https://doi.org/10.18485/iipe_gsirescu.2024.ch8

# ILLEGAL ASPECTS OF THE PROPOSED SEIZURE OF RUSSIAN CENTRAL BANK ASSETS

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**Abstract**: The conflict in Ukraine has brought about destruction and casualties on an immense scale for this state. Its allies in the Western world have identified Russia as the aggressor state and therefore responsible for paying reparations for these damages. The freezing of Russian central bank assets held in Western states offers an opportunity to enforce the obligation to pay reparations. This article is focused on the legal issues related to the possible confiscation of frozen assets. It starts from the hypothesis that although international law does not treat the issue of foreign state property directly, it is nevertheless protected from confiscation by the rules on sovereign immunity, investment protection, and non-interference. The author explores the legal arguments and proposals put forward by Western officials and doctrinal proponents of confiscation and puts them through the test of these three rules to discern if they are legally viable. The hypothesis is developed through the content analysis of official statements and doctrinal works and deduction from established rules of international law to a specific case of seizure of a foreign central bank. The article concludes that no matter which possible model of confiscation is chosen, they are all confronted with the problem of breaching existing rules of international law. Therefore their application will inevitably result in further erosion of relations between the West and Russia, but also might create a legal basis for future litigation to recover seized assets from Russia in international forums.

**Keywords**: Central Bank of Russia, Ukraine, foreign assets, sovereign immunity, non-interference, countermeasures, investment protection.

[1] The paper presents findings of a study developed as a part of the research project "Serbia and challenges in international relations in 2024", financed by the Ministry of Science, Technological Development and Innovation of the Republic of Serbia, and conducted by Institute of International Politics and Economics, Belgrade, during the year 2024.

## Introduction

The armed conflict in Ukraine presents the world with many new challenges and the answers are crafted on the run. One of these challenges is the issue of post-conflict recovery and reconstruction of the ravaged country, once the arms inevitably fall silent. The enormous resources needed for such an operation would be hard to come by. The idea floated by Ukraine's allies in the West is a rather straightforward one – the one party responsible for the start of the conflict should cover the costs incurred during the hostilities. In this case, Russia, as the state that invaded Ukraine in February 2022, should be charged with the costs of the invaded country's recovery. Since it is unrealistic to expect the authorities in Russia to accept this obligation of free will, they must be either compelled to do it on the field of battle, by a complete defeat of their armed forces, or through other means that would go against that will. One such idea, and the one that is gaining momentum as time passes by and the conflict continues, is to use Russian sovereign assets immobilized in the West which according to most estimates total about $300bn (REPO 2023).

These assets had been managed by the Central Bank of Russia (CBR) before the war in Ukraine started. The CBR is a separate legal entity from the government of the Russian Federation but is entrusted with the sovereign authority to issue currency and protect the Russian rouble (Bismuth 2023). It holds assets abroad in the form of foreign currency or securities denominated in foreign currencies at other central banks or foreign commercial banks. These foreign assets serve the CBR to stabilize the rouble and to perform transactions in foreign currency. As part of the package of unilateral sanctions introduced in 2022 at the start of the conflict, the property of Russia itself as well as that of significant state organizations, in particular the CBR, was frozen (Stephan 2023, 195). Over thirty States over time imposed economic sanctions against Russia, including sweeping asset freezes, import bans, export controls, and investment restrictions (Criddle 2023).

Ukraine itself has proposed an international mechanism for the confiscation of Russian sovereign assets called the Global Compensation Mechanism (GCM). The focus of this article is not so much on its technicalities but on the reforms to international law that it proposes, namely the adoption of new rules limiting sovereign immunity concerning Russian state assets. The GCM has already been politically legitimized on a certain level by a majority vote in the United Nations General Assembly in November 2022 (UNGA 2022). However, before it becomes a legally binding

and operative act, considerable obstacles would need to be overcome, of which sovereign immunity is but one.

