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An Examination of Multinational Corporations' Accountability in the light of Switzerland's failed Responsible Business Initiative in the Covid-19 Pandemic Era

Introduction

The amount of international business done by multinational corporations has increased, with the attendant consequences of human rights violations¹ and abuse of the environment.² An MNC is an enterprise that operates in many countries but is managed from one country, customarily called the home country. It is “a legal person that owns or controls production, distribution, or service facilities outside the country in which it is based”.³ Developing countries that lack job opportunities for their masses benefit from MNCs as these MNCs expand their operations through their subsidiaries in these countries.⁴ The paradox of this

1 S.D. Bachmann, *Bankrupting Terrorism: The Role of US Anti – terrorism Litigation in the Prevention of Terrorism and Other Hybrid Threats: A Legal Assessment and Outlook*, “Liverpool Law Review” 2012, vol. 33, p. 96.

2 U. Baxi, *Human Rights Responsibility of Multinational Corporations, Political Ecology of Injustice: Learning from Bhopal Thirty Plus?*, “Business and Human Rights Journal” 2015, vol. 1, pp. 21–40.

3 N. Jägers, *Corporate Human Right Obligations: In Search of Accountability*, “Human Rights Research Series” 2002, vol. 17, p. 11. See also J. P. Mujiyambere, *The Status of Access to Effective Remedies by Victims of Human Rights Violations Committed by Multinational Corporations in the African Union Member States*, “Groningen Journal of International Law” 2017, vol. 5, p. 257.

4 J. Ahiakpor, *Multinational Corporations in the Third World: Predators or Allies in Economic Development?*, “Religion and Liberty” 2010, vol. 2.

is that while MNCs provide job opportunities for developing countries,⁵ they constantly engage in human rights violations and environmental pollution.⁶ At the international level, efforts, in the form of soft laws have been made to hold MNCs accountable for these violations, but they always fail to be effective.

Switzerland, a country with many MNCs that operate not just in the developing countries, but the whole world, recently went to the polls to vote on two referendums – the “Responsible companies – to protect human beings and the environment” and the “ban on financing producers of war material”. While the two failed to get the required cantonal votes, this article will focus on the “responsible companies – to protect human beings and the environment” initiative, popularly called the Responsible Business Initiative (RBI), which required Swiss companies to ensure that their subsidiaries and supply chains comply with UN human rights guidelines and a range of international environmental standards. There are many reasons why these referendums failed, including the fact that according to the government, given that Switzerland’s economy was already nosediving due to the Covid-19 pandemic, it would have hurt the Swiss economy evenmore to enforce strict accountability measures on Swiss MNCs.⁷ Although it is not certain to what extent the Covid-19 pandemic influenced peoples’ voting, politicians and business owners used it to campaign against the RBI. Therefore, in this article, the RBI and other international law policies on responsible business operation, including the UN Guiding Principles on Business and Human Rights, will be discussed. Also, how politicians politicised the Covid-19 pandemic as a reason for the rejection of the RBI will be ex-

5 E. Giuliani and C. Macchi, *Multinational Corporations’ Economic and Human Rights Impacts on Developing Countries: A Review and Research Agenda*, “Cambridge Journal of Economics” 2014, vol. 38, p. 479.

6 K. Omoteso and H. Yusuf, *Accountability of Transnational Corporations in the Developing World: The Case for an Enforceable International Mechanism*, “Critical Perspectives on International Business” 2017, vol. 13, pp. 54–71.

7 N. Illien, *Plan to Hold Corporations Liable for Violations Abroad Fails in Switzerland*, “The New York Times” 29 November 2020.

amined. Finally, it is recommended that economic considerations should not impede the enforcement of human rights and laws on protecting the environment. Another recommendation would be that the RBI could be altered after the Covid-19 pandemic ends, and then resubmitted for another referendum, since many other countries like the United States of America, the United Kingdom, and the Netherlands are beginning to move towards holding parent companies liable for acts of their subsidiaries abroad.

The Precursor to the Responsible Business Initiative: The UN Guiding Principles and Compliance by Swiss Multinational Corporations

This section looks at the provisions of the UN Guiding Principles and at whether Swiss MNCs comply with them. To achieve this, I will cite instances of severe allegations of human rights violations and environmental damage caused by Swiss MNCs. These were what led to the RBI.

The UN Guiding Principles

The recent attempts at making MNCs more responsible in respecting human rights in the context of business operation dates back to 1998, when the Working Group on the Working Methods and Activities of Transnational Corporations was established by a Sub-Commission of the UN Commission on Human Rights.⁸ There were other subtle legal frameworks, in the form of Corporate Social Responsibility by the OECD and the UN, which were indirectly imposed on MNCs through states' intermediary.⁹ This Working Group's efforts culminated into the Norms on the Responsibilities of Transnational Corporations and Other Business

8 P.P. Miretski and S.D. Bachmann, *The UN 'Norms on the Responsibility of Transnational Corporations and other Business Enterprises with Regard to Human Rights': A Requiem*, "Deakin Law Review" 2012, vol. 17, p. 7.

9 Ibidem, p. 10; Some of these also include the Convention on the Elimination of All Forms of Discrimination against Women, and the OECD and UN Anti – Bribery Conventions.

Enterprises with Regard to Human Rights,¹⁰ which was subsequently approved by the Sub-Commission in August 2003. States fiercely opposed the Norms because, among other things, it entailed that MNCs indirectly imposed human rights obligations on States. This duty also applies even when a state refuses to ratify the treaty or convention establishing these obligations.¹¹ In 2005, the Norms were abandoned after UN organs were tasked with coming up with regulations on MNCs' accountability,¹² and in 2011, the UN Guiding Principles were adopted.

The UN Guiding Principles are divided into three main parts – States' Duty to Protect Human Rights,¹³ Corporate Responsibility to Respect Human Rights,¹⁴ and Access to Remedy.¹⁵ These are the trinitarian themes of the UN Guiding Principles – protect, respect, and remedy. It is the responsibility of States to protect human rights in their territory against abuse by third parties, including business enterprises, by introducing laws, regulations, and policies that would address the investigation, punishment, and redress of such abuse.¹⁶ Even though States are required to make it clear to businesses domiciled in their territory that they must respect human rights throughout their operations,¹⁷ States are not

10 Sub-Commission on the Promotion and Protection of Human Rights, *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, 2003, UN ESCOR, 55th sess, 22nd mtg, Agenda Item 4, UN Doc E/CN.4/Sub.2/2003/12/Rev.2; S. Deva, *UN's Human Rights Norms for Transnational Corporations and other Business Enterprises: An Imperfect Step in the Right Direction*, "ILSA Journal of International and Comparative Law" 2004, vol. 10, p. 493; O. Martin-Ortega, *Business and Human Rights in Conflict*, "Ethics and International Affairs" 2008, vol. 22, p. 273; J. Campagna, *United Nations Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights: The International Community Asserts Binding Law on the Global Rule Makers*, "The John Marshall Law Review" 2004, vol. 37, p. 1205.

11 P.P. Miretski and S.D. Bachmann, *The UN 'Norms on the Responsibility...'* p. 8 and p. 10; J.G. Ruggie, *Business and Human Rights: The Evolving International Agenda*, "American Journal of International Law" 2007, vol. 101, pp. 825–826.

