

# Countries' Best Practices to Ban Investments in CLUSTER MUNITIONS

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M77 submunition fired from M26 rocket  
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IKV Pax Christi (the Netherlands) and FairFin (Belgium) publish yearly reports on financial institutions' investments in companies that develop or produce cluster munitions, on financial institutions disinvesting from producers of cluster munitions and on legislative measures to prohibit investments in cluster munitions since 2009. This publication builds on the annual "Worldwide Investments in Cluster Munitions; a shared responsibility"- report, which is available on the websites of IKV Pax Christi and FairFin: [www.ikvpaxchristi.nl](http://www.ikvpaxchristi.nl) and [www.fairfin.be](http://www.fairfin.be), as well as on [www.stopexplosiveinvestments.org](http://www.stopexplosiveinvestments.org).

**Contents**

- Introduction .....4
- 1. DISINVESTMENT - LEGISLATION.....5**
  - 1.1 Belgium .....5
    - 1.1.1 Background .....5
    - 1.1.2 Legislation .....5
    - 1.1.3 Commentary .....6
  - 1.2 Ireland .....7
    - 1.2.1 Background .....7
    - 1.2.2 Legislation .....8
    - 1.2.3 Commentary .....9
  - 1.3 Italy .....10
    - 1.3.1 Background .....10
    - 1.3.2 Legislation .....10
    - 1.3.3 Commentary .....10
  - 1.4 Luxembourg .....11
    - 1.4.1 Background .....11
    - 1.4.2 Legislation .....11
    - 1.4.3 Commentary .....12
  - 1.5 The Netherlands .....13
    - 1.5.1 Background .....13
    - 1.5.2 Legislation .....13
    - 1.5.3 Commentary .....14
  - 1.6 New Zealand.....16
    - 1.6.1 Background .....16
    - 1.6.2 Legislation .....16
    - 1.6.3 Commentary .....16
  - 1.7 Samoa.....17
    - 1.7.1 Background .....17
    - 1.7.2 Legislation .....17
    - 1.7.3 Commentary .....17
  - 1.8 Switzerland.....18
    - 1.8.1 Background .....18
    - 1.8.2 Legislation .....18
    - 1.8.3 Commentary .....19
- 2. DISINVESTMENT –INTERPRETIVE STATEMENTS .....21**
  - 2.1 Australia.....21
  - 2.2 Bosnia and Herzegovina.....21
  - 2.3 Cameroon .....21
  - 2.4 Canada .....21
  - 2.5 Colombia.....22
  - 2.6 Croatia .....22
  - 2.7 The Czech Republic .....22
  - 2.8 The Democratic Republic of the Congo.....23
  - 2.9 France .....23
  - 2.10 Guatemala.....24
  - 2.11 The Holy See .....24
  - 2.12 Hungary .....24
  - 2.13 Lao PDR .....24
  - 2.14 Lebanon.....25
  - 2.15 Madagascar .....25
  - 2.16 Malawi.....25
  - 2.17 Malta .....26

2.18 Mexico .....	26
2.19 Rwanda.....	26
2.20 Senegal.....	26
2.21 Slovenia .....	26
2.22 The United Kingdom .....	27
2.23 Zambia .....	27
3. <b>DISINVESTMENT - PARLIAMENTARY INITIATIVES / DRAFT LEGISLATION</b> .....	28
3.1 Liechtenstein.....	28
3.2 Norway .....	29
4. <b>RECOMMENDATIONS</b> .....	30
<b>REFERENCES</b> .....	31
<b>MAP</b> .....	42

## Introduction

On 3 and 4 December 2008 a group of 94 states signed the Convention on Cluster Munitions (CCM), which categorically prohibits the use, production, transfer and stockpiling of cluster munitions. Driven by a commitment to end the humanitarian harm caused by cluster munitions, the CCM is now signed by 111 states.

The Cluster Munition Coalition (CMC) believes that the prohibition on assistance in the Convention on Cluster Munitions includes a prohibition on investments in cluster munitions.<sup>1</sup> Article 1(1)(c) of the Convention on Cluster Munitions states: *“Each State Party undertakes never under any circumstances to assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.”* Several CCM signatories have already made interpretive statements that they identify investment in cluster munitions as prohibited under the CCM and/or have implemented laws that prohibit investments in cluster munitions.

At the time of writing, eight states have adopted legislation that prohibits (various forms of) investments in cluster munitions: Belgium, Ireland, Italy, Luxembourg, the Netherlands, New Zealand, Samoa, and Switzerland. Additionally, 23 states have not yet passed legislation against investment in cluster munition producers, but they did express the view that investments in the production of cluster munitions are prohibited by the CCM. Australia, Bosnia and Herzegovina, Cameroon, Canada, Colombia, Croatia, the Czech Republic, Democratic Republic of Congo, France, Guatemala, the Holy See, Hungary, Lao PDR, Lebanon, Madagascar, Malawi, Malta, Mexico, Rwanda, Senegal, Slovenia, the United Kingdom and Zambia all interpret (direct) investment as a prohibited form of assistance under the CCM. Finally, legislative proposals have been tabled in Liechtenstein and Norway. In Liechtenstein, the disinvestment prohibition will enter into force on 1 September 2013.

It is vital that more states confirm that article 1(1)(c) includes a ban on investment in cluster munitions. Experience with the legislation in Belgium, Ireland, Italy, Luxembourg, the Netherlands, New Zealand, Samoa and Switzerland can serve as an example for States Party to the CCM and States not Party to the CCM to prohibit investment in cluster munition producers by national law.

This publication outlines what states are doing to ban investments in cluster munitions. The research findings are divided into three categories:

- States that have adopted national legislation to ban (forms of) investment in cluster munitions,
- States that have made interpretive statements that reflect the interpretation that investments are prohibited under the CCM,
- States where parliamentary action is ongoing, or where legislative proposals are tabled at the time of writing.

With this report we strive to encourage an exchange of information and call upon states to make their position known as to whether investments in cluster munitions are banned by the Convention. Installing and implementing national legislation to that effect is the most effective way to prevent investments flowing to the production of a weapon that is banned under international law due to the humanitarian misery it causes.

## 1. DISINVESTMENT - LEGISLATION

There are currently eight states that have adopted national legislation to ban investments in cluster munitions. Some states have done so as part of their ratification of the Convention on Cluster Munitions (CCM), others have covered the issue in separate laws. In what follows, we describe existing legislation with regard to investments in cluster munitions. Per country we provide a short background, the relevant legislation and a commentary.

In our commentary the following questions are leading:

- **What exactly is excluded from investment?**  
The definition of cluster munition producers should be as comprehensive as possible.
- **What is meant by ‘investment’ or ‘financing’?**  
The legislation should exclude *any* financial product or service offered to producers of cluster munitions.
- **Who should not invest?**  
In order to create a complete ban on investment, legislation should make clear that *any* investment by *any* party is prohibited.
- **How is the legislation reinforced?**  
Legislation on disinvestment is powerless without monitoring investments, whether by public institutions, by ethical councils or other actors explicitly assigned to audit the implementation of the law.

### 1.1 Belgium

#### 1.1.1 Background

Acknowledging that cluster munitions are inhumane weapons and acknowledging the role of financial institutions, Belgium adopted legislation banning investment even before the Convention on Cluster Munitions came about. At the end of 2006, the Belgian senate passed a bill forbidding Belgian financial institutions to invest in cluster munition producers. The bill also instructed the Belgian government to produce a list of cluster munition producers. In March 2007, the Belgian chamber of representatives unanimously passed the law, making Belgium the first country to ban investment in cluster munition producers.

Belgium signed the Convention on Cluster Munitions on 3 December 2008 and ratified the convention on 22 December 2009.<sup>2</sup>

#### 1.1.2 Legislation

The Belgian Act Prohibiting the Financing of the Production, Use and Possession of Anti-personnel Mines and Submunitions supplements article 8 of the Act of 8 June 2006 governing economic and individual activities involving arms.<sup>3</sup> The text is as follows:<sup>4</sup>

“Also prohibited is the financing of a company under Belgian law or under the law of another country, which is involved in the manufacture, use, repair, marketing, sale, distribution, import, export, stockpiling or transportation of anti-personnel mines and or sub-munitions within the sense of this act, and with a view to distribution thereof.

To this end The King shall, no later than the first day of the thirteenth month following the publication of this act, prepare a public list

- i) of companies that have been shown to carry out an activity as under the previous paragraph;
- ii) of companies holding more than half the shares of a company as under i) and;
- iii) of collective investment institutions holding financial instruments of companies as designated in i) and ii).

He shall also determine the further regulations for the publication of this list.

Financing of a company on the list includes all forms of financial support, namely credits, bank guarantees and the acquisition for own account of financial instruments issued by the company.

In the event that a company which has already been granted financing is included on the list, this financing should, insofar as contractually possible, be fully terminated.

This prohibition does not apply to investment institutions where the investment policy under the articles of association or management regulations is to follow the composition of a specific share or bond index.

Similarly, the prohibition on financing does not apply to the well-defined projects of a company on the list, insofar as the financing does not envisage activities as stated in this article. The company is required to confirm this in a written statement.

**Art. 3.** Paragraph 6 of article 67 of the act of 20 July 2004 governing certain forms of collective investment portfolio management is withdrawn.

**Art. 4.** The fourth indent of Article 3, § 2, 1, of the act for the prevention of money laundering and the financing of terrorism, dated 11 January 1993 as amended by the act of 12 January 2004, is supplemented as follows: "including anti-personnel mines and/or sub-munitions."

