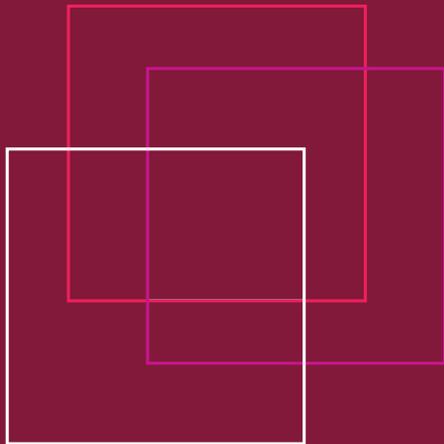




# DISPUTE RESOLUTION IN VIET NAM

A RAPID DIAGNOSIS



A WORKING PAPER ON POSSIBLE REFORMS OF PROVISIONS RELATING TO INDUSTRIAL RELATIONS  
AND DISPUTE SETTLEMENT IN THE VIET NAM LABOUR CODE 2012

# DISPUTE RESOLUTION IN VIET NAM

## A RAPID DIAGNOSIS

**Professor Sean Cooney**  
Melbourne Law School,  
University of Melbourne

**Ms Tran Thi Kieu Trang**  
Faculty of Economic Law  
Hanoi Law University

This is a product of the New Industrial Relations Framework project. Funding for the New Industrial Relations Framework project is provided by the United States Department of Labor under cooperative agreement number IL- 29690-16-75-K-11. This material does not necessarily reflect the views or policies of the United States Department of Labor, nor does mention of trade names, commercial products, or organizations imply endorsement by the United States Government. One hundred percentage of the total costs of the project or program is financed with Federal funds, for a total of 4 million dollars.

Copyright © International Labour Organization 2019

First published 2019

---

Publications of the International Labour Office enjoy copyright under Protocol 2 of the Universal Copyright Convention. Nevertheless, short excerpts from them may be reproduced without authorization, on condition that the source is indicated. For rights of reproduction or translation, application should be made to ILO Publications (Rights and Licensing), International Labour Office, CH-1211 Geneva 22, Switzerland, or by email: [rights@ilo.org](mailto:rights@ilo.org). The International Labour Office welcomes such applications.

Libraries, institutions and other users registered with a reproduction rights organization may make copies in accordance with the licences issued to them for this purpose. Visit [www.ifro.org](http://www.ifro.org) to find the reproduction rights organization in your country.

---

Dispute Resolution in Viet Nam: A rapid diagnosis

International Labour Office – Geneva: ILO, 2019

ISBN : 978-92-2-133716-4 (print)

978-92-2-133590-0 (web pdf)

Also available in Vietnamese: *Giải quyết Tranh chấp Lao động ở Việt Nam - Báo cáo chẩn đoán nhanh* (ISBN 978-92-2-133591-7 (print); 978-92-2-133592-4 (web pdf)), Geneva, ILO, 2019

Labour Office

Labour dispute resolution / Labour dispute / Labour Arbitration Council / Labour arbitrator / Labour mediator / Court / Labour Dispute Resolution Body

ILO Cataloguing in Publication Data

---

The designations employed in ILO publications, which are in conformity with United Nations practice, and the presentation of material therein do not imply the expression of any opinion whatsoever on the part of the International Labour Office concerning the legal status of any country, area or territory or of its authorities, or concerning the delimitation of its frontiers.

The responsibility for opinions expressed in signed articles, studies and other contributions rests solely with their authors, and publication does not constitute an endorsement by the International Labour Office of the opinions expressed in them.

Reference to names of firms and commercial products and processes does not imply their endorsement by the International Labour Office, and any failure to mention a particular firm, commercial product or process is not a sign of disapproval.

ILO publications and digital products can be obtained through major booksellers and digital distribution platforms, or ordered directly from [ilo@turpin-distribution.com](mailto:ilo@turpin-distribution.com). For more information, visit our website: [www.ilo.org/publns](http://www.ilo.org/publns) or contact [ilopubs@ilo.org](mailto:ilopubs@ilo.org).

This publication was produced by the Document and Publications Production, Printing and Distribution Branch (PRODOC) of the ILO.

*Graphic and typographic design, layout and composition, copy editing, proofreading, printing, electronic publishing and distribution.*

PRODOC endeavours to use paper sourced from forests managed in an environmentally sustainable and socially responsible manner.

Code: DTP-WEI-CORR-REPRO

## Foreword

This working paper analyses the policies, practices, and the viewpoints of actors, on dispute settlement in Viet Nam. The paper refers to relevant international labour standards of the ILO and draws on good practices from other countries in the Asia-Pacific region in order to shape recommendations that are suited to Viet Nam's current context and its future development.

The research for this paper was carried out through a collaboration between the ILO New Industrial Relations Project (USDOL) and the Department of Industrial Relations and Wage (DIRWA) of the Ministry of Labour, Invalids and Social Affairs between July and December 2018.

As the technical department responsible for administration of dispute resolution, DIRWA is responsible for proposing reforms to the dispute resolution system as part of a Labour code revision process which began in 2016 and is expected to be completed in November 2019. This paper has been completed as a key input into DIRWA's review and redesign process and DIRWA staff worked closely with the independent research team to undertake field interviews and to ensure a thorough review of the paper in order to ensure its veracity and relevance.

Since "Doi Moi" began in 1986, the country has experienced rapid industrialisation and of international integration for development. Such changes have raised a number of challenges and expectations in the world of work in Viet Nam, including the application of new technologies, demands for different work patterns, the growth in FDI and demands for more skilled workers or (from workers) a greater share of the gains of production. These have sometimes contributed to strained labour relations and wildcat strikes.

In addition to a range of practical issues identified by users of the current dispute resolution system, this paper points to some characteristics that are not in alignment with ILO Conventions No. 87 and No. 98. As an ILO Member State, and bearing in mind Viet Nam's intention to ratify these Conventions in the near future with consequential changes in industrial relation structures

and practices, the reformed system will need to be designed with these Conventions in mind.

The paper provides a description of how a more effective dispute settlement system could be designed legally and institutionally for effective operation in Viet Nam, recommending the establishment of an authoritative labour disputes resolution institution. Within this, recommendations include a focus on professionalization of the Labour Arbitration Councils, and giving arbitrators the power to make binding orders in unfair labour practices cases.

I am grateful to the authors Sean Cooney and Tran Thi Kieu Trang for their knowledge and dedication in working closely with the staff of DIRWA to complete this study and I recommend the report to all interested readers, particularly government policy-makers and social partners.

**Chang-Hee Lee**

*Director*

ILO Country Office in Viet Nam

## Summary and key recommendations

1. This report examines the labour dispute resolution system in Viet Nam by reference to international labour standards, comparative best practice and the literature on dispute resolution. The report is also based on field visits and workshops conducted between June and August 2018.
2. The report finds that the present labour dispute resolution system in Viet Nam has a number of significant characteristics that are not in alignment with ILO Conventions No. 87 and No. 98. These problems also prevent Viet Nam from responding effectively to arising disputes and 'wildcat' strikes.
3. The authors further conclude that, in comparison with other countries in the region, the formal labour dispute resolution system set out in the Labour Code of 2012 has not been successful in resolving disputes. Viet Nam needs to establish an authoritative labour disputes resolution institution framework.
4. In an earlier draft of this report (prepared in July 2018), the writers presented a series of recommendations that supported the creation of a national labour disputes resolution body, along the lines of a labour relations commission, such as those in Japan, Korea and the Philippines (modified to suit Vietnamese conditions). These recommendations, which remain the consultants' preferred option ('Option A') appear in the Annex to this report. This institution would be administered centrally with a number of regional offices in major industrial centres.
5. However, during consultations in August 2018, a number of informants expressed doubts about the feasibility of implementing a national system in line with Option A recommendations: the structural relationship (distribution of responsibilities) between MOLISA and DOLISAs were generally seen as making the creation of such a national system very challenging at the current time.
6. The consultations have therefore developed a set of 'minimum' or 'threshold' recommendations ('Option B'). While not ideal, these recommendations, which appear in section 5 of the report, are aimed at supporting Viet Nam's ratification and implementation of Conventions No. 87 and No. 98.

7. As a minimum, these recommendations include two requirements: that labour arbitration councils be reformed to operate more professionally, and; that labour arbitration councils be given the power to make binding orders in unfair labour practices cases (including in cases where one party does not consent). This empowerment of arbitrators is essential to the functioning and effectiveness of dispute resolution as a whole.
8. If this recommendation is not accepted, then the consultants recommend focusing reforms on the court system where such powers can certainly be established.
9. This report should be read in conjunction with the Impact Assessment dated August 2018, also prepared by the consultants.

## Contents

<b>PART 1. Introduction .....</b>	<b>1</b>
<b>PART 2. Terminology, methodology, evaluation criteria and approach to recommendations .....</b>	<b>3</b>
Terminology .....	3
Methodology .....	6
Evaluation criteria .....	7
Approach to recommendations: comparative experience, domestic constraints and international labour standards .....	10
<b>PART 3. Labour dispute resolution in Viet Nam: current law and practice .....</b>	<b>13</b>
The current legal framework .....	13
<b>PART 4. Evaluation against criteria .....</b>	<b>17</b>
Why are so few cases dealt with by mediation and arbitration? ..	17
Evaluation according to the criteria .....	21
<b>PART 5. Proposed reforms .....</b>	<b>29</b>
Comprehensive vs minimum reform .....	29
Jurisdiction .....	31
Efficiency .....	31
Equity.....	32
Voice.....	38

**Bibliography ..... 39**

Viet Nam government decisions and regulations..... 39  
Key ILO instruments and databases ..... 39  
Academic articles and reports ..... 40

**Annex ..... 45**

Reform option A: A Viet Nam Labour Disputes Settlement  
Commission ..... 45  
The organisational structure of a Viet Nam Labour Disputes  
Settlement Commission ..... 45  
Infrastructure of the Viet Nam Labour Disputes Settlement  
Commission ..... 46  
Members of the Viet Nam Labour Disputes Settlement  
Commission ..... 47  
Jurisdiction of the Viet Nam Labour Disputes Settlement  
Commission ..... 52  
Individual rights disputes ..... 53  
Powers and authority of the Viet Nam Labour Disputes  
Settlement Commission ..... 61  
Relationship between the Viet Nam Labour Disputes Settlement  
Commission and labour mediators ..... 66  
Relationship between the Viet Nam Labour Disputes Settlement  
Commission and inter-agency taskforces ..... 67  
Private mandatory arbitration ..... 68

## List of Abbreviations

Convention No. 87

Freedom of Association and Protection of the Right to Organize Convention,  
1948

Convention No. 98

Right to Organize and Collective Bargaining Convention, 1949

**CPTPP** Comprehensive and Progressive Agreement for Trans-Pacific  
Partnership

**DOLISA** Department of Labour, Invalids and Social Affairs

**EVFTA** European Union-Viet Nam Free Trade Agreement

**FOL** Federation of Labour

**ILO** International Labour Organization

**IZTU** Industrial Zone Trade Union

**MOLISA** Ministry of Labour, Invalids and Social Affairs

**VCCI** Viet Nam Chamber of Commerce and Industry

**VGCL** Viet Nam General Confederation of Labour

**WRO** Worker Representative Organization

# PART 1

## Introduction

- 1.1. This report addresses the request of the Ministry of Labour, Invalids and Social Affairs ('MOLISA')

*to complete a rapid but reliable assessment of Viet Nam's labour dispute settlement system, to diagnose problems and highlight feasible reform options to inform MOLISA's reform proposal in this area.'*

- 1.2. This report has been prepared by an independent expert consultant team drawing on:
- relevant international literature, in particularly concerning Australia, China, Japan, the Republic of Korea (hereafter 'Korea') and the Philippines;
  - Government and scholarly documentation from Viet Nam; and
  - interviews from field visits conducted from 5th June 2018 to 15<sup>th</sup> June 2018 in Hanoi, Hai Phong, Ho Chi Minh City, Binh Duong and Dong Nai.
- 1.3. This Report refers to the 2012 Labour Code and to the September 2018 Zero Draft revision to the Labour Code ('the Zero Draft') and is concerned with dispute resolution processes outside an enterprise: it does not deal with processes internal to enterprises, such as grievance procedures.
- 1.4. As the report is the result of a rapid assessment, it does not set out detailed policy provisions or prescriptions. It focuses on key recommendations that, if accepted, will need to be further developed.
- 1.5. Section 2 sets out terminology, methodology, evaluation criteria and approach used in this rapid assessment. These are linked to relevant Conventions and Recommendations of the International Labour Organization (ILO). Section 3 sets out the information and data gathered on the current system, how it operates, and how it is experienced and perceived by users and system actors.

- 1.6. Section 4 evaluates the current formal labour dispute resolution system in Viet Nam highlighting strengths and weaknesses on the basis of the evaluation criteria, taking account of the data and information gathered. This section draws upon comparative analyses/data relating to other national dispute resolution systems where relevant. Section 5 sets out a minimal set of reforms necessary to improve the existing labour dispute resolution system (Option B recommendations).
- 1.7. This report is accompanied by an Annex, setting out the preferred reform approach of the consultants (Option A recommendations).

## PART 2

# Terminology, methodology, evaluation criteria and approach to recommendations

This section explains key terms and the methodology adopted for the rapid assessment. It further indicates some criteria that can be used to evaluate how a labour dispute resolution system functions and explains our approach to forming recommendations

## Terminology

2.1. Table 1 sets out four aspects of labour dispute resolution and refers to the principle concepts used to address those questions. These concepts are, mostly, already reflected in Vietnamese labour law. However, it is important for the purposes of this report to be clear about their significance.

**TABLE 1. TERMINOLOGY ON LABOUR DISPUTES RESOLUTION**

<b>What is the dispute about?</b>	Rights disputes about existing entitlements	Interest disputes about improving existing conditions, e.g. collective bargaining	
<b>Who is involved in the dispute?</b>	Individuals	Groups of individuals or their union: collective	
<b>What procedure is used to resolve the dispute?</b>	Conciliation, mediation	Arbitration	Adjudication
<b>How is the procedure used?</b>	Voluntary	Compulsory, mandatory	

## Subject matter of disputes

- 2.2 First, concerning the subject matter of a dispute, a broad distinction can be made between *rights* disputes and *interest* disputes. A rights dispute is a dispute about an *existing* entitlement that applies to the parties because of a legally binding instrument, such as a law, collective agreement or individual contract. Examples of rights disputes include claims about underpayments, termination of employment, discrimination, and compensation for work injuries. An interest dispute includes a dispute about *improving* existing conditions, for example, by raising wages. It is commonly associated with collective bargaining. In practice, industrial conflict can arise from a combination of both kinds of disputes.
- 2.3. Another kind of interest dispute concerns the relationship between two different worker organizations; for example, a dispute about which union is the more representative for the purposes of collective bargaining.
- 2.4. Certain kinds of disputes, such as those concerning unfair labour practices, cannot always be neatly divided into rights or interest disputes. Unfair labour practices concern violations of Convention No. 98 and include:
- discriminatory action taken against a worker because of their worker representative activities;
  - interference by an employer in a worker representative organization (and vice versa); and
  - refusal to bargain in good faith.

