

Recovery of illicitly deviated state-owned assets: How feasible is it?

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Lic. iur. LL.M. Maria Gabriela Sarmiento, Doctoral Student, Faculty of Law, Prof. K. Fach Gómez, University of Zaragoza, Spain

Guest Student, Chair for Law & Finances of Prof. K. Alexander, Faculty of Law, University of Zurich, Switzerland

1. Introduction
2. Main focus
3. Research questions
4. Hypothesis
5. Multi-methodological approach
 - Problems
6. Draft of the Ph.D. structure
7. Some provisional findings

1. Introduction

1.1 Motivation

1.3 Status of the research

1.2 University affiliation and advisory

1.4 Language

3

Grand corruption is not coming to an end. Tools and means easing the hide of foreign wealth of illicit origin are to be severely controlled and restricted. In the meantime, the traceability, the freezing, the confiscation, and restitution of assets must improve. Successfully confiscated assets could mitigate *human* damages or compensate citizens of a certain country or region (e.g. due to an exodus from countries in crisis).

Prof. Dr. Katia Fach Gómez



Universidad
Zaragoza

31 Jan. 2018:
Admission as doctoral
student, Faculty of Law,
UniZar, Spain.

Feb. 2018:
Beginning of
documental
research in
Bogota's Libraries.

March 2018:
Unizar - Student
Contract;
Director's
appointment.

May 2018:
Beginning of the
documental
research in Zurich-
based libraries.

August 2018:
Writing of first
chapter, part of a
second chapter.

Sept. - Oct. 2018:
Review of chapter.

Prof. Dr. Kern Alexander



University of
Zurich^{UZH}

Feb. 2019: Approval of
a research-stay at UZH, CH.
Start of a documental and
empirical research as guest
student.

Feb 2019:
Beginning of
survey-period,
preparation of
survey FR, EN, ES.

May 2019:
Submission of UZH
Research Report.
Continuation of
chapters' draft.

June 2019:
Presentation of
research, Doctoral
Spring Seminar,
UZH.

July 2019:
Presentation of
research, Intl'
Summer School,
UNICATT.

3

From tracing State-owned assets that are embezzled, misappropriated, stolen, looted ... to the identification, freezing, confiscation and restitution of such assets.

The retrospective research involves grand corruption, money laundering (of the proceeds of crimes), tax havens and non-cooperative jurisdiction or jurisdictions with solid bank secrecy (hiding the proceeds of crime).

- Case-studies: On one side, the Swiss (CH) offshore financial center; on the other, Venezuela's offshore assets.

The (bank-)note,
nobody wants to
spend

You have no idea
how grateful to you
one is worldwide
for this
great (bank)note!



Recovery of illicitly deviated State-owned assets?

2. Main focus - Why CH as Case-study?

Switzerland is the leader



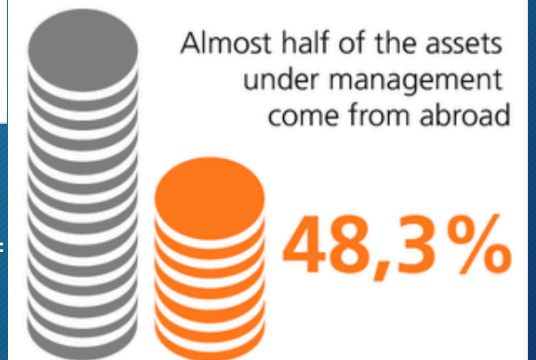
27,5%
of cross-border assets managed around
the world are managed in Switzerland

48% = CHF 3,521.93 bn. =
USD 3'454.59 bn.

CHF 7,291.8 bn



Assets under management
in Switzerland



Almost half of the assets
under management
come from abroad

48,3%

Image 01:
Sources:
mdm, Die Note, die niemand ausgeben
will, Tages-Anzeiger, 1, 1 July 2019.
Swiss Bankers Association, Report 2019

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2. Main focus

- Why VE as Case-study?

