



Trusts at the financial frontier: the flickering forms of property, water, and governance

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ABSTRACT

Financialization is often understood as an expansive, spreading wave, coming from an energetic, global center of finance and creating new financial frontiers at its edges. Instead of presuming this expansive wave, I show how financial frontiers are flickering arrangements. Rather than spreading continuously, financial frontiers come into being, go dormant, and reignite with intensity. This temporal dynamic becomes apparent when we trace the specific techno-legal devices that proliferate at financial frontiers. I focus on the financial trust, an instrument that, despite its prominence in financial circles, has received comparatively little attention beyond legal scholarship. I chart three historical moments in Costa Rica when the trust appears as a frontier device opening the nature of property, enabling the transformation of ecological processes into sources of rent, and redrawing relations between public and private actors interested in water protection. At these flickering frontiers, the trust does much more than channel and shield financial wealth. As a device, the trust makes fundamental assumptions about social life explicit and opens possibilities for some actors to translate those assumptions into social forms.

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Introduction

In February 2021, news circulated globally about the first offering of water futures on Wall Street.¹ This further step in the financialization of water was presented by financial professionals as a solution to unchecked water exploitation in the United States, specifically California. In environmental circles, this created dismay. Anticipating similar effects to those unleashed by speculation in other markets, activists and water protectors denounced the offering as a further expansion of the financial frontier, something that would intensify water extraction and deepen its accompanying processes of dispossession.

Although the threat posed by water futures was circumscribed to the United States, due to how it recognizes water rights as private property,² people wondered how long it would be until this innovation reached the rest of the world. In Costa Rica, people reacted variably to the news. At an online event presenting a new trust fund to protect water, which I will refer to as the WaterFund Trust, one of the speakers asked participants to imagine everything Costa Rica could do if the country opened up to such innovative instruments. She argued that if Costa Rica linked things like payment for environmental services with water futures and financial trusts, unimaginable benefits would follow.

While technically the three financial instruments the speaker mentioned – water futures, payment for environmental services, and water funds – seemed distinct, she presented them as

members of the same family of innovations. Their kinship stems from their shared character as 'nature-based' financial solutions to today's environmental problems. Beyond Costa Rica, journalists and business consultants in EuroAmerica describe the turn towards nature-based financial solutions as the latest financial frontier, a dual opportunity to prove how finance can tackle environmental issues such as climate change, biodiversity loss, and water protection but also generate wealth (Billman 2020). At this financial frontier, nature is capital to be invested and banked on (Twentyman and Hilton 2021).

And yet, while this might seem like a twenty-first-century frontier for mainstream EuroAmerican business and policy circles, it is not exactly a new development for Costa Rica, a country that has experimented with many financial responses to environmental problems. If nature was ever a financial frontier in Costa Rica, it was so sometime in the early 1990s when carbon credits, payments for environmental services, and trust funds were first used towards environmental objectives. At that time, environmental activists opposed those instruments for how they financialized the foundations of ecological life. Today, there is a different attitude. Finance, both as an abstract idea and as a set of specific devices, has become an unremarkable part of Costa Rica's technical and environmental landscape. This history inspires a series of questions: When does a financial frontier come into existence? When does it cease to be? Who decides all of this?

To address these questions I develop the notion of a *flickering financial frontier*. The teleology of frontiers, even while explicitly disavowed, continues to saturate discussions of financialization. This teleology is built on the idea that financialization operates as an 'expansive wave' that moves outward from distinct energetic centers that are usually located in EuroAmerica. From there, this expansive wave travels toward places where financialization is not yet fully realized. However, instead of being passively subjected to expansive waves, financial frontiers can flicker, change form, and go dormant before reigniting with intensity. When closely inspected, flickering frontiers confound assumptions of teleological evolution and, importantly, trouble the idea that financialization is a late-twentieth century phenomenon that originates in Europe or the United States and advances through terra nullius. In turn, flickering frontiers make explicit how colonialism, empire, and religion are integral to contemporary systems of financial exchange. But my point here is not only to emphasize that there is a longer history that needs to be considered. Rather, I am interested in the temporal quality of that longer history – what I am calling its flickering quality – for how it helps us see how financial instruments are tactically deployed for purposes that go beyond channeling financial wealth and how they can appear, disappear, and reappear fulfilling very different roles each time.

To grasp this flickering character I center on one device, the trust, and show how through its appearances it supports distinct visions of sociality, and of nature itself. I conceptualize the trust's multiple appearances as flickers that exemplify a distinct temporal cadence. Combining legal and financial history with ethnographic research, I show the implications of those flickers. Namely, I show how at different historical moments the trust (a) splits up the nature of property, (b) transforms ecological processes into sources of rent, and (c) recasts the relations between public and private actors as matters of governance. As the material shows, the trust is a device that does much more than generate and protect wealth, as typically conceived.

Flickering financial frontiers

The academic literature and financial press often speak of financial frontiers to diagnose emerging areas of investment and accumulation. More often than not the term is used in passing, as a shared metaphor or vernacular label (Dixon and Monk 2014; Langley 2020; Mezzadra and Neilson 2017; Poon et al. 2017). Conceptually, financial frontiers are sites where 'populations/institutions which were previously not included "in" the market' are targeted through 'innovative, if not unconventional, techniques and strategies' (Alami and Guermond 2022, 3). This frontier imaginary distinguishes practices that are settled in financial centers from those that unfold in frontier

conditions – putatively surrounded by ‘behaviors deemed irrational, unstable, risky’ (Alami and Guermond 2022, 3). This financial frontier is constituted by a ‘mixture of progress, development, emergence, inclusion, and therefore lucrative opportunity but also [of] backwardness, unruliness, and danger’ (Alami and Guermond 2022, 3). Rather than a geographic site, this frontier is better conceptualized as a set of ‘powerful yet heterogeneous and contingent [processes] of capture and conversion’ (Bear et al. 2015) – not a place, but a traveling process and theory of how the world operates (Tsing 2003, 5101).

