

# Vertical Law and Development

Ngọc Sơn Bùi†

Drawing on the scholarship on the transnational legal process and the diffusion of international law, this Article conceptualizes and illustrates vertical law and development. Vertical law and development refers to a transnational legal process whereby a state or institution integrates norms of public international law into international economic law which may then be adopted in the national legal system of another state to facilitate domestic law reform and societal change.

Vertical law and development is exemplified by the case of the 2020 European Union-Vietnam Free Trade Agreement (EVFTA). This trade deal does not merely deal with trade. It is also a conduit for the diffusion of international legal norms (norms of international human rights law, labor law, environmental law, intellectual property law, and the international ideals of the rule of law) into Vietnamese law to foster domestic legal reform and social and economic development.

The EVFTA is contrasted with the 2019 European Union-Singapore Free Trade Agreement (ESFTA). Unlike the EVFTA, the ESFTA does not function as a tool of vertical law and development due to the EU's instrumental approach in its trade negotiation with Singapore and Singapore's status as a developed country with a largely autochthonous common law system.

This Article has implications for further studies on the functional (instrumental vs. normative) difference of the European Union (EU) FTAs with ASEAN (Association of Southeast Asian Nations) countries; the role of international law in law and development; and vertical law and development as a promising topic of comparative international law.

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† Associate Professor of Asian Laws, Faculty of Law, University of Oxford.

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## Introduction

Marketization and democratization in the developing world have triggered the international movement of law and development.<sup>1</sup> This refers to the movement in which national, transnational, and international agencies undertake a set of practices to promote legal reforms as a tool to foster political and economic reforms in developing countries.<sup>2</sup> The movement rests on the assumption that market regimes and government require legal underpinnings.<sup>3</sup> Law and development normally took the form of diffusing Western legal institutions and codes into developing countries.<sup>4</sup> “Developing countries” refers to “countries with, relatively speaking, low per capita incomes, low rates of labor productivity, and large segments of their populations engaged in agriculture,”<sup>5</sup> or the Third World countries “which have not yet achieved, but generally aspire to, self-sustaining economic growth.”<sup>6</sup>

As a field of academic inquiry, law and development has been primarily studied in an international law tradition,<sup>7</sup> although it is also studied in other

1. Amy L. Chua, *Markets, Democracy, and Ethnicity: Toward a New Paradigm for Law and Development*, 108 YALE L.J. 1, 4 (1998).

2. *Id.* at 11–13; see also Benjamin van Rooij & Pip Nicholson, *Inflationary Trends in Law and Development*, 24 DUKE J. COMP. & INT’L L. 297, 298–99 (2013); Kevin E. Davis & Michael Trebilcock, *The Relationship between Law and Development: Optimists versus Skeptics*, 57 AM. J. COMP. L. 895, 895–96 (2009); Yong-Shik Lee, *General Theory of Law and Development*, 50 CORNELL INT’L L.J. 415 (2017); John K. M. Ohnesorge, *Developing Development Theory: Law and Development Orthodoxies and the Northeast Asian Experience*, 28 U. PA. J. INT’L ECON. L. 219, 222–23 (2007).

3. Brian Z. Tamanaha, *The Primacy of Society and the Failures of Law and Development*, 44 CORNELL INT’L L.J. 209, 210 (2011).

4. *Id.* at 211. For a recent case study, see Connor Steelberg, *Late Development and the Private Sector: A Perspective on Public-Private Partnerships in Vietnam*, 58 COLUM. J. TRANSNAT’L L. (May 31, 2020), <https://ssrn.com/abstract=3615186> [<https://perma.cc/5Q2G-XQX5>].

5. Chua, *supra* note 1, at 10–11.

6. David M. Trubek, *Toward a Social Theory of Law: An Essay on the Study of Law and Development*, 82 YALE L.J. 1, 2 (1972).

7. Lan Cao, *Culture Change*, 47 VA. J. INT’L L. 357, 376 (2007) (“most law and development scholars come from an international law tradition”).

traditions, such as comparative law.<sup>8</sup> Scholars have theorized about “international law and development.”<sup>9</sup> Law and development is arguably *international* in two senses: development has animated the evolution and expansion of international law; and promoting development through programs assisting legal reforms is the central concern of international institutions such as the World Bank and the International Monetary Fund.<sup>10</sup> Moreover, law and development is international for two other reasons. First, law and development has become an international movement because it has involved agencies worldwide. Originally, law and development emerged in the United States in 1960s as the result of the U.S. government taking an interest in promoting law reform in Latin America and, subsequently, Asia.<sup>11</sup> Later, law and development evolved into an international movement. David M. Trubek, one of the founders of the law and development movement, identifies three periods of the field: the first moment, or the inception of law and development in the 1960s and the early 1970s, which conceptually rested on American liberal legalism; the second moment, or the revival of the field in the late 1980s and 1990s, which was conceptually based on the neoclassical institutionalism embraced by the Chicago School; and law and development in the twenty-first century, which is informed by diverse ideas.<sup>12</sup> In the international sphere, law and development actors are no longer limited to Western powers,<sup>13</sup> but have expanded to Asian donors, including not only the established law and development donor Japan,<sup>14</sup> but also the recent-comers, such as Singapore<sup>15</sup> and China.<sup>16</sup>

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8. See MATHIAS SIEMS, *COMPARATIVE LAW* 332–62 (2018) (“Chapter 11: Comparative Law and Development”).

9. Kerry Rittich, *Theorizing International Law and Development*, in *THE OXFORD HANDBOOK OF THE THEORY OF INTERNATIONAL LAW* 820, 820 (Anne Orford et al. eds., 2016).

10. *Id.* at 826–27; see also Monika Heupel, *Rule of Law Promotion through International Organizations and NGOs*, in *RULE OF LAW DYNAMICS: IN AN ERA OF INTERNATIONAL AND TRANSNATIONAL GOVERNANCE* 133, 133–52 (Michael Zurn et al. eds., 2012); *RULE OF LAW IN LATIN AMERICA: THE INTERNATIONAL PROMOTION OF JUDICIAL REFORM* (Pilar Domingo & Rachel Sieder eds., 2001).

11. See generally, JEDIDIAH J. KRONCKE, *THE FUTILITY OF LAW AND DEVELOPMENT: CHINA AND THE DANGERS OF EXPORTING AMERICAN LAW* (2016); JAMES A. GARDNER, *LEGAL IMPERIALISM: AMERICAN LAWYERS AND FOREIGN AID IN LATIN AMERICA* (1980).

12. David M. Trubek, *Law and Development: Forty Years after ‘Scholars in Self-Estrangement,’* 66 *U. TORONTO L.J.* 301 (2016); see also, *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* (David M. Trubek & Alvaro Santos eds., 2006).

13. See Frank Schimmelfennig, *A Comparison of the Rule of Law Promotion Policies of Major Western Powers*, in *RULE OF LAW DYNAMICS: IN AN ERA OF INTERNATIONAL AND TRANSNATIONAL GOVERNANCE* 111 (Michael Zurn et al. eds., 2012).

14. Teilee Kuong, *Legal Assistance in the Japanese ODA: The Spark of a New Era*, 5 *ASIAN J. L. & SOC’Y* 271, 271 (2018); Pip Nicholson & Teilee Kuong, *Japanese Legal Assistance: An East Asian Model of Legal Assistance and Rule of Law?*, 6 *HAGUE J. ON THE RULE OF L.* 141, 149 (2014); Veronica L. Taylor, *New Markets, New Commodity: Japanese Legal Technical Assistance* 23 *WIS. INT’L L.J.* 251, 254–55 (2005).

15. Andrew Harding, *Multi-Level, Recursive Law and Development: Singapore’s Legal Role in ASEAN*, 5 *ASIAN J. L. & SOC’Y* 251, 254 (2018).

16. Samuli Seppanen, *Chinese Legal Development Assistance: Which Rule of Law? Whose Pragmatism?*, 51 *VAND. J. TRANSNAT’L L.* 101, 102 (2018); Matthew Steven Erie & Ha Hai Do, *Law and Development Minus Legal Transplants: The Example of China in Vietnam*, 7 *ASIAN*

Second, law and development actors seek to promote the application of international legal norms (not merely national legal norms of the exporting countries) in domestic legal systems of the developing countries. As Jonathan M. Miller writes,

most countries simply cannot engage in international commerce or expect international investment without moving their legal regimes toward common standards, and cannot claim good records in areas such as international human rights, protection of the environment and anti-corruption efforts without importing some foreign or international models. Numerous programs sponsored by governments, foundations, and international institutions have actively encouraged these processes.<sup>17</sup>

In this regard, even a project of legal assistance by a single national government can also be international if it seeks to promote the incorporation of international law norms like human rights into national legal systems of other countries.

Much of law and development scholarship has explored the horizontal dimension or the donors' direct involvement in promotion of legal reforms in developing countries.<sup>18</sup> This Article turns to the vertical aspect of law and development.<sup>19</sup> Drawing on scholarship on the transnational legal process and diffusion of international law,<sup>20</sup> it conceptualizes and illustrates vertical law and development. Vertical law and development is defined as the process whereby a state or institution integrates norms of public international law into international economic law, which may then be adopted in the legal system of another state to facilitate domestic law reform and societal change. The mechanisms to diffuse international legal norms vertically are mainly inductive through material conditionality, but partially persuasive and acculturative through learning and dialogue, respectively.

Vertical law and development is illustrated by the case of the European Union-Vietnam Free Trade Agreement (EVFTA), which entered into force on August 1, 2020, "the most comprehensive trade agreement the [European

J. L. & SOC'Y (forthcoming 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3581475](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3581475) [<https://perma.cc/5Q5Z-YRLD>].

17. Jonathan M. Miller, *A Typology of Legal Transplants: Using Sociology, Legal History and Argentine Examples to Explain the Transplant Process*, 51 AM. J. COMP. L. 839, 840 (2003).

18. STEPHEN HUMPHREYS, *THEATRE OF THE RULE OF LAW: TRANSNATIONAL LEGAL INTERVENTION IN THEORY AND PRACTICE* (2010); *LAW AND DEVELOPMENT AND THE GLOBAL DISCOURSES OF LEGAL TRANSFERS* (John Gillespie & Pip Nicholson eds., 2012); *LAW REFORM IN DEVELOPING AND TRANSITIONAL STATES* (Tim Lindsey ed. 2007); *PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE* (Thomas Carothers ed. 2006).

19. Matthew S. Erie, *Chinese Law and Development*, 62 HARV. INT'L L.J. (forthcoming 2021), <https://ssrn.com/abstract=3552044> [<https://perma.cc/WG4F-6AS7>]; see also Laura Nader, *The Americanization of International Law*, in *MOBILE PEOPLE, MOBILE LAW: EXPANDING LEGAL RELATIONS IN A CONTRACTING WORLD* 199 (Franz von Benda-Beckmann et al. eds., 2016); Simon Butt, *Intellectual Property in Indonesia: A Problematic Legal Transplant*, 24 EUR. INTELL. PROP. REV. 249, 250 (2009), <http://ssrn.com/abstract=1401093> [<https://perma.cc/578F-9BJK>] (noting that Indonesia reformed intellectual property law in line with the World Trade Organization's (WTO) Trade Related Aspects of Intellectual Property (TRIPs) Agreement).

20. See *infra* Part II.

Union] has concluded with a developing country.”<sup>21</sup> The second free trade agreement the EU signed with an ASEAN country, and the fourth in Asia after Singapore, Japan, and South Korea,<sup>22</sup> the EVFTA will gradually eliminate almost all customs duties.<sup>23</sup> However, this trade deal does not merely deal with trade. It also includes provisions on human rights, labor rights, environmental protection, intellectual property, institutional reforms and cooperation.<sup>24</sup> The trade deal’s concerns are, therefore, not merely commercial but normative. It is a duct leading to the diffusion of norms of international law in the Vietnamese national legal system to foster domestic social and economic development. The EVFTA is, in fact, a part of EU law and development.

The EVFTA is then situated in a comparative context: the EU-Singapore Free Trade Agreement (ESFTA). Although ESFTA integrates norms of public international law as Singapore has deeply engaged with world markets, its function is mainly commercial rather than normative. The ESFTA does not function as the tool of vertical law and development due to the EU’s dominant instrumental approach to Singapore and Singapore’s status as a developed country with its largely autochthonous common law system.

The remainder of this Article is structured as follows. Part II conceptualizes vertical law and development. Part III exemplifies it with the case of the EVFTA. Part IV compares the EVFTA and the ESFTA. Part IV concludes with reflections on the directions for future studies.

## I. Vertical Law and Development

### A. Features

The concept of vertical law and development is connected to the rich body of scholarship on transnational law, transnational legal order, and transnational legal process.<sup>25</sup> Particularly, this Article’s conceptualization of vertical law and

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21. European Commission Press Release IP/20/1412, The Commission, EU-Vietnam Trade Agreement Enters into Force (July 31, 2020), [https://ec.europa.eu/commission/presscorner/detail/en/ip\\_20\\_1412](https://ec.europa.eu/commission/presscorner/detail/en/ip_20_1412) [<https://perma.cc/BS5H-GCDZ>].

22. For information on EU-Asia trade agreements, see Jappe Eckhardt & Arlo Poletti, *The Politics of Global Value Chains: Import-Dependent Firms and EU-Asia Trade Agreements*, 23 J. OF EUR. PUB. POL’Y 1543 (2016); Daniela Sicurelli, *Normative Trade Power Europe? The Case of EU Trade Agreements with Asian Countries*, in GLOBAL ECONOMIC GOVERNANCE AND HUMAN DEVELOPMENT 103 (Simone Raudino & Arlo Poletti eds., 2018).

23. European Parliament Press Release, Parliament Approves EU-Vietnam Free Trade and Investment Protection Deals (Feb. 12, 2020), <https://www.europarl.europa.eu/news/en/press-room/20200206IPR72012/parliament-approves-eu-vietnam-free-trade-and-investment-protection-deals> [<https://perma.cc/QQJ9-Z7L5>].

24. See *infra* Part III.

25. PHILIP JESSUP, TRANSNATIONAL LAW (1956) (putting forward the proposal of transnational law for the first time); THE MANY LIVES OF TRANSNATIONAL LAW: CRITICAL ENGAGEMENTS WITH JESSUP’S BOLD PROPOSAL (Peer Zumbansen ed. 2020) (a collection of essays engaging with Jessup’s proposal); Peer C. Zumbansen, *Transnational Law: Theories & Applications*, in OXFORD HANDBOOK OF TRANSNATIONAL LAW (Peer C. Zumbansen ed. 2020) (reviewing scholarship of transnational law). For some textbooks on transnational law, see DONALD EARL CHILDRESS III ET AL., TRANSNATIONAL LAW AND PRACTICE (2015); MATHIAS W. REIMANN ET AL., TRANSNATIONAL LAW: CASES AND MATERIALS (2013). For

development builds from Yale Law Professor Harold Hongju Koh's concept of transnational legal process defined as "the process whereby an international law rule is interpreted through the interaction of transnational actors in a variety of law-declaring fora, then internationalized into a nation's domestic legal system."<sup>26</sup> Koh distinguishes "horizontal" or the state-to-state level of the transnational legal process from "the mechanisms of 'vertical domestication,' whereby international law norms 'trickle down' and become incorporated into domestic legal system."<sup>27</sup> Drawing on the latter, I define *vertical law and development* as a transnational legal process whereby a state or institution integrates norms of public international law into international economic law which may be then adopted in the national legal system of another state to facilitate domestic law reform and societal change.

Vertical law and development has Koh's four features of transnational legal process: nontraditional, nonstatist, dynamic, and normative.<sup>28</sup> The following paragraphs elaborate these features but within the context of vertical law and development and with a focus on the conceptual level.

First, as a transnational legal process, vertical law and development is *nontraditional* in the sense that it departs from the binary distinction between international law and national law and the distinction of different areas of international law.<sup>29</sup> Vertical law and development prompts international law as a part of national law. In vertical law and development, international economic law is used as a tool to diffuse norms of public international law in domestic legal systems. In other words, public international law is integrated into international economic law. Vertical law and development is also nontraditional in that it departs from the conventional scholarship of law and development which focuses on horizontal, direct state-to-state legal transplant processes. In addition, the concept of vertical law and development departs from the traditional prescriptive and evaluative accounts of law and development. It does not ask how law should be reformed to facilitate development, or how law and development projects are successful or unsuccessful. Rather, vertical law and development is an exploratory and explanatory concept. It tries to explore and explain how and why international law norms are integrated into international economic law to foster national legal and societal development.

