
Advance Unedited Version

Distr.: General
23 February 2018

Original: English

Human Rights Council

Thirty-seventh session

26 February - 23 March 2018

Agenda item 3

**Promotion and protection of all human rights, civil,
political, economic, social and cultural rights,
including the right to development**

Report of the Independent Expert on the effects of foreign debt and other related financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, on his visit to Switzerland*

Note by the Secretariat

The Secretariat has the honour to transmit to the Human Rights Council the report of the Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky, on his mission to Switzerland from 25 September to 4 October 2017. The main objectives of the mission were to study Switzerland's policies and efforts, at national and international level, aiming at curbing illicit financial flows, tax abuse and corruption and their impact on the enjoyment of human rights within and outside Switzerland. The second focus of the visit was the integration of human rights due diligence in public and private financial institutions operating in Switzerland.

* The present report was submitted after the deadline in order to reflect the most recent developments.

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** Circulated in the language of submission and French only.

I. Introduction

1. The Independent Expert on the effects of foreign debt and other related international financial obligations of States on the full enjoyment of all human rights, particularly economic, social and cultural rights, Juan Pablo Bohoslavsky, conducted an official visit to Switzerland from 25 September to 4 October 2017. The objective of his visit was to study Switzerland's policies and efforts, at national and international level, aiming at curbing illicit financial flows, tax abuse and corruption and their impact on the enjoyment of human rights within and outside Switzerland. In addition, the mission aimed at examining the integration of human rights policies and human rights due diligence in public and private financial institutions.

2. Human Rights Council resolution 34/3 requested the Independent Expert to pay particular attention to the impact of illicit financial flows on the enjoyment of human rights. The Independent Expert studied, among other aspects, measures deployed by Switzerland to combat tax evasion by transnational corporations and high net worth individuals and taxation policies for corporations, and their impact on public revenues for the realization of economic, social and cultural rights in Switzerland and abroad. He also examined efforts and challenges faced in freezing, confiscating and returning illicitly acquired assets by politically exposed persons.

3. The Swiss Confederation is a prominent financial centre and a leading global location for cross-border management of private assets, with an estimated world market share of 25 per cent. Its financial sector contributes 9.1 per cent to the GDP and assets held in Swiss banks by non-resident custody account holders' amount to 2.92 trillion CHF¹. Integrating human rights due diligence in its financial sector and lending policies will therefore significantly reduce risks and prevent adverse human rights impacts.

4. The Independent Expert thanks the Government of Switzerland for its invitation and its full cooperation before, during and after the visit. He is grateful to all those who took the time to meet with him.

II. Human rights framework and policies

5. Switzerland is party to most human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic Social and Cultural Rights (ICESCR). Section II of the Swiss Constitution provides that the country shall "assist in the alleviation of need and poverty in the world and promote respect for human rights and democracy, the peaceful co-existence of peoples and the conservation of natural resources".²

6. The human rights strategy of Switzerland for 2016-2019 aims at promoting the universality, interdependence and indivisibility of human rights. The strategy underlines the importance of consistent domestic and foreign policy in the area of human rights to maintain credibility. The Independent Expert welcomes that the strategy emphasises that Switzerland, as home to the headquarters of some of the largest multinational corporations, has a particular duty to encourage respect for human rights by members of the private sector.³ In December 2016, a national action plan on business and human rights was also adopted.

¹ Federal Department of Finance, State Secretariat for International Financial Matters SIF, Swiss Financial Centre: Key Figures October 2017, Tables 1 and 8.; Swiss National Bank, Banks in Switzerland 2016, p. 22-23.

² Constitution of Switzerland, article 54 (2).

³ See Federal Department of Foreign Affairs, Human Rights Strategy 2016-2019, in particular p.9 and 24, available at: https://www.eda.admin.ch/dam/eda/en/documents/publications/MenschenrechtehumanitaerePolitikundMigration/Strategie-Menschenrechte-160224_EN.pdf.

III. Illicit financial flows and human rights

7. While it is recognized that estimations on the amount of illicit financial flows⁴ leaving developing countries are to some extent imprecise, they are deemed substantial. The amount of illicit financial flows leaving developing countries may be close to one trillion each year,⁵ most of which can be related to trade, tax evasion and tax avoidance. A significant percentage of such funds are deposited in financial centres, depriving developing countries of important financial resources for the realisation of economic, social and cultural rights.

8. The so-called “Paradise Papers” (2017), “Panama Papers” (2016), and “Swiss leaks” (2015) have indicated that politically exposed persons, high net worth individuals and transnational corporations are more likely to engage in cross-border tax evasion or avoidance, corruption or the misappropriation of public funds.⁶ The likelihood of such deviance increases due to their positions of power, their ability to engage in cross-border financial transactions, or owing to the significant personal or corporate benefits that encourage such harmful behaviour.

9. Undoubtedly, States have a common interest in ensuring that human rights abuse, tax evasion, corruption and robbing people of public resources does not pay off and that stolen assets are seized and returned to their legitimate owners, and that there is no impunity for those involved in these actions.

10. Illicit financial flows are a global phenomenon not only affecting Switzerland. They have adverse effects on all countries that are losing tax revenues and funds for domestic investment, but their effects are particularly harsh in developing countries which frequently lack adequate financial resources for establishing well-functioning institutions in the field of education, food security, health, social security, water and sanitation, justice or law enforcement.⁷

11. Illicit financial outflows nourish unsustainable debt and undermine efforts to enhance genuine social development. States and the international community have acknowledged the adverse effects of illicit financial flows in the Agenda 2030 for Sustainable Development. Goal 16.4 explicitly notes the commitment of States to “significantly reduce illicit financial and arms flows, strengthen the recovery and return of stolen assets and combat all forms of organized crime”. In this context, the Independent Expert welcomes that the Federal Council approved in 2016 a report on illicit financial flows from developing countries.⁸

⁴ On the definition of illicit financial flows, see A/HRC/31/61, A/HRC/28/60. The Swiss Federal Council has opted for a comprehensive definition in its report on Illicit Financial Flows from Developing Countries, 12 October 2016.

⁵ Global Financial Integrity, *Illicit Financial Flows from Developing Countries 2004-2013*, Washington DC, December 2015; and Global Financial Integrity, *Illicit financial flows, to and from Developing Countries, 2005-2014*, Washington DC, May 2017, http://www.gfintegrity.org/wp-content/uploads/2017/05/GFI-IFF-Report-2017_final.pdf.

⁶ See <https://www.icij.org/investigations/>.

⁷ See OECD, *Illicit Financial Flows from Developing Countries, Measuring OECD Responses*, Paris 2014.

⁸ Available at: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-64112.html>.

12. In order to meet this goal, the Independent Expert has always underlined that countries of origin and of destination must make joint efforts. In the case of Switzerland, this primarily requires taking appropriate steps to prevent that illicit financial flows enter its financial sector and to ensure that banks operating in Switzerland exercise due diligence with clients, in particular politically exposed persons and high-net worth individuals. It also entails ensuring financial transparency and participation in multilateral exchange of information in the field of taxation to reduce the likelihood that individuals can engage undetected in tax evasion and avoidance. In addition, sanctions to financial institutions that have failed to exercise due diligence should be imposed in a timely, transparent and proportional manner in order to guarantee that neither robbing funds nor hiding them pays off.