When uncritically reproduced, the concept of a financial frontier replicates the expansive wave model in which financialization is a process that starts in global centers of finance in Europe and the United States and moves outwards toward the rest of the world. In this model, frontiers are temporary passage points in the movement from condition A (unfinancialized) to condition B (financialized). Koddenbrock, Kvangraven, and Sylla (2022) argue that such directionality has become naturalized because of a lack of attention to imperial histories. When the question of empire is centered, they suggest, we see how financialization has been historically and structurally intrinsic to colonial and postcolonial conditions, and how flows of not only money and wealth but also financial techniques and instruments have always been multidirectional (Bear 2015; Elyachar 2006; Elyachar, this issue).

In accounting for that multidirectionality and historical ubiquity, the notion of a flickering frontier is helpful. It directs our attention not to an epochal or geographic diagnosis but to a historical dynamic. Without the expansive wave model as an operating assumption, we can see historical frontiers that appear and disappear, troubling any assumption of steady pace or unidirectional movement.³ To grasp these kinds of frontiers, we need to anchor our analyses on specific devices and track how they spring up as new, fade out and become old, and pop up as new again. Consider devices such as property titles, business plans (Giraudieu 2008), the corporate form (Foster 2014), collateral (Riles 2011), and contracts (Appel 2019; Muehlebach this volume). They all have appeared and reappeared as innovations to enable forms of financial dispossession and violence as well as to equip communities to resist forms of extraction (Ballester 2015; Bhandar 2014; Byrd et al. 2018; Lumba 2022; Manjapra 2020). Through their historical flickers these devices embody assumptions of what collective life entails, who is a legitimate member of a community, and how wealth and resources are extracted, saved, and managed (Ballester and Oyarzun 2022; Peebles 2010, 436).

The trust form as device

A device is a conceptual instrument that takes the form of an object, such as a mathematical formula or a taxonomy (Ballester 2019). It also takes material forms such as a computing tool or a filing system. Devices fuse notions of community, legal ideas such as property or liability, and financial concepts such as rents or profits. They perform a kind of political work that merges practices and desires with long-standing assumptions about sociality and embed them in legal and economic forms (Ballester 2019). As an analytic tool, the device has been generative for the field of social studies of finance (Callon and Muniesa 2005; Çalışkan 2007; Law and Ruppert 2013; Poon 2007; Ruppert 2012). It has been used to explain how large abstract ideas like the market and economy take concrete empirical forms (Muniesa, Millo, and Callon 2007). It has also been approached as a token of an epoch, an example of broader arrangements of power/knowledge and their corresponding biopolitical matrices (Agamben 2009; Deleuze 1992; Dumez and Jeunemaître 2010).

In my conceptualization, techno-legal devices have two further powerful implications (Ballester and Oyarzun 2022). First, they reveal how the metaphysical assumptions behind their form accomplish more than a pragmatic task – in the case of the trust the narrow task of generating, protecting and/or moving money. Those metaphysical assumptions entail distinct senses of what the world is and, in consequence, of whether and how certain parts of said world can be financialized and by whom (Ballester 2015; Braun 2020; Fourcade 2011, 1723; Özden-Schilling 2021; Riles 2011). Second, techno-legal devices operate as temporal hinges. They draw our attention to histories

that are braided through practice and they propel those histories towards an intended future. Techno-legal devices are designed and tactically deployed to shape worlds to come.

Trust-like devices appear in diverse legal histories including Islamic law, Common law, and Canonical law. They create what is technically called a fiduciary substitution, a situation where a property owner is replaced in their fiduciary obligations by another party. In the United States and the United Kingdom, many scholars describe the trust as one of the most cherished ‘inventions’ of the Common law tradition and trace its origin to medieval England (Cotterrell 1987; Langbein 1995; Lewin 1858). Yet, if we expand our historic and geographic focus, we see a variety of potential predecessors and successors to the trust, including the Islamic *waqf* and the Canonical *capellanía* and *patronato*. These are forms of subsidiary substitution that split the rights and obligations of property apart from its benefits for a variety of social reasons that go from protecting inheritance lines, to endowing social and religious institutions, and passing benefits to third parties without burdening them with the responsibilities stemming from ownership.

In Islamic law, for instance, we find the *waqf* of the seventh and eighth centuries AD. This mechanism was used by landowners to bypass Qur’anic inheritance rules and to endow religious institutions with resources for their pious objectives (Gaudiosi 1987–1988; Gvelesiani 2020; Moumtaz 2021).⁴ Devices analogous to the *waqf* also existed in Canon law since the Middle Ages. They were used to bypass limitations to the transfer of property beyond family lines and to improve the standing of the wealthy who endowed the Catholic Church with financial resources in exchange for religious and political favors (Reina Aguilar 2021, 542). This exchange was built on the Catholic doctrine that any ecclesiastic service had to be followed by some form of income or rent (Antón Solé 1994, 103). Through the *capellanía*, for example, a person redirected the benefits drawn from a particular property to a specific clergy who, in return, performed liturgic services in the name of the benefactor. This relationship could intensify into the establishment of a *patronato*, a type of permanent property affectation to benefit a whole church (Pérez, Ruiz, and Suárez 2007; Pro Ruiz 1989). In both of these cases, the underlying property remained in its original hands.

