ILO-VIETNAM INDUSTRIAL RELATIONS PROJECT

International Labour Organization in Viet Nam

Industrial relations and dispute settlement in Viet Nam

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ILO DISCUSSION PAPER

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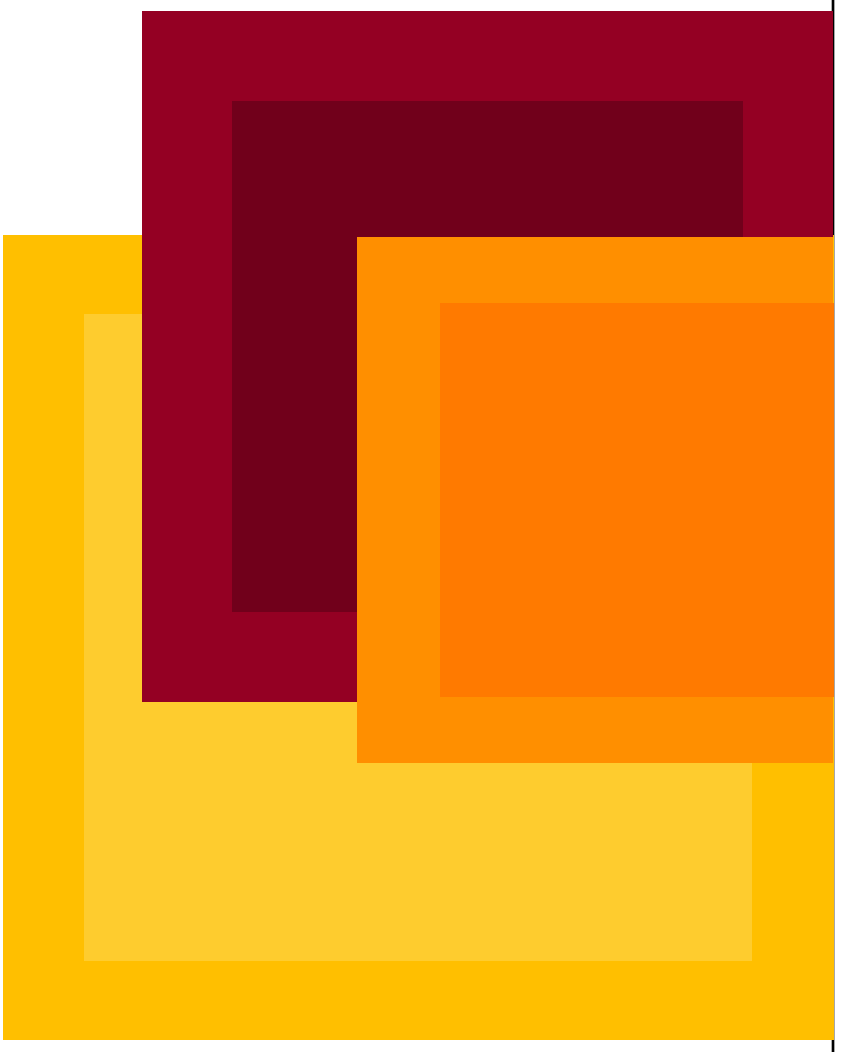

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Preface

Industrial relations in Viet Nam is at a crossroad. The *doi moi* policy of the Government has created an economic and social environment that is conducive to rapid industrialization and economic development during the past two decades. Viet Nam's accession to WTO will certainly accelerate the pace of change and deepen the reform. Accelerated changes arising from the deeper integration of Viet Nam's economy into the global economy would make it a prerequisite that the Government and social partners should be able to manage this process of change through harmonious industrial relations. The experiences of other countries tell us that a sound industrial relations system is one of most important social institutions to jointly manage the often turbulent process of the economic and social change.

This ILO publication, *Industrial Relations and Dispute Settlement in Viet Nam*, is prepared by Dr. Chang-Hee Lee, Senior Industrial Relations Specialist of the ILO's Sub-Regional Office for East Asia, who has been working closely with tripartite partners in building modern institutions of industrial relations in Viet Nam for the past five years. The articles in the publication are designed to contribute to reasoned policy discussions among tripartite policy makers and experts by providing an in-depth analysis of recent industrial relations developments in Viet Nam with a special focus on wildcat strikes and the dispute settlement system. Though written by Dr. Lee, this publication should be seen as a joint product of ILO experts and Vietnamese policy-makers who made an important contribution to the publication by offering information and insights, and by sharing their concerns.

We hope that the publication will help tripartite policy-makers and industrial relations experts in building new industrial relations practices so that Viet Nam can manage the difficult process of economic and social change in the context of its transition to a market economy.

Finally, the ILO would like to express its gratitude to the US Department of Labor, which provided the financial support for this publication as a part of their larger support for the ILO-Viet Nam Industrial Relations Project.

RoseMarie Greve
Director, ILO Office in Viet Nam

Contents

Acronymes

CBA	Collective Bargaining Agreement
DOLISA	Department of Labour Invalids and Social Affairs
ECC	Enterprise Conciliation Council
FDI	Foreign Direct Investment
MOLISA	Ministry of Labour Invalids and Social Affairs
PAC	Provincial Arbitration Council
SOE	State-owned Enterprises
Strike TF	Strike Task Force
VCCI	Vietnam Chamber of Commerce and Industry
VGCL	Vietnam General Confederation of Labour

ILO Discussion Paper

Strikes and Industrial Relations in Vietnam

This Discussion Paper was prepared by Dr. Chang-Hee Lee, Industrial Relations Specialist of the ILO, based upon his joint field research which was carried out by him, Professor Simon Clarke and Ms. Do Quynh Chi in November 2004. The author would like to thank for all government officials, representatives of trade unions and management who kindly provided useful information on industrial relations situation in Viet Nam. The views expressed in this paper do not necessarily reflect the views of the ILO.

STRIKES AND INDUSTRIAL RELATIONS IN VIET NAM

Industrial Relations at Crossroad in Viet Nam: Challenges and Opportunities

1. Ten years since the adoption of the 1995 Labour Code

1. Transition towards a market economy from the centrally planned economy has created entirely different environments for employment relations at the enterprises in Viet Nam. The employment security granted to workers of state-owned enterprises (***SOEs***) is a story of the past and interests of employers and workers could no longer be aligned and adjusted through administrative intervention as it was before. Labour forces are no longer allocated by central planners, but largely by market forces. Separation of interests between employer(s) and workers is becoming more and more prominent, as shown in increase of labour disputes during the past decade.

2. The year 2005 marks the 10th anniversary of the Labour Code, which was revised in 2002. Viet Nam has made remarkable efforts to modernize its industrial relations as the country has begun another historic transformation towards socialist market economy since the adoption of *doi moi* policy in late 1980s. There are a number of milestones showing major steps towards modern industrial relations in Viet Nam.

Box 1: Major milestones of industrial relations developments in Viet Nam

- In 1995 the Labour Code came into effect. The Labour Code created a legal framework of industrial relations and employment relations in line with a newly emerging reality of socialist market economy.
- Since mid 1990s, the government has implemented the process of SOE equitization designed to accelerate the country's transition towards market economy.
- In 2000, the new enterprise law was introduced, creating an enabling environment for and therefore spurring private sector growth.
- In 2002 ILO and Viet Nam with financial support of the US government started the industrial relations project. This is a reflection of the policy priority attached to developing sound industrial relations by not only the government but also social partners.
- In 2002 the 1995 Labour Code was revised with a view to updating the labour legislation based upon tripartite discussion.
- In its National Congress in 2003, the Viet Nam General Confederation of Labour launched a campaign for one million new members in non-state sector, signalling its new strategy of strengthening union capacity to represent non-state sector workers.
- In 2004 the Government is prepared to adopt a new decree on tripartite consultation which, once officially adopted will herald a new era of tripartite social dialogue.
- In 2004, the VCCI and VCGL had the first bi-partite social dialogue which produced a joint MOU on developing sound industrial relations.
- In 2004 the National Assembly has been debating a new ordinance on strike. This is a clear signal that both reality of industrial relations and perception of industrial relations actors are rapidly maturing.

3. The developments summarized in the Box 1 show the progresses and efforts made by the government, Viet Nam General Confederation of Labour (***VGCL***) and Viet Nam Chamber of Commerce and Industry (***VCCI***) with a view to moving peacefully towards a market economy and to building modern institutions of industrial relations in line with the new reality of the market economy.

2. Evolving nature of strikes and their characteristics

4. Currently the issue of 'wildcat strike' and its effective regulation has become the hottest industrial relations issue in Viet Nam. As we will describe in the following sections of this ILO discussion paper, a scientific and objective understanding and interpretation of specific patterns of strikes holds a key to assessing progresses of as well as problems with industrial relations development in Viet Nam. A scientific analysis of the causes of the wildcat strike and exploration of variety of practical policy options to address 'wildcat strike' is extremely important, as a new regulatory framework in the forms of a new ordinance on strike will have a great impact on the future course of industrial relations development in Viet Nam.

5. This ILO discussion paper will attempt to review the current system of strike regulation in Viet Nam in the broader context of industrial relations development with a view to identifying policy options for tripartite partners to consider in their discussion on designing new regulatory framework on strike. We will first review the recent patterns and causes of strikes, and analyze evolving nature of strikes in Viet Nam. Secondly, we will review the current strike regulation with a particular focus on labour dispute settlement machinery and its relations with industrial actions. Thirdly, we will examine the most crucial issue of patterns of workers' representation by enterprise unions primarily through collective bargaining, and its relations with specific patterns of strikes in Viet Nam. Finally, this ILO discussion paper will identify a number of broader policy issues which would help to create environment for prevention of labour disputes and sound industrial relations at the enterprises.

6. Strikes are natural industrial relations phenomena in a market economy where interests of workers and employers tend to be divergent, which often develop into open conflicts in the form of industrial actions including both strikes and lockouts. Natures of strikes tend to change and evolve as a society goes through different stages of industrialization and economic developments. It is quite common that in the early stage of industrialization labour disputes would arise mainly due to violation of workers' legal rights by employers. In this situation, workers would take spontaneous collective protest action when their patience ran out after their long endurance of injustice whether perceived or real. Frequent disputes over rights related issues at this early stage of industrialization also often reflect the fact that the government has weak capacity to enforce its labour legislation through efficient labour inspection. This kind of spontaneous protest action is basically *defensive and passive* in its nature as they would try just to defend their *legal rights*. Other countries' historical experiences show that workers would soon start taking action to gain better working conditions through their collective actions. At this stage, collective actions of workers would become *active means* to *advance their interests*. This changing nature of workers' collective action is very natural one, because what it shows is that workers have begun to understand the logic of employment relations in a market economy through their years of day-to-day working experiences at the workplace.

7. There had been 744 reported cases of strikes since 1995 until October 2004. The table 1 shows the overall strike trends in Viet Nam since the adoption of the Labour Code in 1995. While there has been a small increase in the incidence of strikes since 2002, the incidence of strikes has been fairly

stable in relation to the growing number of enterprises. More than two-thirds of all strikes have been in foreign-invested enterprises, which account for only around 3% of the total number of enterprises, though 15% of enterprise employees. There has been a marked fall in the incidence of strikes in SOEs since 2000. Most of the strikes in SOEs were around the non-payment of wages and lay-offs and redundancy compensation, which were particularly acute problems in the 1990s but which have declined in significance since then.

Table 1. ***Strikes per year by enterprise ownership, 1995-2004***

Year	No of Strikes	SOE		FDI		Private	
	No.	No.	%	No.	%	No.	%
1995	60	11	18.3	28	46.7	21	35
1996	52	6	11.5	32	61.6	14	29.2
1997	48	10	20.8	24	50	14	26.9
1998	62	11	17.7	30	48.4	21	33.8
1999	63	4	6.4	38	60.3	21	33.3
2000	71	15	21.1	39	54.9	17	23.9
2001	85	9	10.6	50	58.8	26	30.6
2002	88	5	5.6	54	61.4	29	33.0
2003	119	3	2.5	81	68.1	35	29.4
10/2004	96	1	1.1	40	72.9	25	26.0
Total	744	75	10.1	446	59.9	223	30.0

Source: *Strikes and the Resolution of Strikes, Situation and Resolutions*, VGCL document, 2004.

8. The prevalence of strikes in foreign-invested enterprises in the mid-190s was attributed to 'cultural differences' and some notorious managerial violence or abuse such as beating workers. According to ILO experts' information, almost half the strikes in this sector before 2001 involved managerial violence or abuse. Since then, however, there have been far fewer reports of managerial violence being a cause of strikes. Now strikes have a more straightforward economic foundation. The prevalence of strikes in foreign-invested enterprises is now explained by the fact that work is more intensive in foreign enterprises, that workers believe that foreign owners can afford to meet their demands and that they expect the state to support them against foreigners, an expectation that is not unfounded.

9. According to ILO's research findings, almost a third of strikes in 2002-4 involved complaints of low wages (often failure to pay a promised increase), a quarter involved demands for the payment of bonuses (again, often failure to pay an agreed bonus), a quarter featured complaints of excessive working hours (often associated with underpayment for overtime working), one in five involved demands for the payment of unpaid wages, one in six complaints about the failure to pay for overtime. One in six involved complaints that workers did not receive labour contracts, one in eight that the employer did not pay social insurance contributions and one in eight that the employer imposed (illegal) fines on workers[1].

10. The above developments clearly show that a *transition of workers' collective actions from passive means to defend their legal rights to more active means to advance their interests* is

[1] These findings are very similar to the causes of strikes enumerated by the report of a high-level task force on industrial relations in Taiwanese joint-venture enterprises in the South of Viet Nam, which highlighted the poor working conditions of workers in this sector. Hop, Thach Bich 2004, *Report on Labour Dispute and Strike (in Dong Nai, Binh Duong and Ho Chi Minh City)*, Hanoi, 5 May 2004

underway in Viet Nam, as evidenced by more number of strikes occurring over economic interests: complaints about low wages and demands for higher wages complaints about failure to pay agreed bonus and demand for bonus payment, and shorter working hours. A report in Viet Nam Economic Times recognized the implications:

> "Previously, workers only downed tools to claim what they were legally entitled to", says Nguyen Van Khai, an official from the Ho Chi Minh City Confederation of Labour. "These days the situation has changed. They will also organize strikes to demand better meals, higher salary increases, reductions in working time, and other such conditions." Last year these types of strikes made up about 20 per cent of the city's total, according to the Labourer newspaper. Relevant authorities such as the federation have handled these strikes in the past by referring to labour regulations. If the demands are contained among the stipulations, they ask the employers to satisfy the strikers. If not, they ask the workers to return to work. This way of settlement, however, cannot be applied to the new kinds of strikes[2].

3. A discussion on the changing nature of strikes under the changing labour market situation

11. There seems to be widely shared view among tripartite actors at higher level, however, that main causes of 'wildcat strikes' are violation of workers' legal rights by employers, workers' ignorance of the labour law and regulations, and cultural misunderstanding between foreign employers and local workers. Thus, tripartite actors at higher level tend to place a great emphasis on education of workers and employers on the labour law as a measure to prevent 'wildcat strikes'. However, our analysis in the preceding paragraphs suggests that strikes do not arise only because employers violate the law, but have *increasingly arisen of direct conflicts of interest between employers and employees*. Though a cultural difference explanation about frequent occurrences of strikes in FDI sector holds some truth, the cultural difference factor needs be seen as a *convenient trigger of disputes over interests*, which can easily escalate into open conflicts *in the absence of two-way communications between foreign management and representative union*. Therefore, education of workers and employers on the labour law may not be able to address the issue of wildcat strikes, as strikes are social actions of economic nature which require not just legal remedy, but more importantly industrial relations process such as collective bargaining to reconcile conflicting economic interests of both parties.

12. Furthermore, there is an indication that the current economic and labour market situation may lead to more strike actions. Workers activism, manifested in the form of wildcat strikes, is likely to increase due to the changing labour market situation which has begun to show a labour shortage[3]. The expansion of the foreign-invested sector has mopped up all of the available local workers in the cities around which the industrial zones and export processing zones are located, so they are having to rely increasingly on migrant workers from more distant rural areas (according to DOLISA in Binh Duong and Dong Nai, 70-80% of workers there are non-resident (Hop 2004, p. 1)). And it appears that it was becoming increasingly difficult to attract rural workers to the cities because the high cost

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[2] Tan, Le Duc (2005) 'Grounds for Dispute' *Vietnam Economic Times*, 132, 01/02. http://www.vneconomy.com.vn/vet/?param=info&name=Business%20report&id=5314 Last accessed 16/03/05

[3] A job bazaar organised by the Dong Nai Youth League and local employers seeking 3,000 new staff recruited fewer than 150 workers (*Thanh Nien, ILO Office in Vietnam Press Review*, April 2004).

of living and low wages left them with little money to send back home, their main reason for coming to the city[4].

13. The tightening labour market situation would give stronger bargaining power to workers individually and collectively. Workers who are not satisfied with working conditions of the enterprises they are working for would move to another enterprise in a hope to find better opportunities more easily under the tightening labour market. This is called 'exit' option by labour economists, because workers seek better working conditions by 'exiting' from their current workplaces. Or alternatively workers may choose to improve their working conditions through collective bargaining, often by mobilizing collective actions. Under the tightening labour market, workers' choice of collective action would become also easier because employers would not want to lose their workforce and workers would have less fear of losing their jobs. This is called 'voice' option by labour economists, because workers try to improve their working conditions by expressing their 'voices' within the enterprise they are working for. 'Exit' and 'voice' options reinforce each other. Given relatively high degree of workers' solidarity in Vietnamese society, it would be reasonable to expect that workers would choose more or more 'voice' option, particularly under the tight labour market situation, leading to more number of wildcat strikes over interests[5].

4. Ad hoc approach to collective labour dispute resolution in Viet Nam

14. As described in preceding paragraphs, the changing nature of strikes in Viet Nam is natural one, which has been experienced by other advanced countries at the similar stage of the industrialization and industrial relations development. However, there are a certain number of Vietnamese characteristics of strike phenomena. Firstly, all of the strikes since 1995 were *'wildcat strikes*'. In other words, all strikes occurred *outside the legal framework* regulating collective labour disputes and *without trade union involvement*. Secondly, *strike actions take place before collective bargaining*, not as a last resort after workers (usually represented by trade unions) and employer(s) fail to reach agreement through collective bargaining. In other words, strikes are used by workers as *the first and last weapon* to force employers to listen to their voice and accept their demands, often with assistance of government conciliators and union cadre at higher level. Thirdly, although strikes are wildcat strikes, they are often well-organized and coordinated, with workers showing *relatively high level of workers solidarity* during the strike actions, compared to other countries. While the strike may initially involve a small group of workers, typically the entire workforce would stop their work, demonstrating high level of solidarity.