6

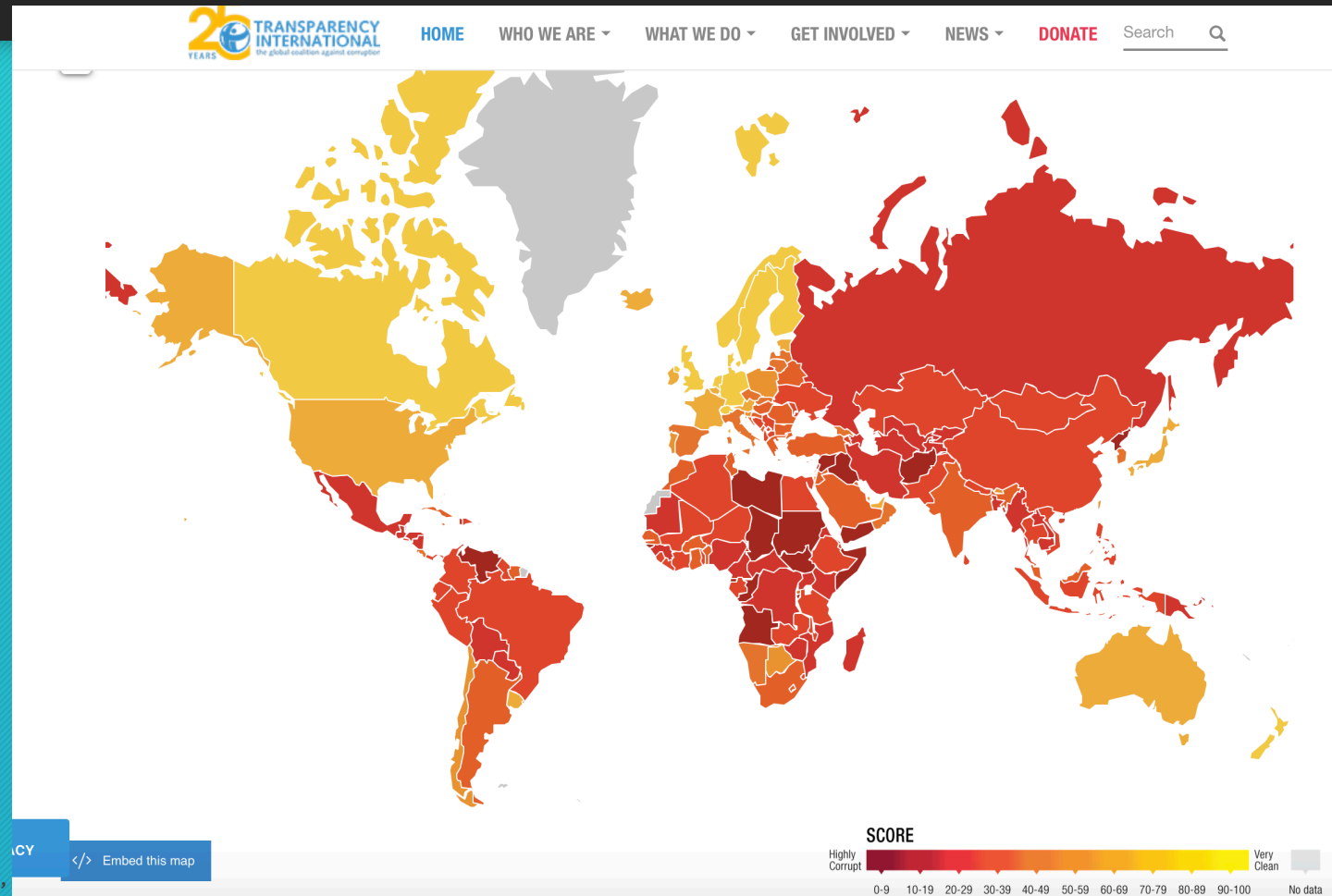


Image 02: Source: Transparency International, Corruption Index 2018

Recovery of illicitly deviated State-owned assets?

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- 3.1 How can DCs claim owned assets diverted by public officials towards CH, EU or US banks?
- 3.2 How are foreign assets of illicit origin identified, frozen, confiscated, and restituted in (CH as case-study)?
- 3.3 What is the result of the enforcement of laws on asset's restitution (CH case-study)?
- 3.4 How could foreign assets of illicit origin return to the country of origin, when the elites of governments have not changed?
- 3.5 Do DCs recover the lost patrimony?
- 3.6 What is the impact of the anti-money laundering regulations and PEPs compliance/due diligence in the financial sector (CH case-study)?

- Hypothesis 1: Difficulties to reconstitute foreign assets of illicit origin rely on the countries where the assets are originally coming from.
- Hypothesis 2. Signatory member-states of the UNCAC have adapted their internal legislation to the provisions of the convention, therefore all member-state provide spontaneous exchange of information, accept requests of mutual legal assistance on AML/grand corruption cases and reconstitute assets once the corresponding administrative or judicial procedure would have come to an end.
- Hypothesis 3. Assets restitution has been a success. The amount of restituted assets is significant.

5.1 Analytic approach. Documental research: Legislation (Swiss, international instruments, FATF Recommendations); precedents (Swiss, US); doctrine (global*); official assessments and other types of reports (Swiss and global*).

5.2 Comparative approach. *Droit comparé*:

- common and civil Laws approaches to assets recovery, AML, corruption.
- CH, EU (Ireland, Bulgaria, Italy, Malta), US, Canada ...

5.3 Empiric research: Questionnaire (in/outside CH, performed: 33; target: 50).

5.4 Investigative journalism

- OCCRP / Visual investigative scenarios.