Second, vertical law and development is *non-statist*.<sup>30</sup> To be sure, a state, for example, the US, may integrate international law norms into its trade agreements with developing countries to foster national legal and socio-

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transnational legal order and process, see TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., 2015); Gregory Shaffer, *Transnational Legal Process and State Change*, 37 L. & SOC. INQUIRY 229 (2012); Harold H. Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181 (1996).

26. Harold H. Koh, *The 1998 Frankel Lecture: Bringing International Law Home*, 35 HOUS. L. REV. 623, 629 (1998).

27. *Id.* at 626–27.

28. Koh, *supra* note 25, at 184.

29. *Id.*

30. *Id.*

economic development. However, beyond nation-states, transnational actors (such as the EU) and private actors (e.g., national and transnational civil societies and enterprises) may engage in mobilizing for the application of international norms in domestic legal systems.

Third, vertical law and development is *dynamic*.<sup>31</sup> This process involves numerous interactions of multiple transnational and national actors. The interactive fora can be formal (such as legislative sessions and negotiation meetings) and informal (such as the mobilization of the transnational and national civil societies, and the exchange of information between the development agencies and the host country). The consequence of vertical law and development is nonlinear. International law norms may not be merely copied but adopted, adapted, and resisted in national legal systems. Even when international law norms are integrated into formal national law, this does not mean they are internalized in domestic legal practice. While a developing country may adopt an international law norm in its national legal system, the actual implementation of the norm depends on a range of contextual, dynamic factors, such as the host country's interests, its capacity for law enforcement, local legal culture, and the engagement of the civil societies.

Fourth, vertical law and development is *normative*.<sup>32</sup> It is normative in two senses: legal and developmental. In the first instance, international law norms are diffused into domestic legal systems to facilitate domestic legal reform (e.g., adopting new laws, revising the existing laws, creating new legal institutions, or adjusting the existing legal institutions). Vertical law and development aspires to modernize the law of the developing world according to international legal standards. In the second aspect, vertical law and development aims to foster domestic societal development (meaning political, social, and economic transformation) in the developing world. The developmental normativity is connected to the preceding legal normativity. Vertical law and development is premised on the assumption that societal development requires national legal development according to international legal standards.

The concept of vertical law and development is built from and can enrich Koh's transnational legal process theory. The concept situates the transnational legal process within the developmental context. Transnational legal process can occur in both developed and developing countries. Koh's theory focuses more on developed countries (particularly the U.S.), and, therefore, the normative feature of the transnational legal process in his theory is predominantly legal. In the context of developing countries, the normative developmental feature of the transnational legal process is particularly prominent. Transnational legal process theory should pay more attention to the developmental normativity of the transnational legal process.

## B. Mechanisms

How do external actors promote international law norms in the domestic legal system of a developing country? Drawing on diffusion theory, three

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31. *Id.*

32. *Id.*

mechanisms of law and development can be identified: inductive, persuasive, and acculturative. Vertical law and development is mainly driven by the inductive mechanism, although the other two mechanisms are supplemental.

Diffusion theories have been developed in various intellectual traditions to explain the global spread of institutions, policy, and legal norms, including norms of international law.<sup>33</sup> In a sophisticated study, NYU Law Professor Ryan Goodman and Texas Law Professor Derek Jinks provide a useful distinction of three mechanisms of international human rights law diffusion: material inducement, persuasion, and acculturation.<sup>34</sup> Material inducement refers to the mechanism “whereby states and institutions influence the behavior of other states by increasing the benefits of conformity or the costs of nonconformity through material rewards and punishments.”<sup>35</sup> Persuasion is the process whereby “target actors are convinced of the truth, validity, or appropriateness of a norm, belief, or practice,” and occurs when “the practices of actors are influenced through processes of social ‘learning’ and other forms of information conveyance that occur in exchanges within international organizations and transnational networks.”<sup>36</sup> Acculturation or socialization, “is the process by which actors adopt the beliefs and behavioral patterns of the surrounding culture, without actively assessing either the merits of those beliefs and behaviors or the material costs and benefits of conforming to them.”<sup>37</sup> Drawing on a range of empirical evidence, Goodman and Jinks argue that acculturation, rather than material inducement and persuasion, accounts for the diffusion of human rights norms.<sup>38</sup>

Based on Goodman and Jinks’ theorizing model, three corresponding mechanisms of law and development can be identified: inductive, persuasive, and acculturative.

*Inductive law and development* refers to a mechanism whereby a state or institution impels another state to comply with external legal norms to foster domestic law reform and societal change.<sup>39</sup> The base of this inductive influence is material interests, such as the accession to development aids or the transnational market. This form of inductive law and development is material conditionality. Material conditionality can be positive or negative.<sup>40</sup> Positive conditionality means the external actor rewards the host country with material

33. See, e.g., Zachary Elkins et al., *Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice*, 54 HARV. INT’L L.J. 61, 63, 66 (2013) (discussing authors who have examined the diffusion theory); THE GLOBAL DIFFUSION OF MARKETS AND DEMOCRACY (Beth A. Simmons et al. eds., 2008) (same); Paul J. DiMaggio & Walter W. Powell, *The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields*, 48 AM. SOC. REV. 147, 149 (1983) (examining diffusion in organizational fields from an institutional, social theorist perspective).

34. RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* 21–25 (2013).

35. *Id.* at 22.

36. *Id.* at 22–24.

37. *Id.* at 22.

38. *Id.* at 28.

39. Schimmelfennig, *supra* note 13, at 122–23.

40. *Id.*

benefits for its national law's compliance with the external legal norms.<sup>41</sup> Negative conditionality means the external actors sanction the host country through withdrawal or restrictions of material benefits for its national law's failure to comply with the external legal norms.<sup>42</sup> As a result, the host country may integrate some external legal norms in some parts of its legal system, leading to the formal convergence between the host country's national law and the external legal norms.

*Persuasive law and development* refers to the process whereby a state or institution propels another state to accept external legal norms to foster domestic law reform and societal change.<sup>43</sup> Different from the inductive model, the base for persuasive influence is not the incentives of material interests but the normative appeal of the substantive contents of the external legal norms. Through learning forms—such as “legal technical assistance,”<sup>44</sup> scholarships for overseas study, exchange of legal information or best legal practices—the external actors try to convince the host country about the normative values and correctness of the external legal norms. If the host country is persuaded by the values of the external legal norms, it may internalize them. The legal internalization driven by persuasion will lead to functional convergence: The external legal norms are not merely adopted in the host country's formal law but are imbedded in its legal practice.

*Acculturative law and development* is a process whereby a state or institution compels another state to conform to the surrounding legal culture to foster domestic law reform and societal change.<sup>45</sup> The base for this acculturative influence is not material interests or normative values but social relationship between the host country and the external surrounding community.<sup>46</sup> Through dialogic forms, such as transnational human rights or judicial dialogue,<sup>47</sup> the external actors propel the host country toward a surrounding legal culture—ways of legal behaviors and attitudes about certain legal norms—adopted by the external actor and the larger international community. This may lead to social convergence: The host country may adopt certain legal behaviors and attitudes in order to be recognized by the surrounding community. This social convergence can boost the international legitimacy of the host country's legal and societal development.

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41. *Id.* at 123.

42. *Id.*

43. Van Rooij & Nicholson, *supra* note 2, at 299.

44. *Id.* (citing Scott Newton, *The Dialectics of Law and Development*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 174, 178 (David M. Trubek & Alvaro Santos eds., 2006)) (internal quotations omitted).

45. GOODMAN & JINKS, *supra* note 34, at 26.

46. *Id.*

47. See, e.g., Anne-Marie Slaughter, *A Global Community of Courts*, 44 HARV. INT'L L.J. 191, 192 (2003) (discussing how judges in different national and international courts interact with and influence each other); Melissa A. Waters, *The Future of Transnational Judicial Dialogue*, 104 AM. SOC'Y INT'L L. 465, 465 (2010) (same); Monica Claes & Maartje De Visser, *Are You Networked Yet? On Dialogues in European Judicial Networks*, 8 UTRECHT L. REV. 100, 101 (2012) (same, but in a specifically European context).

Table 1: Three Mechanisms of Law and Development

Type	Inductive	Persuasive	Acculturative
Influence	Impel	Propel	Compel
Base	Material	Normative	Relational
Form	Conditionality	Learning	Dialogue
Result	Formal Convergence	Functional Convergence	Social Convergence

The three models of law and development draw on but complicate Goodman and Jinks' diffusion theory. First, this study situates Goodman and Jinks' diffusion theory within the context of law and development. While Goodman and Jinks provide a useful framework, they have not yet substantively accounted for the function of international law diffusion in fostering legal reform and socioeconomic development in developing countries. This study suggests a functional connection between international law diffusion and legal and societal change in the developing world.

Second, while Goodman and Jinks' theory focuses on the diffusion of international human rights law, this triple construction of law and development expands to international legal norms generally and is not limited to human rights law. Although human rights normally feature law and development projects, development agencies have the broader concerns of legal reforms beyond human rights law, including, for example, reforms of business law and labor law. In addition, in the developing country's legal needs, laws for development include not only laws for protection of human rights but also laws for promotion of the market (business law), laws for state-building (constitutional and administrative law), and laws for social welfare (social law).

Third, while Goodman and Jinks focus on acculturation as the main diffusion mechanism, this triple construction of law and development is more holistic. Acculturation may work prominently in the area of international human rights law where enforcement relies mainly on the state's voluntary acceptance of international norms. However, acculturation alone may not explain why international legal norms can be diffused through trade agreements. Emilie M. Hafner-Burton argues in an empirical study that preferential trade agreements, rather than human rights agreements, are more effective in changing the repressive behaviors toward respecting fundamental norms of human rights.<sup>48</sup> As opposed to human rights agreements—a kind of soft law influenced through persuasion—preferential trade agreements—a kind of hard law requiring legally enforceable binding obligations—"influence through coercion: [preferential trade agreements] provide member governments with a mandate to protect certain human rights, while they supply the material benefits and institutional structures to reward and punish members'

48. See Emilie M. Hafner-Burton, *Trading Human Rights: How Preferential Trade Agreements Influence Government Repression*, 59 INT'L ORG. 593, 595 (2005).

behavior.”<sup>49</sup> This coercive mechanism is consistent with Goodman and Jinks’ concept of material inducement. Hafner-Burton’s account, however, tends to be dichotomous.

From a holistic perspective, I contend that vertical law and development is mainly driven by the inductive mechanism, and the other two mechanisms are supplemental. Inductive law and development can be horizontal and vertical. In the *horizontal model* of inductive law and development, the states or institutions directly impose external legal norms into domestic legal systems. The case of Japan’s postwar Constitution imposed by General Douglas MacArthur provides a textbook example.<sup>50</sup> In the *vertical model* of inductive law and development, the states or institutions integrate norms of public international law (such as human rights, labor, and environmental standards) into international economic law (e.g., trade agreements) which may lead to their adoption in the national legal system of another state. International economic law mainly induces a government’s compliance with international law norms through material sanction and reward. However, it may supplement mechanisms to convince the government to accept the validity of the international law norms, and to put pressure on the government to adopt the surrounding behavioral legal patterns. Therefore, vertical law and development is principally inductive but partially persuasive and acculturative.

### C. EU Vertical Law and Development

The EU has been a major actor of the law and development movement. EU law and development is motivated by its interests in promoting its founding values in the larger world. Article 2 of the Treaty on European Union provides: “The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.”<sup>51</sup> The 2009 Lisbon Treaty introduces into the Treaty on European Union a provision that requires the Community to promote human rights and other related values “in the wider world.”<sup>52</sup> This provision, therefore, establishes “constraints on EU external policies.”<sup>53</sup> In addition, the 2012 EU Strategic Framework and Action Plan on Human Rights and Democracy stresses that the Community “will promote human rights in all areas of its external action without exception” and particularly that “it will integrate the promotion of human rights into trade, investment, technology and

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49. *Id.*

50. David S. Law, *The Myth of the Imposed Constitution*, in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 239, 240 (2013). For imposed constitutions generally, see THE LAW AND LEGITIMACY OF IMPOSED CONSTITUTIONS (Richard Albert et al. eds., 2019).

51. Consolidated Version of the Treaty on European Union of Oct. 26, 2012, art. 2, 2012 O.J. (C 326) 1, 5.

52. *Id.* at 16 (art. 21).

53. See Lorand Bartels, *The EU’s Human Rights Obligations in Relation to Policies with Extraterritorial Effects*, 25 EUR. J. OF INT’L L. 1071, 1074 (2014).

telecommunications, Internet, energy, environmental, corporate social responsibility and development policy . . . .”<sup>54</sup>

The EU does not merely promote national legal norms of the EU’s members. The EU also seeks to diffuse its “programmatic trinity” (democracy, human rights, and rule of law)<sup>55</sup> into developing countries. These norms are not the EU’s normative identities but the international legal norms that the EU shares with the global community. This explains why most EU law and development projects focus on the promotion of democracy, human rights, and the rule of law. The EU has actively engaged in promoting human rights, rule of law, and democracy in developing countries in Central and Eastern Europe, Western Balkans, Transcaucasia, Asia, Latin America and sub-Saharan Africa.<sup>56</sup> Particularly, in Southeast Asia, the EU promoted democracy in Cambodia<sup>57</sup> and Myanmar.<sup>58</sup>

The EU has actively engaged in promoting law reforms to facilitate social and economic development in Vietnam.<sup>59</sup> According to an EU document, for the period 2014–2020, the EU Commission spent some EUR 50 million in Vietnam “to promote democracy, strengthen governance and rule of law; and to enable the business environment by building accountable and transparent institutions that are responsive to citizens’ rights, and that promote access to justice, participation and a conducive business environment.”<sup>60</sup> Particularly, through the European Instrument for Democracy and Human Rights (allocating EUR 3.5 million to Vietnam for the period 2014–2017) and the Civil Society Organizations and Local Authorities program (allocating EUR 3.35 million to Vietnam for the period 2015–2017), “the EU has been supporting civil society in Vietnam to promote and protect human rights and fundamental freedoms as

54. EU Strategic Framework and Action Plan on Human Rights and Democracy of Jun. 25, 2012, 2012 O.J., 11855/12.

55. See Schimmelfennig, *supra* note 13, at 114.

56. See Nicklas Norling & Svante E. Cornell, *The Role of the European Union in Democracy-Building in Central Asia and the South Caucasus*, INT’L INST. FOR DEMOCRACY & ELECTORAL ASSISTANCE 1, 6–7 (2016); Alexander Strelkov, *The EU and Rule of Law Promotion in Western Balkans—a New Role for Candidate States’ Parliaments*, 32 E. EUR. POL., 505, 505–24 (2016); Martin Mendelski, *The EU’s Rule of Law Promotion in Central and Eastern Europe: Where and Why Does It Fail, and What Can Be Done About It?*, BINGHAM CTR. FOR THE RULE OF L. 1, 2–11 (2016); Martin Mendelski, *The EU’s Rule of Law Promotion in Post-Soviet Europe: What Explains the Divergence between Baltic States and EaP Countries?*, 7 E. J. EUR. STUD. 111, 112–44 (2016); Samantha Velluti, *The Promotion and Integration of Human Rights in EU External Trade Relations*, 32 UTRECHT J. INT’L & EUR. L. 41, 42–59 (2016).

57. See Markus Karbaum, *Cambodia’s Façade Democracy and European Assistance*, 30 J. CURRENT SE. ASIAN AFF. 111, 115 (2011).

58. See *EUR 14 Million to Support Myanmar’s Democratic Transition*, RELIEFWEB (July 11, 2018), <https://reliefweb.int/report/myanmar/eur-14-million-support-myanmars-democratic-transition-enmy> [<https://perma.cc/F9FN-D92P>].

59. See *Commission Staff Working Document: Human Rights and Sustainable Development in the EU-Vietnam Relations with specific regard to the EU-Vietnam Free Trade Agreement*, at 11, SWD(2016) 21 (Jan. 26, 2016), [http://trade.ec.europa.eu/doclib/docs/2016/january/tradoc\\_154189.pdf](http://trade.ec.europa.eu/doclib/docs/2016/january/tradoc_154189.pdf) [<https://perma.cc/954M-W62Y>] [hereinafter, Commission Document].

60. See *id.*

well as reinforcing its capacity to be an actor of development.”<sup>61</sup> These programs display horizontal law and development. These programs, through legal aid, directly supported law reforms to foster social and economic development in Vietnam. The rule of law and justice are the norms for these law and development programs.

The EU does not merely directly involve itself in promotion of rule of law in the developing countries in the horizontal manner. It also integrates norms of international law into the trade deals with the developing countries which may be then domesticized in the law of the latter. The EVFTA exemplifies EU vertical law and development. The EU-Vietnam free trade deal is a part of the EU’s larger law and development enterprise to promote the diffusion of norms of international legal regimes into some aspects of Vietnamese law to facilitate domestic legal reforms and socio-economic transformation. The logic of EU vertical law and development through the EVFTA can be explained by the below positions regarding: (1) conditions; (2) framework; (3) international legal norms; (4) mechanisms; and (5) denouement.