**Art. 5.** This act comes into force on the day it is published in the Belgian Monitor."<sup>i</sup>

### 1.1.3 Commentary

- **What exactly is excluded from investment?**

- The law prohibits investments in companies that fall under Belgian law or under the law of another country, which are involved in the manufacture, use, repair, marketing, sale, distribution, import, export, stockpiling or transportation of anti-personnel mines and or submunitions and with a view to the distribution thereof. The law does not specify how to deal with (key) components of anti-personnel mines or submunitions.

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<sup>i</sup> Original text:

"Est également interdit le financement d'une entreprise de droit belge ou de droit étranger dont l'activité consiste en la fabrication, l'utilisation, la réparation, l'exposition en vente, la vente, la distribution, l'importation ou l'exportation, l'entreposage ou le transport de mines antipersonnel et/ou de sous-munitions au sens de la présente loi en vue de leur propagation.

A cette fin, le Roi publiera, au plus tard le premier jour du treizième mois suivant le mois de la publication de la loi, une liste publique

i) des entreprises dont il a été démontré qu'elles exercent l'une des activités visées à l'alinéa précédent;

ii) des entreprises actionnaires à plus de 50% d'une entreprise au point i).

iii) des organismes de placement collectif détenteurs d'instruments financiers d'une entreprise aux points i) et ii).

Il fixera également les modalités de publication de cette liste.

Par financement d'une entreprise figurant dans cette liste, on entend toutes les formes de soutien financier, à savoir les crédits et les garanties bancaires, ainsi que l'acquisition pour compte propre d'instruments financiers émis par cette entreprise.

Lorsqu'un financement a déjà été accordé à une entreprise figurant dans la liste, ce financement doit être complètement interrompu pour autant que cela soit contractuellement possible.

Cette interdiction ne s'applique pas aux organismes de placement dont la politique d'investissement, conformément à leurs statuts ou à leurs règlements de gestion, a pour objet de suivre la composition d'un indice d'actions ou d'obligations déterminé.

L'interdiction de financement ne s'applique pas non plus aux projets bien déterminés d'une entreprise figurant dans cette liste, pour autant que le financement ne vise aucune des activités mentionnées dans cet article.

L'entreprise est tenue de confirmer ceci dans une déclaration écrite.'

**Art. 3.** Le paragraphe 6 de l'article 67 de la loi du 20 juillet 2004 relative à certaines formes de gestion collective de portefeuilles est abrogé.

**Art. 4.** Le quatrième tiret de l'article 3, § 2, 1, de la loi du 11 janvier 1993 relative à la prévention de l'utilisation du système financier aux fins du blanchiment de capitaux et du financement du terrorisme, modifié par la loi du 12 janvier 2004, est complété par la disposition suivante: « en ce qui compris les mines anti-personnel et/ou les sous-munitions ».

**Art. 5.** La présente loi entre en vigueur le jour de sa publication au *Moniteur belge*. "

(Loi interdisant le financement de la fabrication, de l'utilisation ou de la détention de mines antipersonnel et de sous-munitions, available at <http://staatsbladclip.zita.be/staatsblad/wetten/2007/04/26/wet-2007003169.html>, last viewed 20 March 2013. Translated by certified translator P. van Weeghel; text in IKV Pax Christi's archives.



- The ban does not apply to financing specific projects of the above mentioned companies when it can be demonstrated that the financing will not be used for operations linked to anti-personnel mines or cluster munitions. To ensure exemption, financiers need a written declaration confirming the nature of the project and that financing will not be used for operations linked to anti-personnel mines or cluster munitions. This still permits investors and lenders to finance projects of companies identified as anti-personnel mines or cluster munition producers, but only when the project has nothing to do with the forbidden activities. This exception weakens the law, for it will not limit companies to transfer money internally to projects that are connected with anti-personnel mines or cluster munitions.
- **What is meant by ‘investment’ or ‘financing’?**
- The law prohibits “all forms” of financial support, yet the definition of financing is defined in a rather restrictive way: “credits, bank guarantees or the acquisition for own account of the financial instruments” issued by cluster munition producers.
  - However, the law does not apply to “[...] investment institutions where the investment policy under the articles of association or management regulations is to follow the composition of a specific share or bond index.” This means that funds following an index may still contain shares in or obligations issued by companies that produce or sell anti-personnel mines, depleted uranium weapons and cluster munitions. This exception weakens the law.
- **Who should not invest?**
- The Belgian Act Prohibiting the Financing of the Production, Use and Possession of Anti-personnel Mines and Submunitions does not explicitly mention who it applies to. Since it is a supplement to article 8 of the Act of 8 June 2006 governing economic and individual activities involving arms, which mentions “no one may [...]”, it should be read that the law applies to “everyone,”<sup>5</sup> meaning both individuals and financial institutions.
- **How is the legislation reinforced?**
- The Belgian Act Prohibiting the Financing of the Production, Use and Possession of Anti-personnel Mines and Submunitions is a supplement to article 8 of the Act of 8 June 2006 governing economic and individual activities involving arms. The 2006 Act includes the penalty provision that “those who violate this law [...] will be punished with imprisonment ranging from one month to five years and a fine of 100 Euro to 25 000 Euro, or one of these penalties.” It should be understood that this penalty applies to those in violation of the prohibition on investment.<sup>6</sup>
  - The law mentions a public exclusion list is to be created. However, at the time of writing, six years after the legislation was passed, the responsible minister has still not published the exclusion list.

## **1.2 Ireland**

### **1.2.1 Background**

Ireland was a driving force behind the Oslo process. It signed and ratified the Convention on Cluster Munitions on 3 December 2008.<sup>7</sup>

Even before Ireland signed the convention on 3 March 2008, its National Pensions Reserve Fund announced that it would withdraw €27 million in investments from six international companies involved in producing cluster munitions. This announcement was made in response to a government request to withdraw from companies involved in the manufacture of cluster munitions.<sup>8</sup>

On 22 October 2008, Ireland presented the 2008 Cluster Munitions and Anti-personnel Mines Bill to its Lower House. Presenting this act, number 20, was Ireland's way of signing and ratifying the convention. It made Ireland one of the four countries signing and ratifying the convention all at once on 3 December 2008.<sup>9</sup>

Ireland was the first country to specify an investment ban in the text ratifying the CCM. This is an important example for other countries.

### 1.2.2 Legislation

The 2008 Cluster Munitions and Anti-Personnel Mines Act explicitly prohibits investment of public money in cluster munition producers.

The prohibition is set out in Part 4 of the act.<sup>10</sup>

**"PART 4: Investment of Public Moneys**

**11.—In this Part—**

**"components"** means components specifically designed for use in prohibited munitions;

**"investor"** means a person or body responsible for the investment of public moneys owned by a Minister of the Government;

**"munitions company"** means a company involved in the manufacture of prohibited munitions or components;

**"prohibited munition"** means a cluster munitions, explosive bomblet or anti-personnel mine;

**"public moneys"** means moneys provided by the Oireachtas out of the Central Fund, or the growing produce thereof.

**12.—(1)** Nothing in any enactment that authorises the investment of public moneys shall be taken to authorise any investment, direct or indirect, in a munitions company.

**(2)** Notwithstanding any other enactment, an investor, in the performance of any function conferred on it by or under any enactment, shall endeavour to avoid the investment of public moneys in a munitions company.

**(3)** In pursuing the objective set out in subsection (2) an investor shall have regard to the matters set out in this Part.

**13.—(1)** An investor shall endeavour to avoid the direct investment of public moneys in equity or debt securities issued by a munitions company.

**(2)** Where public moneys are directly invested in a company which is or becomes a munitions company, the investor shall—

**(a)** establish to its satisfaction that the company intends to cease its involvement in the manufacture of prohibited munitions or components, or

**(b)** divest itself of its investment in that company in an orderly manner.

**14.—(1)** An investor shall avoid investing public moneys in collective investment undertakings or investment products unless, having exercised due diligence, the investor is satisfied that there is not a significant probability that the public moneys will be invested in a munitions company.

**(2)** Where public moneys are invested in a collective investment undertaking or investment product which invests these moneys in a company which is or becomes a munitions company, the investor shall—

**(a)** establish to its satisfaction that—

**(i)** the company intends to cease its involvement in the manufacture of prohibited munitions or components,

or

(ii) the collective investment undertaking or investment product intends to divest itself of its investment in the company, and that there is not a significant probability that the collective investment undertaking or investment product will again invest public moneys in a munitions company,

or

(b) so far as possible, taking into account any contractual obligation it has assumed, divest itself of its investment in that collective investment undertaking or investment product in an orderly manner.

**15.**—Nothing in this Part shall prevent an investor from contracting derivative financial instruments based on a financial index.”

### **1.2.3 Commentary**

- **What exactly is excluded from investment?**

- The law leaves no doubt about what is excluded from investments. It prohibits investment in cluster munition producers (whether for munitions-linked or other activities). This includes producers of specifically designed components of cluster munitions.

- **What is meant by ‘investment’ or ‘financing’?**

- The law covers only public money provided by the “Oireachtas out of the Central Fund, or the growing produce thereof.” This means that the act does not cover money from sources other than the Central Fund, e.g. it does not extend to money from counties and municipalities or money from private sources. Moreover, the law does not mention withdrawing bank guarantees; the Irish government can still grant a guarantee to a bank that invests in cluster munition producers.
- The law prohibits many investment products: equity and debt securities issued by a munitions company, collective investment undertakings or investment products that invest in the involved companies (unless the company and/or the financial product severs its link to cluster munitions).
- The Irish law makes an exception for financial instruments based on a financial index: these investments are allowed even when they contain shares in or obligations issued by cluster munition producers. This exception weakens the law.

- **Who should not invest?**

- The legislation indicates that “investor” means a person or body responsible for the investment of public moneys owned by a Minister of the Government.

- **How is the legislation reinforced?**

- The legislation does not provide for supervision or monitoring tools. It is not clear how the law will be enforced: the law does not stipulate that the investment of public money should be made public to ensure that none is invested in companies that produce cluster munitions. There are no provisions setting criteria for determining which companies are involved in the manufacture of prohibited munitions or their components.

