

A LEGAL FRAMEWORK FOR IMPACT

Sustainability impact in
investor decision-making



Freshfields Bruckhaus Deringer



Principles for
Responsible
Investment

generation
foundation



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The Generation Foundation

Al Gore and David Blood

When we founded Generation Investment Management in 2004, the concept of sustainable investing was widely considered an admirable but fringe approach. Now, 17 years later, sustainable investing has not only become mainstream, but is recognised as a mark of prudent investment practice. Pioneering analyses like the 'Freshfields report' in 2005, and Fiduciary Duty in the 21st Century helped drive this transition by challenging accepted wisdom about investors' duties and helping them re-envision their roles. And in the intervening years, environmental, social and governance issues have introduced both new risks and new opportunities across investors' portfolios, awakening many to the material costs of failing to incorporate these values, as well as the prospects for using ESG analysis to better identify new, fast-growing business trends. Yet, too many investors still approach ESG investing from a defensive posture. We consider that risk management alone is not enough.

Investors should make decisions on the basis of risk, return and impact in order to take full advantage of the opportunities provided by what we call the Sustainability Revolution.

This first-of-its-kind report, commissioned by The Generation Foundation, PRI and UNEP FI, considers the role of the investor as an active agent in shaping the world around us, rather than as a spectator betting on the side lines. This detailed, global legal analysis demonstrates that investors should feel empowered to set impact goals and measure progress against them. It also highlights what must change to ensure that the rules that govern our financial system foster a truly sustainable economy.

We hope that investors, intermediaries, policymakers and regulators will read this report as a call to action to build a better financial system. We do not have another 17 years to wait.



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United Nations Environment Programme (UNEP)

Inger Andersen

The Sustainable Development Goals and the Paris Climate Agreement are our best chance for not only a livable but also a brighter future. Reaching these goals requires an updated financial system that is fit for purpose – one in which assessing and accounting for the sustainability impact of investment decision-making is a core part of investment activity. This groundbreaking report provides a much-needed roadmap.

To date, despite significant advances, capital markets continue to operate beyond sustainability boundaries. It is clear that we need to change. The science cannot be disputed. Business-as-usual is having a devastating impact by propelling climate change, destroying nature, and raising pollution levels. The triple planetary crisis is not only being exacerbated by inequality, but it is also likely to further deepen inequality. At the same time, we are seeing a rapid awakening in some segments of society, and in particular among young people, demanding better from business and government. Capital markets must treat all these risks as the serious, systemic risks that they are.

Investing and collaborating for sustainability impact is no longer optional. It is essential for financial stability, for managing systemic risks, and for protecting the world for our children. It is now clear that investors can and must consider how these issues affect their goals and their impact on the real world.

This report offers a blueprint for how to better align the provision of finance with sustainability objectives, looking at existing opportunities and obstacles.

Taking account of the vast regulatory landscape, this report identifies areas of reform to foster a more supportive environment for investors to integrate impact into investment decision-making. For capital markets to significantly help solve the big societal issues we face requires regulatory frameworks that move beyond merely integrating ESG issues where they are financially material, towards more effective integration of sustainability impact. This requires determined and collective action from investors, policymakers and regulators, unified in the journey to achieving the goals of the Paris Agreement and the SDGs.

As stewards of the common good, it is vital that all actors steer our world onto a more sustainable path. A Legal Framework for Impact highlights paths forward to strengthen the financial system so that impact is systematically managed by all investors – a pre-requisite for meeting our sustainability goals. The health of people and planet, as well as of investments across the world, depend on investors and policymakers engaging with the issues addressed in this report.



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Principles for Responsible Investment (PRI)

Fiona Reynolds

Responsible investment has come a long way over the past few decades as investors have started to recognise the importance of ESG issues to their investment decisions. This has been driven in large part by the Freshfields report of 2005 which concluded that investors are permitted and arguably required to integrate ESG factors into their analysis, and the subsequent UNEP FI, PRI and Generation Foundation programme: *Fiduciary Duty in the 21st Century*, which determined that ESG factors must be considered for investors to meet their fiduciary duties.

Today investors are starting to look beyond the impacts of ESG risks on their portfolios to understand the impacts their portfolios have on the real world around them – the world their beneficiaries live in and will ultimately retire into. They are beginning to assess, measure and manage the real-world sustainability outcomes of their investment activities.

As it currently stands, many investors still do not systematically consider their role in shaping sustainability outcomes. But this mode of operating, without considering the positive and negative impacts of investments on people and the planet, will not be sufficient for a sustainable economy. A gap has emerged in the ways of working we need in responsible investment to minimise harms and deliver on increasingly urgent environmental and social needs.

The Legal Framework for Impact project was launched by PRI, UNEP FI and The Generation Foundation to address this gap. This groundbreaking report shows how investing for sustainability impact is relevant for all investors, and that they will likely have an obligation to consider doing so where it can help in pursuing their financial objectives. It lays the foundation for the financial policy reforms we need to reorient investors and, through them, markets and economies towards net zero and inclusive, sustainable economic growth.

The clock is ticking on our opportunity to achieve the Sustainable Development Goals and align with the Paris Agreement and it is clear that we need to move faster and go further. PRI, UNEP FI and The Generation Foundation are launching a 3-year work programme to translate the findings of the report into jurisdiction-specific engagement with policymakers, lawyers and investors on investing for sustainability impact, so we can work together to accelerate change.

A paradigm shift towards investing for sustainability impact is upon us. This is a new frontier that we must navigate together.



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Freshfields Bruckhaus Deringer LLP

Georgia Dawson and Edward Braham

We are proud to have been asked to produce this report, in collaboration with firms in our *StrongerTogether* network. The report addresses the pressing issue of how far institutional investors are legally required or permitted to invest for sustainability impact, covering the world's major investment hubs.

The report sets out the law as it stands and indicates the direction of travel around the world. It also lays out policy options that facilitate investing for sustainability impact. It should therefore help investors, business leaders and policymakers.

The firm's 2005 report on institutional investor duties for the UNEP FI has been highly influential in sustainable finance practice and regulation around the world. It also affected the firm's own thinking and contributed to our decision in 2007 to be carbon neutral, a key milestone towards the larger goal of net zero and delivering on broader sustainability goals.

More than fifteen years on, with global society increasingly appreciating the importance of sustainability issues and their interdependence with finance and economic activity, the questions addressed in this report have never been more urgent. We hope that this report contributes to a brighter future for the world.



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INTRODUCTION

This report is about achieving the goals we value. It is about how institutional investment management can help with that, and it is about how the law supports the process.