5.5 Case-Studies:

- Switzerland (financial regulations, PEPs assets restitution, jurisprudence, cases of restitution).
- Venezuela (grand corruption of public officials).



Image 03:
Content Source: Shaarli Community, The Guardian, Finews, Tages Anzeiger, NZZ,
Le Temps, Tribune de Genève, Gotham City, Canard enchaîné,
Inside Paradeplatz, Bloomberg.

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5. Multi-Methodological approach

5.4 Investigative journalism

- OCCRP / Visual investigative scenarios

11

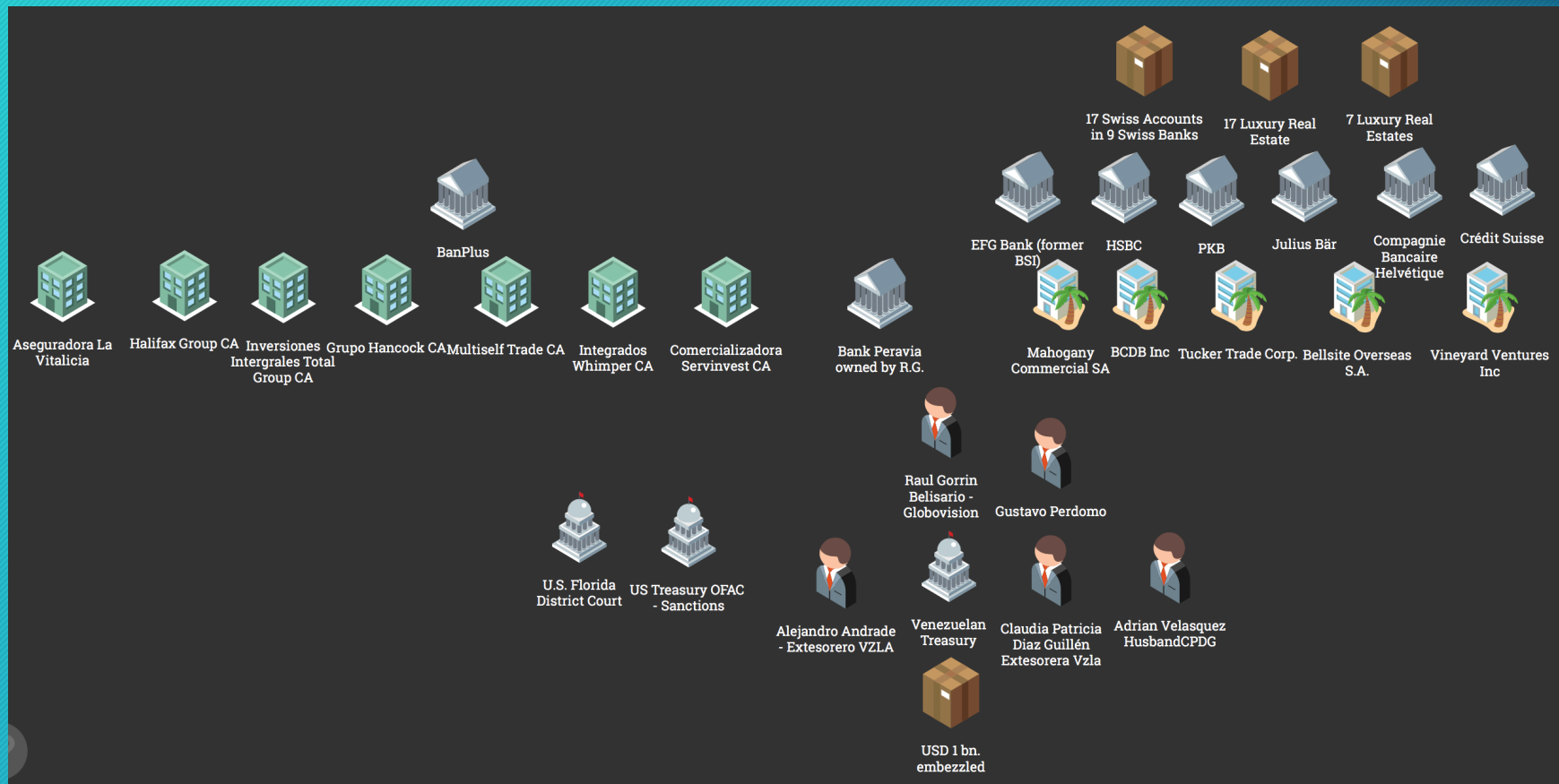


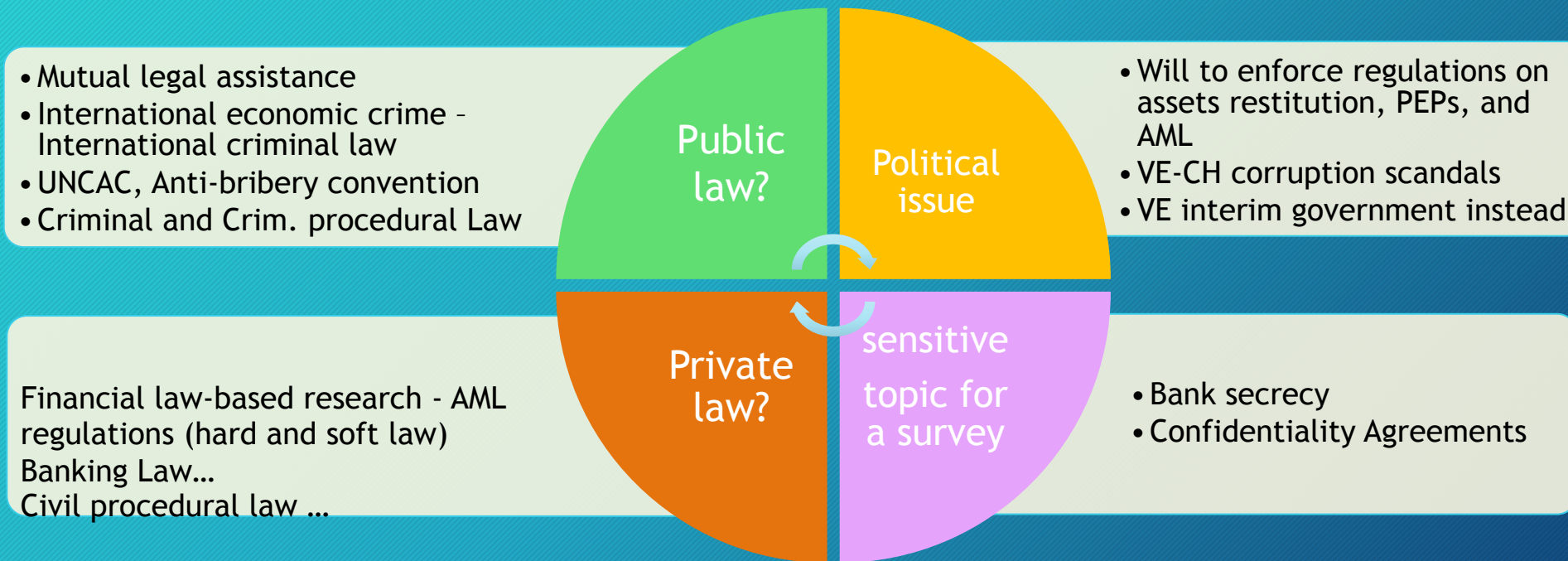
Image 04:
Source: MG Sarmiento 2019
Visual investigative scenarios tool.
Design based on press and US-based court decisions.

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5. Multi-Methodological approach - Problems

12



- 5.1 Bank havens or bank secrecy
- 5.2 Tax havens
- 5.3 Money laundering
- 5.4 Grand corruption
- 5.5 Restitution of foreign assets of illicit origin
- 5.6 Case-Studies
- 5.7 Conclusions and Proposals
- 5.8 Annex: Interviews

7. Some provisional findings - CH case-study

14



Constitutionally
guaranteed
Property Rights

There is no Common
Law- or
UNCAC-based
Im Rem Civil
Forfeiture not
requiring a previous
criminal conviction
of the owner.
However, there is
the PEP's Law

a. Justice Federal Office

Mutual Legal Assistance on Criminal Matters (EIMP Act), UNCAC
/ IPL procedure

b. Federal or Cantonal Attorney-General

Swiss Criminal Code, Criminal Procedural Code, AMLA, UNCAC /
Criminal procedure

c. Fed. Dept. Foreign Affairs/Federal Council

Art. 184.3 Swiss Federal Constitution and Swiss Federal Law on the
Freezing and the Restitution of Assets of Illicit Origin held by Foreign
Politically Exposed Persons (Subsidiary Law) / Administrative procedure

Image 06: Source MG Sarmiento 2019:
Three available Swiss procedures with specific
legal framework.

