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Legal Report on Confiscation of Russian State Assets for The Reconstruction of Ukraine

February, 2024

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ACKNOWLEDGEMENT

During the preparation of this report, the authors gained valuable insights and drew inspiration from the esteemed community of experts, in particular Yuliya M. Ziskina and Dr. Philip D. Zelikow (["Multilateral asset transfer: A proposal to ensure reparations for Ukraine"](#)), Laurence H. Tribe and Raymond P. Tolentino (["The Legal, Practical, and Moral Case for Transferring Russian Sovereign Assets to Ukraine"](#)), as well as Thomas Grant (["Multilateral Action Model on Reparations for Ukraine"](#)). We are also grateful to members of the Yermak-McFaul International Working Group on Russian Sanctions for their contributions to this topic, including in [Working Paper #6 "Why and How to Confiscate Russia's Sovereign Assets to Help Rebuild Ukraine"](#), and [Working Paper #15 "Why and How the West Should Seize Russia's Sovereign Assets to Help Rebuild Ukraine"](#). However, the perspectives and conclusions presented herein solely reflect the views of the authors and may diverge from those of the aforementioned community.

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EXECUTIVE SUMMARY

In the immediate aftermath of Russia's full-scale invasion of Ukraine in February 2022, the European Union, United States, United Kingdom, and their allies, imposed unprecedented restrictions on Russia's central bank, including the freezing of its reserves under their jurisdictions. The total immobilized assets are estimated at around \$300 billion, more than \$220 billion of which are located in the European Union and \$190 billion held by Brussels-based Euroclear alone, one of the world's largest central securities depositories.

Coalition governments have repeatedly stated that these funds will not be unblocked until Russia ends its illegal invasion of Ukraine and pays reparations for the damages it has caused to Ukraine. At the same time, discussions about the confiscation of Russian sovereign assets—and their use for reconstruction of Ukraine—have been gaining attention in recent months.

Many legal scholars have voiced their support for the confiscation of Russian assets, but concerns about the legality of such a step, potential implications for G7 financial systems and currencies, as well as consequences for foreign companies' and investors' assets in Russia are also being expressed in many countries. In this report, we outline the most important legal considerations and touch upon some of the aforementioned additional concerns.

We find that countermeasures against Russia, including asset confiscation, are justified:

- **Third countries are entitled to invoke countermeasures against Russia, including the confiscation of state assets, for Russia's gross violations of peremptory norms of internal law, or as specifically-affected states.** Countermeasures are a form of self-help available to all states in order to induce a wrongdoing state to comply with its international obligations. They have a double function in the law of state responsibility: as means for the implementation and justification for such actions.
- **Third countries are obligated to invoke Russia's responsibility by means of countermeasures due to the breach of international law represented by Russia's full-scale invasion of Ukraine.** Countermeasures enable states to respond to serious violations of international law without having to resort to, for instance, military action, and are supported by extensive state practice.
- **Countermeasures against Russia are justified due to the exceptional seriousness of Russia's violations of peremptory norms of international law.** Such norms reflect and protect fundamental values of the international community and give rise to obligations owed to this community as a whole. Russia has violated core principles of a rules-based international order by committing an act of aggression against Ukraine and by attempting to forcibly change the boundaries of a sovereign state.
- **Countermeasures are the only practical mechanism of responsibility in the case of Russia's violations of international law due to the unavailability of other courses of actions.** As a permanent member of the

UN Security Council, Russia can—and, in fact, has—avoided responsibility for its actions in the past by employing its veto power. Furthermore, Russia persistently defies the decisions of international courts and tribunals, as well as those of international organizations.

Alternatively, States are permitted to confiscate Russian sovereign assets by invoking their right to collective self-defense in response to Russian aggression:

- While the right to self-defense is often understood as an exemption to the prohibition of the use of force in the UN Charter system, there are strong arguments—stemming from interpretation of the UN Charter, jurisprudence, and state practice—to conclude that such an inherent right encompasses non-military actions as well.

Confiscation of Russian sovereign assets does not violate rules of sovereign immunity as claimed by many opponents of such a step:

- In fact, sovereign immunity is not relevant in the current situation as it is a procedural concept applicable to adjudication or enforcement by courts—not executive action. But, even if sovereign immunity played a role in this case, Russia’s enjoyment of it should be abrogated in view of its severe and systemic violation of international law.

Concerns with regard to Russia’s potential retaliation against assets of foreign companies and potential investment arbitration are misplaced:

- **Russia has already adopted various measures that amount to the expropriation of companies from “unfriendly” states and severely restrict the rights of foreign investors in Russia.** In terms of Russian claims against states implementing asset seizure, these should be dismissed at the jurisdiction and admissibility state of the dispute as Russia’s gross and continuous violation of international law deprive it of such protections.

States have enough instruments at their disposal to authorize and legitimize a seizure of Russian sovereign assets:

- They should enter into a binding multilateral treaty which would establish a ground for further action as a matter of public international law, as well as implement national legislative reform. The proposed legal framework emphasizes the restoration of international peace and security and would represent a formidable response to Russia’s military aggression against Ukraine.

1. STATES ARE ENTITLED TO INVOKE RUSSIA'S RESPONSIBILITY BY MEANS OF COLLECTIVE COUNTERMEASURES

1.1. The doctrine of countermeasures as means for the implementation of state responsibility and justification precluding wrongfulness

Seizure¹ of Russian assets, including CBR reserves, constitutes lawful countermeasures against Russia under international law. Third states are entitled to invoke countermeasures against Russia for its violation of peremptory norms of international law, or as specifically affected states.

According to Article 22 of Articles on State Responsibility for Internationally Wrongful Acts (“Articles on State Responsibility” or “ARSIWA”), actions taken as countermeasures, even if they appear to breach international law are justified. Article 22 specifically reads: “The wrongfulness of an act of a State not in conformity with an international obligation towards another State is precluded if and to the extent that the act constitutes a countermeasure taken against the latter State.”

Countermeasures are considered a form of self-help² available to all states in order to induce the wrongdoing state to comply with its international obligations. As clarified by the International Law Commission (“ILC”) in the commentary to the Articles on State Responsibility, “[c]ountermeasures are a feature of a decentralized system by which injured States may seek to vindicate their rights and to restore the legal relationship with the responsible State which has been ruptured by the internationally wrongful act.”³ In most cases, the focus of countermeasures is to ensure cessation of an ongoing wrongful act. Additionally, they may also be taken to ensure reparation, provided that certain conditions are satisfied.⁴

Countermeasures have a double function in the law of state responsibility: as a means for the implementation of state responsibility and as a justification. As a means, countermeasures are applied to bring about cessation of the internationally wrongful act and ensure reparation.⁵ As a justification, countermeasures preclude wrongfulness of the actions taken against the wrongdoing state, even if such actions would amount to violations of international law in other circumstances. Therefore, and even if one maintains that Russian assets are protected by sovereign immunity (see

¹ The terms “seizure” and “forfeiture” are used interchangeably in this report and denote transfer of legal title to a property, variation of terminology arises out of difference among particular national jurisdictions, which is a subject of this study. Similar approach can be found in Multilateral Action Model on Reparations [Report](#) by T. Grant at p.48.

² ARSIWA Commentary, p. 75: “In the literature concerning countermeasures, reference is sometimes made to the application of a “sanction”, or to a “reaction” to a prior internationally wrongful act; historically the more usual terminology was that of “legitimate reprisals” or, more generally, measures of “self-protection” or “self-help”. The term “sanctions” has been used for measures taken in accordance with the constituent instrument of some international organization, in particular under Chapter VII of the Charter of the United Nations—despite the fact that the Charter uses the term “measures”, not “sanctions”. The term “reprisals” is now no longer widely used in the present context, because of its association with the law of belligerent reprisals involving the use of force. At least since the Air Service Agreement arbitration, the term “countermeasures” has been preferred, and it has been adopted for the purposes of the present articles.”

³ ARSIWA Commentary, p. 128.

⁴ ARSIWA Commentary, p. 131.

⁵ ARSIWA, art. 49(1).

Section 3.3.), abrogation of sovereign immunity or other rules theoretically protecting Russian assets is in compliance with international law.

From the theoretical standpoint, **the legal nature of countermeasures can be explained through rights forfeiture doctrine, whereby their legality is rooted in the fact that the recalcitrant state has, by its illegal conduct, renounced the legal protection of its rights.**⁶ Accordingly, even if one accepts the view that CBR reserves are shielded by sovereign immunity, Russia has deprived itself of the ability to invoke sovereign immunity protection for its assets through its violation of international law.

Pursuant to forfeiture theory, countermeasures do not breach the target state's rights since the target state has forfeited the legal protection of those rights. This understanding of countermeasures was also supported by ILC members over the course of its work on the Articles on State Responsibility.⁷

Importantly, the forfeiture doctrine does recognize that the wrongdoing state's forfeiture may concern numerous parties, plausibly since many states are bound by collective obligations.⁸ Therefore, it fully supports collective countermeasures. The forfeiture doctrine is also in line with Article 50 of the *Articles on State Responsibility*, whereby countermeasures may not infringe on peremptory norms of international law, fundamental human rights, and international humanitarian law. Peremptory norms are, by definition, non-derogable; therefore, states may not forfeit them. Fundamental human rights and humanitarian law (other than *jus cogens* norms) may not be forfeited by a violating state because such forfeiture would affect the individuals, protected by such rules, rather than the state itself.⁹

1.2. States are instructed to invoke Russia's responsibility by means of countermeasures due to the seriousness of the breach of international law

Third states have an obligation to act in order to end Russia's violation of international law. According to Article 41 of the *Articles on State Responsibility*, states shall cooperate to bring to an end through lawful means any serious breaches of international law within the meaning of Article 40 (for discussion on serious violations of international law attributable to Russia, please see Sections 1.5.-1.6.). This article creates a positive obligation to act in addition to obligations not to recognize illegal situations and not to provide aid or assistance to the violating state.

As the *ILC* explains in its commentary to the Articles on State Responsibility: "Pursuant to paragraph 1 of Article 41, States are under a positive duty to cooperate in order to bring to an end any serious breach in the sense of Article 40." Because of the diversity of circumstances which could possibly be involved, the provision does not prescribe in detail what form this cooperation should take. Cooperation could be organized in

⁶ Paddeu F. *Justification and Excuse in International Law. Concept and Theory of General Defences.* Cambridge Studies in International and Comparative Law. Cambridge University Press, p.294

⁷ *Id.*, p.294.

⁸ *Id.*, p.277.

⁹ *Id.*, p.297.

the framework of a competent international organization, in particular the United Nations. However, Paragraph 1 also envisages the possibility of non-institutionalized cooperation.”¹⁰ Further, the ILC emphasizes: “It is, however, made clear that **the obligation to cooperate applies to States whether or not they are individually affected by the serious breach.**”

Therefore, Article 41 explicitly obligates states to take measures in order to put an end to Russia’s continuous gross violations of international law. G7 states have done so by imposing economic sanctions on Russia. Confiscation of Russian assets is a possible next step, which falls within the scope of lawful measures under Article 41. As noted by James Crawford¹¹: “Article 41 can only do so much to redress the breach of peremptory norms: when all is said and done, the political will to enforce international law must be present.”¹²

Furthermore, as clarified by the International Court of Justice (“**ICJ**”) in its Namibia Advisory Opinion, “**The qualification of a situation as illegal does not by itself put an end to it. It can only be the first, necessary step in an endeavor to bring the illegal situation to an end.**”¹³ A separate opinion by Judge Simma in *Armed Activities on the Territory of the Congo (DRC v. Uganda)* further clarifies that “regardless of whether the maltreated individuals were Ugandans or not, Uganda had the right—indeed the duty—to raise the violations of international humanitarian law committed against the private persons at the airport.”¹⁴

Importantly, **third-party countermeasures enable states to respond to serious violations of international law, without having to resort to military action.** As explained by Crawford in his third report to the *ILC*: “As a matter of policy, the constraints and inhibitions against collective countermeasures—in particular concerns about due process for the allegedly responsible State as well as the problem of intervention in and possible exacerbation of an individual dispute—are substantially reduced where the breach concerned is gross, well attested, systematic and continuing. To disallow collective countermeasures in such cases does not seem appropriate. Indeed, to do so may place further pressure on States to intervene in other, perhaps less desirable ways. (...) But at least it can be said that international law should offer to States with a legitimate interest in compliance with such obligations, some means of securing compliance which does not involve the use of force.”¹⁵

Further, according to Article 48 of the Articles on State Responsibility, “a State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: (a) that State individually; or (b) a group of States including that State, or the international community as a whole, and the breach of the obligation: i(i)

¹⁰ ARSIWA Commentary -p. 114.

¹¹ James Crawford is regarded as the most authoritative scholar of the law of state responsibility. Crawford was believed to be “a towering figure in international law, his work unparalleled in terms of its rigour, its authoritativeness and its comprehensiveness” and he was “a legendary rapporteur of the UN International Law Commission, he single handedly penned the law on state responsibility”. Crawford served as Judge at the International Court of Justice and Director at the Lauterpacht Centre for International Law at Cambridge University.

¹² Crawford J., *State Responsibility: The General Part*. Cambridge Studies in International and Comparative Law. Cambridge University Press; 2013, p.389.

¹³ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion of 21 June 1971.

¹⁴ *Armed Activities on the Territory of the Congo (DRC v Uganda)*, Judgement, 2005 I.C.J., para. 34.

¹⁵ Third report on State responsibility, by Mr. James Crawford, Special Rapporteur, para.405

specially affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.”

