The Global ESG Stewardship Ecosystem

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Abstract

There is growing interest in the phenomenon of international or transnational corporate law. This development is marked by its complexity. It involves multidirectional processes of law development and transmission resulting from the initiatives of numerous state, international and private actors. Transnational developments are driving another remarkable feature of contemporary corporate governance practice – namely, the dramatic rise of stewardship concerning ESG issues, including climate change. These developments are underpinned by what our paper calls the "global ESG stewardship ecosystem". This ecosystem involves a transnational network of different non-state actors, including globally-active institutional investors, international institutions and agencies, non-governmental organizations, investor networks and representative bodies, as well as the various service providers that support the governance activities of institutional investors. Although the "global ESG stewardship ecosystem" comprises a myriad of actors, institutional investors are at its core. They are critical to norm development and goal-setting, network creation and coordination and transmission of ESG stewardship. This ecosystem exerts significant influence, shaping ESG investor stewardship, not only "on the books", but also "on the ground" in markets around the world, including developing markets. Our paper provides two important contributions to contemporary corporate governance discussion. First, it highlights the scale, complexity and influence of the "global ESG stewardship ecosystem". Second, it explores the implications of the ecosystem for a range of contemporary corporate governance theories and debates. Our analysis of the "global ESG stewardship ecosystem" challenges many assumptions of modern corporate governance, such as the supposed "rational reticence" of institutional investors, the nature of "agency capitalism", the implications of common ownership, the role and potential of stewardship codes. Finally, the "global ESG stewardship ecosystem" revives the convergence-divergence debate in corporate governance and suggests that any convergence which is underway is likely to be complex and unpredictable.

Keywords: stewardship, institutional investors, ESG, activism, environmental, social, corporate governance, CSR, corporate social responsibility, transnational corporate law, international corporate law
JEL Classifications: D23, D70, G23, G30, G32, K22, K33, L21, L 22, N20, 016

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THE GLOBAL ESG STEWARDSHIP ECOSYSTEM

Tim Bowley and Jennifer G. Hill

I. INTRODUCTION

There is growing interest in the phenomenon of international or transnational corporate law,[1] which involves the creation and transmission of corporate governance laws and norms at a supranational level.[2] Scholars have highlighted the increasing significance of international corporate law and corporate governance rules,[3] as well as its complexity.[4] This complexity, which is a key characteristic of transnational law generally,[5] involves multidirectional processes of law development and transmission resulting from the initiatives of numerous state, international and private actors.[6]

Transnational developments are also driving a remarkable contemporary corporate governance practice: ESG stewardship. "ESG stewardship" refers to investors using their influence as major shareholders to prompt public companies to address material environmental, social and

[1] See Mariana Pargendler, *The Rise of International Corporate Law*, 98 WASH. U. L. REV. 1765, 1767 note 1, 1774 (2021) (expressing a preference for the term "international corporate law" over alternative epithets, such as "transnational corporate law" or "global corporate law").

[2] See Terence C. Halliday & Gregory Shaffer, *Transnational Legal Orders*, in TRANSNATIONAL LEGAL ORDERS (Terence C. Halliday & Gregory Shaffer eds., 2015) (analyzing what is distinctive about transnational law and legal ordering).

[3] Ronald J. Gilson, *From Corporate Law to Corporate Governance*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 3, 6 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018); Pargendler, *supra* note 1.

[4] Pargendler, *supra* note 1, 1818 (describing international corporate law as "not monolithic, but fragmented, diverse, highly networked, and dynamic").

[5] Jennifer G. Hill, *Transnational Migration of Laws and Norms in Corporate Governance: Fiduciary Duties and Corporate Codes*, in TRANSNATIONAL FIDUCIARY LAW (Gregory Shaffer and Seth Davis eds., forthcoming).

[6] See generally Pargendler, *supra* note 1; Elizabeth Pollman, *Corporate Social Responsibility, ESG and Compliance*, in CAMBRIDGE HANDBOOK OF COMPLIANCE 662, 668–70 (D. Daniel Sokol & Benjamin van Rooij eds., 2021).

corporate governance (ESG) issues such as climate change.[7] Recent years have witnessed a "remarkable"[8] rise of ESG stewardship across various global markets.[9]

This transnational governance phenomenon is underpinned by what this article calls the "global ESG stewardship ecosystem". This ecosystem is a transnational network of different non-state actors, including globally-active institutional investors, international institutions and agencies, non-governmental organizations, investor networks and representative bodies, as well as the various service providers that support the governance activities of institutional investors. Although the ecosystem comprises a myriad of actors, institutional investors are at its core. They engage with international institutions in relation to norm development and goal-setting; they form and operate international and regional investor networks that coordinate ESG stewardship; and they play a key role in bringing ESG stewardship into the various markets where they invest.

This ecosystem exerts significant influence. It shapes institutional investors' ESG stewardship both "on the books" through its development and dissemination of norms of ESG stewardship, and "on the ground" by facilitating and coordinating investors' ESG stewardship activities. Its reach is global, with the result that ESG stewardship now targets public companies in markets around the world, including developing markets.[10]

This article highlights the global ESG stewardship ecosystem and its complex web of institutional investors and other actors. It examines the role that these actors play in developing and disseminating ESG stewardship norms and undertaking ESG stewardship in relation to public companies globally. In doing so, the article makes two important contributions. First, it provides an overall account of the ESG stewardship ecosystem, highlighting its scale and influence. Second, the article explores the corporate governance implications of the ecosystem. It argues that acknowledging the ecosystem's existence and significance is critical to understanding the ramifications of a number of other important corporate governance developments and issues. These include the ongoing debate about the capacity and incentives

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[7] See, e.g., Sustainalytics, *3 Reasons to Skill Up and Scale Up ESG Stewardship in 2022* (Jan. 20, 2022), https://www.sustainalytics.com/esg-research/resource/investors-esg-blog/esg-stewardship-2022.

[8] George Kell, *The Remarkable Rise of ESG*, FORBES (July 11, 2018), https://www.forbes.com/sites/georgkell/2018/07/11/the-remarkable-rise-of-esg/?sh=620373b31695.

[9] See *infra* Part III. See also, Tim Bowley & Jennifer G. Hill, *Stewardship Codes, ESG Activism and Transnational Ordering*, in RESEARCH HANDBOOK ON ENVIRONMENTAL, SOCIAL, AND CORPORATE GOVERNANCE (Thilo Kuntz ed., forthcoming).

[10] See *infra* Part (IV)(b).

of institutional investors to engage meaningfully in corporate governance;[11] "systemic" stewardship by highly diversified investors;[12] and the relevance and impact of institutional investor stewardship codes.[13] Finally, the global ESG stewardship ecosystem revives the convergence-divergence debate in corporate governance.[14] The ecosystem's transnational reach exemplifies convergence in action, although the complex nature of the ecosystem raises the very real possibility of what Gordon has described "divergence within convergence".[15]

The article is structured as follows. Part II describes what is meant by "ESG stewardship" and why investors undertake it. Part III describes the increasing significance of ESG stewardship in practice. Part IV highlights and explores the global nature of the ecosystem which supports investors' ESG stewardship. Part V explores the implications of the global ESG stewardship ecosystem for important contemporary corporate governance debates and developments, and Part VI concludes.

II. ESG STEWARDSHIP

Investors commonly use the acronym ESG adjectivally to describe a particular investment approach; namely, an approach that is guided by a broader conception of the considerations that are material to investment decision-making.[16] This broader conception is delineated by the "E", "S" and "G" categories in the acronym ESG. "E", "S" and "G' refer, respectively, to environmental issues, societal issues, and corporate governance practices and arrangements.[17]

[11] See, e.g., Lucian A. Bebchuk ET AL., *The Agency Problems of Institutional Investors*, 31 J. OF ECON. PERSP. 89 (2017); Lucian A. Bebchuk & Scott Hirst, *Index Funds and the Future of Corporate Governance: Theory, Evidence and Policy*, 119 COLUM. L. REV. 2029 (2019).

[12] See, e.g., Madison Condon, *Externalities and the Common Owner*, 95 WASH. L. REV. 1 (2020); John C. Coffee Jr., *The Coming Shift in Shareholder Activism: From "Firm-Specific" to "Systematic Risk" Proxy Campaigns (and How to Enable Them),* 16 BROOK. J. CORP. FIN. & COM. L. 45 (2021); Jeffrey N. Gordon, *Systematic Stewardship*, J. CORP. L. (forthcoming 2022).

[13] See generally GLOBAL SHAREHOLDER STEWARDSHIP (Dionysia Katelouzou & Dan W. Puchniak eds., 2022).

[14] See generally CONVERGENCE AND PERSISTENCE IN CORPORATE GOVERNANCE (Jeffrey N. Gordon & Mark J. Roe eds., 2004); Jeffrey N. Gordon, *Convergence and Persistence in Corporate Law and Governance*, in THE OXFORD HANDBOOK OF CORPORATE LAW AND GOVERNANCE 28 (Jeffrey N. Gordon & Wolf-Georg Ringe eds., 2018); Jennifer G. Hill, *The Persistent Debate About Convergence in Comparative Corporate Governance*, 27 SYD. L. REV. 743 (2005).

[15] Gordon, *supra* note 14, at 28, 32, 41–44.

[16] See also Bowley & Hill, *supra* note 9, Part. II.

[17] See generally, Elizabeth Pollman, *The Origins and Consequences of the ESG Moniker* (Inst. for L. and Econ., Research Paper No. 22-23, 2021), https://ecgi.global/sites/default/files/Paper%3A%20Elizabeth%20Pollman.pdf.

The boundaries of the "E", "S" and "G" categories are, in practice, drawn broadly and encompass a wide range of salient issues, ranging from mitigation of climate change risk, respect for human rights, achieving board and workforce diversity, and executive remuneration practices.[18]

Investors will take account of ESG factors for different reasons. It is helpful to think of these reasons lying on a spectrum ranging from an approach at one end that takes account of ESG factors exclusively for their impact on the risk adjusted return of an investment and an approach at the other end that takes account of ESG factors for non-financial reasons (such as ethical or faith-based considerations).[19] Commentary indicates that, in practice, a substantial majority of investors lie towards the value-based end of this spectrum, focusing on ESG considerations exclusively or mainly for their potential financial relevance.[20] For example, an investor may critically examine how an oil company is adapting its business model to address climate change transition risks because a failure by the company to do so may result in an unsustainable business model that negatively affects the investor's returns. Highly diversified institutional investors, in particular, may have strong incentives to pressure companies to address ESG issues that could have an economy wide (or systemic) impact, such as climate change and social inequality. This is because the highly diversified nature of their investments means that these investors effectively "own the market" and cannot, therefore, avoid the potential economy-wide impact of such issues.[21] Focusing on ESG factors because of their financial materiality has been described as the mainstream approach to ESG investing.[22]

Precisely how investors use ESG considerations in their investment activities also varies. Many investors use them to guide capital allocation and trading decisions; for example, impact,

[18] Bowley & Hill, *supra* note 9.

[19] Responsible Investment Association Australasia, RESPONSIBLE INVESTMENT BENCHMARK REPORT: 2021 AUSTRALIA, 18 (2021).

[20] See Stavros Gadinis & Amelia Miazad, *Corporate Law and Social Risk*, 73 VAND. L. REV. 1401 (2020) (arguing that attention to social risk can provide protection against downside risks to corporate value); Pollman, *supra* note 6, 666 (distinguishing ESG on this basis from its predecessor, corporate social responsibility (CSR), which is often viewed as involving ethical or moral principles); Virginia Harper Ho, *Risk-Related Activism: The Business Case for Monitoring Nonfinancial Risk*, 41 J. CORP. L. 647, 662–68 (2016) (discussing the economic rationales for risk-related shareholder activism and the link between non-financial and financial risks).

[21] See *supra* note 12.

[22] Dionysia Katelouzou & Alice Klettner, *Sustainable Finance and Stewardship: Unlocking Stewardship's Sustainability*, in GLOBAL SHAREHOLDER STEWARDSHIP 549, 570 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022). See also John C. Coffee Jr., *The Future of Disclosure: ESG, Common Ownership, and Systematic Risk*, COLUM. BUS. L. REV. 602 (2021).

divestment and screening investment strategies.[23] However, investors are also increasingly using ESG considerations to define the objectives and nature of their governance interactions with their investee companies.[24] For example, an investor which is concerned about a portfolio company's preparedness for the transition to a low carbon economy may pressure that company to hasten its adaptation through private discussions and/or voting in favor of shareholder proposals.[25] Highly diversified investors are engaging with multiple companies across an entire sector on the same ESG issues where they consider that such issues have sector-wide (or even economy-wide) significance.[26]

The term "stewardship" is now a common way of describing this type of investor-company engagement. The term has acquired a degree of formality in the various jurisdictions that have adopted institutional investor stewardship codes — typically "soft law" codes of conduct that exhort institutional investors to engage meaningfully with their investee companies with a view to encouraging sustainable corporate activity and investment returns.[27] Even in the United States, where critics have expressed doubts about the efficacy of stewardship codes,[28] the term "stewardship" has entered common parlance.[29]

III. ESG STEWARDSHIP IN ACTION

ESG stewardship involves shareholders adopting an "activist" stance; that is, taking action to influence change in their companies' affairs in relation to ESG issues.

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[23] Responsible Investment Association Australasia, *supra* note 19, at 19.

[24] *Id.*

[25] Bowley & Hill, *supra* note 9, Part. II.

[26] See *supra* note 12.

[27] Katelouzou & Puchniak, *supra* note 13.

[28] See, e.g., Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 868–69 (2013); Jill Fisch, *The Uncertain Stewardship Potential of Index Funds*, in GLOBAL SHAREHOLDER STEWARDSHIP 454 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022) (arguing that index funds have particularly limited incentives to engage in stewardship).