## 1.3 Italy

### 1.3.1 Background

Italy signed the Convention on Cluster Munitions on 3 December 2008. On 16 March 2011, the Italian senate unanimously adopted legislation to ratify and implement the Convention on Cluster Munitions. The Chamber of Deputies followed suit on 18 May 2011. On 4 July 2011, the Law on the Ratification and Implementation of the Oslo Convention on the ban on cluster munitions (Law no. 95) was published.<sup>11</sup>

### 1.3.2 Legislation

Art. 7 (1) of the Law on the Ratification and Implementation of the Oslo Convention on the ban on cluster munitions (Law no. 95) declares financial assistance to acts prohibited by the law a crime:

“Whoever uses, subject to the provisions of Article 3, paragraph 3, develops, produces, acquires in any way, stores, retains, or transfers, directly and indirectly, cluster munitions or parts thereof, or financially assists, encourages or induces others to engage in such activity, is punished with imprisonment from three to twelve years and a fine of 258.228 Euro to 516.456 Euro.”<sup>12 ii</sup>

The Italian Campaign to Ban Landmines has advocated a separate, more detailed law. On 26 April 2010, separate draft legislation on investments was introduced in the Senate. It would prohibit all Italian financial institutions from providing any form of support to Italian or foreign companies performing a range of activities including the production, use, sale, import, export, stockpiling, or transport of antipersonnel mines as well as cluster munitions and explosive submunitions.<sup>13</sup> The draft legislation was referred to the Senate financial and treasury commission on 26 May 2010. On 18 December 2012 the draft legislation was approved in the legislative finance committee of the Chamber of Deputies.<sup>14</sup> National elections were held in Italy in February 2013 and it is believed that the previous approval of the Chamber of Deputies will facilitate the discussion of the draft bill by the new administration. Until then Law no. 95 remains the legislative framework for investments in cluster munitions.<sup>15</sup>

### 1.3.3 Commentary

- **What exactly is excluded from investment?**
- The text of Law no. 95 prohibits financing the development and production of cluster munitions or parts thereof. It does not explain whether this means that cluster munition producers are excluded from investment, or that the exclusion only covers the act of producing cluster munitions. The latter would permit general purpose financing for cluster munition producers.

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<sup>ii</sup> Original text:

“Chiunque impiega, fatte salve le disposizioni di cui all'articolo 3, comma 3, sviluppa, produce, acquisisce in qualsiasi modo, stocca, conserva o trasferisce, direttamente o indirettamente, munizioni a grappolo o parti di esse, ovvero assiste anche finanziariamente, incoraggia o induce altri ad impegnarsi in tali attività, e' punito con la reclusione da tre a dodici anni e con la multa da euro 258.228 a euro 516.456.”<sup>12</sup>  
Translated by Suzanne Oosterwijk, IKV Pax Christi.

- **What is meant by ‘investment’ or ‘financing’?**

- The text of Law no. 95 does not define “financial assistance.” In that respect the draft proposal of 26 April 2010 defines the scope of financial assistance more precisely. The latter prohibits the provision of any form of financial support, including granting any type of credit, issuing financial guarantees, equity participation, acquisition or subscription of securities issued by companies producing antipersonnel mines or cluster munitions. It forbids Italian and foreign companies in Italy from financing companies performing a range of activities relating to antipersonnel mines, cluster munitions and submunitions.
- The reference to the prohibition of “financial assistance” in the law is due to an approved amendment to the original text. As a consequence, financial assistance to the production, development, storage, etc. of cluster munitions or parts thereof is a national crime. However, the current text seems to leave the possibility open that it only applies to the Italian level. The Italian Campaign to Ban Landmines warns that the law still makes it possible to offer financial assistance on an international level.

- **Who should not invest?**

- The law stipulates that “Whoever [...] financially assists, encourages or induces others to engage in such activity, is punished with imprisonment from three to twelve years and a fine of 258.228 Euro to 516.456 Euro.”

- **How is the legislation reinforced?**

- The Italian law defines penalties, but does not provide for supervision or monitoring tools. The implementation order will have to regulate all of these issues and will be decisive for the law’s scope. The 26 April 2010 draft proposal is more detailed. It wants the Bank of Italy to appoint a third party to monitor compliance and to publish a list of companies involved in the production, use, repair, promotion, sale, distribution, import, export, storage, possession or transportation of cluster munitions.

## **1.4 Luxembourg**

### **1.4.1 Background**

Even before the Oslo Convention was signed, Luxembourg developed draft legislation on cluster munitions that included a ban on investment. Luxembourg decided to freeze this procedure to wait for the final text of the CCM in December 2008. After signing the Oslo Convention, it published a draft ratification law.

Luxembourg signed the Convention on Cluster Munitions on 3 December 2008 and ratified the convention on 19 July 2009.

### **1.4.2 Legislation**

The draft ratification law included a prohibition for all persons or businesses from knowingly financing cluster munitions or explosive submunitions.<sup>16</sup> Luxembourg passed the law on 7 May 2009. Article 3 contains the investment ban:

“Art 3. All persons, businesses and corporate entities are prohibited from knowingly financing cluster munitions or explosive submunitions.”<sup>iii</sup>

Article 4 states that “those who knowingly breach Articles 2 or 3 can be penalised with 5 to 10 years detention and a fine ranging from €25,000 to €1 million.”<sup>17</sup>

At the first Meeting of States Parties to the Convention on Cluster Munitions in Lao PDR, Luxembourg's Vice-Prime Minister, Jean Asselborn, encouraged all the states that have signed the convention “to prohibit the financing of cluster bombs.”<sup>18</sup>

### 1.4.3 Commentary

- **What exactly is excluded from investment?**

- The law forbids financing of cluster munitions or explosive submunitions. It does not explain whether this means that cluster munition producers are excluded from investment, or that the exclusion only covers the act of producing cluster munitions. The latter would permit general purpose financing for cluster munition producers.

- **What is meant by ‘investment’ or ‘financing’?**

- The text does not define “financing.” The word’s scope should be clarified, because it is open to multiple interpretations.
- The term “knowingly” did not appear in the first draft of the legislation. In June 2008, the Luxembourg Bankers Association (ABBL) and the Luxembourg Fund Association (ALFI) published a commentary on this draft legislation. These associations suggested adding the term knowingly to the text. They argued that a bank could never be 100% sure that their client or any given transfer of money had no link to cluster munitions. They suggested replacing the words “direct or indirect financing” with “knowingly financing.”<sup>19</sup> The term “knowingly” could create difficulties in implementing this legislation. It could release banks from their duty of due diligence and operate with scrutiny. Luxembourg's implementation order will have to provide a clear and airtight definition of knowingly. The publication of a black list of cluster munition producers could solve this problem.

- **Who should not invest?**

- All persons, businesses and corporate entities are prohibited from knowingly financing cluster munitions or explosive submunitions.

- **How is the legislation reinforced?**

- Article 4 defines the following penalty provisions: “those who knowingly breach Articles 2 or 3 can be penalised with 5 to 10 years detention and a fine ranging from €25,000 to €1 million.”<sup>20</sup>
- The law does not provide for supervision or monitoring tools. The implementation order will have to specify all of these and is of major importance for the implementation and scope of the law. At the first Meeting of States Parties to the Convention on Cluster Munitions in Lao

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<sup>iii</sup> Original text: “Il est interdit à toute personne physique ou morale de financer, en connaissance de cause, des armes à sous-munitions ou des sous-munitions explosives.” Translated by Katherine Harrison, Action on Armed Violence.

PDR, Luxembourg announced that it would set up an ethics commission. Minister for Foreign Affairs Asselborn launched the idea to create an ethical council in the Grand Duchy of Luxembourg. This council would be composed of Luxembourg financial (Alfi, Gafi, ABBL, CSSF) and public institutions (Ministry of Finance, Ministry of Justice, Ministry of Foreign Affairs, Compensation Fund). It would be responsible for monitoring and verifying present and future investments by the State of Luxembourg to prevent improper investments in companies involved in the production of cluster munitions.<sup>iv</sup> This commission would be of great assistance in monitoring investments and enforcing the law, but is still not in place.<sup>21</sup>

## 1.5 The Netherlands

### 1.5.1 Background

The Netherlands signed the Convention on Cluster Munitions on 3 December 2008 and ratified the convention on 23 February 2011. The law approving ratification of the Convention on Cluster Munitions guides the Netherlands' implementation of the convention's provisions. This law does not contain a prohibition on investments in cluster munitions.

On 29 March 2011 however, the Dutch Senate adopted a motion calling for "a prohibition on direct and demonstrable investments in the production, sale and distribution of cluster munitions."<sup>v</sup> <sup>22</sup> On 13 December 2011, the Lower House of the Dutch Parliament adopted a similar motion.<sup>23</sup>

### 1.5.2 Legislation

On 1 January 2013, the amended Market Abuse (Financial Supervision Act) Decree entered into force that "imposes an obligation that prevents an enterprise directly supporting any national or foreign enterprise which produces, sells or distributes cluster munitions."<sup>24</sup>

The prohibition, set out in Article 21a of the Decree, states the following:

"1. An enterprise as referred to in Article 5:68 (1) of the Act, not being a clearing institution, will take adequate measures in order to ensure that it does not:

- a. carry out transactions or has transactions carried out with a view to acquiring or offering a financial instrument that has been issued by an enterprise that produces, sells or distributes cluster munitions as referred to in Article 2 of the Convention on Cluster Munitions which was concluded in Dublin on 30 May 2008 (published in the Bulletin of Treaties 2009, 45) or essential parts thereof;
- b. provide loans to an enterprise as referred to in subsection (a) above;
- c. acquire non-marketable holdings in the capital of any enterprise described under (a) above.