It is important to emphasize that **the Articles on State Responsibility authorize states to take tangible measures against a violating state**. As noted by Crawford: “Once again, invocation of responsibility in this context entails something more than raising concerns in a diplomatic setting. (...) Depending on the circumstances, many or even all states could be entitled to invoke responsibility in reliance on this provision.”¹⁶

1.3. Third-party countermeasures are supported by extensive state practice

Third states can invoke countermeasures against Russia for its violation of peremptory norms of international law. Russia’s gross and continuous breach of peremptory norms is recognized and deplored by the UN General Assembly and the ICJ. Third party countermeasures are the only available means for invoking responsibility due to Russia’s use of veto powers in the UN Security Council to preclude any effective resolution as well as Russia’s systematic refusal to comply with decisions of international judicial institutions or other international organizations.

As the drafting history of the Articles on State Responsibility as well as works of esteemed legal scholars indicate, third party countermeasures are precisely intended to apply in such circumstances. **There is sufficient state practice to argue that customary international law has evolved in the direction of recognition of third-party countermeasures** since the adoption of the Articles on State Responsibility or even at the time of their drafting. Opponents of the proposal to transfer Russian reserves to Ukraine argue that third-party countermeasures are not explicitly provided for by the Articles on State Responsibility. Article 54 which stipulates measures taken by states other than an injured state is often referred to as “saving clause.” It states that the chapter on countermeasures “does not prejudice the right of any state entitled under Article 48, Paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured state or of the beneficiaries of the obligation breached.”

Interestingly, when discussing third-state countermeasures, the ILC states that “[p]ractice on this subject is limited and rather embryonic. In a number of instances, States have reacted against what were alleged to be breaches of the obligations referred to in Article 48 without claiming to be individually injured. Reactions have taken such forms as economic sanctions or other measures (e.g. breaking off air links or other contacts).”¹⁷ This conclusion is made by the ILC alongside citing six instances of clear third-party countermeasures, which include:¹⁸

¹⁶ Crawford, *supra* note 12, p. 550.

¹⁷ ARSIWA commentary p. 137.

¹⁸ ARSIWA commentary p. 138.

- **United States-Uganda (1978):** In October 1978, the United States Congress adopted legislation prohibiting exports of goods and technology to, and all imports from, Uganda. The legislation recited that “[t]he Government of Uganda (...) has committed genocide against Ugandans” and that the “United States should take steps to dissociate itself from any foreign government which engages in the international crime of genocide.”
- **Certain Western countries-Poland and the Soviet Union (1981):** On 13 December 1981, the Polish government imposed martial law and subsequently suppressed demonstrations and detained many dissidents. The United States and other Western countries took action against both Poland and the Soviet Union. The measures included the suspension, with immediate effect, of treaties providing for landing rights of Aeroflot in the United States and LOT in the United States, the United Kingdom, France, the Netherlands, Switzerland, and Austria.
- **Collective measures against Argentina (1982):** In April 1982, when Argentina took control over part of the Falkland Islands (Malvinas), the Security Council called for an immediate withdrawal. Following a request by the United Kingdom, European Community members, Australia, Canada, and New Zealand adopted trade sanctions. These included a temporary prohibition on all imports of Argentine products, which ran contrary to Article XI:1 and possibly Article III of the General Agreement on Tariffs and Trade.
- **United States-South Africa (1986):** When in 1985, the government of South Africa declared a state of emergency in large parts of the country, the Security Council recommended the adoption of sectoral economic boycotts and the freezing of cultural and sports relations. Subsequently, some countries introduced measures which went beyond those recommended by the Security Council. The United States Congress adopted the *Comprehensive Anti-Apartheid Act* which suspended landing rights of South African Airlines on United States territory.
- **Collective measures against Iraq (1990):** On 2 August 1990, Iraqi troops invaded and occupied Kuwait. The Security Council immediately condemned the invasion. European Community member states and the United States adopted trade embargoes and decided to freeze Iraqi assets. This action was taken in direct response to the Iraqi invasion with the consent of the government of Kuwait.
- **Collective measures against the Federal Republic of Yugoslavia (1998):** In response to the humanitarian crisis in Kosovo, the member states of the European Community adopted legislation providing for the freezing of Yugoslav funds and an immediate flight ban.

Since 2001, state practice on third party countermeasures has grown dramatically. In recent years, scholars have been questioning whether the *International Law Commission's* conclusion on the scarcity of state practice of third-party

countermeasures remains accurate.¹⁹ **It is possible to argue, for instance, that the whole body of economic sanctions and coercive measures imposed by Western states since 2001 can be qualified as third-party countermeasures.** Such measures often include embargoes and trade restrictions that prima facie violate WTO and other free trade regimes, or asset freezes which appear to be inconsistent with bilateral investment treaties.²⁰

The most exhaustive study of collective countermeasures to date by Martin Dawidowicz provides an extensive overview of recent state practice of invoking third-party countermeasures. Many of the measures referred to in national legal systems as sanctions actually fall under the category of countermeasures as a matter of international law. Below, we provide a summary of certain state actions, qualified as countermeasures by Dawidowicz. We focus on the most relevant precedents and the ones that involve assets freezes.

Target State	Measures	Why the measures fall under the category of countermeasures
Iraq, 1991	Freezing of state assets on the territory of EC member states. Trade embargoes by EC member states and other states.	<p>Measure was taken before the adoption of UN SC Resolution imposing mandatory and comprehensive sanctions against Iraq. France explained at the Security Council that such action was justified in response to a ‘major violation of international law’.</p> <p>Imposing states did not refer to the right to collective self-defense.</p> <p>States did not justify their prima facie unlawful trade embargoes under Article XXI GATT.</p>
Sudan, 1997	United States imposed trade embargo against Sudan and froze all Sudanese government assets within its jurisdiction.	Asset freeze required justification under general international law, and can only be understood as a third-party countermeasure.

¹⁹ Dawidowicz M., *Third-Party Countermeasures in International Law*. Cambridge Studies in International and Comparative Law. Cambridge University Press; 2017.
 Martin Dawidowicz, *Third-party countermeasures: A progressive development of international law?* http://www.qil-qdi.org/wp-content/uploads/2016/06/02_Collective-CM_DAWIDOWICZ.pdf
²⁰ For more details, see Dawidowicz *supra* note 19, pp. 222-223, p.235.

Libya, 2011	<p>Switzerland implemented a freeze of the assets of the Libyan Central Bank as well as those of several senior Libyan officials involved in the violent repression of the civilian population, including assets belonging to Colonel Gaddafi.</p> <p>United States imposed freeze of the assets of the Central Bank of Libya as well as those of Colonel Gaddafi and his closest associates in response to the 'extreme measures taken against the people of Libya, including by using weapons of war, mercenaries, and wanton violence against unarmed civilians, all of which have caused a deterioration in the security of Libya and pose a serious risk to its stability'.</p>	<p>Actions taken by the US and Switzerland were adopted prior to UN SC resolution and states did not invoke any specific treaty provision for justifying such actions, therefore asset freezes constituted third party countermeasures.</p>
Syria, 2011	<p>A number of states froze assets belonging to President Al-Assad and the Central Bank of Syria.</p>	<p>On 24 February 2012, at the First Conference of the Group of Friends of the Syrian People, more than sixty states and several regional organizations explained application of unilateral coercive measures as response to Syria's 'ongoing, widespread and systematic human rights violations', amounting in some cases to 'crimes against humanity.'</p>
Iran, 2012	<p>In 2012 EU member states froze assets of the Central Bank of Iran in response to the controversy over Iran's nuclear program.</p>	<p>EU member states referred to "Iran's continued refusal to comply with its international obligations and to fully cooperate with the IAEA".</p>

Russia, 2014	EU imposed an initial set of trade restrictions.	Limited export embargo applicable to energy-related goods amounted to a quantitative trade restriction, which is prima facie unlawful under Article XI GATT. EU member states did not invoke the national security exception in Article XXI GATT as possible justification for their conduct.
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Since customary international law is formed by consistent state practice in combination with *opinio juris*—an acceptance of the practice as law by the international community— it is evident that application of formal countermeasures by third states is becoming a new rule of customary international law.

1.4. Countermeasures by specially affected states

Article 42 of the Articles on State Responsibility stipulates that “a State is entitled as an injured State to invoke the responsibility of another State if the obligation breached is owed to: (a) that State individually; or (b) a group of States including that State, or the international community as a whole, and the breach of the obligation: (i) specially affects that State; or (ii) is of such a character as radically to change the position of all the other States to which the obligation is owed with respect to the further performance of the obligation.”

As recent reports indicate, the US considers justification of transfer of Russian sovereign assets to Ukraine based on the right of specially affected states to invoke countermeasures as a form of state responsibility.²¹ We find that this approach ultimately stems from the US’s position during the writing of the Articles of State Responsibility.²² There is a considerably smaller body of scholarly studies and international court decisions clarifying what is considered a specially affected state in the context of state responsibility, and the concept itself is borrowed from the law of treaties. It is worth noting that **the notion of specially affected states is nevertheless inextricably linked to the concept of obligations owed to the international community as a whole.**

The ILC’s commentary to the Articles on State Responsibility provides some guidance for the understanding of specially-affected states. The ILC explains: “Subparagraph (b)(i) stipulates that a State is injured if it is “specially affected” by the violation of a collective obligation. (...) Even in cases where the legal effects of an internationally

²¹ <https://www.cnn.com/2024/01/12/politics/us-proposal-russian-assets-ukraine/index.html>

²²Comments of the Government of the United States of America, 1 March 2001 <https://2009-2017.state.gov/documents/organization/28993.pdf>

wrongful act extend by implication to the whole group of States bound by the obligation or to the international community as a whole, the wrongful act may have particular adverse effects on one State or on a small number of States.”²³

As to the standard or degree by which the violation affects particular states in order for these states to qualify as specially-affected the *ILC* provides a very broad general guidance: “This will have to be assessed on a case-by-case basis, having regard to the object and purpose of the primary obligation breached and the facts of each case. **For a State to be considered injured, it must be affected by the breach in a way which distinguishes it from the generality of other States to which the obligation is owed.**”

With regard to examples of situations where specially affected states can be singled out from the community of states, the *ILC* refers to pollution of the high seas. In a case when such pollution occurs in violation of the United Nations Convention on the Law of the Sea and particularly impacts one or several states whose coastal lines may be polluted by toxic residues or whose coastal fisheries may be closed, according to the ILC, “independently of any general interest of the States parties to the Convention in the preservation of the marine environment, those coastal States parties should be considered as injured by the breach.”²⁴

James Crawford provides a slightly different example, which specifically relates to the act of aggression. Crawford opines: “First, Article 42(b)(i) concerns so-called ‘specially affected states’, reflecting Article 60(2)(b) VCLT. It may be that one particular state is the primary victim of a wrongful act, or the primary obligee of an obligation owed to a wider group of states. For example, the obligation not to use force in interstate relations enshrined in Article 2(4) of the UN Charter applies to the international community as a whole, but a specific act of aggression will always be perpetrated against a specific state (or states), and will have its most significant adverse impact on the target state. In such cases that specially affected state should have access to the full range of remedies open to an ‘injured state’, whether or not it may be said to have had an individual right to the performance of the obligation under Article 42(a).”²⁵

1.5. Peremptory norms of international law violated by Russia

Pursuant to the Vienna Convention on the Law of Treaties (VCLT), a **peremptory norm of general international law “is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”** (Article 53).²⁶ According to the UN ILC, “[p]eremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community. They are

²³ ARSIWA Commentary p. 119.

²⁴ *Ibid.*

²⁵ Crawford, *supra* note 12, p. 546.

²⁶ Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980).

universally applicable and are hierarchically superior to other rules of international law.”²⁷ Further, the ILC states that *jus cogens* norms give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in relation to which all states have a legal interest.

Peremptory norms include the prohibition of aggression; the prohibition of genocide; the prohibition of crimes against humanity; the basic rules of international humanitarian law; the prohibition of racial discrimination and apartheid; the prohibition of slavery; the prohibition of torture; and the right of self-determination”²⁸ Importantly, the International Court of Justice articulated that **prohibition of armed aggression as expressed in Article 2, paragraph 4 of the UN Charter is a peremptory norm of international law**²⁹. As stated above, international law contains obligations *erga omnes*, i.e., obligations of a state towards the international community as a whole. According to the International Court of Justice, *erga omnes* obligations include ‘the outlawing of acts of aggression, and of genocide, (...)’.

Russia’s violation of peremptory norms of international law was repeatedly confirmed by the UN General Assembly. On 2 March 2022, the UN General Assembly overwhelmingly adopted Resolution ES-11/1 whereby the UN deplored “in the strongest terms the aggression by the Russian Federation against Ukraine in violation of Article 2(4) of the [UN] Charter”. Importantly, Article 2(4) is considered to be a “a cornerstone of the United Nations Charter”³⁰ (and represents obligations owed to all UN member states). As stated in the UN’s press release: “The measure was adopted by a vote of 141 in favor to 5 against (Belarus, Democratic People’s Republic of Korea, Eritrea, Russian Federation, and Syria) with 35 abstentions—a clear reaffirmation of the 193-member world body’s commitment to Ukraine’s sovereignty, independence, unity, and territorial integrity.”³¹

On 14 November 2022, the UN General Assembly adopted Resolution ES-11/5, where in remarkably strong terms the General Assembly stated that “the Russian Federation must be held to account for any violations of international law in or against Ukraine, including its aggression in violation of the Charter of the United Nations (...) and that it must bear the legal consequences of all its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts”. Finally, in its Resolution of 17 February 2023, the UN General Assembly urged member states to redouble support for achieving a comprehensive, just and lasting peace in Ukraine, consistent with the Charter.