12 P.P. Miretski and S.D. Bachmann, *The UN 'Norms on the Responsibility...'* p. 9.

13 The United Nations Human Rights Council, *The UN Guiding Principles...* 1–10.

14 *Ibidem*, Principles 11–24.

15 *Ibidem*, Principles 25–31.

16 *Ibidem*, Principle 1.

17 *Ibidem*, Principle 2.

generally required to regulate the activities of their domestic businesses abroad, except where a crime has been committed, and a State is required to prosecute the crime based on the nationality jurisdiction.¹⁸ The justification for this Principle is that some business enterprises are independent of their home country, making extraterritorial regulation difficult. It is expected that all States will comply with the UN Guiding Principles, thereby making extraterritorial regulation amounting to double regulation unnecessary.

When it comes to business enterprises, they should respect human rights,¹⁹ and this obligation to respect refers to “internationally recognised human rights...as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organisation’s Declaration on Fundamental Principles and Rights at Work”.²⁰ Business enterprises must avoid causing human rights violations through their activities and immediately address such when they occur.²¹ Business enterprises are to carry out human rights due diligence by “assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed”.²² The UN Guiding Principles recognise the fact that unforeseen human rights abuse might occur even after a business enterprise has taken human rights due diligence, and when this occurs, “they should provide for or cooperate in their remediation through legitimate processes.”²³ It is worth noting that the duties imposed on business enterprises by the UN Guiding Principles apply regardless of “the size, sector, operational context, ownership, and structure” of the business enterprise.²⁴

18 Ibidem, Commentary to Principle 2.

19 Ibidem, Principle 11.

20 Ibidem, Principle 12.

21 Ibidem, Principle 13 (a).

22 Ibidem, Principle 17.

23 Ibidem, Principle 22 and its Commentary.

24 Ibidem, Principle 14.

On access to remedy, “[s]tates must take appropriate steps to ensure, through judicial, administrative, legislative, or other appropriate means, that when such abuses occur within their territory and/or jurisdiction, those affected have access to an effective remedy.”²⁵ Access to remedy can be achieved if the barriers preventing access to justice, such as prolonged legal matters, high costs of instituting claims in court, denial of justice regardless of the merits of the claims, partiality, lack of integrity, and the corruption of judicial officials, are removed.²⁶

In Switzerland, the Swiss National Action Plan (the Swiss NAP), which the Swiss government presented in 2016, was focused on implementing the UN Guiding Principles. The Swiss “NAP highlighted that corporations are expected to conduct human rights due diligence in their activities in Switzerland and abroad”,²⁷ and this plan had to be reviewed and updated after four years. So, there are revised National Action Plans 2020–2023, approved by the Swiss National Council on 15 January 2020, on the Implementation of the UN Guiding Principles on Business and Human Rights.²⁸ In the view of Swiss civil society organisations, the revised version of the Swiss NAP do not constitute a robust framework for ensuring that Swiss businesses, and their business partners abroad, respect human rights in their operations,²⁹ and it is asserted that it lacks rigour in comparison with the NAPs of other countries.³⁰ According to the Swiss Coalition for Justice, it is unfortunate that the Swiss NAP does not provide for any binding instrument, such as manda-

25 Ibidem, Principle 25.

26 Ibidem, Principle 26 and its Commentary.

27 N. Bueno, *The Swiss Responsible Business Initiative and its Counter – proposal: Texts and Current Developments*, “Business and Human Rights Journal Blog” 2018, no. 1.

28 Swiss Action Plan 2020–2023, 15 January 2020 <<https://globalnaps.org/wp-content/uploads/2020/05/beilage-01-directeurs-entreprises-l%E2%80%99homme-la-eda-bf.pdf>>.

29 The civil society organisations in Switzerland released a joint statement on their views on the revised Swiss NAP, entitled “Business and Human Rights: Switzerland’s new yet Incomplete Action Plan” 2020, p. 1, <<https://globalnaps.org/wp-content/uploads/2020/05/stakeholder-analysis-nap-020-2023.pdf>>

30 Ibidem, p. 2.

tory due diligence for MNCs,³¹ and this, as discussed in the next section, has resulted in many reports of human rights violations and damage to the environment abroad, as MNCs were not mandated to comply with the NAP.

Human Rights and Environmental Violations by Swiss Multinational Corporations

As one of the world's wealthiest countries, a substantial part of Switzerland's GDP is generated from MNCs "importing raw materials and turning them into high – value goods, such as pharmaceuticals or luxury watches".³² In addition, Switzerland has the world's largest MNC footprint and was named the most competitive nation in 2013.³³ Reports abound of Swiss MNCs' activities that violate human rights and destroy the environment, contrary to the requirements of the UN Guiding Principles. The actual test of the effectiveness of the UN Guiding Principles on Swiss MNCs is focused on their business and human rights compliance. In Bolivia, Sociedad Minera Illapa S.A., a 100% subsidiary of Glencore, a Swiss corporation, employs underage workers as young as eleven to work in mining operations. There are approximately 20 fatalities annually on the mining site, caused by accidents.³⁴ Besides this, the mining activity in that region "pollutes the Agua Castillo River, which is the primary source of drinking water for the surrounding villages".³⁵

31 Swiss Coalition for Corporate Justice, *Switzerland's disappointing Action Plan on Business and Human Rights*, "European Coalition for Corporate Justice" 13 December 2016 <<https://corporatejustice.org/news/359-switzerland-s-action-human-ights>>.

32 K. Hetze and H. Winistörfer, *Insights into the CSR Approach of Switzerland and CSR Practices of Swiss Companies in: Corporate Social Responsibility in Europe*, eds. S.O. Idowu, R. Schmidpeter and M.S. Fifka, Switzerland 2015, p. 154.

33 Ibidem.

34 Public Eye, *Glencore shirks its Responsibility in Bolivia*, "Public Eye" 2020 <<https://www.publiceye.ch/en/media-corner/press-releases/detail/mine-child-shirkts-esponsibility-in-bolivia>>

35 KonzernVerantwortungs Initiative, *Minors Toil in the Glencore Mine* <<https://konzern-initiative.ch/beispiel/minderjaehrige-schuften-glencore-ine/>>

The Swiss IXM buys copper ore from Namibia, where Bulgarian copper is processed and subsequently sold to other countries. Arsenic and other heavy metals are released during copper processing. The toxic arsenic is stored in sugar sacks in an open-air dump on a small town's outskirts.³⁶ In a 2018 study, it was found that the amount of arsenic and other toxic metals around the smelting area is very high,³⁷ and very toxic to human health when inhaled or upon skin contact.³⁸ LafargeHolcim has a subsidiary in Nigeria, the Wapco-Lafarge Ewekoro Cement Plant I & II, where there are reports of dust from the factory polluting the Ewekoro community. The dust's impact on the lives of inhabitants around the area and workers includes respiratory diseases,³⁹ as well as liver, lung and spleen damage.⁴⁰ Again, Glencore, through its 100% subsidiary, PetroChad Mangara, violates human rights in Melom, a village in south-western Chad. By-products of their oil production are channelled to the wastewater, but unfortunately, it spills to a nearby river, from which the villagers drink. According to a report, "dozens of residents suffered physical injuries including burns, skin lesions, and pustules on the skin. Others complained of blurred vision, stomach aches, internal pains, vomiting and diarrhoea after using, and sometimes drinking, the water from the river".⁴¹ The Swiss corporation Syngenta sold pesticides that

36 R. Schenkel, *Dump with Toxic Arsenic next to a Residential Area: A Swiss Company Purchases Copper from a Controversial Smelter*, "Aargauer Zeitung" 2020 <<https://www.aargauerzeitung.ch/schweiz/deponie-mit-giftigem-neben-firma-umstrittenen-chmelzerei-39594138>>.

