

UC Irvine Journal of International, Transnational, and Comparative Law

Volume 5 Symposium: *Transnational Fiduciary Law*

Article 3

5-13-2020

Transnational Fiduciary Law

Tamar Frankel
Boston University School of Law

Follow this and additional works at: <https://scholarship.law.uci.edu/ucijil>



Part of the [International Law Commons](#)

Recommended Citation

Frankel, Tamar (2020) "Transnational Fiduciary Law," *UC Irvine Journal of International, Transnational, and Comparative Law*. Vol. 5, 15.

Available at: <https://scholarship.law.uci.edu/ucijil/vol5/iss1/3>

This Article is brought to you for free and open access by UCI Law Scholarly Commons. It has been accepted for inclusion in UC Irvine Journal of International, Transnational, and Comparative Law by an authorized editor of UCI Law Scholarly Commons.

Transnational Fiduciary Law

Tamar Frankel*

Fiduciary law is expanding throughout the world. Fiduciary law aims at encouraging fiduciary relationships, which are beneficial to society. Increasing globalization has increased the need for fiduciary law. Consequently, fiduciary law has spread in both common law and civil law jurisdictions, leading to a need for a unified approach, which would provide many advantages. The two systems share the same goals but achieve them through different means. International fiduciary standards and self-regulation may be helpful in promoting trust to encourage use of fiduciary services. The impact of fiduciary law is predicted to increase because of the increasing importance of trust and trust relationships and increasing interdependence of nations.

Introduction.....	17
I. Part One: The Problems that Fiduciary Law is Designed to Solve.....	19
II. Part Two: Globalization.....	21
III. Part Three: The Rise of Fiduciary Law in Global Relationships.....	22
A. The world needs more trustworthy parties and experts because international trade and expertise are expanding.....	22
B. Migration is facilitating cultural exchange as well as the transfer of law. Law is evolving to reflect the changes in national social structures.....	23
C. As major corporate scandals highlighted shortcomings of corporate governance regulations, concerns about corporate cultures rose.....	24
D. Fiduciary law is spreading in both common law and civil law jurisdictions. To be effective, however, a unified approach may be critical.....	25
E. Nations have absorbed the fiduciary principles and legal transplantation has taken place in different legal systems.....	26
1. The experience of Japan.....	26
2. The experience of China.....	27
3. The experience of South Korea and Taiwan.....	28
IV. Part Four: Integrating Fiduciary Law into Different Laws and Cultures.....	29
A. How did common law and civil law jurisdictions introduce and incorporate fiduciary laws into their legal framework?	29

* Professor of Law Emerita, Boston University School of Law. Sezgi Guler Fuechec (sezgi@bu.edu) has significantly contributed to this Article.

1. Common law and civil law are the two governing legal systems around the globe.....	29
2. Although two essentially different legal systems have the same goals, their methods of reaching these goals are quite different.....	30
3. The common law anchors its regulation of fiduciary relationship in equity and property law while the basis of civil law's regulation of fiduciary relationships is statutory contract law.....	31
4. The common law puts great weight on the ability of the entrustor to protect his interests from the fiduciaries' abuse of power.....	31
B. The distinctions between two systems are important.....	32
1. The property law umbrella of fiduciary law seems more suitable for the common law system, while the contract rules umbrella seems to fit the civil law system better	32
2. The existence of bifurcated property rights, as compared to contract promises, has serious consequences for the followers of each system...	33
C. The goal shared by both common law and civil law.....	34
D. Towards a universal fiduciary rule.....	34
1. Establishing principles.....	35
2. Embodying the same principles in different legal systems.....	35
3. Providing a structure of choice of law.....	36
4. Establishing an implementing court.....	37
V. Part Five: Promoting Trust at an International Level.....	39
A. Standardization and certification of fiduciaries' services may be the key to ensure service quality and reliability.....	39
1. International standards touch everyone and are a part of daily life.....	39
2. Self-regulation, building an institutional culture of trust, and education may be effective strategies to cultivate trust internally.....	41
3. Usually, both ethics and culture establish habitual rules of behavior...	41
4. Self-regulation is a democratic system in which free group members voluntarily limit their freedom.....	42
VI. Part Six: The Future of Fiduciary Laws.....	43
A. Culture may gain increasing importance in behavior and enforcement of the law.....	43
B. Trust relationships are becoming more crucial for success.....	44
C. Given the intricate network of global trade, nations are likely to be more interdependent in the future.....	45

INTRODUCTION

Fiduciary law is expanding throughout the world.¹ It seems to be a new phenomenon, but in reality, it is not. Fiduciary law is ancient. It existed centuries ago in Mesopotamia,² Rome,³ Egypt,⁴ Greece,⁵ as well as in Jewish⁶ and Christian laws.⁷ Fiduciary duties arguably developed later in Great Britain when master landlords left for the holy land on religious crusades and had to rely on others to manage their estates.⁸ The ancient rules, such as those found in agency law in Mesopotamia, may not have been as sophisticated as the current ones—such as stewardship codes⁹ and the consideration of environmental, social, and governance

1. See, e.g., Lei No. 6.404 § 5, de 15 de Dezembro de 1976, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 17.12.1976 (Braz.) (recognizing fiduciary duties that are owed to an array of stakeholders by corporate officers); Directive 2014/65/EU, of the European Parliament and of the Council of 15 May 2014 on Markets in Financial Instruments and Amending Directive 2002/92/EC and Directive 2011/61/EU (requiring member counties to adopt rules regarding the honesty, fairness, and professionalism of investment services providers as well as the requirement of acting in accordance with the best interest of their clients); see also J. Mark Ramseyer & Masayuki Tamaruya, *Fiduciary Principles in Japanese Law*, 19 (Harv. Publ. L., Working Paper No. 17-49, 2017), reprinted in OXFORD HANDBOOK OF FIDUCIARY LAW (Evan J. Criddle et al. eds., 2019), <https://ssrn.com/abstract=3044758> (discussing Japanese fiduciary principles in detail as well as “guardianship trusts,” which are developed in line with demographic needs specific to Japan to limit the misappropriation of assets owned by the elderly).

2. See Russ VerSteeg, *Early Mesopotamian Commercial Law*, 30 U. TOL. L. REV. 183, 196–202 (1999) (explaining Hammurabi’s laws of agency and bailment that imposed fiduciary-like responsibilities on the agent and bailee).

3. See Henry Hansmann et al., *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1356–61 (2006) (discussing the commercial forms of organizations); Mary Szto, *Limited Liability Company Morality: Fiduciary Duties in Historical Context*, 21 QUINNIPIAC L. REV. 61, 89 (2004) (emphasizing the relationship between fiduciary laws and laws of property and inheritance); see generally DAVID JOHNSTON, *THE ROMAN LAW OF TRUSTS* (1988) (examining the development of the *fideicommissa* (trusts) in Roman law, which had considerable influence on the 22 Common Law development of trusts).

4. See, e.g., Joshua J. Mark, *Ancient Egyptian Law*, ANCIENT HISTORY ENCYCLOPEDIA (Oct. 2, 2017), https://www.ancient.eu/Egyptian_Law/ (explaining a legally enforceable agency-like relationship in which family members hired replacements known as *ka-priests* to fulfill the family’s obligation to provide daily food and drink offerings for their deceased’s tomb on their behalf).

5. STEVEN JOHNSTONE, *A HISTORY OF TRUST IN ANCIENT GREECE* 9 (2011) (“[M]any Greek marketplace regulations, usually understood as attempts to control prices, seem equally aimed at overcoming or at least compensating for the asymmetric positions of sellers and buyers and at restraining or eliminating haggling, which is the manifestation of this asymmetry.”).

6. See Israel Herbert Levinthal, *The Jewish Law of Agency*, 13 JEWISH Q. REV. (n.s.) 117, 124 (1922) (explaining the Jewish law of agency); Steven H. Resnicoff, *Jewish Law and Socially Responsible Corporate Conduct*, 11 FORDHAM J. CORP. & FIN. L. 681, 691 (2006) (discussing the characterization of corporate shareholders as partners).

7. Szto, *supra* note 4, at 88. (“In Christian theology, Christ is the perfect fiduciary.”).

8. See GARY WATT, *TRUSTS AND EQUITY* 9 (8th ed. 2018); see generally David J. Seipp, *Trust and Fiduciary Duty in the Early Common Law*, 91 B.U. L. REV. 1011, 1014–16 (exploring the roots of trust and fiduciary duties in Anglo-American common law).

9. The stewardship movement, pioneered by the United Kingdom in 2010, has been followed by many countries and global institutional investors including Australia, Brazil, Canada, Denmark, Hong Kong, India, Italy, Japan, Kazakhstan, Kenya, Malaysia, the Netherlands, Singapore, South Africa, South Korea, Switzerland, Taiwan, Thailand, and the United States. Ernst & Young, *Q&A on Stewardship Codes* 4 (Aug. 2017), <https://www.ey.com/Publication/vwLUAssets/ey-stewardship-codes->

(ESG) factors¹⁰—for measuring financial performance. But the fundamental problems and solutions in each system have remained the same. These problems continue in the recent global movement, which developed these principles and guides of behavior.

What caused the rise of this global movement? Human nature offers a partial answer. Unlike many types of animals, whose survival depends on the support of other members, cooperation in human societies is generally volitional rather than based on genetics.¹¹ Human beings have sought and found ways not only to live with each other, but also to specialize and to help others as well as themselves. Yet, with these benefits came problems of dependence and unequal power in relationships. Fiduciary law helps resolve such problems and encourages these relationships. When people of different countries and cultures interact, fiduciary law is doubly valuable. It provides a foundation for trust, without which long-term and profitable relationships cannot exist.

Part one of this article describes the main problems found in fiduciary relationships—that is, the types of problems fiduciary law is designed to solve. Part two offers a short description of globalization: the rising interaction among people in different parts of the globe. Part three discusses the current growth of problems involving fiduciary relationships in the global context. Part four describes the difficulties of integrating fiduciary law into different legal systems and different cultures, and part five focuses on the ways in which fiduciary rules could more easily be applied to fiduciaries and their relationships with others.

This Article concludes with a prediction that fiduciary principles and their enforcement will likely regulate a significant part of international relationships. This

august-2017/\$FILE/ey-stewardship-codes-august-2017.pdf. Generally, stewardship codes encourage institutional investors with long-term mandates to engage with the management of their portfolio companies to discharge their fiduciary duties owed to beneficiaries. This engagement helps reduce the gap between the ultimate beneficiary and managers as well as the potential for misalignment of interests. David Walker, *A Review Of Corporate Governance In UK Banks And Other Financial Industry Entities: Final Recommendations* § 5 (2009), https://webarchive.nationalarchives.gov.uk/+http://www.hm-treasury.gov.uk/d/walker_review_261109.pdf. Stewardship activities may include monitoring and engaging with companies on matters such as strategy, performance, risk, capital structure, and corporate governance, including culture and remuneration.

