Request for Proposals

A Legal Framework for Impact - *A legal framework for the consideration of sustainability impact in investor decision-making.*

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1. Executive summary

This is a Request for Proposal for a law firm, or a proven partnership or network of law firms, to collaborate with the United Nations Environment Finance Initiative (UNEP FI), the Principles for Responsible Investment (PRI) and The Generation Foundation, to understand and analyse how or whether legal frameworks consider the management of sustainability impact by investors in major jurisdictions.

This project assumes that 1) driving sustainability progress overall requires an ability to understand and measure impact by investors, and that 2) understanding and managing impacts makes it possible to capture the financial value of sustainability issues, ultimately one of the biggest drivers for both investors and their financial intermediaries (such as banks).

In this project, an impact is commonly understood as being a change in outcome for a stakeholder. Impacts (also referred to as 'sustainability impacts') may be positive or negative, direct or indirect, actual or potential, intended or unintended, short-term or long-term. Impacts might be social (on people), economic (on economies) or environmental (on the environment). As such, sustainability impacts in this project refer to the impacts that an investee company or project may have on people, the environment, economies or some combination thereof.

This project will explore the legal contours around when and how investors can or are even required to assess and manage sustainability impacts as part of their investment decision-making process.

The project will provide recommendations that have not previously been formulated. It presents a unique opportunity to advance the global economy's transition to a more sustainable model – one that is aligned with the global climate agenda, under the framework of the UN Sustainable Development Goals agreed by 165 countries and territories.

In order to deliver this project, the law firm(s) will be expected to provide legal research and analysis, produce a final report, engage stakeholders, and propose recommendations for investors, regulators and policy-makers on how policies, regulation and the law may evolve to achieve the systematic assessment and management of sustainability impacts in investment decision-making.

The project is expected to be completed in Q4 2020, it includes a grant contribution from the project partners of maximum USD 200'000.

Firms should confirm interest by COB **Wednesday 26 June**. The project Secretariat will schedule informational sessions of approximately 45-60 minutes with interested parties the week of July 1st. Final proposals should be submitted by COB **Friday 26th July.**

UNEP FI, PRI and The Generation Foundation believe this project will be key to influencing, unlocking and advancing investor practice such that, within the next decade, assessing and managing the sustainability impact of investment decisions becomes a core part of investment activity.

2. Background

Launched in January 2019 by the PRI, UNEP FI and The Generation Foundation, *A Legal Framework for Impact*, will prepare and publish legal analysis, as well as practical recommendations, for investors seeking to assess and manage sustainability impact in investment decision-making as a core part of investment activity.

The first generation of responsible investment:

In the 2000s, investors began to understand the importance of environmental, social, and governance (ESG) issues to their investment decisions—best articulated by the *Freshfields report*—which found that investors could incorporate financially material ESG issues as part of their fiduciary duties.

The second generation of responsible investment:

Despite growing awareness, an implementation gap remained with capital markets often not accounting for sustainability-related risks and opportunities.

Launched in 2016, the Fiduciary Duty in the 21st Century programme advocates for the implementation of global policy reform to clarify fiduciaries' duties to their beneficiaries, reinforcing the core duties of loyalty, prudence and competence and stressing that investors must pay attention to long-term investment value drivers (including ESG issues) in their investment processes, in their active ownership activities and in their public policy engagement.

Financial regulators in the EU, UK, South Africa, Brazil and Ontario (Canada) have begun to clarify ESG requirements in legislation.

The third generation of responsible investment:

The third generation of responsible investors are beginning to assess, measure and manage the real-world sustainability impact of their investment activity.

However, as currently defined, investor duties do not require a fiduciary to account for the sustainability impact of their investment activity, beyond what is financially material. In other words, fiduciary duties require consideration of how sustainability issues affect the investment decision, but not how the investment decision affects sustainability issues.

This project aims to address this gap by investigating the legal framework(s) for the consideration of sustainability impact in investor decision-making, in specific jurisdictions.

3. Objectives of the project

Major sustainability challenges, such as climate change and inequality, have led to increased public expectations for businesses, including investors, to contribute to solving these problems. The United Nations estimates that there is a multi-trillion-dollar funding gap for the UN sustainable development goals (SDGs) and that private funding will be needed to close this gap.

While it is widely acknowledged that we need to shift to a more sustainable financial system and that impact management is central to achieving this, it is not yet understood how legal frameworks currently prohibit, limit, support or should support investors to drive this transition.[1]

Beyond the limited sphere of the so-called *impact investors*, there are emerging 'pockets of excellence' in technical understanding of impact management by mainstream financial institutions, including disclosure frameworks for impact reporting and methodologies to identify sustainability impacts in investment decision making processes.

