

The Restitution of Illicit Assets Act alias the *Lex Duvalier*

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SHERPA Seminar, Paris 20 June 2011



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Plan

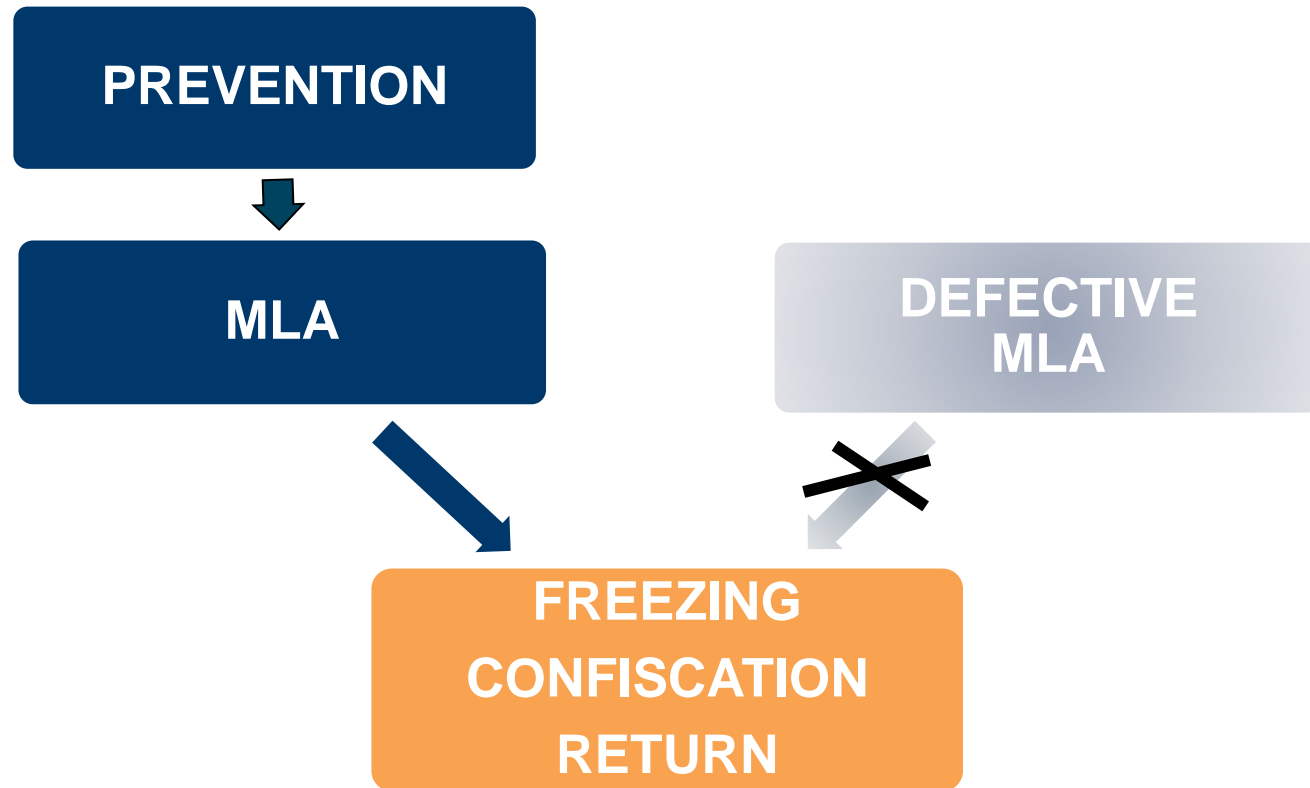
- I. The issue of “failing” states
- II. The *Duvalier* case
- III. The Swiss Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means
- IV. Conclusion

I. 1/4 – The return of kleptocrats' assets in figures

Switzerland has returned over CHF **1.7 billion** over the past **15 years** (FDFA, 2011).

