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Switzerland

ENVIRONMENTAL, SOCIAL AND GOVERNANCE

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This country-specific Q&A provides an overview of environmental, social and governance laws and regulations applicable in Switzerland.

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SWITZERLAND

ENVIRONMENTAL, SOCIAL AND GOVERNANCE



1. Climate - the law governing operations that emit Greenhouse Gases (e.g. carbon trading) is addressed by Environment and Climate Change international guides, in respect of ESG: a. Is there any statutory duty to implement net zero business strategies; b. Is the use of carbon offsets to meet net zero or carbon neutral commitments regulated; c. Have there been any test cases brought against companies for undeliverable net zero strategies; d. Have there been any test cases brought against companies for their proportionate contribution to global levels of greenhouse gases (GHGs)?

a. Under the Paris Agreement on Climate Change, Switzerland has committed to halving its greenhouse gas emissions by 2030 as compared to 1990. The current Federal Act on the Reduction of CO₂ Emissions (CO₂ Act) and the respective CO₂ Ordinance defines (technical) measures to reduce CO₂ emissions, but there is currently no explicit statutory duty to implement net zero business strategies. However, the CO₂ Act stipulates the obligation to pay an emissions levy on the production, extraction and import of thermal flues, the obligation to participate in the Emissions Trading Scheme (ETS) for operators of installations that belong to a specific category and causing high greenhouse gas emissions, and the obligation of fuel importers to compensate for part of the CO₂ emissions they cause (cf. question 1./b below).

Installation operators in certain economic sectors are reimbursed the CO₂ levy on application provided that they undertake to reduce greenhouse gas emissions to a certain extent by the end of 2024. Operators who do not comply with this reduction obligation must pay a specific amount for each excess ton of CO₂ emitted. For the excess tonnes CO₂ emitted, emission allowances must be surrendered to the federal government in the

following year. There are also criminal sanctions. For example, any person or company who wilfully obtains an unlawful advantage for itself or another person, in particular by evading the CO₂ levy or by obtaining an unlawful exemption from or distribution or refund of the levy, is liable to a fine of up to three times the amount of the unlawful advantage. In this context, there are possibilities for sanctioning or prosecuting companies that do not fulfil their obligation to pay the CO₂ levy or to reduce greenhouse gas emissions.

In September 2022, the Federal Parliament passed the Federal Act on Climate Protection Goals, Innovation and Strengthening Energy Security (CGA), which aims, among other things, to reduce greenhouse gas emissions in such a way that the net zero target can be achieved by 2050. This includes the principle that all companies must have net-zero emissions by 2050 at the latest. To achieve this goal, companies and industries can (voluntarily) develop roadmaps, and the federal government will support companies or industries that develop corresponding roadmaps by 2029 with basics, standards and expert advice. The electorate will vote on the CGA in June 2023. If approved, the CGA and the corresponding Ordinance would likely enter into force in January 2025. In addition, the Federal Council has submitted a draft amendment of the CO₂ Act to the Federal Parliament for approval, after a revision of the CO₂ Act was rejected by voters in summer 2021. This amendment aims to implement new measures starting in 2025 to halve greenhouse gas emissions by 2030 and achieve the 2030 climate target.

b. The CO₂ Act obliges producers and importers of fossil fuel to offset part of their CO₂ emissions through climate protection projects. Certificates for emission reductions or increasing the carbon sink effect may be surrendered in order to meet this compensation obligation. The CO₂ Ordinance sets out the requirements for the projects for emission reductions: Like international projects under the Clean Development Mechanism (CDM) of the Kyoto Protocol, compensation projects in Switzerland must follow a specific procedure. If all requirements are met,

national and international certificates are issued that can be used to offset emissions. Any person or company who fails to fulfil this obligation to compensate must pay a specific amount for each uncompensated ton of CO₂. In addition, emission allowances or international certificates must be surrendered to the federal government.