Therefore, **countermeasures invoked against Russia are in compliance with UN General Assembly resolutions and aimed at achieving goals stated in the resolutions, specifically to induce Russia to withdraw all of its military forces**

²⁷ Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), Conclusion 2. https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf

²⁸ Draft conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), Conclusion 23, Annex. https://legal.un.org/ilc/texts/instruments/english/draft_articles/1_14_2022.pdf

²⁹ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgement 1986 I.C.J., para. 190.

³⁰ Armed Activities on the Territory of the Congo (DRC v Uganda), Judgement, 2005 I.C.J., para. 148.

³¹ General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops <https://press.un.org/en/2022/ga12407.doc.htm>

from the territory of Ukraine, to bring about Russia's international responsibility, and to induce Russia to make reparations.³²

1.6. Exceptional seriousness of violations of international law by Russia: illegal use of force and attempt to forcible change boundaries of a sovereign state

Russia committed an act of aggression and attempted to forcibly change the boundaries of a sovereign state. These two specific violations are at the center of this analysis as examples of Russia's violations of peremptory norms of international law, although Russia's violations of international law are not limited to said breaches. **Russia's ongoing aggression against Ukraine constitutes a violation of international law on a scale not seen since WWII.**³³ To understand the gravity of Russia's violations, an overview of the exceptionally serious role of the prohibition of use of force and the special status of territorial regimes under international law is provided below.

1.6.1. Act of aggression

Article 2(4) of the UN Charter stipulates that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." Use of force is allowed only upon authorization by the UN Security Council for the purpose of self-defense.³⁴

Further, as articulated by the ICJ in *Congo v. Uganda*, **"the prohibition against the use of force is a cornerstone of the United Nations Charter."**³⁵ The Nuremberg tribunal also stated that **aggression is the "supreme international crime differing only from other war crimes in that it contains within itself the accumulated evil of the whole."**³⁶

Although Russia technically notified the UN Security Council of invoking self-defense on the date of the commencement of the full-scale invasion on February 24, 2022,

³² UN General Assembly resolutions ES-11/1 of 2 March 2022, entitled "Aggression against Ukraine", ES-11/2 of 24 March 2022, entitled "Humanitarian consequences of the aggression against Ukraine", and ES-11/4 of 12 October 2022, entitled "Territorial integrity of Ukraine: defending the principles of the Charter of the United Nations", Resolution adopted by the General Assembly on 14 November 2022 A/RES/ES-11/5 entitled "Furtherance of remedy and reparation for aggression against Ukraine"

³³ T. Grant, Multilateral Action Model on Reparations for Ukraine: "Russia's aggression against Ukraine constitutes an attack against general public order of a magnitude and kind without precedent since 1945."

³⁴ UN Charter, Chapter VII.

³⁵ *Armed Activities on the Territory of the Congo (DRC v Uganda)*, Judgement, 2005 I.C.J., para. 148.

³⁶ *Trial of the Major War Criminals Before the International Military Tribunal, Nuremberg*, 14 November 1945–1 October 1946, Vol. 1, 1947, p. 186.

Russia's action has been recognized to constitute an unlawful aggression by the UN General assembly, ECHR and ICJ.

1.6.2. Attempts to forcible change boundaries of a sovereign state

Protection of set interstate boundaries is one of the preeminent principles of a rules-based international order. The International Court of Justice concluded in the Corfu Channel case that “between independent states, respect for territorial sovereignty is an essential foundation of international relations”.³⁷ As it is stressed by Thomas Grant,³⁸ breach of the territorial settlement is not a matter of degree. “Any attack on that principle—even on the smallest scale, even before any “cumulation of attacks” has occurred—concerns international law in the most serious way.”³⁹

It is important to note that **there is no territorial dispute between Ukraine and Russia as a matter of international law. Russia never formally challenged Ukrainian borders as established in 1991 until the purported annexation of Crimea in 2014.** Russia recognized Ukrainian sovereignty and existing borders by virtue of the 1990 Treaty between Ukrainian Soviet Socialist Republic and Russian Soviet Federative Socialist Republic.⁴⁰ Further, Russia reaffirmed the inviolability of the Ukrainian border in the Treaty on Friendship, Cooperation and Partnership between Ukraine and the Russian Federation of 1997⁴¹.

The International Court of Justice's position on inviolability of settled borders is unequivocal. In *Libya v Chad*, the court stressed: “Once agreed, the boundary stands, for any other approach would vitiate the fundamental principle of the stability of boundaries, the importance of which has been repeatedly emphasized by the Court.”⁴² Further, the court clarified that a territorial regime outlives the treaty by which it was established. “A boundary established by treaty thus achieves a permanence which the treaty itself does not necessarily enjoy. The treaty can cease to be in force without in any way affecting the continuance of the boundary. In this instance, the Parties have not exercised their option to terminate the Treaty, but whether or not the option be exercised, the boundary remains. This is not to say that two States may not by mutual agreement vary the border between them; such a result can of course be achieved by mutual consent, but when a boundary has been the subject of agreement, the continued existence of that boundary is not dependent upon the continuing life of the

³⁷ Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgement, 1949 I.C.J. p.35.

³⁸ Dr. Thomas Grant is Senior Research Fellow at Wolfson College and Fellow at Lauterpacht Centre for international Law at Cambridge University, his research is focused on State immunity, State succession, sovereignty, international investment protection, international organizations, use of force under international law, comparative constitutional law, diplomatic history, international dispute settlement, land and maritime frontier disputes. Stephen M. Schwebel, former President, International Court of Justice called Grant ‘a leading analyst of international legal issues raised by actions of the Russian Federation in the post-Soviet era’. <https://www.law.cam.ac.uk/people/td-grant/114>

³⁹ Thomas D. Grant, *Aggression Against Ukraine: Territory, Responsibility, and International Law*, Palgrave Macmillan, 2015, p.153..

⁴⁰ Treaty between Ukrainian Soviet Socialist Republic and Russian Soviet Federative Socialist Republic of 19 November 1990, Article 6.

⁴¹ Treaty on Friendship, Cooperation and partnership between Ukraine and the Russian Federation of 31 May 1997, Article 2.

⁴² Territorial Dispute (Libyan Arab Jamahiriya v. Chad), Judgement, 1994 I.C.J., para. 72.

treaty under which the boundary is agreed". The same was confirmed by the court in *Nicaragua v. Colombia*.⁴³

According to Grant, the exceptional importance of territorial principle in international law is evidenced by the "[t]he unqualified and obligatory character of the response and its universal scope".⁴⁴ An attempt to forcibly change boundaries warrants a collective response.⁴⁵ Therefore, **the international community is not just empowered to take effective countermeasures against Russia, but international law obligates states to act in order to induce Russia to cease ongoing aggression against Ukraine and assault on the rules based international order.**

1.7. Countermeasures as the only practical mechanism of international responsibility available in cases where the recalcitrant state is a member of the UN Security Council

In the current horizontal system of the international legal order, the only body of quasi law enforcement is the UN Security Council, which is empowered to authorize binding international sanctions and the use of force against violating states. As stated above, countermeasures are commonly referred to as a self-help mechanism in international law.

Notably, Russia has been using its veto power more than any other permanent member of the Security Council, blocking 152 resolutions (as of February 2023) since the Security Council's founding. Since 1991, Russia has used its veto power 32 times, while the USA did so 18 times and China 16 times.⁴⁶ Specifically, Russia vetoed the following UN Security Council resolutions⁴⁷ to isolate itself from liability for violating international law:

- **15 June 2009** - Russia blocks a resolution on extension of the mandate of the UN observer mission in Georgia.⁴⁸
- **March 15, 2014** - The UN Security Council failed to adopt a resolution on Crimea, which Russia has occupied, due to the Russian Federation's veto.⁴⁹

⁴³ Territorial and Maritime Dispute (*Nicaragua v. Colombia*), Judgement, 2007 I.C.J., para.89.

⁴⁴ Grant, *supra* note 39, p. 153.

⁴⁵ *Ibid.*

⁴⁶ https://www.wikiwand.com/en/List_of_vetoed_United_Nations_Security_Council_resolutions

⁴⁷ A UN General Assembly UN General Assembly Resolution ES-11/1 referenced several times in this report was adopted by the General Assembly in response to Russia destructive role as a permanent member of Security Council and a paradox caused by the fact that such permanent member is an aggressor state in question. UN General Assembly invoked the substitutive power granted to the General Assembly in case of inaction by the Security Council under the famous Uniting for Peace Resolution of 1950. It is important to understand that the tool of Uniting for Peace Resolution was created by UN General Assembly in response of destructive role of the Soviet Union in Security Council, successor of whom Russia claims to be. In 1950 the Soviet Union blocked any attempts by the Security Council on measures to protect the Republic of Korea against the aggression launched against it by North Korea. <https://legal.un.org/avl/ha/ufp/ufp.html>

⁴⁸ <https://press.un.org/en/2009/sc9681.doc.htm>

⁴⁹ <https://news.un.org/en/story/2022/09/1129102>

- **29 July 2015** - Russia blocks a resolution on the establishment of a tribunal to investigate the downing of Malaysia Airlines Flight MH17.⁵⁰ Again, Russia was the only Security Council member to use its veto during the vote.
- **April 10, 2018** - The UN Security Council failed to consider a resolution to investigate a possible chemical attack in Syria. Russia, a supporter and accomplice of the Syrian dictator, Bashar al-Assad, used its veto⁵¹. Overall, Russia has vetoed 16 resolutions on Syria.
- **February 25, 2022** - Russia vetoed a Security Council resolution condemning its actions in Ukraine and calling to immediately cease using force and withdraw its troops from Ukrainian territory. Russia was the only SC member to vote “no” on the resolution.⁵²
- **30 September 2022** - Russia vetoed a UNSC resolution condemning the purported annexation of Ukrainian territory. The draft characterized the so-called referendums held by Russia in four regions of Ukraine—Luhansk, Donetsk, Kherson, and Zaporizhzhya—as illegal and an attempt to modify Ukraine’s internationally recognized borders⁵³.

Some of the most authoritative legal scholars have stressed that **denial of the right to countermeasures will lead to an erosion of the legal order and, in fact, incentivize violations of international law**. Further, the drafting history of the ARSIWA indicates that **one of the primary goals behind provisions related to countermeasures is to empower states to invoke responsibility of wrongdoing states when there is no effective international adjudication mechanism, or the UN Security Council is blocked by the violating state**. Therefore, **the ongoing gross violation of international law by the Russian Federation precisely exemplifies the scenario for which the doctrine of state countermeasures is intended**.

To understand the current situation, we need to consider the following facts: a state commits an act of aggression and gross violations of international law on a scale not seen since WWII⁵⁴; the state in question is a permanent member of the UN Security Council and vetoes any resolutions that would provide any form of redress; the state explicitly refuses to comply with any decisions of international courts and tribunals. If other states do not invoke international responsibility of such a state by means of countermeasures, what are the implications for the international legal order?

The chairman of the ILC Drafting Committee Giorgio Gaja⁵⁵ opined that it would mean that common interests of international society are not protected by law, and in situations of violations of states’ legitimate rights and interests, “[w]ere States not even allowed to adopt counter-measures that are otherwise lawful, one would

⁵⁰ <https://press.un.org/en/2015/sc11990.doc.htm>

⁵¹ <https://documents.un.org/doc/undoc/pro/n18/101/87/pdf/n1810187.pdf?token=Wo26SZgsCZG7LLPNHi&fe=true>

⁵² <https://press.un.org/en/2022/sc14808.doc.htm>

⁵³ <https://news.un.org/en/story/2022/09/1129102>

⁵⁴ Grant, *supra* note 33: “Russia’s aggression against Ukraine constitutes an attack against general public order of a magnitude and kind without precedent since 1945.”

⁵⁵ Judge of the International Court of Justice 2012-2021.

probably have to conclude that law rather protects the infringement of those interests.”⁵⁶

Further, a state’s inability to invoke responsibility for violations dilutes the very idea of the existence of any obligations under international law. As Gaja noted, “[t]he existence or non-existence of these legal consequences for a wrongful act is by no means irrelevant when it comes to applying the test of effectiveness to the rule establishing a primary obligation. Let us assume that in the case of an infringement of human rights, no State may seek a reparation or adopt a counter-measure: does this not mean that an obligation exists, whose violation is automatically condoned? Does this not convey the impression that the term ‘obligation’ is misused, because States are practically free to ignore the rule imposing it?”⁵⁷

Russia’s ability to shield itself from any other means of international responsibility by virtue of its veto powers in the UN Security Council prompts invocation of third state countermeasures. Legal scholars conclude that “**third-state countermeasures are the only effective means of protecting international law in situations when collective response is dependent on “the establishment of an authority yet to be devised or on a decision-making process whose outcome would predictably work in favour of the accused State”.**⁵⁸

The drafting history of the Articles on State Responsibility also indicates that members of the ILC supported the approach that states, including third ones, should be empowered to invoke responsibility of a recalcitrant state for serious violations of international law⁵⁹ in situations in which the UN Security Council is blocked.⁶⁰ ILC member Alain Pellet⁶¹ maintained that third-party countermeasures were ‘one of the essential consequences’ of serious breaches of obligations *erga omnes* without which States would be ‘powerless’ to deal with such breaches given that the UN Security Council frequently failed to do so because of political disagreements.⁶² Further, ILC member and later judge of the International Court of Justice Bruno Simma stated in support of third-party countermeasures that “leaving it up to the “organized international community”, i.e. the United Nations, to react to breaches of obligations *erga omnes* bordered on cynicism.”⁶³

Further, during the discussion of the *Articles on State Responsibility* at its 52nd session, members of the *ILC* expressed support for third-party countermeasures: “The real question was whether, where an exceptionally serious breach such as genocide—which affected the international community as a whole and which thus concerned all States individually—had been committed, any State of the international community was entitled to react individually, even when not directly injured by the breach. In his view [Pellet], the answer was emphatically in the affirmative. That did not mean,

⁵⁶ Gaja cited by Dawidowicz, *supra* note 19.