15. As indicated in the above paragraph, none of 744 reported strikes went through the formal procedures of conciliation and arbitration. However, this does not mean that the government failed to provide conciliation services to the disputing parties when strikes occur. According to ILO's field research in November 2004, the DOLISA officials often together with officials of local federation of trade unions play a crucial fire-fighting role in resolving collective labour disputes once they occur. It is normal practice, as soon as news on strike reaches the DOLISA, for the local labour department officials to try to persuade the employer to meet the workers' demands so as to get them back to work as soon as possible.

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[4] The cost of rented accommodation is a serious problem for migrant workers. Very few employers provide dormitories and the local administrations are only just beginning to address the accommodation problem.

[5] This small increase of strikes since 2002 as shown in table 1 may be associated with increasingly tightening labour market in industrial provinces.

16. In actual strike situation, the workers usually assemble in front of the factory, often blocking the entrance and the road outside[6]. However it is very unlikely at this stage that they will have an articulated set of demands, because strike actions are taken not after the failure of collective bargaining, but after workers accumulated diverse grievances which reached a critical point. A representative from the local labour department, usually accompanied by a trade union official, comes to the enterprise to investigate the dispute, having been alerted by a manager, a trade union officer in the enterprise, the local police or the local People's Committee. The priority of the authorities is to get the workers back to work to preserve social peace and public order and to prevent the strike from spreading to neighbouring enterprises. To this end they hold a meeting with the strikers to hear their grievances and put together a list of demands which they can then take to the management. It is rare for the strikers themselves to play any part in the resolution of the dispute: negotiations take place behind closed doors between the employer and Labour Department officials and it is the officials who present the demands and achieve a resolution of the dispute.

17. The *ad hoc* conciliation by DOLISA officials seem to have a filtering effect, through which DOLISA officials filter out what they regard as being 'just' demands, which they can press the employer to satisfy, from 'unreasonable' demands which they cannot press. According to ILO's information about 50 strikes, outcomes of which are known and which were resolved through the *ad hoc* conciliation, the workers' key demands were met in 48 cases[7]. As such, it can be said that the *ad hoc* conciliation of DOLISA officials has been largely successful in resolving collective labour disputes once they occur. It is also remarkable that there have been no reports of police action against strikers or strike leaders, either during or after a strike.

18. The *ad hoc* conciliation, though it appears to be effective in short term, poses a number of policy challenges which the government and social partners may have to consider with a view to promoting sound industrial relations at the workplace which can be managed on the basis of bi-partite social dialogue.

19. As we emphasized earlier, grievances are much more diffuse than the legal violations identified by the officials, often concentrating on issues that arise from workers' interests rather than their legal rights such as low pay, holiday and seniority bonuses, overwork, short-time working, harmful working conditions, managerial abuse and poor quality food. However, the guiding principle behind the *ad hoc* conciliation approach appears to be based upon a distinction between 'legitimate' demands vs. illegitimate demand when it comes to rights related issues, and reasonable vs. unreasonable demands when it comes to interest related issues. The notion of 'legitimate' demands is closely related with the notion of the party which is at fault in a dispute. According to Decree No. 58-CP of May 31, 1997, wages should be paid in full for the duration of a strike if the strike is declared by a court to be legal and the employer is judged to be at fault. Only if the strike is illegal and the employer is not at fault should no wages be paid. The current practice of *ad hoc* conciliation tends to filter out legitimate and reasonable demands from illegitimate and unreasonable demands, and re-frame the strike over interests into a dispute over rights, in which the employer is at a fault, and that tends to discard as 'unreasonable' grievances which arise from irreconcilable differences of interests.

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[6] The inter-sector task force report noted that 'when there is strike, workers mainly gather outside the gate of enterprises causing regional security disorder and traffic in-safety' (Hop, 2004, p.3). The employers do not demand police action but that a special area should be provided for strikers to assemble (VCCI Hanoi officer).

[7] This appears to leave an impression among foreign management that 'the government should be neutral but in fact they are a bit more on the workers' side.

20. This approach is likely to produce *three unintended consequences*. Firstly, workers will have powerful incentives to go on wildcat strikes, because they know their demands, though re-framed into rights-based framework by the ad hoc conciliation process, would be mostly met, as evidenced by the fact that workers' key demands were met in 48 out of 50 strikes. Furthermore, within the rights-based framework, wages will be paid in full for the duration of a strike. This means that workers have no costs at all to go on strikes while there are only gains. In this respect, it is to be noted that '*no work no pay*' principle is widely applied in most countries whether strikes are lawful or not. With the application of '*no work no pay*' principle, workers will have to think twice before they go on strike as there are significant costs involved in their strike actions. In other words, it is ultimately the economic principle of *no work no pay* which governs strike action arising from conflicting economic interests between employers and workers, as both sides should weigh potential benefits and costs of their actions. Secondly, the ad hoc conciliation based upon rights-centred approach can just *store up problems for the future*, because this approach would not be able to address properly *conflicting interests*, which may be filtered out as unreasonable demands. Then, it is more likely that workers would take another round of collective actions to improve their working conditions in the future. Thirdly, the ad hoc conciliation process can produce *unintended effect of 'substituting' the role of trade unions and collective bargaining* at the enterprise level. It is simply because it is far quicker and more efficient for workers to bypass trade unions, which are currently seen as very weak at the workplace, and then to have the ad hoc conciliation which tend to produce satisfying results for strikers. Workers on wildcat strikes would bypass unions and legal procedures not because workers lack proper understanding of labour law but because workers learned from their experiences that strikes are the most effective means for them to address their grievances. It appears that trade unions fails to monitor employers' violation of the rights and interests of their employees, and also fail to take up their members' grievances and advance them through the procedures for conciliation and arbitration.

21. Therefore, what is required may be not the education of workers on the labour law, but the training of trade union leaders on collective bargaining and representation at the workplace. In this respect, it is interesting to note that the knowledge of workers in other countries on their labour law is not better than Vietnamese workers, but there are far less 'wildcat strikes'. In other countries, it is the trade union leaders at the workplace who know the labour legislation, who monitor employers' violation of labour legislation, who take up their members' grievances through the official machinery of dispute settlement, and, if necessary, take strike actions once their best efforts to reach an agreement with employer through collective bargaining failed. It is also to be noted that in other countries trade unions' influence reaches far beyond unionized workplaces, because non-union workplaces tend to follow the patterns set by unionized workplace in a hope that the management in non-union enterprises would be able to avoid unionization if the management offers voluntarily the gains achieved by the trade unions in other workplaces.

5. Legal requirements for lawful strikes: labour dispute settlement machinery and strikes

22. The above characteristics of strike phenomena and their resolution process in Viet Nam require careful examination and analysis, because they are inextricably related to the nature of current regulatory framework governing strike and labour dispute settlement, and also, more importantly, to the nature of workers' representation at the workplace and patterns of collective bargaining process.

23. According to the revised Labour Code of 2002, there are a number of legal requirement for

lawful strikes: declaration of strike decision by the Executive Committee of trade union of the enterprise either through secret ballot or through signature collection by the majority of worker's collective (article 173); prohibition of violence, damages to machinery, equipment and property of the enterprise, and acts in breach of public order and safety during a strike (article 173). The strike is also considered illegal when (a) it does not arise from a collective labour disputes; it goes beyond the scope of labour relations, (b) it goes beyond the scope of the enterprise (article 176). Also the article 174 of the Labour Code defines dispute settlement procedures at the undertakings which are deemed as public essential services where strikes are prohibited. In this section, we will limit our discussion to the relations between labour dispute settlement procedures[8] and strike. There will be another opportunity to discuss the above legal requirements for lawful strike. In this discussion paper, our discussion will focus on the relations between strike actions and labour dispute settlement procedures.

Box 2: Legal Provisions on Labour Dispute Settlement and Strikes

- The labour conciliation council or the labour conciliator is required to proceed with the conciliation within seven days from the date when the application for conciliation is acknowledged (article 170).
- The labour arbitration council is required to proceed with the conciliation and settlement of the collective labour dispute within 10 days from the date when the application for dispute settlement is acknowledged (article 171).
- The arbitration council shall set forth conciliation proposals for examination by the disputing parties. In case of agreement by both disputing parties, the Council shall establish a conciliation record… (article 171).
- If the conciliation fails, the arbitration council shall settle the case by arbitration procedure and issue its decision in settlement of the dispute and immediately notify both disputing parties of the award (article 171).
- In case of objection to the decision of the labour arbitration council by the workers' collective, the latter shall have the right to request the People's Court to settle the dispute, or to go on strike. (article 172)
- While the collective dispute is under examination of the Labour Conciliation Council or the Labour Arbitration Council, neither party is allowed to take unilateral action against the other party (article 173)

24. In Viet Nam, lawful strikes can be initiated *after exhausting two conciliations* - one by Enterprise Conciliation Council (***ECC***) and another by Provincial Arbitration Council (***PAC***) - *and arbitration procedures* (see Box 2). Not only Viet Nam, but also many other countries have similar provisions of requiring disputing parties to *exhaust conciliation/mediation procedures before a strike may be called*. Most countries have introduced these provisions to encourage the full development and utilization of machinery for the voluntary negotiation of collective agreements, which are

[8] This paper does not review dispute settlement procedures for individual disputes, because its focus is 'wildcat strike' which is by nature collective labour disputes.

compatible with the ILO's Right to Organize and Collective Bargaining Convention 1949 (No. 98). Such machinery must, however, have the sole purpose of facilitating bargaining: it should not be so complex or slow that a lawful strike becomes impossible in practices or loses its effectiveness.

25. As we pointed out, there have been virtually no cases which have gone through all three phases of labour dispute settlement, and most strikes were resolved by *ad hoc* interventions of the local labour bureaus together with local federation of trade unions, outside the institutional framework of the collective labour dispute settlement. The very fact that virtually no collective disputes have gone through mandatory three-stage procedures point to a great need to review the current three-stage dispute settlement procedures. Let us turn first turn to the ECC.

5.1 Enterprise Conciliation Council, Labour-Management Consultation Committee, and Grievance Handling Procedures

26. The ECC at the enterprise level is a bi-partite body, composed of equal number of representatives of workers and employers, which is supposed to be the first line institution to resolve collective labour disputes[9]. It is not very clear how this bi-partite body can fulfil its goal of resolving collective labour disputes, because collective labour disputes must have arisen in the first place, at least in theory, due to the eventual failure of both parties' reaching an agreement on new terms and conditions of employment. Under the usual circumstances, it would be hard to expect that the disputing parties could produce agreements through the bi-partite process of the ECC without a third party intervention, when the very same parties failed to reach agreement through bi-partite process of collective bargaining. In this respect, it is to be reminded that collective bargaining itself is a bi-partite negotiation process, through which both parties try to reconcile their conflicting interests. In other countries, the failure of both parties reaching agreement would usually lead to conciliation procedure where *a third party, acting as an intermediary - independent of the two parties* - seeks to bring the disputants to a point where they can reach agreement. In other words, conciliation involves a third party assisting the disputants to reach agreement not bi-partite process (Box 3). There is a need to make a careful review of the practical *relevance* and actual functions of the ECC *as bi-partite collective labour dispute settlement machinery at the enterprise* with a particular attention paid to its distinction from and relations with bi-partite collective bargaining process.

Box 3: Definitions of conciliation

An extension to the bargaining process in which the parties try to reconcile their differences. A third party, acting as an intermediary - independent of the two parties - seeks to bring the disputants to a point where they can reach agreement. The conciliator has no power of enforcement and does not actively take part in the settlement process but acts as a broker, bringing people together.

Conciliation/mediation is ideally a *voluntary* process in which the services of an *acceptable* and *independent third party* are used in a conflict as a means of *helping* the parties to arrive at an *agreed* outcome.

The purpose of conciliation is to convert a two-dimensional fight into a three-dimensional exploration leading to the design of an outcome.

[9] At the enterprise where there is no ECC, it is local conciliator who takes the responsibility of conciliation. The role and function of local conciliator seems to be extremely important (perhaps far more important than the arbitration council in reality), but we do not have sufficient information about their actual functions.

27. A hidden assumption behind the ECC as a collective dispute settlement machinery may be that workers - presumably without union initiative - would make demands, and then trade union representatives and representatives of employer would try to resolve collective labour disputes over workers' demand through the ECC process. If this is the case, it implies that this system assumes existence of tripartite actors even at the workplace workers, trade unions and employer. Then, it implies in turn that trade unions are de facto defined as an intermediary between workers and employer, not as an organization representing workers through collective bargaining and through collective actions. Otherwise it is difficult to find a rationale of having the bi-partite ECC as a dispute settlement body.

28. What is lacking in most enterprises in Viet Nam is collective bargaining between workers (ideally represented by trade unions) and employer, through which both parties can reconcile their conflicting interests and reach an agreement on new terms and conditions of employment, serving both interests of workers and employer. As we will discuss in following sections, trade unions need to develop coherent strategy to promote collective bargaining and to ensure balanced representation of different categories of workers within the trade union decision-making structure, if trade unions are to play their role as a representative organization of workers and therefore to play a crucial role of managing conflict through collective representation of workers' views and interests. If both parties fail to reach an agreement through collective bargaining, a third-party assisted conciliation service should be available to help both parties reach an agreement through conciliation which is in its essence a third-party assisted negotiation - instead of the bi-partite conciliation process.

29. In considering future innovation of the ECC with a view to *preventing collective disputes* and *resolving individual disputes*, the policy-makers may need to examine *two different types of bi-partite arrangements at the workplace* in other countries which are *created either in parallel with collective bargaining or through collective agreements* with different purposes: one is *labour-management joint consultation committee* (Box 4), another is bi-partite *grievance handling procedures*.

Box 4: Labour-Management Consultation Committee

Many countries have introduced and established bi-partite consultation mechanism at the workplace to promote labour-management cooperation. These kinds of mechanisms have different titles, mandates, compositions, and their relations with collective bargaining process in different countries: they are called, for example, Labor-Management Committee in the United States, Labour-Management Joint Consultation Committee in Korea and Japan, and Works Council in Germany; the Labour-Management Joint Consultation Committee in Japan is in principle a body for exchange of information and consultation, while German Works Council has the right to co-determination on a number of issues, and; some countries (for example, Korea and most European countries including Germany, France, Sweden etc) introduced them through legislation, while they are introduced by voluntary agreements between labour and management without legislative foundations in other countries (for example, Japan and United States).

In spite of this diversity, various types of bi-partite mechanisms share some common principles and goals. These mechanisms are designed to promote cooperation between workers and employers through better two-way communications on regular basis in the form of better exchange of information and sincere consultation over issues of mutual concerns. They differ from collective bargaining in a number of ways: the outcome of the bi-partite consultation would not usually produce legally binding agreements, while the purpose of collective bargaining is to conclude a legally binding collective agreement; the

bi-partite consultation mechanisms are designed to deal with, not exclusively but mostly, non-distributive issues of mutual concerns, while collective bargaining would, not exclusively but mostly, deal with distributive issues such as wages and other working conditions; industrial actions are not allowed even when both parties have conflicting views at the consultation process, while both parties are guaranteed a right to take industrial action when they fail to reach an agreement through collective bargaining, and; the consultation meetings will be held on a regular basis at least every quarter, but in many cases more frequently -, while collective bargaining is held every year or every two years depending on national practices. The bi-partite consultation mechanisms have proven *their effectiveness in preventing disputes through better two-way communications at the workplace*.

30. Also, a consideration can be also given to *active promotion of grievance handling procedures through collective agreements* as an effective way to handling day-to-day grievances through bi-partite discussion and negotiation. In fact, as defined in the article 164 of the Labour Code, the ECC is entrusted to deal with individual labour disputes over rights, similar to the grievance handling procedures in other countries.

Box 5: Grievance handling

Definition of *Grievance* is any complaint either by a worker, a group of workers or a trade union, or by an employer, a group of employers or an employers' organization, regarding some specific aspect of the employment relationship, or - in case of workers - regarding employment conditions or the employers' policy and practices.

Enterprises covered by collective agreements usually have collective agreements which have provisions on how to resolve problems linked with the application and interpretation of an individual labour contract or arising out of a collective labour agreement. Grievance handling usually follows a number of sequential steps laid down in the procedure and involves progressively higher levels of management and workers' representatives.

Grievance handling procedures are bi-partite process of joint discussion for resolving disputes by mutual agreement without involving outside third party.

Box 6: ILO standards on Grievance Handling

Recommendation No. 130 (1967) on the Examination of Grievances deals with a special category of labour disputes the grievances of one or several workers against specific aspects of their employment conditions or labour relations. The grounds for a grievance may be any measure or situation that concerns employer-worker relationship, or that is likely to affect the conditions of employment of one or more workers in the enterprise, if the situation appears to be contrary to the provisions of collective agreement, individual employment contract, national laws or other rules. In case grievance procedures are established through collective agreements, the parties should be encouraged to promote the settlement of grievances using those procedures, abstaining from any action which would impede their effective functioning.

Recommendation No. 130 explicitly calls for workers' organizations and workers' representatives to be associated on an equal basis with employers and their organizations in the establishment and implementation of grievance procedures. The Recommendation also highlights the various elements that form the basis of grievance procedures in any enterprise.

- An attempt should be made initially to settle the grievance directly between the workers or group of workers and the immediate supervisor.
- In the event of a failure to settle the grievance at the initial level, the worker should have the right to have the case considered at a higher level, depending on the nature of the grievance and structure of the enterprise.
- Grievance procedures should be so formulated and applied that there is a real possibility for the settlement of the dispute at every level.
- Grievance procedures should be expeditious and simple.
- Workers concerned in a grievance should have the right to take part directly in the grievance procedure. During the procedure, workers may be assisted or represented by a trade union representative or any other person of his or her choosing, in conformity with national law and practice.

31. Workers' grievances are inevitable in the day-to-day relations between the management and workers at the enterprises. When an enterprise is covered by a collective agreement, grievances of individual workers may be expected to arise from the way it is being implemented. Grievances may also arise from any measure or situation which the worker or workers concerned consider to be contrary to their contract of employment, to work rules, laws or regulations or to relevant customs. As indicated in the ILO Examination of Grievances Recommendation, 1967 (No. 130), it is highly desirable that 'as far as possible, grievances should be settled within the undertaking itself according to effective procedures which are adapted to the conditions of the … undertaking concerned and when give the parties concerned every assurance of objectivity' (see Box 6). In practice, grievance procedures often include a number of steps, and the last step within the enterprise will generally involve discussion between the top management and the workers' representative or the union concerned. This process is essentially one of joint discussion between the parties for resolving an issue by agreement on both sides. If no agreement is reached in settling a grievance within the enterprise and worker or trade union insist on pursuing the claim further, a dispute may be said to have arise for purposes of outside intervention such as arbitration or adjudication. Throughout the grievance handling process, trade unions will represent workers not as an third party to the grievance concerned.

32. In view of the fact that the ECC in its present form and mandate as a bi-partite collective dispute settlement machinery at the workplace has not functioned and lost much of its relevance, alternative approaches need to be explored. The most urgent policy challenge is, as we will re-emphasize later, the promotion of genuine collective bargaining at the workplace. As the above paragraphs (26-31) indicated, bi-partite procedures to deal with workers' grievances need to be also promoted as a part of collective agreement. Also useful would be a consideration of setting up labour-management consultation committee type body at the workplace as a joint body for consultation and two-way communication. However, it needs to be reminded that the labour-management consultation committee type body usually functions properly when there is a strong workers' organization representing workers' interests and views primarily through collective bargaining.

