Economic Sanctions and the Law of Central Bank Immunity in the United States

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Introduction

On Thursday, February 24, 2022, Russian forces launched a military invasion of Ukraine. The response from the international community was swift: mere days after the invasion, the United States, the European Union, the United Kingdom, and other allies initiated an unprecedented array of coordinated economic sanctions. A wide range of sanctions measures were proposed, debated, and eventually adopted, from a prohibition on imports of key Russian goods such as petroleum products and luxury goods[2] to removing certain Russian banks from the SWIFT interbank messaging network.[3] Among the sanctions tools employed by the United States were the full blocking or freezing of individual and institutional assets, as well as a prohibition on any transactions involving the Central Bank of Russia, the Russian Ministry of Finance, or the Russian National Wealth Fund.[4]

In the United States, key aspects of the legality of blocking, freezing, and seizing foreign assets are governed by the International Emergency Economic Powers Act ("IEEPA") of 1977.[5] In cases where those assets are foreign state-owned or held in the name of foreign central banks, sanctions authorized pursuant to IEEPA may affect property that may be subject to the immunity protections of the Foreign Sovereign Immunities Act of 1976 ("FSIA").[6] Among other things, the FSIA includes a specific provision conferring attachment immunity protections on property held in central bank accounts at U.S. financial institutions, including the Federal Reserve Bank of New York (the "New York Fed").

This paper considers how economic sanctions authorized by IEEPA may interact with FSIA immunity in the United States when foreign central bank assets are potentially subject to sanctions. Part I analyzes the provisions in the FSIA that confer heightened immunity protections on foreign central bank assets, discusses the public positions that the New York Fed

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[2] *See* Exec. Order No. 14,066, 87 Fed. Reg. 13625 (Mar. 10, 2022) (prohibiting petroleum imports); Exec. Order No. 14,068, 87 Fed. Reg. 14381 (Mar. 15, 2022) (prohibiting imports of luxury goods).

[3] *See* Council Regulation (EU) 2022/345, 2022 O.J. (L 63) 6 (Mar. 1, 2022); Press Release, European Commission, Ukraine: EU Agrees to Exclude Key Russian Banks from SWIFT (Mar. 2, 2022), https://ec.europa.eu/commission/presscorner/detail/en/ip_22_1484.

[4] Office of Foreign Assets Control, Dir. 4 Issued Under Exec. Order No. 14,024 (Feb. 28, 2022, amend. May 19, 2023); Press Release, U.S. Dep't of Treasury, Treasury Prohibits Transactions with Central Bank of Russia and Imposes Sanctions on Key Sources of Russia's Wealth (Feb. 28, 2022), https://home.treasury.gov/news/press-releases/jy0612.

[5] 50 U.S.C. § 1701 *et seq*.

[6] 28 U.S.C. § 1602 *et seq*.

has taken in some cases regarding such protections, and explains certain terrorism-related exceptions to FSIA immunity. Part II explores recent events related to assets held by Da Afghanistan Bank ("DAB") at the New York Fed in order to illustrate how sanctions authority and the FSIA can be applicable in the context of central bank assets. Part III briefly describes the coordinated efforts by the United States, the European Union, and others to apply sanctions to Russian central bank assets. Part IV briefly examines asset forfeiture as an alternative avenue for compensating victims of sanctions targets, including in the context of the Russia-Ukraine conflict.

I. The Foreign Sovereign Immunities Act and Central Bank Immunity in the United States

The Federal Reserve System, the central bank of the United States, consists of the Board of Governors of the Federal Reserve System, the Federal Open Market Committee, and 12 regional Federal Reserve Banks including the New York Fed. Uniquely among the Reserve Banks, the New York Fed acts as the international operating arm of the Federal Reserve System. In this capacity, the New York Fed, among other activities, maintains accounts for itself and for the U.S. Treasury Department at foreign central banks, including in connection with management of U.S. foreign exchange reserves, and participates in foreign exchange markets on behalf of the Treasury Department and the Federal Reserve System.

In addition, since 1917, the New York Fed has provided banking and financial services to foreign public-sector entities including central banks, monetary authorities, and multilateral financial institutions such as the International Monetary Fund and the World Bank. The New York Fed offers dollar-denominated custody, payment, and investment services to each of these account holders, and many countries maintain a significant portion of their foreign exchange reserves in dollar-denominated assets at the New York Fed.