⁵⁷ Giorgio Gaja, *Obligations Erga Omnes*, *International Crimes and Jus Cogens: A Tentative Analysis of Three Related Concepts*, in *International Crimes of State: A Critical Analysis of The ILC’s Draft Article 19 On State Responsibility*, p. 155.

⁵⁸ *Id.* p. 156.

⁵⁹ In early ARSIWA drafts “international crimes of States”.

⁶⁰ In drafting rules on international crimes, the necessity for not presuming on the United Nations’ capacity to operate effectively was stressed by D. Alland, ‘La legitime defense et les contre-mesures dans la codification du droit international de la responsabilite’, Gaja, *supra* note 58.

⁶¹ Alain Pellet also former President and Member of Institut de Droit international.

⁶² Dawidowicz, *supra* note 19, p. 97.

⁶³ YbILC (2001), vol. I, p.305, para. 31.

however, that the reaction must necessarily be collective, still less that it must involve the use of force.”⁶⁴

Interestingly, Russia opposed stronger wording on third-party countermeasures in the Articles on State Responsibility, claiming that “[i]t would be unacceptable for any State to take countermeasures at the request of any injured State, because that would give the big powers the opportunity to play the role of international policemen.”⁶⁵ In reality, it is Russia who attacks states much smaller in territory, population, and economic resources.

Insofar as administration of justice is concerned, legal scholars often refer to the Iraq-Kuwait Claims Commission as a possible model for securing compensation for Ukraine. In the Iraq-Kuwait case, however, the aggressor was not a permanent member of the UN Security Council, which allowed for a normal functioning of existing accountability mechanisms. UN Security Council Resolutions 687 (1991) and 692 (1991) stipulated three principal pillars of the compensation mechanism including the establishment of a fund for satisfying claims.⁶⁶

Because of the proper functioning of the UN Security Council, the compensation fund was established under the auspices of the UN as a special account and as a subsidiary organ under the authority of the Security Council. It was partly composed of voluntary contributions by UN member states but mostly consisted of confiscated Iraqi oil export revenues. In April 1991, the Security Council decided by virtue of Resolution 687 to establish the fund and requested the Secretary General to make recommendations on the appropriate level of Iraq’s contribution to the fund. The Secretary General concluded that Iraq’s contribution to the compensation fund should be set at 30 percent of its annual oil export earnings.⁶⁷ This figure was officially adopted by the Security Council in Resolution 705 (1991). The compensation fund was functional primarily due to the fact that Iraq was bound by Security Council resolutions.

Consequently, **if civilized nations fail to apply countermeasures against Russia for its ongoing and systematic gross violations of international law, by claiming that they are precluded from doing so by certain provisions of their national law, they would effectively relinquish reliance on any existence of rules of international law.**

1.8. Confiscation of Russian sovereign assets as the only practical option to secure compensation for Ukraine due to Russia’s persistent defiance of international courts and tribunals

⁶⁴ YbILC (2001), vol. I, p.336, para. 46.

⁶⁵ [UN Doc. A/C.6/55/SR.18](#), Russian Federation, para. 51.

⁶⁶ Furthermore, the government of Iraq conceded that it was liable for the damages that it had caused and agreed to the establishment of a mechanism to determine the amount of its liability for the illegal invasion and occupation of Kuwait in a letter to the United Nations Security Council dated 6 April 1991, Identical letters dated 91/04/06 from the Permanent Representative of Iraq to the United Nations addressed respectively to the Secretary-General and the President of the Security Council <https://digitallibrary.un.org/record/111607?ln=en>

⁶⁷ Note of the Secretary-General Pursuant to Paragraph 13 of his Report of May 2, 1991 (S/22559), S/22661 of 30 May 1991 <https://uncc.ch/sites/default/files/attachments/S-22661%20%5B1991%5D.pdf>

International law does not offer enforcement measures similar to those of national legal systems. However, as a general practice, **the majority of states do comply with decisions of international courts and tribunals; instances in which states openly and consistently disregard court decisions are rather rare. Russia, however, is exactly the example of such a position and has done so repeatedly.**

The Russian Federation has never voluntarily complied with any of the twelve decisions of investment arbitration tribunals rendered against it. The only successful case of recovering any compensation in investment arbitration from Russia was through enforcement procedures and after a decade of litigation. Russia has 3,116 decisions of the European Court of Human Rights delivered concerning it, which is the second largest number in the court's history. At the same time, Russia demonstrates one of the weakest track records in compliance with the *ECHR* decisions.⁶⁸

Further, the Russian legal system expressly stipulates the priority of Russian law over international law, and subjects decisions of international courts and tribunals to judicial review by Russian courts. In 2015, Russia enacted a law authorizing the Constitutional Court to decide whether to comply with decisions of international human rights courts.⁶⁹ It is reported that the law was adopted as a response to the ECHR's 2014 ruling obligating Russia to compensate \$2.09 billion to former Yukos shareholders. In 2020, Russia enacted constitutional amendments that, among other things, allow Russia to disregard decisions of any international courts and tribunals, including the International Court of Justice, and/or any international organizations, including the UN. Specifically, Article 79 of the Russian constitution reads: "Decisions of interstate bodies adopted on the basis of the provisions of international treaties of the Russian Federation which in their interpretation contradict the Constitution of the Russian Federation, shall not be implemented in the Russian Federation".

In 2022, Russia formally withdrew its participation in the European Convention on Human Rights as a response to Russia's exclusion from the Council of Europe on March 16, 2022. According to newly adopted Russian legislation, the decisions which were rendered by the ECHR before Russia's withdrawal shall be payable only in rubles and only through Russian banks. Finally, Russia openly states that it does not recognize the binding force of the *ICJ* provisional order issued in March 2022, which requires Russia to "immediately suspend the military operations (...) in the territory of Ukraine."⁷⁰ In his statement at a UNSC debate on "Strengthening accountability and justice for serious violations of international law," Russia's permanent representative to the UN claimed that the ICJ order was rendered "under a powerful political pressure."

1.9. Reversibility of countermeasures

⁶⁸ <https://www.einnetwork.org/russia-echr>

⁶⁹ Federal Law "On Amending Federal Law on the Constitutional Court of the Russian Federation" of 14 December 2015.

⁷⁰ *Allegations Of Genocide Under the Convention On The Prevention And Punishment Of The Crime Of Genocide (Ukraine V. Russian Federation)*, Provisional Order, 2022, I.C.J. para. 86.

One of the most persistent objections to confiscation of Russian assets relies on the requirement of reversibility. However, this objection should be dismissed on two grounds: (1) reversibility of countermeasures is not an absolute requirement; and (2) alternatively, and without prejudice to the above, seizure of Russian assets does not violate the reversibility requirement.

1.9.1. Reversibility of countermeasures is not an absolute requirement

Article 49(3) of the Articles on State Responsibility reads: “Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.” To begin with, interpretation in good faith and in accordance with the ordinary meaning of the text instructs that **countermeasures should be reversible only “as far as possible**. As further clarified by the *ILC’s* commentary to the Articles on State Responsibility, **“the duty to choose measures that are reversible is not absolute. It may not be possible in all cases to reverse all of the effects of countermeasures after the occasion for taking them has ceased. (...)** The phrase “as far as possible” in paragraph 3 indicates that if the injured State has a choice between a number of lawful and effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures.”⁷¹

In the present case, states are entitled to resort to nonreversible countermeasures due to the gravity of violations of international law attributable to Russia and the fact that imposition of reversible countermeasures on Russia for the past decade did not yield results. As stated above, the objective of countermeasures is to induce the recalcitrant state to cease internationally wrongful acts and to make reparations for the damages caused. G7 nations have had sanctions in place against Russia since the annexation of Crimea in 2014. As we show in Section 1.3, many of the sanctions imposed on Russia constitute countermeasures as a matter of public international law.

Although stated in the context of proportionality of countermeasures, the following observation by Professor Tribe and his coauthors is relevant for considering the reversibility of countermeasures against Russia: “Russia’s invasion in February 2022 was not the beginning of its violations of international law but only an escalation of its occupation of Ukraine’s sovereign territory that began in 2014. In that time, G7 countries have imposed a series of sanctions that include the transfer of property belonging to private Russian citizens, sanctions on critical industries in Russia, and heavy restrictions on Russia’s access to global financial markets. Further, since February 2022, G7 countries have frozen the same sovereign assets that are now the object of the asset transfer. Despite these actions, Russia has continued and even escalated its campaign against the Ukrainian people. The inadequacy of these prior

⁷¹ ARSIWA Commentary, p. 131.

actions provides a straightforward legal justification for G7 countries to implement more muscular countermeasures.”⁷²

Moreover, the *ILC*'s commentary indicates that **states are expected to select between a number of “effective” countermeasures. As the situation stands now, G7 states no longer have an option of selecting those countermeasures that are clearly reversible—such countermeasures have proven to be ineffective in achieving the goal of preventing Russia from escalating its aggression.** Over the span of a ten-year long sanctions regime, G7 states exhausted available means of reversible actions and have the right to resort to nonreversible countermeasures.

1.9.2. Seizure of Russian assets does not violate the reversibility requirement

It can be argued that countermeasures in the form of forfeiture of Russian assets are a reversible measure as they affect procedural protection in the form of immunity, rather than the property in question. It is put forth by Juliya Ziskina that: “[c]ountermeasures apply to state immunity of the assets, and not the assets themselves. By definition, countermeasures are taken against a state and not, as it were, *in rem* against an asset. Thus, the “reversibility” does not apply to the assets themselves, but rather the suspension of immunity—which can be reinstated once Russia comes into compliance with its international obligations to make reparations.”⁷³

⁷² This view is expressed in by Laurence H. Tribe, Raymond P. Tolentino, Kate M. Harris, Jackson Erpenbach, and Jeremy Lewin, *The Legal, Practical, and Moral Case for Transferring Russian Sovereign Assets to Ukraine*, p. 58.

⁷³ Ziskina Y, *Multilateral asset transfer: A proposal to ensure reparations for Ukraine*, New Lines Institute, p.23.

2. STATES CAN INVOKE RIGHT TO COLLECTIVE SELF DEFENSE IN RESPONSE TO RUSSIAN AGGRESSION

2.1. Inherent nature of the right to self defense

As explained by the ICJ in Nicaragua, the right to self-defense did not originate from Article 51 of the UN Charter, rather it is a “pre-existing customary international law” reflected in Article 51.⁷⁴ Additionally, the court has repeatedly referenced the French text of the UN Charter (“*droit naturel*”) to underscore that the right to self-defense is a natural right.⁷⁵ Further, in its Nuclear Weapon Advisory Opinion, even though the ICJ did not render an opinion regarding the legality of the threat of use of nuclear weapons, the court consistently highlighted an inherent nature to the right of self-defense.⁷⁶

2.2. Non-military measures of self-defense

A right to self-defense is most often understood and interpreted as an exemption to the general prohibition on the use of force in the UN Charter system that allows for legally justified use of force by the states⁷⁷. However, **there are strong arguments to conclude that an inherent right to self-defense encompasses non-military measures as well.**

2.2.1. Non-military acts of self-defense are in line with the ILC’s position

According to the ILC commentary to Articles on State Responsibility, “[s]elf-defence may justify non-performance of certain obligations other than that under Article 2, paragraph 4, of the Charter of the United Nations, provided that such non-performance is related to the breach of that provision.” Here, the ILC expressly articulates that measures of self-defense may not necessarily involve the use of force as long as such measures are invoked in response to an illegal use of force. Therefore, for the measures to qualify as a legitimate self-defense, there is only a requirement to demonstrate that the action is invoked in response to the illegal use of force, which is in detail discussed in Sections 1.5 -1.6.

⁷⁴ Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgement 1986 I.C.J.), para. 176.

⁷⁵ Ibid, para. 176: “The Court therefore finds that Article 51 of the Charter is only meaningful on the basis that there is a “natural” or “inherent” right of self-defence...”

⁷⁶ Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J., para. 96.

⁷⁷ Military and Paramilitary Activities in and against Nicaragua, para.193, ARSIWA Commentary, p. 74.

2.2.2. Non-military acts of self-defense are supported by the interpretation of the UN Charter and certain state practice

Treaties are to be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.⁷⁸ It is indisputable that the objective driving establishment of the UN was strengthening the peaceful coexistence of states. As stipulated in Article 1 of the UN Charter, one of the purposes of the UN is “to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.”

Therefore, based on these provisions alone, it is safe to conclude that seizing Russian assets qualifies as non-military action of collective self-defense and corresponds to the notion of effective collective measures taken to bring to an end an act of aggression or other breaches of the peace under Article 1, Paragraph 1 of the UN Charter. Additionally, as noted by Buchan,⁷⁹ inclusion of non-military measures of self-defense in Article 51 is supported by interpretative maxim *in eo quod plus sit semper inest et minus*—in the greater is always included the lesser. Therefore, based on this interpretive tool, the right to use force in self-defense must include the right to use non-military action.

