Transnational Fiduciary Law

Edited by Seth Davis, Thilo Kuntz and Gregory Shaffer

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TRANSNATIONAL FIDUCIARY LAW

Fiduciary law is important transnationally, particularly in the context of global capitalism. Fiduciary law's characteristic regard for others offers a response to the pursuit of unconstrained self-interest in business and government relations, potentially implicating the exercise of both private and public power. Stakeholders have invoked it not only to address traditional private law matters, but also to enjoin transnational corporations to respect human rights, to combat public corruption, and to constrain national governments to respect the rights of Indigenous Peoples. This book focuses on the processes through which conceptualizations of fiduciary relationships and fiduciary norms may (or may not) settle transnationally – or become unsettled – as actors invoke fiduciary norms to address problems in different domains, including across borders. It identifies complications and challenges of any transnational convergence of fiduciary norms that fiduciary theorists often elide. This book is also available as Open Access on Cambridge Core.

Seth Davis is Professor of Law at the University of California, Berkeley School of Law. He is a leading expert on public fiduciary law.

Thilo Kuntz is Chair of Private Law, Commercial Law, and Corporate Law at Heinrich-Heine-University Düsseldorf, Germany. An expert on ESG, his research focuses on fiduciary law, corporate law, and legal theory.

Gregory Shaffer is Scott K. Ginsburg Professor of International Law at Georgetown University Law Center and President of the American Society of International Law. He is an expert on international and transnational law.

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Edited by

SETH DAVIS

University of California, Berkeley

THILO KUNTZ

Heinrich Heine University Düsseldorf

GREGORY SHAFFER

Georgetown University

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Contents

Contributors

Jens-Hinrich Binder Eberhard Karls University

Seth Davis School of Law, University of California, Berkeley

Evan Fox-Decent McGill University

Jennifer G. Hill Monash University

Shelly Kreiczer-Levy College of Law and Business, Ramat Gan

Thilo Kuntz Heinrich Heine University Düsseldorf

Rebecca Lee Faculty of Law, The University of Hong Kong

Moritz Renner Department of Law, University of Mannheim

Gregory Shaffer Georgetown University Law Center

Masayuki Tamaruya Faculty of Law and Graduate Schools for Law and Politics, The University of Tokyo

Andrew F. Tuch Washington University School of Law

1

Theorizing Transnational Fiduciary Law

A Processual Framework

Seth Davis and Gregory Shaffer

1.1 INTRODUCTION

It began with the South Sea Bubble. Shares of the South Sea Company, which had a paper monopoly on trade with South America, had soared after Parliament agreed to have the Company take over the national debt. The bubble burst, as bubbles do. Among the many unfortunate investors was Lord Macclesfield, a chancellor who had taken funds filed by litigants with the Court of Chancery and invested them for his own profit as the South Sea Bubble expanded. Macclesfield was impeached, removed from office, and replaced by the man who presided over his trial, Peter King, lately the Chief Justice of the Court of Common Pleas. To Lord Chancellor King we owe the modern ideal that a fiduciary should not profit from exercising their authority over another person's interests.[1]

The problems that fiduciary law addresses today are no less important globally than they were when the South Sea Bubble exposed Chancery's corruption. Then, and much more so today, fiduciary law bears upon the governance of capital that crosses national borders. Fiduciary law's complex relationship with colonialism and imperialism – which began long before the South Sea Company sought a monopoly on a trade focused upon slavery – continues in contemporary struggles against neocolonial and imperial domination. And today, unlike in 1720, there are also international organizations seeking to shape the law of fiduciary duties in response to global problems, such as climate change.

Fiduciary law's reach has grown since the era when the Court of Chancery dominated the development of trust doctrine. It is no longer plausible to understand

[1] *See* Joshua Getzler, *As If Accountability and the Counterfactual Trust*, 91 B.U. L. Rev. 973, 983 (2011). ("It was Lord Chancellor King who crystallized the idea that a fiduciary assumes an office that permits no profit or conflicts of interest.") On the South Sea Bubble, *see, e.g.*, Julian Hoppit, *The Myths of the South Sea Bubble*, 12 Transactions of the Royal Hist. Soc'y 141 (2002).

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the trust as the "distinctive achievement of English lawyers," a description that F. W. Maitland offered in his influential lectures on equity.[2] Trust law has gone transnational. Indeed, it had already crossed national borders before the posthumous publication of Maitland's lectures in 1909. Today, distinctive innovations in trust law are as apt to come from the Cayman Islands as from England. Offshore jurisdictions are competing for the business of holding and managing global wealth. They have enacted comprehensive trust regimes that flout basic precepts of English trust law – the very trust law that scholars have taken as paradigmatic of the field. Onshore jurisdictions – including states within the United States – now follow the lead of these offshore jurisdictions. Competition for transnational trust business, in other words, contributes to the development of trust law transnationally.

Today, stakeholders invoke fiduciary law not only to address traditional private law matters like wealth management. They also point to norms of fiduciary responsibility to enjoin transnational corporations to respect human rights,[3] to combat corruption of public officials,[4] and to constrain national governments so that they respect the rights of Indigenous Peoples.[5] The appeal of the fiduciary norm lies in its ideal of regard for others, which offers a response to the pursuit of unconstrained self-interest in business relations and the abuse of public office for private gain.

As Justice Benjamin Cardozo famously wrote, fiduciary law's ideal of other-regarding loyalty demands "something stricter than the morals of the marketplace."[6] Fiduciary law thus responds to a pervasive problem that cuts across common law and civil law traditions and state borders and is manifested in discrete domains within

[2] F. W. Maitland, Equity; Also the Forms of Action at Common Law 23 (1909).

[3] *See* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. Davis L. Rev. 1183 (2016); Jonathan Zittrain, *How to Exercise the Power You Didn't Ask For*, Harv. Bus. Rev. (Sept. 19, 2018), https://hbr.org/2018/08/how-to-exercise-the-power-you-didnt-ask-for; Jack M. Balkin & Jonathan Zittrain, *A Grand Bargain to Make Tech Companies Trustworthy*, The Atlantic (Oct. 3, 2016), https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346.

[4] *See* U.S. House of Representatives, The Trump-Ukraine Impeachment Inquiry Report 8 (Dec. 2019) (quoting Alexander Hamilton for proposition that impeachment is appropriate for "the abuse or violation of some public trust"); U.S. House Committee on Oversight and Reform, Chairman Nadler Announces the Introduction of Articles of Impeachment Against President Donald J. Trump (Dec. 10, 2019), https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=2179 (reporting Chairman Jerrold Nadler's remarks that "Our President holds the ultimate public trust"); Andrew Kent et al., *Faithful Execution and Article II*, 132 Harv. L. Rev. 2111, 2119 (2019) (arguing that under the US Constitution, executive officers have a fiduciary duty to faithfully execute the laws); *see also* Evan J. Criddle & Evan Fox-Decent, Fiduciaries of Humanity: How International Law Constitutes Authority 79 (arguing that there is a human right against public corruption grounded in fiduciary theory of international human rights law).

[5] Seminole Nation v. United States, 316 U.S. 286, 296–97 (1942) (holding that United States has fiduciary duties to American Indian Tribes); Seth Davis, *American Colonialism and Constitutional Redemption*, 105 Calif. L. Rev. 1751 (2017) (describing and critiquing the Indian trust doctrine of US law).

[6] Meinhard v. Salmon, 164 N.E. 545, 546 (1928).

different legal fields. The problem is one of holding a person entrusted with discretionary authority over the interests of another to their other-regarding mandate. Fiduciary law seeks to address and solve this problem by imposing norms – such as those regarding a duty of loyalty – that direct fiduciaries to further the purposes of their entrusted authority.

The transnational dimensions of fiduciary law remain largely unexplored. Scholars have tended to study fiduciary norms within specific legal domains, such as agency law, corporate law, and trust law, and they have tended to do so in terms of national private law.[7] Only recently have they treated "fiduciary law" as a meta-concept and a potentially unified field across subject areas and national legal systems. Most of this scholarship has been conceptual and has focused on formal law. It has treated fiduciary law as something the state – particularly through state courts – makes and applies. When scholars have recognized that the formal law governing fiduciary relations interacts with private ordering and customary practices, moreover, their inquiries have mostly stopped at state borders.

Fiduciary law has a long history that includes the common law and equity, Roman law and civil law, as well as canon law, classical Islamic law, and classical Jewish law. Private fiduciary law – the law of agency, trusts, corporations, and the like – has transnational dimensions, both in its history and in its contemporary applications. So too does public fiduciary law; the revival of interest in fiduciary law's contemporary application to government actors hearkens back to the Roman Republic, as well as to the origins of modern international law.[8] Historically, the public and private faces of fiduciary law were not always as distinct, as shown, for example, by Edmund Burke's famous denunciation of the British East India Company for abusing its public trust.[9] Today, the line between public and private responsibility remains contested in the regulation of fiduciaries, as exemplified in arguments that governments should establish "public trusts" to protect personal data and that tech companies owe fiduciary duties with respect to their collection, use, and transfer of such data.[10]

International organizations and nongovernmental organizations (NGOs) also have challenged settled understandings of fiduciary norms. In 2019, the United Nations, in partnership with private sector finance and institutional investors, issued

[7] By "private law," we refer to formal state law governing private relationships (such as the law of contract). This should be distinguished from norm development by private associations and private parties, which we at times refer to as private rulemaking.

[8] *See, e.g.*, Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 Tex. L. Rev. 993 (2017).

[9] *See* Chapter 10.

[10] *See* Aziz Z. Huq, *The Public Trust in Data*, 110 Georgetown L.J. 333 (2021); *see also supra* note 3 and accompanying text.

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a report entitled "Fiduciary Duty in the 21st Century."[11] Its ambitious aim was to restate the fiduciary duties of investors to encompass environmental, social, and governance (ESG) goals. Former United States Vice President Al Gore helped launch this project with a YouTube announcement, proclaiming that "fiduciary duty is not a barrier to investing sustainably."[12] NGOs such as the Global Legal Action Network and the Children's Trust have drawn upon fiduciary law through human rights litigation to hold governments responsible for responding to climate change. Domestic courts in the Americas, Europe, and Asia, as well as the European Court of Human Rights, have entertained these claims, with some claimants prevailing on the merits.[13]

These transnational developments acutely present the challenge of theorizing – much less potentially unifying – the field of fiduciary law. The concept of a fiduciary relationship is capacious. It can plausibly encompass everything from wealth management to managing the environment for future generations. Yet, there is tension between applying fiduciary norms to discrete problems in different fields and conceptual scholars' dream of a unified field of fiduciary law.[14]

This book explores this interaction of conceptualizations and discrete problem-solving in the transnational development of fiduciary norms. In particular, the book focuses upon the processes through which conceptualizations of fiduciary relationships and fiduciary norms may or may not settle transnationally – or become unsettled – as actors invoke fiduciary norms to address problems in different domains. It tests the ambitions of a unified theory of fiduciary law that would align theory and practice beyond state borders. In doing so, the book challenges fiduciary theorists to ask whether "unification" of the field of fiduciary law across national boundaries is achievable, and even if achievable in particular subfields, what variations might remain. The complications and challenges of any transnational convergence of fiduciary norms involve political relations, power dynamics, and social norms that fiduciary theorists often elide.

Thus, the aim of this book is not to unify fiduciary law. Instead, it develops a framework for understanding what unification – or in its terms, transnationalization –

[11] United Nations Environment Programme Finance Initiative, Fiduciary Duty in the Twenty-first Century (Oct. 2019), https://www.unepfi.org/wordpress/wp-content/uploads/2019/10/Fiduciary-duty-21st-century-final-report.pdf.

[12] Al Gore, *Fiduciary Duty in the Twenty-first Century*, PRI, https://www.youtube.com/watch?v=PKRIW2yc5WA.

[13] For an introduction to this litigation, *see* Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U.C. Davis L. Rev. 741 (2012).

[14] *See, e.g.*, Hanoch Dagan, *Fiduciary Law and Pluralism*, *in* The Oxford Handbook of Fiduciary Law (Evan J. Criddle et al. eds. 2019). *Cf.* Paul B. Miller, *The Identification of Fiduciary Relationships*, *in* Criddle et al., *id.* at 367 (conceptualizing the field in terms of "several unifying principles") *with* Andrew S. Gold, *The Loyalties of Fiduciary Law*, *in* Philosophical Foundations of Fiduciary Law (Andrew S. Gold & Paul B. Miller eds., 2014) (stressing differences between multiple conceptions of loyalty in different settings).

might entail not just in theory but also in practice. The book draws upon transnational legal theory, and, in particular, the theoretical framework of transnational legal ordering, which can give rise to transnational legal orders, as developed by Terence Halliday and Gregory Shaffer. This work provides a way of understanding processes of transnational legal ordering – involving norm construction, conveyance, contestation, and resistance – which can produce a transnational legal order (or TLO). They define a TLO, in terms of a Weberian ideal type, as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions."[15] TLO theory provides a framework for assessing how norms and institutions interact at the transnational, national, and local levels of social organization, pursuant to which legal norms settle, unsettle, and change in transnational context.

The chapters in this book examine the dynamic and recursive processes through which fiduciary norms are conveyed across borders and shape the practices of transnational, national, and local actors and institutions across an array of issue areas. By bringing together scholars working in both common law and civil law traditions, this book seeks to open new inquiries into the development and practice of fiduciary law in transnational contexts. The chapters' authors include both fiduciary theorists whose work has aimed to unify fiduciary norms across particular domains, and scholars who work on the gaps between theory and practice in those domains. While some are more open to the promise of a unified fiduciary law, others are quite skeptical of it. The contests over framing among stakeholders thus spill over into these pages in ways that deepen the questions explored, including the following:

- To what extent are fiduciary norms converging such that they can be viewed as part of a TLO, if not generally, then in discrete subject areas? Is a body (or bodies) of fiduciary law at times emerging transnationally as a function of domestic legal responses to common problems of entrusted authority? Or are transnational processes of problem construction, norm propagation, diffusion, and application also playing important roles?
- Has the transnational legal ordering of fiduciary law institutionalized in certain domains? Where that is the case, what processes and mechanisms drive institutionalization?
- How does the legal ordering of private fiduciary law align and compete with other areas of law where fields overlap, such as public regulation in the areas of finance, environmental law, and information law?
- What explains variation in how transnational fiduciary norms are implemented in transnational, national, and local contexts? What are the ways

[15] Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* Transnational Legal Orders 3 (Terence C. Halliday & Gregory Shaffer eds. 2015). It is an "ideal type" in the sense of accentuating aspects of complex phenomena in an analytic construct.

in which different legal traditions – such as common law and civil law – and different histories and cultural contexts shaping how social problems of trust and dependence are addressed through law?
- What are the interactions between the meta-conceptualization of "fiduciary law" and discrete conceptualizations of fiduciary relationships in particular fields? Are the discrete conceptualizations of most importance for national and local practice? How, if at all, do meta-concepts inform analysis and practice within discrete fields?
- What is distinctive about transnational legal ordering in the field of fiduciary law compared to other legal fields?
- What is the relationship between socio-legal (external) and jurisprudential (internal) accounts of fiduciary norms as these norms are marshaled to frame transnational problems and solutions?

Eleven case studies address these questions across different substantive areas. The five chapters in Part I address questions relating to the transnational *formation and institutionalization* of fiduciary law in different domains. They address, in particular, the tension between meta-conceptualizations of fiduciary norms and normative contestation within discrete fields. Part II's four chapters examine historical, political, and social *factors affecting the recursive development* of transnational fiduciary law over time. They illustrate how transnational fiduciary law involves dynamic processes in which hard and soft law norms and institutions interact, and through which differences in history, culture, and conceptions of social problems shape fiduciary law's application. Part III's two chapters address questions at the *frontiers* of transnational fiduciary theory, including the responsibilities of international standard-setting organizations and transnational corporations operating as information platforms. Collectively, these chapters explore how processes of transnational legal ordering can give rise to legal orders in particular areas of fiduciary law that transcend and permeate nation-states, while also assessing how convergence in formal law may nonetheless entail considerable variation in local practice.

This introduction presents the book's framework for the study of the transnational legal ordering of fiduciary law. It notes the key conceptual tools of TLO theory (such as normative settlement and the recursivity of law) and explains how these tools bear upon analytic, normative, and socio-legal inquiries into transnational fiduciary law. The introduction discusses the role of framing problems in fiduciary terms in transnational legal ordering (Section 1.2), the potential, but uneven, formation and institutionalization of fiduciary law transnationally (Section 1.3), the recursive, transnational development and limits of fiduciary law over time (Section 1.4), the conceptual frontiers of transnational fiduciary law (Section 1.5), and the contributions of the book's chapters (Section 1.6). The conclusion (Section 1.7) presents the book's principal findings regarding fiduciary law and its relation to theorizing transnational legal ordering.

1.2 THE FIDUCIARY FRAME IN TRANSNATIONAL LEGAL ORDERING

The development of legal norms by legislatures, courts, and private actors responds to the framing of social and economic problems. The spread and deployment of transnational fiduciary law often entails contests over the framing of such problems. Financial fiduciaries manage trillions of dollars worldwide. Corporate directors cite fiduciary duties to shareholders, which they use as reasons not to invest in more environmentally sustainable ways. At the same time, governments debate whether public and private bodies have fiduciary duties to protect future generations from a rapidly warming planet. Some activists, advocates, lawmakers, and scholars think fiduciary law can meaningfully contribute to resolving a wide range of transnational problems, from public and private corruption to environmental and individual privacy protection. Others do not.

Fiduciary law has emerged as one of many frames for making sense of social problems arising from global markets and transnational governance. Erving Goffman developed the concept of framing to assess how social movement actors diagnose problems, articulate solutions, and motivate others to act collectively for change.[16] Contests over framing help us understand the ways in which different actors and institutions seek to use – or challenge – the fiduciary law framework for ordering behavior in other-regarding ways. Fiduciary law is "semantically permeable," involving openly textured principles, which social actors with diverse ideological commitments may marshal to construct activities as problems and imagine legal solutions to them.[17]

Several factors have increased the salience of the fiduciary frame for legal ordering over the past decades. One is functional – the rise of global markets increased pressure for coordinated business regulation and the convergence of fiduciary norms across jurisdictions. High-profile corporate scandals and governance failures have played important, episodic, and catalytic roles. More quotidian business activities have as well, as fiduciary law offers a way to build trust in transnational market settings when social bonds otherwise may not exist. In parallel, scholars have promoted the ideational development of fiduciary legal theory as a distinct field, illustrated by Tamar Frankel's pathbreaking work in 1983 that helped to catalyze this field, which has grown rapidly over the past decade.[18] Transnational legal education and legal practice have also contributed to the growing global salience of fidiciary

[16] Erving Goffman, Frame Analysis: An Essay in the Organization of Experience (1974); Robert D. Benford & David A. Snow, *Framing Processes and Social Movements: An Overview and Assessment*, 26 Ann. Rev. Soc. 611 (2000).

[17] On framing and semantic permeability in US constitutional law, *see* Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. Pa. L. Rev. 297, 322 (2001).

[18] Until the 1980s, legal scholars had not sought to theorize fiduciary law as a field. Frankel went beyond studying discrete domains of law to define the "basic vocabulary" of fiduciary norms of loyalty and fidelity that cut across these substantive areas. Tamar Frankel, *Fiduciary Law*, 71

law, as students and lawyers study and practice abroad, helping to bring common law fiduciary concepts to civil law jurisdictions.[19] These patterns reflect a longer history of the spread of common law fiduciary duty concepts through colonialism and imperialism. Yet, the contributions and innovations of civil law countries are often underappreciated, as the development and spread of fiduciary norms among East Asian countries in the past decades show.

Conventional histories of fiduciary law focus on developments within national borders – English borders, in particular. The typical story begins with the feoffment to uses, a predecessor to today's donative trust, under which one person (the feoffee) would hold title to property for the benefit of another person (the cestuy que use). Then, as now, the entrustment of property was bound up with taxation, as the feoffment developed as a way to avoid Crown taxation of grants or inheritances. "[F]aithless feoffees" who violated their instructions set the stage for the development of fiduciary law.[20] As a creature of equity, fiduciary law developed within the English Court of Chancery, which began in the fifteenth century to provide remedies when feoffees abused their authority. The modern conception of a fiduciary duty emerged by 1726, when the Court of Chancery, now headed by Lord Chancellor King, held in *Keech v. Sanford* that a trustee should not seek to profit from managing trust property for the benefit of another.[21] As this history highlights, English law has been central to the development of fiduciary law, which owes its global importance in part to the historical reach of capitalism and British imperialism.

The fiduciary concept has, however, historical roots that do not lie within English legal history but instead span multiple legal systems. Scholars have traced examples of fiduciary (or fiduciary-like) concepts not only to fourteenth-century devices for transferring land in England, but also to legal institutions for guardianship and the transferring of property within Roman law, as well as the laws of various religious traditions, including Sharia law, Jewish law, and canon law in medieval Europe.[22] There is, for instance, more than a passing resemblance between the *waqf*, an Islamic legal institution that allowed for the endowment of charitable institutions such as mosques or hospitals, and proto-trusts in England, such as Merton College,

Calif. L. Rev. 795, 829–30 (1983). ("Loyalty, fidelity, faith, and honor form [fiduciary law's] basic vocabulary.")

[19] Bryant Garth & Gregory Shaffer, The Globalization of Legal Education: A Critical Perspective (2022).

[20] Henry Smith, *Why Fiduciary Law Is Equitable*, *in* Gold & Miller, *supra* note 14, at 261, 263 (quoting 1 Austin Wakeman Scott et al., Scott & Ascher on Trusts § 1.5, at 14 (5th ed. 2006)).

[21] (1726) 25 Eng. Rep. 223, 223–24.

[22] David Johnston, *Trusts and Trustlike Devices in Roman Law*, *in* Itinera Fiduciae: Trust and Treuhand in Historical Perspective 45, 51 (Richard Helmholz & Reinhard Zimmermann eds. 1998); *see* Tamar Frankel, Fiduciary Law 79–97 (2010) (discussing historical development of fiduciary law and citing examples from Laws of Hammurabi, Sharia law, Jewish law, Roman law, and Medieval European law).

Oxford, incorporated in 1274, leading some scholars to suggest that Islamic law may have influenced the development of English trust law.[23] On this point, Islamic law may in turn have borrowed from Roman law by way of the Byzantines,[24] but whatever the precise influences may be, history reveals fiduciary institutions without English origins.

That is not to deny, however, the crucial role that English law and English imperialism played in the transnational development of fiduciary law. Too often, the role of power is left out of the story of fiduciary law's development. The development of trust law in India, for example, emerged from the collision of the "practices of European settlers," foremost among them codification efforts of British imperial authorities, with "'trust-like' devices" that predated the imperial period, including the *waqf* of Islamic law as well as Hindu devices for charitable and religious endowments.[25] Judges trained in English law strained to assimilate these devices, with one leading textbook insisting that the Hindu *benami* was "merely a deduction from [a] well-known principle of equity."[26] Similar stories could be told about nineteenth-century legal developments in Hong Kong.[27]

Indeed, fiduciary law did not just spread with colonialism; it was part of the law of colonial rule. As Antony Anghie has argued, colonial regimes such as the League of Nation's Mandate System justified domination through the "concept of trusteeship," which characterized colonial rule as "directed by concern for native interests . . . rather than by the selfish desires of the colonial power."[28] This colonial trusteeship was rooted in a fiduciary conception of government that "stretches back to the early days of European colonialism,"[29] and was also marshaled by apologists for slavery in the American South.[30] The trusteeship idea appears in multiple jurisdictions as a frame for the relationships between Indigenous Peoples and settler states. Kirsty Gover has compared the emergence of the Crown's common law fiduciary duties to Indigenous Peoples in New Zealand and Canada with its lack of emergence in Australia, tracing dynamics around unilateralism and legitimation

[23] *See* Avisheh Avini, *The Origins of the Modern English Trust Revisited*, 70 Tulane L. Rev. 1139 (1996); Monica M. Guiosi, *Comment, The Influence of the Islamic Law of* Waqf *on the Development of the Trust in England: The Case of Merton College*, 136 U. Pa. L. Rev. 1231 (1988).

[24] Avini, *supra* note 23, at 1156.

[25] Stelios Tofaris, *Trust Law Goes East: The Transplantation of Trust Law in India and Beyond*, 36 J. Legal His. 299, 302–03 (2015).

[26] *Id.* at 302–03 (quoting J. D. Mayne, A Treatise on the Hindu Law and Usage 374 (2d ed. 1880)).

[27] S. Po-Yin Chung, *Chinese Tong as British Trust: Institutional Collisions and Legal Disputes in Urban Hong Kong, 1860s–1980s*, 44 Modern Asian Studies 1409 (2010).

[28] Antony Anghie, Imperialism, Sovereignty and the Making of International Law 140 (2007).

[29] Davis, *supra* note 5, at 286.

[30] *Id.* at 282.

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that have clear parallels in US law's Indian trust doctrine, which holds that the US government is a fiduciary for American Indians.[31]

In addition, fiduciary law has been central to international law in terms of the responsibility of states and international organizations in colonial and postcolonial transitions. After World War I, the League of Nations set up the Mandate System for administering former colonial territories.[32] The mandates applied to territories where, in the words of the Versailles Treaty, peoples were considered not to be "able to stand by themselves under the strenuous conditions of the modern world."[33] Article 22 of the Treaty called for tutelage of these peoples to be "entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility."[34] Class A territories were those formally controlled by the Ottoman Empire and included Iraq, Syria, and Palestine. Class B and C territories were former German colonies in Africa and Oceania. After World War II, the mandates were transformed into the Trusteeship System of the United Nations, which created a Trusteeship Council.[35] Today, questions about the fiduciary duties of states also arise within the "law of occupied territories,"[36] and with respect to the responsibilities of United Nations' peacekeeping missions.[37]

Thus, historically, actors have referenced fiduciary principles in a diverse array of contexts. They include agency, corporate law, financial services, and trusts (within private law), environmental protection, cultural heritage preservation, and peacekeeping (within public law), as well as the duties of lawyers (which include both private and public responsibilities). Relationships within families entail fiduciary duties, at least sometimes, and some scholars have argued that friends as well may be fiduciaries.[38]

Many societies "have adopted fiduciary rules or similar initiatives" to regulate relationships of trust and dependence upon another's discretion.[39] In common law countries, some fiduciary relationships are recognized as a matter of convention (or, put more technically, "status"), while others are recognized as a matter of

[31] Kirsty Gover, *The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism*, 38 Sydney L. Rev. 339 (2016); *see* Davis, *supra* note 5, at 286.

[32] *See, e.g.*, Anghie, *supra* note 28, at 115–95 (describing the Mandate System).

[33] Treaty of Peace Between the Allied and Associated Powers and Germany art. 22, June 28, 1919, 2 Bevans 43, 56.

[34] *Id.*

[35] *See* Criddle & Fox-Decent, *supra* note 4, at 57.

[36] Eyal Benvenisti, *Occupation and Territorial Administration*, *in* Routledge Handbook of the Law of Armed Conflict (Rain Liivoja & Timothy McCormack eds., 2016).

[37] Criddle & Fox-Decent, *supra* note 4, at 300–06.

[38] *See* Ethan J. Leib, *Friends as Fiduciaries*, 86 Wash. U. L. Rev. 665 (2009); Elizabeth S. Scott & Robert E. Scott, *Parents As Fiduciaries*, 81 Va. L. Rev. 2401 (1995).

[39] Tamar Frankel, *Transnational Fiduciary Law*, 5 U.C. Irvine J. Int'l Transnat'l & Comp. L. 15 (2020).

case-by-case context (or, more technically, as "a matter of fact").[40] Status-based fiduciary relationships include the well-recognized common law examples of agency and partnership, while fact-based fiduciary relationships include those between banks and their customers in "so-called special circumstances."[41] Thus, the fiduciary idea is quite flexible.

Civil law countries recognize fiduciary relationships or their functional equivalents. Some Anglophone lawyers assume that civil law countries lack fiduciary law. But fiduciary law's roots in Roman law make the existence of fiduciary duties in civil law altogether unsurprising. Functionally speaking, for example, civil law has agents, corporate managers, and investment managers, all of whom are subject to a fiduciary duty of loyalty.[42]

The fiduciary frame suggests that a common problem of trust cuts across these distinct issue areas. In different contexts, people entrust others to act on their behalf. Someone who owns property may entrust it to the care of another on the understanding that they will manage it for a beneficiary and not for their own self-interest. Or a society may entrust someone – a president or a prime minister, for instance – with the authority to act for the public good. In each case, the trustee may betray that trust. The private trustee may misuse the entrusted property to benefit herself. Or a president may trade on the public trust to enhance his power and wealth. Law and economics scholars specify this problem in terms of agency costs. In the moralistic terms of common law decisions, the problem is one of holding a person entrusted with authority over the interests of another to "the punctilio of an honor the most sensitive."[43]

Fiduciary norms of loyalty and care for others respond to these problems. The duty of loyalty requires fiduciaries to pursue their beneficiaries' interests, not their own or some third parties' interests.[44] In the common law of trusts, for example, the duty of loyalty prohibits a trustee from engaging in self-dealing or acting on the basis of a conflict of interest.[45] Civil law countries such as Germany, even though they lack the common law trust, describe the fiduciary's core obligations in terms of loyalty as well.[46] The fiduciary duty of care demands competence, diligence, and

[40] Miller, *supra* note 14, at 367; Seth Davis, *The False Promise of Fiduciary Government*, 89 Notre Dame L. Rev. 1145, 1156–58 (2014).

[41] Andrew Tuch, *Fiduciary Principles in Banking*, *in* Criddle et al., *supra* note 14, at 125, 127–28 ("An 'overwhelming majority' of jurisdictions . . . recognize that banks may be fiduciaries of their borrow-customers when so-called special circumstances or exceptions exist . . . .").

[42] *See, e.g.*, Michele Graziadei, *Virtue and Utility: Fiduciary Law in Civil Law and Common Law Jurisdictions*, *in* Gold & Miller, *supra* note 14, at 287, 294.

[43] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (Cardozo, J.).

[44] *See, e.g.*, Paul B. Miller, A *Theory of Fiduciary Liability*, 56 McGill L.J. 235, 281 (2011) (noting "consensus" that duty of loyalty is a universal fiduciary obligation).

[45] Restatement (Second) of Trusts § 170(1) (1959).

[46] *See, e.g.*, Thilo Kuntz, *Das Recht der Interessenwahrungsverhältnisse und Perspektiven von* Fiduciary Law *in Deutschland*, *in* I Festschrift Für Karsten Schmidt Zum 80. Geburtstag 761 (Katharina Boele-Woelki et al. eds., 2019).

skill.[47] In trust law, for example, it requires a trustee to manage the trust funds "as a prudent investor would."[48]

Fiduciary law's open-ended principles of loyalty and care have adapted as markets, morals, and modes of regulation change. Fiduciary norms are no longer confined to courts of equity in the common law world, if they ever were. As chapters in this volume reveal, public regulatory agencies produce fiduciary norms or their functional equivalents, as do private self-regulatory bodies. UN institutions debate their proper interpretation with business consultants, corporate lawyers, legal academics, and national lawmakers.

As more actors and institutions beyond national courts marshal (and contest) fiduciary norms, some scholars have strived to create a unified theory to describe (and limit) the field. Doctrinal scholars reason from fiduciary relationships that are settled in judge-made law. Law and economics scholars characterize fiduciary duties as facilitating market transactions where transaction costs prevent parties from crafting explicit contractual solutions to agency costs. Moralists zero in on the expressive dimension of fiduciary duties in fostering loyalty and altruism where one person entrusts another who agrees to put their interests first. Debate ranges across questions about what makes a relationship fiduciary; how fiduciary law solutions relate to public regulatory responses, private ordering, and social and moral norms; and the nature and efficacy of enforcement of fiduciary duties.

The elasticity of the fiduciary concept has thus been a source of norm entrepreneurship and controversy. According to one common law jurist, "[t]here are few legal concepts more frequently invoked but less conceptually certain than that of the fiduciary relationship."[49] Things are even more complicated in some civil law countries where the lack of the trust as a legal institution has been compensated by a "trust agreement," combining elements of contract and property law, explicitly establishing a fiduciary relationship.[50]

Much of the recent analytical work in fiduciary legal theory has aimed to develop a more refined understanding of the fiduciary relationship. In her landmark article, Frankel explained that "one party to a fiduciary relation (the *entrustor*) is dependent on the other (the fiduciary) . . . because [the entrustor] must rely on the fiduciary for a particular service."[51] For Frankel, fiduciary law is unified in its concern for the problem of abuse of fiduciary power.[52] Paul Miller has defined fiduciary

[47] *See* Miller, *supra* note 14, at 282–83 (noting debate about whether duty of care in fiduciary law is distinct from the duty of care in tort law and arguing that duty of care in fiduciary law is distinct because, while "the tort duty demands reasonable care, the fiduciary duty typically also requires reasonable diligence and skill").

[48] Restatement (Third) of Trusts § 227 (2007).

[49] Lac Minerals Ltd. v. Int'l Corona Res. Ltd., 2 S.C.R. 574, 643–44 (1989) (La Forest, J.).

[50] *See, e.g.*, Stefan Grundmann, *The Evolution of Trust and Treuhand in the Twentieth Century*, *in* Helmholz & Zimmermann, *supra* note 22, at 469.

[51] Frankel, *supra* note 18, at 800.

[52] *See id.* at 817.

relationships in terms of the powers that a fiduciary enjoys, but without Frankel's focus upon the provision of services: "fiduciary relationships arise upon the fiduciary's undertaking of a mandate under which he receives discretionary legal powers to be exercised for other-regarding purposes."[53] Another approach, developed by Gordon Smith, defines fiduciary relationships in terms of "critical resources."[54] A fiduciary, he contends, is a person who wields discretionary powers to administer, invest, or manage another's "critical resources." Evan Criddle and Evan Fox-Decent, who have developed an influential fiduciary theory of public law, define fiduciary relationships in terms of powers and interests: "the law entrusts one party (the fiduciary) with discretionary power over the legal or practical interests of another party (the beneficiary)."[55] In economic terms, the concern is about agency costs, and scholars working in this vein have theorized fiduciary relationships as a species of underspecified contractual relations and fiduciary duties of loyalty and care as preference-estimating default terms.[56] Each of these conceptions shares a concern with a problem that arises when one person wields authority over the interests of another.

Construed broadly, fiduciary law is a "master frame" for addressing problems of abuse of authority and betrayal of trust.[57] States that shut their borders to refugees, regulatory agencies that kowtow to the fossil fuel industry, a broker-dealer pushing the most profitable securities regardless of costs and alternative potential investments, a corporate director who fails to consider ESG factors in investing, and a close friend who betrays one, all involve fiduciaries under some understandings of the field. Some of these understandings have motivated domestic and transnational legal advocacy, while others may be found only in the law reviews. All of these understandings are contested by some as lying beyond the bounds of the fiduciary frame. These different conceptualizations reflect contestation over the appropriate framing of a social "problem," including whether it should be done in fiduciary terms.

This book examines such contests over the legal framing of problems in transnational context. It does not aim to unify the field of fiduciary law, but rather to explore contests over the application across and within borders. Focusing upon these

[53] Miller, *supra* note 44, at 379.

[54] D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399 (2002).

[55] CRIDDLE & FOX-DECENT, *supra* note 4, at 18.

[56] *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 426 (1993); Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 25 (1991). But *cf.* Robert Cooter & Bradley J. Freedman, *The Fiduciary Relationship: Its Economic Character and Legal Consequences*, 66 N.Y.U. L. REV. 1045 (1991).

[57] On "master frames," *see* Nicholas Pedriana, *From Protective to Equal Treatment: Legal Framing Processes and Transformations of the Women's Movement in the 1960s*, 111 AM. J. OF SOCIOLOGY 1718, 1725 (2006).

transnational dimensions puts the potential breadth of fiduciary norms and the challenge of a unified conceptual understanding in sharp relief.

Scholars have only begun to examine the extent of convergence of fiduciary norms across jurisdictions from a comparative law perspective. Recent conceptual work in fiduciary legal theory has aimed to develop a jurisprudential understanding that would cut across national legal systems. Yet, such conceptual study leaves unaddressed the processes of convergence and divergence in practice – that is, the ways in which interactions among transnational, national, and local actors, both public and private, may lead (or not lead) to the development of what can be viewed as transnational fiduciary law. The "quest for a unified understanding of fiduciary law"[58] requires a framework for understanding what unification entails and how it does – or does not – come about. This book provides such a framework.

1.3 THE TRANSNATIONAL FORMATION AND INSTITUTIONALIZATION OF FIDUCIARY LAW

The theory of transnational legal ordering provides a framework to assess the development of fiduciary law in transnational context. It examines how actors and institutions develop legal norms, such as fiduciary norms, in response to perceived social problems. Drawing upon this theoretical framework, this book explores existing tensions between constructing a broader concept of fiduciary responsibility and differentiating fiduciary norms to address discrete problems in particular places. It analyzes processes of norm construction, institutionalization, and contestation through which particular conceptualizations of fiduciaries and fiduciary law become settled and unsettled in practice transnationally. It thereby informs debates as to whether we are witnessing a potential unification of fiduciary law as a field, including through the development of a meta-norm that may be applied to a wide range of private and public law problems.

As developed by Halliday and Shaffer, TLO theory addresses how legal *ordering* is produced transnationally to address particular conceptions of problems.[59] A TLO is "legal" insofar as it involves norms formalized into recognizable legal texts, whether as hard law or soft law, which ultimately can affect legal practice. These texts may be produced by a legal organization or network that transcends or spans nation-states,

[58] D. Gordon Smith & Andrew S. Gold, *Introduction to the Research Handbook on Fiduciary Law*, *in* Research Handbook on Fiduciary Law 1, 2 (D. Gordon Smith & Andrew S. Gold eds., 2018).

[59] Halliday & Shaffer, *supra* note 15, at 5. For a different, process-oriented conception of transnational law, *see* Harold Hongju Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181, 183–84 (1996). ("Transnational legal process describes the theory and practice of how public and private actors – nation-states, international organizations, multinational enterprises, non-governmental organizations, and private individuals – interact in a variety of public and private, domestic and international fora to make, interpret, enforce, and ultimately, internalize rules of transnational law.")

and the texts directly or indirectly may engage legal institutions within nation-states, whether in the adoption, recognition, or enforcement of the norms.[60] A TLO is "ordered" where it involves shared norms and institutions and some regularity of behavior, communication, and social expectations in response to a social "problem," as the relevant actors understand it.[61] It is "transnational" where the norms transcend and permeate multiple state boundaries.[62]

TLO theory differs from other approaches to transnational legal theorizing in its focus upon the process of norm construction, its emphasis upon recursive processes between norm construction and application, its applicability to both private and public law, and its attention to the relationship between law and other forms of social ordering. The theory asks how "legal norms are constructed, flow, settle, and unsettle across levels of social organization, from the transnational to the local."[63] Normative settlement can result, in practice, "through the use of . . . written rules, standards, model codes, or judicial judgments," whether those instruments involve hard or soft law, or public or private ordering.[64] "Normative settlement" refers to the stabilization of the meaning of terms in the practices of those implementing and applying the law.[65]

The formation and institutionalization of a fiduciary TLO may occur narrowly in response to specific problems within different fields. Consider, for example, trust law. Offshore jurisdictions compete with onshore jurisdictions for trust management business, leading to the development of transnational innovations such as the "international trust."[66] The creation of common markets, such as in Europe, led to the development of the Hague Trust Convention.[67] Even where the fiduciary relationship lies within a single jurisdiction, the development of fiduciary law may involve settlement on legal norms that transcend and permeate multiple state boundaries, such as through transnational judicial dialogue among common law jurisdictions regarding the treatment of private trusts.

[60] Halliday & Shaffer, *supra* note 15, at 12–17.

[61] *Id.* at 11; Gregory Shaffer and Terence Halliday, *With, Within, and Beyond the State: The Promise and Limits of Transnational Legal Ordering*, *in* Oxford Handbook of Transnational Law 987 (Peer Zumbansen ed., 2020).

[62] Halliday & Shaffer, *supra* note 15, at 20.

[63] Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 Ann. Rev. L. & Soc. Sci. 231, 237 (2016).

[64] Halliday & Shaffer, *supra* note 15, at 15.

[65] *Id.* at 43.

[66] Rebecca Lee, *The Evolution of the Modern International Trust: Developments and Challenges*, 103 Iowa L. Rev. 2069 (2018).

[67] Hague Convention on the Law Applicable to Trusts and on Their Recognition, July 1, 1985, 23 I.L.M. 1388; Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition, HCCH, https://www.hcch.net/en/instruments/conventions/status-table/?cid=59 (last accessed June 28, 2019) (listing fourteen contracting parties to convention, and noting that Convention has not entered into force in United States); Adair Dyer, *International Recognition and Adaptation of Trusts: The Influence of the Hague Convention*, 32 Vand. J. Transnat'l L. 989, 994 (1999).

Actors may deploy fiduciary norms to frame legal ordering across fields. For example, activists, advocates, and scholars have sought to frame the problem of global environmental regulation and climate change in terms of the public trust doctrine. This concept of "nature's trust,"[68] which has been called "the law's DNA,"[69] would hold governments to fiduciary duties to conserve the environment for future generations. Fiduciary law thus appears as both a meta-concept in diagnostic struggles over the framing of global problems and an instrument for the solution to these problems.

There are many legal and institutional tools through which actors seek transnational normative settlement in relation to the conceptualization of a problem. Treaties, such as the Hague Trust Convention, which governs the recognition of trusts, exemplify one form of vertical ordering based upon fiduciary norms. Formal domestic law also may be shaped by horizontal processes that affect the enactment and application of relevant norms, such as through transnational judicial and administrative dialogues. Privately made soft law can contribute to the development of transnational fiduciary law as well. It ranges from self-regulation and standard-setting, the development of best business practices, and other forms of private ordering that may be formalized in contracts. Fiduciary legal theorists conventionally have focused upon the role of courts. However, public regulatory bodies, private organizations, and NGOs also contribute to the development of legal ordering that applies fiduciary norms. Social expectations regarding trust too play a crucial role in settling – or unsettling – fiduciary norms, especially when it comes to practice.

TLO theory, with its processual focus, contributes to the assessment of fiduciary law by including the lawmaking activities of state and non-state actors within a broader context. Fiduciary law may develop transnationally through a combination of bottom-up and top-down processes involving not only courts and domestic regulatory agencies and legislatures but also non-state actors, such as international organizations, NGOs, and transnational networks. As Thilo Kuntz explains in this volume (Chapter 2), to understand whether discrete bodies of transnational fiduciary law have formed, one must assess horizontal and vertical interactions among these types of actors and institutions. On the one hand, transnational fiduciary law can emerge through horizontal entanglements among domestic actors and legal institutions, as has occurred in East Asia. Yet, the vertical dimension of transnational legal ordering should be addressed as well. The UNEP's "Fiduciary Duty for the Twenty-first Century" report is one example where bottom-up activism and top-down norm development have contributed to the development of a transnational body of soft law concerning fiduciary duties.

[68] Mary Christina Wood, Nature's Trust: Environmental Law for a New Ecological Age (2014).

[69] Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 Wake Forest J.L. & Pol'y 281 (2014).

Fiduciary norms may form through these mechanisms to govern domestic, transnational, or international relationships of trust. Although *domestic law* addresses fiduciary relationships within the borders of a nation-state, it may diffuse to have transnational effects. Corporate governance norms, for example, could migrate across state borders and come to settle at the level of national and local practice to govern domestic relationships in another jurisdiction. Fiduciary relationships themselves could be *transnational*, as may arise, for instance, with wealth planning and trust management for family members located and holding assets in different jurisdictions. Domestic law can address these transnational relationships and activities both through domestic law's extraterritorial application, and through transnational parties' selection of foreign law as the applicable law in a trust arrangement. Particular domestic laws may become predominantly used in practice, such as New York or UK law, or the law of a tax haven for tax avoidance purposes.[70] In addition, private parties may develop transnational norms to apply to transnational activities and relationships that include fiduciary norms. Finally, fiduciary relationships may exist on the *international* plane as a matter of international law, such as the norms governing UN peacekeepers or the norms of the now-defunct Trusteeship System of the United Nations.

Transnational norm development need not – and often does not – lead to the institutionalization of a full-blown TLO (in its ideal type), although it still may have transnational effects. From the perspective of TLO theory, normative settlement at the transnational level is insufficient. Framing struggles may be won at the transnational and even the national levels without legal norms becoming settled in practice at the local level. TLO theory therefore stresses the importance of assessing whether there is concordant normative settlement at the transnational, national, and local levels. As an ideal type, a fully institutionalized TLO exists only where there is concordance of normative understanding and practice across all three levels.[71] Such institutionalization is challenging in practice, often for good reason given variation in national and local contexts.

This distinction between transnational norms and TLOs suggests that apparent transnational agreement on open-ended fiduciary norms may not correspond with local practice. In this volume (Chapter 9), for example, Jennifer Hill describes the global transmission of corporate governance codes and stewardship codes from the United Kingdom, which, among other things, aimed to empower institutional investors in corporate governance. The adoption of the UK model has not always led to similar corporate governance practices. Singapore's stewardship code is nearly identical to the United Kingdom's; yet it operates locally to strengthen majority

[70] *See generally* Katharina Pistor, The Code of Capital: How the Law Creates Wealth and Inequality (2019).

[71] Terence C. Halliday & Gregory Shaffer, *Researching Transnational Legal Orders*, *in* Halliday & Shaffer, *supra* note 15, at 477–78.

shareholders in state and family-controlled firms, quite the opposite from the United Kingdom's practice. The converse may be true as well. Apparent disagreement on formal doctrine may mask correspondence in practice. As Andrew Tuch has argued, the United Kingdom and the United States differ in their doctrinal approaches to fiduciaries who engage in self-dealing. The United Kingdom's no-conflict rule differs from the United States's fairness rule – at least on paper.[72] While scholars have made much of this distinction, Tuch argues that the two rules operate similarly to require neutral corporate directors to police self-dealing. Thus, doctrinal difference may mask correspondence in practice.

1.4 THE RECURSIVE DEVELOPMENT AND DYNAMIC CONSEQUENCES OF TRANSNATIONAL FIDUCIARY LAW

The transnational formation and institutionalization of fiduciary law is a dynamic process in which local conditions can shape the recursive development and differentiation of transnational legal norms. A number of chapters explore several features of the recursive development of fiduciary law, including the complications that arise from implementing the open-ended concept of fiduciary loyalty, the different relationships between fiduciary norms and the problems they target, and the roles that lawyers, regulatory advisors, and other intermediaries play in the development of transnational fiduciary norms.

The concept of recursivity highlights the cyclical nature of norm development at the transnational, national, and local levels over time.[73] Legal ordering may cycle as law on the books is translated into law in action, with transnational, national, and local actors iteratively developing, implementing, and contesting norm making. These cycles begin with the social construction and understanding of a "problem" to be addressed, but they do not end with adoption of one (or more) legal responses.[74] Transnational legal ordering may expand or recede as actors construct competing conceptions of social "problems" and seek to develop, import, and export norms across jurisdictional boundaries. Recursive cycles of lawmaking and implementation may strengthen the concordance and legitimacy of a TLO, or lead to its erosion. In a contest among rival conceptions of problems and their legal resolution, a particular TLO could win out or different TLOs could exist side by side, interacting in various ways, including to address sub-issues of a larger social problem.[75]

[72] Andrew F. Tuch, *Reassessing Self-Dealing: Between No Conflict and Fairness*, 88 FORDHAM L. REV. 939 (2019).

[73] Halliday & Shaffer, *supra* note 15, at 37–42.

[74] Terence C. Halliday & Bruce G. Carruthers, *The Recursivity of Law: Global Norm Making and National Lawmaking in the Globalization of Corporate Insolvency Regimes*, 112 AM. J. SOC. 1135, 1146–52 (2007).

[75] Halliday & Shaffer, *supra* note 15, at 46–51.

The global development of trust law reveals recursive cycles of transnational legal ordering. Recursivity theory posits four mechanisms that drive recursive processes: diagnostic struggles over the nature of the problem; actor mismatch between those adopting and enacting norms at the transnational, national, and local levels and those applying them; contradictions within legal texts; and the indeterminacy of legal texts.[76] Masayuki Tamaruya has charted a recursive dynamic in his study of the "the global evolution of the fiduciary norm," which traces the trust as an institution transmitted throughout East Asia through two routes.[77] The first route ran through the British Empire and London's one-time dominance of capital markets. The second began in the United States, particularly after the United States became a creditor nation in the early twentieth century. Along these routes, Tamaruya charts a recursive process through which the trust as an institution "was introduced and developed in Japan and East Asia."[78] For example, Tamaruya describes the codification of substantive trust law in Japan from 1918 to 1922, during which drafters in the Ministry of Justice made choices in interpreting indeterminate common law jurisprudence, modified proposed trust provisions drawn from United States and Indian law in an attempt to fit them with Japanese private law, and defined the term "trust" differently than both models in order to limit the ability of trust companies to compete with existing banks. The subsequent development of Japanese trust law also reveals the importance of geopolitical conflict and power in the transnational development of trust law. Following the end of World War II, American lawyers drafted new constitutional law, corporate law, and securities law for Japan, as well as an act "converting trust companies into banking institutions."[79] Ultimately, Tamaruya argues, the trust law and practices of common law jurisdictions, including England and the United States, and that of Japan, Taiwan, and Korea have come to interact and evolve together.[80]

The recursive development of fiduciary law is subject to local variation in moral norms and social expectations. Fiduciary law explicitly incorporates moral, open-ended, and indeterminate norms of loyalty.[81] These features of fiduciary law blur the lines between positive law and social norms. The fiduciary duty of loyalty interacts with norms, such as expectations about trust, that vary across cultures. The extent to which adoption of a fiduciary frame will lead to normative concordance at the transnational, national, and local levels depends in part on these variations. As Tamaruya explains (Chapter 8), Japanese business managers' status-

[76] Halliday & Carruthers, *supra* note 74, at 1135; Halliday & Shaffer, *supra* note 15, at 37–42.
[77] Masayuki Tamaruya, *Japanese Law and the Global Diffusion of Trust and Fiduciary Law*, 103 Iowa L. Rev. 2229, 2230 (2018).
[78] *Id.*
[79] *Id.* at 2240–41.
[80] *See id.* at 2260.
[81] *See, e.g.*, Meinhard v. Salmon, 164 N.E. 545, 546 (1928). For an overview of fiduciary law and morality, *see* James Penner, *Fiduciary Law and Moral Norms*, *in* Criddle et al., *supra* note 14.

based expectations of loyalty, which reflect norms of deference to family elders, have persisted even as modern fiduciary law reforms have incorporated Anglo-American common law notions of loyalty to shareholders.

Differences in national legal infrastructure and market practices further complicate the operation of fiduciary law as a TLO. Understanding of fiduciary norms (which shapes what practitioners advise and do), for example, can vary as a function of whether and how the norms are enforced, by whom, and in light of varying market structures. Within common law jurisdictions, for example, fiduciary duties of loyalty and care are part of a complex structure of remedies (such as disgorgement) that have developed over centuries. Arguably, remedies help define the duties they enforce, at least from a legal realist perspective regarding law's relation to behavior.[82] The interdependence of rights and remedies complicates the effectiveness of horizontally transmitted fiduciary duties across national boundaries without the accompanying remedies. So too does variation in market practices. Tamaruya shows (Chapter 8) that Japanese styles of corporate management mediate the incorporation within Japanese law of Western-inspired fiduciary norms.

Chapters in this book identify several types of relationships between fiduciary TLOs and other legal orders that apply to a problem. Fiduciary norms may be closely aligned with a problem that they are to solve, or only tangential to the problem. They may address only a particular issue within the problem, or their coverage may extend well beyond the problem. A fiduciary TLO could, in theory, dominate the governance of an issue, providing the primary if not exclusive legal solution to a problem, or it could compete with alternative legal approaches that aim to address the same problem under a different frame. Assessing issue alignment with a problem, and the relative role of fiduciary norms compared to other legal norms, sheds light on the relationship of different normative orders and governance mechanisms. These relationships affect the recursive development and success of a fiduciary TLO over time.

Sometimes a fiduciary TLO corresponds closely with an issue and it dominates – or purports to dominate – the regulatory environment. The League of Nation's Mandate System, which aimed to regulate Western colonialism and the decolonization of so-called dependent peoples, provides one example.[83] The shareholder primacy model of corporate governance provides another.[84] Yet, both examples suggest that transnational legal ordering and its legitimacy may be continually resisted.

[82] Davis, *supra* note 40, at 1201.

[83] Anghie, *supra* note 28, at ch. 3.

[84] *See, e.g.*, Lynn A. Stout, *On the Rise of Shareholder Primacy, Signs of Its Fall, and the Return of Managerialism (In the Closet)*, 36 Seattle U. L. Rev. 1169, 1178 (2013) ("shareholder primacy values were internalized as the dominant norms of a rising generation of business leaders, investors, academics, journalists, and lawmakers").

In many cases, fiduciary law plays a supplementary role, filling a gap left open by a dominant regulatory approach, or it covers only a subset of the issue alongside other law and governance tools. Many of the chapters in this book explore the gap-filling function of fiduciary law. In so doing, they contribute to the ongoing debate about whether and to what extent fiduciary norms are characteristically supplementary to other legal ordering. Jens-Hinrich Binder's concept of "functional fiduciary law" (Chapter 4) shows how a fiduciary TLO may emerge because of indeterminacy and contradictions within legal orders. Binder points to the development of fiduciary norms in the regulatory treatment of financial intermediaries in Europe, as developed by the International Organization of Securities Commissioners and other transnational bodies such as the European Parliament. This functional fiduciary law aims to resolve tensions between private law and public regulation by imposing cross-cutting fiduciary duties on financial intermediaries.

Finally, the aspiration to develop a fiduciary TLO can be essentially contestatory. Actors and institutions present transnational fiduciary norms as part of a critique of, and effort to destabilize and displace, existing legal orders. For example, Seth Davis (Chapter 6) describes the work of activists, academics, and NGOs to require national governments to take greater action to combat climate change by developing the public trust doctrine as a transnational fiduciary legal norm. They deploy this doctrine to catalyze judicial action to hold governments accountable as fiduciaries of the environment for future generations.

Whether the transnational legal ordering of fiduciary norms becomes institutionalized in light of such contests depends upon structural factors such as governance capacities, perceptions of legitimacy, and the practices and attitudes of intermediaries implementing the relevant norms. As Hill describes (Chapter 9), the structure of governance at the national and local level shapes the content and consequences of transnational legal ordering. She contrasts corporate governance and stewardship codes in the United Kingdom and Australia, which are administered by government-backed regulators, with those in the United States, which were developed by US-based asset owners and managers. Unsurprisingly, the United Kingdom's and Australia's codes impose more robust social obligations than the United States' governance principles, which reflect the greater dominance of the shareholder primacy model in the United States. Japan's adoption of a UK-style stewardship code, which further softened the code's commitment to shareholder activism, again reflects the importance of local norms and perceptions of legitimacy, affecting what, and if so how, a TLO may develop over time.

Legal intermediaries – lawyers, as well as internal and external compliance advisors and the like – also significantly shape transnational legal ordering. They can do so in ways that distort a norm's purported purpose. Take, for example, the application of fiduciary duty norms to the transnational legal ordering of wealth. Within this global system, fiduciary law is not straightforwardly other-regarding. To the contrary, fiduciary obligation may conflict, at a minimum, with social

obligation, with devices like the private trust being used to shield assets and shift risks onto others.[85] Chapters in this volume, including Rebecca Lee's chapter on the evolution of the modern international trust (Chapter 7), highlight the role of legal intermediaries within systems of global capital where fiduciary law can play a central role in the creation and distribution of wealth. As Katharina Pistor has pointed out, the legal "coding of capital" "is much less static than often assumed"; there is, for instance, more than "one way to set up a trust," having very different distributive outcomes.[86] The movement of global capital creates common problems that actors and institutions may address through a fiduciary law frame, with intermediaries playing a crucial role in the settling and unsettling of fiduciary norms over time.

1.5 THE FRONTIERS OF TRANSNATIONAL FIDUCIARY LAW

Fiduciary law's commitment to mandatory regard for others, combined with the indeterminacy of the other-regarding obligations it imposes, opens the field to a variety of ideological commitments. On the one hand, fiduciary law is part of systems of financial regulation that undergird global capitalism. On the other hand, fiduciary law might be seen as a counter to the unconstrained pursuit of self-interest. In recent years, activists, advocates, and scholars have pushed the boundaries of the field to apply the fiduciary frame to relationships between states and their citizens, international organizations and those subject to their authority, and transnational digital businesses and their customers.

Recent work in fiduciary theory has pushed beyond the boundaries of private law to treat public officials and international civil servants, together with the states and organizations they represent, as fiduciaries. Public fiduciary theory holds that public officials are fiduciaries for those subject to their authority. This theory invites scholars to think about the abuse of public authority within the same frame as abuse of private authority. Historical examples of public fiduciary law include the law of European colonialism and its treatment of Indigenous Peoples.[87] Fiduciary law has since been part of public international law in terms of the responsibility of states and international organizations in postcolonial and other transitions. These bodies of law engage transnational legal processes. They involve large numbers of people and considerable territory around the globe, are designed to maintain order through law aimed at local administrative practice, and are transnational in their scope.

[85] *See, e.g.*, Seth Davis, *Owners and Fiduciaries* 33–34 (working paper).

[86] Pistor, *supra* note 70, at 159.

[87] *See, e.g.*, Ralph Wilde, *Trusteeship Council*, *in* The Oxford Handbook on the United Nations 149 (Sam Davis & Thomas G. Weiss eds., 2007). Compare the duties of occupying forces under the law of war, which conceived of the occupant as a "trustee," but found in practice that it was not possible "to expect the occupant to perform the function of the impartial trustee." Eyal Benvenisti, The International Law of Occupation 4, 6 (2004).

The revival of public fiduciary theory has raised the question whether fiduciary law provides the controlling meta-normative framework for public law. At its most ambitious, public fiduciary theory holds that public authority is fiduciary authority through and through. As a conceptual matter, scholars argue, public law is fiduciary law.[88] This conceptual claim, however, neglects the question of normative settlement of public fiduciary norms: To what extent do legal actors take for granted that government actors and institutions are fiduciaries with duties of loyalty and care to the public? TLO theory provides a framework for exploring this question, which chapters in this volume (Chapters 11 and 12) address.

In recent years, evidence has mounted that digital businesses may abuse – and have abused – individuals' trust. Jack Balkin and Jonathan Zittrain have developed the concept of an "information fiduciary" to address this problem,[89] arguing that digital companies such as Facebook, Google, and Twitter are fiduciaries because they collect and sell individuals' personal data, a resource that analysts value more than oil.[90] This conception shares with public fiduciary theory a concern with unconstrained power and dominance. It looks to fiduciary law for other-regarding obligations of loyalty and care to constrain powerful actors to protect user privacy.

The information fiduciary concept has elicited criticism from both the political left and right. Some critics worry that fiduciary norms do not go far enough to address the market power that digital titans such as Facebook possess. They see the information fiduciary concept as a competitor to other forms of regulation, such as antitrust, that would provide more throughgoing regulatory changes to the ways digital business operate.[91] Critics also charge the information fiduciary conception with incoherence: Facebook (now "Meta"), they point out, already owes fiduciary duties to shareholders, and those duties are inconsistent with purported fiduciary duties to users.[92]

TLO theory sheds light upon this ongoing debate by providing a framework to explore the processes through which different conceptions of a problem and ensuing legal responses to it become settled and unsettled transnationally in practice. There

[88] *See, e.g.*, Evan J. Criddle et al., *Introduction – Fiduciary Government: Provenance, Promise, and Pitfalls*, *in* Fiduciary Government 1, 5 (Evan J. Criddle et al. eds., 2018). ("Public officials, like private fiduciaries, are said to be subject to legal norms designed to prevent, deter, or punish corruption and to ensure that legal powers are exercised properly and carefully for the purposes for which they were conferred.")

[89] *See* Balkin, *supra* note 3; Zittrain, *supra* note 3.

[90] On data as the new oil, *see* Kiran Bhageshur, *Data Is the New Oil – And That's a Good Thing*, Forbes, Nov. 15, 2019. Seven of the eight most valuable listed firms in 2019 profit critically from data: Microsoft, Apple, Amazon, Alphabet (parent of Google), Facebook, Alibaba, and Tencent (parent of WeChat). The eighth is Berkshire Hathaway, a holding company whose largest holding was Apple.

[91] *See* David E. Pozen & Lina M. Khan, *A Skeptical View of Information Fiduciaries*, 133 Harv. L. Rev. 497 (2019).

[92] *See id.* at 508–10. *But see* Andrew F. Tuch, *A General Defense of Information Fiduciaries*, 98 Wash. U. L. Rev. 1897 (2021).

is recursive interaction between conceptualizations of problems, norm formation, and practice in terms of the usefulness of conceptualizations and legal norms to address particular situations. This dynamic is emerging in the competition between Europe's General Data Protection Regulation and US privacy law. Whether one approach (such as Europe's) will gradually win out, or advocates' invocation of fiduciary law can play an intermediary role in reconciling these legal approaches, remains highly contested. By examining the frontiers of fiduciary law, this volume opens new questions about diagnostic struggles that are central to this growing and vibrant field of legal theory and doctrinal and empirical study.

1.6 OVERVIEW OF THE CHAPTERS

In the opening chapter to Part I, "Transnational Fiduciary Law: Spaces and Elements," Thilo Kuntz explores the challenge of theorizing a meta-concept of fiduciary law at the transnational level. The problem that fiduciary law seeks to solve, he contends, cuts across common law and civil law traditions, whether it be the English trust or the contract-based *Treuhandverhältnisse* in German law. Thus, from a functional perspective of comparative law, there is a common "point of entry for transnational fiduciary law." The more difficult question, Kuntz argues, is whether a transnational body of fiduciary law is emerging as a result of domestic legal responses to that common problem of trust or through transnational processes. He contends that the transnational element is critical, but that it varies across discrete issue areas.

In Kuntz's account, transnational fiduciary law can emerge from horizontal entanglement among national legal systems, as well as vertical transmission through a transnational body of soft law. As to the horizontal dimension, he charts the cross-border transmission of fiduciary norms among Japan, South Korea, Taiwan, and China. Methodologically, to trace the development of fiduciary law through these transnational ties requires an historical orientation to legal processes that conventional comparative law tends to lack. Theoretically, this analysis challenges a sharp distinction between the national and transnational, and conceptions of fiduciary law norms and practices.

As to vertical conveyance mechanisms, Kuntz examines international efforts to integrate environmental, social, and governance (ESG) goals into corporate decision-making, thereby instilling fiduciary law norms and practices. The UNEP's "Fiduciary Duty for the Twenty-first Century" report, the 2011 UN Guiding Principles on Business and Human Rights, and the G20/OECD 2015 principles on corporate governance constitute a transnational body of soft law that "has to be reckoned with" at the national and local levels. These international soft law developments also illustrate transnational fiduciary law at work. But such law, Kuntz argues, does not constitute a unified meta-concept of fiduciary law. To the contrary, Kuntz finds that diverse TLOs involving fiduciary norms are emerging in response

to the conceptualization of discrete "problems" from the horizontal entanglement of national lawmakers, on the one hand, and the vertical interactions among transnational, national, and local actors, on the other. For Kuntz, there is no unified field.

Andrew Tuch's chapter, "A Narrow View of Transnational Fiduciary Law," distinguishes the formation of transnational fiduciary norms from the formation of a TLO. Tuch argues that transnational fiduciary norms have emerged from conflict-of-laws principles and extraterritorial application of fiduciary law, which has led to the predominant application of the fiduciary law of certain states to transnational activity. Similarly, focusing upon financial firms, Tuch also views the development of transnational private ordering and soft law as competing with the traditional domestic fiduciary norms of states. However, because of ongoing differences among state fiduciary law as applied by courts, he questions whether there are distinctively fiduciary TLOs in the sense that relatively common fiduciary norms have settled across national jurisdictions.

Fiduciary law may be transnational in practice to the extent that the hard law of particular states generally applies to the conduct of transnational fiduciaries. This transnational character may arise from the application of conflict-of-laws principles or the extraterritorial effect of domestic fiduciary law, leading to the application (for example) of the law of New York or the United Kingdom. Fiduciary law scholars, Tuch argues, have not given these processes sufficient attention. More difficult, he argues, is identifying whether there are TLOs that are distinctively fiduciary in terms of transnational normative settlement across national jurisdictions. Part of the difficulty lies in the analytically important distinction that Tuch draws between fiduciary norms and non-fiduciary norms that happen to apply to fiduciaries. But the chief difficulty, Tuch argues, lies in the tendency of fiduciary law scholars to equate law with domestic hard law – the pronouncements of courts or legislatures, for instance. Tuch is sympathetic to this picture of fiduciary law and questions whether transnational processes, at least at present, can properly be understood to lead to the development of transnational fiduciary law. TLO theory, by contrast, assesses socio-legal processes of norm formation and implementation, and is thus open to soft law as potentially constituting legal ordering through its implications for not only national law enforcement, but also legal practice. Tuch canvasses several examples of private ordering and standard-setting, such as firm-level conflict of interest management, and questions whether they are settled enough to constitute a TLO and, in any event, whether they constitute distinctively fiduciary norms. Thus, if one limits (fiduciary) law to formal law made and enforced by national lawmakers, the focus of study naturally turns toward choice-of-law and extraterritorial application of domestic law. But if one is open to a conception of law that includes soft law and legal practice, the potential for the development of fiduciary TLOs becomes a more open question.

Together, Kuntz and Tuch pose two questions about the normative settlement of fiduciary law. First, what makes a norm "fiduciary"? Second, what is the relationship between hard law and soft law in fiduciary lawmaking and practice? TLO theory explores these questions in terms of the normative understandings of relevant actors and institutions that affect practice. The first question is one of framing – that is, how do particular social problems become conceived in terms of "fiduciary" relationships? The second question concerns the production of normative order and the regularization of behavior. From the perspective of TLO theory, soft law potentially constitutes legal order through contributing to normative settlement in the application of legal norms in practice.

Jens-Hinrich Binder's and Moritz Renner's chapters address these questions of framing and soft law in the formation and institutionalization of a TLO. They focus upon the ways in which transnational legal ordering, including through private agreements and custom, can give rise to settled norms that hold financial firms to other-regarding duties characteristic of conventional fiduciary law. In this way, a TLO can be developed through private lawmaking and practice.

In "Transnational Fiduciary Law in Financial Intermediation," Binder argues that "functional fiduciary law" has emerged as a regional TLO to govern the obligations of financial intermediaries across Europe. Financial intermediaries provide financial services that range from holding assets on behalf of clients, transacting on their behalf, and providing investment and loan advice. Their relationships with their customers involve aspects common to all fiduciary relationships, including trust, dependency, and vulnerability. In recent years, multiple legal systems have converged in the regulatory treatment of financial intermediaries, such that fiduciary duties are an "increasingly ... accepted" component. Although the convergence across regulatory regimes is not matched by a convergence in formal private fiduciary law at the state level, Binder contends that a TLO is emerging within Europe to resolve tensions among diverse regulatory and private laws. Binder focuses upon standard-setting by the International Organization of Securities Commissioners (IOSCO) and regulatory requirements developed by European lawmakers. The IOSCO principles, first published in the 1990s, reflected a convergence across legal systems around certain norms to order financial intermediaries' provision of services. These principles, in turn, influenced lawmaking in the European Union in 1993 (at that time named the European Economic Community), 2004, and 2014 through the Financial Instruments Directives.

To describe this emerging TLO, Binder develops the concept of "functional fiduciary law" as a body of law that has fiduciary roots and characteristics, but is developed by public regulators, not by courts, as per conventional fiduciary law theory. This body of law responds to a common challenge of reconciling public regulation with private fiduciary law, which cuts across European jurisdictions. Binder thus challenges simple narratives about doctrinal convergence as the unifying force of fiduciary law. Rather, he hypothesizes that TLOs with fiduciary norms

can form in response to divergence in private hard law regimes across national jurisdictions.

Renner invites us to see transnational fiduciary law as extending beyond hard law altogether. In "Transnational Fiduciary Law in Bond Markets," Renner argues that a fiduciary TLO may form from customary practices that lead to settled expectations of trust within industries. In particular, he shows how these practices have given rise to a TLO for bond markets. Renner focuses on "net short debt investing," a strategy where bondholders take a net short position in credit default swaps to profit from a bond issuer's eventual default. Net short debt investing gives rise to multiple relationships involving potential vulnerability: that between bondholders and issuers, that among bondholders, and that between the bondholder and the swap counterparty. Although these three types of relationships may be treated differently in common law and civil law jurisdictions, it is unlikely that fiduciary duties would apply to any of them under current private law. Even so, fiduciary law has the potential to support social and business norms, affecting the reasonable expectations of participants in bond markets, thus shaping legal practice.

Renner shows that global bond markets can be understood as operating within a TLO that has emerged from private ordering, and in particular from the practice of using standardized documentation developed by the Securities Industry and Financial and Markets Association (SIFMA) and the International Capital Market Association. Bond issuers typically rely upon these standardized provisions, which leave the contracting parties free to create a fiduciary relationship by agreement, even though they do not necessarily mention fiduciary duties. Bond market participants generally expect each other to follow norms that are necessary for market functioning, even though the norms are not specified in hard law. Market participants' expectations about bondholders' conduct can, Renner argues, be understood in fiduciary terms. Thus, Renner invites us to see transnational fiduciary law as extending beyond formal law to customary practices that create expectations for conduct involving relationships of trust and vulnerability to self-serving behavior.

Seth Davis's chapter on "The Public Trust as Transnational Law" considers the formation and institutionalization of public fiduciary law transnationally. He focuses on the degree of transnational normative settlement around a paradigmatic example of public fiduciary law: the public trust doctrine. In the face of threats from climate change, lawyers have turned to the public trust doctrine. The doctrine holds that the state is a trustee with duties to manage and preserve natural resources on behalf of the public. Davis's chapter explores the degree of normative settlement around the public trust concept, asking whether the public trust doctrine has emerged as a meta-TLO – that is, whether the public trust provides an encompassing framework for thinking about the duties of state actors in the areas of environmental and natural resource law. As Jothie Rajah has argued, a TLO may "frame[] and contextualize[] all efforts to manage and regulate law, legitimacy, and conceptions of legality in the

sphere of the transnational."[93] Drawing upon the public trust doctrine as a kind of meta-TLO, lawyers and activists have pressed for regulatory action to address environmental challenges like climate change at the local, national, and transnational levels.

Examining the horizontal and vertical dimensions of transnational legal ordering, Davis shows that the broader concept that the state is a trustee of natural resources has converged across state boundaries. But what Tuch contends regarding private fiduciary law is true of public fiduciary law too: We should not confuse a transnational norm with a TLO. Convergence on the public trust ideal has not realized the ambitious aims of scholars, activists, and lawyers to create a meta-TLO for environmental law in practice. Davis contrasts the World Heritage Convention, regarding the designation and protection of world heritage sites, where a discrete TLO arguably has formed. For environmental law more generally, however, he highlights the importance of national and local infrastructure in order for public trust principles to become institutionalized, affecting practice.

Part II's chapters explore questions of legal infrastructure as well as historical, political, and social factors affecting the development of transnational fiduciary law over time. Comparative law scholars working within particular fields of fiduciary law have developed important insights regarding similarities and distinctions in the fiduciary law of different nation-states. There is, for instance, a wealth of studies of comparative corporate law. But much of this work takes a static perspective that tells us little about interactions across jurisdictions linked to changes in fiduciary law over time. The chapters in Part II take a dynamic perspective on transnational processes of legal norm development and application. These chapters highlight the importance of local practices and intermediaries in transnational legal ordering processes, leading to the settlement and unsettlement of legal norms in both private and public fiduciary law and practice.

Rebecca Lee's chapter, "Transnational Legal Ordering of Modern Trust Law," examines the rise of global wealth and the role of competition among legal intermediaries in the development of trust law transnationally. Wealthy entrepreneurs look across the globe for trust planners to provide them with ways to secure their family fortunes. In response, these intermediaries have pushed the boundaries of the fiduciary theorist's conception of trusteeship. Offshore jurisdictions have, for example, adopted settlor-friendly approaches that give the wealthy entrepreneur a great deal of flexibility in structuring the trust. Competition for trust services has resulted in onshore jurisdictions adopting some of these innovations. The story she tells is one in which onshore jurisdictions, such as England and Hong Kong, are playing catch-up to developments in the Cayman Islands. As Lee shows, trust planners' modifications of the trust device in competition for global wealth and

[93] Jothie Rajah, *"Rule of Law" as Transnational Legal Order*, *in* Halliday & Shaffer, *supra* note 15, at 340, 343.

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the creation of new conceptions of trust challenge common conceptual and normative assumptions concerning what a trust is, how it works, and how it should work, shaping the legal ordering of trusts transnationally.

In "Japanese, East Asian, and Transnational Fiduciary Orders," Masayuki Tamaruya offers a detailed historical account of the dynamic processes of transnational legal ordering of fiduciary norms in Japan. Japanese fiduciary law, he argues, has come to reflect corporate governance norms from Western legal traditions. But the process of transnational legal ordering has been recursive, involving the interaction of norm making and practice. Japanese styles of corporate management and the Japanese concept of the corporation as a community of employees cannot be understood simply by applying the shareholder-primacy model of US corporate law. Rather, they must be understood in relation to long-standing status-based conceptions of loyalty to family elders and to authority within Japan. Modern legislation has not incorporated these status-based conceptions. Nevertheless, these conceptions have persisted as norms that order behavior, including the relationship between corporate managers and employees.

Tamaruya charts the contests over the development of fiduciary norms at the level of local practice. Norm entrepreneurs have sought to incorporate Western fiduciary norms within hard law. But these efforts remain in tension with Japanese conceptions of loyalty. Over time, soft law, optional regulation, and market practices have mediated this process of norm incorporation and resistance. Japan's ultimate movement toward "the American duty of loyalty" has been a complex process involving the interaction of transnational, national, and local legal norm development and practice. Tamaruya's study raises important questions for fiduciary legal theory, including the complications that arise when the concept of fiduciary loyalty is implemented in a particular field in a particular locale. These complications include not only ones of legal infrastructure (such as how will the fiduciary norms be enforced), but also of economic systems and normative environments.

Jennifer Hill offers a similarly nuanced assessment of the development of transnational fiduciary law in the area of corporate governance. In "Transnational Migration of Laws and Norms in Corporate Governance: Fiduciary Duties and Corporate Codes," Hill considers whether fiduciary duties of corporate directors have converged across jurisdictions. In particular, she assesses whether the relatively recent adoption of national corporate governance codes may lead to transnational norm convergence. She concludes that there is less convergence in fiduciary duties across jurisdictions, including across common law jurisdictions, than is typically supposed under the well-known "law matters" hypothesis in institutional economics. This hypothesis holds that superior investor protection rules lead to dispersed capital market structures. Its proponents argue that the common law provides a superior suite of investor protections as compared to the civil law, including through judicial review of corporate directors' actions by independent judges. The OECD and the World Bank, among other international institutions, have taken up the "law

matters" hypothesis in designing model corporate governance codes and placing conditions on financial assistance, potentially shaping corporate governance law around the world. Yet, Hill argues, the hypothesis supposes a degree of similarity in fiduciary law across common law jurisdictions that simply does not exist. For example, Australia, the United Kingdom, and the United States (especially Delaware) differ in how they define which duties are fiduciary, whether and under what circumstances those duties are waivable, and whether and under what circumstances corporate directors enjoy a safe harbor from liability. They further differ in terms of whether private or public enforcement is the primary mechanism for enforcing fiduciary duties. These differences, Hill argues, reflect path dependence and the importance of historical, political, and social factors, including resistance of regulated firms, corporate scandals, and financial crises.

Hill compares traditional common law norms with the more recent development of private norms through corporate governance codes and shareholder stewardship codes that can shape the behavior of fiduciaries. These relatively recent developments could lead to greater international convergence in corporate governance in practice. However, here too Hill stresses the ways in which local norms can produce divergence. First developed in the United Kingdom, corporate governance codes have been transmitted transnationally through vertical and horizontal interactions, ones in which transnational organizations have played an important role. In particular, the OECD's 1999 *Principles of Corporate Governance*, which relied upon national codes such as the United Kingdom's, accelerated a trend of horizontal transmission, resulting in a recursive dynamic of transnational ordering that "became increasingly visible" during the global financial crisis from 2007 to 2009. Yet, again, we should not overstate the degree of convergence. Local variation in capital markets can produce some surprises, as in the case of Singapore, whose stewardship code, despite being nearly formally identical to the United Kingdom's, operates to *strengthen* majority shareholders in state and family-controlled firms, even though the United Kingdom's code has the aim of strengthening institutional investors.

Thus, like Tamaruya's study, Hill's chapter finds that notwithstanding horizontal and vertical transmission of fiduciary concepts and related regulatory norms, concordant normative settlement may not result at the local level in practice. Not only does it matter who writes the rules, but who administers them matters too. As Tamaruya underscores, the normative environment within which the rules are written and administered complicates analysis of convergence across jurisdictions, as form diverges from practice. While in some cases there may be greater convergence in practice than in form in light of transnational activity and transnational ties, in other cases there may be greater convergence in form than in practice in light of local conditions. In each case, the idea of a unitary transnational field of fiduciary law is called into question.

Seth Davis's "Empire and the Political Economy of Fiduciary Law" also explores the development of fiduciary law over time. His chapter addresses the origins of

modern international law: the colonial encounter between the Spanish and Indigenous Peoples in the Americas. Spanish theologians and jurists, especially Francisco de Vitoria, developed the concept of a colonial guardianship to respond to the transnational problem that colonialism posed. In embryonic form, this was the "sacred trust of civilization" that the League of Nations placed with so-called advanced nations, a development that might plausibly be described as fiduciary law's first TLO. While legal scholars have typically described this legal order by reference to an idea about sovereignty – the "sacred trust" – Davis shows that fiduciary law played broader ideological and institutional roles in various European empires and the US empire. It included institutions and practices that are characteristic of private fiduciary relations and encompassed not only what we would now classify as public international law, but also private international law, national law, and private legal ordering. Exploring the development of this TLO, Davis explores how it was bound up with a project of giving the modern nation-state a monopoly over sovereignty. While Vitoria used the idea of "trust" to deny the sovereignty of non-Christian, non-European peoples, thinkers like Edmund Burke employed it to deny the sovereignty of companies, such as the East India Company, that in practice were the actual implementers of Europe's imperial expansion. What we would now think of as practices of "private" fiduciary law – including the use of fiduciary relationships as investment vehicles and the expectation that fiduciaries will give an accounting – were crucial to imperial administration. As Davis describes, peoples in Africa, Asia, North America, and Oceania contested trust in the Empire's law, and this contestation should be understood as recursively forming part of the TLO itself. Davis's chapter thus illustrates the role of resistance in TLO theory, identifying ways in which people (or peoples) may shape the very transnational legal ordering that aims to control them. In the process, Davis highlights how fiduciary law can be enmeshed in oppressive histories of transnational legal ordering, even while purporting to create legal constraints on the "guardians."

The chapters in Part III address questions at the frontiers of transnational fiduciary theory today, including the responsibilities of international standard-setting organizations and transnational corporations. These chapters explore the jurisprudential conceptualization of particular social activity in fiduciary terms beyond fiduciary law's traditional application. In both cases, they include private lawmaking as law from a fiduciary perspective, finding that it is transnational, if not global, in its scope.

Evan Fox-Decent's chapter, "Transnational Law's Legality," bridges TLO theory and jurisprudential analysis, revealing how a synthesis of socio-legal and conceptual inquiries should inform both approaches. This synthesis builds upon Fox-Decent's fiduciary theory of public law, including international human rights law, which holds that public authorities occupy an other-regarding office that entails fiduciary duties of loyalty and care. In his account, fiduciary law is a meta-concept that explains what makes TLOs distinctively *legal* even when they are voluntary and

not developed by state actors, such as courts. Thus, Fox-Decent takes issue with claims that the *lex mercatoria*, or transnational law more broadly, is not really law.

In Fox-Decent's study, the International Organization for Standardization (ISO) exemplifies transnational legal ordering. The ISO is a private standard-setting body that develops transnational standards for various products and technologies, from fasteners to agricultural irrigation. No state or international organization has formally delegated lawmaking or law enforcement authority to the ISO. Rather, the organization develops *voluntary* standards in consultation with a wide array of actors, both private and public. These standards may be recognized by international organizations such as the WTO, national administrative bodies and national courts, private conformity assessment bodies (such as United Laboratories), and in private contracts. They thus constitute ordering that shapes market behavior.

Still, the private character of the ISO and the voluntary nature of compliance with its rulemaking presents a conundrum: What, if anything, makes the ISO's standards part of a *legal* order? From a jurisprudential perspective, Fox-Decent argues, it is the ISO's fiduciary mandate to exercise its authority in an other-regarding manner that makes its standards *law*. The ISO's standards can constitute a TLO in a socio-legal sense insofar as private actors believe they are legitimate and conform to them in practice, including through, but not limited to, contracts. From a jurisprudential perspective, Fox-Decent maintains, the ISO has legal authority insofar as it possesses and exercises fiduciary authority – that is, so long as it exercises its discretionary rulemaking powers impartially as among all affected parties. In this sense, the ISO, though a private actor, occupies a public office representing everyone subject to its standards. Recognition of the ISO's norms by states or international organizations reflects the legal character of its public rulemaking. Such orders are legal, in Fox-Decent's jurisprudential terms, when they emerge from representational processes that impartially address matters of common concern for those subject to them. Fox-Decent contends that fiduciary law as a meta-concept supports TLO theory's socio-legal assessment that formally nonbinding, private transnational orders can constitute a TLO.

Shelly Kreiczer-Levy's "The Fiduciary Role of Access Platforms" similarly combines jurisprudential and socio-legal analyses to explore the consequences of framing a social problem in fiduciary terms. In particular, she emphasizes the role that fiduciary norms can play in filling gaps in hard law instruments with respect to the regulation of transnational digital companies. Activists and scholars, particularly within the United States, contend that companies that collect individual data should hold duties as "information fiduciaries." Kreiczer-Levy explores the boundaries of the fiduciary concept by examining companies such as Airbnb, Turo, Eatwith, and Uber, peer-to-peer platforms that connect customers and businesses. She argues that the concept of an information fiduciary cannot address the transnational legal challenges that these platforms represent.

Rather, access platforms are "market-constituting fiduciaries," a concept that Kreiczer-Levy has developed to theorize the operation and normative obligations of transnational actors such as Uber. As Kreiczer-Levy explains, these companies create a transnational regulatory challenge, one that cannot be addressed by a single city's or nation-state's regulatory regime. From a socio-legal perspective, Kreiczer-Levy argues that there is an emerging TLO for regulation of these market-constituting fiduciaries, one that combines self-regulation by the companies themselves with state and local regulation. From a jurisprudential perspective, she maintains, the concept of a market-constituting fiduciary is capacious enough to give content to a TLO transcending state boundaries. Like Fox-Decent, Kreiczer-Levy seeks to bridge socio-legal and normative analysis in exploring the nature of the authority of private actors that pose and respond to a transnational regulatory problem.

1.7 CONCLUDING REMARKS

This book's case studies support five main findings regarding the transnational legal ordering of fiduciary law. First, transnational legal ordering can give rise to distinct TLOs in particular fields that incorporate fiduciary norms. Most conceptual theorizing and formal study of fiduciary law has focused on fiduciary law within national private law systems. From both conceptual and socio-legal perspectives, scholarship should place fiduciary law within a broader, dynamic transnational context.

Second, fiduciary law is relatively unique in that it includes both a broader meta-concept of fiduciary loyalty in combination with this norm's application in discrete subject areas of law, involving distinct actors, institutions, and bodies of law. The general conceptualization of fiduciary norms implicates its contextualized applications, raising the question whether the contextualized applications should not also shape the broader conceptualization. The interaction of the meta-concept of fiduciary loyalty with the conceptualization of discrete fiduciary problems applies in both private and public law, as transnational legal ordering theory makes salient.

Third, the TLO theoretical framework is processual, examining the recursive interactions between norm making and practice over time across different levels of social organization in response to different conceptions of problems. The development of a TLO and the drawing of its boundaries is often highly contested. This book shows how fiduciary law norms may emerge both to contest and complement other legal norms, as reflected in the development of new fiduciary concepts, such as "information fiduciaries," and the role of fiduciary norms as gap-fillers. The relationship between positive law, on the one hand, and soft law, custom, and other social norms, on the other, is critical for understanding the implications of transnational legal ordering. This book's studies highlight the interaction and tensions between traditional private law governing fiduciaries and new public regulation and

private rulemaking, implicating the boundaries between them and their impacts on practice.

Fourth, the socio-legal study of fiduciary law sharpens conceptual debates about fiduciary law as a "unified field." By assessing the horizontal and vertical dimensions of transnational legal ordering and the recursive development of legal orders transnationally, the book addresses the limits of scholars' quests for a unified understanding of fiduciary law. The book moves beyond conceptual analysis and conventional comparative law by incorporating studies of legal practice over time in transnational context within and across discrete domains. Different TLOs may arise in response to particular problems, but they vary considerably in scope and practice.

Fifth, the transnational study of fiduciary law has implications for theorizing transnational legal ordering in two ways. On the one hand, fiduciary law illustrates how transnational legal ordering can develop through horizontal processes involving the entanglement of distinct national legal orders, without the existence of any international or transnational institution. National legal orders encounter similar legal problems. National courts observe, learn from, and at times cite developments in other national systems in developing national law. National law can thus settle and unsettle in common ways through such entanglements, as legislatures and courts incorporate each other's legal enactments, interpretations, and applications in addressing common problems.

On the other hand, fiduciary law has distinctive qualities in that it involves both a meta-norm and discrete applications. It thus highlights how actors may use meta-fiduciary norms in discrete domains in particular locations. In addition, because fiduciary law is open-ended and incorporates moral norms, it illustrates how formal law interacts with moral and social norms, affecting law's normative understanding and settlement in practice. Fiduciary law's explicit reliance upon open-ended, explicitly moral norms provides a particularly interesting case study of the recursive development of, and variations within, transnational legal ordering for TLO theory more broadly.

Fiduciary law is developing dynamically through application to ever-new problems and contexts. We hope that this book opens the door for further study, critique, theorizing, and effective use of fiduciary norms. Whether it be global or local markets, national or local governments, or international or transnational governance, the problems of trust and other-regarding duties will continue. So too will the relative roles of public and private norm making and practice applying fiduciary norms to address them.

PART I

The Transnational Formation and Institutionalization of Fiduciary Law

2

Transnational Fiduciary Law

Spaces and Elements

Thilo Kuntz

2.1 INTRODUCTION

In recent years, fiduciary law has moved toward the center of scholarly attention in the common law world.[1] In spite of its "elusive" nature,[2] enough instances of fiduciary relationships occur across a wide variety of legal areas that many – with good cause – describe it as a distinctive field.[3] Courts as well as scholars in common law jurisdictions deal concepts and ideas concerning fiduciary law back and forth.[4] Although civil law countries have no tradition of the trust as a legal institution,[5] courts and scholars alike term relationships based on some kind of personal or professional trust "fiduciary."[6] German law subjects guardians,[7] trustees in

[1] The increasing number of volumes on fiduciary law bears testimony to this. *See* PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW (Andrew S. Gold & Paul B. Miller eds., 2014); RESEARCH HANDBOOK ON FIDUCIARY LAW (D. Gordon Smith & Andrew S. Gold eds., 2018); THE OXFORD HANDBOOK OF FIDUCIARY LAW (Evan J. Criddle et al. eds., 2019).

[2] Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 79 DUKE L.J. 879, 879 (1988).

[3] *See* Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795 (1983); *see also* Gold & Miller, *supra* note 1, at 1. ("Whether it is viewed from the perspective of relationships, rights and duties, or wrongs and remedies, fiduciary law is a distinctive body of law.")

[4] *See* Section 2.4.2 (providing examples).

[5] *See, e.g.*, Richard Helmholz & Reinhard Zimmermann, *Views of Trust and* Treuhand: *An Introduction*, *in* ITINERA FIDUCIAE: TRUST AND TREUHAND IN HISTORICAL PERSPECTIVE 27 (Richard Helmholz & Reinhard Zimmermann eds., 1998).

[6] *See* Thilo Kuntz, *Das Recht der Interessenwahrungsverhältnisse und Perspektiven von* Fiduciary Law *in Deutschland*, *in* I FESTSCHRIFT FÜR KARSTEN SCHMIDT ZUM 80. GEBURTSTAG 761 (Katharina Boele-Woelki et al. eds., 2019).

[7] *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice], Mar. 30, 1955, 17 ENTSCHEIDUNGEN DES BUNDESGERICHTSHOFS IN ZIVILSACHEN [BGHZ] 108 (116); KONRAD RUSCH, GEWINNHAFTUNG BEI VERLETZUNG VON TREUEPFLICHTEN 191 (2003); Walter Zimmermann, *in* SOERGEL, 20 KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH § 1833 margin no. 1, 3 (13th ed. 2000).

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bankruptcy,[8] attorneys,[9] and others to a specific set of fiduciary duties, the most important of which is a duty of loyalty.[10] France has introduced "*la fiducie*," a substitute for the common law trust.[11] Indeed, civil law countries have long combined property and contract law in order to fashion substitutes for the common law trust. Contract-based *Treuhandverhältnisse* – that is, relationships of trust – have been a staple part of the German legal discourse for several decades, if not centuries.[12] And in recent years, the trust as a legal institution is gaining ground in civil law jurisdictions, following national recognition of the Hague Trust Convention by countries such as Italy and the Netherlands.[13]

[8] 214 BGHZ 220 (margin no. 12); Udo Becker, Insolvenzverwalterhaftung bei Unternehmensfortführung 40 (2017).

[9] *See, e.g.*, Oberlandesgericht [OLG] [Court of Appeal] Brandenburg, Mar. 5, 2012, Neue Juristische Wochenschrift – Rechtsprechungsreport [NJW-RR] 1191 (1193). The legal basis for fiduciary duties of a German attorney (*Rechtsanwalt*) is to be found in section 43a of the Federal Lawyer's Act (*Bundesrechtsanwaltsordnung*):

> The basic duties of a Rechtsanwalt: (1) A Rechtsanwalt may not enter into any ties that pose a threat to his/her professional independence. (2) A Rechtsanwalt has a duty to observe professional secrecy. This duty relates to everything that has become known to the Rechtsanwalt in professional practice. This does not apply to facts that are obvious or which do not need to be kept secret from the point of view of their significance. (3) A Rechtsanwalt must not behave with lack of objectivity in professional practice. Conduct which lacks objectivity is particularly understood as conduct which involves the conscious dissemination of untruths or making denigrating statements when other parties involved or the course of the proceedings have given no cause for such statements. (4) A Rechtsanwalt may not represent conflicting interests. (5) A Rechtsanwalt must exercise the requisite care in handling any assets entrusted to him/her. Monies belonging to third parties must be immediately forwarded to the entitled recipient or paid into a fiduciary account. (6) A Rechtsanwalt has a duty to engage in continuing professional development.

Translated in http://www.brak.de/w/files/02_fuer_anwaelte/brao_engl_090615.pdf (last accessed June 12, 2023).

[10] *See* Kuntz, *supra* note 6, at 762 et seq.

[11] Loi 2007-211 du 19 février 2007 instituant la fiducie [Law 2007-211 of Feb. 19, 2007 on Instituting the Trust], Journal officiel de la République française [J.O.] [Official Gazette of France] Feb. 21, 2007, 3052. On open questions concerning concept and doctrine, *e.g.*, Yaëll Emerich, *Les fondements conceptuels de la fiducie française face au trust de la* common law: *entre droit des contrats et droit des biens*, 61 Revue Internationale de Droit Comparé 49 (2009) (comparing the French *fiducie* with the common law trust); *see also* the short overview in Martin Gelter & Geneviève Helleringer, *Fiduciary Principles in European Civil Law Systems*, *in* Criddle et al., *supra* note 1, at 583, 594.

[12] *See* Stefan Grundmann, *The Evolution of Trust and* Treuhand *in the Twentieth Century*, *in* Helmholz & Zimmermann, *supra* note 5, at 469.

[13] Hague Conf. on Priv. Int'l L. [HCCH], *Convention on the Law Applicable to Trusts and on Their Recognition* (July 1, 1985), https://www.hcch.net/en/instruments/conventions/full-text/?cid=59 (last accessed June 12, 2023); for a list of signatories and the status of ratification: https://www.hcch.net/en/instruments/conventions/status-table/?cid=59 (last accessed June 12, 2023). *See also* Commercial Trusts in European Private Law: The Interest and Scope of the Enquiry (Michele Graziadei et al. eds., 2005); Re-imagining the Trust: Trusts in Civil Law (Lionel Smith ed., 2012).

Some scholars even argue for progressing toward a hybrid system of fiduciary law, built on unified principles applicable both in common law and civil law jurisdictions.[14] There is some precedent for this hybrid approach. For instance, East Asian countries with a strong civil law background such as Japan have adopted (and adapted) the trust as a legal institution.[15] Mixed legal systems in the United States (Louisiana) and Canada (Quebec) have done the same.[16] Nor is this hybridity limited to domestic law. International institutions such as the Organization for Economic Co-operation and Development (OECD), the United Nations Environment Programme (UNEP) Finance Initiative[17] (e.g., the OECD Principles of Corporate Governance,[18] and the UN report on "Fiduciary Duty for the Twenty-first Century"[19]) are shaping fiduciary norms across national borders, even though these initiatives do not have the force of law themselves – at least when viewed from traditional Hartian or Kelsenian accounts of law.

In short, even a cursory review shows ample evidence of the importance of fiduciary-related norms not only in common law and civil law jurisdictions, but also beyond the nation-state. Additionally, many norms are created through national or quasi-national legislation on a supranational level as, for example, in the European Union, while others are developed by nongovernmental actors.

In other areas of the law with regulations and rules spreading beyond the nation-state, scholars have been trying to spell out a concept of transnational law, determined to map the reality of "something being there" that does not quite fit the bill of either national law or international law.[20] In the well-known words of Philip Jessup:

> [T]he term "international" is misleading since it suggests that one is concerned only with the relations of one nation (or state) to other nations (or states). . . . Part of the difficulty in analyzing the problem of the world community and the law regulating them is the lack of an appropriate word or term for the rules we are discussing. Just as the word "international" is inadequate to describe the problem, so the term "international law" will not do. . . . I shall use, instead of "international law," the

[14] Tamar Frankel, *Toward Universal Fiduciary Principles*, 39 Queen's L.J. 391 (2014).

[15] *See* Section 2.3.1.2 for more on this.

[16] On Louisiana, *see* Michael McAuley, *Truth and Reconciliation: Notions of Property in Louisiana's Civil and Trust Codes*, *in* Smith, *supra* note 13, at 119. On Quebec, *see* John B. Claxton, Studies on the Quebec Law of Trust (2005).

[17] *Background*, United Nations Env't Programme Finance Initiative, https://www.unepfi.org/about/background/ (last accessed June 12, 2023).

[18] Org. for Economic Co-operation and Development [OECD], G20/OECD Principles of Corporate Governance (2015), https://www.oecd.org/corporate/principles-corporate-governance.htm (last accessed June 12, 2023).

[19] *Fiduciary Duty in the Twenty-first Century*, https://www.fiduciaryduty21.org/ (last accessed June 12, 2023).