Starting in the fourteenth century, forms of fiduciary substitution proliferated largely thanks to the Catholic Church’s adoption of the doctrine of purgatory.⁵ Colonizers in the Americas would use the *capellanía* and *patronato* to improve their political standing vis-a-vis Spanish-born nobility. However, in the nineteenth century, following independence movements and liberal reforms, the use of property as a religious and monarchical token was outlawed in Latin America (Pro Ruiz 1989). Authorities proscribed most fiduciary substitutions to limit the economic power of the church. This legacy remained in place until the early twentieth century when discussions about fiduciary relations reemerged and legal scholars and politicians began reconsidering their introduction in Latin American legal systems. At this time, legal scholars erased any Islamic or Catholic precedents and instead turned to English law to argue for the virtues of the trust as a powerful and broadly utilized device (Alfaro 1920).

In its contemporary secular form, the trust (*fideicomiso*) is a legal agreement between three parties: a settlor or grantor who transfers property of a group of assets; a trustee who receives those assets and has fiduciary responsibility over them; and a beneficiary who receives the benefits the assets yield. Such benefits can eventually include property rights, but the transfer of those rights to the beneficiary is often postponed to a later point in time. This delay is part of the allure of the trust. As a way to deal with property, the trust avoids burdening the beneficiary with the responsibilities associated with ownership (e.g. paying taxes, guaranteeing debts, or managing different forms of liability). Because of this structure, trusts ‘permit the nearly frictionless global movement of capital, maximizing profits by minimizing compliance costs and tax obligations, as well as sheltering assets from tax authorities and creditors’ (Harrington 2017, 2). Effectively, trusts allow finance practitioners to operate beyond the bounds of the ‘sovereign national cage’ and shelter assets from the reach of the rule of law in different jurisdictions (Palan 2002, 168).

Trusts have played critical roles both enabling the dispossession of land in imperial and colonial projects and supporting progressive innovations. In Dutch and British colonies, for example,

colonizers dispossessed local populations by banning them from owning land or legally controlling their territory and placing land in trusts that ultimately retained dominion over land (Bhandar 2018). In the United States, the federal government assumed the role of trustee of Indigenous lands, an arrangement based on nineteenth-century assumptions of the unsuitability of Indigenous peoples to control their territory (Gover 2006). In contrast, and more recently, communities in the United States have used trusts to collectivize land ownership and protect it from real estate speculation (Davis 2010).

In contemporary financial operations, trusts perform a variety of roles. They shield assets, such as stocks, and their revenue behind privacy and tax protections. Trusts are also used to transfer inter-generational and illicit wealth. And, since the late twentieth century, they have become mechanisms to channel public investments and imbue financial logics into social domains not understood to be financial *per se*. Today, efforts to secure water conservation, promote the arts, or expand educational opportunities, among endless others, are financed through trusts. In these arrangements, grantors pass on public or private resources (donations, loans, stock, infrastructures) to be used for a particular social purpose. Trustees – those looking after the assets – look after their financial performance and exercise their fiduciary responsibility to ensure proper use. Beneficiaries, who can be identifiable individuals, collective entities, or classes of people (e.g. artists, students, people affected by pollution, residents of a certain area), collect the financial or other benefits that the trust yields. The ubiquity of the use of the trust to finance social concerns means that when trustees introduce financial preferences and performance expectations into their fiduciary decisions, they are steering a wide range of domains of social life through financial benchmarks and values.

In the last few decades, Latin America has seen the proliferation of trusts as mechanisms to channel public investments in things like infrastructure, housing, and environmental remediation. In these cases, trusts create literal decision-making tables where a reduced number of individuals (trustees) make large-scale financial decisions intended to address broad social needs or objectives. Here, trusts accomplish much more than transferring and protecting financial wealth. In Costa Rica's history, they have operated as geopolitical tokens, devices that transform nature into sources of rent, and means to reassemble public and private actors around the governance of water.

Appearance *n*: trusts and the geopolitics of property

In the genealogy that legal scholars in Latin America trace, the initial travels of the trust through the region date back to the early twentieth century, hand in hand with the work of the Kemmerer missions in the region. Edwin Kemmerer was a US economist who organized a series of technical exchange trips throughout Latin America between 1920 and 1940. Kemmerer was a 'money doctor' who worked to implement 'stable' monetary systems, facilitate trade and economic exchange, and solidify the United States' imperial control over different regions in the world (Drake 1997; Flandreau 2005; Gennaioli, Shleifer, and Vishny 2015). Kemmerer worked as a consultant and, following diplomatic and religious custom, referred to his advisory visits as missions.

Money doctors like Kemmerer mediated between indebted countries and their debtors. After the independence of Latin American countries, money doctors complemented military and security operations, pushing newly created states to align with the economic interests of global imperial centers – the United Kingdom and France during the nineteenth century, the United States during the twentieth. From 1890 to 1920, US money doctors steered Caribbean and Central American countries and imposed 'economic order' to preempt the return of French or British financiers to the region.⁶ Money doctors advised central banks, the executive branch, and/or congress on how to manage foreign powers and at the same time guided international creditors on how to collect the debts these countries had accumulated (Drake 1997). Even as they orchestrated foreign policy objectives, money doctors traveled through the region as private citizens, hired by host countries on the basis of their expertise and connections.