This article aims to explore the obstacles to the confiscation of Russian sovereign assets situated on the territory of foreign countries. There indeed exists in international law no explicit rules prohibiting the confiscation of foreign sovereign assets. However, other, more general rules apply to this case, and they are among the most developed and important in the field. No matter the type of proposed mechanism to confiscate those assets, it is argued that the existing international legal rules of sovereign immunity, investment protection, and non-interference prevent any confiscation from being realized and that the confiscation would give rise to the claim by the Russian Federation to recover any such seized assets in future litigations against the perpetrators. The hypothesis is developed through the content analysis of official statements and doctrinal works and deduction from established rules of international law to a specific case of the confiscation of the CBR's assets.

The article does not deal with the issue of the legality of confiscation as a countermeasure, although in the doctrine there have been attempts to justify this measure based on the law of countermeasures. To this view, Ukraine may deploy countermeasures by freezing Russian assets in response to Russia's injurious and illegal conduct against it. Going a step further, it is argued that frozen or seized assets need not be returned to Russia at the close of the war as long as Russia has failed to pay reparations. That is because the failure to pay reparations is itself an unlawful act for which countermeasures (continued freezing of assets) may be kept in place even if the unlawful war has ceased (Hathaway et al. 2024). It is the opinion of this author that countermeasures are the unsettled field of international law and prone to unilateral interpretations. Besides, „the procedural limitations to the resort to countermeasures, mainly identified in the need to exhaust preliminarily amicable means of dispute settlements, substantive limitations to countermeasures and, in particular, the most important one: proportionality" (Cannizzaro & Bonafe 2016), as necessary preconditions for the deployment of countermeasures would all need to be analyzed by the state that would deploy the countermeasure itself. Thus, it would lack legitimacy in the wider community of states. It is a similar dilemma as with the use of sanctions, which is also touched upon later in the text.

The article starts with an overview of proposals to confiscate Russian sovereign assets in the countries allied to Ukraine that have access to these assets on their territories. Then it proceeds in a tripartite structure to analyze

three various objections based on international law against such proposals – sovereign immunity, non-interference, and investment protection. At the end, a concluding discussion of the issues raised is offered.

## Proposal to confiscate Russian sovereign assets

The Government of the United States of America first started the idea of confiscation, but as time passed it seems most proposals have ended as dead letters on paper or instead focused on linking confiscation to organized crime and corruption, which is another matter completely and perfectly legal in international law. Shagina implies that this is due to constitutional obstacles, not international legal: "The Fourth Amendment of the US Constitution is construed as barring the federal government from seizing assets based on sanctions designations, but it has considerable latitude to do so for alleged crimes" (Shagina 2023). Anyway, in October 2022, some US senators proposed targeting the assets of Russian oligarchs and channeling the proceeds toward Ukraine's reconstruction (USS FRC 2022). As Shagina again notes, this proposal led to last year's seizure of a superyacht owned by Viktor Vekselberg, a close political ally of Russian President Vladimir Putin, and more recently the US Department of Justice seized an aircraft owned by the Russian oil company Rosneft (Shagina 2023).

In the meantime, public discussion in the US about seizing Russian sovereign assets has been guarded: "US Treasury Secretary Janet Yellen has noted that under the current legal framework, it is not permissible to seize Russian sovereign assets" (Shagina 2023). Probably one of the long-term priorities for the US government is to avoid diminishing the role of the US dollar as the world's dominant reserve currency. While such concerns are warranted, the process of de-dollarisation in central-bank reserves had already been underway in Russia, triggered by financial sanctions before major fears of confiscation materialized. As a result, US institutions hold only 6% of Russia's foreign reserves, significantly less than Germany (16%), France (10%) or even Japan (9%).

