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Global Shareholder Stewardship: Complexities, Challenges, and Possibilities

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Abstract

Within less than twenty years the idea of shareholder stewardship has become a global phenomenon. In 2010, the United Kingdom hastily released the world's first stewardship code to cure what was perceived to be the UK's primary corporate governance malady: rationally passive institutional investors in a country characterized by a dispersed ownership structure. Today, UK-style stewardship codes exist in 20 jurisdictions, on 6 continents, and are embedded in a panoply of legal systems, shareholder markets, and corporate cultures. This introductory Chapter to the Global Shareholder Stewardship edited book explains why shareholder stewardship around the world is far more complex than the existing literature suggests and how this complexity impacts current theories and existing practices. To explain complexity, the Chapter provides a loose taxonomy of global shareholder stewardship by categorizing stewardship along three dimensions. The first-dimension illuminates how stewardship can be conceived in a variety of ways – which makes the intellectual exercise of understanding stewardship complex and presents a challenge for policymakers to implement an idea with multiple conceptions. The second-dimension compares the formal design and content of stewardship codes globally and reveals that they have largely been modelled after the first version of the UK Code (2010/2012) – creating a mirage of global uniformity based on the UK Model of stewardship. The third-dimension demonstrates how the different origins of the codes (government codes versus institutional investor codes), a variety of mechanisms for enforcing (or not enforcing) codes, and jurisdiction-specific corporate governance factors that impact how the codes function, result in stewardship serving a variety of functions which would have never been anticipated by the original drafters of the UK Code. This complexity, which has largely been overlooked in the literature, creates distinct varieties of stewardship. Based on the distinct varieties of stewardship in jurisdictions around the world, this Chapter concludes by illuminating the challenges and possibilities of global shareholder stewardship. The taxonomy also serves as a useful lens for observing the common themes and points of intersection that make the whole of this Book greater than the sum of its individual Chapters.

Keywords: stewardship, institutional investors, controlling shareholders, comparative law, Asia, sustainability, enforcement, ESG

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Global Shareholder Stewardship: Complexities, Challenges, and Possibilities

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ABSTRACT

Within less than twenty years the idea of shareholder stewardship has become a global phenomenon. In 2010, the United Kingdom hastily released the world's first stewardship code to cure what was perceived to be the UK's primary corporate governance malady: rationally passive institutional investors in a country characterized by a dispersed ownership structure. Today, UK-style stewardship codes exist in 20 jurisdictions, on 6 continents, and are embedded in a panoply of legal systems, shareholder markets, and corporate cultures. This introductory Chapter to the *Global Shareholder Stewardship* edited book explains why shareholder stewardship around the world is far more complex than the existing literature suggests and how this complexity impacts current theories and existing practices. To explain complexity, the Chapter provides a loose taxonomy of global shareholder stewardship by categorizing stewardship along three dimensions. The first-dimension illuminates how stewardship can be *conceived* in a variety of ways – which makes the intellectual exercise of understanding stewardship complex and presents a challenge for policymakers to implement an idea with multiple conceptions. The

[*] An expanded version of this Chapter will be published as: Dionysia Katelouzou & Dan W. Puchniak, *Global Shareholder Stewardship: Understanding the Rise of a Global Movement* (forthcoming). The authors would like to thank the Centre for Asian Legal Studies at the National University of Singapore Faculty of Law for funding the research assistance for the Chapter and Jordan Ng for his exceptional work as a Research Assistant. Any errors remain our own.

second-dimension compares the *formal design* and *content* of stewardship codes globally and reveals that they have largely been modelled after the first version of the UK Code (2010/2012) – creating a mirage of global uniformity based on the UK Model of stewardship. The third-dimension demonstrates how the different origins of the codes (government codes versus institutional investor codes), a variety of mechanisms for enforcing (or not enforcing) codes, and jurisdiction-specific corporate governance factors that impact how the codes *function*, result in stewardship serving a variety of functions which would have never been anticipated by the original drafters of the UK Code. This complexity, which has largely been overlooked in the literature, creates *distinct varieties of stewardship*. Based on the distinct varieties of stewardship in jurisdictions around the world, this Chapter concludes by illuminating the *challenges* and *possibilities* of global shareholder stewardship. The taxonomy also serves as a useful lens for observing the common themes and points of intersection that make the whole of this Book greater than the sum of its individual Chapters.

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I. INTRODUCTION

In 2019, when we started this research project, the world was a very different place. Not only could we never have anticipated that as this Book went to press facemasks would be a ubiquitous accessory, but it was beyond our wildest imaginations how much our understanding of *shareholder stewardship* would expand and evolve. As the excitement of research lies in discovering the unknown, the pages that follow in this Book are full of excitement as they reveal many important discoveries.

Upon reflection, perhaps from the outset, we should have been more sanguine about the prospects for this research project. In 2010, the United Kingdom hastily released the world's first stewardship code (UK Code 2010) in response to the 2008 Global Financial Crisis (GFC).[1] The UK Code 2010 was designed to cure what was perceived to be the UK's primary corporate governance malady: rationally passive institutional investors in a country characterised by a dispersed ownership structure. It sought to achieve this by using a 'soft'[2] law code to incentivize institutional investors – who own most of the

[1] Financial Reporting Council, *The UK Stewardship Code* (July 2010) <https://www.frc.org.uk/getattachment/e223e152-5515-4cdc-a951-da33e093eb28/UK-Stewardship-Code-July-2010.pdf> accessed 25 May 2021 [hereinafter UK Code 2010].

[2] 'Soft', non-binding, and more often non-statist rules in corporate governance – as opposed to 'hard', legally binding and statist rules – have a long history back to the exponential rise of corporate governance codes in the 1990s. While this binary distinction between soft and hard law rules is important in heuristic terms, it is important to recognise that in practice there are overlaps between the two and soft corporate governance norms often bear a high degree of coerciveness. See e.g. Gregory C Shaffer and Mark A Pollack, 'Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance' (2010) 94 *Minnesota Law Review* 706, 716 (examining the relationship between hard and soft law and noting that 'hard and soft law are best seen not as binary categories but rather as choices arrayed along a continuum'). For a more recent discussion in the area of corporate governance rules, see Dionysia Katelouzou and Peer Zumbansen, 'The New Geographies of Corporate Governance' (2020) 42 *University of Pennsylvania Journal of International Law* 51, 114-120.

shares in UK listed companies[3] – to become actively engaged shareholder ‘stewards’.

In the 2010s, this bespoke solution to the UK’s ‘ownerless corporations’ problem went global. UK-style stewardship codes (in the broad sense) now exist in 20 jurisdictions, on 6 continents, and are embedded in a panoply of legal systems, shareholder markets, and corporate cultures.[4] In addition, stewardship codes have been developed at international and regional levels,[5] making shareholder stewardship an international corporate law phenomenon.[6] The appearance of UK-style stewardship codes and similar initiatives in such diverse and foreign environments should have alerted us to the fact that there was still much to be explored – but the existing Anglo-American-centric scholarship was blinding.[7]

[3] The latest data from the Office of National Statistics reveal that 80.4% of UK public equity as of 2018 is in the hands of institutional investors, but the majority of them (54.9%) are foreign (non-UK) investors. See Office for National Statistics, ‘Ownership of UK quoted shares: 2018’ (14 January 2020) <https://www.ons.gov.uk/economy/investmentspensionsandtrusts/bulletins/ownershipofukquotedshares/2018> accessed 25 May 2021.

[4] Appendix and Table 1.2. We adopt the broadest definition of stewardship codes as including ‘preliminary stewardship initiatives’. As such, we have included Norway in the Appendix of stewardship codes in this Chapter and included a chapter on Norway in this book for comparative purposes. For the definitional distinction between stewardship codes and preliminary stewardship initiatives on the basis of three criteria (drafting style, content and scope), see Katelouzou and Siems, The Global Diffusion of Stewardship Codes, Chapter 30. See also Mähönen, Sjåfjell and Mee, Stewardship Norwegian-Style, Chapter 8 (noting that Norway does not have a stewardship code in the conventional sense but a ‘preliminary stewardship initiative’).

[5] The most important transnational stewardship codes include the ones developed by the European Fund and Asset Management Association (EFAMA) and International Corporate Governance Network (ICGN). The revised EU Shareholder Rights Directive (Directive (EU) 2017/828 of the European Parliament and of the Council of 17 May 2017 amending Directive 2007/36/EC as regards the encouragement of long-term shareholder engagement [2017] OJ L132/1 (SRD II)) also incorporates aspects of shareholder stewardship usually found in stewardship codes in its Articles 3g (engagement policy), 3h (investment strategy of institutional investors and arrangements with asset managers) and 3i (transparency of asset managers), but it is excluded from the Appendix because of its legal nature as a directive rather than a code. Further on the stewardship provisions of the SRD II, see Iris H–Y Chiu and Dionysia Katelouzou, ‘From Shareholder Stewardship to Shareholder Duties: Is the Time Ripe?’ in Hanne S Birkmose (ed), *Shareholders’ Duties* (Kluwer Law International 2017) 131–152 and Dionysia Katelouzou and Konstantinos Sergakis, ‘When Harmonization is Not Enough: Shareholder Stewardship in the European Union’ (2021) 22 *European Business Organization Law Review* 203.

[6] The role of international organizations as key standard setters of corporate law today is illuminated in the recent work by Pargendler, who highlights that in the area of stewardship the IMF and World Bank have also supported the diffusion of norms through their ROSC (Report on the Observance of Standards and Codes) assessments. See Mariana Pargendler, ‘The Rise of International Corporate Law’ (2020) ECGI Law Working Paper No 555/2020 <https://ssrn.com/abstract=3728650> accessed 25 May 2021.

[7] Gen Goto, Alan K Koh and Dan W Puchniak, ‘Diversity of Shareholder Stewardship in Asia: Faux Convergence’ (2020) 53 *Vanderbilt Journal of Transnational Law* 829. See also, Koh, Puchniak and Goto, Shareholder Stewardship in Asia, Chapter 29. It should be noted that Jennifer Hill’s article (Jennifer G Hill, ‘Good Activist/Bad Activist: The Rise of International Stewardship Codes’ (2018) 41 *Seattle University Law Review* 497) stands out as a piece of research that preceded this project that undertook a comparative analysis of stewardship. However, as noted in Chapter 29, ‘Although Hill correctly identifies the difference in policy objectives between [codes] she does not go so far as to consider the alternative possibility that stewardship itself means different things in [different

To the best of our knowledge, before this project, never before had corporate law experts from each of the 20 jurisdictions with a stewardship code been brought together to undertake an in-depth contextual, comparative and empirical analysis of shareholder stewardship.[8] The result of this undertaking – which also includes an analysis of stewardship in the world's two largest economies without stewardship codes (China and Germany) – is the revelation that stewardship is far more complex than originally understood. However, merely revealing that something is complex is of marginal benefit – understanding the drivers and consequences of the complexity is where valuable insights are gained.

Against this backdrop, the goal of this Chapter is to explain why shareholder stewardship around the world – *global shareholder stewardship* – is far more complex than the existing literature suggests, and how this complexity impacts current theories and existing practices. To explain complexity, this Chapter provides a loose taxonomy of global shareholder stewardship by categorizing stewardship along three dimensions. The first-dimension illuminates how stewardship can be *conceived* in a variety of ways – which makes the intellectual exercise of understanding stewardship complex and presents a challenge for policymakers to implement an idea with multiple conceptions. The second-dimension compares the *formal design* and *content* of stewardship codes globally and reveals that they have largely been modelled after the first version of the UK Code (2010/2012) – creating a mirage of global uniformity based on the UK Model of stewardship. The third-dimension demonstrates how the different origins of the codes (government codes versus institutional investor codes), a variety of mechanisms for enforcing (or not enforcing) codes, and jurisdiction-specific corporate governance factors that impact how the codes *function*, result in stewardship serving a variety of functions

jurisdictions]'. In a subsequent article, Hill summarized recent developments in Asia as follows: 'Japan adopted its own Stewardship Code, based on the U.K. model, in 2014, and many other Asian jurisdictions have now followed suit.' See Jennifer G Hill, 'The Trajectory of American Corporate Governance: Shareholder Empowerment and Private Ordering Combat' [2019] *University of Illinois Law Review* 507, 516.

[8] Chapters with empirical evidence include: Van der Elst and Lafarre, Shareholder Stewardship in the Netherlands, Chapter 4; Birkmose and Madsen, The Danish Stewardship Code, Chapter 7; Ringe, Stewardship and Shareholder Engagement in Germany, Chapter 9; Kang and Chun, Korea's Stewardship Code and the Rise of Shareholder Activism, Chapter 11; Lin, The Assessment of Taiwan's Shareholder Stewardship Codes, Chapter 12; Donald, Stewardship in the Hong Kong International Financial Centre, Chapter 13; Tan, Institutional Investor Stewardship in Malaysia, Chapter 15; Kowpatanakit and Bunaramrueang, Thai Institutional Investors Stewardship Code and its Implementation, Chapter 16; Varottil, Shareholder Stewardship in India, Chapter 17; Puchniak and Lin, Institutional Investors in China, Chapter 18; Ouko, Stewardship Code in Kenya, Chapter 22; Katelouzou and Klettner, Sustainable Finance and Stewardship, Chapter 26; Katelouzou and Sergakis, Shareholder Stewardship Enforcement, Chapter 27; Katelouzou and Siems, The Global Diffusion of Stewardship Codes, Chapter 30.

which would have never been anticipated by the original drafters of the UK Code. This complexity, which has largely been overlooked in the literature, creates *distinct varieties of stewardship*. Based on the distinct varieties of stewardship in jurisdictions around the world, this Chapter concludes by illuminating the *challenges* and *possibilities* of global shareholder stewardship. The taxonomy also serves as a useful lens for observing the common themes and points of intersection that make the whole of this Book greater than the sum of its individual Chapters.

II. MULTIPLE CONCEPTIONS OF SHAREHOLDER STEWARDSHIP: INTELLECTUAL COMPLEXITY REVEALED

The starting point for any comparative analysis is to identify the subject of comparison. At the outset of this project, we (incorrectly) assumed that this would be relatively simple as the project was focused on a global comparison of 'shareholder stewardship'. What we quickly realized, however, was that 'shareholder stewardship' is an ambiguous term, which has come to mean different things, at different times, in different places.

Based on our review of the Chapters in this Book, there are at least five conceptions of what the term 'shareholder stewardship' means. The first conception is that institutional investors will *actively engage* as 'stewards' in the *corporate governance* of companies in which they are shareholders. This concept of stewardship fits with the idea behind the original UK Code 2010 and its revised 2012 version:[9] to incentivize passive institutional investors to become active shareholder stewards by using a 'comply or explain' code.[10] In theory, this concept of stewardship made sense in the UK context as institutional investors own a majority of shares in listed companies and, therefore, collectively have the legal right to steward them *if* they have the incentive to do so. Although in theory the concept was sound, in practice, after a decade, the consensus is that the UK Code 2010/2012 (which are fundamentally the same)[11] failed to incentivize institutional

[9] Financial Reporting Council, *The UK Stewardship Code* (September 2012) <https://www.frc.org.uk/getattachment/d67933f9-ca38-4233-b603-3d24b2f62c5f/UK-Stewardship-Code-(September-2012).pdf> accessed 25 May 2021 [hereinafter UK Code 2012].

[10] The overall aim of shareholder stewardship in the original UK codes was to promote long-term shareholder value in alignment with the principle of enlightened shareholder value which is mandated under the Companies Act 2006, s 172. See Dionysia Katelouzou, *The Path to Enlightened Shareholder Stewardship* (CUP 2022) (forthcoming).

[11] See also Davies, The UK Stewardship Code 2010-2020, Chapter 2, and Katelouzou (n 10) (referring to them together as the 'first version' or 'first generation' of the UK Code, respectively).

investors to become actively engaged shareholder stewards.[12] Surprisingly, despite this domestic failure, this original, corporate-governance-focused, concept of stewardship appears in the overwhelming majority of the jurisdictions in the world that have adopted a stewardship code (a curiosity that we will examine in detail below).

However, despite its global ubiquity, this original, corporate-governance-focused, concept of stewardship is a *misfit* in all the jurisdictions that have adopted a code, with the notable exceptions of the UK and US.[13] This is because, outside of the UK and US, institutional investors rarely own a majority of shares in listed companies.[14] Therefore, even if the code succeeds in transforming institutional investors into actively engaged shareholders, they will not have the collective legal power to 'steward' listed companies in most of the jurisdictions around the world. This is reinforced by the fact that outside of the UK and US, and a handful of other jurisdictions, a substantial portion of companies have a rationally active *controlling-block-shareholder* who has the legal rights and economic incentive to steward the company.[15] In these jurisdictions, 'ownerless companies' are virtually non-existent and passive institutional investors – who only own a minority of shares in listed companies – are more akin to 'absentee tenants' than 'absentee landlords'.[16] Thus, in practice, outside of the UK and US, the original corporate-governance-focused conception of stewardship on the part of institutional investors theoretically should have a completely different target.

