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Bill C-61: The Freezing Assets of Corrupt Foreign Officials Act

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Legislative Summary of Bill C-61

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Any substantive changes in this Legislative Summary that have been made since the preceding issue are indicated in **bold print**.

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LEGISLATIVE SUMMARY OF BILL C-61: THE FREEZING ASSETS OF CORRUPT FOREIGN OFFICIALS ACT

1 BACKGROUND

On 3 March 2011, the Government of Canada introduced in Parliament Bill C-61, An Act to provide for the taking of restrictive measures in respect of the property of officials and former officials of foreign states and of their family members (Freezing Assets of Corrupt Foreign Officials Act). The bill received Royal Assent on 23 March 2011.

Bill C-61 establishes the powers of the Governor in Council to respond to requests from a foreign state that is in political turmoil or in an uncertain political situation, allowing Canada to take action to seize, freeze or sequester property that has been inappropriately obtained or misappropriated from the foreign state by such designated persons as current or former heads of state, government ministers and officials, military officers or judges.

1.1 THE INTERNATIONAL POLITICAL CONTEXT: TURMOIL IN THE MIDDLE EAST

A dramatic political transformation has been under way in North Africa and parts of the Middle East since January 2011. On 14 January, President Zine al-Abidine Ben Ali, whose autocratic rule of Tunisia had lasted for 23 years, was forced to quickly resign and flee the country in the face of growing popular unrest. The events in Tunisia served as a catalyst for further revolt across the region, most notably in Egypt and Libya. Mass protests began on 25 January 2011 in central Cairo against the authoritarian rule, since 1981, of President Hosni Mubarak. President Mubarak relinquished power on 11 February, handing over full authority for the country's affairs to the national army. Pro-democracy protests have continued in Egypt, and the political situation there remains unsettled. Since that time, protests against the rule of Colonel Moammar Gadhafi, in power since a coup in 1969, have flared in eastern Libya, centred on the city of Benghazi. In the crackdown on protests, reports have emerged of serious human rights abuses and violence committed by Gadhafi's security regime.

On 26 January, the transitional government in Tunisia issued an international arrest warrant for former president Ben Ali and six of his relatives. He is accused of illegally removing money from Tunisia in the course of his flight from power. A number of Mr. Ben Ali's relatives were reportedly in Canada. According to one media report, "Sources have previously told *The Globe and Mail* that members of the Ben Ali clan, accused of using their influence to amass billions, have between \$10 million and \$20 million in assets in Canada."¹

On 26 February 2011 the United Nations Security Council passed a unanimous resolution specifying actions against the Libyan regime.² On 27 February, the Government of Canada announced that it was implementing these measures,

including a freeze on the assets of Moammar Gadhafi and his children, through regulations under the *United Nations Act*.³ In addition, Canada announced that it was taking additional action under the *Special Economic Measures Act*,⁴ including “an asset freeze on, and a prohibition of financial transactions with the Government of Libya, its institutions and agencies, including the Libyan Central Bank.”⁵ It has been reported that Canada froze an estimated \$2.3 billion in assets belonging to Moammar Gadhafi, his family and the Libyan government.

The Minister of Justice, the Honourable Rob Nicholson, told the House of Commons Standing Committee on Foreign Affairs and International Development that the authorities in states in situations of internal turmoil or democratic transition

may not be able to gather the evidence required to use existing Canadian legal mechanisms that govern asset restraint and recovery. ... The information and evidence required by Canada may simply not be made available in time to prevent the assets from being diverted or depleted. The Freezing Assets of Corrupt Regimes Act would permit a freezing order without requiring the evidence of criminality or specific identification of assets that now exist under current law.⁶

In a departmental news release, Minister of Foreign Affairs Lawrence Cannon has stated, “Recent developments in the Middle East and North Africa have shown the world how important it is to have legislation in place to allow for a quick response to ensure that foreign dictators cannot hide their ill-gotten wealth in our country.”⁷

2 DESCRIPTION AND ANALYSIS

This summary describes key provisions in Bill C-61 and highlights selected aspects of the bill. It also reviews a number of other Canadian laws that already permit the freezing or seizing of assets and property in Canada that are in the possession or control of foreign nationals or persons acting on behalf of those foreign nationals, though these other laws do not necessarily address the same types of international circumstances as Bill C-61.

2.1 DEFINITIONS (CLAUSE 2)

Clause 2(1) sets out definitions of eight terms contained within the bill. Of note is the definition of “foreign state,” which is a state other than Canada, and includes:

- any of its political subdivisions;
- its government and any government departments, or the government or departments of a political subdivision; and
- any agencies of its government or of its political subdivisions.

This broad definition may give rise to a situation where competing requests are made to the Government of Canada for action to be taken pursuant to the proposed legislation by different subdivisions within a foreign state, or where it is unclear whether a requesting body should be considered to have the authority to make the request.

The “Minister” defined within the meaning of the bill is the minister of Foreign Affairs. The definition of “politically exposed foreign person” is explained in the following section.

2.2 ORDERS AND REGULATIONS (CLAUSES 4 TO 7)

Clauses 4 through 6 detail the orders and regulations that may be made by the Governor in Council (i.e., the Cabinet of the Government of Canada) pursuant to the proposed legislation. Clause 4 includes several preconditions that must be met. Clause 4(1) states that a foreign state must have requested in writing that the Government of Canada freeze the property of a particular individual. The foreign state must also “assert” in writing to the Government of Canada that the person “has misappropriated property of the foreign state or acquired property inappropriately by virtue of their office or a personal or business relationship.” A strict interpretation of this wording implies that the property in question does not necessarily need to be either state property or property acquired by virtue of an “office,” but could simply be property acquired “inappropriately” because of “a personal or business relationship.”

