Greening White-Collar Crime: Transforming Anti-Money Laundering Enforcement into an Instrument Against Environmental Crime

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Abstract

This paper provides a response to and analyses the practical implementation of the Financial Action Task Force's 2021 Report on Money-Laundering from Environmental Crime in Switzerland. In doing so it seeks to show-case the role of anti-money laundering in combating environmental crime, within the FATF framework and beyond. It argues that the FATF is the structurally and politically ideal forum to force action in financial sectors on humanitarian issues and showcases the FATF's impact on a traditional financial hub such as Switzerland. It then demonstrates that, while administrative environmental law and enforcement fails to address environmental crimes at the core of the Report, Swiss statutory and jurisprudential anti-money laundering law can apply extraterritorially to prosecute profiteers from environmental degradation. While recognizing their political limitations, the paper then proposes legislative and policy amendments to permit the implementation of the FATF's Report in Switzerland.

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I. Introduction[1]

The "polluter pays principle" is one of the core concepts of environmental policymaking in OECD countries to ensure that polluters bear the environmental and social cost of their actions.[2] The Financial Action Task Force (FATF) proposes to push the principle one step further: the polluter launders. In 2021, it published its Report on Money-Laundering from Environmental Crime, which identified environmental crimes as the fourth most profitable transnational crime generating between USD $110 and 281 billion in criminal gain every year.[3] Not only are these criminal offenses devastating for ecosystems and public health, they also cause significant revenue leakages from natural-resources rich countries. These proceeds then transit physically or virtually through financial and commodities hubs – among them Switzerland.[4] At this point, their illicit origin has already been dissimulated during the supply chain and perpetrators use the financial sector to launder these proceeds. Despite this, risk assessments in financial markets and corresponding investigations targeting these kinds of financial flows have been limited to date.[5] The Report therefore recommends that FATF members criminalise money-laundering from environmental offenses.[6] The practical consequence of this proposal is the following: whereas the countries where the original crime occurred lack the political will or resources to pursue environmental crimes, countries central to the international financial market step in to extraterritorially prosecute their illicit profiteer.

The FATF has an established position as a vital player in efforts to build "a new international financial regulatory architecture".[7] Its previous reports, though not legally binding, successfully set widely followed enforcement standards in anti-money laundering. The practical implementation of its proposals should therefore be investigated. This paper argues that the FATF is a structurally and politically ideal forum to address humanitarian causes such as environmental degradation. The paper therefore seeks to analyse whether Swiss statutory and case law can accommodate environmental crimes as predicate offenses to money-laundering, and whether extraterritorial application of these anti-money laundering provisions can combat the practical difficulty of cross-border prosecution of environmental crimes. The paper will then attempt to propose both legislative and policy amendments to implement the proposals of the FATF.

The paper first examines the FATF Recommendations and their impact in Switzerland (Section II) and the FATF's 2021 Report's proposals and shortcomings (Section III). It illustrates the financial and transporting characteristics of environmental crimes permitting central financial and commodities hubs to find a jurisdictional nexus on their territory (Section

[1] The author thanks Prof. Dr. iur. Zulauf for supervising this paper, and encouraging the topic to be pursued.

[2] *See*: Finn R. Førsund, 'The Polluter Pays Principle and Transitional Period Measures in a Dynamic Setting', in *The Swedish Journal of Economics, Vol. 77, No. 1, Public Finance: Allocation and Distribution* (March 1975); OECD, 'The Polluter Pays Principle', (26.2.2008).

[3] Financial Action Task Force, 'Money-Laundering From Environmental Crime', (July 2021), p.5.

[4] FATF, '2021 Report', p. 15.

[5] FATF, '2021 Report', p. 7.

[6] FATF, '2021 Report', pp. 7, 43.

[7] M.T. Nance, 'The Regime That FATF Built': An Introduction To The Financial Action Task Force', in Crime Law Soc Change 69, (2018), p. 110.

IV). Section V then analyses Switzerland's risk exposure to environmental criminal proceeds, Swiss environmental and white collar-crime law and corresponding enforcement structures, and political considerations furthering and limiting the FATF Report's implementation. It then provides practical and legislative solutions to position Switzerland as an enforcer against transnational environmental money-laundering operations. Section VI concludes.

II. The Financial Action Task Force

Organized by the G-7 in 1989, the Financial Action Task Force (FATF) is the international policy-making body for anti-money laundering and countering the financing of terrorism.[8] It develops and issues Standards, which, though non-binding, are intended to drive its member states to national legislative and regulatory reforms in these areas.[9] It does so, in particular, by reviewing its member states' money laundering and terrorist financing practice and law to ensure that implement the FATF Standards fully and effectively, and by holding countries to account that do not comply.[10]

1. The 40 Recommendations

The FATF first published its 40 Recommendations[11] in 1990 with a view to preventing financial institutions from (inadvertently) laundering proceeds from drug trafficking operations.[12] Law enforcement had failed to successfully catch criminal organisations engaging in their core activities. Alternatively, these organisations could be targeted at the most vulnerable stage of the laundering process, i.e. when placing illegally gained proceeds into the legitimate financial system.[13] This, argued the G-7, would curb the commercial viability of drug operations, and weaken its perpetrators' source of income.[14] The first set of Recommendations therefore sought to fill the oversight gaps in the financial system in three ways: implementing enforcement measures, reenforcing the role of financial intermediaries in the fight against money-laundering and strengthening international cooperation.

Central to the first dimension is that countries should identify their money laundering, terrorist financing and proliferation financing risk and adopt policies and inter-agency cooperation mechanisms dedicated to these phenomena based on a *risk-based approach*

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[8] Financial Action Task Force, 'International Standards on Combating Money Laundering and the Financing of Terrorism & Proliferation', (FATF, Paris, France, 2012-2022), p. 1.

[9] Ursula Cassani, *Droit pénal économique*, (Basel, 2020), Helbing Lichtenhahn Verlag, p. 169.

[10] Cassani, *Droit pénal économique*, p. 169.

[11] To facilitate the reader's distinction between the FATF Recommendations (the 40 Standards) and its recommendations (proposals for further action or best practices beyond the 40 Standards), this paper will use "Recommendation" if one of the 40 Standards is concerned, and "proposal" for the small-r recommendations.

[12] Financial Action Task Force, '1990 Annual Report', pp.3-4.

[13] United Nations Office on Drugs and Crime, E4J University Module Series: Organized Crime – Money-Laundering.

[14] *See*: G-7 Summit Economic Declaration, (July 17, 1989), §53; *see also*: JL Quillen, The International Attack on Money Laundering: European Initiatives, in: Duke Journal on Comparative & International Law, p. 213 (1991).

(Recommendations 1-2).[15] The *risk-based approach* allows the responses to be ratcheted up or down in intensity depending on the risk associated with a kind of transaction or client. It ultimately determines the strength of preventive measures implemented by governments and financial institutions, as well as the severity of sanctions applied.[16] First, countries must criminalise money-laundering and terrorist financing (Recommendation 5).[17] In order to target a broad spectrum of criminal activities, countries are required to set all "serious offenses" as predicate offenses to money laundering, in line with the Vienna Convention and the Palermo Convention and as defined by the FATF Glossary (Recommendation 3).[18] Countries are further required to identify, confiscate, and freeze or seize property laundered or proceeds from, or instruments used in or intended for use in money laundering or predicate offenses (Recommendation 4).[19] Countries are then bound to implement international financial sanctions targeting terrorism financing (Recommendation 6) and proliferation and financing of weapons of mass destruction (Recommendation 7).[20] This marks the international cooperation dimension of enforcement measures imposed by the FATF.

Recommendations 9-23 establish preventive measures against money-laundering and terrorism financing. Financial institutions are required to undertake customer due diligence measures (Recommendation 10)[21] and adopt additional surveillance mechanisms for politically exposed persons (Recommendation 12)[22] and cross-border correspondent banking relationships (Recommendation 13).[23] Countries should ensure that natural or legal persons that provide money or value transfer services (MVTS) and its agents are registered and monitored (Recommendation 14).[24] The same goes for virtual asset service providers (Recommendation 15).[25] Financial institutions which rely on third parties or foreign branches and subsidiaries for their services are required to supervise their activities and remain responsible for their compliance (Recommendations 17 & 18).[26] Following the *risk-based approach*, financial institutions should apply enhanced due diligence measures to business relationships with persons from high-risk countries, and comply with countermeasures called for by the FATF (Recommendation 19).[27] Should a financial institution suspect that their client had engaged in money-laundering or terrorist financing, it is required to report its suspicions to a financial intelligence unit (Recommendation 20)[28] without tipping off the client

[15] FATF, 'International Standards', pp. 10-11.
[16] FATF, 'International Standards', p. 8.
[17] FATF, 'International Standards', p. 13.
[18] FATF, 'International Standards', p. 12.
[19] FATF, 'International Standards', p. 12.
[20] FATF, 'International Standards', p. 13.
[21] FATF, 'International Standards', p. 14.
[22] FATF, 'International Standards', p. 16.
[23] FATF, 'International Standards', p. 16.
[24] FATF, 'International Standards', p. 16.
[25] FATF, 'International Standards', p. 17.
[26] FATF, 'International Standards', pp. 17-18.
[27] FATF, 'International Standards', p. 19.
[28] FATF, 'International Standards', p. 19.

(Recommendation 21).[29] The FATF has also identified certain non-financial businesses and professions (DNFBPs) which are at a higher risk of carrying out transactions related to money-laundering and terrorism financing. These businesses and professions are therefore also required to comply with the same due diligence and disclosure measures as set forth above (Recommendations 22-23).[30] Often, complex legal structures are used to conceal the identity of a person making a transaction. The FATF therefore requires its members to obtain and record information on the beneficial owners and potential *de facto* controlling agents of legal entities (Recommendations 24-25)[31] through its financial institutions and government authorities. To ensure compliance with these obligations, financial institutions and DNFBPs are subject to regulation and supervision by their government's competent authorities (Recommendations 26-28).[32]

The FATF also requires its countries to deploy an adequate information and law enforcement infrastructure to follow up on reports of money-laundering, terrorist financing or suspicious transaction reports related thereto. Members therefore need to establish a financial intelligence unit (FIU) which centralizes and disseminates this information (Recommendation 29)[33], introduce specialized law enforcement and financial investigation authorities (Recommendations 30-31)[34] and implement systems tracing and, when required, restrain and confiscate physical cross-border transportation of currency and bearer negotiable instruments (Recommendation 32).[35] Countries are also required to hold statistics recording the effectiveness of their AML/CFT systems (Recommendation 33)[36] and sanction financial institutions and DNFBPs, as well as their directors and senior management, for failure to comply with AML/CFT requirements (Recommendation 35).[37]

Money-laundering and terrorist financing is an inherently transnational phenomenon. It therefore requires a strong international cooperation network among FATF members' government agencies, as well as between their law enforcement authorities. The foundation for this cooperation is adherence to and ratification of international conventions concerning efforts against anti-money laundering, corruption and terrorist financing (Recommendation 36).[38] This provides a baseline for definitions and international standards beyond the FATF framework, which inform cooperation efforts. Central to the cooperation is the rendering of rapid and effective mutual legal assistance among countries (Recommendation 37).[39] The FATF requires its members not only to freeze and confiscate assets on behalf of other countries

[29] FATF, 'International Standards', p. 19.
[30] FATF, 'International Standards', pp. 19-20.
[31] FATF, 'International Standards', p. 22
[32] FATF, 'International Standards', p. 23.
[33] FATF, 'International Standards', p. 24.
[34] FATF, 'International Standards', pp. 24-25.
[35] FATF, 'International Standards', p. 25.
[36] FATF, 'International Standards', p. 25.
[37] FATF, 'International Standards', p. 26.
[38] FATF, 'International Standards', p. 27.
[39] FATF, 'International Standards', pp. 27-28.

(Recommendation 38)[40], but to extradite (or themselves sanction) potential offenders (Recommendation 39)[41]. These measures, as well as information sharing obligations, trump any domestic legal obligations of confidentiality or dual criminality requirements.[42] Countries must deploy equally effective information and enforcement infrastructure to realize these transborder enforcement measures.

2. Political Dimension and Legitimacy

The 40 Recommendations were revised in 1996, 2003 and in 2012 to extend the scope of action beyond drug-related money-laundering. The revisions have arguably responded to political events only distantly related to anti-money laundering enforcement. Immediately following the terrorist attacks on September 11, 2001, for instance, the FATF issued eight special additional Recommendations on terrorist financing.[43] This had the effect of internationalising the "war on terror" waged by the US. The FATF's 40 Recommendations have also been recognized by the International Monetary Fund and the World Bank as the international standards for combating money laundering and terrorist financing.[44] In 2014, the U.N. Security Council, acting under Chapter VII of the Charter of the United Nations, also adopted a resolution strongly urging U.N. member states to implement the FATF standards.[45] While the language used by the Security Council ("urges") may not rise to the level necessary to legally bind U.N. members to adopt the FATF standards,[46] the resolution is nonetheless a strong endorsement of an intergovernmental body not affiliated with the United Nations. It should also be noted that the number of U.N. members far exceeds the number of FATF members, meaning that countries not agreeing to FATF monitoring were nonetheless encouraged to align their laws and practices with the FATF standards. These modifications would in part affect cross-border transactions and target certain country nationals over others in accordance with the above-mentioned *risk-based approach*. The FATF has therefore arguably helped steer its members', as well as non-members', foreign policy measures.

As of 2021, the FATF counts 37 countries, and 2 regional organisations as full members.[47] These members have agreed to be monitored by the FATF to ensure compliance with the 40 Recommendations. As mentioned above, the Recommendations are *soft law* norms, meaning that members are not legally bound by them. However, the FATF has implemented a

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[40] FATF, 'International Standards', p. 28.

[41] FATF, 'International Standards', p. 28.

[42] FATF, 'International Standards', pp. 27-28.

[43] Financial Action Task Force, 'Annual Report 2001-2002', (21 June 2002), p. 1.

[44] Financial Action Task Force, 'FATF 40 Recommendations [2004 Version]', (October 2003), p. 2.

[45] United Nations Security Council, Res. 2161 (2014), S/RES/2161, §§ 10-11.

[46] The interpretation of the mandatory nature of SCRs is debated widely. Once view is that,"as general practice nowadays, when the Council intends a provision to be mandatory, the resolution contains or refers to an Article 39 determination, and includes the words "acting under Chapter VII" or reference to an appropriate article thereof, as well as the word "decides"; Michael C. Wood, 'The Interpretation of Security Council Resolutions', (Max Planck Yearbook of United Nations Law, 1998), p. 82. In this case, while the mention of "acting under Chapter VII indicates a mandatory nature of the resolution, the action verb used does not reflect that a decision has been made.

[47] Financial Action Task Force, 'FATF Members and Observers'.

system of mutual evaluation reports analysing legislative measures and practices adopted by member states, which has proven to effectively ensure compliance.[48] FATF members are required to submit self-assessments. Missions regrouping other members and the secretariat come to the members' territory to verify its legislation and practice, and suggest improvements.[49] The results are then made public in mutual evaluation reports. These reports have proven an effective *naming and shaming* mechanism.[50] Countries subject to increased monitoring (figuring on the *grey list*), or labeled non-compliant (figuring on the *black list*) may then be targeted by multilateral sanctions.[51] The FATF may for instance bindingly require countries and banks to shore up surveillance of financial transactions from specific countries, or to implement counter-measures.[52] The *naming and shaming* approach, as well as the sanctions, have also been extended to non-members, i.e. countries who had not agreed to be subject to FATF monitoring or their Recommendations.[53] The FATF also issues reports on best practices on the implementation of its Recommendations. In some cases, this has included new predicate offenses to money-laundering, or extended reporting obligations to entities not involved in anti-money laundering enforcement. These reports have consequently extended the FATF's purview; while these reports are explicitly non-binding guidance documents, failure to adhere to new best practices can weaken a member's compliance with the Recommendations and trigger a sanction.

3. FATF's Impact in Switzerland

The United States became the first state to criminalise money laundering in 1986.[54] This was one of the many steps the Reagan Administration took to target illicit narcotics trafficking in its "war on drugs".[55] While a few states, mostly within the G7, had legislation pending to that effect at the time, there was no overlap on a definition of money-laundering, nor on a solution to it.[56] In 1988, the United Nations established the first international definition of money laundering in the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, also called the Vienna Convention. In an effort to curb profits made by narcotics organisations, the Convention obliged States to "deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for

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[48] Cassani, *Droit pénal économique*, pp. 167-168.

[49] Financial Action Task Force, '1990-1991 Report', (Paris, 13.5.1991), pp. 3-4.

[50] Cassani, *Droit pénal économique,* pp. 167-168.

[51] Financial Action Task Force, 'Topic: High-risk and Other Monitored Jurisdictions'.

[52] Financial Action Task Force, 'High-risk and Other Monitored Jurisdictions'.

[53] *See*: Valsamis Mitsilegas, 'The Global Governance Of Transnational Crime: Implications For Justice And The Rule Of Law', pp. 66 ff, in M.J. Christensen and R. Levi (Eds.), *International Practices Of Criminal Justice: Social And Legal Perspective,* (2017, Routledge).

[54] M.T. Nance, 'The Regime That FATF Built', p. 114.

[55] *See:* Preamble to Anti-Drug Abuse Act of 1986, which includes the Money Laundering Control Act of 1986 at its Subtitle H; Anti-Drug Abuse Art of 1986, 21 USC 801, (Oct. 27, 1986 [H.R. 5484]), *see also*: Cornelius Friesendorf, *US Foreign Policy And The War On Drugs – Displacing The Cocaine And Heroine Industry,* (London, New York: Routledge, 2007).

[56] M.T. Nance, 'The Regime That FATF Built', p. 114.

so doing."[57] However, the Convention took 10 years to negotiate and was considered ineffective in the fast-paced evolution of the financial market.[58] In response, the United States proposed to establish a task force with a one-year mandate to catalog all existing money-laundering statutes.[59] On the United States' and France's initiative, the G-7 countries met a year later in Paris to agree on the need for re-enforced measures against drug-related money laundering.[60]

At the time, Switzerland had just successfully (and very publicly) prosecuted Haci Mirza and four accomplices for the largest recorded drug smuggling operation recorded in the country.[61] With the help of the United States and Italy, Switzerland had intercepted 100 kilos of cocaine and heroin worth 2.5 million dollars.[62] The publicity had come at the tails of another drug-related scandal: only one year prior, Shakarchi Trading, a currency trading company based in Switzerland had been discovered to launder money from a large-scale drug operation in the United States.[63] Concerns were mounting that the Swiss financial market was serving as a laundromat for illicit narcotics operations world-wide. It was only natural, then, that Switzerland would follow the United States a few months later at the Paris summit to become one of the first 15 countries to agree to adhere to the FATF Recommendations.[64]

After the Shakarchi Trading scandal Switzerland fast-tracked the implementation of a provision within the Swiss Criminal Code penalizing money-laundering and was therefore already in compliance with Recommendation 5.[65] In fact, despite Switzerland's public reputation as a silent accomplice to money-launderers, many of the 40 Recommendations were inspired by recent Swiss legislative modifications strengthening international mutual legal assistance and enforcing contractual due diligence obligations for banks. During its first round of evaluations in the 1992-1993 cycle, Switzerland was praised as a potential "example to other Member governments in their own implementation of the FATF's Recommendations".[66] Its only shortcoming was the lack of transparency and due diligence obligations for the non-banking financial sector.[67] This criticism was reiterated in the 1997-1998 cycle[68]; the Swiss Banking Act had entered into force just a few months before the mutual evaluations took place and its effect on the non-banking financial sector was yet to be seen.[69] The subsequent mutual evaluations were less stellar: in 2005, Switzerland was considered to be in non- or insufficient conformity with the Recommendations and was subject to a more stringent and frequent

[57] United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, 20 December 1988, E/CONF.82/14, Preamble.
[58] M.T. Nance, 'The Regime That FATF Built', p. 114.
[59] M.T. Nance, 'The Regime That FATF Built', p. 114.
[60] G-7 Summit Economic Declaration, (July 17, 1989); FATF, '1990 Annual Report'.
[61] Le Soir, 'Le procès de la drogue qui a fait', (Le Soir, 8.4.1989).
[62] Andreas Heller, 'Der Grenzgänger –Aus dem Leben eines Geldkuriers', (NZZ, 28.2.2001).
[63] AP News, 'Swiss-based Company Named In Largest U.S. Probe", (AP News, 24.2.1989).
[64] FATF, '1990 Annual Report', p. 3.
[65] Financial Action Task Force, 'Annual Report 1992-1993', (June 29, 1993), §63.
[66] FATF, 'Annual Report 1992-1993', §67.
[67] FATF, 'Annual Report 1992-1993', §66.
[68] Financial Action Task Force, Annual Report 1997-1998, (June 1998), §47-48.
[69] FATF, 'Annual Report 1997-1998', §47-48.

evaluation process henceforth.[70] The lagging legislative modifications continued to be a pattern in the reprimands: Switzerland seemed to introduce legislation amending its shortcomings only months, or a year at most prior to any upcoming evaluations, in 2005[71], in 2016[72] and again in 2020[73]. Evaluating its progress was therefore difficult and slow.

The delay can be attributed in part to the lengthy legislative consultation process in Switzerland, as well as the strong resistance within certain business sectors to the progressive ratcheting up of transparency and disclosure obligations required by the FATF[74]. The revision process of the Swiss Anti-Money Laundering Act following the 2005 FATF evaluation was particularly animated.[75] Financial intermediaries worried that a supranational organization was imposing measures that would disadvantage them with respect to other, more laxist countries.[76] Their intervention in the legislative process was striking and reduced a very ambitious revision to its bare bones.[77] The proposal to extend the scope of application of the Swiss Anti-Money Laundering Act to the surveillance of bearer shares and to include stock-exchange related offenses as predicate offenses to money-laundering were abandoned.[78] Only measures against terrorism financing and other predicate offenses were kept in the novel law.[79] The intermediaries' worries revealed themselves as unfounded; a report by the federal administration showed that even the more ambitious proposals were in line with initiatives in other countries and that there would not be significant economic costs involved in the legislative modifications.[80] The abandoned proposals were finally included in subsequent revisions: persons dealing in goods commercially (dealers) accepting more than CHF 100'000.- in cash were included in the AMLA in 2014[81], insider trading and aggravated stock manipulation offenses became predicate offenses in 2012[82] and bearer shares were prohibited in 2019[83]. The delay may have given the Swiss financial sector more time to strengthen their

[70] Financial Action Task Force, 'Third Mutual Evaluation Report On Anti-Money Laundering And Combating The Financing Of Terrorism – Summary Switzerland' (14.10. 2005).
[71] FATF, 'Third Mutual Evaluation Report', §2.
[72] Financial Action Task Force, 'Anti-Money Laundering And Counter-Terrorist Financing Measures – Switzerland, Mutual Evaluation Report' (December 2016), §419.
[73] Financial Action Task Force, 'Anti-Money Laundering And Counter-Terrorist Financing Measures – Switzerland, 3rd Enhanced Follow-up Report & Technical Compliance Re-Rating' (January 2020), pp. 6-7.
[74] *See*: Cassani, *Droit pénal économique*, p. 242.
[75] Cassani, *Droit pénal économique*, p. 242.
[76] Cassani, *Droit pénal économique*, p. 242.
[77] Cassani, *Droit pénal économique*, pp. 242-243.
[78] Cassani, *Droit pénal économique*, p. 242.
[79] Cassani, *Droit pénal économique*, p. 243.
[80] Federal Finance Department, 'Mise en œuvre des recommandations du GAFI à l'étranger et conséquences économiques des recommandations, Rapport en exécution des postulats Stähelin 05.3175 et 05.3456 des 17 mars et 17 juin 2005', (May 2006), pp. 83 ff.
[81] Federal Council, 'Message concernant la mise en œuvre des recommandations du Groupe d'action financière (GAFI), révisées en 2012', (FF 2014 585).
[82] Federal Act of 15 June 2018 on Financial Institutions (Financial Institutions Act, FinIA), modification of 28 September 2012 (RO 2013 1103), entered into force on 1 May 2013.
[83] Art. 622 al. 1 bis CO revised by the Loi fédérale sur la mise en œuvre des recommandations du Forum mondial sur la transparence et l'échange de renseignements à des fins fiscales, (FF 2019 4313).

due diligence and transition to FATF-compliant activities, but earned Switzerland diplomatic tensions with their FATF peers in the process.

Despite these internal obstacles, the FATF's impact on Swiss law and practice is striking. To comply at least partially with the FATF Recommendations, Switzerland amended eight domestic statutes, including the Civil Code, the Code of Obligations, the Federal Act on Intermediated Securities, the Federal Act on Debt Collection and Bankruptcy, the Criminal Code, and the Federal Act on Money Laundering.[84] The Federal Council also established the Interdepartmental Coordination Group on Combating Money Laundering and Terrorist Financing (GCBF) in 2013, which published the first report on the national assessment of money laundering and terrorist financing risks in Switzerland in June 2015.[85] Among the many legislative modifications, three of which stand out which arguably run counter to fundamental characteristics of Swiss financial practice and diplomacy.

First, Swiss banks have had to substantially modify onboarding procedures of their clients and pry into background information on beneficial ownership. While these measures were not unique to Switzerland, it can be argued that Switzerland expressly offered certain corporate structures designed to obscure shareholder identity. This anonymity benefitted controlling shareholders who sought to "backseat-drive" their company's activity.[86] The FATF imposed the disclosure of shareholder identity and shareholding percentage and the abolition of bearer shares[87] which could previously be transferred to third parties freely, only requiring that the holder's identity was announced.[88] It also required Swiss banks to disclose suspicious potential clients to authorities without tipping the former off (art. 10a AMLA). This was a strong reversal of established practices in Swiss banks, who would previously simply decline to pursue a client relationship if any red flags appeared in the onboarding process.[89] Banks were in fact so partial to this practice, that it took 3 mutual evaluation reports, including admonishments for lack of compliance by the FATF for it to change.[90] Banks were also required to continuously monitor and request updated information from long-time established clients, and terminate contractual relationships with them in case they refused to comply (art. 5 AMLA). This ran counter to an almost caricaturist deference to these grandfathered-in clients.

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[84] Marina Abbas, 'Le rôle de la Suisse dans la lutte contre les crimes fiscaux', (12.6.2017), p. 7.

[85] Interdepartmental Coordinating Group On Combating Money Laundering And The Financing Of Terrorism (CGMF), 'Report On The National Evaluation Of The Risks Of Money Laundering And Terrorist Financing In Switzerland', p. 4.

[86] David Ledermann and Andreas Rötheli, 'Shareholder Activism in Switzerland: Overview', (Thomson Reuters, Practical Law).

[87] *See*: Financial Action Task Force, 'FATF Guidance, Transparency And Beneficial Ownership', (October 2014).

[88] *See*: 685a al. 1 aCO, *e contrario*; art. 697i aCO. The beneficial owner only had to be announced if he held more than 25% of shares or voting rights in the company, 697j aCO.

[89] *See*: FATF, '2016 Mutual Evaluation Report', §316.

[90] *See*: FATF, 'Third Mutual Evaluation Report 2005', §34; Financial Action Task Force, 'Rapport d'évaluation mutuelle, Rapport de suivi, Lutte contre le blanchiment de capitaux et le financement du terrorisme – Suisse', (27.10.2009), §§125-126; FATF, ' 2016 Mutual Evaluation Report', §320.

Secondly, Switzerland – who had a reputation as a fiscal paradise[91] – was compelled to introduce aggravated tax offenses as predicate offenses to money-laundering.[92] Prior to 2016, there was only one offense violating the states' fiscal interests, which was introduced in 2009 in an administrative statute to criminalise aggravated smuggling.[93] In 2012 the FATF revised its Recommendations to include fiscal offenses as predicate offenses.[94] This created a big stir in Switzerland, not least because Swiss representatives had not agreed to this kind of imposition at the time of signature. Despite initial misgivings, the Swiss Criminal Code was amended in 2016 to include aggravated tax crimes as predicate offenses to money-laundering and the existing tax crime mentioned above was extended to aggravated indirect tax fraud not limited to transborder smuggling.[95] It should however be noted that this modification is much narrower than that which occurred in neighboring countries.[96]

Thirdly, Switzerland was required to improve its financial information exchange program with other countries, thereby reducing the scope of the Swiss banking secret.[97] The requirement met resistance within the Communication Bureau (MROS) whose task it was to serve as an FIU[98], and to cooperate with its international counterparts within the Egmont Group setting – a worldwide organization of 139 FIUs formed in 1995 to exchange intelligence, establish FIU standards and monitor them. The MROS refused to transmit identifying information on clients without passing through mutual legal assistance channels.[99] After the Egmont Group threatened to expel Switzerland over its refusal to cooperate[100], a 2013 legislative revision compelled the MROS to comply with the intelligence sharing obligation.[101] It also permitted the MROS to request additional information about banking clients from financial intermediaries (art. 11a AMLA).

While Switzerland has adapted its financial neutrality and banking secrecy practices following other international pressure mechanisms – be it over financial scandals, to appease diplomatic partners, to ratify UN Conventions or to comply with international sanctions programs – the FATF's impact on the Swiss financial market has been remarkable. Its influence is all the more impressive if we consider the soft-law nature of the FATF Recommendations and the profit that Switzerland makes from its financial market.

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[91] *See*: Sébastien Guex, 'The Emergence of the Swiss Tax Haven, 1816–1914', in *Business History Review*.

[92] Loi fédérale sur la mise en oeuvre des recommandations du Groupe d'action financière, révisées en 2012, (RO 2014 1389; FF 2014 9465); Message du Conseil fédéral FF 2014 585).

[93] Art. 14 al. 4 DPA, introduced at the urging of FATF by Loi fédérale du 3 octobre 2008 sur la mise en œuvre des recommandations révisées du Groupe d'action financière, (RO 2009 361; FF 2007 5919).

[94] Financial Action Task Force, 'Recommandations du GAFI – Informations pour les médias', (Paris, 16.2.2012), p.2.

[95] Loi fédérale sur la mise en œuvre des recommandations du Groupe d'action financière, révisées en 2012, (RO 2014 1389; FF 2014 9465; Message du Conseil fédéral FF 2014 585).

[96] Cassani, *Droit pénal économique*, p. 199.

[97] See: FATF, 'Third Mutual Evaluation Report 2005', p. 13.

[98] Art. 1 Ordonnance sur le Bureau de communication en matière de blanchiment d'argent, RS 955.23.

[99] Cassani, *Droit pénal économique,* p. 244.

[100] Cassani, *Droit pénal économique*, p. 244.

[101] Federal Act of 15 June 2018 on Financial Institutions (Financial Institutions Act, FinIA), modification of 28 September 2012 (RO 2013 1103), entered into force on 1 May 2013.

4. Transferability of Success to Environmental Crime

Some authors have argued that the FATF's success is highly dependent on its specific background and capabilities, and that its transferability as a global governance model for other issues is limited.[102] The pivot of the new German presidency towards combating financial offenses generated by environmental crimes[103] might therefore rouse skepticism as to (1) whether the FATF is the proper forum for such measures and (2) how effective these proposals might be. This paper argues that it is the proper forum to address environmental crime.

First, the FATF has identified that environmental crime is closely associated with other more typical forms of white-collar crime: criminal organisations use natural resource extraction processes to launder money[104], and employ extracted materials, like gold or precious stones, to make payments outside of financial intermediaries.[105] It also fuels corruption, while converging with other serious crimes such as drug trafficking and forced labour.[106] Investigating the environmental crime may therefore reveal important intelligence about other crimes the FATF is dedicated to combat. Given the FATF members' keen interest in eradicating narcotics trafficking and illegal arms trade, as well as preventing loss of tax revenue, they might be favorable to entertain alternative investigative methods rooted in the persecution of environmental crime.