5.2 Conciliation and arbitration in Viet Nam and other countries

33. According to article 171 of the Labour Code, the Labour Arbitration Council undertakes both conciliation and arbitration: upon receiving the case, the Council is required to make a conciliation effort, and, if it fails, the Council 'shall settle the case by arbitration procedures'. Once the Council make an arbitration award, the disputing parties have the right to refuse the arbitration award, and either go on strike or refer the case to the People's Court. This means that the arbitration award is non-binding if one party refuses to accept it. This is quite unusual procedures which are rarely found in other countries. There is a variety of different types of conciliation and arbitration system in the world, which are summarized in Box 7 and Box 8. According to the typology of Box 7 and Box 8, the labour dispute settlement system in Viet Nam appears to combine *compulsory conciliation* with *advisory arbitration on a compulsory basis*.

Box 7: Different Types of Conciliation

Voluntary conciliation system (UK, USA): In voluntary conciliation the parties are free to use or not to make use of the government's conciliation facilities. When of the parties to disputes requests conciliation, it may be provided if the other party does not object. In voluntary systems the provision of conciliation by the government is mainly conceived of as assistance or service to industry, and the term "service" may figure in the official title of the governmental organ concerned (for example, Federal Mediation and Conciliation Service (FMCS) in USA, and the Advisory, Conciliation and Arbitration Service (ACAS) in UK).

Compulsory conciliation system (Korea, Malaysia, Viet Nam): In compulsory system parties to disputes are required to make use of the governmental conciliation machinery. However, compulsory conciliation differs from voluntary conciliation only in the method by which the procedure is set in motion; the substantive object of conciliation in either case remains the same, i.e. a settlement of the dispute on the basis of the parties' agreement. In compulsory conciliation (as in voluntary conciliation) the parties are not bound to accept a conciliator's suggestions or proposals for settlement; the conciliator can only persuade the parties to make mutual compromises in order to reach agreement.

Box 8: Different Types of Arbitration

Voluntary arbitration: Voluntary arbitration has two sub-types.

- Voluntary arbitration with advisory award (UK, Bolivia, Nigeria): The award made by the arbitrator or arbitration council does not bind the parties unless it is accepted by both of them. The award therefore has only the effect of a recommendation. For this reason, these forms of arbitration may be described as 'advisory arbitration'. Both parties may have to submit their disputes for arbitration, but they are not necessarily bound by the arbitration award.
- Voluntary arbitration with binding award (US, Ireland, Tanzania, India, Japan etc): In this type of arbitration, the submission of the dispute to arbitration is voluntary but the arbitration award is legally binding on the parties.

Compulsory arbitration

- Compulsory arbitration is the submission of a dispute to arbitration without the agreement or consent of all the parties involved in it, and with a legally binding award. Compulsory arbitration may be used either in essential public service or in civil service where the right to strike might be either restricted or prohibited.

34. It is not clear what kind of distinction is made - both in theory and in practice - between the two stages - compulsory conciliation and advisory arbitration on compulsory basis - in Viet Nam[10]. In practice, advisory arbitration on a compulsory basis bears some resemblance to compulsory conciliation where the conciliation body is given powers of investigation and has to make a recommendation for settlement. The similarity is close enough that compulsory advisory arbitration may be selected in lieu of compulsory conciliation, to perform a role substantially similar to that.

35. Nevertheless, compulsory advisory arbitration differs from compulsory conciliation. The competent authority will be able to decide that in the particular circumstances of the case it would, for example, be desirable to apply advisory arbitration, while in a case involving a different set of circumstances it may apply compulsory conciliation. Compulsory conciliation will usually be selected where the element of give-and-take or compromise is important, while compulsory advisory arbitration may be considered useful where it is difficult for the parties to retreat from their positions and an independent award may be acceptable to them as a face-saving settlement.

36. However, the problem in Viet Nam is that the compulsory conciliation and the compulsory advisory arbitration are not the matter of a choice to be made depending on the circumstances, but the mandatory, consecutive steps which disputing parties should go through within the same institution of the Labour Arbitration Council, while the two processes are similar enough that one may be selected in lieu of another to perform a role substantially similar to each other (paragraph 33 and 34). This implies that, as pointed out in paragraph 24 the dual steps of the compulsory conciliation and compulsory advisory arbitration may be seen so complex and slow that a lawful strike becomes impossible in practices or loses its effectiveness, thus not fulfilling its purpose of facilitating voluntary negotiation through collective bargaining. It is all the more so when we consider the disputing parties should also go through bi-partite process at the ECC at the enterprise level before two-stage procedures at the Labour Arbitration Council, making the dispute settlement process excessively complex and slow to the extent that it would be almost impossible to organize a lawful strike.

37. In this respect, it is worthwhile to note that the most widely used form of voluntary arbitration is that in which the submission to arbitration is voluntary but the arbitration award is legally binding on the parties. As regards the timing of the application of the procedure, official systems using this form of voluntary arbitration fall into two main patterns. Under one pattern, a dispute may be referred to voluntary arbitration at any time after it has arisen. It is therefore possible for the parties to proceed directly to arbitration without prior resort to conciliation (India, Ireland, Japan and Singapore). Under the second pattern the legislation envisages the submission of disputes to the official machinery for voluntary arbitration after the failure of conciliation (Norway, Malaysia, Korea, Sweden, and Switzerland etc). This is a combination of *compulsory conciliation* and *voluntary arbitration with binding award*. This second pattern differs from the dispute settlement machinery in Viet Nam which combines *compulsory conciliation* with *compulsory advisory arbitration*.

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[10] In practice, the distinction may not have any relevance in reality, because there have been very few cases referred to by the Labour Arbitration Council since its establishment. According to the officials, Hanoi Arbitration Council had only two cases since its set-up in 1997, while HCMC Arbitration Council had only one case since its set-up in 1998. As described earlier in paragraph 17, most collective labour disputes are said to have been resolved through ad hoc intervention of the DOLISA together with local federation of trade unions - not through the Labour Arbitration Council process.

5.3 Reflection on ad hoc conciliation process

38. In preceding paragraphs (15-21), the discussion paper briefly described the typical process of *ad hoc* conciliation process by DOLISA, assessed its effectiveness and also identified some unintended consequences associated with the current approach. We also highlighted different types and combinations of conciliation and arbitration in other countries, and identified a number of potential problems in Viet Nam. So far the *ad hoc* conciliation *outside the official framework* appears to have largely been effective in resolving collective labour disputes once they occur, even though there may be associated problems as pointed out earlier. This is in a clear contrast with the non-performing official system of conciliation and arbitration. Then, a policy question may be whether it is possible to find a way to incorporate the *ad hoc* conciliation approach into more effective process with clearer objectives and principles, defined by new regulatory framework, while redefining and revitalizing the current official system of conciliation and arbitration. There can be a number of ways to do so. An example of dealing with the current challenge is illustrated in the following paragraphs. However, the sole purpose of the illustration is to stimulate policy discussion among tripartite actors and legislators.

39. The following can be one example of innovating the system among many others.

- *A new combination of compulsory conciliation and voluntary arbitration with binding award* may be considered as one of options. The current combination of compulsory conciliation and advisory arbitration on a compulsory basis combines two similar approaches and therefore is likely to prolong the settlement process without distinctive effects which can be expected from each stage. Under the new combination, workers would be allowed to either go on strike or voluntarily refer their case to the arbitration and accept the binding award once the compulsory conciliation fails to produce an agreement. Workers will have to measure benefits and costs of strikes and arbitration.

    - Application of *no work no pay principle* during the period of strike *regardless of legal status of strikes* needs to be considered, as an economic instrument to balance relative benefits and costs of strike action. Workers would have to think twice whether they would choose go to strike or arbitration with binding award.

    - It needs to be reminded, however, that it is ultimately *coordination capacity of employers with strong support of employers' organizations which determines success or failure of no work no pay principle*. The *no work no pay principle* can become an effective tool to balance costs and benefits of strikes only when majority of employers - under the umbrella of employers' organization - actually apply this principle.

    - At the same time, however, there appears to be a greater need to provide *better legal protection for workers' representatives who lead collective bargaining and initiate strike actions against unfair labour practices by employers.* It is often reported that workers who are active in collective bargaining and trade union works are victimized by employers. Without better protection of workers' representatives at the workplace against the management's unfair labour practice, the sound practice of collective bargaining would not emerge.

- Under the new combination, the DOLISA - if deemed necessary, with social partners organization - will take the responsibility of providing conciliation service to the disputing

parties. The purpose of this new conciliation should be to assist the disputing parties at the enterprise to reach agreement *through the process of a third-party assisted negotiation*. In view of very weak development of collective bargaining practices, DOLISA conciliators and conciliators from social partners' organization - need *to be equipped with knowledge and skills to facilitate voluntary negotiation between workers' representatives and employer with a particular focus of conciliation of interests* - if necessary, assisted by staff members of Industrial Relations Advisory Service Centres.

  - This would require an intensive training of DOLISA official concerned on conciliation skills with a view to equipping them with a crucial skill of *assisting* workers and employer to reach an agreement through *a third-party assisted negotiation*.

  - In this respect, the current distinction between legitimate and illegitimate, reasonable and reasonable demands needs to be reconsidered.

- The relevance of the ECC needs to be reviewed thoroughly. Sound practice of collective bargaining should be actively promoted. Institutionalization of *labour-management consultation committee as a main two-way communication channel* between workers and employer on regular basis can be considered to help prevent labour disputes, provided that there is a strong workers' organization at the workplace, which is independent from the management.

- As a bi-partite settlement mechanism for individual disputes over rights, it may be strongly encouraged that both parties include grievance handling procedures in their collective agreements or in the work rules (in the absence of collective agreements and trade unions).

6. Workers' representation, trade unions and strikes

40. However, the problem of 'wildcat strikes' is not so much that the legal procedures do not work as that the trade unions do not effectively represent the interests of their members, while the wildcat strike has proved to be the most effective means for workers to redress their grievances. This is a serious problem because the legal provisions governing collective bargaining and disputes in Viet Nam have based upon a supposition that the trade unions should be the *sole* organizational agent representing workers' interests and bargain collective with employers on behalf of workers concerned.

41. According to the article 173 of the Labour Code, “the decision to go on strike is declared by the Executive Committee of the trade union of the enterprise after obtaining the approval through secret ballot or signatures collection by the majority of workers' collective”. This article is closely related with other articles such as article 153 which stipulates trade unions should be set up in all enterprises, and article 45 which stipulates that 'representatives of the parties to the collective bargaining shall be: a) the executive committee of the enterprise trade union or a provisional trade union executive committee, on the side of the labour collective; b) on the employer side, the Director of the enterprise, or a person so authorized by the enterprise works rules or by the Director of the enterprise, in writing'.

42. As such, the basic supposition behind the above legal provisions is that the trade unions should be the *sole* organizational agent representing workers' interests and bargain collective with

employers on behalf of workers concerned. In this respect, it is useful to note that while sharing a view that trade unions should be the major organizational agent for representing workers through collective bargaining, legal systems in most countries envisage a situation where enterprises are not unionized. Even in this situation, it is possible for workers to bargain collectively with employers by electing their representatives for the purpose of collective bargaining through majority vote. Under this situation, it would therefore be logical that workers, even though they are not represented by trade unions, are granted the right to strike under certain conditions.

43. Nevertheless, employment relations at the unionized workplaces in most countries are regulated through collective bargaining between employer(s) and trade unions which represent workers' views and interests. In its essence, collective bargaining in a market economy is a bi-partite process where workers who are usually represented by trade unions collectively negotiate, on regular basis, new price of their labour at which they are willing to provide with employer(s) who has his/her own level of price of labour at which he/she is willing to buy workers' labour. In this situation, most of strikes are organized by trade unions when both parties reach a deadlock on reaching agreement on new terms and conditions of employment through collective bargaining.

44. In Viet Nam, however, *none* of 744 strikes were organized by trade unions, even though trade unions are supposed to be the *sole* organizational agent representing workers' interests through collective bargaining and if necessary taking strike actions according to the legal principles of the labour legislation in Viet Nam. While many of 744 strikes happened in non-union enterprises, there were an equally significant number of 'wildcat strikes' without union sanction which occurred in unionized enterprises. This is the *symptom* of *the most serious problem* with the current industrial relations in Viet Nam, because it suggests that there are serious deficiencies in the representational function of enterprise trade unions. In one enterprise ILO experts visited in November 2004, for example, the chairman of the trade union failed to detect any sign of impending strike actions, organized and executed in very well coordinated manner by rank-and-file workers, even 10 minutes before the strike actually happened. This is evidence that there is very weak representational link between rank-and-file workers and trade union leadership at the workplace. As implied in paragraph 14, unusually high level of workers' solidarity exists side by side with the official trade unions' weak capacity to represent workers' interests through collective bargaining at the enterprise level. The effective representation of workers by workers' organizations constitutes a fundamental foundation for industrial relations system as a whole. Sound industrial relations at the workplace based upon effective workers' representation forms a basic cell of industrial relations, which determines performance of not only industrial relations at the enterprise level, but also the entire system of industrial relations in the country.

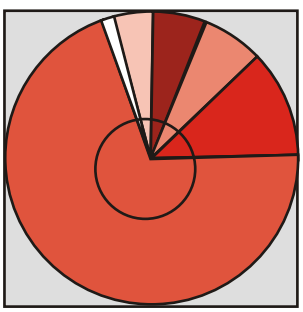
45. In this respect, we need to review patterns of workers' representation in unionized enterprises. For any successful industrial relations system, it is extremely important that the trade unions at the workplace have organizational structures which enable them to represent workers' interests, independently from the management and free from the interference of employer(s). Also, important is that the trade unions at the workplace are capable of representing different groups of workers - for example, production workers, supervisors, engineers etc - and articulate interests of those groups through democratic process - primarily contested union election and delegation structures. In Viet Nam, however, majority of trade union committees at the enterprise level are disproportionately represented by the management staff.

46. The figure 1 attempts to illustrate three different types of workers' representation within union

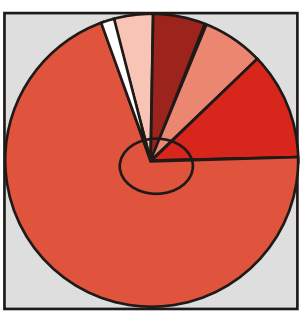
structure. In the figure 1, the smaller circles within the bigger circles represent union committee memberships. In real world, there may be more variety of patterns than what is presented in the figure 1, meaning that the smaller circles can be placed anywhere within the bigger circles. Nevertheless, this typology based upon 'ideal type' reflects predominant patterns of union representations at the workplace.

47. The pattern A of the figure 1 represents desirable composition of union committee members which is approximately proportional to the workers the trade union at the enterprise level is expected to represent, though in real practice there will always be a certain degree of deviation from this pattern. An important point regarding the pattern A is that union leadership should be able to represent divergent voices of different groups of workers they represent, and that given the democratic nature of trade unions, proportional representation of their constituents is usual features of trade union structure. Representation of divergent voices of different groups of workers does not necessarily limited to representation of workers with different position with the management structure, but also representation of female and male workers, and young and old workers who have different views and concerns. This pattern of balanced representation of divergent voices of different groups of workers would be made possible when there are contested union elections through properly designed delegation structure where candidates for the election can communicate their election platforms with their constituents.

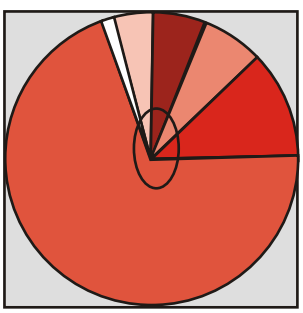
Figure 1: Representation of Different Groups of Workers in the Union Committee



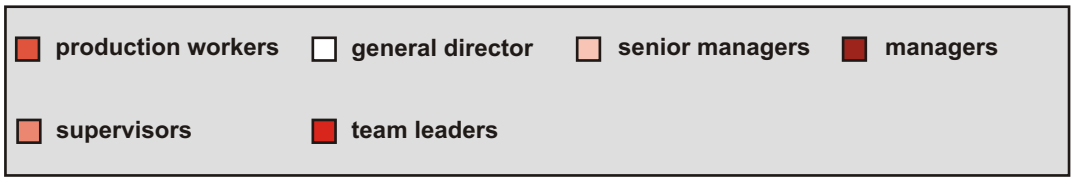
Representation pattern A



Representation pattern B



Representation pattern C



48. The pattern B represents a situation where union committees are predominantly dominated by production workers with little participation of other categories of employees. This pattern can create a problem because it will encourage the trade unions to focus on narrowly defined interests of production workers without long term perspective about the enterprise development.

49. The pattern C shows a trade union committee dominated by the management staff (senior managers such as human resource director, finance director, junior managers and engineers etc). Under this pattern C, it would be extremely difficult to expect the trade union to represent divergent interests and views of workers independently from the employers' influence, as the union leadership itself is composed of either senior managers or managerial staff whose responsibility is to supervise workers and control the workplace. Under this pattern, the representation function of trade unions will be diminished, reducing chance of collective bargaining working as a mechanism to reconcile conflicting interests between the management and workers. It appears that the pattern C is the predominant pattern of union representation in non-state enterprises with unions in Viet Nam.

50. But under this pattern, industrial relations system cannot function properly. Collective bargaining cannot fulfil its essential function of reconciling conflicting interests between workers and the management, when the negotiation team of the employers negotiate collective agreements with the executive committee members of trade union who are mostly managerial staff. It is also highly unlikely that managers, who have simultaneously hat of members of the executive committee of trade union, organize a strike against the management, because it would basically mean strike against managers themselves. In this situation, workers would have every reason to regard the union as a part of the management, and therefore would prefer to take strike actions directly bypassing the executive committee of trade unions at the workplace. Simply put it, *trade unions should be workers' unions, not managers' unions*. When trade unions are managers' unions, it is impossible to address the issue of wildcat strike. It is because, under this situation, 'wildcat strikes' would become the most effective and only industrial relations process *for workers*, while the official industrial relations system at the workplace and outside the workplace is likely to be discredited by *workers*.

51. Also related issue is collective bargaining process. It is reported that collective bargaining is gradually spreading in various types of enterprises in Viet Nam, though exact number of collective agreements are unknown. The ILO's case study in November 2004 found two joint ventures where trade unions and managements have developed relatively sophisticated practice of collective bargaining. In these companies, the enterprise trade unions paid sufficient attention to collecting the demands and opinions of workers, rather than propagating and mobilizing workers, during the preparation (*democratic preparation through two-way communication within union structure*). Second, the issues covered in the agreements were more directly related to concrete conditions of employment relations of the company, and covered many aspects of employment (*negotiation over company specific aspects of employment relations - not replication of legal provisions*). Third, the trade union committee appeared to have learned how to handle negotiation tactics and strategies (*better negotiation skills*). Fourth, the trade union appeared to have developed a relatively sophisticated delegation structure in each workshop through which the union leadership could

collect the demands and opinions of workers in democratic manner (*democratic delegation structure*).