This is how the second conception of stewardship emerged. While in the UK and the US the direct target of shareholder stewardship is corporate (mis)management, in jurisdictions with increased concentration of equity ownership, shareholder stewardship arguably should be conceived to transform institutional investors into actively engaged shareholders to monitor controlling shareholders and reduce 'tunnelling'.[17] Using the economic jargon, while the first conception of shareholder stewardship aims to minimise the agency problems between corporate managers and shareholders, the second conception aims to solve the agency problems between majority and controlling

[12] For an early critique, see Brian R Cheffins, 'The Stewardship Code's Achilles' Heel' (2010) 73 *Modern Law Review* 1004. More recently, see John Kingman, 'Independent Review of the Financial Reporting Council' (Department for Business, Energy and Industrial Strategy, December 2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/767387/frc-independent-review-final-report.pdf> accessed 25 May 2021 [hereinafter Kingman Review]; Edward Rock, 'Institutional Investors in Corporate Governance' in Jeffrey Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (OUP 2018) 16-28.

[13] Dan W Puchniak, 'The False Hope of Stewardship in the Context of Controlling Shareholders' (2021) *The American Journal of Comparative Law* (forthcoming).

[14] Puchniak (n 13); Lim and Puchniak, Can a Global Legal Misfit be Fixed?, Chapter 28.

[15] For a detailed discussion, see Part IV below.

[16] Puchniak (n 13); See also Lim and Puchniak, Can a Global Legal Misfit be Fixed?, Chapter 28.

[17] Lim and Puchniak, Can a Global Legal Misfit be Fixed?, Chapter 28.

shareholders.[18] Although controlling shareholders, rather than management, should be the key target of corporate-governance-focused shareholder stewardship where concentrated ownership structures prevail, there is surprisingly no stewardship code which has explicitly adopted this second conception of stewardship. Rather, as explained below, almost all stewardship codes have been modelled on the UK Code 2010/2012, and there are only passing references to the need for engagement by institutional investors-stewards with controlling shareholders in two jurisdictional-specific codes, that of Canada and Kenya.[19] The International Corporate Governance Network (ICGN) model code also provides that '[i]n the case of controlled companies, investor engagement may also extend to meeting with controlling shareholders'.[20] But these passing references to controlling shareholders in the current stewardship codes fall short of focusing on the potential of institutional shareholder driven stewardship to act as a check on controlling shareholder power.[21]

The third conception of stewardship identifies the corporate governance actor who has actual control over the company and creates a code to try to encourage that actor to steward the company in a way that maximizes the benefits for all stakeholders. The most

[18] For a seminal analysis of the various legal strategies to mitigate these agency problems, see Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe and Edward Rock (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, OUP 2017).

[19] See Principle 4 of the Canadian Code (Canadian Coalition for Good Governance, 'Stewardship Principles' (May 2020) <https://ccgg.ca/wp-content/uploads/2020/05/2020-Stewardship-Principles-CCGG-new-branding.pdf> accessed 25 May 2021) and paragraph 2 of the application section of the Kenyan Code (Stewardship Code for Institutional Investors 2017 (9 May 2017), enacted by the Capital Markets Authority vide Kenya Gazette Notice No. 6016 dated 23 June 2017), respectively. It is also notable that the Securities and Futures Commission in its consultation preceding the adoption of the Hong Kong code noted that '[i]n a market dominated by controlling shareholders, there is evidence to support the view that investors will often find it more productive to engage directly with the controlling shareholder rather than seek to engage with the board of directors as a whole through the usual voting channels'. See Securities and Futures Commission, 'Consultation Paper on the Principles of Responsible Ownership' (2015) 6, para 25 <https://www.sfc.hk/edistributionWeb/gateway/EN/consultation/openFile?refNo=15CP2> accessed 29 May 2021. But this different target of stewardship was not incorporated in the final Hong Kong code: Koh, Puchniak and Goto, Shareholder Stewardship in Asia, Chapter 29. See also, Goto, Koh and Puchniak (n 7).

[20] International Corporate Governance Network, *ICGN Global Governance Principles* (2016) 17, Principle 4.4 <http://icgn.flpbks.com/icgn-global-stewardship-principles/files/extfile/DownloadURL.pdf> accessed 25 May 2021. For a discussion of this point see, Goto, Koh and Puchniak (n 7).

[21] It is noteworthy that the 2018 Chinese Corporate Governance Code appears to adopt the second concept of stewardship in its attempt to incentivize institutional investors to engagement in the corporate governance of their investee companies to act as a check on controlling shareholders. However, as explained in Puchniak and Lin, Institutional Investors in China, Chapter 18, this use of institutional investors as a check on controlling shareholder power has a long history in China and must be understood on its own terms. To label it as 'stewardship' would be to incorrectly impose an Anglo-American understanding on an autochthon Chinese corporate governance mechanism.

prominent example of this is the 'Stewardship Principles for Family Businesses' in Singapore (Singapore Family Code).[22] The concept at the core of the Singapore Family Code is to use soft law to incentivize family controllers to use their controlling power to benefit all corporate stakeholders and society. This concept of stewardship arguably makes sense in the Singaporean context as a majority of listed companies are family firms with controlling shareholders who have the legal right and economic incentive to steward the company.[23] Stewardship Asia, which is based in Singapore and released the Singapore Family Code, has been promoting it throughout Asia where family firms make up a significant portion of listed companies in many jurisdictions.[24] While the Family Code has not yet gained traction in other jurisdictions, conceiving controlling shareholders, such as family controllers or the state, as stewards, is not alien to the way shareholder stewardship is, in reality, already practiced in many jurisdictions with concentrated ownership structures.[25] Private benefits of control may jeopardize the effectiveness and efficiency of this type of stewardship,[26] but what becomes clear is that current stewardship practices are indicative that the conventional boundaries between the different stewards – 'institutional investor stewards' versus 'non-institutional investor stewards' – are already blurred in most Non-UK/US jurisdictions, as they tend to have an abundance of controlling shareholders.

A fourth conception of stewardship – which only recently gained increasing prominence – is institutional investor driven stewardship with the aim of advancing the *Environmental, Social, and Governance* (ESG) movement. This conception of stewardship differs from the previous ones in two respects. First, the primary target of stewardship is not to solve any specific agency problem, but rather to incentivize the companies in which institutional investors invest to adopt an ESG agenda.[27] Second, it

[22] Stewardship Asia Centre, *Stewardship Principles for Family Businesses* (2018) <https://www.stewardshipasia.com.sg/sites/default/files/2020-09/SPFB-brochure-0913.pdf> accessed 25 May 2021 [hereinafter Singapore Family Code]. Puchniak and Tang, Singapore's Embrace of Shareholder Stewardship, Chapter 14.

[23] See Lim and Puchniak, Can a Global Legal Misfit be Fixed?, Chapter 28, for a critique of the Singapore Family Code (n 22) as a mechanism for mitigating the majority/minority agency problem that is prominent in jurisdictions dominated by controlling shareholders.

[24] Puchniak and Tang, Singapore's Embrace of Shareholder Stewardship, Chapter 14.

[25] Puchniak and Tang, Singapore's Embrace of Shareholder Stewardship, Chapter 14; Lim and Puchniak, Can a Global Legal Misfit be Fixed?, Chapter 28; Koh, Puchniak and Goto, Shareholder Stewardship in Asia, Chapter 29.

[26] Lim and Puchniak, Can a Global Legal Misfit be Fixed?, Chapter 28.

[27] There is a portion of ESG stewardship which may fall under the agency problem between the company and society, which is explained as the third type of agency problem that corporate law may address: Kraakman, Armour, Davies, Enriques, Hansmann, Hertig, Hopt, Kanda, Pargendler, Ringe and Rock (n 18) 36. However, ESG is more than preventing companies from producing 'negative externalities' but also includes incentivizing companies to be an agent of positive change to solve societal problems that they themselves may not have created.

aims to provide the ultimate beneficiaries of institutional investors with the information and means to channel their funds towards ESG investments. Although this concept of stewardship was non-existent in the UK Code 2010 and received only a fleeting reference in the UK Code 2012, it is at the core of the latest version of the UK Code (UK Code 2020).[28] This recent shift in the focus of stewardship in the UK has been described by a preeminent UK corporate law academic as a movement 'from saving the company to saving the planet'.[29] It is also noteworthy that over the last decade this ESG concept of stewardship has found its way into stewardship codes around the world. Empirical evidence based on a review of the text of the latest versions of stewardship codes reveals that 84 percent of the codes now refer 'at least once to ESG factors' and that only four current codes (i.e., Danish Code 2016, Korean Code 2016, Swiss Code 2013, and US Code 2017) do not mention ESG factors at all.[30]

The fifth – and final – conception of stewardship is about what stewardship means 'inwards' for the institutional investors themselves. This conception is focused on the 'investment management' side of stewardship, that is the relationship between the institutional investor – an investment intermediary – and their ultimate beneficiaries/clients. Most investors are organised on the basis of what has been described as a 'separation of funds and managers'.[31] This means that the investors' assets and liabilities are placed into one entity, the fund, whereas the fund's assets are managed by a separate entity, the management company.[32] The primary goal of this conception of stewardship is to reconcile a constructive stewardship role with the investors' own internal business models. The inaugural UK Code 2010/2012 incorporated good investment management practices within the notion of shareholder stewardship, such as managing conflicts of interests (between funds, between managers and funds investors,

[28] Financial Reporting Council, *The UK Stewardship Code 2020* (2019) <https://www.frc.org.uk/getattachment/5aae591d-d9d3-4cf4-814a-d14e156a1d87/Stewardship-Code_Dec-19-Final-Corrected.pdf> accessed 25 May 2021 [hereinafter UK Code 2020].

[29] Davies, The UK Stewardship Code 2010-2020, Chapter 2.

[30] Katelouzou and Klettner, Sustainable Finance and Stewardship, Chapter 26. This change in the focus of shareholder stewardship from corporate governance problems to societal problems needs to be understood within the increasing shift of 'corporate purpose' away from a sole focus on shareholder primacy. The debate is currently taking prominence in the US and the UK, the two countries where the original corporate-governance-focused conception of stewards found fertile ground. For a good overview of the relevant literature see Edward Rock, 'For Whom is the Corporation Managed in 2020?: The Debate Over Corporate Purpose' (2020) ECGI Law Working Paper No 515/2020 <https://ssrn.com/abstract=3589951> accessed 25 May 2021.

[31] John Morley, 'The Separation of Funds and Managers: A Theory of Investment Fund Structure and Regulation' (2014) 123 *The Yale Law Journal* 1228, 1232.

[32] The resulting separation of funds and managers alienates the owners of record and the beneficial owners and results in what has been defined as 'the agency costs of agency capitalism'. See Ronald Gilson and Jeffrey Gordon, 'The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights' (2013) 113 *Columbia Law Review* 863.

and between investors) in discharging stewardship and promoting transparency across the investment chain. These principles travelled well around the world,[33] but even though the corporate governance and investment management sides of stewardship are intertwined,[34] the investment management side of stewardship has remained at the periphery of the academic and policy debates.[35] One explanation may be that the original UK Code did not make it clear whether institutional investors, by discharging their stewardship obligations as shareholders in their investee companies (i.e., the 'corporate governance side' of stewardship), were concurrently discharging their duties to their clients and ultimate beneficiaries (i.e., the 'investment management-side' of stewardship). The failure to explicitly identify the difference between the corporate governance and investment management sides of stewardship, and how they interrelate, has often resulted in the importance of the investment management side of stewardship being overlooked.[36]

Against a largely monolithic literature and practice with a narrow focus on the first conception of shareholder stewardship as good corporate governance by institutional investors in dispersed-owned companies – and more recently on ESG – our taxonomy adds significant value in capturing a variety of stewards (institutional investors and various controlling shareholders) and targets (corporate governance, ESG, investment management) which all contribute to how shareholder stewardship is *conceived*. Indeed, without all five conceptions it is impossible to accurately understand the past or anticipate the future of global shareholder stewardship. By recognizing the existence, problems, and possibilities raised by the five conceptions of global shareholder stewardship and their overlap, this Book adds significant insight and detail to what we know of stewardship around the world.

Finally, before moving on, two important points concerning the terminology used for this comparative and contextual analysis must be explained. We chose to use the term 'shareholder stewardship' over the term 'investor stewardship' for two reasons: first, we

[33] See Part III.

[34] For a thorough analysis of the links between the two sides of stewardship in the UK, see Roger M Barker and Iris H-Y Chiu, *Corporate Governance and Investment Management: The Promises and Limitations of the New Financial Economy* (Edward Elgar Publications 2017) 4 (calling this 'the 'governance nexus' between the fund management sector and the corporate sector'). It is also important to note here that the investment management side of stewardship is interrelated to all the other conceptions of stewardship except for the third one, which views controlling shareholders as the potential stewards. For all the other conceptions of stewardship investment management sets the means, limits and possibilities for the institutional investors' stewardship abilities and capacities.

[35] For an exception, see Barker and Chiu, Investment Management, Stewardship and Corporate Governance Roles, Chapter 25. On the incentives and abilities of index funds to pursue stewardship, see Fisch, The Uncertain Stewardship Potential of Index Funds, Chapter 21.

[36] This gap was filled by the UK Code 2020 (n 28) which clarifies that shareholder engagement is part of good investment management. See, further, Katelouzou (n 10).

do not solely focus on 'institutional investor stewards' but also consider 'non-institutional investor stewards' (e.g., different types of controlling shareholders); and second, our focus is on the roles of these stewards as shareholders of public companies. We also prefer the term 'shareholder stewardship' over merely the term 'stewardship', which is too broad to be analytically useful.

III. How the Seven Principles of the UK Code Went Global

A. *The Historical Roots of the UK-Cum-Global Stewardship Code Model*

In 1991, the Institutional Shareholders' Committee (ISC), a private body composed of four prominent UK institutional investors and fund managers, released a statement entitled 'The Responsibilities of Institutional Shareholders in the UK'.[37] This statement, which was only three pages long and included nine principles of good practice, can be seen as the genesis of the first corporate-governance-focused conception of shareholder stewardship – despite the intriguing absence of the word 'stewardship' from its text. It was revised three times in 2002, in 2005, and in 2007, until in 2009 it was reformulated into seven principles – 'The ISC Code on the Responsibilities of Institutional Investors' – which formed the basis for the UK Code in 2010.[38]

Although the ISC Code can be seen as the genesis of shareholder stewardship codes, the UK Code 2010 is often referred to as the world's first stewardship code. This is largely because the UK Code 2010 was released by the Financial Reporting Council (FRC), a quasi-government body, which gave it the imprimatur of the UK government. By 2010, the UK had established itself as a global corporate governance leader by creating the world's first corporate governance code, which had by then been transplanted around the world. In this context, the UK Code 2010 seemed like an encore by the UK to reaffirm its status as a global corporate governance leader – but this time by focusing on shareholder stewardship.[39] The position of the UK Code as the global 'gold standard' has been

[37] See Katelouzou and Zumbansen (n 2) 91-2 (elaborating the synthesis of the ISC and the evolution of its principles).

[38] In its consultation preceding the introduction of the UK Code, the FRC recognised the ISC 2009 Code as a 'good starting code' for the UK Code and included it in Appendix B. See Financial Reporting Council, 'Consultation on a Stewardship Code for Institutional Investors' (19 January 2010) <https://www.frc.org.uk/consultation-list/2010/consultation-on-a-stewardship-code-for-institution> accessed 25 May 2021. For a comprehensive analysis of the history of the UK Code, see Katelouzou (n 10).

[39] Recommendation 17 of the Walker Review which recommended FRC to 'ratify' the ISC Code. See David Walker, 'A Review of Corporate Governance in UK Banks and Other Financial Industry Entities.

reinforced by European and international bodies (both public and private ones)[40] adopting to a large extent the UK Code 2010/2012 model of the seven principles – part of a larger movement which has recently been coined 'international corporate governance'.[41] Several Chapters in this Book analyse the seven principles of the UK Code 2010/2012 and the details will not be repeated here. Table 1.1 below provides a snapshot of the seven core principles of the UK Code 2010, which were transferred almost completely into the revised UK Code 2012.