Further, as proposed by Buchan, the wording of Article 51 of the UN Charter can be interpreted in comparison with Article 5 of North Atlantic Treaty and Article 3 of the Inter-American Treaty on Reciprocal Assistance. Article 5 of the North Atlantic Treaty famously creates a collective self-defense system and reads: “The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.” Therefore Article 5 of the North Atlantic Treaty supports the notion of non-military self-defense: Article 5 relies on Article 51 of the UN charter and expressly singles out the use of armed force as one of the instances of self-defense.

Similarly Article 3(1) of the Inter-American Treaty on Reciprocal Assistance establishes a collective self-defense system and states that “[t]he High Contracting Parties agree that an armed attack by any State against a State Party shall be considered an attack against all the States Parties and, consequently, each of them undertakes to assist in meeting any such attack in the exercise of the inherent right of

⁷⁸ Vienna Convention on the Law of Treaties, Article 31.

⁷⁹ Buchan, R. (2023) Non-forcible measures and the law of self-defence. *International and Comparative Law Quarterly*, 72 (1). pp. 1-33.

individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.” **Article 3(2) provides that** “each of the States Parties may determine, according to the circumstances, the immediate measures it may take individually **in fulfillment of the obligation set forth in the preceding paragraph.**”

As evidenced by the provisions of the North Atlantic Treaty and the Inter-American Treaty on Reciprocal Assistance, when states undertake obligations which are rooted in Article 51 of the UN Charter, the states presuppose the notion of non-military actions of self-defense.

2.2.3. Requirements for lawful self-defense

A state invoking the right to self-defense must comply with several substantive and procedural requirements, stipulated in the UN Charter and/or articulated by the *ICJ*. Such requirements include:

- self-defense can be invoked in response to an “armed attack”;
- defensive actions must meet the conditions of necessity and proportionality;
- measures of self defense must not breach international humanitarian law and human rights obligations;
- measures of self-defense must be reported to the UN Security Council;
- the right of self-defense is suspended as soon as the SC adopts measures necessary to maintain international peace and security.

2.2.4. Response to an “armed attack”

There are scholarly debates and discussions as to what constitutes an armed attack when it comes to violence perpetrated by various paramilitary groups or other non-state actors, as well as a right to anticipatory self-defense in case of an imminent threat of armed attack. These discussions are irrelevant for the present case as a continuous armed aggression committed by Russia against Ukraine has been repeatedly recognized and deplored by the UN General Assembly, the *ICJ*, the *ECHR* and national governments. For details, please see Sections 1.5. -1.6.

3. TRANSFERRING RUSSIAN STATE ASSETS DOES NOT VIOLATE RULES OF SOVEREIGN IMMUNITY

Contrary to the widespread view that repurposing Russian assets as compensation for Ukraine would violate the principle of sovereign immunity, we maintain that sovereign immunity is not a legal framework applicable to the current situation. Rather, the forfeiture of Russian state assets is governed by rules on state sovereign equality, and disposition of Russian assets is in conformity with the principle of sovereign equality of states. Alternatively, and without prejudice to the above, even if sovereign immunity were to be applicable to the forfeiture of Russian assets, Russia's enjoyment of its immunity privileges shall be abrogated since Russia must bear international responsibility for its severe and systemic violation of peremptory norms of international law.

3.1. Sovereign immunity is not applicable to the forfeiture of Russian assets by executive action

Sovereign immunity is a well-established principle of international law, which includes immunity from jurisdiction of foreign courts and immunity from execution against state-owned property.⁸⁰ General principles and rules of sovereign immunity, on which a broad consensus exists, are codified in the UN Convention on Jurisdictional Immunities of States and Their Property⁸¹ and the European Convention on State Immunity. It can be argued that state central banks and other monetary authorities enjoy more favorable immunity regimes compared to other state assets. The UN Immunities Convention generally applies restrictive immunity, whereby assets used "for other than government non-commercial purposes" are not shielded by immunity from execution.⁸² At the same time, the convention states that the commercial use exception does not apply to the property of the central bank or other monetary authority of the state.⁸³ Case law in certain states indicates that central bank assets are, in fact, protected by sovereign immunity based on central banking functioning principle, irrespective of the commercial use of assets.

However, as stated above, **the doctrine of sovereign immunity is procedural in nature and can be invoked only in the context of adjudication or enforcement measures by national courts.** Sovereign immunity is, in fact, an exemption to the principle of territorial sovereignty and territorial jurisdiction of a forum state.⁸⁴ At the same time, when the issue of confiscation of Russian assets is raised, opponents of the idea almost unanimously claim that forfeiture is barred by sovereign immunity.

⁸⁰ James Crawford, *Brownlie's Principles of Public International Law* (2021), p.487.

⁸¹ The Convention was adopted by the UN General Assembly by resolution A/59/38 of 2 December 2004, it shall enter into force after ratification by 13 states. It is generally considered a codification of customary international law.

⁸² U.N. Convention on Jurisdictional Immunities of States and Their Property, Article 19.

⁸³ U.N. Convention on Jurisdictional Immunities of States and Their Property, Article 21.

⁸⁴ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J. para. 57.

Interestingly, the overextension of sovereign immunity doctrine persisted even before the question of transferring Russian assets became relevant. For instance, when explaining applicability of the immunities doctrine to assets freezes, Tom Ruys noted that “(...) generally, when discussing the matter with fellow scholars, it seems that the applicability of, and incompatibility with, immunity rules is often taken for granted.”⁸⁵ However, such an approach is superficial and contradicts international and national law.

3.1.1. Sovereign immunity is a procedural principle applicable in the process of adjudication or enforcement by courts of the forum state

Official commentary to the text of the UN Convention on Jurisdictional Immunities of States and Their Property consistently clarifies that the immunity is applicable in the course of judicial proceedings. The commentary explains that “Article 1 indicates the subject matter to which the articles should apply. (...) The expression “jurisdictional immunities” in this context is used not only in relation to the right of sovereign States to exemption from the exercise of the power to adjudicate, normally assumed by the judiciary or magistrate within a legal system of the territorial State, but also in relation to the non-exercise of all other administrative and executive powers, by whatever measures or procedures and by whatever authorities of the territorial State, in relation to a judicial proceeding.” The commentary further clarifies all types of procedures that may accompany court proceedings or attachment of property, and immunity respectively applies to all such proceedings.⁸⁶

Further, the commentary states that **immunity with respect to state property is invoked only when such property is subject to enforcement procedures in national courts**: “Article 18 concerns immunity from measures of constraint only to the extent that they are linked to a judicial proceeding. Theoretically, immunity from measures of constraint is separate from jurisdictional immunity of the State in the sense that the latter refers exclusively to immunity from the adjudication of litigation. Article 18 clearly defines the rule of State immunity in its second phase, concerning property, particularly measures of execution as a separate procedure from the original proceeding.”

The Council of Europe in its Explanatory Report to the European Convention on State Immunity makes clear that “[t]he Convention applies only to the jurisdiction of courts, whether judicial or administrative. It does not deal with the treatment of Contracting States by the administrative authorities of other Contracting States.”⁸⁷ Moreover, the ICJ stressed in the Jurisdictional Immunities case that “[t]he rules of State immunity

⁸⁵ Tom Ruys, Immunity, inviolability and countermeasures – a closer look at non-UN targeted sanctions. Cambridge Handbook on Immunities and International Law, p. 673.

⁸⁶ The concept therefore covers the entire judicial process, from the initiation or institution of proceedings, service of writs, investigation, examination, trial, orders which can constitute provisional or interim measures, to decisions rendering various instances of judgements and execution of the judgements thus rendered or their suspension and further exemption. It should be stated further that the scope of the articles covers not only the question of immunities of a State from adjudication before the court of another State but also that of immunity of a State in respect of property from measures of constraint, such as attachment and execution in connection with a proceeding before a court of another State, as provided in part IV.

⁸⁷ Council of Europe, Explanatory Report to the European Convention on State Immunity, Basel, 16 May 1972, ETS – No. 74, para. 8.

are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State”.⁸⁸

Nevertheless, some scholars found it possible to extrapolate the principle of judicial immunity to administrative measures or executive action. It was previously done when discussing asset freezes and it is done now with regard to the potential confiscation of Russian assets for the benefit of Ukraine. In addition to the quite straightforward and unequivocal wording of the convention, legal scholars who specialize in the issues of immunity of state property demonstrate that such extrapolation is inappropriate and has no support in law.

It is important to note that scholars specializing in matters of central bank immunities recognize the distinction between judicial and administrative measures involving central bank assets. Specifically, Ingrid Brunk⁸⁹ opines that “asset freezes that involve executive action unrelated to a judicial proceeding, do not violate immunity, (...)” She further elaborates that “[t]o date, for example, Russian central bank assets have been frozen through various domestic and regional sanctioning regimes that do not appear to implicate immunity”⁹⁰ and reached the conclusion that immunity would generally apply to measures of confiscation involving judicial power.⁹¹ This conclusion does not impair the proposal to transfer Russian funds by means of executive action based on an international treaty as proposed in this paper.

3.1.2. Application of sovereign immunity cannot be automatically presumed

As observed by Ruys, scholars who claim that asset freezes violate various immunity rules, “generally fail to explain why and how—especially in the absence of any link to judicial proceedings.”⁹² The same can be said about the position, whereby confiscation of Russian assets is barred by sovereign immunity in some general unspecified way. It is especially important in the context of violation of *jus cogens* norms, **“one does not start from an assumption that immunity is the norm, and that exceptions to the rule of immunity have to be justified. One starts from the assumption of non-immunity, qualified by the reference to the functional need (...) to protect the sovereign rights of foreign States operating or present in the territory.”**⁹³

State immunity itself represents a derogation from the principle of territorial sovereignty of the forum state. As noted by the ICJ in *Jurisdictional Immunities*, “[t]he rule of State immunity occupies an important place in international law and international relations. It derives from the principle of sovereign equality of States, which, as Article 2, Paragraph 1, of the Charter of the United Nations makes clear, is

⁸⁸ *Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening)*, Judgment, 2012 I.C.J., para. 93.

⁸⁹ Professor Brunk is currently co-editor-in-chief of the *American Journal of International Law*; she is widely published on the issue of immunities of central banks.

⁹⁰ Ingrid (Wuerth) Brunk, *Central Bank Immunity, Sanctions, and Sovereign Wealth Funds* *George Washington University Law Review*, p.11.

⁹¹ *Id.*, p.40.

⁹² Ruys, *supra* note 86, p. 676.

⁹³ Ian Sinclair, *The Law of Sovereign Immunity. Recent Developments* (Volume 167), *Collected Courses of the Hague Academy of International Law*, p.215.

one of the fundamental principles of the international legal order. This principle has to be viewed together with the principle that each State possesses sovereignty over its own territory and that there flows from that sovereignty the jurisdiction of the State over events and persons within that territory. Exceptions to the immunity of the State represent a departure from the principle of sovereign equality.⁹⁴ Immunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it.”⁹⁵

In its Asylum Case the ICJ explained that derogations from a state’s territorial sovereignty must be justified in every specific case: “A decision to grant diplomatic asylum involves a derogation from the sovereignty of that State. It withdraws the offender from the jurisdiction of the territorial State and constitutes an intervention in matters which are exclusively within the competence of that State. Such a derogation from territorial sovereignty cannot be recognized unless its legal basis is established in each particular case.”⁹⁶

Accordingly, **the entire debate of purported application of sovereign immunity to the disposition of Russian assets should be redirected towards discussion of the principle of sovereign equality of states** (discussed further herein).

3.1.3. Immunity vs. inviolability: neither regime covers CBR reserves

Generally, there are two types of protections granted to states and their property. First is jurisdictional immunities from adjudication or enforcement measures by national courts as discussed above. Second, is immunity of diplomatic missions and inviolability of their property. **Confiscation of Russian central bank reserves by administrative act does not trigger application of any of the above.**

Diplomatic immunity and related inviolability of diplomatic property is a separate legal regime governed by its own body of international legal instruments such as the Vienna Convention on Diplomatic Relations 1961, the Vienna Convention on Consular Relations 1963, and the New York Convention on Special Missions 1969. The said conventions apply to a specific circle of actors: diplomatic missions and diplomatic agents. **There is no conceivable legal basis to argue that inviolability of property of diplomatic missions can be extended to other state assets.**

We agree with analysis offered by Ruys who notes using the example of EU immobilization of Iranian Central Bank assets, that when asset freezes are implemented through administrative acts, such acts normally provide for exemptions for payments into or from an account of a diplomatic mission or consular post or an international organization ‘enjoying immunities in accordance with international law.’⁹⁷

⁹⁴ For discussion on principle of sovereign equality of states as applicable to the present issue, please see Section 3.2.

⁹⁵ Jurisdictional Immunities of the State (Germany v. Italy: Greece intervening), Judgment, 2012 I.C.J para. 57.

⁹⁶ Asylum Case (Colombia v. Peru), Judgment, I.C.J. Reports 1950, 266 at 274-275.