The goal most associated with institutional investment management is earning a financial return. People and organisations depend on institutional investors to generate the finance they need to sustain themselves. Earning a financial return is a valued goal.

But earning money is obviously not the only goal we have for our lives or for our world. It exists alongside broader goals concerning the quality of the social and natural environment we inhabit, or at least its sustainability. These too are valued goals.

There may have been a time when it was possible to approach the goal of earning a financial return largely in isolation from the others. In reality, however, financial and economic systems are part of wider social and natural ecosystems, the health of which is vital to broader goals. Financial and economic systems can help these ecosystems flourish, particularly in their social dimension. However, they also depend upon and can adversely affect them. They can both strengthen and undermine the systems on which they rely.

The impact of laws on how people behave depends, among other things, on what those laws say, but also how they are understood and followed in practice. Both are affected by prevailing beliefs about the way things are. If it has been assumed that investment could be approached as no more than an exercise in generating financial return, detached from its social and natural environment, then it is not

surprising if laws and the way they have been understood have reflected that.¹

But if it was once possible to approach the goal of earning a financial return in isolation from other valued goals, that time is not now. The interdependence between financial and economic activity and the systems on which it relies – and on which achieving broader goals depend – is ever clearer.

Because of that, there has been an increasing focus on the financial community as a source of solutions and on the question of whether finance law needs to change to achieve sustainability-related goals. At least in part, that question needs to be answered through political processes. The challenges are systemic, and finance is part of the system, so clearly finance has a role. However, solutions also involve looking more widely at consumption and production activities and facing questions of inter-generational and inter-group justice.

It is therefore not the purpose of this report to answer the question of what *ought* to happen. Rather, the report looks at 11 jurisdictions that represent a cross-section of investment hubs, cultures and legal traditions, including the world's largest centres of investment management. It asks whether the law as it stands in those jurisdictions requires or permits institutional investors, specifically pension and mutual funds and insurers and their investment managers, to tackle sustainability challenges in discharging their legal duties and exercising their discretions: does the law do so in order to enable them to realise a financial return, and does it do so in a way that allows them to treat resolving

some sustainability challenges as an end in itself? This is, essentially, what is meant in this report by 'investing for sustainability impact'. To the extent the law does not require or permit that, and to the extent the political processes mentioned above determine that it should, the report also looks at what options might be available to policymakers.

The report is, then, in three parts following the executive summary.

- Part A looks at what investing for sustainability impact is, how extensive it is and growing evidence that people want their money managed so as to have positive sustainability impacts.
- Part B addresses the question of whether the law in the jurisdictions covered requires or permits investing for sustainability impact, considering both the 'black letter' of the law and circumstances that are relevant to the way in which it is applied.
- Part C discusses options available to policymakers to facilitate investing for sustainability impact.

As well as focusing on the goals investors are required or permitted to pursue, a key theme in this report is cooperation. Many sustainability challenges are essentially the result of problems caused by multiple actors and require collective action to resolve them. The outcome of a collective action is the product of a multitude of individual acts. However, those acts are not atomised. They are trained on a common goal. In investment markets, one way of achieving this sort of coordination is through investor coalitions. Policy intervention is another.

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¹ Mark Carney, *Value(s): Building a Better World for All* (William Collins 2021); David Rouch, *The Social Licence For Financial Markets: Reaching For The End And Why It Counts* (Palgrave Macmillan 2020).

INTRODUCTION

In a sense much has changed and yet little has changed since we started writing this report. The sustainable finance landscape has developed at dizzying speed, with a host of sustainability-related initiatives and commitments from major financial institutions, and an acceleration of work among governments and NGOs. Much of it is relevant to this report and is mentioned in it. We had to hit a moving target. And yet, the underlying sustainability challenges remain, and in some cases are growing. The questions addressed by this report are therefore as pressing as ever.

We are enormously grateful to the considerable number of people who have contributed to providing answers, both the jurisdictional legal teams in our offices and the members of our StrongerTogether network who have prepared the legal memoranda in the annexes and all of those who have commented on and helped in drafting it, whose names are included in the acknowledgements that follow. We would especially like to thank Philip Richards, Annabel Sykes and Mark Kalderon for invaluable assistance and challenge and the core team who have supported the work: Emma Rachmaninov, Shona Hughes-Daly, Olivia Carrington, Gabriela Rocha

Gomes Strieder and Angela Evans. We are grateful to our clients, the UNEP FI, the PRI and the Generation Foundation for asking us to prepare the report and to the partners of Freshfields Bruckhaus Deringer LLP for having made such a generous commitment to it and given us the opportunity to undertake this important work on their behalf.

The concern of this report is a collective global challenge and, appropriately enough, meeting the challenge of preparing it, particularly during the Covid-19 pandemic, has been very much a collective global exercise.

David Rouch and Juliane Hilf

July 2021



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Jurisdiction	Firm	Authors
Australia	Corrs Chambers Westgarth	Anton Bobenko, Michael Chaaya, William Chaffey, Kon Mellos, James Whittaker and Phoebe Wynn-Pope
Brazil	Mattos Filho	Flávio Barbosa Lugão, Fernanda Basaglia Teodoro, Tábata Bocanera Guerra de Oliveira, Vitória de Assis Pacheco Moraes, Gabriel de Freitas Queiroz, Eduardo Cezar Delgado de Andrade, Anália Cristina Ferreira Brum, Júlio Figueiró Melo, Renata Fonseca Zuccolo Giannella, Juliana Furini de Vasconcellos Puntel, Juliana Gomes Ramalho Monteiro, Luis Eduardo Kussarev Al-Contar, Ary Oswaldo Mattos Filho, Maria Luiza Miranda Geraldi, Vinicius Paula Castro, Lina Pimentel Garcia, Isabela Sartori, Bárbara Gabriel de Vasconcelos Silveira, Marcela Venturini Diorio and Gabriel Zampieri Ferreira Batista
Canada	Stikeman Elliott LLP	Sagar Darar, Chris Lofft and Stewart Sutcliffe
China	Freshfields Bruckhaus Deringer LLP	Amber Liu, Yuxin Shen and Wang Zhe
EU	Freshfields Bruckhaus Deringer LLP	Markus Benzing, Wessel Heukamp, David Jansen, Daniel Klingenbrunn, Jadwiga Loiko, Bastian Schuster and David Schwintowski
France	Freshfields Bruckhaus Deringer LLP	Marc Perrone
Japan	Kanagawa International Law Office	Shinsuke Kobayashi
Netherlands	Freshfields Bruckhaus Deringer LLP	Marit Balkema, Michael Broeders, Igor Dovgaliouk, Hakan Gargili, Charlotte Kriekaard, Maxine Lemstra, Sharon Sloof, Barbara Slooter and Marco Vogels
South Africa	Bowmans Gilfillan	David Geral, Richard Griffin and Ryan Kitcat
United Kingdom	Freshfields Bruckhaus Deringer LLP	Edmund Barber, Olivia Carrington, Gareth Davies, Rachel Duffy, Lisa Eger, Morag Elwis, Angela Evans, Laura Feldman, Abdullah Geelah, Tom Howard, Shona Hughes-Daly, Gregory King, Priti Lancaster, Charles Magoffin, Martin McElwee, Emma Rachmaninov, Tom Rhodes, Christopher Simpson and Annabel Sykes
United States	Freshfields Bruckhaus Deringer (US) LLP	Elizabeth Bieber, Lori Goodman, Timothy Harkness, Lauren Kaplin, Hannah Khalifeh, Brian Lewis, Sam Lowenstein, Laurie Morgan, Travis Panneck, Jerome Ranawake, Brian Rance, Jordan Saltzman, Elvira Sihvola, Altin Sila, Aaron Voloj Dessauer and Timothy Wilkins

