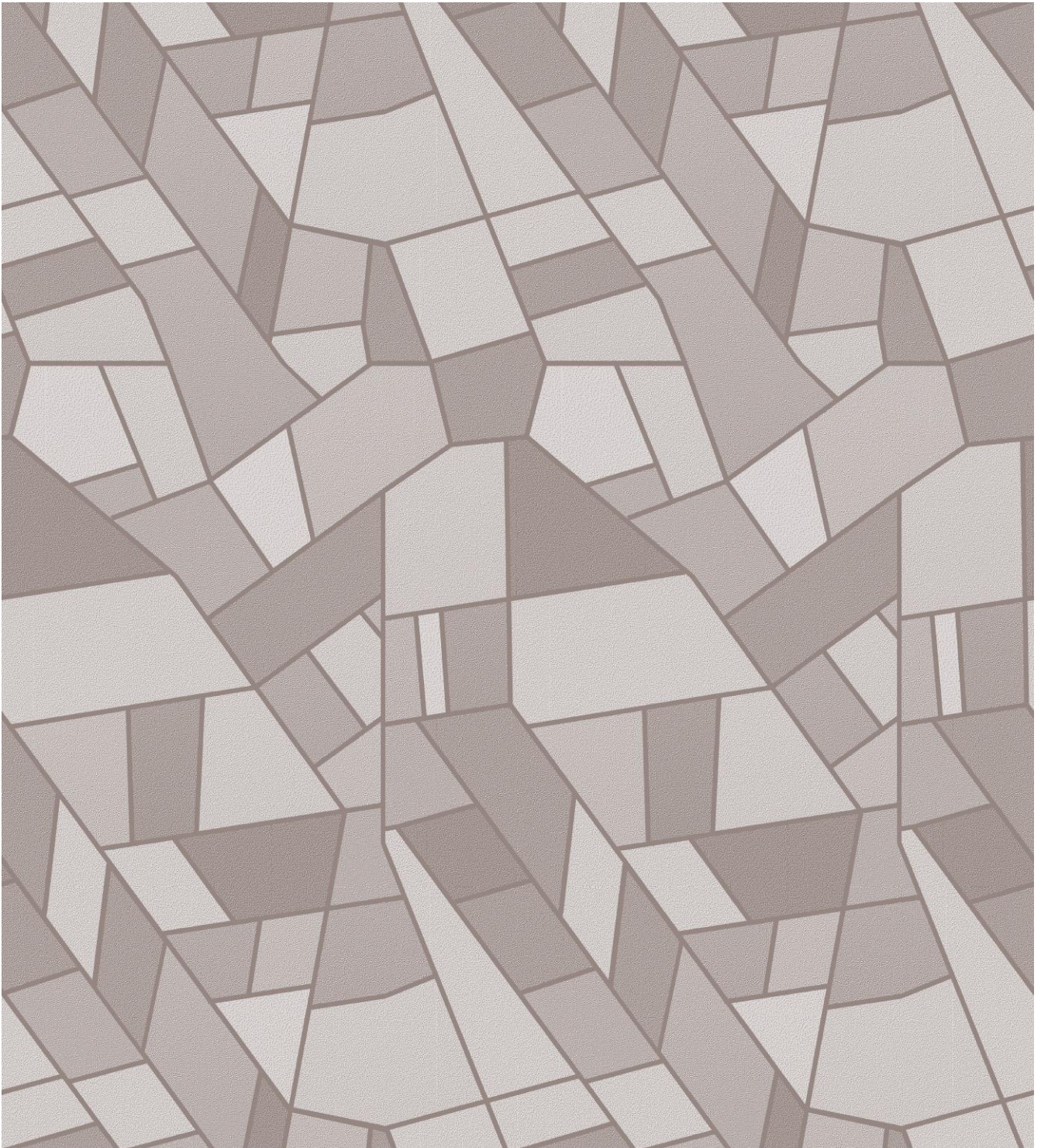


# Expert Study on the Swiss Gold Sector and related Risks of Human Rights Abuses

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## Abbreviations

|          |  |
|----------|--|
| AJP/PJA  | Aktuelle Juristische Praxis / Pratique Juridique Actuelle  |
| ALM      | Asset liability management   |
| AML      | Anti money laundering  |
| AMLA     | Federal Act on Combating Money Laundering and Terrorist Financing (Anti-Money Laundering Act) of 10 October 1997, SR 955.0                         |
| AMLO     | Anti-Money Laundering Ordinance of 11 November 2015, SR 955.01   |
| Art.     | article  |
| ASM      | Artisanal or small-scale gold mining   |
| CDDH     | Steering Committee for Human Rights (Council of Europe)  |
| CO       | Code of Obligations of 30 March 1911 (Federal Act on the Amendment of the Swiss Civil Code – Part Five: The Code of Obligations) SR 210            |
| CoC      | Chain of Custody   |
| CPIL     | Federal Code on Private International Law of 18 December 1987, SR 291  |
| CRC      | Convention on the Rights of the Child of 13 December 1996, SR 0.107  |
| DRC      | Democratic Republic of the Congo   |
| et. seq. | Subsequently/following   |
| FCA      | Federal Customs Administration   |
| FDFA     | Federal Department of Foreign Affairs  |
| FINMA    | Swiss Financial Market Supervisory Authority   |
| GRUR-Int | Gewerblicher Rechtsschutz und Urheberrecht, Internationaler Teil   |
| HRC      | Human Rights Council   |
| ICCPR    | International Covenant on Civil and Political Rights, of 16 December 1966, SR 0.103.2  |
| ICoC     | International Code of Conduct for Private Security Service Providers   |
| ICRC     | International Committee of the Red Cross   |
| IHRB     | Institute for Human Rights and Business  |
| ILO      | International Labour Organization  |
| ICESCR   | International Covenant on Economic, Social and Cultural Rights of 16 December 1966, SR 0.103.1   |
| KYC      | Know-Your-Counterparty or Know-Your-Customer   |
| LBMA     | London Bullion Market Association  |
| LC       | Lugano Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial matters of 30 October 2007, SR 0.275.12 |
| Lit.     | litera   |
| LSM      | Large-scale, industrial gold mining  |
| NAP      | National Action Plan   |
| OECD     | Organisation for Economic Cooperation and Development  |
| OHCHR    | Office of the United Nations High Commissioner for Human Rights  |
| OPMC     | Central Office for Precious Metals Control, within the FCA   |
| Para.    | Paragraph  |
| PMC      | Precious Metals Control Offices  |
| PMCA     | Precious Metals Control Act (Bundesgesetz über die Kontrolle des Verkehrs mit Edelmetallen und Edelmetallwaren) of 20 June 1933, SR 941.31         |
| PMCO     | Precious Metals Control Ordinance (Verordnung über die Kontrolle des Verkehrs mit Edelmetallen und Edelmetallwaren) of 8 May 1934, SR 941.311      |
| RJC      | Responsible Jewellery Council  |
| SCC      | Swiss Criminal Code of 21 December 1937, SR 311.0  |
| SER      | Social and Economic Council (Netherlands)  |
| SICL     | Swiss Institute of Comparative Law   |
| UAE      | United Arab Emirates   |
| UDHR     | Universal Declaration of Human Rights  |
| UNDRIP   | United Nations Declaration on the Rights of Indigenous Peoples   |
| UNGP     | United Nations Guiding Principles on Business and Human Rights   |
| WGC      | World Gold Council   |





## Summary

### **Background and Structure of Expert Study**

The present expert study was commissioned by the Swiss government represented by the FDFA to analyse the potential risks of human rights abuses to which the Swiss gold sector is potentially exposed to through its business operations. The study provides inputs to the response to the Postulate Recordon (15.3877).

The study is structured to accommodate the five elements per Terms of Reference in a stringent and comprehensive way.

- After setting the scope and describing the Swiss gold sector (chapter 2), the study elaborates a comprehensive overview of the relevant instruments of the international and Swiss regulatory framework (chapter 3) as well as regulations in place in three selected countries which prevent import of gold sourced under conditions of human rights abuses (Annexes A2 to A4).
- Potentially affected human rights and the potential adverse impacts along the three key gold value chains are assessed in chapter 4.
- Existing measures to reduce risks that gold produced and transported under conditions of human rights abuses is imported to Switzerland, the effectiveness of due diligence measures applied in the gold industry, and the significance of foreign trade statistics to determine gold provenience are analysed in chapter 5.
- The overall assessment of the risk that problematic gold is imported to Switzerland including the remaining key gaps as well as possible future scenarios to further reduce these risks are provided in chapter 6.

The study was conducted between July and November 2017 and included document analysis, interviews with the Swiss gold refining industry, one luxury good producer, international industry standard setters, Swiss NGOs and different representatives from the Swiss administration. It should be noted that this study focuses on the large gold refiners in Switzerland, and does not include interview or research concerning small refiners, banks or recycling companies.

### **Background of Swiss Gold Sector and Human Rights**

Switzerland is one of the most important trading and refining venues for gold. In the last five years, it has annually imported between 2'236 and 3'080 metric tons of raw gold (for non-monetary purposes) from 92 different countries, with a total value of between 65 and 109 billion Swiss francs. Raw gold is sourced from artisanal/small-scale mines (ASM), from industrial, large-scale mines (LSM) or through gold recycling, either from the industry or from high-value source e.g. old jewellery. Typical gold value chains include distinct steps such as activities of pre-production, production/extraction, pre-processing, transportation, trading, and refining.

Activities of companies within the gold value chain may have negative impacts on a wide range of human rights. The responsibility to respect human rights according to the UN Guiding Principles on Human Rights and Business requires that business enterprises a) avoid causing or contributing to adverse human rights impacts through their own activities, and b) seek to prevent such impacts that are directly linked to their operations, products or services by their business relationships. Hence, the Swiss gold companies' responsibilities extend beyond their own activities when trad-

ing raw/pre-processed gold along the whole supply chain, including the sourcing and production of gold through their business relationships.

### **Regulatory Framework**

The international instruments that regulate or are relevant for gold trade and the protection of human rights come in different shapes and vary with regard to their scope and legal nature:

- A first group are soft law instruments which refer to *business and human rights in general* such as the UNGP and the OECD Guidelines for Multinational Enterprises. Despite their legally non-binding nature, they are highly relevant in practice and apply also the gold industry.;
- Other rules are more *specific* as they address *human rights violations* within the supply chain of minerals or even more specifically within the gold value chain. Within this second group there are binding hard law norms such as the Dodd-Frank Act or the EU Regulation 2017/821 on conflict minerals as well as soft law instruments, such as the OECD Due Diligence Guidance on Conflict Minerals and its Supplement on Gold;
- A third group of binding (hard law) and non-binding (soft law) instruments addresses specific topics in *other areas and industries* which are relevant for the protection of human rights within the gold supply chain. Examples include International Humanitarian Law, the Montreux Document on Private Military and Security Companies and the UN Declaration on indigenous peoples' rights).

For the topic of this study, the key international soft law instrument is the OECD Due Diligence Guidance on Minerals and its Supplement on Gold, as it has served as a reference to develop gold industry standards, such as the LBMA Responsible Gold Guidance, which is applied by the main Swiss gold refiners (Argor-Heraeus, Metalor, Pamp, Valcambi).

Apart from standards and norms at the international level, the study also analyses selected relevant national laws.

In general, Swiss criminal and civil law might serve as instruments to prevent the import of gold, which was produced under human rights violating circumstances, provided that non-compliance results in the respective company risking criminal or civil liability. While the current legal situation would theoretically allow for such criminal or civil liability, so far no actual case establishing such a liability has been reported.

The Precious Metal Control Act (PMCA) and the Anti-Money Laundering Act (AMLA) are the key instruments regarding the import of gold.

- On the one hand, Art. 20 PMCA addresses the import of precious metal articles (and not of raw gold) into Switzerland. Its focus is on the correct marking and the quality of the imported gold, yet, according to current practice and interpretation human rights aspects are not covered.
- On the other hand, Swiss Anti-Money Laundering Law obliges financial intermediaries to file a report with the Money Laundering Reporting Office if they know or have reasonable grounds to suspect that assets involved in a certain business relationship are connected to criminal offences or are the proceeds of a felony. AMLA covers human rights violations as long as they amount to criminal offences and if they occur in the context of trade with monetary-used gold and trade with raw

gold (except trading of raw gold for own account). Trade with non-monetary-used gold is outside of AMLA's scope.

The table gives an overview on the steps of the gold value chain which fall within the scope of either Anti-Money Laundering Law or Precious Metal Control Legislation. The table further illustrates if and to what extent human rights issues are addressed or might be addressed by the applicable and relevant provisions:

|      | Melt Material  | Melt Products   | Precious Metal Articles | Human Rights Issues Covered?   |
|------|--|---|-------------------------|--|
| PMCA |  |   | Importing, art. 20 PMCA | No   |
|      | Manufacturing of Melt Products, art. 24 et seq. PMCA and art. 164 et seq. PMCO   |   |                         | Not included in term „lawful acquisition“  |
| AMLA | <ul style="list-style-type: none"> <li>• <b>Buying</b> raw gold in order to fabricate and then sell banking precious metals</li> <li>• <b>Trading</b> with raw gold at stock exchange for third party's account</li> <li>• <b>Trading</b> with raw gold for third party's account outside stock exchange if raw material's standardization is high enough for it to be liquidated at any time</li> </ul> | <ul style="list-style-type: none"> <li>• <b>Trading</b> with banking precious metals (art. 178 PMCO)</li> </ul> |                         | AMLA due diligence covers human rights violations if they meet the constitutive elements of a criminal offence |

Apart from the AMLA provisions, which apply to part of the gold being imported into Switzerland, no other Swiss law imposes any *specific* obligations regarding the traceability of gold. Gaps mainly remain regarding trading of raw gold for own account or “non-monetary used” gold.

With a view to position the Swiss legal framework in a comparative context the study provides an overview of current relevant legal regulations in South Africa, the United Arab Emirates (example: Dubai) and India. It shows that none of the compared national frameworks explicitly prohibits the import of gold that was produced under human rights violating circumstances. Moreover, none of these countries imposes any obligations on gold importing companies to declare the circumstances of the production of the imported gold. Finally, only the Dubai Multicommodities Centre's Rules explicitly require business enterprises in the gold value chain to conduct human rights due diligence if they wish to apply for accreditation.

### Hazard Assessment

Especially mined raw gold may originate or cross areas which are affected by conflicts, suffer from poor governance and accountability and are therefore more exposed to adverse impacts for people and the environment. Adverse impacts that may occur include environmental pollution, poor labour conditions, resettlements and violence against local communities, unequal benefit-sharing, fraudulent documentation, corruption, smuggling and illegal trade. Additionally, the characteristics of gold make it an extremely attractive vehicle for laundering money. Finally, the formalization of artisanal miners is an almost ubiquitous challenge in developing countries.

The study identifies firstly the hazards along the gold value chains from a *human rights perspective* and maps out which human rights are potentially affected in different scenarios, categorized in five groups:

- Poor treatment of employees and contractors: may fall under labour right, right to adequate standard of living, in serious cases also right to life and/or right to liberty and security
- Interference with traditional lifestyle and indigenous people: may fall under the indigenous peoples' right to their lands, if it is not being carried out with free, prior and informed consent, or the right to just and fair compensation
- Negative impact on local communities: may fall under freedom of movement which protects from internal displacement (with exceptions), property rights, or the right to peaceful assembly and freedom of opinion and expression
- Negative environmental issues: may fall under the right to the highest attainable standard of health and in serious cases the right to life
- Corruption or other criminal activities are typically not a human right abuse itself but may negatively impact various human rights such as property rights, indigenous people's rights or the labour rights.

Secondly, the study identifies the most relevant scenarios (13 out of 69) along the three value chains and then estimated from a *technical perspective* their (potential) adverse impacts on morbidity, health, livelihood opportunities, or the environment. Four cases stand out:

- In ASM operations, a high relevance is assigned to the scenario "damage to the environment and the negative direct and indirect health impact to the surrounding communities" where the study team estimates the consequences to be immediate to long-term negative health impacts with an increased mortality, specifically related to the use of mercury and cyanide.
- In ASM operation, a medium relevance is assigned to the scenario "poor working conditions, treatment of employees and contractors, including forced labour" where the study team estimates the consequence to be severe negative impacts on the directly involved humans' health and morbidity.
- In LSM operation, a medium relevance is assigned to the scenario "damaging the environment through construction and mine operation and/or leaving behind deteriorated land at and around mining site" where the study team estimates the consequence to be immediate to long-term negative health impacts and an increased mortality.
- In LSM operation, a medium relevance is assigned to the scenario "public or private security services intimidate or force local communities out of potential mining sites" where the study team estimates the consequence to be a reduction of livelihood opportunities of local communities on one hand, but also violent conflicts and occasional casualties on the other hand.

## Measures

A variety of measures are in place in the gold industry, in Switzerland and at international level to reduce the hazards along the value chains but also to reduce the overall risks the problematic gold is imported to Switzerland. The four types of measures concern:



- Promotion of principles on good business conduct, CSR and transparency by the Swiss government and international organisations
- Risk management and due diligence measures by the gold industry entities and industry associations
- Development and economic cooperation projects by bilateral and multilateral agencies
- Other measures, such as market-based certification of “fair” gold mining but also the advocacy around human rights risks led by Swiss NGOs.

As the analysis of the effectiveness of due diligence measures in terms of impact on reduction or abolition of human rights abuses along the gold value chains is impossible in the framework of this study, the team summarized the key statements by the interviewees and analysed to what extent the LBMA’s Responsible Gold Guidance (RGG) is adhered to in terms of auditing and reporting. The conclusion is that Swiss refiners are complying with the RGG requirements and sometimes also provide information that goes beyond these requirements. Although disclosed information reveals that due diligence procedures are effectively applied, it does not allow identifying for instance the countries of gold origin or amounts imported from individual countries.

The analysis of the customs procedures and the foreign trade statistics reveals that with the current procedures and instruments at hand, the origin of raw and recycled gold can be identified only for a very limited fraction of the imported volumes.

### **Risk Assessment and Gaps**

The risk assessment reveals a series of issues where all involved stakeholders agree, namely the relevance of potential human rights violations or abuses in gold trade for Switzerland, the difficulty and complexity to assess human rights along complex supply chains, the importance of development and economic cooperation in the regions where gold originates from, as well as the assumption that high industry standards in Switzerland may stimulate a shift of the supply chain.

Differing stakeholder views are stated regarding mainly two points: the relevance and effectiveness of due diligence measures applied by the industry, and the current risk that problematic gold is imported to Switzerland.

#### *Effectiveness of due diligence measures applied by the industry*

- Industry and sector organizations emphasise the significant improvements over last ten years, critics point out that – from what they know – there is a persisting focus on financial risks, a lack of compliance with OECD recommendations also proven by cases of suspected severe human rights abuses.
- The study team questions that the reported cases of human rights abuses along the gold value chain can be interpreted as indicators for systemic weakness or gap in the due diligence procedures (and respective corporate compliance and risk management system) established by the Swiss gold refiners. The reported cases may well be related to intrinsic challenges to achieve 100% traceability in highly complex value chains, failure in applying appropriate risk management procedures in an individual case, misconduct or negligence of individuals, falling victim to fraud or other reasons.

### *Risk that problematic gold is currently imported to Switzerland*

- Industry representatives emphasize that it is not possible to exclude it but that – if at all – the quantities are very small, while critics point out that it is very probable – some say it is 100% sure – that problematic gold is imported to Switzerland, even if in only small quantities.
- The study team concludes that it cannot be excluded that gold produced under human rights abuses is imported into Switzerland. Further, the risk exposure regarding raw gold imported to Switzerland remains generally high given the poor resource governance situation in many of the 92 trading partner countries (as exemplified by the Resource Governance Index ratings for mineral resource governance). However, the share of gold sources from problematic ASM operations is estimated as small (below 10% in terms of value) and the introduction of due diligence in the gold industry presumably decrease risk exposure. The study however remains limited in its scope, further analysis of the risk awareness of small refiners or end consumers/banks would need to be analysed.

### **Key Remaining Gaps**

The key gaps identified throughout the study are:

- The physical and financial **traceability** of raw gold from the origin to the refiner and on to the end customers. Key challenges are the blind spots regarding the country of origin of imported raw gold and the unquantifiable shares of different gold sources.
- The perceived (alleged) lack of **transparency** of gold refiners concerning the country of origin and quantities of gold (note that this information is required for instance by the LBMA RGG guidance, but not disclosed publicly so far). In addition, these gaps concern the lack of public disclosure on how countries and supplier risks are assessed, on how risk-based due diligence processes work in practice and what their outcome is, or indications of the main regions of origin of gold and the main sources of gold.

### **Scenarios for the Future**

For whatever measures the Swiss government decides to engage, the overall goal is twofold: to avoid the risk of importing problematic gold to Switzerland and to improve the human rights situation of the people affected on the ground. In accordance with the UNGP, the Swiss government may tackle the two key gaps identified in this study through a “smart-mix” of binding regulations and non-binding instruments.

In choosing among the different options, the study recommends that the government be guided by (1) levelling the playing field for actors in the gold industry with defined governmental expectation, (2) clarifying what sound due diligence entails and (3) fostering coherence among existing standards.

#### *Improving financial and physical traceability*

There are different options to address the identified blind spots regarding the country of origin of imported raw gold and the unquantifiable shares of different gold sources. The study suggests exploring the following for **improving financial and physical traceability**:

- A first option is establishing a *gold provenience certification scheme* based on a cooperation with key international gold trade partners, specifically starting from

gold mining countries, and work from voluntary towards mandatory requirements along all process steps. This process could for instance draw from lessons learned in the Kimberly process (governance structure, rulebook, technical procedures). Innovative technical options to establish traceability such as distributed ledger technologies (e.g. blockchain) could be considered. Applying such technology to the gold supply chain could increase transparency, traceability and thereby foster trust in the industry. It would also allow Switzerland to create synergies with ongoing initiatives in the context of digitalisation and the Swiss strategy for the digital economy.

- A second option to consider is complementing the foreign trade statistics with supplementary information, to specifically identifying or verifying the provenience/source of gold more accurately.

#### *Improving transparency*

The second identified key gap, the lack of **transparency**, results in a situation where the government as well as other stakeholders in the current situation cannot make an informed assessment or decision. Instead they depend on information from the companies themselves or at best aggregated information, for instance from auditors. Increasing transparency is therefore a prerequisite for enabling the government to develop further measures and policies and for enhancing public trust in the sector. Therefore, the study suggests that the Swiss government encourages the industry to disclose more information on

- (1) risk assessment and risk management procedures;
- (2) the set-up and operationalization of risk-based due diligence;
- (3) practical outcomes of the procedures applied (e.g. number of relationships that have been discontinued because of non-compliance etc.);
- (4) the main regions/countries of origin of gold.

The study suggests the following options for **increasing transparency** along these lines:

- publishing additional data in the context of complementing the foreign trade statistics to allow for enhanced plausibility checks in terms of country of gold provenience;
- introducing increased transparency on risk assessment and management as well as risk-based due diligence procedures in the “Commodities Trading Sector Guidance” which is currently being developed;
- introducing mandatory reporting obligations in accordance with international developments with a view to monitor the compliance with the mentioned self-regulation instruments.

As concrete objectives of further action the study team emphasizes the need to foster coherence among industry standards, detailing what “sound due diligence” actually means, and clarifying expectations of Swiss government towards the gold sector for instance through a dialogue between the government, industry entities and industry associations.

In sum, the study calls for a holistic approach and thereby for exploring additional options which are based not only on (state) regulation but also on cooperation among the different actors. Several cooperative instruments such as the Swiss Better Gold Initiative or the Sustainable Artisanal Mining Project in Mongolia could serve as a basis for more systematically exploring the potential of such initiatives for improving the human rights situation in the context of Swiss gold trade. In addition, building on and further developing existing SDC programmes with a view to strengthening and enhancing the local regulatory and public administration environment could be another area which Switzerland may want to consider.

At the national level, the study suggests exploring recent innovative approaches based on multi-stakeholder participation, such as the Dutch IRBC Agreement, carefully with regard to their potential for informing the Swiss debate.

Finally, the study sees potential in a joint effort led by the Swiss government for increasing transparency involving all stakeholders and covering a broad range of measures such as legislation, independently managed databases fed with information from industry and NGOs, promoting applicable standards and transparent reporting/corporate disclosure.

In sum, such a holistic, multi-stakeholder approach could substantially contribute to not only reducing the risks related to Swiss gold trade for Switzerland and the industry, but also provide much needed support for those who are at the heart of the debate: the rights-holders on the ground.

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# 1. Introduction

## 1.1 Background

Switzerland is one of the most important trading and refining venues for precious metals worldwide with gold holding a dominant position among precious metals.<sup>1</sup> Over the last five years, the volume of imported raw (unrefined) gold to Switzerland varied between 2'236 and 3'080 metric tons with a total value of between 65 and 109 billion Swiss francs.<sup>2</sup> In comparison, the quantity of imported recycled gold was minimal, but has increased to almost 60 tons with a total value of 2.1 billion CHF in 2016.<sup>3</sup>

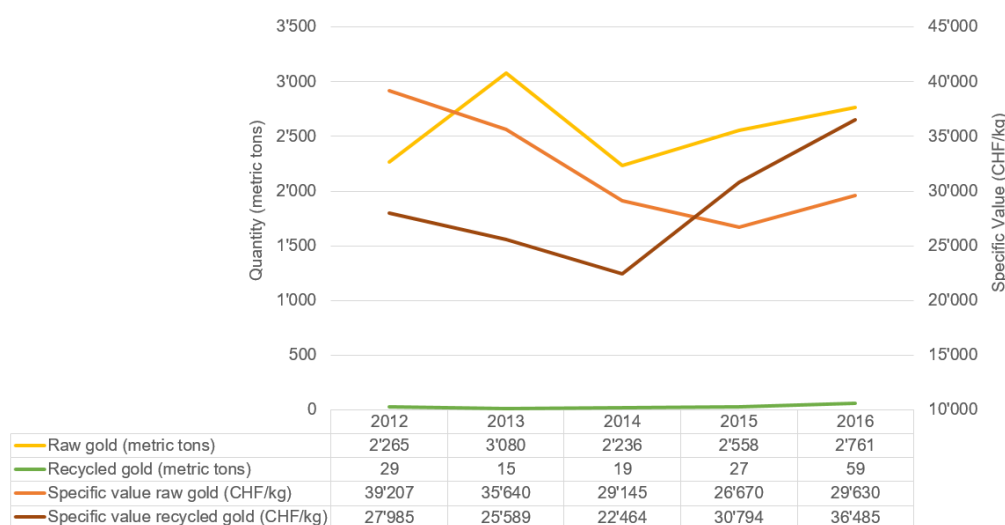


Figure 1: Raw and recycled gold imported to Switzerland, total quantity and specific value, for the period 2012 – 2016 (source: Swiss-Impex).

Swiss gold refineries play a major role globally, providing for around 40% of global refining capacity.<sup>4</sup> Four of the world's nine largest refining companies are located in Switzerland. It is estimated that approximately up to two thirds of gold worldwide are refined in Switzerland.<sup>5</sup>

<sup>1</sup> CGMF (2015): Report on the national evaluation of the risks of money laundering and terrorist financing in Switzerland.

<sup>2</sup> Raw gold refers to all gold imported in unrefined form for non-monetary purposes, excluding powder and recycled gold (Swiss tariff number 7108.12). Based on the OECD definitions, raw gold can come in different forms, including as alluvial gold, gold ore, gold concentrate (intermediate form between ore and doré), gold doré (normally of 85% - 90% purity), or as mining by-product (OECD, 2012: Due Diligence Guidance, Gold supplement).

<sup>3</sup> Recycled gold refers to waste and scrap of gold, incl. metal clad with gold (excl. those of precious metal incorporated and cast into unworked ingots, pigs or other similar, and sweepings and ash containing precious metals) as well as other waste and scrap containing gold or gold compounds, of a kind used principally for the recovery of precious metal (Swiss tariff number 7112.91). According to the OECD, sub-categories of recyclable gold are unprocessed recyclable gold, melted recyclable gold, or industrial by-product (OECD, 2012: Due Diligence Guidance, Gold supplement).

<sup>4</sup> CGMF (2015): Report on the national evaluation of the risks of money laundering and terrorist financing in Switzerland, referring to the World Gold Council 2013.

<sup>5</sup> SECO (2016): Tender Document BGI for ASM, Phase II.

In 2016, raw gold was imported to Switzerland from 92 different countries, with the most important trade partners for raw gold import to Switzerland being the UK and the UAE (33% in terms of value).<sup>6</sup>

|    | Raw gold net mass (metric tons), 2016 | Raw gold value (billion CHF), 2016 |
|----|---------------------------------------|------------------------------------|
| 1  | United Arab Emirates (373)            | United Arab Emirates (15.0)        |
| 2  | United Kingdom (313)                  | United Kingdom (11.8)              |
| 3  | Argentina (297)                       | USA (8.1)                          |
| 4  | USA (277)                             | Hong Kong (6.4)                    |
| 5  | Peru (161)                            | Thailand (4.0)                     |
| 6  | Hong Kong (158)                       | Venezuela (2.8)                    |
| 7  | Chile (109)                           | Peru (2.8)                         |
| 8  | Thailand (102)                        | Uzbekistan (2.8)                   |
| 9  | Venezuela (77)                        | Ghana (2.3)                        |
| 10 | Uzbekistan (70)                       | Italy (1.9)                        |

Table 1: Top 10 countries in terms of volume and value of imported raw gold into Switzerland in 2016. Source: Swiss-Impex.

Despite the declaration of the country of provenience at Swiss customs, the actual country of origin or the source of gold – i.e. whether it was sourced from a high-risk country, from an industrial mine or a small, artisanal mine – cannot be identified from the Swiss foreign trade statistics (see chapter 2.3 and 5.3.4). As a result, it remains difficult to assess the risk exposure that relates directly to the country of origin based on the information received by Swiss customs and the Swiss foreign trade statistics.

In addition, the Swiss gold sector does typically not disclose countries of gold provenience or sources of gold (see chapter 5.2). Only one of the four large Swiss gold refiners (MKS PAMP Group) has disclosed some information on its sourcing and countries of provenience for the years 2015 and 2016.<sup>7</sup> In 2015 and 2016, it declared to have sourced from “recycled and mined gold supply chains” and that the mined gold was sourced “primarily from well-established industrial mines located in North America, South America, Africa, Asia and Oceania”. In 2015, it declared to have “one artisanal mining supply chain” where it sourced “through a licensed buyer and exporter” from small licensed mine in Southwestern Ghana. In 2016, the refiner declared to “not [have] sourced from artisanal mining supply chains”.

<sup>6</sup> Source: Swiss-Impex. This number varies between 87 and 99 countries over the period 2012-2016. The relevant non-monetary imports are classified as unwrought gold (code 7108.12).

<sup>7</sup> See PAMP and MKS LBMA RGG Independent Limited Assurance Reports for the years 2014 and 2015: <http://www.mkspamp.com/sustainability/responsible-sourcing> [accessed on 2 November 2017], for the year 2016 for PAMP see [http://www.lbma.org.uk/assets/audit-reports/CMB\\_PAMP2016.pdf](http://www.lbma.org.uk/assets/audit-reports/CMB_PAMP2016.pdf).

The net receipts from merchanting – largely in commodities trading – can be used as an approximation for the national economic importance of the commodities trading cluster (trading, shipping, transaction financing and inspection services). Receipts from merchanting commodities account for around 3.8% of the Swiss GDP.<sup>8</sup>

In 2013, the Swiss Federal Council published the Background Report on Commodities (*Grundlagenbericht Rohstoffe*) which beside the significant economic and fiscal importance of the commodities sector in Switzerland also pointed out the challenges, namely regarding human rights, environmental issues, corruption and reputational risks for Switzerland as a whole.<sup>9</sup> Critiques expressed by national and international civil society organizations have further contributed to increased public scrutiny of Swiss private and public actors' role in the context of mining and commodity trading, including gold and other precious metals.<sup>10</sup>

In September 2015, the “*Postulat 15.3877 Recordon – Commerce de l’or produit en violation des droits humains*” (trade of gold produced under conditions of human rights violations) was submitted by then Council of States member Luc Recordon and subsequently approved in December 2015 and handed over to the Federal Council.<sup>11</sup> The postulate requires the Federal Council to provide a report outlining the current situation on trade with gold that was produced under conditions of human rights violations and the extent to which such trade affects Switzerland. Moreover, the report should explore the measures that could be taken in Switzerland to address this situation. The present expert study was commissioned by the FDFA to analyse the current situation around gold imports into Switzerland which could be linked to violation of human rights.

The Swiss government has initiated various efforts to address challenges related to mining and trading of commodities or precious metals. With regard to the Swiss gold sector, notably the following initiatives are important:

- On 2 December 2016, the Federal Council approved the third status report<sup>12</sup> on the implementation of the recommendations made in the Background Report on Commodities (*Grundlagenbericht Rohstoffe*). The status report provides an overview of the state of implementation for each of the 17 recommendations. Part of this ongoing process is dialogue and consultation with actors outside the public sector and through the interdepartmental platform on commodities (*Interdepartementale Plattform Rohstoffe*), established by the Federal Council in 2013. The recommendations 8 to 13 are directly or indirectly linked to the Swiss gold sector.

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<sup>8</sup> Federal Council (2016): Background report commodities: Third status report on the implementation of the recommendations, 2 December 2016, p. 3.

<sup>9</sup> See also: <http://dievolkswirtschaft.ch/de/2017/03/huber-4-2017/>

<sup>10</sup> Reports critically analysing the Swiss involvement in gold production and trade were published for instance by Public Eye, the Society for Threatened People, Fastenopfer/Brot für Alle, or the Graduate Institute Geneva/Swissaid.

<sup>11</sup> Recordon Luc (2015): Goldhandel und Verletzung der Menschenrechte.

<sup>12</sup> Federal Council (2016): Background report commodities: Third status report on the implementation of the recommendations, 2 December 2016.

- In 2015, the London-based Institute for Human Rights and Business (IHRB) was mandated with a mapping study of human rights issues associated with commodities trading which has been published in March 2017.<sup>13</sup> Based on the mapping study, a guidance for the Swiss commodity trading sector on implementing human rights due diligence consistent with the UN Guiding Principles on Business and Human Rights (UNGPs)<sup>14</sup> is currently being developed by the IHRB in cooperation with a representative group of relevant stakeholders.
- On 9 December 2016, the Swiss Federal Council adopted a report outlining a National Action Plan (NAP)<sup>15</sup> for the implementation of the UNGPs. The UNGPs were endorsed in 2011 by the UN Human Rights Council and can be safely described as the most widely accepted international framework addressing business responsibilities in the area of human rights. The NAP was drawn up in response to the parliamentary postulate 12.3503 “A Ruggie strategy for Switzerland” submitted by National Council member Alec von Graffenried in June 2012. The NAP contains 50 instruments aimed at ensuring that Swiss companies operating in Switzerland and abroad respect human rights. The present study corresponds to measure no. 16 in the NAP “Minimizing human rights risks in the context of gold mining and trading”.<sup>16</sup>
- The NAP is in line with the Federal Council’s strategy on Corporate Social Responsibility (CSR Position Paper and Action Plan of the Federal Council) and the related action plan for the period 2015 to 2019, which was approved by the Federal Council on April 1, 2015.<sup>17</sup> A first progress report was published in June 2017.<sup>18</sup>
- In December 2016, the Federal Council commissioned the interdepartmental platform on commodities with the task of conducting a fresh assessment of the state of the Swiss commodities sector by November 2018 in terms of its competitiveness, integrity, environmental and other aspects.

In addition, Switzerland is involved in efforts at the international level to support the industry in the implementation of sustainable business practices, of which the most relevant are the OECD Guidelines for Multinational Enterprises, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas and specifi-

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<sup>13</sup> IHRB (2017): The Swiss Commodities Trading Industry: A Mapping Study, 16 March 2017.

<sup>14</sup> Human Rights Council (2011): Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework: Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises’ (21 March 2011), UN Doc A/HRC/17/31, endorsed with Resolution 17/4 UN Human Rights Council (16 June 2011), UN Doc A/HRC/17/4.

<sup>15</sup> Federal Council (2016): Report on the Swiss strategy for the implementation of the UN Guiding Principles on Business and Human Rights – Report of the Federal Council in fulfilment of postulate 12.3503, Alec von Graffenried, 14 December 2012.

<sup>16</sup> Federal Council (2016): Report on the Swiss strategy for the implementation of the UN Guiding Principles on Business and Human Rights

<sup>17</sup> Federal Council (2015): CSR Position Paper and Action Plan.

<sup>18</sup> Federal Council (2017): Position and Action Plan CSR: Report on Progress 2015-2017 (in German and French).



cally its “Gold Supplement”. These developments are further analysed in chapter 3.

Finally, Switzerland supports different development cooperation activities in gold producing countries, e.g. in Peru, Columbia, Bolivia or Mongolia, to promote sustainable production practices and the formalization of artisanal and small-scale miners. These efforts are further analysed in chapter 5.1.

## 1.2 Objective of Expert Study

This expert study shall provide the Federal Department of Foreign Affairs (FDFA) and the Federal Council with factual input for its response to the Postulate Recordon. The objective of the study is set out in the Terms of Reference (see Annex A9), structured in five elements:

1. Analysis of risks of violating human rights for the Swiss gold sector, mainly Swiss gold refiners;
2. Analysis of current national/international legislation regarding human rights and gold trade, including analysis of such legislation in three selected countries;
3. Analysis of standards used in the Swiss gold sector to prevent human rights violations;
4. Inventory of projects and measures realized by the public and private sector in Switzerland which contribute to reducing (risks of) human rights violations;
5. Analysis of existing Swiss customs procedures and the current foreign trade statistics for gold imports, as well as a simple feasibility analysis of adapting these trade statistics to identify gold sourced from mines.

The five elements listed in 1.2 are addressed in a suitable structure and further explained in the next chapter.

## 2. Methodology, Scope and Definitions

### 2.1 Approach and Structure

The study is structured to cover all five study elements (see chapter 1.2) in a stringent way i.e. the elements are not discussed in isolations from each other one-by-one but rather embedded in a logic study structure. The study is structured as follows:

- The global gold trade system, the Swiss gold sector and its actors, human rights and human rights abuses as well as the relevant gold value chains and their different steps are defined in chapter 2.3.
- The instruments of the international and Swiss regulatory framework (soft and hard law) are analysed in chapter 3 in terms of their relevance for addressing risks related to human rights abuses along the relevant gold value chains. It also briefly compares with the regulatory provisions in three country studies (A2-A4).
- The subsequent analysis builds upon two streams:
  - The hazard assessment in chapter 4 first describes the broad range of typical challenges along gold value chains, identifies the most relevant potential scenarios (i.e. practical problems with potential adverse impacts) along the relevant gold value chains, then discusses under which human rights these adverse impacts may fall (from a human rights perspective), and then qualitatively analyses the potential impacts of these scenarios on humans and the environment (from a more technical perspective).
  - The overview of the existing measures in chapter 5 provides an overview of a variety of measures which contribute to reduce human rights abuses along the value chain and to reduce the risk that gold produced under conditions of human rights abuses is imported into Switzerland. Further the chapter elaborates on the effectiveness of due diligence measures in the gold industry, and elaborates on the current customs procedures and what information can be drawn from foreign trade statistics regarding gold provenience.
- The final chapter 6 summarizes the (remaining) risks based on the statements of interview partners and the study team's opinion, lists the remaining key gaps, and elaborates on scenarios for addressing these gaps.
- The annexes provide an overview of statements of the interviewees regarding the effectiveness of current measures, remaining risks and possible measures (A1), three country studies (A2 to A4), literature, documents and involved stakeholders (A5 and A6) as well as the methodical instruments and the Terms of Reference (A7 to A9).

Table 2 provides an overview of the chapters' contents and how they relate to the required elements as set out in the Terms of Reference.

| Step   | Description  | Chapter                  | Element in ToR |
|--|--|--------------------------|----------------|
| <b>Scope and Definitions</b>                                     | Definition of the gold trade system, human rights and the relevant value chains for the study  | 2.3                      |                |
| <b>Regulatory framework</b>                                      | Overview of the Swiss and the international legal framework and internationally relevant initiatives, sector guidance and principles (hard and soft law).<br><br>Analysis of the current legal situation in Switzerland regarding its adequacy to prevent the import of gold produced under conditions of human rights abuses, and comparison with the national legal frameworks of three other countries. | 3, plus Annexes A2 to A4 | 2              |
| <b>Hazard assessment</b>   | Identification of the most relevant scenarios (events, actions) along the value chain which impact one or several human rights.<br><br>Discussion of these scenarios' impacts in terms of human rights abuses.   | 4                        | 1              |
| <b>Measures</b>  | Overview of measures taken by relevant stakeholders in Switzerland to reduce hazards of human rights abuse in the gold value chains. Including industry standard.<br><br>Discussion of effectiveness, especially of due diligence measures<br><br>Discussion of current custom procedures and use of information in foreign trade statistics to determine gold provenience and source                      | 5                        | 3 and 4        |
| <b>Risk assessment, remaining gaps, scenarios for the future</b> | Qualitative assessment of remaining risks that gold produced or traded under human rights abuses is imported into Switzerland.<br><br>Identification and prioritization of gaps / the most relevant remaining challenges related to human rights abuses, by comparing the hazards and the measures that are in place along the gold value chains.  | 6                        | 5 and 1        |

Table 2: Overview of chapters, its contents and how they relate to the required elements as set out in the Terms of Reference

## 2.2 Methods

The study builds upon different methodic pillars, allowing a balanced approach between being fact-based, filling the lack of data or information through expert opinions, and ensuring an inclusive process between the different stakeholder groups. These pillars are:

- **Document Analysis:** desk review, primarily reviewing and analysing publicly available information and documentation, such as relevant legislation, jurisprudence, materials, scientific literature or documentation provided by the Federal Administration and other (e.g. the private sector or from NGO).
- **Interviews:** bilateral, face-to-face or telephone interviews with a similar number of key informants from the four key stakeholder groups, namely:
  - Swiss gold (refining) sector, jewellery/watch sector and industry associations in Switzerland;

- Standard / guidance setting organisations, both from the industry and the OECD;
- Civil society and NGOs with expertise related to gold trade and human rights;
- Swiss administration, considering different entities involved in gold trade, human rights, corporate social responsibility and financial matters.

The interviews follow a standard guideline with defined topics for each stakeholder group (see Annex A7), aiming at collecting the views of interview partners and structuring or validating the already gathered information. Interviews usually take between 45 and 90 minutes.

- **Scenario questionnaire:** a questionnaire (see annex A8) to identify the most relevant scenarios and risks (see chapter 4.2) was developed and sent out to Swiss refiners, standard setters and NGOs, either after the oral interview or as a preparation of the interview.
- **Team-internal working sessions:** team-internal working sessions are organized to define methodic cornerstones, to validate preliminary findings, and to identify open questions for a second round of interviews.

Annex A6 lists the interviewed stakeholders.

## 2.3 Scope and Definitions

This chapter describes the gold trade system including the actors involved, the concept of human rights and related issues, the relevant gold value chains, as well as the analytical methods applied in the study.

### 2.3.1 Defining the Gold Trade System

#### **Swiss Gold Sector**

This study focuses on Swiss gold refiners, i.e. gold refiners domiciled or with their main business operations in Switzerland, and their activities i.e. gold imports, marketing and the production of commercial market quality gold.<sup>19</sup> We refer to this economic sector as the “Swiss gold sector”.<sup>20</sup> Swiss refiners typically do not conduct “own activities” in the pre-production, extraction, processing and transport of raw gold. From a human rights perspective however, and because the Swiss gold sector is linked to the process of gold sourcing through their business relationships (be it mining or recycling), the sourcing of gold is equally important and thus part of this study.

Most of the gold this study focuses on is being imported into Switzerland in the form of raw gold (definition in chapter 1.1), non-monetary gold (gold

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<sup>19</sup> As defined in OECD (2016): OECD DD Guidance, Gold Supplement.

<sup>20</sup> The study therefore looks only at a fraction of the whole gold trade which typically refers to the processes of buying, transporting, storing, transforming, refining and/or selling gold or any of its sub-categories, as well as managing gold-related assets (in accordance with IHRB (2017): Mapping Study).

dust) or waste, with raw gold accounting for the largest share by far.<sup>21</sup> The refineries in Switzerland refine raw gold or melt existing items made of gold.<sup>22</sup>

Gold can mainly be sourced from:

- **Gold mining**, which is the process of exploring and developing mining operations (pre-production), extracting, processing (e.g. milling, concentrating, refining) and managing mining sites (production) and transporting including storing of gold. We differentiate between artisanal or small-scale gold mining (ASM) and large-scale, industrial gold mining (LSM)<sup>23</sup>, however many further distinctions exist.
- **Recycling of gold**, i.e. the activities of collecting, dismantling or disassembling and transportation of either high-value gold objects (e.g. jewellery) or scrap materials. This includes gold components such as waste electronic or electric equipment (WEEE), and the transportation of these secondary materials.

### Type of Value Chains

This analysis focuses on the three main value chains for Swiss gold trade, understood in this study as gold traded by refiners with their domicile or key operational base in Switzerland. These value chains mainly differ in terms of gold origin i.e. in the gold sourcing phase. We use three schematic value chains

- Industrial, large-scale mining (LSM)
- Artisanal or small-scale mining (ASM)
- Gold recycling, including recycling of high-value products and industry recycling

The differentiation into these three value chains is schematic and in reality, a series of interconnections exist. In the countries of origin, gold value chains can be complex with a series of actors involved in several processing, collecting, transporting and trading steps. For example, gold sourced from small, informal and often illicit or even illegal gold mining operations may enter formal value chains at different points along the way.

Differentiating these value chains allows for better structuring the analysis and focusing on the most relevant risks for human rights abuses along the gold sourcing process.

Figure 2 illustrates the steps of **gold sourcing** and **gold trade** for the three typical value chains. Gold trade in the context of this study includes both the trade of gold for importing it to Switzerland and the refinement process taking place in Switzerland.

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<sup>21</sup> Between 99.2% and 99.7% in period from 2012 to 2016 (Swiss Impex, by comparing total imported value of tariff numbers 7108 and 7108.12).

<sup>22</sup> CGMF (2015): Report on the national evaluation of the risks of money laundering and terrorist financing in Switzerland.

<sup>23</sup> In accordance with OECD (2016): OECD DD Guidance, Gold Supplement.