The FSIA provides two types of immunity: jurisdictional immunity and immunity from attachment and execution. "Jurisdictional immunity" is immunity from suit in United States courts. A foreign entity that enjoys jurisdictional immunity cannot be forced to defend itself in a lawsuit brought in a U.S. court (other than those minimal actions needed to establish its immunity). Immunity from attachment and execution is immunity from the process by which a court orders the seizure and/or transfer of property. Immunity from attachment and execution may protect a foreign entity's assets from being used by judgment creditors to satisfy a judgment, even though the foreign entity may have litigated and lost a suit in a U.S. court.

Attachment and execution are the primary legal means for a judgment creditor to take a judgment debtor's property to satisfy a judgment against the judgment debtor. In many cases of judgments issued against a foreign government, judgment creditors seek to attach assets of agencies or instrumentalities of the foreign government, including its central bank, even though these entities were not parties to the underlying action.

Together, Sections 1609 through 1611 of the FSIA govern the attachment and execution immunity protections that apply to the property of foreign states held in the United States, with specific protections for the property of foreign central banks. Read together, these sections show that Congress intended to confer clear and unambiguous legal protections on foreign central bank assets. Indeed, the legislative history of the FSIA indicates that Congress was concerned that if foreign central bank property in the United States were left vulnerable to attachment or execution, deposits of central bank reserves in the United States would be discouraged and, by

implication, the stability of the international financial system undermined.[7] Moreover, Congress worried that permitting execution against central bank reserves without explicit waiver could cause significant foreign relations problems.[8]

Section 1609 establishes a general presumption of sovereign immunity from attachment or execution for foreign states.[9] Section 1610 enumerates exceptions to this general presumption of immunity, including exceptions for attachment or execution against the property of a foreign state that is used for commercial activity in the United States, or where the foreign state has waived immunity from attachment or execution.[10] Section 1611(b)(1) is specifically directed at central banks, and provides immunity from attachment or execution to all property "of a foreign central bank or monetary authority held for its own account,"[11] the exceptions to sovereign immunity carved out by Section 1610 notwithstanding.

Section 1611(b) immunity is subject to two requirements. First, the entity seeking protection for its assets must be a "central bank" or "monetary authority," terms that are not defined in the FSIA. Second, the funds for which protection is sought must be "held for [the entity's] own account." The U.S. Court of Appeals for the Second Circuit set forth a test to determine whether funds are "held for [an entity's] own account": when assets are held in an account in the name of a central bank or monetary authority, the assets are presumed to be immune from attachment under Section 1611(b). However, this presumption may be rebutted by "demonstrating with specificity that the funds are not being used for central banking functions as such functions are normally understood."[12] Unlike Section 1610, there is no commercial activity exception. Courts have recognized that traditional central banking activity may appear commercial in nature, and this does not affect the immunity protections set forth in Section 1611(b)(1).[13] In addition, the relationship between a central bank or monetary authority and its parent state is immaterial; unless there is a final ruling by a court that the parent government is the alter ego of the central bank or monetary authority, the property of the foreign central bank or monetary authority qualifies for immunity regardless of the degree of independence.[14]

The FSIA permits a central bank or monetary authority, or its parent government, to waive immunity from attachment and execution if such waiver is explicit, clear and

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[7] *See* H.R. REP. NO. 94-1487, at 31 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6630; Letter from Charles N. Brower, U.S. Dep't of State Acting Legal Advisor, to Elliott L. Richardson, U.S. Att'y Gen. (Jul. 23, 1973), *quoted in* Ernest T. Patrikis, *Foreign Central Bank Property: Immunity from Attachment in the United States*, 1982 U. ILL. L. REV. 265, 270 (1982).

[8] *See* H.R. REP. NO. 94-1487, *supra* note 7, at 31.

[9] 28 U.S.C. § 1609.

[10] *See id.* § 1610(a).

[11] *Id.* § 1611(b)(1).

[12] *NML Capital, Ltd. v. Banco Central de la República Argentina*, 652 F.3d 172, 197 (2d Cir. 2011).