Clause 4(2)(a) requires that the Governor in Council must be satisfied that the “person” who is the subject of the request is a “politically exposed foreign person.”⁸ Subsection 2(1) defines such a person as someone who holds or has held – or those who due to personal, business or family relationships are closely associated with a person who holds or has held – one of the following offices in the foreign state:

- head of state or government;
- member of the executive council of government or member of a legislature;
- deputy minister or equivalent;
- ambassador or attaché or counsellor of an ambassador;
- military officer with a rank of general or above;
- president of a state-owned company or a state-owned bank;
- head of a government agency;
- judge;
- leader or president of a political party represented in a legislature; or
- holder of any prescribed office or position.

The definition makes no distinction between politically exposed foreign persons who reside abroad and those who are resident in Canada.

Clause 4(2) sets out two other preconditions: the Governor in Council must be satisfied that there is “internal turmoil, or an uncertain political situation, in the foreign state,” and that the order or regulation to be made must be in “the interest of international relations.” The vagueness of this clause was flagged as potentially problematic during hearings before the House of Commons Standing Committee on Foreign Affairs.⁹

If all preconditions are met, the Governor in Council may make orders or regulations in accordance with clauses 4(1)(a) and (b) and 4(3). These include orders that any of the identified person's property situated in Canada be "seized, frozen or sequestrated." The bill does not contain provisions for the disposal, confiscation, transfer, forfeiture or other conversion of the property once seized, frozen or sequestrated. Presumably, such further steps could proceed in accordance with other legislation.

The Governor in Council may also make orders or regulations to restrict or prohibit certain activities either inside or outside Canada, including any direct or indirect dealings with the person's property and any financial transactions or services in relation to the property.

Clause 6 ensures that orders or regulations cease to have effect five years after they come into force unless a new order is made to extend them. Every order or regulation must be tabled in each House of Parliament within 15 days of being made (clause 7).

The Governor in Council may exclude by individual, or class of persons, any person, property or transaction from being subjected to an order or regulation made under the proposed legislation (clause 4(4)).

Clause 5 permits the minister of Foreign Affairs to provide a permit (and revoke it if necessary) to any person to allow him or her to carry out any of the activities that are restricted or prohibited under clause 4.

2.3 DUTIES TO DETERMINE OR DISCLOSE (CLAUSES 8 AND 9)

Clause 8 imposes on a list of selected "entities" an obligation to determine continually whether they are in possession or control of property that they believe to be that of a politically exposed foreign person subjected to an order or regulation made under clause 4. The list includes banks, credit unions, insurance or loan companies, companies engaging in the business of foreign exchange, and other companies operating further to certain listed pieces of legislation or prescribed by any regulation under the proposed legislation.

Clause 9 places a general obligation on every Canadian and person in Canada to disclose to the Commissioner of the Royal Canadian Mounted Police if they have knowledge of any property in their possession or control, or information regarding any transaction in respect of property, which is subject to an order or regulation under clause 4. So long as such disclosure is made in good faith, no criminal or civil proceedings may be initiated against them.

2.4 OFFENCES (CLAUSES 10 TO 12)

Clause 10 sets out a number of offences for wilful contraventions¹⁰ of any order or regulation made under clause 4 or of the duty to disclose in clause 9. The penalties for a person found guilty are either imprisonment for a maximum of five years on an

indictable offence, or a fine of \$25,000 and a maximum of one year of imprisonment on summary conviction.

Clauses 11 and 12 provide details regarding court proceedings. Clause 11(1) specifies that an offence may be tried by a court having jurisdiction at the place in Canada where the offence was committed or where the person who is charged lives or works when the proceedings begin. Clause 11(2) provides that where a Canadian is alleged to have committed an offence outside Canada, Canadian courts will have extraterritorial jurisdiction to try the person. Clause 12 specifies that court proceedings may begin only with the consent of the Attorney General of Canada.

2.5 RIGHTS OF PERSONS WHO ARE SUBJECT TO AN ORDER OR REGULATION (CLAUSE 13)

Clause 13 sets out a procedure whereby persons subject to orders or regulations under clause 4 could apply for reconsideration of their status. The reconsideration process could be used only to contest whether the individual falls within the definition of a “politically exposed foreign person.” The bill does not provide an avenue by which a person could apply for reconsideration based on the contention that the initial requests from the foreign state or the assertions therein are unjustified.

If the minister finds that there are reasonable grounds to believe that the individual in question is not a “politically exposed foreign person,” the minister would then have to recommend to the Governor in Council that orders or regulations relating to the person be repealed or amended (clause 13(2)).

2.6 APPLICATIONS FOR A CERTIFICATE (CLAUSES 14 AND 15)

Clause 14 addresses the possibility of cases of mistaken identity. This clause would allow the minister to issue a certificate stating that a particular person is not subject to regulations or orders under clause 4, following an application from the individual.

Clause 15 would allow individuals subject to orders and regulations to apply to the minister for a certificate to exempt certain property, if that property is necessary to meet the reasonable expenses of the person or their dependants.