[29] See, e.g., BlackRock, *BlackRock Investment Stewardship*, https://www.blackrock.com/corporate/about-us/investment-stewardship.

U.S. academic literature has paid much attention to the role played by activist hedge funds as a catalyst for shareholder activism.[30] A classic example of this paradigm in the ESG context is the recent activist campaign at ExxonMobil in the United States. In late 2020, a small hedge fund, Engine No. 1 LLC (Engine No. 1), nominated four new directors to ExxonMobil's board of directors with the aim of "purposefully repositioning [the] company to succeed in a decarbonizing world".[31] In spite of opposition from ExxonMobil's management,[32] three of the nominees were elected.[33] Engine No. 1 was the clear leader in this offensive. However, the campaign's ultimate success was due to the fact that BlackRock, Vanguard and State Street, which collectively owned more than 20% of ExxonMobil's stock,[34] ultimately supported the hedge fund which owned a mere 0.02% stake.[35] The institutional investors' power in this regard has led to their description as "kingmakers".[36]

Hedge funds have also engaged in ESG stewardship in other jurisdictions. For example, in 2020, Sir Chris Hohn's hedge fund, The Children's Investment Fund Management (TCI), and its charitable foundation, The Children's Investment Fund Foundation (CIFF), launched the so-called "Say on Climate" annual voting initiative, which is designed to prompt companies to

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[30] See e.g., Gilson & Gordon, *supra* note 28.

[31] Reenergize Exxon, ENGINE NO. 1, REENERGIZE EXXONMOBIL: INVESTOR PRESENTATION 18 (Apr. 2021), https://reenergizexom.com/materials/engine-no-1-releases-white-paper-detailing-changing-energy-landscape-in-response-to-exxonmobil-investor-day-presentation-2. See also Robert G. Eccles, *ExxonMobil's Investor Magical Mystery Tour (Is Waiting to Take You Away!)*, FORBES (Apr. 29, 2021), https://www.forbes.com/sites/bobeccles/2021/04/29/exxonmobils-investor-magical-mystery-tour-waiting-to-take-you-away/?sh=7454f2243469; Justin Jacobs & Derek Brower, *Exxon Faces "Winds of Change" as Climate Battle Reaches Boardroom*, FIN. TIMES, May 25, 2021, at 9; Thomas Ball ET AL., Alliance Advisors, *Was the Exxon Fight a Bellwether?*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (July 24, 2021), https://corpgov.law.harvard.edu/2021/07/24/was-the-exxon-fight-a-bellwether/.

[32] ExxonMobil argued that the nominees would implement a "value-destructive agenda". See ExxonMobil, *Letter to Shareholders* (Mar. 16, 2021), https://corporate.exxonmobil.com/-/media/Global/Files/investor-relations/annual-meeting-materials/proxy-materials/ExxonMobil-3_16_21-Shareholder-Letter.pdf.

[33] See Steven Mufson, *Representatives of Discontented ExxonMobil Shareholders Win a Third Seat on Oil Giant's Board of Directors*, THE WASH. POST, June 3, 2021, at A08.

[34] Vanguard held approximately 8.2% of ExxonMobil's stock, BlackRock had a 6.7% stake and State Street owned 5.7%. See Svea Herbst-Bayliss, *BlackRock Backs 3 Dissidents to Shake Up Exxon Board*, REUTERS, May 25, 2021.

[35] Matt Phillips, *How a Tiny Green Fund Turned the Exxon Tanker*, THE N.Y. TIMES, June 11, 2021; Herbst-Bayliss, *supra* note 34; Justin Baer ET AL., *Investors Give Exxon Payback for Frustration on Strategy and Climate*, THE WALL STREET J. (ONLINE) (May 28, 2021), https://www.proquest.com/docview/2533631587?pq-origsite=primo.

[36] Assaf Hamdani and Sharon Hannes, *The Future of Shareholder Activism*, 99 BOST. U. L. REV. 971, 990 (2019). See also Jessica Camille Aguirre, *The Little Hedge Fund Taking Down Big Oil*, THE N.Y. TIMES MAGAZINE, June 23, 2021.

inform shareholders about how they plan to manage greenhouse gas emissions in accordance with the Paris Agreement.[37]

The "Say on Climate" initiative has now gone global. TCI has announced plans to file resolutions requesting annual shareholder "Say on Climate" votes at 100 companies in the S&P 500 index by the end of 2022,[38] and several U.S. issuers, including S&P Global and Moody's, have publicly supported the initiative.[39] In the Asia-Pacific region, the Australasian Centre for Climate Responsibility (ACCR) has joined with CIFF to file "Say on Climate" resolutions at a number of Australian resource companies.[40] CIFF has announced that it is also working with non-governmental organizations (NGOs), asset owners and asset managers to file "Say on Climate" resolutions in Asia.[41]

In spite of these examples, the hedge fund activism paradigm in U.S. academic literature is not representative of most contemporary ESG stewardship. Much ESG stewardship is instead undertaken by mainstream institutional investors. The Global Sustainable Investment Alliance

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[37] See, e.g., Attracta Mooney, *Billionaire Chris Hohn Forces First Annual Investor Vote on Climate Policy*, FIN. TIMES (Oct. 23, 2020), https://www.ft.com/content/07e4aa70-a99e-40ea-9b66-2eac47ade0d6; Tim Human, *Say on Climate Builds Momentum*, IR MAGAZINE (Apr. 6, 2021), https://www.irmagazine.com/activism/say-climate-builds-momentum. See also Robert G. Eccles, *Here is My Say on "Say on Climate"*, FORBES (Jan. 5, 2021), https://www.forbes.com/sites/bobeccles/2021/01/05/here-is-my-say-on-say-on-climate/?sh=72d9ffd75c49 (adopting a skeptical view on the likely effectiveness of "Say on Climate").

[38] See Shirley Westcott, Alliance Advisors, 2021 PROXY SEASON REVIEW 4 (July 2021), https://uploads-ssl.webflow.com/5f6b70b40b9f16c04a0fe20a/60f8298d160da4e75c368c7f_Alliance%20Advisors%20Newsletter%20Jul.%202021%20(2021%20Proxy%20Season%20Review).pdf.

[39] See, e.g., S&P Global, Media Release, *S&P Global Affirms Net-Zero Commitment by Endorsing "Say on Climate" Initiative* (Mar. 16, 2021), https://press.spglobal.com/2021-03-16-S-P-Global-Affirms-Net-Zero-Commitment-by-Endorsing-Say-on-Climate-Initiative; *Moody's Announces Commitment to "Say on Climate" Campaign*, BUSINESSWIRE (Dec. 22, 2020), https://www.businesswire.com/news/home/20201222005094/en/Moody%E2%80%99s-Announces-Commitment-to-%E2%80%98Say-on-Climate%E2%80%99-Campaign.

[40] ACCR, *Say on Climate Launches with Resolutions to Santos and Woodside* (Feb. 11, 2021), https://www.accr.org.au/news/say-on-climate-launches-with-resolutions-to-santos-and-woodside/. ACCR sought an annual vote on the adoption of a climate report, consistent with recommendations of the Task Force on Climate-related Financial Disclosures (TCFD) and the Climate Action 100+ Benchmark. In February 2021, Rio Tinto became the first Australian-listed company to commit to a "Say on Climate" vote. See ACCR, Media Release, *Rio Tinto Becomes First Australian Company to Commit to Climate Vote* (Feb. 17, 2021), https://www.accr.org.au/news/rio-tinto-becomes-first-australian-company-to-commit-to-climate-vote-1/. Santos and Woodside committed to adopting "Say on Climate" votes in March 2021. See Santos, *Santos Adopts Shareholder Advisory Vote on Climate Change Report* (Mar. 16, 2021), https://www.santos.com/news/santos-adopts-shareholder-advisory-vote-on-climate-change-report/; ACCR, Media Release, *Woodside Adopts Say on Climate* (Mar. 19, 2021), https://www.accr.org.au/news/woodside-adopts-%E2%80%98say-on-climate%E2%80%99/. Other Australian-listed companies to adopt a "Say on Climate" vote in 2021 include Oil Search, AGL Energy, Origin Energy, and South32. See ACCR, *Say on Climate*, https://www.accr.org.au/topics/say-on-climate/.

[41] Sir Chris Hohn, *A Shareholder Say on Climate is Crucial for Climate Action*, ASIAN VENTURE PHILANTHROPY NETWORK (Apr. 22, 2021), https://avpn.asia/blog/a-shareholder-say-on-climate-is-crucial-for-climate-action/.

reports, for example, that "corporate engagement and shareholder action" directed at ESG issues – which it defines as "[e]mploying shareholder power to influence corporate behavior"[42] – has experienced consistent growth worldwide since 2016 as an investment strategy and, in 2020, was the third most common sustainable investment strategy (as measured by assets under management).[43]

Indeed, it is now common for major international investment managers to proclaim their commitment to ESG stewardship. BlackRock, for instance, reported a 48% increase in engagements directed at ESG issues between 2019 and 2020.[44] Investors are also harnessing their voting power to pressure their investee companies to address ESG concerns.[45] Aberdeen Standard, for example, reported that in 2020 it took "voting action against 38 companies in the UK, 60 in the US, 4 in Canada, 5 in Switzerland and 3 in other European markets" owing to concerns about board gender diversity.[46] Academic research has also highlighted the scope of investors' ESG stewardship in various markets across the globe.[47]

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[42] Global Sustainable Investment Alliance, GLOBAL SUSTAINABLE INVESTMENT REVIEW 2020, 7 (2021).

[43] *Id*. at 11 (noting also that, in contrast, norms-based screening, positive screening and negative screening have each experienced a "more variable trajectory since 2016").

[44] BlackRock, INVESTMENT STEWARDSHIP ANNUAL REPORT 20 (Sep. 2020). See also Kosmas Papadopoulos ET AL., *ESG Drivers and the COVID-19 Catalyst*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Dec. 27, 2020), www.corpgov.law.harvard.edu/2020/12/27/esg-drivers-and-the-covid-19-catalyst/ (reporting that in 2020 the European investment firm, AXA IM, had undertaken more engagement "than ever before", targeting 181 issuers in a 6-month period in relation to matters concerning public health, workforce management, and shareholder rights); Legal & General Investment Management, *LGIM Steps Up Sustainability and Governance Efforts*, (Apr. 22, 2020), https://www.legalandgeneralgroup.com/media-centre/press-releases/lgim-steps-up-sustainability-and-governance-efforts.

[45] See further, Bowley & Hill, *supra* note 9, Part. VI. It is worth noting, however, that BlackRock recently indicated that it is unlikely to support climate change-related proposals it considers to be too onerous on companies, given the economic and geopolitical challenges resulting from the conflict in Ukraine: Brooke Masters, *BlackRock to Vote against Climate Resolutions*, FIN. TIMES, May 12, 2022, at 6.

[46] Aberdeen Standard Investments, *2020 AGM Season Voting Review: The Active Manager Is in the Detail*, (Nov. 30, 2020), https://www.abrdn.com/en/capgemini/insights-thinking-aloud/article-page/2020-agm-season-voting-review-the-active-manager-is-in-the-detail.

[47] See, e.g., Marco Becht ET AL., *Outsourcing Active Ownership in Japan* (Eur. Corp. Governance Inst. (ECGI), Working Paper No. 766/2021, June 2021), https://ecgi.global/sites/default/files/Paper%3A%20Outsourcing%20Active%20Ownership%20in%20Japan.pdf (examining "behind the scenes" ESG engagement in Japan between institutional investors and portfolio companies via an equity ownership service, Governance for Owners Japan); Elroy Dimson ET AL., *Coordinated Engagements*, 2–3 (ECGI, Working Paper No. 721/2021, Jan. 2021), www.ssrn.com/abstract_id=3209072 (examining engagement projects coordinated by the Principles for Responsible Investment between 2007–15); Elroy Dimson ET AL., *Active Ownership*, 28 REV. FIN. STUD. 3225, 3227 (2015) (examining the ESG stewardship of a major institutional investor and reporting that it engages worldwide and, in 2014, had 4186 communications with investee companies regarding ESG matters).

Commentators have heralded investors' growing propensity for ESG stewardship as "a true paradigm shift in the relationships between public companies and their investors"[48] and "a very powerful driver towards a more sustainability-oriented future in corporate governance".[49]

A range of factors lie behind investors' increasing engagement in ESG stewardship. The potential financial materiality of ESG considerations has already been noted.[50] Regulatory and quasi-regulatory developments also play a role.[51] The European Union, for example, has been particularly active in developing regulation in relation to investor stewardship and sustainable finance. The amended Shareholder Rights Directive contains a clear expectation that institutional investors will engage with their investee companies.[52] The EU's Non-Financial Reporting Directive, Sustainable Finance Disclosure Regulation and Taxonomy Regulation also contain detailed requirements, which seek to promote sustainable economic activity and provide transparency regarding the approach of companies and investors approach toward sustainability issues.[53]

Investor stewardship codes constitute another important development in this area. The United Kingdom's Financial Reporting Council issued the original stewardship code in 2010 as a response to concerns that, during the Global Financial Crisis, institutional investors had exercised inadequate oversight of excessive risk taking by banks and other financial institutions.[54] The U.K. code exhorted institutional investors to monitor their investee companies, develop a policy on when and how they would escalate unresolved concerns

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[48] Jessica Strine ET AL, *The Age of ESG*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Mar. 9, 2020), https://www.corpgov.law.harvard.edu/2020/03/09/the-age-of-esg/.

[49] Wolf-Georg Ringe, "Investor-led Sustainability in Corporate Governance" 3 (ECGI Law Working Paper No. 615/2021, Nov. 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3958960.

[50] See *supra* notes 20–22 and accompanying text.

[51] Cynthia A. Williams, *Comparative and Transnational Developments in Corporate Social Responsibility*, in COMPARATIVE CORPORATE GOVERNANCE 92 (Afra Afsharipour & Martin Gelter eds., 2021).