[13] *See, e.g.*, *Preble-Rish Haiti, S.A. v. Republic of Haiti*, 558 F. Supp. 3d 155, 159-60 (S.D.N.Y. 2021); *Cont'l Transfert Technique, Ltd. v. Fed. Gov't of Nigeria*, No. 08-cv-2026, 2019 WL 3562069, *17-19 (D.D.C. Aug. 6, 2019); *Weston Compagnie de Fin. Et D'Investissement, S.A. v. La Republica del Ecuador*, 823 F. Supp. 1106, 1113 (S.D.N.Y. 1993).

[14] *NML Capital, Ltd*., *supra* note 12, at 190.

unambiguous.[15] A parent government can only waive immunity for its central bank or monetary authority where it specifically mentions the central bank or monetary authority, or the particular assets in question.[16] Section 1610 of the FSIA permits foreign states to waive immunity from prejudgment attachment, but Section 1611(b) does not permit a waiver of immunity from prejudgment attachment for central bank assets.[17]

As part of the central bank of the United States and one of the largest custodians of foreign official reserves in the world, the New York Fed has a substantial interest in promoting both a stable legal environment for foreign central bank assets and clear and certain central bank immunity law. As such, the New York Fed occasionally files amicus curiae, or "friend of the court," briefs in litigation matters involving the scope of central bank immunity under Section 1611(b)(1). For example, the New York Fed filed such an amicus brief[18] in 2011 in the Second Circuit appeal of *NML Capital, Ltd. v. Banco Central de la República Argentina*.[19] In *NML Capital*, holders of defaulted bonds issued by the Republic of Argentina obtained judgments against the Republic of Argentina in a U.S. district court, then sought to attach the reserves of the Central Bank of Argentina on deposit at the New York Fed to satisfy those judgments.[20] The district court allowed the attachment. The Second Circuit reversed, holding that the account at the New York Fed was the property of the central bank, not the parent government, and was immune from attachment under Section 1611(b).

Over time, Congress has introduced a number of modifications or exceptions to FSIA immunity, including in connection with terrorism-related activity. In particular, the Terrorism Risk Insurance Act of 2002 ("TRIA")[21] amended the FSIA to permit attachment of blocked assets of a terrorist party ("a terrorist, a terrorist organization . . . or a foreign state designated as a state sponsor of terrorism"), or of an agency or instrumentality of a terrorist party, to satisfy an award of compensatory damages.[22]

A party seeking to execute against assets under this TRIA exception must show that (1) they have obtained a judgment against a terrorist party, (2) on a claim based on an act of terrorism or an act for which a terrorist party is not immune under certain other provisions of the FSIA, which they seek to satisfy with the (3) blocked assets, (4) of that terrorist, terrorist party, or their agency or instrumentality, (5) to the extent of only their compensatory damages. Importantly, the exception applies only to "blocked assets," which is defined in TRIA to include "any asset seized or frozen by the United States…under sections 202 and 203 of the [IEEPA]."[23] This definition captures many or most assets blocked under U.S. economic sanctions programs.

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[15] *Id*. at 195.

[16] *Id.* at 195-96.

[17] *See* 28 U.S.C. § 1610(d); *Weston*, 823 F. Supp. at 1111.

[18] 2010 WL 3032829 (C.A. 2) (Appellate Brief) (Jul. 23, 2010).

[19] 652 F.3d 172 (2d Cir. 2011).

[20] *See EM Ltd. v. Republic of Argentina*, 382 F.3d 291, 292-94 (2d Cir. 2004).

[21] TRIA, Pub. L. No. 107–297, 116 Stat. 2322 (2002) (codified as 28 U.S.C. § 1610 note).

[22] *Id.* § 201(a).

[23] *Id.* § 201(d)(2)(A),

With respect to the property of entities that are alleged to be agencies and instrumentalities of a terrorist party, because TRIA does not specifically define the terms "agency" or "instrumentality," the Second Circuit has construed those words according to their ordinary meanings.[24]

TRIA is not the only statutory mechanism by which Congress has created an exception to the FSIA. Enacted in 2016, the Justice Against Sponsors of Terrorism Act ("JASTA") removes a foreign state's jurisdictional immunity for injuries to property or persons that occurred in the United States if such injury was caused by (1) an act of "international terrorism" in the United States or (2) a tortious act of the foreign state regardless of where the act took place.[25] It is possible that a plaintiff could attempt to assert under JASTA a cause of action against a central bank or monetary authority as an "agency or instrumentality of a foreign state."

