Central Bank Immunity, Sanctions, and Sovereign Wealth Funds

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Abstract

Central bank assets held in foreign countries are entitled to immunity from execution under international law. Even as foreign sovereign immunity in general has become less absolute over time, the trend has been toward greater protection for foreign central bank assets. As countries expand their use of central banks, however, recent cases have limited immunity for certain kinds of sovereign wealth funds held by central banks. Sanctions on foreign central bank assets have also become more common, raising issues about the relationship between central bank immunity and the recognition of governments, the relationship between immunity and executive actions, and the denial of central bank immunity as a countermeasure. This symposium Article explores recent developments in central bank immunity focusing on sovereign wealth fund litigation in Sweden, U.S. sanctions on Afghan central bank assets, and the global response to sanctions imposed on Russian central banks following the invasion of Ukraine. Some of these actions and cases do not implicate foreign sovereign immunity. However, proposals to confiscate Russian central bank assets and U.S. litigation to turn Afghan central bank assets over to private plaintiffs, even if presented as countermeasures to secure reparations, would undermine significantly one of the increasingly rare areas of international economic law around which there is a global consensus: the immunity of foreign central banks from measures of execution.

Table of Contents

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INTRODUCTION

Central bank assets held in foreign countries are entitled to immunity from execution under international law. Although foreign sovereign immunity in general has become less absolute over time, the trend has been toward greater protection of foreign central bank assets from measures of execution.[1] As countries expand their use of central banks, however, recent cases have limited immunity for certain kinds of sovereign wealth funds held by central banks. States have also imposed sanctions on foreign central bank assets with increasing frequency, raising issues about the relationship between central bank immunity and the recognition of governments, the relationship between immunity and executive actions, and the denial of central bank immunity as a countermeasure.

This Article explores recent developments in central bank immunity through an analysis of sovereign wealth fund litigation and sanctions. Part I argues that sovereign wealth funds controlled or held by central banks without a connection to central banking functions, such as monetary policy, should not be immune from execution. Part II analyzes the relationship between immunity and sanctions, focusing on

[1] *See* Ingrid (Wuerth) Brunk, *Immunity from Execution of Central Bank Assets*, *in* THE CAMBRIDGE HANDBOOK OF IMMUNITIES AND INTERNATIONAL LAW 266 (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019).

sanctions against Afghanistan and Russia. The transfer by the United States of frozen Afghan central bank assets to a fund in Switzerland for eventual disbursement to aid the Afghan people follows from the lack of recognition of the Taliban and, like similar actions regarding Venezuelan central bank assets, is consistent with international law governing immunities. Freezing foreign central bank assets, including the measures taken to date against Russian central bank assets, also do not implicate immunity because they are not related to assertions of judicial power. Conversely, U.S. litigation to turn Afghan central bank assets over to private victims of terrorism supported by the Taliban—the former government of Afghanistan—would appear to violate international law, if successful. Some global proposals to confiscate Russian central bank assets would also violate international law on immunities, if adopted. Neither can be justified as countermeasures under current international practice.

The law of central bank immunity reflects a tension. On the one hand central bank immunity is nearly absolute, which promotes financial security and stability that arguably benefits a wide range of states. On the other hand, foreign central bank assets are alluring targets for efforts to satisfy large monetary awards and also for sanctions that are designed to achieve political objectives. As Part III describes, the pressure on central bank immunity is part of larger trends in international trade and finance, in particular the decrease in global legal arrangements in favor of regional or fragmented economic patterns.

I. Sovereign Wealth Funds and a Functional Approach to Central Bank Immunity

Some countries have expanded the work of their central banks to include the administration of sovereign wealth funds. Sovereign wealth funds ("SWFs") are investment funds owned or controlled by a state. They are often funded through the sale of natural resources, such as oil,[2] and they serve various purposes like the furtherance of state monetary policies or the maximization of returns with the same objectives, methods, and time horizons as private investments.[3] When the latter kinds of sovereign wealth funds are deposited into, through, or administered by a central bank, they give rise to questions of broad significance: whether all assets held by central banks are entitled to immunity from measures of execution in foreign countries and, if not, the appropriate legal test

2 Adrian Blundell-Wignall, Yu-Wei Hu & Juan Yermo, *Sovereign Wealth and Pension Fund Issues* 4 (OECD Working Papers on Ins. and Priv. Pensions, Paper No. 14, 2008), https://www.oecd.org/finance/private-pensions/40345767.pdf [https://perma.cc/KQ3W-92WH].

3 *Id.*

to distinguish between those that are protected by immunity and those that are not.

Cases addressing these questions have sometimes applied an absolute approach, protecting all assets held or controlled by a foreign central bank. Nevertheless, more recent cases in Belgium and Sweden have applied a functional approach and denied immunity to central banks assets that are invested and used in ways that are unrelated to monetary policy or other central banking functions. The more recent cases correctly reason that the distinction between those assets entitled to immunity and those that are not should not turn on whether the assets are in commercial use, but instead on whether they are being used for central banking purposes.[4]

A. Customary International Law and Article 21 of the U.N. Convention

The Swedish Supreme Court recently addressed central bank immunity in *Ascom v. Kazakhstan*,[5] which was one of many actions brought around the world by Moldovan investors to enforce international arbitral awards against the Republic of Kazakhstan.[6] In the Swedish litigation, an arbitration panel in Stockholm held that Kazakhstan violated the fair and equitable treatment standard of the Energy Charter Treaty and awarded over 500 million dollars to aggrieved investors.[7] To enforce the award, the investors attached property of the National Fund of Kazakhstan ("NFK"), a sovereign wealth fund managed by the Kazakh central bank. The attached property included shares of Swedish corporations.[8] The Swedish Supreme Court had to decide whether the assets of the sovereign wealth fund were immune from measures of execution because they were held and managed by the central bank of Kazakhstan.[9] The same issue arose in Belgium. Investors had attached NFK's assets that were located in Belgium, but held by a bank in New

4 Those cases raise an additional question not addressed in this Article: how exactly to define central bank property as opposed to the property of the state itself. Högsta Domstolen [HD] [Supreme Court] 2021-11-18 Ö 3828-20 (Swed.) §§ 8, 10, https://www.domstol.se/globalassets/filer/domstol/hogstadomstolen/avgoranden/engelska-oversattningar/o-3828-20-eng.pdf [https://perma.cc/C3QS-AG5T] (noting that the issues before the Supreme Court did not include "whether the attached property is to be deemed to be located in Sweden or whether the property belongs to Kazakhstan in the sense required by attachment law").

5 *Id.* The Author served as an expert in the case.

6 *See, e.g.*, State St. Corp. v. Stati, No. CV 19-MC-91107, 2020 WL 8839775, at *1 (D. Mass. Nov. 16, 2020), *report and recommendation adopted*, No. CV 20-12052, 2021 WL 1010697 (D. Mass. Feb. 25, 2021).

7 HD 2021-11-18 Ö 3828-20 § 1.

8 *Id.* §§ 10, 30.

9 *Id.* §§ 38–39.

York, which served as NFK's global custodian of the National Fund.[10] The assets were managed by the Kazakh central bank.[11]

A similar U.K. case against Kazakhstan from 2005, *AIG v. Kazakhstan*,[12] held that Kazakh sovereign wealth funds managed by the Kazakh central bank were entitled to immunity.[13] The *AIG* decision applied the U.K. State Immunity Act (not customary international law)[14] and afforded categorical immunity to assets managed by a foreign central bank, regardless of whether they were invested like private assets with the long-term goal of obtaining high profits at reasonable risk levels.[15]

The Swedish Supreme Court resolved the issue in *Ascom* by applying customary international law.[16] The law is unsettled in this area. Although there has been a trend toward a greater protection of central bank assets overall,[17] the extent to which sovereign wealth funds administered through central banks are entitled to immunity is not clear.[18] In general terms, it seems inconsistent with the restrictive approach to immunity from execution to conclude that the state can protect all assets from measures of execution merely by administering or holding them through a central bank. That sort of categorical approach to immunity could lead to "unreasonable outcomes," to use of the words of the Swedish appellate court, by requiring the protection of property with no relationship to the standard operations of a central bank.[19]

The *Ascom* case interpreted customary international law based on Article 21 of the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property. Although the Convention is not in force, many of its provisions reflect customary international law.[20] Article 21 of the Convention provides special protections to central bank property.[21] The *Ascom* court held these special protections did not apply to the assets of a sovereign wealth fund managed by a central

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10 CA [Courts of Appeal] Brussels (17th div.), June 29, 2021, 5536, 2021, p. 1, 7, D. Degreef.

11 *Id.*

12 AIG Cap. Partners, Inc. v. Republic of Kaz. [2005] EWHC (Comm) 2239 (Eng.), https://www.italaw.com/sites/default/files/case-documents/ita0022.pdf [https://perma.cc/EZP2-E37K].

13 *Id.* at [95].

14 *Id.* at [1].

15 *Id.* at [95].

16 HD 2021-11-18 Ö 3828-20 §§ 23–24.

17 (Wuerth) Brunk, *supra* note 1, at 266.

18 *See id.* at 280 n.103.

19 Rättsfall från Hovrätterna [RH] [cases from the Courts of Appeal] 2020 p.1 ÖÄ 7709-19 (Swed.) § 52, https://www.italaw.com/sites/default/files/case-documents/italaw11684.pdf [https://perma.cc/QD6Y-HQCR].

20 Philippa Webb, *The United Nations Convention on Jurisdictional Immunities of States and Their Property*, U.N. Audiovisual Libr. Int'l L. (2019), https://legal.un.org/avl/pdf/ha/cjistp/cjistp_e.pdf [https://perma.cc/KRB9-4G9Q].

21 HD 2021-11-18 Ö 3828-20 §§ 20–21.

bank but not used for purposes related to central banking—such as implementing monetary policy.[22] The court responded that central bank assets are given special protection because of their connection to monetary policy.[23] It found "no clear support for the position that absolute immunity under international customary law also applies in respect of property which a central bank has at its disposal without any connection to the bank's monetary policy tasks."[24]

Concerning the specific property at issue, the Swedish Supreme Court noted that it was part of the NFK's "savings portfolio."[25] That portfolio was managed with a significantly higher risk tolerance than permitted by the NFK's "stabilization portfolio."[26] The court observed that the savings portfolio, unlike the stabilization portfolio, was managed like other long-term assets invested in the international capital market.[27] Because the savings portfolio was managed like a normal private equity portfolio, it should not be characterized as "an instrument for the exercise of the National Bank's exchange and monetary policy function."[28] Note that the court's conclusion means that the savings portfolio is not entitled to central bank immunity. But those assets would still be entitled to the same robust immunity from execution to which government assets are generally entitled.[29]

The Swedish court of appeals had held to the contrary, reasoning that customary international law provides central bank immunity to all sovereign wealth funds, including those with a savings portfolio, so long as they are administered by a central bank. The court of appeals adopted this "categorical" approach based in part upon the structure of Article 21, which provides special immunity for diplomatic, cultural, military and central bank property.[30] Subparagraph (c) of Article 21(1) protects "property of the central bank or other monetary authority of the State."[31] The other subparagraphs are worded

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22 *Id.* § 23.

23 *Id.*

24 *Id.* § 24.

25 *Id.* § 41.

26 *Id.*

27 *Id.*

28 *Id.*

29 *See* Michael Wood, *Immunity from Jurisdiction and Immunity from Measures of Constraint*, *in* The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary 13, 17 (Roger O'Keefe & Christian Tams eds., 2013).

30 Rättsfall från Hovrätterna [RH] [cases from the Courts of Appeal] 2020 p.1 ÖÄ 7709-19 (Swed.) §§ 46, 48. The district court had authorized the attachment, reasoning that property was not central bank property and also that it was not used for sovereign, noncommercial purposes. Nacka Tinsgrätt [TR] [District Court] 2019-5-7 Ä 6686-17 (Swed.), https://www.italaw.com/sites/default/files/case-documents/italaw10723.pdf [https://perma.cc/LNN3-6T7J].

31 G.A. Res. 59/38, annex, Convention on Jurisdictional Immunities of States and Their Property, art. 21(c) (Dec. 2, 2004) [hereinafter U.N. Convention].

differently—subparagraph (d) protects property "forming part of the cultural heritage of the State or part of its archives and not placed or intended to be placed on sale,"[32] and (b) protects "property of a military character or used or intended for use in the performance of military functions."[33] The court of appeals reasoned that because the language providing special protections to other property all refers to the *use* of that property—but the language protecting central bank property does not refer to its use—it is not appropriate to consider whether the property was used for central banking purposes to determine whether it fell within the special protections afforded by 21(1)(c).[34]

The Swedish Supreme Court implicitly rejected this argument. It was correct to do so. The difference in language arises because subparagraph (c), which addresses central bank assets, is the only clause that confers immunity based on ownership or control. Subparagraph (b), for example, as quoted above does not protect the property *of* the military, it protects only "property of a military character or used . . . in the performance of military functions."[35] Subparagraph (d), also quoted above, does not protect property *of* a particular state organ. It protects property that is part of the state's cultural heritage and that is not intended for sale.[36] Clauses (b), (d), and the other clauses of Article 21 (other than (c)) thus confer immunity based upon function and use, not ownership or control, so they must refer explicitly to function and use—that is the basis for the category itself. By contrast, Article 21(1)(c) is a category based on ownership (or control), not solely a function-and-use category. Article 21(1)(c) protects property of a central bank or other monetary authority, so it accordingly does not refer to use. The difference in wording between (c) and the other subparagraphs does not mean that "property of the central bank or other monetary authority of the State"[37] in subparagraph (c) should be interpreted without reference to common meaning and purposes of central banks and central banking.

More broadly, the reference in Article 21(1)(c) to "or other monetary authority" itself eschews formalist categories and protects property-based function, not on a formalist designation of the institution that owns or controls it as a "central bank." In this sense, the entire Convention takes a functionalist approach to immunity. Article 2.1(b), for example, defines a "State" to include agencies or instrumentalities of the state, but only to the extent that they are "actually performing

32 *Id.* at art. 21(d).

33 *Id.* at art. 21(b).

34 RH 2020 ÖÄ 7709-19 §§ 46–48.

35 U.N. Convention, *supra* note 31, at art. 21(b).

36 *Id.* at art. 21(d).