52. This pattern, which we regard a sound practice of collective bargaining, is characterized by (i) democratic preparation through two-way communication with union structure, (ii) negotiation over company specific aspects of employment relations not replication of legal provisions, (iii) better negotiation skills, and (iv) democratic delegation structure. It appears that this desirable pattern of collective bargaining process is more widely spread in the large size joint venture than other types of enterprises. It is not certain how wide spread this pattern is in the joint venture sector and other sectors.

53. However, it appears that predominant patterns of collective bargaining process in Viet Nam are very different from the above pattern. According to ILO's field research, it appears that collective bargaining does not involve real negotiation of new terms and conditions of employment at the enterprise, but just become a formal process to replicate legal minimum standards with a few minor modifications in their collective agreements. In private companies where the executive committee of trade union is dominated by the management, collective bargaining becomes a formalistic ritual to endorse the management proposal without consulting workers' views.

54. ILO's case study indicates that wildcat strikes are least likely to occur at the enterprise where trade unions have balanced representation of various categories of workers and a regular collective bargaining leads to collective agreement which defines concrete conditions of company specific employment relations rather than simple replication of legal minimum. Wildcat strikes are most likely to occur at the enterprise where trade unions do not exist, where trade unions are not workers' union but mostly managers' union and therefore incapable of representing workers' interests as well as their legal rights through primarily collective bargaining over a range of issues affecting working conditions including wages, and where employers violate legal rights of workers, where there is no regular two way communication between labour and management.

Summary of discussions

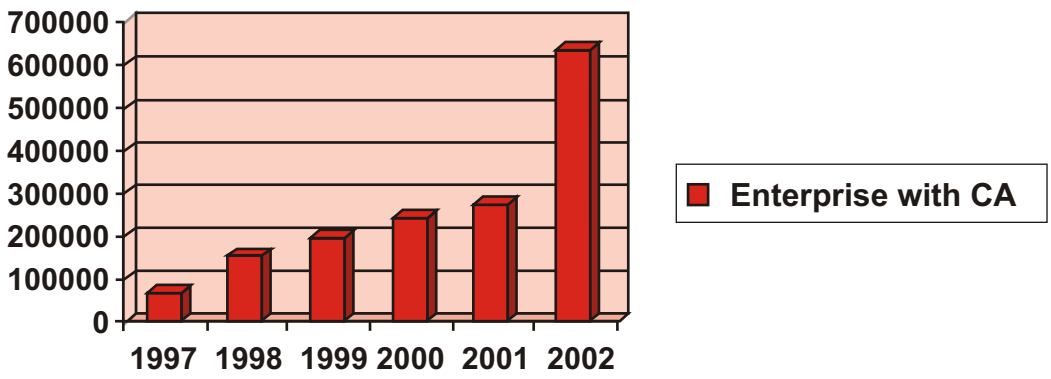
55. In the earlier paragraph 40, we stated that "the problem of 'wildcat strikes' is not so much that the legal procedures do not work as that the trade unions do not effectively represent the interests of their members, while the wildcat strike has proved to be the most effective means for workers to redress their grievances". Given the high level of workers' solidarity and their ability to take a coordinated collective action, any measures to impose more restrictions on strike is likely to generate counter-productive result. A set of proactive measures to strengthen trade unions' capacity to represent workers and to conduct collective bargaining need to be taken instead.

56. A particular emphasis needs to be given to improving representational capacity of trade unions at the workplace. As discussed earlier in paragraph 49, under the union representation pattern of C, workers would have every reason to regard the union as a part of the management, and therefore would prefer to take strike actions directly bypassing the executive committee of trade unions at the workplace. Simply put it, *trade unions should be workers' unions, not managers' unions*. When trade unions are managers' unions, it is impossible to address the issue of wildcat strike. It is because, under this situation, 'wildcat strikes' would become *the most effective and only industrial relations process for workers to redress their grievances*, while the official industrial relations system at the workplace and outside the workplace is likely to be discredited by *workers*. In order to improve representational functions of trade unions at the workplace, a number of policies need to be

developed and implemented, which may include clearly defined *enterprise union lection rules* which enable candidates for the enterprise union election to communicate their election platforms with their constituents at the workplace. There needs to be also *a union rule on the composition of the executive committee of the trade union at the enterprise to ensure balanced representation of divergent voices of workers* based upon democratic principles[11]. It is also to be noted, however, that legal changes alone would not make a difference unless the regulatory changes are matched with consistent efforts to improve capacity of trade unions through education and training. There appears to be a considerable gap between the real development of industrial relations at the workplace, and the attitudes and orientation of the official industrial relations actors at the enterprise and particularly higher level. Training on collective bargaining, wage negotiation, effective representation, grievance handling, and, if necessary, strike action need to be developed and undertaken in systematic manner throughout the country

57. It is not clear how much importance and high priority has been attached to the promotion of collective bargaining in Viet Nam. There appears to be greater need to develop and implement a nation-wide policy by primarily VGCL and also other two parties to promote collective bargaining at the workplace. In this respect, it would be useful to note that in China there has been well coordinated campaign, led by the All China Federation of Trade Unions with strong political support of the Communist Party and the Ministry of Labour and Social Security, which resulted in dramatic increase of number of collective agreements and workers covered by the collective agreements (figure 2 and Box 9). Also trade unions in China have made a number of innovative experiments to cover as many workers as possible by collective agreements of various forms (Box 10). The campaign for collective bargaining, which was initially launched after the labour law was adopted in 1995, has gained a new momentum after China established tripartite consultation mechanism for better coordination of labour relations in August 2001 (figure 2). The Chinese Communist Party has given a high priority to the promotion of collective bargaining.

Figure 2. Enterprises with collective agreements in China



Source: China Labour and Social Security Communiques

[11] In one of above enterprises, the trade union developed an unwritten rule that staff of human resource department should not be involved in the executive committee of the trade union and that employees with management position should relinquish their management position once they are elected as a chairperson of the trade union so as to avoid the conflict of interest situation.

Box 9: ACFTU campaign for collective bargaining

The ACFTU campaign for collective bargaining at the workplace has gathered a pace since mid 1990s with the adoption of the Labour Law in 1995 and particularly after the creation of the tripartite consultation committees at all levels in early 2000s which have proven to be instrumental in spreading collective bargaining through tripartite coordination. At the end of 2001, there were 270,000 collective agreements and 70 million workers covered by those agreements. As of December 2003, according to the ACFTU, the corresponding numbers reached 672,900 collective agreements covering 103.5 million workers in 1,214,000 enterprises. It means that number of collective contracts increased by 249%, while number of workers covered by those contracts increased by 48%. It may indicate that by the end of 2001, collective contracts were concluded in most of large enterprises, and since then they began to be introduced in smaller enterprises at a rapid pace. The ACFTU announced its aim of reaching collective bargaining coverage of 60% by 2008.

Box 10: Nanjing Federation of Trade Unions' Policy on Collective bargaining

Nanjing Federation of Trade Unions has adopted a long-term policy to improve quality of collective contracts and to "perfect" the system of collective bargaining. Major directions are announced as follows:

- Replacement of "mutual guarantee contracts" in state-owned enterprises with genuine collective contracts[12]
- Move towards the implementation of collective contract systems in non-state sector
- Move towards territorial collective contracts from individual enterprise collective contracts[13]
- Move towards industry-based collective contracts from territorial collective contracts
- Establishing practices of collective contracts with community and street offices (for workers engaged in public services such as cleaning and others)
- Implement collective contract and move towards wage consultation

This new emphasis is not limited to Nanjing. Similar moves are observed in many cities where industrial relations actors have gained considerable experience of collective bargaining.

Source: Nanjing Federation of Trade Unions (2004)

Other related policy issues

58. In the previous sections, we have examined industrial relations issues directly associated with the issue of strike such as labour dispute settlement machineries, workers' representation and collective bargaining. In this final section of the ILO discussion paper, we will briefly point out other policy issues, which are not directly related to the issue of strike, but which need to be considered as

[12] "Mutual guarantee contracts" reflect transitional features of collective contracts in SOEs. Under these contracts, workers of SOEs make commitment to achieving annual economic target in return for the management's guarantee of improved working conditions and wages (NFTU, 2004).

[13] This aims at providing a proper protection to workers in small and medium sized enterprises which are difficult to organize and conduct collective bargaining in each enterprise.

a part of comprehensive national industrial relations and labour market policy with a view to promoting industrial peace and economic growth.

Strengthening employers' associations

59. Employers' associations play key roles in promoting sound industrial relations in a market economy. VCCI has gradually strengthened its capacity to represent various types of employers in industrial relations. The recent MOU between VCCI and VGCL shows the active role of VCCI in promoting sound industrial relations in the country. There are a number of crucial roles for VCCI and other employers' associations to play in improving industrial relations in general and in addressing the issue of 'wildcat strikes' in particular. First, VCCI can become a powerful organizational medium through which best practices of industrial relations and human resource management can be disseminated. In order to play this role, there is a need for VCCI to create a network forum of human resource managers who will share the best practices, identify success factors and develop a set of common principles and lessons to be disseminated through the VCCI structure and its affiliation. Second, VCCI needs to gradually strengthen its capacity of coordinating industrial relations strategies of its member enterprises. For example, as previously pointed out, the application of the principle of *no work no pay* during a strike period can be made possible only when employers stick to this principle collectively. If a significant proportion of enterprises do not follow this principle, this rule would lost its relevance. Therefore, it is vital for VCCI to develop organizational capacity to coordinate industrial relations strategies among its member companies.

Improvement of minimum wage system

60. In Viet Nam, the national minimum wage system is not regularly adjusted. It is adjusted only when there is big increase in consumer price index. This may not be conducive to harmonious industrial relations in the country. The absence of regular adjustment of minimum wage could give a wrong signal to employers who might be unwilling to increase wages for their workers on the excuse of the unchanged minimum wage. If minimum wage is increased by significant margin after a number of years without upward adjustments, this can create also unfavourable environment for harmonious industrial relations because employers would have a great difficulty to make a sudden increase of wages by such a big margin while workers would naturally develop high expectation. Normally, the minimum wage should be adjusted annually. In some circumstances it may be decided to make no annual adjustment but, in such cases it is important to explain the reasons for the non-adjustment. Annual adjustments are normally based on changes in the cost of living index, but not necessarily in the same proportion. For example, if the CPI increases by 25% in one year, an increase of 25% in minimum wages may not be advisable because of the likely inflationary impact. An annual adjustment for changes in the cost of living might be complemented by an adjustment every 3 years or so, based on changing economic circumstances. This will enable workers to share in the benefits of economic growth. This is particularly important where there is no collective bargaining arrangements in place and workers are unable to negotiate for wage increases. Once a decision has been made to adjust the minimum wage, it will then be necessary to decide on the actual date on which the increase will take effect. Ideally, there should be a gap of a couple of months between the date of determination and the date on which the new wage will apply. For example, the new wage may be decided on 1 October but not take effect until 1 January of the next year.

Wage guideline (employers' coordination & workers' coordination)

61. A transition towards a market economy means that the government ceases to intervene in micro-management of wages at the enterprise level as it did under the planned economy. But it does not necessarily mean that the government has no role in wage development in non-state sectors. In this respect, it is worthwhile to note that in many countries, the government in consultation with social

partners issue wage guidelines, which help workers and employers at the enterprise level to negotiate wage increases within a range which tripartite actors at higher level think regard as desirable for the entire economy and sound industrial relations at the workplace. In China, the city level wage guideline was instrumental in ensuring wage determination at the enterprise level to move within a certain range while achieving its goal of removing itself from micro-level management of wages (Box 11).

Box 11. Annual wage guidelines at municipal level and its interplay with wage negotiation at the enterprise level

Municipal labour bureaus issue annual wage guideline. In formulating the annual wage guideline, the labour bureaus take into account such factors as GDP growth, CPI, living expenditures, productivity, labour market situation and others. In formulating the wage guideline, the labour bureaus seek opinions of the city federation of trade unions and city federation of enterprises. The guidelines give maximum and minimum of wage increase rates for different industries and enterprises with different economic performance (better performing, average performing and under-performing enterprises). The guideline is not binding, but negotiators at the enterprise level are encouraged to consider this guideline during their wage negotiation.

ILO's case study indicates that the wage guideline influences on starting point of wage negotiation at the workplace. The trade union negotiators are likely to take maximum ceiling of the wage increase rates suggested by the guideline as their initial wage demand proposal to the management. After several rounds of negotiation, both sides will determine wage increase rate upon their consideration of enterprise specific factors. Under the influence of the wage guideline, the agreed wage increase rate is likely to be within the range suggested by the guideline.

It implies that there may be a positive interplay between the city wage guideline and the wage negotiation at the enterprise level, and that the government may have been successful in achieving its goal of removing itself from micro-level management of wages while ensuring wage determination at the enterprise level to be made within certain parameter.

ILO Discussion Paper

Labour Disputes and Their Settlement in Vietnam

LABOUR DISPUTES AND THEIR SETTLEMENT IN VIET NAM

Introduction

1. The *Issue Paper on Labour Disputes and Their Settlement in Viet Nam* (hereafter the Issue Paper) aims at identifying main issues regarding the current situation of labour disputes, particularly 'wildcat strikes', and labour dispute prevention and settlement systems in Viet Nam. The *Issue Paper* summarizes main points of in-depth discussions which emerged during the Tripartite Experts' Roundtable Discussion (hereafter the Roundtable Discussion), which was held in Hanoi, 16th - 17th March 2006.

2. The Roundtable Discussion was held against the background of the recent wave of 'wildcat strikes' and the ongoing debate regarding the revision of the Chapter 14 of the Labour Code. For the last 10 years between the promulgation of the Labour Code in 1995 and the end of 2005, there have been 1,056 strikes in Vietnam and all of them were 'wildcat strikes' - strikes are initiated by rank-and-file workers (not trade unions) without going through the legal procedures defined in the Labour Code. The scale and intensity of the 'wildcat strikes' has particularly grown in recent months before and after the lunar new year holiday (*Tet*) in 2006 - there were as many as 150 'wildcat strikes' involving 140,000 workers in January and February of 2006 alone. The recent wave of 'wildcat strikes' started in foreign invested enterprises of industrialized provinces in South where workers went on strike demanding higher (minimum) wages. Soon the strikes spread to other sectors and to other regions as well. The recent wave of the strikes has given a sense of urgency among tripartite partners in their on-going discussion on how to revise the Chapter 14 of the Labour Code so as to ensure orderly exercise of rights to strike and sound development of harmonious industrial relations.

3. The Roundtable Discussion was very productive and serious with all participants contributing their ideas to the discussion. Although ILO experts facilitated the Roundtable Discussion, it was the tripartite experts who have identified main issues of labour disputes and dispute settlement machineries in Viet Nam. This *Issue Paper*, while prepared by the ILO experts, simply tries to summarize the main points of the discussions among the tripartite experts in a structured manner. The *Issue Paper* is designed to assist the tripartite decision-makers in considering various policy options, including revision of legal framework, for improving labour dispute settlement systems in Viet Nam through clarifying issues and through illustrating various views expressed by the tripartite experts regarding alternative approaches to labour dispute settlement.

4. The *Issue Paper* is composed of two parts. The Part 1 summarizes various views expressed by the tripartite experts regarding a wide range of the current industrial relations issues which include the following issues: causes of strike and wildcat strikes, the current state of labour relations at the enterprise level with a special focus on weakness of workplace trade unions, collective bargaining situation, wage determination including minimum wage policies and wage negotiation, dispute settlement process at the enterprise level, and review of the current system of labour dispute settlement. In Part 1, the Issue Paper try to summarize the main points made by the tripartite experts in Viet Nam, without adding ILO experts' viewpoints. In the Part 2, the ILO experts try to put forwards an alternative proposal to improve industrial relations and labour dispute settlement

system in Viet Nam in line with what has emerged as a preliminary common understanding among the tripartite experts and ILO experts during the Roundtable Discussion. The views expressed in the Part 2 should be seen as individual views of the ILO experts concerned, which are designed to stimulate and facilitate further in-depth discussion among the tripartite decision-makers, and should not be seen to constitute the ILO's official advice or recommendations.

Part 1
Identifying industrial relations issues with special focus on strikes and improving dispute prevention & settlement system

5. In the beginning of the Roundtable Discussion, a VCCI representative made a statement. He emphasized that Viet Nam's integration into the global economy has brought positive benefits to the country in terms of economic growth which created new jobs. According to him, however, the development of modern industrial relations has lagged behind the pace of social and economic changes in the country. He stressed the importance of developing sound industrial relations. If employers do not recognize the importance of trade unions, he said, it would be hard to expect good labour relations at the workplace. At the same time, he stressed that *the role of employers as a creator of wealth and jobs should be fully acknowledged by the entire society*, and that employers should not be seen as an exploiter in the old fashioned manner. He also expressed his view that the trade unions need to change as there are problems within the trade unions associated with the historical trajectory of trade unions development in Viet Nam. Finally, he stressed the importance of strengthening and improving Court system as it helps to establish the rule of law in the field of labour as well.

6. A VGCL representative gave his identification of main industrial relations problems in his opening remarks, by presenting a list of the problems which included: low unionization rate; limited capacity of trade union officials at the enterprise level; employers' negative perception of trade unions' roles at the workplace; low awareness of workers on labour law, and underdeveloped practices of collective bargaining.

1.1 Why strikes happen and why all of them are 'wildcat strikes'

7. With this recent wave of 'wildcat strikes', tripartite partners have begun to ask two important questions: 'Why there have been so many strikes and why all of them are wildcat strikes'.

1.1.1 Why strikes?

Is employers' non-compliance with labour law the main cause of strikes?

8. *Employers' violation of the labour laws and workers' rights* has been pointed out by not only trade union officials but also government officials as one of main causes of the strikes. According to the VGCL officials, the foreign employers tend to ignore the local labour legislation and infringe workers' rights, driven by their blind pursuit of profits. Though workers make their complaints to the employers, the employers often ignore workers' complaints that is why workers just walked out to protest in the form of 'wildcat strikes' in their attempt to send a strong signal to the authority for the government help, according to the VGCL officials. It was stated that “around 90% of strikes were due to the violation of the labour law by employers, and around 80% of strikes were related to wages, salaries and bonuses”.

Box 1: Two questions from ILO experts

Q1: If we suppose that the employers' violation of the labour law is the main cause of the strike, we should be able to say that there were much more frequent violations of labour law by employers in the past few months than before. Were there more frequent violations of the labour law by employers recently than before?