[20] *See, e.g.*, Gralf-Peter Calliess & Peer Zumbansen, Rough Consensus and Running Code: A Theory of Transnational Private Law (2010); Roger Cotterrell, *What Is Transnational Law?*, 37 L. & Soc. Inquiry 500, 500 (2012); Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 Ann. Rev. L. & Soc. Sci. 231, 232 (2016).

> term "transnational law" to include all law which regulates actions or events that transcend national frontiers. Both public and private international law are included, as are other rules which do not wholly fit into such standard categories.[21]

Given the phenomena described, the rather obvious question driving this chapter is subsequently: Is there such a thing as transnational fiduciary law? Answering this question and mapping a research agenda proves to be a thorny issue, however, because the object of analysis is difficult to grasp. It is not only fiduciary law that is "elusive,"[22] but also transnational law and transnational legal theory. More than one scholar attempting to capture the concept of transnational law ends up with playing a fugue in a minor key: "Transnational law remains an imprecise notion."[23] Anyone slogging through the heap of literature on transnational legal theory ends up in "a jungle without a map."[24] Given that "[t]here is no unicity of its sources and no systemic form of justification" and that "it does not conform to a general or universal model,"[25] it is no wonder that definitions of transnational law have multiplied over the years.[26]

Moreover, some lawyers, especially those with a common law background, may question if the project is not seriously limited from the start. If the trust is a creature born and bred in the common law, how can a transnational fiduciary law framework encompass both civil law and common law countries? This is a question traditionally allocated to the comparativist's breadbasket. But again, the scholar seeking to stand on the shoulders of others is in danger of a misstep. Comparative law and transnational law have a lot in common. Not even the latest edition of the Oxford Handbook of Comparative Law,[27] arguably one of the most sophisticated and far-reaching volumes on the subject, contains a distinct section on the relationship of comparative law and transnational law, let alone one on comparative fiduciary law.[28] Methodologically, this makes thinking about transnational fiduciary law a daunting task. It cuts across transnational law, fiduciary law, and comparative law with only one certainty: Even fundamental issues are unclear, elusive, and hotly debated. At least at first glance, the endeavor of finding a vantage point puts the

[21] Philip C. Jessup, Transnational Law (1956).
[22] *See* DeMott, *supra* note 2.
[23] Cotterrell, *supra* note 20, at 522.
[24] Shaffer, *supra* note 20, at 232.
[25] H. Patrick Glenn, *A Transnational Concept of Law*, *in* The Oxford Handbook of Legal Studies 839, 860 (Mark Tushnet & Peter Cane eds., 2005).
[26] Excellent overviews are provided by Cotterell, *supra* note 20; Shaffer, *supra* note 20; Lars Viellechner, Transnationalisierung des Rechts 159 (2013). *See also* Glenn, *supra* note 25, at 849.
[27] The Oxford Handbook of Comparative Law (Mathias Reimann & Reinhard Zimmermann eds., 2d ed. 2019).
[28] On this blind spot of comparative law, *see* Mathias Reimann, *Beyond National Systems: A Comparative Law for the International Age*, 75 Tul. L. Rev. 1103, 1108 (2001).

author in a legal cockleshell without oars in the middle of the Atlantic, drifting along on an ocean of literature.

Grappling with all these issues, this chapter aims to make a threefold contribution: First and foremost, it lays a foundation stone for transnational fiduciary law as a field, existing at the intersection of transnational law and fiduciary law and including both common law and civil law traditions. It shows that from a functional comparative perspective it is possible to bridge the common law/civil law divide in fiduciary law. Germany, to give but one example, solves many problems located in fiduciary law and equity in the common law through contract. Second, methodologically, this chapter connects transnational law and comparative law inquiries, arguing that inquiries into transnational legal ordering (TLO) require a comparative, functional approach to legal problems and institutions. This problem-focused approach complements TLO theory's focus upon the construction of legal orders in response to social problems. Third, and relatedly, this chapter expands both transnational law and fiduciary law by establishing new perspectives on how law develops transnationally and how fiduciary law in particular has developed in both common law and civil law jurisdictions. It explores how transnational law may evolve out of national norms through horizontal entanglement of national legal orders. Moreover, it demonstrates how the diffusion and implementation of nonnational norms engender transnational legal orders through vertical integration. The argument proceeds as follows.

Section 2.2 deals with a significant preliminary. According to many a common lawyer's intuition, the divide between common law and civil law with respect to equity and the trust as a legal institution gives cause to question the project as a whole. From a functional perspective, however, the different legal traditions do not present a significant obstacle. Both civil law and common law countries have to deal with the phenomenon of one person enjoying some sort of discretionary power over the interests or position of another. Comparatively speaking, this establishes a common *tertium comparationis* and therefore a point of entry for transnational fiduciary law.

Anyone talking about transnational law needs to take a stand and clearly set out their premises, otherwise they run the risk of becoming incoherent. Accordingly, Section 2.3 takes a deeper look into the methodological toolbox and scrutinizes the horizontal and vertical ordering of fiduciary law. On the horizontal level, transnational fiduciary law may come into existence as a consequence of entangled national legal orders. The starting point is a blind spot left by conventional transnational legal theory. Concentrating on "norms beyond the nation-state," most scholars neglect that national laws themselves might be a suitable basis for the emergence of a transnational legal order. Drawing on the theory of *histoire croisée* and connected histories, this chapter argues that transnational law may come into existence through the entanglement of national laws. Spreading out from Japan, the trust has been diffused over South Korea, Taiwan, and China – all countries with a

strong civil law background. Close historical ties and traditions shared among the "East Asian four" have established connections between the legal systems and a strong sense of awareness as to how the respective others develop their national laws – allowing legal reforms in one country to echo changes in the laws of the others. Going far beyond standard comparative fare, these coevolutions make it impossible to understand national norms without taking into account this background of entangled laws.

Vertical ordering of fiduciary law occurs whenever norms "beyond the state" become implemented in multiple national systems. A good example is the standards and principles concerning environmental, social, and governance (ESG) issues. These standards and principles, generated by the United Nations, the OECD, and other nonstate actors, contain a rich body of norms on fiduciary law, aiming at integrating stakeholder interests into the fiduciary duties of corporate boards and investment managers. They address policy makers and legislators all over the world and purport to provide benchmarks for the creation of legal norms on the national level.[29] Given their intended scope of application and transformation into laws within multiple nation-states, such frameworks potentially provide the basis for transnational legal orders and, in the present context, for transnational fiduciary law. The question remains, however, as to whether and how these norms turn from nonbinding standards and principles into law, at least from a socio-legal perspective. Pundits close to the Delaware approach in corporate law and traditional US investment managers' fiduciary law are quick to deny the legal relevance of ESG standards. Both the *loi PACTE*, a recent piece of French legislation, and EU ESG reporting standards prove them wrong, however. Nation-states with stakeholder-oriented governance systems provide doors that allow so-called soft law to enter and settle down as hard fiduciary law.

However, merely looking at the spaces of legal ordering is not enough. Transnational legal orders "articulate … a set of norms for legal subjects over a given territory."[30] Consequently, a transnational legal order is not only defined by its regional extension or geographic scope, but also by its normative elements or what may be called its intension. In other words, talking about "orders" implies being able to define an order's legal scope.[31] This can only be done by identifying the relevant norms at play in a specific area of legal ordering spanning a certain geographic space. Therefore, Section 2.4 engages with different elements in the transnational ordering of fiduciary law. Viewing fiduciary law(s) through the lens of transnational

[29] *See, e.g.*, OECD, *supra* note 18, at 9. ("On the basis of the *Principles*, it is the role of government, semi-government or private sector initiatives to assess the quality of the corporate governance framework and develop more detailed mandatory or voluntary provisions that can take into account country-specific economic, legal, and cultural differences.")

[30] Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders, in* Transnational Legal Orders 3, 28 (Terence C. Halliday & Gregory Shaffer eds., 2015).

[31] *Id.*

legal theory helps to shed some light on its confines, even within the common law world. Fiduciary law is defined by specific elements, specific traditions, and the extent to which it binds actors in a particular type of social relationship. Two examples serve as illustrations, the first relating to the duty of loyalty and the second to the duty of care: Whereas the duty of loyalty serves as the distinctive marker of fiduciary relationships in the common law, set apart from contract and contract law principles, it cannot do comparable work in civil law countries. Many of contract law's shortcomings in the common law do not exist in a civil law regime. Therefore, the duty of loyalty is not distinctive in the way it is in England, the United States of America, and other regions of the globe resting on equity traditions. Loyalty is distinctive, however, in that it separates fiduciary relationships from other agreements by implementing an obligation unknown to "regular" contracts. Again, the trust in East Asia illustrates how this plays out as a socio-legal matter. As the example of the duty of care shows, different orders of fiduciary law evolve even in the common law world. Whereas, for example, the United States recognizes the duty of care as a fiduciary obligation, English and Australian courts explicitly deny this possibility. Courts communicating across the borders of England and Australia have built an entangled regime of national fiduciary law, producing a transnational version of fiduciary law to a certain extent set apart from other nations of the common law.

Section 2.5 concludes by summarizing the chapter's findings concerning transnational legal ordering of fiduciary norms.

2.2 THEORIZING TRANSNATIONAL FIDUCIARY LAW AND THE CIVIL LAW/COMMON LAW DIVIDE

Anyone theorizing about transnational fiduciary law must grapple with a challenge absent from the conventional legal material that transnational legal theory addresses. A strong line in transnational legal theory relates to transnational legal orders established by contract. For Western nation-states, freedom of contract is a core principle of their respective private laws; thus, talking about contract law and contractual models does not encounter significant obstacles with respect to methodology. Fiduciary law, with its strong roots in equity traditions not known in civil law jurisdictions, is different. As shown in Section 2.2.1, comparative law and the functional method it relies on provide tools for overcoming differences in doctrine and legal traditions.[32] What remains to be elucidated, however, is the relationship between transnational law and comparative law. It will be argued in Section 2.2.2

[32] At least according to the still-prevailing view in the literature on comparative law. This chapter is not the place for a discussion on this, but rather must build on what the majority of scholars in comparative law still uses as the methodological standard. For a (critical) review, *see* Ralf Michaels, *The Functional Method of Comparative Law*, *in* Reimann & Zimmermann, *supra* note 27, at 345.

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that transnational law necessarily involves comparability. After these methodological preliminaries, Section 2.2.3 deploys the tools. Given that the comparative literature is sparse and gives a bird's-eye view of civil law regimes,[33] and, alas, is not always very precise, it seems useful to discuss a specific example in greater detail in order to show the mechanisms at work. Regarding Germany's position as one of the major and most traditional civil law orders, it seems especially suitable as the basis for a case study.

2.2.1 *The Challenge of Theorizing Transnational Fiduciary Law*

Many of those thinking about transnational legal theory take their cue from commercial practice and the web of social norms fostered and stabilized by standardized contractual arrangements. The staple examples looming large in the literature emanate from what many coin "law merchant" or *lex mercatoria*.[34] Examples abound, such as the Uniform Customs and Practices for Documentary Credits and the INCOTERMS (both issued by the International Chamber of Commerce in Paris),[35] the International Swaps and Derivatives Association's master agreements for derivatives,[36] Internet Regulation by ICANN,[37] and standards set by the International Organization for Standardization (ISO).[38] An important factor driving the success story of transnational private legal ordering is freedom of contract. At least in Western capitalist democracies, market participants enjoy considerable leeway to shape their relations with others and act under obligations they choose to undertake. Discrepancies in detail notwithstanding, most common law and civil law countries share a baseline.[39] As a consequence, there is no need to build a bridge between the legal systems in order to have a starting point for research.

[33] *See* Gelter & Helleringer, *supra* note 11; Michele Graziadei, *Virtue and Utility: Fiduciary Law in Civil Law and Common Law Jurisdictions*, *in* Gold & Miller, *supra* note 1, at 287.

[34] Be it real or imagined, *see* Gralf-Peter Calliess, *Transnationales Verbrauchervertragsrecht*, 68 RabelsZ 244, 254 (2004); Calliess & Zumbansen, *supra* note 20, at 28; Gunther Teubner, *"Global Bukowina": Legal Pluralism in the World Society*, *in* Global Law without a State 3, 8 et seq. (Gunther Teubner ed., 1997), on the one hand; and Halliday & Shaffer, *supra* note 30, at 15 (with note 8), on the other.

[35] *See*, *e.g.*, Gregory Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 Conn. L. Rev. 147 (2009).

[36] International Swaps and Derivatives Association, Inc., www2.isda.org (last accessed June 12, 2023). *See*, *e.g.*, Johan Horst, *Lex Financiaria. Das transnationale Finanzmarktrecht der International Swaps and Derivatives Association (ISDA)*, 53 Archiv des Völkerrechts 461 (2015).

[37] *See* Lars Viellechner, *Governing through Transnational Arrangements: The Case of Internet Domain Allocation*, *in* Society, Regulation and Governance: New Modes of Shaping Social Change? 106 (Regine Paul et al. eds., 2017).

[38] *See*, *e.g.*, Tim Büthe & Walter Mattli, The New Global Rulers: The Privatization of Regulation in the Word Economy 162 (2011).

[39] "Most," considering that some members of each family may deviate. China, to give one example, is a civil law country. Freedom of contract in a Western sense, however, seems not to be the all-foundational principle of its legal order, judged from the outside.

Fiduciary law is different. Common law lawyers may question the endeavor of transnational fiduciary law from the start because of their own fiduciary law's specific background and history.[40] It evolved on a general level out of equity and equitable remedies and is tightly bound to the trust as a legal institution.[41] Civil law systems, by contrast, traditionally lack both equity[42] and the trust institution,[43] though a number of civil law countries recognize the trust as a matter of private international law (e.g., Italy, Netherlands) or have adopted the trust (e.g., Japan).[44] How can there be "real" transnational fiduciary law if the latter group lacks equity and traditionally does not know the trust as a core institution? Furthermore, fiduciary duties, especially the duty of loyalty, have a strong anchor in national law and parties may not, at least according to conventional wisdom, contract out of it.[45] Establishing a framework constituting fiduciary standards beyond the nation-state is thus apparently much more challenging in jurisdictions putting fiduciary relationships in the vicinity of contract law. After all, the Hague Trust Convention has not met with much approval in the civil law world.[46]

On the other hand, however, no one can deny the successful diffusion of the trust in East Asia. Starting out in Japan, the trust as a legal institution spread via South Korea and Taiwan to China.[47] Regardless of their legal family background, the respective trust laws include a duty of loyalty or at least duties requiring a trustee's loyal behavior.[48] There are attorneys, corporate directors, trustees in bankruptcy,

[40] *But see* Frankel, *supra* note 14.

[41] On the importance of both equity and the trust for common fiduciary law: Joshua Getzler, *Fiduciary Principles in English Common Law*, *in* Criddle et al., *supra* note 1, at 471. That is not to say that today trust is the only foundation of fiduciary law. The second pillar, especially in the United States, is agency law. On agency law as a source of fiduciary law: Deborah DeMott, *The Fiduciary Character of Agency and the Interpretation of Instructions*, *in* Smith & Gold, *supra* note 1, at 321; Deborah DeMott, *Fiduciary Principles in Agency Law*, *in* Criddle et al., *supra* note 1, at 23.

[42] Gelter & Helleringer, *supra* note 11, at 585.

[43] *See* Bundesgericht [BGer] [Federal Supreme Court] Jan. 29, 1970, 96 Entscheidungen des Schweizerischen Bundesgerichts [BGE] II 79, 88, for Switzerland.

[44] On the trust in East Asia, *see* Section 2.3.1.2.

[45] DeMott, *supra* note 2, at 885–86; Scott FitzGibbon, *Fiduciary Relationships Are Not Contracts*, 82 Marq. L. Rev. 303 (1999); Tamar Frankel, Fiduciary Law 229–35 (2011). For an opposing view, *e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J. L. & Econ. 425 (1993); with certain reservations John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 671 (1995); *see also* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 Vand. L. Rev. 1399, 1492 (2002).

[46] *See* Hague Conf. on Priv. Int'l L. [HCCH], *Status Table 30: Convention of 1 July 1985 on the Law Applicable to Trusts and on Their Recognition*, https://www.hcch.net/en/instruments/conventions/status-table/?cid=59 (last accessed June 12, 2023).

[47] Masayuki Tamaruya, *Japanese Law and the Global Diffusion of Trust and Fiduciary Law*, 103 Iowa L. Rev. 2229 (2018).

[48] *See* Section 2.4.3.

guardians, and a plethora of other persons working in positions and exercising functions similar to their fiduciary counterparts in Australia, England, and the United States of America.[49] German courts and scholars, to give one example from one of the most "civilistic" of the civil law countries, employ the rhetoric of fiduciary law, even though, for lack of an established model such as the trust in common law jurisdictions, it is impossible to go forward by analogy to an archetype serving as a guidepost.[50] In many instances, what is called "fiduciary duty" and "fiduciary law" in the United States is mirrored by *Treuepflicht* in Germany.[51] The fact remains, however, that many of the relationships deemed "fiduciary" in Germany and other civil law countries are governed by contract or quasi-contractual mechanisms. At first glance, this contrasts starkly with the majority opinion in common law fiduciary law scholarship according to which fiduciary law is *not* contract.[52] Before pondering whether comparative law's functional approach may help to resolve this predicament (Section 2.2.3), an intermediate step has to be taken. Resorting to comparative law in the context of transnational law requires exploring the relationship between these two.

2.2.2 *Transnational Law and Comparative Law*

The relationship between transnational law or transnational legal theory and comparative law and its methodology has mostly evaded scholarly attention so far. Although many scholars of transnational law heavily invest in exercises in comparative law, the methodological premises are rarely made explicit. Two books on transnational legal theory which have been (justifiably) widely perceived as important contributions to the field[53] do not put their finger on the issue. The rare book chapter here and there pointing to comparative law as a necessary tool for transnational law[54] sketches an idiosyncratic definition of the latter that stands square to conventional theory. Others tackle the rapport between transnational law and comparative law from the direction of the latter and either declare comparative

[49] *See, e.g.*, Smith, *supra* note 45, at 1450–83 (listing types of relationships courts have concluded are fiduciary in nature).

[50] *See* Rusch, *supra* note 7, at 193 et seq.

[51] *See* the examples *supra* at notes 7–10.

[52] *See, e.g.*, DeMott, *supra* note 2, at 887–88; FitzGibbon, *supra* note 45; Smith, *supra* note 45, at 1492.

[53] *See* Calliess & Zumbansen, *supra* note 20; Halliday & Shaffer, *supra* note 30.

[54] Mathias Lehmann, *A Plea for a Transnational Approach to Arbitrability in Arbitral Practice*, 42 Colum. J. Transnat'l L. 753, 753–54, 763 (2004) (defining transnational law as "general principles of law that are recognized by a significant number of national laws" and demanding "converge[nce] on the same solution to a particular problem"). For a discussion in the same vein that relies on Lehmann's definitions, *see* Reza Dibadj, *Panglossian Transnationalism*, 44 Stan. J. Int'l L. 253, 289–97 (2008).

law to be transnational law[55] or want to enrich comparative law by integrating insights from transnational legal theory.[56]

The necessary starting point for thinking through the relationship between transnational law and comparative law is a definition of transnational law accepted by the majority of authors working in the field. According to many pundits, it transcends national law, but is not international law – or at least not limited to it.[57] Additionally, there has to be some connection of the transnational norm to national law or national lawmaking.[58] If transnational legal orders unfold through "the adoption, recognition, or enforcement of the norms" by legal institutions within multiple nation-states,[59] tracing these various instances of norm-acceptance must employ the conceptual apparatus of comparative law. As not all legal orders are alike, not even within one legal family, the means by which the process of norms being "uploaded" from or "downloaded" into national legal orders[60] are unique to the environment originating or receiving them. Different conceptions of public and private law, diverging boundaries of contract and tort[61] – these and other rifts in the legal landscape inevitably lead to a broad variety of instruments and strategies for placing transnational norms within a given national legal order. Locating the transnational norm in question thus presupposes an exercise in comparative law and searching for functional equivalence of legal institutions.[62] Institutions are comparable if they serve similar purposes (*function*) in the systems compared.[63] A function, at least according to a popular definition in the comparatist's methodological quiver, is the

[55] Russel A. Miller & Peer C. Zumbansen, *Introduction – Comparative Law as Transnational Law*, *in* Comparative Law as Transnational Law: A Decade of the German Law Journal 3 (Russel A. Miller & Peer C. Zumbansen eds., 2011).

[56] Reimann, *supra* note 28, at 1115–19. Reimann's approach did not generate a large following. *See* Boris N. Mamlyuk & Ugo Mattei, *Comparative International Law*, 36 Brook. J. Int'l L. 385, 424 (2011). In the ensuing ten years, to be fair, comparativists did not rush to engage with what Reimann called "vertical comparisons."

[57] *See*, *e.g.*, Halliday & Shaffer, *supra* note 30, at 4, 19; Viellechner, *supra* note 26, at 167.

[58] Calliess & Zumbansen, *supra* note 20, at 110; Halliday & Shaffer, *supra* note 30, at 13.

[59] Halliday & Shaffer, *supra* note 30, at 13.

[60] Harold H. Koh, *Why Transnational Law Matters*, 24 Penn State Int'l L. Rev. 745–46 (2006).

[61] Whereas German law knows a pre-contractual liability norm, the "culpa in contrahendo," and puts it under a quasi-contractual roof, common law deals with similar situations under tort law (if at all), *see*, *e.g.*, the classical essay of Friedrich Kessler & Edith Fine, Culpa in Contrahendo, *Bargaining in Good Faith, and Freedom of Contract: A Comparative Study*, 77 Harv. L. Rev. 401 (1964). *See* Nadia E. Nedzel, *A Comparative Study of Good Faith, Fair Dealing, and Precontractual Liability*, 12 Tul. Eur. & Civil L. F. 97 (1997), for a more recent take.

[62] *See* Michaels, *supra* note 32, for a (critical) review of the functional method in comparative law.

[63] *See* Hugh Collins, *Methods and Aims of Comparative Law*, 11 Oxford J. Comp. L. 396 (1991), and Uwe Kischel, Rechtsvergleichung, 93–94 (2015), for a strong commitment to the function method.

relation between institutions and problems.[64] Therefore, one first has to nail down the problem, which then may serve as the constant for the comparative work.[65]

As a result, the fact that relevant relationships in civil law countries are governed wholly or in part by contract law does not take them out of the equation a priori. The heart of the problem lies in the question as to whether, for example, the German contract law provisions serve the same purpose as the rules of fiduciary law in the United States or in England. Similitude or difference in remedies may well count as circumstantial evidence. From a methodological point of view, however, neither the one nor the other is decisive. Factual or purely descriptive methods do "not tell us whether these [similarities or differences] are accidental or necessary, or how they relate to society."[66] They "simply" have to fulfill the same purpose.[67] The next section illustrates this point.

2.2.3 *Fiduciary Law in Civil Law Jurisdictions: Germany as a Case Study*

Even though the exact confines and definitions of a fiduciary relationship are still subject to a lively debate,[68] nearly all theories agree on the core problem: the other-regarding powers conferred or taken by one person over another's interests (broadly construed), combined with an element of discretion.[69] In the language of law and economics, this gives rise to a principal-agent problem.[70] The person having the interests in question, i.e., the principal, is vulnerable. They cannot sufficiently observe the agent's actions and, in many situations, will lack the skill for monitoring the agent.[71] That creates an opportunity to engage in opportunistic behavior or, in the famous phrase coined by Oliver Williamson, "self-interest seeking with guile."[72] The agent may engage in hidden actions under conditions of moral hazard.[73] They can, for example, misappropriate assets belonging to the principal or act despite

[64] Michaels, *supra* note 32, at 371.
[65] *Id.*
[66] *Id.* at 369.
[67] Dubious therefore Gelter & Helleringer, *supra* note 11, at 595–96.
[68] *Cf.*, to name just three recent attempts at a general definition and theory: Paul B. Miller, *The Fiduciary Relationship*, *in* Gold & Miller, *supra* note 1, at 63, developing a "fiduciary powers theory"; Smith, *supra* note 45, testing a "critical resource theory" and; Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 Tex. L. Rev. 993 (2017).
[69] *See* Paul B. Miller, *The Identification of Fiduciary Relationships*, *in* Criddle et al., *supra* note 1, at 367, 379. Critics interpret some instances of fiduciary relationships as lacking the element of discretion, for example, when an investment adviser is either not given discretionary power to act on their client's behalf or refuses to assume discretion. *See* Arthur Laby, *Book Review*, 35 L. & Phil. 123, 132–34 (2016) (reviewing Gold & Miller, *supra* note 1).
[70] *See* Robert H. Sitkoff, *An Economic Theory of Fiduciary Law*, *in* Gold & Miller, *supra* note 1, at 197, 198.
[71] *Id.* at 199.
[72] Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J. L. & Econ. 233, 234 n.3 (1979).
[73] Sitkoff, *supra* note 70, at 199.

having a conflict of interests. This leads into the question as to whether and how a given legal systems addresses these risks. In the common law system, it is first and foremost the duty of loyalty. The duty of loyalty prohibits incurring profits other than those agreed upon when the parties entered the relationship and requires the agent to avoid conflicts of interest.[74] These "no conflict" and "no profit" rules build the fiduciary loyalty's core in the common law.[75] They serve as entry points for more specific duties such as to ask for consent in conflicted transactions and remedies such as disgorgement of profits.[76] German law reacts to a similar set of real-world problems by means of functionally equivalent rules.

Contracts between attorneys, investment advisors, tax consultants and their clients, distribution agreements (*Vertriebshändlervertrag*), commercial agency agreements (*Handelsvertretervertrag*), construction management contracts (*Baubetreuungsvertrag*), the duties of corporate directors vis-à-vis the corporation, duties of trustees in bankruptcy (*Insolvenzverwalter*) to creditors, to name but a few examples – they all create the problems sketched earlier. In these relationships, one person enjoys discretionary powers over the interests of another, followed by the danger of the agent acting opportunistically. In Germany, just as in other civil law countries, the knot tying these and comparable relationships together is primarily the *mandate contract*.[77]

The German Civil Code (*Bürgerliches Gesetzbuch – BGB*) provides default rules for an agreement to act on another person's behalf[78] in the shape of a mandate contract (*Auftrag*).[79] These rules are the foundation for the development of a functional equivalent to fiduciary duties in the common law world. Just like the legal norms governing a common law fiduciary relationship, the provisions of the mandate contract deal with the rights and duties of a person in a position of power over rights and interests of another. The German Civil Code subjects the agent to a regime of contract law rules governing, inter alia, the agent's duty to notify the mandator if they want to deviate from instructions and then to wait for a decision,[80]

[74] Andrew S. Gold, *The Fiduciary of Loyalty*, *in* Criddle et al., *supra* note 1, at 385, 387, 389; Paul B. Miller, *A Theory of Fiduciary Liability*, 6 McGill L.J. 235, 257 (2011). *See* Sitkoff, *supra* note 70, at 201, from a law and economics point of view.

[75] Gold, *supra* note 74, at 386.

[76] *Id.* at 387, 394.

[77] *See generally* Gelter & Helleringer, *supra* note 11, at 588–90.

[78] German law distinguishes the agent's authority to act from the agreement to act between agent and principal. *See* Basil S. Markesinis et al., The German Law of Contract: A comparative Treatise 109, 158 (2d ed. 2006).

[79] The mandate contract is a contract in which one person takes on a duty to act on behalf of another without receiving remuneration. *See id.* at 158.

[80] Section 665 of the *BGB*: "The mandatary is entitled to deviate from the instructions of the mandator if he may assume in the circumstances that the mandator would approve of such deviation if he were aware of the factual situation. The mandatary must make notification to the mandator prior to such deviation and must wait for the decision of the latter unless postponement entails danger." Bundesministerium der Justiz Und für Verbraucherschutz,

a duty to provide the mandator with information on the status of the transaction and, after carrying out the mandate, to render account for it,[81] the disgorgement of profits,[82] and a penalty in case the agent misappropriates assets under his management.[83] Generally, it is an accepted (if unwritten) basic rule that the agent has to put the principal's interests before their own and avoid conflicts of interest.[84]

The mandate contract in itself is of limited practical significance because it covers only those relationships in which the agent acts without remuneration. Its importance results from a regulatory choice. The rules of the mandate contract form a nucleus other provisions piggyback on. Other types of contract do not have their own provisions about an agent's duties, but only refer to the agent's duties as defined by the norms of the mandate contract. They are applied by analogy. One example is section 675(1) of the *BGB*, a linchpin of German contract law regulating what – reluctantly – may be called agency agreements:[85]

> **Nongratuitous management of the affairs of another**
>
> (1) The provisions of sections 663, 665 to 670 and 672 to 674 apply to a service contract or a contract to produce a work dealing with the management of the affairs of another to the extent that nothing else is provided in this subtitle and, if the person obliged is entitled to terminate without complying with a notice period, the provisions of section 671 (2) also apply with the necessary modifications.

This – if read out of context admittedly slightly cryptic – piece of legislation contains an essential set of duties. An agreement in the sense of section 675(1) of the *BGB* is a contract for services or work and labor in exchange for remuneration. "[D]ealing with the management of the affairs of another" is understood by the

https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2934 (last accessed June 12, 2023).

[81] Section 666 of the *BGB*: "The mandatary is obliged to provide the mandator with the required reports, and on demand to provide information on the status of the transaction and after carrying out the mandate to render account for it." *Id.*

[82] Section 667 of the *BGB*: "The mandatary is obliged to return to the mandator everything he receives to perform the mandate and what he obtains from carrying out the transaction." *Id*. *See also* Graziadei, *supra* note 33, at 287, 295 (discussing disgorgement of profits under civil law).

[83] Bürgerliches Gesetzbuch [BGB] [Civil Code], § 668, *translated in* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2934 (last accessed June 12, 2023). ("If the mandatary spends money for himself that he must return to the mandator or spend for the mandator, then he is obliged to pay interest on it from the time of spending onwards.")

[84] Michael Martinek & Sebastian Omlor, *in* Staudinger, Kommentar zum Bürgerlichen Gesetzbuch, Buch 2, Vorbemerkungen zu §§ 662 ff margin no. 28 (14th ed. 2017).

[85] "Reluctantly" because of the content any common lawyer will immediately think of in connection with agency. Although there is an overlap of agency agreements in the common law and those of the German civil law variety as to content, significant differences remain, such as the difference between the authority to act and the agreement to act. *See* Markesinis et al., *supra* note 78, at 158–60. *See also* BGB § 675(1), *translated in* https://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p2934 (last accessed June 12, 2023).

BGH, the Federal Court in private law matters, as an independent activity[86] of an economic character[87] on behalf of another within a foreign[88] sphere of interest.[89] This section does not define the duties applying to agency agreements, but refers to provisions of the mandate contract, inter alia those governing notification and information duties and disgorgement of profits. Moreover, the agent is subject to a duty of loyalty, which is deemed to be the decisive characteristic distinguishing a *Geschäftsbesorgungsverträge* from other contracts, for example, regular service contracts and contracts for work and labor.[90]

German scholars observe that *Geschäftsbesorgungsverträge* fit well into concepts of economic contract theory and demand a specific set of duties in order to counter the various problems discussed under the rubric of agency theory and in the incomplete contracts literature.[91] The rules governing mandate contracts and agency agreements address exactly those problems fiduciary law addresses in the United States. Therefore, from a functional point of view, it is completely legitimate to categorize the German contract law provisions just discussed as fiduciary law from a comparative perspective.[92]

The mandate contract, however, is not the only way to establish a fiduciary relationship and a duty of loyalty. In addition to contract law, other parts of German law also provide for fiduciary obligations. Examples already mentioned in this chapter's introduction are the relationship between guardian and ward[93] and the trustee in bankruptcy (*Insolvenzverwalter*).[94] A director on the executive board of a public corporation (*Vorstand der Aktiengesellschaft*) owes specific fiduciary duties to the corporation itself. These duties are not grounded in the employment contract, but in the corporate relationship of the director and the corporation.[95] Moreover,

[86] As opposed to an employment relationship.

[87] In contrast to a mandate in the sense of section 662 of the *BGB*, which is a similar contract without consideration. Additionally, this criterion excludes contracts related to activities traditionally considered having a noneconomic purpose from section 675's scope – for example, contracts between doctors and patients, teacher and pupil, and artists and "customer." *See* Martinek & Omlor, *supra* note 84, § 675 margin no. A 16.

[88] As opposed to one's own sphere of interest.

[89] *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 25, 1966, 45 Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 223 (228).

[90] Christoph Benicke, *in* Soergel, 10 Bürgerliches Gesetzbuch mit Einführungsgesetz und Nebengesetzen (BGB) § 675 margin no. 5 (13th ed. 2011); Klaus J. Hopt, *Interessenwahrung und Interessenkonflikte im Aktien-, Bank- und Berufsrecht*, 33 ZGR 1, 20 (2004).

[91] Kuntz, *supra* note 6, at 766; *see also* Christoph Kumpan, Der Interessenkonflikt im deutsche Privatrecht 59–63 (Mohr Siebeck Tübingen 2014) (discussing in the context of conflicts of interests); Martinek & Omlor, *supra* note 84, Vorbem zu §§ 662 ff margin no. 77.

[92] Kuntz, *supra* note 6, at 766.

[93] BGHZ, *supra* note 7; Rusch, *supra* note 7; Zimmerman, *supra* note 7.

[94] BGHZ, *supra* note 8; Becker, *supra* note 8.

[95] *See, e.g.*, Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 20, 1995, 129 Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 30 (34); 1

public law enriches and subjects several relationships to a special fiduciary law regime, even though the parties are bound by contract, as is the case with investment advisors[96] and attorneys[97] toward their clients. Several courts and authors even underscore that fiduciary duties are stricter than those flowing from the covenant of good faith and fair dealing,[98] echoing the well-known adage coined by Judge Cardozo who famously expected a trustee to show the "punctilio of an honor the most sensitive."[99] Even though the relationships just mentioned are not mandate contracts in terms of legal doctrine, this does not mean that the trustee in bankruptcy or a guardian enjoys the privilege of a more lenient regime. Either the relevant specific regulations contain supplementary rules or courts draw from the rules governing mandate contracts by analogy.

The no-profit rule may serve as an example: In cases where no express reference is made to this rule, courts apply the relevant section 667 of the *BGB*[100] by way of analogy – for example, in case of a guardian letting entailed land after receiving a "commission"[101] or an insolvency trustee holding monies in an escrow account on behalf of the debtor.[102] Should the fiduciary engage in illegal competition, German law provides another set of norms serving as no-profit rule, for example, in section 88 of the German Stock Corporation Act (*Aktiengesetz*) with respect to the board of directors of a stock corporation (*Aktiengesellschaft*).[103] These and other prohibitions

Holger Fleischer, Beck-Online Grosskommentar zum Aktiengesetz § 93 margin no. 117 (Gerald Spindler & Eberhard Stilz eds., as of April 1, 2023).

[96] *See* Wertpapierhandelsgesetz [WpHG] [German Securities Trading Act] § 63(1) ("Investment firms shall be required to provide investment services and ancillary services honestly, candidly and with the requisite degree of expertise, care and diligence in the best interests of their clients.") (Thilo Kuntz trans. 2020); *see also* Hopt, *supra* note 90, at 1, 6–8; Kumpan, *supra* note 91, at 119–21.

[97] Oberlandesgericht [OLG] [Court of Appeal] Brandenburg, Mar. 5, 2012, Neue Juristische Wochenschrift – Rechtsprechungsreport [NJW-RR] 1191 (1193).

[98] *See* Oberlandesgericht [OLG] [Higher Regional Court] Nov. 18, 2019, Die Aktiengesellschaft [AG] 462, 463, 2011; Fleischer, *supra* note 95, § 93 margin no. 115.

[99] Meinhard v. Salmon, 249 N.Y. 458, 464 (1928).

[100] *See supra* note 83.

[101] Reichsgericht [RG] [Federal Court of Justice] May 30, 1940, 164 Entscheidungen des Reichsgerichts in Zivilsachen [RGZ] 98 (103).

[102] BGH Dec. 15, 2011, Neue Zeitschrift für Insolvenzrecht [NZI] 135 (136), 2012.

[103] Aktiengesetz [AktG] [German Stock Corporation Act] § 88. ("(1) Members of the executive board may not engage in any trade or enter any transactions in the line of the corporation's business without prior approval by the supervisory board. They may not be member of another corporation's executive board, director of a limited liability company or general partner of another commercial enterprise. [. . .]; (2) The corporation may claim damages from a member of the executive board who violates this prohibition. In lieu thereof, the corporation may require said member to treat any transaction made on his own behalf as if he had acted on behalf of the corporation and deliver up any remuneration received for actions on behalf of another, or assign his rights to such remuneration. (3) [. . .]. (2) The corporation may claim damages from a member of the executive board who violates this prohibition. In lieu thereof, the corporation may require said member to treat any transaction made on his own behalf as if he had acted on behalf of the corporation and deliver up any remuneration received for actions

of engaging in competition with the principal are also applied analogously, for example, to the directors of a limited liability company (*Gesellschaft mit beschränkter Haftung*)[104] or a trustee in bankruptcy appropriating the debtor's corporate opportunities.[105]

In the end, German contract law and other legal institutions address problems arising out of relationships in which one party enjoys other-regarding powers over another's interests, combined with an element of discretion. From a comparative perspective, this establishes the functional equivalence of these solutions to the common law approach. That means that the differences between equity-based common fiduciary law and German civil law, as significant as they are in general, do not stand in the way of the current project. Given the same set of problems that both civil law and common law must solve, the differences in the regulatory "technique" are irrelevant as far as concerns the establishment of transnational law. Everyone knows that many, if not all, roads lead to Rome.

2.3 SPACES OF TRANSNATIONAL FIDUCIARY LAW

Transnational law exists in different spaces[106] and so does transnational fiduciary law. Notwithstanding the ubiquity of fiduciary law, there is no "world" or "global" fiduciary law, as will be discussed in Section 2.2.3. Legal ordering of fiduciary law rather occurs in two dimensions. Entanglement of national laws can entail the emergence of transnational legal orders on the horizontal level (Section 2.2.1). On the vertical plane, norms created "beyond the state" may trickle down into national legal systems either because legislators and courts transform them in national laws or actors make use of them in enforcing rights and remedies (Section 2.2.2).

2.3.1 *Horizontal Transnational Ordering of Fiduciary Law*

The horizontal transnational ordering of fiduciary law is a consequence of several national legal orders becoming entangled through norms flowing back and forth between the respective systems. This claim rests on a nontrivial premise – namely, the assumption that national law can provide a basis for transnational legal ordering. Considering national law's uncertain status in transnational legal theory, this is a point in need of some elaboration as a first step. Having cleared the ground, a

on behalf of another, or assign his rights to such remuneration. (3) [...]." (Thilo Kuntz trans. 2020).

[104] BGH Oct. 26, 1964, Wertpapiermitteilungen [WM] 1320 (1321), 1964.

[105] BGH Mar. 16, 2017, Wertpapiermitteilungen [WM] 776 (779), 2017.

[106] *See* Halliday & Shaffer, *supra* note 30, at 18–19.

second step then helps to chart the territory, taking up the example of the diffusion of the trust as a legal institution in East Asia.

2.3.1.1 National Law's Uncertain Status in Transnational Legal Theory

Workers in the vineyard of transnational legal theory have long been underlining that transnational law has a distinctive geographic component.[107] Contrary to traditional national law, it reaches beyond the nation-state and expands beyond the confines of a legally defined territory and scope of application.[108] Its extension varies[109] and remains to be determined case by case, depending on the market participants, legislators, courts, and other institutions applying and subjecting themselves to transnational law.[110] Pointing this out, many scholars conclude that transnational orders vary in geographic scope.[111] This geographic approach is rooted in the idea of transnational law being based on norms "beyond" the nation-state as a starting point. Building their theories on normative arrangements like the contract models typically collected under the umbrella term *lex mercatoria*,[112] the overwhelming majority of writers, while stressing the importance of national laws,[113] take this as a given.[114] Whatever their respective position on what transnational law actually "is" may be, these scholars – at least implicitly – carve out orders exclusively based on national laws.

At first glance, this strategy of erecting a dichotomy not only provides for a manageable definition of transnational law, but also sensibly divides labor between transnational law on the one hand and comparative law on the other. Just having two or more national legal orders look alike does not imply norms reverberating across borders and beyond the nation-state. Legal transplants are not transnational law either, at least according to typical view of the field.[115] Even though such repotting of a legal rule or legal institution from one national system and into

[107] *See id.* at 18–19, 28. *See also* Shaffer, *supra* note 20, at 232.

[108] International private law excluded for a moment. That is not to say that national law never can have extraterritorial reach, to the contrary. But as this is the exception rather than the rule, this issue does not alter the thrust of the argument developed above. On the status of international private law, which the discussion here brackets, *see* text cited *infra* note 123.

[109] Halliday & Shaffer, *supra* note 30, at 18.

[110] *Id.* at 12–13.

[111] *Id.* at 18–19.

[112] *See supra* note 34 and accompanying text. For a broader view, *see*, *e.g.*, Halliday & Shaffer, *supra* note 30, at 13–15.

[113] Calliess & Zumbansen, *supra* note 20, at 19; Glenn, *supra* note 25, at 839; Halliday & Shaffer, *supra* note 30, at 13.

[114] *See*, *e.g.*, Calliess & Zumbansen, *supra* note 20, at 63 (noting "contested relationship between *lex mercatoria* and the state legal order"); Terence C. Halliday & Pavel Osinsky, *Globalization of Law*, 32 Ann. Rev. Soc. 447, 450 (2006); Halliday & Shaffer, *supra* note 30, at 12; Viellechner, *supra* note 26, at 180–85.

[115] A couple of authors beg to differ; *see*, *e.g.*, Jonathan Wiener, *Something Borrowed for Something Blue: Legal Transplants and the Evolution of Global Environmental Law*, 27

another national bed refers to a border-crossing movement, the issue is not so much the creation of an additional point of reference. The question is rather whether the receiving system accepts or rejects the transplant. Legal transplants thus appear "as elements of local law reform."[116] Even though transnational law cannot forego exercises in comparative law,[117] the latter remains reduced to the status of an auxiliary discipline to the former. Methodologically speaking, comparative law does not gain anything or grow just by being employed for the purposes of the transnational enterprise.

And still, there is a curious ambiguity in many established narratives on how transnational law comes into being and which role national law may play. One does well to bring to mind that riding the transnational train does not add value in generating another substantive body of norms. What makes the trip worth the while is the methodological aspect of giving process pride of place.[118] Theorizing transnational legal ordering moves the "construction, flow … and settlement of legal norms"[119] into the spotlight and helps to understand how the production of national laws interacts with "different levels of social organization, from the transnational to the local" – for example, "the migration across borders, … contestation and homologies among the transnational, national, and local levels."[120]

Nation-states create "true" legal norms in the sense of classical positivist legal theory. Consequently, contrary to what is the case concerning norms of transnational law, the theoretical puzzle to ponder is not normativity in a legal sense,[121] but this: If several nation-states generate trust law, and this process of norm production is interdependent, because legislators and courts of each of the states look at what the other is doing, does this not also constitute *trans*national law? After all, transnational law is "transnational" not because of the norm-giving involved or because the norm-producing institutions are non-state actors, but because of its reach in terms of geography.[122]

Ecology L.Q. 1295 (2001); Anna Dolidze, *Bridging Comparative and International Law: Amicus Curiae Participation as a Vertical Legal Transplant*, 26 Eur. J. Int'l L. 851 (2015).

[116] Ralf Michaels, *State Law as a Transnational Legal Order*, 1 UC Irvine J. Int'l. Transnat'l. & Comp. L. 141, 148 (2016).

[117] *See* Section 2.2.2.

[118] Halliday & Shaffer, *supra* note 30, at 37–38; Harold Koh, *Transnational Legal Process*, 75 Neb. L. Rev. 181, 183–84 (1996); Shaffer, *supra* note 20, at 237; Peer Zumbansen, *Where the Wild Things Are: Journeys to Transnational Legal Orders, and Back*, 1 UC Irvine J. Int'l. Transnat'l. & Comp. L. 161, 166 (2016). The extent to which these views are all purely procedural is subject to debate. *See, e.g.*, Halliday & Shaffer, *supra* note 30; Michaels, *supra* note 116, at 144. *See* Jessup, *supra* note 21, at 2, for a differing view, putting emphasis on substantive law rather than process.

[119] Shaffer, *supra* note 20, at 237.

[120] *Id.*

[121] On this problem, *see* Halliday & Shaffer, *supra* note 30, at 11.

[122] Michaels, *supra* note 116, at 154.

In a more recent turn of events, a group of scholars has already started moving into this direction, grounding their approach in international private law.[123] (National) international private law, so their argument goes, "engage[s] institutions in foreign states, too."[124] Stressing the political – and therefore regulatory – nature of international private law,[125] these authors conclude that international private law and cross-border litigation engender transnational (private) law.[126] National law can also turn into transnational law, or so some propose, through national judges developing common private international law principles.[127]

Delving into the debate's details is not of interest for the purposes of this text.[128] What is of interest, however, is the fact that scholars are able to attribute international private law – state law – to a popular definition of transnational legal orders. This undergirds the conjecture of conventional accounts of transnational law having blind spots with respect to the "transnational potential" of national laws. Entanglement of national laws is another entity, highly relevant for fiduciary law, as will be argued in Section 2.3.1.2.

2.3.1.2 Transnationalization through Horizontal Entanglement of National Laws

The starting point for the following discussion of the meaning and consequences of entanglement is the diffusion of trust law in East Asia. The legal systems of Japan, South Korea, Taiwan, and China have a civil law core. Nevertheless, Japan introduced the trust as a legal institution, which then spread over East Asia for various reasons. It would be a mistake, however, to qualify this as a problem of transplanting law from one national legal system to another. Doing so would seriously neglect the fact that these East Asian countries' laws are in many ways connected and intertwined. As a consequence, to truly understand trust law in East Asia – and with it, large portions of fiduciary law – presupposes an understanding of the trajectories that these national legal orders share. Building on the case study of trust law in East Asia, the section moves forward by exploring the consequences for transnational fiduciary law more generally. It constructs the theoretical framework for understanding how entanglement and *histoire croisée* establish a process of transnationalization.

[123] *See, e.g.*, Michaels, *supra* note 116; Robert Wai, *Transnational Law and Private Ordering in a Contested Global Society*, 46 Harv. Int'l L. J. 471 (2005).
[124] Michaels, *supra* note 116, at 153.
[125] *E.g.*, Wai, *supra* note 123, at 473.
[126] *See* Michaels, *supra* note 116; Wai, *supra* note 123.
[127] Craig Scott, *"Transnational Law" as Proto-Concept: Three Conceptions*, 10 Ger. L. J. 859, 870–71 (2009); *see also* Shaffer, *supra* note 20, at 244 ("legal Esperanto").
[128] Apart from the question if the analysis in general stands up to closer scrutiny, there is a further debate within that group whether in addition to the rules of international private law the applicable substantive law should be part of transnational law as well. *See* Michaels, *supra* note 116, at 153.

(A) Introductory Example: The Diffusion of Trust Law in East Asia Japan, South Korea, Taiwan, and China not only share a rich history as a region,[129] they also share a common legal framework as they are all civil law jurisdictions with strong historical roots in the German civil code (*Bürgerliches Gesetzbuch*).[130] As a consequence, these East Asian countries lack equity courts and are historically situated within a framework built around the concept of single ownership, which runs counter to a core element of trust architecture: dual ownership.[131] This distinguishes them from their common law siblings: Hong Kong, Singapore, and Malaysia.[132] Nevertheless, after the Secured Bond Trust Act of 1905 was introduced as a piece of specific legislation, Japan followed through with the enactment of the Trust Business Act of 1922.[133] As part of its colonial rule over Taiwan, acquired from China in 1895, and Korea, annexed in 1910,[134] Japan imposed its trust legislation.[135] China, the latest addition to the East Asian civil law and trust family, included the trust as an institution only after the Opening Up policy implemented by Deng Xiaoping in 1979; the legal institution based on the Trust Act entered into force only in 2001.[136] Both Taiwan and South Korea kept the trust after Japanese colonial rule ended.[137] What did not end, however, was the influence of Japanese trust law. Given its status as the root of modern trust regulation in these two jurisdictions, it still oftentimes served as a pacesetter for Taiwanese and South Korean trust law and exercises some influence on the 2001 Chinese legislation.[138] At the same time, the trust laws of the group members echo US models on trust.[139]

The implementation of a common law institution into a jurisdiction with a solid civil law background led to shared problems and points of departure for doctrinal

[129] *See* Charles Holcombe, A History of East Asia (2d ed. 2017).

[130] *See* Lusina Ho & Rebecca Lee, *Reception of the Trust in Asia: An[sic] Historical Perspective*, *in* Trust Law in Asian Civil Law Jurisdictions 10–11 (Ho and Lee eds., 2013). China did not directly adopt and adapt German law, but took it over from the Soviet legal system. Lusina Ho, *Trust Laws in China*, *in* Smith, *supra* note 13, at 183.

[131] *See* Lusina Ho, *The Reception of Trust in Asia: Emerging Asian Principles of Trust*, 2004 Sing J. Legal Stud. 287, 289 (2004).

[132] Ho & Lee, *supra* note 130, at 10.

[133] *See* Tamaruya, *supra* note 47, at 2231, for a detailed description of the Japanese reception of trusts and trust law.

[134] *See* Holcombe, *supra* note 129, at 273 (on Korea); *id.* at 384 (on Taiwan), for a concise introduction into this period of East Asian history and Japanese imperialism.

[135] Tamaruya, *supra* note 47, at 2242.

[136] On the trust in China, *see*, *e.g.*, Ho, *supra* note 131; Charles Zhen Qu, *The Doctrinal Basis of the Trust Principles in China's Trust Law*, 38 Real Prop. Prob. & Tr. J. 345 (2003); *see also* Tamaruya, *supra* note 47, at 2245; Holcombe, *supra* note 129, at 369 (on the Opening Up policy).

[137] Ho & Lee, *supra* note 130, at 12; Tamaruya, *supra* note 47, at 2246.

[138] *See* Tamaruya, *supra* note 47, at 2246.

[139] *Id.*

development. There is no constructive trust on traceable assets.[140] Additionally, even though there are functional equivalents of the duty of loyalty in the respective trust laws, the content and extent of these rules awaits further clarification compared to their common law counterparts.[141] Reviewing these common points of departure, it comes as no surprise to find solutions closely resembling each other.[142]

Bearing in mind the historical development of trust legislation of the "East Asian Four" means that a traditional comparative approach is not enough. The individual legal orders do not simply stand alongside each either nor did they each on their own "simply" accept a legal transplant which now becomes part of the national body of law.[143] They rather interlace on several levels and form a discernible space of trust law and fiduciary regulation. Trust legislation in South Korea, China, Taiwan, and Japan develops with a view to the respective other(s). Comparative studies typically neglect this element of interaction and the accompanying echo-chamber effect. This case leads to a challenging methodological issue: Does the obvious and persistent connection between national laws and national legal institutions give rise to a transnational legal order, even though there is no set of rules or standards "produced by, or in conjunction with, a legal organization or network that transcends or spans the nation-state"?[144] As will be shown later, the answer is affirmative.

(b) Entanglement, Histoire Croisée, and Transnational Legal Spaces The evolution of the legal frameworks over time and the historical intersections generated what historians writing about transnational history term *histoires connectées*,[145] connected histories,[146] and *histoire croisée*.[147] Moving forward from comparative

[140] Ho, *supra* note 131, at 301.

[141] *Id.* at 297; *see* Tamaruya, *supra* note 47, at 2251, for a more detailed analysis; *see also* Section 2.4.3.

[142] *See also* Section 2.4.3.

[143] On this effect of transplanting law, *see* Michaels, *supra* note 116, at 148.

[144] Halliday & Shaffer, *supra* note 30, at 12.

[145] *See, e.g.*, Caroline Douki & Philippe Minard, *Histoire globale, histoires connectées: Un changement d'échelle historiographique?*, 54 Revue d'histoire moderne & contemporaine 7 (2007), *translated in* https://www.cairn-int.info/article-E_RHMC_545_0007–global-history-connected-histories.htm.

[146] Robert W. Strayer, The Making of the Modern World: Connected Histories, Divergent Paths: 1500 to the Present (Strayer ed., 2d ed. 1995); Sanjay Subrahmanyam, *Connected Histories: Notes towards a Reconfiguration of Early Modern Eurasia*, 31 Modern Asian Stud. 735 (1997).

[147] Foundational: Michael Werner & Bénédicte Zimmermann, *Penser l'histoire croisée: Entre empirie et réflexivité*, 58 Annales HSS 7 (2003) (in French; for an English version *see* Michael Werner & Bénédicte Zimmermann, *Beyond Comparison:* Histoire Croisée *and the Challenge of Reflexivity*, 45 Hist. & Theory 30 (2006)). The methodological differences between *histoires connectées* and *histoire croisée* are minor and negligible for the purposes of this Article. They share a common interest in going beyond comparative history; this is the important point for the text above. *Histoire croisée* complements comparative history; it does not supplant it. *See* Jürgen Kocka, *Comparison and Beyond*, 42 Hist. & Theory 39, 43–44 (2003).

history, these scholars emphasize the element of interaction and echo-chamber effects resulting from shared narratives and histories.[148] With this changed perspective comes an interest not in the merger of institutions or hybridizations of formerly singular institutions, but in how the crossings affect the parties involved and create something new.[149] What historians working in this methodology's ambit want to achieve is a transnational view on history, not by adding another layer on top of regional, local or national history, but rather through readjusting the focus on how the interaction and connections came into being, which specific logic lies behind them, and how they structure space.[150] Apparently, there is something unique in these *histoires croisées* worth looking at in its own right. All the issues and vantage points just mentioned surface in East Asian trust regulation, making it a fine example of a transnational phenomenon.

A historian researching the entangled developments and evolution of trust law and trust-related fiduciary law in East Asia has to retrace the "construction, flow . . . and settlement of legal norms," the production of national laws and the latter's interaction with "different levels of social organization, from the transnational to the local," including "the migration across borders, . . . contestation and homologies among the transnational, national, and local levels."[151] This is where *histoire croisée* and transnational legal theory meet. Even though historians (with the arguable exception of legal historians) do not operate in the shadow of questions of legal normativity, historians grapple with issues surprisingly similar to what legal scholars have to address. Conventional comparative history and comparative law both follow a static approach and tend to neglect interactive processes. Insofar, historical methodology undergirds the claim that the entanglement of national laws may constitute transnational law. It adds a vertical dimension to comparative law's horizontal plane.[152] Paying close attention to how norms gain transnational character according to leading legal theorists proves the point.

Transnational norms are norms "adapted transnationally."[153] They do not necessarily have to originate outside the nation-state.[154] Transnational legal orders are transnational if they (at least) have social effects in more than one jurisdiction[155] and "engage legal institutions within multiple nation-states."[156] The ways in which legal

[148] *See* Werner & Zimmermann, *supra* note 147, at 12 (2003); *id.* at 35 (2006).
[149] *Id.* at 16 (2003); *id.* at 38 (2006).
[150] *Id.* at 22 (2003); *id.* at 43 (2006).
[151] For the quotations, *see supra* at notes 119–120.
[152] *Cf.* Reimann, *supra* note 28, at 1116. (Traditional model of comparative law operates "on the horizontal plane.")
[153] Halliday & Shaffer, *supra* note 30, at 19. *But see also id.* at 15 (the requirement of "recognition" in the context of religious norms), and the justified criticism by Michaels, *supra* note 116, at 150.
[154] Halliday & Shaffer, *supra* note 30, at 19.
[155] *Id.*
[156] *Id.* at 13.

institutions engage with the norms – bottom-up, top-down, or horizontally – does not matter, at least not for their qualification as parts of transnational legal orders, because the concept of transnational law comprises processes in all directions.[157] What is important is that multiple nation-states lace into each other as a consequence of recognizing norms with an international scope.[158] Law enacted by a foreign state and then transplanted into and adapted to the needs of another nation-state's legal system fits the description of "rules of extra-state origin." From the transplanting nation-state, this foreign state law is just as nonbinding as any model law or framework drafted by an international organization or informal network of private actors. Furthermore, leading theorists increasingly point out the importance of persuasive authority in transnational law, such as engagement with and references to foreign law and judicial opinions.[159] According to these criteria, trust regulation in Japan, Taiwan, South Korea, and China spawns transnational fiduciary law insofar as trust law contains fiduciary norms.

Critics might ask what is added by the transnational approach as developed in the preceding sections. The answer is that given by many scholars of transnational legal theory: It shows the flow, diffusion, and construction of norms across national borders, fostering a deeper understanding of the process of lawmaking in a globalized world.[160]

2.3.2 *Vertical Transnational Ordering of Fiduciary Law*

Vertical transnational legal ordering involves norms, as some scholars succinctly put it, "downloaded" from a domain beyond the nation-state into national legal systems or "uploaded, then downloaded."[161] In the course of their voyage, norms created by non-state actors may gain normative force comparable to state law. This is one of the basic insights of transnational legal theory, not only true for *lex mercatoria*,[162] but also for fiduciary norms. Given that the movement of norms stands at the center of transnational legal theory,[163] the following section can forego another exercise in theorizing transnational law. Instead, it explores the issue based on a case study centering on fiduciary law. Specifically, it discusses the potential of transnational legal ordering in the area of environmental, social and (corporate) governance (ESG) matters[164] in corporate law.[165] ESG regulation unfolds normative force from

[157] *See id.* at 16; Koh, *supra* note 60, at 745–46.
[158] *See* Michaels, *supra* note 116, at 154.
[159] Shaffer, *supra* note 20, at 244.
[160] *See* Section 2.3.1.1.
[161] *See* Koh, *supra* note 60.
[162] *See* Section 2.2.1.
[163] *See* Section 2.3.1.1.
[164] *See* Section 2.1, text before note 30.
[165] On investment managers and the "sole interests rule," *see* Susan N. Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 U. Colo. L. Rev. 731 (2019) (on the

a socio-legal perspective. This is true even for the United States, regardless of critiques pointing to the requirements of national law. Standards and principles on ESG relevant for corporate law have been floating around for a while now. Even though they are "soft law" (i.e., not law in the sense of classical positivist accounts of law), these norms find their way into national legal systems, either by way of legislation or through enforcement by private actors.[166]

2.3.2.1 Standards and Principles

Two important international organizations, the United Nations (UN) and the OECD, have been setting standards for corporate law and corporate fiduciaries for some time. The UN Environment Program joined with more than 200 private institutions to form the UNEP Finance Initiative (UNEP/FI),[167] which delivered a report on "Fiduciary Duty for the Twenty-first Century" in 2015[168] – a follow-up on an earlier report delivered in 2005.[169] The report lays out a framework under which it would be not only legal to take ESG-matters into account, but which even requires fiduciaries to pay attention to ESG. A broader perspective is employed by the 2011 UN Guiding Principles on Business and Human Rights (UN Guiding Principles), holding business enterprises obliged to respect human rights.[170] These UN Guiding Principles aver that the responsibility to respect human rights "is a global standard of expected conduct for all business enterprises wherever they operate." According to the UN Guiding Principles, this responsibility "exists independently of States' abilities and/or willingness to fulfill their own human rights obligations and does not diminish those obligations." The guideline commentary positions it "over and above compliance with national laws and regulations protecting human rights."[171] The G20/OECD 2015 principles on corporate governance recommend that corporate boards should take stakeholder interests into account.[172]

one hand); Max M. Schanzenbach & Robert H. Sitkoff, *The Law and Economics of Environmental, Social, and Governance Investing by a Fiduciary*, 72 STAN. L. REV. 381 (2020) (on the other).

[166] Bearing in mind the heated debate on ESG, a proviso seems in order: This article is neutral on the question whether this is a laudable or deplorable development. The only issue of interest is to show that these principles are at work. To decide if this is for better or for worse is up to the reader.

[167] *See supra* note 17.

[168] *See supra* note 19.

[169] UN Env't Programme [UNEP] Finance Initiative, A *Legal Framework for the Integration of Environmental, Social and Governance Issues into Institutional Investment*, https://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf (last accessed June 12, 2023).

[170] UN Office of the High Commissioner, *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, U.N. Doc. HR/PUB/11/04 (2011), https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

[171] *Id.* at 13.

[172] OECD, *supra* note 18, at 46.

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2.3.2.2 Normative Effects of Nonbinding Rules

Notwithstanding the purported softness and the nonbinding character of the rules, it would be a mistake to discard them as politics or mere wishes of non-governmental actors, thereby carving them out of transnational fiduciary law. They are highly influential in shaping practice and legislation, especially in the last twenty years and increasingly so after the financial crisis of 2007/2008. As a consequence, they stand at the beginning of what appears now as the emergence of a transnational legal order. It is somewhat beside the point to argue that actions like a self-commitment to invest in line with ESG standards run counter to actual law requiring directors to maximize shareholder wealth. Clearly, *Dodge v. Ford Motor Co.*'s[173] progeny seems to prove these critics right, especially its modern Delaware offspring.[174] Two things have to be borne in mind, however. Regardless of the "strictly legal point of view," the critique carries only so far. It does not reach beyond state law pursuing the Delaware take on corporate directors' fiduciary duties. Many jurisdictions outside the United States do follow a different path, among them major economies like France[175] and Germany,[176] to name but two.[177] Even in the United States, a number of state corporate laws establish a stakeholder-oriented model of corporate governance, which at least makes it possible to take stakeholder-interests into account on the same footing with those of the shareholders.[178]

Three examples may help to undergird the general claim expressed above that "soft law" on ESG exercises a normative thrust which has to be reckoned with, both from a more technical legal perspective and as a matter of socio-legal impact.[179] The first example concerns recent French legislation on corporate law, the *loi PACTE*; the second one concerns ESG-disclosure rules in the EU, and the third concerns acknowledgment through enforcement of rights and remedies and the exercise of power.

[173] 204 Mich. 459, 170 N.W. 668 (Mich. 1919).

[174] *See, e.g.*, eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1 (Del. Ch. 2010). *See* Brett McDonnell, *The Corrosion Critique of Benefit Corporations*, 101 B.U. L. Rev. 1421 (2021), for a recent review of the Delaware case law.

[175] *See infra* Section 2.3.2.2(a).

[176] *See, e.g.*, Jens Koch, *Commentary on the German Stock Corporation Act*, *in* Aktiengesetz, § 76 margin no. 30 (17th ed. 2023).

[177] On the many twists and turns in the United Kingdom, *e.g.*, Marc T. Moore, *Shareholder Primacy, Labour and the Historic Ambivalence of UK Company Law*, *in* Research Handbook on the History of Corporate and Company Law 142 (Harwell Wells ed., 2018).

[178] *See* McDonnell, *supra* note 174, at 8, 16.

[179] *See, e.g.*, OECD, *supra* note 18, at 11. ("The *Principles* are widely used as a benchmark by individual jurisdictions around the world. They are also one of the Financial Stability Board's Key Standards for Sound Financial Systems and provide the basis for assessment of the corporate governance component of the Reports on the Observance of Standards and Codes of the World Bank.")

(A) The French "Loi PACTE" The French law on the growth and the transformation of businesses,[180] known in shorter form as the *loi PACTE*,[181] contains, inter alia, new provisions on fiduciary duties.[182] Pursuant to the reformed Chapter 1833 of the French *Code Civil*, a corporation has to be managed in its social interest, taking into consideration its activities' social and environmental effects,[183] replacing the old focus on the common interest of the shareholders.[184] *PACTE* relies to a considerable extent on the Notat-Sénard report,[185] prepared by two high-profile individuals – one representing an ESG- and Union-perspective (Nicole Notat), the other "big business" (Jean-Dominique Sénard).[186] Notat and Sénard explain their ESG-led reform proposals, inter alia, with reference to UN frameworks.[187] Even though these and other international guidelines and principles are not the sole reason or even the main driving force behind the French bill, they serve as an important reference point and anchor linking national French law and transnational perspectives. The *PACTE* firmly integrates these into national legislation and corporate fiduciary law.

(B) EU ESG-Reporting Standards EU law requires large companies to disclose certain information regarding the way they operate and manage social and environmental challenges.[188] The relevant Directive 2014/95/EU goes back to a strategy

[180] Loi no 2019-486 du 22 mai 2019 relative à la croissance et la transformation des entreprises, J. officiel de la République française (May 23, 2019), https://www.cjoint.com/doc/19_05/IExhRKuGrQh_joe-20190523-0119-0002.pdf (last accessed June 12, 2023).

[181] "PACTE" is an acronym for the "plan d'action pour la croissance et la transformation des entreprises," a plan developed by the French government to give business the means to innovate, to transform, to grow, and to create jobs ("donner aux entreprises les moyens d'innover, de se transformer, de grandir et de créer des emplois"). *La loi PACTE adoptée par le Parlement*, RÉPUBLIQUE FRANÇAISE, https://www.economie.gouv.fr/plan-entreprises-pacte (last accessed June 12, 2023).

[182] *See* Pierre-Henri Conac, *The Reform of Articles 1833 on Social Interest and 1835 on the Purpose of the Company of the French Civil Code: Recognition or Revolution?*, in 1 FESTSCHRIFT FÜR KARSTEN SCHMIDT ZUM 80, for an overview in English.

[183] "La société est gérée dans son intérêt social, en prenant en considération les enjeux sociaux et environnementaux de son activité."

[184] Conac, *supra* note 182, at 231. "Replace" concerns mainly the wording, in essence that stakeholder approach has long been the French law of the land. *See id.* at 230.

[185] Nicole Notat & Jean-Dominique Sénard, *L'entreprise, object d'interêt collectif*, MINISTRES DE LA TRANSITION ÈCOLOGIQUE ET SOLIDAIRE, DE LA JUSTICE, DE L'ÉCONOMIE ET DES FINANCES DU TRAVAIL (Mar. 9, 2018), https://www.vie-publique.fr/sites/default/files/rapport/pdf/184000133.pdf (last accessed June 12, 2023) [hereinafter Notat-Sénard Report]. On the influence of this report, *see* Conac, *supra* note 182, at 231. ("The Notat-Sénard report [...] served as the 'intellectual' basis for the PACTE Bill.")

[186] Nicole Notat is president of Vigeo Eiris, a rating firm specializing on ESG, and former head of the Union CFDT. Jean-Dominique Sénard was the CEO of Michelin at the time the report was delivered.

[187] *See* Notat-Sénard Report, *supra* note 185, at 34, 41.

[188] Directive 2014/95/EU, of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34 as regards disclosure of nonfinancial and diversity information by

paper of the EU Commission.[189] It grounds its policy approach, inter alia, in the UN Guiding Principles, qualifying them to be one element of "authoritative guidance ... provided by internationally recognised[*sic*] principles and guidelines" and belonging to a "core set of internationally recognised[*sic*] principles and guidelines represents an evolving and recently strengthened global framework for CSR [i.e., corporate and social responsibility]."[190] Companies subject to the Directive's reporting and disclosure regime may rely on international frameworks in order to structure their non-financial disclosure document,[191] among them the UN Guiding Principles.[192] The EU regulation partly builds on a French role model on ESG reporting, enacted in its earliest form in 2001.[193] Even if these reporting requirements, as the more reserved-minded argue, are just that and not fiduciary duties in the narrow sense, fiduciaries still have to explain themselves.[194] Whereas this might not affect the legal grid of the fiduciary's obligations directly, the normative expectations it has to cater to will change. This clearly is the EU's idea, describing the disclosure requirements as part of a broader agenda.[195]

Inhabitants of the planets Hart and Kelsen may still stress that legally, the fiduciary duties in a technical sense have not changed at all. But this argument does not prove much in the context of transnational law (and thus transnational fiduciary law) which conceives "norm" in a broader sense.[196] What is relevant here is that the EU legislator clearly acts based on an understanding of the UN Guiding Principles and other international ESG standards as "authoritative" and "internationally recognised [*sic*] principles" for CSR and CSR-related duties in general.[197] Disclosure rules concerning nonfinancial information are just one element of a broader strategy to push "enterprises [to adopt] a process to integrate social, environmental, ethical,

certain large undertakings and groups, 2014 O.J. (L 330) 1. It has been amended by the Directive (EU) 2022/2464 of the European Parliament and of the Council of 14 December 2022, 2022 O.J. (L 322) 15.

[189] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Renewed EU Strategy 2011–14 for Corporate Social Responsibility, COM (2011) 681 final (Nov. 25, 2011) [hereinafter Communication from the Commission]. Recital (2) of the Directive 2014/95/EU (*supra* note 188) explicitly refers to this document.

[190] *Id.* at 6.

[191] Directive 2014/95/EU, *supra* note 188, at 6–8.

[192] Communication from the Commission: Guidelines on Non-financial Reporting (methodology for reporting nonfinancial information), C/2017/4234, 2017 O.J. (C 215) 1.

[193] *See* Conac, *supra* note 182, at 229, 230.

[194] *E.g.*, Holger Fleischer, *Vermessung eines Forschungsfeldes aus rechtlicher Sicht*, *in* Corporate Social Responsibility 1, 31 (Holger Fleischer et al. eds., 2018). Some German scholars have argued to the contrary, *i.e.*, that the reporting standards indirectly alter the board members' fiduciary duties under German law, *e.g.*, Peter Hommelhoff, *Nichtfinanzielle Ziele in Unternehmen von öffentlichem Interesse – Die Revolution übers Bilanzrecht*, *in* Festschrift für Bruno Kübler 291 (Reinhard Bork et al. eds., 2015).

[195] *See* Communication from the Commission, *supra* note 189, at 7.

[196] Halliday & Shaffer, *supra* note 30, at 11.

[197] *See* Communication from the Commission, *supra* note 189.

human rights and consumer concerns into their business operations and core strategy in close collaboration with their stakeholders . . .”[198] They represent an expression of this broader conception rather than being an exception to the rule. From a policy point of view, these guidelines and principles unfold normative thrust, especially in countries with already more stakeholder-oriented approaches in corporate law.

(c) Acknowledgment through the Enforcement Even in nation-states without comprehensive ESG legislation such as the United States, ESG standards start becoming influential in shaping fiduciary law, at least from a socio-legal perspective. Institutional investors increasingly put ESG on the corporate policy agenda, calling for boards to disclose and act according to established international frameworks such as the UN Guiding Principles. BlackRock, one of the world’s largest investment firms, professes to monitor and engage “with companies to encourage them to adopt business practices consistent with sustainable long-term value creation,” citing ESG as a prime example.[199] BlackRock has been a signatory to the United Nations-backed Principles for Responsible Investment (PRI) since 2008.[200] Given this changing environment, corporate boards not dealing with ESG matters will more likely slide between a rock and a hard place, with nongovernmental organizations such as OxFam as additional watchers on the wall.[201]

Institutional investors like BlackRock and other groups hold a rich set of cards in their hands. They can submit shareholder proposals, initiate campaigns against incumbent directors at annual meetings or divest of their holdings in a corporation, to name but a few examples. Imagine Carl Icahn “tweeting” not that he had a “cordial dinner with Tim” (Cook),[202] but his dissatisfaction with management’s approach to environmental issues – “will divest US$ 1 bill. in shares tomorrow.” Publicly asking management to explain why poultry workers – not in Bangladesh, but in the United States – have to wear diapers at work[203] will not slip away

[198] *Id.* at 6–7.

[199] *See BlackRock Investment Stewardship: Protecting Our Clients’ Assets for the Long-Term*, Blackrock 1, 4, https://www.blackrock.com/corporate/literature/publication/blk-profile-of-blackrock-investment-stewardship-team-work.pdf (last accessed June 12, 2023).

[200] *Id.* at 19.

[201] *See, e.g.*, Chloe Christman, *PepsiCo Is Moving from Policy to Practice*, Oxfam: The Politics of Poverty (Feb. 6, 2018), https://politicsofpoverty.oxfamamerica.org/2018/02/pepsico-from-policy-to-practice/ (last accessed June 12, 2023).

[202] Carl Icahn (@Carl_C_Icahn), Twitter (Oct. 1, 2013, 7:23 AM), https://twitter.com/carl_c_icahn/status/385047418284158976 (last accessed June 12, 2023). On the market reaction, *see, e.g.*, Steven Russolillo, *Carl Icahn Tweets About “Cordial Dinner” with Tim Cook*, Wall St. J.: Moneybeat (Oct. 1, 2013), https://blogs.wsj.com/moneybeat/2013/10/01/carl-icahn-tweets-about-cordial-dinner-with-tim-cook/ (last accessed June 12, 2023).

[203] *See US Poultry Workers Wear Diapers on Job over Lack of Bathroom Breaks*, The Guardian (May 12, 2016, last modified July 14, 2017), https://www.theguardian.com/us-news/2016/may/12/poultry-workers-wear-diapers-work-bathroom-breaks (last accessed June 12, 2023).

unattended on a corporate board agenda's backside. In these and other circumstances, reality in the boardroom will prevail over the courtroom, even in Delaware. Notwithstanding the Delaware creed of shareholder primacy and shareholder value only,[204] measures like those mentioned before have to be addressed by corporate directors. Not doing so creates more bad publicity and, at least in many cases, causes stock prices to take a dive. Recent surveys suggest that the majority of corporate boards engage seriously and regularly with ESG-issues.[205] One hundred eighty-one CEOs signed the 2019 statement of the "Business Roundtable" in the United States, proclaiming publicly a commitment to all stakeholders.[206] There is good cause to question the motives behind corporate ESG-commitment.[207] In 2022, BlackRock backed down from their grand agenda and announced that it was more reluctant in supporting sustainability shareholder proposals, arguing that "many of the climate related shareholder proposals coming to a vote in 2022 are more prescriptive or constraining on companies and may not promote long-term shareholder value."[208] But there is no denying the fact that companies are implementing and debating ESG policies following the standards and principles outlined above.

Moreover, most pundits agree that shareholder primacy statutes such as the Delaware General Corporation Law leave room for paying attention to stakeholder interests in the course of ordinary business decisions.[209] Whereas the norms in their purest form – "shareholders only" versus mandatory inclusion of stakeholders – grind against each other, the business judgment rule typically works as the sheet anchor, "though [management] may have to be just a bit careful about what they say."[210] Change of control and corporate takeovers are the scenarios in which Delaware courts require boards to act single-mindedly in the interests of shareholders.[211] They do not happen on a daily basis.

[204] *See* McDonnell, *supra* note 174, at 8, 18, for a recent overview.

[205] *See, e.g., Pearl Meyer Quick Poll: Environmental and Social Governance (ESG) and Its Potential Link to Incentives*, Pearl Meyer (Mar. 2017), https://www.pearlmeyer.com/knowledge-share/research-report/pearl-meyer-quick-poll-environmental-and-social-governance-esg-and-its-potential-link-to-incentives (last accessed June 12, 2023).

[206] *Business Roundtable Redefines the Purpose of a Corporation to Promote "An Economy That Serves All Americans"*, Business Roundtable: Corporate Governance (Aug. 19, 2019), https://www.businessroundtable.org/business-roundtable-redefines-the-purpose-of-a-corporation-to-promote-an-economy-that-serves-all-americans (last accessed June 12, 2023).

[207] Early stakeholder-friendly statutes in the United States just mirrored anti-takeover provisions in the articles of association, thereby giving cause to believe that the motive was protecting incumbent management, not protecting workers or the environment. *See* Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 Ann. Surv. Am. L. 85, 94 (1999); with respect to Minnesota, *see* McDonnell, *supra* note 174, at 1442.

[208] *See* Blackrock, *Shareholder Proposals in 2022*, https://www.blackrock.com/corporate/literature/publication/commentary-bis-approach-shareholder-proposals.pdf (last accessed June 12, 2023).

[209] *See* McDonnell, *supra* note 174, at 20, 28.

[210] *Id.* at 20.

[211] *See* the crisp analysis by McDonnell, *supra* note 174, at 1441-1445.

2.3.3 *Transnational, Not Global Fiduciary Law*

Not a few authors mining the veins of transnational legal theory posit the emergence of "world law"[212] or "global law."[213] Tamar Frankel, arguably the founder of the field of fiduciary law in the common law world, sees universal fiduciary principles at work and argues for the adoption of a hybrid system of fiduciary law.[214] Whereas the functional approach builds a bridge over the troubled waters separating common law and civil law, unifying the two worlds with respect to fiduciary law may appeal to many as a matter of legal politics, but is likely to run into serious trouble in practice. In light of the remaining differences between civil law and common law systems (and the considerable differences between legal systems within the respective families), a more cautious approach allowing for the emergence of several transnational legal orders[215] seems the more promising road to travel.

This is corroborated by the fact that, as Clifford Geertz famously put it, law is local knowledge.[216] Searching for and then comparing abstract legal principles therefore does not amount to much,[217] especially in transnational law or so-called "global" law. "[G]lobal doctrine becomes clothed in local knowledge."[218] It is enmeshed in prior customs and legal traditions. Different legal systems may coexist side by side or tie the knot, leading to a hybrid, neither common law nor civil law, built on layers upon layers of regime changes and shifting political environments.[219] There is no peeling off the eggshells of common law or civil law and out comes the global fiduciary law chick. Acknowledging and accepting principles of fiduciary duty or, more generally, fiduciary law in any given system, no matter whether bred within it or transplanted from the outside, will work only if the relevant rules and principles latch on to what is there already. Transnational legal orders most likely arise based on preexisting bonds and shared traditions.

[212] Harold J. Berman, *World Law*, 18 Fordham Int'l L. J. 1617, 1619 (1995). "[T]he word 'transnational' refers back to the era of sovereign national states and indicates that it is to be transcended. It does not, however, give a new name to the new era that all humanity has entered. The right name for the new era, I submit, is 'emerging world society,' and the right name for the law by which it is governed is 'world law.'")

[213] Teubner, *supra* note 34, at 4. ("Thus we see a number of inchoate forms of global law, none of which are the creations of states.")

[214] Frankel, *supra* note 14, at 432–34.

[215] *See, e.g.*, Halliday & Shaffer, *supra* note 30, at 18–21.

[216] Clifford Geertz, Local Knowledge 167 (1993). ("[L]aw and ethnography are crafts of place: they work by the light of local knowledge.")

[217] *See id.* at 218; *see also* Andrew Harding, *Global Doctrine and Local Knowledge: Law in South East Asia*, 51 Int'l. & Comp. L. Q. 35 (2002).

[218] Harding, *supra* note 217, at 45.

[219] This has been demonstrated for South East Asia. *See, e.g.*, Harding, *supra* note 217, at 45; Carol G. S. Tan, *Law and Legal Systems in South East Asia: Three Paths to a Viewpoint*, *in* Trading Arrangements in the Pacific Rim – ASEAN and APEC, Commentaries, 1 (Paul J. Davidson ed., 1998).

2.4 ELEMENTS OF TRANSNATIONAL FIDUCIARY LAW

Transnational legal orders unfold in terms of geographic and legal scope.[220] Until now, this chapter has dealt with the geographic scope as the first prong of transnational legal ordering. The following section takes up the second prong, the elements of transnational legal orders.

Employing a transnational perspective not only uncovers multiple spaces of transnational legal ordering of fiduciary law. It also reveals how fiduciary law on the transnational plane develops elements different from national legal orders, either as variations on common themes, such as the duty of loyalty, or because the content of fiduciary obligations diverges from national law. First of all, as Section 2.4.1 will show, the distinctiveness of the duty of loyalty, an issue of the highest importance in national common law legal orders, may play out differently, depending on the scope of contract. Secondly, Section 2.4.2 demonstrates that even within the common law, court communication between individual nation-states may engender several fiduciary legal orders. Thirdly, Section 2.4.3 argues that the duty of loyalty does not necessarily become manifest in a single norm which, when applied to a fact-pattern, unfolds in more fine-grained specific rules, but may also be the result of bundling together a number of particular rules. In other words, different legal orders may construct the duty of loyalty differently. Again, East Asia provides an example.

2.4.1 *The Fiduciary Duty of Loyalty and the Scope of Contract in Common Law and Civil Law*

Given the peculiarities of fiduciary obligations compared to contract law in the common law world, the outcome of a case hinges on which drawer a judge opens. It is most importantly the duty of loyalty where fiduciary law and contract law part ways. Loyalty "is one of the most prominent features of fiduciary law[,] ... often considered essential to fiduciary relationships ..."[221] It "is a part of what gives the field its distinctive qualities."[222] Millet J, in the seminal decision *Bristol & West Building Society v. Mothew*, held it to be the "distinguishing obligation of a fiduciary ..."[223]

Embracing a particular obligation as part of the duty of loyalty[224] is of double import in the common law. At least historically, it helps to overcome several shortcomings of contract law. Fiduciary duties arise without having to follow a certain set of rules governing formalities of forming an enforceable

[220] *See* Halliday & Shaffer, *supra* note 30.
[221] Andrew S. Gold & Paul B. Miller, *Introduction*, *in* Gold & Miller, *supra* note 1, at 5.
[222] Gold, *supra* note 74, at 386.
[223] Millet J, Bristol & West Building Society v. Mothew [1996] EWCA (Civ) 33, [1996] 4 All ER 698 [711]–[712] (Eng.).
[224] On the varying accounts of the duty of loyalty's contents *see* Gold, *supra* note, 74, at 387–89.

agreement.[225] Other than a party to a contract, the beneficiary of a fiduciary obligation may compel the fiduciary to specific performance and not only claim damages.[226] Beneficiaries have rights against the fiduciary, whereas (English) contract law protects only the parties of the contract.[227]

Contract law in civil law jurisdictions typically requires specific performance and knows third-party beneficiaries. Consequently, there is no need for fiduciary duties enforcing specific performance and protecting third parties. The job is done by contract. As a result, at least to a certain extent, speaking of a duty of loyalty and fiduciary obligation(s) loses its significance in civil law jurisdictions. Sorting a breach into the register of "contract" instead of "loyalty" then does not make much of a difference, as long as the judge qualifies the fiduciary's behavior as a breach of their obligations.

What makes this interesting from the perspective of transnational legal theory is not the comparative insight. Rather, it is important as a potentially constitutive feature of a transnational legal order. In the end, loyalty keeps pride of place as the distinctive feature of fiduciary law in its transnational version. But it is distinctive first and foremost viewed from an overarching functional perspective – wherever the law specifically requires a person enjoying discretionary other-regarding powers to act loyally toward a beneficiary, transnational fiduciary law emerges. Consequently, transnational fiduciary law knows different shades of loyalty and therefore offers room for different transnational fiduciary legal orders.

2.4.2 *Contents of Fiduciary Obligations*

Speaking of transnational fiduciary law in the common law world can mean two different things. First, all jurisdictions hold the duty of loyalty near and dear to the heart of the fiduciary relationship.[228] Commonwealth courts frequently cite and discuss decisions of courts in other nation-states belonging to the same legal family. This horizontal dialogue is unsurprising, as these courts shared a common law background, tradition, and history stemming from the British Empire.[229] Perhaps somewhat counter intuitively, especially for the civil lawyer dabbling in matters of equity law, it is not only English law and English courts influencing courts in the former dominion. Starting with an Australian case, court communication between Australian and English courts across national borders has led to a transnational legal order in fiduciary law in which the duty of care has lost its quality of a *fiduciary* duty.

[225] *See* Sarah Worthington, *The Commercial Utility of the Trust Vehicle*, *in* Extending the Boundaries of Trust and Similar Ring-Fenced Funds 135, 147, 150 (David Hayton ed., 2002).
[226] *Id.* at 150.
[227] *Id.* at 150. In the United States, the situation is different. *See* Langbein, *supra* note 45, at 653.
[228] *See* Section 2.2. 3.
[229] *See* Section 2.3.1.2(b), for theoretical background on connected history and entanglement.

It remains part of fiduciary law in the United States of America, however. This means that, as a consequence of transnational ordering, there is no longer a unitary common fiduciary law.

Second, in the seminal case *Permanent Building Society (in liq) v. Wheeler*, the Australian Supreme Court, led by Ipp J, denied the duty of care having a fiduciary character, qualifying only the duty of loyalty as truly fiduciary in nature.[230] That was taken up by the English High Court and Millet J in the also seminal decision *Bristol & West Building Society v. Mothew*.[231] Just like the example of trust legislation in East Asia, courts in the United Kingdom and Australia watch each other and, sometimes, communicate in their reasoning. This establishes another example of connected histories in the development of the law – fiduciary law in this case – which is the product of shared experiences and legal reasoning across national borders.

A skeptic might argue that even those who think of the duty of care as a fiduciary obligation doubt its quality as a distinctive feature of fiduciary relationships[232] or even deny it.[233] Starting with this critical view as a premise, one might deny the existence of two transnational orders of fiduciary law in the common law world. Nevertheless, the question remains relevant. Where the duty of care kept its place under the fiduciary roof, it interacts with the duty of loyalty.[234] Put differently, courts seem to construe the demands of loyalty in light of how the duty of care works, inside or outside the fiduciary relationship – defined narrowly. Vice versa, as the Japanese example shows,[235] duties of care can gobble up parts of what in Australia is defined in terms of loyalty.

[230] Ipp J, Permanent Building Society (in liq) v. Wheeler (1994) 11 WAR 187, 239 (Austl.); *see also* Breen v. Williams (1996) 186 CLR 71 (Austl.).

[231] Millet J, Bristol & West Building Society v. Mothew [1996] EWCA (Civ) 33, [1996] 4 All ER 698 [711]–[712] (Eng.). This is not to say that the issue has been definitely settled either in the United Kingdom or in Australia. The line of cases mentioned above is subject to severe criticism. *See, e.g.*, Dyson Heydon QC, *Modern Fiduciary Liability: The Sick Man of Equity?*, 20 TRUST & TRUSTEES 1006 (2014). In recent years, several court decisions may well be interpreted as scaling back on the issue and at least propagating a more nuanced view. The courts are carefully citing cases of the pre-1994 era. *See, e.g.*, Pitt v. Holt [2011] EWCA (Civ) 197 and [2013] UKSC 26 (Eng.); Ancient Order of Foresters in Victoria Friendly Society Limited v. Lifeplan Australia Friendly Society Limited [2018] HCA 43 (Austl.). For the purposes of this chapter, however, these criticisms and newer developments in the case law do not change the fact that – at least for more than a decade – English and Australian courts developed a distinct concept of fiduciary law by communicating across borders.

[232] On the fiduciary duty of care and its precarious status in the United States, *see* John C. P. Goldberg, *The Fiduciary Duty of Care*, *in* Criddle et al., *supra* note 1, at 405.

[233] Peter Birks, *The Content of Fiduciary Obligation*, 34 ISRAEL L. REV. 3, 35 (2000). (The duty of care "is a fiduciary obligation, but is not, as such, distinguishable from any contractual or non-contractual duty of care.")

[234] Goldberg, *supra* note 232, at 407.

[235] *See* Section 2.4.3.

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It is open to further research to assess court practice and see to what extent judges following the Australian and English approach allocate issues to the duty of loyalty their US counterparts would solve referring to the duty of care.

2.4.3 *Constructing the Duty of Loyalty*

Anyone looking for a duty of loyalty as the distinctive feature of transnational fiduciary law has to consider that not all jurisdictions construct this duty comparable to the common law approach, i.e., as a single rule which then is divided into several sub-norms depending on the fact pattern in case. Alternatively, or in addition, the duty of care bears the potential of solving loyalty-related issues. Again, the functional perspective governs the analysis of fiduciary law on the transnational level.[236] Once more, the "East Asian Four" provide an example.[237]

Until recently, China, Japan, Taiwan, and South Korea did not have an open-ended standard establishing a fiduciary duty of loyalty in trust law. They have implemented a more diverse set of rules, each addressing a more specific aspect of the trustee's obligation.[238] Combined in a bundle, however, they yield the idea of loyalty.[239] Moreover, they "impose the core trust obligations on a trustee."[240] This turns the common law doctrine on its head; instead of loyalty as a ground rule from which courts extract more specific duties,[241] they generate a general rule by induction. As in Germany and other civil law jurisdictions, these duties add to the regular set of contractual obligations without having fundamentally different remedies.

One should hasten to add that, in 2006 and 2011, respectively, Japan and South Korea introduced generic duties of loyalty.[242] What remains to be seen, however, is the extent to which these duties will be able to lead a life on their own. Taking into account the other and more specific rules on a trustee's obligations, it is likely that courts will construe a much narrower scope of application and judge cases referring to the more specific duties and other sets of rules.

Experiences with Japanese corporate law corroborate this assumption. Under US military rule, Japan introduced a duty of loyalty in its corporate law in 1950, in addition to an older provision on agency law, also applicable on corporate directors, which imposes a duty of care.[243] Nevertheless, the Japanese Supreme Court held the general agency provision to comprise a duty of loyalty, rendering the later

[236] *See* Section 2.2.2.
[237] On East Asia, *see supra* Section 2.3.1.2(a).
[238] Ho, *supra* note 131, at 296–98. On China, *see Id.* at 210–17.
[239] *Id.* at 297–98.
[240] *Id.* at 297.
[241] *See* Gold, *supra* note 74, at 386.
[242] Tamaruya, *supra* note 47, at 2250.
[243] *See* J. Mark Ramseyer & Masayuki Tamaruya, *Fiduciary Principles in Japanese Law*, *in* Criddle et al., *supra* note 1, at 643, 646–47.

corporate law provision superfluous.[244] It was only later, in 1989, that the Supreme Court switched gears in corporate law and now solves at least some loyalty issues by relying on the specific corporate law provision.[245] Nevertheless, Japanese courts do not use this provision extensively[246] and still seem to cling to the old Supreme Court decision.[247] Corporate and comparative law scholars weigh different reasons for this reluctancy.[248] One of these reasons, however, unsurprisingly seems to be the legal environment into which the duty of loyalty was transplanted.[249] The idea was already there[250] and found its way into court practice by other normative means. Outside the corporate law arena, Japanese judges solve loyalty issues based on the general agency provision.[251]

2.5 CONCLUSION

Viewing fiduciary law from the perspective of transnational legal theory provides important insights into the emergence of legal orders and processes of legal ordering transcending the boundaries of nation-states. All legal systems have to address problems arising out of relationships in which one person enjoys discretionary powers over the interests of another. Interestingly, but perhaps not surprisingly, both common law and civil law jurisdictions have developed a set of tools subjecting the person having powers under loyalty constraints in various ways. Regardless of their differences in traditions and technical approaches, from a functional perspective the divide between common law and civil law may be crossed.

On the one hand, this perspective makes it possible to paint a picture of fiduciary law outside the common law. It shows how norms and institutions taken from the common law (such as the trust) may survive and develop in civil law systems, which lack an equity tradition. On the other hand, using the example of trust law as an instance of fiduciary law shows that conventional transnational legal theory leaves a blind spot, because it concentrates too much on norms "beyond" the nation-state being incorporated or acknowledged in national legal institutions.

Transnational fiduciary law develops in different spaces and may develop in horizontal and vertical dimensions. Horizontal transnational ordering concerns the flow of norms between nation-states. The example of the trust in four East Asian countries, Japan, Taiwan, South Korea, and China, demonstrates that legal orders may evolve in reaction to each other, using and implementing norms created

[244] *Id.* at 648.
[245] Hideki Kanda & Curtis J. Milhaupt, *Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 Am. J. Comp. L. 887, 895 (2003).
[246] *Id.* at 898–901.
[247] Ramseyer & Tamaruya, *supra* note 243, at 651, 651 n.6 and accompanying text.
[248] *See* Kanda & Milhaupt, *supra* note 245, at 898–901.
[249] *Id.* at 900.
[250] *Id.* at 899.
[251] Ramseyer & Tamaruya, *supra* note 243, at 649, 657.

in other nation-states. This recursive process is not captured by traditional accounts of comparative law. Transnational legal theory offers a methodological toolbox, which allows one to better focus on the process of norm creation beyond nation-states. The case study of so-called soft law on ESG is an example of vertical transnational ordering of fiduciary law. Exploring fiduciary law from a transnational angle and its socio-legal approach adds value, because it lays bare several ways in which nonbinding norms created by international organizations like the UN or the OECD have normative thrust, even in legal systems resting on legal concepts like shareholder value.

Last, but not least, employing a transnational perspective provides insights into how the contents of fiduciary obligations may be conceptualized differently in different (transnational) legal orders. Even though the duty of loyalty remains distinct, its import may differ from order to order. Moreover, the contents of fiduciary obligations may vary. Communication between courts in Australia and England led to a transnational fiduciary legal order where the duty of care is no longer considered having the quality of a fiduciary obligation.

3

A Narrow View of Transnational Fiduciary Law

Andrew F. Tuch[*]

3.1 INTRODUCTION

Fiduciaries frequently confront transnational situations. Lawyers – an archetypal class of fiduciary – have long counseled participants in cross-border transactions and conducted their own activities transnationally.[1] Financial institutions – firms that often act in a fiduciary capacity[2] – have provided products transnationally for centuries.[3]

Yet, even as people, products, and capital have become more mobile, scholars have until recently given little attention to the transnational dimensions of fiduciary law. Instead, they have focused on activities occurring within the borders of legal systems.[4] Scholars have explored fiduciary obligations by examining when they arise, what they require, and how they apply and have applied in various substantive fields

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[1] For example, innovations by lawyers in the eighteenth and nineteenth centuries facilitated cross-border trade between Britain and America. *See* ALAN D. MORRISON & WILLIAM J. WILHELM, JR., INVESTMENT BANKING: INSTITUTIONS, POLITICS, AND LAW 97–120 (2007). US lawyers were instrumental in creating the Panama Canal. *See* JOHN OLLER, WHITE SHOE: HOW A NEW BREED OF WALL STREET LAWYERS CHANGED BIG BUSINESS AND THE AMERICAN CENTURY 72–75 (2019).

[2] Andrew F. Tuch, *The Weakening of Fiduciary Law*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 354, 356–60 (D. Gordon Smith & Andrew S. Gold eds., 2018).

[3] During the eighteenth century, investment houses operating on both sides of the Atlantic raised funds from parties located in multiple national systems to finance railroads and wars. *See*, *e.g.*, VINCENT P. CAROSSO, INVESTMENT BANKING IN AMERICA 29–42 (1970); CHARLES R. GEISST, WALL STREET: A HISTORY FROM ITS BEGINNINGS TO THE FALL OF ENRON 35–63 (2004).

[4] *See infra* notes 26–28 and accompanying text.

and legal systems,[5] but they have rarely examined how fiduciary law applies to conduct spanning national systems or to disputes that transcend national frontiers. Even the application of private international law principles to fiduciary law, an exercise that examines problems with transnational dimensions, has largely gone unexplored by fiduciary scholars.

This chapter conceptualizes "transnational fiduciary law," a term that marries the fields of fiduciary and transnational law. Transnational fiduciary law warrants attention because of the growing frequency and significance of transnational business problems and the inevitability that many such problems have fiduciary dimensions. This chapter identifies two primary understandings of the concept and explores their scope and possible content.

Under the first interpretation of this composite concept, the term "transnational" qualifies what fiduciary scholars have conventionally understood as fiduciary law. Transnational fiduciary law, on this view, encompasses the application of fiduciary law to transnational problems and situations. The directors of a Delaware corporation that does business in Venezuela may face such problems. A US mutual fund advisor who invests in UK companies on behalf of US investors fulfills a fiduciary role. In the course of their work, these actors will owe fiduciary duties under US law, even though their operations may occur outside the United States. This sense of transnational fiduciary law further encompasses the global spread of fiduciary laws, as jurisdictions learn from each other or perhaps reform or develop their laws, converging with those of another system.