Furthermore, there is a statutory obligation for operators of installations that belong to a specific category and causing high greenhouse gas emissions to participate in the ETS.

c. No, as there is currently no statutory duty to implement net zero business strategies (cf. question 1./a above).

d. As there is currently no general legal prohibition on companies emitting greenhouse gases, there haven't been any test cases brought against companies for their proportionate contribution to global levels of greenhouse gases. However, in the course of the emissions manipulation scandal involving the German car manufacturer Volkswagen, a consumer group filed a class action against Volkswagen and the Swiss importer AMAG, seeking to establish and confirm that Volkswagen and AMAG had misled buyers and violated Swiss law, and to claim for damages in connection with the emissions manipulations. The Zurich Commercial Court dismissed the collective action due to lack of standing of the consumer group. The Federal Supreme Court has confirmed these judgments.

In addition, fishermen from the disappearing Indonesian island Pari have filed a civil lawsuit with a Swiss cantonal court against the Swiss global building materials and aggregates group Holcim for its contribution to global warming. The plaintiffs claim a violation of the personality rights.

2. Biodiversity - are new projects required to demonstrate biodiversity net gain to receive development consent?

In Switzerland, there is currently no general legal requirement that new projects must demonstrate a net gain in biodiversity to receive development consent. However, there are various legal provisions that aim to protect indigenous flora and fauna, their biological diversity and natural habitats. These provisions and the obligations contained therein for the implementation of measures to protect biodiversity must be observed in the planning and realization of projects.

3. Water - are companies required to report on water usage?

The cantons are required by law to ensure that over the long term no more water is withdrawn from groundwater resources than flows into them (cf. art. 43 para. 1 of the Waters Protection Act [WPA]). In doing so, the cantons record the water consumption data on their territory according to their own needs. However, this does not include an administrative obligation for companies to report on their water usage. Nevertheless, there are more and more companies in Switzerland that measure their water consumption, assess the impact on water resources and make the corresponding values available to the public.

Furthermore, art. 964a et seqq. of the Swiss Code of Obligations (CO) require large companies with registered office in Switzerland exceeding certain thresholds (at least 500 employees and a balance sheet total of 20m or revenues of CHF 40m on a consolidated basis) which are listed on a trading venue or subject to supervision by the Swiss Financial Market Supervisory Authority (FINMA) to publish an annual report on material environmental issues (cf. question 10 below). This reporting includes, among other things, information on the impact of the company's business activities on the environment in general. The respective provisions have entered into force on 1 January 2022 and are effective as of 1 January 2023. The Ordinance on Climate Disclosures, which will come into force on 1 January 2024, sets out the details of how companies should report on climate concerns as part of their environmental issues. Although reporting on water usage is not explicitly mentioned in the CO or the implementing Ordinance, companies for which water usage is an essential part of its business activity are required to include respective information in their annual sustainability report to fully comply with this reporting obligation. Due to the rather openly worded provisions and the current lack of comparability of the expected reporting, not much guidelines exist so far on how to report on water usage.

4. Forever chemicals - have there been any test cases brought against companies for product liability or pollution of the environment related to forever chemicals such as Perfluoroalkyl and Polyfluoroalkyl Substances (PFAS)?

In Switzerland, certain substances from the group of PFAS that are hazardous to health have been banned, but no comprehensive and binding limits or measures for prevention or elimination of such substances have yet

been legally established. As far as can be seen, there haven't been brought any test cases against companies for product liability or pollution of the environment related to forever chemicals in Switzerland.

5. Circularity - the law governing the waste hierarchy is addressed by the Environment international guide, in respect of ESG are any duties placed on producers, distributors or retailers of products to ensure levels of recycling and / or incorporate a proportionate amount of recycled materials in product construction?

The Federal Act on the Protection of the Environment (EPA) sets out the principles for the avoidance, collection, treatment and recovery of waste. In addition to the EPA, there are other laws that promote the framework of circularity in Switzerland. In particular, the Ordinance on Beverage Container (BCO) regulates the supply and take-back of beverage containers used within Switzerland and sets out requirements for beverage containers. For example, distributors, manufacturers and importers may only dispense packaging in containers that, when they are collected, treated or recycled, do not create significant additional costs or significant technical difficulties. In addition, they must take back refillable containers of all the products they stock and refund the corresponding deposit. In the case of non-refillable PVC or PET containers they, in general, must take back the packaging, refund the deposit and pass the packaging on for recycling at their own expense.

