The Minimal Litigation Risk to EU Member States of the EU's Reparations Loan

- One of the arguments raised against the European Commission's proposal to loan Ukraine the value of Russian State assets immobilised within the EU (the ***Reparations Loan***) is that this would expose Member States to claims for compensation by the Russian Federation.

- The risk that EU Member States could be compelled by Russia to defend the lawfulness of the Reparations Loan before an international court or tribunal has been significantly exaggerated:

    - In reality, neither the International Court of Justice (***ICJ***) or any other similar international court or tribunal would have jurisdiction over a claim brought by Russia on the theory that the loan constituted a violation of its sovereign immunity and/or an expropriation of the assets in question.

    - That includes any claim brought under a bilateral investment treaty (***BIT***) between Russia and an EU Member State, such as the BIT between Russia and Belgium and Luxembourg. The protections against uncompensated expropriation provided by those treaties do not extend to sovereign assets such as those at issue here. Even if that were not the case, any claim brought by Russia would face a multitude of obstacles leaving only the slenderest prospect of success.

- The Reparations Loan constitutes neither seizure nor confiscation of Russia's immobilised State assets. Cash that is immobilised until Russia pays reparations (the status quo) has the same value as a loan agreement that will be repaid when Russia pays reparations (the proposed Reparations Loan).

- But, as we have set out in previous papers, even in the highly unlikely scenario that an arbitral tribunal were to find jurisdiction and if the Reparations Loan were considered to amount to a seizure or confiscation, that action would be justified under international law as a legitimate countermeasure designed to bring Russia back into compliance with its international obligations – in particular by ending its war of aggression against Ukraine and paying the reparations it now owes.

Russia Could Not Challenge an EU Reparations Loan in the ICJ or any Comparable International Adjudicative Body

- Because there is no international court or tribunal with general jurisdiction over violations of international law, many such violations simply cannot be challenged before an international adjudicative body.

- Russia has taken advantage of this fact for years to avoid accountability for its unlawful occupation of Crimea since 2014, its covert invasion of Ukraine's Donbas region starting around the same time, and its full-scale invasion of Ukraine beginning in February 2022.

- The ICJ – the international court with the widest powers to hear disputes between States over alleged violations of international law - can exercise jurisdiction only in certain clearly-defined circumstances:

  - If both or all parties to a dispute have consented to the compulsory jurisdiction of the Court, *i.e.*, the authority of the ICJ to hear any dispute arising between the parties in question except for any categories of dispute specifically excluded by the States in question in their declarations accepting the Court's compulsory jurisdiction;

  - If the parties to the dispute have consented in a written instrument (a *compromis*) to the Court's jurisdiction to hear the specific dispute in question; or

  - If the subject matter of the dispute falls within the scope of a dispute resolution clause of an international convention binding upon both or all the parties to a dispute.

- No dispute relating to the Reparations Loan could be brought by the Russian Federation before the ICJ on the first basis above, because Russia does not accept the compulsory jurisdiction of the Court, even if certain EU Member States do.

- We assume that no EU Member State would voluntarily agree to ICJ jurisdiction over a Russian legal challenge to an EU Reparations Loan and therefore do not discuss the second basis above further.

- The third basis above is also inapplicable because no international convention currently in force gives the ICJ jurisdiction to hear disputes between Russia and any EU Member State concerning the subject matter of any dispute that could plausibly arise from the Reparations Loan:

  - Only a limited number of currently-in-force international conventions provide for the ICJ to resolve disputes between State parties arising under the convention in question.[1] It is abundantly clear that none of these would have within their scope any dispute likely to arise from the Reparations Loan.

  - Although the United Nations Convention on Jurisdictional Immunities of States and their Property (2004) provides for ICJ dispute resolution in tightly defined circumstances,[2] that Convention does not give Russia a path to bring a dispute over the Reparations Loan before the ICJ for multiple reasons:

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[1] *See e.g.,* Convention on the Prevention and Punishment of the Crime of Genocide, adopted 9 December 1948, Article IX; Convention Relating to the Status of Refugees, adopted 28 July 1951, Article 38; International Convention on the Elimination of All Forms of Racial Discrimination, adopted 21 December 1965, Article 22; Protocol Relating to the Status of Refugees, adopted 16 December 1966, Article IV; Convention on the Elimination of All Forms of Discrimination against Women, adopted 18 December 1979, Article 29(1); United Nations Convention on the Law of the Sea, adopted 10 December 1982, Article 287; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, Article 30(1); United Nations Framework Convention on Climate Change, adopted 9 May 1992, Article 14(2)(a); Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, adopted 3 September 1992, Article XIV.2; Convention on Biological Diversity, adopted 5 June 1992, Article 27(3)(b).

