The Public Law-Private Law Divide and Access to Frozen Russian Assets

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The overwhelming majority of the international community condemned Russia's war against Ukraine as a gross violation of international law and several countries introduced unilateral measures freezing Russian assets. It has been argued that countries should go beyond that and use these assets for the indemnification of Ukrainian war damages. Confiscation would, however, be unprecedented and raise serious international law concerns. While states have, with good reason, been reluctant to react to one wrongful act with another, this question has given rise to intensive debate. Recently, the EU authorized the use of net profits from the frozen assets but not the assets themselves to support Ukraine.

In my paper forthcoming in the University of Pennsylvania Journal of International Law I argue that this question should be approached from the perspective of the public law-private law divide and international investment law may open the door to the use of a substantial part of the frozen assets for the purpose of war reparations. The pre-print version is available at SSRN.

Under international law, sovereign immunity rules out confiscation both as a countermeasure and a compensatory measure responding to *acta jure imperii*, such as military operations. Nonetheless, sovereign immunity does not extend to commercial matters, where judgments and awards can be enforced against state assets. Investment treaties, including the Russia-Ukraine BIT (RUBIT), "commercialize" *acta jure imperii*. They convert public law violations into *quasi*-commercial claims "immune from sovereign immunity." Although not the norm, mass claims are not unknown in investment arbitration. This implies that if Ukrainian claims for war damages can be submitted to investment arbitration and

incorporated into an arbitral award, they may have a solid legal basis for enforcement against Russian assets. A good part of these assets can be used for this purpose. Although "non-commercial" assets, such as the property of diplomatic missions, military assets, cultural property, items displayed at an exhibition and, most importantly, the property of the central bank are immune from enforcement due to sovereign immunity, sovereign direct investments, airplanes, ships and the assets of persons attributable to the state can be used to satisfy investment awards.

The key issue of the RUBIT's applicability is territorial scope. Although, at first, the idea that Ukrainians may be awarded compensation on the basis of the RUBIT may raise eyebrows, in the Crimea cases arbitral tribunals just did that. They consistently applied the RUBIT to Russian measures and treated Crimea (strictly for the purpose of the BIT!) as the territory of Russia on account of de facto control and legal incorporation. The foregoing principles should be valid also outside Crimea in cases where Russia occupies a territory and/or unilaterally incorporates (annexes) it. And if these territories can be treated as a territory for which Russia bears responsibility under international law, Ukrainians may be able to rely on this responsibility.

The Crimea arbitral awards' notion of territorial scope is not unprecedented in international law at all. For instance, in *Loizidou v. Turkey* and in *Cyprus v Turkey*, the European Court of Human Rights applied the European Convention on Human Rights to Turkey by reason of its occupation of Northern Cyprus. In *Al-Skeini v. United Kingdom*, it found the Convention applicable to the UK's operations in Iraq on account of the occupation of the country.

Although the RUBIT was recently terminated by Ukraine, it remains in force until January 27, 2025, and has a "continuing effects" clause in Article 14(3), which sustains investment claims for ten years after termination.