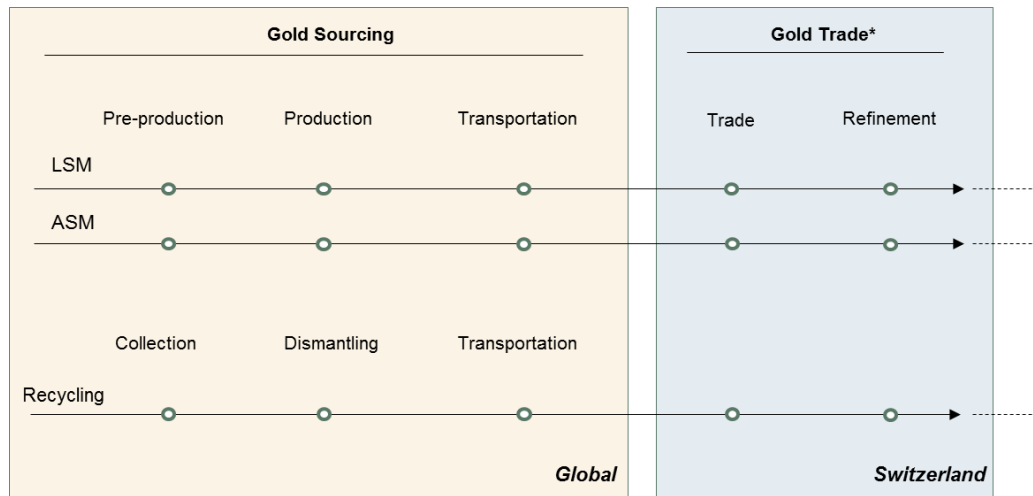


Figure 2: Chart illustrating how Swiss gold trade is linked to the global gold sourcing process through three distinct value chains. (\*Gold Trade here also includes the refining process and ultimately also the buying end customers, e.g. banks, industry etc.)

### Actors and Stakeholders in the Swiss Gold Sector

Naturally, the relevant actors along the entire gold value chains are not limited to Swiss gold refineries, but extend to all actors involved along the gold value chains as well as those trading recycled gold.<sup>24</sup>

Customers of refined gold products include buyers and traders of refined gold investment products (typically bars, ingots, or coins) e.g. central or bullion banks (including marketing, selling, or storing of refined gold), jewellery/watches fabricants, recycling companies and specific industries which use gold for their applications (medical, electronics, etc.).<sup>25</sup>

### Focus of the Study

Based on the above definitions, the scope of this study can be defined as follows:

- The study focuses on the large Swiss gold refiners. Small refiners and downstream customers such as banks or specific industries using gold for their applications are not addressed in this expert study.
- The study focuses on current practices (“how is it done today”) and to a lesser degree on past practices. Accordingly, potential human rights abuses related to “grandfathered stocks”<sup>26</sup> – which in reality can still occur in all value chains today – are outside of its scope.

<sup>24</sup> According to the FATF, nine of the eleven Swiss traders exercise industrial refining activities and financial intermediation activities with gold product, where the finished product – mainly gold ingots – is sold to central banks, banks, and institutional investors, thus entering the Swiss financial system. The other two are exclusively involved in trading precious metals (FATF (2016): Anti-money laundering and counter-terrorist financing measures – Switzerland, Fourth Round Mutual Evaluation Report, para 75, p. 21.)

<sup>25</sup> OECD, 2012: Due Diligence Guidance, Gold supplement.

<sup>26</sup> Gold investment products held e.g. in bullion banks or refiners with a verifiable date prior to 1 January 2012. Source: OECD (2016): OECD DD Guidance, Gold Supplement.



- The study excludes the trade and management of gold-related assets by Swiss bullion banks<sup>27</sup> as well as the sourcing from refined gold bars bought on the gold market and transformation into different products.

## 2.3.2 Defining Human Rights and Human Rights Abuses

### Human Rights and Business Activities

Business activities along the gold value chain can have negative impacts on a wide range of human rights. The commentary on UNGP 12 states that companies may impact “virtually the entire spectrum of internationally recognized human rights”. At a minimum, this includes the human rights enshrined in the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights,<sup>28</sup> the International Covenant on Civil and Political Rights<sup>29</sup> and the International Covenant on Economic, Social and Cultural Rights<sup>30</sup>) and the ILO core labour rights.<sup>31</sup>

The UNGP, however, also acknowledge that the specific activity of a company determines what human rights within this wide spectrum are at a particular risk. In addition to the International Bill of Human Rights and the eight Core ILO Conventions, other human rights standards therefore may have to be taken into account, such as international humanitarian law in situations of armed conflict<sup>32</sup> or the UN instruments on the human rights of specific vulnerable groups (indigenous peoples;<sup>33</sup> women;<sup>34</sup> national or

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<sup>27</sup> A bullion bank conducts financial transactions in refined gold. This includes retail, commercial and investment banks or financial institutions such as a trading houses (OECD, 2016: OECD DD Guidance, Gold Supplement).

<sup>28</sup> Universal Declaration of Human Rights, 10 December 1948 (GA resolution 217 A).

<sup>29</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966 (GA resolution 2200A (XXI) (SR 0.103.1).

<sup>30</sup> International Covenant on Civil and Political Rights, 16 December 1966 (GA resolution 2200AXXI) (SR 0.103.2).

<sup>31</sup> The ILO Core conventions are: ILO-Convention 29: Forced or Compulsory Labour (1930); ILO-Convention 87: Freedom of Association and Protection of the Right to Organise (1948); ILO Convention 98: Right to Organise and Collective Bargaining (1949); ILO-Convention 100: Equal Remuneration (1951); ILO-Convention 105: Abolition of Forced Labour (1957); ILO-Convention 111: Discrimination [Employment and Occupation] (1958); ILO-Convention 138: Minimum Age (1973); ILO-Convention 182: Worst Forms of Child Labour (1999).

<sup>32</sup> The main instruments of International Humanitarian Law are the four Geneva Conventions of 1949 and their Additional Protocols: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (SR 0.518.12); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (SR 0.518.23); Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 (SR 0.518.42); Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (SR 0.518.51); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims in International Armed Conflicts (Protocol I) (SR 0.518.521); Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977 (SR 0.518.522).

<sup>33</sup> UN Declaration on the Rights of Indigenous Peoples, A/RES/61/295; ILO Convention No. 169: Concerning Indigenous and Tribal Peoples (1989).

<sup>34</sup> Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979 (SR 0.108).

ethnic, religious and linguistic minorities;<sup>35</sup> children;<sup>36</sup> persons with disabilities;<sup>37</sup> migrant workers and their families<sup>38</sup>).<sup>39</sup>

Table 3 lists the most relevant human rights that might potentially be infringed along the gold value chain. In accordance with the UNGP the general criteria for the identification of human rights risks are the International Bill of Human Rights and the eight Core ILO Conventions. References to other human rights instruments are made where necessary and appropriate. Potential human rights abuses have to be determined case by case.

Human rights that are potentially infringed along the gold value chain are to a large extent identical for ASM and LSM. Therefore, they are summarized in the same column of the table below. In principle, all of these human rights are also relevant for the recycling value chain, in the sense of “legacy issues” of the recycled material. The following list, however, focuses on potential human rights issues within the collection, dismantling and transportation phase of the value chain.

| ASM, LSM  | Recycling  |
|---|--|
| <ul style="list-style-type: none"> <li>Equality / non-discrimination (art. 2 UDHR, art. 7 UDHR, art. 3 ICPR, art. 26 ICCPR, art. 2 para. 2 ICESCR, art. 3 ICESCR)</li> <li>Right to life (art. 3 UDHR, art. 6 ICCPR)</li> <li>Right to liberty and security (art. 3 UDHR, art. 9 ICCPR)</li> <li>Right to be free from slavery and forced labour (art. 4 UDCHR, art. 8 ICCPR)</li> <li>Right to privacy and to family life (art. 12 UDHR, art. 17 ICCPR)</li> <li>Freedom of movement (art. 13 UDHR, art. 12 ICCPR)</li> <li>Property rights (art. 17 UDHR)</li> <li>Freedom of opinion and expression (art. 19 UDHR, art. 19 ICCPR)</li> <li>Right to peaceful assembly (art. 20 UDHR, art. 21 ICCPR)</li> <li>Labour rights: workers' rights to freedom of association, equal opportunity, freedom from discrimination, right to peaceful protest and assembly and collective bargaining) (art. 23 UDHR, art. 22 ICCPR, art. 6 ICESCR, art. 7 ICESCR, art. 8 ICESCR, ILO Core Conventions)</li> <li>Right of children to be free from economic exploitation (child labour) (art. 32 CRC, ILO Convention 182)</li> <li>Right to health (art. 25 UDHR, art. 12 ICESCR)</li> </ul> | <ul style="list-style-type: none"> <li>Equality / non-discrimination (art. 2 UDHR, art. 7 UDHR, art. 3 ICPR, art. 26 ICCPR, art. 2 para. 2 ICESCR, art. 3 ICESCR)</li> <li>Right to life (art. 3 UDHR, art. 6 ICCPR)</li> <li>Right to be free from slavery and forced labour (art. 4 UDCHR, art. 8 IC-CPR)</li> <li>Property rights (art. 17 UDHR)</li> <li>Labour rights: workers' rights to freedom of association, equal opportunity, freedom from discrimination, right to peaceful protest and assembly and collective bargaining) (art. 23 UDHR, art. 22 ICCPR, art. 6 ICESCR, art. 7 ICESCR, art. 8 ICESCR, ILO Core Conventions)</li> <li>Right of children to be free from economic exploitation (child labour) (art. 32 CRC, ILO Convention 182)</li> <li>Right to health (art. 25</li> </ul> |

<sup>35</sup> International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965 (SR 0.104).

<sup>36</sup> Convention on the Rights of the Child, 20 November 1989 (SR 0.107).

<sup>37</sup> Convention on the Rights of Persons with Disabilities, 13 December 2006 (SR 0.109).

<sup>38</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 18 December 1990.

<sup>39</sup> UNGP, principle 12 and commentary on principle 12.

| ASM, LSM  | Recycling  |
|---|--|
| <ul style="list-style-type: none"> <li>• Right adequate standard of living (art. 25 UDHR, art. 11 ICESCR)</li> <li>• Right to water (art. 25 UDHR, art. 11 ICESCR)</li> <li>• Right to adequate housing (art. 25 UDHR, art. 11 ICESCR)</li> <li>• Right to education (art. 26 UDHR, art. 13 ICESCR)</li> <li>• Indigenous peoples' rights (UNDRIP)</li> </ul> | <ul style="list-style-type: none"> <li>• UDHR, art. 12 ICESCR</li> <li>• Right adequate standard of living (art. 25 UDHR, art. 11 ICESCR)</li> </ul> |

Table 3: Potential human rights impacts in ASM, LSM and Recycling

### Human Rights Abuse

An “adverse human rights impact” as applied by the UNGP occurs when an action removes or reduces the ability of an individual to enjoy his or her human rights.<sup>40</sup> The UNGP use the general term “adverse human rights impacts”, and specifically “human rights abuse” to describe adverse human rights impacts caused by business enterprises, while the term “human rights violations” usually covers adverse human rights impacts by States.<sup>41</sup> The UNGP further differentiate between actual and potential human rights impacts.<sup>42</sup> We therefore use the term “human rights abuses” in this study.

Activities of companies within the gold value chain may have negative impacts on a wide range of human rights as outlined in the table above. The responsibility to respect human rights according to UNGP 13 requires that business enterprises:

- avoid causing or contributing to adverse human rights impacts through their **own activities**, and address such impacts when they occur; and
- seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their **business relationships**, even if they have not contributed to those impacts.

Swiss companies in the gold sector are directly involved through their “own activities” mainly when trading raw/pre-processed gold, but they are typically linked to the sourcing and production of gold through their business relationships in the gold supply chain.

Further, the UNGP require businesses to provide remedy mechanisms in cases where they have caused or contributed to adverse human rights impacts. If businesses are neither causing nor contributing but can be linked to a negative human rights impact by a business relationship they are not required to provide for remediation themselves but may play a role in doing so (UNGP 22).

In the spirit of the UNGP, the two categories – being directly linked through a business relationship on the one hand and contributing or causing an

<sup>40</sup> OHCHR (2012): The Corporate Responsibility to Respect, an Interpretive Guide, p. 5.

<sup>41</sup> OHCHR (2014): Frequently Asked Questions about the Guiding Principles on Business and Human Rights, p. 43.

<sup>42</sup> UNGP, principle 17 and commentary on principle 17; OHCHR (2012): The Corporate Responsibility to Respect Human Rights, An Interpretative Guide, p. 5 and 7.

adverse human rights impact with own activities on the other hand – must not be seen in clinical isolation. As a result, the OHCHR, John Ruggie as the author of the UNGP and the UN Working Group argue that a change in categories may occur. According to this reasoning, a Swiss refining company with a business relationship to a company responsible for human rights abuses may under certain circumstances become a contributor. At this stage, it is however not clear what the criteria for such a change in categories are. This issue is currently intensively discussed in the context of financial services.<sup>43</sup>

### 2.3.3 Defining the Relevant Value Chains

Globally, the total supply of refined gold increased to more than 4'500 metric tons in 2016 after three years of lower volumes (see Figure 3).<sup>44</sup>

- The share of mined gold increased from approx. 64% in 2012 to 71%.
- The share of recycled gold decreased from approx. 37% to 28% of the total gold supply. According to the World Gold Council (WGC), around 90% of recycled gold comes from jewellery and the remainder being extracted from technology.<sup>45</sup>

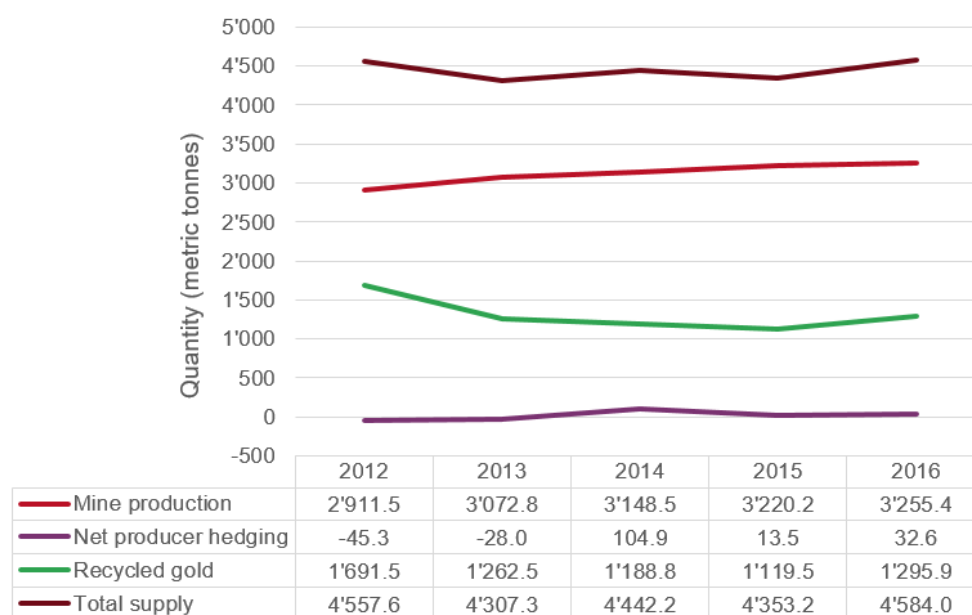


Figure 3: Total global gold supply from mining, recycling and hedging gold, 2012 - 2016 (Gold Demand Trends Data Tables, World Gold Council, 2017, <https://www.gold.org/data/gold-supply-and-demand>)

<sup>43</sup> See: Ruggie (2017): Comments on Thun Group of Banks Discussion Paper on the Implications of UN Guiding Principles 13 & 17 in a Corporate and Investment Banking Context; UN Working Group on the issue of human rights and transnational corporations and other business enterprises (2017): Letter to Thun Group of Banks; OHCHR (2017): Response to request from BankTrack for advice regarding the application of the UN Guiding Principles on Business and Human Rights in the context of the banking sector.

<sup>44</sup> Gold supply is measured for each country and indicates the “amount of gold available locally for jewellery, investment and technology” (see methodology note on <https://www.gold.org/data/gold-supply-and-demand>). For information on gold producing countries, see: <https://www.gold.org/about-gold/gold-supply/gold-mining/gold-mining-map>.

<sup>45</sup> See: <https://www.gold.org/about-gold/gold-supply>.

The three value chains are described in more detail in the following paragraphs, with the tables showing the functions and activities along the value chain (gold production, gold trade up to refinery) as well as the actors involved in the different value chains. Each step consists of activities that may involve different risks for adverse human rights impacts.

### **Industrial, Large-scale Mining (LSM)**

Industrial, large-scale mining is characterized by large operational and investment capital, high level of mechanizations and quality of machinery, large quantities of processed deposits, relatively high number of employees<sup>46</sup> in one location, high output of gold, a formalized development and operation of its mining projects (i.e. legalized through mining licenses, marketing agreements and a chain-of-custody transportation from the mine site to a refiner) and typically represents a significant economic activity and contribution on a regional or even national level. The use of cyanide for industrial processing of ore is the state-of-the-art leaching technology and in modern large-scale mines is handled in closed circles today. There are well-defined rules for the safe and responsible use of cyanide – as laid out in the International Cyanide Code.

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<sup>46</sup> The term “large” refers to the qualitative characteristics of the operation and not necessarily to the quantity of employees, as ASM may also employ up to thousands of miners. See SDC (2011): Experiences with Formalization and Responsible Environmental Practices in Small-scale Gold Mining.

|   | Functions   | Activities in LSM value chain   | Actors / Stakeholders in LSM  |
|---|---|---|---|
| 1 | Pre-Production, Project development   | <ul style="list-style-type: none"> <li>Prospecting, exploration of mining site, (feasibility study),</li> <li>Acquisition/ occupation of land, licensing for development and operation</li> <li>Mine-site design and construction</li> </ul>  | <b>Main actors:</b><br>Junior miners and exploration companies, Medium- or large-scale miners/mining companies, including employees<br><br><b>Stakeholders:</b> <ul style="list-style-type: none"> <li>Geological, technical and legal experts</li> <li>Security services</li> <li>Construction contractors</li> <li>Local and international NGO</li> <li>National and local governments</li> <li>Local communities</li> </ul>  |
| 2 | Production (extraction, processing and consolidation locally, incl. sourcing) | <ul style="list-style-type: none"> <li>Operation of gold extraction on-site (surface and underground)</li> <li>On-site processing of gold (crushing, milling, concentrating, smelting &amp; refining, incl. recycling of scrap metals), producing bars of bullion</li> <li>Management of processing facilities and waste (tailings, waste rock, waste management)</li> <li>Mine rehabilitation, remediation, closure</li> <li><i>Sourcing of gold from nearby mining sites / ore bodies</i></li> <li><i>Sourcing of recycled/scrap gold at consolidation point</i></li> </ul> | <b>Main actor:</b><br>Medium- or large-scale miners/mining companies, including employees<br><br><b>Stakeholders:</b> <ul style="list-style-type: none"> <li>Technical and legal advisors</li> <li>Security services</li> <li>Contractors (e.g. mine operation, equipment, suppliers)</li> <li>Local communities</li> <li>Local and international NGO</li> <li>National and local governments</li> <li><i>Local gold trade networks</i></li> <li><i>Local government</i></li> </ul> |
| 3 | Transport (logistics, storage)  | <ul style="list-style-type: none"> <li>Off-take agreements</li> <li>Transport to export point (national or regional)</li> <li>International transport, shipping</li> </ul>  | <ul style="list-style-type: none"> <li>Marketing and trading companies</li> <li>Customs, export</li> <li>(Local / regional logistic company)</li> <li>International logistic company</li> </ul>   |
| 4 | Trade (of pre-processed gold, national or regional or international)          | <ul style="list-style-type: none"> <li>Buying, trading and marketing of pre-processed gold (e.g. bullion bars)</li> </ul>   | <b>Main actor:</b> <ul style="list-style-type: none"> <li>International gold trader / consolidator</li> <li>Buyer: gold refineries or end customer e.g. banks, various industries, etc.</li> <li>Government, authorities, central banks</li> <li>International Organisations (BIS, IMF)</li> </ul>  |
| 5 | Refining, incl. sourcing  | <ul style="list-style-type: none"> <li>Refining of gold</li> <li><i>Sourcing of recycled/scrap gold at refinery</i></li> <li><i>Sourcing of raw gold through illegal imports</i></li> </ul>   | <ul style="list-style-type: none"> <li>Gold refiners</li> <li><i>Recycler, collector of scrap to refiners</i></li> <li><i>International transport networks</i></li> </ul>   |

Table 4: Functions, activities in a typical LSM gold value chain (production, trade) up to the refinery (in blue), actors involved (in orange). Sourcing of gold from other sources than one specific mine (nearby mining sites, recycled/scrap gold) are indicated in *italic*.

### Artisanal or Small-scale Mining (ASM)

ASM produces about 15% of the worldwide gold production but employs more than 80% of the total workforce engaged in gold mining. ASM miners prefer small high-grade deposits or abandoned tailings, abandoned industrial mines or locations that are nearby an official mining operation. This type of mining covers permanent, formal ASM communities, or rather informal seasonal mining or rush-type or shock-push type of mining. ASM can often involve mining sites with little to no structure, and in particular a lack of protection for workers or the environment. The non-professional use of mercury for amalgamation is widespread.

Most of global ASM gold production takes place outside of a legal framework but is at the very least tolerated by many governments. Governments often lack the capacity (and willingness) to formalize the sector, and sometimes government agencies or their representatives directly profit from illegal mining themselves through corruption, e.g. by enabling the export of illegally mined gold. Initiatives for more formalisation of ASM however do exist, for example in Mali, where artisanal mining is legal by law in desig-

nated geographical areas or gold mining 'corridors'. In reality however, the vast majority of artisanal mining sites still lie outside of these corridors.

Mined ASM gold generally passes through several layers of consolidators, intermediaries, and exporters (some of whom may be illegal smelting operations or smugglers who illegally export the gold from the country of origin by bribing custom officials) before it eventually enters the (formal) supply chain. Once gold reaches consolidators or refiners it may be difficult to trace it back to the origin, because of a lack of documentation or the mixing with other sources such as recycled or scrap gold. Another difficulty is the potential transiting of several countries and the involvement of different parties who may have an interest in concealing the origin in order to sell to an established player at market price.

|   | Functions   | Activities in ASM value chain   | Actors / Stakeholders in ASM   |
|---|---|---|--|
| 1 | Pre-Production  | <ul style="list-style-type: none"> <li>• Exploration of mining site, (feasibility study)</li> <li>• Acquisition/ occupation of land, licensing for development and operation</li> </ul>   | <b>Main actors:</b><br>Subsistence/ artisanal or small-scale miners, operators and owners, including employees<br><br><b>Stakeholders:</b> <ul style="list-style-type: none"> <li>• Security services</li> <li>• National and local governments</li> <li>• International and local NGOs</li> <li>• Local communities</li> <li>• Local gold traders (gold sourcing)</li> </ul>  |
| 2 | Production (extraction, processing and consolidation locally, incl. sourcing) | <ul style="list-style-type: none"> <li>• Operation of gold extraction on-site</li> <li>• On-site processing of gold (milling, concentrating, smelting refining, incl. recycling scrap metals)</li> <li>• (Management of processing facilities [tailings, waste rock, waste management])</li> <li>• (Mine rehabilitation, remediation, closure)</li> <li>• <i>Sourcing of gold from nearby mining sites / ore bodies</i></li> <li>• <i>Sourcing of recycled/scrap gold at consolidation point</i></li> </ul> | <b>Main actors:</b><br>Subsistence/ artisanal or small-scale miners, operators and owners, including employees<br><br><b>Stakeholders:</b> <ul style="list-style-type: none"> <li>• Security services</li> <li>• In-country small smelters operators / owners with local/ regional outreach</li> <li>• Local/regional traders and consolidators</li> <li>• National and local governments and agencies</li> <li>• Local communities</li> <li>• International and local NGO</li> <li>• <i>Recycler, collector of scrap, local gold trader networks</i></li> <li>• <i>Local governments</i></li> </ul> |
| 3 | Transport (logistics, storage)  | <ul style="list-style-type: none"> <li>• Transport to export point (national or regional)</li> <li>• International transport, shipping</li> </ul>   | <ul style="list-style-type: none"> <li>• Trading company</li> <li>• Local / regional logistic company</li> <li>• Trading company</li> <li>• International logistic company</li> </ul>  |
| 4 | Trade (of pre-processed gold, national or regional or international)          | <ul style="list-style-type: none"> <li>• Buying, trading and marketing of pre-processed gold</li> </ul>   | <ul style="list-style-type: none"> <li>• Small-scale local traders and consolidators</li> <li>• International gold trader/ consolidator</li> <li>• End customer e.g. Swiss or foreign banks, various industries, etc.</li> <li>• Government, authorities</li> </ul>  |
| 5 | Refining, incl. sourcing  | <ul style="list-style-type: none"> <li>• Refining of gold</li> <li>• <i>Sourcing of recycled/scrap gold at refinery</i></li> <li>• <i>Sourcing of raw gold through illegal imports</i></li> </ul>   | <ul style="list-style-type: none"> <li>• Gold refiners</li> <li>• <i>Recycler, collector of scrap to refiners</i></li> <li>• <i>International transport networks, potentially also smuggling networks</i></li> </ul>   |

Table 5: Functions, activities in a typical ASM gold value chain (production, trade) up to the refinery (in blue), and actors involved. Sourcing of gold from other sources than one specific mine (nearby mining sites, recycled/scrap gold) are indicated in *italic*. Activities in brackets are unlikely to occur in ASM.

## Gold Recycling

Two different segments with different value chains exist in the gold recycling value chain:<sup>47</sup>

- **High-value gold recycling**, accounts for around 90%, mostly made up of jewellery, gold bars and coins.
- **Industrial gold recycling**, around 10% and up from 5% in the last 10 years, primarily gold recovered from waste electrical and electronic equipment.

The value chain for industrial gold recycling is typically longer, comprises more actors and thus may be more complex. On the one hand, it is more prone to involve informal collection and dismantling facilities in developing countries, on the other hand the dismantling and pre-processing of industry gold requires more sophisticated technologies.<sup>48</sup>

Swiss Impex statistics show a total of 551 tons (value CHF 23 billion) of precious metal scrap imported in 2016, of which 59 tons (value 2.1 billion) are waste and scrap of gold.<sup>49</sup> Looking at the waste and scrap of gold, the largest quantity in 2016 was imported from Indonesia (44.2 tons, 80% of total quantity) followed by Malaysia, Italy, France and Germany. The specific value (CHF/kg) varies widely between 40'436 (Malaysia) and 12'938 (Germany), which provides an indication of the grades contained in the scrap material.

Recycled gold made up around one third of global total supply (including mine production and net producer hedging) on average between 1995 and 2014.<sup>50</sup>

The volume of old gold being sold by individuals in Switzerland, mainly in exchange for cash, has risen sharply since 2009 but is still at a comparatively low level. Swiss refineries purchase only very low volumes of old gold directly from the buyers of old gold.<sup>51</sup>

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<sup>47</sup> BCG, WGC (2015): The Ups and Downs of Gold Recycling. Understanding Market Drivers and Industry Challenges.

<sup>48</sup> BCG, WGC (2015): The Ups and Downs of Gold Recycling. Understanding Market Drivers and Industry Challenges.

<sup>49</sup> Swiss Impex number 7112.91 is defined as "waste and scrap of gold, incl. metal clad with gold, (excl. those of precious metal incorporated and cast into unworked ingots, pigs or other similiary, and sweepings and ash containing precious metals); other waste and scrap containing gold or gold compounds, of a kind used principally for the recovery of precious metal"

<sup>50</sup> BCG, WGC (2015): The Ups and Downs of Gold Recycling. Understanding Market Drivers and Industry Challenges.

<sup>51</sup> CGMF (2015): Report on the national evaluation of the risks of money laundering and terrorist financing in Switzerland.



|   | Functions                      | Activities in recycling value chain  | Actors:<br>High-value gold recycling  | Actors:<br>Industry gold recycling  |
|---|--------------------------------|--|---|---|
| 1 | Collection                     | <ul style="list-style-type: none"> <li>• Selling / sourcing of gold or materials containing gold component</li> <li>• Collection of recycled gold</li> </ul> | <ul style="list-style-type: none"> <li>• Private consumers</li> <li>• Jewellery manufacturers</li> <li>• Pawn shops</li> <li>• Private collectors</li> <li>• Informal collection systems</li> </ul> | <ul style="list-style-type: none"> <li>• Private households</li> <li>• Institutions</li> <li>• accredited E-waste collectors</li> <li>• Municipalities</li> <li>• Electronic manufacturers / shops</li> <li>• Informal collection and dismantling actors</li> </ul> |
| 2 | Dismantling                    | <ul style="list-style-type: none"> <li>• Processing / dismantling of WEEE to extract gold components</li> </ul>  | <ul style="list-style-type: none"> <li>• Formal / informal dismantling sites, collection points</li> </ul>  | <ul style="list-style-type: none"> <li>• Informal dismantling sites</li> </ul>  |
| 3 | Transport (logistics, storage) | <ul style="list-style-type: none"> <li>• Transport to local exporters, to local export point</li> </ul>  | <ul style="list-style-type: none"> <li>• Transport company</li> </ul>   | <ul style="list-style-type: none"> <li>• Transport company</li> </ul>   |
| 4 | Trade                          | <ul style="list-style-type: none"> <li>• Buying, trading and marketing of recycled gold</li> <li>• International transport, shipping</li> </ul>              | <ul style="list-style-type: none"> <li>• Traders of recycled gold, mainly B2B</li> <li>• Transport company</li> </ul>   | <ul style="list-style-type: none"> <li>• E-waste collectors</li> <li>• Informal traders</li> <li>• End customer e.g. Swiss or foreign banks, various industries, etc.</li> <li>• Transport company</li> </ul>   |
| 5 | Refining, incl. sourcing       | <ul style="list-style-type: none"> <li>• Refining of gold</li> </ul>   | <ul style="list-style-type: none"> <li>• Integrated or specialized refiners</li> </ul>  | <ul style="list-style-type: none"> <li>• Integrated refiners</li> </ul>   |

Table 6: Functions, activities in the recycling gold value chain (based on BCG/WGC, 2015)

## 2.4 Hazard Assessment

A hazard is a source of potential harm to a human, the environment, an institution or an object. It is defined by the:

- **Source of harm**, which includes events, activities, or circumstances that may directly or indirectly cause an adverse human rights impact along the gold value chains.
- **Agent** who is potentially adversely affected.

To determine the most relevant hazards along the three value chains, the hazard assessment:

- Defines the relevant **human rights** along the gold value chains.
- Identifies and evaluates the most relevant **scenarios** (sources of harm which may cause violations of human rights). The relevant scenarios are identified based on a simplified approach which focusses on the frequency of scenario occurrence.
- Discusses qualitatively how the different scenarios **impact** on individual human rights (from a human rights perspective, in chapter 4.3) and how they impact on human and the environment (from a technical perspective, in chapter 4.4).

### 3. Regulatory Framework

This chapter elaborates on the following elements:

- Overview of the international legal framework, including relevant hard and soft law, summarized and analysed on their specific obligations/recommendations regarding the protection of human rights in the context of the gold trade. Only international legal sources, which are relevant for Switzerland, are considered.
- Overview of the Swiss legal framework, as well as its implementation, regulating the import, smelting and refining of gold in Switzerland, from a human rights perspective.
- Analysis of the current legal situation in Switzerland regarding its adequacy to prevent the import of gold that was produced under conditions of human rights violations, and comparison of it to the national legal frameworks of three important countries with regards to the locations of refineries, namely South Africa, India and Dubai/UAE.

#### 3.1 International Legal Framework

This chapter summarizes and analyses the international legal framework with regard to relevant hard and soft law. The chapter focuses on the following aspects:

- What are the specific obligations/recommendations regarding gold trade and the protection of human rights?
- Whether these obligations and recommendations address States and/or companies?
- Are these obligations and recommendations binding or non-binding?

##### 3.1.1 UN Guiding Principles on Business and Human Rights (UNGP)

The UNGP were adopted by the Human Rights Council in 2011 and are directed at States and companies. They are not a binding instrument and do not establish new legal obligations. Rather they illustrate the existing States' duty to protect and companies' responsibility to respect human rights in the context of business activities and ensure access to remedy for victims of human rights violations that may occur during such activities.<sup>52</sup> The UNGP address business activities in general and therefore, are also applicable to business activities within the gold industry. Of particular interest for the present study is UNGP 7, which acknowledges the heightened risk of gross human rights abuses in conflict-affected areas and issues specific recommendations on the State's duty to protect regarding business activities in these high-risk areas.

The UNGP do not directly issue recommendations on their implementation at the national level. Other bodies, however, have recommended the devel-

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<sup>52</sup> OHCHR (2014): Frequently asked questions about the Guiding Principles on Business and Human Rights, Q6 and Q7.

opment of national action plans on business and human rights.<sup>53</sup> Switzerland adopted its National Action Plan in December 2016.<sup>54</sup> According to the Federal Council, it is also contributing to Switzerland's implementation of the Sustainable Development Goals (mainly Goals No. 8, 10, 12 and 17).<sup>55</sup>

### 3.1.2 OECD Instruments

#### **OECD Guidelines for Multinational Enterprises<sup>56</sup>**

The OECD Guidelines for Multinational Enterprises were revised in 2011. They now include a human rights chapter that builds upon the UNGP and aims at making them more concrete. The OECD Guidelines are binding for States but not for business enterprises. As members of the OECD or as adhering parties to the OECD Guidelines, States are obliged to implement the OECD Guidelines and to ensure that they are complied with by businesses. The Guidelines state that enterprises should, within the national and international legal framework, respect human rights and address, prevent or mitigate adverse human rights impacts, have a policy commitment to respect human rights, carry out human rights due diligence and provide or co-operate in remediation for negative human rights impacts.

#### **OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas and its Supplement on gold<sup>57</sup>**

The OECD Due Diligence Guidance is a non-binding instrument that builds on the OECD Guidelines for Multinational Enterprises and on the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones<sup>58</sup>. Its recommendations are addressed at companies that potentially obtain minerals or metals from conflict-affected and high-risk areas. It aims to assist companies to avoid the financing of a conflict and to respect human rights when they purchase minerals. For this purpose, it provides a detailed framework for due diligence for responsible supply chains of minerals from conflict-affected and high-risk areas (Annex I) and also suggests measures for risk mitigation and indicators for measuring improvements (Annex III). Furthermore, the two Supplements of the Guidance contain more detailed recommendations on the supply chain of tin, tantalum and tungsten as well as on the supply chain of gold.

The Supplement on Gold to the OECD Due Diligence Guidance provides specific recommendations on due diligence for companies at different levels

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<sup>53</sup> OHCHR (2014): Frequently asked questions about the Guiding Principles on Business and Human Rights, Q23.

<sup>54</sup> Federal Council (2016): Report on the Swiss strategy for the implementation of the UN Guiding Principles on Business and Human Rights - Report of the Federal Council in fulfillment of postulate 12.3503, Alec von Graffenried. The Swiss National Action Plan refers to the present expert study as a planned policy measure in Pi16.

<sup>55</sup> Federal Council (2016): Report on the Swiss strategy for the implementation of the UN Guiding Principles on Business and Human Rights – Report of the Federal Council in fulfillment of postulate 12.3503, Alec von Graffenried, p. 6.

<sup>56</sup> OECD (2011): Guidelines for Multinational Enterprises.

<sup>57</sup> OECD (2016): Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas.

<sup>58</sup> OECD (2006): Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.

of the gold supply chain from conflict-affected and high-risk areas for companies at different levels of the supply chain. It recommends five steps of specific measures that companies should take to avoid contributing to conflict and/or serious abuses of human rights in their gold supply chains. For further information on the measures recommended by the OECD Due Diligence Guidance, see Chapter 5.

### **OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector<sup>59</sup>**

The non-binding OECD Guidance for Meaningful Stakeholder Engagement in the Extractive Sector primarily addresses certain staff members of business enterprises within the extractive sector and does therefore not cover artisanal or informal extractive activities. The Guidance gives an overview on how to ensure effective stakeholder engagement and avoid and address adverse impacts. Some recommendations refer to corporate planning and/or management on adequately prioritizing stakeholder engagement at an organisational level. The main part of the Guidance focuses on practical due diligence guidance for on-ground personnel so as to ensure effective stakeholder engagement and address adverse impacts.

### **3.1.3 International Humanitarian Law**

International Humanitarian Law is applicable in situations of armed conflict and establishes fundamental principles of conduct in warfare, such as the strict distinction between combatants and non-combatants and the protection of civilians. While it is primarily binding on States, business enterprises that are operating in a country with an armed conflict are equally subject to International Humanitarian Law, if their activities are closely linked to the armed conflict – a requirement which is not always easy to determine.<sup>60</sup> If such a situation occurs business enterprises, for instance, have to make sure that any hired security personnel comply with International Humanitarian Law obligations,<sup>61</sup> that their acquisition of land and resources does not contribute to pillage<sup>62</sup> and that their business operations in conflict-affected areas do not involve forced labour.<sup>63</sup> Since countries that are rich in natural resources are often affected by conflicts,<sup>64</sup> international humanitarian law may be more relevant for the commodity sector than for other industries.

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<sup>59</sup> OECD (2017): Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector.

<sup>60</sup> ICRC (2006): Business and International Humanitarian Law, An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law, p. 14.

<sup>61</sup> ICRC (2006): Business and International Humanitarian Law, An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law, p. 21.

<sup>62</sup> ICRC (2006): Business and International Humanitarian Law, An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law, p. 22.

<sup>63</sup> ICRC (2006): Business and International Humanitarian Law, An Introduction to the Rights and Obligations of Business Enterprises under International Humanitarian Law, p. 23.

<sup>64</sup> For the so-called “resource curse” or “paradox of plenty”, see Tim Harford, Michael Klein (2005): Aid and the Resource Curse, The World Bank Group, Private Sector Development Vice Presidency, Note #291.

### 3.1.4 Recommendations from the UN Group of Experts on the Democratic Republic of Congo

In 2010, the Group of Experts on the Democratic Republic of the Congo established by the UN Security Council, issued recommendations to be endorsed by the Security Council on minerals from red flag locations to mitigate the risk of providing direct or indirect support for conflict in the eastern part of the DRC. The recommendations include due diligence guidelines for responsible supply chains for minerals linked to a risk of providing direct or indirect support for the conflict in the eastern part of the DRC. The guidelines consist of five steps similar to the OECD Guidance for Responsible Supply Chains mentioned above (Chapter 3.1.2).<sup>65</sup>

Moreover, the Group of Experts recommends the Security Council to call upon the member states to incorporate due diligence guidelines into national legislation and to support regional systems of certification that distinguish between national production and export and re-export of minerals from the DRC.<sup>66</sup> The Security Council supported the Group of Experts' Recommendations in its Resolution 1952 (2010) and called upon States to raise awareness of the due diligence guidelines and to "urge importers, processing industries and consumers of Congolese mineral products to exercise due diligence".<sup>67</sup> This development confirms, at least in the context of gold from the DRC, a strong international expectation that States should urge the gold industry to exercise due diligence that is consistent, at the minimum, with the guidelines recommended by the Group of Experts.

### 3.1.5 Council of Europe, Committee of Ministers, Recommendation CM/Rec(2016)3 on Human Rights and Business

In 2016, the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec(2016)3 on human rights and business. The recommendation is non-binding and addresses the member states of the Council of Europe. It aims at assisting member States in implementing the UNGP with an emphasis on gaps at the European level.<sup>68</sup> Similar to the UNGP, it covers business activities in general and therefore includes the gold industry.

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<sup>65</sup> Security Council, Letter dated 15 November 2010 from the Chair of the Security Council Committee established pursuant to resolution 1533(2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council, S/2010/596, p. 83-96.

<sup>66</sup> Security Council, Letter dated 15 November 2010 from the Chair of the Security Council Committee established pursuant to resolution 1533(2004) concerning the Democratic Republic of the Congo addressed to the President of the Security Council, S/2010/596, p. 96-98.

<sup>67</sup> Security Council, Resolution 1952(2010), para. 8.

<sup>68</sup> Council of Europe (2016): Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business; Council of Europe, CDDH (2016): Explanatory Memorandum to Recommendation CM/Rec(2016)3 of the Committee of Ministers to member States on human rights and business, CM(2016)18-addfinal.

### 3.1.6 European Union

EU Directive 2014/95<sup>69</sup> requires companies of a certain size and of public interest, which are domiciled within the EU to annually disclose non-financial and diversity information. This also includes information on human rights issues.

Furthermore, in May 2017, the EU passed Regulation 2017/821<sup>70</sup> on conflict minerals. Parts of the Regulation are applicable as of 9 July 2017 (art. 20 para. 2). However, the provisions for companies regarding the required due diligence measures, including disclosure requirements, will take effect after a transition period on 1 January 2021 (art. 20 para. 3).

The Regulation aims at preventing conflict minerals and metals from being imported into the EU, at banning global and EU-based smelters and refineries from using conflict minerals, and at protecting mine workers. It requires EU companies to ensure responsible sourcing when importing gold, tin, tungsten and tantalum with a particular focus on conflict-affected and high-risk areas.

The Regulation only applies to companies based within the EU that import a certain amount of the four minerals (art. 1 para. 3 and Annex 1 Regulation 2017/821). Nevertheless, it will also affect business enterprises outside the EU since EU-based companies will be required to make sure that any of their possible suppliers, such as refineries, are sourcing responsibly (art. 4 paras. f and g, art. 5 para. 4). In this respect, the Regulation is also relevant for Swiss companies.

Referring to the OECD Due Diligence Guidance for Responsible Supply Chains from Conflict-Affected and High-Risk Areas, the EU Regulation requires companies to establish a strong company management system (art. 4), to identify and assess risks in the supply chain and to implement a strategy to respond to identified risks (art. 5), to carry out independent third-party audits (art. 6) and to disclose information on supply due diligence (art. 7).

### 3.1.7 USA: Dodd-Frank Act

Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 aims at preventing the financing of armed groups in the east of the Democratic Republic of Congo through trade with conflict minerals. It therefore requires stock listed companies to annually disclose if they use certain minerals (including gold), from the DRC or its neighbouring States. If they do so, the companies are further required to report on their due diligence measures for preventing the financing of the conflict. The first reporting period started in January 2013.<sup>71</sup> According to the U.S. Securities

<sup>69</sup> Directive 2014/95/EU of the European Parliament and the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups.

<sup>70</sup> Regulation (EU) 2017/821 of the European Parliament and of the council of 17 May 2017 laying down supply chain due diligence obligations for Union importers of tin, tantalum and tungsten, their ores, and gold originating from conflict-affected and high-risk areas.

<sup>71</sup> U.S. Securities and Exchange Commission (2013): Specialized Corporate Disclosure.

and Exchange Commission's (SEC) implementation rules for Sec. 1502 manufacturers can meet these requirements *inter alia* by relying on refiners who have received "conflict-free" designation by a recognized industry group that requires an independent private sector audit of the smelter;<sup>72</sup> this would include schemes such as the London Bullion Market Association (LBMA) Responsible Gold Guidance<sup>73</sup> and the Responsible Jewellery Council's (RJC) Code of Practices and Chain of Custody.<sup>74</sup>

The Dodd-Frank Act is a national law, which is only legally binding for companies listed on a US-based stock exchange. However, the law is also relevant for non-US based suppliers of minerals: Since the companies are required to report on their due diligence measures along their supply chain, non-US based companies will also be required to disclose the origin of their minerals and their respective due diligence measures.<sup>75</sup> In this respect the Dodd-Frank Act also has an effect on companies outside of the US. The regulation can therefore be qualified as a national law with extraterritorial implications.<sup>76</sup> In August 2017, the Financial CHOICE Act which aims to repeal substantial parts of the Dodd-Frank Act, including Sec. 1502, was approved by the House of Representatives. Whether the proposal to repeal will pass in the Senate remains to be seen, as it would require 60 votes to pass.<sup>77</sup>

### 3.1.8 WTO Law

WTO law does not contain gold-specific provisions. The GATT requires WTO members to generally liberalise the trade with goods, including gold, by treating foreign and domestic goods equally (national treatment, art. III GATT) and by not discriminating between WTO members (most favoured nation treatment, art. I GATT). In the gold context, these provisions may become relevant if, for example, a WTO member decides to regulate the import of gold, by requiring a certificate on human rights compliance, similar to the Kimberley Scheme for conflict diamonds.<sup>78</sup> Generally speaking, a country would then have to justify its measure by invoking the exception clause of public order in art. XX (a) GATT by arguing that the certificate is required in the public interest to safeguard human rights.

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<sup>72</sup> U.S. Securities and Exchange Commission (2012): Conflict Minerals – Final Rule, 17 CFR parts 240 and 249b, D.1.c Reasonable Country of Origin Inquiry, final rule, p. 149.

<sup>73</sup> See chapter 5.1.2 below.

<sup>74</sup> See chapter 5.1.2 below.

<sup>75</sup> U.S. Securities and Exchange Commission (2013/2014): Dodd-Frank Wall Street Reform and Consumer Protection Act, Frequently Asked Questions.

<sup>76</sup> For the categorization of national measures in national measures with extraterritorial implications and direct extraterritorial jurisdiction, see: HRC (2010): Business and Human Rights: Further steps toward the operationalization of the "protect, respect and remedy" framework, para. 49.

<sup>77</sup> Financial CHOICE Act of 2017, H.R. 10 – 115<sup>th</sup> Congress (2017/18).

<sup>78</sup> The WTO members agreed on a Waiver for the Kimberley scheme: Waiver concerning Kimberley Process Certification Scheme for Rough Diamonds, Decision of 15 May 2003, WT/L/518 (27 May 2003).

### 3.1.9 Other Instruments

#### **Extractive Industries Transparency Initiative**

The Extractive Industries Transparency Initiative (EITI) is a global standard to promote the open and accountable management of oil, gas and mineral resources by States with extractive industries. The initiative can be adopted by countries with gold resources. The standard must be implemented on a national level. A key element of the EITI is the disclosure of information on the respective State's natural resource management, such as licencing and taxing of companies within the extractive industry, so that it becomes more transparent regarding how much revenue is being generated, where it ends up and who benefits from it.<sup>79</sup>

As a country without an extractive industry Switzerland is not formally a member of EITI. Instead, it is an EITI-supporting country and provides funding for the EITI International Secretariat. Switzerland has been supporting governance efforts in natural resources for many years.