## Nature of the parties

- 2.5. A second distinction can be made based on the **nature of the parties involved**; that is, between an *individual dispute* and a *collective dispute*. An individual dispute involves just one person and a collective dispute involves more than one – usually a group of people and sometimes the entire workforce of an enterprise (as can occur during collective bargaining). It is not necessarily the case that rights disputes are individual and interest disputes are collective. For example, if several workers are dismissed, underpaid or discriminated against, they may raise a collective rights dispute.
- 2.6. An unfair labour practice dispute may have both individual and collective aspects.

## Resolution procedure

- 2.7. The third distinction concerns the **procedure** used to deal with a dispute. *Mediation* and conciliation both refer to a process where parties come to an agreement between themselves, rather than having a third party impose a resolution. Frequently the two terms are used interchangeably, although strictly speaking a mediator confines their role to facilitating interactions between the parties, whereas a conciliator actively proposes solutions. Arbitration on the other hand, refers to a process in which the third party imposes a binding solution on the parties, often where the parties have conferred jurisdiction of that party. The difference between arbitration and adjudication is that in the latter case the solution is frequently imposed by a judge through a formal court process. However, some bodies can exercise both arbitral and adjudicatory powers.
- 2.8. One or more of these procedures are commonly combined under labour dispute resolution laws. For example, a dispute might be dealt with by mediation then, if that fails, by arbitration or adjudication.

## Voluntary or Compulsory

- 2.9. The fourth distinction concerns **how the procedure is used**, that is, whether a procedure is *voluntary* or *compulsory*. A procedure is voluntary if the parties are not subject to it unless they both consent. A compulsory procedure is one where the procedure takes place regardless of a party's consent. Mediation is often a voluntary procedure whereas adjudication is compulsory. Arbitration can be voluntary or compulsory.
- 2.10. Note that the voluntary/compulsory distinction here applies to the application of the procedure, not the outcome of the procedure (such as an agreement, arbitral award, or judicial decision). A voluntary procedure can lead to a *binding outcome* as in the case where the parties consent to a mediation agreement. In this report, 'compulsory' will refer to procedures whereas 'binding' will refer to an outcome.

## Methodology

2.11. This rapid assessment is based on four primary sources of data:

- a) a review of the international literature on labour dispute resolution, including literature on evaluating the effectiveness of labour dispute resolution systems;
- b) empirical studies and reports on the functioning of the current system of labour dispute resolution in Viet Nam;
- c) qualitative interviews with key stakeholders in Viet Nam; and
- d) International labour standards and the comments of the supervisory systems.

2.12. Material relating to the first two items is set out in the bibliography. The last two items ((c) and (d)) require further elaboration.

2.13. In relation to c) above, qualitative interviews referred to in the previous section were conducted between 4<sup>th</sup> and 15<sup>th</sup> June 2018 in Hanoi, Ho Chi Minh City, Hai Phong, Binh Duong and Dong Nai. Twenty interviews were conducted (most of which involved several participants). The interviewees were from the following organizations:

- MOLISA
- DOLISA
- VGCL (including FOLs and IZTUs)
- VCCI
- Various enterprises engaged in the Better Work program
- Small and Medium Enterprises Association
- Scholars
- A legal aid agency

2.14. In accordance with standard research procedures, the names of individual interviewees are not set out in this report. Comments are attributed to organizations rather than to individuals, or to individual enterprises.

2.15. The issue of international labour standards is addressed in Section 2.4.

## Evaluation criteria

- 2.16. For the purposes of evaluating the present labour dispute resolution system in Viet Nam and considering possible reforms, this report will adapt a framework developed by Professors Budd and Colvin (2008). Although this was developed and applied in the United States (see also Halegua 2016), it has also been used to examine other countries, notably Korea (Croucher et al 2013). That framework concerns both intra-firm and external procedures, so it will be modified for this report, which concerns only external procedures.
- 2.17. Budd and Colvin propose three criteria for evaluating a labour dispute resolution system: efficiency, equity and voice. We add one more: jurisdictional coverage. Taken together, these criteria assist in assessing potential compliance with relevant ILO Conventions, including Convention No. 87 and Convention No. 98. So the evaluation criteria applied are:
- Criterion 1: jurisdiction
  - Criterion 2: efficiency
  - Criterion 3: equity
  - Criterion 4: voice
- 2.18. An *efficient* system is one which both conserves scarce resources such as time and money and promotes productive employment (Budd and Colvin 2008: 463). Thus, a system which is quick and inexpensive, and which results in a reduction of strikes and other forms of disruption, is efficient.
- 2.19. An *equitable* labour dispute resolution system is one which is unbiased and produces broadly consistent decisions. It, therefore, becomes credible. Budd and Colvin explain that the outcomes of an equitable system are:
- consistent with the judgment of a reasonable person who does not have a vested interest in either side and are supported by objective evidence* (Budd and Colvin 2008: 463).
- 2.20. The production of credible outcomes is clearly related to the professionalism and impartiality of the decision-maker.
- 2.21. An equitable system also has safeguards against capricious and inconsistent decision-making (for example, by providing appeal rights)

and enforceable remedies (Budd and Colvin 2008: 463). It is practically accessible to a wide range of people and is transparent (in that information about the procedures and operation of institutions within the system is widely available). It also provides protection against retaliation for raising a legitimate dispute.

2.21.1. A labour dispute resolution system which provides for voice is one in which individuals are able to participate. This entails fair hearings for both parties (including being able to present evidence and being able to be represented). Another aspect of voice is the possibility of including representative persons in the operation of the process, for example, by having members of an arbitration panel appointed by worker and employer organizations.

2.21.2. One dimension that Budd and Colvin do not explore is *jurisdictional coverage*: that is, the range of disputes that one or more labour institutions can deal with. These could be rights disputes, or interest disputes or both. Subject matter is also relevant to jurisdictional coverage, since a single institution could potentially deal with a wide range of disputes relating to, for example, wages, termination of employment, collective bargaining, social security, and work safety. Alternatively, a system could also be designed in which multiple institutions deal with these cases. The most important point is not the number of institutions (although cost and complexity considerations are relevant to that issue) but rather the extent to which all potential labour disputes are covered by the resolution system.

2.22. A further issue concerning jurisdictional coverage is how the employment relationship is defined within the system. If this is defined narrowly, many precarious workers, in particular, are denied remedies because they do not have a formal contract. A preferable approach is to reduce technical barriers to jurisdiction.

2.23. These four criteria assist in assessing Viet Nam's practical adherence to international labour standards. This is especially important at present because Viet Nam is entering into trade agreements which require it to take credible steps towards ratifying Conventions No. 87 and No. 98. The ILO supervisory bodies have made it clear that this requires not only legal provisions directly reflecting the obligations in the Conventions but also 'effective and rapid procedures that ensure their application in practice'.

2.24. The evaluation criteria above are summarised in Table 2 below (compare also Budd and Colvin 2008: 466). The table sets out the four criteria just discussed and fourteen specific elements which are associated with each criterion. Jurisdictional coverage is listed first, as this is the order in which the issues are addressed later in the report.

**TABLE 2. EVALUATION CRITERIA CONCERNING LABOUR DISPUTES RESOLUTION INSTITUTIONS**

Criterion	Specific elements
<b>Jurisdictional coverage</b>	<ul style="list-style-type: none"> <li>• <b>Comprehensive coverage:</b> different kinds of disputes are heard by one or more institutions</li> <li>• <b>Reduction of technical barriers:</b> workers not excluded because of legal technicalities</li> </ul>
<b>Efficiency</b>	<ul style="list-style-type: none"> <li>• <b>Cost</b></li> <li>• <b>Speed</b></li> <li>• <b>Conflict reduction:</b> promotes productive employment (conflict reduction)</li> </ul>
<b>Equity</b>	<ul style="list-style-type: none"> <li>• <b>Credibility:</b> unbiased and consistent decision making based on evidence</li> <li>• <b>Safeguards:</b> opportunity for appeal and measures to ensure consistent decision-making</li> <li>• <b>Enforceability:</b> binding remedies</li> <li>• <b>Accessibility:</b> wide range of people can access the institutions in practice</li> <li>• <b>Transparency:</b> public reporting of procedures and operations</li> <li>• <b>Protection against retaliation</b></li> </ul>
<b>Voice</b>	<ul style="list-style-type: none"> <li>• <b>Fair hearings:</b> both parties have opportunities to present their case</li> <li>• <b>Representivity:</b> participation of representatives in operation of the system</li> </ul>

## **Approach to recommendations: comparative experience, domestic constraints and international labour standards**

- 2.25. This report draws on comparative experience. There is no ‘perfect’ or ‘ideal’ system. There are, however, examples of systems that function relatively well; in other words, ‘best practice’ systems.
- 2.26. Best practice systems cannot be introduced into Viet Nam without adaptation to Vietnamese circumstances (Teubner 1998; Berkowitz et al 2003). While foreign models may be useful in generating ideas for improvements they cannot provide a pre-packaged answer. The national context is therefore very important in providing recommendations.
- 2.27. In the first iteration of this report, the consultants considered how a best practice model (such as that in South Korea) might be adapted to suit Vietnamese conditions. That discussion appears in the Annex to this version of the report. The consultants consider that the recommendations in the Annex have the best prospects of addressing the deficiencies found in the current labour dispute resolution system in Viet Nam and of facilitating ratification of Conventions No. 87 and No. 98.
- 2.28. Nonetheless, as discussed below, it became clear during and after the August dispute resolution workshop that current political and economic constraints appear to preclude the adoption of such a ‘best practice’ approach to reform. There seems to be no consensus among stakeholders that an adaptation of the Korean model is feasible in Viet Nam.
- 2.29. Consequently, the approach that we have ultimately pursued is as follows: to identify the key deficits in the labour dispute resolution system in Viet Nam; and to devise a minimum set of recommendations which are essential to a credible attempt to ratify Conventions No. 87 and No. 98 as well as in line with articles in other Conventions that address dispute resolution systems.

### **International labour standards and dispute resolution**

- 2.29.1. No ILO Convention specifically deals with labour dispute resolution, because such instruments generally address substantive areas of labour regulation rather than processes in themselves. However, many of the Conventions indicate that a dispute resolution process is required for their implementation (International Labour Organization International Training Centre

2014). This is the case, for example, with instruments relating to freedom of association and collective bargaining. Article 3 of the Right to Organise and Collective Bargaining Convention, 1949 (No. 98) provides that:

*Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise [...].*

2.30. Article 5(2)(e) of the Collective Bargaining Convention, 1981 (No. 154) provides that:

*[...] bodies and procedures for the settlement of labour disputes should be so conceived as to contribute to the promotion of collective bargaining (See also paragraph 8 of the Collective Bargaining Recommendation, 1981 (No. 163)).*

2.31. The ILO supervisory bodies have elaborated on these provisions in their General Surveys and in the Freedom of Association Digest. In its 2012 General Survey, the ILO's Committee of Experts on the Applications of Conventions and Recommendations indicated that:

*The existence of legal provisions prohibiting acts of anti-union discrimination is not enough if they are not accompanied by effective and rapid procedures to ensure their application in practice. (International Labour Organization 2012, paragraph 190).*

2.32. In the same Survey, the Committee of Experts indicated that, where an institution is charged with determining representivity disputes in the context of collective bargaining:

*such determination should be carried out in accordance with a procedure that offers every guarantee of impartiality, by an independent body that enjoys the confidence of the parties, and without political interference. (International Labour Organization 2012, paragraph 228).*

2.33. Similarly, the ILO Committee on Freedom of Association has stressed the need for rapid and effective protection for acts of anti-union discrimination:

*The government is responsible for preventing all acts of anti-union discrimination and it must ensure that complaints of anti-union discrimination are examined in the framework of national*

*procedures which should be prompt, impartial and considered as such by the parties concerned.* (International Labour Organization 2018, paragraph 1138; see generally 1131-1162).

- 2.34. One instrument that specifically deals with dispute resolution is the Voluntary Conciliation and Arbitration Recommendation, 1951 (No. 92). This instrument emphasises the need for procedures to be inexpensive, expeditious, and where appropriate to include equal representation of employers and workers.
- 2.35. In summary, in relation to Conventions that specifically reference dispute resolution processes, the system must be designed:
- to ensure respect for the right to organise;
  - to contribute to the promotion of collective bargaining;
  - to provide a means of ensuring that protections against acts of anti-union discrimination can be practically, effectively and rapidly applied through an impartial process that the parties concerned recognise as such;
  - to use procedures that guarantee impartiality (an independent body that enjoys the confidence of the parties) and prevent political interference, when charged with determining representivity; and
  - where appropriate, to include equal representation of employers and workers.
- 2.36. The ILO International Training Centre has produced a Guide on Dispute Resolution (“the Guide”) which assists in elaborating how these criteria can be used operationally (International Training Centre of the ILO International Labour Organization 2013). Chapter 4 of the Guide is particularly relevant to this rapid assessment as it deals with the situation in which there are fundamental problems with an existing dispute resolution system, as appears to be the case in Viet Nam. In such a situation, the Guide suggests that it is not possible to ‘revitalise’ current processes as this will not overcome design flaws that prevent the system from operating effectively. The Guide, therefore, recommends establishing a new dispute resolution institution, which it describes as an ‘independent authority’. The Guide cites many examples from around the world where such an institution has been established to overcome previous problems.
- 2.37. As already stated, this was the Consultants’ first proposal and remains their preferred one.

Labour dispute  
resolution in Viet Nam:  
current law and  
practice

## The current legal framework

- 3.1. The current labour dispute resolution system in Viet Nam appears in Chapter XIV of the 2012 Labour Code.
- 3.2. The legal system distinguishes between individual rights disputes, collective rights disputes and collective interest disputes. Mediation can be used for the three kinds of disputes; the procedure after mediation then changes depending on the nature of the dispute. Rights disputes may be adjudicated by the People's Courts (and in the case of collective rights disputes, the Chairperson of the People's Committees at district, town or provincial level) whereas interest disputes may, with the consent of the parties, be adjudicated by Labour Arbitration Councils (articles 200 and 203).