First, *experimental compatibility* constitutes the three conditions for the EU vertical law and development through EVFTA. Vietnam’s international integration, its developing status, and its existing experience of law reform provide the conditions for the EU to promote, through the EVFTA, vertical application of international law norms in Vietnamese law.<sup>62</sup>

Second, *institutional linking* defines the structural framework to connect trade with law reform and development. The trade agreement is institutionally linked to a broader political agreement between the EU and Vietnam.<sup>63</sup> The political agreement creates the base for cooperation according to which the EU will assist Vietnam to achieve development aims.<sup>64</sup> The trade agreement, signed after the political agreement, is an instrument to implement the broader development aims beyond trade and investment concerns.<sup>65</sup>

Third, *international legal norms* are the contents promoted through the trade deal. Due to both instrumental and normative concerns, the deal seeks to promote in Vietnam the norms that the EU shares with the broader international community, including norms of international human rights law, labor law, environmental law, intellectual property law, and the cosmopolitan ideal of the rule of law.<sup>66</sup>

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61. See *id.* at 12.

62. See *infra* Part II.A.

63. See Ha Hai Hoang, *Understanding the EU-Vietnam Free Trade Agreement*, E. ASIA FORUM (May 21, 2020), <https://www.eastasiaforum.org/2020/05/21/understanding-the-eu-vietnam-free-trade-agreement/> [<https://perma.cc/34U8-VK7U>].

64. See *id.*

65. See Geert Bourgeois, *Legislative Train Schedule: A Balanced and Progressive Trade Policy to Harness Globalisation*, EUR. PARL. (Apr. 26, 2020), <https://www.europarl.europa.eu/legislative-train/theme-a-balanced-and-progressive-trade-policy-to-harness-globalisation/file-eu-vietnam-fta> [<https://perma.cc/XGB7-U5PR>].

66. See *infra* Part II.C.

Fourth, The EVFTA mainly uses the *inducive* mechanism to diffuse international legal norms into the Vietnamese legal system, but it also provides the base for persuasive and acculturative diffusion.

Fifth, the diffusion generates *legislative convergence*. Vietnamese legislative laws in relevant areas (human rights, labor, environmental, and intellectual property law) formally incorporated norms of international legal regimes.

## II. The Case of the EU-Vietnam Free Trade Agreement

The methodology of this case study is principally qualitative and partially quantitative. The case study employs two types of written primary material. First, it relies on the EU's position papers and press releases to understand its normative intension through the trade deal. Second, this study uses Vietnamese-language original material on national laws, institutions, political documents, and legal and political discourse. The qualitative analysis of this material is, to some extent, supported by quantitative data regarding the number of international agreements Vietnam signed, and the number of domestic laws adopted in response to international commitments. With that methodology, this part will explore and explain the conditions, framework, contents, and mechanisms of the EU vertical law and development through the FTA with Vietnam.

### A. Conditions: Experimental Compatibility

The factors determining the specific target countries of law and development generally include regional proximity, colonial legacies, and local experience of law reforms.<sup>67</sup> Particularly, law and development programs seem to concentrate on countries that have already carried out law reforms in some ways.<sup>68</sup> In addition, some level of compatibility between the laws of the recipients and the donors creates the conditions for law and development work. In this regard, the EU's law and development enterprise in Vietnam is shaped by the experimental compatibility of (1) Vietnam's international integration; (2) the developing context; and (3) domestic legal reform.

#### 1. International Integration

Since the Cold War, the Socialist Republic of Vietnam has widely diversified its international relations. The Constitution enacted in 1992 provided that the government "carries out a policy of peace and friendship, seeks to expand its relations and cooperation with all countries in the world, regardless of their political and social regimes . . ." <sup>69</sup> This creates the constitutional foundation for the country's engagement with regional and international legal regimes, such as ASEAN and the WTO.<sup>70</sup>

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67. See Schimmelfennig, *supra* note 13, at 129.

68. *Id.*

69. SOCIALIST REPUBLIC OF VIET. CONST. OF 1992, art. 14 (amended 2013).

70. See Hao Duy Phan, *The Effects of ASEAN Treaties in Domestic Legal Orders: Evidence from Vietnam*, 17 INT'L J. CONST. L. 205, 210 (2019); Tu-Anh Vu-Thanh, *Does WTO*

Vietnam has also ratified major international human rights treaties, including the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (Feb. 5, 2015); the International Covenant on Civil and Political Rights (Sep. 24, 1982); the Convention on the Elimination of All Forms of Discrimination against Women (Feb. 17, 1982); the International Convention on the Elimination of All Forms of Racial Discrimination (June 9, 1982); the International Covenant on Economic, Social and Cultural Rights (Sep. 24, 1982); the Convention on the Rights of the Child (Feb. 28, 1990); the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict (Dec. 20, 2001); the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution, and child pornography (Dec. 20, 2001); and the Convention on the Rights of Persons with Disabilities (Feb. 5, 2015).<sup>71</sup>

On trade liberalization, apart from the EVFTA, Vietnam has officially participated in twelve other FTAs, including ASEAN FTA (1996), ASEAN-China FTA (2003), ASEAN-Korea FTA (2007), ASEAN-Japan FTA (2008), Vietnam-Japan FTA (2009), ASEAN-India FTA (2010), ASEAN-Australia-New Zealand FTA (2010), Vietnam-Chile FTA (2011), FTA Vietnam-Korea (2015), FTA Vietnam-Asia-Europe Economic Union (2016), the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018), and ASEAN-Hong Kong FTA (2019); and Vietnam has engaged in negotiations for three other FTAs, including the Regional Comprehensive Economic Partnership, Vietnam FTA-European Free Trade Association, and Vietnam-Israel FTA.<sup>72</sup> With these dynamics, a World Bank report considers Vietnam “among the most open economies with a trade-to-GDP ratio of 190 percent in 2018.”<sup>73</sup> Like the EVFTA, these FTAs link trade to human rights issues, which attracted local discussions.<sup>74</sup>

Vietnam’s international integration has generated the need to adjust its national legal system to international legal standards. In an official document, the Communist Party of Vietnam urged the state to

urgently review, supplement and perfect laws directly related to international economic integration, in accordance with the Constitution, and fully and properly complying with the rules of the market economy and commitments in international economic integration; internalize in domestic law, with an

*Accession Help Domestic Reform? The Political Economy of SOE Reform Backsliding in Vietnam*, 16 *WORLD TRADE REV.* 85, 90–91 (2017).

71. *Ratification Status for Viet Nam*, UN TREATY BODY DATABASE, [https://tbineternet.ohchr.org/\\_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=192&Lang=EN](https://tbineternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=192&Lang=EN) [https://perma.cc/4X9G-LQPH] (last visited Apr. 26, 2021).

72. Lê Đình Tĩnh & Hàn Lam Giang, *Hiệp định EVFTA Từ Góc Nhìn Chiến Lược [EVFTA Agreement From a Strategic Perspective]*, *TẠP CHÍ CÔNG SẢN* (Mar. 14, 2020), [http://www.tapchicongsan.org.vn/web/guest/media-story/-/asset\\_publisher/V8hhp4dK31Gf/content/hiiep-dinh-evfta-tu-goc-nhin-chien-luoc](http://www.tapchicongsan.org.vn/web/guest/media-story/-/asset_publisher/V8hhp4dK31Gf/content/hiiep-dinh-evfta-tu-goc-nhin-chien-luoc) [https://perma.cc/B9DX-BPUD] (last visited Apr. 25 2021).

73. THE WORLD BANK, *VIETNAM DEVELOPMENT REPORT 2019: CONNECTING VIETNAM FOR GROWTH AND SHARED PROSPERITY 1* (2019).

74. *See generally* *ẢNH HƯỞNG CỦA THƯƠNG MẠI TỰ DO ĐẾN NHÂN QUYỀN [THE IMPACT OF FREE TRADE ON HUMAN RIGHTS]* (Lê Thị Hoài Thu & Vũ Công Giao eds., 2016).

appropriate roadmap, international treaties to which Vietnam is a member, with a priority of laws on commerce, investment, intellectual property, technology transfer, and labor-trade union.<sup>75</sup>

Vietnam's international integration and the concomitant imperative of domestication of international legal standards create the experimental condition for external actors like the EU to engage in vertical law and development in the country.

## 2. A Developing Country

Vietnam is a developing country. The economic reform program known as *Đổi mới* (Renovation) launched in 1986 and has transformed Vietnam from one of the poorest countries in the world into a lower middle-income country.<sup>76</sup> According to the World Bank, in Vietnam, “between 2002 and 2018, GDP per capita increased by 2.7 times, reaching over US\$2,700 in 2019, and more than 45 million people were lifted out of poverty. Poverty rates declined sharply from over 70 percent to below 6 percent (US\$3.2/day PPP).”<sup>77</sup> The Politburo of Communist Party of Vietnam envisaged a program for the country to achieve the objectives of industrialization and modernization by 2030 and to become an industrialized developed country by 2045.<sup>78</sup>

Vietnam's developing status and its vision to become a developed country provide the condition for external actors to become involved in the country's development, including through vertical law and development. The external involvement may be under the form of development aids,<sup>79</sup> horizontal legal

75. SEC. CENT. EXEC. COMM. XII, COMMUNIST PARTY OF VIETNAM, 06-NQ/TW, NGHỊ QUYẾT HỘI NGHỊ LẦN THỨ TƯ BAN CHẤP HÀNH TRUNG ƯƠNG ĐẢNG (KHÓA XII) VỀ THỰC HIỆN CÓ HIỆU QUẢ TIẾN TRÌNH HỘI NHẬP KINH TẾ QUỐC TẾ, GIỮ VỮNG ỔN ĐỊNH CHÍNH TRỊ - XÃ HỘI TRONG BỐI CẢNH NƯỚC TA THAM GIA CÁC HIỆP ĐỊNH THƯƠNG MẠI TỰ DO THỂ HỆ MỚI [RESOLUTION OF THE FOURTH CONFERENCE OF THE PARTY CENTRAL COMMITTEE (SESSION XII) ON THE EFFECTIVE IMPLEMENTATION OF THE PROCESS OF INTERNATIONAL ECONOMIC INTEGRATION, MAINTAINING SOCIO-POLITICAL STABILITY IN THE CONTEXT OF OUR COUNTRY'S PARTICIPATION IN THE NEW GENERATION OF FREE TRADE AGREEMENTS] (Nov. 5, 2016).

76. On the “*Đổi mới*” reform in Vietnam, see generally DOI MỚI: VIETNAM'S RENOVATION, POLICY, AND PERFORMANCE (Dean Forbes et al. eds., 1991); SOCIOECONOMIC RENOVATION IN VIET NAM: THE ORIGIN, EVOLUTION, AND IMPACT OF DOI NOI (Peter Boothroyd & Pham Xuan Nam eds., 2000); THE VIETNAMESE ECONOMY: AWAKENING THE DORMANT DRAGON (Binh Tran-Nam & Chi Do Pham eds., 2003). For discussion on law and development in Vietnam in the context of middle-income countries, see John Gillespie, *Growing Wealth in East Asian Middle-Income Countries with Transnational Production Regimes*, in LAW AND DEVELOPMENT OF MIDDLE-INCOME COUNTRIES: AVOIDING THE MIDDLE-INCOME TRAP 108, 108–28 (Randall Peerenboom & Tom Ginsburg eds., 2014).

77. *The World Bank in Vietnam*, THE WORLD BANK, <https://www.worldbank.org/en/country/vietnam/overview#1> [https://perma.cc/HGG7-ZFQW] (last updated Apr. 7, 2021).

78. THE POLITBURO, COMMUNIST PARTY OF VIETNAM, 23-NQ/TW, NGHỊ QUYẾT CỦA BỘ CHÍNH TRỊ VỀ ĐỊNH HƯỚNG XÂY DỰNG CHÍNH SÁCH PHÁT TRIỂN CÔNG NGHIỆP QUỐC GIA ĐẾN NĂM 2030, TẦM NHÌN ĐẾN NĂM 2045 [RESOLUTION OF THE POLITBURO ON THE ORIENTATION TO FORMULATE NATIONAL INDUSTRIAL DEVELOPMENT POLICIES UNTIL 2030, WITH A VISION TO 2045] (Mar. 23, 2018).

79. Brent Doberstein, *EIA Models and Capacity Building in Viet Nam: An Analysis of Development Aid Programs*, 24 ENV'T. IMPACT ASSESSMENT REV. 283, 283 (2004).

transplants to support domestic law reform,<sup>80</sup> or promoting law reform as the tool to facilitate development vertically through international economic law as in the case of EVFTA.

### 3. Legal Reform

After the launch of the Renovation program, Vietnam undertook law reforms to facilitate market reforms, including the enactment of several pieces of legislation dealing with market-related issues, such as the tax system, land property, foreign and domestic investment promotion, trade and commerce laws, banking, and company law.<sup>81</sup> This local experience attracted the attention of law and development agencies (including European countries such as Denmark, Sweden, and France) to further facilitate the law reforms in the country.<sup>82</sup>

Apart from national European agencies, the EU's engagement in law and development in Vietnam has been animated by local law reform experience. Vietnam's continuing legal reforms and human rights development create conducive conditions for this engagement. To illustrate, it is demonstrated that "modernization and globalization play a decisive role in changing the Vietnamese government's inward-looking, relativist views of human rights into cosmopolitan, universal perspectives."<sup>83</sup> In addition, judicial transparency has been increasingly improved through publication of courts' judgments.<sup>84</sup> The death penalty has still remained in Vietnam, but its nature has changed "from a tool of power and coercion to a manifestation of justice based on the principles of human rights and rule of law."<sup>85</sup> That said, globalization and trade liberalization have generated more problems in Vietnamese law and human rights. For example, some rights-related laws enacted under domestic and international pressures, such as the new 2016 Freedom of Information Law, are more like a tool for political stability than legal protection for human rights.<sup>86</sup> Furthermore, Vietnamese workers have increasingly been concerned with their legal rights, including striking, and have demanded justice from labor unions

80. See, e.g., John Gillespie, *Transplanting Commercial Law Reform: Developing a 'Rule of Law' in Vietnam* (Apr. 2005) (Ph.D. thesis, The Australian National University) (ResearchGate).

81. See Brian J.M. Quinn, *Legal Reform and Its Context in Vietnam*, 15 COLUM. J. ASIAN L. 219, 223 (2002); *Protection of Foreign Direct Investment in a New World Order: Vietnam—A Case Study*, 107 HARV. L. REV. 1995 (1994).

82. See generally Carol V. Rose, *The "New" Law and Development Movement in the Post-Cold War Era: A Vietnam Case Study*, 32 L. & SOC'Y REV. 93, 111–13 (1998).

83. John Gillespie, *Human Rights as a Larger Loyalty: The Evolution of Religious Freedom in Vietnam*, 27 HARV. HUM. RTS. J. 107, 112 (2014).

84. Trang (Mae) Nguyen, *In Search of Judicial Legitimacy: Criminal Sentencing in Vietnamese Courts*, 32 HARV. HUM. RTS. J. 147, 150 (2019).

85. Kien Tran & Cong Giao Vu, *The Changing Nature of Death Penalty in Vietnam: A Historical and Legal Inquiry*, 9 SOCIETIES 1, 3 (2019).

86. Ha Dang Trung & Lan Phuong Do, *Freedom of Information Law Comes to Vietnam: How Do Human Rights Adapt to Goals of Economic Development and Political Stability?*, 18 AUSTL. J. ASIAN L. 1, 2 (2017).

and state authorities.<sup>87</sup> Citizens in urban cities such as Hanoi have increasingly demanded, including through street protests, their right to participate in local governance.<sup>88</sup> Additionally, there has remained considerable weakness in the anti-corruption legal framework, and in the courts' independence, integrity, and accountability.<sup>89</sup> The existing achievements and the remaining impediments in Vietnamese law reforms and human rights have generated the empirical condition for law and development engagement, including the EU's.

Local law reform alone is not sufficient to explain the EU's law and development work in Vietnam. This work also stems from the fact that Vietnam's reforming law includes features compatible with civil law in continental Europe. Due to the colonial diffusion of French civil law and the convergent diffusion of socialist law that is in turn based on civil law, Vietnamese modern law shares the European civil law tradition's core elements—particularly the positivist conception on the nature of law as deriving from state and concomitantly legal codes, with written statutes as the main sources of law.<sup>90</sup> The existing legal similarities at the deep ideational and structural level animate further efforts to diffuse European law or legal norms that the EU supports into Vietnam through law and development projects. In addition, like civil law in Europe, Vietnamese modern law is more like a legal project developed through deliberate design than a legal system (like common law) developed through natural evolution.<sup>91</sup> Consequently, Vietnamese legal development has been prominently animated through deliberate law-making and institutional design—the areas easily targeted by deliberate law and development projects of external donors, including the EU.