Secondly, criminal organisations routinely use the same international transit routes to smuggle narcotics and arms, as they do for trafficking illegally harvested natural resources.[107] These routes are already under increased scrutiny by national law enforcement and customs officers as imposed by the FATF Recommendations. These officers may easily be trained to identify products stemming from environmental crimes. The threshold to extend physical surveillance to these kinds of products is therefore substantially lower than if another international forum would impose the implementation of an additional surveillance system superfluous to the existing one.

Thirdly, environmental crimes have many characteristics in common with narcotics trafficking for which the FATF was originally created. There is a strong international political motivation to tackle environmental degradation. The latter is also, in one form or another, the subject of many international conventions and conferences, with many states pledging to common goals to reduce emissions, deforestation, extraction and pollution. This is hardly surprising; environmental degradation is not only a pressing issue for social and natural welfare, but also a financially costly one. It is estimated that environmental crime generates around USD $110 to 281 billion in criminal gains each year.[108] According to UNEP, it is the

[102] *See* e.g.: Anja P. Jakobi, P. Jakobi, "Global Networks against Crime: Using the Financial Action Taskforce as a Model?", in: *International Journal*, (Vol 70, Issue 3, 2015).
[103] Dr. Marcus Pleyer, 'Priorities For The Financial Action Task Force (FATF) Under The German Presidency Objectives For 2020-2022', p. 2.
[104] FATF, '2021 Report', p. 14.
[105] FATF, '2021 Report', p. 14.
[106] FATF, '2021 Report', p. 11.
[107] FATF, '2021 Report', p. 20.
[108] FATF, '2021 Report', p. 5.

world's fourth most profitable criminal enterprises after drug smuggling, counterfeiting and human trafficking.[109] It is, much like drug trafficking, a transnational crime which uses financial and non-financial markets to move the products derived from the environmental crime – timber, stone, waste – from one country to another. In most cases the environmentally harmful activity occurs in natural-resources rich but cash-poor countries where there is a lack of will or capacity to strike down the activity.[110] This activity therefore leaks tax and licit sale revenues from their source countries. Finally, it relies heavily on trade-based fraud and shell and front companies to launder gains from illegal logging, illegal mining, and waste trafficking.[111] Criminals also frequently co-mingle legal and illegal goods early in the resource supply chains to conceal their illicit source.[112] Combined with the absence of statutes prohibiting environmental crimes and lack of enforcement in the source countries, these dissimulation methods render the discovery and persecution of the predicate offense difficult. Targeting the chain of events once the proceeds enter licit trade and financial markets, as provided by the FATF for narcotics trafficking, is therefore a feasible way to disrupt environmental crime.

Fourthly, and in the same vein as the second point, the FATF has led member countries and non-members alike to introduce legislation and institutions dedicated to identifying illicit financial activities. Worldwide, banking clients and customers must fill in forms providing a borderline intrusive amount of information about their profession, residence and tax status among other data. As addressees of FATF Recommendations, banks are required to submit suspicious transaction data to surveillance authorities. These same institutions have also been transformed into indirect enforcers of U.S. sanctions law and tax law, with every client having to declare their financial connection to and potential residence in the U.S., as well as their ties to politically exposed persons or institutions targeted by economic sanctions whether or not these clients were in fact territorially or *ratione personae* subject to U.S. law. Much ink has already been spilled about the extraterritorial reach of U.S. finance law and the ensuing homogenizing effect on non-U.S. financial markets.[113] It is no surprise then that a forum dedicated to financial surveillance spearheaded by the United States would have the following effect: arguably no other domain of law (except perhaps for data protection guidelines emanating from the European Union) has seen as much self-imposed compliance as anti-money

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[109] United Nations Environment Programme, 'Environmental Crimes Are On The Rise, So Are Efforts To Prevent Them', (21.0.2018).

[110] FATF, '2021 Report', pp. 18-19.

[111] FATF, '2021 Report', pp. 11-19, 18.

[112] FATF, '2021 Report', p. 19.

[113] *See* e.g.: Joanne Scott, 'Extraterritoriality and Territorial Extension in EU Law', The American Journal of Comparative Law, Volume 62, Issue 1, Winter 2014, (pp. 87–126); Michael Gruson, 'The U.S. Jurisdiction Over Transfers Of U.S. Dollars Between Foreigners And Over Ownership Of U.S. Dollar Accounts In Foreign Banks', 2004 Columbia Business Law Review 721; Scott M. Flicker, Jason Fiebig, Kwame Manley, 'United States of America v. Reza Zarrab: The Long Reach of U.S. Sanctions May Have Just Gotten Longer', (October 2016; Shearman & Sterling LLP, 'It doesn't take much: Expansive jurisdiction in FCPA matters', (March 2009); Susan Emmenegger, 'Extraterritorial Economic Sanctions and their Foundation in International Law', Arizona Journal of International & Comparative Law, Vol. 33, n. 3, 2016 (pp. 631 – 660); Susan Emmenegger, Thirza D beli, 'Extraterritorial application of US sanctions law' in: Andrea Bonomi, Krista Nadakavukaren Schefer (eds.) US Litigation Today: Still a Threat For European Businesses or Just a Paper Tiger? Conference proceedings from the 29th Journ e de droit International priv du 23 juin 2017. Publications de l'Institut suisse de droit compar : Vol. 85 (pp. 231-257). (Schulthess Verlag, Genf/Zürich)

laundering law in line with FATF Recommendations. As anti-money laundering law established a dense net of control on customer data and transactions, it evolved into an instrument with much potential, from tracing tax avoidance to sanctioning countries.[114] Countries have been (more or less) happy to follow along with this continuous expansion. Extending this "catch-all solution" of tracing (virtual or physical) transactions to products of environmental crime, and minimally amending regulations already dedicated to surveillance and enforcement of other kinds of transactions is therefore a small burden to countries– both in terms of effort and ideological analogizing.

Fifthly, this paper argues that there is no other international forum which provides the tools necessary to target environmental crime. The FATF regroups a relatively small number of countries. This facilitates the deepening of commitments and integration between member states.[115] As already mentioned, the resulting commitments have a spill-over effect on non-member states, meaning that the dilution of commitments commonly seen with broadening or enlargement of membership is avoided with the FATF. This one-two punch feature is unique to the FATF and distinguishes it from environmental fora which fail to set ambitious goals due to a lack of consensus among a large number of negotiating countries.[116] As mentioned above, the FATF member states also happen to be transit countries for products from environmental crime.[117] These countries may be relatively unaffected by the predicate offenses which are the subject of environmental conventions, and consequently feel less concerned with these conventions' implementation. However, these transit countries have recognized their role in facilitating the laundering of illicit revenues *lato sensu* when adhering to the FATF and have agreed to mitigate these activities on their financial market. The FATF therefore creates a stronger buy-in effect for traditionally natural resources-poor, cash-rich countries which is absent in other international fora. The FATF can also, crucially, investigate compliance periodically and sanction failure to adhere to commitments. Even the threat of being sanctioned by being banned from a major national financial market for instance,[118] may be enough to force compliance from members and non-members alike. The FATF can also expand its Recommendations without requiring unanimous consent from its members. It can do so explicitly, or implicitly by issuing reports on best practices. These reports create *de facto* enhanced obligations for the members by adding new, detailed requirements to meet the FATF Standards. Finally, the FATF regroups international actors such as Interpol or the World Bank who hold an observer status within the FATF.[119] As part of their statutes these organisations are required to endorse the FATF Standards, enhance the FATF's global reach and contribute

[114] Economic sanctions (unless related to terrorism) are however outside the scope of the FATF Recommendations.

[115] As opposed to broadening commitments. Deepening vs. Broadening is a concept in political science commonly held for supranational unions such as the European Union; *see*: Jeffrey A. Karp, Shaun Bowler, 'Broadening and deepening or broadening versus deepening: The question of enlargement and Europe's 'hesitant Europeans"', in *European Journal of Political Research* (2.5.2016).

[116] *See* e.g.: Michael Sheldrick, 'COP26 a Failure For The Planet and The World's Poor', (Forbes, 15.11 2021).

[117] FATF, '2021 Report', p. 15.

[118] *See*: FATF, 'Topic: High-risk and Other Monitored Jurisdictions'.

[119] Financial Action Task Force, 'FATF Members and Observers'.

to the work of the FATF.[120] These criteria ensure cohesion between money-laundering agencies and avoid contradicting overlapping mandates. They also set a common framework of definitions and guidelines for these agencies and reduce friction for multi-level collaboration. As an example, the FATF Recommendations underpin the European Union's (a member organization of the FATF) anti-money laundering architecture and Directive, the latter setting minimal enforcement standards for EU member states (not all of which are FATF members themselves).[121] As part of this architecture the states are required to report suspicious transactions to the FIUs[122], which in turn inform Europol's and Interpol's investigative and operational activity. The latter two then inform their own agencies on current financial crime trends and train law enforcement officers and FIUs with the knowledge and best practices to meet crime threats.[123] Feeding new best practices to combat environmental crime – through the 2021 Report for instance – into any part (or agency) of this loop will affect the other parts' activity as well.

Whether the FATF's proposals in the 2021 Report are effective to combat environmental crime by way of targeting money-laundering of environmental criminal proceeds depends on their implementation by the member states. As discussed in this paper's introduction, this paper sets out to analyse the implementability of the Report in Switzerland.

III. The 2021 FATF Report on Money Laundering from Environmental Crime

1. Context and Content

The 2021 FATF Report on Money Laundering from Environmental Crime is part of a larger agenda to tackle environmental crime and illegal wildlife trade under the 2020-2022 German Presidency.[124] The agenda was jump started under the previous Chinese Presidency with the 2020 Report on Money Laundering and Illegal Wildlife Trade.[125] Both reports join a growing set of documents from other regional and international bodies highlighting the inadequacy of information and legislation available to address illegal wildlife trade and environmental crime.[126] In its contribution, the FATF remains firmly in its niche dedicated to

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[120] FATF, 'FATF Policy on Observers'..

[121] Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [Official Journal L 166 of 28.06.1991].

[122] Art. 3(8) Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering [Official Journal L 166 of 28.06.1991].

[123] Interpol, 'Interpol's Financial Crime And Anti-Corruption Centre (IFCACC)', (January 2022), p. 2.

[124] Pleyer, 'Priorities', p. 2.

[125] FATF, '2021 Report', p. 6.

[126] The 2020 Report on IWT built on two regional studies carried out by FATF-style regional bodies (FSRBs): the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) in 2016, and the Asia Pacific Group on ML (APG) in 2017. The UN Office on Drugs and Crime (UNODC) also conducted a study on financial investigations in the region. There is a wealth of research by other bodies on IWT, including by the International Consortium on Combating Wildlife Crime (ICCWC), and the UN Environment Programme (UNEP). FATF reports that "[w]hile the majority of this work to date has focused on the methods used to conceal and traffic the illegal wildlife, there have been a growing number of studies focused on the financial side of this crime. In 2019, Legal Atlas conducted an in-depth review of AML laws of 110 jurisdictions to assess their adequacy in enabling

combating money-laundering from illicit activities. The Report aims to survey current methods that criminals are using to launder their gains from environmental crimes, and the measures that countries are taking to respond. Once identified, it seeks to enhance national authorities' and private sector awareness of the scale and nature of money laundering risks arising from environmental crimes and provide best practices on how to address them. Finally, it identifies priority regulatory actions to be taken at the national and international level.[127]

Environmental crime is estimated to be the fourth most profitable proceeds-generating crime in the world, generating from USD $110 to 281 billion in criminal gains each year.[128] The Report narrowly addresses illegal logging, illegal mining and waste trafficking as environmental crimes that may be tackled by implementing the FATF Recommendations. These three focus areas account for two-thirds of the figure above.[129] Illegal wildlife trade and illegal logging alone are estimated to cause resources losses worth up to USD $253 billion yearly.[130] Despite its impact on tax revenues and GDP, governments have not invested proportionate resources into detecting and disrupting the financial flows from these activities. Some countries erroneously assume that they don't need to assess potential money-laundering threats from environmental crimes because few are committed on their territory or because they don't have many natural resources targeted by these offenses. As a result, few countries reported to conduct money-laundering risk assessments identifying their position in the global environmental crime supply chain.[131] And while most countries criminalise at least some aspects of environmental crime – whether through specific criminal offenses or more general provisions – statutes and norms are often narrowly drafted and exclude transnational elements or extraterritorial fact patterns of these offenses.[132] Countries also impose comparatively lax sanctions for these offenses, meaning that they don't rise to the level required to constitute a predicate crime to money-laundering. The low penalties also lead to the perception of environmental crimes as 'low risk, high reward' for criminals.[133] This is further compounded by limited coordination between anti-money laundering and environmental government agencies and inadequate law enforcement resources to investigate and trace the proceeds from environmental crime.[134]

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their application to IWT and found that 45 of the 110 were not satisfactory. In addition, the OECD's Task Force on Countering Illicit Trade (TF-CIT) has published reports on the necessary governance, co-ordination and capacities to tackle IWT, including through financial investigations. The Egmont Centre of FIU Excellence and Leadership (ECOFEL) is also conducting ongoing work to provide guidance to Financial Intelligence Units (FIUs) on financial investigations in wildlife and forestry crimes.", Financial Action Task Force, 'Money Laundering and the Illegal Wildlife Trade', (25 June 2020), p. 9.

[127] FATF, '2021 Report', p. 7.

[128] FATF, '2021 Report', p. 5.

[129] FATF, '2021 Report', p. 5.

[130] Global Conservation, '$250 Billion Market For Illegal Wildlife, Logging And Mining Is Destroying Our National Parks In Developing Countries', (15.7.2017).

[131] FATF, '2021 Report', p. 5.

[132] FATF, '2021 Report', p. 5.

[133] FATF, '2021 Report', p. 38.

[134] FATF, '2021 Report', p. 6.

The Report argues that full implementation of the FATF Standards is an effective tool to disrupt laundering from environmental crimes.[135] It states that countries need to take a series of measures so as to comply with the FATF Standards: Countries must criminalise money-laundering for a range of environmental offenses (FATF Recommendation 3) and identify and assess their money laundering risks across crime areas, including environmental crime, and to take steps to mitigate these risks (FATF Recommendation 1).[136] They should also ensure that the private sector is aware of these risks, and that the latter introduce preventative measures, such as reporting suspicious financial transactions. The Report provides that these obligations extend to, among others, banks, dealers in precious metals and stones, lawyers and trust and company service providers (TCSPs) when carrying out financial transactions (FATF Recommendations 9 – 23).[137] Finally, countries should have sufficient law enforcement resources to investigate, trace and confiscate criminal assets, including environmental investigators (FATF Recommendations 29-31).[138] These requirements are, in essence, an extension to environmental crime of best practices set forth by the FATF with regards to Illegal Wildlife Trade in 2020.[139]

The Report on Environmental Crime further suggests that countries determine their position within the environmental crime supply chain and adapt their response to their risk factor accordingly.[140] To assess their money-laundering risk factor, these countries should include data provided from non-traditional AML/CFT stakeholders, such as environmental crime and protection agencies, or authorities responsible for forestry or mining concessions.[141] They should also integrate environmental investigation authorities into wider anti-money laundering and counter-terrorism financing strategies. The Report also stresses that existing AML/CFT systems should be adapted to cover environmental crime. This could mean using cross-border declaration and disclosure systems to document the transport of precious metals and stones and other natural resources.[142] The Report also proposes that AML/CFT measures should be applied to sectors not covered by the FATF Standards, such as key chokepoints along environmental supply chains like refiners, logging and mining companies.[143] Once again, the Report's proposals stand out because they consider that best practice compliance with the FATF Standards involves imposing AML/CFT-like regulations on traditionally non-AML/CFT authorities and intermediaries. Finally, countries should strengthen public-private sector dialogue to share risk information, and promote organization- or industry-led initiatives to enhance due diligence of natural resources supply chains and their financial flows.[144] While this Report, like all others, is an explicitly non-binding guidance document for Switzerland,

[135] FATF, '2021 Report', p. 7.
[136] FATF, '2021 Report', p. 7.
[137] FATF, '2021 Report', p. 7.
[138] FATF, '2021 Report', p. 7.
[139] *See*: FATF, 'Money Laundering and the Illegal Wildlife Trade', p. 6.
[140] FATF, '2021 Report', p. 34.
[141] FATF, '2021 Report', pp. 34-35.
[142] FATF, '2021 Report', p. 52.
[143] FATF, '2021 Report', pp. 43, 55.
[144] FATF, '2021 Report', p. 49.

failure to adhere to new best practices could weaken its compliance with the Recommendations and trigger a sanction.

2. Methodology and Limitations

Experts from Canada, Ireland and UNODC co-led the drafting of the 2021 Report on Money-Laundering from Environmental Crime.[145] They were assisted by a host of other countries, as well as the CITES Secretariat, the Egmont Group, the IMF, and the OECD as observer organizations.[146] The scope of the FATF Report was narrowed to include specific environmental crimes, based on size and complexity, after a review of existing literature and open-source material on the topic.[147] The Report seeks to present qualitative and quantitative data provided by its member states to illustrate the location of supply chains and the regional phenomena. It is therefore primarily based on money-laundering cases related to environmental crimes, as well as surveys indicating these countries' own perception of risk.[148] National authorities used a range of information sources, including credit reports, bank transaction data, export data, and other payment information to identify and estimate illicit financial flows affecting their jurisdiction.[149]

Out of the 200 jurisdictions that were contacted to provide data to the FATF Report, 45 responded with their findings.[150] The report doesn't indicate which countries participated. It is therefore hard to tell whether the findings skew towards specific regional phenomena at the exclusion of accurately representing all 200 jurisdictions within the FATF's Global Network. Of the 45 participants, only 20 considered environmental crime in their national or sectoral money-laundering risk assessments.[151] This raises a question as to the completeness of the shared information; if a country doesn't consider environmental crime in their risk assessments, chances are that their border agents and financial intermediaries do not pay close attention to exports and transactions related to environmental activities. Moreover, self-reported data can introduce biases or lead to omissions by the participants of particularly discrediting data. Finally, the availability of increasingly diverse ways of moving money outside the traditional banking system leads to illicit financial flows being understated. This is also the case with environmental crimes: some natural resource-rich jurisdictions, where environmental crimes are most often committed, face issues of access to banking.[152] These jurisdictions rely heavily on correspondent banking relationships and Money or Value Transfer Services (MVTS) to ensure access to global financial markets.[153] While correspondent banking institutions must

[145] FATF, '2021 Report', p. 9.
[146] FATF, '2021 Report', p. 9.
[147] FATF, '2021 Report', p. 10.
[148] FATF, '2021 Report', p. 10.
[149] FATF, '2021 Report', p. 10.
[150] FATF, '2021 Report', p. 10.
[151] FATF, '2021 Report', p. 5.
[152] FATF, '2021 Report', p. 6.
[153] FATF, '2021 Report', p. 21.

apply customer due diligence (CDD), and, in some cases, enhanced due diligence (EDD)[154], to the respondent banks they have a business relationship with, they are not required to know their customers' customer.[155] Correspondent banking transactions are therefore more prone to gaps in oversight. The same applies to financial institutions working with MVTS providers.[156] With respect to environmental crimes, these factors are compounded with a lack of awareness of the risk that the different financial intermediaries in the banking relationship are exposed to. The information provided to form the FATF Report can therefore be considered to understate both the severity of the problem and the ways that the transactions are dissimulated.

The biggest limitation of the Report lies in its scope, however. The Report only addresses tangible goods (timber, ore, waste) as a product from environmental crime, and not the financial proceeds generated from activities involving intangible environmental degradation. This can be explained in three ways. First, the FATF's environmental agenda began by addressing money laundering from wildlife trade, where the objects to be traded can be traced physically. The same applies to timber, ore and waste. The scope of the original agenda may therefore have limited follow-up reports and investigation methods. Secondly, timber and ore, much like wildlife, have a market value. The extracted commodity (1) is therefore itself a profit to be laundered, meaning that it doesn't have to be transformed into money to be subject to money-laundering legislation, and its paper trail can be dissimulated by cross-border transport only. It also facilitates (2) the quantification of money laundered. This cannot be said for environmental crimes involving air or water pollution (although waste trafficking may indirectly cause these), or land clearing not for logging purposes. These crimes are harder to put a price on. They also imply a longer chain of causation between predicate offense and profit. A company X may for instance clear a large plot of land by burning down existing vegetation without a permit. This may increase the plot's market value, but is not the profit sought by company X. Company X then proceeds to grow monocultures, or install cattle on the plot. The crops and cattle products are sold without correctly disclosing their origin. The sale then generates a profit. Putting aside the question of whether the un-permitted land clearing is criminalised in the country in question, it is unclear whether, legally speaking, company X's profit was generated directly from the environmental degradation or from the subsequent licit activities. Further, it is unclear whether incorrectly identifying the sold products' country of origin would be sufficient to dissimulate the paper trail and fulfill the requirements for a money-laundering offense. Given these caveats, the FATF may have chosen to forgo addressing environmental crimes which are more difficult to address by straightforward suspicious transaction reports and anti-money laundering enforcement prescribed by its Recommendations. Thirdly, the simplicity of the crimes addressed by the report and the traceability of the extracted material facilitates comprehension from member states, their law enforcement agencies and DNFBPs who will be tasked with implementing FATF guidance on the matter. In order to accelerate implementation and avoid political resistance from its members, FATF may have therefore opted for providing guidance on a less complex issue.

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[154] Financial Action Task Force, 'Guidance on correspondent banking services', (FATF, 2016, Paris), p. 9.

[155] FATF, 'Guidance on correspondent banking services', p. 4.

[156] ATF, 'Guidance on correspondent banking services', p. 6.

The German Presidency sets environmental crimes as a priority because they "have far-reaching implications for the environment, economy, and public health and safety."[157] Its agenda also targets migrant smuggling, right-wing terrorism, and arms-trading.[158] The FATF appears to position itself as an indirect contributor to moral and humanitarian causes. It is therefore surprising that the FATF chooses to forgo addressing environmental crimes directly causing global warming and limiting access to clean water. Of course, deforestation is a major factor in reducing global temperature rise. As illegal logging accounts for up to 30% of timber trade, addressing the illegal logging through FATF channels contributes to mitigating climate change.[159] Oceanic ecosystems are the largest carbon sink available.[160] Reducing illegal fishing will allow these ecosystems to restore and effectively absorb CO2 emissions.[161] However, many corporate and organized activities harming the environment escape the narrow definition of environmental crime addressed by the FATF. These activities pollute groundwater or release harmful emissions into the air. They all make a net gain, whether the water is contaminated because a factory disposes of its chemical waste illicitly to reduce expenditures, or the air is polluted from an oil refinery who refuses to spend money on filtration systems required by law.[162] Depending on the jurisdiction that these fact patterns occur in, the net gain generated may constitute a money-laundering offense if the non-expenditure is hidden by falsified end-of-year statements. While this paper will analyse the applicability of money-laundering provisions to cases in which the environmental harm is a negative externality of principal economic activities in Section V subsection 2 of this paper, it should be noted that the FATF has the political power to propose its members extend predicate offenses to profitable activities which cause environmental degradation as a by-product. In fact, it has already proposed that certain FATF Standards be extended to institutions and industries previously untouched by its oversight in the 2021 Report. In not doing so, the FATF falls short of its mission to nudge its members and their financial sector to "do the right thing"–morally speaking.

IV. Transport and Financing Characteristics of Environmental Crimes

Illegal logging, illegal mining and waste trafficking share some overarching commonalities concerning the dissimulation of the commodities' origin or revenues flowing from their sale.

First, these crimes are often committed by criminal organisations, who rely on specialized networks to move products and money. These networks vary in complexity and

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[157] Financial Action Task Force, 'Environmental Crime'.

[158] Pleyer, 'Priorities'.

[159] United Nations Environment Programme, 'Organized Crime Trade Worth over US$30 Billion Responsible for up to 90% of Tropical Deforestation", (Rome, 27.9.2012).

[160] European Environmental Agency, 'Carbon stocks and sequestration in terrestrial and marine ecosystems: a lever for nature restoration?'.

[161] Binbin Huang et al., 'Ecological restoration and rising CO2 enhance the carbon sink, counteracting climate change in northeastern China', in: *Environmental Research Letters*, Vol.17, N.1, (2021).

[162] *See* e.g.: Toine Spapens and Wim Huisman, 'Cross-Border Environmental Crime', p. 34, in: Toine Spapens, Rob White, Wim Huisman (Eds.), *Environmental Crime in Transnational Context – Global Issues in Green Enforcement and Criminology* (Green Criminology Series, Routledge, 2016).

range from cash couriers to networks of front and shell companies.[163] They are enabled by corruption or weak regulatory oversight in natural resource chains. The lack of oversight encourages "co-mingling" (i.e. mixing illegally sourced materials with legally sourced ones) early on in the supply chain.[164] Front companies are used to co-mingle gains from illegal mining, logging and waste trafficking into legitimate business accounts.[165] In many cases these front companies are related to natural resource markets (e.g., logging, mining and waste companies)[166], and engage in large numbers of transactions with low individual profit margins.[167] This makes it difficult to distinguish illegitimate financial flows from licit ones. As with other laundering operations, the offenders rely on politically exposed persons, complex corporate structures, shell companies and intermediaries such as lawyers to prevent detection.[168] The overall goal here is to create layers between the commission of the environmental crime and the person who will benefit financially from the sale of the illegally sourced product.[169]

Criminals also use underground money value transfer services (MVTS), particularly in illegal mining, to conceal the paper trail from environmental crime.[170] These mechanisms are often limited to specific regions and will reflect local customs.[171] One such regional custom is Hawala, an informal method of transferring money without any physical money moving. While hawaladars are spread throughout the world, they are primarily located in the Middle East, North Africa and India.[172] Hawaladars will act as intermediaries for transfers between multiple parties.[173] These transfers are promissory (i.e. virtual or fictional) but occur without any promissory notes or official records.[174] The Hawaladar network operates outside of traditional banking or remittance systems and is based on trust alone.[175] This impedes the use of banking transparency and compliance measures to detect environmental crime.

All three environmental crimes noted above rely on trade-based fraud to conceal cross-border financial transfers.[176] Usually all transport of goods, including natural resources and waste, is tracked through customs and its origin, destination, volume, weight, type and potential indications as to hazards or legislative compliance are documented.[177] Criminal organizations

[163] FATF, '2021 Report', p. 11.
[164] FATF, '2021 Report', p. 11.
[165] FATF, '2021 Report', p. 3.
[166] FATF, '2021 Report', p. 27.
[167] FATF, '2021 Report', p. 27.
[168] FATF, '2021 Report', p. 11.
[169] FATF, '2021 Report', p. 18.
[170] FATF, '2021 Report', p. 31.
[171] FATF, '2021 Report', p. 31.
[172] Mohammed El-Qorchi, 'The Hawala System', in: *Finance and Development*, Vol. 39, No. 4 (December 2002).
[173] El-Qorchi, 'The Hawala System'.
[174] El-Qorchi, 'The Hawala System'.
[175] El-Qorchi, 'The Hawala System'.
[176] FATF, '2021 Report', p. 29.
[177] For waste transport form requirements, see e.g.: Environment Agency, 'The Transfrontier Shipment Of Waste', (Environment Agency, February 2004), p. 22; for timber, *see* e.g. art. 5 Swiss Timber Trade Ordinance, requirement among others "information on the harvesting concession, [...] information indicating compliance with the applicable legislation in the country of origin.; for rough diamonds see e.g.: art. 10 Council Regulation (EC)

will however falsify documents, particularly import and export customs declarations, and invoices to legitimize otherwise illicit flows.[178] Hazardous waste may for instance be labeled as non-hazardous or as second-hand goods, and timber from endangered flora will be labeled as common tree species to conceal their actual value. This highlights the need for placing specialized environmental investigators at central transfer points, and training border agents in detecting inconsistencies on labels and certificates accompanying such shipments. These central transfer points may be identified based on data provided by Interpol, as well as from FATF surveys. Both illegal mining and logging supply chains have a distinct Global South to Global North trajectory. Forestry crimes occur primarily in rainforests in Central and South America, central and southern Africa, Southeast Asia, and parts of Eastern Europe.[179] Timber logged in these ventures is then destined to East Asia, North America, and Western Europe.[180] Illegal mining is concentrated in South America and Africa.[181] Extracted materials are then destined for major precious metal and stone markets. Mined metals from South America and Africa are often moved to centralized refineries and smelters in global markets; China, Hong Kong, Japan, Russia, India, Singapore, South Africa, Switzerland, Turkey, UAE, UK, and U.S. were identified as primary centers for gold refineries and bullion trading.[182] Waste trafficking on the other hand moves from the Global North to the Global South. Waste is sourced in or transits through North America and Western Europe and moves towards sub-Saharan Africa, Southeast Asia, and Central and South America.[183] However, in some cases waste is just disposed of locally or at sea. For this reason, waste trafficking and financial flows associated with it are of regional or domestic nature.[184]

Finally, environmental crimes distinguish themselves from other predicate offenses such as narcotics trafficking and terrorism financing, in that they are criminalised only when they are undertaken without permit. Permits might limit which species or minerals may be extracted, and the quantity and location of the harvest[185], or which kind of technique and machinery may be used[186]. Waste transporters and (intermediary) storage facilities must comply with containment obligations in order to be green-lighted for waste transportation and storage.[187] Only if these terms or permits are violated, are the perpetrators subject to sanctions. Going further, when such permits and concessions are secured through corruption or intimidation, or when the officials are defrauded, these permits are considered void (*see* e.g.

No 2368/2002 of 20 December 2002 implementing the Kimberley Process certification scheme for the international trade in rough diamonds, (OJ L 358, 31.12.2002, p.28).

[178] *See*, e.g.: FATF, '2021 Report', p. 62.

[179] FATF, '2021 Report', p. 13.

[180] FATF, '2021 Report', p. 13.

[181] FATF, '2021 Report', p. 15.

[182] FATF, '2021 Report', p. 15.

[183] FATF, '2021 Report', p. 16.

[184] FATF, '2021 Report', p. 16.

[185] *See* e.g. for logging permits in the United States: Forest Service Handbook (FSH) 2409.18, Chapter 50, Sections 53 and 54.

[186] *See* e.g. for mining in Canada: British Columbia Ministry of Energy, Mines & Petroleum Resources, "Mineral and Coal Exploration Notice of Work Application Companion, (March 2020), p. 102.

[187] *See* e.g.: Environmental Protection Agency, 'Introduction to Treatment, Storage and Disposal Facilities (40 CFR Parts 264/265, Subpart A-E), (September 2005), p. 2.

arts. 28 al. 1, 29 al. 1 CO). The permitted activity is therefore *de jure* conducted illicitly. Pollution is also subject to such allowances[188]; plants and immobile sources can pollute, within legislative or regulatory limits, if they dispose of a permit allowing them to do so.[189] Polluters are therefore not sanctioned if they emit air or water pollution under a certain threshold if purification or containment provisions are respected. Beyond the threshold, polluters – often companies – will be fined for their activity.[190] Environmental protection agencies in charge of supervising these activities would consequently need to disclose these violations to FIUs.

1. Waste Trafficking as an Anomaly

Illicit waste trafficking generates an estimated USD 10-12 billion annually.[191] The clean-up costs for governments associated with it however significantly exceed these profits and failure to address the trade has widespread consequences for public health and safety; illicit waste treatment and disposal can contaminate ground and surface water, disrupt agricultural activities and cause serious illnesses for people located close to improper landfills or disposal sites.[192] The illegal trade of hazardous waste is particularly organized and outsourced to criminal organizations.[193]

Waste trafficking is an anomaly among the crimes addressed in the FATF Report. First, as mentioned above, its movements don't follow traditional trafficking trajectories. Secondly, while timber and in particular precious stones and metals have an inherent value that can be used as currency, waste has a negative value. This pushes businesses to dispose of it cheaply, which often means in violation of waste disposal regulations. This provides criminal organizations with many potential repeat customers, who have a strong incentive to cover the organizations' tracks.[194] Governments who target this illegal activity must also bear the repatriation costs for the waste, further lessening any interest in addressing the problem.[195] Tracing waste trafficking chains to their source is however an important tool in identifying large criminal networks who also engage in bribery, racketeering and extortion.