Throughout his work in the early twentieth century, Kemmerer 'restructured' national economies and helped re-write legislation (Drake 1989). He promoted financial orthodoxy, significantly influencing the re-organization of central banks, taxation, and macro-economic policies around national budgets and debt. The Kemmerer approach to economic advising was a 'one-size-fits-all' approach. He planted the same economic and legal ideas across the region without any regard to contextual specificities. In public statements, Kemmerer described his objective as seeking to 'familiarize' countries with the rules and practices by which US banks conducted business (Goldschmidt 1961). Many among the local elites saw his work as one of 'modernizing' financial practices in the region.

One of the business instruments Kemmerer was keen to disseminate was the trust. In Colombia, for example, his mission went as far as promoting the creation of a Trusts Department in a national bank, even though the trust did not yet exist in that country's legal order (Malumián 2009, 170). In 1925, Panamá was the first Latin American country to formally adopt the trust, largely due to the proximity of Panamanian elites with US politicians, military and government officials, as well as business people resulting of the US's military control over the Panamá Canal.⁷

A few years before, in 1920, Ricardo Alfaro, a Panamanian politician, practicing lawyer, and well respected legal scholar, wrote a book on the implications of introducing the *fideicomiso* (trust) in Latin American legal orders (Alfaro 1920). Early on in his book, Alfaro reflects on how the *fideicomiso* was deemed suspicious by scholars and practitioners, and even by himself, due to the implications it had for property in equity (the significance of this will be explained below) and due to its character as a form of fiduciary substitution. Alfaro narrates how he changed his mind and came to recognize the possibilities the English trust created for financial life in Latin America. During the next few years, Alfaro was centrally involved in drafting the Panamanian trust law that became a referent in Latin America and inspired subsequent reforms in Bolivia (1928), Chile (1930), Colombia (1933), and Peru (1935).

The suspicion that enveloped the English trust in Latin American legal circles was based on the nineteenth century rejection of the idea that the benefits of ownership could be split from the responsibilities associated to it, something that is referred to as fiduciary substitution. This split creates what is known as property in equity, a property right over the benefits an asset yields which does not extend to the asset itself. In the nineteenth century, Latin American civil law systems embraced the notion of property as a unitary right. This implied that the person or entity that owns an asset is entitled to its benefits and cannot separate those benefits from the responsibilities attached to them. Here, property entails a set of taxonomically pre-determined possibilities which include the right to possess, control, exclude, derive income, and dispose of one's property. For a property right to exist, all of these subsidiary rights have to be in place along with the obligations they entail. Put differently, in this legal tradition the act of owning is singular (Jiménez Zeledón 1994). In fact, in Spanish the term property right (*derecho de propiedad*) is singular, while in English it is the plural 'property rights.' While a person with *derecho de propiedad* can potentially pass on benefits to another person, those benefits do not yield property rights to that third person. They yield rights to rents, to use, to possess. These rights are less robust than property rights in the hierarchy of legal possibilities for the protection of interests. For that reason, the right to a benefit is not widely accepted as collateral for legal obligations – a person cannot use expected rents as collateral for a mortgage unless they have been securitized in multiple ways. This might seem a small technical distinction but, as I will show, it has great consequences.

Given the foundational incompatibility between singular and split notions of property, the task of introducing the English trust into civil law systems was not a straightforward matter. At the time, legal scholars and practitioners published reflections that cut to the core of legal and economic philosophy. Some, including the French legal scholar Pierre Lepaule (1932), went as far as arguing that the trust was so transgressive that it erased the notion of property altogether. Lepaule published an article titled 'The Nature of the Trust' where he concluded that trusts created a curious condition where assets were not properly owned by any party. He argued that the assets in a trust are universal

res, things universally owned – or, from a different point of view, things not owned by anybody. Lepaulle's theory of null ownership was ultimately discarded. Nevertheless, it exemplifies how foreign the trust seemed, and shows the puzzlement and epistemic difficulties among legal scholars theorizing the idea that the right to property could be split. The trust was at the frontier of legal doctrine and financial practice.

Costa Rica introduced the *fideicomiso* (trust) into its legal system only in 1964. For Roberto Goldschmidt, a prominent Argentinian legal scholar, the adoption was another example of how the United States exercised its imperial power by promoting structural changes as mere preferences among business people (Goldschmidt 1961). The Mexican legal scholar Raúl Cervantes Ahumada had a different perspective. He was invited to deliver a lecture at the University of Costa Rica's Law School to celebrate the incorporation of the trust in Costa Rica's legislation. His reflections took a more orthodox approach. He turned to a story of origins, and not surprisingly for legal academics, Euro-centric ones.

In his talk, Cervantes Ahumada (1965) took his audience to equity courts in England during the fifteenth century. At the time, he explained, clergy members were banned from holding certain forms of property, something they did regardless by transferring formal ownership to subjects they trusted. Conflicts emerged when those individuals later refused to let the clerics use or enjoy the assets they had been entrusted with. The cases were brought to court where judges found two conflicting logics at play. On the one hand, by law, clerics were not entitled to own these assets. On the other hand, it seemed inequitable for those entrusted with the assets to use and dispose of them as if they were their property. To deal with the contradiction, courts invented the notion of property in equity, denoting at once the interest clerics had on the assets and the limits that applied to those holding them. At the same time, this move formalized the trust as an English legal device. Cervantes Ahumada made a historical leap and argued that Costa Rica's legal reform was the continuation of that story. This origin story is so powerful that it continues to be replicated by legal scholars and economic historians today, not only in Latin America but in the Global North more generally, when they refer to the origin of the trust (Pistor 2019).