37 *Id.* at art. 21(c).

acts in the exercise of sovereign authority of the State."[38] This language may even apply to some central banks—it would apply to a central bank that is not an "organ of government" of the state, but is instead an entity with a separate legal personality under domestic law, meaning that it is an "agency or instrumentality."[39]

A central bank that is an agency or instrumentality of a state is only protected by immunity to the extent that it is performing acts in the exercise of sovereign authority, which underscores the importance of functional reasoning rather than formal categories under the Convention. The language in Article 21(1)(c) should be interpreted functionally, as protecting property with a connection to central banking purposes, as the Swedish Supreme Court held. For sovereign wealth funds, central banking purposes means monetary policy but not long-term wealth maximization. For assets that do qualify for protection as central bank assets, the immunity to which they are entitled is all but absolute.

B. The "Central Banking Functions" Test

A functional approach to the immunity of central bank assets leaves open the question of how to distinguish—based on function—between those assets that should be protected and those that should not. As described in this Section, courts have taken two basic approaches. Some have held that central bank assets used for "commercial activity" are not entitled to central bank immunity. Other courts have reasoned assets not used for "central banking purposes" or "functions" are not entitled to central bank immunity. The latter test is preferrable under both U.S. law and the language of the U.N. Convention. Note that either of these two tests creates uncertainty that is avoided through a categorical or absolute approach, but the categorical approach has the disadvantage of providing special protections to assets that do not serve the purposes that central bank immunity was intended to protect.

The U.N. Convention, as well as many domestic state immunity statutes, distinguishes between commercial and noncommercial activity in a variety of contexts.[40] Lower courts in the United States have sometimes used a commercial activity test in central bank immunity cases. A Belgium court recently denied immunity in another case against

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38 *Id.* at art. 2.1(b)(iii).

39 *See* Tom Grant, *Article 2(1)(a) and (b)*, *in* The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary 40, 50–51 (Roger O'Keefe & Christian Tams eds., 2013).

40 *See* U.N. Convention, *supra* note 31, at arts. 10, 19; Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1332, 1391, 1441, 1602–1611; State Immunity Act 1978, c. 33 (UK); *see also* Foreign State Immunities Act 87 of 1981 (S. Afr.). *See generally* Yas Banifatemi, *Jurisdictional Immunity of States – Commercial Transactions*, *in* The Cambridge Handbook of Immunities and International Law 125 (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019).

the National Fund of Kazakhstan relating to $542 million of its assets held by the central bank.[41] The court rejected a categorical approach to immunity and apparently reasoned that because the assets were in commercial use, they were not entitled to immunity, even if they were invested through the central bank.[42]

The distinction between commercial and noncommercial conduct or purpose is not the correct test to determine whether central bank assets are entitled to Article 21(1)(c) protections. This application would run counter to the structure of the U.N. Convention because assets not in commercial use are already protected by immunity. If central bank assets are not entitled to the special immunity afforded by Article 21(1)(c), they are treated as other forms of state property under Article 19 of the Convention.[43] Article 19 protects foreign state assets from measures of execution, and it creates exceptions to that immunity for state property used for commercial purposes.[44] A functional approach to Article 21(1)(c) should not confer central bank immunity based on the noncommercial use of the assets because Article 19(c) already protects state property used for noncommercial purposes. If Article 21(1) only protected central bank property not in commercial use, it would not add to the protections already afforded to all state property under Article 19.

It follows that the correct test under Article 21(1)(c) is not whether the assets were in commercial use. Indeed, the Swedish Supreme Court correctly evaluated whether the assets in question were used as an instrument of the central bank's "exchange and monetary policy function."[45] Applying this test, a SWF savings portfolio managed to maximize long-term investment goals was not entitled to central bank immunity because it did not serve an exchange or monetary policy function.[46]

The United States has taken a similar approach under the Foreign Sovereign Immunities Act ("FSIA"). The FSIA, in 28 U.S.C. § 1609, makes all property of a foreign state immune from execution, except as provided in §§ 1610 and 1611.[47] Section 1610 exempts (under certain

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41 Tomas Vail, *Arbitral Enforcement Takeaways from Kazakh Asset Ruling*, VAIL DISP. RESOL. (Aug. 16, 2021), https://www.vail-dr.com/arbitral-enforcement-takeaways-from-kazakh-asset-ruling/ [https://perma.cc/9H9T-REFU].

42 *Id*.

43 *See* U.N. Convention, *supra* note 31, at art. 19.

44 Article 19 prohibits postjudgment measures of constraint against the property of a state, except to the extent that "the property is specifically in use or intended for use" for "other than government non-commercial purposes." *Id.*

45 Högsta Domstolen [HD] [Supreme Court] 2021-11-18 Ö 3828-20 §§ 41–43, https://www.domstol.se/globalassets/filer/domstol/hogstadomstolen/avgoranden/engelska-oversattning-ar/o-3828-20-eng.pdf/ [https://perma.cc/KW7M-8ZFX].

46 *Id.* §§ 47–48.

47 28 U.S.C. §§ 1609–1611.

conditions), "property in the United States of a foreign state . . . used for a commercial activity in the United States."[48] Section 1611(b)(1) then provides that "[n]otwithstanding the provisions of section 1610," the property of a foreign state shall be immune from attachment if it is property "of a foreign central bank or monetary authority held for its own account."[49]

Courts in the United States have considered various tests to determine whether property is that of a central bank (or monetary authority) held for its own account under 1611(b), including whether the property is in commercial use.[50] Some courts adopted a commercial use test under 1611(b) based in part on the legislative history of FSIA.[51] Most courts have correctly rejected that approach, however, for effectively the same reason that it should be rejected under the U.N. Convention. Section 1611(b)(1) of the FSIA must be read in conjunction with Section 1610,[52] just as Article 21(1)(c) of the U.N. Convention must be read in conjunction with Article 19. Section 1610 of the FSIA allows attachment only of certain property "used for a commercial activity."[53] The relevant property referred to by Section 1611(b)(1) thus includes property used for a commercial activity: if it were not, it would already be protected as state property and no exception to the lifting of immunity under Section 1610 would be necessary. A showing that property of a central bank is used for a commercial activity does not, therefore, exclude it from the special immunity granted by Section 1611(b)(1).[54]

Recent U.S. decisions have rejected a commercial activity test in favor of a test that focuses on central banking functions or activities.

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48 *Id.* § 1610(a), (d).

49 *Id.* § 1611.

50 *See id.*

51 Banco Cent. De Reserva del Peru v. Riggs Nat'l Bank of Wash., D.C., 919 F. Supp. 13, 17 (D.D.C. 1994). The court relied on language in the legislative history to say that central bank immunity applies only to those funds "used or held with central banking activities, as distinguished from funds used solely to finance the commercial transactions of other entities or of foreign states." *Id.* (quoting H.R. Rep. No. 94-1487, at 31 (1976)).

52 28 U.S.C. § 1611(b)(1):

> (b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if—
>
> (1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver.

53 *Id.* § 1610.

54 *See, e.g.*, Weston Compagnie de Fin. et D'Investissement, S.A. v. La República del Ecuador, 823 F. Supp. 1106, 1112 (S.D.N.Y. 1993); NML Cap., Ltd. v. Banco Cent. de la Republica Argentina, 652 F.3d 172, 193–94 (2d Cir. 2011); Restatement (Fourth) of The Foreign Relations Law of the United States § 464 reporter's note 8 (Am. L. Inst. 2018).

The Second Circuit Court of Appeals held that central bank immunity applies to funds "being used for central banking functions as such functions are normally understood."[55] The test differs somewhat from the approach taken by the Swedish Supreme Court in *Ascom*, but it is a difficult to evaluate how important those differences will be in practice. The U.S. cases adopting a central banking functions test did not involve sovereign wealth funds and they do not focus specifically on monetary policy.[56] The *Ascom* case, by contrast, developed its test in the context of various investment portfolios of a foreign sovereign wealth fund, and it did focus on whether the investment served exchange or monetary functions. The Second Circuit test specifically assigns a burden of proof: an account under the name of a foreign central bank is presumptively "held for [the central bank's] own account" under § 1611, and therefore presumptively immune.[57] That presumption can be overcome by the party seeking attachment if they show that "the funds are not being used for central banking functions as such functions are normally understood."[58]

The Swedish decision appeared, by contrast, to put the burden on the party claiming immunity to show that "the attached property has a clear connection with the bank's central monetary policy function."[59] On the other hand, the Swedish Court's approach may be specific to the context of sovereign wealth funds or other money that is invested in international capital markets rather than used for other purposes. The Court reasoned along these lines that "[a]s regards holdings of financial assets traded on the capital market, there is often an absence of actual use that can form the basis for assessing the purpose behind the holding."[60] Ultimately, the Court relied upon the investment strategy used for the funds in question, and it may have put the burden on Kazakhstan to show a connection to monetary policy only because the funds were invested in a standard long-term equity portfolio.[61]

The U.S. cases acknowledge that there is no "definitive list of activities" that are "normally understood" as central banking functions and

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55 *NML Cap., Ltd.*, 652 F.3d at 194.

56 *See id.*; Cont'l Transfert Tech., Ltd. v. Fed. Gov't of Nigeria, No. CV 08-2026 (PLF), 2019 WL 3562069, at *2 (D.D.C. Aug. 6, 2019). The U.S. cases considering the immunity of sovereign wealth funds do not involve central banks. *See, e.g.*, Atlantica Holdings v. Sovereign Wealth Fund Samruk-Kazyna JSC, 813 F.3d 98 (2d Cir. 2016) (no sovereign immunity in a case against a Kazakh sovereign wealth fund under the "commercial activity," where the sovereign wealth fund had allegedly made misrepresentations in connection with the sale of securities).

57 *NML Cap., Ltd.*, 652 F.3d at 194.

58 *Id.*; *Cont'l Transfert Tech., Ltd.*, 2019 WL 3562069, at *17.

59 Högsta Domstolen [HD] [Supreme Court] 2021-11-18 Ö 3828-20 (Swed.) § 40, https://www.domstol.se/globalassets/filer/domstol/hogstadomstolen/avgoranden/engelska-oversattningar/o-3828-20-eng.pdf [https://perma.cc/KW7M-8ZFX].

60 *Id.* § 25.

61 *See id.* § 29.

that those functions could change over time.[62] Many central banking functions are straightforward, however, including maintaining foreign exchange reserves, maintaining monetary supply, and issuing currency.[63] They also include commercial banking services performed on behalf of the foreign government—an issue not relevant in the Swedish litigation. For example, a U.S. court considered whether an account of the Nigerian central bank at JPMorgan Chase Bank was engaged in "central banking functions" if the account was used pay for "aircraft and military equipment and services, tuition payments to U.S. institutions, legal and consulting expenses, technology services and research subscriptions, and professional training costs."[64] The court reasoned that standard central banking functions include "serving as a banker [to the foreign state] by paying certain commercial debts in the United States."[65] Although these assets would not be protected under a commercial activity test, they are protected under a central banking functions test.

Taken together, the Swedish and the U.S. decisions point toward a high level of immunity from measures of execution for foreign central bank assets, but they also suggest that assets deposited in (and under the control of) central banks for purposes unrelated to central banking functions will not be entitled to immunity. The presumption should be in favor of immunity, as the U.S. courts have stated, and the scope of central banking functions should be construed broadly. However, states should not expect immunity for any and all sovereign assets—especially some kinds of investments by sovereign wealth funds—just because they are invested with a central bank.

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62 *NML Cap., Ltd.*, 652 F.3d at 194 n.20.

63 *Id.* at 195. As another court explained, central banking functions include:

> (1) issue of notes, coin, and legal tender, (2) custody and administration of the nation's monetary reserves through the holding of gold, silver, domestic and foreign securities, foreign exchange, acceptances, and other credit instruments, and IMF Special Drawing Rights, (3) establishment and maintenance of reserves of depository institutions, [. . .] (5) receipt of deposits from the government, international organizations, depository institutions, and in special cases, private persons, (6) open market operations (7) credit controls, and (8) licensing, supervision, and inspection of banks.

Cont'l Transfert Tech., Ltd., 2019 WL 3562069, at *18 n.12 (quoting Ernest Patrikis, Foreign *Central Bank Property: Immunity from Attachment in the United States*, 1982 U. Ill. L. Rev. 265, 274).

64 *Cont'l Transfert Tech., Ltd.*, 2019 WL 3562069, at *3.

65 *Id.* at *18; *see also* EM Ltd. v. Republic of Arg., 865 F. Supp. 2d 415, 424 (S.D.N.Y. 2012) ("[U]se of a central bank's foreign reserves to pay the commercial debt of the sovereign is a traditional central banking function."); Preble-Rish Haiti, S.A. v. Republic of Haiti, 558 F. Supp. 3d 155, 159–160 (S.D.N.Y. 2021) (holding that central banking functions include acting "as an intermediary" to facilitate payments from an agency of the foreign state to its contracted suppliers).

II. Sanctions and Central Bank Immunity

War, violations of international law, and political disagreements have prompted some governments—especially the United States—to sanction the central bank assets of other countries.[66] Recent examples include the United States's sanctions against Russia following the invasion of Ukraine and against Afghanistan following the Taliban's takeover of government power. The United States has frozen about $7 billion in Afghan central bank assets held in the United States.[67] Similarly, the United States, European Union, Japan, the United Kingdom, and other countries have frozen more than $300 billion in Russian central bank assets located in their jurisdictions.[68] These actions are not entirely unprecedented. Syrian, Venezuelan, Iranian, and Cuban central bank assets have also been subjected to sanctions.

Some sanctions against central bank assets do not implicate immunity at all. As described in Section II.A, for example, certain sanctions against Venezuelan and Afghan central banks involve decisions to not recognize the government that is in power and to turn control of central bank assets over to a different representative of the country. Such actions may be in tension with other obligations under international law, but standing alone, they do not violate immunity. Additionally, asset freezes that involve executive action unrelated to a judicial proceeding do not violate immunity, as Section II.B explains. To date, for example, Russian central bank assets have been frozen through various domestic and regional sanctioning regimes that do not appear to implicate immunity.

Nevertheless, other sanctions do or would violate central bank immunity. Many have argued that frozen Russian central bank assets should be turned over to Ukraine—an action that could raise significant immunity issues, ones that are sometimes not described with care.[69]

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66 Note various definitions of sanctions under international law. *See generally* Tom Ruys, *Sanctions, Retorsions and Countermeasures: Concepts and International Legal Framework*, *in* Research Handbook on U.N. Sanctions And International Law (Larissa van den Herik ed., 2016).