Q2: It was stated that "around 80% of strikes were related to wages, salaries and bonuses", while "around 90% of strikes were due to employers' violation of the labour law". Were 80% of strikes due to non-payment of wages or payment of wages below minimum wage level? Or were those strikes related to workers' demand for higher (minimum) wages or bonuses? If the former is the case, it is indeed due to the violation of the labour law. But if the latter is the case, it may be difficult to explain how 90% of strikes were associated with employers' violation of the labour law when 80% of strikes took place due to workers' demand for higher wages or bonuses.

Strikes as *de facto* negotiations in the absence of genuine collective bargaining

9. A government official commented that workers' strikes were their desperate attempt to send a signal to employers that they wanted to have better working conditions, and a signal to the government that there should be a better enforcement of the law. He went on to saying that *strikes were de facto negotiation in the absence of genuine collective bargaining at the workplace*.

Insufficient law enforcement and an environment favouring investors

10. A VGCL representative pointed out that the government's weak law enforcement was to blame for frequent strikes. While showing a understanding that the labour administration has *insufficient capacity of conducting labour inspection* (there are only 300 labour inspectors in the country of 80 million population), the VGCL stated its view that many local authorities are "laying red carpets on the back of workers to welcome investors", creating a situation that workers' plights are not addressed unless workers cry through 'wildcat strikes'.

11. Though there was no consensus whether employers' violation of labour law was the main cause of strikes, many participants seem to share a view that *foreign invested enterprises from some countries (particularly, Taiwan and Korea) tended to be more prone to causing disputes* and strikes than any other types of enterprises. But it was added by a participant that the strikes were spreading to other companies Japanese companies and also domestic companies, implying that the violation of the labour law by certain groups of investors cannot be a sole reason for strikes.

Tightening labour market and workers' bargaining power

12. A government official pointed out that the recent wave of strikes was closely associated with *a changing balance between demand and supply in the labour market*. A serious labour shortage has emerged in the most industrialized provinces of Southern Viet Nam where 30,000 (Dong Nai) 50,000 shortages (Binh Duong) were reported and employers could no longer recruit workers from the localities. According to him, workers understand instinctively that they have better bargaining power due to labour shortage, leading to a bold action to demand higher wages. According to him, the recent surge of strike activities was associated with this natural labour market phenomena rather than violation of the labour law by employers.

No adjustment of minimum wage for years and accumulation of workers' discontents

13. It was noted that there was no adjustment of minimum wage for many years. In the absence of

wage negotiation at the enterprise level, this meant that many workers had been paid at the same minimum wage level for many years, while the cost of living has considerably increase for the same period. This means that workers' discontents have been accumulated for a long time, which erupted into the strikes which spread like wildfire - particularly in the tightening labour market.

Dual minimum wages in the same industries with similar characteristics

14. A number of the participants predicted that *more strikes are likely to happen* in near future because *workers cannot accept the fact that workers in domestic companies get lower minimum wage than workers in foreign invested enterprises due to dual minimum wage rates* applied to domestic and foreign enterprises, even when workers in both sectors have same qualification and productivity, and perform the same job - this was obvious in the spread of wildcat strikes from foreign enterprises to domestic enterprises.

Wage differentials between unskilled and skilled workers

15. According to the government officials and employers' representatives, another contributing factor behind the recent wave of strikes was the *changing wage differentials between unskilled (new) workers and skilled (experienced) workers*. As unskilled workers' wages was increased by a sudden upward adjustment of minimum wage, experienced workers went on strikes demanding higher wages for them as well. This situation was aggravated due to ambiguous provision in the Decree No.3 which made the upward adjustment of minimum wage in certain locality. According to the Decree No.3, 'trained' workers should be paid at least 7% higher than minimum wage, leaving a confusing question of "who are the 'trained workers'" unanswered and, therefore, leading to more strikes.

Emergence of mature industrial workforce and their social network

16. It appears also that there was also a growing self-confidence and better (spontaneous) organizational capacity of new working class. A number of the participants expressed a view that strikes have become more frequent and more sophisticated as workers have accustomed the new factory lives. The farmers-turned-workers tended to willingly accept low payment and bad working conditions when they started a new factory life. *Now workers have familiarized themselves with their new factory lives, workers are beginning to demand better pay* and working conditions particularly in the face of increasing cost of living in recent years.

17. In addition, it was pointed that the workers have developed *a social network* among themselves - often workers from same hometown/villages - through which they frequently *exchange information regarding different wage levels and working conditions* in the factories of the locality they live, which *helps the workers to take coordinated collective actions* to put pressure on the employers to improve working conditions in line with the nearby factories with better working conditions.

Box 2: ILO experts' tentative analysis of (recent) strikes in Viet Nam

1. There are certain groups of employers or investors who might be frequent violators of the labour law, which caused angers of workers and therefore led to strikes.

2. It must be also true that there is insufficient enforcement of law - labour inspection capacity of the labour administration needs to be strengthened.

3. However, when we consider all the issues and cases, it appears that *a root cause of strikes* is *conflicting interests* between workers and employers - workers are demanding higher

wages and better working conditions. *Strikes are de facto negotiation in the absence of genuine collective bargaining at the workplace.*

4. The non-adjustment of minimum wage for many years contributed to accumulation of workers' discontent to the extent that it suddenly erupted into strikes which spread like wildfire. *Workers were stuck at the minimum wage level for many years in the absence of wage negotiation at the enterprise level, while labour market situation was tightening.*

5. *Changing labour market situation in favour of sellers* (i.e. workers) make it easier for workers to take collective actions. *That is why there were much more strikes recently than ever before.*

6. *Dual minimum wage between foreign and domestic sectors explains the recent pattern of strikes: spreading from foreign to domestic sector.*

7. After years of experiences with a new factory life, *workers have now gained know-how on how to advance their interests*, which was helped by *spontaneous social network of workers' community*. They have now far better capacity to take coordinated collective actions outside of the official enterprise unions. *That is why the recent strikes displayed a sophisticated coordination among workers of different factories.*

8. In this respect, the recent upsurge of strikes should not be attributed to a few individuals with bad intention (so-called 'black' leaders) it is about workers' [natural] community enabling workers' spontaneous solidarity outside the official system.

1.1.2 Why wildcat strikes?

18. The above section summarized the tripartite experts' discussion on why strikes take place in Viet Nam. This section attempts to summarize the main points of the tripartite discussion on why all strikes were wildcat strikes (i.e. strikes initiated not by the official trade unions, but by workers without following the current legal procedures).

Problems with the current legal framework and low awareness of the law among workers

19. VGCL representatives stated that the current legal procedure for dispute resolution was a main cause of 'wildcat' strikes. According to them, the current legal procedures for a lawful strike was too complicated and lengthy, making a lawful strike very difficult, while workers would get what they demanded by staging a wildcat strike. In this respect, they emphasized the need to amend and improve the legal framework to cope with the new situation and challenge, In response to this, government officials informed the meeting that the Chapter 14 of the Labour Code should be revised by the end of 2006, and the whole Labour Code be amended by 2008. In addition, government officials expressed a view that insufficient understanding of labour law was a cause of wildcat strikes, and that therefore there was a need for labour law education for workers and employers.

Government intervention's unintended consequences

20. Employers took a strong view that the current legal procedures and the actual process for ending the wildcat strike situation does not impose any cost for the strikers, and employers had to bear huge loss. According to them, workers were paid for the days of strike, though the strike action did not

follow the legal procedures. Workers and unions are not asked to compensate for the damages of the company which were made during the strike action.

21. Some DOLISA officials also said that, *while the government intervention tends to succeed in ending the strike situation immediately, the intervention tends to encourage both parties to rely on more government intervention instead of giving an incentive for both parties to resolve their differences through voluntary negotiation.* This view was supported by representatives of employers who also said that the current approach does not give incentives for both parties to negotiate and instead reinforce both parties' dependency on the state intervention.

Absence of genuine collective bargaining leading to wildcat strikes

22. According to the government official, *workers would go on 'wildcat strikes' because there is no widespread practices of voluntary negotiation* with employers. He acknowledged that the government has encouraged practice of collective bargaining. However, most collective bargaining agreements (***CBAs***) were simple replications of the labour law rather than the outcome of real negotiation between workers and employers. As a result, wages tend to be unilaterally set by employers. In the absence of genuine collective bargaining including wage negotiations, workers frustrated with their low wages tend to develop *an expectation that the government would increase the minimum wage in the absence of real collective bargaining*. Some government officials commented that this phenomenon reflects *the old mindset of the centrally-planned economy era when wages were determined by the State,* not by two parties at the workplace.

23. According to the official, the above problem was compounded by *the underdeveloped practice and institutions of bi-partite and tripartite social dialogue* which should have harmonized conflicts. It was urged that bi-partite and tripartite social dialogue system should be fully developed.

Weak trade unions at the enterprise level

24. There was a general consensus among the tripartite participants - including VGCL both at central and local level that *the poor capacity and ineffectiveness of enterprise unions contributed to widespread 'wildcat' strikes*. In particular, according to the VGCL officials, the enterprise unions fail to serve as a bridge or a channel of communication and negotiation between workers and employers. As a result, misunderstanding would emerge between workers and employers, and workers' concerns would not be addressed. Hence, wildcat strikes. Employers' representatives agreed with the VGCL regarding ineffective enterprise unions being a main cause for 'wildcat' strikes.

25. A number of employers' representatives took a view that employers had no clue or information on why the strikes happened, even though they maintained a good relationship with their enterprise unions on which the employers used to rely for communication with their workforce. According to them, employers were frustrated with the fact that they had no opportunity to negotiate with workers before strikes happened. Employers felt that due to lack of dialogue between workers and employers, workers just wanted to get their demands satisfied without understanding on or sympathy with the companies' financial difficulties. After 'wildcat' strikes, *many employers were said to have lost their confidence in the enterprise unions*, and therefore they are now trying to establish direct channels of communication with their employees - instead of relying on the enterprise unions.

Box 3: ILO experts' tentative analysis of interaction between 'wildcat strikes', government intervention and absence of genuine collective bargaining

1. All strikes were wildcat strikes since 1995 without a single exception, meaning that the official trade unions failed to initiate a single strike and no strike went through legal procedures.

2. There are said to be shortcomings of the current legal and institutional framework for dispute resolution - it is too complicated and lengthy, according to most Vietnamese experts.

3. Though the government handling of the wildcat strike is seen as effective in ending the strike situation as quickly as possible, the current mode of government's intervention creates unintended consequence of creating more incentives for workers to take a shortcut to achieve their goals - that is 'wildcat strikes'.

4. Therefore, the current mode of government's intervention creates also a strong disincentive for workers and employers to settle their differences and conflicts through voluntary negotiations.

5. The above 3rd and 4th problems are closely associated with the absence of genuine collective bargaining, including wage negotiation, between representatives of workers and employers. The absence of genuine collective bargaining make it imperative for the government to directly intervene with a view to ending the 'undesirable' situation of 'wildcat strikes', and this intervention in turn creates an expectation among workers that the government would intervene in their favour if they go on 'wildcat strikes', setting vicious cycle of wildcat strikes-government's direct intervention-more wildcat strikes.

6. However, the fundamental reason for absence of genuine collective bargaining (and therefore 'wildcat strikes') lies in the weakness of trade unions at the enterprise level trade unions are not capable of negotiating better terms and conditions of employment.

7. After seeing that trade unions did not serve as a useful communication channel with workers, employers are trying to open direct communication channel with their workforce. This indicates that the official enterprise trade unions are likely to be further marginalized and weakened at the workplace.

1.2 Why enterprise unions are weak and collective bargaining are underdeveloped?

Centrality of the official trade unions in the industrial relations system in Viet Nam in contrast with actual weakness of the official trade unions

26. The Viet Nam's legal and institutional framework of industrial relations, including the Constitution, assumes the central role of VGCL and its affiliated unions in every aspect of industrial relations. For example, a strike would be deemed lawful only when it is organized by the unions - however, none of strikes was initiated by the trade unions. The participants discussed why the unions are so weak that they could not organize even a single strike out of more than 1,000 strikes for the last 10 years.

Deficiency in their capacity to represent workers vis-à-vis employers

27. Most participants agreed that the weakness of trade unions was a critical problem in the industrial relations system in Viet Nam. The followings are various remarks made by the participants regarding the current situation of the enterprise trade unions in Viet Nam: "enterprise trade unions just follow what the management tells them to do"; "enterprise trade unions play the roles of human resource managers"; "Trade union leaders do not understand workers", and; "even when workers submitted their complaints to enterprise union leaders, the union leaders would not give any feedback, and therefore workers eventually lost their confidence in the union leadership". The above remarks illustrate that the union weakness is not just a weak capacity in general, but *serious deficiency in their capacity to represent workers vis-à-vis employers* at the workplace.

Lack of financial independence of trade unions

28. According to VGCL officials, there are several factors contributing to weakness and dysfunction of the enterprise unions. Enterprise union leaders are reluctant to represent workers' voice vis-à-vis employers because *their salaries are paid by the employers* and therefore they are afraid of confronting employers with workers' demands.

Insufficient legal protection of union leaders against employers' unfair labour practices

29. Also, the VGCL official criticized that there was *insufficient protection of union leaders against the employers' unfair labour practices,* which make union leaders vulnerable to employers' action against them. When trade union leaders try to protect their members rights and interests, they might have to risk their jobs or posts because employers may fire or terminate his/her employment contract or transfer him/her to an unwanted post which would make his/her union job very difficult.

Employers' union avoidance

30. VGCL officials also criticized that some employers do not allow union organizations in their companies, citing 'low' unionization rate in foreign invested sector (20%) and domestic private sector (50%). They also pointed out that employers do not create favourable conditions for union activities at the workplace. For instance, according to them, some employers avoid meetings with provincial unions or rotate active union leaders to jobs where they have few chances to meet with their members.

Lack of professional skills as train union leaders

31. VGCL officials said that the capacity of enterprise union leaders remained poor. They received little training in union skills, poor understanding of the labour legislation, barring them from becoming real leaders and protectors of workers. Also, it was noted that there are very few number of full-time union officials who can make a full devotion to the trade union work of representing workers.

Human resource managers are often trade union 'leaders'

32. It was noted by many participants, including the VGCL representatives, that trade union leaders at the enterprise level were often human resource managers or managerial staff. Explanations were given by VGCL officials on why so many human resource managers (or other managerial staff) are trade union leaders: "Trade union tasks take a lot of time. That is why administrative staff are appointed as trade union leaders"; "It is better to have managerial staff as union leaders, because they can communicate directly with the employers"; "We need a person who can bridge between managers and employees. That is why you appoint human resource managers who know workers as well as employers"; "when VGCL establish a provisional trade union committee in a newly established company, we lack information about the people in the company. Therefore, we approach human resource managers who must know workers better than anybody else.", and "Most workers

are not willing to run for the union election. Therefore, we continue to have human resource managers as trade union leaders".

Workers see trade union 'leaders' more aligned with employers than workers

33. An employers' representative complained that union leaders were not close to their members so that union leaders could not convey concerns of workers to employers. Also, a government official observed that *workers tended to consider 'trade union leaders' not as their representative but as a part of the management, because union leaders in many companies are often human resource managers.* This explains also why unionization rate is so low, according to her, because workers do not see benefits of the trade unions - for their own benefit, workers would take a shortcut of wildcat strike.

Therefore, workers follow 'black' leaders

34. Once a dispute takes place, therefore, workers tend to elect their own leaders (so-called 'black leaders' vs. 'red leaders'), bypassing or ignoring the official union leaders, according to the government official. All three parties said that there are 'black leaders' who organize and lead strikes. The government officials said that the 'black leaders' were able to organize workers, led strikes and even "controlled" thousands of workers: "when these black leaders ask workers to go on strike, they go on strike; when they ask workers to stop the strike and workers get back to work".

Box 4. ILO experts' preliminary observations regarding weakness of enterprise trade unions

1. The Constitution and the Labour Code grant the central role to the official trade unions in every aspect of industrial relations in Viet Nam. But the trade unions are very weak at the workplace.

2. The weakness is not just a weakness in general, but a deficiency in the enterprise union's capacity to represent workers vis-à-vis employers at the workplace.

3. The weakness partly stems from financial dependency of the enterprise trade union leaders on the employers' payroll.

4. There is a urgent need to provide better and stronger legal protection of trade unionists at the enterprise against employers' unfair labour practices so that trade union activists or officials can carry out their representative functions without fear of losing their jobs or other forms of employers' retaliation.

5. It is also to be noted in this respect that the best protection of trade union leaders always come from workers' trust and confidence in the trade union's capacity and willingness to protect and represent workers' interests, though strong legal protection is also important.

6. Also, more systematic training should be undertaken by VGCL to improve skills and knowledge of trade union activists or officials at the enterprise level so that they can more effectively represent workers and negotiate collective agreements with employers.

7. However, a fundamental problem lies in the fact that human resource mangers or managerial staffs are often enterprise trade union 'leaders'. Workers see them more aligned with (or closer to) management than workers - very rightly so. While workers are losing (or have lost) their confidence in the trade union 'leaders', they follow what 'black' leaders tell them to do in the wildcat strike situation.

1.3 How to strengthen enterprise unions and improve collective bargaining

Better legal protection of enterprise union leaders against unfair labour practices of employers

35. VGCL stated that firstly a better legal protection for union leaders against unfair labour practices should be provided. For example, the employment contracts of the union leaders should not be terminated or expire during their term of union leadership. Secondly, there should be a legal framework enabling union officials at higher level to support enterprise unionists in their negotiation with the management, and if necessary to organize strikes. It would also require that the provincial VGCL would send professional negotiators and mediators to support the local unionists.

More financial independence of enterprise unions and more financial autonomy of higher level union organizations

36. A VCCI representative said that the VGCL was not a weak organisation. According to the VCCI official, VGCL needed to accelerate its pace of organizational reform. He also pointed out that VGCL has financial resources to support its affiliated unions at the enterprise level with a view to making them more independent, and that in this regard the VGCL should be granted with financial autonomy.

Systematic, genuine efforts to promote collective bargaining

37. According to a government official, it would encourage the VGCL to develop teams of professional negotiators at provincial level. Also, the VGCL should think about negotiating industrial agreements with employers, according to the same official. The official emphasized the voluntary nature of collective bargaining, which should be based upon social partners' willingness to negotiate. In its response, VGCL stated that it strongly supported the idea of spreading the practice of collective bargaining (in its genuine sense) to enterprise and industrial levels as collective bargaining is an efficient tool to ensure sustainable development of sound industrial relations.

How to promote collective bargaining: different models of collective bargaining

38. As all three parties made a strong commitment to promoting collective bargaining, the discussion focused on how collective bargaining can be promoted systematically. The ILO experts presented different models of collective bargaining to facilitate tripartite discussion.

Box 5: Different models of collective bargaining

Model 1: Purely enterprise bargaining

- Practices in many East Asian countries (Japan, most sectors in Korea, China, Thailand, the Philippines etc). Vietnamese labour law and practices appear to be based on this model.
- Advantage: flexibility and adaptability for setting enterprise specific working conditions suitable for workers and management in the enterprises concerned
- Disadvantage: disparity between companies
- Disadvantages in Vietnamese context: enterprises trade unions are too weak to negotiate with their employers at the workplace.