#### **Voluntary Principles on Security and Human Rights**

The non-binding *Voluntary Principles on Security and Human Rights* are a multi-stakeholder initiative addressing companies within the extractive industry (oil, gas and mining) and provide guidance to help ensuring that human rights are respected when using services of private and public security providers to protect extractive industries' operations.<sup>80</sup> The Voluntary Principles are relevant for and can be applied by Swiss companies within the commodity and gold sector, insofar as they have extractive operations where private or public security services are provided. In 2013, Switzerland chaired the Voluntary Principles on Security and Human Rights, and under the Swiss chair, a Strategy 2013-2016 was adopted.

#### **Montreux Document on Private Military and Security Companies**

The *Montreux Document on Private Military and Security Companies* of 2008 is a non-binding instrument that compiles existing legal obligations as well as good practices in the context of activities of private military and security companies in armed conflicts.<sup>81</sup> The Montreux Document is complemented by the International Code of Conduct for Private Security Service Providers (ICoC), which provides a compilation of standards for security companies regarding their responsibility to respect human rights and humanitarian law. Companies that become signatories of the ICoC are subject to an oversight mechanism, and in some countries adherence to the ICoC is a prerequisite for obtaining a national license to operate.

#### **Indigenous Peoples Rights Documents**

The UN Declaration on the Rights of Indigenous Peoples<sup>82</sup> and the ILO convention on Indigenous and Tribal Peoples<sup>83</sup> are highly relevant with re-

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<sup>79</sup> For further information see: <https://eiti.org> (28.8.2017).

<sup>80</sup> Further information on the Voluntary Principles on Security and Human Rights are available on its website: <http://www.voluntaryprinciples.org/> (17.8.2017).

<sup>81</sup> See <http://www.mdforum.ch/>.

<sup>82</sup> UN Declaration on the Rights of Indigenous Peoples, A/RES/61/295.

<sup>83</sup> ILO Convention 169 (1989): Indigenous and Tribal Peoples.



gard to the definition of free, prior and informed consent of indigenous peoples in the context of exploitation of their lands and resources.

### 3.1.10 Other Relevant Developments at a National Level

The following regulatory developments are of particular interest for the topic of this study.

#### **United Kingdom: Modern Slavery Act**

In 2015, the Modern Slavery Act was adopted in the United Kingdom.<sup>84</sup> Among other provisions, it requires enterprises with a minimum turnover of £36 Mio. and business activities in the UK to annually publish a declaration on the measures taken for preventing modern slavery and trafficking within the enterprise itself and its whole supply chain. The declaration has to be signed by a member of the board of directors or an equivalent body. Several enterprises with activities in the gold supply chain, including Swiss companies, published such a declaration.<sup>85</sup>

#### **Netherlands: International Responsible Business Conduct (IRBC) Agreement for Responsible Gold Value Chain**

In June 2017, electronics manufacturers, jewellery makers, gold recycling firms, civil society organisations and the Dutch government signed the Dutch Gold Sector International Responsible Business Conduct (IRBC) Agreement. The Agreement aims at ensuring the respect for human rights and the environment throughout the gold value chain and is only binding for its signatories.<sup>86</sup>

#### **Netherlands: Child Labour Due Diligence Law (Draft)**

The Senate of the Dutch Parliament is currently debating the adoption of the Child Labour Due Diligence Law.<sup>87</sup> If adopted, it would require business enterprises offering products or services in the Netherlands to monitor their whole supply chains for potential use of child labour, implement measures to combat child labour within their supply chains and – similar to the UK Modern Slavery Act – to publish a declaration on all the measures taken. Once adopted, the law would apply to Swiss companies offering products and services in the Netherlands.

#### **France: *Loi sur le devoir de vigilance***

On 29 March 2017, the new French law on a duty of care (*devoir de vigilance*) for companies entered into force.<sup>88</sup> The law requires a detailed due

<sup>84</sup> Modern Slavery Act 2015, see: <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted/data.htm>.

<sup>85</sup> See: <http://www.modernslaveryregistry.org/>. Among these companies is Glencore.

<sup>86</sup> SER, Agreement on international responsible business conduct of companies in the Netherlands with gold or gold bearing materials in their value chains. See: <https://www.internationalrbc.org/~media/files/imvo/gold/agreement-gold.ashx>.

<sup>87</sup> Wet Zorgplicht Kinderarbeid, Kamerstukken I, 2016/17, 34 506, adopted by the House of Representatives on 7 February 2017, currently pending in the Senate with the next hearing scheduled for 19 December 2017, see: [https://www.eerstekamer.nl/wetsvoorstel/34506\\_initiatiefvoorstel\\_kuiken](https://www.eerstekamer.nl/wetsvoorstel/34506_initiatiefvoorstel_kuiken).

<sup>88</sup> New Articles L225-102-4, L225-102-5 Code de commerce, introduced by the Loi 2017-399 (Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, 27.3.2017), see (in French): [http://www.assemblee-nationale.fr/14/dossiers/devoir\\_vigilance\\_entreprises\\_donneuses\\_ordre.asp](http://www.assemblee-nationale.fr/14/dossiers/devoir_vigilance_entreprises_donneuses_ordre.asp).

diligence process for human rights and environmental risks combined with reporting obligations. It applies to French companies with more than 5'000 employees and to any other company doing business in France with more than 10'000 employees. Large Swiss businesses in the gold supply chain may therefore be subject to this law.

## 3.2 Legal Framework Switzerland

This chapter summarizes and analyses national legal sources with regard to their relevance for regulating the import, smelting and refining of gold in Switzerland and their potential to prevent the import of gold that was produced under conditions of human rights violations.

### 3.2.1 Control of Precious Metals

The control of precious metals in Switzerland is regulated by the Precious Metals Control Act (PMCA)<sup>89</sup> and the Precious Metals Control Ordinance (PMCO).<sup>90</sup> Further information on the PMCA and the PMCO is available in the Instructions on the application of precious metals legislation by the Central Office for Precious Metals Control (OPMC).<sup>91</sup>

The PMCA and the Swiss Unfair Competition Law (UWG)<sup>92</sup> share similar aims. According to the FCA, the main goals of the PMCA and the PMCO are the protection of consumers against inferior goods,<sup>93</sup> the protection of manufacturers against unfair competition and the preservation of the good reputation of Swiss quality in the precious metal sector.<sup>94</sup> The determination of origin, the abolishment or mitigation of risks that imported goods have been obtained in an illegal way, such as metals extracted or produced under unlawful conditions e.g. under human rights violations, are not an explicit objective of the regulation. Nevertheless, the UWG does not preclude the consideration of human rights violations as an element of unfair competition.<sup>95</sup>

The OPMC, part of the FCA, supervises the trade with gold, silver, platinum and palladium (art. 1 para. 1 and art. 36 para. 1 PMCA). It deals with the registration of responsibility marks (art. 9-12 PMCA) and supervises the official controlling and hallmarking of precious metal articles (art. 13-19 PMCA).

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<sup>89</sup> Federal Act on the Control of the Trade in Precious Metals and Precious Metal Articles (Precious Metals Control Act, PMCA) of 20 June 1933, SR 941.31.

<sup>90</sup> Ordinance on the Control of Trade in Precious Metals and Articles of Precious Metals (Precious Metals Control Ordinance, PMCO) of 8 May 1934, SR 941.311.

<sup>91</sup> Eidgenössische Oberzolldirektion, Zentralamt für Edelmetallkontrolle, Instruktionen über die Anwendung der Edelmetallgesetzgebung (EMKI), 1.5.2017.

<sup>92</sup> Federal Law on Unfair Competition of 19 December 1986, SR 241.0.

<sup>93</sup> See, for instance, Dobler (2013): Es ist nicht alles Gold was glänzt, Ein Überblick über die Bezeichnungsvorschriften der Schweizer Edelmetallgesetzgebung.

<sup>94</sup> OPMC (2017): Instruktionen über die Anwendung der Edelmetallgesetzgebung (EMKI)..

<sup>95</sup> Weber/ Weber (2008): Unlauteres Marktverhalten des Importeurs bei Nichteinhaltung von Arbeitsbedingungen durch ausländische Lieferanten?, p. 901.

### **Import of precious metal articles**

The import of precious metal articles as defined in art. 1 para. 4 and 5 PMCA and in art. 2 PMCA is regulated in art. 20 PMCA. In contrast, the import of melt products, such as ingots and bars (art. 1 para. 2 PMCA) and melt material (art. 1 para. 3 PMCA) does not fall within the scope of art. 20 PMCA. The import of precious metal articles is allowed if the requirements of the PMCA (art. 20 para. 1 PMCA and art. 126 para. 1 and 2 PMCO) are met, which mainly means correct marking of articles, such as jewellery or watches. Some specific articles are excluded from the import requirements (art. 128 PMCO). The imported precious metal articles have to be declared to customs (art. 130 PMCO) and might be subject to analytical controls (article 131 PMCO). According to art. 20 para. 3 PMCA, imported precious metal articles are subject to comprehensive or random testing. If the testing reveals that an offence has been committed, the precious metal articles must be seized and forwarded to the PMC which then may file a criminal complaint (see also art. 131 para. 2 PMCO). If no criminal offence has been committed but the precious metal articles do not meet the requirements of the PMCA, they are returned across the border (art. 20 para. 3 PMCA and art. 131 para. 3 PMCO). The same procedure applies to precious metal articles in transit through Switzerland (art. 22 PMCA). If the OPMC suspects incorrect marking or that the provisions for the protection of intellectual property were violated, it reports to the aggrieved party and may retain the articles (art. 22a PMCA).

The requirements for the import of precious metal articles according to art. 20 PMCO also apply to the removal of such articles from customs or bonded warehouses (art. 22 para. 3 PMCA). The requirements further apply to articles that do not enter the domestic market and remain under customs supervision, but are forwarded abroad with Swiss transport papers duty unpaid (art. 22 para. 2 PMCA and art. 140 PMCO).

With respect to human rights, the PMCA/PMCO does not establish any specific due diligence or verification requirements for gold that is imported into Switzerland.

### **Melter's licences**

The OPMC is further responsible for granting melters' licences and for the supervision of the determination of the fineness of melt products (art. 36 para. 2 PMCA). Articles 25 PMCA and 165a and 165b PMCO specify the requirements for obtaining a melter's licence: Commercial enterprises, co-operatives and Swiss branches of foreign enterprises must be entered in the Swiss commercial register and the persons entrusted with the administration and business management of the company must be of good standing and offer proof of irreproachable business operations (art. 25 para. 3 PMCA). According to the OPMC these requirements are met through submitting excerpts of the criminal record and/or of the commercial register. The licence is granted for a period of four years and may be renewed if the statutory requirements are met (art. 26 para. 1 PMCA). The licence can be withdrawn temporarily or permanently, if the licence holder no longer satisfies the requirements for obtaining a licence or has repeatedly violated its obligations (art. 26 para. 2 PMCA and art. 166a PMCO).

Holders of a melter's licence are only allowed to accept melt material from persons who can prove its lawful acquisition. In addition, the offering party's identity must be verified (art. 168a para. 1 and 2 PMCO). The licence holder has to clarify the origin of the melt material in more detail if its origin or the identity of the offering party is doubtful (art. 168a para. 3 PMCO) and report to the police if any suspicion arises that the material has been unlawfully acquired (art. 168a para. 5 PMCO). In order to comply with those requirements, the licence holders have to take the necessary organisational measures (art. 168b para. 1 PMCO). Until now, the term "lawful acquisition" has been interpreted so as to exclude material obtained in violation of legally binding norms, for example by theft. Since as a rule, private actors in a melter's supply chain are not formally bound by human rights, such an interpretation results in art. 168a PMCO not covering human rights aspects. While the German version of art. 168a para. 1 PMCO "Personen, die sich über deren rechtmässigen Erwerb ausweisen können" seems to leave room for a broader understanding which could include formally non-binding human rights standards, the French and the Italian text focus on the legal notion of property and possession with their emphasizing the supplier's status as legal owner or possessor of the goods ("personnes en mesure d'établir leur qualité de propriétaire légitime" and "persone che siano in grado di provare la loro qualità di legittimi possessori").

In sum, the PMCA/PMCO do not establish a specific human rights due diligence as a requirement for obtaining and keeping a melter's licence.

The OPMC supervises the operations of melter's licences holders (art. 168d para. 2 PMCO) and is therefore permitted to inspect the business documents, commercial accounts and goods storage (art. 168d para. 3 PMCO). Non-compliance with PMCA/PMCO may lead to criminal charges (see art. 44 et. seq. PMCA and art. 179 et. seq. PMCO).

### 3.2.2 Civil Law

If a Swiss company imports and/or purchases gold that was produced under human rights violating circumstances, the question of civil liability under Swiss corporate law and/or Swiss tort law arises.<sup>96</sup> If a company that imports gold that was produced under human rights violating circumstances risks of being held liable in civil court, civil law might have a preventive effect on such gold from being imported.<sup>97</sup> The preventive effect depends on circumstances, such as enforcement and its perception by each individual company.

#### **Corporate law**

In Swiss civil law there neither exists a specific provision on the liability of companies that import and/or purchase gold which was produced under

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<sup>96</sup> The question of civil liability of foreign companies (e.g. subsidiaries and suppliers of Swiss companies) goes beyond the scope of the present study and is therefore not being covered by the following remarks. For further information on civil liability of foreign companies, especially of foreign subsidiaries and suppliers of Swiss companies, under Swiss law and Swiss jurisdiction see: Kaufmann et al. (2016), 2016 Extraterritorialität im Bereich Wirtschaft und Menschenrechte, p. 63-64.

<sup>97</sup> Geisser (2017): Die Konzernverantwortungsinitiative, p. 946.

human rights violating circumstances,<sup>98</sup> nor a specific obligation on non-financial reporting that explicitly includes reporting on human rights impacts of business activities.<sup>99</sup> A motion of the Foreign Affairs Committee of the National Council to implement human rights due diligence and non-financial reporting requirements in Swiss corporate law was rejected by the National Council in March 2015.<sup>100</sup> However, the Federal Council currently proposed the introduction of yearly non-financial disclosure requirement for producing companies within the extractive industry regarding their payments to government agencies.<sup>101</sup> Furthermore, the Federal Popular Initiative “Responsible Business Initiative” aims at introducing human rights due diligence obligations for Swiss companies in the Constitution. According to the launching committee, unsuccessful attempts to introduce binding norms on corporate due diligence in parliament are among the triggers for the initiative.<sup>102</sup> On 15 September 2017 the Federal Council adopted its dispatch on the “Responsible Business Initiative” and requested the Swiss Parliament to recommend the rejection of the Initiative.<sup>103</sup>

Some elements of a human rights due diligence can be derived from existing legal provisions within Swiss corporate law in the Code of obligations (CO).<sup>104</sup> Theoretically and only under restricted circumstances, the obligation to assess business activities’ impacts on human rights can be derived from the duty of care and loyalty of the board of directors (art. 717 CO).<sup>105</sup> Furthermore, human rights implications of companies’ activities might fall within the ordinary reporting requirements (art. 957 et. seq. CO) if they have the potential of becoming a relevant and material risk factor for the company.<sup>106</sup> In case of non-compliance with the said provisions, the board

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<sup>98</sup> Kaufmann et al. (2016): Extraterritorialität im Bereich Wirtschaft und Menschenrechte, para. 210.

<sup>99</sup> Kaufmann et al. (2013): Umsetzung der Menschenrechte in der Schweiz, Eine Bestandesaufnahme im Bereich Menschenrechte und Wirtschaft, para. 65; SICL (2013): Gutachten über gesetzliche Verpflichtungen zur Durchführung einer Sorgfaltsprüfung bezüglich Menschenrechte und Umwelt bei Auslandaktivitäten von Unternehmen und zur Berichterstattung über getroffene Massnahmen, p. 53.

<sup>100</sup> See: <https://www.parlament.ch/de/ratsbetrieb/suche-curia-vista/geschaefft?AffairId=20143671> (10.8.2017).

<sup>101</sup> Federal Council (2016): Botschaft zur Änderung der Obligationenrechts (Aktienrecht), 23.11.2016, BBI 2017, p. 620-625.

<sup>102</sup> BBI 2017, p. 6379; For further information on the Responsible Business Initiative see <http://konzern-initiative.ch/?lang=en> (28.8.2017).

<sup>103</sup> Federal Council (2017): Botschaft zur Volksinitiative „Für verantwortungsvolle Unternehmen – zum Schutz von Mensch und Umwelt“, 15.9.2017, BBI 2017, p. 6335-6378.

<sup>104</sup> Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations), of 30 March 1911, SR 220.

<sup>105</sup> For further details, see: SICL (2013): Gutachten über gesetzliche Verpflichtungen zur Durchführung einer Sorgfaltsprüfung bezüglich Menschenrechte und Umwelt bei Auslandaktivitäten von Unternehmen und zur Berichterstattung über getroffene Massnahmen, p. 40-51; Kaufman et al. (2016): Extraterritorialität im Bereich Wirtschaft und Menschenrechte, para. 210.

<sup>106</sup> SICL (2013): Gutachten über gesetzliche Verpflichtungen zur Durchführung einer Sorgfaltsprüfung bezüglich Menschenrechte und Umwelt bei Auslandaktivitäten von Unternehmen und zur Berichterstattung über getroffene Massnahmen p. 54. For more details on reporting on human rights implications of business activities according to Swiss law, see p. 51-56.

of directors or members of the management may become liable (art. 754 para. 1 CO).<sup>107</sup>

### **Tort law**

In principle, human rights abuses by companies may fulfil the elements of tort (art. 41 CO). Therefore, civil liability of a Swiss company under tort law for the purchase and/or import of gold, which was produced under human rights violating circumstances abroad, is theoretically possible. For international tort cases, the Lugano Convention<sup>108</sup> determines the jurisdiction while the Federal Code on Private International Law (CPIL)<sup>109</sup> defines the applicable national law. When a company is domiciled in Switzerland, such civil suit would fall under Swiss jurisdiction (art. 2 Lugano Convention).

However, according to art. 133 CPIL any lawsuit against a Swiss company based on human rights violations as a tort abroad would normally be assessed under the law of the State where the human rights violation has occurred or where the act has been committed and therefore most likely not under Swiss law. Swiss law could become applicable in the rare cases of the ordre-public provision (art. 17 CPIL)<sup>110</sup> or the overriding mandatory rule (art. 18 CPIL).<sup>111</sup> As far as can be ascertained, in the context of business related human rights violations abroad, there has never been such a specific case in Switzerland.

Furthermore, it is argued in the literature that adverse human rights impacts due to the activities of foreign subsidiaries may, under specific circumstances, be attributed to their Swiss mother company.<sup>112</sup> However, the issue has not yet been decided and clarified by the Federal Supreme Court.

## **3.2.3 Criminal Liability**

### **In general**

Swiss criminal law might serve as an instrument to prevent the import of gold, which was produced under human rights violating circumstances, if Swiss companies risk being held criminally liable under the Swiss Criminal Code (SCC)<sup>113</sup> in case of importing/purchasing such gold.

Art. 102 SCC stipulates the criminal liability of companies. For most criminal offenses, it establishes subsidiary liability, which only becomes relevant, if the responsible natural person cannot be identified due to deficient organ-

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<sup>107</sup> For further details see SICL (2013): Gutachten über gesetzliche Verpflichtungen zur Durchführung einer Sorgfaltsprüfung bezüglich Menschenrechte und Umwelt bei Auslandaktivitäten von Unternehmen und zur Berichterstattung über getroffene Massnahmen, p. 50-51.

<sup>108</sup> Lugano Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 30 October 2007, SR 0.275.12.

<sup>109</sup> Federal Code on Private International Law of 18 December 1987, SR 291.

<sup>110</sup> Geisser (2017), Die Konzernverantwortungsinitiative, p. 947; Kaufmann et al. (2016): Extraterritorialität im Bereich Wirtschaft und Menschenrechte, p. 61-62.

<sup>111</sup> Kaufmann et al. (2016): Extraterritorialität im Bereich Wirtschaft und Menschenrechte, p. 61-62.

<sup>112</sup> Weber/ Baisch (2016): Liability of Parent Companies for Human Rights Violations of Subsidiaries, European Business Law Review 2016, pp. 669 et seq., 684-691; Geisser (2017): Die Konzernverantwortungsinitiative, p. 954.

<sup>113</sup> Swiss Criminal Code, SR 311.0.

isation of the company (art. 102 para. 1 SCC). As an exception, art. 102 para. 2 SCC further stipulates primary criminal liability of companies, in case they are to blame for not implementing measures to prevent such offences. Primary criminal liability of companies is limited to specific criminal offences, such as money laundering and corruption,<sup>114</sup> which theoretically might become relevant for a company in the gold industry when, for instance, when a refinery accepts melting material that was obtained from mines that were illegally confiscated in an armed conflict.

Whether Swiss territorial jurisdiction for such cases of criminal corporate liability according to art. 102 para. 2 SCC can be established through the place where the company should have implemented its managerial measures, i.e. Switzerland, is disputed.<sup>115</sup> If jurisdiction in Switzerland is accepted, the fact that the actual crime has taken place outside of Switzerland becomes irrelevant.

### **Money laundering and bribery offences**

The purchase or processing of gold that was produced under human rights violating circumstances might meet the constitute elements of different criminal offences according to the SCC. Especially relevant in this respect is money laundering (art. 305<sup>bis</sup> SCC).

Money laundering is one of the offences which establish a direct criminal liability of corporations under art. 102 para. 2 SCC, under the condition that they have not implemented reasonable organisational measures to prevent such offences. It covers acts that are “aimed at frustrating the identification of the origin, the tracing or the forfeiture of assets which he knows or must assume originate from a felony or aggravated tax misdemeanour” (art. 305<sup>bis</sup> SCC). Object of the crime is any asset,<sup>116</sup> which also covers gold of any form (no difference is made between raw gold, refined gold or gold products). The asset (or more specifically, the gold) has to originate from a felony, which can also have taken place abroad.<sup>117</sup> The actual criminal act consists of making it impossible to trace the origin or to find and/ or to confiscate the gold.<sup>118</sup> Money laundering requires intent by the perpetrator.<sup>119</sup>

Bribery of foreign public officials, for instance, in order to obtain a mining licence meets the constitute elements of art. 322<sup>septies</sup> para. 1 SCC which also establishes direct criminal liability of corporations (art. 102 para. 2 SCC). Switzerland also ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in

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<sup>114</sup> For further explanations on criminal liability of companies according to Swiss law and in the context of human rights violations abroad, see: Kaufmann et al. (2016): Extraterritorialität im Bereich Wirtschaft und Menschenrechte, p. 65-66.

<sup>115</sup> In favour: Niggli/Gfeller (2013): Siebenter Titel: Verantwortlichkeit des Unternehmens, Art. 102, para. 430 et seq.; against: Donatsch (2013): Art. 102, para. 3

<sup>116</sup> Pieth (2013): Kommentar zu Art. 305 bis StGB, Art. 305bis paras. 9-10.

<sup>117</sup> Pieth (2013), Kommentar zu Art. 305 bis StGB, Art. 305bis para. 67.

<sup>118</sup> Pieth (2013), Kommentar zu Art. 305 bis StGB, Art. 305bis para. 37.

<sup>119</sup> Pieth (2013): Kommentar zu Art. 305 bis StGB, Art. 305bis para. 59.

2000, which establishes legally binding standards with regards to bribery of foreign public officials in international business transactions.<sup>120</sup>

#### **Case Study: Argor-Heraeus<sup>121</sup>**

So far, there has been one case of criminal proceedings based on alleged money laundering activities in connection with human rights abuses in Switzerland. In 2013, after the filing of a complaint by TRIAL, the Swiss Federal Prosecutor opened a criminal investigation against Argor-Heraeus and its Vice President on accounts of the accusation of having committed money laundering in connection with war crimes and complicity in the war crime of pillage. Firstly, the Federal Prosecutor concluded that Argor-Heraeus, in fact, had refined gold on a contractual basis for a third party. The gold originated from circumstances in the Democratic Republic of Congo that amounted to the war crime of pillage. Secondly, the Federal Prosecutor determined whether the refinery's actions would fall under the definition of complicity to the mentioned war crime of pillage. He affirmed that on the objective elements of complicity, the refining of the gold was causal for the pillage in the sense that pillage of raw gold only becomes lucrative once the raw gold is being refined. On the subjective elements of complicity, however, the Federal Prosecutor denied that the refinery knowingly wanted the actual perpetrator to expropriate the affected people in the DRC. The Federal Prosecutor further concluded that for complicity in the war crime of pillage, it was not enough that Argor-Heraeus could have known about these circumstances. Thirdly, the Federal Prosecutor addressed the accusation of money laundering. It denied that the refinery had committed any acts of concealing of the actual origin of the product: Once the gold arrived at the refinery it had already been processed several times and it was impossible to determine its origin. The Federal Prosecutor neither found any obscuring acts within bookkeeping of the refinery. On the other hand, the Federal Prosecutor came to the conclusion, that Argor-Heraeus would have had the obligation to further investigate in the gold's origin due to its own internal guidelines but denies that the refinery intentionally ignored concrete evidence for the gold's criminal background as is required by art. 305bis SCC.

In conclusion, the Federal Prosecutor denied that Argor-Heraeus had been complicit to the war crime of pillage or had committed money laundering through refining of gold that was illegally produced in the DRC. It therefore dismissed the case in 2015, which in return was heavily criticised by TRIAL and other NGOs.<sup>122</sup>

### **3.2.4 Money Laundering**

The Federal Act on Combating Money Laundering and Terrorist Financing (Anti-Money Laundering Act, AMLA) of 10 October 1997 (SR 955.0) applies

<sup>120</sup> OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Adopted by the Negotiating Conference on 21 November 1997, available at: [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf) (24.10.2017).

<sup>121</sup> Office of the Attorney General of Switzerland: Einstellungsverfügung, 10 March 2015 (SV.13.1374-MUA), anonymised version.

<sup>122</sup> For further information on the Argor-Heraeus case, see, for instance, <https://business-humanrights.org/en/argor-heraeus-investigation-re-dem-rep-of-congo> (21.8.2017).



to financial intermediaries and to dealers (natural persons and legal entities) that accept cash while dealing commercially with goods (articles 2 AMLA and 13 AMLO [Anti-Money Laundering Ordinance; SR 955.01]).

Companies within the gold value chain may be defined as financial intermediaries according to art. 2 para. 3 lit. c AMLA if the threshold criteria according to art. 7 AMLO are met. Swiss anti-money laundering legislation applies to trade with monetary-used gold (art. 5 para. 1 lit. a AMLO) which includes, according to art. 178 para. 2 PMCO, gold bars and granules of a fineness of 995 thousandth, as well as (under certain circumstances) investment coins of the same fineness.<sup>123</sup> On the contrary, anti-money laundering legislation is not applicable to trade with raw gold or products (partially) made of gold.<sup>124</sup> In addition, AMLA is not applicable to the Swiss National Bank (art. 2 para. 4 lit. a AMLA).

The trade with raw gold only may fall within the scope of art. 2 para. 3 lit. c AMLA if it is traded at the stock exchange for a third party's account (art. 5 para. 1 lit. c AMLO). Trade with raw gold outside stock exchange falls within the scope of AMLA if it is traded for a third party's account and the material's degree of standardization is high enough for it to be liquidated at any time (art. 5 para. 1 lit. d AMLO).<sup>125</sup>

Swiss companies, trading with monetary-used gold, as it is defined by the PMCO, or with raw gold and meeting the requirements of art. 5 para. 1 lit. c or lit. d AMLO, are considered as financial intermediaries according to art. 2 para. 3 AMLA<sup>126</sup> and therefore subject to the duty of due diligence (art. 3 et. seq. AMLA).

The following table gives an overview on which gold trade activities are covered by Swiss anti-money laundering law:

| Covered by AMLA   | Not covered by AMLA   |
|---|---|
| <b>Trade with monetary-used gold (as defined in art. 178 PMCO)</b>                  | <b>Trade with non-monetary-used gold</b>  |
| - Buying and selling of monetary-used gold  | - Buying and selling of melt materials, precious metal articles, semi-factured products, plated articles and imitations   |
| - Buying of melt material in order to fabricate and then selling monetary-used gold | - Buying and selling of monetary-used gold of/to manufacturers in order to produce precious metal articles, semi-factured products, plated articles or imitations |

<sup>123</sup> Finma (2011): Rundschreiben 2011/1, paras. 75-80; Thelesklaf /Wyss /Zollinger /van Tiel (2009):, Kommentar Geldwäschereigesetz, p. 42.

<sup>124</sup> Finma (2011): Rundschreiben 2011/1, para. 82.

<sup>125</sup> See also: FINMA (2011): Rundschreiben 2011/1, para. 72.

<sup>126</sup> "Financial intermediaries are also persons who on a professional basis accept or hold on deposit assets belonging to others or who assist in the investment or transfer of such assets; they include in particular persons who: [...] trade for their own account or for the account of others in banknotes and coins, money market instruments, foreign exchange, precious metals, commodities and securities (stocks and shares and value rights) as well as their derivatives." (art. 2 para. 3 lit. c AMLA).

| Trade with raw gold  | Trade with raw gold   |
|--|---|
| - Trading of raw gold at stock exchange for a third party's account  | - Trading of raw gold for own account   |
| - Trading of raw gold outside the stock exchange for a third party's account in case the raw material's degree of standardization is high enough for it to be liquidated at any time | - Trading of raw gold outside the stock exchange for a third party's account if material's degree of standardization is not high enough |

Financial intermediaries are generally required to take measures to prevent money laundering and terrorist financing in their field of business and ensure adequate staff training and that checks are carried out (art. 8 AMLA). With the exception of business relationships that only involve assets of low value and where no suspicion of money laundering or terrorist financing exists (art. 7a AMLA), financial intermediaries are particularly required to (1) verify the identity of their customers upon the establishment of a business relationship (art. 3 AMLA) and (2) establish the identity of the beneficial owner (art. 4 AMLA). Those steps are to be repeated if any doubt arises on the identity of the customer or the beneficial owner (art. 5 AMLA). The financial intermediary is further required to ascertain the nature and purpose of the business relationship (art. 6 para. 1 AMLA). Under certain circumstances financial intermediaries are required to clarify the economic background and purpose of a transaction or a business relationship. This obligation applies to situations of unusual transaction or business relationship, unless its legality is clear or if there are indications that assets are the proceeds of a felony, an aggravated tax misdemeanour, subject to the power of disposal of a criminal organization or serve the financing of terrorism; or in cases where the transaction or the business relationship carries a higher risk, as is the case of politically exposed persons (art. 6 paras. 2-4 AMLA). Financial intermediaries are furthermore required to keep records of transactions (art. 7 AMLA).

Under certain circumstances, the financial intermediary is required to file a report with the Money Laundering Reporting Office Switzerland (art. 9 AMLA). This applies, for instance, if the financial intermediary knows or has reasonable grounds to suspect that assets involved in business relationships are connected to certain criminal offences (criminal organizations art. 260ter SCC or money laundering art. 305bis SCC) or that the assets are the proceeds of a felony or an aggravated tax misdemeanour (art. 305bis number 1<sup>bis</sup> SCC). It is further obliged to freeze all assets that are connected to the reported business relationship in certain circumstances (art. 10 AMLA) and prohibited to inform the person concerned or any other party<sup>127</sup> on the report (art. 10a AMLA). In case of non-compliance with the above-mentioned duty to report, the respective company will be held criminally liable (see art. 37 AMLA).

<sup>127</sup> The self-regulatory organisation to which the financial intermediary is affiliated is not considered a third party. The same applies to FINMA and the Federal Gaming Board in relation to the financial intermediaries under their respective supervision.

This means, that a company trading with monetary-used gold, that knows or has reasonable grounds to suspect that purchased gold originates from human rights violating circumstances, has the obligation to immediately report to the Money Laundering Reporting Office if these human rights violating circumstances meet the constitute elements of a felony.

### 3.2.5 Public Procurement

Public procurement is regulated on the Federal, the cantonal, as well as on the communal level. This chapter focuses on the regulations on the federal level. Public procurement is regulated by the Federal Act on Public Procurement,<sup>128</sup> which is currently being revised.<sup>129</sup>

For services in Switzerland, contracts are only awarded to contractors that ensure compliance with Swiss health and safety regulations/labour rights and equal pay for men and women (art. 8, para. 1, lit. b and c Federal Act on Public Procurement). For services abroad, the contractor has to ensure compliance with the eight ILO Core Conventions (art. 7, para. 2 Federal Ordinance on Public Procurement). To ensure compliance, providers are usually required to explicitly commit to the obligations, mentioned above, and also to ensure compliance by their respective subcontractors or suppliers.<sup>130</sup> Non-compliance with the obligations may lead to revocation of the award, the exclusion from the pending or future procurement procedures (art. 11 Federal Act on Public Procurement) and/or penalties (art. 6 Federal Ordinance on Public Procurement).

### 3.2.6 Competition Law

Non-compliance with human right standards in the supply chain might theoretically also raise questions under the Federal Act on Unfair Competition. The Federal Act on Unfair Competition includes some provisions that may, at least theoretically and by their deterrent effect due to the respective penalties, have a preventive effect on gold produced under human rights violating circumstances from being imported to Switzerland.

Firstly, companies that create the false appearance that they ensure their suppliers' compliance with human rights standards abroad and thereby give misleading information on their business practices may meet the criteria of unfair competition according to art. 3 para. 1 lit. b of the Federal Act on Unfair Competition. Secondly, non-compliance with working conditions that are also imposed on competitors either through (customary) law or through a contract might be considered as an act of unfair competition (art. 7 of the Federal Act on Unfair Competition).

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<sup>128</sup> Federal Act on Public Procurement, SR 172.056.1

<sup>129</sup> Draft of revised Federal Act on Public Procurement, available at: <https://www.bkb.admin.ch/bkb/de/home/oeffentliches-beschaffungswesen/revision-des-beschaffungsrechts.html> (12.9.2017).

<sup>130</sup> See: [https://www.bkb.admin.ch/dam/bkb/de/dokumente/Oeffentliches\\_Beschaffungswesen/Arbeitschutz/Selbstdeklaration\\_07\\_02\\_2013.pdf.download.pdf/Selbstdeklaration%20allgemein.pdf](https://www.bkb.admin.ch/dam/bkb/de/dokumente/Oeffentliches_Beschaffungswesen/Arbeitschutz/Selbstdeklaration_07_02_2013.pdf.download.pdf/Selbstdeklaration%20allgemein.pdf) (24.7.2017).

Competitors, associations, customers and the Swiss Government are entitled to initiate a civil and/or criminal proceeding in case of a violation of art. 3 para. 1 lit. b and/or art. 7 of the Federal Act on Unfair Competition (see art. 10 and 23 of the Federal Act on Unfair Competition). So far, no proceedings on the abovementioned provisions of the Federal Act on Unfair Competition in connection with human rights violations in the supply chain have been initiated in Switzerland.<sup>131</sup>

### 3.3 Comparison with Other National Legal Frameworks

To compare the Swiss legal framework with other national legal frameworks, the Swiss Institute of Comparative Law contributed a short report on the legal framework of following three countries (see annexes A2 to A4):

- South Africa
- India
- UAE (example: Dubai)

The country reports analyse whether the respective national legal framework prevents the import of gold, which was produced under human rights abuses. Where such framework exists, the country reports also briefly assess its effectiveness. However, it must be noted that a thorough assessment of the respective regulations' effectiveness would require additional steps, such as an in-depth analysis of self-reporting instruments, an evaluation of implementation measures and their concrete enforcement on the ground as well as the verification of obtained data and information in this context. As desirable as such an endeavour may seem, it is beyond the scope of this study.

The countries were selected in consultation with the Federal Administration who suggested taking into account the currently developing refinery locations rather than basing the selection exclusively on existing (large) capacities. Therefore, the selection process focuses on future developments and only partially took into account the countries that currently host the largest refinery's capacities.

South Africa was chosen for the comparative analysis due to its second highest refinery capacity after Switzerland,<sup>132</sup> though it has to be taken into account that, in contrast to Switzerland, the gold refined in South Africa mostly originates from national mines and imports are relatively small. On the other hand, UAE (example: Dubai)<sup>133</sup> and India<sup>134</sup> were chosen on the

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<sup>131</sup> In Germany, however, NGOs filed a complaint against Lidl with the Hamburg Consumer Protection Agency for unfair competition because it had misleadingly given the impression of ensuring labour standards with its suppliers in Bangladesh. For further information on the "Lidl"-case see: <https://www.ecchr.eu/de/unsere-themen/wirtschaft-und-menschenrechte/arbeitsbedingungen-in-suedasien/bangladesch-lidl.html> (24.7.2017).

<sup>132</sup> The ranking is based on several consolidated sources: <http://goldbarsworldwide.com/major-gold-refiners-brands/> (28.8.2017); Inside BullionStar (19 Aug 2016): The World's largest Precious Metals Refineries.

<sup>133</sup> Dubai was chosen due to the building of the Kaloti Refinery with a capacity of approximately 1'400 tons. See the information on the Refinery's website at <http://www.kalotipm.com/Service> (28.8.2017).

basis of their current developments and their status and/or potential to become a major competitor of Switzerland regarding the refining of raw gold.

As in Switzerland, the trade with precious metals, including gold, in all three compared countries is regulated by one specific legislation: The *Precious Metals Act 2005* (including the secondary legislation “Precious Metals Regulations”) in South Africa, the *Foreign Exchange Management Act 1999 (FEMA)* in India and the *Federal Law No. 11 of 2015 concerning monitoring trade in precious stones, precious metals and its hallmark* for the Federal level of the UAE. Moreover, Dubai further specifically regulates gold trade within its free trade zone (Dubai Multi Commodities Centre, DMCC) in its *Resolution no. 4 of 1 May 2002 in Respect of Organizing the Work at Dubai Commodities and Metals Centre*.

General or gold-specific import legislation is a possibility to address human rights issues within the gold supply chain. India, for instance, could restrict imports of gold for reasons of protection of human rights. South Africa’s importation regulator can attach conditions to import permits. But it is not evident that such conditions were used to address human rights issues within the gold supply chain so far. As discussed above, Swiss legislation on import of gold and its application do not take into account, whether the imported gold was produced under human rights violating circumstances. The same hold for the other national legal frameworks, with the exception of Dubai. None of the national frameworks examined explicitly prohibits the import of gold that was produced under human rights violating circumstances, nor do they impose any obligations on gold importing companies to declare the circumstances of the production of the imported gold.

In Dubai, the provisions of the *DMCC Rules for Risk Based Due Diligence in the Gold and Precious Metals Supply Chain* are mandatory for all members of the DMCC, that are subject to the Dubai Good Delivery standard or the Market Deliverable Brand standard. These provisions include the establishment of a supply chain management system, the identification and assessment of supply chain risks, third party audits, and annual reporting. The DMCC Rules for RBD-GPM are a quasi-mandatory set of rules, applying only to those actors that wish for accreditation, and its effectiveness is dependent on the DMCC’s enforcement efforts rather than the efforts of the UAE officials. Whether these efforts are sufficient is currently unclear, a solid assessment would require further analysis beyond the scope of this study.

Contrary to Switzerland and the UAE, South Africa is a significant gold mining location itself and, therefore, also regulates the production of gold. The *Mineral and Petroleum Resources Development Act* regulates all prospecting and mining, including in relation to precious metals and the issuing of licences for mining. In this regard, all applicants for a minerals or petroleum

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<sup>134</sup> According to a study by the World Gold Council, gold industry developed majorly in the recent years. Currently there exist 30 organised refineries with a combined capacity of approximately 1,450 tons. See Wold Gold Council, *India’s gold market: evolution and innovation*, Mumbai 2017, p. 61.

resources licence are required to demonstrate that they have assessed the environmental impact of their operations and that they have sufficient funding to implement social and labour plans and to comply with health and safety legislation. Beyond these requirements, the *Mineral and Petroleum Resources Development Act* does not impose any requirement specifically related to human rights. In 2016, the first license to mine gold was granted in India, based on the *Mines and Minerals (Development and Regulation) Act 1957 (MMA)*. The MMA does not establish any human rights requirements to refuse, grant or revoke a mining license.

With the exception of the abovementioned DMCC Rules for Risk Based Due Diligence in the Gold and Precious Metals Supply Chain of Dubai, none of the national frameworks stipulates an explicit provision for business enterprises within the gold value chain to conduct human rights due diligence, nor do the national legal frameworks establish any other human rights specific requirements for actors within the gold value chain, such as refineries. There are also no specific provisions regarding the traceability of the origin and – more importantly – the circumstances of the production of the imported or purchased gold. In this respect, the Swiss legal framework and the other three national legal frameworks examined in the annexes are similar.

With respect to anti-money laundering law, the compared national legal frameworks differ. Whereas anti-money laundering law is applicable to gold trade in general in South Africa, UAE and India, the Swiss regulation distinguishes between raw gold and “monetary-used” gold. The anti-money laundering law of Switzerland, South Africa and the UAE require reporting in case of knowledge or reasonable grounds to know that the assets involved in a certain business relationship are connected to criminal offences or the proceeds of a felony. In these circumstances, anti-money laundering laws become relevant if human rights violations in the gold value chain meet the constitute elements of a criminal offence. In contrast, India specifically refers to human rights issues in its Prevention of Money-Laundering Act and requires companies to report on assets that arise from bonded and child labour. In this context, it should be noted that the FATF recommendations do not subject commodity trading to AML/CFT obligations<sup>135</sup>.

### 3.4 Conclusion

The instruments of the international legal framework discussed in this present chapter, regulating gold trade and human rights, can be categorized in three groups according to their substance. The first category entails soft law instruments on *business and human rights in general*, which also apply to business activities within the gold industry (UNGP, OECD Guidelines on Multinational Enterprises, CM/Rec[2016]). The second category consists of hard law, as well as of soft law instruments, specifically tailored to *prevent human rights violations* within the supply chain of minerals or even more specifically within the gold value chain (OECD Due Diligence Guidance on Conflict Minerals and Supplement on Gold, OECD Due Diligence Guidance

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<sup>135</sup> FATF, 40 Recommendations (last updated November 2017), Glossary, definition of financial institutions, p. 117-118.

on Stakeholder Engagement, Recommendations from the Group of Experts on the DRC, EITI, Dodd-Frank Act, EU Regulation 2017/821). These instruments focus on human rights issues in connection with minerals/gold sourced from conflict-affected areas. A third category includes soft law instruments that focus on *other specific topics*, such as private security companies or indigenous peoples' rights, that are also relevant for the protection of human rights within the gold supply chain.

The following remarks assess the Swiss legal framework on its effectiveness to prevent gold from being imported that was produced under human rights violating circumstances.

In general, the import of gold, which was produced under human rights violating circumstances, can be addressed in two different ways:

- Binding regulation can address the import itself, e.g. by import bans; and
- Industry can avoid the buying/importing of gold that was produced under human rights violating circumstances based on policies developed, for instance, in the context of self-regulation or in implementing existing hard law. In this regard, traceability of gold (e.g. through traceability provisions and/or the marking/labelling of the product) is of essential importance, since the import of gold produced under human rights violating circumstances may only be addressed or even avoided if its origin is known or can be found out with reasonable effort.

Currently, the import of precious metal articles into Switzerland is being regulated by art. 20 PMCA, which focuses on the correct marking and the quality of the imported gold. No further inquiries are required by the PMCA and therefore no further clarifications on the gold's origin or the circumstances of its productions are being made by the customs authorities. Swiss import regulation therefore does not provide the necessary information for preventing the import of gold that was produced under human rights violating circumstances. The same applies to the legal frameworks of South Africa, UAE/Dubai and India.

The analysis of the existing regulatory frameworks also suggests that a combination of the two general options described above warrants further exploration with a view to its potential to contribute to preventing the import of gold that was produced under human rights violating circumstances. The anchor point of such an approach is the concept of corporate due diligence and the question to what extent companies are (legally or otherwise) obliged to exercise supply chain due diligence that includes human rights issues along the gold value chain, including its pre-production, production phase and transportation phase. Following this line of argument, the impact of mining activities on indigenous peoples, local communities or the environment and labour rights of miners in the production phase of the supply chain would have to be considered when importing gold.

Swiss anti-money laundering law obliges financial intermediaries to file a report with the Money Laundering Reporting Office, if they know or have reasonable grounds to suspect that assets involved in a certain business relationship are connected to criminal offences or are the proceeds of a

felony. Human rights violations will often meet the constitutive elements of criminal offences as well as of tort (art. 41 CO). Therefore this would be covered by the due diligence requirements according to the AMLA. In case of non-compliance, this could lead to a criminal charge.

However, not all companies in the gold industry are within the scope of the AMLA, as it applies to enterprises that:

- sell and/or buy monetary-used gold,
- buy melting material in order to fabricate and then sell monetary-used gold,
- trade with raw gold at stock exchange for a third party's account,
- trade with raw gold outside the stock exchange for a third party's account in case the raw material's degree of standardization is high enough for it to be liquidated at any time.

AMLA does not apply to enterprises that:

- trade with raw gold for their own account,
- buy and/or sell melt materials, precious metal articles, semi-factured products, plated articles or imitations,
- buy and/or sell monetary-used gold of/to manufacturers in order to produce such articles.

Consequently, there is a part of gold trade, which is covered by AMLA and is subject to elaborate due diligence requirements, which also include human rights aspect as far as they meet constitute elements of criminal acts. Human rights violations which do not meet the constitute elements of a criminal act are not covered by the due diligence requirements according to AMLA, but they might meet the constitute elements of tort (art. 42 CO) and theoretically establish civil liability.

The acceptance of raw gold by Swiss refineries in order to manufacture melt products is covered and regulated by the Precious Metals Control Legislation. The PMCA imposes several obligations on the refineries in order to obtain and keep their melter's licences, one of which is the verification of lawful acquisition of the melt material. According to the OPMC, this requirement of verification of lawful origin does not cover human rights aspects.

In conclusion, it can be said that Swiss anti-money laundering and precious metals control legislation may have a preventive effect on the import of gold produced under human rights violating circumstances. Gaps mainly remain regarding raw or "non-monetary used" gold. Apart from the AMLA and PMCA provisions, which apply to part of the gold being imported into Switzerland, no other Swiss law imposes any *specific* obligations regarding the traceability of gold. Furthermore, criminal and civil law may contribute to preventing the import of gold that was produced under human rights abusing circumstances if companies risk being held criminally and/or civilly liable when purchasing, importing or accepting such gold. Nonetheless, while the



current legal situation would theoretically allow for such criminal or civil liability, but no such case has been brought to date.

## 4. Hazard Assessment

This chapter provides first an overview of key challenges in the context of gold trade, then identifies the most relevant scenarios along the three key gold value chains, and discusses their impact on human rights (from a human rights perspective) and on humans and the environment (from a technical perspective).