10. The recent paradigm shift measures corporate success in the long-run, paying attention to how it was achieved. Institutional investors are increasingly being required to make sustainability assessments of the portfolio assets in regards to environmental, social, and governance aspects (ESG) to measure future financial performance. Furthermore, investment portfolios that do not take ESG factors into account are a potential breach of fiduciary duty because they may expose the beneficiaries to legal, regulatory, geopolitical, and reputational risks. INT'L CORP. GOVERNANCE NETWORK, ICGN GUIDANCE, IMPLICATIONS OF FIDUCIARY DUTY FOR INSTITUTIONAL INVESTORS: A GLOBAL OVERVIEW OF INVESTOR DUTIES AND RESPONSIBILITIES 11 (2018), https://www.icgn.org/sites/default/files/Item_5_ICGN%20Fiduciary%20Duty%20Guidance-Final2015May25.pdf.

11. STEPHEN JAY GOULD, *EVER SINCE DARWIN: REFLECTIONS IN NATURAL HISTORY* 259 (1992) (“Now we may need to emphasize our difference as flexible animals with a vast range of potential behavior. Our biological nature does not stand in the way of social reform.”); *see also* Tamar Frankel, *The Rise of Fiduciary Law*, 4–5 (B. U. Sch. of L., Public Law Research Paper No. 18-18, 2018), <https://ssrn.com/abstract=3237023> (explaining the role of fiduciary duties in human societies, in which cooperative behavior is not linked as tightly to genes).

prediction, however, is a hopeful one. Hopefully, the restrictions on powerful fiduciaries will not be excessive and the benefits of their self-limitations will enrich all parties in societies around the globe.

PART ONE: THE PROBLEMS THAT FIDUCIARY LAW IS DESIGNED TO SOLVE

The main problems that fiduciary law addresses are as follows:

First, most fiduciaries offer services—such as health care, legal services, teaching, asset management, financial advice, and corporate management—that are socially desirable and often require expertise. Usually, this level of expertise cannot be easily or quickly acquired. To be sure, some fiduciary services can be offered by machines. Yet, even then, building, developing and using the machines would require expert services, which themselves might lead to fiduciary relationships.

Second, in order to perform these services effectively, fiduciaries must be entrusted with property or power. For example, brokerage and asset management cannot be performed without vested powers and control over the managed assets. We name the owners of the assets “entrustors.”

Third, entrustment poses the risk that fiduciaries may abuse their entrusted power by failing to perform the promised services adequately. They may perform the services negligently and thereby cause entrustors harm, or they may misappropriate entrusted property, or entrusted power, for the benefit of someone other than the entrustor. In fiduciary relationships, there is a likelihood that entrustors will be unable to protect themselves from these risks. The markets may also fail to protect entrustors. Further, the costs of establishing trustworthiness may be higher than the benefits a fiduciary receives from the relationship.¹² Unless the law intervenes to protect the interests of society in providing these services by meeting the needs of both parties, it is unlikely that the parties will choose to interact.¹³ In other words, as economists might say, the costs of the relationship to both parties need to be reduced.¹⁴

Thus, fiduciary law aims at encouraging dependent relationships by reducing the burdens of the parties’ self-protection on one hand, and trust-insurance on the other hand, thus inducing them to interact. Differently stated, fiduciary law consists of a society’s rules that help maintain trust by dependent members when trust is desirable and when verification of trustworthiness of others is costly.

Fiduciary law aims at reducing the entrustors’ risks of their fiduciaries’ violations of expectations in two main areas.¹⁵ First, there is a risk of misappropriation of the entrusted property or power by the fiduciaries. Second, entrustors may suffer losses because of the faulty performance of the fiduciaries’ services, which, as noted earlier, are usually expert services and often hard to

12. TAMAR FRANKEL, FIDUCIARY LAW 6 (2011).

13. *Id.*

14. *Id.*

15. *Id.* at 107.

evaluate by non-experts.¹⁶ These risks are precisely what entrustors are encouraged to take.¹⁷ Therefore, fiduciary duties are focused on the assumptions about an entrustor's ability to protect himself as well as his ability to provide alternative means of protections that entrustors can enjoy.¹⁸ In sum, fiduciary law establishes a duty of care, ensuring the quality of expert services and a duty of loyalty prohibiting conflicting interests, which undermine trust.

The combined duties of care and loyalty are similar to the so-called Golden Rule, which has historically attracted supporters from different cultural backgrounds.¹⁹ The Golden Rule acknowledges an essential moral principle based on the ethics of reciprocity: one should treat others in a manner that he or she would like to be treated.²⁰ The Rule requires everyone to “[a]ct in his relations with others on the same standards or principles that he would have them apply in their treatment of him, taking account of and respecting, but not necessarily acceding to, their wishes and desires.”²¹ Consequently, one should identify with another to exercise reasonable care and avoid conflicts of interest in his or her dealings.²² Similar to fiduciary law, this rule cultivates trust among individuals.

The assurance of trust in others is not merely “good.” It is crucial to the existence of profitable human societies. We depend on each other from birth to death. Yet, if that is so, why do we need the law? Arguably, the fiduciary concept plays a similar role to the genetic preference for cooperation that is seen in most animals.²³ However, the discussion in this article is limited to the current spread of fiduciary rules *as law* around the globe. The subject-law varies, but the applicability of fiduciary principles to the law's foundation and objectives is the same whenever and wherever it is applied.

In sum, regardless of their cultural and historical background, societies have adopted fiduciary rules or similar initiatives to resolve the issues arising from human behavior. Traits such as trust, cooperation, and loyalty are a result of a complex neurological and biochemical process that develops continuously, based on a

16. *Id.*

17. *Id.*

18. *Id.*

19. The history of the Golden Rule extends to Homer's *Odyssey* (800 B.C.E.), the writings of Confucius (551–479 B.C.E.), the Babylonian legend of Ahikar (500 B.C.E.), and it resonates in the maxims of prophets, philosophers and common understandings of religious leaders. See JEFFREY WATTLES, *THE GOLDEN RULE* 15 (1996).

20. PARLIAMENT OF THE WORLD'S RELIGIONS, *DECLARATION TOWARD A GLOBAL ETHIC* 2 (1993), [https://parliamentofreligions.org/pwr_resources/_includes/FCKcontent/File/Toward sAGlo balEthic.pdf](https://parliamentofreligions.org/pwr_resources/_includes/FCKcontent/File/Toward%20a%20GlobalEthic.pdf) (“We must treat others as we wish others to treat us.”).

21. Marcus G. Singer, *The Golden Rule*, 38 *PHILOSOPHY* 293, 313 (1963).

22. Essentially the word “identity” implies separateness. Every individual has an identity that distinguishes one from another. The word “identify”, among other definitions, means to “recognize” and “associate.” It means empathy, the capacity to imagine how others feel, even though they are different from us. Therefore, one who identifies with another avoids doing harm from which he or she will also suffer.

23. FRANKEL, *supra* note 13, at 4.

continually updating dataset obtained from our interactions with other humans.²⁴ Although externalities such as personal experience may vary between individuals, the decision-making process is organic, and essentially similar.²⁵

PART TWO: GLOBALIZATION

In the twentieth century, technology facilitated a new wave of globalization.²⁶ Technological developments (e.g., commercial civil aviation, rise of productivity in merchant marines, use of the telephone as the main mode of communication) enabled the worldwide expansion of trade after the Second World War because they resulted in reduced transaction costs.²⁷

Technology brought people in distant places closer together. The digitization of traditional forms of communication such as mail and telephone facilitated interaction between greater distances. This increased trade and the exchange of knowledge, ideas, opinions, and it satisfied our curiosity. All these changes raised the foundational issue of trust to the forefront because each enriching exchange also has the potential to be devastatingly harmful if it was untrustworthy and fraudulent.

Previously, in the nineteenth century, international travel and trade were mainly driven by colonialism.²⁸ Together with colonial activities, fiduciary relations spread from England to its colonies throughout the world, resulting in London's prominence in the international capital market. The path of fiduciary relationships diverged into two routes: one route went around the Cape of Good Hope toward the east, through South Africa, India, and then to Japan. The other path went west crossing North America and the Pacific Ocean, to reach Japan in the early twentieth century.²⁹

24. A recent study investigating the underlying decision-making mechanisms through iterated trust games, in which the participants were required to choose between investing with a friend, confederate, or computer, posits that one's decisions are affected by his or her learning of the partner's reputation and that the participant's expectations are updated based on the experienced outcomes. A second hypothesis is that reciprocated trust triggers a reward signal that drives future collaborative decisions. Dominic S. Fareri et al., *Computational Substrates of Social Value in Interpersonal Collaboration*, 35(21) J. OF NEUROSCI. 8170, 8176 (2015).

25. In another experiment, the participant had to choose an amount of money to send to a stranger via computer, knowing that the money would triple in amount if the recipient cooperated and understanding that the recipient could keep all the cash. As a result, the more money people received (denoting greater trust on the part of senders), the more oxytocin hormone their brains produced. The amount of oxytocin found in the blood circulation of the recipients predicted how trustworthy (their likelihood of sharing the money) they would be. The study also found that oxytocin increased a person's empathy, which is underscored as a "useful trait for social creatures trying to work together." Paul J. Zak, *The Neuroscience of Trust*, HARV. BUS. REV., 3, 84 (2017).

26. Esteban Ortiz-Ospina et al., *Trade and Globalization*, OUR WORLD IN DATA (2014), <https://ourworldindata.org/trade-and-globalization>.

27. *Id.*

28. *Id.*

29. Masayuki Tamaruya, *Japanese Law and the Global Diffusion of Trust and Fiduciary Law*, 103 IOWA L. REV., 2229, 2229–30 (2018).

Today the trend continues, driving the “integration of national economies into a global economic system,”³⁰ increasing the volume of international trade and the number of preferential trade agreements. This is *globalization*. This process has produced a remarkable growth in trade between countries,³¹ and has facilitated migration and diverse geographical pathways, causing changes in societal structures and affecting legal developments.

PART THREE: THE RISE OF FIDUCIARY LAW IN GLOBAL RELATIONSHIPS

Technology may be the short explanation for the growth of global fiduciary rules. Yet it is more complex than that. Technology has fueled global interaction, which has led to increasing volumes of international trade, e-commerce, and the need for expert services. This increased interaction has also resulted in a growing trust-gap, which fiduciary laws are attempting to fill. Another reason for the expansion of fiduciary rules may be the efforts to limit the power of corporate directors and financial managers, which has become more prevalent since the revelation of major scandals and global financial crises.