In effect, JASTA serves to create liability for persons, including corporations, associations, and other private entities, and possibly central banks and monetary authorities, who aided and abetted, or conspired, in an act of international terrorism. Initially passed to aid families of victims of the September 11 terrorist attacks, JASTA is still the subject of legislative amendment efforts today, with one recent proposal aiming to expand JASTA exceptions to FSIA immunity and altogether abrogate attachment and execution immunity for foreign states and their agencies and instrumentalities in cases arising from terrorist attacks that kill U.S. citizens on U.S. soil.[26]

II. Case Study of Da Afghanistan Bank: Executive Sanctions Authority and Interplay with Terrorism Exceptions to the FSIA

In August 2021, the Taliban completed a forcible takeover of Afghanistan and its capital city Kabul. U.S. plaintiffs with judgments or claims against the Taliban have attempted to attach the assets of Da Afghanistan Bank ("DAB"), which has been the central bank of Afghanistan since its founding in 1939.[27] These litigation efforts have focused on DAB assets held at the New York Fed and have raised a number of interrelated legal issues, including questions around certain statutory exceptions to FSIA attachment immunity and the use of executive orders to freeze central bank assets. For example, victims of the terrorist attacks of September 11, 2001 who have obtained default judgments against the Taliban have sought to enforce their judgments using DAB's accounts at the New York Fed, through the provision of TRIA discussed above, specifically arguing that DAB itself is an agency or instrumentality of the Taliban.

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[24] *Kirschenbaum v. 650 Fifth Ave. & Related Properties*, 830 F.3d 107, 135 (2d Cir. 2016).

[25] JASTA, Pub. L. No. 114-222, § 3(a), 130 Stat. 853 (codified as 28 U.S.C. § 1605B).

[26] Press Release, Chuck Grassley, Senator, Grassley, Colleagues Introduce Bill to Strengthen 9/11 Victims Law (Jun. 22, 2023), https://www.grassley.senate.gov/news/news-releases/grassley-colleagues-introduce-bill-to-strengthen-9/11-victims-law.

[27] *In re Terrorist Attacks on September 11, 2001*, No. 03-MDL-01570, 2023 WL 2138691, at *3 (S.D.N.Y. Feb. 21, 2023) [hereinafter *In re* 9/11]. Despite the takeover, no country in the world recognizes the Taliban regime as the government of Afghanistan. *Id*.

A. Executive Authority Under the International Emergency Economic Powers Act

On February 11, 2022, amidst the ongoing litigation attempts to attach DAB assets, President Biden issued Executive Order 14064, titled "Protecting Certain Property of Da Afghanistan Bank for the Benefit of the People of Afghanistan" (the "Executive Order").[28] In recognition of the "unusual and extraordinary threat to the national security and foreign policy of the United States" posed by the "widespread humanitarian crisis in Afghanistan," and finding the preservation of certain property of DAB held by U.S. financial institutions to be "of the utmost importance to addressing this national emergency and the welfare of the people of Afghanistan," the Executive Order blocked all DAB assets in the United States, including those at the New York Fed.[29]

The Executive Order was issued pursuant to IEEPA and related authorities such as the National Emergencies Act. IEEPA, enacted in 1977, empowers the President to freeze foreign-owned assets, including the property of foreign states, based on an executive declaration of a "national emergency."[30] The statute provides that the President may make such a declaration when dealing with "any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States, to the national security, foreign policy, or economy of the United States."[31] IEEPA provides the modern statutory basis for most U.S. sanctions programs, including sanctions imposed on Russia for its aggression in Ukraine. Specifically, upon declaring a national emergency, IEEPA authorizes the President to "prevent or prohibit…dealing in…or transactions involving…any property in which any foreign country or a national thereof has any interest by any person, or with respect to any property, subject to the jurisdiction of the United States."[32] Note that while *blocking* or *freezing* assets pursuant to this provision is a common practice under IEEPA and related authorities, IEEPA only permits the President to *confiscate* foreign-owned property "when the United States is engaged in armed hostilities or has been attacked by a foreign country or foreign nationals."[33]