However, fundamental legal questions remain.

This project will collaborate with a major law firm (or law firms) to understand and analyse how, or whether legal frameworks consider the management of sustainability impact by investors, how they

[1] UNEP FI, Rethinking Impact to Finance the SDGs, 2018.

may set impact-related targets and work towards achieving sustainability goals, how that relates to their diverse legal requirements and duties and what happens if these are in conflict.

The project will present legal analysis to support not just how sustainability issues affect the investment decisions but also how investment decisions may in turn affect sustainability issues in a positive or a negative way.

In some jurisdictions, the legal analysis may find that there are legal impediments or limited incentives to incorporate sustainability impact, in which case the project will recommend policy change.

We believe that a deep analysis of the law, policies and financial regulation will be key to unlocking and advancing investor practice. In turn, this will contribute to building normative expectation for sustainability impact management in investment practice.

Our aim is that, within the next decade, assessing, managing and accounting for the sustainability impact of investment decisions is a core part of investment activity.

4. Project set up

The project is expected to be completed in Q4 2020.

We identify four main parties to the organizational structure of the project: the Steering Committee, the Secretariat, the Reference Group and the lead law firm.

- Oversight: project Steering Committee:

The project is responsible to a Steering Committee of the PRI CEO, UNEP FI Director, and representatives of The Generation Foundation.

- The Secretariat:

The Secretariat is comprised of a joint management team from UNEP FI, the PRI, and The Generation Foundation. Together the three partners are responsible for the management and delivery of the recommendations and project overall. In addition, the Secretariat plays an active role leading and coordinating the Reference Group and the lead law firm.

- The Reference Group:

Members, appointed by the Secretariat, join the Reference Group in their capacity as representatives of investment organizations, academic bodies or in their personal capacity. The Reference Group members provide support and advice to the Secretariat and the lead law firm as relevant. Decision-making remains with the Secretariat. Members of the Reference Group are displayed on the project webpage: https://www.unepfi.org/investment/legal-framework-for-impact/

- The (lead) law firm:

Selected by the Secretariat with advice from the Reference Group, the law firm (or lead law firm should a consortium be formed) will be formally contracted via the PRI Association.

This project welcomes law firms with proven partnership or network (i.e. consortium), with the condition that a lead law firm is responsible for the delivery and coordination of the project as defined in this RfP.

5. Current thinking and scope of this Request for Proposals

The following scope and ideas around a minimum set of research questions are derived from the discussions and deliberations among the Reference Group and the Secretariat.

The project partners acknowledge that the project cannot be perfectly predicted, and that the first round of analysis may reveal the need to seek additional expertise or deviate slightly from the initial project plan.

Please make clear in your proposal, if, why and how you would suggest deviating from the outlined scope and what approaches you would suggest taking to achieve the objectives of this project. For additional proposal requirements, see section 10 of this RfP.

5.1 Audience

This project targets institutional investors (e.g. pension funds, insurance company reserves, mutual funds and public investment agencies) and their asset managers and legal advisors - referred to collectively as 'investors' in this RfP. It focuses on mainstream investment activity, including equity, fixed income, and alternative assets. In other words, it focuses on the management of impact in investment decisions, not solely on the so-called *impact investing* community or asset class.

This project also aims to make recommendations to policymakers and regulators, that we expect will learn from this analysis to inform future responsible investment policies and regulations, where policymakers set the plan which governments pursue, and regulators deliver a mandate set by policymakers.

5.2 Geographic scope

The jurisdictions we would like to examine include:

- European Union (and its institutions);
- US; and / or US States;
- UK;
- France;
- Canada;
- China.

These have been pre-selected based on GDP, the size of the institutional investment market, industry interest, and/or policy/regulatory developments.

Additional jurisdictions such as Sweden, the Netherlands, Brazil, Australia, Japan, Switzerland, and/or South Africa can be proposed and added to this scope by the law firm(s).

We expect scope to include at least 6 geographies and will prioritise depth of analysis, over geographic breadth. Proposals shall include an argument for each additional jurisdiction(s) that is deemed particularly significant.

A final agreement on the geographic scope will be reached in conjunction with the lead law firm, the Secretariat, and the Reference Group.

5.3 Defining impact

While defining impact will not be the focus of this project, an agreed working definition is required before embarking on this project.