## The court system

- 3.3. While there may be certain difficulties with the treatment of individual rights disputes by the People's Courts, this aspect of the dispute resolution system is operating in practice. According to data from MOLISA (MOLISA 2018: 19), itself derived from statistics provided by the Supreme People's Court, the courts have handled an average of 4,970 cases per year since 2012. The number of cases has been also rising: there were 6,846 cases in 2016, although some preliminary evidence suggests a fall in caseload in 2017 (for more detailed discussion, see Hoang 2015).
- 3.4. Although it would be desirable to carry out an evaluation of labour cases in the courts by reference to the evaluation criteria outlined above (jurisdictional coverage, efficiency, equity, voice), that is beyond the scope of this report. This report will focus on the labour dispute resolution system under MOLISA, in accordance with the terms of reference.

## Mediation

- 3.5. The mediation processes established under the Labour Code 2012 do operate in practice, with 1,420 mediators active in 2016 (MOLISA 2018: 18). However, the number of cases handled by mediators is on average only 3-4 per year.
- 3.6. In our interviews with mediators, we noted some variation in the number of cases heard according to province and district. Some districts in Hanoi, HCMC and Hai Phong had no labour mediations at all over a year, while others had up to 30 (see also Hoang 2015). We also saw variation in the kinds of cases mediators heard, although most cases appear to involve claims about unpaid wages and social security.
- 3.7. Several stakeholder organizations we interviewed were very critical of the mediation system. With some exceptions, such as District 7 in HCMC, informants reported that mediation was not effective. This was in part because mediators were part-time and did not have the correct skill set. Some interviewees indicated that many persons who were suitably qualified as mediators preferred to work in private practice or consultants where the remuneration was better.
- 3.8. Mediation appeared to be more effective where it was proactive; in District 7 in HCMC, mediators would work with workers and enterprises to try to solve disputes at an early stage.
- 3.9. Our strong impression was that the system of mediation is greatly underutilized in a country with a waged labour force of some 27 million workers. This is supported by the following observation in MOLISA's 2018 Industrial Relations Report:

*In general, the mediation work of local labour mediators has no highlights [sic] as the number of disputes is small. On the other hand, the access to labour mediators by workers and employers is limited. Workers are more inclined to file complaints to state management agencies than to get disputes settled through mediation (MOLISA 2018: 18-19).*

## Arbitration

- 3.10. While the court system is in active operation, Labour Arbitration Councils have not been used at all since the 2012 Labour Code came into effect (MOLISA 2018:19) and rarely before that.

3.11. None of the interviewees formally associated with Labour Arbitration Councils that we spoke to could point to a case settled by them, even in large cities, such as Hanoi and Ho Chi Minh City. This is consistent with the views expressed in the literature. In particular, the information we received suggested that the activities of the Labour Arbitration Councils have not developed since the report prepared by the former Secretary of the Ho Chi Minh City Labour Arbitration Council, Dr Ho Xuan Dung (2011). This is despite the legal changes in 2012. Dr Ho observed that:

*'... in recent years, the Labour Arbitration Council at the provincial level has only performed the task of giving professional instructions about conciliation of labour disputes to labour conciliatory councils and labour conciliators in the district level... the conditions to support the Labour Arbitration Council operating in accordance with its proper functions... are still limited (at page 6).*

3.12. The scholarly literature, past analyses by the ILO and other bodies and the rapid assessment informant interviews all point to factors that contributed to the inactivity of the Labour Arbitration Councils.

3.13. Dr Ho explains that the fact that the Labour Arbitration Councils have not engaged in arbitrating disputes arises from multiple factors that have been present for many years (page 5-7). These factors have persisted in the current 2012 Labour Code (see Part XIV Section 3). The procedure of Councils requires them to conciliate, even though the dispute has already been through a conciliation phase. Labour Arbitration Councils do not actually have the power to arbitrate in many instances. Moreover, many dispute cases involve a mix of rights and interest whereas the Labour Arbitration Councils can only deal with interest disputes; this creates a jurisdictional limitation.

3.14. In reality, the consultants' learnt that many workers ignore the arbitration procedures stipulated in the Labour Code 2012 and engage in strikes without accessing the Labour Arbitration Councils. The role of the Council is then displaced by inter-agency taskforces.

3.15. Furthermore, there are a number of practical problems with Labour Arbitration Councils. The researchers noted that, at least in the cities we visited, they do not have a full-time specialised place of business. They do not appear to have easily accessible contact numbers and webpages. They do not have full-time permanent staff.

3.16. Finally, the Labour Arbitration Councils are effectively unable to make binding orders, including in relation to unfair labour practices.

This section begins by examining a preliminary question asking why there are so few mediation and arbitration cases. It then evaluates the current system against the criteria set out above.

### **Why are so few cases dealt with by mediation and arbitration?**

4.1. A few interviewees suggested to us that the low numbers of mediations and arbitrations in Viet Nam are not problematic because either:

- there are not many labour disputes; or
- labour disputes are dealt with effectively by other methods.

We examine each of these possibilities in turn.

4.2. In relation to the claim that there are not many labour disputes, the consultants consider that this is extremely unlikely. It is much more probable that there are many labour disputes, but they are not being brought to mediators and arbitrators. We say this for the following reasons:

- First, several of our interviewees, including scholars and employer representatives, indicated that there were many disputes but that the parties avoided taking them to mediators or arbitrations.
- Second, unlawful strikes are widespread, even if apparently not as common as in the period before 2012 (MOLISA 2018: 20).
- Third, this situation contrasts with the dispute resolution processes in all other major countries in the region. Table 4.2, demonstrates this very clearly (see also Tajgman 2015).

- 4.3. The countries in Table 4.2 are quite diverse but the dispute resolution institutions are used far more often than they are in Viet Nam. For example, countries with similar political and legal systems to Viet Nam (China) or with similar population and level of economic development (Philippines) have many tens of thousands of formal disputes every year. Even Cambodia, a small underdeveloped country with a voluntary arbitration system, has around 250 arbitrations per year.
- 4.4. The China case is particularly instructive. Prior to 2007, China operated a dispute resolution system which was quite similar to Viet Nam (Cooney et al 2013). However, after widespread industrial disputes, especially in the construction sector, the country drastically reformed the individual labour dispute system. This including reorganizing provincial level labour dispute resolution councils into professional bodies with binding powers (see Labour Disputes Mediation and Arbitration Law 2007). Access was greatly facilitated, including through prohibiting fees. As can be seen in Table 4.3, the number of cases doubled in 2008 (when the new system went into operation) and has since tended to increase.
- 4.5. It is very unlikely that there were suddenly double the number of actual disputes in China in 2008. A far more probable explanation is that, after the reforms, many disputes that were previously resolved (or not) outside the formal system were brought to the formal system as a result of increased confidence in it.
- 4.6. This experience is consistent with the argument – demonstrated empirically in several well-known studies – that non-use of a dispute resolution system frequently reflects institutional obstacles, rather than, for example, cultural preferences or other national characteristics (for an overview and analysis of the studies in relation to Japan, see Ginsburg and Hoetke 2006). As has already been mentioned, there are numerous institutional obstacles associated with the present disputes resolution system in Viet Nam (lack of binding powers, inaccessibility, need for greater professionalism etc.).
- 4.7. Indeed, several interviewees indicated that it was institutional obstacles that inhibited access to the existing dispute resolution system. This extended to basic problems of accessibility; many potential disputants did not know how or where to contact mediation services. The inability of arbitrators to make binding orders was also cited by several interviewees as being a particular disincentive, as it suggested that use

of the arbitration process would fail to resolve a dispute and simply waste time.

4.8. Finally, evidence specifically in relation to unfair labour practices suggests that there are many cases of workers who experience discrimination such as the wrongful termination because of their worker organization activities. This evidence includes:

4.9. ILO reports (e.g. International Labour Office 2015; Institute for Workers and Trade Unions 2016);

- academic studies (e.g. Hoang 2015; Do 2017, Wang 2017); and
- statements made in the course of interviews for this and previous research by this Consultant.

4.10. For example, the Institute for Workers and Trade Unions 2016 report, which involved interviewing VGCL officials found many instances of worker representatives being unfairly punished. In 2018 Professor Wang Hongzen interviewed foreign direct investors in Viet Nam and found numerous examples of unfair labour practices, such as an employer interviewee admitting:

*'I try to transform a trade union into a recreational association. I use various activities to divert union members' attention from labour affairs.'*

4.11. Several VGCL interviewees confirmed that they had received complaints of unfair labour practices from their staff and their members.

4.12. This widespread evidence of unfair labour practices is particularly important because it suggests that failure to deal with this problem could create serious obstacles to the implementation of Conventions No. 87 and No. 98.

4.13. Turning to the argument that labour disputes do not come to mediation and arbitration at DOLISAs because there are other effective processes. While other processes do exist, a number of interviewees confirmed that these other processes are not an adequate substitute. Indeed, MOLISA's 2018 Industrial Relations Report points to the negative impact of some informal processes on the formal system (MOLISA 2018: 20-21).

4.14. Alternatives, at least in part, to mediation and arbitration include:

- the courts;
- internal grievance systems within enterprises;
- interagency task forces; and

- labour inspection.

4.15. We have already seen that the courts do hear significant numbers of individual disputes. However, these cases almost never involve collective disputes or unfair labour practices. According to MOLISA (2018: 19), 43 per cent of these disputes relate to social insurance, 21 per cent to wages and 19 per cent to termination of employment. Only 9 cases (or 0.04 per cent) concerned collective bargaining or union related disputes.

4.16. Furthermore, many interviewees informed us that court cases often involved expense and delay, and they would prefer a more efficient and accessible labour dispute resolution institution.

4.17. Many representatives of enterprises, and several VCCI interviewees indicated that they had greatly improved their internal grievance dispute systems in recent years. They suggested that this might be a contributing factor in the reduction of strikes since 2012.

4.18. These improvements in internal processes are very positive, but they do not substitute for an external, objective, dispute resolution system which is not controlled by one of the parties. In particular, where there are allegations of unfair labour practices such as discrimination against union members, or employer control over unions, internal mechanisms are inappropriate and would not satisfy Convention requirements.

4.19. A number of interviewees told us that interagency taskforces sometimes operate fairly effectively. However, MOLISA's 2018 Industrial Relations Report points out:

*most strikes are settled thanks to local inter-agency interventions through administrative mechanisms with most of workers' requirements met, leading to the understanding by workers that strikes are the best option and that it is unnecessary to use mediation and arbitration. This weakens the roles of negotiation and mediation, which hinders the movement of IR following the market mechanism (MOLISA 2018: 20-21).*

4.20. A number of interviewees supported this proposition, making clear that interagency taskforces were not a long-term solution to industrial disputes, as they produce inconsistent principles and rules that cannot be applied more generally, and did not discourage unlawful strikes. Many employers informed the consultants that the outcomes of taskforce interventions were unpredictable and might even encourage workers to strike rather than using formal processes. This view has also been reflected in scholarly research (see, e.g. Hoang 2015).

- 4.21. In assessing the dispute resolution system and proposing recommendations, the consultants have taken account of the fast pace of economic and societal development in Viet Nam: whatever system is adopted, it must be fit for the coming decade and not just the present. It is questionable whether existing ad hoc administrative interventions can assist in the development of mature industrial relations practices and achieve predictable outcomes. As already noted, such interventions would seem to undermine respect for the formal legal system.
- 4.22. The system of labour inspection, if it were properly resourced, could be effective in addressing many issues, such as underpayment of wages or OSH breaches. However, international experience suggests that an inspectorate is much less effective at dealing with complex collective disputes pertaining to collective bargaining or unfair labour practices.
- 4.23. In addition, in Viet Nam, the number of inspectors is quite low compared to the number of enterprises (for example, around 30 labour inspectors in HCMC (Hoang 2015). This is insufficient to deal effectively with the current workload and could not be expected to effectively identify and enforce cases of unfair labour practices.
- 4.24. Finally, it is important to recall that new forms of worker representative organizations (WROs) are likely to create new kinds of disputes, such as disputes about which WROs can participate in bargaining. None of the existing mechanisms in Viet Nam is empowered to deal with such disputes.
- 4.25. Experience in other countries suggests that at least several hundred of such cases may arise each year (for a more extensive consideration of the possible impact of WROs, see the Impact Assessment).

## **Evaluation according to the criteria**

- 4.26. Table 4.1 summaries our evaluation of the current system against the four criteria of jurisdiction, efficiency, equity and voice.
- 4.27. There are several ways in which the current dispute resolution system does not meet the criteria. This suggests that Viet Nam would not be able to credibly ratify Conventions No. 87 and No. 98 unless reforms are made.

**Criterion 1: Jurisdiction**

- 4.28. In terms of *jurisdiction*, as mentioned above, Chapter XIV of the 2012 Labour Code rests on distinctions between individual rights disputes, collective rights disputes and collective interest disputes. Mediation is an element in all three kinds of disputes; the procedure then changes depending on the nature of the dispute. Rights disputes may be adjudicated by the People's Courts whereas interest disputes may, with the consent of the parties, be adjudicated by Labour Arbitration Councils.
- 4.29. It is not straightforward to fit unfair labour practices into this scheme. They may be categorised as individual rights disputes, such as where a worker is terminated for union activity (although this is also arguably a collective rights dispute because it impacts upon other workers). They may be collective rights disputes, such as where an employer obstructs the formation of a union or interferes in union management. Or they may have aspects of both collective rights and collective interest disputes, such as where the collective bargaining process breaks down because of a refusal to bargain in good faith
- 4.30. In summary, at present, there is no clear jurisdiction for a body to adjudicate on unfair labour practices as required by international labour standards. Furthermore, there appears to be no process for dealing with representivity disputes between multiple WROs in the course of collective bargaining.

**Criterion 2: Efficiency**

- 4.31. In terms of efficiency, interviewees suggested that mediation is provided without cost to the parties and quick. However, arbitration does not operate in practice and therefore makes no contribution to efficient dispute resolution.
- 4.32. Furthermore, mediation and arbitration processes do not appear to lead to widespread reduction in illegal strikes or the losses flowing from them (see Impact Assessment). None of our interviewees attributed the fall in the number of illegal strikes since 2012 to effective dispute resolution by mediators or arbitrators. Employers have suggested that it has been caused, at least in part, by a tightening of the labour market: this means employers need to retain workers and are ready to find a quick settlement informally rather than follow a longer procedurally correct process.