[52] It has been said that the amended directive effectively imposes a "duty to demonstrate engagement" on institutional investors. Iris H-Y Chiu & Dionysia Katelouzou, *From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?*, in SHAREHOLDER DUTIES 131–52 (Hanne Birkmose ed., 2017)

[53] Ringe, *supra* note 49, 37–38.

[54] See generally Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497 (2018); Paul L. Davies, *The UK Stewardship Code 2010–2020: From Saving the Company to Saving the Planet?*, in GLOBAL SHAREHOLDER STEWARDSHIP 44 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022).

regarding their investee companies, and to act collectively with other shareholders to address such concerns.[55]

Stewardship codes have proliferated since 2010 and now exist in at least 20 jurisdictions.[56] Some codes go a step further and actively promote ESG stewardship.[57] One of the Australian stewardship codes notes, for example, that "[s]tewardship refers to the responsibility asset owners have to exercise their ownership rights to protect and enhance long-term investment value for their beneficiaries … One way that asset owners can help protect and enhance their investments for the long term is by considering ESG matters through their stewardship practices".[58] Recent revisions to the U.K., Japanese and Singaporean stewardship codes have also placed far greater weight on ESG considerations.[59]

Commentators have identified a variety of other economic, political and social factors that are contributing to investors' growing focus on ESG stewardship. It has been pointed out, for example, that operating ESG-focused funds can be financially attractive for fund managers.[60] U.S. researchers claim that U.S. index funds emphasize their commitment to ESG stewardship as a way of attracting business from millennial investors and to recruit and retain millennial employees.[61] The threat of further regulatory initiatives may also indirectly affect investor behavior. Davies, for example, has argued that investors in the United Kingdom have material incentives to demonstrate a commitment to ESG stewardship in order to forestall any further prescriptive government regulation in this area.[62]

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[55] THE UK STEWARDSHIP CODE (FIN. REPORTING COUNCIL 2010).

[56] Dan W. Puchniak, *The False Hope of Stewardship in the Context of Controlling Shareholders: Making Sense out of the Global Transplant of a Legal Misfit*, AM. J. COMP. L. (forthcoming) 18; Dionysia Katelouzou & Mathias Siems, *The Global Diffusion of Stewardship Codes*, in GLOBAL SHAREHOLDER STEWARDSHIP 631 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022) (discussing the diffusion of codes generally).

[57] See generally, Katelouzou & Klettner, *supra* note 22.

[58] Australian Council of Superannuation Investors, AUSTRALIAN ASSET OWNER STEWARDSHIP CODE (May 2018) 5.

[59] Bowley & Hill, *supra* note 9, Part. V. The precise impact of stewardship codes on ESG stewardship is open to debate, as evidence indicates that ESG stewardship occurs in jurisdictions without stewardship codes, or with codes that do not emphasize ESG considerations. This point is explored *infra* Part V(c).

[60] Ringe points out that in some markets there is increasing client demand for such funds and that fund managers are often able to charge higher management fees in relation to such funds: Ringe, *supra* note 49, at 10–14.

[61] Michal Barzuza ET AL, *Shareholder Value(s): Index Fund ESG Activism and the New Millennial Corporate Governance*, 93 S. Cal. L. Rev. 1243 (2020) (arguing, at 1320, that "[t]he issue of social values in investment management and corporate decision-making cannot be ignored").

[62] Davies, *supra* note 54, at 62–65.

However, the growing significance of ESG stewardship across the globe is not simply the confluence of separate national trends shaped by local regulatory, political, social and economic factors. There is also an important transnational dimension to the increasing global significance of ESG stewardship: what this article calls the global ESG stewardship ecosystem.

IV. INTRODUCING THE GLOBAL ESG STEWARDSHIP ECOSYSTEM

A close examination of ESG stewardship reveals a transnational ecosystem of diverse non-state actors which is providing both normative and practical support for the global dissemination of ESG stewardship. This section outlines the key elements of this global ecosystem.

(a) International Agencies as Transnational ESG Stewardship Norm-Creators and Stewardship Promoters

One point that quickly emerges from an examination of the recent growth of ESG stewardship is the significant role of international agencies in developing ESG stewardship norms and practices. This multiplicity of global standard-setters, which often act collectively, has been described as creating a "veritable alphabet soup of acronyms".[63]

The United Nations (UN) and its agencies have been at the forefront of ESG norm creation and dispersion.[64] In February 1999, then-Secretary General, Kofi Annan, proposed that the UN and business leaders establish a "global compact of shared values and principles, which will give a human face to the global market".[65] Officially launched in July 2000,[66] the Global Compact describes itself as "the world's largest corporate sustainability initiative".[67] Through this initiative, the UN has strategically sought to involve the private sector in advancing human rights and global sustainability, as well as mobilizing "a global movement of sustainable

[63] Pollman, *supra* note 6, 668.

[64] See also Pollman, *supra* note 17; Pargendler *supra* note 1.

[65] See UN, Press Release, *Secretary-General, Secretary-General Proposes Global Compact on Human Rights, Labour, Environment, in Address to World Economic Forum in Davos* (Feb. 1, 1999), https://www.un.org/press/en/1999/19990201.sgsm6881.html.

[66] UN, Press Release, *Executive Summary and Conclusion of High-Level Meeting on Global Compact* (July 27, 2000), https://www.un.org/press/en/2000/20000727.sg2065.doc.html.

[67] UN Global Compact, *The World's Largest Corporate Sustainability Initiative*, https://www.unglobalcompact.org/what-is-gc.

companies and stakeholders".[68] The Global Compact now has more than 9,500 participating organizations that, as a condition of membership, pledge to operate responsibly, promote sustainability and report annually on their efforts.[69]

In implementing the Global Compact, the UN and its agencies have focused in particular on the investment community, with a view to leveraging the capital markets to drive private sector changes.[70] In 2004, the Global Compact published a report, *Who Cares Wins: Connecting Financial Markets to a Changing World*, which first coined the "environmental, social and governance" epithet and acronym.[71] The aim of this report was to improve the investment community's understanding of ESG risks and opportunities and promote greater integration of ESG considerations in investment decisions.[72] The report's central message was that ESG factors have real economic consequences and can, therefore, also have a material impact on a firm's financial performance and its valuation.[73]

Another key UN initiative in this area was the 2006 launch at the New York Stock Exchange of the Principles for Responsible Investment (PRI), which considers itself "the world's leading proponent of responsible investment".[74] The PRI published a set of six Principles for Responsible Investment (Principles),[75] which include a call for its signatories to incorporate

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[68] UN Global Compact, *Our Mission*, https://www.unglobalcompact.org/what-is-gc/mission.

[69] UN Global Compact, *What's the Commitment*, https://www.unglobalcompact.org/participation/join/commitment.

[70] See generally, Pargendler, *supra* note 1, at 1794–1804 (claiming that "UN initiatives not only coined the concept of ESG, but also critically mobilized support for the spread and influence of ESG factors around the globe" (*id*. at 1794)).

[71] See *id*. at 1796; The Global Compact, *Who Cares Wins: Connecting Financial Markets to a Changing World* (2004), https://www.unepfi.org/fileadmin/events/2004/stocks/who_cares_wins_global_compact_2004.pdf. The *Who Cares Wins* scheme was a joint initiative of the UN Global Compact and the Swiss Federal Department of Foreign Affairs.

[72] See generally IFC Advisory Services in Environmental and Social Sustainability, Issue Brief, *Who Cares Wins, 2004–08*, https://www.ifc.org/wps/wcm/connect/9eeb7982-3705-407a-a631-586b31dab000/IFC_Breif_whocares_online.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-9eeb7982-3705-407a-a631-586b31dab000-jkD12B5 (describing the operation of the *Who Cares Wins* initiative, and related publications, from 2004 to 2008).

[73] *Id*.; Kell, *supra* note 8.

[74] Principles for Responsible Investment (PRI), *About the PRI*, https://www.unpri.org/pri/about-the-pri. In 2007, the UN was also involved in the launch of the Sustainable Stock Exchange (SSE) Initiative. This initiative is a UN Partnership Programme, involving the UN Conference on Trade and Development, the UN Global Compact, UN Environment Programme Finance Initiative (UNEP FI) and the PRI, which is designed to investigate the role of stock exchanges in fostering ESG and sustainable investment goals. See Sustainable Stock Exchanges Initiative, *About the SSE Initiative*, https://sseinitiative.org/about/.

[75] PRI, *What Are the Principles for Responsible Investment*, www.unpri.org/pri/what-are-the-principles-for-responsible-investment. As is apparent from the website, both the organization and its principles are referred to as the "Principles of Responsible Investment" or "PRI". However, technically, the organization is a company

ESG considerations into their investment analysis and decision-making and to engage actively with their investee companies regarding such considerations.[76] The PRI's current strategic plan seeks, *inter alia*, to "[f]oster a community of active owners" and "[c]hampion climate action".[77]

The number of PRI signatories has grown from 100 at the time of its launch to approximately 4,800 institutional investors and allied organizations representing approximately US$120 trillion in assets under management.[78] Some of the largest yearly increases in signatories have occurred in the last four years.[79] The PRI has recently directed resources and attention to ensuring greater accountability of signatories for failure to implement the Principles and for greenwashing.[80] New accountability mechanisms include development of a watch list for non-compliant signatories, with the potential for delisting if they fail to meet minimum criteria after two years.[81]

The UN and the PRI have, in turn, helped to establish several climate change-focused collaborative initiatives with the investment sector. In 2019, the UN and PRI established the Net-Zero Asset Owner Alliance (Owner Alliance), which is supported by two prominent NGOs, the Worldwide Fund for Nature and Global Optimism.[82] As at 2021, membership of the Owner Alliance comprises more than 60 institutional investors with over $10 trillion assets under

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limited by guarantee formed under English law known as "PRI Association": see PRI, *Governance: The Board*, https://www.unpri.org/pri-governance.

[76] PRI, *What Are the Principles for Responsible Investment?*, https://www.unpri.org/pri/what-are-the-principles-for-responsible-investment.

[77] PRI, PRI STRATEGIC PLAN 2018–2021 at 9 (Oct. 2017), https://www.unpri.org/Uploads/m/g/u/PRIStrategy_2018-21_v2.pdf.

[78] PRI, *Signatory Directory*, https://www.unpri.org/signatories/signatory-resources/signatory-directory (displaying signatory details as at February 2022); PRI, *About the PRI*, https://www.unpri.org/pri/about-the-pri (displaying AUM as at 2021).

[79] PRI, *About the PRI*, https://www.unpri.org/pri/about-the-pri.

[80] PRI, PRI STRATEGIC PLAN 2018–2021, *supra* note 77, at 7; PRI, PRI STRATEGIC PLAN 2021–24 (Apr. 2021), https://www.unpri.org/download?ac=13269.

[81] PRI, PRI STRATEGIC PLAN 2018–2021, *supra* note 77.

[82] UNEP FI, *About Net-Zero Asset Owner Alliance*, https://www.unepfi.org/net-zero-alliance/about/.

management.[83] These members have committed to achieving net-zero emissions in their investment portfolios by 2050, using a range of measures including company engagement.[84]

In 2020, the PRI also co-founded a parallel initiative targeting asset managers. The Net Zero Asset Managers Alliance (Managers Alliance) has more than 80 signatories, managing in excess of US$37 trillion of assets.[85] These signatories are committed to supporting investment strategies that are aligned with a goal of achieving net zero emissions by 2050 or sooner.[86] Membership of the Managers Alliance has implications for ESG activism. By becoming members, signatories commit to implementing "a stewardship and engagement strategy, with a clear escalation and voting policy, that is consistent with the [Managers Alliance's] ambition".[87] Both the Owner Alliance and the Managers Alliance are members of the Race to Zero network, which was formed under the auspices of the UN Framework Convention on Climate Change. The Race to Zero network's primary goal is to mobilize non-state actors into promoting efforts towards a de-carbonized world economy.[88]

Another supranational program designed to address climate change is The Investor Agenda. This program, founded by the PRI, the UN Environment Programme Finance Initiative (UNEP Finance Initiative) and five investor networks,[89] describes itself as "a common leadership agenda … focused on accelerating investor action for a net-zero emissions economy".[90] One of The Investor Agenda's core objectives is to prompt investors to engage with, and put pressure on, companies to "accelerat[e] the business transition to a net-zero carbon economy" and "drive the boards and senior management … to take action to reduce GHG emissions across

[83] UNEP FI, *The Net-Zero Asset Owner Alliance New Year Countdown: A Review of 2021 and a Vision for 2022* (Dec. 22, 2021), https://www.unepfi.org/themes/climate-change/the-net-zero-asset-owner-alliance-new-year-countdown-a-review-of-2021-and-a-vision-for-2022/.

[84] PRI & UNEP FI, INAUGURAL 2025 TARGET SETTING PROTOCOL (Jan. 2021), https://www.unepfi.org/wordpress/wp-content/uploads/2021/01/Alliance-Target-Setting-Protocol-2021.pdf.

[85] Net Zero Asset Managers Initiative, *Homepage*, https://www.netzeroassetmanagers.org.

[86] *Id.*

[87] Net Zero Asset Managers Initiative, *The Net Zero Asset Managers Commitment*, https://www.netzeroassetmanagers.org/media/2021/12/NZAM-Commitment.pdf.

[88] United Nations Climate Change, *Race to Zero Campaign*, https://unfccc.int/climate-action/race-to-zero-campaign.

[89] The Investor Agenda, *The Partners,* https://theinvestoragenda.org/the-partners/. The investor networks are discussed below in Part IV(c).