37 I. Hasheela, *Contamination Mapping and Land Use Categorization for Tsumeb, Namibia*, "Communications of the Geological Survey of Namibia" 2018, vol. 19, p. 1.

38 D. Popov, *Dirty Precious Metals: Dumping European toxic waste in Tsumeb, Namibia*, Namibia 2016, p. 11.

39 M.N.Chukwu and N.I.Ubosi, *Impact of Cement Dust Pollution on Respiratory Systems of Lafarge Cement Workers, Ewekoro, Ogun State, Nigeria*, "Global Journal of Pure and Applied Sciences" 2016, vol. 22, pp. 1–5. See also E.E.Ekeng, S.E.Bejor, and I.E.Ibiang, *Effluent Effect from Lafargeholcim Cement Plant on Environment in Cross River State, South – South, Nigeria* "International Journal of Scientific & Engineering Research" 2017, vol. 8, pp. 731–740, where the authors analysed the health impact of Lafargeholcim business activities in another part of Nigeria.

40 KonzernVerantwortungs Initiative, *Lafargeholcim Puts People at Risk with Cement Dust* <<https://konzern-initiative.ch/beispiel/lafargeholcim/>>

41 RAID, *Glencore's Oil Operations in Chad: Local Residents Injured and Ignored* 2020, p. 4, <<https://konzern-initiative.ch/wp-content/uploads/2020/03/raid-glencore-had.pdf>>

contain toxic substances – paraquat and profenofos, already banned for use in the European Union and Switzerland, to Asia, Africa, and South America. Through long-term exposure, paraquat damages the lungs, eyes, kidneys and heart.⁴² It was only during the campaign for and against the RBI that the Swiss government banned the exportation of these pesticides.⁴³

These reports of human rights violations and environmental damage by subsidiaries of Swiss corporations necessitated the initiation and promotion of the RBI. The next section looks at how the RBI was intended to address these abuses and the role of the Covid-19 pandemic in the failure of the RBI.

The Responsible Business Initiative (RBI) and the Counter Proposal

In this section, attempts will be made to look at the provisions of the RBI, the provisions of the Counter Proposal, and other opposing opinions of the RBI, especially from business owners.

The Responsible Business Initiative

Barely five years after the UN Guiding Principles on Business and Human Rights (UN Guiding Principles) were endorsed by the United Nations Human Rights Council, the Swiss government presented the Swiss National Action Plan on the implementation of the UN Guiding Principles, which would require Swiss companies to ensure human rights due diligence in their activities in Switzerland and with their subsidiaries abroad.⁴⁴ In 2015, a group of non – government organisations submitted the RBI, which mandated that corporations and their subsidiaries would have to respect human rights and the environment. The RBI only gath-

42 F. Harvey, *Toxic Pesticides Banned for EU use Exported from UK*, “The UK Guardian” 10 September 2020 <<https://www.theguardian.com/environment/2020/sep/10/toxic-pesticides-banned-eu-se-xported-from-uk>>

43 K. Schafer, *Switzerland to stop Exporting Banned Pesticides*, “PAN” 15 October 2020 <<https://www.panna.org/blog/switzerland-stop-exporting-banned-pesticides#:~:text=This%20week's%20decision%20affects%20five,be%20exported%20from%20the%20country>>

44 N. Bueno, *The Swiss Responsible Business ...*, p. 1.

ered the required 100,000 signatures in 2016. If the RBI had succeeded, the Swiss parliament would have been obligated to amend the constitution to reflect the RBI.⁴⁵

The RBI proposed the below two far-reaching provisions as Article 101a to the Constitution of Switzerland:

1. The Swiss government was to take measures to strengthen respect for human rights and the environment through business. This was the general principle of the initiative and the general idea behind the RBI. As a result, the government could take measures in all legal fields additional to those changes required by the initiative text. Not only is the government competent to take the appropriate steps but was also mandated to do so.⁴⁶
2. The obligations of corporations with their registered office, central administration, or principal place of business in Switzerland shall be regulated by law in accordance with the following principles:
 - a) Such corporations and businesses under their control abroad, must respect *internationally recognised*⁴⁷ human rights and international environmental standards.
 - b) Corporations, together with their controlled businesses abroad, are required to carry out appropriate due diligence. This means that they must: identify real and potential impacts on internationally recognised human rights and the environment; take appropriate measures to prevent the violation of internationally recognised human rights and international environmental standards; cease existing violations, and account for the actions taken.

45 Swiss Federal Chancellery, *The Swiss Confederation – A Brief Guide*, “Communication Support”, 2019, p. 18.

46 Swiss Coalition for Corporate Justice, *The Initiative Text with Explanations*, “Factsheet V”, p.1 <https://media.business-humanrights.org/media/documents/files/documents/150421_sccj_factsheet_5_-_responsible_business_initiative.pdf>

47 Emphasis added.

- c) Corporations are also liable for damage caused by other corporations under their control, where they have, during business operation, committed violations of internationally recognised human rights or international environmental standards. Nevertheless, this liability will not apply where corporations prove that they took all due care.
- d) These will apply irrespective of the law applicable under private international law.

The RBI was far-reaching in its scope and intended legal regime. The RBI's objective was to make Switzerland comply with all internationally recognised human rights laws, including the UN Guiding Principles,⁴⁸ the Universal Declaration of Human Rights,⁴⁹ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁵⁰ the International Covenant on Civil and Political Rights (ICCPR),⁵¹ the OECD Guidelines for Multinational Enterprises,⁵² etc. and international environmental standards such as the rules set by the Vienna Convention for the Protection of the Ozone Layer,⁵³ the Montreal Protocol,⁵⁴ the Protection of Global Climate Resolution of 1988,⁵⁵ etc.

An interesting part of the RBI is that it used the phrase “*internationally recognised human rights standard*” while referring to the laws that

48 The United Nations Human Rights Council, *UN Guiding Principles ...*,

49 United Nations General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, GA Res 217 A (III) UN – Doc A/810 at 71.

50 The United Nations General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3.

51 The United Nations General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171.

52 Organisation for Economic Cooperation and Development, *OECD Guidelines for Multinational Enterprises* 2011 <<http://www.oecd.org/daf/inv/mne/48004323.pdf>>

53 UN General Assembly, *Vienna Convention for the Protection of the Ozone Layer*, 22 March 1985, reprinted in 26 I.L.M. 1516 (1987).

54 UN General Assembly, *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, reprinted in 26 I.L.M. 1541 (1987).

55 UN General Assembly, *Protection of Global Climate for Present and Future Generations of Mankind* resolution/adopted by the General Assembly, 6 December 1988, A/RES/43/53.

Swiss corporations must abide by. An argument could arise over what “internationally recognised” law means. Would a regional law, like the African Charter on Human and Peoples Rights,⁵⁶ for instance, be regarded as internationally recognised? An internationally recognised human rights standard is international law, and in its most straightforward meaning, international law is defined as those set of rules that “govern[] relations between *Independent States*.”⁵⁷ If this definition is correct, then the RBI would have forced the Swiss government to accept the rules set by the UN Intergovernmental Working Group (IGWG) in 2018 called the “Binding Treaty”⁵⁸ and its Optional Protocol,⁵⁹ because they are to guide multinational corporations’ activities in *independent states*. The Binding Treaty and its Optional Protocol aimed at reinforcing respect, advancement, safety, and enforcement of human rights in the light of transnational business activities,⁶⁰ which most of the European countries under the auspices of the European Union had already objected to,⁶¹ would have indirectly

56 African Union, *African Charter on Human and Peoples’ Rights*, 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982).

