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Russian aggression against Ukraine and the law of countermeasures – a momentum for caution or an opportunity for evolution?[1]

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Summary: The paper addresses some of the challenging legal issues invoked by the response of the part of the international community to the Russian aggression in Ukraine in 2022. These legal issues were selected through the lenses of *evolution versus caution* paradigm. In particular, it maps the issue of the permissibility of third-party countermeasures, a topic that has already enjoyed attention of the doctrine but is still controversial. It then focuses on the issue of confiscation of frozen Russian assets as a possible form of countermeasure. This issue is addressed through the optics of the human right to private property and briefly also through the lenses of the law on the immunities of States. The paper then addresses a complicated issue of possible claims against sanctions initiated in international investment arbitration. It focuses primarily on the question whether host States can raise the defence of countermeasures in investment arbitration.

Keywords: Sanctions against Russia, confiscation, countermeasures, international investment arbitration

1 Introduction

In February 2022, the Russian Federation launched an offensive against Ukraine, whose territorial integrity has been violated by Russia already since 2014. However, the Russian aggression in 2022 surpassed the intensity of Russia's previous actions. It is violating the most fundamental rules on which the system of international

1 This paper was developed as part of the project co-financed from State budget funds allocated by the Minister of Science under the "Social Responsibility of Science II" Program (Polska), under contract no. POPUL/SP/0201/2023 /01 of September 1, 2023, regarding the project entitled "The European Union towards armed conflicts, with particular emphasis on the conflict in Ukraine" (in Polish: Projekt dofinansowany ze środków budżetu państwa, przyznanych przez Ministra Nauki w ramach Programu „Społeczna odpowiedzialność nauki II", na podstawie umowy nr POPUL/SP/0201/2023/01 z dnia 1 września 2023 r., dot. Projektu pt. „Unia Europejska wobec konfliktów zbrojnych, ze szczególnym uwzględnieniem konfliktu w Ukrainie").

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law is based and is inflicting huge damage in terms of casualties and destruction of infrastructure and environment. In particular, there is a flagrant violation of the prohibition on the use of force, widespread violations of the rules of armed conflict and the commission of war crimes (if the author can afford to analyse the situation in this abbreviated way from the available information). From 2022, we have also seen a multi-State response in the form of comprehensive sanctions measures targeting multiple sectors of the Russian economy, banking or individuals. These measures are much more advanced than those adopted after the aggression against Ukraine in 2014. Sanctions have also affected Belarus, which has assisted the Russian Federation in its military offensive against Ukraine, at least by providing its territory. Since the first sanction package in 2022, EU have been gradually tightening sanction regimes as the Russian aggression continued. Next to EU, also the UK, the US, Canada, Japan and several others adopted countermeasures against Russia.[2] The successive sanctions measures adopted by the EU and some countries are very complex, especially when compared to those adopted after the Russian aggression against Ukraine in 2014. Therefore, the topic of international sanctions has been receiving increased attention precisely because of the robust measures taken by some forty countries around the world. There was also a debate on the possibility of confiscating Russian assets.

Sanctions and countermeasures (hereinafter referred to primarily as "sanctions")[3] in international law represent an important tool given to the hands of the members of international community for its enforcement. This contribution does not focus on the legal nature or types of sanctions adopted against Russia. It rather provides an overview of those legal aspects that are controversial or legally problematic and provides a brief analysis of these selected issues. The author tried to look at the selected legal issues through the lenses of *evolution versus caution* paradigm. Therefore, in the first part, this paper addresses the issue of permissibility of the so-called third-party countermeasures, a topic which was already discussed in the doctrine before 2022, but which became even more relevant today given the number of States imposing sanctions on Russia. Second part focuses on the issue of confiscation of frozen Russian property, a topic that is still discussed on the level of the EU, with few individual States taking steps to proceed with confiscation (Canada, Estonia). This issue will be addressed through the optics of the human right to private property and briefly also through the lenses of the law on the immunities of States. Third part will then focuses on another potentially problematic aspects of sanctions – possible repercussions in international investment arbitration. Given the scale and gravity of sanctions, it may not be surprising if sanctioned entities pursue investment arbitration against States imposing sanctions. This part primarily addresses the question whether

2 *Tracking sanctions against Russia*. [online]. Available at: <https://graphics.reuters.com/UKRAINE-CRISIS/SANCTIONS/byvrjenzmve/> Accessed: 14.01.2024.