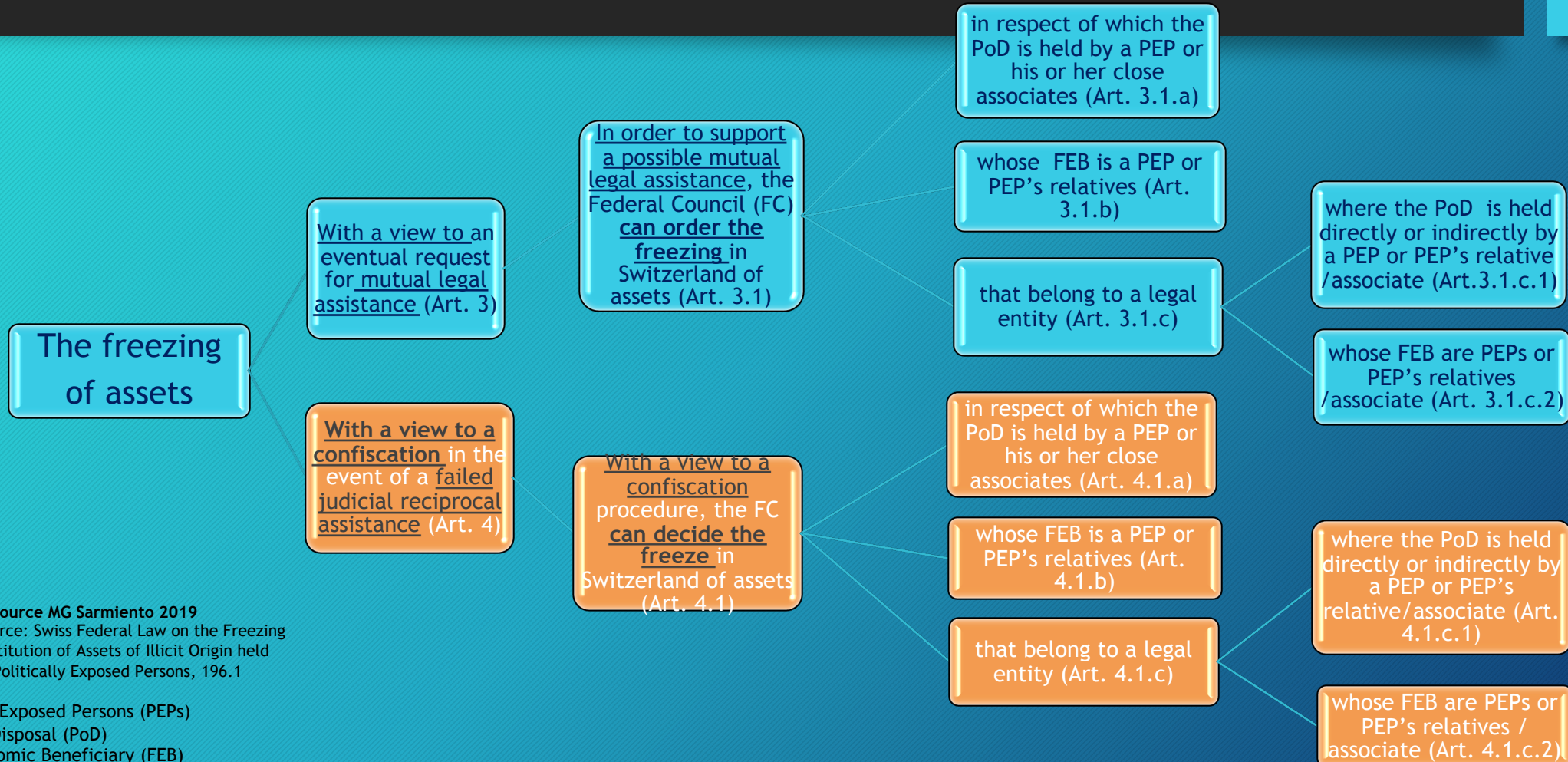
UN Anticorruption Convention (UNCAC)
International Public Law (IPL)
Anti-Money Laundering Act (AMLA)
Freezing and Restitution of Assets Act (RIAA)

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7. Some provisional findings - CH case-study

15




 The PEPs freezing & confiscation of assets

Image 07: Source MG Sarmiento 2019
Content Source: Swiss Federal Law on the Freezing and the Restitution of Assets of Illicit Origin held by Foreign Politically Exposed Persons, 196.1

Politically Exposed Persons (PEPs)
Power of Disposal (PoD)
Final Economic Beneficiary (FEB)
Federal Council (FC)

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7. Some provisional findings - CH case-study

The freezing of assets to support mutual legal assistance in the context of IMLA is admissible if:

The government of the state of origin has lost power (Art. 3.2.a) or

Some members of the government of the state of origin have lost power (Art. 3.2.a) or

A change seems inexorable (Art. 3.2.a) or

The degree of **corruption** in the state of origin is **notoriously high** (Art. 3.2.b)

It is probable that the assets have been acquired by acts:

- a. Of **corruption** (Art. 3.2.c) or
- b. **Unfair management** (Art. 3.2.c) or
- c. That constitute other crimes (Art. 3.2.c) or

The safeguard of Switzerland's interests requires freezing the assets (Art. 3.2.d)

The freezing with a view to confiscate assets in case of a failed IMLA is admissible if:

The assets have been the subject of an interim measure of seizure in the context of an IMAC -based procedure at the request of the state of origin (Art. 4.2.a)

The state of origin cannot meet the requirements of the IMAC procedure due to:

- a. Total collapse of the judicial system (Art. 4.2.b)
- b. The collapse of substantial part of the judicial system or (Art. 4.2.b)
- c. Malfunction of the judicial system (Art. 4.2.b)

