

Transnational Law's Legality

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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,

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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.

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 supra-national 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.

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).

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 be 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/global.g.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 HOBBS, *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, Thorburn’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 arbitration 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, *Foreword: 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.