Model 2: Enterprise bargaining, assisted by professional negotiators of trade unions (and if agreeable, employers' organizations) at higher level

- Practices in USA, some sectors in Malaysia, a few sectors in Korea.
- Same advantage as pure enterprise bargaining model.

- Disparity between companies may be less, as trade unions (and employers' organizations) at higher level (usually at industry/regional level) may have desire to produce more or less similar bargaining outcome across the companies in the sector concerned.
- Advantages in Vietnamese context: trade unions at higher level are independent from the management of specific companies, while enterprise union leaders are closer to the management rather than workers.
- Still, there is a need to establish strong and direct link between trade unions at enterprise and higher level, and rank-and-file members, through prior consultation before entering into collective bargaining and approval of tentative agreements by union members.

Model 3: Industry bargaining between trade unions and employers' organizations at industry level

- Practices in most continental European countries (Germany, Italy, France, Belgium, Sweden etc), two sectors in Korea, port workers in Japan, some sectors in USA
- Advantages: better solidarity among workers, less bargaining costs, enterprises are relatively free from hassle of negotiation and therefore conflicts.
- Disadvantages: less flexibility and adaptability for each enterprise
- Trend: decentralization more towards enterprise bargaining (due to the globalization)
- In Vietnamese context, it runs the same danger of disconnection between trade unions at higher level and their members at the enterprise level. Without democratic linkage between unions and employers' organizations at higher level, and their members at enterprise level, this system may not function.

The role of social partners at higher level to improve collective bargaining at the enterprise level

39. A representative of VCCI stated that model 2 or 3 (or combination of both) should be more appropriate and desirable in the Vietnamese context. He said that VCCI would have a meeting with VGCL to discuss how they could promote collective bargaining along the model 2 and 3. On the other hand, a representative of VGCL expressed his view that model 1 or 2 (or combination of both) would be appropriate for Viet Nam. He added that trade unions at higher levels should be able to assist enterprises unions in their negotiations with employers. A government official commented that trade unions at higher level should be in position to offer their support to enterprise unions. He implied that, given the representational deficits of the enterprise unions, the model 2 could play a bridging role - leading to either model 1 or model 3 (or both). An ILO expert commented that there might be a need to change legal provisions which appear to confine labour relations to the enterprise level, without giving a space for industrial relations development, including bi-partite collective bargaining, beyond the enterprise level.

1.4 Reviewing the current dispute settlement procedures and system

40. All three parties shared a view that the current dispute settlement system does not function properly, and that therefore there was a urgent need to reform and improve the legal and institutional framework of labour dispute settlement.

Non-functioning Enterprise Conciliation Council (hereafter *ECC*)

41. There was a unanimous agreement that the *ECC did not function at all as the first mandatory process of conciliation* - no disputes have ever been conciliated by the ECC. According to the Labour Code, the legal procedures of settling collective disputes start from the ECC, which is the first mandatory step of 'conciliation'. The ECC is composed of equal number of trade union representatives and employers' representatives. Any industrial action would be declared unlawful if both sides did not go through this very first mandatory step of 'conciliation' by the 'mandatory' bi-partite ECC. The gap between the real situation (ECC does not function at all as a dispute settlement body) and the legal provisions (a strike would be deemed unlawful if the dispute case was not referred to ECC) creates a serious problem.

Box 6: ILO comments on ECC as a mandatory first step of dispute settlement and supposition of 'mandatory' unionization in Vietnam's legal structure

The above problem would be compounded when we consider there are non-union enterprises. ECC can exist only when there is a union (or provisional union committee in case of newly established enterprises). A representative of VCCI observed that this contradiction creates illegality of disputes by default in many non-union enterprises because the dispute cannot be referred to the very first legal procedure of dispute settlement due to non-existence of trade unions and therefore non-existence of ECC. This problem appears to be associated with the legal provisions which make trade unions as a mandatory body to be organized in every enterprise in Viet Nam, while this is only a fiction in the reality.

A few suggestions on ECC

42. Nevertheless, nobody proposed to abolish the ECC. Instead the discussion centred on the composition of the ECC: some proposed to allow the involvement of an independent conciliator, while others (VGCL representative) proposed the establishment of a tripartite mediation team (DOLISA, VGCL and VCCI) to support the function of this council, which was also supported by a VCCI representative. A suggestion was made by a representative of VGCL that ECC should be made a mandatory requirement only for dispute over interests, while voluntary step for dispute over rights.

Non-functioning official system of dispute settlement in Viet Nam

43. There was also a consensus that the current legal procedures for dispute settlement are too complicated and lengthy to the extent it might encourage workers to go on a wildcat strike to seek a quick and easy solution through a favourable government intervention. Many participants pointed out that the Provincial Arbitration Councils (hereafter ***PAC***), which are supposed to carry out conciliation and arbitration, were largely ineffective - very few, if any, cases were handled by the PAC.

Doubt about the compulsory arbitration over interests disputes

44. A VGCL representative stated that compulsory arbitration on interest disputes was not necessary because only both parties know best what their best interests and only they can make decisions for themselves. An arbitration award, which does not take into account of the capacity and conditions of the parties involved, would be hardly appropriate, according to him.

Re-design of conciliation system

45. The importance of effective conciliation by a third party was recognized by all participants.

There were a few different proposals regarding structure and nature of the improved conciliation service. Some suggested that conciliation service needs to be placed directly under the government, while other said that it should be made an independent body from the government, which may have a tripartite composition. Even when the government officials are actually assigned to conduct conciliation service, they may be granted special, independent status through a secondment from the government to the independent conciliation body.

Strike Task Force (hereafter *Strike TF*): effective in short term, counterproductive in long term

46. There was a shared view that the DOLISA (and recently the strike TF, composed of the government officials and VGCL officials)'s handling of the wildcat strike was largely effective in ending the strike situation. But it was also pointed out by many participants that this approach tended to create more incentives for workers in other enterprises to go on wildcat strikes. It is because workers have learned that they would get what they demanded as the government intervention would put pressure on employers to end the strike situation by accepting workers' 'legitimate' demands. A local DOLISA official expressed her concern that the current approach would lead to bad habit or expectation of workers to turn to the government for quick solution to their problems instead of collective bargaining.

47. A representative of employers pointed out that VCCI was excluded from the Strike TF, and that in most cases the Strike TF pressured employers to accept the demands of workers even though many cases were disputes over interests not disputes over rights. Regarding the composition of the Strike TF, a VCCI representative stated that VCCI would work with local member associations to take part in the strike task force in provinces where VCCI does not have its own branch.

Conflicting views on strike (or work-stoppage) over rights disputes

48. A VGCL official took a view that wildcat strikes over rights disputes would continue to occur, regardless of the legal provisions, because employers violate the labour law and infringe workers' rights. He suggested that workers should be allowed to stop work if their request for compliance with the labour law is not accepted by employers. And as work stoppage would have happened due to the employers' persistent non-compliance with the law, workers who had stopped their work should be still paid.

49. The VCCI strongly opposed the VGCL proposal of permitting workers to stop their work when employers violate labour law, by stating that the employers' violation of the labour law should be properly handled by the public authority, but the business operation should not be disrupted. Instead, the VCCI representative conveyed its members' serious complaints that there was no proper enforcement of the law against illegal actions of workers, including violence and destruction of the company property. It was also pointed out that, according to the current legal provisions, employers can request the People's Court to judge the legality of strikes. If the Court make a judgement that the strike was indeed illegal, workers on strike will not be paid. So far, however, no employer has taken the case to the Court.

Social partners' views on distinction between rights and interests disputes

50. The VGCL officials did not give a clear position on this question. They urged that the government should take measures against employers' violation of the law as it was the primary cause of strikes. A VGCL official expressed a view that the VGCL can only protect workers' legal rights, not interests which have not been provided for by the law or agreements.

51. A representative of employers demanded a clear definition of rights and interests. In her

understanding, disputes over rights are those arising from interpretation or application of existing laws and agreements, while disputes over interests are those arising from new terms and conditions of employment which are not yet codified either in the law or agreements. In particular, she questioned the prevailing notion of 'legitimate interests' by asking how somebody can determine legitimacy of somebody else's interests.

52. Employers also emphasized a need to separate interests issues from rights issues - she said that workers would tactfully mix their demand for better working conditions/higher wages with their claims of employers' violation of the law so that employers could be cornered to accept their demands for better working conditions while they were under pressure from the government to correct their alleged non-compliance with the law. In this way, workers would also succeed in getting their payment for the days lost due to strike on the ground that strike happened due to employers' violation. They expressed that the essence of industrial relations in a market economy is the voluntary negotiation between two parties, and therefore the government should minimize its administrative intervention.

1.5 Minimum wage, wage negotiation and labour disputes

53. A hot issue was wage determination including minimum wages and wage negotiation. There was a general view that the current minimum wage system was flawed and there was a need to improve the system. But there was a considerable confusion over the concept of minimum wage and negotiated wages, and significantly differing views on wage determination and the role of the government in this respect. Some participants often used minimum wage as the actually paid lowest wage in individual enterprises, while minimum wage should be a legally enforced level of wage below which no workers should be paid.

54. While three parties agreed in principle that the purpose of minimum wage should be to protect the most vulnerable workers from being paid at socially unacceptable level of low wages, they displayed different understanding on the role of minimum wage in reality. It was pointed out by the ILO experts that the current minimum wage seems to be function as a substitute of negotiated wages as workers of larger enterprises are paid minimum wages, which should be significant higher than wages of workers in small enterprises.

55. Acknowledging that different minimum wage rates between foreign invested enterprises and other types of enterprises cause more disputes and strikes, a VGCL official proposed that the government should raise the minimum wage in other sectors to the level of minimum wage in foreign invested enterprises. The VCCI opposed the VGCL proposal, by saying that there are so many micro and small enterprises which will face serious financial problems if they are to pay their workers at the level of higher minimum wage rate of foreign enterprises. Also, there was a suggestion from the VCCI that the minimum wage for the public service (which is linked to the level of social benefits and public sector wages) should be separated from the minimum wage for other enterprises so that the latter will not be influenced when the government tries to reform the public wages. The government representative announced its intention to shift towards a unified single minimum wage by the end of 2008.

56. A government official explained that minimum wage serves [or should serve] as a basis for enterprises to determine wage and salary scales of other categories of workers than unskilled workers. According to the official, the government begun to ask enterprise to develop wage tables and register them to the local DOLISA after the recent wave of strikes. The government instruction asks non state enterprises to develop wage tables in the same way as SOEs and public services. A representative of the VGCL supported the government approach, because it could ensure that

workers' salary will rise as they serve longer years and gain more experiences. Otherwise employers would raise wages arbitrarily, leading to a situation where many workers would get the same wages for many years. However, representatives of employers strongly opposed the government policy, not only because they regarded their wage system as a business secret[14], but also they believed that wages should be determined by social partners themselves free from the outside intervention. They also pointed out that the state sector and non-state sector differed significantly in their management style as well as ownership structure.

57. Another issue was related to an article in Decree 03 on the minimum wage adjustment in foreign enterprises, which instructed employers to pay at least 7% higher wages to 'trained workers' than the minimum wage. Ambiguity on how to define 'trained workers' led to more strikes, while it is also true that higher minimum wage for unskilled workers made 'skilled or experienced workers' to complain about narrowing wage differentials between unskilled workers and skilled/experienced workers, leading again to industrial actions.

58. An ILO expert commented that the discussion revealed the confusion on minimum wage and negotiated wages. According to him, while workers went on strike to demand higher minimum wage, what they were asking was higher wages whether through minimum wage or voluntary negotiation. Because there was no genuine collective bargaining at the workplace and also because workers are also used to the direct government intervention, workers expressed their demand for higher wages as their demand for higher minimum wage. In a sense, it has become a sort of government-workers negotiation - workers demanding higher wages through their wildcat strikes and the government responding to them by raising minimum wage, with employers missing. He emphasized that it was important to urgently promote regular wage negotiation at the workplace. According to him, minimum wage policy instrument should not be used as a substitute for wage negotiation at the workplace for it can create a host of economic problems as well as hamper development of autonomous bargaining. He also pointed out that minimum wage should be adjusted regularly through tripartite consultation.

Part 2
Exploring alternative labour dispute settlement systems in Viet Nam

2.1 Introduction and summary of main principles emerged from the Roundtable Discussion and main problems with the current system

59. As can be seen in the Part 1 of the Issue Paper, the tripartite experts have made a variety of constructive suggestions on how to improve the current system based upon insightful assessment of the current problems during the Roundtable Discussion. Also, the tripartite experts expressed their genuine concerns about the current situation and showed a great commitment to tackling the challenges in the spirit of tripartite social dialogue. The major suggestions or views of tripartite experts regarding improving the labour dispute settlement system in Viet Nam could be summarized as followings, even though the time-limit during the Roundtable Discussion did not permit the tripartite experts to have in-depth discussions:

[14] The government official assured that the government would not reveal wage information to others. The wage tables should only be the official framework for payment in each company, according the official.

(i) There are different types of disputes - such as rights disputes and interests disputes which require different procedures or machineries to settle them. But currently there are confusions on the distinction between rights and interests disputes - both in the mindset of industrial relations actors and in the legal/institutional framework. There is a need to design a new system of labour dispute resolution within which there may be separate procedures or machineries to deal with different types of labour disputes in impartial, effective and expeditious manner.

(ii) The spirit and principle of tripartism may have to be materialized in designing and operating a new system of labour dispute resolution. In particular, as employers' participation is as important as workers' participation, the participation of social partners on equal footing should be ensured in designing and operating a new system wherever and whenever appropriate.

(iii) The mode of the government's intervention (to end the wildcat strike situation) should be changed, as the current government approach creates incentives for workers to go on wildcat strikes in their expectation of the government's direct intervention in favour of workers. The government's role as a law enforcer should be separated from the role as a third party conciliator.

(iv) The current procedures for labour dispute settlement are too complicated and lengthy so that it becomes very difficult for workers to exercise their legitimate rights to strike. There is a need to simplify the system.

(v) A particular attention should be given to provide better legal protection of trade unionists against employers' unfair labour practices. This implies that there is a need to establish a special procedure, within a new system of labour dispute resolution, to deal with the case of unfair labour practice in expeditious manner with remedies (such as expeditious reinstatement of dismissed trade unionists etc).

(vi) Also, there is a need to have a further tripartite consultation regarding rules governing industrial actions (strike and lockout) as it is common concerns of workers and employers.

60. Considering the above views and concerns, the Part 2 of the Issue Paper attempts to present a number of preliminary suggestions regarding alternative legal and institutional frameworks for dispute prevention and settlement. The preliminary suggestions contained in the Part 2 have been prepared in full consideration of the identified issues, various concerns expressed by the tripartite partners, constructive suggestions made by the tripartite experts and the current industrial relations situation in Viet Nam. The preliminary suggestions contained in the Part 2 are designed to facilitate focused and informed discussion among the tripartite partners with regard to improving legal and institutional framework for prevention and settlement of labour disputes. They do not necessarily reflect official views of the International Labour Office.

2.2 Failure of the main pillars of the current labour dispute settlement system and a number of underlying problems with the current legal framework of industrial relations in Viet Nam

61. Currently, the official labour dispute resolution system is composed of four different institutions: local conciliator (in case of individual disputes in non-union enterprises), enterprise

conciliation council, local arbitration council, and ordinary court. According to the tripartite experts and other sources, it appears that very few cases of disputes have been dealt with by four pillars of dispute settlement machinery in Viet Nam (with a possible exception of local conciliator dealing with individual disputes). It is said that ECC as the first mandatory step of dispute settlement has never dealt with disputes (therefore, no successful conciliation at all by ECC). And it is also pointed out that the local arbitration councils, which are supposed to be the key institution of dispute settlement in the country according to the Chapter 14 of the Labour Code, have dealt very few, if any, disputes for the last 10 years of their existence. In summary, the supposed-to-be key pillars of Viet Nam's labour dispute settlement machinery do not function at all as they were supposed to do. The first version of the revised Chapter 14 appears to address this problem of non-functionality by adding a few more layers to the already complicated procedures without reviewing the role of each pillars and the entire system. This may go against the majority views expressed by the tripartite experts which suggested a need to simplify the complicated and lengthy procedures (point (iv) of the paragraph 59)

62. There could be several reasons behind the non-functioning dispute resolution system. First, a fundamental problem is associated with the legal and political fiction of universal or compulsory trade unions (article 153). Based upon a legal fiction of trade unions having to exist in every enterprise, the trade unions are given a variety of mandatory roles in every aspect of industrial relations and employment relations. For instance, while all collective disputes, which did not go through the conciliation process by ECC, would be seen as unlawful, the ECC can only exist when there is a trade union or at least a provisional trade union committee but the unionization rate is low in reality (10% of non-state enterprises). This contradiction creates illegality of disputes by default in many non-union enterprises because the dispute cannot be referred to the very first legal procedure of dispute settlement due to non-existence of trade unions and therefore non-existence of ECC. This indicates that the legal (and political) fiction of compulsory trade union organizations may have to be seriously reconsidered. Or at least, new design and procedures of labour dispute settlement should not be inextricably linked with the existence of trade unions.

63. Second, regardless of the problems associated with the compulsory trade union organizations, there may also be a need to review flaws in the current institutional structure or design of the main pillars of the labour dispute settlement, which we will undertake in greater details in following sections - how those four pillars are related to each other, how they are structured and equipped to deal with different types of labour disputes, and how great the capacity of conciliators/arbitrators in each pillar is etc.

Another key issue of the current Labour Code regarding industrial relations

64. Another key issue is the assumption of the Labour Code that labour relations exist only at the enterprise level. The current Labour Code and draft articles (157.2, 157.3, 173.1, 173.5) of the revised Chapter 14 confines legitimate industrial relations activities only enterprise level. For instance, draft article 157(2) and (3) in combination with draft article 173(1) provides that labour disputes would arise from interest disputes, emerging from the negotiation of a collective agreement concerning workers in a single enterprise. These provisions recognize collective bargaining and related industrial action only at the enterprise level. A related issue is the right of federations and confederations to engage in collective bargaining and carry out industrial action. The draft article 157(2) envisages collective bargaining only at the enterprise level and draft article 173(5) provides that a strike is considered as illegal if it is not organized by a local trade union. Considering the serious weakness of enterprise trade unions and workplace labour relations, the new legal and

institutional framework should provide for the development of industrial relations at higher levels (industry, regional, occupational etc) so that industrial relations actors at higher levels can provide organizational supports to representatives of workers and employers at enterprise level and, also if deemed appropriate, develop collective bargaining practices at higher levels. Therefore, it should be seriously considered to broaden scope of industrial relations beyond the enterprise level, particularly because currently representatives of VGCL and VCCI are having a discussion how to develop practices of collective bargaining at higher levels.