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EXECUTIVE SUMMARY

KEY MESSAGES

What is the issue?

Human wellbeing relies on the sustainability of key environmental and social systems. In some cases, that sustainability is under threat. This is partly the result of economic activity and, if not addressed, will create risks to economic systems and all who rely on them. Solutions require action from individuals and institutions, but also a system-wide response: collective action, coordination and cooperation.

Investment is part of and depends on these systems to generate financial returns. So, there is a question whether the investment sector needs to be more focused on addressing sustainability challenges, even if its only motive in doing so is to achieve its own financial purpose.

What is the solution?

Investment activity within the scope of ‘investing for sustainability impact’, or ‘IFSI’, has been identified as a way for the investment sector to do just that. Investors are increasingly focusing on their impact. Clarity on the legal framework for doing so is therefore of key importance.

IFSI describes any investment approach where investors *intentionally* seek (through the activities they finance or otherwise) to influence what investee enterprises and third parties do in *assessable* ways that address sustainability challenges. It therefore differs from many existing forms of sustainable investing which focus on integrating sustainability factors into investment decisions but do not necessarily involve intentional influence of this sort. It addresses a similar issue to current work on corporate purpose, but from the point of view of investors. Growing evidence suggests that this more purposeful investing is what many

individual investors want from those managing their investments.

The aim of our project has been to establish whether the law currently requires or permits IFSI (looking at the main categories of asset owner and their investment managers in 11 jurisdictions), and to identify options for policymakers wishing to facilitate IFSI.

Does the law require or permit IFSI?

To a significant extent it does although, given the diversity of jurisdictions and investor types covered, there are all sorts of variations. Financial return is commonly the primary goal of institutional investors, so the situation is most clear where a sustainability risk bears on investors’ duties to pursue financial goals. Here, where sustainability impact approaches can be effective in achieving an investor’s goals, the investor will likely be required to consider using them and act accordingly. However, there are differences of understanding and uncertainties. Cases where investors can pursue sustainability goals for their own sake *in parallel* with financial goals are more limited, but there are instances in most jurisdictions, usually subject to prioritising financial goals.

Whether institutional investors conclude in practice that IFSI is legally required or permitted will also depend on the circumstances in which they act; for example, an IFSI approach might, in principle, be attractive in a given case, but there could be too much uncertainty as to outcome or cost to adopt it. In addition, prevailing market features, such as commonly used performance benchmarks, may reduce attention to sustainability factors in investment practice.

Facilitating IFSI: what can be done?

Since the behaviour produced by legal rules depends on what those rules say and the circumstances in which they are applied, we identify options for policymakers wishing to facilitate IFSI that tackle both. They are possibilities for consideration, not recommendations. They do not cover wider interventions in primary economic activity or fiscal policy (which can also fundamentally affect investment decisions), although policymakers will undoubtedly want to consider these.

Options include:

- changing investors’ legal duties and discretions and how they are understood in ways that facilitate IFSI (such as allowing the pursuit of sustainability goals as long as financial return goals are prioritised, and a presumption in favour of investor collaboration in tackling sustainability challenges);
- changing the circumstances in which rules are applied in three broad ways: (i) building the enabling environment for IFSI (eg by ensuring the availability of decision-useful corporate sustainability data); (ii) promoting in-depth research to establish whether market features (such as prevailing investment theory, the terms on which investment managers are appointed and stock lending to short sellers) may lead investors to underweight sustainability factors and steps to address this if so; and (iii) strengthening market discipline (eg through product labelling and governance rules for sustainability-branded products and ensuring that investors’ sustainability preferences are properly reflected in the investment process).

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This report is about achieving the goals we value. It is about how institutional investment management can help with that, and it is about how the law supports the process. It concerns an approach to investing which is orientated towards addressing sustainability challenges either to achieve financial investment goals, or in addition to those goals.

In this report, that approach to investing is called 'investing for sustainability impact', or 'IFSI'. IFSI is not a legally defined expression and is not used in this report as a term of legal art. Nor is it intended to add to the alphabet soup of the sustainability world. Instead, it serves here as no more than a 'conceptual net' to catch, broadly, any activities that involve an investor *intentionally* attempting (through the activities it finances or otherwise) to influence the behaviour of investee enterprises and other third parties in *assessable* ways that can help to achieve **overarching sustainability outcomes** – outcomes consistent with the social, environmental, economic and human rights goals suggested by various international instruments such as the Paris Agreement and the Sustainable Development Goals.

1. What is the issue?

Human wellbeing relies on the sustainability of key environmental and social systems. In some cases, that sustainability is under threat. This is partly the result of economic activity and, if not addressed, will create risks to economic systems and all who rely on them. Solutions require action from individuals and institutions, but

also a system-wide response: collective action, coordination and cooperation.

The investment sector is part of and depends on these systems to generate financial returns. So, there is a question whether it needs to be more focused on addressing these challenges, even if its only motive in doing so is to achieve its own financial purpose.

Sustainable finance and investment activity has grown significantly, driven among other things by opportunities created by sustainability transitions and a desire to protect financial asset value. The need for investor attention to sustainability factors is ever-more pressing. However, it is unclear how far activities to date have helped in achieving overarching sustainability outcomes.¹

Some of the main forms of sustainable, responsible or ESG investing tend to focus on investing in enterprises considered as having a positive sustainability profile and avoiding those that are not. These investment approaches may have an influence that is aligned with overarching sustainability outcomes and could be used as part of an IFSI strategy. However, in isolation, they do not involve the investor intentionally seeking to bring about assessable changes in the behaviour of investee enterprises and others.