In the United Kingdom as well concerns over property rights and due process seem to have slowed progress in the confiscation debate. Nevertheless, the government is "considering all options on the seizure of Russian-linked assets in the UK" (UK Parliament 2023). Panja & Smith explain how the issue originated in February 2023, when Labour MP Chris Bryant introduced a bill in the House of Commons to provide a framework for the seizure of both Russian private and public assets. The bill was

rejected, but it will be given a second hearing. Having frozen more than £18bn in assets last year, London, like Washington, is accelerating the seizure and forfeiture of Russian oligarchs' assets. As part of the deal between one such oligarch, Roman Abramovich, and the UK's Office of Financial Sanctions Implementation, Chelsea Football Club, which Abramovich owned, was sold for £2.5bn in May 2022 (Panja & Smith 2022). The proceeds of the sale will be deposited in a frozen bank account and later redirected to victims of the war in Ukraine. Furthermore, the expedited passage of the Economic Crime and Corporate Transparency Bill in March 2022 introduced significant reforms to Unexplained Wealth Orders, an investigative tool that can speed up asset recovery of private funds (UK Parliament 2023b).

At the EU level, discussions on confiscation have revolved more around private assets than public ones. In May 2022, the European Commission proposed amending its directive on asset recovery and confiscation, with a focus on organized crime and racketeering (EC 2022). The proposal highlights the need for effective asset tracing and identification. The EU has also expanded the list of criteria for conduct that would constitute a crime, adding the violation or evasion of sanctions (Council 2022). It emphasizes sanctions evasion as the main justification for asset seizure. As of November 2022, EU countries had frozen around €18.9bn-worth of Russian private assets (Criddle 2023). Like the US, the EU is wary of pursuing Russian sovereign assets. The concerns about the role of the euro as a reserve currency are not as important as in the US with the dollar, but I have noted previously that the EU officials are keen to maintain the moral high ground and avoid distorting international law to fit their foreign-policy objectives the way authoritarian states do (Vučić 2021). Their bottom line is to ensure that any EU legal framework for seizure can withstand a legal challenge by the Russian state. Germany also wants to avoid setting a precedent for state immunity whereby the Greek, Italian, or Polish governments might seek reparations for Second World War forfeitures (Shagina 2023).

Despite the limited legal room for maneuver, however, there seems to be considerable enthusiasm within the EU to explore all feasible options. Under the Swedish presidency, a new working group has been set up at the Council of the European Union to "carry out a legal, financial, economic and political analysis of the possibilities of using frozen Russian assets" (Sweden 2023). The European Commission has suggested creating a trust fund through which to invest Russian foreign reserves for rebuilding Ukraine. In the short term, the ownership of the assets would not change, thus bypassing the issue of state immunity. It is unclear whether the fund would

be centralized at the EU, decentralized at the member state level, or placed in a third country like Switzerland, and how seized sovereign assets would be channeled to Ukraine. In the longer term, the CBR reserves would be returned upon negotiated settlement and Russia's payment in full of agreed compensation to Ukraine.

While the trust fund is inventive, it remains unclear what would happen if the trust investments generated losses, potentially putting the EU in the awkward position of having to guarantee Russian sovereign assets with EU public money. The long-term solution also seems to exaggerate the leverage that immobilized Russian central bank assets would afford the West in compelling Russia to reach a peace agreement. Due to record-high energy prices last year, Russia accumulated about $250bn from the export of hydrocarbons – almost the equivalent of its immobilized assets. In addition, the EU mechanism would rely strongly on Russia abiding by the rules and paying reparations to Ukraine against the backdrop of a raft of flagrant Russian violations of international law.

Canada is the only G7 country to have amended its legislation to allow for the seizure of assets Under the amendments, the proceeds of the forfeited property can be used for the reconstruction of a foreign state to the extent that it is adversely affected by a grave breach of international peace and security, and the proceeds are needed to restore pre-conflict conditions and compensate victims. Thus, Canada's new powers allow it to go after Russia's central bank assets, which amount to almost C$20bn (Kaminga 2023).