**Criterion 3: Equity**

- 4.33. In terms of equity, there are at least six major problems. First, the current system lacks credibility because there are no professional full-time mediators and arbitrators (although there are some very experienced part-time mediators in a few districts). Mediators are poorly paid for mediation work (a very low rate per case) and have very low caseloads. While many expressed their dedication to this work, it was also clear that the rate was undermining rather than an incentivising them.
- 4.34. Second, the decentralized nature of the system means that there are limited mechanisms to ensure national consistency. There is wide variation between different provinces and districts. This is a problem because it may lead to mediators and arbitrators in some provinces producing outcomes that do not conform to Convention obligations.
- 4.35. Third, the lack of power of the arbitrators to make binding orders, and to require parties to participate in proceedings which should be compulsory (such as unfair labour practice cases), greatly erodes credibility and may make proceedings futile for many workers and/or employers.
- 4.36. Fourth, while some mediators seem to be accessible, in certain districts, this is not uniformly the case. Moreover, the consultants were informed that arbitrators do not have dedicated premises for their arbitration work. Neither do they have secretariats, a web presence or public point of contact. This is in contrast to all the other major jurisdictions in the region.
- 4.37. Fifth, there is a lack of institutional autonomy of arbitrators within the DOLISAs. We referred above to the emphasis that the ILO supervisory bodies place on the importance of dispute resolution bodies being 'impartial' and, in the case of disputes about representation in collective bargaining, 'independent etc. and without political interference'. While a dispute resolution body engaged in arbitration could be located within a DOLISA, it will not have sufficient autonomy if its members are fully integrated into its operations.
- 4.38. The sixth problem in relation to the equity criterion is that arbitrators coming from worker representative backgrounds can currently be selected only from VGCL-affiliated organizations. This may give rise to perceived bias where, in the future, a dispute arises between two WROs, one of which is affiliated to the VGCL and the other not.

#### **Criterion 4: Voice**

4.39. In relation to voice, which requires fair hearings, the fact that there are no arbitral proceedings at all means that fair hearings do not occur except in the courts. As we have already mentioned, the courts are not suited to handling several important categories of labour disputes which require a rapid response.

**TABLE 4.1. SUMMARY EVALUATION OF THE CURRENT SYSTEM**

<b>Dimension</b>	<b>Evaluation</b>
<b>Jurisdictional coverage</b>	<ul style="list-style-type: none"> <li>• Jurisdiction for comprehensively dealing with unfair labour practices is unclear</li> <li>• No jurisdiction for dealing with certain bargaining disputes (e.g. representivity)</li> </ul>
<b>Efficiency</b>	<ul style="list-style-type: none"> <li>• The current mediations that take place appear reasonably efficient and cost-effective. However, they do not seem to play a major in reducing costs to businesses</li> <li>• Arbitration system ineffective</li> </ul>
<b>Equity</b>	<ul style="list-style-type: none"> <li>• Current system lacks credibility because of insufficient professionalization</li> <li>• Lack of mechanisms to ensure national consistency</li> <li>• Absence of binding remedies in arbitration unless both parties consent</li> <li>• Inaccessible because of limited public presence (through premises or websites)</li> <li>• Insufficient autonomy</li> <li>• Insufficient impartiality of arbitrators</li> </ul>
<b>Voice</b>	<ul style="list-style-type: none"> <li>• As arbitration system does not function in practice, there is no opportunity to provide fair hearings in labour arbitrations</li> </ul>
<b>Compliance with Conventions No. 87 and No. 98</b>	<ul style="list-style-type: none"> <li>• Does not provide effective and rapid procedures to deal with unfair labour practices/representivity disputes</li> <li>• Lack of national consistency</li> <li>• Lack of sufficient administrative autonomy</li> <li>• Therefore, conventions cannot be credibly ratified</li> </ul>

TABLE 4.2. LABOUR RELATIONS COMMISSION OR EQUIVALENT IN REGIONAL COUNTRIES

Country	Institution	Qualified arbitrators or judges adjudicating cases?	Jurisdiction over collective interest disputes?	Legally binding orders?	Permanent premises and regular business hours?	Secretariat?	Phone contact and a website presence?	Regional offices/ hearings?	Number of cases per year <sup>1</sup>
<b>Australia</b>	Fair Work Commission	Yes	Yes	Yes	Yes	Yes	Yes	Yes	33 071 <sup>2</sup>
<b>Cambodia</b>	Arbitration Council	Yes	Yes	No	Yes	Yes	Yes	Yes	248 <sup>3</sup>
<b>China</b>	Labour Disputes Arbitration Committees	Yes	No	Yes	Yes	Yes	Yes	Yes	813 859 <sup>4</sup>
<b>Indonesia</b>	Industrial Relations Court	Yes	Yes	Yes	Yes	Yes	Yes	Yes	(unavailable)
<b>Japan</b>	Labour Relations Commission	Yes	Yes	Yes	Yes	Yes	Yes	Yes	873 <sup>5</sup>
<b>Korea, Republic of</b>	Labour Relations Commission	Yes	Yes	Yes	Yes	Yes	Yes	Yes	14 483 <sup>6</sup>
<b>Malaysia</b>	Industrial Court of Malaysia	Yes	Yes	Yes	Yes	Yes	Yes	Yes	1615 <sup>7</sup>
<b>Philippines</b>	Labour Relations Commission	Yes	Yes	Yes	Yes	Yes	Yes	Yes	35 595 <sup>8</sup>
<b>VIET NAM</b>	Labour Arbitration Council	No	Yes	No	No	No	No	No	0

<sup>1</sup> There are very significant differences in jurisdiction, and in the availability of other dispute resolution institutions. This may account in part for the great variation in data here.

<sup>2</sup> Fair Work Commission (Australia), 2016-2017 Annual Report, p 42.

<sup>3</sup> The Arbitration Council (Cambodia), Annual Report 2016.

<sup>4</sup> China Labour Statistical Yearbook 2016, Table 8-1.

<sup>5</sup> Japan Institute for Labour Policy and Training, Labor Situation in Japan and its Analysis 2015-2016, Table IV-7, IV-8 and IV-9 (data from 2014).

<sup>6</sup> Korean National Labor Relations Commission presentation for ILERA Conference, Seoul, July 2018 (2017 data).

<sup>7</sup> Data from the website of the Industrial Court of Malaysia. Last available public figures are from 2012 (accessed 30<sup>th</sup> July, 2018).

<sup>8</sup> National Labor Relations Commission of the Philippines, Annual Report, 2013 (this is the latest available on the Commission's website (accessed 31st July, 2018)).

TABLE 4.3. EXTRACT FROM CHINA YEARBOOK OF LABOUR STATISTICS 2016

	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Number of Cases Left from Last Year-end	2634	2864	3475	3840	6374	8739	12472	16276	17117	17829	22165	25424	33084	83709	77926	42308	36151	34478	31796	39580
Cases Accepted																				
Cases	48121	71524	93649	120191	135206	154621	184116	226391	260471	313773	317162	350182	693465	684379	600865	589244	641202	665760	715163	813859
Number of Collective Labour Disputes	3150	4109	6767	9043	8247	9847	11024	10823	19241	16217	13977	12784	21880	13779	9314	6592	7252	6783	8041	10466
Number of Cases Left from Last Year-end	41697	68773	84829	114152	120043	146781	172253	215512	249335	293710	301233	325590	650077	627530	558853	568768	620849	641932	690418	784229
Number of Laborers Involved(person)	189120	221115	358531	473957	422617	467150	608396	801042	764981	744195	679312	653472	1214328	1016922	815121	779490	882487	888430	997807	1159687
Number of Laborers Involved in Collective Labour Disputes	92203	132647	251268	319445	259445	286680	374956	514573	477992	409819	348714	271777	502713	299601	211755	174785	231894	218521	267165	341588
Disputes Reasons																				
Labour Remuneration						45172	59144	76774	85132	103183	103887	108953	225061	247330	209968	200550	225981	223351	258716	321179
Social Insurances						31158	56558	76181	88119	97519	100342	97731				149944	159649	165665	160961	158002
Change the Labour Contract		2992	2840	3469	3829	4254	3765	5494	4465	7567	3456	4695								
Relieve or End the Labour Contract		10337	13069	18108	21149	29038	30940	40017	57021	68873	67868	80261	139702	43876	31915	118684	129108	147977	155870	182396
Others		8917	9515	8626	12549															
Cases Settled																				
Number of Cases Settled	46543	70792	92288	121289	130688	150279	178744	223503	258678	306027	310780	340030	622719	689714	634041	592823	643292	669062	711044	812461
by Manners of Settlement																				
by Mediation	24223	32793	31483	39550	41877	42933	50925	67765	83400	104308	104435	119436	221284	251463	250131	278873	302552	311806	321598	362814
by Arbitration Lawsuit	12789	15060	25389	34712	54142	77250	77340	95774	110708	131745	141465	149013	274543	290971	266506	244942	268530	283341	313175	368409
Others	9531	22939	35155	47027	34669	35096	50479	59954	64550	69974	64880	71581	126892	147280	117404	69008	72210	73915	76271	81238
by Result of Settlement																				
Lawsuit Won by Units	9452	11488	11937	15674	13699	31544	27017	34272	35679	39401	39251	49211	80462	95470	85028	74189	79187	82519	82541	90785
Lawsuit Won by Laborers	23696	40063	48650	63030	70544	71739	84432	109556	123268	145352	146028	156955	276793	255119	229448	195680	213453	217551	250284	287544
Lawsuit Partly Won by Both Parties and Others	13395	19241	27365	37459	37247	46996	67295	79475	94041	121274	125501	133864	265464	339125	319565	322954	350652	368992	378219	434132
Cases Mediated						63939	77342	58451	70840	93561	130321	151902	237283	185598	163997	194338	212937	215595	227447	258114



## Comprehensive vs minimum reform

- 5.1. The first iteration of this rapid assessment report contained detailed recommendations for a comprehensive reform: the establishment of national-level labour dispute resolution body. This body would be structured in a similar way to national commissions existing in many of the countries in the region, notably the National Labour Relations Commission in Korea.
- 5.2. In the view of the consultants, a national-level labour dispute resolution body would offer the best chance of remedying the deficiencies in the current system, and of building a strong case for ratification of Conventions No. 87 and No. 98.
- 5.3. However, the recommendations were presented to MOLISA and other stakeholders at a workshop held in Hanoi on 16-17 August 2018. Mr Chang Keun Sop, representing the National Labour Relations Commission in Korea also gave a presentation on the operation of that Commission.
- 5.4. While many stakeholders expressed support for the recommendations, it became clear at and after the workshop that stakeholders, particularly the technical line Ministry (DIRWA), felt there were too many obstacles to the introduction of a national-level labour dispute resolution body as part of the current law reforms. These included:
  - a) governmental restrictions on the creation of new institutions;
  - b) caps on the number of public servants; and
  - c) the vertical-horizontal (song trung) structure of government in Viet Nam, according to which responsibilities for labour dispute resolution lie at the provincial level.

- 5.5. The separate impact assessment report prepared by the consultants relating to Labour Code reforms concerning freedom of association, makes clear that the benefits from major reform of the labour dispute resolution system will greatly outweigh the costs. In particular, the economic benefits flowing from Viet Nam's participation in the Comprehensive and Progressive Agreement for a Transpacific Partnership and the European Union-Viet Nam Free Trade Agreement include a significant projected increase in Viet Nam's gross domestic product. Participation of Viet Nam in these trade agreements is linked to Viet Nam's ratification of Convention No. 87 and No. 98.
- 5.6. A decision not to embark on comprehensive reform to Viet Nam's labour dispute resolution system increases the risk that ratification of Conventions No. 87 and No. 98 will not be viewed as credible.
- 5.7. The consultants note that innovative reforms of areas such as competition law, including the creation of a national competition authority, occurred in the lead-up to Viet Nam's accession to the World Trade Organization in 2007, notwithstanding that such an agency had not previously existed.
- 5.8. Nonetheless, the consultants appreciate that comprehensive reform may not be feasible at this time. Given this limitation, the consultants have reduced the detailed content in this part of the report regarding Option A, but it is provided in Annex A in case needed.
- 5.9. In the light of the obstacles reported in relation to Option A, the consultants have developed Option B. This option involves the *minimum reforms* (or *threshold requirements*) that are required in order to establish a system which, with respect to jurisdiction, efficiency, equity and voice, may meet the standards required by Conventions No. 87 and No. 98, as explained by the ILO Supervisory Bodies.
- 5.10. At the time of writing, the consultants had available the Zero Draft Labour Code dated 18th September 2018. The consultants have evaluated Chapter XV of that Zero Draft, which deals with the resolution of labour disputes, to consider in what respects it might need to be further amended to meet the threshold requirements. The consultants find that the Zero Draft makes considerable progress towards approaching the threshold requirements. However, having regard to the evaluation criteria, we do not consider that the Zero Draft meets those requirements. Consequently, this section sets out recommendations

(‘Option B recommendations’) that would improve the Zero Draft from the perspective of compliance with Conventions No. 87 and No. 98.

## Jurisdiction

5.11. Article 190 of the Zero Draft deals with labour disputes. As presently worded, it does not cover a matter that directly pertains to Convention No. 98, namely, disputes concerning an employer and one or more workers who seek to form a WRO where one is not currently in existence.

**Recommendation B1: The new Labour Code should provide for dispute resolution concerning all forms of unfair labour practices, including disputes concerning an employer and one or more workers who seek to form a WRO where one is not currently in existence.**

5.12. Article 190 refers to ‘disputes among worker’s representative organizations on the level of representativeness and the right to collective bargaining’, in other words, representivity disputes. We note that such disputes can also occur between WROs and employers, in which case they can constitute a failure to comply with the obligation to negotiate in good faith.

5.12.1. The Zero Draft does not appear to provide a mechanism for the comprehensive resolution of representivity disputes, apart from the possibility of disputes involving an employer being dealt with as a collective rights dispute.

**Recommendation B2: The new Labour Code should ensure that all disputes about which WROs are entitled to represent workers for the purposes of collective bargaining can be dealt with as collective rights disputes.**

## Efficiency

5.12.2. The current system of labour arbitration councils is inefficient, in the sense that the Councils (and Arbitrators) play no practical role in labour dispute resolution. If they are to operate in practice, they need to be efficient in terms of cost and time.

5.12.3. It is also inefficient from the perspective of the user experience. Users face significant challenges in understanding or following processes to be followed and lack faith in them.

**Recommendation B3:** The new Labour Code, or implementing regulations, should ensure that the cost of mediation and arbitration to the disputing parties is minimal. The Code should also provide for time limits which, while realistic, minimise delay.

**Recommendation B4:** The new Labour Code, or implementing regulations, should ensure that an online or united system for receiving and allocating applications for mediation and arbitration is established. This system should provide for the allocation of cases out to the appropriate bodies and processes (to mediation or arbitration) rather than rely on users to understand all the complexities of legal processes.

5.12.4. Labour dispute resolution procedures need also to be efficient in the sense of reducing the costs of disputes to workers and businesses. They can only achieve if they make authoritative, credible decisions which are respected by the parties. These matters are considered below under the heading ‘equity’.

## Equity

5.12.5. As indicated above, the current system is deficient in the following respects:

- insufficient professionalization;
- lack of mechanisms to ensure national consistency;
- absence of binding remedies in arbitration (unless both parties consent);
- limited public presence;
- insufficient autonomy; and
- insufficient impartiality.