A. The world needs more trustworthy parties and experts because international trade and expertise are expanding.

Today’s global economic system is based on an “intricate network of economic interactions” throughout the entire world.³² “[C]ountries exchange not only final products, but also intermediate inputs,” and services, such as tourism, financial services, and legal advice, which are intangible commodities.³³ The international exchange of expert services is fairly new compared to the trade of tangible goods,³⁴ however, this trend is likely to increase in the near future. Companies that traditionally developed products are progressively building capabilities to offer services and solutions to complement their products.³⁵ This trend suggests that the market demand for higher standards of service will steadily rise and a successful response to this demand will offer beneficial opportunities.³⁶

International trade requires the support of financial and non-financial institutions. These institutions are both obvious (e.g., law enforcement) and more obscure (e.g., institutions providing countries with credit), and they include country-specific institutions (e.g., knowledge of foreign languages). “[P]roducers in

30. Ortiz-Ospina et al., *supra* note 27.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. INT’L ORG. FOR STANDARDIZATION, ISO STRATEGY FOR SERVICE STANDARDIZATION (2016), https://www.iso.org/files/live/sites/isoorg/files/archive/pdf/en/the_iso_strategy_for_service_standardization.pdf (emphasizing the importance of setting a standardization strategy for catching up with the so-called “servitization” trend).

36. *Id.*

exporting countries often need credit in order to engage in trade.”³⁷ According to recent studies, “financially developed economies—those with more dynamic private credit markets—typically outperform exporters with less developed financial institutions.”³⁸ Thus, the availability of trustworthy financial experts is critical to success in international trade.

Moreover, there is a link between prosperity and availability of trustworthy experts, such as legal and financial service providers. The intricacy of global trade networks, the increasing number of transactions, and the need for experts raise the demand for trust. Arguably, countries with an established culture of institutional trust are more likely to flourish, while countries with poorer institutional trust lose opportunities because of the costs and risks associated with mistrust.

B. Migration is facilitating cultural exchange as well as the transfer of law. Law is evolving to reflect the changes in national social structures.

Technological developments have facilitated migration across increasingly diverse geographical pathways.³⁹ First, technological change has lowered financial restraints on mobility because it has significantly reduced the cost of travel and communication.⁴⁰ Second, increased mobility has strengthened migrant networks and transnational ties by enabling immigrants to maintain connections with family and friends, to remit money, and to travel back and forth between their countries of residence and origin.⁴¹ Third, rising literacy rates, increased access to formal education, and improved access to “global” information through (satellite) television, mobile phones, and the internet seem to have increased society’s aspirations and awareness of previously unknown opportunities in other countries.⁴² Combined, these developments may have increased people’s abilities and aspirations to migrate.

Today’s migratory and media-connected world offers abundant information from the “global cultural supermarket” to individuals.⁴³ Today, we have more freedom to formulate our own identity by exposure to elements from other cultures.⁴⁴ When “[a] group of people have a common culture . . . they have common codes. With the aid of such a common system of codes it is possible to communicate

37. Ortiz-Ospina et al., *supra* note 27.

38. *Id.*

39. Mathias Czaika & Hein de Haas, *The Globalization of Migration: Has the World Become More Migratory?*, 48 INT’L. MIGRATION REV. 283, 284 (2015).

40. *Id.*

41. *Id.*

42. *Id.* (citing Hein de Haas, *Mobility and Human Development*, U.N. DEV. PROGRAMME HUMAN DEV. REPS. (2009)).

43. See generally GORDON MATTHEWS, GLOBAL CULTURE/INDIVIDUAL IDENTITY: SEARCHING FOR HOME IN THE CULTURAL SUPERMARKET (2000) (discussing globalization, culture and identity).

44. *Id.* at 5.

group affiliation to the environment, to the group and to oneself.”⁴⁵ Interaction with people from other cultures may lead to shared values and ease the process of identifying with others.

Further, migration is an important component for the transfer of law.⁴⁶ To be sure, the culture of “sending” and “receiving” societies are still important in assessing the fate of transplanted rules.⁴⁷ Law reflects changes in culture and societal structure as well.⁴⁸ Thus, a major reason for recognizing and developing a separate body of universal fiduciary law is that society is evolving into a culture which is predominantly affected by fiduciary relations.⁴⁹ The body of law governing fiduciary relations can affect and be affected by this social trend.⁵⁰

C. As major corporate scandals highlighted shortcomings of corporate governance regulations, concerns about corporate cultures rose.

In 2014, Brazil was shaken by the “Lava Jato” (i.e., Operation Car Wash), which was likely the biggest corruption scandal in history. Investigations uncovered a vast and extraordinarily intricate web of corruption⁵¹ in which officials awarded contracts at inflated rates to the state-controlled oil company Petrobras. This scandal has caused a huge fallout in Brazilian equities.⁵² In Japan, concerns about corporate governance laws arose after the accounting scandals of the Olympus and Toshiba Corporations, and Tepco executives’ professional negligence in taking measures against the tsunami that caused the nuclear meltdowns in Fukushima.⁵³ The “Satyam” fiasco, which included falsification of financial accounts, was the catalyst for India’s extensive corporate governance reforms.⁵⁴ Corporation from the United States and a number of European countries have not lagged behind.⁵⁵

45. Philip M. Nichols, *The Viability of Transplanted Law: Kazakhstani Reception of a Transplanted Foreign Investment Code*, 18 U. PA. J. INT’L ECON. L. 1235, 1237 (1997) (citing Jorgen Selmer, “Cultural Groups” and the Study of Life-Styles and Cultural Identity, in TRADITION AND CULTURAL IDENTITY 47, 57 (Lauri Honko ed., 1988)).

46. See Prakash Shah, *Globalization and the Challenge of Asian Legal Transplants in Europe*, SINGAPORE J. LEGAL STUD. 348, 349 (2005) (citing MASAJI CHIBA, LEGAL CULTURES IN HUMAN SOCIETY, 20–21 (2002)).

47. *Id.* at 348.

48. Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 798 (1983).

49. *Id.*

50. *Id.*

51. Jonathan Watts, *Operation Car Wash: Is This The Biggest Corruption Scandal In History?*, THE GUARDIAN (June 1, 2017), <https://www.theguardian.com/world/2017/jun/01/brazil-operation-car-wash-is-this-the-biggest-corruption-scandal-in-history>.

52. Claire Felter & Rocio Cara Labrador, *Brazil’s Corruption Fallout*, COUNCIL ON FOREIGN REL. (Nov. 7, 2018), <https://www.cfr.org/background/brazils-corruption-fallout>.

53. See, e.g., Joel Slawotsky, *The Virtues of Shareholder Value Driven Activism: Avoiding Governance Pitfalls*, 12 HASTINGS BUS. L.J. 521, 558–61 (2016).

54. See, e.g., Garima et al., *The Satyam Failure*, 15 INT’L BUS. J. 28 (2015).

55. See, e.g., Jason M. Halper et al., *Revisions Proposed to the UK Corporate Governance Code: An Overview and Comparison with Aspects of US Corporate Governance*, THE NAT’L L. REV. (Feb. 22, 2018), <https://www.natlawreview.com/article/revisions-proposed-to-uk-corporate-governance-code-overview-and-comparison-aspects>.

These scandals may have raised concerns about the prevailing business cultures, which promote self-interest and measure corporate success in monetary gain regardless of how it is achieved.⁵⁶ Each scandal led to an intensive corporate governance reform and a codification movement in both common law and civil law jurisdictions. As demonstrated later in the fourth part of this Article, both legal systems offered similar fiduciary principles, even though, as noted below, their methods and approaches differ. In common law jurisdictions, fiduciary law is rooted in the law of property, whereas in civil law jurisdictions, fiduciary principles are rooted in contract law.

D. Fiduciary law is spreading in both common law and civil law jurisdictions. To be effective, however, a unified approach may be critical.

Although both systems have different approaches, in global relationships there is a crucial need for uniform principles and laws to reduce, if not eliminate, abuse of fiduciaries' powers. The pressures for uniform rules arose when non-legal principles became insufficient to provide sustainable trust relationships. It is crucial to understand not only the rules, but also the sources and foundations of fiduciary rules from other countries. Understanding the same language is not enough if the underlying history and context differ.

As noted, in order to reconcile differences between fiduciary laws of various countries, one should identify the universal systems on which most legal systems are built. In fact, we are dealing mainly with two legal systems: common law and civil law. We can analyze the sources of fiduciary principles in common law and civil law and then identify the underlying differences between the two systems. This process will identify the common source principles on which both systems are based. Ultimately, there is an argument for adopting a hybrid system of fiduciary law, built upon broad unifying principles that could apply in both common law and civil law jurisdictions.⁵⁷

There are many advantages to unifying fiduciary law: first, a uniform law may be more helpful in establishing trusting relationships across state boundaries. Second, the unification of the governing rules reduces the cost of designing agreements among parties. After all, just as the mixing of languages is costlier than a uniform language, so a mixture of different legal rules is costlier than a rule drawn and based on one system. Third, a common, unified language helps foster ideas of trust and trustworthiness, and generate a better understanding of morality. Unification leads to a common understanding and compromises rather than a fight for "winning my way." Fourth, unification avoids the need for a third-party arbitrator between two systems and for seeking compromises. Therefore, although the foundations of two legal systems are different and can remain intact, we can

56. FRANKEL, *supra* note 13, at 101–02.

57. *See generally* Tamar Frankel, *Toward Universal Fiduciary Principles*, 39 QUEEN'S L. J. 391 (2014) (providing a detailed comparative analysis of fiduciary law in common law and civil law jurisdictions as well as discussing the methods to reconcile the two different legal systems).

recognize that both systems aim at achieving a similar mission. The question is: how can the mission of these two different systems follow a uniform approach?

E. Nations have absorbed the fiduciary principles and legal transplantation has taken place in different legal systems.

1. The experience of Japan

Japan's adoption of the duty of loyalty for corporate directors illustrates how a legal transplant (*i.e.*, a transfer of legal rules to another culture) may become part of the legal system, dressed in traditional garb over time, as the legal infrastructure and political economy change and affect the motivation of the legal professionals who interpret and enforce the transplant.⁵⁸

In Japanese law, relations between a corporation and its directors are mainly governed by the law of agency.⁵⁹ In accordance with agency law, which applies to all agency relationships, directors owe a duty to exercise the care of a faithful manager while carrying out their work and pursuing the goal of the agency relationship.⁶⁰ Directors owe an additional duty of loyalty derived from corporate law.⁶¹ Japanese courts interpret corporate directors' duty of care as a component of their duty of loyalty. This interpretation may have been influenced, in part, by the fact that, in Japan, corporate directors are generally corporate officers, who are responsible for what happens under their leadership at all levels of the organization.⁶² Under this approach the scope of duty of care is broader than its equivalent in the common law system.⁶³ In addition, Japanese courts are less deferential to the "business judgment rule" as compared to courts in the United States.⁶⁴ Despite these nuanced differences, the substance of corporate fiduciary duties is similar in both systems. For example, both systems prohibit transactions that give rise to the directors' personal enjoyment of corporate opportunities and that engage in self-dealing, and both systems relieve directors from such a prohibition upon disclosing any material facts about the transaction and obtaining the shareholders' approval.⁶⁵

58. *Id.* at 423.