## B. Framework: Institutional Linking

Vietnam, a former French colony, has a long historical connection with Europe.<sup>92</sup> Vietnam formally established diplomatic relations with the European Communities in 1990. In 1995, Vietnam signed an EU-Vietnam Framework Cooperation Agreement (FCA), which has been enforced since June 1, 1996.<sup>93</sup> The Agreement aimed to support development and market reform in Vietnam.<sup>94</sup>

87. See Trinh Ly Khanh, *The Right to Strike in Vietnam's Private Sector*, 2 ASIAN J. OF L. AND SOC'Y 115, 115–35 (2015); Tu Phuong Nguyen, *Labour Law and (In)justice in Workers' Letters in Vietnam*, 5 ASIAN J. L. & SOC'Y 29, 29–47 (2018).

88. John Gillespie & Quang Hung Nguyen, *Between Authoritarian Governance and Urban Citizenship: Tree-Felling Protests in Hanoi*, 55 URBAN STUD. 977, 978 (2019).

89. See Phạm Hồng Thái et al., *The Court System in the Fight against Corruption in Vietnam: Traditional Problems and New Challenges from Free Trade Agreements*, 15 J. VIETNAMESE STUD. 77, 83–91 (2020).

90. For elaboration of these features of civil law in Europe, see JOHN HENRY MERRYMAN & ROGELIO PÉREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* 20–33 (2018).

91. For the distinction of law as project and system, see generally PAUL W. KAHN, *ORIGINS OF ORDER: PROJECT AND SYSTEM IN THE AMERICAN LEGAL IMAGINATION* (2019).

92. Hang Thi Thuy Nguyen & Bruno Mascitelli, *From European Colony to a New Era: EU-Vietnam Relations - 1990–2017*, 9 AUSTL. AND N.Z. J. EUR. STUD. 83, 83–84 (2017).

93. EU-Vietnam Framework Cooperation Agreement, 1996 O.J. (L 136) 7.6.

94. *Id.* art. 2.

The agreement was recently replaced by the EU-Vietnam Framework Agreement on Comprehensive Partnership and Cooperation (PCA), which was signed in 2012 and enforced since October 1, 2016.<sup>95</sup> The EU contends that the PCA “broadens EU-VN cooperation scope in the areas of trade, environment, energy, science and technology, good governance, human rights, as well as, tourism, culture, migration and the fight against corruption and organized crime.”<sup>96</sup> The Vietnamese Government’s Minister for Foreign Affairs Pham Binh Minh states that the PCA “creates important premises for Viet Nam and the EU to engage in negotiations of a Free Trade Agreement.”<sup>97</sup> This suggests a connection between the general political and trade agreements.

The chronology of the trade deal is as follows:

October 2010: The Prime Minister of Vietnam and the President of the European Commission agreed to launch negotiations for the EVFTA Agreement.

June 2012: The Minister of Industry and Trade of Vietnam and the EU Trade Commissioner officially announced the commencement of trade negotiations.

December 2015: End of negotiations and the start of legal review<sup>98</sup> to prepare for the signing of the Agreement.

June 2017: Completed the legal review at the technical level.

September 2017: EU officially asked Vietnam to separate the content of investment protection and the dispute settlement mechanism between the State and investors from the EVFTA Agreement into a separate agreement.

June 2018: Vietnam and the EU officially agreed to separate EVFTA into two agreements: Vietnam-EU Free Trade Agreement (EVFTA) and Investment Protection Agreement (IPA). This officially ended the whole process of legal review of the EVFTA Agreement. The parties agreed on all contents of the IPA Agreement.<sup>99</sup>

August 2018: Completed the legal review for the IPA Agreement.

95. Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the Other Part, 2016 O.J. (L 329) (May 12, 2016) [hereinafter *The Framework Agreement*].

96. Delegation of the European Union to Viet., Vietnam and the EU: Political and Economic Relations (May 16, 2016), [https://eeas.europa.eu/delegations/vietnam/1897/vietnam-and-eu\\_en](https://eeas.europa.eu/delegations/vietnam/1897/vietnam-and-eu_en) [<https://perma.cc/BW37-QU6L>].

97. Pham Binh Minh, *Forward to Delegation of the European Union to Viet., Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the One Part, and the Socialist Republic of Viet Nam, of the Other Part*, 87, 88, <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3244/download> [<https://perma.cc/Q43Q-SJPS>] (last visited Aug. 3, 2021).

98. “Legal review” refers to an extensive process to consider whether Vietnamese law is consistent with the commitments in the trade agreement under negotiation.

99. Thu Thuy, *What’s to Gain from EU-Vietnam Trade Agreement*, NHAN DAN NEWS (July 2019), <https://en.nhandan.org.vn/evfta/> [<https://perma.cc/N9RJ-JWRA>]; *Giới Thiệu Chung Về Hiệp Định EVFTA Và IPA [General Introduction to EVFTA and IPA Agreements]*, SOCIALIST REPUBLIC OF VIET., [http://evfta.moit.gov.vn/?page=overview&category\\_id=fb203c7b-54d6-4af7-85ca-c51f227881dd](http://evfta.moit.gov.vn/?page=overview&category_id=fb203c7b-54d6-4af7-85ca-c51f227881dd) [<https://perma.cc/R8W8-39T3>] (last visited Aug. 3, 2021) (providing a general introduction to EVFTA and IPA Agreements).

October 17, 2018: The European Commission officially adopted EVFTA and IPA.

June 25, 2019: Council of Europe approved for signature.

June 30, 2019: Vietnam and EU officially signed EVFTA and IPA.

January 21, 2020: European Union International Trade Commission adopted recommendation to approve EVFTA.

March 30, 2020: Council of Europe adopted EVFTA.

June 8, 2020: Vietnam's National Assembly ratified EVFTA.<sup>100</sup>

The EU's document states that “[t]he institutional framework and procedures under the PCA and FTA will provide the EU with an enhanced basis for actively promoting respect for human rights and sustainable development in its relations with Vietnam.”<sup>101</sup> These two agreements, therefore, display the EU's law and development efforts in Vietnam—efforts to promote legal reforms to facilitate socio-economic change in the country.

First, consider the PCA, the key aims of which are development, human rights, and legal reforms. The agreement provides that the corporation aims, *inter alia*, to eradicate poverty and promote sustainable development, to establish cooperation in the area of justice and security (including the rule of law and legal cooperation), and to foster human rights.<sup>102</sup> The PCA also stipulates various forms of cooperation, including technical assistance; training courses; workshops and seminars; the exchange of experts, studies, and joint research; and information exchange.<sup>103</sup> Particularly, major areas of cooperation include human rights and related legal reforms. Human rights cooperation includes human rights promotion and education as well as strengthening the following: human rights-related institutions, the existing human rights dialogue, and cooperation within the human rights-related institutions of the UN.<sup>104</sup> The related “legal cooperation” spans from “the strengthening of the rule of law and of institutions at all levels in the areas of administration of justice and law enforcement” to “the enhancement of the judicial capacity and legal system in such areas as civil law, civil procedural law, criminal law and criminal procedural law, as well as to engage in an exchange of information concerning legal systems and legislation.”<sup>105</sup>

The PCA's provisions on human rights cooperation and legal cooperation constitute the base for EU programs of law and development in Vietnam. The

100. Thông Báo Về Việc Thay Đổi Trang Web Đăng Tải Thông Tin Về Các Hiệp Định Thương Mại Tự Do (Fta) Của Việt Nam [Notice of Changes to the Website to Download Information About Free Trade Agreements (FTAs) of Vietnam] (Jan. 8, 2021), <http://evfta.moit.gov.vn/default.aspx?page=news&do=detail&id=fa75b150-0ed2-4f0f-ac49-5a274be166bf> [<https://perma.cc/HA25-LWUE>]; Anh Minh, *Quốc hội phê chuẩn Hiệp định thương mại tự do Việt Nam-EU [The National Assembly Ratified the Vietnam-EU Free Trade Agreement]*, VNEXPRESS (June 8, 2020), <https://vnexpress.net/quoc-hoi-phe-chuan-hiep-dinh-thuong-mai-tu-do-viet-nam-eu-4111959.html> [<https://perma.cc/B55B-TZHT>].

101. Bartels, *supra* note 53, at 15.

102. The Framework Agreement, *supra* note 95, art. 2.

103. *Id.* art. 7.

104. *Id.* art. 35.

105. *Id.* art. 11.

provisions provide the framework for the EU to promote human rights and legal reforms that facilitate political, social, and economic development in the country. The implementation of human rights and legal cooperation normally involves law and development projects, which would induce the diffusion of external legal ideas, norms, and institutions into some aspects of the Vietnamese legal system.<sup>106</sup>

To illustrate, consider the EU's support of Vietnamese constitutional reform in 2012, shortly after the PCA was signed and the trade negotiation was launched. On October 4, 2012, the Delegation of the European Union to Vietnam, in collaboration with a local research institution, held a two-day workshop titled "Constitution building and protection—International and Vietnamese experiences." The workshop was a part of the EU-funded Strategic Dialogue program's series of activities on human rights.<sup>107</sup> In his opening remarks, Ambassador Franz Jessen underlined the positive developments in the bilateral relationship, including the signature of the PCA. Ambassador Jessen stated,

The ongoing revision of the Constitution and a wide range of legislative measures under consideration by the National Assembly are of particular relevance for Vietnam's future. The EU believes that the promotion of and the respect for human rights and the rule of law are of crucial importance for Vietnam's own development and a key aspect of bilateral relations.<sup>108</sup>

At the workshop, a German expert shared the European experience on drafting a National Bill of Rights.<sup>109</sup> This event illustrates an EU activity of law and development in Vietnam in the area of constitutional reform. The area of focus is constitutional rights and the form of assistance involves a workshop and the exchange of the constitutional experience.

The EU's law and development in Vietnam is not merely implemented horizontally (through technical assistance and professional exchanges), but is also integrated into the EU-Vietnam trade deal. The aims of the EVFTA are not merely commercial. The EVFTA has broader law and development aims. Beyond trading, the deal is an instrument to foster legal change to facilitate socio-economic development. To illustrate, consider some EU actors' statements, which signal the EU's developmental intention through this trade deal. After the EU Parliament's vote, the Chair of the Committee on International Trade, Bernd Lange, said,

History shows that isolation does not change a country. That is why Parliament voted in favor of this trade agreement with Vietnam. With it, we strengthen the role of the EU in Vietnam and the region, ensuring that our voice has more weight

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106. See, for example, a collection of essays on "legal transplants" in Vietnam with reference to European experience published with the support of the EU-Viet Nam Strategic Dialogue Facility. OFFICE OF THE NATIONAL ASSEMBLY OF VIET NAM, CHALLENGES AND PRACTICES OF LEGAL TRANSPLANTS IN VIET NAM: SHARING EUROPEAN EXPERIENCES (2016).

107. *EU Supports Vietnam's Constitutional Reform*, COMMUNIST PARTY OF VIET. ONLINE NEWSPAPER (Oct. 4, 2012), <http://en.dangcongsan.vn/science-education/eu-supports-vietnams-constitutional-reform-150294.html> [<https://perma.cc/55SR-766A>].

108. *Id.*

109. *Id.*

than before. This is particularly important on issues on which we disagree, such as the role of the free press or political freedom. We also extend the room for maneuver of civil society.<sup>110</sup>

These statements indicate that the EU-Vietnam trade deal is the basis to “change a country.” Specifically, the statements also indicate that the trade deal is meant to enhance the EU’s influential voice on human rights in Vietnam, which include not only social and economic rights but also political rights.

In the same vein, Commissioner for Trade, Phil Hogan, commented,

The EU-Vietnam agreement . . . goes well beyond economic benefits. It proves that trade policy can be a force for good. Vietnam has already made great efforts to improve its labour rights record thanks to our trade talks. Once in force, these agreements will further enhance our potential to promote and monitor reforms in Vietnam.<sup>111</sup>

This commentary indicates that the trade agreement is conceived as “a force for good.” “[G]ood” includes not only economic well-being but also broader human development, including advancements in human rights. In addition, the EVFTA signals the EU’s intention to facilitate and supervise reforms in Vietnam based on the trade agreement. The reforms encompass not only economic reform but also legal reform.

### C. Contents: International Law Norms

The European national and transnational projects of law and development have sought to promote external national, transnational, and international legal norms and institutions in Vietnam. The national legal sources involve the law of the EU’s members. The diffusion in Vietnamese discourse of the French idea of a constitutional council provides an example.<sup>112</sup> The transnational legal norms and institutions involve EU law, which is illustrated through the horizontal diffusion of the EU Competition Law in Vietnam.<sup>113</sup> How does the trade deal promote law and development vertically? It does so by integrating norms of international law (including international human rights, labor, environmental, and IP law), which may be subsequently integrated into Vietnamese domestic law. The next sections explore these norms of international law in detail.

110. European Parliament Press Release, *supra* note 23.

111. *Commission Welcomes European Parliament’s Approval of EU-Vietnam Trade and Investment Agreements*, EUROPEAN COMMISSION (Feb. 12, 2020), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=2114> [https://perma.cc/2UVZ-6QY2].

112. Huong Thi Nguyen, *Contesting Constitutionalism in Vietnam: The Justifications and Proposed Models of Judicial Review in the 2013 Constitutional Amendment Process*, in *POLITICS AND CONSTITUTIONS IN SOUTHEAST ASIA* 273, 281–83 (Marco Bünte & Björn Dressel eds., 2016).

113. John Gillespie, *Localizing Global Competition Law in Vietnam: A Bottom-Up Perspective*, 64 *INT’L & COMP. L. Q.* 935, 938 (2015).

### 1. International Human Rights Law

Like the U.S., the EU has increasingly included human rights clauses in its free trade agreements with other countries.<sup>114</sup> In 1973, the U.S. Congress adopted legislation that recommended development assistance depending on respect for human rights. In the next four years, the U.S. Congress established human rights conditionality in trade with communist countries.<sup>115</sup> The EU “watched these developments with some interest.”<sup>116</sup> Since 1995, the EU has adopted a policy on the inclusion of a human rights clause in its external agreements with other countries.<sup>117</sup> The forms of human rights clauses in EU trade deals are varied.<sup>118</sup> However, the trend is that “[a]ll PTAs negotiated by the EU since 2006 have been framed within broader political agreements covering cooperation in the human rights field.”<sup>119</sup> The human rights clauses are included in the Cotonou Agreement governing the EU’s political and developmental relations with 79 African, Caribbean, and Pacific countries, and in the EU’s free trade agreements with Mediterranean and Latin American countries, Mexico, Chile, South Africa, the former Soviet Union countries, and many Asian countries.<sup>120</sup>

Human rights were the key concern in the EU-Vietnam trade negotiations and a controversial area for NGOs’ mobilization.<sup>121</sup> On May 12, 2015, the EU held a roundtable in Brussels with a wide range of stakeholders (NGOs, business associations and companies, representatives from the European Parliament, EU Member States and international organizations) on *Trade, Sustainable Development and Human Rights in EU-Vietnam Relations*, and then published the Summary Paper on this meeting.<sup>122</sup> In January 2016, when the legal texts of the EU-Vietnam Free Trade Agreement were about to be finalized, the EU Commission published a document related to the issues discussed in

114. See generally EMILIE M. HAFNER-BURTON, *FORCED TO BE GOOD: WHY TRADE AGREEMENTS BOOST HUMAN RIGHTS* (1st ed. 2009); LORAND BARTELS, *HUMAN RIGHTS CONDITIONALITY IN THE EU’S INTERNATIONAL AGREEMENT* (2005); ELENA FIERRO, *THE EU’S APPROACH TO HUMAN RIGHTS CONDITIONALITY IN PRACTICE* (2003).

115. BARTELS, *supra* note 114, at 7–8.

116. *Id.* at 8.

117. Resolution on the Communication from the Commission on the Inclusion of Respect for Democratic Principles and Human Rights in Agreements Between the Community and Third Countries (COM (95)0216 - C4-0197/95), 1996 O.J. (C 320) (Oct. 20, 1996).

118. BARTELS, *supra* note 114, at 26.

119. Daniela Sicurelli, *The EU as a Promoter of Human Rights in Bilateral Trade Agreements: The Case of the Negotiations with Vietnam*, 11 J. CONTEMP. EUR. RSCH. 231, 235 (2015).