The Executive Order, which expressly acknowledged the ongoing litigation attempts to attach assets held by DAB, laid the groundwork for a mechanism by which approximately half of the assets would remain at the New York Fed, and the other half would be "transferred for the benefit of the Afghan people[] in view of the urgent humanitarian and economic crisis in Afghanistan."[34] On the same date as the Executive Order, the Treasury Department's Office of Foreign Assets Control ("OFAC") issued License No. DABRESERVES-EO-2022-886895-1 (the "OFAC License") which, among other things, directed the New York Fed, upon instruction from individual(s) certified by the Secretary of State pursuant to Section 25B of the Federal Reserve Act as having authority to receive, control, or dispose of property from or for the account of

[28] Exec. Order No. 14,064, 87 Fed. Reg. 8391 (Feb. 15, 2022).

[29] *Id.*

[30] 50 U.S.C. § 1701 *et seq*.

[31] 50 U.S.C. § 1701(a).

[32] *Id*. at § 1702(a)(1)(B).

[33] *Id*. at § 1702(a)(1)(C).

[34] *In re* 9/11, *supra* note 27; Statement of Int. of the United States of America at 4, *John Does 1 Through 7 v. The Taliban et al*., No. 1:20-mc-00740-KPF (S.D.N.Y. Feb 11, 2022), ECF No. 49 [hereinafter Statement of Interest].

DAB, to transfer $3.5 billion from an identified DAB account at the New York Fed to an international financing mechanism to address the humanitarian crisis.[35] This $3.5 billion was subsequently transferred from the DAB account at the New York Fed to the newly created, Swiss-based Fund for the Afghan People ("Afghan Fund").[36]

The assets transferred to the Afghan Fund remained immune from attachment because, as noted above, TRIA authorizes the attachment only of "blocked assets," which are defined as assets "seized or frozen by the United States."[37] The Second Circuit has determined that assets are "blocked" for the purposes of TRIA only if they are subject to a freezing of assets that imposes an "across-the-board prohibition against transfers or transactions of any kind with regards to the property," and assets subject to OFAC license are not subject to this type of prohibition.[38]

The assets subject to the OFAC license were transferred to the Afghan Fund upon instructions from two individuals certified pursuant to Section 25B of the Federal Reserve Act.[39] Section 25B authorizes the Secretary of State to issue a certification to a Reserve Bank regarding the authority of one or more individuals to control and dispose of central bank property in the United States when a representative of the foreign state recognized by the Secretary, typically the accredited ambassador to the United States, has delivered a parallel certification to the Secretary.[40] In the DAB case, because the State Department had delivered a Section 25B certification to the New York Fed and the OFAC license expressly contemplated transfer of licensed assets on the instruction of 25B-certified individuals, the licensed portion of the central bank's blocked property was able to move to the Afghan Fund using this statutory mechanism.

B. Litigation Involving Statutory Exceptions to the FSIA

As noted above, in recent multidistrict litigation in federal court, plaintiffs groups with judgments against the Taliban arising from various acts of terrorism, including the terrorist attacks on September 11, 2001, moved to attach the remaining DAB assets at the New York Fed through the TRIA exception.[41] On February 21, 2023, the United States District Court for the Southern District of New York held that DAB is a central bank entitled to jurisdictional immunity under the FSIA and that the court is constitutionally constrained from permitting creditors to seize DAB funds. The Southern District opined that "[f]inding that the Taliban controls DAB or can use DAB to advance its goals implies that the Taliban is Afghanistan's

[35] *Id.* at 2.

[36] Fund for the Afghan People, https://www.afghanfund.ch/.

[37] TRIA §§ 201(a), 201(d)(2)(A).

[38] *See* Statement of Interest, *supra* note 34, at 16-19 (quoting Weinstein v. Islamic Repub. of Iran, 299 F. Supp. 2d 63, 75 (E.D.N.Y. 2004) (internal quotations omitted)); Bank of New York v. Rubin, 484 F.3d 149, 150 (2d Cir. 2007) (adopting the "persuasive analysis" of Weinstein).