The safeguard of Switzerland's interests requires freezing the assets (Art. 4.2.c)

The freezing with a view to confiscate assets in case of a failed IMLA is equally admissible if

After submitting an IMLA request, cooperation with the requesting state is excluded because there is reason to believe that the procedure in the requesting state does not comply with the procedural principles set out in article 2(a) LEIMP, provided that it is necessary to safeguard the interests of Switzerland (Art. 4.3)

 The PEPs freezing & confiscation of assets

Image 08: Source MG Sarmiento 2019,
Content Source: Swiss Federal Law on the Freezing and the Restitution of Assets of Illicit Origin held by Foreign Politically Exposed Persons, 196.1

Intl' Mutual Legal Assistance (IMLA)
Federal Act on International Mutual Legal Assistance in Criminal Matters, 351.1 (IMAC)

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Lic. iur. LL.M. Maria Gabriela Sarmiento

7. Some provisional findings

- EU and assets recovery

17



The Council of Europe
Convention on Laundering,
Search, Seizure and
Confiscation of the Proceeds
from Crime and on the
Financing of Terrorism
8.11.1990

Directive 2001/97/EC of the
European Parliament and the
Council of 4.12.2001
amending Council Directive
91/308/EEC (derogada)

Council framework decisions

2001/500/JHA
2003/577/JHA
2005/212/JHA
2006/783/JHA
2007/845/JHA

2001/500/JAI: Council
framework decision on money
laundering, the identification,
tracing, freezing, seizing and
confiscation of
instrumentalities and the
proceeds of crime 26.06.2001

Directive 2014/42/EU of the
European Parliament and
Council of 3.4.2014 on
the freezing and confiscation of
instrumentalities and proceeds
of crime in the EU (Replace
2001 and 2005 framework
decision)

7. Some provisional findings

- EU and assets recovery

18



Civil claims brought to French court by an NGO in representation of countries

UK, Denmark, FR and the NL permit value-based post-conviction confiscation.

In D, IT, Finland, and Sweden post-conviction confiscation of criminal proceeds is mandatory.

