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**Open-ended Intergovernmental Working
Group on Asset Recovery**

Vienna, 25-26 August 2016

Item 3 of the provisional agenda

**Forum for advancing practical aspects of asset recovery,
including challenges and good practices**

Foreign Illicit Assets Act (FIAA) of 18 December 2015

V.16-05154 (E)



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Foreign Illicit Assets Act (FIAA) of 18 December 2015

Ever since the Marcos affair, Switzerland has pursued a proactive policy with regard to the illicitly acquired assets of foreign politically exposed persons. In so doing, it has accumulated extensive experience in asset recovery and has achieved tangible results in this area. Over the last 20 years, Switzerland has managed to return almost CHF 2 billion (roughly equivalent in USD) to the states of origin concerned.

During the Arab uprisings of 2011, the Swiss government immediately took proactive measures and ordered the freezing of assets of the former rulers involved and their entourages without waiting for requests for mutual legal assistance from the countries in question. Lacking a specific legal basis to do so, this was undertaken as an emergency measure based on the government's constitutional right to safeguard Switzerland's interests. As requested by Parliament therefore, the Swiss government drew up a new law on illicitly acquired assets to establish a clear legal basis for its policy on stolen assets.

The FIAA was approved by Parliament in December 2015. It aims to address situations where foreign leaders have, in all probability, enriched themselves by misappropriating assets through corrupt or by other felonies and by transferring them to other countries. The law regulates the freezing, confiscation and restitution of stolen assets. It aims to offer solutions even in cases that cannot be resolved through mutual legal assistance in criminal matters. It also provides for measures to help states where the illicitly acquired assets originated in their efforts to recover those assets. In the event that the mutual assistance process does not succeed, this allows the Swiss government to instigate administrative confiscation proceedings. To do so, no prior criminal conviction of the politically exposed person or their close associates is necessary. In addition, there is a presumption that assets are of illicit origin where certain conditions are fulfilled. Instigating administrative confiscation proceedings opens the way for returning the assets to the state of origin.

Purpose (Section 1): The law regulates the freezing, confiscation and restitution of illicitly acquired assets of foreign politically exposed persons and their close associates. It defines the terms 'foreign politically exposed persons' or 'PEPs', 'close associates' and 'assets'.

Freezing of assets (Section 2): This section sets out the purpose and conditions of an asset freeze. During a change of power in a state with a high degree of corruption, and as far as the safeguarding of Swiss interests necessitates, the government may order a preventive freezing of assets in order to bolster cooperation in mutual legal assistance with the state of origin. If the legal assistance process fails, the government may at a later stage decide to freeze assets with a view to confiscation.

This section also outlines the principle of international coordination with key partner countries and international organisations regarding asset freezing.

In addition, it contains effective provisions on how to implement asset freezing in practice (duration of asset freeze, duty to report and provide information, administration of frozen assets, potential release of a portion of the frozen assets) and a provision on amicable settlement in order to find a compromise with the holders of the frozen assets.

Support measures for the state of origin (Section 3): This section enables Switzerland to provide technical assistance to the state of origin in question in its efforts to recover assets that have been, in all probability, illicitly acquired, and transferred abroad. The law details different possible support measures such as legal advice, bilateral or multilateral conferences and meetings, and the secondment of experts to the state of origin. A special provision allows for the transmission of own- initiative information, including bank information, to the state of origin under certain circumstances. This is only to allow the state in question to prepare a request for mutual legal assistance from Switzerland or to complete an insufficiently substantiated request.

Confiscation (Section 4): This section regulates the procedure to confiscate frozen assets. It is a legal procedure under public law and not criminal law. This means that the asset holder does not have to have been found guilty of a criminal offence, no statute of limitations in respect of criminal prosecution may be applied. A presumption of the illicit origin of the assets is foreseen but this may be reversed if the asset holder is able to prove that their assets have, in all probability, been acquired legitimately. The rights of third parties may enable them to oppose confiscation to a limited extent.