3 The term sanctions will be used where reference is made to countermeasures imposed by the EU or group of States.

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host States can raise the defence of countermeasures in investment arbitration. It must be noted that even though the author of this paper[4] provides his legal view on some of the issues concerned, many of these issues are not actually settled in the doctrine and are yet fully to be examined. Judicial challenges of eventual confiscatory measures or investment claims challenging restrictive measures of individual States may provide a unique opportunity for that.

2 Momentum for evolution – third-party countermeasures

One of the problematic aspects of sanctions against Russia is the question of who is entitled to impose them. To the author's view, this issue is actually two-fold as it may be perceived as either example of evolution of international law or as a moment for caution due to possible contradiction to international law. According to the rules of international responsibility, it is primarily the injured State that can impose countermeasures against the wrongdoer (provided that other conditions are also met).[5] However, there is at least a risk that countermeasures/sanctions may be used as a foreign policy instrument even if their author has not been harmed by a violation of an international legal obligation. In the EU context, restrictive measures are an important instrument of the Common Foreign and Security Policy used to protect international peace and security, democracy, the rule of law, human rights and the fundamental principles of international law.[6] The question of admissibility of sanctions by primary non-injured parties (so-called third-party countermeasures) is quite intensively discussed in legal theory,[7] but seems to be not yet fully clarified. Sanctions against Russia represent another opportunity for discussion on this topic. The issue is very relevant for the international community and the EU,[8] but also for individual member States, such as the Czech Republic as

4 The version of the paper submitted for the review has been finalised in the 2nd quartile of 2024.

5 Art. 49 par. 1 of the UN International Law Commission. *Draft Articles on Responsibility of States for Internationally Wrongful Acts*. Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess., Supp. No. 10, at 43, UN Doc. A/56/10 (2001), hereinafter as "DARS."

6 See European Commission. *EU Sanctions map*. [online]. Available at: <https://www.sanctionsmap.eu/#/main> Accessed: 03.03.2024.

7 See for example DAWIDOWICZ, Martin. *Third-Party Countermeasures in International Law*. Cambridge University Press, 2017; or PALCHETTI, Paolo. Consequences for Third States as a Result of an Unlawful Use of Force. In WELLER, Marc (ed). *The Oxford Handbook on the Use of Force in International Law*. Oxford University Press, 2015, pp. 1224–1238.

8 Discussions on the legality of third-party countermeasures are held also in relation to international organisations where the issue is even more challenging. See for example CUJO, Eglantine. Invocation of Responsibility by International Organizations. In Crawford, James (ed). *The Law of International Responsibility*. New York, 2010, pp. 973, 976–982.

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it has adopted its own national mechanism for adopting autonomous sanctions.[9] The country has already put some Russian entities on the national sanction list.[10] In the event that a State breaches an international obligation, only the parties to whom the obligation has been breached are in principle entitled to enforce the remedy. According to one line of opinion, however, the situation may be different in the case of violations of fundamental rules of international law owed to the international community as a whole. Some authors point to the increasingly frequent practice where, in the case of a breach of a rule that has so-called *erga omnes* character,[11] other States or international organisations adopt sanctions, even though they have not been directly affected by the breach (for example, they are not the target of an armed attack).[12] According to this construction, the effects of the violation of these *erga omnes* rules arise against the entire international community and therefore any member of the international community is then entitled to invoke responsibility against the violating State.[13] Under this approach, all members of the international community are entitled to exercise coercion because they are affected by the violation of a rule with *erga omnes* effects. Thus, when these rules are violated, the violator has a duty to cease owed to all members of the international community because, in addition to causing harm to a particular State by, for example, the use of armed force, it has legally injured the whole international community (e.g., by threatening the peace).[14] This could be consistent with the concept of Art. 48 of the UN International Law Commission's (hereinafter as "ILC") Draft Articles on Responsibility of States for Internationally Wrongful Acts (hereinafter as "DARS"), according to which, in the event of a breach of a rule with *erga omnes* character serving to protect collective interests, every State has the right to invoke international responsibility.[15] The argument is that, in addition to being able to invoke responsibility, third States may resort to sanctions to that end.[16]

