicate a retreat from Vietnam's socialist ideals; indeed, quite the opposite is true, as demonstrated by the significant progress that all levels of society have enjoyed over the last several decades of Vietnam's booming economic prosperity.⁸² However, in an environment in which an increasing proportion of Vietnamese workers are employed in the private sector, it suggests that Vietnam's socialist ideals may best be furthered by increasing the independence of labor organizations, which will thereby enhance their ability to negotiate on behalf of Vietnamese workers for wages, working conditions, and social benefits appropriate to Vietnamese socialist ideals. As employment becomes increasingly privatized, workers are better served by independent labor organizations, and there is less need for government control over labor organizations for the purpose of promoting economic growth and social harmony.

V. PROSPECTS FOR FURTHER REFORM

A. *Pre-Summer 2016 Discussions of Labor Law Reform*

A fundamental requirement of all parties to “new generation” trade agreements, such as the TPP or the EU-Vietnam FTA, is that the parties adopt core labor standards (e.g., ILO Conventions). Over the last two decades, Vietnam took significant steps in this direction by eliminating forced and compulsory labor, abolishing child labor, and prohibiting employment discrimination.⁸³ The most significant remaining topic is freedom of labor associations and the effective recognition of the right to collective bargaining, which is the impetus behind extant proposals to amend Labor Code 2012.

Before 2014, there was almost no discussion, in either the academic or popular press, on the topic of core labor standards generally or freedom of association/collective bargaining specifically. Any such discussion was considered politically sensitive and discouraged by the authorities, and avoided by nearly everyone else inside of Vietnam.

2016, 5:44 PM), <http://vneconomy.vn/thoi-su/so-doanh-nghiep-nha-nuoc-giam-gan-23-sau-5-nam-201610230252115.htm> [<https://perma.cc/64HL-V5XS>].

82. *The other Asian tiger*, *supra* note 1 (noting Vietnam's rapid economic development and commitment to universal education).

83. See *International Labour Standards in Viet Nam*, International Labour Organization, <http://www.ilo.org/hanoi/areasofwork/international-labour-standards/lang-en/index.htm> [<https://perma.cc/FMM3-FFWU>].

That changed, however, once Vietnam began the negotiation process for joining the TPP. Since that time, many conferences and seminars have been held and academic papers have been published on the topic of core labor standards and freedom of labor association, including the especially sensitive topic of whether labor unions should be permitted to exist independent of the VGCL. Leaders of the VGCL often joined these conferences and seminars, indicating that the Party at least saw the topic as open for discussion and likely was clearing a path for independent unions.

For example, Dr. Pham Cong Bay, former judge of the Labor Court in Supreme People's Court of Vietnam, published the article *The Impact of Implementing the Freedom of Establishment of Employee Representative Organizations under the Transpacific Partnership (TPP)*.⁸⁴ Similarly, Pham Trong Nghia published the article *Labor Commitments in Trans Pacific Partnership (TPP)* in the Journal of Law Research.⁸⁵ In general, these articles emphasized the need for Vietnam to amend its labor legislation to become compliant with the international core labor standards as required by the new generation FTAs.⁸⁶ Such articles would not have been written—much less published in government-approved publications—before 2014.

Simultaneously, the Vietnamese Government sent strong signals that it was receptive to these core labor standards, including freedom of labor association. For example, Dr. Nguyen Manh Cuong, Director of the Centre for Industrial Relations Development (and the former leader of Vietnam's TPP Labor Negotiating Committee) published *Essential Labor Terms in Trans Pacific Partnership*.⁸⁷ Similarly, Mr. Mai Duc Thien, Deputy Director of the Legal Department of the Ministry of Labor, Invalids and Social Affairs published the article *Labor Commitments in the Free Trade Agreements that Vietnam Is Concluding*, in which he stated that:

84. Dr. Pham Cong Bay, *Tác động của việc Thực hiện các Tổ chức Đại diện cho Người sử dụng lao động thuộc Đối tác xuyên Thái Bình Dương (TPP)* [The Impact of Implementing the Freedom of Establishment of Employee Representative Organizations under the Transpacific Partnership (TPP)], 17 J. PEOPLE'S CT. 29–35 (2016).