⁹⁷ Council Regulation (EU) No 267/2012 of 23 March 2012 concerning restrictive measures against Iran and repealing Regulation (EU) No 961/2010, O.J. 24 March 2012, L-88/1, Article 27 (‘By way of derogation from Article 23(2) and (3), the competent authorities may authorise, under such conditions as they deem appropriate, the release of certain frozen funds or economic resources or the making available of certain funds or economic resources, after having determined that the funds or economic

In the case of Russian sanctions, EU regulations provide for several exemptions or derogations from trade restrictions and contract performance bans for the “official purposes of diplomatic or consular missions of Member States or partner countries in Russia or of international organizations enjoying immunities in accordance with international law.”⁹⁸

Therefore, we observe that states distinguish between state assets in general (including central bank reserves) and diplomatic property, which is protected by diplomatic immunities, and explicitly stipulate this distinction in relevant regulations. It is safe to conclude that should states consider that sovereign immunities shield central bank reserves from executive action, it would have been explicitly indicated as it is the case with diplomatic missions and their property.

3.1.4. Non-justiciability of public international law disputes in national courts

Opponents of the proposal to transfer Russian assets for the benefit of Ukraine additionally argue that possibility of disposition of Russian assets must be decided by courts in relevant jurisdictions, as their national legal systems mandate that forcible taking of property can be done only by judicial procedure. However, such a position is contrary to the non-justiciability principle, applicable in many states. Simply put, **national courts are not competent to decide on international law aspects of acts of foreign states.** Logically, if national courts of any state were to decide on a transfer of Russian funds to Ukraine, they would need to make pronouncements as to Russia’s international responsibility and in essence decide on Russia’s reparation to Ukraine, which is not an issue capable of being adjudicated by national courts.⁹⁹

For example, English courts offer quite extensive jurisprudence on the issue. In *Westland Helicopters Ltd v Arab Organisation for Industrialisation*, an international organization (AOI) was established in 1975 by treaty between Egypt and the Gulf states, to create an Arab arms manufacturing industry. The treaty provided that the AOI should have juridical personality and should not be subject to the law of any of the member states. Later, Gulf States decided to liquidate the organization and Egypt refused to accept this decision. Thereafter, the state parties applied to the arbitration court regarding cancellation of a joint venture agreement between Westland and AOI. The arbitral award was then submitted to an English court, and some of the issues for the consideration by this court were related to evaluation of actions by the Gulf States and Egypt’s decision to adopt national legislation, whereby AOI would continue operations as an Egyptian company. The court refused to consider these issues based on no-justiciability doctrine.¹⁰⁰ It was stated in the decision “that the English courts will

resources are necessary for official purposes of diplomatic or consular missions or international organisations enjoying immunities in accordance with international law.’

⁹⁸ For example Article 3h (3) Council Regulation (EU) No 833/2014.

⁹⁹ This is different from the situation when individual claimants seek compensation based on valid decision of competent international forum.

¹⁰⁰ “The problem about issue (ii) is that it involves considering (a) whether the conduct of the three Gulf states was such as to amount to a wrongful repudiation of the treaty and (b) whether in so far as Law No 30 imposed a control regime for AOI which differed from that in the treaty, it represented a justifiable response in public international law. Because of the principles of non-justiciability, an English court can decide neither issue (a) nor issue (b). Such issues can be decided only by reference to public

not adjudicate *on the lawfulness of the extraterritorial acts of foreign states in their dealings with other states or the subjects of other states.*” Further, Lord Sumption noted: “This is because once such acts are classified as acts of state, an English court regards them as being done on the plane of international law, and their lawfulness can be judged only by that law. It is not for an English domestic court to apply international law to the relations between states, since it cannot give rise to private rights or obligations. (...) If a foreign state deploys force in international space or on the territory of another state, it would be extraordinary for an English court to treat these operations as mere private law torts giving rise to civil liabilities for personal injury, trespass, conversion, and the like.”

More recently, and probably more pertinent to the issue at hand, in the dispute between Ukraine and a Russian appointed trustee regarding repayment of a \$3 billion Eurobond issued by Ukraine in December 2013, the *UK Supreme Court* rejected Ukraine’s defense that non-payment by the Ukrainian side represented countermeasures against the Russian Federation based on non-justiciability of inter-state disputes while upholding other defenses asserted by Ukraine. Specifically, the court found that to consider Ukraine’s claim of countermeasures, the court would need to assess the legality of states’ conduct as a matter of international law: “the subject matter of such inter-state disputes is inherently unsuitable for adjudication by courts in this jurisdiction. If the availability of countermeasures at the level of international law were accepted as giving rise to a defence in domestic law, national courts would become the arbiter of inter-state disputes governed by international law which is not their function. They would be required to rule on the legality of conduct of states on the international plane and whether it constituted an internationally wrongful act.”¹⁰¹

The court further clarified that proper consideration of the countermeasures defense would require “assessment on the basis of evidence led as to the legality in international law of Russia’s invasion and annexation of Crimea. In addition, it would be required to assess the proportionality of the response, taking account of the gravity of the internationally wrongful act and the rights in question. (...) In our view, Ukraine’s case on countermeasures falls prima facie within the principle of non-justiciability of inter-state disputes identified by Lord Wilberforce in *Buttes Gas*, pp 931-938.”¹⁰²

Therefore, **as long as the confiscatory action is taken by another state via administrative procedure the rules of sovereign immunity do not apply,¹⁰³ since the sovereign immunity principle is procedural in nature and constitutes exemption to the territorial sovereignty of the forum state.** International law does not offer ground to extend applicability of sovereign or diplomatic immunity beyond clearly defined boundaries of these regimes.

international law, by a public international law forum and not by an English municipal court, for both issues necessarily involve the determination of whether foreign sovereign states are acting consistently or inconsistently with the rules of public international law. It is thus unnecessary to investigate what impact this part of the case has on these proceedings.” (at p 311)

¹⁰¹ The Law Debenture Trust Corporation plc v Ukraine [2023] UKSC 11 (15 March 2023), para 207.

¹⁰² *Ibid.*

¹⁰³ Also please see, Tribe, *supra* note 72, Ziskina, *supra* note 73.

3.2. Forfeiture of Russian assets for the benefit of Ukraine is governed by the rules of sovereign equality of states and fully in compliance with the principle of sovereign equality

Rules on sovereign immunity are generally understood to be an aspect and originating from principle sovereign equality of states. The ICJ in *Jurisdictional Immunities of States* noted that “sovereign immunity derives from the principle of sovereign equality of States, which, as Article 2, Paragraph 1, of the Charter of the United Nations makes clear, is one of the fundamental principles of the international legal order.”¹⁰⁴

According to the 1970 Declaration on Principles of International Law, sovereign equality includes the following elements: (a) states are juridically equal; (b) each state enjoys the rights inherent in full sovereignty; (c) each state has the duty to respect the personality of other states; (d) the territorial integrity and political independence of the state are inviolable; (e) each state has the right freely to choose and develop its political, social, economic, and cultural systems; (f) each state has the duty to comply fully and in good faith with its international obligations and to live in peace with other states.

In general terms, **the principle of sovereign equality requires the equal application of rules of general international law to all states.** We assert that, firstly, **Russia grossly and continuously violated virtually all components of the principle of sovereign equality of states vis a vis Ukraine,**¹⁰⁵ and, secondly, **invocation of Russia’s responsibility by other states serves the purpose of fulfilling the principle.**

The principle of sovereign equality implies the possibility for the recalcitrant state to bear international responsibility for its illegal action, which Crawford called “delictual capacity”.¹⁰⁶ To reflect this concept, the 1996 iteration of the Articles on State Responsibility contained the following provision: “Every State is subject to the possibility of being held to have committed an international wrongful act entailing its international responsibility.” Crawford opines that the wording did not make its way into the final version of the Articles because it was a “truism”. Crawford further concludes that “by definition no state can be immune from the principle of international responsibility. Any proposition to the contrary would be a denial of international law and a rejection of the principle of state equality.”¹⁰⁷ **Accordingly, invocation of Russia’s responsibility by means of countermeasures is in full compliance and aimed at protection of the principle of sovereign equality of states.**

¹⁰⁴ *Jurisdictional Immunities of the State*, Germany v. Italy; Greece intervening), Judgment, 2012 I.C.J., para. 93.

¹⁰⁵ For discussion of Russia’s breach of international law, please see 1.5.-1.6.

¹⁰⁶ Crawford, *supra* note 12, p.62.

¹⁰⁷ *Ibid.*

3.3. Alternatively, without prejudice to the above, even if confiscation of Russian assets triggered application of sovereign immunity, Russia's enjoyment of such immunity is to be abrogated in view of its severe and systemic violation of international law

Firstly, if accepting that Russia's assets are shielded by sovereign immunity from any measures including administrative action, as discussed in Section 1.1 on forfeiture theory of countermeasures, **Russia effectively waived its right to protection under international law by committing acts of aggression against Ukraine.**

It needs to be addressed that the ICJ rejected the 'gravity of the violations' argument submitted by Italy in the Jurisdictional Immunities Case.¹⁰⁸ This finding of the court has to be read in context of the entire decision; just a few paragraphs further the ICJ states that "the Court would point out that whether a State is entitled to immunity before the courts of another State is a question entirely separate from whether the international responsibility of that State is engaged and whether it has an obligation to make reparation."¹⁰⁹ Therefore, where Russian assets are transferred as a state countermeasures to secure reparation to Ukraine, such measures are not in conflict with the position of the ICJ.

Emerging state practice indicates that states find that sovereign immunity should be restricted in case of allegations of serious violations of international law. For instance, Italy, the respondent in the Sovereign Immunities Case, disagrees with the ICJ ruling and Italian courts continue to entertain claims for compensation against Germany. The Italian Constitutional Court recognized "[t]he duty of the Italian judge . . . to comply with the ruling of the ICJ of 3 February 2012," however, found that the "fundamental principle of judicial protection of fundamental rights" under Italian constitutional law shall prevail when it comes to war crimes and crimes against humanity.¹¹⁰

Practice of international organizations offers arguments in support of suspension of immunities protection in certain circumstances as well. For instance, at the UN Torture Committee, it was proposed to abrogate immunity when a state is accused of torture. The committee's chairman stated that "as a countermeasure permitted under international public law, a State could remove immunity from another State – a permitted action to respond to torture carried out by that State. There was no peremptory norm of general international law that prevented States from withdrawing immunity from foreign States in such cases to claim for liability for torture."¹¹¹

¹⁰⁸ Jurisdictional Immunities of the State, (Germany v. Italy; Greece intervening), Judgment, 2012 I.C.J. para.82.

¹⁰⁹ Jurisdictional Immunities of the State, para.100.

¹¹⁰ Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-Owned Property (Germany v. Italy), Application Instituting Proceedings of 29 April 2022, paras.7-8. This triggered Germany's second application to the ICJ in 2022 - and the case concerning Italy's alleged failure to respect Germany's jurisdictional immunity and comply with previous ICJ decision is pending. Questions of Jurisdictional Immunities of the State and Measures of Constraint against State-Owned Property (Germany v. Italy) <https://www.icj-cij.org/en/case/183>

¹¹¹ Committee Against Torture, 'Summary Record of the Second Part (Public) of the 646th Meeting', 6 May 2005, CAT/C/SR.646/Add.1, at para. 67.

Some of the most esteemed jurists who shaped the theory of public international law, raised concerns regarding overreach of sovereign immunities. We certainly do not propose any radical revision of the doctrine, however it is important to recognized as early as 1951, Hersch Lauterpacht¹¹² argued for serious constraints on the foreign state to “free (...) international law of the shackles of an archaic and cumbersome doctrine of controversial validity and usefulness.”¹¹³

Provided that sovereign immunities apply, the current regime should be modified to establish Russia’s accountability. Neither international or domestic law are static: customary international law on sovereign immunities evolved from a doctrine of absolute immunity to a more restrictive approach.¹¹⁴ This is also reflected in national legislation and most jurisdictions recognize “commercial act” exceptions to immunity. Further, national laws have been amended in the past in response to certain countries’ transgressions. For instance, the *U.S. Foreign Sovereign Immunities Act* was amended in 1996 to address state sponsored terrorism and later, a similar terrorism exception was introduced in Canada.

Accordingly, **it is a natural and progressive development of international and national laws if concerned states adopt abrogation of immunities in such exceptional circumstances as acts of aggression.** This view is supported by Thomas Grant, who suggests that forfeiture of Russian assets will not create a negative precedent because similar measures can be invoked only in the “narrowest of circumstances” and it is fully justified by the gravity of Russia’s violations.

Grant further explains: “Seizure and forfeiture of Russian assets is a remedy in extremis: the harm that the remedy addresses is an act of international aggression of a kind and scope having no precedent in international practice since 1945. Russia’s invasion of Ukraine, a plain violation of international law in itself, is accompanied by stated Russian war aims of an extremity not seen since World War II. Russia’s stated war aims include the destruction of Ukraine as a state and Ukrainians as a people or ethnic group, and Russia’s ancillary war aims, also stated, include the “restoration” of territorial and maritime boundaries of past Russian empires, e.g. the boundaries of the USSR. The present situation is readily understood as unique and unlikely to have precise analogues in future practice. Indeed, a central objective of the international response to Russia’s aggression is to deter and prevent Russia or any other state from a future act of aggression of this kind.”¹¹⁵

4. PROPOSED COURSE OF ACTION FOR CONFISCATION OF RUSSIAN STATE ASSETS FOR THE RECONSTRUCTION OF UKRAINE

¹¹² Sir Hersch Lauterpacht was one of the leading international lawyers of the twentieth century. Among his many achievements, his work helped shape the United Nations’ Universal Declaration of Human Rights and the European Convention for the Protection of Human Rights. He also played key role in Nuremberg trials.