5.13. In relation to professionalization, it would be preferable if arbitrators had status and qualifications similar to those of senior public servants or judges. Furthermore, there should be a core number of arbitrators who are full-time, at least in major industrial centres/cities such as Hanoi, HCMC, Binh Duong, Dong Nai and Hai Phong.

5.14. The consultants note that the most recent version of the Zero Draft provides for full-time labour arbitrators.

**Recommendation B5:** In order to improve professionalization of arbitrators, arbitrators should have a status similar to, and enjoy conditions comparable to, senior provincial public servants or judges.

**Recommendation B6:** The new Labour Code should enable the appointment of full-time arbitrators (as provided in the Zero Draft).

5.15. As mediators and arbitrators are appointed at the provincial level, and there is no central dispute resolution body, divergence in operation and decision-making can emerge. We saw above that there is considerable difference in mediation practices at provincial, and indeed district level. This may be replicated in arbitration should it become operational in practice.

5.16. We note from the Zero Draft that it would be possible to appeal arbitral decisions to the People's Courts (which are part of a hierarchy that provides national consistency). That provides some check against decision-making that is contrary to law. However, the People's Courts are generalist courts (albeit with labour panels in some circumstances). Judges are not necessarily familiar with the concept of unfair labour practices and cannot be familiar with new forms of collective disputes, such as those involving representation, since these do not occur at present. They may adopt interpretations of the law which are not necessarily consistent with Conventions No. 87 and No. 98.

5.17. It is therefore important to establish an authoritative national body which could provide consistent guidance to provincial-level mediators and arbitrators on how to implement reforms in a manner than is consistent with the Conventions.

**Recommendation B7:** The new Labour Code should provide for the establishment of a national level body on labour dispute resolution which would promote consistency of decision-making and compliance with Conventions No. 87 and No. 98 at the provincial level.

5.18. A crucial weakness with arbitration in the Labour Code 2012 is that arbitral awards are not binding unless both parties consent. If labour arbitration councils are to be empowered to resolve unfair labour practice disputes, this must be reformed.

5.19. Article 204 of the Zero Draft provides for compulsory arbitration (that is, arbitration at the request of one of the parties only) for unfair labour practice cases. This is a significant improvement on the 2012 Code.

- 5.20. However, the Zero Draft does not appear to make arbitral awards in such cases binding.
- 5.21. Article 204 (3)(b) provides that:
- depending on the nature and extent of such acts, produce a record of violation and make recommendation accordingly to the authority competent for administrative sanctions, criminal investigation, remedial measures or restitution in accordance with the law.*
- 5.22. The underlying reasoning may be that a labour arbitration council cannot make a ‘final judgement’ unless both parties consent to its jurisdiction (contrast article 204(3)(a) of the Zero Draft and article 196(5)).
- 5.23. This reasoning is not adopted by other labour relations bodies in the region, which can issue binding orders in unfair labour practice cases (for example, Japan, Korea, the Philippines and Australia).
- 5.24. The consultants further note that the labour disputes arbitration committees in China, while empowered to deal only with individual rights disputes, can make binding arbitral awards which ‘shall be final and the award shall take legal effect from the date the award is made’ (Labour Disputes Mediation and Arbitration Law article 47).
- 5.25. It may be considered that the issuance of binding orders in compulsory proceedings is better characterised as ‘adjudication’ rather than ‘arbitration’ (although it can also be referred to as ‘compulsory arbitration’). Some of the countries in the region make this distinction (e.g. Korea) and some do not (e.g. China) but in all cases, the distinction does not affect the jurisdiction or powers of the labour dispute resolution institution to make binding orders.
- 5.26. Furthermore, the consultants note that the Zero Draft already empowers labour arbitration councils to undertake compulsory arbitration in certain collective interest disputes (article 209(2)).
- 5.27. The consultants are not aware of any constitutional obstacle which would prevent Vietnamese labour arbitration councils from issuing binding awards in a similar way in unfair labour practice cases. Nor would it seem that the Civil Procedure Code 2015 or the Law on the Organisation of People’s Courts 2014 require that only the courts can make a binding decision in civil disputes, including labour ones.

- 5.28. The consultants note that it is possible for non-judicial bodies in Viet Nam to issue a sanction decision (Article. 106, Law on Competition 2004).
- 5.29. If labour arbitration councils are not empowered to issue binding orders in unfair labour practices cases, it is not clear why they should exercise that jurisdiction at all. It would be preferable to simply refer such cases to the People's Courts. This would mean that investments in additional resources to deal with multiple WROs would be better directed to the court system than to the labour mediation and arbitration system.
- 5.30. If the People's Courts are to be the sole body that can make binding decisions in unfair labour practice cases, then there would need to be new rules establishing 'rapid and effective procedures' to enable the courts to deal with cases quickly. As indicated above, several interviewees informed us that current court procedures are slow.

**Recommendation B8:** The new Labour Code should provide that decisions of the labour arbitration councils in unfair labour practice cases are 'final judgment' (subject to judicial review).

**Recommendation B9:** If Recommendation B 7 is not adopted, the unfair labour practices jurisdiction should be focused on the People's Courts. New procedural rules should be adopted to enable the People's Courts to deal with unfair labour practice cases rapidly and effectively, in order to ensure compliance with Convention obligations.

- 5.31. The consultants further note that the binding orders need to include a wide range of remedies which address unfair labour practices.

**Recommendation B10:** Binding orders should include the power to impose:

- reinstatement of affected workers in their former positions, or equivalent positions, together with compensation;
- fines commensurate with the size and financial capacity of the enterprise;
- specific orders directed at improper behaviour, such as:
  - (where an employer refuses entry to union officials) an order to permit union officials to enter an enterprise at appropriate times where they have been asked to represent workers; or

- (where a party unreasonably delays bargaining) an order to meet within a certain time period; and
  - in cases where a party persistently refuses to negotiate in good faith despite orders to do so, compulsory arbitration with the power to make a binding award (where consistent with Convention No.98)
- (see also Recommendation A 21 in Annex).

5.32. The consultants note that the Zero Draft provides for the possibility of compulsory arbitration ‘where the disputing parties are in the process of collective bargaining for the first time or where a labour dispute arises at an undertaking in which strikes are prohibited’ (article 209(2)) and where there is a significant delay (article 171).

5.33. The consultants support the use of compulsory arbitration as a last resort measure in cases where a party unreasonably refuses to engage in good faith bargaining, especially where collective bargaining is occurring for the first time. We note that this remedy is available, for example, under the Canada Labour Code and the Australian Fair Work Act.

5.34. Nonetheless, the ILO supervisory bodies have expressed considerable reservations about compulsory arbitration. For example, the Committee of Experts on the Application of Conventions and Recommendations has indicated that:

*Compulsory arbitration in the case that the parties have not reached agreement is generally contrary to the principles of collective bargaining. In the Committee’s opinion, compulsory arbitration is only acceptable in certain specific circumstances, namely:*

- (i) *in essential services in the strict sense of the term, that is those the interruption of which would endanger the life, personal safety or health of the whole or part of the population;*
- (ii) *in the case of disputes in the public service involving public servants engaged in the administration of the State;*
- (iii) *when, after protracted and fruitless negotiations, it becomes obvious that the deadlock will not be broken without some initiative by the authorities; or*
- (iv) *in the event of an acute crisis.*

*However, arbitration accepted by both parties (voluntary) is always legitimate*

(International Labour Organization 2012, paragraph 247).

**Recommendation B11:** The Zero Draft should ensure that compulsory arbitration in the context of collective bargaining for the first time should take place only when, after ‘protracted and fruitless negotiations, it becomes obvious that the deadlock will not be broken without some initiative by the authorities’

5.35. Having regard to what has just been said about compulsory arbitration, arbitration should not be a precondition to striking unless both parties consent to the arbitration, with the exception of the circumstances referred to in Recommendation B10.

**Recommendation B12:** Other than in the cases identified in paragraph 5.4.23 above, strikes should not be prevented by compulsory arbitration.

5.36. The consultants observe that in all the comparator countries in the region, labour dispute resolution bodies have distinct office locations, a secretariat and web presence (for example, see article 19 of China’s Labour Disputes Mediation and Arbitration Law). It is essential that labour arbitration councils have a visible and accessible presence if they are to perform their functions.

**Recommendation B13:** Labour arbitration councils should be empowered to set up offices for handling their day-to-day work and points of communication with potential users of the system, including through their own website.

5.37. As indicated above, it is important for compliance with Conventions No. 87 and No. 98 that labour dispute resolution bodies exercise their functions impartially and (particularly in the case of representivity disputes) independently.

5.38. There appears to be no provision in the Labour Code of 2012 or the Zero Draft which addresses this. This should be remedied.

**Recommendation B14:** The Labour Code should provide that in exercising its functions, a Labour Arbitration Council shall exercise its discretion independently and is not subject to administrative direction.

5.39. Article 196 of the Zero Draft provides that the provincial-level federations of labour will nominate arbitrators. This privileges the position of the VGCL over that of non-VGCL-affiliated WROs. This is incompatible with the requirement of impartiality in the context of the Conventions (especially in representivity disputes). It would be preferable to adopt the same language as that used in the context of employer-nominated arbitrators.

5.40. If the VGCL-affiliated provincial-level organization is in fact the most representative worker organization then it would be acceptable to appoint its nominees. However, this should not be assumed in advance.

**Recommendation B15:** The Labour Code should provide arbitrators representing workers' interests should be nominated by 'worker representative organizations', rather than specifically naming the provincial level federations of labour. It should also make clear that, if accepted as arbitrators, all nominees act with neutrality and not as 'representatives' of any organisation.

## Voice

5.41. The Labour Code or implementing regulations must provide for fair hearings during the arbitration process.

**Recommendation B16:** The Labour Code, or implementing regulations, should provide for fair hearings comparable to those in courts or in commercial arbitration; in particular:

- Fees for users should be eliminated or kept to a minimum.
- All parties should have a reasonable opportunity to present their cases.
- Subject to the need for fair hearings, proceedings should be quick and adhere to time limits.
- Procedures should be transparent, including public reporting of procedures and operations.
- Parties and witnesses should be protected against retaliation because they have commenced dispute resolution proceedings.

### **1. Viet Nam government decisions and regulations**

Decision No. 145/QD-TTg dated 20/1/2016 of the Prime Minister on the Approval of the Strategy for International Integration in Labour and Social Affairs Through 2020, Vision to 2030.

Decision No. 2528/QD-TTg dated 31/12/2015 on Approving the Plan of Implementation and Proposal for Joining the Conventions of the United Nations (UN) and the International Labour Organization (ILO) in the labour and social fields in the period of 2016-2020.

Decree No. 43/2012/ND-CP detailing Article 10 of the Trade Union Law on rights and responsibilities of trade unions in representing and protecting lawful and legitimate rights and interests of workers.

### **2. Key ILO instruments and databases**

ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labour Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010).

Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87).

Right to Organise and Collective Bargaining Convention, 1949 (No. 98).

Collective Bargaining Convention, 1981 (No. 154).

Collective Agreements Recommendation, 1951 (No. 91).

Collective Bargaining Recommendation, 1981 (No. 163).

IRLEX database.

NATLEX database.

NORMLEX database.

### 3. Academic articles and reports

Acemoglu, D and Jackson M 2017, 'Social Norms and the Enforcement of Laws', *Journal of the European Economic Association*, vol. 15, no. 2, pp. 245-295.

Anner, M and Liu X 2015, 'Harmonious unions and rebellious workers a study of wildcat strikes in Viet Nam' *ILR Review*, vol. 69, no. 1, pp. 3-28.

Berkowitz D, Pistor K and Richard JF 2003, 'The Transplant Effect', *The American Journal of Comparative Law*, Volume 51, Issue 1, 163–204.

Block, RN and Simmelkjaer, RT 2013 'Introduction and Overview (Special Issue on Labour Dispute Resolution)', *Comparative Labor Law and Policy Journal*, vol. 34, no. 4, pp. 737-741.

Budd JW & Colvin A 2008, 'Improved Metrics for Workplace Dispute Resolution Procedures: Efficiency, Equity and Voice', *Industrial Relations* vol. 47 no. 3 pp. 460-479.

Clarke, S 2006, 'The Changing Character of Strikes in Viet Nam', *Post-Communist Economies*, vol. 18, no. 6, pp. 345, 348.

Colvin, A 2017, *The Growing Use of Mandatory Arbitration*, Economic Policy Institute Report, September 2017.

Cooney S and Do HH 2017, Assisting Viet Nam to Ratify the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and the Right to Organise and Collective Bargaining Convention, 1949 (No.98), Report prepared for the International Labour Organization, Hanoi Country Office, October 2017.

Cooney S, Biddulph S and Zhu Y 2013, *Law and Fair Work in China*, Routledge, London.

Croucher R, Joung KE and Miles L (2013) 'Evaluating South Korean Legal Channels for Individual Employment Disputes Through Budd and Colvin's Framework', *Comparative Labor Law and Policy Journal* vol. 13 no. 1, 45-66.

Do HH 2016, *The dynamics of legal transplantation: regulating industrial conflicts in post-Doi moi Viet Nam*, Ph.D. thesis, University of Melbourne.

Do HH 2018, 'Strike Settlement in Transitional Viet Nam and the Persistence of Socialist and Marxist-Leninist Influences' in Fu H, Gillespie J, Nicholson P and Partlett W, *Socialist Law in Socialist East Asia*, Cambridge University Press, Cambridge.

Do, QC 2011, *Understanding Industrial Relations Transformation in Viet Nam: A Multi-Dimensional Analysis* (PhD Thesis, University of Sydney, 2011).

Do, QC, 2013, 'Enhanced employee participation and the influence from below' *Asia Pacific Journal of Human Resources*, Vol. 51, No. 2, pp. 193-207.

Do, QC 2017, 'The Regional Coordination of Strikes and the Challenge for Union Reform in Viet Nam', *Development & Change*, vol. (2017) 48(5): 1052-1068, 1057.

Do QC and Nguyen HL 2018, *Current Situation of Industrial Relations and Wages Databases and Proposed Indicators: a Study Report*, International Labour Office, Hanoi.

Dung HX 2011, *Some Assessment on Activities of the District Labour Conciliators and the Provincial Labour Arbitration Council in Resolving Labour Disputes*, unpublished paper by secretary of the labour arbitration council in Ho Chi Minh city, on file at International Labour Office, Hanoi,'

Ebisui M, Cooney, S and Fenwick, C (eds) 2016, *Resolving individual labour disputes: A comparative overview*. International Labour Office, Geneva.

Ford, M and Sirait G 2016, 'The state, democratic transition and employment relations in Indonesia', *Journal of Industrial Relations*, vol. 58, no. 2, pp. 229-242.