Restitution (Section 5): This section sets out the principles to be followed when returning assets that were confiscated by the Swiss courts based on administrative proceedings. The principles of transparency and accountability should be respected irrespective of the national context. The restitution of assets is intended to improve the living conditions of the local people and to strengthen the rule of law, thereby helping to combat impunity, in the state of origin. As a rule, an agreement between the Swiss government and the government of the state of origin regulates the practical arrangements for returning assets. Non-governmental organisations may also be involved.

Legal remedies and criminal provisions (Sections 6 and 8): Any person affected by measures taken under the law is entitled to legal protection and may go before the Swiss courts (section 6). A legal remedy is expressly provided to enable politically exposed persons and their close associates to request that their names be removed from the Swiss government's list of people subject to an asset freeze. The last section contains a series of criminal provisions establishing custodial sentences and fines for violating the asset freeze or breaching the duty to report and provide information on the assets of listed persons.

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Federal Act on the Freezing and the Restitution of Illicit Assets held by Foreign Politically Exposed Persons (Foreign Illicit Assets Act, FIAA)

of 18 December 2015

*The Federal Assembly of the Swiss Confederation,
based on Article 54, paragraph 1, of the Federal Constitution,
and having regard to the Federal Council Dispatch of 21 May 2014,
decrees:*

Section 1: General Provisions

Art. 1 Purpose

This Act governs the freezing, confiscation and restitution of assets held by foreign politically exposed persons or their close associates, where there is reason to assume that those assets were acquired through acts of corruption, criminal mismanagement or by other felonies.

Art. 2 Definitions

Within the meaning of the present Act,

- a. *foreign politically exposed persons* means individuals who are or have been entrusted with prominent public functions by a foreign country, for example heads of State or of government, senior politicians at the national level, senior government, judicial or military officials at the national level, important political party officials at the national level and senior executives of State-owned corporations of national importance;
- b. *close associates* means natural persons who are known to be in close association with the persons defined in subparagraph (a) by reason of a family, personal or business relationship;
- c. *assets* means property of any kind, whether tangible or intangible, movable or immovable.

Section 2: Freezing of Assets

Art. 3 Freeze for purposes of mutual legal assistance

¹ In order to support future cooperation within the framework of mutual legal assistance proceedings with the country of origin, the Federal Council may order the freezing of assets in Switzerland:

- a. over which foreign politically exposed persons or their close associates have power of disposal;
- b. of which foreign politically exposed persons or their close associates are the beneficial owners; or

- c. which belong to a legal entity:
 1. through which foreign politically exposed persons or their close associates hold direct or indirect power of disposal over those assets, or
 2. of which foreign politically exposed persons or their close associates are the beneficial owners.

² An asset freeze shall be admissible if the following conditions are met:

- a. the government or certain members of the government of the country of origin have lost power, or a change in power appears inexorable;
- b. the level of corruption in the country of origin is notoriously high;
- c. it appears likely that the assets were acquired through acts of corruption, criminal mismanagement or other felonies;
- d. the safeguarding of Switzerland's interests requires the freezing of the assets.

³ Prior to ordering an asset freeze, and barring exigent circumstances, the Federal Council shall inquire into the position of Switzerland's main partner countries, and of international organisations, with regard to freezing orders. As a rule, it shall coordinate the timing and substance of the measures it orders with measures taken by those countries and organisations.

Art. 4 Freeze for purposes of confiscation in the event mutual legal assistance proceedings fail

¹ The Federal Council may order an asset freeze in Switzerland in anticipation of initiating proceedings for the confiscation of assets:

- a. over which foreign politically exposed persons or their close associates have power of disposal;
- b. of which foreign politically exposed persons or their close associates are the beneficial owners; or
- c. which belong to a legal entity:
 1. through which foreign politically exposed persons or their close associates hold direct or indirect power of disposal over those assets, or
 2. of which foreign politically exposed persons or their close associates are the beneficial owners.

