

SWITZERLAND'S HOME STATE DUTY TO PROTECT AGAINST CORPORATE ABUSE

Analysis of legislation and needed reforms in Switzerland to
strengthen corporate accountability regarding
human rights and environmental abuses

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This study was researched and drafted by Carlos Lopez and Simone B. Heri at the International Commission of Jurists (ICJ). The contributions and views of the following persons are gratefully acknowledged: Prof. Christine Kauffman, Prof. Anne Petitpierre, Me. Josephine Boillat (Poncet, Amadruz et Associées, Law firm), Me. François Membrez (Weber, Membrez Bruchez, Advocats), Hannah Ellis (CORE-UK), Filip Gregor (ECCJ), Prof. Gilles Carbonnier, Prof. Guido Pallazzo, Prof. Eva Maria Belser, and ICJ staff. Elizabeth Umlas edited the study. Its content, however, can only be attributed to the members of the coalition of Swiss NGOs.

Members of the coalition of Swiss NGOs:

Alliance Sud

www.alliancesud.ch

Fastenopfer

www.fastenopfer.ch

Amnesty International

www.amnesty.ch

Gesellschaft für bedrohte Völker

www.gfbv.ch

Arbeitsgruppe Schweiz Kolumbien

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www.brotfueralle.ch

Swissaid

www.swissaid.ch

This document is available at:

www.fastenopfer.ch/csr

For further information please contact:

Danièle Gosteli-Hauser

Amnesty International

dgosteli@amnesty.ch

+41 31 307 22 18

Oliver Classen

Berne Declaration

oliver.classen@evb.ch

+41 44 277 70 06

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EXECUTIVE SUMMARY

This study focuses on Switzerland's implementation of its duty to protect against corporate human rights and environmental abuse. The study's objectives are to review and assess the national Swiss legislation and policies and to outline the main areas that may need reform and to map the options available to ensure full compliance of Switzerland with its international obligations.

The Context

Switzerland is a state party to most of the universal and European international instruments on the protection of human rights, labour rights and the respect for the environment. Treaties concerning the protection of human rights and labour rights impose a wide range of obligations on States to respect and/or ensure respect for (depending on the formulation of each treaty), including to prevent, prohibit and bring an end to third party abuse of rights. In some cases, it will require holding those third parties legally responsible. Some provisions in certain treaties have been considered as imposing obligations of extraterritorial reach (i.e. Convention Against torture, CRC and Geneva Conventions).

The study takes into account Prof John Ruggie's framework based on three pillars: the primary duty of States to protect people against violations of their rights by third parties, including businesses; secondly, the responsibility of corporations to respect all human rights; thirdly, the need to enhance access to remedies (judicial and non judicial) by victims of rights violations by companies. It also takes into account developments and proposals made at the European level (such as those made by ECCJ) calling for clearer duties of corporations, access to justice and mandatory reporting.

Overall Swiss policy framework

Despite its intense engagement at the international level promoting a number of initiatives Switzerland does not have a unified overall policy on human rights, business and CSR. Independent government departments are in charge of human rights at home and abroad and of economic matters, and although close coordination is said to exist among them, this does not result in a unified policy involving a structure, principles and mechanisms.

Swiss Legal framework on CSR, human rights and environment

The Swiss Federal Constitution requires State organs to respect human rights and promote them in the context of its foreign policy. However, national legislation and policies have not developed that mandate to the fullest.

Legal duties of company directors- There are no specific rules in Swiss corporate law imposing an obligation on directors to consider the company's impacts on non-shareholders (including human rights impacts on the individuals and communities affected by the company's operations), within or outside Switzerland, except certain provisions of the Law on the Protection of the Environment -LPE. Practice in other countries generally links consideration of social and environmental impacts to the financial interests of the company. However, the law **permits** the directors to consider the company's impacts on non-shareholders, provided that this is not contrary to the company's interests.

Nor are there specific legal requirements on directors to ensure that subsidiaries, suppliers or other business partners take into account human rights considerations. The possibility that the parent company be held liable for such impacts (and, as the case may be, that the directors' liability be in turn triggered) is, in principle, limited, as they are different legal entities.

The Swiss Criminal Code establishes liability for individuals who commit crimes and this applies to company directors as individuals, including in relation to international crimes (crimes against humanity, war crimes and genocide). This covers direct perpetrators, accomplices and others. Criminal jurisdiction is based on a territorial principle, but in certain cases of international crimes and offences against children, it suffices that the perpetrator is in Swiss territory even if the offence was committed abroad to trigger Swiss jurisdiction.

Companies' liability- Environmental law imposes certain obligations on companies to take "appropriate measures" to prevent harm from occurring, a duty to inform the buyers and consumers about the characteristics and potential impact of the products (i.e. in case of biological organisms). Failure to observe these duties would trigger legal liability.

The Swiss legal system also establishes a novel system of criminal liability for corporations, yet untested (Article 102 of the Criminal Code): when the individual perpetrator of an offence cannot be identified because of the enterprise's lack of organisation; and, for certain specific crimes, the enterprise's parallel liability arises due to defective organisation (the enterprise has not taken all reasonable and necessary organisational measures to prevent the individual from committing the offence).

The principle is that a company and its subsidiary have separate legal personalities and are therefore considered as two different legal entities, one not being liable for the activity of the other. However, Swiss courts have developed some exceptions to this principle under specific and exceptional circumstances. In relation to the company **suppliers**: although they are two different legal entities, if the supplier has no decisional power of its own and the influence of another company is decisive, this other company may be held liable for the activities of the supplier.

Reporting on social and environmental issues

The existing reporting obligations focus mainly on financial reporting obligations. Companies are required to disclose risks that may have a major influence on the company, which may include impacts on non-shareholders, if, for instance, they pose a legal risk to the company.

The law requires listed companies (in the stock exchange) to inform on any price-sensitive facts that can trigger significant change in market prices. Price-sensitive facts could include events connected to the company's impact on non-shareholders such as **liability risks resulting from damages to the environment, violations of human rights or product liability** that imply an important change in the financial evaluation of the company.

In conclusion, companies may be required to disclose the impacts of their operations (including societal impacts) on non-shareholders mainly in cases where this might have a significant influence on their financial situation or on market prices, which limits the scope of

impacts to be reported on. They may also have to report these impacts in specific situations, where it is required in other laws, including labour and environmental laws.

As a rule companies are permitted to disclose the impacts of their operations (including societal impacts), as long as this reporting is not detrimental to the interests of the company. Many largest Swiss companies have codes of conduct and report on them.

Access to justice and grievance mechanisms

Access to an effective remedy is a human right. When affected communities face transnational companies, huge power and financial disparities become evident. Swiss law does not recognise the institution of “*class action*” whereby a group of persons who claim to be similarly affected by a company can bring a collective claim before the court for damages. Class actions usually facilitate legal action by a group with a single legal counsel reducing costs and also alleviating the burden of proof each individual would otherwise have, and possibly reducing the length of litigations. By contrast, Swiss law recognises to *civil associations and organizations the right to bring claims in defence of a collective interest* (not only of their members but also of those outside carrying out similar trade) provided that their statute enables them to defend the economic interest of their members.

Other obstacles to access justice include high legal costs (mainly of legal representation) and protection of witnesses and whistleblowers.

There are some grievance mechanisms that are being used, such as the OECD National Contact Points system. But the methods and outcomes of the Swiss NCP show that it is not yet an effective remedy for victims. At the same time, another potentially valuable mechanism, a national human rights commission, does not exist yet.

Policy instruments

Switzerland uses a series of policy instruments to advance human rights at home and abroad. They include a policy to defend Swiss enterprises economic interests abroad, which reportedly excludes cases of corruption or of companies without good human rights and labour record; public procurement that contemplates respect to ILO core labour conventions as conditions, and the export credit agency (SERV).

Common criticisms against these policies include the lack of coordination and coherence amongst them, selective use of standards, politicising, and lack of accountability.

Outlining options for reform

- Switzerland needs an overarching policy or plan to promote human rights and environmental business responsibilities, to catch up with the European trend. One way to achieve this is that the Federal Parliament requests the Federal executive to produce such a policy or paper in consultation with civil society, business and other stakeholders.
- Alternatively, the Federal Parliament can request the Federal executive to commission such policy paper to the Competence Centre on Human Rights that has been created as a pilot project. Failure of Parliament should not be a deterrent and the Federal executive

may be persuaded to directly commission such policy paper or plan from the Competence Centre.

- Company law may be reformed with the introduction of a specific duty of care of parent companies in respect to their subsidiaries and companies under their control. This duty may be added explicitly in amended Articles 716a and 717 CO that define directors' duties to the effect that directors' duties will include to exercise due diligence to ensure that subsidiaries and societies under its control do not commit serious human rights violations or cause serious damage to the environment.
- To enforce the duty of care in relation to subsidiaries, a suit at law may be brought against the parent domiciled in Switzerland.
- A general **duty of care** on the part of a company to ensure that human rights and the environment are respected **throughout its sphere of responsibility** (and not only as regards its subsidiaries or companies under its control) would be more effective if limited to the relationship of Swiss companies with suppliers, and, among suppliers, the most important ones over which the company has a significant leverage by virtue of being the main trading partner.
- Questions may be raised about a possible requirement of mandatory environmental and social reporting as part of the "financial reporting". Most of the largest Swiss companies already include some environmental and social reports in their annual reporting.
- Other European countries can serve as models. In Denmark, companies are required to report on: Their existing social responsibility policies, how the policies are implemented, and the achievements. France requires companies to report on: Information about the manner in which the company takes into account the social and environmental consequences of its activities, including social, employment, and local impacts of companies and subsidiaries (in France and abroad). These models, especially the Danish one, could be viable in Switzerland.
- The administration should use its procurement contracts and SERV in a more coherent and consistent way with its human rights goals. Companies aspiring to have government contracts should be able to show that they have an internal CSR policy that pays due regard to human rights and environmental issues, they report annually on its implementation and follow internationally recognised guidelines for reporting. A negative finding by the Swiss NCP should logically affect the company's access to government procurement and export risk insurance.
- Civil society may lobby the Government to use intensively the Competence centre on Human Rights, notably in relation to the preparation of a national policy or plan on CSR, and in-depth studies. After five years, Swiss civil society may wish to advocate more strongly in favour of a national human rights institution with powers of: Monitoring and reporting of human rights abuses in the corporate sector, facilitating law and administrative reform, building capacity of government institutions to better regulate business, and improving access to judicial and non-judicial dispute settlement.

- The unique character of the OECD Guidelines should be exploited. The Swiss Government and civil society should vigorously advocate a fair and transparent process and higher effectiveness of NCP processes and outcomes in the context of the “updating” process. Introduction of standards on human rights due diligence and corporate complicity into the Guidelines should be supported.
- Other European countries can also serve as models (i.e. Netherlands and the United Kingdom), although the novelty of their NCP innovations does not allow for conclusive assessment about their advantages.
- Procedural reform would facilitate access to justice with the introduction of class actions in civil responsibility cases. Just as trade unions counterweight the company’s power with the power of collective action, class actions offset the economic disadvantages in facing a company by pooling together resources and knowledge of a large group of victims.
- Consideration should also be paid to a possible reform of the legal aid system by expanding its coverage to cover eventual payment of legal costs (“the loser pay principle”). This area may need further study.

Introduction

This study on Switzerland's implementation of its duty to protect against corporate human rights and environmental abuse was prepared at the request of a group of Swiss NGOs working on Corporate Justice (hereafter called Coalition of Swiss NGOs).

The objective of the study, as set in the terms of reference, is "to clarify the existing legal framework and the needed reforms to improve Switzerland's duty to protect the human rights of the people in its territory or under its jurisdiction as a home state of transnational corporations and other enterprises. The study should focus on the theory and practice of corporate, criminal and civil law, and take a look at the political feasibility of amending existing or passing new laws." A second objective is to outline the main areas that need reform and to suggest the direction that such reform may take to ensure full compliance of Switzerland with its international obligations.

This study is justified given the ongoing international processes on corporate social responsibility, the economic and financial importance of Switzerland, and the country's prominent role in supporting or leading international initiatives in the field of business human rights responsibilities. Arguably, countries leading international initiatives should demonstrate good practice at the national level.

Switzerland hosts some of the leading companies operating in global markets in industries as diverse as pharmaceuticals and chemicals, machinery, infrastructure and utilities, food and beverages and financial services. In addition to these large groups with their strong presence in foreign markets, a multitude of small and medium-sized enterprises (SMEs) do business abroad (80 per cent of Swiss companies are SMEs).

In accordance with the terms of reference given to the ICJ by the Coalition of Swiss NGOs, the report takes into account the policy framework presented by Prof John Ruggie, Special Representative of the UN Secretary General, in his reports to the UN Human Rights Council (especially that of 2008¹), his project on Corporate Law Tools, and the debates at the European level and proposals formulated by the European Coalition on Corporate Justice (ECCJ) in that context. The issues addressed in the present report also correspond to those enumerated by the Coalition of Swiss NGOs in the terms of reference.

In general terms, the present study covers issues falling under the first pillar and partially the third pillar of Prof. Ruggie's framework: the State's duty to protect against third-party abuse of human rights and its duty to provide for the right to an effective remedy for those who claim their rights have been affected. Therefore, although it technically focuses on the Swiss state duty to protect, it does so in a way that also covers its duty to provide for an effective remedy.

In monitoring States' compliance with international obligations, UN treaty bodies generally look at national legislation and its implementation, as well as to a series of national policies

¹ "Protect, Respect and Remedy: a Framework for Business and Human Rights", Report by the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, UN Human Rights Council, 2008 A/HRC/8/5 (hereafter Ruggie Report 2008).

that foster or hinder the realisation of the rights enshrined in the treaties. In certain domains, policies or programmes are prescribed but States party maintain relatively substantial discretion in choosing their means to implement their obligations.

This study is organised as follows: the first section will briefly restate the international law framework applicable to Switzerland and defining its obligations. It will also set out the main elements of the current policy discussions within the United Nations. The second section will map out the main legislation in force, its potential and gaps to protect human rights in the context of corporate activity. The third section will review some policies implemented and traditionally used to advance human rights in the context of economic activity. The fourth section will discuss the available options for civil society to develop advocacy for reform.

1. THE INTERNATIONAL LEGAL AND POLICY FRAMEWORK – THE SWISS POSITION AND ROLE

This section will briefly set out the international human rights and environmental obligations of Switzerland as well as the main developments at the multilateral level regarding States' duties to protect human rights against third-party interference. Legislation provides incentives to engage in human rights-compliant conduct and disincentives, in some cases involving criminal sanction, to non-compliant conduct. Areas of law that are generally considered include constitutional law, corporate law, criminal law, and the law of civil remedies.

1.1 Swiss International Human Rights and Environmental Obligations

Switzerland is a state party to most of the universal and European international instruments on the protection of human rights² and the respect for the environment (with the notable and important exception of the Aarhus Convention on access to information, public participation in decisions and access to justice in environmental matters)³. It is also party to the core ILO labour rights conventions and other ILO conventions and is a member of most UN Specialised Agencies, including the ILO, WHO and UNESCO, thereby assuming the obligations imposed by the Charters/Statutes of those organisations.

Treaties concerning the protection of human rights and labour rights impose a wide range of obligations on States to protect, respect and/or ensure respect for human rights (depending on the formulation of each treaty), including to prevent, prohibit and bring an end to third-party abuse of rights. In some cases, this requires states imposing civil or criminal liability on third parties.

² European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR); International Covenant on Civil and Political Rights (ICCPR); International Covenant on Economic, Social and Cultural Rights (ICESCR); Convention against Torture (CAT); Convention on the Rights of the Child (CRC); Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW); Convention on the Elimination of All Forms of Racial Discrimination (CERD).

³ Among the environmental commitments of Switzerland include those contained in: the Convention on Biological Diversity and the Cartagena Protocol on Biosafety; efforts to ensure the entry into force of the UN Framework Convention on Climate Change and the Kyoto Protocol; and the Basel Convention regulating trade in hazardous wastes. They also include those in the framework of Bilateral Agreements II, approved by Parliament: 17 December 2004, date effective: 1 April 2006. The Aarhus Convention has been signed but not yet ratified. The Federal Government has recommended ratification.