[90] The Investor Agenda, *The Investor Agenda: Accelerating Action for a Net-Zero Emissions Economy*, https://theinvestoragenda.org/.

the value chain".[91] To this end, it encourages investors to support one of three investor-driven initiatives designed to prompt public companies to respond to the risks of climate change.[92] The Investor Agenda also includes prominent NGO organizations, such as ShareAction and the Interfaith Centre on Corporate Accountability, as "supporting partners".[93]

To foster investors' pursuit of ESG-related objectives, UN agencies have emphasized that responsible investment practices, such as ESG stewardship, are permitted, and perhaps required, by existing laws.[94] In 2005, the UNEP Finance Initiative commissioned a report from Freshfields Bruckhaus Deringer (Freshfields Report) on this topic.[95] A decade later, the PRI, UNEP Finance Initiative and the Generation Foundation launched a four year project, entitled *Fiduciary Duty in the 21st Century*.[96] The group published a preliminary report in 2015,[97] a Global Statement on Investor Obligations and Duties the following year[98] and a Final Report in 2019 (2019 Final Report).[99] The overall project was prompted by the apparent belief of some institutional investors that consideration of ESG factors was inconsistent with their fiduciary

[91] The Investor Agenda, *Corporate Engagement*, https://theinvestoragenda.org/focus-areas/corporate-engagement/.

[92] *Id*.

[93] The Investor Agenda, *The Partners*, theinvestoragenda.org/the-partners/.

[94] See generally Pargendler, *supra* note 1, at 1798–99.

[95] UNEP FI, A LEGAL FRAMEWORK FOR THE INTEGRATION OF ENVIRONMENTAL, SOCIAL AND GOVERNANCE ISSUES INTO INSTITUTIONAL INVESTMENT (Oct. 2005), https://www.unepfi.org/fileadmin/documents/freshfields_legal_resp_20051123.pdf.

[96] See UNEP FI, *Fiduciary Duty in the 21st Century*, https://www.unepfi.org/investment/history/fiduciary-duty/. See also Al Gore's discussion of the *Fiduciary Duty in the 21st Century* project: *Al Gore Introduces Fiduciary Duty in the 21st Century*, PRI (Sept. 22, 2017), https://www.unpri.org/fiduciary-duty/al-gore-introduces-fiduciary-duty-in-the-21st-century/245.article. According to the Executive Summary of the 2015 report, the report's purpose was "to end the debate about whether fiduciary duty is a legitimate barrier to investors integrating environmental, social and governance (ESG) issues into their investment processes". UN Global Compact, UNEP FI, PRI & Inquiry: Design of a Sustainable Financial System, FIDUCIARY DUTY IN THE 21ST CENTURY 9 (2015), https://www.unepfi.org/fileadmin/documents/fiduciary_duty_21st_century.pdf.

[97] See UN Global Compact ET AL, FIDUCIARY DUTY IN THE 21ST CENTURY, *supra* note 96.

[98] Generation Foundation, UNEP FI & PRI, FIDUCIARY DUTY IN THE 21ST CENTURY: GLOBAL STATEMENT ON INVESTOR OBLIGATIONS AND DUTIES (2016). The Global Statement on Investor Obligations and Duties project also developed roadmaps for regulatory reform to permit integration of ESG-considerations into investment decision-making in eleven jurisdictions and worked with the European Commission to clarify investor duties in the European Union. See Pargendler, *supra* note 1, at 1779.

[99] UNEP FI & PRI, FIDUCIARY DUTY IN THE 21ST CENTURY: FINAL REPORT (2019), https://www.unepfi.org/wordpress/wp-content/uploads/2019/10/Fiduciary-duty-21st-century-final-report.pdf. This report replaced the original 2015 report. *Id*. at 2.

duties.[100] An ancillary issue was whether "active ownership and public policy engagement" accords with investors' fiduciary duties.[101]

The Freshfields Report, together with the various statements and reports associated with the Fiduciary Duty in the 21st Century project, conclude that institutional investors are required to have regard to ESG considerations in their decision-making. The foreword to the Freshfields Report, for example, states that the report's findings should help dispel the "all-too-common misunderstanding" that fiduciary responsibility is restricted to profit-maximization.[102] The 2015 Fiduciary Duty in the 21st Century report states that "failing to consider long-term investment value drivers, which include environmental, social and governance issues, in investment practice is a failure of fiduciary duty".[103] According to the 2019 Final Report, the reason for this is that ESG factors are "financially material" and failure to identify and consider them can result in mispricing of risk and sub-optimal decisions regarding asset allocation.[104] The 2019 Final Report predicts that this type of fiduciary duty failure is likely to become the subject of increasing litigation.[105] The World Bank Group's International Finance Corporation has stated that regulators can help to achieve ESG integration goals by "stating explicitly that they see no contradiction between a thoughtful consideration of material ESG issues and fiduciary responsibilities".[106]

A handful of other international and supranational bodies play a role in the development and dissemination of ESG stewardship norms and practices. For example, the World Economic Forum established an Active Investor Stewardship Project to promote investor stewardship[107] and an initiative comprising institutional investors and other financial sector organizations to

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[100] Generation Foundation, UNEP FI & PRI, *supra* note 98. See also Kell, *supra* note 8 (claiming that institutional investors were originally averse to embracing ESG factors on the basis that "their fiduciary duty was limited to the maximization of shareholder values").

[101] UN Global Compact ET AL, FIDUCIARY DUTY IN THE 21ST CENTURY, *supra* note 96.

[102] UNEP FI, *supra* note 95.

[103] UN Global Compact ET AL, FIDUCIARY DUTY IN THE 21ST CENTURY, *supra* note 96.

[104] UNEP FI & PRI, FIDUCIARY DUTY IN THE 21ST CENTURY: FINAL REPORT, *supra* note 99, at 8.

[105] *Id*.

[106] IFC Advisory Services in Environmental and Social Sustainability, WHO CARES WINS, 2004-08: ISSUE BRIEF 4, https://www.ifc.org/wps/wcm/connect/9eeb7982-3705-407a-a631-586b31dab000/IFC_Breif_whocares_online.pdf?MOD=AJPERES&CACHEID=ROOTWORKSPACE-9eeb7982-3705-407a-a631-586b31dab000-jkD12B5.

[107] World Economic Forum, *Enabling Investor Stewardship in the Global Public Equity Markets*, https://www.weforum.org/reports/enabling-investor-stewardship-in-the-global-public-equity-markets/.

promote stakeholder capitalism through coordinated action between multiple stakeholders.[108] The Organisation for Economic Co-operation and Development (OECD) has published guidance to assist institutional investors implement due diligence practices to address human rights, environmental, labor rights and corruption issues in their investment portfolios.[109] Actions recommended by the OECD guidance include active engagement by institutional investors with their portfolio companies, together with "participation in industry or multi-stakeholder initiatives … (e.g. PRI Collaboration Platform, UNEP Finance Initiative, Investor networks on climate change, Corporate Sustainability Reporting Coalition)".[110]

(b) Cross-border Activities of Institutional Investors

The cross-border activities of globally-focused institutional investors also play an important role in the international development and dissemination of ESG stewardship norms and practices.

Prominent institutional investors now routinely proclaim the international scope of their ESG stewardship. For example, Legal & General Investment Management, one of Europe's largest asset managers, reported that in 2019 it engaged companies with low levels of gender diversity throughout the world, including in the U.S., Japan, Asia Pacific and emerging markets.[111] BlackRock's 2020 and 2021 global stewardship reports provide examples of engagement in Asia, Europe, and Latin America.[112] U.S. and European institutional investors have also demonstrated an increasing focus on ESG issues in Asia.[113] There is some evidence that the majority of such investors hail from a handful of western markets. Dimson et al. report, for

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[108] World Economic Forum, *Shaping the Future of Investing*, https://www.weforum.org/events/world-economic-forum-annual-meeting-2022/sessions/shaping-the-future-of-investing.

[109] Organisation for Economic Co-operation and Development, RESPONSIBLE BUSINESS CONDUCT FOR INSTITUTIONAL INVESTORS: KEY CONSIDERATIONS FOR DUE DILIGENCE UNDER THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES (2017).

[110] *Id*. at 32.

[111] Legal & General Investment Management, Press Release, *LGIM Steps Up Sustainability and Governance Efforts* (Apr. 22, 2020), https://www.legalandgeneralgroup.com/media-centre/press-releases/lgim-steps-up-sustainability-and-governance-efforts.

[112] See, e.g., BlackRock, *supra* note 44; BlackRock, *Investment Stewardship Global Engagement Summary Report Q1-Q4 2021*, https://www.blackrock.com/corporate/literature/press-release/blk-engagement-summary-report-2021.pdf.

[113] PriceWaterhouseCoopers, ENVIRONMENTAL, SOCIAL AND GOVERNANCE (ESG) IN ASIA (2020) 2. Relevantly, Climate Action 100+ (CA100+) discloses an intervention coordinated by the network against the Korean company, Kepco, in relation to climate change concerns that was led by Dutch investor APG Asset Management and Sumitomo Mitsui Trust Asset Management, supported by "collaborating investors from Europe". CA 100+, 2020 PROGRESS REPORT 47 (2021).

example, that more than half of the shareholders participating in coalitions coordinated through the global Collaboration Platform of the Principles for Responsible Investment (PRI) were from just four countries.[114]

The contribution of such globally-active investors to local market ESG stewardship is multi-dimensional. In some cases, these investors effectively operate as "importers" of ESG stewardship norms and practices. The Canada Pension Plan Investment Board, for instance, has acknowledged its role as a norm-importer in emerging markets where it operates. The Pension Board has noted that, although it needs to make some allowance in emerging markets for "normative differences" regarding ESG considerations, it nonetheless adopts certain non-negotiable "baseline" expectations.

One such expectation is that investee companies in emerging markets take adequate action to manage climate change risk.[115] In other cases, globally-active investors act as supporters rather than leaders, lending their investment heft and experience to support the initiatives of local investors, thereby creating a distinctive form of transnational "agency capitalism".[116] Dimson et al. note, for example, how coalitions coordinated under the PRI's Collaboration Platform commonly comprise a mixture of domestic and offshore investors, with the former often acting as lead investors and the latter as supporting investors.[117] A similar pattern can be seen in the Asian working group convened by Climate Action 100+, where one of the key objectives is to partner Asian investors with international investors in order to combine Asian investors' local knowledge and cultural familiarity with international investors' significant offshore engagement experience.[118]

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[114] Dimson ET AL., *Coordinated Engagements*, *supra* note 47, at 21 (those countries being the United Kingdom, Netherlands, the United States and Canada).

[115] Reported in World Economic Forum, *Tips for Investor Engagement in Emerging Markets*, (Feb. 5, 2020), www.weforum.org/agenda/2020/02/investor-engagement-emerging-markets/. Ringe has noted that, although Germany does not have a domestic stewardship code, a high proportion of active foreign investors in Germany nonetheless adhere to international stewardship frameworks, particularly the U.K.'s influential stewardship code, resulting in the transmission of foreign stewardship norms and practices into the German market: Wolf-Georg Ringe, *Stewardship and Shareholder Engagement in Germany*, EUROPEAN BUS. L. REV. 87, 108 (2021).

[116] Gilson & Gordon, *supra* note 28.

[117] Dimson ET AL., *Coordinated Engagements*, *supra* note 47, at 23 (noting at 35, that the success rate of interventions is higher where the lead investor is based in the same country as the targeted company).

[118] CA100+, *supra* note 113, at 66. See also World Economic Forum, *supra* note 115 (reporting how engagement in emerging markets benefits from being undertaken by partnerships of offshore investors with engagement expertise and local investors with good local knowledge and connections).

A recent activist shareholder campaign against Rio Tinto, one of the world's largest mining companies which has a dual listing on the London and Australian stock exchanges, provides a notable case study of the multidirectional interactions between globally-active and local investors that underpin ESG stewardship.[119]

The background to the activist campaign against Rio Tinto is as follows. In late May 2020, Rio Tinto conducted a blasting operation at Juukan Gorge in Western Australia to gain access to a high-quality iron ore deposit.[120] Although the blasting was legislatively authorized[121] and therefore legal, it destroyed two rock shelters, which were 46,000 year old Aboriginal cultural heritage sites.[122] The destruction was said to have caused "indescribable" grief[123] for the traditional owners of the land, the Puutu Kunti Kurrama and Pinikura peoples.[124]

News of the blasting resulted in public outrage[125] and the launch of a government inquiry.[126] It also prompted an announcement by Rio Tinto on June 19, 2020 that the board of directors

[119] The activist campaign at Rio Tinto is by no means the first example, of this form of transnational agency capitalism spearheaded by Australian institutional investors. A fascinating early example occurred in relation to News Corp's move in 2004 from Australia to Delaware and the company's subsequent adoption of a poison pill against the wishes of its institutional investors. A consortium of twelve institutional investors filed legal proceedings against New Corp. and its directors in the Delaware Court of Chancery in October 2005. The majority of the institutional investors were from Australia (six being members of ACSI), the Netherlands and the United Kingdom. Only two of the plaintiffs were U.S. institutional investors. See generally Jennifer G. Hill, *Subverting Shareholder Rights: Lessons from News Corp.'s Migration to Delaware*, 63 VAND. L. REV. 1, 42–47 (2010).

[120] See Peter Ker, *The Moment Juukan Gorge Was Lost*, AUSTL. FIN. REV., Dec. 12, 2020, at 18.

[121] Under § 18 of the Aboriginal Heritage Act, No. 53 (1972) (W. Austl.). A government report on the destruction of the Juukan Gorge later found that there were serious deficiencies with this legislation and that the Act provided inadequate protection to Aboriginal cultural sites. See Parliament of the Commonwealth of Australia, Joint Standing Committee on Northern Australia, A WAY FORWARD: FINAL REPORT INTO THE DESTRUCTION OF INDIGENOUS HERITAGE SITES AT JUUKAN GORGE xi, 71-77 (Oct. 2021), https://nativetitle.org.au/sites/default/files/2021-10/AWayForward.pdf.