67 Jeff Stein, *Biden Administration Freezes Billions of Dollars in Afghan Reserves, Depriving Taliban of Cash*, Wash. Post (Aug. 17, 2021, 4:17 PM), https://www.washingtonpost.com/us-policy/2021/08/17/treasury-taliban-money-afghanistan [https://perma.cc/QZ8N-GA49]; Shannon Pettypiece, *Biden Moves to Freeze $7 Billion in Afghan Funds*, NBC News (Feb. 11, 2022, 10:37 AM), https://www.nbcnews.com/politics/white-house/biden-moves-freeze-7-billion-afghan-funds-rcna15882 [https://perma.cc/6LFK-KACC].

68 Charles Lichfield, *The Russian Central Bank Is Running out of Options*, Atl. Council (Mar. 4, 2022), https://www.atlanticcouncil.org/blogs/new-atlanticist/the-russian-central-bank-is-running-out-of-options/ [https://perma.cc/G832-BFF5].

69 *See, e.g.*, Philip Zelikow & Simon Johnson, *How Ukraine Can Build Back Better: Use the Kremlin's Seized Assets to Pay for Reconstruction*, Foreign Affs. (Apr. 19, 2022), https://www.foreignaffairs.com/articles/ukraine/2022-04-19/how-ukraine-can-build-back-better [https://

Litigation in the United States to turn Afghan central bank assets over to plaintiffs who hold terrorism-related judgments against the Taliban would apparently violate the immunity to which those assets are entitled under international law, as addressed in the Section II.C. Finally, even the measures that violate central bank immunity might fall within the doctrine of countermeasures, which would preclude their wrongfulness. That argument is not plausible for the potential U.S. confiscation of the Afghan assets, however, and it is a weak argument with respect to the confiscation of Russian central bank assets, as discussed in Section II.D.

A. Recognition of Governments and Central Bank Assets

Following the fall of the Afghan government to the Taliban in August 2021, neither the United States nor any other country has recognized the Taliban as the country's government.[70] A similar situation unfolded in Venezuela when the United States (and some other countries) recognized Juan Guaidó as the President of the country in 2020, although he did not actually control the government.[71] Both Afghanistan and Venezuela had significant central bank assets in the United States, prompting disputes about who owns or controls those assets in the face of disagreement about the legitimate government of the country.

That question is answered under domestic U.S. law in part by Section 25B of the Federal Reserve Act,[72] which requires federal reserve banks to follow the determination of the Secretary of State when deciding who represents a foreign government or foreign central bank.[73] The Da Afghanistan Bank ("DAB"), the central bank of Afghanistan, had approximately $7 billion in the United States, all of which was blocked by an Executive Order issued by President Biden pursuant to the International Emergency Economic Powers Act.[74]

Relying in part on Section 25B, the Office of Foreign Assets Control ("OFAC") directed the Federal Reserve Bank to transfer $3.5 billion of the DAB assets to persons designated by the Secretary of State, who

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perma.cc/5NQW-Y425] (discussing the legality of confiscating Russian central bank assets under international law and citing the use of Afghan central bank assets for humanitarian purposes as "precedent" although the legal issues are entirely distinct as discussed infra).

70 Karen DeYoung, *Countries Are Establishing Relations with the Taliban Even Though None Has Offered Formal Recognition of the Militant Government*, Wash. Post (Sept. 9, 2021, 6:43 PM), https://www.washingtonpost.com/national-security/taliban-recognition-us-china-russia/2021/09/09/7ca9f34e-1189-11ec-bc8a-8d9a5b534194_story.html [https://perma.cc/TSP8-YRQ7].

71 *See* Scott Smith, *Official: US Will Extend Support for Venezuela's Guaidó*, Wash. Post (Aug. 4, 2020, 2:07 PM), https://www.washingtonpost.com/politics/official-us-will-extend-support-for-venezuelas-guaido/2020/08/04/65e30756-d67d-11ea-a788-2ce86ce81129_story.html [https://perma.cc/BJ9Q-RW3C].

72 12 U.S.C. § 632.

73 *See id*.

74 *See* Exec. Order No. 14,064, 87 Fed. Reg. 8391 (Feb. 11, 2022).

will use the assets for the benefit of the Afghan people.[75] The Departments of the Treasury and State in turn announced the creation of the "Afghan Fund," a legal entity in Switzerland, to make decision about the disbursement of the $3.5 billion dollars.[76] Under Section 25B, the Secretary of State designated the two individuals who formally created the Afghan Fund.[77]

The disbursement of central bank assets through the Afghan Fund apparently raises no issues of immunity. Technically, the assets are being turned over to representatives of the Afghan government. In other words, ownership of the central bank assets has not changed—they still belong to "Afghanistan," even if the Taliban-controlled DAB has no control over or access to them. The United States has decided not to recognize the Taliban and has instead designated or "recognized" other people—at least for the limited purposes of disbursing central bank assets. The U.S. government describes the designation of individuals other than the Taliban who now control Afghan central bank assets as "[c]onsistent with past practice."[78] The "past practice" has not been identified, but similar action was taken with respect to Venezuelan central bank assets.[79]

Concerning international law, the U.S. decision to designate individuals with control over central bank assets does not violate immunity-related obligations because the actions did not involve an exercise of judicial power or authority.[80] But other international legal obligations may be implicated. For example, as described below, litigation in the United States seeks to use Afghan central bank assets to pay private victims of terrorism who have obtained judgments against the Taliban. If successful, those cases would effectively treat the Taliban as the government of Afghanistan by using Afghan government assets to pay Taliban debts. Doing so could constitute something like *de jure* recognition of

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75 *See* Press Release, U.S. Dep't of Treasury, Joint Statement by U.S. Treasury and State Department: The United States and Partners Announce Establishment of Fund for the People of Afghanistan (Sept. 14, 2022), https://home.treasury.gov/news/press-releases/jy0947 [https://perma.cc/9KG2-SVA5] [hereinafter Joint Statement by Treasury & State Departments].

76 *Id.*

77 *Id.* For critical reactions to the creation of the Afghan Fund, *see* Sarajuddin Isar, *Don't Release Foreign Reserves to the Taliban*, Foreign Pol'y (Nov. 29, 2022, 5:56 AM), https://foreignpolicy.com/2022/11/29/afghanistan-taliban-release-foreign-reserves/ [https://perma.cc/MSY5-XZWZ]; Paul Fishstein, *The New Afghan Fund and Engagement with the Taliban*, N.Y.U. Ctr. on Int'l Coop. (Sept. 30, 2022), https://cic.nyu.edu/resources/the-new-afghan-fund-and-engagement-with-the-taliban/ [https://perma.cc/5Y7X-UZLE].

78 Joint Statement by Treasury & State Departments, *supra* note 75.

79 *See* Press Statement, Robert J. Palladino, Deputy Spokesperson, U.S. Dep't of State, Protecting Venezuela's Assets for Benefit of Venezuelan People (Jan. 29, 2019), https://2017-2021.state.gov/protecting-venezuelas-assets-for-benefit-of-venezuelan-people/index.html [https://perma.cc/WQZ9-CUQQ].

80 *See infra* Section II.B.

the Taliban, meaning that the Taliban is entitled to control Afghan state assets located in the United States, including the central bank assets given over the Afghan fund.

A similar issue arose when the United Kingdom refused to recognize the Soviet annexation of the Baltic states in 1940 and, accordingly, did not turn Baltic states's government assets located in the United Kingdom over to the Soviet government.[81] But the United Kingdom also wanted to confiscate the Baltic gold to pay Soviet debts to British citizens.[82] The latter appeared to be a *de jure* recognition of the Soviet annexation, meaning that the Soviets should have been able to claim the gold as theirs. The issue was not resolved.[83]

More recently, the U.K. Supreme Court refused to distinguish between *de jure* and *de facto* recognition in litigation over the assets of the Venezuelan central bank. Nicolás Maduro was in actual control of the country, arguably making him the *de facto* President of Venezuela, but Juan Guaidó claimed to be the legitimate President and was recognized by the United Kingdom as the Interim President, arguably making him the *de jure* President.[84] The English Court of Appeal distinguished between the *de jure* and *de facto* governments for the purposes of deciding which government was legally entitled to the central bank assets,[85] but the U.K. Supreme Court rejected the distinction, reasoning instead that the government's general recognition decision was binding on the courts and that Guaidó controlled the assets unless a valid judgment of the Venezuelan courts enforceable in the United Kingdom held otherwise.[86] The precedent from the United Kingdom provides some support in international practice for the U.S. decision to designate an entity other than the Taliban to control Afghan central bank assets.

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81 *See* Eileen Denza & Lauge Poulsen, *Settling Russia's Imperial and Baltic Debts*, 117 Am. J. Int'l L. 441, 461 (2023); *see also* Sean D. Murphy & Edward T. Swaine, The Law of U.S. Foreign Relations 156–63 (2023) (describing how U.S. courts treat unrecognized governments).

82 *See* Denza & Poulsen, *supra* note 81.

83 *See id.* at 461–70.

84 *See* Peter Webster, *The Venezuelan Gold Decision: Recognition in the English Court of Appeal*, EJIL: Talk! (Nov. 2, 2020), https://www.ejiltalk.org/the-venezuelan-gold-decision-recognition-in-the-english-court-of-appeal/ [https://perma.cc/A6PT-DVN3]. *See generally* Stefan Talmon, Recognition of Governments in International Law: With Particular Reference to Governments in Exile 60 (1998).

85 "Maduro Bd." of Cent. Bank of Venez. v. "Guaidó Bd." of Cent. Bank of Venez., [2020] EWCA (Civ) 1249, [122–25].

86 "Maduro Bd." of Cent. Bank of Venez. v. "Guaidó Bd." of Cent. Bank of Venez. [2021] UKSC 57, [99], [101], [181] (appeal taken from Eng.). *See generally*, Massimo Lando, *Supremely Pragmatic: The UK Supreme Court's Judgment in* "Maduro Board" of the Central Bank of Venezuela v. "Guaidò Board" of the Central Bank of Venezuela, Nat'l Univ. Sing.: CTR. Int'l L. Blog, https://cil.nus.edu.sg/blogs/supremely-pragmatic-the-uk-supreme-courts-judgment-in-maduro-board-of-the-central-bank-of-venezuela-v-guaido-board-of- the-central-bank-of-venezuela-by-mas/ [https://perma.cc/CKT2-G23A].

Even the U.S. government's assignment of Afghan central bank assets to the Afghan Fund—aside from the potential use of the assets to pay the debts of the Taliban—may be in tension with either the rights of the Taliban as the entity in actual control of Afghan territory or with the rights of Afghanistan as a state. Professor Ben Saul has argued along these lines that "[i]f an entity has effective control in a state as its government it is entitled to exercise the state's international rights and bears its international obligations" including the right to "own and deal with state property or assets held abroad."[87] But there is state practice to the contrary, including the Venezuelan and Soviet examples described above. There are also examples of governments in exile that lacked effective control over the state's territory but which were nonetheless recognized as the State's government and who were thus given the right to dispose of the State property located in the country that has recognized them.[88] International law places few, if any limitations, on the decision by one country to recognize the government of another country, whether or not it controls the State territory.

What makes the Afghan situation unusual, however, is that the United States has not recognized any government of Afghanistan at all. Instead, it is distributing the central bank assets to the "Afghan Fund," an entity created by the United State solely for the purposes of distributing Afghan central bank assets to aid the people of Afghanistan. The power to do so does not obviously flow from the power to recognize governments as a whole.

In any event, recognition provides a way for governments to freeze foreign central bank assets and then give control over those assets to other persons or entities that are designated or recognized as representing the foreign government. And immunity limitations imposed by customary international law—or domestic U.S. law—are not implicated. Other measures against central bank assets, in particular the freezing of such assets through the actions of the executive branch, also do not raise issues of foreign sovereign immunity.[89]

B. Freezing Central Bank Assets Through Executive Action

The sanctions against Russian central bank assets have been unprecedented in their scope (meaning the amount of money involved), but the sanctions to date are limited to freezing the assets in question. In the United States, the central bank asset freeze was put in place though

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87 Ben Saul, *"Recognition" and the Taliban's International Legal Status*, INT'L CR. FOR COUNTER-TERRORISM (Dec.15, 2021), https://icct.nl/publication/recognition-talibans-international-legal-status/ [https://perma.cc/6BKK-R62R].

88 *See* TALMON, *supra* note 84, at 191–94.

89 *See infra* Section II.B.

the U.S. Treasury's Office of the Foreign Asset Control ("OFAC") and an April 15, 2021, Executive Order by President Biden pursuant to his authority under the International Emergency Economic Powers Act.[90] President Biden's order blocked Russian central bank assets by directing that those assets may not be "transferred, paid, exported, withdrawn or otherwise dealt in."[91] Other countries, including France, Japan, and Germany, also froze Russian central bank assets.[92]

Freezing assets does not implicate immunity under domestic or international law because it does not involve the assertion of jurisdiction by domestic courts, nor is an asset freeze necessarily related to the enforcement or execution of a court judgment. Under both U.S. law and customary international law, foreign sovereign immunity does not apply to assertions of purely executive power. Immunity is a limitation on judicial power. The FSIA, for example, affords immunity from the jurisdiction of courts in the United States.[93] It also protects a foreign state's property in the United States from "attachment arrest and execution," language that refers to various measures that are related to or arise out of judicial proceedings.[94] In the case of Russia, the OFAC directive prohibits "United States persons" from engaging in "[a]ny transaction involving the Central Bank of the Russian Federation . . . ."[95] That order is not an attachment, arrest or execution. Similarly, the United Nations Convention on the Jurisdictional Immunities of States and their Property provides that foreign sovereigns are immune from the jurisdiction of foreign domestic courts and that their assets are free from "measures of constraint in connection with proceedings before a court."[96] The term "court" is defined as "any organ of a State, however named, entitled to exercise judicial functions."[97] Asset freezes do not involve courts or judicial functions and thus fall outside of this language.

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90 Office of Foreign Assets Control, U.S. Dept' of the Treasury, Directive 4 (as Amended) Under Executive Order 14024, 88 Fed. Reg. 36648 (2023), https://www.federalregister.gov/documents/2023/06/05/2023-11980/publication-of-directive-4-as-amended-under-executive-order-14024-of-april-15-2021 [https://perma.cc/56QQ-Q46C].

91 Exec. Order No. 14,024, 86 Fed. Reg. 73 (Apr. 19, 2021), https://www.federalregister.gov/documents/2021/04/19/2021-08098/blocking-property-with-respect-to-specified-harmful-foreign-activities-of-the-government-of-the [https://perma.cc/Y5P8-DWUB].

92 See *Value of Assets of the Bank of Russia Frozen Due to Sanctions Due to the War in Ukraine as of March 2022, by Country*, Statista (Apr. 11, 2023), https://www.statista.com/statistics/1298593/frozen-assets-of-bank-of-russia-by-country/ [https://perma.cc/LPX2-X2Q8].

