The Age of Mega-Regionals Symposium

Labour Standards Enforcement Within and Beyond Party States Under the TPP: A Case Study of Vietnam

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Overview

1. Background
   - An overview of the two main mechanisms in the TPP for leveraging institutional reform in the area of labour law enforcement: the US-negotiated consistency plans and the labour chapter in the TPP

2. Labour laws and enforcement in Vietnam – a case study

3. The US-Vietnam Consistency Plan (pre-ratification conditionality)

4. The Labour Chapter (post-ratification conditionality)

5. Some concluding observations on the question of effectiveness
Trade-labour linkages & the ‘effective enforcement’ obligation

- Two basic types of obligations in US-negotiated labour chapters: enforcement of domestic labour laws and respect for international standards.
- NAFTA and the NAALC (1994)
- The ‘May 10’ Template
The US-negotiated Labour Consistency Plans

- Side agreements to the TPP negotiated by the US on a bilateral basis with Brunei, Malaysia and Vietnam.
- The plans include specific commitments to improve labour standards and their enforcement through legal and institutional reforms.
- Reflecting past US practice – ‘action plans’ with Peru and Colombia.
- Driven by US domestic politics.
Chapter 19: Labour

- **Definitions**, including of ‘labour laws’ (art 19.1)
- A statement of **shared commitment** (including to ILO standards)(art 19.2)
- Commitments to ‘adopt and maintain in its statutes and regulations, and practices thereunder,’ the fundamental rights in the ILO Declaration and standards on acceptable conditions of work with respect to wages, hours of work and occupational safety and health (art 19.3)
- A non-derogation clause (art 19.4)
- **An effective enforcement obligation** (art 19.5)
- Articles on forced or compulsory labour & corporate social responsibility
- Commitments to implement measures relating to public awareness, access to justice and transparency (arts 19.8)
Chapter 19: Labour

- A public submissions process (art 19.9) through ‘contact points’.
- Provision for cooperative activities between the Parties (art 19.10)
- A process of Cooperative Labour Dialogue between the Parties (art 19.11)
- Provision for Labour Consultations between Parties (art 19.15)
- Establishes an institutional framework, including:
  - A Labour Council, composed of senior governmental representatives at the ministerial or other level (art 19.12)
  - Contact Points within each country, to address matters relating to the Chapter (arts 19.13 and 19.14)
Labour law in Vietnam - the legal framework

- Vietnam’s transition to a market economy (đoì mới) and the creation of a new labour law framework.
- Today, Vietnam has:
  - (with the important exception of freedom of association), a fairly comprehensive safety net of minimum employment standards, including employment contracts, minimum wages, working hours, OHS and protections against discrimination;
  - a legal and institutional framework for the settlement of individual and collective labour disputes; and
  - an institutional architecture to support implementation of these laws, including a government labour inspectorate (MoLISA and the DoLISAs) and a judicial system (people’s courts).
Labour law in Vietnam – the enforcement gap

- BUT there is widespread non-compliance with minimum labour standards. This includes in key export sectors (e.g. apparel).

- The state inspectorate
  - Vietnam ratified the ILO’s *Labour Inspection Convention, 1947* (No. 81) in 2008 and MoLISA and the DoLISAs are engaged in various ILO-administered projects.
  - But the state inspectorate continues to face major challenges:
    - Only around 150 of the 440 labour inspectors are responsible for carrying out inspections of working conditions (for 400,000 registered enterprises with 10 million workers)
    - Labour inspectors face severe budget constraints
    - Enforcement strategies are inadequate (including a reliance on ‘self-assessments’)

- Vietnamese trade unions have formal responsibilities to monitor compliance with labour laws and to assist workers enforce their rights but, in practice, these roles are limited.

- Workers prefer to use informal or ‘extra-legal’ channels to pursue their rights (e.g. ‘wildcat strikes’).
The US-Vietnam Consistency Plan
- Commitments

- The Plan requires far-reaching legal reforms, including in key areas such as freedom of association, trade union autonomy, industrial action, forced labour and non-discrimination.