57 Emphasis added. Permanent Court of International Justice, ‘*Lotus*’, *France v Turkey*, Judgment No 9, PCIJ Series A No 10, ICGJ 248 (PCIJ 1927), (1935) 2 Hudson, World Ct Rep 20, 7th September 1927, p. 16.

58 The United Nations Intergovernmental Working Group (IGWG), *Binding Instrument To Regulate, In International Human Rights Law, The Activities Of Transnational Corporations And Other Business Enterprises* 6 July 2018 <<https://www.business-humanrights.org/sites/default/files/documents/DraftLBI.pdf>>. In 2019, the Zero Draft was revised into a well mature, well-constructed, and coherent document. The revised form provides that the Zero Draft will also guide all businesses, not just transnational corporations. See Openended Intergovernmental Working Group, *Transnational Corporations and Other Business Enterprises with Respect to Human Rights*, 2019. <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/OEIGWG_RevisedDraft_LBI.pdf>

59 The United Nations Intergovernmental Working Group (IGWG), *Draft Optional Protocol to the Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises*, October 2018 <<https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session4/Zero-DraftOPLegally.PDF>>

60 The IGWG, *Binding Instrument to Regulate...*, art 2.

61 CIDSE, *Pressure Growing for a UN Binding Treaty with or without the EU’s support*, “CIDSE” 19 October 2018 <<https://www.cidse.org/newsroom/pressure-growing-for-un-without-he-u-s-support.html>>

found its way into Swiss law, thereby enjoying the support of a developed country.

A more expansive definition of international law is that “international law is the totality of norms which have not been created by single states but by customary international law or by international treaties.”⁶² Nevertheless, it is doubtful whether this was the intention of the initiators of the RBI, because the RBI refers specifically to the UN Guiding Principles, which, as soft laws, are not even binding⁶³ and are not in the form of a treaty.

Another critical aspect of the RBI is “control”: “whoever controls a company should use this control to prevent violations of human rights and the environment. Whoever gains an economic benefit from another should also carry his share of the associated risks. If a Swiss company controls an economic entity abroad, Swiss law has the task to protect people from human rights and environmental damage abroad.”⁶⁴ Traditionally, corporations under control include subsidiaries within a corporate group and subcontractors or suppliers under certain conditions.⁶⁵ For instance, Glencore, an MNC with its mining headquarters in Baar, Switzerland, was on many occasions accused of engaging in environmental pollution,⁶⁶ child labour, and tax evasion in the Democratic Republic of the Congo, (DRC)⁶⁷ through its groups in DRC:Katanga Mining Limited and Mutanda Mining. Those that campaigned for the RBI highlighted how the agrochemical giant Syngenta is still marketing pesticides long banned in Switzerland in developing nations and

62 A. Von Verdross, *On the Concept of International Law*, “The American Journal of International Law” 1949, vol. 43, p. 435.

63 P.P. Miretski and S.D. Bachmann, *The UN ‘Norms on the Responsibility...’*, p.25.

64 Swiss Coalition for Corporate Justice, *The Initiative Text with Explanations...*, p. 2.

65 N. Bueno, *The Swiss Responsible Business ...*, p. 2.

66 S. Bradley, *Glencore Accused of Environmental Pollution in DRC*, “Swissinfo.ch” 27 November 2018 <<https://www.swissinfo.ch/eng/business-and-human-accused-drc/44574658>>

67 Business & Human Rights Resource Centre, *DRC: Glencore Copper – Cobalt Mine Allegedly Linked to Pollution, Child Labour and Tax Evasion; Including Past Company Responses*, “Business & Human Rights Resource Centre” 17 March 2020 <<https://www.business-humanrights.org/en/latest-news/drc-copper-to-tax-responses/>>

strongly condemned the small – particle contamination spewed from the Lafarge Africa Plc cement plant operated by LafargeHolcim in Nigeria.⁶⁸ So, in these instances, the RBI entailed that Glencore and Lafarge-Holcim would be liable for the Katanga Mining Limited and Lafarge Africa Plc actions, respectively, for their human rights abuses under the control principle of the RBI.

Under international law, conflict of laws is fundamental, especially when the parties involved are of different nationalities or the case in question has connections to more than one jurisdiction.⁶⁹ The RBI, in paragraph 5, provides that the new law would apply irrespective of applicable law under private international law. The reason for this provision is to make sure that the implemented RBI rules would be applicable regardless of conflict of laws rules. In other words, Swiss law would be applicable if a Swiss corporation were sued for violations committed abroad, as though they were committed in Switzerland. This state law-centred conflict-of-laws approach, even though it has been criticised because “domestic laws... are often ill-suited for the special needs of international trade”,⁷⁰ would have been great since most developing countries where these Swiss corporations have subsidiaries do not have effective laws for holding MNCs liable for human rights violation and environmental damage. This would have also made it possible for the implemented RBI to develop into a model for other countries to emulate.

68 Aljazeera, *Plan to Boost Swiss Firms' Global Liability Fails in Referendum*, “Aljazeera” 29 November 2020 <<https://www.aljazeera.com/news/2020/11/29/plan-to-boost-firms-global-liability-fails-in-referendum>>

69 Black’s Law Dictionary, *Conflict of Laws*, 11th ed. 2019.

70 M.J. Bonell, *The Law Governing International Commercial Contracts and the Actual Role of the UNIDROIT Principles*, “Uniform Law Review” 2018, vol. 23, p. 16.

The Counter Proposal and Oppositions to the Responsible Business Initiative

Unlike the RBI, which came by way of a constitutional amendment, the Swiss parliament came up with a Counter Proposal in the form of a modification of the Swiss Code of Obligations⁷¹ by including a new article 964bis. The Counter Proposal is a milder version of the RBI without creating civil liability for corporations. On certain human rights, environmental, social, anti-corruption, and employment-related issues, it imposes comprehensive non-financial reporting responsibilities. It also sets out additional duties of due diligence and accountability about conflict minerals and child labour.⁷² The Counter Proposal, just like the RBI, has three novelties that include a due diligence obligation, a non-financial reporting obligation, no civil liability but criminal sanctions. Bueno recognises a fourth element of the Counter Proposal to be “an overriding mandatory provision to ensure application of Swiss law in international matters.”⁷³

- a) The due diligence and transparency obligation: The board of directors is mandated to take measures to ensure that the corporation complies with the provisions for protecting human rights and the environment relevant to its areas of activities, including abroad. In other words, the board of directors must identify and assess actual and potential human rights and environmental risks; take measures to prevent risks and mitigate violations as well as monitor the effectiveness of the measures and account for how it addresses impacts.⁷⁴ This obligation extends to minerals and metals produced out of conflict areas⁷⁵ and regarding

71 The Swiss Code of Obligations SR/RS 22 220 Federal Act of 30 March 1911. This is the law that regulates contract law and corporations in Switzerland.