The bill does not provide any mechanism for review or appeal of the minister’s decisions regarding these recommendations or certificates, or in relation to permits issued under clause 5 allowing a person to carry out a specified activity or transaction (or class of activities or transactions) which would otherwise be prohibited. However, existing judicial review mechanisms would apply (see the “Commentary” section, below).

2.7 GENERAL CLAUSES (CLAUSES 16 TO 19)

Clauses 16 to 19 pertain to general matters. Clause 16 would protect persons from civil liability as long as they act reasonably in taking or omitting to take measures to comply with any order or regulation under clause 4. Clause 17 states that regulations and orders under the bill would not affect any existing secured and unsecured rights

in property seized or frozen. According to clause 18, an order or regulation under the bill would not prevent proceedings regarding the property under other legislation, such as the *Mutual Legal Assistance in Criminal Matters Act* or the provisions relating to seizure of proceeds of crime under the *Criminal Code*. Finally, clause 19 would empower the Governor in Council to make regulations under the bill.

2.8 FIVE-YEAR REVIEW (CLAUSE 20)

The House of Commons Standing Committee on Foreign Affairs and International Development amended Bill C-61 to require a comprehensive review of provisions and operations of the bill and of the *Special Economic Measures Act* to be undertaken by committees of both the House of Commons and the Senate within five years.

2.9 COMPARATIVE REVIEW OF LEGISLATION PERMITTING THE FREEZING OF ASSETS OF FOREIGN NATIONALS

The following Canadian laws may allow for the freezing or seizing of assets and property in Canada that are in the possession or control of foreign nationals, or persons acting on their behalf, in certain contexts or situations.

2.9.1 THE *SPECIAL ECONOMIC MEASURES ACT* AND THE *UNITED NATIONS ACT*

The *Special Economic Measures Act* (SEMA) permits the Governor in Council to make orders or regulations to impose economic sanctions against other states in two general sets of circumstances: “for the purpose of implementing a decision, resolution or recommendation of an international organization of states or association of states, of which Canada is a member, that calls on its members to take economic measures against a foreign state” and “where the Governor in Council is of the opinion that a grave breach of international peace and security has occurred that has resulted or is likely to result in a serious international crisis.” The SEMA further permits the Governor in Council to order that property in Canada belonging to a foreign state, to persons in that foreign state, or to nationals of that foreign state who are not ordinarily residing in Canada, be seized, frozen or sequestered.¹¹ Unlike Bill C-61, therefore, the SEMA does not apply to the property of persons residing in Canada.

The precondition of a “grave breach of international peace and security” having taken place or being likely to occur has been used to justify sanctions against states based on their governments’ records of human rights violations, according to statements made by the Department of Foreign Affairs and International Trade (DFAIT).¹² For example, in addition to the measures against Libya discussed above, the Governor in Council has imposed sanctions against Burma through the *Special Economic Measures (Burma) Regulations*¹³ and against Zimbabwe through the *Special Economic Measures (Zimbabwe) Regulations*.¹⁴

The *United Nations Act* also allows for the Governor in Council to make orders and regulations regarding any measures taken by the United Nations Security Council under section 41 of the *Charter of the United Nations* that Canada is legally bound to

implement.¹⁵ Section 3(2) allows “any property dealt with contrary to any order or regulation made under this Act” to be seized and made liable to forfeiture.

Recent measures required by the Security Council targeting Moammar Gadhafi and members of his family were implemented under the *United Nations Act*.¹⁶ Canada has imposed sanctions against Iran through the *Regulations Implementing the United Nations Resolutions on Iran*¹⁷ under the *United Nations Act* as well as the *Special Economic Measures (Iran) Regulations*¹⁸ under the SEMA.¹⁹ Following Security Council Resolutions 1267(1999) and 1373(2001),²⁰ the assets of listed individuals and entities have been frozen in Canada under the *United Nations Afghanistan Regulations*²¹ and the *United Nations Suppression of Terrorism Regulations*.²²

Details of the specific sanctions and asset freezes being imposed are included in the regulations to these Acts. Schedules to the regulations provide the names of “designated persons” and organizations or entities to which Canadians may not provide financial services, and with which they may not undertake financial transactions or deal in property or goods. Regulations and orders under the *United Nations Act*, in contrast to the provisions of the SEMA and Bill C-61, may be annulled by resolutions of both the House and the Senate within 40 days after they are laid before Parliament.²³

Like Bill C-61, the SEMA was created to deal specifically with certain international political situations where it is deemed necessary to seize property or freeze assets expeditiously. The SEMA allows for broader economic sanctions to be taken,²⁴ but both may restrict certain dealings with the property or assets of identified foreign nationals and allow the minister of Foreign Affairs to make exceptions and permit a person to carry out an otherwise prohibited activity. Neither the bill nor the law contains provisions that deal with the forfeiture, confiscation, disposal or transfer of the seized property.

The preconditions required in the SEMA do not specifically address situations where a state is in political turmoil or uncertainty or, perhaps more significantly, where property has been misappropriated by a person who is no longer in the position of power that they held (i.e., as a head of state, government official, judge, military officer, etc.) or who is no longer connected to a political regime that is still in power. This being said, if the United Nations or other international organization to which Canada belongs specifically calls for economic measures to be taken against a state in political turmoil, then the SEMA and the *United Nations Act* may provide for action to be taken.

2.9.2 CRIMINAL LAW

The *Criminal Code*,²⁵ the *Mutual Legal Assistance in Criminal Matters Act*,²⁶ and the *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*²⁷ are all laws that allow for property and assets, including any financial instruments or currencies being exchanged, to be seized. The intent of Bill C-61, unlike that of these laws, is not to deal with criminal matters, though ultimately criminal proceedings could flow from the types of situations addressed by the bill.

