

## Some legal issues for Vietnam on workers' right to organize in the new generation of free trade agreements

Một số vấn đề pháp lý đối với Việt Nam về quyền thành lập tổ chức của người lao động trong các hiệp định thương mại tự do thế hệ mới

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**Abstract:** In recent years, Vietnam has achieved many significant achievements in economic development through promoting openness, integration into the global economy, and actively participating in the new generation of free trade agreements. Vietnam has participated in negotiations and signed 16 Free Trade Agreements (FTA), among which the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the European Union-Vietnam Free Trade Agreement (EVFTA) are two "new generation" free trade agreements with many new commitments on labor, including the right to freedom of association of workers in enterprises. This article focuses on clarifying the provisions on the right to establish representative organizations of workers in the CPTPP and EVFTA, as well as the challenges that Vietnam must face in amending and supplementing the legal provisions to implement these agreements effectively.

**Keywords:** *New generation free trade agreements; workers' right to organize workers; Vietnam's law*

**Tóm tắt:** Trong những năm qua, Việt Nam đã đạt được nhiều thành tựu quan trọng trong phát triển kinh tế nhờ thúc đẩy mở cửa, hội nhập nền kinh tế thế giới, tích cực tham gia các hiệp định thương mại tự do thế hệ mới. Đến nay, Việt Nam đã tham gia đàm phán, ký kết 16 Hiệp định thương mại tự do (FTA), trong số các Hiệp định thương mại tự do mà Việt Nam đã và đang tham gia, Hiệp định Đối tác toàn diện và tiến bộ xuyên Thái Bình Dương (CPTPP) và Hiệp định Thương mại tự do Việt Nam - Liên minh châu Âu (EVFTA) là hai Hiệp định thương mại tự do "thế hệ mới" với nhiều cam kết mới về lao động, bao gồm cả cam kết về quyền tự do lập hội của người lao động trong các doanh nghiệp. Bài viết tập trung vào việc làm rõ các quy định về quyền tự do thành lập tổ chức đại diện người lao động trong CPTPP và EVFTA và những thách thức mà Việt Nam phải đối mặt trong quá trình sửa đổi, bổ sung các quy định pháp luật để thực thi có hiệu quả các Hiệp định này.

**Từ khóa:** *Hiệp định tự do thế hệ mới; pháp luật Việt Nam; quyền thành lập tổ chức*

### 1. Introduction

With the promotion of openness, integration into the global economy, and active participation in free trade agreements in recent years, Vietnam has signed 15 FTAs and is currently

negotiating two others. Among the 15 signed agreements, some new-generation FTAs have deep and comprehensive commitments, including commitments on free trade of goods and services like traditional FTAs, as well as commitments with the most profound

level (reducing tariffs almost to 0% according to the roadmap), strict enforcement mechanisms, and expansion to non-traditional areas such as labor, environment, state-owned enterprises, government procurement, transparency, and investment dispute settlement mechanisms. These include the CPTPP and the EVFTA. Under the terms of these agreements, Vietnam will have a roadmap to meet labor commitments. However, these are new and challenging provisions for Vietnam, especially regarding the organization of labor representatives, which require time for research and legal development, and establishing enforcement mechanisms.

## **2. Commitments on the right to establish labor representative organizations in new-generation FTAs: CPTPP and EVFTA**

The United States, Canada, Mexico, Peru, Chile, New Zealand, Australia, Japan, Singapore, Brunei, Malaysia, and Vietnam are among the 12 members of the Trans-Pacific Partnership (TPP), a free trade pact negotiated since March 2010. The TPP was formally signed on February 4, 2016, and its implementation was anticipated to begin in 2018. Nevertheless, the United States announced its departure from the TPP in January 2017, preventing it from taking effect as scheduled. In November 2017, the 11 member states of the TPP signed a Joint Statement agreeing to rebrand the TPP as the CPTPP.