Under the second interpretation, transnational fiduciary law refers not to fiduciary law as applied in transnational contexts but rather to transnational law governing the conduct of fiduciaries. Transnational law lacks a universally accepted definition.[6] Nevertheless, here we seek some wider notion of a "legal order" that is said to govern the behavior of parties operating within it. This order incorporates formal laws but also "regulatory instruments and mechanisms of governance that, while implicating some kind of normative commitment, do not rely on binding rules or on a regime of

[5] *See, e.g.*, The Oxford Handbook of Fiduciary Law (Evan J. Criddle et al. eds., 2019) (examining fiduciary law under numerous classifications).

[6] *See* Roger Cotterrell, *What Is Transnational Law?*, 37 Law & Social Inquiry 500, 500–02 (2012); Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 Ann. Rev. L. & Soc. Sci. 231, 232 (2016). *See also infra* notes 20–27. For instance, transnational law has been understood not simply as a corpus of law, but as the production and transmission of legal norms. Another point of divergence concerns whether the notion of transnational law refers to the law's scope of application or the legal sources implied. *See* Ralf Michaels, *State Law as a Transnational Legal Order*, 1 U.C. Irvine J. Int'l Transnat'l. and Comp. L. 141, 145–46 (2016). Efforts to identify transnational law or legal orders are often tentative, arguing only that such law or legal orders may be emerging. *See, e.g.*, Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L & Contemp. Probs. 15, 16 (2005); Ross Cranston, *Theorizing Transnational Commercial Law*, 42 Texas Int'l L. J. 597, 616 (2007).

formal sanctions."[7] As such, this understanding largely encompasses the first interpretation but extends more broadly to include norms, contractual constraints, customary practices, official guidance, and assorted voluntary schemes, all of which might achieve similar objectives to fiduciary law.[8]

In this chapter, I argue that scholarly attention to the transnational dimensions of fiduciary law ought, in most instances, to be bounded by the first interpretation. Fundamentally, I question whether transnational law governing fiduciaries generally can be equated with fiduciary law at all without causing significant confusion. Fiduciary duties are distinctive in ways that prevent non-fiduciary law – to say nothing of vague and shifting norms – from serving as substitutes. Keep in mind that much of the law that governs fiduciaries is not fiduciary law; nor does it purport to be fiduciary law. Similarly, many of the duties fiduciaries owe are not fiduciary duties.[9] What makes them fiduciaries, then, is precisely fiduciary law, not the wider range of laws and norms to which they may also be subject.[10]

Another difficulty with the second interpretation is that legal norms and practices that appear to serve similar functions as fiduciary law may be rarely stated and therefore difficult to verify. When they are stated, they may be vague and provisional. It is, therefore, hard to determine whether transnational fiduciary law in this second sense exists at all in practice. The chapter provides case studies illustrating the difficulty of isolating the second interpretation in practice, except as it reduces to the first through its incorporation of fiduciary law applied in transnational contexts.

To be clear, I do not claim that the transnational dimensions of fiduciary law are irrelevant. Far from it: Fiduciaries find themselves more and more involved in deals across jurisdictions, which can raise thorny questions about how they must behave in order to meet fiduciary obligations. Nor do I reject the importance of transnational law or transnational legal ordering. However, I suggest that we treat transnational fiduciary law as an application of fiduciary law rather than as a field deserving independent study, at least until we can establish that transnational fiduciary law – in the first interpretation – is itself distinct from fiduciary law.

3.2 DEFINITIONAL ISSUES

Although transnational fiduciary law simply marries the concepts of fiduciary law and transnational law, defining the term poses challenges. Scholars in each of these

[7] Anna Di Robilant, *Genealogies of Soft Law*, 54 Am. J. Comp. L. 499, 499 (2006). *See also* Carrie Menkel-Meadow, *Why and How to Study "Transnational" Law*, 1 U.C. Irvine L. Rev. 97, 103 (2011).

[8] On one definition, fiduciary law aims "to prohibit fiduciaries from misappropriating or misusing entrusted property or power." Tamar Frankel, Fiduciary Law 240 (2011).

[9] *See infra* notes 88–105 and accompanying text.

[10] *Id.*

fields conceive of law differently, with transnational law scholars adopting a more capacious understanding.

To fiduciary scholars, fiduciary law means "hard" law. Hard law imposes "legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) and that delegate authority for interpreting and implementing the law."[11] First, fiduciary law imposes legally enforceable obligations, requiring loyalty and, under American law, due care.[12] Second, fiduciary obligations are precise or capable of being made precise through adjudication or rulemaking. As Seth Davis notes, fiduciary "duties of loyalty and care can be specified in these relationships by reference to a specific maximand and a discernible set of decision rules."[13] Third, authority for interpreting and implementing fiduciary law is delegated to courts. It is an oft-stated principle that parties themselves do not determine whether a fiduciary relationship exists; courts do.[14]

To scholars of fiduciary law, therefore, fiduciary law is state-enforced law, the product of common law or legislative principles.[15] This is so even when fiduciary law is applied to non-fiduciaries functioning in a fiduciary-like manner or to duties that are analogous to fiduciary duties.[16] Of course, fiduciary law may reflect various

[11] *Cf.* Kenneth W. Abbott & Duncan Snidal, *Hard and Soft Law in International Governance*, 54 Int'l Org. 421, 421 (2000).

[12] *See* Matthew Conaglen, *Fiduciary Principles in Contemporary Common Law Systems*, *in* Criddle et al., *supra* note 5, 565, 574–75.

[13] Seth Davis, *The False Promise of Fiduciary Government*, 89 Notre Dame L. Rev. 1145, 1170 (2014); *id.* at 1158 (discharging fiduciary duties requires the fiduciary to "pursue one or a set of agreed-upon ends, which are measured by a specific set of doctrinal maximands").

[14] *See, e.g.*, Restatement (Third) of Agency § 1.02 (2006) ("Whether a relationship is characterized as agency in an agreement between parties . . . is not controlling"). For applications of this general principle, *see* Veleron Holdings, B.V. v. Morgan Stanley, 117 F. Supp. 3d 404 (2015) (citing Ne. Gen. Corp. v. Wellington Adver., Inc., 82 N.Y. 2d 158, 163 (N.Y. 1993)) ("we must look past the labels that [the parties] placed on their relationship and instead plumb the real character of the services that [the bank] provided . . . because 'Ultimately, the dispositive issue of fiduciary-like duty or no such duty is determined not by the nomenclature [used by the parties] but instead by the services agreed to under the contract between the parties'"); In re Merrill Lynch Auction Rates Securities Litigation, 758 F. Supp. 2d 264, 282 (S.D.N.Y. 2010) (refusing to give effect to a disclaimer of fiduciary duties because "it is the facts and circumstances of the relationship of the parties that governs whether a [fiduciary] duty existed," not how the parties characterize the relationship).

[15] Prominent scholarship examining fiduciary law focuses on legal doctrine, usually case law. *See, e.g.*, Matthew Conaglen, Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties 7–31 (2011); Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 37 Duke L. J. 879 (1988); Paul Finn, Fiduciary Obligations 1–5 (1977); J. D. Heydon et al., Meagher, Gummow & Lehane's Equity Doctrines & Remedies 141–85 (5th ed. 2015).

[16] *See, e.g.*, Martin Gelter & Genevieve Helleringer, *Fiduciary Principles in European Civil Law Systems*, *in* Criddle et al., *supra* note 5, 583, 584 (referring to "fiduciary-like duties"); Chaim Saiman, *Fiduciary Principles in Classical Jewish Law*, *in* Criddle et al., *supra* note 5, 545, 546 (referring to "the nearest analogue to a modern fiduciary"). *See also* Nicholas C. Howson, *Fiduciary Principles in Chinese Law*, *in* Criddle et al., *supra* note 5, 603, 603 (referring to "something like fiduciary obligations").

policies and rationales,[17] enable the development of social norms,[18] and be seen as codifying moral intuitions or reasoning.[19] But no matter what is contained in the larger sphere of goals and justifications surrounding fiduciary law, it is conventionally understood as state-enforced law.

In contrast to fiduciary law as conventionally understood, transnational law is both hard – state-enforced – and "soft." It need not be the product of legislative, regulatory, or judicial determinations but can instead result from "customary practices, norms, and patterns of behavior regulation."[20] These are enforced not by the state but "through such social and political processes as economic sanctions, 'shaming,' and reputational effects."[21] Transnational law may also be created in an ad hoc manner by the parties through private legal ordering, which they can accomplish through private contract or standard-setting.[22] Such law is transnational because it applies to parties located in multiple national systems,[23] or targets events or situations that occur in more than one national system,[24] or "regulates actions or events that transcend national frontiers."[25]

This is one way to conceptualize transnational law: as a substantive body of law – with the notion of law broadly conceived – applied in transnational contexts. Another focus of study is transnational legal ordering, which focuses upon processes of normative settlement across national borders, which can occur through "hard" or "soft" law as the result of interactions among actors and institutions in multiple jurisdictions.[26] Developed by Terence Halliday and Gregory Shaffer, this theoretical framework addresses how legal norms are produced transnationally and migrate across borders, shaping legal practice.[27] Here the focus of study is the transmission of

[17] For example, fiduciary law may reflect "the need to maintain public confidence in the integrity and utility of a range of socially important relationships in which loyal service is properly to be expected." Hughes Aircraft Sys Int'l v. Air Servs Austl (1997) 76 FCR 141, 237 (Austl.).

[18] *See, e.g.*, Matthew Harding, *Fiduciary Law and Social Norms*, *in* Criddle et al., *supra* note 5, 797, 808–10.

[19] *See* Tamar Frankel, *Fiduciary Law*, 71 Cal. L. Rev. 795, 829–30 (1983). ("Courts regulate fiduciaries by imposing a high standard of morality upon them.")

[20] Menkel-Meadow, *supra* note 7, at 103.

[21] *See id.* at 113.

[22] *See* Chapter 1.

[23] Gregory Shaffer, *Transnational Legal Process and State Change*, 37 L. & Soc. Inq. 229, 232 (2012). (Transnational law can be interpreted to "generally comprise legal norms that apply across borders to parties located in more than one jurisdiction.") *See also* Cotterrell, *supra* note 6, at 500–02 .

[24] Shaffer, *supra* note 23, at 233. (Transnational law "refers to law that targets transnational events and activities – that is, transnational situations which involve more than one national jurisdiction.")

[25] Philip C. Jessup, Transnational Law 2 (1956). (Transnational law includes "all law which regulates actions or events that transcend national frontiers.")

[26] *See* Michaels, *supra* note 6, at 143–45.

[27] *See* Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* Transnational Legal Orders 3, 5 (Terence C. Halliday & Gregory Shaffer eds., 2015). *See also* Shaffer, *supra* note 6.

laws "across borders, regardless of whether they address transnational activities or purely national ones" and the roles of networks and institutions in constructing them.[28]

How to fuse these disparate notions of law into a single composite concept? In fact, I believe it is necessary to develop more than one composite, as no one sense of transnational fiduciary law fully embraces what is traditionally understood as fiduciary law alongside both approaches to transnational law. I therefore develop two interpretations of transnational fiduciary law.

In the first, the term "transnational" qualifies what fiduciary scholars have conventionally understood as fiduciary law. Here, transnational fiduciary law encompasses the application of fiduciary law to transnational problems and situations. A scholar exploring transnational fiduciary law in this sense will seek to understand how particular fiduciary laws operate across national boundaries or jurisdictions, as parties transact in multiple national systems or create business arrangements that implicate parties in multiple national systems. This scholar may also take interest in the changing practice of fiduciary law within a given national system as its legislators, regulators, jurists, and practitioners learn from their experiences in contact with other national systems or find their domestic business environments altered by foreign laws governing parties doing business in an increasingly globalized financial milieu. For instance, scholars may note the extension of US fiduciary practices to other parts of the world where US fiduciaries, such as mutual fund managers, are required to follow US fiduciary law even as they operate abroad. Halliday and Shaffer's theoretical framework of transnational legal orders provides a framework for studying these processes. Section 3.3 examines transnational fiduciary law on this understanding: hard law as applied in transnational contexts.

Under the second interpretation, transnational fiduciary law encompasses transnational law understood as a corpus of law or as the production and transmission of law that governs fiduciaries. Law may be hard or soft. Section 3.4 considers this interpretation and explains why I regard it as overinclusive.

3.3 FIDUCIARY LAW WITH TRANSNATIONAL DIMENSIONS

Among fiduciary law scholars, fiduciary law has a decidedly national orientation. Assumed prototypes for the accepted or status-based categories of fiduciary relationship – those between partners, agents and principals, lawyers and clients, trustees and beneficiaries, and directors or officers and the corporations they serve – are rarely considered to exhibit transnational dimensions. If they do, those dimensions rarely feature in the questions that fiduciary scholars address. Other relationships, though not fiduciary relationships by default, may also have fiduciary character

[28] Shaffer, *supra* note 23, at 8–9.

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because, say, a party reposes trust or confidence or is vulnerable to opportunism.[29] These, too, rarely have transnational legal dimensions. Questions that tend to concern fiduciary scholars – fiduciary standards of conduct; how those standards vary across relationships, jurisdictions, and time periods; and the remedies available for fiduciary breach – usually do not involve transnational activities or situations. And while comparative fiduciary law attracts strong scholarly attention, it too lacks transnational dimensions, since it tends to consider the law of one national system alongside that of another rather than the law that spans those systems or that governs actors located in or problems arising in both national systems. One measure of this scholarly indifference is the recently published *Oxford Handbook of Fiduciary Law*. Its forty-eight chapters offer one of the most comprehensive accounts of the subject, but none of them deals substantively with transnational fiduciary law.[30]

Yet fiduciary law, understood in its conventional sense, often has transnational dimensions. A fiduciary's activities may span borders, or a fiduciary may face problems arising in multiple national systems. A fiduciary itself may reside in multiple national systems. The fiduciary law governing fiduciaries may apply across national borders. And scholars undertaking comparative studies of fiduciary law examine how fiduciary law in one national system may migrate to and influence law in other systems.[31] In Section 3.3.1, I explore circumstances such as these, in which fiduciary law has transnational character.

3.3.1 *The Effect of Conflict-of-Laws Principles*

Under conflict-of-laws principles, fiduciary law can apply transnationally, such as to parties whose conduct occurs across national borders. One instance in which fiduciary law was applied transnationally under these principles was *Sinclair Oil Corp. v. Levien*,[32] an iconic corporate law case. Sinclair Oil was a New York-

[29] *See* Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 Ariz. L. Rev. 925, 940–51 (2006); Daniel B. Kelly, *Fiduciary Principles in Fact-Based Fiduciary Relationships*, *in* Criddle et al., *supra* note 5, 3, 6–11; Andrew F. Tuch, *Fiduciary Principles in Banking*, *in* Criddle et al., *supra* note 5, 125, 127–37.

[30] *See* Criddle et al., *supra* note 5.

[31] *See*, *e.g.*, Martin Gelter & Genevieve Helleringer, *Opportunity Makes a Thief: Corporate Opportunities as Legal Transplant and Convergence in Corporate Law*, 15 Berkeley Bus. L. J. 92 (2018); Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, U. Ill. L. Rev. 507 (2019); David Kershaw, The Foundations of Anglo-American Corporate Fiduciary Law (2018); David Kershaw, *The Path of Corporate Fiduciary Law*, 8 N.Y.U. J.L. & Bus. 395 (2012); Amir N. Licht, *Farewell to Fairness: Towards Retiring Delaware's Entire Fairness Review*, 4 Del. J. Corp. L. 1 (2020); Amir N. Licht, *Lord Eldon Redux: Information Asymmetry, Accountability, and Fiduciary Loyalty*, 37 Oxford J. Legal Stud. 770 (2017); Andrew F. Tuch, *Reassessing Self-Dealing: Between No Conflict and Fairness*, 88 Fordham L. Rev. 939 (2019).

[32] 280 A.2d 717 (Del. 1971).

incorporated oil exploration and production company that operated internationally through various subsidiaries. One of these, the Delaware-incorporated Sinven, was Sinclair's subsidiary in Venezuela.[33] Minority shareholders in Sinven sued Sinclair, alleging that, as the dominant shareholder in Sinven, it had breached its fiduciary duties to minority shareholders. Specifically, the minority shareholders alleged that Sinclair had allowed one of its wholly owned subsidiaries to breach contracts with Sinven and, in turn, as controller of Sinven, had failed to enforce Sinven's rights against that subsidiary. According to the Delaware Supreme Court, Sinclair owed fiduciary duties to the Sinven minority shareholders as a controlling shareholder and, having failed to establish the fairness of the relevant transactions, had breached those duties. The court rejected other claims brought by minority shareholders, including the claim that Sinclair had breached its duties by allocating opportunities for developing oil fields in Alaska, Canada, and Paraguay to the company's other subsidiaries.

The case illustrates the reach of Delaware corporate fiduciary law to activities occurring in multiple national systems. The key under conflict-of-laws principles was the status of Sinven as a Delaware corporation. According to Delaware law's internal affairs doctrine, corporate governance matters – such as disputes between directors and shareholders – are governed by the law of a company's state of incorporation.[34] This meant that Sinven was subject to Delaware law, even though its activities were in Venezuela. The same would be true of any Delaware-incorporated company; the doctrine applies Delaware law to directors' conduct occurring in other national systems or in multiple national systems, giving transnational character to Delaware fiduciary law. Similar conflict-of-laws principles apply in other states,[35] as well as in England.[36]

However, apart from the internal affairs doctrine, conflict-of-laws principles apply with some uncertainty to fiduciary questions. The *Restatement (Second) of Conflict of Law* gives no explicit guidance about the applicable law for resolving disputes under fiduciary law, except for agency relationships, in which case the *Restatement* would determine the parties' rights and duties using the law of the jurisdiction with the most significant relationship to the parties of the transaction.[37] Leading treatises have little substantive discussion of conflict-of-laws principles for fiduciary questions, except tangentially in discussing choice-of-law clauses for contract claims.[38] Nor does legal scholarship appear to address these conflicts-of-laws questions as regards fiduciary disputes.

[33] Levien v. Sinclair Oil Corp., 261 A.2d 911, 913 (Del. Ch. 1969).
[34] Restatement (Second) of Conflict of Laws § 309 (1971); Stephen M. Bainbridge, Corporate Law 8–9 (3d ed. 2015).
[35] *See* Bainbridge, *supra* note 34, at 9.
[36] Peter Hay et al., Conflict of Laws 1342 (6th ed. 2018).
[37] Restatement (Second) Conflict of Laws §§ 291 (1971).
[38] *See, e.g.*, Hay et al., *supra* note 36, at 1076–80.

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To the extent courts do consider choice-of-law in resolving fiduciary disputes, they often characterize such disputes as either tort of contract cases. Because fiduciary duty has been characterized as a tort, we would expect choice-of-law principles *for torts* to resolve fiduciary claims.[39] According to the *Restatement (Second) of Conflict of Laws*, the relevant law is that with "the most significant relationship to the occurrence [of the tort] and the parties."[40] However, instead of applying first-principles analysis to determine the governing law to resolve a fiduciary claim, courts may follow the law specified in a choice-of-law clause in a contract between parties to a fiduciary relationship. Before taking this approach, courts must determine whether the relevant choice-of-law clause governs noncontractual issues – such as fiduciary breach – arising from the contractual relationship to which the clause applies.[41] Courts have taken different positions on whether such clauses govern fiduciary issues.[42] According to a leading treatise, "the most logical inference" from the *Restatement (Second) of Conflict of Laws* is that such clauses apply only to contractual issues and therefore not to fiduciary breach.[43] But the legal position is unsettled.[44] Still, because cases often turn on interpretations of the contract in question,[45] clauses are often given their intended effect. The result is that clauses written to apply to disputes "whether based on contract, tort, or otherwise" – an increasingly common formulation in some business contexts – apply to claims of fiduciary breach. Even in the absence of such clear language, Delaware courts have been willing to apply the law specified in a choice-of-law clause to tort claims in order to avoid "uncertainty of precisely the kind that the parties' choice of law provision sought to avoid."[46]

For a recent case involving a transnational situation, consider *Veleron Holdings, B.V. v. Morgan Stanley*.[47] In resolving an insider trading claim, the question arose of when a fiduciary relationship existed between the French bank BNP Paribus and its contractual counterparty, the US bank Morgan Stanley. Morgan Stanley had undertaken to act as BNP's agent in a transaction involving the acquisition of Magna

[39] Restatement (Second) of Torts § 874, cmt. A (1979).

[40] Restatement (Second) of Conflict of Laws § 145 (1971).

[41] Hay et al., *supra* note 36, at 1073. (The relevant question is whether "a choice-of-law clause may, or does, encompass non-contractual issues arising from, or connected to, the same contractual relationship that is the object of the clause.")

[42] *Id.* at 1074. ("The Restatement is silent on whether the parties may agree in advance on the law that will govern the parties' non-contractual rights, especially those arising from a future tort between them.")

[43] *Id.*

[44] *Id.* at 1076. ("The case law on this issue in the United States is still unsettled.")

[45] *See, e.g.*, Thomas v. Fidelity Brokerage Services, Inc., 977 F. Supp. 791 (W.D. La. 1998) (rejecting defendant's argument that a choice-of-law provision in a contract extended to a breach of fiduciary duty claim, reasoning that the parties intended that the provision apply to issues of contract construction and enforcement only); Hay et al., *supra* note 36, at 1076–78.

[46] Abry Partners V, L.P. v. F&W Acquisition LLC, 891 A.2d 1032, 1048 (2006).

[47] 117 F. Supp. 3d 404 (2015).

International, a Canadian entity listed on the New York Stock Exchange and Toronto Stock Exchange, by Russian Machines (RM), an entity owned by a Russian oligarch. To facilitate the acquisition, RM formed Veleron B.V., a Dutch special-purpose vehicle. BNP agreed to lend $1.2 billion to Veleron; in turn, Veleron purchased some 20 million shares of Magna, pledging them to BNP as security for the loan. BNP appointed Morgan Stanley as an agent under an "Agency Disposal Agreement" (ADA); Morgan Stanley was to sell Veleron's Magna shares if Veleron defaulted on the loan from BNP. The French bank also entered into a credit default swap with Morgan Stanley under which Morgan Stanley assumed some risk of BNP's loan to Veleron.

In September 2008, during the turmoil of the global financial meltdown, BNP informed Morgan Stanley that Veleron was experiencing financial difficulties and needed to restructure its loan from BNP. Using this information, Morgan Stanley decided to "short sell" Magna stock, allowing it to profit if Magna's stock price fell. When Veleron later defaulted, BNP sold the pledged Magna stock, Magna's price fell, allowing Morgan Stanley to profit under its short sale arrangement.

Veleron commenced suit against Morgan Stanley, raising the question whether Morgan Stanley was a fiduciary of the French bank under the ADA. The US District Court for the Southern District of New York denied in part Morgan Stanley's motion for summary judgment, finding that there was a genuine issue of material fact on the fiduciary question. Observing that New York law governed the ADA, the court applied New York law in examining the fiduciary question, effectively applying the choice-of-law test for contract cases.[48] Fiduciary law thus applied to a situation implicating actors in multiple national systems.

3.3.2 *Fiduciary Law with Transnational Application: Extraterritoriality*

Fiduciary law, as conventionally understood, may also have extraterritorial effect and therefore apply to transnational problems. This is thanks in part to the enormous global influence of US mutual funds.[49] The managers of mutual funds owe fiduciary duties, according to the Investment Advisers Act of 1940.[50] These duties govern their conduct even if it spans national systems or occurs in another national system.[51]

In practice, that conduct will often be transnational because mutual funds may, and commonly do, vote in corporate elections held by their portfolio companies – companies that are often based outside the United States. Frequently fund

[48] *Id.* at 451.

[49] As to the size and expected growth of these enterprises, *see* Lucian Bebchuk & Scott Hirst, *The Specter of the Giant Three*, 99 B. U. L. Rev. 721 (2019).

[50] Investment Advisers Act, 15 U.S.C. §§80b-1 to b-21(2012).

[51] As to the imposition of fiduciary duties, *see* SEC v. Capital Gains Research Bureau, 375 U.S. 180, 191–92 (1963). For an overview of fiduciary principles in investment management, *see* Arthur Laby, *Fiduciary Principles in Investment Advice*, *in* Criddle et al., *supra* note 5, 145, 146–48.

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managers will "vote by proxy." In 2003, the Securities and Exchange Commission adopted Rule 206(4)-6 of the Investment Advisers Act,[52] making clear that investment advisors are fiduciaries even when deciding whether and how to vote their funds' proxies and creating powerful incentives for advisors to vote their proxies.[53] Indeed, investment advisors vote virtually all of their shares, usually voting in-line with the recommendations of proxy advisors.[54] Indeed, investment advisors vote virtually all of their shares, usually voting in-line with the recommendations of proxy advisors. The largest US mutual fund families – Blackrock, Vanguard, and State Street Global Advisors – have significant holdings in foreign corporations. For example, BlackRock, the largest US manager of mutual funds, invests some $1.6 trillion in Europe, the Middle East, and Africa and a further $428 billion in the Asia Pacific,[56] together representing around 30 percent of BlackRock's total assets under management.[57] Data from the United Kingdom illustrates the increasingly transnational nature of investment advisors' activities. Figure 3.1 shows the holdings of UK public companies from 1963 to 2020 by various categories of shareholder, including individuals/households, insurance companies, pension funds, mutual funds, and foreign shareholders (labelled "rest of the world"). Over this period, individual/household ownership decreased as ownership by institutional investors increased. Foreign ownership rose from 7 percent in 1963 to 56.3 percent in 2020, giving foreign investors significant influence over UK companies through voting and other stewardship activities.[58] Of these international investors, US mutual funds are the largest category, accounting for some 30 percent of all foreign investor holdings in UK public companies.[59] When the investment advisors of these US mutual fund advisors vote their shares in UK companies, US fiduciary law governs their decisions.[60]

[52] Proxy Voting by Investment Advisers, 17 C.F.R. § 275.206(4)-6 (2018).

[53] *See* Andrew F. Tuch, *Proxy Advisor Influence in a Comparative Light*, 99 B.U. L. Rev. 1499 (2019).

[54] *See* Broadridge & PWC Proxy Pulse: 2018 Proxy Season Review 2–4 (2018), https://www.broadridge.com/_assets/pdf/broadridge-2018-proxy-season-review.pdf [https://perma.cc/AA39-4XDK].

[56] *See* Blackrock, Inc., Form 10-K for 2018, at 10.

[57] *Id.* at 4.

[58] Office for Nat'l Statistics, Ownership of UK Quoted Shares: 2020 (Mar. 3, 2022), https://www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/ownershipofukquotedshares/2020#:~:text=The%202020%20estimate%20for%20unit,underlying%20ownership%20by%20unit%20trusts.

[59] *See id.* at table 3 (showing that in 2020 stockholdings of mutual funds (known in the United Kingdom as unit trusts) accounted for GBP 315.9 billion out of total foreign stockholdings of GBP 1,220.5 billion). For more detailed analysis of investor holdings and voting, *see* Suren Gomtsian, *Voting Engagement by Large Institutional Investors*, 45 J. Corp. L. 659 (2020).

[60] Recognizing the application of US law to voting decisions in non-US companies, the SEC in its 2003 guidance to investment advisers observes that proxy voting may not serve clients' interests, and therefore not be required, if the cost of such voting exceeds its benefits. It gives the example of "casting a vote on a foreign security may involve additional costs such as hiring a translator or traveling to the foreign country to vote the security in person." Proxy Voting by

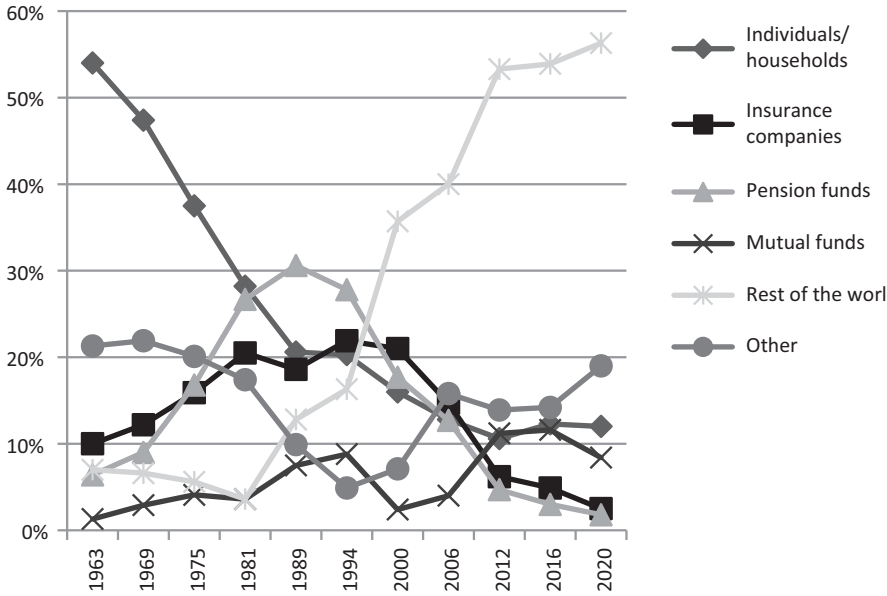

FIGURE 3.1. Share ownership patterns in the United Kingdom, 1963–2020[61]

The same applies to US investors voting on boards of companies outside the United Kingdom. US fiduciary law follows US investors across the globe, ensuring that US fiduciary law has considerable transnational presence and effect.

Investment Advisers, Investment Advisers Act Release No. IA-2106, 68 Fed. Reg. 6585, 6587 (Feb. 7, 2003). The voting by US advisors in UK companies has influenced voting behavior by their British counterparts. *See* Bernard S. Black & John C. Coffee, *Hail Britannia?: Institutional Investor Behavior under Limited Regulation*, 92 MICH. L. REV. 1997, 2004 (1994). ("American influence may also have an impact. British institutions have observed the American voting practices and also realize that if they do not vote, the votes of American institutions, who own a significant fraction of British equities, could dictate the outcome of shareholder votes.")

[61] OFFICE FOR NAT'L STATISTICS, OWNERSHIP OF UK QUOTED SHARES: 2020 (Mar. 3, 2022), https://www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/ownershipofukquotedshares/2020#:~:text=The%202020%20estimate%20for%20unit,underlying%20ownership%20by%20unit%20trusts; OFFICE FOR NAT'L STATISTICS, OWNERSHIP OF UK QUOTED SHARES: 2016 (Nov. 29, 2017), at figs. 3–8 https://www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/ownership ofukquotedshares/2016 [https://perma.cc/672V-YD52]. The "Rest of the world" category includes foreign investors, among them mutual funds, pension funds, insurance companies, banks, private non-financial companies and public sector entities (including sovereign wealth funds). *Id.* at table 5. Note that these data may exaggerate the influence of investment advisors because they classify a shareholder as foreign if its parent is foreign-domiciled, even if the shareholder is a locally managed UK subsidiary. Tuch, *supra* note 53, at 1459, 1502–03. But *see* Brian R. Cheffins, *The Stewardship Code's Archilles' Heel*, 73 MOD. L. REV. 1004, 1008–09 (2010) (emphasizing the implications of foreign ownership of UK public company stock).

3.3.3 *Fiduciary Law as Process*

This first interpretation of transnational fiduciary law also encompasses the spread of fiduciary laws across national boundaries, as national laws develop, converging with those of another system. Fiduciary law is often transmitted across boundaries and evolves by reference to fiduciary law in other national systems. These sorts of influences across jurisdictions are explicitly studied in comparative law work on fiduciary law.[62] Examples of this sense in which fiduciary law has transnational character are given below.[63]

3.4 TRANSNATIONAL LAW GOVERNING FIDUCIARIES

Section 3.3 focused on fiduciary law that is transnational in character. In Section 3.4, the analysis widens to encompass transnational law governing fiduciaries and therefore applies broader conceptions of law. Here, law means not just the hard law of legislation, regulation, and judicial decisions, but also private legal ordering through contract and standard-setting by parties. Terence Halliday and Gregory Shaffer theorize what they call a "transnational legal order" (TLO), defined as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions."[64] Halliday and Shaffer explain that "state law ... becomes TLO law in subject areas when transnational legal norms are adopted and practiced in a settled, concordant way so that a new normal arises regarding the social understanding of the legal norms that apply."[65] And, as we saw, the focus of transnational law also can be on the production of norms and their transmission across borders – not just the body of law or the legal order, but the ways in which interaction across jurisdictions affects the development of laws and legal norms within national jurisdictions.[66]

Under this interpretation, transnational fiduciary law is not so much the application of fiduciary law across borders as transnational law that governs the conduct of fiduciaries or the transnational legal ordering of fiduciaries. Conceiving of transnational law in this way would bring a broader range of legal instruments within transnational fiduciary law than does the first interpretation[67] and would attend

[62] *See supra* note 32

[63] *See* Section 3.4.4.

[64] Halliday & Shaffer, *supra* note 27, at 11.

[65] Gregory C. Shaffer, *Theorizing Transnational Legal Ordering of Private and Business Law*, 1 U.C. IRVINE J. INT'L TRANSNAT'L. AND COMP. L. 1, 9 (2016).

[66] *See supra* note 27–29 and accompanying text.

[67] This understanding overlaps with the first understanding and may encompass it. Transnational law may be conceptualized as transnational law that "address[es] transnational activities and situations," Shaffer, *supra* note 23, at 7. The term can include "the application of *national law* to events that occur outside a state's borders but have effects within it." *Id.* at 8 (emphasis added).

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more to the role of transnational institutions and networks in the development of legal norms. Below I explore these understandings of transnational law by sketching a few brief examples of transnational norms, practices, and patterns of behavior that may govern the conduct of fiduciaries. These examples exclude cases that would also fall within the first interpretation through their incorporation of fiduciary law applied in transnational contexts.[68] I then consider whether these arrangements are firmly enough established across borders to amount to transnational law and, more fundamentally, whether they may sensibly be described as fiduciary law at all. The framework of TLO theory helps us assess the extent to which such norms have settled transnationally from a socio-legal perspective.

3.4.1 *Examples*

3.4.1.1 Private Ordering and Standard-Setting

Firm-Level Conflict-of-Interest Management. In performing various functions, financial conglomerates often act as fiduciaries.[69] Although they are loathe to admit this, they readily claim to have extensive internal procedures and controls for "addressing" conflicts.[70] In fact, financial conglomerates inevitably face conflicts of interest, a function of their business model, which sees them "act[ing] for numerous clients across a broad and diverse range of financial activities, all the while acting as principals in a similarly broad and diverse range of activities."[71] These firms seek to address conflicts to avoid potential fiduciary liability but they do so also to avoid reputational harm, which may be severed, and these measures therefore go further than fiduciary law would require.

[68] For examples, in additional to those in Part II, concerning hard law that may fall within both interpretations, *see* Chapters 4 and 5.

[69] When they act as investment advisors, they are fiduciaries under the Investment Advisers Act of 1940. Section 206(1)-(2). They are also often fiduciaries also under principles of agency and trust law. *See* Deborah A. DeMott & Arthur B. Laby, *The United States of America*, *in* Liability of Asset Managers 411, 415 (Danny Busch & Deborah A. DeMott eds., 2012). When they act as broker-dealers, they may be fiduciaries, particularly if they manage discretionary accounts or exercise control over customer assets. *See* Sec. & Exch. Comm'n, Study on Investment Advisers and Broker-Dealers: As Required by Section 913 of the Dodd–Frank Wall Street Reform and Consumer Protection Act 50–73 (Jan. 2011). On rare occasions financial conglomerates will be fiduciaries when accepting deposits or making loans. *See* Tuch, *supra* note 29, at 127–30.

[70] The Goldman Sachs Group, Inc., Annual Report on Form 10-K, for year ended Dec. 31, 2021, at 45. ("We have extensive procedures and controls that are designed to identify and address conflicts of interest, including those designed to prevent the improper sharing of information among our businesses.")

[71] Andrew F. Tuch, *Financial Conglomerates and Information Barriers*, 39 J. Corp. L. 563, 564 (2014). *See also* Alan D. Morrison & William J. Wilhelm Jr., *Trust, Reputation, and Law: the Evolution of Commitment in Investment Banking*, 7 J. Leg. Anal. 363, 391 (2015).

Major financial conglomerates operate transnationally. Their activities span the globe, often involving transactions involving actors and capital flows that span national borders. Their internal procedures and controls governing conflicts would seem to apply firm-wide.[72] The objective is often to "mitigate" conflicts of interest, rather than necessarily to avoid them.[73] Firms do not publicize their internal policies, other than to describe them in general terms, and deal on a client-by-client basis, leaving observers uncertain about the precise norms applicable to addressing conflicts. In addition to internal controls, common measures include the disclaimer of liability for conflicts (to the extent possible) and the disclosure of actual and expected conflicts.[74] Policies also include information barriers to stem internal flows of information.[75] A strict fiduciary regime requiring conflict avoidance appears not to govern; rather, through a combination of measures, primarily internal limits and controls on conflicts but also the elimination or waiver of fiduciary duties, firms hold themselves to a standard of conflict "mitigation" or "management."

These various norms and practices governing fiduciaries' conduct may well span national systems, having transnational dimensions. Still, these norms and practices are difficult to identify and verify outside these firms.

Advice on Mergers and Acquisitions. The field of firms advising on mergers and acquisition (M&A) transactions provides another concrete example of private legal ordering by parties that may be fiduciaries. Highly lucrative, these services are provided by financial conglomerates or smaller financial firms dedicated to providing advice. These transactions can have transnational elements since the companies involved often operate transnationally and may be in different national systems from their counterparty in a transaction. M&A transactions have high-stakes for the corporations involved, each of which will typically be advised by a financial advisor and legal advisor, and often several of each. M&A advisors may be ad hoc fiduciaries of their clients.[76] In light of the risk of fiduciary characterization, financial advisors

[72] Firms' public disclosures do not suggest otherwise.

[73] *See, e.g.*, Morgan Stanley, Annual Report on Form 10-K, for year ended Dec. 31, 2021, at 17.

[74] Tuch, *supra* note 71, at 576–77.

[75] *See, e.g.*, Goldman Sachs, *supra* note 70. *See also* Law Commission, Fiduciary Duties and Regulatory Rules, 1992, Consultation Paper 124, 61–163 (United Kingdom).

[76] *See, e.g.*, Am. Tissue, Inc. v. Donaldson, Lufkin & Jenrette Sec. Corp., 351 F. Supp. 2d 79, 102 (S.D.N.Y. 2004); Official Committee of Unsecured Creditors v. Donaldson, Lufkin & Jenrette Securities Corp., No. 00 Civ. 8688 (WHP), 2002 WL 362794 (S.D.N.Y. Mar. 6, 2002); Baker v. Goldman Sachs & Co., 656 F. Supp. 2d. 226 (D. Mass. 2009). Similarly, financial firms acting as securities underwriters may owe fiduciary duties. *See* EBC I, Inc. v. Goldman Sachs & Co., 5 N.Y.3d 11, 21–22 (2005). More generally *see* William W. Bratton & Michael L. Wachter, *Bankers and Chancellors*, 93 Tex. L. Rev. 1 (2014) and Andrew F. Tuch, *Banker Loyalty in Mergers and Acquisitions*, 94 Tex. L. Rev. 1079 (2016). Courts in the United Kingdom have not specifically addressed the question, but Australian law, which is likely to be persuasive, suggests that the M&A advisor-client relationship has have "all the indicia of a fiduciary relationship." *See* Australian Sec & Invs Comm'n v. Citigroup Glob Mkts Austl Pty Ltd [No. 4] (2007) 160 F.C.R. 35 (Austl.) and Andrew Tuch, *Investment Banks as Fiduciaries: Implications for Conflicts of Interest*, 29 Melb. U. L. Rev. 478 (2005).

routinely disclaim the existence of fiduciary duties in their client engagement letters.[77] As a further measure, they disclose the possibility that they will face conflicts of interest, an attempt to establish informed consent by their clients for conduct that would otherwise violate fiduciary duties.[78] Nevertheless, financial advisors adopt internal procedures and controls to mitigate conflicts of interest. Though not publicly disclosed, these policies typically include obtaining client consent to conflicts arising during the course of an engagement. Moreover, engagement letters attempt to insulate financial advisors from liability "except to the extent that any losses, claims, damages, liabilities or expenses incurred by the Company result from the willful misconduct, gross negligence or bad faith of [the financial advisor] in performing the services that are the subject of [the engagement] letter."[79] Put simply, rather than needing to act in their client's sole or best interests, M&A advisors and their clients have crafted a regime that purports to impose liability on advisors only for "willful misconduct, gross negligence or bad faith."[80] Such engagement letters are common in developed markets internationally.[81]

Other norms of conduct have developed among financial advisors and their M&A clients beyond those required to avoid fiduciary liability. These practices are observable in financial advisors' conduct but firms have no reason to publicly explain their conduct or disclose their policies. M&A advisors advise a single "side" to the transaction; they virtually never advise both parties in a deal. An M&A advisor will not lend to its client's counterparty to finance a transaction without its client's informed consent. When advising a buyer, a financial advisor will not trade on its own account in the stock of the target corporation.

Though the norms are rarely stated, difficult to verify, and somewhat vague, in practical effect they protect clients from more severe conflicts of interest, conflicts that fiduciary law might not prevent. They thereby protect financial advisors from reputational harm as well as potential fiduciary liability. This especially benefits financial conglomerates because they adopt a structure in tension with strict fiduciary doctrine. Given the cross-border nature of many M&A deals, these norms and practices may be shared across borders. By and large, these norms and practices are not legally enforceable. Nor are they capable of being made precise through adjudication or rulemaking.

Law Firms' Restrictions on Insider Trading. Another norm intended to curb conflicts of interest, which may be regarded as transnational law governing

[77] Andrew F. Tuch, *Disclaiming Loyalty: M&A Advisors and Their Engagement Letters*, 93 Texas L. Rev. See Also 211, 212 (2015).

[78] *Id.* at 220–21.

[79] *See* Letter from Goldman Sachs & Co. LLC to United Natural Foods, Inc., July 20, 2018, at 9.

[80] *Id.*

[81] Indeed, investment banks operating outside the U.S. often use their U.S. style engagement letters. For an example, *see* Australian Sec & Invs Comm'n v. Citigroup Glob Mkts Austl Pty Ltd [No. 4] (2007) 160 F.C.R. 35 (Austl.).

fiduciaries, is the use of firm-level policies to prevent lawyers from engaging in insider trading. Because major law firms advise public companies on important transactions, lawyers working for these firms may obtain nonpublic information about their clients and other companies, information they can use to trade public securities in violation of their fiduciary duties or other laws, including insider trading law. Firms therefore routinely require their lawyers to seek approval from an internal "conflicts committee" before buying or selling stock or other securities. Such approval policies guard against risks of conflicted transactions and violations of duties owed to clients. A guide for lawyers describes the routine law firm practice as follows:

> Most [law] firms will have a clear securities trading policy outlining the steps you need to take to clear a trade.... [The policy] will probably involve you conducting a search through a database to see whether the firm believes it has any relationship with the security that you wish to trade. If it does, you'll likely need to submit a form to the conflicts department where they will vet the relationship. If you can trade in the security, they'll let you know. If you can't, they'll let you know that as well.
>
> Once you receive approval, you'll usually get a small window where you can execute the trade.[82]

The practice of imposing this layer of firm approval likely arose at US law firms, given the intensity with which US regulators and market participants enforce insider trading laws. The practice may have spread as US law firms and lawyers ventured abroad. This would be an example of legal norms being exported and imported across borders as law firms in non-US jurisdictions observed the practices of US firms in an effort to meet the expectations of US clients. While norms requiring lawyers to get firm approval for trading in client stock are rarely publicly stated (law firm policies typically remain nonpublic) and therefore difficult to verify, they probably have broad acceptance among major law firms internationally. They serve similar functions to fiduciary law in promoting lawyers' loyalty toward their clients.

3.4.1.2 International Organizations and Standard-Setting

Transnational law governing fiduciaries may also arise from the work of International standard-setters and organizations. The Organisation for Economic Co-operation and Development (the OECD) first published its Principles of Corporate Governance in 1999, intending these nonbinding principles of "good" corporate governance to serve as benchmarks for improved corporate practice.[83] In 2004, the OECD updated these principles, which by then had become an "international benchmark for policy

[82] *Insider Trading and Dumb Lawyers*, Biglaw Investors, Apr. 3, 2017, *available at* https://www.biglawinvestor.com/insider-trading-and-dumb-lawyers.

[83] *See* Organisation for Economic Co-operation and Development (OECD), OECD Principles of Corporate Governance 5–6 (1999), *available at* https://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=C/MIN(99)6&docLanguage=En. For a discussion of the

makers, investors, corporations and other stakeholder worldwide,"[84] having been designated by the Financial Stability Forum as key standards for sound financial systems and used by the World Bank and IMF in their reports assessing countries' compliance with internationally recognized standards.[85] Companies, especially those in developing economies, may apply the principles voluntarily or be subject to provisions under local law modeled on them.[86] The current iteration of the Principles of Corporate Governance, published in 2015 in collaboration with G20 countries, is of immediate relevance because it purports among other things to govern the conduct of directors, an established category of fiduciary.[87]

The OECD and G20 identify seven broad principles for boards, which it states as recommendations or guidelines that "should" be followed.[88] One principle provides that board members "should act on a fully informed basis, in good faith, with due diligence and care, and in the best interest of the company and the shareholders." The accompanying comments suggest that the principle reflects practices in many, but not all, jurisdictions. The discussion is general, failing to articulate the rule in the sort of detail one would expect to resolve disputes. The discussion also avoids certain basic issues (on which jurisdictions may disagree), such as to whom duties are owed, leaving some ambiguity as to the content and application of the principle.

Other OECD principles of corporate governance formulate board responsibilities that would typically be on the fringes of or clearly beyond the substance of fiduciary law. These principles are also stated as recommendations while purporting to reflect existing "good" governance practices in many (unspecified) jurisdictions.[89] The preamble explains that "there is no single model of good corporate governance."[90] They are similarly non-prescriptive. For example, the board "should apply high ethical standards," "should take into account the interests of stakeholders," "should fulfil certain key functions," such as guiding corporate strategy and overseeing major expenditures, "should be able to exercise objective independent judgement on corporate affairs," and "should have access to accurate, relevant and timely

development and evolution of these principles, *see* Mariana Pargendler, *The Rise of International Corporate Law*, 98 WASH. U. L. REV. 1765, 1781–84 (2021).

[84] OECD, OECD Principles of Corporate Governance, Foreword (2004).

[85] *Id.*

[86] *See* Matthias M. Siems & Oscar Alvarez-Macotela, *The G20/OECD Principles of Corporate Governance 2015: A Critical Assessment of the Operation and Impact*, J. BUS. L. 310 (2017).

[87] OECD, G20/OECD Principles of Corporate Governance, 2015, *available at* http://www.oecd.org/corporate/principles-corporate-governance/, at 51–61.

[88] *Id.* at 51.

[89] For example, the commentary regarding the sub-principle that boards should align director and officer remuneration with long-term corporate and shareholder interests, asserts that it is "regarded as good practice" for companies to develop remuneration policy statements and refers briefly to the terms that these statements "generally tend" to include and others that they "often specify." *Id.* at 54.

[90] *Id.* at 10.

information." Other principles broadly guide directors on matters concerning the treatment of shareholders, account for the interest of stakeholders, oversight of risk management and other systems, and board accountability.[91] These principles are broadly expressed, lacking the specificity or clarity one would expect to see in a statute or in judicial opinions. The principles are nonbinding on member and nonmember countries alike, and nowhere do they purport to be fiduciary law.

The International Organization of Securities Commissions, IOSCO, an association of national securities regulatory agencies and other organizations, promulgates principles and standards to govern capital markets. It is well known for its Objectives and Principles of Securities Regulation, first published in 1998 after the Asian financial crisis and updated in 2010.[92] These objectives and principles state high-level principles that IOSCO asserts "need to be practically implemented under the relevant legal framework" to achieve certain specified objectives.[93] Representatives of national regulators populate the organization's committees, giving these committees considerable industry credibility and subject matter expertise. However, like the OECD, the organization lacks state-level rule-making authority and its principles and standards are unenforceable except to the extent they are enshrined in state laws, in which event one would expect the principles to be expressed with greater specificity and precision. The principles are wide-ranging, applying to regulators, self-regulatory organizations, issuers, auditors, credit rating agencies, collective investment schemes, and market intermediaries.[94] The principles most closely related to the conduct of fiduciaries concern corporations in their activities as issuers and therefore implicate the conduct of directors. These principles provide that issuers "should" disclose financial, risk and other information that is "full, accurate, and timely"; that they "should" treat their shareholders "in a fair and equitable manner"; and that the accounting standards they use in preparing financial statements "should be of a high and internationally acceptable quality."[95] These principles indirectly concern directors' conduct; they are, in fact, expressed to govern the conduct of corporations issuing securities, a role in which actors owe fiduciary duties.

3.4.2 *Certainty*

Although I have attempted in these examples to show how norms and practices governing various categories of fiduciaries have transnational dimensions, I question

[91] *Id.* at 51–61.

[92] International Organization of Securities Commissions (IOSCO), Objectives and Principles of Securities Regulation (2017), *available at* https://www.iosco.org/library/pubdocs/pdf/IOSCOPD561.pdf.

[93] *See* Cally E. Jordan, *The New Internationalism? IOSCO, International Standards and Capital Markets Regulation* (Sept. 19, 2018, CIGI Papers No. 189, *available at* https://ssrn.com/abstract=3257800.

[94] IOSCO, *supra* note 92.

[95] *Id.* at 8.

whether these norms and practices comport with theories of transnational law from a legal positivist perspective. Although broad agreement seems to exist among market participants and policymakers in numerous national systems that financial institutions should "manage" or "mitigate" conflicts of interest and that corporate directors should engage in various matters of "good" governance, it is unclear precisely what these norms mean and whether they are so firmly established across borders as to amount to transnational law. As Shaffer explains, it is "when norms become concordant and settle transnationally" that "one can speak of a TLO."[96] At least in the financial services industry, norms governing fiduciaries' conduct are rarely clearly stated by firms and difficult to identify and verify, which may prevent this sort of settlement from emerging. And when norms do operate, they may be provisional, developed in response to particular, shifting regulatory concerns. Moreover, it may be that the norms described above can only be formulated in broad terms.

3.4.3 *Distinguishing Fiduciary Law*

More fundamentally, even if the dissemination of these norms and practices comports with theories of transnational law, it is reasonable to question whether they may be rightly regarded as fiduciary law, or even as functional substitutes for fiduciary law. Not any law is fiduciary law. As explained above, fiduciary law is conventionally understood by scholars and courts as "hard" law, as binding obligations "that delegate authority for interpreting and implementing the law."[97] Fiduciary law is precise, or capable of being made so.[98] The obligations it imposes are legally enforceable since they are the product of the state, typically the common law or legislative principle.[99] And authority for interpreting and implementing fiduciary law is delegated to courts.[100]

Fiduciary scholars take the fiduciary concept seriously.[101] They regard fiduciary law as distinct from other fields of law. This has been clearly recognized in Australia, where "[i]t is essential to bear in mind that the existence of a fiduciary relationship

[96] Shaffer, *supra* note 65.

[97] *Cf.* Abbott & Snidal, *supra* note 11. Accordingly, it is possible that transnational law governing fiduciaries may "harden" as fiduciary law. Thilo Kuntz, *Transnational Fiduciary Law: Spaces and Elements*, 5 UCI J. Int'l, Trans., & Comp. L. 47, 53 (2020). (Soft law may "enter and settle down as hard fiduciary law.") EU legislation governing financial intermediaries in Europe may constitute such an example. *See* Chapter 4, at 100.

[98] *See supra* note 11 and accompanying text.

[99] *See supra* note 12.

[100] *See, e.g.*, Paul B. Miller, *The Identification of Fiduciary Relationships*, *in* Criddle et al., *supra* note 5, 367, 369. ("It is, ultimately, for the courts to decide whether a relationship is fiduciary. . ..")

[101] This is consistent with the approach of new private law, which is to "take[] private law concepts and categories seriously." Andrew Gold et al., *Introduction*, *in* The Oxford Handbook of the New Private Law, xv, xvi (Andrew S Gold et al. eds., 2021).

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does not mean that every duty owed by a fiduciary . . . is a fiduciary duty."[102] In the law of corporations, for example, directors owe distinct fiduciary duties and statutory duties. Discussing directors' duties, Matthew Conaglen cautions that "[t]he fiduciary principles themselves can only be soundly understood if one differentiates carefully between differences kinds of duties owed by fiduciaries. In other words, it is important to acknowledge that not all of the duties owed by a fiduciary, such as a company director, are necessarily fiduciary duties."[103] The reason is that the fiduciary duties of directors "spring from the general principles, developed in courts of equity, governing the duties of all fiduciaries – agents, trustees, directors, liquidators and others."[104] And keeping the duties distinct is important because they interact in complex ways with non-fiduciary duties.

In England, courts are similarly clear that not any law is fiduciary law. In *Bristol & West Building Society v. Mothew*, Lord Justice Millett cautions that "[T]his branch of law has been bedeviled by unthinking resort to verbal formulae. It is therefore necessary to begin by defining one's terms. The 'fiduciary duty' is properly confined to those duties which are peculiar to fiduciaries and the breach of which attracts legal consequences differing from those consequent upon the breach of other duties."[105] The House of Lords has endorsed this approach, with Lord Walker observing in *Hilton v. Barker Booth & Eastwood* that "not every breach of duty by a fiduciary is a breach of fiduciary duty."[106] Reviewing these and other authorities, Professor Conaglen observes that this careful or "refined" use of "fiduciary" label is "wide-spread";[107] it is "entrenched" in England[108] and has been broadly endorsed in Australian courts.[109]

While fiduciary doctrine has developed differently in the United States from other jurisdictions, there is broad agreement that fiduciary law has distinctive characteristics.[110] To be sure, fiduciary principles have been considered "subsidiary elements" of other non-fiduciary fields of law;[111] for example, the fiduciary duties of agents or trustees may be considered under the categories of agency law or trust law, respectively. Nevertheless, scholars generally, and increasingly, recognize that fiduciary law is distinctive. Deborah DeMott observes that "fiduciary law is distinctive because it imposes a duty of loyalty that 'supports the main purpose of fiduciary law: to prohibit

[102] Permanent Building Society v. Wheeler, 11 West. Aust. Rep. 187 (1994).
[103] Matthew Conaglen, *Interaction between Statutory and General Law Duties Concerning Company Director Conflicts*, 31 Co. & Sec. L. J. 403, 403 (2013).
[104] Levin v. Clark [1962] New South Wales Reports 686, 700–01.
[105] Bristol & West Building Society v. Mothew, [1998] Ch. 1, 16.
[106] Hilton v. Barker Booth & Eastwood [2005] UKHL 8 at [29].
[107] Conaglen, *supra* note 103, at 405.
[108] Conaglen, *supra* note 15, at 21.
[109] *Id.* at 22–23.
[110] Fiduciary doctrine in the Unites States developed differently from that in England and Australia. *See id.* at 25–26.
[111] Evan J. Criddle et al., *Introduction*, *in* Criddle et al., *supra* note 5, xix, xix. ("Until recently, fiduciary principles have been treated as subsidiary elements of a broad array of fields.")

fiduciaries from misappropriating or misusing entrusted property or power.'"[112] Focusing on the duty of care, John C. P. Goldberg asserts that "[t]he role of fiduciary is defined in part by the distinctive duties that attend it."[113] In particular, duties of care – owed by fiduciaries and non-fiduciaries alike – "have special dimensions in the fiduciary context."[114] To similar effect, Daniel Markovits distinguishes between fiduciary and contract law, arguing that a fiduciary's orientation after being engaged is necessarily other-regarding and must adjust open-endedly to the interests of the other as circumstances develop, whereas a contract promisor's posture is based on self-interest, depends on the terms of the contract, and need not adjust open-endedly.[115] Robert Clark has similarly argued that the fiduciary relationship has "major distinctive attributes," among other things, judicial enforcement of affirmative duties to disclose and open-ended duties to act.[116]

Some scholars see fiduciary duties through an economic lens and regard them as gap-filling terms in incomplete contracts.[117] The contractarian approach has become a pervasive influence in scholarly analysis of fiduciary doctrine and has influenced certain judges,[118] but it is not a mainstream view among judges generally.[119] In any case, even scholars who do not regard fiduciary law as distinct from, say, contract law, suggest it is nothing other than "hard" law. Consider the case studies above. The private ordering adopted by financial firms may involve practices and norms adopted in response to prevailing fiduciary and other rules, but they are

[112] Deborah A. DeMott, *Causation in the Fiduciary Realm*, 91 B.U. L. Rev. 851, 852 (2011) (citing Frankel, *supra* note 8)

[113] John C. P. Goldberg, *The Fiduciary Duty of Care*, *in* Criddle et al., *supra* note 5, 405.

[114] *Id.* at 407.

[115] Daniel Markovits, *Sharing* Ex Ante *and Sharing* Ex Post: *The Non-Contractual Basis of Fiduciary Relations*, *in* Philosophical Foundations of Fiduciary Law, 209, 212–16 (Andrew S. Gold & Paul B. Miller eds., 2014); *see also* D. Gordon Smith, *Contractually Adopted Fiduciary Duty*, 2014 U. Ill. L. Rev. 1783, 1784. ("My thesis is that the fiduciary duty of loyalty, properly understood, cannot be adopted contractually.")

[116] Robert C. Clark, *Agency Costs versus Fiduciary Duties*, *in* Principals and Agents: The Structure of Business 55, 71–76 (J. W. Pratt & R. J. Zeckhauser eds., 1985).

[117] *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 Yale L.J. 698, 702 (1982); Daniel R. Fischel, *The Corporate Governance Movement*, 35 Vand. L. Rev. 1259, 1264 (1982).

[118] *See, e.g.*, Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 436 (7th Cir. 1987), *cert. dismissed*, 108 S. Ct. 1067 (1988) (referring to the fiduciary obligation as "a standby or off-the-rack guess about what parties would agree to if they dickered about the subject explicitly").

[119] *See, e.g.*, Joel Seligman, *Sheep in Wolf's Clothing: The American Law Institute Principles of Corporate Governance Project*, 55 Geo. Wash. L. Rev. 325, 350 (1986). ("The judiciary analyzing litigated controversies has essentially ignored this academic debate in favor of the application of traditional fiduciary duty concepts.") In extrajudicial writing, members of the Delaware judiciary regard fiduciary doctrine more in-line with classical views. *See, e.g.*, Leo E. Strine & J. Travis Laster, *The Siren Song of Unlimited Contractual Freedom*, *in* Handbook on Partnerships, LLCs and Alternative Forms of Business Organizations (Robert W. Hillman & Mark J. Lowenstein eds., 2015).

not themselves fiduciary law. Even if the procedures and controls are intended to apply to fiduciaries, they cannot be said to impose anything like fiduciary duties.

One might refer to these norms and practices as transnational law governing fiduciaries or the transnational legal ordering of fiduciaries. But they cannot be described as transnational fiduciary law without denuding fiduciary law of its distinctiveness and without causing significant confusion.

3.4.4 *Transnational Fiduciary Law as Process*

Transnational law also encompasses the process by which legal norms and practices flows across national boundaries. As the case studies suggest, it does not seem controversial that legal norms and practices do indeed flow – that interaction occurs between lawmakers, practitioners, and others across legal systems, influencing legal development. Fiduciary laws may converge or diverge, be exported or imported, imposed or received. As hard law, fiduciary law is often transmitted across boundaries, in the sense that fiduciaries may be bound by their home law when operating abroad. Fiduciary law also evolves by reference to developments in other national systems. For example, American fiduciary law evolved from English law. Australian and English jurists routinely make references to each other's judicial decisions on fiduciary law.[120] Policymakers are sometimes more explicit in learning from other system's legal norms and practices. In the 1990s, Australian rule makers made clear that they were revamping directors' duties and other corporate law principles on the basis of fiduciary principles borrowed from the United Kingdom and United States.[121] In the United Kingdom, recent commissions of inquiry formed to consider corporate-law reforms examined corresponding fiduciary laws in the United States.[122] One does not need a broad interpretation of fiduciary law to accept that such law may flow across state borders in this way, potentially resulting in a degree of convergence among jurisdictions.[123]

These sorts of influences across jurisdictions are often remarked upon in fiduciary scholarship. They are explicitly studied in comparative law work on fiduciary law. They also sensibly fall within the first interpretation of transnational fiduciary law, in which the term describes hard law applied similarly in varying jurisdictions, or the

[120] Prominent Australian examples including Hospital Products Ltd. v. United States Surgical Corp. (1984) 156 CLR 41; Westpac Banking Corporation v. Bell Group (in liq) (No. 3), [2012] WASCA 157. Prominent English examples include Hilton v. Barker Booth & Eastwood [2005] 1 WLR 567 (H.L.); Kelly v. Cooper [1993] AC 205.

[121] *See, e.g.*, Commonwealth of Australia, Directors' Duties and Corporate Governance: Facilitating Innovation and Protecting Investors: Corporate Law & Economic Reform Program Proposals for Reform: Paper No. 3 (1997) at paras. 7.1 and 7.3.

[122] *See, e.g.*, Paul Myners, London HM Treasury, Institutional Investment in the United Kingdom: A Review 92 (2001).

[123] *See supra* note 27 and accompanying text.

transmission of hard law by virtue of its application to international deals or by virtue of exchanges among rule makers.

3.5 CONCLUSION

Although fiduciaries frequently confront transnational situations, the topic of transnational fiduciary law has attracted little scholarly attention. This chapter identifies two primary interpretations of the term, one limited by a conventional understanding of fiduciary law, the other taking a broad understanding of transnational law and applying it to fiduciaries. I prefer the former meaning since it is more attentive to the distinctiveness of fiduciary relationships and duties. The interpretation is broad enough to capture the process by which fiduciary law develops, including by reference to developments in other systems. However, I would not equate the second interpretation – transnational law that governs fiduciaries – with transnational fiduciary law. Doing so would overlook the distinctive character of fiduciary law. It would also create confusion. And it is not apparent how much that interpretation would advance analysis beyond the first interpretation. A better term for scholars interested in transnational law governing fiduciaries may be the transnational legal ordering of fiduciaries or transnational fiduciary legal orders, as theorized by Halliday and Shaffer, since these terms are less apt to lead to confusion. A further benefit lies in reliance on the term "legal order," which is often used in transnational law scholarship and has a fairly settled meaning.

I do question the merit of investigating transnational law governing fiduciaries as an independent field, as distinct from, say, transnational law in commerce, unless we can first establish whether there is something distinctive about transnational law as it applies to fiduciaries. Instead, I would regard transnational fiduciary law as a particular application of fiduciary law that must develop in a manner consistent with general principles of fiduciary law and with the substantive legal areas in which fiduciaries operate.

4

Transnational Fiduciary Law in Financial Intermediation: Are We There Yet?

A Case Study in the Emergence of Transnational Legal Ordering

Jens-Hinrich Binder[*]

4.1 INTRODUCTION

In both common and civil law jurisdictions, fiduciary duties (in the broadest sense) have long been recognized as a key element of the relationships between financial intermediaries and their customers. If one defines fiduciary relationships as including "important social and economic interactions of high trust and confidence that create an implicit dependency and peculiar vulnerability of the beneficiary to the fiduciary" (to borrow a definition suggested by Leonard Rotman),[1] a broad range of financial services clearly match the description.[2] From a comparative – and,

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[1] Leonard I. Rotman, *Understanding Fiduciary Duties and Relationship Fiduciarity*, 62 McGill L.J. 975, 988 (2017).

[2] It should be noted that this definition, although firmly rooted in common law doctrine, is generic in nature. At least English cases traditionally have determined the existence of fiduciary duties by reference to the status of the relevant relationships (trustee-beneficiary, solicitor-client, agent-principal, director-company, partner-partner), while only a smaller number of cases have adopted a functional definition; *see*, within the present context, Law Comm'n, Consultation Paper No. 124, Fiduciary Duties and Regulatory Rules (1992), ¶¶ 2.4.3–2.4.7. For an example of the latter, which is broadly consistent with the definition advanced above, *see* Reading v. Attorney-General [1949] 2 KB 232 at 236, *approved*, [1951] AC 507 (discussed in Law Comm'n, *id.* ¶ 2.4.5):

> [T]he term 'fiduciary relation' … is used in a very loose, or at all events a very comprehensive, sense … . [F]or the present purpose a 'fiduciary relation' exists (a) whenever the plaintiff entrusts to the defendant property … and (b) whenever the plaintiff entrusts to the defendant a job to be performed … and relies on the defendant to procure for the plaintiff the best terms available. …

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particularly, from a Trans-Atlantic perspective – a useful starting point for analysis can be found in the statutory definitions of financial activities subject to specific prudential and conduct-of-business regulations. Wherever intermediaries hold money or other assets on behalf of clients in connection with transactions carried out on their behalf,[3] or agree to provide expert advice with regard to investments[4] or the conditions of a loan taken out by a customer,[5] the existence of both a high level of trust *and* a high level of dependency and vulnerability on the part of the client is not just a characteristic feature of the intermediary-customer relationship, but provides the very rationale for public intervention, particularly in the form of conduct-of-business regulation. From a common law perspective, such activities usually will be qualified as agency relationships, which, given the functional nexus between fiduciary law and the law of agency in common law generally,[6] helps explain why common law courts have frequently held that financial intermediaries are under fiduciary duties of loyalty and care, as well as duties to disclose certain information, to their customers.[7] This doctrinal analysis can be backed up by an economic analysis of the agency problems between the intermediary (acting as

[3] Qualifying as an "ancillary service" in relation to the provision of "investment services" pursuant to European Parliament and Council Directive 2014/65/EU, Annex I, Section B no. (1), 2014 O.J. (L 173) 349 [hereinafter MiFID II]. In US law, by contrast, the Securities Exchange Act applies a rather broad concept to define a "broker" as "any person engaged in the business of effecting transactions for the account of others." 15 U.S.C.A. § 78c (a)(4)(A) (Westlaw through Pub. L. No. 117-167).

[4] Qualifying as an "investment service" pursuant to Annex I, Section A no. (5) in conjunction with art. 4(1)(2) MiFID II, *supra* note 3. In US law, the provision of investment advisers is addressed by the Investment Advisers Act of 1940; *see* 15 U.S.C.A. §§ 80b–1 et seqq. (Westlaw through Pub. L. No. 117-167).

[5] Unlike investment advice, the provision of advice with regard to the conditions (and/or uses) of a loan to a borrower is not universally regulated as a financial service and thus does not give rise to specific regulatory duties on the part of an intermediary, but may nonetheless held to be subject to special duties of care under fiduciary law or general principles of contract law. *Cf.*, *e.g.*, Andrew F. Tuch, *Fiduciary Principles in Banking*, *in* The Oxford Handbook of Fiduciary Law 125, 128 (Evan J. Criddle et al. eds., 2019) (discussing US case law); Jens-Hinrich Binder, *Germany*, *in* A Bank's Duty of Care 61, 63–65 (Danny Busch & Cees van Dam eds., 2017) (discussing the legal basis in German law and relevant cases).

[6] *See*, *e.g.*, Deborah A. Mott, *Fiduciary Principles in Agency Law*, *in* Criddle et al., *supra* note 5, at 23. *See also* Howell E. Jackson & Talia B. Gillis, *Fiduciary Law and Financial Regulation*, *in* Criddle et al., *supra* note 5, at 856. *Cf.* Marme Inversiones 2007 v. NatWest Markets PLC and Others [2019] EWHC (Comm) (QB) 366 [408]–[417] (providing an in-depth analysis of the doctrinal link between the two concepts from an English law perspective).

[7] *See also* Thomas Lee Hazen, The Law of Securities Regulation 632–39 (7th ed. 2017); Donald C. Langevoort, *Fraud and Deception by Securities Professionals*, 61 Tex. L. Rev. 1247, 1279–83 (1983); *cf.* Tuch, *supra* note 5 (comprehensively analyzing of US case law in relation to commercial and investment banking activities); Arthur B. Laby, *Fiduciary Principles in Investment Advice*, *in* Criddle et al., *supra* note 5, at 145 (comprehensively analyzing of US case law in relation to the provision of investment advice). English courts have also recognized the fiduciary nature of broker services; *cf.*, *e.g.*, Brandeis (Brokers) Ltd v. Herbert Black and Others, 2001 WL 513189 (QB), ¶¶ 49 and 52.

"agent" for less knowledgeable investors) and the customer (as a "principal" who, almost by definition, can hardly protect himself against the fallout from information asymmetries and conflicts of interest on the part of the former).[8] Even in civil law jurisdictions, where the legal basis for financial services contracts usually consists of, or is derived from, statutory categories of general contract law,[9] the concept of fiduciary duties increasingly has come to be accepted as an analytical framework.[10] For a number of reasons to be explored in detail later, both the substantive laws pertaining to the provision of financial services and, indeed, their doctrinal interpretation can be seen to have converged in a large number of jurisdictions over the last few decades.

With international standard-setters – in particular, the International Organization of Securities Commissioners (IOSCO) – as a driving force behind these developments,[11] the emergence of an increasing body of an internationally agreed-upon set of standards applicable to intermediary-customer relationships in financial services seems to showcase transnational legal ordering, in terms of the causes of convergence and the underlying institutional arrangements that facilitate the transmission process, as well as the substance of such duties and their adaptation in different legal systems. On closer inspection, however, the picture is more nuanced. As rightly observed in a recent contribution by Howell Jackson and Talia Gillis, we have to distinguish between the regulatory regimes applicable to the provision of financial services, consisting of "elaborate set[s] of *ex ante* requirements and supplemental open-ended duties that govern the operations of regulated entities and police their interactions with the public," on the one hand, and parallel, overlapping or indeed conflicting, fiduciary duties proper, which are derived from general principles of private law and imposed ex post by courts in individual lawsuits.[12] As will be discussed in Section 4.2, while the structure and content of

[8] *See also* Langevoort, *supra* note 7, at 1249–50, 1252–58 (discussing the economic aspects of securities frauds in the light of the principal-agent relationship between broker and investor). *Cf.* D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1432 (2002) (noting the applicability and limits of the principal-agent theory in relation to fiduciary relationships).

[9] *Cf.*, *e.g.*, the position of German law, *see* Section 4.3.3.

[10] *See*, characteristically, Binder, *supra* note 5 (combining both civil and common law analyses of various types of commercial and investment banking activities); *see also* Thilo Kuntz, *Das Recht der Interessenwahrungsverhältnisse und Perspektiven von Fiduciary Law in Deutschland*, *in* FESTSCHRIFT FÜR KARSTEN SCHMIDT ZUM 80. GEBURTSTAG 761, 773–80 (Katharina Boele-Woelki et al. eds., 2019), for an analysis of the relevance of fiduciary duties in the areas of investment advice and corporate law.

[11] *See* Section 4.2.3.

[12] Jackson & Gillis, *supra* note 6, at 851, 853. *Cf.* LAW COMM'N, *supra* note 2 (providing an early, but very comprehensive analysis of the interplay between both regimes from an English law perspective); LAW COMM'N, FIDUCIARY DUTIES AND REGULATORY RULES (LAW COM No 236) (Dec. 1995) (same).

regulatory regimes have been converging over the past decades, the relevant *fiduciary* principles, in terms of substance, interpretation and, indeed, their functions within the respective private law regimes, continue to vary among different jurisdictions. This is certainly true within the European Union, where EU law has gone some way to harmonize the regulatory framework, whereas the applicable private law remains defined by the laws of the Member States, many of which had established transactions-oriented principles long before the first harmonization efforts at the European level.[13]

However, in addition to the international harmonization of regulatory conduct-of-business standards, their interaction with the applicable private law regimes can also be identified as a common theme: Whether and to what extent principles of general contract law are influenced by regulatory requirements, and which of the two regimes prevails in cases of conflicting duties – such questions will ultimately influence which duties can be enforced by customers in private lawsuits against the intermediary. The answers may differ from jurisdiction to jurisdiction, depending on the doctrinal basis. Yet, the very fact that regulatory requirements and duties under general contract law coexist and that the potential for tensions between the two regimes clearly *is* a recurring phenomenon provides sufficient grounds for the hypothesis that, in the end, fiduciary activities by financial intermediaries *are* the object of an emerging transnational legal order.

Focusing on conduct-of-business standards for securities services providers,[14] this chapter explores the emergence of a transnational body of fiduciary duties of financial intermediaries. Section 4.2 examines the interaction between regulatory requirements and fiduciary principles and explains the transnational character of the former. Section 4.3 then looks into the process of how transnational regulatory principles have been adapted by European legislation, which in turn has triggered a process of convergence also of the underlying contract law regimes. In this process, substantive and organizational duties of care and loyalty have changed their nature: Principles derived from the common law doctrine of fiduciary law are adapted to different contract law regimes, while retaining their functions and meaning for the individual customer. As demonstrated by ongoing disputes concerning the relevance of regulatory duties for individual contractual relationships in several European jurisdictions, this process is by no means frictionless – but it is, for that very reason, an interesting case study in the emergence of a transnational legal order. Section 4.4 concludes.

[13] *See* Section 4.3.3.

[14] To be sure, similar observations can be made also in other areas of financial intermediation. Arguably, though, securities intermediation is a particularly well-placed object of study for present purposes, given the high degree of convergence of applicable conduct-of-business standards in this regard, especially by comparison with retail banking activities the regulation of which, at least in the EU, has not attracted the attention of the legislator to a similar extent.

4.2 FIDUCIARY LAW IN FINANCIAL INTERMEDIATION: A TRANSNATIONAL LEGAL ORDER?!

4.2.1 *Conduct-of-Business Standards as Transnational Law: Origins, Nature, and Legitimacy*

The modern development of converging conduct-of-business standards for the provision of financial services (and, thus, toward standards for the *regulatory* treatment of relationships that qualify as "fiduciary" within the meaning defined before) can be traced back (at least) to the late 1980s and early 1990s.[15] Following preparatory work, in particular, by the French Commission des Opérations de Bourse (COB), which had published a report of self-regulatory principles for the provision of securities services in 1988,[16] the International Organization of Securities Commissions (IOSCO) promulgated a set of genuinely international, rather high-level and basic conduct-of-business standards, entitled "International Conduct of Business Principles,"[17] in July 1990.[18] With this "soft law" document, IOSCO made a first step toward the global recognition of conduct-of-business regulation as an integral part of securities regulation generally, implemented and enforced in the interest of customer protection and market integrity and distinct from market conduct regulation (e.g., regulation relating to insider trading and market abuse), on the one hand, and the prudential regulation of intermediaries' capital and liquidity positions, on the other hand.[19] The report justified the need for global convergence of such standards against the backdrop of the internationalization of securities markets since the 1970s, driven by technological progress but also the institutionalization of portfolio management in the widest sense, whereby not just issuers' and intermediaries', but also investors' activities extended increasingly beyond national boundaries.[20] Significantly, in this context, the report argued that global

[15] It is, therefore, imprecise to attribute IOSCO's work only to a later stage of international standard-setting in financial regulation, but *see* Eric Helleiner, *Regulating the Regulators: The Emergence and Limits of the Transnational Financial Legal Order*, *in* TRANSNATIONAL LEGAL ORDERS 231, 238 (Terence C. Halliday & Gregory Shaffer eds., 2015) (referring to later work products).

[16] *Cf.* Comm'n des opérations de bourse, *Rapport général du Groupe de Déontologie des Activités Financières*, BULL. MENSUEL DE LA COMMISSION DES OPÉRATIONS DE BOURSE, mars 1988, at Supplément.

[17] TECH. COMM. OF THE INT'L ORG. OF SEC. COMM'NS, INTERNATIONAL CONDUCT OF BUSINESS PRINCIPLES (July 9, 1990), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD8.pdf.

[18] *Cf.*, *e.g.*, DIRK HERMANN BLIESENER, AUFSICHTSRECHTLICHE VERHALTENSPFLICHTEN BEIM WERTPAPIERHANDEL 205–06 (1998) (discussing the developments leading toward this report).

[19] TECH. COMM. OF THE INT'L ORG. OF SEC. COMM'NS, *supra* note 17, ¶¶ 18–21.

[20] *Id.* ¶¶ 4–7.

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harmonization of conduct-of-business standards was in the interest of market participants themselves, as universally applicable common principles

> should facilitate cross border business, encouraging competition among firms, with increased customer choice and lower costs. Commonly agreed principles should also enhance investor understanding, and hence confidence, and so increase investor participation in international markets.[21]

Conduct-of-business principles, in the report, were defined

> as those principles of conduct which govern the activities of those who provide financial services and which have the objective of protecting the interests of their customers and the integrity of the markets.[22]

To that end, the "Principles" established, in particular, the following duties of an investment firm:

- to "act honestly and fairly in the best interest of its customers and the integrity of the market" (which expressly included "any obligation to avoid misleading and deceptive acts or representations");
- to "act with due skill, care and diligence in the best interest of its customers and the integrity of the market" (which expressly included "any duty of best execution");
- to provide for and effectively employ the necessary resources;
- to "seek from its customers information about their financial situation, investment experience and investment objectives relevant to the services to be provided" (to "know one's customer");
- to "make adequate disclosure of relevant material information in its dealings with its customers" (in order to provide the customer with all relevant information needed to make informed investment decisions and in order to keep her informed as to the execution of orders); and
- to "try to avoid conflicts of interest, and when they cannot be avoided, [to] ensure that its customers are fairly treated."[23]

These principles were later taken up, and refined further, by the IOSCO "Objectives and Principles of Securities Regulation," first promulgated in September 1998,[24] the last comprehensive update of which was published in 2003.[25]

[21] *Id.* ¶ 12.
[22] *Id.* at 7.
[23] *Id.* at 8–9.
[24] Int'l Org. of Sec. Comm'ns, Objectives and Principles of Securities Regulation 33–41 (Sept. 1998), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD82.pdf.
[25] Int'l Org. of Sec. Comm'ns, Objectives and Principles of Securities Regulation 32–39 (May 2003), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD154.pdf.

To be sure, conduct-of-business standards as part of *regulatory* (as distinct from contract law) frameworks for the provision of investment services are considerably older than these international standards. Within the United States, they were first introduced by federal securities legislation in the 1930s and 1940s, most notably the Securities Exchange Act of 1934[26] and the Investment Advisers Act of 1940,[27] which, in conjunction with SEC Rules adopted under the Securities Exchange Act, prescribed transaction-oriented standards for the provision of investment services (in a wide, nontechnical sense).[28]

Given not just the global importance of the City of London, but also – at the time – the United Kingdom's considerable influence on the content of European legislation, the comprehensive reform of the regulatory framework for financial services undertaken by the British legislature in the 1980s can be identified as yet another important milestone in the process of global convergence of such standards. Replacing the former, exclusively self-regulatory arrangements with an integrated system of self-regulatory bodies and oversight by a public authority, Part I, Chapter V of UK Financial Services Act of 1986 established the statutory basis for a complex set of conduct-of-business requirements that had to be developed by the Financial Services Authority (formerly, the "Securities and Investments Board") and a number of recognized (sector-specific) self-regulatory organizations (SROs).[29]

Within the European Economic Community (as it then was), article 11 of the Investment Services Directive (ISD) of 1993[30] first established an obligation for Member States to introduce a range of harmonized, yet rather broadly defined conduct-of-business standards for the provision of investment and related services. Significantly, the requirements, to a large extent, were a *verbatim* adaptation of the 1990 IOSCO "Principles," reflecting not just the latter's usefulness as a technical source of inspiration for legislators worldwide, but also their relevance as a driving force for the trend toward global convergence. The requirements were later taken up, and refined further, by the successors to the 1993 ISD, namely the (first) markets in Financial Instruments Directive (MiFID) of 2004[31] and the current regime, laid down in articles 24 and 25 of MiFID II.[32]

[26] 15 U.S.C.A. §§ 78a et seq. (Westlaw through Pub. L. No. 117-167).

[27] *Supra* note 4.

[28] *See generally*, *e.g.*, HAZEN, *supra* note 7, at 18–21, for a useful introduction to these statutes and their historic background. *Cf. id.* at 632–47 (*generally* discussing of the interplay between regulatory conduct-of-business standards and fiduciary law in the United States); 2 LOUIS LOSS ET AL., FUNDAMENTALS OF SECURITIES REGULATION 1608–25 (7th ed. 2018).

[29] *See*, in particular, Financial Services Act 1986, c. 60, § 48 (authorizing the promulgation of conduct-of-business rules by the FSA); *see also id.* § 119(1)(a) (regarding the SROs' powers to promulgate separate standards of conduct).

[30] Council Directive 93/22/EEC, art. 11, 1993 O.J. (L 141) 27, 37.

[31] European Parliament and Council Directive 2004/39/EC, arts. 18, 19, 2004 O.J. (L 145) 1, 16–18.

[32] MiFID II, *supra* note 3.

Against this backdrop, the publication of the first version of the IOSCO Principles, in 1990s, clearly was not the trigger of global convergence, but merely a reflection of a growing convergence among national authorities that had started sometime before. For three reasons, however, the significance of the "Principles" goes far beyond a mere formal recognition of that trend and helps explain the successful emergence of genuinely transnational standards in the field.

First, the Principles' origins in an institutionalized cooperation of securities authorities clearly distinguishes them from other initiatives for the global harmonization of laws, as they do not just reflect the perspective of an impressive range of important jurisdictions, but also reflect these jurisdictions' willingness to coordinate their respective laws and enforcement regimes accordingly. Originating from the Inter-American Conference of Securities Commissioners (established in 1974), IOSCO had been created as a global institution with an impressively broad membership base in the mid-1980s.[33] By instituting an international "working group on Principles of ethical conduct," with members from Hong Kong, Italy, Japan, Quebec, Sweden, Switzerland, the United Kingdom, Germany, as well as the Securities and Exchange Commission and the Commodity Futures Trading Commission of the United States, with Australia as a correspondent member,[34] IOSCO's Technical Committee had, in fact, brought together authorities from the most important financial markets worldwide. While in itself the result of technocratic regulation without participation of democratically elected political actors, this background undoubtedly helped enhance the legitimacy of the Principles in the eyes of legislators of participating jurisdictions, inasmuch as they could be interpreted as reflecting the accumulated expertise of leading authorities in the field of securities regulation. In this respect, the IOSCO standards fall in line with the development of international standard-setting in the area of financial regulation more generally (sometimes referred to as "The Global Financial System"), which was first associated mainly with the activities of the Basel Committee on Banking Supervision in the 1970s and was reinforced through various policy initiatives by the G-20 nations under the auspices of the newly created Financial Stability Board after the global financial crisis.[35] To be sure, IOSCO's influence on global legislative developments has been limited so far, especially by comparison with the output generated by the Basel Committee and its impact on the convergence of regulatory frameworks in the field of prudential banking regulation.[36] Although national

[33] *See, e.g.*, Emilios Avgouleas, Governance of Global Financial Markets: The Law, the Economics, the Politics 173–74 (2012).

[34] Tech. Comm. of the Int'l Org. of Sec. Comm'ns, *supra* note 17, ¶ 2.

[35] *See, e.g.*, Chris Brummer, Soft Law and the Global Financial System 70–90 (2012) (*generally* discussing the different standard-setting bodies); Helleiner, *supra* note 15, at 232–49 (same). *See also* Ross P. Buckley & Douglas Arner, From Crisis to Crisis: The Global Financial System and Regulatory Failure (2011), for an analysis of the crisis-driven history of the relevant institutional arrangements.

[36] Brummer, *supra* note 35, at 78.

interpretations of the standards and enforcement practices continue to differ considerably between individual jurisdictions at a more granular level,[37] the relevance of IOSCO's work on conduct-of-business standards is hardly disputable, precisely because the "Principles" reflected (and reinforced) earlier trends toward global convergence, which were then taken up also in incoming European legislation.

Second, and relatedly, the interplay between international standards with incoming EU regulation certainly played an important role as a driving force toward global convergence. Because the IOSCO Principles, as noted before, were formative for the development of harmonized conduct-of-business standards under the European Investment Services Directive of 1993[38] and, subsequently, MiFID I and MiFID II,[39] their importance as a global benchmark was reinforced. At the same time, the representation of European jurisdictions in the working group arguably was instrumental to shape the Principles' character as a product of genuinely transnational collaboration between legal systems of different origins. Motivated by the objective to create a common Internal Market for financial services among the Member States of the European Economic Community and, subsequently, the European Community and the European Union,[40] European legislation and European institutions thus contributed to, and reinforced, a more general trend toward global convergence of financial law and regulation and established themselves as an important driving force toward the globalization of markets and relevant legal frameworks. At the same time, the rise of European financial markets began to balance out the dominance of US law and regulation as the dominant rule-maker for global transactions. In this respect, the development of transnational conduct-of-business standards for the fiduciary relationship between financial intermediaries and their customers mirrored a broader trend in international financial regulation, which can be observed particularly clearly in the field of banking regulation.[41]

Third, by taking the form of an easily accessible, concise, indeed rather simple document, the standards certainly were highly conducive to application across a wide variety of different jurisdictions. As formulated in the IOSCO Principles, the

[37] *Cf., e.g.*, Howell E. Jackson, *Variation in the Intensity of Financial Regulation: Preliminary Evidence and Potential Implications*, 24 YALE J. ON REG. 253 (2007) (providing an illustrative trans-Atlantic analysis); Howell E. Jackson & Mark J. Roe, *Public and Private Enforcement of Securities Laws: Resource-Based Evidence*, 93 J. FIN. ECON. 207 (2009) (same).

[38] *Supra* note 31.

[39] *Supra* notes 32 and 3, respectively.

[40] *See* Section 4.3.1, for a discussion of the relevant policy and legal background.

[41] *Cf.* BRUMMER, *supra* note 35, at 45–48 (discussing the impact of European financial lawmaking on global financial governance). *Cf. also* KERN ALEXANDER ET AL., GLOBAL GOVERNANCE OF FINANCIAL SYSTEMS: THE INTERNATIONAL REGULATION OF SYSTEMIC RISK 174–83 (2006), for a general analysis of the emergence of global "soft law" in financial regulation.

conduct-of-business standards do not even purport to provide a comprehensive legal framework for the formation and execution of contracts between intermediaries and their customers, or, indeed, for specific means of enforcement of duties arising thereunder. With a focus on individual aspects of the intermediary-customer relationship, they merely establish minimum qualitative standards addressing agency problems in general, and conflicts of interests and information asymmetries in particular, between the two parties – standards that can (and, indeed, are designed to) be implemented and enforced differently in different legal and institutional environments. This approach was clearly motivated by residual differences among IOSCO member states in terms of both substantive law and enforcement mechanisms.[42]

Importantly, this background reflects a need to redefine what is actually meant by "fiduciary law" in a transnational context. Despite obvious parallels and similarities between the regulatory standards and traditional concepts of the common law of fiduciary relationships,[43] transnational conduct-of-business standards pertaining to the fiduciary relationship between financial intermediaries and their customers are generic in the sense that they can, and will, apply irrespective of whether or not the legal environment is constituted by common law principles. As illustrated by the IOSCO Principles, transnational law governing fiduciary relationships in the field of financial intermediation, in order to be adaptable across different jurisdictions with different systems of private law, inevitably has to be defined exclusively by its object and objectives rather than by reference to the doctrinal roots of fiduciary law in common law legal systems. The quest, in other words, has been for universally acceptable solutions to common problems deriving from the *status* of the relevant parties to contractual relationships (which, in a common law environment or in law and economics terminology influenced by concepts of common law, can be characterized as "agency" or "fiduciary" relationships). In order to be adaptable, the relevant standards therefore had to establish "functional" (as distinct from doctrinal-technical) fiduciary law. By contrast, a mere "transplantation" of common law fiduciary law into other legal environments – that is, the application of the same set of substantive rules without regard to the specific nature of the applicable contract law regime – would inevitably create coordination problems between conflicting regimes.[44]

[42] *Cf.* Tech. Comm. of the Int'l Org. of Sec. Comm'ns, *supra* note 17, ¶ 25: "Conduct of business rules are implemented by the different member organisations in a variety of ways: laws; regulations; internal rules within a company or institution; unwritten principles and customs; case law."

[43] *See* Section 4.2.

[44] In this regard, the ongoing discussion on the legal nature of regulatory conduct-of-business rules and their implications on contractual duties of intermediaries in a number of European jurisdictions can be interpreted as ample evidence, *see* Section 4.3.3.

4.2.2 *From Fiduciary Law to "Functional Fiduciary Law": The Fiduciary Roots of Conduct-of-Business Regulation (and Some Implications on the Relevance of Regulatory Fiduciary Duties for the Intermediary-Customer Relationship)*

If, as discussed before, converging conduct-of-business standards in the field of securities intermediation can be interpreted as the establishment of transnational fiduciary law in the field of financial intermediation, this finding, as such, tells us little about the functions of the relevant rules within the broader legal framework that governs the rights and duties of parties to relevant contracts, especially vis-à-vis the applicable contract law regime. This caveat should not come as a surprise: Precisely because the relevant standards address only selected, if crucial aspects of the intermediary-customer relationship, and because they do so at a rather abstract level, their technical relevance (and doctrinal interpretation) is bound to differ depending on the nature and content of the relevant contract law environment.

In order to facilitate the understanding of the core characteristics of transnational fiduciary law in the field of financial intermediation in substantive as well as in functional terms, however, the analysis clearly cannot stop here. In this context, it is particularly important to note that conduct-of-business regulation for financial services has never – and nowhere – been developed, or applied, independently from principles or doctrines of general private law, originating outside the regulatory sphere. Rather, such standards can be said to have *complemented* general principles of contract or, indeed, fiduciary (or agency) law: Both from a historic perspective and in terms of substantive content, they were developed in order to enhance the protection of investors against intermediaries. As a result, investors were protected as the beneficiaries of agency relationships in a wider sense, who otherwise could rely only on general principles of contract, tort, agency, or, again, fiduciary law.[45] Historically, the emergence of conduct-of-business standards in US securities regulation certainly was revolutionary less in terms of the substantive content (which, in many respects, can be traced back to general principles of common law), but rather in terms of the transformation of such principles into mandatory requirements, to be operationalized in each securities firm's operations and business practices and to be monitored by public authorities ex ante. In other words, it is hardly surprising that the gradual recognition of duties of care, knowledge, and skill in the applicable *regulatory* frameworks, to some extent at least, mirrored preexisting *general* principles of law, including core principles of the common law of fiduciary duties. Nor should it come as a surprise that regulatory rules may come to be interpreted, and

[45] *Cf.*, for a forceful statement to that effect, SEC v. Capital Gains Research Bureau, Inc., 375 U.S. 180, at 191 (1963) (noting that: "The Investment Advisers Act of 1940 … reflects a congressional recognition 'of the delicate fiduciary nature of an investment advisory relationship. …'")

applied, by recourse to general principles of law (including, again, principles of fiduciary law) – and may even influence the interpretation and further development of such general principles in ex post litigation. Historically, the interplay between regulatory and legal conduct-of-business standards in US law provides ample evidence of this development of regulatory rules by reference to general norms of fiduciary law. In the United States, both regulatory agencies (in particular, the Securities Exchange Commission) and courts, respectively, have repeatedly (a) reinforced existing regulatory norms by adapting fiduciary principles in the course of their interpretation in specific circumstances, (b) transformed fiduciary principles into new regulatory requirements, or (c) "filled the gaps" left by regulatory requirements through imposing additional restrictions on intermediaries based on general principles of fiduciary law.[46]

Against this backdrop, it is also not surprising that the IOSCO Principles' restatement of conduct-of-business requirements in some ways paralleled traditional common law fiduciary norms. The Principles focused on establishing "functional fiduciary law" – that is, a duty of care and skill in the interest of customers and on preventing or, at least, mitigating potential conflicts of interests on the part of the intermediary and their implications for the customers. Of course, one should not press the point too far. Differences between traditional concepts of fiduciary law on the one hand and the individual conduct-of-business standards on the other hand certainly exist, and the regulatory standard often deviates substantially from generally accepted principles of fiduciary law.[47] Nonetheless, the parallels are particularly obvious with regard to the fiduciary duty to avoid conflicts of interests, the fiduciary's duty not to exploit his position at the expense of the beneficiary, and the duty of loyalty to the beneficiary.[48]

It follows that regulatory requirements and private law, including fiduciary principles, pertaining to the same activities – different types of financial services – cannot and should not be conceptualized as functionally separate regimes. Rather, they are functional complements, designed to work together to ensure adequate levels of investor protection. Conduct-of-business regulation and parallel principles of private law thus illustrate the more general observation that the purposes of modern private law, almost inevitably, are not confined to defining the rules for private contracting in full freedom ("private autonomy" in a civil law perspective), but usually include

[46] *See* Jackson & Gillis, *supra* note 6, at 868–69 (discussing specific examples). *Cf.* Hazen, *supra* note 7, 632–39; Loss et al., *supra* note 28, 1608–25. And *cf.* Law Comm'n, *supra* note 2, at Part VI, for a useful analysis of the policy choices encountered when structuring the interplay between regulatory and private law requirements from an English law perspective.

[47] One – important – example is the regulatory requirement to treat customers fairly, which does not appear to have origins in English case law; *cf.* Joanna Benjamin, Financial Law, ¶¶ 27.11, 27.21–27.25 (2007).

[48] *Cf.* Law Comm'n, *supra* note 2, ¶ 2.4.9, for a useful summary of the core elements of fiduciary duties in the present context.

(semi-)regulatory objectives to ensure fairness between unequal parties.[49] Fiduciary law, with its focus on the protection of "vital interactions of high trust and confidence resulting in one party's implicit dependency upon and peculiar vulnerability to another" certainly has a regulatory element to the extent that it imposes "strict duties requiring fiduciaries to act honestly, selflessly, with integrity, and in the best interests of their beneficiaries."[50]

Thus, conduct-of-business regulation facilitates additional enforcement and sanctions mechanisms to duties at least some of which, in substance, existed previously in fiduciary law or elsewhere in general private law. These regulations recognize and address agency problems between intermediaries and their customers, particularly structural information asymmetries and conflicts of interests inherent in the business model of financial intermediaries and the resulting incentives for the expropriation of customers by intermediaries. Of course, within the EU as well as elsewhere, *regulatory* standards apply in their own right and irrespective of the applicable private law. In view of existing regulatory enforcement powers, it may therefore appear pointless to discuss their private law implications.[51] However, private law – and private enforcement – matter for the effectiveness of *regulatory* norms from a customer perspective. After all, public authorities' enforcement of norms will be limited, not just due to limited resources, but possibly also to the incentive structures of public officials.[52] Private law may replicate the substance of regulatory norms in some cases. And where private law does not do so, the effectiveness of regulatory norms crucially depends on whether or not private enforcement of the regulatory norms is possible.

The aforementioned analysis should not be misinterpreted as suggesting that regulatory requirements, as enforced by public authorities ex ante, and general principles of law, as enforced by courts in private lawsuits ex post, are functionally identical sides of the same coin. They are, in fact, not just operationalized in

[49] *Cf.* Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016), for a recent general discussion. And *see* ALEXANDER HELLGARDT, REGULIERUNG UND PRIVATRECHT (2016), for an impressive analysis of the regulatory functions of private law.

[50] In the words of LEONARD I. ROTMAN, FIDUCIARY LAW 250, 255 (2005); Rotman, *supra* note 1, at 986.

[51] *See*, to that effect, Luca Enriquez & Matteo Gargantini, *The Overarching Duty to Act in the Best Interest of the Client in MiFID II*, *in* REGULATION OF THE EU FINANCIAL MARKETS: MIFID II AND MIFIR ¶ 4.01, ¶ 4.16 (Danny Busch & Guido Ferrarini eds., 2017) (discussing the nature of EU conduct-of-business standards).