## Sovereign immunity

Sovereign immunity comprises two different concepts: immunity from jurisdiction and immunity from enforcement (ICJ 2012, 113). Immunity from jurisdiction prevents domestic courts of one state from establishing jurisdiction over another state (Fox & Webb 2015, 75). Immunity from execution prevents a state from coercing another state to enforce a decision by a domestic court (Ibid, 484). Sovereign immunity as a rule of international law is of a customary nature and has been developed in state practice for a considerable time (ICJ 2012, 56; Jennings & Watts 2008, 342). More recent times have seen its codification in the United Nations Convention on the Jurisdictional Immunities of States adopted by the UNGA in 2004 (UNCSI 2004). The UNCSI is not yet in force, however, at least some of its provisions are a reflection of existing customary law (Salvati 2022). Given that the majority of states that propose the confiscation are members of the Council

of Europe, it is important to mention the European Convention on State Immunity (ECSI 1972), adopted by the Council of Europe in 1972. Some of those states have also enacted national statutes to implement international obligations on state immunity protection (Wuerth 2019).

According to the proposals on the table, it is the executive and not the judiciary that orders the seizure of sovereign assets (Shagina 2023). This also means that the enforcement of the decision does not relate to court proceedings. It is based on extrajudicial proceedings. The distinction is important since the explicit focus of existing rules on immunity from the judiciary's jurisdiction leaves a legal loophole when it comes to the executive's jurisdiction. In a landmark case, the International Court of Justice defined immunity from jurisdiction as "the right of a state not to be the subject of judicial proceedings in the courts of another state", and referred to the immunity from enforcement only in the context of court proceedings (ICJ 2012, 113, 114). However, the ICJ's approach is only logical since the facts of the case only related to court proceedings: on the one hand, the case concerned judgments rendered by the national courts of Italy and Greece against Germany, and, on the other hand, enforcement measures against assets of Germany for executing these judgments. The ICJ simply did not have to discuss whether state immunity applies in extrajudicial proceedings and there is no indication that the reasoning would be any different.

Regarding the immunity from jurisdiction, Art. 5 UNCSI stipulates that"[a]state enjoys immunity, in respect of itself and its property, from the jurisdiction of the courts of another state". Regarding the immunity from execution, Art. 18 and 19 UNCSI provide that neither pre-judgment nor post-judgment measures of constraint "may be taken in connection with a proceeding before a court of another state". It would seem, thus, at first glance, that the definition is a narrow one. Yet, it is important to note that the treaty defines the term "court" as "any organ of a state, however named, entitled to exercise judicial functions (UNCSI 2004, Art. 2(1)). The position of the organ that decides on the confiscation in the political system of a state is not relevant, therefore, but the nature of the function it exercises through the act of confiscation is, so the executive organ might still qualify as a court, and be bound by the immunity prohibitions.

This wide interpretation is in nature with the purpose of the sovereign immunity rule in international law. Sovereign immunity derives from the principle of the sovereign equality of states. This principle is enshrined in the UN Charter. It stipulates that "the Organization is based on the principle of the sovereign equality of all its Members" (UN 1945, Art. 2(1)). Sovereign

equality represents the essence of the international legal order. Whereas states differ in the military power, wealth, population, or the territory they possess, they are equal from a legal point of view. If they are equal, it follows that a state cannot decide upon another state - *par in parem non habet imperium* - as the old Latin maxim goes (De Vattel 1758, 105). By shielding a state from the jurisdiction and measures of enforcement by another state, state immunity protects the principle of the sovereign equality of states. This facilitates international cooperation as it helps reduce friction among states.