Furthermore, the Federal Parliament is currently debating a revision of the EPA on the basis of the parliamentary initiative named "Strengthening the Swiss circular economy". The revised provisions contain further requirements for product design and allow for the obligation of producers and distributors to use packaging made of recyclable materials. In addition, new provisions are to be established to strengthen innovative, private sector industry agreements in the sense of Extended Producer Responsibility (EPR). Producers, importers and online mail order companies that do not participate in an industry organization recognized by the federal government may in future be obliged to pay an early recycling contribution.

6. Plastics - what laws are in place to deter and punish plastic pollution (e.g. producer responsibility, plastic tax or bans on certain plastic uses)?

Unlike the EU, Switzerland has currently no regulations restricting plastic consumption. The introduction of a plastic tax was considered by the Federal Parliament in 2020, but not pursued. The EPA would provide a basis for the Federal Council to introduce a ban on single-use plastic. This authorization has rarely been used so far.

In August 2022, the Federal Council decided to participate in negotiations to draw up an international convention on plastic pollution, which was initiated by the United Nations Environment Assembly (UNEA). This international agreement is intended to prevent further pollution of the environment by plastics (including microplastics) and to ensure that the production of new plastic is reduced. Another goal is the gradual elimination of plastics that are hardly recyclable and contain problematic additives.

7. Equality Diversity and Inclusion (EDI) - what legal obligations are placed on an employer to ensure equality, diversity and inclusion in the workplace?

According to the Swiss Federal Constitution (FC), no person may be discriminated against, in particular on grounds of origin, race, gender, age, language, social position, way of life, religious, ideological, or political convictions, or because of a physical, mental or psychological disability. Furthermore, men and women have equal rights and the law shall ensure their equality, both in law and in practice, most particularly in the family, in education, and in the workplace. Men and women also have the right to equal pay for work of equal value (art. 8 para. 2 and 3 FC). Other than the general principle of gender equality, the constitutional right to equal pay can be directly enforced by employees against their employer in court. Based on these principles, the Gender Equality Act (GEA) and the Disability Discrimination Act (DDA) have been enacted.

The GEA is equally applicable to all employment relationships under private law as well as public law. An employer must ensure none of its employees are discriminated on the basis of their sex, whether directly or indirectly, including on the basis of their marital status, family situation or pregnancy. Furthermore, it is the employer's responsibility to oversee that no sexual harassment or other behaviour related to the person's sex that adversely affects the dignity of women or men takes place.

The DDA aims to support people in participating in social life, maintaining social contacts and continuing education. The DDA provides for measures to create better access to buildings and facilities, public transport

and services. The measures to be taken by such company include, in particular, the areas of (i) work premises, (ii) workplaces, (iii) working hours, (iv) opportunities for professional development as well as (v) career planning. It is noteworthy, that the DDA and its corresponding ordinance refer to publicly accessible infrastructure and services and large buildings as well as educational institutions and otherwise only address employers subject to federal public law and thus do not place any obligations on employers subject to private law..

The DDA is set to be partially revised and a consultation draft presented by the end of 2023. Employers in general shall be required to create equal opportunities for people with disabilities and to prevent discrimination.

With regards to gender equality, the CO requires large listed companies domiciled in Switzerland to ensure that each gender makes up at least 30% of the board of directors and 20% of the management board. If these thresholds are not met, the company shall indicate the reasons in its remuneration report and present measures to increase the representation of the less well represented gender. The CO allows companies five years to comply with the threshold in respect of the board of directors and ten years in respect of the management board as of January 2021. Under the listing rules of SIX, non-Swiss companies the shares of which are listed on the SIX must include disclosure according to the aforementioned provision of the CO in their annual corporate governance report.

8. Workplace welfare - the law governing health and safety at work is addressed in the Health and Safety international guide, in respect of ESG are there any legal duties on employers to treat employees fairly and with respect?

The CO recognises the employer's general duty of care, which includes the protection of the employee's personality as well as fair and respectful treatment. This duty of care contains an employer's obligation to refrain from any interference with the employee's personality that is not justified by the individual employment contract. It is interpreted broadly and protects in particular the life and health of the employee, the physical and mental integrity, personal and professional reputation, position and standing in the company, personal freedom of speech, protection of the employee's secrecy and privacy, and his or her right to join a trade union organisation. It also requires that the employer must ensure a sound working atmosphere, i.e. one that does not endanger or damage the employee's

mental health.