13. Countries of destination should furthermore ensure that illicit funds can be frozen, seized and returned in a timely and human rights compliant manner to their legitimate owners in the countries of origin, in line with the United Nations Convention Against Corruption and relevant international human rights law, which requires States to use the maximum of its available resources for the realization of economic, social and cultural rights.⁹

IV. Efforts and challenges of curbing illicit financial flows

14. The policies of Switzerland in relation to illicit financial flows have seen a positive change. Since 2008, many initiatives have been undertaken to strengthen the regulation of its banking sector, after revelations that banks domiciled in Switzerland facilitated tax evasion or lacked adequate due diligence procedures to prevent that politically exposed persons use its jurisdiction to hide stolen assets. These policies are set out in a report of the Federal Council and include efforts to prevent and combat illicit financial flows by addressing the root causes of such flows in countries of origin¹⁰ and includes addressing the problem through international development cooperation.

A. Background

15. Before 2009, there was widespread cross-border tax evasion by foreign nationals from various jurisdictions facilitated by banks operating in Switzerland. The data relating to tax evasion by US tax payers is revealing in itself. In 2009, UBS reached a 780 million USD settlement for facilitating tax evasion of USA tax payers. By the end of January 2016, 80 additional banks operating in Switzerland had entered into non-prosecution agreements with the USA Department of Justice. The list of banks includes Swiss branches of many well-known international commercial banks. The non-prosecution agreements include statements of facts providing details about how the respective banks or their employees had organised tax evasion schemes for their clients. Under the so-called “Swiss bank programme” banks would receive a penalty, based on the value of the assets held in undisclosed accounts. In total, penalties have amounted to more than 5.5 billion USD.¹¹

16. There are no indications that such practices have been limited exclusively to clients in one jurisdiction. For example, account documents leaked from HSBC’s private banking arm in Geneva, a foreign bank operating in Switzerland, indicated that the bank had business relationships with people from more than 200 countries, among them several

⁹ ICESCR, article 2.1, A/HRC/31/61, A/HRC/28/60.

¹⁰ See footnote 8 above.

¹¹ See United States Department of Justice, Swiss bank programme, available at: <https://www.justice.gov/tax/swiss-bank-program> and <http://www.ustaxprogram.com/penalty-statistics/>. Details about non-prosecution agreements and penalties are available at: <https://www.justice.gov/tax/file/631356/download>.

alleged “tax dodgers”, “dictators” “traffickers of blood diamonds” and a “arms dealer who channelled mortar bombs to child soldiers in Africa”.¹²

17. In April 2016, the Swiss Financial Market Supervisory Authority (FINMA) pointed out that, despite significant efforts in adopting legislation and improving procedures to detect suspicious transactions, the risks that the Swiss financial market continued to be abused for the purpose of money laundering was not over.¹³ Reports about financial institutions suspected to be involved in facilitating tax evasion or laundering money have continued to appear in the media.¹⁴ The risk is also highlighted by the involvement of several Swiss banks in the Petrobras corruption scandal and in the suspicious cash flows linked to the Malaysian sovereign fund 1MDB,¹⁵ an investigation that was triggered by a report of a suspicious transaction by a Swiss financial institution to its Swiss financial intelligence unit.

B. International commitments

18. Switzerland has committed itself to significantly reduce illicit financial and arms flows and to strengthen the recovery and return of stolen assets by 2030, as set out in SDG target 16.4. The Swiss Confederation has also endorsed the Addis Ababa Action Agenda, in which States have committed themselves to combat tax evasion and corruption, to enhance tax transparency and to make sure that all companies, including multinationals, pay taxes to the governments of countries where economic activity occurs and value is created.

19. Switzerland is party to the United Nations Convention against Corruption since 2009 and to OECD’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions since 2000; and is actively participating in the OECD initiative to counter base erosion and profit shifting. Furthermore, it has introduced the automatic exchange of tax information (AEOI) between countries to fight tax evasion and tax avoidance at the international level. The Swiss Confederation is also a member of the Financial Action Task Force (FATF).

20. Switzerland underwent several peer reviews by FATF analysing the level of compliance of its anti-money laundering and counter-terrorist financing system and policies. According to FATF’s latest peer review in 2016, Switzerland’s anti-money laundering regime is technically robust and has achieved good results, but it would benefit from some improvements in order to be fully effective. The review found that the Swiss financial system is exposed to a high risk of money laundering of assets derived from offences that are mostly committed abroad. The peer review welcomed several legislative measures that strengthened Switzerland’s Anti-Money-Laundering framework, but recommended to make sanctions for money laundering sufficiently dissuasive. The review by FATF concluded that the country was compliant with 6 recommendations, largely compliant with 25, partly compliant with 9 recommendations.¹⁶ Switzerland is currently taking steps to address some of the deficiencies identified.¹⁷

¹² ICIJ, *Banking Giant HSBC Sheltered Murky Cash Linked to Dictators and Arms Dealers*, 8 February 2015, available at: <https://www.icij.org/investigations/swiss-leaks/banking-giant-hsbc-sheltered-murky-cash-linked-dictators-and-arms-dealers/>.

¹³ See Mark Branson, Chief Executive Officer of FINMA, «Combating money laundering is a duty of every banker», Annual Media Conference, 7 April 2016.

¹⁴ “Credit Suisse faces tax probes in multiple countries”, *Financial Times*, 31 March 2017 and “Verdacht auf Steuerhinterziehung: Steuerrazzia bei deutschen UBS Kunden”, *Handelsblatt*, 27 September 2017.

¹⁵ See Annual Report 2016 of the Office of the Attorney General of Switzerland, p. 16.

¹⁶ FAFT, *Switzerland peer review*, 2016, p. 10.

¹⁷ <https://www.admin.ch/gov/en/start/documentation/media-releases/media-releases-federal-council.msg-id-67338.html>.

C. Legal framework

21. Measures to avoid illicit funds entering the country are central to an effective anti-money laundering strategy. The Federal Act on Combating Money Laundering and Terrorist Financing (Anti-Money Laundering Act) provides the legal basis to combat the laundering of assets derived from corruption, aggravated tax offences or other felonies.

22. The law entails specific due diligence obligations for financial intermediaries, in particular when dealing with politically exposed persons (PEPs) in order to prevent 'dirty money' deposits in Swiss accounts. Banks also have the duty to verify the identity of their customers and determine the beneficial owners of the assets held in their accounts.¹⁸ They are required to re-evaluate the terms and, potentially, the continuity of their business relationship with PEPs over time. Moreover, if a transaction raises any doubts, financial intermediaries are expected to take proactive measures and alert the Money-Laundering Reporting Office to investigate the transaction.

23. Bank secrecy (article 47 of the Federal Act on Banks and Saving Banks) is not absolute. When suspicious transactions are reported in good faith,¹⁹ the prohibition to reveal a secret - which was shared in the context of a professional or business relationship - finds no application. Financial intermediaries have a duty to report suspicious transactions to the authorities when the possibility that the assets are of criminal origin cannot be excluded. The distinction between mandatory and voluntary reporting by financial intermediaries leaves, however, in the view of the Independent Expert, room for under-reporting of questionable transactions.