59. Ramseyer & Tamaruya, *supra* note 2, at 5.

60. *Id.*

61. *Id.*

62. Frankel, *supra* note 58, at 424.

63. Compare *In re Caremark International Inc. Derivative Litigation*, 698 A.2d 959 (Del. Ch. 1996) with *Nishimura v. Abekawa* (The Daiwa Bank Case), 1573 Shoji Homu 4, 4 (Osaka Dist. Ct., Sept. 20, 2000) (quoted in Ramseyer & Tamaruya, *supra* note 2, at 11) (holding that each director has the duty to understand and manage the risks properly by maintaining a risk management system appropriate to the scale and nature of the firm's business as a part of his duties of faithful care and loyalty) and *Nihon gakki seizo, K.K. v. Kobayashi*, 286 Hanrei Taimuzu 360 (Tokyo High Ct., July 28, 1972), (quoted in Ramseyer & Tamaruya, *supra* note 2, at 9) (holding that an interim director breached his duties by entrusting the firm work to his subordinates despite a good faith manager's duties of care, loyalty and social responsibility).

64. Ramseyer & Tamaruya, *supra* note 2, at 6.

65. *Id.* at 5.

2. *The experience of China*

The history of trust law in China provides an interesting example of legal transplantation. The communist society facilitated a use for a legal tool originally designed to protect English landowners from the overarching government.⁶⁶ This use may demonstrate the flexible character of fiduciary law. China adopted the Trust Law of the People's Republic of China "to provide a legal foundation for the regulation of financial trust services and charitable activities" on October 1, 2001.⁶⁷ In Charles Zhen Qu's words, "How well these legislative objectives are achieved will depend on how the common law principles are embodied in the Trust Law in China.... China's legal system, although still being developed, is basically a civil law system."⁶⁸

Charles Zhen Qu suggested that the trust law in China "will not be of much practical value if it cannot be interpreted in light of civil law principles. Civil lawyers cannot viably approach their own trust law with common law principles."⁶⁹ He further asserted that:

[a] relationship analysis helps answer the questions because the trust law was made to regulate trust relationships. The roles of each party to a trust, are determined by how the concept of trust is defined, how a trust is created, and when a trust is constituted under the trust law.⁷⁰

For example, because the regulations governing trust businesses do not reflect "civil" and "commercial" trust categories set forth by the trust law, the establishment of small-scale family businesses and civil trusts becomes almost practically impossible.⁷¹ In this vein, Chinese scholars seek specific rules for legal trusts.

Chinese scholars point out that even if beneficiaries are aware [of the existence of a trust], rules that promote secrecy of trusts may make it impossible for beneficiaries to fulfill the role American trust law assigns them as enforcer of trusts. Because no record exists of an invisible trust's purpose, property, parties, or fiduciary rights and duties, beneficiaries lack the information they need to monitor a trustee and hold that trustee accountable for any misconduct. Indeed, secrecy of trusts may effectively deny beneficiaries any claim whatsoever to trust property. As Zhong Ruidong and Chen Xiangcong observed, "if the trust is not established in writing, after a considerable period of time, when the beneficiary asserts his

66. Stephen Tensmeyer, *Modernizing Chinese Trust Law*, 70 N.Y.U. L. REV. 710, 712 (2015).

67. Charles Zhen Qu, *The Doctrinal Basis of the Trust Principles in China's Trust Law*, 38 REAL PROP. PROB. & TR. J. 345, 347 (2003); see generally Frances H. Foster, *American Trust Law in a Chinese Mirror*, 94 MINN. L. REV. 602 (2010) (exploring the background of China's adoption of the classic "Anglo-American" concept of trust as well as the systemic flaws in American trust law).

68. Zhen Qu, *supra* note 68, at 347.

69. *Id.*

70. *Id.*

71. Tensmeyer, *supra* note 67, at 712.

beneficial rights, no evidence [of those rights] will exist.” To Chinese authors, the inevitable result is conflict and uncertainty.⁷²

3. *The experience of South Korea and Taiwan*

Taiwan provides an example of reconciling of common law and civil law systems by a “sliding movement.” While the current system is maintained, a partial use of an alternative system with slow adoption can lead to full adoption of the common law, civil law, or a hybrid of both.⁷³ Scholars have observed that while civil law judges have been paying far more attention to precedents, common law judges paid attention to the written law and the codes.⁷⁴ Fiduciary law may be more amenable to this form of “sliding” because the category of fiduciaries is open-ended, offering flexibility. For instance, Choong Kee Lee proposed that common law fiduciary principles could be integrated into Korean law as a subset of good faith and sincerity principles, encouraging Korean judges to exercise more discretion.⁷⁵

Although there are various types of fiduciary relationships that have been continuously evolving, the fundamental objectives of fiduciary laws are the same or very similar. These objectives may appear in different systems and jurisdictions, and they require the same or very similar treatment by law depending on the social and cultural pressures of the population.

Taiwan has imported the duty of loyalty by copying Japan’s Article 254-3, which imposes a duty of loyalty on corporate directors.⁷⁶ Like Japan, a commentator has suggested that the fiduciaries’ duty of loyalty is poised to play a role in corporate governance because the two countries demonstrate similarities from legal, political, and economic perspectives.⁷⁷ It may take years (as it did in Japan) for other countries to adopt the duty of loyalty, and even though these countries may develop substitute rules,⁷⁸ the essence of the duty of loyalty is similar, regardless of how it is named.

Contrary to the approach of most scholars to date, it is virtually impossible to discuss the ‘success’ or ‘failure’ of wholesale transplants of entire bodies of law (such as Japan’s transplantation of codes in the European Civil Law tradition in the late 19th century), or to extrapolate meaningfully from a single rule to the feasibility of legal transplants in general. Each legal rule or institution must be examined individually, and an assessment of the overall feasibility of legal transplants as a form

72. Foster, *supra* note 68, at 646 (footnotes omitted).

73. Frankel, *supra* note 58, at 425.

74. *Id.*

75. Choong Kee Lee, *How to Adopt and Develop Anglo-American Concept of Fiduciary Law in a Civil Law System: A Korean Perspective*, http://www.law.nyu.edu/sites/default/files/ECM_PRO_071736.pdf (last visited on Dec. 31, 2018).

76. Hideki Kanda & Curtis J. Milhaupt, *Re-examining Legal Transplants: The Director’s Fiduciary Duty in Japanese Corporate Law*, 51 AM. J. COMP. L. 887, 888 (2003) (citing Japanese statute).

77. Frankel, *supra* note 58, at 425.

78. See Kanda & Milhaupt, *supra* note 77, at 900–01.

of legal change shows that a more rigorous theoretical base than existing literature has provided, is needed.⁷⁹

As seen in the harmonization of European Union and United States securities regulations, these barriers are not easy to overcome.⁸⁰ However, the benefits of creating a single securities market may justify the efforts.⁸¹ The codification trend to adopt open and general rules in civil law jurisdictions gave courts more room to interpret these rules and develop more focused and specific approaches.⁸² For instance, the Dutch Civil Code of 1992 abandoned the “traditional hierarchy among the different sources of law.”⁸³ Similarly, Article 1261 of the Quebec Civil Code declares that a trust patrimony is distinct from that of the trustee or beneficiary and is a “patrimony by appropriation” (*patrimoine d’affectation*).⁸⁴ The Law of Obligations in the civil law system is divided into general and specific rules. According to this division, general rules are applicable so long as no special provisions were set for the case at bar.

In accordance with the general provisions in the civil law system, trusts that are similar to common law trusts can be established. In contrast, the Supreme Court of Canada imposed a common law trust on the Crown in Canada holding that the Crown was a fiduciary of an aboriginal community that lived in Canada based on assertions to the community made prior to entering into a contract, even though the Crown was not a trustee of the community in the strict sense of the word.⁸⁵ The Crown was considered to be a fiduciary in the sense of the power relationship with the aboriginal community with whom it had signed the contract.⁸⁶

IV. PART FOUR: INTEGRATING FIDUCIARY LAW INTO DIFFERENT LAWS AND CULTURES

A. How did common law and civil law jurisdictions introduce and incorporate fiduciary laws into their legal framework?

1. Common law and civil law are the two governing legal systems around the globe.

Both systems have similar interests and motivations to promote trust in legal relationships. Fiduciary laws are highly beneficial in encouraging society members to interact, accumulate funds through investments, spending, and payment of taxes

79. *Id.*

80. Eric J. Pan, *Harmonization of U.S.-EU Securities Regulation: The Case for a Single European Securities Regulator*, 34 L. & POL’Y INT’L BUS. 499, 536 (2003).

81. *Id.*

82. Frankel, *supra* note 58, at 426.

83. Salvatore Mancuso, *The New African Law: Beyond the Difference Between Common Law and Civil Law*, 14 ANN. SURV. INT’L & COMP. L. 39, 44 (2008).

84. Frankel, *supra* note 58, at 426.

85. *Id.*

86. *See* *Osoyoos Indian Band v. Oliver (Town)*, [2001] S.C.R. 746 (Can.).

as well as avoiding costly duplication of services.⁸⁷ Both systems herald moral, honest and fair behavior among interacting parties.

Even though they share the same goal, however, their ways of implementing these goals differ. Common law and civil law legal systems seek to reach this goal by different rules and through different routes.⁸⁸ These differences may produce different rights, judicial approaches and detailed rules. Indeed, there were periods in which the two systems intersected. The common law drew on Roman law in the 17th century,⁸⁹ and Latin words are still used in some contexts today.⁹⁰ However, the current regulation on trusted experts differs in each system, drawing on a fundamentally different structure and culture. It is also enforced with a different judicial process. As noted, the common law draws the regulation of fiduciaries mainly from *property law*, while in the civil law the regulation is based on *contract*. In the common law the judicial process is managed more actively by the parties in an adversarial mode as compared to the more passive parties and more “hands-on” civil law judges.⁹¹

2. *Although two essentially different legal systems have the same goals, their methods of reaching these goals are quite different.*

For instance, the property law system in common law is bifurcated to entitle a party other than the legal owner to benefit from a property. In civil law, however, the title of a property resides in a single owner, and one may become a fiduciary based on a *contractual* relationship which assumes that the power of the contracting parties is equal and that fairness is inherent in contracts.⁹²

As international trade expands and relationships among strangers come closer, scholars and practitioners in common law and civil law jurisdictions would benefit from adjusting their agreements and rules towards a more unified approach.⁹³ With the increase of global commerce and finance, the importance of the laws designed to strengthen trust relationships is rising. Its importance is rising in proportion to the costs of verifying honesty and the moral behavior of others. A unified legal

87. Alex Gray, *A Question of Confidence: The Countries with the Most Trusted Governments*, WORLD ECON. FORUM (Nov. 15, 2017), <https://www.weforum.org/agenda/2017/11/the-countries-with-the-most-and-least-trusted-governments/>.