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<sup>iv</sup> Original text: "Lors d'une prise de position devant la presse luxembourgeoise, le Vice-Premier Ministre a réitéré son appel à l'interdiction du financement en connaissance de cause d'armes à sous-munitions. Au vu des difficultés de prévoir les ramifications de certaines sociétés dans des secteurs industriels qui produisent des armes à sous-munitions, le ministre Asselborn a lancé l'idée de créer une enceinte éthique au Grand-Duché de Luxembourg qui serait composé d'institutions financières luxembourgeoises (Alfi, Gafi, ABBL, CSSF) ainsi que d'institutions publiques (ministère des Finances, ministère de la Justice, ministère des Affaires étrangères, Fonds de Compensation) et qui serait chargé de contrôler et vérifier les investissements actuels et futurs de l'État luxembourgeois en vue de prévenir des investissements erronés dans des sociétés impliquées dans la production d'armes à sous-munitions." Translated by Esther Vandenbroucke, FairFin.

<sup>v</sup> Original Dutch text: "[...] een verbod op aantoonbare directe investeringen in de productie, verkoop en distributie van clustermunities." Translated by Roos Boer, IKV Pax Christi.

2. The first section above is equally applicable to carrying out transactions, or having them carried out, with a view to acquiring or offering a financial instrument that has been issued by any enterprise that holds more than half of the share capital of an enterprise as referred to in subsection 1 (a) and also to loans to, or non-marketable holdings in such an enterprise.

3. Section 1 above will not apply to:

- a. transactions based on an index in which enterprises described in subsection 1 (a) constitute less than 5 percent of the total;
- b. transactions in investment funds operated by third parties in which enterprises described in subsection 1 (a) constitute less than 5 percent of the total; and
- c. investments in clearly defined projects carried out by an enterprise described in subsection 1 (a) insofar as such funding is not utilized for the production, sale or distribution of cluster munitions.

4. Without prejudice to the provisions of section 1 above, enterprises that do hold financial instruments, loans or non-marketable holdings as described in that section should dispose of them or terminate them within a reasonable period of time.”<sup>25</sup>

A Dutch financial institution in violation of Article 21a of the Market Abuse (Financial Supervision Act) Decree can be sanctioned to a fine with a set basic amount of €500,000 and a maximum of €1,000,000.<sup>vi26</sup>

### 1.5.3 Commentary

- **What exactly is excluded from investment?**

- The legislation defines the subject of financial exclusion as “an enterprise that produces, sells or distributes cluster munitions” or “essential parts thereof.” The explanatory note defines essential parts as “those (components) which are indispensable for the functioning of cluster munitions.” Dual use components are explicitly excluded from the scope of the definition in the explanatory note.<sup>27</sup>
- Section 2 equally applies the prohibition to holdings containing a subsidiary involved in activities related to cluster munitions. As the explanatory notes explain: “without this addition, it would be relatively easy to evade the provision by establishing a parent company (holding) in which investments could be made and transferring the activities related to cluster munitions to a separate, wholly or partly-owned subsidiary.” However, the legislation is only applicable to enterprises “holding more than half of the share capital” of a company involved in cluster munitions.<sup>28</sup>
- The ban does not apply to financing specific projects of companies involved in the production, sale or distribution of cluster munitions when it can be demonstrated that the financing will not be used for operations linked to cluster munitions. To ensure exemption, financial institutions need a written declaration confirming the nature of the project and that financing will not be used for operations linked to cluster munitions. This still permits investors and lenders to finance projects of companies identified as cluster munition producers, but only when the project has nothing to do with the forbidden activities. This

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<sup>vi</sup> A fine of category 2 applies to a financial institution in breach with Article 21a of the Market Abuse (Financial Supervision Act) Decree. The set basic amount is €500,000 with a maximum of €1,000,000. The Netherlands Authority for the Financial Markets can increase or decrease the basic amount as it sees fit, according to duration and nature of the violation.



exception weakens the law, for it will not limit companies to transfer money internally to projects that are connected with cluster munitions.

- **What is meant by ‘investment’ or ‘financing’?**

- The legislation applies only to “direct and demonstrable investments.” The ban defines “direct and demonstrable investments” as investments, loans or non-marketable holdings in or to an enterprise that produces, sells or distributes cluster munitions.<sup>29</sup> The “adequate measures to prevent investment” pertain particularly to measures that are legally possible and are unilaterally enforceable by a financial institution. According to the explanatory notes, “this is at least the case when an institution is acting on its own behalf and for its own account, is itself manager of an investment fund or receives explicit instructions from a client, without an associated request for advice, to invest in an enterprise as referred to in subsection 1 (a); this is known as an ‘execution only’ situation.” This would suggest that investments on behalf of clients, investments managed by an external party, or investments when instructed by a client with an associated request for advice would be permitted. The addition of “at least” however, suggests this is a minimal approach to implementation of the law, and therefore creates uncertainty for financial institutions as to how to implement the law.
- The prohibition contains several exceptions, as laid out in subsection 3: Subsection (3) (a) provides an exception for transactions based on an index, when less than five percent of the total assets of that index are invested in companies that produce, sell or distribute cluster munitions. Transactions based on an index are deemed to include, among others, “index funds, index trackers, the replication of indices in a ‘basket’, and similar financial products.”<sup>30</sup> Subsection 3 (b) holds a similar exception for “transactions in investment funds managed by third parties, where one or more of the enterprises that produce, sell or distribute cluster munitions constitute less than five percent of the total.”<sup>31</sup> This means that funds following an index and investment funds may still contain the specified percentage of cluster munitions producing companies. This exception weakens the prohibition, especially since companies involved in the production of cluster munitions usually do not represent more than 5% in funds that follow an index or investment funds.

- **Who should not invest?**

- The prohibition’s scope is limited to financial institutions that operate in the Netherlands and that have substantial dealings with the financial markets. This means that article 21a does not apply to individuals, to legal entities other than those specified in the prohibition’s accompanying explanatory notes, or to foreign subsidiaries of financial institutions in the Netherlands.

- **How is the legislation reinforced?**

- Financial institutions in violation of the prohibition are subjected to financial penalties. The Netherlands Authority for Financial Markets is in charge of monitoring the implementation of the prohibition.
- The prohibition does not provide for specific monitoring tools or auditing methods, nor does it provide for a black list of companies involved in the production of cluster munitions which will complicate the implementation of the law. The law does assign the Netherlands

Authority for Financial Markets as supervisor to regulate all of these issues which will be decisive for the law's scope.

## 1.6 New Zealand

### 1.6.1 Background

New Zealand signed the Convention on Cluster Munitions on 3 December 2008. On 10 December 2009, the New Zealand parliament unanimously passed its legislation to implement the Convention on Cluster Munitions. This Cluster Munitions Prohibition Act contains a prohibition on investments in cluster munitions. Late amendments after strong campaigning by the Aotearoa New Zealand Cluster Munition Coalition added an investment ban to the law.

### 1.6.2 Legislation

The Cluster Munitions Prohibition Act states that:

"A person commits an offence who provides or invests funds with the intention that the funds be used, or knowing that they are to be used, in the development or production of cluster munitions."<sup>32</sup>

The law defines clearly what it means by funds: "funds means assets of every kind, whether tangible or intangible, moveable or immovable, however acquired; and includes legal documents or instruments (for example bank credits, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts, and letters of credit) in any form (for example, in electronic or digital form) evidencing title to, or an interest in, assets of any kind."<sup>33</sup>

The legislation was unanimously adopted and the governor-general signed it into law on 17 December 2009 paving the way for the deposit of New Zealand's ratification instrument on 23 December 2009.

### 1.6.3 Commentary

- **What exactly is excluded from investment?**
  - The legislation prohibits providing or investing funds with the intention that the funds be used, or knowing that they are to be used, in the development or production of cluster munitions.
- **What is meant by 'investment' or 'financing'?**
  - The law defines clearly what it means by funds: "funds means assets of every kind, whether tangible or intangible, moveable or immovable, however acquired; and includes legal documents or instruments (for example bank credits, travellers' cheques, bank cheques, money orders, shares, securities, bonds, drafts, and letters of credit) in any form (for example, in electronic or digital form) evidencing title to, or an interest in, assets of any kind."<sup>34</sup>
  - The scope of the law seems to be limited to project finance of cluster munitions production because of the terms "knowing" and "with the intention." This would mean that cluster

munition producers would still be able to obtain funding if an investment is not intended for the development and production of cluster munitions.

- **Who should not invest?**

- The Cluster Munitions Prohibition Act, Part 1, preliminary provision 9 mentions that the Act applies to all acts done or omitted in New Zealand and also applies to all acts done or omitted outside New Zealand by citizens and residents of New Zealand, [...]a body corporate, or a corporation sole, incorporated in New Zealand.”<sup>35</sup>

- **How is the legislation reinforced?**

- The New Zealand law defines penalties, but does not provide for supervision or monitoring tools. A person who commits an offence against the investment prohibition is liable on conviction on indictment to imprisonment for a term not exceeding 7 years or a fine not exceeding \$500,000, or both.<sup>36</sup>
- Were the New Zealand government to publish a list of cluster munition producers, this would provide a strong tool for determining whether there is an intention or knowledge that the funds will be used to finance the production of cluster munitions.

## **1.7 Samoa**

### **1.7.1 Background**

The Independent State of Samoa signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 28 April 2010.<sup>37</sup> Samoa’s Cluster Munitions Prohibition Act went into effect on 27 April 2012.<sup>38</sup> This Cluster Munitions Prohibition Act 2012 contains a prohibition on investments in cluster munitions.