### 4.1 Challenges along the Gold Value Chain

The world's top gold producers are developed countries such as China, Australia, United States of America, Russia, South Africa and Canada, but also include developing countries or countries in transition. Many smaller producers are dispersed over developing countries in Africa, Asia and Latin America, which are also suffering more from resource dependency than developed countries. In addition, mined or recycled gold that originates from – or has transited – an area affected by conflicts or a country which is characterized by a lack of public governance and accountability (lack of government capacity, political and economic instability, high level of corruption, weak regulatory framework and respective lack of enforcement), can therefore more likely be related to adverse impacts for people and the environment. This is particularly true for ASM operations<sup>136</sup>, which in many regions or countries are not formalized and operate outside or in absence of a legal framework.<sup>137</sup> Gold recycling as well presents specific social and environmental challenges, as for instance the dismantling of electronic waste in developing countries shows (e.g. Ghana).

#### **Military or rogue regimes**

The export of gold is important or even central for many problematic regimes or states (military, rogue regimes) as a source of income or debt financing. Dealing with such regimes poses risks to a broad range of issues including human rights abuses, financing of armed groups or criminal activities, benefitting an undemocratic state organization. Given this situation, commodity trade becomes often subject to increased international scrutiny or even sanctions.<sup>138</sup>

The LSM sector is dominated by large corporations which are confronted with high entry barriers, including obtaining the necessary environmental and regulatory permission of LSM projects. These activities are “susceptible to corruption of a large scale.”<sup>139</sup>

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<sup>136</sup> OECD (2012): DD Guidance, Gold Supplement, p. 47.

<sup>137</sup> They may be considered legitimate for instance in cases where a regulatory framework is absent e.g. when artisanal and small-scale miners show good faith efforts to operate within the applicable legal framework (where it exists) as well as their engagement in opportunities for formalization as they become available. (OECD (2012): DD Guidance, Gold Supplement, p. 10)

<sup>138</sup> Federal Council (2013): Grundlagenbericht Rohstoffe. The report does however not list any country sanctions related to gold or gold trade (status in 2013).

<sup>139</sup> FATF (2015): Money laundering / terrorist financing risks and vulnerabilities associated with gold.

### Environmental pollution

Mercury - which is often used in ASM operations – is regarded as a very harmful substance, producing significant adverse neurological as well as other health effects. Unregulated gold mining activities account for 37% of global mercury pollution (more than 1'400 tons of mercury per year). On average, 350 tons of mercury enter the atmosphere yearly, while the remaining amount is released into rivers, lakes, soil and tailings. According to UNIDO, as much as 95 per cent of all mercury used in ASM is released into the environment.<sup>140</sup>

LSM also presents specific environmental challenges, namely noise, dust, water pollution, degradation of land, water use or the interference and competition with traditional lifestyles. In well-managed large-scale mines, environmental issues are generally of a lesser concern, although the environmental related negative impacts on communities do exist. Rehabilitating the land at the end of mine life poses particular challenges in LSM for which certain agreed standards (e.g. concerning biodiversity) exist but are not always fully implemented.<sup>141</sup> In terms of use of chemicals, cyanide is usually easily controlled in LSM mines and compared with mercury its risk for the environment is much lower.

### Labour conditions and social aspects

A series of reports from the ILO, national human rights institutions and civil society organisations have reported human rights abuses in and around ASM mines, absent presence of government authorities and in some cases through armed and criminal groups that control ASM.<sup>142</sup> Informal or illegal miners may work directly or indirectly for such groups, or may have to pay them.<sup>143</sup> Possible abuses include forced labour, poor and unsafe labour conditions, exploitation of children and human trafficking, lack of education, restricted freedom of movement, corruption of government officials, and an overall breakdown of society and general security.<sup>144</sup> Such illegal ASM operations may vary over time as in the case of Mali where economic sanctions led to increased country-internal displacement of people seeking artisanal mining as a way to survive (in 2012) or where government crack-downs on artisanal miners reduced ASM gold production (in 2014).<sup>145</sup>

In the case of LSM operations, different social challenges exist. In many host countries that suffer from a lack of governance, accountability and

<sup>140</sup> The UN Minamata Convention on mercury includes a ban on new mercury mines, as well as the depletion of existing ones. Source: OECD, Interpol & UNICRI (2017): AUREUS. Development Idea.

<sup>141</sup> See for example the recent report by the Audit Office of New South Wales, Mining rehabilitation security deposits, 11 May 2017, <http://www.audit.nsw.gov.au/publications/latest-reports/mining-rehabilitation-security-deposits> (30.11.2017).

<sup>142</sup> For example: ILO-IPEC, Analytical studies on child labour in mining and quarrying in Ghana, Geneva, May 2013; South African Human Rights Commission (SAHRC), Report of the SAHRC Investigative Hearing: Issues and Challenges in Relation to Unregulated Artisanal Underground and Surface Mining Activities in South Africa, Johannesburg 2015; Global Witness, Undermined, London 2017.

<sup>143</sup> Verite (2016), p. 6f

<sup>144</sup> Verite (2013), p. 20f

<sup>145</sup> CMI-U4 (2017),

revenue transparency, an important social challenge is the fact that large amounts of money are being paid by mining companies in taxes and fees but the host country remains impoverished and economically and socially underdeveloped. Often people living close by a mining site would see few, if any, tangible benefits. Initiatives like EITI have been set up to increase transparency and pressure on governments to overcome mismanagement and corruption. The same holds true for private or state-owned LSM operations in countries with a rogue regime. It can be argued that in such a system any income generated by mining activities will be used to support a rogue regime, with its known negative implications on human rights.

Since mining operations are taking place in often remote and underdeveloped regions, another main issue is how the rights of the indigenous population around a mining site are respected. This includes resettlements of local communities and how those communities are involved in terms of their right to “free, prior and informed consent”, and if an adequate system for compensation is in place.<sup>146</sup> Industry Associations such as the International Council on Mining & Metals (ICMM) have specific initiatives and released guidance which are applied by their member companies.<sup>147</sup> Furthermore, legacy issues can exist around non-transparent mining license processes. There are numerous reports with alleged cases of corruption around obtaining licenses and approvals.

As to workers’ rights and labour conditions (including health and safety), established LSM operations usually show a better performance, while there often are differences between the main global players who apply the same rules globally, and national large scale miners who sometimes do not have the same high standards.

### **Formalization of ASM operations**

The formalization of ASM operations remains a massive challenge in many gold producing countries, and at the same time presents an enormous opportunity to lift millions of people out of illegal conditions that affect them so negatively. Formalization of ASM operations requires establishing *and* enforcing the respective adequate legal framework. But formalization itself often does not automatically imply actual improvements of the environmental or social conditions under which ASM operate.

In Peru for instance, in 2012 the national government passed a new law to formalize informal miners and to ban illegal mining. However, the challenge remains large, and to date, only 16 out of 70’000 requests for formalization (benefitting altogether 631 informal miners) have been approved by the government.<sup>148</sup> Illegal mining takes place outside formal mining concessions, very often in highly sensitive ecosystems such as the Amazon rainforest, most importantly in the Department of Madre de Dios.<sup>149</sup> Other re-

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<sup>146</sup> Fastenopfer & Brot für alle (2016), STP (2014).

<sup>147</sup> ICMM.com, 'Mining and communities'. <http://www.icmm.com/en-gb/society-and-the-economy/mining-and-communities> (30.11.2017).

<sup>148</sup> SECO (2016): Tender Document, SBGI Phase 2.

<sup>149</sup> According to different interviews.

gions or villages (Santa Filomena, Cuatro Horas) have changed from massive problems to more decent ASM gold mining operations.<sup>150</sup>

As another example, the Ethiopian Government is promoting formalization of ASM operators under mining cooperatives, small and micro enterprises or mining development groups. However, the Ethiopian EITI estimates that only about 6% of the artisanal miners are formally organized (and licensed) and that licensing has to be considered only as a “nominal desk work.”<sup>151</sup>

The shift to more formalization is supported by international organisations such as the UNIDO with its Global Mercury Project (which includes some Swiss refiners as participants) and, in the same vein, the EITI requires its member countries to disclose an estimate of informal sector activity and its contribution to the economy.

### **Financial flows and money laundering**

Gold is seen as an “extremely attractive vehicle for laundering money” as it is cash intensive and “provides a mechanism for organised crime groups to convert illicit cash into a stable, anonymous, transformable and easily exchangeable asset [...]”.<sup>152</sup>

The potential threat of money laundering in the gold sourcing process in the country of origin or the country of transit comes in different forms:<sup>153</sup>

- With respect to the origin, gold may be unlawfully acquired, e.g. through bribery, theft, pillage<sup>154</sup> or another criminal offence.
- Direct use of gold for laundering purposes or as financial vehicles to finance other felonies, including but not limited to conflicts and drug trafficking.
- In addition, “gold laundering” is the process whereby illegally obtained gold is melted and recast into another form. The recasting is performed to obscure or conceal the true origin of the gold and sell gold into formal channels at market price.

In all of these cases, the actual financial flows are obscured and the revenues are in several cases believed to finance non-state armed groups / armed conflicts (in Central Africa or Colombia) or even terrorist activities.<sup>155</sup>

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<sup>150</sup> SDC (2011): SDC Experiences with Formalization and Responsible Environmental Practices in Artisanal and Small-scale Gold Mining in Latin America and Asia (Mongolia).

<sup>151</sup> EEITI (2016): Artisanal Mining Operation and its Economic Values, Ethiopia. A Final Draft Report. Addis Ababa: Ethiopian Extractive Industries Transparency Initiative EEITI. See also: <https://eiti.org/blog/getting-down-to-smallscale-mining-level-in-ethiopia> (30.11.2017).

<sup>152</sup> FATF (2015): Money laundering / terrorist financing risks and vulnerabilities associated with gold.

<sup>153</sup> CGMF (2015): Report on the national evaluation of the risks of money laundering and terrorist financing in Switzerland.

<sup>154</sup> For instance, the case of Argor which was accused of refining nearly 3 tons of gold pillaged by rebels in the north of the Democratic Republic of the Congo (DRC) between 2004 and 2005. Source: <https://trialinternational.org/latest-post/argor-heraeus-sa-and-hussar-limited/> (30.11.2017).

<sup>155</sup> OECD (2016): Due Diligence in Colombia's Gold Supply Chain. Overview; OECD, Interpol & UNICRI (2017): AUREUS Development Idea.

In the case of ASM, such illicit financial flows are stimulated by different characteristics of the ASM gold value chain:

- The **internal logic** of the ASM gold value chain, which, due to its finance-intensive character, is linking streams of goods with financial streams, where sometimes actors pre-finance other actors up the value chain, sometimes also refiners are pre-financing exporters.<sup>156</sup> Other contributing factors are the complexity of the in-country value chain and the number of actors involved, as well as the existence of cash-for-gold deals instead of bank transactions.<sup>157</sup>
- The **contextual condition** in the country of origin and transit, characterized by weak regulation and enforcement capacities for tax, labour or environmental laws, and ASM operations that are not formalized or operate in illegality.

According to the FATF, Swiss financial intermediaries in the gold and precious metals sector generally have a good understanding of the money laundering and terrorist financing risks they are exposed to.<sup>158</sup> However, as the CGMF has assessed, the “quantitative measurements suggest that the threat in the sector is underestimated, particularly with respect to the predicate offences of bribery and participation in a criminal organisation”. This threat mainly concerns the “use of precious materials, frequently gold or precious stones, as vehicles for laundering assets of criminal origin.”<sup>159</sup>

### **Smuggling and illegal trade routes**

The weak border controls and corruptible customs allow **smuggling** networks to transport gold to the country of export, as has been shown in the case of Mali (illegally imported from Burkina or Ivory Coast) or Togo (imported from Burkina) and is known from many other developing countries. As has been shown in the case of Togo, tax regulations can stimulate such inter-country smuggling networks.<sup>160</sup> Such gold source from various mines or smuggle networks may be refined in a rudimentary way before being exported for further refining.<sup>161</sup> For the Democratic Republic of Congo (DRC), the UN Group estimates that in 2013 98% of gold produced in the DRC was smuggled out of the country and that nearly all of the gold traded in neighbouring Uganda – the main transit country for Congolese gold – is illegally exported from the DRC.

### **Fraudulent documentation and corruption**

Weak control of shipment documentation also allows that fraudulently misrepresented documentation is produced, be it in the country of origin or transit. Given a lack of traceability and transparency in business relationships, such documentation may be obscuring the origin of gold, the type of

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<sup>156</sup> PAC (2017), p. 18

<sup>157</sup> CMI-U4 (2017), p.35

<sup>158</sup> FATF (2016): Anti-money laundering and counter-terrorist financing measures, p. 94.

<sup>159</sup> CGMF (2015): Report on the national evaluation of the risks of money laundering and terrorist financing in Switzerland, p. 99.

<sup>160</sup> PAC (2017), CMI-U4 (2017), EvB (2015): A Golden Racket.

<sup>161</sup> CMI-U4 (2017), p. 35

treatment the gold has already undergone (e.g. pre-smelting), the real transport routes, or the institutional relationships between suppliers. The UN considers corruption as “an enormous obstacle to the realization” of all political, economic, social and cultural human rights.<sup>162</sup>

## 4.2 Most Relevant Scenarios

The most relevant scenarios i.e. practical problems that can occur along the value chains are identified based on a simplified approach. The relevance of each scenario is determined by the expected frequency of occurrence as estimated by a range of questionnaire respondents from the Swiss refiners, NGOs and standard setters. This approach is chosen because the categorization of human rights abuses according to their severity would be controversial and the necessary discussion of the relevant criteria on how to determine the severity of a human rights abuse would go beyond the scope of this study.

Therefore, the study team chose the following approach:

- In a first step, the most relevant scenarios (13 out of 69 in total) are identified. The relevance of each scenario is determined by the expected frequency of occurrence. This was done through a questionnaire which lists all 69 possible scenarios (see annex A8) and asked an assessment by the respondents as well as a final selection by the study team.<sup>163</sup>
- In a second step, the impact of these scenarios is assessed in terms of human rights abuses (from a human rights perspective, chapter 4.3) and in terms of impacts on humans and the environment (from a technical perspective, chapter 4.4).

Table 7 summarizes the results of the above-mentioned first step i.e. the most relevant identified scenarios including the estimation about its relevance. The scenarios are listed in order of the determined relevance.

|     |   | Identified relevant scenarios  |
|-----|---|--|
| LSM | 1 | Interference with traditional lifestyle, impacting traditional livelihoods of indigenous people.<br>→ Considered to happen <b>often</b> .  |
|     | 2 | Lack of a good process of engagement, consent, resettlement, remediation and proper compensation of displaced local communities.<br>→ Considered to happen <b>often</b> or <b>at times</b> .   |
|     | 3 | Damaging the environment through construction and mine operation site as well as negative, direct health impacts on communities (e.g. noise, dust) and leaving behind deteriorated land at / around mining site.<br>→ Considered to happen <b>at times</b> . |
|     | 4 | Public or private security services intimidate or force local communities out of potential mining sites<br>→ Considered to happen <b>at times</b> .  |
|     | 5 | Displacement of ASM miners by LSM mine developers or operators.<br>→ Considered to happen <b>at times</b> .  |

<sup>162</sup> OHCHR (2013), p. 7.

<sup>163</sup> The selection is based on a total of 8 respondents for LSM, 6 respondents for ASM, and 4 respondents on the recycling value chain. The reference frame of the respondents was typically confined to one country in the case of NGO representatives and was more regional or global for respondents from the industry.

|                |    |  |
|----------------|----|--|
| ASM            | 6  | The damage to the environment and the negative direct and indirect health impact to the surrounding communities through the mining operations, inappropriate waste management and lasting deterioration of the land/soil resources.<br>→ All considered to happen <b>often</b> . |
|                | 7  | Interference with traditional lifestyle, impacting traditional livelihoods of indigenous people.<br>→ Considered to happen <b>often</b> .  |
|                | 8  | Money laundry due to lack of control along the supply chain, for instance by allowing non-sealed gold shipments (domestic or international).<br>→ Considered to happen <b>often</b> .  |
|                | 9  | Corrupt and fraudulent acquisition of land to develop mines or mine operation licenses.<br>→ Considered to happen <b>often or at times</b> .   |
|                | 10 | Poor working conditions, treatment of employees and contractors, including forced labour.<br>→ Considered to happen <b>at times</b> .  |
| Gold Recycling | 11 | Money laundry through buying or selling gold during the collection process e.g. of high-value gold.<br>→ Considered to happen <b>at times</b> .  |
|                | 12 | Extortion or other unrighteous ways of acquiring gold, or the corrupt or fraudulent behaviour for obtaining documentation of provenience.<br>→ Considered to happen <b>rarely or at times</b> .  |
|                | 13 | Lack of control along the supply chain for instance by allowing non-sealed gold shipments (domestic or international).<br>→ Considered to happen <b>rarely</b> .   |

Table 7: Most relevant scenarios with their estimated relevance (estimated frequency of occurrence), as identified by questionnaire respondents and the study team, for all three gold value chains.

## 4.3 Hazards Related to Human Rights

This chapter categorizes the most relevant scenarios identified in chapter 4.2 by thematic categories and discusses their possible impact on relevant human rights. The thematic categories are chosen for the purpose of simplification, they are non-exhaustive and may also be overlapping in some aspects.

Due to the necessary generalization of the scenarios identified, it can only be discussed whether the respective scenario might fall within the scope of certain human rights and assess the possible infringement on a very generalized level, whereas any possible human rights abuse in a specific case would always have to be determined on an individual basis.

### 4.3.1 Treatment of employees and contractors

Poor treatment of employees and contractors including forced labour or unsafe working conditions, as described in scenario 10, may fall within the scope of several human rights, such as labour rights and the right to an adequate standard of living. Very serious cases of poor treatment of employees and contractors might also fall within the scope of the right to life and/or the right to liberty and security.

The eight ILO Core Conventions include the following guarantees: prohibition of forced labour, freedom of association and protection of the right to organize, right to organize and collective bargaining, equal remuneration, abolition of forced labour, prohibition of discrimination in employment and



occupation, the establishment of a minimum age for admission to work and the prohibition and elimination of the worst forms of child labour.

The right to just and favourable conditions of work (art. 7 ICESCR) applies to all labourers regardless the context of their work<sup>164</sup> and includes, in particular: The right to fair and equal remuneration which provides a decent living (art. 7 lit. a ICESCR). The right to safe and healthy working conditions (art. 7 lit. b ICESCR), which is also related to the right to the highest attainable level of physical and mental health (art. 12 ICESCR) and entails, among others, the prevention of occupational accidents and diseases and access to safe drinking water and adequate sanitary facilities for workers.<sup>165</sup> The right to just and favourable working conditions further includes the right to equal opportunities to be promoted (art. 7 lit. c ICESCR) and the right to rest, leisure and a reasonable limitation of working hours (art. 7 lit. d ICESCR).

It has to be assessed in each case individually, if poor treatment by mining operators actually abuses their workers' or contractors' labour rights, all the more since for many labour rights the States have to establish minimal standards, for instance regarding the maximum of weekly working hours.<sup>166</sup> Therefore, depending on the country, labour standards that have to be met by each company within the gold value chain will stem from national law or – if national law does not comply with international minimum standards – from international law.

#### 4.3.2 Traditional Lifestyle and Indigenous People

The interference with traditional lifestyle or the impacting of traditional livelihoods of indigenous people, as described in scenario 1 and 7, may fall within the scope of indigenous people's rights such as their rights to land, to territories and to resources. For instance, the relocation of indigenous peoples in the context of mining activities may violate the indigenous peoples right to their lands, if it is not being carried out with free, prior and informed consent of the indigenous peoples concerned and after an agreement on just and fair compensation and (where possible) with the option of return (art. 10 UNDRIP).

Depending on the circumstances of the specific situation, the hampering with traditional livelihood or restrictions regarding the access to resources might infringe the indigenous people's right to be secure in the enjoyment of their own means of subsistence and development and to engage freely in all their traditional and other economic activities, if they are not compensated in a just and fair way (art. 20 UNDRIP).

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<sup>164</sup> CESCR (2016): General comment No. 23. (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/23, para. 5.

<sup>165</sup> CESCR (2016): General comment No. 23. (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/23, paras. 25 and 30.

<sup>166</sup> CESCR (2016): General comment No. 23. (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights), E/C.12/GC/23, paras. 33 et. seq.

### 4.3.3 Communities

As described in scenarios 2, 4, 5 and 6, activities within the gold value chain may impact on communities living in the mining site area.

The freedom of movement (art. 12 ICCPR) guarantees to nationals the right to move freely within the whole territory of a State and gives everyone the right to decide to move around and to settle at a place of choice. Among others, the freedom of movement protects from all types of internal displacement, which includes displacement by actions of private actors.<sup>167</sup> Therefore, the displacement of ASM miners or local communities in general falls within the scope of and is only compatible with the right to freedom of movement, if the requirements according to art. 12 para. 3 ICCPR are met: The restriction to the freedom of movement has to be provided by law and has to be either necessary to protect national security, public order, public health or morals or the rights and freedoms of others (art. 12 para. 3 ICCPR). Depending on the circumstances the displacement of local communities might further violate their property rights on the land that they are displaced of. Deciding on such claims requires identifying legal ownership of land which will often be very difficult and particularly challenging in the absence of titles or registered properties.

Negative health impacts on communities in the production phase may fall within the scope of the right to the highest attainable standard of health (art. 12 ICESCR), which not only includes the right to healthcare but also other factors that contribute to a healthy life.<sup>168</sup> In this regard, the right to health may also be infringed in case of environmental conditions that directly or indirectly impact human health, such as polluted water, air or soil due to activities of the extractive industry.<sup>169</sup> Negative, direct health impacts may further fall within the scope of the right to an adequate standard of living and serious cases may even fall within the scope of the right to life (for instance, tailings dam failure).

Another issue is the intimidation of local communities or even the use of force by public or private security services operating for mining sites to force local communities out of potential mining sites (both at pre-production and at production phase) which may fall within the scope of property rights, the right of movement, the right to liberty and security, the right to family life, the right to privacy, the right to peaceful assembly and the freedom of opinion and expression.

### 4.3.4 Environmental Issues

Environmental harm through mining activities, as described in scenarios 3 and 6, may impact a variety of human rights, such as the right to health and

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<sup>167</sup> CCPR (1999): General Comment No. 27: Article 12 (Freedom of Movement), CCPR/C/21/Rev.1/Add.9, paras. 5 et. seq.

<sup>168</sup> CESCR (2000): General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, paras. 4 and 11.

<sup>169</sup> CESCR (2000): General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, paras. 4, 15 and 51.

the right to adequate standard of living (including right to water, right to food, right to adequate housing) and, in serious cases, also the right to life.<sup>170</sup>

Environmental issues which lead to health issues for the communities living at/around the mining site may fall within the scope of the right to the highest attainable standard of health (art. 12 ICESCR), which not only includes the right to healthcare but also other factors that contribute to a healthy life.<sup>171</sup> In this regard, the right to health may also be infringed in case of environmental conditions that directly or indirectly impact human health, such as polluted water, air or soil due to activities of the extractive industry.<sup>172</sup> Environmental issues may further fall within the scope of the right to an adequate standard of living (including right to water, right to food, right to adequate housing) and serious cases even may fall within the scope of the right to life.<sup>173</sup>

#### 4.3.5 Corruption

Corruption within the gold value chain, as described in scenarios 9 and 12, is not a human rights abuse by itself, but may impact a variety of human rights.<sup>174</sup> For instance, paying bribes in the process of acquiring land or to obtain a licence to develop a mining site might impact property rights or indigenous people's rights. Corruption in the production phase may, for instance, prevent regular labour inspections and therefore compromise safety and lead to impacts on labour rights. Corruption in border controls, customs and for issuing (falsified) certificates may contribute to concealing the origin of gold.

#### 4.3.6 Criminal Activities

Activities of operators or traders within the gold value chain that are involved in or contributing to criminal activities, such as money laundering or the financing of conflicts (as described in scenarios 8, 11 and 12), may impact on a wide range of human rights: Property rights may be affected, if the criminal activity affects the acquisition of the gold. Conflict-financing and criminal (or other) activities aiming at concealing the origin of the gold such as money laundering may touch upon the whole spectrum of human rights, depending on the individual case.

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<sup>170</sup> HRC (2013): Report of the Independent Expert on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy and sustainable environment, A/HRC/25/53, p. 6 et. seq.

<sup>171</sup> CESCR (2000): General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, paras. 4 and 11.

<sup>172</sup> CESCR (2000): General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), E/C.12/2000/4, paras. 4, 15 and 51.

<sup>173</sup> CCPR (2017): General comment No. 36 on article 6 of the International Covenant on Civil and Political Rights, on the right to life, Revised draft prepared by the Rapporteur, paras. 30 and 65.

<sup>174</sup> OHCHR (2013): The Human Rights Case against Corruption.

#### 4.4 Impacts of the Relevant Scenarios on Humans and the Environment

While chapter 4.3 discussed whether the most relevant scenario might fall within the scope of certain human rights, this chapter qualitatively estimates the potential, negative impact on humans and the environment caused by a “typical” case of these scenarios. This impact estimation takes into account various aspects, including negative impacts on:

- human health and mortality through labour conditions;
- human security e.g. determined by armed groups, local conflicts, etc.;
- livelihoods of local communities;
- the environment including resources which in return are important for livelihoods;
- the relations between the individual and the state, undermining trust in the state, justice and the rule of law.

Possible positive impacts are not listed here.

Table 8 summarizes the qualitative analysis of potential negative impacts of the most relevant scenarios for three gold value chains.

|                |    | Relevance of scenarios   | Type and level of potential, negative impacts on humans and the environment   |
|----------------|----|--|---|
| LSM            | 1  | Interference with traditional lifestyle, impacting traditional livelihoods of indigenous people.<br>→ Considered to happen <b>often</b> .  | Reducing livelihood opportunities of these communities. Morbidity and health of these communities may be affected.  |
|                | 2  | Lack of a good process of engagement, consent, resettlement, remediation and proper compensation of displaced local communities.<br>→ Considered to happen <b>often</b> or <b>at times</b> .   | Reducing livelihood opportunities through poor compensation in cases of displacement or occupation of non-formalized land use rights. Morbidity and health of these communities may be affected.  |
|                | 3  | Damaging the environment through construction and mine operation site as well as negative, direct health impacts on communities (e.g. noise, dust) and leaving behind deteriorated land at / around mining site.<br>→ Considered to happen <b>at times</b> .                     | Immediate to long-term negative health impacts and increased mortality are expected   |
|                | 4  | Public or private security services intimidate or force local communities out of potential mining sites<br>→ Considered to happen <b>at times</b> .  | Reduces livelihood opportunities of local communities and may lead to violent conflicts and occasional casualties.  |
|                | 5  | Displacement of ASM miners by LSM mine developers or operators.<br>→ Considered to happen <b>at times</b> .  | May lead to violent disputes.   |
| ASM            | 6  | The damage to the environment and the negative direct and indirect health impact to the surrounding communities through the mining operations, inappropriate waste management and lasting deterioration of the land/soil resources.<br>→ All considered to happen <b>often</b> . | Immediate to long-term negative health impacts, increased mortality is expected, specifically related to the use of mercury and cyanide   |
|                | 7  | Interference with traditional lifestyle, impacting traditional livelihoods of indigenous people.<br>→ Considered to happen <b>often</b> .  | Reducing livelihood opportunities of these communities. Morbidity and health of these communities may be affected.  |
|                | 8  | Money laundry due to lack of control along the supply chain, for instance by allowing non-sealed gold shipments (domestic or international).<br>→ Considered to happen <b>often</b> .  | Such shipments offer opportunities that gold from illegal sources is added and that the provenience of the shipment is obscured. Although this has no direct impact on human health or the environment, it offers opportunity to launder gold which may have been sourced from a problematic gold mine or entered through a regional smuggling routes for instance. Proceeds from such activities can be used to finance activities that directly impact on human rights. |
|                | 9  | Corrupt and fraudulent acquisition of land to develop mines or mine operation licenses.<br>→ Considered to happen <b>often</b> or <b>at times</b> .  | It reduces livelihood opportunities of local communities; generally undermines trust in the state and local authorities. Morbidity is typically not affected.   |
|                | 10 | Poor working conditions, treatment of employees and contractors, including forced labour.<br>→ Considered to happen <b>at times</b> .  | Directly and negatively affected health and mortality rates among involved miners   |
| Gold Recycling | 11 | Money laundry through buying or selling gold during the collection process e.g. of high-value gold.<br>→ Considered to happen <b>at times</b> .  | No direct impact on human health or the environment, offers opportunity to launder gold which may have been sourced from a problematic gold mine for instance (indirect impact). Proceeds from such activities can be used in turn to finance activities that directly impact on human rights.  |
|                | 12 | Extortion or other unrighteous ways of acquiring gold, or the corrupt or fraudulent behavior for obtaining documentation of provenience.<br>→ Considered to happen <b>rarely</b> or <b>at times</b> .  | Undermines trust in the state and local authorities but direct casualties are typically not to be expected.   |
|                | 13 | Lack of control along the supply chain for instance by allowing non-sealed gold shipments (domestic or international).<br>→ Considered to happen <b>rarely</b> .   | None expected   |

Table 8: Qualitative analysis of the type and level of potential, negative impacts of the most relevant scenarios (13 out of total 69 scenarios) for three gold value chains (orange: most important potential, negative impacts)



## 5. Measures Reducing Risks of Human Rights Abuses

This chapter describes existing voluntary measures (5.1), then analyses current, practical procedures of registering gold at Swiss customs and evaluates the quality and meaningfulness of information that can be derived from the foreign trade statistics regarding provenience of imported gold (5.3), and elaborates on the effectiveness of measures to reduce the risks of human rights abuses along the three gold value chains (5.2).

### 5.1 Overview of Measures

Voluntary measures are implemented in Switzerland, by international organizations, the gold industry or industry associations, Swiss economic and development cooperation, and by (Swiss) NGO or the civil society. Measures which are based on – or related to – Swiss or international regulatory frameworks are also addressed in chapter 3.

The following different types of measures are analysed:

|   |  |
|---|--|
| 1 | Promotion of principles on good business conduct, CSR and transparency by the Swiss government and international organisations |
| 2 | Risk management and due diligence measures by gold industry entities   |
| 3 | Development and economic cooperation projects by bilateral and multilateral agencies   |
| 4 | Other measures   |

In the following chapters, the four types of measures are described according to their objectives, target groups (incl. geographic scope) and, if such information is available, budget and funding source, implementing agent and their focus in the gold value chain.

Basic information was drawn from publicly available information on the relevant bodies' websites. Additional information, especially about achievements and challenges, is based on the interviews held with the gold industry, industry associations, standard setters and NGO's.

#### 5.1.1 Promotion of Principles on Good Business Conduct

The Swiss government and international organisations promote good business conduct, corporate social responsibility, accountability and transparency in the commodity sector and gold industry through various means. Regulatory measures and requirements established in Switzerland and internationally to promote transparency in the commodity sector, including the gold sector were discussed in chapter 3.

For the gold sector, the key measures on good business conduct are outlined in the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, and specifically in its 'Supplement on Gold'. The OECD Guidance provides the baseline for most of the other standards or initiatives described hereinafter.

### OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas: Supplement on Gold

**Description** The OECD Due Diligence Guidance is an instrument that builds on the OECD Guidelines for Multinational Enterprises and on the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones. Its legally non-binding recommendations address companies that potentially obtain minerals or metals from conflict-affected and high-risk areas<sup>175</sup>. The OECD Due Diligence Guidance Supplement on Gold provides detailed recommendations to help companies respect human rights and avoid contributing to conflict through their decisions and practices. It provides specific guidance on supply chain due diligence of gold for upstream as well as downstream companies, regardless of whether they own, lease or loan the gold.

It focuses on measures to avoid contributing to conflict and abuses of human rights in the supply chain of gold potentially sourced from conflict-affected and high-risk areas. It includes also measures to be taken on recycled/scrap and previously refined gold.

The Guidance is based on the following five steps:

1. Establish strong company management systems
2. Identify and assess risks in the supply chain
3. Design and implement a strategy to respond to identified risks
4. Carry out independent third-party audit of refiner's due diligence practices
5. Report annually on supply chain due diligence

The companies themselves finance the implementation of the recommended measures. The recommended frequency of reporting is an annual report on the supply chain due diligence.

The program comprises over 500 stakeholders from governments, international organizations, the private sector, local and international civil society, and experts.

Other initiatives are based on these guidelines, e.g. London Bullion Market Association's Responsible Gold Program, Responsible Jewellery Council's (RJC) Chain of Custody (CoC) Certification, Conflict-Free Sourcing Initiative / Conflict-Free Smelter Initiative (CFSI), ICGLR initiative against the Illegal Exploitation of Natural Resources, ITRI Supply Chain Initiative iTSCi.

**Focus in supply chain** — Covers all three value chains (LSM, ASM, and recycled gold) but with a focus on mining operations.

— Within these five steps the guidance not only makes recommendations to all companies (up- and downstream) within the gold supply chain, but also very detailed recommendations to specific companies within the gold supply chain: from mining process (gold producers), local exports to gold traders and refiners, as well as downstream companies.

The **OECD Guidelines for Multinational Enterprises** are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards

<sup>175</sup> Defining conflict-affected and high risk areas – not countries (OECD, 2014): Conflict-affected and high-risk areas are identified by the presence of armed conflict, widespread violence, including violence generated by criminal networks, or other risks of serious and widespread harm to people. Armed conflict may take a variety of forms, such as a conflict of international or non-international character, which may involve two or more states, or may consist of wars of liberation, or insurgencies, civil wars etc. High-risk areas are those where there is a high risk of conflict or of widespread or serious abuses as defined in paragraph 1 of Annex II of the OECD Due Diligence Guidance. Such areas are often characterized by political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure, widespread violence and violations of national or international law.



for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting.<sup>176</sup>

Governments adhering to the Guidelines for Multinational Enterprises are required to set up a **National Contact Point (NCP)** whose main role is to take appropriate measures to further the implementation of the Guidelines such as undertaking promotional activities, handling enquiries, and contributing to the resolution of issues that may arise from the alleged non-observance of the guidelines in specific instances.<sup>177</sup> According to the OECD Guidelines, any interested party can invoke NCP procedures against a company for alleged breaches of the Guidelines. If such a specific instance is submitted to a NCP, it has to examine whether the raised issues merit further consideration. If this is the case, it will offer its good offices to help the parties resolve the issues.<sup>178</sup> According to the official OECD database, 72 cases involving the mining sector have so far been filed with NCPs. 22 of these cases concern human rights and 4 relate to gold.<sup>179</sup> In the mining sector, these NCP are regarded as measures to improve the situation regarding human rights abuses, but sometimes also criticized by NGOs to be intransparent or not independent enough.<sup>180</sup>

### 5.1.2 Due Diligence Measures

According to OECD, due diligence is an on-going, proactive and reactive process through which companies can identify and account for how they address their actual and potential adverse impacts as an integral part of business decision-making and risk management systems. Due diligence can help companies ensure they observe the principles of international law and comply with domestic laws.<sup>181</sup> The measures include risk assessments (e.g. country and counterpart risks), due diligence procedures (e.g. on counterpart and origin of gold) and related control mechanisms, mitigation, remediation and other corrective action, monitoring, review and audit procedures, and disclosure and reporting.

The two most commonly used voluntary standards established by the industry which are based on OECD standard assessment (as described in

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<sup>176</sup> <http://mneguidelines.oecd.org/guidelines/>.

<sup>177</sup> <http://www.oecd.org/investment/mne/ncps.htm>.

<sup>178</sup> OECD Guidelines for Multinational Enterprises Procedural Guidance (2011).

<sup>179</sup> Canadian NCP, Gold mining in Mongolia, <http://mneguidelines.oecd.org/database/instances/ca0013.htm> (30.11.2017); Argentina NCP, Mining sector in Argentina, <http://mneguidelines.oecd.org/database/instances/ar0007.htm> (30.11.2017); Canadian NCP, Gold mining in China's Tibet Autonomous Region, <http://mneguidelines.oecd.org/database/instances/ca0012.htm> (30.11.2017); Brazilian NCP, Kinross Brasil Mineração and Paracatu neighboring associations, <http://mneguidelines.oecd.org/database/instances/br0020.htm> (30.11.2017).

<sup>180</sup> See for example "Canada is back" An Assessment of Canada's National Contact Point for the OECD Guidelines for Multinational Enterprises (2016): <http://aboveground.ngo/canada-is-back-but-still-far-behind/> (30.11.2017).

<sup>181</sup> OECD, Gold Supplement 2016, p. 66-67.

the 'Supplement on Gold') are those from the Responsible Jewellery Council (RJC) and from the London Bullion Market Association (LBMA).

Both build upon or make reference to the OECD standard assessment, but the required degree of implementation varies and not every element is mandatory. The differences in the standards regarding to OECD recommendations are shown in Table 9.

| <b>Responsible Jewellery Council (RJC): Code of Practices and Chain of Custody</b> |  |
|--|--|
| <b>Description</b>   | <p>The RJC is a whole-of-supply chain standards initiative for the jewellery supply chain from mine to retail (incl. sourcing, segregation, transferring). It has established two standards against which its members can be audited and certified:</p> <ul style="list-style-type: none"> <li>— Code of Practices (COP)<sup>182</sup> concerns management systems and the auditing of the responsible business practices of member companies. Mandatory for all members (within two years of joining). The following steps are required: self-assessment, audit, reporting, certification and periodic reviews. The CoP is designed for international application to all following business: exploration and mining, refining and trading, jewellery manufacturing, jewellery retailing, service industries.</li> <li>— Chain of Custody (CoC)<sup>183</sup> concerns traceability of the material (precious metal) and requires responsible business practices at each step in the jewellery supply chain. For RJC members who work with precious metals only; voluntary for members who wish to be certified. The standard requires companies to have a policy and risk management framework for conflict sensitive sourcing practices, drawing on the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict Affected and High-Risk Areas. Certification Audit by accredited Auditors. After 3 years, the audit must be renewed.</li> </ul> |
| <b>Focus in supply chain</b>   | <ul style="list-style-type: none"> <li>— Complete industry supply chain, from sourcing (mines), refining, alloying, assaying, jewellery and watch manufacturing and retailing companies</li> <li>— Application in the ASM value chain may be difficult. However, the RJC mentions on his website, that it supports initiatives to enhance ASM participation in the jewellery supply chain.</li> </ul>  |

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| <b>London Bullion Market Association (LBMA): Responsible Gold Guidance (v.7)</b> |  |
|--|--|
| <b>Description</b>   | <p>The LBMA is an international trade association, representing the London market for gold and silver bullion. This includes the majority of the gold-holding central banks, private sector investors, mining companies, producers, refiners and fabricators.</p> <p>LBMA's Responsible Sourcing Programme was set up to consolidate, strengthen, and formalize existing standards of refiners' due diligence.<sup>184</sup></p> <p>The "Responsible Gold Guidance" (RGG) has been mandatory for all gold Good Delivery accredited refiners since 2012 (GDL: Good Delivery List). It covers about 90% of refined gold among its members. And according to LBMA it enables the downstream sector to identify and source from conflict-free refiners.</p> <p>The LBMA produces GDLs for gold and silver bars, detailing the names of accredited refiners, their listing date and the marking details of their bars. Because of the</p> |

<sup>182</sup> [http://www.responsiblejewellery.com/files/RJC\\_Code\\_of\\_Practices\\_2013\\_V.2\\_eng.pdf?dl=0](http://www.responsiblejewellery.com/files/RJC_Code_of_Practices_2013_V.2_eng.pdf?dl=0) (30.11.2017).

<sup>183</sup> [http://www.responsiblejewellery.com/files/S002\\_2012\\_RJC\\_CoC\\_Standard\\_PM.pdf](http://www.responsiblejewellery.com/files/S002_2012_RJC_CoC_Standard_PM.pdf) (30.11.2017).

<sup>184</sup> [http://www.lbma.org.uk/assets/downloads/presspack/LBMA\\_Overview\\_Brochure.pdf](http://www.lbma.org.uk/assets/downloads/presspack/LBMA_Overview_Brochure.pdf) (30.11.2017).

stringent assaying and bar quality criteria that applicants must satisfy to attain accreditation, GDL are universally recognized as the *de facto* standard for the quality of gold and silver bars.

The RGG programme is based on the OECD Due Diligence Guidance as well as Swiss and US KYC, Anti-Money Laundering and Combating Terrorist Financing regulations and procedures.

The measures to be taken are based on the five steps of the OECD Guidelines, including annual reporting.<sup>185</sup> The Guidance shall be applied by refiners for annual reporting beginning on or after 1 January 2016.

Available standards/tools for implementing and monitoring the “Responsible Gold Guidance” are:

- Third-Party Audit Guidance: to facilitate transparency and ensure consistent implementation of Responsible Gold Guidance
- LBMA Responsible Gold Webinars: to highlight news and changes to the responsible gold documentation
- Due Diligence checklist for mined gold and for recycled gold
- KYC Questionnaire for mined gold and for recycled gold
- Approved Service Providers List

**Focus in supply chain** All steps in the entire supply chain, from mining process (gold producers), local exports to gold traders and refiners, as well as downstream companies.

In the following table, the steps 1 (management system), 2 (risk assessment), 3 (risk identifying strategy), 4 (third party audit) and 5 (reporting) in the OECD Guidelines ‘Supplement on Gold’ and the corresponding measures are compared to the two industry standards of the LBMA and the RJC.

|                          | OECD  | LBMA RGG  | RJC CoP  |
|--------------------------|---|---|--|
| <b>Management System</b> | <p>STEP 1: ESTABLISH STRONG COMPANY MANAGEMENT SYSTEMS</p> <p>A) Adopt and commit to a supply chain policy for identifying and managing risks for gold potentially from conflict-affected and high-risk areas</p> <p>B) Structure internal management systems to support supply chain DD</p> <p>C) Establish a <b>system of transparency, information collection and control over the gold supply chain</b></p> <p>D) Strengthen company engagement with suppliers</p> <p>E) Establish a company and/or mine level grievance mechanism.</p> <p>Section II: Specific recommendations for refiners.</p> | <p>1. ESTABLISH STRONG COMPANY MANAGEMENT SYSTEMS</p> <p>— Adopt a company policy regarding due diligence for supply chains of gold</p> <p>— Set up an internal management structure to support supply chain due diligence</p> <p>— Establish a <b>strong internal system of due diligence, controls and transparency</b> over gold supply chains, <b>including traceability and identification of other supply chain actors</b></p> <p>— Strengthen company engagement with gold-supplying counterparties and, where possible, assist gold-supplying counterparties in building due diligence capacities</p> <p>— Establish a company-wide communication mechanism to promote broad employee participation and risk identification to management</p> | <p>GENERAL REQUIREMENTS</p> <p>1.1 Legal compliance: Members shall have systems in place that maintain awareness of and ensure compliance with Applicable Law.</p> <p>POLICY AND IMPLEMENTATION</p> <p>2.1 Members shall adopt a policy/ies that documents the Member's commitment to responsible business practices, is endorsed by senior management, communicated to Employees and <b>made publicly available</b>.</p> <p>2.2 Senior management shall conduct, <b>at least annually, reviews to assess the ongoing suitability and adequacy</b> of the Member's business practices in achieving the policy, and implement improvements to address any gaps.</p> |

<sup>185</sup> <http://www.lbma.org.uk/assets/market/gdl/RGG%20v6.0%20201508014.pdf> (30.11.2017).

|                           | OECD  | LBMA RGG   | RJC CoP  |
|---------------------------|---|--|--|
| Outputs                   | <ul style="list-style-type: none"> <li>Supply chain policy</li> <li>Internal management system</li> <li>Grievance mechanism</li> </ul>  | Mostly equal to OECD Guidelines. Publication of documents is not explicitly demanded here (but later in step 5)  | <ul style="list-style-type: none"> <li>Supply chain policy</li> <li>Reviews, if policy is achieved</li> </ul>  |
| Identify and assess risks | <p>STEP 2: IDENTIFY AND ASSESS RISKS IN THE SUPPLY CHAIN</p> <p>Section II (Risk assessment for local exporters, recyclers, international traders of mined/recyclable gold and refiners)</p> <p>A) Determine gold origin</p> <p>B) Identify red flags in the gold supply chain</p> <p>C) Map the factual circumstances of the company's red flagged supply chain(s), under way and planned [...] <b>by in-depth reviews of the context of all red-flagged locations [...]</b> and establish <b>on the ground assessment teams</b></p> <p>D) Assess risk in the supply chain</p>   | <p>2. IDENTIFY AND ASSESS RISK IN THE SUPPLY CHAIN</p> <p>Identify risks in the gold supply chain:</p> <ul style="list-style-type: none"> <li>For both Mined Gold and Recycled Gold, Refiners should identify in accordance with Annex II of OECD (2012) the following risks associated with the supply chain from the point of origin to the Refinery [...]</li> <li>Assess risks in light of the standards of their supply chain DD system</li> <li>Report risk assessment to designated Senior Management</li> </ul>  | [No overall risk assessment is required, but provisions 6 et seq. mention due diligence processes to identify, prevent, mitigate and account their impacts on human rights.] |
| Output                    | <ul style="list-style-type: none"> <li>Mapping of circumstances</li> <li>Reviews</li> <li>Assessment teams on the ground</li> </ul>   | Mostly equal to OECD Guidelines. Publication of documents is not explicitly demanded here. Reviews and assessment teams on ground as mentioned in OECD.  |  |
| Risk Strategy             | <p>STEP 3: DESIGN AND IMPLEMENT A STRATEGY TO RESPOND TO IDENTIFIED RISKS</p> <p>A) Report findings to designated senior management</p> <p>B) Enhance engagement with suppliers and the internal systems of transparency, information collection and control over the gold supply chain from Step 1. <b>Refiners should make available information to auditors or at least to downstream purchasers.</b></p> <p>C) Devise and adopt a risk management plan.</p> <p>D) Implement the risk management plan, monitor and track performance of risk mitigation, report back to designated senior management and consider suspending or discontinuing engagement with a supplier after failed attempts [...]</p> <p>E) Undertake additional fact and risk assessment for risk requiring mitigation, or after a change of circumstances</p> | <p>3. DESIGN AND IMPLEMENT A STRATEGY TO RESPOND TO IDENTIFIED RISKS</p> <ul style="list-style-type: none"> <li>Devise a strategy for risk management of an identified risk by either (I) mitigation of the risk while continuing trade, (II) mitigation of the risk while suspending trade or (III) disengagement from the risk</li> <li>Where a management strategy of risk mitigation is undertaken, it should include measurable steps to be taken and achieved, monitoring of performance, periodic reassessment of risk and <b>regular reporting to designated senior management.</b></li> </ul> | [No overall risk assessment is required, but provisions 6 et seq. mention due diligence processes to identify, prevent, mitigate and account their impacts on human rights.] |

|                   | OECD  | LBMA RGG  | RJC CoP   |
|-------------------|---|---|---|
| Output            | <ul style="list-style-type: none"> <li>• Risk management plan; monitoring and tracking of identified risks</li> <li>• Report about identified risks (internal document for management)</li> <li>• Make available these information to auditors</li> </ul>   | <ul style="list-style-type: none"> <li>• Improvement strategy (risk management plan); regular review and assessment at the end of each deadline</li> <li>• Report about identified risks (internal document for management)</li> </ul>  |   |
| Independent Audit | <p>STEP 4: CARRY OUT INDEPENDENT THIRD-PARTY AUDIT OF REFINER'S DUE DILIGENCE PRACTICES</p> <p>A) Plan an independent third party audit to verify the implementation of refiner's DD practices for responsible supply chains.</p> <p>B) Implement the audit in accordance with the audit scope, criteria, principles and activities. ⇒ (4.) <b>Publish summary audit reports of refiners with due regard taken of business confidentiality.</b> A summary should include:</p> <ul style="list-style-type: none"> <li>- Refiner details, date of the audit, audit period</li> <li>- Audit activities and methodology</li> <li>- Conclusions</li> </ul> | <p>4. ARRANGE FOR AN INDEPENDENT THIRD-PARTY AUDIT OF THE SUPPLY CHAIN DUE DILIGENCE</p> <p>Refiners should have their supply chain management systems and practices audited by independent and competent third parties. The LBMA requires refiners to use an auditing body on the Approved Service Providers List. The LBMA accepts audit engagement in accordance with ISAE 3000 or ISO 19011:2011. Submission of Audit Report to LBMA: <b>Copies of full report and review reports should be submitted to the LBMA Chief Executive on an annual basis.</b></p> | <p>The audit is part of the certification and comprises the following:</p> <ul style="list-style-type: none"> <li>— A preliminary desktop review of the member's self-assessment questionnaire and other related information;</li> <li>— Selection of a representative set of the Member's Facilities and Business Activities to visit and assess</li> <li>— Verification of the member's self-assessment through on-site review at the selected sample of facilities.</li> </ul> <p>The auditor is an independent third party person or organisation meeting the RJC' objective selection criteria and accredited to carry out verification.</p> |
| Outputs           | <ul style="list-style-type: none"> <li>• Audit report (internal)</li> <li>• Summary of audit report (public)</li> </ul>   | [Audit report and regular reviews as basis for the certification]   | [Audit report and regular reviews as basis for the certification]   |

|           | OECD   | LBMA RGG   | RJC CoP   |
|-----------|--|--|---|
| Reporting | <p>STEP 5: REPORT ANNUALLY ON SUPPLY CHAIN DUE DILIGENCE</p> <p>A) <b>Annually report or integrate into annual sustainability or corporate responsibility reports</b> [...] with due regard taken of business confidentiality and other competitive or security concerns<sup>186</sup>.</p> <ul style="list-style-type: none"> <li>– report on steps taken to implement company management system (step 1)</li> <li>– report on steps taken to implement company risk assessment in the supply chain (step 2)</li> <li>– report on steps taken to implement risk management (step 3)</li> </ul> <p>For Refiners: in addition to the above, Refiners should also do audits and <b>publish the summary audit reports</b> with due regard taken of business confidentiality (incl. Refiner details and the date of the audit; the audit activities and methodology; the audit conclusions).</p> | <p>REPORT ON SUPPLY CHAIN DUE DILIGENCE</p> <p>Refiners should <b>publicly report on their gold supply chain due diligence policies and practices</b>, with appropriate regard for security, proprietary information and the legal rights of the other supply chain actors. [...] over 12-month reporting period. [...] Refiners are <b>not required to disclose publicly the annex report disclosing the countries of origin of mined gold</b>.</p> <p>Refiners should <b>make available to the public their company policy regarding gold supply chain</b>, the Refiners Compliance Report with these guidelines together with the Assurance Report.</p> <p>Refiners should also <b>submit a corrective action plan</b> [...] when there is a [risk] and/or the Refiner fails to satisfy one or more of the requirements [from step1-5] of the LBMA Responsible Gold Guidance.</p> | <p>3.1 [REPORTING] Members shall communicate to stakeholders at least annually on their business practices relevant to the RJC CoP.</p>   |
| Output    | <ul style="list-style-type: none"> <li>• Annual report on steps 1-3</li> <li>• Summary of audit report</li> </ul>  | <ul style="list-style-type: none"> <li>• Company policy</li> <li>• Compliance report</li> <li>• Assurance report</li> <li>• Corrective Action plan</li> </ul>  | <p>➔ No indication of <i>public</i> reporting</p> <p><i>Chapter 6 and following concern Human Right and other issues (e.g. environment) but do not require a reporting neither.</i></p> |

Table 9: Differences between the LBMA RGG and the RJC standards, compared to OECD's standard assessment steps 1 to 5, in terms of requirements and outputs.

