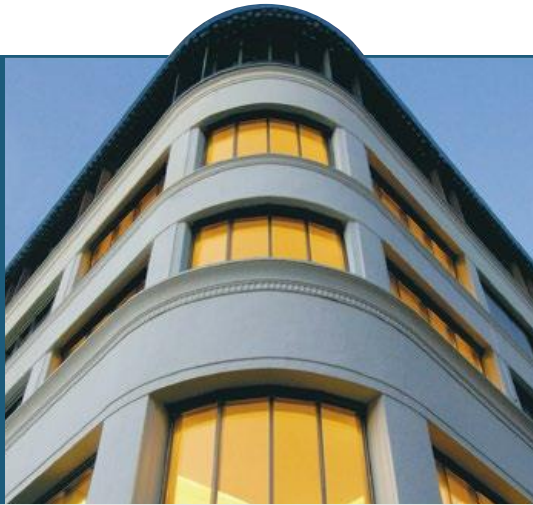


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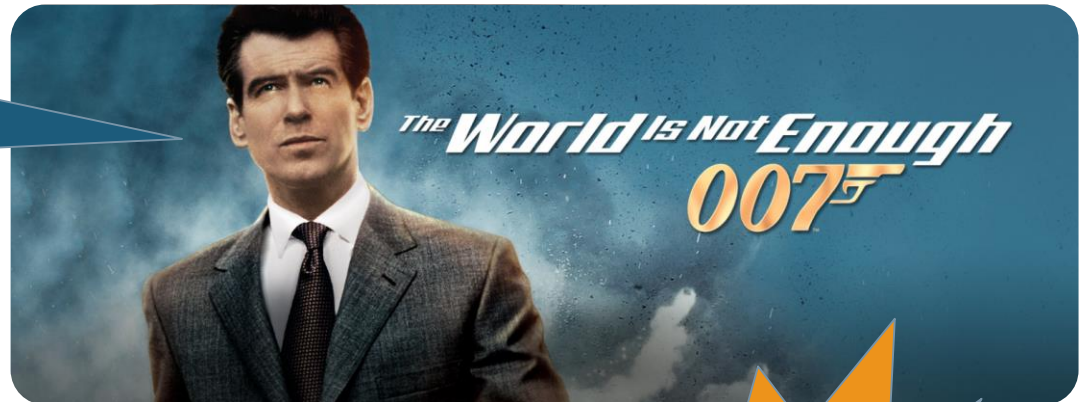
The *Duvalier* case & FRIAA: **Asset recovery in a failed state**

C5 Fraud, Asset Tracing & Recovery

Miami, 26-27 October 2015

Asset recovery in Switzerland

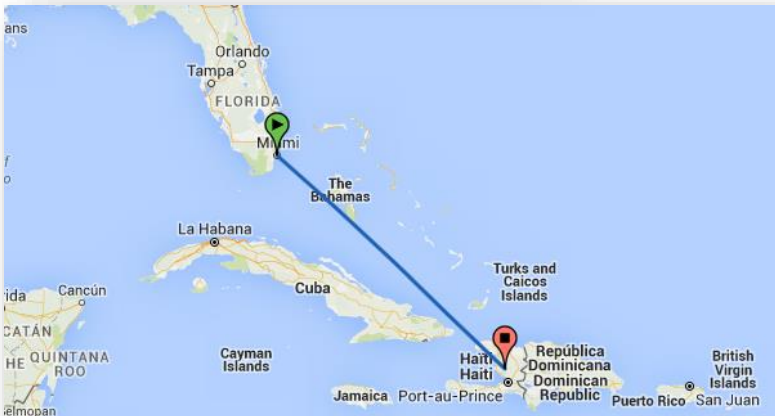
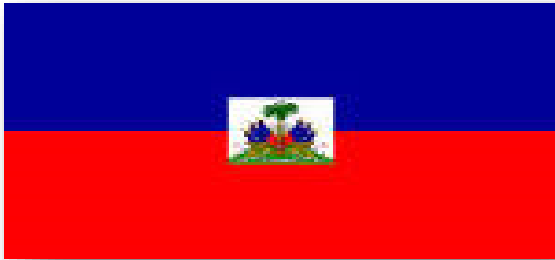
If you can't trust a Swiss banker, then what's the world come to?



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.

Failed
state?

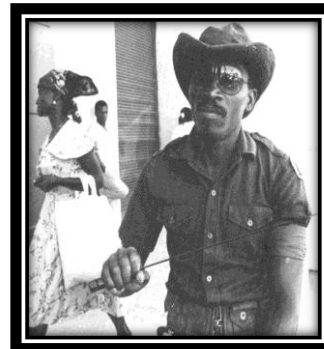
Haiti



- **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

**Criminal
organisation**

Failed State?