2.3 Dealing with different types of labour disputes: other countries' experiences and policy lessons for Viet Nam

65. Rights (or legal) disputes are those arising from the application or interpretation of an existing law or collective agreement, while interests (or economic) disputes are those arising from the failure of collective bargaining, i.e. when the parties' negotiation for the conclusion, renewal, revision or extension of a collective agreement end in deadlock.

66. In negotiating a collective agreement the parties are in effect deciding on the terms of a contract which is to be a law for them and for the individual workers and employers covered thereby. In negotiating a new collective agreement, each party seeks the best terms for itself, guided largely if not exclusively by its own interests, and as such disputes involved non-judicial issues and are therefore considered to be inappropriate for judicial settlement, conciliation/mediation became the principal methods for their peaceful settlement.

2.3.1 Variety of labour dispute settlement systems for resolving disputes over interests

67. While conciliation and mediation are main methods for settling disputes over interests, there are different systems of conciliation/mediation (Box 7).

Box 7: Different Types of Conciliation

Voluntary conciliation system (UK, USA): In voluntary conciliation the parties are free to use or not to make use of the government's conciliation facilities. When one of the parties to disputes requests conciliation, it may be provided if the other party does not object. In voluntary systems the provision of conciliation by the government is mainly conceived of as assistance or service to industry, and the term "service" may figure in the official title of the governmental organ concerned (for example, Federal Mediation and Conciliation Service (FMCS) in US, and the Advisory, Conciliation and Arbitration Service (ACAS) in UK).

Compulsory conciliation system (Korea, Malaysia, Viet Nam): In compulsory system parties to disputes are required to make use of the governmental conciliation machinery. However, compulsory conciliation differs from voluntary conciliation only in the method by which the procedure is set in motion; the substantive object of conciliation in either case remains the same, i.e. a settlement of the dispute on the basis of the parties' agreement. In compulsory conciliation (as in voluntary conciliation) the parties are not bound to accept a conciliator's suggestions or proposals for settlement; the conciliator can only persuade the parties to make mutual compromises in order to reach agreement.

68. At the same time, there are different institutional structures in conciliation and mediation services.

- In some countries (such as Malaysia and Singapore), conciliation is carried out government conciliators (under the department of industrial relations)

- In others (Japan and Korea), conciliation is provided by tripartite Labour Relations Commission (composed of independent conciliator, assisted by conciliators appointed by workers' and employers' organizations).
- In many Anglo-Saxon countries, conciliation is provided by independent, professional agencies (UK, USA and Australia)
- In most continental European countries, there are bi-partite conciliation bodies created by social partners through collective agreements (associated with well established practices of collective bargaining at industry level) along with the government conciliation services.

69. In conciliation/mediation, the responsibility for settling disputes rests with the parties themselves. In arbitration the responsibility shifts from the parties to the third party who is called in as arbitrator. There are two different types of arbitration (Box 8) - most commonly used form of arbitration is voluntary arbitration with binding award.

Box 8: Different Types of Arbitration

Voluntary arbitration: Voluntary arbitration has two sub-types.

- Voluntary arbitration with advisory award (UK, Bolivia, Nigeria): The award made by the arbitrator or arbitration council does not bind the parties unless it is accepted by both of them. The award therefore has only the effect of a recommendation. For this reason, these forms of arbitration may be described as 'advisory arbitration'. Both parties may have to submit their disputes for arbitration, but they are not necessarily bound by the arbitration award.
- Voluntary arbitration with binding award (US, Ireland, Tanzania, India, Japan etc): In this type of arbitration, the submission of the dispute to arbitration is voluntary but the arbitration award is legally binding on the parties.

Compulsory arbitration

- Compulsory arbitration is the submission of a dispute to arbitration without the agreement or consent of all the parties involved in it, and with a legally binding award. Compulsory arbitration may be used either in essential public service or in civil service where the right to strike might be either restricted or prohibited.

70. Detailed suggestions on how to improve procedures for settling disputes over interests will be made later (paragraphs 90-94).

2.3.2 Variety of labour dispute settlement systems for resolving rights disputes and preliminary suggestions for Viet Nam

71. However, rights disputes are treated differently from dispute over interests in most countries. As a general rule, industrial actions are not permitted on dispute over rights. Disputes over rights are those arising from the application or interpretation of an existing law or collective agreement or an existing contract of employment as well - it is to be noted that the application or interpretation of collective agreement is included as well because collective agreements are seen to create legal rights. This type of dispute should not lead itself to industrial actions for its resolution, but to law enforcement by the public authority. It should and can be resolved through judicial or semi judicial

procedure whereby ordinary court, special labour court or arbitrators would settle the disputes.

72. Countries have developed different systems for resolving rights disputes, reflecting their judiciary tradition, industrial relations practices and histories.

- In some countries (most continental European countries, Thailand), there are specialized labour courts to deal with disputes over rights. Often, the judges of the labour courts are assisted by associate judges nominated by workers' and employers' organizations.

- In others (Malaysia and Singapore), there are industrial tribunal for arbitration and adjudication (in practices, it functions similarly to labour courts), which also deal with interests disputes under certain circumstances.

- In other countries, there are independent commissions within which both disputes over rights and interests are dealt with (Australian Industrial Relations Commission, Labor Relations Commissions in Japan and Korea)

73. It is to be noted that procedures in either specialized labour courts or commissions/ tribunals are less formalistic and more expeditious than ordinary courts. Also, it is generally believed that ordinary courts are not well equipped to deal with labour disputes, due to the particular nature of labour disputes.

74. **Note:** In this respect, the tentative proposal to permit workers to stop their work when employers allegedly consistently fail to comply with the laws and regulations should be reconsidered. This is an issue which should be addressed by strengthening labour inspection and by establishing expeditious and impartial process of resolving rights disputes. In fact, it might be advisable to carry out a tripartite investigation into the alleged, widespread violation of labor laws by employers, as it is often pointed out as a main cause of the 'wildcat strikes'. Though it might be certainly true that there may be certain group of employers who are frequent violators of the labour laws, there may be other problems as followings: information regarding labour laws are not effectively distributed among employers (particularly foreign employers); labour laws and regulations are drafted in a way to create confusions and various interpretation (such as 7 % higher wages for 'trained workers'), and; labour laws and regulations may be drafted in too detailed manner so that employers may have difficulties of full compliance.

75. It is said that in Viet Nam disputes tend to take place as a combined dispute over both rights and interests, meaning that it involves application or interpretation of existing law or collective agreement, and conflicts over new terms and conditions of work. In principle, however, it should be possible to disentangle both aspects of disputes and refer the dispute over rights to separate (semi) judiciary procedures for its resolution, while continuing conciliation efforts to resolve dispute over interests. It is neither appropriate nor productive in the long run for the government to take the issue of alleged employers' violation of laws so as to put pressure on the employers to accept 'legitimate interests' of workers (either partially or totally). It is mixing the role of government as a law enforcer with the role of government as a conciliator. In this regard, it is to be noted that the law enforcement function of the labour administration is separated from conciliation function of the labour administration in most countries.

Box 9. Suggestions on Settling Disputes over Rights

- Consider establishing separate procedure and body to settle disputes over rights
- In particular, consider whether it is desirable and feasible to establish specialised labour courts or industrial tribunal or special section within dispute settlement body entrusted to settle disputes over rights in expeditious, fair and professional manner
- Consider separation of labour law enforcement function from conciliation/mediation function of labour administration
- Investigate why there are so many *allegations* of the labour law violation by employers, and determine whether it is due to real violation, miscommunication or lack of information, or confusing or too detailed regulation, and develop action plan to address the root cause (strengthening labour inspection, improving legal and regulatory framework through consultation with social partners, improving IR and labour law information dissemination for foreign employers etc)

2.3.3 Special procedure for prevention of unfair labour practices

76. In certain countries (Japan, Korea and Thailand), the law has established a special procedure to deal with unfair labour practices, generally including the possibility of reinstatement of dismissed workers; such a procedure obviates or precludes conciliation. In the absence of such a procedure unfair labour practice cases are subject to the normal procedure for settling labour disputes if they fall within the definition of labour disputes (the Philippines). In some countries, unfair labour practices are criminal offences (Korea). This may be helpful to induce a change in management attitudes. As in the case of rights disputes, the process of settlement would require an inquiry into the facts - whether in fact the worker has been dismissed or subject to discriminatory action for being an active trade unionist. Considering that there are serious concerns regarding the alleged unfair labour practices contributing to the weakness of enterprise trade unions in Viet Nam, a special consideration may have to be given to introducing a separate procedure for addressing the unfair labour practices in expeditious and effective manner, which should be available in order to address such acts, as well as the applicable remedies and sanctions which should be sufficiently dissuasive.

Box 10. Suggestions for Dealing with Unfair Labour Practices

- Consider setting up special procedure to deal with unfair labour practices against unionists by employers
- Consider which body would be entrusted with this special procedure to settle disputes arising from the unfair labour practices

2.3.4 Summary of different systems of labour dispute resolution and its implications for Viet Nam

77. As noted above, different countries have different systems of labour dispute settlement. However, the above examples show that each country has separate procedure and system to deal

with disputes over rights and interests. While the Labour Relations Commissions in Japan and Korea deal with both rights and interests disputes, it has to be noted that there are separate sections (and personnel) within the Commissions to deal with rights and interests disputes according to different procedures. In other countries (such as Thailand, Malaysia and Singapore, for example), while government officials carry out conciliation over interests disputes, rights disputes are adjudicated in labour courts or industrial courts.

78. At present, it appears that the distinctive procedures for settling rights and interests disputes are not provided for by the Labour Code in Viet Nam, though separate procedures for individual and collective disputes are provided for. In this respect, a consideration may have to be given to whether to establish separate procedures for settling interests and rights disputes, including a special procedure to settle disputes arising from the unfair labour practices.

79. The above task of establishing different procedures for settling different types of disputes should be followed by reforming the existing institutions of labour dispute settlement and building the capacity of the institutions. This requires a series of preparatory steps: thorough assessment of the current institutions; redesign of (or adjustment to) the current system; establishing operational guidelines for conciliation, arbitration and adjudication, and; training of conciliators and arbitrators (if necessary, labour court judges) etc. The review of the institutions of labour dispute settlement is beyond the scope of this Issue Paper. It might be considered that the ILO and tripartite constituents conduct a joint review of labour dispute settlement institutions with a view to preparing a comprehensive plan to improve and reform labour dispute settlement institutions in Viet Nam.

2.4 Preliminary suggestions on improving labour dispute settlement procedures

80. From this section till the end of the Part 2, we will attempt to make an in-depth analysis of the current system and propose a number of preliminary suggestions on a number of key issues which have been debated among tripartite partners. They include the followings: firstly, improving the current system of dispute prevention and resolution at the enterprise level focusing on ECC; secondly, improving and streamlining the procedures for settling interest disputes; thirdly, a suggestion on how to create effective mechanism to settle disputes over rights, and; finally, analysis of the current Strike TF approach, which was employed to end the wildcat strike situation, and make a suggestion on operational guideline for Strike TF with a view to promoting voluntary negotiation. The suggestions are designed to assist and facilitate the tripartite discussion regarding the revision of the Labour Code and should not be seen as constituting the ILO's official recommendations.

2.4.1 Special Note on Enterprise Conciliation Council (ECC)

81. During the tripartite experts' meeting, most experts expressed the view that ECC is *not functioning as the first step of the mandatory dispute settlement mechanism* for a variety of reasons: no dispute has ever been dealt with by ECC, and workers have doubts about the fairness of the ECC.

82. As we discussed earlier (Box 6 of Part 1), workers have doubts about the fairness of the ECC. A number of Vietnamese experts indicated that this is related to the composition of the ECC (equal number of representatives of trade unions and employers) which does not ensure neutrality and impartiality. But it has to be pointed out that this is more related to the composition of enterprise union committee where managerial staff tends to have dominant position (because often enterprise union leaders are human resource managers or senior managers) than related to the composition of the ECC itself.

83. As the first step of the mandatory dispute settlement mechanism, the ECC has a serious logical

contradiction because representatives of workers and employers are expected to resolve their conflicts while the dispute must have arisen from the failure of the same two parties to resolve their conflicts through voluntary negotiation. In this respect, it is to be reminded that collective bargaining itself is a bi-partite negotiation process, through which both parties try to reconcile their conflicting interests.

84. In other countries, the failure of both parties reaching agreement would usually lead to conciliation procedure where *a third party, acting as a conciliator independent of the two parties* seeks to bring the disputants to a point where they can reach agreement. In other words, conciliation involves a third party assisting the disputants to reach agreement, facilitating bi-partite process[15]. Therefore, *ECC should be removed from the mandatory procedures of the dispute settlement.*

85. However, the removal of the ECC from the mandatory procedure of the dispute settlement does not necessarily mean that ECC has to be abolished. ECC can be transformed into a labour-management consultation body at the workplace designed to promote cooperation through information sharing and consultation between workers' representatives and the management. In fact, there are many countries where this kind of labour-management consultation body has been introduced either through legislation or through voluntary agreements.

Box 11: Labour-Management Consultation Committee

Many countries have introduced and established bi-partite consultation mechanism at the workplace to promote labour-management cooperation. These kinds of mechanisms have different titles, mandates, compositions, and their relations with collective bargaining process in different countries: they are called, for example, Labor-Management Committee in the United States, Labour-Management Joint Consultation Committee in Korea and Japan, and Works Council in Germany; the Labour-Management Joint Consultation Committee in Japan is in principle a body for exchange of information and consultation, while German Works Council has the right to co-determination on a number of issues, and; some countries (for example, Korea and most European countries including Germany, France, Sweden etc) introduced them through legislation, while they are introduced by voluntary agreements between labour and management without legislative foundations in other countries (for example, Japan and United States).

In spite of this diversity, various types of bi-partite mechanisms share some common principles and goals. These mechanisms are designed to promote cooperation between workers and employers through better two-way communications on regular basis in the form of better exchange of information and sincere consultation over issues of mutual concerns. They differ from collective bargaining in a number of ways: the outcome of the bi-partite consultation would not usually produce legally binding agreements, while the purpose of collective bargaining is to conclude a legally binding collective agreement; the bi-partite consultation mechanisms are designed to deal with, not exclusively but mostly, non-distributive issues of mutual concerns, while collective bargaining would, not exclusively but mostly, deal with distributive issues such as wages and other working conditions; industrial actions are not allowed even when both parties have conflicting

[15] See box 3 of the ILO Discussion Paper on Strikes and Industrial Relations in Viet Nam

views at the consultation process, while both parties are guaranteed a right to take industrial action when they fail to reach an agreement through collective bargaining, and the consultation meetings will be held on a regular basis at least every quarter, but in many cases more frequently - while collective bargaining is held every year or every two years depending on national practices. The bi-partite consultation mechanisms have proven *their effectiveness in preventing disputes through better two-way communications at the workplace*.

86. Nothing prevents both parties from using this type of bi-partite body to resolve their disputes when they wish to do so. But the ECC (or labour-management consultation body) should not be designated as a mandatory first step to conciliate labour disputes.

87. It has to be noted that this type of labour-management consultation committee does not necessarily presuppose presence of trade unions. In unionized workplace, it is usually trade union representatives who will represent workers in the labour-management consultation committee. In non-union workplace, representatives of workers will be elected through vote. This approach has an advantage of providing a channel for workers to express their voices even in non-union enterprises - this is exactly why many countries have introduced this type of bi-partite body.

88. During the Roundtable Discussion, all participants expressed their desire to keep the ECC at the workplace. One way of keeping the ECC as a workplace based dispute prevention and settlement machinery may be by making the ECC as a bi-partite grievance handling committee as well as workplace cooperation body described in previous paragraphs (81 and 82). In fact, as defined in the article 164 of the Labour Code, the ECC is entrusted to deal with individual labour disputes over rights, similar to the grievance handling procedures in other countries.

Box 12: Grievance handling

Definition of *Grievance* is any complaint either by a worker, a group of workers or a trade union, or by an employer, a group of employers or an employers' organization, regarding some specific aspect of the employment relationship, or - in case of workers - regarding employment conditions or the employers' policy and practices.

Enterprises covered by collective agreements usually have collective agreements which have provisions on how to resolve problems linked with the application and interpretation of an individual labour contract or arising out of a collective labour agreement. Grievance handling usually follows a number of sequential steps laid down in the procedure and involves progressively higher levels of management and workers' representatives.

Grievance handling procedures are bi-partite process of joint discussion for resolving disputes by mutual agreement without involving outside third party.

Box 13: ILO standards on Grievance Handling

Recommendation No. 130 (1967) on the Examination of Grievances deals with a special category of labour disputes the grievances of one or several workers against specific aspects of their employment conditions or labour relations. The grounds for a grievance may be any measure or situation that concerns employer-worker relationship, or that is

likely to affect the conditions of employment of one or more workers in the enterprise, if the situation appears to be contrary to the provisions of collective agreement, individual employment contract, national laws or other rules. In case grievance procedures are established through collective agreements, the parties should be encouraged to promote the settlement of grievances using those procedures, abstaining from any action which would impede their effective functioning.

Recommendation No. 130 explicitly calls for workers' organizations and workers' representatives to be associated on an equal basis with employers and their organizations in the establishment and implementation of grievance procedures. The Recommendation also highlights the various elements that form the basis of grievance procedures in any enterprise.

- An attempt should be made initially to settle the grievance directly between the workers or group of workers and the immediate supervisor.
- In the event of a failure to settle the grievance at the initial level, the worker should have the right to have the case considered at a higher level, depending on the nature of the grievance and structure of the enterprise.
- Grievance procedures should be so formulated and applied that there is a real possibility for the settlement of the dispute at every level.
- Grievance procedures should be expeditious and simple
- Workers concerned in a grievance should have the right to take part directly in the grievance procedure. During the procedure, workers may be assisted or represented by a trade union representative or any other person of his or her choosing, in conformity with national law and practice.

89. Workers' grievances are inevitable in the day-to-day relations between the management and workers at the enterprises. When an enterprise is covered by a collective agreement, grievances of individual workers may be expected to arise from the way it is being implemented. Grievances may also arise from any measure or situation which the worker or workers concerned consider to be contrary to their contract of employment, to work rules, laws or regulations or to relevant customs. As indicated in the ILO Examination of Grievances Recommendation, 1967 (No. 130), it is highly desirable that 'as far as possible, grievances should be settled within the undertaking itself according to effective procedures which are adapted to the conditions of the … undertaking concerned and when give the parties concerned every assurance of objectivity' (see Box 13). In practice, grievance procedures often include a number of steps, and the last step within the enterprise will generally involve discussion between the top management and the workers' representative or the union concerned. This process is essentially one of joint discussion between the parties for resolving an issue by agreement on both sides. If no agreement is reached in settling a grievance within the enterprise and worker or trade union insist on pursuing the claim further, a dispute may be said to have arise for purposes of outside intervention such as arbitration or adjudication. Throughout the grievance handling process, trade unions will represent workers - not as an third party to the grievance concerned.