120. *The Application of Human Rights Conditionality in the EU’s Bilateral Trade Agreements and Other Trade Arrangements with Third Countries*, at 3, EXPO/B/INTA/2008/57 (Nov. 25, 2008).

121. See Daniela Sicurelli, *The EU as A Norm Promoter Through Trade. The Perceptions of Vietnamese Elites*, 13 ASIA EUR. J. 23, 23–39 (2015); Sicurelli, *supra* note 119, at 230–45.

122. *Summary Paper: Trade, Sustainable Development and Human Rights in EU-Vietnam Relations Roundtable with EU Stakeholders*, at 2 (Jan. 26, 2016), [https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc\\_153624.pdf](https://trade.ec.europa.eu/doclib/docs/2015/july/tradoc_153624.pdf) [<https://perma.cc/8PHC-F93U>].

the roundtable.<sup>123</sup> In response to civil society's call for an explicit reference in the FTA to international human rights standards and instruments, the Commission said that "the FTA makes clear reference to specific human rights-related international norms."<sup>124</sup> After the deal was adopted, it was reported on the European Parliament's website that "the trade deal can be suspended if there are human rights breaches."<sup>125</sup> How can the deal be suspended due to human rights breaches? How exactly does it include human rights-related international norms?

The EU Council's press release states that "[t]he trade agreement also includes an institutional and legal link to the EU-Vietnam Partnership and Cooperation Agreement, allowing appropriate action in the case of serious breaches of human rights."<sup>126</sup> This link is possible through three interrelated clauses: (1) the essential element clause; (2) the linking clause; and (3) the non-execution clause.

First, the PCA provides for this essential element clause:

The Parties confirm their commitment to . . . the respect for democratic principles and human rights, as laid down in the UN General Assembly Universal Declaration of Human Rights and other relevant international human rights instruments to which the Parties are Contracting Parties, which underpin the internal and international policies of both Parties and which constitute an essential element of this Agreement.<sup>127</sup>

This clause connects the abstract essential norms of "democratic principles and human rights" to international human rights law.

Second, the EVFTA includes this linking clause: "This Agreement shall be part of the overall relations between the Union and its Member States, of the one part, and Viet Nam, of the other part, as provided for in the Partnership and Cooperation Agreement and shall form part of the common institutional framework."<sup>128</sup> Free trades are, therefore, to implement the broader development commitments, including human rights. That linking clause is backed by the EVFTA's preamble which affirms the parties' commitment to "the principles articulated in *The Universal Declaration of Human Rights*."<sup>129</sup> This declarative statement reinforces the connection of the EVFTA to the essential element: human rights.

Third, the EVFTA includes a non-execution clause: "If a Party considers that the other Party has committed a material breach of the Partnership and Cooperation Agreement, it may take appropriate measures with respect to this

123. *Commission Staff Working Document: Human Rights and Sustainable Development in the EU-Vietnam Relations with Specific Regard to the EU-Vietnam Free Trade Agreement*, at 2 (Jan. 26, 2016), [http://trade.ec.europa.eu/doclib/docs/2016/january/tradoc\\_154189.pdf](http://trade.ec.europa.eu/doclib/docs/2016/january/tradoc_154189.pdf) [https://perma.cc/B9NC-AR4S].

124. *Id.*

125. European Parliament Press Release, *supra* note 23.

126. European Commission Press Release, *supra* note 21.

127. The Framework Agreement, *supra* note 95, art. 1.

128. Free Trade Agreement Between the European Union and the Socialist Republic of Viet Nam art. 17.22, May 12, 2020, 2020 O.J. (L 186) 160 [hereinafter EVFTA].

129. *Id.* at preamble.

Agreement in accordance with Article 57 of the Partnership and Cooperation Agreement.”<sup>130</sup> Material breach of the PCA would include the violation of its essential elements, including human rights. The language of “appropriate measures” may be intentionally flexible and does not explicitly include suspension or termination measures.

The EU’s seeking to promote human rights through trade agreements has generated great theoretical debate in international law. Some accounts examine the formation, effectiveness, legitimacy, and legality of the human rights conditionality in EU free trade agreements.<sup>131</sup> These descriptive, exploratory accounts are useful to understand how human rights clauses are formulated in EU trade deals. Other studies discuss the challenges, such as “the mismatch between the internal and external dimensions of human rights promotion and protection, the inevitable clash between the objectives of the different EU external policies and human rights as well as the disparity in treatment between the EU’s trading partners.”<sup>132</sup> Since the human rights clause is included in the EU formal trade agreements, it is legally binding and enforceable, but this clause has never applied in practice.<sup>133</sup> In February 2019, however, the EU launched the procedure to temporarily suspend Cambodia’s preferential access to the EU market under the Everything But Arms trade scheme due to the Southeast Asian country’s violation of core human rights and labor rights.<sup>134</sup> According to the EU Commission, sanctions under the human rights clause “should be reserved only for the most extreme and flagrant violations of human rights.”<sup>135</sup> Critics, therefore, contend that “the human rights conditionality policy lacks a proper mechanism for implementation, monitoring, and evaluation of the effectiveness of sanctions.”<sup>136</sup>

This study is more concerned with explanatory rather than normative and critical questions regarding human rights conditionality in the EU’s free trade deals. The explanatory questions are more addressed in international relations scholarship on the theme. Some consider trade policy as the venue to promote the EU’s normative values externally.<sup>137</sup> Another theory underlines the interests of the EU’s member states in human rights conditionality.<sup>138</sup> Others explain that the EU’s policy outcomes are influenced by the mobilization of interest

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130. *Id.* art. 17.8.

131. BARTELS, *supra* note 114, at 17–19.

132. Velluti, *supra* note 56, at 42–43.

133. Ingo Borchert et al., *Trade Conditionality in the EU and WTO Legal Regimes*, RESPECT 1, 8, 11 (2018), [http://respect.eui.eu/wp-content/uploads/sites/6/2019/02/EU\\_conditionality\\_D2.2.pdf](http://respect.eui.eu/wp-content/uploads/sites/6/2019/02/EU_conditionality_D2.2.pdf) [<https://perma.cc/6QA8-EYKA>].

134. *Cambodia: EU Launches Procedure to Temporarily Suspend Trade Preferences* (Feb 11, 2019), <https://trade.ec.europa.eu/doclib/press/index.cfm?id=1981&title=Cambodia-EU-launches-procedure-to-temporarily-suspend-trade-preferences> [<https://perma.cc/9CUB-FEDL>].

135. Velluti, *supra* note 56, at 53.

136. Borchert et al., *supra* note 133, at 11.

137. Ian Manners, *The Social Dimension of EU Trade Policies: Reflections from a Normative Power Perspective*, 14 EUR. FOREIGN AFF. REV. 785, 785–802 (2009).

138. Sophie Meunier & Kalypso Nicolaidis, *The European Union as a Conflicted Trade Power*, 13 J. EUR. PUB. POL’Y 906, 907 (2006).

groups and NGOs.<sup>139</sup> A holistic theory argues that free trade agreements' regulation of human rights "reflect policymakers' preferences" and "reflect the institutions through which they compete from decision-making influence and countries' relative market power."<sup>140</sup> These theories explain the ideational, institutional, and political factors that shape the EU's trade policy outcomes. However, they are less concerned with the legal factors of the human rights conditionality.

From a legal perspective, the human rights clause in the EU's trade deals with developing countries like Vietnam can be understood as the tool of vertical law and development. They create the negative and positive conditionality for vertical, inductive law and development. Although the clause may not lead to the application of negative conditionality, it at least has three functions: expressive, signaling, and discursive. First, it expresses the EU's commitment to human rights protection and its resistance to human rights violations. Second, the human rights clause sends both positive and negative messages to the third countries: They may be rewarded or sanctioned for their behaviors toward human rights. Third, it can function as the discursive foil for political dialogue on human rights.<sup>141</sup> The expressive, signaling, and discursive functions of the human rights clause may have a diffusion affect: The trade partners may adjust their actions toward human rights. Within the EU's preferred approach, the human rights clause in the EU-Vietnam trade deal may not lead to application, but it does exhibit similar expressive, signaling, and discursive functions. With these functions, the human rights clause can operate as the institutional base for the EU to diffuse human rights norms in Vietnamese law to facilitate domestic law reform and socio-economic change.

## 2. *International Labor Law*

The U.S., Canada, and the EU have included labor international standards in their free trade agreements.<sup>142</sup> Particularly, although the EU is not a member of the International Labor Organization (ILO), it has a close relationship with this body because they share the "vision premised on a belief that economic and social progress should go hand in hand, and common support for 'Decent

139. See Dirk De Bièvre & Jappe Eckhardt, *Interest Groups and EU Anti-Dumping Policy*, 18 J. EUR. PUB. POL'Y 339, 345 (2011).

140. HAFNER-BURTON, *supra* note 114, at 24.

141. Ionel Zamfir, *Human Rights in EU Trade Agreements: The Human Rights Clause and Its Application*, EUR. PARLIAMENTARY SERV. 8 (2019) ("[I]n practice, the Eur. Research conducts regular political and human rights dialogue with many of its partners, including with those to which it is bound through a political cooperation agreement and / or trade agreement.").

142. Steve Charnovitz, *The Labor Dimension of the Emerging Free Trade Area of the Americas*, in LABOUR RIGHTS AS HUMAN RIGHTS 143, 155–56 (Philip Alston ed. 2005); James Harrison et al., *Labor Standards Provisions in EU Free Trade Agreements: Reflections on the European Commission's Reform Agenda*, 18 WORLD TRADE REV. 635, 638–42 (2019).

Work' and the achievement of the Sustainable Development Goals continue [to foster] many fruitful joint initiatives."<sup>143</sup>

The EVFTA, therefore, includes norms of the ILO conventions to ensure sustainable development.<sup>144</sup> The deal commits the parties to respecting fundamental principles and rights at work, including the freedom of association, the elimination of all forms of forced or compulsory labor, the effective abolition of child labor, and the elimination of discrimination in respect of employment and occupation.<sup>145</sup> It also requires the parties to implement in their domestic laws the ILO conventions ratified by the parties.<sup>146</sup> In addition, the agreement commits Vietnam to ratify other ILO conventions.<sup>147</sup>

Vietnam ratified six out of eight ILO fundamental conventions, including the Forced Labor Convention (in 2007), the Right to Organise and Collective Bargaining Convention (in 2019), the Equal Remuneration Convention (in 1997), the Discrimination (Employment and Occupation) Convention (in 1997), the Minimum Age Convention (in 2003), and the Worst Forms of Child Labor Convention (in 2000).<sup>148</sup> The EVFTA commits Vietnam to ratify the Abolition of Forced Labor Convention, and the Freedom of Association and Protection of the Right to Organize Convention, which the Vietnamese government has planned to ratify in 2020 and 2023, respectively.<sup>149</sup>

Domestically, Vietnam modified the bill of rights and labor law to conform to the ratified labor conventions.<sup>150</sup> The country's 2013 Constitution includes new rights to equal and safe working conditions, payment, and rest; prohibition of discrimination, forced labor and employment of workers under a minimum age; and prohibition of abuse and exploitation of child labor.<sup>151</sup> In addition, the Vietnamese legislature adopted a new Labor Code in 2019, replacing the

143. Int'l Labour Org. [ILO], *The European Union ILO Cooperation* (May 2019), [https://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms\\_350516.pdf](https://www.ilo.org/wcmsp5/groups/public/---dgreports/---exrel/documents/publication/wcms_350516.pdf) [https://perma.cc/GFE5-49Q9] (last visited Aug. 3, 2021).

144. Mai Ha Thu & Erwin Schweissshelm, *Labour Rights and Civil Society Empowerment in the EU-Vietnam Free Trade Agreement - The Political Limitations of "Value-Based Trade"* (Hochschule für Wirtschaft und Recht Berlin [Berlin School of Econ. and L.], Working Paper No. 135/2020), [https://www.ipe-berlin.org/fileadmin/institut-ipe/Dokumente/Working\\_Papers/ipe\\_working\\_paper\\_135.pdf](https://www.ipe-berlin.org/fileadmin/institut-ipe/Dokumente/Working_Papers/ipe_working_paper_135.pdf) [https://perma.cc/Z2S8-XGRN].

145. EVFTA, art. 13.4.

146. *Id.*

147. *Id.*

148. Int'l Labour Org. [ILO], *Ratifications for Viet Nam*, [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0:NO:P11200\\_COUNTRY\\_ID:103004](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0:NO:P11200_COUNTRY_ID:103004) [https://perma.cc/5V2Q-KD3H] (last visited Aug. 3, 2021).

149. *Hội thảo tham vấn Dự thảo Kế hoạch chiến lược về Thúc đẩy gia nhập và thực hiện các tiêu chuẩn lao động quốc tế tại Việt Nam [Consultation Workshop Draft Strategic Plan for Promoting Accession and Implementation of International Labor Standards in Vietnam]*, TRUNG TÂM DỊCH VỤ VIỆC LÀM KON TUM (July 2, 2019), <http://vieclamkontum.vn/bai-viet/5969/Hoi-thao-tham-van-Du-thao-Ke-hoach-chien-luoc-ve-Thuc-day-gia-nhap-va-thuc-hien-cac-tieu-chuan-lao-dong-quoc-te-tai-Viet-Nam> [https://perma.cc/5URB-RMB8].

150. See SOCIALIST REPUBLIC OF VIET. CONST. Of 1992 (amended 2013); Bộ luật lao động [Labor Code] (2019), <https://thuvienphapluat.vn/van-ban/Lao-dong-Tien-luong/Bo-Luat-lao-dong-2019-333670.aspx> [https://perma.cc/49QR-LYHB] [hereinafter Vietnam Labor Code].

151. SOCIALIST REPUBLIC OF VIET. CONST. Of 1992, art. 35, 37 (amended 2013).

previous 2012 provision.<sup>152</sup> Enforced since January 2021, one of the striking features of the new Code is the workers' right to form independent unions at workplaces beyond the national trade union.<sup>153</sup> Vietnamese lawmakers explained that this new right is "in accordance with ILO Conventions and other international commitments facilitating international integration."<sup>154</sup> That means the right to form a trade association is included to facilitate free trade deals like the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) and the EVFTA.

In short, the EVFTA seeks to diffuse norms of international labor law into the Vietnamese legal system. In response, Vietnam modified and adopted its domestic labor law to comply with international labor standards. Consequently, EU vertical law and development through the trade deal generated legislative convergence between Vietnamese labor law and international labor law.

### 3. International Environmental Law

Linking trade with environmental issues is the lasting concern of not only the World Trade Organization but also bilateral free trade agreements.<sup>155</sup> Most FTAs concluded by the U.S. and the EU include environmental provisions.<sup>156</sup> This is due to the concerns that "trade liberalization adversely impacts the environment" because, "for developing countries, international competition may lead them to adopt less stringent environmental standards or to engage in more polluting activities."<sup>157</sup> In addition, the inclusion of environmental provisions in FTAs is connected to human rights. In *Case Concerning the Gabcikovo-Nagymaros Project*, Judge Weeramantry stated,

The protection of the environment is . . . a vital part of contemporary human rights doctrine, for it is a *sine qua non* for numerous human rights such as the right to health and the right to life itself. It is scarcely necessary to elaborate on this, as damage to the environment can impair and undermine all the human

152. Vietnam Labor Code, *supra* note 150.

153. *Id.* art. 3.

154. Press Release, Ministry of War Invalids and Social Affairs, *Quốc Hội Thông Qua Bộ Luật Lao Động Sửa Đổi* [The National Assembly Passes the Revised Labor Code] (Nov. 20, 2019), <http://www.molisa.gov.vn/Pages/tintuc/chitiet.aspx?tintucID=221042> [<https://perma.cc/AXF9-ZKU8>].

155. ERICH VRANES, TRADE AND THE ENVIRONMENT: FUNDAMENTAL ISSUES IN INTERNATIONAL AND WTO LAW (2009); Stephen Hickson, *The Greening of Free Trade: Domestic Politics and Environmental Issues in New Zealand's Free Trade Agreement Negotiations*, 33 N.Z. INT'L REV. 31, 31 (2008); Dale Colyer, *Agriculture and Environmental Issues in Free Trade Agreements*, 4 ESTEY CTR. J. INT'L L. & TRADE POL'Y 123, 125–27 (2003).

156. Sikina Jinnah & Elisa Morgera, *Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda*, 22 REV. EUR. COMMUNITY & INT'L ENVTL. L. 324, 324 (2013); *see also* SIKINA JINNAH & JEAN-FREDERIC MORIN, GREENING THROUGH TRADE: HOW AMERICAN TRADE POLICY IS LINKED TO ENVIRONMENTAL PROTECTION ABROAD (2020).