Other industry standards and procedures, that are cross-recognized with the OECD Due Diligence Guidelines<sup>187</sup> and partly also with LBMA or RJC standards:

- **Conflict-Free Sourcing Initiative (CFSI) and Conflict Free Smelter Program (CFSP)**: verifies that the sources of conflict minerals processed by smelters are conflict-free. Enables downstream companies to identify and source from conflict-free smelters. Audit/external assurance and public disclosure are required.
- **Dubai Multi-Commodities Centre (DMCC) Rules for Risk Based Due Diligence in the Gold and Precious Metals Supply Chain**: Enforces

<sup>186</sup> For details of business confidentiality see OECD (2012), p. 45: Business confidentiality and other competitive or security means, without prejudice to subsequent evolving interpretation: price information; supplier identities and relationships; transportation routes; and the identity of information sources and whistle-blowers located in conflict-affected and high-risk area, where revealing their identity of such sources would threaten their safety. All information will be disclosed to any institutionalized mechanism, regional or global, once in place with the mandate to collect and process information on minerals from conflict-affected and high-risk areas.

<sup>187</sup> <http://www.oecd.org/investment/mne/Gold-Industry-and-Sector-Initiatives-Guide.pdf> (30.11.2017).

accredited members globally to implement the OECD Due Diligence Guidelines. Audit/external assurance and public disclosure are required.

- **World Gold Council (WGC) Conflict-Free Gold Standard:** Common approach by which gold producers can assess and provide assurance that their gold has been extracted in a manner that does not cause, support or benefit unlawful armed conflict or contribute to serious human rights abuses or breaches of international humanitarian law. Voluntary and globally recognized standards can be used by all entities involved in the extraction of gold. Audit/external assurance and public disclosure are required.

Other voluntary certification schemes with focus on market-based promotion of responsible gold are discussed in the next chapter 5.1.3.

### 5.1.3 Developmental Initiatives

Given the global importance of commodity trade and gold refinement for Switzerland, the Swiss government as well as NGO have worked and engaged in the topic over the last 40 years with a focus on fostering economically sustainable, environmentally responsible and socio-economic sound conditions in the gold mining sector. These measures and initiatives include promotion of good governance principles, strengthening of local institutions, enforcement of local and national laws, capacity building and formalization of small/artisanal miners. Initiatives include also research and advocacy on the plight of thousands of artisanal miners in cases of human rights abuses.

ASM was identified as a development topic in the 1970s by the Swiss Agency for Development and Cooperation (SDC), starting with a focus on the environmental impact of mercury use e.g. in Brazil.<sup>188</sup> In 1992, the first SDC project in the ASM sector was planned in Ecuador, initially focusing on mercury, shortly later also in Bolivia with a more integrated approach including poverty alleviation and a broader perspective on sustainable livelihoods. In 1999, the third project started in Peru and 2005 in Mongolia, which is based on lessons learnt from Ecuador and Bolivia.<sup>189</sup> (see example below)

Many of these initiatives were based on the insight that formalization of the ASM sector requires rule of law and an adequate, enforceable legal framework. Only then ASM miners can be empowered, create sustainable livelihoods and as such their dependency and vulnerability can be reduced. Essentially, in most LDCs ASM and other resource extraction operations remains to be the economic activity that offers the best opportunity to lift many people out of poverty.<sup>190</sup>

Currently, SDC is considering taking up the gold mining theme as a regional program focusing on local governance, transparency and accountability, and poverty alleviation in its priority countries in West Africa (Chad, Niger,

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<sup>188</sup> SDC (2011): SDC Experiences with Formalization and Responsible Environmental Practices in Artisanal and Small-scale Gold Mining in Latin America and Asia (Mongolia).

<sup>189</sup> *ibid.*

<sup>190</sup> *ibid.*



Mali, Burkina Faso).<sup>191</sup> In Mozambique for instance, the new SDC country strategy 2017-2020 envisages to also include the private sector in the dialogue on governance of natural resources.<sup>192</sup>

#### Example: Sustainable Artisanal Mining (SAM) Project in Mongolia

|                              |   |
|------------------------------|---|
| <b>Description</b>           | <p>Intervention started in 2005 and is currently in its phase 4 (2015-2018). The total Swiss contribution between 2005 and 2018 is CHF 16.5 million. Primary beneficiaries in phase 4 are 15'000 to 20'000 ASM miners, supply chain operators and state institutions. 230'000 people largely from the rural population are directly or indirectly affected.<sup>193</sup></p> <p>Mongolia produces around 5-7 tons of ASM gold, of which only a marginal part enters the formal supply chain.<sup>194</sup></p> <p>The current 4<sup>th</sup> phase aims at (i) Improving the application of a human rights-based approach to community mining; (ii) Economically strengthening all stakeholders along the formal gold supply chain; and (iii) Creating a global knowledge hub with which to share ASM best practices from and to Mongolia.</p> <p>The key achievements were:</p> <ul style="list-style-type: none"> <li>— Shifting ASM towards the formal economy through legalization</li> <li>— Empowerment of ASM miners, government institutions have started to provide services to the sector</li> <li>— Improvement in ASM occupational health and safety, enrolment in social and health insurance schemes, increased income and large increase of ASM gold sales</li> <li>— ASM National Umbrella Federation (NF) established in 2013, important for upholding the dialogue between organized ASM miners and the national government</li> <li>— Reduction of mercury emissions</li> </ul> |
| <b>Focus in supply chain</b> | The focus is primarily in the country of origin, focusing on the mining site and its surroundings as well as to some extent the in-country "supply chain operators"   |

SDC estimates that the reduction of mercury emissions achieved through direct interventions of SDC projects in pilot sites in Peru, Ecuador, Bolivia and Mongolia amounts to approximately 11 tons annually.<sup>195</sup>

In the domain of Swiss economic cooperation, the State Secretariat for Economic Affairs (SECO) is engaged in the gold sector with the Better Gold Initiative (BGI). The BGI is one of the leading initiatives<sup>196</sup> which promote the trade of responsible gold sourced from ASM operations. The BGI started in 2013 as a private-public partnership between the Swiss Better Gold

<sup>191</sup> Interview with SDC, 12/07/2017.

<sup>192</sup> SDC (2017): Beitrag Mozambique für Block (Podium) Rohstoffe, Business & Human Rights. Afrikatag der Boko am 25.08.17 im Berner Generationenhaus.

<sup>193</sup> SDC (2014): Sustainable Artisanal Mining. Mongolia/East Asia. Credit Proposal (Phase 4), 1 January 2015 – 31 December 2018.

<sup>194</sup> SDC (2014): Planning Platform: SAM – Sustainable Artisanal Mining Project, Phase 4.

<sup>195</sup> SDC (2011): SDC Experiences with Formalization and Responsible Environmental Practices in Artisanal and Small-scale Gold Mining in Latin America and Asia (Mongolia).

<sup>196</sup> See also: Positionspapier und Aktionsplan des Bundesrates zur Verantwortung der Unternehmen für Gesellschaft und Umwelt Bericht des Bundesrates zum Stand der Umsetzung des Aktionsplans (Periode April 2015 bis März 2017)



Association (SBGA) and SECO (see box) and currently focuses on gold sourced from Peru, Bolivia and Colombia.

#### Example: Better Gold Initiative in Peru (since 2014) and Bolivia and Colombia (since 2017)

|                              |   |
|------------------------------|---|
| <b>Description</b>           | <p>Aims to reduce poverty and to improve social and environmental conditions in ASM by establishing more sustainable gold value chains from the ASM mines in Latin America to the market in Switzerland. The members of the Swiss Better Gold Association have taken an engagement to purchase the gold from certified mines. During the second phase of the BGI, the objective is to scale up the Initiative through the introduction of minimum criteria for responsibly sourced ASM gold.</p> <p>The number of miners working in the ASM sector in these three countries – the vast majority of them informally – is estimated to more than 300'000. In addition, the livelihood of possibly up to one million people depends indirectly on jobs in the ASM sector in these three countries.</p> <p>Between 2013 and 2016 a total of ca. 1500kg of responsibly sourced ASM gold was exported to the Swiss market.</p> <p>The key achievements were:</p> <ul style="list-style-type: none"> <li>— Until 2016, five mines were certified in Peru, whereas two delivered 1'500kg gold to Switzerland.<sup>197</sup> These mines have several hundred employees, in Peru this is classified as small-scale mines. Key challenge for the BGI is going at scale, currently only very small quantities of certified gold (in terms of share of total exported quantities)</li> <li>— Commitment of the gold sector to buy the premium gold was achieved, and the BGI connects actors along the entire value chain, PPP approach can be seen as a valuable coordination mechanism contributing to converging agendas between the government and the gold sector.</li> <li>— Primary focus on establishing more sustainable gold value chains, policy dialogue regarding the formalization process remained in its infancy and not well-structured in the first BGI phase.</li> </ul> <p>Critics however point out in two interviews that the most problematic gold mining operations (e.g. Madre de Dios or La Rinconada regions in Peru) are not targeted and thus problematic gold from Peru continues to be imported to Switzerland. Also, it was criticized that the BGI does not target the most vulnerable miners whose needs are the most urgent in terms of human suffering and possibly also environmental pollution.</p> |
| <b>Focus in supply chain</b> | <p>The focus is from producer to consumer, e.g. starting from the mining site / process, through the trade and transport process to the end customers (SBGA members)</p>  |

SECO is further responsible for the Swiss contribution to the “Extractives Global Programmatic Support (EGPS) Multi-Donor Trust Fund<sup>198</sup> (eight donors that have pledged approximately USD27 million) and the Managing of the Natural Resource Wealth Topical Trust Fund (MNRW)<sup>199</sup> (several donors that have pledged approximately \$25 million) which work closely with EITI.

Swiss NGOs are engaged in developmental initiatives in the gold sector although with smaller programme budgets. NGOs operate projects in gold mining countries e.g. Peru, Colombia, or Burkina Faso. Such projects typically aim at advocacy and raising awareness among local communities

<sup>197</sup> SECO (2017): Factsheet BGI.

<sup>198</sup> <http://www.worldbank.org/en/programs/egps> (30.11.2017).

<sup>199</sup> <http://www.imf.org/en/Capacity%20Development/trust-fund/MNRW-TTF> (30.11.2017).

about negative impacts of gold mining, in some cases also technical support of gold miners or improved access to public services for these communities.

Also, the gold industry engages in technical development projects. As an example, Argor-Heraeus is cooperating with the United Nations Industrial Development Organization UNIDO to promote sustainable mercury-free technologies in artisanal and small-scale gold mining operations and production.

#### 5.1.4 Other Measures

From 2005 onwards, the growing consumer awareness also led to the promotion of voluntary sustainability standards in the gold sector. Apart from certification schemes established by the gold industry, there are mainly two different voluntary certification schemes for gold:

- Fairmined Standard, certified by the Alliance for Responsible Mining (ARM): This standard applies a third-party assurance related to the formalization of artisanal mines and responsible social, environmental and labour practices.
- Fairtrade Gold Standard, certified by Fairtrade International / Max Havelaar: This standard was established to give companies and consumers the opportunity to improve the livelihoods of ASM miners, and applies a certification system that ensures fair working condition for miners and sound managing of environmental impacts. As to date only few mines in Peru are certified.

These two standards certify mainly gold sourced from ASM, and make up a vanishingly small fraction of global gold production.<sup>200</sup> Both organizations today work independently from each other.

The overall awareness and pressure on the involved (gold industry) actors to establish procedures to reduce potential human rights abuses (or to at least disclose to the public what is being done in that regard) has also been created in the last few years by various Swiss NGO which have published reports about human rights abuses in the gold mining context and raised awareness on the implications for Switzerland. Their main objectives are to achieve a higher transparency in gold trade and tighter control of the industry's due diligence measures. To that end, NGO have also directly engaged in informal discussions with Swiss gold refiners in recent years. One of the main points of criticism is the lacking institutionalized dialog.

## 5.2 Effectiveness of Due Diligence Measures

### 5.2.1 Introduction

An evaluation of the extent to which due diligence measures effectively minimize or reduce human rights abuses applied among Swiss gold refiners would typically require the following three basic steps:

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<sup>200</sup> IHEID (2015), p.36

- Measure the changes of the desired impact e.g. abolition or reduction of human rights abuses along gold value chains of Swiss gold refiners;
- Attributing these observed changes to the measures;
- Judging the value of these changes.

However, the following factors challenge the analysis of this first step:

- Lack of information regarding the countries from which the large Swiss refiners are sourcing raw gold;
- Time resources required to assess these changes, considering a wide range of sourcing sites, human rights aspects;
- Lack of baseline data.

Steps 2 and 3 would pose further difficulties. For these reasons, the effectiveness could only be evaluated in a much larger and time-consuming process in which much of the analysis would have to be conducted along the sourcing processes of the ASM and LSM gold value chains.

To nevertheless add value to the discussion around the effectiveness of due diligence measures, this chapter will:

- Summarize the statements by the interviewees on the effectiveness of due diligence measures; where adequate, the statements are commented by the study team (chapter 5.2.2), and
- Analyse of auditing and disclosure aspects – as part of the due diligence process – based on what is publicly accessible and based on the additional information made available by the interviewed Swiss gold refiners.

Interviewed NGOs have raised concerns that the effectiveness of due diligence in the gold supply chain cannot be assessed due to a lack of transparency by the Swiss gold refiners when it comes to reporting about the implementation and application of the relevant guidance (namely of OECD and LBMA). The assumption of these interviewees is that the effectiveness of due diligence measures can be assessed by the public *only* if evidence in the areas of risk assessment, risk management, due diligence and the origins of raw gold are published. This assumption is tested in this chapter.

### 5.2.2 Statements by Interviewees

All interviewed companies point out that they have established compliance management systems operating in accordance with the procedures described in this report (namely the relevant guidance from LBMA and OECD, RJC and others such as KYC procedures required by AML legislation), thereby covering the relevant risks.

The interviewed Swiss gold refiners stressed the following points:

- Refiners stress that they only accept gold from established suppliers, companies and bullion banks and not from individual traders, gold shops or private persons, fiduciaries, nor do they accept blends or at discount, and never against cash. They say they mostly buy from LSM and recycling where they have a very good level of control and very little to none

from ASM. From ASM they only take gold when they can trace back the origin of gold and when they can make sure that adequate standards are met, e.g. by buying from established organizations who oversee different formalized artisanal and small scale mines. They also exclude certain high risk countries or regions (for example, some state that they do not take gold from the DRC at all).

- New suppliers are checked and assessed by Corporate Compliance, irrespective of size, type of business or location. Every supplier is visited when on-boarding and checked locally, with periodic revisits (more frequent in high risk locations, up to every six months). Human rights aspects are usually also addressed by compliance personal locally, with support from third parties.
- Suppliers who fail to meet the standards are blacklisted. Refiners said that they regularly turn down business when standards are not met or important information is missing. Some refiners say that their rate is as high as 50%. Mostly this happens at an early stage of the due diligence process.
- The source (counterpart), the origin of gold as well as the people involved in transportation are identified and checked. This includes for example: identification of company, management and beneficial ownership, funds, company information, certificates and permits; and origin, quantity and quality of material, as well as existence of supply chain policy to respect human rights. Refiners often have long-term contracts and relationships with suppliers and know them very well.
- During the course of a business relationship, refiners are doing plausibility checks related to the source and the supplier, to check consistency with quality and amounts of gold produced, and monitor if a particular amount of gold can reasonably come from a given source. This process requires a lot of effort (e.g. checking on volumes, fingerprint in form of unique chemical composition, reconciling supply and shipping information)
- Country risk assessments: Black lists are used from different sources (e.g. SECO / EU / United States, databases such as Heidelberg Institute *Konflikt Barometer*, TI CPI and internal lists, or information from NGO and associations). Besides this, there is also a focus on specific regions within a country.
- KYC procedures are applied thoroughly throughout the business; this principle today has become even more important and expands in the supply chain to “know your customers’ customer”.
- With recycled gold, it is very difficult to trace all the sources. In strictly technical terms it is not possible to trace the origin. Refiners claim they regularly go to collection points and verify the system indirectly (comparable to asset liability management processes) to ensure that LBMA, OECD, Dodd-Frank regulation and other requirements are met. Refiners emphasize that on certain points they have to trust the provided documentations.

- The share of recycled gold is dropping every year, because less gold is used in industry products and gold is used much more efficiently. Recycling in the future might become more of an issue, when there is a lack of supply from mining. Some interviewees voiced concerns that this could lead to a contamination of the RJC CoC process.

The interviewed Swiss NGOs do not agree with the self-assessment of the companies and predominantly distrust the effectiveness of due diligence measures implemented by Swiss gold refiners. The interviewed NGOs stressed the following points:

- Given the fact that gold refiners do not disclose much detail about their supply chain due diligence procedures, NGOs claim that it is impossible to make a judgment on their effectiveness. Given the lack of transparency, many NGO representatives doubt that these due diligence procedures systematically include aspects regarding human rights that are also applied in the field.
- Instead, voluntary standards by the industry have been complete “window dressing”, and given the lack of transparency (despite promises by gold refiners to get more transparent) there have been almost no (visible) improvements.
- NGOs also claim the Swiss refiners would not be reporting enough on the due diligence analysis as recommended by the OECD Guidelines and its Gold Supplement, and believe that the Guidelines are not taken too seriously by the industry.
- The actual clients who buy or trade the gold (e.g. bullion banks or trading houses) are not disclosed to the Swiss customs at import. They only register the address of the shipment – typically a refiner – but not the actual client. Refineries rarely purchase on their own accounts.
- Audits are looking at management systems, but not considering enough the sources, or financing instruments. They believe if somebody wants to do illegal business, he still can and would not be detected by the standardized procedures and certifications.
- One respondent argues that no gold mines have been certified under the RJC Chain of Custody (CoC) certificate, and that CoC covers often only a small fraction of the gold refined by member companies.
- NGOs argued that the refiners are visiting their sites primarily because of commercial interest and that they often miss the opportunity to do the things right on site at the same time, with the right people and expertise. They should also involve and engage more with their business partners. So far, they say due diligence procedures are applied in a too defensive manner.

### 5.2.3 Analysis of Auditing and Reporting Based on the LBMA RGG

There is a difference between actual, mandatory disclosure requirements and such disclosure that is suggested or desirable or where currently no requirements for public disclosure exist. The current requirements for the

four Swiss gold refiners analyzed are laid out in LBMA's RGG which represents the main applicable guidance (see also chapter 5.1.2).<sup>201</sup>

LBMA's RGG represents the predominant guidance for refiners, because they have been made mandatory for all gold Good Delivery refiners since 2012. This means that all refiners producing LBMA good delivery gold bars must comply with the LBMA RGG in order to remain on the LBMA GDL.

Figure 4 illustrates the due diligence audit and disclosure requirements according to LBMA's RGG. It shows that third party audit reports including annex are disclosed to LBMA as a basis for certification, that these reports however are not publicly disclosed with its annexes. The LBMA internal due diligence includes policy, process and governance for both current and potential new members as well as GDL refiners. This includes incident and sanctions management (e.g. removal from GDL).

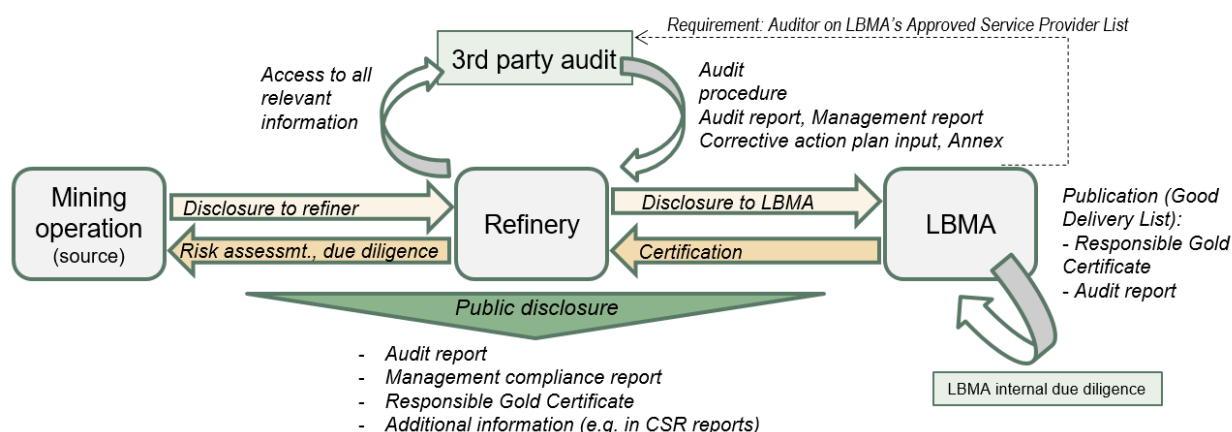


Figure 4: LBMA's RGG due diligence audit and disclosure requirements

The following tables list the requirements as set out in step 4 and 5 of LBMA's RGG, and analyses how the surveyed companies have followed these:

#### RGG Step 4: Arrange for an independent third-party audit of the supply chain due diligence

| Requirements  | Analysis of public reporting of surveyed companies; Comments  |
|---|---|
| <b>Audits:</b> Refiners should have their gold supply chain management systems and practices audited by independent and competent third parties | All companies are doing so, in accordance with the appropriate audit standards and procedures. It should be noted that these standardized audit procedures focus primarily on management and staff interviews, review of policies and procedures, management and internal control systems, relevant documentation and Refiner's compliance report, and testing of procedures including sampling (e.g. counterparty due diligence file and transaction |

<sup>201</sup> RGG formalizes and consolidates existing high standards of due diligence amongst all LBMA Good Delivery Refiners, and follows the five steps framework for risk-based due diligence of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas. LBMA Responsible Gold Guidance. Version 7 Last updated 1st September 2017 <http://www.lbma.org.uk/assets/market/gdl/RGG%20v6.0%20201508014.pdf> (30.11.2017).

| Requirements   | Analysis of public reporting of surveyed companies; Comments   |
|--|--|
|  | documentation) and have inherent limitations (e.g. no site visits to gold mines).  |
| <i>Audit reports:</i> RGG lists all the elements required, including the need for making recommendations to the refiner to improve their supply chain practice (if necessary, in a separate report). Any non-compliance (Medium, High Risk, Zero Tolerance) must be reported to the LBMA.  | Companies disclose the Audit Report on LBMA's website and companies' website. However, these reports do not list all details (e.g. on detailed improvement measures, or origin of gold, always in correspondence with the RGG requirements).<br><br>On both websites, the Audit Report as well as the corresponding RGG Certificate can be downloaded. |
| <i>Audit periodicity:</i> An audit of the Refiner's compliance with the LBMA Responsible Gold Guidance is required on a yearly basis, covering activities over a 12-month reporting period. Depending on results (instances of non-compliance), refiners after that may be subject to a lower level of audit. In any case, a full audit is required every three years. | This is done by all companies as a requirement (without a certification cannot be obtained)  |
| Submission of Audit Report to LBMA   | Copies of full audit reports, review reports and management reports are submitted to the LBMA by all companies   |

### RGG Step 5: Report on supply chain due diligence

| Requirements  | Analysis of public reporting of surveyed companies; Comments   |
|---|--|
| <i>General remarks:</i> Refiners should publicly report on their gold supply chain due diligence policies and practices, with appropriate regard for security, proprietary information and the legal rights of the other supply chain actors. Refiners should publicly report on their compliance with this Guidance on an annual basis, which will cover activities over a 12-month reporting period.  |  |
| <i>Disclosure:</i> Refiners should make available to the public their company policy regarding the gold supply chain, the Refiner's Compliance Report with these guidelines together with the Assurance Report. Refiners are not required to disclose publicly the Annex of the Compliance Report disclosing the countries of origin of gold. For assurance engagements based on ISAE 3000, refiners are required to compile a Refiner Compliance Report. | All companies disclose their gold supply chain policy, Audit or Assurance Report, Management Compliance Report and RGG Certificate (on LBMA's website and/or companies website). The Compliance reports detail the companies' efforts and activities to be compliant with all steps of the RGG, however they have a varying level of detail. For example, some companies disclose roughly from where they have supplied mined gold (e.g. regions) and which countries they exclude, what their main suppliers are (e.g. well-established industrial mines), whether they have sourced from ASM or not, or give details about specific cases of high-risk counterparts where a relationship was suspended. Other companies reveal less detail.<br><br>As refiners are not required to disclose publicly |

| Requirements   | Analysis of public reporting of surveyed companies; Comments   |
|--|--|
|  | <p>the <i>Annex</i> of the Compliance Report that includes the countries of origin of gold and quantities of gold, none of the companies are disclosing detailed information on this matter. This kind of information however is disclosed to LBMA.</p> <p>As for the Audit statement issued by the mandated audit firm, these are standard forms that are set by the standard setters, and as such do not disclose a lot of meaningful information (other than for example the scope of the audit).</p> |
| <i>Corrective Action Plan:</i> Refiners should also submit a Corrective Action Plan when there is a Medium / High-Risk / Zero Tolerance non-compliance and/or the Refiner fails to satisfy one or more of the requirements as set out in Steps 1 to 5 of this Guidance | The corrective action plan is not required to be made public. None of the companies are disclosing this.   |
| Submission of Audit Report to LBMA   | This is a requirement for obtaining the RGG Certificate.   |

The following conclusions can be drawn here:

- LBMA increasingly demands refiners to disclose more granular and detailed information about due diligence processes that refiners apply. To this end LBMA is working with its members to encourage them in being more transparent.
- There are examples of refiners who have been delisted for reasons of non-compliance with RGG. Consequences of non-compliance can be drastic, affected refiners would be removed from GDL and most certainly would lose their license to operate. However, delisting is the *ultima ratio* and before that LBMA can e.g. request in-depth reviews, engage in discussions, or increase the number and depth of audits and investigations.
- Beginning January 1<sup>st</sup> 2018 (and with effective date 1.1.2017), GDL refiners must disclose to LBMA the countries of origin and respective quantities for both mined and recycled material. Such information would also be used to validate the due diligence approach of refiners. The information collected from all refiners that are listed on the GDL might be published in the future in some form of geographical aggregation. This would then cover the major fraction of gold produced annually worldwide. However, from a Swiss perspective such aggregated information would not cover all the gold imported into Switzerland, because banks, small refiners, recycling businesses or the luxury good industry would not be included unless they are buying gold from GDL refiners.

From the analysis, the following summary can be made:



- The analyzed public disclosure from refiners in Switzerland corresponds with LBMA's RGG requirements.
- As for the disclosure of the origin of gold, there is specifically no requirement to publicly disclose the countries of origin of gold (both Mined and Recycled), and quantities imported from specific countries (as listed in the Annex of the audit report: 'Refiners are not required to disclose publicly the Annex report disclosing the countries of origin of mined gold'). For reasons of business confidentiality or commercial sensitivity refiners do not publicly disclose such information.
- Not all information that is reviewed, audited and submitted to LBMA is made public. This is common practice and comparable to any other (financial or non-financial, regulated or voluntary) audit.
- In areas other than the origin of gold, companies go further: In addition to complying with LBMA's RGG and disclosing the required information to the auditor and LBMA (gold supply chain policy, audit reports, and compliance management reports), companies regularly publish additional information on their websites. All surveyed companies for example publish a corporate responsibility or sustainability report (or corresponding sections in the annual report) where more contextual information can be found.
- The RGG procedure should also be seen in the context of a multitude of other systems and processes that companies have in place to ensure compliance with applicable laws and regulations. These systems and procedures operate on the industry, company or supply chain level and comprise for example:

| Level        | Procedures, commitments, certifications, memberships, collaborations   |
|--------------|--|
| Industry     | LBMA, RJC, WGC, OECD rules and standards   |
| Company      | Code of Conduct, company policies (e.g. responsible supply chain policy) and procedures, accreditations and certifications from LBMA, RJC (CoP, CoC), LME, Swiss AML / FINMA, ISO (9001, 14001), OHSAS 18001 |
| Supply Chain | Procedures in line with OECD Guidance, KYC procedures  |

5.2.4 Conclusions

The analysed Swiss refiners are complying with the RGG requirements set out by the LBMA. Some provide information beyond what is required but no Swiss refiner is disclosing information on the origin of gold to the public. Given the different layers of controls, independent reviews, audits and certification processes within the LBMA framework, it can be assumed that existing standards are effectively applied.

However, the study team concludes that the applied procedures themselves cannot be assessed directly since they are not disclosed to the public. There is no requirement to disclose this information. Refiners emphasize

business confidentiality and the need of protecting information that is sensitive from a commercial and competitive point of view.

Another question however is, whether the disclosed information is sufficient i.e. meaningful enough to inform stakeholders and the public debate, and to generate public trust that the applied due diligence processes are effectively working. From some interviewees' perspective, the current level of information provided by the companies is neither sufficient nor meaningful.

These areas for additional disclosure to be further considered by Swiss gold refiners are summarized in chapter 6.2.

### 5.3 Customs Procedures and Foreign Trade Statistics

The aim of this chapter is to describe the current, practical procedure of registering gold at customs and evaluate the quality and meaningfulness of information that can be derived from the foreign trade statistics regarding provenience of imported gold, and its suitability to determine provenience/source of the mined gold.

According to the Postulate Recordon, the question of provenience mainly concerns mined gold, which is for the largest part (more than 99% in 2016) registered at customs as "other unwrought forms" of raw gold (customs tariff 7108.12). To complete, the study also briefly discusses the import of recycled/scrap gold (customs tariff 7112.91).

#### 5.3.1 Legal Requirements Related to the Foreign Trade Statistics

The Ordinance on Foreign Trade Statistics defines the purpose of the foreign trade statistics to document import, export and transit of goods differentiated by product type and country, among others (Art. 1). The basis of the trade statistics are the customs declarations (Art. 3). The technical and commercial properties of the imported or exported goods must be declared as accurate as possible and the customs tariff number (Art. 7), the quantity (Art. 8) and value of goods (Art.9) must be indicated. Art. 10 stipulates that for imports the country of origin and the country of dispatch need to be indicated (for export the country of destination, for transit country of dispatch and country of destination). The following definitions apply:<sup>202</sup>

- The "*country of origin*" is defined as the "country where the merchandise was entirely obtained or produced, or where the last substantial transformation was carried out."
- The "*country of dispatch*" is "the last country from which the merchandise was directly dispatched to the Swiss customs territory. Transit, re-settlement, re-sale or storage has no impact on the country of dispatch."

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<sup>202</sup> See:

[https://www.ezv.admin.ch/dam/ezv/en/dokumente/archiv/a5/tares\\_bemerkungen/hinw%20ausf%20zollanmeldung\\_e.pdf.download.pdf/hinw%20ausf%20zollanmeldung\\_e.pdf](https://www.ezv.admin.ch/dam/ezv/en/dokumente/archiv/a5/tares_bemerkungen/hinw%20ausf%20zollanmeldung_e.pdf.download.pdf/hinw%20ausf%20zollanmeldung_e.pdf) (30.11.2017).

The customs tariff numbering is aligned with the internationally widely established “Harmonized Commodity Description and Coding System” published by the World Customs Organization<sup>203</sup>.

The FCA participates in the execution of around 150 non-customs legislative instruments, of which the Precious Metals Control regulation is one.<sup>204</sup>

### 5.3.2 Customs Declaration of Imported Gold

In the customs declaration forms, the above requirements for the declaration of gold imports are mandatory. They apply only to traded goods, not to personal goods. The example below illustrates such a form for a raw gold shipment.

| VORANMELDUNG   |                                    | FREI OHNE               |                                    | Einfuhrliste  |             | Definitiv  |                 |
|--|------------------------------------|-------------------------|------------------------------------|---|-------------|--|-----------------|
| Domizil<br>CH002771 ZÜRICH-FLUGHAFEN<br>Annahmedatum: 04.01.2016, 16:42                  |                                    |                         |                                    | <br><b>16CHEI000543806676.1</b> |             |  |                 |
| Versender:   |                                    | Versendungsland:        | GB                                 | Positionen:   | 1           | Packstücke:  | 10              |
| Importeur:   |                                    | Rohmasse gesamt:        | 4'183.5                            | MWST-Wert gesamt:   | 138'024'916 | MWST-Nr.:  |                 |
| Empfänger:   |                                    | Konto Zoll:             |                                    | Konto MWST:   |             | Rechnungswährung:                                  | US-Dollar (USD) |
| Spediteur:   |                                    | Incoterms:              | CIF                                | Code ZO:  |             | Transport (Verkehrszweig, Typ, Land, Kennzeichen): | Luftverkehr, -- |
| Ref-Nr.: 7850899   |                                    | Sonstige, :             |                                    | Sonstige, :   | /04.01.2016 | Sonstige, :  | --              |
| <b>1 (1)</b><br><b>GOLDBARREN IN ROHFORM ZUR RAFFINATION</b>                             |                                    |                         |                                    | <b>7108.1200</b><br><b>FREI OHNE</b>  |             |  |                 |
| <input checked="" type="checkbox"/> Handelswaren   | <input type="checkbox"/> Präferenz | Ursprungsland: GB       | Veranlagungstyp: Normalveranlagung |   |             |  |                 |
| Eigenmasse: 4034.607   | Rohmasse: 4183.5                   | Stat. Wert: 138'024'816 | Zollansatz: 0.00                   | MWST-Wert: 138'024'916 MWST [%]: 0 <sup>(1)</sup>   |             |  |                 |
| Packstücke (Art, Anzahl, Nummer):<br>Palette, 7, Adresse / seal 63077+81+85+89+93+97+101 |                                    |                         |                                    | Unterlagen (Art, Nummer, Datum, zusätzliche Angaben):<br>Handelsrechnung, INV, 30.12.2015, --                     |             |  |                 |
| Palette, 3, Adresse/seal 63107+109+113   |                                    |                         |                                    |   |             |  |                 |
| <sup>1)</sup> Steuerfrei   |                                    |                         |                                    |   |             |  |                 |

Figure 5: Example of a customs declaration form, indicating e.g. customs number, country of dispatch (*Versendungsland*), country of origin (*Ursprungsland*), gross and net volume of shipment.

For shipments declared to contain precious metals such as gold, two steps are foreseen at the customs offices:

<sup>203</sup> See: Convention: [http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs\\_convention.aspx](http://www.wcoomd.org/en/topics/nomenclature/instrument-and-tools/hs_convention.aspx); Coding published in 2017: [http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/instruments-and-tools/hs-nomenclature-2017/2017/1471\\_2017e.pdf?la=en](http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/nomenclature/instruments-and-tools/hs-nomenclature-2017/2017/1471_2017e.pdf?la=en) (30.11.2017).

<sup>204</sup> See: <https://www.ezv.admin.ch/ezv/en/home/documentation/legal-foundations/non-customs-tasks.html> (30.11.2017).

- **Formal inspection:** includes checking whether the declaration form includes all mandatory information.
- **Physical inspection:** The customs office decides, based on a risk analysis if a shipment shall be physically inspected. This inspection will be performed by the customs office. Like for all goods, only less than 1 % of the annual gold imports can be physically inspected. It does not include any further analysis of the provenience of the goods declared.

The country of origin and the country of dispatch are both required to be declared in the customs form. They may vary or be identical. The customs are not mandated to verify the correctness of the country of origin indicated on the declaration form. The FCA does not have any information or estimation how often the country of dispatch is declared instead of the country of origin.<sup>205</sup>

Shipments declared as raw gold at times contain other precious metals (silver, copper, etc.), typically due to the specific geological conditions in the mines where the minerals are coming from. In such cases, the shipment is declared at customs as raw gold – which is the precious metal with the highest value – if the mass content of raw gold equals or exceeds 2% of the total mass.<sup>206</sup>

Generally, custom tariffs are a fiscal instrument as well as a trade regulation instrument. However, raw gold imports are duty-free, and scrap gold imports are duty-free (if imported from countries with a free trade agreement) or are taxed with a reduced tariff rate (8 CHF/100kg, if imported from countries which have no free trade agreement with Switzerland). Imported raw gold and gold scrap shipments are both exempted from Swiss V.A.T.<sup>207</sup>

### 5.3.3 Documentation of Imported Gold in the Foreign Trade Statistics

The foreign trade statistics are based on the customs declaration (Art. 3, Ordinance on Foreign Trade Statistics) and thus fully depend on the data registered in the declaration forms. The FCA is responsible to publish the statistics (Art. 16) and may aggregate or waive the publication of neglectable figures (Art. 16).

According to the FCA, the statistics' objective is to provide information on foreign trade to public administrations, economic, academic and scientific entities as well as the general public, thereby contributing to informed political decisions and research. The general principle of proportionality (*Verhältnismässigkeit*) is considered important to not overburden economic actors with administrative tasks.

The documentation of import and export of gold and other precious metals in the Swiss foreign trade statistics disaggregated per country of origin was recommended by a working group led by the FCA in 2013, mainly to comply

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<sup>205</sup> Written communication with FCA, 19.10.2017.

<sup>206</sup> Interview FCA, 1.9.2017; Explanatory notes to customs tariff code number 7108.12.

<sup>207</sup> Interview FCA, 1.9.2017.

with international recommendations and statistical practices.<sup>208</sup> In 2015, the working group recommended to further publish historical data back to 2012 for non-monetary gold and silver and coins.<sup>209</sup>

### 5.3.4 What Does the Gold Import Statistics Tell Us?

The Swiss foreign trade statistics is accessible through the Swiss-Impex database. For raw gold and scrap gold the datasets are disaggregated per year (since 2012) and country of origin (import) or country of destination (export) with the variables “value” in CHF and “net mass” in kg.<sup>210</sup>

The country of dispatch of gold imports is currently not published in Swiss-Impex database although it is registered at customs. According to the FCA this information is not published in order to prevent confusion and because it is considered irrelevant for the public.<sup>211</sup>

Although the provenience of gold (i.e. under which circumstances the gold has been sourced) cannot be read out from the statistics, the data can be used for further interpretation.

Based on the data published in Swiss-Impex, the average annual value per imported kilogram can be calculated (specific value). The specific value of raw gold may be interpreted as a rough proxy for the refinement grade of the goods imported from one country. The assumption is: the smaller the difference between the average specific value (CHF/kg) and the market price (see figure below), the higher the gold refining grade and/or the gold content of the average shipment (shipments at times contain several precious metals in non-refined or pre-refined form).



Figure 6: Average gold price (CH/kg), 2013 – 2017 (source: goldprice.org)

<sup>208</sup> See: Interpellation C. Wermuth (12.3442); EZV (2013): Offenlegung der Statistik zur Ein- und Ausfuhr von Gold. Schlussbericht der Arbeitsgruppe zu Händen des Oberzolldirektors. See also: <http://xtares.admin.ch>; for raw gold imports for refining purposes see Art. 44 para. 1 let. d VAT Ordinance (RS 641.201).

<sup>209</sup> EZV (2015): Offenlegung der Statistik zur Ein- und Ausfuhr von Gold. Schlussbericht der Arbeitsgruppe über die Offenlegung der historischen Daten.

<sup>210</sup> See: <https://www.gate.ezv.admin.ch/swissimpex/>

<sup>211</sup> Based on an interview with Jean-Claude Wagnon, FDF, Federal Customs Administration, Head of Department Foreign Trade Statistics.

The interpretation is different for raw gold and scrap/recycled gold.

#### Raw gold (7108.12)

The specific value of raw gold (7108.12) can be compared to the mining operations per country<sup>212</sup> or with export statistics (volumes and country of destination) of a specific country. These pieces of information combined may allow narrowing down the (average) provenience of the goods (mined or recycling of scrap/high-value gold) imported from a specific country to Switzerland.

However, for large volumes of imported raw gold the country of origin is not known. In that case, the country of dispatch may be declared (for instance the UK or the UAE) as the country of origin. This fact largely reduces the meaningfulness of this data because in these cases the real country of origin of the raw gold shipment does not appear in the Swiss import statistics.

Further, physical import routes of raw gold do not necessarily describe the financial flows i.e. trading intermediaries may not necessarily transit the shipments through the country where they are registered. Hence the identity of entities involved in financing gold trade can only partly be derived from the import statistics.

#### Scrap / recycled gold (7112.91)

The scrap/recycled gold imported to Switzerland derives to the largest extent from various European countries (such as Italy), while Indonesia, Hong Kong, Malaysia, the USA and Singapore have also contributed significant shares (in terms of shipment value) over the last five years. In 2016, the largest quantity was imported from Indonesia and the specific values (CHF/kg) vary widely (see chapter 2.3.3).

According to an interview partner, the custom's declaration as either raw gold or scrap/recycled gold is currently not verified as a matter of priority at the Swiss customs. This is mainly due to the fact that both tariff numbers are duty-free and thus there is no fiscal risk to reduce the inspections.<sup>213</sup>

### 5.3.5 Conclusions

The following conclusions can be drawn related to the current practices:

- Current statistics allow tracing back only a limited fraction of the Swiss raw gold imports to the country of origin. For large volumes of imported raw gold the country of dispatch is indicated as the country of origin. Tracing back even to the exact site or production process from where the gold was sourced (mined or recycled) is considered even more difficult.

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<sup>212</sup> For instance, the US Geological Survey offers country overviews - although with a certain time lag, currently up to 2013 or 2014 depending on the country.

Source: <https://minerals.usgs.gov/minerals/pubs/country/> (30.11.2017).

<sup>213</sup> Interview FCA, 1.9.2017.