Box 14. Suggestions

1. Remove ECC from the mandatory dispute settlement procedures

2. Transform ECC into either mandatory or voluntary labour-management consultation committee designed to promote cooperation between workers and management at the workplace

3. Establish rules regarding election of workers' representatives in non-union enterprises, and rules regarding appointment of trade union officials in the committee in unionized enterprises.

4. Decide, through tripartite consultation, scope of agenda for consultation and rule regarding information sharing

5. Promote voluntary grievance procedures to be included in every collective agreement. ECC may be entrusted to handle grievances on bi-partite basis.

2.4.2 Suggestions for improving procedures of settling disputes over interests

90. According to article 171 of the Labour Code, the Labour Arbitration Council undertakes both conciliation and arbitration: upon receiving the case, the Council is required to make a conciliation effort, and, if it fails, the Council 'shall settle the case by arbitration procedures'. Once the Council make an arbitration award, the disputing parties have the right to refuse the arbitration award, and either go on strike or refer the case to the People's Court. This means that the arbitration award is non-binding if one party refuses to accept it. This is quite unusual procedures which are rarely found in other countries. There is a variety of different types of conciliation and arbitration system in the world, which are summarized in Box 7 and Box 8. According to the typology of Box 7 and Box 8, the labour dispute settlement system in Viet Nam appears to combine *compulsory conciliation* with *advisory arbitration on a compulsory basis*.

91. It is not clear what kind of distinction is made - both in theory and in practice - between the two stages - compulsory conciliation and advisory arbitration on compulsory basis - in Viet Nam[16]. In practice, advisory arbitration on a compulsory basis bears some resemblance to compulsory conciliation where the conciliation body is given powers of investigation and has to make a recommendation for settlement. The similarity is close enough that compulsory advisory arbitration may be selected in lieu of compulsory conciliation, to perform a role substantially similar to that.

92. However, the problem in Viet Nam is that the compulsory conciliation and the compulsory advisory arbitration are not the matter of a choice to be made depending on the circumstances, but the mandatory, consecutive steps which disputing parties should go through within the same institution of the Labour Arbitration Council, while the two processes are similar enough that one may be selected in lieu of another to perform a role substantially similar to each other.

[16] In practice, the distinction may not have any relevance in reality, because there have been very few cases referred to by the Labour Arbitration Council since its establishment. According to the officials, Hanoi Arbitration Council had only two cases since its set-up in 1997, while HCMC Arbitration Council had only one case since its set-up in 1998. As described earlier in paragraph 17, most collective labour disputes are said to have been resolved through ad hoc intervention of the DOLISA together with local federation of trade unions - not through the Labour Arbitration Council process.

93. Considering the above problem, a consideration may have to be given to the following option.

Simpler model: A combination of a compulsory conciliation and a voluntary arbitration with a binding award

94.

Step 1: Both parties fail to reach a new collective agreement through bi-partite negotiation - a dispute has arisen

Step 2: Both parties are required to refer their dispute to conciliation service. Conciliation period is 14 days unless both parties agree to extension of the duration of the conciliation.

Note: Conciliation may be undertaken by either individual conciliator or conciliation board

Step 3 a: If both parties accept the conciliated solution, both parties would sign a new collective agreement and the signed collective agreement will be certified by and registered with the conciliation officer, creating the same legally binding effect as collective agreement

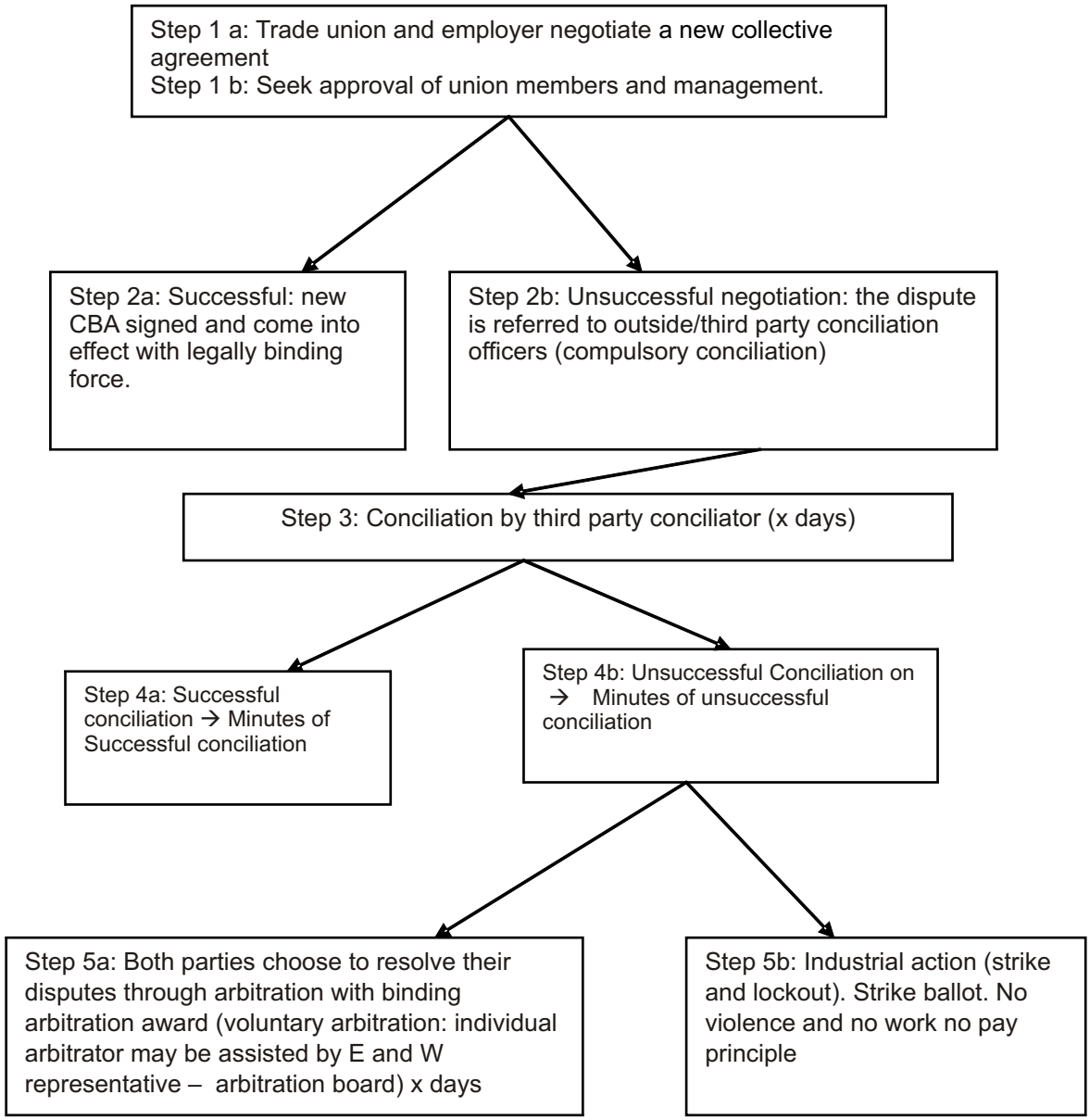
Step 3 b: If the conciliation fails to resolve the dispute, there are two options.

Step 4 a: Either party choose to take industrial actions (strike and/or lockout).

Note: there should be a number of rules regulating strike action with a view to ensuring that strike decision is taken by majority through strike ballot and that strike action should not involve any violence etc.

Step 4b: Both parties may choose to take their dispute to arbitration. Even one party may refer the dispute to the arbitration if that is permitted in the collective agreement. Once the dispute is referred to arbitration, both parties will be bound by the arbitration award.

Chart 1 (Simpler Model): Settlement of collective labour disputes over interests
Combination of compulsory conciliation and voluntary arbitration with a binding decision



Comparison between the simpler model and the current Chapter 14 procedures

95. Main differences between the simpler model and the current Chapter 14 procedures are as followings:

- ECC is removed from the mandatory procedures of labour dispute settlement
- Compulsory arbitration with a non-binding award is removed.
- There is one-step compulsory conciliation, after which both parties are free to take industrial actions.

96. The **simpler model** has one mandatory step of conciliation before both parties can choose to take

industrial action. The option is one of the most widely practices system, which combines *compulsory conciliation* and *voluntary arbitration with binding award*.

97. It is to be noted that the system of compulsory arbitration with binding award may still be used in 'essential public service' (public services, a disruption of which may affect entire security and safety of entire society such as water supply, electricity supply etc) where strike actions may not be allowed in many countries.

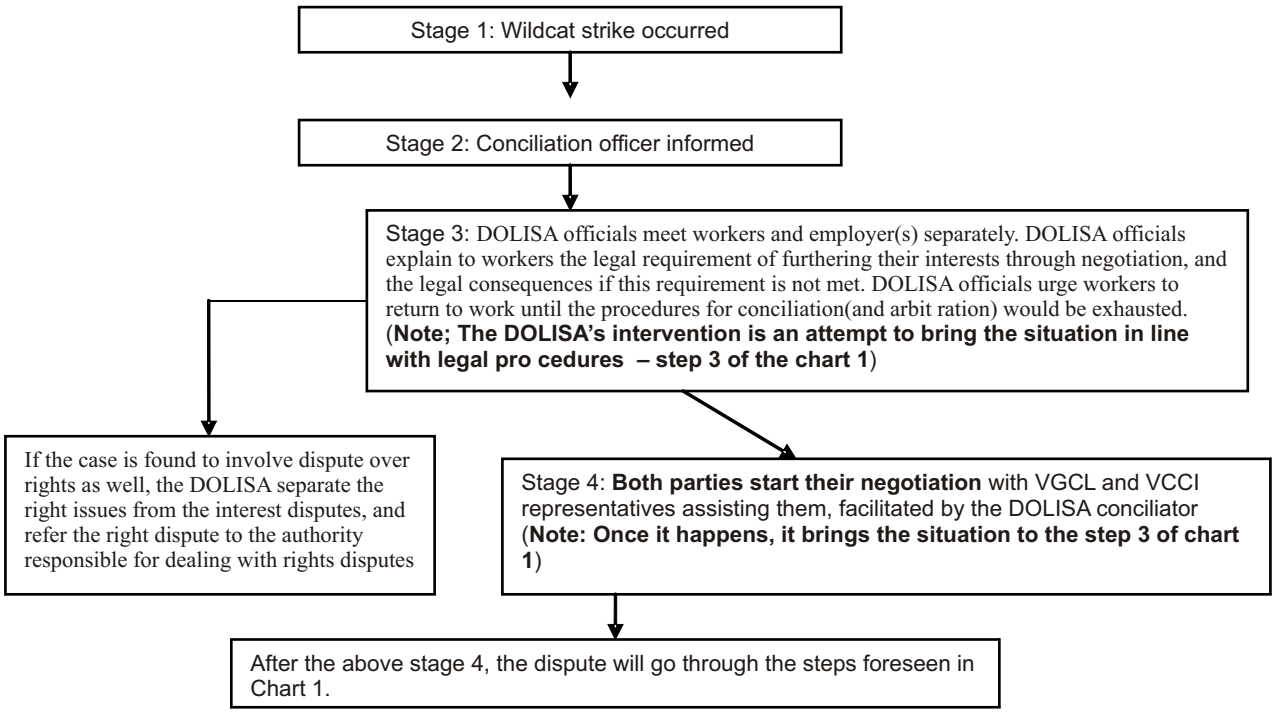
2.5 The issue of wildcat strike

98. The above option as well as the current chapter 14 of the Labour Code supposes that collective disputes over interests would occur only after both parties' failure to reach an agreement through voluntary collective bargaining. Due to seriously underdeveloped practices of collective bargaining, all strikes have been 'wildcat strikes' - meaning that strikes take place without voluntary negotiation, instead of strike occurring due to the failed collective bargaining.

99. It is obvious in actual situation that 'wildcat strikes' would continue to take place for the time being in the absence of a well-entrenched collective bargaining procedures and negotiating capacity. It is also true at the same time that the illegality of such strike action should be discouraged and industrial relations actors should be gradually guided into an orderly exercise of the right to strike.

100. In this respect, it would be useful if an operational guideline can be prepared for a gradual but orderly transition from the strike as the first and only weapon (strike as the first resort and solution by the government intervention) to the strike as the last weapon (voluntary negotiation-conciliation/arbitration-if necessary, industrial action) within the parameter of the improved legal framework (whether the option above or something else).

Chart 2: Operation guideline for Strike TF in case of a 'wildcat strike'



101. The chart 2 represents an interim operational guideline, will help to move towards an orderly exercise of rights to collective bargaining and strikes while acknowledging the today's reality of 'wildcat strikes'. The chart 2 derives its idea from the actual resolution of 'wildcat strikes' through *de facto* conciliation by DOLISA officials.

102.
Step 1: Once 'wildcat strikes' took place, DOLISA officials (or conciliators) would be informed of the strike and would visit the enterprise concerned.

Step 2: DOLISA officials (or conciliators) would have meetings with workers and employer(s) separately. DOLISA officials (or conciliators) would explain to workers the legal requirement of furthering their interests through negotiation, and the legal consequences if this requirement is not met. DOLISA officials (conciliators) would urge workers to return to work until the procedures for conciliation (and arbitration) would be exhausted.

Step 2a: If the case is found to involve also dispute over rights (alleged non-compliance or non-implementation of the labour law or collective agreements or conflicting interpretation of them), the conciliators should separate the rights disputes from the interest disputes, and immediately refer the rights dispute to the competent authority responsible for settling rights disputes.

> Note: The above mode of DOLISA's intervention is a key step to bring the illegal situation of 'wildcat strike' back to legal procedure of a third party assisted negotiation (that is a conciliation).

Step 3: DOLISA officials (or competent authority responsible for dispute settlement) invite representative of VGCL and employers' organizations to assist workers and the management of the enterprise concerned in their negotiation to reach a negotiation solution in the form of a written collective agreement, which will be facilitated by the conciliator(s).

> Note 2: In the actual situation, the DOLISA officials are usually accompanied by VGCL official in their visit to the enterprises concerned. It appears that the role of VGCL is to persuade workers to go back to workplace, while putting pressure, together with the government officials, on the employers to find a solution for ending the strike situation. Under the current approach, the Strike TF does not include representatives of employers' organizations. This approach should be changed. The Strike TF should also include representatives of employers' organizations to ensure a balanced and fair approach. But the role of representatives of VGCL and employers' organizations should be to assist both parties to resolve their conflicts through assisted negotiation.

Step 4: Once they reached tentative agreement, both sides should seek approval from workers and management board.

Step 5a: Once approved, both sides sign CBA with a clause specifying next round of negotiation and grievance procedures. It will be certified by and registered with the conciliators.

Step 5b: If they fail to reach an agreement, both parties can choose to take an industrial action through proper procedures such as strike ballot.

> Note: This is somewhat different from the current prevailing mode of government intervention. Under the current mode of government intervention, the government officials

would meet workers first to get their demands and would then meet employers to find a solution. It does not seem to be a case that the government officials would act as a conciliator urging both parties to sit down and resolve their conflicts through a third party assisted negotiation (i.e. conciliation). It appears that the government intervention tends to replace voluntary negotiation. This approach needs to be changed. The role of conciliators (whether DOLISA officials or independent conciliators) should be to encourage both parties to resolve their conflicts through voluntary negotiation, and to offer their conciliation services to assist both parties' negotiation.

2.6 Rules related to Strike

Issue of no work, no pay

103. Strike actions by workers are seen as workers' collective decision to withhold their provision of labour so as to economic pressure on employers to get better working conditions including higher wages. As the strike action is interpreted that workers' *collective decision not to provide their labour* to the employers, workers should not be paid for those days on strike. It is very rare to have prolonged strikes in any country very because workers will lose their wages while employers lose their profits to the extent that both parties cannot bear the cost of the strike if the strike prolongs. Without no work no pay principle, there is a danger of encouraging undisciplined, wildcat strikes which will damages both workers and employers in the long run.

104. Often an argument is made that employers should pay wages of workers even for those days on strike because strike has in the first place happened due to alleged violation of labour law by employers. In principle, employers' violation of laws should have been dealt with labour inspection before it causes a dispute. Once disputes occur due to allegation of employers' violation, the dispute settlement body responsible for resolving rights disputes starts its (semi) judicial procedures to determine whether there was indeed a violation of law, and if so, order legal remedy to the situation which may also involve imposition of fine in accordance with legal provisions. But it is not appropriate to ask employers to pay for wages of strikers for those days on strikes. It would be useful to note that trade unions set up strike fund from membership fees, and pay members' wages from the strike funds during the strike in some countries.

Strike ballot

105. Draft article 174b of the revised Chapter 14 provides that a strike may be carried out if, inter alia, 50 per cent of the workers agree to it. However, this requirement may be excessive and could hinder the possibility of carrying out a strike, particularly in large enterprises. In this respect, policy-makers may consider to establish provisions which require a vote by workers before a strike can be held, account should be taken only of the votes cast and the required quorum and majority should be fixed at a reasonable level. For instance, the drafters of the Chapter 14 may consider introduction of a requirement for an absolute majority of the votes cast.

Annex: The 9 principles of collective bargaining and settling labour disputes in the Vietnamese context[17]

1. Working conditions (including wages above the minimum wage) must not be determined by law, but by negotiation between employers and workers on the basis of 2 criteria:

- what employers think is affordable given the business climate, the competitive position of heir undertaking and the productivity of their workforce
- what workers think is in fairness due to them given their needs for livelihood, the efforts they are making, the skills they have built up and the critical contribution they make to the company's profits

2. *Good faith principle*. Employers and workers accept that they bring these different perspectives to the negotiations, but actively pursue agreement in a spirit of compromise.

3. Government (MOLISA, DOLISA, EPZ/IZ Authority etc.) enforces the law and any agreement that has been reached between employers and workers. Government offers its services to facilitate negotiations as long as agreement has not been reached, but does not influence the outcome of the negotiations.

4. Collective agreements must be made binding.

5. Trade unions form a bridge between workers and employers by representing the position of workers to the employer. Human resource managers form a bridge between workers and employers by representing the position of the employer. Trade union representatives and human resource managers cannot be the same person.

6. Collective negotiations cannot function if trade union representatives are not protected against reprisal from the employers for their role as representatives, and are not given facilities (e.g. paid leave for union activities, collective bargaining purposes or training to become a better representative (e.g. public speaking skills)) to play their role.

7. Collective agreements between employers and workers are contracts that normally last for a period from 2 - 4 years. While the agreement is in effect, workers cannot lawfully go on strike to change matters that have been settled in the agreement. The collective agreement should contain a "grievance procedure" that allows disputes with respect to the agreement to be settled by, for example, a jointly appointed arbitrator.

8. It is permissible for strikes to temporarily disrupt the economic activity of a company. It is not permissible for striking workers to destroy company assets or commit acts of violence against persons.

9. Workers should not be paid for strike days. The trade union should establish and manage a strike fund from which workers can be supported during strike days.

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[17] This was prepared by Mr. Tim de Meyer, international labour standards and labour law specialist of the ILO with a view to setting out a number of key principles which might be considered in tripartite discussion on labour code reform.