In March 2018, the remaining 11 TPP nations (except the United States) officially signed the CPTPP. Australia, Canada, Japan, Mexico, Singapore,

New Zealand, Vietnam, and Peru are eight of the signatories of the CPTPP. Australia, Canada, Japan, Mexico, Singapore, and New Zealand implemented the CPTPP on December 30, 2018, Vietnam on January 14, 2019, and Peru on September 19, 2021. The CPTPP keeps almost all of the TPP's pledges, with the exception of (i) the United States' or its obligations; (ii) 22 suspended sections (with a complete list); and (iii) some adjustments to the bilateral agreements between CPTPP countries [1].

The agreement's preamble affirmed that the parties involved in this agreement made efforts to "protect and enforce labor rights, improve working conditions and living standards, enhance cooperation and capacity of the Parties on labor matters" [2]. Therefore, the agreement has dedicated an entire chapter - Chapter 19 on Labor, which includes provisions on the right to form labor organizations freely. The agreement further reaffirms the international legal framework governing labor based on the ILO Declaration on Fundamental Principles and Rights at Work ("DFPRW") and its Follow-up in 1998. The agreement provides detailed provisions on labor rights, including Article 19.3(a), which states: "Each Party shall promote and maintain, in its laws and regulations and the implementation thereof within its territory, the following rights as outlined in the ILO Declaration: freedom of association and the effective recognition of the right to collective bargaining." Member States have a responsibility to fulfill these obligations

within their territories, as demonstrated by the requirement that they "promote and maintain laws and regulations and the implementation of those laws and regulations" in order to facilitate and effectively enforce these commitments. Thus, the agreement affirms that Member States must continue to comply with the ILO Declaration, even in cases where they have not ratified ILO Conventions.

The EVFTA is a free trade agreement between Vietnam and the 27 EU member states. The EVFTA has the broadest scope and highest level of commitment that Vietnam has ever made.

Chapter 13. Trade and Sustainable Development aims to " promote sustainable development, reflected through promoting the contribution of trade-related areas and investment to addressing labor and environmental issues" [3]. Accordingly, the parties have affirmed their commitment, in line with their obligations under the ILO and the DFPRW, to their respective workplaces and next steps, which the International Labor Conference adopted at its 86th session in 1998. To implement these agreements, the agreement stipulates: "Each Party reaffirms its commitment to the effective implementation of its domestic law and regulations, as well as ILO Conventions which Vietnam and the EU member states have ratified. The Parties recognize that violating the principles and fundamental rights at work in the workplace cannot be cited or used as a means of competitive advantage or to undermine the legality of trade and

labor standards for commercial purposes" [4].

Thus, the agreement refers to the DFPRW provisions and its follow-up actions in 1998 on general labor rights, the freedom of association, and the right to collective bargaining in particular. This Declaration requires that state members commit to respecting, promoting, and realizing the fundamental rights [5]. Therefore, the parties must comply with the implementation of the fundamental Conventions of this Declaration in general, specifically the implementation of Convention No. 87 on Freedom of Association and Protection of the Right to Organize, 1948 (Convention 87), which requires that "workers and employers, without distinction whatsoever, shall have the right to establish and join organizations of their choosing without previous authorization, with the single condition that they shall abide by the statutes of such organizations" [6]. These organizations have the right to establish statutes and rules, elect representatives, organize activities, and develop action programs. At the same time, the agreement also specifies that commitments regarding labor rights in general and the right to freedom of association, in particular, cannot be invoked to protect trade which is not compatible.

### **3. Some legal issues regarding Vietnam's implementation of commitments in new-generation FTAs on workers' right to organize**

Vietnam joined the ILO in 1992, and up to now, Vietnam has ratified five out of

eight fundamental ILO Conventions. On June 14, 2019, the National Assembly recently voted to approve the accession to Convention 98 concerning the Right to Organize and Collective bargaining (“Convention 98”). This leaves only two conventions, Convention 87, and Convention 105, concerning the Abolition of Forced Labour, still under consideration for ratification.