These anomalous characteristics also pose difficulties for establishing waste trafficking as a predicate offense to money-laundering. In most jurisdictions, including Switzerland, money-laundering requires (1) a monetary value (2) which is directly generated from a predicate offense and (3) which is subject to an act hindering its confiscation by law

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[188] *See* e.g. Art. 2 al. 3 Federal Act on the Reduction of CO2 Emissions (RS 641.71).

[189] *See* e.g. Art. 6 al. 1 Waters Protection Ordinance (RS 814.201).

[190] *See* e.g. Art. 21 al. 1, 32 al. 1 Federal Act on the Reduction of CO2 Emissions.

[191] FATF, '2021 Report', p. 16.

[192] Jen Allan, 'How to Regulate Our Waste-Full World', in: *Earth Negotiations Bulletin*, (International Institute for Sustainable Development, July 2021).

[193] *See* e.g. Pasquale Peluso, 'Organized Crime and Illegal Waste Disposal in Campania', in: Toine Spapens, Rob White, Wim Huisman (Eds.), *Environmental Crime in Transnational Context – Global Issues in Green Enforcement and Criminology* (Green Criminology Series, Routledge, 2016), for a case study on organized waste disposal in Italy.

[194] FATF, '2021 Report', p. 18.

[195] FATF, '2021 Report', p. 18.

enforcement to hide its paper trail.[196] In a case regarding falsified currency, the Federal Supreme Court specified that the object of money-laundering cannot qualify as a monetary value if it doesn't have any intrinsic value.[197] As opposed to precious metals, hazardous waste would therefore not qualify as a monetary value *per se* under the statutory requirements, and waste trafficking not involving any payments could not be subject to money-laundering operations. On the other hand the requirements are fulfilled if waste trafficking generates a profit for the organization facilitating illegally disposing it. Finally, if a company disposes of its waste improperly, it wouldn't generate a profit, but a saving. If company X is required by law to dispose of its hazardous materials through a process costing USD $100'000, and it chooses to dispose of it in an unsanctioned landfill instead, it would avoid spending USD $100'000. Opinions by Swiss courts and scholars diverge on whether a saving fulfills the requirement that a monetary value is generated from the predicate offense directly.[198] This point of contention will be discussed in Section V, subsections 2 and 3 below. Legislators will therefore have to address waste more closely than illegal logging and mining, in order to fulfill the FATF's proposal to establish it as a predicate offense to money-laundering.

2. Pollution as an Anomaly

Interpol categorizes many different offenses as pollution crimes.[199] For the purposes of this paper, these will be distinguished into three categories: (1) the illicit emission of air pollutants, either (a) without an allowance, (b) in violation of an emission cap or allowance, or (c) the emission of ozone-depleting pollutants, such as chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs), which are both banned from production and consumption in Europe[200], (2) the illicit water discharge of pollutants, or (3) the illicit trading of carbon credits. To facilitate the reader's understanding, (1) and (2) will be referred to as 'pollution crime', whereas (3) will be referred to as 'carbon trading crime'.

a. Pollution Crime

The prosecution of water discharge and air pollution offenses suffers from the dispersed and intangible nature of these offenses. National legislators have sought to substantialize air pollution by requiring the measurement of emissions at the source and allowing a certain quantity of emission per source.[201] They have also sought to commodify, and therefore render tangible, air pollution by monetizing CO2 tonnes through emission allowances or carbon credit

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[196] BSK-StGB II-Pieth, Art. 305bis, N 9, 10, 27, 37.

[197] TF, SJ 2007 I 271, 272 ff.

[198] Cassani, *Droit pénal économique*, pp. 194 - 197.

[199] Interpol, Environmental Security Programme, 'Strengthening Law Enforcement Cooperation Against Pollution Crime', (January 2022).

[200] Art. 4, Regulation (EC) No 2037/2000 of the European Parliament and of the Council of 29 June 2000 on substances that deplete the ozone layer, OJ L 244 , 29/09/2000 1-24.

[201] *See* e.g.: art. 11 Environmental Protection Act, (RS 814.01); The Clean Water Act, 33 U.S.C. 1251, §122.1(b)(1).

markets.[202] The World Bank reported that countries worldwide raised USD $53 billion in 2020 by charging firms for emitting CO2, up almost 18% from 2019.[203] It is nonetheless difficult to quantify the commission of air pollution crimes, as only 21.5% of global GHG emissions are covered by carbon pricing instruments.[204] In simplified terms, air pollution crime concerns the kind of pollution which is emitted outside of the permitted parameters set by these programs. There are however no clear metrics of how much is emitted outside these guardrails. Water discharges also require permits at the source, meaning that the emitting entity will have measurement tools in and outside their points of discharge and must respect set terms for quantity and quality of products they are allowed to discharge.[205] Once in the ambient air or in larger bodies of water however, the emitted pollution is hard (or impossible) to trace back to one emitter. This makes investigation and prosecution thereof, which requires establishing a chain of causation, difficult. Furthermore, everyone pollutes in some way or another and both legislators and law enforcement want to avoid targeting average citizens for ubiquitously committed activities. Legislators have tried to draw the line by regulating emissions not with car owners, but with vehicle manufacturers and importers.[206] They also set minimal quantities for water discharges which indirectly exclude the average person from violating water protection acts.[207] Legislators are conscious however, that a certain amount of environmental damage is necessary in order for business to be economically viable and modern infrastructure and transportation to function properly. These considerations are well-founded and explain why legislators have opted to disregard *de minimis* emissions and discharges. This decision would also exclude the average person or entity from being considered a money-launderer, if they reinvested or repurposed the money generated from their polluting day-to-day activity. In Switzerland, these *de minimis* rules are compounded with the requirement for a predicate offense to be a felony.[208] This threshold establishes that only grave emissions which occurred in violation of the law and which generate a benefit for the emitter, are predicate offenses. This benefit would be considered susceptible to confiscation, meaning that we consider that only grave emissions should not benefit its emitter.

In analysing whether pollution crimes can be considered predicate offenses, we recognize its parallels with waste trafficking. Pollution crime relates to waste trafficking in two ways. First, the disposal of waste, particularly hazardous waste and chemicals, pollutes soil, groundwater and surface bodies of water. The unsanctioned sale of chemicals to entities without handlings permits can also lead to environmental fallouts because they lack the proper equipment or filtration systems. Secondly, pollution much like waste, does not have any intrinsic value. A company who pollutes above permitted levels would therefore only make a saving from not having to invest in proper filtration and equipment. It may also gain a

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[202] *See* e.g. arts. 15 ff. Federal Act on the Reduction of CO2 Emissions (RS 641.71); Directive 2003/87/EC (OJ L 275 25.10.2003, p. 32)

[203] Reuters, 'Global Carbon Pricing Schemes Raised 53 Bln in 2020 - World Bank', (Reuters, 25.5.2021).

[204] The World Bank, 'State and Trends of Carbon Pricing 2021' (May 2021).

[205] *See* e.g.: Electric Power Research Institute, 'NPDES Permit Compliance Measurement Methods As Context For Water Quality Trading Programs', (May 2018), p. 3.

[206] *See* e.g.: arts. 10-12 ff. Federal Act on the Reduction of CO2 Emissions (RS 641.71).

[207] *See* e.g.: Annex 2, art. 11 al. 3, 12 al. 5, 22 al. 2, Annex 3.1 Waters Protection Ordinance (RS 814.201).

[208] Art. 305bis al. 1 Swiss Criminal Code of 21 December 1937 (RS 311.0).

competitive advantage over other market players because it would have fewer base business expenses.[209] While the value of savings mentioned is already difficult to quantify, putting an economic value on the competitive advantage gained is even more so. In this sense, the analysis of waste trafficking as a predicate offense to money laundering, notably in terms of its negative value, serves as a prototype to pollution crimes.

b. Carbon Trading Crime

Carbon trading is the world's fastest growing commodities market.[210] In 2022, Reuters reported that the global value of carbon trading markets for CO2 had grown by 164% in a year to USD $851 billion.[211] Under the carbon trading scheme, participants to the market are assigned a cap on the total amount of GHG emissions they may emit. This cap is set in the form of carbon credits, or units, which the participants may "use up" by emitting pollution. A unit equals one tonne of CO2.[212] If participants exceed their cap, they must buy carbon credits from others who have to spare, in order to off-set the excess.[213] These transfers and acquisitions of carbon credits are tracked and recorded through the registry systems under the Kyoto Protocol.[214] In theory, the cap-and-trade system sets a net limit on total GHG emissions worldwide, as the trade happens within the aggregate amount of credits. However, as stated only 25% of emissions take place within the guardrails of the carbon trading market. The Kyoto Protocol, which is the principal legal instrument establishing the validity of carbon trading, also allows participants to "earn" credits (VERs) by investing in environmentally beneficial projects in developing countries.[215] This allowance seeks to off-set the environmentally damaging effect of emissions. However, carbon trading markets are particularly vulnerable to fraudulent activities, also called carbon trading crimes. This is because the market does not actually involve transferring physical commodities, but virtual credits, or their derivatives.[216] Regulation has not been able to keep up with the recent growth in size and complexity of carbon trading schemes. As with most licit markets, criminals have created concurrent illicit trading activities within or adjacent to the carbon trading market, and have benefitted from its lack of regulation and oversight.[217] Although there are no clear metrics on how widespread or profitable these practices are, an EU carbon credit or allowance (EUA) is priced at USD $84 as of May 2022.[218] Large scale fraudulent operations are therefore lucrative. In the last 7 years,

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[209] Koordinationsgruppe Umweltkriminalität (KUK), 'Bericht an den Bundesrat', (21.9.2021), p. 4..

[210] Mark Schapiro, 'Conning the Climate: Inside the Carbon Trading Shell Game', *Harper's Magazine* (February 2010), p. 31.

[211] Reuters, 'Global Carbon Markets Value Surged Record $851 Bln Last Year - Refinitiv', (Reuters (21.1.2022).

[212] Interpol, 'Guide on Carbon Trading Crime', (2013), p. 2

[213] Interpol, Guide on Carbon Trading Crime', pp. 2-6

[214] Interpol, 'Guide on Carbon Trading Crime', p. 1.

[215] 1997 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 2303 UNTS 148, 37 ILM 22 (1998), §12.

[216] Interpol, 'Guide on Carbon Trading Crime', p. 11.

[217] Interpol, 'Guide on Carbon Trading Crime', p. 11.

[218] Trading Economics, 'EU Carbon Credits'.

two separate cases of carbon credit scams involved profits of £39 million[219] and £80 million[220] respectively.[221]

Carbon trading crime is a special form of pollution crime, in that it ultimately involves emissions in violation of legal emission allowances, but uses the carbon credit market to obscure the illicit nature of the emissions. Interpol lists the following acts as carbon trading crimes:

- Fraudulent manipulation of measurements to claim more carbon credits from a development project than were actually obtained;
- Sale of carbon credits that either do not exist or belong to someone else;
- False or misleading claims with respect to the environmental or financial benefits of carbon market investments;
- Laundering proceeds from crimes through the acquisition of carbon credits.[222]

The first three variations all constitute a form of fraud and market abuse, while the latter constitutes money-laundering. As a consequence, the criminal activities listed above are already covered by fraud and laundering provisions in the Criminal Code. This paper will therefore not further elaborate on carbon trading crime.

V. Positioning Switzerland as An Enforcer

1. Environmental Crime Legislation and Enforcement

A key critique against the prosecution of perpetrators of environmental crime through money-laundering legislation is that this avenue is redundant; environmental crime statutes already exist, which allow for this. This paper will provide an overview of Switzerland's commitments to pursue environmental crime and explain why the statutory provisions and Switzerland's federalist structure do not provide sufficient tools to combat environmental crime.

a. International Commitments

Environmental harm knows no bounds or borders. This is why the international community has sought to address the protection of the environment collectively. These international agreements serve as guidelines for the implementation of environmental criminal provisions, although few of them explicitly refer to environmental criminal law.

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[219] McKenzie Flunk, 'The Hack That Warmed the World', (Foreign Policy, 30.1.2015).

[220] Interpol and The World Bank, 'Chainsaw Project: An Interpol Perspective On Law Enforcement In Illegal Logging', (undated), pp. 45- 46.

[221] Several carbon credit frauds in recent years were actually VAT frauds using real carbon credits; *see* e.g.: Jilian Ambrose, 'HMRC cracks down on gangs over renewable energy VAT fraud', (The Guardian, 19.6.2019). The cited incidents involved the sale of inexistent carbon credits, which has an environmentally detrimental impact.

[222] Interpol, 'Guide on Carbon Trading Crime', p. 11.

The first commitment to protect the environment was made with the Stockholm Declaration in 1972[223], which stipulated that no country should use its territory to cause environmental harm to another. Further agreements followed, which were ratified by Switzerland[224]: the 1972 London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter[225], which concerned the deliberate disposal at sea of waste, but did not cover discharges from land-based sources; the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[226], which subjects international trade in specimens of more than 35'000 species of animals and plants to controls; the International Convention for the Prevention of Pollution from Ships (MARPOL) in form of its 1978 Protocol[227] concerning the prevention of pollution of the marine environment by ships; the Convention on Long-Range Transboundary Air Pollution[228] aiming to reduce transboundary air pollution through knowledge sharing; the Vienna Convention for the Protection of the Ozone Layer[229] seeking to reduce the production of chlorofluorocarbons; the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal[230] reducing the movement of hazardous waste between nations; the United Nations Convention on the Law of the Sea[231] establishing a legal framework for all marine activities; the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade[232], which established a prior informed consent procedure for import of hazardous chemicals; the United Nations Framework Convention on Climate Change (UNFCCC)[233], calling for the reduction of greenhouse gas emissions; the Kyoto Protocol[234], which implemented the UNFCCC goals by setting clear emission reduction commitments for the main anthropogenic greenhouse gases; and the Paris Agreement[235], which set an aggregate emission reduction limit of 50% by 2030, required countries to report on its contributions, and aimed to mobilise sufficient finance for climate

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223 *Stockholm Declaration on the Human Environment*, in Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF. 48/14, at 2 and Corr. 1 (1972).

224 List created by Prof. Dr. Marianne Johanna Hilf and Prof. Dr. Hans Vest, in: Prof. Dr. Marianne Johanna Hilf and Prof. Dr. Hans Vest, 'Gutachten „Umweltstrafrecht" im Auftrag des BAFU', (September 2016), p. 244.

225 International Maritime Organization, 2003, *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 1972 and 1996 Protocol*, London: International Maritime Organization.

226 Convention on International Trade in Endangered Species of Wild Fauna and Flora, March 3rd, 1973, 993 U.N.T.S. 243.

227 International Maritime Organization, 2011, *MARPOL International Convention for the Prevention of Pollution from Ships*, 1973, as modified by the 1978 and 1997 protocols.

228 *Convention On Long-Range Transboundary Air Pollution — Resolution On Long-Range Transboundary Air Pollution* (OJ L 171, 27.6.1981, pp. 13-24).

229 *Vienna Convention For The Protection Of The Ozone Layer*, (OJ L 297, 31.10.1988, p. 10–20).

230 *Basel Convention On The Control Of Transboundary Movements Of Hazardous Wastes And Their Disposal* (OJ L 39, 16.2.1993, p. 3–22).

231 *Convention on the Law of the Sea*, Dec. 10, 1982, 1833 U.N.T.S. 397.

232 *Rotterdam Convention On The Prior Informed Consent Procedure For Certain Hazardous Chemicals And Pesticides In International Trade*, (OJ L 63, 6.3.2003, p. 29–47).

233 *United Nations Framework Convention on Climate Change*, 20 January 1994, A/RES/48/189.

234 *Kyoto Protocol to the United Nations Framework Convention on Climate Change,* Dec. 10, 1997, 2303 U.N.T.S. 162.

235 *Paris Agreement to the United Nations Framework Convention on Climate Change*, Dec. 12, 2015, T.I.A.S. No. 16-1104.

resilience and adaptation. Most of these conventions entrust its ratifying members the decision on how to transpose these commitments. Only a few conventions require the sanctioning of certain behavior, but rarely does it rise to the level of criminal prosecution.[236] Only CITES, MARPOL and the Basel Convention require its members to prosecute their violation on the members' territory.[237] In addition to these concrete commitments, all UN members are called upon to protect the environment through environmental criminal provisions by the "The Role of Criminal Law in the Protection of Nature and the Environment" UN Resolution from 1990.[238] This was confirmed by the ECOSOC Resolutions 1993/28, 1994/15, and 1995/27.[239] The Council of Europe Convention on the Protection of the Environment through Criminal Law of November 4, 1998 also pursued the goal of strengthening environmental criminal law. However, this convention was ratified by only one state and never entered into force.[240] Despite their abundance, none of these commitments have created a meaningful framework on environmental criminal prosecution for Switzerland. The requirements to prosecute violations of the Basel Convention, the MARPOL Convention or the CITES Convention were transposed into Swiss statutory law, which is addressed in Section V subsection 1. Practice shows however that the yearly quantity of these sanctions remains low despite constituting the third-most profitable criminal enterprise worldwide.[241] The only strong agenda currently developing a framework to protect the environment through criminal law is limited to EU countries through the EU Commission's 2019 Green Deal.[242] While the resulting directives will have a legally indirect effect or a political soft power impact on Switzerland, they are not binding for it. As a result, Switzerland is not meaningfully incentivized through international environmental law to pursue environmental offenses.

The cooperation called for in the instruments above occurs within INTERPOL, Europol, the World Customs Organization (WCO), the United Nations Office on Drugs and Crime (UNODC), the CITES partnerships[243] and UNEP. These coordinate closely with each

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[236] Hilf & Vest, 'Gutachten Umwelt', p. 244.

[237] Hilf & Vest, 'Gutachten Umwelt', p. 245.

[238] Hilf & Vest, 'Gutachten Umwelt', p. 245.

[239] Hilf & Vest, 'Gutachten Umwelt', p. 245.

[240] Statement of Federal Council of 26 May 2021 in Response to Interpellation by Adèle Goumaz Thorens, 'Ecocides ou atteintes majeures à l'environnement: Le Conseil fédéral entend-il améliorer les dispositions pénales du droit de l'environnement?' (18.3.2021).

[241] Sybille Dillon, 'Umweltstrafverfahren in der Praxis – Teil 1', p. 134 in: Marianne Johanna Hilf, Jürg-Beat Ackermann (Eds.), *Umwelt-Wirtschaftsstrafrecht – 9. Schweizerische Tagung zum Wirtschaftsstrafrecht*, Collection EIZ Band/Nr. 177 (2017).

[242] European Commission, Communication From The Commission To The European Parliament, The European Council, The Council, The European Economic And Social Committee And The Committee Of The Regions, 'The European Green Deal', COM/2019/640 final.

[243] The Biodiversity Liaison Group and other Multilateral Environmental Agreements regroups the heads of the secretariats of the eight biodiversity-related conventions: the Convention on Biological Diversity (CBD), CITES, the Convention on Migratory Species (CMS), the Intergovernmental Panel on Climate Change (IPCC), the International Treaty on Plant Genetic Resources for Food and Agriculture (ITPGR), the International Whaling Commission (IWC), the Ramsar Convention on Wetlands and the World Heritage Convention). The Group's aims are to explore opportunities for collaboration and increased coordination; International Consortium on Combating Wildlife Crime regroups the CITES Secretariat, INTERPOL, the United Nations Office on Drugs and Crime (UNODC), the World Bank and the World Customs Organization (WCO) and endeavors to bring coordinated support to the national wildlife law enforcement agencies; the United Nations Environment Management Group

other to address environmental criminality.[244] Representatives of fedpol, the Federal Customs Union and the Federal Food Safety and Veterinary Office collaborate closely with these institutions[245]. INTERPOL and Europol lead international operations targeting environmental crime cases and facilitate the exchange of information between law enforcement agencies. They also support national criminal investigations and provide training to strengthen national environmental prosecution. Switzerland, like all other member states, stations a police attaché of fedpol at INTERPOL, and three attachés of fedpol and the Federal Customs Union at Europol. The Federal Customs Union is also the responsible agency for coordinating national action on environmental criminality with Europol as part of its EMPACT law enforcement priorities.[246] Information exchange is crucial to ensure the cross-border collaboration between law enforcement agencies. The WCO developed the Environet platform in 2009 which customs agencies can use to upload data on confiscations.[247] It also co-created the Green Customs Initiative, a partnership which seeks to enhance the capacity of customs officers to detect illegal trade in environmentally sensitive commodities. These currently consist of ozone depleting substances (ODS), toxic chemicals, hazardous wastes, endangered species and living-modified organisms.[248] These initiatives have shown that Switzerland's decentralized law enforcement structure is not adapted to coordinate effectively within these international collaboration mandates. It has sought to streamline national action on environmental crime since 2018, which will be addressed in Section V subsection 1(d).

b. Environmental Criminal Law in Switzerland

Environmental criminal law barely appears in the principal Criminal Code. A few offenses indirectly affect the environment, such as art. 223 CP (creation of an explosion by gas, gasoline, petroleum or other products), art. 224 CP (creation of a danger through explosives and toxic gases), arts. 232 - 236 CP (felonies and misdemeanors against public health), art. 226bis CP (creation of a danger through the use of nuclear energy, radioactive substances or ionized radiation) and 230bis CP (creation of danger through genetically modified organisms). All primary environmental criminal offenses are codified in administrative statutes as annex provisions. Each statute regulates the human interaction with a different environmental good:

- The Environmental Protection Act (EPA), which covers multiple areas of the environment[249],

is a United Nations system-wide coordination that furthers inter-agency cooperation in support of the implementation of the international environmental and human settlement agenda; thematic cooperation between several technical organizations on trade, sustainability, marine species, tree species, safety and welfare standards and illegal wildlife trade. CITES, 'Cooperation and Partnerships'.

[244] KUK, 'Bericht an den Bundesrat', p. 6.

[245] KUK, 'Bericht an den Bundesrat', p. 6.

[246] KUK, 'Bericht an den Bundesrat', p. 7.

[247] World Customs Organisation, 'Launch of the new WCO Data Model: Optimizing data exchange for enhanced facilitation', (11 December 2009).

[248] United Nations Environmental Programme, 'The Green Customs Initiative'.

[249] Federal Act on the Protection of the Environment of 7 October 1983, (RS 814.01).

- The CITES Act, which codifies international obligations on the international trade of endangered species[250],
- The Fisheries Act, which aims to maintain and improve of marine biodiversity, and regulate its sustainable exploitation[251],
- The Water Construction Act, which aims to protect people and infrastructure from water damage[252],
- The CO2 Act, which seeks to reduce emission of greenhouse gasses in order to limit global temperature rising above 2° Celsius in compliance with the Kyoto Protocol and the Paris Agreement[253],
- The Gene Technology Act, which seeks to protect humans, animals, and the environment from abuses of gene technology[254],
- The Hunting Act, which regulates the hunting of certain animals[255],
- The National Park Act, which concerns the protection of two national parks in Switzerland[256],
- The Protection of Nature and Cultural Heritage Act, which seeks to protect sites of local or historical character, Swiss natural and cultural monuments, and indigenous flora and fauna[257],
- The Waters Protection Act, which aims to protect waters against harmful effects and manages its use for drinking water, irrigation, and leisure[258], and
- The Forest Act, which is intended to conserve the forest as well as promote the forestry sector[259].

Environmental provisions are also included in non-environmental statutes, such as the Chemicals Act[260], the Foodstuffs Act[261], the Agriculture Act[262], or the Nuclear Energy Act[263].

This dispersal causes the criminal provisions to repress different kinds of behaviors; some norms require that the criminalised behavior have an environmentally damaging impact, while others consider the abstract behavior itself sufficiently grave to warrant a sanction notwithstanding a lack of damaging result. Some of these offenses are accessory to an administrative act, or accessory to an administrative statute, which has direct consequences on

[250] Bundesgesetz über den Verkehr mit Tieren und Pflanzen geschützter Arten (BGCITES) vom 16 März 2012, (RS 453).
[251] Bundesgesetz über die Fischerei (BGF) vom 21 Juni 1991, (RS 923).
[252] Bundesgesetz über den Wasserbau vom 21 Juni 1991, (RS 721.100).
[253] Federal Act on the Reduction of CO2 Emissions (CO2 Act) of 23 December 2011, (RS 641.71).
[254] Federal Act on Non-Human Gene Technology of 21 March 2003 (RS 814.91).
[255] Bundesgesetz über die Jagd und den Schutz wildlebender Säugetiere und Vögel (Jagdgesetz, JSG) vom 20. Juni 1986 (RS 922.0).
[256] Federal Act on the Swiss National Park in the Canton of Graubünden (National Park Act) of 19 December 1980, (RS 454).
[257] Federal Act on the Protection of Nature and Cultural Heritage (NCHA) of 1 July 1966 (RS 451).
[258] Federal Act on the Protection of Waters of 24 January 1991, (RS 814.20).
[259] Federal Act on Forest of 4 October 1991, (RS 921.0).
[260] Federal Act on Protection against Dangerous Substances and Preparations of 15 December 2000 (RS 813.0).
[261] Federal Act on Foodstuffs and Utility Articles of 20 June 2014, (RS 817.0).
[262] Federal Act on Agriculture of 29 April 1998 (RS 910.1).
[263] Nuclear Energy Act of 21 March 2003, (RS 732).

the competence to review on appeal of administrative vs. criminal judicial instances, as well as the scope of review and remedies awarded to them.[264] The proposed sanctions are also inconsistent; they can range from a fine for some contraventions of the EPA, Water Protection Act, Hunting Act, Fisheries Act and Protection of Nature and Cultural Heritage Act[265] under the Ordnungsbussenbesetz (OBG)[266], to a prison sentence depending on the statute, means of violation and *mens rea*. The fine ranges up to CHF 300.- (Art. 1 al. 4 OBG), but can be accumulated with another up to CHF 600.- (Art. 5 al. 2 OBG *e contrario*). Any violation of a decision issued by an agency to address an environmentally harmful behavior, such as the prohibition to fish (Art. 19 al. 1 Fisheries Act), is fined according to Art. 292 CP, for a sum of up to CHF 10'000.- (Art. 106 al. 1 CP). Some statutes, such as the CITES Act, provide prosecuting authorities the possibility to sanction violations with a prison sentence of up to 5 years if the offense is committed commercially or in an organised group (Art. 26 al. 2 CITES Act). Insofar as the matter is not conclusively or exclusively regulated on a federal level, there is (also) room for cantonal criminal law in the environmental sector pursuant to Art. 335 al. 1 CP.[267] Art. 335 al. 2 CP permits the cantonal government to sanction violations of cantonal environmental law with a prison sentence.

The criminal offenses codified in administrative laws are primarily pursued and prosecuted by the cantonal criminal prosecution agencies[268], either because their respective statutes stipulate to that effect *(see* Art. 20 al. 1 Fisheries Act), or tacitly, pursuant to Art. 22 CPP[269]. In some instances, the administrative agency responsible for the general execution of a statute (*see* Art. 1 §2a Cantonal Nature and Cultural Heritage Ordinance of Zurich[270]) is a party to the trial. The prosecution can also be statutorily attributed to federal authorities (see Art. 20 al. 2 Fisheries Act), including administrative agencies under the federal executive branch. The measures implemented by administrative agencies may be of administrative nature (as defined by, among others, Art. 5 al. 1 Administrative Procedural Act), which are however subject to appeal before the Federal Administrative Court (Art 5 al. 1 ACA). Much like the substantive divergences between the statutes, the procedural requirements for their prosecution differ too. Some statutes, such as the CO2 Act, or some individual provisions, such as in the EPA, follow the Administrative Criminal Code (ACA)[271]. In this case the sanction is subject to appeal before the Federal Criminal Tribunal if the statute does not provide otherwise (Art. 25 al. 1 ACA). Cases in which only a few provisions are subject to the ACA create a split competence, where only the prosecution of some offenses is delegated to federal, and not

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[264] *See*: Hilf & Vest, 'Gutachten Umwelt', p. 37 ff.

[265] Sybille Dillon, 'Umweltstrafverfahren in der Praxis – Teil 1', p. 130 in: Marianne Johanna Hilf, Jürg-Beat Ackermann (Eds.), *Umwelt-Wirtschaftsstrafrecht – 9. Schweizerische Tagung zum Wirtschaftsstrafrecht*, Collection EIZ Band/Nr. 177 (2017).

[266] Ordnungsbussengesetz (OBG) vom 18 März 2016 (RS 314.1).

[267] Hilf & Vest, 'Gutachten Umwelt', p. 12.

[268] In Zurich, environmental crimes violating the EPA or the Water Protection Act are prosecuted by the state attorneys. Federal Office of the Environment, 'Strafverfolgung: Oft werden Umweltdelikte fahrlässig begangen' (14.2.2018).

[269] Swiss Criminal Procedure Code of 5 October 2007 (RS 312.0).

[270] Kantonale Natur- und Heimatschutzverordnung (KNHV), vom 1 Juli 1978 (702.11).

[271] Bundesgesetz über das Verwaltungsstrafrecht of 22 March 1974 (RS 313.0).

cantonal agencies.[272] For instance, the Federal Customs Union is responsible for investigating omissions to pay incentive taxes under the EPA (Art. 62 al. 2 EPA) and violations of certain provisions in the CO2 Act (Art. 45 CO2 Act). The Federal Food Safety and Veterinary Office pursues offenses against the CITES Act (Art. 27 al. 1 CITES ACT), and imports in violations of the Fisheries Act (Art. 20 al. 2 Fisheries Act). If the last offense also violates the Added Value Tax Act, then the Federal Customs Union is competent (Art. 27 al. 1 CITES Act, Art. 20 al. 2 Fisheries Act).[273] The split happens within the canton as well, where both the police and government agencies can be made responsible for issuing fines (Art. 2 al. 1 2nd phr. OBG). Where offenses concern wildlife trafficking, Swiss border agencies notify and cooperate with the customs and environmental authorities of the receiving, or transit country (Art. 18 CITES Act). Finally, the Federal Office of the Environment has the power to overview and appeal decisions made by cantonal authorities on the basis of the EPA (Art. 56 al. 1 EPA). Similar provisions are included in other environmental statutes; in the case of the Protection of Nature and Cultural Heritage Act for instance, either the Federal Office of the Environment, the Federal Culture Agency or the Federal Roads Office can review the decision by the cantonal agency (Art. 12g al. 2 Protection of Nature and Cultural Heritage Act). The cantonal environmental agencies can also appeal the cantonal criminal prosecution agencies' decisions, such as setting a low sanction, or ceasing a pre-trial investigation, if a statute grants them the right to do so.[274]

Statutes provide whom the offenses can be committed by. These can be any private persons or entities, or specific persons or entities, or such persons or entities subject to certain obligations under a permit or duty to act. Companies and corporations are also subject to violate environmental criminal provisions, either by virtue of a special statute or through application of the Criminal Code. Art 102 CP allows companies to be sanctioned for felonies and misdemeanors (pursuant to Art. 3 CP), including those codified outside the Criminal Code (Art. 333 al. 1 CP).[275] Even here, confusion between the statutes abound: most special statutes provide for the applicability of the ACA, including Art. 7 ACA, which foresees sanctioning companies with fines of up to CHF 5000.- for violating a statutory obligation.[276] This differs greatly from the fine of up to CHF 5'000'000.- provided by Art. 102 al. 1 CP. The unanimous view of Swiss scholarship is however that Art. 7 ACA does not displace Art. 102 al. 1 CP for felonies and misdemeanors, even if a(n environmental) statute refers to the ACA's applicability.[277] Art. 7 ACA remains applicable for contraventions. Companies are therefore liable for the higher fine if (1) a felony or misdemeanor has been committed inside their structure (2) during its normal business activities and (3) the perpetrator can't be identified because the company has failed to organize themselves to avoid dissimulation (Art. 102 al. 1 CP). Art 102 al. 1 CP therefore creates subsidiary liability for companies. Art 102 al. 2 CP,

[272] Hilf & Vest, 'Gutachten Umwelt', p. 15.
[273] Hilf & Vest, 'Gutachten Umwelt', p. 16.
[274] Federal Office of the Environment, 'Umweltstrafrecht: «Entscheidend sind der Wille und das Know-how der Strafverfolgenden»'.
[275] Hilf & Vest, 'Gutachten Umwelt', p. 63.
[276] Hilf & Vest, 'Gutachten Umwelt', p. 64.
[277] Hilf & Vest, 'Gutachten Umwelt', p. 64.

which creates principal liability for companies, doesn't apply to environmental crimes directly, as these are not included in the exhaustive list of offenses required for the provision's application. The design of Art. 102 al. 1 CP leads to unfavorable conditions for the pursuit of corporate environmental crime which will be addressed below.

c. Obstacles to Enforcement

The current state of environmental criminal law is not conducive to address environmental crime effectively, let alone to repress the kind of transnational environmental crime that generates the most proceeds. This is in large part due to the decentralized nature of enforcement caused by Switzerland's federalist structure and fragmented environmental legislation. In addition, environmental crime is not seen as a prosecutorial priority and therefore lacks the resources and institutional will to be enforced.[278] The relegation of environmental criminal provisions to administrative statutes creates the impression in private persons and law enforcement agencies that their violation is "only" a minor administrative offense.[279] This weakens the deterrent effect that criminal law usually has on the population.[280] In fact, the criminal provisions are seen by some as "strengthening the enforcement" of environmental protection, while the administrative provisions are the main drivers of behavioral regulation.[281] The effect on law enforcement is equally palpable: when comparing other offenses codified in the Criminal Code (such as theft or white collar crime), and secondary criminal provisions in administrative courts, the police is less aware that they are the first instance of criminal social control.[282] The administrative environmental offenses require either law enforcement to independently investigate a fact pattern or a private citizen to file a complaint. Most environmental offenses are however not obvious to the average person, and it would fall to government agencies to step in.[283] Furthermore, the technical nature of the statutes makes it hard for law enforcement agencies to understand their application[284] or to understand at which stage to reach out for enforcement by environmental agencies who are better equipped to parse the evidence.