An impact is commonly understood in this project as being a change in outcome for a stakeholder. Impacts (also referred to as 'sustainability impacts') may be positive or negative, direct or indirect, actual or potential, intended or unintended, short-term or long-term.[2] In this project we shall adopt a holistic view of stakeholders, that is impacts might be understood as effects on people (social), on economies (economic/financial), or on the environment (environmental).[3]

The specific rationale for assessing and managing impact is twofold. On the one hand, driving sustainability progress overall requires an ability to understand and measure impact by investors (e.g. understand baselines and set targets), and on the other hand, understanding and managing impacts makes it possible to capture the financial value of sustainability issues, ultimately one of the biggest drivers for both investors and their financial intermediaries (such as banks).

5.4 Research questions

The project seeks to answer the following question:

- Whether the consideration and management of sustainability impact in investment management (including asset allocation, portfolio construction, and company engagement) and decision-making processes across all asset classes by institutional investors is permitted, legally required, restricted or prohibited by law and regulation?

To illustrate, sub-questions include:

- Whether investors are legally required to integrate the sustainability impact of their investment activity in their decision-making processes;
- If not, on what legal grounds can investors pro-actively manage sustainability impacts in their investment decision-making and/or strategies. *Example: Investors may analyse whether and how the investment decision has an impact on the wider society and manage as well as measure the impact accordingly;*
- Whether there are legal impediments to investors adopting 'impact targets'—for example—that an investor's investment activity is consistent with no more than 1.5 degrees of warming. *Example: Investors may incorporate decarbonisation targets, work towards achieving net-zero portfolios, and as such impose on themselves an impact obligation to measurably decarbonise their portfolio;*
- Whether investors have a legal obligation to consider the non-financial interests of their beneficiaries/clients? If so, what the requirements may be for them (i) to determine what those interests are and (ii), how potential conflicts of interests between beneficiaries may be dealt with;
- Whether there are examples from the finance and other sectors of the economy – such as the healthcare industry or mining industry – that can provide a basis for understanding impact requirements and due diligence frameworks for investment activity. *Example: Whether the role and duties of companies' boards of directors may translate to investors;*

[2] https://impactmanagementproject.com

[3] In line with the UNEP FI Principles for Positive Impact Finance

- Whether reporting obligations on sustainability impact imply an imperative to consider and manage impact in investment decisions (e.g. European Commission investor duties legislative proposal).

5.5 Actions

Delivering the project should include the following elements:

1. Conduct research and analysis

   - Critically review the law and policies in the selected jurisdictions and provide relevant summaries, covering at a minimum the following points (see section 5.6);
   - Critically review soft law and voluntary initiatives (these can include private initiatives or public/private initiatives) to identify signs of the emergence of normative expectations of the industry or standard practices that are arising across the industry (see section 5.7);
   - Propose and/or provide case study examples from the finance and/or other sectors of the economy that can be a source of inspiration to apply to investment activity, where relevant;

2. Develop recommendations (also see section 5.8)

   - Identify the parameters of the current legal and regulatory frameworks that can create space for investors to assess and manage sustainability impacts, adopt sustainability impact targets, and ultimately support the deployment of capital for sustainability impact with greater legal certainty;
   - Propose practical recommendations for policy-makers and regulators on how policies, regulation and the law could evolve to enable the systematic assessment and management of sustainability impact in investment decision-making;

3. Participate in outreach

   - Participate in outreach and engagement activities set up by the Secretariat to promote the project and recommendations with investors, policymakers, regulators and other relevant stakeholders (e.g. conference calls as judged necessary, two in-person workshops, two in person high level representations during the report launch; participate in press releases at the beginning and end of the project);
   - Publicly endorse the final product and recommendations.

The Secretariat expects each proposal to consider and elaborate on the various types of data required for the critical review and how the data can be sourced.

Please highlight your understanding and capability to help guide the Secretariat in this regard.

Please make clear in your proposal, if, why and how you would suggest deviating from the outlined scope and what approaches you would suggest taking to achieve the objectives of this project.

5.6 Critical review of law and policies in selected countries

The project will be based around a critical review of the policy, regulatory and legal frameworks in select jurisdictions regarding the consideration of sustainability impact in investor decision-making.

That includes (non-exhaustively):

- International policy frameworks, conventions, multi-lateral agreements such as the Paris Agreement, the Sustainable Development Goals etc.
- Common law duties including fiduciary duties and duties of care and associated jurisprudence;
- Civil code duties that correspond to fiduciary duty and duty of care concepts;
- Statutory obligations for conducting investment activities;
- Stewardship duties and shareholder rights;
- Accounting standards and current legal frameworks for assessing intangibles;
- Reporting obligations relating to impact (e.g. clarify how investor disclosure requirements may match an obligation for impact management);
- Contractual duties where institutional investors choose to adopt impact targets;
- The law around considering the views of beneficiaries and retail clients;
- Dominant investment theories i.e. how the modern portfolio theory and efficient markets theory intersect with legal duties and policy development concerning sustainability impacts.