88. Frankel, *supra* note 58, at 394.

89. C.H. van Rhee, *Trusts, Trust-Like Concepts and Ius Commune*, 8 EUR. REV. PRIV. L. 453, 455 (2000), *reprinted in* TRUSTS IN MIXED LEGAL SYSTEMS 8:3 (Michael Milo & Jan Smits eds., 2001).

90. *See, e.g.*, Paul S. Gillies, *Latin in Vermont Law*, 28 VERMONT B. J. 15, 16 (2002) (“Latin words are placeholders for concepts, but the elegant phrases of the English common law are chains of words making so perfect an exposition of a legal principle that they resisted translation all those years.”).

91. *See* FRANKEL, *supra* note 13, at 79–99; *see also* TAMAR FRANKEL, FIDUCIARY LAW: ANALYSIS, DEFINITIONS, RELATIONSHIPS, DUTIES, REMEDIES OVER HISTORY AND CULTURE 7–23 (2008); Dominik Lengeling, *Common Law and Civil Law—Differences, Reciprocal Influences and Points of Intersection* (2008) (unpublished manuscript) (on file with author).

92. Frankel, *supra* note 58, at 400.

93. *See* Mathias Reimann, *Parochialism in American Conflicts Law*, 49 AM. J. COMP. L. 369 (2001).

language, even if pronounced in different accents and intonations, can lead to shared values, better understanding, and stronger relationships.⁹⁴

3. The common law anchors its regulation of fiduciary relationship in equity and property law while the basis of civil law's regulation of fiduciary relationships is statutory contract law.

Common law focuses on protecting entrusted property or power. Therefore, it imposes duties on fiduciaries to prevent misappropriation of entrusted property and misuse of entrusted power.⁹⁵ By contrast, civil law imposes fiduciary duties to avoid unfair and immoral terms of an agreement and enforce contractual obligations, provided that these obligations are fair and moral. In this system, fiduciaries have the legal ownership of property or the right to exercise power and the beneficial ownership of property, and power belongs to their entrustors.⁹⁶ Therefore, fiduciaries may not entertain their conflicting interests or act carelessly.

4. The common law puts great weight on the ability of the entrustor to protect his interests from the fiduciaries' abuse of power.

Society expects entrustors to bear the reasonable costs designed to verify and control the trustworthiness of others with whom they deal to the extent possible.⁹⁷ In contrast to common law, civil law focuses on the fairness of the terms between the fiduciaries and entrustors. There is an inherent *contractual* duty to act ethically and morally.

The emphasis on morality in the two systems is not drastic, yet notable. For decades, American courts have mentioned morality while discussing breach of fiduciary duties. For example, a court decision notes that equity applicable to the fiduciary relationship is “based on the highest morality,”⁹⁸ and a claim against an attorney must demonstrate a breach of fiduciary duties involving immoral

94. Frankel, *supra* note 58, at 395.

95. FRANKEL, *supra* note 13, at 108.

96. A similar approach was adopted in Roman law. Roman fiduciary law imposed a duty on a true owner of a slave to abide by the slave's contracts with third parties. It also imposed on a gift's recipient under a will—such as slaves—the duty to free the slaves according to the request of the trustor. In both cases, the reason for the recognition of a fiduciary relationship was the laws that did not recognize a slave's obligation (being property) and the trustor's directive to act rather than merely receive property under the will. Rather than change the laws, the rules allowed for deviations. FRANKEL, *supra* note 13, at 90–91.

97. The emphasis in this description of fiduciary law is not accepted by everyone in the common law system. Some scholars argue for viewing fiduciary law as part of common law contract, in which each party must fend for itself. However, the disagreement focuses on the degree to which the entrustors can reduce or eliminate their risks from abuse of fiduciaries' power, and the extent to which society is harmed by abuse of fiduciaries' entrusted power. See Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434 (1998); see also Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373 (2002).

98. *Alcorn v. Alcorn*, 194 F. 275, 278 (W.D. Miss. 1911).

behavior.⁹⁹ Fiduciary duties raise “the highest and truest principles of morality.”¹⁰⁰ There is a “need for enforcement of commercial morality in fiduciary relationships.”¹⁰¹ In case law, the emphasis is not as much attached to misappropriation and misuse of entrustment as is it attached to the terms of the relationship. As one court noted, “[S]tandards of corporate morality and fiduciary duties may be different in West Germany.”¹⁰²

In civil law jurisdictions, contracts draw on statutory law, which prohibits trusted persons from breaking their promise or acting immorally. A civil law lawyer who wishes to create an arrangement similar to a common law trust, could do so by finding a similar statutory design in their own jurisdiction.¹⁰³ In addition, civil law includes a broader definition of unethical and immoral behavior compared to common law, as it draws on statutes as well as the courts’ statutory interpretations. However, in both systems, remedies against the fiduciary may also reflect the level of wrongful behavior and immorality.

B. The distinctions between two systems are important

1. The property law umbrella of fiduciary law seems more suitable for the common law system, while the contract rules umbrella seems to fit the civil law system better.

Common law courts will enforce contracts among independent parties and give effect to the substance of their agreement. Under civil law, the courts will seek authority in statutes to determine the validity of a contract. The court may also decide on the fairness and morality of terms based on the parties’ independence and ability to form contracts for themselves. Thus, there are fundamental distinctions between a contract formed by the parties’ negotiated terms, and a contract based on a code provision. This distinction has important consequences relating to the source of the law and the role of judges in determining the interpretation of contracts.

99. *See In re Franke*, 345 N.W.2d 224 (Minn. 1984); *Burton v. Slaughter*, 67 Va. 914 (1875); J.S.T. Dev. Corp. v. Vitano, No. CV030521186S, 2004 Conn. Super. LEXIS 2136 (Conn. Super. Ct. June 22, 2004).

100. *Samba Enters., LLC v. iMesh, Inc.*, No. 06 Civ. 7660, 2009 U.S. Dist. LEXIS 23393 (S.D.N.Y. Mar. 19, 2009) *aff’d*, 390 F. App’x 55 (2d Cir. 2010) (quoting *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 416 (2001); *see also* K.M. Sharma, *From “Sanctity” to “Fairness:” An Uneasy Transition in the Law of Contracts?*, 18 N.Y.U. J. INT’L & COMP. L. 95 (1999).

101. *Kilbarr Corp. v. Business Systems, Inc.*, 679 F. Supp. 422, 424 (D.N.J. 1988).

102. *USACO Coal Co. v. Carbomin Energy, Inc.*, 539 F. Supp. 807, 812 (D. Ky. 1982).

103. *See* John Henry Merryman, *Ownership and Estate (Variations on a Theme by Lawson)*, 48 TUL. L. REV. 916, 939 (1974) (“[M]any of the functions served by the trust can be achieved in [a civil] legal system by using indigenous institutions, but each such arrangement would be significantly different in legal structure and in legal consequences from the trust.”).

2. *The existence of bifurcated property rights, as compared to contract promises, has serious consequences for the followers of each system.*

Habits and cultures are hard to change, just as they are hard to establish.¹⁰⁴ The efforts of Professor Louis Loss, the creator of securities regulation as an area of law, successfully combined various securities acts into a code. His efforts underscore the difficulty of changing habits. He hoped that the U.S. Congress would adopt the Code and that members of the Bar would use it. The American Law Institute and a group of expert members worked on the Code. It contained over 3,000 sections, balancing directives and smoothing contradictions.¹⁰⁵ Yet, instead of adopting the entire Code, the Securities and Exchange Commission (SEC) adopted only certain innovative provisions.¹⁰⁶ The Code itself did not become law.¹⁰⁷

Why was this Code not adopted and why did it lose the Bar's support? One answer is related to the high cost involved in teaching practitioners the new section numbers of the Code. "Everyone understands when you say section 5 violation of the 1933 Act and section 17(a) of the 1940 Act," stated one renowned securities lawyer, "But in the Code these are designated by entirely different numbers. No one wishes to learn new numbers now."¹⁰⁸

As "[t]he Hague Report concludes, '[T]he mainstream in the Civil Law characterization of the trust . . . emphasizes its flexibility and sees it as a contract-like institution. . . .'"¹⁰⁹ "In Europe, contract does the work of trust."¹¹⁰ When building blocks of different legal systems conflict, the chances of changing these building blocks in order to combine the two systems are very slim. No wonder the current literature on the sources and interaction between the common law and civil law demonstrates disagreements and uncertainty.

104. Frankel, *supra* note 58, at 421.

105. *Id.*

106. See Jeffery D. Bauman, *Loss and Seligman on Securities Regulation: An Essay for Don Schwartz*, 78 GEO. L. J. 1753, 1780 (1990) (reviewing LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* (1989) and noting the impact of the American Law Institute's proposed Federal Securities Code on the Securities Exchange Commission); see also AMERICAN LAW INSTITUTE, *FEDERAL SECURITIES CODE* §§ 401–406, 1704(g) (1978) (examples of Code provisions adopted), *cited in* Bauman, *supra*, at 1780.

107. Bauman, *supra* note 107, at 1776.

108. Interview with anonymous source.

109. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L. J. 625, 670 (1995) (citing Adair Dyer & Hans van Loon, *Report on Trusts and Analogous Institutions*, in HAGUE CONFERENCE ON PRIVATE INT'L LAW, PROCEEDINGS OF THE FIFTEENTH SESSION: TRUSTS - APPLICABLE LAW AND RECOGNITION 10, 11 (1985)).

110. *Id.* (citing FREDERIC W. MATTLAND, *EQUITY: A COURSE OF LECTURES* 23 (John Brunyate rev. ed., 2d ed. 1936) (A.H. Chaytor & W.J. Whittaker eds., 1st ed. 1909), *cited in* Dyer & van Loon, *supra* note 110, at 40). F.H. Lawson writes, "[T]he three-cornered relation of settlor, trustee, and [beneficiary] . . . is easily explained in the modern law in terms of a contract for the benefit of a third party." F.H. LAWSON, *THE THOMAS M. COOLEY LECTURES: A COMMON LAWYER LOOKS AT THE CIVIL LAW* 200 (5th ed. 1953).