2. What is the solution?

Investor activities within the scope of IFSI would involve seeking to bring about change in just that way. Investors are increasingly focusing on their impact. Clarity on the legal framework for doing so is therefore of key importance.

The purpose of our project has not been to test whether IFSI investment approaches can bring about change, although it seems credible. Rather, the principal aim has been to reach a view on the basic question of how far the law in key jurisdictions² currently requires or permits investment approaches that fall within IFSI, as part of or in addition to the usual financial goals of investment. That said, the two issues are not entirely separable. Consequently, we have needed to assume for this project that IFSI investment approaches can indeed contribute to achieving overarching sustainability outcomes and help realise institutional investors' investment goals, financial or otherwise.

IFSI essentially addresses the same issue as current attention to corporate purpose, but from the point of view of investors: what is the purpose of economic activity and how does it relate to the wellbeing of people and planet? Questions of investment purpose and corporate purpose both concern what is valuable, not just financially but also in terms of outcomes for the social and natural environments on which people depend. IFSI approaches these questions from the perspective of investors, corporate purpose from that of the companies in which they invest. In answering them it is helpful to recognise that they converge on similar ground. Growing evidence suggests that this more purposeful investing is what many individual investors want from those who manage their assets (see Part A.4).

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¹ See for example, *World Economic Outlook: A Long and Difficult Ascent*, International Monetary Fund, October 2020, Chapter 3.

² The 11 jurisdictions covered represent a cross-section of investment hubs, cultures and legal traditions, but include the world's largest centres for investment management.

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3. What are the key characteristics of IFSI?

The key feature of IFSI is the sort of goals an investor is pursuing (see Part A.1). IFSI will always involve an investor intentionally using its powers to try to bring about assessable behaviour changes among business enterprises or policymakers aligned with achieving overarching sustainability outcomes. This includes, but is not limited to, investment funding for sustainability-focused projects. Influence could be direct, or indirect through engagement with others, such as scientific or industry bodies. In this report, changes of this sort targeted by investors are called ‘sustainability impact goals’. Targeted changes can involve a reduction in negative or an increase in positive impact, or both.

Sustainability impact goals could take many forms ranging, for example, from a change in a business process to reduce its negative sustainability impact (such as polluted water emission levels), or the launch of a new enterprise that involves a positive sustainability impact (such as developing battery technology), through to higher-quality enterprise sustainability disclosures to inform investment decisions and impact-oriented stewardship and policy engagement. Goals could also involve steps to achieve better policy alignment with international sustainability commitments.

Two levels of impact. Investors engaging in IFSI are therefore concerned with two sorts of related sustainability impact.

First, the impact on social and environmental sustainability of business enterprises, and the impact of policymakers and other third parties on the operating environment for enterprises and investors.

Second, the influence, or impact, that the investors themselves can have on the sustainability impact of enterprises, policymakers and other third parties.

Some forms of sustainable, responsible, or ESG investing essentially focus on the first sort of impact, as noted previously, by investing in enterprises that have a positive sustainability profile and avoiding those that do not. By contrast, IFSI concerns both sorts of impact. It involves an investor recognising that to achieve its objectives it needs to pursue sustainability impact goals by influencing the sustainability impact of others (see Diagram below). What is often called ‘impact investing’ would be an example of this, but IFSI covers a much broader range of practices than has typically been the case with impact investing to date.

Ways to pursue impact. Investors can pursue sustainability impact goals in various ways. However, the project has looked at the legal position on investors’ use of investment powers, stewardship activities and public policy engagement. Which of these it is appropriate for an investor to deploy in pursuing a given sustainability impact goal, and in what combination, will depend upon the precise circumstances, including the sustainability goal concerned and asset class. Legal attention has hitherto tended to focus on the use of investment powers. However, in public markets, there is likely to be a particular role for stewardship and policy engagement, especially when undertaken collectively. Indeed, for the growing portion of global assets under management (AuM) committed to passive investment strategies these may effectively be the only means of influence available.

Investors and investment relationships covered.

The concept of IFSI is not confined to any section of the investment market or any asset class (so would cover holdings of debt instruments, funds and private equity interests as well as publicly traded shares).

4. The purpose of IFSI: instrumental IFSI and ultimate ends IFSI

The key defining feature of IFSI is the investor’s purpose. IFSI will always involve trying to influence the behaviour of third parties in ways aligned with overarching sustainability outcomes, but for what reason?

One reason will be protecting or enhancing the *financial performance* of the investor’s portfolio. In particular, targeting sustainability impact goals might be intended to help support the sustainability of economic, environmental and social systems on which financial value depends, the declining sustainability of which could (as with climate change) create systemic risks to investors’ ability to achieve their financial goals. Another case might involve seeking an increase in value through working with one or more investee companies to address a given sustainability challenge. However, an investor might also pursue sustainability impact goals for reasons not directly connected with its financial return objectives, including treating impact goals as worthwhile ends in themselves.

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This report makes a key distinction between two kinds of IFSI based on this difference (See Diagram).

- **Instrumental IFSI** is where achieving the relevant sustainability impact goal is 'instrumental' in realising the investor's financial return goals.
- **Ultimate ends IFSI** is where achieving the relevant sustainability impact goal, and the associated overarching sustainability outcome, is a distinct goal, pursued alongside the investor's financial return goals, but not wholly as a means to achieving them.

The goals of ultimate ends IFSI can be broader than instrumental IFSI. However, that does not mean that they would necessarily be inconsistent with investors' financial goals, nor that they should take priority over them. It simply means that an investor's decisions are partly motivated by seeking to achieve a sustainability impact goal for reasons other than achieving the investor's financial goals.

Clarity on this question of purpose is important because of how the purpose of an activity influences the way it is undertaken and its outcomes, including which legal rules are relevant and how they are applied.