### **1.7.2 Legislation**

The Cluster Munitions Prohibition Act 2012 states that:

“[...] a person who directly or indirectly does one (1) or more of the following commits an offence: invest funds with the intention that the funds be used, or knowing that the are to be used, in the development or production of cluster munitions.”<sup>39</sup>

The law clearly defines what it means by funds: “funds means assets of every kind, whether tangible or intangible, moveable or immoveable, however acquired; and includes legal documents or instruments in any form evidencing title to, or an interest in, assets of any kind.”<sup>40</sup>

### **1.7.3 Commentary**

- **What exactly is excluded from investment?**

- The legislation prohibits directly or indirectly investing funds with the intention that the funds be used, or knowing that they are to be used, in the development or production of cluster munitions.

- **What is meant by ‘investment’ or ‘financing’?**

- The law defines clearly what it means by funds: “funds means assets of every kind, whether tangible or intangible, moveable or immovable, however acquired; and includes legal documents or instruments in any form evidencing title to, or an interest in, assets of any kind.”<sup>41</sup>
- The scope of the law seems to be limited to project finance of cluster munitions production because of the terms “knowing” and “with the intention.” This would mean that cluster munition producers would still be able to obtain funding if an investment is not intended for the development and production of cluster munitions.

- **Who should not invest?**

- The Cluster Munitions Prohibition Act 2012 states that “a person” is prohibited from directly or indirectly investing funds with the intention that the funds be used, or knowing that they are to be used, in the development or production of cluster munitions. Furthermore, Part 1, preliminary provision 4 mentions that the Act extends to acts done or omitted to be done outside Samoa by citizens and residents of Samoa, [...] or a corporation.<sup>42</sup>

- **How is the legislation reinforced?**

- The Samoa law defines penalties, but does not provide for supervision or monitoring tools. A person who commits an offence against the investment prohibition is “[...] punishable, upon conviction, by: (a) in the case of a corporation, a fine not exceeding 100,000 penalty units; or (b) in the case of a natural person, a fine not exceeding 10,000 penalty units or imprisonment for a term not exceeding seven (7) years, or both.”<sup>43</sup>

Were the government of Samoa to publish a list of cluster munition producers, this would provide a strong tool for determining whether there is an intention or knowledge that the funds will be used to finance the production of cluster munitions.

## **1.8 Switzerland**

### **1.8.1 Background**

The Swiss Confederation signed the Convention on Cluster Munitions on 3 December 2008.<sup>44</sup> On 16 March 2012 both Chambers of the Swiss parliament had accepted the ratification legislation.<sup>45</sup> In the same session the parliament approved a revision in the Federal Law on War Materiel that would incorporate a prohibition on cluster munitions and anti-personnel mines with the same provisions which entered into force on 1 January 2013.<sup>46</sup> Because Switzerland is home to many large financial institutions, many expect the law to have a major impact on how financial markets regard the cluster munitions issue.

### **1.8.2 Legislation**

The prohibition of investment in forbidden war materiel (including cluster munitions) is set out in Art. 8b and 8c, dealing with direct and indirect investment respectively.

“Art. 8b Prohibition of direct financing

1 It is prohibited to finance directly the development, manufacturing or acquisition of forbidden war materiel.

2 For the purposes of this Act following acts are considered as direct financing: the direct extension of credits, loans and donations or comparable financial benefits to cover the costs of or to promote the development, manufacturing or the acquisition of prohibited war materiel.

Art. 8c Prohibition of indirect financing

1 It is prohibited to finance indirectly the development, manufacturing or acquisition of forbidden war materiel if the intention is to bypass the prohibition on direct financing.

2 For the purposes of this Act following acts are considered as indirect financing:

- a. the participation in companies that develop, manufacture or acquire forbidden war materiel.
- b. the purchase of bonds or other investments products issued by such companies.”<sup>vii47</sup>

Art. 35b of the law stipulates the punishment of offences against the prohibition of financing.

“Art. 35b Offences against the prohibition of financing

1 Any person who intentionally and without being able to invoke the exceptions (...) violates the prohibition of financing provided under art. 8b and 8c can be punished by a custodial sentence of maximum five years or by a fine.

2 The custodial sentence can be accompanied by a fine.

3 If the offender only accommodates the possible violation of the prohibition of funding provided under art. 8b and 8c, he will not be punishable under this provision.”<sup>viii</sup>

### 1.8.3 Commentary

- **What exactly is excluded from investment?**

- The legislation prohibits to finance directly or indirectly the development, manufacturing or acquisition of forbidden war materiel (including cluster munitions). The law does not specify how to deal with (key) components.

- **What is meant by ‘investment’ or ‘financing’?**

- The law prohibits direct and indirect financing in development, manufacturing or acquisition of war material. Direct financing is described as: “the direct extension of credits, loans and donations or comparable financial benefits to cover the costs of or to promote the development, manufacturing or the acquisition of prohibited war materiel.”<sup>48</sup> Financing other activities of cluster munition producers not linked to war material is still possible. Financial flows in companies are hard to divide as they are interconnected. Only a ban on the financing of *all* activities of these manufacturers guarantees that no war material is funded.

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<sup>vii</sup> Original text:

“Art. 8b Interdiction du financement direct

1 Il est interdit de financer directement le développement, la fabrication ou l’acquisition de matériels de guerre prohibés.

2 Est considéré comme financement direct au sens de la présente loi l’octroi direct de crédits, de prêts, de donations ou d’avantages financiers comparables en vue de couvrir ou d’avancer les coûts du développement, de la fabrication ou de l’acquisition de matériels de guerre prohibés ou les frais liés à de telles activités.

Art. 8c Interdiction du financement indirect

1 Il est interdit de financer indirectement le développement, la fabrication ou l’acquisition de matériels de guerre prohibés si le but visé est de contourner l’interdiction du financement direct.

2 Est considéré comme financement indirect au sens de la présente loi:

- a. la participation à des sociétés qui développent, fabriquent ou acquièrent des matériels de guerre prohibés;
- b. l’achat d’obligations ou d’autres produits de placement émis par de telles sociétés.” Translated by Stijn Suijs, FairFin.

<sup>viii</sup> Original text: “Art. 35b Infractions à l’interdiction de financement

1 Est punie d’une peine privative de liberté de cinq ans au plus ou d’une peine pécuniaire toute personne qui, intentionnellement et sans qu’elle puisse invoquer l’une des exceptions prévues aux art. 7, al. 2, 8, al. 2, ou 8a, al. 3, enfreint les interdictions de financement prévues aux art. 8b et 8c.

2 La peine privative de liberté peut être assortie d’une peine pécuniaire.

3 Si l’auteur ne fait que s’accommoder de l’éventualité d’une infraction aux interdictions de financement prévues aux art. 8b et 8c, il n’est pas punissable au sens de la présente disposition.” Translated by Stijn Suijs, FairFin.

- According to art. 8c, indirect investments are only forbidden “if the purpose is to bypass the prohibition on direct financing.” This constitutes an exception to the prohibition which is difficult to verify. Moreover, the definition of “indirect investment” is narrowed down to shares and bonds.
- Art. 35b tries to address the problem of unintended investment: if an investor did not know he was investing in prohibited war material, he will not be sued. This could be the case e.g. with funds following an index. However, without a clear definition of “unintended”, investors could easily declare their financing is “unintended”, therefore bypassing the law.
  - **Who should not invest?**
  - The legislation applies to: “Any person who intentionally and without being able to invoke the exceptions [...] violates the prohibition.”<sup>49</sup>
  - **How is the legislation reinforced?**
  - The Swiss law defines penalties, but does not provide for supervision or monitoring tools. Any person who violates the prohibition can be punished by a custodial sentence of maximum five years or by a fine.<sup>50</sup>

## **2. DISINVESTMENT –INTERPRETIVE STATEMENTS**

Several countries have confirmed the position that investing in cluster munitions is banned under the Convention on Cluster Munitions (CCM). Australia, Bosnia and Herzegovina, Cameroon, Canada, Colombia, Croatia, the Czech Republic, the Democratic Republic of the Congo, France, Guatemala, the Holy See, Hungary, Lao PDR, Lebanon, Malta, Madagascar, Malawi, Mexico, Rwanda, Senegal, Slovenia, the United Kingdom and Zambia have defined investment as prohibited by the CCM.

### **2.1 Australia**

Australia signed the Convention on Cluster Munitions on 3 December 2008. Australia deposited its instrument of ratification on 8 October 2012 and became a State Party on 1 April 2013.<sup>51</sup> The Convention on Cluster Munitions is implemented by the Criminal Code Amendment (Cluster Munitions Prohibition) Act 2012.

The Criminal Code Amendment (Cluster Munitions Prohibition) Act 2012 does not include any provision to prohibit investments in cluster munitions.<sup>52</sup> However, on 27 October 2010, the Attorney-General explained that an example of prohibited conduct would be “where a person provides financial assistance to, or invests in, a company that develops or produces cluster munitions, but only where that person intends to assist, encourage or induce the development or production of cluster munitions by that company.”<sup>53</sup>

In March 2011, when asked about the issue again in the Australian senate, the Attorney General's Department on the Bill confirmed that "the intentional provision of financial assistance to an entity so that the entity can develop or produce cluster munitions will amount to an offence."<sup>54</sup>

### **2.2 Bosnia and Herzegovina**

Bosnia and Herzegovina signed the Convention on Cluster Munitions on 3 December 2008, ratified it on 7 September 2010, and became a State Party to the convention on 7 September 2010.<sup>55</sup>

In July 2011, the head of the department of conventional weapons of the Ministry of Foreign Affairs expressed the Ministry's view it “considers investment in the production of cluster munitions to be prohibited.”<sup>56</sup>

### **2.3 Cameroon**

The Republic of Cameroon signed the Convention on Cluster Munitions on 15 December 2009. Cameroon deposited its instrument of ratification on 12 July 2012 and became a State Party on 1 January 2013.<sup>57</sup>

On 12 May 2011 in a letter to Handicap International France, the Ministry of External Relations declared: “Cameroon [...] approves therefore [...] the prohibition on investments in cluster munitions.”<sup>58</sup>

### **2.4 Canada**

Canada signed the Convention on Cluster Munitions on 3 December 2008. Canada is in the process of adopting the required domestic legislation in order to ratify the convention. The draft

Bill S-10: An Act to implement the Convention on Cluster Munitions was approved by the cabinet in January 2012 and introduced to the parliament in February 2012. It was voted on and approved by the Senate on 4 December 2012 and had First Reading in the House of Commons on 6 December 2012.<sup>59</sup> The bill will be voted on in the House after Third Reading.