2.9.2.1 *CRIMINAL CODE*

The *Criminal Code* allows for the seizure, detention and forfeiture of property that is either related to a criminal offence or is considered to be proceeds of crime. Further to sections 462.3–462.5, where it is satisfied on a balance of probabilities that the property in question is proceeds of crime and that the designated offence was committed in relation to that property, the court may order the forfeiture of such property to the Crown. The term “proceeds of crime” is further defined under section 462.3(1) as being:

any property, benefit or advantage, within or outside Canada, obtained or derived directly or indirectly as a result of

(a) the commission in Canada of a designated offence, or

(b) an act or omission anywhere that, if it had occurred in Canada, would have constituted a designated offence.

According to this section, proceeds of crime may therefore be confiscated in Canada for crimes committed outside Canadian jurisdiction so long as the crime in question would also constitute a designated offence in Canada.

Section 462.31 makes the laundering of the proceeds of crime a criminal offence. In other words, a person who knowingly obtains, transfers, alters, disposes of or otherwise deals with any proceeds of crime with the intent to conceal or convert that property is guilty of an offence under the Code.

Other *Criminal Code* provisions allow for the forfeiture of “offence-related” property²⁸ other than proceeds of crime (such as in sections 490.1 and 491.1) and of property “owned or controlled by or on behalf of a terrorist group” or that has been used to “facilitate or carry out a terrorist activity” (as in section 83.14(1)). Similarly, other *Criminal Code* provisions are designed to address such crimes as theft, fraud, or robbery and extortion that, assuming Canadian jurisdiction can be established, may allow for criminal proceedings to be undertaken with regard to the misappropriation of property.²⁹

2.9.2.2 *MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS ACT*

The primary purpose of the *Mutual Legal Assistance in Criminal Matters Act* is to promote cooperation among states by establishing a system for exchanging information and evidence. It grants Canadian courts powers to issue such compulsory measures as subpoenas and search warrants that would permit Canadian authorities to obtain evidence in Canada on behalf of a foreign state, for use in a criminal investigation and/or prosecution being conducted by that state. It also allows for the restraint or seizure of property in Canada when a request is either presented to the minister of Justice by the International Criminal Court (see section 9.1) or by another state or an entity listed in the schedule to the Act (see section 9.3).

The minister may authorize the Attorney General of Canada, or an attorney general of a province, to make arrangements for the enforcement of the order. The attorney

general must first be satisfied that the person has been charged with an offence within the jurisdiction of the state or other designated entity and that the offence would be an indictable offence if it were committed in Canada.

2.9.2.3 *PROCEEDS OF CRIME (MONEY LAUNDERING) AND TERRORIST FINANCING ACT*

The *Proceeds of Crime (Money Laundering) and Terrorist Financing Act* (PCMLTFA) enacts measures that may be taken to assist in the investigation and prosecution of *Criminal Code* offences pertaining to the laundering of proceeds of crime and the financing of terrorist activities in Canada or by Canadians. It places obligations on certain financial services providers and other persons or entities who “engage in businesses, professions or activities that are susceptible to being used for money laundering or the financing of terrorist activities.” These bodies must establish record-keeping practices and report suspicious financial transactions. Those to whom the law applies are set out in section 5 in a list that is largely similar to the one set out in clause 8 of Bill C-61. There is one notable omission from Bill C-61, however: entities authorized under provincial legislation to engage in dealings in financial instruments other than securities, such as derivatives, will not necessarily be subject to discovery obligations. This omission has the potential to be significant, because existing legislation may not subject dealers in other financial instruments to reporting requirements that are as onerous as those placed on securities dealers.³⁰ Such entities could, however, be added as a prescribed class of entity by regulation under clause 8(k) of Bill C-61.

The PCMLTFA also establishes the Financial Transactions and Reports Analysis Centre of Canada to receive the reported information and to take certain actions to assist with existing government efforts to combat money laundering and the financing of terrorist organizations. Sections 18 through 23 establish procedures for the seizing and forfeiture of any imported or exported currency or monetary instruments that were not properly reported in accordance with the Act. Review, appeal and third party claim procedures for any seized assets are included in sections 24 through 35.

The term “politically exposed foreign person,” which is used in Bill C-61, also appears in section 9.3 of the PCMLTFA. The list of individual office-holders contained in the PCMLTFA definition is identical to that found in clause 2(1) of the bill. A divergence between the Act and the bill occurs in the definition of persons whose activities connected with their property may be restricted or prohibited. Only family members who are specifically designated by regulations are included in the PCMLTFA definition, whereas the definition in Bill C-61 also includes other persons who, for personal or business reasons, are or were closely associated with a politically exposed foreign person. The broadening of this definition in Bill C-61 significantly increases the number of people who could be affected by orders under the legislation.

3 COMMENTARY

Because of the speed with which this bill was passed by Parliament, there was little opportunity for external comment on its provisions. This section will review some of the key issues raised in debate on the bill.