24. Changes in Swiss criminal provisions may have improved the reporting of suspicious transactions by banks. On 1 January 2016 a new offence entered into force, contained in article 305bis (1) of the Swiss Criminal Code. Accordingly, "any person who carries out an act that is aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which he knows or must assume originate from a felony or aggravated tax misdemeanour is liable to a custodial sentence not exceeding three years or to a monetary penalty." However, laundering assets derived from an aggravated tax misdemeanour is only a criminal offence in Switzerland if there has been an evasion of more than 300,000 CHF in taxes per year (per tax period). In other words, bank employees may only incur criminal liability for money laundering if they should have good reason to suspect that they are assisting a wealthy client in a serious tax offence.²⁰ Such high thresholds do not exist for assisting in the evasion of federal, cantonal or communal taxes, which can be punished in Switzerland by a fine of up to CHF 10,000, and in more serious cases by a fine of up to CHF 50,000.²¹

25. While such provisions may encourage enhanced due diligence with high net worth clients, they may be insufficient to prevent money laundering or facilitating tax evasion within the Swiss banking sector. Firstly, the 300,000 CHF threshold is rather high. Secondly, Swiss prosecution authorities will often face difficulties to assess whether the evaded tax exceeds the specified amount, as it requires knowledge of the tax law of various foreign jurisdictions. Thirdly, the Swiss law only penalized tax fraud, as defined by articles 59 (1) and 186 of the Federal Acts of 14 December 1990 related to the Harmonisation of Direct Federal Taxation at Cantonal and Communal Level and to Direct Federal Taxation. Tax fraud does not cover all forms of tax evasion as it requires the falsification of documents. Finally, the fines for assisting tax evasion are low and may not be sufficient to discourage such behaviour.

26. Although it may be too early to assess the impact of article 305bis (1), prosecutors indicated to the Independent Expert in that they are not aware of any criminal investigation

¹⁸ AMLA, art. 3.

¹⁹ AMLA, art. 11.

²⁰ <https://www.admin.ch/opc/en/classified-compilation/19370083/index.html>.

²¹ See article 56 (3) of the Federal Act of 14 December 1990 on the Harmonisation of Direct Federal Taxation at Cantonal and Communal Level and article 177 of the Federal Act of 14 December 1990 on Direct Federal Taxation.

launched under the new law. In addition, the Swiss financial intelligence unit has not received many reports of suspicious transactions related to tax fraud. Partly this can be explained by the fact that Swiss banks have pushed their clients to regularize their deposits or closed business relationships with suspicious clients.

D. Automatic exchange of information for tax purposes

27. On 1 January 2017, the Convention on Mutual Administrative Assistance in Tax Matters of the Council of Europe and the OECD (Convention) that allows for automatic, spontaneous exchange of tax information as well as exchange of information on request entered into effect. On the same date, the Multilateral Competent Authority Agreement on Automatic Exchange of Financial Account Information (MCAA) entered into force.

28. The introduction of automatic exchange of information for tax purposes (AEIO) is an important step to combat tax evasion. It will hamper foreign nationals from participating jurisdictions to hide undeclared assets in Swiss bank accounts. The same applies to Swiss residents that have moved assets abroad in order to evade taxes. However, it requires that jurisdictions participating in the system have well-functioning and independent tax enforcement authorities who can use the exchanged data and enforce tax duties.

29. The Independent Expert commends Switzerland to have started as of 1 January 2017 with 38 jurisdictions the Automatic Exchange of Information for Tax Purposes (AEOI). The AEOI standard requires Switzerland to provide to the concerned States once a year with financial account information related to accounts held with Swiss financial institutions by tax residents in foreign jurisdictions. In reciprocity, Switzerland receives information about accounts held by Swiss residents from participating jurisdictions. On 1 January 2018 Switzerland introduced AEOI with an additional 38 jurisdictions with a first exchange of information planned for 2019.

30. The AEOI system may not be an effective tool for curbing tax evasion in developing countries lacking the technical requirements to participate in it. Like other developed countries, Switzerland should consider expanding the number of developing countries participating in the new global standard by providing technical assistance and allowing low income countries to implement gradually the provision of taxation information. Switzerland can build upon its expertise acquired in development cooperation projects aimed at strengthening national tax administrations and since 2015 has already been providing technical assistance in the context of the Global Forum on Transparency and Exchange of Information and participates in the African Tax Administration Forum which supports capacity building in African states. The participation of developed and developing countries is crucial for enhancing transparency and international tax cooperation at a global level.

31. The high requirements set by the OECD in terms of confidentiality and data management remain difficulty for some countries, although such standards are important to protect the right to privacy. Information provided to foreign tax authorities could potentially be misused for other purposes than investigating tax offences. In some countries human rights defenders and opponents of Governments have been prosecuted for alleged tax offences in a rather suspicious or selective way, suggesting that the motivation of prosecution is less to ensure tax justice, and more to obstruct their legitimate activities and shrink civic space.

32. As the OECD requires full reciprocity from its counterparts when entering in data exchange agreements - which implies the availability of a certain level of administrative and technical capacities and structures - a number of developing countries have difficulties to cope with this new standard.

33. Switzerland is also active in the field of exchange of tax information on request with more than 100 jurisdictions, including several developing countries, based on double taxation agreements, tax information exchange agreements and on the Federal Act on International Administrative Assistance in Tax Matters.

E. Reducing corporate tax abuse and harmful tax competition

34. Switzerland has also embarked on implementing various measures to avoid profit shifting of multinational corporations, such as OECD BEPS Action 13. Their aim is to ensure that corporate tax revenues are paid where real economic activities are taking place, labour is performed and profits are made. The Independent Expert encourages Switzerland to consider requiring multinational enterprises to publicly report on a country-by-country basis the taxes they have paid, as in his view non-public reporting is insufficient to ensure tax transparency by transnational corporations.

35. The Government presented to the Swiss electorate a comprehensive corporate tax reform package in 2016 (USR III) which included measures to bring Swiss corporate tax regimes in line with OECD standards to combat base erosion and profit shifting (BEPS) of multinational companies. The new law would have outlawed certain tax reduction regimes that are no longer accepted internationally, replacing them with patent-box regimes and other avenues for tax reduction and profit shifting from abroad.

36. In February 2017, the proposal of the Government and Parliament failed to reach a majority in a public referendum. In September 2017 the Federal Council published a revised “tax proposal 17” for public consultation with the aim of ensuring that Swiss corporate tax regimes will become compliant to OECD standards.²² The Independent Expert is concerned about the potential human rights impact of the revised tax reform in foreign countries. Essentially the “tax reform proposal 17” aims to keep taxation of multinational corporations and other businesses in Switzerland at low levels to attract establishing headquarters and businesses in the country. Attracting businesses may bring benefits for Switzerland in form of tax receipts and employment opportunities. However, excessive tax competition between countries is harmful, as it has resulted in a dramatic reduction of corporate tax payments of large corporations worldwide, contributed to the reduction of public revenues for investment, and the increase of unsustainable public debt in many countries, especially in the developing world.

37. Importantly, the reduction of corporate tax rates for businesses or tax exemptions for transnational corporations should not undermine the ability of federal, cantonal or local government institutions in Switzerland to implement their human rights obligations, in particular in the field of education, social security, health or culture. Nor should corporate tax reforms result in a shifting of tax burdens from businesses to low or middle income households.