Still, there are precedents of states seizing assets of other states in extrajudicial proceedings in times of war. Yet, in peacetime, states generally abstain from seizing assets of other states in extrajudicial proceedings (Egli 2023, 32). By contrast, the situation looks different when it comes to the practice of sanctions. States have increasingly used the tool of financial sanctions against other states (Ruys 2019, 671). Sanctions are the domain of the executive and legislative branches of states and have a coercive character. Thus, they entail measures of constraints in extrajudicial proceedings. The practice of sanctions shows that at least some states engage in exercising jurisdiction and the application of measures of constraints against other states in extrajudicial proceedings. However, the legal basis for sanctions must be provided in another binding act of international law, such as a UN Security Council resolution empowering those states to perform sanctions. Otherwise, sanctions are only a unilateral measure of diplomatic pressure staying outside the realm of international law. This is because the unilateral application of international law endangers reciprocity and equality and undermines the whole system. The same argument can be used to oppose those scholars who claim that „it is time to revisit sovereign immunities to interpret and apply them in a manner that complies with international human rights law", adding that in the context of the Ukraine war and Russia's role as the attacker: „one may reasonably doubt the legitimacy of the sovereign immunity rule as far as it prevents compensation for serious human rights violations such as thousands of recorded civilian causalities and hundreds of thousands of destroyed residential buildings" (Chernohorenko 2023, 1070-1071). These arguments suffer from the same deficiencies that burdened the concept of humanitarian intervention, once a popular instrument to intervene in a conflict by the Western powers – they are simply out of touch with the system and nature of international law, since they would suppose one state taking in its hands the role of the judge and the executor against another state which is its equal (Vučić 2018).

## Non-interference

The non-interference rule in international law prohibits "forcible or dictatorial interference by a state in the affairs of another state, calculated to impose certain conduct or consequences on that other state" (Jennings & Watts 2008, 430). In our present analysis, the question arises whether the seizure of the CBR assets by another state's organs constitutes an intervention in the affairs of Russia and is thus prohibited under international law.

Like the principle of state immunity, the prohibition of intervention is rooted in the principle of sovereign equality of states. If states are equal, it follows that a state is not allowed to interfere in the affairs of another state. The prohibition of intervention can be understood as a principle that, at least in a rudimentary fashion, coordinates the coexistence of sovereign states. In this sense, the sovereignty of a state ends where the sovereignty of another state begins. The prohibition of intervention has evolved as a rule of customary international law and it was finally incorporated into the UN Charter (Art. 2(7)). Its most succinct definition was provided again by the ICJ in another seminal judgment: „The principle forbids all states or groups of states to intervene directly or indirectly in internal or external affairs of other states. A prohibited intervention must accordingly be one bearing on matters in which each state is permitted, by the principle of state sovereignty to decide freely. Intervention is wrongful when it uses methods of coercion in regard to such choices, which must remain free ones" (ICJ 1984, 205). Two elements of the definition are essential: the intervention interferes with the freedom of another state; the intervention is coercive.

Another state's freedom is usually described in theory as the domain where a state has the exclusive rights to make decisions - *domaine réservé* (Tzanakopoulos 2015, 621). Interference in the exclusive domain can be direct or indirect and based on positive as well as negative acts (Ibid). The exclusive domain is somewhat difficult to define. It comprises all matters not regulated by international law and thus is the sole responsibility of a state (Egli 2023, 20). Since states differ in their international obligations, the exclusive domain is not the same for every state. The ICJ held that the *domaine réservé* includes "the choice of a political, economic, social and cultural system, and the formulation of foreign policy" (ICJ 1984, 205).

Interference by a state in the exclusive domain of another state must accompanied by coercion, which should be distinguished from mere pressure exertion (Tzanakopoulos 2015, 620). Coercion exists in the case of the use of

force. This holds both in the case of using force directly as well as in the case of indirectly using force by supporting armed activities in another state operating against the government of this state (ICJ 1984, 205). However, not only the military force but also economic, political, or diplomatic measures can qualify as coercion if they achieve the required coercive effect. Again, as with the notion of the "court", the definition is functional. This understanding acknowledges that instead of relying on brute force, there exist more subtle ways to coerce another state. The Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States under the Charter of the United Nations adopted by the UNGA takes up this approach by stating that "no state may use or encourage the use of economic, political or any other type of measures to coerce another state to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind" (UNGA 1971). However, it can be hard to distinguish between, on the one hand, a state pursuing economic interests that affect the exclusive domain of another state and, on the other hand, a state using its economic power to impose decisions on a state concerning a matter where this state is entitled to freely make its own decision.