[52] On the respective advantages and shortcomings of public and private law enforcement, *see generally*, *e.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, at ch. 24 (9th ed. 2014); Mitchell A. Polinsky & Steven Shavell, *The Economic Theory of Public Enforcement of Law*, 38 J. ECON. LIT. 45 (2000); Mitchell A. Polinsky & Steven Shavell, *The Theory of Public Enforcement of Law*, *in* HANDBOOK OF LAW AND ECONOMICS 403 (Mitchell A. Polinsky & Steven Shavell eds., 2007).

different ways, but may also serve partly different objectives.[53] Nor should it be forgotten that the substantive content of the two regimes may differ and, indeed, conflict.[54] At the same time, though, it is important to recall that even in the United States, as the country of origin of modern conduct-of-business regulation, where relevant principles had been developed long before the trend toward global convergence of securities laws in the 1980s and 1990s arose, the regulation of the intermediary-customer relationship has transcended traditional concepts of fiduciary law from the very origins of modern securities regulation in the 1930s and 1940s. The emergence of what we could describe as "functional fiduciary law," a set of rules and requirements addressing the specific agency problems of the relationship between intermediaries and investors, thus took place long before the relevant substantive rules became exported to, and adapted by, foreign jurisdictions in the course of the globalization of securities regulation at a later stage. As a consequence, the analysis of fiduciary principles in the area of financial intermediation inevitably has to rely on a nontechnical, "functional" understanding of fiduciary principles – an understanding that is determined by the protective objectives of fiduciary law[55] rather than by its traditional emanation in common law.

Similar considerations apply with regard to the resulting tensions between regulatory standards and private law – and thus the need to determine whether and to what extent the applicable *regulatory* standards should have a bearing on the individually enforceable *private law* duties arising within intermediary-customer relationship (whether these follow from general contract law or, for that matter, other general principles of law, including tort, agency, or indeed fiduciary law in the technical sense).

Problems of coordination inevitably arise. Regulatory standards and private law duties will in some cases differ from and, potentially, conflict with each other. The need to reconcile *regulatory* duties – "functional fiduciary law" within the meaning defined previously – with each jurisdiction's *private* law environment therefore has to be considered as part and parcel of the emerging body of transnational fiduciary law in the area of financial services regulation. In a transnational context, defining a solution to these problems of coordination will be particularly difficult precisely because the operation of "functional fiduciary law" or, at least, its impact on the intermediaries' privately enforceable duties vis-à-vis their customers, is inevitably contingent on how each individual jurisdiction will coordinate *regulatory* duties on

[53] Note, in this context, that the IOSCO "Principles," in addition to the protection of investors, are also designed so as to protect market integrity, which certainly does not form part of intermediaries' duties to customers under general contract or, indeed, fiduciary law. TECH. COMM. OF THE INT'L ORG. OF SEC. COMM'NS, *supra* note 17, at 7–9.

[54] *See supra* note 48 and accompanying text. *Cf.* Jackson and Gillis, *supra* note 6, for a functional analysis of overlaps and tensions between fiduciary law and regulation in the United States. *Cf. also* LAW COMM'N, *supra* note 2, at Part VI, for a similar analysis from an English law perspective.

[55] As to which, *see*, again *supra* text accompanying note 50.

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the one hand and the applicable *private law* on the other hand. One could characterize this problem as the fundamental "contingency problem" for the development of transnational fiduciary law in the field of financial services: the problem that a truly transnational understanding of what constitutes fiduciary obligations of financial intermediaries toward their customers and how these obligations affect the customers' position in their individual contractual relationships is contingent on the interplay between regulatory rules and the applicable private law.

Given the long-standing trend toward international cooperation between supervisory authorities and convergence of regulatory standards as well as supervisory practices in all fields of financial regulation and supervision, there is no reason to doubt that the implementation and supervisory enforcement of regulatory conduct-of-business standards, as such, can be accomplished effectively and consistently. The convergence of applicable standards, developed within the institutional framework of IOSCO, provides ample evidence in this regard. The "contingency problem" identified earlier, by contrast, is inevitably more difficult to resolve – and it clearly presents a rather complex impediment for the development of transnational fiduciary law in the field. The case of conduct-of-business regulation in the European legislative framework, to be considered in Section 4.3, illustrates the point.

4.3 MAKING TRANSNATIONAL LAW APPLY TRANSNATIONALLY: THE CASE OF EUROPEAN FINANCIAL LAW

4.3.1 *European Financial Law and Conduct-of-Business Regulation: A Primer*

With far-reaching powers to enact legislation designed to harmonize national laws or, indeed, to create universal rules for application across no less than twenty-eight (post-Brexit: 27) jurisdictions with different legal traditions, substantive laws, and enforcement institutions, the European Union[56] indisputably is an important driver toward convergence in all areas of law and regulation covered by the mandate (and corresponding powers) laid down in the Treaty on European Union (TEU) and, in particular, the Treaty on the Functioning of the European Union (TFEU). It is an open question whether or not (and, if so, to what extent and subject to which qualifications) European financial law would qualify as a "transnational legal order." To be sure, EU law generally constitutes a legal order, and a highly developed one for that matter, considering the specific constitutionalization of the European Union (not quite a federation of states, but certainly more than an international organization), the comprehensive perimeter of European economic lawmaking as a whole (which covers legislation in all areas of economic activity), the

[56] The same already applied to its predecessors, namely the European Economic Community and the European Community.

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existence of European (as distinct from national) regulatory and supervisory agencies, and the corresponding high level of harmonization of national laws and regulations.[57] Taken together, though, these aspects certainly distinguish European financial law from other areas of international cooperation of legislators, authorities and/or courts in different jurisdictions.[58] More specifically, it could be argued that, owing to the high level of integration of national jurisdictions the EU Member States, EU lawmaking, even though it formally involves a multitude of jurisdictions, is structurally closer to coordination problems within a *single* jurisdiction and thus lacks the characteristics of genuine transnational legal ordering. In this context, it is worth noting that, under the European Treaties, compliance with, and implementation of, legal rules adopted at the European level takes place within a pre-defined legal framework, in which Member States are bound to give effect to EU legislation, and judicial powers to resolve any controversy as to its legality and substantive content are allocated to the European Court of Justice, which issues decisions that are binding on the Member States.[59]

It is neither possible nor necessary to fully explore the nature of EU financial law within this chapter. It is important here to stress two points. First, European financial law and the relevant institutional arrangements established within the EU may have to be qualified for the purposes of transnational law theory. Second, however, it is certainly true that the EU and its institutions have played an important role not just in *shaping* the "transnational financial legal order"[60] established at a *global* level, but also in terms of *implementing* the work promulgated by international standard-setters. In the field of securities regulation, as in financial regulation more generally, European legislation has thus been instrumental to turn international "soft law" standards promulgated by international standard-setting bodies (such as IOSCO) into "hard law," be it in the form of Directives (which harmonize the national laws of the Member States) or of Regulations (which apply directly and universally in all Member States).[61] Both as an increasingly powerful negotiating party in working groups responsible for the development and the reform of regulatory standards and in view of its powers to render such standards effective across a large and important market, the EU has contributed to the effectiveness and success of that legal order,

[57] *Cf.* Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* Halliday & Shaffer, *supra* note 15, at 3, 5. (suggesting the following definition of a transnational legal: "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice across national jurisdictions.")

[58] *Cf. id.* at 18–21, for a general discussion of what constitutes the relevant "transnational" element.

[59] *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 267, July 6, 2016, 2016 O.J. (C 202) 1 [hereinafter TFEU] (setting out the procedure and status of adjudicating on "preliminary reference" by national courts); *see generally*, *e.g.*, Damian Chalmers et al., European Union Law 166–88 (4th ed. 2019).

[60] To borrow the term coined by Helleiner, *supra* note 15.

[61] On the differences and relevance of Directives and Regulations (as defined by TFEU art. 288 (2) and (3)), *see generally* Chalmers et al., *supra* note 59, at 114.

making it a useful object of study for present purposes irrespective of whether European law itself qualifies as a transnational legal order in its own right or merely as a (partly autonomous) subset of a larger system.

Moreover, EU legislation in the field of financial services regulation, irrespective of the constitutional environment and its embeddedness in an institutional structure defined in the Treaties, arguably is also a showcase for more general problems of coordination between different legislators, authorities, and courts, problems pertaining to the national "operationalization" of legal rules and norms originating at a supranational level. The ongoing controversy about the need for private law implications of regulatory conduct-of-business standards established by EU law[62] is a particularly illustrative case in point. These problems, which – as noted before – inevitably come with implications for the effectiveness of *any* attempt to apply solutions developed at a supranational level to circumstances within a national turf, are likely to be more or less identical with those observable in the context of transnational legal orders proper.[63] Irrespective of the idiosyncratic characteristics of EU financial law and regulation (and EU economic lawmaking more generally), an analysis of the conditions for and the functioning of the harmonization of conduct-of-business standards for financial intermediaries established in EU law can thus be expected to contribute to our understanding of transnational legal orders more generally. Much the same applies with regard to the interplay between the different levels of rule-makers and standard-setters, and its implications on the interpretation and implementation of both legal rules and principles of supranational origin in the national legal environments, respectively.[64]

Against this backdrop, it should be recalled that conduct-of-business regulation has been a core element of EU financial law ever since the introduction of harmonized principles for the regulation of investment services with the Investment Services Directive of 1993. The relevant legal acts – the Investment Services Directive, MiFID I and MiFID II[65] – were all enacted on the basis of Treaty provisions mandating the adoption of directives for the harmonization of national conditions for market entry by individual providers of goods or services or for companies from other EU Member States.[66] Significantly, the relevant provision

[62] *See* Section 4.3.3.

[63] *See generally* Halliday & Shaffer, *supra* note 57, at 31–55 (discussing general aspects of the formation and institutionalization of transnational legal orders).

[64] *Cf. id.* at 55–63 (discussing various scenarios of how transnational legal orders trigger similar impacts).

[65] *See supra* notes 31, 32 and 33.

[66] *See* TFEU art. 53(1). ("In order to make it easier for persons to take up and pursue activities as self-employed persons, the European Parliament and the Council shall . . . issue directives for the mutual recognition of diplomas, certificates and other evidence of formal qualifications and for the coordination of the provisions laid down by law, regulation or administrative action in Member States concerning the taking-up and pursuit of activities as self-employed persons.")

(just as its predecessors in earlier Treaties)[67] is confined to the removal of differences in the conditions for market participation in order to facilitate the creation of an integrated "Internal Market" for goods and services, historically the core policy objective of the European Union (*cf.* art. 3(3) TEU), which requires a regulatory "level playing field" and, thus, harmonized rules governing the provision of financial services across all Member States.[68] Just as with other aspects of EU financial regulation, the harmonization of conduct-of-business standards for investment firms, which (at least initially) accomplished the liberalization of national regulations, served as an instrument to facilitate the mutual access of financial intermediaries licensed in one of the Member States to what used to be reclusive domestic markets.[69] Given that this clearly served the interests of the regulated industry, it is fair to note close parallels between the development of European financial regulation on the one hand and the driving forces behind the emergence of *global* ("transnational") conduct-of-business standards identified earlier:[70] At both levels, the standards were driven by the desire to provide a mutually acceptable basis for market access and market integration, and at both levels, this motive may have helped to enhance the industry's readiness to adapt and comply.

While allowing for a comprehensive harmonization of the regulatory frameworks (not just) for securities intermediaries, however, this constitutional background also accounts for an important limitation to the role of EU legislation as a catalyst for convergence in the conditions for the provision of such services across the Member States. Because the focus was on the harmonization of conditions for market access, EU financial law has never aimed at a full harmonization of all norms of relevance for the contractual relationship between intermediaries and customers – an attempt that would not just have been technically difficult (given residual differences in the national private laws of the Member States) and fraught with political controversies. Arguably, it also would have exceeded the scope of the relevant legislative powers, which (at least expressly) do not provide for a comprehensive harmonization of general private law, even when confined to individual areas of particular relevance to the Internal Market.[71]

[67] TFEU art. 53(1) effectively replicates the wording of art. 47(2) of the former Treaty on the European Community, which itself was based on art. 57(2) of the Treaty on the European Economic Community.

[68] For a general discussion of the constitutional basis for EU securities regulation, *cf.* Niamh Moloney, EU Securities and Financial Markets Regulation 8–13 (3d ed. 2014).

[69] *See id.* at 19–22; *see also* Jens-Hinrich Binder, *Vom offenen zum regulierten Markt: Finanzintermediation, EU-Wirtschaftsverfassung und der Individualschutz der Kapitalanbieter*, 25 Zeitschrift für Europäisches Privatrecht [ZEuP] 569 (2017), for a detailed analysis of the parallels between EU banking and securities regulation in this regard.

[70] *See supra* note 21 and accompanying text.

[71] For a more in-depth discussion, *see* Binder, *supra* note 69, at 588–89, 592–93 and 596–98. And for an early assessment of the limitations for (and the rationale of) the harmonization of conduct-of-business standards through the Investment Services Directive of 1993, *cf.* Johannes

To be sure, as will be explored in Section 4.3.2, significant aspects of the European conduct-of-business standards (just as the original IOSCO Principles of 1990) bear close similarities with traditional concepts of fiduciary relationships recognized by common law. Given the restrictions of their legal basis in European Treaty law, the relevant provisions, nonetheless, must not be misinterpreted as mandating the introduction of fiduciary duties in a technical sense, that matter being outside the scope of the relevant instruments and left to the discretion of the Member States.[72] Just as the IOSCO Principles, the relevant standards therefore can be characterized as "functional fiduciary law" within the meaning defined previously. While the regulatory standards clearly address core problems of the principal-agent relationship between intermediaries and clients and apply to relationships that would qualify as fiduciary in common law, the interplay between these standards and the applicable private law environment of the Member States is not specified in detail by European law. Whether or not at least some form of private law implications, for example, in the form of contractual, damages for violations of regulatory obligations still ought to be recognized as a matter of European law, remains an open question.[73]

4.3.2 *What Has Become of the IOSCO "Principles": Conduct-of-Business Regulation in Current EU Legislation*

While a detailed analysis of the current version of conduct-of-business requirements for investment firms in European law, laid down in articles 24 and 25 of MiFID II (as well as in delegated legal instruments adopted by the European Commission in connection with these provisions),[74] would be outside the scope of this chapter,[75] the close parallels between the substantive content of relevant duties and the early precedents in the IOSCO Principles of 1990 are nonetheless worth noting. Although formulated in significantly more complex terms and in far greater detail, the relevant provisions take up all aspects of the original principles. As a general duty that also seeks to fill the gaps left by more specific requirements,[76] article 24(1) MiFID II first establishes a general duty of investment firms,

Köndgen, *Rules of Conduct: Further Harmonisation?*, *in* European Securities Markets: The Investment Services Directive and Beyond 115 (Guido Ferrarini ed. 1998).

[72] Enriquez & Gargantini, *supra* note 51, ¶ 4.16.

[73] On which, *see* further Section 4.3.3.2.

[74] *See* Commission Delegated Regulation (EU) 2017/565, 2017 O.J. (L 87) 1; and Commission Delegated Directive (EU) 2017/593, 2017 O.J. (L 87) 500. Note that the relevant requirements are specified further in "Guidelines" promulgated by the European Securities and Markets Authority (ESMA) (*see* art. 25(9)–(11) MiFID II, *supra* note 3, outside the scope of the present paper).

[75] *See*, for more extensive analyses, of the current regime, *e.g.*, Enriquez & Gargantini, *supra* note 51; Stefan Grundmann & Philipp Hacker, *Conflicts of Interest*, *in* Busch & Ferrarini, *supra* note 51, at ch. 7.

[76] *See*, for further discussion of the functions of the duty within the MiFID II framework, Enriquez & Gargantini, *supra* note 51, ¶¶ 4.16–4.22.

> when providing investment services or, where appropriate, ancillary services to clients, [to] act honestly, fairly and professionally in accordance with the best interests of . . . clients . . ..

Article 24(2), subpara. (2) MiFID II then requires that investment firms

> understand the financial instruments they offer or recommend, assess the compatibility of the financial instruments with the needs of the clients to whom it provides investment services, also taking account of the identified target market of end clients (. . .), and ensure that financial instruments are offered or recommended only when this is in the interest of the client.

Pursuant to article 24(3) MiFID II (specified further and complemented with detailed duties to inform and warn of risks in para. (4) of the same provision),

> [a]ll information, including marketing communications, addressed by the investment firm to clients or potential clients shall be fair, clear and not misleading. Marketing communications shall be clearly identifiable as such.

Article 24(5) MiFID II then continues to define the format and quality of the required information, which has to

> be provided in a comprehensible form in such a manner that clients or potential clients are reasonably able to understand the nature and risks of the investment service and of the specific type of financial instrument that is being offered and, consequently, to take investment decisions on an informed basis. Member States may allow that information to be provided in a standardised format.

Article 24(8) and (9) MiFID II restrict the acceptability of commissions or other benefits by investment firms for the marketing and recommendation of financial products and thus address an important source of conflicts of interest that could impair the quality of investment advice and related services. In a similar vein, article 24(10) MiFID II prohibits incentive structures that could induce staff to offer financial products whose acquisition would not be in the client's best interest. Complementing these provisions, article 25(1) MiFID II then establishes requirements for the qualification of natural persons providing investment advice and related services, while article 25(2)-(4) MIFID II specify the obligations of investment firms to explore their clients' interest prior to the provision of services.

4.3.3 *The Functions and Enforcement of Conduct-of-Business-Regulation in Europe: A German and a European Perspective*

4.3.3.1 German Law

If the effectiveness of "functional fiduciary law" crucially depends on the interplay between *regulatory* standards and the relevant *private law*

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environment,[77] EU financial law certainly is a highly illustrative case in point. Just as in other areas of EU legislation, the introduction of harmonized conduct-of-business standards since 1993[78] had to be implemented in Member States with different legal traditions, different contract laws, and, in particular, fundamentally different legal regimes governing the relationship between financial intermediaries and their customers. Among these, only a small fraction – namely, the United Kingdom and Ireland – are common law jurisdictions, the remainder being variants of civil law legal systems. While it is, for obvious reasons, impossible to develop a full account of the relevant private law environments in each and every Member State within this chapter, it is probably safe to assume that at least in the majority of them, the relevant aspects of intermediary-client relationships (general duties of care and skill, principles governing conflicts of interests, as well as duties to inform and disclose) had already been addressed in the applicable contract law (to some extent, as the case may be, complemented by general principles of private law).[79] It should come as no surprise that the interplay between regulatory conduct-of-business standards and private law has been debated for some time in response to incoming European legislation, with only few jurisdictions having developed clear-cut solutions for the reconciliation of regulatory and private law regimes.[80]

German law illustrates the point. Building both on general contract law, which does not provide a bespoke regime addressing intermediary-client relationships, and on general principles of private law, including on misrepresentation prior to or in the course of contractual relationships, German courts, in particular in the aftermath of a landmark decision in 1993,[81] have over time defined a rather complex set of duties of care and skill with regard to the provision of investment advice, which includes both prescriptive and proscriptive elements. As established in a large body of case law,[82] investment firms are required (a) to ensure that any advice given has to be commensurate with the investor's profile and risk preference, (b) to explore their clients' expertise, financial position, and risk preference prior to the provision of

[77] *See* Section 4.2.1.

[78] On the relevant legal instruments, *see*, again, *supra* notes 31–33 and accompanying text.

[79] For a representative overview, compare the country reports on selected civil and common law jurisdictions in Busch & van Dam, *supra* note 5. *See also* Danny Busch, *Why MiFID Matters to Private Law – The Example of MiFID's Impact on Asset Managers*, 7 Cap. Markets L.J. 386 (2012).

[80] *See*, for an early assessment of the relevant problems, *e.g.*, Peter O. Mülbert, *The Eclipse of Contract Law in the Investment Firm-Client-Relationship: The Impact of the MiFID on the Law of Contract from a German Perspective*, *in* Investor Protection in Europe – Corporate Law Making, the MiFID and Beyond 299 (Guido Ferrarini & Eddy Wymeersch eds., 2006).

[81] Bundesgerichtshof [BGH] [Federal Court of Justice] July 6, 1993, 123 Entscheidungen des Bundesgerichtshofs in Zivilsachen [BGHZ] 126. *See* Binder, *supra* note 5, at 75. The following paragraphs borrow from that publication.

[82] For an in-depth account of the relevant private law environment, an analysis of the resulting duties of intermediaries, and references to case law, *see*, again, Binder, *supra* note 5, at 66–81.

investment advice, (c) to inform their clients of all aspects that are material for their investment decisions, (d) to explore the characteristics and risk profile of any investment recommended to clients, and (e) to warn clients if, on the basis of the exploration of their individual expertise and risk profile, they perceive the client to be unaware of specific risks arising in the context of a proposed investment. Even though fiduciary law, in the common law interpretation of the concept, does not exist in German private law, the parallels between these principles and fiduciary duties in the common law understanding are obvious.

Nonetheless, the functional interplay between these principles and the regulatory requirements enacted in order to transpose the incoming European Directives (first in sections 31–34 and, since 2017, in sections 63–71 of the Wertpapierhandelsgesetz [Securities Trading Act][83]) has been debated controversially in German legal doctrine ever since the transposition of the Investment Services Directive 1993, while the courts have been reluctant to recognize any implication of the regulatory regime for the construction of the contractual relationship between intermediaries and their clients.[84] Prior to the transposition of MiFID into the German Securities Trading Act, the Federal Supreme Court did acknowledge, albeit somewhat imprecisely, that the regulatory requirements, although based in public law, could have a bearing on contractual duties to the extent that their objective was to protect the clients; even so, the Court did not construe duties of care independent from those established under general contract law.[85] In some decisions, the Federal Supreme Court and other courts have also referred to provisions of earlier versions of the WpHG as a basis for a duty to avoid adverse consequences of conflicts of interests for clients.[86] The practical consequences of this approach, however, remain obscure. In the academic literature, which is frequently cited as persuasive authority by German courts, the controversy continues about whether, and to what extent, implications of regulatory conduct-of-business standards on the private law relationships between intermediaries and customers ought to be recognized. The prevailing opinion is that regulatory conduct-of-business standards, *qua* rooted in public law, cannot be considered as authoritative for the determination of obligations arising in private law. But in recent years an increasing number of scholars have argued for reconciliation of both regimes.[87]

[83] Wertpapierhandelsgesetz [WpHG] [Securities Trading Act], July 26, 1994, BGBl I at 1749, repromulgated Sept. 9, 1998, BGBl I at 2708, as amended June 23, 2017, BGBl I at 1693.

[84] *See generally* Matthias Casper & Christian Altgen, *Germany*, *in* Liability of Asset Managers (Danny Busch & Deborah A. DeMott eds., 2012), ¶ 4.01, ¶¶ 4.37–4.41.

[85] *Cf.*, *e.g.*, BGH, Dec. 19, 2006, 170 BGHZ 226 (232); BGH, July 24, 2011, 17 Neue Juristische Wochenschrift-Rechtsprechungs-Report [NJW-RR] 405 (406), 2002.

[86] *Cf.*, *e.g.*, 170 BGHZ 226 (234).

[87] *Cf.* Binder, *supra* note 5, at 72–74 (summarizing the case law and the relevant academic literature).

Given residual differences between the two regimes, this state of affairs is clearly unsatisfactory, and strong arguments have been advanced supporting a further realignment between the two regimes. Nonetheless, German law as it currently stands continues to interpret both regimes as functionally and doctrinally separate.[88] German courts still hesitate to reconcile their interpretation of the applicable contract and general private law with the substance of conduct-of-business regulations to the extent these are designed to protect investors. As a result, the "functional fiduciary law" established by the transposition of European law in the German Securities Trading Act, has not yet transformed into obligations under German private law, although, on occasion, it has had an influence on the interpretation and doctrinal analysis of the applicable private law regime.

4.3.3.2 European Law

Similar problems of coordination have arisen in other European jurisdictions. As discussed earlier, different national approaches will come with different results not just in terms of the rights of individual investors, but also in terms of the effectiveness of the regulatory standards as such. It therefore is hardly surprising that the implications of the harmonized conduct-of-business standards should have become the object of a general discussion that transcends the national jurisdictions of the Member States. Significantly, the question whether or not these standards should be interpreted as influencing also the obligations of intermediaries under national contract (and/or general private) laws has been debated not just as a matter of national doctrine (e.g., in order to ensure consistency of obligations and to avoid contradictory sanctions), but also as a matter of EU law.

At first sight, this may appear to be inconsistent both with the fact that the relevant European legislation has never itself prescribed specific sanctions, let alone the introduction of fiduciary principles proper in the national laws of the Member States, and with the lack of legislative powers for the harmonization of general private law in the EU Treaties.[89] Yet, while both aspects remain largely undisputed, it is obvious that differences in terms of obligations under national private law may come with implications for cross-border competition in the Internal Market in at least two respects.[90] First, if and to the extent that national *private* law imposes a stricter standard on financial intermediaries than the standards defined in the harmonized *regulatory* frameworks, intermediaries operating in this jurisdiction face higher costs than they would incur in other jurisdictions where the applicable

[88] *See* Kuntz, *supra* note 10, for a recent analysis and forceful arguments supporting convergence between the two regimes.

[89] *See*, again, *supra* notes 72 and 73 and accompanying text.

[90] For a more extensive analysis, *cf.* Danny Busch, *The Private Law Effect of MiFID I and MiFID II*, *in* Busch & Ferrarini, *supra* note 51, ¶¶ 20.03–20.27 (discussing different scenarios that have arisen in recent practice).

private law is more closely realigned with the harmonized regulatory standards. And, second, where national private laws are less strict than the regulatory regime, the absence of private law enforcement as a sanctions regime complementing oversight and enforcement by supervisory authorities may impair the effectiveness of the regulatory standards, which in turn may create competitive disadvantages for similar activities carried out in other Member States. Either scenario would be problematic in view of the EU's overarching policy objective to create an integrated Internal Market with harmonized "rules of the game."[91] Moreover, the latter scenario would be inconsistent with the principle of effectiveness, a core principle of European law developed in case law by the Court of Justice of the European Union (ECJ), whereby the duty of Member States to comply with European law implies their duty to provide for effective implementation (including by sanctions in national law).[92]

Interestingly, in spite of these rather obvious consequences, ECJ case law has remained vague in this regard. In a prominent case addressing the question whether MiFID I required the Member States to provide for individually enforceable sanctions for a violation of the know-your-customer requirements stated therein, the Court held that, in the absence of specific EU legislation, the Member States, subject to the principles of equivalence and effectiveness, remained entitled to define the sanctions regimes according to their own preferences.[93] This authority arguably includes the freedom to restrict implementation to *regulatory* requirements without direct implications for obligations under general private law. With the doctrinal debate ongoing, it remains to be seen whether this principle will be upheld in future cases, even if it could be established that the lack of individually enforceable private law duty, in the circumstances, reduces the effective implementation of the regulatory standards.

Whatever the future may bring, both the ongoing doctrinal debate on the private law implications of regulatory standards and the different approaches in place across the EU Member States clearly illustrate that the "transnationalization" of fiduciary

[91] *See*, again, *supra* note 69 and accompanying text.

[92] *See generally*, *e.g.*, Takis Tridimas, The General Principles of EU Law 418–76 (2006); Walter van Gerven, *Of Rights, Remedies and Procedures*, 37 Common Mkt. L. Rev. 501 (2000).

[93] Case C-604/11, Genil 48 SL, Comercial Hostelera de Grandes Vinos SL v. Bankinter SA, Banco Bilbao Vizcaya Argentaria SA, ¶¶ 57, 58 (May 30, 2013), https://curia.europa.eu/juris/document/document.jsf?text=&docid=137832&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=146393; confirmed in Case C-312/14, Banif Plus Bank Zrt. v. Márton Lantos and Mártonné Lantos, ¶ 78 (Dec. 3, 2015), https://curia.europa.eu/juris/document/document.jsf?text=&docid=172564&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=148968. *See*, for a critical analysis in the light of ECJ case law in similar scenarios, again, Busch, *supra* note 90. And *cf.* Stefan Grundmann, *The Bankinter Case on MIFID Regulation and Contract Law*, 9 Eur. Rev. Cont. L. 267 (also supporting a more extensive interpretation of the regulatory requirements).

rules for the relationship between financial intermediaries and their customers, despite the high level of global convergence of regulatory conduct-of-business standards, is a process that has not yet reached its end. Only some jurisdictions thus far have resolved the problems of coordination between the two regimes, transforming "functional fiduciary law" into private law obligations in one way or another. In others, the two regimes continue to operate separately, sometimes on the basis of rather vague principles, which creates legal uncertainty for both intermediaries and their customers. It is at least conceivable that future developments, either through changes in the applicable EU legislation or in the form of a revision of ECJ case law, could trigger further convergence in this respect. For the time being, however, convergence with international trends so far has been restricted to the regulatory sphere.

4.4 CONCLUSIONS

Over many decades, regulatory frameworks for the provision of financial services – in particular, vis-à-vis retail customers – have come to complement national contract laws with conduct-of-business standards designed to establish minimum qualitative standards of care, skill, and honesty for the provision of a wide range of services to customers. At least parts of this regime mirror and, to some extent, replicate duties that have also been recognized as fiduciary duties in general private law, particularly because (and to the extent that) the underlying contractual relationships qualify as agency relationships in common law. Modern conduct-of-business standards, developed in order to facilitate the effective protection of investors through ex ante supervision and enforcement of qualitative requirements, thus have come to complement (and, in part, to supersede) functionally parallel duties that would otherwise be enforceable ex post, within the context of individual lawsuits brought by customers against their intermediary. Historically, this development can be explained with the desire to balance out deregulatory developments in US state legislation since the beginning of the twentieth century through the imposition of harmonized standards in federal securities regulation in the 1930s.

This process has been taken up by a global trend toward converging regulatory standards since the 1980s, which – both in international standards (in particular, the IOSCO "Principles") and European legislation – has been driven by the desire to open national financial markets and facilitate cross-border competition for financial services intermediaries. Though certainly onerous in terms of compliance cost, the adaptation and implementation of a growing body of transnational conduct-of-business standards thus certainly has served industry interests. In this regard, securities regulation clearly is in line with the emergence of international standards in other fields of financial regulation, including, in particular, the area of prudential requirements for the establishment and ongoing operations of banking

institutions – and it is reflective of the relevance of "soft law" as a driving force behind the development of transnational legal orders more generally.[94]

With regulatory (as distinct from contract) law as a platform and transmission mechanism for the emergence of a transnational regime for the regulation of fiduciary relationships between intermediaries and customers, the respective provisions have changed their nature. While the understanding of fiduciary duties and, indeed, their relevance for the solution of problems in the individual contractual relationships differ considerably, especially between common and civil law jurisdictions, the emerging body of principles and duties can nonetheless be described as "functional fiduciary law" – that is, legal solutions to economic problems that arise in agency relationships irrespective of the respective underlying contract law frameworks and their links toward more general principles (good faith, duties of care, skill, and honesty) in the respective legal systems. In this sense, the emergence of a universally accepted body of conduct-of-business standards certainly can be characterized as a successful example of transnational legal transplants.

Apart from the incentives of the regulated industry to accept and implement such standards as a price for unrestricted access to foreign markets, two interrelated aspects in particular appear to have facilitated this development: *First*, regulatory law is, almost by definition, generic in nature, and thus less contingent on functional interlinkages with general principles of contract law, be they rooted in common or statutory civil law. *Second*, precisely because the inclusion of transaction-oriented conduct-of-business standards originally served to compensate for weaknesses in the protection of investors under general principles of fiduciary law, the applicable regulatory standards were at the same time more focused on specific aspects of the intermediary-customer relationships – and simpler to administer. Regulatory conduct-of-business standards apply independently from general principles of contract law. At the same time, they are *not* intended to provide a legal basis addressing all aspects of the relevant relationships, but merely *add* to general contract law by imposing certain protective duties and facilitating their ex ante supervision by public authorities. This allows the implementation and enforcement of regulatory requirements in a way that is functionally and operationally separate from the application of general contract law, which in turn facilitates their "export" to, and adaptation by, jurisdictions with different contract law regimes.

Against this backdrop, however, problems of coordination between the regulatory sphere and the respective contract law environment are inevitable, and it is hardly surprising that such problems can be identified as a common concern in many jurisdictions, including the Member States of the European Union. Realigning regulatory standards with the technical content of applicable contract law and,

[94] On which, *see*, *e.g.*, Gralf-Peter Calliess & Peer Zumbansen, Rough Consensus and Running Code: A Theory of Transnational Private Law 123–34 (2010/2012 reprint).

indeed, general principles of contract law (including, for that matter, the common law of agency and fiduciary duties) continues to be difficult, especially in cases where the substantive content diverges. In this respect, ongoing discussions on the private law implications of the harmonized body of European conduct-of-business regulations is just one illustrative showcase. As long as national differences in the treatment (and resolution) of such conflicts continue to exist, the process of "transnationalization" of what could be described as "functional fiduciary law" clearly remains incomplete – with potentially significant results in terms of substantive outcomes. Although the transnational convergence of regulatory standards that can be described as "functional" fiduciary law has made enormous progress over the past decades, the private law regimes applicable to the intermediary-customer relationship continue to differ considerably. International "soft law" instruments are highly relevant, and transnational cooperation of regulatory institutions acting under highly politicized mandates and corresponding restrictions, and influenced by strong market forces, continues. The resulting emergence of transnational standards for the regulation of financial intermediation reflects an ongoing process of transnational legal *ordering*, but does not represent a mature transnational legal order, yet.

5

Transnational Fiduciary Law in Bond Markets

A *Case Study*

Moritz Renner

5.1 INTRODUCTION

The aim of this chapter is twofold. First, it is a comparative study on the potential benefits and limitations of applying fiduciary law in a "hard case." This analysis is inductive in nature. It aims at contributing to a better understanding of fiduciary law doctrines in both common and civil law jurisdictions. Second, the chapter focuses on specific transnational processes that may shape fiduciary norms. In particular, it analyzes the influence of transnational private ordering on the establishment of fiduciary duties in state law.

Centering on a case study, the chapter discusses the legal aspects of "net-short debt investing" on global bond markets through the lens of transnational fiduciary law. Generally, the term "net-short" refers to the positioning of an investor who benefits as the price of a specific financial asset falls. Net-short debt investing is an increasingly popular investment strategy that enables bondholders (i.e., holders of a company's debt) to cash in on the default of the bond-issuing company by building up a net-short position in credit default swaps (Section 5.2). The strategy raises the question whether the net-short investor has a fiduciary duty of loyalty toward (1) the issuer of the bond, (2) other bondholders, and (3) the counterparty of the credit default swap (CDS) (Section 5.3). This legal question has a transnational dimension: large-scale bond sales do not only involve a number of different jurisdictions, but also heavily build on mechanisms of private ordering (Section 5.4).

The chapter argues that any legal conceptualization of net-short debt investing must consider this transnational dimension (Section 5.5). Specifically, the chapter will make the case that the concept of fiduciary duties should be interpreted with a view to facilitating mechanisms of transnational private ordering.

To make this argument, this chapter assesses a case study – the *Windstream v. Aurelius* dispute involving net-short debt investing – one that, at first glance, seems an unlikely candidate for the application of fiduciary norms. One thing is

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clear: The practice of net-short debt investing may have adverse effects on issuers of bonds, other bondholders, and credit default swap counterparties. Yet "hard" fiduciary law – that is, the domestic legal norms of common law and civil law countries that fiduciary theorists typically focus upon – is unlikely to apply fiduciary duties to net-short debt investing, leaving market participants largely without viable remedies. The picture may change, however, if we take seriously the transnational dimension of bond market cases such as *Windstream v. Aurelius*. Transnational bond markets are a prime example of transnational private ordering, one with a fiduciary dimension, as this chapter argues.

5.2 CASE STUDY: NET-SHORT DEBT INVESTING

The problems of net-short debt investing have received considerable media attention: the *Financial Times* opines that US companies face "a growing threat from activist investors," whereas others critically discuss the role of "hedge-fund debt cops."[1] Even more pointedly, an opinion piece in the *New York Times* claims, "What Hedge Funds Consider a Win Is a Disaster for Everyone Else."[2] What, then, is net-short debt investing? The phenomenon is well illustrated by the much-discussed *Windstream v. Aurelius* case, which was decided by a federal trial court in New York.[3]

The (stylized) facts of the case are as follows. In 2013, Windstream, a telecoms company, issued bonds in order to finance its operations. As is standard market practice, the bond documentation contained a number of so-called covenants. Bond covenants, as an instrument of creditor protection, are clauses that oblige the bond issuer to comply with certain financial ratios, such as a specific debt-to-earnings ratio, and to refrain from risky financial activities.[4] One of the bond covenants prohibited Windstream from transferring any assets to affiliated companies. Windstream violated this prohibition when it transferred a considerable number of its network services to a holding company in 2015, allegedly for regulatory purposes. Given this violation of a covenant, the bondholders, with a quorum of 25 percent,

[1] Sujeet Indap, *USA Inc. Faces Growing Threat from Activist Debt Investors*, FINANCIAL TIMES, Sept. 18, 2018, at 13; Mary Childs, *Windstream Dispute Highlights Aurelius' Role as a Hedge-Fund Debt Cop*, BARRON'S (Aug. 31, 2018), https://www.barrons.com/articles/windstream-dispute-highlights-aurelius-role-as-a-hedge-fund-debt-cop-1535750611.

[2] William D. Cohan, *What Hedge Funds Consider a Win Is a Disaster for Everyone Else*, N. Y. TIMES, May 12, 2019, at 19.

[3] US Bank Nat'l Association v. Windstream Services, LLC, No. 12-CV-7857 (JMF), 2019 WL 948120 (S.D.N.Y. Feb. 15, 2019). The case was brought by the indenture trustee, US Bank National Association, on behalf of the bondholders. The trusteeship arrangement between US Bank National Association and the bondholders raises no issues of fiduciary law in the case at hand.

[4] PHILIP R. WOOD, INTERNATIONAL LOANS, BONDS, GUARANTEES, LEGAL OPINIONS 69 (2d ed. 2007).

would have been entitled to declare an "event of default" after a sixty-day cure period and demand immediate repayment of the bonds (acceleration).[5]

However, the bondholders took no action after Windstream violated the covenant. Their decision not to act was in line with common bond market practice. Triggering an event of default and accelerating repayment of the bond is considered the bondholders' "nuclear option," as it almost invariably leads to the bankruptcy of the bond issuer. Thus, bondholders mostly use covenant violations as bargaining chips for adjusting the financial conditions of the bond and restructuring the company's debt rather than enforce the clauses by demanding immediate repayment (Section 5.4).

In this regard, the facts leading to the *Windstream v. Aurelius* dispute were unusual. Aurelius, a US hedge fund, bought 25 percent of the Windstream bonds in 2017 – that is, well after the covenant violation. It then took swift action by declaring an event of default and demanding immediate repayment of the bond, causing Windstream to fall into bankruptcy. Why did Aurelius act this way? It is hard to know from publicly available information. On one account, one based upon unproven market rumors, Aurelius had built a net-short position on Windstream's debt by buying credit default swaps worth ten times the amount of its bond exposure.[6] Thus, Windstream's default – which Aurelius had triggered itself (a so-called manufactured default) – allowed Aurelius to cash in on the credit default swaps. Aurelius effectively relied on the letter of the bond covenant in order to benefit from Windstream's bankruptcy.

Perhaps Aurelius was acting strategically in this way. Perhaps not. The most that one can say – and all that needs to be said for this chapter's argument – is that for Aurelius, such a strategy certainly would have made business sense. Whether it made sense from a broader economic perspective seems rather questionable, given that Windstream as the bond issuer (as well as its shareholders and employees), other bondholders and the counterparty of Aurelius' credit default swaps all stood to lose.[7] On the other hand, one could argue that broader market benefits in the form of deterrence effects for potential covenant violators achieved through Aurelius'

[5] Section 6.02 of the bond indenture provided that if an event of default occurs, "the Trustee or the Holders of at least 25% in principal amount of the then outstanding Notes may declare all the Notes to be due and payable immediately by notice in writing to the Issuers specifying the Event of Default."

[6] *See* Vincent S. J. Buccola, Jameson K. Mah, & Tai Zhang, *The Myth of Creditor Sabotage*, 81 U. Chi. L. Rev. 2029, 2072–80 (2020) (discussing market rumors and expressing reasonable doubts as to their veracity as well as to the plausibility of Aurelius' alleged "net-short" strategy).

[7] András Danis & Andrea Gamba, *Dark Knights: The Rise in Firm Intervention by CDS Investors*, WBS Finance Group Research Paper No. 265, argue that firm value is even enhanced by CDS investor intervention – at least to the extent that the CDS seller is induced to inject equity capital into the distressed firm.

"policing" role outweighed these individual losses.[8] As a matter of law, the question is what duties Aurelius had toward other market participants (Section 5.3). Both the economic and the legal assessment of the case, however, are contingent upon the structure of transnational bond markets and the reasonable expectations of market participants (Section 5.4). This chapter now turns to those topics, arguing that fiduciary law can play an important role in translating market structures and expectations into legal categories.

5.3 FIDUCIARY DUTIES: A COMPARATIVE ANALYSIS

As the *Windstream v. Aurelius* dispute shows, the legal implications of net-short debt investing concern at least three different relationships: those between bondholder and issuer, relationships within the group of bondholders, and relationships between bondholder and CDS counterparty. Different laws may apply to each of these relationships under conflict-of-laws rules. The legal framing of the relationships might particularly differ between common law and civil law jurisdictions.

5.3.1 *Between Bondholder and Issuer*

In the *Windstream v. Aurelius* dispute, the bonds were issued under New York law. Depending on the nationality of the issuer and the relevant market, bonds are subject to different applicable laws. For German companies, for example, it is not uncommon that bonds are issued under German law, even if the majority of investors is domiciled in other jurisdictions. In any case, the bond covenants will likely be based on transnational standard documentation.

5.3.1.1 Common Law

Under New York law, Windstream seemed to have no effective defense against Aurelius' action. In the New York Federal District Court's conclusions of law, Judge Furman reasoned that the court's "sole task is to enforce the Indenture's plain terms."[9] From a common law perspective, this approach was justified as a matter of general principles. Under the common law of contracts, "good faith does not envision loyalty to the contractual counterparty but rather faithfulness to the scope, purpose, and terms of the parties' contract."[10] There is no general doctrine of abuse of rights, but "if one has a right to do an act, then one can, in general, do it for

[8] On this mechanism, *see* Marcel Kahan & Edward Rock, *Hedge Fund Activism in the Enforcement of Bondholders Rights*, 103 NORTHWESTERN UNIVERSITY LAW REVIEW 281 (2009).

[9] US Bank Nat'l Association, 2019 WL 948120, at 23.

[10] ASB Allegiance Real Estate Fund v. Scion Breckenridge Managing Member, LLC., 50 A.3d 434, 430–31 (Del. Ch. 2012).

whatever reason one wishes."[11] These general common law principles, however, do not control in the field of business law, where the Uniform Commercial Code (UCC), the model code for commercial transactions, expressly incorporates the principle of good faith.[12]

Thus, some courts and commentators have relied on the UCC's principle of good faith in order to establish lender liability in a wide array of banking law cases. In several decisions, US federal and state courts have held that a lender's right to accelerate or terminate a loan may only be exercised in good faith.[13] These decisions were mostly based on the state-law adoptions of section 1-309 of the UCC.[14] Under these standards, courts tend to allow the use of acceleration and termination provisions in loan contracts only as a "shield" rather than as a "sword."[15] Violations of good faith duties by the lender can give rise to contract claims for damages or potentially also tort-based lender liability.[16] Substantively, the duty of good faith imposes a standard of "commercial reasonableness" on the lender.[17] It seems highly questionable, however, whether such a standard would have prevented Aurelius from accelerating the repayment of the bond in our case. If we merely look at Windstream and Aurelius as two parties in a lending relationship, Aurelius did have a legitimate interest in enforcing the covenant after it was breached by Windstream.

[11] Jack Beatson, *Public Law Influences in Contract Law*, *in* Good Faith and Fault in Contract Law 266–67 (Jack Beatson & Daniel Friedmann eds., 1995) (quoting Allen v. Flood [1891] AC 1).

[12] On the doctrine of good faith under the UCC and its origins, *see* Imad D. Abyad, *Commercial Reasonableness in Karl Llewellyn's Uniform Commercial Code Jurisprudence*, 83 Virginia Law Review 429 (1997); Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 Stanford Law Review 621 (1974–75); Mitchell Franklin, *On the Legal Method of the Uniform Commercial Code*, 16 Law & Contemporary Problems 330 (1951); Moritz Renner, *From "The Study of Nature" to Systems Theory: Sociological Approaches in Commercial Law*, Ancilla Iuris 41, 50–51 (2020); James Whitman, *Commercial Law and the American Volk*, 97 Yale Law Journal 156 (1987).

[13] *See, e.g.*, State Nat'l Bank v. Farah Mfg. Co., 678 S.W.2d 661 (Tex. Ct. App. 1984); K.M.C. Co. v. Irving Trust Co., 757 F.2d 752 (6th Cir. 1985).

[14] Tex. Bus. & Com. Code Ann. § 1.309 (West 2003) ("A term providing that one party or that party's successor in interest may accelerate payment or performance or require collateral or additional collateral 'at will' or when the party 'deems itself insecure,' or words of similar import, means that the party has power to do so only if that party in good faith believes that the prospect of payment or performance is impaired.").

[15] Brown v. Avemco Inv. Corp., 603 F.2d 1367 (9th Cir. 1979); *cf.* Cheryl Anderson, *Breach of Good Faith in Lending and Related Theories*, 64 N. D. L. Rev. 273, 313 (1988).

[16] Alan A. Blakeboro & Rex Heesemann, *Good Faith Duties and Tort Remedies in Lender Liability Litigation*, 15 W. St. U. L. Rev. 617 (1988); James Mabry Vickery, *A Special Relationship: The Use of the Duty of Good Faith and Fair Dealing to Impose Tort Damages in Contracts between Lender and Borrower*, 9 Rev. of Litig. 93 (1990). For a purely contracts-based solution, *see* Sandra Chutorian, *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm*, 86 Colum. L. Rev. 377, 402–06 (1986).

[17] Jonathan K. Van Patten, *Lender Liability: Changing or Enforcing the Ground Rules*, 33 S. D. L. Rev. 387, 407 (1988).

Beyond the principle of good faith,[18] far-reaching duties of loyalty may be imposed on the parties when there is a fiduciary relationship between them[19] – that is, when one of the parties is a fiduciary and therefore "is under a duty to act for or give advice for the benefit of another upon matters within the scope of the relation."[20] In such a relationship, the fiduciary has specific obligations to the extent that the beneficiary "would be justified in expecting loyal conduct."[21] From this perspective, the legal conceptualization of the *Windstream v. Aurelius* dispute hinges on the question whether Aurelius was a fiduciary of Windstream and whether it had a fiduciary duty of loyalty to refrain from enforcing the bond covenant.

The particular question of bondholders' fiduciary duties toward an issuer has apparently not been discussed in banking law literature. The most relevant articles focus on the inverse situation. They ask – mostly from a corporate governance perspective – whether the management of the issuer has fiduciary duties toward bondholders.[22] *Windstream v. Aurelius*, however, seems much more closely related to relationships where fiduciary duties are imposed on a bank or other debt investors based on their particular role as a lender.

As there is no general doctrine of fiduciary duties in banking law, courts and commentators tend to assume fiduciary duties of banks only in two scenarios: if the bank acted as an agent or trustee, or if there is some "special circumstance" warranting an ad hoc application of fiduciary norms.[23] In the lending business, "special circumstances" typically refers to situations that deviate from the model of an arm's-length relationship between creditor and debtor.[24] Thus, banks as lenders have fiduciary duties toward the borrower if they have "control or an informational advantage over the borrower."[25] Most examples involve cases where banks acted outside of their usual lending role, for example, by giving advice that the borrower relied upon.[26]

[18] This complementarity reflects the origins of fiduciary law in equity. On this aspect, *see* Cecil J. Hunt, *The Price of Trust: An Examination of Fiduciary Duty and the Lender–Borrower Relationship*, 29 Wake Forest L. Rev. 719, 728–29 (1994).

[19] Beatson, *supra* note 11, at 267.

[20] Restatement (Second) of Torts, § 874 cmt. a (Am Law Inst. 1979).

[21] Deborah A. DeMott, *Breach of Fiduciary Duty: On Justifiable Expectations of Loyalty and Their Consequences*, 48 Ariz. L. Rev. 925, 936 (2006).

[22] *Cf.*, *e.g.*, David M. W. Harvey, *Bondholders' Rights and the Case for a Fiduciary Duty*, 65 St. John's L. Rev. 1023 (1991); George S. Corey, M. W. Marr Jr. & Michael F. Spivey, *Are Bondholders Owed a Fiduciary Duty?*, 18 Fla. St. Univ. L. Rev. 971 (1991).

[23] Andrew F. Tuch, *Fiduciary Principles in Banking*, *in* The Oxford Handbook of Fiduciary Law 125, 127 (Evan J. Criddle et al. eds., 2019); Hunt, *supra* note 19, at 739–50. However, there is an argument to be made that the lender-borrower relationship necessarily has fiduciary elements that give rise to corresponding duties, *cf.* Hunt, *supra* note 19, at 723–27.

[24] Tuch, *supra* note 24, at 127.

[25] *Id.* at 127–28.

[26] *See*, *e.g.*, Morris v. Resolution Trust Corp., 622 A.2d 708 (Me. 1993); Buxcel v. First Fidelity Bank, 601 N.W.2d 593 (S.D. 1999).

Does the *Windstream v. Aurelius* dispute fall under this category of cases? Arguably, yes. It might be a "special circumstance" that Aurelius, by virtue of holding 25 percent of the bonds, had particular leverage over Windstream, as it was able to trigger an event of default at will. On the other hand, however, Windstream itself had violated the bond covenant. Aurelius did not overstep the contractual boundaries of its role as a lender. To the contrary, it availed itself of a contractual right that expressly aimed at safeguarding its financial interests. Thus, under the common law, the case for establishing a fiduciary duty that would enjoin Aurelius from triggering a default seems rather weak. Even those who argue for a broad application of fiduciary duties in lending relationships do not discuss a restriction of the lender's termination rights.[27]

5.3.1.2 Civil Law

Had Windstream issued the bond under German law, the legal situation would have been quite different at the outset. As in most civil law jurisdictions, there is no elaborate doctrine of fiduciary duties in German law.[28] However, there are functional equivalents to such duties with a potentially much broader range of application. Like many civil law jurisdictions,[29] German law establishes a principle of "good faith and fair dealings" (section 242 *Bürgerliches Gesetzbuch*) for all contracts. Legal acts that run counter to this principle are void. At the same time, the law of contracts establishes a general duty to protect the other party's rights and interests in section 241(2) *Bürgerliches Gesetzbuch*. Violations of this duty can give rise to contractual claims for damages. These general clauses are open to different interpretations and are mostly given concrete substance on a case-by-case basis.

It is widely agreed, however, that the principle of good faith implies a far-reaching prohibition of the abuse of rights.[30] The prohibition is interpreted in a context-specific manner. For instance, relationships of agency and trust give rise to a strong duty of loyalty. By contrast, there are only minimal requirements of consistent behavior for transactional contracts.[31] Given its adaptability, the abuse-of-rights doctrine potentially has a very wide range of applications.

[27] Most notably Hunt, *supra* note 19, at 775–78.

[28] Thilo Kuntz, *Das Recht der Interessenwahrungsverhältnisse und Perspektiven von Fiduciary Law in Deutschland- zugleich ein Beitrag zum Verhältnis von öffentlichem Recht und Privatrecht am Beispiel der wertpapierhandelsrechtlichen Wohlverhaltenspflichten und der Geschäftsleiterhaftung*, *in* Festschrift für Karsten Schmidt zum 80. Geburtstag 761 (Katharina Boele-Woelki et al. eds., 2019).

[29] On the civil tradition of "good faith" and its role as a "legal irritant" in common law jurisdictions, *see* Gunther Teubner, *Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergences*, 61 Mod. L. Rev. 11 (1998).

[30] *Cf.*, *e.g.*, Claudia Schubert, *§ 242*, *in* Münchener Kommentar zum Bürgerlichen Gesetzbuch paras. 199–202 (Franz Jürgen Säcker & Roland Rixecker eds., 9th ed. 2019).

[31] Christoph Kumpan, Der Interessenkonflikt im deutschen Privatrecht 100–03 (2014); Schubert, *supra* note 31, paras. 236–38 (2019). The details of the interrelation of

In banking law, it has specifically been discussed in the scholarly literature whether the principle of "good faith and fair dealings" can effectively enjoin a lender from demanding repayment in certain situations. This problem is often expressly framed as a question of the "fiduciary duties" (*Treuepflichten*) of the lender.[32] The doctrinal foundation of this argument differs from the common law approach to the extent that fiduciary duties are understood as a mere concretion of the general principle of good faith. In substance, however, many of the same considerations apply.

Most commentators agree that even a relationship bank – that is, a bank that has a long-standing business relationship with its customer – is free to terminate the credit line of its customer if the latter is in financial distress.[33] However, the special "fiduciary" role of the bank limits this freedom in two distinct ways. On the one hand, an outright abuse of rights is prohibited: A bank may not terminate a loan if the debtor can still be saved by an extension of the credit line, and if the termination does not even advance the bank's financial interests.[34] On the other hand, the bank may not behave in a self-contradictory way: If – based on past behavior – a debtor can reasonably expect his relationship bank to extend existing credit lines, these can only be terminated for compelling reasons.[35]

The *Windstream v. Aurelius* dispute falls under neither category. The termination of the bond by Aurelius was not outright abusive, as it did make business sense for Aurelius to terminate. Furthermore, Aurelius' behavior was not prima facie contradictory, as – individually – Aurelius did nothing to cause a legitimate expectation on Windstream's side that the bond covenant would not be enforced. Thus, a civil law perspective on the constellation will likely lead to the same results as the common law analysis.

5.3.2 *Within the Group of Bondholders*

It is more plausible that, by enforcing the bond covenant, Aurelius violated a fiduciary duty toward other bondholders. In both common law and civil law jurisdictions, the content and reach of mutual duties between lenders or

general contract law and the law of agency and trust are much disputed in detail. Its existence in principle, however, is widely accepted.

[32] Most notably, Claus-Wilhelm Canaris, *Kreditkündigung und Kreditverweigerung*, 143 ZHR 113, 116 (1979); more restrictively, Klaus Hopt, *Rechtspflichten der Kreditinstitute zur Kreditversorgung, Kreditbelassung und Sanierung von Unternehmen. Wirtschafts–und bankrechtliche Überlegungen zum deutschen und französischen Recht*, 143 ZHR 139, 159 (1979). On the further discussion, *see* Bankvertragsrecht, Vierter Teil paras. 137–39 (Stefan Grundmann & Moritz Renner eds., 5th ed. 2014).

[33] *Cf.* Bankvertragsrecht, *supra* note 33, para. 137.

[34] Hopt, *supra* note 33, at 162–63 (1979); Claus-Wilhelm Canaris, Bankvertragsrecht para. 1266 (2d ed. 1981).

[35] Canaris, *supra* note 35, at 125 (1979).

bondholders is highly controversial. Much depends on the conception of the legal relationship constituted by a group of investors: Is it merely contractual, or does a group of investors amount to some form of legal association? In the latter case, individual investors are more likely to be bound by specific fiduciary duties.

5.3.2.1 Common Law

In common law jurisdictions, it is widely held that investors do not form any kind of legal association that would give rise to specific mutual duties. The question has been discussed for syndicated lending in particular, where a number of lenders contribute individual shares to a large-scale corporate loan. Although earlier court decisions have not been unequivocal in this matter,[36] most commentators agree that – even in such cases – the arrangement between the lenders is "not a partnership, joint venture, or other association."[37] A fortiori, this also holds true for the relationship between bondholders, where the degree of cooperation between investors is usually much lower than in a syndicated loan. The market standard agreement issued by the International Capital Markets Association (ICMA) expressly provides – for the underwriting banks ("managers") – that "[n]one of the provisions of this Agreement or any other agreement relating to the Securities shall constitute or be deemed to constitute a partnership or joint venture between the Managers or any of them."[38]

Nevertheless, there are situations in which a lender or bondholder might have fiduciary duties toward other investors. This is most evident when the lender or bondholder acts as an agent or trustee of the other investors, a common practice for administering the outstanding debt and facilitating its repayment. Standard loan documentation often contains a disclaimer of fiduciary responsibilities for these functions.[39] The validity of such disclaimers is subject to dispute (Section 5.4).

With a view to the *Windstream v. Aurelius* dispute, however, it is worth noting that courts have discussed the existence of fiduciary duties between investors well beyond relationships of trusteeship and agency. Most notably, the English High Court in the *Redwood* case[40] discussed whether a majority of lenders has a fiduciary duty not to take a debt restructuring decision that would harm a minority of the lenders. The

[36] *See* Crédit Français Intl., S.A. v. Sociedad Financiera de Comercio, C.A., 128 Misc.2d 564, 581 (1985) (holding that a consortium of lenders constitutes a joint venture under New York law).

[37] Agasha Mugasha, The Law of Multi-Bank Financing. Syndicated Loans and the Secondary Loan Market para. 5.09 (2007) (with further references).

[38] Int'l Capital Mkt. Ass'n. *Standard Form Agreement Between Managers*, § 9 (Dec. 2018).

[39] *See, e.g.*, Loan Mkt. Ass'n., *Facility Agreement*, para. 28.5, provides that "[n]othing in any Finance Document constitutes the Agent or the Arranger as a trustee or fiduciary of any other person."

[40] Redwood Master Fund Ltd v. TD Bank Europe Ltd. [2006] 1 BCLC 149.

High Court held that this may, in fact, be the case – but only to the extent that the majority acts in bad faith and thus abuses the powers conferred to it.

Applied to *Windstream v. Aurelius*, the result of this "abuse of powers" standard is far from clear. When Aurelius used its 25 percent share of the bonds to declare an event of default and thus triggered Windstream's bankruptcy, other bondholders that had not sufficiently hedged their exposure were disadvantaged. But Aurelius' decision to do so was not taken with the purpose of disadvantaging other creditors. Without this subjective element, there is generally no abuse of powers – and thus no breach of a fiduciary duty.

5.3.2.2 Civil Law

In contrast to the common law approach, civil law jurisdictions like Germany consider a lenders' consortium to be a partnership.[41] As a result, they transpose the corporate law doctrine of fiduciary duties to the relationship between lenders.[42] However, most commentators clearly differentiate between loans and bonds. Whereas lenders contributing to a syndicated loan are widely regarded as forming a partnership, bondholders are not.[43] Therefore, fiduciary duties between bondholders do not reach beyond the minimum standard prohibiting an abuse of rights or self-contradictory behavior. As a result, Aurelius' behavior is to be judged much along the same lines as under the common law approach – and cannot be considered in breach of a fiduciary duty.

5.3.3 *Between Bondholder and CDS Counterparty*

CDS contracts are usually made under New York or English law, based on standard documentation by the International Swaps and Derivatives Association (ISDA).

[41] For German law, *see* Carsten Schäfer, *Vorb.* § 705, *in* Münchener Kommentar zum Bürgerlichen Gesetzbuch para. 58 (Franz Jürgen Säcker & Roland Rixecker eds., 7th ed. 2017); Andreas Diem & Christian Jahn, Akquisitionsfinanzierungen – Kredite für Unternehmenskäufe § 31 para 2 seq (4th ed. 2019); Kai Andreas Schaffelhuber & Frank Sölch, *in* Münchener Handbuch des Gesellschaftsrechts § 31 para. 9 (Hans Gummert & Lutz Weipert eds., 5th ed. 2019); Jens Wenzel, Rechtsfragen internationaler Konsortialkreditverträge 256 et seq. (2006). The question is highly disputed in French and Spanish law.

[42] For a critical account of the pertinent German law, *see* Moritz Renner, *Treupflichten beim grenzüberschreitenden Konsortialkredit*, Zeitschrift für Bankrecht und Bankwirtschaft 278, 285–87 (2018).

[43] *See, e.g.*, Christian Hofmann & Christoph Keller, *Collective Action Clauses*, 2011 ZHR 684, 718 (2011); Florian Leber, Der Schutz und die Organisation der Obligationäre nach dem Schuldverschreibungsgesetz 254 (2012). For a rare exception, *see* Philip Liebenow, Das Schuldverschreibungsgesetz als Anleiheorganisationsrecht und Gesellschaftsrecht § 14 (Jörn Axel Kämmerer et al. eds., 2016).

In the ISDA Master Agreement under English law, each party expressly represents that "[t]he other party is not acting as a fiduciary for or an adviser to it in respect of the Transaction."[44] This is in line with the typical risk allocation of a swap contract, where the parties clearly delineate their respective responsibilities. There is nothing to suggest that this disclaimer of fiduciary duties would be held unenforceable (see Section 5.4), either in a common or a civil law court.

In March 2019, the ISDA published a proposal to the ISDA Credit Derivatives Definitions that aimed to preclude "manufactured defaults" allowing investors to benefit from events of default.[45] However, these definitions only capture defaults that have been "manufactured" through a collusion of investor and issuer – another increasingly common practice spooking market participants.[46] It does not encompass defaults brought about by strategies of net-short debt investing such as the one employed by Aurelius.

At the same time, capital market regulators from different jurisdictions have discussed the issues of net-short debt investing and "manufactured defaults" as potential instances of market manipulation.[47] So far, their inquiries have not led to tangible results. Yet, it might prove to be an interesting test case for the idea of public fiduciary duties of capital market investors.

5.3.3.1 Interim Conclusion

Judged against general principles of common law and civil law, the *Windstream v. Aurelius* dispute is an unlikely case for applying fiduciary duties. Although the practice of net-short debt investing might have adverse effects on a range of market participants – the issuer of the bond, other bondholders, CDS counterparties – neither common law nor civil law consider it a breach of the investor's fiduciary duties. This leaves affected market participants largely without viable remedies against the practice.

5.4 THE TRANSNATIONAL DIMENSION OF FIDUCIARY LAW

This chapter suggests that we might reach a different conclusion if we take the transnational dimension of the case seriously. It argues that the bond market is a

[44] Int'l. Swaps & Derivatives Ass'n., *Master Agreement and Schedule*, Part 4 (m)(3) (2002).

[45] Int'l. Swaps & Derivatives Ass'n., *Proposed Amendments to the 2014 ISDA Credit Derivatives Definitions Relating to Narrowly Tailored Credit Events* (2019), https://www.isda.org/a/nyKME/20190306-NTCE-consultation-doc-complete.pdf (last accessed July 20, 2019).

[46] Joe Rennison, *Hovnanian Misses Bond Payment in Controversial "Manufactured Default,"* Financial Times (May 2018), https://www.ft.com/content/56c729b4-4da4-11e8-8a8e-22951a2d8493 (last accessed July 20, 2019).

[47] US Sec. & Exch. Comm'n [SEC], Press Release, *Joint Statement on Opportunistic Strategies in the Credit Derivatives Market* (June 24, 2019), https://www.sec.gov/news/press-release/2019-106 (last accessed July 7, 2019).

prime example for transnational private ordering. Against this background, it outlines a transnational approach to fiduciary law. Following this approach, it takes a fresh look at the justification and scope of fiduciary duties in both common and civil law jurisdictions. Specifically, it examines the potential of fiduciary law to "enable and bolster social norms"[48] formed in a transnational context.

5.4.1 *Transnational Ordering in the Bond Market*

5.4.1.1 Transnational Legal Orders

The concept of transnational law has always been contested. Until today, the discussion is dominated by two opposing camps – to the extent that the existence of transnational law is accepted at all.[49] On the one hand, there are authors in the tradition of Jessup who aim at developing a functional conception of transnational law as "all law which regulates actions or events that transcend national frontiers."[50] On the other hand, there are authors who make the case for a more rigorous definition of transnational law, often taking the ancient *lex mercatoria* as an example.[51]

The "wars of faith"[52] over the existence and nature of the medieval law merchant and its potential successors shall not be revisited in this chapter. For the chapter's purposes, it will suffice to acknowledge that there is a cornucopia of mechanisms of legal ordering – with differing degrees of public sector involvement – that are not limited to one national jurisdiction. For this chapter's purposes, several features of these phenomena are worth highlighting. First, a legal order is transnational when it transcends the boundaries between national and international law, such as when it is neither a creature of purely domestic or purely public international law, but rather interstate law that has effects within multiple states. Second, such ordering is transnational if it transcends the boundary between unity and fragmentation; that is, it does not form a self-sufficient legal order comparable to national legal systems. Finally, transnational legal orders (TLOs) may transcend the boundary between

[48] Matthew Harding, *Fiduciary Law and Social Norms*, *in* Criddle et al., *supra* note 24, 798.

[49] It is disputed, *e.g.*, by F. A. Mann, *Lex Facit Arbitrum*, *in* International Arbitration Liber Amicorum for Martin Domke 157 (Pieter Sanders ed., 1976); Michael Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, *in* Liber Amicorum for the Rt. Hon. Lord Wilberforce 149 (Maarten Bos & Ian Brownlie eds., 1987).

[50] Philip C. Jessup, Transnational Law 2 (1956); similarly Gralf-Peter Calliess & Moritz Renner, *Between Law and Social Norms: The Evolution of Global Governance*, 22 Ratio Juris 260 (2009); Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 Ann. Rev. L. & Soc'y 231 (2016).

[51] Clive M. Schmitthoff, *International Business Law: A New Law Merchant*, *in* 2 Current Law and Social Problems 129 (1961); Berthold Goldman, *Frontières du droit et "lex mercatoria"*, 9 Archives de philosophie du droit 177 (1964).

[52] Gunther Teubner, *"Global Bukowina": Legal Pluralism in the World Society*, *in* Global Law without a State 3, 8 (Gunther Teubner ed., 1997).

public and private ordering; that is, they may involve mechanisms of private ordering that often rely on public enforcement mechanisms – for example, litigation in state courts.[53]

The elements of such orders are well captured by Halliday's and Shaffer's concept of transnational legal orders (TLOs).[54] TLOs constitute functional equivalents to state law in the dimensions of rulemaking, adjudication, and enforcement.[55] In these three dimensions, they involve legal norms, produced by or with legal bodies that transcend nation-states and are engaged with legal bodies within multiple nation-states..[56]

5.4.1.2 Ordering the Bond Market

(A) Formalized TLO Global bond markets are largely structured as a TLO in this sense. Bond issues heavily rely on standard documentation that is developed by industry associations such as the US-based Securities Industry and Financial and Markets Association (SIFMA) and the Zurich-based ICMA, as well as by globally active law firms. Whereas the SIFMA plays an important role in the market for bonds denominated in US dollar, the ICMA is the leading standard-setter for Euro-denominated bonds. The associations often work together, for example, on interest-rate benchmarks[57] and on standard agreements for the repo market.[58] The structure and function of both associations is similar; their membership is constituted by financial institutions from around the world.[59] The following remarks focus on the example of the ICMA.

Members of the ICMA, mostly banks and other market participants from more than sixty countries, work together in a number of committees in order to set standards for global primary and secondary bond markets. The ICMA's Legal and

[53] Moritz Renner, Zwingendes transnationales Recht: Zur Struktur der Wirtschaftsverfassung jenseits des Staates 215–28 (2011).

[54] Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* Transnational Legal Orders 3 (Terence C. Halliday & Gregory Shaffer eds., 2015).

[55] Gralf-Peter Calliess et al., *Transformations of Commercial Law: New Forms of Legal Certainty for Globalized Exchange Processes?*, *in* Transforming the Golden Age Nation State 83 (Achim Hurrelmann et al. eds., 2007).

[56] Halliday & Shaffer, *supra* note 54, at 12–17. Who, however, seem to limit their definition to "formalized" legal "texts"; *see infra* note 61.

[57] Sec. Indus. & Fin. Markets Ass'n., *ISDA, AFME, ICMA, SIFMA and SIFMA AMG Launch Benchmark Transition Roadmap* (Feb. 1, 2018), https://www.sifma.org/resources/news/156924/ (last accessed Sept. 28, 2019).

[58] Int'l Capital Mkt. Ass'n., *Global Master Repurchase Agreement*, https://www.icmagroup.org/Regulatory-Policy-and-Market-Practice/repo-and-collateralmarkets/legal-documentation/global-master-repurchase-agreement-gmra/ (last accessed Sept. 28, 2019).

[59] In the case of the SIFMA and their respective subsidiaries in the United States, *see* Sec. Indus. & Fin. Markets Ass'n., *Member Directory*, https://www.sifma.org/about/member-directory/ (last accessed Sept. 28, 2019).

Documentation Committee consists of the heads and senior members of the legal transaction management teams of member firms. The standard documentation elaborated by the committee is intended as market "best practice." Its real impact on market practice can hardly be overestimated. As bonds are heavily traded on cross-border secondary markets, bond documentation needs to be highly standardized in order to generate a marketable financial instrument that is not limited to a single jurisdiction. Therefore, bond issuers usually stick closely to market standard provisions outlined in the ICMA's *Primary Market Handbook* when drafting the bond indentures.

The indentures will invariably contain a choice-of-law clause subjecting the bond to the jurisdiction of state courts. However, scope and detail of the bond indentures are such that there is usually not much room for resorting to rules of domestic law.

To the extent that fiduciary duties are assumed by one of the parties – for example, by the lead manager of a bond issue – they are expressly spelled out in the contract or a separate trust deed. If there is no mention of fiduciary duties, there is a high probability that market participants did not deem them necessary or conducive to the functioning of the bond market.

(b) Informal Rules in TLOs? At the same time, the practice of bond market participants is not determined by contract language alone. It is also embedded in different layers of relational and social norms.[60] These norms are often informal in nature. They are thus not clearly encompassed by Halliday's and Shaffer's concept of TLOs.[61] Yet such rules may structure whole fields of cross-border transactions. Empirical studies on industries as diverse as the international cotton trade and the global software industry have shown the high significance of informal norms of cooperation.[62]

Most actors in the bond market are repeat players. Global banks cooperate in different settings, as managers of a bond issue or as members of a financing

[60] On the concept of relational norms, *see generally* Stewart Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 Am. Soc. Rev. 55 (1963); Ian R. Macneil, *Relational Contract: What We Do and Do Not Know*, 3 Wis. L. Rev. 483 (1985); on the concept of social norms, *see* Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 The Journal of Legal Studies 115, 138 (1992); Robert C. Ellickson, Order Without Law: How Neighbors Settle Disputes (1991).

[61] *Cf.* Halliday & Shaffer, *supra* note 55, at 15–16.

[62] For the cotton trade, *see* Lisa Bernstein, *Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions*, 99 Mich. L. Rev. 1724 (2001). Barak D. Richman, *Ethnic Networks, Extra-Legal Certainty, and Globalization: Peering into the Diamond Industry*, *in* Contractual Certainty in International Trade 31 (Volkmar Gessner ed., 2008); for the software industry, *see* Thomas Dietz, Global Order beyond Law: How Information and Communication Technologies Facilitate Relational Contracting in International Trade (Hugh Collins et al. eds., 2014).

consortium. In the course of cooperation, they form mutual, or relational, expectations of behavior. Many banks active in the primary market are also interested in a stable business relationship with the bond issuer. They know well that "continuity [of cooperation] can be put in jeopardy by defecting from the spirit of cooperation and reverting to the letter [of a formal contract]."[63] Thus, in the words of Ellickson, relational norms constitute an effective means of "second-party control" of behavior.[64]

On a wider scale, market participants feel obliged to a number of unwritten rules that are considered necessary for the functioning of the market as a whole. In Ellickson's taxonomy of private ordering, these norms can be termed mechanisms of "third-party control," as they extend well beyond bilateral relationships between market participants and can be enforced by third parties.[65] Sometimes, market participants comply with the unwritten rules of market practice out of mere self-interest. In most cases, they simply have nothing to gain from disruptive behavior. In other instances, market actors comply with the unwritten rules of the industry for fear of retribution by third parties. As in other industries, "black lists" and "white lists" are widely used in financial markets to exclude noncooperating players from future transactions.

Are there any unwritten rules of market practice that might influence the legal evaluation of the *Windstream v. Aurelius* dispute? Empirical research shows that creditors almost never accelerate a corporate loan or bond in case of a technical event of default.[66] They mostly refrain from doing so for fear of a domino effect: As soon as one creditor demands immediate repayment, others will follow suit and try to take hold of the borrower's assets.[67] Mandatory disclosure of the default will further impair the financial situation of the borrower. Bankruptcy then seems the all-but-inevitable consequence. Therefore, creditors usually coordinate in order to adapt financing conditions when a covenant has been breached, rather than declare an event of default and accelerate the loan or bond.[68] But can this – factual – standard behavior of bond creditors be regarded a transnational legal norm?

This question points to one of the eternal problems of legal theory, the distinction between law and social norms.[69] From a functional perspective, much is to be said for the proposition that behavioral norms become law as soon as they are integrated into the communicative structures of the legal system.[70] For the purposes of this chapter, the question does not need to be answered conclusively. Instead, I suggest

[63] Oliver E. Williamson, *The Economics of Governance*, 95 Am. Econ. Rev. 1, 2 (2005).
[64] On this terminology, *see* Ellickson, *supra* note 61, at 126–32.
[65] *Id.* at 126–32.
[66] Daniela Matri, Covenants and Third-Party Creditors 115–46 (2017).
[67] *Id.* at 130–32.
[68] For empirical evidence, *see id.* at 130–32.
[69] Calliess & Renner, *supra* note 51, at 262.
[70] *Id.* at 267–68.

that behavioral standards in the bond market can and should be reflected in the traditional categories of contract and fiduciary law doctrine (Section 5.4.3).

5.4.2 *Transnational Fiduciary Law*

This approach implies that the TLO that has emerged in the global bond market is not an autonomous legal system of its own that could be chosen as applicable law under conflict-of-laws rules. Instead, it constitutes and defines the legitimate expectations of the parties that form the basis of fiduciary duties in both common and civil law jurisdictions.

5.4.2.1 Transnational Fiduciary Law as Non-state Law

When standard contracts and usages in transnational bond markets are conceptualized as a legal order in its own right, it becomes possible for market participants to choose them as the law applicable to their contractual relations, based on general conflict-of-laws rules. As a consequence, the existence and scope of fiduciary duties would have to be discussed solely within the system of these privately made norms. The parties would be able to opt out of the relevant state law,[71] at least within the boundaries of international public policy.

It is disputed whether a choice of law can point to non-state law at all. In the US and UK literature, the question is hardly discussed at all.[72] In Continental Europe, there has been an intense debate on the matter.[73] However, it has been largely settled by the EU legislator. The wording of the relevant Article 3 Rome I Regulation and related provisions were put in a manner that limits the permissible choice of law to the "law of a country," while earlier drafts of the regulation had expressly allowed for a choice of non-state "rules of law."[74]

[71] *Cf.* Bernstein, *supra* note 61, at 154–57.

[72] Ralf Michaels, *The Re-State-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 Wayne Law Review 1209, 1210 et seq. (2005).

[73] Andreas Kappus, *"Lex mercatoria" als Geschäftsstatut vor staatlichen Gerichten im deutschen internationalen Schuldrecht*, IPRax 137(1993); Stefan Leible, *Parteiautonomie im IPR – Allgemeines Anknüpfungsprinzip oder Verlegenheitslösung?*, *in* Festschrift für Erik Jayme zum 70. Geburtstag 485, 490 (Heinz-Peter Mansel et al. eds., 2004); Johannes Christian Wichard, *Die Anwendung der UNIDROIT-Prinzipien für internationale Handelsverträge durch Schiedsgerichte und staatliche Gerichte*, 60 RabelsZ 269, 282 et seq. (1996).

[74] Ulrich Magnus, *Die Rom I-Verordnung*, IPRax 27, 33 (2010); Giesela Rühl, *Rechtswahlfreiheit im europäischen Kollisionsrecht*, *in* Die richtige Ordnung. Festschrift für Jan Kropholler zum 70. Geburtstag 187–89 (Dietmar Baetge ed., 2008); Stefan Leible & Matthias Lehmann, *Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht ("Rom I")*, RIW 528, 533 (2008).

5.4.2.2 Transnational Fiduciary Duties in State Law

Thus, even in a field that is largely determined by transnational legal ordering, such as the global bond market, the rights and obligations of market actors, including their fiduciary duties, are subject to state law. Yet, as I will argue, fiduciary duties under both common and civil law must be defined with a view to the transnational dimension of the social field concerned.

(A) Common Law There is no single overarching theory explaining the imposition of fiduciary duties under the common law.[75] A particularly convincing attempt at combining the relevant criteria set out by courts and commentators that shall be explored in this chapter has been developed by Finn and further elaborated by DeMott.[76] The approach has recently gained broader support among courts and commentators in Commonwealth countries.[77]

This approach argues, in brief, that fiduciary duties are based on "justifiable expectations of loyalty."[78] Both the identification of fiduciary relationships and the imposition of distinct fiduciary duties rely on this concept. As to the identification of a fiduciary relationship, Finn convincingly argues that it implies an assessment that "cannot be arrived at by any process of strict legal reasoning"[79]: "A variable mix of legal phenomena, factual phenomena, presumptions, and public policy, guide and structure the judgment made when a character is to be attributed to a relationship."[80]

The expectations-based approach is especially fruitful when applied to the "non-conventional, atypical, fact-based, and informal fiduciary relationships"[81] that might be at play in the *Windstream v. Aurelius* dispute. Conceptually, it ties in with the often-cited entry in Black's Law Dictionary, which defines the fiduciary relation as arising "whenever confidence is reposed on one side, and domination and influence result on the other; the relation can be legal, social, domestic, or merely personal."[82]

It is rare that fiduciary relationships arise alongside an existing contractual relationship.[83] Interestingly, however, Finn makes the case that specifically bank-

[75] For an overview of the current debate, *see* Paul B. Miller, *The Identification of Fiduciary Relationships*, *in* Criddle et al., *supra* note 24.

[76] Paul Finn, *Contract and the Fiduciary Principle*, 12 UNSW L. J. 76 (1989); DeMott, *supra* note 22, at 938. For an application of the approach to the field of investment law, *see* Andrew F. Tuch, *Investment Banks as Fiduciaries*, 29 Melbourne Univ. L. Rev. 478 (2005).

[77] Tuch, *supra* note 77, 482; DeMott, *supra* note 22 at 938.

[78] DeMott, *supra* note 22, at 934–38.

[79] Finn, *supra* note 77, at 83.

[80] *Id.* at 87.

[81] DeMott, *supra* note 22, at 940.

[82] *Fiduciary Relationship*, Black's Law Dictionary (10th ed. 2014). The definition has been considerably expanded in the 11th ed. 2019.

[83] Finn, *supra* note 77, at 94.

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borrower relationships are prone to give rise to fiduciary relationships: Banks "are not charitable institutions" – yet, the transformation of bank-customer relationships over time, the complexity of financial transactions, and the social role of banks as performing "vital public services" generate justifiable expectations of behavior that are legally protected as a fiduciary relationship.[84]

These justifiable expectations also form the basis for the specific duties arising out of the fiduciary relationship. DeMott identifies a number of circumstances in which an actor has "justifiable expectations of loyalty" toward a potential fiduciary: Such expectations may arise "in the course of the parties' relationship over time," based on "an actor's evident allegiances," and in case of the beneficiary's "inability to self-protect."[85] Thus, DeMott's contribution points toward how sociological insights can inform the doctrine of fiduciary duties.

This chapter assumes that a sociologically informed approach to legal doctrine is desirable to the extent that it allows for a "reflexive law" – that is, legal norms that provide legal certainty and at the same time adapt to the circumstances of the social field they regulate.[86] DeMott's approach takes an important step in this direction. When she acknowledges the importance of "the course of the parties' relationship over time," this comes very close to sociological accounts of the function of "relational norms."[87] The concept effectively refers to the mutual expectations of behavior formed by the parties of a bilateral relationship that play a crucial role in transnational legal ordering.

These relational norms are often complemented with expectations of behavior that arise not from the bilateral relationship between two parties, but from the common usage of all market participants. A prime example of the effect of social "roles"[88]: When assuming a certain role, professional or otherwise, or when entering into a specific social field, actors are necessarily subject to a number of generalized expectations of behavior. A lawyer, for example, is expected to behave in a way that is loyal to the interests of her client – because she is a lawyer. In a similar manner, bond market participants are subject to a set of behavioral expectations that are formed by market practice. These generalized expectations play a decisive role in the *Windstream v. Aurelius* dispute, as will be shown later.

(B) Civil Law Despite its differing doctrinal framing, the civil law approach to fiduciary duties provides similar "points of entry" for expectations generated in

[84] *Id.* at 95.
[85] DeMott, *supra* note 22, at 941–48.
[86] *See generally* Gunther Teubner, *Substantive and Reflexive Elements in Modern Private Law*, 17 L. & Soc. Rev. 239 (1983). Specifically for transnational law, *see* Gralf-Peter Calliess, *Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law*, 23 ZfRSoz 185 (2002).
[87] On the concept of "relational norms" in sociolegal studies, *see generally* Macaulay, *supra* note 61; MacNeil, *supra* note 61.
[88] DeMott, *supra* note 22 at 938–40.

settings of transnational private ordering.[89] Such a "point of entry" may be found in the prohibition of self-contradictory behavior that forms part of the German concept of fiduciary duties. Similar to the "justifiable expectations" test in the common law approach to fiduciary duties, the principle of consistency may build upon the relational as well as the generalized expectations of behavior held by the actors involved. German commentators expressly refer to the notion of "justifiable expectations" when it comes to spelling out the conditions of the abuse-of-rights doctrine and the prohibition of self-contradictory behavior.[90]

5.4.3 *Fiduciary Duties in the Bond Market Revisited*

What does this mean for the *Windstream v. Aurelius* dispute? How can fiduciary law reflect transnational legal ordering in bond markets? The answer turns on the concept of "justifiable expectations" that arguably forms the basis of the relevant doctrines in both common law and civil law jurisdictions. At the same time, it depends on relationship between formal and informal elements in TLOs. The formal rules in transnational standard documentation clearly imply the existence of – very limited – fiduciary duties of bondholders. They do foresee specific situations in which a bondholder might act as a fiduciary of other bondholders. These situations are limited to instances where a bondholder expressly assumes the role of a fiduciary, for example, when they act as an agent of the underwriting banks. In all other instances, bondholders are restrained by majority thresholds or quorums, not fiduciary duties.

In our case, the bond indenture permitted Aurelius to act on Windstream's covenant violation because Aurelius held 25 percent of the outstanding bonds. Thus, the formalized bond documentation created no expectation on part of other bondholders that Aurelius would not make use of its right to demand immediate repayment of the bond. To the contrary, the imposition of a fiduciary duty restraining Aurelius from doing so would run counter to the declared intentions of the parties.

Informal rules of transnational ordering make the matter more complicated. As market practice diverges from the black letter of the contract, so might the expectations of the parties. If almost all market participants refrain from enforcing bond covenants almost all of the time, this will necessarily give rise to the expectation that a particular covenant will not be enforced in this particular instance.

Is this expectation justifiable in the sense that it should be legally protected by the imposition of a fiduciary relationship and fiduciary duties of loyalty and/or care?

[89] On general clauses as a means of "socialization of contract," *see* Teubner, *supra* note 87, at 277.

[90] Dirk Olzen & Dirk Looschelders, § 242, *in* J. von Staudingers Kommentar zum Bürgerlichen Gesetzbuch para. 286 (2015).

This normative question cannot be reduced to a moral evaluation of the conflicting claims of the parties. Instead, it must be answered with a view to the functional rationality of the social field concerned.[91] That bondholders generally make use of covenants only in a coordinated manner is not by chance, and it is neither merely in their self-interest. The factual collectivization of acceleration rights also serves a broader purpose: It helps bondholders to overcome the collective action problem posed by the threat of a creditors' race. Only if bondholders refrain from accelerating their bonds individually, a solution that is sustainable for all investors can be found.

Thus, it seems highly plausible that both Windstream and other bondholders had a justifiable expectation that Aurelius would not accelerate the bond and cause Windstream's default. This justifiable expectation should be reflected by fiduciary law doctrine in both common and civil law jurisdictions. Conceptually, it can be framed as a good faith duty to act in accordance with the interests of the bond issuer as well as other bondholders – to the extent that these interests are substantiated in specific expectations of behavior.[92] Imposing a fiduciary duty on Aurelius to refrain from acceleration would also have a positive side effect on the swap market, as it would limit the potential for information arbitrage for CDS-insured bondholders.

However, imposing on Aurelius a fiduciary duty to refrain from accelerating the bond would mean that the informal expectations formed by participants in transnational markets would effectively render ineffective the formal rules laid down in transnational standard contracts. As these contracts aim at conclusively regulating the collective use of default clauses through majority and quorum requirements, they can be considered as a collective opt-out of fiduciary duties. Is such an opt-out permissible?

The question is highly controversial in both common law and civil law countries.[93] In settings of transnational legal ordering, the question needs to be addressed from a somewhat different perspective. If the purpose of fiduciary duties in this context is to preserve the functionality of TLOs, then the bar is set high for justifying the imposition of fiduciary duties on individual market participants. To the extent

[91] Gunther Teubner, *After Privatization? The Many Autonomies of Private Law*, 51 Current Legal Problems 393 (1998).

[92] On the role of the principle of good faith under civil law doctrines of fiduciary law, *see supra* Section 5.3.1.2; On the duty of good faith in the context of the fiduciary duty of loyalty in common law doctrine, *see* Andrew S. Gold, *The Fiduciary Duty of Loyalty*, *in* Criddle et al., *supra* note 24, 390–91.

[93] For US law, *see*, *e.g.*, Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 Stanford L. Rev. 211, 249–51 (1995). For legal comparative overviews of the debate, mostly from the perspective of company law, *see* Holger Fleischer & Lars Harzmeier, *Zur Abdingbarkeit der Treuepflichten bei Personengesellschaft und GmbH*, 18 NZG 1289 (2015); Alexander Hellgardt, *Abdingbarkeit der gesellschaftsrechtlichen Treuepflicht*, *in* Festschrift für Klaus J. Hopt zum 70. Geburtstag am 24. Aug. 2010: Unternehmen, Markt und Verantwortung 89 (Stefan Grundmann et al. eds., 2010); Maximilian Mann, Abdingbarkeit und Gegenstand der Gesellschaftsrechtlichen Treuepflicht 73–92 (Holger Fleischer et al. eds., 2018).

that formal rules of transnational legal ordering, such as standard contracts, are made and adapted in an inclusive and transparent procedure, it can be presumed that all relevant concerns are adequately reflected in the rules.[94] Accordingly, it should be left to the transnational rulemaking process to define the reach of fiduciary duties. If formalized transnational rules are silent on the matter, they may be complemented by informal expectations of behavior as default rules. If, in contrast, they clearly aimed at conclusively regulating the duties of market participants, there is no room for imposing fiduciary duties and, through the formalized rules of the standard contracts, market participants opt out of the default rules.

As a consequence, Windstream's claim against Aurelius would have to be dismissed under both common and civil law rules, as would have to be claims of other bondholders. Even though Windstream and other bondholders had a justifiable expectation based in transnational market practice that the bond would not be accelerated, the relevant transnational standard contracts effectively opt out of the bondholders' fiduciary duties.

5.5 CONCLUSION

Under traditional doctrines of fiduciary law in both common and civil law traditions, the practice of net-short debt investing is hard to capture. However, fiduciary law doctrine accepts that justified expectations giving rise to a fiduciary relationship may be formed not only in the bilateral relation between two parties but also in the wider setting of a market or social field. By translating these expectations into legal rights and obligations, fiduciary law can be a powerful tool for enabling and framing private ordering. In this sense, "transnational fiduciary law" stands for an approach that seeks to reinterpret existing doctrines of fiduciary law in light of the specific problems of cooperation arising in transnational settings. Both formal and informal elements of TLOs are thus reflected in the rules and principles of state law.

Under a transnational fiduciary law approach, strategies of net-short debt investing may amount to violations of the fiduciary duty of loyalty. They run counter to the justifiable expectation of bond issuer and other bondholders alike that default provisions in bond indentures are only enforced for securing or facilitating repayment of the bond. This informal expectation of behavior may complement the formalized rules of transnational standard contracts that structure global bond markets. However, market participants may also use standard contracts for collectively opting out of fiduciary duties.

[94] On the underlying "constitutionalization" of transnational legal orders, *see*, *e.g.*, Moritz Renner, *Occupy the System! Societal Constitutionalism and Transnational Corporate Accounting*, 20 INDIANA J. OF GLOBAL LEGAL STUD. 941 (2013).

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6

The Public Trust as Transnational Law

Seth Davis

6.1 INTRODUCTION

The public trust doctrine has been called "the law's DNA."[1] The doctrine, it is argued, is rooted in natural law. Its ancient principle – that some waterways are not to be put under private ownership – is one that nearly all peoples have recognized nearly all the time.[2] Its modern iteration holds that the state is a trustee for natural resources more broadly. Today's public trust doctrine, some say, "is perhaps the only principle ... that can provide a common global platform" for the rule of environmental law in an era of political stagnation and environmental degradation.[3] In short, the public trust doctrine "has become internationalized,"[4] and not a moment too soon.[5]

What, precisely, would it mean to say that the public trust doctrine is internationalized? This chapter addresses that question, which has, as far as I can tell, at least five answers worth examining. My main conclusion is that the public trust doctrine is a transnational legal norm but not a transnational legal order. This thesis will,

[1] Gerald Torres & Nathan Bellinger, *The Public Trust: The Law's DNA*, 4 WAKE FOREST J.L. & POL'Y 281 (2014).

[2] *See* Charles F. Wilkinson, *The Headwaters of the Public Trust: Some of the Traditional Doctrine*, 19 ENVTL. L. 425, 430 (1989) (arguing that "the reluctance to allow our great watercourses to be subject to wholesale private acquisition" is a "general and nearly universal notion").

[3] Mary Christina Wood & Gordon Levitt, *The Public Trust Doctrine in Environmental Decision Making*, *in* DECISION MAKING IN ENVIRONMENTAL LAW 73, 82 (LeRoy C. Paddock et al. eds., 2016).

[4] Michael C. Blumm & Rachel D. Guthrie, *Internationalizing the Public Trust Doctrine: Natural Law and Constitutional and Statutory Approaches to Fulfilling the Saxion Vision*, 45 U. C. DAVIS L. REV. 741, 750 (2012).

[5] *See* MARY CHRISTINA WOOD, NATURE'S TRUST: ENVIRONMENTAL LAW FOR A NEW ECOLOGICAL AGE 257 (2014). ("If there remains a habitable planet at the end of the century, it may be because extraordinary jurists across the world rose to their constitutional duties and vindicated the rights of the people as beneficiaries of Nature's Trust ... .")

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I recognize, require unpacking. To do that, I apply concepts from Gregory Shaffer and Terence Halliday's theory of transnational legal orders (TLOs).[6] My claim is about the processes and degree of transnational normative settlement around the public trust norm.[7] In a nutshell, the claim is that the public trust doctrine is not a transnational legal order in the way that, say, the rule of law is a transnational legal order.[8] Put this simply, the claim may seem obvious to anyone familiar with the advocacy of civil society organizations, lawyers, and academics to get governments to embrace the public trust doctrine as an ordering principle for environmental protection and natural resource management.[9] But my thesis yields nonobvious insights into not only the public trust doctrine but also public fiduciary law.

In using the public trust doctrine as a case study of the transnational dimensions of public fiduciary law, this chapter aims to introduce an empirically focused socio-legal approach into conversations about public fiduciary theory. To date, public fiduciary scholarship has focused upon the juridical properties of fiduciary relationships and the normative values of fiduciary law. Some scholars have made the conceptual claim that public fiduciary law is transnational in scope.[10] In responding to that sort of claim, this chapter suggests the need for rigorous analysis of normative *settlement* (or lack thereof) around public fiduciary norms. To the extent that public fiduciary theory "outlines an agenda for reform" of

[6] Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* TRANSNATIONAL LEGAL ORDERS 5 (Terence C. Halliday & Gregory Shaffer eds., 2015) (defining a TLO as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions").

[7] In recent work, Joseph Orangias has offered an incisive analysis of the "transnationalisation" of the public trust doctrine. *See* Joseph Orangias, *Towards Global Public Trust Doctrines: An Analysis of the Transnationalisation of State Stewardship Duties*, 12 TRANSNAT'L LEGAL THEORY 550 (2021). Although Orangias labels the article's methodology one of "conceptual analysis," it has important lessons about processes of transnational norm development and institutionalization, which I draw upon in applying TLO theory to the public trust doctrine. *See id.* at 553.

[8] *See* Jothie Rajah, *"Rule of Law" as Transnational Legal Order*, *in* Halliday & Shaffer, *supra* note 6, at 340, 343 (arguing that "transnational rule of law discourse" is a TLO that operates at the meta-level to "frame and contextualize[] all efforts to manage and regulate law, legitimacy, and conceptions of legality in the sphere of the transnational").

[9] Since the 1970s, there have been calls to order international environmental law around public trust norms. *See*, *e.g.*, KLAUS BOSSELMANN, EARTH GOVERNANCE: TRUSTEESHIP OF THE GLOBAL COMMONS (2015); WOOD, *supra* note 5, at 188–227; Blumm & Guthrie, *supra* note 4, at 741; Raphael D. Sagarin & Mary Turnipseed, *The Public Trust Doctrine: Where Ecology Meets Natural Resources Management*, 37 ANN. REV. ENVTL. RES. 473, 481 (2012) (referring to "[t]he geopolitical expansion of the public trust doctrine"); Peter H. Sand, *Sovereignty Bounded: Public Trusteeship for Common Pool Resources?*, 4 GLOBAL ENVTL. POL. 47 (2004); Ved P. Nanda & William K. Ris, Jr., *The Public Trust Doctrine: A Viable Approach to International Environmental Protection*, 5 ECOLOGY L.Q. 291, 291 (1976).

[10] *See* EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY 2–3 (2016) ("Fiduciary concepts have furnished a conceptual foundation of international legal relationships for centuries. . . ."); *see also* Eyal Benvenisti, *Sovereigns as Trustees of Humanity*, 12 AM. J. INT'L L. 295 (2013).

transnational law,[11] it must confront the challenges of achieving normative settlement in legal practice. The public trust doctrine's transnational career, so to speak, is a case study in these challenges. And this case study may offer lessons for scholars studying the framing, development, and institutionalization of TLOs, particularly those that draw upon domestic legal norms.

6.2 THE PUBLIC TRUST AS A CASE STUDY

The public trust doctrine is a particularly useful case study of transnational normative settlement of public fiduciary norms. Public fiduciary scholars have pointed to the public trust doctrine as an example of the norm of fiduciary government within domestic legal systems.[12] Increasingly, legal actors – particularly, NGOs and legal academics – have framed the problem of transnational environmental regulation in terms of the public trust.[13]

The roots of the modern public trust doctrine are often traced to Roman law through the English common law, although the doctrine has a more limited scope in England today than it does in other common law countries, particularly India and the United States.[14] Contemporary interest in the doctrine owes much to the influence of American legal scholar Joseph Sax, who argued in 1970 that the doctrine may serve as a "tool of general application for citizens seeking to develop a comprehensive legal approach to resource management problems."[15] In particular, Sax argued that the doctrine authorized courts to "promote equality of political power for a disorganized and diffuse majority" against "self-interested and powerful minorities [who] often have an undue influence" on policymaking.[16]

[11] CRIDDLE & FOX-DECENT, *supra* note 10, at 5.