Table 1.1: The Seven Core Principles in the UK Code 2010/2012

Principle 1	Publicly disclose their policies on how they will discharge stewardship responsibility
Principle 2	Have a robust policy on managing conflicts of interest
Principle 3	Monitor investee companies
Principle 4	Establish clear guidelines on when and how to escalate stewardship activities
Principle 5	Willing to work collectively with other investors
Principle 6	Have a clear policy on voting and disclosure of voting activity
Principle 7	Report periodically on stewardship and voting activities to their client/beneficiaries

The UK Code 2010/2012 has had a significant impact globally. Before the publication of the UK Code in 2010, the only trace of shareholder stewardship outside the UK was in the 2005 Canadian Coalition for Good Governance statement on shareholder involvement by a group of Canadian institutional investors.[42] Internationally, some early stewardship traces can be found in the ICGN 'Statement on Institutional Shareholder Responsibilities' published in 2003.[43] However, these two pre-2010 stewardship initiatives bear little resemblance to the stewardship codes that proliferated after 2010 based on the UK Code 2010/2012.[44]

Following the publication of the UK Code in 2010, stewardship codes have been issued in 20 jurisdictions on six continents (8 in Asia, 6 in Europe, 2 in Africa, 2 in North

Final Recommendations' (26 November 2009) <https://ecgi.global/sites/default/files/codes/documents/walker_review_261109.pdf> accessed 25 May 2021 [hereinafter Walker Review]. See further Katelouzou (n 10).

[40] See text accompanying n 6.

[41] Pargendler (n 6).

[42] Williams, Stewardship Principles in Canada, Chapter 20.

[43] International Corporate Governance Network, 'ICGN Statement on Institutional Shareholder Responsibilities' (2003) <https://www.icgn.org/sites/default/files/2003%20Statement%20on%20Shareholder%20Responsibilities.pdf> accessed 25 May 2021.

[44] For empirical evidence, see Katelouzou and Siems, The Global Diffusion of Stewardship Codes, Chapter 30.

America, 1 in Australia, and 1 in South America).[45] In three jurisdictions, more than one type of stewardship code has been issued to deal with either different types of institutional investors (Australia/India) or different types of shareholders (Singapore).[46] In addition, in several jurisdictions (Canada, India, Italy, Japan, Netherlands, Norway and the UK) a subsequent amended version(s) of the inaugural stewardship code has been issued – resulting in a total of 35 codes having been issued in 20 jurisdictions.[47] To this impressive list one should add the European Fund and Asset Management Association (EFAMA) and ICGN codes which were issued by regional and international bodies respectively – resulting in a total of 39 stewardship codes being issued after 2010.

B. *Evidence from the Formal Design and Content of Non-UK Stewardship Codes*

1. The Core Principles of the UK Code Have Been Transplanted Around the World

Prior to this Book project, it was often assumed that UK-style stewardship had been transplanted around the world.[48] However, this claim had never been tested. This assumption likely arose for good reasons. First, the UK Code 2010 has widely come to be considered the world's first stewardship code and stewardship codes began to appear around the world following its release. Second, over the past two decades UK-style corporate governance codes had been adopted in 90 jurisdictions around the world and stewardship codes were seen to likely follow the same path.[49] Third, and perhaps most importantly, in jurisdictions that adopted codes leading academics, government officials, and/or the text of the code itself explicitly recognize the influence of the UK Code 2010/2012.[50] Indeed, in the main Conference which brought together leading corporate

[45] See Appendix for the full list of Stewardship Codes. We adopt a broad definition of stewardship codes as including 'preliminary stewardship initiatives', like the one in Norway. For the definitional details see Katelouzou and Siems, The Global Diffusion of Stewardship Codes, Chapter 30, Part III.A.

[46] See Appendix for details.

[47] See Appendix for details.

[48] Koh, Puchniak and Goto, Shareholder Stewardship in Asia, Chapter 29.

[49] However, despite comparisons between the global spread of UK-style corporate governance codes and UK-style stewardship codes, the proliferation of the former has been far greater – as corporate governance codes now exist in almost 90 jurisdictions and have made independent directors globally ubiquitous. See Puchniak (n 13).

[50] Australian Council of Superannuation Investors, 'Australian Asset Owner Stewardship Code' (May 2018) 1 <https://acsi.org.au/wp-content/uploads/2020/01/AAOSC_-The_Code.pdf> accessed 25 May 2021 [hereinafter Australian (ACSI) Code 2018]; Financial Services Council, 'FSC Standard 23: Principles of Internal Governance and Asset Stewardship' (July 2017) 7 <https://www.fsc.org.au/web-

governance scholars and policymakers from all the jurisdictions with codes for this Book project, perhaps the most common theme was that jurisdictions had modelled their codes on the UK Code 2010/2012. This theme was based primarily on repeated references to stewardship codes around the world being modelled on the seven core principles contained in the UK Code 2010/2012[51] – which over the course of the Conference were coined the 'UK's Seven Magic Principles'.[52]

It is one thing for academics and policymakers to say that their jurisdiction intended to use the UK Code 2010/2012 as the model and another to verify whether this general impression was put into practice. To determine this, it makes sense to analyse the *formal design* of Non-UK stewardship codes along three dimensions, their: (1) core concept; (2)

page-resources/fsc-standards/1522-23s-internal-governance-and-asset-stewardship> accessed 25 May 2021 [hereinafter Australian (FSC) Code 2017]; Associação de Investidores no Mercado de Capitais (AMEC), 'Código AMEC de Princípios e Deveres dos Investidores Institucionais: Stewardship [AMEC Code of Principles and Duties of Institutional Investors: Stewardship]' (27 October 2016) 6 <https://en.amecbrasil.org.br/wp-content/uploads/2016/11/livreto_stweardship_eng_site.pdf> accessed 25 May 2021 [hereinafter Brazil Code 2016]; Williams, Stewardship Principles in Canada, Chapter 20; The Committee on Corporate Governance, 'Stewardship Code' (November 2016) 3 <https://corporategovernance.dk/sites/default/files/180116_stewardship_code.pdf> accessed 25 May 2021 [hereinafter Danish Code 2016]; Donald, Stewardship in the Hong Kong International Financial Centre, Chapter 13; Varottil, Shareholder Stewardship in India, Chapter 17; Strampelli, Institutional Investor Stewardship in Italian Corporate Governance, Chapter 6; Goto, Japanese Stewardship Code, Chapter 10; Ouko, Stewardship Code in Kenya, Chapter 22; Kang and Chun, Korea's Stewardship Code and the Rise of Shareholder Activism, Chapter 11; Minority Shareholder Watchdog Group (MSWG) and Securities Commission Malaysia (SC), 'Malaysian Code for Institutional Investors' (June 2014) 18 <http://www.iicm.org.my/wp-content/uploads/2018/05/MALAYSIAN-CODE-FOR-INSTITUTIONAL-INVESTORS-MCII.pdf> accessed 25 May 2021 [hereinafter Malaysian Code 2014]; Eumedion, 'Best Practices for Engaged Share-Ownership Intended for Eumedion Participants' (30 June 2011) 2 <https://www.eumedion.nl/en/public/knowledgenetwork/best-practices/best_practices-engaged-share-ownership.pdf> accessed 25 May 2021 [hereinafter Dutch Code 2011]; Eumedion, 'Dutch Stewardship Code' (20 June 2018) 2 <https://www.eumedion.nl/en/public/knowledgenetwork/best-practices/2018-07-dutch-stewardship-code-final-version.pdf> accessed 25 May 2021 [hereinafter Dutch Code 2018]; Puchniak and Tang, Singapore's Embrace of Shareholder Stewardship, Chapter 14; Institute of Directors in Southern Africa, 'Code for Responsible Investing in South Africa 2011' (2011) 12 <https://cdn.ymaws.com/www.iodsa.co.za/resource/resmgr/crisa/crisa_19_july_2011.pdf> accessed 25 May 2021 [hereinafter South African Code 2011]; Association Suisse des Institutions de Prévoyance (ASIP), 'Guidelines for Institutional Investors Governing the Exercising of Participation Rights in Public Limited Companies' (21 January 2013) 3 <https://ecgi.global/code/guidelines-institutional-investors-governing-exercising-participation-rights-public-limited> accessed 25 May 2021 [hereinafter Swiss Code 2013]; Lin, The Assessment of Taiwan's Shareholder Stewardship Codes, Chapter 12; Securities and Exchange Commission, 'Investment Governance Code for Institutional Investors' (2017) 32 <https://www.sec.or.th/cgthailand/EN/Documents/ICode/ICodeBookEN.pdf> accessed 25 May 2021 [hereinafter Thai Code 2017]; Fisch, The Uncertain Stewardship Potential of Index Funds, Chapter 21.

[51] See Table 1.1.

[52] Dionysia Katelouzou and Henning Jacobsen, 'Global Shareholder Stewardship: A Conference Report' (2020) 24 <https://ssrn.com/abstract=3610792> accessed 25 May 2021 ('[w]hat all the jurisdictional panels have demonstrated is that ostensibly 'seven' is the 'magic number' in terms of stewardship principles').

primary content; and (3) text/language.[53] As explained, the *core concept* of the UK Code 2010/2012 was to incentivize passive institutional investors to become active shareholder stewards by using a 'comply or explain' code. An examination of all 36 jurisdictional and inter-jurisdictional non-UK codes published after 2010 reveals that the only code that does not conceptualize institutional investors as being the focus of stewardship is the Singapore Family Code.[54] In addition, in the 35 stewardship codes that see institutional investors as the 'stewards', 29 out of 35 are designed overwhelmingly around the first conception of stewardship: that institutional investors will *actively engage* as 'stewards' in the *corporate governance* of companies in which they are shareholders – the small minority of other codes (6 out of 35) see institutional investors playing more of a role promoting ESG or focus more on the investment management conception of stewardship.[55]

In this sense, it is clear that the core concept of the UK Code 2010/2012 has served as a model which has shaped the primary target of stewardship around the world: institutional investors. This finding is significant because this concept of stewardship does not appear to fit into jurisdictions with controlling shareholders which, as explained in detail below,[56] is the shareholder landscape in all the Non-UK jurisdictions that have adopted stewardship codes (with the notable exception of the US). It has also meant that the ESG and investment management conceptions of stewardship have not been the primary focus in the vast majority of Non-UK jurisdictions – but, as explained below,[57] this may change in the near future with the UK Code 2020 adding ESG as one of its primary focal points.

In terms of the *primary content*, the vast majority of Non-UK Codes around the world adopted all, or almost all, of the seven principles in the UK Code.[58] If we consider all the 35 Non-UK Stewardship Codes (i.e., jurisdiction-specific, regional, and international codes) that focus on institutional investors, 77.29 percent have adopted all seven principles – with 91.43 percent of the codes adopting five or more principles. Thus, it is clear that the primary content of the UK Code 2010/2012 has been significantly embraced by stewardship codes globally – definitive evidence of a *UK-Cum-Global Stewardship*

[53] This approach was first developed and undertaken in Puchniak (n 13), but here we take into account both jurisdiction-specific and inter-jurisdictional codes and the use of the language of 'stewardship'.

[54] It is noteworthy that Singapore has a second code that focuses on institutional investors. As such, every jurisdiction that has adopted a stewardship code has at least one code that focuses on institutional investors: Puchniak and Tang, Singapore's Embrace of Shareholder Stewardship, Chapter 14.

[55] See Appendix. See also Part III.B.2 for a discussion of the codes that incorporate other conceptions such as ESG and investment management.

[56] Part IV.C.

[57] Part IV.E.

[58] Katelouzou and Siems, The Global Diffusion of Stewardship Codes, Chapter 30; Puchniak (n 13).

Code Model. This evidence is even more overwhelming if one considers the latest versions of all Non-UK Codes focused on institutional investors, with 83.3 percent adopting all seven UK principles and 95.8 percent adopting five or more principles. Definitively, 100 percent of the regional and international codes have adopted the seven UK principles. This reaffirms how the seven principles served as the model for the primary content of codes globally as these non-jurisdiction specific codes were intended to promote the dissemination of stewardship around the world – which empirical evidence in a Chapter in this Book proves was indeed the case.[59]

Table 1.2: Percentage of Codes that Adopted the UK Code 2010/2012's 7 Principles[60]

Types of Codes	**Number of Codes**	**Percentage that Adopted all 7 Principles**	**Percentage that Adopted 5 or More Principles**
All Stewardship Codes	36	72.2%	88.89%
Latest Versions of All Stewardship Codes	25	80%	92%
All Institutional Investor Focused Codes	35	74.29%	91.43%
Latest Version of Institutional Investor Focused Codes	24	83.3%	95.8%
All Interjurisdictional Codes	4	100%	100%
Latest Interjurisdictional Codes	2	100%	100%
All Jurisdiction Specific Codes	32	68.75%	87.5%
Latest Jurisdiction Specific Codes	23	78.26%	91.3%

In terms of the *text* of Non-UK codes, an automated textual analysis of the specific wording used in non-UK Codes in a Chapter in this Book confirms that much of the text of non-UK Codes has been copied from the UK Code 2012.[61] The UK Code 2012 is found to be the most influential text in a sample of 41 UK and non-UK stewardship codes – particularly among Asian common law jurisdictions.[62] However, the same Chapter confirms that diffusion of stewardship norms is multi-dimensional with the intra-jurisdictional codes of EFAMA and ICGN playing an influential role in the travelling of stewardship principles and with regional clusters, such as the one between Korea and Japan, also explaining jurisdictional variety in stewardship codes.[63] While studying the text of stewardship codes with computational tools revealed more complicated patterns of stewardship diffusion than then a unidimensional transfer from the UK Code

[59] See Katelouzou and Siems, The Global Diffusion of Stewardship Codes, Chapter 30.

[60] The preamble, principles and guidance of the latest versions of codes in every jurisdiction that has adopted a stewardship code for institutional investors were examined to determine whether each of the 7 core principles contained in the UK Code 2010/2012 had an equivalent provision in each jurisdictions code. See Appendix for more details.

[61] Katelouzou and Siems, The Global Diffusion of Stewardship Codes, Chapter 30.

[62] Katelouzou and Siems, The Global Diffusion of Stewardship Codes, Chapter 30; Puchniak (n 13).

[63] Katelouzou and Siems, The Global Diffusion of Stewardship Codes, Chapter 30.

2010/2012, it is admitted that a textual analysis may underestimate the extent to which core concepts or principles have been transplanted from the UK Code 2010/2012 to other codes because the same concepts are sometimes described using different words or are lost in translation when expressed in non-English languages – suggesting that the influence of the text of the UK Code 2010/2012 on codes globally may be even greater than the automated textual analysis suggests.[64]

Before concluding this Section, the linguistic choices for the titles of the codes add further evidence of the influence of the UK Code 2010/2012 as the model for stewardship codes around the world. 25 out of 36 jurisdictional-specific codes include the word 'stewardship' in their title. This demonstrates how the term 'stewardship', which was coined in the title of the UK Code 2010, has been disseminated around the world. It is interesting that policymakers and academics from the jurisdictions that did not include the word 'stewardship' in the title of their codes still tend to colloquially, and in their Chapters in this Book, refer to their codes as 'stewardship' codes – demonstrating that the UK Code 2010/2012 made 'stewardship' the lingua franca for describing these codes around the world.

2. Outliers and Deviations from the UK Model

Despite the strong evidence that the UK Code 2010/2012 has served as the model for stewardship codes around the world, there are interesting observations that can be drawn from jurisdictions which have chosen to deviate from the UK model in terms of the core concept, primary content, or text of their codes.

In terms of the *core concept*, as highlighted above and explained in detail in a Chapter in this Book, the Singapore Family Code is the only stewardship code that does not mention institutional investors.[65] Instead, it focuses on family controllers, which fits Singapore's corporate governance context as family-controlled companies comprise the vast majority of companies on the Singapore Exchange.[66] As most Non-UK jurisdictions have shareholder landscapes dominated by controlling shareholders (and not institutional investors) an interesting question is why other jurisdictions have not taken such an

[64] For instance, the Malaysian Code 2014 (n 50) does not mention even once the term 'escalat-e/ion' but in substantive terms has an equivalent principle on intervention which resembles too closely Principle 4 of the UK Code 2010/2012. Similarly, the Canadian Code (n 19) does not make any reference to the word 'collect-ive' but it includes a principle on collaborative action which draws heavily on Principle 5 of the UK Code 2010/2012. The use of different words to express similar content may be attributed to differences in translation of English words but may also suggest that the principles have been 'softened' to account for different market, legal and cultural environments.

[65] Part II. Puchniak and Tang, Singapore's Embrace of Shareholder Stewardship, Chapter 14.