¹¹³ H Lauterpacht, ‘The Problem of Jurisdictional Immunities of Foreign States’, 1951, 28 *British Yearbook of International Law* p. 220,247.

¹¹⁴ Crawford, *supra* note 80, p.473.

¹¹⁵ Grant, *supra* note 33, p.22, Note (10).

Although there is no readily available solution under international law for confiscating and repurposing CBR funds, the global community has enough instruments at its disposal to authorize and legitimize such a measure, and it should take appropriate action to give a formidable response to Russia's military aggression. The legal framework for confiscation of Russian assets as proposed below emphasizes the restoration of international peace and security, and enforcement of the UN Charter in the interests of the international community as a whole, rather than just punishing Russia.

4.1. Binding international treaty

We propose that sanctions coalition states enter into a binding multilateral treaty which would establish a ground for further action as a matter of public international law. The treaty should reference UN General Assembly Resolution ES-11/1, which deplores Russia's actions against Ukraine in violation of Article 2(4) of the UN Charter. The treaty should also refer to UN General Assembly Resolution ES-11/5, which stipulates that "the Russian Federation must be held to account for any violations of international law in or against Ukraine, including its aggression in violation of the Charter of the United Nations (...) and that it must bear the legal consequences of all its internationally wrongful acts, including making reparation for the injury, including any damage, caused by such acts." The treaty should also reference the impossibility of holding Russia accountable through UN Security Council mechanisms.

According to the treaty, signatory states should undertake an obligation to invoke countermeasures against Russia and to adopt respective national legislation. The treaty should also stipulate the general framework for transferring assets to the fund for compensating the Ukrainian state and/or nationals of Ukraine. The treaty may also stipulate requirements for such a fund in terms of governance, oversight, and accountability.

We also propose that the treaty be accompanied by a declaration or additional protocol stating in greater detail grounds for invoking Russia's responsibility, but without creating a positive legal obligation to seize the assets. Third states who do not hold Russian assets within their jurisdiction can endorse the proposal of holding the aggressor state accountable by joining the declaration or additional protocol.

4.2. National legislative reform

We propose that based on the international treaty, concerned states adopt national legislation to explicitly grant competence and authority to the executive bodies to implement confiscation of Russian assets. Grounds for confiscation should conform to the principle of legal certainty and ensure that such a measure can be taken in exceptional circumstances. Therefore, we propose to either adopt

legislation applicable exclusively to the case of Russia's aggression against Ukraine, or to stipulate that the confiscatory action can be taken against states, which meet two cumulative criteria: (i) states that were found to have violated UN Charter by the UN General Assembly after a certain date; and (ii) states on which sanctions were imposed by the nation adopting the legislation.

The legislation should also allow for the confiscation to be avoided or suspended when the hostilities have ceased and violating state made full compensation to the injured state, which is confirmed by a binding international treaty.

5. ADDITIONAL PRACTICAL CONCERNS WITH REGARD TO THE CONFISCATION OF RUSSIAN STATE ASSETS

Opponents of seizure of Russian assets often caution that Russia might retaliate against Western companies and their assets remaining within Russian jurisdiction, or that Russia will be entitled to bring a claim in international courts and tribunals against the states implementing the seizure. **We argue that concerns regarding Russia's potential retaliation is misplaced since Russia has already adopted measures amounting to expropriation against a number of Western companies and enacted legislation severely restricting rights of all Western investors in Russia.** Insofar as Russia's ability to initiate proceedings against certain states is concerned, it is reported that Russia plans to apply for investment arbitration based on the Belgium-Luxemburg-Russia investment treaty. **We maintain that any Russian claims against states implementing seizure of its assets should be dismissed at the jurisdiction and admissibility stage of the dispute.**

5.1. Russian retaliatory actions against Western companies

Starting from March 2022, the Russian government moved to adopt legislative amendments aimed at limiting capital outflows and precluding Western businesses from exiting Russia. Importantly, restrictive measures exclusively affect the investors affiliated with so-called unfriendly states. The legally binding list of "unfriendly" states contains more than 50 states and territories, including the United States, all EU member states, Ukraine, the United Kingdom (including all British Overseas Territories and Crown Dependencies), Australia, Canada, Norway, and Switzerland.

Restrictive amendments include bans on bank transfers abroad from accounts of individuals and legal entities from "unfriendly" states; serious restrictions on repayment of FX loans; legal permission to disregard votes of foreign shareholders associated with "unfriendly" jurisdictions; a practical ban on payment of dividends to foreign investors; provisions that any transactions involving foreign investors from "unfriendly" states leading to a change of shareholding/ownership structure in Russian entities require authorization from the Governmental Commission for Foreign Investment Control—and for certain "strategic" companies, authorization from the president of Russian Federation—; imposition of requirements for granting permission to close transactions on a sale of assets, whereby the seller is oftentimes obligated to transfer the entire transaction value to the Russian federal budget.

These regulatory interventions culminated in Presidential Decree No. 302, which introduced a legal framework for imposing outside "temporary" administration in certain companies with foreign investments, which in fact amounts to expropriation. JSC Fortum, owned by Finland's majority state-owned *Fortum Oyj*, Russian energy company Unipro, owned by German state-owned Uniper SE, JSC Danone Russia, and LLC Brewing Company Baltika were the first companies affected by the decree.

A more detailed chronological account of Russia's discriminatory regulations is provided in Annex 1. A comprehensive study of Russian legislation enacted since the start of the full-scale invasion demonstrates that **Western companies who continue to operate in Russia have been effectively stiped of any control of their business and deprived of the economic value of their investments.**

5.2. Potential investment arbitration claims by Russia

It is reported that Russia considers initiating investment arbitration based on the Belgium-Luxemburg-Russia investment treaty.¹¹⁶ **We argue that the case should be dismissed at the jurisdiction and admissibility stage without considering the merits.**

As demonstrated above, the confiscation of Russian reserves should be implemented as a countermeasure based on a binding international treaty. Therefore, the subject matter of the potential dispute would no longer fall within the competence of the investment arbitration tribunal, rather it would be an interstate public international law dispute.

As to admissibility of dispute, Russia's claim should be precluded based on the "clean hands" doctrine, whereby a court should not support a cause of action if the party bringing the claim contributed to the situation by its illegal action.¹¹⁷ An example of application of the "clean hands" doctrine in investment arbitration can be found in *Al Warraq v. Republic of Indonesia*, where the tribunal found that the claimant having breached the laws of the host state had put the public interest at risk; therefore, he had deprived himself of the protection afforded by the relevant instrument.¹¹⁸ In its analysis, the tribunal reached the conclusion that claimants actions were "prejudicial to the public interest," and even though the investor did not receive fair and equitable treatment by the host state, the claimant is prevented from pursuing this specific claim based on the "clean hands" doctrine.¹¹⁹

Accordingly, **as disposition of Russian assets would take place exclusively due to Russia's gross and continuous violation of international law, Russia can no longer be entitled to protection under the investment treaty.**

¹¹⁶ <https://www.hln.be/nieuws/russen-proberen-bevroren-rekeningen-in-belgie-te-deblokkeren-op-basis-van-oud-verdrag-met-sovjet-unie-aa9460d1/>

¹¹⁷ One of the statements of the doctrine cited by international courts and tribunals is English court decision of *Holman v Johnson* (1775): "No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act. If, from /he plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says he has no right to be assisted"

¹¹⁸ Hesham T. M. Al Warraq v. Republic of Indonesia, UNCITRAL, para. 645.

¹¹⁹ Hesham T. M. Al Warraq v. Republic of Indonesia, para. 647.

ANNEX 1: CHRONOLOGY OF THE MOST RELEVANT RUSSIAN RESTRICTIVE REGULATIONS AGAINST WESTERN COMPANIES

1 March 2022 – Russian Central Bank circulated a letter establishing a ban on all bank transfers abroad from bank accounts of individuals and legal entities from “unfriendly” states. The ban was initially to introduced for the time period through 31 March 2022, later it was prolonged until 30 September 2023. In September 2023, the restrictions were prolonged until 31 March 2024.

5 March 2022 – Governmental Decree No.430 approving a list of “unfriendly” states. The list of unfriendly jurisdictions includes more than 50 states and territories, including the United States, all EU member states, Ukraine, the United Kingdom (including all British Overseas Territories and Crown Dependencies, which were added on 29 October 2022), Australia, and Canada, Norway and Switzerland.

5 March 2022 – Presidential Decree No.95 “On the Temporary Procedure for Complying with Obligations owned to Certain Foreign Creditors” establishes special procedure for repayment of loans and performance under other financial instruments issued by creditors from “unfriendly” states. Payments under such obligations exceeding 10 million rubles per month can only be made in rubles (regardless of the contractual terms), and to a special type “C” account in Russian banks exclusively. (Type “C” accounts allow for extremely limited list transactions, please see the Decision of the Board of Directors of Bank of Russia of 24 June 2022). The decree also mentions that the Ministry of Finance and the Central Bank of Russia can authorize payments beyond the outlined procedure. However, the Decree provides no guidance regarding the process for seeking this authorization or the criteria by which such authorization will be granted.

5 March 2022 – Ministry of Finance issues clarification, whereby restrictions imposed by Decree No.95 shall apply to payment of dividends to foreign shareholders (affiliated with “unfriendly” states) of Russian joint-stock companies. Meaning that such shareholders can receive dividends **exceeding 10 million rubles a month** only in rubles and such funds can be credited only toward type “C” account in Russian banks exclusively. (type “C” accounts allow for extremely limited list of transfers of funds from such accounts, please see the Decision of the Board of Directors of Bank of Russia of 24 June 2022). The decree also mentions that the Ministry of Finance and the Central Bank of Russia can authorize payments beyond the outlined procedure. However, the Decree provides no guidance regarding the process for seeking this authorization or the criteria by which such authorization will be granted.

8 April 2022 – the Russian Parliament introduced a draft law N 103072-8 allowing Russian government to expropriate the property of foreign nationals/companies affiliated with “unfriendly countries” without any compensation. The bill was withdrawn from consideration, but it signaled to foreign investors that similar law can be adopted in near term.

4 May 2022 – Presidential Decree No. 254 “On the Temporary Procedure for Performing Financial Obligations Pertaining to Corporate Relations Towards Certain

Foreign Creditors". According to the Decree dividends payable to foreign (affiliated with "unfriendly" countries) investors in Russian limited liability companies exceeding 10 million rubles per month can only be paid in rubles, and to a special type "C" account in Russian banks exclusively.

24 May 2022 – a draft Federal Law "On External Administration for the Management of an Organization" is approved by Russian Parliament in the first reading. External administration is designed to prevent foreign companies from exiting Russian markets.

According to the bill, external administration can be imposed based on a court order in companies that meet the following cumulative criteria:

- An entity affiliated with "unfriendly" state holds directly or indirectly at least 25% of shares or participatory interests in a Russian company in question;
- Such company is considered to have "a significant role for the stability of the economy and civil circulation, the protection of the rights and legitimate interests of citizens of Russia".

Imposition of external administration can be triggered if any of the following grounds occur:

- Company's management stops running a company;
- Company engages in actions or omissions, that lead to considerable reduction of company's assets or company's failure to perform its obligations;
- Company engages actions leading to "unjustified" termination of operations;
- Actual termination or suspension of operations or, scaling down of operations;
- Reduction of company's revenues for three full month by at least 30% compared to the preceding three month and/or compared to the same period of the previous year.

Temporary administration function will be vested in the state-owned corporation "VEB.RF"

24 June 2022 – Decision of the Board of Directors of Bank of Russia on establishing regime of type "C" bank accounts. The Decision stipulates that nonresidents can transfer funds from such accounts for the following exhaustive list of transactions:

- payment of taxes, duties, fees and other obligatory payments payable in accordance with the budget legislation of the Russian Federation;
- transfers for the purchase of federal bonds issued by the Russian Ministry of Finance;
- transfers to bank accounts of type "C";
- transfers to brokerage accounts of type "C" and special brokerage accounts of type "C", trading bank accounts of type "C", clearing bank accounts of type "C";
- payment of commissions to an authorized bank servicing the account;
- transfers to Russian residents in connection with the transfer of securities;
- transfers to Russian residents for payment of a penalties (fines, penalty fees) under certain transaction;

- return of funds erroneously credited to a type “C” bank account.

5 August 2022 – presidential Decree No. 520 "On Application of Special Economic Measures in Financial and Fuel and Energy Sectors in Connection with Unfriendly Actions of Certain Foreign States and International Organizations".

- The Decree prohibits execution without approval of the president of Russian Federation of any transactions resulting, directly and/or indirectly, in acquisition, modification, termination, or creation of any encumbrance over the rights to own, use, or dispose of:
 - securities issued by Russian legal entities;
 - participation interests in the charter capitals of Russian legal entities;
 - and participations interests, rights and obligations held by parties to production sharing agreements, joint operating agreements, or other agreements under which investment projects are implemented in Russia.
- The prohibition specifically applies to the following assets:
 - Shares in the so-called “strategic stock companies” listed in Presidential Decree No. 1009 dated August 4, 2004, "On Approval of the List of Strategic Enterprises and Strategic Stock Companies".
 - Shares (participation interests) in entities in which the above strategic stock companies own any shares (participation interests), directly or indirectly.
 - Participation interests, rights, and obligations of the participants in the certain production sharing agreements.
 - Certain entities in energy sector.
 - Shares (participation interests) in Russian credit organizations (e.g., banks) according to the list approved by the president.
- According to the Decree transactions executed without approval of the president shall be null and void.
- Initially, the restriction was effective until December 31, 2022 with possibility of repeated prolongation. As of now, it applies until December 31, 2023. There is no information on further prolongation, but it is possible that prolongation will be enacted in December, as it was done before.