3.1 RECONSIDERATION AND REVIEW OF MEASURES UNDER THE BILL

During hearings before the House of Commons Standing Committee for Foreign Affairs and International Development, there was discussion regarding the lack of an evidentiary basis for measures under clause 4 of the bill, as well as the due process protections – including ministerial reconsideration and judicial review – for persons who would be subject to them. The bill’s powers were described as “unprecedented” on the basis that they could allow for the discretionary freezing of all property of persons in Canada, as well as the seizure of such property, without any requirement that a foreign state furnish the evidentiary basis for its request. These concerns were reflected in the committee’s amendment requiring a review of the bill by committees of the House of Commons and the Senate five years after it comes into force (discussed above).

In testimony before the committee, the Minister of Justice and Attorney General of Canada, the Honourable Rob Nicholson, and the Minister of Foreign Affairs, the Honourable Lawrence Cannon, both confirmed that ministerial actions taken under the bill, including decisions taken under the ministerial reconsideration process, would be subject to judicial review.³¹

Section 18.1 of the *Federal Courts Act*³² provides for the right to apply to the Federal Court for judicial review. Simply put, judicial review is a process under which the courts can review the decision of an administrative decision maker, such as a board, tribunal or minister.³³ If a court determines that the decision maker made an error, by, for example, failing to observe a principle of natural justice or procedural fairness; basing a decision on an erroneous finding of fact; or acting without jurisdiction or in any other way that was contrary to law, then the Court may,³⁴ in accordance with section 18.1:

- order the decision maker to do any act or thing it has unlawfully failed or refused to do, or has unreasonably delayed in doing; or
- declare a decision, order, act or proceeding of the decision maker to be invalid or unlawful, quash it, set it aside, or set it aside and refer it back for determination in accordance with any directions that the Court considers to be appropriate.

3.2 INTERNATIONAL COMPARISONS

In response to inquiries by members of the committee, a senior official from DFAIT indicated that the United States, the European Union and Switzerland all have the ability to freeze quickly the assets of politically exposed foreign persons without requiring an evidentiary basis.³⁵

3.2.1 UNITED STATES

The United States is able to freeze assets through the use of legally binding Executive Orders which set out the details for the administration of sanctions under legislation passed by Congress. Congress may set out the steps the President of the United States of America is required to take, or it may grant the President discretionary powers in responding to certain circumstances.³⁶

The *International Emergency Economic Powers Act* (IEEPA),³⁷ which was enacted on 28 October 1977, used in conjunction with the *National Emergencies Act*³⁸ and other legislation, has allowed presidents to order embargoes, block transactions, freeze assets and confiscate property to deal with national emergencies. Since the purpose of the IEEPA is to allow the President to handle an emergency in the United States precipitated by international events, the IEEPA does not require a request from a foreign state, a resolution of the United Nations Security Council or the commission of serious human rights violations before an Executive Order can be made. Like the system proposed under Bill C-61, Executive Orders under the IEEPA to freeze or otherwise restrict dealings in assets do not require an evidentiary basis, although the President is required to report the exercise of these powers to Congress. The IEEPA also contains an exception for transactions related to maintenance and the payment of living expenses.

Using this legislative framework, U.S. President Barack Obama issued an Executive Order freezing the assets of certain members of the Libyan Government and their family members on 25 February 2011, prior to the issuance of the United Nations Security Council's Resolution 1970 (2011)³⁹ imposing sanctions on Libya.⁴⁰ The Executive Order freezes a wide range of assets of listed individuals and permits certain property to be exempted from the freeze. The Executive Order relating to Libya does not permit the confiscation of assets. Additional persons may only be listed if the secretary of state determines that they meet the criteria set out in the Executive Order. The secretary of the treasury, in consultation with the secretary of state, has the power to determine if the asset freeze is no longer warranted, but the measures do not automatically expire.⁴¹

The *Comprehensive Iran Sanctions, Accountability, and Divestment Act* of 2010⁴² also implements sanctions, asset freezes and other similar economic measures through the issuance of Executive Orders.

3.2.2 THE EUROPEAN UNION

Member states of the European Union (EU) may be required to freeze assets pursuant to Decisions and regulations made by the Council of the European Union under Article 29 of the *Treaty on European Union*⁴³ and Article 215 of the *Treaty on the Functioning of the European Union*.⁴⁴ EU Decisions and regulations are legally binding on member states and do not require further domestic legislation before they can be implemented.⁴⁵

Under this legal framework, the EU has recently issued Decisions and regulations in respect of Tunisia,⁴⁶ Libya⁴⁷ and Egypt.⁴⁸ The Decision and regulations in relation to

Libya were taken pursuant to United Nations Security Council Resolution 1970 (2011), but no such United Nations resolution was required in order to allow the issuance of a Decision and regulations relating to Tunisia or Egypt. Only the EU's legal actions relating to Tunisia and Egypt are discussed here, since these are most similar to the regime contemplated under Bill C-61.

The EU Decisions regarding certain Tunisian and Egyptian persons do not require an evidentiary basis before assets can be frozen. Certain exemptions are permitted and limitations on liability for compliance apply.⁴⁹ The EU Decisions and regulations specify the grounds for listing each person whose assets are frozen.⁵⁰ Unlike regulations and orders that would be authorized under Bill C-61, the EU regulations regarding certain Tunisian and Egyptian persons do not appear to authorize the seizure of assets, and their operation is not triggered by a request from a foreign state (although the political decision to issue a Council of the European Union Decision on a particular matter may be the result of such a request). The EU regulations allow persons whose assets have been frozen to submit observations and have their listing reviewed by the Council.⁵¹ Legal acts of the Council, as defined in the *Treaty on the Functioning of the European Union*, are also subject to judicial review by the European Court of Justice.⁵²