The seizure of CBR's assets, therefore, might constitute a prohibited intervention if this measure coercively interferes in the exclusive domain of the Russian Federation. In other words, an intervention exists if the seizure of assets imposes a decision on Russia regarding a matter where Russia is entitled to decide freely under international law. If states permanently deprive Russia of certain assets located on their territory for the payment of reparations, they impose these payments on Russia. This is coercive. The issue turns around to whether is then Russia obliged to pay reparations to Ukraine. If there is an international obligation for Russia to pay, Russia cannot decide freely whether it wishes to pay or not but would be obliged to pay reparations under international law.

Therefore, it is crucial that the authority of a state that adopts the decision to deprive Russia of certain assets carefully evaluates the extent of Russia's obligation to pay reparations. In other words, Russian responsibility for an internationally wrongful act should be established first by a court decision. Furthermore, a state must consider to which extent Russia has already fulfilled its obligations, notably because authorities of other states might already have adopted measures to deprive Russia of certain assets. This shows that the allies of Ukraine must work together. If they go beyond the enforcement of Russia's international obligations, the seizure of assets of Russia becomes a prohibited intervention.

## Investment protection

International investment law aims to protect foreign investments, which means investments in a state (the capital-importing state) made by investors from another state (the capital-exporting state) (Collins 2016). There are only relatively few multilateral treaties protecting foreign investments. Bilateral investment treaties (BITs) are the main source of international investment law (Ibid) BITs regulate how investments by a foreign investor are treated, the so-called "post-establishment provisions", and, in some cases, under which condition a foreign investor is allowed to invest in the first place ("pre-establishment provisions") (Ibid).

One of the post-establishment provisions is the key for the present analysis, namely the prohibition of expropriation of foreign investors by the host state. The main idea of international investment law is to ensure legal security for the investors and therefore enable the free flow of capital globally. States conclude BITs because, on the one hand, they are interested in attracting investments from abroad and, on the other hand, they wish that investments of their nationals are protected in other countries, that is they expect reciprocity in the treatment of investors. The scope of BITs depends on how they define the terms "investor" and "investment". As each BIT is the result of negotiations between two states, BITs comprise different definitions of those terms. Therefore, the scope of BITs requires a case-by-case analysis.

Russia has concluded 85 BITs of which 64 are in force – those in force include BITs with almost all member states of the EU as well as Canada, Japan, South Korea, Switzerland, and the UK (UNCTAD 2024). On the other hand, the BIT signed between Russia and the USA in 1992 never entered into force. For the present analysis, due to constraints of time and space, not all relevant BITs will be analyzed. The proper analysis would have to take into account all BITs between the Russian Federation and allies of Ukraine that are planning on confiscating the CBR's assets. It is the opinion of this author that it suffices to take one BIT as an example and a case study. The decision was made to take as a case study the BIT between Russia and the United Kingdom of Great Britain and Northern Ireland from 1989 (UK BIT 1989). This BIT was concluded by the Union of Soviet Socialist Republics (USSR) as the predecessor of the Russian Federation. After its disintegration in 1991, the newly emerged Russian Federation succeeded in all international treaty obligations of the USSR. Therefore, the BIT is still in force. Although it is a model treaty, it was adopted at the time when the USSR was starting to fall apart and its strength in international relations was

on decline. The provisions agreed upon, and obligations assumed by the UK reflect the minimum standards it believed should be afforded to a country that was desperate to start its economic transition to the free market. If the UK would breach any of its provisions in the attempt to confiscate CBR's assets it would represent a blatant disregard for minimum standards of foreign investment protection.

The first issue that needs to be clarified is whether the BIT with the UK protects the foreign reserves of the CBR. at all. Let us analyze the scope *ratione personae* of the BIT. According to Art. 1, the term "investor" shall comprise with regard to either Contracting Party:

i) natural persons having the citizenship or nationality of that Contracting Party in accordance with its laws;

ii) any corporations, companies, firms, enterprises, organizations, and associations incorporated or constituted under the law in force in the territory of that Contracting Party; provided that that natural person, corporation, company, firm, enterprise, organization, and association is competent, in accordance with the laws of that Contracting Party, to make investments in the territory of the other Contracting Party".