In this financial frontier, the trust operates as a historical hinge for Latin American legal scholars to tie their local history to the English legal imaginary. In this flicker, the trust can appear as an innovation only if any connection with the *waqf* or *capellaniás* is erased. Rather than connections to Islamic or Canon law, what we find is a connection to England as a cradle of liberal philosophy. In addition to establishing this particular genealogy, this flicker also splits property, opening the door for equity, and extending the United States' imperial influence in Costa Rica and more broadly in Latin America. In this appearance, the trust is a geopolitical token, part of a stream of monetary and financial reforms designed to protect the interests of US financial actors in the region. The trust is a historical hinge that erases some genealogies and establishes other. And, it is an instrument that splits the right to property by separating benefits from obligations.

Appearance n + 1: the trust turns nature into a source of rent

In the 1970s, trusts became popular tools for financial operations in Latin America, largely following the trend of adjusting commercial law to match the needs of an expanding global financial sector (Harrington 2017). In response to the diversity of national regulations and the different definitions of property between civil and common law systems, a group of countries attempted to establish an international treaty to standardize the trust as a legal instrument. In 1985, after years of preparation, the Hague Convention on Trusts was signed. As of 2017, however, only fourteen countries had ratified it. This is not surprising as global financial actors exploit the opportunities that different regulatory cultures offer. Those variations have given rise to 'a vast army of global specialists who can transcend the orders separating those regimes from one another' and who offer their services as advisors with the capacity to anticipate legal responses to financial innovations (Peebles 2010, 436). These global financial specialists understand their job as a form of

'forum shopping' or 'jurisdiction shopping' and aim to find the best alignments between financial performance, secrecy or publicity, and taxation (Peebles 2010). Their search yields a globalized financial sector that flourishes, adjusts, and expands around specific devices.

Despite their introduction into Costa Rica's legal order in 1964, trusts were not widely used until the mid 1970s. But their real explosion came in the 1980s as the country tried to establish itself as a modern financial center. Business people, state agencies, and banks used trusts to transfer financial assets, build large-scale public infrastructures, and facilitate real estate transactions by avoiding taxes on property gains. In the 1990s, when Costa Rican experts and activists began thinking more systematically about environmental issues as concerns of the nation, they turned to trusts to finance forest protection, carbon sequestration, and projects that supported the hydrological cycle (Malumián 2009). The government created *Fondo Nacional de Financiamiento Forestal* (FONAFIFO, or National Fund for the Finance of Forests) in 1996 as a trust and a public agency of the same name. To this day, FONAFIFO remains the largest environmental trust in Costa Rica. The FONAFIFO agency disperses payments to property owners whose lands house ecosystems performing one or more of four legally determined services: carbon sequestration, biodiversity conservation, protection of the hydrological cycle, and protection of landscape beauty. This is Costa Rica's globally recognized system for payment for environmental services (PES).

The FONAFIFO trust and PES system first raised capital from two sources: a 15% domestic tax on oil and internationally traded carbon offset bonds. The latter constituted the first global sale of these security-like instruments, called Certified Tradable Offsets (CTOs). Each bond represented one metric ton of carbon stored or prevented from release through Costa Rica's forests and had a value of \$10. The rationale was that companies around the world could mitigate their carbon emissions by paying land owners in Costa Rica for capturing, storing, or preventing the release of carbon. In theory, owners of the CTOs could potentially sell them in financial markets. A Norwegian business conglomerate was the first one to purchase US\$2 million in bonds to compensate for their emissions. Costa Rica's government received the funds and put them into the FONAFIFO trust.

The FONAFIFO trust became a keystone of Costa Rica's environmental policies. It continues to pay property owners a yearly and predetermined amount for the services their lands provide. In selecting beneficiaries to the program, the agency has prioritized small and medium land owners, as well as indigenous lands. Additionally, the government correlates property size with the sustainable development index of the municipality where a property is located to reach poorer segments of the population. FONAFIFO aims to keep at least 300,000 hectares of private lands under the PES system every year (Unidad de Planificación y Gestión 2019). Today, though, the FONAFIFO trust is no longer oriented towards international financial markets. Most of its financial resources come from the oil tax and from occasional funds the government receives through international donations.

Many environmental activists opposed Costa Rica's PES and FONAFIFO trust when they were created in the 1990s for how they commodified nature and introduced market mechanisms that privileged financial gain. The PES mechanism is often seen as epitomizing the neoliberalization of nature, a paradigm in which pricing mechanisms and market relations are expected to mediate environmental issues. And yet, despite critiques, what happened in Costa Rica was less the commodification of nature and more its financialization – its transformation into a source of rent. Because PES is structured as a public trust managed by a public agency, its domestic operation is not market-based. This is despite its circulation internationally as a successful example of market-based responses to environmental questions. In the FONAFIFO trust, financial resources are not allocated following demand/supply logics or under conditions of competition. Rather, a state agency invites landowners to apply for the payment (rent) by submitting paperwork and going through a series of bureaucratic procedures. FONAFIFO selects beneficiaries on the basis of those applications and then pays a legally set amount. If funds are available and a person submits the correct paperwork, they receive the payment. The only possible market-based transaction involved in securing PES in

Costa Rica is hiring a biologist or forestry engineer who certifies the forest or plantation producing the environmental services (Legrand, Le Coq, and Froger 2016).