Despite being one of the most lucrative criminal enterprises worldwide, environmental crime is not addressed in a centralised and dedicated manner in Switzerland. This differs from other large-scale offenses enumerated in art. 24 CPP, which are delegated to the central Federal Office of the Attorney General due to their importance and complexity. The competence to investigate and prosecute is instead attributed to different agencies on a federal and cantonal level. This can lead both law enforcement and potential victims not to know which agencies to reach out to, and whether the competence falls to federal or cantonal authorities. The decentralised attribution of competence also leads to discrepancies in prosecution between the

[278] Dillon, 'Umweltstrafverfahren in der Praxis', p. 134.
[279] Hilf & Vest, 'Gutachten Umwelt', p. 36.
[280] Hilf & Vest, 'Gutachten Umwelt', p. 36
[281] Komm.USG-Ettler, intro. remarks to Art. 60-62 N 15f.
[282] Hilf & Vest, 'Gutachten Umwelt', p. 14.
[283] Hilf & Vest, 'Gutachten Umwelt', p. 14.
[284] Komm.USG-Ettler, Art. 60 N 177, Art. 61 N 141.

cantons.[285] This may be abused by companies looking to change their seat of business to reduce its exposure to prosecution. The enforcement against environmental offenses requires multi-agency collaboration. Agencies may however not have the sufficient resources to cooperate on every matter, to proactively create collaboration opportunities or to track law enforcement cases without solicitation. This creates a disconnect between environmental agencies and law enforcement authorities. In cases where multiple agencies must work together because the offense violates several statutes, the bureaucracy involved might also deter the investigation altogether or slow it down so much that the statute of limitation is reached before the investigation has ended.[286] Accordingly, only about 1000 – 1500 decisions based on environmental criminal law are issued in Switzerland in a year.[287] The low number of cases means that either (1) few offenses are identified by injured parties or law enforcement or (2) few offenses are addressed to the authorities. This may be due to a lack of (1) awareness of the existing law, (2) understanding of the appropriate authorities, (3) understanding that an activity is criminally sanctionable, or (4) faith in follow-through by law enforcement.

Authors have observed that the Federal Office of the Environment has not filed many criminal complaints with law enforcement because its priorities lie elsewhere and because it lacks the resources to do so.[288] Overall Swiss practice shows that prison sentences are rarely issued, and the majority of violations is punished with fines of less than CHF 1000.-, averaging at about CHF 500.- per offense. The highest fine imposed during the evaluation period 2017 was CHF 5000.-, even though the EPA allows for fines to go up to CHF 20'000.-.[289] This practice shows that law enforcement doesn't make use of the statutory potential. The low fines further confirm the public's opinion that these are petty offenses. The low fines can be explained due to the demographic that they address. Statistics from the last few years show that it is primarily natural persons which are sanctioned.[290] It follows from the low fines that the offenses committed are mostly contraventions, meaning that their perpetrators were not identified as part of a criminal enterprise. If they had been committed within the business activities of a company, the company would have escaped the application of art. 102 CP, and would only be sanctionable by a maximal fine of CHF 5000.- (art. 7 ACA).[291] This finding is problematic because it is not private individuals but companies and criminal organizations which are the main perpetrators of environmental crimes, particularly of the transnational

[285] FOEN, 'Umweltstrafrecht: «Entscheidend sind der Wille und das Know-how der Strafverfolgenden»'.

[286] For an example: State attorney Guy Krayenbühl recounts a case where the collaboration between the police and the state attorney's office took 2 ½ years and the compensatory claim risked to be time-barred. His office therefore sought an agreement with the parties to make a payment in the amount of CHF 200,000 to the public treasury of the Canton of Zurich. The proceedings against the two accused employees were then discontinued in application of Art. 53 StGB. Guy Krayenbühl, 'Umwelt-Wirtschaftsstrafrecht aus staatsanwaltschaftlicher Sicht', p. 161 in Marianne Johanna Hilf, Jürg-Beat Ackermann (Eds.), *Umwelt-Wirtschaftsstrafrecht – 9. Schweizerische Tagung zum Wirtschaftsstrafrecht*, Collection EIZ Band/Nr. 177 (2017).

[287] KUK, 'Bericht an den Bundesrat', p. 4.

[288] Dillon, 'Umweltstrafverfahren in der Praxis', pp. 133-134.

[289] FOEN, 'Umweltstrafrecht: «Entscheidend sind der Wille und das Know-how der Strafverfolgenden»'.

[290] Hilf & Vest, 'Gutachten Umwelt', pp. 5-8.

[291] This assumes that they have been identified for the purposes of the data indicated, rendering art. 102 al. 1 CP inapplicable.

kind.[292] Not only would the fines issued not be sufficient to make a dent in any major company or organization's assets, but the prosecution is clearly not focused on the "big players" violating environmental law. It therefore misses out on addressing the biggest potential damage.

Despite being added to the Swiss Criminal Code in response to the environmental disaster caused by the Schweizerhalle fire in 1986[293], art. 102 al. 1 CP is not designed to hold companies liable for causing environmental disasters. This also shows in the very rare application of the provision.[294] First, it is sufficient to identify one person who was part of the criminal activities in order to absolve the company of criminal wrongdoing. Often, the harm occurs following the improper inspection of infrastructure or the improper disposal of waste by an employee low in the company hierarchy. This incentivises the company to scapegoat the perpetrator, instead of holding company leadership responsible for lack of environmental oversight. Secondly, whether a company has complied with all necessary and reasonable due diligence measures to prevent environmental damage is in fact irrelevant to art. 102 al. 1 CP. Criminal law "compliance" only requires the observance of personal organisational duties and the resulting identification of one (!) perpetrator.[295] This means that even gross negligence as to environmental compliance remains unsanctioned if the company complies with all purely organisational requirements. The way art. 102 al. 1 CP applies to environmental offenses does therefore not create strong incentives to impose preventive measures to ensure environmentally harmless conduct. As a result of (1) the subsidiary nature of company liability and (2) the requirement of organizational mismanagement even if the offense was committed by leadership, art. 102 al. 1 CP fails to adhere to international standards on corporate criminal liability.[296] The proposed directive on the protection of the environment through criminal law[297], which was updated as part of the EU Commission's 2019 Green Deal[298], would require EU countries to sanction companies whose *de facto* or *de jure* leadership committed, incited, abetted or attempted to commit an environmental offense (Art. 6(1) proposed Directive). It would also require imposing environment-specific sanctions on legal persons who commit an environmental offense: the company could be sentenced to reinstate the environment within a given period (Art. 7(2)(b) proposed Directive), to an exclusion from public benefits or aid (Art. 7(2)(c) proposed Directive), to temporary or permanent disqualification from the practice of business activities (Art. 7(2)(e) proposed Directive), to temporary or permanent closure of establishments used for committing the offense (Art. 7(2)(i) proposed Directive), or to install due diligence schemes for enhancing compliance with environmental standards (Art. 7(2)(j) proposed Directive). While the Directive would not territorially apply to Swiss companies, they

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[292] *See*: Spapens & Huisman, 'Cross-Border Environmental Crime', p. 34-35.

[293] *See*: BSK StGB I-Niggli/Gfeller, Art. 102 N 13.

[294] Hilf & Vest, 'Gutachten Umwelt', p. 66.

[295] Hilf & Vest, 'Gutachten Umwelt', p. 65.

[296] Hilf & Vest, 'Gutachten Umwelt', p. 70. These corporate criminal liability standards were developed in the framework of the cybercrime convention of the Council of Europe on 1999 and 2001, in the 2008 EU Directive on the protection of the environment through criminal law, and in the EU Commission's 2019 Green Deal.

[297] Proposal for a Directive Of The European Parliament And Of The Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC, 2021/0422 (COD).

[298] European Commission, Press Release – 'European Green Deal: Commission proposes to strengthen the protection of the environment through criminal law' (15.12.2021).

might fall under its jurisdiction if their activities caused an environmental damage on an EU member's territory; in fact, the Directive allows EU member states to extend its jurisdiction to that effect (Art. 12(2)(c) proposed Directive).

Finally, Swiss environmental criminal law is not designed to assign jurisdiction to Swiss courts over cross-border or extraterritorial environmental crime. Only a few provisions in the body of Swiss environmental criminal law address the authority to prosecute cross-border activities: art. 60 al. 1 lit. p *cum* Art. 30f al. 1 EPA attributes the competence to pursue violations of orders and ordinances concerning the environmentally friendly disposal of waste in Switzerland and abroad, and the import and export of waste destined to such disposal to the cantonal authorities; art. 26 al. 1 *cum* 27 CITES Act assigns the competence to pursue the illicit import of endangered species to the Federal Food Safety and Veterinary Office. This only guarantees the competence of Swiss authorities over activities which occur in Switzerland or at its border, and none which take place abroad. Many offenses in environmental statutes are also formulated in a behavior-centric way, meaning that there is no result required in order for an offense to be committed (*delit formel* vs. *matériel; Erfolgs-* vs. *Tätigkeitsdelikt*). Accordingly, these provisions are not designed to create a result-based jurisdictional nexus in Switzerland.[299] It is therefore impossible, barring a modification of environmental statutes to include these activities[300], to pursue transnational environmental crime with environmental statutes alone. Here too, Swiss environmental law would not meet the jurisdictional standards envisaged by its European neighbors.

d. Recent Developments

The Swiss government has sought to address some of these shortcomings above in the past 5 years. In 2017, the Federal Office for the Environment solicited an independent expert report reviewing Swiss environmental criminal law.[301] The report proposed the legislative modification of all environmental statutes to equalise sentences penalising similarly grave activities, and to increase overall potential criminal penalties. It also proposed adapting art. 102 CP to environmental prosecution by striking down al. 1 and the exhaustive list of offenses in al. 2.[302] This would ensure that corporate criminal liability is primary for all environmental felonies or misdemeanors. It also suggested that, while retaining the environmental criminal provisions in administrative statutes, some offenses should be included in the principal Criminal Code, which constitute concrete public endangerment offenses.[303] These would criminalise "impairment of the soil by substances or other organisms" (Art. 230b proposed draft CP), "impairment of waters by substances or organisms" (Art. 230c proposed draft CP) and "endangerment by air change" (Art. 230d proposed draft CP) and "endangerment by waste" (Art. 230e proposed draft CP). They would be formulated as result-based offenses,

[299] *See*: Cassani, *Droit pénal économique*, pp. 36-42.
[300] As proposed by Hilf & Vest, 'Gutachten Umwelt', p. 254 ff.
[301] Hilf & Vest, 'Gutachten Umwelt', p. 1.
[302] Hilf & Vest, 'Gutachten Umwelt', p. 72.
[303] Hilf & Vest, 'Gutachten Umwelt', p. 257.

meaning that foreign offenses with effects on Swiss territory would also be covered.[304] These recommendations have been analysed by the Federal Council and will be debated in parliament once the different statutes are up for revision. Parliament recently approved stricter sanctions in the CITES Act on the basis of the expert report, and amendments to EPA are currently being discussed in chambers of parliament.[305]

Following the publication of the report, the Federal Council introduced the environmental crime coordination group (*Koordinationsgruppe Umweltkriminalität,* KUK) in 2018. The coordination group is composed of representatives of the Federal Office of the Environment, the Federal Food Safety and Veterinary Office, fedpol, the Department of Justice, the Federal Customs Union, the Federal Department of Foreign Affairs, and the Federal Consumer Affairs Bureau, as well as two representatives of the Cantonal Police Commanders Conference (*Konferenz der kantonalen Polizeikommandanten*, KKPKS), the Swiss Prosecutors Conference (*Schweizerische Staatsanwälte-Konferenz*, SSK) and the Heads of Environmental Protection Agencies Conference (*Konferenz der Vorsteher der Umweltschutzämter*, KVU).[306] It seeks to strengthen collaboration among federal agencies, and between federal and cantonal agencies on environmental crime to improve prosecution procedures, and develop environmental criminal legislation and statistics to its application. It also serves as the primary interlocutor with INTERPOL's environmental crime division, and has nominated the Federal Customs Union to be Europol's principal coordination partner on environmental crime enforcement.[307] Since its establishment, the coordination group has worked with the Swiss Police Institute (SPI) to educate law enforcement offices on enforcing environmental law, following proper inter-agency procedure, and recognizing and investigating markers of environmental offenses.[308] It has also tasked the SSK with developing sentencing recommendations for environmental offenses, who has presented the draft document to the KUK in 2021.[309] The KUK also solicited the creation of a reference work, compiling quantified confiscation standards and case studies on confiscations of proceeds from environmental crime from neighboring countries. These will serve state attorney's offices and courts, who may not have the expertise to determine the value of natural resources or expenses saved by environmental non-compliance.[310] The objective is to improve the rate of confiscation in environmental crime in order to disincentivise perpetrators from committing these offenses. Finally, the KUK has identified criminal organisations as primary perpetrators of environmental crime and has therefore envisaged expanding existing criminal provisions to these activities. It has therefore acknowledged that "financial flows resulting from organized environmental crimes are subject to the Money Laundering Act (AMLA) and financial

[304] Hilf & Vest, 'Gutachten Umwelt', p. 257.
[305] KUK, 'Bericht an den Bundesrat', p. 5.
[306] KUK, 'Bericht an den Bundesrat', p. 2.
[307] KUK, 'Bericht an den Bundesrat', p. 2, This decision is questionable, because the Federal Customs Union is tasked with confiscating trafficked natural resources and species at the border. It neglects intangible cross-border crimes, such as air pollution or unsanctioned water discharge over which the Federal Customs Union does not have any jurisdiction.
[308] KUK, 'Bericht an den Bundesrat', p. 3.
[309] KUK, 'Bericht an den Bundesrat', p. 2.
[310] KUK, 'Bericht an den Bundesrat', p. 4.

intermediaries are subject to the reporting obligation pursuant to Article 9 AMLA or would have a right to report under Article 305ter al. 2 CP."[311] The KUK has also identified MROS and the organized crime division at fedpol as relevant enforcement agencies to cooperate with on environmental crime.[312]

These recent developments are promising for the prosecution of environmental crime, as well as money-laundering from environmental proceeds. The proposed legislative amendments would create jurisdictional nexuses in Switzerland for environmental felonies committed abroad, particularly those which create geographically dispersed results such as air pollution. Prosecuting the predicate crime in Switzerland would facilitate the confiscation of possibly laundered proceeds flowing from these offenses, which will be addressed below (Section V subsection 3). The KUK's proposed 2022-2026 agenda focuses, among others, on streamlining and preempting cooperation between enforcement agencies.[313] It is therefore encouraging that the KUK has identified the organized crime division at fedpol and MROS as partners. This sets the groundwork for future collaboration between law enforcement dedicated to financial crime, and agencies pursuing environmental offenses. The KUK's limited focus on organized crime, without mentioning corporate criminality is unfortunate and will hopefully be expanded in its 2022-2026 agenda. Only in addressing both demographics of potential perpetrators the legislator would target the whole scope of environmentally damaging activities beyond trafficking of endangered species.

2. Anti-Money Laundering Enforcement

The primary goal of sanctions in environmental law is to force perpetrators of environmentally harmful activities to internalise the costs of these activities.[314] Central to this paper is the proposition that anti-money laundering enforcement can be an additional, and possibly more powerful tool to achieve this objective. As will be discussed below, Swiss money-laundering provisions also target predicate activities not occurring on Swiss territory, and in that sense reach farther than environmental law does. Anti-money laundering also primarily targets entities creating important profits, such as members of organised crime, or corporations. These two have been identified as the primary perpetrators of large-scale environmental harm which largely escape significant prosecution under ordinary environmental statutes. Finally, anti-money laundering enforcement benefits from a much larger international network, which has already led to significant, binding changes in financial market regulation. The same can not be said for environmental law *stricto sensu*.

This paper's proposition is assisted by the FATF's proposal to implement environmental crimes as predicate offenses to money-laundering, and the recognition thereof by Swiss institutions, above like the KUK, as well as members of parliament. Other parallel

[311] KUK, 'Bericht an den Bundesrat', p. 8.
[312] KUK, 'Bericht an den Bundesrat', p. 8.
[313] KUK, 'Bericht an den Bundesrat', p. 8.
[314] Federal Council, 'Nachhaltigkeit im Finanzsektor Schweiz - Eine Auslegeordnung und Positionierung mit Fokus auf Umweltaspekte, Bericht des Bundesrates' (24.6.2020).

'greening' projects in financial regulation and corporate responsibility, which all find themselves at the more corporate end of legal focus areas, suggest that environmental protection can (or must) happen by making the latter economically viable– either through incentives or through punitive measures. Switzerland has for instance identified sustainable finance as a way for the Swiss financial market to stay competitive with other financial hubs like the EU.[315] The Federal Council has therefore selected several potential avenues to render financial instruments more environmentally friendly, including among others requiring financial market actors to take into account climate risks in investments in order to comply with their fiduciary duties to their clients.[316] Further, financial market supervisory authorities would have to examine whether financial market actors sufficiently considered the financial risks in connection with climate change.[317] The growing concern about the environmental impact of corporate activities has also led the Swiss citizenry to vote on the *Konzernverantwortungsinitative* in 2020. This initiative proposes that corporations headquartered in Switzerland should be criminally liable for environmental (and human rights) offenses committed by any entity within its supply chain, or any of its subsidiaries.[318] While the initiative failed to gain a cantonal majority required for a constitutional amendment[319], the counterproposal by parliament has now introduced reporting and due diligence obligations for major Swiss companies already subject to auditing obligations[320]. These companies must identify risk factors on environmental damage in their supply chain, and define the supply chain policy for minerals and metals that may originate from conflict and high-risk areas as well as a system for tracing the supply chain (Art. 964sexies al. 1 proposed draft CO). Violations of the reporting and retention obligations can be sanctioned with a fine of up to CHF 100'000.- (Art. 325ter proposed draft CP).[321] These avenues indicate that environmental enforcement is not limited to administrative statutes and agencies, and environmental sustainability has begun turning into a market viability factor. Anti-money laundering enforcement targeting proceeds from environmental crime follows the same objectives as the two projects discussed above. Its ultimate goal is to render the financial market more environmentally sustainable, and hold entities accountable for profiting from environmentally harmful activities. Given recent international initiatives on both corporate responsibility and sustainable finance, Switzerland may therefore achieve two political goals in implementing anti-money laundering enforcement mechanisms to environmental crimes.

Finally, considered a critical hot spot for money-laundering at the integration phase, i.e. at the tail end of the financial criminal flows, Switzerland's primary comparative advantage in

[315] Federal Council, 'Nachhaltigkeit im Finanzsektor Schweiz', pp. 4-5.
[316] Federal Council, 'Nachhaltigkeit im Finanzsektor Schweiz', p. 43.
[317] Federal Council, 'Nachhaltigkeit im Finanzsektor Schweiz', p. 45.
[318] Abstimmungstext Bundesbeschluss über die Volksinitiative «Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt» vom 19. Juni 2020, 1. Erste Vorlage.
[319] Frank Sieber, Gian Andrea Marti, 'Das Volk sagt knapp Ja zur Konzernverantwortungsinitiative – die Stände aber lassen sie scheitern', (NZZ, 29.11.2020).
[320] Philippe Fuchs, Barbara Schroeder de Castro Lopes, 'Indirekter Gegenvorschlag zur Konzernverantwortungsinitiative – Überblick und Würdigung', LSR 1/2021, pp. 46–49.
[321] Fuchs & Lopes, 'Indirekter Gegenvorschlag'.

anti-money laundering lies in analyzing business relationships and account information.[322] Almost half of the CHF 7'879 billion assets currently managed by Swiss banks originated abroad.[323] In 2016, this sum was evaluated as making up approximately 26% of the world market's foreign asset management.[324] Switzerland's two largest banks, UBS and Credit Suisse, are also Switzerland's only two globally active banks and hold foreign assets making up 70% of their respective balance sheets.[325] Switzerland is therefore well positioned to identify deposits of international criminal activities and cooperate in the international enforcement against money-laundering. More important still for the purpose of this paper is the central nature of the Swiss financial market for products associated with environmental crimes. Raw data possibly submitted by Switzerland to the FATF in view of its 2021 Report was not made available to the author, nor could the author officially confirm that Switzerland had participated in it. However, available open-source data may help paint a picture of the risk exposure of the Swiss market to money-laundering from environmental crime (although it should be noted that the following data concerns the legal trade of goods flowing through Switzerland, and no statements can be made on whether or to what extent parts of these are of illicit origin).

First, Switzerland's main import *and* export in 2020 was gold: USD $87.4 billion were imported, and USD $67.5 billion were re-exported.[326] In 2020, worldwide trade of gold was valued at USD $422 billion.[327] This means that about 20% of the world's gold transits via Switzerland to be refined. And yet, the Federal Audit Office called attention to the inadequate control of gold imports into the country in a report published on June 23 2020. The report indicated that Customs data is not sufficiently transparent to differentiate between mined gold, bank gold and recycled gold.[328] This increases the risk that gold bars of illicit origin are co-mingled with licit bars. A 2021 follow-up report by the Federal Council confirmed that this risk had been taken seriously: It amended customs tariff classification to better differentiate between types of gold imports since 1 January 2021. The aim was to "make the statistics more transparent and improve traceability along the supply chain, as well as to distinguish more clearly between gold traded prior to refining, and refined gold."[329] In 2021 and 2022, the Anti-Money Laundering Act[330] was revised to include trade of precious metals under the anti-money laundering surveillance executed by the Precious Metals Control within the Federal Customs Office. However, these amendments still excluded the most high-risk aspect of the gold trade,

[322] Oliver Zihlmann und Christian Brönnimann, 'Unser ganzer Instrumentenkasten versagt', (Tagesanzeiger, 21.9.2020).
[323] Thomas Rühl, 'Switzerland's banking sector: Facts & Figures', (Swissbanking, updated 2021).
[324] FATF, '2016 Mutual Evaluation Report', p. 139; Federal Council, 'Umwelt Schweiz 2018 – Bericht des Bundesrates', (2018), p. 34.
[325] SNB, 'Financial Stability Report 2021', (2021), p.16.
[326] CEPII, BACI: International Trade Database at the Product-Level, Harmonized System (HS96) 1996 - 2020 version.
[327] CEPII, BACI: International Trade Database at the Product-Level, Harmonized System (HS96) 1996 - 2020 version.
[328] Federal Audit Office, 'Audit de l'efficacité du contrôle des métaux précieux', (24.2.2020), p. 4.
[329] Federal Council, 'Recommendations from 'The Swiss commodities sector: current situation and outlook' – progress on implementation – Report of the Federal Council', (Bern, 21.4.2021), p. 5.
[330] Federal Act on Combating Money Laundering and Terrorist Financing of 10 October 1997 (RS 955.0).

which lies at the import of raw materials.[331] This means that upstream activities in the supply chain from mine to refinery escape anti-money-laundering enforcement. The Federal Audit Office therefore recommended the inclusion of refineries or entities buying raw materials into the Precious Market Control's scope of anti-money laundering surveillance.[332] The Head of Unit Raw Materials at Swissaid, Marc Ummel, has also pointed out that Switzerland is comparatively weak on refinery oversight[333]; the United States and the EU both already have legislation on conflict minerals in place which aim to stop the use of gold from politically unstable areas.[334] This data shows that the Swiss refinery market may be exposed to risks of money-laundering from gold mining.

Secondly, a 2005 WWF Report on Switzerland's role in illegal logging shows that 8% of imported wood in Switzerland is estimated to come from illegal sources.[335] The timber is said to be refined into paper or other derivative products via several countries mainly located in Europe, where it is processed before entry into Switzerland.[336] While the report is fairly old, Switzerland only introduced legislation criminalising illegally logged wood on 1 Jan 2022.[337] It thereby only implemented the WWF's petition to do so 17 years after the fact. In the meantime, the EU has implemented the Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 (EUTR), which entered into force in 2013, banning the placing of illegally harvested timber on the market.[338] It can therefore be expected that, in banning these products, the import of illicitly sourced milled products would also decrease. However, a 2021 Fitness Check report indicated that "[w]hile the EUTR has achieved some success, its application has varied across the EU and there has been no significant effect on the volume of timber import from known high-risk sources."[339] It may therefore be deduced that the import of illegally sourced wood products has also not significantly decreased for Switzerland.

Thirdly, Switzerland is home to around 550 commodities trading companies, which generate 3.8% of Swiss GDP.[340] 35% of global trade in oil and 60% of global trade in metals flows through Switzerland.[341] With the exception of gold, the commodities in question never physically enter Switzerland, but are transported directly from third-country to third-country by Swiss firms.[342] These are involved in complex value chains, which have raised concerns

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[331] Federal Audit Office, 'Audit de l'efficacité du contrôle des métaux précieux', p. 33.

[332] Federal Audit Office, 'Audit de l'efficacité du contrôle des métaux précieux', p. 5.

[333] RTS, 'Manque de transparence dans le commerce de l'or: interview de Marc Ummel (Swissaid)', (La Matinale, 23.6.2020).

[334] European Commission, 'Conflict Minerals Regulation'.

[335] WWF, 'Wood laundering: 8 Per Cent Of Swiss Woods Imports Originate From Illegal Sources', (3.3.2005).

[336] WWF, 'Wood laundering: 8 Per Cent Of Swiss Woods Imports Originate From Illegal Sources'.

[337] Federal Office for the Environment, 'Timber Trade Regulation in Switzerland'.

[338] European Commission, Timber Regulation.

[339] European Commission, Commission Staff Working Document, Executive Summary Of The Fitness Check on Regulation (EU) No 995/2010 of the European Parliament and of the Council of 20 October 2010 laying down the obligations of operators who place timber and timber products on the market (the EU Timber Regulation), (Brussels, 17 November 2021), SWD(2021) 329 final.

[340] Federal Department of Foreign Affairs, 'Commodities Trade'.

[341] Federal Council, 'Umwelt Schweiz 2018', p. 33.

[342] Public Eye, 'Switzerland – the commodities hub', (undated).

over lack of transparency and exposure to corruption.[343] In fact, several OECD studies show that the commodities sector is particularly susceptible to corruption, both in extraction (e.g., in the awarding of mining concessions) and in trade (market access, transfer prices that are too high/too low).[344] The production of raw materials and the increasing demand for certain raw materials are having an ever greater impact on the environment in the source countries. The consequences are particularly severe for the extraction of non-renewable raw materials such as metals and ores. Mining (extraction, processing and disposal) often leads to erosion, loss of biodiversity, water scarcity and contamination of soils and groundwater.[345] In addition, mining generates production residues, most of which are toxic and cannot be recycled.[346] Given the lack of transparency, tracing traded raw materials is often difficult. This leaves the Swiss market exposed to trading commodities obtained criminally, or in violation of environmental provisions despite voluntary efforts in the commodities sector to avoid such exposure. In a 2015 report that evaluated the risks of money-laundering, the Swiss Government also stressed that "the commodity sector poses the risk of Switzerland being used as a platform to launder assets derived from bribery committed abroad in resource producing countries for the purpose of obtaining contracts".[347]

This data suggests that laundered proceeds from environmental crimes transit through Switzerland's market, potentially creating a sufficient jurisdictional nexus for Swiss courts to adjudicate the offense and confiscate its profits. The following section examines whether money-laundering criminal provisions in Switzerland can be applied to environmental crimes, and identifies potential legislative changes required for the eventual implementation. It only addresses the art. 305bis CP's constitutive elements, as aggravating and *mens rea* factors of this provisions don't pose any extraordinary considerations.

a. Constitutive Elements

Whether proceeds of environmental offenses can be targeted by anti-money laundering law depends on whether they fulfill the criminal provision's requirements. Art. 305bis CP requires (1) assets (2) originating from (3) a crime or an aggravated fiscal offense, which were (4) subject to activities permitting the prevention of identification of its origin, its discovery or its confiscation.

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[343] Federal Council, 'Rohstoffsektor Schweiz: Standortbestimmung und Perspektiven – Bericht des Bundesrates, (Bern, 30.11.2018), p. 23.

[344] OECD, 'OECD Foreign Bribery Report – An Analysis of the Crime of Bribery of Foreign Public Officials', (OECD Publishing, Paris, 2014); OECD, 'Corruption in the Extractive Value Chain – Typology of Risks, Mitigation Measures and Incentives', (OECD Publishing, Paris, 2016).

[345] Federal Council, 'Rohstoffsektor Schweiz', p. 25.

[346] Federal Council, 'Rohstoffsektor Schweiz', p. 25.

[347] Interdepartmental coordinating group on combating money laundering and the financing of terrorism (CGMF), 'Rapport sur l' valuation nationale des risques de blanchiment d'argent et de financement du terrorisme en Suisse', (June 2015), p. 123.

i. Assets

The assets subject to laundering activities can be movable or immovable in nature. They can be monetary assets, or consist of a debt or right.[348] The assets must however have an intrinsic value.[349] This has a number of consequences for environmental crimes. First, goods which have an intrinsic market value like timber or metals could qualify themselves as assets originating from a predicate offense. The dissimulation of these goods could therefore be as simple as co-mingling them with licitly harvested goods of the same kind. Secondly, waste and pollution have no intrinsic value. If a saving was generated from improperly disposing of the waste or emitting pollution that would qualify as an asset.

ii. Origin

The assets must originate from a predicate offense. The term 'originate from' is marred with doctrinal disagreements regarding the strictness of establishing the causation between assets and offense, and the scope of assets involved.[350]

The difficulty of determining with certitude, or even obtaining a prior conviction for the predicate offense has led the Federal Supreme Court to waive the requirement for a strict proof of the predicate offense.[351] It is therefore not necessary to know the details of the offense, nor its perpetrator, to build a money-laundering case.[352] The causation is particularly tenuous where the proceeds are generated as part of a criminal organisation's operation. The Federal Supreme Court allows for the causation to be established if it can be shown that crimes were committed in the context of the organisation and that the assets flow from that context.[353] This facilitates the extraction of assets whose specific origins are difficult to detect due to the covert nature of its perpetrators' environment. Given the proclivity of organised crime towards the commission of waste and wildlife trafficking, this case law is favorable to the practical implementation of anti-money laundering enforcement against environmental criminal proceeds. It would also, with regards to natural resources with an intrinsic value, allow law enforcement to exclude the possibility that they were of licit origin as organised crime is seldom in the business of licit environmental trade practice. This would avoid concerns raised by Cassani and Ackermann[354] that assets of licit origin would be targeted and confiscated despite a lack of evidence as to their direct origin.