There is an important debate about the scope of these obligations in relation to activities and actors located outside the national territory, such as transnational corporations.⁴

It is well established that the universal and regional human rights treaties themselves apply extraterritorially, although the scope of their extraterritorial reach and the circumstances under which state responsibility may be engaged for an extraterritorial breach of those treaties is not entirely settled and in any event may vary from treaty to treaty. At a bare minimum, the obligation to respect treaty convention rights extends to where the state has effective control over the territory or over persons situated in the territory of another state.⁵ Moreover, states have obligations to engage in international cooperation toward the realisation of rights of persons outside their territory. These obligations are expressed in a number of human rights treaties, including the International Covenant on Economic, Social and Cultural Rights (articles 2(1), 11(2), 22 and 23), the Convention on the Rights of the Child (articles 4, 24(4) and 28(3)), the Convention on the Rights of Persons with Disabilities (article 32), the Convention against torture (article 9(1)), the Convention for the Protection of all Persons from Enforced Disappearance (article 15) and the Rome Statute for the International Criminal Court (articles 86 to 102).⁶ These conventional obligations serve to give effect, in part, to the agreement of states to engage in international cooperation under the UN Charter in order to achieve the purposes of the charter, including the realisation of human rights (article 1(3) and 56), as well as article 22 of the Universal Declaration on Human Rights.

Such international cooperation and assistance, whether conducted directly by the state or through private actors, must be undertaken in conformity with human rights. In addition, international humanitarian law requires States to ensure that private security and military companies observe humanitarian law and human rights law when taking part in armed conflicts, including abroad (see below, box on the Montreux Document).

Public international law also imposes general obligations on all States to respect the environment and persons in other jurisdictions. As expressed already in 1941 by an arbitral tribunal: “A State owes at all times a duty to protect other States against injurious acts by individuals within its jurisdiction”.⁷ The same principle was more clearly and explicitly articulated by the International Court of Justice in 1997:

“The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond

⁴ Professor John Ruggie, UN Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises: “Operationalising the ‘respect, protect, remedy’ framework”, 22 April 2009, UN General Assembly, A/HRC/11/13, para. 15 (hereafter Ruggie Report 2009). *Also see* letter dated 9 July 2009 from Daniel Bethlehem QC to UN Special Representative Ruggie clarifying the United Kingdom Government’s view of the state duty to protect human rights, and letter in response, dated 14 July 2009. Available at <http://www.business-humanrights.org/SpecialRepPortal/Home/Submissions/2009>. Mr Bethlehem’s letter argued that currently international law contains no general international obligation on States to regulate extraterritorial activities of their businesses.

⁵ See, for example, UN Human Rights Committee, General Comment 31, CCPR/C/21/Rev.1/Add.13 para.10

⁶ Article 2(1) ICESCR reads: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.”

⁷ Trail Smelter Arbitration (US V Canada) 1941, 3 UNRIAA, 1938, para. 144. Ian Brownlie considers this to be a principle of general international law. *Principles of Public International Law*, 5th Edition, Oxford University Press, 1998 p. 284.

national control is now part of the corpus of international law relating to the environment.”⁸

Obligations to respect the environment have an important bearing on the realisation of a number of human rights.

Switzerland is also member of the World Trade Organisation and is bound by the WTO Agreements (including GATT, GATS, TRIPS and the Agreement on Government Procurement). These treaties impose obligations to treat foreign products and services similarly to national products and services (including by protecting intellectual property rights according to certain international standards). WTO obligations have the effect of limiting the possibilities of requiring foreign products and services to comply with stricter social and environmental standards, and harmonising technical and other standards with the aim of eliminating barriers to trade. Thus, WTO obligations restrict to a great extent the policy options available to States to protect and promote human rights.

Switzerland has entered into a number of sectoral agreements with the European Union and its member States in a number of specific areas. Beginning with the Free Trade Agreement of 1972, a series of sectoral agreements has been concluded step by step, notably in bilateral negotiation Rounds I and II. As well as creating the conditions for mutual access to each other's markets, these agreements serve as the basis for close cooperation in various areas, including the environment. These agreements were signed in 1999 and 2004.

The Bilateral Agreements-I with the EU involve a further reciprocal opening of markets in seven specific areas: free movement of persons, technical barriers to trade, public procurement, agriculture, overland transport, civil aviation and research. The Bilateral Agreements-II cover additional economic interests and extend cooperation to the fields of internal security, asylum, statistics, the environment and culture.

1.2 Treatment of the question within the United Nations, the work of John Ruggie and the European debate

The attention of the international community has been drawn increasingly to corporate accountability over the past decade, spurred by the realisation of a growing corporate role in globalisation and numerous allegations of human rights and environmental abuse by some companies. This fact is reflected in the significant processes underway at the United Nations and at the European regional level.

1.2.1 The United Nations Human Rights Council

The former UN Sub-Commission on the Promotion and Protection of Human Rights was the first UN body to attempt to elaborate or at least clarify standards in relation to business and human rights, adopting in 2005 the UN Norms for Transnational Corporations and Other

⁸ “Legality of the Threat or Use of Nuclear Weapons (request by the United Nations General Assembly), Advisory Opinion”, ICJ Reports 1997, para. 29.

Business Enterprises.⁹ However, a number of States were uncomfortable with the outcome, and as a result the former UN Commission on Human Rights failed to take action to adopt the Norms. Instead, the Human Rights Commission (the predecessor body to the present Human Rights Council) in 2005 opted to tackle the question by appointing Professor John Ruggie as Special Representative of the Secretary General on Business and Human Rights (SRSG). The Commission mandated Professor Ruggie to study, clarify and issue recommendations. In 2008, after two interim reports, the SRSG presented to the UN Human Rights Council a report containing a policy framework of three pillars:

“the State duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others; and greater access by victims to effective remedy, judicial and non-judicial.”¹⁰

In June 2008, the Council decided to extend Professor Ruggie’s mandate by three years and requested him to “operationalise” his policy framework. In particular, it requested that the SRSG prepare guidelines for companies on how to exercise their responsibility to respect human rights (notably, by exercising due diligence); and to provide views and recommendations about how States can better implement their duty to protect as well as how to enhance access to remedies.

1.2.2 The debate at the level of the European Union

Debates about CSR and the human rights responsibilities of business enterprises have also taken place within the European Union. The European Commission understands CSR as the “voluntary integration, by enterprises, of social and environmental concerns” in its operations and activities.¹¹ In 2007, the European Parliament passed a landmark resolution recognising the need to improve the accountability framework in which European business operates.¹² A process of multi-stakeholder dialogues organised by the European Commission helped to clarify positions but stalled due to a number of differences about participation and process. The 2009 multi-stakeholder forum saw the return of civil society to the dialogue. Business has coalesced around a platform called CSR Europe.

As part of its strategy to improve the regulation and accountability framework for European business, the ECCJ, a coalition of some 250 organisations at the European level, released a report¹³ in which it called for far-reaching reforms in European legislation, including:

- The establishment of strict liability of parent companies for abuses of their subsidiaries

⁹ Draft Norms on Human Rights for Transnational and Other Business Enterprises, UN Sub-Commission on the protection and promotion of human rights, 2003.

¹⁰ Ruggie Report 2008, cited above.

¹¹ This concept was developed in the Green Paper 2001, and later in the Communication of July 2002 relating to the “Social Responsibility of enterprises: a contribution to sustainable development”, and the Communication of March 2006, “Implementing the partnership for growth and employment: make Europe an excellence pole on CSR”.

¹² European Parliament, Committee on Employment and Social Affairs, Report on CSR: A New Partnership (2006/2133(INI))

¹³ “Fair Law: Legal Proposals to improve Corporate Accountability for Environmental and Human Rights Abuses”, European Coalition for Corporate Justice, 2008. See also the companion report, “With Power Comes Responsibility: Legislative Opportunities to Improve Corporate Accountability within the European Union,” ECCJ, 2008, available at www.corporatejustice.org

- Establishment of a duty of care to prevent abuses in the corporate sphere of responsibility
- Mandatory environmental and social reporting.

Through their proposals, ECCJ aims to establish a clearer link of responsibility between parent and subsidiary company.

The same issues of parent-subsidiary's responsibilities have been addressed by the ICJ report on Corporate Complicity and by Professor Ruggie's 2008 companion report on "complicity and sphere of influence".¹⁴ These reports address the issue from the angle not of direct parent responsibility but of responsibility of the parent company as accomplice.

At the European level, some matters fall within the mandate of the European institutions, while others remain under national jurisdiction of member States. Among the latter are legal and judicial matters. However, the Brussels I Regulation (EC 44/2001) defining the applicable laws in matters of jurisdiction and judicial cooperation within the European area has had a positive impact on harmonising rules of jurisdiction across member States. Under the Brussels I Regulation European courts should have jurisdiction on private law cases against companies domiciled within the EU. A review is underway and in this context proposals have been made to expand the jurisdiction of European courts to companies not domiciled within the EU but that have most of their business in Europe or are controlled by EU-domiciled shareholder/s.¹⁵ The outcome of this debate will have an impact on Switzerland since most Swiss companies have substantive business within the European zone. Any outcome will most likely have an impact on the equivalent legal framework provided by the Lugano Convention applicable to Switzerland.¹⁶

1.3 Switzerland's general policy on human rights, business and CSR

The main tenets of Switzerland's policy on human rights are explained in the 2007 message from Federal Council president Micheline Calmy-Rey to Parliament. In this message, Calmy-Rey stated Switzerland's support for dialogue with non-State actors and its involvement in peace and defense of human rights efforts.¹⁷ In this context, an important place is assigned to the development of a multilateral normative framework.

Switzerland has consequently supported politically and financially the process led by Prof. John Ruggie within the UN Human Rights Council and has joined the consensus in favour of the adoption of Ruggie's reports. In addition, Switzerland has been actively involved in several voluntary initiatives to foster human rights compliance by the business sector, including, for example, the Global Business Initiative on Human Rights, the Global Compact Platform for SMEs, and, since 2010, the Voluntary Principles on Security and Human Rights. Switzerland also provides funding for a number of projects in this area. It has also led the

¹⁴ Report of the UN Secretary-General's Special Representative on the issue of human rights and transnational corporations and other business enterprises, "Clarifying the Concepts of 'sphere of influence' and 'Complicity'", A/HRC/8/16 (15 May 2008); also "Corporate Complicity and Legal Accountability, Report of the Expert Legal Panel on Corporate Complicity in International Crimes", Vols. 1-3, Geneva, International Commission of Jurists, 2008.

¹⁵ See European Commission, Report and Green Paper on the operation of the Brussels I regulation, Brussels, 2009.

¹⁶ Convention concerning judicial jurisdiction and execution in civil and commercial matters concluded at Lugano on 16 September 1988 and entered into force in Switzerland on 1 January 1992.

¹⁷ « Message sur les mesures de promotion civile de la paix et de renforcement des droits de l'homme », 2007, FF- 4536.

creation of two important international initiatives in the area of transnational corporations and their responsibility under international humanitarian law: one in collaboration with the ICRC that has led to the adoption by a group of States of the Montreux Document, and another currently underway in collaboration with the Geneva Centre for the Democratic Control of Armed Forces (DCAF) to set a Code of Conduct for Private Military and Security Companies (PMSCs).

Two international initiatives by the Swiss Government

The Montreux Document

The website of the ICRC describes this initiative in the following terms:

“The Montreux Document reaffirms the obligation on States to ensure that private military and security companies operating in armed conflicts comply with international humanitarian and human rights law. The document also lists some 70 recommendations, derived from good State practice. These include verifying the track record of companies and examining the procedures they use to vet their staff. States should also take concrete measures to ensure that the personnel of private military and security companies can be prosecuted when serious breaches of the law occur.” See www.icrc.org. This process had some 17 participating States, including a majority of Western States.

The Code of Conduct for Private Military and Security Companies

Under this new initiative, the Government of Switzerland has entrusted DCAF to lead a process toward drafting a Code of Conduct for PMSCs, including a monitoring/oversight and accountability system. The process involves a number of Governments covering both home and host Governments of PMSCs. The draft is currently available to the public for comments, but the section on the accountability mechanism is yet to be developed.

Despite this intense engagement at the international level, Switzerland does not have a unified, integrated and public policy on human rights, business and CSR.¹⁸

The Federal Department of Foreign Affairs- DFA (Political Affairs Division IV) formulates Switzerland’s peace and human rights policies and implements measures to strengthen human rights worldwide.¹⁹ Public officials state that DFA and SECO closely coordinate and consult each other in all matters relating to business and human rights and CSR. Civil society groups maintain that such close coordination does not exist in practice.

The Swiss Government’s policies for the promotion of human rights include policy dialogues with third countries and their businesses (for example, in China), and financial support for multi-stakeholder initiatives such as the Global Compact and the financial and political support of the mandate of the SRSG on human rights and business.²⁰ Outside the UN, Switzerland is also encouraging and supporting international frameworks such as those

¹⁸ Switzerland’s response to John Ruggie’s State CSR policy survey <http://www.reports-and-materials.org/Ruggie-survey-re-state-CSR-policies.pdf>; see also « Economie et droits humains: analyses et propositions pour soumettre les entreprises transnationales au regime des droits humains », Pain pour le Prochain et Action de Carême, Lausanne, octobre 2009, p. 8.

¹⁹ Measures to promote peace and human rights represent some 5% of official development assistance (ODA), OECD DAC Peer Review of Switzerland 2009, p. 26.

²⁰ See Foreign Policy Report 2009, Swiss Federal Council, 2009 p. 170.

within ILO, OECD and the Multilateral Development Banks.²¹ Switzerland understands its role as a broker, facilitator and donor for international initiatives.²² In this context, it assigns marginal importance to national legal reform and/or accountability. For instance, none of the currently funded projects is focused on the ways in which State regulatory activity is exercised or could be enhanced.

1.3.1 Policy Coherence

In response to a questionnaire formulated by the SRSG, Switzerland stated in 2009 that it does not have an overall national CSR strategy, but pointed to the Sustainable Development strategy adopted by the Federal Council for the period 2008-2011.²³ This strategy seeks to frame CSR as a sustainability issue and recommends that state intervention must be kept to a minimum.²⁴ Until the 2009 Foreign Economic Policy Report focussing on the subject of “sustainability in foreign economic policy”²⁵, the Sustainable Development strategy had limited impact on foreign economic policy issues.

In his 2009 report the SRSG identifies both “vertical” and “horizontal” incoherence as challenges to the fulfilment of the State duty to protect.²⁶ “Vertical” incoherence occurs when Governments sign on to human rights obligations but then fail to adopt policies, laws and processes to implement them. “Horizontal” incoherence refers to domestic policy incoherence, where economic or business-focused departments conduct their work in isolation from and largely uninformed by their Government’s human rights agencies and obligations.²⁷ Horizontal incoherence may be an impediment to discharge the State duty to protect when the task to address these issues is left to individual government departments and the human rights impact of business is generally subsumed within other departments (normally trade or industry).²⁸

In the UN context, Switzerland seems committed to overcoming those incoherencies.²⁹ These commitments should be observed in practice.

The OECD notes that what is described as “policy coherence for development” in many Swiss documents is just internal policy coherence in the delivery of programmes rather than

²¹ “Message du Conseil fédéral concernant la continuation de mesures de promotion civile de la paix et de renforcement des droits de l’homme », available at <http://www.admin.ch/ch/f/ff/2007/4495.pdf>, p. 4536.

²² « Réponse de la Suisse au questionnaire sur les politiques en matière de responsabilité sociale des entreprises et leur pertinence par rapport aux droits humains », Letter from the Swiss Government to John Ruggie, 2 July 2009.

²³ Swiss Federal Council, “Sustainable Development Strategy: Guidelines and Action Plan 2008–2011”. Available at <http://www.are.admin.ch/themen/nachhaltig/00262/00528/index.html?lang=en>

²⁴ *Ibid.*, p. 21.

²⁵ 2009 Foreign Economic Policy Report, available at <http://www.seco.admin.ch/aktuell/00277/01164/01980/index.html?lang=en&msg-id=31032>

²⁶ Ruggie Report 2009, para 18.

²⁷ *Ibid.*

²⁸ See UK Joint Committee on Human Rights, “Any of our business? Human rights and the UK private sector”, p.59.

²⁹ Statement by Ms. Muriel Berset on behalf of Switzerland, United Nations Press Release, « Le Conseil des droits de l’homme ouvre les travaux de sa onzième session », 2 juin 2009. Available at <http://www.unhchr.ch/hurricane/nsf/0/A43774A564DFB1EDC12575C9004D4BC0?opendocument>. Webcast available at: <http://www.un.org/webcast/unhrc/archive.asp?go=011>

coherence among policies.³⁰ Policy coherence for the OECD is a process based on three building blocks: political commitment, policy co-ordination and monitoring, and analysis and reporting systems.³¹

First, regarding political commitment and a specification of policy objectives, Switzerland lacks an overarching strategy on CSR or on business and human rights that could foster a coherent approach. The 2009 Foreign Policy Report mentions the issue of business and human rights only when reporting on Switzerland's support for the Human Rights Council's extension of the SRSG's mandate.³² The 2009 Foreign Economic Policy Report does briefly list Switzerland's engagement in various CSR initiatives, but the report does not discuss business and human rights beyond voluntary initiatives.³³

Recent national strategies and reports

In response to calls and initiatives from civil society groups, the Norwegian Council of States approved the White Paper on "Corporate Social Responsibility in a Global Economy" (2009), drafted by the Ministry of Foreign Affairs upon decision of the Government.³⁴ In the Netherlands, there is a "Government Vision on Corporate Social Responsibility 2008 - 2011"³⁵ and the UK published its "Government Corporate Responsibility Report 2009".³⁶ The UK Parliament has actively engaged in the debate, through the House of Lords and House of Commons Joint Committee on Human Rights, which conducted an inquiry and recently published its report entitled "Any of our business? Human Rights and the UK private sector".³⁷ All of these initiatives were preceded by sustained civil society campaigning. These reports and their recommendations are good examples of efforts to design a coherent national policy on CSR, including human rights and the environment.