[66] ibid.

approach and whether other jurisdictions will follow the Singapore Family Code model in the future – which has been promoted for export by Stewardship Asia.[67] Also, it is noteworthy that from the 35 non-UK Codes treating institutional investors as 'stewards', six do not focus on the corporate-governance oriented core concept of the UK Code 2010/2012.[68] The Norwegian Codes, Swiss Code 2013, the Australian (FSC) Code 2017, and the ICGN Code 2013 appear to place more of an emphasis on the investment management conception of stewardship than other codes, raising the question of whether this conception of stewardship will be stressed more in other codes in the future. Finally, the South African Code, which was released in 2011, adopts ESG – instead of the corporate governance of investee companies – as its core concept to be advanced by institutional investors.[69] As already mentioned, the UK Code 2020 added ESG as a major focal point, in addition to its original core concept on transforming institutional investors into actively engaged shareholder stewards. At the same time, the UK Code 2020 is much more focused on the investment management side of stewardship compared to their predecessors.[70] This, combined with the rise of the ESG movement, raises another interesting question, which we discuss below: will ESG become the core concept of stewardship codes in the future and, if so, will the UK Code 2020 serve as the new model for this movement?[71]

In terms of the *primary content*, in the small minority of Non-UK Codes that have not adopted all seven principles, two principles are most often the 'missing principles': (1) escalating monitoring activities in investee companies (Principle 4 of the UK Code 2010/2012); and, (2) collective action and collaboration among institutional investors (Principle 5 of the UK Code 2010/2012).[72] This may be because the codes which lack these principles are in jurisdictions where institutional investors collectively are minority shareholders – which as explained by one of the authors elsewhere – makes the concepts of escalation and collective action less meaningful.[73] It is also likely that because escalating activities and collective action are closely associated with shareholder activism, these principles are not well-perceived by local market and governmental actors with more stakeholder or 'communitarian' views of the firm, which in turn may explain the absence of such principles from stewardship codes in jurisdictions like Japan.[74] It is also

[67] Puchniak and Tang, Singapore's Embrace of Shareholder Stewardship, Chapter 14.

[68] See Appendix.

[69] Locke, Encouraging Sustainable Investment in South Africa, Chapter 23.

[70] Appendix. See also Katelouzou (n 10).

[71] Part IV.E.

[72] This is also confirmed by automated textual analysis: Katelouzou and Siems, The Global Diffusion of Stewardship Codes, Chapter 30.

[73] Puchniak (n 13).

[74] See Katelouzou and Siems, The Global Diffusion of Stewardship Codes, Chapter 30.

noteworthy that two early non-UK codes (Canadian Code 2010 and Italian Code 2013) did not include an equivalent of the conflicts of interests principle (Principle 2 of the UK Code 2010/2012) and two (Canadian Code 2010 and Norwegian Code 2012) did not include an equivalent to Principle 7 of the UK Code 2010/2012, which refers to periodic reporting of the stewardship activities to ultimate beneficiaries of institutional investors.[75] Both Principles 2 and 7 are part of the investment management aspect of the stewardship and their absence in earlier versions may be attributed to the fact that codes have generally deemphasized the investment management conception of stewardship. However, all three codes have now been amended to include equivalents of Principles 2 and 7 – suggesting that although investment management is not the core concept of any code it is still an important aspect of stewardship (the reasons for which are explained in detail in a Chapter in this Book).[76] Finally, it is important to note that 23 out of the 36 non-UK codes (63.9 percent) have adopted principles that are not included in the UK Code 2010/2012.[77] Among these non-UK originated principles is a principle on ESG which is found in ten stewardship codes including the UK Code 2020 – suggesting the importance of ESG in the future of stewardship.[78]

In terms of the *text*, while a Chapter in this Book has provided clear evidence of diffusion of the text of the UK Code 2012 around the world (especially among Asian common law countries but also through diffusion to the EFAMA Code 2011 and Japanese Code 2017),[79] there are interesting observations that can be drawn from codes that significantly deviate from the text used in the UK Code 2012. Four codes are found to be textually detached from the UK Code 2012 even though they all include the seven UK principles, that is the Australian (FSC) Code 2017, Australian (ACSI) Code 2018, South African Code 2011, and Taiwanese Code 2018.[80] There are three reasons for these – perhaps surprising at first – linguistic deviations. First, textual differences may be attributed to the manner in which the seven UK principles are expressed in each code which tends to differ significantly – in that some principles are combined together in a

[75] See Appendix for details.

[76] Barker and Chiu, Investment Management, Stewardship and Corporate Governance Roles, Chapter 25.

[77] Of course, here one needs to include the Singapore Family Code (n 22) which include a completely different set of principles addressed to family owners, compared to the institutional investor targeted UK model.

[78] Non-UK codes that include ESG-related principles are: Brazil Code 2016 (n 50); Canadian Code 2017/2020 (n 19); Japanese Code 2020 (n 50); Kenya Code 2017 (n 50); Malaysian Code 2014 (n 50); Dutch Code 2011/2018 (n 50); South African Code 2011 (n 50).

[79] Katelouzou and Siems, The Global Diffusion of Stewardship Codes, Chapter 30.

[80] ibid.

single 'combine principle' and others are split up into several smaller parts.[81] Second, that a non-UK Code may have all seven UK Principles does not necessarily mean that it only has these seven principles. Rather, the majority of non-UK Codes also include principles that are *not* included in the UK Code 2010/2012. For instance, the Australian (ACSI) Code 2018 includes a principle addressed to policy-makers with the aim to encourage them to 'better align the operation of the financial system and regulatory policy with the interests of long-term investors'.[82] Finally, as we have seen above, the Australian (FSC) 2017 Code and South African Code 2011 differ from the UK Code 2010/2012 in terms of their core concept which explains why despite adopting the seven UK principles these codes also have many additional principles which reflect their different core concepts, investment management and ESG, respectively.

Another important observation is that while textual differences, when the primary content of non UK-Codes is similar to the UK 2010/2012 model, do not challenge the basic proposition that the UK Code 2010/2012 served as the global stewardship model, there are a few codes that are different from the UK model both in terms of text and primary content. Two non-UK codes stand out here: the Brazil Code 2016 and the Swiss Code 2013. They are both found to be textually dissimilar to the UK model.[83] And, they both differ from the UK model in terms of their primary content.[84] The Brazil Code 2016 has a Principle with no direct correspondence with the UK model, that is Principle 3 which urges institutional investors to take into account ESG factors.[85] The Swiss Code 2013 is the code that lacks most of the UK principles (it only has 4 out of 7) which may be attributed to the fact that the code has a different core concept: it focuses on the investment management side of stewardship and aims to minimize the agency costs between asset managers and their clients, rather than turning institutional investors to active monitors of investee companies.[86]

IV. Varieties of Global Shareholder Stewardship: Complexity Revealed

It has been over two decades since the legal origins theory captivated comparative

[81] There is, therefore, a great variety in the number of the principles among non-UK Codes, with the Australian (FSC) Code 2017 (n 50) and Taiwanese Code 2018 (n 50), for instance, having 3 and 6 generic principles, respectively.

[82] The Australian (FSC) Code 2017 (n 50) and South African Code 2011 (n 50) also include principles that are not included in the UK Code 2010/2012. See Part IV.A below.

[83] Katelouzou and Siems, The Global Diffusion of Stewardship Codes, Chapter 30.

[84] See Appendix.

[85] Becker, Andrade and Prado, The Brazilian Stewardship Framework, Chapter 24.

[86] Daeniker and Hertig, Capitalist Stakeholders, Chapter 5.

corporate law scholarship based purely on a comparison of 'corporate law on the books' – without any examination into how the corporate law provisions that were being compared across jurisdictions were enforced and actually functioned in practice.[87] Although the original legal origins research is heavily cited and its progeny spawned an index currently (mis)used by the World Bank,[88] its validity and ability to accurately explain the reality of how corporate law functions in different jurisdictions has been persuasively debunked.[89] In the wake of the legal origins debacle, a primary lesson learned is that examining how the law is enforced and analysing other jurisdiction-specific factors that influence how the law functions in practice are critical for any meaningful comparative corporate law analysis. Based on our review of the Chapters in this Book, the case of stewardship codes is no exception.

From our analysis in Part III, it is clear that the UK Code 2010/2012 has served as the model for the proliferation of stewardship codes around the world. Outliers and deviations may have been revealed, but this does not alter the fact that the UK-cum-Global stewardship model has been adopted in an overwhelming majority of jurisdictions with codes and has significantly influenced the form and/or content of virtually every stewardship code in the world. This finding is important as it confirms that the UK Code 2010 was the genesis of the global stewardship movement. It also suggests why, prior to this Book project, the conventional wisdom was that UK-style stewardship had proliferated around the world. However, to stop our analysis here would be to repeat the fundamental flaw in the legal origins scholarship: merely because the UK Code 2010/2012 served as a model for the design of stewardship codes globally does *not* mean that these codes were adopted for similar reasons, and/or have performed a similar function, as in the UK.

Indeed, as explained in this Part, and elaborated upon in several Chapters in this Book, the opposite is often the case. Most jurisdictions have formally adopted the seven principles of the UK Code 2010/2012 and the UK's institutional investor, corporate

[87] Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert W Vishny, 'Law and Finance' (1998) 106 *Journal of Political Economy* 1113; Holger Spamann, 'The "Antidirector Rights Index" Revisited' (2010) 23 *The Review of Financial Studies* 467.

[88] Dan W Puchniak and Umakanth Varottil, 'Related Party Transactions in Commonwealth Asia: Complicating the Comparative Paradigm' (2020) 17 *Berkeley Business Law Journal* 1; Jedidiah Kroncke, 'Intransigent Indices and the Laments of Comparative Law: Why Legal Origins Won't Die' (*JOTWELL*, 19 November 2020) <https://intl.jotwell.com/intransigent-indices-and-the-laments-of-comparative-law-why-legal-origins-wont-die/> accessed 25 May 2021.

[89] Spamann (n 87); Puchniak and Varottil (n 88); Dionysia Katelouzou and Mathias Siems, 'Disappearing Paradigms in Shareholder Protection: Leximetric Evidence for 30 Countries, 1990–2013' (2015) 15 *Journal of Corporate Law Studies* 127; Jeffrey Gordon, 'Convergence and Persistence in Corporate Law and Governance' in Jeffrey Gordon and Wolf-Georg Ringe (eds), *The Oxford Handbook of Corporate Law and Governance* (OUP 2018) 34.

governance focused, conception of stewardship. However, shareholder stewardship in jurisdictions around the world has often functioned in a way that is different – and in some cases diametrically opposed – to shareholder stewardship in the UK. This is a core reason for why understanding shareholder stewardship globally appears simple, but is, in fact, teeming with complexity. We now turn to an examination of the forces that have driven stewardship to function in a variety of ways around the world.

A. *The Origins of Stewardship Codes: A Bifurcated World*

Although stewardship codes globally have overwhelmingly adopted the formal design and content of the UK Code 2010/2012, the ostensible simplicity of this global legal transplant is only skin-deep. If we drilldown a bit by examining the origins of the codes, the largely unified global rise of stewardship becomes bifurcated into two worlds: (1) there have been 19 codes in 11 jurisdictions issued by government or quasi-government bodies (public or governmental codes); and (2) there have been 16 codes in 9 jurisdictions issued by private organizations composed of, or supported by, mainly institutional investors (private or institutional investor codes). In addition, the four inter-jurisdictional codes are all private in nature.[90]

The motives for adopting a stewardship code and the mechanisms available to enforce a code may differ significantly between public (governmental or quasi-governmental) bodies and private institutional investor organizations. Governments may be driven by a desire to demonstrate that they are acting in response to an economic crisis and/or to signal that their jurisdiction is at the cutting-edge of global norms of good corporate governance.[91] Governments can survey their jurisdictions corporate governance landscape and tailor the stewardship code to the stakeholder that has de facto or actual control of most listed companies.[92] Governments can use the coercive power of the state to bind institutional investors – or another type of steward – in their jurisdiction to the code.[93] Governments may create codes to advance their own political agenda, using a stewardship code as a form of policy-channelling that may have little to do with any of

[90] See Appendix.

[91] Koh, Puchniak and Goto, Shareholder Stewardship in Asia, Chapter 29; Goto, Japanese Stewardship Code, Chapter 10; Lin, The Assessment of Taiwan's Shareholder Stewardship Codes, Chapter 12; Donald, Stewardship in the Hong Kong International Financial Centre, Chapter 13; Puchniak and Tang, Singapore's Embrace of Shareholder Stewardship, Chapter 14; Kowpatanakit and Bunaramrueang, Thai Institutional Investors Stewardship Code and its Implementation, Chapter 16.

[92] Puchniak and Tang, Singapore's Embrace of Shareholder Stewardship, Chapter 14.

[93] Davies, The UK Stewardship Code 2010-2020, Chapter 2; Varottil, Shareholder Stewardship in India, Chapter 17.

the conceptions of stewardship, and everything to do with politics.[94]

In contrast, the motives for institutional investor organizations to come together to create a code appear to be narrower as they will naturally be focused on promoting the interests of institutional investors.[95] Institutional investors will only draft codes that consider institutional investors to be the 'stewards' regardless of the shareholder landscape of a jurisdiction.[96] Institutional investor organizations can only create codes that use the coercive power of membership in the organization to enforce their codes.[97] Institutional investors may be driven by a desire to create a code to promote self-regulation and avoid being regulated by the government.[98] Institutional investors may create codes to serve as a vehicle to overcome the collective action problems that they tend to face as small minority shareholders.

In this context, the fact that 15 out of the 20 codes adopted by institutional investors include all seven UK principles is unsurprising.[99] As the UK Code 2010/2012 was designed with institutional investors at its core, it fits well with the agenda of institutional investor organizations. Also, as the UK Code 2010/2012 has gained the status as the 'gold standard' for stewardship codes globally, adopting this gold standard sends a signal that institutional investors in a jurisdiction are taking stewardship seriously – an effective method for promoting self-regulation and pre-empting the government from issuing a code. Indeed, there is no Non-UK jurisdiction in which institutional investors have adopted a UK-style stewardship code where the government has subsequently attempted to issue a public code – suggesting that this pre-emptive strategy has been effective so far.

Another notable observation is that institutional investors are more likely to adapt the original UK model to their specific needs by adding 'additional principles':[100] from the 23 codes with additional principles, 15 are issued by a private drafter. In addition to principles on ESG and long-termism which are included in many non-UK Codes, it is not surprising that several non-governmental codes address the investment management side of stewardship, including specific principles on internal governance. For instance, this is the case with all the four jurisdictional codes focusing on the investment management conception of stewardship, that is Australian (FSC) Code 2017, the two Norwegian Codes and Swiss Code 2013. Other additional principles included in private codes reflect the

[94] Koh, Puchniak and Goto, Shareholder Stewardship in Asia, Chapter 29; Puchniak (n 13).

[95] Puchniak (n 13).

[96] ibid.

[97] ibid.

[98] See e.g. Katelouzou (n 10) (explaining the development of the pre-2010 UK codes to the lobbying power of UK institutional investors).

[99] See Appendix.

[100] Outside the UK 2010/2012 model.

stakeholder orientation of some jurisdictions and ask institutional investors to communicate with stakeholders and exercise their shareholder rights, including the right to request a special meeting (e.g., Dutch Code and Swiss code) – which may allow institutional investors to demonstrate their understanding of trends within a jurisdiction and to expand their client base in this manner. Finally, some non-governmental codes ask institutional investors to work with policy makers and regulators (e.g., Canadian Codes), perhaps in an attempt to co-regulate and pre-empt future governmental regulation.

While the adoption of private codes closely resembling the UK model is unsurprising, from a narrow corporate governance perspective, the widespread transplantation of the UK Code 2010/2012 by government or quasi-government bodies is, at first blush, more puzzling. This is because, when viewed through a narrow corporate governance lens, one would expect that governments would create stewardship codes to fit the corporate governance context in their respective jurisdictions. As institutional investors collectively do not comprise a majority of shareholders in any Non-UK jurisdiction with a government code – and most Non-UK jurisdictions with government codes are dominated by controlling block shareholders who have the incentive and voting rights to steward most listed companies – one may expect that governments would adapt codes to be targeted towards controlling shareholders (rather than institutional investors) as the natural stewards of companies.

However, as noted above, the Singapore Family Code is the only stewardship code that has taken such an approach.[101] Rather, as explained in several Chapters in this Book and confirmed in our hand-compiled data, the overwhelming majority of public codes (11 out of 16) have adopted all seven UK principles. The extensive adoption of the UK model by government or quasi-government bodies is also confirmed by the fact that all the 16 government codes adopt the core corporate-governance-focused concept of the UK model to transform institutional investors into active shareholder stewards. This is paradoxical because, as explained in detail below, stewardship has functioned in a wide variety of ways in these jurisdictions due to the influence of jurisdiction-specific factors.[102]

Before moving on, it is noteworthy that there is a stark geographic divide in terms of governmental codes versus institutional investor codes.[103] All the Asian codes (14 codes in 9 jurisdictions) are governmental codes; while outside of Asia only two Non-UK jurisdictions – Denmark and Kenya – have governmental codes. In this respect, Asia has adhered more closely to the design of the UK model of a governmental code than other

[101] Part II. Puchniak and Tang, Singapore's Embrace of Shareholder Stewardship, Chapter 14.