[2] Art. 27(2) ("Any dispute between two or more States Parties concerning the interpretation or application of the present Convention which cannot be settled through negotiation with six months shall, at the request of any of

(continued…)

- Russia has signed but not ratified the Convention and is therefore not a State party able to invoke its dispute resolution provisions;

- The Convention is in any case not yet in force because it has not been ratified by the 30 States required by Article 30 to bring it into force.[3] Given the failure to gather the necessary 30 ratifications in the 20 years since the Convention was opened for signature, it is highly unlikely that this barrier to effectiveness will be overcome any time soon.

- Article 1 of the Convention provides that "[t]he present Convention applies to the immunity of a State and its property from the jurisdiction of the courts of another State." A Russian claim that the Reparations Loan violated the sovereign immunity applicable to its immobilised State assets would therefore fall outside the scope of the Convention, as the loan is based on legislative and executive action rather than judicial measures.

- As noted above, the ICJ is the international court with the widest powers to hear disputes between States over alleged violations of international law, yet its jurisdiction would not reach a claim by Russia arising from an EU Reparations Loan. We are unable to imagine any viable claim that Russia could bring before other comparable international courts or tribunals in relation to this subject matter.

Russia Has No Viable Claim Under its Bilateral Investment Treaties with EU Member States

- It has been suggested in the alternative that Russia could claim compensation for the expropriation of its sovereign assets under one of the bilateral investment treaties (***BITs***) to which it is a party with various EU Member States,[4] such as its BIT with Belgium and Luxembourg.[5]

- This also is incorrect: a tribunal constituted pursuant to such a treaty would lack jurisdiction to hear a dispute relating to alleged expropriation of Russia's sovereign assets. Moreover, even leaving this aside, a Russian claim would face further significant challenges relating to jurisdiction, as well as admissibility, liability, and enforceability.

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those States Parties, be submitted to arbitration. If six months after the date of the request for arbitration, those States Parties are unable to agree on the organization of the arbitration, any of those States Parties may refer the dispute to the International Court of Justice by request in accordance with the Statute of the Court.").

[3] According to the United Nations, as of 4 December 2025, only 25 States have ratified the Convention. *See* https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=III-13&chapter=3&clang=_en.

[4] Russia has BITs currently in force with the following EU Member States: Austria (signed 8 February 1990); Belgium and Luxembourg (9 February 1989); Bulgaria (8 June 1993); Czech Republic (5 April 1994); Denmark (4 November 1993); Finland (8 February 1989); France (4 July 1989); Germany (3 June 1989); Greece (30 June 1993); Hungary (6 March 1995); Italy (9 April 1996); Lithuania (29 June 1999); Netherlands (5 October 1989); Romania (29 September 1993); Slovakia (30 November 1993); Spain (26 October 1990); Sweden (19 April 1995).

[5] Agreement Between the Governments of the Kingdom of Belgium and the Grand Duchy of Luxembourg and the Government of the Union of Socialist Soviet Republics Concerning the Promotion and Reciprocal Protection of Investments (9 February 1989) (the ***Belgium-Russia BIT***).

- First, jurisdiction would be lacking under Russia's BITs with EU Member States, including Belgium, because such treaties are specifically designed to encourage and protect investments by persons and legal entities other than the contracting States themselves.

    - In common with the generality of BITs negotiated between States since the 1960s, Russia's BITs relate to the promotion and protection of investments by "investors" of each of the contracting parties, not investments by the contracting parties themselves.[6]

    - "Investors" are typically defined in Russia's BITs (as well as BITs entered into between third countries) as being either persons or legal entities (e.g. corporations) having the nationality of one or the other of the contracting parties.[7]

    - While State-owned enterprises have been found on occasion to qualify as investors on the basis of the separateness of their identities from those of the States that own them, it is well understood in investor-State jurisprudence that States themselves do not qualify as investors within the meaning of that term as typically defined in BITs.[8]

    - This understanding is confirmed by other context within BITs, including the fact that they commonly include two distinct dispute resolution provisions: one for disputes between the two contracting parties and the other for disputes between an investor of one contracting party and the other contracting party.[9] It is obvious from this structural feature that "investors" and contracting parties are distinct and mutually exclusive concepts within BITs.

    - The two different types of dispute resolution clause also typically apply to resolution of different types of dispute: the investor-State clause usually governs disputes concerning an investment by an investor of one contracting party in the territory of the other contracting party (or some subset thereof);[10] the State-to-State clause typically relates to disputes concerning the "interpretation or application" of the treaty itself.[11]

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[6] *See, e.g.*, Belgium-Russia BIT, Preamble ("Desiring to create favourable conditions for the realisation of investments by investors of one of the contracting Parties on the territory of the other contracting Party.") (unofficial translation).