157. Richard K. Lattanzio & Ian F. Fergusson, *Environmental Provisions in Free Trade Agreements* (FTAs), CONGRESSIONAL RSCH. SERV. (May 28, 2015), [https://digital.library.unt.edu/ark:/67531/metadc815515/m2/1/high\\_res\\_d/IF10166\\_2015May28.pdf](https://digital.library.unt.edu/ark:/67531/metadc815515/m2/1/high_res_d/IF10166_2015May28.pdf) [<https://perma.cc/J6SE-536Q>].

rights spoken of in the Universal Declaration and other human rights instruments.<sup>158</sup>

Thus, environmental protection is also an issue of human rights protection.

The EVFTA, therefore, includes three articles dealing with environmental issues as a part of sustainable development, but this also reflects the EU's concern human rights in Vietnam. The first article is general, committing the parties to implementing in their domestic laws and practices the multilateral environmental agreements.<sup>159</sup> The second article deals with climate change.<sup>160</sup> This article commits the parties to implement by domestic policies the international instruments dealing with climate change, including the United Nations Framework Convention on Climate Change, the Kyoto Protocol to the United Nations Framework Convention On Climate Change, and the Paris Agreement.<sup>161</sup> The article also stipulates that the parties will cooperate in domestic policies addressing climate change issues, including consultation and sharing "information and experiences of priority or of mutual interest," such as "best practices and lessons learned in designing, implementing, and operating mechanisms for pricing carbon," "the promotion of domestic and international carbon markets," and "the promotion of energy efficiency, low-emission technology and renewable energy."<sup>162</sup> The third article aims to protect biological diversity.<sup>163</sup> The clause recognizes the importance of ensuring the conservation and sustainable use of biological diversity in accordance with the Convention on Biological Diversity of 1992, the Strategic Plan for Biodiversity 2011–2020 and the Aichi Biodiversity Targets, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, and other relevant international instruments to which the parties signed.<sup>164</sup> The provision then stipulates that the parties shall "encourage trade in products which contribute to the sustainable use and conservation of biological diversity, in accordance with their domestic laws and regulations," and "adopt and implement appropriate effective measures, which are consistent with their commitments under international treaties to which they are a party, leading to a reduction of illegal trade in wildlife, such as awareness raising [sic] campaigns, monitoring and enforcement measures," among others.<sup>165</sup> The above three provisions in fact seek to promote the compliance of Vietnamese law with international norms for protection of the environment, dealing with climate change, and conservation and sustainable use of biological diversity.

Vietnam ratified twenty-eight multilateral agreements on environmental protection generally, and on climate change and biological diversity particularly, including the Basel Convention (Mar. 13, 1995), Cartagena Protocol (Jan. 21,

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158. DONALD K. ANTON & DINAH L. SHELTON, ENVIRONMENTAL PROTECTION AND HUMAN RIGHTS 119 (2011).

159. EVFTA, art. 13.5.

160. *Id.* art. 13.6.

161. *Id.*

162. *Id.*

163. *Id.* art. 13.7.

164. *Id.*

165. *Id.*

2004), Convention on Biological Diversity (Nov. 16, 1994), Convention on International Trade in Endangered Species of Wild Fauna and Flora (Apr. 20, 1994), Kyoto Protocol (Sep. 25, 2002), Minamata Convention on Mercury (June 23, 2017), Montreal Protocol (Jan. 26, 1994), Nagoya Protocol (Apr. 23, 2014), Nagoya – Kuala Lumpur Supplementary Protocol (Apr. 23, 2014), Paris Agreement (Nov. 3, 2016), Ramsar Convention (Sep. 20, 1988), Rotterdam Convention (May 7, 2007), Stockholm Convention (July 22, 2002), UN Watercourses Convention (May 19, 2014), United Nations Convention to Combat Desertification (Aug. 25, 1998), United Nations Framework Convention on Climate Change (Nov. 16, 1994), United Nations Convention on the Law of the Sea (July 25, 1994), and the Vienna Convention (Jan. 26, 1994).<sup>166</sup>

Domestically, the country's 2013 Constitution newly provided for "the right to live in a clean environment" and "the duty to protect the environment."<sup>167</sup> To implement this constitutional right and duty, the National Assembly promulgated the new Law on Environmental Protection in 2014, replacing the 2005 version.<sup>168</sup> In 2019, the legislature formulated a plan to amend the law, and one of the goals is to comply with commitments in the free trade agreements and international environmental commitments.<sup>169</sup> In addition, the legislature enacted the Biodiversity Law in 2008 and the Environmental Protection Tax Law in 2010, and the Government and other administrative bodies issued some 177 regulations on national resources and the environment.<sup>170</sup>

Thus, the EVFTA seeks to diffuse norms of international environmental law into Vietnamese law. Vietnam has promulgated domestic environmental laws to comply with international environmental standards. This resulted in the legislative convergence between Vietnamese environmental law and international environmental law.

#### 4. *International IP Law*

Intellectual property (IP) chapters are included in many FTAs concluded by the U.S. and the EU with developing countries.<sup>171</sup> The EVFTA has a strong concern with the protection and enforcement of intellectual property since

166. Viet Nam, INFORMEA, <https://www.informea.org/en/countries/VN/parties> [<https://perma.cc/T9L5-UN3G>] (last visited Aug. 3, 2021).

167. SOCIALIST REPUBLIC OF VIET. CONST. OF 1992, art. 43 (amended 2013).

168. Vietnam Law on Environmental Protection, No. 55/2014/QH13 (June 23, 2014).

169. Bộ Tài Nguyên Và Môi Trường, *Tờ Trình: Dự Án Sửa Đổi, Bổ Sung Một Số Điều Của luật Bảo Vệ Môi Trường* [Report: *The Project on Amending and Supplementing Some Articles of the Law On Environmental Protection*], DỤ THẢO ONLINE, [http://duthaoonline.quochoi.vn/DuThao/Lists/DT\\_DUTHAO\\_LUAT/View\\_Detail.aspx?ItemID=1792&TabIndex=2&TaiLieuID=3825](http://duthaoonline.quochoi.vn/DuThao/Lists/DT_DUTHAO_LUAT/View_Detail.aspx?ItemID=1792&TabIndex=2&TaiLieuID=3825) [<https://perma.cc/B9DX-BPUD>].

170. Văn Bản Quy Phạm Pháp Luật Hiện Hành Về Tài Nguyên Và Môi Trường [Current Legal Documents on Natural Resources and Environment], <http://vanban.monre.gov.vn/> [<https://perma.cc/B3KC-KNU4>].

171. Pedro Roffe, *Intellectual Property Chapters in Free Trade Agreements: Their Significance and Systemic Implications*, in EU BILATERAL TRADE AGREEMENTS AND INTELLECTUAL PROPERTY: FOR BETTER OR WORSE? 17, 18–22 (Josef Drexler, et al. eds., 2013).

protection contributes to the promotion of technological innovation and the transference and dissemination conducive to social and economic welfare.<sup>172</sup> The EVFTA, therefore, commits the parties to observe and implement the international treaties dealing with intellectual property which they signed, including the Agreement on Trade-Related Aspects of Intellectual Property Rights, Berne Convention for the Protection of Literary and Artistic Works, and the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations.<sup>173</sup> It also commits Vietnam to accede to the World Intellectual Property Organization (WIPO) Copyright Treaty and the WIPO Performances and Phonograms Treaty within three years from the date this Agreement entered into force.<sup>174</sup>

Vietnam has also actively engaged with the international regimes on intellectual property. The country joined the World Intellectual Property Organization in 1976, and is a member of major WIPO treaties, including the Berne Convention (July 26, 2004), Brussels Convention (Oct. 12, 2005), Hague Agreement (Sep. 30, 2019), Madrid Agreement (Marks) (Sep. 17, 1956), Madrid Protocol (Apr. 11, 2006), Paris Convention (Apr. 7, 1981), Patent Cooperation Treaty (Dec. 10, 1992), Phonograms Convention (Apr. 6, 2005), Rome Convention (Dec. 1, 2006), UPOV Convention (Nov. 24, 2006), and WIPO Convention (Apr. 7, 1981).<sup>175</sup>

Domestically, Vietnam has rapidly developed a comprehensive legal framework for intellectual property (including the Intellectual Property Law and related legislation, such as Competition Law, Civil Procedure Law, Customs Law, and administrative regulations on intellectual property), which is generally compatible with international standards provided in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).<sup>176</sup> Particularly, when the EU-Vietnam trade agreement was about to be finalized, a review report found that Vietnamese IP law is compatible with the majority of the trade deal's commitments on intellectual property, including general principles, standards of protection of rights, and enforcement of rights.<sup>177</sup> That means Vietnamese domestic IP law converges with international commitments on intellectual property.

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172. EVFTA, art. 12.1.

173. *Id.* art. 12.5.

174. *Id.*

175. World Intell. Prop. Org., *Viet Nam*, [https://www.wipo.int/directory/en/details.jsp?country\\_code=VN](https://www.wipo.int/directory/en/details.jsp?country_code=VN) (last visited Aug. 3, 2021) [<https://perma.cc/K72D-CPQV>].

176. Nguyễn Bích Thảo, *Hoàn Thiện Pháp Luật Sở Hữu Trí Tuệ Trong Bối Cảnh Việt Nam Đẩy Mạnh Hội Nhập Kinh Tế Quốc Tế Và Tham Gia Các Hiệp Định Thương Mại Tự Do Thế Hệ Mới [Perfecting Intellectual Property Law in the Context of Vietnam Promoting International Economic Integration and Joining New-Generation Free Trade Agreements]*, TẠP CHÍ NGHIÊN CỨU LẬP PHÁP [JOURNAL OF LEGISLATIVE STUDIES] (Feb. 1, 2017), <http://www.lapphap.vn/Pages/tintuc/tinchitiet.aspx?tintucid=208003> [<https://perma.cc/A8KS-97BQ>].

177. *Rà Soát Pháp Luật Việt Nam Với Các Cam Kết Của Hiệp Định Thương Mại Tự Do Việt Nam - Eu Về Sở Hữu Trí Tuệ [Review of Vietnamese Law with the Commitments of Vietnam - Eu Free Trade Agreement on Intellectual Property]* 16 (Nguyễn Thị Thu Trang ed. 2016).

### 5. *International Rule of Law*

International actors of law and development promote some international standards of the rule of law, such as open government, judicial independence, and regulatory enforcement.<sup>178</sup> The EVFTA promotes norms, such as judicial independence, good governance, and predictable regulations for rule of law reforms in Vietnam. The agreement recognizes the possible impact of a predictable regulatory environment and efficient procedures on trade and investment, and it, therefore, requires the parties to maintain the impartiality and independence of judicial, arbitral, or administrative tribunals or procedures.<sup>179</sup> It also provides that “the Parties agree to cooperate in promoting regulatory quality and performance” and that “the Parties subscribe to the principles of good administrative behavior and agree to cooperate in promoting such principles, including through the exchange of information and best practices.”<sup>180</sup> These provisions involve institutional reforms in Vietnam, particularly judicial, administrative, and regulatory reforms. These areas of institutional reform create the base for legal cooperation, which would animate the horizontal diffusion of external legal norms into Vietnam.

The EVFTA’s concern of administrative and judicial reforms does not emerge in a vacuum but must be informed by local experiences. Vietnam has launched several important programs to facilitate administrative reforms. To illustrate, in 2001, the Government introduced the Administrative Reform Master Program for the Period 2001–2010, stating that “[t]he demands of building and perfecting the socialist market economy push a forceful pressure on administrative reform which is associated with economic reform.”<sup>181</sup> The implementation of this program has resulted in significant changes to the Vietnamese bureaucracy. Changes to procedural institutions include the simplification or removal of burdensome administrative procedures.<sup>182</sup> Structural changes involve redefinition of administrative functions, rearrangement of ministerial bodies, and decentralization in central-local relations.<sup>183</sup> In 2011, the Government introduced the Administrative Reform Master Program for the Period 2011–2020.<sup>184</sup> It aims at both economic and

178. Mila Versteeg & Tom Ginsburg, *Measuring the Rule of Law: A Comparison of Indicators*, 42 L. & SOC. INQUIRY 100, 107–08 (2017).

179. EVFTA, art. 14.6

180. *Id.* art. 14.7.

181. *Quyết Định Của Thủ Tướng Chính Phủ Số 136/2001/QĐ-TTg Ngày 17 Tháng 9 Năm 2001 Phê Duyệt Chương Trình Tổng Thể Cải Cách Hành Chính Nhà Nước Giai Đoạn 2001-2010* [Prime Minister’s Decree No. 136/2001/QĐ-TTg, Dated 17 September 2001 *Approving the Administrative Reform Master Program for the Period 2001–2010.*], <https://thuvienphapluat.vn/van-ban/bo-may-hanh-chinh/Quyết-dinh-136-2001-QĐ-TTg-phe-duyet-Chuong-trinh-tong-the-cai-cach-hanh-chinh-nha-nuoc-giai-doan-2001-2010-48236.aspx> [<https://perma.cc/9KYG-7C3B>].

182. Ngo Thanh Can, *Public Administration Reform in Vietnam: Current Situations and Solutions*, 3 SCHOLARLY J. BUS. ADMIN. 110, 111 (2013).

183. *Id.* at 112.

184. *Nghị Quyết Của Chính Phủ Ban Hành Chương Trình Tổng Thể Cải Cách Hành Chính Nhà Nước Giai Đoạn 2011-2020* [Government’s Resolution Issuing the Administrative Reform Master Program for The Period 2011-2020], <https://thuvienphapluat.vn/van-ban/Bo-may->

political objectives. It underlines first the objectives of further administrative reform “to build and perfect the socialist-oriented market economy” and “create the equal, ventilating, favorable, and transparent business environment.”<sup>185</sup> The program also attempts to reform administrative systems to promote the rule of law in public administration and to protect human rights.<sup>186</sup> This echoes the EVFTA’s concern of rights-related administrative reform.

In addition, the EVFTA’s concern of judicial independence is connected to Vietnam’s ongoing judicial reforms. In 2005, the Politburo of the Vietnamese Communist Party issued the long-term judicial reform campaign called *The Strategy for Judicial Reform until 2020*.<sup>187</sup> This judicial reform program stems from the need to facilitate “economic development and international integration.”<sup>188</sup> On that basis, the *Strategy* focused on reorganizing the courts system to make it more independent from the local government, increasing the quality of judicial staff, and ensuring financial conditions for judicial activities, among other things.<sup>189</sup> To assist the implementation of this program, in 2011 the Party created the Steering Central Commission for Judicial Reform headed by the President of State. In 2014, the Commission reviewed eight years of implementation of the judicial reform campaign and recommended moving forward. The Politburo then issued the *Conclusion* on the continuing implementation of the program and clarified further directions.<sup>190</sup> In the Party’s review, the judicial reform was successful to a certain extent, considering the clarification of the judicial functions and duties, empowerment of the district courts, the extension to hearing administrative litigations, increase in the quality and quantity of judicial staff, and renovation of the judicial infrastructure.<sup>191</sup> But, several policies proposed in the *Strategy* have not yet been implemented, and new policies arise. The *Conclusion*, therefore, attempts to accelerate judicial reform by separating local courts from local administrative units to promote judicial independence from local government’s interference.<sup>192</sup> Judicial independence and the courts’ role in human rights protection remain the main

hanh-chinh/Nghi-quyet-30c-NQ-CP-Chuong-trinh-tong-the-cai-cach-hanh-chinh-nha-nuoc-131576.aspx [https://perma.cc/HKS2-5ZZY].

185. *Id.*

186. *Id.*

187. Nghị Quyết 49-Nq/Tw Của Bộ Chính Trị Về Chiến Lược Cải Cách Tư Pháp Đến Năm 2020 [Politburo’s Resolution 49-NQ/TW on the Strategy for Judicial Reform to 2020], <http://hoiluatgiavn.org.vn/nghi-quyet-so-49-nqtw-ngay-02-thang-06-nam-2005-cua-bo-chinh-tri-ve-chien-luoc-cai-cach-tu-phap-den-nam-2020-d563.html> [https://perma.cc/7FSR-VK9G].

188. *Id.*

189. *Id.*

190. *Kết Luận Về Việc Tiếp Tục Thực Hiện Nghị Quyết Số 49-Nq/Tw, Ngày 2/6/2005 Của Bộ Chính Trị Khóa IX Về Chiến Lược Cải Cách Tư Pháp Đến Năm 2020* [Conclusion on The Continuing Implementation of Politburo’s Resolution 49-NQ/TW on the Strategy For Judicial Reform to 2020], <https://tulieuvankien.dangcongsan.vn/he-thong-van-ban/van-ban-cua-dang/ket-luan-so-92-kltw-ngay-1232014-cua-bo-chinh-tri-ve-viec-tiep-tuc-thuc-hien-nghi-quyet-so-49-nqtw-ngay-262005-cua-bo-chinh-223> [https://perma.cc/Y8ZP-Y6GJ].