7. Some provisional findings

- UK, US, CA and assets recovery

19



Non-conviction based (in rem)
asset confiscation.
Shifting the burden
of proof

7. Some provisional findings - CH case-study

20

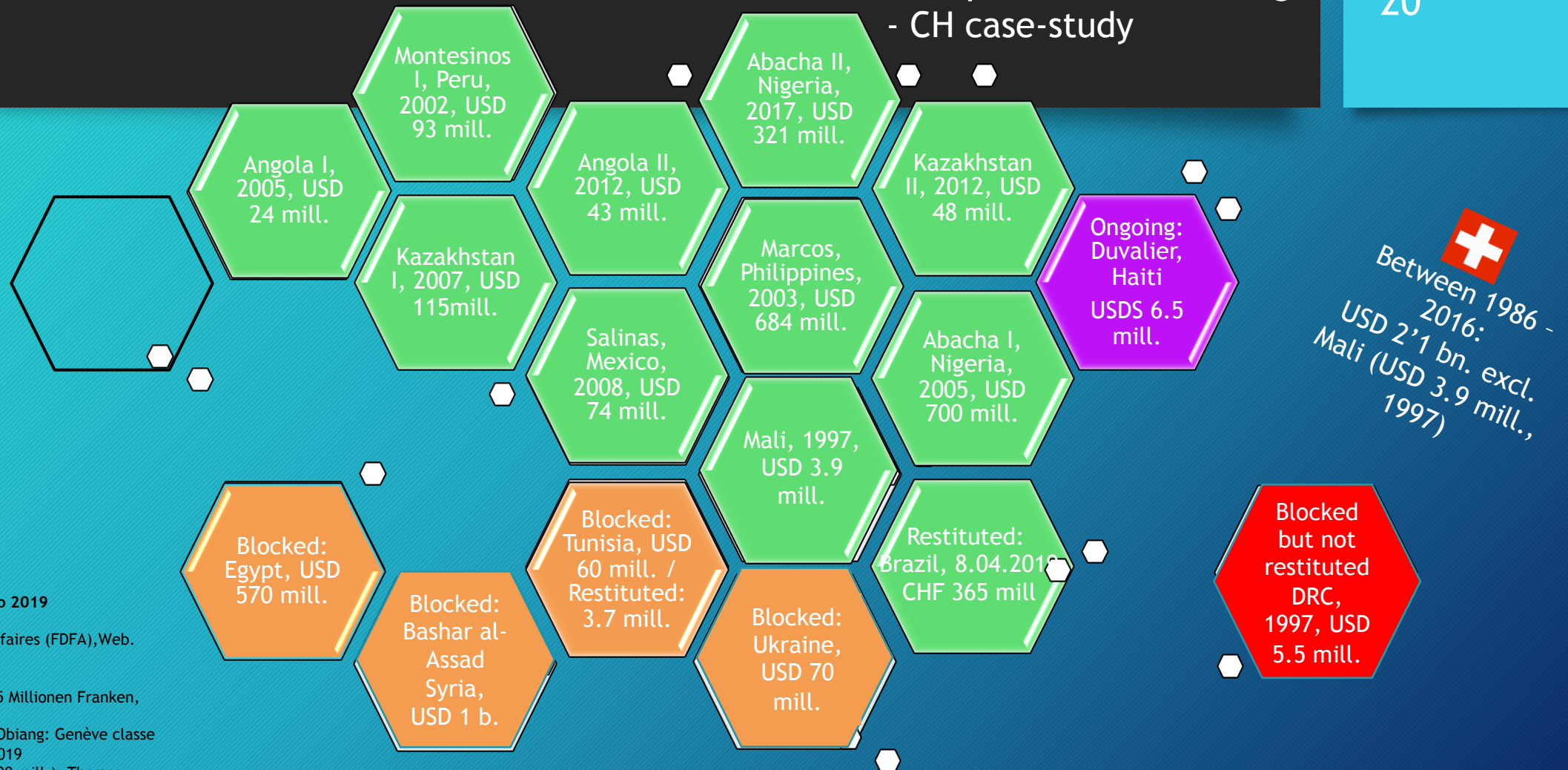


Image 09: Sources MG Sarmiento 2019

Most cases source:

- Swiss Fed. dept. of foreign affairs (FDFA), Web.

Specific cases sources:

- Tunisia: FDFA.

- Brazil: yr, Brasilien erhält 365 Millionen Franken, NZZ, 10 April 2019.

- Equatorial Guinea: Teodorin Obiang: Genève classe l'affaire, *Gotham City*, 8.2.2019

- Uzbekistan (Karimova, CHF 800 mill.): Thomas Knellwolf, Christian Brönnimann, Das System Quetsch kollabiert, *Basler Zeitung*, 26 April 2019

Recovery of illicitly deviated State-owned assets?

Lic. iur. LL.M. Maria Gabriela Sarmiento

7. Some provisional findings - CH case-study

21

Between 1986 - 2017
USD 2'108'500'000.00
excluding Mali.