3.2.3 SWITZERLAND

Switzerland passed legislation in October 2010 aimed at permitting the freezing, forfeiture and restitution of the unlawfully obtained assets of a foreign state's senior officials and their close associates.⁵³ The legislation applies only when the judicial system of the country in question is unavailable or has wholly or substantially collapsed.⁵⁴ In hearings before the House of Commons committee, this legislation was cited by a senior official from DFAIT as being "very similar" to that proposed in Bill C-61.⁵⁵

Like Bill C-61, the Swiss legislation requires a formal request from a foreign state before assets may be frozen. The law allows the executive branch of the Swiss federal government, the Federal Council, to order the freezing of assets for up to 10 years without requiring the production of the full range of evidence that would need to be obtained through the foreign state's judicial processes under Swiss mutual legal assistance legislation. This power is subject to appeal in the Swiss Federal Administrative Court.⁵⁶

The requirement in the Swiss legislation that a requesting state's judicial institutions be unavailable or in a state of collapse is taken from Article 17(3) of the *Rome Statute of the International Criminal Court*.⁵⁷ The criterion is designed to exclude "a general political or economic value judgement" and requires a specific evaluation of whether the requesting state is able to conduct criminal proceedings that would satisfy the requirements of Swiss law.⁵⁸

Both the Swiss statute⁵⁹ and the bill would apply to assets owned by a similar range of high-ranking persons. Bill C-61, however, also includes, within the ambit of "politically exposed foreign person," a residual category for the "holder of any

prescribed office or position.” This means that the bill’s provisions have the potential to apply to a larger number of persons (clauses 4(2)(a), 2(1)(h) and 2(1)(j)).

The Swiss legislation also provides powers of forfeiture over assets, but this power can only be exercised following an order of the Swiss Federal Administrative Court. The Swiss legislation permits forfeiture if a rebuttable presumption that the property was unlawfully obtained can be established.⁶⁰ The Swiss legislation also contains provisions governing the restitution to foreign states of unlawfully obtained assets forfeited under the Act. These provisions are designed to ensure that any assets returned are used to improve the living conditions of people, to strengthen the rule of law or to fight the impunity of criminals in the country of origin.⁶¹

NOTES

1. Campbell Clark and Tu Thanh Ha, “[Ottawa expedites special law to freeze foreign assets](#),” *The Globe and Mail*, 3 March 2011.
2. [United Nations Security Council Resolution 1970 \(2011\)](#), UN Doc. S/Res/1970 (2011) [UNSC Res. 1970], 26 February 2011.
3. [United Nations Act](#), R.S.C., 1985, c. U-2.
4. [Special Economic Measures Act](#), S.C. 1992, c. 17.
5. Prime Minister of Canada, “[Statement by the Prime Minister of Canada on implementing sanctions against Libya](#),” Ottawa, 27 February 2011. See also Foreign Affairs and International Trade Canada [DFAIT], [Libya: Overview](#).
6. House of Commons, Standing Committee on Foreign Affairs and International Development, [Evidence](#), 3rd Session, 40th Parliament [FAAE], 7 March 2011, 1535 (Honourable Rob Nicholson, Minister of Justice and Attorney General of Canada).
7. DFAIT, “[Harper Government Introduces Freezing Assets of Corrupt Regimes Act](#),” News release, No. 89, 3 March 2011.
8. As set out later in this paper, the term “politically exposed foreign person” is also used in section 9.3 of the [Proceeds of Crime \(Money Laundering\) and Terrorist Financing Act](#), S.C. 2000, c. 17.
9. FAAE (2011), 1630–1635 (Honourable Bob Rae, MP for Toronto Centre).
10. The Supreme Court of Canada has held, in relation to the breach of a judicial order, that the word “wilful” “stresses intention in relation to the achievement of a purpose.” See [R. v. Docherty](#), [1989] 2 S.C.R. 941. See also [R. v. Klundert](#) (2004), 242 D.L.R. (4th) 644 (Ont. C.A.), paras. 43–54.
11. [Special Economic Measures Act](#), s. 4(1).
12. DFAIT, [Burma \(also Known as Myanmar\)](#).
13. [Special Economic Measures \(Burma\) Regulations](#), SOR/2007-285.
14. [Special Economic Measures \(Zimbabwe\) Regulations](#), SOR/2008-248. See also DFAIT, [Zimbabwe](#).
15. The United Nations Security Council may pass resolutions that are binding on UN Member member states in accordance with “[Chapter VII: Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression](#)” in the *Charter of the United Nations*.