[102] Part IV.D.

[103] See Puchniak (n 13) as the only other place we are aware of that makes this observation.

parts of the world – a finding that has been entirely overlooked. There are three reasons for why this geographic divide may have arisen. First, in Non-Asian jurisdictions institutional investors tend to have a larger ownership stake in listed companies,[104] which may provide institutional investors with greater incentives to create a code. Second, governments and public regulation tend to play a larger role in Asian economies and corporate governance than in many Western jurisdictions. Third, there is also less of a history of shareholder activism by private institutional investors in most of Asia than in the West.[105] The centrality of governments in Asian corporate governance systems – combined with the general weakness of institutional investors throughout most of Asia – may explain why all the codes in Asia have been issued by government entities or entities supported by the government.[106] This contrasts with a litany of institutional investor organizations outside of Asia, which have developed from the ground-up, without any government involvement, and have produced stewardship codes driven by free-market forces.[107]

B. Stewardship in a World of Lax Enforcement: The UK as a Global Outlier

Surprisingly, although an overwhelming majority of jurisdictions with stewardship codes adopted the seven principles of the UK Code 2010/2012, *none* of them have adopted the UK's model for enforcing their stewardship codes. In the UK, since December 2010, all asset managers authorized by the Financial Conduct Authority (FCA) have been required to follow the UK Code.[108] As most UK authorized asset managers are 'domestic' investors,[109] this has effectively meant that all domestic asset managers in

[104] See Table 1.4 below.

[105] Yu-Hsin Lin, 'When Activists Meet Controlling Shareholders in the Shadow of the Law: A Case Study of Hong Kong' (2019) 14 *Asian Journal of Comparative Law* 1. We note that Japan is an exception – but activism targeting Japanese companies has been mainly brought by US hedge funds and has to do with the fact that Japan has few controlling shareholders and is the most dispersed jurisdiction in Asia. See e.g. John Buchanan, Dominic Heesang Chai and Simon Deakin, *Hedge Fund Activism in Japan: The Limits of Shareholder Primacy* (CUP 2012); Dan W Puchniak, 'Multiple Faces of Shareholder Power in Asia: Complexity Revealed' in Jennifer G Hill and Randall S Thomas (eds), *Research Handbook on Shareholder Power* (Edward Elgar Publishing 2015) 511; Dan W Puchniak and Masafumi Nakahigashi, 'The Enigma of Hostile Takeovers in Japan: Bidder Beware' (2018) 15 *Berkeley Business Law Journal* 4.

[106] Koh, Puchniak and Goto, Shareholder Stewardship in Asia, Chapter 29; Puchniak (n 13).

[107] Appendix. See e.g. Australian (FSC) Code 2017, Australian (ACSI) Code 2018, Brazil Code 2016, Canadian Codes, Italian Codes, Dutch Codes, Norwegian Codes, South African Code 2011, Swiss Code 2013, and US Code.

[108] COBS 2.2.3R (06/12/2010).

[109] Although UK authorised asset managers are usually 'domestic' investors, international asset managers can be authorised by the FCA. See Financial Conduct Authority, 'Our Approach to International Firms'

the UK are bound by the principles and reporting obligations in the UK Code.

In stark contrast, 17 out of the 19 jurisdictions that have adopted UK-style stewardship codes have made them *entirely voluntary* in *scope* – with one of the codes in Australia[110] and all four Indian codes being the only Non-UK codes that are non-voluntary for a certain portion of institutional investors in their respective jurisdictions.[111] The implications of almost all the world's stewardship codes being entirely voluntary in scope, that is institutional investors can decide whether to be signatories of the code – are difficult to overstate. It makes stewardship entirely optional for institutional investors – or family controllers in the case of the Singapore Family Code. As discussed in a Chapter in this Book, this distinguishes stewardship codes from corporate governance codes – almost all of which are linked to a stock exchange or other mandatory regulations which do not allow listed companies to ignore corporate governance codes if they choose to do so.[112]

The most extreme example of the deleterious impact that the voluntary scope of stewardship codes can have on translating a code into practice comes from Kenya. Since the Kenya Code was issued in 2017, not a single institutional investor has volunteered to be bound by it.[113] As such, Kenya has a stewardship code that applies to no one – the archetypal example of a code that formally creates shareholder stewardship, with no functional effect in practice. Interestingly, the Kenya Code is a government issued code, which raises the question of why a government, which has the coercive power of the state, would issue a code that binds no one. Although the Kenya Code 2017 is highlighted as the only voluntary code to which no one has agreed to be bound, its voluntary scope is typical of Non-UK governmental codes – and also institutional investor codes – which are almost all entirely voluntary. For institutional investor codes, their voluntary scope makes sense as the private organizations that issue the codes lack the coercive power of the state, and membership in the private organizations themselves is almost always voluntary. However, the failure of governments to use their coercive power – distinct from what most have done in the case of corporate governance codes – to make codes binding on a certain constituency of shareholders, is a puzzling development in the evolution of global shareholder stewardship that has went largely unrecognized and which we address

(February 2021) <https://www.fca.org.uk/publication/corporate/approach-to-international-firms.pdf> accessed 25 May 2021.

[110] Australian (FSC) Code 2017 (n 50).

[111] See Appendix.

[112] See, further, Katelouzou and Sergakis, Shareholder Stewardship Enforcement, Chapter 27 (developing a simple enforcement taxonomy based on three dimensions: (i) the nature of the norm-enforcer (self-enforcement and third-party enforcement), (ii) the nature of the enforcement mechanism (formal and informal) and (iii) the temporal scope of enforcement).

[113] Ouko, Stewardship Code in Kenya, Chapter 22.

below.

The outlier status of the UK's enforcement model becomes even starker when the increasingly onerous *obligations* that institutional investors have under the UK Code are compared with the surprisingly lax, and even non-existent, obligations under most other Non-UK codes. The UK Code 2010/2012 employed a 'comply or explain' *mode* of enforcement – which allows institutional investors who are bound by the code (whether because they fall within its scope or voluntarily sign-up) to deviate from it if they provide an explanation for doing so. However, as the quality of commitment and disclosure in the UK were seen as lacking, in 2016 the FRC introduced a public tiering system, dividing institutional investors into tiers based on the quality of their disclosure.[114] Most recently, the UK Code 2020 adopted an 'apply and explain' principle which suggests more strongly that those who are bound by the code should apply it.[115]

In sum, the story of the UK enforcement regime has three key components. First, domestic institutional investors are legally bound to follow the code (i.e., it is non-voluntary for domestic asset managers). Second, the obligation to 'comply or explain' is evaluated and explicitly subjected to market pressure by the public tiering exercise conducted by the FRC. Third, recently the 'comply or explain' obligations have been replaced with 'apply and explain' obligations which move the obligation to conform to the principles in the UK Code a step closer to becoming mandatory rules.[116]

In stark contrast, as reported in Table 1.3 below, 10 codes in 7 Non-UK jurisdictions with stewardship codes and 3 inter-jurisdictional codes provide that those who voluntarily agree to be 'bound' by the code have *no obligations* under it.[117] It is shocking that in a significant portion of jurisdictions that have adopted UK-style stewardship codes, those who have agreed to be 'bound' by the code are required *to do nothing at all* – a game-changing reality of global shareholder stewardship that has been completely overlooked.[118] These codes are merely suggested principles issued to those who voluntarily sign-up, but do not even require the signatories to comply, explain, or do anything at all. This mode of enforcement – which more correctly should be called a mode

[114] Further on the tiering exercise as a 'formal' (but not judicial) enforcement mechanism, see Katelouzou and Sergakis, Shareholder Stewardship Enforcement, Chapter 27.

[115] It should be noted that an outcomes-based enforcement approach was also adopted by the South African Code 2011 (n 50) which operates on an 'apply or explain' basis. See Locke, Encouraging Sustainable Investment in South Africa, Chapter 23. However, it did not gain traction in any other jurisdiction until the UK adopted an 'apply and explain' mode in 2020.

[116] Katelouzou (n 10).

[117] It is also notable that from the 10 jurisdiction-specific codes, 6 are the latest versions (that is: Australian (ACSI) Code 2018 (n 50), Malaysian Code 2014 (n 50), Norway Code 2019, Singapore Code 2016, Singapore Family Code (n 22), US Code 2017).

[118] Puchniak and Tang, Singapore's Embrace of Shareholder Stewardship, Chapter 14 raises this most forcefully.

of 'non-enforcement' – makes such codes more like statements of best suggested practices. These 'no-obligations' codes, which are drafted by both governmental (as in Singapore) and private issuers (as in the US), are perhaps the most deceptive codes – and difficult to understand – as signing-up to something, which requires nothing, seems like an exercise in futility. However, our examination of jurisdiction specific factors below illuminates some possible rationales for this ostensibly futile exercise.[119] There is also some evidence of 'hardening'[120] in terms of the mode of enforcement as the latest versions of the Italian and Canadian codes moved from a no-obligations mode to a comply-or-explain one.[121]

In fact, Table 1.3 confirms that outside the UK, only the Australian (FSC) Code 2017 and Indian (IRDAI) Code 2017 adopt the original enforcement model of the UK Code 2010/2012, that is non-voluntary scope and comply-or-explain mode. In 17 non-UK codes, institutional investors who are bound by the code are required to 'comply or explain' with the principles in the code.[122] At first blush, these jurisdictions may be seen to have adopted the UK-style 'comply or explain' enforcement regime. However, upon closer examination, the enforcement regimes in these 'comply or explain' jurisdictions, differ significantly from UK-style enforcement. To start, as all the codes which adopt the comply oy explain enforcement mode – except for the Australian (FSC) Code 2017 and Indian (IRDAI) Code 2017 – are voluntary, those institutional investors who do not want to 'comply or explain' can simply decide that they no longer want to be bound by the code – which is not an option for domestic institutional investors in the UK.

Table 1.3: Enforcement of Stewardship Codes[123]

			SCOPE	
	Degree of Coerciveness	Voluntary	Non-Voluntary (for some)	Total
MODE	No-Obligations	13 (7)	0 (0)	13 (7)
	Comply-or-Explain	17 (13)	4 (2)	21 (15)
	Apply or/and Explain	1 (1)	1 (1)	2 (2)
	Mandatory	0 (0)	3 (3)	3 (3)
	Total	31 (21)	8 (6)	39 (27)

The UK's experience with *foreign* institutional investors, for which the UK Code is voluntary, demonstrates how institutional investors opting out of a voluntary code when

[119] Part IV.D.

[120] On hardening of stewardship rules, see Chiu and Katelouzou (n 5) 131-152.

[121] See Appendix for further details.

[122] These include 16 jurisdictional-specific codes in 12 non-UK jurisdictions and the EFAMA Code 2018. For further details see Appendix.

[123] Table 1.3 takes into account all intra- and inter-jurisdictional codes. The number in brackets relates to the latest version of the codes.

it suits their self-interest is a real risk. After the UK adopted its public tiering exercise, a significant number of institutional investors (among which some foreign ones) who wanted to avoid the embarrassment of being placed in the bottom tier simply opted to no-longer be bound by the UK Code.[124] As one of the UK's most prominent corporate law scholars has persuasively argued, the fact that the UK Code is voluntary for foreign institutional investors has rendered it virtually nugatory for this important class of institutional investors in the UK.[125] However, what has gone almost entirely unnoticed prior to this Book project, is that, with two exceptions (Australian (FSC) Code 2017 and Indian (IRDAI) Code 2017), globally all the jurisdictions that have adopted the UK's 'comply or explain' standard have done so in the context of codes which are voluntary codes for all (*both* domestic and foreign) institutional investors – while all other codes, aside from the three latest Indian codes (Indian (PFRDA) Code, Indian (SEBI) Code and Indian (IRDAI) Code 2020), are no-obligations codes which require nothing at all from those who volunteer to be 'bound' by the codes.

As if the UK enforcement system was not already enough of an outlier, there is not a single Non-UK jurisdiction that has adopted anything in its enforcement regime that even comes close to approximating the UK's public tiering exercise. This suggests that the UK stands alone as having the only enforcement system which evaluates the quality of commitment and disclosure to the principles in its stewardship code, with a market mechanism to explicitly sanction poor performers.[126] Moreover, the UK's recent adoption of its stricter 'apply and explain' standard has not yet been followed by any other jurisdiction and the emphasis of the UK Code 2020 on stewardship outcomes rather than mere policies – further accentuating its outlier status as having an enforcement regime that places considerably more pressure on institutional investors (or other shareholders bound by a code) to take stewardship seriously. This is somewhat ironic because the UK Code has faced harsh criticism for its 'soft law' approach – but when viewed through a comparative lens the UK's shareholder stewardship regime is the 'hardest' in the world.[127]

This observation is important because the global ubiquity of stewardship codes with the UK-seven principles has resulted in the widespread misunderstanding that UK-style stewardship has been transplanted around the world. Indeed, a recent prominent article

[124] See Katelouzou (n 10) for data.

[125] Cheffins (n 12).

[126] Further on market mechanisms, see Katelouzou and Sergakis, Shareholder Stewardship Enforcement, Chapter 27.

[127] The three latest Indian codes, PFRDA 2018, SEBI 2019 and IRDAI 2020, are mandatory in terms of the mode of enforcement but there is no active monitoring of the quality of compliance as in the UK: Varottil, Shareholder Stewardship in India, Chapter 17. This is why the UK code is perceived as the 'hardest' code in terms of enforcement.

on 'The Agency Problems of Institutional Investors' lumps the UK Code together with Non-UK Codes as being 'nonbinding stewardship codes which various institutional investors have pledged to follow'.[128] An important insight from this prominent article is that most often institutional investors lack the economic incentives to properly invest in stewardship. While we agree with this general observation, the variety in enforcement regimes that we have identified suggests that a finer grained analysis – which differentiates among the different types of enforcement regimes in different jurisdictions with stewardship codes – is required.

Given the extremely lax and non-existent enforcement regimes in almost all non-UK jurisdictions, there is an acute risk that UK-style stewardship codes in these jurisdictions will be ineffective in motivating institutional investors to adequately invest in corporate governance. However, in the UK, where the regime is binding on domestic institutional investors and places real obligations on all institutional investors bound by the code, the analysis is different. In the UK, the success of corporate governance focused stewardship will depend on whether this regulatory nudge will be enough to change the economics of investing in stewardship for institutional investors in the UK. The widespread consensus is that the regulatory nudge under the UK Code 2010/2012 was insufficient. However, it is important to recognize that, different from Non-UK jurisdictions, the UK has developed an enforcement regime that provides a stronger regulatory nudge than in almost any other jurisdiction and that it has recently been strengthened further by replacing the 'comply or explain' with the 'apply and explain' standard. Moreover, as discussed below, the economic incentive problem for institutional investors to invest in stewardship may be less acute when the focus of stewardship is ESG than when it is corporate governance.[129] This, combined with the UK Code's new stricter 'apply and explain' standard, may provide a glimmer of hope for the new ESG focused UK Code 2020.

Finally, a clear question that arises from the totality of this comparative analysis of stewardship enforcement regimes around the world is: Why have almost all jurisdictions departed from the UK's enforcement model? There are at least five reasons that may explain this development. First, the original conception of stewardship, which focuses on transforming institutional investors into actively engaged shareholders, is contrary to the business models of several types of institutional investors – which makes a voluntary code more tenable as those institutional investors which have a business model that suits the code can choose to join (and, perhaps more importantly, those with incongruent

[128] Lucian A Bebchuk, Alma Cohen and Scott Hirst, 'The Agency Problems of Institutional Investors' (2017) 31 *Journal of Economic Perspectives* 89.

[129] Part IV.E and V. See also Katelouzou (n 10).

business models are not bound). Second, from a corporate law perspective, shareholders normally have no obligation to be actively engaged in corporate governance and, therefore, making codes voluntary avoids stewardship conflicting with a fundamental tenant of corporate law. Third, the ambiguity of what stewardship is – which as described above has five different conceptions[130] – is more conducive to a voluntary regime as ambiguous principles are hard to strictly enforce. Fourth, with the UK Code 2020 making ESG obligations a central component of stewardship, some jurisdictions may be hesitant to require institutional investors to follow these principles when their corporate law may still be centred on a narrower conception of corporations focusing on maximizing shareholder value.[131] Fifth, a UK-style stewardship code may not fit with the shareholder environment in jurisdictions that are dominated by controlling shareholders – a voluntary code may allow such jurisdictions to formally adopt the code to signal compliance with a global standard of 'good corporate governance', without it having much impact in practice. It is to this critical aspect of global shareholder stewardship – the transplantation of UK-style codes to a world in which institutional investors are normally collectively minority shareholders and controlling-block shareholders are normally predominant – to which we now turn.