38. Low tax regimes provide incentives to profit shifting and result in reduced tax revenues in those countries where most of the real business takes place, thus shrinking the fiscal space of states to fulfil their human rights obligations. The Independent Expert calls upon the Swiss government at all levels to carry out a social and human rights impact assessment of the tax reform package, which should include an assessment of how the reform will impact on tax revenues available for the realisation of economic and social rights within Switzerland and abroad, in particular in developing countries.²³

39. In this context, he would like to recall that Article 141 a) and g) of the Swiss Parliamentary Law requires the Government to submit assessments on the impacts of draft laws on the economy, society, environment and future generations and assess their compliance with fundamental rights and binding international law. A recent report of the Swiss Federal Audit Office indicates, however, that only one third of all Federal Council dispatches meet the minimum requirements of assessing the impact on the society and the environment.²⁴

²² The documentation is available at: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-68007.html>.

²³ For the principles that should inform such assessments, see A/HRC/37/54.

²⁴ Swiss Federal Audit Office, *Prognosen in den Botschaften des Bundesrates, Evaluation der prospektiven Folgenabschätzungen von Gesetzentwürfen*. 24 October 2016, available at: <https://biblio.parlament.ch/e-docs/389085.pdf>.

40. Unfortunately the explanation of the “tax proposal 17” does not include any detailed assessment of whether the reform may have positive or adverse impact on the enjoyment of economic, social and cultural rights in Switzerland and abroad.

F. Institutional framework for tracing stolen assets and curbing money laundering

41. A balanced and nuanced role of the state is of paramount importance to ensure accountability, transparency and fairness in the financial sector when dealing with human rights abuses and illicit financial flows. The supervision of Swiss banks through self-regulatory norms set by the Swiss Banking Association and regulation by FINMA is therefore crucial.

42. It is the view of the Independent Expert that the staffing, resources and powers of FINMA need to be proportional to the size of the Swiss financial market and the volume of assets managed by its financial institutions. FINMA should have sufficient capacities to supervise all banks and financial intermediaries adequately, irrespectively of their size.

43. Investigations of recent cases show that the majority of banks fulfil their duties under the Anti-Money Laundering Act of Switzerland, but a minority has not done so. In the Petrobras case, for instance, FINMA revealed that 75 per cent of the approximately 20 Swiss banks involved were in conformity with Swiss legal regime in applying their money-laundering rules. However, FINMA noted that for the remaining percentage of banks “there (were) concrete indications that the measures those banks had in place to combat money laundering were inadequate”.²⁵ FINMA has dissolved a bank, withdrawn the fiduciary licences of companies and ordered the disgorgement of illegally generated profits in the context of enforcement.

44. The Independent Expert welcomes FINMA’s 2011 publication of an investigation on the due diligence obligations of Swiss banks handling assets of politically exposed persons, indicating that it had initiated administrative proceedings against four of the audited 20 banks where serious gaps were found. The names of those four banks were not made public. Hence, the general public wonders which banks had serious flaws in their due diligence procedures or carried out clarifications “solely with a view to the bank’s own reputation, with little consideration being given to the risk of money laundering.”²⁶ There is also no information available as to whether sanctions were imposed and if so to which financial institutions.

45. The Independent Expert also commends FINMA for publishing, since 2014, annual enforcement reports²⁷ and for recently issuing press statements indicating measures taken against particular financial institutions in the most egregious cases of non-compliance. Yet, the Independent Expert regrets that its enforcement reports do not specify the names of the financial institutions subjected to sanction. In his opinion, the purpose of enforcement is to avoid repetition of infringements and ensure individual corporate accountability for non-compliance with banking regulations.

46. Financial intermediaries are required to submit information about suspicious transactions to the Money Laundering Reporting Office of Switzerland (MROS). After gathering information on the origin of the assets or on suspect persons, MROS may forward the information to prosecutors for their potential action. MROS received 2,909 suspicious transaction reports in 2016 related to financial transactions of a total value of 5.32 billion Swiss Francs. Currently most suspicious transaction reports are received from banks,

²⁵ Speech by Mark Branson, “Combating money laundering is a duty of every banker”, Annual Press Conference 7 April 2016.

²⁶ FINMA, “Due diligence obligations of Swiss banks when handling assets of “politically exposed Persons””, October 2011, p. 9.

²⁷ Available at: <https://www.finma.ch/en/documentation/finma-publications/reports/enforcement-reports/>.

however only very few fiduciaries report suspicious transaction to MROS. After reviewing the notices, 71.3 per cent of all cases were forwarded to judicial authorities.²⁸

G. Prosecution

47. The Office of the Attorney General of Switzerland and cantonal prosecutors have specialised units for financial crimes and crimes related to money laundering. Complex, large-scale investigations have been conducted at both federal and cantonal levels, including cases involving predicate offences committed outside Switzerland.

48. In 2016, prosecution authorities and courts received 766 suspicious transaction reports from the MROS. In about half of all cases, proceedings were dismissed, 108 cases reached judgment by a court and only 3 per cent resulted in the acquittal of the offender.²⁹ In addition, criminal investigations in money laundering cases can be opened by the federal and cantonal prosecution authorities in response to requests for mutual legal assistance, police reports, complaints filed by members of the public and reports from other federal and cantonal authorities. In total, every year between 200 and 300 cases have resulted in convictions.³⁰

49. The Swiss authorities successfully identified and dismantled several sophisticated money laundering networks. In the 1MBD and Petrobras cases, the Office of the Attorney General initiated dozens of proceedings in which the alleged offence was large-scale corruption resulting in losses amounting to the equivalent of hundreds of millions, if not billions of Swiss francs for Malaysia and Brazil, respectively.³¹ In the 1MDB case, assets intended for the economic and social development of Malaysia estimated to be as high as several billion US dollars had been transferred to Swiss accounts held by former Malaysian and United Arab Emirates officials.³²

50. In some instances, national efforts to bring accountability for economic crimes committed in multiple jurisdictions can be undermined, if a mechanism for genuine international cooperation is not in place. Swiss authorities have faced difficulties to ensure accountability when starting a successful prosecution domestically depends on the political will in foreign jurisdictions to prosecute the underlying criminal acts committed abroad.

H. Freezing, confiscation and repatriation of stolen assets

51. Switzerland has demonstrated an increasing willingness to freeze and confiscate stolen assets. The first case involved the freezing of several millions related to the former Philippine ruler Ferdinand Marcos when he was forced into exile in 1986. Other prominent cases include Abacha (Nigeria), Mobutu (Democratic Republic of Congo), Montesinos (Peru) and Duvalier (Haiti). In January 2011, Switzerland swiftly froze accounts belonging to the former presidents of Egypt and Tunisia and their entourage, and in February 2014, assets belonging to the former Ukrainian President. Switzerland has also frozen assets of politically exposed persons (PEPs) from Libya and Syria in the context of international sanction regimes. In total, over the last 30 years, Switzerland has returned about two billion USD of illicit assets to their countries of origin.³³

²⁸ Money Laundering Reporting Office of Switzerland (MROS), “Annual Report”, Bern, April 2017.

²⁹ *Ibid.*, p. 14.

³⁰ FATF, Anti-money laundering and counter-terrorist financing measures Switzerland. Mutual Evaluation Report, December 2016, p. 63.