191. *Id.*

192. *Id.*

concern of the ongoing judicial reform in Vietnam,<sup>193</sup> which resonates with the EVFTA's.

To implement the agreement, the EVFTA anticipates the objectives and various forms of cooperation and capacity building. The cooperation aims to foster not only “the continued expansion of trade and investment” but also “sustainable development in all its dimensions, including sustainable growth and the reduction of poverty.”<sup>194</sup> So, the cooperation to implement the trade deal is linked to the broader development aims. The areas of cooperation include regional cooperation and integration; trade facilitation; trade policy and regulations; trade-related aspects of agriculture, fishery, and forestry; sustainable development, in particular in its environmental and labor dimensions; small and medium-sized enterprises; other areas identified under specific chapters of this agreement; and other areas of mutual interest related to this agreement.<sup>195</sup> The Commission Document explains that human rights cooperation is not explicitly included as an area of cooperation but “can fall under ‘other areas of mutual interest related to the present Agreement’<sup>196</sup> e.g. in terms of awareness-raising of FTA provisions in order to address impacts of the FTA on human rights and sustainable development.”<sup>197</sup> Thus, the trade deal anticipates possible channels to diffuse human rights norms. The forms of cooperation include: the exchange of information, experience, and best practices; policy cooperation; seminars, workshops, training, studies, and technical assistance.<sup>198</sup>

## 6. Conclusion

The EU-Vietnam trade deal exemplifies the vertical diffusion of international legal norms: the norms that the EU shares with the global community. The trade agreement is institutionally linked to the essential elements of the political agreement, defined in terms of universal human rights. The trade deal seeks to promote international norms related to labor, environmental protection, and intellectual property. In addition, the trade deal seeks to promote the norms associated with the cosmopolitan ideal of the rule of law, such as judicial independence, good governance, and predictable regulations. This is consistent with the general European approach to rule of law promotion. Comparatively, “support for the international rule of law, including the International Criminal Court and the implementation of relevant United Nations (UN) conventions, features on the priority list of European rule

193. Trương Thị Hồng Hà, *Thực Hiện Chiến Lược Cải Cách Tư Pháp Với Việc Bảo Vệ Quyền Con Người Ở Việt Nam [Implementation of the Judicial Reform Strategy with the Protection of Human Rights in Vietnam]*, LÝ LUẬN CHÍNH TRI (May 24, 2018), <http://lyluanchinhtri.vn/home/index.php/nguyen-cuu-ly-luan/item/2507-thuc-hien-chien-luoc-cai-cach-tu-phap-voi-viec-bao-ve-quyen-con-nguoi-o-viet-nam.html> [https://perma.cc/4KGG-3XXC].

194. EVFTA, art. 16.1.

195. EVFTA, art. 16.2.

196. *Id.*

197. Commission Document, *supra* note 59, at 11.

198. EVFTA, art. 16.2

of law promotion but is weak or absent on the U.S. agenda.”<sup>199</sup> The promotion of international norms of the rule of law through the EU-Vietnam trade deal exemplifies this.

Free trade’s promotion of international legal norms is both instrumental and normative. Instrumentally, the harmonization of Vietnamese law with international standards facilitates and eases the EU’s investment in Vietnam because this reduces uncertainty and the cost of learning domestic law. Normatively, the trade deal seeks to bring national law closer to international legal standards to facilitate legal and socio-economic development in the country.

While the substance of the promoted norms is international, the way they are included in the trade deal is informed by the contextual necessities of Vietnamese law reforms and socio-economic development in the relevant areas. For example, the right to trade association, environmental protection, and judicial independence have been the imperative concerns in Vietnamese law reforms. These local concerns resonate with what the trade deal seeks to promote.

#### D. Mechanisms: Inducive, Persuasive, and Acculturative

The EVFTA mainly uses the inductive mechanism to diffuse international legal norms into the Vietnamese legal system. It includes legally binding obligations which compel Vietnam to comply with labor, environmental, and intellectual property international standards in its domestic law and practices to foster law reforms in these areas and local socio-economic development.<sup>200</sup> The basis of influence is material interests, such as Vietnam’s accession to the EU’s market, the attraction of EU investments in Vietnam, and development aid through cooperation.<sup>201</sup> The forms of influence are material conditionality. The trade deal establishes the positive conditions to access the material benefits, including the accession to the EU’s market and, possibly, development assistance.<sup>202</sup> In addition, the non-execution human rights clause creates a negative conditionality or a threat of material sanction: the “appropriate measures” in case of material breach of the essential element (human rights).<sup>203</sup> These measures potentially include suspension of market accession and limitations on development assistance.

While inducive law and development is the main mechanism, the trade deal additionally provides the base for persuasive and acculturative mechanisms. The EU not only seeks to compel the Vietnamese state to comply with international legal standards through material coercion, but it also seeks to convince the Vietnamese state to accept the merit and meaning of such standards. The basis of this persuasive influence is not the material interests but the content of international legal norms. The forms of influence involve

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199. Schimmelfennig, *supra* note 13, at 116.

200. *See generally* EVFTA.

201. *Id.*

202. *Id.*

203. *Id.*

learning microprocesses, e.g., training, education, information exchange, and joint research anticipated in both the political and trade agreements between the EU and Vietnam. The trade deal's provisions on human rights, labor rights, environmental protection, and intellectual property serve as the macro-base for such micro-activities.

In addition, the trade deal creates the institutional platform for acculturation. Particularly, its human rights non-execution clause may provide that base for EU-Vietnam human rights dialogue. It is rather idealistic for a country or a transnational institution to change another country's deeply held legal beliefs and understandings. If this internal change of norms occurs, it would take a long time and require repeated and numerous micro-cooperative activities. Therefore, the EU has deployed mechanisms, such as annual human rights dialogues to propel Vietnam toward adopting a legal culture shaped among the EU community, its members, and the larger international community.<sup>204</sup> The base of this mechanism of influence is social relationship—the social relationship between Vietnam with the EU community, its members, and the larger world society. The form of influence is social reward and sanction. The social reward includes the EU's recognition of the achievements in Vietnamese law, such as human rights law and practices. This social reward boosts the country's international legitimacy. The social sanction involves the EU's expression of critical concerns on Vietnamese legal issues, such as human rights situations. This social sanction generates the target country's uncomfortable sense caused by dissonance between the international legal norms and Vietnamese human rights law and practices. To illustrate, in the recent Vietnam-EU human rights dialogue held in Hanoi on February 9, 2020, “the EU welcomed Vietnam's progress[,] notably the robust social-economic development, the recent adoption of the revised Labor Code, the measures to effectively implement newly ratified International Labor Organization Convention 98, and the steps taken towards ratification of Conventions 105 and 87,” but the EU also expressed its concerns on civil and political rights, freedom of expression, association and assembly, and the death penalty.<sup>205</sup> The former indicates social reward, while the latter indicates social sanction.

#### E. Denouement: Legislative Convergency

Vertical law and development resulted in legislative convergence between Vietnamese law in relevant areas with international legal standards. To illustrate, the constitutional rights formally incorporate international human rights treaties that the country signed, particularly the new labor and environmental rights. This constitutional convergence is mainly animated by the mechanism of acculturation consistent with Goodman and Jinks' theory. Through the incorporation of human rights treaties into the national

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204. *Id.*

205. Press Release, EU Delegation to Vietnam, The Annual Viet Name-EU Human Rights Dialogue 2020 (Feb. 20, 2020), [https://eeas.europa.eu/delegations/vietnam\\_en/74927/The%20Annual%20Viet%20Nam%20-%20EU%20Human%20Rights%20Dialogue%202020](https://eeas.europa.eu/delegations/vietnam_en/74927/The%20Annual%20Viet%20Nam%20-%20EU%20Human%20Rights%20Dialogue%202020) [<https://perma.cc/2CN9-78Z4>].

constitution, the socialist state seeks to socialize itself into the world society to enhance international legitimacy.

However, convergence also occurs at the sub-constitutional level, which is not necessarily associated with socialization. Vietnamese labor law, environmental law, and intellectual property law formally converge with the international standards in the signed international agreements in relevant areas. The pressure to conform to international commitments drives the need to incorporate international legal standards into national law, leading to legislative convergence. The leading Communist Party of Vietnam issued a policy resolution suggesting that the State should respond to free trade agreements by “internalizing” international commitments in domestic law.<sup>206</sup> The EVFTA is not the single factor of this formal convergence, but it has generated specific convergent effects. For example, as indicated, due to the deal negotiation, Vietnam modified the Labor Code to make it comply with international labor standards.<sup>207</sup> More generally, during the trade negotiation, Vietnam was compelled to conduct what is called “legal review” to make sure that national laws are consistent with the international commitments the deal seeks to support.<sup>208</sup> The legislative convergence of Vietnamese law with international standards promoted through the trade deal is largely the function of material inducement. The convergence is the consequence of national compliance with international legal standards to attract foreign investment and development cooperation.

Textual legislative convergence does not necessarily mean that the convergent laws will be fully implemented in practice. Specifically, when convergence occurs through material inducement rather than persuasion, this convergence may feature prominently in the text of domestic laws but does not guarantee the complete realization of the international norms and institutions in domestic practices. A local commentary indicates the challenges (low level of regulatory quality, freedom of expression, public participation in decision-making, and high level of corruption) for Vietnam in the realization of human rights commitments in free trade agreements the country signed, including the one with the EU.<sup>209</sup> That said, when international legal norms have become a part of national formal law, they will be subject to the influence of a wide range

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206. See Ban Chấp Hành Trung Ương [Central Executive Committee], *Nghị Quyết Số 06-NQ/TW Ngày 5/11/2016 Về Thực Hiện Có Hiệu Quả Tiến Trình Hội Nhập Kinh Tế Quốc Tế, Giữ Vững Ổn Định Chính Trị - Xã Hội Trong Bối Cảnh Nước Ta Tham Gia Các Hiệp Định Thương Mại Tự Do Thế Hệ Mới* [Resolution No. 06-NQ/TW Of November 5, 2016, on Effective Implementation of the Process of International Economic Integration and Maintaining Socio-Political Stability in the Context of Our Country's Participation in the New Generation Free Trade Agreements], Part III.2.2, <https://thuvienphapluat.vn/van-ban/Bo-may-hanh-chinh/Nghi-quyet-06-NQ-TW-thuc-hien-tien-trinh-hoi-nhap-kinh-te-quoc-te-giu-vung-on-dinh-chinh-tri-xa-hoi-2016-332532.aspx?tab=3> [<https://perma.cc/6YQ2-QP2C>].

207. See Vietnam Labor Code, *supra* note 150.

208. See *supra* note 99 and relevant text.

209. Ngô Quốc Chiến, *Các Giá Trị Nhân Quyền Thông Qua Các Hiệp Định Thương Mại Tự Do Và Thách Thức Đối Với Việt Nam* [Human Rights Values Through Free Trade Agreements and Challenges for Vietnam], NGHIÊN CỨU LẬP PHÁP (Sept. 26, 2019), <http://lapphap.vn/Pages/tintuc/tinchitiet.aspx?tintucid=210300> [<https://perma.cc/98SC-J32F>].

of international and domestic actors. The complex influence may incrementally transform formal legal convergence into some level of practice. In this regard, in the long term, due to external pressure stemming from continuing international and regional integration, and the increasing demands of local citizens (including through legal mobilization), formal convergence in Vietnamese law may influence functional legal development. This national legal development may in turn provide institutional conditions conducive to socio-economic development.

### III. A Comparison With the EU-Singapore Free Trade Agreement

A comparison between the EU-Singapore Free Trade Agreement (ESFTA) and the EU-Vietnam Free Trade Agreement (EVFTA) illustrates a functional difference.<sup>210</sup> The free trade deals that the EU signed with Singapore mainly have an instrumental function: to facilitate free trade and investment. This is so because instrumentalism dominates the EU's approach in the trade negotiations with Singapore and because Singapore is a developed country with an advanced legal system. Therefore, there is no incentive to use the trade deals to import legal norms and facilitate domestic development.

#### A. Instrumentalism

Singapore is the EU's largest trading partner in ASEAN, a major destination for European investments in Asia, with the bilateral foreign direct investment stock between the EU and Singapore amounting to roughly €334 billion by 2017.<sup>211</sup> This explains why EU members, the European Commission, and its Directorate General for Trade prioritized commercial interests in FTAs negotiation with Singapore.<sup>212</sup>

That focus on commercial interests exemplifies instrumentalism, a dominant approach in the EU's trade deal negotiation with Singapore. This instrumental approach considers trade agreements mainly as the tool to pursue material, commercial interests. The consequence is that international law norm diffusion to foster local development is not the primary concern. The instrumental approach is shaped by the EU's material interests, but it is also due to experimental incompatibility: Singapore does not have conducive conditions for the EU to operate vertical law and development there.

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210. For comparison from an international relations perspective, see Ha Hai Hoang & Daniela Sicurelli, *The EU's Preferential Trade Agreements with Singapore and Vietnam: Market vs. Normative Imperatives*, 23 CONTEMP. POL. 369, 369–87 (2017).

211. *Countries and Regions: Singapore*, EUROPEAN COMMISSION (Apr. 23, 2020), <https://ec.europa.eu/trade/policy/countries-and-regions/countries/singapore> [https://perma.cc/BEU4-MDGB].

212. Lachlan McKenzie & Katharina L. Meissner, *Human Rights Conditionality in European Union Trade Negotiations: The Case of the EU-Singapore FTA*, 55 J. COMMON MKT. STUD. 832, 841 (2017).

## B. Experimental Incompatibility

Following independence in 1965, the city-country Singapore, a former British colony, began as a developing, Third World country but has evolved into a developed country with a high standard of living and quality of life.<sup>213</sup> It is also one of the world's leading international financial centers, thanks to the government's political will, skillful use of industry policy, and commitment to the rule of law.<sup>214</sup> Singapore also has a well-developed common law system which contributed to its development. As Andrew Harding states,

Despite the overt notion of a state based on Confucian or Asian “shared” values, it is in practice legalism, and legal certainty, that govern society, administration, and private transactions in Singapore, and orientate the city-state to the rule of law as a universal value as well as one that has served Singapore's own development into a prosperous society and a notable common-law jurisdiction.<sup>215</sup>

Although Singapore does not explicitly promote its legal model externally, “advancing the rule of law amongst the ASEAN states is clearly very much in Singapore's interests, and is perceived in Singapore to be decidedly in the interests of the other ASEAN states.”<sup>216</sup>

Singapore, therefore, does not have conditions for the operation of vertical law and development through trade deals by external actors like the EU. Although the city-country has deeply integrated into global markets, it has already become a developed country with an advanced legal system, which does not incentivize the EU to export external legal norms to foster domestic legal and societal development. In addition, despite the influence of English common law due to colonial legacy, common law in Singapore has evolved “on its own” “taking into consideration its unique social circumstances and the needs of its population.”<sup>217</sup> Judicial citations of foreign decisions (particularly UK courts) have been empirically documented,<sup>218</sup> but this exemplifies a horizontal legal diffusion rather than vertical law and development. Finally, because Singapore operates a common law tradition, the EU may have less interest in exporting norms of continental civil law there. In short, law and development is not the main concern of the ESFTA due to incompatibility between Singapore's experimental conditions and the EU's interest in law and development.

213. For Singapore's development story, see generally LEE KUAN YEW, *FROM THIRD WORLD TO FIRST: SINGAPORE AND THE ASIAN ECONOMIC BOOM* (2011).

214. Jianguy Wang, *The Rise of Singapore as International Financial Centre: Political Will, Industrial Policy, and Rule of Law*, in *FINANCE, RULE OF LAW AND DEVELOPMENT IN ASIA: PERSPECTIVES FROM SINGAPORE, HONG KONG AND MAINLAND CHINA* 3 (Jiaxiang Hu et al. eds., 2016).

215. Harding, *supra* note 15, at 255.

216. *Id.*

217. Kevin Y. Tan, *Singapore: A Statist Legal Laboratory*, in *LAW AND LEGAL INSTITUTIONS OF ASIA: TRADITIONS, ADAPTATIONS AND INNOVATIONS* 330, 336–37 (E. Ann Black & Gary F. Bell eds., 2011).

218. See Kwai Hang Ng & Brynna Jacobson, *How Global is the Common Law? A Comparative Study of Asian Common Law Systems – Hong Kong, Malaysia, and Singapore*, 12 *ASIAN J. COMP. L.* 209, 218–19 (2017).