C. UK-Style Codes: Misfits in a World of Minority Institutional Investors and Controlling Shareholders

It is now time to play a thought experiment. Assume that Non-UK stewardship codes around the world were not hobbled by the lax and non-existent enforcement problems just highlighted. In fact, let us go one step further. Assume that institutional investors around the world followed the principles in their UK-style stewardship codes to a tee. At first blush, one may expect that this would produce similar results around the world as almost all codes have adopted the UK's seven principles and enforcement would be moot. However, in reality, the opposite would be the truth – the corporate governance effect in the UK would be dramatically different than in most non-UK jurisdictions.

This is because, as explained in detail by one of us elsewhere and elaborated on in a Chapter in this Book, for the UK Code to have its intended corporate governance effect a jurisdiction's shareholder landscape must have two foundational features: (1) institutional

[130] Part II.

[131] For example, jurisdictions such as the US: Lucian Bebchuk and Roberto Tallarita, 'The Illusory Promise of Stakeholder Governance' (2020) 106 *Cornell Law Review* 91, 106, 128 and Rock (n 30) 19.

investors collectively have the legal rights to control most listed companies; and (2) a single or small group of block shareholders does not have the voting rights to control most listed companies.[132] As explained below, the UK and US are virtually the only two jurisdictions in the world in which these two features exist. As such, they are the only two jurisdictions where *if* a stewardship code succeeds in incentivizing institutional investors to become actively engaged shareholders, they will be able to 'steward' most listed companies.

For decades, it has been well-known and widely accepted that *if* institutional investors act collectively they have the legal rights to control the corporate governance in most UK listed companies.[133] As a result, this assumption was the intellectual starting point for the idea to create a stewardship code in the UK and has been at the core of the UK's stewardship regime ever since.[134] This assumption was embedded in the design of the UK Code 2010, which assumes that if institutional investors act collectively they normally have the legal rights to intervene in a company's corporate governance by taking measures such as replacing the board of directors.[135] The UK Code 2020 also assumes that if institutional investors act collectively they have the ability to control a wide enough swath of UK listed companies to 'respond to market-wide and systemic risks to promote a well-functioning financial system'.[136] In fact, the entire idea of making institutional investors – rather than another corporate stakeholder – the focus of the UK Code is predicated on the fact that if institutional investors act collectively they have the legal right to steward most UK listed companies.

However, the fact that collectively institutional investors have the legal right to control most listed companies makes the UK exceptional and cannot be assumed to be the case in almost any other jurisdiction. With the notable exception of the United States, institutional investors do not own a majority of the shares in listed companies in any other

[132] Lim and Puchniak, Can a Global Legal Misfit be Fixed?, Chapter 28; Puchniak (n 13).

[133] Paul Myners, 'Institutional Investment in the United Kingdom: A Review' (HM Treasury 2001) 27 <https://uksif.org/wp-content/uploads/2012/12/MYNERS-P.-2001.-Institutional-Investment-in-the-United-Kingdom-A-Review.pdf accessed 25 May 2021 [hereinafter Myners Review].

[134] Myners Review (n 133) 1; John Kay, 'The Kay Review of UK Equity Markets and Long-Term Decision Making' (Department for Business, Innovation and Skills, July 2012) 50 <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/253454/bis-12-917-kay-review-of-equity-markets-final-report.pdf> accessed 25 May 2021 [hereinafter Kay Review]; Walker Review (n 39) 87; Financial Conduct Authority/Financial Reporting Council, 'Building a regulatory framework for effective stewardship' (Discussion Paper, January 2019) 14 <https://www.fca.org.uk/publication/discussion/dp19-01.pdf> accessed 25 May 2021.

[135] UK Code 2010 (n 1) 8 (Principle 5); Davies, The UK Stewardship Code 2010-2020, Chapter 2, Part III.C and IV.A.

[136] UK Code 2020 (n 28) 11 (Principle 4).

major economy.[137] To the contrary, based on the hand-calculated data in Table 1.4 below, at the end of 2017, the mean share ownership of institutional investors in the jurisdictions that have adopted a stewardship code, excluding the UK/US, was 23 percent – a stark contrast to 68 percent in the UK and 80 percent in the US. In Asian jurisdictions, where UK-style stewardship codes have proliferated, at the end of 2017 the mean shareholder ownership of institutional investors was just 15 percent. Thus, the global corporate governance reality is the opposite of that in the UK: in most jurisdictions institutional investors collectively hold a minority of shares in most listed companies and do not have the legal rights to control them. In short, the assumption embedded in the UK Code's design – that institutional investors collectively have the legal rights to act as stewards in most listed companies – does not fit the global corporate governance reality.

As would be expected, there is some variation in the level of institutional shareholder ownership across jurisdictions and there are a handful of jurisdictions in which institutional investors collectively own a sizable *minority* of shares in listed companies. For instance, as reported in Table 1.4 below, in Canada and Australia, the mean share ownership of institutional investors is 43 percent and 29 percent, respectively, whilst block holders are fading. It is, therefore, likely that in these jurisdictions institutional investors may in some cases possibly be able to make use of company law rights to block corporate actions pursued by controlling shareholders.[138] However, in jurisdictions where the collective shareholder ownership of institutional investors is in the small single digits, the company law remedies available to block actions pursued by the controlling shareholders and the benefits of acting collectively will be considerably more limited.

While the variation in the size of the minority share ownership stake of institutional investors is meaningful, it should not obscure the reality that institutional investors acting primarily as minority shareholders does not fit the assumption embedded in the UK Code nor its ambitious goals. It does not provide institutional investors with the legal rights to

[137] Adriana De La Cruz, Alejandra Medina and Yung Tang, 'Owners of the World's Listed Companies' (OECD Capital Market Series, 17 October 2019) 18, figure 8 <http://www.oecd.org/corporate/owners-of-the-worlds-listed-companies.htm> accessed 25 May 2021.

[138] However, even in these jurisdictions the ability of institutional investors to have an impact on corporate governance may be limited. As noted in Williams, Stewardship Principles in Canada, Chapter 20, there are a significant portion of Canadian companies where the UK Code's concept of institutional investor stewardship does not fit due to its 'predominance of public companies with controlling shareholders who are by definition exercising stewardship' (Part I). For a summary of shareholder rights that can be exercised by minority shareholders, see Luca Enriques, Henry Hansmann, Reinier Kraakman and Mariana Pargendler, 'The Basic Governance Structure: Minority Shareholders and Non-Shareholder Constituencies' in Reinier Kraakman, John Armour, Paul Davies, Luca Enriques, Henry Hansmann, Gerard Hertig, Klaus Hopt, Hideki Kanda, Mariana Pargendler, Wolf-Georg Ringe and Edward Rock (eds), *The Anatomy of Corporate Law: A Comparative and Functional Approach* (3rd edn, OUP 2017) 84. See also Williams, Stewardship Principles in Canada, Chapter 20, highlighting the extensive shareholder rights provided by statute in Canada.

steward companies if they act collectively – let alone to be 'guardians of market integrity' who 'respond to market-wide and systemic risks', as contemplated in the UK Code 2020.[139] Nor does institutional shareholders collectively acting as minority shareholders fit with the goal to solve the systemic problems of excessive risk taking and short-termism revealed by the GFC in UK listed companies – which was the impetus behind the UK Code 2010's goal of transforming rationally passive institutional investors into actively engaged shareholder stewards.[140] However, in the UK's corporate governance reality, where institutional investors collectively own a sizable majority of shares, the UK Code's aim to transform institutional investors into the solution for the UK's core corporate governance – or even societal – problems makes sense.

Table 1.4: Shareholding Statistics in Jurisdictions that have Adopted Stewardship Codes

Region	Jurisdiction	Percent of Shares Owned by Institutional Investors	Percent of Listed Companies with 3 Largest Owners Controlling Majority of Shares	Institutional Ownership		3 Largest Owners as Controllers	
				Mean for Region	Median for Region	Mean for Region	Median for Region
Asia	Japan	31%	15%	15%	13%	56%	66%
	Korea	13%	45%				
	India	19%	66%				
	Hong Kong	12%	75%				
	Thailand	8%	51%				
	Malaysia	11%	72%				
	Singapore	6%	70%				
	Taiwan	18%	N.A.				
Europe	UK	68%	12%	38%	38%	37%	33%
	Netherlands	39%	31%				
	Norway	26%	35%				
	Italy	16%	71%				
	Denmark	33%	N.A.				
	Switzerland	23%	N.A.				
North America	US	80%	4%	62%	62%	10%	10%
	Canada	43%	15%				
Africa	South Africa	33%	38%	33%	33%	38%	38%
	Kenya	N.A.	N.A.				

[139] UK Code 2020 (n 28) 4.

[140] Davies, The UK Stewardship Code 2010-2020, Chapter 2, Part II; UK Code 2010 (n 1) 7.

South America	Brazil	22%	72%	22%	22%	72%	72%
Australia	Australia	29%	N.A.	29%	29%	N.A.	N.A.
All jurisdictions				29%	25%	45%	45%
All jurisdictions (excl. UK/US)				23%	23%	50%	51%
Jurisdictions with public codes (excl. UK)				17%	13%	56%	66%
Jurisdictions with private codes				37%	31%	38%	35%

The rationale for transplanting a UK-style stewardship code to other countries appears even more curious considering the game-changing fact that in most countries, with the notable exception of the UK/US, a single or small group of block-shareholders, who are *not* institutional investors, control the voting rights in most listed companies. These controlling shareholders – who are often wealthy families or individuals, the state, or other corporations – have the voting rights and economic incentive to control the corporate governance in their respective listed companies.[141] As 'stewardship' has become a global buzz word to signify good corporate governance, some of these rationally active, non-institutional, controlling block-shareholders have begun to label themselves as 'good stewards' of the companies they control – giving life to the second conception of stewardship explained above.[142] However, nothing in the history, policy rationale, or content of the UK Code, suggests that it was ever intended to apply to such controlling shareholders.[143]

Nevertheless, as is clear from Table 1.4 above, listed companies are dominated by non-institutional controlling shareholders in most Non-UK jurisdictions that have UK-style stewardship codes: in 50 percent of companies outside the UK/US the three largest shareholders control a majority of shares, whereas in the UK and US it is 12 percent and 4 percent, respectively. Moreover, if one considers smaller block shareholders and the mechanisms they used to maintain control, outside of the UK/US, in most jurisdictions most listed companies are controlled by controlling shareholders.[144] Therefore, UK-style codes in jurisdictions with controlling shareholders are legal misfits as they target

[141] Lim and Puchniak, Can a Global Legal Misfit be Fixed?, Chapter 28; Puchniak (n 13).

[142] Part II. Temasek as an example, see Dan W Puchniak and Samantha Tang, 'Singapore's Puzzling Embrace of Shareholder Stewardship: A Successful Secret' (2020) 53 *Vanderbilt Journal of Transnational Law* 989; Temasek, 'A Trusted Steward' <https://www.temasekreview.com.sg/steward/a-trusted-steward.html> accessed 25 May 2021 (on its website, Temasek calls itself a 'trusted steward' and an investor with an institutional conscience, and a duty towards present and future generations).

[143] Katelouzou and Siems, The Global Diffusion of Stewardship Codes, Chapter 30 (explaining that UK-style stewardship codes aim to address the agency problem caused by the rise of institutional investors).

[144] In contrast, 'the vast majority [of jurisdictions in the world] have corporations with controlling shareholders as the dominant characteristic'. See OECD, 'OECD Corporate Governance Factbook 2019' (2019) 17-18 <https://www.oecd.org/corporate/corporate-governance-factbook.pdf> accessed 25 May 2021; see also Puchniak (n 13).

institutional shareholders (the original conception of stewardship), rather than non-institutional controlling shareholders (the second conception of stewardship), as the stewards of listed companies – which fits the corporate governance realities in the UK/US, but not in almost any other jurisdiction with a stewardship code.

A final important observation relates to the origin of stewardship codes. As we have seen above,[145] stewardship codes have been issued either by government or quasi-government bodies (public or governmental codes) or by private organizations composed of, or supported by, mainly institutional investors (private or institutional investor codes). It is clear from Table 1.4 that private codes – as opposed to public codes – have tended to arise in non-UK jurisdictions in which institutional investors control a greater percentage of the stock market and controlling block holders are less pronounced.

The average percentage of stock market capitalization owned by institutional investor ownership in Non-UK jurisdictions with private codes is 37 percent – compared to 17 percent in Non-UK jurisdictions that have public codes, while the average percentage of blockholders in the two camps are 38 percent and 56 percent, respectively.[146] This makes sense because in jurisdictions where institutional investors have a greater ownership stake, they will have a greater incentive to act collectively as they may be able to use their collective power to form a significant minority block of shares which may give them access to important veto rights. In addition, in jurisdictions in which institutional shareholders have a larger presence, they may have a greater ability to organize and to pre-empt government regulation by creating a self-regulatory stewardship regime. This is not surprising: institutional investors have the incentives to adopt a code as a pre-emptive device to maintain self-regulation.[147] In the absence of controlling shareholders, institutional investors not only have the incentives but also the abilities to adopt such a code and formalize collective engagement.

In sum, a game-changing fact, which was entirely overlooked prior to this Book project, is that UK-style stewardship codes have been largely transplanted into jurisdictions in which institutional investors are collectively minority shareholders and controlling shareholders predominate, making them ‘legal misfits’.[148] What is more, this legal misfit has been mainly driven by government or quasi-government bodies rather

[145] Part IV.A.

[146] However, two jurisdictions stand out as an exception here: Japan and Italy. In the former, public/governmental codes have been adopted despite the relatively high institutional ownership and the lack of controlling blockcholders, whereas in the latter private codes have been adopted despite the low institutional ownership and the high percentage of blockholder ownership. For jurisdiction-specific factors that may explain this apparent disparity, see Goto, Japanese Stewardship Code, Chapter 10 and Strampelli, Institutional Investor Stewardship in Italian Corporate Governance, Chapter 6.

[147] Part IV.A.

[148] Puchniak (n 13).

than by private actors. This fact, however, has not rendered the impact of the global proliferation of UK-style stewardship codes nugatory. To the contrary, as we explain in the next Section, these misfitted UK-style stewardship codes have served diverse, often jurisdictionally-contingent, functions – many of which would have been beyond the wildest imaginations of the original drafters of the UK Code. Understanding these functions, which prior to this Book project were entirely overlooked, is necessary to have an accurate picture of the global proliferation of shareholder stewardship. It is to this that we now turn.

D. Jurisdictional-Contingent Drivers of Global Shareholder Stewardship

1. Politics as an Important Driver of Public Stewardship Codes

In the binary world of private versus public codes, one may have to look for jurisdictional-contingent factors to explain the observed paradox of the proliferation of UK-style stewardship codes in terms of formal design and content but not in terms of enforcement. One such factor in the case of the adoption of UK-style codes by governmental and quasi-governmental bodies has been political motives. Several Chapters in this Book provide rich examples of the role of politics as a driver of the adoption of public stewardship codes, especially in Asia where, as we have seen above,[149] all stewardship codes have been issued by governmental or quasi-governmental bodies. Sometimes governments appear to implement a UK-style code as it is considered the gold standard of stewardship, which signals that their jurisdiction complies with *global standards* of good corporate governance. Sometimes adopting a UK-style code demonstrates the government's responsiveness to an *economic crisis* or a scandal by adopting a corporate governance mechanism which almost universally has been seen as an indicium of good corporate governance. Sometimes a UK-style code allows the government to promote its own political agenda, with the code serving as a cover for *policy channelling*.

First, contributions in this Book reveal that in some Asian jurisdictions the adoption of UK-style codes by governmental or quasi-governmental bodies has been driven by the government's motive to signal that their jurisdiction embraces cutting-edge global norms of 'good' corporate governance.[150] The rationale behind such government action is to

[149] Part IV.A.

[150] Puchniak and Tang, Singapore's Embrace of Shareholder Stewardship, Chapter 14; Koh, Puchniak and Goto, Shareholder Stewardship in Asia, Chapter 29.

attract foreign investment by bolstering the jurisdiction's image as an attractive cutting-edge investment hub and to strengthen the local investment market, without significantly changing how the jurisdiction's corporate governance actually works in practice – a corporate governance reform strategy which has been explained and coined in a Chapter as '*halo signalling*'.[151] As halo signalling does not involve the corporate governance mechanism effecting actual change, importance is placed on the jurisdiction's formal adoption of a mechanism that is considered to be the global gold standard of 'good' corporate governance.