72 V.A. Duvanel, *The Swiss Responsible Business Initiative Has Been Rejected, but the Government's Counterproposal Will Likely Enter Into Force: Brief Overview of the New Duties for Companies*, “JDSUPRA” 10 December 2020.

73 N. Bueno, *The Swiss Responsible Business ...*, p. 2.

74 *Ibidem*; Proposed Art 716 abis (1)(5) Code of Obligation.

75 The “conflict minerals” is based on EU Regulation 2017/821. See Regulation (EU) 2017/821 of the European Parliament and of the Council of 17 May 2017 laying down supply chain

child labour⁷⁶ for corporations with a registered office, central administration, or principal place of business in Switzerland.⁷⁷ The Counter Proposal allows those corporations to comply with a certain degree of due diligence obligations in their supply chain if they are involved in the importation into Switzerland of certain minerals or metals or in the production in Switzerland of such minerals or metals; or provide goods or services manufactured or made using child labour. Unlike the RBI, the Counter Proposal sets a threshold for companies that are required to comply with the due diligence and transparency obligations. In order words, these obligations apply to corporations that satisfy two out of the following three thresholds – (i) a balance sheet of CHF40 million, (ii) a turnover of CHF80 million, and (iii) employment of 500 employees.⁷⁸ This is quite unlike the UN Guiding Principles, which apply regardless of “the size, sector, operational context, ownership, and structure” of the business enterprise.⁷⁹ Again, while the RBI would have required Swiss corporations to comply with *internationally recognised* human rights and environmental standards, the Counter Proposal limits its application only to binding provisions under international law ratified by Switzerland.

- b) Non-Financial Reporting Obligations: An annual report detailing due diligence procedures and processes used in relation to non-financial matters (human rights, environmental, social, anti-corruption and employment-related) would have to be provided by

due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict – affected and high – risk areas OJL 130, 19 May 2017, 1–20.

76 This requirement is based on the Dutch Child Labour Due Diligence Act, proposed to come into force in 2022.

77 See the analysis by J. Kilchmann, *RBI: What is the Most Important Content of the Counter-Proposal?*, “KPMG Blog!” 1 December 2020. <<https://home.kpmg/ch/en/blogs/home/posts/2020/12/responsible-business-initiative.html>>

78 Proposed Art 716abis (3) Code of Obligations.

79 The United Nations Human Rights Council, *The UN Guiding Principles...* Principle 14.

major Swiss public interest bodies (that is, public corporations and regulated financial institutions). The report will extend abroad to controlled corporations.⁸⁰ Corporations that meet the underlisted conditions are obligated to publish such a report on an annual basis: (i) corporations of a certain public interest in the sense of Article 2 (c) of the Audit Oversight Act,⁸¹ which together with their subsidiaries in Switzerland and abroad, (ii) employ in two successive financial years at least 500 full-time positions on annual average, and (iii) exceed at least one of the following thresholds in two successive financial years: a balance sheet total of 20 million francs and sales revenues of 40 million francs.

- c) No Civil Liability, but Criminal Sanctions: Failure to comply with the relevant annual reporting obligations or make false statements is subject to criminal liability, resulting in a fine of up to CHF 50,000 for negligence or CHF 100,000 for deliberate infringement.
- d) The application of Swiss law in an international matter: The CounterProposal provides that Swiss law will apply to determine whether the company domiciled in Switzerland conducted the required due diligence and whether an international provision relating to human rights or the environment that Switzerland ratified has been violated.⁸² This is also the same provision as that contained in the RBI.

Apart from the Swiss government's opposition to the RBI, business owners in Switzerland vehemently opposed the RBI and even the Counter Proposal. Several multinational executives spoke out against it, and corporations put out full-page Swiss newspaper advertisements urging

80 V.A. Duvanel, *The Swiss Responsible Business Initiative...*

81 *The Audit Oversight Act*, SR 221.302, Federal Law Of 16 December 2005 on the Approval and Supervision of Auditors. Hereinafter: Law on the Supervision of the Revision, Lsr.

82 Article 139a to the Swiss Code of Private International Law (SPIL)

people not to vote for the RBI.⁸³ In a letter dated 8 August 2019 and addressed to the Swiss Legal Affairs Committee of the Council of States, an association of 19 Swiss corporations expressed concern that, relative to other jurisdictions, the RBI and the Counter Proposal are unusual in their reach and implementation, and would thus expose Swiss corporations to substantial legal risks.⁸⁴ But this is not entirely the case, considering that countries like the UK, the Netherlands, and the US have developed special means, such as the foreign direct liability principle, for holding their MNCs accountable for breaches abroad. So, the RBI would not have been the first of its kind if it had succeeded. The president of the board of LafargeHolcim, called the demands of the RBI “a gigantic absurdity,”⁸⁵ while Novartis and Nestlé board members said that the RBI would make them reconsider investing in high – risk countries, because the RBI would open a floodgate of lawsuits from foreigners from these high – risk countries.⁸⁶ But the truth is that some countries have developed special means, like the foreign direct liability principle, for holding their MNCs accountable for breaches committed abroad. So, the RBI would not have been the first of its kind if it had succeeded.

The opposition also came from members of parliament. The parliamentarian Christa Markwalder opposed the RBI and argued for the rejection of the original text of the RBI. According to her, Switzerland accommodates MNCs and small and medium – sized businesses that will be impacted by the proposal, thus it will harm Switzerland as an

83 N. Illien, *Plan to Hold Corporations Liable...*

84 Business & Human Rights Resource Centre, *Companies Clarify Position on Swiss Mandatory Human Rights Due Diligence Initiative*, “Business & Human Rights Resource Centre” 18 September 2019.

85 V. Gogniat, *Beat Hess, président de LafargeHolcim: «L’initiative sur les multinationales est une absurdité gigantesque*, “Le Temps” 8 November 2020 <https://www.letemps.ch/economie/beat-hess-president-linitiative-newsletter_eco&utm_medium=email&utm_source=Newsletters&utm_term=0_56c41a402e-dd2f8f12f-10044885>

86 J.D. Plüss, *Big Multinationals in Switzerland have been nearly Unanimous in their Rejection of an Initiative to make Companies more Accountable for their Actions Abroad. What are they afraid of?*, “Swissinfo.ch”, 15 November 2020.

economic business location.⁸⁷ These claims are what opponents think the economic impact of the RBI would be, without giving careful consideration to human rights violations and environmental damage caused by Swiss MNCs.

The position put forward by Novartis and Nestlé board members, namely that if the RBI were implemented, it would lead to a floodgate of cases lodged by foreigners, did not consider the acts likely to lead to these cases. They failed to address the human rights and environmental grounds on which these cases would be based. In any case, countries would be more willing to allow an MNC with a strong mechanism for addressing human rights and environmental violations to conduct business in their territories.⁸⁸ So, a strict human rights and environmental protection mechanism in Switzerland would almost always make other countries more receptive to Swiss MNCs.

The Responsible Business Initiative during the Covid-19 Pandemic

The current Covid-19 pandemic is caused by SARS-CoV-2 (severe acute respiratory syndrome, coronavirus 2),⁸⁹ which was first reported in Wuhan, China. Subsequently, on 30 January 2020,⁹⁰ the World Health Organisation declared Covid-19 a public health emergency of international concern, and therefore a pandemic.⁹¹ This was after the WHO reported

⁸⁷ M. Vuilleumier, *Why Swiss Businesses Oppose Plans for Corporate Liability*, "Swissinfo.ch", 8 November 2020.