16. UNSC Res. 1970 (2011); Prime Minister of Canada (2011); and DFAIT, *Libya: Overview*.
17. [Regulations Implementing the United Nations Resolutions on Iran](#), SOR/2007-44.
18. [Special Economic Measures \(Iran\) Regulations](#), SOR/2010-165.
19. DFAIT has explained that Canada imposed these sanctions because “Iran continues to violate its international obligations by ignoring successive UN Security Council resolutions to cooperate fully with the International Atomic Energy Agency (IAEA) and suspend its enrichment-related activities.” DFAIT, [Sanctions against Iran](#).
20. United Nations Security Council, [Resolution 1267 \(1999\)](#), U.N. Doc. S/Res/1267 (1999), 15 October 1999, establishing the Al-Qaida and Taliban Sanctions Committee; and United Nations Security Council, [Resolution 1373 \(2001\)](#), UN Doc. S/Res/1373 (2001), 28 September 2001, establishing the Security Council Counter-Terrorism Committee. For more information on the listing process, the relevant legal framework and the activities of these committees, see United Nations Security Council, “[Security Council Committee established pursuant to resolution 1267 \(1999\) concerning Al-Qaida and the Taliban and Associated Individuals and Entities](#)”; and United Nations Security Council, “[Security Council Counter-terrorism Committee](#).”
21. [United Nations Al-Qaida and Taliban Regulations](#), SOR/99-444.
22. [Regulations Implementing the United Nations Resolutions on the Suppression of Terrorism](#), SOR/2001-360.
23. *United Nations Act*, s. 4(2).
24. Prohibited activities are set out in the regulations. See, for example, *Special Economic Measures (Burma) Regulations* and [Special Economic Measures \(Burma\) Permit Authorization Order](#), SOR/2007-286; [Special Economic Measures \(Iran\) Regulations](#) and [Special Economic Measures \(Iran\) Permit Authorization Order](#), SOR/2010-166; *Special Economic Measures (Zimbabwe) Regulations* and [Special Economic Measures \(Zimbabwe\) Permit Authorization Order](#), SOR/2008-249.
25. [Criminal Code](#), R.S.C., 1985, c. C-46.
26. [Mutual Legal Assistance in Criminal Matters Act](#), R.S.C., 1985, c. 30 (4th Supp.).
27. [Proceeds of Crime \(Money Laundering\) and Terrorist Financing Act](#), S.C. 2000, c. 17.
28. “Offence-related property” is defined under section 2 of the *Criminal Code* as any property, inside or outside Canada:
 - (a) by means of or in respect of which an indictable offence under this Act or the *Corruption of Foreign Public Officials Act* is committed,
 - (b) that is used in any manner in connection with the commission of such an offence, or
 - (c) that is intended to be used for committing such an offence.
29. *Criminal Code*, ss. 322–334 (theft); ss. 343–346 (robbery and extortion); or ss. 380–396 (fraud).
30. For an overview of the regulation of derivatives in Canada, see Expert Panel on Securities Regulation, Appendix 5, “[The Regulation of Derivatives in Canada](#),” in *Creating an Advantage in Global Capital Markets: Final Report and Recommendations*, Department of Finance Canada, January 2009.
31. FAAE (2011), 1600 (Honourable Rob Nicholson, Minister of Justice and Attorney General of Canada) and 1620 (Honourable Lawrence Cannon, Minister of Foreign Affairs). See also the evidence at 1550 (Mr. Allan H. Kessel, Legal Adviser, Department of Foreign Affairs and International Trade).

32. [Federal Courts Act](#), R.S.C., 1985, c. F-7.
33. Section 18.1 of the *Federal Courts Act* refers to a “federal board, commission or other tribunal,” which is defined in section 2(1) to include “any ... person ... having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament.” It is well established that section 18.1 applies to the exercise of ministerial discretion. See [Canada v. Addison & Leye Ltd.](#), [2007] 2 S.C.R. 793.
34. In [Canada \(Citizenship and Immigration\) v. Khosa](#), [2009] 1 S.C.R. 339, para. 36, Justice Binnie, for the majority, stated that “the language of s. 18.1 generally sets out threshold grounds which permit but do not require the court to grant relief.” The standards against which ministerial and other administrative decisions will be reviewed are set out by the Supreme Court in [Dunsmuir v. New Brunswick](#), [2008] 1 S.C.R. 190.
35. FAAE (2011), 1610 (Ms. Sabine Nölke, Director, United Nations, Human Rights and Economic Law Division, DFAIT).
36. As head of state, the president signs Congress’ bills into law. The president also has the power of a veto over Congress bills, though a two-thirds majority in both chambers of Congress – the Senate and the House of Representatives – can in turn override the veto, and the bill then becomes law. Bills passed by Congress that are neither signed nor vetoed by the president come into force after 10 days.
37. United States of America, [International Emergency Economic Powers Act](#), Public Law 95-223, 95th Congress, 91 Stat. 1625, 28 December 1977 (codified as amended at 50 USC 35 ss. 1701–1707).
38. United States of America, [National Emergencies Act](#), Public Law 94-412, 94th Congress, 90 Stat. 1255, 14 September 1976 (codified as amended at 50 U.S.C. ss. 1601–1651).
39. UNSC Res. 1970 (2011).
40. President Barack Obama, [Executive Order 13566 of February 25, 2011, Blocking Property and Prohibiting Certain Transactions Related to Libya](#), 76 FR 11315, 2011.
41. *Ibid.*, ss. 1, 2, 6 and 11.
42. United States of America, [Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010](#), Public Law 111-195, 111th Congress, 124 Stat. 1312, 1 July 2010 (codified at 22 USC ss. 8501–8551).
43. “[Consolidated Version of the Treaty on European Union](#),” *Official Journal of the European Union*, C 083, 30 March 2010, pp. 13–45. The Council of the European Union is a political body made up of ministerial-level representatives appointed by each member state. See Article 16(2).
44. “[Consolidated Version of the Treaty on the Functioning of the European Union](#),” *Official Journal of the European Union*, C 083, 30 March 2010, pp. 47–199.
45. EUR-Lex, [The legal order of the EU](#), “The EU’s Means of Action.”