Examples taken from recent legislative initiatives may include (again non-exhaustively):

- The South Africa FSB Reg 28 (the pension fund regulations) requiring pension funds to disclose against the "sustainable" long-term performance of assets: *…Sustainability includes managing the impact that the business of an entity has on the life of the community, the broader South African economy and the natural environment in which it operates. It also includes the converse, namely considering the effects that the society, economy and environment have on business strategy …*
- The EU Parliament's negotiating position for the Investor Duties file [Proposal for a regulation on disclosures relating to sustainable investments and sustainability risks and amending Directive (EU) 2016/2341] suggests that all funds and all entities (e.g. fund managers) should disclose the "sustainability impact" of their investment activity*…. in addition, where financial market participants and financial advisors market financial products or services claim that such products or services pursue sustainable investment objectives, obliging them to disclose information on the contribution of the investment decisions to the sustainable investment objectives (ex-post disclosure in regular reporting) and on how the investment strategy is aligned with the sustainable investment objectives (ex-ante disclosure in pre-contractual and contractual documents) …*

5.7 Critical review of soft law and voluntary initiatives

These can include private initiatives, UN-led and/or or public/private initiatives that indicate signs of the emergence of normative expectations of the industry or standard practices that are starting to be taken up across the industry.

This project will build on existing initiatives factoring in impact, including:

- UNEP FI Positive Impact Principles; UNEP FI Principles for Responsible Banking
- Impact Management Project and Convention
- UN Guiding Principles on Business and Human Rights
- PRI Sustainable Financial System programme
- UN Alliance for SDG Finance
- 2018 EU Action Plan for Sustainable Finance
- Science-based target initiative
- GRI SDG Project
- Aligning Investors with Sustainable Finance: A focus on the OECD
- IFC Operating Principles for Impact Investing
- GIIN Core Characteristics of Impact Investing

- ICMA Principles for Sustainability Linked Loans + Green / Sustainability Bonds

This review could be supported by the Secretariat, upon agreed geographic scope by the lead law firm, and all parties.

5.8 Recommendations

As described in section 5.5, recommendations should include:

- The parameters of the current legal and regulatory frameworks that can create space for investors to assess and manage sustainability impacts, set sustainability impact targets and support the deployment of capital for sustainability impact with greater legal certainty;
- Practical recommendations for policy-makers and regulators on how policies, regulation and the law could evolve to enable the systematic assessment and management of sustainability impact in investment decision-making;

In addition, by the end of the project the Secretariat would expect to have better visibility around the following issues, please highlight your understanding and capability to help guide the Secretariat in this regard:

- Leverage opportunities and tipping points to increase support for investors to manage sustainability impacts and set sustainability impact targets;
- Level of maturity in the select jurisdictions for the elaboration of an impact duty and/or opportunity for continued intervention;
- Identify a '*model*' policy & regulatory environment for sustainability impact management in investment; and
- Pathway for the development of a norm for impact management, including steps and timeframe.

6. Deliverable(s)

To deliver this project, the law firm will be expected to:

- Propose a table of contents and produce a final report, including (but non-exhaustively):

  - an executive summary;
  - research and legal analysis covering the jurisdictions and elements described above;
  - case studies, examples to clarify and illustrate status and opportunities;
  - recommendations to investors, regulators and policymakers;
  - perspectives on prospects for sustainability impact duties to emerge for institutional investors in the selected jurisdictions;

Noting the final table of contents for the final report will be subject to negotiations and further discussed among parties to this project.

- Engage investors, policy-makers, and other relevant stakeholders as part of the research process, with support from the Secretariat;

- Participate in outreach activities as described in section 5.5.

7. Intellectual property

At the end of this project all deliverables will be published including logos of the law firm and the partners to this project on the main page. The aim is for investors/asset owners and policymakers/regulators to use and/or build upon these pieces of work.

All rights in and to the report and all other content developed by the law firm in connection with this project will be owned by the Generation Foundation, UNEP FI and PRI Association. It is the intention that all deliverables will be published and made publicly available for general, non-commercial purposes under a Creative Commons Attribution-Non-Commercial 3.0 Unported licence. This means that third parties may share the content by copying, distributing, and transmitting it, and may produce derivative works from the content, but may not make commercial use of it and must always attribute it to The Generation Foundation, UNEP FI and PRI Association.

8. Timeline

Please see below a rough timeline for this project. The Secretariat expects proposals to provide a more granular indication of intermediate deliverables and interactions with the Secretariat. A detailed timeline will be developed and agreed upon by the (lead) law firm and the Secretariat.