[122] See Parliament of Australia, NEVER AGAIN: JUUKAN GORGE INTERIM REPORT ¶ 1.1–1.3 (Dec. 3, 2020), https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Northern_Australia_46P/CavesatJuukanGorge/Interim_Report.

[123] *Id.* ¶ 1.1.

[124] *Id.*

[125] See, e.g., Calla Wahlquist, *Juukan Gorge: Rio Tinto Blasting of Aboriginal Site Prompts Call to Change Antiquated Laws*, THE GUARDIAN AUSTL. (May 30, 2020), https://www.theguardian.com/australia-news/2020/may/30/juukan-gorge-rio-tinto-blasting-of-aboriginal-site-prompts-calls-to-change-antiquated-laws. See generally *Timeline: Rio Tinto's Sacred Indigenous Caves Blast Scandal*, REUTERS (Dec. 3, 2020), https://www.reuters.com/article/us-australia-mining-indigenous-timeline-idUSKBN28D0OC.

[126] On June 11, 2020, the Australian Senate referred an inquiry on the matter to the Joint Standing Committee on Northern Australia. See Parliament of Australia, INQUIRY INTO THE DESTRUCTION OF 46,000 YEAR OLD CAVES AT THE JUUKAN GORGE IN THE PILBARA REGION OF WESTERN AUSTRALIA, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Former_Committees/Northern_Australia_46P/CavesatJuukanGorge . An interim report was released in December 2020. See Parliament of Australia, Joint Standing Committee on Northern Australia, *supra* note 122,. The final report, which was published in late 2021,

would conduct a review of the company's heritage management processes,[127] with a view to recommending procedural improvements.[128] The board's report was published on August 24, 2020.[129] Although the report identified serious deficiencies in the company's processes and work culture,[130] the only penalty recommended was a £4 million reduction in executive pay for Rio Tinto's then-CEO, Jean-Sébastien Jacques, and two other senior managers.[131]

The report triggered an immediate negative response by some of Australia's substantial industry pension (superannuation) funds,[132] and their representative organization, the Australian Council of Superannuation Investors (ACSI).[133] UniSuper and AustralianSuper, which were material shareholders in Rio Tinto, declared that the financial penalties were inadequate and failed to produce meaningful accountability.[134] ACSI adopted a similar position, stating that "[r]emuneration appears to be the only sanction applied to executives. This raises the question — does the company feel that £4 million is the right price for the destruction of cultural heritage?"[135]

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recommended numerous legal changes to improve the protection of Aboriginal heritage sites. See Parliament of Australia, Joint Standing Committee on Northern Australia, supra note 121.

[127] See Rio Tinto, Media Release, *Rio Tinto Announces Details of Board-Led Heritage Process Review* (June 19, 2020), https://www.riotinto.com/en/news/releases/2020/Rio-Tinto-announces-details-of-board-led-heritage-process-review.

[128] See Rio Tinto, BOARD REVIEW OF CULTURAL HERITAGE MANAGEMENT ¶ 2 (Aug. 23, 2020).

[129] See Rio Tinto, *Rio Tinto Publishes Board Review on Cultural Heritage Management* (Aug. 24, 2020), https://www.riotinto.com/en/news/releases/2020/Rio-Tinto-publishes-board-review-of-cultural-heritage-management.

[130] For example, Ian Silk, Chief Executive of AustralianSuper, described Rio Tinto's board-led report as highlighting "profound systemic, operational, and governance failings". See Peter Ker, *AusSuper: Rio's Juukan Penalty Too Low*, AUSTL. FIN. REV., Aug. 26, 2020, at 17.

[131] Rio Tinto's board review recommended that no 2020 annual bonus should be payable to Mr Jacques and two other members of the senior management team, Simone Niven (Group Executive, Corporate Relations) and Chris Salisbury (Chief Executive, Iron Ore). In addition, the review recommended that Mr Jacques' long-term incentive plan award should be reduced by £1,000,000. See Rio Tinto, BOARD REVIEW OF CULTURAL HERITAGE MANAGEMENT, "Addendum", 27–28 (Aug. 23, 2020).

[132] Leading Australian superannuation funds that expressed serious dissatisfaction with the penalties envisaged in the Rio Tinto board review included AustralianSuper, UniSuper, HESTA and Aware Super (previously First State Super). See Nick Toscano & Elizabeth Knight, *How Aussie Rabble Rousers Ended Rio Boss*, THE SYDNEY MORNING HERALD, Sept. 19, 2020, at 4.

[133] ACSI was established in 2001. Its membership includes 34 Australian and international asset owners and institutional investors with over $1 trillion in funds under management. See ACSI, *Who Our Members Are*, https://acsi.org.au/members/who-our-members-are/.

[134] See Ker, *supra* note 130.

[135] See ACSI, Media Release, *ACSI Statement on Rio Tinto Board Review of Destruction of 46,000 Year Old Caves in the Juukan Gorge* (Aug. 24, 2020), https://acsi.org.au/media-releases/acsi-statement-on-rio-tinto-board-review-of-destruction-of-46000-year-old-caves-in-the-juukan-gorge/.

Yet, the ire of the Australian superannuation funds, which collectively held 20% of Rio Tinto stock, was not initially shared by U.S., U.K. and European investors, which owned a much larger proportion of Rio Tinto's shares.[136] Indeed, it was reported that U.S. investors were angry, not because they regarded Rio Tinto's remuneration cuts as an inadequate penalty, but rather because they viewed them as overkill.[137]

By early September 2020, this picture was changing, with reported "disquiet" among some Rio Tinto board members[138] and growing support for the stance of the Australian institutions coming from some international investors, such as the U.K.-based Local Authority Pension Fund (LAPFF) and the U.K. Church of England Pension Fund.[139] Aberdeen Standard Investments, one of the largest holders of Rio Tinto's London-listed stock, also publicly announced that the destruction of the Juukan rock shelters called into question Rio Tinto's commitment "to doing what is right, not just what is legal".[140]

A group of eleven institutional investors, acting collectively, wrote to Rio Tinto's chairman urging the board to take stronger action.[141] Rio Tinto responded by announcing, on September 11, 2020, that its CEO and the two other executives would leave the company.[142] At the company's annual shareholder meeting in London the following month, influential shareholders, including Norway's oil fund and the LAPFF, voted against Rio Tinto's

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[136] Toscano & Knight, *supra* note 132.

[137] *Id.*

[138] See Ben Butler ET AL., *"Test for the Board": UK Pension Fund Heaps Pressure on Rio Tinto Boss over Juukan Gorge Blasts*, THE GUARDIAN (Sept. 9, 2020), https://www.theguardian.com/business/2020/sep/09/test-for-the-board-uk-pension-fund-heaps-pressure-on-rio-tinto-boss-over-juukan-gorge-blasts; Joe Aston & Myriam Robin, *Rio Tinto Misleads Parliamentary Inquiry*, AUSTL. FIN. REV., Sept. 7, 2020, at 40.

[139] Toscano & Knight, *supra* note 132; Lorena Allam, *Rio Tinto Condemned by Shareholders for Seeking Legal Advice before Blowing up Juukan Gorge*, THE GUARDIAN (Sept. 8, 2020), https://www.theguardian.com/business/2020/sep/07/rio-tinto-condemned-by-shareholders-for-seeking-legal-advice-before-blowing-up-juukan-gorge; Butler ET AL., *supra* note 138.

[140] Nick Toscano, *Rio Tinto Feels More Heat on Cave Blast as Investor Pressure Rises*, THE SYDNEY MORNING HERALD (June 3, 2020), https://www.smh.com.au/business/companies/rio-tinto-feels-more-heat-on-cave-blast-as-investor-pressure-rises-20200602-p54yqm.html.

[141] Nick Toscano, *Investors Teamed up to Roast Rio over Rock Shelter Blast, Warn Departures Are First Step*, THE SYDNEY MORNING HERALD (Sept. 15, 2020), https://www.smh.com.au/business/companies/investors-teamed-up-to-roast-rio-over-rock-shelter-blast-warn-departures-are-first-step-20200914-p55vhl.html.

[142] See Rio Tinto, Media Release, *Rio Tinto Executive Committee Changes* (Sept. 11, 2020), https://www.riotinto.com/en/news/releases/2020/Rio-Tinto-Executive-Committee-changes; Peter Ker, *CEO Blasted Out: Australia to Regain Rio Control*, AUSTL. FIN. REV., Sept. 12, 2020, at 1. In March 2021, Rio Tinto announced that its chairman, Simon Thompson, would not stand for re-election and that Michael L'Estrange, the director who led the controversial Rio board inquiry into the Juukan Gorge destruction would retire before the company's next annual general meeting. See generally Jamie Smyth & Neil Hume, *Destruction of Sacred Site Claims Another Rio Tinto Scalp*, FIN. TIMES, Mar. 3, 2021, at 5.

remuneration report, which disclosed a pay rise for Jean-Sébastien Jacques in spite of the events at Juukan Gorge.[143]

Local and international institutional investors have used the Juukan Gorge destruction to place pressure, not only on Rio Tinto, but also on other global mining companies.[144] In late October 2020, 64 institutional investors, representing over US$10.2 trillion, became signatories to a letter sent by ACSI and The U.K. Church of England Pension Fund, to major Australian and international mining companies.[145] The consortium of additional signatories was truly global in nature, comprising 12 Australian institutions; 34 U.K. institutions; 9 European institutions; 6 U.S. institutions; one institution based in Canada and another in Chile.[146] Their letter, which was a clear shot across the bow, sought assurances from some of the world's largest mining companies as to "how the sector obtains and maintains its social license to operate with First Nations and Indigenous peoples"[147] The letter stressed that incidents such as the Juukan Gorge blasting pose a serious investment risk,[148] noting that, although this particular incident occurred in Australia, "the principles apply to projects across the world".[149]

The destruction of the Juukan Gorge has been described as a "potent global symbol" of the growing importance of ESG investment.[150] As a case study, the Juukan Gorge incident

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[143] Institutional Shareholder Services (ISS) and Glass Lewis recommended that institutional investors vote against the report. See Henry Sanderson & Neil Hume, *Rio Tinto Investors Oppose Pay Report after Cave Blast*, FIN. TIMES, Apr. 10, 2021, at 10,

[144] See Peter Ker, *Big Investors Challenge Miners over Traditional Owner Consent*, AUSTL. FIN. REV., Oct. 30, 2020, at 20; Nick Toscano, *Top Investors Put Miners on Notice*, THE SYDNEY MORNING HERALD, Oct. 30, 2020, at 29.

[145] It was reported that recipients of the letter included Rio Tinto, BHP, Fortescue Metals, Vale, Barrick Gold, Newmont, Glencore, Anglo American, Minerals and Metals Group, Newcrest, Saracen Mineral Holdings, Alcoa, Antofagasta, and several large Chinese companies. See Ker, *supra* note 144.

[146] See *id*.

[147] *Letter from The Church of England Pensions Board and ACSI* (Oct. 27, 2020), https://www.actiam.com/4ab406/siteassets/4_verantwoord/documenten/en/investor-letter-on-indigenous-engagement.pdf.

[148] The letter stated that "[w]e believe that investment risk exists where there is a mismatch between a company's stated approach to relationships with First Nations and Indigenous communities and what happens in practice". *Id*.

[149] *Id*.

[150] See Jennifer Hewett, *Rio's Day of Reckoning Too Little, Too Late*, AUSTL. FIN. REV., Sept. 11, 2020, at 2; Toscano & Knight, *supra* note 132. Some of the key issues in the Juukan Gorge incident are being replayed in the United States at the Resolution Copper Mine in Oak Flat, Arizona, where Native American groups have claimed that the land is sacred and should not be mined: Lauren Redniss, *Rio Tinto Promised to Respect Indigenous People. It Has a Chance to in the U.S.*, THE WASH. POST (Sept. 22, 2020), https://www.washingtonpost.com/outlook/2020/09/22/rio-tinto-oak-flat/.

highlights the intricate, networked nature of ESG stewardship. It shows that local and international institutional investors can build relationships and become repeat players in relation to ESG stewardship. For example, this was not the first time that The U.K. Church of England Pension Fund had collaborated with Australian superannuation funds to put ESG pressure on Rio Tinto.[151] The Juukan Gorge case study also highlights how institutional investors undertake their ESG stewardship collectively, and that the larger, globally-focused institutions play a pivotal role in such collective initiatives.

(c) Investor Associations and Networks as Transnational Norm Developers and ESG Stewardship Facilitators

The Juukan Gorge case study is an example of international and local investors forming an ad hoc coalition to respond to a significant ESG concern. However, spontaneous formations of investor coalitions are not the only means by which institutional investors leverage their ESG stewardship. Investors are also increasingly exerting collective influence through representative bodies and formal investor networks,[152] a number of which operate across borders.

Some of these transnational investor associations and networks develop and promote stewardship norms and best practice behaviors.[153] Examples include the International Corporate Governance Network (ICGN)[154] and the European Fund and Asset Management

[151] See The Church of England, Media Release, *Funds with £1.8 Trillion Declare They Will Support Shareholder Resolution on Lobbying at Rio Tinto Limited* (Apr. 28, 2018), https://www.churchofengland.org/news-and-media/news-and-statements/funds-ps18-trillion-declare-they-will-support-shareholder; Adam Becket, *Church of England Pensions Board Files Motion against Mining Company Rio Tinto*, CHURCH TIMES (Mar. 27, 2018), https://www.churchtimes.co.uk/articles/2018/23-march/news/uk/church-of-england-pensions-board-files-motion-against-mining-company-rio-tinto.

[152] See generally, Tim Bowley & Jennifer G. Hill, *Stewardship and Collective Action: The Australian Experience,* in GLOBAL SHAREHOLDER STEWARDSHIP 417 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022).