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9 Czech Republic. Act No. 1/2023 Coll., on Restrictive Measures against Certain Serious Conduct applied in International Relations (Sanctions Act).

10 Ministry of Foreign Affairs of the Czech Republic. *Three more entities were added to the national sanction list.* [online]. Available at: <https://mzv.gov.cz/jnp/en/issues_and_press/press_releases/three_more_entities_were_added_to_the.html> Accessed: 12.12.2023.

11 This concerns fundamental rules on which the system of international law builds, such as the prohibition of the use or threat of force or protection of the core of human rights.

12 PELLET, Alain, MIRON, Alina. *Sanctions*. [online]. Available at: <https://opil.ouplaw.com/display/10.1093/law:epil/9780199231690/law-9780199231690-e984?prd=MPIL> Accessed: 03.03.2023, at par. 11, 55–59; RUYS, Tom. Sanctions, retorsions and countermeasures: concepts and international legal framework. In HERIK, Larissa van den (ed). *Research Handbook on UN Sanctions and International Law*, Northampton, 2017, p. 46.

13 CASSESE, Antonio. *International Law*. Oxford: Oxford University Press, 2001, pp. 185–186.

14 Cassese uses the term *legal injury*, see ibid at p. 201.

15 UN International Law Commission. *Yearbook of the International Law Commission, Vol. II, Part Two. Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, 2001*. P. 126, par. 6, hereinafter as "DARS, Commentary."

16 CASSESE, c. d., pp. 185–186.

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However, the question of the legality of third-party countermeasures is quite complex and there are also restrictive views on it.[17] Arguably, Art. 48 of the DARS itself cannot be used as an argument for their admissibility since the ILC, in drafting them, abandoned its initially more accommodating formulation in relation to their legality.[18] In view of the complexity of the subject, the author would refer the reader to works that deal with it in detail,[19] including a study that maps State practice.[20] The fact remains, however, that third-party countermeasures are an important and used tool in the limited palette of enforcement tools of international law.[21] Rather a non-positivist legal argument for their legality could be the interest in the effectiveness of international law[22] and the need for a tool to combat violations of the most fundamental rules of international law, especially in situations where the Security Council's central enforcement mechanism has significant limits due to the veto power of the permanent members. Moreover, the current practice of comprehensive countermeasures against Russia by nearly forty States represents another legally relevant practice that may contribute to the identification of a customary rule allowing the enforcement of international law by directly non-affected States. In addition, sanctions imposed in 2011 on Libya or Syria by the Arab League for human rights violations suggest that this is not a practice exclusive to the *Western bloc* of States. Depending on an analysis of the qualification of this practice and the legal opinion of a representative number of States, one could arguably speak of an evolution of international law[23] to which the current crisis in Ukraine further contributes.

17 See BRUNK, Ingrid, Wuerth. *Countermeasures and Confiscation of Russian Central Bank Assets*. [online]. Available at: <https://www.lawfaremedia.org/article/countermeasures-and-the-confiscation-of-russian-central-bank-assets> Accessed: 03.03.2024; or ŠTURMA, Pavel. Nesnesitelná lehkost sankcí? Zamyšlení nad aktuálním problémem z pohledu mezinárodního práva. In Špaček, Metod (ed). *Medzinárodné právo jako strážca svetového pozadku: Vynútiteľnosť medzinárodného práva v 21. storočí*. Bratislava: Slovenská spoločnosť pre medzinárodné právo při SAV, 2014, pp. 57–58.