As we have explained above, where stewardship is concerned, the gold international standard is the UK Code 2010/2012.[152] The fact that the UK Code 2010/2012 is a poor fit in jurisdictions with controlling shareholders is irrelevant for the public drafters of stewardship codes, as the impetus for adopting a code is to signal formal compliance with the gold standard, and not to effect actual change. That public stewardship codes follow the UK model only as far as the formal design and content is concerned but deviate in terms of enforcement is a further indicator of signalling. Adopting the UK stewardship model only as far as its formal content is concerned whereas turning its scope and compliance to voluntary standards and sometimes no-obligations at all makes it easy for governments to signal compliance while they limit the codes' bite.

As this Book shows, the two jurisdictions where signalling appears to have played the most significant role as a driver in the adoption of UK-style public stewardship codes are Hong Kong and Singapore.[153] Both jurisdictions adopted a code that mirrors the core concept, primary content, and text of the UK Code 2010/2012 but they significantly deviated from the UK model of enforcement.[154] In both jurisdictions, for reasons explained by one of us elsewhere,[155] the codes served well the purpose of halo signalling. But that is not to say that signalling is a phenomenon unique to Asian 'International Financial Centres'.[156] Rather, there is some evidence that in other jurisdictions with public codes adopting the UK-model was at least in part driven by an attempt to signal compliance with global corporate governance standards. For instance, the introduction of the Taiwanese Code by governmental bodies appears to be an attempt to signal

[151] Puchniak and Tang, Singapore's Embrace of Shareholder Stewardship, Chapter 14.

[152] Part IV.A.

[153] Donald, Stewardship in the Hong Kong International Financial Centre, Chapter 13; Puchniak and Tang, Singapore's Embrace of Shareholder Stewardship, Chapter 14; Koh, Puchniak and Goto, Shareholder Stewardship in Asia, Chapter 29.

[154] Part IV.B.

[155] Puchniak (n 13). See also Koh, Puchniak and Goto, Shareholder Stewardship in Asia, Chapter 29.

[156] On an insightful analysis of Singapore and Hong Kong as International Financial Centres, see Donald, Stewardship in the Hong Kong International Financial Centre, Chapter 13.

conformance to Anglo-American-Cum Global norms of 'good' corporate governance.[157] A similar force could be at play in Thailand where General Prayut Chan-o-cha's military junta, which took power in a coup d'état a few years earlier, issued a UK-style code in 2017 to send a message to the world that Thailand was at the cutting-edge of global trends in 'good' corporate governance.[158] Outside Asia, the introduction of a public stewardship code in Kenya has also been described as a political attempt to align with global best practices.[159]

Second, beyond halo signalling, another significant driver for the adoption of a UK-style public code is the political desire of the government to indicate its responsiveness to an economic crisis or scandals by adopting a corporate governance mechanism which almost universally has been seen as an indicium of good corporate governance.[160] The Japanese Code stands out here. As it has been thoughtfully explained by a Chapter in this Book, the Japanese Code was adopted as a key part of the Abenomics strategy to reinvigorate the Japanese economy with the aim to transform Japanese institutional investors to active stewards in close ties with their overseas counterparts.[161] But serving these political desires via the medium of a UK-style code appears to promote, or at least incentivize, a more short-termist culture among Japanese investors which is antithetical to the original corporate-governance-oriented conception of long-term active monitors which is at the heart of the UK Code 2010/2012.[162]

Third, the adoption of a UK-style code by a public body can serve as a cover for *policy channelling*. A Chapter in this Book has insightfully illuminated that the Korean Code may have been adopted by Korean financial regulators to exert their political agenda and power on private industry.[163] As they explain, there is reason to believe that the government has used its influence over the Korean National Pension Service (NPS) – which is the largest institutional investor in Korea and the third-largest public pension fund in the world – to execute a strategy which has been labelled by its critics as 'pension-fund socialism' under the guise of stewardship.[164] Malaysia's embrace of a UK-style stewardship code may have also been motivated by concerns to cover policy channelling. As illuminated in a Chapter in this Book the Malaysian government's position as the

[157] Lin, The Assessment of Taiwan's Shareholder Stewardship Codes, Chapter 12.

[158] Kowpatanakit and Bunaramrueang, Thai Institutional Investors Stewardship Code and its Implementation, Chapter 16.

[159] Ouko, Stewardship Code in Kenya, Chapter 22.

[160] Responding to a scandal can be the motivation behind the introduction of a private code too. See Becker, Andrade and Prado, The Brazilian Stewardship Framework, Chapter 24, Part II.A.

[161] Goto, Japanese Stewardship Code, Chapter 10.

[162] Goto, Japanese Stewardship Code, Chapter 10.

[163] Kang and Chun, Korea's Stewardship Code and the Rise of Shareholder Activism, Chapter 11.

[164] Kang and Chun, Korea's Stewardship Code and the Rise of Shareholder Activism, Chapter 11, Part IV.D.

controlling shareholder in many of the country's most powerful investment companies and listed companies has inextricably linked stewardship and the state.[165] As it is explained, there is a real risk that Malaysia's government is using a UK-style code to achieve its political agenda, such that it is unclear 'whether the interests of the state are aligned with those of the asset owners, the asset managers and more importantly, those of the ultimate beneficiaries or clients which are at the end of the investment chain'.[166]

These examples illustrate how the adoption of UK-style stewardship codes by public bodies may have more to do with a government's desire to execute its political agenda than corporate governance – making the fit of the UK-style code with the jurisdiction's corporate governance context a subsidiary concern. Beyond politics, however, it appears there are other significant drivers for the adoption of UK-style stewardship codes by both public and private bodies, which will now be explored.

2. Legal Forces as an Important Driver of Stewardship Codes: Complements, Substitutes and Accents

Legal forces have always been an important driver for the adoption (or non-adoption) of soft corporate governance standards. Central to a legal pluralist perspective of corporate governance is the observation of how mandatory and soft laws may operate in complementary or substitute fashion and how corporate governance norms today contain elements of both hard and soft law, or mandatory and voluntary rules.[167] As one of us has thoroughly explained elsewhere rules relating to shareholder stewardship are mixed in nature: some rules are laid down in soft-law stewardship or corporate governance codes but others (including rules about investment management and shareholder rights) are laid down in statutory instruments.[168] Stewardship codes, therefore, are part and parcel of a broader, multilayer regulatory framework of mandatory and soft rules relating to corporate governance and investment management, described as 'stewardship ecology'.[169] The adoption of UK-style stewardship codes both by public bodies and by private actors appears to be – at least in part – driven by these legal forces.

Sometimes stewardship codes may be introduced to *complement* mandatory rules or other soft-law standards. Sometimes stewardship codes – especially when they emanate from private actors – may be introduced to fill existing gaps in mandatory rules and

[165] Tan, Institutional Investor Stewardship in Malaysia, Chapter 15.
[166] Tan, Institutional Investor Stewardship in Malaysia, Chapter 15, Part I
[167] Katelouzou and Zumbansen (n 2).
[168] Katelouzou (n 10).
[169] Katelouzou (n 10).

substitute for 'harder' state-emanated regulation. But, at the same time, mandatory rules may substitute the need for stewardship codes. Sometimes stewardship codes may reinforce and *accent* distinctive legal features.

First, it appears that the adoption of UK-style stewardship codes has been largely motivated by a desire to *complement* the jurisdiction's existing corporate governance code.[170] The origins of this complementarity can be found in the UK Code 2010/2012 itself. The Preamble of the UK Code makes it clear that one of its aims is to establish a framework of 'effective stewardship' for institutional investors which works in parallel to the principles of the UK Corporate Governance Code that underlie 'an effective board' and, thereby, support (what it was at the time) the comply-or-explain system.[171] In addition, under Principle 3 of the UK Code 2010/2012 monitoring companies includes, among others, evaluating whether company's boards adhere to the UK Corporate Governance Code and thus supporting the conformity with good corporate governance standards.[172] In other words, institutional investors are expected to assess the company's displayed compliance to the corporate governance code as part of their stewardship obligations and give effect to the comply-or-explain enforcement model. This need to complement good corporate governance principles – which are mainly aimed at increasing the effectiveness of the board of directors by transforming institutional investors into 'good stewards' to be a catalyst for the comply-or-explain regulatory model – can be found in many non-UK codes.

For example, the Danish Code which was introduced by the same governmental body that adopted the Danish Corporate Governance Code – the Danish Committee on Corporate Governance – works in a 'parallel' fashion to and supports its corporate governance counterpart.[173] The Dutch Code also acknowledges its complementarity to the Dutch corporate governance code. The Guidance to Principle 1 of the original Dutch Code 2011 recommends to investors belonging to Eumedion – the institutional investor association that introduced the Dutch Code – to 'make a thorough assessment of the reasons provided by the company for any non-compliance with the best practice provisions of the Dutch corporate governance code'.[174] In a similar vein, the Dutch Code 2018 highlights that the 'Code should be read in conjunction with the Dutch Corporate Governance Code'.[175]

[170] For the complementarity between the two types of codes, see Katelouzou (n 10).

[171] UK Code 2012 (n 9) 1. Further on the changes in the enforcement mode between the two version of the UK Code, see Katelouzou (n 10).

[172] UK Code 2012 (n 9) 7. On the complementarity between the two codes, see Katelouzou (n 10).

[173] Birkmose and Madsen, The Danish Stewardship Code, Chapter 7, Part III.A.

[174] Dutch Code 2011 (n 50) 5

[175] Dutch Code 2018 (n 50) 2

Outside Europe this complementarity is recognized by the Kenyan Code which aims, among others, to reinforce the implementation of the 'apply-or-explain' system of the Kenyan corporate governance code.[176] South Africa is also a prime example of this complementarity. As a Chapter in this Book has skilfully highlighted, the South Africa Code 2011 interacts very closely with the King IV report.[177] In Asia, the Thai Code, in a fashion similar to the UK-model, provides that as part of monitoring institutional investors should ensure that the board of directors and sub-committees of their investee companies conform to the Thai corporate governance code.[178] In a less direct way, the Japanese Code 2014 recognizes in its Preamble that 'the function of the board and that of institutional investors as defined in the Code are complementary and both form essential elements of high-quality corporate governance'.[179]

It seems, therefore, that the adoption of UK-style stewardship codes both by public bodies and private actors has been – at least in part – driven by the perceived need to complement and support the implementation of the jurisdiction's corporate governance code and give effect to the comply-or-explain system. Beyond that, complementarity runs on other levels too. For instance, non-UK stewardship codes have been adopted to complement various soft and hard law stewardship-related rules, as in the case of the Brazil Code 2016, or investment management rules, as in the case of the South African Code 2011.[180]

Within the EU, another legal factor that appears to impact the adoption – but also the rejection – of the UK stewardship model is the introduction of the amended Shareholder Rights Directive (SRD II) in 2017.[181] As one of us has explained elsewhere, the SRD II has largely followed the steps of the UK Code 2010/2012 in introducing an engagement policy for all institutions and a form of disclosure-based regulation of institutions' investment policies and strategies, their arrangements with asset managers, and the accountability of asset managers to institutions.[182] Despite the fact that the SRD II does not adopt the term stewardship and it rather refers to 'shareholder engagement', the European notion of shareholder engagement includes monitoring, collaborative activities,

[176] Kenya Code (n 19) Schedule, para 5; Ouko, Stewardship Code in Kenya, Chapter 22, Part II.D.

[177] Locke, Encouraging Sustainable Investment in South Africa, Chapter 23.

[178] Thai Code 2017 (n 50) 42, Principle 3.2.

[179] The Council of Experts Concerning the Japanese Version of the Stewardship Code, 'Principles for Responsible Institutional Investors «Japan's Stewardship Code» - To promote sustainable growth of companies through investment and dialogue' (26 February 2014) 2 <https://www.fsa.go.jp/en/refer/councils/stewardship/20140407/01.pdf> accessed 25 May 2021.

[180] See Locke, Encouraging Sustainable Investment in South Africa, Chapter 23 and Becker, Andrade and Prado, The Brazilian Stewardship Framework, Chapter 24.

[181] SRD II (n 5).

[182] Chiu and Katelouzou (n 5).

conducting dialogue with companies and exercising voting rights and is thereby consonant with the UK-style stewardship.[183] The SRD II was adopted in 2017 but its first version started to be negotiated in 2014 – long before the spike in the evolution of stewardship codes which is dated between the years 2016 and 2017 by one of the Chapters in this Book.[184] One of us has elsewhere illuminated that the stewardship provisions of the SRD II were transposed in a literal and minimalistic fashion despite divergent national specifications.[185] This was attributed in part to the more apt soft, flexible and mostly bottom-up stewardship codes contained in private stewardship codes in the EU.[186]

Whereas it is plausible that the direction of causality runs from earlier soft stewardship codes to the mandatorily transposed SRD II rules, one cannot exclude the possibility that the relationship between the SRD II and national stewardship codes is not unidirectional and can go both ways. The case of the Netherlands is indicative here. Previous literature suggests that because of the pre-existing Dutch Code 2011, the SRD II was transposed in the Netherlands in a literal and minimalistic fashion.[187] But at the same time, the revised Dutch Code 2019 can be viewed as the direct result of the implementation of the SRD II in the Netherlands.[188] Of course, this two-way exchange of stewardship norms is more difficult to be found in other EU Member States with stewardship codes introduced by investor associations with less lobbying power than the Dutch Eumedion.[189] For instance, in Italy, although the SRD II was transposed in a literal and minimalistic way,[190] this transposition took place separately from the revisions of the Italian Code which has been introduced by an association of asset managers (Assogestioni), and a Chapter in this Book claims that the SRD II transposed rules do not seem to have a positive impact 'in enhancing the relevance' of the Italian code.[191]

The impact of the SRD II on the appetite of EU Member States with no stewardship code, like Germany, to introduce a code is even more questionable. A Chapter in this Book argues that the SRD II may act as a *substitute* and thereby make the introduction of a domestic code nugatory.[192] A substituting impact upon domestic codes may also be found in Denmark. A Book Chapter contends that as a consequence of the implementation of

[183] SRD II (n 5) Art 3h para 2.

[184] Katelouzou and Siems, The Global Diffusion of Stewardship Codes, Chapter 30, Part III.A.

[185] Katelouzou and Sergakis (n 5).

[186] ibid.

[187] ibid.

[188] Van der Elst and Lafarre, Shareholder Stewardship in the Netherlands, Chapter 4, Part II.B.

[189] On the lobbying of Eumedion on the transposition of the SRD II in the Netherlands, see Van der Elst and Lafarre, Shareholder Stewardship in the Netherlands, Chapter 4, Part I.

[190] Katelouzou and Sergakis (n 5).

[191] Strampelli, Institutional Investor Stewardship in Italian Corporate Governance, Chapter 6, Part VI.

[192] Ringe, Stewardship and Shareholder Engagement in Germany, Chapter 9.

the SRD II engagement provisions which are very similar to the Danish Code, the Danish Committee on Corporate Governance - the drafter of the Danish Code – made a tentative steps to phase out the Code and weaken its enforcement mode.[193] That the jurisdiction of origin of the global stewardship model (the UK) – which has provided the yardstick and bedrock of the SRD II – is no longer part of the EU, may further negatively impact the future diffusion of the UK-model in the EU.[194]

Finally, the adoption of a UK-style code may be motivated by and *accent* distinctive legal rules. Italy serves as a prime example in this regard. We have highlighted above the paradox of the origins of the Italian code as a private code introduced by an Italian investment management association despite the low presence of institutional investors in Italian public forms and the predominance of controlling share-blockholders.[195] A Chapter in this Book has skilfully explained this paradox by reference to the so-called slate (or list) voting system which enables minority shareholders to appoint at least one director on the management and statutory auditor boards.[196] Data shows that a significant number of minority-appointed directors has, in recent years, been appointed by institutional investors coordinated by Assogestioni, the drafter of the Italian Code.[197] This suggests that a UK-style code can still fit in a jurisdiction with controlling shareholders if there are other distinctive legal forces that can foster the role of minority institutional investors.

While it is too early to reach a conclusion about the symbiosis of stewardship rules and principles, what our analysis makes clear is that the shareholder stewardship landscape is complex and multilevel and legal forces can highly influence the adoption and sometimes rejection of UK-style stewardship codes.

E. ESG Movement: Enriching the UK Model

In addition to jurisdiction-specific factors, a driver which more recently appears to motivate the adoption of both public and private codes is a focus on ESG considerations

[193] Birkmose and Madsen, The Danish Stewardship Code, Chapter 7, Part VI (noting that the Committee announced that the Code's signatories are not expected the report on their compliance following the transposition of the SRD II). But no final steps have been taken by the Committee as this Book goes to press: Committee on Corporate Governance, 'Udfasning af Anbefalinger for aktivt Ejerskab [Phasing Out Recommendations on Active Ownership]' (28 January 2020) <https://corporategovernance.dk/udfasning-af-anbefalinger-aktivt-ejerskab> accessed 25 May 2021.