Article 2 of the ILO DFPBW states: "All Members, whether or not they have ratified the Conventions in question, have an obligation arising from membership in the Organization to make every effort to bring these Conventions to the attention of the public, to promote their ratification and to secure their application". Therefore, even though Vietnam has not ratified Convention 87, as a member of the ILO, Vietnam still has an obligation to respect, promote and realize these rights in good faith. By doing so, Vietnam can ensure the fulfillment of commitments regarding labor standards in new-generation free trade agreements.

Article 10 of the 2013 Constitution continues to affirm that "The Vietnam General Confederation of Labor (“VGCL”) is a socio-political organization of the working class and laborers voluntarily established to represent and protect the legitimate rights and interests of laborers; participate in the management of the state and social-economic management; participate in inspection, supervision and monitoring of the activities of state agencies, organizations, units and enterprises regarding the rights and obligations of laborers; disseminate,

mobilize laborers to study, improve their professional qualifications and skills, observe the law, build and protect the Fatherland”.

Article 1 of the 2012 Trade Union Law (“TUL”) stipulates that "Trade unions are large political and social organizations of the working class and laborers, established on a voluntary basis, as a member of the political system of Vietnamese society, under the leadership of the Communist Party of Vietnam; representing officials, public employees, civil servants, workers, and other laborers (hereinafter referred to as workers), together with state agencies, economic organizations, and social organizations, to care for and protect the legal and legitimate rights and interests of workers; participate in state management, socio-economic management, participate in inspection, examination, and supervision of the activities of state agencies, organizations, units, and enterprises; propagate and mobilize workers to improve their knowledge, skills, comply with the law, and build and protect the socialist Fatherland of Vietnam."

It can be affirmed that throughout its history, accompanying the country's development, the Vietnam Trade Union is the only organization representing and protecting the legal and legitimate rights and interests of members and workers. The Trade Union in Vietnam has formed a tight organizational system from the central to grassroots levels, with the VGCL as the highest level in the Vietnam Trade Union system, trade unions at all levels are divided according to administrative units, and

according to occupational sectors, and grassroots trade unions are the lowest level of trade union organization.

Article 5 of the 2012 TUL affirms that: "1. Vietnamese workers working in state agencies, organizations, and enterprises have the right to establish, join, and participate in trade union activities.

The procedures for establishing, joining, and operating trade unions are in accordance with the regulations of the Vietnam Trade Union Charter."

The legal document guiding the establishment of political and social organizations in enterprises of all economic components under Decree No. 98/2014/ND-CP is the legal basis for organizing and operating grassroots trade unions. Accordingly, "enterprises with at least five union members, or workers who voluntarily join the Vietnam Trade Union, are eligible to establish a trade union organization according to the provisions of the Trade Union Law and the Vietnam Trade Union Charter." [7]. The Executive Committee of the Grassroots Trade Union is the name of the body that is in charge of these unions and is chosen by their Congress. The Congress of the grassroots trade union decides [8], in accordance with the VGCL, how many people will make up the Executive Committee of the grassroots trade union.

These regulations are the most fundamental legal basis for the right to establish representative organizations of workers - the trade union - is the sole representative organization of workers

in Vietnam. However, it can be seen that these regulations need to be adjusted, for example: as a political-social organization in the political system, clause 1 of Article 5 of the TUL stipulates that the subject with the right to join the Trade Union is Vietnamese citizens who limits the subject group, which is not consistent with the 2013 Constitution, especially the provisions of clause 2 of Article 170 of the 2019 Labor Code, which stipulates that the subject with the right is workers, regardless of whether they are Vietnamese citizens. In fact, according to the assessment of the Multilateral Trade Policy Bureau, the Vietnam Trade Union still has many limitations: rigidity in the model, pure organizational movements, monotony, and slow adaptation to new situations [9]. In addition, the 2013 Constitution has stipulated that "Citizens have the right to freedom of speech, freedom of the press, access to information, assembly, association, and demonstration. The exercise of these rights is regulated by law" [10], but until now, the Law on Associations has not been passed, making the legal system incomplete.