18 DAWIDOWICZ, Martin. Third-party countermeasures: A progressive development of international law? *Questions of International Law*, 2016, No. 29, pp. 3–15.

19 HILLGRUBER, Christian. The Right of Third States to Take Countermeasures. In TOMUSCHAT, Cristian, THOUVENIN, Jean-Marc (eds). *The Fundamental Rules of the International Legal Order*. Brill, 2005, pp. 265–293; PALCHETTI, c. d.

20 DAWIDOWICZ, *Third-Party Countermeasures in International Law*, Chapter 4.

21 DAWIDOWICZ, Martin. Third-party countermeasures. Observations on a controversial concept. In CHINKIN, Christine, BAETENS, Freya (eds). *Sovereignty, Statehood and State Responsibility*. Cambridge, Cambridge University Press, 2015, p. 361.

22 AKEHURST, Michael. *Reprisals by Third States*. [online]. Available at: <http://heinonline.org/HOL/LandingPage?handle=hein.journals/byrint44&div=4&id=&page=> Accessed: 01.12.2023, pp. 14–15; RUYS, c. d., pp. 45–47.

23 DAWIDOWICZ, *Third-party countermeasures. Observations on a controversial concept*, p. 361.

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3 Momentum for caution – confiscation of property as a form of countermeasure

Already from the early phases of the Russian invasion in 2022, we have been witnessing calls for confiscatory mechanisms targeting frozen Russian assets. This idea was discussed by various commentators and media,[24] but also pronounced by top political leaders, including EU representatives.[25] Similar voices have been raised also by the political representatives in the UK.[26] Also the US Congress conducted steps to enable the seizure of Russian assets and sending the revenues to Ukraine.[27] The calls or at least a support for confiscatory measures have been repeatedly heard also from the EU representatives, including the commissioners.[28] However, more than two years after the invasion, the reader may see that States are still very cautious in putting in place confiscatory mechanisms. To the knowledge of the author, there have been no reported cases of confiscatory measures against Russian assets as a tool of coercion or sanctions, with some exceptions mentioned below. Of course, this statement is not taking into account Ukraine as a belligerent party to the Russian conflict which itself is taking confiscatory steps,[29] but there the legal framework is strongly influenced by the rules of the law of armed conflict. Probably the most advanced development can be seen in Canada. According to the Special Economic Measures Act, Canada can seize or restrain property owned or controlled by a foreign State (or its national) that is responsible for grave breaches of international peace and security or for gross and systematic human

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24 The Economist. *Could seizing Russian assets help rebuild Ukraine?* [online]. Available at: <https://www.economist.com/finance-and-economics/2022/06/06/could-seizing-russian-assets-help-rebuild-ukraine> Accessed: 01.12.2023.

25 *EU vyzývá členské státy ke konfiskaci majetku ruských oligarchů.* [online]. Available at: <https://ct24.ceskatelevize.cz/svet/3477630-eurokomisar-pro-justici-eu-vyzyva-clenske-staty-ke-konfiskaci-majetku-ruskych-oligarchu> Accessed: 03.03.2024.

26 See for example GRIERSON, Jamie, MASON, Rowena. *Property of Russian elites could be handed to Ukrainian refugees*. [online]. 4 March 2022. Available at: <https://www.theguardian.com/world/2022/mar/04/property-of-russian-elites-could-be-handed-to-ukrainian-refugees-says-raab> Accessed: 03.03.2024.

27 KAPLAN, Juliana and others. *Congress tees up a plan to seize Russian yachts and properties in the US — and sell them for Ukraine aid*. [online]. Available at: <https://www.businessinsider.com/congress-bill-seize-russian-yachts-sell-for-ukraine-aid-2022-3?r=US&IR=T> Accessed: 03.03.2024.