Second, regarding policy co-ordination mechanisms, an interdepartmental core group on human rights policy has the task of coordinating human rights policy.³⁸ Information on the activities and agenda of this group, and whether and how CSR, human rights and environmental matters are addressed is scarce. DFA-PA IV states that it maintains permanent coordination and consultation with the SECO Development Directorate. In this context, the departments exchange projects and jointly review partners and projects twice a

³⁰ OECD DAC Peer Review of Switzerland, 2009, p. 37. The comments in the contexts of policy coherence for development seem no less pertinent to policy coherence for human rights promotion.

³¹ See Ibid, 2009, p. 35.

³² „Bericht des Bundesrates vom 2. September 2009 zur Aussenpolitik“, BBl 2009-3098, p. 170. Past editions of Reports on Peace and Human Rights in Swiss Foreign Policy (e.g. 2007, p. 18) briefly note the initiatives Switzerland undertakes in the area of business and human rights. The Human Rights Foreign Policy Report 2003-2007 includes a section on business and human rights, announcing that the activities of Switzerland in the area of business and human rights will be of increasing importance in the future (BBl 2004-0981, p. 6103-6104).

³³ „Bericht des Bundesrates 13. Januar 2010 zur Aussenwirtschaftspolitik 2009“, BBl 2010 xx, p. 36-37, 40.

³⁴ Available at http://www.regjeringen.no/pages/2203320/PDFS/STM200820090010000EN_PDFS.pdf

³⁵ Available at http://mvoplatforn.nl/publications-en/Publication_2364

³⁶ Available at <http://www.berr.gov.uk/files/file50312.pdf>

³⁷ Available at <http://www.publications.parliament.uk/pa/jt200910/jtselect/jtrights/5/5i.pdf>

³⁸ Kerngruppe Internationale Menschenrechtspolitik [KIM], see „Bericht über die Menschenrechtsaussenpolitik der Schweiz (2003-2007) vom 31. Mai 2006“, BBl 2004-0981, p. 6116.

year. However, the terms of reference and outcomes of this coordination mechanism are not known to the public.

Policy coordination

Some governments have appointed ministers responsible for cross-department information sharing and coordination. Others, such as France and Sweden, have appointed ambassadors to foster greater integration of human rights principles and standards among government departments, including those addressing business and other trade and economic issues. In Kenya and South Africa, the National Human Rights Institutions (NHRIs) play this role.³⁹

Third, regarding monitoring, analysis and reporting systems, the Government submits reports to Parliament. Since 2009, the various reports have been consolidated into one comprehensive yearly report on foreign policy by the Department of Foreign Affairs. However, the Federal Department of Economic Affairs still issues reports on foreign economic policy separately and there are few cross-references to other reports. These reports generally only summarise activities and do not contain a systematic evaluation of the impact of human rights policies, in particular as they relate to CSR, human rights and environmental matters.

Upshot

Despite its overall commitment to pursue a CSR agenda at the international level, Switzerland lags behind other European countries in establishing practice for a coherent overall national policy on CSR matters.

2. SWISS LEGISLATION: INCENTIVES AND SANCTION

Legislation is one of the tools States often use to protect human rights. Switzerland's legal system is a complex, multilayered one involving Federal law, cantonal regulations and the local communal rules and decisions. This study focuses only on the federal level.

2.1 The Federal Constitution

Switzerland is a Federal State. The Federal and cantonal constitutions and laws contain provisions that have implications for the protection of rights and the environment.

Article 5 para. 4 of the 1999 Constitution states: "The Confederation and the cantons respect international law". According to Federal constitutional law, Switzerland adheres to the monist system. Therefore, the principles, rules and norms of public international law that bind Switzerland acquire internal validity without a need to incorporate such international law into domestic law or for the State legislature to make any implementation decision. However, because the principles and rules of several conventions are not self-executing (i.e. clear and precise enough to be put directly into practice), the authorities must pass acts to incorporate them into domestic law to make them applicable.

³⁹ See UK Joint Committee on Human Rights, "Any of our business?...", p.59

According to Swiss legal theory and case law, public international law takes precedence over cantonal (state) law. With regard to Federal law, the situation is more complex because Art. 190 of the Federal constitution declares both Federal laws and international law applicable but does not give directions for cases where there is a conflict between a federal law and international law.⁴⁰ The Federal Supreme Court clarified the situation with regard to human rights as enshrined in the European Convention on Human Rights (ECHR) in the sense that the ECHR will prevail over any provision in domestic Swiss law.⁴¹ In all cases, national law shall be interpreted in accordance with international law.

The Constitution provides that Swiss foreign policy aims at preserving the independence and prosperity of Switzerland and contributes to “the promotion of the protection of human rights, democracy, peaceful co-existence among peoples and the preservation of natural resources”. Article 35 declares:

1. *Fundamental rights must be upheld throughout the legal system.*
2. *Whoever acts on behalf of the state is bound by fundamental rights and is under a duty to contribute to their implementation.*
3. *The authorities shall ensure that fundamental rights, where appropriate, apply to relationships among private persons.”*

This provision may serve as a constitutional basis for bold action regulating and adjudicating companies’ activities, but so far its potential remains unrealised.

2.2 Corporate liability for human rights and environmental impacts in Swiss law

Under the heading of corporate liability, two issues will be analysed: first, directors’ duties and liability vis-à-vis shareholders and the community, and second, the company’s duties and liability proper.

2.2.1 Directors’ duties and liability

Directors’ duties are important because it is the board of directors or the top management that conducts ordinary company business, takes the most crucial decisions and responds and reports on behalf of the company. A key question in this regard is whether directors have a duty to take into account social and environmental impacts of the company in relation to its operations.

Article 754 of the Swiss *Code des Obligations* (code of contract law, hereafter “CO”) sets forth the general principle governing the liability of the directors toward the company, the shareholders and the company’s creditors. The directors’ duties, under Swiss corporate law, are owed to these three categories of stakeholders to varying degrees depending on the nature of the duty: the main general duties are owed to the company, while only specific duties are owed to shareholders or creditors. The directors’ main general duties toward the company are listed in article 716a CO. Directors have to give absolute priority to the interests of the company, and exercise their responsibilities with due diligence. A violation of this

⁴⁰ See the new report of the Federal Council on the relation between Public International Law and Swiss law, March 2010.

⁴¹ Propaganda Material PKK, Decision of the Swiss Federal Supreme Court 125, II, at 417

provision may lead to a liability claim against the directors. Directors shall give equal treatment to shareholders (art. 717 §2 CO and also art. 706 §2 CO). Violation of the equal treatment requirement constitutes a direct damage to a shareholder.

Although there are no legal duties of directors toward the community or third parties - except perhaps under environmental law - it could be argued that such duties are part of the social responsibility of the enterprise, which the directors are entrusted to implement. This social responsibility may have an impact on whether civil liability arises.

Although there are no specific duties to avoid legal risk and damages to the company's reputation, such duties can be accommodated by art. 754, which holds directors responsible for any damage they cause either by negligence or on purpose. In addition, they can also be seen as incorporated into a general duty to comply with the laws, if breaching the law leads to legal risk or reputational damage.

Thus, if a director fails to protect the company from a legal risk or reputational damage (for instance, by engaging negligently in environmental damage or human rights violations, exposing the company to negative public campaigning), this might be considered a breach of his duty of due care in the management of the company, for which he can be held liable.

There are no specific rules in Swiss corporate law imposing an obligation on directors to consider the company's impacts on non-shareholders (including human rights impacts on the individuals and communities affected by the company's operations), within or outside Switzerland. Certain provisions (see below, section 2.2.2) of the Law on the Protection of the Environment (LPE), may impose duties on the enterprise to evaluate and take measures regarding the risks that its activities entail for human beings and the environment. There is scarce evidence of other countries imposing such an obligation on company directors. For instance, section 172(d) of the UK Companies Act provides that a director, in promoting the success of the company, must "have regard (amongst other matters) to...the impact of the company's operations on the community and the environment". The weakness of this provision is that it subjects the consideration of social and environmental impacts to the "success of the company".

However, to the extent that directors in Switzerland should carry out their duties with diligence and safeguard the interests of the company, they might have to consider in certain circumstances the company's impacts on non-shareholders, including human rights impacts. For example, if by not duly considering impacts on non-shareholders, the directors cause the company to breach the law (labour law, environmental law), this may entail legal responsibility and damage the company, for which directors would be held liable.

Pursuant to article 754 CO, directors' liability applies in cases where directors have caused damages to the company, its shareholders or its creditors by a wilful or negligent breach of their duties.

Under the law the directors **are permitted** to consider the company's impacts on non-shareholders, provided that this is not contrary to the company's interests, nor to other interests they have to protect according to their mandate. It may even be considered in the

interest of the company to take these impacts into account with respect to the reputation and image of the company. This applies to impacts within or outside Switzerland.

Directors have broad discretion in determining what they deem to be in the company's interest and how they do so. They may therefore decide to consider the impacts on human rights of the company's activity, by applying the Swiss Code of Best Practice⁴² (hereafter "SCBP") or the OECD Guidelines for Multinational Enterprises (hereafter "OECD Guidelines"), or any other instrument even if it is not of a binding nature.

Regarding the impacts by subsidiaries, suppliers or other business partners, whether they occur within or outside Switzerland, there are no specific legal requirements on directors to ensure that such entities take into account human rights considerations in their operations. The possibility that the company could be held liable for such impacts (and, as the case may be, that the directors' liability could in turn be triggered) is, in principle, limited, as the company and its subsidiaries, suppliers and other business partners are different legal entities.

Criminal liability of directors or company officials

The Swiss Criminal Code establishes liability for individuals who commit crimes involving bodily and mental harm, killing, patrimonial damage, etc. Switzerland has also ratified the Rome Statute of the International Criminal Court and incorporated the definition of international crimes provided in the Statute into its national legislation. This legislation is highly relevant given that, in the past, corporate directors or other officials were held criminally liable before international criminal tribunals at Nuremberg and later on before the ad hoc tribunal for Rwanda.⁴³

Swiss criminal legislation provides for liability for perpetrators, accomplices and others that participated in gross human rights violations constituting international crimes in the form of crimes against humanity, war crimes and genocide. During the recent revision of the Criminal Code the question of providing a general forum for prosecuting international crimes in Switzerland was heavily debated. In light of developments in other European countries in relation to universal jurisdiction cases, the Parliament decided that only cases with a certain relationship or link to Switzerland should be brought before Swiss courts (the perpetrator or victim are Swiss nationals or the foreign perpetrator is in Swiss territory). As a result, Switzerland does not accept general universal jurisdiction in these cases but provides a forum under specific conditions: according to the principle of territoriality, article 3 of the Criminal Code acknowledges the jurisdiction of Swiss authorities when the offence has been committed in Swiss territory. If the offence has been committed abroad, it may nevertheless be prosecuted in Switzerland according to Article 7 which – in general terms – requires a link between the offence and Switzerland. With regard to human rights violations, Articles 5 and 182 acknowledge Swiss jurisdiction even if neither the perpetrator nor the victim is a Swiss national but the perpetrator is found in Switzerland.

⁴² "Swiss Code of Best Practice for Corporate Governance", Economiesuisse, 2008, www.economiesuisse.ch. This is a code of best practice adopted by a group of experts tasked by the Swiss Federation of Enterprises to provide a tool for corporate self-regulation.

⁴³ Examples can be found in ICJ, "Corporate Complicity & Legal Accountability", cited above.

The scope of Swiss jurisdiction to cover acts of foreign individuals in Swiss territory constituting incitement or complicity with offences that take place abroad has not been clear in the past. Swiss authorities have taken the view that such acts would not fall under the jurisdiction of Switzerland, but the OECD Working Group of Experts stated that Switzerland should have jurisdiction over any person (national or foreign) who knowingly incites or aids and abets the commission of a crime abroad. This consideration, which was made in the context of corruption-related crimes, can also be extended to cases involving crimes against humanity, war crimes and other international crimes. Thus, if a company director or employee within Switzerland aids and abets the commission of a crime by a Swiss or foreign company abroad, such individuals should be prosecuted within Switzerland.

The commission of international crimes abroad by a Swiss individual or company can be prosecuted in Switzerland according to the nationality principle that grants jurisdiction to the State of which the perpetrators are nationals.

Upshot

Swiss laws do not explicitly require company directors to take human rights and environmental impacts into account in company operations, but directors are permitted to do so;

Swiss law provides for civil and criminal liability for company directors as individuals, although the implementation of such a liability requires fulfilment of certain conditions and is limited to certain rights and crimes.

2.2.2 Corporations' legal duties and liability

Under Swiss law, corporations as such can incur civil and criminal liability for violations of labour law, environmental law, the commission of crimes and/or a civil tort. The liability of the company as such toward third parties or employees generally arises from conduct of the directors or company officials or agents that is attributable to the company.

Vicarious liability

Article 55 CO sets out the following general principle: the employer is responsible for damage caused by its workers or other assistants in carrying out their work if it does not prove that it took the measures and care necessary under the circumstances to prevent the damage from occurring or the damage was produced despite its due diligence. Damage caused by an employee in Switzerland or abroad equally gives rise to company liability.

Environmental liability for corporations

Regarding environmental impacts, Swiss environmental law lays down rules establishing prohibitions and rules relating to risk management.

The Law on the Protection of the Environment- LPE adopted in 1983,⁴⁴ is based on the principle of “cooperation,” whereby enterprises and economic actors are assigned a role in the implementation of the law. It was assumed that enterprises were in a better position to assess the risks relating to their activities and to adopt the necessary measures. The law sets the objectives but the choice of means is left to the economic actors. However, if those measures are insufficient and harm is produced, the damage should be repaired.

This philosophy of cooperation was extended in 1993 to integrate “economic organisations” (and not only individual enterprises) in the process of defining norms and objectives, while the implementation and choice of means is left only to the economic actors and their organisations. The same philosophy underpins the laws on energy and CO2 emissions. The public authority has a subsidiary role, intervening only when the measures taken by the economic actors are insufficient (art. 41 LPE).

Environmental law imposes certain obligations on companies. For instance, according to Article 10 LPE, an exploitation or installation that could cause harm to the population in the event of a catastrophe should take “appropriate measures” to prevent that harm from occurring. The authority verifies the adequacy of those measures. The mechanism is the same for article 16.3 LPE.

In other cases, the responsibility to establish control measures is left to the enterprise in the case of substances that represent a threat or harm to the environment (art. 26). The enterprise also has a duty to inform buyers and consumers about the characteristics and potential impact of the products (art. 27). The same obligation is imposed by Article 29 in the case of biological organisms that may threaten the environment and biodiversity.

In all these cases the law imposes obligations on economic actors. Since 1995, lack of compliance with most of these provisions triggers the application of article 59a LPE: responsibility of the owner of an enterprise or installation that represents a danger for the environment. This provision covers Article 10 as well as the case of those who own or use substances requiring prior authorisation or special rules. In the case of dangerous products covered under articles 26 and 29d LPE, responsibility is established under article 41 CO (see below for further discussion).

Finally, the law subjects three types of activity to stricter rules: waste elimination, utilisation of pathogen organisms and genetically modified organisms (GMOs). In these cases, prior authorisation is necessary and the level of control or responsibility left to the enterprise is marginal.

It is unclear to what extent these obligations extend to operations of Swiss companies abroad, especially with regard to subsidiaries or subcontractors. While the importation of products is subjected to Swiss laws and regulations, it is not clear whether the same is true for

⁴⁴ Loi fédérale du 7 octobre 1983 sur la protection de l’environnement, RS 814.01, available at http://www.admin.ch/ch/f/rs/c814_01.html

exportation or for production taking place abroad. WTO obligations may apply here to restrict Switzerland's ability to regulate processes of production abroad.

Enterprise's responsibility in "environmental management"

Art 43a LPE introduces a legal basis for the Federal Council's prescriptions on a "**voluntary system of evaluation and improvement**" of enterprise performance on environmental protection. In issuing prescriptions, the Council is to take into account international law and technical standards recognised internationally.