[153] In addition to the examples mentioned in this paragraph, see also the Asian Corporate Governance Association and its advocacy and policy work in relation to stewardship: ASIAN CORPORATE GOVERNANCE ASSOCIATION, https://www.acga-asia.org. The Global Sustainable Investment Alliance is a network of regional sustainable investing networks which seeks, among other things, "to deepen the impact and visibility of sustainable investment organizations at the global level": Global Sustainable Investment Alliance, *About Us*, https://www.gsi-alliance.org/aboutus/.

[154] ICGN was established in 1995 as an investor-led network to promote corporate governance and stewardship standards globally. Its investor members have more than $59 trillion of assets under management. See Institutional Corporate Governance Network, *Homepage*, www.icgn.org; Institutional Corporate Governance Network, *About*, https://www.icgn.org/about.

Association (EFAMA).[155] Both organizations have published model stewardship codes that reference ESG considerations.[156] The preamble to the ICGN Code claims that stewardship involves "consideration of wider ethical, environmental and social factors as core components of [investors'] fiduciary duty",[157] and Principle 6 of the code states that investors should incorporate ESG factors into their stewardship activities.[158] The EFAMA Code defines stewardship as "engagement" and notes that "[e]ngagement can be on matters such as…environmental and social concerns; corporate governance issues".[159] Principle 1 requires that investors publish an engagement policy which should disclose how investee companies are monitored in relation to, among other things, "[e]nvironmental and social concerns".[160]

Recent research reveals the international influence of the ICGN and EFAMA model codes. Using a detailed textual analysis and cross-referencing methodology, Katelouzou and Siems highlight the influence of the ICGN code on codes adopted in Malaysia and Kenya and the influence of the EFAMA code on Italian stewardship codes.[161]

Several other transnational investor networks assist institutional investors in their efforts to implement ESG stewardship "on the ground". These networks do so by providing guidance and facilitating collective action by investors in relation to particular ESG issues. Examples of these networks include Climate Action 100+ (CA100+) (focused on climate change),[162] Investors Against Slavery and Trafficking APAC (focused on slavery and human trafficking in the Asia Pacific region)[163] and the PRI's Collaboration Platform (which pursues a range of

[155] EFAMA is non-profit organization comprising national investor associations and institutional investors whose purpose is to "promote optimal conditions for the European fund and asset management industry". European Fund and Asset Management Association, *Our Mission and Role*, https://www.efama.org/about-us/our-mission-role.

[156] Institutional Corporate Governance Network, ICGN GLOBAL STEWARDSHIP PRINCIPLES (2020); European Fund and Asset Management Association, EFAMA STEWARDSHIP CODE (2018); European Fund and Asset Management Association, Peter de Proft, PROMOTING STEWARDSHIP IN A MORE SUSTAINABLE WORLD (Dec. 12, 2018).

[157] Institutional Corporate Governance Network, *supra* note 156, at 5.

[158] *Id*. at 11.

[159] European Fund and Asset Management Association, *supra* note 156, at 2.

[160] *Id*. at 5.

[161] Katelouzou & Siems, *supra* note 56, 644. See also Ernest Lim, SUSTAINABILITY AND CORPORATE MECHANISMS IN ASIA 172–187 (2020) (discussing stewardship codes and sustainability in Asia).

[162] CA100+, *Homepage*, https://www.climateaction100.org.

[163] Investors Against Slavery and Trafficking Asia Pacific, *Homepage*, https://www.iast.fastinitiative.org.

sustainability-related issues).[164] These networks cooperate with their investor members to settle agreed strategy and objectives in relation to their ESG focus areas, identify companies to target for intervention, and form coalitions of interested members to undertake the interventions.[165] Interventions can take a variety of forms, only some of which are visible.[166] Behind-the-scenes engagement can, for example, involve letter writing or private meetings. Public interventions include voting against directors or filing a shareholder proposal at shareholder meetings.[167]

These investor networks have global strategies and utilize evolved organizational structures to achieve transnational reach and influence. ICGN, for example, has an explicitly stated strategy of promoting good corporate governance and responsible investing stewardship globally,[168] and, as part of this mission, has coordinated global networks of investor associations and stewardship code issuers.[169]

CA100+ also exemplifies the trend toward global collaboration. This investor network aims to leverage the shareholding power of institutional investors to compel the world's largest corporate greenhouse gas emitters to address the climate change implications of their businesses.[170] The network brings together five separate investor networks, each of which has a particular geographical focus, to implement CA100+'s strategies. These networks are the Ceres Investor Network on Climate Risk and Sustainability (North American focus), Asia Investor Group on Climate Change (Asian focus), the Institutional Investor Group on Climate

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[164] PRI, *The PRI Collaboration Platform*, https://www.unpri.org/collaborative-engagements/pri-collaboration-platform/4808.article. On the activities of the collaboration platform, see Dimson ET AL., *Coordinated Engagements*, *supra* note 47.

[165] See, e.g., the discussion of the PRI's role in Dimson ET AL., *Coordinated Engagements*, *supra* note 47.

[166] See, eg, Becht ET AL., *supra* note 47.

[167] See, e.g., CA100+, *Engagement Process*, www.climateaction100.org/approach/engagement-process/.

[168] Institutional Corporate Governance Network, ICGN ANNUAL REVIEW JUNE 2019 – JUNE 2020 at 9 (2020), https://www.icgn.org/sites/default/files/2021-11/77098%20ICGN%20Annual%20Review%202019%20-%202020%20SML.pdficgn.org/sites/. The Network discloses that it has a particular focus on promoting stewardship and good corporate governance practices in Japan, with its CEO serving as a member of Japan's Council of Experts responsible for the development of Japan's stewardship and corporate governance codes. *Id.* at 20.

[169] *Id.* at 14–15.

[170] CA100+, *supra* note 167.

Change (European focus) and the Investor Group on Climate Change (Australian and New Zealand focus).[171] A fifth network — the PRI — has a global focus.[172]

CA100+ has a steering committee, comprising investor representatives, which maintains a "focus list" of companies of concern and formulates broad strategic priorities for engaging with those companies.[173] Each network assists in assembling and coordinating coalitions of institutional investors to engage with targeted "focus list" companies located in the network's respective region.[174] The networks also help to develop and disseminate relevant know-how and assistance.[175] For example, State Street Global Advisors recently announced that it had adopted the influential Institutional Investors Group on Climate Change (IIGCC) decarbonization framework as a guide to achieving net zero investment portfolio decarbonization.[176]

Similar transnational coordination can be seen in networks that are focused on other aspects of ESG. Investors Against Slavery and Trafficking APAC, for example, receives administrative and know-how support from the Liechtenstein Initiative for Finance Against Slavery and Trafficking; the Australian NGO, Walk Free; and the Find It, Fix It, Prevent It project run by CCLA Investment Management (which is based in the U.K., and manages investments for charities, religious organizations and the public sector).[177] The CCLA Investment Management project is, in turn, supported by the PRI.[178]

These various networks claim significant investor support. CA100+, for example, states that it has more than 700 investors across 33 markets with over US$68 trillion of assets under

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[171] CA100+, *The Investor Networks*, https://www.climateaction100.org/whos-involved/investor-networks/.

[172] *Id*.

[173] CA100+, *About Climate Action 100+*, https://www.climateaction100.org/about/.

[174] *Id*.

[175] For example, the Asia Investor Group on Climate Change has an "Engagement and Policy Working Group" and a "Climate Change Training Project". Asia Investor Group on Climate Change, *Working Groups*, https://www.aigcc.net/working-groups/. CA100+ has convened an Asian advisory group to provide advice on how to engage in Asian markets. CA100+, *supra* note 113.

[176] State Street Global Investors, THE WORLD TARGETS CHANGE (Nov. 2021), https://www.ssga.com/library-content/pdfs/global/esg-research-report-global.pdf. The IIGCC is a European body, with over 360 members and approximately €50 trillion in assets under management, dedicated to investor collaboration on climate change. See IIGCC, *About Us*, https://www.iigcc.org/about-us.

[177] Investors Against Slavery and Trafficking Asia Pacific, *About Us*, https://www.iastapac.org/about/.

[178] CCLA Investment Management, FIND IT, FIX IT, PREVENT IT: YEAR ONE ANNUAL REPORT 2020 (2020), https://www.ccla.co.uk/documents/find-it-fix-it-prevent-it-annual-report-2020/download?inline=true .

management.[179] Survey data from North America and Australasia reveals that a significant proportion of institutional investors in those regions participate in at least one such network.[180] The North America data indicates that CA100+, PRI and Ceres Investor Network on Climate Risk and Sustainability are the three most popular networks among North American institutional investors.

(d) Internationally Active Advocacy Organizations

Internationally active public advocacy organizations also play a role in the global ESG stewardship ecosystem.[181] These are non-commercial organizations which engage in activism in relation to environmental or social issues. Some of these organizations, such as ShareAction and Shareholder Commons, engage in international collaborations as part of their campaigns to compel major public companies to address environmental or social concerns and work closely with institutional investors to achieve their aims.

For example, ShareAction coordinates three investor coalitions comprised of institutional investors from around the globe relating to climate change, improving children's health and improving workplace safety.[182] ShareAction has also partnered with the Australia-based advocacy organization, Australasian Centre for Corporate Responsibility, and the Carbon Disclosure Project and the Children's Investment Fund Foundation, to promote the introduction of "say on climate" votes at companies across the globe.[183] The project claims to have the support of more than fifty major investors.[184] Shareholder Commons has partnered with Jesus College, Cambridge, and the Centre for the Study of Existential Risk at the

[179] CA100+, *supra* note 173.

[180] ISS Governance, 2020 ASSET OWNER STEWARDSHIP SURVEY 7 (Nov. 2020) (presenting survey data obtained from primarily North American asset owners and reporting that 51% of respondents regard ESG-oriented coalitions to be useful and participate in at least one of them, with the three most popular coalitions being PRI, CA100+ and Ceres); Responsible Investment Association Australasia, RESPONSIBLE INVESTMENT BENCHMARK REPORT: 2020 AUSTRALIA, 25 (2021) (presenting survey data from Australasian asset owners and managers and reporting that 58% of respondents are members of more than one collaborative initiative).

[181] On this point, see also Ringe, *supra* note 49, 26–27.

[182] ShareAction, *Investor Initiatives*, https://www.shareaction.org/what-we-do/investor-initiatives.

[183] Say on Climate, *Home*, https://sayonclimate.org/.

[184] *Id*.

University of Cambridge to work with investors to encourage proxy advisers to take into account the systemic effects of corporate behavior when providing proxy advice to investors.[185]

(e) The Global ESG Advisory Industry

A number of the developments discussed above are supported by an array of commercial service providers that assist and advise investors with their ESG stewardship. This includes engagement firms, proxy advisers, data providers and consultants.[186] Investors use these specialist firms in order to access their expertise, supplement their in-house resources and expand the scope of their engagement activities.[187] Many of these organizations are multinational and use their international reach to assist investors with their global stewardship activities. For example, Sustainalytics, which is part of Morningstar group, offers engagement services on a global basis;[188] ISS ESG, the ESG consulting arm of Institutional Shareholder Services (ISS), also markets its ability to assist investors to engage with companies on ESG-related matters on a global basis.[189] Federated Hermes has a division, Federated Hermes EOS, which specializes in the provision of ESG-related engagement services to investors. Its engagement report for the first quarter of 2021 discloses that it undertook ESG-related engagements in Europe, Asia, North America, Australia and New Zealand.[190] In 2019, Federated Hermes EOS entered into an engagement services agreement with the Australian industry association representing Australia's superannuation funds,[191] reflecting the global stewardship ambitions of the Australian funds.

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185 Jesus College Cambridge, *Universal Ownership Active Consultation*, https://www.jesus.cam.ac.uk/universal-ownership-active-consultation.

186 Dimson ET AL., *Coordinated Engagements*, *supra* note 47, at 22–23 (reporting on the role of such service providers in engagements coordinated under the PRI's Collaboration Platform); Ringe, *supra* note 49, 28–32.

187 Bowley & Hill, *supra* note 152, at 429–31. See also Tim Bowley, ACTIVIST SHAREHOLDERS IN CORPORATE GOVERNANCE: THE AUSTRALIAN EXPERIENCE AND ITS COMPARATIVE IMPLICATIONS, ch 5 (forthcoming, 2023).

188 Sustainalytics, News Release, *Sustainalytics Launches Material Risk Engagement Service for Institutional Investors* (Mar. 3, 2020), https://www.sustainalytics.com/esg-news/news-details/2020/03/02/sustainalytics-launches-material-risk-engagement-service-for-institutional-investors.

189 ISS ESG, *ISS ESG*, https://www.issgovernance.com/esg/ (claiming that ISS ESG has "[g]lobal reach combined with local presence").

190 Federated Hermes, PUBLIC ENGAGEMENT REPORT Q1 2021 4 (Apr. 30, 2021), https://www.hermes-investment.com/au/eos-insight/eos/public-engagement-report-q1-2021.

191 Federated Hermes, Press Release, *Greater Demand for Stewardship Sees Hermes EOS and ACSI Share Engagement Insight* (Mar. 12, 2019), https://www.hermes-investment.com/au/press-centre/stewardship/greater-demand-stewardship-sees-hermes-eos-acsi-share-engagement-insight/.

Other service providers offer data and analysis to inform investors' global stewardship activities.[192] RepRisk offers ESG data in relation to more than 170,000 companies extending to "all countries", including emerging and so-called "frontier markets".[193] A number of think-tanks and non-governmental organizations also provide ESG-related know-how and support to investors. For example, the Transition Pathway Initiative is a global initiative led by asset owners, supported by asset managers and drawing on the resources of FTSE Russell and the London School of Economics to develop resources for assessing companies' preparedness for the transition to a low-carbon economy.[194] As at April 2021, 104 investors globally had pledged support for the Transition Pathway Initiative, committing to use its know-how in their stewardship activities.[195]

V. Global Stewardship as an Evolved, Networked Ecosystem – Analysis and Insights

The preceding discussion highlights that ESG stewardship is not simply a domestic phenomenon shaped only by local market factors. Rather, the development and practice of ESG stewardship today is influenced by a significant transnational phenomenon — namely, cross-border interactions of various ESG-focused non-state actors, described in this article as the global ESG stewardship ecosystem.