Gillespie, J 2015, 'Localized Global Competition Law in Viet Nam: A Bottom-up Perspective', *International and Comparative Law Quarterly* vol. 64, pp. 956.

Ginsburg T and Hoetker G (2006), 'The Unreluctant litigant: an Empirical Analysis of Japan's Turn to Litigation' *The Journal of Legal Studies*, Vol. 35, Issue No. 1, pages 31-59.

Halegua, A 2016, 'United States' in Ebisui M, Cooney, S and Fenwick, C (eds), *Resolving individual labour disputes: A comparative overview*. International Labour Office, Geneva.

Hoang, MT 2015, *Report on Performance of Prevention and Resolution Mechanisms for Individual Labour Disputes: Viet Nam*, International Labour Organization, Geneva.

Honami, M 2015, 'How Successful is Japan's Labor Tribunal System?: The Labor Tribunal's Limited Scope and Effectiveness', *Asia Pacific Law and Policy Journal*, Vol.15 No. 2.

Hou, LL and Li, KG 2016, *A Report of Individual Labour Disputes in Mainland China*, report prepared for International Labour Office, Geneva.

Institute for Workers and Trade Unions 2016, *Identifying and Responding to Unfair Labour Practices against Trade Unions and Workers in Viet Nam*, Hanoi.

International Labour Organization 2006, *Digest of decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO*, Fifth (Revised) Edition, Geneva.

International Labour Organization 2012, *Giving globalization a human face: General Survey on the Fundamental Conventions concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008*, Report of the Committee of Experts on the Application of Conventions and Recommendations (articles 19, 22 and 35 of the Constitution) Report III (Part 1B) 101st Session of the International Labour Conference, 2012, Geneva.

International Labour Office 2014 (?), *Good Practices and Lessons Learnt from Pilot Initiatives of Viet Nam General Confederation of Labor in Trade Union and Industrial Relations Development*, International Labour Office, Hanoi.

International Labour Office 2015 (?), *ILO Working Paper: Review of the Vietnamese Labour Law in light of Core International Labour Standards*, International Labour Office, Hanoi.

International Labour Organization International Training Centre 2014, *Guide to International Labour Standards* (2<sup>nd</sup> ed.), Turin.

International Training Centre of the ILO International Labour Organization 2013, *Labour Dispute Systems: Guidelines for improved performance*, ITCILO, Turin.

Kerkvliet, B 2014, 'Workers' protests in contemporary Viet Nam', *Labour in Viet Nam*, vol. 5, no. 1. pp. 160-210.

Lee, CH 2006, 'Industrial Relations and Dispute Settlement in Viet Nam', ILO Discussion Paper, Hanoi.

Lee, JH 2015, 'Understanding the effectiveness of individual labour dispute resolution systems in Korea', unpublished ILO country report - Republic of Korea, International Labour Office, Geneva.

Marshall, S and Fenwick, C 2016, 'Labour law and development: Characteristics and challenges' in Marshall, S and Fenwick, C (eds) *Labour Regulation and Development*, Edward Elgar Publishing, Cheltenham, United Kingdom, pp. 1-32.

Ministry of Labour, Invalids and Social Affairs (MOLISA) 2018, *Industrial Relations Report*, Hanoi.

Nogami, N 2013, *ILO Discussion Paper: Review of the Vietnamese Revised Labour Law and Case Studies Against International Labour Standards and Recommendations for a Way Forward*, International Labour Office, Hanoi.

Tu Thanh Nguyen, Competition Law in Viet Nam: A Paper or Young Tiger, 57 *Antitrust Bull.* 409 (2012).

Pham TT 2017, 'Why Always Wildcat Strikes', *Global Labour Column*, No. 290, University of Witwatersrand.

Pistor, K, Berkowitz D and Richard JF 2003, 'The Transplant Effect', *American Journal of Comparative Law*, vol. 51, no. 2, pp. 163-203.

Pringle, T and Clarke, S 2011, *The Challenge of Transition: Trade Unions in Russia, China and Viet Nam*, Palgrave Macmillan, Basingstoke, United Kingdom.

Siu, K and Chan, A 2015, 'Strike Wave in Viet Nam 2006-2011', *Journal of Contemporary Asia*, vol. 45, no. 1, pp. 71-91.

Tagjman, D 2015, *A Comparative Study of Governmental Industrial Relations Agencies in Nine Countries*, 5 November, 2015, International Labour Office, Hanoi.

Teubner, G. 1998, 'Legal irritants: good faith in British law or how unifying law ends up in new divergences', *Modern Law Review*, 61: 11-32.

Tran, AN 2013, *Ties that Bind: Cultural Identity, Class and Law in Viet Nam's Labor Resistance*, Cornell University Press, Cornell, Ithaca.

Tran, LTT 2017(?) Labour Dispute Resolution In Viet Nam - Status and Challenges, un published paper, Hanoi University.

Trinh, LK 2014, 'Trade Union Organizing Free from Employers' Interference: Evidence from Viet Nam', *Southeast Asian Studies*, vol. 3 no. 3, pp. 589-609.

Van Gramberg, B, Teicher J and Nguyen T 2013, 'Industrial disputes in Viet Nam: The tale of the wildcat'. *Asia Pacific Journal of Human Resources*, vol. 51, no. 2, pp 248-268.

Viet Nam Chamber of Commerce and Industry 2015, ILO Conventions 87, 98 and 105: *what they mean for Viet Nam labour market and how Vietnamese business needs to react*, discussion paper dated August 2015.

Wang HZ, 2017, *Global Capital and Local Labor Unrest: Strikes in Taiwanese Factories in Viet Nam*, unpublished manuscript.

Yamakawa, R 2015, The Law of the Labour Relations Commission: Some Aspects of Japan's Unfair Labor Practice Law, *Japan Labor Review*, vol. 12, no. 4, 51-63.

## Reform option A: A Viet Nam Labour Disputes Settlement Commission

1. The researchers identify an institutional form in regional countries that assists in addressing the four criteria: labour relations commissions. Unlike the Labour Arbitration Councils in current Vietnamese law, labour relations commissions in many countries play a significant practical role in industrial relations systems.
2. Another option would be to confer greater jurisdiction on the ordinary courts. However, judges in ordinary courts are not trained to deal with complex labour disputes, especially interest disputes, nor do they have appropriate procedures. Countries which have not established labour relations commissions have frequently found it necessary to establish specialist labour courts (for example, Singapore, Malaysia and Germany). This would require greater structural disruption and expense, therefore that option is not pursued here.

**Recommendation A1: Labour Arbitration Councils should be transformed into a Viet Nam Labour Disputes Settlement Commission, similar to those in other countries in the region.**

3. Examples of labour relations commissions, or equivalent institutions, are set out in Table 4.2 [above]. It covers the four key countries we examine in this report (Australia, Japan, Korea and the Philippines) as well as Cambodia, China, Indonesia and Malaysia).

## The organisational structure of a Viet Nam Labour Disputes Settlement Commission

4. All of the institutions in Table 4.2 have branch offices (or at least circuit hearings). These do not necessarily follow administrative divisions. For

example, the central institution may be based in a capital with branch offices in certain major cities, but not all provinces or states. This is the case in Korea, Malaysia and the Philippines.

5. Where labour relations commissions are not organised according to sub-national divisions such as provinces or states, they are administered by the national government, usually by the relevant labour ministry.
6. The Labour Code 2012 provides that Labour Arbitration Councils be set up at the provincial level (article 199). However, as provinces in Viet Nam differ very greatly in terms of population and industrial structure, this does not seem workable (as current practice demonstrates). Therefore, it is suggested that the government establish a system which is centrally administered.
7. We note that, while there are no *labour* institutions equivalent to a centrally-administered labour relations commission in Viet Nam, there are other Vietnamese institutions which may serve as useful examples. For example, the Viet Nam Competition Council<sup>9</sup>, established under the Competition Law of Viet Nam,<sup>10</sup> operates under the Ministry of Industry and Trade but has the status of a separate legal entity with its own seal. A related agency, the Viet Nam Competition Authority is also a separate legal entity. While established in Hanoi, the Viet Nam Competition Authority has branch offices in Ho Chi Minh City and Da Nang. These are national rather than provincial agencies and they have some control over their own budgets.

**Recommendation A2: The Viet Nam Labour Disputes Settlement Commission should be a national level, autonomous, agency with branch operations in major cities. This would be similar to agencies such as the Korean Labour Relations Commission, and the competition law authorities in Viet Nam.**

## Infrastructure of the Viet Nam Labour Disputes Settlement Commission

8. In all of the countries cited here, labour relations commissions share many physical and administrative characteristics of courts. They all have secretariats,<sup>11</sup> operational space, regular business hours, contact

<sup>9</sup> Original decree: The decree of the Government No.05/2006/ND-CP on establishment, functions, duties, power and organizational structure of Viet Nam Competition Council, dated January 9th, 2006.

<sup>10</sup> Competition Law of Viet Nam, Chapter IV Section 2.

<sup>11</sup> See Korean Labour Relations Commission Act 1997, article 14.

addresses and, with the partial exception of China, a web presence.

9. Furthermore, in most of these countries, the labour relations commissions have a high degree of institutional and financial autonomy from the labour ministry, although they may operate within its structure. For example, the Korean statute governing that's country's labour relations commission system provides as follows:

(1) *The Labor Relations Commission has discretion over the performance of functions and duties within its authority.*

(2) *The Chairman of the National Labor Relations Commission manages budgets, personnel affairs, education and training and other administrative matters of the National and Regional Labor Relations Commissions and may direct and supervise staff [...]. (Labour Relations Commission Act 1997 (Korea), article 4).*

**Recommendation A3: The Viet Nam Labour Disputes Settlement Commission should enjoy institutional autonomy, similar to that enjoyed by quasi-judicial labour relations commissions in other countries, and the Vietnamese competition authorities. It should:**

- **have its own offices which are accessible in a similar way to courts;**
- **operate during normal business hours;**
- **have a secretariat that can assist in the administration of case load, and in answering public inquiries;**
- **operate its own website and telephone contact service;**
- **be a separate legal entity with its own seal;**
- **have its own operating budget; and**
- **be able to make decisions, including arbitration orders, without external bureaucratic interference.**

## **Members of the Viet Nam Labour Disputes Settlement Commission**

10. The labour institutions from other countries surveyed in this report engage highly qualified people to carry out their dispute resolution functions. These people are frequently lawyers<sup>12</sup> or persons with extensive experience in labour relations.<sup>13</sup> The demanding nature of the

<sup>12</sup> See, for example, Labor Code of the Philippines, article 215.

<sup>13</sup> See, for example, Korean Labour Relations Commission Act 1997, article 8.

qualifications is very important to uphold the *credibility* of the institution, which is a key aspect of equity. Experienced and well qualified members are more likely to be able to engage in 'unbiased and consistent decision making based on evidence' than people without sufficient expertise or practical knowledge. The general public, including both workers and employers, are more likely to have confidence in an institution staffed with such people. This may induce them to refer their disputes to the institution, rather than initiating actions such as unlawful strikes.

11. Several labour institutions also have worker and employer representatives, which sometimes hear cases together with a public/independent member. In Japan, Korea and the Philippines, for example, the law requires that these bodies have a tripartite structure. This can enhance credibility and also bolster the dimension of voice, through providing representation of interest groups. The members are commonly chosen from employer and worker organizations.
12. Although they do not operate in practice, the Labour Arbitration Councils in Viet Nam are also intended to be tripartite in structure. It would seem useful to retain this feature in the transition to the Viet Nam Labour Disputes Settlement Commission.

**Recommendation A4: The Viet Nam Labour Disputes Settlement Commission should be tripartite in structure with an equal number of members representing employers, workers and the public interest. These persons should be appointed at the national level but may be assigned to specific regions. The members representing employers and workers should be appointed from a list of persons recommended by employer and worker organizations at the national level.**

**Recommendation A5: Members of the Viet Nam Labour Disputes Settlement Commission should satisfy qualification criteria which include familiarity with labour law and labour relations, and a record of ethical behaviour. Public interest members should hold a university qualification in law, labour relations, or a related field and have at least five years practical experience in labour relations. The views of employer and worker organizations should be sought in the appointment of public interest members.**

13. The term of office of labour relations commission members in other countries varies. In Japan and Korea, members are appointed for three

---

<sup>14</sup> Japan Trade Union Law, article 19-5. Korean Labour Relations Commission Act 1997, article 7.

years but this term is renewable.<sup>14</sup> In the Philippines, by contrast, members are appointed until they reach retirement age, unless they engage in inappropriate behaviour or become incapacitated.<sup>15</sup> It is important that members of a labour relations commission have some security of tenure so that they:

- can gain experience and confidence in the job;
- are protected against retaliation owing to decisions taken in good faith and in accordance with the law; and
- can contribute to ensuring that the administration of the commission is stable.

14. However, it does not follow that members should be appointed until retirement age. In a context where the suitability of appointees is untested (because there have been no formal labour arbitrations in Viet Nam), it may be preferable to adopt the Korean approach and have limited, but renewable terms.

**Recommendation A6: Members of the Viet Nam Labour Disputes Settlement Commission should serve terms of at least three years. These terms can be renewable depending on the performance of the member.**

15. Members of labour relations commissions in other regional countries generally enjoy terms and conditions of employment of very senior public servants or judges in order to attract outstanding persons who can enhance the public credibility of the institution. The senior status and conditions help guard against corruption and help attract the most competent and experienced people, as experience in multiple countries has shown.

**Recommendation A7: Core members of the Viet Nam Labour Disputes Settlement Commission should enjoy terms of employment comparable to those of senior public servants or senior judges.**

16. The labour dispute institutions in regional countries have both full-time and part-time staff. The relative proportions vary from country to country. For example, in Australia and the Philippines, most staff are full-time, whereas in Korea and Cambodia, there is a core full-time staff and a larger number of part-time staff. In this latter case, the core staff oversee the operation of the institution and co-ordinate the appointment and work of the part-time members.

<sup>15</sup> Labor Code of the Philippines, article 215.