28 *European Commission positive on Estonia's Russian asset seizure initiative.* [online]. Available at: <https://news.err.ee/1608849637/european-commission-positive-on-estonia-s-russian-asset-seizure-initiative> Accessed: 12.01.2024; or for example Věra Jourová at the Czech National TV (ČT24, *Otázky Václava Moravce*, 22. April 2022. Available at: <https://www.ceskatelevize.cz/porady/1126672097-otazky-vaclava-moravce/222411030500424/>.

29 See for example *Two Russian Banks Threaten Treaty Arbitration.* [online]. Available at: <https://www.iareporter.com/articles/two-russian-banks-threaten-treaty-arbitration-against-ukraine-following-seizure-of-their-assets-in-the-context-of-the-ongoing-russia-ukraine-war/> Accessed: 12.12.2023; or *PM: Ukraine prepares for confiscation of Russian assets, receives first 17B.* [online]. Available at: <https://www.ukrinform.net/rubric-economy/3677837-pm-ukraine-prepares-for-confiscation-of-russian-assets-receives-first-17b.html> Accessed: 12.12.2023.

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rights violations.[30] Moreover, it has been reported that Canada was preparing to confiscate and transfer seized Russian aircraft, Antonov An–124 (Ruslan), to Ukraine. This is an aircraft that is held in Canada from 27 February 2022. This Antonov is allegedly one of four aircraft of the type stuck at international airports. The supposed confiscation and transfer is about to take place in the near future as part of new package of Canadian countermeasures against Russia.[31] Next to Canada, Estonia is also pioneering the legal avenues on confiscation of Russian assets. The government is now preparing a national legislation allowing such measures.[32]

3.1 Privately owned assets and human rights limits

Important starting position of legal analysis is to differentiate confiscation of private assets and Russian State assets (represented namely by the Russian central bank assets) as the nature of the assets has direct impact on the relevant international legal framework. Starting with the private Russian assets, these are in majority of the cases an ownership of private individuals.

3.1.1 European Convention on Human Rights

The first legal hurdle is thus the level of international human rights protection. Putting now aside a separate and also important question of due process, an interesting question is the conformity with the human right to private property in the sense of Art. 1 of the Additional Protocol 1 of the European Convention on Human Rights (hereinafter as "API Art. 1"). The human right to the free enjoyment of private property is not an absolute one. The conditions for legal interference with this right include, in particular, pursuing of the public interest, proportionality and the right to judicial protection.[33] The provision of adequate compensation is also one of the necessary conditions for the legality of various forms of interference with an individual's property rights. But provision of compensation goes contrary to the very idea of confiscation and would entail provision of funds to Russan entities, an outcome which is unacceptable in context of Russian aggression. So is it even possible to go beyond mere freezing without violating API Art. 1?

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30 Special Economic Measures Act. S. C. 1992, c. 17. The Act is available at: <https://laws-lois.justice.gc.ca/eng/acts/S-14.5/page-1.html>.

31 See for example here: *Canada will transfer confiscated Antonov An–124 from Volga-Dnepr to Ukraine*. [online]. Available at: <https://www.aerotime.aero/articles/canada-will-transfer-confiscated-antonov-an-124-from-volga-dnepr-to-ukraine> Accessed: 12.01.2024.

32 See for example here: *In confiscating frozen Russian assets, Estonia may follow Canadian example.* [online]. Available at: <https://news.err.ee/1608872648/in-confiscating-frozen-russian-assets-estonia-may-follow-canadian-example> Accessed: 12.11.2023.

33 See in detail for example GORDON, Richard, John, Francis and others. *Sanctions Law*. Oxford, Portland: Hart Publishing, 2019, pp. 219–223.