	Jul 2019	Aug	Sep	Oct	Nov	Dec	Jan 2020	Feb	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
Proposals submitted by law firms																		
Selection of law firm																		
Contracting process																		
Legal review																		
Desk research																		
Mid-term in person meeting																		
Recommendations																		
First draft report																		
Open consultation																		
Final draft																		
Global and country launches																		

9. Parties to the contract

The selected (lead) law firm will be contracted by the PRI Association.

10. Your proposal

Your proposal should include the following sections with appropriate headings:

1. Title page listing the law firm(s), date, and main responsible individual(s), template/under corporate headings
2. Executive summary

3. Legal team
    - Names, roles, locations, jurisdictional expertise, and time commitment of those persons that will carry out the work
    - Identify at least one reference lawyer for each jurisdiction proposed
4. Scope and approach
    - A clear scope and approach to this project, based on this RfP
    - Highlight and explain any suggested deviations from this RfP
5. Jurisdictions
    - Proposals on jurisdictions to cover and why
6. Recommendations
    - Highlight your understanding and capability to help guide the Secretariat regarding outcomes and recommendations
7. Studies
    - Reference any track record of key academic work, studies or other projects that may be relevant to this project as well as the data sources you would propose to use;
8. Budget detail
    - Provide a budget breakdown on day rate and expenses detailing the scope of work from what this RfP outlines that your proposal commits to deliver with a grant contribution of maximum USD 200'000
9. Annexes:
    - Include previous work your company/institution completed that is relevant to this project
    - Include only CVs of staff members who will contribute to the project. Please specify which role each of the staff members you are presenting will fulfil in the project
10. Page limit:
    - Please limit your proposal to 10 pages plus annexes
    - Describe what issues and which approaches you would choose to achieve outlined objectives and which data sources you would propose to use. Please remember that what is outlined in this proposal are initial ideas and the Secretariat is open to other suggestions based on your subject-matter expertise

Tenders from multiple law firms will be considered under the condition that an existing, proven partnership or network exists among the law firms included in the submission and that there is a clearly identified lead law firm responsible for the final delivery and central coordination of the project.

Please confirm your firm's interest by **COB June 26th**. The Secretariat will schedule informational sessions of approximately 45-60 minutes with interested parties the week of July 1st to raise any issues or seek clarification on any items.

Please submit your proposal as both Word and PDF documents to Elodie Feller (elodie.feller@un.org), copying Will Martindale (will.martindale@unpri.org), and Grace Eddy (grace.eddy@generationim.com) by **Friday 26th July**.

11. About the project partners

About the PRI

The Principles for Responsible Investment (PRI) works with its international network of signatories to put the six Principles for Responsible Investment into practice. Its goals are to understand the investment implications of environmental, social and governance issues and to support signatories in integrating these issues into investment and ownership decisions. The six Principles were developed by investors and are supported by the UN. They have over 2,000 signatories from over 50 countries representing US$80trn of assets. They are voluntary and aspirational, offering a menu of possible actions for incorporating ESG issues into investment practices. In implementing the Principles, signatories contribute to developing a more sustainable global financial system. For more information, see www.unpri.org.

About UNEP FI

The United Nations Environment Programme Finance Initiative (UNEP FI) is a unique global partnership between the United Nations Environment Programme (UNEP) and the global financial sector founded in 1992. UNEP FI works closely with over 200 financial institutions who have signed the UNEP FI Statements, as well as a range of partner organisations, to develop and promote linkages between sustainability and financial performance. Through peer-to-peer networks, research and training, UNEP FI carries out its mission to identify, promote, and realise the adoption of best environmental and sustainability practice at all levels of financial institution operations. For more information, see www.unepfi.org.

About The Generation Foundation

The Generation Foundation (the Foundation') was part of the original vision of Generation Investment Management LLP ('Generation') since the firm was founded in 2004. The Foundation was established alongside Generation in order to strengthen the case for Sustainable Capitalism. Our strategy in pursuit of this vision is to mobilise asset owners, asset managers, companies and other key participants in financial markets in support of the business case for Sustainable Capitalism. In our effort to accelerate the transition to a more sustainable form of capitalism, we primarily use a partnership model to collaborate with individuals, organisations and institutions across sectors and geographies and provide catalytic capital when appropriate. In addition, the Foundation publishes in-house research, gives select grants related to the field of Sustainable Capitalism, engages with our local communities and supports a gift matching programme for the employees of Generation. All of the activities of the Foundation, a not-for-profit entity, are funded by a distribution of Generation's annual profitability. For more information, see www.genfound.org.