17. Even in those countries where there are mainly full-time arbitrators, such as the Philippines, a core group of senior labour arbitration commission members can be responsible for leading the institution. This can include through issuing guiding rules, deciding difficult cases and/or hearing appeals.
18. In the case of Viet Nam, it is not clear how many disputes may be brought to the labour relations commission (see also Impact Assessment). It is therefore difficult to estimate how many members of the labour relations commission may need to be appointed. Some comparative data in Table Annex-1 below may suggest the number of cases that may ultimately be brought before the Viet Nam Labour Disputes Settlement Commission. This will depend on the jurisdiction of the Commission and on how it fares on the criteria of efficiency, equity and voice.
19. Given these conditions of uncertainty, it would seem appropriate to be cautious in the number of initial appointments to the proposed Commission. The preferable approach may be to appoint a core number of senior full-time members, and to supplement their numbers with part-time members as required. If the case load proves to be high, then more full-time members would need to be appointed.
20. Considering the number of full-time members of labour relations commissions and their equivalents in regional countries, there would seem to be at least fifteen needed as the core of the Viet Nam Labour Disputes Settlement Commission:

**TABLE ANNEX - 1: CORE SENIOR STAFF OF LABOUR RELATIONS COMMISSION OR EQUIVALENT**

Country	Core part of institution	Number of core members	Tripartite?
Japan	Central Labour Relations Commission	15	Yes
Korea	National Labour Relations Commission	170	Yes
The Philippines	National Labour Relations Commission	15	Yes
Australia	Fair Work Commission (presidential members)	19	No
Cambodia	Arbitration Council	30	Yes

**Recommendation A8:** The Viet Nam Labour Disputes Settlement Commission should consist of at least fifteen members, preferably full-time. Five members would be nominated from worker representatives, five from employer representatives and five to represent the public interest. The law should provide for the appointment of additional full-time and part-time members as required. An approximate gender balance should also be maintained.

21. In all the other regional countries, the labour relation commissions are headed by a President or Chairperson of high standing. The President presides over the administration of the commission and represents the commission to the public. In Korea and the Philippines, the President of the Labour Relations Commission is appointed by the President of the country and in Korea, she or he has the status of a Minister. In Japan, the Chairperson is elected by the other public interest members. These examples suggest that it is important to appoint a publicly visible person who can exercise a leadership function.

**Recommendation A9:** The Viet Nam Labour Disputes Settlement Commission should be led by a Chairperson who is a highly competent, fair-minded and ethical person able to gain the trust of the public, employers and workers. The Chairperson's appointment should be confirmed at the highest level of government. The Chairperson could be chosen either by the government or by election from among the public interest members.

22. All regional countries provide for dismissal of labour relations commissions members on the grounds of serious physical and mental incapacity or for serious misconduct. Evidence of corruption would constitute serious misconduct. Any dismissal should take place only after an impartial and objective inquiry.
23. In order to avoid suspicion of corruption or impartiality, members should recuse themselves (that is, not preside over the hearing) in any case where they have a personal or financial interest. The rules for recusal should be indicated in legislation and/or in the relevant decree.<sup>16</sup>

**Recommendation A10:** A member of the Viet Nam Labour Disputes Settlement Commission should be dismissed where it is shown, through a fair and objective process, that the member is suffering from a serious

<sup>16</sup> See, for example, Korean Labour Relations Commission Act 1997, article 11-2.

physical or mental incapacity which prevents them from carrying out their work, or where there is compelling evidence of serious misconduct (such as accepting bribes to influence the outcome of a case).

**Recommendation A11:** There should be clear rules that indicate where members should recuse themselves from a hearing due to a potential conflict of interest, in order to avoid the appearance of impartiality and/or corruption.

## Jurisdiction of the Viet Nam Labour Disputes Settlement Commission

24. Earlier in this report, we indicated that one of the key criteria in evaluating the effectiveness of a dispute resolution is its jurisdictional coverage. The question of jurisdictional coverage is also relevant to estimating the number of cases to be dealt with by an institution, and therefore its staffing levels, and infrastructure.
25. The foreign labour relations commissions and their equivalents vary in their jurisdictional coverage. This is in part because they coexist with other institutions, such as courts, labour inspectorates and mediation agencies, which deal with some categories of labour disputes. However, it is usual for labour relations commissions to deal, at least, with unfair labour practices and with collective interest disputes.
26. In order to consider the possible jurisdiction of a Viet Nam Labour Disputes Settlement Commission, it is appropriate to consider the different categories of labour disputes, and then determine where gaps exist, given the configuration of other institutions in the Vietnamese system.
27. Returning to the terminology outlined in Section 2 above, we can broadly categorise labour disputes as:
  - individual rights disputes;
  - individual interest disputes;
  - collective rights disputes;
  - collective interest disputes; and
  - (a further category) disputes about union coverage.

## Individual rights disputes

28. Individual rights disputes can be dealt with in Viet Nam, as in other countries, by the court system.<sup>17</sup> The treatment of individual rights disputes by Viet Nam's court could be improved, having regard to the criteria considered above (efficiency, equity, voice). However, we noted above that the system is being used to deal with many individual rights disputes in practice.
29. In certain kinds of cases, particularly those solely involving debts (such as a claim with respect to unpaid wages, social security or termination money), courts are very well placed to resolve disputes; they do not require judges to have any special labour expertise. Around 83 per cent of labour cases in the courts appears to be of this kind (MOLISA 2018: 19). There appears to be no compelling reason why courts should not continue to hear such cases.
30. In contrast, certain instances of termination of employment, while at first glance individual in nature, have broader industrial implications. This is the case where it is alleged that a failure to hire, a dismissal, or other prejudicial action such as demotion or transfer, has occurred because of a worker's organizational activities. This is a form of *unfair labour practice* which we will term *adverse action*.
31. We have seen that there is credible evidence that there are significant numbers of such cases in Viet Nam.
32. In other countries, it is a core function of labour relations commissions or their equivalents to provide remedies for adverse action against worker activists. It would seem that this should also be the case in Viet Nam.
33. The Zero Draft Labour Code contains provisions empowering Labour Arbitration Councils to deal with adverse action cases.<sup>18</sup> This is a very significant improvement on the current Code. We note, however, that adverse actions cases are categorized as 'collective rights disputes' in the draft. This is not always accurate, since, with respect to an individual who is dismissed for attempting to set up a worker representative organization where there is currently none in existence, there would be

---

<sup>17</sup> Labour Code 2012, article 200.

<sup>18</sup> Article 190(2)(c).

in an individual dispute with the employer.<sup>19</sup> It would be preferable to categorise these as neither individual nor collective rights disputes but as unfair labour practice disputes.

**Recommendation A12: The Viet Nam Labour Disputes Settlement Commission should have jurisdiction over unfair labour practice disputes, including over cases of alleged adverse action against a worker, or a prospective worker, on the grounds of that worker’s activities in relation to a worker representative organization. This jurisdiction should exist irrespective of whether the unfair labour practice is individual or collective in nature.**

34. In countries such as Australia, Korea and the Philippines, the labour relations commissions or equivalents have a broader jurisdiction to hear unfair dismissal and disciplinary cases (even if apparently unrelated to worker organization activities) as well as other employment related matters. This jurisdiction overlaps with that of the courts. The advantage of this is that a labour relations commission retains jurisdiction over a termination disputes in instances where the termination was not because of worker organization activity but was nonetheless unfair. In addition, this may lead to more efficient treatment of such cases than judicial hearings (in terms of time and cost) and may also provide for greater worker and employer voice (because the labour relations commissions are tripartite).
35. In the two of these countries for which detailed data is available (Australia and Korea), unfair dismissal cases constitute at least half the caseload of the Commission.<sup>20</sup> Given:
- this potential high caseload;
  - terminations which are not unfair labour practices are not a Convention No. 98 compliance matter; and
  - and the fact that these disputes are currently being dealt with by the courts,

<sup>19</sup> Compare Trade Union and Labour Relations Adjustment Act 1997 (Korea) article 81(1); Fair Work Act 2009, Part 3-1 Division 3; Japan Trade Union Law 1949, article 7(1); Labor Code of the Philippines, article 248(a), (b) and (e).

<sup>20</sup> See the sources cited for Australia and Korea in Table 3 which put the percentages at 76 per cent in the case of Korea and 54 per cent in the case of Australia (a small proportion of the latter cases may also be unfair labour cases).

**Recommendation A13:** Consideration could be given to extending the jurisdiction of the Viet Nam Labour Disputes Settlement Commission to cover all disputes concerning termination of employment and discipline regardless of whether they are individual or collective, and regardless of whether they involve unfair labour practices. However, this would likely entail and increase in staffing and infrastructure. This jurisdiction is also not required by Conventions No. 87 and No. 98.

### Individual interest disputes

36. There is currently no legislative provision for the resolution of individual interest disputes. Ordinarily, these are dealt with by individual negotiation and do not require the intervention of an external body. An individual request for a pay-rise is a case in point. However, sometimes an employer and an employee (likely in a senior role) may wish to have an interest dispute dealt with by an external agency.
37. The Viet Nam Labour Disputes Settlement Commission could potentially deal with such disputes if they were voluntarily referred to it. We suggest that the Commission have discretion to either accept or refuse such cases, depending on whether it is overworked, since the priority for the Commission should be to deal with those cases which constitute its core work (such as unfair labour practices and collective disputes).
38. We note that article 200 of the Zero Draft of the Labour Code provides for arbitration of individual disputes by consent. This provision is suitable providing that the proposed Commission has the discretion to refuse to accept such cases for workload reasons.

**Recommendation A14:** The proposed Viet Nam Labour Disputes Settlement Commission should be empowered to accept voluntary requests for arbitration of individual interest disputes (along the lines of article 200 of the Zero Draft Labour Code), provided that the Commission is also empowered to refuse to accept such cases where it would detract from its ability to deal with its core caseload in an efficient manner.

## Collective rights disputes

39. Collective rights disputes include:
- a) disputes about the refusal to hire, termination of or other adverse action against more than one worker, or potential worker, on account of their worker organization activity;
  - b) disputes about a refusal to engage in good faith bargaining;
  - c) disputes about the interference from an employer in the management of a worker representative organization, including a union;
  - d) disputes about the interference from a workers' organization in an employer organization; and
  - e) disputes about the interpretation of a collective agreement.
40. Items (a)-(d) concern unfair labour practices which are the subject matter of ILO Convention 98. As indicated above, the labour relations commissions in Japan, Korea and the Philippines<sup>21</sup> as well as, in part, the Fair Work Commission in Australia<sup>22</sup> all have jurisdiction with respect to unfair labour practices, whether they give rise to an individual or collective dispute.
41. The 2012 Labour Code provides that collective rights disputes can be dealt with by a court (in addition to other mechanisms).<sup>23</sup> Labour Arbitration Councils do not have jurisdiction to hear collective rights disputes; they are empowered to hear collective interest disputes only.
42. While it is in principle possible to confer jurisdiction on courts to deal with unfair labour practices rather than on a labour relations commission, the experience in the region (and elsewhere)<sup>24</sup> suggests that labour relations commissions have greater expertise in dealing with this form of labour dispute than courts. This is particularly so where the labour relations commission have tailored procedures and remedies.
43. We further note that in practice, while Viet Nam courts frequently deal with general termination cases, they do not appear to deal frequently

<sup>21</sup> Japan Trade Union Law articles 7, 19 and 20; Korean Trade Union and Labour Relations Adjustment Act articles 81 and 82; Labor Code of the Philippines article 217 and Title VI.

<sup>22</sup> Fair Work Act 2009 (Australia) article 576.

<sup>23</sup> Article 203.

<sup>24</sup> Such as in several Canadian provinces and with the National Labor Relations Board in the United States.

with unfair labour practice terminations. In any event, courts have not prevented unfair labour practices from occurring often.

44. Disputes about the interpretation of a collective agreement (item (e) above) are also collective rights disputes. While it is currently possible for these disputes to be referred to a court, it is again the case that a specialist labour relations institution will in general have more industrial expertise than a generalist court.
45. Moreover, we note that only a very few cases involving the interpretation of a collective agreement have in fact been brought to the courts.<sup>25</sup> We therefore suggest that the Viet Nam Labour Disputes Settlement Commission share jurisdiction concerning disputes about the interpretation of a collective agreement with the People's Courts.
46. We note that the Zero Draft Labour Code provides that Labour Arbitration Boards have jurisdiction in relation to:
  - collective unfair labour practices; and
  - the interpretation of collective agreements.<sup>26</sup>

This provision gives effect to our Recommendation, save that the Labour Arbitration Councils should be transformed into the Viet Nam Labour Disputes Settlement Commission.

**Recommendation A15: The Viet Nam Labour Disputes Settlement Commission should have jurisdiction over collective rights disputes concerning:**

- **unfair labour practices; and**
- **the interpretation of collective agreements.**

**as set out in the Zero Draft Labour Code, provided that the reference to 'Labour Arbitration Council' should be replaced by 'Viet Nam Labour Disputes Settlement Commission'.**

### **Collective interest disputes**

47. A further category of dispute concerns disputes between a group of workers, often unionized, and one or more employers over claims to

---

<sup>25</sup> Between 2012 and 2016 only 9 out of 24,854 labour cases settled by first instance courts involved disputes related to collective agreements and union establishment (0.04 per cent of cases): MOLISA 2018: 19.

<sup>26</sup> Articles 190(2)(b), 204.

improve conditions. A common way in which collective interest disputes occur is when the parties to collective bargaining have claims that cannot easily be reconciled.

48. Collective interest disputes are associated with strikes and other forms of industrial action, as industrial action is a 'weapon of last resort' that can be used to pressure the other party to give ground.
49. From the perspective of the ILO Supervisory Bodies, the role of dispute resolution bodies in collective interest disputes should be limited. This is because of the concern that if a dispute resolution body intervenes, it may undermine the autonomy of the parties and impede exercise of the right to strike.
50. This limitation on the availability of compulsory arbitration is generally observed in the labour relations commissions concerned in this report. These commissions may hear collective interest disputes where parties *voluntarily* refer the dispute for arbitration.<sup>27</sup>
51. In Viet Nam, under the Labour Code 2012,<sup>28</sup> mediation by the Labour Arbitration Councils in collective interest disputes is a precondition to a lawful strike. However, Labour Arbitration Councils cannot arbitrate or otherwise impose a solution (and of course they do not operate in practice). This legal position is consistent with the pronouncements of the ILO Supervisory Bodies.
52. On the other hand, labour relations commissions in Korea<sup>29</sup> and the Philippines,<sup>30</sup> as well as the Fair Work Commission in Australia,<sup>31</sup> all have power to undertake compulsory arbitration in certain circumstances, such as where a strike occurs in essential services.
53. The issue of exactly which kinds of collective interest disputes can be taken to compulsory arbitration is vexed and cannot be explored in detail in a report of this nature. However, there are certain matters – linked to the passage from the Committee of Experts cited above – which need to be carefully considered as possible subjects for compulsory arbitration.

<sup>27</sup> See for example, Trade Union and Labour Relations Adjustment Act 1997, article 62.

<sup>28</sup> Article 206.

<sup>29</sup> Korea Trade Union and Labour Relations Adjustment Act article 80.

<sup>30</sup> Labor Code of the Philippines article 263.

<sup>31</sup> Fair Work Act 2009 Part 2-5 Division 3 and Division 4.

**Recommendation A16:** The Viet Nam Labour Disputes Settlement Commission should have jurisdiction over collective interest disputes where these are voluntarily referred to it.