- Relevant commitments undertaken by Vietnam in the Plan include:
  - the expansion and adequate training of the labour inspectorate and relevant criminal system authorities to enforce the amended laws and regulations
  - the establishment of ‘an effective complaints mechanisms’ in the central and provincial labour departments for workers to inform authorities of rights violations
  - the allocation by Vietnam of ‘sufficient resources necessary’ for the enforcement of labour law. This includes increasing the number of labour inspectors to 750-800 (by 2016) and 1200 (by 2020)
  - addressing its enforcement strategy with respect to forced and child labour
  - transparency and information sharing commitments
  - institutions and processes to regularly assess the Plan’s implementation, including a ‘Labour Expert Committee’
Under the Plan, Vietnam must comply with its commitments prior to the entry into force of the TPP, except where otherwise provided (Cl. VII(1)). The Plan is also subject to the Labour Consultations and DSP provisions of the TPP itself.

Prior experience with US-negotiated pre-ratification agreements suggests significant scope for flexibility (e.g. Columbia Action Plan).

Non-compliance will most likely lead to further dialogue between the parties.
The effective enforcement obligation in Chapter 19

Article 19.5

No Party shall fail to effectively enforce its labour laws through a sustained or recurring course of action or inaction in a manner affecting trade or investment between the Parties after the date of entry into force of this Agreement. [emphasis added]

If a Party fails to comply with an obligation under this Chapter, a decision made by that Party on the provision of enforcement resources shall not excuse that failure. Each Party retains the right to exercise reasonable enforcement discretion and to make bona fide decisions with regard to the allocation of enforcement resources between labour enforcement activities among the fundamental labour rights and acceptable conditions of work enumerated in Article 19.3.1 (Labour Rights) and Article 19.3.2, provided that the exercise of that discretion, and those decisions, are not inconsistent with its obligations under this Chapter.

Nothing in this Chapter shall be construed to empower a Party’s authorities to undertake labour law enforcement activities in the territory of another Party.
## How can art 19.5 be enforced?

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<th><strong>Submission made to Contact Point</strong></th>
<th><strong>Bilateral Cooperative Labour Dialogues</strong></th>
<th><strong>Confidential Labour Consultations</strong></th>
<th><strong>Arbitral Panel</strong></th>
<th><strong>Sanctions</strong></th>
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<td>Any person may file a submission with a Party’s Contact Point concerning any matter relating to the Chapter (Art 19.9)</td>
<td>A Party may request dialogue with another Party on any matter arising under the Chapter (Art 19.11)</td>
<td>Consultation at the Ministerial level (Art.19.15)</td>
<td>Where the Parties have failed to resolve the matter within 60 days of receipt of the initial request for Labour Consultations, a Party may request the establishment of an arbitral panel under Art. 28.7.</td>
<td>Where a Party fails to implement a final arbitration report, the Parties may enter into negotiations for compensation.</td>
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<td>Parties may seek advice from experts &amp; have recourse to good offices, conciliation or mediation.</td>
<td>A three member panel (with labour law expertise) shall arbitrate the dispute.</td>
<td>Where Parties fail to agree on compensation or compensation is not paid, the Party may suspend benefits of equivalent effect or pay monetary assessment (Art. 28.20)</td>
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<td>A Party may request that the Labour Council representatives of the two Parties consider the matter.</td>
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The Effective Enforcement Obligation – Prospects for Enforcement

- In theory, the prospect of Vietnam being subject to enforcement proceedings for failure to comply with art 19.5 would seem significant:
  - There is widespread non-compliance with labour laws, including in sectors which have a high volume of trade with the US.
  - While there are efforts underway in Vietnam to enhance its labour law enforcement system, they are arguably not relevant to the legal question of effective enforcement.

- In practice, the prospect is remote. Why?
  - The state-based nature of the enforcement mechanisms.
  - Past experience suggests political and diplomatic considerations prevail - in only one case has a Party pursued arbitration for non-compliance with the labour standards in a trade agreement.
  - We are much more likely to see activity under the public submissions and cooperative activities articles of the Chapter.
Some concluding comments on effectiveness

- In the cases of both the Consistency Agreement and the Effective Enforcement Obligation, we have argued that the prospects for formal intergovernmental enforcement of the commitments undertaken by Vietnam are slim.

- From a regulatory perspective, there are also deficiencies in the approaches taken through both mechanisms that limit their capacity to secure improvements to levels of labour law compliance (e.g. little attention is paid to leveraging the capacities of workers and enterprises)

- But ratification of the TPP may nevertheless lead to some improvements in labour law enforcement in Vietnam.