³¹ *Ibid.* p. 62.

³² Federal Office of Justice, Annual Activity Report 2016, Mutual Legal Assistance, p.14.

³³ See Federal Department of Foreign Affairs, No dirty money, The Swiss Experience in returning Illicit Assets, available at: https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/edas-broschuere-no-dirty-money_EN.pdf

52. The freezing of large assets held by corrupt and human rights abusing rulers has however raised questions about the reasons why such assets were managed for many years by Swiss financial institutions without alerting the authorities about their suspicious nature or without due investigations. Allegations that those leaders were involved in corruption or responsible for human rights violations were well known when they were still in power.

53. In 2011, Switzerland adopted a law aimed at facilitating the freezing and return of stolen assets of PEPs and their entourage. The country further refined its policies by adopting in 2014 a comprehensive strategy on freezing, confiscating and returning illicitly acquired assets of PEPs which includes preventive and repressive measures.³⁴

54. Switzerland's legal framework was further strengthened by revising the Foreign Illicit Assets Act in December 2015. The law allows the freezing of assets when the country of origin is unable to satisfy the requirements for mutual legal assistance owing to the total or substantial collapse, or the impairment, of its judicial system. It allows in such circumstances the seizure of assets on the reasonable presumption that they must have been acquired by illicit means, changing the burden of proof. The act specifies that the restitution of assets shall have the objective of strengthening the rule of the law and improving the living conditions of the inhabitants of the country of origin.

55. There is, however, a limitation of the Foreign Illicit Assets Act. According to its Article 3 (2) a) assets can only be frozen if "the government or certain members of the government of the country of origin have lost power, or a change in power appears inexorable". In other words, the Swiss Confederation cannot freeze assets of politically exposed persons under this law while they are still firmly in power, except if such a freeze is made on the basis of an international sanctions regime or a request for mutual legal assistance in criminal matters from the country of origin. In those situations, such requests would be highly unlikely.

56. Adequate strategies need to be developed at international and national level to reduce the risk that financial support and services strengthen rulers involved in criminal conduct and result in a continuation of serious violations of human rights. Regrettably, compared to measures in place to prevent the financing of terrorism, international standards are still underdeveloped to prevent the provision of financial services to States and individuals responsible for serious violations of human rights.³⁵

57. Swiss authorities have encountered challenges with regard to judicial confiscation. For instance, the burden of proof imposed by Swiss criminal law, requires prosecutors to provide evidence demonstrating that the assets frozen relate to a crime. Thus, proving the link between the committed crime and the money frozen is usually key to ensure the seizure, confiscation and return of stolen assets. Only in situations covered by the Foreign Illicit Assets Act, assets can be seized from a political exposed person or his entourage on the basis of presumption of their illicit origin. However, certain narrowly defined conditions have to be fulfilled: the country of origin must be unable to engage in mutual legal assistance owing to the total or substantial collapse, or impairment, of its judicial system; the wealth of the asset holder must have increased inordinately facilitated by the exercise of a public function; and there must have been notorious high levels of corruption during his or her term of office.³⁶

58. In all other situations, when asset recovery proceeds on the basis of mutual legal assistance, Swiss authorities will seize assets pursuant to a mutual legal assistance request, if the condition of dual criminality is met, and provide the requesting State with evidence to allow the courts of the requesting State to order the confiscation of the assets frozen in Switzerland. In a second stage, based on the confiscation decision in the requesting State,

³⁴ Switzerland's strategy on freezing, confiscating and returning illicitly acquired assets of PEPs ("Asset Recovery") available at:

https://www.eda.admin.ch/content/dam/eda/fr/documents/aussenpolitik/finanzplatz-wirtschaft/Strategie-Schweiz-Sperrung-Einziehung-Rueckfuehrung-Potentatengelder_FR.pdf.

³⁵ For a more detailed analysis, see A/HRC/28/59.

³⁶ Foreign Illicit Assets Act, articles 4 and 15.

the frozen assets will then be returned to the requesting State. However, MROS has highlighted that chances to obtain information from abroad are not the same for every country³⁷. In addition, due process standards in Switzerland, allow account holders of stolen assets to challenge freezing and expropriation decisions. While due process is very important from a human rights point of view, adequate measures should be taken to ensure that judicial guarantees do not result in extremely lengthy legal procedures in Swiss courts before stolen assets could be returned.

59. Efforts to return stolen assets to Egypt illustrate the difficulties. On the same day that the former president Hosni Mubarak was ousted, the Swiss Federal Council issued an order to freeze all his assets and those of his entourage. Subsequently, close to 700 million USD of assets were frozen. Criminal prosecutions were launched in Egypt and Switzerland. However, after several years of investigations, the Attorney General of Switzerland announced in December 2016 that he had to drop criminal proceedings against several persons and order the unblocking of 180 million CHF. An analysis of Egyptian court decisions by the Office of the Attorney General made it unlikely to link the respective funds to a crime committed in Egypt.³⁸

60. In December 2017, the Federal Council decided to end with immediate effect the freeze of the remaining assets from Egypt, given that the Egyptian courts had dropped all relevant criminal proceedings with possible links to Switzerland.³⁹ The assets have only remained frozen for the time being as criminal procedures in Switzerland are still ongoing. The result is rather unfortunate. Despite more than five years of investigations and regular exchanges between Swiss and Egyptian authorities it appears likely that the assets frozen in Switzerland will not be returned to Egypt for the benefit of the population.

61. The innovative Foreign Illicit Asset Act was of no assistance in this case. The Swiss authorities maintained that Egypt was not a failed State without a functioning judicial system, therefore asset recovery efforts took exclusively place on the basis of mutual legal assistance requests. However, Swiss authorities could not continue to block indeterminately assets, without sufficient proof that they were acquired by irregular means.

62. The Independent Expert therefore recommends strengthening Switzerland's legal framework for asset recovery by reversing the burden of proof to the extent permitted by international human rights standards. Swiss authorities should be empowered to seize assets from politically exposed persons, if there are well-founded reasons to believe that the respective assets have been derived from corruption, or other criminal conduct. In such cases, the onus should be on the respective account holder, to demonstrate that all assets held by him or her had been acquired by legitimate means.

63. The Swiss authorities have occasionally also faced difficulties to guarantee that assets returned are used for the benefit of the population as required by the Foreign Illicit Asset Law. The authorities have learnt lessons from past cases and taken measures to prevent that funds returned are misappropriated again.⁴⁰

64. The Independent Expert recalls that participation and transparency are core human rights principles that should also guide the restitution of stolen assets, as stated in the Principles for Disposition and Transfer of Confiscated Stolen Assets in Corruption Cases endorsed at the Global Forum on Asset Recovery held in Washington on 4 December 2017.⁴¹ It is important that the people from whom the funds have been stolen receive them back in a timely manner, that they have a say about their final use, and that there is full transparency and accountability about their use after their return.

³⁷ Money Laundering Reporting Office of Switzerland, "Annual Report" (Bern, April 2017) p. 12.

³⁸ Arab Spring, Attorney General meets Egyptian Authorities in Cairo, 17 December 2016, available at: <https://www.admin.ch/gov/en/start/documentation/media-releases.msg-id-64958.html>.