[39] *See* Joint Stmt. by U.S. Treasury and State Dept.: 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.

[40] 12 U.S.C. § 632.

[41] *See In re* 9/11, *supra* note 27.

government. The Constitution vests this authority to recognize governments in the Executive Branch alone."[42] The judgment creditor plaintiffs have appealed to the Second Circuit.

The Southern District came to a similar decision days later in *Owens v. Taliban*, where victims and family members of victims of the August 7, 1998 terrorist bombings of the U.S. embassies in Dar es Salaam, Tanzania and Nairobi, Kenya by al Qaeda who had recently filed claims against the Taliban sought to confirm a pre-judgment attachment order against DAB accounts at the New York Fed.[43] The plaintiffs argued that the Taliban's financial support for al Qaeda, combined with the influence that the Taliban exerted on DAB, including installing its own officials at DAB, controlling DAB's decision-making, replacing Afghanistan's central banking laws with traditional Islamic banking, and scaling back DAB's anti-money laundering and anti-terrorism financing efforts, demonstrated that DAB assets should be used to satisfy judgments under TRIA.[44] The Southern District held that while the alleged loosening of controls at DAB enabled the Taliban to "engage in financial misconduct without interference from DAB," that does not mean that "DAB is currently *operating* as an arm of the Taliban."[45] But even if the facts had indicated thus, the court concluded that it could not find the Taliban to be the government of Afghanistan since, through the executive order and its Statement of Interest filed in the multidistrict litigation, the U.S. government "reaffirmed DAB's status as a sovereign agency or instrumentality entitled to immunity notwithstanding a non-state terrorist entity's efforts to assert control over it."[46]

In other contexts, plaintiffs have managed to successfully use the TRIA exception to attach central bank assets. For example, in *Harrison v. Republic of Sudan*, plaintiffs obtained a default judgment against the Republic of Sudan, which the U.S. government at the time had designated a state sponsor of terrorism for providing material support to al Qaeda, the organization responsible for the attack on the U.S.S. Cole that injured and killed plaintiffs and plaintiffs' spouses.[47] In order to partially satisfy the amounts owned under the judgment, the Southern District in 2016 relied on the TRIA exception to order the turnover of Central Bank of Sudan assets held at the New York Fed,[48] and in 2018 denied the central bank's appeal of a turnover order issued regarding central bank assets held at a commercial bank in New York.[49] The court specifically noted that "[t]he TRIA applies '[n]otwithstanding any other provision of law.' The Supreme Court, relying on this phrase, observed that the 'FSIA's central-bank immunity provision ... limits [parts of section] 1610[], but not the TRIA.' Because the TRIA applies here…the central-bank immunity provision does not apply."[50]

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[42] *Id.* at *11.

[43] *Owens v. Taliban*, No. 22-cv-1949, 2023 WL 2214887 (S.D.N.Y. Feb. 24, 2023).

[44] *Id.* at *2.

[45] *Id.* at *5.

[46] *Id.* at *6.

[47] *See Harrison v. Republic of Sudan*, 882 F. Supp. 2d 23 (D.D.C 2012).

[48] Stipulation of Order and Judgment Concerning Turnover of Blocked Property, *Harrison v. Republic of Sudan*, No. 13-cv-03127-PKC, Dkt. No. 495 (S.D.N.Y. Nov. 29, 2016).

[49] *Harrison v. Republic of Sudan*, 309 F. Supp. 3d 46 (S.D.N.Y. 2018).

[50] *Id.* at 52 (citing TRIA § 201(a) and *Bank Markazi v. Peterson*, 136 S.Ct. 1310, 1318 n.2 (2016)).

III. Russian Central Bank Assets and International Sanctions

On February 28, 2022, the United States, European Union, United Kingdom, and other allies all announced prohibitions on transactions involving the Central Bank of Russia and other Russian sovereign entities, with some subtle differences in language. The EU announced a prohibition on "transactions related to the management of reserves as well as of assets of the Central Bank of Russia," to which EU member states may grant exemptions.[51] At the same time, the UK prohibited its nationals from "provid[ing] financial services" to, including activities "relating to the reserves or assets of," the Central Bank of Russia, the Russian Ministry of Finance, or the Russian National Wealth Fund.[52]

The United States announced the most comprehensive restriction, imposing a full prohibition on "any transaction involving" the Central Bank of Russia, the Russian Ministry of Finance, or the Russian National Wealth Fund, including any transfer of assets to such entities or any foreign exchange transaction for or on behalf of these three entities.[53] While not a full block or asset freeze of Russian central bank assets, this prohibition effectively prevents Russian central bank assets in existing accounts from moving by prohibiting U.S. persons, including the New York Fed, from executing transaction instructions received from the Central Bank of Russia.