3. *The goal shared by both common law and civil law*

Both systems share common goals in seeking to overcome rigid rules and searching for justice and fair treatment of parties. We should recognize the vision and objective of the two systems. Common law and civil law jurisdictions seek to achieve justice in the name of the sovereign, *i.e.*, the head of state.¹¹¹ According to Salvatore Mancuso, there is a commonality of values that constitutes a basis for these two jurisdictions:

Civil and common law seem to converge into a larger and more comprehensive Western liberal democratic family of legal systems, where some common values about law and democracy, as well as general legal principles in the area of public, administrative, criminal and private laws are shared by the legal traditions. Although a general sub-distinction between common law and civil law still persists, the major distinctions between them, however, have been greatly diluted in a continuous convergence between the two legal traditions clearly evident from the current harmonization initiatives taken within the European legal community.¹¹²

It is doubtful whether this description reflects the practice under the two systems. However, this description may point to the future. These foundational principles may pave the road to uniformity. For example, while one system may view law as limiting the actors' freedom, another system may stress the law as the source of legal rights. Both views can be adapted to view law as a source of the victims' rights against abusers of the victims' freedom.¹¹³ That is especially true for fiduciary rules. Similarly, while bifurcation of property can represent the feudalism of the past, where the powerful party held its power by force and by law, today, the seemingly powerful party in a fiduciary relationship is the servant endowed with power by the other party.¹¹⁴ Bifurcation of property rights may be viewed as the tool for protecting the true owners who lack physical control over his or her property, against the servants on whom the owner must depend, when such dependence is socially desirable.¹¹⁵

D. Towards a universal fiduciary rule.

As mentioned in the third part of this Article, a homogenous international legal system has many advantages. Unified laws establish trusting relationships

111. It has been suggested that "Roman, Canon and Germanic law (sources of the European *Ius-Commune* tradition) have provided elements of the [English] law of trust." van Rhee, *supra* note 90, at 454. William Blackstone's use of Roman law categories in systematizing English law is a perfect example of the interaction between two different legal systems. It is also important to note that England's equity law has not developed in an orderly fashion. The Court of Chancery may have had its roots as an administrative entity that administrated the king's justice. See Timothy S. Haskett, *The Medieval English Court of Chancery*, 14 L. & HIST. REV. 245 (1996).

112. Mancuso, *supra* note 84, at 45.

113. Frankel, *supra* note 58, at 422–23.

114. *Id.* at 423.

115. *Id.*

across state boundaries, reduce the cost of agreements, bring together different ideas of trust and faithfulness, and raise a better understanding of morality. Absent the friction caused by legal disparities, the parties are more likely to reach an understanding and compromise. Additionally, an integrated legal system would avoid the inconveniences caused by imperfect legal comparisons, distinctions, explanations and interpretations.¹¹⁶

1. Establishing principles.

Unifying two different legal systems is not an easy task. If we ignored the source of the principles but articulated the principles, we could agree on a set of principles that each system follows today and may undertake to follow in the future. In contrast to rules, principles do not prescribe the righteousness or falsity of a behavior, but rather “provide an abstract method or procedure for determining the morality [or legitimacy] of a line of action” that can lead to more specific rules.¹¹⁷ Therefore, the principles of unified fiduciary law should be less prescriptive and limited in scope so that they can provide the flexibility necessary for rules to evolve and therefore ease the process of embodying these same principles in different legal systems.

There are reasons for creating a platform of uniform international principles for select types of fiduciaries, such as corporate management, directors, trustees, or partners. The choice of a particular type of fiduciary should respond to need and circumstances. For example, if trusts are used in the process of securitization, and that process is worldwide, there may be a significant need for unifying the rules that govern trustees who deal only in this type of position.

If the laws governing directors or partners have been unified, the experience of unification in this context can be followed and provide extremely fruitful lessons. Yet, the more detailed the rules are, the more difficult it will be for the benefits of this system to carry over into other contexts. By contrast, the more general the principles are, the broader their application will be, and there will be a better chance for principles to follow. Perhaps uniform rules may take hold if the number of the actors and their types is relatively small, the fiduciary relationships that are chosen are the least complicated, and the existing rules are the least diverse.

2. Embodying the same principles in different legal systems.

Like any legal system, if a multi-system is not carved in granite, it may be more amenable to unification. There are also benefits in diversity of approaches to solve the same or similar problems.¹¹⁸ As much as diversity results in additional confusion and costs, it may also offer a field experiment in different solutions.¹¹⁹ Perhaps, in

116. *Id.*

117. Singer, *supra* note 22, at 294–95.

118. Frankel, *supra* note 58, at 434.

119. *Id.*

time, this process will give rise to a unified or fractured, but well-understood, system.

There is a reason for optimism about the development of a better legal system in the future. That is because the shared problems that caused the adoption of different laws are persistent. The interaction between different societies has never been greater than in today's world. People are learning to speak each other's language and someday they may successfully create a combined, somewhat new language. I conclude that a unified legal system is not only more desirable but also more feasible.¹²⁰

Even though we discussed unifying two major legal systems, most legal systems are not entirely uniform. For instance, specific rules of sub-groups (e.g., family) may diverge from the general rules that apply to small communities.

The conflict of laws rules in the United States are an example of how a multi-layered legal system may function.¹²¹ It is governed by general principles and enforced by a single mechanism. Beneath the general principles, there is a layer of law in more detail: federal law, that applies to all, and beneath that layer there are state laws, municipal laws, and the laws of other small communities. Each layer offers choices to the citizens. In some cases, the same entity may be governed by different legal systems. In the United States, while corporations can determine the laws that will govern their internal affairs by choosing the State of incorporation, operations of the corporations are governed by the laws of the State where they are performed. Therefore, every system contains methods to reconcile a diverse set of rules.

3. *Providing a structure of choice of law.*

The legal pyramid in the United States creates a hierarchy of norms in which Congress may superimpose rules and preempt state law within the frame of the U.S. Constitution. However, there are many statutes that allow the two systems to operate together.¹²² In such cases, the courts determine the extent to which state law may apply notwithstanding the imposition of federal law.¹²³ Alternatively, we may consider developing choice of law rules in fiduciary law, similar to those in the United States, rather than the unification of different legal systems. This is especially considerable when the values and ultimate results in different jurisdictions are similar.

Greater uniformity is necessary especially for transactions that require predictability, such as promissory notes and bills of exchange, which involve everyday transfers of funds. In line with the harmonization efforts in the European Union, scholars have argued that the European Parliament should favor the

120. *Id.*

121. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 8(2) (AM. LAW INST. 1971) (listing choice-of-law principles for determining which local law should be applied).

122. 15 U.S.C. § 80a-1-64 (2011); *but see* 15 U.S.C. § 35(b).

123. *See, e.g.,* *Burks v. Lasker*, 441 U.S. 471 (1979).

eventual adoption of “a common civil code for all of Europe.”¹²⁴ In Rodolfo Sacco’s words:

If the 19th century and the first half of the 20th century celebrated the inherently national character of law, the second part of the 20th century evinces an awareness of the inherent unity of law, and the inherent value of uniform legal rules. . . . There can be no doubt that conflicts of law are interfering with trade. Uniform law means cultural unity, and thus the elimination of misunderstandings and difficulties between different civilizations that must get on together.¹²⁵

According to this view, uniformity of specific rules is not merely desirable but is necessary¹²⁶ in today’s world, depending on the context of the relationships and the frequency of their use.

On the other hand, some situations pose strong tendencies and desires against uniformity. For example, the private character of wills and wills-substitutes often reflect the strong desire of the testator to keep his or her freedom to change the terms and shield the terms of the wills from publicity. For this reason, some jurisdictions in the United States declined to adopt uniform state laws in the face of testator’s privacy rights, and instead followed a more nuanced approach.¹²⁷

4. *Establishing an implementing court.*

If a process implementing a dual or hybrid system is adopted, it must be accompanied by, and indeed will depend on, an implementing judiciary. Similar to the International Court of Justice or the International Court of Arbitration, there could be an International Court of Fiduciary Law.¹²⁸ This international judicial system could be primarily based on case law, created by the judges that represent both common law and civil law jurisdictions. Therefore, the decisions would reflect conclusions that are based on a hybrid legal analysis.

The importance and value of such a court is its weakness. The fact that all other courts would be backed by strong governments, and that no strong government will accept the decision of another strong government, may lead to implementation of the law by a weaker court.¹²⁹ There is a risk that the implementing court will be biased, showing sensitiveness to the trends and strong convictions of those who appointed it. In this case, the outcome would likely be affected by more powerful members that have an interest in the resolution.

124. Rodolfo Sacco, *Diversity and Uniformity in the Law*, 49 AM. J. COMP. L. 171, 171 (2001) [hereinafter *Diversity and Uniformity in the Law*] (footnotes omitted); see also Rodolfo Sacco, *Unification and Certainty: The United Nations Convention on Contracts for the International Sale of Goods*, 97 HARV. L. REV. (1984).

125. *Diversity and Uniformity in the Law*, *supra* note 125, at 171–72.

126. See Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L. J. 713, 766–67 (2006) (footnotes omitted).

127. *Id.*

128. Frankel, *supra* note 58, at 437–38.

129. *Id.* at 438.

In this sense, the evolution of the Internet Corporation for Assigned Names and Numbers (ICANN) offers an instructive example. Online, names embody not only the address but the very existence of any person. Therefore, the power to establish and grant names is politically and financially valuable. Initially, the government of the United States supported the development of the internet and controlled the management of domain names. As the internet developed and expanded, the government of the United States sought to delegate this power to another entity, but it wished to retain some control over the process. The Internet Engineering Task Force's (IETF) 'requests for comments' (RFCs), which outline the key functions of the Internet, are now firmly asserted as copyrighted by the Internet Society.¹³⁰

This conflict and debate resulted in the establishment of ICANN, an organization with the power to establish and grant domain names: a corporation that does not have much power as compared to the governments that were interested in acquiring that power. When all or most of the countries could not agree who would hold the power to grant domain names, which could not be exercised by all, ICANN's power was granted by default. They agreed on bestowing this power on a virtually powerless organization.¹³¹

However, the source of legal change in common law and civil law somewhat differs from the ICANN experience. In common law, the courts are the source of incremental and slow legal change. Civil law jurisdictions mostly adopt legal reforms through legislatures, possibly paying regard to judicial precedents. However, there is a current codification trend in common law jurisdictions to adopt laws that reflect court decisions.¹³² Although it could be argued that common law courts will begin to interfere in contractual arrangements, the parties' agreement is likely to remain as their starting point. In that respect, the common law is moving towards a civil law system.

130. "The copyright is deployed as a flavor of 'copyleft,' meaning that it is used for the purpose of ensuring the widespread availability of the standards, preventing their proprietization by any particular party. The intellectual property behind RFCs is thus held in trust by the Internet Society—the IETF umbrella group which still retains some influence over ICANN, and which . . . has been tentatively selected by ICANN to run the .org registry, providing an anticipated needed infusion of cash to the organization. In other words, there is no doubt that the Internet Society 'owns' its RFCs, and thus no battle is to be waged over who will rule them. There is only the question of whether the world at large will pay heed to them as they are published—since an RFC is not self-enforcing." Jonathan Zittrain, *What's In a Name?*, 55 FED. COMM. L.J. 153, 163 (2002) (reviewing MILTON L. MUELLER, *RULING THE ROOT* (2002)) (footnotes omitted); see also Tamar Frankel, *Governing by Negotiation: The Internet Naming System*, 12 CARDOZO J. INT'L & COMP. L. 449 (2004); Tamar Frankel, *Accountability and Oversight of the Internet Corporation for Assigned Names and Numbers (ICANN)* (B. U. Sch. of L., Public Law & Legal Theory Research Paper No. 02-15, 2002), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=333342.