46. European Union, "[Council Decision 2011/72/CFSP of 31 January 2011 concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia](#)," *Official Journal of the European Union*, L 028, 2 February 2011, pp. 62–64 [Council Decision 2011/72/CFSP of 31 January concerning Tunisia]; European Union, "[Council Regulation \(EU\) No. 101/2011 of 4 February 2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Tunisia](#)," *Official Journal of the European Union*, L 031, 5 February 2011, pp. 1–2 [Council Regulation No. 101/2011 of 4 February 2011 concerning Tunisia]; European Union, "[Council Implementing Decision 2011/72/CFSP of 4 February 2011 implementing Decision 2011/72/CFSP concerning restrictive measures directed against certain persons and entities in view of the situation in Tunisia](#)," *Official Journal of the European Union*, L 031, 5 February 2011, pp. 40–47 [Council Implementing Decision 2011/72/CFSP concerning Tunisia].
47. European Union, "[Council Decision 2011/137/CFSP of 28 February 2011 concerning restrictive measures in view of the situation in Libya](#)," *Official Journal of the European Union*, L 058, 3 March 2011, pp. 53–62; European Union, "[Council Implementing Decision 2011/156/CFSP of 10 March 2011 implementing Decision 2011/137/CFSP concerning restrictive measures in view of the situation in Libya](#)," *Official Journal of the European Union*, L 064, 11 March 2011, pp. 29–30; European Union, "[Council Regulation \(EU\) No. 204/2011 of 2 March 2011 concerning restrictive measures in view of the situation in Libya](#)," *Official Journal of the European Union*, L 058, 3 March 2011, pp. 1–13; and European Union, "[Council Implementing Regulation \(EU\) No 233/2011 of 10 March 2011 implementing Article 16\(2\) of Regulation \(EU\) No 204/2011 concerning restrictive measures in view of the situation in Libya](#)," *Official Journal of the European Union*, L 064, 11 March 2011, pp. 13–14.
48. European Union, "[Council Decision 2011/172/CFSP of 21 March 2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt](#)," *Official Journal of the European Union*, L 076, 22 March 2011, pp. 63–67 [Council Decision 2011/172/CFSP of 21 March 2011 concerning Egypt]; European Union, "[Council Regulation \(EU\) No 270/2011 of 21 March 2011 concerning restrictive measures directed against certain persons, entities and bodies in view of the situation in Egypt](#)," *Official Journal of the European Union*, L 076, 22 March 2011, pp. 4–12 [Council Regulation No. 270/2011 of 21 March 2011 concerning Egypt].
49. European Union, Council Decision 2011/72/CFSP of 31 January concerning Tunisia, art. 1; Council Regulation No. 101/2011 of 4 February 2011 concerning Tunisia, arts. 1–2 and 4–8; Council Decision 2011/172/CFSP of 21 March 2011 concerning Egypt, art. 1; Council Regulation No. 270/2011 of 21 March 2011 concerning Egypt, arts. 1–2 4–8.
50. European Union, Council Decision 2011/72/CFSP of 31 January concerning Tunisia, art. 3 and Annex I; Council Regulation No. 101/2011 of 4 February 2011 concerning Tunisia, art. 3 and Annex I; Council Implementing Decision 2011/72/CFSP concerning Tunisia, art. 1 and Annex I; Council Decision 2011/172/CFSP of 21 March 2011 concerning Egypt, art. 3 and Annex I; Council Regulation No. 270/2011 of 21 March 2011 concerning Egypt, art. 3 and Annex I.
51. European Union, Council Regulation No. 101/2011 of 4 February 2011 concerning Tunisia, art. 12; Council Regulation No. 270/2011 of 21 March 2011 concerning Egypt, art. 12.
52. [Consolidated Version of the Treaty on the Functioning of the European Union](#) (2010), arts. 263 and 265.
53. Switzerland, [Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means \(Restitution of Illicit Assets Act \[RIAA\]\)](#), 1 October 2010 SR 196.1 [unofficial translation].

54. Switzerland, *RIAA*, art. 2.c; Switzerland, [*Dispatch concerning the Federal Act on the Restitution of Assets of Politically Exposed Persons obtained by Unlawful Means \(Restitution of Illicit Assets Act, RIAA\)*](#) [*RIAA Dispatch*], 28 April 2010, SR 10.039, s. 2.2 (commentary to art. 2) [unofficial translation].
55. FAAE (2011), 1610 (Nölke).
56. Switzerland, *RIAA*, arts. 2–3 and 11; *RIAA Dispatch*, s. 2.2 (commentary to arts. 2–3 and 11).
57. [*Rome Statute of the International Criminal Court*](#), 17 July 1998, 2187 U.N.T.S. 90, C.T.S., 2002/13 (entered into force 1 July 2002; ratified by Canada on 7 July 2000). (See Canada Treaty Information, [*Rome Statute of the International Criminal Court*](#)). Article 17 of the statute states:
 1. Having regard to paragraph 10 of the Preamble and article 1, the Court shall determine that a case is inadmissible where:

...

(b) The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute;

...

3. In order to determine inability in a particular case, the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.
58. Switzerland, *RIAA Dispatch*, s. 2.2.
59. Switzerland, *RIAA*, art. 2.b, *RIAA Dispatch*, s. 2.2 (commentary to art. 2).
60. Switzerland, *RIAA*, arts. 5–7; *RIAA Dispatch*, ss. 1.7.3 and 2.2 (commentary to arts. 5–7).
61. Switzerland, *RIAA*, arts. 8–10; *RIAA Dispatch*, s. 2.2 (commentary to arts. 8–10).