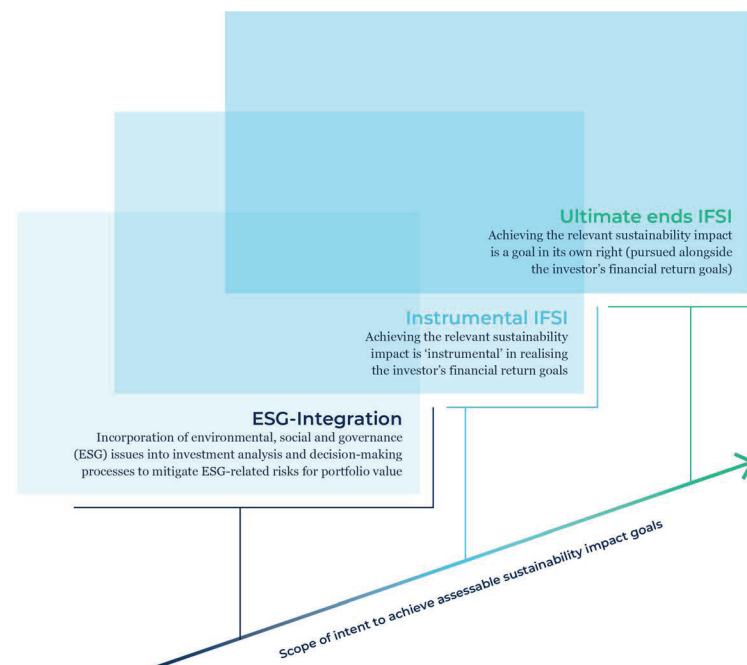
5. How feasible is it in practice for investors to set and pursue sustainability impact goals?

It is not the purpose of this report to answer this question. However, it is relevant to the legal analysis.

Investors' capacity to define sustainability impact goals, assess progress towards them and understand their own contribution is developing but is more advanced in some areas and for some

aspects of sustainability than others (see Part A.2). This presents challenges for investors, not least in terms of expense. These challenges affect what investors can and should do. That is because what legal duties and discretions require or permit does not just depend on what the relevant rules 'say' (their 'black letter') but also the circumstances in which they are applied. Current challenges should

reduce as market understanding, methodologies and practice develop and relevant, consistent data become more available. However, for now they may lead investors to focus on areas where the ground is more certain, extending their activities as this 'market infrastructure' evolves.



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6. What level of global AuM is currently subject to IFSI?

The concept of IFSI has not so far been used to define AuM research, so there is no easy answer to this (see Part A.3). An investor could engage in IFSI in various ways. A proper answer would therefore require a qualitative assessment; just because assets appear to be subject to an IFSI approach does not necessarily reveal much about its rigour or outcomes.

Management of the bulk of global institutional investor AuM (approximately \$ 110tn) does not currently appear to involve IFSI. Nonetheless, with important caveats including those just mentioned, a significant and growing proportion may be subject to IFSI at some level. This is based especially on the activities of investor coalitions whose activities appear to involve to some extent pursuing sustainability impact goals. Members of the NetZero Asset Managers Initiative and Net-Zero Asset Owners Alliance control AuM of \$ 43tn and \$ 6.6tn of AuM respectively.

The increasing concentration of AuM with a number of large investment management firms potentially gives them a particularly important role in the development of IFSI investment approaches.

7. Does the law require or permit IFSI?

Investment markets involve a multitude of different operators all of which may influence how far investors engage in IFSI. However, at its core, the answer to the question posed for our project depends on legal rules applicable to two categories of investors: asset owners and their investment managers. Our project has therefore focused on these and, in the case of asset owners, on the three largest subcategories by global AuM: pension funds, mutual funds and insurance companies (Asset Owners).

The legal duties and discretions that apply to Asset Owners in managing their assets are key to the analysis. But what these require or permit is not just relevant to them; it also shapes the obligations and discretions of investment managers and others who assist Asset Owners in managing their assets. For example, to discharge their own legal duties, investment consultants need to understand the Asset Owner's duties and discretions to decide how best to advise. In other words, there is a legal 'cascade effect' from Asset Owners to all those who directly or indirectly provide services to them.

7.1 High level conclusions

There is no single or simple answer to the question of how far IFSI is legally required or permitted across the jurisdictions covered, or in any single jurisdiction. The legal rules that apply to different investor types vary considerably between jurisdictions. Their content, application and interpretation reflect the culture of the jurisdiction concerned. Even within a jurisdiction, there are different rules for different categories of investor. In addition, the circumstances of each investor are unique. Because of these differences, precisely what an investor is legally required or permitted to do will also be specific to that investor: investors need to consider their position on a case-by-case basis (see Part B.2). Nonetheless it is still possible to reach a set of broad conclusions about what the law generally requires or permits. The following is not intended to be an exhaustive statement of all the circumstances in which IFSI could be required or permitted (see Part B.3).

• Financial return as the primary goal of investors

The primary purpose of Asset Owners' investment activity is generally regarded (by legislators,

regulators, courts and the Asset Owners themselves) as generating a financial return for beneficiaries within acceptable risk parameters. Thus, applicable legal duties have generally been interpreted to require financial investment objectives to be prioritised, and in some cases a financial return is the only goal that an Asset Owner should pursue. This is then reflected in the terms upon which Asset Owners appoint investment managers.

• Instrumental IFSI

If an Asset Owner or investment manager concludes, or on the available evidence ought to conclude, that one or more sustainability factors poses a material risk to its ability to achieve its financial investment objectives, it will generally have a *legal obligation* to consider what, if anything, it can do to mitigate that risk (using some or all of investment powers, stewardship, policy engagement or otherwise) and to act accordingly. Possible options include seeking to bring about specific sustainability impact goals that can reasonably be expected:

- to help influence the relevant sustainability factor(s) or the exposure of investee enterprises to it/them; and
- to do so in ways that reduce the investment risk.

Investors also talk of addressing sustainability factors that present risks of this sort as being necessary for long-term value enhancement.

It is also possible to envisage cases where an investor seeks a return consistent with its financial objectives by investing in and working with a number of enterprises to tackle specific sustainability challenges in order to achieve an increase in their value.

Relevant factors for an investor in determining

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whether it should engage in instrumental IFSI include the direct and indirect costs and risks of pursuing this course of action (including as between different generations of beneficiaries, where relevant), and the relative likelihood that doing so will help address the relevant sustainability factor so as to reduce the financial risk posed (or realise financial opportunities). An investor may decide to act individually. However, both of these factors are likely to weigh in favour of a decision to foster or join collective investor action aligned with the same goal.

In current conditions, it seems unlikely that an investor, acting alone in public markets and considered in isolation, would have sufficient influence over an investee enterprise's sustainability impact to justify use of its investment powers alone as a basis for instrumental IFSI. However, it is more foreseeable that a group of investors, acting collectively and holding in aggregate a substantial portion of the securities of relevant investee enterprises, or proposing to invest at scale, could achieve an impact of this sort, especially if their proposed action aligns with similar market movements more widely.

Especially in relation to publicly traded investee enterprises, we anticipate that stewardship and public policy engagement are likely to be a particular focus for investors considering instrumental IFSI. However, where an investor has concluded that it should engage in stewardship to pursue sustainability impact, it may also conclude that it should use or threaten to use its investment powers from time to time to over or underweight investee enterprises in the portfolio or exit altogether, to strengthen its voice in support of that. Doing so to achieve a positive sustainability impact would fall within the

concept of instrumental IFSI.