8 September 2022 – presidential Decree No.618 “On a Special Procedure For The Implementation (Execution) Of Certain Types Of Transactions Between Certain Persons” introduces a restriction, whereby transactions between foreign entities and/or persons connected to “unfriendly” jurisdictions and other foreign entities or Russian residents, that result directly and/or indirectly, in acquisition or other change in title to shares and/or participatory interests in Russian-incorporated entities can be executed only upon approval by Russian Foreign Investment Commission. The Decree applies to companies that are not subject to Decree No. 520, i.e., transactions with such companies do not require approval from the president of the Russian Federation.

15 October 2022 – Presidential Decree No. 737 “On Certain Aspects of Performing Certain Types of Transactions” - imposes restrictions on funds distributions to entities affiliated with “unfriendly” states in relation to the liquidation of Russian-incorporated companies, the reduction of the charter capital of such companies, and in course of procedures related to bankruptcy. Such payments **exceeding 10 million rubles a month can** only be made in rubles and such funds can be credited only toward type “C” account in Russian banks exclusively. Transfer of funds in any other manner can only be done upon authorization from Ministry of Finance and Central Bank of Russia.

22 December 2022 – the Governmental Commission for Foreign Investment Control approves a list of criteria for authorizing sale of shares and participatory interests in Russian-incorporated entities:

- assets must be sold with a discount of no less than 50% of the market value indicated in the asset appraisal report;
- seller must agree to payment deferment for 1-2 years, and/or
- to commit to voluntarily transfer at least 10% of the transaction value to the federal budget.

Simultaneously the Commission approves a list of criteria, that can be considered when authorizing payment of dividends to foreign investors:

- Sum of dividends amounts to not more than 50% of company’s net profit for the preceding year;
- Retrospective analysis of payment of dividends in the past;
- Readiness of foreign investors to continue to operate in Russia;
- Opinion of the federal executive authorities and Central Bank of Russia regarding company’s “significance for technological and industrial sovereignty of the Russian federation, social and economic development of the Russian federation”;
- Federal executive authorities establish quarterly key performance indicators for the company in question;
- Dividends can be payable on a quarterly bases, provided that the company meets the key performance indicators, established by the federal executive authorities.

17 January 2023 – Presidential Decree No. 16 “On the Temporary Procedure for Decision-Making by the Governing Bodies of Certain Russian Business Enterprises” whereby qualified entities are allowed to disregard votes cast by foreign investors (affiliated with “unfriendly” states) or their representatives in board of directors, supervisory boards. The decree applies to the companies that meet the following cumulative criteria:

- The company operates in energy (including electricity), engineering, or trade sector;
- Sanctions have been imposed by “unfriendly” states on the controlling entity and/or beneficial owner.
- Foreign investors affiliated with 'unfriendly' countries do not own more than 50% of the charter capital.

- Revenue for the preceding year exceeds 100 billion rubles.

2 March 2023 – the Governmental Commission for Foreign Investment Control amended requirements for the companies seeking to divest from Russia:

- Obligation to make voluntary contribution to the federal budget of at least 10% of the half of market value stated in the assets appraisal report
- Obligation to make voluntary contribution to the federal budget of at least 10% of the full market value according to the assets appraisal report, in cases when the assets are being sold with more than 90% discount of the market value stated in the assets appraisal report.

25 April 2023 – Presidential Decree No. 302 “On Temporary Management of Certain Assets, Including Movable and Immovable Assets And Equity Interests In The Capital Of Russian Legal Entities”:

- Establishes general framework for appointment of the Federal Agency for State Property Management as the temporary manager of qualified assets;
- Applies to the assets of the companies associated with “unfriendly countries”;
- Purportedly is enacted in response to restrictive measures of sanctioning nations¹²⁰ and “in order to protect national interests of the Russian Federation”;
- Imposition of temporary manager can be triggered by any of the following:
 - deprivation of the Russian federation, Russian legal entities or individuals of the right to property located in the foreign states,
 - restrictions of their property rights, the event of threat of such deprivation or restrictions of property rights, the event of threats to national, economic, energy, or other types of security of the Russian federation;
- Authorization of the Federal Property Agency to exercise all the rights of the owner of such assets, except for disposal of the assets;
- Federal Property Agency to be appointed as a manager ostensibly as a temporary measure, however such appointment can be terminated only by decision of the president of the Russian federation;
- Assets to be placed under temporary management are listed in the annex to the decree and can be expanded at any time.

After amendments of July 16, 2023, the Decree 203 applies to the following assets:

- 98,2% of shares in JSC Fortum, owned by Finland’s majority State-owned Fortum Oyj. Fortum’s Russian assets include seven thermal power plants and a portfolio of wind and solar generation capacities.
- 83.73% of shares in Russian energy company Unipro, owned by German state-owned Uniper SE. Unipro operates five power plants in Russia.

¹²⁰ The Preamble to the Decree 302 reads: “Due to the need for urgent action in response to hostile and contradicting international law actions of the United States of America and foreign states and international organizations, who have aligned with them, seeking to unlawfully deprive the Russian Federation, Russian legal entities and individuals of the property rights and/or restricting their property rights and in order to protect national interests of the Russian Federation...”

- 100% of shares in Danone Russia JSC, 99.99% of which are currently held by Produits Laitiers Frais Est Europe (France) and 0.01% – by Danone Trade LLC (a wholly owned Russian subsidiary of Danone Russia JSC).
- 100% of participatory interests in Brewing Company Baltika LLC, 98.56% of which are currently held by Carlsberg Sverige Aktiebolag (Sweden), 1.35% by Hoppy Union LLC (wholly owned Russian subsidiary of Carlsberg Sverige Aktiebolag) and 0.09% by Carlsberg Deutschland GmbH (Germany).

07 July 2023 – the Governmental Commission for Foreign Investment Control amends requirements for the companies seeking to divest from Russia:

- Submission of assets appraisal report issued by an appraisal provider/appraisal organization, which are listed as recommended by the Commission;
- Submission of the expert report, issued by an expert organization, which is listed as recommended by the Commission;
- Sale of assets at a discount of at least 50% from the market value of the relevant assets indicated in the independent valuation report;
- Obligation to make voluntary contribution to the federal budget of at least 10% of the half of market value stated in the assets appraisal report;
- Obligation to make voluntary contribution to the federal budget of at least 10% of the full market value according to the assets appraisal report, in cases when the assets are being sold with more than 90% discount of the market value stated in the assets appraisal report.
- Option agreement for the repurchase of the assets by a foreign investor at a market value as of the date of such future transaction, provided that such repurchase is economically beneficial for Russian owner of the assets. The option can be exercised not later than within 2 years as of original sale of assets;
- Payments to the foreign shareholder shall be made to the type “C” bank account or in Russian rubles within Russian banking system.

4 August 2023 – Federal Law No. 414-ФЗ “On Windfall Tax” (will come into effect on 1 January 2024)

- Applies to all companies operating in Russia who meet certain quantitative criteria (unlike other legislation in this list, which targets foreign investors, associated with “unfriendly states”);
- Windfall tax applies to all companies whose arithmetic average profits for 2021 and 2022 surpassed 1 billion rubles(there are some exemptions to this rule: companies that listed in the register of small and medium enterprises, hydrocarbons extraction and coal mining companies, and some other categories are exempt from the tax);
- The taxable amount is calculated as a difference between an arithmetic average of profit for 2021-2022 and for 2018-2019;
- The tax rate is 10%;
- The tax must be paid no later than 28 January 2024;

- Companies can receive a 50% discount if they pay the tax before 30 November 2023.

4 September 2023 – Federal Law No. 470-ФЗ “On Certain Aspects of Regulating Corporate Relations in Business Entities that are Economically Significant Organizations”.

Summary: The law stipulates procedure for “suspending” corporate rights of majority shareholders, associated with “unfriendly states”.

- Determination of a company as an economically significant organizations is made by the Government of the Russian Federation upon the proposal of the federal executive body regulating relevant economic sector. The law provides some quantitative criteria for such determination¹²¹. The decision to include a business company in the list of economically significant organizations is not subject to appeal to a court.

Qualified foreign investors for the purposes of this law:

- a foreign legal entity that is associated with foreign states that are engaged in unfriendly actions against the Russian Federation, Russian legal entities and individuals; and
- owns at least 50 percent of the voting shares (stakes in the charter capital) of economically significant organization.

Suspension of corporate rights of foreign investors is effectuated by a court decision (Arbitration Court¹²² of the Moscow Region).

The law provides for general list of circumstances that may trigger application to the court for suspension of corporate rights.

The following entities can initiate court proceedings to suspend corporate rights:

- federal executive body authorized to do so by the Government of the Russian Federation;
- shareholders (participants) of an economically significant organization, regardless of the number of shares they own (the size of their shares in the charter capital);
- the sole executive body or member of the board of directors (supervisory board) of an economically significant organization.

Suspension of the corporate rights means:

- a foreign shareholder does not have the right to vote at the general meeting of shareholders (participants);
- a foreign shareholder does not have the right to take part in meetings of the general meeting shareholders (participants);

¹²¹ The procedure for determining that a company is an economically significant organizations was adopted on 1 November 2023.

¹²² In Russian legal system “arbitration courts” are state courts specialized in commercial and corporate disputes.

- a foreign shareholder does not have the right to convey/call for convening general meeting shareholders (participants);
- a foreign shareholder does not have the right exercise other rights arising from shareholding/ participation in an economically significant organization;
- a foreign shareholder does not have the right to sell or otherwise dispose of the shares;
- a foreign shareholder does not have the right to receive dividends;
- a foreign shareholder does not have the preemptive right to acquire (purchase) shares (share or part of a share in the authorized capital) of an economically significant organization owned by other shareholders (participants);
- shares owned by a foreign shareholder shall be transferred to an economically significant organization.

The Law stipulates that the federal register of legal entities shall reflect the transfer of shareholding from a foreign shareholder to the Russian business entity.

Duration of suspension of corporate rights shall be determined by the court, but should not continue beyond 31 December 2024.

26 September 2023- the Governmental Commission for Foreign Investment Control amends requirements for the companies seeking to divest from Russia:

- Obligation to make voluntary contribution to the federal budget of at least 15% of the full market value according to the asset's appraisal report within 1 months as of the sale transaction;
- As we understand, all other conditions remain applicable.

29 September 2023 - Statement of the Central Bank of Russia

Restrictions on FX payments abroad by individuals and legal entities affiliated with "unfriendly states" are prolonged until 31 March 2024.

30 November 2023 – presidential Decree No. 909 "On the Application Of Special Economic Measures In The Field Of Air Transport Due To The Unfriendly Actions Of Some Foreign States And International Organizations."

Summary: The decree blocks foreign investors from exercising their voting rights as shareholders in a Russian company that operates airport Pulkovo by vesting their shares from original company into a newly created legal entity and transferring their voting rights to Russian shareholders. Original Russian business entity with foreign investments is "Air Gates of the Northern Capital" LLC and it was a party to a concession agreement for operating Pulkovo airport. A group of Russian and foreign investors participated in "Air Gates of the Northern Capital" LLC through Cyprus holding company THALITA TRADING LIMITED.

The Decree cites the following reasons for invoking special economic measures towards a group of foreign investors:

- unfriendly and contrary to international law actions of the United States of America and the foreign states and international organizations that have joined them;
- threat to the national interests and economic security of the Russian Federation, which arose as a result of violation by some foreign legal entities of obligations related to the management of the limited liability company "Air Gates of the Northern Capital" (no further description of alleged violations is provided).

Special economic measures:

- The Government of the Russian Federation incorporates a limited liability company "Holding VVSS";
- 100 percent of the shares in the charter capital of the limited liability company "Air Gates of the Northern Capital", owned by THALITA TRADING LIMITED are being transfer to the ownership of the company "Holding VVSS" LLC in the manner and on the terms determined Government of the Russian Federation;
- Original shareholders (both Russian and foreign) of THALITA TRADING LIMITED become participants of "Holding VVSS" LLC;
- Voting rights of foreign investors are being transferred to Russian investors, specifically:

"Advanced Industrial and Infrastructure Technologies-7" LLC (a Russian company holding 2,33% in the original company) assumes voting rights of the following foreign shareholders:

- THIRTY SEVENTH INVESTMENT COMPANY LLC (7,99% shareholding, UAE)
- Bahrain Mumtalakat Holding Company B.S.C. (1,26% shareholding, Bahrain)
- Felmen Ventures Limited (1,05% shareholding, Cyprus)
- ZAMORALO HOLDINGS LIMITED (1,04% shareholding, Cyprus)
- Co-Investment Partnership I, L.P (0,17% shareholding, Cayman Islands), Co-Investment Partnership V, L.P.), 0,16% shareholding, Cayman Islands)

"Air Gates of the Northern Capital" LLC assumes voting rights of following foreign shareholders:

- Fraport AG Frankfurt Airport Services Worldwide (25% shareholding, Germany)
 - F3 Holding LLC (24,99% shareholding, Qatar)
 - MEVELIDA LTD (0,02% shareholding, Cyprus)
- While the transfer of the voting rights is said to be temporary, the Decree does not specify duration of applied measures or conditions for reinstating shareholder rights of a group of foreign shareholders.