² An asset freeze shall be admissible if the following conditions are met:

- a. the assets have been made subject to a provisional seizure order within the framework of international legal assistance proceedings in criminal matters instigated at the request of the country of origin;
- b. the country of origin is unable to satisfy the requirements for mutual legal assistance owing to the total or substantial collapse, or the impairment, of its judicial system (failure of state structures);
- c. the safeguarding of Switzerland's interests requires the freezing of the assets.

³ An asset freeze shall also be admissible where, following receipt of a request for mutual legal assistance, cooperation with the country of origin proves to be impossible because there are reasons to believe that proceedings in the country of origin do not satisfy the essential

principles of procedure foreseen in Article 2 letter a of the Mutual Assistance Act of 20 March 1981 and where the safeguarding of Switzerland's interests so requires.

Art. 5 Amendment and publication of list entries

¹ Where the asset freeze ordered pursuant to Article 3 of this Act takes the form of an administrative ordinance (asset freeze ordinance), the Federal Department of Foreign Affairs (FDFA) may amend the list of persons named in the asset freeze, as appended to that ordinance. Following consultation with the other departments concerned, the FDFA may add or remove the names of foreign politically exposed persons or their close associates where international coordination with the main partner countries and international organisations or the safeguarding of Switzerland's interests so requires.

² The FDFA shall immediately remove from that list the names of those persons against whom the freeze is found to be groundless.

³ The list of the names of persons appended to the asset freeze ordinance shall be published in the Official Compilation of Federal Legislation. It may include personal and sensitive data concerning, in particular, current or past membership of a political party or the existence of pending criminal or administrative proceedings or sanctions.

Art. 6 Duration of freeze

¹ A freeze ordered pursuant to Article 3 shall be limited to a maximum duration of four years. The Federal Council may extend the freeze for an additional year, renewable annually, where the country of origin has expressed its willingness to cooperate within the framework of mutual legal assistance proceedings. The maximum duration of the asset freeze is ten years.

² Assets frozen pursuant to Article 4 shall remain frozen until such time as the decision concerning their confiscation becomes enforceable. Where no proceedings for confiscation of the assets have been instigated within a period of 10 years from the date the freezing order issued pursuant to Article 4 becomes enforceable, the freeze on the assets shall be lifted.

Art. 7 Duty to report and to provide information

¹ Persons or institutions who hold or manage in Switzerland assets of persons affected by an asset freeze within the meaning of Article 3 must immediately report these assets to the Money Laundering Reporting Office Switzerland (MROS).

² Persons or institutions that neither hold nor manage such assets in Switzerland, but who have knowledge thereof by virtue of the functions they perform, must report the assets immediately to MROS.

³ Based on reports received pursuant to paragraph 2, MROS may request information from any person or institution that may hold or manage assets covered by a freeze ordered under the provisions of the present Act.

⁴ Persons or institutions subject to the terms of paragraphs 1 to 3 have the further duty to produce, at the request of MROS, all information and documents relating to the reported assets as may be required for the enforcement of the present Act, to the extent that they possess any such information.

⁵ Lawyers and notaries are not subject to the duty to report and inform where they are constrained by the duty of professional confidentiality within the meaning of Article 321 of the Swiss Criminal Code.

⁶ MROS shall transmit the information received pursuant to the provisions of paragraphs 1 to 3 to the FDFA and the Federal Office of Justice (FOJ). The Federal Council shall determine the procedures for cooperation in the framework of this Act between the FDFA, the FOJ and the MROS.

Art. 8 Administration of frozen assets

¹ Persons and institutions who hold or manage in Switzerland assets that have been made subject to a freezing order pursuant to the terms of this Act shall continue to administer them once the order has been issued. They shall inform the FDFA immediately where the value of the assets is at risk of declining rapidly or the cost of maintaining the assets is excessive.

² Persons and institutions who administer frozen assets pursuant to paragraph 1 shall provide the FDFA, on its request, with all information and documents relating to the freezing and management of the assets in question.