[12] *See, e.g.*, Ethan J. Leib, David L. Ponet, Michael Serota, *A Fiduciary Theory of Judging*, 101 CALIF. L. REV. 699, 710 (2013). ("The public trust doctrine embodies the fiduciary principle that a sovereign government holds the shared natural resources of the polity, such as navigable waters and the soil beneath them, in trust for the benefit of both present and future generations of its citizenry.")

[13] *Supra* note 9 and accompanying text.

[14] *Cf.* R (on the application of Newhaven Port and Properties Limited) v. East Sussex County Council [2015] UKSC 7 (comparing English public trust doctrine with doctrine in United States, particularly in New Jersey, and concluding that the doctrine has narrower scope in English common law), *and* Blundell v. Catterall, 106 Eng. Rep. 1190, 5 Barn & Ald 268 (1821) (denying public right of access to dry sand area of beach and rejecting argument that public trust doctrine guaranteed such a public right), *with* Matthews v. Bay Head Imp. Ass'n, 471 A.2d 355, 365–66 (N.J. 1984) (holding that public trust doctrine requires public access to privately owned dry sand areas of beach), *and* Fomento Resorts & Hotels v. Minguel Martins, (2009) I.N.S.C. ¶ 40 (holding that public had right under public trust doctrine to use footpath across resort development for beach access).

[15] *See* Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 560 (1970). For discussion of Sax's influence, *see* Carol M. Rose, *Joseph Sax and the Idea of the Public Trust*, 25 ECOLOGY L.Q. 351, 352–54 (1998).

[16] Sax, *supra* note 15, at 560.

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It did not take long for Sax's vision to influence international lawyers. In 1976, Ved Nanda and William K. Ris argued that the public trust doctrine was a "viable approach to international environmental protection."[17] More recently, Peter Sand has argued that the public trust can be scaled up from the national to the global level.[18] Mary Christina Wood and Gordon Levitt have described the doctrine as a "macro approach" to natural resource management, suggesting that the "doctrine is perhaps the only principle ... that can provide a common global platform of fiduciary duty enforceable by domestic courts."[19] Raphael D. Sagarin and Mary Turnipseed ask, "[a]s the [doctrine] increasingly manifests in international and comparative contexts, will it ... evolve into a central tool for addressing complex global environmental challenges?"[20]

In this view, which has gained prominence in response to national governments' failures to address the threat of climate change, there is a problem of politics that traverses all areas of environmental lawmaking and natural resource management and exists at all levels of governance, from the local to the national and the transnational. The problem is one of political dysfunction and myopia.[21] The public trust is a legal solution to this problem.[22]

Thus understood, the public trust doctrine addresses the type of problem that public fiduciary theory aims to address more broadly. Public fiduciary theory holds that public officials generally owe duties of loyalty and care to those subject to their authority, just as a private trustee owes fiduciary duties to her beneficiaries.[23] Thus, public fiduciary theory has aimed to identify the normative entailments of public authority.[24] For the normatively oriented scholar, the appearance of trust (or trust-like)[25] norms in multiple legal systems across space and time provides some evidence that trust is a constitutive legal concept, and a normatively attractive one at that. This is why discussions of public fiduciary theory may begin by citing examples from classical Greece, the Roman Republic, post-Restoration England,

[17] Nanda & Ris, *supra* note 9, at 291.
[18] Sand, *supra* note 9, at 57. ("[A] transfer of the public trust concept from the national to the global level is conceivable, feasible, and tolerable.")
[19] Wood & Levitt, *supra* note 3, at 77, 82.
[20] Sagarin & Turnipseed, *supra* note 9, at 492.
[21] This view has been put recently and powerfully by Klaus Bosselmann: "Corporations, governments and parliaments are neither willing nor sufficiently equipped to solve global environmental problems." Klaus Bosselmann, *Environmental Trusteeship and State Sovereignty: Can They Be Reconciled?*, 11 Transnat'l Legal Theory 47, 48 (2020).
[22] *See, e.g.*, *id.* at 49. ("[W]e need a deliberate, bold move towards trusteeship for the Earth.")
[23] *See, e.g.*, Leib et al., *supra* note 12, at 711.
[24] *See, e.g.*, Criddle & Fox-Decent, *supra* note 10, at 352. ("The normative appeal of the theory lies in its account of what [state] responsibility entails and the structure of international legal order that it demands.")
[25] "Trust-like" is a bit of a fudge. The point is to distinguish between a norm that relevant actors explicitly understand to be a trust norm and one that the scholar can plausibly (re)frame in terms of the trust concept.

sixteenth-century imperial Spain, the seventeenth-century Dutch Empire, and the League of Nations, among others.[26] To the extent that public fiduciary theorists have suggested that fiduciary norms are settled within domestic or international law,[27] critics have questioned these suggestions.[28]

For the most part, however, the question of normative settlement has been neglected with public fiduciary theory. Normative settlement concerns the process by which legal norms become taken for granted by legal actors, particularly those tasked with implementing and applying law.[29] Focusing upon normative settlement "can emancipate scholars and practitioners alike from the tenacious premise that a coherent and dominant set of transnational legal norms amounts to anything more than just transnational norms."[30]

TLO theory provides a framework for assessing transnational normative settlement. Halliday and Shaffer define a TLO as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions."[31] The aim of a TLO is "to produce *order* in a domain of social activity or an issue area that relevant actors have construed as a 'problem' of some sort."[32] A legal order is "*transnational* insofar as it orders social relationships that transcend the nation-state."[33] And an order "is *legal* insofar as it [1] has legal form, [2] is produced by or in connection with a transnational body or network, and [3] is directed toward or indirectly engages national legal bodies."[34]

A transnational norm does not itself constitute a TLO. The existence of a legal norm on the transnational plane does not by itself show normative settlement at national and local levels. When it comes to settlement, the "ultimate test" of the existence of a fully institutionalized TLO is whether actors at the transnational, national, and local levels share "a set of legal norms that they simply take for granted

[26] *See, e.g.*, *id.* at Evan J. Criddle et al., Introduction, in Fiduciary Government 1, 1–4 (Evan J. Criddle et al. eds. 2018); Criddle & Fox-Decent, *supra* note 10, at 1–2, 13–16.

[27] *See, e.g.*, Criddle et al., *supra* note 6, at 1 (arguing that "idea of fiduciary government" has "proved deeply influential" in Britain and United States); Criddle & Fox-Decent, *supra* note 10, at 3. ("Fiduciary concepts have furnished a conceptual foundation of international legal relationships for centuries. . ..")

[28] *See* Ethan J. Leib & Stephen Galoob, *Fiduciary Political Theory: A Critique*, 125 Yale L.J. 1820, 1868–75 (2016) (international law); Seth Davis, *The False Promise of Fiduciary Government*, 89 Notre Dame L. Rev. 1145, 1170–78, 1194 n.297 (2014) (domestic Canadian, English, and US law).

[29] Halliday & Shaffer, *supra* note 6, at 42–43.

[30] Terence C. Halliday & Gregory Shaffer, *Researching Transnational Legal Orders*, *in* Halliday & Shaffer, *supra* note 6, at 475, 517.

[31] Halliday & Shaffer, *supra* note 6, at 5.

[32] *Id.* at 20.

[33] *Id.*

[34] *Id.*

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as being appropriate in a particular situation."[35] A TLO, moreover, may be more or less aligned with the problem (or "issue area") that it aims to address.[36]

The upshot is that there is more than one sense in which the public trust doctrine, or, more generally, public fiduciary norms, may (or may not) "become internationalized."[37] Some scholars, for example, have focused upon identifying public trust norms in domestic laws and judicial opinions.[38] Others focus instead upon international organizations.[39] Still others may point to both domestic and international law, often without theorizing the relationship between the two. Joseph Orangias's recent work makes an important advance through a process-oriented approach that distinguishes between "internalisation," defined as the spread of public trust norms across national borders, and "transnationalisation," defined as the application of public trust norms to transnational management of resources.[40]

To preview the analysis that follows in the next two parts of this chapter, there are at least five ways in which we might say that the public trust doctrine is "transnational" or "international." First, the point might be simply that the public trust doctrine or its functional equivalent appears in multiple legal systems. This comparative law point does not necessarily tell us much, if anything, about transnational processes of normative framing, development, and settlement. Second, we might assess the degree of convergence on the public trust framing across multiple domestic legal systems. That is, we might be interested in whether domestic legal actors themselves frame problems in terms of the public trust. The point here is not simply that there are functional equivalents to the public trust doctrine. Rather, the point is that domestic legal actors, such as courts (but not only courts), have adopted public trust norms to frame and address problems of environmental policymaking and natural resource management. Third, we might go beyond domestic law to say that the public trust doctrine is a transnational norm in the sense that civil society, acting in ways that cross the national borders, employs it as a frame to construct and respond to social problems. The public trust doctrine is a transnational norm both in the sense that we see some convergence upon it across domestic legal system and the sense that civil society has mobilized it as a frame for transnational advocacy. Fourth, we might analyze whether and to what extent the public trust doctrine has been

[35] *Id.* at 32.

[36] *See id.* at 46–49.

[37] *See* Blumm & Guthrie, *supra* note 4, at 750 (arguing that public trust doctrine "has become internationalized").

[38] *See id.* at 760–807.

[39] *See, e.g.*, Bharat H. Desai, *On the Revival of the UN Trusteeship Council with a New Mandate for the Environment and the Global Commons*, 48 ENVTL. P. & L. 333, 336 (2018).

[40] Orangias, *supra* note 7, at 563, 576. As Orangias puts it, "[w]hereas internalisation involves [public trust doctrines] spreading into individual legal systems or disseminating into states from international environmental law principles or treaties, transnationalisation is the process of adapting the geographic scopes of [public trust doctrines] and applying them beyond traditional limitations of the state." *Id.* at 576.

institutionalized in a particular problem area through a TLO. There are "micro-TLOs" for specific resource management problems that incorporate public trust norms.[41] Studying the successes and failures of these TLOs sheds light upon the obstacles to normative settlement around the public trust doctrine. Finally, we might ask whether the public trust doctrine has become a "meta-TLO" that cuts across multiple legal orders and generally frames legal responses to problems of environmental law and resource management.[42] There have been calls for the creation of a meta-TLO based in public trust norms. But no such meta-TLO exists.

6.3 THE PUBLIC TRUST AS A TRANSNATIONAL NORM

All countries face the problem of political dysfunction in environmental policymaking and natural resource management. The public trust doctrine provides a legal solution by authorizing courts to review policymaking for compliance with fiduciary norms. To the extent that multiple legal systems have converged on this solution, especially as the result of transnational processes such as horizontal judicial dialogue and civil society advocacy, the public trust doctrine is a transnational norm.[43]

In recent years, scholars of environmental law have argued that the public trust doctrine is transnational in this sense. Michael Blumm and Rachel Guthrie argue that the doctrine has been adopted not only in the United States, where it has a long history, but also in eleven other domestic legal systems, including India, where it has a broader scope than in US law.[44] In each country, they argue, public trust norms have emerged as a solution to a similar problem of environmental policymaking and natural resource management. Sand has similarly argued that the public trust doctrine is emerging as a common legal solution to the problem of politics in environmental law.[45] As Wood summarizes the scholarship, there has been convergence across multiple legal systems on the general norm that there "is a public property right" in some natural resources "and corollary sovereign obligation" to manage those resources for the benefit of the public.[46]

There are transnational dimensions to the modern convergence around this norm. For one, the cases reveal a "transnational judicial dialogue" concerning the

[41] On "micro-TLOs," *see* Daniel Bodansky, *Climate Change: Transnational Legal Order or Disorder?*, *in* Halliday & Shaffer, *supra* note 6, at 293.

[42] On "meta-TLOs," *see* Rajah, *supra* note 8, at 343.

[43] *See* Carrie Menkel-Meadow, *Why and How to Study "Transnational" Law*, 1 UC IRVINE L. REV. 97, 111 (2011). ("Perhaps the leading question in the study of transnational and international law and their differences from each other is whether we are observing convergences of legal systems in the similarity of treatment of common legal issues. . ..")

[44] Blumm & Guthrie, *supra* note 4, at 747–48.

[45] Peter H. Sand, *The Rise of Public Trusteeship in International Environmental Law*, Third International Haub Prize Symposium, Murnai 2013, *at* http://globaltrust.tau.ac.il/wp-content/uploads/2013/07/Peter-Sand-Murnau-Lecture-2013.pdf.

[46] WOOD, *supra* note 5, at 116.

public trust.[47] In *M. C. Mehta v. Kamal Nath*, for example, the Supreme Court of India discussed modern US public trust law and Professor Sax's article at great length before declaring the doctrine to be "the law of the land."[48] Recent public trust litigation concerning climate change, much of it brought or at least supported by the Children's Trust, a US-based NGO, has aimed to foster this sort of transnational dialogue.[49] International governmental organizations have also lent some support to the transnational dialogue concerning the public trust. In its first-ever Global Report on the Environmental Rule of Law, the United Nations Environment Programme (UNEP) discussed a decision of the Lahore High Court in Pakistan as an example of an effective rights-based approach to environmental protection.[50] In addition, the UNEP's compendium of judicial decisions has included and identified public trust cases from various jurisdictions.[51]

To the extent that the public trust doctrine's origins are in Roman law, it is unsurprising to see public trust norms in multiple modern legal systems. Moreover, given British imperialism in the nineteenth and early twentieth centuries, and American hegemony in the twentieth and twenty-first centuries, we might expect to see a doctrine of Anglo-American common law appear around the globe, whether we call that process "transplantation"[52] or something else. But existing scholarship risks overstating the degree of convergence by understating the complexity of fiduciary law.

In analyzing the public trust doctrine as a transnational norm, it is important to distinguish between the existence of functional equivalents and convergence upon the public trust doctrine. A comparativist may interpret a law as responding to a social problem.[53] From there, "[t]he comparativist will look for a law in a different

[47] *See* Melissa A. Waters, *Mediating Norms and Identity: The Role of Transnational Judicial Dialogue in Creating and Enforcing International Law*, 93 GEO. L.J. 487, 494 (2005) (discussing comparative dimensions of transnational judicial dialogue).

[48] *See* Mehta v. Nath, (1997) 1 S.C.C. 388 (1996).

[49] *See* Our Children's Trust, Global Legal Actions, *at* https://www.ourchildrenstrust.org/global-legal-actions.

[50] *See* United Nations Envtl. Programme, Environmental Rule of Law First Global Report 150, *at* https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf?sequence=1&isAllowed=y (citing Ashgar Leghari v. Federation of Pakistan (W.P. No. 22501/2015), Lahore High Court Green Bench, Orders of 4 Sept. and 14 Sept. 2015, *available at* https://elaw/org/pk_Leghari).

[51] 1 United Nations Environment Project Compendium of Judicial Decisions in Matters Related to the Environment (1998).

[52] James L. Wescoat, Jr., *Submerged Landscapes: The Public Trust in Urban Environmental Design, From Chicago to Karachi and Back Again*, 10 VT. J. ENVT. L. 435, 467 (2009).

[53] *See* Ralf Michaels, *The Functionalist Method of Comparative Law*, *in* THE OXFORD HANDBOOK OF COMPARATIVE LAW 339, 386 (Mathias Reimann & Reinhard Zimmerman eds. 2006); *see also* KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 11, 15, 34 (3d ed. 1998) (summarizing functionalist method of comparative law). Functionalism in comparative legal analysis has its critics. *See* Christopher A. Whytock, *Legal Origins, Functionalism, and the Future of Comparative Law*, 2009 B.Y.U. L. REV. 1879, 1879–80 (2009) ("Some leading comparative legal scholars claim that functionalism is 'compromised' and suffering from 'exhaustion,' and that new approaches to comparative law

legal system that can be interpreted to perform a similar function."[54] The presumed similarity between functional equivalents is limited. Two legal institutions from different systems may be "similar in one regard (namely in one of the functions they fulfill) while they are (or at least may be) different in all other regards – not only in their doctrinal formulations and concrete modes of resolving a problem, but also in the other functions or dysfunctions they may have besides the one on which the comparatist focuses."[55] Thus, a comparative law perspective, if anything, may be important in bringing our attention to the differences between legal norms and institutions.[56]

When it comes to the public trust doctrine, the differences between legal systems may begin with the definition of the general norm. Is the function of the public trust doctrine to address *abuses of trust*? Or, is the function to recognize *public rights*? Within common law countries, the public trust doctrine has allocated the ownership of some resources into public rather than private hands.[57] There are, moreover, similarities between this aspect of the public trust doctrine and principles in some civil law countries, including the concepts of *Sozialpflichtigkeit* and *öffentliche Sachen* in German law, not to mention the concepts of *domaine public* and *droit de garde* in French law,[58] as well as concepts within Spanish law, Mexican law,[59] Ecuadorian law, and Brazilian law.[60] In particular, the notion that public rights to navigable waterways limit their privatization enjoys widespread acceptance.[61]

are needed." (citing Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L.J. 221, 237, 239, 246 (1999)).

54 Michaels, *supra* note 53, at 387.

55 *Id.* at 377.

56 For this reason, I worry that we may confuse matters by conflating "explicit" public trust norms with the "implicit" existence of such norms from an analyst's perspective. *See* Orangias, *supra* note 7, at 552; Blumm & Guthrie, *supra* note 4, at 741, 749, 786.

57 *See* Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 714 (1986).

58 Sand, *supra* note 45; *see also* Hanno Kube, *Private Property in Natural Resources and the Public Weal in German Law – Latent Similarities to the Public Trust Doctrine?*, 37 NAT. RESOURCES J. 857, 879 (1997).

59 Some scholars, particularly American legal scholars concerned with natural resource use in the Western United States, have argued that Spanish and Mexican law recognized the public trust doctrine, at least in the nineteenth century. *See, e.g.*, Jan S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. DAVIS L. REV. 196, 197 (1980); Dion G. Dyer, *California Beach Access: The Mexican Law and the Public Trust*, 2 ECOLOGY L.Q. 571, 577 (1972). For American lawyers, nineteenth-century Mexican law is relevant to debates about the status of the public trust doctrine in California, which Mexico ceded to the United States through the Treaty of Guadalupe Hidalgo in 1848. *See* City of Los Angeles v. Venice Peninsula Properties, 644 P.2d 792, 797 (Cal. 1982), *rev'd sub nom.* Summa Corp. v. California ex rel. State Lands Comm'n, 466 U.S. 198 (1984).

60 Blumm & Guthrie, *supra* note 4, at 794–98.

61 *See* Wilkinson, *supra* note 2, at 430 (arguing that "the reluctance to allow our great watercourses to be subject to wholesale private acquisition" is a "general and nearly universal notion").

But treating the "public trust" and "public rights" as synonyms may obscure more than it reveals. It makes a difference whether a legal norm's aim is to address problems of political dysfunction – that is, whether one's concern is to constrain the political branches from pursuing private interests and thus abusing the public trust reposed in them. Empowering a national ministry to protect public rights to particular natural resources, as various countries have done, is not the same as empowering the judicial branch to review the political branches' decision-making for compliance with fiduciary norms.[62]

As I have argued elsewhere, focusing upon an abstract "public trust" norm tells one little about the law on the books, much less the law in action. The state may be a trustee for natural resources, but what does that mean, and how are its duties implemented? Much of "the bite" of fiduciary law lies in implementation of the conduct and decision rules that specify the duties that the public trust norm entails.[63] Across legal systems, there may be significant variation in the relationship between these conduct and decision rules – particularly where, as in the case of fiduciary law, the two types of rules "often diverge."[64] And to the extent that fiduciary law rests upon "informal social norms" for its implementation,[65] comparative legal analysis should highlight variations in such norms and understandings of social roles.

There is significant variation among (and within) jurisdictions in the conduct and decision rules that implement explicit public trust norms. Even within the United States, which, along with India, has one of the most well-developed public trust doctrines, there is considerable variation among the various subnational governments as to which types of resources the public trust covers and what legally

[62] Conflating the "public trust doctrine" with a human right to a healthy environment may also be misleading if we are trying to assess transnational normative convergence. David Takacs has argued that the rights entailed by the public trust doctrine are conceptually distinct from – though complementary to – "environmental human rights." *See* David Takacs, *The Public Trust Doctrine, Environmental Human Rights, and the Future of Private Property*, 16 N.Y.U. Envtl. L.J. 711, 712 (2008). ("[T]he 'Public Trust Doctrine' and 'Environmental Human Rights' do not convey precisely the same idea and do not carry the same legal weight. . ..") Evan Fox-Decent has argued that public fiduciary theory "yield[s] a human right to a healthy environment," while acknowledging that "the conventional understanding of human rights is ill-suited to address environmental concerns." Evan Fox-Decent, *From Fiduciary States to Joint Trusteeship of the Atmosphere: The Right to a Healthy Environment through a Fiduciary Prism*, *in* Fiduciary Duty and the Atmospheric Trust 253, 253 (Charles Sampford et al. eds., 2011).

[63] Davis, *supra* note 28, at 1203; *see* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 Harv. L. Rev. 625, 627 (1983) (distinguishing between "conduct rules" addressed to regulated parties and "decision rules" addressed to officials enforcing conduct rules).

[64] *See, e.g.*, William T. Allen et al., *Function over Form: A Reassessment of Standards of Review in Delaware Corporation*, 56 Bus. Law. 1287, 1296 (2001).

[65] *See* Elizabeth S. Scott & Robert E. Scott, *Parents As Fiduciaries*, 81 Va. L. Rev. 2401, 2424 (1995).

enforceable duties are imposed upon public trustees. Some US states hew closely to the historical scope of the doctrine, which was limited to a prohibition on the privatization of watercourses, while others apply the doctrine more broadly to reach resources other than navigable waterways and to impose procedural and substantive obligations on government actors.[66] There is also considerable variation among common law countries. Though often cited as the source of the public trust doctrine, including in India and the United States, English common law recognizes a much narrower version of the doctrine.[67] The public trust norm has "had little influence"[68] in Australia and has played a more limited role in Canada than some comparative analyses suggest.[69]

There is also variation in the public trust (or trust-like) conduct and decision rules across civil law countries and between civil law and common law countries. Indeed, it is a fair question whether the doctrine's "methodology and terminology is essentially derived from the Anglo-American law of charitable trusts."[70] Sand, for example, compares the public trust doctrine in India with the role of the Nature Conservation Board in Sweden and the Environment Ministry in Italy.[71] Here, the differences among the legal systems are instructive. In India, the doctrine imposes robust constitutional duties on government actors regarding a wide range of environmental resources and directs courts to review their actions closely for abuse of trust.[72] In Sweden, the Nature Conservation Board plays an "Ombudsman" role for the protection of natural resources,[73] while the Environment Ministry in Italy

[66] *See* Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 Notre Dame L. Rev. 699 (2006).

[67] *See* R (on the application of Newhaven Port and Properties Limited) v. East Sussex County Council [2015] UKSC 7 (Lord Carnwath) (comparing US and English law); Blumm & Guthrie, *supra* note 4, at 760 (explaining that public trust doctrine in India has broader scope than in some US states).

[68] Tim Bonyhady, *A Usable Past: The Public Trust in Australia*, 12 Envt'l & Plan L.J. 329, 330 (1995). References to the public trust doctrine in Australian jurisprudence are "largely . . . metaphorical." Samantha Hepburn, *Public Resource Ownership and Community Engagement in a Modern Energy Landscape*, 34 Pace Envtl. L. Rev. 379, 407 (2017) (citing, inter alia, Willoughby City Council v. Minister for the Env't (1989) 78 LGERA 19, 34 (Austl.) (noting that "[N]ational parks are held by the State in trust for the enjoyment and benefit of its citizens, including future generations")).

[69] *Cf.* Blumm & Guthrie, *supra* note 4, at 801–07 (offering Canada as example of "internationalization" of public trust doctrine), *with* Stepan Wood, *Canada*, *in* The Oxford Handbook of Comparative Environmental Law 109, 120 (Emma Lees & Jorge E. Viñuales eds., 2019). ("[D]espite . . . signs of openness to the public trust doctrine, Canadian courts are hostile to the proposition that individuals may sue polluters to vindicate alleged public rights to environmental protection.")

[70] Sand, *supra* note 9, at 49.

[71] *Id.*

[72] Mehta v. Nath, (1997) 1 S.C.C. 388 (1996) (India); *see* Jona Razzaque, *Application of the Public Trust Doctrine in Indian Environmental Cases*, 13 J. Envtl. L. 221, 227 (2001).

[73] *See* Thomas Hillmo & Ulrik Lohm, *Nature's Ombudsmen: The Evolution of Environmental Representation in Sweden*, 3 Envt. & Hist. 19 (1997).

may sue on behalf of the public for damage to the environment.[74] In the Swedish and Italian examples, the Nature Conservation Board and the Environment Ministry involve governmental representation of the public in confronting threats to the environment, while the Indian public trust doctrine is as much, if not more, concerned with the threats that the government may pose to the environment. This is a familiar distinction from a fiduciary law perspective; as I have argued elsewhere, the public trust norm may play the role of empowering government to act or the role of constraining government action.[75]

Finally, there is significant variation in the institutional frameworks for implementing the doctrine and the degree of implementation at the local level. Consider first the role that institutions play. Within US law, the modern public trust doctrine conjures images of private citizens and NGOs litigating on behalf of the public and requesting judicial review of actions taken by the political branches. This image no doubt reflects the important role that impact litigation plays in the politics of the United States. Thus, the public trust doctrine in US law is as much an institutional and cultural choice for litigation to solve social problems, as it is a body of conduct and decision rules. That may also be the case in India, which has a mechanism for direct petition to the Supreme Court in cases of national significance, including the canonical public trust cases in Indian law.[76] The doctrine does not play the same institutional role elsewhere, as we have already seen.

Implementation of the doctrine at the local level varies as well across and within jurisdictions. Within the United States, where the doctrine is well developed, there is such variation. In the United States, for example, courts have generally not applied the public trust doctrine to the national political branches, which is practically significant insofar as the national government owns and manages a great deal of land in the American West, as much as 90 percent in some states.[77] There is, to cite another example, no case law in Nigeria on the scope of the public trust doctrine and the duties it entails, though scholars have cited Nigerian law as implicitly recognizing the public trust norm.[78] And although South Africa has expressly incorporated the public trust into its law, "in the 21 years since the promulgation of South Africa's constitution and environmental legislation, and there has been little academic and legal recognition of the public trust provisions."[79]

[74] *See* Andrea Bianchi, *Harm to the Environment in Italian Practice: The Interaction of International Law and Domestic Law*, *in* HARM TO THE ENVIRONMENT: THE RIGHT TO COMPENSATION AND THE ASSESSMENT OF DAMAGES 103, 104 (Peter Wetterstein ed., 1997).

[75] Davis, *supra* note 28, at 1189–93.

[76] *See* Dr. Parvez Hassan & Azim Afar, *Securing Environmental Rights Through Public Interest Litigation in South Asia*, 22 VA. ENVTL. L.J. 215, 226–31 (2004); *see also* Wescoat, *supra* note 52, at 467.

[77] Davis, *supra* note 28, at 1190.

[78] *See* Blumm & Guthrie, *supra* note 4, at 786–88.

[79] Andrew Craig Blackmore, *The Rediscovery of the Trusteeship Doctrine in South African Environmental Law and Its Significance in Conserving Biodiversity in South Africa* 280

There has been some convergence around public trust principles across domestic legal systems, particularly around the notion that some resources (such as watercourses) are subject to public rights. But once we move beyond the general public trust norm to consider conduct and decision rules, institutional design, and local implementation, there is significant variation across national legal systems.

6.4 THE PUBLIC TRUST AS A TRANSNATIONAL LEGAL ORDER

The existence of a transnational norm does not by itself show the existence of a TLO. Put simply, norms may cross national boundaries without settling at the transnational, national, and local levels in such a way as to impact behavior at all these levels. That is the "ultimate test" of a TLO.[80]

The Ramsar Convention[81] on wetlands conservation provides an intuitive and important example of the distinction between a transnational norm and a settled TLO. The Ramsar Convention is about the heartland of the public trust doctrine: wetlands. If anything, then, we would expect to see significant normative settlement around implementation of the Ramsar Convention norms. What we see, however, is a transnational norm that has not settled to shape behavior at the national and local levels. The Convention is one of the first environmental law treaties with a "global scope,"[82] and has "near-universal membership (171 parties [as of March 2021])."[83] The contracting parties have agreed, among other things, to designate at least one wetland within their borders for conservation, to promote "as far as possible, the wise use of wetlands in their territory," to monitor the state of wetlands, and to consult and coordinate among themselves regarding wetlands protection.[84] The Ramsar system includes Advisory Missions tasked with monitoring and reporting on noncompliance.[85] Yet the data on wetlands protection tells a sobering story: roughly 35 percent of wetlands worldwide have been "lost over the Convention's life."[86]

The Convention provides not only evidence of a transnational norm – conservation and "wise use" of wetlands – that is at the core of the public trust doctrine, but also evidence that this transnational public trust norm has not become a TLO. The

(2018); *cf.* Ane de Plessis, *Climate Change, Public Trusteeship and the Tomorrows of the Unborn*, 31 South African J. on Hum. Rts. 269, 288 (2015) (reporting that 2011 government white paper on climate change made "no mention" of public trust doctrine).

[80] Halliday & Shaffer, *supra* note 6, at 32.

[81] Convention on Wetlands of International Importance, Especially as Waterfowl Habitat, 2 Feb. 1971, T.I.A.S. No. 1084, 996 U.N.T.S. 245 [hereinafter Ramsar Convention].

[82] Omella Ferrajiolo, *State Obligations and Non-compliance in the Ramsar System*, 14 J. Int'l Wildlife L. & Pol'y 243, 243 (2011).

[83] Peter Bridgewater & Rakhyun E. Kim, *The Ramsar Convention on Wetlands at 50*, 5 Nature Ecology & Evol. 268. 268 (Mar. 2021).

[84] Ramsar Convention, *supra* note 81, arts. 2.4, 3.1, 3.2, & 5.

[85] *See, e.g.*, Ferrajiolo, *supra* note 82, at 250–51. The Advisory Missions mechanism depends upon state consent and has been underfunded. *See id.* at 253.

[86] Bridgewater & Kim, *supra* note 83, at 268.

Convention's "very general" and "somewhat vague" norms have not induced widespread practices of wetlands stewardship.[87] Its reliance upon listing and reporting and "shaming states into better protection" has had limited effect.[88] That is not to suggest that the Convention has no effect. Political actors within a country, as well as transnational NGOs, may use the Convention to frame their advocacy as against "competing domestic concerns."[89] Even in those cases where the Convention provides "overarching concepts" for domestic advocacy and negotiation, it may still "play[] a limited role" in actually ordering behavior.[90] What we do not see is transnational normative settlement at the national and local levels. Instead, "the impact of the Ramsar Convention on national wetlands protection policies has been negligible."[91]

The Ramsar Convention's failure speaks to the challenge of constituting a TLO based upon fiduciary law. Of course, this failure no doubt has something to do with the Convention's particular features, such as its choice of voluntary compliance mechanisms. But it also has something to do with the opacity of fiduciary norms. One of the often-observed features of fiduciary law is its moralizing rhetoric. Fiduciary law "embraces abstract moral injunctions of loyalty and care."[92] At a high level of generality, there may be normative agreement about fiduciary duties, which may explain why there is near-universal agreement to the "wise use" principle of the Ramsar Convention. But when it comes to the legal ordering of behavior, the challenge is to institutionalize and implement fiduciary law's moral injunctions. That the Ramsar Convention has failed to do.

In understanding the problem of normative settlement, we can usefully contrast the Ramsar Convention with another contemporaneous TLO that incorporates public trust norms: the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage.[93] The initial draft of the Convention, submitted to UNESCO by the head of the United States Council on Environmental Quality (US CEQ), a division of the Executive Office of the President, was titled the "World Heritage Trust Convention."[94] The Nixon White House had proposed the

[87] *See* Ferrajiolo, *supra* note 82, at 245.

[88] Annecoos Wiersema, A *Train without Tracks: Rethinking the Place of Law and Goals in Environmental and Natural Resources Law*, 38 Envtl. L. 1239, 1285 (2008).

[89] *Id.* at 1286.

[90] Jonathan Verschuuren, *The Case of Transboundary Wetlands Under the Ramsar Convention: Keep the Lawyers Out!*, 19 Colo. J. Int'l Envtl. L. & Pol'y 49, 115–16 (2008).

[91] Noah M. Sachs, *The Paris Agreement in the 2020s: Breakdown or Breakup?*, 46 Ecology L.Q. 865, 885 (2019).

[92] Davis, *supra* note 28, at 1203.

[93] United Nations Educational, Scientific and Cultural Organisation [UNESCO], Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 [hereinafter World Heritage Convention].

[94] *See* Sand, *supra* note 45, at 8 (citing UNESCO Doc. SHC/MD/18/Add.1 (1972)). The term "trust" was deleted "apparently because the word was considered untranslatable into French." *Id.*

creation of a "world heritage trust" the prior year,[95] as had a 1965 White House Conference on International Cooperation.[96] US-based environmental NGOs, such as the Sierra Club, repeated these proposals.[97] Thus, the Convention emerged in no small part from efforts by the United States to upload the public trust norm to the transnational domain.

The Convention can be understood as creating a "transnational public trusteeship."[98] The Convention provides for a process for a state to propose that the World Heritage Committee designate a world heritage site within the state's borders,[99] requires an accounting from host countries of the steps they have taken to conserve these sites, and has been implemented at the transnational level through the World Heritage Committee as well as international tribunals and at the local level through private enforcement in courts.[100] This regime, which has 194 state parties,[101] is a "highly concordant TLO."[102] It has a high degree of normative settlement at the transnational level (i.e., the World Heritage Committee and international tribunals), the national level (i.e., the state parties, which identify sites for designation and enact implementing legislation),[103] and the local level (i.e., through judicial enforcement and advocacy by civil society organizations, which may include appeals to local, national, and international media, as well as efforts by private corporations to conserve heritage sites).[104] Such a regime is not a private trust,[105] but the World Heritage TLO resembles the public trust doctrine insofar as it involves a state's

[95] US CEQ, Environmental Quality: Second Annual Report 302–03 (1971).

[96] *See* Blueprint for Peace 154–55 (R. N. Gardner ed., 1966).

[97] *See* R. Train, *A World Heritage Trust*, *in* Action for Wilderness 172 (E. R. Gillette ed., 1972).

[98] *See* Sand, *supra* note 45, at 8.

[99] On the role that international criminal tribunals have played in implementing the Convention, *see* Federico Lenzerini, *The Role of International and Mixed Criminal Courts in the Enforcement of International Norms Concerning the Protection of Cultural Heritage*, *in* Enforcing International Cultural Heritage Law 40, 51 (Francesco Francioni & James Gordley eds., 2013) (discussing decisions of International Criminal Tribunal for the Former Yugoslavia that concluded that shelling and destruction of world heritage sites was serious violation of international humanitarian law).

[100] Francesco Francioni, *Plurality and Interaction of Legal Orders in the Enforcement of Cultural Heritage Law*, *in* Francioni & Gordley *supra* note 99, at 9, 15–17.

[101] *See States Parties*, https://whc.unesco.org/en/statesparties/ (last visited Nov. 15, 2022).

[102] *See* Halliday & Shaffer, *supra* note 6, at 45.

[103] *See*, *e.g.*, Ctr. for Biological Diversity v. Export-Import Bank of the United States, 2015 WL 738641, at *2 n.6 (Feb. 20, 2015) (noting that National Historic Preservation Act, 16 U.S.C. § 470 et seq., implements World Heritage Convention).

[104] *See* Francioni, *supra* note 100, at 16. On the role of private corporations in implementing (and sometimes watering down the obligations in) the Convention, *see* Natasha A. Affolder, *The Market for Treaties*, 11 Chi. J. Int'l L. 159, 161, 170–75 (2010).

[105] Michael Bothe, *Whose Environment? Concepts of Commonality in International Environmental Law*, *in* Multilevel Governance of Global Environmental Change 539, 551 (Gerd Winter ed., 2010) (arguing that "World Heritage Convention seems to get close" to private trust principles, but "actual content of the obligations" under the Convention are not similar to those under private trust law).

obligations to manage a specific *res* for the benefit of the public and to account for that management.

The United Nations Convention on the Law of the Sea (UNCLOS)[106] is another example of a TLO that can be understood in public trust terms. This Convention addresses a range of problems arising from the "freedom-of-the-seas" doctrine, which held that the seas and offshore resources were generally open to all. Article 136 of UNCLOS proclaims that the deep seabed and "its resources are the common heritage of mankind."[107] Much like the traditional common law public trust doctrine, the Convention proscribes alienation of these common resources. It further imposes duties upon states to protect such resources and specifies that activities in the area shall be "for the benefit of mankind as whole."[108] The Convention established the International Seabed Authority (ISBA) to manage the extraction of mineral resources from the international seabed.[109] Commentators have described this regime in terms of a public trust, with the ISBA acting as trustee of a specific *res* (namely, submarine mineral resources) for the global public.[110] With 167 state parties, the UNCLOS regime is a relatively settled one, though, notably, the United States has signed but not ratified the Convention, which undermines implementation of some of its provisions.[111]

From one vantage, UNCLOS and the World Heritage Convention may be understood as TLOs within separate issues spaces. UNCLOS addresses problems of resource management on and underneath the seas, while the World Heritage Convention addresses preservation of culturally and historically significant sites. They may thus be seen as responding to different social problems and thus as having little to do with one another.

From another vantage, however, UNCLOS and the World Heritage Convention may be understood as micro-TLOs that address different aspects of the same problem. Daniel Bodansky has developed the concept of a "micro-TLO" in the context of assessing transnational legal responses to climate change.[112] There is no encompassing TLO that addresses climate change, Bodansky argues, but there are "micro-TLOs ... with more limited legal or geographical scope."[113] Such micro-

[106] Third United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397. For an illuminating analysis of both UNCLOS and the World Heritage Convention, *see* Orangias, *supra* note 7, at 572–76.
[107] UNCLOS, *supra* note 106, art. 136.
[108] *Id.* arts. 137, 139, 140.
[109] *Id.* arts. 156–57.
[110] *See, e.g.*, Gail Osherenko, *New Discourses on Ocean Governance: Understanding Property Rights and the Public Trust*, 21 J. Envtl. L. & Litig. 317, 374 (2006); Carol B. Thompson, *International Law of the Sea/Seed: Public Domain Versus Private Commodity*, 44 Nat. Resources J. 841, 857 (2004); Sand, *supra* note 45, at 8.
[111] *See, e.g.*, Nadia H. Dahab & Spencer G. Scharff, *Lost Opportunity: Why Ratifying the Law of the Sea Treaty Still Has Merit*, 6 Ariz. J. Envtl. L. & Pol'y 582, 583 (2016).
[112] Bodansky, *supra* note 41, at 293.
[113] *Id.* at 293.

TLOs may provide order within "one or another part of the issue 'space.'"[114] For instance, within the climate change issue space, there appears to be an emerging micro-TLO for emissions from maritime transport.[115]

UNCLOS and the World Heritage Convention can be described as micro-TLOs insofar as they both are transnational legal orderings that address the general problem of resource management and environmental protection. Both TLOs respond to the issue of ensuring that governments manage particular shared resources in the public interest. And both address that issue by imposing trust (or at least trust-like) duties.

From the perspective of TLO theory, whether to view UNCLOS and the World Heritage Convention as micro-TLOs depends upon how relevant social actors construct the problem each addresses. If, pace Bodansky, one is concerned with the problem of climate change, UNCLOS and the World Heritage Convention might be seen as micro-TLOs that address different aspects of that problem by incorporating public trust principles into international law.[116] To the extent that one thinks of the problem in terms of global environmental regulation and resource management, it makes sense to view the two regimes as micro-TLOs that address different aspects of a common problem. This possibility suggests a more ambitious role for the public trust in transnational law.

In this more encompassing sense, the public trust doctrine might be seen as a "meta-TLO" – that is, a frame for the rule of (environmental) law. Jothie Rajah has developed the concept of a "meta-TLO" to understand transnational rule of discourse, which "frames and contextualizes all efforts to manage and regulate law, legitimacy, and conceptions of legality in the sphere of the transnational."[117] The concept of a meta-TLO thus seeks to describe a TLO that serves as a frame or an "umbrella category" for other TLOs.[118]

Proponents of an encompassing public trust TLO have suggested that it may serve as a frame for environmental regulation and natural resource management, both domestic and transnational. Civil society organizations as well as legal academics have called for a meta-TLO based upon environmental trusteeship. As Klaus Bosselmann has described, for example, the Ecological Law and Governance Association, a "global network of lawyers and environmental activists," has established the Earth Trusteeship Initiatives, which published the *Hauge Principles for a Universal Declaration on Responsibilities for Human Rights and*

[114] Halliday & Shaffer, *supra* note 30, at 496.
[115] Bodanksy, *supra* note 41, at 293.
[116] *See, e.g.*, Lucy Wiggins, *Existing Legal Mechanisms to Address Oceanic Impacts from Climate Change*, 7 SUSTAINABLE DEV. L. & POL'Y 22 (2007) (identifying UNCLOS and World Heritage Convention as two treaties that impose duties on states to reduce greenhouse gas emissions).
[117] Rajah, *supra* note 8, at 343.
[118] *Id.*

Earth Trusteeship.[119] While the Hague Principles sweep more broadly than the public trust doctrine, as they state trusteeship obligations for all human beings, Bosselmann draws upon public fiduciary theory to make the legal argument for trusteeship as a meta-principle.[120]

The public trust doctrine is not yet a meta-TLO. The most obvious example to prove this point is the failure of proposals to reconstitute the Trusteeship Council as a public trustee for the global environment. The Trusteeship Council was established pursuant to Chapter XIII of the Charter of the United Nations and tasked with monitoring "the political, economic, social, and educational advancement of the inhabitants of each trust territory" administered by UN members.[121] In 1994, the Council was suspended once Palau, the last trust territory, became an independent nation-state.[122] Several years later, UN Secretary-General Kofi Annan proposed a reconstitution of the Council with a new mandate: global environmental protection.[123] Ultimately, the proposal went nowhere. Instead, following the 2005 World Summit, the General Assembly proposed eliminating Chapter XIII of the Charter and with it the Trusteeship Council.[124] The Trusteeship Council, it concluded, "has no remaining functions."[125]

The failure of Secretary-General Annan's proposal may not be surprising. The concept of trusteeship has a long and ignominious colonial history, as does the Trusteeship Council.[126] Moreover, refashioning the Council's mandate to focus on environmental protection would require an amendment to the Charter, which is rare.[127]

In imagining other possibilities for the emergence of a meta-TLO, it is worth focusing upon the interaction between international legal commitments and domestic litigation. Particularly interesting is the potential for interaction between the Paris Agreement and domestic litigation. The Paris Agreement itself can be understood in terms of a public trust norm; for example, the Agreement requires states to account for their nationally determined contributions (NDCs),[128] which might be

[119] Bosselmann, *supra* note 21, at 53 (citing Earth Trusteeship, *The Hague Principles*, *at* https://www.earthtrusteeship.world/the-hague-principles-for-a-universal-declaration-on-human-responsibilities-and-earth-trusteeship/ (last accessed Nov. 15, 2022)).

[120] *See id.* at 57–60.

[121] Charter of the United Nations, art. 88, ch. XIII.

[122] *See* Chapter 10.

[123] *See* UN Secretary-General, A New Concept of Trusteeship, UN Doc A/51/950 (14 July 1997), paras. 84–85 ("The Secretary General proposes, therefore, that [the Trusteeship Council] be reconstituted as the forum through which Member States exercise their collective trusteeship for the integrity of the global environment and common areas such as oceans, atmospheres and outer space."); Desai, *supra* note 39.

[124] 2005 World Summit Outcome, para. 176, U.N. Doc. A/RES/60/1 (Oct. 24, 2005).

[125] *Id.* ¶ 176.

[126] *See* Chapter 10.

[127] Desai, *supra* note 39, at 339.

[128] *See* Paris Agreement to the United Nations Framework Convention on Climate Change (Dec. 12, 2015, in force Nov. 4, 2016), *available at* http://unfccc.int/paris_agreement/items/9485.php (last accessed Nov. 15, 2022).

analogized to a fiduciary's duty to account. Scholars have begun to chart not only the increase in climate change suits in domestic courts since the Agreement's adoption,[129] but also the "cross-level" interactions between the Paris Agreement and domestic climate change litigation.[130] Litigants use multiple frames for such litigation, including human rights frames, tort law frames, and the public trust doctrine.[131]

In domestic public trust litigation, advocates have characterized the public trust as a transcendent principle of sovereignty.[132] A group of leading American legal scholars, for example, recently described the doctrine as an "inherent limit on sovereignty" in an amicus brief before the US Supreme Court.[133] Legal practitioners and NGOs have also pointed to this understanding of the public trust, while courts in multiple countries have expressly incorporated the public trust doctrine as a principle of natural law. The Indian Supreme Court, for example, recognized the doctrine as one "of the laws of nature [that] must … inform all of our social institutions."[134] Similarly, the Supreme Court of the Philippines reasoned that the doctrine, which it incorporated into Filipino law, "may even be said to predate all governments and constitutions."[135] The more recent *Urgenda* decision of the Hague District Court, which has garnered global attention, concluded that the state's duty of care includes an obligation to adopt climate change mitigation measures, a holding that may be understood in public trust terms.[136]

Public trust litigation in various countries occurs in connection with transnational organizations and networks. For example, the United Nations Environment

[129] Reza Maddahi & Alois Aldridge Mugadza, *A Review of Recent Climate Change-Related Cases before Domestic Courts*, 27(1) Envt. Liability 14 (2021).

[130] Lennart Wegener, *Can the Paris Agreement Help Climate Change Litigation and Vice Versa?*, 9 Transnat'l Envt. L. 17, 18 (2020).

[131] *See generally* Climate Change Litigation: A Handbook (Wolfgang Kahl & Marc-Philippe Weller eds., 2021).

[132] Much like the rule of law TLO identified by Rajah, the natural law account of the public trust takes the form of a transcendent and constitutive principle of government. *See* Rajah, *supra* note 8, at 350.

[133] Brief of Law Professors in Support of Granting Writ of Certiorari as Amicus Curiae for Petitioners at 1, Alec L. ex rel. Loorz v. McCarthy, 561 F. App'x 7 (D.C. Cir. 2014) (No. 14-405) [hereinafter Amicus Curiae Brief], 2014 WL 5841697.

[134] Mehta v. Nath, (1997) 1 S.C.C. 388 (1996) (India).

[135] Oposa ex rel. Oposa v. Factoran, G.R. No. 101083 (S.C., July 30, 1993) (Phil.).

[136] *See* Urgenda Foundation v. Netherlands, case C/09/456689/HA ZA 13-1396 (District Court of the Hague June 24, 2015), *at* https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196 (last accessed Nov. 15, 2022). All of this goes to show that, as Joyeeta Gupta has pointed out, "transnational epistemic communities of legal scholars and lawyers may promote legal principles and concepts simultaneously at the national and international level through legal scholarship and the use of litigation and [such] promotion may lead to similar court judgments in national courts in different parts of the world using similar principles, doctrines and often referring to case law in other countries." Joyeeta Gupta, *Legal Steps outside the Climate Convention: Litigation as a Tool to Address Climate Change*, 16 Rev. European Cmty. & Int'l Envt. L. 76, 78 (2007).

Programme's first Environmental Rule of Law Global Report pointed to public trust litigation in Pakistan as a case study of the potential for litigation to address climate change.[137] Echoing Wood's characterization of the problem of environmental lawmaking today, the UN Report found that while there has been "a dramatic growth" of environmental laws and regulatory institutions, the rule of law is failing the global environment.[138] Instead of decisive regulatory action by political branches of government, there is widespread delay.[139] In the face of this delay, the UN Report proposed the adoption of rights-based approaches to environmental protection.[140] As an example, the Report pointed to *Ashgar Leghari v. Federation of Pakistan*, in which the Lahore High Court held that the Pakistani government's delay in responding to climate change violated the constitutional rights of Pakistani citizens, including their rights under the public trust doctrine.[141] Similarly, in 2017, the UN Environment Programme and the Sabin Center for Climate Change Law at Columbia University published a report on global climate change litigation that discussed the "relevance of the public trust doctrine to governments' approaches to climate change mitigation and adaptation."[142]

Despite these connections with governance on a transnational level, it cannot be said that public trust litigation has led to the formation of a settled TLO. Much of the litigation is recent and ongoing. The reticence of some national courts to enforce public trust principles suggests that any emerging normative settlement may be fragile or at least limited in scope. The progression of the *Juliana* litigation in the United States is an example. In *Juliana v. United States*, the Children's Trust, an NGO based in the United States that focuses upon bringing public trust litigation to force governments to take additional steps to address climate change, won a major victory when a US federal district court held that the federal government is a trustee

[137] United Nations Envtl. Programme, Environmental Rule of Law First Global Report 1–2 (2019), https://wedocs.unep.org/bitstream/handle/20.500.11822/27279/Environmental_rule_of_law.pdf?sequence=1&isAllowed=y (concluding that "[i]f human society is to stay within the bounds of critical ecological thresholds, it is imperative that environmental laws are widely understood, respected, and enforced" but that "too often [environmental laws] exist mostly on paper") [hereinafter Rule of Law Report]; *see* Taylor Kilduff, *The Difficulties of Enforcing Global Environmental Law*, 2/1/2019 Geo. Envtl. L. Rev. Online 1 (discussing UN report).

[138] *See* Rule of Law Report, *supra* note 137, at viii, 2.

[139] *See id.* at 3. ("[M]any of these [framework environmental] laws have yet to take root across society, and in most instances, there is no culture of environmental compliance.")

[140] *See id.* at 150 ("Rights-based approaches can provide important norms and forums for addressing climate change, especially in instances when a country has yet to act. . .."); *see also id.* ("Rights-based approaches are already focusing governments' attention on climate change and urging stronger action").

[141] *See* Ashgar Leghari v. Federation of Pakistan (W.P. No. 25501/2015), Lahore High Court Green Bench, Orders of 4 Sept. and 14 Sept. 2015, available at: https://elaw.org/pk_Leghari (Leghari).

[142] United Nations Environment Programme and Sabin Center for Climate Change Law at Columbia University 40 (2017).

of natural resources with fiduciary duties to current and future generations.[143] The trial court pointed to the natural law understanding of the doctrine, which it held that had been incorporated into US law through English common law.[144] But a federal appeals court reversed on jurisdictional grounds, holding that the US federal courts did not have authority "to order, design, supervise, or implement the plaintiffs' requested remedial plan" in light of the "complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches."[145] Thus, in some jurisdictions, including the United States, in which the modern public trust doctrine was born, the future of public trust litigation as a response to transnational environmental problems is in doubt.

6.5 CONCLUSION

The flexibility of the trust concept invites us to frame a variety of legal relationships in fiduciary terms. But this same flexibility poses a challenge to a socio-legal analysis that seeks to understand the ways in which actors settle (or not) on a legal order to address those problems. From this perspective, which focuses upon normative settlement, the distinction between transnational norms and transnational legal orders matters.

This chapter aimed to clarify the ways in which we might think about the question, "has the public trust doctrine become internationalized?" It showed that public trust doctrines or their functional equivalents appear in multiple legal systems. But the existence of functional equivalents by itself is not evidence of transnational normative settlement. There has been some convergence among relevant actors (domestic courts, but not just courts, for instance) on the public trust framing of problems in environmental law and natural resource management. The degree of convergence is easily overstated, however. The convergence among domestic courts on public trust norms has occurred in part as a response to the advocacy of transnational civil society actors and organizations that have mobilized it as a framework. In so doing, they may point to examples of micro-TLOs that incorporate public trust principles to address specific resource management problems. They may also learn lessons from the failures of some transnational norms, such as the Ramsar Convention's "wise use" norm for wetlands conservation, to settle into full-fledged TLOs. Whether domestic litigation strategies, shaped in light of international standards such as those in the Paris Agreement, can overcome the challenge of implementing open-ended standards of fiduciary responsibility and lead to the formation of a meta-TLO based upon the public trust remains to be seen.

[143] Juliana v. United States, 217 F. Supp. 3d 1224, 1254 (D. Or. 2016).
[144] *Id.* at 1253.
[145] Juliana v. United States, 947 F.3d 1159, 1171 (9th Cir. 2020).

PART II

The Recursive Development and Dynamic Consequences of Transnational Fiduciary Law

7

Transnational Legal Ordering of Modern Trust Law

Rebecca Lee[*]

7.1 INTRODUCTION

Law is conventionally associated with the law of the nation-state. Halliday and Shaffer's seminal work on transnational legal ordering shows, however, that legal ordering occurs transnationally along multiple dimensions. The legal norms that order the understanding and practice of law transcend and permeate the boundaries of nation-states, which can give rise to transnational legal orders (TLOs) that reflect, penetrate, and harness national law and legal institutions.[1]

This chapter demonstrates that transnational legal ordering is particularly evident in the law of trusts. The concept of local or national trust law does not adequately capture the global and transnational flow of ideas and institutions that shape the making of modern trust law, as it exhibits variations in legal ordering beyond nation-states. Instead, modern trust law exemplifies the dynamics of TLOs, because modern trust norms are themselves transnational: They often vary in their geographic and substantive legal scope, producing multiplicities of legal orders that invariably transcend, span, and permeate nation-states, including both offshore and onshore jurisdictions, as well as both common law and civil law jurisdictions.

This chapter focuses on the processes through which modern trust norms develop and flow across borders to become a substantive body of transnational and comparative trust law. It discusses how the making of modern trust law at the transnational, national, and local levels develops dynamically over time, by reference to two recent

[*] I am grateful to the editors for their helpful comments. The usual caveats apply. Research for this chapter was funded by the RGC General Research Fund 2023–2024 (project number: 17607723).

[1] Halliday and Shaffer define a "transnational legal order" as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions." Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* TRANSNATIONAL LEGAL ORDERS 3, 4 (Terence C. Halliday & Gregory Shaffer eds., 2015); *see also* Chapter 1 of this volume.

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phenomena that illustrate the interplay of trust norms across national boundaries. The first phenomenon pertains to the rise of global wealth, which is driving offshore trust jurisdictions to adapt and embrace innovations and transformations in trust law in order to remain competitive in the holding and management of that wealth. This has prompted some onshore jurisdictions to adopt certain offshore modifications, a practice Lionel Smith calls the "onshoring of the offshore."[2] Second, the interplay of trust norms across national boundaries is evident in the rise of the civil law trust in East Asia, which has led both civil and common law jurisdictions to rethink the core elements of the trust. These phenomena have prompted scholars to explore how transnational trust law has developed through horizontal interactions among onshore and offshore jurisdictions and civil law and common law jurisdictions. This chapter concludes that examining the trust law terrain would make a significant contribution to TLO theory, because such an examination would go far beyond the traditional categorization of laws as civil versus common, or Asian versus Anglo-American, and demonstrate that transnational legal ordering processes apply in the making of modern trust law.

Although this chapter focuses on the horizontal dimensions of transnational legal ordering, it is worth noting that, in addition to horizontal dimensions, there are also vertical dimensions of transnational legal ordering in the context of modern trust law. Vertical ordering of trust law occurs whenever non-state actors purport to provide benchmarks for the creation of trust norms on the national level within multiple national states. A notable example is the Hague Convention on the Law Applicable to Trusts and on their Recognition ("Hague Trusts Convention").[3] The Hague Trusts Convention was developed by the Hague Conference on Private International Law, an international organization with ninety-one members, with another sixty-five nonmember states being parties to conventions that it has developed. As the trust institution was developed by courts of equity in common law jurisdictions, civil law jurisdictions – which do not have the concept of a trust (or equitable proprietary interest) as part of their domestic law – could not give effect to a trust by simple analogy to existing civil law institutions. Aiming to address this problem and providing guidance on choice of law rules in cross-border trusts disputes, the Hague Trusts Convention purports to "establish common provisions on the law applicable to trusts and to deal with the most important issues concerning the recognition of trusts."[4] Notably, it proposed a harmonized definition of the trust:

[2] Lionel Smith, *Give the People What They Want? The Onshoring of the Offshore*, 103 Iowa L. Rev. 2155, 2174 (2018).

[3] The Convention was opened for signature on July 1, 1985 and entered into force on January 1, 1992. So far, fourteen states have ratified the Convention. For a discussion of the civilian experience of ratification of the Convention, *see* Michele Graziadei, *Recognition of Common Law Trusts in Civil Law Jurisdictions under the Hague Trusts Convention with Particular Regard to the Italian Experience*, *in* Re-Imagining the Trust: Trusts in Civil Law (Lionel Smith ed., 2012).

[4] Hague Trusts Convention, Preamble.

> The term "trust" refers to the legal relationships created – inter vivos or on death – by a person, the settlor, when assets have been placed under the control of a trustee for the benefit of a beneficiary or for a specified purpose.[5]

Insofar as the Hague Trusts Convention provides benchmarks for the creation of trust norms on the national level in multiple states, it is a basis for transnational legal ordering of the modern trust law. Vertical ordering takes place to the extent that trust norms created by the Hague Trusts Convention trickle down into national legal systems and gain normative force comparable to national law. Because, however, this sort of vertical ordering has played a comparatively minor role,[6] this chapter focuses upon horizontal interactions that have shaped trust law as a transnational body of law.

7.2 TRUST LAW AS A TRANSNATIONAL BODY OF LAW: OFFSHORE INNOVATIONS AND ONSHORE MODIFICATIONS

7.2.1 *The Rise of Transnational Trusts*

The interplay of trust norms at the transnational, national, and local levels to become a substantive body of transnational trust law is evident in the rise of transnational trusts.[7] Who are the key actors driving the processes of transnational legal ordering in this context? And what innovations and modifications of the trust have been brought about as a result?

In the 1960s and 1970s, offshore financial centers began to emerge. Financial institutions in offshore financial centers engaged primarily in business with non-residents, and their services typically featured low taxation, light financial regulation, and banking secrecy. Over time, offshore financial centers were also used to provide asset management and protection services through offshore trusts to enable clients to minimize their tax liability, ring-fence their assets from onshore lawsuits, and avoid forced inheritance provisions in their home jurisdictions.[8]

Countries with small domestic financial sectors soon found the development of offshore financial and trusts businesses attractive, as they generated employment for the host economy and revenue for the government. Indeed, offshore trust

[5] Hague Trusts Convention, art. 2.

[6] The Hague Trusts Convention is in force in the following common law jurisdictions: Australia, Canada, Hong Kong, Malta, Cyprus, and the United Kingdom; as well as the following civil law jurisdictions: Italy, Liechtenstein, Luxembourg, Monaco, Netherlands, Panama, San Marino, and Switzerland. France and the United States have signed, but not ratified, the Convention.

[7] For a recent empirical study on the worldwide growth and transformation of trust practice, *see* Adam S. Hofri-Winogradow, *Trust Proliferation: A View from the Field*, 31 TRUST L. INT'L 152–82 (2017).

[8] International Monetary Fund, *Offshore Financial Centers: IMF Background Paper* (June 2020).

jurisdictions such as the Cayman Islands and the Channel Islands became heavily reliant on offshore trust business as a major source of both government revenues and economic activity. As more capital aiming to shield or hide assets by way of the offshore trust rushed in, jurisdictional competition for trust business intensified. A process of transnational legal ordering was underway, and this brought about further innovations of the trust. Examples include trust protectors, legislative enshrinement of settlor reserved powers, abolition of the rule against perpetuities, and legalization of noncharitable purpose trusts. The lucrative business opportunities drove other offshore jurisdictions, followed by onshore jurisdictions, to emulate these initiatives. In addition to the demand for innovation from clients and the supply of trust services by governments, trust law professionals (including lawyers and asset managers) were key actors in the horizontal competition between onshore and offshore jurisdictions. They often drove innovation through lobbying or otherwise advocating for legal changes in their jurisdictions. They would ascertain the needs of the potential clients, which might range from protecting assets from creditors, disgruntled beneficiaries or divorcing spouses, to maximizing control and management of the trust assets. They then worked with their local legislatures to introduce client-friendly trust or trust-like structures.[9]

In recent decades, the explosion of global tech entrepreneurship has increased demand for trust and wealth management services from a modern, younger clientele, who are more reluctant than previous generations to relinquish control over trust assets, which often comprise business empires that they are still actively managing or using as an investment vehicle. In order to compete for trust business, many offshore jurisdictions, alongside onshore wealth management centers such as Singapore and Hong Kong that provide sophisticated offshore trust services, have been eager to pioneer innovative developments to accommodate the desires of this new clientele. Among them are the pervasive use of objects and duty modification clauses in modern trusts.[10] These two emerging features not only challenge our traditional understanding of the trust, but also capture the recursive nature of the TLO process. Both defy our traditional understanding of the scope of the trustee's powers, discretion, and duties and, in turn, the dynamics of the tripartite relationship within a trust.

7.2.2 *Objects of Discretionary Trusts*

Trusts in offshore jurisdictions and wealth management centers operate very differently from those in onshore jurisdictions. Traditionally, the beneficiary principle lies at the core of the trust, and its primary rationale is to hold trustees to account. Thus,

[9] *Id.*

[10] *See* Rebecca Lee, *The Evolution of the Modern International Trust: Developments and Challenges*, 103 Iowa L. Rev. 2069, 2076–81 (2018).

traditionally at least, a trust is enforceable only by the beneficiaries, who enjoy an equitable proprietary interest in the trust property.[11] However, to enable a trustee to respond to unforeseen circumstances, modern trusts are invariably settled as discretionary trusts. Not only are trustees given discretion; they are also given, at least in theory,[12] wide dispositive discretion to distribute the trust assets (including, for example, the power to decide whom to pay, how much, and when). In addition to empowering trustees to add or remove beneficiaries, many discretionary trusts now have no beneficiary but merely objects to whom a trustee may appoint capital or income. Although objects of powers are not a new feature in traditional trusts, they have become a defining feature of modern discretionary trusts.[13] Objects of discretionary powers are not beneficiaries in the strict sense: Unless the trustee makes an appointment to them, objects have no right to the trust property, no standing to sue, no interest in the trust capital, no right to a definable part of the trust income, and no transmissible right. Instead, an object has only a limited right to be considered as a potential recipient of a benefit by the trustee and, as a corollary, through the trustee's proper exercise of his or her power. Given the limited rights of objects, as a conceptual matter, they cannot sensibly be treated as beneficiaries, and their presence does not satisfy the traditional beneficiary principle. As a result, trust professionals usually include a default beneficiary clause in a discretionary trust to satisfy the beneficiary principle, even though no one expects that the default beneficiary will receive any trust property. The trust property will almost invariably be distributed pursuant to the wide dispositive discretion of the trustee rather than via the default clause naming the residuary or default beneficiaries. As a result, the trustee's wide dispositive powers effectively displace the beneficial interests of the sole (default) beneficiaries, and they are thus an affront to the trust concept.

Professor Smith describes these highly discretionary trusts pejoratively as "massively discretionary trusts."[14] Because the primary rationale of the beneficiary principle is to hold trustees to account, massively discretionary trusts do not satisfy that principle and distort the trust concept. According to Professor Smith, these law reforms driven by clients and jurisdictional competition are necessarily shortsighted.[15] Why? As a doctrinal matter, not only may onshore courts hold that a

[11] Lynton Tucker et al., Lewin on Trusts ¶ 1-005 (20th ed 2020).

[12] In practice, settlors (the creators of trusts) express nonbinding requests through letters of wishes to trustees concerning how the latter's wide dispositive discretion is to be exercised: *See* Australia: Hartigan Nominees Pty Ltd v. Rydge (1992) 29 NSWLR 405, 408; England: Breakspear v. Ackland [2008] EWHC 220, [5]; Jersey: In re Rabaiotti 1989 Settlement [2000] JLR 173, 173–74.

[13] Peter Turner, *The Entitlements of Objects as Defining Features of Discretionary Trusts*, *in* Trusts and Modern Wealth Management 242–76 (Richard Nolan et al. eds., 2018).

[14] Lionel Smith, *Massively Discretionary Trusts*, 70 CLP 17 (2017).

[15] Smith, *supra* note 2, at 2174.

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resulting trust can arise in favor of the settlor from the moment of the trust's inception, but beneficiaries may also collapse the trust.[16]

Nonetheless, even onshore jurisdictions have begun to grapple with the prevalence of objects in modern trusts alongside other offshore innovations. For example, in *Schmidt v. Rosewood*,[17] Lord Walker held in relation to two trusts set up in the Isle of Man with distributions to be made by the exercise of powers of appointment, rather than through interests in discretionary trusts, that no distinction exists between discretionary trusts and powers of appointment for the purpose of seeking the disclosure of information from the courts. Accordingly, a beneficiary under a discretionary trust and an object entitled to benefit under a power are equally able to seek protection in respect of the rights they have. The Privy Council affirmed that its right and duty to intervene in the administration of a trust are based on its inherent jurisdiction to do so. Professor Smith criticizes *Schmidt* for downgrading the rights of fixed beneficiaries by denying them an entitlement as of a right to see trust accounts, thereby eradicating the irreducible core of the trust. Not everyone agrees, however. Some scholars have defended such trusts on the ground that objects of discretionary powers should be treated as beneficiaries for the purposes of the beneficiary principle. Such objects have a proprietary right that applies against third parties; they also have standing to apply to the courts to protect their interests.[18]

The divergence of views highlights the difficulty of finding the conceptual limits of the trust. It is now well established in English law that there is an "irreducible core" of the obligations owed by the trustee, which include the duty to perform the trust honestly and in good faith for the benefit of beneficiaries, who have a correlative right to hold trustees to account for the performance of their duties.[19] That duty was considered by Millett LJ in *Armitage v. Nurse* as the "minimum necessary to give substance to … trusts," which is "fundamental to the concept of a trust."[20]

This principle creates tension between legal concepts and on-the-ground legal practice – and thus the possibility of recursive development of trust norms. Applying the principle of an irreducible core of trust duties to a "massively discretionary

[16] Smith, *supra* note 14, at 18.

[17] Schmidt v. Rosewood Trust Ltd (Isle of Man) [2003] UKPC 26; [2003] 2 AC 709.

[18] Charles Holbech, *Discretionary Objects and the Beneficiary Principle*, 27 T&T 321, 324 (2021); *see also* Turner, *supra* note 13, at 242–76.

[19] Armitage v. Nurse [1998] Ch 241 held that a trustee can validly exempt liability for a breach of trust unless it is a dishonest breach of trust. It thus follows that it is also permissible for an exemption clause to exempt a trustee, whether lay or professional, from liability for a loss arising from negligence: Armitage v. Nurse at 253H-254A; *see also* Lee v. Torrey [2015] NZHC 2135 at [127]. But even though such clauses are capable of excluding a trustee's liability for a breach of trust in a wide array of circumstances, they must not infringe the "irreducible core" of the obligations owed by the trustee.

[20] Armitage v. Nurse [1998] Ch 241 at 253. *See also* Adam Hofri-Winogradow, *The Irreducible Cores of Trustee Obligations*, 139 LQR 311 (2023); Alexander Trukhtanov, *The Irreducible Core of Trust Obligations*, 123 LQR 342, 344 (2007); David Hayton, *The Irreducible Core Content of Trusteeship*, *in* Trends in Contemporary Trust Law 47–55 (A. J. Oakley ed., 1996).

trust"[21] leads to the conclusion that a trustee's core duty to perform the trust honestly and in good faith for the benefit of the beneficiaries should not be curtailed. Yet, in trusts with objects and a default beneficiary, there is no beneficiary to enforce the trust. Thus, if mere objects exist (along with a default beneficiary who is unlikely to benefit in reality), it can hardly be said that the trustee still owes any meaningful irreducible core duty in order for the trust to exist. Although Professor Smith suggests that onshore courts will not accept such structures,[22] on-the-ground practice suggests otherwise. As Professor Tang has argued, because these global trusts are the norm rather than the exception in practice, it is likely that judges in jurisdictions hosting international wealth management centers will accommodate them via a liberal interpretation of trust jurisprudence rather than take a strict view of trust law that would undermine the trust industry in the jurisdiction concerned.[23] Indeed, such a pragmatic judicial attitude probably prevailed in Hong Kong in *Zhang v. DBS*, a case on duty modification clauses to which we now turn.

7.2.3 *Duty Modification Clauses*

First, some background is necessary. The trust assets of a modern trust often comprise companies owned by the settlor-entrepreneur. *Bartlett v. Barclays Bank*[24] held that where a trust whose sole asset is a controlling shareholding in a company, the trustee has a consequent duty to keep him or herself informed of the company's affairs, and to use his or her powers to obtain information and decide whether to intervene. As a result, the trustee-shareholder cannot sit passively and leave the running of the company wholly to the directors but instead is under a duty to supervise the management of the company.

The rule of *Bartlett* creates several problems for trust practice. First, contrary to traditional practice, modern settlors often wish to retain active control over the management and investment activities of their company even after they have transferred it to a trust administered by a third-party trustee. Second, the trustee may not have the expertise necessary successfully to manage the business of the underlying holding company. Besides, the trustee's duty under *Bartlett* may require him or her to supervise and intervene in the company's business, such as by preventing it from entering into an inappropriately risky venture.[25] Yet, the settlor may prefer the controlled underlying company to pursue an aggressive speculative

[21] Smith, *supra* note 14, at 17.
[22] *Id.* at 18.
[23] Hang Wu Tang, *From Waqf, Ancestor Worship to the Rise of the Global Trust: A History of the Use of the Trust as a Vehicle for Wealth Transfer in Singapore*, 103 Iowa L. Rev. 2263, 2289–90 (2018).
[24] Bartlett v. Barclays Bank [1980] 2 WLR 430.
[25] Zhang Hong Li v. DBS Bank (Hong Kong) Ltd [2019] HKCFA 45; (2019) 22 HKCFAR 392; Tucker et al., *supra* note 11, at 34-056–34-058.

investment policy, and the trustee may find him or herself in a vulnerable position if the *Bartlett* duty is not modified.

In modern trusts, therefore, anti-*Bartlett* clauses are frequently inserted to enable trustees to accept trusteeships while delimiting their duty to inquire into or interfere in the conduct of the company. Anti-*Bartlett* clauses stipulate that the trustee need not be actively engaged – or involved at all – in corporate management. Such provisions, in turn, separate the function of trust administration from the function of corporate management and, in turn, ensure that the settlor retains control over the company held in trust. They also negate a trustee's duty to supervise or intervene in investments by the trust in an underlying holding company unless he or she is guilty of dishonesty or of failing to intervene in circumstances where he or she had actual knowledge of dishonesty in the company's management.

A question remains as to whether the trustee is still subject to a "residual, high-level supervisory obligation"[26] to oversee the underlying company's operation despite the presence of a clause that comprehensively excludes his or her duty to supervise, interfere, or make inquiries. The Hong Kong Court of Final Appeal in *Zhang v. DBS*[27] rejected the suggestion of any such high-level supervisory obligation. It unanimously held that the anti-*Bartlett* clauses in the relevant trust deed were valid and that there was no residual obligation or high-level supervisory duty of the trustee that might otherwise contradict or override such express clauses.[28] The effect of the anti-*Bartlett* clauses in *Zhang v. DBS* was to "restrict the power of the trustees to interfere in the conduct or management of [the company's] investment business," with the court holding that the powers to intervene "were, on their true construction, unavailable to the trustees."[29] DBS Trustee's concomitant duty to ensure that the company was managed prudently was therefore also excluded. Thus, the only obligation that can be said to be "residual" is the obligation to act in cases involving actual knowledge of dishonesty not covered by anti-*Bartlett* clauses.[30] Thus, the decision in *Zhang v. DBS* suggests that there is no public policy that

[26] Zhang Hong Li v. DBS Bank (Hong Kong) Ltd [2019] HKCFA 45; (2019) 22 HKCFAR 392 at [39]. *See also* Appleby Corporate Services v. Citco Trustees 17 ITELR 413 for a discussion of the trustee's duty of supervision.

[27] Zhang Hong Li v. DBS Bank (Hong Kong) Ltd [2019] HKCFA 45; (2019) 22 HKCFAR 392. In that case, Zhang and his wife Ji had established a family trust governed by Jersey law with themselves and their minor children as beneficiaries. The only trust asset was the sole share of their private investment company that had been set up to make high-risk investments. The trust deed contained extensive anti-*Bartlett* clauses that restricted the trustee's duties. For example, the deed stipulated that the trustee was under no duty to interfere with the management or conduct of the business of the investment company, but was to leave it to the directors and Ji, and was under no duty to supervise them unless it had actual acknowledge of dishonesty.

[28] Zhang Hong Li v. DBS Bank (Hong Kong) Ltd [2019] HKCFA 45; (2019) 22 HKCFAR 392 at [45].

[29] *Id.* at [79].

[30] *Id.* at [61]–[63]. On the facts, there was no actual knowledge of dishonesty that required DBS Trustee to interfere.

requires the recognition of such a supervisory duty in the trust instrument and that its existence, if any, is a matter of the instrument's construction.[31]

Zhang v. DBS is likely to be highly persuasive in offshore and Anglo-common law jurisdictions. It is, after all, the first case examining the effectiveness of an anti-*Bartlett* clause at a final appellate level, and Lord Neuberger, former President of the Supreme Court of the United Kingdom, sat as a nonpermanent judge in the case. Moreover, trustees will likely welcome the decision, as it relieves them of a high-level supervisory duty to underlying company investments so long as the trust instrument expressly removes such duty. For their part, settlors rely on such clauses to restrain trustees from interfering in or obtaining information on the affairs of the underlying company. Thus, while scholars have questioned whether trustees can or should be completely exonerated from their duty/power to interfere in the management of a trust-owned company by anti-*Bartlett* clauses,[32] there are powerful market participants who will continue to press for precisely that norm.

Underneath the exclusion of duties of trustees is the persistent settlor control that is uninterrupted by the transfer of trust property to the trustee. Once the formal, conceptual layer of the trustee-beneficiary relationship in modern trusts is stripped away,[33] a substantive, commercial relationship between a client and a private banker/professional trustee is revealed. Given that relationship and the desire for persistent settlor control, it is pertinent to ask about the limits on [of] offshore discretionary trusts, the extent of influence that a settlor can retain consistent with prevailing conceptions of trust law, and, correspondingly, the extent of the duties otherwise owed by trustees that can be curtailed.[34] Professor Barnett, in examining offshore trusts in the South Pacific, even questions how far the concept of the trust can be stretched before it breaks.[35] Anti-*Bartlett* clauses, in effect, reserve to the settlor (or some third party) an ability to, inter alia, direct the trustee in the trust investments, alter the nature of the obligations that the trustee owes, and reduce the obligations otherwise imposed on him or her. Such relational dynamics in the modern trust may threaten the irreducible core aspect of the trust.[36] But because such clauses remove the trustee's duty of care, which is not part of the trustee's irreducible core duty, they may be reconcilable with the traditional conception of

[31] Tucker et al., *supra* note 11, at [34-059] subpara. 7.

[32] Underhill and Hayton Law of Trusts and Trustees [51.55] (Charles Mitchell et al. eds., LexisNexis Butterworths 2022).

[33] For additional discussion, *see* Adam Hofri-Winogradow, *The Stripping of the Trust: A Study in Legal Evolution*, 65 U. Toronto L.J. 1 (2015).

[34] *See, e.g.*, David Russell & Toby Graham, *The Limits of Discretionary Trusts: Have Powers of Addition and Removal Been Taken a Step Too Far?*, 27 T&T 280 (2021); Katy Barnett, *Offshore Trusts in the South Pacific: How Far Can the Concept of the Trust Be Stretched before It Breaks?*, *in* 1 Asia-Pacific Trusts Law: Theory and Practice in Context 373 (Ying Khai Liew & Matthew Harding eds., 2021).

[35] *Id.*

[36] *See* Rebecca Lee & Man Yip, *Exclusion of Duty and the Irreducible Core Content of Trusteeship*, 10 J. Equity 131, 141–49 (2020).

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the trust. Nonetheless, by tailoring the trust deed at the outset in such a way that the trustees have to comply with investment-related directions given by the settlor, the trustees' investment powers are effectively removed. It is only in the absence of such prescribed directions that a trustee may act as he or she sees fit in accordance with the terms of the trust deed and his or her fiduciary obligations.

7.2.4 *Implications*

The proliferation of objects and duty modification clauses are but some examples of the significant changes trust law has undergone at a phenomenal speed in the past few decades. Not only have the traditional rules been liberalized, the making of trust law norms has also become transnational. Despite our conception of the trust as a quintessential English concept that emerged in medieval England, the modern trust is embedded in a transnational context. The trust has spread transnationally, and innovations and transformations have been introduced. The innovations and modifications demonstrate that transnational trusts are a new category of their own to be scrutinized from multi-jurisdictional angles. Modern trust research therefore has begun to shift from a predominantly national context to one that emphasizes the interaction between transnational, national, and local lawmaking. Professor Lupoi crafts a new label of "industrial trusts" for these trusts:

> Nowadays trustees in the offshore version of trusts (but not only) are companies the business of which is to serve as trustees; each company is the trustee of thousands of trusts (at times, I am told, of tens of thousands). I shall refer to those trusts as "industrial trusts." It is difficult to understand how the trustee of an industrial trust could fulfil his fiduciary obligations or make use of his fiduciary powers in accordance with the rules laid down with reference to the trustees d'antan. It is also difficult to understand how much it would cost to have such a trustee keep trace of the trust beneficiaries, of their needs and of their desires, so as to be in a position to act "in the interest of the beneficiaries" as the standard jargon would require him to do.[37]

Trust norms were created centuries ago. The modernization and transnationalization of trusts signify the eventual decline in the popularity of the traditional trust and corresponding rise of the transnational trust. Over the centuries, the reasons for setting up a trust have also evolved from property-holding to succession planning and asset protection from creditors and a potential divorce. There is no a priori reason to exclude these goals from the modern transnational trust and to treat such trusts as devices for tax evasion. Nonetheless, given the aforementioned developments, the transnational trust is transforming what it means to be a trustee. A trustee is a custodian, not an active manager with equitable obligations to beneficiaries.

[37] Maurizio Lupoi, *Trusts and Their Comparative Understanding*, 27 T&T 286, 293–94 (2021).

7.3 TRUST LAW AS A TRANSNATIONAL BODY OF LAW: CIVIL LAW TRUSTS IN EAST ASIA

The transplantation of the common law trust to civil law jurisdictions first took place in Europe and then in East Asia. Following national recognition of the Hague Trusts Convention by countries such as Italy and the Netherlands, the trust as a legal institution has gained ground in other civil law countries in Europe.[38] In East Asia, Japan historically led the way in introducing the Western legal system and ideas to the region.[39] Many civil law jurisdictions in East Asia have introduced the trust by legislation.[40] Starting in Japan, the trust as a legal institution spread via South Korea and Taiwan to China.[41] As the Japanese economy flourished after the Second World War, trust banks emerged to focus mainly on commercial trust activities, such as pension trusts or loan trusts to raise funds for infrastructure projects. The Japanese experience in the reception of the trust inspired South Korea, Taiwan, and China, and trust laws were enacted to regulate trust and investment companies. Most of the theoretical obstacles to the reception of the trust in these civil law jurisdictions stem from the perceived incompatibility of the trust with civil law property concepts. These include the absolute nature of ownership, the doctrine of *numerus clausus*, the absence of certain key trust components in indigenous law (such as the fiduciary duty of loyalty), and the existence of different remedial rules in civil law jurisdictions, to name but a few. While it is easy to lift specific rules pertaining to the trust concept and codify it in a trust statute, the presence of the aforementioned theoretical obstacles made the transplantation of the system of laws pertaining to the trust a mammoth task. A process of transnationalization has emerged regarding the conceptual foundation of the trust, the duties requiring a trustee's loyal behavior, and remedies for breaches of trust. What follows is an examination of how these trust norms have settled and become aligned at the transnational level in the East Asian jurisdictions of Japan, South Korea, Taiwan, and China.[42]

[38] *See, e.g.*, M. J. De Waal, *In Search of a Model for the Introduction of the Trust into a Civilian Context*, 12 STELLENBOSCH L. REV. 63 (2001); H. L. E. Verhagen, *Trusts in the Civil Law: Making Use of the Experience of "Mixed" Jurisdictions*, 3 EUROPEAN REV. PRIVATE L. 477, 488 (2000).

[39] Japan enacted the Trust Act in 1922 (Law No. 512 of 1922). *See also* Masayuki Tamaruya, Chapter 8 of this volume, suggesting that Japan has played a positive role in promoting transnational ordering, making informed suggestions for potential domestic reform.

[40] *See also* Chapter 2 of this volume.

[41] *See* Lusina Ho & Rebecca Lee, *Reception of the Trust in Asia: A Historical Perspective*, *in* TRUST LAW IN ASIAN CIVIL LAW JURISDICTIONS: A COMPARATIVE ANALYSIS ch. 2 (Lusina Ho & Rebecca Lee eds., 2013).

[42] *See* Lusina Ho & Rebecca Lee, *Emerging Principles in Asian Trust Law*, *in* Ho & Lee, *supra* note 41, ch. 13. The East Asian trust laws discussed in this chapter include: Shintaku-hō [Trust Act], Law No. 108 of 2006 (Japan); Sintagbeob [Trust Act], Act. No. 10924, Jul. 25, 2011 (South Korea); Xintuofa [Trust Law], Law of Jan. 26, 1996; amended Dec. 30, 2009 (Taiwan);

7.3.1 *Conceptual Foundation of the Trust*

The laws of the aforementioned East Asian countries all have strong historical roots in the German civil code (*Bürgerliches Gesetzbuch*). As a consequence, they not only lack equity courts, but also are historically situated within a legal framework built around the concept of single ownership.[43] The *numerus clausus* principle of property rights adopted in many civil law jurisdictions means that only absolute ownership can be vested in a civilian trustee, which runs counter to the core element of the trust architecture, namely the dual ownership of trust property.

The duality of ownership at common law explains the segregation of trust property: The trustee has legal ownership of the property, whereas the beneficiary has equitable ownership. Such equitable ownership means that the beneficiary has a right over the trust assets that is enforceable against the whole world except a bona fide purchaser of a legal estate for value without notice (known as "equity's darling"). The beneficiary's equitable ownership of the trust property also provides the traditional justification for the immunity of trust property. In an English trust, trust assets (and their traceable products) are segregated from the trustee's own assets, and hence are immune from any claims of the trustee's personal creditors, heirs, and spouse (unless that party is equity's darling). Such segregation is necessary for the operation of the trust and protection of the beneficiary's rights. Otherwise, the trust property could be affected by trustee liability incurred for matters unrelated to the trust.[44]

The reception of the trust in East Asia has prompted an inquiry into whether the absence of equitable jurisdiction will hinder the reception of the trust, and, in turn, a rethinking of the conceptual foundation of the trust in both civil and common law jurisdictions. The independence and segregation of trust assets in these East Asian jurisdictions are achieved by way of statutory provisions stipulating that trust assets do not form part of the trustee's bankruptcy estate[45] and are immune from the claims of the trustee's heirs, spouse, and personal creditors.[46] As a practical matter, these statutory solutions address the problem of lack of an equity jurisdiction and dual ownership. From a conceptual perspective, statutes conferring immunity to the trust assets can be justified through the notion of patrimony in civil law, which provides

Xintuofa [Trust Law], Order no. 50 of the President of PRC of 2001, Oct. 1, 2001 (China). For ease of reference, the Trust Act of Japan 2006, Trust Act of Korea 2011, Trust Law of Taiwan 2009, and Trust Law of China 2001 are referred to as the Japanese Trust Law, Korean Trust Act, Taiwanese Trust Law, and Chinese Trust Law, respectively, in this chapter.

[43] Chapter 2 of this volume.

[44] *See* Maurizio Lupoi, Trusts: A Comparative Study 199 (2000).

[45] *See* Japanese Trust Act, art. 25(1); Taiwanese Trust Law, art. 11; and Chinese Trust Law, art. 16.

[46] *See*, *e.g.*, Japanese Trust Act, art. 25(1); Korean Trust Act, arts. 24 and 25; Taiwanese Trust Law, arts. 10 and 11; and Chinese Trust Law, arts. 16 and 17.

the conceptual foundation of the civil law trust.[47] In a trust arrangement, the trustee has two distinct patrimonies: the trust patrimony (comprising the trust assets and liabilities) and his or her own private patrimony (comprising the trustee's own assets and liabilities). Each patrimony has its own creditors, and thus the trustee's personal creditors can claim only the trustee's private patrimony, while the trust creditors (beneficiaries) make claims upon the trustee's trust patrimony.[48] Beneficiaries have personal claims against the trust patrimony, which is immune from the trustee's personal creditors (the latter having access only to the trustee's private patrimony). Beneficiaries do not have "proprietary rights" over the trust patrimony.

This civil law conceptualization of the trust, prompted by the reception of common law ideas, has recursively prompted common law jurisdictions to rethink the nature of the beneficiary's right. Some scholars have suggested that even in the English trust, it is not necessary to give the beneficiary any in rem right in the trust property.[49] All that the beneficiary has is a claim against the segregated trust fund (or trust patrimony), which is not available to the spouse, heirs, or personal creditors of the trustee.[50] Consequently, the creation of a trust would not violate the *numerus clausus* principle of property rights adopted in many civil law jurisdictions.

7.3.2 *Fiduciary Duty of Loyalty of the Trustee*

Even though the trust is a creature born and bred in common law, the concept of the trustee's fiduciary duty of loyalty demonstrates that a transnational trust law framework can encompass both civil law and common law jurisdictions. In common law jurisdictions, the significance of the concept of fiduciary duty can be seen from the US Restatement Third of Trusts, which defines the trust as "a fiduciary relationship with respect to property [that] subject[s] the trustee to duties to deal with it for the benefit of charity or for one or more persons."[51] Thus, it has been

[47] Kenneth Reid, *Conceptualising the Chinese Trust: Some Thoughts from Europe*, *in* Towards a Chinese Civil Code: Comparative and Historical Perspectives 209 (Chen Lei & C.H. van Rhee eds., 2012); Kenneth Reid, *Patrimony Not Equity: The Trust in Scotland*, 8 European Rev. Private L. 427 (2000); Rebecca Lee, *Conceptualising the Chinese Trust*, 58 Int'l & Comp. L.Q. 655 (2009); Kai Lyu, *Re-Clarifying China's Trust Law: Characteristics and New Conceptual Basis*, 36 Loy. L.A. Int'l & Comp. L. Rev. 447 (2015).

[48] Thus, there is a duty to segregate and administer trust property from the trustee's own property: *see*, *e.g.*, Japanese Trust Act, art. 34(1); Korean Trust Act, art. 4(2); Taiwanese Trust Law, art. 24.

[49] *See* Ben McFarlane & Robert Stevens, *The Nature of Equitable Property*, 4 J. Equity 1 (2010) for the view that the beneficiary's right is a right against the specific right of the trustee over the property, but not a property right itself. *Cf.* the traditional view that beneficiaries have equitable title to the trust property: James Penner, *The (True) Nature of a Beneficiary's Equitable Proprietary Interest under a Trust*, 27 Canadian Journal of Law & Jurisprudence 473 (2014).

[50] Verhagen, *supra* note 38, at 488.

[51] US Restatement of the Law (3d) of Trusts, § 2 (Am. Law Inst. 2003).

said that "a trust is the quintessential fiduciary relationship."[52] A trust implements the settlor's freedom of disposition: By making a transfer in trust rather than outright, a settlor ensures that the property will be managed and distributed in accordance with his or her wishes as expressed in the terms of the trust.

Fiduciary duties are the primary safeguard for beneficiaries in modern trust practice. Nonetheless, it has been said that transnational fiduciary law recognizes different shades of loyalty, and it remains contested whether the duty of care should be seen as a fiduciary duty.[53] East Asian civil law jurisdictions have incorporated the full range of duties typically seen in English law into their trust statutes, such as the duties to comply with the terms of the trust, to take care,[54] to act honestly and in good faith, to provide information to beneficiaries or interested parties, and to segregate the trust fund from the trustees' own assets or other assets held by them,[55] although the scope of these individual duties is sometimes narrower than in English law. Until recently, China, Japan, Taiwan, and South Korea had no open-ended standard establishing a (fiduciary) duty of loyalty in trust law.

In recent decades, some East Asian countries have introduced the duty of honesty and good faith. Even so, its scope is much narrower than in common law jurisdictions. In English law, the fiduciary no-profit or no-conflict rules are sufficiently wide to cover both the misuse of trust assets and the misuse of the trustee's position for personal profit where there is a conflict of interest. In some East Asian countries, however, in order to violate the fiduciary duty of honesty and good faith, the misuse of trust assets – as opposed to trust information – is necessary. For example, although both the Japanese Trust Act and Chinese Trust Law contain express *general* stipulations on fiduciary duty,[56] the examples of prohibited conflicts of interest in both statutes revolve around the abuse of trust property and self-dealing transactions.[57] The Taiwanese Trust Law does not even contain express stipulations on fiduciary duty, but only prohibitions on a trustee's entitlement to trust benefits and on converting trust property for his or her own use.[58] Thus, the civil law trusts in Japan, Taiwan, and China expressly prohibit only the use of trust assets; neither the making of personal profits for the trustee nor the making of profits out of the trust position or information is covered.

[52] Robert H. Sitkoff, *Fiduciary Principles in Trust Law*, *in* The Oxford Handbook of Fiduciary Law (Evan J. Criddle et al. eds., 2019).

[53] Bristol and West Building Society v. Mothew [1998] Ch 1, 18; Permanent Building Society (in liq) v. Wheeler (1994) 11 WAR 187.

[54] Japanese Trust Act, art. 29(2); Korean Trust Act, art. 32; Taiwanese Trust Law, art. 22; and Chinese Trust Law, art. 25.

[55] Japanese Trust Act, arts. 34 and 36–39; Korean Trust Act, arts. 37 and 39; Taiwanese Trust Law, arts. 24 and 31; and Chinese Trust Law, arts. 20, 29, 33 and 49.

[56] *See* Japanese Trust Act, art. 30 and Chinese Trust Law, art. 25.

[57] *See* Japanese Trust Act, art. 31 and Chinese Trust Law, arts. 26–28.

[58] Taiwanese Trust Law, arts. 34 and art. 35.

A couple of observations may be made. First, even though there are functional equivalents of the duty of loyalty in the respective trust laws of East Asian countries, the content and extent of those equivalents await further clarification in comparison with their common law counterparts. In particular, Western conceptions of loyalty may be understood differently from the status-based conceptions of loyalty to family elders and authority in most East Asian civil law jurisdictions, which display unique Asian dynamics in the development of fiduciary norms.[59] This observation reflects transnational legal ordering as a recursive process and is consistent with Halliday and Shaffer's account that the development of TLOs is dynamic, involving interactions among international, transnational, national, and local actors. Second, the transnationalization of trusts has laid a foundation for transnational fiduciary law as a field existing at the intersection of transnational law and fiduciary law,[60] thereby expanding both transnational law and fiduciary law by establishing new perspectives on both. This new field shows how transnational law can evolve out of national norms that cross borders and are implemented within local fields that may – or may not – differ in their substantive understandings of loyalty and good faith or their institutional frameworks for remedying breaches of these norms.

7.3.3 *Remedies for Breach of Trust*

This section first highlights two major remedial differences between Anglo-common law approaches and approaches in East Asia. It then discusses how one may think about those differences from the perspective of TLO theory. Two notable differences from the Anglo-common law approach can be discerned, namely the scope of disgorgement remedy and the availability of the constructive trust. Where a trustee breaches his or her duties, English trusts generally provide for the disgorgement of profits made from the breach,[61] in addition to compensation for damages arising from the breach. To invoke this remedy, it is irrelevant that the beneficiary has suffered no loss from the breach or may have even profited from it.[62] There is some Anglo-Australian authority suggesting that it is not necessary to prove that, but for the

[59] In the context of Japan, *see* Masayuki Tamaruya, *Japanese Law and the Global Diffusion of Trust and Fiduciary Law*, 103 Iowa L. Rev. 2229 (2018) and Chapter 8 of this volume.

[60] Tamar Frankel, *Transnational Fiduciary Law*, 5 UCI J. Int'l, Transnat'l, & Comp. L. 15 (2020).

[61] Regal (Hastings) Ltd v. Gulliver [1942] 1 All ER 378. In fact, traditional English principles go further to suggest that the trustee is liable to hold the profit and assets purchased with bribes and secret commissions on (constructive) trust for the beneficiaries: AG for Hong Kong v. Reid [1994] 1 AC 324; FHR European Ventures LLP v. Cedar Capital Partners LLC [2014] UKSC 45, overturning Lister & Co. v. Stubbs (1890) LR 45 Ch D 1.

[62] Regal (Hastings) Ltd v. Gulliver [1942] 1 All ER 378.

breach, the trustee would not have made the profit concerned, although the position remains unsettled.[63]

In civil law trusts in East Asia, trustees are liable primarily through a compensatory remedy. The Japanese Trust Act stipulates only the remedy of rescission in the event that a trustee has breached his or her duty of loyalty, with no mention made of the disgorgement remedy.[64] Even when the disgorgement remedy is available in other jurisdictions, it is fairly limited in scope. For example, the Taiwanese Trust Law provides for a duty to disgorge profits to the trust fund where a trustee has converted trust property for his or her own use, but only on the condition that the trust property has suffered a loss.[65] The Chinese Trust Law also contains a disgorgement remedy, but applies it only to profits obtained in breach of trust (by misuse of trust assets), not to other breaches (e.g., converting trust property into the trustee's property or self-dealing transactions). The most recently revised Korean Trust Act also added a disgorgement remedy, which, unlike the Taiwanese provision, allows for the disgorgement of profits obtained from a breach of the trustee's duty of loyalty even though the trust property suffers no loss.[66]

Another notable difference from English common law is the availability of constructive trusts and proprietary claims against trust assets and their substitutions. It is well established in English law that, first, the trust fund includes the original settled sum and all assets representing it from time to time, whether derived lawfully or unlawfully. Second, as long as the trust assets are traceable into exchange products (substitutions), beneficiaries can assert a proprietary claim in the form of a constructive trust against assets[67] held in the hands of any recipient except a bona fide purchaser without notice. Thus, if a trustee breaches a trust and transfers property to a third party, the beneficiary can invoke the equitable tracing process and plaintiff-friendly tracing rules to identify the value of an original asset in a new, substituted asset even though the property has passed through several hands. These tracing rules often include artificial presumptions in favor of the beneficiaries, such as presumptions against the wrongdoing trustee when trust property is mixed with

[63] England: Murad v. Al Saraj [2005] EWCA Civ 959; [2005] All ER (D) 503; Australia: Ancient Order of Foresters in Victoria Friendly Society Ltd v. Lifeplan Australia Friendly Society Ltd [2018] HCA 43; (2018) 265 CLR 1, 88. The Hong Kong Court of Appeal in Kao, Lee & Yip v. Koo [2003] 3 HKLRD 296 has expressed the principle in a more circumspect manner, suggesting the need for reasonable approximation between the breach and the gain made, whereas the Singapore Court of Appeal in UVJ v. UVH [2020] SGCA 49 recently affirmed the requirement of but-for causation. *See also* Matthew Conaglen, *Identifying the Profits for Which a Fiduciary Must Account*, 79(1) Cambridge L.J., 38 (2020).

[64] Japanese Trust Act, art. 31(6) and (7).

[65] Taiwanese Trust Law, art. 35(3).

[66] Korean Trust Act, art. 43(3).