A distinguishing feature of any ecosystem is its interconnected nature.[196] This is certainly a hallmark of the global ESG stewardship ecosystem, whose various actors do not operate independently and in isolation. Instead, they interact closely with one another to form a highly-networked, global movement. This partnership-building is visible, for example, in the steps

[192] ISS Governance, *supra* note 180, at 9 (presenting survey data obtained from primarily North American asset owners and reporting that 53% of respondents rely on outside research providers to assist them to identify companies for engagement on ESG issues).

[193] RepRisk, *Approach*, https://www.reprisk.com/approach#scope-and-scale.

[194] Transition Pathway Initiative, *Overview of the TPI*, https://www.transitionpathwayinitiative.org/overview. The TPI was established in 2017 as a joint initiative between the Church of England National Investing Bodies (Church of England Pensions Board, the Church Commissioners and CBF Funds) and the Environment Agency Pension Fund.

[195] *Id*.

[196] The Oxford English Dictionary defines "ecosystem" as "[a] biological system composed of all the organisms found in a particular physical environment, interacting with it and with each other. Also in extended use: a complex system resembling this". *Ecosystem*, Oxford English Dictionary, https://www.oed.com/view/Entry/59402?redirectedFrom=ecosystem&.

taken by the UN and its agencies to form links with the investment community through the establishment of the PRI, the Net Zero Asset Owner and Asset Manager alliances and the Investor Agenda. Indeed, the UN has an articulated strategy of seeking to realize its sustainability objectives through multi-stakeholder, public-private partnerships.[197] A high degree of networking is apparent in other aspects of the ecosystem examined in this article. Both of the Net Zero alliances disclose, for instance, that they seek to work collaboratively with other investor alliances, including CA100+, in relation to climate change.[198] CA100+, in turn, brings together regional investor networks which assist in establishing and coordinating investor coalitions. Service providers, think tanks and non-governmental organizations also collaborate with these networks and coalitions. For example, Glass Lewis offers an ESG Climate Solutions Set, which is linked to focus list companies nominated by CA100+;[199] the Transition Pathway Initiative is a member of a technical advisory group convened by CA100+;[200] and Federated Hermes EOS is an active participant in investor coalitions formed under the auspices of CA100+ and its regional networks.[201]

Institutional investors lie at the heart of this byzantine configuration. As highlighted by the preceding discussion, they participate in UN-sponsored initiatives with respect to the development of ESG norms and goals; they establish and operate transnational investor networks; and they engage (often collectively) in "on the ground" ESG stewardship and activism in the various markets where they operate.

As a result, today, when any individual company is engaged by institutional investors in relation to an ESG issue, that engagement may be just the tip of the iceberg. That is, it may be the outworking of complex, often unseen, interactions occurring among multiple organizations within the global ESG ecosystem.

[197] See, e.g., Partnership Accelerator 2030 Agenda For Sustainable Development, *2030 Agenda Partnership Accelerator*, http://partnershipaccelerator.org/.

[198] UNEP Finance Initiative, *About the Net-Zero Asset Owner Alliance*, https://www.unepfi.org/net-zero-alliance/about/.

[199] Glass Lewis, *Investor Solutions*, https://www.glasslewis.com/esg-solution-set-climate/.

[200] CA100+, 2020 PROGRESS REPORT 14 (Dec. 2020).

[201] *Id.* at 30, 34, 59.

The existence and role of the global ESG stewardship ecosystem has significant implications for our understanding of both the potential and the regulatory implications of institutional investor participation in corporate governance. We explore the key implications below.

(a) Global ESG Stewardship Calls into Question the Conception of the Institutional Investor as "Rationally Reticent" and the "Agency Capitalism" Model

A number of leading scholars have expressed doubts about the corporate governance potential of investor stewardship. Some of these doubts are jurisdiction-specific; for example, commentators have suggested that stewardship in a market is likely to be constrained by local capital market structure, cultural differences or regulatory settings.[202] A little over a decade ago, Cheffins, for instance, expressed doubts about the potential of the U.K. Stewardship Code on the basis that it did not apply to foreign investors, which are responsible for a sizeable proportion of investment activity in the United Kingdom.[203] On this analysis, the presence of foreign investors in the U.K.'s highly fragmented capital market was the "weak link" in the United Kingdom's efforts to promote investor stewardship.

Other doubts are based on long-standing concerns about whether institutional investors have the capacity and incentives to engage in the governance of their investee companies.[204] These concerns have only escalated in recent years as a result of the continuing growth of institutional investor share ownership and the proliferation of indexed investors[205] with constricted incentives to participate in corporate governance.[206] Gilson and Gordon conclude that, in light of these incentive issues, institutional investors will, in general, adopt a default stance in corporate governance of "rational reticence"; that is, they will usually find it economically

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[202] See, e.g., Brian R. Cheffins, *The Stewardship Code's Achilles Heel*, 73 MOD. L. REV. 1004 (2010) (noting the implications of United Kingdom's capital market structure for stewardship in the United Kingdom); Mila R. Ivanova, *Institutional Investors as Stewards of the Corporation: Exploring the Challenges to the Monitoring Hypothesis*, 26 BUS. ETHICS, THE ENV'T AND RESP. 175 (2017) (noting, among other issues, lack of transparency in companies' public disclosures); Katelouzou & Klettner, *supra* note 22, at 567–68 (noting concerns about the impact of national differences in culture, governance, share ownership patterns and regulatory settings).

[203] Cheffins, *supra* note 202. See also Davies, *supra* note 54.

[204] See, e.g., Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L. J. 445 (1991).

[205] See, e.g., Jason Zweig, *Are Index Funds Eating the World? Even the Father of Passive Investing Has Warned of the Potential for "Chaos" is Index Funds Get too Popular*, THE WALL STREET J., Aug. 26, 2016; Louis Navellier, *The Index Monster that Ate the Stock Market*, SEEKING ALPHA (Sept. 8, 2016), https://seekingalpha.com/article/4004842-index-monster-ate-stock-market.

[206] See, e.g., Bebchuk ET AL., *supra* note 11; Bebchuk & Hirst, *supra* note 11.

rational not to engage *proactively* in the governance of their investee companies.[207] Gilson and Gordon argue, however, that institutions may shed their reticence when other market participants with greater incentives to engage in corporate governance, such as hedge funds, formulate and put proposals before them for consideration.[208] In these circumstances, institutions act as a "swing" constituency,[209] determining the outcome of proposals formulated by such other actors. So conceived, institutional investors are a reactive constituency that will engage in company-specific stewardship only when catalyzed by other market actors. Gilson and Gordon therefore conclude that, without more, stewardship codes are unlikely to prompt institutions to behave as proactive corporate stewards. In a recent article, Gordon argues that institutions' rational reticence is likely to extend to ESG issues.[210] He claims that institutional investors are more likely to be responders than instigators of climate change activism, stating:

> [T]he large broadly-diversified funds can take the same stance as with the hedge fund activists: *they can count on others to tee-up the proposals* that would bear on climate change risk, and then figure out which proposals would in fact create value, that is, would reduce the risk.[211] [emphasis added]

Brian Cheffins has also recently suggested that institutional investor ESG stewardship is likely to prove "underwhelming" owing to the constrained incentives of investors to engage in corporate governance.[212]

Our article calls into question the conception of institutional investors as "rationally reticent". The complex and highly networked global ecosystem described in the article supports a very different image of institutional investors — one involving deliberate, strategic and coordinated behavior. This collaboration involves synergistic combinations of investors, international agencies, coordinating networks and public advocacy organizations. Globally-focused institutional investors play a particularly prominent role, acting as either "lead" investors or

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[207] Gilson & Gordon, *supra* note 28.

[208] *Id*.

[209] See *id*. at 896; Jennifer G. Hill, *The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat*, 2019 U. ILL. L. REV. 507, 539–40 (2019).

[210] Gordon, *supra* note 12 at 9.

[211] See *id*. at 38–39.

[212] Brian R Cheffins, *Foreword,* in GLOBAL SHAREHOLDER STEWARDSHIP xix, xx (Dionysia Katelouzou and Dan W. Puchniak eds., 2022).

"supporting" investors.[213] Such collaboration is consistent with other research which finds that a material proportion of investors undertake their stewardship collectively.[214]

The changes in corporate behavior being driven by investors' ESG stewardship are significant. They are certainly not of the "motherhood and apple pie" variety that some commentators once associated with some types of institutional investor activism.[215] In the face of ESG stewardship, public companies and their boards are providing greater disclosure,[216] agreeing to adapt their business models,[217] assenting to changes in senior personnel and at board level,[218] and linking their executives' remuneration to the attainment of ESG-related milestones.[219] The significance of investors' ESG stewardship activities is also reflected in emerging signs of political backlash. In the United States, Republican state lawmakers have sought to withhold government business from ESG-focused investment managers whom they have labeled "woke capitalists" intent on undermining energy and resources businesses in their states.[220] During a 2021 inquiry conducted by the Australian parliament into "common ownership" concerns, the committee chairperson, a member of the government, expressed concern about the increasing influence of

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213 Gordon specifically references CA100+ and notes that its activities are "consistent with the 'rational reticence' stance of index funds and other passive funds" on account of the fact that CA100+ "provides information and technical assistance" and "funds within the network make independent determinations whether to support particular initiatives": Gordon, *supra* n 12, 39. This analysis, however, does not appear to take account of the fact that investors are integral participants in the management of CA100+ and of the active role of the regional investor networks that assist CA100+ attain its objectives: see *infra* Part IV(c). In short, the evidence reveals that investors are a driving force in CA100+ rather than merely a reactive constituency.

214 International Corporate Governance Network, ICGN ANNUAL INVESTOR STEWARDSHIP SURVEY (Feb. 2019) (presenting survey data from the network's investor members and reporting that nearly 30% of respondents undertake their stewardship collectively); Rajna Gibson Brandon ET AL., *Do Responsible Investors Invest Responsibly?* 44 (ECGI Working Paper No. 712/2022, Sept. 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3525530 (reporting that 65% of PRI signatories undertake their ESG-related stewardship collectively). See also Oguzhan Karakas ET AL., *Coordinated Engagements*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Jan. 22, 2021), https://corpgov.law.harvard.edu/2021/01/22/coordinated-engagements/ (arguing that "[c]oordinated engagements on E&S issues are surging in the institutional investment world").

215 See, e.g., Marcel Kahan & Edward B. Rock, *Hedge Funds in Corporate Governance and Corporate Control* 155 U. PENN. L. REV. 1021, 1059 (2007).

216 Coffee, *supra* note 22.

217 See, e.g., the discussion of the ExxonMobil intervention, *infra* Part III.

218 See, e.g., the discussion of the Rio Tinto case study, *infra* in Part IV(b).

219 See, e.g., Gadinis & Miazad, *supra* note 20, at 1407 (noting that a number of major U.S. corporations, including Walmart, Microsoft, Chevron and Shell, have now integrated ESG improvements into executive pay); Shira Cohen ET AL., *Executive Compensation Tied to ESG Performance: International Evidence* (Eur. Corp. Governance Inst., Finance Working Paper No. 825/2022, Apr. 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4097202 (noting the growing use of ESG performance metrics by public companies around the world); Roberto Barontini & Jennifer G. Hill, *Sustainability and Executive Compensation* (Working Paper, on file with the authors).

220 Steven Mufson, *Wall Street Takes Heat for Stances on Climate*, THE WASH. POST, Jul. 14, 2022, at A01.

Australia's superannuation funds in the governance of Australian public companies.[221] The government's concerns were founded in part on a perception that the industry superannuation funds were not supportive of the government's conservative policies owing to the funds' historical ties to the Australian trade union movement.[222]

In light of these developments, the prevailing conception of "agency capitalism" requires refinement. Institutional investors are not inherently rationally reticent. Hedge fund activism, which Gilson and Gordon describe as an endogenous market response to the concentration of share ownership in the hands of institutional investors,[223] is not the only market response to the increasing significance of institutional investment. The global ESG stewardship ecosystem constitutes an important additional and, in many ways, more complex development.

Collective action is crucial to the global ESG stewardship ecosystem. Collective action is sometimes direct – such as the formation of investor coalitions as either an ad hoc response to a serious ESG concern (as occurred in relation to Rio Tinto) or as part of a strategic engagement plan formulated by investor networks such as CA100+. On other occasions, investors collectivize their influence indirectly via intermediary bodies, such as investor representative organizations or engagement firms and service providers, which can represent and undertake activities on behalf of multiple investors.

Thus, the hallmark of agency capitalism today is not the rational reticence of institutional investors but, instead, a high degree of self-organization designed to collectivize the corporate governance leverage of these significant share owners. This self-organized coordination needs to be recognized and carefully considered in research concerning a range of contemporary corporate governance issues, including the "common ownership" debate, the potential of institutional investor stewardship codes, and the nature and implications of investors' "systematic stewardship".

[221] Proceedings of House of Representatives Standing Committee on Economics, Parliament of Australia, *Inquiry into the Implications of Common Ownership and Capital Concentration in Australia* 1, 17 (Sept. 20, 2021) (Transcript of comments by Tim Wilson MP).

[222] John Kehoe, *High Stakes in Ownership Investigation*, AUSTL. FIN. REV., Aug. 5, 2021, at 36. See further, Bowley, *supra* 187, ch 6, section 6.1.4(iii).

[223] Gilson & Gordon, *supra* note 28, 873.