³ The principles that govern the investment of seized assets apply *mutatis mutandis* to the administration of assets frozen under the provisions of this Act.

⁴ The FDFA may order the measures necessary to avoid the risk of a rapid decline in the value of the assets or excessive maintenance costs, including the immediate liquidation of the assets pursuant to the provisions of the Federal Act of 11 April 1889 on Debt Enforcement and Bankruptcy. The terms of paragraph 1 also apply to the liquidation proceeds.

⁵ Where a freeze on the assets has also been imposed within the framework of criminal proceedings or of mutual legal assistance proceedings, management of the assets is the responsibility solely of the authority overseeing the criminal proceedings or the mutual legal assistance proceedings. That authority shall inform the FDFA before ordering the freeze to be lifted.

Art. 9 Release of frozen assets

In exceptional cases, in particular in cases of hardship or where the safeguarding of important Swiss interests so requires, the FDFA may authorise the release of a portion of the frozen assets.

Art. 10 Amicable settlement

¹ Throughout the period in which the asset freeze is in force, the Federal Council may instruct the FDFA to seek an amicable settlement so as to permit the full or partial restitution of the frozen assets. Articles 17 through 19 apply *mutatis mutandis* to this restitution.

² Any amicable settlement is subject to the approval of the Federal Council.

³ If the Federal Council approves the amicable settlement, it shall lift the freeze on the assets.

Section 3: Support Measures

Art. 11 General principle

The Confederation may provide the country of origin with assistance in its efforts to obtain restitution of the frozen assets.

Art. 12 Technical assistance

¹ The FDFA and the FOJ may, after consulting one another, provide the country of origin with technical assistance.

² They may, in particular:

- a. assist in the training of the competent authorities and provide them with legal advice;
- b. organise bilateral or multilateral conferences or meetings;
- c. second experts to the country of origin.

³ The FDFA shall coordinate these measures with the other departments concerned and may cooperate with qualified domestic and international institutions for their implementation.

Art. 13 Transmission of information to the country of origin

¹ MROS may transmit to its counterpart abroad in the country of origin any information, including bank information, that it has obtained under the provisions of this Act in order to permit that country to prepare a request for mutual legal assistance from Switzerland or to complete an insufficiently substantiated request.

² The transmission of information obtained by MROS under the provisions of this Act shall proceed subject to the terms set out in Article 30, Article 31 letter b and c and Article 32 paragraph 3 of the Anti-Money Laundering Act of 10 October 1997. Article 30 paragraph 4 letter a number 1 of that Act does not apply.

³ The information obtained under the provisions of this Act shall not be transmitted abroad if:

- a. the country of origin is experiencing a failure of state structures, or if
- b. the life or physical well-being of the persons concerned would be threatened as a result.

⁴ The information obtained under the provisions of this Act shall be transmitted in the form of a report. If required by the circumstances, the transmission of information to the country of origin may take place in stages or be subject to conditions. In defining the conditions, MROS shall take particular account of the need to respect the right to a fair trial in the country of origin.

⁵ Before transmitting information obtained under the provisions of the present Act, the MROS shall consult with both the FOJ and the FDFA.

Section 4: Confiscation of assets

Art. 14 Conditions and procedure

¹ The Federal Council may instruct the Federal Department of Finance (FDF) to take legal action before the Federal Administrative Court for the confiscation of frozen assets.

² The Federal Administrative Court shall order the confiscation of assets:

- a. that are subject to the power of disposal of a foreign politically exposed person or a close associate of that individual, or of which those individuals are the beneficial owners;
- b. that are of illicit origin, and which
- c. have been frozen by order of the Federal Council in anticipation of their confiscation, pursuant to Article 4.

³ No statute of limitations in respect of criminal prosecution or penalties may be applied.

⁴ Should mutual legal assistance proceedings in criminal matters resume, confiscation proceedings shall be suspended until such time as a final decision has been reached in those proceedings.