In effect, the FONAFIFO trust and its associated government agency implement PES as an instrument to capitalize natural processes, turning them into sources of rent for land owners and, in some instances, for those who possess land without owning it. Rather than land (the classic asset), what is capitalized here is an ecological process (labeled a service). Costa Rica successfully deployed this arrangement as an instrument for nation-making and international branding as the frontier of environmental financial innovation (Evans 2010; Fletcher, Dowd-Uribe, and Aistara 2020).

In this appearance, the trust transforms nature into a source of rent (from the point of view of the land owner) and into a legitimate financial investment (from the point of view of the state). The FONAFIFO trust is a state-based redistributive mechanism that channels tax revenue to land owners and turns nature into a rent-producing service. The FONAFIFO trust monetizes ecological processes that, while nested in land, are more than that. It has enabled the invention of an entirely new financial sector that in the twenty-first century has become one of the most recognized global examples of 'nature-based' financial responses to climate change and other environmental challenges.

Appearance n + 2: the trust as a governance mechanism

In 1996, as Costa Rica was launching the PES system and revamping its environmental institutions through the creation of FONAFIFO, the country lost its qualification to receive direct international development assistance. This occurred when its per capita income increased, shifting it from a 'poor' to a medium-income country. International aid agencies withdrew and smaller foundations trickled in to 'support' the country as its institutions adjusted to this new 'phase' of development. These smaller non-profits had narrower targets than aid agencies. Rather than promoting development writ large, they invested in more specific issues such as women's rights, technological innovation, and the environment. The Costa Rica USA Foundation (CRUSA) was created at this time and has operated in the country since. As part of its program, CRUSA identified environmental issues to invest in. In the mid-2010s it partnered with a local NGO, with a global environmental NGO based in the United States called The Nature Conservancy, and with a group of multinational corporations to create Costa Rica's first private-public water fund – the WaterFund Trust that this paper opened with. The WaterFund Trust was intended to raise funds from public agencies and private corporations and channel those funds to land owners and tenants in the form of annual payments. In exchange, land owners would commit to protecting forest cover and/or implementing sustainable agriculture practices. This was a variation on the public PES and FONAFIFO system created in the 1990s. Its main difference, however, was the role that private actors played. With the WaterFund, corporations would directly provide the financial assets to establish a trust in exchange for a seat on the board that decides how those payments would be allocated and the opportunity to shape the environmental conditions of a particular area of Costa Rica.

This is the most recent appearance of the trust as a frontier device. Its promoters are a group of actors who have been involved in Costarican environmental policy for many years. The idea of creating a water fund began when they noticed that more than twenty similar WaterFunds had been created in Latin America.⁸ Behind them was The Nature Conservancy with the financial support of the Interamerican Development Bank, the German Environment Ministry, the Global Environment Facility, and the FEMSA Foundation.⁹ In a promotional video explaining their strategy, the program's director notes how water funds seek 'to get the world to invest in nature for nature and people'¹⁰ and to 'design and enhance financial and governance mechanisms which unite public, private and civil society stakeholders around a common goal' (The Nature Conservancy 2018, 9). Its promoters are clear. Water trust funds are created with two objectives: to manage investments and wealth, and to push the limits of governance by aligning public and private interests. Building on the legal transformation of the twentieth century that recreated the trust, what is new in this appearance is no longer the splitting of property, nor the extraction of rent from nature.

Rather, the transformative change here is the merging of public and private in the act of government. This is financialization beyond privatization, a mechanism to bring to the decision-making table corporations and private actors who have no interest in more conventional privatization schemes (such as taking control over water utilities).

Costa Rica's WaterFund Trust was established in 2018, after consultations with the Comptroller's office, workshops with potential participants, and legal negotiations with the state bank that ultimately became the trustee. In comparison with the earlier FONAFIFO trust, the WaterFund was unique because of its geographic focus. In the 1990s, FONAFIFO was created to pay rents to property owners in any part of the country. It was a national project. In contrast, the WaterFund was designed for land owners and tenants in Costa Rica's central valley exclusively. This is the region that houses 57% of the country's population, 75% of its industry, and most of the corporate operations of the companies who contributed money for the creation of the WaterFund (Guerrero, Carazo, and Herrera-Fernández 2018). Thus, the WaterFund aligned public action with the specific territorial interests of the corporations involved – that is they focused on the areas that 'produce' the water they require for their operations. Rather than a national project, the WaterFund was conceived as a device with the capacity to focus the influence and impact of private actors in specific geographic areas. The fund was created with a seed capital of US\$200,000. Today, it makes payments to land owners for a set of four ecological services: (a) aquifer recharge, (b) erosion control around water springs, (c) erosion control around superficial water (rivers and lakes), and (d) regulation of water flow (Guerrero, Carazo, and Herrera-Fernández 2018, 28). Participants receive about US\$60/year/hectare for a total of five years.