### C. A Common Institutional Framework?

Unlike the case with Vietnam in which the PCA was signed before the FTA and hence serves as the broader framework for the latter, the EU concurrently signed the Partnership and Cooperation Agreement (EUSPCA), the Investment Protection Agreement (IPA), and the Free Trade Agreement with Singapore on October 19, 2018.<sup>219</sup> The European Parliament approved the trade agreement on February 13, 2019, EU Member States endorsed it on November 8, 2019, and the trade deal entered into force on November 21, 2019.<sup>220</sup> However, by that time (November 21, 2019), the PCA had not yet entered into force as it still needed to be approved by the European Parliament and EU Member States.<sup>221</sup>

Like the EVFTA, the ESFTA includes a clause linking it to the CPA:

This Agreement shall be an integral part of the overall relations between the Union and its Member States, of the one part, and Singapore, of the other part, as governed by the Partnership and Cooperation Agreement, and shall form part of a common institutional framework. It constitutes a specific agreement giving effect to the trade provisions of the Partnership and Cooperation Agreement.<sup>222</sup>

Despite this linking clause, the fact that the FTA entered into force before the PCA indicates the relative independence between the two agreements. Commercial aims can be achieved through the FTA relatively independently from political aims to be set down in the PCA. Therefore, there is not a linking framework for the EU vertical law and development through the trade deal with Singapore.

### D. International Law and Market

This section compares the EVFTA and the ESFTA's engagement with international human rights law, labor law, environmental law, IP law, and the cosmopolitan ideal of the rule of law. Main comparative points are summarized in the table below:

219. *EU and Singapore Forge Closer Economic and Political Ties*, EUROPEAN COMMISSION (Oct. 19, 2018), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1926>.

220. *EU-Singapore Free Trade Agreement*, EUROPEAN COMMISSION (Nov. 27, 2019), <https://ec.europa.eu/trade/policy/in-focus/eu-singapore-agreement/> [<https://perma.cc/3LD4-QY7Y>].

221. See EUROPEAN COMMISSION, *supra* note 2019.

222. Free Trade Agreement between the European Union and the Republic of Singapore art. 16.8 Oct. 12, 2018, 2018 O.J. (L 294) 342 [hereinafter ESFTA].

Issues	EU-Vietnam FTA	EU-Singapore FTA
Human Rights Conditionality	Non-execution clause	No clause
International Labor Law	Requiring the parties to ratify and implement in domestic law labor conventions;  No provision	Requiring the parties to ratify and implement in domestic law labor conventions;  Provision on cooperation in trade-related aspects of labor policies
International Environmental Law	Committing the parties to implementing in domestic law environmental instruments, including the ones on climate change  Provision on cooperation in domestic policies' dealing with climate change  Provision on biological diversity	Committing the parties to implement in domestic law environmental instruments, including the ones on climate change  No provision  No provision
International Intellectual Property Law	Recalling the parties' commitments to the international treaties dealing with intellectual property	Recalling the parties' commitments to the international treaties dealing with intellectual property
International Rule of Law	Calling for cooperation in promoting regulatory quality and performance, the principles of good administrative behavior.	Calling for cooperation in promoting regulatory quality and performance, the principles of good administrative behavior.
Agreement Implementation	Provisions on development objectives, areas, and forms of cooperation in cooperation and capacity building.	No provisions

Consider first international human rights law. Different from the EVFTA, the ESFTA does not have a non-execution human rights clause. This is in part because commercial interests, rather than norm promotion, dominated the EU's negotiation of the FTA with Singapore.<sup>223</sup> Another reason for the lacking of human rights conditionality in the ESFTA is the Singaporean government's opposition to such conditionality: "The Singaporean government was unwilling to agree to any deal that compromised its domestic position on human rights, thus conditionality was potentially a source of conflict in the negotiations."<sup>224</sup> Its domestic position on human rights is communitarian, prioritizing the nation and the society's interests over individual rights,<sup>225</sup> which is shapely dissonant with the EU's universalist approach to human rights. The epistemological differences may inform divergent positions between the EU and Singapore on concrete human rights issues in Singapore, such as the death penalty and the

223. See McKenzie & Meissner, *supra* note 212, at 839.

224. *Id.* at 840.

225. Li-ann Thio, *Soft Constitutional Law in Nonliberal Asian Constitutional Democracies*, 8 INT'L J. CONST. L. 766, 778 (2010).

gay sex ban.<sup>226</sup> The EU may focus on material interests to avoid conflicts in FTA negotiation while pursuing human rights issues separately in the political agreement (the PCA).

The non-execution clause, therefore, is mentioned in the European Parliament non-legislative resolution of February 13, 2019, on the draft Council decision on the Conclusion of the EU's CPA with Singapore. The resolution

[c]onsiders that the PCA, the framework agreement, is politically closely associated with and complements the FTA and the IPA; recalls that Article 44 of the PCA allows for the non-execution of the agreements in cases of systematic and serious violation of essential elements, including democratic principles, the rule of law and human rights.<sup>227</sup>

This clause may provide the base for human rights dialogue between the EU and Singapore but is not the institutional base for vertical law and development through material conditionality. That is because the clause is not included in the ESFTA.

Like the EVFTA, the ESFTA has the same concern of sustainable development. Therefore, it requires the parties to ratify and implement labor conventions in domestic law and regulation.<sup>228</sup> The FTA commits Singapore to ratifying the Convention on Freedom of Association and Protection of the Right to Organize and the Convention on Discrimination (Employment and Occupation).<sup>229</sup> Different from the Vietnamese counterpart, the ESFTA includes an article detailing international cooperation in trade-related aspects of labor policies.<sup>230</sup> Cooperative activities include the following: cooperation in international fora addressing labor aspects of trade and sustainable development; the exchange of information and the sharing of best practices in areas such as labor law and practices; the exchange of views on the promotion of the ratification of fundamental ILO Conventions and other conventions of mutual interest, and on the effective implementation of ratified conventions, among others.<sup>231</sup> This cooperation serves to address international labor issues, rather than developmental issues at the local level.

Apart from labor law issues, the ESFTA includes one article on environmental protection.<sup>232</sup> Like the EVFTA, the ESFTA commits the parties

226. On these human rights issues in Singapore, see Michael Hor, *The Death Penalty in Singapore and International Law*, 8 S.Y.B.I.L. 105, 107 (2004); LYNETTE J. CHUA, *MOBILIZING GAY SINGAPORE: RIGHTS AND RESISTANCE IN AN AUTHORITARIAN STATE* (2015).

227. European Parliament Non-Legislative Resolution of 13 February 2019 on the Draft Council Decision on the Conclusion, on Behalf of the European Union, of the Partnership and Cooperation Agreement between the European Union and its Member States, of the One Part, and the Republic of Singapore, of the Other Part (15375/2018 – C8-0026/2019 – 2018/0403M(NLE)), EUR. PARL. DOC. P8/TA(2019)0093, [https://www.europarl.europa.eu/doceo/document/TA-8-2019-0093\\_EN.html](https://www.europarl.europa.eu/doceo/document/TA-8-2019-0093_EN.html) [<https://perma.cc/QMS4-9S5X>].

228. ESFTA, *supra* note 222, arts. 12.3, 12.6.

229. *Up-to-date Conventions and Protocols Not Ratified by Singapore*, INT'L LABOUR ORG. [ILO], [https://www.ilo.org/dyn/normlex/en/f?p=normlexpub:11210:0::no::p11210\\_country\\_id:103163](https://www.ilo.org/dyn/normlex/en/f?p=normlexpub:11210:0::no::p11210_country_id:103163) [<https://perma.cc/R2KH-V3TG>] (last visited Aug. 3, 2021).

230. ESFTA, art. 12.4.

231. *Id.*

232. *Id.* art. 12.6.

to implementing in “their respective laws, regulations or other measures and practices in their territories, the multilateral environmental agreements to which they are party.”<sup>233</sup> The ESFTA also stipulates the parties’ commitments to implementing international instruments dealing with climate change.<sup>234</sup> However, different from the EVFTA, the ESFTA does not have a provision on cooperation in dealing with climate change in domestic policies. In addition, the ESFTA does not include a provision on biological diversity. The ESFTA is not a tool of law and development, and it does not have provisions to assist the local addressing of developmental issues pertaining to climate change and biological diversity.

The ESFTA recalls the parties’ commitments to the international treaties dealing with intellectual property, including the TRIPS Agreement and the Paris Convention for the Protection of Industrial Property.<sup>235</sup> The ESFTA, like the EVFTA, also has the same concern of rule of law, providing that “the parties shall pursue a transparent and predictable regulatory environment for economic operators, including small and medium-sized enterprises, that do business in their territories.”<sup>236</sup> It also states that the parties agree “to cooperate in promoting regulatory quality and performance in their respective regulatory policies through the exchange of information and best practices” and “subscribe to the principles of good administrative behavior, and agree to cooperate in promoting it in their respective administrations through the exchange of information and best practices.”<sup>237</sup> Different from the EVFTA, the ESFTA does not include a chapter on cooperation and capacity building. Because the ESFTA is not a law and development instrument, it does not create the institutional base for legal technical assistance under the form of cooperation and capacity building.

Although both EVFTA and the ESFTA commit Vietnam and Singapore, respectively, to international legal standards, their function is different. It is observed that

[a]dherence to and observance of international law in Singapore foreign policy is well-known . . . . Small states, in particular, benefit from a rule-based and rule of law-based international order. A trading nation like Singapore, in particular, thrives on a relatively predictable global environment. International legal rules help to foster such an environment.<sup>238</sup>

This observation indicates that Singapore’s engagement with international law is driven by trading factors. The ESFTA, therefore, integrates norms of international law to facilitate trade liberalization and Singapore’s further

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233. *Id.*

234. *Id.*

235. ESFTA, art. 10.2.

236. *Id.* art. 13.2.

237. *Id.* art. 13.7.

238. Lim Chin Leng et al., *Ch.05:Singapore And International Law*, SING. L. WATCH (July 13, 2020), <https://www.singaporelawwatch.sg/About-Singapore-Law/Overview/ch-05-singapore-and-international-law> [https://perma.cc/PS9M-32N3].

connection with the global markets, not to foster domestic law reform and societal change like the case of the EVFTA.

## Conclusion

This Article has explored and illustrated the non-traditional, non-statist, dynamic, and normative concept of vertical law and development. Vertical law and development is the transnational legal process whereby the external actors integrate norms of public international law into international economic law to facilitate legal reform and societal change in developing countries. It demonstrates that international law is used by development agencies. Vertical law and development is illustrated by the case of the EU-Vietnam FTA and contrasted with the EU-Singapore FTA. I conclude with reflections on the directions for further studies on (1) the functional difference of the EU FTAs in ASEAN countries; (2) the role of international law in law and development; and (3) comparative international law.

First, one possible direction for future inquiry concerns the functional difference of EU FTAs with ASEAN countries. The failure of EU-ASEAN FTA bi-regional negotiation (due to the EU's comprehensive approach to trade liberalization and the ASEAN's lack of common negotiation machinery) opens the doors for EU's negotiation of bilateral FTAs with ASEAN members.<sup>239</sup> The EU FTAs with Singapore and Vietnam served as the precedents for the EU's expansion of FTAs with other members in the region. The EU has launched FTA negotiations with Malaysia (2010), Thailand (2013), the Philippines (2015), and Indonesia (2016).<sup>240</sup> The EU FTAs with these developing countries may have the normative function of vertical law and development. To be sure, the EU has commercial interests in ASEAN—the EU's third largest trade partner outside Europe (after the US and China), with more than €237.3 billion of trade in goods in 2018.<sup>241</sup> The EU also needs to diversify its trade partners in the post-COVID 19 and post-Brexit era. Therefore, the EU's trade agreements with both developed and developing countries in the region have the same commercial function.

However, the EU's trade deals with developing countries (particularly with civil law countries like Indonesia) in the region may also function as the duct to vertically diffuse international law norms to facilitate domestic legal and socio-economic reforms.<sup>242</sup> For example, "legal cooperation" is one of the main

239. Hoang Hai Ha, *The Social Dimension in EU Free Trade Agreements: ASEAN Perspectives*, 25 EUR. REV. 532, 533 (2017); Katharina L. Meissner, *A Case of Failed Interregionalism? Analyzing the EU-ASEAN Free Trade Agreement Negotiations*, 14 ASIA EUR. J. 319, 320 (2016).

240. *Countries and Regions: Association of South East Asian Nations (ASEAN)*, EUROPEAN COMMISSION (May 5, 2020), <https://ec.europa.eu/trade/policy/countries-and-regions/regions/asean/> [<https://perma.cc/B7PJ-JSYX>].

241. *Id.*

242. For some discussions on the EU's diffusion of norms (including legal norms) in ASEAN countries through trade, see Daniela Sicurelli, *External Conditions for EU Normative Power Through Trade: The Case of CEPA Negotiations with Indonesia*, 18 ASIA EUR. J., 57, 58

aims in the EU-Indonesia Partnership and Cooperation Agreement: “The Parties shall cooperate on issues pertaining to the development of their legal systems, laws and legal institutions, including on their effectiveness, in particular by exchanging views and expertise as well as by capacity building.”<sup>243</sup> This PCA potentially provides the framework for the EU to integrate international legal norms in its FTA with Indonesia to facilitate domestic legal and societal development.

The second direction for further studies involves the role of international law in law and development. One aspect of the inquiry is normative. For example, one study indicates international law can change local culture and advance the well-being of the local populations.<sup>244</sup> Another study demonstrates that reforms of the regulatory legal framework for international trade can facilitate “microtrade” and foster economic development in least developed countries.<sup>245</sup> These cultural and regulatory theories may be useful in informing the design of law and development projects. Another aspect can focus on a positivist approach to international law and development. From this perspective, international law can be described as an instrument used by development agencies to diffuse norms of international legal regimes into some aspects of national legal systems to facilitate domestic legal reforms and by which to foster national societal transformation. Further studies are needed to explain how and why various development agencies (such as developed governments and international bodies like the World Bank and IMF) use different types of international economic law (such as FTAs, WTO law, international monetary law, and international investment law) to diffuse international legal norms in the legal system of developing countries.

The third direction for future inquiry concerns comparative international law. While studies about different and comparative approaches to international law are not scanty,<sup>246</sup> recent years have witnessed emerging academic attempts to develop a new field called comparative international law.<sup>247</sup> Comparative international law “entails identifying, analyzing, and explaining similarities and differences in how actors in different legal systems understand, interpret, apply,

(2020); Maria Garcia & Annick Masselot, *EU-Asia Free Trade Agreements as Tools for Social Norm/Legislation Transfer*, 13 ASIA EUR. J. 241, 242 (2015).

243. Framework Agreement on Comprehensive Partnership and Cooperation between the European Union and its Member States, of the One Part, and The Republic of Indonesia, of the Other Part, art. 4, 2014 O.J. (L 125) 47 (Apr. 26, 2014)

244. See generally LAN CAO, *CULTURE IN LAW AND DEVELOPMENT: NURTURING POSITIVE CHANGE* (2016).

245. Yong-Shik Lee, *Law and Development for Least Developed Countries*, in *LAW AND DEVELOPMENT PERSPECTIVE ON INTERNATIONAL TRADE LAW* 7, 9–10 (Yong-Shik Lee et al. eds., 2011).

246. Simon Chesterman, *Asia’s Ambivalence about International Law and Institutions: Past, Present and Futures*, 27 EUR. J. INT’L L. 945, 946 (2016); Eric Stein, *International Law in Internal Law: Toward Internationalization of Central-Eastern European Constitutions?*, 88 AM. J. INT’L L. 427, 431 (1994). See generally Lauri Malksoo, *RUSSIAN APPROACHES TO INTERNATIONAL LAW* (2015); Xue Hanqin, *CHINESE CONTEMPORARY PERSPECTIVES ON INTERNATIONAL LAW: HISTORY, CULTURE AND INTERNATIONAL LAW* (2012).

247. *COMPARATIVE INTERNATIONAL LAW* (Anthea Roberts et al. eds., 2018).

and approach international law.”<sup>248</sup> Ironically, globalization, more than the force of global convergence, creates divergent local views about international law. Vertical law and development is a promising topic for comparative international law. Comparative international law can explore and explain how different actors (e.g., legislators, courts, political elites, and civil societies) in developing countries interpret, apply, and approach international law promoted by the external efforts of vertical law and development.

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248. Anthea Roberts et al., *Conceptualizing Comparative International Law*, in *COMPARATIVE INTERNATIONAL LAW* 3, 6 (Anthea Roberts et al. eds., 2018).