There are two internationally recognised systems: the European regulation known as Environmental Management and Assessment System (EMAS); and the private certification system ISO 14001. Their objective is to establish environmental management methods to improve the "environmental performance" of the enterprise. Rather than being result-oriented, they deal with processes that often take a long time to put in place and require constant evaluation.

Enterprises may have an interest in engaging in "environmental management", whether they espouse the idea of a "citizen enterprise" that accepts its social responsibilities or they want to avoid long-term social damage related to the degradation of the environment in which they operate. On the other hand, the enterprise may have an interest in avoiding risk or extra costs, or simply a motivation to obtain a label or certification that will give it a competitive advantage in the market. In economic terms, environmental management can be seen as a process of internalisation of social costs by the enterprise, encouraged by the authorities rather than imposed.

To undertake "environmental management" the enterprise should put in place an internal "environmental policy" as a framework to set general and specific objectives. As such, it is part of company management and entails a structure, organisation, evaluation and definition of responsibilities.

Criminal liability of corporations

The Swiss criminal code sets out certain prohibitions that are highly relevant for companies. Article 182 prohibits trafficking of human beings and attaches criminal liability to individuals and legal entities that violate that norm. Article 234 sets rules and prohibits the pollution of water sources and supply. Under Article 5, criminal offences against children abroad may be prosecuted in Switzerland.

In addition, the Swiss legal system contains novel provisions establishing liability for corporations. Article 102 of the Criminal Code institutes two systems of criminal liability for enterprises.⁴⁵

⁴⁵ Code pénal suisse du 21 décembre 1937, RS 311.0, available at http://www.admin.ch/ch/fr/rs/311_0/index.html.

Article 102:

Article 102, paragraph 1, provides for criminal liability for the enterprise when the individual perpetrator of an offence cannot be identified because of the enterprise's lack of organisation. This definition would apply to **all criminal offences**, including those committed abroad and those subject to universal jurisdiction, and those offences against human rights or the environment, when they exist. However, the enterprise's liability seems to be subsidiary and would not arise in the same time as liability for the individual. While most experts state that proof of both an "unidentified" offender and "lack of organisation" in the company may be difficult to furnish, proving intent or negligence of an unknown perpetrator may be much more difficult. This provision constitutes a strong incentive to all companies to put in place adequate policies and organisation defining clear responsibilities.

Article 102, paragraph 2, provides, for certain specific crimes (including domestic and foreign bribery, money laundering and terrorism-related offences and the "participation in a **collective undertaking**") for the enterprise's parallel liability due to defective organisation: that is, the enterprise has not taken all reasonable and necessary organisational measures to prevent the individual from committing the offence. This provision seems to penalise the company for participating in, rather than direct commission of, the crime. Such participation may generally be treated as an act of negligence. On the other hand, the application of paragraph 2 does not require the parallel sanctioning of a natural person. There must be an offence for which the enterprise is liable. It is not necessary for the natural person responsible to have been convicted or sanctioned.

The kind of acts that may be attributed to the enterprise or trigger its criminal liability under these two headings could be understood to include cases in which affiliates, subsidiaries or subcontractors commit a criminal offence for the company's benefit or with its knowing assistance and aid, or when the one who commits such an act is an outside (or foreign) intermediary used by the company. Swiss authorities believe that the perpetrator of the crime should be a *de jure* or *de facto* body, an employee occupying a senior managerial function or an employee with no particular powers. The phrase "in pursuit of its commercial activities in conformity with its objects" should be interpreted to apply to acts within the enterprise's sphere of activity with the exclusion of private acts of employees. However, all these interpretations have to be confirmed by case law. These provisions have not yet been applied in practice to human rights cases.

"1. A crime or misdemeanour committed within an enterprise in the pursuit of its commercial activities in conformity with its objects shall be imputed to the enterprise if it cannot be imputed to any specific individual because of the enterprise's lack of organisation. In such case, the enterprise shall be liable to a maximum fine of five million francs.

2. In the case of an offence under Articles 260ter, 260quinquies, 305bis, 322ter, 322quinquies and 322septies, the enterprise shall be punished independently of the punishment of any individual if the enterprise can be said to have failed to take ["s'il doit lui être reproché"] all reasonable and necessary organisational measures to prevent such an offence.

3. The courts shall set the amount of the fine taking into consideration the seriousness of the offence, the lack of organisation, the damage caused and the economic capacity of the enterprise.

4. The following are deemed enterprises within the meaning of this article:

- a) private law legal persons;
- b) public law legal persons except for territorial corporations;
- c) companies;
- d) single-person enterprises. »

Civil liability of companies

Liability of social organs: the company's governance bodies could also have civil liability for tort/damage caused to third parties (individual or communities). The existence of "environmental management" systems within the enterprise may help the company's governance bodies to argue that they have taken all measures that would be expected from them under the circumstances to prevent the damage from occurring. This will alleviate the burden of proof, while it will be more difficult for shareholders and creditors to show that these bodies violated their duties.

Strict liability: strict or objective liability arises under article 59a LPE in association with the risks inherent to certain activities and products/substances deemed dangerous. Individuals suffering damage can claim compensation. This responsibility is based on risk as "a particular danger for the environment", that materialises and gives rise to the obligation for the company owner to repair the damage, including harm to health, human and animal life, plants and environment. The granting of prior authorisation to the product or activity does not take away this responsibility.

Responsibility for dangerous activities/business: equivalent responsibility arises under Article 59 LPE, but in this case it is administrative responsibility: it is the public authorities that will take action and sanction the wrongdoer.

This responsibility includes the development of dangerous activities or products: the production process or the products themselves have defects that were not evident or clear from applying the existing techniques and scientific knowledge at the time of entry into circulation of the product (art. 30.4 LGG). It is especially important to undertake a permanent evaluation of the risks in these cases.

Again, it has been suggested that a process of environmental management (assessment of "significant impacts on the environment" through an EMAS) may allow the identification of new or greater risks. It allows the timely identification of risks as the best protection against the materialisation of risk and ensuing responsibility.

In the case of activity or business that is not dangerous *a priori*, a process of environmental management (including its audits) will influence the determination of the existence of fault or due diligence.

The adoption of a system of environmental management does not imply an automatic release from liability nor a true presumption of due diligence as required of the company under the circumstances. However, it may permit a company to identify those responsible and possibly limit the damages.⁴⁶ It may also help to prove the infraction or the breach of due diligence duty when the officials' behaviour is contrary to the rules adopted by the enterprise.

The case GRICA vs IBM in Switzerland

⁴⁶ Petitpierre-Sauvain, Anne "La responsabilité environnementale de l'entreprise", en Droit des sociétés: Mélanges en l'Honneur de Roland Ruedin, edités par F. Bohnet et P. Wessner, Helbing & Lichtenhahn, Bâle, Genève, Munich, p. 141

In a relatively recent case, an association of descendants of Roma who were allegedly detained in Switzerland and extradited to the Nazi regime sued IBM in Switzerland for complicity in providing the technological means for Government agents to track down and detain gypsies during the Second World War.

While the state court of first instance in Geneva had admitted the case, the court of appeals as well as the Federal Supreme Court in 2006 dismissed the case on the grounds that legal action was time-barred by the statute of limitations, as the events in question occurred some 50 years earlier (ATF 132 III 661).

However, since the decision has been issued, article 101 of the Criminal Code has entered into force, which declares *inter alia* that genocide and crimes committed in violation of the Geneva Conventions are not subject to the statute of limitation. Current jurisprudence supports the view that future similar civil cases may not be time-barred.

Parent company liability for subsidiaries, business partners and suppliers under Swiss law

The following analyses two questions in relation to proposals made by the ECCJ: Is a parent company liable for its subsidiary under Swiss law and under which circumstances? Is a company liable for its suppliers or for its partners in a joint venture?

The principle is that a company and its subsidiary have separate legal personalities and are therefore considered to be two different legal entities, one not being liable for the activity of the other. However, Swiss courts have developed some exceptions to this principle under specific circumstances:

- (a) The first exception relates to cases where there is a financial and decision-making link between two legal entities such that treating them as distinct entities would lead to a result contrary to good faith or would contravene legitimate interests of third parties (e.g. creating or using a subsidiary in order to avoid some prohibition on competition or to avoid respecting a contract). In such cases, the legal separation between a parent company and its subsidiary can be disregarded with respect to the misuse under consideration⁴⁷.
- (b) The second exception is the development by the Swiss Supreme Court of a liability theory that rests not on the basic grounds of liability (contracts and torts), but on a violation of good faith ("the liability based on trust").⁴⁸ The scope of operation of this additional liability theory is extremely restrictive. It applies where, despite the absence of a contractual relationship, there is a special relation of trust between two persons by virtue of which one of them takes measures based on the behaviour of the other, which measures later prove to be detrimental to his interests (4C.71/2001). If the injured party makes arrangements based on trust, the party who generated that trust is liable for any damage to the extent that there is a proximate causal connection with the thwarted expectation. In short, the conditions under which this liability theory applies can be

⁴⁷ Decision of the Swiss Supreme Court of 9 December 2008, 4A_384/2008.

⁴⁸ Decision of Swiss Supreme Court of 12 June 2007, 4C.28/2007.

summarised as follows: (i) trust has been created; (ii) betrayal of that trust; (iii) disloyalty; (iv) the victim had precise expectations; (v) a special relation of trust between the parties; (vi) intent; (vii) damage to the victim; and (viii) proximate causation.⁴⁹ On this basis, the Swiss Supreme Court exceptionally held a parent company liable for the commitments of its subsidiary in a case where the subsidiary represented to third parties, through advertising documentation, that it had very close links with the parent company and therefore benefited from its support.⁵⁰ That said, most of the cases presented to the courts based on the abovementioned grounds have been rejected.

- (c) The third exception applies to cases where the subsidiary has no decisional power of its own, because the influence of the parent company is decisive. For this ground to be admitted, the board of the parent company must have behaved as if it were itself the board of the subsidiary (through links of a certain duration, acting freely as the board would do, having the competences and information the board would have in order to make decisions and so contributing to the decision-making of the subsidiary). A simple influence on the decisions of the subsidiary's board is not sufficient in this respect. In such a case, the parent company is qualified as a "*de facto* body" and may be held liable for the activities of the subsidiary it has influenced.⁵¹

There are no known cases of parent companies held liable for environmental and human rights impacts of their subsidiaries under Swiss law. However it cannot be excluded that, if the conditions for liability of a parent company as described above are met, such liability may be established in the future. Moreover, one could argue that, under the Swiss Private International Law Act (hereafter "LDIP"), action could be taken in Switzerland against a Swiss parent company of a foreign subsidiary if the activities of the foreign subsidiary are exercised in Switzerland or from Switzerland (articles 152 and 159, Federal Code on Private International Law).

Is a company liable for its suppliers or for its partners in a joint venture under Swiss law?

In relation to the company's **suppliers**, the principle is also that a company and its suppliers have separate legal personalities and are therefore considered to be two different legal entities, one not being liable for the activities of the other. However, if the supplier has no decisional power of its own and the influence of another company is decisive, this other company may be held liable for the activities of the supplier. For this ground to be admitted, the board of the dominant company must have acted as if it were itself the board of the supplier (see above regarding subsidiaries). A simple influence on the decisions of the supplier is not sufficient in this respect. The Swiss Supreme Court has also ruled that where there is a specific form of dependency between two persons, implying a control of one person over the other (but not necessarily through the control of all the capital of one over the other), the controlled entity could be considered a "straw man" under the direction of the controlling entity, where treating them as distinct entities would lead to a result contrary to good faith or contravene legitimate interests of third parties. In such cases, the legal separation between the

⁴⁹ Semaine Judiciaire 1997, p. 165.

⁵⁰ ATF 120 II 331 and also a recent case (2006) on money laundering in which the Swiss court took into account the fact that The Bahamas have more lenient standards than Switzerland: 2A.91/2005.

⁵¹ ATF 128 II 122.

two entities can be disregarded with respect to the misuse under review.⁵² That said, the court was referring to dependency in the context of friendship or family relationships. There are no known cases where a company has been held liable for the activity of a supplier in relation to human rights or environmental impacts.

Joint ventures: Under Swiss law, joint ventures are considered as partnerships regulated by articles 530 *et seq.* CO. They have no legal personality (which means that the assets of the partnership belong to the partners jointly, and that the partners are personally liable for obligations resulting from the activity of the partnership), even if some specific rules regarding decision-making or liability apply to the partnership. Articles 543 *et seq.* CO regulating the relationship between the partners and third parties cannot be contractually set aside. They are based mainly on rules of agency, with the main difference that there is a presumption in favour of third parties that, regarding the normal activity of the partnership, a managing partner is entitled to represent the partnership or all partners. The third party will need to prove that he had legitimate reasons to think that there was a partnership, and that he was dealing with a managing partner. In the case of a joint venture, such proof should normally be admitted. Therefore, a commitment undertaken by one partner acting on behalf of the partnership (or making a diligent third party believe he is) is binding for the other partners and a third party could take action against all the partners. However, whereas this form of liability applies for the regular business of the partnership, it does not apply to torts. Indeed, a partner could be held liable for the unlawful act of another partner only if he himself took part in it, willingly or by negligence.⁵³ This results from the fact that the partnership, even if regulated by specific rules, has no legal personality. Therefore, with respect to environmental or human rights impacts, the liability of a partner for another one could *a priori* be taken into consideration only if the other partner took part in some manner in the unlawful act or if he acted as if he were a “*de facto* body” of his partner (see above regarding the situation of suppliers).

Upshot

Swiss law provides for interesting but still untested avenues for pursuing criminal and civil liability of corporations.

Separate legal personality and the corporate veil could be an obstacle for holding Swiss transnationals to account for acts of their subsidiaries or suppliers. The exceptions provided by law are insufficient.

2.2.3 Obligation of Reporting on human rights and environmental impacts

Reporting on social and environmental impacts, especially those of operations abroad, has become a crucial demand from civil society to enhance transparency and accountability of corporations. It has also been argued that reporting will encourage companies to take into account more seriously their impacts on human rights and the environment. The following addresses whether companies are required or permitted under Swiss law to disclose the impacts of their operations (including human rights impacts) on non-shareholders, as well as

⁵² Decision of the Federal Supreme Court, December 9, 2008, 4A_384/2008.

⁵³ ATF 90 II 501, JT 1965 I 369.

any action taken or intended to address those impacts, whether as part of financial reporting obligations or a separate reporting regime.

Obligatory disclosure

General corporate rules regarding reporting are common to listed and private companies. However, there are more stringent rules regarding listed companies (those whose shares can be traded on a stock exchange).

General rules: Articles 662 *et seq.* CO govern the reporting obligations of the company's directors. Pursuant to these provisions, each year the directors must prepare annual financial statements, the annual report and the consolidated financial statements (if the latter are required by law).

The annual financial statements are mainly the profit and loss statement (or income statement), the balance sheet and an Annex with more detailed information (articles 663, 663a, 663b). The annual report discusses the course of business, as well as the economic and financial situation of the company (article 663d CO). Consolidated financial statements apply only to groups of companies.

The Swiss system focuses mainly on financial reporting obligations. However, as part of these obligations, a new provision entered into force in January 2008, which requires that indicators on **risk management** be disclosed with the Annex to the balance sheet. Thus directors must report risks that may have a major influence on the company, which may include impacts on non-shareholders, if, for instance, they pose a legal risk to the company. For financial institutions, the Basel II framework explicitly requires an assessment of legal risks, i.e. the risk of being taken to court. With regard to human rights, this has become an issue for banks doing business in the US in the context of employment discrimination. As of today, it is very difficult to assess the scope of this provision, as courts have not yet provided any guidance, but this could potentially lead to the disclosure of societal impacts and could be seen as a window of opportunity.

Aside from corporate law (and financial reporting obligations), other bodies of law may also have a bearing on the reporting of impacts on non-shareholders under specific circumstances. For example, with regard to labour law, article 335f-g CO requires the employer, prior to a mass dismissal, to consult first with the employees' representative body and then to notify the cantonal Labour Office in writing of such mass dismissal with all pertinent information. Another example is the obligation to conduct an environmental impact assessment prior to launching certain projects, as required by articles 10A and 10B of the Swiss federal Law on the Protection of the Environment (LPE).

Rules applying only to listed companies: in January 2008, new provisions were enacted (article 663b bis CO) in connection with indemnities, bonuses and other similar remuneration to directors or former directors. These provisions state that such indemnities must be disclosed in the Annex to the balance sheet, in addition to the indications mentioned above. Shareholders meeting certain thresholds ("important" shareholders) must also be disclosed (article 663c CO).