³⁹ See "Freeze of foreign assets in Swiss banks extended", 20 December 2017, available at: https://www.swissinfo.ch/eng/tunisia--egypt--ukraine_freeze-of-foreign-assets-in-swiss-banks-extended/43770116.

⁴⁰ See the case of Nigeria, <https://www.news.admin.ch/newsd/message/attachments/50734.pdf>.

⁴¹ https://star.worldbank.org/star/sites/star/files/20171206_gfar_communique.pdf.

65. Many countries from which assets have been stolen are going through transitional periods, dealing with past atrocities. When the regulatory authorities or criminal courts find that financial intermediaries have failed to exercise the required due diligence when receiving or managing those funds, human rights victims of the country concerned need and deserve an explicit public apology from the respective financial institutions as well as compensation. This would be an important step in rebuilding trust in the context of transitional justice and may often be similar important as the actual return of the stolen assets.

V. Integration of human rights due diligence in private and public financial institutions

A. Regulatory framework

66. While several banks have adopted human rights policies at corporate level, there is no official regulation by the Government, nor a directive or recommendation by self-governing bodies on how financial institutions in Switzerland should apply human rights due diligence in their operations. Federal Law prohibits financial institutions to undertake only very few human rights sensitive investments.

67. The most prominent example is the Federal Act on War Material which includes since 2013 a prohibition of financing of the development, manufacture or acquisition of nuclear, biological or chemical weapons, anti-personal mines and cluster munitions.

68. The Independent Expert welcomes the revision of the War Material Act, which outlaws the financing of weapons which continue to violate the right to life, personal integrity and health of civilians long after they have been deployed in armed conflicts. He is however concerned that the law may be insufficient to prevent the indirect financing of such weapons, as it does not outlaw investments in companies that produce also other goods. Furthermore, to his knowledge, no individual has so far been prosecuted for the financing of prohibited war materials. Furthermore, the Act does not specify how the competent Federal Authorities should monitor the compliance of financial institutions with it.

69. The War Materials Act regulating business conduct is an exception. Most often, Swiss authorities encourage the adoption and promotion of voluntary human rights standards within the private sector. Regulations to ensure human rights due diligence and corporate liability of financial institutions for potential human rights violations do not exist.

B. National action plan on business and human rights

70. In December 2016, the Government adopted a National Action Plan for implementing the Guiding Principles on business and human rights in Switzerland after a consultative process with the private sector and non-governmental organizations. The National Action Plan covers all business enterprises based, headquartered or operating in Switzerland, including financial institutions, State owned enterprises, or public-private institutions. In addition, the Federal Council adopted in 2015 an Action Plan on corporate social and environmental responsibility, covering some human rights issues.⁴²

71. The National Action Plan endorses the concept of a smart mix of mandatory and voluntary commitments. However only few of its “action points” refer to regulatory measures to improve business respect for human rights. According to the Committee on

⁴² Confédération Suisse, La responsabilité sociétale des entreprises, Position et plan d’action du Conseil fédéral concernant la responsabilité des entreprises à l’égard de la société et de l’environnement, Berne 1 April 2015, available at: https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/Gesellschaftliche_Verantwortung_der_Unternehmen/CSR.html.

Economic, Social and Cultural Rights, State obligations in the context of business activities entail a positive duty to adopt a legal framework requiring business entities to exercise human rights due diligence.⁴³ The Committee has stressed that States are required to remove substantive, procedural and practical barriers to remedies, including by establishing parent company or group liability regimes.⁴⁴ An alliance of 85 civil society organisations has therefore launched a responsible business initiative aimed at embedding human rights and environmental due diligence obligations in the Swiss constitution and in a federal law, including regulations relating to the civil liability of business enterprises to ensure a better protection of victims of corporate human rights abuses.⁴⁵

72. The National Action Plan does not include particular “action points” in relation to the financial sector of Switzerland, except mentioning the role played by the Thun Group of Banks.

C. National Contact Point

73. In 2000, Switzerland established a National Contact Point (NCP) promoting the implementation of the OECD Guidelines for Multinational Enterprises which can receive complaints from individuals and interest groups about violations of the OECD guidelines⁴⁶. Since 2011 the OECD guidelines include a human rights chapter consistent with the UN Guiding Principles on Business and Human Rights. Hence, concerns about adverse human rights impacts and human rights violations including lack of due diligence by businesses and financial institutions headquartered in Switzerland with business partners can also be brought to the attention of the NCP. The NCP can offer mediation between the complainant and the concerned business enterprise.

74. Since 2000 eighteen complaints have been submitted to the Swiss NCP⁴⁷, including in April 2017, for the first time, a complaint against a Swiss corporate bank, Credit Suisse, concerning its business relationships with USA companies involved in the construction of the North Dakota Access Pipeline in the USA. The complaint alleged that the construction of the pipeline would result in violations of human rights for affected indigenous communities.⁴⁸

75. In an initial assessment, the Swiss NCP found that the issues raised in the complaint merit further consideration and offered mediation between the concerned parties.⁴⁹ The Independent Expert welcomes this decision by the NCP and hopes the mediation process will assist clarifying the matter and help to address some of the concerns expressed. The case under consideration is an example of how NCPs can also contribute to the promotion of human rights due diligence in the financial sector. However, he highlights the limitations of the powers of the NCP, which cannot express in its final statements whether a violation of the OECD guidelines took place, is not in the position to impose or enforce remedial measures, and cannot force a business enterprise to take part in the mediation process.⁵⁰

⁴³ CESCR, General Comment no. 24 from 23 June 2017, para 16.

⁴⁴ *Ibid*, para 44.

⁴⁵ <http://konzern-initiative.ch/>.

⁴⁶ See https://www.seco.admin.ch/seco/en/home/Aussenwirtschaftspolitik_Wirtschaftliche_Zusammenarbeit/Wirtschaftsbeziehungen/NKP.html.

⁴⁷ See <http://mneguidelines.oecd.org/database>.

⁴⁸ A summary of the complaint is available at: https://www.gfbv.ch/wp-content/uploads/summary_2017_ncp_complaint-stp.pdf.

⁴⁹ See National Contact Point of Switzerland, Initial Assessment, Specific Instance regarding Credit Suisse submitted by the Society for Threatened Peoples Switzerland, Bern 19 October 2017.

⁵⁰ See for example <http://www.alliancesud.ch/de/politik/unternehmen-und-menschenrechte/nkp-der-oecd-wenn-dialog-grenzen-stoesst>.

D. Human rights policies of commercial and private banks

76. The two largest commercial Banks UBS and Credit Suisse have adopted their own human rights policies. In 2006, UBS adopted a Human Rights Position and incorporated later its human rights due diligence policy in its Environmental and Social Risk Policy Framework.⁵¹ The bank excludes doing business with or investing in companies whose activities would damage world heritage sites, endanger wetland or species, and high conservation forests, are involved in illegal lodging, child or forced labour according to ILO conventions 29, 138 and 182, or disrespect Indigenous Peoples rights.

77. In a comparative study of 45 international commercial banks, UBS and Credit Suisse received middle scores (6.5 points on a 12 points score list) in relation to their human rights policies, ahead of most banks evaluated. However ratings of UBS and Credit Suisse for ensuring that concerned individuals have access to effective remedies as specified by the UN Guiding Principles on business and human rights have been very poor (0 and 0.5 points of 3 points possible).⁵² This appears to be a weakness affecting the entire sector as ratings in relation to access to remedies were poor for most financial institutions reviewed. It should be noted that tax evasion and avoidance of individuals and corporations has so far been largely regarded as a compliance issue with national banking regulations and anti-money laundering law, less as a human rights issue.