The principle of legality also elicits questions about the scope of assets, which once manipulated in any way, are susceptible to constitute part of a money-laundering operation.

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[348] Cassani, *Droit pénal économique*, p. 188.

[349] The Federal Supreme Court considered that because falsified currency didn't have any intrinsic market value, they could not be laundered. The act was therefore of no criminal significance; TF, 6S.426/2006, 28 December 2006, c. 2.2.

[350] *See*: Cassani, *Droit pénal économique,* p. 188 - 197.

[351] ATF 138 IV 1, p.7; ATF 120 IV 323, p. 328.

[352] ATF 120 IV 323, p. 328. Cassani argues however that the facts of the case must be sufficiently determined and precise in order to be compatible with the principle of legality; Cassani, *Droit pénal économique,* p. 189.

[353] ATF 138 IV 1, p. 9.

[354] Cassani, *Droit pénal économique*, p. 190.

The direct products of a predicate offense as well as the compensation for having committed it are both incontestably assets originating from a predicate offense. The replacement values of these two kinds of proceeds also fall within the scope of art. 305bis CP. The Federal Council's Message announcing the legislative amendment proposes that the replacement values can be laundered so long as they have a chain of causation to the predicate offense allowing for their confiscation. This shows that arts. 305bis and 70 CP are inter-connected, and whichever assets fall within the scope of one, are necessarily covered by the other.[355] Put another way by the Federal Council, so long as the paper trail of assets can be documented and clearly traced, the assets can be confiscated and therefore laundered.[356] The Federal Supreme Court has specified that the paper trail must constitute a chain of causation; the assets or its replacement values must seem like the direct and immediate consequence of the predicate offense.[357] At first, the Court considered that assets could not be considered the proceeds of an offense if it only facilitated the acquisition of assets by a future act without immediate chain of causation between the two.[358] More recently however, it allowed the chain of causation to be merely "natural and adequate", where the conclusion of a contract facilitated by corruption generated proceeds. In this case, the gains made by the corruptee can be laundered, so long as there is a chain of causation established even if the gains don't directly spring from the corruption act itself.[359] These decisions frame which gains made by harming the environment are susceptible to be laundered. In some cases, the environmental damage characterised as a crime is incidental to an otherwise licit activity, and it is only the latter which creates a profit. For instance, a factory polluting in violation of its emission allowances is not gaining money from the emission, but from (1) the factory's principal activity and (2) making a saving by not having to off-set additional emission allowances through Voluntary Emission Reductions (VERs), or by not spending money on a proper filtration system. The first category of profits would not be a direct and immediate consequence of the crime, and would therefore *prima facie* not fall within the scope of art. 305bis CP. The second category is however a direct consequence and therefore susceptible to be laundered, which will be addressed in Section V, subsection 2. One could also consider that an environmental crime which facilitated a profit would fall within the scope of the more flexible causation proposed by the Federal Supreme Court. This would be the case, for instance, where illegal logging within a protected area would make way for a profit-generating crop culture, such that the latter is a natural and adequate consequence of the former. The KUK's report to the Federal Council also seems to consider that a monetary competitive advantage gained from committing an environmental offense is susceptible to be confiscated.[360] By extension, it can also be laundered, although there is currently no case law confirming this position.

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[355] Cassani, *Droit pénal économique,* p. 192; ATF 137 IV 79, p. 80; ATF 129 IV 238, p. 244.
[356] Cassani, *Droit pénal économique,* p. 192.
[357] ATF 129 II 453, p. 461.
[358] TF, 3.10.2010, 6B_914/2009, c. 5.1.; ATF 137 IV 79, p. 80 f.; TF, 19.2.2001, 6S.667/2000, c. 3a.
[359] ATF 137 IV 79, p. 80 f.
[360] KUK, 'Bericht an den Bundesrat', p. 4.

The Federal Supreme Court has accepted that savings made by committing an offense fall within the meaning of art. 305bis CP.[361] This position has been criticised by a part of Swiss scholarship, particularly by Cassani[362] and Schmid[363], who consider that a non-expenditure cannot be confiscated, and therefore not laundered. However, government agencies and standing case law allow for savings to be confiscated (see below in Section V subsection 3). It was also the legislature's and executive's intent to allow for this solution when adhering to the FATF's Recommendations to include fiscal predicate offenses.[364] These kinds of offenses usually generate a tax saving.[365] To exclude a saving from the scope of art. 305bis CP would counteract the purpose of having amended the predicate offenses in art. 305bis CP in the first place. The technical implementation of art. 305bis CP to tax savings also applies to environmental crimes which don't generate a profit.[366] In fact, the Federal Supreme Court has confirmed that savings from environmental offenses are susceptible to be confiscated in a case regarding illicit waste disposal.[367] They can therefore also be laundered.

iii. Predicate offense

If environmental crimes are to fall under the scope of art. 305bis CP, they must fulfill the requirements for a predicate offense. The predicate offenses to money-laundering under Swiss law must be crimes within the meaning of art. 10 al. 2 CP or "aggravated tax misdemeanours" (art. 305bis al. 1 CP). This means that the abstract sentence for the predicate crime must be of at least 3 years custodial sentence, regardless of the actual sentence imposed on the perpetrator.[368] Crucially for transnational environmental crimes, the predicate offense can also be committed abroad, in which case the dual incrimination principle requires that the fact pattern is criminally prosecuted both in Switzerland and abroad (art. 305bis al. 3 CP). [369]

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[361] ATF 137 IV 145, p. 152; ATF 120 IV 365, p. 367; ATF 119 IV 10, p. 16. It thereby confirmed what the Federal Council stated in its Message announcing the legislative amendment to include fiscal offenses to the scope of predicate offenses to money-laundering; Message du Conseil fédéral concernant la mise en oeuvre des recommendations du Groupe d'action financière, révisées, en 2012, 13.12.2013, (FF 2014 585), p. 606.

[362] Cassani, *Droit pénal économique,* pp. 194-195.

[363] Schmid, *Kommentar Einziehung*, Art. 70-72 N 53.

[364] Cassani, *Droit pénal économique,* p. 194.

[365] Cassani, *Droit pénal économique,* p. 194.

[366] The calculation of these savings is however undecided by case law. It must also avoid 'contaminating' the perpetrator's entire assets because they include the laundered savings; Cassani, p. 195. Some authors have proposed the use of legal fictions from property law, such that a share (Eigentumsanteil, quote-part) of proportions equal to the proceeds adheres to the perpetrator's assets; Cassani, *Droit pénal économique,* p. 195. Others have proposed a contaminated residual amount on the account.Ackermann, Kommentar Geldwäscherei, Art. 305bis N 209 and 232. In both cases, the perpetrator can freely dispose of his assets, and not risk committing money-laundering, so long as he doesn't touch that share. KV/KO-II-Ackermann/Zehnder, Art. 305bis N 363.

[367] ATF 137 IV 35. Also confirmed in Marianne Johanna Hilf, 'Unternehmensstrafbarkeit im Bereich der Umwelt(schutz)delikte', p. 97 in: Marianne Johanna Hilf, Jürg-Beat Ackermann (Eds.), *Umwelt-Wirtschaftsstrafrecht – 9. Schweizerische Tagung zum Wirtschaftsstrafrecht*, Collection EIZ Band/Nr. 177 (2017).

[368] Cassani, *Droit pénal économique,* p. 197.

[369] The principles developed in extradition and mutual legal assistance matters can be used to determine whether the foreign sentences are of administrative or criminal nature. This includes the principles established by the Engel et al. v. The Netherlands case before the European Court of Human Rights; PK StGB-Pieth/Schultze, Art. 305bis, N 28. ECrtHR; In order to determine whether the charges are "criminal in nature", the Court develops three criteria in Engel et al. Firstly, it looks at the characterization adopted by the domestic law of the State party. Secondly,

It doesn't matter, for the purposes of art. 305bis al. 3 CP, whether the foreign criminal law considers the offense a crime within the Swiss meaning, whether the foreign authorities have begun investigating the matter or whether the perpetrator would actually be prosecuted abroad in the case at hand.[370] It is even possible that the foreign authorities have abandoned the legal proceedings or acquitted the alleged offender.[371] Swiss prosecutors would therefore have a broad extraterritorial mandate to address. Possible violations of the *ne bis in idem* principle would be analysed at a preliminary stage as to the court's jurisdiction (see below in Section V subsection 2(b)).

First, it must be mentioned that existing provisions already apply to activities with environmentally damaging consequences, and which may fall under the scope of art. 305bis CP. Carbon credit fraud for instance, which involves the fraudulent sale of non-inexistent carbon credits, or the misrepresentation of the environmental benefit of development projects in order to acquire additional carbon credits, fulfills the requirements of fraud under art. 146 CP. The provisions foresee a custodial offense of up to 5 years, or 10, if the perpetrator sought a commercial gain (art. 146 al. 2 CP). Corruption pursuant to arts. 322ter ff. CP is also a useful tool to indirectly address money-laundering from environmental crime. Activities with environmental externalities may be facilitated by paying public officials to look the other way or obtaining logging or mining permits in exchange for advantages (monetary or otherwise). The proceeds flowing from the service, contract or permit obtained through corruption may be confiscated. Since corruption is sentenced with a custodial sentence of 5 years, these proceeds are covered by art. 305bis CP. Environmental crimes were already addressed this way in 2012, when the Swiss Federal Attorney General's Office investigated UBS for allegedly having accepted more than USD $90 million in corruption money. The money is said to have come from the illegal logging of tropical rainforests to make way for palm oil plantations in the Malaysian state of Sabah.[372] In 2020, the Attorney General's Office also opened a criminal probe into commodity miner and trader Glencore over allegations that it failed to have measures in place to prevent corruption in the Democratic Republic of Congo. Glencore operates copper and cobalt mines in Congo, where a former business partner and Israeli billionaire businessman Dan Gertler was alleged to have used his friendship with former DRC President Joseph Kabila to secure sweetheart mining deals.[373] The Federal Supreme Court's case law is favorable to the anti-money laundering enforcement of such operations; it permits the confiscation of all proceeds flowing from the conclusion of a contract obtained through

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the Strasbourg judges observe the nature itself of the offense, which must be of a certain gravity to be qualified as criminal. Thirdly, the Court takes into account the purpose and severity of the sanction incurred; Vincent Martenet and Matthieu Corbaz, 'L'influence des garanties fondamentales de procédure sur le contentieux administratif', p. 15 in: François Bellanger and Thierry Tanquerel (Eds.), *Le contentieux administratif*, (Schulthess, 2013), citing ECrtHR, *Engel et al* v. *Netherlands*, 8 June 1976, nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72.

[370] Cassani, *Droit pénal économique,* pp. 200-201.

[371] Cassani, *Droit pénal économique,* p. 201.

[372] Tagesanzeiger, 'UBS soll Korruptionsgeld aus Regenwald-Abholzung angenommen haben', (Tagesanzeiger, 31.8.2012).

[373] Zandi Shabalala and Helen Reid, 'Swiss prosecutors launch Glencore criminal probe over Congo', (Reuters, 19.6.2020).

corrupt practices.[374] This deprives the environmental criminal of all profits that the contract (or permit, if applied by analogy) would have brought about. However, arts. 322ter ff. CP can't be the (only) answer in combating environmental crime. First, not all environmental offenses involve corrupt practices. Secondly, the solution fails to identify the environmental offense as the wrongful act and the deterrent effect of the criminalisation doesn't affect actors carrying out environmentally harmful practices. Environmental laws as predicate offenses can fill this gap.

International political pressure on Switzerland has had a marked effect on which offenses are considered prerequisites to money-laundering.[375] Of course, the FATF Recommendations had a large role to play with regards to fiscal predicate offenses.[376] The FATF was also responsible for Switzerland raising its sentences for organised trafficking, qualified product counterfeiting, as well as human trafficking in 2008 in order to subject any profits from these activities to money-laundering enforcement.[377] The FATF's 2021 Report may have the same effect, and could accelerate the Federal Council's attempt to strengthen Swiss environmental criminal law.

The principal obstacle to an environmental anti-money laundering platform is the weakness of sentencing in Swiss environmental law. Only a few environmental offenses actually fulfill the minimal sentencing requirement for a predicate crime:

- Art. 26 al. 2 LCITES foresees a custodial sentence for up to 5 years or a fine if someone (a) doesn't announce the import or export of endangered species, doesn't request a permit to do so with CITES-listed species, violates an import prohibition, or buys or sells a large quantity of CITES-listed species, or (b) engages in activities violating LCITES on a commercial basis, or (c) engages in such activities in a group or gang;
- Art. 89 al. 2 Nuclear Act forsees a custodial sentence of up to 10 years if nuclear waste is disposed of incorrectly;
- Art. 172 Agriculture Act foresees a custodial sentence of up to 5 years for someone acting on a commercial basis who unlawfully uses a protected geographical indication of an agricultural product;
- Art. 49 al. 1 and 2 Chemicals Act foresees a custodial sentence of up to 5 years if someone places chemical substances on the market which directly endanger life or health, fail to classify substances incorrectly, or place such substances on the market in violation of notification and authorisation requirements, if through any of these acts human health is gravely put in danger;
- Art. 49 al. 3 and 4 Chemicals Act foresee a custodial sentence of up to 5 years if someone doesn't inform a recipient of dangerous substances about their properties, violates their duty of care of handling dangerous substances, or handles such substances without proper notification or authorization;

[374] ATF 137 IV 79, p. 80s.

[375] BSK StGB-Pieth, Art. 305bis, N 22.

[376] The 2014 legislative amendment occurred in direct response to the Recommendation's revision in 2012 requiring FATF member states to introduce fiscal offenses tied to direct and indirect taxes as predicate offenses; Message du Conseil fédéral (FF 2014 585).

[377] BSK StGB-Pieth, Art. 305bis, N 22; Message du Conseil fédéral, (FF 2007 6269).

- Art. 234 CP foresees a custodial sentence of up to 5 years for someone who contaminates drinking water used by people or domestic animals with substances harmful to health.

Except for the LCITES provisions, these offenses do not match those addressed by the FATF 2021 Report. Swiss law does criminalise illegal deforestation with a custodial sentence of up to 1 year or a fine (art. 42 al. 1 let. a Forestry Act), as well as the fraudulent sale of precious metals with a custodial sentence of up to 1 month if the fraud is perpetrated in a commercial manner (art. 44 al. 2 PMCA), or by a fine of 100'000 otherwise (art. 44 al. 1 PMCA)[378]. However, Swiss law does not criminalise the unpermitted extraction of precious stones or metals *per se*. In order to comply with the FATF's proposals in its 2021 Report, Switzerland would have to increase penalties on illegal deforestation, and criminalise the illegal extraction of stones and metals, or the improper import, transit or export of these materials. While Switzerland might not be affected by these activities, the dual criminalisation requirement under art. 305bis CP calls for the existence and severity in sentencing of these provisions. Only with such provisions on the books would knowingly refining illegally extracted metals and gold constitute money-laundering.

The tightening of CITES Act sentences was proposed in 2020[379] following the publication of the 2020 FATF Report on Illegal Wildlife Trade, and entered into force in 2022. The amendments had already been called for in the Motion Barazzone in 2015[380], had been accepted in 2016 by parliament, but awaited the publication of the expert report on environmental law mentioned above. It was therefore not exclusively the FATF Report, but a number of international commitments and incongruences in sentencing between Switzerland and other European countries, as well as newly emerging statistics on the loss of biodiversity which caused the amendment.[381] The Federal Council has also requested the tightening of sentences under the EPA, with the explicit intention of meeting international standards of environmental criminal law[382] and constituting grave environmental offenses as predicate crimes to art. 305bis CP.[383] The legislative draft proposes a custodial sentence of up to 5 years if someone (a) has employed large quantity of chemical substances or organisms *in ways hazardous to human or environmental health*[384], or trafficked a large quantity of waste (hazardous or not) without a permit or in violation of a restriction thereto, (b) has done so

[378] Federal Act on the Control of the Trade in Precious Metals and Precious Metal Articles (Precious Metals Control Act, PMCA) of 20 June 1933 (RS 941.31).
[379] Federal Council, 'Botschaft zur Änderung des Bundesgesetzes über den Verkehr mit Tieren und Pflanzen geschützter Arten', (BBl 2020 7965).
[380] Motion 15.3958 Barazzone, 'Renforcer les sanctions pénales en Suisse contre le commerce illicite d'espèces menacées'.
[381] *see* Federal Council, 'Botschaft zur Änderung des Bundesgesetzes über den Verkehr mit Tieren und Pflanzen geschützter Arten', (BBl 2020 7965).
[382] Statement of Federal Council of 26 May 2021 in Response to Interpellation by Adèle Goumaz Thorens, 'Ecocides ou atteintes majeures à l'environnement: Le Conseil fédéral entend-il améliorer les dispositions pénales du droit de l'environnement?' (18.3.2021).
[383] Federal Council, Federal Department of the Environment, Transport, Energy and Communications (DETEC), Federal Office for the Environment, 'Erläuternder Bericht zur Vernehmlassung zur Änderung des Umweltschutzgesetzes zu Altlasten, Lärmschutz und Umweltstrafrecht', (8.9.2021), p. 64.
[384] Emphasis added by author.

irrespective of the quantities involved, in a recurring or commercial manner, or (c) has done so irrespective of quantities involved as part of a group or gang constituted to repeatedly violate the EPA (Art. 60 al. 2 proposed draft EPA).[385] The draft has been submitted for consultation to interested parties until the end of February 2022.[386] As of May 2022, no official statement has been issued by the publishers of the draft proposal on the consultation results, and there is no indication on whether the proposed amendments will enter into force. Should it enter into force however, then the provisions on waste trafficking would correspond to the proposals set forth in the 2021 FATF Report. The crimes concerning chemical substances or organisms would however not cover air pollution emissions (art. 7 al. 2 EPA *e contrario*), but only those subject to the Chemicals Act.[387] In that sense, any use of these chemicals in large quantities or by corporations in a manner harmful to the environment, i.e., the introduction into soil, ground or surface water, may serve as a predicate offense to money-laundering. No case law exists yet to that effect to confirm this proposition, although the Federal Supreme Court accepted cantonal jurisprudence considering that, among others, the use of slurry in moorland harmed the environment within the meaning of the current art. 29 *cum* 60 al. 1 let. e EPA.[388] This decision is significant in that the Federal Council can edict which substances, including slurry, *pose a danger to human health and the environment*[389] (*see* art. 29 al. 1 EPA). Given the overlapping requirements for art. 60 al. 2 proposed draft EPA and art. 29 al. 1 EPA, the commercial use of slurry or other dangerous substances selected by the Federal Council can, if intentionally and improperly employed, therefore rise to the level of a crime pursuant to the draft art. 60 al. 2 EPA. Proceeds from this activity can consequently be laundered and confiscated. The inclusion of soil and water pollution in the draft proposal shows the political will to criminalise activities which aren't limited to discrete and tangible goods. A further extension could be explored regarding large quantities of air pollution exceeding emission allowances.

The question arises as to whether the environmental anti-money laundering platform can be completed by raising sentencing floors for certain criminal activities, or whether the Swiss legislator is better positioned to add an additional kind of predicate offense to art. 305bis CP which addresses the specificity of environmental criminal proceeds. The latter may, like aggravated tax misdemeanours under art. 305bis CP, be subject to a sentence lower than a minimum 3-year sentence. Currently, Swiss law makers seem to be partial to the selective increase of sentences for activities involving particularly grave environmental harm, large quantities of substances or the commercial or gang nature of these activities. This approach allows legislators to selectively address activities which are particularly prone to laundering operations. The solution to create aggravated versions of misdemeanors for gang or commercial operations also targets the perpetrators most likely to seek a profit from environmentally harmful practices. On the other hand, this approach raises the same issues that aggravated tax misdemeanors do if the commission of the environmental offense generates a saving. Courts may therefore be hesitant to issue confiscations, as these could render a company's entire assets

[385] Draft proposal of amended EPA.
[386] Statement of Federal Council of 26 May 2021 in Response to Interpellation by Adèle Goumaz Thorens.
[387] Alain Griffel, Heribert Rausch, *Kommentar zum Umweltschutzgesetz*, Vorbemerkungen zu Art. 26-29, N. 4.
[388] TF, 17.6.2008, 6B 171/2008.
[389] Emphasis added by the author.

inaccessible to the company's day-to-day operations. Cassani, who has criticised the legislative formulation of the 2016 tax amendment of art. 305bis CP for not considering the specificities of calculating and freezing tax savings, has proposed to introduce an explicit clause to art. 305bis CP specifying that in matters of tax fraud a dissimulation act involving undeclared assets is considered a money-laundering act.[390] A similar solution could be envisaged for environmental offenses. Art. 305bis CP could be amended to consider all proceeds generated from activities in relation with environmentally criminal activities, including those where the profits aren't directly caused by the environmental crime but where the crime is tangential from otherwise licit activities, as launderable and therefore subject to anti-money laundering prosecution and enforcement. This would ensure a stronger deterrent effect on companies and criminal organisations; confiscation orders would not be limited to savings generated from not updating filtration systems, nor from offsetting carbon emissions, or from improperly disposing of waste, but could extend to all proceeds from activities indirectly involving environmental crimes. Given the objective behind arts. 70 and 305bis CP of preventing unjustified enrichment, this solution would follow the provisions' *ratio legis.* The provision would have to be phrased in a sufficiently specific way so as to avoid legal uncertainty for business owners and average market participants. The following formulation is proposed:

> 1ter. Any person who dissimulates assets which have been saved or obtained as a result of activities amounting to, causing or facilitated by an environmental felony, shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.[391] An environmental felony is any felony under Swiss law aimed at repressing reductions of water, ground, or air quality, or harm to flora or fauna.[392]

This solution can be accompanied by continued legislative modifications of environmental statutes to raise sentences on commercial, gang-related or particularly grave offenses. This combination permits the scalpel-like approach favored by the legislature.

Alternatively, the provision can include environmental misdemeanors as predicate offenses. In order to avoid prosecuting the average citizen or small business owners as potential money launderers, the legislature could introduce a de minimis floor of proceeds subject to art. 305bis CP. This amendment would serve as an additional guardrail to the statutory definition

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[390] Cassani, *Droit pénal économique,* p. 196.

[391] The phrasing "amounting to, causing or facilitated by an environmental felony" permits targeting proceeds which, while associated with an environmental felony, was not directly caused by it and is therefore "clean". "Amounting to" is the most straightforward of the three: the activity itself is the environmental felony, from which the assets flow directly. This would for instance occur through the sale of an endangered species. The second hypothesis occurs where otherwise licit activities have caused an environmental disaster, i.e. an oil spill from a factory. In that case, the factory's profits would be confiscated. This mirrors the Federal Supreme Court's case law on proceeds generated from a contract facilitated by corruption, but removes the onus from the judge to make this interpretative call. It poses however an issue as to the time frame or the amount of profits concerned. The third hypothesis concerns situations in which an otherwise licit activity involved environmental felony. This would for instance apply where a company slashed and burned a land in order to clear it for its crops.

[392] The phrasing here may be replaced by an exhaustive list of felonies similar to, e.g. art. 102 al. 2 CP. Given the impending sentencing changes under the EPA and possibly other statutes, the author thought it unwise to do so at this stage.

of activities pursued in a commercial manner, which only concerns businesses making a turnover of CHF 100'000.- or a net gain of CHF 10'000.- per year[393]:

> 1ter. Any person who dissimulates assets which have been saved or obtained as a result of activities amounting to, causing or facilitated by an environmental misdemeanors, shall be liable to a custodial sentence not exceeding three years or to a monetary penalty, if the assets exceed 300 000 francs.[394] An environmental felony is any felony under Swiss law aimed at repressing reductions of water, ground, or air quality, or harm to flora or fauna.[395]

This alternative would avoid relying on legislative will to increase sentences to offenses in administrative environmental statutes, while still targeting big environmental polluters. In either alternative, this phrasing aids courts in determining how and over which sums to issue a confiscation order.

iv. Activities Aimed at Frustrating the Forfeiture of Assets

Art. 305bis CP criminalises all acts "aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets" originating from a predicate offense. It is therefore sufficient that the proceeds are dissimulated; it is not necessary to try and make them appear of legal origin.[396] As long as the confiscation is feasible *in abstracto*, this requirement is fulfilled.[397] Money-laundering is therefore excluded if the confiscation is time-barred (art. 70 al. 3 CP).[398] The Federal Supreme Court has shown itself fairly lenient in considering which acts fall within the meaning of art. 305bis CP.[399] Most relevant for the Swiss market and environmental offenses are:

- the exchange of assets into another currency;
- the payment onto an account of a third party, including an offshore company, without correct identification of the beneficial owner;
- the dissimulation of the illicit source of the assets through the use of a falsified document (manipulated company balance sheets, fake contracts or certificates), or by other dissimulating maneuvers;
- the sale, acquisition, donation or exchange of assets for other goods;

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[393] The Federal Supreme Court has quantified that criminal activities pursued in a commercial manner must have generated a turnover of at least CHF 100'000 or of a net profit of CHF 10'000 (ATF 129 IV 188; ATF 129 IV 253).

[394] Here, the CHF 300'000 threshold is inspired by the one chosen with regard to aggravated tax misdemeanors.

[395] The phrasing here may be replaced by an exhaustive list of misdemeanors or felonies similar to, e.g. art. 102 al. 2 CP. Given the impending sentencing changes under the EPA and possibly other statutes, the author thought it unwise to do so at this stage.

[396] Cassani, *Droit pénal économique,* p. 201. The hypotheses of identification and tracing are illustrative only; the Federal Supreme Court has considered that they can't be invoked independently if confiscation is not possible (anymore); ATF 145 IV 335, c. 4.4; ATF 139 IV 79, p. 80; ATF 129 IV 238, p. 244.

[397] ATF 145 IV 335, c. 4.4.

[398] ATF 126 IV 255, p. 262.

[399] For a full list, see Cassani, *Droit pénal économique,* p. 203.

- the physical dissimulation of the assets[400];
- the deposit of physical objects in a safe or vault at a bank or at a free port, as the latter don't know what these vaults contain, nor who the beneficial owner is,[401]
- every form of investment of criminal funds[402], abstracting the question of whether a paper trail can be traced.[403]

This case law can be applied *mutatis mutandis* to both financial flows from environmental offenses, and physical supply chains moving through the Swiss commodities market. Timber, metal and precious metals, which are co-mingled with their licit counterparts, stored at free ports, whose origin is hidden through falsified certificates, or which are sold to refineries or mills under the guise of being sustainably or legally sourced have therefore been subject to acts aimed at frustrating their forfeiture. The investment of money into further commercial projects by companies engaged in activities involving environmental crime would also fulfill the requirement.

The transfer of proceeds from a Swiss to a foreign bank account is also conducive to obstructing their confiscation. This concerns primarily financial flows which transit Switzerland. A 2019 Federal Supreme Court decision specified that this only applied if the confiscation of illegally acquired funds was also thwarted abroad by dissimulating activities.[404] The decision had overturned long-standing case law which categorized the transfer *per se* as a laundering activity.[405] However, this change in practice ignores the fact that a large number of foreign financial centers are unable or unwilling to confiscate such funds within a reasonable timeframe.[406] It remains unclear whether an unreasonably long delay in confiscating is sufficient to consider that the confiscation is thwarted abroad. More uncertain, on the other hand, is whether transactions from abroad to Switzerland also benefit from this case law. This is particularly relevant for financial flows from environmental crimes, since the Swiss financial market is used at the late integration stage of a money-laundering operation. Given that art. 305bis CP protects not only the Swiss, but also the foreign administration of justice[407], this should be affirmed and would also be welcomed by Ackermann.[408] Ackermann refers to the difficulty of independent confiscation without legal assistance from abroad to justify this approach. His position is also supported by recent trials in Geneva against Russian nationals.[409] However, the solution also creates a very fine line for legal practitioners and judges to walk

[400] The Federal Supreme Court allows money-laundering if the dissimulation is achieved by "even the simplest acts" (ATF 122 IV 218, confirmed in TF, 6S.702 /2000 ["Hiding in the home of a third party"]; District Court Zurich, 9. 5. 2003 ["Hiding in unusual, camouflaging containers"]; District Court Zurich, 12. 4. 2002 ["Storing drug money in the fuse box"]; District Court Zurich ZH, 28. 8. 2002 ["Taking and storing stolen money outside the stolen wallet"]), cited in: BSK StGB-Pieth, Art. 305bis N 46.

[401] Cassani, *Droit pénal économique,* p. 204.

[402] ATF 119 IV 247.

[403] BSK StGB-Pieth, Art. 305bis N 48.

[404] ATF 144 IV 172, p. 176; confirmed in TF, 4.7.2019, 6B_416/2019, c. 4.6.

[405] Cassani, *Droit pénal économique,* p. 205, referring to ATF 127 IV 20, p. 26; ATF 128 IV 117, p. 132; ATF 136 IV 188, p. 191.

[406] BSK StGB-Pieth, Art. 305bis N 49.

[407] Cassani, *Droit pénal économique,* p. 187.

[408] Kommentar KV/KO-II-Ackermann/Zehnder, Art. 305bis N 468 ff.

[409] BSK StGB-Pieth, Art. 305bis N 49.

on, where the abstract possibility of confiscation is required to fulfill art. 305bis CP, but confiscation must be impossible *in concreto* in order to fulfill the same requirements before a Swiss court. The practical solution to the concrete impossibility to confiscate is the compensatory claim addressed below (Section V subsection 3(b)).

Money-laundering can also be committed by omission, if the author of the offense failed to comply with a legal duty to act (art. 11 CP). The author then has a duty to surveil or to protect the legally protected right from danger.[410] This duty must be created on the basis of (a) a statutory provision, (b) a contract, (c) a risk-bearing community entered into voluntarily, or (d) the creation of a risk (art. 11 al. 2 CP). Money-laundering protects the administration of justice. The guarantors of this right are therefore officers of the justice, such as border agents, prosecutors, bureaucrats, etc.[411] FINMA is for instance statutorily obliged under art. 38 al. 3 FINMASA[412] and art. 16 AMLA to inform the competent authorities about the commission of offenses that it observes.[413] In fact, if FINMA fails to communicate any suspicion of money-laundering to MROS, then it is liable to commit money-laundering by omission.[414] The Federal Supreme Court held that financial intermediaries can also be liable by omission if they don't communicate their suspicions of money-laundering to MROS in accordance with their due diligence duties under arts. 6 and 9 AMLA and AMLO-FINMA (previously, the CFB directives)[415], and even if this duty to communicate is only set forth in a bank's internal regulation[416]. Autoregulation organisms (art. 27 al. 4 AMLA) and auditors of trade dealers (art. 15 al. 5 AMLA) are also required to report their suspicions and are therefore susceptible to become launderers by omission. MROS itself has a duty to file a complaint with the relevant criminal prosecution authorities if it has a well-founded suspicion of money-laundering (art. 23 al. 4 AMLA). If the anti-money laundering enforcement mechanisms under AMLA and AMLO-FINMA[417] are to extend to suspicions of money-laundering from environmental crimes, then the entities above would be required to signal their suspicions under penalty to become criminally liable themselves for money-laundering. This would lead to *de facto* environmental crime-free financial value chains as suggested by Finance For Biodiversity[418], provided that transparency and disclosure requirements imposed on financial market participants would make it difficult for financial intermediaries to omit enquiring into their clients' environmental crime risk exposure. A necessary caveat must be raised at this point: this criminal liability can only be established if a hypothetical chain of causation exists between the inactivity violating a duty to act and the money-laundering pursuant to art. 305bis CP. It

410 Federal Council, Message, (BBl 1989 II 961), p. 983.

411 Kommentar KV/KO-II-Ackermann/Zehnder, Art. 305bis N 622.

412 Federal Act on the Swiss Financial Market Supervisory Authority (Financial Market Supervision Act, FINMASA) of 22 June 2007 (RS 956.1).