According to art. 6 sec. 1 of the Swiss Labour Act (LA) and the Swiss Labour Ordinance No. 3 on Health Protection employers are required to take all measures to protect the health of the employees, which extend to their personal integrity and mental health and include limits to surveillance and prevention of mobbing. Breaching the LA is a criminal offense punished by a fine.

9. Living wage - the law governing employment rights is addressed in the Employment and Labour international guide, in respect of ESG is there a legal requirement to pay a wage that is high enough to maintain a normal standard of living?

In Switzerland, there is no statutory minimum wage at national level. According to the CO the wage to be paid must be the wage agreed by the parties, customary or fixed by a collective employment contract or standard employment contract. Trade unions and employers' associations in various business sectors have set minimum wages in such contracts. It should be noted that in some cases these contracts apply to all employees (or certain categories of employees) in an entire sector or profession, while in other cases they only apply to the employees of companies that have signed the contract. An overview of the collective employment contracts and standard employment contracts currently in force can be found on the website of the State Secretariat for Economic Affairs (SECO).

In addition, the cantons can also impose minimum wages. Five of the 26 Swiss cantons have adopted minimum wages based on popular initiatives.

10. Human rights in the supply chain - in relation to adverse impact on human rights or the environment in the supply chain: a. Are there any statutory duties to perform due diligence; b. Have there been any test cases brought against companies?

a. Art. 964a et seqq. CO require large companies with registered office in Switzerland exceeding certain thresholds (at least 500 employees and a balance sheet total of 20m or revenues of CHF 40m on a consolidated basis) which are listed on a trading venue or subject to supervision by FINMA to publish an annual report on material environmental issues including human rights.

Breaching this obligation is a criminal offence and is punished by fines. Under the listing rules of SIX, non-Swiss companies the shares of which are listed on SIX must report on the topics required by art. 964a et seqq. CO in their corporate governance report unless they publish an equivalent annual sustainability report under foreign law.

The annual sustainability report must cover impacts on the business as well as on the environment, describe respective due diligence processes, and, to the extent relevant and appropriate, include business partners and the supply chain. The law refers to international standards such as the principles laid down by the Organisation for Economic Cooperation and Development (OECD) as a possible source and guideline. The respective provisions have entered into force on 1 January 2022 and are effective as of 1 January 2023, i.e. applying to the sustainability report of the financial year 2023 for the first time.

Furthermore, art. 964j et seqq. CO require companies with registered office in Switzerland to implement due diligence and publish an annual report if they import or process certain metals or minerals from conflict areas or offer products for which there is reasonable suspicion of child labour. The Swiss Federal Council has enacted an implementing ordinance specifying the respective duties, the Ordinance on Due Diligence and Transparency in relation to Minerals and Metals from Conflict-Affected Areas and Child Labour. The Ordinance provides for exemptions for minor quantities of metals and minerals and for small and medium sized companies (SMEs) regarding child labour. For the definition of child labour, the law refers to ILO conventions. The respective provisions have entered into force on 1 January 2022 and are effective as of 1 January 2023. The law does not ban conflict metals and minerals, or products made from child labour but obliges companies to implement a sound management system to identify and minimize risks of certain minerals and metals as well as child labour in their supply chain.

b. There have not been any test cases concerning the new obligations regarding disclosure and due diligence in matters of environment and human rights. However, a private lawsuit filed by fishermen from the disappearing Indonesian island Pari is pending before a Swiss cantonal court against the Swiss global building materials and aggregates group Holcim for its contribution to global warming. The plaintiffs claim a violation of the personality rights including the rights to life, physical integrity and economic development.

Another eminent lawsuit, Verein KlimaSeniorinnen Schweiz and Others v. Switzerland, is pending before the

European Court of Human Rights (ECtHR). It is not against a company but against the Swiss state. However, if the ECtHR establishes a link between international law on climate change and human rights, this may affect the interpretation of civil personality and property rights by Swiss civil courts in actions against companies.

One current liability case before the district court in the Canton of Basel-Stadt relates to an alleged intoxication by pesticides sold to Indian small-scale farmers by Syngenta.

11. Responsibility for host communities, environment and indigenous populations - in relation to adverse impact on human rights or the environment in host communities: a. Are there any statutory duties to perform due diligence; b. Have there been any test cases brought against companies?

a. There are no particular Swiss legal provisions referring to host communities and indigenous populations.

b. No.