The BIT with the UK differentiates between natural persons and legal persons. Regarding legal persons, the BIT lists seven structures that are protected. Furthermore, it is required that these structures are lawfully incorporated or constituted in one of the contracting states. The BIT does not indicate whether a state itself or state entities can qualify as investors. In this regard, this treaty is no exception. The great majority of BITs do not make any reference to states or state entities as investors (Qureshi & Ziegler 2019, 25). It is rare that BITs explicitly include or exclude states or state entities. Let us take for example another BIT concluded by the UK, this time with the United Arab Emirates. In Article 1(b), the term "investor" is defined as "any national or company of one of the Contracting Parties or the Government of one of the Contracting Parties, or the Government of any of the Emirates of the United Arab Emirates" (UK BIT 1992). In the absence of an explicit rule, a BIT must be interpreted to establish its scope. As for other treaties, Art. 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) serve as the guidelines for interpretation (VCLT 1969). According to Art. 31 par. 1 VCLT, a "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".

Thus, three different methods of treaty interpretation can be distinguished: textual interpretation (the ordinary meaning), systematic

interpretation (the context), and teleological interpretation (the object and purpose) (Vučić & Đukanović 2024, 31). Regarding the CBR, it is doubtful to qualify it as a "corporation", "company", "firm", "enterprise" or "association". However, the CBR might be considered an "organisation" in the ordinary sense of the term. Furthermore, the treaty does not make any distinction whether the entity is of a private or public nature. Thus, the CBR can be considered as covered based on a textual interpretation of the BIT.

The systematic interpretation requires considering the context of a treaty, including the entire text as well as the preamble and annexes. The preamble of the BIT with the UK states that the contracting parties are "recognizing that the promotion and reciprocal protection under an international agreement of such investments will be conducive to the stimulation of business initiative and will contribute to the development of economic relations between the two states". The wording is very broad. It does not provide any hints that the treaty should be limited to private investors.

Regarding the object and purpose of the treaty at hand, it is instructive to consider its historical context. The treaty was concluded by the USSR in 1989. The USSR was based on a communist model. According to Soviet law, only the state could have ownership of significant property (Annacker 2011, 539). If the BIT concluded by the USSR in 1989 had not covered the state and state entities, the treaty would have offered no protection to Soviet investments, given that at this time only state entities made such investments abroad. In conclusion, given the broad wording of the treaty and the historical context, it seems plausible that Russia and its entities (including the CBR) qualify as investors under the BIT.

But one issue remains to be clarified. Is it possible for a state or state entity to also qualify as an investor if it does not act like a private actor in a commercial context but exercises sovereign functions? This issue is a subject of some discussion in international investment law doctrine, because state-owned enterprises (SOEs) play an increasingly crucial role in the global economy as foreign investors (El-Hosseny 2016). In principle, the CBR is a "juridical person" that may qualify as a "national of another Contracting State" within the meaning of Article 25 of the ICSID Convention (ICSID 1965). A central bank from an ICSID Contracting State that invested in another Contracting State should, *a priori*, be entitled to standing before the Centre for the settlement of investment disputes. One of the lead drafters of the ICSID Convention, Aron Broches, confirmed that SOE claims against states under the Convention should be permissible provided that the SOE was not "acting as an agent for the government" or "discharging an essentially governmental

function" (El-Hosseny 2016, 375). This statement has become known as the "Broches test". The application of the Broches test in the CBR's case depends on whether the nature of the acts performed by it was commercial (*jure gestionis*) or governmental (*jure imperii*). If one follows these considerations, the CBR does not qualify as an investor under the BIT with the UK. The CBR is entrusted with the task of issuing currency and protecting the Russian rouble. The assets invested by the CBR abroad are used as reserves for protecting the stability of the rouble. Thus, the CBR exercises a governmental function. It is therefore not protected under the treaty with the UK.