413 Cassani, *Droit pénal économique,* p. 206.

414 Cassani, *Droit pénal économique,* p. 206.

415 Cassani, *Droit pénal économique,* p. 207 referring to ATF 136 IV 188, p. 197.

416 Cassani, *Droit pénal économique,* p. 207 referring to TF, 8.12.2011, 6B_729/2010, c. 4.3.

417 Ordonnance de l'Autorité fédérale de surveillance des marchés financiers sur la lutte contre le blanchiment d'argent et le financement du terrorisme dans le secteur financier (Ordonnance de la FINMA sur le blanchiment d'argent, OBA-FINMA) du 3 juin 2015, (RS 955.033.0).

418 Finance For Biodiversity, 'Breaking the Environmental Crimes-Finance Connection', (January 2022), p. 7.

also requires the omission to have been intentional. Failure to detect inconsistencies and the not follow-up in the way required by circumstances is not sufficient. This would also apply to environmental authorities, if these were to be integrated in the anti-money laundering network. For environmental offenses, the duty to report is provided by art. 302 al. 1 or al. 2 CPP. Pursuant to al. 1, criminal justice authorities are obliged to report to the competent authority all offenses that have come to light or that have been reported to them in the course of their official activities. Al. 2 accords the Confederation and the cantons the power to regulate the duty to report of members of other authorities. Most authorities dedicated to environmental matters are administrative authorities, and most refer the criminal prosecution to law enforcement agencies. These administrative authorities are not criminal justice authorities within the meaning of Art. 302 al. 1 CPP, and therefore not required to report their suspicions under arts 7. and 302 al. 1 CPP.[419] The attribution of reporting duties pursuant to art. 302 al. 2 CPP is not widespread in federal environmental statutes. As such, only art. 52 al. 2 Chemicals Act obliges federal authorities responsible for enforcing the act to file a report if they become aware of concrete, factual indications of criminal activity in violation of the Chemicals Act.[420] The Federal Supreme Court has, in an isolated case, held a game keeper liable for obstruction of justice (art. 305 CP) because he had violated his duties to report the commission of a hunting-related offense. This means that the court considered that the game keeper had a duty to act within the meaning of art. 11 CP.[421] On a cantonal level, some environmental statutes create a duty to report an environmental offense. In Fribourg forest district foresters and forest district engineers must file a report if they have concrete grounds for suspicion of a forestry-related offense.[422] In St. Gallen fisheries supervision agencies must report violations of fisheries, animal protection and water protection legislation.[423] All of these federal and cantonal reporting obligations are obligations according to Art. 302 al. 2 CPP.[424] These duties to report refer however not to money-laundering activities, but to environmental violations, which may not be sufficiently sanctioned to predicate offenses. If environmental and border agencies, as well as mills and refineries were required to communicate their suspicions of environmental crimes within the meaning under art. 305bis CP suggested above, or their suspicions of subsequent laundering, then their intentional omission to do so would also fall under art. 305bis CP. A border agent who knew that the timber shipping he controlled was co-mingled, and didn't flag this to the relevant authorities would therefore run the risk of criminal liability under both art 305 and 305bis CP. In addition to government entities, private companies along natural resources supply chains may also have duties to act which expose them to money-laundering liability. A melter's licence holder for instance, has to clarify the origin of the melt material if its origin or the identity of the offering party is doubtful (art. 168a al. 3 PMCO) and report to the police if any suspicion arises that the material has been unlawfully acquired (art. 168a al. 5 PMCO). In order to comply with those requirements, the licence holders have to take the

[419] Hilf & Vest, 'Gutachten Umwelt', p. 81.
[420] Hilf & Vest, 'Gutachten Umwelt', pp. 83-84.
[421] Hilf & Vest, 'Gutachten Umwelt', p. 83 referring to ATF 74 IV 164.
[422] Hilf & Vest, 'Gutachten Umwelt, p. 86.
[423] Hilf & Vest, 'Gutachten Umwelt', p. 86.
[424] Hilf & Vest, 'Gutachten Umwelt', p. 86.

necessary organisational measures to prevent the melting of melt material of unlawful origin. (art. 168b al. 1 PMCO). Until now however, the provision has been interpreted to consider an acquisition unlawful if it violated a legally binding norm, e.g., if it was acquired by theft.[425] Should the acquisition of illegally mined gold – or even the acquisition of gold mined in an environmentally damaging way – be criminalised, then an intentional omission to comply with any of these notification duties would constitute an act aimed at frustrating the confiscation of illicit assets. The PMCO consequently provides a good blueprint on how to utilize private companies' transparency obligations as part of a broader environmental anti-money laundering platform.

b. Extraterritorial Jurisdiction

Swiss courts are not known for engaging in judicial activism. They have been historically reluctant to broaden legal rights to a healthy environment. Administrative courts have refused to grant standing to applicants in environmental trials for lack of a particularised injury. Most recently, the Federal Supreme Court confirmed that a group of seniors lacked standing to request a ruling on the discontinuation of omissions to reduce pollution levels in Switzerland, because the applicants were not particularly nor immediately affected by the lack of action because climate temperatures would not exceed 2°C before 2032.[426] Of course, this decision ignores the recent case law all over other European countries, which granted standing to applicants requesting the court to order measures reduction of pollution levels under essentially the same legal requirements for such standing.[427] Furthermore, the Federal Supreme Court also pronounced the lack of an imminent danger in two *criminal* cases. In 2020, activists trespassed on Credit Suisse grounds to protest their investment in fossil fuels. In both Lausanne[428] and Geneva[429], the court of first instance and the court of appeals respectively, chose to acquit the protesters on the grounds that the imminent danger of the environmental degradation caused by climate change justified the protesters' actions as necessary and proportional. Both were appealed to the Federal Supreme Court, who held that the danger used to justify the protest was not imminent under the necessity to act doctrine under Art. 17 CP.[430] This is to say that the time is not ripe for bold environmental case law in Switzerland.

Swiss courts have however been creative in matters concerning money-laundering operations. This is perhaps due to the political legitimacy to sanction criminal organisations and the political pressure on Switzerland to protect its financial market. It may also be because

[425] EBP, 'Expert Study on the Swiss Gold Sector and related Risks of Human Rights Abuses', (12.12. 2017), p. 46.
[426] TF, 5.5.2020, 1C_37/2019, c. 5.4.
[427] *inter alia*: Commune de Grand-Synthe v. France (Decision on the Admissibility: French Conseil d'Etat, Commune de Grande-Synthe and Others v. France, case no. 427301, Admissibility, 19 November 2020), Neubauer, et al. v. Germany (BvR 2656/18/1 BvR 78/20/1 BvR 96/20/1 BvR 288/20), Urgenda Foundation v. State of the Netherlands (Hof's-Gravenhage 9 Oktober 2018, AB 2018, 417 m.nt. GA van der Veen, Ch.W. Backes (Staat der Nederlanden/Stichting Urgenda).
[428] Cour d'appel pénale du Tribunal cantonal du canton de Vaud, n° 371 PE19.000742/PCL, 22.9. 2020.
[429]Cour de justice de la République et canton de Genève, Chambre pénale d'appel et de révision, P/24123/2018 AARP/339/2020, 14.10.2020.
[430] TF, 25.5.2021, 6B_1295/2020, c. 2.6; TF, 28.9.2021, 6B_1298/2020, 6B_1310/2020, c. 3.6.

some international conventions in the financial or economic sector recognize the principle of extraterritorial application.[431] Whatever the reason might be that spurs the Federal Supreme Court, the result is that Swiss courts have considerably extended their territorial jurisdiction over financial activities occurring principally outside of Switzerland. As a result, the statutory money-laundering provisions can be applied to transnational activities.

The territorial jurisdiction of Swiss criminal courts is determined by Arts. 3 to 8 CP. These provisions describe the territorial application of Swiss criminal law, but also the competence of criminal authorities. In application of the principle of territoriality pursuant to Arts. 3 *cum* 8 CP, Swiss criminal law applies to offenses committed in Switzerland. According to art. 8 CP, "[a] felony or misdemeanour is considered to be committed at the place where the person concerned commits it or unlawfully omits to act, and at the place where the offense has taken effect." The offense is therefore committed where the perpetrator was physically located at the time that he carried out one of its constitutive elements, as well as where the result did or should have taken place. The place of result has elicited a noticeable extension of the principle of territoriality. At first, the Federal Supreme Court considered that the place of result was to be any place where the harm which justified the repression of the activity took effect.[432] This was also understood as the place where the legally protected right was located. This case law was severely criticised by Swiss scholars, as it extended Swiss territorial jurisdiction to any activity abroad which harmed an injured party's assets in Switzerland, or which violated the Swiss public order despite never having occurred within Swiss borders.[433] Authors preferred the place of result of arts. 3 *cum* 8 CP to converge with the place of result required for result-based offenses (*Erfolgsdelikt*, *delit de resultat*).[434] This defined the place of result as "a modification of the external world, ascribable to the perpetrator and making up one of the constitutive elements of the offense."[435] It would also mean that only result-based offenses were covered by the second option offered by arts. 3 *cum* 8 CP, whereas behavior-based activities (*Tätigkeitsdelikt*, *delit de comportement*) occurring outside of the Swiss territory would not be subject to Swiss territorial jurisdiction.[436] In a subsequent case, the Federal Supreme Court agreed with the majority doctrine and limited the scope of Swiss territorial jurisdiction accordingly.[437] This case law was never formally overturned. However, the Federal Supreme Court has over the last years begun relaxing its decisions towards an autonomous definition of the place of result.[438] At first, the court considered that in cases of fraud pursuant to art. 146 CP, the place of result was where the unlawful gain took effect.[439] In the case at hand, this was a bank account in Geneva, justifying the competence of the Swiss judge. However, the unlawful gain is a subjective and not objective element of the offense, meaning

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[431] *See*: Cassani, *Droit pénal économique,* pp. 49-59.
[432] ATF 91 IV 228, p. 232; ATF 87 IV 153, p. 154; ATF 86 IV 65, p. 69; ATF 82 IV 65, p. 68.
[433] Cassani, *Droit pénal économique,* p. 37.
[434] Cassani *Droit pénal économique,* pp. 37-39.
[435] Cassani,*Droit pénal économique,* p. 37, citing ATF 105 IV 326, p. 328f.
[436] Cassani, *Droit pénal économique,* p. 38.
[437] ATF 105 IV 326, p. 329.
[438] ATF 141 IV 336, p. 339.
[439] ATF 109 IV 1, confirmed in ATF IV 171, p. 177; ATF 125 IV 177, p. 180; ATF 124 IV 241, p. 244f.

that the Federal Supreme Court abandoned the strict notion of the place of result.[440] This case law has been extended by doctrinal authors to apply to any case where an unlawful gain was a constitutive element, or where the objective pursued by the perpetrator came into effect.[441] In a case of active corruption for instance, the place where the activity of the person accepting a bribe took place or should have taken place, is where the result-based jurisdictional nexus is located.[442] In a subsequent case of fraud, the Federal Supreme Court considered that the result had taken place where the injured party suffered a reduction of its assets – or more precisely, a lack of gain which the injured party had expected but was defrauded of.[443] In an *obiter dictum*, the Court stated that the same conclusion would be applicable in cases of misappropriation pursuant to art. 138 CP.[444] There is therefore a result at place where the injured party suffered an economic harm, even if that is not a constitutive element of the offense. This decision was cited in subsequent cases, making it standing case law.[445] The large notion of a place of result has multiple consequences:

First, practically speaking, any offense which produced either a gain for the perpetrator or a loss for the injured party would create a jurisdictional nexus in Switzerland if the change in account balance occurred on a Swiss bank account. This would create a domestic jurisdictional nexus in Switzerland if a money-launderer held his assets there. If the logic should be followed that a non-augmentation in the perpetrator's assets sufficiently fulfilled the requirements for a money-laundering offense, then the same non-augmentation of a Swiss bank account would suffice to attribute competence to a Swiss judge.

Secondly, the decision stretches territorial jurisdiction to extraterritorial lengths without the guardrails that ensure the principle of legality in cases of extraterritorial jurisdiction. More specifically, the requirement of dual criminality does not apply where a judge is competent on the basis of territorial jurisdiction.[446] A perpetrator can therefore be sentenced for activities which are criminalised in Switzerland without regard to the legal nature of the activity in his country of origin, or where the rest of the constitutive elements of offense were committed. This may pose difficulties of previsibility for the perpetrator, which is a protection required by the principle of legality. It also reduces the applicability of the *ne bis in idem* principle. In fact, art. 3 al. 2 CP only applies the *ne bis poena in idem* principle, meaning that the Swiss judge can rejudge a perpetrator but must reduce the sentence by the sanction that the perpetrator was already subject to in another jurisdiction.[447] The *ne bis in idem* principle only applies where

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[440] Cassani, *Droit pénal économique,* p. 39.

[441] Cassani, *Droit pénal économique,* p. 40; CR CP I-Harari/Liniger Gros, Art.8 N 36.

[442] Cassani, *Droit pénal économique,* p. 39; Ursula Cassani, 'Grenzüberschreitende Korruption: internationale Zuständigkeit der schweizerischen Strafjustiz', in: Jürg-Beat Ackermann, Wolfgang Wohlers (Eds.), *Korruption in Staat und Wirtschaft: 4. Zürcher Tagung zum Wirtschaftsstrafrecht*, (Schulthess Verlag, Zürich, 2010), pp. 17-47.

[443] Cassani, *Droit pénal économique,* p. 41, citing ATF 124 IV 241, p. 245.

[444] Cassani, *Droit pénal économique,* p. 41, citing ATF 124 IV 241, p. 245.

[445] Cassani, *Droit pénal économique,* p. 41.

[446] Cassani, *Droit pénal économique,* p. 44.

[447] Cassani, *Droit pénal économique,* p. 45.

Switzerland has previously requested another jurisdiction to prosecute the author for the same facts (art. 3 al. 3 CP).[448]

Thirdly, international legal scholars agree that "unless a nation's extraterritorial law falls within one of five categories – territoriality, nationality, protective principle, passive personality, or universality, the nation violates international law."[449] The Federal Supreme Court's case law is based on the territoriality principle. Save for situations in which Swiss nationals were involved in the commission of or were victims of money-laundering (*see* art. 7 CP), no other basis would justify the prosecution of extraterritorial activities. In fact, no international convention makes the prosecutability of money-laundering or of environmental offenses universal.[450] This excludes any Swiss jurisdiction on the basis of art. 6 CP. Nor are money-laundering or environmental offenses listed in art. 5 CP, which excludes the jurisdiction on the basis of autonomous universal competence. They are also not considered to violate the national interests of Switzerland, excluding any competence on the basis of art. 4 CP.[451] Remains the territoriality principle under arts. 3 *cum* 8 CP. The territoriality principle under international customary law requires the effect to be "direct, substantial and foreseeable".[452] However, the change (or even non-change) of an account balance at a Swiss bank is a virtual phenomenon. There is in fact no tangible money being moved out of a physical space. It is therefore arguable whether the effect is substantial. The prosecution in Switzerland for activities having occurred outside of Switzerland may therefore be in violation of international law.

Fourthly, extraterritorial jurisdiction is as much a question of law, as it is one of legitimacy in the eyes of the international community. If a balance change on a bank account at a Swiss financial institution is grounds enough to allow Swiss authorities and courts to inflict sanctions to those violating Swiss law, then Switzerland becomes a global law-making power[453] and the standard setter in international policy on money-laundering from

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[448] The *ne bis in idem* principle is applied more extensively in the Schengen space pursuant to arts. 54 ff of the Schengen Accord (CAAS), and replaces national law where the two conflict. Switzerland has however raised a reserve to the CAAS, which allows it to refuse application of the *ne bis in idem* principle when rejudging a case, where the facts of the case occurred in part on its territory, except where all the facts of the case had already occurred on the territory of the country which had already adjudicated the perpetrator (art. 55 § 1 lit. a CAAS). With regards to money-laundering from environmental crime, this would only be applicable where an EU country had already adjudicated the perpetrator and Switzerland nonetheless considered that a higher sentence or a different legal qualification was to be applied; Cassani, *Droit pénal économique,* pp. 47-48. Given the politically sensitive nature of doing so, it is doubtful whether a Swiss court would as of now decide to reexamine a case more strictly that had already been adjudicated in a neighboring country.

[449] Curtis A. Bradley, 'Universal Jurisdiction and U.S. Law', in 2001 University of Chicago Legal Forum, p. 323.

[450] with regard to money-laundering, Cassani, *Droit pénal économique,* p. 52.

[451] An argument can be made that, at some point in the future, environmental offenses will be considered sufficiently harmful to national security (*see* e.g.: Christopher Flavelle, Julian E. Barnes, Eileen Sullivan and Jennifer Steinhauer, 'Climate Change Poses A Widening Threat to National Security', (New York Times, 11.10.2021) to justify modifying art. 4 CP to that effect. *See also*: *Juliana* v. *United State*s, 947 F.3d 1159, 1175 (9th Cir. 2020), at 1175, (Staton, J. dissenting) on the perpetuity principle.

[452] Bradley, 'Universal Jurisdiction and U.S. Law', p. 323.

[453] *See*: Susan Emmenegger, Thirza Döbeli, 'Extraterritorial application of US sanctions law' on the U.S.' position as a global law making power; *See also*: Anu Bradford, *The Brussels Effect: How the European Union Rules the World,* (Oxford University Press (March 2, 2020) on the Brussels effect making the EU a global law-making power on data protection.

environmental crime. This can only work if Switzerland follows international consensus on sanctionable behavior and is generally regarded as a legitimate and reliable foreign policy actor. The international community is indeed favorable to curbing money-laundering – the cohesion around the FATF Recommendations shows this. The United Nations Convention against Transnational Organized Crime and the Protocols Thereto (CNUCTO)[454] has also given its signatory states the option of applying universal jurisdiction to money-laundering offenses, although Switzerland has not chosen to codify the option.[455] CNUCTO only requires its signatory states to apply the *aud dedere aut prosequi* principle.[456] This is a departure from previous conventions, such as the Warsaw Convention[457] and the Strasbourg Convention[458] which didn't establish any form of extraterritorial jurisdiction, whether voluntary or obligatory.[459] CNUCTO therefore signifies a recent shift in favor of extraterritorial prosecution and adjudication of money-laundering offenses. Switzerland would however be an unexpected enforcer. First, unlike the United States who has a history of enforcing compliance with its domestic laws through extraterritorial jurisdiction, Switzerland is a small country in the international arena. U.S. courts have sought to extraterritorially pursue violations of the Foreign Corrupt Practices Act (FCPA)[460], and enforce compliance with and adherence by other states with US economic sanctions policy.[461] By clearing through the U.S. Federal Reserve Bank, bank transactions in dollars have been considered sufficient to create a domestic jurisdictional nexus in the US.[462] Switzerland on the other hand doesn't have the political weight to credibly pressure other countries into complying with Swiss anti-money laundering law. It also wouldn't be able to recreate something like the 'Brussels effect', because it does not have the market power to indirectly influence company behavior. The term was first coined in 2012 by Anu Bradford, who posited that the European Union imposed regulations on businesses to protect consumer health, data and privacy. If international companies wanted to reach the EU population as potential customers, they needed to respect these regulations. As a consequence, market forces alone were sufficient to make the EU a global influence as multinational companies voluntarily extended EU rules to govern their global operations.[463] While Switzerland is well-positioned as a financial hub to put its hands on laundered assets, it hasn't spearheaded the anti-money laundering mission. It also doesn't have a monopoly over the financial market in the same way that the US has over US dollar transactions – 80% of all international transactions occur in that currency.[464] Companies and organisations would be

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454 *United Nations Convention against Transnational Organized Crime and the Protocols Thereto,* (8 January 2001), A/RES/55/25.

455 Cassani, *Droit pénal économique,* p. 52.

456 Cassani, *Droit pénal économique,* p. 53.

457 *Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism*, Warsaw, 16.V.2005, Council of Europe Treaty Series - No. 198.

458 *Convention relative au blanchiment, au dépistage, à la saisie et à la confiscation des produits du crime,* Strasbourg, 8 November 1990, (RS 0.311.53, RO 1993 2386, FF 1992 VI 8)

459 Cassani, *Droit pénal économique,* p. 53.

460 *See*: Shearman & Sterling LLP, 'It doesn't take much: Expansive jurisdiction in FCPA matters'.

461 *See*: United States v. Zarrab (SDNY), 17 Oct 2016, (No. 15 Cr. 867 RMB).

462 United States v. Zarrab (SDNY), pp. 27-28.

463 *See*: Anu Bradford, *The Brussels Effect: How the European Union Rules the World.*

464 Emmenegger, 'Extraterritorial application of US sanctions law', p. 245.

inclined to relocate their assets to other large financial hubs in order to escape Swiss enforcement. Nor is anti-money laundering criminal law designed in the same way as EU data protection regulation. The former has a punitive purpose, while the latter is a market regulator with a privacy violation prevention or consumer protection compliance dimension. Only the inclusion of analyses of exposure risks to environmental crime in a company's supply chain, as part of a mandatory compliance with ESG standards for instance[465], could transpose the Brussels effect to environmental crime prevention.

3. Tracing & Recovery

Environmental crimes harm natural-resources rich countries by preventing the proper taxation and monetisation of their resources. These crimes also have further economic ripple effects; deforestation can lead to soil erosion and increases the risk of landslides and water pollution can taint a previously attractive tourist destination, reducing tourism income in the years to come.[466] If we accept the premise that Switzerland is a hot-spot for money-laundering at the integration phase due to its financial sector, then Switzerland is also well positioned to aid in the tracing and recovery of laundered assets. While the resources itself may not pass physically through Swiss borders, deposits on Swiss accounts can serve as jurisdictional anchors for confiscation or for issuing compensatory claims to be restituted to the harmed individuals. Switzerland could therefore meaningfully aid the harmed countries, not only through humanitarian aid, but by sequestering illicit revenues resulting from these environmental crimes and returning them to the aggrieved. It could also use confiscation as a potential crime deterrent; the purpose of such a measure is not to sanction a criminal activity but to ensure that crime doesn't pay. Whether this approach is feasible depends on Swiss statutory and case law, and practice from enforcement agencies.

a. Jurisdiction

A Swiss court can order the confiscation of assets if it is competent under arts. 3 to 7 CP to prosecute the offense whose proceeds are subject to confiscation proceedings or if its competence derives from a specific statute.[467] If we consider that a Swiss court is competent to prosecute money-laundering offenses based on the presence of the laundered assets (or its replacement assets) on a Swiss bank account, then we can also accept its competence as to their confiscation. Even if Swiss authorities aren't competent to prosecute the predicate offense, they are still competent to prosecute the laundering of such assets that took place in Switzerland.[468] If depositing money under a third party's name in Switzerland is considered laundering, then Swiss authorities are competent for the confiscation due to the presence of assets in Switzerland. This is all the truer if the proceeds are controlled by a criminal organisation. In

[465] See, e.g.: Joseph Mari, 'Sustainability: Converging AML and ESG', in: *ACAMS Today*, (17.3.2022).
[466] *See*: Inger Andersen, 'Speech at FATF High-Level Conference – Partnering for Greater Impact Environmental Crime', (7.12.2021).
[467] Carlo Lombardini, *Banques et blanchiment d'argent*, (Schulthess Editions romandes, 2016), p. 127.
[468] TPF, 16.3.2015, BB.2014.157, cons. 3.1.; see above for an analysis of what constitutes laundering.

that case a Swiss court is competent to order their confiscation pursuant to Art. 260ter al. 5 CP (previously Art. 260ter al. 3 CP) if they are deposited or managed in Switzerland.[469] The court's competence also applies if assets did not originate from a criminal offense: it is sufficient for a court to consider that a criminal organization is the beneficial owner or controlling entity over the assets, for the latter to be seized.[470] Further, the burden of proof lies with the asset holder who has participated in or supported a criminal organisation to show that the assets are not controlled by the organization itself.[471] As we have seen above, the environmental crimes addressed by the FATF are often perpetrated by criminal organisations. Proceeds from these offenses perpetrated by criminal enterprises are therefore more easily forfeitable by the courts. If the criminal organizations operate outside of Switzerland however, then Swiss courts must await a final judgment on the recognition of the organization's criminal quality from the foreign court before proceeding with the confiscation.[472] As with other aspects of environmental crimes, mutual legal assistance, and cooperation from the criminal organization's "home country" is a major obstacle to the seizure of assets and prosecution of money-laundering. These difficulties will be addressed below (Section V subsection 3(b)(iii)). Finally, confiscation may also be ordered even if the perpetrator can't be identified. This is only possible if the Swiss court has no doubt as to the existence of the offense.[473] Clarifications as to the predicate offense would still require judicial cooperation from the country in which it was committed, raising the same difficulties as mentioned above regarding the identification of criminal organizations.

Swiss jurisdiction for confiscation also extends beyond the courts to the executive branch, which has the political legitimacy to freeze and confiscate assets which are owned or ultimately controlled by politically exposed persons (PEPs) or their entourage.[474] The Swiss Federal Council can order the freezing of these assets in view of a mutual legal assistance procedure (Art. 3 FIAA) based on the loss of power or inexorable change in power within the country of origin of the PEPs, if the level of corruption in that country is notoriously high, or where it appears likely that the assets were acquired through acts of corruption, criminal mismanagement or other felonies (Art. 3 al. 2 FIAA). It can also order the freezing when the mutual legal assistance procedure doesn't come to fruition (Art. 4 FIAA). The Swiss Federal Council may then instruct the Federal Department of Finance (FDF) to initiate proceedings before the Federal Administrative Court for the confiscation of frozen assets (Art. 14 al. 1 FIAA). The Federal Administrative Court subsequently orders the confiscation of assets (Art. 14 al. 2 FIAA) if these are of illicit origin, irrespective of any statute of limitations in respect of criminal prosecution or penalties for the alleged criminal behavior (Art. 14 al. 3 FIAA). The presence of assets, whether these are material or virtual, in Switzerland is therefore sufficient to establish Swiss jurisdiction over the confiscation and economic sanctioning of politically

[469] TPF, 27.3.2015, SK.2014.54, cons. 2; 6.5.2010, BB.2010.3.

[470] Lombardini, *Banques et blanchiment d'argent*, p. 137.

[471] CR CP I-Hirsig-Vouilloz, art. 70, N. 9a, TF, 6.2.2017, 6B_474/2016, c. 3.2, SJ 2007 I 366 ff.

[472] TPF, 22.1.2014, BB.2013.128.

[473] Lombardini, *Banques et blanchiment d'argent*, p. 127.

[474] *See*: Art. 3, 4, 14 Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (Foreign Illicit Assets Act, FIAA) of 18 December 2015 (RS 196.1).

exposed persons.[475] As the FATF Report lays out, politically exposed persons are often facilitators to environmental offenses, either as active beneficiaries, or as bribed bystanders. In creating this jurisdictional nexus, the Foreign Illicit Assets Act (FIAA) is therefore an important tool to address environmental crimes transnationally. The Act only entered into force in 2015, however. Its relative novelty means that it has not yet been explored which offenses fall under "other felonies". The statutory scope of art. 3 al. 2 FIAA excludes non-felony offenses, and therefore most environmental crimes from justifying the freezing of PEP assets. Notwithstanding this provision, art. 14 al. 2 FIAA allows for the confiscation of assets which are of illicit origin, and does not explicitly exclude non-felonies. It remains to be seen whether the Federal Administrative Court would accept to order the confiscation of assets resulting from environmental offenses, especially considering the diplomatic sensitivity concerning PEPs.

b. Legal Requirements

i. Qualification and Quantification of Assets

The assets subject to confiscation are quantifiable economic benefits that are the direct or indirect product, meaning the replacement value or substitution of the original product of the offense.[476] In essence, it suffices that the assets or their replacement values are still identifiable as flowing from an offense. This identification chain is also called a "paper trail". These assets can take the form of an increase in assets, a decrease in liabilities, a non-decrease in assets or a non-increase in liabilities.[477] This was confirmed by the Federal Supreme Court concerning savings made by a wrongful waste disposal.[478] The Federal Supreme Court has also admitted, with regards to tax evasion[479], and fraud against seizure[480] that proceeds can be confiscated even if they constitute a debt that the offender omitted to pay, where the omission constitutes an offense.[481] Where an environmental crime abroad generates a saving for the perpetrator, that saving (or its replacement value) is therefore also subject to confiscation provided that (1) the saving is laundered in Switzerland and (2) made on an account in Switzerland. This would arguably pose a few difficulties. First, some authors argue with regards to the confiscation of savings made from tax evasion, that only the part of the assets that have not been paid as a tax are subject to confiscation.[482] This solution also may at first

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[475] *See*: Art. 3, 4, 14 FIAA.

[476] CR CP I-Hirsig-Vouilloz, art. 70, N 13a

[477] ATF 144 IV 1, c. 4.2.2.; in a less detailed manner, considering that forfeitable assets are those which can be written in an accountable manner for a civil compensatory debt (i.e. including non-decreases in assets or non-increases in liabilities): TF, 19.2.2020, 6B_1000/2019, c. 13.1; TF, 8.1.2019, 6B_122/2017, c. 18.3; TF, 24.10.2017, 6B_735/2016, c. 4.2.2; ATF 144 IV 1, c. 4.2.1.

[478] ATF 137 IV 35. Also confirmed in Marianne Johanna Hilf, 'Unternehmensstrafbarkeit im Bereich der Umwelt(schutz)delikte', p. 97 in: Marianne Johanna Hilf, Jürg-Beat Ackermann (Eds.), *Umwelt-Wirtschaftsstrafrecht – 9. Schweizerische Tagung zum Wirtschaftsstrafrecht*, Collection EIZ Band/Nr. 177 (2017).

[479] CR CP I-Hirsig-Vouilloz, art. 70, N 13c.

[480] TF, 6.9.2000, 6S.324/2000.

[481] Allowing for the confiscation of savings generated from a tax offense, TF, 6.10.2005, 1S.9 and 1S.10/2005, c. 7.

[482] Cassani, *Droit pénal économique,* p. 195.

seem applicable for the category of environmental crimes that don't generate a profit. A Swiss court would have to prove that it was the asset holder's account in Switzerland which would habitually be used to make payments to proper waste disposal units or towards maintenance of a filtration system. This would require the perpetrator to have, at least a few times, disposed of its waste correctly in the past. It would be easy for the perpetrator to argue that these payments would have been made from an account in a different country, thereby evading Swiss jurisdiction. Secondly, the deposit of assets in a bank account leads to their co-mingling with other assets of lawful origin. Scholars agree that the direct confiscation of an amount from the account corresponding to the assets remains possible as long as a chain of causation between the account and the crime can be established.[483] The Geneva Court of Justice considered in a 2000 decision that confiscation remains possible if the credit of the proceeds to the account has not been followed by other movements that make it more difficult to determine whether the funds in the account are still the proceeds of the offense.[484] In other words, if the "paper trail" of the assets can no longer be followed, confiscation is excluded.[485] Legal scholars disagree over this decision.[486] This discussion doesn't only affect financial deposits. The import and processing of timber, stone or ore is also impacted by the co-mingling problem. The paper trail of illegally harvested timber can be hidden by (1) mixing it with a batch of legally harvested timber and labeling the entirety as such or by (2) processing it into pulp or other parts for furniture or other wooden goods. In the first case, separating the legal from the illegal is possible, but disproportionately laborious. It would require the sampling of each individual log to ensure the correct labeling of wood. Even then, the sampling would only show whether the wood came from an endangered species which, by definition, can't be logged legally. It would however not show whether the timber was obtained in accordance with the logging permit (quantity, location or logging method). Once the wood is processed further, the separation is not at all possible and therefore the paper trail erased. The source of gold and other smeltable metals is even more difficult to establish; batches of metals can't be tested for their source, and their co-mingling would not be reversible once melted and casted.