93 28 U.S.C. § 1604.

94 *Id.* § 1609.

95 Office of Foreign Assets Control, U.S. Dept' of the Treasury, Directive 4 (as Amended) Under Executive Order 14024, 88 Fed. Reg. 36648 (2023), https://www.federalregister.gov/documents/2023/06/05/2023-11980/publication-of-directive-4-as-amended-under-executive-order-14024-of-april-15-2021 [https://perma.cc/XR5Y-QPRL].

96 U.N. Convention, *supra* note 31, at Part IV.

97 *Id.* at art. 2.1(a).

Some scholars argue or assume that immunity applies, absent an exception, to *any* measure that restrains a foreign government's use of its own property in the forum state, including measures of restraint imposed by a president or executive authority, as is common with economic sanctions. There are three general arguments in favor of broader immunity rules of this kind: state practice, a general opposition to unilateral sanctions and a concern with the sovereign equality of states, and the difficulty in distinguishing between judicial and executive functions.

1. State Practice on Immunity and Executive Measures

First, some argue—and many scholars seem to assume—that there is state practice demonstrating that immunity applies to sanctions imposed through executive measures that lack a connection to judicial measures or judgments.[98] Almost all state practice, however, is in the opposite direction. Sanctions imposed by the United States, Europe, Canada, and other countries restrain the use of property by foreign states, with no diplomatic protests or state practice suggesting that doing so violates international law of immunity. For example, sanctions imposed by the European Union include asset freezes on the central banks of Iran and Syria that apparently generated no protests based on immunity.[99] The United States has frozen Venezuelan government property in the United States,[100] and Venezuela has protested, but not based upon immunity. A comprehensive examination of the Venezuelan response to sanctions, including central bank sanctions, and Venezuela's

98 *See* Matthias Goldman, *Hot War and Cold Freezes: Targeting Russian Central Bank Assets*, Verfassungsblog (Feb. 28, 2022), https://verfassungsblog.de/hot-war-and-cold-freezes/ [https://perma.cc/KU4Q-VKQG]; *see also* Tom Ruys, *Immunity, Inviolability and Countermeasures—A Closer Look at Non-UN Targeted Sanctions*, *in* The Cambridge Handbook of Immunities and International Law 670, 673 nn.19, 21 (citing Jean-Marc Thouvenin, '*Gel des Fonds des Banques Centrales et Immunité d'Exécution*', *in* Immunities in the Age of Global Constitutionalism 209, 209–19 (Anne Peters, Evelyn Lagrange, Stefan Oeter & Christian Tomuschat eds., 2015)); E. Castellarin, *Le Gel des Avoirs d'une Banque Centrale Étrangère comme Reaction D*écentralisée *à un Fait Internationalement Illicite: R*étorsion *ou Contre-mesure?*, in Hague Yearbook of International Law 2012 173, 179–90 (Nikolaos Lavranos & Ruth Kok eds., 2013).

99 See White & Case, *EU Sanctions Against Syria Expanded to Cover Central Bank of Syria, Gold, Precious Metals & Diamonds and Cargo Flights*, JD Supra (March 1, 2012), https://www.jdsupra.com/legalnews/eu-sanctions-against-syria-expanded-to-c-04475/ [https://perma.cc/6F-WW-LMQT]; Ruys, *supra* note 98, at 672, 674–75. *See generally* Devika Hovell, *Unfinished Business of International Law: The Questionable Legality of Autonomous Sanctions*, 113 Am. J. Int'l L. Unbound 140, 142 (2019) (explaining that the "European Union is a key player in the autonomous sanctions game . . . .").

100 *See generally* Clare Ribando Seelke, Cong. Rsch. Serv., IF10715-37, Venezuela: Overview of U.S. Sanctions (2022).

arguments that those sanctions violate international law makes no mention of immunity.[101]

On rare occasions, states have protested that sanctions, especially those on central bank assets, violate customary international law governing immunity.[102] Iran, for example, sued the United States before the International Court of Justice, based in part on measures that the United States took against Iranian central bank assets deposited in banks in New York.[103] Iran had also raised the issue with U.N. Secretary General, arguing in both situations that some sanctions imposed by the United States violated Iran's entitlement to immunity.[104] The protests by Iran received support from a group of nonaligned states.[105] The measures against Iran were not sanctions imposed by the executive branch, however, and so they are legally distinct from other sanctions regimes that merely freeze assets through executive actions.

Iran complained, in other words, not about the blocking or freezing of assets but instead about measures of execution to enforce judgements rendered in terrorism-related cases. Those measures of execution would permanently turn the Iranian central bank assets over to judgment creditors. For example, Iran has argued that the Supreme Court's decision in *Bank Markazi v. Peterson*[106] violated customary international law, but that case involved a judicial order directing assets be paid out to creditors.[107] To use the language of the U.N. Convention, these are "measures of constraint in connection with proceedings before a court."[108] Immunity accordingly applied. Most sanctions do not involve judicial or court orders, and there is little reported state practice suggesting that they violate international law governing immunities.

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101 Dapo Akande, Payam Akhavan & Eirik Bjorge, *Economic Sanctions, International Law, and Crimes Against Humanity: Venezuela's ICC Referral*, 115 Am. J. Int'l. L. 493, 496 (2021).

102 This discussion does not address diplomatic or other individual immunities. *See, e.g.*, Majid Takht Ravanchi, Letter dated Aug. 5, 2019 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, U.N. Doc. A/73/976 (Aug. 5, 2019), https://digitallibrary.un.org/record/3823779?ln=en_[https://perma.cc/8NX7-8XND] (protesting U.S. sanctions against the Minister of Foreign Affairs of Iran as violations of diplomatic immunity).

103 Certain Iranian Assets (Islamic Rep. of Iran v. U.S.), Application Instituting Proceedings, 2016 I.C.J. Rep. 164 (June 14), https://www.icj-cij.org/sites/default/files/case-related/164/164-20160614-APP-01-00-EN.pdf [https://perma.cc/V974-75K6].

104 M. Javad Zarif, Annex to the Letter dated Apr. 28, 2016 from the Permanent Representative of the Islamic Republic of Iran to the United Nations addressed to the Secretary-General, U.N. Doc. A/70/853–S/2016/400 (Apr. 29, 2016), https://digitallibrary.un.org/record/828768?ln=en [https://perma.cc/B2DA-YEQ4].

105 *See* Kristina Daugirdas & Julian Davis Mortenson, *U.S. Supreme Court Upholds Law Facilitating Compensation for Victims of Iranian Terrorism*, 110 Am. J. Int'l L. 555, 561 (2016).

106 Bank Markazi v. Peterson, 578 U.S. 212 (2016).

107 *Id.*; Zarif, *supra* note 104.

108 U.N. Convention, *supra* note 31, at 7.

2. Sanctions and the Sovereign Equality of States

Second, a lack of state practice notwithstanding, perhaps non-judicial measures of constraint unrelated to any judicial process but directed at foreign government property in the forum state *should* be limited by immunity.[109] Sanctions, especially those imposed outside of the framework of the United Nations, are a contested area of international law.[110] They may target private individuals, government officials, private corporations, state-owned enterprises, and foreign governments themselves, including foreign government property located in the sanctioning state.[111] Sanctions can take many forms—they may limit trade, financial transactions, travel, and so on—and most do not involve the freezing or confiscation of government assets.[112] Some have devasting effects on people's health and welfare.[113]

Although sanctions, even those imposed without the authorization of a U.N. Security Council Resolution, are not presumptively prohibited in international law, they are frequently challenged as violating international legal rules governing nonintervention, human rights, trade, and foreign direct investment.[114] These kinds of limitations generally may also apply to the more narrow set of sanctions in question here—sanctions against foreign government property located in the forum state, in particular central bank assets. For example, in Iran's International Court

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109 *See* Jean-Marc Thouvenin & Victor Grandaubert, *The Material Scope of State Immunity from Execution*, *in* The Cambridge Handbook of Immunities and International Law 245, 250–51 (Tom Ruys, Nicolas Angelet & Luca Ferro eds., 2019) (noting a lack of state practice in favor of this position but arguing nonetheless that "non-judicial measures can hinder the foreign State's management of its property and should in principle be covered by immunity from execution under customary international law").

110 *See* Hovell, *supra* note 99, at 140–45; Akande, Akhavan & Bjorge, *supra* note 101, at 496.

111 *See, e.g.*, Elena Chachko & J. Benton Heath, *A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield*, 116 Am. J. Int'l L. Unbound 135–139 (2022).

112 *See, e.g.*, *id.*

113 *See* Seyed M. H. Razavi & Fateme Zeynodini, *Economic Sanctions and Protection of Fundamental Human Rights: A Review of the ICJ's Ruling on Alleged Violations of the Iran-U.S. Treaty of Amity*, 29 Wash. Int'l L.J. 303, 325 (2020).

114 The U.N. General Assembly has passed resolutions almost every year since 1992 urging states to stop imposing autonomous sanctions—those resolutions cite "the sovereign equality of States, non-intervention and non-interference in their internal affairs." *See, e.g.*, G.A. Res. 75/289 (June 23, 2021); *see also Joint Communiqué*, *Ministry of Foreign Affairs of the People's Republic of China, Joint Communiqué of the 14th Meeting of the Foreign Ministers of the Russian Federation, the Republic of India and the People's Republic of China*, Ministry of Foreign Affs. of China (Apr. 19, 2016, 2:44 PM), https://www.fmprc.gov.cn/mfa_eng/wjdt_665385/2649_665393/201604/t20160419_679455.html [https://perma.cc/8JEU-PGFF] (condemning unilateral sanctions as violating the principals of sovereign equality, nonintervention, and cooperation). *See generally* Alexandra Hofer, *The Developed/Developing Divide on Unilateral Coercive Measures: Legitimate Enforcement or Illegitimate Intervention*?, 16 Chinese J. Int'l L. 175 (2017) (discussing whether unliteral sanctions violate international law because they use economic coercion).

of Justice case against the United States, the immunity claims were dismissed for lack of jurisdiction, but the case went forward to consider Iran's allegations that the sanctions imposed on its central bank assets in the United States violated the fair and equitable treatment standard (and other terms) in the Treaty of Amity between the two countries.[115] And some sanctions on foreign government property, including central bank property, do involve judicially imposed measures of constraint, which do implicate the customary international law of immunity.[116]

It is unclear, however, that the general dissatisfaction with—and opposition to—economic sanctions means that the law of immunity should be expanded to presumptively prohibit any sanctions directed at any foreign government property located in the forum state. The argument extends beyond central bank immunity to all asset freezes or constraints of foreign government-owned property and would represent a significant departure from state practice. Wartime measures directed at enemy property, including state-owned property, may raise questions of domestic law and the international laws of war, but they have not historically been understood as raising issues of immunity.[117] Moreover, economic sanctions are a widely used tool around the world. If all restraints on foreign government-owned property imposed by sanctions are subject to immunity, there are likely widespread violations of the law of immunity globally. Japan, for example, has frozen an estimated $33 billions of Russian foreign exchange reserves, with no murmur about immunity.[118] It would be surprising to conclude that this and other asset freezes violated customary international law, especially considering prior examples of asset freezes that also raised no protests based upon a purported application of immunity law.

Foreign sovereign immunity is based in part upon the sovereign equality of states.[119] Some authors argue that this general principle means that freezing the assets of foreign sovereigns—and any other measures of constraint against foreign state-owned property—is inconsistent with the foreign state's entitlement to immunity.[120] There are several problems with this argument. Sovereign equality of states is a broad and

115 *See* Memorial of the Islamic Republic of Iran, Certain Iranian Assets (Islamic Republic of Iran v. U.S.), 2017 I.C.J. 1, 86–96 (Feb.1); Certain Iranian Assets (Islamic Republic of Iran v. U.S.), Preliminary Objections, Judgment, 2019 I.C.J. Rep. 7, 20–40 (Feb. 13).

116 *See* Bank Markazi v. Peterson, 578 U.S. 212, 249 (2016).

117 Anton Moiseienko, *Trading with a Friend's Enemy*, 116 Am. J. Int'l L. 720, 724–26 (2022).

118 *Japan to Freeze Russia's Foreign Exchange Reserves*, *Report Says*, Japan Times (Feb. 28, 2022), https://www.japantimes.co.jp/news/2022/02/28/national/japan-russia-central-bank-sanctions/ [https://perma.cc/3KVY-FH46].

119 *See* Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 143, ¶ 54 (Feb. 3).

120 *See* Ruys, *supra* note 98, at 684–85 (discussing the argument advanced by Thouvenin, *supra* note 98).

general principle. That it provides part of the basis for the law of immunity does not mean that the law of immunity should be expanded to cover any conduct that scholars may argue is inconsistent with a general, and ill-defined, understanding of sovereign equality. Doing so is in tension with another important aspect of sovereign equality: state consent.[121] Although international legal norms are not based entirely upon state context, expanding state immunity beyond what is supported by the actual practice, or expressed will, of states binds them to a law of immunity to which they did not consent, in some tension with sovereign equality.

Immunity as implied directly from sovereign equality also raises other difficulties. These include the application of such a rule to separately incorporated foreign central banks and other state-owned enterprises, the existence of exceptions, the relationship between such immunity and the general lack of rights of states to own property,[122] and whether such immunity applies equally to trade embargos and other conduct that imposes severe restrictions on state behavior.

3. Judicial Versus Executive Action

The potential difficulties in distinguishing between judicial and executive actions provide a third potential reason to treat executive branch asset freezes and other executive measures as implicating immunity. Some proposals to turn Russian central bank assets over to Ukraine, either to assist with the war effort or to provide reparations for the terrible harm inflicted on the country and its people by Russia,[123] go well beyond blocking or freezing assets. Some suggest doing so through executive action, with no role for courts, in part to avoid the immunity to which central bank assets would otherwise be entitled.[124]

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121 *See* Benedict Kingsbury, *Sovereignty and Inequality*, 9 Eur. J. Int'l L. 599, 601, 612 (1998); Johannes Hendrik Fahner, *In Dubio Mitius: Advancing Clarity and Modesty in Treaty Interpretation*, 32 Eur. J. Int'l L. 835, 850 (2021).

122 *See* Peter Tzeng, *The State's Right to Property Under International Law*, 125 Yale L. J. 1805, 1809–11 (2016).