131. Frankel, *supra* note 58, at 438.

132. See, e.g., Ziad Raymond Azar, *Bankruptcy Policy, Legal Heritage and Financial Development: An Agenda for Further Research*, 24 EMORY BANKR. DEV. J. 379, 455 (2008) ("[T]he adoption of a lengthy bankruptcy code, securities regulations, and tax codes in the U.S., England, Canada, and Australia, among others, reflects a strong trend toward codification in common law countries.") (citing UGO MATTEI, *COMPARATIVE LAW AND ECONOMICS* 101–21 (1997)).

Civil law courts start by examining the statutes and looking for guidance in moral and fairness principles. Thus, depending on the legislatures, it may be easier to change statutes to ameliorate some of the resistance to bifurcation of property rights in civil law countries than in common law countries. However, a recent change in the French statutes was criticized as only a change on the surface, not altering the resulting conflicts between the civil law and common law.¹³³ Arguably, the attempt in China to unify common law of trusts contained similar faults and resulted in a similar failure. In contrast, it seems that Taiwan has enacted a statute that coherently follows the common law and could be used in this civil law country to establish trusts.¹³⁴ In conclusion, it could be said that legal transplantations are still at the experimentation stage.

V. PART FIVE: PROMOTING TRUST AT AN INTERNATIONAL LEVEL

A. Standardization and certification of fiduciaries' services may be the key to ensure service quality and reliability.

According to the World Bank's statistics, commercial service exports have quadrupled in the last two decades.¹³⁵ International Organization for Standardization (ISO) forecasts that continuing trends of deregulation and privatization of public services, delocalization of supply (e.g., health services, IT assistance, call centers) and expansion of digital services (e.g., financial services, online commerce) will contribute to a growing need for international standards for the services sectors.¹³⁶

1. International standards touch everyone and are a part of daily life.

The function of international standards varies from enabling the use of a bank card overseas to ensuring that children's toys don't have sharp edges.¹³⁷ Their primary purpose is to ensure customer confidence on safety, reliability, and quality of products and services.¹³⁸ By standardization, consumers and businesses avoid time and money spent on verifying trustworthiness by research, testing, and comparing different products.

133. Valerio Forti, *Comparing American Trust and French Fiducie*, 17 COLUM. J. EUR. L. ONLINE 28 (2011).

134. Christopher C. Chen, *Transplantation of Fiduciary Duties into Civil Law Jurisdiction: Experiences from Taiwan* (Nov. 15, 2011) (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1878204.

135. See *Commercial Service Exports (Current US\$)*, THE WORLD BANK, <https://data.worldbank.org/indicator/TX.VAL.SERV.CD.WT> (last visited Dec. 30, 2018).

136. INT'L ORG. FOR STANDARDIZATION, *supra* note 36, at 2.

137. INT'L ORG. FOR STANDARDIZATION, *The Main Benefits of ISO Standards*, [hereinafter *The Main Benefits of ISO Standards*] <https://www.iso.org/benefits-of-standards.html> (last visited Dec. 30, 2018).

138. *Id.*

In line with ISO's foundational principle, it is desirable for established experts, regulators and governments to set articulated standards for "the best way of doing things." Standardization could be beneficial in many aspects.¹³⁹

From the perspective of fiduciary law, most fiduciaries cannot provide services unless they have been previously certified by government agencies or professional associations. For instance, physicians, lawyers, and financial advisors generally may not practice without a license. However, most of the licensing requirements are aimed at maintaining minimum standards and may not necessarily promote compliance with the best practices. Additionally, compliance with local licensing requirements may be a weak assurance to international entrustors, especially when the expert's home country lacks a sound legal infrastructure arising from limited, unclear, absent, or unenforced regulations. In this case, verification of the experts' trustworthiness becomes more problematic, which may obstruct international trade.

Therefore, global investors might abstain from investing in an emerging market in the face of risks and costs associated with lack of expertise and potential fraud. In this case, all parties are likely to miss opportunities to build strategic alliances, enhance their businesses, and improve their gains. Further, the home countries of experts are likely to be deprived of foreign currency flow. Second, investors will most likely justify the risks arising from expert services by relying on the international presence, size, and prestige of a global expert, which is operational in the target country. However, this may not necessarily be the best alliance for any of the parties. For instance, there may be local service-providers available to meet the entrustor's needs by higher quality services, lower prices, familiarity with the market, business acumen or experience. Again, there will be missed opportunities, especially in terms of the local experts' ability to compete with global consultancy giants.

These problems may be solved by establishing an international fiduciary organization or mandating an existing one to set international standards for fiduciaries operating in various fields and certifying complying experts. This organization could help determine the best fiduciary practices and fill the trust gap in international transactions. Certified B Corporations¹⁴⁰ provide a good example for this type of international certification.

An argument against the effectiveness of the fiduciary certification system could be made. This argument is based on the absence of direct enforcement powers such as prohibiting unauthorized practice or taking regulatory actions. However, the purpose of fiduciary certification should be to shed light on the expert institutional culture, as well as the standards adhered to by the fiduciary. For

139. *Id.*

140. Certified B Corporations are different from the "benefit corporations" stipulated in the United States corporate laws. They are certified by a global non-profit organization for demonstrating commitment to the highest standards of social and environmental performance, public transparency, and legal accountability to balance profit and purpose. See *About B Corps*, CERTIFIED B CORP., <https://bcorporation.net/about-b-corps> (last visited Dec. 30, 2018).

instance, the fiduciary certification may save a multi-national company seeking to expand its business in another country time and money in its search for qualified lawyers in the target market.

In addition, international standards guide governments and policymakers in developing better regulations.¹⁴¹ For example, ISO standards assist policymakers in reducing barriers to international trade, stimulating solutions to national, international and policymaking issues (e.g., disaster mitigation and recovery), and establishing effective policies by presenting a wide range of views and expertise.¹⁴² A similar structure specific to fiduciary law may provide an invaluable assistance to legislators, policymakers, practitioners, and fiduciaries in both common law and civil law jurisdictions.

2. Self-regulation, building an institutional culture of trust, and education may be effective strategies to cultivate trust internally.

Financial institutions have grown larger; they engage in complex transactions, expand their activities around the globe, and make an impact both locally and internationally.¹⁴³ Due to their size, some financial institutions pose a systemic risk to the financial and economic systems of their home country and other countries in which they operate. The size, interaction, and impact of these institutions may render government regulators and examiners less effective. It has been suggested that these institutions are currently not only too big to fail, but also too big to regulate.¹⁴⁴

Expecting the courts to deliver justice and punish wayward financial institutions may mean waiting too long and achieving too little. The harm done can be devastating. Thus, in addition to demands for external regulation, oversight, and prosecution, a strong movement has risen to demand self-enforcement of law within corporations to prevent such violations from occurring.¹⁴⁵ Indeed, there is a growing demand to require institutions to establish and effectively operate compliance programs.

3. Usually, both ethics and culture establish habitual rules of behavior.

Ethics speaks to the habits of individuals, and culture speaks to the habits of groups. Habits are efficient. They induce automatic behavior and reaction. However, they are harder to change. Yet, good ethical habits, including the habit of reviewing our habits periodically, can be powerful components of a compliance culture.¹⁴⁶ As noted earlier, habits, cultures, and laws are difficult to change just as

141. *The Main Benefits of ISO Standards*, *supra* note 138.

142. *Id.*

143. *See generally* TAMAR FRANKEL, *THE LAW OF INSTITUTIONAL SELF-REGULATION (COMPLIANCE)* (2018) (discussing the means of self-regulation and their contribution to businesses).

144. Ryan Tracy & Victoria McGrane, *Fed to Banks: Shape Up or Risk Breakup*, WALL STREET J. (Oct. 21, 2014), <https://www.wsj.com/articles/fed-to-banks-shape-up-or-risk-breakup-1413847436>.

145. FRANKEL, *supra* note 144.

146. *Id.*

they are hard to be established. According to evolutionary biologist Richard Dawkins, “[c]ultural transmission is analogous to genetic transmission in that, although basically conservative, it can give rise to a form of evolution.”¹⁴⁷ Yet if a sufficient number of people or institutions follow one of the structures from a different legal system, a new habit and culture may develop.¹⁴⁸

The current model of compliance reflects our approach to enforcement. Institutions monitor employees for wrongdoing. They supervise, investigate and punish employees, and prepare themselves for regulatory examinations.¹⁴⁹ Traditionally, all actors in the corporation, from top management to low-level employees, have been subject to coercive and enforceable rules. As we study the evolution of compliance systems, we might also develop other forms of compliance programs.¹⁵⁰ For example, it is possible to design a compliance program in which middle managers are rewarded for undertaking an additional function along with their managerial duties to identify and correct mistakes and wrongful actions.¹⁵¹ This system may be adapted to each level of the organization, instead of a conventional top down process. In a self-governing group, the governed have more power to determine the rules and decide how they will be enforced, increasing the likelihood of compliance.¹⁵²

4. *Self-regulation is a democratic system in which free group members voluntarily limit their freedom.*

This type of limitation is internal and not imposed by the others; not by the government nor by any other governance system. Each and every member of the group is his or her own regulator.¹⁵³ In fact, self-regulation is similar to ethical behavior. Each constituent of the group is not only a part of a group, whose members behave in a certain way, but they are also a member of the government that imposes the rules of behavior. In other words, in this system, the governed are also the governors. For example, Financial Industry Regulatory Authority (FINRA) and the American Bar Association (ABA) are some of the most recognized self-regulated institutions.

Self-regulation is not only sensible in theory, but also in practice, as can be seen in various examples. For instance, Israeli banks and their regulators resist softening banks’ strict fiduciary duties, even when pressured by other government departments.¹⁵⁴ They choose to retain their customers’ trust over profit, even when risk-taking is promoted on another nationally desirable project.