Year	Country	Case	Amount returned
2002	Peru	<i>Montesinos</i>	approx. USD 93 million
2003	The Philippines	<i>Marcos</i>	approx. USD 683 million
2005	Nigeria	<i>Abacha</i>	approx. USD 700 million
2005	Angola		approx. USD 21 million
2007	Kazakhstan		approx. USD 144 million
2008	Mexico	<i>Salinas</i>	approx. USD 74 million
2010	Taiwan	<i>Chen Shui-bian</i>	approx. CHF 20 million

I. 2/4 – Swiss system regarding illicit assets



I. 3/4 – “Failure” of the requesting state

- State **unable** to satisfy the conditions set out by Swiss law for an MLA request
- “Failing” state
 - ▶ Lack of means – *Affaire Duvalier*
 - ▶ Lack of will – *Affaire Mobutu*
- Failure of the MLA leads to the lifting of the freezing on the assets, unless ...



I. 4/4 – Political Freezing

- **Art. 184 para. 3 Cst. (art. 102 ch. 8 a Cst.)**

Where safeguarding the **interests of the country** so requires, the Federal Council may issue **ordinances** and rulings. Ordinances must be **of limited duration**.

- In Switzerland's interest to have a clean financial centre

II. The *Duvalier* case

YEAR	HAÏTI	SWITZERLAND	FREEZING
1986	MLA	IMAC freezing (approx. USD 7,5 million?)	IMAC freezing
2002		Failure of the MLA procedure due to Haiti's inability to satisfy the legal requirements	Political freezing
2005 – 2008			Renewals of the political freezing
2008	New MLA		MLA freezing
2009		FOJ's decision to return the assets to Haiti	
2009		Confirmation by the SFCC	
2010		Annulment by the SSC Lifting of the freezing	Political freezing
2011		Entry into force of the <i>lex Duvalier</i>	
?		Decision of the SFAC	?
?		SCC / SFAC + SCC	?

III. 1/6 – The Restitution of Illicit Assets Act

- The Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means Restitution of Illicit Assets Act (RIAA)
- **Art. 1 RIAA**

The present Act governs the **freezing**, **forfeiture** and **restitution** of assets of **politically exposed persons** or their close associates in cases where a **request for mutual assistance** in criminal matters cannot produce an outcome owing to the **failure of state structures** in the requesting state in which the politically exposed person exercises or exercised office (country of origin).

III. 2/6 – Conditions for the freezing of assets

- At the **discretion** of the Swiss government (art. 2 RIAA)
→ **Political freezing**
- Conditions
 1. **MLA request**
 2. **Assets belonging to a PEP or persons from his/her close associates**
 3. **Failure of the state structures**
 4. **Safeguarding of Swiss interests**

III. 3/6 – Forfeiture procedure

- **At the discretion** of the Swiss government (art. 5 – 7 RIAA)
→ **Forfeiture claim**
- Conditions
 1. Assets belonging to a PEP or his/her close associates
 2. Obtained by unlawful means → **Presumption of unlawful origin**
 - i. Extraordinary increase of assets
 - ii. Level of corruption acknowledged as high
 3. Assets frozen by the Swiss government pursuant to the RIAA
- Criminal statute of limitations not applicable

III. 4/6 – Amicable settlement and third-party rights

- **At the discretion** of the Swiss government (art. 4 RIAA)
→ Mandate to the FDFA to seek an **amicable settlement**
- Rights of third-party **largely excluded** (art. 7 RIAA) except for:
 - ▶ Swiss authorities
 - ▶ People who have acquired rights *in rem* in good faith

III. 5/6 - Restitution

- **Agreement** between Switzerland and the country of origin
- Otherwise, the Swiss government shall determine the process of restitution (art. 8 – 10 RIAA)
- Objectives of the restitution
 - ▶ To improve the living conditions of the people of the country of origin
 - ▶ To strengthen the Rule of Law in the country of origin and to fight the impunity of criminals
- Restitution in the form of **financing for programmes of public interests public**

III. 6/6 Application to the *Duvalier* case?

- **Art. 14 RIAA – Transitional provisions**
 1. Assets already frozen on the commencement of this Act on the basis of a Federal Council order issued pursuant to Article 184 paragraph 3 of the Federal Constitution, because a request for mutual legal assistance in criminal matters has proven unsuccessful, shall remain frozen until a decision on their forfeiture enters into force in accordance with this Act.
- **Application to the *Duvalier* case?**

IV. Conclusion

- Switzerland is at the **forefront** of the fight against assets of illicit origin
- However, it remains an issue **essentially political**
- With **no third-party rights** such as NGO's
- Impacts the **security of law**

THANK YOU

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