There is one respect, however, in which the WaterFund did not meet the original aspirations of its designers. The architects of the WaterFund initially hoped to capture public funds as similar water funds in Latin America were doing. That possibility disappeared quickly after the Environment Ministry consulted the Comptroller's office. In a short response, the Comptroller noted that while the WaterFund was an interesting device for collaboration, no public funds could be transferred to it without specific legislation. The boundary between public and private was fixed, requiring the kind of legal change that is very difficult to achieve in Costa Rica. In one sense, the Comptroller's decision was an important roadblock for the proponents' original ambition to use the trust to align governmental action with the interests and ideas of private actors – in this case corporations. But as I explain below, this did not deflate the proponents' enthusiasm over the potential of the WaterFund.

As I was learning about this new appearance of the trust, and why its creators saw it as a radical innovation, I interviewed two key participants in the process. The first was Pedro, a veteran NGO official who directed one of the NGOs at the helm of the PES system in the 1990s. When we spoke in October 2021, he was no longer associated with the WaterFund, though many of the current participants still considered him the powerhouse behind the initiative. During our conversation, I asked Pedro about the relation between the WaterFund and other water projects he had worked on. He paused, considered my question and then said, 'Think of a spider. Imagine the legs, those are the projects. But what is at the center? What is most valuable? The body that produces the silk. That is the financial instrument we have created. You need that instrument. That is the real jewel. The reason this is so valuable is that it creates a precedent. You could replicate the trust for education, for health. We have generated a public-private instrument that pushes questions of efficiency in the management of resources for a public agenda. This is as valuable as gold.'

Here, the trust sets in place a precedent for institutional rearrangement. It is a precedent in the sense that it is a small exercise with the potential to go beyond water and into national education and public health, the two largest and most sensitive areas of state activity in Costa Rica. The potential of this precedent is better measured by recalling the PES system. In the 1990s, the FONAFIFO trust started in a similar way, as an uncertain experiment. Today, it is not only central to Costa Rica, but is a globally recognized system. In Pedro's view, the water trust could have a similar structural effect on what for him was a long-standing problem: the divide between private and public sectors.

Beyond its financial utility, the water trust is powerful because of how it shapes a vision of political life that brings government and private actors together. The financial wealth that it distributes is secondary to this larger vision.

Another person key to making the WaterFund was Francisco. He was the lead lawyer who worked pro-bono to design and negotiate the WaterFund Trust charter with the public bank that would become the trustee. During our conversation on the legal philosophy behind the trust, and after telling me how he originally wanted to study biology but settled on law to ensure more professional opportunities, he launched into a general discussion of Costa Rica's political landscape. He emphatically noted that any innovation that happens in the country comes from the private sector (i.e. businesses and NGOs). I was surprised by his statement. One can critique the outcomes of many of Costa Rica's policies, but it is difficult to deny the imagination and reach of public servants, politicians, and environmentally minded citizens who over the years have experimented with different policies and programs. Nevertheless, for Francisco, the WaterFund solved the problem of a public sector that lacks ideas and is unaccountable to private citizens. In his view, the WaterFund creates an arrangement where public and private sit at the same table and overcome the lack of public ideas and accountability that ail the country. The trust, he explained, was the only legal mechanism fit for that purpose. They had considered many other legal entities – the association, foundation, cooperative, or limited liability company – but none of these could bring government bodies and private actors to the same table to make substantial decisions together.

In Francisco's rendering, the trust is an opening in a legal system that is closed off to public-private partnerships. His view of such a public-private separation is not unique; most people in Costa Rica understand collective life to be either fully public, led by state institutions that channel public funds, or fully private, led by private entities who seek private benefits. The internal organization of a project where both public and private entities might be present is less important than the visible institution presented to the public. Through the WaterFund, Francisco and his associates hoped to create the conditions for recharting this kind of perception. When they settled on the trust as a legal figure, they knew the board had to include public and private actors. They knew this would create the material conditions for sustained relations and everyday discussions to shift the public-private dichotomy that guides Costa Rica's public actors.

Empirically, the idea of a radical divide between public and private is difficult to defend. Many scholars have shown how this purified distinction is more an ideological artifact than a clear empirical arrangement (Aistara 2012; Hetherington 2009; Valverde 1995). And yet, the dichotomy retains lasting power as a contrast that inspires political visions and desires to redesign collective life (Alexander 2017; Gal 2002). It endures as a symbol that organizes people's thoughts and political life. Spokespersons on both sides routinely invoke the contrast to describe the social landscape in which they operate. In their renditions, some things are clearly public, usually involving the state in one way or another. Other things are clearly private, usually under the control of private corporations and businesses. Nonetheless, in this latest appearance, the trust is an attempt to set the pre-conditions for a future that dissolves this partition. As a device, the trust is enrolled to re-sculpt those boundaries. Even if for now it is only a small experiment, the WaterFund holds the potential for major transformations. In Pedro's words, if you have vision, the trust can radically transform Costa Rica's institutional landscape for the long run.

In this appearance, the promoters of the trust uphold it as a groundbreaking device to create a precedent for the future. They see it as a tool to re-sculpt the private-public divide, producing the necessary intimacy for private actors (corporations) and public actors (government officials, municipalities, and public utilities) to sit at the same table and coordinate action – something that people in Costa Rica believe is extremely difficult to achieve, whether it is desirable or not. In other words, in this appearance of the trust, the circulation of financial resources is secondary to a much larger project of re-sculpting the country's foundational division between public and private. A trust that is created with the dual objectives of managing wealth and transforming governance is a new field of political action.