Listed companies are subject not only to the requirements of the CO but also to those arising from several other regulations. These regulations provide for a number of reporting obligations and subject listed companies to the oversight of competent authorities. They require, *inter alia*, the establishment of intermediary accounts (and not only annual accounts) that have to be compatible with the *International Financial Reporting Standards*; the obligation to declare the number of shares that exceed a certain threshold; and the obligation to comply with recognised international standards regarding information to be shared with investors in order to allow them a proper evaluation of securities and the quality of the issuer. The main rules are found in the Corporate Governance Directive of the SWX Swiss Exchange and in the listing rules. The Directive mainly follows international standards, but tends to be somewhat less stringent. Information must be provided on the structure of the group and the shareholders, the structure of the capital, directors, remuneration of directors, participation of shareholders, opting out and opting in clauses, revision body and information policies of the company.

Finally, pursuant to article 53 of the listing rules:

“1 The issuer must inform the market of any price-sensitive facts which have arisen in its sphere of activity. Price-sensitive facts are facts which are capable of triggering a significant change in market prices.

2 The issuer must provide notification as soon as it becomes aware of the main points of the price-sensitive fact.

3 Disclosure must be made so as to ensure the equal treatment of all market participants”

Examples of price-sensitive facts could include events connected to the company’s impact on non-shareholders such as **liability risks resulting from damage to the environment, violations of human rights or product liability** that imply an important change in the financial evaluation of the company. A recent example is the set of lawsuits against Eternit and its CEO Stephan Schmidheiny for not protecting its workers from exposure to asbestos.

In conclusion, companies may be required to disclose the impacts of their operations (including societal impacts) on non-shareholders mainly in cases where this might have a significant influence on their financial situation or on market prices, which limits the scope of impacts to be reported on. They may also have to report these impacts in specific situations, where it is required in other laws, including labour and environmental laws.

There is a trend in the EU to request companies to disclose their CSR guidelines or to state they use none. The obligation to report on social and environmental impacts has been introduced in France, the United Kingdom, Denmark and Sweden. Outside the EU, Norway requires non-financial reporting. The Norwegian Accounting Act requires companies to report on specific non-financial factors: working environment, gender equality, impact on the natural environment and actions taken to prevent or reduce such an impact.

Denmark requires the largest companies to state which standards they follow, how they implement them and what results have been achieved. Companies that do not have a CSR policy should say so. Norway was discussing similar legal requirements.

The UK Companies Act 2006 requires listed companies to report on environmental matters, employees and social community issues to the extent necessary to understand the performance and position of the company. Similarly, France requires listed companies to include in their annual report information about social and environmental impacts (Article L. 225-102-1 Code de Commerce). The law defines the kind of information that should be included. Any interested person may have recourse to the tribunals if the company's directors fail to fulfil this duty.

Voluntary disclosure

As a rule, companies are permitted to disclose the impacts of their operations (including societal impacts), as long as this reporting is not detrimental to the interests of the company, nor to the interests of other constituencies that directors have the mandate to protect.

Companies may, on a voluntary basis, follow the OECD Guidelines' recommendation, in article III, to disclose material issues regarding employees and stakeholders, as well as to provide information on business conduct including information on the social, ethical and environmental policies of the enterprise.

There are no specific legal provisions that extend the obligation of reporting impacts outside Switzerland or of subsidiaries or business partners. However, reporting obligations may extend to impacts outside Switzerland if such impacts are of a nature to affect the financial situation of the company, or if it affects the market price sufficiently to require reporting it. This also applies *mutatis mutandis* to the impacts of subsidiaries, suppliers and other business partners.

Annual financial statements (following articles 662 *et seq.* CO) must be prepared by the directors and need approval from the general meeting of shareholders. Some companies (including listed companies) must have their financial statements reviewed by auditors that are totally independent from the company.

If the company has outstanding bond issues or if its shares are listed on a stock exchange, Article 697h CO provides for the disclosure of the annual financial statement and consolidated financial statement in the Swiss Official Gazette of Commerce, or the company must send a copy of such statements to any person requesting it. Other companies have to disclose the annual financial statement and consolidated financial statements to creditors who can provide evidence of an interest worthy of being protected.

As part of the duties of the directors, failure to report may lead to a liability claim against them and/or against the auditors, if the conditions mentioned above are met. Under certain circumstances, a misrepresentation may lead to a criminal conviction against the directors for forgery.

The reports issued in compliance with the reporting obligations resulting from the listing rules are by definition public. Companies failing to respect these provisions may receive a warning or a fine of up to CHF 1 million, be suspended from trading, or even delisted. Furthermore, a liability action could be taken against the company.

Upshot

Swiss law does not require companies to report on social or environmental impacts, but it does not prohibit it either, provided the reporting does not damage the company's interests. The general trend in Europe is to require some form of mandatory social and environmental reporting from companies, but practice varies and is evolving.

2.3 Access to justice/remedy and grievance mechanisms

Several international human rights instruments ratified by Switzerland, in particular the International Covenant on Civil and Political Rights, article 2, guarantee the right to an effective remedy. Any person in Swiss territory or under its jurisdiction has the right to an effective remedy when his/her rights have been violated by State agents or by private actors whose activities are condoned and not remedied by the State. The essential characteristics of this right are its effectiveness, accessibility and promptness.

In the area of grievance mechanisms, Professor Ruggie has developed a set of criteria to assess those mechanisms in the context of the need to enhance access to justice for victims. Those principles include: accessibility, legitimacy, predictability, equitability, rights-compatibility and transparency.⁵⁴ Mechanisms such as the OECD National Contact Point or a National Human Rights Institution that receives complaints, investigates and issues recommendations may play an important role in providing relief to victims.

Switzerland's laws provide for a number of avenues for legal redress. However, the realisation of the right to an effective remedy in the context of corporate abuse (whether transnational or not) is hindered by a set of legal, procedural and social obstacles.

2.3.1 Legal standing

To hold company directors liable

The Swiss Supreme Court has made a distinction between direct and indirect damages. Such distinction determines who may take action as well as the relief sought. The criterion to distinguish between direct damages and indirect damages depends on the assets directly affected by the action attributed to the directors. Indeed, a shareholder or a creditor suffers direct damages when his assets are individually and specifically affected, independently of any damages to the company (e.g. a creditor who agreed on a loan to the company based on false indications of a director), while he suffers indirect damage when his prejudice is a result of the damage suffered by the company (e.g. diminution of the dividend because of damage affecting the company, or a claim of the creditor unpaid because of the company's lower credit-worthiness). Legal standing to sue the directors for damages is granted to the company as such represented by the board of directors or a special representative, the shareholders and the creditors if they have suffered direct damages. However, observers note that shareholders or creditors are unlikely to hold directors liable in relation to human rights and/or environmental impacts.

⁵⁴ Ruggie Report 2008, A/HRC/8/5 para 92.

As regards criminal liability, under Swiss law the prosecution of crime –including crime allegedly perpetrated by corporations– corresponds to public prosecution. The victim may have a limited role.

Swiss law on civil liability allows any person or legal entity to bring a claim against any other person domiciled in Switzerland for tort and to demand the payment of damages and compensation. In principle, this avenue would also be open to citizens of other countries if they have access to Swiss courts directly or through representation.

Class actions: Swiss law does not recognise the institution of “class action,” whereby a group of persons who claim to be similarly affected by a company can bring a collective claim before the court. Most European countries do not permit such class actions while most common law countries admit them in certain areas, including the United Kingdom and the United States, and most recently Italy for consumers’ rights. Other countries may have other institutions similar to class actions, and several Latin American countries of civil law tradition admit collective claims for constitutional remedies.

Class actions usually facilitate legal action by a group with a single legal counsel, reducing costs and also alleviating the burden of proof each individual would otherwise have, and possibly reducing the length of litigations. In its message about the new Swiss Code of Civil Procedure, the Federal Council rejected the introduction of class action in Swiss law citing, *inter alia*: difficulties in defining the group entitled to legal standing and in sharing the compensation amounts; the possibilities that other members of the group might take legal action outside the group; and its potential abusive use to sue for enormous amounts (akin to “blackmail” to force companies to settle).⁵⁵

By contrast, Swiss law recognises the right of *civil associations and organisations to bring claims in defence of a collective interest* (not only of their members but also of others who carry out similar trade) provided that their statute enables them to defend the economic interest of their members. According to Swiss Civil Code Article 28, the professional associations can only request declaratory relief and cessation but not reparation of damages for loss or injury. Despite its usefulness (for instance it was thanks to a labour union’s intervention that the administration refused authorisation to an enterprise to have women working on Sundays), the new Swiss Code of Civil Procedure –to enter into force in January 2011– has kept its scope limited, especially in connection to the relief that these associations may seek.

2.3.2 Obstacles to access to justice

Access to a legal remedy in Switzerland, although in theory open to a broad range of individuals and entities, is nevertheless marred by a series of obstacles. Among them are common obstacles such as the important financial resources needed to litigate in Switzerland (including the possible payment of legal costs of the opposing party if the case is lost); lack of knowledge about the mechanisms and avenues available; and availability of legal aid or legal representation. There are also important limits to capacity within the system to address issues

⁵⁵ FF 2006 6902

of a transnational and complex nature. Lack of clarity in the law of corporate criminal liability or limited options for piercing the corporate veil are also material obstacles for victims seeking to obtain justice. Also, apart from the above-mentioned limits to victims' legal standing, significant procedural obstacles may in practice prevent access to justice.

Costs of legal representation and legal aid

The costs of legal representation in Switzerland are generally high and are in practice the single most important obstacle for victims- especially those from poor countries- to gain access to the courts. The Federal Constitution, article 29.3, provides for the right to legal aid of everybody without sufficient resources, unless the claim appears to have no possibility of success. According to legal practitioners, legal aid generally works well. However, there are some difficulties in relation to the assessment of whether "possibilities of success" exist, which may be especially serious in the context of litigation against large corporations, where obtaining the necessary evidence against the company is difficult. In this context, such an assessment could be arbitrary.

Evidentiary problems

One of the most important problems victims face when confronting corporations in a legal context is providing the required evidence to prove the company's tort. This difficulty flows largely from the fact that most evidence, in the form of documents, records and archives is in the hands or control of the company. Witnesses, whistleblowers and the victims themselves may still be working for the company in a subordinate position, which makes them vulnerable to potential intimidation. The unequal position of the parties to the dispute in terms of financial resources is also seen clearly in their unequal ability to produce the necessary evidence. Requiring the complainants to provide *prima facie* evidence and then shifting the burden of proof to the defending company could be a solution (as is done for cases concerning gender discrimination).

During the proceedings, the judge can address the imbalance between the parties by ordering the party in control of a piece of evidence to disclose it (Article 186.2 Geneva Law of Civil Procedure) even if that party does not carry the burden of proof. However, the new Swiss Code of Civil Procedure will take a significant step backward in this regard by recognising a right to refuse to disclose the evidence when disclosing it would expose a party to criminal prosecution or civil liability (Article 163). While the refusal to disclose evidence that could bring criminal prosecution may be understandable by virtue of the guarantees against self-incrimination, allowing the party who controls the evidence to refuse to disclose it to protect itself against civil liability is clearly not in the interest of justice and diminishes the victim's ability to prove his claim. There may be strong policy grounds to change this rule and consider introducing stronger powers for the judge to order discovery of evidence.

Protection of witnesses and whistleblowers

The possibility that a company or financial institution employee who has witnessed irregularities would decide to reveal those irregularities to the authorities seems rather slim according to the report of the OECD Phase 2 review of Switzerland (2005). This report found

no cases of whistleblowers denouncing corrupt activities on the part of their firms. The main reasons for this are said to be labour laws that do not effectively protect employees from unfair dismissal (the indemnity for unfair dismissal is limited by law to six months' salary at most, often reduced in practice by the courts); the absence of any obligation for employers to reinstate employees who are victims of unfair dismissal; and the relatively small size of the country. Regarding the latter, a whistleblower, labelled as an informant, would very quickly be excluded from the labour market, as Swiss law has no specific provisions to protect employees' "right to warn", or to guarantee that they be reinstated if dismissed unfairly.

In practice, potential whistleblowers, as workers within the meaning of Swiss law, are subject to a number of restrictive legal obligations. Federal jurisprudence,⁵⁶ endorsed by legal commentary, establishes an employee's obligation of loyalty not only to abstain from any behaviour that may prejudice the employer's legitimate interests, but also to intervene actively, for example by informing the employer of irregularities and anomalies found within the firm. In this context, an employee's option to approach the firm's executive bodies seems, according to the OECD, to be limited in practice. The company's image and the trust of its customers and creditors are factors that may encourage senior managers not to bring a reported offence to the attention of the police.

There are also grounds for victims or witnesses to fear retaliation. Law enforcement agencies cannot guarantee that the names of witnesses will not be divulged during the procedure, except in situations in which knowledge of the witness's identity would constitute a threat to life or limb for the witness or a member of his family.

The OECD Working Group had recommended, in the phase 2 Report in 2005, that Switzerland examines measures to ensure effective protection of whistleblowers, especially employees in the private sector (Recommendation 3c). In March 2006, the Council of States accepted a revised version of Motion Gysin (03.3212) and mandated the Swiss Government to prepare a bill that addresses the protection of whistleblowers; the National Council followed suit in June 2007. The consultation procedure on the partial revision of the Swiss *Code des obligations* ended on 31 March 2009, with the Federal Council taking note of the report on 19 December 2009. The majority of stakeholders welcomed better protection for whistleblowers, but before taking a decision the Federal Council opened another consultation on the question of the existing and foreseen sanctions for unfair dismissal of whistleblowers.⁵⁷

2.3.3 Swiss National Contact Point

The OECD Guidelines for Multinational Enterprises provide the only multilateral framework that Governments are committed to promote. They set a number of recommendations and principles for multinational enterprises operating in or from OECD member countries or the 11 observer countries that have endorsed the Guidelines. The National Contact Points play a crucial role in promoting observance of the Guidelines, but international practice is uneven.

⁵⁶ ATF 127 III 310

⁵⁷ See http://www.ejpd.admin.ch/ejpd/fr/home/themen/wirtschaft/ref_gesetzgebung/ref_whistleblowing.html

The system of National Contact Points (NCP) established under the revised OECD Guidelines, as well as National Human Rights Commissions or Ombudspersons, are frequently presented as alternative non-judicial mechanisms to provide redress to victims of corporate abuse. The human rights system, in principle, does not limit the available remedies to those of judicial nature but also accepts those of administrative character subject to the requirement that the remedy offered be prompt and effective. As mentioned above, Professor Ruggie has suggested a number of principles that non-judicial remedies should comply with. However, it is not clear whether in his conceptual framework these non-judicial remedies correspond to what is mandated under international law.⁵⁸

The Swiss NCP is located within the International Investment and Multinational Enterprises Unit of the State Secretariat for Economic Affairs and is managed by Government officials. At the moment, the OECD Procedural Guidelines relating to the work of NCPs do not require any specific location of the NCP within the administration. It is still fairly common (some 17 NCPs) that the NCP is located in the same department as investment protection and promotion and/or staffed by employees from the respective ministry for economic affairs. But there is also a discernible trend to include stakeholders in NCP structures since 2000, when the NCP mechanism under the revised Guidelines was created. The number of NCPs with tri- or quadri-partite composition and/or involvement (business, governments, unions and sometimes other civil society groups) has increased to about 13 (including the Nordic countries: Norway, Sweden and Denmark), and advisory committees or permanent consultative bodies involving non-governmental partners have become frequent in countries with government-based NCP structures (such as in the UK). Recently, the Netherlands created a totally independent NCP served by a secretariat comprised of state officials for a trial period.

The Swiss Government regards international investment and CSR as closely related and sees no inconsistency in having the Swiss NCP and the task of protecting Swiss businesses investing abroad in the same governmental unit. Support to businesses operating internationally can and should be combined with fostering responsible corporate behaviour in an effective and flexible way.⁵⁹

The NCP approach to transparency and communication in concrete cases is described on the Swiss NCP website in very broad terms: "...with respect to the results of the procedure, the NCP needs to find a balance between transparency and confidentiality."⁶⁰ The outcome of the NCP's involvement in specific cases is made public on the website, in a very general and generic manner, in the annual report of the Swiss NCP, on the website of the OECD and in the OECD report of the "Annual Meeting of the National Contact Points".

In total, 11 specific instances have been filed with the Swiss NCP. Final statements, which are issued only once a case is closed, can be found online for only two cases. Other cases are

⁵⁸ Amnesty International has criticised the labeling of OECD NCPs or the Global Compact as "remedial mechanisms," where in practice they were not conceived of as such. See "Response by AI: Right to an Effective Remedy", CSR Conference convened by the EU President, Sweden, 10 November 2009.