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What is quite relevant for our analysis, according to the European Court of Human Rights (hereinafter as "ECtHR") jurisprudence, API Art. 1 does not guarantee the right to full compensation in all circumstances.[34] The ECtHR fairly consistently states in its decisions that failure to provide compensation is justified under the so-called exceptional circumstances.[35] Unfortunately, however, these cases do not clearly tell us (due to the different factual circumstances as well as the brevity of the court's argumentation) what other circumstances could be included under this term. For example, in *Holy Monasteries v. Greece*, the Court stipulated that:

> "*Compensation terms under the relevant legislation are material to the assessment whether the contested measure respects the requisite fair balance and, notably, whether it does not impose a disproportionate burden on the applicants. In this connection, the taking of property without payment of an amount reasonably related to its value will normally constitute a disproportionate interference and a total lack of compensation can be considered justifiable under Article 1 (P1–1) only in exceptional circumstances. Article 1 (P1–1) does not, however, guarantee a right to full compensation in all circumstances, since legitimate objectives of "public interest" may call for less than reimbursement of the full market value (see the Lithgow and Others v. the United Kingdom judgment of 8 July 1986, Series A no. 102, pp. 50–51, para. 121).*"[36]

In the *Jahn and others v. Germany* judgment from 2005, the Grand Chamber of the ECtHR stated that in the unique context of German reunification, the lack of any compensation did not upset the fair balance that has to be struck between the protection of property and the requirements of the general interest.[37] The Court reiterated that the States have „*a wide margin of appreciation when passing laws in the context of a change of political and economic régime.*"[38] The case was about the obligation to return to the reunified State, without compensation, the property allocated before to the ascendants following the land reform implemented in the Soviet Occupied Zone of Germany.[39]

It is therefore a question whether the confiscation of the property of individuals associated with a State responsible for aggression and serious violations of human

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34 ECtHR. *The Holy Monasteries v. Greece*, no. 13092/87; 13984/88, Judgement, 9 December 1994, par. 71.

35 ECtHR. *Lithgow and others v. the United Kingdom*, no. 9006/80, 9262/81, 9263/81, 9265/81, 9266/81, 9313/81, 9405/81, Judgement, 8 June 1986, par. 120 and other cases.

36 ECtHR. *The Holy Monasteries v. Greece*, no. 13092/87; 13984/88, Judgement, 9 December 1994, par. 71.

37 ECtHR. *Jahn and Others v. Germany*, no. 46720/99, 72203/99 and 72552/01, Judgement, 30 June 2005, par. 117.

38 Ibid, par. 113.

39 ECtHR. *Information Note No. 76 on the case-law of the Court (June 2005).* [online]. Available at: <https://www.echr.coe.int/documents/d/echr/CLIN_2005_06_76_ENG_822320> Accessed: 01.10.2023.

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rights would constitute exceptional circumstances justifying the non-provision of compensation, where there is a general interest that makes such action proportionate to the protection of property. The author of this paper believes that this is the core element of the legality of the confiscatory measures against individuals. If targeting only selected persons where connection to the State regime, support of its illegal acts or even complicity in them would be proven (such as decision makers, individuals or companies financing the government, individuals openly supporting the aggression, to name few examples), it could perhaps be considered as reasonable.[40]

3.1.2 EU Human Rights Protection and Review of Restrictive Measures

There might however be problems also with different legal regimes. For the measures adopted by the EU, incompatibility of restrictive measures adopted by the Council of the EU with human rights obligations may cause illegality and annulment as fundamental rights form part of primary (EU constitutional) law. The recent Judgement of the General Court (First Chamber) of the EU on the action for annulment of Council Decision in respect of listing Mr. Pumpyanskiy on the sanction list[41] also sheds some light into the possible position of the Court on confiscation. When dealing with the condition of respecting the essence of fundamental rights, the Court reiterated, among other things, that restrictive measures are limited in time and reversible.[42] Then, the Court concluded that " *.. in so far as the contested measures do not have the effect of confiscating the applicant's property, the Court finds that such measures are not punitive in nature.*"[43] It seems therefore that for the General Court of the EU reversibility and non-confiscatory and non-punitive nature of restrictive measures are the factors that ensure conformity with one of the four requirements for the restrictions of the fundamental rights.