78. The Independent Expert welcomes the leading role of UBS and Credit Suisse in setting up the Thun Group of Banks with the aim to engage with peer international banks in a discussion and exchange of information on human rights due diligence.⁵³ However, he shares concerns voiced by the UN Working Group on business and human rights and other stakeholders that one of its recent discussion papers would unduly limit the responsibilities of banks for preventing and mitigating human rights impacts to which there are directly linked in the context of their client relationship.⁵⁴ He therefore welcomes that the Thun Group has recently invited human rights experts and non-governmental organizations to their annual meeting and hopes that concerns expressed by human rights experts will be taken into account and incorporated. He further recommends that the Thun Group study the issue of lending in contexts marked by gross violations of human rights, with the aim of developing adequate strategies to reduce the risk of financial complicity with regimes engaged in gross violations of human rights.⁵⁵

79. Furthermore, he would like to encourage the Government, Swiss Banking, the Association of Swiss Private Banks and professional and civil society associations to consider developing a banking sector agreement on responsible business conduct in Switzerland. The Dutch Banking Sector Agreement may be a source of inspiration in this

⁵¹ UBS, Environmental and Social Risk Framework, available at: https://www.ubs.com/content/dam/ubs/global/about_ubs/corporate_responsibility/UBS-ESR-framework.pdf.

⁵² Banktrack, *Banking with Principles? Benchmarking Banks Against the UN Guiding Principles on Business and Human Rights*, 2nd edition, June 2016, available at: https://www.banktrack.org/ems_files/download/5412388/banking_with_principles_june2016update.pdf.

⁵³ The two discussion papers are available at <http://www.menschenrechte.uzh.ch/en/publikationen/thun-group-of-banks.html>.

⁵⁴ See letter of the UN Working Group on Business and Human Rights to the Thun Group of Banks, available at: http://www.ohchr.org/Documents/Issues/TransCorporations/WG_BHR_letter_Thun_Group.pdf and OHCHR response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector available at <http://www.ohchr.org/Documents/Issues/Business/InterpretationGuidingPrinciples.pdf>.

⁵⁵ Report to the HRC on financial complicity, A/HRC/28/59 and letter to the Thun Group of Banks from 19 October 2017, available at: <http://www.ohchr.org/Documents/Issues/Development/IEDebt/LetterThunGroup.pdf>.

context.⁵⁶ In his view there is a need to develop a common understanding and enhance consistency in what it means to include human rights due diligence in the financial sector.

E. Public financial institutions

80. Public financial institutions, state owned companies and pension funds serving employees of public institutions are, as State-linked institutions, specially expected to exercise human rights due diligence.

81. According to its policy statement, the Swiss Export Credit Agency (SERV) gives high priority to human rights, social issues and the environment when assessing insurance applications. SERV has adopted Guidelines for reviewing environmental, social and human rights issues which are based on the OECD Common Approaches for Export Credit Agencies. According to the SERV Act insurance cover can be excluded, suspended or reduced if a coverage has been concluded on the basis of false information provided by the applicant. This may include the withholding of information in relation to social, environmental or human rights risks related to the business for which risk insurance had been requested.

82. The Independent Expert would like to encourage SERV to provide public information about its own grievance mechanism that would allow affected individuals or communities covered by its risk insurance to bring concerns to the direct attention of SERV, in particular if local grievance procedures by its insured clients fail. A first step would be indicating a procedure to submit complaints or the establishment of an independent complaints mechanism. In order to allow external stakeholders to identify whether a particular investment is covered by SERV's export insurance, it would be important to cover information about export businesses covered by SERV on a country-by-country basis.

83. The Independent Expert welcomes that an increasing number of pension funds in Switzerland have adopted investment policies that include human rights criteria, including the public pension funds of the cantons of Geneva and Vaud. In December 2015, seven public pension funds managing investment assets totalling over CHF 150 billion founded the Swiss Association for Responsible Investments (SVVK-ASIR). They now jointly plan to exercise their environmental, social and economic responsibilities in a holistic way.⁵⁷ The Independent Expert would like to encourage insurance companies, public and private pension funds in Switzerland to adopt similar measures to ensure that they do not invest in companies that fail to respect human rights, international labour standards, or are involved in tax evasion, corruption or illicit arms trade.

84. The Independent Expert welcomes that the Swiss National Bank (SNB) revised in 2015 its Investment Policy Guidelines. The guidelines state that the bank "avoids shares in companies which produce internationally banned weapons, seriously violate fundamental human rights or systematically cause severe environmental damage."⁵⁸ To identify the relevant companies the bank relies on the recommendations of external companies specialised in such analyses.⁵⁹ The SNB has not disclosed further details how it ensures that investments in companies responsible for human rights abuses are avoided, nor has it publicly reported which equity investments were excluded since 2015 from its portfolio due to human rights concerns.

⁵⁶ Sociaal-Economische Raad, Dutch Banking Sector Agreement on international responsible business conduct regarding human rights, available at https://www.ser.nl/en/~media/files/internet/publicaties/overige/2010_2019/2016/dutch-banking-sector-agreement.ashx.

⁵⁷ See information provided by SVVK-ASIR at, http://www.svvk-asir.ch/fileadmin/user_upload/Dokumente/SVVK-ASIR_NormativeBasis.pdf.

⁵⁸ Investment Policy Guidelines of the Swiss National Bank (SNB), p. 2, available at: https://www.snb.ch/en/mmr/reference/snb_legal_richtlinien/source/snb_legal_richtlinien.en.pdf.

⁵⁹ See SNB Annual Report 2016, p. 75.

F. Incorporating human rights due diligence in investment policies

85. Private banks that have specialised in wealth management should similarly integrate human rights approaches in their asset management strategies and in financial products offered to their clients. For example, the private Bank Lombard Odier excludes as a general policy at group level any investments involved in the production or distribution of controversial weapons, including biological, chemical weapons, anti-personal mines, cluster weapons, depleted uranium and white phosphorus. It is noteworthy that it has also banned investments in financial instruments such as futures, options, swaps, indices, exchange-traded funds directly linked to ‘essential food commodities’ such as wheat, rice, corn and soybeans,⁶⁰ which can be linked to the right to food and food security.