(b) The Content of ESG Stewardship Is not Solely Determined by Local Market Factors

The evidence presented in this article also highlights how the nature of ESG stewardship in a particular market will not necessarily be determined exclusively by domestic factors. ESG stewardship norms and practices in a market may be shaped by the activities of international agencies, transnational investor networks and globally-active non-governmental organizations. The evidence highlights, in particular, how globally-focused institutional investors may act as "importers" of ESG stewardship norms and practices.[224] In markets with high-levels of inbound institutional investor ownership, globally-focused institutional investors can therefore exert significant influence on local ESG stewardship norms and practices.

This insight has important implications for national law makers and regulators. Owing to the diverse actors that inhabit the global ESG ecosystem, ESG stewardship norms and practices in a given market may be shaped by actors that do not have any formal responsibility for the development of such norms and practices at a local level.[225] Therefore, jurisdictions that do not currently have a stewardship code or other regulatory initiative addressing ESG stewardship prescriptively, may find that they are subject to ESG stewardship norms and practices developed within the global ESG stewardship ecosystem.[226] As a result of its transnational nature, it cannot be assumed that the ecosystem will address ESG concerns which are considered material by local law makers and regulators, or will address such concerns in a manner acceptable to local law makers and regulators.[227] This issue is compounded by the expansive and evolving nature of the concept and meaning of "ESG", which has been described as a "highly flexible moniker" that can mean different things to different people.[228]

In light of the dramatic growth in ESG stewardship, one international commentator has recently argued that ESG stewardship "has the potential to become a very powerful driver towards a more sustainability-oriented future" and, as a market phenomenon, is likely to provide a more dynamic and flexible means of achieving economic sustainability than mandatory

[224] See Hill, supra note 209, 540–41 (arguing that, as a result of the involvement of global institutional investors, the United States has become an importer, rather than exporter, of a range of corporate governance norms relating to shareholder participation).

[225] Bowley & Hill, *supra* note 9.

[226] *Id*.

[227] *Id*.

[228] Pollman, *supra* note 17, 5.

regulation.[229] Law makers and regulators who may be attracted to this argument must appreciate, however, that leaving ESG stewardship "to the market" will mean, among other things, that the nature and objectives of ESG stewardship are likely to be shaped to a significant extent, not just by domestic developments, but rather by the activities of the global ESG stewardship ecosystem.[230]

An even more fundamental issue can arise in these circumstances – namely, whether the influence of the global ESG ecosystem may affect the legitimacy of ESG stewardship from a local market perspective.[231] For example, to what extent are transnational developments consistent with governmental policy and/or the preferences of underlying beneficiaries in the local market?[232] Scholars have recently claimed that ESG stewardship can have particular economic relevance for institutional investors seeking to protect their highly diversified portfolios from undiversifiable systemic risk.[233] They have noted that it may make good economic sense for such investors to support shareholder proposals which have the effect of decreasing the value of systematically problematic companies in their portfolio (e.g. by putting pressure on oil and gas companies to take significant and value-decreasing responses to climate change risk), provided that such decreases are outweighed by overall gains in their portfolio as a whole due to systematic risk mitigation. If ESG stewardship proceeds on this basis, what implications could it have in a market where domestic public companies are particularly exposed to these types of systematic risk?[234]

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[229] Ringe, *supra* note 49, 3.

[230] In a recent article, Lund and Pollman have described a "corporate governance machine", comprising "[a] vast array of institutional players", which they argue exercises significant normative influence in U.S. corporate governance: Dorothy S. Lund and Elizabeth Pollman, *The Corporate Governance Machine*, 121 COLUM. L. REV. 2563, 2565 (2021). The global ESG stewardship ecosystem plays a not dissimilar role at the transnational level in relation to ESG stewardship norms and practices. An interesting issue, deserving of further consideration, is the interrelationship between the global ESG stewardship ecosystem and the U.S. "corporate governance machine" described by Lund and Pollman.

[231] See also Condon, *supra* note 12, at 70–75 (querying whether the role of the private investor acting as a quasi-regulator in relation to environmental and social issues is compatible with democratic principles).

[232] Pargendler has noted the increasingly transnational (or international) origins of much corporate law and regulation and questions whether, from the perspective of individual nation states, this development *inter alia* unduly threatens nations' sovereignty and democratic rule-making processes, is unduly prone to capture by particular political or interest groups, or impedes potentially beneficial regulatory diversity amongst nations. Pargendler, *supra* note 1, 1814.

[233] Condon, *supra* note 12; Gordon, *supra* note 12; Coffee, *supra* note 22.

[234] This point is highlighted, for example, by the efforts of Republican lawmakers in U.S. states with significant energy and resources sectors to push back against the ESG stewardship of investment managers. *Supra* note 220.

In these circumstances, the prospect of further political backlash to investor stewardship is very real.

(c) Stewardship Codes Play a Somewhat Uncertain Role in the Global ESG Ecosystem

Stewardship codes are often regarded as having significant instrumental potential in developing stewardship norms and practices.[235] It has been argued, for example, that these codes have the potential to establish ESG stewardship norms and practices in markets that have not traditionally promoted sustainable investment, and that they can also assist investors in giving effect to ESG-related legal requirements in markets that already emphasize sustainable investing.[236] Although we do not dispute this potential for stewardship codes, nonetheless, we argue that codes' capacity to play such a role must be assessed by reference to the global ESG stewardship ecosystem. As this article demonstrates, ESG stewardship has an extraordinary momentum that appears to be independent of, or at least not solely shaped by, stewardship codes.[237]

In the past, it has generally been considered advantageous for stewardship codes to be non-prescriptive in nature, on the basis that this creates flexible regulatory instruments that can allow best practice to develop incrementally and responsively over time.[238] One of the implications of our analysis is that, although this stance is not necessarily inappropriate, policy makers and code issuers should, nonetheless, bear in mind the potential implications of such an approach in markets where transnational developments have considerable sway over market practice. An important implication in this context is that a non-prescriptive domestic code which provides investors with latitude through a "comply or explain" approach may struggle to establish distinctive local norms and practices.[239] ESG stewardship may already be

[235] See, e.g., Katelouzou & Klettner, *supra* note 22, at 565. The Financial Reporting Council has noted that the U.K. code "was developed to help build a critical mass of investors willing and able to engage with the companies in which they invest, to increase the quantity and quality of engagement, and to increase accountability down the investment chain to clients and beneficiaries". Financial Reporting Council, DEVELOPMENTS IN CORPORATE GOVERNANCE AND STEWARDSHIP 2016 24 (Jan. 2017).

[236] Katelouzou & Klettner, *supra* note 22, at 565.

[237] Tellingly, many of the developments described earlier in this article are occurring in markets without codes or with codes that do not address ESG or only address it in cursory terms; for example, in developing and emerging markets. See Bowley & Hill *supra* note 9, Part VIII.

[238] Alice Klettner, *The Impact of Stewardship Codes on Corporate Governance and Sustainability*, 23 N.Z. Bus. L. Rev. 259, 259 (2017) (noting how this justification is articulated in the Danish stewardship code). It is noteworthy, however, that a strengthened version of the U.K. stewardship code, with a particular focus on ESG issues, was introduced in 2020. See generally Davies, *supra* note 54.

[239] An interesting issue is whether transnational factors might even result in "two-speed" stewardship in a market; that is, stewardship that conforms to transnational norms and practices in relation to large companies in which

underway in the market and actors in the global ESG ecosystem may be shaping the nature and extent of that stewardship. As a consequence, the issuer of such a code could find that ESG stewardship in that market evolves in unanticipated ways due to global pressures. This may present challenges if a local code issuer has a particular conception of ESG stewardship that differs from the norms and practices evolving within the global ESG stewardship ecosystem. In these circumstances, a more prescriptive approach towards stewardship in a particular market might be justified.[240]

(d) Novel Implications for the Convergence-Divergence Debate

Some aspects of the ESG stewardship ecosystem, such as the pivotal role played by international agencies and institutional investors, accord with Gordon's identification of supranational forms of corporate governance convergence.[241] As Gordon has noted, convergence may be driven by a variety of factors.[242] Sometimes it is driven by companies themselves voluntarily adopting certain governance mechanisms to try to achieve a competitive advantage in a particular product or capital market.[243] However, according to Gordon, supranational forms of convergence also exist through:

(i) international institutions, such as the OECD, the International Monetary Fund (IMF), the World Bank and the Financial Stability Board (FSB), endorsing certain corporate governance measures, which they believe will promote financial stability;[244] and

globally-focused investors have a significant presence, and stewardship that takes on a different, "local" characteristic in relation to smaller public companies which do not have significant levels of ownership by foreign investors.

[240] At the very least, an issuer in this situation may wish to consider formulating the reporting requirements of investors under the code in a way that ensures that such reporting sheds light on the extent to which transnational factors are affecting stewardship domestically. It may be necessary, for example, to consider whether reporting requirements under codes should require disclosure of how investors conceive of the relevance of ESG considerations, investors' involvement in investor networks, participation in coalitions assembled by networks, utilization of external service providers and resources of think-tanks and non-governmental organizations.

[241] See generally Gordon & Roe, *supra* note 14.

[242] Gordon, *supra* note 14, at 28.

[243] *Id*. See also Pargendler, *supra* note 1, at 1767–68 (arguing that the original convergence-persistence debate of the late 1990s relied on a "model of competition" concerning whether individual states would, or would not, alter their corporate governance frameworks in order to compete in a global market).

[244] Gordon, *supra* note 14, at 44–51. See also Pargendler, *supra* note 1, at 1778–93.

(ii) institutional investors promoting particular governance techniques designed to foster stability and mitigate risk in their global investment portfolios.[245]

The global ESG stewardship ecosystem encompasses both of these supranational forms of convergence, via its various actors, including international institutions, investor networks, and non-governmental organizations. The coordinated and collective nature of the activities undertaken by the ecosystem creates the promise of greater ESG convergence and harmonization.

Nonetheless, such an outcome is by no means seamless or assured. Rulemaking by transgovernmental networks in the aftermath of the global financial crisis highlighted a range of problems that can occur in this regard, such as regulatory overlap or inconsistency across agencies with different focal points, goals and philosophies.[246] The global ESG ecosystem also contains instances of "divergence within convergence".[247] Stewardship codes provide a clear example of this trend. Although the popularity of stewardship codes over the last decade might at first suggest formal convergence, stewardship codes around the world are far from uniform in the emphasis given to ESG issues.[248] One of the reasons for such "divergent convergence" is that many jurisdictions have adopted these codes for different reasons and to address different problems.[249] Furthermore, a variety of organizations have responsibility for "writing the rules" of stewardship codes. Some codes are written by regulators or quasi-regulators, whereas others are written by stock exchanges or investor associations.[250] Different authorship of stewardship codes can significantly affect not only their ESG content, but also issues relating

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[245] Gordon, *supra* note 14, at 54–55.

[246] See Jennifer G. Hill, *Regulatory Cooperation in Securities Market Regulation: The Australian Experience*, 17 EUR. CO. & FIN. L. REV. 11, 15–17 (2020). See also Pargendler, *supra* note 1, at 1769 (noting that tension may exist between the pro-investor approach of some international organizations and agencies in contrast to the pro-stakeholder approach of others).

[247] Gordon, *supra* note 14, at 32, 41–44.

[248] See Katelouzou & Siems, *supra* note 56 (analyzing the treatment of ESG considerations in 25 stewardship codes).

[249] See e.g., Bowley & Hill, *supra* note 9; Gen Goto, *The Logic and Limits of Stewardship Codes: The Case of Japan*, 15 BERKELEY BUS. L. J. 365 (2019); Gen Goto, *The Japanese Stewardship Code: Its Resemblance and Non-resemblance to the UK Code*, in GLOBAL SHAREHOLDER STEWARDSHIP 222 (Dionysia Katelouzou & Dan W. Puchniak eds., 2022).

[250] See generally Jennifer G. Hill, *Good Activist/Bad Activist: The Rise of International Stewardship Codes*, 41 SEATTLE U. L. REV. 497, 507–13 (2018).

to institutional investor activism, including whether collective activism is encouraged.[251] Furthermore, the extent to which the norms embodied in stewardship codes are effective in practice may depend on the level of prescription in them, their coverage and who is responsible for monitoring compliance with them.[252]

Recognizing ESG stewardship as an example of contingent convergence underscores the point made earlier. That is, local law makers and regulators must appreciate that the development of ESG stewardship norms and practices is not an exclusively national phenomenon. Although the transnational nature of this phenomenon provides it with remarkable momentum, it also creates uncertainty regarding the actual local implications of this phenomenon in national markets.

VI. CONCLUSION

The rise of institutional investors' ESG stewardship is a critical feature of contemporary corporate governance. It reflects fundamental themes of transnational law and has a momentum that defies the more pessimistic assessments in recent literature of institutional investors' capacity and willingness to engage in stewardship.

Institutional investors' ESG stewardship now forms part of an extensive global ecosystem of non-state actors. Understanding the nature and scope of that ecosystem, together with its activities and influence, is critical to understanding the full implications of several contemporary corporate governance debates and developments. These include the assumed "rational reticence" of institutional investors, the nature of "agency capitalism", the implications of common ownership and the role and potential of stewardship codes. More generally, the existence and activities of the ecosystem highlights that convergence may be

[251] See generally *id*. at 520–24; Bowley & Hill, *supra* note 152. See also Gaia Balp & Giovanni Strampelli, *Institutional Investor Collective Engagements: Non-Activist Cooperation vs Activist Wolf Packs*, 14 OHIO ST. BUS. L. J 135 (2020).

[252] This is highlighted in the Australian context by a 2019 proposal made by the industry-body issuer of one of Australia's two stewardship codes. Only one year after issuing its code, ACSI called for a formal review of the efficacy of Australia's approach of having separate codes covering different sections of the investment industry. It expressed concern that there were resulting variations in investors' stewardship practices and called for the imposition of minimum, industry-wide standards of stewardship, potentially as part of a regulatory initiative rather than an industry initiative. Bowley & Hill, *supra* note 152, at 424.

underway in corporate governance, albeit in a complex way that defies simple predictions of its ultimate endpoint.

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