⁸⁸ For instance, many countries are afraid of dealing with Chinese corporations because it appears China does not have adequate mechanisms for addressing human rights infringements and environmental wrongs. See G. Karsten, *Perceptions, Practices and Adaptations: Understanding Chinese – African Interactions in Africa*, "Journal of Current Chinese Affairs" 2014, vol. 43, p. 1; B. Karin, *Chinese Human Rights Guidance on Minerals Sourcing: Building Soft Power*, "Journal of Current Chinese Affairs" 2017, vol. 46, p. 136.

⁸⁹ N. van Doremalen and others, *Aerosol and Surface Stability of SARS-CoV-2 as Compared with SARS-CoV-1* "The New York Journal of Medicine" 2020, vol. 382, p.1.

⁹⁰ Ibidem

⁹¹ The WHO, *Archived: WHO Timeline – COVID-19*, 27 April 2020 <<https://www.who.int/news/item/27-04-2020-who-timeline-19>>

7818 total confirmed cases globally, with China having the most cases, and 82 cases reported in 18 countries outside China. The WHO gave a risk assessment of very high for China and high at the global level.⁹²

On 24 January 2020, the first European case of Covid-19 was reported in France (the person had visited China),⁹³ while Switzerland had its first case on 25 February 2020.⁹⁴ Since then, the number of cases has dramatically increased, with many deaths recorded. As of 23 January 2021, the total number of global confirmed cases stood at 98,827,832, with 2,118,209 deaths.⁹⁵ Switzerland recorded a total of 509,279 cases, with 9034 deaths as of 23 January 2021.⁹⁶

The WHO and national governments issued guidelines and introduced safety measures. Some of these measures took the form of straightforward advice, such as avoiding touching one's nose, mouths, and eyes, sneezing into the elbow and not the palm, and others. Some other mandatory measures, like the restriction on movement, social distancing, shut down of businesses, schools, and places of worship, were enforced with sanctions. The employment rate reduced drastically while many businesses had to close permanently, especially small businesses.⁹⁷ Switzerland, a country with the highest presence of MNCs globally,⁹⁸ took a serious economic hit. Because of the second wave of the pandemic in Europe, Switzerland's State Secretariat for Economic Affairs said that gross domestic product would expand to 3.2%

92 The WHO, *Novel Coronavirus 2019 – nCoV: Situation Report – 10*, 30 January 2020 <https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200130-10-cov.pdf?sfvrsn=d0b2e480_2>

93 European Centre for Disease Prevention and Control, *Timeline of ECDC's Response to COVID-19* <<https://www.ecdc.europa.eu/en/covid-19/timeline-ecdc-esponse>>

94 The Local, *UPDATED: Switzerland confirms first case of coronavirus*, 25 February 2020 <<https://www.thelocal.ch/20200225/breaking>>

95 Worldmeter, *Covid-19 Coronavirus Pandemic*, 23 January 2021 <<https://www.worldometers.info/coronavirus/>>

96 Ibidem

97 A.W. Bartika and others, *The Impact of COVID-19 on Small Business outcomes and Expectations*, "PNAS" 2020, vol. 117, p. 17666; N. Donthu and A. Gustafsson, *Effects of COVID-19 on Business and Research*, "Journal of Business Research" 2020, vol. 117, p. 284.

98 K. Hetze and H. Winistörfer, *Insights into the CSR Approach...*, p. 154.

in 2021, slower than the 4.2% initially forecast.⁹⁹ The 2020 statistics from the International Monetary Fund showed that GDP decreased to – 5.3% as against 1.2% in 2019, GDP per capita was 81K USD in 2020 as against 82K USD in 2019. While Switzerland's unemployment rate increased from 2.3% in 2019 to 3.2% in 2020, the General Government Gross Debt grew from 42.1% in 2019 to 48.7 in 2020.¹⁰⁰ According to Marius Faber et al, “the spike in the number of employees on short – time work in March and April 2020 is unprecedented and dwarfs even the strong increase following the Great Recession of 2007”.¹⁰¹

Apart from the direct impact of the Covid-19 pandemic on Switzerland's economy, the pandemic also affected the operations of Swiss MNCs in other countries. Most countries were in lockdowns from the middle of March 2020 until they were partially lifted in late May in some countries. The second wave of the Covid-19 pandemic forced governments to consider another round of lockdown, but many countries feared that their economy may never survive another total lockdown.¹⁰²

This was the situation when Swiss nationals went to the polls to vote for or against the RBI on the 29 November 2020. The outcome is somewhat surprising. It gained a narrow majority of votes, with 50.7 percent supporting it and 49.3 percent against it, but it failed because it was opposed by the majority of the Swiss cantons, or states. In Switzerland, for a referendum to be successful, it must win both the popular votes and the cantonal votes,¹⁰³ and the RBI could only gather 8.5 cantonal votes

99 C. Bosley, *Swiss Economic Recovery Delayed by Second Virus Wave*, “Bloomberg” 15 December 2020.

100 The International Monetary Fund, *World Economic Outlook International Monetary Fund: A Long and Difficult Ascent* “Washington DC” October 2020, 55.

101 M. Faber, A. Ghisletta, and K. Schmidheiny, *A Lockdown Index to Assess the Economic Impact of the Coronavirus*, “Swiss Journal of Economics and Statistics”, 2020, vol. 156, p. 2.

102 K. Adam, *Second Wave of Covid-19 in Europe leads to new Restrictions but no National Lockdowns*, “The Washington Post” 12 October 2020. The Irish Times had predicted that most businesses that survived the first lockdown may not be able to survive a second one. See C. Taylor, *Covid-19: Businesses that Survived First Lockdown may not Survive a Second*, “The Irish Times”, 19 October 2020.

103 C. Pierre, *Swiss Politics for Complete Beginners*, Slatkine, 2nd ed, 2015, p. 24.

out of 23. The rejection of the RBI by voters automatically activated the government’s Counter Proposal, with its narrower requirements.¹⁰⁴

	Yes	No	% Yes	% No
People	1,299,173	1,261,673	50.73%	49.27%
Canton	8.5	14.5		

Source: Swissinfo.¹⁰⁵

The table above shows that the referendum result is unprecedented, since it is the first time in more than half a century that a referendum measure has failed on cantonal grounds, despite achieving a popular majority in the whole country.¹⁰⁶ The reason for this is bound up with the uncertainties created by the Covid-19 pandemic. According to Imogen Foulkes, a BBC reporter, “the campaign for and against the [RBI] was a hard – fought one, and in the end economic worries, exacerbated by the Covid-19 pandemic, influenced voters”,¹⁰⁷ many of whom were already affected economically by the pandemic.