- In cases where a non-gold producing country is indicated as country of origin, e.g. the UAE or GB, tracing back their imports depends on their publication of import statistics (e.g. in the UN Comtrade database). However, this would still only generate a general overview and by no means information about the provenience of the gold exported to Switzerland.
- Available statistics do not allow determining how many of the gold import shipments have different declarations for their country of origin and their country of dispatch.
- Specific values (CHF/kg) – which serve as a proxy of the refinement grade (with reservations) – can be used as a rough indicator for the type of the imported goods, but need to be validated and checked for every single case.
- The comparison of the total volume of imported goods from a country with the gold production statistics (e.g. from the US Geological Survey<sup>214</sup>) may help to understand roughly if and to what extent that country is rather a country of origin or primarily a country of dispatch.

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<sup>214</sup> See: <https://minerals.usgs.gov/minerals/pubs/country/> (30.11.2017).

## 6. Risk Assessment, Gaps and Possible Scenarios for the Future

### 6.1 Risk Assessment

This chapter summarizes the remaining risks based on considerations of the hazards and the existing measures in place.

#### 6.1.1 Commented Statements Made by Interviewed Stakeholders

Statements of the interviewed stakeholders can be summarized in undisputed, questioned and disputed issues. The study team comments where necessary.

##### **Undisputed: Relevance and nature of risks**

The interviewees have largely expressed common views on the relevance and the nature of the risk and the study team agrees with this assessment. Almost all interviewees agree on the following points (statements from interviewees are detailed in Annex A1):

- Important position of the Swiss gold sector in the global context translates into an increased responsibility for Switzerland to establish and enforce wide-ranging, high standards to reduce the risks of problematic gold being imported to Switzerland.
- Non-financial risks including human rights risks are difficult to assess and require a continuous and systematic (on-the-ground) process or engagement.
- Higher standards may lead to a shift of the supply chain i.e. an evasion from Switzerland to other countries.
- Strengthening and enforcing resource governance and related socio-economic aspects of gold in the countries of origin through development or economic cooperation projects are a relevant and important contribution for addressing human rights related risks.

##### **Questionable: Focus of risk assessment**

However, some respondents question whether the Swiss gold sector sets its focus adequately with regard to existing human rights assessments and due diligence procedures. Notably, there is a debate on whether:

- Gold recycling and its related (non-)financial risks are really as unproblematic as its perception and its low attention by the public suggests;
- The focus on ASM as a source of potentially problematic gold is really justified. Although the risks seem generally higher, the raw gold import volumes deriving from ASM operations are estimated small compared to LSM. Some respondents call the current focus on ASM “disproportional”.

The study team makes the following assessment regarding these two questions:



- In the case of gold recycling, given its distinct supply chains, the risks are considered lower by the study team compared to the other two gold sources ASM and LSM (see chapter 4.4)
- As for the alleged disproportionate attention on ASM compared to LSM, the study team is aware that LSM may – due to much larger volumes – absorb much more resources. Nevertheless, from a risk-oriented perspective as required by the UNGP, the study team considers it important to apply the same level of scrutiny to both ASM and LSM sourced gold and therefore not to differentiate industry standards and their application based on gold provenience.

### **Disputed: Effectiveness of Due Diligence and Management of Human Rights Risks by the Swiss gold sector**

The interviewed stakeholders expressed diverging opinions on the effectiveness of the applied risk and due diligence procedures and on the extent to which these have contributed to reducing the risk of Swiss refiners being involved in the human rights abuses along the supply chain:

- On the one hand, industry and sector organizations emphasise the significant improvements over last ten years and the drivers inherent to the supply chain (market and other regulation, reputational risks and increased public scrutiny, corporate responsibility) that promote better risk analysis and management especially, notably through sector standards such as the LBMA RGG.
- On the other hand, critics point out that – from what they know – there is a persisting focus on financial risks. In their view, approaches to effectively analyse and address risks of human rights abuses among the suppliers are insufficient and not coherent and compliant with OECD recommendations. Given that practices within the gold industry are not comprehensively disclosed publicly, these stakeholders conclude that they are not effective. From their perspective, this assessment is supported by cases of suspected severe human rights abuses.

For the study team a formal assessment of the effectiveness of due diligence measures would depend on the availability of comprehensive information about existing risk management practices and their impact on the ground. Since they are not fully disclosed, as discussed in chapter 5.2, the effectiveness of the due diligence measures and hence the remaining current level of risks cannot be formally assessed.

The study team concludes that Swiss refiners meet the auditing and reporting requirements as set out by the LBMA RGG. However, important information e.g. on origin / quantities of imported gold and how procedures are applied – which would allow to directly assess the adequacy of the reports and to satisfy the expectations of the NGOs – is not publicly disclosed.

### **Conclusion: Risk that problematic gold is imported to Switzerland**

The interviewed stakeholders draw diverging conclusions on whether problematic gold is imported to Switzerland. The industry representatives emphasize that it can never be excluded completely but that – if at all – the quantities would be very small. Critics point out that it is very probable –

some say it is 100% sure – that problematic gold is imported to Switzerland, even if only in small quantities.

### 6.1.2 Assessment by the Study Team

In addition to the comments made about the statements summarized in chapter 6.1.1, the study team draws more nuanced conclusions regarding the risk assessment.

#### **Relevance of potential hazards and their impacts**

A series of potential hazards and their adverse impact on human rights, on humans and the environment along the typical value chains exist (see chapter 4.4). Among the 13 scenarios identified as the most relevant ones, four scenarios stand out in terms of their expected negative impacts.<sup>215</sup>

- In ASM operations, a high relevance is assigned to the scenario “damage to the environment and the negative direct and indirect health impact to the surrounding communities” where the study team estimates the consequences to be immediate to long-term negative health impacts with an increased mortality, specifically related to the use of mercury and cyanide.
- In ASM operations, a medium relevance is assigned to the scenario “poor working conditions, treatment of employees and contractors, including forced labour” where the study team estimates the consequence to be severe negative impacts on the health and mortality of directly involved persons.
- In LSM operations, a medium relevance is assigned to the scenario “damaging the environment through construction and mine operation and/or leaving behind deteriorated land at and around mining site” where the study team estimates the consequence to be immediate to long-term negative health impacts and an increased mortality.
- In LSM operations, a medium relevance is assigned to the scenario “public or private security services intimidate or force local communities out of potential mining sites” where the study team estimates the consequence to be a reduction of livelihood opportunities of local communities on the one hand, but also violent conflicts and occasional casualties on the other hand.

In the case of gold recycling, the occurrence is generally deemed considerably lower compared to the mining related value chains.

Such hazards may also appear in the sourcing process of gold which ends up in Switzerland. The quantification or projection of these hazards and its impacts on the Swiss gold imports would however be speculative. It can be repeated that according to the interviewed Swiss refiners more than 90% of gold imported to Switzerland derives from established LSM operations.

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<sup>215</sup> The rating “at times” (related to occurrence) is interpreted as a medium relevant, the rating “often” is interpreted as high relevance.

### General risk exposure in countries of raw gold origin

The risk exposure regarding human rights abuses during the sourcing of raw gold imported to Switzerland remains generally high for certain countries of provenience, because among the 92 countries exporting gold to Switzerland are many resource-rich countries with weak governance systems. This can for instance be illustrated with the Resource Governance Index which has rated resource governance in the mining sector of 34 countries.<sup>216</sup> 24 of these 34 countries exported raw gold to Switzerland in 2016 according to Swiss trade statistics.<sup>217</sup>

Figure 7 illustrates the value of imported raw gold in 2016 from these 24 countries against the RGI scores of the mining sector. These 24 countries represent 15% of the total value of raw gold imported to Switzerland in 2016.

The RGI ratings reveal that at least 1.2% of the total raw gold (in terms of value) imported to Switzerland is estimated to be sourced from countries with a *poor* or *failing* governance system (rating below 45), while at least 7.1% is sourced from countries with a *weak* governance system (rating between 45 and 59).<sup>218</sup>

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<sup>216</sup> Based on the RGI, <http://resourcegovernanceindex.org/country-profile> (30.11.2017).s . Only scores related to mining of precious metals are considered. The 2017 RGI assesses how 81 resource-rich countries govern their oil, gas and mineral wealth. The index composite score is made up of three components. Two measure key characteristics of the extractives sector – value realization and revenue management – and a third captures the broader context of governance – the enabling environment. 0 is the worst value of the scoring scale.

<sup>217</sup> Source: Swiss-Impex. The relevant non-monetary imports are classified as unwrought gold (code 7108.12).

<sup>218</sup> All of the countries with rating below 50, except the Kyrgyz Republic, scored their lowest ratings in the field of revenue management i.e. in terms of national budgeting, subnational resource revenue sharing and sovereign wealth funds. The Kyrgyz Republic scores low in the category “enabling environment” i.e. regarding rule of law, control of corruption, political stability and absence of violence This is also the reason why Kyrgyzstan in 2017 was temporarily suspended from EITI. EITI sanctioned Kyrgyzstan (and Tajikistan) for making “inadequate progress” in the area of civil society reform, and established “corrective” actions for the two states to implement.

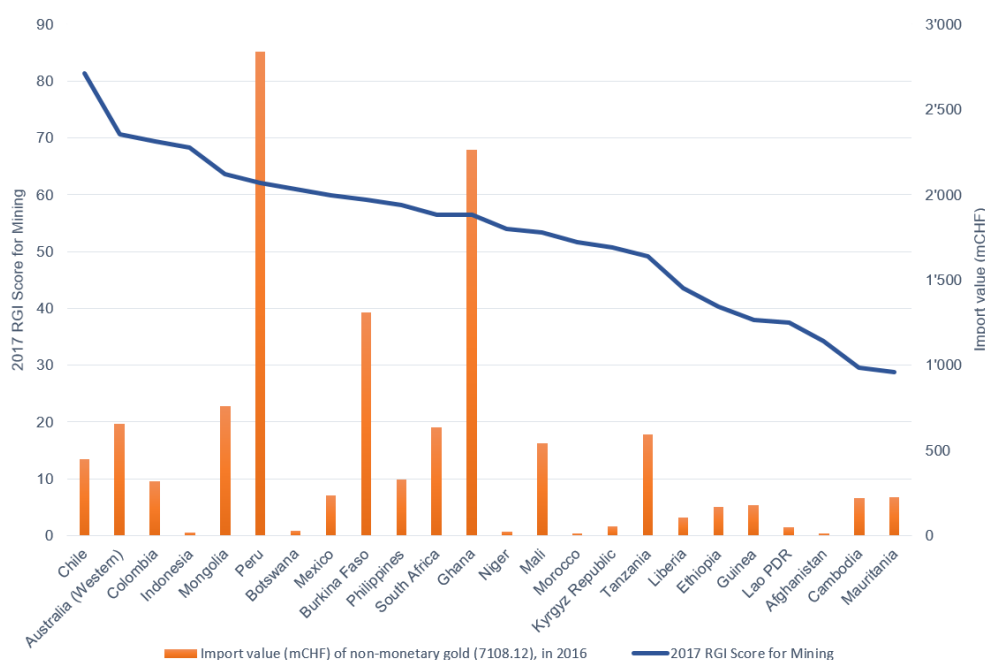


Figure 7: Value of imported raw gold (in 2016) from the 24 trade partner countries for which a Resource Governance Index (RGI) score related to mining of precious metals is available. (Sources: Swiss-Impex; Resource Governance Index)

As discussed earlier it cannot be determined – neither from Swiss-Impex nor from industry disclosures – where the raw gold is sourced from i.e. from ASM, LSM or recycling and in consequence no statements about concrete risk exposure can be made.

Still, risk exposure of Switzerland has decreased from a technical point of view, due to enhanced risk management and due diligence procedures applied by the relevant market participants. Most interview partners – and the study team agrees with this – also thought that Switzerland has gained the advantage over (peer) locations due to a comprehensive financial and anti-money laundering regulation and law enforcement. It is also visible that Swiss refiners are engaging in initiatives which promote a more sustainable gold trade – notably all large Swiss refiners are members of the Swiss Better Gold Association.

Despite these positive developments, the high level of attention, awareness and scrutiny for the topic and the lack of comprehensive information on the provenience of raw gold still result in a reputational risk for Switzerland.

### Effectiveness of due diligence measures

Statistical analysis and facts from individual cases that have occasionally become public in Switzerland and elsewhere indicate that an inherent risk that gold imported into Switzerland can be associated with human rights abuses. However, as mentioned afore, the lack of accessible information on risk management procedures in place makes a formal assessment of due diligence effectiveness impossible.

Whether the reported cases can be interpreted as indicators for systemic weakness or gaps in the respective corporate compliance and risk man-

agement system is questionable from the study team's perspective. The reported cases may well be related to the discussed intrinsic challenges to achieve 100% traceability in highly complex value chains, and for example be attributed to a failure in applying appropriate risk management procedures in an individual case, misconduct or negligence of individuals, falling victim to fraud, misrepresentations or other reasons.

In sum, the study team cannot make a general authoritative statement on the effectiveness of due diligence systems of the Swiss gold sector as such.

## 6.2 Key Gaps

The first key gap is the missing **physical and financial traceability** of raw gold from the origin to the refiner (and on to the end customer). This gap is determined by:

- *Blind spots regarding the country of origin of imported raw gold.* In 2016, raw gold was imported to Switzerland from 92 different countries.<sup>219</sup> The most important trading partners for raw gold import to Switzerland were – and still are – the UK and the UAE which contributed 33% in terms of value of the total raw gold imports.<sup>220</sup> Both countries have no own gold mines and thus import gold from other countries. The UK for instance imported 93% of its gold (in 2016) from Switzerland, Canada, South Africa, China/Hong Kong SAR, Australia, the USA, Turkey, and Japan.<sup>221</sup> With multiple-step trade routes with several physical and at times also virtual transit points, it is currently not possible to draw any proven conclusions about the origin of the gold imported to Switzerland.
- *Unquantifiable shares of different gold sources,* the estimation of the share of the imported raw gold which origins from ASM operations is challenged by an almost complete lack of data. Worldwide, ASM is estimated to contribute around 15% to total production.<sup>222</sup> According to two interviewees, the overall share of ASM in the Swiss imports is estimated far below 10%, and refiners generally declare to have significantly reduced or completely stopped taking in ASM gold, while others have started to increase the share in ASM again from countries where the formalization has progressed.

The second key gap is the **lack of transparency** on gold provenience and the current level of public disclosure beyond the required disclosure clauses of the LBMA industry standard (e.g. on how risk assessment and man-

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<sup>219</sup> Source: Swiss-Impex. This number varies between 87 and 99 countries over the period 2012-2016.

<sup>220</sup> Source: Swiss-Impex. The relevant non-monetary imports are classified as unwrought gold (code 7108.12).

<sup>221</sup> Source: Comtrade. The UK classifies the relevant non-monetary imports and semi-manufactured gold (code 7108.13). Switzerland physically imports from and exports to the UK, mainly due to the refining taking place in Switzerland and vast gold reserves being stored in vaults in London. According to one Swiss refiner, most of the gold imported from the UK is gold from refiners listed on LBMA's Good Delivery List (GDL).

<sup>222</sup> SDC (2011): SDC Experiences with Formalization and Responsible Environmental Practices in Artisanal and Small-scale Gold Mining in Latin America and Asia (Mongolia).

agement is practically done, how red flags are identified etc.). In more concrete terms, the study team identified the following specific gaps.

- Information on how country and supplier risks are assessed in practice e.g. how risk assessment procedures work, which risks are looked at and identified, how risks are handled, how risk mitigation measures, follow-up activities, monitoring efforts and improvement measures work
- Information on how risk-based due diligence processes work e.g. how red flags are identified, how internal control and traceability systems work, how and with which expertise on-the-ground assessments are carried out, how KYC procedures are applied
- Evidence and information on practical outcomes of the procedures applied e.g. number of relationships that have been discontinued because of non-compliance, number of instances and reasons for disengagement with suppliers, countries or regions that are excluded for risk considerations
- Rough indications of the main regions of origin of gold, respectively, regions or countries that are not sourced from
- Rough indication of the main sources of gold (mined / LSM/ASM, recycled)
- Information about projects and initiatives (that all surveyed refiners are involved in) on ASM formalization or gold certification (BGI, Fairmined, Fairtrade, etc.)

Other gaps such as the **challenges found in some raw gold sourcing or producing countries** are also relevant, notably the lack of accountability and governance, and lack of national and local administrative capacities to enforce national or international hard and soft law.

## 6.3 Scenarios for the Future

This study concludes, and the interviews with company and NGO representatives confirm, that it cannot be excluded that gold produced under human rights abuses is imported into Switzerland. Such a finding is not unique to Switzerland and neither are the related key gaps identified in this study, traceability and transparency.

Challenges identified by this study vary as much as the avenues for addressing them. Therefore, the following sections will describe some **key scenarios for Switzerland** with the respective pros and cons, depending on the approach chosen for addressing them.

### 6.3.1 General Options for Addressing Challenges and the Need for Clarifying Expectations

Since this study addresses the Swiss Government, its focus is on potential measures that could be taken by the Government (and not by the private sector). The UNGP do not prescribe a uniform approach but recommend states to apply a combination of binding and non-binding measures, a “smart mix” in the words of John Ruggie.

Regulation may focus on different aspects of the gold supply chain and range from import bans to specific due diligence requirements. Recently published National Action Plans to implement the UNGP illustrate countries' efforts or intentions to strengthen due diligence with stricter or more detailed binding and non-binding rules. Examples in this regard include France,<sup>223</sup> the Netherlands,<sup>224</sup> the UK,<sup>225</sup> and the USA.<sup>226</sup> Even new instruments such as the Dutch International Responsible Business Conduct (IRBC) Agreement for responsible gold value chains mentioned before (chapter 3.1.10) still rely heavily on existing or at least announced potential regulation despite their contractual nature.<sup>227</sup> In a similar vein, the German government announced to explore the establishment of binding due diligence norms should less than 50% of businesses implement the non-binding due diligences measures of the German NAP.<sup>228</sup>

At the non-binding level, industry standards such as the LBMA with its requirements and sanctions can be highly effective in regulating market participants' behaviour.

Looking at the many different requirements, interviewed company and business representatives mentioned the possibility for the Swiss Government to bring together the different codes and standards under one umbrella, thereby helping to clarify expectations and requirements for the respective actors. The study team suggests using the opportunity for addressing this quest for coherence in the context of the Commodities Trading Sector Guidance which is currently being developed under the auspices of the FDFA and SECO.<sup>229</sup>

Similarly, there is a need for better aligning international standards such as OECD and FATF.

Before discussing potential options in detail, it is important to note that regardless of their nature as binding or non-binding, regulatory measures can play an important role in levelling the playing field. In deciding on which options to pursue, the Swiss Government should be guided by the overall goal to avoid risks for importing problematic gold and at the same time improve the human rights situation for affected people on the ground accord-

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<sup>223</sup> New Articles L225-102-4, L225-102-5 Code de commerce, introduced by the Loi 2017-399 (Loi relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre, 27.3.2017), available (in French) at: [http://www.assemblee-nationale.fr/14/dossiers/devoir\\_vigilance\\_entreprises\\_donneuses\\_ordre.asp](http://www.assemblee-nationale.fr/14/dossiers/devoir_vigilance_entreprises_donneuses_ordre.asp) (30.11.2017).

<sup>224</sup> Dutch Ministry of Foreign Affairs, National Action Plan on Business and Human Rights, The Hague 2014.

<sup>225</sup> Modern Slavery Act 2015, <http://www.legislation.gov.uk/ukpga/2015/30/contents/enacted/data.htm> (30.11.2017).

<sup>226</sup> Section 1502 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 2. July 2010 (Pub.L 111-203), section 1502, 15 U.S.C. 78m.

<sup>227</sup> The Dutch government announced to establish binding norms in the future in the form of a legally binding agreement.

<sup>228</sup> Deutsche Bundesregierung, Nationaler Aktionsplan Umsetzung der VN-Leitprinzipien für Wirtschaft und Menschenrechte 2016-2020, 12.

<sup>229</sup> Federal Council, Grundlagenbericht Rohstoffe 2013, Empfehlung 11 (Background report commodities, recommendation 11).

ing to the UNGP. This translates into more specific *basic parameters* which will be elaborated in detail in the following sections:

- (1) In order to level the playing field, the Government's expectations towards the gold sector should be further clarified.
- (2) Based on these expectations, the Swiss government could define what meaningful reporting entails and provide guidance on what "sound due diligence" means. The gaps identified in this study, e.g. regarding traceability, could be addressed in this context.
- (3) Fostering coherence among existing industry standards and measures taken by the state should be a guiding principle in whatever measure the Swiss government chooses.

### 6.3.2 Improving Physical and Financial Traceability

Blind spots regarding the country of origin of imported raw gold and unquantifiable shares of different gold sources have been identified as a key gap (see 6.2). In order to clarify expectations and specify the required information according to the basic parameters (1) and (2) defined in section 6.3.1 different options for improving physical and financial traceability could be considered:

- One option is the *establishment of a gold provenience certification scheme* based on a cooperation with key international gold trade partners, specifically starting from gold mining countries, and work from voluntary towards mandatory requirements along all process steps. For this purpose, existing voluntary systems could be enhanced, for instance the RJC CoC transfer documents. Such cooperation could contribute to a level playing field among gold refining nations. Technical options to establish traceability e.g. isotope profiling and distributed ledger technologies (e.g. blockchain) could be considered.<sup>230</sup>

The latter is particularly interesting because the blockchain technology has already been applied to foster traceability in other industries, among them diamonds.<sup>231</sup> It would provide gold with a digital "passport" or DNA which could then be traced throughout the whole supply chain. A key feature of this technology is the principle of irreversibility of records. This means that once a transaction with gold has been recorded, the digital record – unlike a paper certificate – can as a rule not be altered. Thus, every transaction which occurs after gold has left the mine would be added to the history, resulting in a comprehensive record of all transactions during the gold's „lifespan“. Once a system is established, failure of record taking along the value chain may for instance be defined as an exclusion criterion for raw gold buyers. This could substantially increase transparency, traceability and eventually foster trust in the industry. Clearly, additional research would be necessary to design a specific pro-

<sup>230</sup> For a concise explanation of blockchain: Rolf H. Weber, Blockchain als rechtliche Herausforderung, in: Jusletter IT 18. Mai 2017.

<sup>231</sup> For diamonds see <https://www.everledger.io/>; more case studies can be found on <https://www.provenance.org> (30.11.2017).



ject for applying distributed ledger technology to gold as it is a more complex material than for example diamonds. In this regard, synergies with ongoing research initiatives in the context of digitalisation and the Swiss strategy for the digital economy could be created.<sup>232</sup>

Finally, with a view to the process and institutions the Kimberly Process concerning raw diamond trade may serve as an example.<sup>233</sup> Moreover, the due diligence requirements in the new EU Regulation on Conflict Minerals may also be helpful in shaping a traceability scheme. This scenario would be based on a mix of binding and non-binding regulation (see 6.3.1 above) and thus qualify as “smart mix” under the UNGP.

- A second scenario which could be pursued for identifying or verifying the provenience/source of gold more accurately is complementing the *foreign trade statistics* with supplementary information.

The study team concludes that increasing the number of physical investigations by the FCA may not contribute to identifying the gold provenience given the typical gold import routes and the difficulty to trace pre-refined gold beyond the country of dispatch. Instead, we suggest looking into alternatives to reach this goal: The FCA/PMC could be mandated with the collection of such data, if necessary with an amendment of the respective regulatory framework for the Foreign Trade Statistics (see chapter 5.2 above) or the creation of a specific legal basis. Overall, with these measures FCA may be vested with a more prominent role in increasing transparency and thereby facilitate due diligence provided that it has the necessary instruments to request the relevant information. However, this option would require regulatory amendments whose feasibility would need to be further discussed.

### 6.3.3 Increasing Transparency

The LBMA framework plays a unique role and has been a game changer since it leveraged the OECD standards by making them mandatory. With regard to transparency, the large Swiss refiners comply with LBMA mandatory disclosure requirements. Yet, these requirements for public disclosure are not entirely sufficient and meaningful enough to accommodate the general public’s need for information to establish trust that the applied due diligence processes are effectively working. In addition, particularly with regard to the provenience of gold and existing due diligence procedures it is difficult for the Swiss government to decide on any policy measure without having access to primary sources of information. As noted above, it is therefore not possible to formally and independently assess the effectiveness of applied due diligence measures.

In the study team’s view this situation could be improved with the Swiss Government encouraging the industry to disclose more information on:

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<sup>232</sup> Federal Council, Bericht über die zentralen Rahmenbedingungen für die digitale Wirtschaft, p.25; Relevant research is ongoing at the University of Zurich Centre for Human Rights Studies and the Centre for Information Technology, Society and Law;

<sup>233</sup> <https://www.kimberleyprocess.com/en> (30.11.2017).

- (1) risk assessment and risk management procedures;
- (2) the set-up and operationalization of risk-based due diligence;
- (3) practical outcomes of the procedures applied (e.g. number of relationships that have been discontinued because of non-compliance etc.);
- (4) the main regions/countries of origin of gold.

Again, in line with basic parameter (2) defined in section 6.3.1 above, there are different options to be considered for reaching these goals. The study team suggests exploring the following scenarios:

- The selection and eventual publication of additional data that can contribute to enhanced plausibility checks with regard to (4) could be considered in the context of improving foreign trade statistics. For instance, the information on the country of dispatch may be useful in that regard. As outlined above, these measures could at least partially be based on the existing regulatory basis in the Ordinance on Foreign Trade Statistics. Whether this basis would need to be expanded, needs to be investigated. Within the portfolio of possible approaches outlined above (6.3.1) such a measure would form part of binding law.
- The Swiss government could with regard to (4) promote the collection and aggregated disclosure of information on the regions/countries of origin of imported gold by the Swiss gold sector (refiners) or any industry association such as the LBMA.
- Increased transparency on risk assessment and management as well as risk-based due diligence procedures mentioned in (1) and (2) could form part of the future commodities trading sector guidance which is currently being developed in the context of Recommendation No. 11 of the Commodity Baseline Study. With such an approach the Swiss Government would enhance and encourage self-regulation by the industry.
- The third scenario relates to outcome reporting as addressed by (3) above. With a view to recent developments in the international context, such as new reporting obligations introduced in the EU with Directive 2014/95, the new *Loi Vigilance* in France or the German National Action Plan, Switzerland should consider the introduction of mandatory reporting obligations with a view to monitor the compliance with the mentioned self-regulation instruments. From the study team's perspective, this seems to be particularly relevant with regard to the reputational risks at stake for Switzerland. Such a scenario would situate itself between the government's encouraging non-binding (self-regulation by the industry) and establishing binding measures (mandatory reporting obligations) and thus fall in the category of "smart mix".

#### 6.3.4 A Call for a Holistic, Cooperative Approach

Overall, the study team proposes that a mix of binding and non-binding measures is considered to reduce the risks of problematic gold being imported into Switzerland. In its view, stricter regulation alone bears the risk of being counterproductive and result in the respective actors blacklisting non-compliant suppliers or completely withdrawing from countries with a

difficult human rights environment due e.g. to weak governance, corruption or internal conflicts, as seen with other regulations which are not embedded in a strategy for sustainably improving the situation on the ground. An example in this regard are the controversially discussed effects of the Dodd-Frank Act on the situation in the DRC.<sup>234</sup> Such withdrawal would naturally reduce corporate risks and (reputational) risks for Switzerland, but on the other hand also reduce the positive role that educated businesses could play in critical regions.

While market regulation developments such as the LBMA or binding, national laws are praised as milestones, the question remains whether they contribute to improving the situation on the ground. In fact, the described withdrawal from problematic countries, regions or suppliers and the resulting disengagement with affected communities bears the risk of ultimately worsening the human rights situation on the ground. In other words, more or stricter regulation alone will not necessarily contribute to improving the human rights and environmental situation on the ground, which after all should be the goal of implementing the UNGP and Switzerland's commitment to foster human rights worldwide.

Therefore, we would like to suggest exploring additional options which are based not only on (state) regulation but also on cooperation among the different actors.

Several cooperative instruments analyzed for the purpose of this study (among them the Better Gold Initiative or the Sustainable Artisanal Mining Project in Mongolia, see chapter 5.1 above) could serve as a basis for more systematically exploring the potential of such initiatives for improving the human rights situation in the context of Swiss gold trade. In bringing the debate initiated by the *Postulate Recordon* to the next level, Switzerland may wish to explore options for expanding its engagement in multi-stakeholder initiatives. In addition, building on and further developing existing SDC programmes with a view to strengthening and enhancing the local regulatory and public administration environment could be another area which Switzerland may want to look into.

At the national level, we would suggest analyzing recent innovative approaches based on multi-stakeholder participation, such as the Dutch IRBC Agreement, carefully with regard to their potential for informing the Swiss debate as well as to the related legal challenges which such a contractual agreement raises under Swiss law.

Finally, we see potential in a joint effort led by the Swiss government for increasing transparency involving all stakeholders and covering a broad range of measures such as legislation, independently managed databases fed with information from industry and NGOs, promoting applicable standards and transparent reporting/corporate disclosure.

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<sup>234</sup> For a positive account see the testimony by Arvind Ganesan before the US Senate Committee on Foreign Relations Subcommittee on Africa and Global Health Policy, 5 April 2017, and for a negative assessment the testimony by Mvemba Phezo Dizolele, in the same hearing: <https://www.foreign.senate.gov/hearings/a-progress-report-on-conflict-minerals-040517> (30.11.2017).

In sum, such a holistic, multi-stakeholder approach could substantially contribute to not only reducing the risks related to Swiss gold trade for Switzerland and the industry, but also provide much needed support for those who are at the heart of the debate: the rights-holders on the ground.

## A1 Statements of Interviewees

The following chapters summarize the statements from the interviewees (see list of interviewed institutions in Annex A6), firstly regarding their perception of risks that gold imported to Switzerland was produced, pre-refined or transported under human rights abuses and current counter measures, and secondly regarding possible additional measures to reduce these risks and to generally reduce the hazards related to human rights abuses along the gold value chain.

### A1.1 Perception of Risks and Measures in Place

#### A1.1.1 Risk of Problematic Gold Imports

Regarding the risk of gold related to human rights abuse being imported into Switzerland, the assessments vary between the interviewed stakeholders:

- Interviewed companies believe that there is always a likelihood (even though a small one) that such gold is imported into Switzerland, since full traceability for gold for all value chains is difficult to achieve and not all market participants have the same procedures, policies and know-how.
- NGO remark that it is very probable – some say it is 100% sure – that problematic gold is imported into Switzerland. They mentioned the case of Columbia, especially in the problematic region of Choco, where export statistics show that the legally mined gold is smaller than the total registered gold exported from Colombia. They also say that - since this possibility cannot be completely ruled out - it is therefore much more important to look at the measures (and determine whether they work effectively) instead of the risks.

Individual interview partners were not so sure about the role of the less-known, small Swiss gold refineries which today attract less attention (note that small gold refiners were not covered in this study and interview requests by the study team were not successful). About 85-90% of annual gold production derives from refiners accredited at LBMA (in total 72 refiners, located all over the world). But the remaining 10-15% of the refiners (often small to very small players) are not part of this system.

Similarly, the role of the banks and where they stand with regard to the topic is not entirely clear to some interviewees. Interviewees argued that banks seem to be less proactive, but are essentially required to do the same, and that in the past it was difficult to get the attention of banks for these issues, but this apparently has changed now. Still banks should also do more on transparency, they think.

#### A1.1.2 Position of the Swiss Gold Sector in the Global Context

The position of Switzerland in gold trade overall is seen controversially:

- Swiss refiners are considering themselves “top of the class”, by arguing that Switzerland is more regulated, also due to its history with strict financial and anti-money laundering regulation and law enforcement. As a result, they think that they are ahead of the game compared with other commodities. Further, they argue that other sectors are less controlled than the gold sector.
- Sector associations argue that Switzerland globally has a unique position, and that involved companies today understand the risks and what it takes to protect the good reputation and maintain that position. Overall, they believe this to be a mature system now, although constant improvements are required.

Both companies and sector associations say that Swiss regulations are exemplary and leading. The USP of the gold industry in Switzerland is considered to be the manufacturing excellence, reliability, reputation, the Swiss brand, the secure and stable business environment, low financing and insurance costs, respect for confidentiality agreements, and clear custom regulation. In addition, an increasing number of clients from Swiss refiners are demanding very high ethical and environmental standards. To comply with this request, Swiss refiners even introduced separated processing lines to ensure that material with a certain provenance is not mixed with other material.

Interviewees have raised concerns with some countries of gold origin. For instance, it was mentioned that gold from doubtful or undetermined sources is still finding its way to Dubai and other countries in Asia. On the other hand, this can also be considered a competitive advantage for Swiss refiners with high standards - for example some watchmakers are more willing to buy from Swiss refiners because they are trustworthy and known to conform with the required standards.

Because of stricter regulation, some interview partners think that there is likely an evasion movement to India or Dubai, where there are less controls and law enforcement is less rigorous. Specifically, Dubai and Turkey were mentioned in this context. This is of relevance, since the biggest consumer market for gold is not the western electronics or jewellery companies, but the Indian and Chinese market as a whole. India is considered to be building additional capacity, but so far they have no real framework to check and have showed limited engagement.

Sector associations however see promising signs as well, as some countries like China and India are doing more now to develop and apply similar standards. To such end, they are engaging with organisations like OECD, LBMA and RJC. For instance, Dubai has the DMCC Responsible Sourcing of Precious Metals Programme<sup>235</sup> which also participated in the OECD

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<sup>235</sup> See: <https://www.dmcc.ae/gateway-to-trade/commodities/gold/responsible-sourcing>

alignment assessment pilot phase.<sup>236</sup> Cross-recognition with standards of such countries will however require a more time and coordination efforts.

### A1.1.3 Risk Awareness and Risk Aversion by the Swiss Gold Sector

Companies and sector associations argue that the situation has massively improved over the last ten years and today the risks involved in their business are much better handled and lower. They argue that AML legislation and respective KYC procedures have led to more risk awareness and influenced the development of better and more appropriate risk management and DD procedures, and DD procedures for human rights and other social and environmental issues were built on this experience and approach. The big refineries say they are also under a lot of scrutiny and must manage related risks well if they want to survive.

In their eyes, the main game changer was the LBMA who made the OECD standards mandatory and, due to its high relevance as a trading platform, has pushed forward the whole sector, as refiners which fail to apply proper DD procedures could lose the LBMA accreditation or even its business completely.

Risk aversion seems to be also driven by business strategies.

- Jewellery and luxury (branded) good producers are very risk sensitive and have to protect their reputation vis-à-vis. Since there are no important mines that are RJC CoC certified and refiners have come under a lot of scrutiny, they started to focus on recycled gold, or even operate their own refineries.
- To avoid the main risks, some large refiners are buying less from consolidators or collectors, or ASM, and are focussing on buying mainly directly from sources that are easier to control, such as LSM.

One standard setter said, there is conflict of interest between those that understand the risks in the entire supply chain and deal with gold physically (such as the refineries), and those that see gold as just another form of money (e.g. traders).

Several industry representatives consider assessing human rights risks tricky. One pointed out that human rights issues are different according to the type of material (e.g. mined, grandfathered, or recycled), the location or region of origin of the material, the size and complexity of supply chains (e.g. buying directly or indirectly; level of direct control; controls that are in place, and how effective they are), and the identity and track record of the counterpart.

Many of the industry interviewees expressed concerns that the reality on the ground is often not properly understood, that risks are part of this business, and avoiding certain regions or entire supply chains is not going to solve the problem overall, or it will even make things worse. In their per-

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<sup>236</sup> Alignment assessment of industry initiatives with the OECD Due Diligence Guidance for Responsible Mineral Supply Chains, see: <http://mneguidelines.oecd.org/industry-initiatives-alignment-assessment.htm>

spective, it is important that responsible businesses keep engaged and do business also in more difficult parts of the world. To this end, they also continue to engage specifically with ASM formalization initiatives.

Several industry representatives voiced concerns to whether the right focus is set by the various stakeholders.

- Recycling for example is still perceived as a 'good thing' (connotation of recycling), but the risks involved are probably underestimated, since recycling gold can be used as a cover for illicit sources. Of course, KYC is meant to help here, but traceability remains a challenge.
- While everybody is focusing on ASM the focus should also be on LSM. There is a missed opportunity to better involve LSM, for example for mining companies with only few but big assets, or state-owned national companies that don't have standards comparable to the large global mining companies, as well as in the context of LSM operations in countries with a rogue regime.

Companies and associations repeatedly said that the countries themselves need to establish better regulations and initiatives that help solve the problem locally, and local authorities must be more involved and engaged given the estimated some 40 million people involved in ASM, and more even that depend indirectly on ASM for their livelihood. In the absence of a functioning legal framework (or a framework that is not enforced) it is very difficult to implement standards. Also, they consider that in the first place it is the duty of states to protect human rights, but it is understood that companies will have to do more in such places. They also consider it important and helpful when Switzerland supports countries through cooperation projects.

Critical respondents said that the focus of supply chain risk management is still on anti-money laundering and financial risk assessment, and that the sector is lagging behind with addressing non-financial risks, including human rights risk. On the policy level, the human rights topic is considered mature, but the process within the industry is not yet going deep enough and thus the policy coherence is not given.

One NGO also said, there are differences between the physical route and intermediaries managing the financial streams, and that it is very problematic that Swiss customs is able to only register the point of consignment or the transit country but not the true country of origin.

One NGO brought up the example of Colombia, where according to statistics between one third and half of the Colombian gold production is exported to Switzerland, while according to this NGO 80% of the Colombian gold production was illegal or criminal and/or supporting the financing of criminal or conflict activities. Upon their request, NGOs said that Swiss refiners did provide more information, and the answers so far were rather disappointing. They should be able to provide more transparency here, the NGO said.



## A1.2 Possible Risk Reduction Measures

### A1.2.1 Swiss refiners and sector associations

The following additional measures or strategies have been proposed in the interviews by companies and sector associations:

- **Harmonization and cross-recognition of industry standards:** to create a level playing field, companies would like to see more harmonization and cross-recognition along the value chain (standards, procedures, documentation) and more inclusion of stakeholders locally. This would make the whole system more effective and sustainable. Goal should be to have the same standards for all companies. Greater harmonization could be achieved also on an international level, for example through established OECD, FATF and GAFi exchange mechanisms.
- **Controlling the flow/origin of precious metals by customs:** customs could be more involved in controlling the flow/origin of precious metals and be more effective (to have the whole control-mechanism in one place). Maybe a centralised office for precious metals would reduce administrative work, if they work together (finance and material flows). Ideally, this should be combined into one agency, so as to have a holistic view on both the money and material flow and control both at the same time. Now there is not enough coordination between the two.
- **Clarify role of regulatory body:** the current regulatory proposal is to make refiners part of the asset management regulation, which from the refiners point of view is not the right approach. In this regard, they would prefer to be directly monitored by the FINMA.
- **Informing the public and political debate:** companies think that the general public does not know much about the activities of refiners, and said that more stakeholder engagement is required. Swiss refiners generally have a good reputation globally, but there is also a lot of misperception especially in Switzerland. The sector should be more active in communicating the good things that they are already doing. The public discussion should be more informed. But there is some hesitance from companies to share more information. With regard to information related to the country of origin and quantities, one refiner expressed the possibility gold importers could anonymously share this information on some kind of neutral platform, which then could be published on an aggregated level (while at the same time respecting data privacy, security and confidentiality). The question on how to deal with allegations and complaints thereby remains. In essence, the sector expressed openness to an enhanced dialogue.
- **Develop scalable business cases with traceable ASM gold:** the share of recycled and grandfathered gold is dropping every year. Gold refiners actually would like to take more ASM gold and have an interest to push the sector to formalize, and the demand for clean / green gold from formalized ASM sources is currently larger than the supply. The main challenge is scalability, as today quantities are often too small in relation to the administrative and compliance costs involved in the process (rea-

sonable amounts start about at 20kg/year for one ASM, but refiners would only buy through a trusted local organization that is also overseeing formalization). Another challenge is that ASM gold usually goes through many intermediaries' hands until it is refined which makes traceability very difficult. More formalization can shorten the supply chain and increase traceability. The same propositions were expressed by the standard setter interviewees.

- **Prevent rebound effects of strict regulation:** from a business perspective, the Dodd Frank Act is seen as an example for overregulation and overreaction, which to certain extent was counter-productive, as it probably contributed to even more illegal mining and smuggling. The DRC is now not producing less, but more (unformalized) ASM gold. Obviously, minerals still find their ways (to less regulated countries) and if the 'educated, good players' are pulling out of a critical region or business because they are very risk adverse, then this is not going to help the ASM sector but instead make the sector even more vulnerable to exploitation and criminal activities.

### A1.2.2 Standard setters, Swiss administration, and NGO

The following additional measures or strategies have been proposed in the interviews by standard setters, the federal administration and partly by NGOs too:

- **Awareness and knowledge of achievements:** there is a general lack of understanding among the public and civil society groups about what has been done and achieved by the industry and the governments.
- **Enforce transparency requirements:** the Swiss government could/should require more transparency from refineries, and require disclosure about origin from gold, not necessarily on an individual but on an aggregated level. That could help outsiders to better understand the risks and related procedures. The public reporting element is not too difficult for companies. Switzerland could also examine to what extent it is possible to apply upcoming EU regulations in Switzerland, this would be a big step forward
- **Promote sector standards:** Switzerland could do more to promote the standards, encourage responsible engagement and generally promote transparency in the market place (push public reporting). However, it is understood that there are limits to public reporting (commercial sensitivities, customer secrecy), and instead of pushing single companies to disclose more information solutions with overall databases could be considered (e.g. for origin of Gold, solutions might be databases that are fed by different players, or improvements at the level of trade statistics). Organisations like OECD could support such a process.
- **Promote multi-stakeholder approaches:** there needs to be a collaborative effort along the complex supply chain which involves not only refiners but also e.g. miners, collectors, refiners, banks, luxury brand and jewellery companies, administration, NGO, and governments both from host countries and countries where mining and refining companies are

located. Switzerland could play a more prominent role in this collaborative effort.

- **Remain engaged and not pull out:** companies should be knowledgeable about risk, their risk appetite, but also take risks. If all walk away - especially the larger, experienced companies - ASM and small scale mining will become even more vulnerable and exposed. If there are minor violations of human rights, the involved parties in the supply chain should address it and try to improve the situation, but should remain engaged. Only for severe violations they should pull out and stop doing business.

### A1.2.3 Non-governmental Organizations

The following additional measures or strategies have been proposed in the interviews by Swiss NGOs:

- **Declaration of gold provenience:** the declaration of provenience should be extended to allow identification of supplier and/or region of provenience. Data about local production (based on royalties, often not very reliable) can then help to identify hot spots of illegal sources
- **Transparency of gold supply chains:** refiners and banks/traders should publish their supply chain transparently, and communicate their DD procedures (what they actually do in terms of analysis of the local conditions e.g. related to environmental or HR risks). The impression is that the sector is hiding behind audits and general CSR efforts which are not always meaningful and accurate.
- **Data to promote transparency on the gold provenience:** provide data that allows to understand the origin of the gold: 1) on aggregated level, companies could feed anonymously a data base handled by an independent third party; 2) on the level of Switzerland, data from customs should be improved to reflect place of origin instead only place of consignment or transit.
- **Proof of implementing OECD Guidance:** NGO think the OECD Guidance is not really taken all too serious by the sector. Most important, they say that companies are not doing enough to generate public confidence in the measures they say they are taking. There is a lack of disclosure and transparency, and Swiss refiners are not disclosing what is recommended by OECD's Gold Supplement and LBMA Responsible Gold Guidance (Step 5: "Report annually on supply chain due diligence" And there especially: "Company risk assessment in the supply chain"). Here they lack to disclose how they identify and deal with risk, the high-risk regions, the identified risks and measures taken to address and mitigate those risks. The published audit reports that are publicly disclosed e.g. on the websites of the refiners are not meaningful enough.
- **Further measures to ensure compliance with OECD Guidance:** if it should become clear that the Swiss gold industry is not fully complying with OECD guidance, NGOs are proposing the following options:

- 1) Make OECD DD guidance mandatory in Swiss law (e.g. by own law, or by integrating it into the AMLA revision), or create a new standard that covers OECD guidance. Examples of jurisdictions that do this already are US (Dodd Frank) and EU, but how well they work cannot yet be determined.
  - 2) Work toward real implementation of the OECD DD standards (which are currently not fulfilled at all by the industry).
- **Refocussing the BGI:** to tackle formalization in difficult regions. According to two NGOs, the current approach is too conservative and focusing mainly on advanced mines.<sup>237</sup> They also propose to better link BGI activities with SDC's objectives in Colombia (under the umbrella of the joint Colombia Country Strategy with SECO, SDC and EDA/Human Security Division) e.g. on promoting the peace process. It is recognized that full risk avoidance is not the solution, hence they consider it key to formalize or legalize the informal or illegal sector.

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<sup>237</sup> This is currently addressed by the BGI management by developing and introducing minimum criteria so that less advanced mines have a higher chance to enter into the programme. See: SECO (2016): Tender Document BGI for ASM, Phase II.

## A2 Country Study 1: South Africa

### A2.1 Gold Importation

The history and development of South Africa is inextricably linked to gold mining. In the modern era, it has dominated production of gold, and until recently, was the world's largest producer of gold.<sup>238</sup> Although the industry has contracted significantly at a time when South Africa's economy has also diversified, **gold still contributes around 7% to export earnings** (from goods) and about 2.5% to GDP.<sup>239</sup>

South Africa is also a **significant importer of gold**, importing around \$1.9 billion worth of gold in 2015, representing 2.4% of total import value.<sup>240</sup> It continues to hold a reputation as a global leader in the refining of precious metals, and its **Rand Refinery** headquartered in Gauteng is the largest integrated single-site precious metals refining and smelting complex in the world.<sup>241</sup> With declining gold production domestically, it is said to depend increasingly on unwrought gold from abroad.<sup>242</sup>

### A2.2 Legal Rules Affecting Importation of Gold

#### A2.2.1 Regulations for Precious Metals/Gold

Precious metals, including gold and platinum group metals, are **principally regulated by the *Precious Metals Act 2005*** (the "Act").<sup>243</sup> The Act commenced on 1<sup>st</sup> July 2007, and is to be read together with secondary legislation, known as the ***Precious Metals Regulations***,<sup>244</sup> which took effect on 9<sup>th</sup> July 2007.

The Act recognises the **South African Diamond and Precious Metals Regulator (the "Regulator")**, established under an amendment to the *Di-*

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<sup>238</sup> Department of Mineral Resources, Republic of South Africa, *The Precious Metals Trade – General Information Handbook*, H2/2009, available at <http://www.dmr.gov.za/publications/viewdownload/122/251.html> (09.08.2017), p.2.