123 *See, e.g.*, Special Russian Sanctions Authority Act, S. 3723, 117th Cong. § 201(a)(1)(A), (c) (2022); Rebuilding Economic Prosperity and Opportunity for Ukrainians Act, H.R. 4175, 118th Cong. §§ 101(a)(7), 104(b)(1) (2023); *see also* Zelikow & Johnson, *supra* note 69; Anton Moiseienko, *Politics, Not Law, Is Key to Confiscating Russian Central Bank Assets*, Just Security (Aug. 17, 2022), https://www.justsecurity.org/82712/politics-not-law-is-key-to- confiscating-russian-central-bank-assets/ [https://perma.cc/37PQ-FS6K].

124 *See, e.g.*, Anton Moiseienko, World Refugee & Migration Council, Frozen Russian Assets and the Reconstruction of Ukraine: Legal Options 15–17 (2022), https://papers.ssrn.com/sol3/-papers.cfm?abstract_id=4149158 [https://perma.cc/V54E-FHWA]; Zelikow & Johnson, *supra* note 69 (suggesting the confiscation and transfer of frozen central bank assets through "a process of direct state action" and "not a process that involves private lawsuits or new court decisions").

These proposals may be limited by domestic and international law that might require judicial process for property deprivations. Even if so, the line between judicial and executive action may be difficult to draw in both domestic and international practice.

Measures that change the ownership of foreign central bank assets, rather than simply freezing them, often require judicial action under domestic law. That is true for the potential turnover of Afghan central bank assets to judgement creditors in the United States just as it was true for the turnover of Iranian central bank assets to judgment creditors.[125] When Canada created statutory authority for the turnover of frozen state-owned Russian assets, including central bank holdings, the relationship between executive and judicial power was an important issue. The original proposals apparently required a judge to determine the fair allocation of assets, which was rejected as not giving the executive branch enough authority over the disposal of the funds—but the final legislation apparently still requires a judicial decision to give effect to the forfeiture or confiscation.[126] Assets confiscated under the statute will accordingly implicate foreign sovereign immunity, although no confiscations of government owned property have been initiated to date.

Concerning assets frozen by the United States, the President probably lacks the power to confiscate or expropriate of Russian central bank assets under existing statutory authorization.[127] New legislation could, however, allow an administrative agency, or the executive branch acting without a hearing, to make confiscation decisions, thus potentially avoiding an exercise of judicial power and the concomitant immunity issues under international law. Indeed, legislation introduced in Congress would allow the President to "confiscate" Russian government property in the United States and transfer it to the government of Ukraine or to other entities for the purpose of compensating Ukrainians.[128] These proposals eschew any action by the courts on the judiciary, in a clear effort to avoid immunity-related limitations.

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125 For a discussion of the disposition of Iranian central bank assets, see, e.g., Bank Markazi v. Peterson, 578 U.S. 212, 218 (2016).

126 Janyce McGregor, *Canada Can Now Seize, Sell off Russian Assets. What's next?*,CBC News (June 27, 2022, 4:00 AM), https://www.cbc.ca/news/politics/c19-russia-sanctions-asset-seizures-test-case-1.6496047 [https://perma.cc/23AK-MDDW].

127 *See* Paul Stephan, *Giving Russian Assets to Ukraine—Freezing Is Not Seizing*, Lawfare (Apr. 26, 2022, 10:48 AM), https://www.lawfaremedia.org/article/giving-russian-assets-ukraine-freezing-not-seizing [https://perma.cc/2Y4C-SFPW]; Scott R. Anderson & Chimène Keitner, *The Legal Challenges Presented by Seizing Frozen Russian Assets*, Lawfare (May 26, 2022, 3:09 PM), https://www.lawfaremedia.org/article/legal-challenges-presented-seizing-frozen-russian-assets [https://perma.cc/DKS2-4MPH].

128 *See* Special Russian Sanctions Authority Act of 2022, S. 3723, 117th Cong. § 201(a)(1)(A), (c) (2022). *See generally* Rebuilding Economic Prosperity and Opportunity for Ukrainians Act, H.R 4175, 118th Congress (2023).

International law and domestic constitutional law might, however, impose limitations on confiscatory measures taken without any form of judicial hearing. For example, the European Court of Human Rights has held that Switzerland violated the European Convention on Human Rights when it implemented United Nations sanctions on property without providing judicial review.[129] Although the right of access to courts is not absolute, the Court emphasized that it holds a "prominent place" in "democratic society" and that the removal "from the jurisdiction of the courts a whole range of civil claims" would be inconsistent with the rule of law.[130] Even if an administrative agency or other nonjudicial body makes the initial decision, European human rights law may require final recourse to a court to provide some level of review by an independent decisionmaker.[131] Outside of Europe, it is unclear whether the International Covenant for Civil and Political Rights necessarily requires judicial review of administrative decisions to impose sanctions that include property deprivations.[132] And although these limitations may apply generally to sanctions on individuals such as Russian oligarchs, it is unclear that foreign nations or their state-owned (but separately incorporated) enterprises are entitled to any human rights protections at all under any of these systems, whether in Europe or beyond.

The U.S. Constitution may also limit the imposition of sanctions through administrative or executive branch action. Foreign states and their agencies and instrumentalities are "persons" entitled to due process protections.[133] They are also protected by separation of powers.[134] Both Article III and due process limit executive branch actions that involve property deprivations, even if specifically authorized by Congress.[135] But administrative agencies within the executive branch nonetheless adjudicate many disputes that involve certain kinds of

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129 Al-Dulimi & Mont. Mgmt. Inc. v. Switzerland, App. No. 5809/08, ¶¶ 26–155 (June 21, 2016), https://hudoc.echr.coe.int/app/conversion/docx/?library=ECHR&id=001-164515&filename=CASE%20OF%20AL-DULIMI%20AND%20MONTANA%20MANAGEMENT%20INC.%20v.%20SWITZERLAND.docx&logEvent=False [https://perma.cc/QS49-JXAY].

130 *Id.* at ¶ 127. *See* Elena Chachko, *Due Process Is in the Details: U.S. Targeted Economic Sanctions and International Human Rights Law*, 113 Am. J. Int'l L. Unbound 157–62 (2019) (concluding that international human rights law requires that property sanctions be imposed only with "access to review by an impartial tribunal.").

131 *See* Grant L. Willis, *Security Council Targeted Sanctions, Due Process and the 1267 Ombudsperson*, 42 Geo. J. Int'l L. 673, 736–37 (2011).

132 *See* Bardo Fassbender, Targeted Sanctions and Due Process, 12–13 (Mar. 20, 2006), https://www.un.org/law/counsel/Fassbender_study.pdf [https://perma.cc/W7X7-SJVW].

133 *See* Ingrid (Wuerth) Brunk, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 Fordham L. Rev. 633, 651–53 (2019); *see also* Stephan, *supra* note 127.

134 *See* Bank Markazi v. Peterson, 578 U.S. 212 (2016).

135 *See generally* William Baude, *Adjudication Outside Article III*, 133 Harv. L. Rev. 1511, 1541–1542 (2020).

property interests including claims for government benefits.[136] These actions are constitutional because they involve public property or public benefits, not preexisting property interests.[137] Claims based on "public rights" fall outside of the courts' Article III "judicial power" and the traditional requirements of due process.[138] The confiscation of Russian central bank assets might come within this exception to the general requirement that deprivations of property must be effectuated by courts.

Nevertheless, the category of "public rights" is contested and unclear.[139] Alienation of foreign central bank assets, or other sanctioned property—as opposed to freezing or blocking the assets—involves the deprivation of preexisting property such as gold or bank accounts that would typically require judicial process in a court.[140] The public rights exception does, however, include money claims against the United States, as well as espousal-based claims against foreign sovereigns for property deprivation.[141] Both kinds of claims are understood as matters of "grace" because they are barred by sovereign immunity unless the government chooses otherwise.[142] Claims against foreign sovereigns have also traditionally been resolved through espousal by the U.S. government, meaning that the government controlled whether, and under what conditions, a private individual received compensation.[143] They were, in other words, matters "that can be pursued only by grace of the other branches."[144]

Confiscation of foreign sovereign property by the executive branch is not, however, a case against foreign sovereigns. Instead, it is an action that deprives foreign sovereigns of their pre-existing property in the United States. The right to that underlying property is not so obviously a benefit conferred by the U.S. government. The access that foreign

136 *See id.* at 1577.

137 *See id.*

138 *See Ex parte* Bakelite Corp., 279 U.S. 438, 449, 452 (1929).

139 *See* N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 69 (1982); Caleb Nelson, *Adjudication in the Political Branches*, 107 COLUM. L. REV. 559, 563-564 (2007).

140 *See* Nelson, *supra* note 139, at 569 (when the government wanted to act authoritatively upon "core private rights," an exercise of "judicial" power was usually "indispensable").

141 *See* La Abra Silver Min. Co. v. United States, 175 U.S. 423, 456 (1899); Henry Paul Monaghan, *Article III and Supranational Judicial Review*, 107 COLUM. L. REV. 833, 868–69 (2007).

142 *See* Murray's Lessee v. Hoboken Land & Imp. Co., 59 U.S. 272, 283 ("[T]he United States may consent to be sued[] and may yield this consent upon such terms and under such restrictions as it may think just . . . .").

143 *La Abra Silver Min. Co.*, 175 U.S. at 459 ("The United States assumed the responsibility of presenting the La Abra claim and made it its own in seeking redress from the Mexican Republic. But from such action on its part no contract obligations arose with the La Abra Company . . . .").

144 Stern v. Marshall, 564 U.S. 462, 493 (2011).

sovereigns enjoy to U.S. courts *is* a matter of grace, however,[145] so that the foreign government's ability to sue at all to *recover* property is not a matter of right.[146] More broadly, the rights of foreign governments within the United States are to some extent within the control of the federal government and are thus public in a way that individual ownership of private property is not.[147] These considerations suggest that Congress would have broad latitude to authorize the confiscation of foreign central bank assets through the actions of the executive branch without a formal exercise of "judicial" power that may only be performed by an Article III court.

Turning to international law, most decisions of administrative agencies in the United States are—at a minimum—subject to judicial review under the Administrative Procedures Act ("APA").[148] That means that some level of "judicial" oversight and review is generally available, and sanctions regimes often grant more generous rights to judicial review than the APA requires,[149] further complicating the distinctions between executive and judicial action. The official commentary by the International Law Commission ("ILC") to the United Nations Convention on the Jurisdictional Immunities of States and Their Property provides that judicial functions should be understood "to cover such functions whether exercised by courts or by administrative organs,"[150] suggesting that some action by administrative agencies would qualify as judicial. The function of changing title to property located in the forum could accordingly be considered "judicial" whether undertaken in the first instance by an administrative agency or by a court.[151]

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145 *See* Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 408–09 (1964); Hilton v. Guyot, 159 U.S. 113, 164–65 (1895).

146 This fact alone should not mean that sanctions regimes fall outside of Article III because the same logic could be applied to any government action—the government summarily seizes property, and the ability to sue the government for its return is a matter of grace and comity.

147 *See* Verlinden B.V. v. Cent. Bank of Nigeria, 461 U.S. 480, 492–97 (1983).

148 5 U.S.C. § 706(2)(A)–(D). All "persons" designated under OFAC programs may seek judicial review. *See* Chachko, *supra* note 130. The term "person" includes corporate entities. 31 C.F.R. § 560.305 (2021) (defining person and entity).

149 *See, e.g.*, 8 U.S.C. § 1189(b).

150 *Report of the International Law Commission on the Work of its Forty-Third Session*, U.N. GAOR Supp. No. 10, at 14, U.N. Doc. A/46/10 (1991); *see also* U.N. Convention, *supra* note 31, art. 2(1)(a) ("'[C]ourt' means any organ of a State, however named, entitled to exercise judicial functions . . . .").

151 *Cf. Basic Principles on the Independence of the Judiciary Adopted by The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders Held at Milan from 26 August to 6 September 1985*, Office of the U.N. High Comm'r for Hum. Rts. (Sep. 6, 1985), https://www.ohchr.org/en/instruments-mechanisms/instruments/basic-principles-independence-judiciary [https://perma.cc/DJ2Q-MLBQ] ("[J]udges are charged with the ultimate decision over . . . property of citizens . . . .").

The difficulties in classifying certain measures as "judicial" might suggest that if immunity under customary international law is limited to judicial actions, the doctrine rests merely on a formal, technical, and unstable distinction between executive and judicial power. This is not a strong reason to expand immunity to cover purely executive actions, however. Most legal categories have their rough or unclear edges and conceptualizing immunity as a doctrine designed to limit jurisdiction to adjudicate and the execution of judicial judgments hardly renders it fundamentally unclear or uncertain. Moreover, aside from some of the proposals for the disposition of Russian central bank assets, the potential problems with distinguishing between executive and judicial action have not arisen in practice, so the problem has been mostly theoretical to date.

Finally, the proposals and debates around the treatment of Russian central bank assets further support the distinction between executive and judicial action concerning immunity limitations. Western states have stridently denounced Russia's invasion of Ukraine, imposed unprecedented asset freezes without hesitation through executive orders, and considered measures of confiscation. And yet, despite the political pressure and the needs of the Ukrainian people, states have stopped short of confiscating Russian central bank assets,[152] and they have floated very creative proposals designed to avoid the immunity problems associated with confiscations through judicial action.[153]

C. Executing Terrorism-Related Judgments Against Central Bank Assets

The foregoing two sections explored sanctions against foreign central bank assets that do not violate immunity: those structured in terms of recognition and those taken by the executive branch without a connection to the exercise of judicial functions. By contrast, some sanctions against central bank assets that are currently under consideration would violate state sovereign immunity. The remaining $3.5 billion in Afghan central bank assets, for example, are the subject of litigation in the United States. Thousands of victims of terrorism—including victims of the September 11th attacks—sued the Taliban, resulting in many

152 *See, e.g.*, Press Release, U.S. Dep't of State, G7 Japan 2023 Foreign Ministers' Communiqué (Apr. 18, 2023) ("We are determined, consistent with our respective legal systems, that Russia's sovereign assets in our jurisdictions will remain immobilized until there is a resolution of the conflict that addresses Russia's violation of Ukraine's sovereignty and territorial integrity. Any resolution to the conflict must ensure Russia pays for the damage it has caused.").

