6

The Public Trust as Transnational Law

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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.*

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).