3.1.3 Countermeasures as Defence in Human Rights Forum?

The previous subsections demonstrated that adopting confiscatory measures against listed individuals might not withstand the test of conformity with human rights. One could ask, however, whether this possible inconformity could not be overcome by merely referencing to invocation of circumstances precluding wrongfulness, among which countermeasures belong.[44] Put differently, if confiscatory measures would be contrary to human rights (such as the human

40 More detailed analysis on this matter is provided in STEJSKAL, Petr, FAIX, Martin. Sanctions from the Perspective of the Right to Property – Confiscation of Assets. In ŠTURMA, Pavel (ed). *International Sanctions and Human Rights*. Springer, 2024, pp. 155–175..

41 General Court (CJEU), *Case T-270/22*, Judgement, 6 September 2023.

42 Ibid, par. 81 and 82.

43 Ibid, par. 83.

44 Art. 22 DARS.

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right to property) for any reasons (such as not fitting into the concept of exceptional circumstances), a question remains whether a State imposing such measures could not invoke the defence of countermeasures when facing individual complaints in front of the ECtHR and rule out their wrongfulness.[45] It is indeed a conceptual feature of countermeasures that measures adopted are contrary to international obligations. The right to private property is not among the so-called hard core of human rights (and thus *ius cogens*),[46] and the primary normativity already allows for many exceptions to it.

However, in the sphere of the European Convention on Human Rights mechanism, it is problematic whether a State can invoke circumstances precluding wrongfulness, belonging to the secondary normativity, in the event of a violation of human rights obligations discussed within the framework of an complaint brought by an individual against the State. Human rights obligations are not understood as a system of inter-State obligations based on reciprocity, but rather on a concept of direct rights of individuals.[47] It is therefore difficult to argue that countermeasures could exclude wrongfulness of impairment of human rights of an individual in response to a breach of international obligations of different subject – a State (Russia). This is an element which is actually relevant also to the relationship between the law of countermeasures and investment arbitration, as will be explained later. Therefore, in adopting laws enabling confiscation of frozen assets of sanctioned entities, States should be cautious and create human rights compliant legal framework. Navigating through the ECtHR concept of exceptional circumstances might be one of the pathways.

3.2 State-owned assets and sovereign immunity of States

Another important question is the legality of confiscatory measures against the State property. At this case, if treating particular property (such as assets of its central bank) as sovereign property of a State, the question of human rights protection would not be an issue. However, the issue of sovereign immunities of States comes to play a role, having its origin in the notion of sovereign equality of States.[48] In fact, the question of the possible confiscation of State-owned assets in context of Russian aggression is in certain aspects more relevant not only because of the possible contradiction with one of the key principles of international law

45 In sense of Art. 22 of the DARS.

46 It is not part of *ius cogens* where countermeasures could not preclude wrongfulness (Art. 26 DARS) nor it could be qualified as part of *fundamental human rights* that cannot be affected by countermeasures either (Art. 50 par. 1 letter b) DARS).

47 MOECKLI, Daniel, and others (eds). *International Human Rights Law*. 3rd ed. Oxford University Press, 2017, p. 89.

48 *Jurisdictional Immunities of the State (Germany v. Italy)*, ICJ, Judgement, 3 September 2012, par. 57.

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(state immunity), but also given the fact that the value of these assets is much higher than the total value of frozen private assets.[49]

This issue is not brand new as it has been discussed already before the Russian aggression in relation to freezing of assets of central banks of Iran or Syria or of few State representatives.[50] It is claimed by some authors that already freezing of assets of a foreign central bank is in contradiction to immunities of States.[51] The central legal question to be answered seems to be whether the execution of legal countermeasures can preclude wrongfulness of a conduct contradicting the immunities of States (or its representatives).[52] Can for example the rules of State immunities be considered as a self-contained regime and exclude the possibility to engage in countermeasures infringing its rules (as was found by the International Court of Justice, hereinafter as "ICJ," in context of the rules of diplomatic law)?[53] What would be the means at the disposal of States that would substitute the possibility to engage in countermeasures, a logic used by the ICJ to qualify rules of diplomatic law as constituting a self-contained regime?[54] In the recently decided *Certain Iranian Assets* case, the ICJ had an opportunity to deal with question of sovereign immunities, but it declared that it lacked jurisdiction to assess it.[55]