153 *See* General Secretariat of the Council of the European Union, *Non-Paper on the Generation of Resources to Support Ukraine From Immobilised Russian Assets* (March, 21, 2023), https://api.politico.eu/editorial_documents/14760385-743f-45a8-aeb4-be8499dba385 [https://perma.cc/MR6J-CLF4].

default judgments.[154] Efforts to enforce those judgments, collectively worth billions of dollars, have been unsuccessful because the Taliban has lacked assets in the United States.[155] After the Taliban took control of Afghanistan, however, the judgment creditors have sought to attach the Afghan central bank assets under the theory that they should be used to satisfy judgments against the Taliban.[156]

Unlike the money earmarked for the Afghan Fund, the litigation brought by the judgment creditors would result in court orders to turn over DAB funds to private litigants in the United States, rather than to a representative of the Afghan government. To prevail, plaintiffs will need to show that the FSIA does not protect the frozen DAB assets from measures to enforce their judgments. The Biden Administration has acknowledged that the more than $3.5 billion in DAB assets not set aside for the Afghan Fund are "subject to ongoing litigation by U.S. victims of terrorism."[157] Although judgment creditors suggested that the U.S. government set funds aside to satisfy their judgments,[158] that is not true. The Biden Administration merely acknowledged that "various parties, including representatives of victims of terrorism, have asserted legal claims against certain property of DAB or indicated in public court filings an intent to make such claims."[159]

The judgement creditors will prevail only if the requirements of the Terrorism Risk Insurance Act ("TRIA") are satisfied.[160] The parties agree that if the TRIA is inapplicable, then the assets are entitled to immunity under the FSIA.[161] The TRIA permits the enforcement of ter-

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154 *See, e.g.*, Havlish v. Bin-Laden, No. 03 MDL 1570 (GBD) (FM), 2012 WL 3090979 (S.D.N.Y. July 30, 2012).

155 Charlie Savage, *Judge Recommends Rejecting Bid by Sept. 11 Families to Seize Frozen Afghan Funds*, NY Times (Aug. 27, 2022), https://www.nytimes.com/2022/08/27/us/politics/sept-11-afghan-central-bank.html [https://perma.cc/4SWK-RND5].

156 *In re* Terrorist Attacks on September 11, 2001, No. 01-cv-10132, No. 02-cv-6977, No. 03-cv-9848, No. 03-cv-6978, No. 20-mc-740, 2023 WL 2138691, at *1 (S.D.N.Y. Feb. 21, 2023).

157 Press Release, The White House, Fact Sheet: Executive Order to Preserve Certain Afghanistan Central Bank Assets for the People of Afghanistan (Feb. 11, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/02/11/fact-sheet-executive-order-to-preserve-certain-afghanistan-central-bank-assets-for-the-people-of-afghanistan/ [https://perma.cc/7QPU-5EXV].

158 *See* Havlish and Doe Creditors' Joint Reply to the Ashton Plaintiffs' Opposition to their Motions for Turnover of Assets from Garnishee Fed. Rsrv. Bank of N.Y. at 7, Havlish v. Taliban, No. 1:03-cv-09848 (S.D.N.Y. Mar. 27, 2022); *see also* Ingrid (Wuerth) Brunk, Havlish *Plaintiffs File a Potentially Misleading Brief Claiming Entitlement to Afghan Central Bank Assets*, Transnat'l Litig. Blog (May 18, 2022), https://tlblog.org/havlish-plaintiffs-file-a-potentially-misleading-brief-claiming-entitlement-to-afghan-central-bank-assets/#:~:text=Taliban%20and%20Havlish%20v.,them%2C%20which%20is%20not%20true. [https://perma.cc/A7NG-JRDU].

159 Exec. Order No. 14,064, 87 Fed. Reg. 8391 (Feb. 11, 2022), https://www.govinfo.gov/content/pkg/DCPD-202200085/pdf/DCPD-202200085.pdf [perma.cc/YW4U-SNSX].

160 (Wuerth) Brunk, *supra* note 133.

161 *Id.*

rorism-related judgments—a requirement satisfied here—against the blocked assets of any "terrorist party," including the blocked assets of any agency or instrumentality of that terrorist party. A "terrorist party" is defined as "a terrorist, a terrorist organization, . . . or a foreign state designated as a state sponsor of terrorism."[162]

Afghanistan is not a "terrorist party" because foreign states are only terrorist parties if they are designated as a state sponsor of terrorism and Afghanistan is not, and has never been, designated a state sponsor of terrorism.[163] Although the Taliban is a "terrorist party," the assets in question are those of the central bank, not the Taliban. The DAB is an agency or instrumentality of Afghanistan, but that alone is not enough for the TRIA to apply. For the TRIA to apply, the DAB must also, and at the same time, be an agency or instrumentality of the Taliban. The Taliban likely exercises a high level of control over the DAB, and this is one factor that courts generally consider.[164] Nevertheless, this case presents unusual circumstances that should prevent courts from holding that DAB is an agency or instrumentality of the Taliban under the TRIA. Courts have so far rejected plaintiffs' efforts to order the turnover of DAB assets.[165]

There are several reasons to conclude that the Afghan central bank is not an "agency or instrumentality" of the Taliban under the TRIA. The TRIA does not define "agency or instrumentality," so the text does not resolve the issue. Holding that the DAB is an agency or instrumentality of the Taliban would be in tension with our common understanding of the relationship between nonstate actors and central banks. After all, central banks are usually understood as agencies of their governments, not as agencies of nonstate actors or political parties such as the Taliban. Central banks are not generally understood as agencies or instrumentalities of two different legal entities. Nothing about the statute or its history suggests that Congress had this scenario in mind, one that would result in the use of central bank assets to satisfy the debts of a private organization while the central bank simultaneously serves as an agency or instrumentality of foreign state. And, in general, an unrecognized government such as the Taliban is not entitled to the foreign state's assets that are in the United States[166]—nothing about the TRIA suggested it intended to change that result.

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162 Terrorism Risk Insurance Act of 2002, Pub. L. 107-297, § 201(d)(4), 116 Stat. 2322, 2340 (2002).

163 *See* Calderon-Cardona v. Bank of New York Mellon, 770 F.3d 993 (2d Cir. 2014).

164 *See* Kirschenbaum v. 650 Fifth Ave. & Related Props., 830 F.3d 107 (2d Cir. 2016).

165 R. & R., *In re* Terrorist Attacks on Sept. 11, 2001, Case 1:03-md-01570 (S.D.N.Y. Aug. 26, 2022); Mem. & Order, *In re* Terrorist Attacks on Sept. 11, 2001, Case 1:03-md-01570 (Feb. 21, 2023).

166 *See* Edwin L. Fountain, *Out from the Precarious Orbit of Politics: Reconsidering Recognition and the Standing of Foreign Governments to Sue in U.S. Courts*, 29 VA. J. INT'L L. 473, 484

Finally, under U.S. law, statutes should be interpreted to avoid a conflict with international law.[167] Turning over Afghan central bank assets to satisfy terrorism-related judgments in these cases would appear to violate customary international law. Some of judgments are based on the Taliban's involvement—when it was in power in Afghanistan—in the attacks of September 11, 2011, which took place in the United States. Underlying jurisdiction in those cases might be based on the territorial tort exception to sovereign immunity. But other plaintiffs have judgments to recover for injuries sustained in Afghanistan, not the United States,[168] and it is difficult to see any exception to immunity from jurisdiction to adjudicate that would apply in those cases. Recall that the judgments were issued by default so that none of these issues were litigated.

More fundamentally, however, enforcement of the judgments against Afghan central bank assets appears to violate the immunity from execution to which those assets are entitled under international law, the validity of the underlying judgment notwithstanding.[169] The Afghan central bank assets apparently include foreign currency reserves which are entitled to an extremely high level of immunity under international law, and it does not appear that any potential exception would apply, even assuming that there are any such exceptions.

D. Countermeasures and Denials of Central Bank Immunity

Current proposals to turn Russian central banks assets over to Ukraine would likely violate foreign sovereign immunity unless structured to avoid any judicial action. So, too, the turnover of Afghan central bank assets to judgment creditors. The wrongfulness of these violations of customary international law could potentially be precluded if these denials of immunity are imposed as countermeasures.

There is a robust academic literature on countermeasures, and growing attention to the specific issues around denials of immunity as countermeasures.[170] The denial of central bank immunity as a countermeasure raises some distinct questions, however, that have received little or no attention. Focusing on Afghan and Russian central bank assets,

(1989); *cf.* Restatement (Third) of Foreign Relations Law § 205 reporter's note 2 (Am. Law Inst. 1987).

167 Murray v. Schooner Charming Betsy, 6 U.S. 64, 118 (1804).

168 *See* Complaint at 1–2, John Does 1 Through 7 v. Taliban, No. 3:20-CV-00681-X, 2020 WL 3001362 (N.D. Tex. June 4, 2020).

169 *See* Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 143, ¶¶ 113, 124 (Feb. 3).

170 *See* Ruys, *supra* note 98; Daniel Franchini, *State Immunity as a Tool of Foreign Policy: The Unanswered Question of Certain Iranian Assets*, 60 Va. J. Int'l L. 433 (2020); Marco Longobardo, *State Immunity and Judicial Countermeasures*, 32 Eur. J. Int'l L. 457 (2021).

the following discussion analyzes denials of immunity from execution (as opposed to immunity from jurisdiction to adjudicate) as countermeasures; the difficulty in ascertaining the "internationally wrongful act" by Afghanistan that might excuse otherwise wrongful actions by the United States; and unexplored problems concerning countermeasures, especially against central bank assets, as reparations.

1. Countermeasures and Immunity from Execution

There is apparently no practice of states explicitly denying central bank immunity, or any other state immunity, as a countermeasure. China and Argentina have enacted statutes that condition immunity from execution for foreign central bank assets upon reciprocal protections by the foreign state, and Russia has a reciprocity statute for measures of execution generally.[171] These may suggest a move toward countermeasures in which immunity is denied in response to wrongful denial of immunity—at least in the context of immunity from execution.

The academic discussions of immunity and countermeasures focus only on jurisdiction to adjudicate, not jurisdiction to enforce or to execute judgments.[172] Central banks receive special immunity from measures of execution and central bank sanctions often focus on property located in the forum (or injured and sanction-imposing) state. Countermeasures against central bank assets are accordingly likely to raise issues of immunity from execution. The two actions—adjudication and execution—are different as a practical matter, and they involve two distinct areas of international law governing immunities. As the International Court of Justice made clear in *The Jurisdictional Immunities of the State Case*, violations of immunity from execution do not arise merely from a violation of immunity in the proceeding that rendered the underlying judgment.[173] The two different denials of immunity should therefore be viewed as distinct actions for the purpose of countermeasures.

One commentator has suggested that the requirement that countermeasures be reversible or temporary may be satisfied in the case of a denial of immunity to adjudicate because efforts to enforce the resulting judgment might be halted.[174] Even if correct, that argument would mean that a denial of immunity from execution is more problematic under international law than a denial of immunity from adjudication

171 (Wuerth) Brunk, *supra* note 1, at 270–71, 276.

172 Franchini, *supra* note 170, at 438; Longobardo, *supra* note 170, at 458; Ruys, *supra* note 98, at 704–708.

173 Jurisdictional Immunities of the State (Ger. v. It.), Judgment, 2012 I.C.J. Rep. 143, ¶¶ 113, 124 (Feb. 3).

174 *See* Franchini, *supra* note 170, at 476.

because once the judgment is executed, the ownership of the property has changed hands, and the countermeasure is not reversible.

Another distinction between the two forms of immunity arises because the denial of immunity from jurisdiction to adjudicate is sometimes understood as a countermeasure if the resulting judgment itself finds that the state whose immunity was denied engaged in an unlawful act. The United States, for example, denies immunity from jurisdiction under the "expropriation" exception—that exception explicitly requires a violation of international law by the foreign state that is denied immunity.[175] The difficulty with this view is that immunity from jurisdiction to adjudicate is designed to prevent a domestic court from finding that the foreign state engaged in an internationally wrongful action in the first place.[176] A denial of immunity from execution would presumably not suffer from this problem (because methods of execution are unlikely to require a finding of an internationally wrongful act), but a denial of immunity from execution must still respond to an unlawful action by the target state, a requirement that may not be met with respect to some central bank sanctions. The efforts to enforce terrorism-related judgments against Afghan central bank assets provide an example.

2. *Terrorism-Related Sanctions on Afghan Central Bank Assets as Countermeasures*

Under U.S. law, special exceptions to central bank immunity apply for the enforcement of certain terrorism-related judgments,[177] meaning that a denial of central bank immunity that is justified as a countermeasure is most likely to arise in terrorism-related litigation. That is true for litigation against the Taliban, in which judgment creditors in terrorism cases seek to execute against the central bank assets. The underlying terrorism-related judgments against the Taliban likely did not violate immunity from jurisdiction to adjudicate because the Taliban was not in power when the judgments were rendered and, in any event, the Taliban is a political party not entitled to state immunity. Those judgments were also unrelated to central bank immunity. The execution of those judgements against Afghan central bank assets would, however, appear to violate international law as described above, unless justified as countermeasures.

Countermeasures may be taken by "an injured state" against "a State which is responsible for an internationally wrongful act in order to

175 *See* 28 U.S.C. § 1605(a)(3).

176 *See* Franchini, *supra* note 170, at 472–73.

177 *See* Terrorism Risk Insurance Act, § 201(a).

induce that State to comply" with its legal obligations.[178] In the Afghan situation, these conditions are not met. The most plausible argument in favor of countermeasures is that the underlying judgments are a response to an "internationally wrongful act" by a state. The underlying judgments do not make an adequate finding of such an act, however. For example, the default judgment in *Doe v. Taliban*[179] is based on a terrorist attack in Afghanistan in 2016 that allegedly violated U.S. law against "international terrorism,"[180] but the statute does not define that term in the context of international legal obligations,[181] and there is in any event no settled definition of "terrorism" in international law.[182]

The core idea of countermeasures is that they are designed to induce the target country to comply with their international legal obligations.[183] Many specific features of countermeasures follow from this basic premise, including the requirement that the state imposing countermeasures communicate and negotiate with the target state, and that the measures be temporary.[184] None of those requirements are satisfied here. The turnover of assets will be permanent. Most of the underlying judgments against the Taliban are for conduct that took place more than twenty years ago—their connection to any present violations of international law is not clear. Even to the extent that the judgments were imposed based upon conduct by Afghanistan that constituted an internationally wrongful act, the execution of judgments is a distinct countermeasure, one that must also be based upon wrongful conduct by Afghanistan and be designed to induce the state of Afghanistan to stop its internationally wrongful behavior.

More fundamentally, the United States is taking measures against the Taliban, not Afghanistan. Countermeasures are directed against states, not against political parties. The two are distinct as illustrated by the *Doe* case itself; it was brought when the Taliban was out of power, and it alleged harm inflicted by the Taliban when it was out of power. The distinction also follows from the U.S. decision not to recognize the Taliban as the government of Afghanistan. The central bank assets in

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178 Int'l Law Comm'n, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries, art. 49, U.N. Doc. A/56/10 (2001) [hereinafter Draft Articles].