**Recommendation A17:** Careful consideration should be given to providing for compulsory arbitration of collective interest disputes by the Viet Nam Labour Disputes Settlement Commission in the following cases:

- where the dispute occurs in essential services (as defined by the ILO Supervisory Bodies);
- where the dispute occurs among public services engaged in the administration of the state (as defined by the ILO Supervisory Bodies);
- in the event of an acute national crisis; and
- where collective bargaining has failed because of the persistent refusal to bargain in good faith by one of the parties, at least in the case of a first collective agreement (this is an unfair labour practice).

The law should provide that compulsory arbitration should only be used where less forceful methods (such as mediation) have failed, except in the case of an emergency.

### Collective disputes, arbitration and strikes

54. The Zero Draft Labour Code proposes that workers be able to engage in lawful strikes where the employer engages in unfair labour practices and where bargaining fails.
55. Under the current 2012 Labour Code, (and under the Zero Draft Labour Code), a strike can only proceed after mediation by a Labour Arbitration Council has been unsuccessful. This procedure is not followed in practice.
56. This report does not express a view as to whether mediation should be required before a strike can be lawful.
57. However, having regard to what has just been said about compulsory arbitration, we note that, other than in relation to the exceptional cases identified above, arbitration should not be a precondition to striking unless both parties consent to the arbitration.

---

<sup>32</sup> Article 205.

<sup>33</sup> Article 206.

**Recommendation A18: Other than in the cases identified in Recommendation A17, strikes should not be prevented by compulsory arbitration.**

58. A related issue concerns determining the legality of a strike. Experience in other countries suggests that workers and their representative organizations may wish to determine whether a strike is lawful, and this will influence whether or not to participate in it. Furthermore, employers may wish to know whether a strike is lawful in order to plan their response.
59. While a court can determine whether a strike is lawful, it does so in a context which is disconnected from collective bargaining. On the other hand, since labour relations commissions have jurisdiction to assess whether collective bargaining is proceeding in good faith, it may be appropriate that they also be empowered to rule on the legality of a strike.<sup>34</sup>

**Recommendation A19: Consideration should be given to empowering the Viet Nam Labour Disputes Settlement Commission to rule on the legality of a strike.**

### Disputes about union coverage and union elections

60. Considering that the government is taking steps for ratification of 98 and 87 in coming years, we assume in the future that workers will be able to form representative organizations outside the purview of the VGCL. This raises the possibility that there may be multiple worker representative organizations within an enterprise. In such a situation, a dispute may arise about which organization, or organizations, should have the right to represent workers for the purposes of collective bargaining (*representivity disputes*).
61. In Korea<sup>35</sup> and Australia,<sup>36</sup> for example, representivity disputes are dealt with by the Labour Relations Commission/Fair Work Commission according to the particular representation scheme applicable in the respective country. In the Philippines, on the other hand, a separate agency within the Department of Labor and Employment deals with representivity disputes.<sup>37</sup>

<sup>34</sup> See also International Labour Organization 2006 paragraphs 628-631.

<sup>35</sup> Korea Trade Union and Labour Relations Adjustment Act Article 29-2.

<sup>36</sup> Fair Work Act 2009 Part 2-4 Division 8.

<sup>37</sup> Labor Code of the Philippines Book Five Title Three.

62. As we propose that the Viet Nam Labour Disputes Settlement Commission will deal with bargaining-related unfair labour practices, it would be logical to also confer on it the jurisdiction to determine disputes about which worker representatives employers should bargain with, as is the case in Korea and Australia.

**Recommendation A20: The Viet Nam Labour Disputes Settlement Commission should have jurisdiction to determine disputes about which worker representative organizations should have bargaining rights.**

63. A further category of disputes concerns those between worker representative organizations and their members (intra-union disputes) and those between two different worker representative organizations (inter-union disputes). Unlike the other disputes examined in this report, these disputes do not involve an employer.
64. As the proposed Viet Nam Labour Disputes Settlement Commission is conceived as a tripartite institution, it may not be appropriate for it to deal with union-member disputes. We note that the Philippines<sup>38</sup> and Australia<sup>39</sup> have established separate agencies to deal with these disputes.
65. As there is no international trend on this issue, we do not make any recommendation in relation to it.

---

<sup>38</sup> Labor Code of the Philippines Book Five Title Three.

<sup>39</sup> Fair Work (Registered Organizations) Act 2009.

**TABLE ANNEX-2: PROPOSED JURISDICTION OF THE VIET NAM LABOUR RELATIONS COMMISSION**

<p><b>Core compulsory jurisdiction</b> (consent of both parties not required)</p>	<p>Individual and collective unfair labour practices including:</p> <ul style="list-style-type: none"> <li>● adverse action against one or more workers on the ground of worker organization activities;</li> <li>● refusal to bargaining in good faith;</li> <li>● interference from employers or worker representative organizations in each other's organization; and</li> <li>● interpretation of collective agreements;</li> </ul> <p>Certain exceptional collective interest disputes (essential services, persistent refusal to bargain in good faith, national crisis).</p> <p>Determination of union representation rights in collective bargaining (representation disputes).</p>
<p><b>Possible additional compulsory jurisdiction</b> (consent of both parties not required)</p>	<p>All individual and collective unfair dismissal cases (but may be dealt with by court).</p> <p>Determining the legality of strikes.</p> <p>Intra- or inter-union disputes (but may be dealt with by another agency).</p>
<p><b>Voluntary jurisdiction</b> (consent of both parties required)</p>	<p>Individual interest disputes.</p> <p>Collective interest disputes not involving exceptional circumstances.</p>

## Powers and authority of the Viet Nam Labour Disputes Settlement Commission

66. One of the most important shortcomings of the Labour Arbitration Councils is that, despite their name, they are unable to issue legally binding orders unless the parties consent. This means that they cannot provide remedies for unfair labour practices, among other issues.
67. This contrasts with the labour relations commissions in Japan, Korea and the Philippines and most of the other institutions set out in Table 4.2.
68. The absence of enforceable remedies may help to explain while Labour Arbitration Councils are not used. Without enforcement powers, they lack a key element of the equity criterion and are not credible.
69. In a report on the March 2017 draft Labour Code, one of us noted that the proposed enforcement powers of the Labour Arbitration Councils do not appear to be clear (Cooney and Ha 2017). Article 204 (3) of the Zero Draft provides that Labour Arbitration Councils can ‘issue a decision’. The provision states that ‘such a decision shall be final judgment and shall be sent to the disputing parties’.
70. However, the draft provision goes on to state that:
- With respect to the disputes [concerning legislative interpretation/ implementation and unfair labour practices], which arise from acts in breach of the law by either of the disputing parties, the arbitration panel shall, depending on the nature and extent of such acts, produce a record of violation and make recommendation accordingly to the authority competent for administrative sanctions, criminal investigation, remedial measures or restitution in accordance with the law (emphasis added).*
71. It is therefore not clear what powers a Labour Arbitration Council would have to make a binding order in relation to unfair labour practices and other matters. On one reading, it is dependent on another agency to provide sanctions and remedies.
72. In the 2017 report by Cooney and Ha, the authors referred to the powers of the Korean Labour Commission:<sup>40</sup>
- (1) The Labor Relations Commission, after completing the inquiry [...] and finding that the employer has committed unfair labour practices, shall issue an order for remedy to the employer. When the Commission determines that unfair labour practice has not been

<sup>40</sup> Trade Union and Labour Relations Adjustment Act 1997, article 84.

committed, it shall enter a decision to dismiss the application for remedy.

- (2) Judgments, orders and decisions under paragraph (1) shall be made in writing, and shall be issued to the pertinent employer and the applicant.
- (3) Each of the parties shall comply with the order issued pursuant to paragraph (1).

73. Similar provisions can be found in the commissions in Japan, Australia and the Philippines.

**Recommendation A21:** We strongly recommend that the Viet Nam Labour Disputes Settlement Commission have the power to issue binding orders. The remedies for unfair labour practices should include:

- reinstatement of affected workers in their former positions, or equivalent positions, together with compensation;
- fines commensurate with the size and financial capacity of the enterprise;
- specific orders directed at improper behaviour, such as:
  - (where an employer refuses entry to union officials) an order to permit union officials to enter an enterprise at appropriate times where they have been asked to represent workers; or
  - (where a party unreasonably delays bargaining) an order to meet within a certain time period; and
  - compulsory arbitration with the power to make a binding award (where consistent with Convention No.98).

**Recommendation A22:** The Viet Nam Labour Disputes Settlement Commission should be able to order interim relief similar to that available under Article 114 of the 2015 Civil Proceedings Code.

## Procedure

74. It is not possible in a report of this length to set out detailed procedures for a Viet Nam Labour Disputes Settlement Commission.
75. However, we suggest that any procedures should respond to the criteria of efficiency, equity and voice outlines above.

76. It may also be helpful to have regard to the procedures used by the established labour relations commissions in Japan, Korea and the Philippines, as well as other institutions such as the Fair Work Commission in Australia.
77. The sound management of caseload by the Commission Chairperson and secretariat will also promote efficiency and equity.
78. We set out below some general recommendations which can be elaborated in detail if our proposal for a Viet Nam Labour Disputes Settlement Commission is accepted.

**Recommendation A23:** The procedures of the Viet Nam Labour Disputes Settlement Commission should be determined by reference to the criteria of efficiency, equity and voice, and in particular:

- Fees should be eliminated or kept to a minimum.
- Hearing should be fair, in that all parties should have a reasonable opportunity to present their cases.
- Subject to the need for fair hearings, proceedings should be quick and adhere to time limits.
- Procedures should be transparent, including public reporting of procedures and operations.
- Parties and witnesses should be protected against retaliation.

**Recommendation A24:** The procedures of the Viet Nam Labour Disputes Settlement Commission should provide for appeals from a first instance decision of the Commission to a panel of senior Commission members.

**Recommendation A25:** Appeals from the Viet Nam Labour Disputes Settlement Commission to a court should be permissible only on questions of law (for example, where it is alleged that the Commission has exceeded its authority). An order of the Commission should remain in force while an appeal to a court is heard, unless the court specifically directs otherwise.

**Recommendation A26:** In relation to the onus of proof, if a worker representative organization, or an individual worker, is able to establish (a) adverse action and (b) worker organization activity in relation to one or more workers then it should be presumed that adverse action has occurred because of the worker organization activity unless the employer can prove that this was not one of the reasons for the adverse action.

## Relationship between the Viet Nam Labour Disputes Settlement Commission and labour mediators

79. As noted above, there are some 1,420 labour mediators in Viet Nam. These are appointed at a provincial level and work part-time. They do not hear many cases.
80. One important question is how these mediators will interact with the proposed Viet Nam Labour Disputes Settlement Commission.
81. One possibility is that these mediators would be integrated into the Viet Nam Labour Disputes Settlement Commission. However, there are several problems with this, including the following:
- Mediators hear certain disputes (such as individual rights disputes concerning non-payment of wages) that would not fall within the proposed jurisdiction of the Commission.
  - Mediators are appointed and remunerated at the provincial level and are subject to the direction of the provincial DOLISAs; they would not be subject to the control of the Commission.
82. Another option is that disputes would have to be dealt with by provincial mediators prior to accessing the Viet Nam Labour Disputes Settlement Commission. There are also problems with this, including the following:
- Mediators do not currently have expertise in matters pertaining to the core jurisdiction of the proposed Commission, including unfair labour practices and representation disputes.
  - Urgent cases may be delayed, leading to prolongation of strikes.
  - It may be difficult to achieve administrative coordination between the mediators and the Commission.
83. In view of these problems, the relationship between mediators and the Commission needs further consideration. However, we tentatively propose the arrangement set out in the recommendation below:

**Recommendation A27: Careful consideration needs to be given to determining the relationship between labour mediators and the Viet Nam Labour Disputes Settlement Commission. One possible approach is that:**

- **The Viet Nam Labour Disputes Settlement Commission has exclusive jurisdiction to conduct mediation in relation to disputes within its jurisdiction.**

- **Labour mediators at provincial level continue to conduct mediations in relation to all other matters currently within their remit (such as individual rights disputes over wages).**
- **Where a labour mediator becomes aware that a case before them involves matters within the jurisdiction of the Commission, the matter should be immediately referred to the Commission.**

## **Relationship between the Viet Nam Labour Disputes Settlement Commission and inter-agency taskforces**

84. If the Viet Nam Labour Disputes Settlement Commission gains public credibility, it is likely that the need for inter-agency taskforces will diminish. Such taskforces are unusual in the other regional countries we have been considering.
85. However, it cannot be expected that the Commission will immediately be able to deal with all collective interest disputes, since it will take time for employers and workers to become familiar with, and confident in, the Commission's work. Therefore, the need for inter-agency taskforces may persist for some time.
86. The inter-agency taskforces can nevertheless enhance the credibility and profile of the Commission by referring disputes to it.
87. Furthermore, where the Commission issues a binding order, it is very important that the inter-agency support that order. It is possible that a party that is bound by an order will refuse to observe it. The party may challenge it through industrial action (in the case of a worker party) or by failing to implement it (in the case of an employer). It is important that inter-agency taskforces resist pressure by such parties to disregard the Commission order and negotiate an alternative resolution.

**Recommendation A28:** Inter-agency taskforces should be encouraged to refer collective labour disputes to the Viet Nam Labour Disputes Settlement Commission, with a view to strengthening the Commission's position as the most appropriate institution for dealing with such disputes.

**Recommendation A29:** Inter-agency taskforces should support the Commission in enforcing its binding orders. In particular, an inter-agency taskforce should not resolve a dispute in a way which undermines an existing Commission order.

## Private mandatory arbitration

88. In the United States, it is possible for an employer to enter into a private mandatory arbitration agreement with a worker which requires a worker to submit a workplace dispute to a private arbitration mechanism. This excludes access to courts and tribunals.
89. This practice has been heavily criticised on the grounds that it can lack transparency, lead to bias in favour of employers and eliminates the public interest element in dispute resolution (Halegua 2015; Colvin 2017).
90. None of the countries in the region considered in this report permit this. Nor do other major advanced jurisdictions (Ebisui, Cooney and Fenwick 2016).

**Recommendation A30:** Any contractual arrangement which purports to limit a worker's access to the Viet Nam Labour Disputes Settlement Commission or to the courts should be absolutely void. However, this should not prevent employers from establishing internal grievance resolution systems, provided that they do not prevent access to public dispute resolution systems.

**ILO Country Office for Viet Nam**

48-50 Nguyen Thai Hoc, Ba Dinh, Hanoi, Viet Nam

 (84-24) 3734 0902

 (84-24) 3734 0904

 [www.ilo.org/hanoi](http://www.ilo.org/hanoi)

 Vietnam.ILO



Scan to sign up  
for ILO newsletter