86. The Independent Expert noted that it is essential to rely on external information for assessing companies on their social performance and human rights record. In particular, large corporations tend to publish shiny corporate responsibility reports that often do not reflect the full picture, in particular on social and human rights issues. Initiatives such as the corporate human rights benchmark assessing the human rights performance of the 89 largest publicly traded companies could partly fill this gap.⁶¹

VI. Conclusions and recommendations

87. **Switzerland has adopted a human rights policy aiming for coherence and the promotion and protection of human rights at home and abroad.⁶² This implies a great challenge, in particular in the financial field. In order to enhance financial and fiscal transparency around the world, national and international actions and effective coordination and cooperation between States are essential.**

88. **In recent years, the Swiss Federal Council has undertaken several efforts and achieved progress in curbing illicit financial flows undermining the rule of law and the enjoyment of human rights in Switzerland and in other jurisdictions. The Independent Expert welcomes that the Swiss Government expects all businesses operating in Switzerland, including public and private financial institutions, to respect human rights wherever they operate. This also requires that businesses and financial institutions exercise human rights due diligence throughout their business and client relationships.**

89. **Switzerland can play a key role in curbing illicit financial flows and become a frontrunner in integrating human rights in the public and private financial sector. This report has identified good practices that other financial centres could follow, but it also indicates areas in which there is room for improvement. This includes strengthening the accountability, regulation and supervision of the Swiss financial market to prevent adverse human rights impacts caused by illicit financial flows, investment or insurance policies.**

90. **Human rights considerations should be more systematically integrated into financial policies of public and private institutions based in Switzerland. First of all, there is a legal obligation to do so according to international human rights standards.⁶³ Second, further embedding human rights in financial policy would enhance the reputation of the Swiss financial sector. It would also give further credibility to its human rights policies and to the aim of making Switzerland’s financial market a leader in sustainable finance. Finally, and this is the most**

⁶⁰ Lombard Odier, SRI Policy, 1 June 2017, https://www.lombardodier.com/files/live/sites/loportail/files/Documents/AssetManagement/RegulatoryDisclosures/2017/September/Lombard%20Odier%20SRI%20policy%202017_format.pdf.

⁶¹ <https://www.corporatebenchmark.org/>.

⁶² Federal Department of Foreign Affairs, Human Rights Strategy 2016-2019.

⁶³ See for example CESCR, General Comment no. 24 on State obligations under the International Covenant on Economic, Social and Cultural Rights in the context of business activities, and the Guiding Principles on business and human rights and the Guiding Principles on foreign debt and human rights.

important aspect, it would improve the protection and enjoyment of human rights in Switzerland and abroad.

91. Integrating human rights due diligence in the financial regulatory field should be considered an evolving duty as asymmetric power relations undermining human rights operating underneath financial markets need to be continuously recomposed.

92. The Independent Expert recommends to the Government and public institutions in Switzerland to:

a) Take further steps to prevent that illicit financial flows enter undetected its financial market;

b) Ensure that banks and financial intermediaries exercise sufficient due diligence with clients, in particular politically exposed persons and high-net worth individuals, and assess the effectiveness of existing regulatory framework;

c) Introduce sufficient dissuasive, proportionate and effective sanctions for financial institutions and their employees that fail to exercise due diligence or assist in tax evasion or money laundering;

d) Reduce significantly the requirement that more than CHF 300.000 of tax must be evaded within one year for incurring criminal responsibility for money laundering when assisting a foreigner in tax fraud. The offence should also cover all forms of tax evasion and not be limited to tax fraud;

e) Continue efforts to encourage all financial intermediaries to systematically submit suspicious transaction reports to the Money Laundering Reporting Office and to expand its power so that it can obtain from a foreign counterpart, information from financial intermediaries in the absence of a suspicious transaction report in Switzerland;

f) Expand the number of developing countries participating in the automatic exchange of information on taxation matters by further increasing technical assistance and allowing low income countries to implement gradually requirements for exchange of taxation information;

g) Bring corporate tax regimes as envisaged in conformity with OECD standards by abolishing tax reduction schemes that facilitate profit shifting by transnational corporations without replacing them with new avenues for tax reduction;

h) Continue to support measures at international level to reduce harmful tax competition between countries;

i) Carry out a human rights impact assessment of the proposed corporate tax reform, in particular its impact on revenues available for the realization of economic and social rights within Switzerland and in developing countries;

j) Enhance staffing, resources and powers of the Swiss Financial Market Supervisory banking supervision authority in proportion to the size of the Swiss financial market and the volume of assets managed by its financial institutions to ensure that the entity has sufficient capacities to supervise all financial intermediaries adequately and irrespective of their size;

k) Publicly identify financial institutions that have been subjected to sanctions or corrective action, to ensure individual corporate accountability for non-compliance with banking regulations;

l) Ensure that the stolen assets derived from corruption, misappropriation of public funds, and other criminal conduct can be seized by Swiss authorities when mutual legal assistance is possible, but unsuccessful, because criminal prosecutions fail to take place in foreign jurisdictions or do not meet international due process standards. It should be possible to seize such assets, as long as the asset holders are unable to demonstrate that their assets have derived from legitimate economic activities;

m) Consider revising the Foreign Illicit Assets Act to allow also as well for the freezing and confiscation of assets derived from corruption or other criminal conduct by politically exposed persons when they are still in power;

n) Monitor regularly the compliance of Swiss financial intermediaries with the prohibition of financing the production or development of anti-personal mines and cluster munitions;

o) Adopt legislation to prevent the provision of financial services and lending to individuals or state actors responsible for serious or systematic human rights violations;

p) Ensure that people from whom funds have been stolen receive them back in a timely manner, that they have a say about their final use, and that there is full transparency and accountability about their use after they are returned;

q) ensure whistle-blower protection in the private sector meets international standards and setting consistent criteria about when information provided by whistle-blowers can be validly used as evidence in judicial proceedings;

r) Ensure thorough regulation that financial intermediaries can be held liable for human rights violations that they have caused or contributed to, including the compensation of victims;

s) Present views on possible measures to improve respect of financial businesses for human rights through regulation in response to proposals made by a popular initiative aimed at embedding human rights due diligence in the Swiss legal order;

t) Develop in collaboration and dialogue with financial institutions and banking associations, nongovernmental organizations and human rights experts a banking sector agreement on responsible business conduct in Switzerland;

u) Encourage the Swiss Export Risk Insurance (SERV) to establish an independent complaints mechanism that would allow individuals or communities affected by insured business projects to bring concerns directly to its attention;

v) Encourage the Swiss National Bank to inform regularly the public about corporations that have been excluded from its investments portfolio due to human rights concerns and provide more detailed information about its human rights due diligence policy;

w) Ratify the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights.

93. The Independent Expert recommends that public and private financial institutions operating in Switzerland:

a) Enhance their reporting of suspicious transactions related to corruption, money laundering or tax evasion to the Money Laundering Reporting Office for investigation;

b) Ensure that assets managed by them are not invested in businesses or provided to state actors responsible for corruption, tax evasion or violations of human rights or international labour standards;

c) Adopt policies to prevent providing financial services or support to individuals, companies or States responsible for gross violations of human rights;

d) Implement the Guiding Principles on Business and Human Rights and Guiding Principles on Foreign Debt and Human Rights by:

- i. adopting a human rights policy covering its own business operations, client and business relationships and its investment policies;
- ii. carrying out appropriate human rights impact assessments before funding decisions;

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- iii. **engaging in meaningful consultations with potentially affected groups and other stakeholders; and improve stakeholder consultations and participation by establishing units or officers responsible for engaging with affected individuals, communities or civil society entities;**
 - iv. **providing remedies for any adverse human rights impact caused or contributed to, and establish effective operational-level grievance mechanisms that are legitimate, accessible, predictable, equitable, transparent and rights-compatible;**
 - e) **Exercise active shareholder rights and engage in dialogue with non-compliant companies with the aim to stop harmful business conduct;**
 - f) **Disinvest from companies which continue to fail meeting human rights standards and report in public about the reasons for disinvestment.**
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