[7] *See, e.g.*, Belgium-Russia BIT, art. 1.1 (defining investors to mean physical persons with Belgian, Luxembourgish or Soviet (*i.e.*, Russian) citizenship, or legal persons with their head office ("siège social") in the territory of one of those States.

[8] *See, e.g.*, *Cyprus Popular Bank Public Co. Ltd. v. Hellenic Republic*, ICSID Case No. ARB/14/16, Decision on Jurisdiction and Liability, 8 January 2019, paras. 372-73.

[9] *See, e.g.*, Belgium-Russia BIT, arts. 9 and 10 respectively.

[10] *See, e.g.*, Belgium-Russia BIT, art. 10 (referring to "[a]ny dispute between a contracting Party and an investor of the other contracting Party, relating to the amount of method payment of compensation due by virtue of article 5 …") (unofficial translation).

[11] See, e.g., Belgium-Russia BIT, art. 9 (referring to "[a]ny dispute between the contracting Parties relating to the interpretation or application of the present Agreement …") (unofficial translation).

- Like BITs entered into by other States, Russia's BITs commit the contracting parties to extend certain protections to investments by investors of the other contracting party, not to investments by the contracting party itself. This is true, for example of the protection against unlawful expropriation found in Russia's BITs.[12]

- It follows that while an investor may bring a dispute under an investor-State dispute resolution clause arising from a contracting party's violation of the protection against unlawful expropriation, no such claim is available (under either dispute resolution clause) to a contracting party whose sovereign assets are unlawfully expropriated by the other contracting party.

- Second, even if a BIT Tribunal could exercise jurisdiction over a claim for expropriation of Russia's sovereign assets, Russia would face other major obstacles to success, including:

  - Jurisdiction: many of Russia's BITs with EU Member States (including its BIT with Belgium and Luxembourg) limit investor-State dispute resolution to "disputes concerning the amount and method of compensation" for expropriation. Russia's consistent position for the last 20 years has been that this formula denies tribunals jurisdiction to determine whether an expropriation has occurred, as opposed to determining the amount of compensation due where the fact of an expropriation has already been determined.[13] It follows from this that if the EU's position is that a Reparations Loan does not constitute an expropriation of Russia's immobilised State assets, Russia would be hard-pressed to argue that a tribunal has jurisdiction to find otherwise.

  - Admissibility: even if a tribunal determines that it has jurisdiction over a given dispute, it may still decline to exercise that jurisdiction by finding the case inadmissible. For example, it is well-established in BIT jurisprudence that tribunals should deem claims inadmissible where they are tainted by violations of international public policy.[14] It is hard to conceive of a claim more tainted by violations of international public policy than a challenge by Russia to a Reparations Loan designed to assist Ukraine in resisting an unprovoked war of aggression.

  - Liability: in the highly unlikely event that a BIT tribunal ever considered the merits of a Russian claim, the respondent EU Member State would have a strong

[12] *See, e.g.*, Belgium-Russia BIT, art. 5 ("Investments by investors of one Contracting Party on the territory of the other Contracting Party shall not be expropriated, nationalised or subjected to measures having equivalent effect, unless such measures are taken in the public interest, subject to a legal procedure, and are not discriminatory.") (unofficial translation).

[13] *See Vladimir Berschader and Moïse Berschader v. The Russian Federation*, SCC Case No. 080/2004, Award (21 April 2006), para. 62 ("The Respondent submits that only disputes as to the amount or mode of payment of compensation for an act of expropriation under Article 5 of the [Belgium-Russia BIT] may be submitted to arbitration under Article 10 of the Treaty and that the issue of whether or not an act of expropriation took place is to be decided by a Russian arbitration court.").

[14] *See, e.g.*, *Bank Melli Iran & Bank Sederat Iran v. The Kingdom of Bahrain*, PCA Case No. 2017-25, Final Award, 9 November 2021.

defence that the Reparations Loan constituted a legitimate exercise of the police powers of the EU and/or its Member States as a countermeasure specifically designed to encourage Russia to cease its war of aggression against Ukraine and pay the reparations owed to it under customary international law.

- Enforceability: in its 18th sanctions package against Russia and Belarus, the EU has already determined that arbitral awards in favour of persons and entities challenging the effect of EU restrictive measures are unenforceable in the courts of EU Member States as a matter of public policy. Other important seats of investor-State arbitration, such as Switzerland, have followed suit. The EU could similarly hinder enforcement of any award in favour of Russia in relation to the Reparations Loan on public policy grounds.

Conclusion

- The argument that the EU should not proceed with the Reparations Loan because it involves unjustified legal risk should be given no weight by EU policymakers. In reality, it would be well-nigh impossible for Russia to persuade an international court or tribunal to find and exercise jurisdiction over such a claim. And, in the unlikely event that it succeeded in doing so, its claim would likely be defeated by one or more of the other practical challenges confronting it.

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