Art. 15 Presumption of illicit origin

¹ There shall be a presumption that assets are of illicit origin where the following conditions are fulfilled:

- a. the wealth of the individual who has the power of disposal over the assets or who is the beneficial owner thereof increased inordinately, facilitated by the exercise of a public function by a foreign politically exposed person;
- b. the level of corruption in the country of origin or surrounding the foreign politically exposed person in question was notoriously high during his or her term of office.

² An increase shall be considered inordinate where there is a significant disproportion, inconsistent with ordinary experience and the prevailing circumstances in the country, between the income legitimately earned by the person with the power of disposal over the assets and the growth in that person's wealth.

³ This presumption shall be reversed where it has been demonstrated with overwhelming probability that the assets in question were acquired legitimately.

Art. 16 Rights of third parties

Assets may not be confiscated in the following cases:

- a. rights thereto are asserted by a Swiss authority;
- b. a person who is not a close associate of the foreign politically exposed person in question has acquired, in good faith, rights in rem on those assets:
 1. in Switzerland, or
 2. in another country, provided that those rights have been affirmed in a judicial decision which can be recognised in Switzerland.

Section 5: Restitution of Assets

Art. 17 General principle

The restitution of assets is made in pursuit of the following objectives:

- a. to improve the living conditions of the inhabitants of the country of origin, or
- b. to strengthen the rule of law in the country of origin and thus to contribute to the fight against impunity.

Art. 18 Procedure

¹ The restitution of confiscated assets is made through the financing of programmes of public interest.

² The Federal Council may conclude agreements governing the restitution of assets.

³ Such agreements may cover, in particular:

- a. the type of programmes of public interest to be funded by the returned assets;
- b. the way in which the returned assets are to be used;
- c. the parties to be included in the restitution process;
- d. control and monitoring of the use made of the returned assets.

⁴ In the absence of an agreement with the country of origin, the Federal Council shall determine the process of restitution. It may, in particular, return confiscated assets via international or national organisations, and provide for the supervision of the FDFA.

⁵ To the extent possible, it shall include non-governmental organisations in the restitution process.

Art. 19 Procedural costs

¹ A lump-sum amount not exceeding 2.5% of the value of the confiscated assets may be deducted by the Confederation or to the cantons to cover costs incurred in proceedings for the freezing, confiscation and restitution of the assets, and in implementation of support measures.

² The Federal Council shall determine on a case-by-case basis the amount to be deducted and the details of any sharing arrangements between the Confederation and the cantons concerned, in consultation with the latter.

Section 6: Legal Remedies

Art. 20 Request for removal

¹ Natural persons and legal entities whose names have been included in the appendix to an asset freeze ordinance may submit to the FDFA a substantiated request for the removal of their names from the list.

² The FDFA shall rule on the request.

Art. 21 Appeal

¹ In accordance with the general provisions on the administration of federal justice, decisions issued pursuant to this Act shall be subject to appeal.

² The appeal does not have suspensive effect. Article 55 paragraph 2 of the Administrative Procedure Act of 20 December 1968 does not apply.

³ Freeze ordinances shall not be subject to appeal.

Section 7: Administrative Assistance between Swiss Authorities, Data Processing and Reporting

Art. 22 Administrative assistance between Swiss authorities

¹ Federal and cantonal authorities shall transmit to the FDFA and the FDF, on their own initiative or on request, the information and personal data necessary for this Act to be enforced.

² The FDFA shall transmit to the federal supervisory authorities and to federal and cantonal authorities responsible in matters of mutual legal assistance and criminal prosecution, at their request, the information and personal data they require to carry out their legal tasks.