12. Have the Advertising authorities required any businesses to remove adverts for unsubstantiated sustainability claims?

No such claims have been raised by advertising authorities so far. However, respective claims for which the authority lies with the SECO are vividly discussed.

13. Have the Competition and Markets authorities taken action, fined or prosecuted any businesses for unsubstantiated sustainability claims relating to products or services?

No such claims have been raised by competition and markets authorities yet.

However, in the financial sector, FINMA has published its Supervisory Notice 05/2021 against greenwashing in the funds industry. FINMA provides detailed guidelines to avoid greenwashing namely in terms of public information, organisation and advisory activities at the point of sale. In the same Supervisory Notice, FINMA has defined greenwashing in a quite broad manner and sees indications for greenwashing in cases such as for instance: (i) claims of being sustainable while just

meeting legal standards, or (ii) fund documentation of products acclaimed of being sustainable not outlining in detail how the targets are reached or (iii) missing to report on the achievement of the targets later on. Breaches may be sanctioned by FINMA who may, among other measures, issue and publish a statement of breach, claw back profits or impose a professional ban.

14. Have there been any test cases brought against businesses for unsubstantiated enterprise wide sustainability commitments?

No.

15. Is there a statutory duty on directors to oversee environmental and social impacts?

Under the general corporate fiduciary duties of care and loyalty, the members of the board of directors and the management board are personally liable to for taking the interests of the shareholders and, according to the prevailing view, the stakeholders into consideration, including environmental and social impacts of the business activity. The business judgment rule as established by in the case law of the Federal Supreme Court protects board and the management from liability in the case of unconflicted and well-informed business decisions.

The CO states a responsibility of the board of directors and the management board of large companies with registered office in Switzerland which are listed on a trading venue or subject to supervision by FINMA to publish an annual sustainability report on material environmental and social issues such as climate, labour and human rights. (cf. question 10/a).

The reporting obligations regarding climate related non-financial matters have been outlined in an ordinance which refers to the recommendations of the Task Force on Climate-related Financial Disclosure (TCFD) in the areas (i) governance, (ii) strategy, (iii) risk management and (iv) metrics and targets. The ordinance follows a comply or explain approach, requiring companies not complying with the TCFD recommendations to establish how they comply with their reporting obligation.

The CO further declares the board of directors and the management board of any company with registered office in Switzerland responsible for the annual report regarding conflict minerals and metals and child labour as well as related due diligence as outlined in the implementing ordinance (art. 964I CO, cf. question 10/a).

Furthermore, the CO requires any Swiss company involved in the extraction or minerals, oil or natural gas or in the harvesting of timber in primary forests, to declare in their annual report payments made to governmental bodies (art. 964d et seqq. CO). Breaches of the respective obligations are deemed criminal offences and may incur fines.

16. Have there been any test cases brought against directors for presenting misleading information on environmental and social impact?

No test cases of misleading or omitted sustainability related information exist yet. The obligation of Swiss companies to publish an annual sustainability report applies for the first time to the report regarding the year 2023.

17. Are financial institutions and large or listed corporates required to report against sustainable investment criteria?

In its Supervisory Notice 05/2021, FINMA requires managements of investment funds promoted as being sustainable to disclose the investment policy and report on the achievement of targets on an ongoing basis.

Moreover, FINMA requires very large Banks and insurance companies (supervisory categories 1 and 2) to report on climate risks and their respective risk management. Otherwise, FINMA has no mandate to promote sustainable investments by Swiss financial institutions.

Apart from the general sustainability reporting obligation of large companies listed on a trading venue or supervised by FINMA (cf. question 10/a.), there are no further Swiss statutory reporting obligations regarding sustainable investments. However, the Federal Council has mandated the State Secretary for International Finance SIF to elaborate a draft regulation against greenwashing by 30 September 2023. Among other points, this regulation will require financial service providers promoting sustainable products or services to report how the products or activities, including investments, will be aligned with or will support sustainability goals such as the 17 Sustainability Development Goals of the UN. Products or services simply avoiding ESG risks may no longer be advertised as sustainable.