⁵⁹ "Annual Report 2008/2009 on Activities of the Swiss National Contact Point" to the OECD Investment Committee, available at <http://www.seco.admin.ch/themen/00513/00527/02584/02586/index.html?lang=en>

⁶⁰ <http://www.seco.admin.ch/themen/00513/00527/02584/index.html?lang=en>.

known from external sources. The Swiss NCP Annual Report 2009 to the OECD reports on four instances: a labour conflict in a factory plant of the Swiss multinational enterprise Nestlé in Russia (2008); a labour conflict in a subsidiary of a Swiss multinational enterprise in Indonesia (2008); a labour conflict in a subsidiary of a Swiss multinational enterprise in Korea (this was filed with the Korean as well as the Swiss NCP); and a labour conflict in a subsidiary of a Swiss multinational enterprise in India (filed with the Swiss NCP in 2009).

The Swiss NCP was also involved in a specific instance initiated in 2007 by an Australian lawyer with the Australian NCP and by a Swiss NGO with the Swiss NCP concerning the coal mine “El Cerrejón,” partially owned by Anglo American, BHP Billiton and Xstrata and operating in Colombia. Since the Australian, Swiss and UK NCPs were involved, it was decided that the Australian NCP would lead the process. On 12 June 2009 the Australian NCP issued a statement formally closing the instance in view of the agreement reached between one plaintiff community and the company and the establishment by the company of an internal mechanism of social responsibility to continue dealing with the communities’ grievances. The Swiss NCP also issued a statement supporting the Australian statement and closing the instance. Both NCPs concluded that the mediation work had been successful. In its statement, the Australian NCP declined to assume an ongoing role in monitoring compliance with agreements and/or negotiations.

The latter case serves to illustrate the shortcomings of the OECD NCP model as a potentially effective remedy for victims. Civil society groups complain that compliance with the recommendations is weak, the procedure is non-transparent and unclear, and victims have a limited possibility of participating (especially if they are located in third countries). Further, in these groups’ view, SECO overemphasises mediation. Officials at SECO maintain that because of the constant coordination and consultation with other departments, the Swiss NCP in practice works as an interdepartmental structure. They also state that the levels of transparency are in keeping with what is required in the OECD Guidelines and NGOs generally publish their own positions. Finally, mediation is central to the NCP system.

Elsewhere concerns have been expressed about the independence and impartiality of bodies controlled by the Governments, the effectiveness of a system that relies largely on the good will of companies to engage in a mediation process and comply with commitments made in that context, and the inherent limitations on investigating or gathering evidence, especially from individuals and communities affected in third countries.⁶¹ Similar concerns arise in regard to the effectiveness of NCP statements favourable to the victims when the good will of the company is absent. Various cases in the UK and elsewhere showing lack of compliance by companies underscore the limits of the current NCP model.

Upshot

Currently, the Swiss NCP cannot be seen as a mechanism that provides an effective remedy, because it is not perceived to be independent and overemphasises mediation as the main tool.

⁶¹ See generally “Any of our business?...”, 2009, cited above.

2.3.4 A Swiss National Human Rights Institution?

The creation of a National Human Rights Commission or Ombudsman has been an advocacy demand of Swiss civil society for a number of years. In 2002, the Federal Council prepared a report on the feasibility of creating a federal commission on human rights. It considered two models: a federal commission and an independent specialised institute. In the end, it decided in July 2009 that establishing a National Human Rights Institution (NHRI) in Switzerland would be premature. Taking into account the current needs, the council decided instead to make available, as a preliminary step, 1'000'000 CHF per year to buy services from a Competence Centre for Human Rights that is or will be established at a Swiss university. Several universities have applied and the Federal Council will decide in spring 2010.

In the consultations on the NHRI, while business associations such as *economiesuisse* were against such a new institution, some multinational corporations (Novartis, ABB, Zurich Financial Services, Pfizer, Bechter, Hesta, Mondaine, UBS) have voiced the need for a National Human Rights Institution such as the Danish Institute on Human Rights, of which ABB and Novartis are regular clients.⁶² The global debates about business and human rights show that national bodies with the task of protecting and promoting human rights can also play an important role in the context of the human rights impacts of business. At the same time, the structure and functions of those institutions vary across countries and some countries lack such institutions altogether.

3. SOME EXISTING POLICY INSTRUMENTS AND THE STATE DUTY TO PROTECT

In its present state international human rights law does not prescribe specific policies for countries to implement their human rights obligations. It generally leaves States wide discretion to choose the most appropriate policies to discharge their human rights obligations, although some treaties such as CERD do require action in specific domains. However, there are strong policy reasons to adopt certain kinds of policies that are proven to be more conducive to the promotion of human rights than others or, in any event, to avoid policies that lead to the commission of violations.

With respect to human rights abroad, apart from the obligations under human rights law and those stemming from the Swiss Constitution, there may also be strong policy reasons for Switzerland to encourage or even ensure their companies respect rights abroad. One important reason is to avoid being associated with possible corporate abuse abroad or even being seen as accomplices. This holds true especially if the State itself is involved in the business venture, be it as owner, investor, insurer, procurer or simply promoter.⁶³

⁶² « Création d'une commission fédérale des droits de l'homme: possibilité, opportunité et alternative ». Rapport du Conseil fédéral, Berne, le 1er juillet 2009, Available at <http://www.eda.admin.ch/etc/medialib/downloads/edazen/topics/human/humri.Par.0043.File.tmp/Rapport%201er%20juillet%202009%20Fr.pdf>

⁶³ Ruggie Report 2009, para. 16.

A review of all policy tools and programmes in place that have an impact on the promotion of human rights falls outside the terms of reference of this study. The following will focus only on those policy tools that are generally seen as having a bearing on the enjoyment of human rights abroad: export credit risk insurance, government procurement and investment and trade agreements.

3.1 Role of Swiss Embassies abroad and the promotion of bilateral dialogues

In response to the 2009 Ruggie questionnaire, Switzerland mentioned its sectoral policy of "défense des intérêts économiques des entreprises suisses à l'étranger". Critics pointed out that this policy (not publicly available) focuses on the protection of Swiss companies' interests. The response to the Ruggie questionnaire mentions that adherence to the OECD Guidelines and to the Global Compact is encouraged and that the protection of interests of Swiss companies also includes preventing reputational damage through respect for human rights. Government officials also stress that Swiss diplomatic missions do not extend protection in cases of corruption or to companies without a good record on human rights and labour standards: and limit that protection in practice to companies that are members of the Global Compact, have a good public reputation and do not have any pending instance before an OECD NCP.

Swiss diplomatic intervention in the cases in Colombia

In a long-running conflict between FENOCO, a Colombian railway company, and Sintraime, a metal workers union, the current Swiss Ambassador made efforts to de-escalate and resolve the conflict, speaking with company representatives and the President of the Central Unitaria de Trabajadores (CUT). A second case involves the alleged complicity of Nestlé Colombia in the torture and assassination of Colombian trade union leaders by paramilitary groups. The company is alleged to have benefited from the violations resulting from a trade union-free zone favourable to business. The Ambassador organised informal meetings between the CUT President and the head of Nestlé Colombia, for example, during a dinner at the ambassador's residence. The current ambassador appears more active than his predecessor and more willing to act when Swiss companies are involved in conflicts.

As the document is not publicly available, this sectoral policy cannot be analysed in full. Government officials stress that this document is internal administration guidance for staff, which is usually not public. It provides guidance to diplomats on cases and information that needs to be reported to Bern and therefore could play a useful role in conflict prevention. However, Swiss diplomats are reportedly reluctant to take an active role or mediate in this type of conflict, following on an instance in which the Ambassador in Brazil was criticised for his active involvement in a case concerning Syngenta.

By way of comparison, the UK has a publicly available business and human rights toolkit aimed at showing how UK overseas missions can promote good conduct by UK companies.⁶⁴ This toolkit provides guidance to staff on how to promote human rights by raising

⁶⁴ Available at: <http://www.fco.gov.uk/resources/en/pdf/3849543/bus-human-rights-tool.pdf>

awareness, lobbying and facilitating contact, and engaging with government, (UK-registered) business, civil society and multilateral organisations as well as how to react to complaints.

The Netherlands outlined a strengthened role for international CSR diplomacy in their Government vision on CSR 2008-2011. This includes the Netherlands' active and leading role in international bodies, taking CSR as an inherent part of promoting international enterprise and economic diplomacy, and ensuring CSR is implemented in all of the government's activities to promote trade and become a standard feature of all economic diplomatic missions of the Ministry of Economic Affairs.⁶⁵

Promotion and adequate training on human rights and business and on the contents of these tools for relevant staff would be essential to ensure the intended objectives are achieved.

3.2 Public Procurement

Public Procurement is one area in which Governments and other public authorities can use their purchasing power to reinforce business' responsibility to respect human rights.

In Switzerland, the federal law on public procurement⁶⁶ (BoeB) was revised in 1994 to conform to the WTO Agreement on Government Procurement binding on Switzerland since 1 January 1996. Article 8 BoeB provides that mandates are awarded only to bidders who respect local labour law, and, if the service is rendered in Switzerland, ensure equal pay for women and men.

In 2008, the Federal Council started a consultation process for the preliminary draft and the explanatory note for a full revision of the public procurement bill. The goal would be to modernise, clarify, insert flexibility and harmonise the law on public procurement. The report of the consultation, published on 18 November 2009, shows there is still a long way to go toward the envisaged comprehensive revision.⁶⁷ On the same date, the Federal Council passed an amendment of the Ordinance on Public Procurement to make important changes in a shorter time frame than the revision of the bill would take. Of particular importance for this study is the amendment of Article 7, which introduced adherence to the eight ILO core labour conventions as a minimum criterion for services rendered abroad.⁶⁸

While the inclusion of ILO core labour conventions is a step forward from simply requiring adherence to local law (which still appears in Article 8 of the Federal law on public procurement), more ambitious proposals were made in the consultation process.⁶⁹ In particular, one option would be to create the legal base to include more human rights and social policy-related issues as criteria for public procurement. The process seems to be stalled

⁶⁵ Available at http://mvoplatforn.nl/publications-en/Publication_2364, pp. 19-21.

⁶⁶ Loi fédérale du 16 décembre 1994 sur les marchés publics, RS 170.056.01, available at http://www.admin.ch/ch/f/rs/c172_056_1.html

⁶⁷ Available at <http://www.admin.ch/ch/f/gg/pc/documents/1606/Ergebnis.pdf>

⁶⁸ « Ordonnance du 11 décembre 1995 sur les marchés publics », RS 172.056.11, available at http://www.admin.ch/ch/f/rs/c172_056_11.html.

⁶⁹ http://www.sp-ps.ch/uploads/tx_userpressemitteilungen/081119_744_oeffentl-Beschaffungswesen_01.pdf

at the moment, but once the overall revision starts it could be an important avenue to operationalise the State duty to protect.⁷⁰

Importance of "Environmental management"

Requiring the establishment of an environmental management system may play a role in government procurement contracts with private companies. It can play the same role in public-private contracts to set environmental objectives or the provision of services. Often it will be a prior condition for the agreement.

The existence of an environmental management system may have an impact on the expectations of authorities to grant a licence (i.e. to use water) or authorisation based on the good faith declaration of the company. An exemption (i.e. ecological taxes) or licence obtained on the basis of the company's declaration that it has a functioning environmental management system that turns out not to be true or inexistent may be nullified or voided and may even trigger civil liability.

The question is whether an environmental management system should be made compulsory for government procurement.

3.3 Swiss Export Risk Insurance

The operating conditions of export risk insurance are laid down in the "Swiss Export Risk Insurance Act"⁷¹ (SERVG) of 16 December 2005 and the "Swiss Export Risk Insurance Ordinance"⁷² (SERV-V) of 24 October 2006. Art. 6 SERVG provides that it respects the principles of Swiss foreign affairs policy, which includes the promotion of human rights per Article 54 of the Swiss Federal Constitution. Art. 13 SERVG stipulates that insurance is excluded if the export would contravene Swiss or foreign law or Switzerland's obligations under public international law.

There are reasonable steps, both procedural and substantial, to ensure that export risk insurances conform to the regulations. These include Environmental Impact Assessments, fulfilment of the more stringent level of either local standards or World Bank Safeguard Policies, and adherence to IFC Performance Standards for project finance. SERV's conformity with the 2007 OECD Council Recommendations on Common Approaches on the Environment and Officially Supported Export Credit Projects is subject to periodic examination.⁷³ SERV also encourages adherence to the OECD Guidelines for multinational enterprises.⁷⁴

⁷⁰ The WTO Government Procurement Agreement and the Bilaterals I may pose some limits to criteria that can be included. See also Marc Steiner, *Die Berücksichtigung sozialer Aspekte im Rahmen der öffentlichen Beschaffung*, Vergaberechtliches Arbeitspapier erstellt im Auftrag der Interessengemeinschaft Ökologische Beschaffung Schweiz (2009), available at www.igoeb.ch.

⁷¹ http://www.serv-ch.com/fileadmin/serv-dateien/Ueber_uns/Rechtsgrundlagen/SERVG_f.pdf

⁷² http://www.serv-ch.com/fileadmin/serv-dateien/Ueber_uns/Rechtsgrundlagen/SERV-V_f.pdf

⁷³ Available at http://www.oecd.org/department/0,3355,en_2649_34181_1_1_1_1_1,00.html

⁷⁴ See <http://www.serv-ch.com/en/sustainability/guidelines-for-multinational-enterprises/>

Common criticisms against SERVG focus on the lack of systematic human rights impact assessments and the fact that recommendations flowing from all of the assessment and standard reviews are voluntary, thus failure to comply does not entail consequences.

Art. 34 SERVG states that in “particularly important”⁷⁵ export operations, the Federal Council can, on demand from the Federal Department of Economy, order SERV to insure the respective exports.

SERV’s environmental practitioner reportedly recommended not insuring the Ilisu Project, but the Federal Council decided otherwise. The Federal Council’s discretion arguably conforms to the weighing-and-balancing test of Art. 54 of the Constitution, whereby the promotion of respect for human rights is only one foreign policy goal among several and can be trumped by the need to safeguard other overriding values. In addition, under Article 101 of the Constitution, the Confederation shall safeguard abroad the interests of the Swiss economy. However, since compliance with human rights is one of the key features of the Swiss constitution there should be no room for deviating from human rights compliance.

The Ilisu and Yusufeli hydroelectric power plants

On 28 March 2007 the Federal Council, in consultation with the German and Austrian export credit agencies, instructed SERV to insure deliveries from Swiss companies to the hydroelectric power plant at Ilisu on the river Tigris in Turkey. This decision was conditional on assurances from Turkey that it would comply with numerous requirements based on World Bank standards in the fields of human rights, the protection of the environment, cultural assets and downstream impacts. In spite of occasional progress, repeated visits to the project site revealed shortcomings in compliance with the specified requirements. After a 180-day time limit expired without full compliance, the export credit agencies terminated the export risk insurance on 7 July 2009.⁷⁶

While the termination of the export risk insurance was commended as a victory for human rights, environmental and cultural concerns over economic interests, the Ilisu dam is not the only controversial project that warrants closer scrutiny.

In fact, only two months after Ilisu, the Federal Council instructed SERV to grant export risk insurance to the Yusufeli hydroelectric power plant – also in Turkey and a category A project, i.e. a project located in sensitive sectors or located in or near sensitive areas.⁷⁷ As in the Ilisu case, the Federal Council decided that the challenges highlighted in the Environmental Impact Assessment⁷⁸ and the Resettlement Action Plan⁷⁹ could be addressed by respective conditions and instructed SERV to insure the export risks.

⁷⁵ “Particulièrement importantes” is defined in Art. 28.2 SERV-V as “Les opérations d’exportation ayant des conséquences importantes sur le plan économique, social, écologique et sur le plan du développement ou d’autres aspects de politique extérieure sont réputées particulièrement importantes.”

⁷⁶ See 2009 Foreign Economic Policy Report, pp. 34-35.

⁷⁷ See http://www.serv-ch.com/fileadmin/serv-dateien/Ethik-Umwelt/Transparenzbericht_E.pdf

⁷⁸ Available at http://www.dsi.gov.tr/english/yusufeli_report.htm

⁷⁹ Available http://www.dsi.gov.tr/english/yusufeli_plan.htm

3.4 Trade and Investment

International trade and investment agreements have the effect of reducing the policy space available to countries to implement their duty to protect human rights. The possibility of conditioning trade advantages and concessions on respect for human rights and labour rights is severely restricted under WTO law, which offers relatively narrow windows of exceptions that must be interpreted on a case-by-case basis. Ruggie's conceptualisation of the impact of trade and investment on human rights focuses on whether trade and investment may "unduly constrain the host Government's ability to achieve its legitimate policy objectives, including its international human rights obligations".⁸⁰ Although the relationship trade/investment and human rights can also be seen from a positive angle - how governments can actively advance human rights through trade and investment agreements - at present conditions can be imposed only in unilateral schemes such as the Generalised System of Preferences or in bilateral agreements. The European Union regularly includes clauses of respect for human rights as essential elements of bilateral trade and cooperation agreements, but their enforcement is weak.