85. Pham Trong Nghia, *Các cam kết về lao động trong Hiệp định đối tác chiến lược xuyên Thái Bình Dương–TPP* [Labor Commitments in the Trans-Pacific Partnership Agreement–TPP], 2-3 INST. LEG. STUD. 42 (2016), <http://lib.hlu.edu.vn/WShowresult.aspx?Author=Ph%E1%BA%A1m%20Tr%E1%BB%8Dng%20Ngh%C4%A9a> [<https://perma.cc/F78Y-FLRQ>].

86. *See id.*; *see also* Bay, *supra* note 84.

87. *See* Nguyễn Mạnh Cường, *Major Contents of Labor Under the Pacific-Pacific Partner Agreement (TPP)*, Agtek, available at http://agtek.org.vn/media/attachments/Tai-lieu-gioi-thieu-noi-dung-Lao_dong-trong-TPP.pdf [<https://perma.cc/3UGM-ZRQ7>]; *see also* United States-Vietnam Plan for the Enhancement of Trade and Labour Relations, U.S.-Viet., Feb. 4, 2016, <https://ustr.gov/sites/default/files/TPP-Final-Text-Labour-US-VN-Plan-for-Enhancement-of-Trade-and-Labor-Relations.pdf> [<https://perma.cc/F5R4-79RX>].

[I]n order to fulfil the labor obligation in free trade agreements, right to freedom of association in particular, Vietnam needs to amend the labor laws within the two years 2016 and 2017 in which allow the employees to establish their own representative at the company level and such representative will collectively negotiate and bargain with the employer to protect their rights in industrial relation.⁸⁸

Likewise, on June 21, 2016, the Da Nang conference *Improving the Legal System on Labor, Employment, Social Security Laws in Line with the 2013 Constitution: International Integration and Implementation of TPP Commitments* was jointly organized by the Vietnam Committee for Social Affairs and the Committee for External Affairs of the National Assembly, in coordination with the Ministry of Labor, Invalids and Social Affairs, VGCL, and the ILO.⁸⁹ Again, these articles probably would not have been publishable, and this conference probably could not have occurred in Vietnam, before 2014.

Even the VGCL, which would be giving up its exclusive power to represent workers, seemed ready to accept (albeit perhaps unenthusiastically) freedom of labor association. For example, in an interview published in the *Journal of Labor*, Mr. Mai Duc Chinh, Vice Chair of the VGCL, indicated that the government might approve giving workers a selection of labor unions from which to choose, and that new unions could freely choose for themselves whether or not to affiliate with the VGCL.⁹⁰

Beginning in 2014 and continuing until 2016, strong momentum seemed to favor a revision of the Labor Code to incorporate principles of free labor association. This momentum was sustained by scholars, legal researchers, labor activists, and even state authorities and law enforcement agencies. However, everything came to a screeching halt in late 2016 when it became clear that the United States planned to withdraw from the TPP negotiations. At that point, the prospect for independent workers' representatives in Vietnam

88. Mai Duc Thien, *Cam Kết Về Lao Động Trong Các Hiệp Định Thương Mại Tự Do Mà Việt Nam Tham Gia* [Labor Commitments in Free Trade Agreements to which Vietnam is a Party], HO CHI MINH CITY INT'L ECON. INTEGRATION (Mar. 29, 2016), <http://www.hoinhap.org.vn/goc-doanh-nghiep/11651-cam-ket-ve-lao-dong-trong-cac-hiep-dinh-thuong-mai-tu-do-ma-viet-nam-tham-gia.html> [https://perma.cc/VBQ5-59SX].

89. *Nhiều thách thức trong hoạt động công đoàn Việt Nam khi hội nhập TPP* [Many challenges in Vietnam's trade union when TPP integration], THE LAU DONG NEWSPAPER (June 21, 2016, 3:49 PM), <http://laodong.com.vn/cong-doan/nhieu-thach-thuc-trong-hoat-dong-cong-doan-viet-nam-khi-hoi-nhap-tpp-564774.bld>.