However, the Broches test was claimed to be on the ebb in international investment law already in the middle of the last decade (El-Hosseny 2016). It is doubtful whether an investment tribunal in a future case led by Russia to recover the CBR's assets would follow it. It is not a customary or a treaty rule of international law, not even a binding precedent, but rather an authoritative interpretation by one of the principal creators of the ICSID convention. Furthermore, the open-ended nature of BIT interpretation, which takes into account myriad factors, not excluding the *travaux-préparatoires* and the subsequent practice by the parties (Vučić & Đukanović 2024), "forbids too categorical an assessment of how any given BIT dispute would turn out (Moiseienko 2024, 32).

Finally, international customary law of foreign investments only includes the so-called international minimum standard. This is a set of rules governing the treatment of aliens (Dickerson 2010, 1). The minimum standard has developed concerning the status of aliens in general and concerns various areas. It includes rules protecting the property of aliens. In particular, it prescribes that expropriation is only allowed if certain requirements are fulfilled (Hobe 2015, 7). The question is who qualifies as an alien and is thus protected by the minimum standard. Aliens are individuals who reside within a state but are not citizens or subjects of that state (Dickerson 2010, 2). Furthermore, foreign legal persons can also qualify as aliens (Hobe 2015, 8). The minimum standard might protect states and state entities when their acts are commercial. By contrast, it is not plausible that they enjoy protection under the minimum standard if exercising sovereign authority.

## Conclusions

The article focused on the proposals to confiscate frozen sovereign assets of the Russian Federation and the legal obstacles to these proposals. The first part of the article presented various proposals in the US, UK, the EU, and

Canada, some of which have already become law, to interfere with the foreign assets of Russian individuals and entities. CBR's sovereign assets have already been encroached upon by the law in Canada and it might be expected that the analogous situation would develop in the rest of these countries. No matter the particular legislative concept, all of these acts would have to cope with the obstacles presented by international legal rules.

The Central Bank of Russia, which had previously managed these funds is a part of the Russian state and it enjoys sovereign immunity from the jurisdiction and enforcement of another state. The second part of the article presented the contents and purpose of this concept in international law and it reached a conclusion based on the analysis of customary international law, and general and regional treaties.

The CBR functions as an entity that conducts monetary policy, part of the exclusive domain of the Russian Federation, and therefore any interference that would prevent the CBR from performing this function would breach the rule of non-interference. The third part of the article presented the contents and the purpose of the concepts of exclusive domain and non-interference. State practice and available treaties were used to conclude.

Finally, even if it is assumed that the CBR is a separate entity from the Russian state that performs commercial functions that do not fall under sovereign immunity or non-interference protection, existing rules on investment protection in international regulate against any confiscation since it would amount to illegal expropriation and alien mistreatment. The fourth part explored this argument through the case study of the UK-USSR BIT and principles of international investment law.

Any proposal to confiscate the sovereign assets thus inevitably reaches the same dead-end – existing rules of international law that serve to create free trade and investment community of states. The very same states and entities that have inspired the creation of such a community, the USA, the UK, and the EU would now attempt to undermine it and thus provoke long-term instability in international relations. Indeed as one author notes: "The justice of making Russia pay for the reconstruction of Ukraine seems undeniable. Yet using the invasion as a pretext for erasing Russian property rights without regard to due process and the rule of law, international law included, would undermine the enterprise" (Stephan 2022, 287). It would be hard to expect other states to continue investing and trading from their bank accounts held in foreign countries since legal security would be utterly shattered after such a confiscation. Finally, the Russian Federation can one day surely be expected to initiate legal proceedings to recover the

confiscated funds. The money would then already have been spent and the US's, UK's, EU's, and other Western taxpayers would have to pay the damages, loss of interest and costs of proceedings from their own pockets.

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