In 2022, the Swiss Bankers Association (SBA) has published its "Guidelines for financial service providers

on the integration of ESG preferences and ESG risks into investment advice and portfolio management". Equally in 2022, the Asset Management Association Switzerland has released its "Self-regulation on transparency and disclosure for sustainability-related collective assets". Both bodies of self-regulation are binding for the members of the respective associations and have not been recognized by FINMA as generally binding for the financial sector.

18. Is there a statutory responsibility on businesses to report on managing climate related financial risks?

Large companies with registered office in Switzerland listed on a trading venue or supervised by FINMA are required to report on environmental issues and disclose, among other aspects, the due diligence, material risks and their management, measures taken and KPIs (*cf.* question 10/a.). The respective companies must comply with the recommendations of the TCFD or establish that they fulfil their statutory obligation otherwise or explain why they do not pursue a climate related concept.

According to the FINMA Circulars 2016/01 and 2016/02 as revised in 2021, very large supervised Swiss banks and securities firms as well as insurance companies (supervisory categories 1 and 2) are required to disclose material climate-related financial risks and their impact on the business strategy, business model and financial planning. In addition, they are required to disclose their risk management process regarding identifying, measuring and addressing these risk and quantitative information including a description of the applied methodology. Finally, the respective companies must describe the main attributes of their governance structure in relation to climate-related financial risks. These disclosure obligations are equally based on the recommendations of the TCFD.

19. Is there a statutory responsibility on businesses to report on energy consumption?

There is a responsibility for certain companies to report on energy consumption to the extent associated with greenhouse gas emissions. According to art. 964b CO large companies with registered office in Switzerland listed on a trading venue or supervised by FINMA are required to report on environmental issues. This reporting includes, among other things, information on the impact of the company's business activities on the environment (*cf.* question 10/a.). The Ordinance on Climate Disclosures, which will come into force on 1

January 2024, sets out the details of how companies should report on climate concerns as part of their environmental issues. Where possible and appropriate, this reporting shall comprise the disclosure of all greenhouse gas emissions. In addition, the CO2 Act requires installation operators and aircraft operators participating in the ETS to report annually on their greenhouse gas emissions. The possibility for installation operators in certain economic sectors to reclaim the CO2 levy also entails an annual reporting obligation on the greenhouse gas emissions.

20. Is there a statutory responsibility on businesses to report on EDI and / or gender pay gaps?

Apart from the reporting obligation in the remuneration report of a company in case of failure of meeting the gender quotas (*cf.* question 7) there is no statutory responsibility on businesses to report on EDI. However, employers who employ 100 or more employees are obliged to carry out an internal equal pay analysis every four years which has to be audited by an independent body such as a firm of auditors licenced under the Auditor Oversight Act or an organisation or an employee's representation in accordance with the Employee Participation Act. The equal pay analysis must be conducted in accordance with a scientific method and the law. The Swiss federal state provides all employers with a standard analysis tool called 'Logib' free of charge. If the analysis is carried out with a different tool, companies must provide proof of the scientific nature and legal conformity of the analysis method used. Certain exemptions from the obligation of conducting an equal pay analysis apply.

After completion of the equal pay analysis and audit employees must be informed in writing about the result of the equal pay analysis and the conclusion of the audit by the independent body (for the first time prior to 30 June 2023). Listed companies are furthermore obliged to inform their shareholders by publishing the results in the annex to their annual accounts. Similarly, public sector employers must publish the results of the equal pay analysis and the audit. Beyond this publication obligation, there is no obligation to communicate the results of the analysis to any authority, unless this is expressly provided for in a special law (e.g. in the area of public procurement).

21. Is there a statutory responsibility to report on modern day slavery in the supply chain?

Art. 964a ff. CO requires large companies with registered office in Switzerland listed on a trading venue or supervised by FINMA to report annually on environmental topics including labour rights and human rights (cf. question 10/a.).

The topics and aspects to be covered by law are to be understood in the light of the EU laws and regulations on which the Swiss provisions have been modelled, as well as international standards. The reporting obligation

extends to risks from business relationships and the supply chain to the extent “relevant and appropriate”, a term also derived from corresponding international standards. For corporate reporting on the topic of human rights, the guidelines of the Federal Department of Justice dated 19 November 2019 (p. 9) specifically refer to ILO conventions including Convention No. 29 on Forced Labour and the Convention 105 on the Abolition of Forced Labour which refers to the 1926 Slavery Convention.

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