147. RICHARD DAWKINS, *THE SELFISH GENE* 245 (4th ed. 2016).

148. Frankel, *supra* note 58, at 437.

149. FRANKEL, *supra* note 144.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. Tamar Frankel, *A Story of Three Bank-Regulatory Legal Systems: Contract, Financial Management Regulation, and Fiduciary Law*, 1 U. BOLOGNA L. REV. 91, 104–05 (2016) (“[Israel] banks hold their

Another early adopter of the self-regulation model is a major financial group in Japan: Mitsubishi UFJ Trust and Banking Corporation (MUTB). MUTB has been following a unique approach to promote trust by serving its diverse client portfolio with a heightened standard of care and loyalty. In this context, MUTB voluntarily adopted a set of corporate principles that consist of morality and trustworthiness, strong expertise and loyalty to customers before the Japanese Financial Services Agency has launched its fiduciary principles.¹⁵⁵ Recognizing that a sound corporate culture is not built overnight, MUTB initiated training activities to instill an understanding of fiduciary principles among its employees, as well as the members of the public. Aspiring to be recognized as a fiduciary by the society,¹⁵⁶ MUTB institutionalized its trust-building efforts through the Center of Fiduciary Office and continued its pioneering role to contribute to public education by opening the first Trust Museum in Japan. This approach illustrates the interaction between culture and compliance.

VI. PART SIX: THE FUTURE OF FIDUCIARY LAWS

The impact of fiduciary law is likely to grow, as the issues it deals with are expanding. Inequality of knowledge and expertise exists. It is likely to continue, depending on the level of trust and reliance on experts and the extent to which society benefits from that trust.

A. Culture may gain increasing importance in behavior and enforcement of the law.

In a world where crossing borders is mundane. Cultural intelligence (CQ), an outsider's seemingly natural ability to interpret unfamiliar and ambiguous gestures, is becoming more important.¹⁵⁷ This ability is vital for international service providers, as well as the employees working together.¹⁵⁸ Although the importance

depositors' money *not as obligors but as fiduciaries, similar to trustees . . . [and] [t]he culture in Israel's banks reflects its governing laws. When one is, for generations, called and expect[ed] to behave as a trustee[,] one become[s] a trustee and act[s] as one.*"

155. In March 2017, the Japanese Financial Services Agency published seven principles for Customer-Oriented Business Conduct as an expression of its fundamental policy. The policy mainly requires financial institutions to formulate and publish their specific approaches to customer-oriented business conduct or explain the reasons for not adopting a customer-oriented business approach. See Shinichi Takahashi et al., *Insurance and Reinsurance in Japan: Overview* (law stated as of Dec. 1, 2019), available at [https://content.next.westlaw.com/Document/I2030a5821cb611e38578f7ccc38dcbee/View/FullText.html?contextData=\(sc.Default\)&transitionType=Default&firstPage=true&bhcp=1](https://content.next.westlaw.com/Document/I2030a5821cb611e38578f7ccc38dcbee/View/FullText.html?contextData=(sc.Default)&transitionType=Default&firstPage=true&bhcp=1) (last visited Jan. 2, 2020) (summarizing principles as seven sub-principles: (1) formulation and announcement of policies regarding such business conduct; (2) pursuit of the customers' best interests; (3) appropriate management of conflicts of interest; (4) clarification of commissions; (5) providing important information in a comprehensible manner; (6) providing a suitable service for customers and; (7) adequately motivating employees).

156. E-mail from Mitsubishi UFJ Glob. Custody (Nov. 1, 2018, 02:23 EST) (on file with author).

157. P. Christopher Earley & Elaine Mosakowski, *Cultural Intelligence*, HARV. BUS. REV. (Oct. 2004), <https://hbr.org/2004/10/cultural-intelligence>.

158. *Id.*

of CQ is gaining more recognition, most of the employees engaged in international business have little understanding about how culture is impacting their work.¹⁵⁹

Regardless of whether they are enforced by law, by social rules, or by cultural pressures, fiduciary rules are a condition to the long-term well-being of a human society. They induce cooperative relationships, which require justly rewarded truthful and reliable expert services by humans to other humans. One's freedom does not include what fiduciary law prohibits. A society will be wealthier if its fiduciaries self-enforce and follow fiduciary principles. The reverse is likely to be true as well. A society whose fiduciaries do not feel compelled to be trustworthy, will, in the long run, be the poorest.

B. Trust relationships are becoming more crucial for success.

Trust is not necessarily emotional, nor is trusting people foolishly blind. Recent studies show that trust might depend on many variables such as experience, memory, and the level of risk of entrusting.¹⁶⁰ A breach of trust raises suspicion, which might eventually cause reluctance to rely on, or rejection of, expert services. Mistrust may also give rise to more rules of culture or law aimed at maintaining the offering of, and the reliance on, the expertise of others.

Alternatively, those who suffered injuries of breach of trust may retaliate and withdraw from using expert services. This reaction is likely to impoverish mistrusting societies. In sum, whether experts or the government can revive general trust in experts may depend on efforts by the government, the experts, and their mistrusting, but needy, members of society. This year's Edelman Trust Barometer—a global trust and credibility survey—produced optimistic results for the experts (e.g., technical experts, academics, financial analysts, directors and CEOs) to regain credibility.¹⁶¹

The rise of fiduciary law will depend on the success of trusted enterprises and societies, and not on those plagued by mistrust and suspicion. Societies that are strictly result-oriented but fail to regard the sustainability of successful outcomes pave the way for mistrusted people to succeed. These are the people who benefit from breach of trust. On the other hand, societies that impose specific laws that measure and specify the required level of trust in expert services are likely to be less successful than societies that impose general laws that require experts to create and follow a culture of expert's identification with the people they serve. The test of trustworthiness is simple: fiduciary law should be based on one guiding test by a party that offers trusted fiduciary expert. *Would I, the trusted person, like to be treated the*

159. E-mail from Mitsubishi UFJ Glob. Custody (Nov. 29, 2018, 07:22 EST) (on file with author).

160. Fareri et al., *supra* note 25, at 8176; Zak, *supra* note 26.

161. EDELMAN INTELLIGENCE, EDELMAN TRUST BAROMETER: EXECUTIVE SUMMARY (2018), https://www.edelman.com/sites/g/files/aatuss191/files/201810/2018_Edelman_TrustBarometer_Executive_Summary_Jan.pdf, (last visited Dec. 30, 2018).

way I treat those who trust me? If I do not, then I should not treat others that way; regardless of whether they can be blamed or whether they are greedy, foolish, or cruel. Besides, others' misbehavior does not justify misbehavior. The test for each person is: *am I abusing the trust put in me?* Trustworthiness should be self-imposed, regardless of how others view behavior, including the law, the government, and the victims. *I am my own judge and my own potential victim of my own activities.*

C. Given the intricate network of global trade, nations are likely to be more interdependent in the future.

International trade in the early stages of globalization was mainly based on exchange of "dissimilar goods between dissimilar countries."¹⁶² Later, it was understood that trade between countries with similar natural resources, products, culture, and institutions could also be a good idea.¹⁶³ Most international trade theories recognize the comparative advantage and postulate that "all nations can gain from trade, if each specializes in producing what they are relatively more efficient at producing," based on their strengths.¹⁶⁴ According to this point of view, specialization allows countries to increase their profitability by reducing production costs through a focused approach on producing large quantities of specific products.¹⁶⁵ In fact, fiduciary relationships are based on a similar rationale.

On the other hand, similar-to-similar trade may cause or deepen interdependency. For instance, financial wellbeing of an automobile exporter may largely depend on the smooth delivery of raw materials and imported components. The sensitivity against irregularities becomes even more dramatic if the imported product or service is highly technical or specialized (e.g., cutting edge technology). Because building an infrastructure to produce specialized product and services is likely to be expensive, time consuming, and require acquisition of know-how, the trade good would no longer be competitive in international markets.

From an international politics perspective, cooperation among different countries is likely to pose a prisoner's dilemma with problematic outcomes. If both parties have conflicting interests and wish to gain the best possible outcomes for themselves, it is difficult to verify the other party's trustworthiness. They may or may not cooperate. Because cooperation works best when one believes that the opponent is also cooperating, equilibrium can be easily undermined by mistrust, leading to non-cooperative behavior.¹⁶⁶ Historically, mistrust among countries has resulted in wasted resources and missed opportunities.¹⁶⁷

162. Paul Krugman, *The Increasing Returns Revolution in Trade and Geography*, 99 AM. ECON. REV. 561 (2009).

163. *Id.*

164. Ortiz-Ospina et al., *supra* note 27.

165. *Id.*

166. Branislav L. Slantchev, *U.S. Foreign Policy: Prisoner's Dilemma vs. Stag Hunt* (2016), <https://pdfs.semanticscholar.org/3b6d/763af21baad6c7cacf399bf5c66fb9084fd2.pdf>.

167. Deborah Welch Larson, *Trust and Missed Opportunities in International Relations*, 18 POL. PSYCHOL. 701, 728 (1997) (concluding that the ability of the United States and Russia to overcome

There are cases in which nations guarantee self-limitation (i.e., promising the other party not to take advantage of the desired equilibrium) based on international law (i.e., by treaties and participation of international organizations). Their purpose is to overcome global issues, promote mutual interests, and sometimes to survive. However, international organizations often lack enforcement power or the ability to impose a binding international law.¹⁶⁸ Besides, restoring the trust between countries with historical conflicts may take centuries.

This article does not purport to offer a solution or discuss the role of international law in restoration of trust among nations. It does, however, emphasize the potential power of fiduciary law on inter-governmental relations. A fiduciary society nourished by a culture of self-limitation, trust, and honesty would bring consistency and predictability to its relations. Fiduciary societies would also arguably be less risky to cooperate with because self-limitation inherently requires an evaluation outside of short-term, selfish benefits. Furthermore, fiduciary governments' legal duty to focus on the long-term benefits of its people would entail a clear alignment of interest in solving global issues.

And as a first step, countries may cultivate trust at the institutional level, similar to that of corporations. Because "culture, more than rule books, determines how an organization behaves,"¹⁶⁹ an internal culture of self-limitation, trust, and honesty, may be instilled in a society's members and institutions through education.¹⁷⁰ Further, unification of fiduciary law may help us to create a global culture and may be an important contributor to building trust amongst nations, creating shared values and reshaping our long-term future interactions.

Finally, memories may die hard especially if they remind one of pain. Recovering from one breach of trust is harder than maintaining long-term trust. One breach may undermine years of trust. It is worth remembering this effect when planning such a breach as well. This is the power of fiduciary law.

their differences has encouraged hopes for peace in Northern Ireland, the Korean peninsula, and the Middle East).

168. Andrew Watson Samaan, *Enforcement of International Environmental Treaties: An Analysis*, 5 *FORDHAM ENV'TL. L. REV.* 261, 264 (1993).

169. Warren E. Buffett, *Full Text of Warren Buffett's Memorandum*, *FINANCIAL TIMES* (Oct. 9, 2006), <https://www.ft.com/content/48312832-57d4-11db-be9f-0000779e2340>.

170. See TAMAR FRANKEL, *TRUST AND HONESTY: AMERICA'S BUSINESS CULTURE AT A CROSSROAD* 107 (2006).