[67] The beneficiary can assert his or her beneficial title over the substituted trust asset by way of a constructive trust: Foskett v. McKeown [2001] 1 AC 102 at 127. Needless to say, he or she may also bring a personal action to require the trustee to restore the trust fund.

the trustee's own property, in order to protect the beneficiaries.[68] Furthermore, the trust assets and their traceable products are also immune from the claims of the heirs, spouses, and creditors of the third-party transferees, who are also subject to duties to refrain from using those assets to meet their personal liabilities. Thus, the rights of beneficiaries under English trust law are enforceable against the whole world, with the exception of a bona fide purchaser for value without notice.

With respect to civil law trusts in East Asia, although the relevant statutory provisions stipulate that trust property includes substituted assets resulting from the trustee's lawful or unlawful conduct,[69] they do not contain the extensive tracing rules found in common law trusts. There are thus no rules of (equitable) tracing to resolve evidentiary ambiguities and allocate losses to defaulting trustees. Furthermore, there is no constructive trust on traceable assets, notwithstanding the presence of provisions on the liability of third parties. In other words, a constructive trust is not imposed on traceable assets currently in the hands of unauthorized third parties; there is only personal liability against knowing recipients of trust property (to compensate for a loss)[70] or a right to rescind the transaction.[71] Accordingly, if recipients become bankrupt, the trust property will be subject to the claims of their personal creditors.

What does the limited availability of disgorgement and constructive trust in East Asia tell us about the transnational legal ordering of trust law? First, one can see that the transnational processes of legal ordering of trust law are inflected by local and national understandings of remedial law. When the legal ordering of trust norms is viewed transnationally across both common law and civil law jurisdictions, the differences on the availability and scope of disgorgement from the Anglo-common law approach raise the question of whether the beneficiary's right to demand that the trustee disgorge profits obtained from a breach is a basic feature of the trust. It is probable that the disgorgement remedy serves only the purpose of providing an additional deterrence to breaches by removing trustees' temptation to engage in a breach. Without the disgorgement remedy, a beneficiary can still rely on the compensatory remedy, although it is less extensive. As to the more limited scope of rights against transferees in civil law jurisdictions in East Asia, this probably suggests that, unlike beneficiaries' personal rights against their transferees, the proprietary liability of transferees is not a necessary feature of the trust. It is probably

[68] For example, where a trustee mixes trust monies with his or her own, the rule in Re Hallett (1880) 13 Ch D 696 presumes that the trustee draws out his or her own monies first so that the beneficiary may claim the balance of the fund. However, if property is purchased from the mixed fund, and the remaining trust fund is then dissipated, the beneficiary can claim against the property: Re Oatway [1903] Ch 356. *See generally* LIONEL SMITH, THE LAW OF TRACING (1997).

[69] *See, e.g.*, Korean Trust Act, art. 27; Taiwanese Trust Law, art. 9(2); and Chinese Trust Law, arts. 14 and 26.

[70] Chinese Trust Law, art. 22.

[71] Korean Trust Act, art. 75(1); Japanese Trust Act, art. 27(1); Taiwanese Trust Law, art. 18(2).

a matter of policy whether to allocate the losses arising from a trustee's breach completely to heirs, spouses, and creditors of third-party transferees who are innocent of the breach. As a matter of policy, English law prefers the interests of beneficiaries over those of an innocent volunteer who receives the trust property, as well as those of innocent creditors, both of whom will be prejudiced by hidden proprietary rights raised against them, whereas East Asia civil law jurisdictions take the opposite view and prefer not to allocate the losses arising from the trustee's breach completely to this group of innocent third parties. Examining the trust law terrain across both common law and civil law jurisdictions thus illustrates the relevance of TLO theory because such an examination goes far beyond the traditional categorization of laws as civil versus common, or Asian versus Anglo-American, and shows how modern trust lawmaking is a transnational process.

Second, the remedial differences identified earlier also show that there are limits to the unification of trust law. The remedial approach in East Asia is to impose liability on defaulting trustees primarily through a compensatory remedy, whereas the disgorgement remedy and the availability of the proprietary constructive trust are the most important remedies in equity's armory in Anglo-common law. Whereas common law anchors its regulation of trusts in equity and property law, the basis of civil law's regulation of trusts is statutory. As trust law has spread in both common law and civil law jurisdictions, the story of East Asian civil law trusts reflects the idea of transnational legal ordering as a dynamic and interactive process. A common question that pertains to different features of the East Asian civil law trust is whether a single, unified theoretical approach to trusts would produce a better understanding of the institution. Significantly, transnationalization does not automatically lead to the uniformity or harmonization of trust law. The East Asian experience shows that it is difficult to unify trust law in light of the remedial differences between Anglo-common law approaches and approaches in East Asia, which reflect different local and national understandings of the basic features of the trust and how the trust should be regulated; rather, "transnational trust law" stands for an approach that seeks to reinterpret existing doctrines of trust law in light of the specific instances of trusts arising in transnational settings. The East Asian dynamic will continue to drive transformations in the future of transnational trust ordering.

7.4 CONCLUSION

This chapter uses TLO theory to explore the processes through which modern trust law has developed transnationally. It focuses on the horizontal interactions among onshore and offshore jurisdictions, and civil law and common law jurisdictions, as the driver of transnational legal ordering of trust law. Both offshore and onshore jurisdictions, as well as both common law and civil law jurisdictions, have developed rules to regulate the voluntary arrangement involving a settlor, trustee, and beneficiary that is known as the trust. The TLO concept as applied to trusts captures the

creation, diffusion, and modification of trust norms across national borders, and it fosters a deeper understanding of the nature of the trust and the process of law-making and application regarding trusts in a globalized world.

The modern transnational trust, whether offshore or onshore, is almost antithetical to our conventional understanding of the English trust wherein the settlor drops out of the picture and the trustee assumes equitable obligations to the beneficiaries, who have proprietary rights attached to the trust fund. The transnational dimension of the trust shows that the English trust is but one type of trust; it is definitely not the only acceptable rendition of the trust concept. Only some features of the trust constitute features that are minimally necessary for a civil law trust to exist and function. These observations suggest that regardless of their differences in traditions and technical approaches, from a functional and pragmatic perspective, the divide between onshore and offshore, and between common law and civil law, may be crossed. Nonetheless, given the varieties of the modern transnational trust, a single, unified theoretical approach to trusts is unlikely to produce a better understanding of the institution.

8

Japanese, East Asian, and Transnational Fiduciary Orders

Masayuki Tamaruya

8.1 INTRODUCTION

East Asia provides fertile soil for cross-fertilization of theories of transnational legal ordering and fiduciary law.[1] Modern fiduciary law provides underlying principles in a broad array of fields, including corporate and financial transactions as well as various context of workaday lives.[2] In East Asian jurisdictions, at least, there are also historical dimensions, as these Western fiduciary norms were received as part of modernization in the nineteenth to twentieth century. While East Asian jurisdictions incorporated modern notions within the traditional or indigenous notion of loyalty, the forms of transplants varied depending on the patterns of modernization and the reception of Western law. The course of history reveals constant interactions of various fiduciary norms across jurisdictional borders, and the patterns were made complex by historical events that included the shifting colonial pressures and economic hegemony, wars, revolutions, and financial crises, as well as legislative imitation and academic exchange of ideas. This chapter attempts to portray this complex process on the East Asian canvass and understand its mechanism against the theoretical framework of transnational legal orders.

Fiduciary norms – particularly those found in agency law, trust law, and company law – were among the most important legal norms received by East Asian countries in the late nineteenth to early twentieth century. Though civil law jurisdictions

[1] This chapter builds from an earlier article: Masayuki Tamaruya & Mutsuhiko Yukioka, *The Japanese Law of Fiduciaries from Comparative and Transnational Perspectives*, 5 U.C. IRVINE J. INT'L TRANSNAT'L & COMP. L. 135 (2020). The author is grateful to Kelvin F. K. Low, Kye Joung Lee, as well as participants at the "Between the Global and the Local" paper session of the Law and Society Association 2020 Annual Meeting. The author also received generous financial support from Japan Society for the Promotion of Science (JSPS Kakenhi Grant No. 19H01408).

[2] Evan J. Criddle et al., *Introduction*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW xix, xx (Evan J. Criddle et al. eds., 2019).

rarely used the terms "fiduciary" and "duty of loyalty" until recently, their legislation routinely contained the notion of duty of care and the regulation of conflicted transactions. In this chapter, the term "fiduciary norm" is used loosely to include both specific doctrines, such as those concerning the duties of loyalty and care, and normative statements concerning who should be recognized as fiduciaries, whom they should serve, and how those rules should be enforced. The term "norm" broadly encompasses rules, principles, and customary notions that relevant parties perceive as binding, although not necessarily legally enforceable.

In East Asia, modernization in the late nineteenth century onward was carried out by the introduction of the Western legal system and concepts. This has meant that indigenous East Asian norms have seldom been discussed in legislation or legal scholarship. Nevertheless, traditional values in the region contain elements that overlap with modern fiduciary notions. Two strands of loyalty form part of traditional Confucian thought: loyalty to familial elders (孝: *ko* in Japanese and *xiào* in Mandarin Chinese) and loyalty to authority (忠: *chu* in Japanese and *zhōng* in Mandarin). Between loyalty to the family and loyalty to the State, there is room in this traditional framework for loyalty to the corporation. Teemu Ruskola has detected a parallel between modern norms of fiduciary duty, on the one hand, and the head of the household's duty to the household corporation as its manager or as a trustee for his heirs in late Imperial China, on the other.[3] These status-based notions have played an important role in modern social and economic life in Japan and East Asia. Among other things, they have created tensions in debates on the reform of fiduciary governance in the region.

Within East Asia, multiple strands of received fiduciary norms have interacted with each other and with indigenous notions of loyalty. Section 8.2 of this chapter explores the transnational dimension of these processes from the late nineteenth to the late twentieth century. From there, the discussion will chart the increasing frequency, intensity, and complexity of interactions among fiduciary norms from the 1990s to the present day. Section 8.3 will discuss these dynamics against the backdrop of greater cross-border transactions and jurisdictional competition aiming to attract transnational capital, as well as the impact of regional and global crises. Lawyers and policymakers in East Asian jurisdictions embraced different fiduciary models with mixed motives and varying degrees of enthusiasm, as their attractiveness shifted along with changes in market dynamics both domestically and globally.

Market dynamics do not, however, fully explain the transnational development of fiduciary norms in East Asia. In addition, differences between common law and civil law traditions have inflected these transnational processes. On the one hand, this chapter will discuss Hong Kong and Singapore collectively as "common law East Asia," representing East Asian jurisdictions where common law influence

[3] Teemu Ruskola, *Corporation Law in Late Imperial China*, *in* Research Handbook on the History of Corporate and Company Law 355, 361 (Harwell Wells ed., 2018).

predominates. On the other hand, Japan, Taiwan, Korea, and mainland China will together be discussed as "civil law East Asia" to represent jurisdictions where the influence of civil law has been more pronounced. Although such categorization is inevitably an oversimplification, I do so for the sake of exposition. Section 8.2 will show that civil law East Asia has also received common law influences to a significant degree. Section 8.3 will suggest that within common law traditions, the differences between American and British approaches have had important consequences.

Against this descriptive backdrop, Section 8.4 will draw upon the theory of transnational legal ordering to examine the factors and mechanisms that have shaped the reception, transformation, synchronization, and divergence of fiduciary norms in domestic, regional, and international contexts.[4] Underlying the transnational developments are the change in the pattern of social interactions from status-based one to more particularized and functional ones, the transformation in the forms of norms from rule-based ones to standard-based ones, and the shifts in the regulatory approach from the reliance on hard law to a greater use of soft law. Each of these transformations facilitated the broader reception of fiduciary norms in East Asian jurisdictions of different social backgrounds and legal traditions. The inquiry will point to the emerging trend in East Asia where evolving corporate and trust laws influence fiduciary norms in nonprofit and family-related areas.

8.2 MODERNIZATION AND RECEPTION: THE LATE NINETEENTH CENTURY TO THE LATE TWENTIETH CENTURY

The modern form of fiduciary law arrived in East Asia in the late nineteenth to early twentieth century, as Western imperial powers advanced in the region and Asian countries were compelled to respond. The process of modernization through Westernization began in Japan by the introduction of the civilian codes in the 1890s. Parallel efforts started soon after in China, and although the civilian-inspired legislation was discontinued on the mainland after Communist Revolution in late 1940s, it was carried over to Taiwan. Meanwhile, Common law trusts were introduced in Japan toward 1920s, and a set of legislation reflecting both civilian and common law influence was extended to Korea and Taiwan that it eventually colonized. The civilian influence endured after Japan lost the World War II and its colonial rule was over, while American influence became pronounced in the region. In these jurisdictions, the fiduciary norms are characterized by their mixed sources and nature. By contrast, the reception of fiduciary law in Hong Kong and

[4] For the analytical framework, *see* Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* TRANSNATIONAL LEGAL ORDERS 3 (Terence C. Halliday & Gregory Shaffer eds., 2015); JOHN BRAITHWAITE & PETER DRAHOS, GLOBAL BUSINESS REGULATION 15–26 (2000).

Singapore was more consistent. Under British rule, these jurisdictions adopted English equity jurisprudence and UK-style legislation. This English legacy, bringing about certainty and predictability for overseas investors, has been used to advance the status of these two jurisdictions as international financial centers in more recent years. These historical courses of reception laid the foundation for the translational evolution of fiduciary norms that accelerated in the 1990s and onward.

8.2.1 *The Japanese Reception of Western Legal Norms*

The modern layers of Japanese fiduciary norms were laid down by the French-inspired Civil Code (1896) and the German-modeled Commercial Code (1899).[5] Although the term "fiduciary" did not immediately become a part of the Japanese legal lexicon, these codes contained a series of rules equivalent to present-day fiduciary principles. At the core of Japanese law on fiduciaries is section 644 of the Civil Code, which prescribes an agent's obligation to manage the principal's affairs "with the care of a faithful manager."[6] This provision applies, *mutatis mutandis*, to partners,[7] guardians,[8] and executors under the Civil Code[9] and extends to corporate directors under the Commercial Code.[10]

The Civil Code prohibits an agent from engaging in self-dealing and the representation of both parties in the same transaction.[11] Similarly, context-specific regulations of conflict-of-interest transactions apply to guardians[12] and directors of charities[13] under the Civil Code, and commercial agents[14] and corporate directors[15] under the Commercial Code.

The Commercial Code also prescribed corporate governance structure for for-profit corporations that parallel the German-style two-tier board (*duale Führungsstruktur*). Just as the German supervisory board (*Aufsichtsrat*) provided for the monitoring of the managing board (*Vorstand*), Japanese statutory auditors (*kansayaku*) were expected to monitor the business decisions and accounting practices of directors (*torishimariyaku*). Herman Roesler, the German architect

[5] Civil Code, Law No. 89 of 1896; Commercial Code, Law No. 48 of 1899.
[6] Civil Code § 644.
[7] *Id.* § 671.
[8] *Id.* § 869.
[9] *Id.* § 1012.
[10] The relevant Commercial Code provision was introduced as § 164(2) by Law No. 73 of 1911; renumbered as § 254(2) by Law No. 72 of 1938; and renumbered as § 254(3) by Law No. 167 of 1950. It is now superseded by Companies Act, Law No. 86 of 2005, § 355.
[11] Civil Code § 108.
[12] *Id.* § 860.
[13] *Id.* § 57.
[14] Commercial Code § 48.
[15] *Id.* §§ 264, 265.

behind the Japanese Code, referred to not just the German example but also to French and British legislation, ensuring that the Code matched the needs of the time in Japan.[16] Notably, the Japanese statutory auditors' position was weaker than that of their German counterparts in that, although they had the power to require directors to produce accounting documents for review and conduct inquiries on their business execution, they lacked the power to appoint or remove directors.[17]

On top of the civil law basis for Japanese private law, common law trust was introduced by the Trust Act of 1922.[18] Under the Act, the trustee must carry out the work of the trusteeship "with the care of a faithful manager,"[19] a language that parallels the Civil Code's agency provision. Extending the agency-based regulation, the 1922 Act prohibited the trustee from engaging in self-dealing under any name involving any proprietary or personal rights.[20] While ensuring consistency with the Civil Code, the drafters of the Trust Act incorporated certain remedies against the breach of trust that track the common law approach and that are more extensive than those available for agency arrangements.[21]

Thus, by the 1930s, fiduciary principles were prescribed under separate codes drawn from different legal traditions. There was no general "duty of loyalty" provision, and the provisions mostly exhibited a rule-based format by listing conflicted transactions, which were prohibited unless there was specific authorization or an independent representative was appointed, depending on the context. The rule-based regulation was not unique to Japan at the time. English fiduciary law had long been largely rule-based, using no-profit, no-conflict formulas.[22] The general formulation of the duty of loyalty in the United States was broadly accepted only in the 1930s, after the publication of Austin W. Scott's *Treatise on Trusts* and the *Restatement on Trusts*, for which he served as a reporter.[23] In Anglo-Commonwealth jurisdictions, more systematic consideration of fiduciary law came later in the twentieth century.[24]

[16] Haruhito Takada & Masamichi Yamamoto, *The "Roesler Model" Corporation: Roesler's Draft of the Japanese Commercial Code and the Roots of Japanese Corporate Governance*, 45 Zeitschrift für Japanisches Recht [Journal of Japanese Law] 45 (2018).

[17] Tsukasa Miyajima, *Auditing Structure*, *in* History of Commercial Law Studies in Showa Period 389, 391–96 (Yasuichciro Kurasawa & Takayasu Okushima eds., 1996).

[18] Trust Act, Law No. 62 of 1922.

[19] *Id.* § 20.

[20] *Id.* § 22.

[21] *Id.* § 31.

[22] Aberdeen Rly Co v. Blaikie Bros (1854) 1 Macq 463, [1843–60] All ER Rep 249; Bray v. Ford [1896] AC 44.

[23] Austin W. Scott, *The Trustee's Duty of Loyalty*, 49 Harv. L. Rev. 521 (1936); Austin W. Scott, *The Restatement of the Law of Trusts*, 31 Colum. L. Rev. 1266 (1931).

[24] Paul D. Finn, Fiduciary Obligations (1977, reprinted 2017); Matthew Conaglen, Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties (2010).

8.2.2 *Modernization in Civil Law East Asia*

In China, after a number of military and diplomatic setbacks against the Western colonial powers, the late Qing Empire embarked on the internal reform to modernize its government system.[25] Part of the reform that began at the turn of the nineteenth century was the introduction of Western-style legal system and the codification in various areas of law. One of its first products was the Company Law of 1904. Codification efforts continued under the Republican government that took over in 1912, which included replacing the 1904 Law with new Company Regulations in 1914. Another Company Act was introduced in 1929 along with the Civil Code from 1929 to 1930. Japanese legal advisors and Chinese students who had returned from their studies in Japan assisted the drafting process.[26] Through their involvement, Chinese legislation was influenced by civil law, especially German and Swiss civil law.[27] Nonetheless, the impact of Western transplants remained marginal. The traditional kinship-based entities – that is, professionally managed commercial enterprises organized in the form of the family – retained their vitality and received recognition by the court during the Republican period.[28] With the ouster of the Republican government by the communists and the establishment of the People's Republic of China (PRC) in 1949, the 1929 Act ceased to affect mainland China, although it was carried over to Taiwan where the Kuomintang, which had formed the Republican government, retreated.[29]

Japan was responsible for direct colonial rule in Taiwan and Korea. After the First Sino-Japanese War (1894–95), Taiwan was ceded to Japan by the Qing Empire. After it defeated Russia in the Russo-Japanese War (1904–05), Japan extended its sphere of influence over Korea, ultimately annexing it in 1910.[30] To modernize the legal system within its territories, the Japanese government mobilized some of its leading scholars to investigate local customs.[31] Eventually, however, the idea of

[25] Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 Stan. L. Rev. 1599, 1677–80 (2000).

[26] Hideaki Nishi, Making of the Modern Law of Republic of China: Custom Research, Codification and Chinese Legal Studies 11–33 (2018).

[27] Andrew Jen-Guang Lin, *Common Law Influences in Private Law – Taiwan's Experiences Related to Corporate Law*, 4(2) National Taiwan Univ. L. Rev. 107, 111 (2009).

[28] Ruskola, *supra* note 25, at 1681.

[29] *See infra* notes 39–41 and accompanying text.

[30] Lusina Ho & Rebecca Lee, *Reception of the Trust in Asia: An Historical Perspective*, *in* Trust Law in Asian Civil Law Jurisdictions: A Comparative Analysis 10, 10–11 (Lusina Ho & Rebecca Lee eds., 2013).

[31] *See, e.g.*, Santaro Okamatsu, Provisional Report on Investigations of Laws and Customs in the Island of Formosa (1902). Okamatsu, Professor of Law at Kyoto Imperial University, was actively engaged in studying customs in Taiwan and Manchuria. Hideaki Nishi, The Making of "Taiwan Private Law" 23–25 (2009).

codifying local customs was abandoned. The Japanese government, instead, imposed its laws and industry regulations in Taiwan and Korea.[32]

It is no apology for colonialism to point out that it laid the foundation for the transnational evolution of fiduciary law in South Korea and Taiwan. The Civil and Commercial Codes under civil law continued to form the basis of the national private laws of both jurisdictions after World War II. Although Japanese rule ceased, its postwar economic development provided a model for many developing economies in the region. In addition, common law influences arrived through trust legislation, securities regulation,[33] and the corporate governance doctrine.[34]

In South Korea, the Japanese codes remained in effect until the introduction of new codes in the 1950s and 1960s, in part because of the Korean War. A new Civil Code was enacted in 1958 following the German model,[35] and the Trust Act was introduced in 1961 with the Japanese legislation serving as the main source of reference.[36] The Commercial Code of 1962 introduced the German-Japanese style of a two-tier structure of corporate governance comprising the board of directors and statutory auditors. In 1969, securities investment trust legislation was introduced.[37] Since the mid-1960s, South Korea was undergoing a rapid economic development, which was largely orchestrated by the industrial conglomerates known as *chaebol* working closely with the military government. *Chaebol*'s concentrated ownership structure with complex cross-holdings created unique challenges for corporate governance even after the political democratization in 1987.[38]

Postwar Taiwan came under the rule of Kuomintang and remained so when they retreated from mainland China in 1949 following their defeat by the communists. The legislation imposed during Japanese colonial rule was replaced by the laws of the Republic of China that had been introduced in 1929 and 1930. Despite the formal change in the Taiwanese legal regime, Tay-sheng Wang observed that the old Japanese codes were preserved in substance because most of the newly introduced codes had been modeled on Japanese legislation as drafted in the late

[32] Korean Private Law Ordinance of 1912; Taiwan Private Law Implementation Ordinance No. 406 of 1922.

[33] Taiwanese Securities and Exchange Act of 1968; South Korean Securities and Exchange Act of 1962.

[34] Corporate Governance in Asia: A Comparative Approach 385 (Bruce Aronson & Joongi Kim eds., 2019).

[35] Section 681 of South Korean Civil Code requires the agent to "manage the affairs entrusted to him with the care of a good manager in accordance with the tenor of the mandate." *See supra* note 10 and accompanying text for discussion of a parallel provision in Japanese Civil Code § 644.

[36] South Korean Trust Act, Act No. 900, Dec. 30, 1961, now superseded by Act No. 7428, Mar. 31, 2005.

[37] Ying-Chieh Wu, *Trust Law in South Korea: Developments and Challenges*, *in* Ho & Lee, *supra* note 30, at 47–48.

[38] Jeong Seo, *Who Will Control Frankenstein?: The Korean Chaebol's Corporate Governance*, 14 Cardozo J. of Int'l & Comp. L. 21 (2006).

1920s.[39] Although Taiwan's public life remained under martial law until 1987, as its economy took off in the 1960s, corporate and commercial activities flourished.[40] Within these fields, American influence became prominent, with the Company Act amended in 1946 and the Securities and Exchange Act enacted in 1968.[41]

8.2.3 *American Law's Influence on Japanese Fiduciary Law*

In Japan, the influence of American law became pronounced after World War II in light of the dominant role played by the United States in the military occupation by the Allied Powers. A number of New Deal–inspired legislations were introduced, including antitrust law, securities law, and labor standards law, as well as a new Constitution. American concepts of fiduciary law were introduced at this time, but the transplantation efforts met at least two obstacles.

First, Japanese lawyers struggled to incorporate the American notion of duty of loyalty into the preexisting statutory framework.[42] The concept was ultimately considered redundant, while its remedial implications were not fully appreciated. In 1950, the Commercial Code was amended to introduce section 254-2, which provided the following:

> A director owes a duty to obey the provisions of the laws, the articles of incorporation, and the decisions of the general meeting of shareholders, and a duty to carry out their work loyally in the interests of the corporation.[43]

A similar statutory duty of loyalty was imposed on the managers of securities investment trusts[44] and investment advisors.[45]

During the 1960s, Japanese courts expanded the restriction on the directors' disloyal conduct by interpreting the preexisting rules in both Civil and Commercial Codes against conflict-of-interest transactions broadly.[46] This left no room for the

[39] Tay-sheng Wang, Legal Reform in Taiwan under Japanese Colonial Rule, 1895–1945 176 (2000). *See supra* notes 30–32 and accompanying text.

[40] Lawrence S. Liu, *The Politics of Corporate Governance in Taiwan*, *in* Transforming Corporate Governance in East Asia 255, 256 (Hideki Kanda et al. eds., 2008).

[41] Lin, *supra* note 27, at 111.

[42] Hideki Kanda & Curtis J. Milhaupt, *Re-examining Legal Transplants: The Director's Fiduciary Duty in Japanese Corporate Law*, 51 Am. J. Comp. L. 887, 900–01 (2003).

[43] Commercial Code § 254-2, later renumbered § 254-3, was superseded by Companies Act, Law No. 86 of 2005, § 355.

[44] Securities Investment Trust Act, Law No. 198 of 1951, § 71, inserted by Law No. 106 of 1967.

[45] Investment Advisors on Securities Regulation Act, Law No. 74 of 1986, § 21, repealed by Law No. 66 of 2007 and consolidated into the Financial Instruments and Exchange Act, Law No. 25 of 1948.

[46] Oe Industrial v. Business Consultancies, 17(8) Minshu 909 (Supreme Court, Sept. 5, 1963); San'ei Electronics v. Japan Victor, 22(13) Minshu 3511 (Supreme Court, Dec. 25, 1968). For discussion of these cases, *see* Tamaruya & Yukioka, *supra* note 1, at 141.

1950 statutory duty of loyalty to do any independent work. The Supreme Court held as such in 1970:

> Section 254-2 of the Commercial Code merely clarifies and details the duty of a faithful manager established in Section 254(3) of the same Code and Section 644 of the Civil Code. It does not impose a separate, higher duty than the general duty of faithful management required of all agents.[47]

The second, and perhaps more significant, obstacle related to the task of reconciling the American concept of corporate governance with the Japanese style of corporate management. By the 1970s, Japan's rise to the status of the world's second-largest economy attracted international attention toward some of the unique features of its corporate management and labor relationships. These features comprised lifetime employment and a steep seniority wage progression that secured employees' loyalty to such an extent that the companies would operate as the communities of employees.[48] The boards of directors almost exclusively included senior managers who had devoted their entire careers to their companies.[49] Shareholders seemed content to have their interests subordinated to other stakeholders' interests, justifying their investments in terms of wider business interests rather than just investment returns.[50]

American business leaders took the position that the Japanese corporate sector was closed to outsiders and lacked transparency. From their point of view, Japan's corporate governance was inadequate. Curtis Milhaupt summarized Japan's corporate governance as follows:

> The market for corporate control was not active during Japan's post-war high-growth period. In the post-war corporate governance regime, publicly traded firms were typically affiliated with a corporate group (*keiretsu*) with a major bank at the center. Group-affiliated firms cross-held shares of their affiliates, forming stable, friendly investor relationships involving significant percentages of the public float. Investor activism was rare and hostile takeover activity was condemned as antithetical to Japanese business norms, which conceptualizes the firm as a community of

[47] Arita v. Kojima, 24(6) Minshu 625 (Supreme Court, June 24, 1970).

[48] James C. Abegglen, The Japanese Factory: Aspects of Its Social Organization 39–40 (1958); Organisation for Economic Cooperation and Development, Manpower Policy in Japan: Reviews of Manpower and Social Policies Number 11 (1973).

[49] Ronald J. Gilson & Curtis J. Milhaupt, *Choice as Regulatory Reform: The Case of Japanese Corporate Governance*, 53 Am. J. Comp. L. 343, 348–49 (2005).

[50] *See, e.g.*, Gen Goto, *Legally Strong Shareholders of Japan*, 3 Mich. J. Private Equity & Venture Cap. L. 125, 142–43 (2014), Bruce Aronson, *Japanese Corporate Governance Reform: A Comparative Perspective*, 11 Hastings Bus. L.J. 85, 95 (2015). For a historical account of the shareholding structure in Japan, *see* Julian Franks et al., *The Ownership of Japanese Corporations in the Twentieth Century*, 27 Rev. Fin. Stud. 2580 (2014).

employees rather than an assemblage of financial assets to be bought and sold.[51]

While both Japanese and American business leaders would have agreed to the substance of this summary, the assessment as to whether the Japanese system needs fixing was beginning to diverge by the late 1980s.

In 1989, a government-level negotiation, known as the US–Japan Structural Impediments Initiative, commenced. To alleviate a mounting trade imbalance between the two countries, the US government demanded that Japan remove a wide range of trading impediments, including corporate governance norms. Following the negotiations, some reforms were introduced to expand shareholder rights. The 1993 revision of the Commercial Code and related statutes expanded the shareholder right to review corporate books,[52] made shareholder derivative suits more accessible,[53] and sought to enhance the independence of statutory auditors.[54] The introduction of independent directors was discussed during the negotiations but did not become a part of the reform package, in anticipation of resistance from the industry. This became a hotly debated issue from the late 1990s onward.

8.2.4 *Developments in Common Law East Asia*

While the modernization of corporate governance in Japan focused upon the civil law, in Southeast Asia, Hong Kong and Singapore incorporated norms from English common law and tracked major statutory developments in the UK and Commonwealth nations.

Singapore, a trading post for the British Empire since 1819, was ceded to the East India Company after the 1824 Anglo–Dutch Agreement. English common law and equity became applicable under the 1826 Second Charter of Justice, although Singapore came under the direct control of Britain as part of the Straits Settlements in 1876. The Companies Ordinance was introduced in 1889 after the model of the UK Companies Act 1862.

Meanwhile, Hong Kong, initially occupied by the British in 1841, formally became a British colony in 1842 after Qing China's defeat in the First Opium War. Principles of English common law and equity were gradually transplanted after the Charter of the Colony of Hong Kong in 1843, and the first Companies Ordinance was enacted in 1865, also based on the UK Companies Act 1862.[55]

[51] Curtis Milhaupt, *Takeover Law and Managerial Incentives in the United States and Japan*, *in* Enterprise Law: Contracts, Markets, and Laws in the US and Japan 177, 182 (Zen'ichi Shishido ed., 2014).

[52] Commercial Code § 293-6, as amended by Law No. 62 of 1993.

[53] *Id.* §§ 267(4), 268-2(1), as amended by Law No. 62 of 1993.

[54] Commercial Code Special Provisions on Company Auditor etc. Act § 18(1), as amended by Law No. 62 of 1993.

[55] S. H. Goo, Study Report on History of Company Incorporation in Hong Kong (2013).

Both Singapore and Hong Kong updated their company laws by generally tracking the legislative developments in the United Kingdom throughout the remainder of the nineteenth century and much of the twentieth century. In the field of trust law, apart from the general reception of equity, the statutory foundations in both jurisdictions were based on the UK Trustees Act of 1925. Subsequently, both jurisdictions updated their trust statutes largely in line with developments in the United Kingdom.[56]

In Hong Kong, a small number of wealthy merchant families were directly involved in managing Hong Kong's economic affairs for over a century and a half. Their influence in the legislative policymaking made Hong Kong's social and legal structure sensitive to the interests of the users of Hong Kong as a port for trade or a market for trading financial instruments and services.[57] The Companies Ordinance 1932 was modeled after the UK 1929 Act and served as the basic framework of Hong Kong Company Law until it was replaced by the Companies Ordinance 2014, an extensive reform with a view to enhancing Hong Kong's status as a major international business and financial center.[58]

The growth of wealth in mainland China following its opening up in 1979 supported economic growth in Hong Kong. Since the 1990s, an increasingly large number of Chinese companies have been listed on stock exchanges in Hong Kong. In the 1990s, Hong Kong's securities market regulator, the Securities and Futures Commission, engaged with the PRC Commission for Restructuring of the Economic System to negotiate a Memorandum of Regulatory Cooperation.[59] Today, Hong Kong's Rules Governing the Listing of Securities contain a special chapter 19A, which specifically applies to issuers incorporated in mainland China to ensure protection for security holders. The UK-style company and trust laws have continued to apply in the Special Administrative Region following the 1997 handover under the constitutional principle of "one country, two systems."[60]

Singapore attained self-government in 1959, joined the Federation of Malaysia in 1963, and achieved independence in 1965.[61] In 1967, the Companies Act was

[56] Hong Kong Trustee Ordinance 1934, Cap. 29, and Singapore Trustee Act 1967, both based on England's Trustee Act 1925, 15 & 16 Geo. 5 c. 19.

[57] David C. Donald, A Financial Centre for Two Empires: Hong Kong's Corporate, Securities and Tax Laws in Its Transition from Britain to China 53 (2014).

[58] Companies Ordinance 2014, Cap. 622.

[59] Donald, *supra* note 57, at 242–46. On the impact of these negotiation on Chinese corporate governance, see text accompanying notes 123–126.

[60] The Basic Law of the Hong Kong Special Administrative Region of the People's Republic of China art. 8.

[61] Kelvin F. K. Low, *Victoria Meets Confucius in Singapore: Implied Trusts of Residential Property*, *in* Asia-Pacific Trusts Law: Theory and Practice in Context 97 (Linkai Yang & Matthew Harding eds., 2021); Goh Yihan & Paul Tan, *An Empirical Study on the Development of Singapore Law*, *in* Singapore Law: Fifty Years in the Making (Goh Yihan & Paul Tan eds., 2015).

introduced to follow the Australian Uniform Companies Acts of 1961–1962. In pursuit of the government's objective of becoming Asia's financial center, Singapore frequently amended its company legislation. In 1976, the Code on Takeovers and Mergers was introduced. While the Code followed the London City Code's self-regulatory tradition, it was given statutory backing along with an administrative implementation mechanism, the Securities Industry Council, which had the power to enforce the Code and resolve disputes in a nonjudicial setting.[62]

One unique feature that differentiates Singapore from Hong Kong is the role of government-linked corporations in the development of the Singapore economy. The Temasek Holdings, incorporated in 1974 with the Government's Minister for Finance as the sole shareholder, has played a vital and unique role in promoting transparent governance in its portfolio companies.[63] This illustrates the ingenuous way in which Singapore explores comparative advantage on the basis of the common English legal tradition.

Both Hong Kong and Singapore faced a unique corporate governance challenge associated with the concentrated shareholding by either families or the State in both local and incoming Chinese companies. Strong family or State control, which can be observed across East Asia,[64] creates a tension with the Anglo-American corporate governance model premised on dispersed shareholder ownership. This tension is one of the principal themes of the transnational processes of legal ordering to which this chapter now turns.[65]

8.3 GREATER TRANSNATIONALIZATION: REFORMS SINCE THE 1990S

8.3.1 *American Corporate Governance in Civil Law East Asia*

By the 1990s, global debates on corporate governance seemed to be dominated by the American model, which emphasized shareholder primacy, the prominent role of independent directors in fiduciary governance, and judicial enforcement of

[62] Wai Yee Wan, *Legal Transplantation of UK-Style Takeover Regulation in Singapore*, *in* COMPARATIVE TAKEOVER REGULATION: GLOBAL AND ASIAN PERSPECTIVES 406, 407 (Umakanth Varottil & Wan Wai Yee eds., 2017).

[63] Tan Cheng-Han, Dan W. Puchniak, and Umakanth Varottil, *State-Owned Enterprises in Singapore: Historical Insights into a Potential Model for Reform*, 28 COLUM. J. ASIAN L. 61, 89 (2015).

[64] The tendency is less conspicuous in Japan and Taiwan. OECD EQUITY MARKET REVIEW 2019, 43–44 (2019).

[65] Dan W. Puchniak & Kon Sik Kim, *Varieties of Independent Directors in Asia*, *in* INDEPENDENT DIRECTORS IN ASIA: A HISTORICAL, CONTEXTUAL AND COMPARATIVE APPROACH 89, 119–28 (Dan W. Puchniak et al. eds., 2017); David C. Donald, *Conceiving Corporate Governance for an Asian Environment*, 12 U.PA. ASIAN L. REV. 88 (2016).

fiduciary rules through derivative suits or securities litigation.[66] Optimism reigned that corporate laws and regulations around the world would converge on this model, which many (at least in the West) deemed the most efficient and effective.[67]

South Korea felt the impact of American-style corporate governance when it was hit by the East Asian financial crisis after the 1997 currency crisis in Thailand. After the bailout package mandated by the International Monetary Fund (IMF), South Korea introduced some reforms that mirrored American-style corporate governance. In 1998, the Commercial Code was revised to introduce the notion of the duty of loyalty,[68] expand the scope of derivative suits,[69] and enhance the minority shareholders' exercise of their rights.[70] The revision in the following year introduced the American-style committee system where independent directors played a key role, and the audit committee replaced the traditional statutory auditor.[71] After a series of changes in the Securities and Exchange Act, Bank Act, and Insurance Business Act, large companies and financial institutions in South Korea are now required to have at least three independent directors constituting the majority of the board, although the original statutory auditor remains an option for smaller companies.[72]

Although the changes in Taiwan were less drastic, the American influence became increasingly apparent, as its government pursued economic globalization strategy. In 2001, the Taiwanese Company Act was amended to specifically provide for the duty of loyalty.[73] In 2006, the Stock Exchange Act was amended to introduce independent directors and the audit committee.[74] The appointment of independent directors was required only for financial institutions and large listed companies; most publicly held corporations were given the additional option of retaining the two-tier system or appointing both corporate auditors and independent directors. The Financial Supervisory Commission expanded the scope of companies that were required to appoint independent directors.[75]

[66] Principles of Corporate Governance: Analysis and Recommendations (America Law Institute 1994); Melvin Aron Eisenberg, *An Overview of the Principles of Corporate Governance*, 48 Bus. Law. 1271 (1993).

[67] Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 Geo. L. J. 439 (2001); Rafael La Porta et al., *Law and Finance*, 106 J. of Pol. Econ. 1113 (1998).

[68] South Korean Commercial Code § 382-3, introduced by Law No. 5591, Dec. 28, 1998.

[69] *Id.* § 403.

[70] *E.g.*, *id.* § 366 (minority shareholder's right to request convocation of shareholders' meeting); § 363-2 (right to make proposal for the shareholders' meeting); § 385-2 (minority shareholder's right to petition the court for removal of a director); § 402 (right to injunction).

[71] *Id.* § 393-2 (committees of board of directors); § 415-1 (audit committee), introduced by Law No. 6086, Dec. 31, 1999.

[72] Kyung-Hoon Chun, *Korea's Mandatory Independent Directors: Expected and Unexpected Roles*, *in* Puchniak et al., *supra* note 65, 176, at 184–96.

[73] Taiwanese Company Act § 23(1).

[74] Taiwan Securities and Exchange Act §§ 14-2(1), 14-4(1).

[75] Hsin-ti Chang et al., *From Double Board to Unitary Board System: Independent Directors and Corporate Governance Reform in Taiwan*, *in* Puchniak et al., *supra* note 65, 241, at 244–45.

As in Japan, inscribing fiduciary norms into the civil law statutory foundation proved to be a major comparative law conundrum in South Korea and Taiwan. In both jurisdictions, the implications of introducing the duty of loyalty provision remain unclear.[76] Commentators questioned whether the mandatory independent director regime was functioning as intended by its proponents.[77] Corporate governance debates were often affected by idiosyncratic factors. Among the salient factors in Taiwan was the ambivalent and often politicized relationship between the businesses that pursue growth across from the booming mainland China, and the government that still maintain regulatory and ownership control over major financial and business sectors in the postmarital era.[78] In South Korea, the dominance of large groups of related corporations known as *chebol*, which operate under concentrated family or individual control, posed a unique challenge for corporate governance.[79]

8.3.2 *The Rise of the Corporate Governance Code in Common Law East Asia*

Although American and English laws share common law origins, there are differences in their approaches to corporate governance. Company legislation in the UK and Commonwealth nations relies more on ex ante measures such as disclosure and board or shareholder approvals, and less on derivative suits to regulate related party transactions.[80] The British regulatory approach relies more on self-regulation such as the Stock Exchange rules and the City Code on Takeovers and Mergers than the binding legislative provisions in the United States.[81] Finally, the Company Law debate in the 1990s in the United Kingdom began to consider broader interest groups as part of the corporate stakeholders, to which corporate directors owe a fiduciary duty.[82]

When the Cadbury Report developed a set of principles of good corporate governance to be incorporated into the London Stock Exchange's Listing Rules in

[76] Lin, *supra* note 27, at 124–25; Jong-Hoon Lee, Corporation Laws & Cases of South Korea § 8.06[G] (2016).

[77] Jill F. Solomon et al., *Corporate Governance in Taiwan: Empirical Evidence from Taiwanese Company Directors* (2003) 11 Corporate Governance: An International Review 235, 238–39; Chun, *supra* note 72, at 177.

[78] Liu, *supra* note 40, at 255–57.

[79] Chun, *supra* note 72, at 179–80.

[80] Dan W. Puchniak & Umakanth Varottil, *Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm*, 17 Berkeley Bus. L. Rev. 1, 20–23 (2020).

[81] Brian R. Cheffins, *Does Law Matter? The Separation of Ownership and Control in the United Kingdom*, 30 J. Legal Stud. 459, 472–76 (2001).

[82] Sarah Worthington, Sealy & Worthington's Text, Cases, & Materials in Company Law 337 (11th ed. 2016); White Paper, Company Law Reform, para. 3.3, at 20–21(Cm 6465, March 2005); Companies Act 2006 c. 46 s 172(1) (UK).

1992,[83] Hong Kong quickly introduced the Code of Best Practice as part of the Stock Exchange's Listing Rules the following year. When the Combined Code of Corporate Governance was made applicable to all UK listed companies in 1998, the Hong Kong stock exchange updated the listing rules the same year.[84] Singapore followed suit, adopting the Corporate Governance Code as part of the Singapore Exchange Listing Rule in 2001.[85]

These corporate governance codes have been updated regularly in Hong Kong and Singapore, earning them consistently high scores and rankings in international indexes of corporate governance.[86] As the two jurisdictions vied with each other to attract foreign investments, they sought to signal attractiveness to capital by updating their corporate governance codes. In the run-up to the introduction of the Corporate Governance Code, Singapore's Corporate Governance Committee made it clear that its goal was to attract international capital in listed companies to Singapore by making it a financial hub of international standing.[87] Some recent scholarship has criticized this strategic signaling to the extent that it is prone to overlook unique challenges brought about by the local conditions. As David C. Donald observed in the context of Hong Kong's securities market regulation,

> The legal framework goes to great lengths to match the "best practice" requirements originating in New York or London …, even though such requirements might be unnecessary in Hong Kong …, whilst overlooking the real source of governance risk: controlling shareholders and the power they wield directly and indirectly.[88]

The prevalence of block-holding by family-dominated corporations or Chinese State-owned enterprises means that the agency problem arose not so much from the separation of ownership and management as from the failure of the large shareholder to act faithfully for the minority shareholders. In other words, the real challenge presented to the court and policymakers often requires different kinds of

[83] Committee on the Financial Aspects of Corporate Governance, *Report* (Gee 1992); *Code of Best Practice* (Gee 1992). For historical background, *see* Brian R. Cheffins, *The Rise of Corporate Governance in the UK: When and Why* (2015) 68 CLP 387.

[84] Syren Johnstone and Say H. Goo, Report on Improving Corporate Governance in Hong Kong a Comparative Based Study 55–56 (2017).

[85] Corporate Governance Committee, Report of the Committee and Code of Corporate Governance (March 2001).

[86] For more detailed and nuanced comparison of Hong Kong and Singapore corporate and financial market regulation, *see, e.g.*, Christopher Chen et al., *Regulating Squeeze-out Techniques by Controlling Shareholders: The Divergence between Hong Kong and Singapore*, 18 J. Corp. L. Stud. 185 (2017).

[87] Corporate Governance Committee, Consultation Paper 1 (Nov. 2000) (Singapore).

[88] Donald, *supra* note 57, at 93.

solutions than are offered by the American or the British models of corporate governance that presuppose dispersed shareholdings.[89]

Similar patterns of cross-border competition and local calibration of legal doctrines can be observed in the field of trust law. Unconstrained by either the comparative law conundrum in civil law jurisdictions or English conservativism, both Hong Kong and Singapore have displayed remarkable agility in law reform, driven by the entrepreneurial spirit typical of common law lawyers and client demands from China and across the globe. Both jurisdictions have generally followed Anglo-Commonwealth developments to trust doctrine and, at the same time, competed with each other in offering global services using offshore trusts.[90] If the proximity to mainland China gave Hong Kong an advantage in developing its capital market, the relative distance from China meant a greater sense of security for the high net-worth individuals, which Singapore could exploit to promote itself as a prime wealth management center.

8.3.3 *Japanese Reception*

In 1991, the Japanese bubble economy collapsed, leading to a long-lasting recession. Japanese corporate law in the 1990s and 2000s was characterized by extensive reform debates and frequent legislative revisions. Statutes were amended almost annually, including the introduction of a freestanding Companies Act in 2005 to replace the corporate law section of the Commercial Code.[91]

The American approach dominated in the 1990s and early 2000s. After the 1993 revision of the Commercial Code reduced filing fees,[92] derivative suits increased in number, revealing a series of mismanagement and accounting irregularities in major Japanese companies.[93] Derivative suits also contributed to the development of case law on the range of duties owed by the directors of banking institutions and other for-profit companies. In the 2000s, the Japanese courts adopted the American business judgment rule with certain modifications.[94]

Requiring independent directors on boards was a controversial proposition in Japan, where companies were still seen as communities of employees.[95] During the

[89] Cheng-Han et al., *supra* note 63, at 92–93 (2015).

[90] Rebecca Lee, *The Evolution of the Modern International Trust: Developments and Challenges*, 103 Iowa L. Rev. 2069 (2018); Tang Hang Wu, *From Waqf, Ancestor Worship to the Rise of the Global Trust: A History of the Use of the Trust as a Vehicle for Wealth Transfer in Singapore*, 103 Iowa L. Rev. 2263 (2018).

[91] Companies Act, Law No. 86 of 2005.

[92] Commercial Code § 267(4), inserted by Law No. 62 of 1993, now incorporated in Companies Act § 847-4(1).

[93] Tomotaka Fujita, *Transformation of the Management Liability Regime in Japan in the Wake of the 1993 Revision*, *in* Kanda et al., *supra* note 40, at 15, 17 table.

[94] Apamanshop Derivative Litigation, 2091 Hanrei jiho 90 (Sup. Ct. July 15, 2010).

[95] Gen Goto et al., *Japan's Gradual Reception of Independent Directors: An Empirical and Political-Economic Analysis*, *in* Puchniak et al., *supra* note 65, at 439–44.

preparation for the 2002 corporate law reform, a proposal was made to require each company to appoint at least one independent director. Eventually, the proposal was defeated, and instead, the company was given an option to replace the statutory auditor with committees for audit, nomination, and compensation.[96] Each committee had to have at least three members, and the majority had to be independent directors. This optional approach reflected the policymakers' ambivalence toward American-style corporate governance.[97] Its impact was limited, with only 1.7 percent of listed companies choosing this option by 2014.[98] The link between independent directors and good corporate performance remained elusive.[99]

The corporate law reforms of the mid-2000s began to see greater use of a soft law approach. As mergers and acquisitions increased in number and attracted attention,[100] a series of nonbinding guidelines were published by the Ministry of Economy, Trade, and Industry to supply guiding principles and ensure fairness.[101] As Curtis Milhaupt observed, the policymaking report underlying these guidelines:

> adroitly straddled the conceptual divide between the shareholder orientation of US corporate law and the more stakeholder- (particularly employee-) oriented approach of post-war Japanese corporate governance practices.[102]

The policymakers' ambivalence toward American-style corporate governance extended to both substance and approach and continued for much of the 2000s.

8.3.4 *Developments after the Financial Crisis in 2007*

The global financial crisis in 2007 brought about a shift in the debate over the proper forms of corporate and market governance. The debate that had been dominated by the American model of statutory law and derivative litigation began

[96] Special Exceptions to Commercial Code Concerning Audit, etc. Act, Law No. 22 of 1974, § 21-5 et seq, inserted by Law No. 44 of 2002.

[97] Gilson & Milhaupt, *supra* note 49, at 343.

[98] Tokyo Stock Exchange, *TSE-Listed Companies White Paper on Corporate Governance 2015*, 15 (2015). For post-2014 developments, *see* note 116–118 and accompanying text.

[99] Bruce Aronson, *Case Studies of Independent Directors in Asia*, *in* Puchniak et al., *supra* note 65, 431, at 439–44.

[100] Livedoor v. Nippon Broadcasting System, 1899 Hanrei Jiho 56 (Tokyo High Court, 23 March, 2005); Steel Partners v. Bull-Dog Sauce, 61(5) Minshu 2215 (Sup. Ct. Aug. 7, 2007).

[101] Ministry of Economy, Trade and Industry (METI) & Ministry of Justice (MOJ), Takeover Defense Guidelines for Protecting and Enhancing Corporate Value and the Common Interests of Shareholders (May 27, 2005); METI, Management Buyout Guidelines for Enhancing Corporate Value and Fair Procedures (Sept. 4, 2007). For backgrounds, *see* John Buchanan, Dominic Heesang Chai & Simon Deakin, Hedge Fund Activism in Japan: The Limits of Shareholder Primacy 259–65 (2012).

[102] Milhaupt, *supra* note 51, at 183–87, referring to Corporate Value Study Group, Preparing Defensive Measures toward Hostile Takeovers (Measures to Defend Corporate Value (2005).

to shift to the British approach of greater self-regulation.[103] After the Kay Review expressed critical views regarding short-termism in equity markets,[104] the UK Financial Reporting Council published the UK Stewardship Code in 2010 to encourage institutional investors to engage in corporate governance in the interest of their beneficiaries.[105] The Code's soft law approach, where the regulated company may either comply with the requirement or if they do not comply, explain publicly why not, became quickly popular around the world.

Japan was the first to follow the United Kingdom's lead by introducing its version of the Stewardship Code in 2014. The Code encouraged institutional investors to engage constructively with the companies in which they invested.[106] The motive behind the Japanese shift, however, may not have been the same as the one that drove the UK Stewardship Code.[107] Institutional investors' engagement with the investee companies was not just for the prevention of myopic excessive risk-taking but was also key to achieving a long-term increase in corporate value in Japan.[108] This was apparent in an influential report published by Professor Kunio Ito, his fellow academic experts, and representatives from institutional investors and the corporate sector.[109] While echoing the Kay Review's emphasis on the dialogue between companies and institutional investors, the Ito Review stressed that Japanese companies should aim for a return on equity of 8 percent to receive recognition from global investors.[110]

The term "fiduciary duty" began to seep into Japanese financial regulation. In 2014, the Financial Services Authority (FSA) began to use the term in its guidance document that set out the FSA's approach to inspection and oversight over financial institutions.[111] The "Japan Revitalization Strategy" published by the Cabinet in 2016, emphasized that action must be taken "to ensure that all entities engaged in the formation of assets by customers … fulfill their fiduciary duties (customer-oriented management of operations)."[112] The FSA followed up by publishing "Customer-first

[103] Bruce Aronson et al., *Corporate Legislation in Japan*, *in* Routledge Handbook of Japanese Business and Management 103–05 (Parissa Haghirian ed., 2016).

[104] The Kay Review of UK Equity Markets and Long-Term Decision Making (Final report July 2012).

[105] Financial Reporting Council, *The UK Stewardship Code* (July 2010; revised September 2012).

[106] Council of Experts on Japanese Stewardship Code, *Principles for Responsible Institutional Investors (Japan's Stewardship Code): Promoting Sustainable Growth of Companies through Investment and Dialogue* (February 2014; revised May 2017).

[107] Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 Seattle U. L. Rev. 497, 513–24 (2018).

[108] Gen Goto, *The Logic and Limits of Stewardship Code: The Case of Japan*, 15 Berkeley Bus. L.J. 365, 394 (2019).

[109] Final Report of the Ito Review, Competitiveness and Incentives for Sustainable Growth: Building Favorable Relationships between Companies and Investors (August 2014).

[110] *Id.* at 18.

[111] Financial Services Agency, Financial Monitoring Policy for 2014–2015 (Policy for Supervision and Inspection) (Sept. 2014).

[112] Cabinet Resolution, Japan Revitalization Strategy 2016, 154 (June 2, 2016).

Business Practices," which set out seven principles to encourage financial service providers to develop best practices to serve their customers' best interests.[113] These principles were expressly nonbinding and created an expectation that any financial institution deviating from any of the principles should provide a full explanation.

Stewardship codes have been introduced in at least ten jurisdictions and the European Union. Investor-led best practice guidance has been introduced in at least nine jurisdictions, including the United States.[114] Corporate governance codes have been adopted in a greater number of jurisdictions. The United Kingdom's initiative in 1992 was quickly followed by similar initiatives in other Commonwealth jurisdictions. The OECD developed the Principle of Corporate Governance in 1999 and encouraged its adoption through mutual assessment and policy discussions. According to the 2019 OECD report, nearly all forty-seven jurisdictions surveyed had a national Code or Principle of Corporate Governance, with the notable exceptions of China, India, and the United States.[115]

Japan was late in introducing the Corporate Governance Code. In 2015, the FSA and the Tokyo Stock Exchange published the Japanese Corporate Governance Code.[116] Japanese corporate lawyers soon found the UK notion of enlightened shareholder value and the "comply or explain" approach conducive to their culture. The Code had a tangible impact. The 2015 Code stated that listed companies should appoint at least two independent directors.[117] As of 2014, only 21.5 percent of the companies listed in section 1 of the Tokyo Stock Exchange satisfied this provision, but by 2019, the number reached 93.4 percent.[118] It was only in December 2019 that the Companies Act was amended to require listed corporations to appoint *one* independent director.

On August 19, 2019, the Business Roundtable, a group of American CEOs, issued a statement announcing that it had decided to retract its long-standing commitment to the principle of shareholder primacy. *Nikkei Shinbun*, the Japanese equivalent of *the Financial Times*, reported this on its front page with a

[113] Financial Services Agency, Customer-first Business Practices (Mar. 30, 2017).
[114] EY, *Q&A on Stewardship Codes* (Aug. 2017); Investor Stewardship Group, *Stewardship Principles: Stewardship Framework for Institutional Investors* (Jan. 1, 2018).
[115] OECD Corporate Governance Factbook 2019, 29–30, 41–44 table 2.2 (2019). For the OECD's initiative, G20/OECD Principles of Corporate Governance (Sept. 2015).
[116] Tokyo Stock Exchange, Japan's Corporate Governance Code: Seeking Sustainable Corporate Growth and Increased Corporate Value over the Mid- to Long-Term (2015).
[117] *Id.* Principle 4–8.
[118] Tokyo Stock Exchange, The Appointment of Independent Outside Directors and the Creation of Appointment and Compensation Committees in Companies Listed in Section 1 of Tokyo Stock Exchange 3 (Aug. 1, 2019).

tone of incredulity: "US Businesses Reconsider 'Shareholder Primacy': Declares to Give Due Regard to Employees."[119]

8.3.5 *Chinese Participation in the Transnational Development of Fiduciary Norms*

In 1993, China enacted its first Company Act since the Communist Party came into power in 1949. Consistent with China's civil law tradition, the Act required a supervisory board comprising representatives of the shareholders and employees to supervise directors and managers.[120] The drafters avoided the Anglo-American formulation of corporate fiduciary duties.[121] The directors were obliged to "faithfully perform their duties" so as not "to use their position and power of office in the company to seek personal gains" and not "to exploit their power of office to accept bribes or other illicit gains" or "to seize the company's property."[122]

The common law fiduciary formulation was arriving just as the 1993 Act was being prepared.[123] Earlier in 1993, nine State-owned enterprises were preparing for listings on the Hong Kong stock exchange. To appease the overseas investors' skepticism toward their governance structure, the PRC Commission for Restructuring of the Economic System (CRES) issued a letter to the Hong Kong Securities and Futures Commission clarifying that the obligation of honesty (誠心責任) held to be owed by the PRC joint-stock company in an earlier official statement had "the same type of meaning as a *fiduciary duty* under Hong Kong law."[124] When the 1993 Act was promulgated, CRES issued a regulatory addendum reiterating that directors and senior management of PRC-domiciled issuers with overseas listings owe the same obligation of honesty, and thus seeking to assure investors that Hong Kong's fiduciary duty jurisprudence is applicable.

In 2002, the China Securities Regulatory Commission and State Economy and Trade Commission jointly promulgated the Code of Corporate Governance for Listed Companies. The Code contained provisions incorporating Delaware-style corporate fiduciary duties of care, loyalty, and good faith. The listed companies were required to implement corporate governance through committees, and the majority

[119] *U.S. Businesses Reconsider 'Shareholder Primacy': Declares to Give Due Regard to Employees*, Nikkei Shimbun (Aug. 20, 2019).
[120] Shen Wei, Corporate Law in China: Structure, Governance and Regulation 253–54 (2015).
[121] Nicholas C. Howson, *Fiduciary Principles in Chinese Law*, *in* Criddle et al., *supra* note 2, at 603, 606–07.
[122] Chinese Company Act § 59 (1993).
[123] For background, *see* Donald, *supra* note 57, at 241–44.
[124] Howson, *supra* note 121, at 608 (quoting CRES' 1992 Opinions on Standards for Companies Limited by Shares, and 1993 letter).

of the directors to fill each committee were required to be independent.[125] Since the 1993 Act was also applicable to listed companies, the combined effect was, in Jiangyu Wang's words, that "Anglo-American jurisdictions install independent directors on the board, Germanic-Japanese jurisdictions provide a supervisory board or *kansayaku*, but listed companies in China must have both."[126]

Thus, when the Company Act was overhauled in 2005, the common law-style fiduciary law was a part of the listed companies' obligations. A newly introduced section 148 provided for corporate directors' and officers' "duty of loyalty and duty of care to the company."[127] It was followed by the new section 149, prohibiting the misappropriation of company funds, direct and indirect self-dealing, corporate opportunities and competing businesses, and a list of conflicted transactions that is more detailed than any other corporate legislation under civil law.[128]

The Company Act also contains provisions distinct to China. In addition to abiding by laws and administrative regulations, Chinese companies are exhorted to "observe social morality," "accept supervision by the government and the public, and bear social responsibilities."[129] They must protect the lawful rights and interests of their employees[130] and provide the necessary conditions for the activities of the labor union and Communist Party organizations.[131] These provisions are conspicuous not just for taking a broad conception of corporate constituencies but also for expressing, in Ruskola's words, "the extraordinary moral optimism of the Confucian tradition" that everyone's interests are ultimately expected to harmonize.[132] Insistence on the role of the Party organization in for-profit entities has increased in recent years and has an impact on both domestic and foreign businesses.[133] The Code of Corporate Governance was revised in 2018 to require establishing Party organization within listed corporations and incorporating Party building work into the articles of association of State-owned enterprises.[134]

A similar mixing of civil and common law fiduciary norms with local conditions against an international background can be seen in the field of trust law. Whereas the Chinese Trust Act of 2006 follows the civil law style of trust legislation in Japan, South Korea, and Taiwan, it is the trust services offered from Hong Kong and

[125] China Securities Regulatory Commission and State Economy &Trade Commission, Code of Corporate Governance for Listed Companies §§ 33, 52. The Delaware-style characterization is by Howson, *supra* note 121, at 609.
[126] Jiangyu Wang, *China*, *in* Aronson & Kim, *supra* note 34, at 238, 238.
[127] Chinese Company Act § 148 (2005 amendment), now renumbered § 147.
[128] *Id* § 149 (2005 amendment), now renumbered § 148; Wei, *supra* note 120, at 261.
[129] Chinese Company Act § 5.
[130] *Id* § 17.
[131] *Id* §§ 18, 19.
[132] Ruskola, *supra* note 25, at 1692–93.
[133] Richard McGregor, *How the State Runs Business in China*, The Guardian (July 25, 2019).
[134] China Securities Regulatory Commission, Code of Corporate Governance for Listed Companies 2018 § 5.

Singapore that cater to the demands of wealthy Chinese capitalists.[135] Reflecting their preference for retention of control over trust assets, the Chinese Trust Act gives settlors a strong influence over trust management.[136] Offshore jurisdictions have also reacted to their demands by introducing special trust legislation that allows settlors to reserve various powers over the management of trusts by the trustee.[137] The statute in both Hong Kong and Singapore expressly provides that a trust cannot be declared invalid when the settlor reserves to himself the power of investment and asset management decisions.[138] This development has questioned the basic notion of common law trusts as a fiduciary relationship between the trustee and the beneficiaries, from which the settlor drops out once the trust has been created.[139]

8.4 NATIONAL, REGIONAL, AND TRANSNATIONAL FIDUCIARY ORDERS

The historical account thus far shows that various strands of fiduciary norms interacted to create a dynamic evolution of legal orders across East Asia. They were derived from civil law, American and English common law, and indigenous sources sometimes dating back centuries. The theory of transnational legal ordering provides a framework for evaluating these complex patterns of fiduciary norms' rise and transformation across jurisdictional borders, their normative settlements and institutional underpinnings, and the interactions among various components or subsets of fiduciary norms.[140]

8.4.1 *Mechanisms of Transnational Fiduciary Ordering*

The major driver of the development of a fiduciary order in late nineteenth-century East Asia was modernization through transplantation of the Western legal system and ideas. The efforts made by Japanese lawyers and policymakers to introduce civil law codes and mix them with common law inspiration foreshadowed the dynamic development of the fiduciary order in Taiwan and South Korea. Hong Kong and Singapore adopted the common law tradition as a result of British rule.

The history of colonization in the region was inseparable from modernization. All of the jurisdictions discussed were, apart from Japan, colonized to some extent by

[135] Masayuki Tamaruya, *Japanese Law and the Global Diffusion of Trust and Fiduciary Law*, 103 Iowa L. Rev. 2229, 2230 (2018).
[136] Chinese Trust Act of 2006 § 2.
[137] A prominent example is the STAR trust now incorporated in Cayman Islands Trusts Law, Part VIII, §§ 95-109 (2017 Revision). For background, *see* J. C. Sharman, *Chinese Capital Flows and Offshore Financial Centers*, 25 Pacific Rev. 317 (2012).
[138] Hong Kong Trustee Ordinance s 41X; Singapore Trustees Act s 90(5).
[139] Lionel Smith, *Give the People What They Want? The Onshoring of the Offshore*, 103 Iowa L. Rev. 2156 (2018).
[140] Halliday & Shaffer, *supra* note 3, at 55–63.

Japan and Britain. The United States did not colonize any of the jurisdictions discussed here; however, its economic dominance in later years created a pressure that the policymakers in the receiving jurisdictions found impossible to resist. Nonetheless, the receiving jurisdictions did not just remain passive. After colonial rule ended, East Asian jurisdictions employed different comparative law strategies to achieve economic competitiveness and attract cross-border investment. In the past several decades, the greater presence of Asian wealth within the world economy has begun to affect the evolution of fiduciary norms in the region and beyond.

Legislative imitation and the academic exchange of ideas also contributed to these transformations in fiduciary norms. The early experience in civil law jurisdictions in East Asia suggests that codes travel better than case law, with the code-based duty of care and specific prohibition of conflicted transaction more readily accepted than common law formulation, including duty of loyalty. However, in common law jurisdictions in East Asia under British colonial rule, equity jurisprudence based on English case law was influential along with the legislation modeled after the UK and Commonwealth legislation. Although the divide between civil and common law systems was tangible in earlier years, the interactions between them became more frequent and dynamic in and after the 1990s. Within common law jurisdictions, American and Anglo-Commonwealth approaches had important differences, and vacillation in intellectual leadership between them shaped the trends of fiduciary norms and governance structures across East Asian jurisdictions.

The increasing movement of people, services, and capital across national borders also is a factor driving the transnational development of fiduciary norms in East Asia. This became prominent particularly in the 1990s and onward, with Hong Kong and Singapore spearheading the trend with their quest to be international financial centers. South Korea and Taiwan also carried out corporate governance reforms out of a desire to attract foreign investments.[141] Even in Japan, sensitivities to corporate governance arose with the rise in foreign investors in Japanese capital markets and the concomitant decline in cross-holding among domestic companies.[142]

Finally, regional and global crises have had unpredictable but profound consequences, operating as precipitating conditions of transformative change and bringing about the transnational uptake of fiduciary norms in East Asia. The Asian financial crisis led major Asian jurisdictions to introduce American-style fiduciary norms. The global financial crisis in 2008 provided momentum for the UK-style corporate governance norm to garner wider acceptance in East Asia and across the globe.

[141] *See* Liu, *supra* note 40, at 259 (Taiwan); Chun, *supra* note 72, at 188–90 (South Korea).

[142] Hideaki Miyajima & Fumiaki Kuroki, *The Unwinding of Cross-shareholding in Japan: Causes, Effects, and Implications*, *in* Corporate Governance in Japan: Institutional Change and Organizational Diversity 79, 85 (Masahiko Aoki et al. eds., 2007); Buchanan et al., *supra* note 101, at 126–27.

8.4.2 *Normative Settlement and Institutional Factors*

Transnationalization does not automatically lead to uniformity or the universal enforcement of the law.[143] A conspicuous feature of fiduciary law is that its core notion of loyalty has almost universal appeal as both a moral and a legal principle. This is so even though fiduciary law is often considered common law in origin. Although civil law jurisdictions did not use the terms "fiduciary" or "duty of loyalty" in earlier times, their equivalents could be found in the form of regulation of conflicted transactions by certain categories of entrusted persons. Yet, the different formulations or perceptions of fiduciary norms have created tensions both within the domestic and in cross-border contexts. The indigenous notion of loyalty supposedly overridden by modern fiduciary law would sometimes surface unexpectedly, leading to debates and complications in reform processes.

The ubiquity of a basic concept of fiduciary loyalty may explain the relatively weak presence of institutional bodies that operate transnationally to enhance harmonization and uniformity. This was particularly true until the 1980s. Even when the IMF and the OECD began to operate in the field of corporate governance in the 1990s, their role was more limited than that of, for instance, the Basel Committee in banking regulations[144] or the International Organization of Standardization in industry regulations.[145]

Given this background, at least three factors characterized the evolution of fiduciary law in the region. The first is a change in the pattern of social interactions. Tamar Frankel explained the rise of fiduciary law in terms of the shift in social relations from status-based ones to more particularized and functional relations of reliance, although she carefully noted the danger of overgeneralization.[146] Both in Japan and East Asia, the status-based notion of loyalty held sway for a long time, but gradually lost its grip as the influence of the household abated and corporate dominance declined toward the end of the twentieth century.[147] The greater mobility of the population, both within and across national borders, accelerated the trend in recent years.

Second, fiduciary norms have shifted from rule-based to standard-based forms.[148] This is significant because the shift can facilitate the application and cross-fertilization of such rules across broader subject matters and across different jurisdictions with different social and legal backgrounds. For civil law East Asia, there has

[143] Halliday & Shaffer, *supra* note 137, at 55–58.
[144] Eric Helleiner, *Regulating the Regulators: The Emergence and Limits of the Transnational Financial Legal Order*, *in* Halliday & Shaffer, *supra* note 4, at 231, 235–54.
[145] Tim Büthe, *Institutionalization and Its Consequences: The TLO(s) for Food Safety*, *in* Halliday & Shaffer, *supra* note 4, at 258, 267–69.
[146] Tamar Frankel, *Fiduciary Law*, 71 Cal. L. Rev. 795, 798–801 (1983).
[147] Katsuto Iwai, What Will Become of the Company Henceforth? 354–60 (2008).
[148] *See*, *e.g.*, Louis Kaplow, *Rules versus Standards: An Economic Analysis*, 42 Duke L. Rev. 557 (1992).

been an observable shift from the predominance of individualized rules that regulate various conflicting transactions to a gradual acceptance of the American duty of loyalty across many areas of law. A similar shift from particularized rules to broader principles happened in common law jurisdictions, in which more theorizing of fiduciary law took place toward the end of the twentieth century.[149] These developments may have been affected by the greater acceptance of the unified conception of "fiduciary-like duties" in recent years in European civil law jurisdictions.[150]

Third, a shift in the regulatory approach from the reliance on hard law to a greater use of soft law facilitated a broader reception of fiduciary norms. In the Japanese context, for instance, the ambivalence of the American-style fiduciary governance that emphasized shareholder primacy and court enforcement led to the adoption of an optional approach to corporate governance. The UK Corporate Governance Code and Stewardship Principles proved more attractive because they allowed for a divergence from the standard model. The soft law regulation allowed relevant actors to deviate from the norm, but when pressed to explain the deviation, they often chose to adopt the standard model. This allowed legislators, regulators, exchanges, and sometimes the court to wait for the general acceptance of the norm and then give them binding effect, hardening the intended norms.

Despite these general trends in gradual acceptance, the motivations of domestic policymakers in East Asia often varied from what the overseas proponents of fiduciary regulations intended. At the same time, these regional divergences and gaps could serve as an opportunity to reconsider the prevailing fiduciary norms.[151] For most of the period reviewed earlier, Asian jurisdictions were on the receiving end of the conveyance of fiduciary norms. Despite the rise in its economic power, Japan played, at best, a modest role in promoting legal unification or transnational ordering.[152] Nevertheless, the rise of Asian wealth created an opportunity to reconsider some of the broadly accepted notions of fiduciary models outside Asia. Whether this will lead to positive changes in the cross-border dialogue or offer an alternative that has universal appeal remains to be seen.

8.4.3 *Fiduciary Norms in Distinct Areas of Law*

The discussion so far was mostly concerned with corporate and trust laws. The global and transnational transformation is beginning to influence areas that have

[149] *See* notes 22–24 and accompanying text.
[150] Martin Gelter & Geneviève Helleringer, *Fiduciary Principles in European Civil Law System*, *in* Criddle et al., *supra* note 2, at 583, 585.
[151] *See supra* notes 135–139, and accompanying texts.
[152] Braithwaite & Drahos, *supra* note 4, at 27 ("Japan's influence is remarkably weak.")

been less susceptible to such changes, namely family, guardianship, succession, and nonprofits.[153]

In Japan, over the past few decades, fiduciary rules and "duty of loyalty" provisions were newly introduced in statutes governing pensions,[154] trusts,[155] and nonprofits,[156] as well as professional responsibilities applicable to lawyers.[157] It should be noted that Japanese society is rapidly aging. When the Japanese age-old guardianship system was reformed in 1999,[158] the use of guardianship increased, but abuse also skyrocketed. Beginning in 2010, a broader cohort of the Japanese population is looking to trusts as an alternative to guardianship and wills.[159] Similar social changes in East Asia may portend the broader application of fiduciary norms. The populations in the region are also aging, with Japan closely followed by Hong Kong, Singapore, South Korea, and Taiwan. The Chinese population aged sixty-five years and above will grow from 136.9 million in 2015 to an estimated 348.8 million by 2030.[160]

Another notable change is the realignment of the relationship between the government and civil society. In Japan, criticism of bureaucratic overbearing on charitable institutions led to the overhaul of nonprofit legislation in 2006.[161] Broadly in East and South East Asia, there has been a tide of nongovernmental organizations (NGOs) mushrooming in policy areas such as environmental protection, human rights, and women's rights since the 1990s and onward, although the relationship between the State and civil society has remained complex.[162] Civic activities have flourished in post-military regimes in South Korea and Taiwan, and China also introduced new charity legislation in 2016.[163] The vitality of Hong Kong's civil society manifested itself in recent

[153] Otto Kahn-Freund, *On Uses and Misuses of Comparative Law*, 37 Modern L. Rev. 1, 16–17 (1974).

[154] Defined Contribution Pension Plans Act, Law No. 88 of 2001, §§ 43, 44; Defined Benefit Corporate Pension Plans Act, No. 50 of 2001, §§ 69–72.

[155] Trust Act, Law No. 108 of 2006, §§ 29–32.

[156] General Association and General Foundation Act, Law No. 48 of 2006 §§ 83–84; Social Welfare Act, Law No. 45 of 1951, §§ 45-16, inserted by Law No. 21 of 2016.

[157] Japan Bar Association, Code of Professional Responsibilities §§ 27, 28, 42, 63–68 (2004).

[158] Consensual Guardianship Contract Act, Law No. 150 of 1999; Civil Code §§ 838–876-10, amended by Law No. 149 of 1999.

[159] Masayuki Tamaruya, *Japanese Wealth Management and the Transformation of the Law of Trusts and Succession*, 33 Tr. L. Int'l 147, 147–48 (2020).

[160] Wang He et al., The Aging World 2015 3–11 (US Census Bureau, March 2016); Mitsuru Obe, *Asia's Worst Aging Fears Begin to Come True*, Nikkei Asian Review (Apr. 9, 2019).

[161] Masayuki Tamaruya, *Fiduciary Law and Japanese Nonprofits: A Historical and Comparative Synthesis*, *in* Firm Governance: The Anatomy of Fiduciary Obligations in Business 261 (Arthur Laby & Jacob Russell eds., 2021).

[162] Lei Xie and Joshua Garland, *NGOs in East and Southeast Asia*, *in* Routledge Handbook of NGOs and International Relations 463, 644 (Thomas Davies ed., 2019).

[163] Charity Law of the People's Republic of China, The National People's Congress Chairman's Order 12th Congress No. 43.

years, although it suffered a setback from the crackdown by Beijing in 2020.[164] Hong Kong has operated without a charity commission, and a reform proposal to introduce one had failed in 2013.[165] In Singapore, charities have long been neglected, but recent years have seen greater interest in part because of the rise in philanthropic momentum, and in part owing to some publicized scandals implicating major charities.[166]

At a more conceptual level, there has been a greater appreciation of the trust and its equivalents in civil law jurisdictions around the turn of the last century.[167] Comparative inquiries into both common and civil law jurisdictions have shown that trusts can be understood as constituting a part of organizational law enabling asset partitioning and fiduciary governance.[168] Although some European jurisdictions have been slow to introduce trusts in noncommercial settings, the East Asian experience can complement academic inquiries in Europe by indicating that trusts can be used as an alternative to guardianship and testamentary instruments.[169] All this opens up the possibility of recursive development of fiduciary norms across civil law and common law jurisdictions and across various problem areas in which a person entrusted with certain properties or powers is under an obligation to act solely in the interests of the beneficiary and to avoid, or at least manage, any conflicts of interest.

8.5 CONCLUSION

In her 2014 article exploring the possibility of universal fiduciary principles, Tamar Frankel sought to bridge differences between the common law and civil law jurisdictions.[170] Although evolution is not yet complete, the East Asian example suggests that fiduciary norms may gradually settle upon certain standards that cut across the divide between common law and civil law. In evaluating the degree of settlement (or lack thereof), the theory of transnational legal ordering provides a

[164] Law of the People's Republic of China on Safeguarding National Security in the Hong Kong Special Administrative Region (June 30, 2020).
[165] The Law Reform Commission of Hong Kong, Report: Charities (Dec. 2013).
[166] Rachel P. S. Leow, *Four Misconceptions about Charity Law in Singapore*, Singapore J. L. Stud. 37–54 (2012).
[167] Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. Rev. 434 (1998); Commercial Trusts in European Private Law (Michele Graziadei et al. eds., 2005).
[168] Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 Yale L.J. 387 (2000); Robert H. Sitkoff, *Trust Law as Fiduciary Governance Plus Asset Partitioning*, *in* The Worlds of the Trust 428 (Lionel Smith ed., 2013).
[169] *See* David J. Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More than Just a Will Substitute*, 24 Elder L.J. 1 (2016); Passing Wealth on Death (Alexandra Braun et al. eds., 2016).
[170] Tamar Frankel, *Toward Universal Fiduciary Principles*, 39 Queen's LJ 391, 432–35 (2014).

useful analytical framework for the detailed understanding and nuanced explanation of the evolution of fiduciary law across jurisdictional borders.

Fiduciary law's development in East Asia, which spans more than a century, provides a particularly rich field for exploring processes of transnational legal ordering. The historical development of East Asian fiduciary law contains certain unique features. The conspicuous role of national law set fiduciary law apart from other examples of transnational legal ordering.[171] Indigenous loyalty norms have uniquely worked with local conditions, as they facilitated the transnational settlement of fiduciary norms, but at the same time created tensions implicating modern reform debates and implementation of reforms. To the extent that the theory of transnational legal ordering has been shown to provide a valuable framework of analysis for this area of law that is historically unique, dynamically changing, and attracting attention worldwide, this chapter has confirmed its validity and broad application.

[171] Thilo Kuntz, *Transnational Fiduciary Law: Spaces and Elements*, 5 U.C. Irvine J. Int'l Transnat'l & Comp. L. 45, 64–66 (2020).

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9

Transnational Migration of Laws and Norms in Corporate Governance

Fiduciary Duties and Corporate Codes

Jennifer G. Hill[*]

9.1 INTRODUCTION

Transnational law is a far-from-settled concept.[1] There is uncertainty as to what the term actually means,[2] and how it differs from other concepts,[3] such as national legal ordering or global law.[4] For early theorists in the field, the essence of transnational law was its role in regulating conduct or events that crossed national boundaries.[5] More recent scholarship, however, has focused not on *what* is being regulated,[6] but rather on *how* laws and norms are transmitted between supranational and local

[*] Thanks go to all the participants in a symposium on Transnational Fiduciary Law at the University of California Irvine. I benefited immensely from everyone's comments and contributions at this symposium. I would also like to thank Tim Bowley, Cally Jordan, and Iain MacNeil for helpful comments and Mitheran Selvendran and Alana Komesaroff for excellent research assistance. Finally, I am grateful to Monash University for providing funding for this research under a Networks of Excellence (NoE) Research Grant on "Enhancing Corporate Accountability."

1 *See, e.g.*, Ralf Michaels, *State Law as a Transnational Legal Order*, 1 U.C. IRVINE J. INT'L, TRANSNAT'L & COMP. L. 141, 143 (2016) (describing transnational law as "vague" and outlining different possible meanings of transnational law). *See also* Peer Zumbansen, *Can Transnational Law be Critical? Reflections on a Contested Idea, Field and Method*, *in* RESEARCH HANDBOOK ON CRITICAL LEGAL THEORY 473, 478 (Emilios Christodoulidis et al. eds., 2019).

2 *See* Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 ANN. REV. L. & SOC. SCI. 231, 232 (2016) (noting that references to transnational law or legal ordering are often vague, resulting in academic literature becoming "a jungle without a map").

3 *See generally* Michaels, *supra* note 1; Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* TRANSNATIONAL LEGAL ORDERS 3, 3–4, 11*ff* (Terence C. Halliday & Gregory Shaffer eds., 2015).

4 *See, e.g.*, Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW. & CONTEMP. PROBS. 15, 15 (2005).

5 PHILIP C. JESSUP, TRANSNATIONAL LAW 2 (1956).

6 *See, e.g.*, Shaffer, *supra* note 2, at 232.

levels.[7] Nonetheless, a common theme underpinning most conceptions of transnational law is that it involves social problems and solutions that transcend any individual state,[8] and that, as a result, "[l]aw can no longer be viewed through a purely national lens."[9]

Corporate governance, with its array of public and private actors,[10] fits naturally within the concept of transnational law.[11] Financial markets today are global and interconnected,[12] and transnational law provides a valuable framework for examining a range of contemporary corporate governance issues. Although capital market structures across jurisdictions vary significantly,[13] globalization increases the risk of similar or shared problems, which can be exacerbated via contagion across financial markets.[14] In this environment, the corporation has taken on a greater societal role.[15] Indeed, according to The British Academy's influential *Future of the Corporation* project, the main purpose of business today is "to solve the problems of people and planet profitably."[16]

A spate of corporate law scandals and crises in recent decades has highlighted the transnational nature of contemporary corporate governance. At the beginning of the twenty-first century, scandals, including Enron and WorldCom in the United

[7] *See, e.g.*, Halliday & Shaffer, *supra* note 3, at 3; Shaffer, *supra* note 2, at 237; Michaels, *supra* note 1, at 144–47.

[8] However, according to Halliday and Shaffer, the nation-state remains a central feature of lawmaking, and therefore transnational law and state law are closely connected. *See* Halliday & Shaffer, *supra* note 3, at 13. *See also* Michaels, *supra* note 1, at 147. Major shifts can occur in the political balance between transnational and national legal orders. *See, e.g.*, Zumbansen, *supra* note 1, at 473.

[9] Halliday & Shaffer, *supra* note 3, at 63.

[10] *See generally* Dionysia Katelouzou & Peer Zumbansen, *The New Geographies of Corporate Governance*, 42 U. Pa. J. Int'l L. 51 (2020).

[11] *Id.* at 69–70 (referring to the "distinctly *transnational*, *hybrid* formation processes of corporate governance in globalized financial markets").

[12] *See, e.g.*, World Economic Forum, The Financial Development Report 2009, xi (2010); Int'l Org. Sec. Comm'n (IOSCO), *Remarks by David Wright, Secretary General of IOSCO, The Atlantic Council, Washington, DC*, Dec. 10, 2012, 5, https://www.iosco.org/library/speeches/pdf/20121210-Wright-David.pdf (accessed June 14, 2022).

[13] Capital market structure lies across a spectrum, from concentrated ownership to less concentrated ownership, with differing levels of institutional investment. *See, e.g.*, OECD, OECD Corporate Governance Factbook 2021 24–26 (2021), https://www.oecd.org/corporate/Corporate-Governance-Factbook.pdf (accessed June 14, 2022); Dan W. Puchniak, *The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense out of the Global Transplant of a Legal Misfit*, Am. J. Comp. L. (forthcoming); OECD, Owners of the World's Listed Companies Annex, Table A.4 (2019), https://www.oecd.org/corporate/ca/Owners-of-the-Worlds-Listed-Companies.pdf (accessed June 14, 2022).

[14] *See, e.g.*, *supra* note 12.

[15] *See, e.g.*, Jennifer G. Hill, *Corporations, Directors' Duties and the Public/Private Divide*, *in* Fiduciary Obligations in Business 285 (Arthur B. Laby & Jacob Hale Russell eds., 2021); Katelouzou & Zumbansen, *supra* note 10.

[16] *See* The British Acad., Policy & Practice for Purposeful Business: The Final Report of the Future of the Corporation Programme, 48 (2021) (UK).

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States,[17] occurred around the world.[18] Although these scandals appeared in multiple jurisdictions, they were arguably isolated events with different origins and motivations.[19] The same cannot be said of the 2007–09 global financial crisis, which exemplified the risk of contagion across interconnected financial markets.[20] This risk is again apparent in the continuing economic fallout from the COVID-19 crisis.[21]

Not only can corporate governance problems transcend national boundaries, so too can their solutions, which often involve regulatory efforts at both a national and transnational level.[22] Discerning the causes of these crises is rarely an easy feat, yet the framing of the underlying problems can be critical to the particular legal solutions adopted.[23]

Corporate governance today is highly fragmented; it has been described as "a braided framework encompassing legal and non-legal elements."[24] These elements operate to "constrain and enable" the behavior of key corporate players, which is an

[17] *See, e.g.*, Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. Chi. L. Rev. 1233 (2002); John C. Coffee, *What Caused Enron?: A Capsule Social and Economic History of the 1990s*, 89 Cornell L. Rev. 269 (2004).

[18] *See generally* Jennifer G. Hill, *Regulatory Responses to Global Corporate Scandals*, 23 Wis. Int'l L.J. 367 (2005).

[19] *See* John C. Coffee, *A Theory of Corporate Scandals: Why the US and Europe Differ*, 21 Ox. Rev. Econ. Pol. 198 (2005).

[20] *See* World Economic Forum, *supra* note 12.

[21] *See, e.g.*, Panel 1, Monash University: *The Differential Health, Economic and Financial Effects of the COVID-19 Crisis*, European Corporate Governance Institute (ECGI) and Global Corporate Governance Colloquia (GCGC), *The COVID-19 Crisis and Its Aftermath: Corporate Governance Implications and Policy Challenges*, 24 Hour Global Webinar (Apr. 16, 2020), https://ecgi.global/content/covid-19-crisis-and-its-aftermath-corporate-governance-implications-and-policy-challenges (accessed June 14, 2022) (comparing and contrasting the impact of the global financial crisis with the likely economic impact of the COVID-19 crisis).

[22] *See* Luca Enriques, *Regulators' Response to the Current Crisis and the Upcoming Reregulation of Financial Markets: One Reluctant Regulator's View*, 30 U. PA. J. Int'l L. 1147 (2009). The quest for financial stability in the wake of the global financial crisis is a classic example of how the legalization of social orders increasingly occurs at a transnational level. Halliday & Shaffer, *supra* note 3, at 3.

[23] *See* Halliday & Shaffer, *supra* note 3, at 7–8. There were multiple possible explanations for the collapse of Enron and the global financial crisis, which resulted in different regulatory responses to these crises. *See generally* Coffee, *supra* note 17; Hill, *supra* note 18; Eilis Ferran et al., The Regulatory Aftermath of the Global Financial Crisis (2012).

[24] Ronald J. Gilson, *From Corporate Law to Corporate Governance*, *in* The Oxford Handbook of Corporate Law and Governance 3, 6 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018). *See also* Mariana Pargendler, *The Rise of International Corporate Law*, 98 Wash. U. L. Rev. 1765, 1818 (2021) (describing international corporate law as "not monolithic, but fragmented, diverse, highly networked, and dynamic"); Tim Bowley & Jennifer G. Hill, *The Global ESG Stewardship Ecosystem* (2022) (unpublished manuscript) (on file with the authors); Elizabeth Pollman, *Corporate Social Responsibility, ESG, and Compliance*, in Cambridge Handbook of Compliance 662 (D. Daniel Sokol &

important aspect of transnational legal orders.[25] This chapter explores, from a transnational perspective, the transmission of laws and norms that constrain directors' conduct and enhance corporate accountability,[26] focusing on two key examples of such accountability mechanisms – fiduciary duties and corporate codes. The chapter begins with a comparative and historical examination of directors' fiduciary duties in the United States, the United Kingdom, and Australia. It analyzes whether the transfer of fiduciary law to these common law jurisdictions has resulted in a unified approach to directors' duties, as is often assumed by studies such as the *law matters* hypothesis.[27] The chapter then moves on to discuss the modern phenomenon of national corporate codes, which originated in the United Kingdom in the early 1990s. The chapter considers the global transmission of these codes and their role as "norm creators." It also assesses the transmission of these laws and norms against the backdrop of convergence and path dependence theories in corporate governance.

9.2 TRANSMISSION OF LAW THROUGH LEGAL TRANSPLANTATION AND IMITATION: UNCOMMON COMMON LAW APPROACHES TO DIRECTORS' FIDUCIARY DUTIES

Fiduciary duties constitute one of the most important legal mechanisms for constraining the conduct of company directors. The law of fiduciary duties was, from a historical perspective, a distinctly national affair.[28] The classification of company directors as "fiduciaries" represented a central pillar of early British law, developing by analogy to trustees and agents,[29] who were considered archetypal fiduciaries.[30] The famous 1742 UK decision, *Charitable Corp v. Sutton* ("Sutton's case"),[31] laid the groundwork for modern directors' duties, with Lord Hardwicke LC stating that

Benjamin van Rooij eds., 2021); Wolf-Georg Ringe, *Investor-Led Sustainability in Corporate Governance* (Working Paper, Nov. 2021).

[25] *See* Halliday & Shaffer, *supra* note 3, 5.

[26] *See* John Armour et al., *Agency Problems and Legal Strategies*, *in* THE ANATOMY OF CORPORATE LAW: A COMPARATIVE AND FUNCTIONAL APPROACH 29 (Kraakman et al. eds., 3d ed. 2017).

[27] *See generally* Rafael La Porta et al., *Law and Finance*, 106 J. POL. ECON. 1113 (1998); Rafael La Porta et al., *Corporate Ownership Around the World*, 54 J. FIN. 471 (1999).

[28] *See generally* Jennifer G. Hill & Matthew Conaglen, *Directors' Duties and Legal Safe Harbours: A Comparative Analysis*, *in* RESEARCH HANDBOOK ON FIDUCIARY LAW 305, 306–07 (D. Gordon Smith & Andrew S. Gold eds., 2018). *See also* Halliday & Shaffer, *supra* note 3, at 3.

[29] *See* Deborah A. DeMott, *Fiduciary Principles in Agency Law*, *in* FIDUCIARY PRINCIPLES IN AGENCY LAW 23, 23–24 (Evan J. Criddle et al. eds., 2018).

[30] *See* Hosp. Prods Ltd v. US Surgical Corp. (1984) 156 CLR 41, 68 (Austl.).

[31] Charitable Corporation v. Sutton (1742) 2 Atk. 400 (UK).

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directors were bound to execute their responsibilities with "fidelity and reasonable diligence."[32]

There are strong similarities in the approach to directors' fiduciary duties across common law jurisdictions, such as the United Kingdom, the United States and Australia.[33] This is hardly surprising, given the United Kingdom's colonial past.[34] The similarities are often clear historical examples of legal transplantation[35] of British law to other common law jurisdictions.[36] In Delaware, the most important US state for the purposes of corporate law,[37] directors' duties of loyalty and care today are the direct descendants of Lord Hardwicke's description of eighteenth-century British directors' responsibilities.[38]

Similarities between common law jurisdictions were an important aspect of La Porta et al.'s influential *law matters* hypothesis, promulgated over two decades ago.[39] This hypothesis had significant implications for the "settlement and unsettlement of legal norms"[40] within a transnational legal ordering framework. The hypothesis claimed that investor legal protection is directly linked to a jurisdiction's financial development,[41] and predicted that jurisdictions with superior investor protection would develop deep dispersed capital market structures, such as those in the United States and the United Kingdom.[42] "Legal origins" played a central role in the hypothesis, since the study concluded that common law jurisdictions within the British "legal family"[43] provided stronger investor protection than civil law jurisdictions.[44] One feature of the common law system that the study viewed as

[32] *Id.* at 406. *See also* Joseph W. Bishop Jr., *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1096–97 (1968).

[33] These similarities also extend to a number of common law jurisdictions in Asia, such as Singapore, Hong Kong, Malaysia, and India.

[34] *See, e.g.*, Umakanth Varottil, *The Evolution of Corporate Law in Post-Colonial India: From Transplant to Autochthony*, 31 AM. U. INT'L L. REV. 253, 258 (2016) (noting Indian corporate law's colonial roots).

[35] *See generally* David Cabrelli & Matthias Siems, *Convergence, Legal Origins, and Transplants in Comparative Corporate Law: A Case-Based and Quantitative Analysis*, 63 AM. J. COMP. L. 109 (2015).

[36] *See* Rafael La Porta et al., *The Economic Consequences of Legal Origins*, 46 J. ECON. LIT. 285, 286 (2008) (arguing that, historically, legal traditions were spread around the globe primarily by conquest and colonization).

[37] *See generally* Michal Barzuza, *Market Segmentation: The Rise of Nevada as a Liability-Free Jurisdiction*, 98 VA. L. REV. 935, 939 (2012).

[38] *See generally* Randy J. Holland, *Delaware Directors' Fiduciary Duties: The Focus on Loyalty*, 11 U. PA. J. BUS. L. 675, 680–81 (2009). Australia also took its lead from the United Kingdom with regard to corporate law, including directors' duties. *See, e.g.*, Rosemary Teele Langford et al., *The Origins of Company Directors' Statutory Duty of Care*, 37 SYD. L. REV. 489, 507–08 (2015).

[39] *See supra* note 27.

[40] Halliday & Shaffer, *supra* note 3, at 5.

[41] La Porta et al., *supra* note 36.

[42] *See, e.g.*, OECD, OECD CORPORATE GOVERNANCE FACTBOOK, *supra* note 13.

[43] La Porta et al., *supra* note 27, at 1119.

[44] *See* David A. Skeel, Jr., *Corporate Anatomy Lessons*, 113 YALE L.J. 1519, 1544–45 (2004).

particularly advantageous was the central role of independent judges, who rely on legal reasoning to decide cases.[45] Judicial reasoning is a central feature of the development of fiduciary law.

The *law matters* hypothesis contributed to a major debate in comparative corporate governance as to whether corporate law regimes would converge[46] or whether, as path dependence theorists argued, legal differences around the world would persist.[47] The *law matters* hypothesis provided powerful support for convergence theory,[48] since it assumed that jurisdictions with substandard legal rules would follow the siren song of economic efficiency and adopt superior rules by means of voluntary imitation.[49]

The *law matters* hypothesis proved to be extraordinarily influential in defining a set of problems and their solutions.[50] It also had real-world consequences in terms of changes to legal rules and norms. On the premise that good corporate governance can improve national economic performance, major international organizations, such as the Organisation for Economic Co-operation and Development ("OECD"), developed model corporate governance rules for ready international transplantation.[51] The World Bank also adopted the methodology of the *law matters* study, applying it to a number of working papers, including the bank's *Doing Business* reports.[52] These supranational organizations sometimes required corporate governance reforms as a condition of financial assistance.[53]

[45] *See generally* Cabrelli & Siems, *supra* note 35, at 118–20.

[46] *See, e.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 Geo. L.J. 439, 468 (2001) (famously stating "[t]he triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured").

[47] *See generally* Convergence and Persistence in Corporate Governance (Jeffrey N. Gordon & Mark J. Roe eds., 2004).

[48] For an overview of convergence theory and the convergence-divergence debate, *see generally id.*; Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, *in* The Oxford Handbook of Corporate Law and Governance 28 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018).

[49] *See* Jennifer G. Hill, *The Persistent Debate About Convergence in Comparative Corporate Governance*, 27 Syd. L. Rev. 743, 744 (2005).

[50] *See* Stijn Claessens & Burcin Yurtoglu, *Corporate Governance and Development – An Update*, 10 Global Corporate Governance Forum Focus 1, 11 (2012); Cally Jordan, *The Conundrum of Corporate Governance*, 30 Brook. J. Int'l L. 983 (2005); Steve Kaplan & Luigi Zingales, *How "Law and Finance" Transformed Scholarship, Debate*, Chi. Booth Rev. (Mar. 5, 2014), https://review.chicagobooth.edu/magazine/spring-2014/how-law-and-finance-transformed-scholarship-debate (accessed June 14, 2022).

[51] *See, e.g.*, Org. for Econ. Co-operation and Dev., G20/OECD Principles of Corporate Governance 3 (2015); Jordan, *supra* note 50, at 986, n. 5. *Cf.* Amir N. Licht, *Legal Plug-Ins: Cultural Distance, Cross-Listing, and Corporate Governance Reform*, 22 Berkeley J. Int'l L. 195, 196 (2004) (arguing that, in the "long and checkered" history of legal transplantation, "direct transplantation efforts were largely futile in generating Western-like economic growth").

[52] *See* Cabrelli & Siems, *supra* note 35, at 120.