Regarding investment treaties, the SRSG singles out stabilisation clauses as an issue of particular interest.⁸¹ These clauses typically require compensation for any interference by the host State that increases the operating costs for the investment project. They may thus limit the application to the investment project of new laws aimed at protecting human rights. One survey paper produced for IFC and the SRSG on stabilisation clauses and human rights is publicly available.⁸²

Switzerland has concluded some 122 Agreements on the promotion and reciprocal protection of investments. An unspecified number is under negotiation or renegotiation. A preliminary survey of some of those investment treaties shows that the stabilisation clauses aim at preserving public interest considerations and do not insulate investors from compliance with new environmental and social laws. However, public policy goals or international human rights mechanisms are mentioned in a broad way and there are no suspension clauses in case of massive human rights violations.⁸³ More research should be undertaken in relation to Switzerland's investment and trade agreements. It appears that Switzerland could use its close ties with many countries to make bilateral investment treaties an instrument for advancing human rights protection.

International Good Practice

A Norwegian draft model agreement and commentary addresses concerns about bilateral investment treaties (BITs). The model was to serve as a guide for future negotiations and to review existing investment treaties for consistency. Later on, Norway decided to shelve the Model BIT as feedback from stakeholders was so

⁸⁰ Ruggie Report 2009, para. 30.

⁸¹ Ibid., para. 32-33.

⁸² A. Shemberg, "Stabilization Clauses and Human Rights: A Research Project conducted for IFC and the United Nations Special Representative to the Secretary General on Business and Human Rights", 11 March 2008. Available at <http://www.reports-and-materials.org/Stabilization-Clauses-and-Human-Rights-11-Mar-2008.pdf>

⁸³ Beschluss des Bundesrates vom 9. April 2003 über die Politik der politischen Konditionalität.

⁸⁴ <http://www.investmenttreatynews.org/cms/news/archive/2009/06/08/norway-shelves-its-proposed-model-bilateral-investment-treaty.aspx>

polarised that “achieving a proper balance was too difficult”⁸⁴. There have also been earlier proposals such as the IISD Model International Agreement on Investment for Sustainable Development⁸⁵. No similar exercise is under way or planned in Switzerland, however in his closing remarks after presenting his 2009 report to the Human Rights Council, the SRSG announced that his team would be doing some work in this area.⁸⁶

There has been an enormous amount of research on the impact of trade law and WTO Agreements on human rights over a number of years.⁸⁷ Apart from the already quite well explored options to influence political and dispute settlement bodies within the WTO, civil society groups use the UN treaty bodies quite effectively to highlight the human rights impacts of States’ trade-related policies.⁸⁸ Also, both the UN Special Rapporteurs on the right to health and on the right to adequate food have used their missions to the WTO to call on States to conduct *ex-ante* human rights impact assessments of their trade policies. In addition, treaty bodies such as CESCR have provided guidance on this matter.⁸⁹

Interesting avenues for lobbying could arise in the context of the European Free Trade Association (EFTA). With the constitution in 2008 of a working group on trade and environment and one on labour standards, discussions on these issues were revived and the working groups are expected to deliver their initial reports soon.⁹⁰

4. OUTLINING THE OPTIONS

Proposals that aim at creating or strengthening a framework for corporate accountability will meet resistance in the prevailing political and economic environment. The political culture in Switzerland has traditionally separated human rights issues from economic ones. If progress

⁸⁵ http://www.fes-globalization.org/dog_publications/Appendix%20%20IISD%20Model.pdf

⁸⁶ Human Rights Council 11th session, 2 June 2009, 2nd Plenary Meeting, Closing Remarks and Answers, John Ruggie, webcast available at: <http://www.un.org/webcast/unhrc/archive.asp?go=011>

⁸⁷ See, for instance, OHCHR, “Human Rights and World Trade Agreements – Using General Exception Clauses to Protect Human Rights”, available at: <http://www.ohchr.org/Documents/Publications/WTOen.pdf>

⁸⁸ See, e.g., *Switzerland – Missing policy coherence: trade interests overriding right to health?* Available at: http://www.3dthree.org/pdf_3D/3D_CESCRSwitzerland_Nov2009.pdf. The concerns on TRIPS have been included in the list of issues Switzerland will have to respond to during the state reporting in November 2010, see <http://www2.ohchr.org/english/bodies/cescr/cescrwg43.htm>

⁸⁹ UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Mission to the World Trade Organisation*, UN Doc. E/CN.4/2004/49/Add. 1 (1 March 2004); UN Special Rapporteur on the right to adequate food, *Report of the Special Rapporteur on the right to food, Olivier De Schutter - Addendum - Mission to the World Trade Organisation*, UN Doc. A/HRC/10/5/Add.2 (25 June 2008).

⁹⁰ EFTA Ministers on 17 December 2009 “welcomed the significant progress reached in the ad-hoc EFTA Working Group on Trade and Environment and looked forward to the finalisation of a report in the first quarter of next year. They mandated the ad-hoc Working Group on Labour Standards in EFTA Free Trade Agreements to pursue its work”. See also, *Draft Discussion Paper on the relationship between trade and labour standards; and the consideration of new provisions in EFTA’s free trade agreements*, available at http://www.efta.int/~media/documents/advisory-bodies/consultative-committee/cc-news/efta_cc_discussion_paper_trade_and_labour.ashx; EFTA Parliamentary Committee Report, *Environmental policies and Labour standards in FTAs*, available at <http://www.efta.int/~media/documents/advisory-bodies/parliamentary-committee/reports-eea-joint-committee/report-labour-environment.ashx>

is to be achieved, political culture has to change and political will be built. A combination of public mobilisation, lobbying and debating with serious proposals and persuasion will be necessary. It could also be more effective to strategically reform existing institutions than to create new ones, which is usually more difficult and takes more time.

Bearing this in mind, a number of concrete steps would allow Switzerland more fully and effectively to discharge its duty to protect.

4.1 Creating a process to reach a national policy on CSR

Civil society may prepare proposals, lobby authorities and members of Parliament and campaign publicly for a national policy on CSR in which human rights and the environment feature prominently. Switzerland needs an overarching policy and plan to promote the human rights and environmental responsibilities of business. Other states, such as Norway, Denmark and the Netherlands have developed such policies and plans. The various state branches and departments (Parliament, the Federal Council, and the cantons) need to be involved in elaborating a national policy and plan, which should be presented to and debated in the Federal Parliament.

One option is for the Federal Parliament (National Council and/or States Council) to request the Federal executive to produce a policy or paper in consultation with civil society, business and other stakeholders.

Alternatively, the Federal Parliament could request the Federal executive to commission a policy paper from the Competence Centre on Human Rights, which has been created as a pilot project. Failure of Parliament to act should not be a deterrent, as the Federal executive may be persuaded to commission a policy paper or plan from the Competence Centre.

4.2 Enhancing companies' legal duties

4.2.1 Companies' duty of care for subsidiaries' impacts abroad

The adoption of an across the board regime of strict liability of parent companies for wrongdoings of their subsidiaries in the area of human rights and the environment is not feasible or desirable.⁹¹ If such a regime were to be established in Swiss law it would render unnecessary the introduction of a "duty of care" for the parent company in respect to subsidiary companies since the parent will always be regarded as liable whether or not it has duly exercised its duty of care. Currently no one proposes such a solution. However, strict liability for certain damages caused to the environment or by employees or company agents already exist in Swiss law and other national legislations. Strict or objective liability should be contemplated in certain cases to ensure that the company repairs the damage caused regardless of whether it behaved negligently or not. In that sense it remains a valid option for

⁹¹ A parliamentary motion was proposed in June 2007 to create a set of rules applicable to groups of companies in order to reinforce the liability of the parent company. However, the Swiss Federal Council considered that there was no need for such a new set of rules, as either specific rules or case law already existed in this respect and was sufficient. This motion was therefore discontinued.

attributing to parent companies the responsibility to repair certain cases of serious damage caused by their subsidiaries.

An alternative is the **introduction of a duty of care of parent companies with respect to their subsidiaries and companies under their control**. This duty could be added explicitly as an amendment to Articles 716a and 717 of CO that define directors' duties to the effect that these duties will include the exercise of due diligence to ensure that subsidiaries and societies under its control do not commit serious human rights abuses or cause serious damage to the environment. A definition of these standards may result from the parliamentary debate leading to the adoption of such legal amendment.

An important option is a more active use of the Swiss justice system (courts and tribunals) to develop progressive standards through jurisprudence, which would also clarify the scope of the **existing duty of care** in relation to subsidiaries and suppliers abroad. There is a growing practice in other countries of holding parent companies legally liable for damages caused by subsidiaries where the parent was involved in causing the damage.⁹² It should not be forgotten that courts and tribunals are part of the State, which is bound by international human rights law.

Questions to address include the following:

- (a) What threshold (number of shares) would need to be reached for a company to be considered to have control over another, which would in turn trigger liability for the acts of its subsidiary? Specifically, would a majority of shares be sufficient or would total economical identity be necessary? The Swiss CO article 663e provides a definition of a group of enterprises only for the purposes of drafting consolidated accounts.⁹³ The French Commercial Code provides the following definitions:

Subsidiary: "When a company owns at least one half of shares of another company, the latter is considered as subsidiary of the former in application of the present section" (Article L. 233-1, unofficial translation).

Control of a company by another: A company is considered as controlling another when: a) it possesses directly or indirectly a fraction of the capital entitling it to the majority vote in the company's general assembly, b) it has the majority vote as a result of an agreement with other shareholders, c) it determines in practice the decisions in the general assembly by virtue of its own votes, d) it is shareholder or associate of the company and has the power to appoint or revoke the majority of members in the directors' board or oversight board (Article L. 233-3).

It is interesting to note that shareholders have the right to demand information about the consolidated accounts, and thus about the subsidiaries under the control of the parent company.

⁹² In this respect, see ICJ Report on Corporate Complicity, Vol. 3 "Civil Remedies".

⁹³ Art. 663^e: « 1. La société qui, par la détention de la majorité des voix ou d'une autre manière, réunit avec elle sous une direction unique une ou plusieurs sociétés (groupe de sociétés) doit établir des comptes annuels consolidés (comptes de groupe). »

- (b) Would such a liability system have a general scope or rather be limited to human rights and environmental issues? A duty of care is a standard that in principle applies to all situations in which reasonable care should be taken to avoid harm by fault or negligence.
- (c) To what extent would Swiss private international law rules need to be modified to include liability of Swiss parent companies for foreign subsidiaries or for activities undertaken outside Switzerland? The Law on private international law may not need to be changed insofar as it recognises the jurisdiction of Swiss courts in claims against domiciled companies. To enforce the duty of care in relation to subsidiaries, a lawsuit may be brought against the parent domiciled in Switzerland or in the EFTA zone.

Relaxing the standards set forth by the case law of the Swiss Supreme Court with respect to the piercing of the corporate veil could also facilitate holding the parent accountable for the subsidiaries' acts, but this is a narrow avenue. If the corporate veil is lifted, the parent may be responsible for illicit acts by its subsidiary company through the principle of vicarious liability.

4.2.2 Companies' duty of care for suppliers and other business partners' impacts abroad

The ECCJ proposes the recognition of a general **duty of care** on the part of a company to ensure that human rights and the environment are respected **throughout its sphere of responsibility** (and not only as regards its subsidiaries or companies under its control). A company should be held liable if it cannot demonstrate that it has complied with this duty. The explicit introduction of this duty in Swiss law would need an amendment of the law establishing specific requirements of due diligence. Again, an option is to have recourse to the courts of justice filing lawsuits against companies for damages resulting from actions by their suppliers and in which the company recklessly or negligently contributed to causing the harm.

If an explicit provision is to be introduced in the law, it could operate in a manner comparable to the duties imposed on financial intermediaries to identify the beneficial owner and the origin of the funds deposited in a bank account. Unless these intermediaries can establish that they have taken every reasonable step in their power to do so, they may be held liable if such funds come from illegal activities. For such a system to operate it would need to address several difficult issues, including the following:

- (a) Which business partners of the company would be covered by this duty of care? Arguably, this additional responsibility should be limited to suppliers and, among them, the most important ones over which the company has significant leverage by virtue of being the main trading partner.
- (b) What would this duty comprise and, more specifically, which standards would govern the conduct of the company? Whereas in the case of subsidiaries or controlled companies the parent company has a clear involvement in directing the subsidiary, the power that the buying company wields in relation to the supplier is different, based more on a contractual relationship: it flows from its purchasing power. In this case, a different

standard of conduct may be expected. For instance, MIGROS Cooperative has long required its suppliers to certify that their goods are made in full respect of socially acceptable conditions of work (including safety, per European standards of the Business Social Compliance Initiative, BSCI) and a wage sufficient for a decent life. A duty of care in relation to suppliers could make this practice more widespread.

In cases where a company has little control over its business partners, this duty of care may be impracticable and therefore impose an excessive burden on the company, more similar to a strict liability system than to a duty of care. A practicable balance between the duty of care and the feasibility of controlling a business partner would have to be found. Moreover, although technically feasible, the imposition of an explicit and specific duty of care standard in relation to suppliers is politically difficult at present.

4.2.3 Mandatory environmental and social reporting

Mandatory environmental and social reporting provisions could be included within the “financial reporting” system. However, this solution would have the disadvantage of linking social and environmental reporting to the accounts or financial situation of the company, which may in turn limit their scope to reporting only on instances where social and environmental issues have a financially material impact on the company. On the other hand, there is a risk that a separate report on CSR and human rights impacts may become marginal for the company and be drafted by a separate CSR or public relations (PR) unit, thus diminishing the impact such an exercise may have within the company structure and culture. Therefore, some have recommended an “integrated reporting” model.

There are a number of possible models of reporting but what matters most are the reporting parameters adopted. The company should report not only on reputational and legal risks but also about risks of having a negative impact on the enjoyment of human rights within the community where it operates. Reputational and legal risks may have some impact in the financial results for the company and are arguably already covered (see analysis above), but many human rights risks may not have direct financial implications and still would need to be reported.

- (a) To whom would these reports be addressed and to whom would they be accessible? They would be public and accessible to all (possibly on the company website). A report of this kind is addressed not only to shareholders, business partners and creditors, although it may be in their interest as well.
- (b) Which companies would be subject to this reporting obligation? It would be difficult to impose a complex reporting obligation on small- and medium-sized companies. Depending on the kind of reporting, it would probably be limited to the largest, including listed and non-listed.
- (c) Would these reports be limited to the activities of the company or rather extend to the activities of the group of affiliated companies? Similar to the consolidated accounts (Art. 663e CO), in principle subsidiaries and other controlled companies would be included.

The specific contents of these reports would need to be clarified or “itemised”, for instance, through the use of standard forms.

It has been reported that most of the largest Swiss companies already include environmental and social reports in their annual reporting.⁹⁴ Most of these companies are among the driving forces of implementing the Global Compact (e.g., ABB, Swiss Re), however, the way they approach “materiality” (what risks should be reported on?) remains problematic. The Swiss investment foundation ETHOS has stated that many companies report on environmental and social matters, but that the standards they use are often not clear.

The UK Companies Act 2006 requires company directors, in the pursuit of their general duty, to have regard to the “impact of the company operations on the community and the environment”. The largest listed companies should include a business review in their annual directors’ report with information about “environmental matters, the company’s employees and social and community issues”. The directors should also include information about any “policies of the company in relation to those matters and the effectiveness of those policies”, but only to the extent that such information is necessary to understand the company’s business.

One recent model presented as good practice is the Danish’ “Social Responsibility for Large Business Law” of January 2009. This law requires large listed and public businesses (estimated to be 1,100 in Denmark) “to supplement their management’s review with a report on social responsibility”. Businesses are required to include information on their corporate responsibility policies and practices in their annual financial reports. Companies remain free to adopt such a policy or not, but if they have it they should report on it. The model used in Denmark has also been followed in Norway.

In the Danish model, companies are required to report on three aspects:

- Their existing social responsibility policies, including standards, guidelines or principles
- How the policies are implemented, including any systems and procedures in this respect
- Achievements and any related future implications for the business

One problem with these reporting models is that compliance and enforcement are left to market forces and public opinion. It would be important to create a right of action for any stakeholder to make a claim in relation to directors’ compliance with the reporting obligations.

It is interesting to consider the French model.⁹⁵ This model requires companies to include in their annual reports:

- Information about the manner in which the company takes into account the social and environmental consequences of its activities

⁹⁴ See generally “Codes de conduite: Meilleures pratiques des plus grandes sociétés cotées en Suisse”, ETHOS, Genève, Mars 2009.