Canada's current draft implementation legislation does not contain a specific prohibition on investment in cluster munitions. However, in a debate in the Senate in May 2012, The Honorary Suzanne Fortin-Duplessis said that "under the bill it is prohibited to assist, encourage or induce anyone to engage in any prohibited activity including knowingly and directly investing in the production of cluster munitions."<sup>60</sup> On 9 July 2012, a Senior Defence Advisor from the Ministry of Foreign Affairs and International Trade stated in an email to Human Rights Watch that: "an investment that is executed with the knowledge and intention that it will encourage or assist cluster munitions production would be captured by the legislation's prohibition on aiding and abetting any primary offence."<sup>61</sup>

## 2.5 Colombia

The Republic of Colombia signed the Convention on Cluster Munitions on 3 December 2008. The ratification process is underway.<sup>62</sup>

Responding to a questionnaire by the Landmine and Cluster Munition Monitor, the Ministry of Foreign Affairs of Colombia stated on 26 March 2010 that it views "investment by any government in the production of cluster munitions"<sup>ix</sup> as prohibited under article 1(1)(c) of the CCM.<sup>63</sup>

## 2.6 Croatia

The Republic of Croatia signed the Convention on Cluster Munitions in Oslo on 3 December 2008. The Croatian parliament approved the "Law for the Ratification of the Convention on Cluster Munitions" on 5 June 2009. Croatia formally deposited its ratification with the UN in New York on 17 August 2009. It was the 16th country to ratify, and thus among the first 30 ratifications that triggered the entry into force on 1 August 2010.<sup>64</sup>

Responding to a questionnaire by the Cluster Munition Monitor, the Ministry of Foreign Affairs and European Integration of Croatia stated on 23 March 2011 that it agrees that, "investment in the production of cluster munitions is prohibited."<sup>65</sup>

## 2.7 The Czech Republic

The Czech Republic signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 22 September 2011. On 21 June 2011, president Vaclav Klaus signed Law No. 213 on the Prohibition of the Use, Development, Production, and Transfer of Cluster Munitions and their Destruction, thus completing all the necessary domestic steps to ratify the convention.<sup>66</sup>

In July 2011, the Czech Republic informed the Cluster Munition Monitor that it had not yet reached national consensus on its views on a number of important issues related to the

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<sup>ix</sup> Original text: En relación con los asuntos anteriores Colombia ha dado estricto cumplimiento al objeto y fin de la Convención de Oslo el cual en su artículo 1 establece: "Cada Estado Parte se compromete a nunca, y bajo ninguna circunstancia: ... (c) Ayudar, alentar o inducir a nadie a participar en una actividad prohibida a un Estado Parte según lo establecido en la presente Convención."

Así, en estricto cumplimiento de estas obligaciones, el Gobierno de Colombia tiene una clara posición de rechazo y prohibición absoluta de cualquier conducta encaminada .... así como la inversión por parte de cualquier gobierno en producción de municiones en racimo."

Translated by Esther Vandenbroucke, FairFin.



interpretation and implementation of the convention, including the prohibition on investment in the production of cluster munitions.<sup>67</sup> However, on 30 April 2012 the Ministry of Foreign Affairs of the Czech Republic confirmed in a letter to Human Rights Watch that the Czech Republic agrees that, “investment in the production of cluster munitions is prohibited under the Convention.”<sup>68</sup>

## 2.8 The Democratic Republic of the Congo

The Democratic Republic of the Congo (DRC) signed the Convention on Cluster Munitions on 18 March 2009. The ratification process is underway.<sup>69</sup>

In April 2012 the coordinator of the government’s National Focal Point of the Struggle Against Mines stated that the Democratic Republic of the Congo was of the opinion that the Convention on Cluster Munitions includes a prohibition on investments in the production of cluster munitions.<sup>70</sup>

### European Parliament

Even before the Convention on Cluster Munitions, there was an international consensus that cluster munitions are indiscriminate and inhumane weapons that, for that reason, should be considered illegal under humanitarian law.

One example of this view is the European Community’s concern about cluster munitions. The European Parliament adopted its *Resolution on a Mine-Free World* on 7 July 2005. This resolution explicitly addresses the role of financial institutions. It “calls on the EU and its Member States to prohibit through appropriate legislation financial institutions under their jurisdiction or control from investing directly or indirectly in companies involved in production, stockpiling or transfers of anti-personnel mines and other related controversial weapon systems such as cluster sub-munitions.”<sup>71</sup>

In October 2007, this call was repeated in the European Parliament’s resolution *Towards A Global Treaty to Ban All Cluster Munitions*. In this resolution the European Parliament calls for “an immediate moratorium on using, investing in, stockpiling, producing, transferring or exporting cluster munitions, including air-dropped cluster munitions and submunitions delivered by missiles, rockets, and artillery projectiles, until a binding international treaty has been negotiated on the banning of the production, stockpiling, export and use of these weapons.”<sup>72</sup>

## 2.9 France

The French Republic signed the Convention on Cluster Munitions on 3 December 2008. France ratified the convention on 25 September 2009 and was thus amongst the first 30 ratifications that triggered the entry into force on 1 August 2010. The convention is implemented through the Law on the Elimination of Cluster Munitions.<sup>73</sup> The French government gave an interpretive statement specifying that it understood investments in cluster munitions as being banned under the prohibition on assistance. On 6 July 2010, the Deputy Minister of Defence said in an address to the National Assembly that “any knowingly financial assistance, directly or indirectly, in the production or trading of cluster munitions would be considered as assistance, encouragement or

inducement falling within the scope of the law under criminal complicity or commission of offences under this bill. If monitoring of the implementation of the law by the National Commission for the Elimination of Anti-personnel Mines (CNEMA) shows a failure on this point, the Government would draw the appropriate conclusions, proposing to the Parliament the necessary legislative changes.”<sup>x 74</sup> After a period of inactivity, CNEMA started its work again in 2012. It has decided to look into how the disinvestment prohibition as declared by the French government is being implemented and consider possible further actions.<sup>75</sup>

## **2.10 Guatemala**

The Republic of Guatemala signed the Convention on Cluster Munitions in Oslo on 3 December 2008<sup>76</sup> and ratified it on 3 November 2010.<sup>77</sup>

On 14 May 2010, the Permanent Representative of Guatemala to the United Nations in Geneva wrote in a letter to Human Rights Watch that “– according to the interpretation of the government of Guatemala- the Convention also includes a prohibition on investments in companies that manufacture cluster munitions.”<sup>78</sup>

## **2.11 The Holy See**

The Holy See signed and ratified the Convention on Cluster Munitions in Oslo on 3 December 2008. It was one of four countries to sign and ratify the convention on the same day.<sup>79</sup>

In a statement to the First Meeting of States Parties in Vientiane, Lao PDR in November 2010 the Holy See said that, “In a world ever more globalized and interdependent, some countries produce or possess production methods or invest in the military industry, outside their national borders. It is important for the integrity of the Convention and for its application to include these investments in the list of prohibitions.”<sup>80</sup>

## **2.12 Hungary**

The Republic of Hungary signed the Convention on Cluster Munitions on 3 December 2008. After Hungary deposited its instrument of ratification on 3 July 2012, it became a State Party to the Convention on Cluster Munitions on 1 January 2013.<sup>81</sup>

In a letter dated 27 April 2011, the Minister of Foreign Affairs János Martonyi informed Human Rights Watch of Hungary’s interpretation of the convention. On disinvestment the Minister wrote, “[...] Hungary believes that the convention prohibits investment in the production of cluster munitions.”<sup>82</sup>

## **2.13 Lao PDR**

The Lao People’s Democratic Republic (Lao PDR) signed the Convention on Cluster Munitions on 3 December 2008. Lao PDR ratified the convention on 18 March 2009, the fifth country in the world and the first in Asia to do so, making it among the first 30 that triggered the entry into

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<sup>x</sup> Original text: “Concernant le financement, il est clair, dans notre esprit, que toute aide financière, directe ou indirecte, en connaissance de cause d’une activité de fabrication ou de commerce d’armes à sous-munitions constituerait une assistance, un encouragement ou une incitation tombant sous le coup de la loi pénale au titre de la complicité ou de la commission des infractions prévues par le présent projet de loi. Si les travaux de suivi de l’application de la loi par la Commission nationale pour l’élimination des mines antipersonnel, la CNEMA, amenaient à constater une insuffisance de la loi sur ce point, le Gouvernement en tirerait les conclusions qui s’imposent, en proposant au Parlement les modifications législatives nécessaires.” Translated by Esther Vandebroucke, FairFin.

force of the convention on 1 August 2010. As the most heavily affected country in the world, the support of Lao PDR was a crucial element in the success of the Oslo Process that produced the convention.<sup>83</sup>

On 1 June 2011, a Ministry of Foreign Affairs official informed Human Rights Watch of Lao PDR's interpretation of the convention, including the issue of disinvestment. "For us it is clear that we strongly support the full prohibition of cluster munitions, including those activities during the joint military operations, transiting, foreign stockpiling and investment in the production of cluster munitions."<sup>84</sup>