³ The FOJ or the authority entrusted with the execution of a request for mutual legal assistance in criminal matters shall inform the FDFA where:

- a. a request for international mutual legal assistance in criminal matters concerning assets frozen in Switzerland held by foreign politically exposed persons or their close associates will not be granted owing to a failure of state structures in the requesting country;
- b. there is reason to believe that no mutual legal assistance proceedings in criminal matters can be conducted based on the provisions of Article 2 letter a of the Mutual Assistance Act of 20 March 1981, or where
- c. it will be necessary to reject an already pending request for mutual legal assistance based on the provisions of Article 2 letter a of the Mutual Assistance Act.

Art. 23 Data processing

The competent federal authorities may process personal data where the enforcement of this Act and of asset freeze ordinances so requires. They may process sensitive personal data where this is indispensable in the handling of specific individual cases.

Art. 24 Reporting

The FDFA, after consulting the other departments concerned, shall submit annually, to the competent parliamentary committees, a report on the measures taken in application of the present Act.

Section 8: Criminal Provisions

Art. 25 Violation of an asset freeze order

¹ Any person who wilfully and without authorisation from the FDFA executes payments or transfers from frozen accounts or releases frozen assets shall be liable to a custodial sentence not exceeding three years or to a monetary penalty.

² Where the act is committed through negligence, the penalty shall be a fine not exceeding CHF 250,000.

Art. 26 Violation of the duty to report and to provide information

¹ Any person who wilfully violates the duty to report and to provide information as set out in Article 7 shall be liable to a fine not exceeding CHF 250,000.

² Where the act is committed through negligence, the penalty shall be a fine not exceeding CHF 100,000.

Art. 27 Offences in business operations

Ascertaining the criminal liability of persons may be dispensed with and instead the business operations may be ordered to pay the fine where the following conditions are met:

- a. identifying the persons who committed the offences requires investigative measures that are disproportionate to the penalty incurred;
- b. a fine of a maximum of CHF 50,000 is under consideration for the violations of the criminal provisions of this Act.

Art. 28 Jurisdiction

¹ The Federal Act of 22 March 1974 on Administrative Criminal Law applies to violations of this Act. The FDF shall be the authority responsible for prosecution and judgment.

² Where a court judgment has been requested, or where the FDF considers that the requisite conditions for a custodial sentence or other custodial measures are satisfied, the federal courts have jurisdiction. In such cases, the FDF shall refer the case file to the Office of the Attorney General of Switzerland for proceedings before the Federal Criminal Court. This referral shall constitute the formal bringing of charges. Articles 73 to 82 of the Federal Act on Administrative Criminal Law apply *mutatis mutandis*.

Art. 29 Consolidation of proceedings

¹ Where a criminal case is subject to the jurisdiction of the FDF and the jurisdiction of the federal or cantonal authorities, the FDF may order that the proceedings be consolidated under the prosecuting authority already handling the case, provided that the following conditions are met:

- a. there is a close factual connection;
- b. the case is not yet pending before the competent court; and c. consolidation will not unreasonably delay the proceedings.

² The Appeals Chamber of the Federal Criminal Court shall decide on any disputes between the FDF and the Office of the Attorney General or the cantonal authorities.

Section 9: Final Provisions

Art. 30 Implementation

The Federal Council shall enact the implementing provisions.

Art. 31 Repeal and amendment of current legislation

¹ The Federal Act of 1 October 2010 on the Restitution of Illicit Assets is repealed.

² The federal acts listed below shall be amended as follows:

...

Art. 32 Transitional provisions

¹ Assets already frozen when this Act enters into force under an order by the Federal Council based on Article 2 of the Federal Act of 1 October 2010 on the Restitution of Illicit Assets

(RIAA) or on Article 184 paragraph 3 of the Federal Constitution shall remain frozen. Such asset freezes shall be considered a freeze ordered pursuant to Article 4.

² This Act applies to legal actions for the confiscation of assets brought before the Federal Administrative Court under the provisions of the RIAA and which are still pending when the present Act enters into force.

Art. 33 Referendum and commencement

¹ This Act is subject to an optional referendum.

² The Federal Council shall determine the commencement date.

Commencement date: **1 July 2016**