⁹⁵ See a good description and analysis in « La responsabilité des entreprises en matière de droits de l’homme: II. Etat des lieux et perspectives d’action publique », Commission nationale consultative des droits de l’homme, La documentation Française, 2008.

- Social, employment and local impacts of companies and subsidiaries (in France and abroad)

Failure to report could give rise to legal emergency action by a stakeholder (shareholder, auditor or others) to require the board of directors to comply.

A very recent draft law in Spain (Law on Sustainable Economy) currently being discussed in the Parliament would allow for the Government to provide a set of criteria and indicators for companies to evaluate their CSR programmes. These criteria and indicators will comply with principles of transparency, good governance, commitment to the local economy and the environment, human rights and gender equality. Very interestingly, it would allow enterprises that comply minimally with those indicators to be certified as CSR-compliant by the State Council on CSR (see below).

Implementation of the French model is still weak and information on the Danish system is scarce. ETHOS argues that public opinion and reputational risks may be a more efficient means to ensure compliance.

In all these cases, reporting is limited to listed and/or the largest companies and the standards for reporting are still uneven. It would be important to establish, together with a mechanism to enforce compliance (perhaps through associations - shareholders would automatically have the right to enforce compliance anyway), a system of benchmarks and indicators for companies to follow in their reporting. Alternatively, companies may be given the freedom to pick one of the most reliable and complete reporting systems such as the Global Reporting Initiative and use it systematically. A possible Swiss Council on CSR should be able to provide those benchmarks and indicators and even certify compliant companies (as is proposed in Spain).

A 2009 motion in the Swiss Federal Parliament to establish a mandatory reporting system similar to the ones cited above was rejected by the Federal Council.⁹⁶ However, sustained public campaigning on this issue may bring a different result in the future.

4.3 Policies to promote and ensure respect for human rights and the environment by enterprises

4.3.1 Coordinating mechanisms: Councils, counsellors or ambassadors- or all of them at once?

France has appointed a special ambassador on CSR. For Switzerland, the appointment of such an ambassador is feasible and could help foster policy integration, international visibility and learning.⁹⁷ In Switzerland, there are geographical Special Ambassadors, such as for Sudan and for the Horn of Africa, and thematic Special Ambassadors, such as for human

⁹⁶ « Engagement environnemental et social des entreprises. Plus de transparence et de reconnaissance. » Motion 09.3520, déposé par Mme Adèle Thorens Goumaz le 9 Juin 2009.

⁹⁷ See, for the case of France, information at http://www.diplomatie.gouv.fr/actions-france_830/droits-homme_1048/droits-economiques-sociaux-culturels_4720/responsabilite-sociale-entreprises_17059.html

rights policy and for migration policy. The usefulness of this institution can be assessed against the expected outcomes and functions that may be assigned to it.

In 2009, Canada created the Office of the Extractive Sector CSR Counsellor⁹⁸ to review the CSR practices of Canadian extractive sector companies operating outside Canada, and to advise stakeholders on the implementation of endorsed CSR performance guidelines. The review process includes assessment, informal mediation, fact-finding, access to formal mediation and reporting. The Counsellor reports to the Minister of International Trade, which may table the report in Parliament. Reviews can be conducted only at the request of individuals, communities or groups that reasonably believe themselves to be adversely affected by activities of Canadian extractives. Civil society groups have noted the limited functions and powers of the Counsellor. The Counsellor was recently appointed and at this stage there is no substantive practice to be assessed.

Another recent and unique example is the Council on CSR in Spain, the first country to have created such a council. The State Council for CSR was created in 2008 but only recently became operational. It is a representative, quadripartite body of advisory and consultative character, with trade unions, the government, business associations and civil society (academics, NGOs) working on CSR. It has the following functions:⁹⁹

- Reporting and drafting of studies
- Submitting an annual report to the Government
- Functioning as the Observatory on CSR in Spain
- Promoting and fostering CSR initiatives
- Cooperating with similar bodies in other countries

These recent initiatives point to an identifiable international trend not only in producing national reports and strategies but also in establishing organs or bodies with monitoring and promotional functions, at the very least. States have been reluctant so far to give these bodies a meaningful remedial function.

4.3.2 Government procurement and Export Credit Insurance (SERV)

The Federal Government Procurement system should be reformed to include the core ILO Conventions. Although there is room for manoeuvre to work on other rights as criteria for granting contracts, there are also important limitations, many of them flowing from the rules set in the WTO Government Procurement Agreement.

One way to reform government procurement is to promote reporting obligations on human rights and environmental impacts. Thus, companies aspiring to have government contracts should be able to show that they have an internal CSR policy that pays due regard to human rights and environmental issues, they report annually on its implementation and they follow internationally recognised guidelines for reporting. This idea could be crafted in such a way as to avoid inconsistency with the WTO Government Procurement Agreement.

⁹⁸ “Building the Canadian Advantage: a CSR Strategy for the Canadian International Extractive Sector”, March 2009.

⁹⁹ Real Decreto 221/2008 creating and regulating the State Council for CSR, Boletín Oficial del Estado número 52, 29 febrero 2008.

For the Export Credit Insurance system, SERV, to be in synergy with other instruments of human rights promotion,¹⁰⁰ project approvals should be made contingent on appropriate due diligence systems for the protection of human rights and compliance with the OECD Guidelines for MNEs without exception. There should also be monitoring and sanction mechanisms. Since governments are obliged to promote the OECD Guidelines under which NCPs operate, a negative finding by the Swiss NCP should logically affect the company's access to government procurement and export risk insurance.¹⁰¹

4.3.3 Social labelling

Since 2002, the Belgian Government has put in place a potentially useful system of social labelling.¹⁰² This social label is granted by the State Secretary and can be used by companies to communicate to consumers that the product or service in question has been produced in full respect of the labour rights contained in the core ILO Conventions: minimum age for children to work and prohibition of the worst forms of child labour; prohibition of discrimination in employment and remuneration; prohibition of forced labour; and respect for freedom of association and collective bargaining. Enterprises can attach the label to the product or otherwise use it for marketing.

The Belgian social label addresses the whole chain of production - from extraction of natural resources to final transformation at factories, if applicable - and is granted following a request to the authorities and a process of certification/verification by external auditors or experts. The social label system also contemplates a mechanism of monitoring and complaints. The authorities can withdraw the label if the enterprise does not respect the minimum labour rights contained in the core ILO Conventions.

In Switzerland there have been some debates about labelling and certification. In 2007, a law was passed on taxing biofuels that on balance have a positive environmental impact and are produced under socially acceptable conditions.¹⁰³ These conditions are defined as the local laws at the production site that comply with core ILO Conventions. Suggestions to attach a certification and labelling system in this context were not taken up.

Drawing from the Belgian model, operational for several years with mixed results, Switzerland can build its own model and consider whether other rights beyond the core ILO conventions can be incorporated. The fact that the Belgian social label survived a challenge in the WTO makes it a safe and viable option.

4.4 Monitoring, grievance and enforcement institutions

4.4.1 A national human rights institution - to be revisited in 5 years

¹⁰⁰ As envisaged by the Human Rights Foreign Policy Report, p. 6115.

¹⁰¹ Ruggie Report 2009, p. 24.

¹⁰² http://www.social-label.be/social-label/FR/home/home_fr.htm

¹⁰³ www.admin.ch/ch/f/rs/641_61/index.html

As stated above, the Federal Council judged premature the establishment of a national human rights institution in Switzerland. The issue will be re-examined in five years. In the meantime, the administration may commission services from a Competence Centre in matters of:

- Research on and assessment of the scope of human rights standards for Swiss authorities
- Analysis and documentation of the human rights situation in Switzerland
- Exchange of expertise and providing a platform for dialogue by request
- Preparation of tools and contribution to training on human rights

It is suggested that civil society groups advocate for an intensive use of these services by the Government, notably in relation to the preparation of a national policy or plan on CSR, and in-depth studies on specific issues raised in the present study.

In five years, Swiss civil society may wish to advocate more strongly in favour of a national human rights institution with powers to advance State protection of human rights in the context of corporate activity. A mapping carried out as part of the round table of national human rights institutions, in Copenhagen in July of 2008, showed that activities of NHRIs in this area include:¹⁰⁴

- Monitoring and reporting of human rights abuses in the corporate sector
- Facilitating legal and administrative reform in policy areas relevant to the protection of human rights in the business sector
- Building capacity of government institutions to better regulate business
- Improving access to judicial and non-judicial dispute settlement

4.4.2 OECD Swiss National Contact Point

The limitations of the National Contact Point system support the conclusion that NCPs are not remedial mechanisms but simply promotional or mediation bodies that aim at achieving corporate compliance with human rights and social norms through persuasion and engagement. However, this does not rule out the potential for a reformed system to produce a remedial mechanism where victims can air their grievances, engaging directly with companies in host and home states. The system is unique and should be exploited, especially now that it is undergoing an “updating” process. There is room for a committed Government to promote reform in the good direction, in particular in ensuring a fair and transparent process and greater effectiveness of NCP processes and outcomes.

In this regard, there seems to be significant room for civil society engagement in the reform process of both the OECD NCP system and the Swiss NCP. Qualified lessons can be taken from two recent innovative models in the Netherlands and the United Kingdom. The UK NCP, originally based in a single Government department, was reformed following a large-scale consultation in 2007. The Department of International Development now works with the Department of Business, Enterprises and Regulatory Reform (BERR). A Steering Committee, comprised of representatives of NGOs, Parliament, trade unions and officials of eight other departments, oversees the work of this newly enlarged NCP.

¹⁰⁴ Report on the Roundtable of NHRI on the issue of Business and Human Rights, Copenhagen July 2008.

The Dutch model is even more innovative. The NCP consists of four independent individuals who are knowledgeable on CSR, plus advisors from four Government departments, all of them served by a secretariat located in the Ministry of Economic Affairs. While the UK model retains decision-making power in the Government, the Dutch system gives that power to independent experts.

The two models are relatively new and their record on implementation is thus limited so far, so a conclusive assessment of their advantages is not yet possible. Other governments and civil society should watch carefully and learn from these experiences. However, they show that innovative approaches are possible if a government has the political will. It is suggested that such political will should be mobilised in Switzerland through serious documentation on best practice, persuasion and public campaigning.

Two Swiss groups have already suggested advocacy points in this regard.¹⁰⁵

- Separation of the NCP from the Directorate of Investment Promotion within SECO, creating an interdepartmental structure and integrating the human rights section. According to Swiss public officials such separation has in fact been the practice, but advocacy could be directed at institutionalising this arrangement.
- Creation of a council with equal representation from civil society to ensure that all viewpoints are taken into account in resolving conflicts. To accomplish such a task, the proposed council would need to have not just advisory powers but also oversight, meaning that the NCP would report to that council. Alternatively, reporting could be made to Parliament in a more detailed way than usual.
- Increase of financial resources
- Setting of clearer and fairer procedural rules, establishing binding deadlines, transparency, clear recommendations and follow-up measures. The adoption of these changes will depend largely on the outcome of the update process in the OECD. While reasonable, the adoption of detailed and stricter rules may not be acceptable to the Swiss Government. A mid-way solution could be worked out that defines the steps, approximate duration of each step and the rights and duties of each party.

In addition, OECD Watch has recommended that the NCPs should engage in promotional and training activities, which should be complemented with other government initiatives. As the group states, “all stakeholders should promote the Guidelines”.¹⁰⁶

The Swiss Government should be encouraged to engage fully in updating the OECD Guidelines. The Government seems willing to discuss ways to better incorporate human rights into the Guidelines as a result of John Ruggie’s reports and recommendations. Similar discussions should focus on the need to more clearly extend the reach of the Guidelines to supply chains by incorporating concepts such as “complicity” and “spheres of influence”, and the clarification of the reach of the Guidelines with respect to countries that are not OECD members or observers. Finally, the involvement of local and affected communities is

¹⁰⁵ Pain pour le Prochain and Action de Carême: in « Economie et droits humains », cited above, p. 21

¹⁰⁶ “Model National Contact Point”, OECD Watch, 2007, p. 13. The series of specific recommendations contained in this publication, including the keeping of an updated website, should be considered by the administration.

another key issue that the Government should be asked to put on the table and advocate with vigour.

Implementation or enforcement remains a crucial issue for the OECD Guidelines system. This also holds true for the Dutch and UK NCPs despite their novelty. As a measure of coherence, Professor Ruggie suggests some form of linkage between the recommendations of NCPs in specific instances and the consideration and granting of public support or credit to investment projects abroad of the concerned companies. Given that Switzerland already seems to exclude companies with pending specific instances before NCPs from its diplomatic protection, it seems possible that at least some level of consultation and coordination between SERV, the Government departments procuring goods and services and the NCP should take place, with a view to achieving a coherent policy toward the concerned companies.

4.4.3 The judiciary and access to justice

Holding companies legally accountable is possible under Swiss law in a number of cases. The frontiers of such legal accountability can be expanded through creative litigation. Swiss courts, as part of the State machinery, are also bound to respect and protect human rights. The classic avenues for holding companies legally accountable are the use of civil remedies (*responsabilité civil extra-contractuelle*) and criminal sanctions. In both areas there are important obstacles that need to be overcome but also enormous potential to be developed.

It has been stated frequently that judicial mechanisms are lengthy, expensive, inaccessible and uncertain. However, up to now, judicial protection of human rights is the sole means that guarantees legitimacy, enforcement, respect of due process and fairness. The Swiss judicial system is fundamentally independent and well-trained but a few significant reforms may improve access to the system by those affected by corporate behaviour, especially abroad.

Legal standing

Perhaps the single most important reform would be the introduction of class actions in civil liability cases. Class actions present the usual problems of coordinating and organising large numbers of people but have the advantage of power in numbers. As in the case of trade unions, class actions offset the sheer economic power of the company by pooling together resources and knowledge of a large group of victims. The introduction of this reform will not meet with significant technical problems (given the widespread and growing acceptance of this mechanism in the world) but may meet political resistance.

A viable option could be the reform of the right of associations to file legal complaints. Currently professional and trade organisations can request only declaratory relief and cessation injunctions but not compensation for pecuniary damages (see analysis above). The recent Law on Genetic Engineering allows “competent public entities” (*collectivité publique compétente*) to file lawsuits and also request compensation for damages. This could be taken as a basis to request the extension of that right to sue for damages in other cases concerning serious human rights and environmental damage.

Costs

Costs of legal representation, court fees and eventual payment of the victorious party's legal costs by the losing party in a civil suit serve as important deterrents to bringing cases against companies in Switzerland. The practice of pro bono legal advice is also very limited and the scope of public legal aid to cover civil suits originating from violations abroad is still untested. The expansion of legal aid has to be tested by filing cases before the court. In the Netherlands there is currently a Parliamentary proposal to expand legal aid to foreign victims of corporate abuse. In Switzerland, it is still uncertain whether such a measure is necessary because the existing legal aid system has not been tested in this respect.

The principle that the losing party in a civil suit for damages pays the costs of the other party and even the court fees is widely accepted. In many cases, the plaintiff is required to deposit a guarantee as security for eventually having to pay costs. This is an additional deterrent to victims' legal action. In certain jurisdictions such as South Africa, there are exceptions to this principle when the suit was filed in good faith and/or is about a fundamental constitutional right. In Colombia, there is a constitutional remedy for poor litigants (*amparo de pobreza*) that can help with legal costs. In Switzerland, the "loser pays" principle has been affirmed and the few exceptions that existed were eliminated in 2007. For instance, the current Law on the Protection of the Environment (LPE), article 55e, provides that the organisation that loses the case will pay the costs. This needs to be changed to provide for some flexibility in the law so that the judge considers factors such as good faith, poverty of means and/or the public interest aspect of the suit in deciding whether to waive the payment of costs.

Burden of proof

In civil procedure the party that asserts an act or argument must provide the necessary proof of it. This has proven problematic in cases involving corporations and cases of transnational nature. Legal reform has been suggested in order to allow the shifting of the burden of proof to the defendant corporation. In Swiss law there is no entitlement for the plaintiff to request full disclosure from the company, as in common law jurisdictions. However, recent legislation is slowly adopting some exceptions. Examples of this include the law on genetic engineering and the law on equality between men and women.

Article 33 of the Law on Genetic Engineering provides that the judge can be satisfied by the "convincing likelihood" that the damage was caused by a given action if conclusive proof cannot be established with certitude or cannot reasonably be demanded from the plaintiff. The judge is also given the power to order expertise on the facts without the parties requesting this. Article 6 of the Law on Equality establishes a lighter burden on the plaintiff to prove only that the discrimination has likely occurred. On this basis a presumption is established and the burden of proof is shifted to the defendant corporation.

Drawing from examples in Swiss legislation, it may be possible to expand cases in which the burden of the proof is alleviated for the plaintiff to cases concerning other equally important human rights and when the victims are particularly vulnerable.

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