### **2.14 Lebanon**

The Republic of Lebanon signed the Convention on Cluster Munitions in Oslo on 3 December 2008<sup>85</sup> and ratified it on 5 November 2010.<sup>86</sup>

In a letter to Human Rights Watch, the government of Lebanon wrote, "It is the understanding of the government of Lebanon that Article /1/ Paragraph (c) of the Convention prohibits the investment in entities engaged in the production or transfer of cluster munitions or investment in any company that provides financing to such entities. In Lebanon's view, "assistance" as stipulated in Article /1/ paragraph (c) includes investment in entities engaged in the production or transfer of cluster munitions and is thus prohibited under the Convention."<sup>87</sup>

### **2.15 Madagascar**

The Republic of Madagascar signed the Convention on Cluster Munitions in Oslo on 3 December 2008.<sup>88</sup>

On 2 April 2010, Ambassador Rajemison Rakotomaharo (Permanent Representative to the United Nations in Geneva) wrote in a letter to Human Rights Watch that, "the Convention, in the opinion of Madagascar, also precludes investments in companies that produce cluster munitions."<sup>89</sup> This view was reiterated in the statement Madagascar made on the First Meeting of State Parties in Lao PDR. Madagascar stated that, "there should be no exceptions when it comes to cluster munitions, which has a negative impact on all human beings, causing unacceptable suffering, therefore any investment in cluster munitions should indeed be prohibited."<sup>90</sup>

### **2.16 Malawi**

The Republic of Malawi signed the Convention on Cluster Munitions on 3 December 2008. It ratified it on 7 October 2009, becoming the fifth African country and the 22nd in the world to ratify the convention. That placed it among the first 30 ratifications that triggered entry into force of the convention on 1 August 2010.<sup>91</sup>

On 25 March 2010, Major Dan Kuwali, director of Legal Services of the Malawi Defence Force, stated during the Africa Regional Conference on the Universalisation and Implementation of Convention on Cluster Munitions in Pretoria, South Africa that, "Malawi is of the opinion that the Convention constitutes a prohibition on the investment in producers of cluster munitions."<sup>92</sup>

## **2.17 Malta**

The Republic of Malta signed the Convention on Cluster Munitions in Oslo on 3 December 2008. Malta ratified the convention on 24 September 2009, becoming the 19th country to do so. That placed it among the first 30 that triggered entry into force of the convention on 1 August 2010.<sup>93</sup>

On 25 April 2010, the Ministry of Foreign Affairs offered its understanding of several provisions in the Convention on Cluster Munitions in an e-mail to Handicap International France. It stated that, "The policy of the Government of Malta on issues of interpretation of the Convention is guided by the need to ensure the rapid destruction of cluster munitions. With regard to investment in the production of cluster munitions, Malta interprets Article 1 (b) of the Convention on Cluster Munitions as prohibiting this activity. Malta believes that the assistance prohibition under Article 1 (c) of the Convention precludes financing and investment in corporations linked with the production of cluster munitions."<sup>94</sup>

## **2.18 Mexico**

The United Mexican States signed the Convention on Cluster Munitions on 3 December 2008 and ratified on 6 May 2009. Mexico was the seventh signatory to ratify the convention and the first from the Western Hemisphere to do so. That placed it among the first 30 ratifications that triggered entry into force of the convention on 1 August 2010.<sup>95</sup>

In a letter to Human Rights Watch dated 4 March 2009, Ambassador Juan Manuel Gómez Robledo from the Ministry of Foreign Affairs wrote that, "It is Mexico's opinion that investment for the production of cluster munitions is also prohibited by the Convention."<sup>96</sup>

## **2.19 Rwanda**

The Republic of Rwanda signed the Convention on Cluster Munitions in Oslo on 3 December 2008 and has started its ratification process.<sup>97</sup>

In a letter to Human Rights Watch on 6 April 2009, Minister Rosemary Museminali of the Ministry of Foreign Affairs and Cooperation made it known that, "any investment in the production of cluster munitions is prohibited."<sup>98</sup>

## **2.20 Senegal**

The Republic of Senegal signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 3 August 2011.<sup>99</sup>

On 3 February 2011 Colonel Meïssa Niang, Director, Control Research and Legislation of the Ministry of Armed Forces of Senegal answered in a letter to Human Rights Watch that, "Senegal considers the transfer and foreign stockpiling of cluster munitions, and investment in cluster munitions to constitute a violation."<sup>100</sup>

## **2.21 Slovenia**

The Republic of Slovenia signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 19 August 2009. Its ratification was thus among the first 30 to trigger the convention's entry into force on 1 August 2010.<sup>101</sup>

In a letter to Human Rights Watch dated 14 March 2012, the Minister of Foreign Affairs of the Republic of Slovenia confirmed that: "Slovenia has no intention to allow for investments in cluster munitions."<sup>102</sup>

## **2.22 The United Kingdom**

The United Kingdom signed the Convention on Cluster Munitions on 3 December 2008 and ratified it on 4 May 2010. The UK "Cluster Munitions (Prohibition) Act 2010" that creates criminal offenses for violation of the prohibitions of the convention received Royal Assent on 25 March 2010.<sup>103</sup>

In both Houses, debates on the Act questioned whether the financing of cluster munitions production was prohibited under the legislation. The text of the legislation does not explicitly include a prohibition on investment in, or provision of financial services to, companies involved in the production of cluster munitions. However, in response to parliamentary questions the Government issued a Ministerial Statement on 7 December 2009 confirming that, "under the current provisions of the Bill, which have been modelled upon the definitions and requirements of the convention, the direct financing of cluster munitions would be prohibited. The provision of funds directly contributing to the manufacture of these weapons would therefore become illegal."<sup>104</sup>

The legislation does not prohibit indirect financing of cluster munitions, but the government announced it intended to work with the financial industry, non-governmental organisations and other interested parties to promote a voluntary code of conduct to prevent indirect financing, and if necessary would use their right to initiate legislation.<sup>105</sup>

## **2.23 Zambia**

The Republic of Zambia signed the Convention on Cluster Munitions in Oslo on 3 December 2008. It formally deposited its instrument of ratification with the UN on 12 August 2009, becoming the 15th country to do so. That placed it among the first 30 ratifications that triggered entry into force of the convention on 1 August 2010.<sup>106</sup>

During the National Committee on Anti-personnel Landmines (NCAL) on 11 September 2009 in Lusaka, the Director of Zambia Mine Action Centre stated that, "it is the understanding of Zambia that the Convention on Cluster Munitions includes a prohibition on investments in companies that manufacture cluster munitions."<sup>107</sup>

### 3. DISINVESTMENT - PARLIAMENTARY INITIATIVES / DRAFT LEGISLATION

In some states, draft legislation has been proposed to ban investments in cluster munitions. These states have no legislation yet, so we cannot offer a commentary. Instead, we offer an update on the current state of these efforts and, where available, provide information on the draft legislation.<sup>xi</sup>

#### 3.1 Liechtenstein

The principality of Liechtenstein signed the Convention on Cluster Munitions in Oslo on 3 December 2008. The Customs Union Treaty with Switzerland stipulated that Liechtenstein could not ratify until Switzerland had concluded its implementation measures and ratified the CCM.<sup>108</sup> Liechtenstein ratified the Convention on Cluster Munitions on 4 March 2013, after Switzerland had done so on 17 July 2012.<sup>109</sup>

The import and export of goods in Liechtenstein falls under Swiss legislation as a result of the Customs Union Treaty between the two countries. Both Liechtenstein and Switzerland were required to incorporate national implementation of the Convention on Cluster Munitions in the Swiss Federal Law on War Materiel.<sup>110</sup> Switzerland amended the Federal Act on War Materiel to include a prohibition on direct and indirect investment in prohibited war materiel (including cluster munitions).<sup>111</sup>

Liechtenstein will amend its Law on War Materiel to also include a prohibition on both direct and indirect investment in prohibited war materiel (including cluster munitions).<sup>112</sup> The prohibition is set out in Art. 7b and Art 7c, dealing with direct and indirect investment respectively, and contains the same wording as the Swiss legislation.

“Art. 7b Prohibition of direct financing

1 It is prohibited to finance directly the development, manufacturing or acquisition of forbidden war materiel.

2 For the purposes of this Act following acts are considered as direct financing: the direct extension of credits, loans and donations or comparable financial benefits to cover the costs of or to promote the development, manufacturing or the acquisition of prohibited war materiel.

Art. 7c Prohibition of indirect financing

1 It is prohibited to finance indirectly the development, manufacturing or acquisition of forbidden war materiel if the intention is to bypass the prohibition on direct financing.

2 For the purposes of this Act following acts are considered as indirect financing:

- a. the participation in companies that develop, manufacture or acquire forbidden war materiel.
- b. the purchase of bonds or other investments products issued by such companies.”<sup>xii</sup>

Art. 29b of the law stipulates the punishment of offences against the prohibition of financing.

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<sup>xi</sup> Although proposed legislation is pending in the Italian senate, we choose to discuss Italy under 1.3 since the proposed law is supplemental to legislation already in force.

<sup>xii</sup> Original text:

“Art. 7b Verbot der direkten Finanzierung

1) Die direkte Finanzierung der Entwicklung, der Herstellung oder des Erwerbs von verbotenem Kriegsmaterial ist verboten.

2) Als direkte Finanzierung im Sinne dieses Gesetzes gilt die unmittelbare Gewährung von Krediten, Darlehen und Schenkungen oder vergleichbaren finanziellen Vorteilen zur Bezahlung oder Bevorschussung von Kosten und Aufwendungen, die mit der Entwicklung, der Herstellung oder dem Erwerb von verbotenem Kriegsmaterial verbunden sind.