The massive opposition from the Swiss government and business sector, who worried that Swiss businesses would be affected by the rules in the middle of an economic recession linked to the Covid-19 outbreak,¹⁰⁸ worked in persuading some voters to vote against the RBI, despite its general acceptance by the masses before the Covid-19 pandemic outbreak. Monika Rühl, the CEO of *economiesuisse* – a Swiss corporate union, had suggested that due to the coronavirus pandemic, the high cost

104 The Local, *UPDATED: World’s Strictest Corporate Responsibility Plan Fails in Swiss Vote*, 29 November 2020, <<https://www.thelocal.ch/20201129/swiss-reject-worlds-corporate-responsibility-ules>>

105 Swissinfo, *Vote Results: November 29, 2020*, <<https://www.swissinfo.ch/eng/vote-results—november—2020/46121138>>

106 I. Foulkes, *Swiss vote to reject Responsible Business Initiative*, “BBC News” 29 November 2020.

107 Ibidem.

108 N. Illien, *Plan to Hold Corporations Liable...*

of carrying out the RBI due diligence requirements would be counter-productive because corporations were already in great difficulty.¹⁰⁹

It is not certain whether the Covid-19 pandemic affected Switzerland more than other countries. In fact, it can be argued that when compared to other countries, from an economic point of view Switzerland has so far managed the crisis successfully.¹¹⁰ The opposition from politicians was not based on any empirical evidence that suggests that the effect of the Covid-19 pandemic was such that an introduction of a stricter accountability measure on Swiss MNCs would have further caused damage on the Swiss economy. They were merely afraid of the future the new regime would bring, but from our discussion in the next section, the idea behind the RBI is not entirely new, as the US, the UK, and the Netherlands, all hold their MNCs liable for human rights violations and environmental damage committed abroad under their various laws.

The US, UK and The Netherlands

Looking at other jurisdictions, an MNC could be accountable in its home country, if its home country's laws are used for human rights infractions. In the US, there is a law known as the Alien Tort Statute (ATS). The ATS is a clause of the US Judiciary Act of 1789¹¹¹ where, for a tort only, the federal courts have authority over any civil lawsuit brought by a foreigner regarding acts perpetrated in breach of the law of nations or a US con-

109 Read the full interview of Monika Rühl with the Swissinfo.ch at M. Vuilleumier, *Why Swiss Businesses Oppose Plans for Corporate Liability*, "Swissinfo.ch", 8 November 2020 <<https://www.swissinfo.ch/eng/why-swiss-business-against-he-corporate-responsibility--initiative/46137670>>

110 The Federal Council, *Impact of the COVID-19 Crisis on Switzerland's Foreign Economy*, 20 January 2021, <<https://www.admin.ch/gov/en/start/documentation/media-releases/media-releases-council.msg-d-2045.html>>

111 Judiciary Act of 1789, ch 20, § 9(b), 1 Stat 73,77. The ATS is also called the Alien Tort Claims Act (ATCA), but we only refer to the ATS. For a detailed analysis of the ATS, see S.D. Bachmann and I. P. Ugwu, *Hardin's 'Tragedy of the Commons': Indigenous Peoples' Rights and Environmental Protection: Moving Towards an Emerging Norm of Indigenous Rights Protection?*, "Oil and Gas, Natural Resources, and Energy Journal" 2021, vol. 6, no. 4, pp 579–583.

vention.¹¹² For the subject matter of this law to be triggered, the following must be present: 1) a foreigner sues, 2) for a tort only, and 3) based on a tort perpetrated in breach of a US convention or the law of nations.¹¹³

In the case of *Doe v Unocal*,¹¹⁴ an oil and gas firm registered in the US with its subsidiary in Myanmar was accused of human rights violations when the corporation used the military to displace the locals and forced them to provide labour. The suit was instituted in a US Federal Court, but the Defendant corporation decided to settle out of court in 2003.¹¹⁵ Again, Pfizer, an American multinational pharmaceutical corporation, was sued in a Federal court in the US for human rights violations committed in Nigeria. In *Abdullahi v Pfizer, Inc.*,¹¹⁶ the company was accused of administering its new medication, the *Trovan* vaccine, which had not gone through the required clinical trials. Many Nigerians that received the vaccine died, while those that survived it were permanently incapacitated. The court held that “non-consensual drug trials violate customary international law”,¹¹⁷ and so a US Federal Court would have jurisdiction over

112 28 USC § 1350; A.J. Bellia Jr and B.R. Clark, *The Alien Tort Statute and the Law of Nations*, “The University of Chicago Law Review” 2011, vol. 78, p. 445; E.A. Young, *Universal Jurisdiction, the Alien Tort Statute, and Transnational Public-Law Litigation After Kiobel*, “Duke Law Journal” 2015, vol. 64, p. 1023; J.N. Drobak, *The Alien Tort Statute from the Perspective of Federal Court Procedure*, “Washington University Global Studies Law Review” 2014, vol. 13, p. 421; M. Koebele, *Corporate Responsibility under the Alien Tort Statute*, “Developments in International Law” 2009, vol. 61; T.G. Banks, *Corporate Liability Under the Alien Tort Statute: The Second Circuit’s Misstep Around General Principles of Law in Kiobel v. Royal Dutch Petroleum Co.* “Emory International Law Review” 2012, vol. 26, p. 229; M. E. Danforth, *Corporate Civil Liability Under the Alien Tort Statute: Exploring Its Possibility and Jurisdictional Limitations* “Cornell International Law Journal” 2011, vol. 44, p. 663.

113 S. Bachmann, *Terrorism Litigation as Deterrence under International Law – From Protecting Human Rights to Countering Hybrid Threats* “Amicus Curiae” 2011, vol. 87, p. 23; B. Jacek, *Alien Invasion: Corporate Liability and its Real Implications Under the Alien Tort Statute* “Seton Hall Law Review” 2013, vol. 43, p. 287; T. Adamski, *The Alien Tort Claims Act and Corporate Liability: A Threat to the United States* “International Relations” “Fordham International Law Journal” 2011, vol. 34, p.1511.

114 *Doe v Unocal* 395F 3d 932, 9th Cir 2002.

115 Earth Rights International, *Doe v. Unocal; The First Case of its Kind: Holding a U.S. Company Responsible for Rape, Murder, and Forced Labour in Myanmar*, <<https://earthrights.org/case/doe-v-unocal/>>.

116 *Abdullahi v Pfizer, Inc.* 562F 3d 163, 2d Cir 2009.

117 *Ibidem*, pp. 166–167.

the case under the ATS. After repeated appeals, Pfizer opted to settle out of court.¹¹⁸ Most of the successful ATS cases involving MNCs ended up settled out of court.¹¹⁹

On 1 May 2019, the Hague District Court in the Netherlands accepted jurisdiction over a case instituted in 2017 by the wives of some of the victims of Shell Petroleum Development Company of Nigeria (SPDC). The SPDC is a subsidiary of the Royal Dutch Shell, Shell Petroleum NV, Shell Transport, and Trading Company, all registered in the Netherlands and the UK. The Nigerian military killed the victims after they protested against environmental pollution and other forms of human rights abuses carried out by the SPDC. Again, the Hague Court of Appeal, early in 2021, held that Royal Dutch was liable for the actions of its subsidiary in Nigeria, the SPDC, based on the common law doctrine of negligence and duty of care. The Court of Appeal held that a foreign anchor defendant in the Netherlands with a relationship with another defendant from another country could be held accountable for the other defendant's negligence.¹²⁰ This decision sets the stage for further business human rights litigation in Europe, and it is the first case where a parent company has been found to owe a common law duty of care to claimants residing abroad, especially local communities affected by its subsidiary's activities.¹²¹

118 J. Stephens, *Pfizer Reaches Settlement Agreement in Notorious Nigerian Drug Trial*, "Washington Post" 4 April 2009.

119 There are other ATS cases involving MNCs like *Wiwa v Royal Dutch Petroleum Co.*, 226 F3d 88 (2d Cir 2000), *Jesner v Arab Bank, PLC* 16–499 US 584 (2018), etc. International organisations can also be sued in the US by victims of human rights and environmental abuse. For instance, see *Jam et al. v International Finance Corporation* 586 US 2019. Even though the US courts are no longer willing and desirous of granting an ATS case claims, it is important to realise that the ATS still exists and can be used to hold MNCs accountable for violating human rights and the environment.