FRIAA



RIAA

**Crimes against
humanity**

The Swiss solution I

- **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**

The Swiss solution – FRIAA (3/5)

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**

The Swiss solution – FRIAA (4/5)

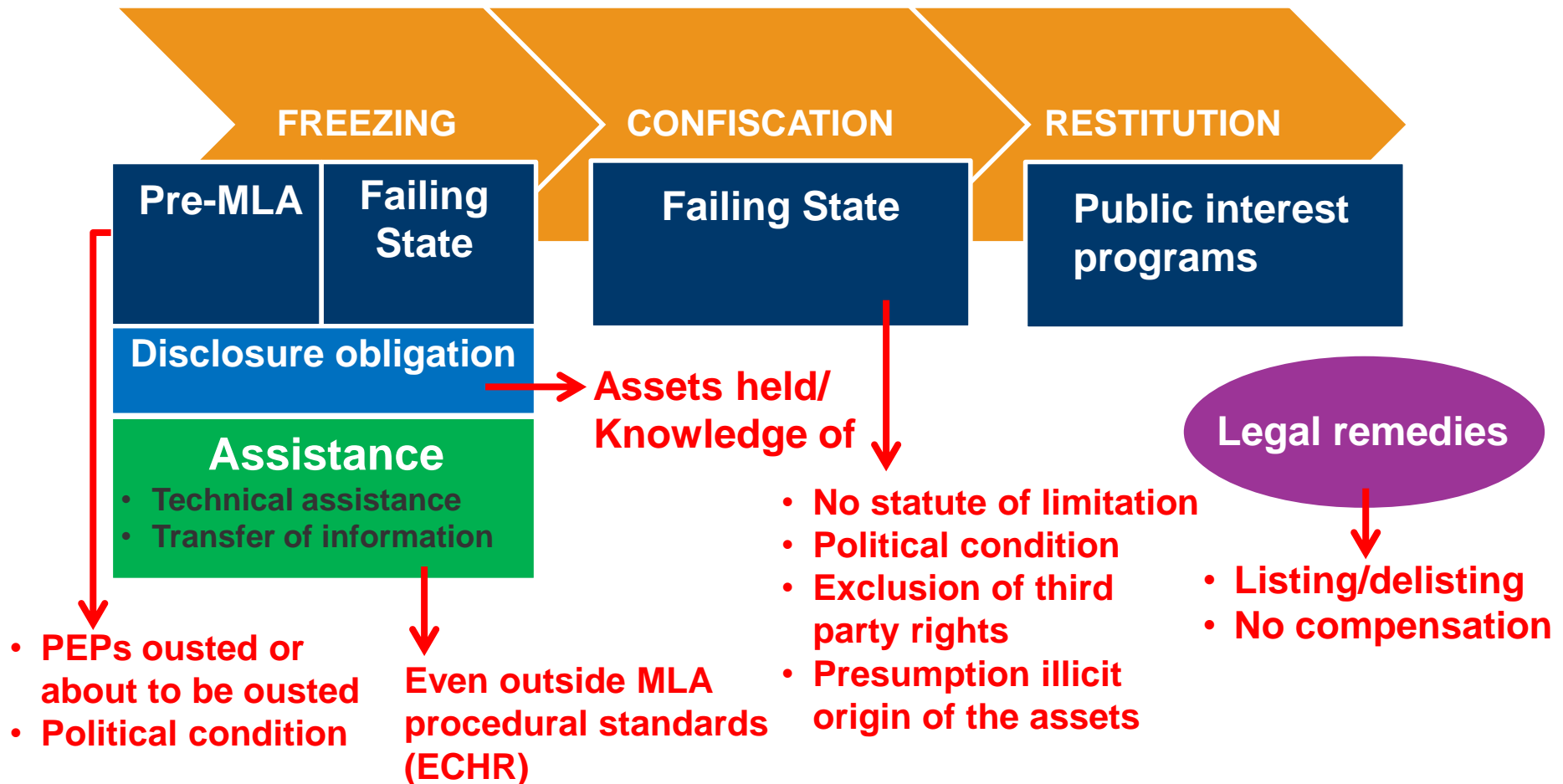
3. Confiscation (Art. 14–16)

- **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)



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

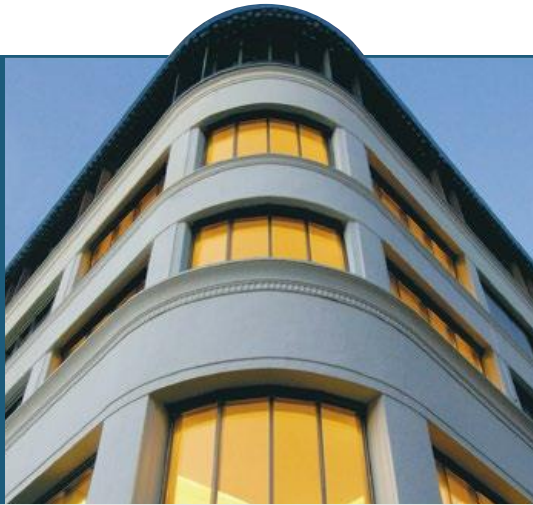
Plus

- **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

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Thank you

www.lalive.ch
sgiroud@lalive.ch