90. *Lao động trong Hiệp định đối tác xuyên Thái Bình Dương (TPP): Đảm bảo tốt hơn các quyền cơ bản của người lao động* [Workers in the TPP: Better protection of workers' fundamental rights], THE LAU DONG NEWSPAPER (Nov. 19, 2015, 7:03 AM), <http://laodong.com.vn/cong-doan/lao-dong-trong-hiep-dinh-doi-tac-xuyen-thai-binh-duong-tpp-dam-bao-tot-hon-cac-quyen-co-ban-cua-nguoi-lao-dong-398320.bld>.

become dubious. So far, the “decision to recognize independent unions in Vietnam is not due to external pressure . . . but rather the result of internal demand for reforms to the union system.”⁹¹

B. The Current Proposal for Labor Code 2017

When the possibility of Vietnam joining the TPP looked promising, labor reform was on a fast track. The Vietnamese government planned to amend Labor Code 2012 by submitting drafts in 2016, and estimating final approval for the new Labor Code for March 2017. However, political events in the United States in mid-to-late 2016 greatly influenced the progress of amendment to Labor Code 2012.

Before mid-2016, leaders of the Communist Party of Vietnam appeared prepared to endorse reform legislation that would have given Vietnamese workers the freedom to choose labor unions that were independent of the VGCL.⁹² However, by mid-to-late 2016, with both U.S. presidential candidates opposing the TPP, the more conservative wing of the Party began to dominate labor reform discussions. At that time, the Political Bureau of the Party Central Committee requested a reconsideration of the advisability of freedom of labor association. For a time, the phrase “freedom of association” was removed from the draft amendment of the Labor Code.

However, more recently, members of the drafting committee of the proposed Labor Code amendments, especially the former TPP delegates in the field of labor, have re-introduced the term freedom of labor association. This term was included in the second draft of Labor Code 2017 amendments at the end of March 2017.⁹³ In this second draft, Chapter 12 (on Worker Representatives) mentioned a new aspect of the right to freedom of

91. Do Quynh Chi, *The Regional Coordination of Strikes and the Challenge for Union Reform in Vietnam*, DEV. & CHANGE 1052, 1066 (2017).

92. See Cent. Comm. of the Communist Party of Viet. Res. 06-NQ/TW, § III.2.10 (2016), <https://thukyluat.vn/vb/nghi-quyet-06-nq-tw-2016-thuc-hien-co-hieu-qua-tien-trinh-hoi-nhap-kinh-te-quoc-te-giu-vung-on-dinh-chinh-tri-xa-hoi-512f4.html> [hereinafter Res. 38/NQ-CP] [<https://perma.cc/7LEH-ML4C>].

93. Luật sửa đổi, bổ sung một số điều của Bộ luật lao động [Law amending and supplementing some articles of the labor code] art. 5 (Proposed Draft No. 2, 2017) (Viet.), http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=1270&LanID=1355&TabIndex=1 [hereinafter Proposed Labor Code 2017] [<https://perma.cc/8JHR-E87F>]. In the second proposed draft of the Labor Code 2017, Article 5 covers the rights of the worker including the right to “[t]o set up, join and operate trade unions and unions at enterprises, professional organizations and other organizations according to the provisions of law; Requesting and participating in dialogue, implementing democratic regulations, collective bargaining with employers and being consulted in the workplace to protect their legitimate rights and interests; to participate in management according to the rules of the employer.” *Id.*

association.⁹⁴ Article 150.2 of the draft implicitly recognizes both traditional labor unions (i.e., under the VGCL umbrella), and also allows employees to establish their own representative organization (as “the employees’ representative at the enterprise shall legally establish and operate after joining the VGCL system *or registering with the competent authorities*”).⁹⁵ This second draft of Labor Code 2017 amendment, also in Articles 148-54, prescribes the procedure for non-VCL-affiliated (i.e., independent) labor unions to register. These Articles, among other things, require that:

1. The labor union must have at least 20 members.
2. The elected board members of the labor union must be Vietnamese workers.
3. The union leaders are forbidden from committing crimes of infringing national security; crimes of infringing human rights, freedom, and democracy of citizens; or violations of property rights in accordance with the provisions of the Criminal Code.⁹⁶

The purpose of these strict rules on union leaders, if enacted, appears to limit the impact of independent unions on the existing political system. However, even with these restrictions on union political activity, it is far from certain whether this version of Labor Code 2017 amendments will become law. Conservative politicians closely aligned with the VGCL continue to argue that Vietnam is not ready to allow freedom of association. Meanwhile, politicians favoring new-generation trade agreements are more inclined to include freedom of association in the new Labor Code.