Conclusion

At the online event where the WaterFund Trust was presented to the public in 2021, one thing was not mentioned. All the financial innovations the speaker mentioned, as instruments to 'solve' environmental issues, operate in one way or another through financial trusts. This unacknowledged centrality is symptomatic of how the global importance of trust as a pillar of the financial system often goes unnoticed. This centrality and acknowledgement are also historical, the trust has been at the center of colonial and imperial projects, religious transformations, reinventions of property as a legal institution, the invention of nature as a source of rent, and attempts to refigure acts of government. By analyzing trust's flickers, putting them next to another, we see how the form of the trust articulates, and occludes, distinct visions of sociality and of historical precedent.

During the last few decades in regions such as Latin America, and in addition to functioning as an infrastructure for the movement of money and for secrecy and tax evasion, the trust has become a mainstay for the organization of collective life. In the realm of public policy, the trust has become a favored instrument for investing in large-scale public projects – such as building roads and hospitals – and for managing the financial and political aspects of social compensation and environmental remediation after the infliction of collective harm. In these capacities, trusts accomplish much more than generating, protecting, or transferring wealth. They support particular visions of sociality and are tactically deployed to bring those about.

Costa Rica introduced the trust in its legal order in the 1960s, about 140 years after independence. Lawyers and financial actors saw the development as a major innovation, a radical move that would create new frontiers for wealth management, international trade, and finance. Thirty years later, in the 1990s, the trust became a prominent innovation again, this time in connection with environmental concerns. At that time, Costa Rica made the trust the core device for PES, the innovative mechanism that turns ecological processes into sources of rent and which has become a hallmark of the country's environmental policies. Most recently, in the second decade of twenty-first century, the trust has reappeared as a 'new' political mechanism to redefine the relation between public and private actors.

I narrate these three moments to exemplify the flickering nature of financial frontiers, formations that unsettle any linear sense of expansion into empty territory. Across these flickers we see the trust's alchemical power to convert the old into new. We also see how financial actors use the trust to align the conditions of social life with their visions of how society should be organized. These visions include splitting the right to property to open the door for fiduciary substitutions and new forms of financial accumulation; the invention of nature as a source of rent via payments for environmental services; and, most recently, the idea that in the post-privatization era of the twenty-first century, public and private actors need to develop intimate relations and shared visions of sociality. In each of these appearances, the trust turns specific assumptions about how social life should be organized into explicit interventions. It enables some actors to set the preconditions of the future and shape the yet to come. Analyzing these appearances shows the trust doing much more than channeling wealth and sheltering assets from taxation and surveillance, the narrow functions trusts are assigned in financial and legal circles. Through its flickers, the trust also makes evident how legal actors occlude certain histories and privilege others. Narrations of the trust in Latin America set its precedents in English medieval history and US imperialism in the twentieth century, erasing the Islamic and Canonic history that precedes them in the region. Through codes, consultants, and calculations, a flickering sequence is converted into a Eurocentric account of origins that pushes some predecessors to the margins.

Finally, by noticing the flickering cadence of the appearances of the trust, we see a financial frontier that does not follow an expansive wave model. The metaphor of a financial frontier posits that financialization operates as a wave expanding outward from global financial centers, colonizing new lands and saturating places presumed untouched by financial practices. In place

of that model, flickering financial frontiers show how things presumed to be in the past reappear as new before disappearing again, and reappearing later on. At the flickering frontier a device such as the trust can seem a relic of the past and later reappear as a shiny innovation. This character troubles the colonizing implications of frontier language and instead puts forward a multi-directional and non-linear dynamic whereby finance, imperial and colonial histories, and ongoing political projects coalesce to sculpt specific social relations that go beyond the accumulation and protection of wealth.

Notes

1. This was possible due to the earlier creation in 2018 of the Nasdaq Veles California Water Index (NQH20). This index aggregates and tracks the prices of tradable water rights in the most heavily traded regions in the state of California. It covers both surface and groundwater and is based on water market data compiled by West Water Research, LLC, a financial consulting firm that specializes in water.
2. Formally, this kind of trading is only possible if water rights are considered private property subject to alienation. In most countries in the world, legal regimes prohibit the buying and selling of water rights or permits. Costa Rica is one of those countries.
3. This historical dynamic resembles Walter Benjamin's (1968) rendering of the past as 'as an image which flashes up at the instant when it can be recognized and is never seen again' (255).
4. Due to the intimate encounters between Islamic and English law in Jerusalem during the Crusades, the emergence of the English trust needs to be understood in this political context (Gaudiosi 1987–1988). Gaudiosi's analysis of the trust that endows Merton College at Oxford University is an example of this integration. She shows how it is likely that Merton borrowed ideas from similar fellowships in Jerusalem to establish what would become one of the classic channels for charitable transfer of property in England.
5. Purgatory is the liminal condition between heaven and hell that subjects could only escape through the offices of church officials on Earth.
6. See also Lumba for an account of how this played out in the Philippines during the US's colonial period (Lumba 2022).
7. Others note how in the early 1900 trusts were established between Mexico and the United States for the development of railroads. In that case, however, the trust was created in the United States and was accepted as an international arrangement in Mexico due to its inexistence in the local legal order.
8. The first WaterFund was established in Quito, Ecuador in the early 2000s.
9. As of now, the Nature Conservancy has established twenty-five WaterFunds in Latin America, the oldest one being the partnership with Quito's Municipal Water Utility. <https://www.fondosdeagua.org/es/los-fondos-de-agua/>.
10. <https://waterfundstoolbox.org/getting-started/what-is-a-water-fund>.

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