Art. 7c Verbot der indirekten Finanzierung

1) Die indirekte Finanzierung der Entwicklung, der Herstellung oder des Erwerbs von verbotenem Kriegsmaterial ist verboten, wenn damit das Verbot der direkten Finanzierung umgangen werden soll.

2) Als indirekte Finanzierung im Sinne dieses Gesetzes gilt:

- a) die Beteiligung an Gesellschaften, die verbotenem Kriegsmaterial entwickeln, herstellen oder erwerben;
- b) der Erwerb von Obligationen oder anderen Anlageprodukten, die durch solche Gesellschaften ausgegeben werden.”

Translated by Suzanne Oosterwijk, IKV Pax Christi.

“Art. 29b Offences against the prohibition of financing

1 Any person who intentionally and without being able to invoke the exceptions (...) violates the prohibition of financing provided under art. 7b and 7c can be punished by a custodial sentence of maximum five years or by a fine by the Court.”<sup>xiii</sup>

The Amended Law on War Materiel will enter into force on 1 September 2013.

### 3.2 Norway

Norway – a driving force behind the so-called Oslo process - signed the Convention on Cluster Munitions in Oslo on 3 December 2008. It was one of the four countries that signed and ratified the convention on that same day.<sup>113</sup>

The Convention on Cluster Munitions was implemented in Norway in a separate law on cluster munitions as set out in Proposition n° 7. It has not yet been formalised.<sup>114</sup>

Proposition n° 7 has been submitted to the Odelsting, the former Norwegian lower house which existed until 2009 when Norway introduced its unicameral parliament system of the Storting. The Norwegian Ministry of Foreign Affairs has agreed that investment in companies that develop or produce cluster munitions may fall within the scope of the convention's prohibition against aiding and abetting cluster munition producers. When assessing an identically worded prohibition against aiding and abetting found in Article 1 of the Convention on Anti-personnel Landmines in 2002, the Petroleum Fund's Advisory Commission on International Law wrote "In the Advisory Commission's view, the point is that any investment of money in a company may be regarded as a form of support to the company even though the sums, relatively speaking, are small. The mere fact that the Petroleum Fund invests in a company at all, could, for example, encourage other States and investors to follow suit. And even if an investment in a company was so modest that it probably would not reach the threshold of the prohibition against States assisting in landmine production, this would probably nevertheless be covered by the alternatives “encourage or induce in a way.” Owning shares in (...) as long as the company (or its subsidiary) continues to produce anti-personnel mines, may, in the view of the Advisory Commission, therefore fall within the scope of the provision concerning aiding and abetting set out in Article 1(1)c.”

Proposition n° 7 concludes that, in the Ministry's view, this assessment is also true of the prohibition on aiding and abetting set out in the Convention on Cluster Munitions. Therefore, it cannot be excluded that private investment, for example, in companies that develop or produce cluster munitions, may be incompatible with the convention.<sup>115</sup>

The Proposition n°7 has not yet been adopted, nor discussed in Norway in recent years. Nevertheless, it seems to be used as a tool to explain the CCM in Norway.<sup>116</sup> Although it is not illegal to finance cluster munitions in Norway, the Council on Ethics of the Norwegian Petroleum Fund has taken steps to ensure that the Norwegian Government is not investing in cluster munition producers.

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<sup>xiii</sup> Original text:

“Art. 29b Widerhandlungen gegen das Finanzierungsverbot

1) Vom Landgericht wird mit Freiheitsstrafe bis zu fünf Jahren bestraft, wer vorsätzlich und ohne dass er eine Ausnahme nach Art. 6 Abs. 2, Art. 7 Abs. 2 oder Art. 7a Abs. 3 in Anspruch nehmen kann, gegen das Finanzierungsverbot nach den Art. 7b oder 7c verstösst.” Translated by Suzanne Oosterwijk, IKV Pax Christi.

## 4. RECOMMENDATIONS

Article 1(1)(c) of the Convention on Cluster Munitions states: “*Each State Party undertakes never under any circumstances to assist, encourage or induce anyone to engage in any activity prohibited to a State Party under this Convention.*” Several CCM countries have already made interpretive statements that identify investment in cluster munitions as prohibited under the CCM and/or have implemented laws that prohibit investments in cluster munitions.

Cluster munitions continue to be produced in some states that have not yet outlawed these weapons. Although States Parties to the CCM must stop producing cluster munitions, some banks and other financial institutions in or from these states may continue to fund their production by investing in corporations that manufacture them elsewhere. Financing and investing are active choices, based on a clear assessment of a company and its plans. Investing in a cluster munition producer therefore is a choice to support the development and production of these weapons that cause unacceptable harm.

Any governmental effort to oppose the unacceptable humanitarian harm that cluster munitions cause should include efforts to dry up the supply capital that funds cluster munitions production. Therefore, states should explicitly acknowledge that the treaty prohibits investments in producers of cluster munitions and should install legislation that prohibits investments in companies that develop and/or produce cluster munitions or key components thereof.

We are asking governments to:

- **Make it clear investment is banned** - States Parties to the CCM should make clear that article 1(1)(c) of the convention’s prohibition on assistance includes a prohibition on the investment in cluster munition producers.
- **Cover investment in national law** - All States Parties’ national legislation to implement the convention should include a prohibition on investments in cluster munition producers. Alternatively, for instance when the CCM has already been implemented, a separate law on this issue should be established.
- **Act now with interim steps** - Until states develop such legislation, they should give interpretative statements and/or provide clear guidelines for financial institutions.



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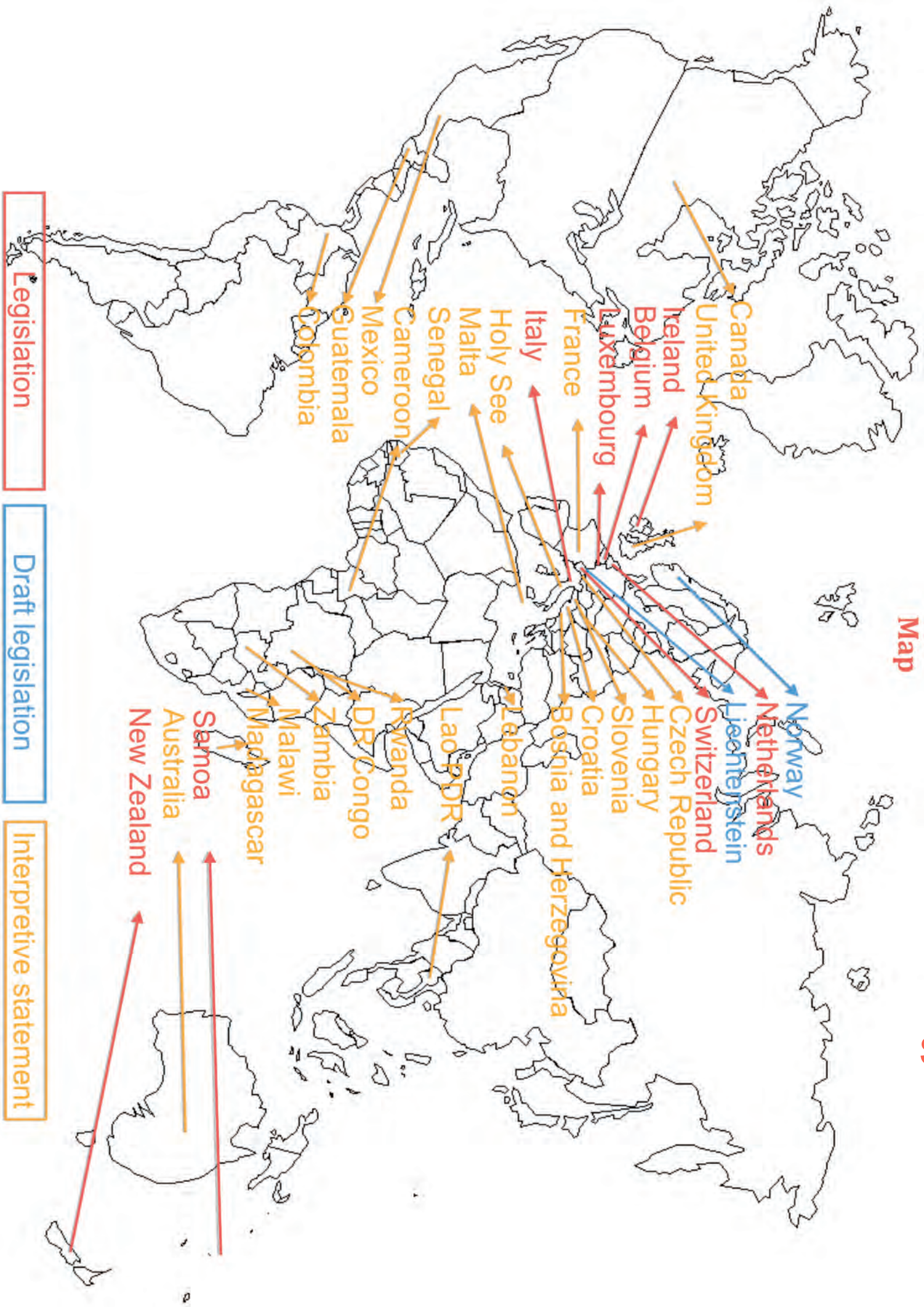


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# Map





**FairFin** promotes an environmentally and socially responsible approach to money, and strives for a just society. FairFin aims to improve the level of ethics in investment policies and to bring harmful and speculative investments to the public attention. FairFin exemplifies the positive role that money can have in society, by introducing ethical alternatives, supporting community currencies and assigning interest free loans based on crowdfunding.

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IKV Pax Christi is the largest peace organization in The Netherlands and works in over 25 countries. IKV Pax Christi is a founding member of the Cluster Munition Coalition (CMC).



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