On April 25, 2017, the Vietnamese Government issued Resolution 38/NQ-CP, which promulgated the Government’s action plan to implement Resolution 06/NQ-TW of the Central Executive Committee of the Vietnamese Communist Party.⁹⁷ Resolution 06/NQ-TW describes how the Government

94. Compare LABOR CODE 2012, ch. 12 (Proposed Draft No. 2, 2017) (Viet.) (defining right to freedom of association), with LABOR CODE 2012 ch. 13 (Viet.) (concerning trade unions).

95. Proposed Labor Code 2017, art. 150.2.

96. Proposed Labor Code 2017, art. 152. However, the proposed draft also noted if Article 150, 2(b) Option 1 is selected, Article 152 would be abandoned from consideration. *Id.* (Option 1 sets forth Government regulations would set establish conditions and competence for union).

97. *Nghi quyết 38/NQ-CP* [Resolution No. 38 / NQ-CP], CỤC QUAN HỆ LAO ĐỘNG (Apr. 25, 2017), <http://quanhelaodong.gov.vn/download/nghi-quyet-38nq-cp/> [<https://perma.cc/9YPK-VQNNQ>].

intends to integrate the domestic economy with the increased trade and investment anticipated from new free trade agreements, while maintaining political and social stability.⁹⁸ Resolution 38/NQ-CP, Section II.8, provides that Vietnam “should quickly complete the legal framework governing labor relations and social relations, especially those arising from the formation of social organizations in industrial relations, including the amendment of the Labor Code”.⁹⁹

Resolution 38/NQ-CP Section II.10 provides that enterprise-level worker organizations should be established, regulated, and managed by legislation.¹⁰⁰ As with the March 2017 proposed Labor Code amendments, this section appears designed to keep labor unions out of politics.¹⁰¹ The section explicitly states that labor organizations may operate only within the scope of industrial relations and provides that the Government will act aggressively against unions “who take advantage of [their position] to intervene in internal affairs or create domestic opposing forces to act against the state.”¹⁰²

Resolution 38/NQ-CP and the most recent draft of the proposed Labor Code 2017 impose significant restrictions on political activity by independent labor unions, and hint of dire consequences to union leaders who transgress this boundary. However, even with these restrictions, the recognition of labor unions that are independent of the VGCL (and therefore the Vietnamese Communist Party) would be a milestone in the exercise of freedom of labor association in Vietnam.

VI. CONCLUSION

Proposed reforms of the Vietnam Labor Code thus stand on a precipice. The existing Labor Code permits labor organizations to exist only if they are affiliated with the VGCL, which is an arm of the Communist Party. Independent labor organizations are a precondition for Vietnam’s inclusion in many trade agreements, and until last year, negotiations over Vietnam’s inclusion in the TPP seemed nearly certain to result in a 2017 Labor Code that expressly guaranteed freedom of labor association.

The demise of the TPP slowed the process of labor reform, and gave opponents new life. At this point, nothing is certain. Draft legislation and pronouncements from the Vietnamese government in spring 2017 seem to indicate a compromise of sorts, with the new legislation permitting independent labor unions but explicitly and strongly limiting those unions to activity

98. See Res. 38/NQ-CP § II.8, <http://quanhelaodong.gov.vn/?wpdmdl=1318> [https://perma.cc/GS55-8SLD].

99. *Id.*

100. See *id.* § II.10.

101. See *id.*

102. *Id.*

directly related to the workplace and punishing unions that engage in political activity. Even this, however, would be a significant step forward for free labor in Vietnam.