• Ultimate ends IFSI

There will be a legal duty to IFSI where an investor is managing the assets of an investment arrangement that has specific sustainability impact objectives, for example, a mutual fund established with the aim of bringing about a particular type of sustainability impact. This would involve ultimate ends IFSI. These sorts of investment arrangement are permissible in most relevant jurisdictions in some shape or form, subject to compliance with consumer protection safeguards.

In most jurisdictions, certain other investors are also likely to have legal discretion to engage in ultimate ends IFSI, but usually only as a parallel objective alongside financial return objectives. Examples include: where some Asset Owners have discretion to pursue sustainability objectives provided adequate financial returns are achieved; where beneficiaries have indicated that they want this; and in some cases where the Asset Owner is a corporate insurer. In the case of the last, while some of a life insurer's investment activity may be restricted by insurance policy terms, directors of insurance companies will otherwise be guided in their investment approach by the broader interests of the company, which may permit the pursuit of positive sustainability outcomes.

Most jurisdictions prohibit investors from engaging in certain activities, such as money laundering, and compliance with these restrictions can be said to have a positive sustainability outcome. An example more specifically targeted at investors, but less common, is legislation prohibiting investment in businesses manufacturing cluster munitions, with the goal of causing manufacturing to

cease. Clearly, it would not be usual to think of compliance with rules of this sort as IFSI. That said, the prohibition of support for activities not aligned with the SDGs has the equivalent impact to a collective ultimate ends IFSI decision by investors to achieve reduction in these activities. In a few jurisdictions there are also positive sustainability related legal obligations in relation to the use of investment powers.

• IFSI and collective action

Collaboration with other investors is likely both to reduce the costs and enhance the prospects of a successful sustainability outcome and therefore of achieving the goals of IFSI investors. This may well weigh in favour of a decision to act, whether the investor is discharging a duty to achieve financial returns or pursuing a discretion in the context of ultimate ends IFSI. Investor cooperation at some level is clearly permitted in all jurisdictions (although there are legal rules that need to be complied with) and a significant number of collaborative ventures are already underway at both national and international levels, such as Climate Action 100+ and those mentioned in paragraph 6. Whether or not there is the possibility of formalised collective action, the activities of other investors or third parties which are aligned with the investor's goal could also be relevant in deciding whether to act if, for example, they increase the prospect of the goal being achieved.

What investors' duties may require with regard to collective action will depend on their circumstances. Some large investors may be in a position to catalyse collective action. Where collective action is already underway, smaller investors may conclude that adding their weight is a cost-effective way to pursue their investment

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goals. However, in understanding how any action has helped an investor to discharge its duties, the focus of a court would likely be on the logical and evidential credibility of the investor's explanation for the difference it has made in the context of the collective action as a whole more than the precise quantification of the individual impact or benefit of its involvement: the essence of collective action is that the sum is intended to be greater than its parts and for any one investor to benefit from a sustainable system the system as a whole must be sustainable.

• IFSI and delegation to investment managers

Asset Owners commonly delegate day-to-day investment management of all or part of their assets to investment managers. These tend to conduct the bulk of stewardship activities and also undertake policy engagement. In doing so, they need to balance or otherwise manage the various objectives of their clients. Given the high levels of AuM now concentrated in the hands of the world's largest investment managers, they are an increasingly significant feature in the stewardship and policy landscape. This concentration has the potential to lower the unit cost of their stewardship activities and increase their impact, considerations which, as noted, would tend to favour a decision to act.

Asset Owners delegating to investment managers need to satisfy themselves that the activities of the manager are aligned (or at least not inconsistent) with their own goals and duties to beneficiaries. However, subject to that, where an Asset Owner concludes that it is otherwise appropriate to appoint a particular manager because that manager can most fully support its needs, it seems unlikely that the Asset Owner would be prevented

from doing so simply because the manager's stewardship approach is not identical to what the Asset Owner would do if it had its own in-house stewardship team.

• The significance of investor disclosure regimes for IFSI

The legal and policy landscape relevant to IFSI is changing rapidly. This includes rules requiring institutional investors to disclose how far they have taken sustainability factors into account in their investment process. The fact that there is a disclosure regime of this sort will not usually on its own be sufficient to change an investor's underlying legal duties; it does not of itself tackle the question of whether and in what circumstances IFSI or any other sort of sustainable investment is required or permitted. However, where the law is unclear on the extent to which an investor is permitted to take sustainability factors into account, this kind of disclosure regime could potentially be an affirmative factor, for example, if it appears to be based on the assumption that they are permitted.

7.2 What rules say and the circumstances in which they are applied

As noted at paragraph 5 above, whether legal rules require or permit IFSI in practice depends both upon what the rules say and the circumstances in which they are applied, and current circumstances may limit what is possible as a technical matter or in terms of cost.

However, circumstances can also influence investors' decisions by affecting what is thought relevant to them. In this context, many market professionals suggested to us in the course of our project that certain market features (such as commonly used investment theories and

benchmarks or the effect of intermediation and the relatively short-term nature of investment management agreements) may result in sustainability factors receiving insufficient attention in the investment process (see Part B.4). If this is correct, then it could undermine investors' attempts to comply with their duties, including decisions on activities within the scope of IFSI. Taking this a step further, in considering whether an investor has complied with its legal duties, a court or regulator may, among other things, assess the investor's actions by reference to established professional practice. Where an investor has done what would be considered appropriate by a respected body of professional practice, then a claim is generally less likely to succeed. Consequently, if sustainability factors are being underweighted in the course of existing market practice, then *legal duties* could unintentionally strengthen that tendency because of how those duties interact, or are believed to interact, with market features.

Investors need to understand these potential issues and ensure that they nonetheless comply with their duties. Among other things, as circumstances change, so should investors' decisions on what they are required or permitted to do. For example, as awareness grows of the financial risks and opportunities created by sustainability factors and how investors can respond to them, existing legal rules (notably, those imposing standards of care and skill) will likely lead investors to act in future in ways they would not necessarily contemplate today.

8. Facilitating IFSI through policy: what can be done?

While there are circumstances in which the law requires or permits IFSI, there are also

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impediments (see Part C.1). Policymakers may be able to help address them.