179 Doe v. Taliban, No. 3:20-CV-00681-X, 2020 WL 3001362 (N.D. Tex. June 4, 2020).

180 Complaint at 1–2, Doe v. Taliban, No. 3:20-CV-00681-X, 2020 WL 3001362 (N.D. Tex. June 4, 2020).

181 18 USC § 2331(1); *see* Draft Articles, *supra* note 178, at art. 3 (the characterization of an act as "internationally wrongful" is governed by international, not domestic, law).

182 *See* Ben Saul, *The Legal Black Hole in United Nations Counterterrorism*, IPI Global Observatory (June 21, 2021), https://theglobalobservatory.org/2021/06/the-legal-black-hole-in-united-nations-counterterrorism/#:~:text=It%20is%20remarkable%20that%20two,a%20common%20definition%20of%20terrorism [https://perma.cc/C93T-SNQP].

183 Draft Articles, *supra* note 178.

184 *Id.* at art. 52.

question are Afghanistan's. The Taliban is not Afghanistan—at least not in relation to the United States, who has chosen not to recognize it as such. Under these circumstances, the use of Afghan central bank assets by the United States to pay the private debts of the Taliban are not countermeasures that would preclude the wrongfulness of the denial of immunity to which Afghan central bank assets are entitled.

3. Reparations, Central Bank Immunity, and Countermeasures.

Proposals have surfaced to confiscate frozen Russian central bank assets and to turn them over as reparations or to aid Ukraine in the war effort. At one level the proposals make sense: Russia has violated fundamental norms of international law, causing unfathomable harm to Ukraine and the Ukrainian people. Moreover, reparations are common responses to unlawful uses of force. Some examples include German reparations paid after both World Wars and Iraqi reparations after its invasion of Kuwait.[185]

The use of Russian central bank assets for reparations poses somewhat different legal issues, however, because there is no peace treaty in place that evinces Russian consent to pay reparations, nor is there a U.N. Security Council resolution mandating payment. There is a U.N. General Assembly Resolution to the effect that Russia must pay reparations, but a large number of countries abstained, and the resolution is not legally binding.[186] Nations have historically seized assets from countries with which they are at war, but the countries that have frozen Russian central bank assets—including Canada, the European Union, Japan, the United Kingdom, the United States—are not at war with Russia.[187]

Measures to confiscate Russian central bank assets in response to the unlawful invasion of Ukraine that would otherwise violate immunity might be justified as countermeasures, as some commentators have suggested.[188] There are various ways that Russian assets might be turned over, and some ways of doing so could violate immunity from jurisdiction or immunity from execution. The potential barriers to

185 *See Iraq Makes Final Reparation Payment to Kuwait for 1990 Invasion*, UN NEWS (Feb. 9, 2022), https://news.un.org/en/story/2022/02/1111632 [https://perma.cc/2XXF-KSGS].

186 *See* G.A. Res. A/ES-11/L.6 (Nov. 7, 2022).

187 Charles Lichfield, *The Russian Central Bank Is Running Out of Options*, ATL. COUNCIL (Mar. 4, 2022), https://www.atlanticcouncil.org/blogs/new-atlanticist/the-russian-central-bank-is-running-out-of-options/ [https://perma.cc/G7UH-Q4RH].

188 Philip Zelikow, *A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine*, LAWFARE (May 12, 2022), https://www.lawfaremedia.org/article/legal-approach-transfer-russian-assets-rebuild-ukraine. *Contra* Evan J. Criddle, *Turning Sanctions into Reparations: Lessons for Russia/Ukraine*, HARV. INT'L L. J. ONLINE, https://journals.law.harvard.edu/ilj/2023/01/turning-sanctions-into-reparations-lessons-for-russia-ukraine/ [perma.cc/5698-NABM].

justifying such actions as countermeasures may differ based upon the specific proposal, but the issue of "third-party" countermeasures and the requirement that countermeasures be temporary and reversable are likely to arise in any effort to confiscate Russian central bank assets.

a. Third Party Countermeasures.

The potential use of countermeasures by third parties—meaning here states who are responding to a breach of an obligation to the community as a whole—is disputed.[189] Russia's invasion of Ukraine violated *erga omnes* obligations, which are owed to all states, potentially permitting countermeasures against Russia by third parties.[190] The obligation to pay reparations itself may not be an *erga omnes* obligation that would even arguably permit the use as countermeasures, but the following discussion puts that difficulty to one side.

The commentary to the Draft Articles on State Responsibility describes the practice of third-party countermeasures as "controversial" and "embryonic."[191] Some scholars have cited additional state practice in support of their permissibility.[192] As Ruys has argued, the practice is difficult to evaluate because most of it involves measures that states did not themselves characterize as countermeasures and because it is unclear in many situations whether the measure itself (especially sanctions such as assets freezes) violates international law at all, meaning the measure might be a retorsion, not a countermeasure.[193] Some purported examples of "countermeasures" are merely a discussion of sanctions, for example, discussions that assume (with no analysis) that asset freezes would otherwise violate international law.[194]

There are additional problems with the state practice that is cited to support third party countermeasures in the form of denials of central bank immunity. In one sense the state practice of countermeasures proves too much. *Erga omnes* obligations are potentially far broader

189 Draft Articles, *supra* note 178, at art. 54.

190 *See generally* Iryna Bogdanova, Unilateral Sanctions In International Law and the Enforcement of Human Rights 82–85 (2022). Countermeasures might also be used on behalf of the injured state—in this situation, Ukraine—but there appears to be even less state practice in this context than there is for third party countermeasures in response to *erga omnes* violations. *See* Martin Dawidowicz, Third Party Countermeasures 270–71 (2017).

191 Draft Articles, *supra* note 178, at 129.

192 *See, e.g.*, Christian Tams, Enforcing Obligations Era Omnes in International Law (Cambridge Univ. Press 2005); Elena Katselli Proukaki, The Problem of Enforcement in International Law: Countermeasures, the Non-Injured State and the Idea of International Community 90, 209 (2010); Dawidowicz, *supra* note 190, at 111–231.

193 Ruys, *supra* note 98, at 704; *see also* Vladyslav Lanovoy, 113 Am. J. Int'l L. 200, 204 (2019) (reviewing Martin Dawidowicz, Third-Party Countermeasures in International Law) (identifying weaknesses in the state practice commonly cited in support of third-party countermeasures).

194 *See, e.g.*, Dawidowicz, *supra* note 190, at 254; Tams, *supra* note 192.

than *jus cogens* norms, and they may well include human rights, maritime, and environmental obligations, as well as obligations related to self-determination (as the International Court of Justice recently said).[195] Indeed, state practice cited as examples of countermeasures includes third party responses to human rights violations.[196] The situations in which third party countermeasures against central bank assets are potentially available are broad and diverse, even if a "serious" breach of *erga omnes* obligations is required.[197]

In another sense, the state practice that is commonly cited proves too little: there are apparently no examples of explicit countermeasures with respect to immunity at all, much less central bank immunity. In evaluating the lack of clear state practice, background rights and obligations become important. Central bank immunity from execution is a core principle of public international law, about which there is no dissent. No country in the world has denied that immunity from such measures is part of customary international law, nor that central banks assets are not entitled to such immunity. Many countries have taken specific actions (such as enacting legislation) in support of such immunity.[198]

Third party countermeasures, on the other hand, are generally contested and their legality is unclear in *all* circumstances. State practice in favor of countermeasures to obtain reparations appears to be effectively nonexistent, even for those who are generous in how they characterize state practice supporting countermeasures.[199] Denial of immunity as a countermeasure is also generally unclear and contested.[200] The absence of state practice of third-party countermeasures against central bank immunity suggests, in this context, that such measures are not permissible. That is especially true because if central bank assets can be the subject of countermeasures in response to Russian aggression in Ukraine, denial of immunity for central bank assets would also be a permissible response to other violations of *erga omnes* norms—which are apparently quite broad.

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195 Eirini-Erasmia Fasia, *No Provision Left Behind – Law of the Sea Convention's Dispute Settlement System and Obligations* Erga Omnes, 20 L. & PRAC. INT'L CTS. & TRIBUNALS 519 (2021); *see also* Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965, Advisory Opinion, 2019 I.C.J. Rep. 169 (Feb. 25).

196 *See* Draft Articles, *supra* note 178, at 137–39 (discussing countermeasures in response to human rights violations by Poland and Yugoslavia).

197 DAWIDOWICZ, *supra* note 190, at 268–69.

198 *See* (Wuerth) Brunk, *supra* note 1.

199 *See* DAWIDOWICZ, *supra* note 190, at 302 ("Unlike claims for cessation, there is no clearly recognized entitlement to obtain reparation by way of third-party countermeasures.").

200 *See* Longobardo, *supra* note 170.

b. Reversible and Temporary.

Countermeasures should also be temporary in nature and reversable. In one sense, these requirements are not ancillary. They go to the core of countermeasures, which are permissible only because (and to the extent that) they are designed to induce the violating state to comply. Countermeasures must accordingly be lifted if (and when) the violating state comes into compliance.[201]

Proponents of confiscating Russian central bank assets argue, in effect, that the requirements that countermeasures be reversible and temporary do not apply if countermeasures are used in response to a country's wrongful failure to make reparations.[202] In other words, countermeasures in this situation would function "as a kind of equitable remedy to enforce performance of the Russian obligation to compensate."[203] The Commentary to the Draft Articles does say that the requirement of reversibility is flexible,[204] and in other contexts, too, authors have suggested that countermeasures to induce the payment of reparations need not be reversible.[205]

The claim that countermeasures in response to a state's wrongful refusal to make reparations are exempt from the general requirements that countermeasures be temporary and reversible is weak, however. As noted above, the Commentary to the Draft Articles suggests the requirement of reversibility is flexible, but not necessarily the requirement that countermeasures be *temporary*.[206] The distinction in the language of the Commentary may reflect that some countermeasures unavoidably inflict harm that is not reversible, but even if so, the measures must nevertheless be temporary and designed to induce the target to bring their conduct in compliance with international law. For example, temporary measures of constraint imposed against central bank assets might impose harm that is generally felt across the economy by

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201 Draft Articles, *supra* note 178, at art. 49.2; *id.* at 129.

202 Anton Moiseienko, Frozen Russian Assets and the Reconstruction of Ukraine: Legal Options 30 (2022) (arguing that countermeasures against Russia need not be reversible because "the net effect of confiscating Russia's assets to pay for Ukraine's reconstruction is equivalent to that of Russia complying with its obligation to provide full reparation").

203 Philip Zelikow, *A Legal Approach to the Transfer of Russian Assets to Rebuild Ukraine*, Lawfare (May 12, 2022, 10:21 AM), https://www.lawfaremedia.org/article/legal-approach-transfer-russian-assets-rebuild-ukraine [https://perma.cc/FZE6-Q293].

204 *See* Draft Articles, *supra* note 178, at 129 (countermeasures are "temporary in character and must be as far as possible reversible in their effects in terms of future legal relations between the two States"); *id.* at 131 ("[T]he duty to choose measures that are reversible is not absolute."); *see also* Franchini *supra* note 170, at 475–6.

205 *See* Michael N. Schmitt, *Responding to Malicious or Hostile Actions Under International law*, Lieber Institute (Apr. 26, 2022), https://lieber.westpoint.edu/white-paper-responding-malicious-hostile-actions-international-law/ [https://perma.cc/8CKR-DMKN].

206 *See* Draft Articles, *supra* note 178, at 129 (countermeasures are "temporary in character and must be as far as possible reversible in their effects in terms of future legal relations").

many people who live in the country. Even after the sanctions are lifted, the harm lingers.[207] That harm may not be reversible even if the measure in place is temporary and can be lifted.

Using countermeasures to seize money for reparations, rather than as a measure to induce the payment of reparations, is in fundamental tension with the basic structure of countermeasures. They are an inducement to act rather than an equitable remedy for the failure to pay.[208] After all, reparations for war damages might take many forms other than using foreign currency reserves to compensate individuals who have been injured, as the historical practice of lump sum agreements suggests. Countermeasures, if permissible at all, serve as inducement, not as a means of seizing money that is then distributed by the seizing state for the purposes of compensating victims. The limitation that countermeasures are designed only to *induce* compliance is an important one that emerged from the debates and concerns around countermeasures voiced by states in the ILC and the Sixth Committee.[209] The decision to limit the Draft Articles to serve a "purely instrumental function" reflects state preferences that countermeasures should not serve other purposes which are more easily manipulated by states for political purposes.[210]

The very limited state practice on third party countermeasures and reparations supports this distinction. A leading study of third-party countermeasures concludes that with one "possible exception," "third-party countermeasures have simply not been adopted to obtain any form of reparation."[211] The possible exception involved the downing of the KAL 007 flight by the Soviet Union and the countermeasures in question did not involve the taking of property, but instead the suspension of air services agreements arguably to induce the payment of reparation.[212] More generally, war reparations are very common, but not as countermeasures. Instead, they are a standard part of postconflict agreements and legal frameworks.[213] Third parties distributing the foreign assets of warring parties—especially central bank assets—during

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207 *See generally* Razavi and Zeynodini, *supra* note 113, at 303, 325 (describing the impact of banking sanctions on access to food and medicine).

208 Draft Articles, *supra* note 178, at 130; *see also* Marry Ellen O'Connell, The Power and Purpose of International Law 257 (2008) ("The purpose of countermeasures must be to induce compliance and/or reparation for a wrong.").

209 *See* Dawidowicz, *supra* note 190, at 292–93.

210 *Id.* at 293.

211 *Id.* at 299.

212 *See id.* at 149–54.

213 Countermeasures have reportedly been used by an injured party in response to an unlawful failure to pay reparations as required by postwar peace treaties. *See* Omer Yousif Elagab, The Legality of Non-forcible Counter-measures in International Law 38–39 (1988).

an armed conflict in the name of third-party countermeasures would mark a very significant development in international law.