The 2019 Labor Code has provided a complete definition of representative organizations of workers, in line with the spirit of Article 3 and Article 5, paragraph 1, point c of Convention 87, specifically, representative organizations of workers at the grassroots level include grassroots trade unions and organizations of workers in enterprises. Workers have the right to establish, join, and operate in

representative organizations of workers, professional organizations, and other organizations as prescribed by law.

For the first time, the roles of representation, protection of rights and legitimate interests, and participation in building progressive, harmonious, and stable labor relations of the Vietnam Chamber of Commerce and Industry, the Vietnam Cooperative Alliance, and other organizations representing employers have been legalized. At the same time, regulations on establishing workers' organizations in non- VGCL-affiliated enterprises have been established to promote and enhance the effectiveness of representation, protection of rights, and legitimate interests of workers in labor relations. This is also a step forward for the State in fulfilling its obligations under ILO Convention 98 and commitments on labor and trade unions in the CPTPP and EVFTA. This is a very new organization, independent of the currently organized trade unions operating in Vietnam. Trade unions and other organizations representing workers in enterprises are equal in rights and obligations in representing and protecting workers' legitimate rights and interests in labor relations [11]. This organization has rights and obligations similar to those of trade unions, such as participating in building labor relations (Article 7), participating in the evaluation regime of the work performance of workers (Article 36), contributing opinions on the use of labor (Article 44), dialogue in the workplace (Article 63), participating in collective bargaining (Article 65), participating in

opinions on the construction of salary scales (Article 93), participating in labor discipline (Article 122). These were previously rights and obligations only belonging to the single trade union, but are now given to any organization established to represent workers.

However, the provisions in Articles 172, 173, and 174 of the Labor Code 2019 show that issues such as the establishment, membership, minimum number of members, organizational charter, and the manner of workers in enterprises are still unresolved require detailed guidance from the Government to implement.

In addition, the Labor Code 2019 has issued provisions regarding prohibited acts of employers related to the establishment, joining, and operation of labor representative organizations at the grassroots level [8, Article 175]; the rights of members of the leadership board of labor representative organizations at the grassroots level [8, Article 176], which contribute to protecting workers when they do not want to participate in a trade union but want to join another representative organization to ensure their rights, thereby limiting the exploitation of employer's power to prevent workers; workers have the freedom to establish or join a labor representative organization without being affected, punished in terms of salary, job opportunities, promotion, and working hours.

#### **4. Some recommendations to effectively ensure and enforce commitments on workers' right to organize in new-generation FTAs**

Firstly, more and more FTAs, bilateral and multilateral, and economic integration agreements, include social and labor-related worker rights provisions. FTAs strengthen references to the DFPRW, which covers all eight fundamental conventions. As of now, Vietnam has joined 25 ILO conventions, including 7/8 basic conventions. Vietnam has also made efforts to implement the conventions, specifically to domesticate the provisions of the conventions into the national legal system. To promote the application and enforcement of international labor standards in Vietnam, Vietnam needs to continue to promote research on joining additional basic conventions of the ILO in the coming time.

Secondly, improving legal regulations on the organization and operation of trade unions as the subject of rights, the standards of the executive committee of the trade unions, methods of operation, and the right to freedom of association to comply with the 2013 Constitution and relevant international treaties, especially in the context of "competing" with labor representative organizations under commitments in new-generation free trade agreements such as CPTPP, EVFTA.

Thirdly, the detailed guidance regulations of the Labor Law were quickly issued, which were previously left ambiguous regarding the right to freely establish representative organizations for workers within businesses as regulated in Articles 170, 171, 172, 173, 174, 175, and 176.

Fourthly, the selection and training of human resources for trade unions and workers' representative organizations continued to ensure that they have the necessary qualifications, skills, professionalism, and ability to adapt and fulfill the commitments of the CPTPP and EVFTA regarding labor in general, and the right to freely establish workers' representative organizations in particular, such as skills in gathering workers, management methods, conciliation skills, and arbitration.

Fifthly, communication efforts were strengthened for workers, businesses, and government officials regarding commitments on labor and the right to freely establish workers' representative organizations and the ability to implement these contents in Vietnam.

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