<sup>239</sup> *Ibid*, pp. 2-3. 2008 figures.

<sup>240</sup> The Observatory of Economic Complexity, *What does South Africa import? (2015)*, available at [http://atlas.media.mit.edu/en/visualize/tree\\_map/hs92/import/zaf/all/show/2015/](http://atlas.media.mit.edu/en/visualize/tree_map/hs92/import/zaf/all/show/2015/) (09.08.2017).

<sup>241</sup> Rand Refinery, *Our Company*, available at [http://www.randrefinery.com/about\\_company.htm](http://www.randrefinery.com/about_company.htm) (09.08.2017).

<sup>242</sup> In 2013, it was reported that the Rand Refinery had taken delivery of two shipments of unwrought gold from the United States, worth \$982m: see Moneyweb, *Why is SA importing tons of gold from the US?*, 17<sup>th</sup> May 2013, available at <https://www.moneyweb.co.za/archive/why-is-sa-importing-tons-of-gold-from-the-us/> (09.08.2017).

<sup>243</sup> *The Precious Metals Act, 2005 (Act 37 of 2005)*, available at [http://www.sadpmr.co.za/upload/Precious\\_Metals\\_Act\\_2005\\_\(Act\\_No\\_37\\_of\\_2005\).pdf](http://www.sadpmr.co.za/upload/Precious_Metals_Act_2005_(Act_No_37_of_2005).pdf) (10.08.2017).

<sup>244</sup> *Precious Metals Act (37/2005): Precious Metals Regulations*, no. R.570, contained in Government Gazette no. 8713, vol. 505, 9<sup>th</sup> July 2007, available at [http://www.sadpmr.co.za/upload/Government\\_Gazette\\_No\\_30061\\_of\\_09\\_July\\_2007.pdf](http://www.sadpmr.co.za/upload/Government_Gazette_No_30061_of_09_July_2007.pdf) (10.08.2017).

*amonds Act, 1986*,<sup>245</sup> as being responsible for the regulation of precious metals in South Africa.<sup>246</sup>

Under the Act, unwrought and semi-fabricated precious metal may only be acquired, possessed or disposed of, by, either as principal or as agent, **persons specifically designated by the Act**.<sup>247</sup>

Section 10 of the Act deals specifically with the right **of any person to import** into South Africa **unwrought or semi-fabricated precious metal**. Such a person is prohibited from doing so without an import permit issued by the Regulator. Section 10(2) sets out the persons **who may apply for an import permit**. With some exceptions, these are the persons specifically designated by the Act (see footnote above) who hold the relevant licence, permit or who have the necessary authority to acquire, possess or dispose of the precious metal.

The person **must declare and submit proof of the origin** of such precious metal in their application.<sup>248</sup> Where the Regulator issues an import permit to such a person, it may attach **conditions to the permit**.<sup>249</sup> The permit will state the origin of the precious metal in question (namely, the country or countries from the precious metal is being imported), the purpose of the import and any other particulars,<sup>250</sup> and will be valid for a period not exceeding one year.<sup>251</sup>

General provisions apply to those dealing in unwrought precious metal (broadly speaking, those eligible to apply for an import licence) which demand that **a register of transactions involving the metal in question is maintained**, and that they be made available for inspection to the Regulator or the South African Police Service on request.<sup>252</sup> Moreover, the **South African Police Service has powers of inspection, search and seizure** in relation to any licence holder.<sup>253</sup> A failure to comply with provisions regard-

<sup>245</sup> *Diamonds Act, 1986 (Act no. 56 of 1986)*, available at [http://www.sadpmr.co.za/upload/diamonds\\_act\\_56\\_of\\_1986.pdf](http://www.sadpmr.co.za/upload/diamonds_act_56_of_1986.pdf) (10.08.2017), section 3(1), as amended by the *Diamonds Amendment Act, 2005 (Act no. 29 of 2005)*, available at [http://www.sadpmr.co.za/upload/Diamonds\\_Amendment\\_Act\\_Act\\_2005.pdf](http://www.sadpmr.co.za/upload/Diamonds_Amendment_Act_Act_2005.pdf) (10.08.2017).

<sup>246</sup> *Precious Metals Act, 2005, op. cit.*, section 3.

<sup>247</sup> *Ibid*, sections 4(1) and 5(1). These are: a holder of a refining licence who acts in accordance with the terms and conditions of his or her licence; an authorised dealer; a producer who has won or recovered the unwrought precious metal (or such metal which has subsequently been refined and made into semi-fabricated precious metal); a person who has obtained a certificate from the Regulator authorising him or her to acquire or to dispose of such unwrought (or semi-fabricated) precious metal; a person who has acquired a special permit from the Regulator in relation to unwrought or semi-fabricated precious metal which does not exceed a prescribed mass for scientific or beneficiation purposes or to make jewellery; a holder of a precious metal beneficiation licence acting in accordance with the terms and conditions of that licence; or a person who, in the case of semi-fabricated precious metals, holds a jeweller's permit.

<sup>248</sup> A pro-forma of the application form is available at [http://www.sadpmr.co.za/upload/Form\\_PMI.pdf](http://www.sadpmr.co.za/upload/Form_PMI.pdf) (29.08.2017).

<sup>249</sup> See this section of the country report, below.

<sup>250</sup> *Ibid*, section 10(4).

<sup>251</sup> *Ibid*, section 10(2)(b) and (c).

<sup>252</sup> *Ibid*, section 15. A pro-forma of the register is available from the website of the Regulator: see [http://www.sadpmr.co.za/upload/PMR%207\\_Gazetted%20Import%20Permit%20register.doc](http://www.sadpmr.co.za/upload/PMR%207_Gazetted%20Import%20Permit%20register.doc) (29.08.2017).

<sup>253</sup> *Ibid*, section 16.

ing the need to hold a licence or to maintain a register amount to **a criminal offence**.<sup>254</sup>

The Act also makes provision for a member of the South African Police Service or an Inspector of the Regulator to **inspect imports**.<sup>255</sup>

Regulations 21 and 22 of the *Precious Metals Regulations*<sup>256</sup> specifically address import permits, setting out the **requirements for completing an import permit application** and confirming that a permit holder will be entitled to import unwrought or semi-fabricated precious metals, subject to any conditions stipulated on the permit. A condition which applies to all import permits is that the holder must make a **declaration to the Regulator on a quarterly basis**, providing documentary proof of each import transaction, indicating:<sup>257</sup>

- the date of the import;
- the type of precious metal imported;
- the quantity;
- the total value; and
- the origin of the precious metal imported.

## A2.2.2 Money Laundering Laws Affecting Gold

Provisions of the *Financial Intelligence Centre Act, 2001* (“FIC Act”)<sup>258</sup> which impose requirements (enforced by criminal law) on accountable institutions to tackle **money laundering** by following customer due diligence and record keeping procedures do not currently apply to dealers in precious metals and stones.<sup>259</sup>

**Dealers in precious metals and stones** do, however, fall into the **Designated Non-Financial Business and Professions** (“DNFBP”) sector, and

<sup>254</sup> *Ibid*, section 20.

<sup>255</sup> *Ibid*, sections 10(3) and 22.

<sup>256</sup> *Op. cit.*

<sup>257</sup> *Precious Metals Regulations, op. cit.*, regulation 22(2).

<sup>258</sup> *Financial Intelligence Centre Act (No. 38 of 2001)*, available at <http://www.banking.org.za/docs/default-source/default-document-library/financial-intelligence-centre-act-38-2001.pdf?sfvrsn=8> (23.08.2017). Note that this is subject to amendments under the *Financial Intelligence Centre Amendment Act (No1 of 2017)*, available at [https://www.fic.gov.za/Documents/FICA\\_Act%201%20of%202017.pdf](https://www.fic.gov.za/Documents/FICA_Act%201%20of%202017.pdf) (23.08.2017).

<sup>259</sup> That such businesses are not categorised as accountable institutions is, however, currently the subject of a government review: see Financial Intelligence Centre, *Notice: Amendment of the Schedules to the Financial Intelligence Centre Act, 2001 (Act 38 of 2001)*, 14th September 2016, available at <https://www.fic.gov.za/Documents/CONSULTATION%20DOCUMENT%20September%202016.pdf> (23.08.2017). The widening of the scope of the FIC Act to include other types of business/profession as accountable institutions follows recommendations made by the Financial Action Task Force (“FATF”), the international standard-setting body on measures to combat money laundering and terrorist financing: see FATF, *Mutual Evaluation Report – Anti-Money Laundering and Combating the Financing of Terrorism, South Africa*, 26<sup>th</sup> February 2009, available at <http://www.fatf-gafi.org/media/fatf/documents/reports/mer/MER%20South%20Africa%20full.pdf> (23.08.2017), in particular, paras. 746-747.

are subject to section 29 of the FIC Act, which requires businesses to make **Suspicious Transaction Reports** to the Financial Intelligence Centre.<sup>260</sup> This requirement applies to all businesses and their employees who know or ought reasonably to know that such a suspicious transaction is taking place. A failure to report suspicious transactions in accordance with the legislation is treated as a criminal offence.<sup>261</sup>

**Relevant transactions** include the receipt of proceeds of unlawful activities or property connected to any offence relating to the financing of terrorist and related activities as well as any transactions which are capable of facilitating the transfer of proceeds or property linked to the financing of terrorist and related activities, or which may have relevance to the investigation of an evasion or attempted evasion of a duty to pay taxes.

### A2.2.3 Other Criminal or Civil Law Rules Affecting Gold

There are **no other known criminal or civil law rules** aimed at the importation of gold or precious metals.

## A2.3 Rules Preventing Importation of Human Rights-Abusive Gold

### A2.3.1 Importation Restrictions

There are **no known state-based rules** preventing the importation of gold linked to human rights abuses.

The **South African legal framework recognises the importance of respect for human rights**: its 1996 Constitution contains a detailed Bill of Rights<sup>262</sup> and it has accepted international obligations as a State Party to key human rights treaties.<sup>263</sup> There is, however, no known jurisprudence addressing the application of this framework in the context of the importation of gold or other precious metals. Moreover, a number of studies by non-governmental organisations has documented violations of human rights in the gold sector<sup>264</sup> and a class action suit is currently before South African courts alleging that gold miners contracted silicosis from their work in the mines. While the lawsuit places workers against the mining companies, the government's failure to protect the workers' health can be implied.<sup>265</sup>

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<sup>260</sup> The "Financial Intelligence Centre", set up under the FIC Act, supervises and enforces compliance with the FIC Act and is South Africa's national centre for the receipt of financial data, analysis and dissemination of financial intelligence to the competent authorities.

<sup>261</sup> *FIC Act, op. cit.*, section 52.

<sup>262</sup> *Constitution of the Republic of South Africa, 1996* – Chapter 2: Bill of Rights, available at <http://www.gov.za/documents/constitution/chapter-2-bill-rights> (30.08.2017).

<sup>263</sup> Such as the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*.

<sup>264</sup> See Harvard Law School International Human Rights Clinic, *The Cost of Gold* (2016); Dean Peacock and Emily Nagisa Keehn, *Justice is Long Overdue for the Widows of South African Mineworkers*, *The Guardian*, 25 October 2016 (<https://www.theguardian.com/global-development/2016/oct/25/justice-long-overdue-widows-south-african-mineworkers-ruling-silicosis-gold>) (D. Peacock is the executive director of the South African NGO Sonke Gender Justice).

<sup>265</sup> See Bongani Nkala et al. v. Harmony Gold et al., *The South Gauteng High Court, Johannesburg* (Case 48226/12) (Notice of Motion, 21 December 2012).



### A2.3.2 Regulations Affecting Producers of Gold

The ***Mineral and Petroleum Resources Development Act*** (Act No. 28 of 2002) (the “MPRDA”),<sup>266</sup> which came into effect in May 2004, controls all prospecting and mining in South Africa, including in relation to precious metals. One of its key objectives is, “*to promote equitable access to the nation’s mineral and petroleum resources to all the people of South Africa.*”<sup>267</sup>

The MPRDA introduced a new regulatory framework which provides that all **rights to minerals and petroleum resources are granted to applicants** who comply with the objectives and requirements of the Act. Applicants must apply to the Minister of the Department for Mineral Resources for a prospecting right, mining right or mining permit.

Among other things, applicants must demonstrate that they have assessed the environmental impact of proposed operations, and conditions are attached to the successful granting of mining rights which demand that an applicant has sufficient funding to implement prescribed social and labour plans and to comply with health and safety legislation.<sup>268</sup> There are, however, **no known obligations under the MPRDA specifically targeted at encouraging respect for human rights.**

### A2.4 Voluntary Guidelines/Proposals for reform

There are a number of **global voluntary initiatives and industry-level standards** partly targeted at the elimination of human rights abuses, which have potential relevance to the importation of gold in to South Africa.

#### A2.4.1 World Gold Council Conflict-Free Gold Standard

Perhaps the main global industry standard is one aimed at gold producers, known as the ***Conflict-Free Gold Standard (the “Standard”)***.<sup>269</sup> Devised by the World Gold Council,<sup>270</sup> it is said to help mining companies to provide assurance that their gold is not contributing to conflict or the abuse of human rights associated with such conflicts.<sup>271</sup>

Although **aimed at enterprises involved in the extraction of gold**, evidence of conformity with the Standard may nevertheless be relied on by

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<sup>266</sup> *Mineral and Petroleum Resources Development Act* (Act No. 28 of 2002), available at <http://www.dmr.gov.za/publications/finish/109-mineral-and-petroleum-resources-development-act-2002/225-mineral-and-petroleum-resources-development-actmprda/0.html> (30.08.2017).

<sup>267</sup> *Ibid*, section 2(c).

<sup>268</sup> See *ibid*, chapter 4 “Mineral and Environmental Regulation”.

<sup>269</sup> World Gold Council, *Conflict-Free Gold Standard*, October 2012, available at [http://www.gold.org/sites/default/files/documents/Conflict\\_Free\\_Gold\\_Standard\\_English.pdf](http://www.gold.org/sites/default/files/documents/Conflict_Free_Gold_Standard_English.pdf) (17.08.2017).

<sup>270</sup> The World Gold Council, based in London is the market development organisation for the gold industry. It states that its purpose is to stimulate and sustain demand for gold, to provide industry leadership and to be the global authority on the gold market. Its 22 members are gold mining companies with operations in more than 45 countries.

<sup>271</sup> World Gold Council, *Responsible gold*, available at <http://www.gold.org/who-we-are/our-members/responsible-gold> (17.08.2017).

others involved in the supply chain, such as importing refineries, as part of their due diligence processes. The former Chief Executive of South Africa's Rand Refinery,<sup>272</sup> for example, has explained that although not a gold mining member of the World Gold Council, the Refinery will fully co-operate with its gold mining depositing customers to encourage conformance with the Standard.<sup>273</sup>

Unlike the Kimberly Process Certification Scheme ("KPCS"), the Conflict-Free Gold Standard is not an intergovernmental scheme and is not supported by any legislation or regulation. Rather, it is **an industry program** designed to be implemented by World Gold Council member companies and other entities involved in the extraction of gold. As such, it does not apply to artisanal or small-scale mining operations.

The Standard adopts the **definition of "conflict"** as referred to in guidelines published by the Organisation for Economic Co-operation and Development ("OECD") regarding the responsible sourcing of minerals.<sup>274</sup> The **definition is far wider than that contained in the KPCS**, and covers intra-national conflict, international conflict, wars or liberation or insurgencies, civil war, violence by criminal networks, widespread **human rights abuses** or other forms of harm on this scale.<sup>275</sup>

World Gold Council member companies and other gold producers who apply the Standard are **expected to make a public statement relating to their compliance** or otherwise with the Standard. Such a statement may be published on the company website or in company reports. The Standard takes the form of a decision tree split into five parts.<sup>276</sup>

The information which is publicly disclosed to show conformity with the Standard is **expected to be relied on by the next participant in the chain of custody** (often a refiner), who may use this as part of their due diligence requirements, alongside a Management Statement of Conformance.

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<sup>272</sup> See section 1. of this country report, above.

<sup>273</sup> See Rand Refinery, *Chief Executive Speech – World Gold Council event at Africa Mining Indaba*, 3 February 2013, available at [http://www.randrefinery.com/events/20130205\\_Mining\\_Indaba/Howard%20Craig%20speech%20at%20World%20Gold%20Council%20event%20-%20Africa%20Mining%20Indaba%202013.pdf](http://www.randrefinery.com/events/20130205_Mining_Indaba/Howard%20Craig%20speech%20at%20World%20Gold%20Council%20event%20-%20Africa%20Mining%20Indaba%202013.pdf) (17.08.2017).

<sup>274</sup> OECD, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, 2<sup>nd</sup> edition, November 2012, available at <https://www.oecd.org/corporate/mne/GuidanceEdition2.pdf> (17.08.2017). For more information, see section 5.2. of this country report, below.

<sup>275</sup> Such abuses are referred to in paragraph 1 of Annex II of the Guidance, described as, "... (i) any forms of torture, cruel, inhuman and degrading treatment; (ii) any forms of forced or compulsory labour, which means work or service which is exacted from any person under the menace of penalty and for which said person has not offered himself voluntarily; (iii) the worst forms of child labour; (iv) other gross human rights violations and abuses such as widespread sexual violence; (v) war crimes or other serious violations of international humanitarian law, crimes against humanity or genocide."

<sup>276</sup> See World Gold Council, *Conflict-Free Gold Standard*, *op. cit.*, p. 9.

## A2.4.2 OECD Guidance: Supplement on Gold

In May 2011, the Organisation for Economic Co-operation and Development (the “OECD”) also developed guidelines for the responsible sourcing of minerals: ***OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*** (the “OECD Guidance”).<sup>277</sup>

**The OECD Guidance includes a *Supplement on Gold*.**<sup>278</sup> Although, like the OECD Guidance itself, this is a voluntary initiative, it is aimed at all stakeholders in the gold supply chain by **providing guidance on the steps companies should take to avoid contributing to conflict and serious abuses of human rights** in the supply chain of gold potentially sourced from conflict-affected and high-risk areas. Specific recommendations are made and adapted according to the role of the stakeholder, such as mining companies, exporters, recyclers, refiners and bullion banks. **A five-step process for corporate due diligence** in sourcing minerals from ‘conflict affected and high risk’ areas is established by the *Supplement on Gold* of the OECD Guidance.

In particular, companies **sourcing gold from artisanal and small-scale gold mining extractions (“ASM”)** are encouraged by the OECD Guidance to undertake both thorough due diligence in connection with ASM gold and to assist and enable ASM miners to build secure, transparent and verifiable gold supply chains. It includes an appendix aimed at minimising the risk of marginalisation of the ASM sector, while promoting conflict-free gold supply chains.<sup>279</sup>

The *Supplement on Gold* contained in the OECD Guidance has, for example, been **relied on as an industry benchmark by the London Bullion Market Association (“LBMA”)** in its *Responsible Gold Guidance* (see below).<sup>280</sup> In South Africa, the Rand Refinery, as the only LBMA-accredited refinery in the country claims to adhere to the OECD Guidance as part of its internal Responsible Gold Policy, publicly confirming the company’s commitment to the sourcing of “Responsible Gold”.<sup>281</sup>

## A2.4.3 LBMA Responsible Gold Guidance

The LBMA describes itself as an international trade association, representing the London market for gold and silver bullion. It has over 140 company members, including refiners, fabricators and traders and operates an **accreditation system known as the *LBMA Good Delivery List***, said to be widely recognised as representing the de facto standard for quality assured

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<sup>277</sup> *Op. cit.*

<sup>278</sup> *Ibid*, p. 61.

<sup>279</sup> *Ibid*, p. 114.

<sup>280</sup> LBMA, *LBMA Responsible Gold Guidance*, Version 6, 14<sup>th</sup> August 2015, available at <http://www.lbma.org.uk/assets/market/gdl/RGG%20v6.0%20201508014.pdf> (17.08.2017).

<sup>281</sup> See section 5.3. of this country report for more detail.

gold and silver bars.<sup>282</sup> This is supported by a system of regular monitoring of refiners featured on the list to confirm that bullion meets the quality criteria needed to attain and maintain accreditation.

All refiners producing LBMA good delivery gold bars must comply with the *LBMA Responsible Gold Guidance* in order to remain on the *LBMA Good Delivery List*. Newly accredited members must implement the guidance and pass an audit covering a 12-month period prior to becoming a member. The **LBMA Gold Guidance is said to formalise and consolidate existing high standards of due diligence** amongst all “good delivery” refiners; in particular, it follows the five steps framework<sup>283</sup> of due diligence contained in the OECD Guidance, as well as the requirements of the *Supplement on Gold*. The second step of this process requires refiners to identify risks associated with the supply chain from the point of origin to the refinery regarding: **systematic or widespread human rights abuses** associated with the extraction, transport or trade of gold; direct or indirect support to non-state armed groups or private or public security forces; bribery and fraudulent misrepresentation of the origin of gold; money laundering and terrorist financing; and contribution to conflict.<sup>284</sup>

As stated above, in South Africa, the **Rand Refinery has adopted a Responsible Gold Policy**,<sup>285</sup> as part of which it reviews its activities on an annual basis, verified by an independent auditor, in order to maintain its status as a “good delivery” refiner, carried out in accordance with the *LBMA Gold Guidance* and OECD Guidance.<sup>286</sup>

## A2.5 Assessment of Effectiveness

In the absence of state-based rules regulating the importation of human rights-abusive gold there can be no statement about the effectiveness of a legal framework. As mentioned above, the general effectiveness of South Africa’s human rights obligations (in domestic and international law) has proven to be faulty.<sup>287</sup> Assessing the effectiveness of **the voluntary industry standards** subscribed to by particular stakeholders is not based on legal analysis, **but rather depends on evaluating the accuracy of self-reporting requirements**.

The *LBMA Responsible Gold Guidance*, incorporating the due diligence standards contained in OECD Guidance, provides the **only known example of an industry standard** on human rights with potential relevance to the importation of gold. The management of subscribers to the *LBMA Responsible Gold Guidance* report each year to confirm their compliance with

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<sup>282</sup> See LBMA, *Good Delivery List*, available at <http://www.lbma.org.uk/the-good-delivery-list> (17.08.2017).

<sup>283</sup> See section 5.2. of this country report, above.

<sup>284</sup> LBMA, *LBMA Responsible Gold Guidance*, *op. cit.*, p. 6.

<sup>285</sup> Rand Refinery, *Precious Metals Responsible Gold Policy*, undated, available at <http://www.randrefinery.com/Documents/Responsible%20Gold%20Policy.pdf> (22.08.2017).

<sup>286</sup> Rand Refinery website, *Responsible Gold*, available at [http://www.randrefinery.com/products\\_responsible.htm](http://www.randrefinery.com/products_responsible.htm) (22.08.2017).

<sup>287</sup> See *supra*, n. 232.

the five steps framework. This form of self-evaluation is verified by auditors in an Independent Assurance Report.<sup>288</sup> The scope of such a report is **limited to verifying the assertions made by management to describe the activities undertaken** during the period to demonstrate compliance and management's overall conclusion.

Companies such as the Rand Refinery display on their website links to the relevant annual reports, **claiming to demonstrate compliance** with these standards. For 2016, the independent auditor, PricewaterhouseCoopers, concluded that the Refinery had complied with all requirements. The three-page report set out the following "Conclusion":

Based on the results of our reasonable assurance procedures, in our opinion, the Company's Compliance Report for the period ended 31 August 2016, in all material respects, fairly describes the activities undertaken during the period to demonstrate compliance, and management's overall conclusion contained therein, in accordance with the Reporting Criteria.<sup>289</sup>

However, given the applied procedure and following the requirements of ISAE 3000, the assurance provider mainly focuses on the management systems and checking and testing of documentation. For the general public it remains difficult to make a judgement on the effectiveness of the risk and due diligence procedures applied.

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<sup>288</sup> See for example, the 2016 report by Price Waterhouse Coopers, *Independent Assurance Report to the Directors of Rand Refinery (Proprietary) Limited*, 4<sup>th</sup> November 2016, available at <http://www.randrefinery.com/Documents/Rand%20Refinery%20Responsible%20Gold%20Assurance%20Report%202016.pdf> (31.08.2017).

<sup>289</sup> Id. p. 3.

## A3 Country Study 2: Dubai / United Arab Emirates

### A3.1 Gold Importation

Dubai, one of the seven Emirates that comprise the United Arab Emirates (UAE), has no gold of its own, but has emerged as an important regional physical gold import, export and redistribution hub, and also as a gold trading centre.<sup>290</sup> The local gold market is comprised by extensive gold refining, gold wholesaling and distributing, a very large gold retail sector, as well as the emergence of gold trading and brokering operations.<sup>291</sup>

According to the Dubai Multi-Commodities Center (DMCC), in 2016, 941 metric tons of gold (worth \$34 billion) were imported into Dubai and 571 metric tons (worth \$23.1 billion) were exported.<sup>292</sup> This is somewhat more in terms of imports and exports than the figures for 2015 (although the import level less than the 2014 import levels). Overall, however, the data highlights large volumes of gold flowing into and out of Dubai. This supports the perception that there is strong political will to further develop Dubai's as a gold trading centre.

### A3.2 Legal Rules Affecting Importation of Gold

#### A3.2.1 Regulations for Precious Metals/Gold

##### **UAE Legal Rules Affecting Importation of Gold**

As an Emirate within the UAE, Dubai is subject to the federal laws in areas such as foreign affairs, customs and financial matters, civil law, criminal law, and labour law.<sup>293</sup> The tariff schedule of the UAE imposes no duty on imports of gold, whether unworked or semi-manufactured, and a 5% duty on gold jewellery.<sup>294</sup>

The **Federal Law No. 11 of 2015 concerning monitoring trade in precious stones**, precious metals and its hallmark replaced the Federal Law No. (9) of 1993. The law's Article 4 states that sale, offering for sale or possession for the purpose of sale of wrought articles shall be prohibited unless such articles are either stamped with the official hallmark or the foreign hallmark, or accompanied by an identification card. However, Article 6 states that 'unwrought articles' shall not be covered by the provisions of hallmarking.

Article 5 states that precious metals, whether wrought or unwrought, and precious stones may not be exported unless they are accompanied by the

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<sup>290</sup> <https://www.bullionstar.com/gold-university/dubai-gold-market#en-53-1>

<sup>291</sup> Id.

<sup>292</sup> <https://www.dmcc.ae/gateway-to-trade/commodities/gold>

<sup>293</sup> UAE Constitution, Arts. 120, 121. Art. 123 of the Constitution permits the emirates to conclude international agreements with neighboring states.

<sup>294</sup> WTO, UAE Tariff Schedule, 2015 version ([https://www.wto.org/english/tratop\\_e/schedules\\_e/goods\\_schedules\\_e.htm](https://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm), accessed 31 August 2017).



certificate or identification card as determined by the Executive Regulations of the Law.<sup>295</sup>

According to a recent statement of the Government of the UAE, the local customs authorities request individuals who transport gold to provide information that includes copies of their passports or identification documents, the address of residence, and the destination to which the funds will be transferred, in conformity with the financial regulatory measures of the Financial Action Task Force (FATF), which require verification of sources of funds, currencies, gold and silver, and in accordance with the established procedures of the OECD pertaining to gold<sup>296</sup>.

### **Dubai Legal Rules Affecting Importation of Gold**

On the regional level, the authorities of Dubai retain certain competences. Not only must an Emirate be consulted before the federal government concludes an international agreement which could have an effect on it<sup>297</sup>, but several local sources of power exist. The Dubai authorities' relevant powers include the competence to create a free zone within their territory. Numerous free zones exist, offering traders not only corporate and income tax-free operations and complete repatriation of profits, but also exempts them from UAE federal company law.

### **DMCC Rules Affecting Importation of Gold**

Relevant to the present study, in 2002, the Crown Prince of Dubai created the DMCC as a free zone and governmental entity. A subsequently issued Resolution (No. 4 of 2002 In Respect of Organizing the Work at Dubai Commodities and Metals Center, as last amended in 2006, hereinafter "Resolution No. 4") sets out the organizational aspects of the zone.<sup>298</sup>

According to Resolution No. 4, the DMCC's aim is to develop and execute strategies and policies to make Dubai a leading centre for trading commodities, metals and services.<sup>299</sup> To accomplish this, the DMCC has a Chairman (selected by the Ruler of Dubai) with the power to issue rules, regulations, and resolutions. Management of the DMCC is undertaken by an Authority (DMCCA) composed of the Chairman, Executive Chairman and Board of Directors (the latter two selected by the Chairman), who also have the power to license and register companies.<sup>300</sup> The DMCC's statute permits

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<sup>295</sup> We are not aware of the enactment of these Regulations. Article 30 of this Law provides that the regulations and resolutions in implementation thereof shall remain in force, to the extent the same does not contradict with the provisions of this Law until the regulations and resolutions that superceded are issued.

<sup>296</sup> Response of the Government of the UAE to the Group of Experts on the Democratic Republic of the Congo dated of February 8th 2017 and produced as Annex 47 to the « Final report of the Group of Experts on the Democratic Republic of the Congo » (S/2017/672/Rev.1) published on August 16th 2017. Available at <http://www.un.org/Docs/journal/asp/ws.asp?m=S/2017/672/Rev.1>

<sup>297</sup> UAE Constitution, Art. 124.

<sup>298</sup> Resolution no. 4 of 1 May 2002 In Respect of Organizing the Work at Dubai Commodities and Metals Center (نظام رقم 4 لسنة 2002 بشأن تنظيم العمل في مركز دبي للسلع والمعادن) In Dubai OG of 31 July 2002, year 36, no. 281, p. 17.

<sup>299</sup> Resolution No. 4, Art. 5.

<sup>300</sup> Id. at Arts. 5 & 11.

the importation and exportation of gold, its processing, and its refining within the zone.<sup>301</sup>

The Resolution further states that companies and individuals working within the DMCC are “not subject to the Laws and regulations applied by Dubai Municipality, the Department of Tourism and Commerce Marketing, the Department of Economic Development in Dubai or the other departments”.<sup>302</sup>

It is worth noting that DMCCA may impose civil penalties on anyone committing a violation of any provision of Resolution No. 4 or rules or regulations issued by the DMCCA itself. The latter includes licensing clauses issued by the Centre.<sup>303</sup>

### A3.3 Money Laundering Laws Affecting Gold

#### A3.3.1 State Law

Many UAE laws and regulations address the question of money laundering<sup>304</sup>. The main piece of legislation is **Federal Law No. (4) of 2002 on ‘Combating Money Laundering and Terrorism Financing Crimes’** (Federal Law No. (4)), which was amended in 2014.<sup>305</sup> This law establishes the criminal liability for money laundering of legal persons as well as natural persons.<sup>306</sup>

Specifically related to gold, Article 6 imposes a duty to disclose the possession of precious metals for whoever is entering or exiting the UAE.<sup>307</sup> The disclosure must be in accordance with the rules of the Central Bank.

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<sup>301</sup> Id. at Art. 8.

<sup>302</sup> Id. at Art. 14.

<sup>303</sup> Id. at art. 23.

<sup>304</sup> On Money Laundering in Dubai, see B. Belaisha, Money Laundering and Financial Crimes in Dubai: A Critical Study of Strategies and Future Direction of Control, PhD thesis, Southampton Solent University 2015. Available at <http://ssudl.solent.ac.uk/3489/>

At page 179, the scholar writes “**one sector that has been neglected by all the laws**, conventions and political pronouncements is the transportation of cash and expected legal declarations, **and the smuggling of cash and/or gold to Dubai**. A substantial amount of money laundering is trade based, and this needs to be tackled; this includes the *Hawala* system of cash transactions, which until recently were often downplayed as a potential conduit of money laundering. Although Dubai and the UAE have a legislative framework for money laundering, it needs to be significantly expanded upon to include all sectors beyond the obvious ‘regulated’ known financial sector”.

<sup>305</sup> **Federal Law No. (4) of 2002 on ‘Combating Money Laundering and Terrorism Financing Crimes’** (قانون اتحادي رقم 4 لسنة 2002 بشأن مواجهة جرائم غسل الأموال) In UAE OG of 5 February 2002, year 32, no. 376, p. 9. For an overview of this law, see <https://gettingthedealthrough.com/area/50/jurisdiction/33/anti-money-laundering-united-arab-emirates/>

<sup>306</sup> «Without prejudice to administrative penalties stated in the law, Financial Institutions and Other Financial, Commercial and Economic Establishments operating in the State shall be criminally liable for the offence of Money Laundering if intentionally committed in their respective names or for their account».

<sup>307</sup> “In pursuance of the procedures of disclosure adopted by the Central Bank, whoever enters to or exits from the State shall disclose all currencies, tradable financial instruments, high-value stones and precious metals therewith”.



More important for the present study, Federal Law No. (4)'s Article 2, para. 3 allows for a prosecution of money laundering on the basis of a predicate offence even if the original act itself did not result in a conviction proving the unlawful source of the returns. It states, "A conviction with a predicate offence shall not be deemed as a condition to prove the illicit source of the proceeds".<sup>308</sup>

Cabinet Resolution No. 38 of 2014 'Concerning the Executive Regulation of the Federal Law No. 4 of 2002 Concerning Anti Money Laundering and Combating Terrorism Financing' (Cabinet Resolution No. 38) provides further detail on this provision. It adds that the predicate act includes such acts committed in another state, as long as such acts constitute a crime in that state and would constitute a crime if committed in the UAE.

The same Resolution requires financial institutions regulated by the UAE Central Bank to carry out anti-money laundering (AML) measures in accordance with Central Bank circulars. Very significantly, however, AML measures must also be carried out by "**Other Financial, Commercial and Economic Institutions**" (OFCEI). These are defined to include "Such establishments licensed and controlled by entities other than the Central Bank or the Authority, including non financial activities and professions such as [...] jewelry and **precious metals** and stones traders [...]."<sup>309</sup> Thus, gold traders are subject to the Resolution's **Article 5, which states:**

"Financial institutions and other financial, commercial and economic establishments shall:

- Not to deal with fictitious banks in any manner whatsoever, whether by opening bank accounts or accepting money or deposits from them.
- Not to open bank accounts in false, pseudo or fictitious names or by numbers without the names of their holders.
- To confirm the source of wealth of politically exposed foreigners and their families and associated persons and to provide continuous check on their transactions.
- To update all information and data in connection with the identity of the clients regularly and periodically."<sup>310</sup>

Article 11 of Federal Law No 4 concerns the powers that the Control Authorities<sup>311</sup> retain with regard to OFCEI. It reads as follow:

"1-

2- The Supervisory Authorities shall oversee Other Financial, Commercial and Economic Institutions (OFCEI) and monitor the work thereof so as to ensure the commitment of the same to the provisions of this law, the execu-

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<sup>308</sup> Federal Law No. (4), art. 2.3.

<sup>309</sup> Cabinet Resolution No. 38, art. 1.

<sup>310</sup> Id. at art. 5.

<sup>311</sup> Control or Supervising Authorities are Federal and local authorities responsible for licensing or supervising financial, commercial and economic institutions, by virtue of the laws and regulations in force (Federal Law No 4, art. 1).

tive regulations thereof and the resolutions issued thereunder; especially the following:

- a- **To issue directives and guidelines** to Other Financial, Commercial and Economic Institutions (OFCEI) that serve as a basis for regulating money laundering, terrorism or terrorist organizations financing, including referral of the reports of suspicious transactions to the Financial Information Unit, upon occurrence of the same.
- b- To issue resolutions in respect of **imposing certain administrative sanctions** on Other Financial, Commercial and Economic Institutions (OFCEI) in breach of the provisions of this law, the executive regulation thereof, the resolutions issued thereunder, the cases thereof and the eligibility to appeal against the same.

3- In pursuance of Clauses (1) and (2) of this Article, the prescribed **administrative sanctions** shall be as follows:

- a- **Warning.**
- b- A **fine** not less than AED (50.000) "fifty thousand dirhams" and not more than AED (500.000), "five hundred thousand dirhams".
- c- To prevent the party in breach from working in the relevant sector for the period determined by the Supervisory Authorities.
- d- To restrict the powers of the board directors, executive directors, supervisory directors, managers and dominant owners, including the appointment of temporary observer.
- e- To **suspend activity** for a period not exceeding one month.
- f- To **cancel the license.**"

Other legislation on Money Laundering includes the Securities and Commodities Authority (SCA) Chairman Resolution No. (17/T) of 2010 concerning the Procedures of Anti-money Laundering and Combating Terrorism Financing as amended in 2017<sup>312</sup> and the Resolution of the Board of Insurance Authority No. 13/2015 on the Anti-money Laundering and Combating the Financing of Terrorism in Insurance Activities<sup>313</sup>.

It is worth noting that the Dubai Economic Security Centre (DESC) was established by Dubai Law No. 4/2016.<sup>314</sup> The DESC aims, among other things, to protect the Emirate's investments from crimes that may harm its economy.<sup>315</sup> The DESC shall, in coordination with the concerned bodies, supervise the **trading of precious metals**.<sup>316</sup>

<sup>312</sup> Art. 16, after 2017 amendments, reads as follow: «The Market and the Financial Institution shall be obligated to implement the resolutions issued by the UN Security Council».

<sup>313</sup> For more texts, see the website of the Central Bank of the UAE (which does not seem to be regularly updated): [https://www.centralbank.ae/en/index.php?option=com\\_content&view=article&id=75&Itemid=95](https://www.centralbank.ae/en/index.php?option=com_content&view=article&id=75&Itemid=95)

<sup>314</sup> Law No. 4/2016 concerning Dubai Economic Security Centre  
(قانون رقم 4 لسنة 2016 بشأن مركز دبي للأمن الاقتصادي) In Dubai OG of 15 May 2016, year 50, no. 399, p. 5.

For an analysis of this law, see

<http://www.lexismiddleeast.com/doc/4C4D454C415F323031365F53657074656D6265725F32?highlight=precious+metals>. Also: <http://www.tamimi.com/en/magazine/law-update/section-14/jun-jul/an-insight-into-the-newly-formed-dubai-economic-security-centre.html>

<sup>315</sup> Id. at Art. 3.

<sup>316</sup> Id. at Art. 7.

### A3.3.2 DMCC's Rules

Article 22 (7) of Regulation No. 4 of 2002 (discussed above) stipulates that any activity that violates the laws of the state, including money laundering, is prohibited. The relevant passage states that: the “entry, trading or providing the following goods, products and services **shall be prohibited**: [...] **Any act contrary to the laws of the State, including money laundering operations**”.

It is worth noting that in addition to any existing powers of sanction and penalty of the DMCC under its existing legal and regulatory framework (notably articles 23 of Resolution No 4<sup>317</sup>), **the DMCC shall be considered as a Control Authority for OFCEIs pursuant to the Cabinet Resolution No 38.**<sup>318</sup> It means that DMCC has the powers set out in Article 11 of Federal Law No 4.<sup>319</sup>

In addition to its obligations as a Control Authority, the DMCC undertakes to implement specific controls in relation to its members under the “Anti-Money Laundering and Combating the Financing of Terrorism (AML/CFT) Policy and Process” (the **DMCC AML/CFT Policy**).<sup>320</sup>

As part of the AML/CFT Policy, the DMCC undertakes to carry out detailed identification, verification and Know-Your-Customer (KYC) processes in relation to the licensing and on-going supervision of its members. The DMCC undertakes to cooperate fully with relevant authorities. As part of such cooperation, the DMCC will (to the extent permitted or required) share such information as it deems appropriate to further the objectives set forth in the DMCC Rules for RBD-GPM and the AML/CFT Policy. This cooperative approach is a further expression of the DMCC's “zero tolerance” position with regard to AML/CFT.<sup>321</sup>

Where there is any discrepancy between: (i) the AML/CFT Policy; and (ii) the provisions of the Cabinet Resolution No 38 or Federal Law No. 4, the latter provisions will prevail.<sup>322</sup>

DMCC has also issued a “Guidance for Risk Based Compliance for Designated Non-Financial Business and Professions” (the **DMCC Guidance for**

<sup>317</sup> See Part 2.1.3. of this Report.

<sup>318</sup> DMCC Rules for RBD-GPM, Part B, Article 5.2. It is further detailed in Part D of the DMCC Rules for RBD-GPM (page 27): “Pursuant to the Resolution, the DMCC is a Control Authority. A Control Authority is specifically vested with the authority:

(a) to implement rules, regulations, forms and procedures related to the prevention of money laundering, combating terrorism financing and funding unlawful organisations, to be applied by (inter alia) OFCEIs (and notably with a view to implementing and enforcing standards in relation to client identification, the determination of ultimate beneficiaries, record keeping and the submission of STRs to the FIU);

(b) to implement procedures to verify (inter alia) that OFCEIs are compliant with the provisions of Law No. 4 of 2002 and the Resolution and any other specific laws in relation to anti-money laundering, combatting terrorism financing or funding unlawful organisations in the UAE....”.

<sup>319</sup> See Part 2.2. of this Report.

<sup>320</sup> Available at <https://www.dmcc.ae/gateway-to-trade/commodities/gold/accreditation-initiatives>

<sup>321</sup> DMCC Rules for RBD-GPM, Part D, page 28.

<sup>322</sup> Id.

**DNFBPs**)<sup>323</sup> which is intended to offer guidance for all DNFBP's registered as DMCC/JLT members on how best to comply with Anti-Money Laundering, Combating Financing of Terrorism and Fraud Prevention legislation and Best Practices applicable to their business.<sup>324</sup>

This Guidance targets, among others, **wholesale dealers or manufacturers in precious metals** and precious stones.<sup>325</sup>

It is worth noting that the recommendations set out in these Guidelines are **not mandatory** and it is up to each DNFBP to determine the extent to which they implement such recommendations.<sup>326</sup>

### A3.3.3 Other Criminal or Civil Law Rules Affecting Gold

The main criminal law legislation is the UAE Federal Penal Code enacted in 1987 and modified several times since then.

In this Code, complicity is punished (art. 44-52).

Article 21 establishes the rule on liability for extraterritorial acts. It states that the law shall apply to any person found in the state after having committed abroad, as a principal perpetrator or as an accomplice, any of a number of crimes, one of which is money laundering.

Article 65 recognizes the liability of legal persons by providing that legal persons (with the exception of the government's associations and their official departments and public organizations and corporations) shall be criminally responsible for crimes committed by their representatives, directors or agents acting in favour of or on behalf of them. This article adds that no sentence shall be imposed on them other than a fine, forfeiture and criminal measures provided for the crime by law. This, however, shall not prevent personally punishing the offender with the penalties prescribed for the crime by law.

A separate provision criminalizes the imitation or forgery of a gold hallmark. The penalty of Article 211 of the Federal Penal Code also applies to any person who uses gold with an illicit hallmark or brings it into the State, knowing it is imitated or forged.

Finally, note that the Local Penal Code of Dubai of 1970 is still in force even though it is rarely applied. The reason for that is that the Law No. 4 of 1994 concerning the Local Penal Code of 1970 cancelled any text of the local Code contradicting the provisions of the Federal Penal Code No. 3 of 1987 but left any other texts of the local Penal Code applicable.

The gold-related crimes (Art. 351 and following articles) deal with the issue of forging and do not concern human rights abuses.

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<sup>323</sup> Available at <https://www.dmcc.ae/gateway-to-trade/commodities/gold/accreditation-initiatives>

<sup>324</sup> DMCC Guidance for DNFBP, art. 1.1.

<sup>325</sup> DMCC Guidance for DNFBP, art. 2.1.2.

<sup>326</sup> DMCC Guidance for DNFBP, art. 1.1.

## A3.4 Rules Prohibiting Importation of Human Rights-Abusive Gold

### A3.4.1 Import Restrictions

#### **DMCC Rules for Risk Based Due Diligence in the Gold and Precious Metals Supply Chain (the “DMCC Rules for RBD-GPM”)**

In April 2012, the DMCC introduced the DMCC Practical Guidance for Market Participants in the Gold and Precious Metals Industry (the “DMCC Guidance”) to assist global market participants across the entire gold supply chain to conduct the necessary due diligence (using a risk based approach) for responsible sourcing of gold. In June 2012, the DMCC made it a mandatory requirement for all members of the DMCC that are subject to any of the Accreditation Standards<sup>327</sup> to comply with and implement all of the provisions of the DMCC Practical Guidance.<sup>328</sup>

The DMCC issued DMCC Rules for Risk Based Due Diligence in the Gold and Precious Metals Supply Chain (the “DMCC Rules for RBD-GPM”) <sup>329</sup> in August 2016 (59 pages). This is an enhanced version of the DMCC Guidance and the DMCC Review Protocol.

For Accredited Members and Reviewers<sup>330</sup>, the DMCC Rules for RBD-GPM establish a **mandatory framework** that goes beyond the concept of guidance and implements strict compliance with the principles underpinning the DMCC Guidance. Non-Accredited Members<sup>331</sup> are encouraged to implement the Rules to the extent applicable to their business.<sup>332</sup>

The Rules set out in the DMCC Rules for RBD-GPM<sup>333</sup> concern the Supply Chain Management Systems, the Supply Chain Risk Identification and Assessment, the Risk Control Plan, the Independent Third-Party Audits and

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<sup>327</sup> DMCC has two Accreditation Standards: Dubai Good Delivery standard (DGD) and the Market Deliverable Brand standard (MDB). The DMCC's Accreditation Rules are available at <https://www.dmcc.ae/gateway-to-trade/commodities/gold/accreditation-initiatives>

There are currently 14 DGD members including PAMP, Argor-Heraeus, Valcambi, Perth Mint, Rand Refinery, The Perth Mint, Heraeus, Emirates Gold, Istanbul Gold Refinery, and Krastsvetmet. There are also 14 former members of the DGD Standard including Royal Canadian Mint, Metalor, Johnson Matthey, and Kaloti Precious Metals.

For the full list of DGD members, see [https://www.dmcc.ae/application/files/8514/9138/7942/DGD\\_List- Gold Alphabetical - \\_October 2016- Final.pdf](https://www.dmcc.ae/application/files/8514/9138/7942/DGD_List- Gold Alphabetical - _October 2016- Final.pdf)

<sup>328</sup> DMCC Rules for RBD-GPM, Part D.

<sup>329</sup> Available at <https://www.dmcc.ae/gateway-to-trade/commodities/gold/accreditation-initiatives>

<sup>330</sup> DMCC Rules for RBD-GPM, Part A, rule 2 states that an “Accredited Member means any person or entity that is subject to any one or more of the Accreditation Standard”. There are two categories of Accredited Member: Category-A and Category-B.

Category-A Accredited Member is an Accredited Member who is domiciled in the UAE (including any Free Zone within the UAE) while Category-B Accredited Member is any Accredited Member who is not a Category-A Accredited Member.