These concerns appear to reflect state preferences and state practice in the current discussion about the disposition of frozen Russian assets. Some countries have stated that efforts to turn over Russian central bank assets as reparations would violate the law[214]; in certain situations, those statements may constitute state practice showing that countermeasures are impermissible. Legal officials from the Commission of the European Union have apparently said that "because of the international principle of state immunity, they were unable to confiscate central-bank assets."[215] Such a statement, coming after careful study by the Commission, must reflect the view that countermeasures would not preclude the wrongfulness of the confiscation of central bank assets. The context also evinces *opinio juris*: countries very much want to confiscate Russian central bank assets, but customary international law governing central bank immunity and countermeasures do not permit them to do so. On the other hand, the situation continues to develop, and Estonia appears ready to confiscate Russian state assets and to turn them over to Ukraine, although it is unclear whether these include central bank assets.[216]

A U.N. General Assembly Resolution from November 7, 2022, recognized that Russia "must be held to account" for violations of international law in or against Ukraine, and must make "reparation for the injury, including any damage."[217] That resolution might be viewed as supporting countermeasures against Russia, perhaps functioning as a soft limiting principle on any precedent created by confiscation.[218]

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214 David Lawder, *Yellen: Not Legal for U.S. to Seize Russian Official Assets*, Reuters (May 18, 2022, 3:22 PM), https://www.reuters.com/world/yellen-not-legal-us-government-seize-russian-central-bank-assets-2022-05-18/ [https://perma.cc/ZT5N-NT8T].

215 Laurence Norman, *EU Says It Can't Seize Frozen Russian Central-Bank Assets for Ukraine*, Wall St. J. (Nov. 30, 2022, 12:09 PM), https://www.wsj.com/articles/eu-says-it-cant-seize-frozen-russian-central-bank-assets-for-ukraine-11669827828 [https://perma.cc/Z9XU-TPHX]; *see also* Jorge Liboreiro, '*Make Russia Pay': EU Moves Ahead with Confiscation of Frozen Assets, Despite Legal Pitfalls*, Euronews (Nov. 30, 2022), https://www.euronews.com/my-europe/2022/11/30/make-russia-pay-eu-moves-ahead-with-confiscation-of-frozen-assets-despite-legal-pitfalls [https://perma.cc/6ZWH-9U9M] (reporting that the European Commission concluded that confiscation of Russia state owned assets would violate international law, but that freezing or immobilizing them does not).

216 Denis Leven, *The Confiscation Protocol*: *Estonia Has Announced It Is Going to Transfer Russia's Frozen Assets to Ukraine. Let's See if This Is Possible to do and Should We Expect Such Actions from the Rest of the EU*, Novaya Gazeta Europe (Jan. 19, 2023, 8:55 AM), https://novayagazeta.eu/articles/2023/01/19/the-confiscation-protocol-en [https://perma.cc/42AZ-RU54].

217 G.A. Res. A/ES-11/L.6 (Nov. 7, 2022).

218 *See* HC Deb (7 Feb. 2023) (727) cols. 796–798 (arguing that an exception to immunity is justified in part because of Russia's "refusal to follow orders . . . of the United Nations General Assembly"); *see also* Rana Moustafa Essawy, *The UN General Assembly Resolution on Reparations for Aggression Against Ukraine: A Victory for the International Rule of Law?*, OpinioJuris

The resolution had 94 votes in favor, 73 abstentions, and 14 votes against.[219] In other words, most countries did not support it—and the resolution did not say anything explicit about immunity or about third party countermeasures, language that would certainly have diminished its appeal. Compare that outcome to the vote just a month earlier on a U.N. General Assembly resolution condemning the annexation of Ukrainian territory by Russia: 143 votes in favor, 35 abstentions, and 5 votes against.[220] The overall issue of reparations accordingly appears deeply contested, even as against a country fighting an unpopular war that is very widely condemned as violating fundamental norms of international law.

Perhaps confiscating central bank assets under these circumstances would mark a positive development in international law, one that would helpfully broaden the use of countermeasures in response to egregious violations of international law such as the invasion of Ukraine.[221] At a minimum, however, the foregoing considerations show that using countermeasures to preclude the wrongfulness of denying immunity for the purposes of confiscation will represent a dramatic development in the law of countermeasures.

The likely effects should be given careful attention. Powerful countries—specifically the ones in which central bank assets are invested—would have even more ways to "enforce" international law against weaker countries which invest their foreign central bank assets abroad but which attract no foreign central bank investments to their own countries.[222] Countries not aligned with the European Union and the United States might follow the precedent such action creates (or countries may fear that they will do so), potentially resulting in significantly weaker system of protection for central bank assets over the long term and potentially encouraging states to invest their central bank assets only in "friendly" counties, contributing to a bifurcated or regional global financial system.

(Jan. 17, 2023), https://opiniojuris.org/2023/01/17/the-un-general-assembly-resolution-on-reparations-for-aggression-against-ukraine-a-victory-for-the-international-rule-of-law/ [https://perma.cc/XW79-765P]

219 Moustafa Essawy, *supra* note 218.

220 G.A. Res. ES-11/4 (Oct. 12, 2022).

221 *See* Monica Hakimi, *Unfriendly Unilateralism*, 55 Harv. Int'l L.J. 105, 126 (2014).

222 *See generally* Shivshankar Menon, *Out of Alignment: What the War in Ukraine Has Revealed About Non-Western Powers*, Foreign Affs. (Feb. 9, 2023), https://www.foreignaffairs.com/world/out-alignment-war-in-ukraine-non-western-powers-shivshankar-menon [https://perma.cc/C8WS-MCQU] (arguing that "the effect of a weakening world order" is "profound on countries outside the West").

Conclusion: Central Bank Immunity as a Tool of Political and Economic Power

The developments canvassed in this Article highlight that states use central bank immunity to further their political and economic agendas. That is nothing new.[223] Central bank immunity also reflects pressures that emerge from global trends in international trade and finance, in the growth of regional or fragmented economic patterns, and in the growing link between economic law and security of various kinds.[224]

The contours of central bank immunity may reflect in part whether the forum state seeks to attract central bank assets. Procedural amendments to the Belgium and the French immunity statutes were designed to enhance protections for foreign central bank property invested in those countries.[225] Recent decisions by French courts have interpreted the amendments to make it nearly impossible to reach such assets in order to enforce judgments—those decisions explicitly cite the statute's purpose of making France an attractive investment destination for central banks from around the world.[226] The Second Circuit articulated the same policy objectives as it developed the "central banking functions" test in a case involving Argentine central bank assets. It reasoned that a broad range of assets should be presumptively immune from suit, in part to preserve the position of New York in the global financial system.[227] The United States hesitates to confiscate Russian central bank assets in part because it wants foreign central banks to continue to invest their assets in the United States.

Sweden, on other hand, is an important center for investor state arbitration, but not an important destination for the investment of foreign central bank assets. In that sense, its decision denying immunity from enforcement measures is perhaps unsurprising, even if Sweden's

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223 *See generally* Maryam Jamshidi, *The Political Economy of Foreign Sovereign Immunity*, 73 Hastings L.J. 585 (2022); Pierre-Hugues Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 108 Am. J. Int'l L. 389 (2014).

224 *See* Robert A. Manning, *Trade and Financial Fragmentation: New Challenges to Global Stability*, Atl. Council (July 7, 2020), https://www.atlanticcouncil.org/in-depth-research-reports/issue-brief/trade-and-financial-fragmentation-new-challenges-to-global-stability/ [https://perma.cc/663C-L5AT]; *see also* Gregory C. Shaffer & Henry Gao, *A New Chinese Economic Law Order?*, 23 J. Int'l Econ. L. 607 (2020).

225 (Wuerth) Brunk, *supra* note 1.

226 *See* Sally El Sawah, *"Waiver of State Immunity over Central Bank Accounts! Say No More!," French Supreme Court Rules*, Eur. Ass'n Priv. Int'l L. (Aug. 5, 2021), https://eapil.org/2021/08/05/waiver-of-state-immunity-over-central-bank-accounts-say-no-more-french-supreme-court-rules/ [https://perma.cc/QK4L-4AQ9] (describing the French Supreme Court's reliance on "the purpose behind Article L153-1 . . . to increase the competitiveness of Paris as an attractive financial hub of foreign central bank reserves").

227 *See* EM Ltd. v. Banco Cent. de la Republica Argentina, 800 F.3d 78 (2d Cir. 2015).

own interests went unmentioned in the litigation.[228] The case involved the execution of an arbitral award issued in Stockholm against a Kazakh sovereign wealth fund whose assets were managed by the central bank, which then designation a commercial bank in New York as the custodian, and that New York bank then invested in the stock of Swedish companies. The case is not yet over, and so the assets may never be turned over. But if they are, it is consistent with Sweden's economic interest in the enforceability of arbitral awards.

Developments in central bank immunity also demonstrate the use of financial tools, especially sanctions, to achieve political and security objectives. The inability of the United States to achieve its foreign policy objectives through diplomacy, other economic means, and even military force have led it to impose sanctions on Afghan, Iranian, Russian, and Venezuelan central bank assets. Most of those assets are invested in the Federal Reserve Bank in New York. As described above, some of the sanctions—especially those that were imposed on Iranian assets and that may be imposed on Afghan assets—may violate international law governing immunity. To date, however, the measures against the Afghan, Russian, and Venezuelan assets do not violate central bank immunity. Those sanctions regimes show the limited scope of central bank immunity—it does not apply to certain "recognition" decisions nor to purely executive branch action. Pending litigation in the United States over some Afghan central bank assets may, however, violate the immunity from execution to which those assets are entitled, which could signal a further weakening of central bank immunity in the face of U.S. geopolitical objectives.

Policy concerning Russian central bank assets reflects similar tensions. Many Western countries want to inflict maximum economic pressure on Russia to bring the war against Ukraine to an end as soon as possible, and they want to compensate Ukraine for the injuries it has sustained. Those geopolitical and military objectives are in tension with the desire to keep in place customary international law governing immunity so that other countries will continue to invest in dollars (and in other leading Western currencies) with confidence that those assets will not be confiscated.[229] Those legal protections also benefit

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228 *Cf.* Hans Dahlberg Kolga & Johan Strömbäck, *International Arbitration Law and Rules in Sweden*, CMS (Apr. 20, 2022), https://cms.law/en/int/expert-guides/cms-expert-guide-to-international-arbitration/sweden [https://perma.cc/4S2A-YK3W] (describing "Sweden's ambition as one of the top jurisdictions for international arbitration").

229 *See* David Lawder, *Yellen: Not Legal for U.S. to Seize Russian Official Assets*, REUTERS (May 18, 2022, 3:22 PM), https://www.reuters.com/world/yellen-not-legal-us-government-seize-russian-central-bank-assets-2022-05-18/ [https://perma.cc/9DAY-H37M] (explaining that some U.S. Treasury officials are concerned with "eroding other countries' confidence in holding their central bank assets in the United States"); *see also* Evan A. Feigenbaum & Adam Szubin, *What China Has Learned from the Ukraine War: Even Great Powers Aren't Safe from Economic Warfare—If the*

countries—including less powerful ones—that seek secure and stable foreign banks in which to deposit their central bank assets.

Even nascent efforts to use central bank assets to compensate Ukraine highlight escalating global tensions and underscore the threat of a fractured global economy. Legal analysts and economists describe a general decline in global trade and global economic integration with related declines in and attacks on global international economic law.[230] Global competition—or rivalry—between China and the United States has escalated, and China is increasingly putting its concerns about U.S.-led economic sanctions as front and center in its foreign policy. Some argue that China's support for (or lack of opposition to) Russia's invasion in Ukraine is driven by China's desire for "disruption of U.S.-led sanctions and security blocs"[231] or that China is increasingly interested in using the same economic measures that the West employs.[232]

Perhaps it is not surprising that the issue of reparations—at least as linked to the immunity of Russia's frozen central bank assets[233]—has emerged as an especially contentious issue in the global response to the war in Ukraine. China, India, and other nations have refused to condemn the war at all,[234] but their failure to support reparations was shared by a far larger number of countries, as discussed above. The U.N. General Assembly Resolution said only that Russia had an obligation to pay reparations and recommended that member states develop a register of damages, but nothing specific about central bank assets. Central bank assets were, however, the primary source of funding for reparations under discussion, as Russia's statement of opposition to the resolution suggested.[235] Opponents argued that the resolution was selective and politically motivated, with China urging that "[s]tates suffering from foreign interference, colonialism, slavery, oppression, unilateral coercive

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U.S.-Led Order Sticks Together, Foreign Affs. (Feb. 14, 2023) (explaining how Russia moved its central bank assets away from dollars in favor of gold, renminbi, and other nondollar holdings).

230 *See, e.g.*, Geraldo Vidigal, *The Unilateralization of Trade Governance: Constructive, Reconstructive, and Deconstructive Unilateralism*, 50 Legal Issues of Economic Integration 1 (2023).

231 Katherine Wilhelm, "*February 24: A Clarifying Moment for China's Foreign Policy*," 26 USALI Persp. 3 (2022), https://usali.org/usali-perspectives-blog/february-24-a-clarifying-moment-for-chinas-foreign-policy [https://perma.cc/6E55-LX2R].

232 *See* Feigenbaum & Szubin, s*upra* note 229.

233 Russia made the connection clear as the U.N. General Assembly debated the resolution on reparations. Press Release, General Assembly, General Assembly Adopts Text Recommending Creation of Register to Document Damages Caused by Russian Federation Aggression Against Ukraine, Resuming Emergency Special Session, U.N. Press Release GA/12470 (Nov. 14, 2022) ("Neither the Assembly nor any other mechanism can annul sovereignty immunity, which States assets have under international law, he emphasized. Those delegations which support the draft resolution will be implicated in the illegal expropriation of sovereignty assets.").

234 *See* Ingrid Brunk & Monica Hakimi, *Russia, Ukraine, and the Future World Order*, 116 Am. J. Int'l L. 687, 694 (2022).

235 *See* Press Release, *supra* note 233.

measures, illegal blockades and other internationally wrongful acts also deserve the right for remedy, reparation and justice."[236] Other nations noted that "[d]ouble standards in the application of international law are counterproductive."[237]

When central bank immunity applies, it remains near absolute—even in an era in which global consensus is increasingly unusual. Immunity does not apply to many kinds of sanctions, including asset freezes, but it does generally apply to measures of confiscation involving judicial power. State practice to date supports that distinction and the argument that the doctrine of countermeasures, even if for the purposes of reparations, would not preclude the wrongfulness of confiscating Russian central bank assets through actions that would otherwise violate immunity. Some measures under consideration by Western states regarding Russia's central bank assets and U.S. litigation to enforce terrorism-related judgments against Afghan central bank assets, even if formally presented as countermeasures, would increase global political divisions in one of the dwindling contexts in which international law and state practice around the world have been fully united: the immunity of foreign central bank assets from measures of execution.

236 *See id.*

237 *Id*. (remarks of Pakistan). South Africa, Egypt, and other countries expressed similar views.