120 See *Milieudefensie v Royal Dutch Shell Plc and Shell Petroleum Development Company of Nigeria Ltd.* 200.126.849 (29 January 2021).

121 R. English, *Parents Company owes Duty of Care in Transnational Cases – Hague Court of Appeal*, "Human Rights Blog" 1 March 2021. <<https://ukhumanrightsblog.com/2021/03/01/parent-company-owes-of-hague-court-f-appeal/>>.

The UK also has a unique mechanism for holding MNCs headquartered in the UK accountable for human rights and environmental standards breaches. The UK Supreme Court developed the foreign direct liability doctrine, wherein victims of human rights violations and other infringements by subsidiaries of companies registered in the UK can sue for damages and compensation.¹²² In *Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe and Others*,¹²³ Vedanta Resources Plc, a company registered in the UK, and its Zambian subsidiary, Konkola Copper Mines Plc, were accused of discharging waste that polluted the local waterways and caused harm. The UK Supreme Court agreed with the victims that the argument that a parent company may be liable for the conduct of its overseas subsidiary and might proceed to trial in England. The ruling highlights the need for MNCs to be mindful of the fact that non – UK plaintiffs can bring claims against them in the English courts where they are headquartered in the UK or with their parent companies in the UK.¹²⁴ According to Pamela Towela Sambo,¹²⁵ “[t]his decision paves the way for the first trial in the UK involving environmental damage committed in a foreign jurisdiction by an overseas subsidiary of a UK – domiciled company”.

Conclusion

The Covid-19 pandemic has affected almost all areas of human activity, and not least is its influence on the attempt made in Switzerland to

122 H. Ward, *Governing Multinationals: The Role of Foreign Direct Liability* “Royal Institute of International Affairs’ briefing paper” 2001, vol. 18, p. 1–6; see also C. Rachel, *Parent Company Direct Liability for Overseas Human Rights Violations: Lessons from the UK Supreme Court* “University of Pennsylvania Journal of International Law” 2021, vol. 42, no. 3, pp. 519–579.

123 *Vedanta Resources Plc and Konkola Copper Mines Plc v Lungowe and Others* [2019] UKSC 20.

124 Norton Rose Fulbright, *UK Supreme Court Ruling on Parent Company Liability for Acts of its Overseas Subsidiaries*, February 2020 <<https://www.nortonrosefulbright.com/en-za/knowledge/publications/721042ff/uk-supreme-ruling-for-subsidiaries>>

125 P. T. Sambo, *Vedanta Resources PLC and K C and Konkola Copper Mines PLC v Lungowe and Others 2019 UKSC 20* “SAIPAR Case Review” 2019, vol. 2, p. 14.

hold MNCs accountable for human rights abuses and environmental violations abroad. Using the failed Swiss RBI, this article has analysed how Switzerland's supposed economic downturn in the middle of a pandemic was used to campaign against the November 2020 referendum on the "responsible companies – to protect human beings and the environment" initiative. There has never been a referendum that garnered the popular votes in more than half a century and yet failed to get the required number of cantonal votes in Switzerland. But the way the Covid-19 pandemic was emphasised during the campaign contributed to the RBI referendum breaking this record. Contrary to those that opposed it, the requirements of the RBI can be found in some other countries like the US, where foreigners can bring civil lawsuits, under the ATS jurisdiction, for actions perpetrated in breach of the law of nations or a US convention. US MNCs have been sued several times for the acts of their subsidiaries abroad. Again, there is an emerging principle of law called "the foreign direct liability doctrine" in the UK, whereby victims of human rights violations and other infringements by subsidiaries of companies registered in the UK can sue for damages and compensation in a UK court. This is also the new trend in the Netherlands as the Hague District Court accepted jurisdiction in 2019 to consider the claims by victims of the Royal Dutch's subsidiary in Nigeria. In early 2021 the Dutch Court of Appeal also held the Royal Dutch liable for its subsidiary's negligence in Nigeria. This Dutch Court of Appeal decision was also given in the middle of the Covid-19 pandemic, and the impact of the pandemic on the economy of The Netherlands was never an issue, and neither did it affect how the decision was analysed and welcomed. So, the pandemic was politicised in Switzerland even when there was no empirical evidence to show that the implementation of the RBI would negatively affect Switzerland's economy. The RBI would not have been so unique to warrant the argument that victims of abuses from other countries would have unduly targeted Swiss MNCs.

Even though the RBI was defeated in the middle of a pandemic, Swiss MNCs have learned lessons regarding their attitude towards human rights violations and environmental damage.

1. Swiss MNCs are now aware that Swiss nationals are worried that a significant source of the country's GDP could be from proceeds of human rights and environmental violations.
2. New reporting and due diligence obligations will be put in place instead, not as contained in the RBI but as the Counter Proposal stipulates, even though the obligations are very narrow.
3. There was no empirical evidence to show that implementing the RBI provisions in the middle of the Covid – 19 pandemic would negatively affect Switzerland's economy. This is especially so, seeing that the Netherlands' Court of Appeal issued a judgment in the middle of the pandemic against a company registered in the Netherlands, which will open the gate for other such cases in the Netherlands.

In conclusion, it is recommended that those that initiated and campaigned for the RBI should make minor alterations to the RBI and subsequently initiate a new campaign for it to be taken to a referendum, long after the Covid-19 pandemic has been curbed. Again, Swiss MNCs should intensify their corporate social responsibilities, if only to assure Swiss nationals that they are responsible business enterprises. Strict compliance with human rights and environmental laws by MNCs from a country leads to a general acceptance of those MNCs to operate in other countries. This is particularly so with MNCs from China, as some countries are sceptical about them because the Chinese government is not too good with human rights and environmental protection. The Covid-19 pandemic should not be the reason why Swiss MNCs should not go above the minimum requirements of human rights laws and environmental standards. In the defeat of the RBI, "one small step for [Switzerland], one giant leap for the [international community]" was missed in MNCs' accountability for human rights and environmental violations.

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SUMMARY

The Accountability of Multinational Corporations in the Light of the Failure of the Responsible Business Initiative of Switzerland during the Covid-19 Pandemic: An Examination

This article examines the efforts made so far in holding multinational corporations (MNCs) liable for human rights and environmental violations in the light of Switzerland's failed referendum in November 2020, during the peak of the Covid-19 pandemic. It also looks at other international law instruments that have the potential to hold MNCs accountable. While these other laws have failed to achieve the desired result of holding MNCs accountable, the referendum, if it had succeeded, would have triggered a binding vote on a constitutional amendment to intro-

duce compulsory human rights due diligence for companies incorporated in Switzerland, the first of its kind in Europe. The consequence would have been that victims of Swiss MNCs' violations would have had the right to bring claims in Switzerland against a defaulting Swiss MNC. Unfortunately, the referendum failed, and to some extent the Covid-19 pandemic negatively affected the referendum outcome, because it was greatly politicised. It became a lost opportunity on what would have been “one small step for [Switzerland], one giant leap for the [international community]”.

Keywords: Multinational Corporations, Covid-19 Pandemic, Environmental and Human Rights, Swiss Responsible Business Initiative, UN Guiding Principles.

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