Another solution presents itself where an asset is not identifiable or available anymore: the compensatory claim (Art. 71 ch. 1 CP).[487] The compensatory claim corresponds to the amount of the assets that should have been confiscated, and may be recovered from any asset of the debtor even if it is of lawful origin (Art. 71 ch. 3 CP). A Swiss court can therefore order a compensatory claim if the asset was not identifiable anymore, provided that (1) the asset was laundered in Switzerland and (2) an account or asset existed in Switzerland from which a compensatory claim could be seized. The same should be possible for a compensatory claim

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[483] Lombardini, *Banques et blanchiment d'argent*, p. 131.

[484] Cour de justice de la République et canton de Genève, Chambre pénale d'appel et de révision, cause 237/00, 23.10.2000, cons. 6a.

[485] CR CP I-Hirsig-Vouilloz, art. 70, N. 19.

[486] As has been discussed above, some authors consider that confiscation remains possible if one accepts that the movements were financed by the lawfully derived funds, meaning that the unlawful assets are still in the account. Others argue that a quote-part can be set on the account in the amount of the unlawful assets. If the account balance doesn't dip below the quote-part, then the confiscation is still possible. *See* e.g.: CR CP I-Hirsig-Vouilloz, art. 70, N. 21;

[487] Lombardini, *Banques et blanchiment d'argent*, p. 128.

where the original asset is a saving, given the symmetry between laundered proceeds and laundered savings in all other confiscation aspects covered by statute or case law seen above. While the compensatory claim seems a welcome solution to the co-mingling and identification problems, it imposes a procedural disadvantage. The recovery of a compensatory claim follows the rules of the Bankruptcy Act.[488] The State would compete with the asset holder's other creditors and find itself with a fraction of the laundered proceeds. The situation is much more favorable if the State succeeds with a confiscation. In that case, the Bankruptcy Act does not apply, and the State can seize the entirety of the unlawful assets.[489]

Under Art. 70 CP, confiscation is possible if the assets have a natural and adequate causal link with the offense, without the assets necessarily being the direct and immediate consequence of the offense.[490] The forfeitable assets are therefore both the proceeds and economic advantage obtained by the offense[491], as well as any income generated by these proceeds.[492] Whether the sequestrable income equals net or gross profit depends on the proportionality principle. The Federal Supreme Court has not set a guiding calculation method although in practice, if the activity that has generated the additional income was lawful the net profit calculation should be preferred.[493] With regard to timber or precious metal trafficking, any profit created from their sale surpassing their market value may be considered sequestrable. With waste trafficking or pollution, the savings generated from the incorrect disposal or lack of legally required filtration system would already constitute the principal proceeds and no additional profits would be open to confiscation. While the trafficked proceeds from forestry crimes and illegal mining are more easily quantifiable, those coming from waste trafficking and pollution are not. The former will generally equal the market value of the harvested timber, ore or stone, or the sale price obtained by the trafficker. The latter may cause environmental damages that destroy species and natural habitat, which is difficult to put a numerical value on. These damages may require reparation costs in the millions, but only generate a saving for a perpetrator. It is the saving, and not the damages caused, which is the forfeitable proceeds from the offense. These savings can be hard to quantify, as it is unclear which money would have been spent to properly dispose of waste or avoid polluting. In this case, Art. 70 al. 5 CP allows the Swiss court to estimate the value of the assets subject to confiscation. This provision is often used when offenses are committed which, by their clandestine nature, can only be apprehended in an approximative manner. The Federal Supreme Court identifies drug trafficking and running a prostitution ring as such offenses[494]– both are generally perpetrated by criminal organisations. The difficulty to estimate the value created by an omission is

[488] Lombardini, *Banques et blanchiment d'argent*, p. 139.

[489] Lombardini, *Banques et blanchiment d'argent*, p. 139. See, however, TF, 26.9.2005, 1S.5/2005, where the Federal Supreme Court accepted that the federal tax administration could sequester assets to secure the State's compensatory claim arising from an aggravated tax offense pursuant to Art. 190 ff LIFD, even though under Art. 46 para. 1 lit. b DPA the sequestration could only relate to assets that could be confiscated. In the same sense, TF, 12.12.2006, 1S.8/2006.

[490] CR CP I-Hirsig-Vouilloz, art. 70 N13a; TPF, 17.11.2017, BV.2017.33, c. 2.3.2.

[491] TF, 10.10.2003, 6S.264/2002, cons. 3.1.

[492] BSK StGB-Baumann, Art. 70/71 StGB N 33.

[493] BSK StGB-Baumann, Art. 70/71 StGB N 34-35.

[494] TF, 8.1.2019, 6B_122/2017, c. 18.4.2; ATF 144 IV 1, c. 4.4.1.

therefore not an obstacle to the confiscation of its proceeds. If these proceeds are below CHF 300.-, and this is aimed for by the perpetrator, Art. 172ter CP applies to the money-laundering offense. This provision reduces the offense's gravity to a contravention, meaning that the offense will be punished with a fine of up to CHF 10'000 (Art. 106 al. 1 CP) and pursued upon complaint from the victim (Art. 172ter al. 1 CP). In Switzerland, a formal complaint needs to be filed by the victim in accordance with art. 115 al. 1 and 118 al. 1 CPP. However, victims of environmental crime may not always be aware or can't sufficiently show that they were exposed to the damage caused by the environmental crime. Further, while anti-money laundering provisions protect both a collective and individual protected right, the latter is only limited to the right of the person who was the victim of the predicate offense. With most environmental crimes, there is no individual victim whose protected rights were infringed. Consequently, a complaint is excluded. Nevertheless, the Federal Supreme Court settled that a confiscation remains possible in the presence of offenses pursued upon complaint only, even if no complaint has been made.[495] The potentially low value of the laundered savings is not an obstacle to its confiscation. However, it is doubtful whether (1) a fine of CHF 10'000 or (2) the threat of a confiscation of a maximum of 300.- would be a sufficient deterrent for potential traffickers and money-launderers. Switzerland might therefore be able to address as a jurisdiction in which laundered proceeds are deposited, but it will not be able to convince traffickers, or other countries seeking international cooperation, that it can show that crime doesn't pay. A legislative amendment as suggested above (Section V subsection 2(iii)) would fill these gaps.

ii. Subsidiarity

Assets resulting from an offense can only be confiscated if they can't be restituted to the party injured by the offense in order to restore their rights (Art. 70 al. 1 *in fine* CP)[496] and if no good faith third party in possession of the assets can't oppose the confiscation (Art. 70 al. 2 CP). The claims of the injured party, and in some cases of the third party, therefore prevail over the States' interest in confiscation. The injured party is the natural or legal person whose individual protected right was directly, immediately and personally[497] harmed by the offense (Art.115 al. 1 CPP). As stated previously, most environmental crimes do not affect an individual protected right directly. Furthermore, the injured party needs to be identified by name and located.[498] This information is not readily available in cases where environmental crime occurs abroad, often in marginalised areas. This excludes the restitution based on Art. 70 al. 1 *in fine* CP, as well as a potential allocation on the basis of Art. 73 CP. Finally, a country's tax income or purse is harmed by the commission of an environmental crime. The Federal Supreme Court has however excluded public entities or states as injured parties.[499]

[495] TF, 15.9.2003, 6S.184/2003, c. 4.2.3, ATF 129 IV 305, SJ 2004 I 98.
[496] CR CP I-Hirsig-Vouilloz, art. 70, N. 24; TF, 22.12.2017, 6B_687/2014, c. 2.3; TF, 1.7.2008, 6B_344/2007, c. 1.4.
[497] ATF 137 IV 280, c. 2.2.1.
[498] CR CP I-Hirsig-Vouilloz, art. 70 N 25.
[499] TF, 11.1.2013, 6B_834/2011, c. 4.

States can only proceed through mutual legal assistance procedures to obtain relief. A third party's right against confiscation is based on Art. 26 Cst[500], i.e. the right to property and the protection of possession.[501] The confiscation can thus not be pronounced if the third party has acquired the assets in ignorance of their origin and has paid an adequate counter-value in exchange for the assets, i.e. has paid their market value. The State has the burden of proof to show these elements.[502] In practice this means that the confiscation can go ahead if the assets are in the form of money deposited on a third party's account, not only because the third party didn't pay for the object to be seized as required by art. 70 CP, but also because this person was part of the offense in the first place. They are therefore not a "third party".[503] If the trafficked goods are acquired in good faith by a wholesaler or a private citizen, the confiscation might not be possible. *Leges speciales* regarding the import of timber and endangered species may nonetheless allow for their confiscation at the border if the required declarations are not complied with, although Swiss authorities are only required to return the confiscated goods in some cases[504], and may otherwise dispose of them.[505] If we consider the standard procedure under criminal law however, foreign states who might otherwise benefit from mutual legal assistance may be thwarted by the subsidiary nature of confiscation. This would deprive them of leaked revenues, and of the opportunity to meaningfully tax or sell primary products.

iii. Mutual Legal Assistance

When a criminal offense is committed in Switzerland, the assets will generally be sequestered during a trial for money-laundering (see Art. 263 CPP), allowing their freezing until a final decision is issued on their confiscation. Where the assets originated from an offense abroad, but a money-laundering offense was committed on the same assets in Switzerland, a Swiss court can decide to (1) pursue the confiscation accessorily to the money-laundering trial[506] or (2) pursue the confiscation independently from the primary trial (see Art. 376 CPP)[507] provided that a confiscation could not be possible during a primary trial. This is because, based on the Federal Supreme Court's jurisprudence and law enforcement practice, confiscation can happen irrespective of the existence of a criminal procedure or criminal liability of the asset holder.[508] Some authors even advocate for an independent confiscation jurisdiction based on the location of the assets in Switzerland alone.[509] An independent confiscation can also occur where the Swiss court considers that the criminal proceedings abroad are considerably

[500] Federal Constitution of the Swiss Confederation of 18 April 1999 (RS 101).
[501] CR CP I-Hirsig-Vouilloz, art. 70 N 35.
[502] *See* TF, 8.2.2006, 6S.325/2000.
[503] CR CP I-Hirsig-Vouilloz, art. 70, N. 32.
[504] This is particularly the case with the import of endangered species, which needs to respect CITES provisions on their return, *see*: Arts. 16 LCITES and 39 al. 3 let a OCITES concerning the import of endangered species.
[505] *See* e.g. Art. 44 Zollverordnung; Art. 19 Ordinance on Placing Timber and Wood Products on the Market.
[506] BSK StPO-BAUMANN, Art. 376 StPO, N 5.
[507] ATF 128 IV 145 c. 2; TF, 7.2.2005, 6S_389/2004, c. 4.2; ATF 134 IV 185 c. 2.1 u. TF, 6.5.2014 GB_422/2013, ; c. 7 (concerning assets of a criminal organization).
[508] BSK StPO-BAUMANN, Art. 376 StPO, N 3.
[509] OK2-SCHMID, Art. 70-72 N 28 f.

protracted and the evidence allowing for the confiscation is clear.[510] In the absence of a foreign judgment, the Swiss judge must administer the evidence according to Swiss procedural law and decide whether an offense exists; the Swiss judge must provide a demonstration that is similar to that which would result from a foreign judgment.[511] The foreign state can also submit a request for mutual legal assistance and demand the seizure and surrender of assets located in Switzerland (Art. 18 and 74a IMAC)[512]. These requests allow for the seizure of assets deposited in Swiss bank accounts.[513] Swiss authorities can then hand over the proceeds of the offense and the profit generated by the offense, or their replacement values, and the values necessary to fulfill a compensatory claim to the foreign authorities.[514] While Swiss authorities generally wait for a foreign final and enforceable judgment to be issued before proceeding with the surrender of the assets, this is not mandatory; the surrender of assets may take place at any stage of the foreign proceedings.[515] Often, assets are first seized in domestic Swiss money laundering proceedings (triggered, for example, by a report from a bank pursuant to Art. 9 AMLA).[516] The foreign state is then notified that they may submit a mutual legal assistance request (Art. 67a IMAC). If the foreign state submits a request, the assets are then subject to a double seizure (under both a Swiss criminal procedural and a mutual legal assistance seizure). In practice however, the latter prevails over the ordinary criminal seizure, allowing for proper restitution to the foreign authorities.[517] The assets are then shared between the Swiss and foreign authorities on the basis of a reciprocal asset sharing agreement (Art. 11 ff. LVPC)[518]. Usually, the assets are shared equally between Switzerland and the foreign state.[519] It's possible however to return all confiscated assets to the foreign state, particularly if the interests of the foreign states were severely damaged by it (Art. 12 al. 3 LVPC). This was the case notably in 2020 when Ms. Gulnara Karimova, daughter of the former President of Uzbekistan was prosecuted in Switzerland for a corruption scheme involving a total of USD $800 million. Uzbekistan and Switzerland agreed to devolve the entirety of proceeds, USD $131 millions, seized in Switzerland to Uzbekistan. Switzerland reasoned that it wanted the proceeds to go to the Uzbek population, and not another corruption scheme in their country. To facilitate this plan Zurich and Geneva, where the assets were held, agreed to waive their claims to a part of the confiscated assets.[520] Such a solution would also lend itself if a foreign country fell victim

[510] TF, 9.8.2005, 6S_68/2004, c. 11.2.2.

[511] Lombardini, *Banques et blanchiment d'argent*, p. 128.

[512] Federal Act on International Mutual Assistance in Criminal Matters (Mutual Assistance Act, IMAC) of 20 March 1981 (RS 351.1).

[513] Lombardini, *Banques et blanchiment d'argent,* p. 142.

[514] Lombardini, *Banques et blanchiment d'argent,* p. 143; A mutual legal assistance for a compensatory claim is possible when the compensatory claim is final and enforceable in accordable with Art. 94 ff IMAC, *see*: TPF, 15.4.2009, RR.2008.244.

[515] Lombardini, *Banques et blanchiment d'argent*, p. 144.

[516] BSK StPO-BAUMANN, Art. 376 StPO, N 5.

[517] BSK StPO-BAUMANN, Art. 376 StPO, N 5.

[518] Bundesgesetz über die Teilung eingezogener Vermögenswerte (TEVG) vom 19. März 2004, (RS 312.4).

[519] CR CP I-Hirsig-Vouilloz, art. 70 N 52.

[520] Balz Bruppacher, '«Schweiz zahlt Korruptionsgelder an Usbekistan zurück - Genf und Zürich verzichten auf ihre Ansprüche»', (NZZ, 4.11.2020).

to the damages of a serious environmental crime, particularly if the population's quality of life was directly impacted.

iv. Issues Concerning Fundamental Rights

Switzerland's ability to trace and recover laundered assets of environmental crimes is bound by the legal commitments it has made under international treaties. The sequestration and confiscation of assets derived from alleged extraterritorially committed environmental crimes poses important questions as to their admissibility under fundamental rights. This analysis is not intended to be exhaustive. Rather, it serves as an overview of potential pitfalls for courts to consider when issuing a confiscation. It uses the European Convention of Human Rights and its Protocols as a legal standard, although other conventions may be implicated too.

The European Court of Human Rights has not given a uniform answer as to the lawfulness of confiscation measures. It has however provided some guidelines for Swiss courts to follow, which may qualify Swiss confiscation measures under art. 70 CP as criminal in nature.[521] These are therefore bound by the full extent of due process rules under Arts. 6 and 7 of the Convention, including the presumption of innocence (Art. 6 §2 ECHR), the principle of celerity (Art. 6 §1 ECHR) and the non-retroactivity principle under the principle of legality (Art. 7 CEDH).[522] On the other hand, administrative confiscations occurring at the border for violating the import conditions would be less likely to fall under the criminal prong of Art. 6 ECHR. They would still have to comply with principles underlying administrative law, such as proportionality, legality and a right to be heard.

In certain cases Switzerland permits the confiscation of assets without regard to the asset holder's criminal liability or a criminal trial. The Basel Institute on Governance has already argued convincingly for the use of non-conviction based confiscation (NCBC) as a tool

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[521] First, the lawfulness of the measure depends on whether it is criminal or civil in nature, as the former are bound by stricter rules of due process under the Convention. The European Court of Human Rights' Engel criteria determine whether a confiscation is a criminal penalty. The Engel criteria constitute three tests to the case under scrutiny: (1) the legal classification of the offense in domestic law; (2) the repressive nature of the offense; and (3) the degree of severity of the possible sanction; *Engel et al* v. *Netherlands*, 8 June 1976, nos 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72. Under Swiss law, confiscation has a triple purpose: (a) to counteract illicit enrichment; (b) to compensate the injured party; and (c) to prevent dirty money from accessing the financial market; BSK StGB-Baumann, Art. 70/71 StGB N 3-5. A confiscation is thus not considered a punitive measure under Swiss law. However, in *Welch v. The United Kingdom*, the Court considered that the confiscation of money related to drug trafficking was of punitive nature because its 'aims of prevention and reparation are consistent with a punitive purpose and may be seen as constituent elements of the very notion of punishment'; *Welch v. The United Kingdom*, no. 17440/90, 9.2.1995, § 31. In *G.I.E.M S.r.l. v. Italy*, the Court held that the confiscation at hand was punitive because it was imposed automatically by the unlawful nature of the confiscated object, and not because it posed an actual danger.; Adriano Martufi, 'Confiscating assets without a prior conviction violates fundamental rights?' (leidenlawblog, 11.6.2018), Furthermore, it was ordered by a criminal court at the end of a criminal proceeding. The confiscation therefore had to be considered a 'penalty' within the meaning of Article 7 of the Convention.; *Ibid*., The parallels between confiscations in Switzerland and those subject to the European Court of Human Rights' scrutiny are obvious. Confiscations under Art. 70 CP may also be regarded as punitive.

[522] *See*: Cour Européenne des Droits de l`Homme, 'Guide sur l'article 6 de la Convention européenne des droits de l'homme Droit à un procès équitable (volet pénal)', (30.4.2022).

to squeeze profits from environmental harm.[523] Swiss case law seems to suggest that NCBC is judicial practice when an acquittal must be pronounced despite the objective constitutive elements of the offense being fulfilled[524], if the offense is time-barred[525], if a complaint was not filed where a complaint would have been required to open pre-trial proceedings[526] or when the asset holder has fled the country and can't be located to stand trial.[527] The European Court of Human Rights' case law indicates that this practice is lawful, although with some caveats. In *Paraponiaris v. Greece* the applicant was sentenced to a pecuniary measure, i.e. a penalty after his acquittal because the prosecution was time-barred although the domestic court held that the objective elements of the offense were nonetheless fulfilled.[528] Here, the Court found that Article 6 §2 ECHR had been violated because "the application of a sanction after acquittal for an offense that was committed was akin to a determination of guilt without due process.[529] If a Swiss confiscation is considered a criminal penalty, then the presumption of innocence applies to the asset holder. In *Varvara v. Italy* however, the Court held that a confiscation requires a finding of personal responsibility under Art. 7 ECHR.[530] This would have excluded the possibility of issuing an NCBC. *G.I.E.M.* specified this principle*:* the finding of personal responsibility was sufficiently met with a simple declaration of liability even when a formal conviction was not issued.[531] Art. 7 ECHR was not violated when the domestic courts imposed a confiscation without a conviction. The courts' practice in Switzerland would therefore not violate Art. 7 ECHR. This is particularly useful to note with regards to environmental crimes, as their detection and prosecution usually spans many years. Many of these crimes are subject to small penalties, meaning that their statutes of limitation are also quite short. Under Swiss law money laundering is no longer possible if the predicate offense is time-barred[532], meaning that the launderers would not be subject to conviction. The confiscation in such liminal cases would however remain possible under the case law illustrated above, provided that it takes place within the statute of limitation applicable to money-laundering, i.e. 15 years (see Art. 70 al. 3 *cum* 97 al. 1 let b. CP). Courts should however be wary of following this regime too often; it may produce particularly egregious results where a third party's assets are confiscated even if the original criminal act has not legally been adjudicated. If the presumption of innocence as to the act applies to the accused (*in personam*), this must also apply as far as possible to his

[523] Jonathan Spicer and Juhani Grossmann, 'Targeting Profit: Non-Conviction Based Forfeiture in Environmental Crime', (Basel Institute on Governance, January 2022).
[524] TF, 21.8.2017, 6B_1269/2016 c. 4.1.
[525] BSK StGB-Baumann, Art. 70/71 StGB N. 19.
[526] ATF 129 IV 305.
[527] ATF 128 IV 145.
[528] Michele Simonato, 'Confiscation and fundamental rights across criminal and non-criminal domains', *ERA Forum* 18, 365–379 (19.9.2017).
[529] Martufi, 'Confiscating assets without a prior conviction violates fundamental rights?'.
[530] Iulia Motoc, 'Chapter Summary: The dialogue between the ECHR and the Italian Constitutional Court: the saga of "GIEM and Others v Italy"', (IACL-AIDC Blog, 1.4.2019).
[531] *G.I.E.M. S.r.l. and Others* v. *Italy* [GC], no. 1828/06, 28.6.2018, §§ 252-253; Martufi, 'Confiscating assets without a prior conviction violates fundamental rights?', Motoc, 'Chapter Summary: The dialogue between the ECHR and the Italian Constitutional Court: the saga of "GIEM and Others v Italy"'.
[532] PK StGB-Pieth/Schultze, Art. 305bis N10; *See*: ATF 126 IV 262; ATF 129 IV 238.

assets (*in rem*) which are now in the hands of another person.[533] Similarly, independent confiscation measures under Art. 376 CPP should also be used sparingly. In these cases, the practical consequence for the asset holder is that the offense justifying the confiscation is determined without giving the accused the opportunity to defend himself against its alleged commission in an ordinary procedure.[534]

The lengthy nature of the money-laundering procedures involving proceeds from environmental crimes also affects the principle of celerity under Art. 6 § 1 ECHR. This principle ensures that everyone has a right to a hearing within a reasonable time, meaning that the accused shall not be charged for too long without determination of guilt and penalty.[535] Often, assets which were possibly obtained illicitly are sequestrated at the beginning of a trial, meaning that the bank account holding these assets is frozen during the trial. According to the Federal Criminal Tribunal, the principle of *in dubio pro duriore* is applicable to the sequestration at this stage of the trial, meaning that, in doubt, the court should settle in disfavour of the asset holder.[536] In theory, the court should lift the sequestration without waiting for a judgment on the merits if the confiscation of the blocked assets or the allocation of a compensatory claim can no longer be envisaged[537] or if the length of the proceedings becomes disproportionate.[538] In practice however, it is only in rare cases that a sequestration is quickly lifted.[539] The release is subject to particularly restrictive requirements if the sequestration was originally requested by a foreign authority.[540] A sequestration may mean the freezing of one or multiple bank accounts, depriving the accused of his income. If the trial spans many years, due to delays caused by investigations, the use of financial or environmental expertise and requests for mutual legal assistance, the sequestration may continue for an undue amount of time. The Federal Supreme Court recognizes that such a sequestration can cause the accused an irreparable disadvantage.[541] An unreasonably long sequestration can therefore *de facto* have a punitive effect before the accused has even received a conviction. According to the European Court of Human Rights, the reasonableness of the length of proceedings is determined in light of the circumstances[542] and may take into account the complexity of the case.[543] *In Neumeister v. Austria*, the European Court of Human Rights has held that the complexity may stem from the number of charges and people involved during the trial, as well as the international dimension of the case.[544] In *C.P. and Others v. France* and *Arewa v. Lithuania* the Court

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[533] BSK StGB-Baumann, Art. 70/71 StGB N. 58.

[534] BSK StPO-Baumann, Art. 376 stop N 4.

[535] Cour Européenne des Droits de l`Homme, 'Guide sur l'article 6', p. 61, *Wemhoff v. Germany,* (27.6.1968), Ser. A, No. 7, 1 E.H.R.R. 55, §18; *Kart v. Turkey* [GC], (3.12.2009), 8917/05, §68.

[536] TPF, 15.8. 2013, FF.2013.108-114.

[537] ATF 128 I 129/JdT 2005 IV 180.

[538] Lombardini, *Banques et blanchiment d'argent*, , p. 124.

[539] Lombardini, *Banques et blanchiment d'argent*, p. 124.

[540] Lombardini, *Banques et blanchiment d'argen*t, p. 141.

[541] *See*: TF, 1.2.2007, 1A.183/2006, *see also* formulation of Art. 80^{e} al. 2 IMAC.

[542] *Boddaert v. Belgium*, (22.9.2002), 12919/87 § 36; Cour Européenne des Droits de l`Homme, 'Guide sur l'article 6', p. 62.

[543] Cour Européenne des Droits de l`Homme, 'Guide sur l'article 6', p. 62.

[544] *Neumeister v. Austria*, (27.6.1968) 1936/63, § 20, where the transactions at play concerned various countries, requiring the assistance of Interpol and the implementation of treaties on mutual legal assistance, and over 20 trial

acknowledged that large-scale white-collar crime operations could lead to long and complex trials where substantial accounting and financial expertise or international investigations were required.[545] The principle of celerity would also be weighed against the possibility of ongoing misconduct during the trial or assets disappearing.[546] Especially where members of organized crime are on trial, judges would favor the victims' rights to an eventual recompensation over the accused parties' procedural right to a timely trial.

The long-term sequestration and confiscation also touch on the principle of proportionality. It is important to note that this principle is not explicitly mentioned in the European Convention on Human Rights but has been developed in the Court's case law where the restriction of qualified rights (i.e. those which the Convention allows to be curtailed in the interest of legitimate concerns) was at play. It also plays a foundational importance under Swiss criminal (procedural or substantive) law. The principle of proportionality requires that an administrative measure is suitable and necessary for the achievement of the objective in the public interest and proves to be reasonable and proportionate for the persons concerned in view of the severity of the restriction of their fundamental rights. A reasonable relationship between the ends and the means is required.[547] Sequestration and confiscation measures interfere particularly with the rights to property. It is obvious that a sequestration which goes over a reasonable amount of time is disproportionate. A confiscation is equally disproportionate if it involves amounts going beyond the estimated value of the criminal assets by which the accused was enriched. The European Court of Human Rights has affirmed that an interference with the right to property violates the principle of proportionality when an excessive burden is imposed on the property-owner.[548] In *Paulet v. The United Kingdom*, the applicant saw his savings of four years confiscated. The government had argued that the order was proportionate because it only confiscated assets with a value equivalent to the applicant's benefit from his criminal conduct. The Court held however that in omitting to consider whether the order had maintained a fair balance between property rights and the public interest (meaning whether it was proportional), the government violated the applicant's rights to a peaceful enjoyment of his possessions under Article 1 Protocol 1.[549] A Swiss court would therefore have to evaluate, when ordering the confiscation, whether its scope was proportional (although current law prevents them from doing so).[550] However, *Paulet* concerned a case where the applicant had obtained employment using a false French passport, and the income earned was confiscated. Authors have noted that the European Court has "shown a readiness to display considerable deference towards how states construct and use asset confiscation as a means of crime control"

participants, some of whom were living abroad.; Cour Européenne des Droits de l`Homme, 'Guide sur l'article 6', p. 62.

[545] *C.P. and Others v. France*, (26.4.2001), 44976/98, § 30; *Arewa v. Lithuania,* (9.3.2021), 16031/18, § 52; Cour Européenne des Droits de l`Homme, 'Guide sur l'article 6', pp. 62-63.

[546] *See:* art. 212 al. 1 and 2 CPP.

[547] ATF 132 I 49 c. 7.2 p. 62.

[548] Michele Simonato, 'Confiscation and fundamental rights across criminal and non-criminal domains'.

[549] *Paulet v. the UK*, (13.5.2014), 6219/08, §§ 65 – 69.

[550] BSK StGB-Baumann, Art. 70/71 StGB N. 59.

with regards to cases involving organized crime.[551] In *Gogitidze and Others v. Georgia,* a case concerning non-conviction based confiscation of assets originating from a corruption scheme, the Court stressed that States have a wide margin of appreciation with regard to what constitutes an appropriate, i.e. proportional means of applying measures to control the use of property.[552] Referring explicitly to the FATF Recommendations, the Court also recognized the legitimacy of "internationally acclaimed standards" to tackle corruption, which would allow for the possibility of lowering the burden of proof, or to confiscate assets belonging to third parties.[553] The margin of appreciation for Swiss courts would therefore be larger when appreciating the proportionality of confiscating laundered assets originating from environmental crimes, particularly if the European Court is aware of the FATF's push to apply their set of standards to fighting environmental crime. Practically speaking, implementing the money-laundering regime to precious metals derived from illegal mining would also require confiscating these commodities. As precious metals traders are already subjected to increased scrutiny under AMLA, and these commodities are used in other crimes unrelated to the environment, this is not a new measure. The FATF's impetus to focus on these traders' involvement in trafficking of proceeds from environmental crime will however amplify the risk of confiscation of assets in their possession. Critics may raise the issue of proportionality when these measures concern commodity traders and refineries holding precious stones they acquired without knowledge of their illicit origin. However, Art. 70 CP already provides guardrails to such overreach by excluding good faith acquirers from confiscation if they have paid equal compensation or if the measure would put an undue burden on them. Bad faith must be interpreted restrictively; intent or contingent intent (*Eventualdolus*, *dol éventuel*) to acquire assets of criminal origin is required for the good faith quality to be waived.[554] Otherwise, the third party's property rights (and potentially his economic rights) may be infringed, especially where the original criminal act has not been legally adjudicated in an independent non-conviction-based confiscation.[555] The third party's contingent intent is established if he could have easily and quickly obtained certain knowledge of the criminal origin of the assets.[556] It is however questionable if a general duty of due diligence or clarification in the case of an unusual transaction can be put on an equal footing with the knowledge of the grounds for confiscation as required by the statutory language.[557] The wording of the law seems to require positive knowledge of the specific circumstances, and not simply an unresolved suspicion.[558] Whether the burden of clarification is higher for commodities traders is unclear. What we can establish, is that they are required to fulfill their due diligence obligations when importing the commodities to Switzerland[559] or

[551] Johan Boucht, *The Limits of Asset Confiscation – On the Legitimacy of Extended Appropriation of Criminal Proceeds*, (Hart Publishing, Oxford, 2017), p. 23.
[552] Michele Simonato, 'Confiscation and fundamental rights across criminal and non-criminal domains'.
[553] *Gogitidze and others v. Georgia,* (12.5.2015), 36862/05, § 105 – 106.
[554] BSK StGB-Baumann, Art. 70/71 StGB N. 58.
[555] BSK StGB-Baumann, Art. 70/71 StGB N. 58.
[556] BSK StGB-Baumann, Art. 70/71 StGB N. 58.
[557] BSK StGB-Baumann, Art. 70/71 StGB N. 58.
[558] BSK StGB-Baumann, Art. 70/71 StGB N. 58.
[559] *See*: commodities importers' obligations under the CITES Act, the Customs Act, etc.

when assessing their clientele.[560] An argument may therefore be raised that failure to adhere to these obligations meets the bar for contingent intent, i.e. envisaging that the assets might originate from environmental crime and accept these circumstances.