Where policymakers decide to intervene, they need to make their purpose clear since this will drive a host of subsequent decisions, not just on which policy tools to use but also in the way investors will apply any new rules. Subsequent judicial or regulatory interpretation may also take the purpose of a given legal measure into account. The purpose of intervention will often be to secure financial or economic goals, but it may also concern achieving overarching sustainability outcomes consistent with international commitments.

Facilitating ultimate ends IFSI raises a particular question about how best to achieve outcomes

aligned with core social values and the role of institutional investors in that. The answer has potential implications, financial and otherwise, for beneficiaries, wider society and future generations. It may be possible to place a monetary value on some sustainability outcomes in trying to balance these needs. Certainly, many have financial implications. However, the value of positive sustainability outcomes ultimately rests in the life that depends on them and is not solely financial. These issues need to be addressed by the relevant societies through a political process. It is not realistic to expect institutional investors to resolve them on their own.

Since the behaviour legal rules produce depends on what those rules say and the circumstances in which they are applied, we identify options

for policymakers wishing to facilitate IFSI that tackle both (see Part C.2 and the Appendix to this Executive Summary). They are possibilities for consideration, not recommendations. They are not exhaustive. They do not cover wider interventions in primary economic activity or fiscal policy (which can also fundamentally affect investment decisions), although policymakers will undoubtedly want to consider these.

Sustainability challenges are often systemic and international. International policy coordination is therefore likely to heighten the impact of policy change. Coordination may also be needed at a national level between regulators responsible for different categories of institutional investor, to ensure a consistent approach.

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APPENDIX – SUMMARY OF POLICY OPTIONS FOR FACILITATING IFSI

1. Change investors' legal duties and discretions and how they are understood

1.1 Investor duties and instrumental IFSI

Introduce guidance making clear that in discharging existing duties to seek to achieve a financial return, pursuing sustainability impact goals is an option that investors should consider (for example, in responding to systemic financial risks created by sustainability factors).

1.2 Investor duties and discretions and ultimate ends IFSI

Introduce or extend existing discretions to allow investors to pursue sustainability goals that reflect actual beneficiary preferences, assumed beneficiary preferences (based on third-party, potentially government, research), or objectives set by government. The scope for this would probably be greatest where any discretion is subject to prioritising financial investment goals.

For especially pressing sustainability goals, consider requiring investors to pursue them or refrain from activities inconsistent with them. This is a blunt tool, so may only be feasible, if at all, for very precise and urgent goals.

Particularly for insurers, guidance on or, if necessary, legal reform to directors' duties to secure the success of their company, making clear that success is not limited to narrow, short-term, financial measures but should be understood by reference to broader factors relevant to the company achieving its purpose over the long-term.

1.3 Collective action to secure sustainability goals

Investor cooperation to address sustainability challenges is widespread. However, guidance could make clear that investors should consider collective action in seeking to achieve their objectives and that this can assist in discharging their duties even if the investor's contribution and the portfolio benefit cannot be precisely measured (since, like political security, the benefits of sustainable systems as a whole are enjoyed by each person that relies on them). As an alternative, this could be in the form of a *prima facie* legal presumption in favour of cooperation unless there are solid reasons against.

1.4 Rules that could inhibit stewardship activity

Review competition law and rules on handling price sensitive information, shareholder concertedness and collective action in relation to a legal entity, and rules on requisitioning shareholder votes, to ensure that they do not unnecessarily restrict stewardship activity on sustainability factors. Where necessary, adjust to provide greater freedom or provide guidance to reassure investors that freedom already exists. In the case of competition law, consider an explicit safe harbour for sustainability related investor initiatives.

1.5 'Financial factors' and 'non-financial factors'

Review use of these expressions. Guidance should turn not on whether a given factor is 'financial', but on its implications for the *objective* of the investor; where an investor is discharging a duty to pursue a financial return, and a sustainability

factor (or any other factor) is materially relevant to that, then the investor needs to decide what to do about it. Use of these expressions should also avoid giving the impression that sustainability factors that only have indirect financial implications (for example, because of reputational risk), or sustainability risks that are hard to predict, are not relevant.

2. Change the circumstances in which investors discharge duties and exercise discretions

■ Strengthen IFSI 'infrastructure'

2.1 Support for development of market-based IFSI infrastructure

Steps to support the development of knowledge, practice and market-wide consensus in areas necessary for investors to engage in IFSI, making it easier for them to do so; for example, the ability to define sustainability impact goals and assess progress towards them, and to understand the relationship with financial outcomes. This could include facilitating specialist work and centres of excellence in which solutions can be worked through, and helping to establish the outcomes as authoritative.

2.2 Frameworks for IFSI capacity-building by investors

Establish frameworks for capacity-building by investors (in terms of their processes, systems and controls for addressing sustainability impact) using 'process regulation' or industry good practice statements that set out practical steps that investors could or should take in considering whether to pursue sustainability impact goals and *how*. The most stringent standards could be

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applied to investment products and strategies held out in ways that suggest they achieve sustainability impact goals.

2.3 Corporate disclosure and reporting

Internationally consistent disclosure regimes for businesses, generating 'decision-useful' information, are key for all forms of IFSI. Policymakers need to consider, as they already are, how best to facilitate these and various associated matters such as any need for external validation. Logically, investors seeking to address the effect of sustainability factors on their portfolio in the round could be expected to need two sorts of information: how an enterprise is impacted by and is responding to sustainability factors, and how the activities of an enterprise have an impact on sustainability factors (since the second of these could be relevant to the sustainability position of other portfolio companies). Disclosure regimes could involve financial quantification of costs and opportunities, and publication of transition plans, in relation to key sustainability factors.

2.4 Ascertaining investors' sustainability attitudes generally

High-quality government-sponsored work to establish greater clarity about the sustainability attitudes of individual investors generally (so centralising cost and reducing uncertainty) for use by institutional investors in exercising discretion in relation to ultimate ends IFSI (where permitted based on investor wishes) and policy formation.

2.5 Strengthen stewardship code coverage of matters relevant to IFSI

Ensure that there is a stewardship code applicable to all key business enterprises, investor-types and investment relationships (so not just restricted to publicly traded equity) covering,

among other things, enterprise risks (systemic or otherwise) from sustainability factors, possible use of sustainability impact goals in seeking to enhance long-term value growth and collective engagement towards that end.

Consider how adherence is strengthened (using, for example, industry working groups, publication of stewardship policies and outcomes and external review of stewardship standards).

Review the relationship between asset owners and investment managers (and advice given on this by consultants) to ensure that the interests of asset owners as they concern sustainability factors are being adequately reflected in stewardship activity conducted by investment managers on their behalf.