[53] *See* Gilson, *supra* note 24, at 5; Timothy Lane et al., *IMF-Supported Programs in Indonesia, Korea, and Thailand*, 178 Int'l Monetary Fund Occasional Paper 1, 72–73 (1999); John

In spite of its influence, the *law matters* hypothesis attracted widespread academic criticism.[54] Much of the censure related to the study's Manichean divide between common law and civil law systems.[55] Another, albeit less prominent, criticism was that the hypothesis overstated the similarities within the common law world.[56]

Although it is often assumed that there is a unified common law approach to fiduciary duties, there are, in fact, significant granular differences at a national level, which, in accordance with transnational legal theory, is also reflected in actual legal practice at the local level. These differences across common law jurisdictions illustrate how supposedly shared laws and norms can diverge in their operation across jurisdictions and over time.[57]

For example, although US corporate law descended from English company law, each legal system had a different organizational starting point.[58] These different starting points radically altered UK and US corporate law trajectories. Modern UK company law derives from the unincorporated joint-stock company, which was a quintessentially private body, with strong contractual elements.[59] US corporate law, on the other hand, developed from a very different type of organization, the British royal chartered corporation, which had strong quasi-public roots and strict mandatory rules limiting directors' actions.[60] The effect of these different organizational

M. Broder, *Asia Pacific Talks Vow Tough Action on Economic Crisis*, N.Y. Times, Nov. 26, 1997, at A1.

[54] *See* Claessens & Yurtoglu, *supra* note 50, at 12. This included criticism of the study's methodology. *See, e.g.*, Holger Spamann, *The "Antidirector Rights Index" Revisited*, 23 Fin. Stud. 467 (2010). La Porta et al. responded to methodological criticism of their original study in several later papers. *See* Cabrelli & Siems, *supra* note 35, at 123.

[55] *See, e.g.*, Skeel, *supra* note 44, at 1546; Katharina Pistor et al., *The Evolution of Corporate Law: A Cross-Country Comparison*, 23 U. Pa. J. Int'l Econ. L. 791, 799 n.27 (2002); Cabrelli & Siems, *supra* note 35, at 117–18; Jordan, *supra* note 50, at 1005, nn. 66–68. *See also* Martin Gelter & Geneviève Helleringer, *Fiduciary Principles in European Civil Law Jurisdictions*, *in* The Oxford Handbook of Fiduciary Law 583 (Evan J. Criddle et al. eds., 2019). In the East Asian civil law context, *see* Zenichi Shishido, *Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions*, 25 Del. J. Corp. L. 189 (2000).

[56] *See, e.g.*, Ruth V. Aguilera et al., *Corporate Governance and Social Responsibility: A Comparative Analysis of the U.K. and U.S.*, 14 Corp. Governance: An Int'l Rev. 147, 147–48 (2006); Steven Toms & Mike Wright, *Divergence and Convergence within Anglo-American Corporate Governance Systems: Evidence from the US and UK, 1950–2000*, 47 Bus. Hist. 267, 267–68 (2005).

[57] Jennifer G. Hill, *Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware*, 63 Vand. L. Rev. 1, 8–9 (2010).

[58] *See generally* Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, U. Ill. L. Rev. 507, 541–47 (2019).

[59] *See id.* at 544–47; John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 Colum. L. Rev. 2145, 2157–66 (2016).

[60] *See generally* Hill, *supra* note 58, at 541–44; L. C. B. Gower, *Some Contrasts between British and American Corporation Law*, 69 Harv. L. Rev. 1369, 1370–72 (1956). British royal chartered companies reflected the theory that the corporate form was a body, approved by the state to act in "the national interest." *See* C. A. Cooke, Corporation, Trust and Company: An Essay in Legal History 78 (1950).

starting points – and subsequent backlash against those starting points – affected the scope of directors' discretion and the role of fiduciary duties.[61] Whereas, for instance, early American general incorporation law statutes tightly constrained directors' conduct,[62] this changed in the late nineteenth-century era of competition for corporate charters.[63] It was during this period, that Delaware substituted the corporation, rather than the state, as primary "law-maker,"[64] resulting in a new vision of US corporate law as inherently "enabling."[65]

Another difference across common jurisdictions relates to the sources of modern directors' duties. In Delaware, directors' fiduciary duties, true to their historical roots, are purely equitable.[66] There has been a shift, however, under modern UK and Australian law toward statutory directors' duties.[67] UK directors' statutory duties, which were introduced in 2006,[68] eradicate and replace common law and equitable duties,[69] whereas Australia's statutory duties[70] operate in addition to the general law.[71]

The jurisdictions also adopt different approaches as to which directors' duties should, and should not, be classified as "fiduciary." US corporate law tends to regard all directors' duties, including the duty of care, as fiduciary in nature; however, UK and Australian courts only characterize proscriptive duties (or duties requiring "self-denial")[72] as fiduciary.[73] The jurisdictions differ too on the extent to which stakeholder interests are implicated in directors' duties. Whereas Delaware and Australia have traditionally adopted a shareholder-centred approach to directors' duties, the United Kingdom now applies an "enlightened shareholder value"[74] approach to corporate governance, which requires directors to consider the interests of a wide range of stakeholders when making business decisions.[75] India, another common

[61] *See generally* Hill, *supra* note 58, at 541–61.
[62] *See* Morley, *supra* note 59, at 2163.
[63] *See generally* Charles M. Yablon, *The Historical Race – Competition for Corporate Charters and the Rise and Decline of New Jersey: 1880–1910*, 32 J. Corp. L. 323 (2007).
[64] Joel Seligman, *A Brief History of Delaware's General Corporation Law of 1899*, 1 Del. J. Corp. L. 249, 258, 273 (1976).
[65] Hill, *supra* note 58, at 549–53.
[66] *See generally* Holland, *supra* note 38, at 678.
[67] *See generally* Hill & Conaglen, *supra* note 28, at 309–12.
[68] *See* Companies Act, 2006 c. 46, pt. 10 c. 2 (UK).
[69] *See* Companies Act, 2006 c. 46, § 170(4) (UK).
[70] *See* Corporations Act, 2001, §§ 180–84 (Austl.).
[71] *See* G. F. K. Santow, *Codification of Directors' Duties*, 73 Austl. L.J. 336 (1999).
[72] Gelter & Helleringer, *supra* note 55, at 583.
[73] *See generally* Hill & Conaglen, *supra* note 28, at 307–08.
[74] *See* Companies Act, 2006 c. 46, § 172 (UK).
[75] In spite of this apparently "public" focus in § 172(1), the duty remains firmly shareholder-oriented in practice, because the UK statutory directors' duties are owed to the company, and enforceable only by the company, or its shareholders in derivative suit. *See* Companies Act, 2006 c. 46, § 170(1) (UK); Virginia Harper Ho, *Enlightened Shareholder Value: Corporate Governance Beyond the Shareholder–Stakeholder Divide*, 36 J. Corp. L. 59, 79 (2010).

law jurisdiction, goes even further in this regard, adopting a "pluralist approach" that recognizes the interests of both stakeholders and shareholders, "without necessarily indicating a preference to either."[76]

The stringency of fiduciary duties is affected by the scope of certain safe harbors available to directors.[77] A disparity across jurisdictions in this regard is particularly evident in the context of the duty of care.[78] In Delaware, for example, directors receive a high level of protection against monetary liability for breach of the duty of care as a result of the generous US business judgment rule.[79] Even gross negligence will not generally attract liability,[80] given the operation of Del GCL § 102(b)(7), which expressly authorizes the inclusion of exculpation clauses in corporate charters.[81] It also seems that the bedrock of Delaware fiduciary law,[82] the duty of loyalty, can itself now be waived in some circumstances.[83] The same is certainly not true of the UK and Australian legal regimes, which offer far less protection to directors for breach of their duties.[84]

Enforcement of directors' duties is another important way in which these jurisdictions differ from one another. Although private enforcement is the norm in the United States and the United Kingdom,[85] Australian corporate law relies predominantly on a public enforcement regime, whereby the business regulator, the Australian Securities and Investments Commission ("ASIC"), is responsible for enforcing statutory directors' duties. It appears that this mode of enforcement has also affected the substance of directors' duties in Australia, shifting them from the realm of private duties to public duties.[86]

[76] *See* Companies Act, 2013, § 166(2) (India); Varottil, *supra* note 34, at 315.
[77] *See generally* Hill & Conaglen, *supra* note 28.
[78] *See, e.g.*, Julian Velasco, *The Role of Aspiration in Corporate Fiduciary Duties*, 54 Wm. & Mary L. Rev. 519 (2012).
[79] *See, e.g.*, Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984); Gagliardi v. Trifoods International, Inc., 683 A.2d 1049, 1052–53 (Del. Ch. 1996).
[80] *See, e.g.*, Malpiede v. Townson, 780 A.2d 1075 (Del. 2001).
[81] The breadth of protection for breach of the duty of care has attracted criticism in recent times. *See, e.g.*, John Armour & Jeffrey N. Gordon, *Systemic Harms and Shareholder Value*, 6 J. Legal Analysis 35 (2014); Holger Spamann, *Monetary Liability for Breach of the Duty of Care?*, 8 J. Legal Analysis 337, 339 (2016).
[82] *See* Holland, *supra* note 38, at 687.
[83] *See* Del. Code tit. 8, § 122(17); Gabriel Rauterberg & Eric Talley, *Contracting Out of the Fiduciary Duty of Loyalty: An Empirical Analysis of Corporate Opportunity Waivers*, 117 Colum. L. Rev. 1075 (2017).
[84] *See* Hill & Conaglen, *supra* note 28, at 326–29.
[85] The United Kingdom does, however, include some aspects of public enforcement. *See* John Armour et al., *Private Enforcement of Corporate Law: An Empirical Comparison of the United Kingdom and the United States*, 6 J. Empirical Legal Stud. 687, 716–17 (2009). The United Kingdom is a considerably less hospitable jurisdiction for private corporate litigation than Delaware as a result of a number of key procedural differences between the two jurisdictions. *See id.* at 692–96.
[86] *See* ASIC v. Cassimatis [No 8] [2016] FCA 1023, [455], [461], [503] (Austl.); Cassimatis v. ASIC [2020] FCAFC 52, [27], [240] (Austl.). *See generally* Hill, *supra* note 15, at 297;

These differences relating to fiduciary duties in jurisdictions that share a common law heritage sit uneasily with the *law matters* hypothesis. Furthermore, the kind of global convergence in corporate law rules, and the accompanying shift in capital market structure, which was predicted by the *law matters* hypothesis, has not eventuated. Concentrated share ownership has, in fact, increased and continues to be a far more common capital market structure around the world than dispersed ownership.[87]

These fiduciary duty differences are more consistent with a path dependence theory of legal development.[88] Path dependence stresses the importance of historical, political, and social factors in the settling of laws and norms.[89] Each of these factors is important in explaining fiduciary duty differences across common law jurisdictions. Legal change in this area has also often occurred as a result of commercial backlash and strategic responses of regulated parties themselves.[90]

Finally, corporate scandals and crises are prime drivers of legal change. They often result in jurisdictionally tailored regulatory responses,[91] which can differ depending upon the framing of the underlying problem that needs to be addressed.[92] Transmission of law by means of transplantation or voluntary imitation is, therefore, by no means the end of the story. The transmitted law will remain dynamic and continually evolving in local context. This is inevitable, given the possibility of different interpretations of the law at a local level, different priorities concerning policy and enforcement, and the way in which commercial pushback can actually alter the contours of the law.

9.3 THE TRANSNATIONAL IMPACT OF CORPORATE CODES AS NORM CREATORS

The behavior of corporate actors is not only shaped by enforceable national laws. It is also shaped by social norms[93] and governance practices, which may indeed be

Michelle Welsh, *Realising the Public Potential of Corporate Law: Twenty Years of Civil Penalty Enforcement in Australia*, 42 Fed. L. Rev. 217, 223–28 (2014).

87 *See* OECD, OECD Corporate Governance Factbook, *supra* note 13 (classifying only six countries – namely, the United States, the United Kingdom, Australia, Canada, Finland, and Iceland – as having a "least concentrated" ownership structure for listed companies). *See also* Puchniak, *supra* note 13.

88 *See generally* Gordon & Roe, *supra* note 47; Gordon, *supra* note 48.

89 *Id.*

90 *See, e.g.*, David A. Skeel, Jr., *Governance in the Ruins*, 122 Harv. L. Rev. 696, 697 (2008); Curtis J. Milhaupt & Katharina Pistor, Law and Capitalism: What Corporate Crises Reveal about Legal Systems and Economic Development Around the World (2008). For instance, statutory authorization of exculpation clauses in Delaware introduced in response to business community backlash and political pressure, following the decision in Smith v. Van Gorkom, Del.Supr., 488 A.2d. 858 (1985) (US).

91 *See generally* Hill, *supra* note 18; Ferran et al., *supra* note 23.

92 *See* Halliday & Shaffer, *supra* note 3, at 7–8.

93 *See* Matthew Harding, *Fiduciary Law and Social Norms*, *in* Fiduciary Principles in Agency Law, 797, 797 (Evan J. Criddle et al. eds., 2018) (describing social norms as "norms that guide conduct with reference to social expectations").

more important than formal legal rules in affecting the behavior of certain corporate actors, including directors.[94]

Corporate codes can be influential sources of norms that affect directors' behavior.[95] These codes, which provide a sharp contrast with state-made law,[96] have become an important feature of modern corporate governance, and the norms they create are in a state of continuous development.[97] Two types of code are particularly significant in this respect – corporate governance codes ("governance codes") and shareholder stewardship codes ("stewardship codes").

In establishing norms associated with governance procedures and practices, these codes operate in a parallel universe to corporate law. However, they can also interact in complex ways with mandatory corporate law rules, such as fiduciary duties,[98] to drive greater international convergence or divergence. Whereas fiduciary law constitutes an ex post species of regulation, governance codes operate as a form of ex ante self-regulation, which can determine and transmit societal expectations of corporate actors.[99] Such codes can affect the scope of directors' discretion; the balance of power within the corporation; the nature of the directors' obligations; and enforcement mechanisms.

Corporate codes epitomize the movement away from "legal rules standing alone to legal rules interacting with non-legal corporate processes and institutions,"[100] which characterizes modern corporate governance. Furthermore, the lines between formal legal rules and norms can sometimes be blurred and hard to define,[101] and there can be movement in either direction between hard law, comprising enforceable legal rules, and soft law, encompassing norms. For example, the appointment of independent directors on US listed public company boards was a prevalent business norm well before it became mandated under the 2002 reforms following Enron's collapse.[102]

[94] *See generally* John C. Coffee Jr., *Do Norms Matter? A Cross-Country Evaluation*, 149 U. Pa. L. Rev. 2151, 2154*ff* (2001).

[95] *See, e.g.*, Dionysia Katelouzou & Alice Klettner, *Sustainable Finance and Stewardship: Unlocking Stewardship's Sustainability Potential*, *in* Global Shareholder Stewardship 549 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022). Yet, in some respects it seems that stewardship codes may, in fact, be playing catch up with "on the ground" developments in shareholder activism. *See* Tim Bowley & Jennifer G. Hill, *Stewardship Codes, ESG Activism and Transnational Ordering*, *in* Research Handbook on Environmental, Social, and Corporate Governance (Thilo Kuntz ed., 2023).

[96] Katelouzou & Zumbansen, *supra* note 10.

[97] *Id.*

[98] *See* Harding, *supra* note 93, at 797; Katelouzou & Zumbansen, *supra* note 10, at 73–74 (noting that "[a]s codes formulate new modes of accountability, transparency and compliance, doctrinal assessments of corporate and directors' liability . . . change").

[99] *See* Iain MacNeil & Irene-Marie Esser, *The Emergence of "Comply or Explain" as a Global Model for Corporate Governance Codes*, 33 Eur. Bus. L. Rev. 1 (2022).

[100] Gilson, *supra* note 24, at 5.

[101] *See* Coffee, *supra* note 94.

[102] *See* § 301 (3A) Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (2002); N.Y. Stock Exchange, Listed Company Manual, § 303A (2003).

Interesting tensions between hard law and soft law are also apparent at an international level. Many common law jurisdictions – though not the United States – protect certain fundamental shareholder rights by mandatory rules in their corporations legislation.[103] The vision of Delaware corporations law as inherently "enabling"[104] has restricted the level of mandatory rules under US state corporations law.[105] As a result, much of US corporate law is made, not by the state but rather by private ordering by corporate actors.[106] In recent times, institutional investors have sought to use private ordering to transplant numerous mandatory shareholder protection rules, embedded by statute in other common law jurisdictions, into the United States on a company-by-company basis.[107] This US trend demonstrates the use of private ordering by shareholders as a self-help mechanism. It suggests that, in an era of globalized investment, institutional investors have become increasingly aware of comparative legal rights across jurisdictions,[108] and it has effectively rendered the United States an importer, rather than exporter, of corporate law.[109] The trend also represents a challenge to transnational law assumptions about the meaning of "globalized business interests,"[110] since it highlights the fact that there is a power struggle in this regard between formidable global institutional investors and US boards of directors.[111]

Corporate codes have been responsible for the global transplantation of norms over the last few decades. Governance codes can be traced back to the influential 1992 UK Cadbury Committee Report.[112] Although the concept of "corporate

[103] *See, e.g.*, Hill, *supra* note 57 (discussing how News Corporation's move from Australia to Delaware in 2004 resulted in reduced governance rights for shareholders).

[104] The idea that US corporate law (specifically Delaware law) is "enabling" became an important feature of the nexus of contracts theory of the corporation. *See generally* Lucian Arye Bebchuk, *Foreword: The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989). *See also* Elizabeth Pollman, *Constitutionalizing Corporate Law*, 69 VAND. L. REV. 639, 651 (2016).

[105] *Cf.* Robert B. Thompson, *Why New Corporate Law Arises: Implications for the 21st Century*, *in* THE CORPORATE CONTRACT IN CHANGING TIMES: IS LAW KEEPING UP? 3, 9–11 (Steven Davidoff Solomon & Randall Stuart Thomas eds., 2019) (noting that, after the shift to permissive state laws, US federal law assumed the "mantle of regulation").

[106] *See* Michal Barzuza, *Inefficient Tailoring: The Private Ordering Paradox in Corporate Law*, 8 HARV. BUS. L. REV. 131 (2018) (critiquing the widely held view that private ordering necessarily promotes efficiency).

[107] This private ordering is typically effected by shareholder proposals and bylaw amendment. *See generally* Hill, *supra* note 58, at 524–29 (2019).

[108] *Id.* at 523–24.

[109] *Id.* at 541.

[110] *See* Zumbansen, *supra* note 1, at 473.

[111] This power struggle has resulted in each group seeking to control the content of corporate law rules via "private ordering combat." *See* Hill, *supra* note 58, at 524–36.

[112] *See* SIR ADRIAN CADBURY, REPORT OF THE COMMITTEE ON THE FINANCIAL ASPECTS OF CORPORATE GOVERNANCE (Dec. 1992). For background to the establishment of the Cadbury Committee, *see generally* Brian R. Cheffins, *The Rise of Corporate Governance in the UK: When and Why*, 68 CURRENT LEGAL PROBS. 387, 406–08 (2015). *See*, however,

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governance" had entered the US lexicon during the 1970s,[113] it was not embraced in other common law jurisdictions, such as the United Kingdom and Australia, until the beginning of the 1990s.[114] The Cadbury Committee Report was a major catalyst in its uptake.[115]

The Cadbury Committee's Final Report was accompanied by a *Code of Best Practice*.[116] The famous "comply or explain"[117] aspect of many governance codes was bolstered shortly afterward by an amendment to the London Stock Exchange Listing Rules, requiring all listed companies to include a statement in their annual reports as to whether they fully adhered to the *Code of Best Practice*.[118] Although adherence to the code was not mandatory, any divergence required an explanation. The current version of this code is the 2018 UK Corporate Governance Code.[119]

Since the Cadbury Committee laid down the blueprint for governance codes, their transmission around the world has been remarkable. In 1999, only twenty-four countries were reported to have a national governance code.[120] This number rose to sixty-four by 2008 and to ninety-three by 2015.[121] Almost all of the forty-nine jurisdictions evaluated in a 2019 OECD survey[122] had a national governance code or principles,[123] with 83 percent of those operating on a "comply or explain"

MacNeil & Esser, *supra* note 99 (noting that the "comply or explain" principle from the Cadbury Code is predated by a longer tradition of self-regulation in UK corporate governance).

[113] Cheffins, *supra* note 112, at 389–91.

[114] *See* Brian R. Cheffins, *The History of Corporate Governance*, *in* The Oxford Handbook of Corporate Governance 46, 57 (Douglas Michael Wright et al. eds., 2013); Henry Bosch, *The Changing Face of Corporate Governance*, 25 U.N.S.W. L.J. 270 (2002).

[115] *See* Cheffins, *supra* note 112, at 388. In the Australian context, *see* Bosch, *supra* note 114, at 274; Working Group of the Australian Institute of Company Directors, Corporate Practices and Conduct (1991).

[116] Sir Adrian Cadbury, *supra* note 112.

[117] Interestingly, the Cadbury Committee did not actually use the now-familiar term "comply or explain." *See* Donald Norberg and Terry McNulty, *Creating Better Boards Through Codification: Possibilities and Limitations in UK Corporate Governance, 1992–2010*, 55 Bus. Hist. 348, 362 (2013). For discussion of the concept of "comply or explain" regulation and what is expected in terms of an explanation for divergence from the Principles in the governance code, *see* Fin. Reporting Council, The U.K. Corporate Governance Code 2 (July 2018).

[118] *See* Cheffins, *supra* note 112, at 407; Bosch, *supra* note 114, at 274.

[119] *See* Fin. Reporting Council, *supra* note 117. *See also* Brian R. Cheffins & Bobby V. Reddy, *Thirty Years and Done – Time to Abolish the UK Corporate Governance Code* (Working Paper, June 2022) (arguing that the UK Corporate Governance Code has now outlived its usefulness).

[120] *See* Alice Klettner, *Corporate Governance Codes and Gender Diversity: Management-Based Regulation in Action*, 39 U.N.S.W. L.J. 715, 715 (2016).

[121] *Id.*

[122] *See* Org. for Econ. Co-operation and Dev. (OECD), Corporate Governance Factbook 9, 41*ff* (2019).

[123] *Id.* at 29. A list of current international codes is available on the European Corporate Governance Institute (ECGI) website at https://ecgi.global/content/codes (accessed June 14, 2022).

basis.[124] Yet, the exceptions in the OECD survey were notable. Neither the United States nor India had adopted a national governance code.[125] China was also an outlier,[126] though for different reasons. China has a national governance code in place, but, unlike most other countries' codes, which operate on a voluntary, "comply or explain" basis, the Chinese provisions are mandatory.[127]

What accounts for the success of governance codes as a regulatory technique and their rapid transmission? One important factor was timing. The 1990s, which have been described as "the decade of corporate governance,"[128] witnessed a decline in capital market segmentation, accompanied by the rise of globalized capital markets and investment strategies.[129] This proved to be a ripe environment for reception of norms relating to improved governance practices and procedures.

The spread of governance codes was also aided by a development involving the vertical transmission of norms. In 1999, when only twenty-four countries had adopted a UK-style governance code,[130] the OECD released the first version of its supranational *Principles of Corporate Governance*.[131] As one scholar has noted, the OECD principles were not plucked "from thin air."[132] Rather, they relied on national governance codes, predominantly from common law jurisdictions like the United Kingdom.[133] As the OECD principles received increased attention at the supranational level, the rate of horizontal transmission of governance codes accelerated. This two-directional dynamic effectively transformed the Cadbury Committee's original governance code into an international standard.[134] Top-down vertical transmission of norms by transnational networks, such as the OECD,[135]

[124] Org. for Econ. Co-operation and Dev. (OECD), *supra* note 122, at 29. *See also id.* at 30.

[125] According to the OECD, the United States and India rely instead on "laws, regulations and listing rules as their legal corporate governance framework." *Id.* at 29.

[126] *Id.*

[127] China Securities Regulatory Commission (CSRC), Code of Corporate Governance for Listed Companies (2018) (China).

[128] Moira Conoley, *Moves to Halt Another Decade of Excess*, Fin. Times, Aug. 5, 1999, 10 (cited in Cheffins, *supra* note 114).

[129] MacNeil & Esser, *supra* note 99.

[130] Klettner, *supra* note 120, at 715.

[131] Org. for Econ. Co-operation and Dev. (OECD), Principles of Corporate Governance (1999). The current version of these Principles is Org. for Econ. Co-operation and Dev., *supra* note 51 (though note that, in June 2023, revised Principles were adopted by OECD Ministers for possible approval).

[132] Jordan, *supra* note 50, at 990.

[133] *Id.* at 990–91.

[134] MacNeil & Esser, *supra* note 99.

[135] Other prominent networks of financial regulators during the global financial crisis included the Financial Stability Board (FSB), the Basel Committee on Banking Supervision, and IOSCO. These networks operated vertically during the crisis, by promulgating informal, nonbinding soft law standards, which were subsequently transformed into hard law at a national level. *See, e.g.*, Eric Helleiner, *Regulating the Regulators: The Emergence and Limits of the Transnational Financial Legal Order*, *in* Halliday & Shaffer, at 244–49; Jennifer G. Hill, *Regulatory*

became increasingly visible during the 2007–09 global financial crisis.[136] These developments in contemporary corporate regulation epitomize the fact that transnational legal ordering occurs "multi-directionally and recursively up from and down to the national and local levels."[137]

Corporate scandals and crises have had a central role in the development of corporate codes. In the case of governance codes, for example, the Cadbury Committee's relevance was heightened by a wave of British business scandals that occurred during the committee's deliberations.[138] The United Kingdom also became the first jurisdiction to adopt a national stewardship code,[139] which was a direct response to the global financial crisis.[140] The original UK Stewardship Code was adopted in 2010,[141] with revised versions issued in 2012[142] and 2020.[143]

Stewardship codes highlight the important link between problem framing and regulatory outcomes.[144] For example, a common view in the United States in the aftermath of the global financial crisis was that shareholders contributed to the crisis, by exerting pressure on corporate managers to engage in excessive risk-taking to increase profitability.[145] Yet, a very different interpretation of the crisis existed in the United Kingdom. The prevalent UK view was that the real problem had been the failure by institutional investors to participate actively in corporate governance and to provide an effective counterweight to excessive managerial

Cooperation in Securities Market Regulation: The Australian Experience, 17 Eur. Co. Fin. L. Rev. 11, 13–17 (2020).

[136] *See generally* Helleiner, *supra* note 135; Hill, *supra* note 135.

[137] Halliday & Shaffer, *supra* note 3, at 5.

[138] *See generally* Cheffins, *supra* note 112, at 409–11. *See also* Stephen Bates, *How Polly Peck Went from Hero to Villain in the City*, The Guardian, Aug. 27, 2010; Roger Cohen, *Maxwell's Empire: How It Grew, How It Fell – A Special Report; Charming the Big Bankers out of Billions*, N.Y. Times, Dec. 20, 1991, at A1.

[139] *See* Fin. Reporting Council, The UK Stewardship Code (July 2010).

[140] *See* Walker Review, A Review of Corporate Governance in U.K. Banks and Other Financial Industry Entities: Final Recommendations, Nov. 26, 2009, Recommendations 16–18. The 2010 UK Stewardship Code was based on an earlier Statement of Principles on the Responsibilities of Institutional Investors, which was prepared by the UK Institutional Shareholders' Committee (ISC) in June 2007 and subsequently transformed into a code in November 2009. *See* Walker Review, *supra* note 140, at ¶ 5.13, Annex 8.

[141] *See* Fin. Reporting Council, *supra* note 139.

[142] Fin. Reporting Council, The UK Stewardship Code (Sept. 2012).

[143] Fin. Reporting Council, The UK Stewardship Code (2020).

[144] *See generally* Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 Seattle U. L. Rev. 497 (2018); Tim Bowley & Jennifer G. Hill, *Stewardship and Collective Action: The Australian Experience*, *in* Global Shareholder Stewardship 417 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022).

[145] *See, e.g.*, John C. Coffee, Jr., *Systemic Risk after Dodd-Frank: Contingent Capital and the Need for Regulatory Strategies beyond Oversight*, 111 Colum. L. Rev. 795, 799 (2011).

risk-taking.[146] The 2010 UK Stewardship Code was designed to address this problem.[147]

The horizontal transmission of stewardship codes has, like governance codes, been rapid and widespread. Since 2010, more than twenty countries have followed the United Kingdom's lead in adopting stewardship codes, and that number is growing.[148] Like the original UK Code, most stewardship codes around the world operate on a "comply or explain" basis, and signing up to such codes is also usually voluntary.[149]

Asian jurisdictions, in particular, have been eager to embrace stewardship codes.[150] This is in spite of the fact that the structure of Asian capital markets is fundamentally different from the UK capital market structure. Unlike UK listed companies, where the vast majority of shares are held by institutional investors,[151] Asian listed companies typically have concentrated ownership structures, with family members or the state as controlling blockholders.[152] This underlying difference can skew the operation of these codes, so that any similarity to the original UK

[146] *See, e.g.*, John Plender, *Shut Out*, Fin. Times, Oct. 18, 2008 (asking "where were the shareholders?"); Walker Review, *supra* note 140, at ¶ 5.11 (stating that "[w]ith hindsight it seems clear that the board and director shortcomings ... would have been tackled more effectively had there been more vigorous scrutiny and engagement by major investors acting as owners"); Andrew G. Haldane, Chief Economist, Bank of England, *Who Owns A Company?*, speech given at University of Edinburgh Corporate Finance Conference, 8, 11 (May 22, 2015), https://www.bis.org/review/r150811a.pdf (accessed June 14, 2022) (stating that "companies tend to have higher valuations when institutional investors are a large share of cashflow, perhaps reflecting their stewardship role in protecting the firm from excessive risk-taking").

[147] A later version of the code made large claims, stating that "[e]ffective stewardship benefits companies, investors and the economy as a whole." *See* Fin. Reporting Council, *supra* note 142, at 1.

[148] For a list of jurisdictions that have to date adopted stewardship code or analogous initiatives, *see* Alice Klettner, *Stewardship Codes and Shareholder Participation in Governance*, 70 Governance Directions 227, 228–29, Table 1 (2018). *See also* Dionysia Katelouzou and Mathias Siems, *The Global Diffusion of Stewardship Codes*, *in* Global Shareholder Stewardship 631 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022).

[149] Katelouzou & Klettner, *supra* note 95.

[150] Jurisdictions in Asia that have adopted a form of stewardship code to date include Japan, Malaysia, Hong Kong, Taiwan, Singapore, South Korea, and Thailand. *Id.*

[151] *See, e.g.*, Paul Davies, *Shareholders in the United Kingdom*, *in* Research Handbook on Shareholder Power 355, 356 (Jennifer G. Hill & Randall S. Thomas eds., 2015); House of Commons Business, Energy and Industrial Strategy Committee, *Corporate Governance: Fourth Report of Session 2016–17*, Mar. 30 2017 at §§ 13–16.

[152] *See* Puchniak, *supra* note 13; OECD, Owners of the World's Listed Companies, *supra* note 13 (Average ownership by category of investor, end-2017). In a controlling blockholder context, increasing shareholder rights or responsibilities may be irrelevant, or indeed counterproductive, as an accountability device. *See* Luh Luh Lan & Umakanth Varottil, *Shareholder Empowerment in Controlled Companies: The Case of Singapore*, *in* Hill & Thomas, *supra* note 151, at 572; Kon Sik Kim, *Dynamics of Shareholder Power in Korea in* Hill & Thomas, *supra* note 151, at 535.

model is superficial only.[153] For example, it has been argued that Singapore's "near carbon-copy" of the UK Stewardship Code in fact upends the UK model's goal of enhancing institutional investor participation.[154] Instead, Singapore's version can operate to bolster the existing power of majority shareholders in state-controlled and family-controlled companies, thereby potentially reducing the incentives of institutional investors to participate in corporate governance.[155]

Although the United Kingdom has been the progenitor of governance codes and stewardship codes around the world, the adopted codes are by no means uniform. There is considerable divergence in the substance of these codes,[156] which is attributable to a range of factors, including the issue of "who writes the rules."[157] Divergence is particularly noticeable in terms of the emphasis given to environmental, social and governance (ESG) in modern codes.[158]

A range of different organizations have responsibility for the authorship of corporate codes. They include government agencies, stock exchanges, and business organizations.[159] These diverse origins can result in major differences concerning the stringency and enforceability of codes.[160] They can also affect the content of the codes, including whether the codes emphasize shareholder or stakeholder interests.[161] For example, the United States does not have a national governance code. However, in 2017, the Investor Stewardship Group ("ISG")[162] issued the US Corporate Governance Principles,[163] which are a set of purely voluntary, self-regulatory norms concerning governance. ISG is a collective of some of the largest US-based and international asset owners and managers,[164] including several activist

[153] *See* Puchniak, *supra* note 13; Gen Goto et al., *Diversity of Shareholder Stewardship in Asia: Faux Convergence*, 53 Vand. J. Transnat'l L. 829 (2020).

[154] Dan W. Puchniak & Samantha S. Tang, *Singapore's Puzzling Embrace of Shareholder Stewardship: A Successful Secret*, 53 Vand. J. Transnat'l L. 989 (2020).

[155] *Id.*; Ernest Lim, Sustainability and Corporate Mechanisms in Asia 188–96 (2020).

[156] *See generally* MacNeil & Esser, *supra* note 99.

[157] For discussion of the significance of authorship of rules in the M&A context, *see* John Armour & David A. Skeel, Jr., *Who Writes the Rules for Hostile Takeovers and Why? The Peculiar Divergence of U.S. and U.K. Takeover Regulation*, 95 Geo. L.J. 1727 (2007). *See generally* Hill, *supra* note 144, at 507–13.

[158] *See* Katelouzou & Klettner, *supra* note 95; Bowley & Hill, *supra* note 95.

[159] *See generally* Klaus J. Hopt, *Comparative Corporate Governance: The State of the Art and International Regulation*, 59 Am. J. Comp. L. 1, 8 (2011).

[160] *Id.* at 8–10.

[161] *See* MacNeil & Esser, *supra* note 99.

[162] *See* ISG, *About the Investor Stewardship Group and the Framework for US Stewardship and Corporate Governance*, https://isgframework.org/ (accessed June 14, 2022).

[163] ISG, *Corporate Governance Principles for U.S. Listed Companies* (Jan. 2017), https://www.isgframework.org/corporate-governance-principles/ (accessed June 14, 2022).

[164] Signatories to the principles include, for example, BlackRock, Vanguard, and State Street Global Advisers. For the full list of signatories to the ISG Corporate Governance Principles and Stewardship Principles, *see* https://isgframework.org/signatories-and-endorsers/ (accessed June 14, 2022).

hedge funds.[165] Given the identity of the actors behind the US governance principles, it is hardly surprising that the norms they contain reflect a strongly private, shareholder-focused conception of corporate governance and directors' duties.[166]

These US norms provide a striking contrast with the trajectory of contemporary UK and Australian governance codes. The UK governance code is administered by an independent government-backed regulator, the Financial Reporting Council ("FRC"),[167] and the Australian version is overseen by a governance committee of the Australian Securities Exchange ("ASX").[168] Recent amendments to the UK and Australian governance codes represent a far more public conception of the corporation and of directors' responsibilities than the US Corporate Governance Principles.[169] The 2018 UK Corporate Governance Code notes, for example, that the role of a successful company is not only to create value for shareholders but also to contribute to "wider society."[170] Both the UK and the Australian governance codes also pay heightened attention to the interests of stakeholders, particularly employees.[171] They exemplify how, in contrast to traditional corporate law, governance norms today cover a pluralistic range of concerns, which are promoted by state and private actors alike.[172]

The issue of "who writes the rules" is also highly relevant to stewardship codes. In some jurisdictions, such as the United Kingdom and Japan, stewardship codes are issued by government regulators or quasi-regulators.[173] In others, such as South Korea and South Africa, they are promulgated by industry players.[174] Finally, in some countries, including Australia, Canada, and the United States, stewardship codes have been initiated by investors themselves.[175] This divergence concerning

[165] Activist hedge fund signatories include Value Act Capital and Trian Partners. *Id.*

[166] *See, e.g.*, ISG, *supra* note 163, Principles 1, 2 and 3.

[167] *See* Fin. Reporting Council, *About the FRC*, https://www.frc.org.uk/about-the-frc, https://www.isgframework.org/corporate-governance-principles/ (accessed June 14, 2022).

[168] ASX Corp. Governance Council, Australian Securities Exchange (ASX) Corporate Governance Council, Corporate Governance Principles and Recommendations, 4th ed. (Feb. 2019), https://www.asx.com.au/documents/regulation/cgc-principles-and-recommendations-fourth-edn.pdf (accessed June 14, 2022). The ASX Corporate Governance Council comprises a group of industry stakeholders. *See About the Council*, *id.* at 1.

[169] *See generally* Hill, *supra* note 15, at 289 (discussing the ongoing tension between public and private conceptions of the corporation).

[170] Fin. Reporting Council, *supra* note 117, at 4, Principle A.

[171] *See generally* Jennifer G. Hill, *Shifting Contours of Directors' Fiduciary Duties and Norms in Comparative Corporate Governance*, 5 U.C. Irvine J. Int'l Transnat'l & Comp. L. 163, 178–80 (2020). *See also* Cheffins & Reddy, *supra* note 119 (arguing that a "comply or explain" approach is ill-suited to the increased focus on stakeholder interests in the most recent iteration of the UK governance code).

[172] *See, e.g.*, Katelouzou & Zumbansen, *supra* note 10; Bowley & Hill, *supra* note 24; Ringe, *supra* note 24; Pollman, *supra* note 24, at 668–70.

[173] *See generally* Hill, *supra* note 144, at 507–08.

[174] *Id.* at 508–09.

[175] *Id.* at 509–13.

"who writes the rules" can influence the content and effectiveness of particular stewardship codes, and can also affect the extent to which shareholder activism, including collective activism, is tolerated and encouraged.[176]

The regulatory goals underpinning the introduction of stewardship codes also vary across jurisdictions. The aim of the original UK Stewardship Code was to provide a check on excessive risk-taking in the aftermath of the global financial crisis. Yet, in Japan, one of the earliest jurisdictions to transplant a UK-style stewardship code, the policy rationale was quite different. Japan's code was designed to reverse declining profitability and increase investor returns, by creating a "warmer climate" for foreign investors and shareholder activists.[177] Japan's adoption of a stewardship code also demonstrates how localized political friction can affect the content of such codes. Japan's stewardship code adopted a relatively gentle approach concerning shareholder activism[178] compared to the UK prototype.[179] It seems that this was a compromise to appease Japanese critics, who resisted the shift effected by the code from a stakeholder-oriented approach to a stronger shareholder-oriented focus.[180] It has been argued that other Asian jurisdictions, such as Singapore, Hong Kong, and Malaysia, have adopted stewardship codes in order to signal their commitment to good corporate governance, thereby attracting foreign investment in global capital markets.[181]

Another factor undermining international convergence of corporate codes is that the underlying UK model has itself undergone fundamental changes over time, creating further disjunction across jurisdictions. For example, in 2018, a British regulatory review[182] branded the much-vaunted and imitated UK Stewardship Code a failure.[183] The FRC responded to this damning assessment by adopting a "substantial and ambitious" revised version of the code, the 2020 UK Stewardship Code.[184] This new UK Code emphasizes shareholder stewardship activities and

[176] *See generally* Bowley & Hill, *supra* note 144. *See also* Gaia Balp & Giovanni Strampelli, *Institutional Investor Collective Engagements: Non-Activist Cooperation vs Activist Wolf Packs*, 14 Ohio St. Bus. L.J. 135 (2020).

[177] *See* Ben McLannahan, *Japanese Reformists Face Challenge over Shake-Up of Corporate Governance Laws*, Fin. Times, May 25, 2014.

[178] *See* Gen Goto, *The Japanese Stewardship Code: Its Resemblance and Non-resemblance to the UK Code*, *in* Global Shareholder Stewardship 222 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022); Gen Goto, *The Logic and Limits of Stewardship Codes: The Case of Japan*, 15 Berkeley Bus. L.J. 365 (2019).

[179] *See generally* Hill, *supra* note 144, at 513–24.

[180] *See supra* note 178.

[181] *See* Lim, *supra* note 155, at 174.

[182] John Kingman, Independent Review of the Financial Reporting Council ("Kingman Review") (2018).

[183] According to the Kingman Review, the 2012 UK Stewardship Code, which it considered in its review, "whilst a major and well-intentioned intervention, is not effective in practice." *Id.* at 8.

[184] *See* Fin. Reporting Council, *supra* note 143. *See also* Fin. Reporting Council, Revised and Strengthened UK Stewardship Code Sets New World-Leading

outcomes over aspirational policies.[185] It also includes far broader aims than earlier versions, with a marked shift from stewardship involving protection of shareholder interests toward stewardship that encompasses ESG issues, including climate change.[186]

9.4 CONCLUSION

Fiduciary duties and corporate codes, which are designed to constrain directors' conduct and enhance corporate accountability, are key aspects of corporate governance. This chapter discusses some of the complex processes by which these laws and norms have been transmitted nationally and transnationally, and the extent to which this transmission has contributed to a uniform regulatory approach.

It is often assumed that there is a cohesive approach to the law of fiduciary duties across common law jurisdictions. The chapter provides a comparative and historical analysis of three common law jurisdictions – the United States, the United Kingdom, and Australia – and shows that, in spite of their common legal heritage, there are sufficiently important granular differences at a national level, in terms of both law and local legal practice, to challenge the existence of any homogeneous law regarding directors' fiduciary duties in these jurisdictions.[187]

The chapter also discusses an important transnational regulatory development, which has occurred in recent decades across both common law and civil jurisdictions. This is the rise of corporate codes, such as governance codes and stewardship codes. These codes also embody important norms, and could, in theory, contribute to greater corporate governance convergence around the world. However, a critical issue in relation to corporate codes is "who writes the rules." In fact, a range of different bodies issue and administer these codes, and this can affect the focus of the codes and the norms they contain.

Codes are also constantly evolving and can operate differently depending on the underlying capital market structure of the jurisdictions in which they operate. Not

Benchmark (Oct. 24, 2019), https://www.frc.org.uk/news/october-2019/revised-and-strengthened-uk-stewardship-code-sets (accessed June 14, 2022).

[185] *See* Fin. Reporting Council, *supra* note 143, at 11, 13. The 2020 UK Stewardship Code followed the recommendations of the Kingman Review in this regard. *See* Kingman, *supra* note 182, at 10.

[186] *See* Fin. Reporting Council, *supra* note 143, at 15, 27; Paul Davies, *The UK Stewardship Code 2010–2020: From Saving the Company to Saving the Planet?*, *in* Global Shareholder Stewardship 44 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022). ESG has become an increasingly important issue in many stewardship codes in recent times. *See* Katelouzou & Klettner, *supra* note 95 (discussing the interplay between hard law and soft law, in the form of stewardship codes, in relation to ESG and sustainability issues).

[187] *See generally* Hill & Conaglen, *supra* note 28.

only can these codes differ across jurisdictions, they can also transmute over time, particularly in responding to corporate scandals and crises. For example, some recent codes, such as the 2020 UK Stewardship Code, reflect an image of the corporation as having a far greater societal role.[188] The evolution of both fiduciary duties and corporate codes discussed in this chapter is more consistent with path dependence, rather than convergence, theory in corporate governance.

[188] *See* Hill, *supra* note 15, at 290–91; Davies, *supra* note 186 (highlighting the enlarged objectives of the revised UK Code); Bobby V. Reddy, *The Emperor's New Code? Time to Re-Evaluate the Nature of Stewardship Engagement under the UK's Stewardship Code* 84 MOD. L. REV. 842, 849 (2021); Katelouzou & Klettner, *supra* note 95.

10

Empire and the Political Economy of Fiduciary Law

Seth Davis

10.1 INTRODUCTION

For five weeks in the waning months of 1923, Zitkala-Ŝa, a Dakota writer, activist, and public intellectual, traveled around Eastern Oklahoma as a researcher for the General Federation of Women's Clubs (GFWC).[1] The topic of her research – Oklahoma probate law – may sound uncontroversial. Yet Zitkala-Ŝa, an advocate of American Indian suffrage and critic of the US Bureau of Indian Affairs' corruption, was no stranger to controversy.[2] And her report on Oklahoma's probate system, published by the Indian Rights Association, was explosive. Zitkala-Ŝa and her coauthors found nothing less than "legalized plunder" of land and wealth from members of Native nations in Oklahoma.[3]

Fiduciary law was at the center of this system of legalized "exploitation."[4] According to the report, "Indians are virtually at the mercy of groups that include the county judges, guardians, attorneys, bankers, merchants – not even overlooking the undertaker – all regarding Indian estates as legitimate game."[5] The game was played through the appointment of non-Native guardians to manage the resources of Native people. County judges, who were elected every two years, were happy to hand out "Indian guardianships" as "plums" to their "faithful friends" by declaring

[1] *See* GERTRUDE BONNIN ET AL., OKLAHOMA'S POOR RICH INDIANS: AN ORGY OF GRAFT AND EXPLOITATION OF THE FIVE CIVILIZED TRIBES – LEGALIZED ROBBERY (1924). Zitkala-Ŝa was the name that Gertrude Bonnin, then Gertrude Simmons, chose for herself. Cathy N. Davidson & Ada Norris, *Introduction*, *in* ZITKALA-ŠA, AMERICAN INDIAN STORIES, LEGENDS, AND OTHER WRITINGS xi, xv (Cathy N. Davidson & Ada Norris eds. 2003).

[2] *See* Davidson & Norris, *supra* note 1, at xxv.

[3] BONNIN ET AL., *supra* note 1, at 26. Zitkala-Ŝa's coauthors were Charles Fabens, a representative of the Indian Defense Association, and Matthew Sniffen, of the Indian Rights Association. *See id.* at 1.

[4] *Id.* at cover page.

[5] *Id.* at 5.

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Indians to be incompetent to manage their own affairs.[6] These "professional" guardians took their cut of the wealth of their wards, as did banks and merchants, not to mention attorneys.[7] Thus, fiduciary law was the frame for legalizing the domination of Native people and facilitated commerce based upon the expropriation of their resources.[8]

This is not a familiar description of the economic structure of fiduciary law. In the typical account, fiduciary law facilitates market exchanges by supplying legal standards to govern the behavior of agents who are entrusted with discretion over the interests of their principals. These government-supplied standards – the fiduciary duty of loyalty and the duty of care – make it less costly for private parties to contract for services.[9]

The exchange-facilitating account is a law-and-economics version of the idea that fiduciary law enhances autonomy. Fiduciary law, that is, creates opportunities for individuals to pursue their own goals and be authors of their own lives. This autonomy-enhancing vision has widespread appeal, and not just for those who think fiduciary law is a species of contract law. Fiduciary law, the ideal holds, "emphasizes not personal conflict and domination," but rather "cooperation and identity of interest pursuant to acceptable but imposed standards."[10]

I want to suggest that the familiar description of fiduciary law has a problem. Most scholarship on fiduciary law says nothing about European or US imperialism. There is no discussion of the ways in which fiduciary law framed imperial struggles over political and economic power. There is no mention of the roles that fiduciary law

[6] *Id.* at 6.

[7] *Id.* at 15.

[8] To be sure, the report's findings were questioned, sometimes with bigoted disdain, and the report's tone was criticized, including by the Commissioner of Indian Affairs at a hearing of the Committee on Indian Affairs shortly after the report's publication. *See* HOUSE OF REPRESENTATIVES, 68TH CONG., HEARING BEFORE THE COMMITTEE ON INDIAN AFFAIRS ON H.J. RES. 181, at 28 (Feb. 21, 1924) (Rep. Sproul) (criticizing proposal to fund further "investigation based upon a report of some women folks"); *id.* at 24–25 (statement of Comm'r of Indian Affairs Charles H. Burke) (stating that "I deplore propaganda"). But the Commissioner agreed with the substance of the report, which has been reaffirmed by subsequent studies. *See id.* at 25 (statement of Comm'r of Indian Affairs Charles H. Burke); *see also* Andrea Seielstad, *The Disturbing History of How Conservatorships Were Used to Exploit, Swindle Native Americans*, UNIV. OF DAYTON MAGAZINE (Aug. 20, 2021), *at* https://udayton.edu/magazine/2021/08/conservatorship.php.

[9] *See, e.g.*, Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1040–45 (2011) (arguing that fiduciary law is a solution to an agency problem that stems from incomplete contracting due to transaction costs); Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. ECON. 425, 426 (1993) (describing fiduciary duty of loyalty as legal rule that "promote[s] the benefit of contractual endeavors in a world of scarce information and high transaction costs").

[10] Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 802 (1983). For a qualified autonomy-enhancing account, *see* Hanoch Dagan, *Fiduciary Law and Pluralism*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 832, 839 (Evan J. Criddle et al. eds. 2019) ("fiduciary types are not always autonomy enhancing, but many fiduciary types are").

played in various European empires and the US Empire between the late fifteenth century, when imperial expansion began, and the time of rapid decolonization in the 1960s.[11]

What follows is a summary of a political economy of fiduciary law and imperialism that I hope to develop at length and in detail.[12] My argument is that the familiar description of the economic structure of fiduciary law is incomplete. So too is the autonomy-enhancing account of fiduciary law. Fiduciary law, I want to argue, may enhance exploitation to facilitate market exchange. It provided an ideological justification for imperial expansion in the interests of opening up trade between peoples. And as Zitkala-Ŝa's report found, and as many other examples show, fiduciary law played institutional roles in the financing, administration, and oversight of imperial exploitation and the facilitation of trade among those who benefitted from it.[13]

10.2 IMPERIALISM AND THE TYPICAL PICTURE OF FIDUCIARY LAW

The case, then, for including imperialism within the picture of fiduciary law is straightforward. Imperial powers claimed to be fiduciaries acting on behalf of peoples under their rule. They used the vocabulary of "guardianship" and "trusteeship," paradigmatic fiduciary relationships that trace back to Roman law.[14] To be sure, this fiduciary ideal was not universal, much less universally adhered to. Imperial legal systems changed over time and differed from one another. Unsurprisingly, the fiduciary ideal developed more clearly and more fully in the common law empires of Britain and the United States than in civil law systems, which never had the common law trust. Various empires, moreover, resisted the

[11] In stopping with the 1960s, I do not mean to imply that international trusteeship has disappeared altogether as a concept or practice. *See* Ralph Wilde, International Territorial Administration: How Trusteeship and the Civilizing Mission Never Went Away (2008).

[12] On law and political economy, *see, e.g.*, Jedediah Britton-Purdy et al., *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 Yale L.J. 1784 (2020); David Kennedy, *Law and the Political Economy of the World*, 26 Leiden J. Int'l L. 7 (2013).

[13] This chapter builds upon prior studies by bringing both fiduciary legal theory and TLO theory to bear upon questions about not only the ideological roles but also the institutional roles that public and private fiduciary law played in imperialism. *See* Wilde, *supra* note 11; Antony Anghie, Imperialism, Sovereignty, and the Making of International Law (2005); William Bain, Between Anarchy and Society: Trusteeship and the Obligations of Power (2003); Robert A. Williams, Jr., The American Indian in Western Legal Thought (1992); Andrew Fitzmaurice, *Sovereign Trusteeship and Empire*, 16 Theoretical Inq. L. 447 (2015).

[14] *See* Joshua Getzler, *Rumford Market and the Genesis of Fiduciary Obligations*, *in* Mapping the Law: Essays in Memory of Peter Birks 577, 590–93 (Andrew Burrows & Alan Rodger eds. 2006); R. M. Helmholz, *The Roman Law of Guardianship in England, 1300–1600*, 52 Tul. L. Rev. 223, 224 (1978).

idea that the law of nations governed their relations with peoples subject to imperial rule.[15] Even so, we can trace a pattern of greater institutionalization of fiduciary norms over time as modern states emerged and consolidated their political sovereignty. By 1919, a fiduciary norm was so settled that the newly formed League of Nations system enshrined the "sacred trust of civilization" as an institution of international relations.[16]

If that were not enough reason to take imperialism more seriously than the field of fiduciary law does, here is another: The "sacred trust of civilization" has a plausible claim to being fiduciary law's first transnational legal order (TLO).[17] The League's Mandate System entrusted authority over various territories and peoples in Africa, the Middle East, and Oceania to various mandatory powers, primarily though not exclusively European states. It included norms and institutions we typically associate with fiduciary relations, including mechanisms for oversight of the mandates. The fiduciary office – the office of the "sacred trustee," that is – provided a frame for resolving disputes among imperial powers by allocating authority to exploit persons and resources among them.[18] Thus, the Mandate System was arguably was the first fiduciary TLO, a point that I return to later.

Fiduciary law, moreover, played a broader role in the construction and management of empires. Its role, that is, was not limited to the sacred trust of civilization or even the law of nations. What we now think of as institutions and practices associated with "private" fiduciary law – including the separation of ownership from control of property, the use of fiduciary institutions as investment vehicles, and the expectation that fiduciaries will give an accounting – were part of the financing and administration of various European and US Empires.

In short, fiduciary law played both ideological and institutional roles in various European empires and the US Empire. The ideological role of fiduciary law in

[15] *See* Lauren Benton, A Search for Sovereignty: Law and Geography in European Empires, 1400–1900, at 226–27 (2010) (discussing works by international lawyers and colonial officials who "argued for the limits of applying international law to systems of quasi-sovereignty [within imperial contexts] and at times imagined imperial power as trending irreversibly toward a unified system of sovereignty").

[16] Treaty of Peace between the Allied and Associated Powers and Germany art. 22, June 28, 1919, 2 Bevans 43, 56.

[17] *See* Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* Transnational Legal Orders 3, 5 (Terence C. Halliday & Gregory Shaffer eds. 2015) (defining a "transnational legal order," or TLO, as "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions").

[18] It is worth stressing the point that fiduciary law played an institutional role in framing relations *among* imperialists and not just a role in framing relations between imperial powers and those subject to their rule. *See infra* notes 68–71 (making this point with respect to role of trusteeship in controversies between Parliament and English East India Company); *id.* at 108–10 (same with respect to Berlin Conference of 1884–85 and the Congo Free State).

imperial rule has gotten more attention, particularly among legal scholars.[19] The norm of fiduciary responsibility – the idea, that is, that fiduciaries are not self-serving actors but instead representatives acting on behalf of someone else – lent itself to discourses that legitimated imperial power based upon religious bigotry and cultural racism. The institutional dimension deserves more attention, especially in legal scholarship.[20] Some institutions, particularly the "company-states" that actually administered imperial rule on behalf of European sovereigns, bridged the "sacred trust" and the private entrustment of authority for business purposes.[21] Consider the best-known example, the English East India Company, whose violence and corruption in Indian prompted debates in London about the allocation of trust authority within the Empire.[22] "Public" and "private" fiduciary authority were entangled in other ways that facilitated domination. For example, during the 1830s, the largest firms pooling American and British capital to finance the removal of Native nations from the southeastern United States, such as the Boston and Mississippi Land Company, were structured as trusts.[23] The US government forced these Native nations to resettle in Indian Territory, which later became the State of Oklahoma. By the early twentieth century, as Zitkala-Ŝa reported, Oklahoma's law of guardianship and probate was the key to a system of "legalized robbery" of the lands and wealth of Native families, including many from those nations that the United States had forcibly moved a century early.[24] Thus, together, private and public fiduciary law were tools of subordination.

As these examples show, fiduciary law could enhance subordination in either of two ways. On the one hand, legal norms and institutions could facilitate subordination *within* a fiduciary relationship. The Mandate System of the League of Nations is one example. On the other hand, fiduciary law also facilitated subordination *outside* the fiduciary relationship, as with, for example, the use of trusts to funnel global capital toward the forced removal of Native nations from their homelands.

Thus, fiduciary law's relationship to autonomy is more complicated than the field's ideals might suggest. Many scholars argue that fiduciary law enhances

[19] *See, e.g.*, Anghie, *supra* note 13; Williams, *supra* note 13. My own contribution is Seth Davis, *American Colonialism and Constitutional Redemption*, 105 Calif. L. Rev. 1751 (2017).

[20] An important exception is Antony Anghie's argument that the Mandate System of the League of Nations' Mandate System established "an intricate and far-reaching network of economic relationships" involving the exploitation of the labor and resources of peoples in the mandate territories. Anghie, *supra* note 13, at 180.

[21] *See* Andrew Phillips & J. C. Sharman, Outsourcing Empire: How Company-States Made the Modern World (2020); Philip J. Stern, The Company-State: Corporate Sovereignty and the Early Modern Foundations of the British Empire in India (2012).

[22] *See, e.g.*, Nick Robins, The Corporation That Changed the World (2012).

[23] *See* Claudio Saunt, *Financing Dispossession: Stocks, Bonds, and the Deportation of Native Peoples in the Antebellum United States*, 106 J. Am. Hist. 315, 318 (2019).

[24] Bonnin et al., *supra* note 1.

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autonomy by supplying standards of behavior that facilitate bargains for fiduciary services. Fiduciary law responds to the risk that comes whenever someone is in charge of someone else's interests. People put fiduciaries in charge of their property or other interests for many reasons. Maybe the fiduciary's an expert. Or maybe they just want someone else to do the work. Whatever the reason, the risk is the same. "Abuse of power" is one way to put the problem that comes when one person has discretionary authority over the interests of another.[25] Or we might call it "an agency problem."[26] Fiduciary law aims to solve this problem by requiring fiduciaries to be loyal, that is, to subordinate their interests to the beneficiaries' interests. Thus, fiduciary law protects people who trust others to provide them with services and expertise. In so doing, fiduciary law enhances individual autonomy.

This autonomy-enhancing account has obvious appeal. After all, many fiduciary relationships exist only because people agreed to them. For those who think fiduciary law is contract law, fiduciary duties enhance autonomy by providing default rules to fill gaps in incomplete contracts. Transaction costs prevent the parties from spelling out the details of fiduciary duties in every contract. Fiduciary law's duty of loyalty requires the agent to pursue the principal's interests, not the agent's own or some third party's interest. And the duty of care demands the agent pursue the principal's interests with reasonable competence. The government facilitates fiduciary bargains by supplying and enforcing those duties.[27]

The autonomy-enhancing account has appeal even for those scholars who reject the contractarian view of fiduciary law. Consider this description by Tamar Frankel, who more than anyone is responsible for the idea that fiduciary law is a distinct body of law: "a fiduciary society emphasizes not personal conflict and domination among individuals, but cooperation and identity of interest pursuant to acceptable but imposed standards."[28] Fiduciary law, that is, facilitates relationships in which "entrustors" rely upon the services of fiduciaries for the entrustors' own benefit.[29]

[25] *See* Tamar Frankel, Fiduciary Law xviii (2011).

[26] *See, e.g.*, Sitkoff, *supra* note 9, at 1040.

[27] *See, e.g.*, Easterbrook & Fischel, *supra* note 9, at 426.

[28] Frankel, *supra* note 10, at 802. Frankel's description of a fiduciary society as one that does not emphasize domination is echoed by Evan Criddle's account, which links fiduciary law and republican political theory to argue that fiduciary law "safeguard[s] individuals from 'domination,' understood as subjection to another's alien control." Evan J. Criddle, *Liberty in Loyalty: A Republican Theory of Fiduciary Law*, 95 Texas L. Rev. 993, 995 (2017).

[29] Frankel, *supra* note 25, at 6–7. Not everyone concurs in the autonomy-enhancing account, of course. Lionel Smith has argued that "[i]n every fiduciary relationship, the fiduciary acquires control over a part (or in some cases, all) of another person's autonomy." Lionel Smith, *Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another*, 130 LQR 608, 613 (2014). In arguing to the contrary that trust and autonomy are not necessarily at odds, Carolyn McLeod & Emma Ryman have argued that "fiduciaries can, and should, act as relational supports for their beneficiaries' (relational) autonomy." Carolyn McLeod & Emma Ryman, *Trust, Autonomy, and the Fiduciary Relationship*, *in* Fiduciaries and Trust: Ethics, Politics, Economics, and Law 74, 86 (Paul Miller & Matthew Harding eds. 2020). Qualifying the autonomy-enhancing account even further, Hanoch Dagan has

In this chapter, I want to ask how this picture of fiduciary law changes if we put imperialism within it.

10.3 FIDUCIARY EXPLOITATION AND FREE EXCHANGE

Scholars have begun to explore how fiduciary law, when understood as a distinctive body of law in its own right, influenced the emergence of modern markets. In recent work, for example, Michael Halberstam and Justin Simard have argued that "lawyers as trusted agents" were important to economic development in the nineteenth-century United States.[30] The story they tell is one in which lawyers performed a wide array of services for clients in "high-risk markets," where businesspeople had to rely upon agents they could not monitor due to physical distance, the use of bills of exchange and private bank notes, and the lack of rapid means of communication.[31] As economic actors, lawyers were crucial to securing trust in these markets. Their work was not limited to drafting briefs. The list of typical tasks is illustrative: "lawyers surveyed land, hired workers, paid taxes, collected notes, drafted agreements, examined titles, prepared and interpreted insurance policies, managed finances, organized partnerships, transferred money, and prepared detailed reports."[32] Many of these lawyers were graduates of Litchfield Law School, where both Aaron Burr and John C. Calhoun were once students, and whose graduates constituted "nearly 5 percent of the lawyers in the United States" by the 1830s, when the school closed.[33] One of these graduates was Elisha Whittlesey, whose work as a land agent in Ohio is representative of the practice of lawyers as trusted agents in the early nineteenth century. Lawyers like Whittlesey "worked as long-distance land agents, helping eastern speculators sell land located in the West."[34]

In the twilight of this career, when he was now the "Honorable Elisha Whittlesey," the former Comptroller of the US Treasury, Whittlesey gave a speech to the Mahoning County Agricultural Society.[35] The Society's meeting was an opportunity for the aged attorney to reflect on the history of Ohio. Whittlesey was especially struck by an exhibition representing "pioneer life in the log cabin," which, he commented, "reminds every old settler, of the country as it was fifty years

argued that fiduciary law is a "heterogeneous" legal category, one within which some, but not all, types of fiduciary relationships "enhance autonomy." Dagan, *supra* note 10, at 832.

30 Michael Halberstam & Justin Simard, *Lawyers as Trusted Agents in Nineteenth-Century American Commerce*, 45 L. & Soc. Inquiry 132 (2020).

31 *Id.* at 135–36.

32 *Id.* at 134.

33 *Id.* at 139. On Aaron Burr and John C. Calhoun, *see* Catherine R. Blondel-Libardi, *Rediscovering the Litchfield Law School Notebooks*, 46 Conn. Hist. Rev. 70, 70 (2007).

34 Halberstam & Simard, *supra* note 30, at 140.

35 Twelfth Annual Address Delivered before the Mahoning County Agricultural Society, at Canfield, Ohio (Oct. 1858).

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ago."[36] The longtime Ohioan went on to offer some advice on best agricultural practices, including how to cultivate "cucumbers, tomatoes and other garden vegetables," as well as "Indian corn."[37] Whittlesey's references to Indian corn were his address's only hints of what listeners must have known but were already in the process of forgetting: Land speculation and pioneer life in the West involved the sale and settlement of Indian lands. The name of Mahoning County, where Whittlesey gave his address, not to mention the name "Ohio," and the names of all of Ohio's "major waterways – the Mahoning, Cuyahoga, Walhonding, Miami, Sandusky, Tuscarawas, Maumee, Scioto, and Ohio rivers" – testify to the presence of Native peoples.[38]

Lawyers as trusted agents in nineteenth-century America were playing an important role in a system of land exchange that was built at least in part upon the exploitation of Native nations and the expropriation of their lands.[39] The role of fiduciary law in this system was not limited to the role of lawyers like Whittlesey who acted as land agents for the eastern land speculators. Fiduciary law, that is, played a bigger market-constituting role than the one that Halberstam and Simard recount.

* * *

To begin to understand the ideological and institutional roles of fiduciary law in facilitating exploitation *and* exchange, there is no better place to start than Tizatlan, a city in what today is Mexico, and no better time than 1519, long before the 1795 Treaty of Greenville cleared the way for settlement of much of the Ohio Territory, and even longer before the so-called sacred trust of civilization had become a TLO with the Covenant of the League of Nations.

In September 1519, an alliance was struck at the palace of Xicotencatl, the tlatoani, or "one who speaks," of Tizatlan, located in a place that today is part of the Mexican state of Tlaxcala.[40] For weeks, the Tlaxcalans had battled a company of several hundred men who burned villages and maimed "emissaries suing for peace."[41] Now, this company, dependent upon their translator Malintzin, a noblewoman from one of the Tlaxcalans' traditional trading partners, promised to join

[36] *Id.* at 4.

[37] *Id.* at 16.

[38] H. F. Raup, *An Overview of Ohio Place Names*, 30 NAMES: A JOURNAL OF ONOMASTICS 49, 49 (1982).

[39] Not every transfer of land from Native peoples was coerced or obtained through fraud. But not every transfer was free and fair, either. *See generally* STUART BANNER, HOW THE INDIANS LOST THEIR LAND (2005).

[40] CAMILLA TOWNSEND, FIFTH SUN: A NEW HISTORY OF THE AZTECS 103 (2019). "Tlatoani" may be translated as "king." *Id.* at x. For much of its history, however, Tlaxcala was more like what political theorists would today call a "republic" than a "monarchy." DAVID STASAVAGE, THE DECLINE AND RISE OF DEMOCRACY: A GLOBAL HISTORY FROM ANTIQUITY TO TODAY 41 (2020).

[41] TOWNSEND, *supra* note 40, at 103.

forces with the Tlaxcalans against a long-standing foe, the Mexica of Tenochtitlan.[42] Tlaxcalan painters would later record the peace in images on palace walls and bark paper, so that all could "recall[]" the alliance in "perpetuity."[43] In December 1519, several thousand Tlaxcalans marched with several hundred of their Spanish allies into one of the largest cities in the world, with avenues so broad that they "put the tiny, mazelike streets of European cities to shame."[44]

This grand city, Tenochtitlan, would fall two years later to allied forces. The next year, Charles V, Holy Roman Emperor and King of Spain, appointed Hernán Cortés, the leader of the Spanish company of adventurers who allied with the Tlaxcalans, as the captain-general of New Spain. As a sovereign with imperial aspirations, and no small measure of anxiety about competition from the Ottoman Empire,[45] Charles V had placed great trust in Cortés's company. Cortés, who "knew Spanish law well,"[46] was not much troubled by those who would come to question the legitimacy of the Spanish Crown's assertion of sovereignty over the lands of the Mexica and other Indigenous Peoples. But Charles V, a pious man, apparently was, and consulted confessors to quiet his troubled mind.[47]

Spanish intellectuals were divided on the question of whether European sovereigns could legitimately claim authority over those peoples they called *Indios*. The key figure, at least for modern international law scholars, is Francisco de Vitoria, a theologian and jurist. In a series of public lectures, which his students scribbled down, Vitoria disagreed with those who argued that Indians had did not have moral agency, natural rights, or their own governments. Instead, Vitoria argued that the Spanish claim of sovereignty over the Indigenous lands was legitimate to the extent that Spaniards acted to stop violations of natural rights, particularly "human sacrifices," and to protect the right of all people to travel and seek to trade with one another.[48]

Guardianship itself was not a new idea. Roman law had the *tutela* and *cura*, the former a legal device for the administration of property for the benefit of children who had no *paterfamilias* exercising authority over them, and the latter a relationship in which one adult had authority over the interests of another deemed

[42] *Id.* at 85, 103.
[43] *Id.* at 103–04.
[44] *Id.*
[45] *See* Ayşe Zarakol, Before the West: The Rise and Fall of Eastern World Orders 176 (2022).
[46] Townsend, *supra* note 40, at 100.
[47] On Charles V's piety, *see, e.g.*, Martti Koskenniemi, To the Uttermost Parts of the Earth: Legal Imagination and International Power 1300–1870, at 119 (2021) (explaining that royal confessor's "influence on Charles V … was pervasive" and that "for Charles hardly any matter lacked … a [spiritual] dimension").
[48] Francisco de Vitoria, Political Writings 288 (Anthony Pagden & Jeremy Lawrance, eds. 1991). ("[I]n lawful defence of the innocent from unjust death, even without the pope's authority, the Spainards may prohibit the barbarians from practicing any nefarious custom or rite.")

incapable of managing their own affairs.[49] Canon law carried forward the idea of guardianship as the medieval church required tutors and curators "to act as fiduciaries" for those subject to their authority.[50] Vitoria did not conclude that Indians were children or incapable of reason, but nevertheless invoked the idea of guardianship to argue that the Spanish Crown had the right to wage war against Indians in order to prevent injustice.[51]

Vitoria imagined a world in which the Spanish and Indians could trade freely with one another, only to deny them equal status as political communities. Indians "lack [ed]" many "wares" that the Spanish could provide in exchange for "either gold or silver or other wares of which the natives have abundance."[52] Trade bound them as equals, and the right to trade demanded that the Indians and Spanish treat with one another. As Vitoria put it, "it is certain that the aborigines can no more keep off the Spaniards from trade than Christians can keep off other Christians."[53] Both had a right to travel and seek to trade. If Indians refused to accept Spanish attempts to travel, the Spanish were justified in intervening to protect this universal right.[54]

This ideology of guardianship was a serious response to a problem of conscience. Vitoria was not the only metropolitan elite who questioned the violence of conquest. He was, however, among the most creative in offering a justification for Spanish sovereignty and identifying limits on its exercise. The key was his pairing of guardianship with a discourse of religious and cultural difference – a discourse that, as Robert Williams has put it, was the "perfect instrument of empire."[55]

At the same time, Indigenous Peoples sought to use the Spanish system to protect their rights and sometimes punctured the pretensions of Spanish guardianship. In the mid-1550s, for example, Tlaxcalan leaders prepared a lienzo in connection with a petition to the Spanish Crown. In the *Lienzo de Tlaxcala*, "[i]n scene after scene, the Spaniards are in the capable hands of Indians," as the "[t]he Tlaxcalans fight everywhere alongside the Spanish, [with] their alliance ... symbolized in the person of Malintzin herself."[56] The lienzo thus reflects the reality of an alliance in which "the Spanish really were dependent on Indians"[57] – not the other way around, as Cortés liked to imply in his letters and as Vitoria's idea of guardianship

[49] David Johnston, *Fiduciary Principles in Roman Law*, *in* Criddle et al., *supra* note 10, at 505, 507–08.

[50] Richard H. Helmholz, *Fiduciary Principles in the Canon Law*, *in* Criddle et al., *supra* note 10, at 490, 495–96.

[51] Franciscus de Victoria, Des Indis et de Ivre Bellis Relectiones 159 (Ernest Nys ed.; John Pawley Bate trans. 1917).

[52] *Id.* at 152.

[53] *Id.* at 153.

[54] see Anghie, *supra* note 13, at 21 (arguing that "Indians *seem* to participate in this system as equals") (emphasis added).

[55] Williams, *supra* note 13, at 59.

[56] Camilla Townsend, Malintzin's Choices: An Indian Woman in the Conquest of Mexico 75 (2006).

[57] *Id.* at 76.

would suggest to later generations of scholars of international law. It is worth remembering, however, that the Tlaxacan's *lienzo* was retelling events from 1519 to 1521. By the 1550s, the balance of power had shifted in the heartland of New Spain.[58] Even there, however, Indigenous Peoples, such as the Nahuas, sometimes succeeded in using the tools of Spanish rule, such as litigation in the *Juzgado General de los Indios*, to protect their lands and personal rights.[59]

The lesson is that people (or peoples) may shape the very legal order that aims to control them. Even so, we should not assume that New Spain had an institutionalized scheme for the faithful guardianship of the rights of Indigenous Peoples. We should not, in other words, mistake the power of an ideology for its institutionalization in practice.[60] Despite all that its etymology might suggest,[61] the *encomienda* system was not a settled fiduciary institution. Under this system, the Crown entrusted Spanish conquerors with rights to labor and tribute from Indigenous Peoples and imposed duties on the *encomenderos* to convert them to Christianity and to protect them from violence. During the early-to-mid-sixteenth century, the Crown's attempts to constrain settlers' most violent abuses, including through laws such as the *Leyes Nuevas* of 1542, sparked murderous resistance in some cases and were largely ignored in others. Nor should we assume that the institution of the *Protectoria de Los Indios*, established in response to the advocacy of Bartolomé de las Casas and Fray Francisco Jimenez de Cisneros, was a full-fledged fiduciary institution.[62]

* * *

The company-states that emerged as transnational actors in the seventeenth century were closer to what we now think of as fiduciary institutions. One of the biggest differences between the Spanish empire on the one hand and the Dutch and

[58] That was not the case throughout the Americas. *See* Grant Jones, The Conquest of the Last Maya Kingdom (1998) (retelling story of Spanish occupation of Nojpeten, the capital of the Itzas, in 1697).

[59] *See* Micaela Wiehe, Making Their Voices Heard: The Nahua Fight to Secure Agency through the Spanish Colonial Legal System, 1575–1820 (2021) (unpublished dissertation).

[60] Vitoria has loomed large for modern scholars searching for early critics of empire and founders of international law. Some might trace the "sacred trust of civilization" as a transnational legal order (TLO) all the way back to Vitoria's idea of guardianship. Felix Cohen, an American scholar whose *Handbook of Federal Indian Law* continues to be the leading treatise, saw the origins of his field in Vitoria and the *encomienda* system of colonial Mexico. *See* Felix S. Cohen, *Spanish Origin of Indian Rights in the Law of the United States*, 31 Geo. L.J. 1 (1942). But Cohen's account goes too far in tracing a through line between the *encomienda* system and US law, which drew upon distinctive traditions and institutions of the common law and equity.

[61] *Encomienda* is derived from *encomendar*, "to entrust."

[62] *See generally* Caroline Cunill, *La protectoría de indios en América: Avances y perspectivas entre historia e historiografía*, 28 Colonial Latin Am. Rev. 478 (2019).

English empires on the other hand was the latter's reliance upon chartered companies. The Dutch and English East India Companies were formed by merchants and held charters from their respective sovereigns. As institutions, they combined functions and aims that we divide between "private" companies and "public" governments. Their charters, like constitutions, assigned various powers and rights, including powers that we associate with the sovereignty of states. These included powers to maintain armed forces, make war, and enter into treaties with foreign sovereigns. At the same time, these chartered companies had features that today we associate with private businesses, including some features, such as the separation of ownership from control of property, that are characteristic of private fiduciary relationships.[63] To call the managers of these companies "fiduciaries" would be anachronistic, at least if we mean to suggest that they were subject to judicially enforceable fiduciary duties of loyalty and care in the way that corporate directors are today. Modern fiduciary law did not exist when these companies were chartered. Indeed, it began to develop during the period of their imperial expansion.

It would be too much to say that modern fiduciary law developed because of imperialism. That is not my point. It is not too much, however, to say that imperial histories and the history of fiduciary law are intertwined.[64]

It is, moreover, fair to say that chartered companies such as the East India Companies "pioneered" various "institutional features" that are characteristic of modern business firms: separate legal personality, limited liability, joint-stock ownership, and the separation of management and ownership. Imperialism did entail institutional challenges that required legal innovation. European companies seeking to establish forts and factories in Asia needed to make long-term investments, not least in their armed forces. To make such investments, they needed to lock in capital. The Dutch were the first movers in the institutional innovation of locking-in capital, which the *Vereenigde Oost-Indische Compagnie* (the VOC, or Dutch East India Company), deployed for trade and violence, or, perhaps more accurately, violence and then trade. By the second half of the seventeenth century, the English East India Company had "emulate[d] the VOC's consolidation of equity maturity."[65]

The agency problems resulting from the companies' institutional innovations are obvious. First, there was the problem of high-level managers failing to act as faithful agents of shareholders. For example, while the Le Maire controversy is better known

[63] *See* Phillips & Sharman, *supra* note 21, at 3–15.

[64] In recent work, I have shown how the history of British Empire shaped the principle that equity will not intervene to protect political rights, which had implications for the fiduciary relationship between imperial powers and Indigenous Peoples. Seth Davis, *Empire in Equity*, 97 Notre Dame L. Rev. 1985 (2022).

[65] Giuseppe Dari-Mattiacci et al., *The Emergence of the Corporate Form*, 33 J. L. Econ. & Org. 193, 214 (2017).

today,[66] there is something strikingly familiar in the complaints about VOC mismanagement from shareholders who published pamphlets and lobbied for charter amendments from 1622 to 1625. As one pamphleteer put it, quoting the Bible, "Give an account of your stewardship, because you cannot be manager any longer."[67] Second, there was the problem of servants of the East India Companies pursuing their own interests while working abroad. The English East India Company, for example, permitted its employees to engage in their own trades abroad and dismissed them if they strayed too far from the limits on private trading and their obligation to pursue trades on the Company's behalf.[68]

The English East India Company is perhaps the best-known example of an institution that bridges the sacred trust of civilization and the private entrustment of authority for business purposes. The Company's corruption and maladministration in India prompted legal and political debates about the entrustment of sovereign authority for business purposes. While Vitoria used the idea of guardianship to limit the sovereignty of non-Christian, non-European peoples, Edmund Burke employed the idea of "trust" to deny the sovereignty of the East India Company, accusing it of plundering India and abusing the authority entrusted to it. Burke demanded that Parliament take greater control of imperial policy and supported a bill before the House of Commons that would have radically changed the management of the Company and the rights of its shareholders. As Burke put it in a 1783 speech to Parliament, "it is of the very essence of every trust to be rendered accountable."[69] To his listeners, whatever their views of the proposed bill, Burke's statement about the enforceability of a trust was familiar doctrine.[70] And while the bill failed, to be followed shortly by the enactment of a different bill reforming governance of the Company,[71] Burke's ideas about the trust obligations of imperial officials would resonate for later generations that institutionalized the fiduciary law of British imperialism, both in India and elsewhere.

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[66] *See, e.g.*, Henry Hansmann & Mariana Pargendler, *The Evolution of Shareholder Voting Rights: Separation of Ownership and Consumption*, 123 Yale L. J. 948, 1003–04 (2014).

[67] Johan Matthijs de Jongh, *Shareholder Activists Avant la Lettre: The "Complaining Participants" in the Dutch East India Company, 1622–1625, in* Origins of Shareholder Advocacy 61, 61 (J. G. S. Koppell ed. 2011).

[68] *See* Santhi Hejeebu, *Contract Enforcement in the English East India Company*, 65 J. Econ. Hist. 496 (2005).

[69] Edmund Burke, *Speech on Mr Fox's East India Bill 1 December 1783, in* I The Works of the Right Hon Edmund Burke 176 (1842).

[70] *Keech v. Sanford*, a foundational case on the enforceability of the trustee's obligation to avoid conflicts of interest, had been decided almost sixty years earlier. *See* (1726) 25 Eng. Rep. 223.

[71] For a summary of the historical context of Burke's speech, *see* Robins, *supra* note 22, at 135–36.

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Burke's trust speech to Parliament took place on December 1, 1783, less than two months after the signing of the Treaty of Paris between Britain and the United States. After losing their empire over thirteen colonies in North America, the British pivoted to consolidate their empire in India.[72] For its part, the fledgling United States hoped to secure in the eyes of the world its claims to sovereign authority. In so doing, it confronted Native nations, some of which had treaties with the English, French, and Spanish crowns recognizing them as independent peoples.[73]

Long before the American Revolution, Native nations in what is now the eastern United States engaged in diplomacy with various European sovereigns, including the English Crown. For many of these Native nations, concepts of kinship framed diplomacy between peoples. Parties to a treaty might refer to each other as brothers. A people that depended upon the military protection of another might use the term "father" to refer to their treaty partner. Native diplomats sometimes had to remind their English treaty partners that the use of these terms did not imply submission.[74]

In its earliest treaties, negotiated during the American Revolution when the United States needed military support, the Continental Congress recognized Native nations as independent peoples. US officials often used kinship terms drawn from Indigenous diplomacy when treating with Native diplomats.[75] During this period, the United States typically would promise to protect Native nations from military threats as well as from white settlers. Native nations emphasized this duty of protection when demanding that the United States make good on its guarantees of security for their lands.[76]

The best-known example is the Cherokee cases of 1831–32.[77] After gold was discovered within the territory of the Cherokee Nation, the State of Georgia enacted a series of laws that purported to regulate Cherokee territory. The Cherokee Nation unsuccessfully petitioned Congress and President Andrew Jackson for redress. It also bought a bill in equity in the original jurisdiction of the Supreme Court, which dismissed the bill on jurisdictional grounds. The leading opinion, written by Chief Justice John Marshall, reasoned that the Cherokee Nation was a "domestic dependent nation," not a "foreign State" entitled under the US Constitution to sue in the

[72] *See generally* P. J. Marshall, The Making and Unmaking of Empires: Britain, India and America C. 1750–1783 (2005).

[73] *See* Gregory Ablavsky, *Species of Sovereignty: Native Nationhood, the United States, and International Law, 1783–1795*, 106 J. Am. Hist. 591, 593 (2019).

[74] *See* Charles W. A. Prior, Settlers in Indian Country (2020); Robert A. Williams, Jr., Linking Arms Together: American Indian Treaty Visions of Law and Peace, 1600–1800 (1999).

[75] *See generally* Williams, *supra* note 74.

[76] For a summary of this duty of protection, *see* Daniel I. Rey-Bear & Matthew L. Fletcher, *We Need Protection from Our Protectors: The Nature, Issues, and Future of the Federal Trust Responsibility to Indians*, 6 Mich. J. Envtl. & Admin. L. 397 (2017).

[77] The history of these cases is summarized by Rennard Strickland, *The Tribal Struggle for Indian Sovereignty: The Story of the Cherokee Cases*, *in* Indian Law Stories 64–79 (Carole Goldberg et al. eds., 2011).

Court's original jurisdiction.[78] Marshall added that the relationship between the Cherokee Nation and the United States might be described as one between a "ward" and its "guardian." The Cherokee Nation did not, however, let the matter drop. It authorized its attorneys to represent a missionary who had been convicted of violating a Georgia law requiring whites to obtain the State's permission before entering Cherokee territory. In the second case, *Worcester v. Georgia*, the US Supreme Court held that the State of Georgia had no authority over the Cherokee Nation by virtue of its treaties with the United States.[79] The Cherokee Nation's lawyers pointed to European international law in their arguments. Accepting those arguments, the Court cited Vattel's Law of Nations, analogizing the Cherokee Nation to those European "tributary" states that had entered into treaties placing themselves under the protection of a more powerful sovereign while retaining their rights of self-government.[80]

The Cherokee cases give us a sense of the ways in which a fiduciary idea framed struggles over political and economic power between Native nations and settler governments. In essence, the Cherokee Nation argued that it was the beneficiary of a specific trust – a treaty promise of protection. It was like various European states that enjoyed similar treaty promises. In making this argument, the Cherokee Nation pushed back on those strands of European international law that were cited to oppose Indigenous sovereignty.[81]

There is a second sense in which the Cherokee cases are illustrative. The Supreme Court's decision in *Worcester* did not stop the US government from forcing the Cherokee Nation and other Native nations to leave their homelands. Fiduciary law and its associated institutions facilitated removal and the land grab that followed. As Claudio Saunt has explained, removal "was a financial as well as political and military operation, the mechanics of which were scrutinized by New York and London bankers as much as by federal officials."[82] Financial firms from Wall Street, State Street, and London provided capital that went toward the dispossession of Native people. Many of these firms were trusts. They invested in land speculation, which was carried out through schemes that "were both banal and appalling": Speculators, for example, "burned down houses and drove off the

[78] Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).
[79] Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832).
[80] *See id.* at 559–61.
[81] Vattel, for instance, argued that Spaniards usurped the sovereignty of the Mexica Empire – better known to world today as the Aztec Empire – when they captured Tenochtitlan and deposed Emperor Moctezuma. By contrast, Vattel mused, Indians in New England were "wandering tribes," not "sovereign states." Emer de Vattel, The Law of Nations, or, Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns, with Three Early Essays on the Origins and Nature of Natural Law and on Luxury bk. I, § 209, at 216 (Béla Kapossy & Richard Whatmore eds. 2005) (1797). For further discussion, *see* Seth Davis et al., *Persisting Sovereignties*, 170 U. Pa. L. Rev. 549, 573–75 (2022).
[82] Saunt, *supra* note 23, at 315–16.

residents."[83] The result was not a well-functioning market, but one in which fraud, violence, and collusion between companies combined to deprive Native people of market value for lands they did not want to leave in the first place.[84]

Perhaps most appalling is the way in which Native peoples' own assets were used to finance their own exploitation. Removal treaties, which were negotiated between the US and Native nations under duress, put Native assets into trust with the United States acting as the trustee. These treaties were an example of what Emilie Connolly has recently called "fiduciary colonialism."[85] During its first few decades, the United States promised to provide annuities to various Native nations, a practice that echoed Indigenous traditions of gift diplomacy. Over time, the US government began to promise payments of specie as annuities – a crucial development, as specie was "an exceedingly scarce and attractive form of capital to Natives' trading partners."[86] By the time of the removal era, the Jackson Administration had moved to the use of investments in trust funds, with the United States investing the principal and dispensing the interest as an annuity. These investments funded "banks, canals, railways, and other state-financed carriers of westward expansion."[87] During the removal period, Indian agents invested Native money at the instance of land speculators and state banks, leading to a system where a speculator might, for example, borrow specie certificates tied to Native money and use those certificates to buy Native land.[88]

In short, the story of removal is one of exchange through fiduciary exploitation. It is a story that would be repeated in US history. For instance, as we saw with Zitkala-Ŝa's report on Oklahoma guardianship and probate law, Native people whose ancestors were forced to leave their homelands in the nineteenth century would lose their wealth to fiduciary exploitation in the twentieth.

The juridical expression of this institutional dynamic may be found in the US Supreme Court's opinion in *Lone Wolf v. Hitchcock*.[89] In the late nineteenth century, the US Congress authorized the allotment of the lands of various Native nations with the aim of assimilating Native people. Allotment meant parceling out tribal lands into individual plots, with some plots to be held in trust for tribal members, while others would be sold to white settlers. Lone Wolf and other leaders of the Kiowa, Comanche, and Apache Nations filed a bill in equity to enjoin implementation of the allotment policy, arguing that the Constitution protected their treaty-guaranteed property rights against allotment. The Supreme Court

[83] *Id.* at 320.
[84] *Id.* at 324–26.
[85] Emilie Connolly, *Fiduciary Colonialism: Annuities and Native Dispossession in the Early United States*, 127 Am. Hist. Rev. 223 (2022).
[86] *Id.* at 228.
[87] *Id.* at 228.
[88] Saunt, *supra* note 23, at 329.
[89] Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

dismissed the bill. It reasoned that allotment was a "mere change in the form of investment" of Native assets, one that a trustee was entitled to make.[90]

* * *

Investing the assets of Native people required an administrative apparatus for accounting for those assets. This was not the only sort of accounting that institutionalized the fiduciary ideal of imperial rule. The compiling of population statistics was another. The idea that imperial powers were guardians for particular peoples both supported, and was supported by, the institution and expansion of accounting practices that sought to quantify populations and their resources.[91]

Consider, for example, the instruction that Chief Protector George Augustus Robinson sent in 1839 to every assistant protector working at the Port Phillip Aboriginal Protectorate in New South Wales.[92] The Protectorate was brand new, established in 1838 at the direction of the Colonial Office of the British Empire in response to an 1837 report of the House of Commons Aborigines Committee.[93] What the Empire needed, the report concluded, was an institution to put Aboriginal peoples on the path to civilization, which required, among other things, protecting them from white settlers.[94]

To this day, Taungurung people remember the violence of the first encroachment of white settlers into their homelands, which are in what today is the state of Victoria, Australia. As Taungurung Elder Roy Patterson put it, "there was a big fight" between white sheep and cattle ranchers and Aboriginal people over access to water.[95] In this fight, "[t]he white people shot the Aboriginals for killing their animals."[96]

The Colonial Office's idea of protection was to settle Aboriginal populations around protectorate stations and turn them into sedentary farmers. Chief Protector Robinson of Port Phillip Protectorate thought that only a gradual process of resettlement would succeed. Assistant protectors should therefore periodically travel to meet with the Aboriginal peoples entrusted to their care. On his instructions, the

[90] *Id.* at 568.

[91] *See* Tim Rowse, *The Statistical Table as Colonial Knowledge*, 41 Itinerario 51, 65 (2017).

[92] *See id.*

[93] Rachel Standfield, *'The vacillating manners and sentiments of these people': Mobility, Civilisation and Dispossession in the Work of William Thomas with the Port Phillip Aboriginal Protectorate*, 15 L. Text Cult. 162, 162 (2011).

[94] *See* British House of Commons, Report from the Select Committee on Aborigines (British Settlements) with the Minutes of Evidence, Appendix and Index (1837).

[95] Uncle Roy Patterson & Jennifer Jones, On Taungurung Land: Sharing History and Culture 15 (2020).

[96] *Id.* For more on violence between settlers and the Aboriginal peoples of the region, *see* Jennifer Jones, *Acknowledging Sovereignty: Settlers, Right Behaviour and the Taungurung Clans of the Kulin Nation*, 8 L. & Hist. 117, 126–27 (2021).

protectors at Port Phillip had to give biannual accountings of "the number of journeys you have made, the number of cases you have enquired into, with the results of such journey, the number of days spent at any fixed station, [and] the number of days in traveling or elsewhere."[97] One assistant protector, Edward Stone Parker, a teacher and lay preacher, responded with all that and more, including statistical tables offering daily average attendance figures for the Taungurung people at this station over an eight-year period ending in 1849, when the Protectorate was shut down. Never mind that Parker's daily averages were almost certainly a "fantasy" – that is, a "projection" of Parker's desire that the Taungurung would settle at his station and become farmers.[98] In the end, Assistant Protector Parker was a good fiduciary. He gave his account.

The history of the British Empire is full of fiduciaries who gave their account. One of the most influential and representative was *The Dual Mandate in British Tropical Africa*, a work of imperial theory by the Right Honourable Lord Frederick John Dealtry Lugard, whose many administrative positions include the Governor-Generalship of Nigeria and the Governorship of Hong Kong. The title page of the 1922 edition, published in Edinburgh and London by William Blackwood and Sons, included a pithy quotation from Joseph Chamberlain that stated the dual mandate of European empires: "We develop new territory as Trustees for Civilisation, for the Commerce of the World."[99] Imperial administrators, that is, had a fiduciary duty to civilize peoples subject to their rule and open up markets for their benefit and the benefit of the people of the imperial metropole. For Lugard, the most effective system for fulfilling this dual mandate was indirect rule, which incorporated local leaders and political systems into imperial administration. Assimilation would be gradual and "progressive"; the imperial government would be "sympathetic" to the "aspirations" of peoples "and the guardians" of their "natural rights."[100] At the same time, the peoples of Africa could not deny the right of Europeans to trade in Africa's natural resources. The "task of developing these resources was . . . a 'trust for civilisation' and for the benefit of mankind."[101] Indeed, this sacred trust had already been institutionalized as a principle of international relations.

* * *

Four hundred years after Tlaxcalans and Spaniards marched to Tenochtitlan, the US Government Printing Office in Washington, DC, printed two monographs on the same subject: "wardship" in international law. That was the title of the

[97] Rowse, *supra* note 91, at 65 (internal quotation marks omitted).
[98] *Id.* at 65–66.
[99] The Right Hon. Sir F.D. Lugard, The Dual Mandate in British Tropical Africa title page (1922).
[100] *Id.* at 34, 194.
[101] *Id.* at 615.

monograph by Charles Fenwick, a political scientist whose career included a stint as the president of the American Society of International Law (ASIL).[102] His *Wardship in International Law* focused upon states that were (or had been) wards of other states. The other monograph was *The Question of Aborigines in the Law and Practice of Nations* by Alpheus Henry Snow, who, like Fenwick, was a member of ASIL.[103] Snow's monograph concluded that "Aboriginal Tribes," as he put it, are wards of whatever "civilized State" colonizes their lands.[104] According to Fenwick and Snow, wardship was a settled TLO.

The year 1919 not only marked the four-hundredth anniversary of the alliance between the Tlaxcalans and Cortes's company. It also was an important one in the history of European international law – and in the history of the idea that "civilized States" were guardians for colonial wards. In that year, the Covenant of the League of Nations entered into force. Article 22 of the Covenant created the Mandate System, which proclaimed that so-called "advanced nations" would hold a "sacred trust of civilization" for "peoples not yet able to stand by themselves under the strenuous conditions of the modern world."[105]

Thus, four hundred years after Cortes's company and their Tlaxcalan allies marched several thousand strong into Tenochtitlan, and three hundred and eighty years after Vitoria delivered his lectures at the School of Salamanca, the League of Nations treated trusteeship as an organizing idea of international law and international relations.

It is not surprising that the US government printed monographs on trusteeship in 1919. US President Woodrow Wilson played an important role in the creation of the League of Nations' mandate system. The original proposal for the mandate system, crafted by General Jan Smuts of South Africa, included parts of Europe that had been under the rule of the Austro-Hungarian Empire, the Ottoman Empire, and the Russian Empire. Wilson's counterproposal, which carried the day, applied the Mandate System of trusteeship to peoples outside Europe. So-called class A territories in the Middle East were formerly controlled by the Ottoman Empire and placed under the mandate power of France or the United Kingdom. The remaining Class B and C territories had been German colonies. Belgium, France, and the United Kingdom assumed authority with respect to the Class B mandates, which were in East Africa, the Cameroons, and Togoland. Class C mandates in Oceania were assigned to Australia, Japan, New Zealand, and the United Kingdom, while South West Africa was assigned to South Africa. Wilson claimed that the

[102] Charles Fenwick, Wardship in International Law (1919).
[103] Alpheus Henry Snow, The Question of Aborigines in the Law and Practice of Nations (1919).
[104] *Id.* at 7.
[105] Treaty of Peace Between the Allied and Associated Powers and Germany art. 22, June 28, 1919, 2 Bevans 43, 56.

Mandate System would protect "helpless peoples" from "exploitation" and support them on the path to collective self-determination.[106]

The Mandate System's "sacred trust of civilization" is arguably fiduciary law's first TLO. We can, of course, trace the "sacred trust" from the League of Nations through legal commentary all the way back to Vitoria.[107] In doing so, we would pause over international predecessors to the League of Nations' trusteeship system, including the Berlin Conference of 1884–85 and the international response to the Congo Free State.[108] The former arguably confirmed that trusteeship was a transnational norm of European imperialism.[109] Trusteeship was linked with the Conference's aim to settle disputes about European claims to African territory, with European imperialists assuming a dual mandate in the interests "of free commerce, tutelage, and security from war."[110] The horrors of the Congo Free State, and the international response, repeated this theme.[111] These examples underscore the role of fiduciary law in allocating authority among imperial powers; in this sense, imperial trusteeship was not about the relationship between a fiduciary and a beneficiary, but rather about the relationships among fiduciaries. The League of Nation's innovation was to institutionalize trusteeship as a system of colonial administration subject to transnational oversight.

The result was a full-fledged TLO. In the terms of TLO theory, a TLO emerges as people (and institutions) settle upon legal norms that order how they act. Thus, a TLO is "a collection of formalized legal norms and associated organizations and actors that authoritatively order the understanding and practice of law across national jurisdictions."[112] In these terms, a TLO is fully institutionalized when people "simply take for granted" the relevant "set of legal norms," following them at the transnational, national, and local levels.[113]

The Mandate System was an institutionalized TLO. Its norms were *legal* norms formalized in the Covenant of the League of Nations, not to mention other legal

[106] *See* Anna Su, *Woodrow Wilson and the Origins of the International Law of Religious Freedom*, 15 J. Hist. Int'l L. 235, 250 (2013) (quoting Wilson). For more on the history and institutionalization of the Mandate System, *see* Veronique Dimier, *On Good Colonial Government: Lessons from the League of Nations*, 18 Global Soc'y 279 (2004). On Smuts's vision for Europe and the League, *see* Joseph Kochanek, *Jan Smuts:Metaphysics and the League of Nations*, 39 Hist. European Ideas 267, 272 (2013).