<sup>331</sup> Non-Accredited Member is any member of the DMCC who is not an Accredited Member (DMCC Rules for RBD-GPM, Part A, rule 2).

<sup>332</sup> DMCC Rules for RBD-GPM, Part A, rule 4.

<sup>333</sup> All these rules are contained in Part C DMCC Rules for RBD-GPM (from page 9 till 25).

the Annual Reporting on Responsible Supply Chain Due Diligence. Each topic is then regulated in a detailed way.<sup>334</sup>

It is worth noting that in addition to any existing powers of sanction and penalty of the DMCC under its existing legal and regulatory framework (notably articles 23 of Resolution No 4<sup>335</sup>), **the DMCC is considered a Control Authority for OFCEIs pursuant to the Cabinet Resolution No 38.**<sup>336</sup> **This means that DMCC has the powers set out in Article 11 of Federal Law No 4.**<sup>337</sup>

#### Efforts on the Federal level

According to a recent statement of the Government of the UAE, the Federal Customs Authority, in agreement with the National Committee on Anti-Money Laundering and Combating Terrorist Financing, will continue to coordinate with security entities, departments of economic development, the UAE Ministry of Economy, and the other concerned authorities on measures to curtail the illicit trade in gold from conflict areas.<sup>338</sup> UAE Authorities implement measures that require the individuals carrying gold to declare, upon their arrival to the UAE, the identity of gold exporters (full name and address).<sup>339</sup>

### A3.4.2 Regulations Affecting Producers of Gold

There is no gold production in the UAE.<sup>340</sup>

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<sup>334</sup> For example, with regard the Supply Chain Management Systems topic, the DMCC Rules for RBD-GPM set an “overriding principle” that each Accredited Member conducting business in the supply chain relating to Mined or Recycled Gold must implement and maintain systems and procedures which are sufficiently robust to conduct effective due diligence on the Accredited Member’s supply chain.

The, detailed rules address various issues including the extent of the supply chain, the minimum KYC (Know-Your-Customer) requirements, the Record Keeping and Updating of Information, the appointment and duties of the Supply Chain Officer and the Controller and Security requirements.

<sup>335</sup> See Part 2.1.3. of this Report.

<sup>336</sup> DMCC Rules for RBD-GPM, Part B, Article 5.2.

It is further detailed in Part D of the DMCC Rules for RBD-GPM (page 27): “Pursuant to the Resolution, the DMCC is a Control Authority. A Control Authority is specifically vested with the authority:

(a) to implement rules, regulations, forms and procedures related to the prevention of money laundering, combating terrorism financing and funding unlawful organisations, to be applied by (inter alia) OFCEIs (and notably with a view to implementing and enforcing standards in relation to client identification, the determination of ultimate beneficiaries, record keeping and the submission of STRs to the FIU);

(b) to implement procedures to verify (inter alia) that OFCEIs are compliant with the provisions of Law No. 4 of 2002 and the Resolution and any other specific laws in relation to anti-money laundering, combating terrorism financing or funding unlawful organisations in the UAE. ...”.

<sup>337</sup> See Part 2.2. of this Report.

<sup>338</sup> Response of the Government of the UAE to the Group of Experts on the Democratic Republic of the Congo dated of February 8th 2017 and produced as Annex 47 to the « Final report of the Group of Experts on the Democratic Republic of the Congo » (S/2017/672/Rev.1) published on August 16th 2017. Available at <http://www.un.org/Docs/journal/asp/ws.asp?m=S/2017/672/Rev.1>

<sup>339</sup> Id. at 100.

<sup>340</sup> USGS, 2014 Minerals Yearbook: United Arab Emirates (Advance Release), 65.2 (U.S. Dept. of Interior, August 2017).

### A3.5 Voluntary Guidelines/Proposals for Reform

Some refiners have their own standards. For example, Emirates Gold has its Compliance, Anti-Money Laundering (AML), Combating the Financing of Terrorism (CFT), and Supply Chain Management Policy.<sup>341</sup>

### A3.6 Assessment of Effectiveness

#### A3.6.1 DMCC Level

The DMCC Rules for RBD-GPM are a quasi-mandatory set of rules, but they apply only to those actors that wish for accreditation. Their effectiveness is dependent on the DMCC's enforcement efforts rather than the efforts of the UAE officials. The DMCC claims to take the Guidelines seriously, maintaining a list of approved auditors subject to Approved Auditor Rules<sup>342</sup> to protect the integrity of the Members' independent auditing requirement and underlining its stated commitment to responsible sourcing of gold with the introduction of a DMCC Members Whistleblowing Policy in October 2016<sup>343</sup>. The Whistleblowing Policy explicitly includes "human rights abuses (including dangers to health and safety or the environment)" under its list of concerns that can be notified within this protection.<sup>344</sup>

There is little literature on the accuracy of the submitted reports as yet. The main attention to effectiveness arose regarding the Kaloti Group's alleged violations of the human rights responsibility provisions of the Rules for RBD-GPM. In that case, a whistle-blower from Ernst & Young claimed that DMCC-Member Kaloti Group, Dubai's largest gold refinery, purchased approximately 75kg of silver-coated gold bars which had left Morocco incorrectly labelled as silver to avoid gold export limits, and for which the suppliers were paid in cash at the Kaloti office in Dubai's gold souk. After being melted down, the gold would be refined into 99.5% pure newly minted bullion bearing the Kaloti stamp and a serial number, and destined for the international gold market. Further investigations found that up to four tonnes of gold may have come to Kaloti Group from several Moroccan suppliers in a similar manner.<sup>345</sup>

Kaloti Group strongly denied the claims. Significantly, the DMCC removed Kaloti from the DGD list in 2015 saying that Kaloti had not met DMCC's

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<sup>341</sup> Source: <http://www.emiratesgold.ae/responsible-gold.html>

<sup>342</sup> DMCC, Approved Auditor Rules, v1.0 (12 January 2017) (<https://www.dmcc.ae/application/files/2414/8886/8204/RulesDMCCApprovedAuditorsRulesV1WebUploadVersion.pdf>; accessed 26 October 2017).

<sup>343</sup> See DMCC Whistleblowing Policy, 24 October 2016 (<https://www.dmcc.ae/blog/dmcc-members-whistleblowing-policy>; accessed 26 October 2017).

<sup>344</sup> Ibid.

<sup>345</sup> Source: <http://www.cclcompliance.com/publications/mena-publications/dfs-regulatory-update-february-2014>. For more details on the Kaloti affair, see: <https://www.theguardian.com/business/2014/feb/25/billion-dollar-gold-market-dubai-kaloti>



practical guidance for market participants in the gold and precious metals industry.<sup>346</sup>

This can be viewed either as an example of effectiveness (given the removal of Kaloti Group's certification) or as an example of the difficulties with ensuring integrity in the auditing process (since the information came from a whistleblower rather than being placed in the official report).

### A3.6.2 UAE Level

In a very recent report written by the Group of Experts on the Democratic Republic of the Congo (DRC) which was established by the UN Security Council (UN Group of Experts)<sup>347</sup>, the UN Group of Experts recalled its previous findings according to which Dubai is the main recipient of artisanally sourced unwrought gold from DRC and that Congolese gold arriving there is mainly exported fraudulently.<sup>348</sup>

The UN Group of Experts noted that the easy access for gold smugglers in Dubai's market is the consequence of the loopholes in the UAE control system and legislation for hand-carry gold and in particular the fact that UAE law does not consider smuggling activity to be a crime.<sup>349</sup>

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<sup>346</sup> Available on <https://www.dmcc.ae/.../Notice-Kaloti-Gold-Factory-LLC-.pdf> . See also <https://www.thenational.ae/business/dmcc-removes-kaloti-from-dubai-good-delivery-list-over-gold-sourcing-1.34979> .

<sup>347</sup> Final report of the Group of Experts on the Democratic Republic of the Congo (S/2017/672/Rev.1) published on August 16th 2017. Available at <http://www.un.org/Docs/journal/asp/ws.asp?m=S/2017/672/Rev.1>

<sup>348</sup> Id., para No 127.

<sup>349</sup> Id., para No 131.



## A4 Country Study 3: India

### A4.1 Gold Importation

India is currently one of the world's largest importers of gold, constituting 14.7% of the global gold imports.<sup>350</sup> Gold and silver constitute approximately 12% of India's total imports, second only after crude oil imports which constitute 34% of India's imports. With the decline in crude oil process, the value of imports generally declined between 2014 and 2016.<sup>351</sup> Gold and silver imports declined by 35.9% in 2015-2016.<sup>352</sup> However, there has been a surge of gold imports since August 2016, possibly representing a shifting forward of purchases by jewellers ahead of expected changes in the taxation structure.<sup>353</sup>

Gold was a highly regulated industry in India until 1990. It has since seen phases of liberalization, and exercise of regulatory controls, depending on the overall monetary policy of the country. One of the driving forces shaping gold policy in India is the trade deficit caused by the difference in exports and imports of gold. The following table provides an overview of the evolution of gold policies adopted in India over the years:

| Years of Reference | Major Policies and Developments Adopted regarding Gold  |
|--------------------|---|
| 1947-1962          | <ul style="list-style-type: none"> <li>• Restrictions on the private ownership of gold.</li> </ul>  |
| 1963-1990          | <ul style="list-style-type: none"> <li>• Enactment of the Gold Control Act 1968 for the purpose of curbing gold imports and reducing private ownership of gold</li> <li>• Low individual holding limits</li> </ul>  |
| 1991-2011          | <ul style="list-style-type: none"> <li>• Beginning of the liberalisation period, marked by the repeal of Gold Control Act on 6th June, 1990.<sup>354</sup></li> <li>• Non-Resident Indian Scheme was introduced in 1992, and a Special Import License was introduced in 1994.</li> <li>• Open General License Scheme of 1997 enabled banks to import gold.</li> </ul>   |
| 2012-2013          | <ul style="list-style-type: none"> <li>• Customs Duty rose from 2% to 10% in 2013 on refined gold.<sup>355</sup></li> <li>• Introduction of the <b>20:80 Scheme</b>, which mandated nominated banks/nominated agencies and other entities to ensure that at least one fifth, i.e., 20%, of every lot of import of gold imported into India was exclusively made available for the purpose of exports and the balance for domestic use.<sup>356</sup></li> <li>• Ban on import of gold coins and sales through banks and post offices.<sup>357</sup></li> <li>• Reducing the amount of loan that can be given against gold as collateral.</li> </ul> |

<sup>350</sup> Top Gold Importers 2015, at [http://www.worldsrichestcountries.com/top\\_gold\\_importers.html](http://www.worldsrichestcountries.com/top_gold_importers.html)

<sup>351</sup> Economic Survey of India 2016-17, para 8.31.

<sup>352</sup> Ibid.

<sup>353</sup> Economic Survey of India 2016-17, Vol. 2, para 1.175

<sup>354</sup> Gold (Control) Repeal Act, 1990 (Act No. 18 Of 1990).

<sup>355</sup> *Customs Duty on Gold, Platinum & Silver Raised*, Press Information Bureau, Government of India (13<sup>th</sup> Aug., 2013), at <http://pib.nic.in/newsite/PrintRelease.aspx?relid=98129>

<sup>356</sup> *Import of Gold by Nominated Banks /Agencies/Entities*, RBI/2013-14/187 A.P. (DIR Series) Circular No. 25 (August 14, 2013), at <https://rbi.org.in/Scripts/NotificationUser.aspx?Id=8312&Mode=0>.

<sup>357</sup> *Id.*

|           |   |
|-----------|---|
| 2014-2016 | <ul style="list-style-type: none"> <li>• Withdrawal of the 20:80 scheme.<sup>358</sup></li> <li>• Ban on import of gold coins lifted.<sup>359</sup></li> <li>• Introduction of 1% excise duty on jewellers with turnover above specified limits.</li> <li>• Enactment of Bureau of Indian Standards Act of 2016, which gives powers to the Bureau of Indian Standards to make the hallmarking mandatory for precious metals (which includes gold).</li> </ul> |
|-----------|---|

While there are no regulatory norms regarding sourcing of gold from countries with human rights related concerns, a recent report indicates that the government may work with the OECD to prepare a policy on responsible sourcing of gold, covering import, refining and delivery.<sup>360</sup> The Gold and Jewellery Export Promotion Council of India (GJEPC), an initiative supported by the Ministry of Commerce and Industry, Government of India, has indicated that it is committed to promoting responsible sourcing of gold.<sup>361</sup> A Gold Board is also expected to be established, which will establish norms for sourcing of conflict-free gold.<sup>362</sup>

This report will provide in Part II a brief overview of the prevailing regulatory framework in India with regard to import of gold. It will also assess spaces for exercise of regulatory controls under the current framework with regard to sourcing of gold from conflict ridden regions. Part III will discuss issues relating to standards, and Part IV will provide a conclusion and key findings of this study.

## A4.2 Legal Rules Affecting Importation of Gold

### A4.2.1 Regulations for Precious Metals/Gold

#### **Regulatory control by the Reserve Bank of India**

The Foreign Exchange Management Act 1999 (**FEMA**) read with the Foreign Exchange Management (Current Account Transaction) Rules, 2000, provides the overarching regulatory framework under which the Reserve Bank of India (**RBI**) exercises its regulatory control over gold. The RBI was established under law in 1934, and is tasked with the responsibility of securing monetary stability in India. Its regulatory controls over gold are a function of its exercise of those powers.

<sup>358</sup> *Import of Gold (under 20: 80 Scheme) by Nominated Banks/Agencies/Entities*, RBI/2014-15/329 A. P. (DIR Series) Circular No.42 (November 28, 2014), at <https://rbi.org.in/scripts/NotificationUser.aspx?Mode=0&Id=9370>.

<sup>359</sup> *Id.*; *RBI Lifts Ban On Import Of Gold Coins, Medallions By Banks*, The Economic Times (19<sup>th</sup> Feb., 2015), at <http://economictimes.indiatimes.com/news/economy/policy/rbi-lifts-ban-on-import-of-gold-coins-medallions-by-banks/articleshow/46290295.cms>

<sup>360</sup> Rajesh Bhayani, "Government to work with OECD to prepare norms for gold imports, refining", Smartinvestor.in, Mumbai 08 Aug 17. (Available at: [http://smartinvestor.business-standard.com/pf/Pfnews-475765-Pfnewsdet-Govt\\_to\\_work\\_with\\_OECD\\_to\\_prepare\\_norms\\_for\\_gold\\_imports\\_refining.htm#.WavcDsqjHIU](http://smartinvestor.business-standard.com/pf/Pfnews-475765-Pfnewsdet-Govt_to_work_with_OECD_to_prepare_norms_for_gold_imports_refining.htm#.WavcDsqjHIU); last visited Sept. 3, 2017).

<sup>361</sup> GJEPC Meets EU Delegation, Reiterates India's Commitment to Promote Responsible Sourcing, March 24, 2017 (Available at [https://www.gjepc.org/news\\_detail.php?id=2826](https://www.gjepc.org/news_detail.php?id=2826), visited 03/09/2017).

<sup>362</sup> *Ibid.*

The RBI issues directions<sup>363</sup> to Authorised Persons<sup>364</sup> under Section 11 of the FEMA with regard to the modalities of conduct of foreign exchange business. The RBI Master Direction on Import of Goods and Services, 2016, specifies the following requirements with regard to imports of gold:

- i. Between July 22, 2013 and November 2014, all nominated banks / agencies / entities, were required to ensure that at least one fifth of every lot of imported gold (in any form or purity) is exclusively made available for the purpose of export. This 20:80 scheme of import of gold was withdrawn on November 28, 2014. However, the obligation to export under the 20:80 scheme would apply to the unutilized gold imported before November 28, 2014.
- ii. Nominated banks and nominated agencies, as notified by the Directorate General of Foreign Trade (**DGFT**),<sup>365</sup> are permitted to import gold on consignment basis. All sale of gold domestically will, however, be against upfront payment. Nominated banks are free to grant gold metal loans.
- iii. Star and Premier Trading Houses (STH/PTH)<sup>366</sup> can import gold on Document against Payment (DP) basis as per entitlement without any end use restrictions.
- iv. The import of gold coins and medallions is permitted. However, there is prohibition on sale of gold coins and medallions by banks; and this has been subject to periodic review.

Under the Extensible Business Reporting Language (XBRL) system which was introduced in October 2014, certain categories of banks were required to submit statements showing the quantity and value of gold imported, as specified in the Master Direction of 2016.<sup>367</sup>

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<sup>363</sup> *Master Direction- Import Of Goods And Services*, RBI/FED/2016-17/12 FED Master Direction No. 17/2016-17(January 1, 2016).

<sup>364</sup> The term "Authorised Person" is defined under S. 2(c) of the FEMA 1999 as "*an authorised dealer, money changer, offshore banking unit or any other person for the time being authorised under sub-section (1) of section 10 to deal in foreign exchange or foreign securities.*"

<sup>365</sup> *Banks Authorised to Import Gold/Silver* as notified by the RBI on March 30, 2017 (Authorisation valid till March 31, 2018): Axis Bank Ltd., Bank of Baroda, Bank of India, Bank of Nova Scotia, Corporation Bank, Federal Bank Ltd., HDFC Bank Ltd., ICICI Bank Ltd., Indian Overseas Bank, IndusInd Bank Ltd., Karur Vysya Bank Ltd., Kotak Mahindra Bank Ltd., Punjab National Bank, South Indian Bank Ltd., State Bank of India, Union Bank of India, Yes Bank Ltd., The RBL Bank Ltd, Industrial & Commercial Bank of China Ltd. (Refer: [https://rbi.org.in/scripts/Bs\\_viewcontent.aspx?Id=1121](https://rbi.org.in/scripts/Bs_viewcontent.aspx?Id=1121).)

<sup>366</sup> The Foreign Trade Policy 2015-2020 provides that business leaders who have excelled in international trade and have successfully contributed to country's foreign trade are proposed to be recognized as Status Holders and given special treatment and privileges to facilitate their trade transactions, in order to reduce their transaction costs and time. However, the previous nomenclatures of Export House, Star Export House, Trading House, Star Trading House, Premier Trading House certificate have been changed to One, Two, Three, Four, Five Star Export House. (*Highlights Of The Foreign Trade Policy 2015-2020*, at <http://dgft.gov.in/exim/2000/highlight2015.pdf>, last accessed on 31/08/2017)

<sup>367</sup> *Master Direction- Import Of Goods And Services*, RBI/FED/2016-17/12 FED Master Direction No. 17/2016-17 (January 1, 2016), at <https://rbi.org.in/scripts/NotificationUser.aspx?Mode=0&Id=10201> .

## A4.2.2 Regulatory Potential of the Customs Act

While the focus of the regulation of gold imports has been based on foreign exchange considerations, **provisions in the laws relating to customs and money laundering gives power to the Central Government to potentially control the import of gold sourced from regions where there are human rights abuses.**

Section 11 of the Customs Act 1962 confers power on the Central Government to prohibit the exportation and importation of goods, or subject them to any conditions, for purposes including the regulation of public morality, the prevention of smuggling, the protection of human health, fulfilment of obligations of the UN Charter, implementation of treaties with any country, as well as the general public interest.

### **Section 11, Customs Act 1962:**

#### **Power to prohibit importation or exportation of goods-**

(1) If the Central Government is satisfied that it is necessary so to do for any of the purposes specified in sub-section (2), it may, by notification in the Official Gazette, **prohibit either absolutely or subject to such conditions (to be fulfilled before or after clearance) as may be specified in the notification, the import or export** of goods of any specified description.

(2) The purposes referred to in sub -section (1) are the following :-

- (a) the maintenance of the security of India;
- (b) the maintenance of public order and standards of decency or morality;**
- (c) the prevention of smuggling;**
- (d) the prevention of shortage of goods of any description;
- (e) the conservation of foreign exchange and the safeguarding of balance of payments;
- (f) the prevention of injury to the economy of the country by the uncontrolled import or export of gold or silver;
- (g) the prevention of surplus of any agricultural product or the product of fisheries;
- (h) the maintenance of standards for the classification, grading or marketing of goods in international trade;
- (i) the establishment of any industry;
- (j) the prevention of serious injury to domestic production of goods of any description;
- (k) the protection of human, animal or plant life or health;**
- (l) the protection of national treasures of artistic, historic or archaeological value;
- (m) the conservation of exhaustible natural resources;
- (n) the protection of patents, trademarks and copyrights;
- (o) the prevention of deceptive practices;
- (p) the carrying on of foreign trade in any goods by the State, or by a Corporation owned or controlled by the State to the exclusion, complete or partial, of citizens of India;
- (q) the fulfilment of obligations under the Charter of the United Nations for the maintenance of international peace and security;**
- (r) the implementation of any treaty, agreement or convention with any country;**
- (s) the compliance of imported goods with any laws which are applicable to similar goods produced or manufactured in India;
- (t) the prevention of dissemination of documents containing any matter which is likely to prejudicially affect friendly relations with any foreign State or is derogatory to national prestige;
- (u) the prevention of the contravention of any law for the time being in force; and**
- (v) any other purpose conducive to the interests of the general public.**

The aforementioned provisions could potentially be used by the Government to regulate imports of gold from areas of human rights abuses, or any other social concerns. This has not, however, been exercised so far to specifically regulate imports of gold.

### A4.2.3 Money Laundering Laws Affecting Gold

The objective of the Prevention of Money-laundering Act, 2002 (**"PMLA"**) is to prevent anyone from benefiting from illegally acquired wealth (or "proceeds of crime"). The focus of the PMLA is to curb "the offence of money laundering" which takes place when one *"directly or indirectly attempts to indulge or knowingly assists or knowingly is a party or is actually involved in any process or activity connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting it as untainted property."*<sup>368</sup>

The PMLA mandates several record keeping and disclosure obligations for any "reporting entity." A reporting entity includes a "dealer in precious metals"<sup>369</sup> who has a turnover of INR Two crores, i.e., INR Twenty Million (INR 20,000,000/-) in a financial year.<sup>370</sup> This includes an importer of gold<sup>371</sup> that meets the turnover criterion.

The reporting obligations on such gold importers include the following:<sup>372</sup>

- (i) Maintaining a record of all transactions so as to enable reconstruction of individual transactions including "suspicious transactions." The term "suspicious transactions" has been defined to include those which:<sup>373</sup>
  - a. give rise to a reasonable ground of suspicion that it may involve proceeds of an offence specified in the Schedule to the Act, regardless of the value involved; or
  - b. appear to be made in circumstances of unusual or unjustified complexity; or
  - c. appear to have no economic rationale or bona fide purpose; or
  - d. give rise to a reasonable ground of suspicion that it may involve financing of the activities relating to terrorism.
- (ii) Verifying the identity of clients,<sup>374</sup> obtaining information on the nature and purpose of their business relationship;
- (iii) Identifying the beneficial owner<sup>375</sup> of clients and verifying their identity;

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<sup>368</sup> S. 3, PMLA

<sup>369</sup> S. 2(wa) r.w. S. 2(sa)(iv)

<sup>370</sup> G.S.R. 1058(E), Notification 4/2017 dated 23rd August, 2017, issued by the Ministry of Finance

<sup>371</sup> Gold is included as "precious metals" in S. 2(sb)

<sup>372</sup> S. 12, PMLA read with Prevention of Money-laundering (Maintenance of Records) Rules, 2005

<sup>373</sup> Rule 2(1)(g) of the Prevention of Money-laundering (Maintenance of Records) Rules, 2005

<sup>374</sup> A "client" of a reporting entity means a person who is engaged in a financial transaction or activity with a reporting entity and includes persons acting on their behalf. (S. 2 (ha), PMLA)

<sup>375</sup> A "beneficial owner" means an individual who ultimately owns or controls a client of a reporting entity or the and includes a person who exercises ultimate effective control over a juridical person. (2(fa), PMLA)

- (iv) Maintaining identity records of clients and beneficial owners as well as account files and all business correspondence relating to clients.

To enforce these obligations, the law empowers the Director of the Financial Intelligence Unit of India,<sup>376</sup> with powers of inquiry and audit of reporting entities' accounts.<sup>377</sup> Failure to discharge these obligations results in administrative sanctions in the form of specific directions or fines from the Director.<sup>378</sup>

### **Money-laundering arising from use of Bonded Labour or Child Labour**

As noted earlier, PMLA defines money laundering as an activity that is "connected with the proceeds of crime including its concealment, possession, acquisition or use and projecting it as untainted property."<sup>379</sup>

The term "proceeds of crime" has been defined as "any property" which is derived or obtained, directly or indirectly, by any person as a result of criminal activity relating to a "scheduled offence."<sup>380</sup> The term "property" is broadly defined to include property or assets "of every description" (whether corporeal or incorporeal, movable or immovable, tangible or intangible).<sup>381</sup>

To constitute money-laundering, the property in question must also arise as a result of a "scheduled offence" which refers to any of the offences listed in the Schedule to the PMLA. Significantly, a predicate offence to money-laundering may arise extraterritorially. The law specifies that an offence listed in the Schedule that occurs outside India but that constitutes an offence in the country of origin, will be considered as an offence in India.<sup>382</sup>

These offences include:

- (i) Offences under Bonded Labour System (Abolition) Act, 1976 ("BLA"), which involves compelling any person to render bonded labour, or entering into an agreement requiring any person to render service under bonded labour system, or abetment to any act prohibited under BLA.
- (ii) Offences under Child and Adolescent Labour (Prohibition and Regulation) Act, 1986, which treats as an offence the employment of a child below the age of fourteen in any occupation or process, and employment of an adolescent between fourteen and eighteen in specified hazardous occupations.

Gold in any form obtained as a result of employing bonded labour or child labour, provided such bonded or child labour are offences in the country of origin, would constitute "proceeds of crime" under the PMLA.

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<sup>376</sup> Designated as "Director" under PMLA as per Notification 5/2005 dated 1st July, 2005, G.S.R. 440(E)

<sup>377</sup> S. 12A, PMLA

<sup>378</sup> S. 13, PMLA

<sup>379</sup> S. 3, PMLA

<sup>380</sup> S. 2(u), PMLA

<sup>381</sup> S. 2(v), PMLA

<sup>382</sup> "Offence of cross border nature" is defined to include "any conduct by a person at a place outside India which constitutes an offence at that place and which would have constituted an offence specified in a Schedule, had it been committed in India and if such person transfers in any manner the proceeds of such conduct or part thereof to India. (Schedule C read with S. 2(ra), PMLA).

#### A4.2.4 Other Criminal or Civil Law Rules Affecting Gold

There are no other known criminal or civil law rules aimed at the importation of gold.

### A4.3 Rules Preventing Importation of Human Rights-Abusive Gold

#### A4.3.1 Import Restrictions

**There are no known state-based rules preventing the importation of gold linked to human rights abuses.**

The Indian legal framework recognizes a wide range of human rights, with a strong court system that individuals can call upon to demand redress. The Indian Supreme Court has a number of cases extending the Constitution's provision on the right to life, including finding that the right to work is one aspect of the right to life.<sup>383</sup>

In the area of foreign business' actions, too, the claim by villagers in Chhattisgarh and Vedanta over the establishment of a gold mine in Sonakhan<sup>384</sup> is just the latest witness to a **vigorous use of legal instruments by individuals or groups in Indian courts.**

At the same time, the **Indian government's record in human rights protection is poor.** A 2015 study by the British Standards Institution placing India on the list of the five worst countries in the world for protecting human rights<sup>385</sup> and one commentator titled an opinion article in The Guardian, "India's human rights record makes a farce of its democracy".<sup>386</sup>

#### A4.3.2 Regulations Affecting Producers of Gold

The Government of India's 2016 awarding of a license to Vedanta to mine gold was the first such license granted to a private company. This was the result of Parliament's passage of amendments to the Mines and Minerals (Development and Regulation) Act 1957 (MMA).<sup>387</sup> The National Minerals Exploration Policy (from June 2016) allows private companies to bid for exploration licenses. The MMA implements a licensing system for the mining of minerals, including gold. The licenses will be granted based on an auction and approval by the government. The MMA permits the government to revoke a license on the grounds of public interest (development and en-

<sup>383</sup> OligaTellis v. Bombay Municipal Corporation and others, AIR 1986 SC 180.

<sup>384</sup> Rina Chandran, Indian Villagers See No Shine in Gold Rush, Thomson Reuters Foundation, 3 May 2017 (<http://in.reuters.com/article/india-landrights-mine/indian-villagers-see-no-shine-in-gold-rush-idINKBN17Z0HM>; accessed 25 October 2017).

<sup>385</sup> British Standards Institution, 2015 Corporate Responsibility Risk Index pp. 3 (2015) (highlighting risk of child labor) (text available at: <https://www.bsigroup.com/SupplyChain/LocalFiles/US/reports/bsi-report-csr-risk-index.pdf>; accessed 25 October 2017).

<sup>386</sup> Seema Sengupta, India's human rights record makes a farce of its democracy, The Guardian, 22 July 2011 (text available at: <https://www.theguardian.com/commentisfree/2011/jul/22/india-human-rights>; accessed 25 October 2017).

<sup>387</sup> Mines and Minerals (Development and Regulation) Act 1957 (No. 67 of 1957)

vironment are noted explicitly)<sup>388</sup>, but has no mention of human rights as a reason to either refuse to grant or to prematurely revoke a license.

#### A4.4 Voluntary Guidelines/Proposals for Reform

Gold standards in India are controlled by the Bureau of Indian Standards (“BIS”). The BIS-Hallmark Scheme is voluntary in nature and is based on the criteria on hallmarking under the Vienna Convention, 1972. Only BIS certified licensed jewellers can get their jewellery hallmarked from any of the BIS recognized Assaying and Hallmarking Centre. The recognition to an Assaying and Hallmarking Centre is given against BIS criteria Doc: HMS/RAHC/GO1, which is in line with international criteria on marking and control of precious metals. This is a certification of purity that aims to protect consumers against misrepresentations regarding the nature and quality of gold purchased by them.

The BIS Act, 2016, also confers powers on the Central Government to notify essential requirements and standards for goods or articles (including gold) if deemed necessary “*for the protection of human, animal or plant health, safety of the environment, or prevention of unfair trade practices.*” **Once the BIS notifies a standard, the government has the power to direct whether the specified standard needs to be mandatorily followed.** For instance, if the BIS notifies requirement for gold to obtain a Standard Mark involving its sourcing from conflict-free regions, and the government mandates this as essential for any gold to be imported into India, then an importer would not be able to import it without the use of the relevant standard mark.

##### A4.4.1 International Guidelines and Voluntary Standards

At the international level, there are numerous guidelines and voluntary standards dealing with the importation of gold which seek to control trade in human rights violating gold. These include the OECD Due Diligence Guidelines on Minerals from Conflict-affected and High-Risk Areas, the World Gold Council’s Conflict-Free Gold Standard, and the London Bullion Market Association Responsible Gold Guidance.

##### A4.4.2 Possible Establishment of a Gold Board

Recent news reports indicate that the Government of India is working closely with the OECD and is likely to establish a Gold Board which will establish norms for sourcing conflict-free gold.

#### A4.5 Assessment of Effectiveness

There is **no specific law** in India that deals with regulating the import of gold based on the product’s categorization as a product stemming from human rights abuses. **As a result, there is no relevant measure for the effectiveness** of legal provisions.

That said, certain general laws dealing with customs, money laundering and standards contain enabling provisions which could be potentially used

<sup>388</sup> MMA Article 4a.



to restrict the importation of gold. This is a field which has not been investigated, but may be worthy of in-depth attention in the future.

Regarding the effectiveness of voluntary standards, India is one of the foremost consumers of gold jewelry in the world, but manufacturers and dealers in this sector are largely fragmented entities in the unorganized sector, such as small goldsmiths, family jewelers or designers. The unorganized and fragmented nature of this industry leads to poor infrastructure and difficulty of accessing loans. Typically, they operate through small workshops, which have low capital requirements. They mostly engage in “job work”<sup>389</sup> that is, they engage in processing or working upon gold that is supplied to them, and do not source the gold themselves. All of these factors contribute to the difficulty of adopting voluntary standards.

In recent times, however, organized entities in the retailing of gold jewelry has been increasing. It has been estimated that 5 to 10% of units operate as organised, large-scale facilities. The World Gold Council notes that by 2020, 35% to 40% of the retail market could be captured by the organised sector.<sup>390</sup>

Currently, gold policy centers on the needs of foreign exchange policy, and this is therefore the principal regulatory focus of gold importing rules. Any future Gold Board based on OECD principles must therefore be watched closely to see how the focus can be expanded to consider the human rights aspects of the imports.

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<sup>389</sup> *India's Gold Market: Evolution and Innovation*, Chapter 3, World Gold Council (24<sup>th</sup> Jan., 2017), at <http://www.gold.org/research/india-gold-market>.

<sup>390</sup> *Id.*

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## A6 Interviewed Stakeholders

| Group                  | Organisation   |
|------------------------|--|
| Industry               | Association Suisse des fabricants et commerçants de métaux précieux (ASFCMP) |
|                        | MKS / Pamp   |
|                        | Argor-Heraeus  |
|                        | Valcambi   |
|                        | Metalor  |
|                        | Richemont  |
| Standard Setters       | LBMA (London Bullion Market Association)                                     |
|                        | RJC (Responsible Jewellery Council)  |
|                        | OECD   |
|                        | Swiss Better Gold Association  |
| NGO                    | Society for Threatened Peoples   |
|                        | Terre des Hommes   |
|                        | PublicEye  |
|                        | Fastenopfer  |
|                        | ask! AG Schweiz-Kolumbien  |
| Federal Administration | SECO (State Secretariat for Economic Affairs)                                |
|                        | SDC (Swiss Agency for Development and Cooperation)                           |
|                        | FDF (Federal Customs Administration)   |

## A7 Interview Guide, example

*Here below the introduction part and examples of the themes asked in the interview with partners from the Swiss gold industry.*

### **Background & General Information**

- This expert study is mandated by Swiss Federal Department of Foreign Affairs (FDFA), Human Rights and Security Division
- Study also fits into context of other initiatives, such as the Background report from the Federal Council, the National Action Plan (NAP) where 50 measures are defined, or the UNGP Guidance for Commodity Traders in Switzerland
- Statements will be anonymized, or only allocated to stakeholder groups (e.g. corporate, NGO, administration)
- The study will serve as a basis for the Swiss administration to answer the "Postulate Recordon" and to inform the discussion around Commodities in Swiss administration
- It is upon FDFA's discretion whether this expert study will be made public. In case of interest, contact person for the public and interviewed stakeholders will be Mr. Frederic Chenais at Human Security Division, FDFA

**Objective of the interview** is to obtain the views from different stakeholders:

- How they view and understand the risks of human rights abuses along the value chain of gold that is imported into and refined in Switzerland;
- To what extent the different regulations, standards, policies and procedures applied in the (Swiss) gold industry (including the OECD guidance, RJC CoC, or LBMA Guidance, as well as company own due diligence procedures) address relevant risks of Human rights abuses, and if these measures effectively allow to identify, assess, mitigate and eliminate risks of human rights abuses, and whether there are any apparent gaps.
- Understand where Interviewees see need for further action or development over time (for example, cooperation between stakeholders, improved due diligence and audit procedures)

### **1. General Themes**

- 1.1.** Possibility, that **gold in relevant quantities is imported** into Switzerland, which was produced under conditions of **human rights abuses**
- 1.2.** Relevant **risks** of human rights abuses along the gold value chain (differentiated between the "industrial mining / LSM", "artisanal/small-scale mining" and "recycling/scrap")
- 1.3.** Main **import routes** into Switzerland for gold produced under human rights abuses (if at all)
- 1.4.** Measures to reduce risks of human rights abuses (effectiveness, remaining gaps)
- 1.5.** Comparison CH to other countries

### **2. Specific Themes for "Companies and Industry Associations"**

**2.1. Applied policies, standards or due diligence procedures**

- 2.1.1.** Which **policies, standards or due diligence procedures** are applied
- 2.1.2.** **Why and when** did your company / the Swiss gold industry start to apply or introduce them?
- 2.1.3.** How **relevant** and **effective** are these standards, procedures or policies to reduce risks of human rights abuses along the value chain, today and – if different – in the future?
- 2.1.4.** Risk assessment: how are (human rights) **risks identified**, according to which criteria (e.g. country, counterpart, type of transaction) and procedures, standards? Which are the most relevant from experience?
- 2.1.5.** Are there cases, where you have **turned down business** because of red flags or risks related to human rights abuses? If yes, which ones, how many? Which other channels might such gold then take?
- 2.1.6.** Which part of your business can be **fully controlled and monitored** (e.g. CoC, point to point), and which part is more problematic (e.g. ASM)?
- 2.1.7.** How do you determine the **true origin of the gold** (e.g. CoC certificates or other declarations, KYC procedures).

**2.2. Application of standards:**

- 2.2.1.** Impact on your supply chain management and on your risk and compliance management
- 2.2.2.** **Challenges** when implementing the standards
- 2.2.3.** Difficulties when assessing **compliance**

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*Note: Depending on the outcome of the discussion, more questions / themes can be added, or questions can be omitted.*



# A8 Questionnaire to Identify Relevant Scenarios

Questionnaire

Swiss Gold Trade and related Risks of Human Rights Abuses

|                         |  |
|-------------------------|--|
| Organization / company: |  |
| Name:                   |  |
| Function:               |  |
| Additional comments:    |  |

Question 1:

We have listed all 69 potential scenarios that can have a direct or indirect impact on at least one human right aspect by consolidating documented human rights abuses from various geographic regions over the years in one list, considering three distinct gold value chains: ASM, LSM and recycled gold.

We would like you to **identify from your point of view the most important ones**, in terms of frequency of the described event or action.

As different respondents will use different reference frames (e.g. one will have only one region in Peru in mind, another one supply chains that spread across regions) it is important to indicate what you are referring to.

Reference frame:

.....

Rating scale:

- (1) the scenario is known to appear never or rarely
- (2) the scenario is known to appear at times
- (3) the scenario is known to appear often

**Important:** You may add new scenarios if you feel something is missing, by adding a new row in the table below the listed ones.

## Relevant Scenarios on industrial (and large-scale) mining (29 scenarios)

| Pre-Production  | Estimated Frequency<br>1: rarely, 2: at times,<br>3: often |
|---|--|
| Public or private security services intimidate or force local communities out of potential mining sites   |  |
| Lack of a good process of engagement, consent, resettlement, remediation and compensation of displaced local communities  |  |
| Non-transparent or illicit land acquisition to develop mining site (e.g. corruption, money laundering involved)   |  |
| Corrupt or fraudulent behaviour for obtaining mine construction or operation licenses   |  |
| Interference with traditional lifestyle, impacting traditional livelihoods of indigenous people (e.g. hampering livelihood, restricting access to land or other resources)  |  |
| Displacement of ASM miners by LSM mine developers or operators  |  |
| Employment / economic exploitation of children or other forms of forced labour in mine construction   |  |
| Negative, direct health impacts on communities (e.g. noise, dust) during mine construction  |  |
| Unequal / intransparent treatment of bidders/investors for the construction or operation of a mine  |  |
| Engaging in unlawful or unethical manner with (non-governmental) armed groups or security forces to ensure mine construction and operation  |  |
| Poor treatment of employees and contractors during working process (e.g. general workers' rights, working hours, food, sanitary facilities, accommodation, minimal wages)   |  |
| Engaging private or public security forces to unlawfully control employees  |  |
| Damaging the environment through construction of mine site (e.g. water, forest, soil depletion, chemicals, dust and air emissions) without remediation and compensation   |  |
|   |  |
| Production, mine management, pre-processing   | Estimated Frequency<br>1: rarely, 2: at times,<br>3: often |
| Public or private security services intimidate or force out local communities of potential mining sites   |  |
| Facilities or infrastructure collapse, causing casualties, injuries amongst employees, contractors or local communities   |  |
| Employment / economic exploitation of children in mining operations   |  |
| Forced or compulsory labour   |  |
| Poor treatment (e.g. working hours, health& safety, food, sanitary facilities, accommodation) of employees and contractors during production and pre-processing   |  |
| Negative, direct health impacts on communities (e.g. noise, dust)   |  |
| Interference with traditional lifestyle, impacting traditional livelihoods of indigenous people (e.g. restricting access to land, use of water / farming / irrigation, hunting and fishing)   |  |
| Receiving support / assistance during mining, or making payments to (non-governmental) armed groups or security services, thereby contribution to oppression or armed conflicts   |  |
| Operators or traders (of Gold) are involved in corruption or money laundry, or financing of conflicts   |  |
| Damaging the environment through mining operations (e.g. water, forest, soil depletion, chemicals, GHG emissions). Special focus on cyanide and mercury.  |  |
| Tailings failure or dam bursts endangering and impacting employees, contractors and local communities and the environment   |  |
| Sourcing / additional buying of raw materials (including additional gold feed for smelters) from unethical or illegal sources (e.g. from surrounding mines), potentially contributing to violation of human rights, armed conflicts |  |
| Lack of proper waste management at mine site  |  |

|   |  |
|---|--|
| Leaving behind deteriorated land at / around mining site, not re-established to pre-development quality (lack of proper mine closure and rehabilitation)              |  |
|   |  |
| <b>Transport</b>  | <b>Estimated Frequency</b><br>1: rarely, 2: at times, 3: often |
| Receiving support or logistical assistance, or making payments to (non-governmental) armed groups, thereby contributing to oppression, armed conflicts and corruption |  |
| Lack of control over supply chain, e.g. non-sealed shipments offer opportunities that gold illegally enters into the (formal) supply chain                            |  |
|   |  |

## Relevant Scenarios on Artisanal or Small-scale Mining (23 scenarios)

|   |  |
|---|--|
| <b>Pre-Production</b>   | <b>Estimated Frequency</b><br>1: rarely, 2: at times, 3: often |
| Public or private security services intimidate or force local communities out of potential mining areas   |  |
| Lack of a good process of engagement, consent, resettlement, remediation and compensation of displaced local communities  |  |
| Non-transparent or illicit land acquisition to develop mining site (e.g. corruption, money laundering involved)   |  |
| Corrupt or fraudulent behaviour for obtaining mine construction or operation licenses   |  |
| Interference with traditional lifestyle, impacting traditional livelihoods of indigenous people (e.g. hampering livelihood, restricting access to land, water or other resources)           |  |
| Displacement of ASM miners by LSM mine developers or operators  |  |
| Employment / economic exploitation of children or other forms of forced labour  |  |
| Engaging in unlawful or unethical manner with (non-state) armed groups or security forces for ensuring mine construction and operation  |  |
| Engaging private or public security forces to unlawfully control employees  |  |
|   |  |
| <b>Production, mine management, pre-processing</b>  | <b>Estimated Frequency</b><br>1: rarely, 2: at times, 3: often |
| Public or private security services intimidate or force local communities out of potential mining sites   |  |
| Facilities or infrastructure collapse, causing casualties, injuries amongst employees, contractors or local communities   |  |
| Employment / economic exploitation of children in mining operations   |  |
| Forced or compulsory labour   |  |
| Poor treatment of employees and contractors (e.g. working hours, food, sanitary facilities, accommodation)  |  |
| Negative, direct health impacts on communities of mine operations (e.g. noise, dust)  |  |
| Interference with traditional lifestyle, impacting traditional livelihoods of indigenous people (e.g. restricting access to land, use of water / farming / irrigation, hunting and fishing) |  |
| Receiving support / assistance during mining, or making payments to (non-governmental) armed groups or security services, thereby contribution to armed conflicts                           |  |
| Operators or traders (of gold) are involved in corruption or money laundry, or financing of conflicts or other criminal activities  |  |

|  |  |
|--|--|
| Damaging the environment through mining operations (e.g. water, forest, soil depletion, chemicals, dust and other emissions into the air). (Special focus on cyanide and mercury).   |  |
| Tailings failure or dam bursts, impacting employees, contractors and local communities and the environment   |  |
| Sourcing / additional buying of raw materials (including additional gold feed for smelters) from unethical or illegal sources (e.g. from surrounding mines), concealing the true origin and potentially contributing to armed conflicts, exploitation or other criminal activities |  |
| Inappropriate waste management at the mine site  |  |
| Leaving behind deteriorated land at / around mining site, not re-established to pre-development quality (lack of proper mine closure and rehabilitation)   |  |
|  |  |
| <b>Transport</b>   | <b>Estimated Frequency</b><br>1: rarely, 2: at times, 3: often |
| Receiving support or logistical assistance, or making illicit payments to (non-governmental) armed groups, thereby contributing to oppression, armed conflicts   |  |
| Lack of control over supply chain; e.g. non-sealed shipments offer opportunities that gold illegally enters the (formal) supply chain  |  |
|  |  |

## Gold Recycling (high value gold recycling and industry recycling) (17 scenarios)

|   |  |
|---|--|
| <b>Collection</b>   | <b>Estimated Frequency</b><br>1: rarely, 2: at times, 3: often |
| Receiving support or logistical assistance, or making payments to (non-stated) armed groups, thereby contributing to armed conflicts and corruption           |  |
| Extortion or other unrighteous ways of acquiring ore material or gold (e.g. involving corruption, drug trafficking)   |  |
| Unsafe protective measures during collection process (lack of proper health and safety management)  |  |
| Exposure to chemicals or other substances which negatively impact health  |  |
| Employment of children  |  |
| Forced or compulsory labour   |  |
| Poor treatment of employees / contractors (e.g. workers rights)   |  |
| Involvement of money laundry activities in buying / selling gold  |  |
| Corrupt or fraudulent behaviour for obtaining documentation of provenience, or concealing the true origin of recycling gold                                   |  |
|   |  |
| <b>Dismantling, Disassembling</b>   | <b>Estimated Frequency</b><br>1: rarely, 2: at times, 3: often |
| Receiving support or logistical assistance during recycling process, or making payments to (non-stated) armed groups, thereby contributing to armed conflicts |  |
| Unsafe protective measures during WEEE dismantling process, lack of proper health and safety management   |  |
| Exposure to chemicals or other substances which negatively impact health  |  |
| Employment of children  |  |
| Forced or compulsory labour   |  |

|   |  |
|---|--|
| Poor treatment of employees / contractors (e.g. workers rights)   |  |
|   |  |
| <b>Transport</b>  | <b>Estimated Frequency</b><br><br>1: rarely, 2: at times, 3: often |
| Receiving support or logistical assistance from illegal actors, or contributing to armed conflicts. Corrupt payments to ensure transportation |  |
| Non-sealed shipments offer opportunities that gold illegally enters the (formal) supply chain   |  |
|   |  |

**Question 2:**

Which of the scenarios listed above are especially difficult to mitigate or prevent? (please name the top 3 to 5)

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- 
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- 
-

## A9 Terms of Reference of Expert Study