■ Address investment market influences that may diminish attention to sustainability factors in the investment process

2.6 Portfolio theory, use of benchmarks and short-term trading activity

Intensive high-quality cross-disciplinary work coordinated by a group of investors and international-profile academic institutions on:

- the use of key elements of portfolio theory and benchmarks to establish whether they result in insufficient attention to sustainability factors, especially systemic risk, and whether this could prejudice the realisation of financial goals; and
- short-term trading activity to establish whether it helps achieve, is inconsistent with or is neutral with regard to achieving positive sustainability outcomes.

Further policy options would depend on the results but, in the case of the first, could include continuing education requirements and a review

of business school training to ensure appropriate coverage.

2.7 Selection and appointment of investment managers

Market studies on how far longer-term investment approaches (factoring in sustainability risks and opportunities for clients beyond the term of a manager's appointment) are being properly reflected and incentivised, including in relation to stewardship, and what can be done if they are not.

Encourage the development of good practice standards on diligence, appointment, monitoring and relationship management, potentially supported by disclosure requirements for asset owners on how they approach these, including in relation to sustainability factors that are relevant to their objectives.

2.8 Investment consultants and fiduciary managers

Market studies on how far investment consultants and fiduciary managers adequately establish asset owners' sustainability needs and goals and reflect these in their services, and whether the use of portfolio theory and benchmarks in service provision is appropriate. Any concerns could be addressed by rules and guidance for asset owners or directly through consultancy industry work on good practice or regulation.

■ Transparency and market discipline as to IFSI investment approaches through helping individual investors realise sustainability aspirations

2.9 Disclosure of sustainability approach, including on pursuing sustainability impact goals

Institutional investor disclosure on how achieving

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their objectives could be affected by sustainability factors and their response, including whether that involves pursuing sustainability goals, how and with what success. Since a range of approaches could fall within IFSI, consider ways of enabling individual investors to understand the intensity and quality of the IFSI approach of the relevant institutional investor.

2.10 Sustainability impact-focused investment products

Distinguish between labels such as ‘sustainable’, ‘responsible’ and ‘impact’ and make their use dependent on satisfying minimum operating and disclosure standards including, in the case of impact, the credible intentional pursuit of sustainability impact goals and assessment of progress.

2.11 Encourage independent rating of sustainability impact products

Steps to take greater account of investors’ sustainability aspirations in investment services and distribution.

Require investment managers, consultants and advisers to establish a client’s sustainability objectives at the outset of their relationship, including in relation to pursuing sustainability impact goals, and reflect these in their service provision. Alternatively, there could be a regulatory presumption that each investor has a long-term horizon and/or that they wish their money to be managed in ways that achieve certain sustainability goals.

2.12 Beneficiary education

Undertake investor education campaigns to help them understand that their money can make a difference in sustainability terms, how (especially the role of pursuing sustainability impact goals), and the possible trade-offs involved.

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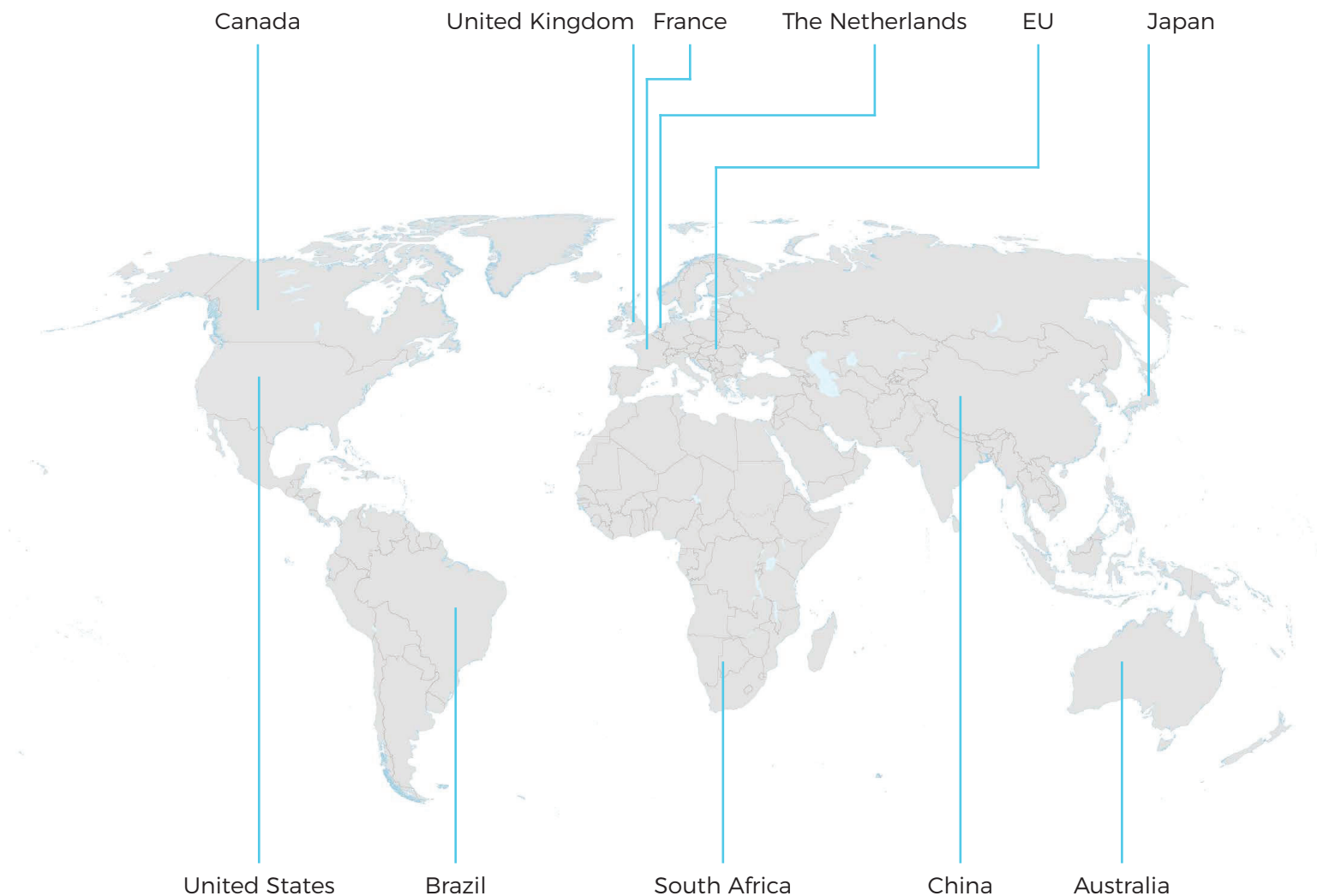
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