[107] In this sense, Anthony Pagden has described Vitoria's work as "the most consistently influential text on the question of the legitimacy of European imperialism." Anthony Pagden, *Stoicism, Cosmopolitanism, and the Legacy of European Imperialism*, 7 Constellations 3, 7–9 (2000).

[108] *See* Bain, *supra* note 13, at 63–74.

[109] *See id.* at 63 (arguing that Berlin Conference "effectively internationalized the idea of trusteeship").

[110] *Id.*

[111] *Id.* at 68–74.

[112] Halliday & Shaffer, *supra* note 17, at 5.

[113] *Id.* at 32.

documents, such as the mandate agreements that the League and the mandate powers agreed to and the questions that the Permanent Mandates Commission (PMC) propounded to the mandatory powers, not to mention the annual reports from those powers to the League.[114] These norms were directed toward the mandate powers, the territories subject to the mandates, and the League as an overseer of the Mandate System. These norms aimed – and, in some measure, succeeded – at "produc[ing] *order*" in response to the disorder of war among imperial powers.[115] And this legal order was *transnational*: It ordered legal and political relationships that transcended the boundaries of the nation-state and, indeed, helped (re)constitute the system of state sovereignty after World War I.[116] This TLO was institutionalized over time through the work of the League Council, the Permanent Mandates Commission (PMC), and the Permanent Court of International Justice, as well as the administrative and reporting activities of the mandate powers. In addition, the peoples of the mandate territories could and did petition the League, notwithstanding the limits that the Commission put on the right to petition.[117]

There is perhaps no better evidence of the institutionalization of the Mandate System than the accounting practices that it generated. Fiduciaries are expected to account for their administration of another's interests. And that is precisely what the Mandate System demanded. As Antony Anghie has summarized it, "the PMC sought an immense amount of information" from the mandatory powers on various topics, including the economy and labor.[118] In 1926, for example, the PMC drew up 118 questions for B and C Mandates on this wide-ranging set of topics: "Status of the Territory"; "Status of the Native Inhabitants of the Territory"; "International Relations"; "General Administration"; "Public Finance"; "Direct Taxes"; "Indirect Taxes"; "Trade Statistics"; "Judicial Organisation"; "Police"; "Defence of the Territory"; "Arms and Ammunition"; "Social, Moral and Material Condition of the Natives," including the telling query, "please state approximately the total revenue derived from the natives by taxation and the total amount of the expenditure on their welfare"; "Conditions and Regulation of Labour"; "Liberty of Conscience and Worship"; "Education"; "Alcohol, Spirits and Drugs"; "Public Health"; "Land Tenure"; "Forests"; "Mines"; and, finally, "Population."[119] The production of legal

[114] *See id.* at 20 (defining "legal" to refer to an order that "[1] has legal form, [2] is produced by or in connection with a transnational body or network, and [3] is directed toward or indirectly engages national legal bodies").

[115] *See id.* (defining "order" to refer to aim of TLO "to produce *order* in a domain of social activity or an issue area that relevant actors have construed as a 'problem' of some sort").

[116] *See id.* (defining "transnational" to refer to a legal order that "orders social relationships that transcend the nation-state").

[117] *See* Susan Pedersen, *Samoa on the World Stage: Petitions and Peoples before the Mandates Commission of the League of Nations*, 40 J. of Imperial and Commonwealth Hist. 231 (2012).

[118] Anghie, *supra* note 13, at 152.

[119] Annex 899b. B and C Mandates: List of Questions which the Permanent Mandates Commission Desires Should Be Dealt with in the Annual Report

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documents is not necessarily the production of legal order. But the accounting that the League demanded from the mandatory powers, and the annual reports they provided, underscore the depth of the institutionalization of the "sacred trust" as a frame for administration.

For a system nominally adopted to enhance the autonomy of colonized peoples, the Mandate System proved well adapted to facilitating their subordination. As Antony Anghie has argued, the Mandate System maintained significant continuity with prior periods of imperialism, even as it departed from the sort of "outright exploitation of native peoples by charter companies that took place in the nineteenth century."[120] For example, though members of the PMC sometimes questioned it, the familiar pattern of fiduciary administration in which peoples paid "for their own exploitation and conquest" continued.[121]

Here too, however, people could and did shape the legal order that sought to control them.[122] As Anghie points out, for instance, "the people of Nauru succeeded in protecting their interests, at least in part, through an astute use" of international procedures.[123] Citing the terms of the Mandate System, as well as those of the successor UN Trusteeship system, the Republic of Nauru brought a case to the International Court of Justice against Australia for destructive mining and other practices that violated its rights to self-determination and permanent sovereignty over natural resources.[124] More recently, however, Nauru has become the site of an offshore immigration detention facility for the Australian government, suggesting that legacies of the Mandate System persist.

Following World War II and the creation of the United Nations, the Trusteeship Council, which began its work in 1947, took up the task of overseeing the fiduciary administration of trust territories, most of them former mandate territories.[125] In 1994, the Council ended its work when Palau became a UN member. Decolonization in the 1960s punctuated the Council's period of operations.

of the Mandatory Powers, 10 League of Nations Official Journal 1322, 1322–28 (1926).

[120] Anghie, *supra* note 13, at 161.

[121] *Id.* at 172. ("For example, the people and territory of Ruanda-Urundi, [a Class B mandate,] paid for the large projects that were essentially designed to extract the country's resources for the principal benefit of Belgium itself.")

[122] *See* Gregory Shaffer & Carlos Coye, *From International Law to Jessup's Transnational Law, from Transnational Law to Transnational Legal Orders*, *in* The Many Lives of Transnational Law: Critical Engagements with Jessup's Bold Proposal 126, 133–40 (Peer Zumbansen ed. 2020).

[123] Anghie, *supra* note 13, at 194.

[124] Certain Phosphate Lands in Nauru (Nauru v. Australia) (Preliminary Objections) [1992] ICJ Rep 240.

[125] For a discussion of UN Trusteeship system and a proposal that the Council might be reimagined and revived as a peacebuilding institution, *see* Saira Mohamed, *From Keeping Peace to Building Peace: A Proposal for a Revitalized United Nations Trusteeship Council*, 105 Colum. L. Rev. 809 (2005).

During the decolonization era, nationalist leaders such as Nnamdi Azikiwe of Nigeria and Kwame Nkrumah of Ghana criticized the ideology and institution of international trusteeship as paternalistic and exploitative[126] – a far cry from scholars' typical story about fiduciary law.

10.4 CONCLUSION

Imperialism is part of the big picture of world history. Yet, it is not part of the typical picture of fiduciary law. This omission has made for incomplete theory and an incomplete political economy of fiduciary law. By putting imperial histories into the picture of fiduciary law, this chapter has explored what fiduciary law has done in the world and the values it has served. The aim is to think about fiduciary law descriptively in a way that may have implications for normative theory building.

Taking imperialism seriously would mean recognizing that fiduciary law can simultaneously be for autonomy *and* for domination. There is much to be said for a pluralist view of fiduciary law, one that, as Dagan puts it, sees fiduciary law as a "heterogeneous" legal category in which some fiduciary relationships "enhance autonomy."[127] This heterogeneity raises the question whether it makes sense to think of fiduciary law as a field in its own right. Perhaps the lesson of this chapter is that certain categories of legal relationships – guardianship, for example – are just so different from other categories – agency, let's say – that we should not lump them. Yet, I think, the lesson is that we should be thinking of these sorts of relationships together, because they are bound together as a matter of political economy. Not simply autonomy enhancing, nor simply subordinating, fiduciary law has framed struggles over political and economic power, while fiduciary institutions have been sites of those struggles.

[126] *See* Adom Getachew, Worldmaking after Empire: The Rise and Fall of Self-Determination 81–82 (2019).
[127] Dagan, *supra* note 10, at 832.

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PART III

The Frontiers of Transnational Fiduciary Law

11

Transnational Law's Legality

Evan Fox-Decent[*]

11.1 INTRODUCTION

I recently defended the grandiose claim that fiduciary principles and concepts, properly elaborated within the domain of public law, supply an interpretive theory of everything, which is to say, a theory capable of explaining the entirety of domestic, international, and supranational public law.[1] This is the scope and promise of what Evan Criddle and I call public fiduciary theory.[2] The key to the theory-of-everything claim is appreciating that fiduciaries and public authorities alike occupy other-regarding roles and hold other-regarding powers to be used exclusively on behalf of or in the name of the persons subject to them. In this chapter, I pile immodesty onto grandiosity. I argue that public fiduciary theory can explain the legal character of transnational legal orders (TLOs) composed of private actors that have no express public authorization to execute their mandates – that is, no delegated authority from either states or treaty-based international organizations.

In making this argument, I borrow and develop the illuminating idea of TLOs developed by Gregory Shaffer and a number of his coauthors.[3] In Section 11.2,

[*] I owe special thanks for comments to Seth Davis and Gregory Shaffer. I am also indebted to Oliver Chan, Marie-Laure Dufour and Steven Haig for superlative research assistance and comments. And I thank Canada's Social Science and Humanities Research Council for financial support.

[1] Evan Fox-Decent, *New Frontiers in Public Fiduciary Law*, *in* THE OXFORD HANDBOOK OF FIDUCIARY LAW 909–10 (Evan J. Criddle et al. eds. 2019).

[2] *See*, *e.g.*, EVAN J. CRIDDLE & EVAN FOX-DECENT, FIDUCIARIES OF HUMANITY: HOW INTERNATIONAL LAW CONSTITUTES AUTHORITY (2016). For spirited critique and our reply, *see* Ethan J. Leib & Stephen R. Galoob, *Fiduciary Political Theory: A Critique*, 125 YALE L.J. 1820 (2016); Evan J. Criddle & Evan Fox-Decent, *Keeping the Promise of Public Fiduciary Theory: A Reply to Leib and Galoob*, 126 YALE L.J. 192 (2016).

[3] *See*, *e.g.*, Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, 68 L. & CONTEMP. PROBS. 263 (2005); Gregory Shaffer, *Transnational Legal Process and State Change*, 37 L. & SOC. INQUIRY 229 (2012);

I summarize Shaffer's socio-legal conception of TLOs, a conception that seeks inter alia to characterize and explain the processes of transnational legal norm creation and change. I then distinguish the socio-legal questions that Shaffer's conception addresses from jurisprudential questions I intend to explore regarding the nature and legal credentials of transnational law. We shall see, for example, that the meaning of legitimacy within a jurisprudential inquiry is distinct from the concept's meaning within a socio-legal framework. To bring this distinction between socio-legal and jurisprudential inquiries into focus, I discuss Thomas Schultz's argument that the *lex mercatoria* is not really law at all,[4] and Martin Loughlin's claim that transnational law is merely a species of regulation that constitutes neither law nor legal order, properly so-called.[5] I suggest that jurisprudential considerations must be adduced to answer Schultz's and Loughlin's arguments, since what is at stake is not the existence of transnational norms and institutions, but rather the significance of those norms and institutions to the question of whether the *lex mercatoria* or other areas of transnational law genuinely count as legal systems.

In Section 11.3, I offer a sketch of public fiduciary theory in the transnational context. I use the International Organization for Standardization (ISO) as a case study to illustrate how public fiduciary theory can reveal (i) the legal quality of norms produced by private transnational organizations, and (ii) the grounds for thinking that transnational law generally comprises a legal system and therefore is genuine law.[6] Prominent among those grounds is transnational law's claim to possess legitimate authority over its subjects and the presence of power-conferring rules that empower transnational actors to make, implement, and adjudicate transnational law.

In Section 11.4, I gather together various implications for jurisprudence of the foregoing analysis. I suggest that transnational law is akin to Dworkin's hard cases in that both show what is there in the ordinary case. More specifically, the claim that transnational law is *law* implies that law is possible outside the sphere of national and international state regulation. Transnational law likewise suggests that coercion is not an essential element of law, and that private entities that abide by fiduciary principles can attain a measure of authority that either is or closely resembles public authority.

Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, *in* Transnational Legal Orders 3 (Terrence C. Halliday & Gregory Shaffer eds. 2015).

4 Thomas Schultz, *Some Critical Comments on the Juridicity of Lex Mercatoria*, 10 Yearbook of Private Int'l L. 667 (2008).

5 Martin Loughlin, *The Misconceived Search for Global Law*, 8 Transnat'l L. Theory 353 (2017).

6 This section of the chapter builds on Evan Criddle's and my prior discussion of the ISO. *See* Criddle & Fox-Decent, *supra* note 2, at 331–36.

11.2 TRANSNATIONAL LEGAL ORDERS

Shaffer and others have developed an interlocking and mutually supportive conception of transnational law, transnational processes, and TLOs.[7] Noting that transnational law has a close affinity to "global law" and "global administrative law," Shaffer characterizes transnational law as a concept developed "to address legal norms that do not clearly fall within traditional conceptions of national and international law, but are not necessarily global in nature."[8] He offers as examples of the transnationalization of law the *lex mercatoria* (commercial law institutionalized by supranational arbitration) and common approaches to cross-border judicial and regulatory issues developing from transjudicial and transgovernmental dialogue.[9]

Shaffer observes that the concept of transnational law is commonly used to refer to law that addresses cross-border events or activities, and may include public and private international law, the development through caselaw of transnational legal rules and principles, and the eventual consolidation of those rules and principles into a relatively coherent body of law.[10] But Shaffer's socio-legal framework, which he calls "Transnational Law as Transnational Construction and Flow of Legal Norms," has a different focus. Its concern is process-oriented, and seeks to assess "the transnational production of legal norms and institutional forms in particular fields and their migration across borders, regardless of whether they address transnational activities or purely national ones."[11] In other words, the focus of this socio-legal approach is on how transnational legal norms are actually produced, their practical effects, and the means by which they travel across borders, where norm migration is typically part of an ongoing and dynamic process of norm creation and amendment. The framework takes an ecumenical approach to sources, which may be "an international treaty, international soft law, privately created codes or standards, a foreign legal model promoted by transnational actors, or a combination of them."[12]

When transnational norms achieve a measure of acceptance, stability, and coherence within a given domain, Shaffer characterizes the domain as a TLO. He conceptualizes these orders generally as "a collection of more or less codified transnational legal norms and associated institutions within a given functional domain."[13] He and Terence Halliday have subsequently defined a TLO as "a collection of formalized legal norms and associated organizations and actors that

[7] *See, e.g.*, *supra* note 3 (citing relevant works).
[8] Shaffer, *supra* note 3, at 232.
[9] *Id.* at 232–33.
[10] *Id.* at 233 (citing Craig Scott, *Transnational Law as Proto-Concept: Three Conceptions*, 10 German L.J. 859 (2009)).
[11] *Id.* at 234.
[12] *Id.*
[13] *Id.* at 236.

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authoritatively order the understanding and practice of law across national jurisdictions."[14] The boundaries of TLOs are differentiated by their legal scope. Scope is defined both by the legal subject matter of a given TLO and by its geographical scope, which is possibly but not necessarily global, and is always, in some way, transnational. Halliday and Shaffer posit that a transnational order is *legal* (rather than, say, social or religious) when "it involves international or transnational legal organizations or networks, directly or indirectly engages multiple national and local legal institutions, and assumes a recognizable legal form."[15] They attribute three constitutive properties to the legal aspect of TLOs.

The first is that "[t]he norms are produced by, or in conjunction with, a legal organization or network that transcends or spans the nation-state."[16] At the national level, these include state organs such as legislatures and executives, while at the international level they include formal treaty-based organizations such as those pertaining to the UN system, but also less formal organizations such as the International Competition Network (ICN).[17]

Their second feature is that "the norms, directly or indirectly, formally or informally, engage legal institutions within multiple nation-states, whether in the adoption, recognition, or enforcement of the norms."[18] These diverse norms include the Codex Alimentarius Commission's food safety standards that the WTO promotes for national adoption, and human rights standards from the Paris Principles that the United Nations encourages states to implement. Halliday and Shaffer claim that these norms are not binding in themselves, but that "actors aim to catalyze through these instruments the adoption, recognition, and enforcement of binding, authoritative legal norms in nation-states."[19] They explicitly include private transnational lawmaking (e.g., contract) and the standard-setting of private organizations such as the ISO (discussed in Section 11.3) because the norms created through these practices shape regulation, liability, and ultimately adjudication.

Halliday and Shaffer's third constitutive feature of "legal" within the concept of TLO is that its norms are produced in "recognizable legal forms."[20] Here, again, the approach is broad, but limited to forms that are characteristic of legal texts, such as rules, standards, model codes, and judgments. They again emphasize that their approach includes hard law and soft law texts, and those developed by private as well as public entities. These texts, Halliday and Shaffer argue, shape and influence the production, interpretation, and implementation of binding national and supranational norms. In addition, they claim that private arbitration awards "although

[14] Halliday & Shaffer, *supra* note 3, at 5.
[15] *Id.* at 7.
[16] *Id.*
[17] *Id.* at 7–8.
[18] *Id.* at 8.
[19] *Id.* at 9.
[20] *Id.* at 10.

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made outside the official public law system, are validated through the recognition and enforcement of arbitral awards by these systems … instantiating the transnational links between private transnational institutions and national legal systems."[21] This is an important insight with jurisprudential implications, as we will see when we turn later to the case of the ISO. Formal legal systems – national and international alike – are conceived in a manner that acknowledges both their permeability to private transnational norms and the legal quality those norms possess once they are recognized within a national or international legal order.

Within this socio-legal framework, the legitimacy of a TLO refers to "the subjective belief of actors that a rule or institution should be obeyed."[22] From this perspective, the question of a TLO's legitimacy is a question about whether its subjects believe it possesses rightful authority or, to put the point slightly differently, whether its subjects believe or accept that its laws are worth obeying. If a regime enjoys significant legitimacy in this sense, there is a greater likelihood that its norms will be accepted and implemented without resort to coercion. If coercion is necessary for enforcement, then greater (sociological) legitimacy makes the success of coercion more likely, since recalcitrant actors will have more difficulty attracting third-party assistance. Also, bad actors may be less willing to resist sanctions if they themselves don't believe in their cause.

From a jurisprudential perspective, however, legitimacy means something else. In the context of a philosophical inquiry into the nature and existence of law, the concept refers not to actors' beliefs (though they are implicated) but to whether a regime in fact possesses rightful authority and that regime's subjects in fact have a correlative (though defeasible) duty to obey the law.[23] To the extent a legal order in fact possesses rightful authority, it is legitimate, even if a significant number of its subjects do not believe in its legitimacy. And conversely, even if every subject of a legal order were to believe in its legitimacy, from this perspective that would not be conclusive. In principle, they could all be wrong or misguided: Hart's "sheep to the slaughter."[24] Most legal philosophers would allow that some significant measure of effectiveness or de facto authority is necessary for a purported authority to be an

[21] *Id.* at 9–10.

[22] *Id.* at 28.

[23] *See, e.g.*, Joseph Raz, The Morality of Freedom 53 (1986) (outlining a positive case for legitimate authority that relies on objective outcomes, not subjective beliefs). Some theorists separate authority and duty, but the more conventional view, which I adopt, views them as conceptually linked and correlative to one another (the existence of one is implied by the existence of the other, and the reasons that justify one in a given case would also justify the other): *see, e.g.*, Evan Fox-Decent, Sovereignty's Promise: The State as Fiduciary 114–16 (2011).

[24] H. L. A Hart, The Concept of Law 117 (Joseph Raz & Penelope A. Bulloch eds. 3d ed. 2012). ("The society in which this was so might be deplorably sheeplike; the sheep might end in the slaughter-house. But there is little reason … for denying it the title of a legal system.")

authority at all,[25] but none would count this as a sufficient condition of legitimate authority.[26]

Just as legitimacy in the socio-legal sense has come to occupy an important role in that framework, legitimacy in the jurisprudential sense now commands a central place in philosophical writings on the nature and existence of law. The short reason for this is Raz's claim that it is an existence condition of all legal systems that they claim to possess legitimate authority.[27] This claim and Raz's own service conception of authority are perhaps his most significant contributions to the legal positivist project, since they offer an account of law's normativity that Hart's account lacked. On Raz's view, a merely de facto authority that did not claim legitimate authority (legitimacy, in the jurisprudential sense) would not be a legal system. And, Raz says, for a putative legal system to claim legitimate authority, the claim must be made in good faith, and it must be possible for the system of rules to have legitimacy.[28] Raz is clear throughout that he is not talking about subjects' perception or approval of their legal system, but rather is referring to legitimate authority as a moral feature of a legal system – that is, as a moral power of lawgivers to announce and interpret law their subjects have a defeasible duty to obey.[29]

Of course, all of this is fully consistent with the socio-legal conception of legitimacy, so long as we bear in mind that the concept in that framework bears a different sense so as to address different questions. To see more concretely the kind of questions the jurisprudential approach is better suited to answer, consider the separate arguments from Schultz and Loughlin that transnational law is not really law.

Schultz is willing to admit that the *lex mercatoria* comprises a system of rules, but denies that it is law, properly so-called.[30] He claims that the *lex mercatoria* lacks autonomy to enforce its arbitral awards, relying on national courts to do so, and so does not constitute a legal system given its lack of autonomy.[31] I will suggest in Section 11.4 that Schultz's argument is unconvincing. At this juncture I merely wish to emphasize that to answer Schultz's structural claim, it will not be enough to point out that transnational legal norms such as arbitral awards can attain binding

[25] *See, e.g.*, Raz, *supra* note 23, at 26.

[26] *See, e.g.*, *id.*; A. John Simmons, Justification and Legitimacy 131 (2001) (discussing and critiquing a conception of legitimacy that follows Weber and equates it to subjects' acceptance or approval of a regime.)

[27] Joseph Raz, *Authority, Law, and Morality*, *in* Ethics in the Public Domain: Essays in the Morality of Law and Politics, 210, 215 (rev. ed. 1995).

[28] *Id.* at 216–17.

[29] *See generally id.*

[30] Schultz, *supra* note 4, at 687–708.

[31] *Id.* at 694–95. Schultz also claims that the *lex mercatoria* fails to meet the requirements of two principles from Lon Fuller's inner morality of law: that is, that law consist in general rules, and that the rules be publicly ascertainable. *See id.* at 704–06. This view is hard to square with the practice of international arbitration in which lawyers routinely make submissions pleading points of law, and before an impartial arbitrator committed to procedural fairness.

status by being "downloaded" into a national context (though incorporating or implementing them into law at the national level will indeed bring them within a national legal order). Schultz concedes that transnational norms may be binding once downloaded but asserts that this shows only that these norms are not properly considered legal until they are converted into binding norms via incorporation into a national public law system.[32] To answer Schultz's jurisprudential argument persuasively, we need to explain why transnational arbitral awards have independent status as law *before* the download.

Loughlin is more skeptical still. He argues that the very idea of global or transnational law is "misconceived."[33] On Loughlin's view, there is a sharp distinction to be drawn between the concepts of law and regulation.[34] For Loughlin, "a legal order is, in essence, a concrete and effective unity and the norms generated by that legal order are derivative phenomena."[35] He claims that transnational law, as depicted by fellow travelers of Shaffer such as Mattias Kumm,[36] Miguel Maduro,[37] and Neil Walker,[38] is replete with "norms or regulatory mechanisms,"[39] but because it lacks unified and effective institutionalization, it is not law, properly so-called.[40] Transnational norms and normative regimes, according to Loughlin, supply a transnational "administration of things" that is merely "the expression of a type of instrumental reason that informs the guidance, control and evaluation mechanisms of the many regulatory regimes that now permeate contemporary life."[41] By contrast, the modern idea of law, Loughlin suggests, consists in the institutional expression of a political community's collective will, an expression of will that makes possible the solidarity of citizenship necessary to maintain relative political and social equality.[42]

Like Schultz, Loughlin recognizes the existence of transnational norms,[43] and likewise acknowledges that these norms may supplement or even replace national legal norms.[44] His objection is to counting transnational norms and regimes as "law"

[32] *Id.* at 695.
[33] Loughlin, *supra* note 5, at 355.
[34] *Id.* at 357.
[35] *Id.*
[36] *See, e.g.*, Mattias Kumm, *The Cosmopolitan Turn in Constitutionalism: On the Relationship between Constitutionalism in and beyond the State*, *in* Ruling the World? Constitutionalism, International Law and Global Governance 258 (Jeffrey L. Dunoff & Joel P. Trachtman eds. 2009).
[37] *See, e.g.*, Miguel Poiares Maduro, *Three Claims of Constitutional Pluralism*, *in* Constitutional Pluralism in the European Union and Beyond 67 (Matej Aybelj & Jan Komárek eds. 2012).
[38] *See, e.g.*, Neil Walker, Intimations of Global Law (2014).
[39] Loughlin, *supra* note 5, at 357.
[40] *Id.*
[41] *Id.* at 356.
[42] *Id.* at 358.
[43] *Id.* at 353.
[44] *See id.* at 359 (acknowledging that global regulation may replace national law, while claiming that such a possibility would be overwhelmingly undesirable if realized).

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and "legal orders," respectively,[45] since they do not, in his view, carry the effective authority of a unified and collective will that the state and sovereignty make possible.[46] Because this is a conceptual claim about the nature of law and the grounds of the authority it asserts, jurisprudential considerations must be adduced to contest it. To set the backdrop to Section 11.4's consideration of this jurisprudential question, I next offer a brief sketch of public fiduciary theory in the transnational context, using the ISO as a case study.

11.3 THE ISO THROUGH A TRANSNATIONAL FIDUCIARY PRISM

Public fiduciary theory takes its structure from the fact that fiduciaries and public authorities alike occupy a role to act in the name of or on behalf of others. Evan Criddle and I argue that this constitutive feature of fiduciary relations supplies a criterion of legitimacy that lets us test the legitimacy of state action: State action is legitimate vis-à-vis an individual only if the action is intelligible as conduct undertaken in the name of or on behalf of the individual.[47] The claim here trades on the idea of fiduciary representation and its implicit requirements. The thought is that law cannot authorize certain abusive actions that may be undertaken by the state, such as slavery or torture.[48] Those abuses are inconsistent with the idea of one person (the state) representing someone else (the subject) in a fiduciary capacity, which is to say, acting in the subject's name or on her behalf.[49] But importantly, although the claim is conceptual, it is also practical in that it embodies a generalization derived from the fact situation characteristic of fiduciary law (one person authorized to act for another) and its governing norms (fiduciary power constrained by proscriptive and prescriptive duties).[50] Fiduciary power resembles public power in that both are quintessentially other-regarding and purposive.[51] Within the domain of public law, public fiduciary theory can be a theory of everything from a conceptual point of view because every public authority stands in a fiduciary relationship with every person subject to its power.

Let's consider now how this theory can be brought to bear on the TLO produced by the ISO and its standard-setting practices. Headquartered in Geneva, the ISO is a

[45] *See generally id.*
[46] *Id.* at 357–58.
[47] Criddle & Fox-Decent, *supra* note 2, at 3, 217, 288.
[48] *Id.* at 99–100, 131.
[49] *Id.* at 217 ("intrinsically abusive actions cannot be authorized through law, as all exercises of public power must be intelligible, in part, as acts taken on behalf of each person subject to them").
[50] *See, e.g., id.* at 99–100 (discussing restrictions on whether governments can lawfully breach certain human rights); *id.* at 217 (discussing states' treatment of foreign nationals in armed conflict); *id.* at 268 (discussing international law's obligations in relation to refugees).
[51] *See id.* at 18 (defining fiduciary power as "other-regarding" and "purposive"; *id.* at 26 (defining public power as "purpose-laden" and "other-regarding").

private network of national standard bodies from 164 countries.[52] Since its founding in 1947, it has developed and published 22,766 commercial standards that harmonize product and business process rules globally.[53] When the ISO receives a request to produce a commercial standard, it consults industry representatives, academics, NGOs, government representatives, and consumer associations.[54] A final draft of the standard is submitted to members for a vote, which then produces an ISO standard if two-thirds vote in favor and not more than one-quarter vote against the proposed standard.[55]

The ISO uses relatively open consultation and participation procedures. The fiduciary theory supplies a helpful analogy to explain why these procedures, or ones much like them, are legally obligatory. This is a challenge because the ISO's standards are used on a voluntary basis. As it has no legal power to impose its standards, it is not obvious that the ISO, as a private entity, owes its stakeholders public law-like obligations regarding the development and dissemination of its standards. The fiduciary theory may appear to support this conclusion, as most fiduciary relations involve legal powers, and fiduciary obligations are typically understood as constraints on the fiduciary's exercise of a legal power.

Some fiduciary relations, however, involve factual rather than legal powers. The classic case is the financial adviser–client relationship. Financial advisers give advice to their clients, but usually do not have legal power to invest their clients' assets. Nonetheless, in light of the client's dependence on the financial adviser's advice, courts have found that advisers have a fiduciary obligation to disclose any conflict of interest they may have in relation to investment advice they give their clients.[56] In the standard case, the client entrusts the adviser with factual discretionary power over her because the client lacks the specialized knowledge possessed by the adviser and thus – practically speaking – commits her investment decisions to the adviser's discretionary judgment. Thus, adviser and client stand in a fiduciary relation, and therefore the adviser owes the client a fiduciary duty to disclose any conflict.

A similar account can be given of the ISO's relation to its stakeholders and the wider public affected by the adoption of its standards. The stakeholders most affected by the development of a standard entrust its development to the ISO, and ordinarily the ISO accepts this charge. Notwithstanding the private constitution of its

[52] For details of the ISO's history and purpose, *see* International Organization for Standardization, *About Us*, *at* https://www.iso.org/about-us.html (last accessed June 10, 2022).

[53] *Id.*

[54] International Organization for Standardization, *Developing Standards*, *at* https://www.iso.org/developing-standards.html (last accessed June 10, 2022).

[55] International Organization for Standardization, ISO / IEC Directives, Part 1: Consolidated ISO Supplement – Procedures Specific to ISO ¶ 2.7 (3d ed. 2012), *available at* https://www.iso.org/sites/directives/current/consolidated/index.xhtml (last accessed June 10, 2022).

[56] *See*, *e.g.*, Hodgkinson v. Simms, [1994] 3 S.C.R. 377 (Can.); Sec. & Exch. Comm'n v. Capital Gains Research Bureau, Inc., 375 U.S. 180 (1963).

organization, the ISO's mission is avowedly public in nature, as it involves resolving transnational coordination problems over standards that will subsequently apply to parties who did not participate in the creation of those standards. In undertaking a public mission, then, the ISO enters into a public fiduciary relation with stakeholders and the wider public affected by its development of a new standard. The ISO's overarching fiduciary duty is to develop such standards impartially, through the use of a transparent, responsive, and participatory institutional framework.

Opportunities for stakeholder participation and responsiveness within the ISO process are similar to the opportunities for participation embedded in notice-and-comment procedures governing rulemaking in some national jurisdictions. In effect, notice-and-comment procedures are to rulemaking what due process is to adjudication.[57] In both national and transnational contexts, subjection to a notice-and-comment duty allows the relevant rulemaking entity to claim credibly that it speaks on behalf of those affected by its determinations. The legitimate rulemaking of the ISO is necessarily regulated by such a duty because it is only through this regulation that the ISO can be understood to develop standards on behalf of all who are affected by them. In other words, the ISO's subjection to duty allows it to satisfy the fiduciary theory's criterion of legitimacy. The legal source and basis of the ISO's public law-like obligations, then, is its public fiduciary relationship to stakeholders and the affected public.

The ISO's legal authority to develop standards is constituted in part by its subjection to a fiduciary duty to exercise its rulemaking power impartially and within a transparent, participatory, and responsive institutional framework. The key difference between the financial adviser's power and the ISO's is that one is public in nature, whereas the other is not. By "public" I mean that the ISO's power is constituted to resolve a certain kind of coordination problem over an indefinite range of actors. To act consistently with its fiduciary duty, the ISO must take into account all potentially affected parties, including stakeholders with divergent interests and future stakeholders who do not take part in the creation of standards that subsequently apply to them.[58] The public nature of the ISO's rulemaking power triggers a *public* – not private – fiduciary obligation, and subjection to this public fiduciary duty lends the *exercise* of the ISO's rulemaking power a limited and very particular kind of legal authority.

Because, strictly speaking, subscription to its standards is voluntary, the ISO does not have authority to impose duties on firms to adopt its standards. The content of its authority, rather, derives from its rulemaking capacity to resolve coordination

[57] *See* Evan J. Criddle, *When Delegation Begets Domination: Due Process of Administrative Lawmaking*, 46 Georgia L. Rev. 117, 191–93 (2011) (characterizing notice-and-comment procedures and due process as complementary checks against domination).

[58] The private/public distinction is notoriously slippery. For present purposes, I stipulate that transnational regulation subject to fiduciary standards, over indefinite and future parties, is public. At the very least, it is regulation with paradigmatically public implications.

problems between firms through the development of standards. Firms are under a liability to lose the benefits of cooperation if they choose to behave as voluntary outcasts by declining to use ISO standards.[59] To the extent this loss of benefits entails a change in the firm's legal position (e.g., through the loss of property or contractual entitlements that depend on the firm's adoption of an ISO standard), the liability is legal and not merely factual or prudential.

Although it is true that a firm's rejection of ISO standards would be a sufficient cause of the firm's loss of benefits, that hypothetical causal story must be interpreted within the context of the ISO's dominance of the transnational standard-setting domain. The ascendant position of the ISO in this domain entails that in practice a transnational firm – an entity created for the purpose of lawfully maximizing profit – could not be a transnational firm without adopting ISO standards. There is, in practice, no exit from the ISO regime that is consistent with a transnational firm being a transnational firm; that is, an entity dedicated to maximizing profit lawfully and transnationally.[60] In a good sense, then, the "choice" of a firm to adopt ISO standards is existential: to be a transnational business capable of engaging in commerce, a firm must use ISO standards for the production and distribution of goods, and those standards therefore are partially constitutive of the legal framework of transnational commerce. It follows that the liability of firms to the exercise of the ISO's rulemaking power is a legal liability of a very comprehensive kind, for the firms' very ability to operate within the legal framework of transnational commerce (i.e., their ability to buy and sell goods transnationally) depends on their adoption of ISO standards. The ISO achieves legal authority to subject firms to this liability through the dutiful exercise of its rulemaking power. The ISO's subjection to and compliance with its fiduciary duty to stakeholders and others, then, is constitutive of its rulemaking authority.

I have selected the ISO as a case study because formally it is a private institution whose origins and salience as a legal person do not trace back to a statute or treaty. Thus, any legal authority it can claim cannot by derived from an express delegation of legal power within its founding charter from states or public international organizations, since there never was such a delegation. But the ISO is far from an isolated case of an institution that creates and regulates transnational norms, including within the expansive field of standard-setting.

For example, the Euro-Retailer Produce Work Group (GLOBALG.A.P. (formerly EUREPG.A.P.)) sets food safety and agricultural practice standards in more

[59] *See* Gregory Shaffer, *How Business Shapes Law: A Socio-Legal Framework*, 42 CONN. L. REV. 147, 174–75 (2009). ("Market forces … press businesses to apply these voluntary ISO standards.")

[60] For the classical statement on the practical implications of a lack of exit, *see* ALBERT O. HIRSCHMAN, EXIT, VOICE AND LOYALTY (1970).

than 135 countries worldwide.[61] GLOBALG.A.P. also sets standards related to environmental protection and worker health and safety.[62] It uses much the same open and participatory method that the ISO uses.[63] One of its signal innovations has been Hazard Analysis and Critical Control Point (HACCP) management systems, which involve proactively seeking out, analyzing, and mitigating threats to safety.[64] The ISO uses an HACCP framework for its "22000 standard" for food safety management systems, and the United States has required use of HACCP systems in meat and poultry plants since 1996.[65] As Errol Meidinger points out, transnational food and agricultural safety regulation involves a myriad of private and public actors that frequently have overlapping and intertwined mandates.[66]

Criddle and I have argued that the ISO can be conceived as the authorized occupant of a public office notwithstanding its private constitution.[67] There are precedents for this idea in both international law and legal theory. In cases of belligerent occupation, international law will confer on the (illegitimate) occupier a temporary authority to establish and maintain legal order.[68] In the absence of the rightful sovereign, the occupier is recognized to have a mandate to rule.[69] Arguably closer still to the case of the ISO is Hobbes's treatment of a private party who steps into a public role. Hobbes claims that the "presumption of a future ratification is sometimes necessary . . . as in a sudden rebellion any man that can suppress it by his own power . . . without express law or commission, may lawfully do it, and provide to have it ratified or pardoned whilst it is in doing or after it is done."[70] When the actions of a private party serve a public purpose, the possibility of their contemporaneous or subsequent public ratification entails that in these circumstances a private actor may be understood to hold a public office or warrant that authorizes her acts. In other words, if a legal framework includes provision for the ex post ratification of

[61] *See* GLOBALG.A.P., *GLOBALG.A.P. History*, *at* https://www.globalgap.org/uk_en/who-we-are/about-us/history/ (last accessed June 10, 2022).

[62] *See* Errol Meidinger, *Private Import Safety Regulation and Transnational New Governance*, *in* Import Safety: Regulatory Governance 233–54 (Cary Coglianese et al. eds. 2009).

[63] GLOBALG.A.P., *GLOBALG.A.P. Standard Development Policy*, *at* https://www.globalgap.org/uk_en/what-we-do/globalg.a.p.-certification/standard-setting/ (last accessed June 10, 2022).

[64] Meidinger, *supra* note 62, at 240.

[65] *Id.* at 242.

[66] *Id.* ("governments regularly find themselves competing with private safety regulatory programs for authority").

[67] Criddle & Fox-Decent, *supra* note 2, at 335.

[68] For extended treatment of belligerent occupation, *see* Eyal Benvenisti, The International Law of Occupation (2d ed. 2012).

[69] *Id.*

[70] Thomas Hobbes, Leviathan (Edwin Curley ed. 1994). For elaboration of this idea in relation to the criminal law doctrine of self-defense, *see* Malcolm Thorburn, *Justifications, Powers and Authority*, 117 Yale L.J. 1070, 1107–10 (2008). For further detail on this point, *see id.* at 1110, arguing that where violence can be fairly characterized as self-defense, Thornburn's public warrant model authorizes the assaulted party to act as a public official would be entitled to act were she present and available to stop the assault.

private acts such that a private actor is treated as an authorized public actor, then in that context the apparently private actor was, from a legal perspective, a public actor all along. The actor's public status is a direct implication of the actor's implicit authorization to act in a public capacity.

In the case of the ISO, it is significant that its standards are recognized ex post as authoritative in decisions of international regulatory organizations such as the WTO.[71] This recognition by international public institutions is arguably a form of public ratification of the ISO's standards and standard-setting process. The WTO's recognition of ISO standards is, at the same time, an implicit recognition of the authoritative role they play in resolving coordination problems. Public recognition of ISO standards is not surprising given their heavy and ubiquitous use in commercial practice, including in contracts that are potentially subject to adjudication and thereby inform arbitral lawmaking.[72] Widespread use of ISO norms in commercial practice and WTO ratification of them helps explain how international law distributes to the ISO legal authority to set transnational standards,[73] notwithstanding their nonbinding nature and the ISO's private constitution. This is not to say that the ISO has a monopoly on standard-setting. In principle, any number of transnational standard-setters could develop standards and enjoy public ratification. Thus, a plurality of private-*cum*-public institutions with overlapping mandates is fully conceivable. Generally, we might imagine the norms and standards of private transnational regulators to comprise a form of nonbinding transnational common law or *lex mercatoria*. Entry into this pantheon would be guided by the fiduciary principle's criterion of legitimacy, which always asks whether a norm, standard or body of soft law that purports to be made on behalf of everyone subject to it has in fact been so made.

The fiduciary principle's criterion of legitimacy, then, is a representational standard of adequacy. It supplies content to a purported legal system's claim to possess legitimate authority by insisting that the regime's norms be intelligible as norms announced and implemented on behalf of all who are subject to them. Because the ISO's standards plainly meet this requirement – in part because the ISO abides by public law-like norms of due process and consultation – the ISO's commercial standards qualify as legal standards before migrating to national or international public law systems.

[71] Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 L. & CONTEMP. PROBS. 15, 23 (2005).

[72] For discussion on private standards being commonly included in contracts and subsequently being enforced through private arbitral processes, *see* Gregory Shaffer, *Theorizing Transnational Legal Ordering*, 12 ANN. REV. L. SOC. SCI. 231, 235–26 (2016).

[73] For discussion of the WTO incorporating ISO standards in legal agreements, as well as illustrative examples, *see* Gregory Shaffer & Carlos Coye, *From International Law to Jessup's Transnational Law, from Transnational Law to Transnational Legal Orders*, *in* THE MANY LIVES OF TRANSNATIONAL LAW 126, 148 (Peer Zumbansen ed. 2020).

11.4 IMPLICATIONS

An important implication of the foregoing fiduciary/jurisprudential analysis is that it bolsters the socio-legal claim that private TLOs, such as the ISO's, really are *legal* orders. Like the socio-legal approach, jurisprudential fiduciary theory helps itself to ex post ratification of private transnational norms, but with an important difference. Under the socio-legal theory, transnational norms must migrate to a formal national or international legal system to become fully legal. Under the fiduciary theory, ratification of transnational norms through their use in national or international legal systems merely confirms what was true of those norms all along – that is, that they were legal in nature from the moment they were produced in accordance with the fiduciary criterion of legitimacy and the public fiduciary duties that attend actors who take on substantively public roles.

As noted with reference to transnational food safety regimes, this analysis extends to hybrid transnational entities that are part public, part private. Rather than insist that the private actor piggy-back on the public for its legal credentials, the fiduciary theory releases the private actor's jurisgenerative potential by enabling the actor to adopt a limited public role.[74] In the case of *lex mercatoria*, this consists mainly in the determination of arbitral decisions and awards. *Contra* Schultz, *lex mercatoria* is a legal system because it makes a claim to legitimate (arbitral) authority, its officials generally respect the norms of due process and treat the parties impartially, and therefore they can be said to act (within their role) on behalf of the parties and the wider commercial public ultimately affected by their decisions. And *contra* Loughlin, transnational regimes can qualify as legal orders, properly so-called, because at the heart of their claim to legitimacy is the fiduciary claim that their institutions serve all who are subject to them, as well as the wider public, in a representational capacity. As fiduciaries of humanity or significant transnational parts thereof, transnational institutions engage matters of common concern on behalf of all stakeholders and affected parties. The unity of legal subjects within these regimes is not determined by state borders or nationalist ideology, but by the jural equality of persons understood as coequal beneficiaries of transnational institutions. The will of legal subjects is expressed in these institutions' mandates and the discretionary but fiduciary means at their disposal to implement them. To think that law's authority – and so law itself – was born and forever delimited with the advent of the nation-state is to adopt a radically parochial conception of law.

A further implication of the fiduciary model, and also *contra* Schultz and Loughlin, is that coercive enforcement of law is not essential for a normative order to count as a legal order. Transnational law is fully intelligible as such by dint of a fiduciary power-conferring rule which allows for norm creation, amendment, and

[74] *See* Robert Cover, *Foreward:* Nomos *and Narrative*, 97 HARV. L. REV. 4 (1983) (discussing "jurisgenerative processes").

adjudication. Here too the fiduciary/jurisprudential view makes common cause with the socio-legal approach. On the fiduciary view, what is key is that transnational norms are created in a manner consistent with fiduciary principles that call for representative and fair procedures, and that they take the legitimate interests of relevant actors seriously. As the discussion of the ISO revealed, even if centralized coercive authority were available to transnational institutions, in many cases it would be neither desirable nor necessary. The subjects of transnational commercial regimes generally have strong reasons to belong to them. Exit is typically costly and impractical. And of equal or greater importance, transnational rulemaking, standard-setting and impartial adjudication resolve problems of indeterminacy and unilateralism that would prevail in the absence of TLOs. By providing common solutions to matters of common concern, transnational regimes let their subjects interact with one another on terms of reciprocal and equal freedom, knowing where they stand and to whom they may be held accountable. Transnational subjects can thus enjoy governance under a rule of law that is intelligible without the state.

11.5 CONCLUSION

I began by noting that much of the literature on transnational law adopts a socio-legal perspective. Within this framework, a legal regime's legitimacy refers to its sociological legitimacy, that is, whether those subject to the regime accept it as worth obeying. By contrast, I said, from a jurisprudential perspective, a legal regime's legitimacy consists in it living up to whatever normative standard of adequacy is appropriate for assessing whether a regime in fact possesses legitimate authority (i.e., a legitimate right or power to rule and represent its people). My argument has been that a jurisprudential approach can complement the socio-legal framework, and in particular can help transnational law scholars answer sceptics such as Schultz and Loughlin who claim that transnational law is not really law at all.

More specifically, I argued that public fiduciary theory can supply a jurisprudential framework congenial to this task. Fiduciary theory is helpful in this context because it takes seriously the idea that all legal regimes claim to possess legitimate authority. Public fiduciary theory interprets this idea to mean that all legal systems, to be legal systems, must undertake the project of law-giving in a manner that is intelligible as an undertaking made on behalf of or in the name of those affected by the relevant legal norms or decisions. Generally speaking, TLOs satisfy this demand, even where the main institution involved is formally private, as in the case of the ISO. By putting substance before formal status, the fiduciary theory shows that transnational regimes and regulation have a genuine legal quality.

12

The Fiduciary Role of Access Platforms

Shelly Kreiczer-Levy

12.1 INTRODUCTION

Peer-to-peer platforms are becoming an important force in today's economy.[1] Companies such as Airbnb, Turo, Eatwith, and Uber are global market actors, generating millions of transactions, in multiple jurisdictions across the globe.[2] These companies connect individuals and small businesses and mediate transactions between owners and renters, service providers and service recipients.[3] Owners rent out their homes, cars, bikes, and personal possessions to renters who prefer access to ownership, and people offer nonprofessional services, including driving and cooking meals, as an alternative to established industries. These transactions do not simply happen. Instead, they are rather heavily controlled by the platform itself.[4]

Despite their clear importance and their market influence, the legal role of peer-to-peer platforms (or access platforms as I refer to them) remains elusive. What is the function of access platforms as private law actors? How should private law jurisprudence conceptualize their role? I argue that access platforms are best conceptualized as market-constituting fiduciaries, a term I introduced before[5] and develop in this chapter.

[1] Liran Einav et al., *Peer to Peer Markets*, 8 Ann. Rev. Econ. 615 (2016).

[2] *See, e.g.*, Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, Forbes (Feb. 11, 2013), http://www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/. *Also see* Mansoor Iqbal, *Uber Revenue and User Statistics (2018)*, Business of Apps (Feb. 27, 2019), http://www.businessofapps.com/data/uber-statistics/.

[3] Einav et al., *supra* note 1.

[4] Guido Smorto, *Protecting the Weaker Parties in the Platform Economy*, *in* Cambridge Handbook on Law and Regulation of the Sharing Economy (Nestor Davidson et al. eds. 2018); Martin Kenney & John Zysman, *The Rise of the Platform Economy*, 32 Issues in Science & Technology (2016).

[5] Shelly Kreiczer-Levy, Destabilized Property: Property Law in the Sharing Economy (Cambridge University Press 2019).

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Access platforms operate as a global, transnational market, and the conceptualization of their legal role is a transnational legal problem.[6] However, the current legal response remains sporadic. Most often, regulation occurs at the local level, focusing on the characteristics of a particular town or city, and generally addressing the social impacts of access economy activity. Other legal questions that scholars address include industry-specific regulation, taxes, antidiscrimination law, and employment law.[7]

Yet, questions of regulation remain partial and incomplete without a prior conceptualization of the legal role of these platforms in their relations to their users. It is a global and normative challenge. What role do platforms serve in transactions among peers? What responsibilities does this role entail? In the absence of a legal conceptualization, access platforms self-regulate and opt for minimal duties set in their terms of service. The emerging processes of transnational legal ordering thus mix self-regulation with sporadic, concrete state or local regulation in several jurisdictions.[8] This mixture of hard and soft law does not constitute anything like a settled transnational legal order, but rather reflects ongoing disputes about how to conceptualize and respond to companies that create a transnational regulatory challenge. In this chapter, I address the jurisprudential challenge of how to conceptualize the problem that access platforms pose, assessing the normative consequences of framing this transnational problem in fiduciary terms.

Relatively few works focus on the responsibilities of platforms toward their users. Some have argued that access platforms mediate transactions, much like real estate brokers.[9] The parties to the transaction transfer a resource, be it property or a service, and the platform simply facilitates the transaction by lowering transaction costs. Platforms should thus be accountable only in their function as brokers.[10] However, this conceptualization does not account for the various additional functions performed by these platforms, including developing search algorithms, creating and

[6] Hannah L. Buxbaum, *Transnational Regulatory Litigation*, 46 Virginia J. Int'l L 252 (2006) (discussing the need of national courts "to participate in implementing effective regulatory strategies for global markets.")

[7] Rashmi Dyal-Chand, *Regulating Sharing*, 90 Tul. L. Rev. 241 (2015); Sofia Ranchordás, *Does Sharing Mean Caring? Regulating Innovation in the Sharing Economy*, 16 Minn. J. L. Sci & Tech. 413 (2015); Sarah Schindler, *Regulating the Underground: Secret Supper Clubs, Pop-Up Restaurants, and the Role of Law*, 82 U. Chicago L. Rev. Dialogue 16 (2015).

[8] *See* Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in Transnational Legal Orders 5 (Terrence C. Halliday & Gregory Shaffer eds. 2015) (providing framework for assessing transnational legal ordering through normative settlement at transnational, national, and local levels); Seth Davis & Gregory Shaffer, *Theorizing Transnational Fiduciary Law*, in Transnational Fiduciary Law (2023).

[9] Jamilla Jefferson-Jones, *Shut Out of Airbnb: A Proposal for Remedying Housing Discrimination in the Modern Sharing Economy*, City Square (May 26, 2016), http://urbanlawjournal.com/shut-out-of-airbnb-a-proposal-for-remedying-housing-discrimination-in-the-modern-sharing-economy/.

[10] *Id.*

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enforcing rules of conduct, overseeing activity, establishing categories for action, and affecting prices. Put differently, it does not account for the power of access platforms in shaping transactions and creating market norms.

A different set of arguments engages with the power of platforms more fully, but these accounts do not account for the conceptualization of access platforms' role in private law. Moreover, these accounts typically group access platforms in peer-to-peer markets together with other online giants such as Facebook, Google, and Amazon.[11] Indeed, access platforms share important attributes with online platforms that serve as a digital infrastructure for activity. All these different platforms – Google, Facebook, Airbnb, and Uber – control a virtual space and access to an activity. Yet, there are important analytical differences. Facebook and Google involve content creation and users' information, but they do not involve the transfer of a resource, property, or service, in the real, offline world. Access platforms, on the other hand, create the infrastructure for offline trades and effectively constitute new forms of markets that are based on disaggregated consumption.[12] These platforms mediate transactions, and redefine consumption of goods and services.

Against this background, I argue that access platforms are best characterized in private law as *market-constituting fiduciaries*. The argument relies on new developments in the theory of fiduciary law – in particular, the idea of a fiduciary relationship as a category for thinking through problems arising from the entrustment of discretionary authority.[13] The market-constituting fiduciary concept provides a normative solution to a transnational problem that could apply in various common law and civil law jurisdictions.

Moreover, the concept responds to the double function of access platforms: They perform services for both service users and service providers. Following the distinction by Paul Miller and Andrew Gold, this role resembles traditional service platforms,[14] though it is not a perfect fit as I explain in Section 12.3. In addition, access platforms create a market and shape its norms. This role generates responsibilities to the participants in this market, and explains why, for example, the platform should be responsible for the discriminatory actions of its participants. Some scholars have argued in favor of such a responsibility, and this chapter provides a much-needed legal basis for this obligation. Other obligations include the duty to give prior notice before pulling out from an area of activity, and the duty to create

[11] Nick Srnicek, Platform Capitalism (2017); K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Tradition*, 39 Cardozo L Rev. (2018); Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. Davis L. Rev. 1183 (2016).

[12] Daniel E. Rauch & David Schleicher, *Like Uber, but for Local Government Law: The Future of Local Regulation of the Sharing Economy*, 76 Ohio St. L.J. 901 (2015).

[13] Hanoch Dagan, *Fiduciary Law and Pluralism*, *in* Oxford Handbook of Fiduciary Law (Evan J. Criddle et al. eds. forthcoming 2019).

[14] Paul B. Miller and Andrew S. Gold, *Fiduciary Governance*, 57 Wm. & Mary L. Rev. 513 (2015),

and maintain fair entry and exit rules. All these implications of the duty of loyalty are discussed in Section 12.3.

The chapter continues as follows. Section 12.2 presents access platforms and their impact on transnational markets. It also discusses the most notable attempts to conceptualize their legal role, and it argues that these conceptualizations are either too narrow or do not account for the full set of activities and functions of access platforms. Section 12.3 discusses fiduciary law, its expansion in recent years in common and civil law jurisdictions, and the possible problems with applying fiduciary law to access platforms. Section 12.4 develops the concept of market-constituting fiduciaries and details its legal and transnational implications. Concluding remarks follow.

12.2 ACCESS PLATFORMS

Access platforms are a particular type of an online platform. Online platforms are broadly defined as a digital infrastructure that enables different groups to interact with one another.[15] This broad definition includes peer-to-peer access platforms, such as Airbnb and Uber, along with other powerful digital platforms, most commonly Google, Facebook, and Amazon.[16] Platforms function as intermediaries that host users' activities. They are therefore in a unique position to collect, record, and store data. In addition, platforms actively dictate the rules of interaction (like cancellation policies or prices), set up a reputation system, manipulate products, and manage services.[17]

Access platforms are a particular type of platform. They mediate transactions that take place offline among peers. These platforms represent an important part of the sharing economy. The sharing economy is defined as collaboration in the use of products and services, simplified and redefined by technological advances.[18] It creates peer markets that allow owners to rent out assets such as cars, homes, bikes, or offer services to strangers.[19] This type of consumption pattern has turned into a global, billion-dollar industry that has been described by proponents as being "as big as the industrial revolution." Access platforms include giants like Airbnb and Uber, as well as other peer-to-peer platforms such as Eatwith, Taskrabbit, Turo, and the like.

[15] Srnicek, supra note 11.
[16] *Id.*
[17] Srnicek, *supra* note 11.
[18] Rachel Botsman & Roo Rogers, What's Mine Is Yours: The Rise of Collaborative Consumption xv (2010).
[19] Peer-to-peer (P2P) markets are markets where trade occurs between peers. *See, e.g.*, Anindya Ghose et al., *Reputation Premiums in Electronic Peer-to-Peer Markets: Analyzing Textual Feedback and Network Structure*, 3 ACM SIGCOMM Workshop on Econ. of Peer-to-Peer Systems (2005).

Access platforms are transnational companies; they operate in a variety of legal jurisdictions.[20] Although their activity is comparable throughout jurisdictions, their policies are occasionally adaptable to local regulation requirements, ranging from local government to state regulation.[21] A prominent example is Airbnb's cooperation with local governments in collecting and remitting tourist taxes across the globe.[22] In other instances, when the access activity is deemed illegal, the activity may still continue but in the shadow of the law and be subject to a fine.[23]

Most jurisdictions are interested in the social impacts of the activity. There is very limited interest in platforms' obligations toward various users. One of the main questions that have occupied courts is whether Uber is an employer of its drivers.[24] The French labor department addressed similar problem by introducing corporate social responsibility guidance rules for platforms.[25] In another context, the US Court of Appeals for the Third Circuit determined that Amazon is a seller for the purpose of product liability law in Pennsylvania.[26] The case was later granted rehearing en banc but finally settled out of court. Although Amazon is not an access platform, the ruling may be further extended to other platforms. Nonetheless, these are sporadic rulings designed to address a concrete issue.

In the absence of a legal conceptualization, the relationship between access platforms and their users, of both parties to the transaction, is dominated by the platform's terms of service. In effect, access platforms self-regulate this relationship.[27] Considering their global reach, one might argue that they effectively engage in transnational legal ordering whenever a concrete regulatory rule does not apply.[28]

Access platforms hold considerable power over their users, both casual and frequent. They employ a unique position to manipulate transactions and frequency of use. Consider, for example, Airbnb's recommendations to its hosts that they "show personality, not personal items." Airbnb blog explains to hosts that personal items and personal photos will not make a guest feel comfortable.[29] Airbnb also nudges hosts to become more professional. Take the case of Jill Bishop. Jill only enjoyed hosting guests who were willing to interact with her, but Airbnb began requiring her

[20] *See supra* note 1–2 and accompanying text.
[21] For Airbnb *see* Shelly Kreiczer-Levy, *The Changing Vision of the Home* in STUDIES IN HOUSING LAW (Michel Vols & Julian Sidoli eds. 2017).
[22] *Id.*
[23] https://www.oyster.com/articles/where-is-uber-banned-around-the-world/.
[24] *See, e.g.*, Uber BV v. Aslam [2018] EWCA Civ 2748.
[25] https://www.jdsupra.com/legalnews/france-s-department-of-labor-issues-92146/.
[26] Oberdorf v. Amazon No. 18-1041 (3rd Cir. 2019).
[27] *See infra* notes 100 and accompanying text.
[28] Evan Fox-Decent, Chapter 11.
[29] Meridith Baer, *Attract More Guests: Ten Simple Tips from Home Staging Expert Meridith Baer*, AIRBNB, INC. (Apr. 17, 2014), https://blog.atairbnb.com/attract-guests-10-simple-tips-home-staging-expert-meridith-baer/.

to host people who were just looking for a place to stay.[30] These policies nudges users into a particular form of property use and property design.

In addition, there are significant information asymmetries between the platform and its users. Various rules of conduct are enforced by strict, algorithmic enforcement.[31] Users cannot negotiate with the platforms. Another feature of access platforms' activity involves the reputation mechanism. Reviews by users and owners are the backbone of access platforms. Nonetheless, reviews are highly sensitive to manipulation. They are not only susceptible to bias by other users, but also vulnerable to algorithmic manipulation by the platforms.[32]

Furthermore, users are dependent on the ability to continue to use a given platform. While some users only use a platform rarely, others are frequent users who depend on its continued activity. They are thus exposed to immediate changes, making access an inherently risky choice. The case of Uber's and Lyft's operation in Austin, Texas, provides a good example. Once the city decided to maintain strict regulation of ridesharing businesses, Uber and Lyft pulled out of the city immediately, within a couple of days.[33] Users, both drivers and passengers, who were dependent on the activity for their livelihood or day-to-day operations had no time to adjust to the change. In this particular case, though, market forces prevailed, and alternative platforms quickly stepped in.[34] Nonetheless, this example exposes the risk that every user undertakes in choosing to participate in a peer-to-peer market dominated by a powerful platform.

A final concern involves the network effect. Platforms rely on two-sided network effects: The more owners or service providers use a platform, the higher is the value of using the platform for the users.[35] As the platform gets stronger, users are less likely to exit the service and choose a competitor.

All these problems point to the power imbalance between platforms and their users (both parties to the transaction), and to an inherent dependency of the latter on the former's services. The legal relations between the platform and its users are

[30] Katie Benner, *Airbnb Tries to Behave More Like a Hotel*, N.Y. Times (June 17, 2017), https://www.nytimes.com/2017/06/17/technology/airbnbs-hosts-professional-hotels.html.

[31] Srnicek, *supra* note 11.

[32] Sarah Hijian et al., *Algorithmic Bias: From Discrimination Discovery to Fairness-Aware Data Mining*, 22 Proc. ACM SIGKDD Int'l Conf. on Knowledge Discovery & Data Mining 2125 (2016).

[33] Alex Hern, *Uber and Lyft Pull Out of Austin after Locals Vote against Self-Regulation*, Guardian (May 9, 2015), https://www.theguardian.com/technology/2016/may/09/uber-lyft-austin-vote-against-self-regulation.

[34] Dan Solomon, *One Year after Fleeing Austin, Uber and Lyft Prepare a Fresh Invasion*, Wired (July 5, 2017), https://www.wired.com/2017/05/one-year-fleeing-austin-uber-lyft-prepare-fresh-invasion/.

[35] *See, e.g.*, Michal S. Gal, *The Power of the Crowd in the Sharing Economy*, *in* Law & Ethics Human Rights (forthcoming 2018); David Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, 3 Competition Policy International 151 (2007).

governed by a standard contract, the terms of service offered by the platform to which the user simply agrees.[36] The contact is nonnegotiable. This framework characterizes the platform as a mere service provider, and it does not sufficiently account for the significant power of the platform to shape transactions and set market norms.

Indeed, access platforms shape norms in the labor, real estate, and hospitality markets. They present a clear example to the dominance of a private actor that shapes market norms across various jurisdictions through the use of contract law and through the design of the market itself. In this sense, they are creating legal orders[37] – that is, access platforms are generating norms that may be formalized into legal texts and that affect legal practice. These legal orders may span state boundaries, as access platforms constitute and govern transnational markets through contract. Thus, platforms are not merely hosting a market for services that (potentially) are regulated; instead, they are norm creators in their own right.

Some argue that platforms serve as the employers of service providers, and in particular, that Uber is the employer of its drivers.[38] This characterization is only applicable to service-oriented (rather than property-oriented) platforms, and it only addresses the role of the platform toward one party of the transaction, service providers, and not toward users of the platform more generally.

A different characterization of platforms has its foundation in administrative law. Sabeel Rahman argues that certain platforms function as public utilities because they hold private power over a vital service that makes our social infrastructure. This definition groups access platforms with other internet platforms such as Facebook, Google, and Amazon.[39] The public utilities approach argues in favor of imposing public law duties on certain platforms. In particular, Rahman characterizes access platforms as marketplaces or clearinghouses that influence wages, prices, and standards, and should therefore be regulated as public utilities.[40] Indeed, access platforms hold the power to regulate transactions, determine entry and exit, and manipulate use. However, not all access economy platforms offer an essential service that is part of our social infrastructure. Airbnb offers guests a luxury service, and they have other available choices. Rahman indeed acknowledges that access economy platforms are only partial utilities.

Another approach works within private law. Jack Balkin has famously argued that Google, Facebook, and Uber are information fiduciaries. An information fiduciary

[36] Guido Noto La Diega & Luce Jacovella, *UBERTRUST: How Uber Represents Itself to Its Customers Through Its Legal and Non-Legal Documents*, 5 J. Civil & Legal Sciences 199 (2016).

[37] Halliday & Shaffer, *supra* note 8; Robert Wai, *Transnational Private Law and Private Ordering in a Contested Global Society*, 46 Harv. Int'l L. J. 471 (2005).

[38] Antonio Aloisi, *Commoditized Workers: Case Study Research on Labor Law Issues Arising from a Set of "On-Demand/Gig Economy" Platforms*, 37 Comp. Lab. L. & Pol'y J. 653 (2016).

[39] Rahman, *supra* note 11, at 1626.

[40] *Id.* at 1667.

is "a person or business who, because of their relationship with another, has taken on special duties with respect to the information they obtain in the course of the relationship."[41] Balkin argues that users entrust platforms with sensitive information because platforms present themselves as trustworthy. These platforms take on fiduciary responsibilities regarding this information.[42] Balkin's analogy to a fiduciary relationship is incredibly helpful.[43] However, it does not account for the particular role of access platforms in creating a market and shaping its norms. The information fiduciary argument has been criticized as ambiguous, failing to address structural power and abandoning more robust public regulation.[44] Balkin's argument and its corresponding critique target information fiduciaries, platforms that offer a service in exchange for the user's information.[45] While this discussion is extremely important, when it comes to access platforms, it fails to engage with their market-constituting function and the duties it entails in private law. Furthermore, unlike Balkin's claim, my argument is not skeptical of public regulation as an important, additional tool in the legal treatment of platforms.

Both of these important approaches, the public utilities and the information fiduciary conceptualization, address power relations, and both group access economy platforms together with other online platforms such as Facebook and Google. In what follows, I seek to expand on the idea of power in private law, and the use of the fiduciary concept.

12.3 FIDUCIARY RELATIONS

Fiduciary law is a complex legal field. Its definition and boundaries are controversial. At its core, fiduciary law concerns discretionary power that the fiduciary holds over the interests of another party, the beneficiary.[46] Power and vulnerability are thus the foundation of the fiduciary relationship. Beneficiaries are vulnerable because someone else acts in their name, for which purpose they must pass on their autonomy, at least partly.[47] This power imbalance may deter beneficiaries from entering into fiduciary relationship. The law thus regulates these relationships in order to provide protection and make sure these important social relationships exist

[41] Balkin, *supra* note 11, at 1209.
[42] *Id.* at 1221.
[43] Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 Colum. L. Rev. 1623 (2017).
[44] Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 Harv. L. Rev. 497 (2019).
[45] *Id.*
[46] Paul B. Miller, *Justifying Fiduciary Duties*, 58 McGill L.J. 969 (2013).
[47] Lionel Smith, *Fiduciary Relationships: Ensuring the Loyal Exercise of Judgement on Behalf of Another*, 130 Law Q. Rev. 608 (2014).

and succeed.[48] Although its legal foundation differs, the concept of fiduciary applies both in civil law and in common law systems.[49] For this reason, it is a particularly promising venue for normatively conceptualizing platforms that operate in global markets.

The source of a fiduciary authority may be contractual and based on consent, or otherwise legally mandated based on the particular kind of relationship.[50] The most important normative implication of a fiduciary relationship is the duty of loyalty imposed on the fiduciary.[51] This duty often means that the fiduciary has to promote the beneficiary's interests and not her own,[52] or at least prioritize their interests.[53] More specific requirements of fiduciaries include deliberation, conscientiousness, and responsiveness to new information.[54]

The concept of a fiduciary relationship is traditionally applied to trusts, an agency, or a corporation and specifically to professionals who control others' interests such as lawyers, doctors, and investors.[55] Nonetheless, this concept has been steadily broadened to account for new types of power-centered relationships.[56] As Tamar Frankel argues, recognizing new fiduciary roles depends on "the terms of their services, their entrustment of property or power, the temptation that they face, and the ability of individuals and institutions as well as the market to control these power holders and their temptation to abuse the trust in them."[57] Two of the most familiar, and controversial, developments include the fiduciary role of the state and the fiduciary role of parents.[58]

Fiduciary roles may differ. Paul Miller and Andrew Gold distinguish between two types of fiduciary relationships: service and governance. Whereas traditional service fiduciaries "manages the affairs or property of persons," governance fiduciaries advance abstract purposes.[59] The latter includes, but is not limited to, charitable trusts and state-owned public purpose corporations.[60] In these cases, according to

[48] Tamar Frankel, *The Rise of Fiduciary Law (August 22, 2018)* (Boston Univ. School of Law, Public Law Research Paper No. 18-18), *available at* https://ssrn.com/abstract=3237023.
[49] Tamar Frankel, *Toward Universal Fiduciary Principles*, 39 Queen's L. J. 391 (2014).
[50] Miller, *supra* note 46; Victor Brudney, *Contract and Fiduciary Duty*, 38 BCL Rev. 595 (1997).
[51] Miller, *supra* note 46; Smith, *supra* note 47; Eithan J. Leib & Stephen R. Gallob, *Fiduciary Political Theory: A Critique*, 125 Yale L.J. 1820 (2016).
[52] Miller, *supra* note 46, at 972.
[53] Leib & Gallob, *supra* note 51, at 1826.
[54] *Id.* at 1824.
[55] Miller, *supra* note 46.
[56] Tamar Frankel, Fiduciary Law 53 (2011).
[57] *Id.*
[58] Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 Va. L. Rev. 2401(1995); Eyal Benvenisti, *Sovereigns as Trustees of Humanity: On the Accountability of States to Foreign Stakeholders*, 107 Am. J. Int'l. L. 295 (2013). For a critique *see, e.g.*, Seth Davis, *The False Promise of Fiduciary Government*, 89 Notre Dame L. Rev. 1145 (2014).
[59] Miller & Gold, *supra* note 14.
[60] *Id.*

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the argument, there is a duty of loyalty to purposes, and not to people.[61] I will return to this distinction in Section 12.3.

Access platforms share important similarities with fiduciaries, but they do not comfortably fit the category. Indeed, access platforms hold considerable power over their users. They broker transactions, consult over terms of agreements, and provide a matching algorithm that connects the parties, and manages the type of transactions performed. Platforms also manipulate use, nudge the behavior of users, and offer safety measures and a reputation system. These functions affect users' choices and limit their autonomy. Despite these high levels of involvement, access platforms are different from traditional fiduciaries in two key ways. First, access do not act in the users' name.[62] Unlike lawyers and investors, platforms do not make the decision for their users; they only structure, oversee, advise, and nudge choices. Second, platforms currently promote their own interests first and foremost, and do not prioritize the interests of users.[63]

Access platforms therefore perform the function of service fiduciary to some extent, but they also perform additional functions that are not currently captured in scholarship. They create the platform that hosts the activity, the acceptable norms, the rules of exit and entry to the activity, and guide the level of participation. Consequently, I argue that the best conceptualization for role of access platform is as market-constituting fiduciaries.

12.4 MARKET-CONSTITUTING FIDUCIARIES

The distinction between service fiduciaries and governance fiduciaries mentioned earlier is important, as it recognizes the different functions that fiduciaries perform.[64] An additional function that is not captured by this distinction is the particular role of access platforms in creating a market and regulating its activities. This function represents a unique position of power in private law, one that controls the interests of participants on both ends of the transaction. This function includes promoting purposes, the purpose of creating, maintaining and regulating the market. However, unlike governance fiduciaries, the purpose is not detached from the interests of concrete individuals who participate in this market. It is not an abstract purpose.[65]

Participants in peer-to-peer markets hosted and created by access platforms have two types of interests. They have specific interests regarding the service they receive and more general interests concerning their continued participation in the market.

[61] *Id.*
[62] *Cf.* Smith, *supra* note 47.
[63] Balkin, *supra* note 11, at 1227.
[64] Miller & Gold, *supra* note 14.
[65] *Id.* at 517 (discussing governance fiduciaries as promoting abstract purposes).

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I, therefore, suggest conceptualizing access platforms as *market-constituting fiduciaries*.[66] This concept unites two distinguishable roles that respond to the double function of access platforms. The *first* role responds to the service-performing function of access platforms. Platforms give advice to users on how to present their service or property, offer a search engine, and provide the matching algorithm. In this sense, access platforms function as the new professionals and therefore owe a duty of loyalty to users at both ends of the transaction. Section 12.4.2.1 explains the legal implications of this role.

The *second* role responds to their function as creators of the market, or in other words, market-constituting fiduciary. Peer to peer transactions took place even before the access economy.[67] People gave each other rides; carpooled, borrowed, and loaned cars; spare rooms, books, and drills.[68] However, the activity was on a much smaller scale; it was based mostly on familiar social networks or other search conventions. In contrast, platforms in the access economy provide an organized system that facilitates multiple transactions among strangers. The platform not only provides the search algorithm, but also enforces rules of conduct and creates certain standards. Standards are technologically enforced, either strictly or by nudging users. Platforms constitute the market: the infrastructure for engaging in the activity, the code of acceptable behavior, and the rules of participation in this activity. Access platforms thus owe a duty of loyalty toward all market participants.

One could argue that these features establish public law obligations. An access platform is a private actor that creates a space for economic activity that it controls and dictates its conditions. According to this view, the platform creates legal norms and establishes a legal authority as a public fiduciary.[69]

In contrast, my argument relies on the conceptualization of market-constituting actors as private law fiduciaries. The fiduciary concept deals with authority-related power relations in private law. As such, private law allows us to think of this kind of dominance that the role of constituting a market creates. Hanoch Dagan suggests we conceive of fiduciary law as a category of thinking that includes very different fiduciary types, but that "their structural similarities could facilitate learning and cross-fertilization."[70] These similarities are relationships of dependence and vulnerability that are legally constituted or facilitated, wherein "one party is subject to the authority entrusted to another."[71] Viewed as a category of thinking, private fiduciary

[66] I first introduce this concept in my book, KREICZER-LEVY, *supra* note 5, but it is significantly developed here.

[67] Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 YALE L.J. 273 (2004).

[68] *Cf.* Jun-E Tan, *The Leap of Faith from Online to Offline: An Exploratory Study of Couchsurfing.org*, *in* TRUST AND TRUSTWORTHY COMPUTING 367, 371 (Alessandro Acquisti et al. eds. 2010).

[69] *See* Fox-Decent, Chapter 11.

[70] Dagan, *supra* note 13 at 5.

[71] *Id.* at 14.

law addresses power and vulnerability in authority relations, such as the market-constituting fiduciary. In this sense, fiduciary law serves as a normative concept that fills gaps; legal gaps, not just regulatory gaps, and more importantly, conceptual gaps.[72] It allows us to think about the duties of actors who constitute a market. Section 12.4.2 explains the legal implications of this role.

12.4.1 *The Service Role of Access Platforms*

Platforms perform services for users, both owners and renters, service providers and service receivers. They control or provide advice on central aspects of the transaction. Uber sets the price for each ride, and it obligates the driver to use a mapping service in determining their routes.[73] Airbnb guides hosts and allows them to choose from a list of options regarding their cancellation policy.[74] Some of the terms of the transaction between the parties are thus structured by the platform. In addition, platforms are involved in the frequency of use,[75] and the type of transaction the user chooses.[76] Airbnb pushes hosts to operate like hotels.[77] Uber manipulates access to a service. As Ryan Calo and Alex Rosenblat explain:

> Uber may also be manipulating consumer access to various tiers of service. Uber offers a variety of services under its umbrella, with variations in price and quality of service. Anecdotally speaking, for some consumers, the cheaper service uberPool appears as a default, requiring the consumer to overcome default bias in search of another option. For other consumers, perhaps those that Uber somehow understands to be better resourced or who potentially have a habit of preferring one tier of service to another, the more expensive uberX appears as a default.[78]

Access platforms thus hold systematic power over their participants.[79] This power builds on the contract that all users simply accept when they first sign into the platform.[80] Participants grant the company authority over various terms of their own transactions with others. Indeed, as previously mentioned, in many cases, participants still make their own choices, unlike beneficiaries in a trust, for example.[81] However, this choice is structured; access platforms consult, nudge, and oversee activity.

[72] Frankel, *supra* note 56, at 101.
[73] Calo & Rosenblat, *supra* note 43 at 1630.
[74] https://www.airgms.com/airbnb-cancellation-policy/.
[75] Calo & Rosenblat, *supra* note 43.
[76] Benner, *supra* note 30.
[77] *See supra* notes 29–30 and accompanying text.
[78] Calo & Rosenblat, *supra* note 43 at 1659.
[79] Calo & Rosenblat, *supra* note 43.
[80] Uri Benoliel & Shmuel L. Becher, *The Duty to Read the Unreadable*, 60 Boston College L. Rev. 2255 (2019).
[81] Hosts on Airbnb determine the price of a daily stay. Hosts and users choose the parties to the transaction (https://www.airbnb.com/help/article/52/pricing-your-listing).

Access platforms are responsible for a service based on the reasonable expectations of the users when entering the service. Users, on both sides of the transaction, trust the platform to present them with the most suitable search result, allow them to determine the use of their property within reason, and craft a transaction that is reasonable to both parties.[82] Users, both the owners-providers and the users-consumers, are vulnerable because the platform controls all aspects of their participation in the given market, including entry and exit. These platforms have the expertise and control of the process that the user simply does not possess, and they thus hold discretionary power over their interests.

A possible concern of this function is the multiple beneficiaries' problem. This problem was first voiced against the use of the fiduciary concept in public law, and more specifically, against the claim that public officials are fiduciaries.[83] In a nutshell, the claim is that the duty of loyalty does not allow a fiduciary to serve two beneficiaries with conflicting interests. Access platforms, if perceived as fiduciaries, serve multiple beneficiaries. First of all, directors of access platforms owe a fiduciary duty to their shareholders.[84] Shareholders' interests often conflict with the protection of users and the market-constituting role.[85] Indeed, this potential conflict is quite common in more traditional fiduciary relations. Banks, for example, may owe a fiduciary duty not only to shareholders but also to those who use their services.[86] To address this problem, the legislature can create a new category of companies where certain purposes and roles are prioritized against certain shareholders' interests.[87]

Second, and more importantly, if platforms were fiduciaries of both providers and users, they would be torn between conflicting interests. Providers and users have different agendas. In matters of profit, frequency of use, cancellation policy, safety and oversight, these two groups may have different and conflicting interests.

The most important response to this critique is that applying the fiduciary concept to access platforms is not designed to address possible conflicts between users and owners, service providers and service receivers. It is not designed to address conflicts over prices, the safety of the property or service, or the need to compensate for damages. Rather, the argument focuses on consumers: All possible users, including

[82] *Cf.* Balkin, *supra* note 11 (arguing that users trust platforms with their information).

[83] Davis, *supra* note 58, at 1160–63.

[84] Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 23 (1991); Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 403 (1983).

[85] Khan & Posen, *supra* note 44.

[86] Mark Budnitz, *The Sale of Credit Life Insurance: The Bank as Fiduciary*, 62 N.C.L. REV. 295 (1984). For the complex fiduciary role of banks, *see* Andrew F. Tuch, *The Weakening of Fiduciary Law* in RESEARCH HANDBOOK ON FIDUCIARY LAW 354 (D. Gordon Smith & Andrew S. Gold eds. 2018).

[87] *Cf.* public benefit corporations in Delaware. Del. Code Ann. tit. 8, § 365(a) (2017) (effective Aug. 1, 2013).

owners' or providers', are vulnerable to platform power. There are shared interests to both groups that involve their dependency on the platform's activity, including the matching algorithms, search results, and the structure of the reviews. These interests take precedent over any concrete conflict and are the core concern of platform power. Consider an analogy to the problem in public fiduciary law. Supporters of public fiduciary theory argue that conflicts among beneficiaries frequently occur in the context of more traditional fiduciaries.[88] Moreover, as opposed to public authorities, platforms are private actors, much like administrators of pension funds that may serve diverse classes of beneficiaries.[89] Evan Criddle and Evan Fox-Decent explain that in public fiduciary theory, "the fiduciary owes not only discrete 'first-order' duties to the beneficiary, but also wider 'second-order' duties to the broader public or to public purposes."[90] The dual commitment argument successfully navigates possible conflicting interests. In this respect, protecting all users' vulnerabilities could be construed as the second-order duties of all platforms. These second-order duties lead us directly to the most important function of access platform as fiduciaries: the constitution of the market.

12.4.2 *The Market-Constituting Role of Access Platforms*

Access platforms do not simply provide a service of brokering, consulting, and constructing the terms of the transaction. They constitute the market itself, structure its activity, determine its rules, and manage its participants. Peer-to-peer platforms create a marketplace for the exchange of goods or services. Yet, unlike eBay where the good is sold, these exchanges are based on short-term rentals and require more coordination and often face-to-face interaction.[91] These platform-hosted markets employ their own rules and conventions that may differ from traditional markets. Some of the rules are governed by the platforms' terms of service that are nonnegotiable and must be accepted when entering the market.[92] Other rules are fashioned as recommendations and suggestions,[93] and yet others are conventions of use that develop over time.

The platform creates and controls the market in several important ways. First, the platform can withhold entry and force exit from its activity. It controls participation

[88] Evan J. Criddle & Evan Fox-Decent, *Guardians of Legal Order: The Dual Commissions of Public Fiduciaries*, *in* Fiduciary Government 67 (Evan J. Criddle et al. eds. 2018).

[89] Evan Fox-Decent, Sovereignty's Promise: The State as Fiduciary (2012) at 161–64.

[90] Criddle & Fox-Decent, *supra* note 88.

[91] Samuel P. Fraiberger and Arun Sundararajan, *Peer-to-Peer Rental Markets in the Sharing Economy* (Working Paper, 2015), https://conference.nber.org/conferences/2015/EoDs15/FraibergerSundararajanNBERDigitization0306.pdf.

[92] La Diega & Jacovella, *supra* note 36.

[93] *See*, *e.g.*, Baer, *supra* note 29.

in the market through its terms of service.[94] Second, the market is defined and structured by the platform. Access platforms determine the mechanism for closing a deal, and the terms that the parties can and cannot negotiate. They nudge users into a desired level and frequency of use.[95] Access platforms also create the evaluation mechanism by establishing and managing a system of reviews.[96] Third, platforms affect the style and marketing of products and services in the market. Airbnb influences hosts' behavior in their home, the house's style and décor, and their interactions with guests.[97] It therefore impacts the level of intimacy and privacy in property use.[98] Fourth, access platforms create the conditions that shape users' behavior by controlling and designing the review mechanism. Because reviews (of both parties to the transaction) are important for future transactions and affect profitability,[99] participants will likely adopt the behavior and manners that will be best perceived and appropriately ranked by the other party to the transaction.

Creating and managing the market yields responsibility and accountability toward participants. In this capacity, platforms exercise discretionary control over the interests of market participants. Access platforms control participation, performance, and level of use in the market. This control is both general and specific. Platforms control the market for all participants with its general rules of conduct, reputation mechanism, and manipulation of use. This control creates a general responsibility for its role as a market constituter. Platforms also control individuals and may determine an individual's ability to enter and exit the activity, or influence an individual or group's participation. This control constitutes a more specific responsibility toward concrete participants. Based on this concept, then, access platforms represent a fiduciary-type, and they owe users of both ends of the transaction a duty of loyalty.

The concept of market-constituting fiduciary can be placed between two competing understandings of access platforms. The platforms typically argue that they are merely technological companies, offering the innovative tools that allow users to

[94] Airbnb declares, for example, that it will ban users who discriminate from the platform. *See* https://www.airbnb.com/help/article/1523/general-questions-about-the-airbnb-community-commitment. Uber has a similar policy. *See* https://www.uber.com/legal/policies/non-discrimination-policy/en/. These policies are examples that demonstrate that platforms are gatekeepers for the activity.

[95] *See supra* notes 29–30 and accompanying text. *Also see* https://blog.atairbnb.com/guide-to-hosting-success/.

[96] As previously mentioned, online reviews are highly susceptible to manipulation by the platform and users. *See* Nancy Leong & Aaron Belzer, *The New Public Accommodations: Race Discrimination in the Platform Economy*, 105 Geo. L.J. 1271 (2017); Hijian et al., *supra* note 32.

[97] *See* sources at note 95.

[98] Shelly Kreiczer-Levy, *Consumption Property in the Sharing Economy* 43 Pepp. L. Rev. 61 (2015).

[99] *Id.*

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connect.[100] This understanding reduces the role of access platforms to mere facilitators. A slight variation of this position, which was declared by Airbnb, is that the platform creates a community of hosts.[101]

At the other end of the spectrum, some argue that access platforms are heavily involved in the transaction to the extent that some of these companies are de facto employers of service providers.[102] This argument is only relevant to some of the access platforms, and it applies to the legal relationship between the platform and service providers, and not to the service recipients.

In similar vein, a ruling by the Third Circuit determined that Amazon is a seller for the purpose of product liability law.[103] The court supported its decision by emphasizing Amazon's control over the transaction between the vendor and the customer. However, it is clear that the platform does not actually sell the product. A better conceptualization relies on platforms' responsibilities in creating and managing the market.

This is the contribution of the market-constituting fiduciary concept. It does not contend that platforms control users' activity entirely, as the employer or seller conceptualization may suggest, nor does it belittle the role of the platform, as the technological-facilitation argument implies. Instead, the conceptualization discerns the concrete function of access platforms and draws the normative implications of this control.

The market-constituting fiduciary structures the market and controls its features, but it also works under the implied agreement of market participants. As participants have no control over the conditions and market and very little knowledge of its design, the implied agreement between platforms and their users is that the fiduciary will construct a market that is stable, open, and fair. The main implication of the duty of loyalty of market-constituting fiduciaries is that access platforms have to respect the interests of their users and their expectation of a stable, open, and fair market for all participants. There are three concrete implications to the duty of loyalty: the duty to mitigate discrimination, the duty to provide prior notice before pulling out from a given area, and the duty to create fair entry and exit rules.

12.4.2.1 Discrimination

The first implication concerns the access platforms' legal responsibility for the discriminatory choices of their users. There are numerous reports of racial and

[100] *See* Uber's Terms of Service as cited in Uber v. Aslam, *supra* note 38: "The Services constitute a technology platform that enables users . . . to pre-book and schedule transportation, logistics, delivery and/or vendors services with independent third party providers."

[101] http://collaborativeeconomy.com/wp/wp-content/uploads/2016/01/OxfordSB_AirbnbCase_vf_posted_final.pdf.

[102] Uber v. Aslam, *supra* note 38.

[103] Oberdorf v. Amazon No. 18-1041 (3rd Cir. 2019).

gender discrimination in collaborative consumption enterprises. Airbnb opens up the home to strangers, enabling people to engage in interactions with individuals from different backgrounds. However, studies have found that users with names that sound African American were 16 percent less likely to be accepted as guests than users with names that sound white.[104] There is additional anecdotal evidence of cases where a host rejected a guest based on discriminating factors.[105] Airbnb is not alone. There are reports of discriminating practices in other sharing economy platforms.[106]

The first question is whether discrimination in the sharing economy is legally prohibited. According to American law, businesses that are open to the public cannot discriminate against protected classes.[107] However, renting out private and personal possessions on occasion may not be an instance of public accommodation. This argument builds on the distinction between places that are personal and private, and places that are open to the public.[108] Sharing personal possessions can be legally classified as working within a personal, private sphere and therefore remain unaffected by antidiscrimination laws. In previous work, I have argued in favor of amending antidiscrimination laws and expanding their scope to sharing economy projects.[109]

This chapter involves a different question. It asks whether access platforms have a responsibility to oversee, control, and mitigate discrimination practiced by their users through elements of design. There is no easy or obvious answer. In order to establish such a legal duty, one must first conceptualize the legal role of platforms, and explain how this legal role entails responsibilities in the realm of discrimination. Some scholars argue that Airbnb is in fact a de facto real estate broker[110] or a chain of hotels.[111] Others argue that platforms are responsible for the discriminatory choices of their users simply because they have the ability to control

[104] Benjamin G. Edelman et al., *Racial Discrimination in the Sharing Economy: Evidence from a Field Experiment*, 9 Am. Econ. J. 1 (2017).

[105] *See, e.g.*, Cheyenne Roundtree, *"I Wouldn't Rent to You If You Were the Last Person on Earth": Trump-Supporting Airbnb Host Cancels Woman's Booking During Snowstorm Because She Is Asian*, Mail Online (Apr. 8, 2017), http://www.dailymail.co.uk/news/article-4392494/Woman-denied-Airbnb-snowstorm-Asian.html.

[106] Leong & Belzer, *supra* note 96; Tamar Kricheli Katz & Tali Regev, *How Many Cents on the Dollar? Women and Men in Product Markets*, 2 Sci. Advances 1 (2016); Arianne Renan Barzilay & Anat Ben-David, *Platform Inequality: Gender in the Gig-Economy*, 47 Seton Hall L. Rev. 393 (2017).

[107] *See* Lisa G. Lerman & Annette K. Sanderson, *Discrimination in Access to Public Places: A Survey of State and Federal Public Accommodation Laws*, 7 N.Y.U. Rev. L. & Soc. Change 215 (1978).

[108] Joseph William Singer, *No Right to Exclude: Public Accommodation and Private Property*, 90 Nw. U. L. Rev. 1283, 1448 (1995).

[109] Kreiczer-Levy, *supra* note 98; Shelly Kreiczer-Levy, *Share, Own, Access* 36 Yale L.& Pol'y Rev. 155 (2017).

[110] Jefferson-Jones, *supra* note 9.

[111] Leong & Belzer, *supra* note 96.

discrimination.[112] These characterizations are rather narrow in scope. They either avoid the legal foundation for the platforms' responsibility altogether or circumvent the challenge by equating companies with familiar industries. The legal foundation is important. The conceptualization of platforms must address the new activity and inner workings of these markets, and provide a broad conceptualization that fits a category of access platforms, rather than one single example.

Platforms' role as market-constituting fiduciaries explains why platforms should be involved in antidiscrimination regulation in the first place. Although the platform itself may not discriminate, it does have a responsibility toward users, market participants, to create an open and fair market, and mitigate discrimination among its users. As access platforms constitute a market through their algorithm design and terms of service agreement, they control users' behavior to an extent. Users have reasonable expectations that platforms will create the conditions of an open market that is a viable option for users from different backgrounds. It is the control over the various elements of users' behavior and over the structure of the market itself that creates a duty to constitute a fair market. The duty of loyalty thus ensures that users, both active and potential users, may fairly participate in the market. Access platforms can use the design of certain features in order to mitigate discrimination.[113] A possible technique (that I do not necessarily endorse) is to close off the option to rent out a home, once the host has refused to rent it to a guest from a protected class. Using its design to mitigate discrimination is the platforms' responsibility toward market participants.

Moreover, the markets constituted are often characterized and branded as promoting diversity and openness.[114] These markets have distinct features that create alternatives to property ownership, and create new opportunities in other industries. Discrimination excludes protected classes from participation in these alternative markets. In addition, peer-to-peer markets become a significant economic phenomenon and are beginning to transform traditional transactions in established industries.[115] Commercial companies are attempting to mimic the types of transaction, the structure of the market, and forms of engagement in an effort to capitalize on the current momentum. Norms that are shaped and formed in peer-to-peer markets thus trickle to traditional markets. For this reason, constituting a market demands wider social and economic responsibility.

Access platforms have already assumed responsibility in response to public opinion, and they have implemented several voluntary steps that address discrimination. Airbnb commissioned a report to review its policies and suggest ways to address these

[112] Renan Barzilay & Ben-David, *supra* note 106.
[113] *Cf.* discrimination by design, *id.*
[114] Kreiczer-Levy, *supra* note 98.
[115] Jeremiah Owyang, *Infographics: Growth of Sharing in the Collaborative Economy*, Web Strategist (Nov. 19, 2015), http://www.web-strategist.com/blog/2015/11/19/growth-of-sharing-in-the-collaborative-economy-top-categories-and-forecasts-infographics/.

problems.[116] The report suggested a new "Community Commitment" policy, declaring: "By joining this community, you commit to treat all fellow members of this community, regardless of race, religion, national origin, disability, sex, gender identity, sexual orientation or age, with respect, and without judgment or bias." This commitment went into immediate effect. Similarly, Uber released a community commitment that states that "when you use Uber you will meet people who may look different or think differently from you. Please respect those differences. We want everyone to feel welcome when they use Uber."[117] It also prohibits discrimination.[118]

A community commitment is important, but it is does not effectively curtail discrimination on its own. Airbnb's commissioned report also recommended reducing the prominence of personal photos and replacing them with objective information.[119] In addition, it encourages increasing the "Instant Booking" feature that does not require the host's approval prior to the booking.[120] Airbnb did not endorse these latter steps. These suggestions conflict with other features of the market, and they merit a holistic discussion that exceeds the scope of this chapter.[121]

12.4.2.2 Prior Notice

Participants in peer-to-peer markets are dependent on the access platform for their continuing activity. They expect a certain level of stability in the market. If the platform relocates, ceases to exist, or bars entry, users will lose the ability to continue to use the platform that serves as a steady source of income or as an alternative form of consumption. Let us revisit the case of Uber's and Lyft's operation in Austin, Texas. After the residents voted to maintain strict regulation of ridesharing businesses, both companies withdrew from activity in the city at once.[122] Drivers and riders lost, almost immediately, a source of income and a valued form of transportation.[123]

I argue that access platforms owe a weak form of market stability to their users. The duty of loyalty includes the obligation to give proper notice before shutting down the platform's activity in a given area. This is a reasonable expectation of a

[116] Laura W. Murphy, Airbnb's Work to Fight Discrimination and Build Inclusion: A Report Submitted to Airbnb (2016), https://blog.atairbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion_09292016.pdf.

[117] https://www.uber.com/legal/community-guidelines/us-en/.

[118] https://www.uber.com/legal/policies/non-discrimination-policy/en/.

[119] Murphy, *supra* note 116.

[120] *Id.*

[121] Kreiczer-Levy, *supra* note 5.

[122] Hern, *supra* note 33.

[123] In this particular case, there were other companies that stepped in. *See* Solomon, *supra* note 34.

market constituter. This obligation provides a safety net that protects users from a sudden change of practices. However, this is not an obligation to continue an activity when it is not profitable, but rather to give prior notice of a few weeks so that users can prepare themselves and search for an alternative. Although this requirement will probably result in a higher premium for consumers, it is required in order to allow users to plan ahead and make peer-to-peer markets a more secure choice.

12.4.2.3 Fair Entry and Exit Rules

The duty of loyalty of market-constituting fiduciaries includes fairness in fashioning entry and exit rules. A fair and stable market is not defined simply by the continued activity of the platform. It is more important to provide individual stability. In other words, it is important to ensure that individual users or groups will not be arbitrarily banned from activity. Platforms may decide to suspend or ban users that do not comply with its policies. Users risk losing access to a market, a pool of resources, if the platform bars entry or forces exit.

The duty also includes transparency of practices and decision-making processes of exit-forcing decisions. Before an access platform decides to bar a user from participating in its market, it has to conduct a fair process, one that allows the user to be heard. Remember the problem of discrimination. If a platform concludes that a user discriminates against a protected class, it may decide to ban the user from further activity. It is definitely important to protect against antidiscrimination, as I argued in Section 12.4.2.2. Nonetheless, in the realm of algorithmic governance and regulation, platforms have tremendous power to control participation and exclude individuals and groups. Some level of procedural justice is required, including the right to be heard and the duty to provide a detailed explanation for the decision to exclude.[124]

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Market-constituting fiduciaries owe a duty of loyalty to market participants, one that is tailored specifically to their function of creating and maintaining the market. The three obligations discussed here: Fair entry and exit rules, prior notice, and antidiscrimination policies are all examples of the kind of implications that this duty of loyalty entails. These obligations build on users' expectation of a fair, open, and stable market. This rationale may support additional obligations. The implications of the duty of loyalty will be developed over time and hopefully respond to new challenges.

[124] *Cf.* S. Umit Kucuk, *Consumerism in the Digital Age*, 50 J. Cons. Affairs 515 (2016) (discussing consumer vulnerabilities in the digital age).

Access platforms shape market norms across the globe. State and local governments in common and civil law target their activity when it affects the community, but their legal obligations toward various users has not been properly discussed and developed. The market-constituting fiduciary presents a normative legal construct that fits different jurisdictions.

12.5 CONCLUSION

Access platforms are transnational firms with a growing impact on markets and social interactions. While markets are changing and expanding, the law seems to lag behind. In lieu of traditional legal institutions, access platforms begin to develop their own rules and self-regulate their relations with users. This chapter suggests a normative solution to this problem, one that can be adopted and implemented in various jurisdictions.

This chapter builds on fiduciary law's focus on power and vulnerability as a category of thinking, and it promotes a new concept: the market-constituting fiduciary. This concept accounts for access platforms' function as creators of the markets, responsible for shaping, constructing, and executing its rules. The market-constituting fiduciary concept responds, first and foremost, to the dependence and vulnerability of market participants on both ends of the transaction to platform power. Their participation in the market depends on the access platform. This concept presents a normative solution to a transnational problem that can be implemented through private law rules of different legal systems. It conceives of a new form of fiduciary duty that can be applied transnationally to transnational actors. It can be supplemented by other regulatory and conceptual efforts to address all of the implications of access platforms' activity.

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