[194] For a more positive view on the future diffusion of soft stewardship codes, see Katelouzou and Sergakis (n 5).

[195] See text accompanying n 146 above.

[196] Strampelli, Institutional Investor Stewardship in Italian Corporate Governance, Chapter 6.

[197] Strampelli, Institutional Investor Stewardship in Italian Corporate Governance, Chapter 6, Part V.A.

in investment management. For public codes, the increased focus on ESG increasingly garners political support in many jurisdictions. The increased focus on ESG in private codes also makes sense as ESG is now an important part of the business model for an increasing number of institutional investors in response to the increasing demand by clients.[198]

Indeed, the rise of ESG as a factor mentioned in the latest versions of stewardship codes globally is striking. The original UK Code 2010/2012 hardly mentions ESG, and the South African Code 2011 was an outlier among first generation Non-UK codes with its core focus on ESG.[199] Building on the UN Principles for Responsible Investing the South African Code 2011 includes five principles aiming at incorporating sustainability and ESG into investment management.[200] But, the South African code – despite deviating from the UK model along all the three dimensions identified above (i.e., core concept, primary content and text/language)[201] – did not manage to establish itself as a global stewardship leader.

Nevertheless, a Chapter in this Book reveals that 84 percent of the latest versions of stewardship codes now refer 'at least once to ESG factors' and that only four current codes (i.e., Danish Code 2016, Korean Code 2016, Swiss Code 2013, and US Code 2017) do not mention ESG factors at all.[202] This comports with our hand-collected data that ten non-UK codes include at least one principle on ESG.[203] This same Chapter, however, highlights that several of these codes mention ESG only in a cursory manner for reasons that have more to do with politics and attracting foreign investment than a genuine commitment to ESG.[204] This is reinforced by the fact that only a minority of codes link the goal of implementing ESG with fiduciary duties. This same Chapter notes that 'from the nineteen codes that explicitly link stewardship practices to the fulfilment of investors' legal duties, only four codes … clearly regard the consideration of ESG factors as part of institutional investors' fiduciary responsibility'. [205] These four codes are three jurisdictional codes – Brazil Code 2016, Kenyan Code 2017 and Thai Code 2017 – and the latest version of the intra-jurisdictional ICGN Code 2016.[206]

The UK Code 2020, which has itself manifested an expanded, 'enlightened', vision

[198] Puchniak (n 13). Further on the demand side of the market for stewardship, see Katelouzou and Micheler, The Market for Stewardship and the Role of the Government, Chapter 3.

[199] Katelouzou and Siems, The Global Diffusion of Stewardship Codes, Chapter 30.

[200] Locke, Encouraging Sustainable Investment in South Africa, Chapter 23, Part II and III.

[201] Part III.B.

[202] Katelouzou and Klettner, Sustainable Finance and Stewardship, Chapter 26, Part III.C.

[203] See Part III.B.2.

[204] Katelouzou and Klettner, Sustainable Finance and Stewardship, Chapter 26, Part III.C.

[205] Katelouzou and Klettner, Sustainable Finance and Stewardship, Chapter 26, Part III.C.

[206] Katelouzou and Klettner, Sustainable Finance and Stewardship, Chapter 26, Part III.C.

of stewardship with its pivot to ESG makes no mention of fiduciary duties.[207] This point is important because investor or beneficiary welfare is still the goal of stewardship in the second version of the UK Code.[208] We will discuss below the potential of ESG as a catalyst for stewardship and whether the UK Code 2020 will serve as a new model in this regard, but what is clear is that the rise of the ESG movement provides another possible rationale for the global proliferation of UK-style codes. Public and private codes enriched with references to ESG – sometimes passing but other times more extended – find it easier to adopt the UK-model.

V. The Future of Global Shareholder Stewardship: Challenges and Possibilities Revealed

As illuminated in this Chapter and detailed in this Book, although formally UK-style stewardship codes have been transplanted around the world, the jurisdiction-specific reasons which have driven their adoption, the way in which they have been enforced, and the local corporate governance and legal environments in which they exist, have combined to produce varieties of stewardship that perform diverse functions – which would have been beyond the wildest imaginations of the original drafters of the UK Code. By revealing the varieties of stewardship this Chapter and Book has not only illuminated the untold complexity of global shareholder stewardship, but revealed the diverse roles it plays – or, perhaps more importantly, does not play – in different jurisdictions around the world.

Despite this diversity and complexity, if we take a step back, there are two features of shareholder stewardship that appear to present serious challenges to its utility globally: (1) lax enforcement regimes designed to change the behaviour of institutional investors in ways that are often contrary to their business models; and, (2) a regulatory design that is premised on institutional investors collectively holding a majority of shares in most listed companies when, in fact, they most often are collectively minority shareholders. These two ubiquitous features suggest that the future of shareholder stewardship is bleak as they appear to seriously undercut its ability to solve most firm-specific or systematic corporate governance problems in most jurisdictions around the world.[209] However, the rise of ESG as a recent focal point of stewardship appears to present a hopeful possibility for its future. This is because it presents a way to overcome the two main challenges to

[207] Katelouzou (n 10) for the term 'enlightened stewardship'.

[208] Katelouzou (n 10).

[209] Jeffrey Gordon, 'Systemic Stewardship' (2021) ECGI Law Working Paper No 566/2021 <https://ssrn.com/abstract=3782814> accessed 25 May 2021.

shareholder stewardship and to be part of the burgeoning ESG movement, which may become a mega-trend in the foreseeable future. Providing a more detailed explanation of these two serious challenges and ESG as the possible future of stewardship, is to which we now turn.

In terms of the first challenge, since the inaugural UK code was released in 2010, the most widely cited feature for its ineffectiveness has been the lax nature of its enforcement regime. This critique was widely discussed and well-known among academics and pundits within the UK prior to this Book project. Indeed, as explained above, this critique drove UK regulators to make several amendments to the UK's enforcement regime, moving it towards a more mandatory approach, which now borders on hard law.[210]

This Chapter and Book project, however, reveal that the enforcement regimes for stewardship codes globally are substantially laxer than the UK's regime – with the vast majority being entirely voluntary in scope and a significant portion requiring institutional investors to do nothing at all. This revelation is critical as there is convincing theoretical and empirical evidence that it is contrary to the business models of most institutional investors to actively engage in shareholder stewardship[211] – which formally, based on the text of codes, is the stated mission of most stewardship codes globally. The revelation that although almost all jurisdictions adopted the UK's seven principles – but none have adopted the UK's stricter enforcement regime – strongly suggests the UK's failure to change the behaviour of rationally passive institutional investors will be repeated, in an even more definitive way, globally.

The second primary challenge to shareholder stewardship globally, is that even if it succeeds in transforming institutional investors into actively engaged shareholders, this will not result in institutional investors acting as the stewards of most listed companies in most jurisdictions globally. As explained in this Chapter and Book, this is because in all major economies, aside from the UK/US, institutional investors are collectively minority shareholders. Moreover, in most jurisdictions globally, most listed companies have a controlling shareholder who is a rationally active steward in most listed companies. As such, in the unlikely scenario where stewardship codes transform institutional investors into actively engaged shareholders, they will most often serve as active minority shareholders – but not shareholder stewards. This reality – that the UK's shareholder stewardship model is a 'global legal misfit' – was entirely unknown prior to this Book project. It also may be the nail in the coffin for institutional shareholder driven stewardship globally – as it demonstrates why it is currently impossible for institutional

[210] Part IV.B.

[211] Bebchuk, Cohen and Hirst (n 128).

shareholders to steward most listed companies outside of the UK/US.

However, before resigning this Book to being a detailed autopsy documenting the demise of global shareholder stewardship, the transformation of shareholder stewardship to a mechanism to promote ESG may spark its resurrection. As explained in this Book, ESG focused stewardship may not be hobbled by the economic incentive problems inherent in institutional shareholder driven stewardship focused on improving corporate governance. This is because ESG focused stewardship may comport with the business models of an increasingly large portion of institutional investors – making in a nudge in the same direction as their business models (rather than a mechanism reliant on changing their business models). In addition, institutional investors acting as minority shareholders may be able to effectively give voice to the ESG movement and pressure controlling shareholders to become part of the movement. This may make the fact that institutional investors normally are not collectively majority shareholders less relevant. However, as a Chapter in this Book also highlights, there is the possibility that institutional investors and corporate controllers may all signal a concern for ESG, without making any change in practice. If this occurs, it may continue the widespread trend, revealed in this Book, of stewardship being a malleable, inexpensive tool, co-opted by institutional investors and governments to serve their own self-interests.

Finally, it is possible, but at present unlikely, that the evolution of global shareholder stewardship may surprise us by adopting one of the other conceptions of stewardship, described at the outset of this Chapter, as its main focal point. Rather than being a global legal misfit, jurisdictions may start to realize that an important role for stewardship in most jurisdictions is to serve as a check on controlling shareholder abuse and amend their codes to focus on the role of institutional investors as collective minorities – but there is no evidence that this is occurring in stewardship codes. However, the analyses of China and Germany in this Book suggest that regulators may be inserting provisions in corporate governance codes to incentivize institutional investors to act as checks on controlling shareholders – bringing some life to this conception of stewardship. Another possibility is that jurisdictions in Asia may follow Singapore and draft codes that make controlling shareholders, rather than institutional investors, a focal point of stewardship – which would be more theoretically sound, but which has its own challenges as highlighted in a Chapter in this Book.[212] Finally, the investment management conception of stewardship may become more prominent if institutional investors drive the future proliferation of shareholder stewardship globally – which does appear to be the trend that is occurring outside of Asia.

[212] Lim and Puchniak, Can a Global Legal Misfit be Fixed?, Chapter 28.

If this Book project has taught us one thing, it is to keep an open mind and be humble. Indeed, when we started this project, we never anticipated how much about global shareholder stewardship we would discover – particularly how pervasively it would diverge in practice from the original UK model and how many varieties of shareholder stewardship would emerge. This suggests that the future will likely hold some more surprises that we have not anticipated – it is indeed likely the beginning of history for shareholder stewardship.

APPENDIX

Stewardship Codes Around the World after 2010

Jurisdiction	Year	Title	Drafter(s)	Type	Enforcement		No of Principles (form)	Core Concept (CG, IM, ESG, CS)	UK Code 2010/2 Principles (substance)							Additional (non-UK 2010/2012) Principles
					Scope	Mode			P1	P2	P3	P4	P5	P6	P7	
Jurisdiction-Specific																
Australia	2018	Australian Asset Owner Stewardship Code	Australian Council of Superannuation Investors (ACSI)	private	voluntary	no-obligations	6	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	2017	FSC Standard 23: Principles of Internal Governance and Asset Stewardship	Financial Services Council (FSC)	private	non-voluntary for members	comply-or-explain	3	IM	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Brazil	2016	AMEC Stewardship Code	AMEC	private	voluntary	comply-or-explain	7	CG	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Canada	2010	Principles for Governance Monitoring, Voting and Shareholder Engagement	Canadian Coalition for Good Governance (CCCG)	private	voluntary	no-obligations	7	CG	Yes	No	Yes	No	Yes	Yes	No	Yes
	2017	CCGC Stewardship Principles	Canadian Coalition for Good Governance (CCCG)	private	voluntary	no-obligations	7	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	2020	CCGC Stewardship Principles	Canadian Coalition for Good Governance (CCCG)	private	voluntary	comply-or-explain	7	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Denmark	2016	Stewardship Code	The Committee on Corporate Governance	public	voluntary	comply-or-explain	7	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Hong Kong	2016	Principles of Responsible Ownership	Securities and Futures Commission	public	voluntary	comply-or-explain	7	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
India	2017	Guidelines on Stewardship Code for Insurers	IRDAI	public	non-voluntary for members	comply-or-explain	7	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
	2018	Common Stewardship Code	PFRDA	public	non-voluntary for members	mandatory	6	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
	2019	Stewardship Code	SEBI	public	non-voluntary for members	mandatory	6	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
	2020	Guidelines on Stewardship Code for Insurers	IRDAI	public	non-voluntary for members	mandatory	7	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Italy	2013	Italian Stewardship Principles for the exercise of administrative and voting rights in listed companies	Assogestioni	private	voluntary	no-obligations	6	CG	Yes	No	Yes	Yes	Yes	Yes	Yes	No

	2015	Italian Stewardship Principles for the exercise of administrative and voting rights in listed companies	Assogestioni	private	voluntary	comply-or-explain	6	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
	2016	Italian Stewardship Principles for the exercise of administrative and voting rights in listed companies	Assogestioni	private	voluntary	comply-or-explain	6	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Japan	2014	Principles for Responsible Institutional Investors <<Japan's Stewardship Code>>	The Council of Experts Concerning the Japanese Version of the Stewardship Code	public	voluntary	comply-or-explain	7	CG	Yes	Yes	Yes	No	No	Yes	Yes	Yes
	2017	Principles for Responsible Institutional Investors <<Japan's Stewardship Code>>	The Council of Experts Concerning the Japanese Version of the Stewardship Code	public	voluntary	comply-or-explain	7	CG	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
	2020	Principles for Responsible Institutional Investors <<Japan's Stewardship Code>>	The Council of Experts Concerning the Japanese Version of the Stewardship Code	public	voluntary	comply-or-explain	8	CG	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Kenya	2017	Stewardship Code for Institutional Investors	Capital Markets Authority	public	voluntary	comply-or-explain	7	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Korea	2016	Principles on the Stewardship Responsibilities of Institutional Investors	Korea Stewardship Code Council	public	voluntary	comply-or-explain	7	CG	Yes	Yes	Yes	No	No	Yes	Yes	Yes
Malaysia	2014	Malaysian Code for Institutional Investors	Minority Shareholder Watchdog Group	public	voluntary	no-obligations	6	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Netherlands	2011	Best Practices for Engaged Share-Ownership	Eumedion	private	voluntary	comply-or-explain	10	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	2018	Dutch Stewardship Code	Eumedion	private	voluntary	comply-or-explain	11	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Norway	2012	Industry Recommendation for the Members of the Norwegian Fund and Asset Management Association: Exercise of Ownership Rights	Norwegian Fund and Asset Management Association	private	voluntary	no-obligations	N.A.	IM	Yes	Yes	No	No	Yes	Yes	No	Yes
	2019	Industry Recommendation for the Members of the Norwegian Fund and Asset Management Association: Exercise of Ownership Rights	Norwegian Fund and Asset Management Association	private	voluntary	no-obligations	8	IM	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Singapore	2016	Singapore Stewardship Principles for Responsible Investors	Stewardship Asia	public	voluntary	no-obligations	7	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
	2018	Stewardship Principles for Family Businesses	Stewardship Asia	public	voluntary	no-obligations	7	CS	N.A.							N.A.

South Africa	2011	Code for Responsible Investing in South Africa	Institute of Directors Southern Africa	private	voluntary	apply-or-explain	5	ESG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Switzerland	2013	Guidelines for institutional investors governing the exercising of participation rights in public limited companies	ASIP, Swiss Federal Social Security Funds, economiesuisse, Ethos, Swiss Banking and SwissHoldings	private	voluntary	comply-or-explain	5	IM	No	Yes	Yes	No	No	Yes	Yes	Yes
Taiwan	2016	Stewardship Principles for Institutional Investors	Taiwan Stock Exchange	public	voluntary	comply-or-explain	7	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Thailand	2017	Investment Governance Code for Institutional Investors	Thai Securities and Exchange Commission	public	voluntary	comply-or-explain	7	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
United Kingdom	2010	The UK Stewardship Code	Financial Reporting Council (FRC)	public	non-voluntary (for some)	comply-or-explain	7	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	N.A.
	2012	The UK Stewardship Code	Financial Reporting Council (FRC)	public	non-voluntary (for some)	comply-or-explain	7	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	N.A.
	2020	The UK Stewardship Code	Financial Reporting Council (FRC)	public	non-voluntary (for some)	apply-and-explain	12	CG/IM/ESG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
United States	2017	Stewardship Framework for Institutional Investors	Investor Stewardship Group	private	voluntary	no-obligations	6	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Inter-Jurisdictional																
EU	2011	EFAMA Code for external governance: Principles for the exercise of ownership rights in investee companies	European Fund and Asset Management Association (EFAMA)	private	voluntary	no-obligations	6	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
	2018	EFAMA Code for external governance: Principles for the exercise of ownership rights in investee companies	European Fund and Asset Management Association (EFAMA)	private	voluntary	comply-or-explain	6	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
International	2013	ICGN Statement of Principles on Institutional Shareholder Responsibilities	International Corporate Governance Network (ICGN)	private	voluntary	no-obligations	12	IM	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
	2016	ICGN Global Stewardship Principles	International Corporate Governance Network (ICGN)	private	voluntary	no-obligations	7	CG	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

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