The *Duvalier case* & FRIAA: Asset recovery in a *failed* state

C5 Fraud, Asset Tracing & Recovery
Asset recovery in Switzerland

If you can't trust a Swiss banker, then what's the world come to?

Switzerland works actively to combat the presence of illicit assets of politically exposed persons in the country. Its strategy includes preventive measures, a system for freezing assets, and measures to restore these assets to their country of origin. These measures have proven effective: Switzerland has returned some USD 1.8 billion to date, more than any other financial centre.
Haiti

- **1804:** Haitian revolution; establishment of the *Republic of Haiti*
  
  France’s recognition as a nation in exchange for 150 million francs (modern equivalent of $21 billion), reduced to 90 million in 1838

- **12 January 2010** earthquake (between 100,000 to 200,000 deaths)
  
  IMF Heavily Indebted Poor Country
Haiti – Duvalier

- **1957 – 1986**: Papa & Baby Doc
- Loans incurred during this period alone were estimated to account for approximately 40% of Haiti’s debt in 2000
- **1986**: Exile in France
- **16 January 2011**: Return to Haiti
- **18 January 2011**: Arrest on charges of corruption, theft, and misappropriation of funds during his presidency
- **4 October 2014**: Death
Switzerland – The Duvalier case

- **1986**  approx. CHF 7.5 million frozen pursuant to an MLA request from Haiti
- **2002**  Haiti unable to meet MLA requirements → political freezing by the Swiss government (renewed 4 times)
- **2008**  New MLA request and freezing
- **2010**  Failure of MLA proceedings: “failure” of the Haitian government → 12 January 2010 Swiss Federal Supreme Court order the release the assets and suggest legislative change
  - Statutory limitation for the offense of participation to a criminal organisation (Art. 260ter SCC)
  - Other acts such as assassinations, crimes against humanity are not directly at the origin of the funds
  - Suggest a legislative change
Failed State?

Criminal organisation

FRIAA

RIAA

Crimes against humanity
Art. 183(4) Cst.
“Where safeguarding the interests of the country so requires, the Federal Council may issue ordinances and rulings. Ordinances must be of limited duration.”

→ Switzerland’s interest to prevent the misuse of its financial centre
The Swiss solution II

- **RIAA (2011)**
  Act on the Restitution of the Assets Illicitly Obtained by PEPs (so-called *Lex Duvalier*)
The Swiss solution I & II – Issues

- **Insufficient legal basis** to freeze assets of **ousted** PEPs or about to be ousted
- **Insufficient** legal basis regarding the **disclosure of banking information** (banking secrecy)
- No possibility to transfer data abroad outside the framework of MLA
- Legal remedies unclear
The Swiss solution III – FRIAA (1/5)

- Act on the Freezing and Restitution of Illicitly Acquired Assets of Foreign PEPs (FRIAA) (so-called Lex Ben Ali)
- "the first of its kind in the world"
- Objective to streamline the identification, freezing, and restitution of assets embezzled by foreign PEPs deposed or about to be ousted
- Parliamentary discussion 2014 – 2016
The Swiss solution – FRIAA (2/5)

- Revolutionary legislation (no level playing field)
- Targets assets of ousted PEPs or about to be deposed
- Freezing and technical assistance outside the MLA framework and corresponding procedural safeguards such as:
  - ECHR
  - UN Pact II on Civil and Political Rights
- Strong political component
1. Freezing (Art. 3–10)

- **Provisional freezing** of PEPs’ assets
  - i. in view of an *anticipated MLA request* under certain conditions
  - ii. in case of a failed MLA request when the State of origin qualifies as a “failing State” under certain conditions (incorporation of the RIAA)
- Political condition: “If in the interest of Switzerland”
- Limited to *4 years*, renewable for a period of 1 year, but with absolute limit of 10 years
- **Disclosure obligation** for any individual or corporation holding assets of supposed PEPs or with knowledge thereof

2. Targeted measures of assistance (Art. 11–13)

- **Technical assistance**
- Transfer of information, including banking information (even outside the MLA framework and corresponding safeguards) → no ECHR / UN Pact II protection
### 3. Confiscation (Art. 14–16)

- **Independent confiscation** of PEPs assets in case the State of origin qualifies as a “failing State”
- Political condition: “*If in the interest of Switzerland*”
- **No statute of limitation**
- Exclusion of **third party rights** unless:
  - Right in rem
  - Acquired in good faith in Switzerland or abroad but has been recognised by a judgment enforceable in Switzerland

### 4. Restitution (Art. 17–19)

- **Objectives**:
  - Improve the **life conditions** in the State of origin
  - Strengthen the **rule of law** in the State of origin and assist in the fight against impunity
  - Financing **public interests programs**
  - Agreement with the State of origin failing which the Swiss government decides on the restitution
The Swiss solution – FRIAA (5/5)

FREEZING
- Pre-MLA
- Disclosure obligation
  - Assistance
    - Technical assistance
    - Transfer of information

CONFISCATION
- Failing State
  - Assets held/ Knowledge of
  - Even outside MLA procedural standards (ECHR)
  - No statute of limitation
  - Political condition
  - Exclusion of third party rights
  - Presumption illicit origin of the assets

RESTITUTION
- Public interest programs
  - Legal remedies
  - Listing/delisting
  - No compensation

The Duvalier case: asset recovery in a failed state
Switzerland – The *Duvalier* case

- **3 February 2010**: Immediate political freezing by the Swiss government until entry into force of a new Act
- **1 October 2011**: RIAA (*Lex Duvalier*)
- **29 April 2011**: Action in confiscation based → assumption *Haiti is a failed state*
- **24 September 2013**: Confiscation
Conclusion

**Plus**
- Creative
- **Consolidation** of Swiss practice and legal framework

**Minus**
- Risks for due process rights
- Imbalance regarding parties’ & third parties’ rights
- **Swiss finish**
  → Several notions undetermined or unclear
- Strong **political component**
  → Lack of predictability and legal certainty
Thank you

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