Critically, positioning Switzerland unequivocally as an unequivocal "international tracer of environmental crime" is not only politically naïve (see below in Section V subsection 4(e)), but poses an issue with regard to the predictability for the accused of the location of a trial. The accused must be able to reasonably predict where he would be adjudicated if he committed an offense, as well as which laws apply to him at the time of commission under the principle of legality. While some Swiss courts have found a jurisdictional nexus where assets were deposited in Switzerland, it is unclear in practice how comfortable judges would be in following this line of thinking. Some might also be inclined to think that this practice would interfere with the judicial sovereignty of the countries in which the environmental crime was committed, even if dismissing a case for lack of jurisdiction might mean that the original crime was never or improperly adjudicated. The courts, as with many transnational issues, face important questions on the fundamental rights of the parties involved in the procedure. Adding in political or diplomatic considerations, although equally common in Swiss case law, complicates the judge's willingness to explore creative solutions to address environmental crime.

4. Practical Implementation

The practical implementation of the 2021 FATF Report, and anti-money laundering enforcement targeting proceeds of environmentally damaging activities more broadly requires the extension of existing regimes and enforcement networks. It may also encounter similar obstacles that have put Switzerland on a backfoot with regards to general anti-money laundering enforcement. It is therefore worth providing a cursory overview of current international cooperation obligations, as well as discussing in which ways these can be broadened for the environmental crime mandate.

a. Current International Cooperation Network

Anti-money laundering in Switzerland has a largely preventive dimension, where certain entities in the financial market have reporting obligations. This facilitates information gathering and, when necessary, is transmitted to traditional criminal justice agencies for investigation and prosecution. At the heart of this network are the entities subject to the AMLA. These are financial intermediaries, as well as so-called dealers, who deal in goods commercially and in doing so accept cash (art. 2 al. 1 AMLA). These entities are considered most closely able to identify suspicious transactions pointing to money-laundering operations.[561] Consequently, banks, as financial intermediaries, and dealers including precious

[560] *See:* Art. 2 al. 3 let. c AMLA *cum* Art. 5 al. 1 let. a AML Ordonnance establishing precious stones and metals traders as subject to AMLA, meaning that they have to respect customer onboarding due diligence measures, among others, under Art. 8a AMLA.
[561] Cassani, *Droit pénal économique*, p. 239.

metals traders are required to collect information on their clients and potential beneficial owners as part of their due diligence obligations, and report legitimate suspicious transactions (SARs) to the Money-Laundering Reporting Office in Switzerland (MROS).[562] The latter must transmit these SARs to its foreign counterparts if the transaction is in some way tied to that country.[563] These transmissions occur within the framework of the Egmont Group, although in rare cases information exchanges can also occur with FIUs not within the organization.[564] In this case, MROS verifies compliance using FATF reports or those of FATF-style regional bodies to determine the best way to proceed with the information exchange.[565] Although MROS doesn't require an international agreement to cooperate, it has signed ten memoranda of understanding with other FIUs allowing for, and in some cases extending, information exchanges.[566] Switzerland's cooperation channels go beyond FIU-to-FIU communication. The Swiss Financial Market Supervisory Authority (FINMA) can also exchange information with foreign supervisory authorities. This communication pathway has increased in popularity over the years, placing FINMA third among all authorities worldwide for the total number of requests received for assistance.[567] In 2015, FINMA received 486 requests for administrative assistance of which only a few strictly concerned money-laundering (although even the cases pertaining to market abuse would involve illicitly gained profits subject to anti-money laundering enforcement).[568] FINMA only rarely sends information spontaneously to foreign supervisory authorities, if it detects serious problems with a customer profile or transaction control.[569] Here again, an international agreement is not required to exchange information, Switzerland has opted to facilitate relations and deepen cooperation through such agreements with 130 partner states.[570] In criminal investigations cantonal authorities, the Swiss Office of the Attorney General and the Federal Office of Justice can request, and receive requests, for mutual legal assistance. Mutual legal assistance may be granted either on the basis of an agreement or on the basis of domestic law (Federal Act on International Mutual Assistance in Criminal Matters, IMAC). Statistics indicate that approximately 2000 such requests are directed to Switzerland each year, of which 10% concern money-laundering offenses.[571] These requests are the second most frequent basis on which criminal investigations for money-laundering are opened in Switzerland.[572] Conversely, Switzerland makes about 1000 requests for mutual legal assistance to foreign countries of which around 17% concern money-laundering.[573] In fact, Swiss authorities have reported that most predicate offenses for money-

[562] Arts. 3-6 AMLA for due diligence obligations on financial intermediaries, Art. 8a AMLA for due diligence obligations on dealers, Art. 9 al. 1 and al. 1bis AMLA for reporting duties for both.
[563] Art. 30 AMLA.
[564] FATF, '2016 Mutual Evaluation Report', pp. 145, 147.
[565] FATF, '2016 Mutual Evaluation Report', p. 147.
[566] FATF, '2016 Mutual Evaluation Report', p. 148.
[567] FATF, '2016 Mutual Evaluation Report', p. 148.
[568] Swiss Financial Market Supervisory Authority, 'Annual Report 2015', (April 2016), p. 79.
[569] FATF, '2016 Mutual Evaluation Report', p. 149.
[570] FATF, '2016 Mutual Evaluation Report', p. 149.
[571] FATF, '2016 Mutual Evaluation Report', p. 139.
[572] Federal Office of Justice, 'International Legal Assistance - Statistics 2021', (21.2.2022); FATF, '2016 Mutual Evaluation Report', p. 139.
[573] Federal Office of Justice, 'International Legal Assistance - Statistics 2021'.

laundering prosecuted in Switzerland are committed abroad, making mutual legal assistance for evidence on the predicate offense crucial for investigations.[574] Law enforcement authorities can also share information spontaneously through the Egmont Group platform without having to open a case in Switzerland.[575] This is a useful mechanism if Swiss authorities consider that another country is concerned with the transaction and disposes of more sufficient evidence to investigate the matter. The practice of spontaneous information sharing has increased, averaging at 35 instances, and has led to prosecutions abroad.[576] Finally, Swiss Banks are required to transmit financial data to foreign tax authorities in cases where the bank client holds an account in the foreign country in question. These information exchanges occur as part of the Automatic Exchange Of Information (AEOI) with OECD+ countries, and under FATCA, with the US. Since 2017, Switzerland has signed AEOI agreements with approximately 100 partner states, including developing countries.[577] While these reports are usually done for tax purposes, the information contained may be forwarded to criminal justice authorities or used for other purposes, provided that the Federal Tax Administration and the Federal Office of Justice consent[578].

b. Expanding Existing Frameworks

Expanding these existing frameworks requires the legislative modification of the AMLA, as well as the amendment of financial intermediaries' and dealers' guidelines on the relationship between politically exposed persons (PEPs) and wildlife crime, as well as guidelines on detecting green money-laundering.

The AMLA may be amended to include additional subjects to its scope of application. The FATF recommends adding pulp mills, timber processing facilities and metal refineries to the scope of anti-money laundering reporting and due diligence.[579] These are considered chokepoints where illegally extracted natural resources enter the legal supply chain, and must already inquire into the origin of their raw materials.[580] They are therefore best equipped at identifying whether their acquired resources are of illicit origin. Consequently, art. 5 Anti-Money Laundering Ordinance can be amended to include the acquisition of timber, wood products and metals as dealing activities. Refineries and facilities doing so will therefore have additional due diligence and reporting duties under AMLA (see arts. 8a, 9 al. 1bis AMLA). This proposition is in line with the Federal Audit Office's suggestion to extend the scope of activities of dealers to the acquisition of raw metals, and not only the trading in monetary, refined metal products.[581]

[574] FATF, '2016 Mutual Evaluation Report', p. 139.
[575] FATF, '2016 Mutual Evaluation Report', p. 145.
[576] FATF, '2016 Mutual Evaluation Report', p. 145.
[577] State Secretariat For International Finance, 'Illicit Financial Flows'.
[578] Art. 15(4) Federal Act on the International Automatic Exchange of Information in Tax Matters.
[579] FATF, '2021 Report', p. 42.
[580] FATF, '2021 Report', p. 42.
[581] Federal Audit Office, 'Audit de l'efficacité du contrôle des métaux précieux', p. 4.

Both financial intermediaries and dealers would require additional awareness training to flag activities related to environmental crime. To that effect, the FATF's 2021 Report includes an annex with potential risk indicators related to money-laundering from environmental crimes[582], which can be employed by Swiss banks and MROS. Additionally, the World Bank has made attempts to educate resource rich countries on detecting the involvement of PEPs in wildlife crime.[583] In time, any professional within the finance sector would be liable for insufficient diligence in financial transactions and right to report pursuant to art. 305ter CP, if they intentionally or contingently accepted a third parties' deposits or placed such assets on the financial market without investigating a beneficial owner who profited from an environmental crime. They would also be liable for money-laundering themselves if they accepted money knowing that, according to the transaction's concrete risk indicators, it came from environmental crime. This would, if put into action, make it more difficult for environmental criminals to receive loans or investments from banks as the latter would themselves criminally participate in a green money laundering operation or dissimulate their environmentally dirty origin themselves as principals. In that sense, this paper's proposition accompanies other initiatives launched by non-profit organisations such as Finance for Biodiversity, who have recently called for environmental crime-free financing value chains.[584] The latter seeks to expand money-laundering definitions to include banks accepting any assets from or providing any loans to individuals and entities engaged in environmentally criminal activities.

Assuming that sentences were increased on environmental offenses and the Anti-Money Laundering Ordinance was amended as indicated above, more financial actors would have broader reporting obligations. Financial intermediaries and dealers may choose to work with environmental risk evaluators to ensure compliance with AMLA. These SARs would then use the same communication pathways to reach MROS and eventually law enforcement agencies. At this stage, new collaborative structures would come into play.

c. New Collaborative Structures

As with all money-laundering offenses committed "to a substantial extent [...] abroad", the primary prosecutorial jurisdiction of these transnational green collar crimes would fall to the federal level, i.e. the Office of the Attorney General of Switzerland (art. 24 al. 1 CPP). This would already remove a layer of complexity present in the patchwork-like prosecutorial competence for environmental offenses. It would also permit resources for this platform to be pooled in one agency, meaning that financial crime and environmental crime experts would be worth employing, who may in turn cross-pollinate each other's knowledge base. The prosecution would also require the AG's Office to coordinate with the Federal Office for the Environment, the Federal Food Safety and Veterinary Office and the Customs Union in order to help train federal financial crime prosecutors on environmental law, detect discrepancies in

[582] FATF, '2021 Report', p. 53 ff.

[583] World Bank Group, 'Illegal Logging, Fishing, And Wildlife Trade: The Costs And How To Combat It', (October 2019), pp. 34-36.

[584] Finance For Biodiversity, 'Breaking the Environmental Crimes-Finance Connection', p. 7.

certificates of origin, and identify environmental laundering risks in financial activities. This could be done within the existing KUK framework as a first step. Additionally, these agencies may benefit from implementing a mandatory data exchange channel on all border confiscations and fines based on environmental statutes. The AG's Office would consequently intervene where it suspects money-laundering activities. Furthermore, the KUK would benefit from having representatives of FINMA and MROS join, as these could consult on legislative modifications and participate in capacity-building projects at the intersection of financial regulatory violations and environmental crime. Lessons on collaborative ventures between environmental administrative offices and prosecutorial agencies can be gleaned from cantonal experiences on the matter. Martin Anderegg, head of the Law and Environmental Impact Assessment Division in the Environmental Protection Agency of St. Gallen reports that:

> "cooperation between the environmental administration and law enforcement agencies works best when: (a) the environmental administration is willing to make its specific environmental expertise available to law enforcement agencies; (b) police and prosecutors are aware of this offer and make use of it; (c) law enforcement agencies have a point of contact with the environmental administration; [...] (d) the environmental administration prepares the relevant facts for the attention of the criminal authorities in specific criminal proceedings and makes the necessary evidence available to them in a suitable form; and (e) the criminal authority opens criminal decisions of the environmental administration."[585]

It can therefore be said that the inter-agency collaboration must happen outside of the KUK, whose meeting schedule is limited and may not have the resources to serve as a first-response communication venue. Internationally, Switzerland could build on the WCO's Environet data to trace natural resources transports and share the data with the AG's Office if necessary. A strong collaboration between the Federal Customs Union and the Federal Office of the Environment would be necessary to ensure that the coordination with Europol by the former on environmental crime investigations does not stop at illicit wildlife trade.

d. Limitations

The limitations to the implementation of this paper's proposition are threefold: existing collaboration failures, lack of resources and aversion to spearhead financial reforms in Switzerland.

First, despite Switzerland's potential for international cooperation, recent financial data leaks have shown however that it has not fulfilled this role[586]. Credit Suisse, one of the two main foreign assets holders in Switzerland, is said to promote a culture of financial risk, and encourages its employees not to report accounts of wealthy individuals.[587] Smaller banks lack the resources to thoroughly investigate each flagged transaction within the legally imposed 60-

[585] Martin Anderegg, 'Umweltstrafverfahren in der Praxis – Teil 2', pp. 151-152 in: Jürg-Beat Ackermann, Marianne Johanna Hilf (Eds.), Umwelt-Wirtschaftsstrafrecht, EIZ - Europa Institut Zürich Band/Nr. 177, (2017), Schulthess Juristische Medien AG.
[586] See e.g. OCCRP and Süddeutsche Zeitung, 'Historic Leak of Swiss Banking Records Reveals Unsavory Clients', (20 February 2022).
[587] OCCRP, 'Historik Leak'.

day reporting period. The problem isn't only located at the bank level. MROS reported a backlog of 6000 reports in 2019; a quarter of all notifications arrive by paper and require time-intensive manual transcription by analysts.[588] The newly mandated UN-led online reporting system is also not equipped to analyse account ownership[589], which is the primary target of Swiss anti-money laundering enforcement. As a result, 60 employees at MROS are tasked with inspecting reports cumulatively ranging from CHF 12 to 17 billion per year.[590] Former head of MROS Daniel Thelesklaf also lamented the positioning of MROS within the federal government. Located within the Federal Office of Police (fedpol), MROS is isolated from FINMA and prosecutors' offices, and is treated as a police reporting station rather than an enforcement branch.[591] Thelesklaf's most damning complaint is directed against Swiss criminal law. Prosecutors are required to show that the suspected assets originate from a crime. The only way they can do so, is through mutual legal assistance from the country where the crime is alleged to have happened. Oftentimes, these countries have corrupt judicial systems and refuse to provide evidence to Swiss prosecutors. The cases are therefore abandoned.[592] These issues would have to be resolved for any anti-money laundering platform to be functional, but particularly for one requiring an additional level of inter-agency cooperation. Adding on to the MROS' workload, as well as requiring training on environmental crime of the average compliance officer at a bank may further exacerbate existing enforcement shortcomings. Finally, many of the environmental crimes addressed would explicitly require mutual legal assistance. If government officials were themselves complicit in environmental criminal behavior, such as issuing a logging permit for protected areas, their collaborators in the department of justice may not be willing to share evidence or information. There is no straight-forward solution to this issue; including resource-rich countries in anti-corruption and anti-money laundering missions, and strengthening north-south cooperation on environmental and financial policies overall may in time lead to stronger prosecutorial cooperation between resource-rich and -poor countries.

Secondly, there may not be sufficient (human and financial) resources to dedicate to a green collar crime platform. The identification of co-mingled resources would require *in situ* environmental investigators at free ports and borders with extensive expertise in species and origin recognition. The investigation of supply chains going through multiple refinery or processing steps would mean passing through mutual legal assistance avenues for evidence gathering. The eventual estimation of assets to be confiscated would also require experienced accountants. At the current stage, environmental investigators at the Federal Office of the Environment already lack the resources required to inquire into complaints related to environmental statutes.[593] Stefan Lenz, a former Swiss federal prosecutor, also noted that there seemed to be a lack of law enforcement resources to investigate Swiss banks for accepting

[588] Oliver Zihlmann und Christian Brönnimann, 'Unser ganzer Instrumentenkasten versagt', (Tagesanzeiger, 21.9.2020).
[589] Zihlmann & Brönnimann, 'Unser ganzer Instrumentenkasten versagt'.
[590] Zihlmann & Brönnimann, 'Unser ganzer Instrumentenkasten versagt'.
[591] Zihlmann & Brönnimann, 'Unser ganzer Instrumentenkasten versagt'.
[592] Zihlmann & Brönnimann, 'Unser ganzer Instrumentenkasten versagt'.
[593] Dillon, 'Umweltstrafverfahren in der Praxis'.

laundered money[594] despite being required to do so by the FATF Recommendations. Switzerland may therefore risk being named and shamed in the FATF arena for short-changing its agencies involved in anti-money laundering enforcement.

Thirdly, and perhaps most importantly, Switzerland has (beyond the first years of the FATF's mandate) been reluctant to spearhead any substantial financial regulation reform. Daniel Thelesklaf stated after his departure from office just one year into the position, that "in relation to money laundering, Switzerland consistently implements only the bare minimum, i.e. what it is forced to do by pressure from abroad."[595] This pattern can be observed with regard to all ambitious attempts to reform sustainable finance, corporate responsibility and anti-money laundering enforcement in Switzerland. It may therefore also lag behind in implementing an environmental anti-money laundering platform in line with its neighboring countries in order to protect the attractivity of its financial market for investors, as well as for a number of political considerations.

e. Political Considerations

Switzerland has ratified a number of environmental conventions creating international cooperation frameworks, and calling for environmental action. It has shown a political will to address environmental degradation. As with all legal regimes potentially involving extraterritorial penalties and frozen assets however, targeting the financial flows from environmental crime may implicate diplomatic channels. Swiss diplomacy has led the relatively small country to play an important role as mediator and broker in international conflicts, and is therefore central to Switzerland's foreign policy interests. To maintain this reputation, Switzerland walks a fine line between aligning itself with its allies' efforts to strengthen international legal cooperation and distancing itself from binding enforcement commitments against economic partners. It does so, primarily, in accordance with what it calls its obligations of neutrality, which can be distinguished between issues of diplomatic and legal neutrality. Legal neutrality is largely untouched by proposals contained in this paper. Switzerland's policy of staying *diplomatically* neutral, on the other hand, affects how far its governmental institutions are willing to go to address transnational environmental crime in its financial sector. We can identify this by looking at Switzerland's reticence to adhere to international sanctions regimes unconditionally. Switzerland has in some cases been criticised for stalling concerted sanctions efforts and thereby offering sanctioned individuals a safe place to transition their assets into.[596] It has also been accused of cherry-picking only certain aspects of an economic sanctions regime which would benefit it financially.[597] It has however fully

[594] OCCRP, 'Historik Leak'.

[595] Zihlmann & Brönnimann, 'Unser ganzer Instrumentenkasten versagt'.

[596] See on sanctions on Russia in 2014: « Switzerland said on Wednesday it would not be "abused" by those wanting to circumvent Western sanctions against Russia but stopped short of adopting its own measures. […] Switzerland is reluctant to take measures it fears could compromise its cherished netutrality or damage closely nurtured trade relations with Moscow.» Caroline Copley, Oliver Hirt, 'Switzerland treads careful path over Russia sanctions', (Reuters, 26.3.2014).

[597] See on sanctions on Iran in 2012: " 'We are not putting in place, or are applying differently, sanctions that seem to us to go too far and tend towards 'regime change'', Foreign Minister Didier Burkhalter told Reuters. […]

cooperated with sanctions on suspected terrorists, and aligned with the EU and the US on the treatment of Taliban members' assets on Swiss bank accounts. It also agreed to extend sanctions to Russian assets after the 2022 invasion into Ukraine. We may therefore be seeing an increased political will in Switzerland to align with internationalized financial responses to humanitarian crises.

Legislators might fear that addressing environmental crime as proposed may impact foreign investment into or from Switzerland. Whether or not this would actually materialise, such a stance might have a chilling effect on the FATF Report's implementation and similar measures. It is true that trade and investment make up a large part of the Swiss economy. In 2014, almost 40% of Switzerland's GDP depended on foreign markets, one of the highest in the OECD. Furthermore, Switzerland's outward investment (over 150% of GDP in 2015) was larger than its inward investment (107% of GDP). It serves as seat to many commodities companies which require mining or logging activities in its supply chains. As a major financial hub, it also harbors many major companies through which global trade flows: 35% of the oil and grain, around 50% of sugar and 60% of metals traded worldwide therefore find a nexus in Switzerland.[598] Targeting their supply chains by increasing liability risks for money-laundering may push companies to relocate elsewhere. A 2017 Report by Oliver Wyman on the competitiveness of the Swiss commodities market showed that this was already the case in the commodities sector: the growing number of legislative initiatives and public activism calling for increased transparency on sustainability and human rights in the corporate sector exposed companies to increased costs and reputational risk.[599] A follow-up report by the Federal Council also indicated that, although no major and systematic migration trends could be identified, independent commodity traders were already relocating to Switzerland's main competitors USA, Dubai and Singapore. These trends were due in part to the shift of trade flows to Asia, and rising costs of doing business in Switzerland. The Federal Council stressed however, that these trends would continue if companies perceived Switzerland as politically unstable due to public activism, and couldn't accurately predict the framework conditions of doing business in the country.[600] While no reports conclusively show that additional regulation of or enforcement in the Swiss financial market has impeded investors' interest in Switzerland, it remains nevertheless difficult to suggest any prosecution platform targeting the main players on the Swiss commodities market. This difficulty may be mitigated if other financial hubs moved in lockstep to increase due diligence measures and transparency obligations on such companies, making it difficult for them to simply relocate to a less regulated country.

Switzerland may also be seen as hypocritical in its pursuit of environmentally damaging entities outside its territory. Switzerland has not met the emission targets it set itself in

'It's not a secret to say that the United States and the EU have a problem with Swiss non-alignment', said a western diplomatic source." Emma Farge, 'Insight - West raises pressure on neutral Switzerland over Iran', Reuters (5.11.2012).

[598] Federal Council, 'Umwelt Schweiz 2018', p. 33.

[599] Oliver Wyman, 'The Swiss Commodity Trading Sector: Competitiveness And Integrity – A Report For The Interdepartmental Platform On Commodities', (November 2017), p. 7.

[600] Federal Council, 'Rohstoffsektor Schweiz: Standortbestimmung und Perspektiven', p. 20.

alignment with international emission goals.[601] Its own agriculture also routinely overuses fertilizer and pesticides, which were shown to flow into surface- and groundwater, putting human, animal and plant health at risk.[602] Studies by the Federal Office for the Environment show that financial flows in Switzerland are responsible for more than 20 times as many greenhouse gas emissions as the entire Swiss population and industry emit.[603] These flows would result in climate heating of 4 to 6°C if no additional action is taken.[604] Furthermore, a 2018 Report by the Federal Office for the Environment indicates that in 2015, 73% of the total environmental impact of Swiss consumption was created abroad.[605] This is because Switzerland is primarily an import economy and relies on feed for its livestock sector, energy sources (including fossil fuels) and chemical products from abroad which have a negative impact on the environment. Around two thirds of Switzerland's greenhouse gas footprint are currently generated outside its own territory – and the trend is rising.[606] By relying on and benefiting from economic consumption which is environmentally damaging, Switzerland can be said to promote the source activities for these damages. At the same time, the Swiss inland environmental footprint has decreased by 7% due to reduction of water consumption, higher material productivity and an investment in public transport.[607] This may create the impression that Switzerland is offloading or "outsourcing" its environmentally damaging activities abroad. Furthermore, Swiss trade agreements seek to promote the economic and social development of its trade partners. While these agreements do include environmental standards as required by the European Free Trade Association (EFTA) since 2010, and the model provisions serving as a basis for all trade agreements include measures for sustainable development, the provisions are only of general character and only partially address specific product groups.[608] The Federal Government has endeavored to promote the inclusion of specific environmental considerations in trade agreements under its 'Federal Measures for a Green Economy' plan.[609] The cynical end result is however, that Switzerland is promoting environmentally damaging activities as a byproduct of foreign development. Criminalising proceeds from these activities, if they don't conform with environmental standards set by Switzerland, may therefore be diplomatically difficult to justify. Politicians may fear that natural-resource rich countries would be reluctant to sign trade agreements with Switzerland if this meant that their financial flows to Switzerland would increase and with them the risk of seeing their citizens prosecuted.

A third major political consideration for Switzerland is the reaction of influential interest groups to a strong environmental anti-laundering platform, such as the Schweizer Bauernverband (SBV) or representatives of economiesuisse. These institutions have been a major obstacle to environmental reform in Switzerland. The SBV has notably opposed the

[601] Federal Council, 'Umwelt Schweiz 2018', p. 40.
[602] Federal Council, 'Umwelt Schweiz 2018', p. 40-42.
[603] Thomas Vellacott, 'Sustainable Finance – Nachhaltige Finanzflüsse fordern', WWF Schweiz.
[604] Thomas Vellacott, 'Sustainable Finance – Nachhaltige Finanzflüsse fordern'.
[605] Federal Council, 'Umwelt Schweiz 2018', p. 33.
[606] Federal Council, 'Umwelt Schweiz 2018', p. 35.
[607] Federal Council, 'Umwelt Schweiz 2018', p. 40.
[608] Federal Council, 'Umwelt Schweiz 2018', p. 38-39.
[609] Federal Council, 'Umwelt Schweiz 2018', p. 39.

reduction of pesticide and fertilizer use.[610] It has also been a strong force against reducing subsidies to agricultural business and levies on foreign agricultural products. This opposition has earned Switzerland strong criticisms from the EU and members of the WTO, who raised concerns that Swiss agricultural protectionism impeded free trade. Their influence has therefore perceivably hindered Switzerland aligning with its economic partners' trade politics. Eonomiesuisse on the other hand was one of the strongest opponents of the *Konzernverantwortungsinitiative*, a popular initiative seeking to hold companies incorporated in Switzerland accountable for violations of human rights and environmental protection standards occurring by companies abroad which are controlled by them or operating within their supply chain. Their main concerns were that the proposed reform would create an undue burden for companies in Switzerland, who would in turn take their business abroad. The initiative would, in their view, introduce obligations which would put Switzerland at a disadvantage compared to its economic competitors. These worries mirror the financial sector's complaints in response to the amendment of Swiss money-laundering and tax law and corporate transparency obligations in line with the FATF Recommendations we have seen above. We have also seen that these oppositions are powerful, and lead to the dilution of promising legislative reforms. The same occurred with the *Konzernverantwortungsinitiative*. The initiative was accepted by popular majority, but not by cantonal majority and was therefore discarded. A less ambitious counterproposal was however accepted and the resulting provisions amending the Code of Obligations and the Criminal Code entered into force on 1 January 2022 which have been addressed above. These provisions are in line with the (EU) 2017/82 Regulation requiring these obligations of EU companies, as well as the OECD guidelines on due diligence measures in multinational companies.[611] So notwithstanding initial opposition, Switzerland is now in conformity with international minimal standards. This is not to be understated. It is in Switzerland's interest to participate in an even playing field. Adherence to international standards removes obstacles to trade, reduces the risk of financial sanctions – explicitly as provided by the FATF Recommendations or indirectly from losing out on investment opportunities – and facilitates diplomatic collaboration. Switzerland has recognised this by establishing a 2020-2023 action plan on corporate social responsibility[612], seeking to make its financial sector more sustainable in line with the EU, and being an active collaborator within the FATF framework. Its ambition to adhere to environmental standards can be seen in its collaboration with Europol on environmental crime and its planned expansion of Swiss environmental law. The same initiative should apply to the enforcement against money-laundering of proceeds from environmental crime. Of course, and most importantly, *failure* to conform to increasing obligations under the FATF Recommendations could further tarnish Switzerland's reputation as a slow cooperator. And as we have seen, it would be required to align itself with these obligations down the line anyway – as it has done in the past. Whether

[610] Désirée Föry, 'Die Macht der Bauern', (NZZ, 09.2.2017).

[611] Fuchs & Lopes, 'Indirekter Gegenvorschlag'; *see*: OECD (2011), *OECD Guidelines for Multinational Enterprises*, (OECD Publishing, Paris, 2011).

[612] Federal Council, 'Position et plan d'action du Conseil fédéral concernant la responsabilité des entreprises à l'égard de la société et de l'environnement – État de la mise en œuvre 2017-2019 et plan d'action 2020-2023', (15.1.2020), pp. 18 ff.

the internal political reasons for delaying implementation would justify withstanding international pressure from allies and economic partners is therefore questionable.

VI. Conclusion

This paper sought to demonstrate how existing Swiss statutory and case law *already* permits the creation of an ambitious environmental anti-money laundering platform in Switzerland. The first impetus for this project was the 2021 FATF Report on the matter, although first calls for stronger sanctions on illegal wildlife trade came from within the Swiss parliament in 2015. The analysis showed that, where environmental law inadequately enforces domestic environmental offenses and fails to address transnational environmental crime, anti-money laundering law serves as an important tool to address both. Most importantly, the case law on money-laundering creates a jurisdictional nexus in Switzerland wherever proceeds – tangible or intangible – are laundered through the Swiss financial and commodities sector. The analysis resulted in a proposal for an amendment to art. 305bis CP allowing proceeds associated with environmental crimes, and not merely those resulting from them directly, to be laundered and therefore confiscated. It also proposed to expand the scope of application of the Swiss Anti-Money Laundering Act to impose due diligence and reporting obligations on important chokepoints in the Swiss private sector – mills, refineries and trading companies. The paper showed how existing reporting obligations within the financial sector could, combined with stricter sanctions on environmental offenses, expose financial intermediaries to money-laundering liabilities if they chose to accept environmentally criminal assets, or finance environmentally criminal endeavours. In time, this may lead to environmental crime-free financial value chains, and squeeze illicit profits from supply chains originating in environmentally harmful practices abroad.

On a bigger scale, the paper showed that more than in matters of "traditional" environmental law, there is judicial and *political* will in Switzerland for environmental solutions involving the financial sector. The Federal Council has requested multiple reports examining the risk exposure to human rights, environmental degradation and crime in its commodities sector, its financial sector and its gold trade sector. It has also aimed to shore up obligations in the private sector to match international standards in corporate social responsibility, and implement reporting requirements in its financial sector to support mitigation and adaptation actions that will address climate change. The Swiss government therefore recognized that environmental protection couldn't stop at traditional conservation-oriented measures. It also had to be addressed through market-based solutions: by commodifying CO2 emissions for instance, or by increasing the financial risk for financial intermediaries and traders making profits from environmentally degrading activities. Environmental anti-money laundering is another tool in a large spectrum of solutions to protect the environment. The proposal contained in this paper is an ambitious one: it requires Switzerland to go one step beyond its current actions spearheaded by the KUK, and increase minimum sentences on environmental offenses, consistently prosecute transnational money-laundering operations in its financial and commodities sector and confiscate profits related to environmental crime committed abroad. It also showcases how the FATF Report's best

practices can serve as a blueprint for environmental crimes involving pollution, which are often only externalities of otherwise licit activities. Of course, the political ramifications of such a solution are not to be understated, especially since environmental degradation is a natural consequence of human life and commercial activity. But it is important to understand that if *not* addressed aggressively, environmentally criminal activities bode much larger economic risks in the long-run.[613] In a world risking a 4-6° C ambient temperature increase, where ecosystems are failing and resources become scarce, it would be negligent not to ensure that environmental degradation doesn't pay.

[613] *See*, *inter alia*: Swiss Re, 'World economy set to lose up to 18% GDP from climate change if no action taken, reveals Swiss Re Institute's stress-test analysis', (22.4.2021); Matthew E. Kahn *et al*., 'IMF Working Paper – Long-Term Macroeconomic Effects of Climate Change: A Cross-Country Analysis', (IMF, October 2019); Zurich, 'Managing the impacts of climate change: risk management responses – second edition', (September 2019); Richard S. J. Tol, 'The Economic Impacts of Climate Change', in: *Review of Environmental Economics and Policy*, Vol. 12, N. 1, (2018).

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