Under existing sanctions law, these assets could remain effectively inaccessible for a long period of time, but likely could not be seized or confiscated by the U.S. government. However, recent legislative proposals in the United States would grant new statutory authority for the President to seize Russian central bank assets. The most recent of these bills, the Rebuilding Economic Prosperity and Opportunity (REPO) for Ukrainians Act, was proposed in June 2023 and would give the President the authority to confiscate Russian sovereign assets subject to sanctions in the United States, expressly including central bank assets, and transfer them to assist in Ukraine's reconstruction efforts.[54] The bill further prohibits the release of funds to sanctioned Russian entities until Russia withdraws from Ukraine and agrees to provide compensation for harm caused by war, and instructs the President to work with allies and partners to establish an international compensation mechanism to transfer confiscated or frozen Russian sovereign assets to assist Ukraine.

IV. Using Asset Forfeiture for Victim Compensation

While new legislation likely would be required to provide the authority to seize sanctioned assets, there are other areas of law where assets can be seized for use in compensating victims of wrongful acts. Criminal asset forfeiture, an action brought as a part of a criminal

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[51] Council Regulation (EU) 2022/334, 2022 O.J. (L 57) 1 (Feb. 28, 2022).

[52] *See* Press Release, HM Treasury & Office of Financial Sanctions Implementation, UK Statement on Further Economic Sanctions Targeted at the Central Bank of the Russian Federation (Feb. 28, 2022), https://www.gov.uk/government/news/uk-statement-on-further-economic-sanctions-targeted-at-the-central-bank-of-the-russian-federation.

[53] *See* Office of Foreign Assets Control, Dir. 4 Issued Under Exec. Order No. 14,024, *supra* note 4.

[54] Press Release, Senate Foreign Rels. Comm., Risch, Whitehouse, McCaul, Kaptur Introduce Legislation to Repurpose Sovereign Russian Assets for Ukraine (Jun. 15, 2023), https://www.foreign.senate.gov/press/rep/release/risch-whitehouse-mccaul-kaptur-introduce-legislation-to-repurpose-sovereign-russian-assets-for-ukraine.

prosecution of a defendant and that requires a criminal indictment or conviction, is used in the United States to compensate victims of crimes.[55] Criminal forfeiture is limited to the property interests of the defendant and is generally limited to property involved in or earned by the particular counts on which the defendant is indicted or convicted.

In May 2023, the United States for the first time seized and transferred assets from a Russian oligarch for the reconstruction of Ukraine under asset forfeiture authority.[56] The U.S. Department of Justice announced the seizure of millions of dollars from an account at a U.S. financial institution traceable to businessman Konstantin Malofeyev's sanctions violations after Malofeyev failed to contest charges that he violated sanctions imposed on Russia and provided financing to separatists in Crimea. The $5.4 million dollars in forfeited funds, authorized by the Justice Department to be used "in Ukraine to remediate the harms of Russia's unjust war,"[57] were transferred to the U.S. Department of State.

[55] *See Types of Federal Forfeiture*, U.S. DEP'T OF JUST. (Feb. 17, 2022), https://www.justice.gov/afms/types-federal-forfeiture.

[56] Press Release, U.S. Dept. of Justice, Russian Oligarch Charged with Violating U.S. Sanctions (Apr. 6, 2022), https://www.justice.gov/opa/pr/russian-oligarch-charged-violating-us-sanctions; James Politi, Sam Fleming & Ian Johnston, *U.S. Transfers Seized Assets from Sanctions-Hit Oligarch to Send to Ukraine*, FINANCIAL TIMES (May 11, 2023), https://www.ft.com/content/ef3501bf-c498-4597-bec3-c284daf9ac2b.

[57] *Id*.