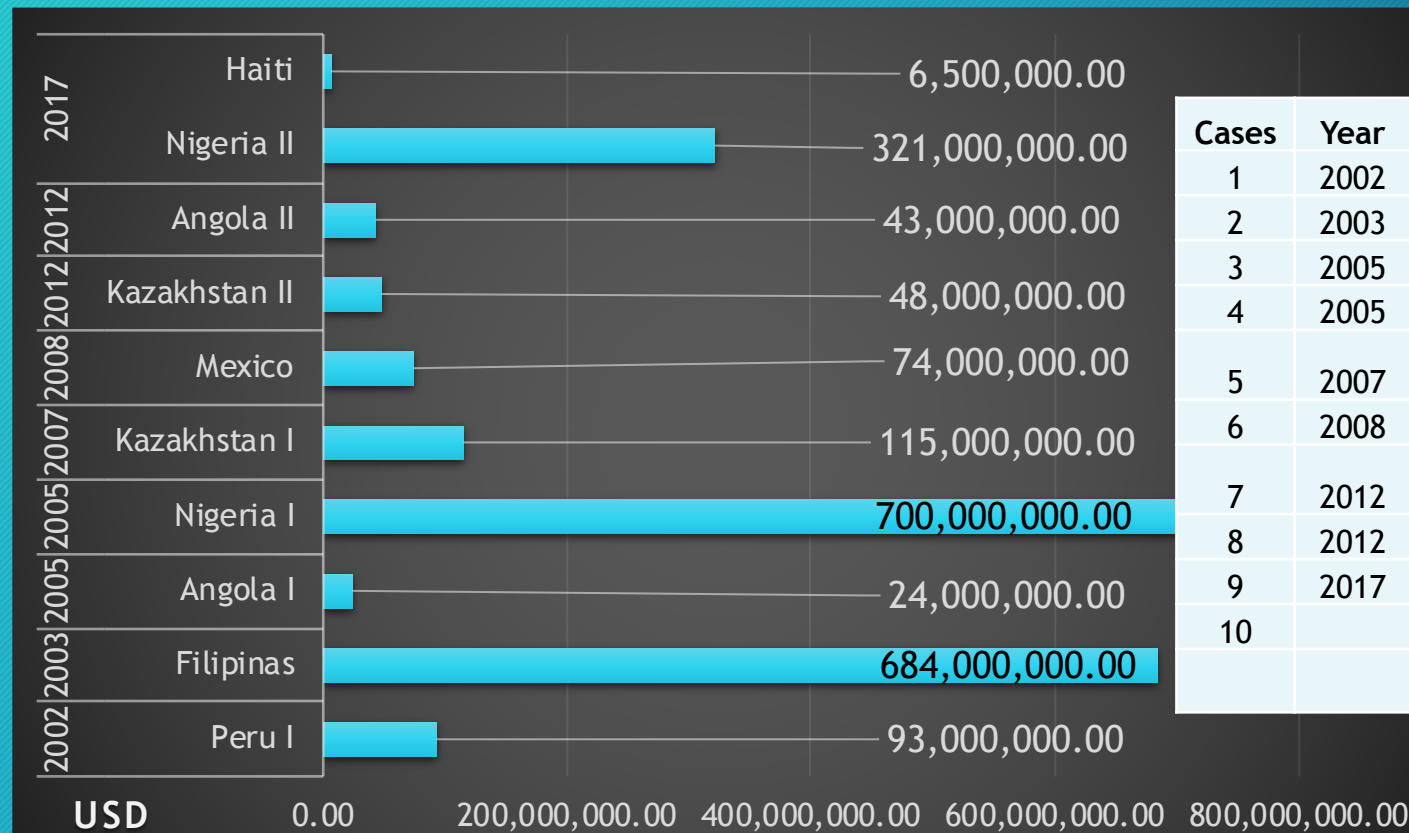


Image 10: source MG Sarmiento 2019.
Source Content: FDFA Web.

7. Some provisional findings - CH case-study

22

The average between USD 20 - USD 40 is USD 30 bn. This is the average sum of annual stolen assets in DCs.

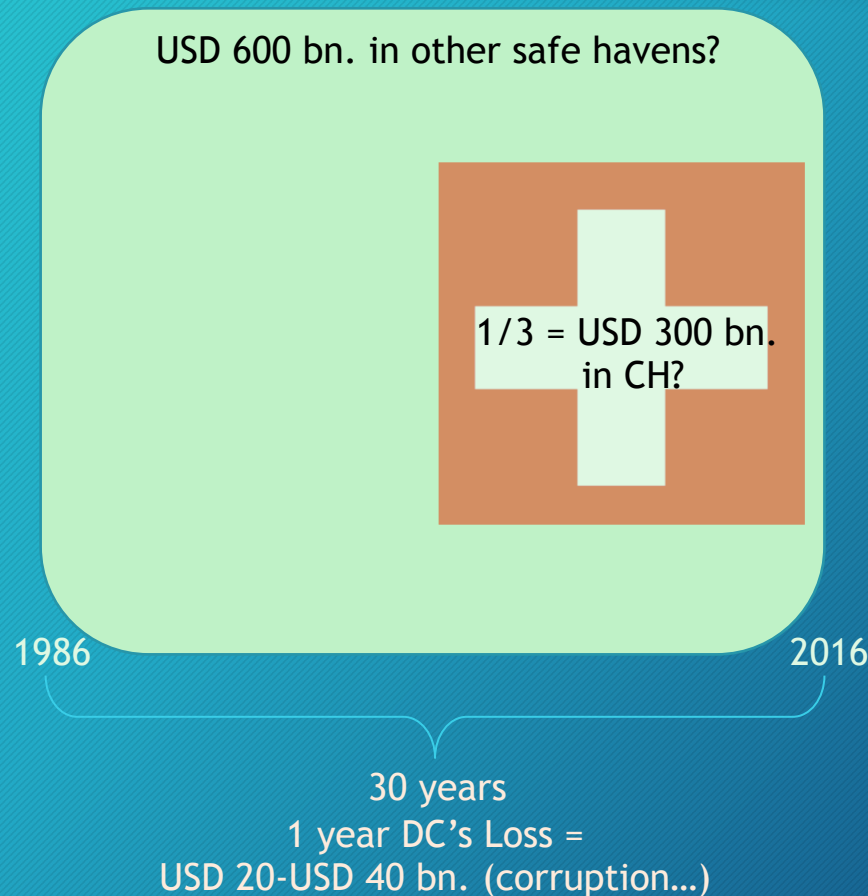
In 30 years, approx. USD 900 bn. have disappeared from DCs.

1/3 of the world's offshore wealth is managed by the CH financial centre.

1/3 of the USD 900 bn. stolen assets is USD 300 bn.

Image 11: Sources MG Sarmiento 2019.
Source content: FDFA/EDA, World Bank Statistics, The BCG, and Zucman.

Developing Countries (DCs)



Not-scientifically proved assumption:
In 30 years, USD 300 bn. stolen assets might have entered the CH financial centre.

In 30 years, CH has restituted USD 2.1 bn.

USD 2.1 bn. is 0.7% of USD 300 bn.

USD 2.1 bn. is 50% of all assets restituted worldwide.

Thank you for your attention.

Critics are highly in demand.

*Volunteers to participate to the survey
are very much welcome!*