There is quite a few of works written on the topic of central bank assets, and it seems that authors are rather divided in their opinions on the legality of confiscation or freezing of these assets.[56] Given the complexity of the topic, the author is still analysing relevant literature. However, visible carefulness[57] on the side of the EU can be understood as evidence of doubts about conformity with international law. Despite the original calls in 2022, no comprehensive

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49 BACZYNSKA, Gabriela. *No quick EU path to give Ukraine profits on sanctioned Russian assets.* [online]. Available at: <https://www.reuters.com/world/europe/no-quick-eu-path-give-ukraine-profits-sanctioned-russian-assets-2023-12-08/> Accessed: 04.10.2023.

50 See for example THOUVENIN, Jean-Marc. Gel des fonds des banques centrales et immunité d'exécution. In PETERS, Anne and others (eds). *Immunities in the Age of Global Constitutionalism*, 2015, pp. 209–219.

51 Ibid, p. 215.

52 Even though there is also a view that the law of State immunities is not applicable to assets of central banks at all. See for example KAMMINGA, Menno T. Confiscating Russia´s Frozen Central Bank Assets: A Permissible Third-Party Countermeasure? *Netherlands International Law Review*, 2022, vol. 70, pp. 1–17.

53 *Case Concerning United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran)*, ICJ, Judgement, 24 May 1980, par. 86.

54 Ibid.

55 *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, ICJ, Judgement, 30 March 2023, par. 48.

56 MOISEIENKO, Anton. Legal: The Freezing of the Russian Central Bank's Assets. *European Journal of International Law*, 2023, vol. 34, no. 4, pp. 1007–1020.

57 See *EU Policy. Brussels rows back on plan to tax €200 bn in frozen Russian assets.* [online]. Available at: <https://www.euronews.com/my-europe/2023/12/12/brussels-rows-back-on-plan-to-tax-200-bn-in-frozen-russian-assets> Accessed: 01.12.2023.

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confiscation mechanism is in place on the level of the EU.[58] Of course, confiscatory measures based on criminal law (including crime of evasion of sanctions) is quite a different topic.[59]

3.3 Confiscation as irreversible sanction

Moving from the level of human rights law and the level of State immunity to the level of the rules of State responsibility, the problem with confiscatory measures is the requirement of reversibility and the temporary character of sanctions. The question is whether the reversibility requirement is to be understood absolutely, or as a direction to which the coercing state should come as close as possible. The formulation used by the ICJ seems to be rather absolute. The Court stated that "*measure must therefore be reversible.*" However, as the Court already found proportionality requirement as not fulfilled in this case, it did not elaborate further on the notion of reversibility.[60]

The wording of the DARS seems (at least on the first sight of the author) less restrictive. Art. 49 par. 3 states that countermeasures shall, *as far as possible*, be taken in such a way as to permit the resumption of performance of the obligations in question (emphasis added). The ILC Commentary recognizes that it may not always be possible to reverse all effects of countermeasures. But it also states that the *as far as possible* reference means that where the coercing State has a choice between a number of lawful and effective countermeasures, it should select one which permits the resumption of performance of the obligations suspended as a result of countermeasures. [61] It also explicates that inflicting irreparable damage on a State would rather be a punishment and not a countermeasure. But the Commentary does not provide more detailed analysis nor examples.

Protracted and grave breaches of peremptory norms of international law by Russia with devastating effects on civilian population must be taken into consideration. However, if using the ILC's logic, what probably should be the primary consideration in this part of analysis is whether the confiscation can actually be more effective than freezing in order to enable the State to opt for it. In this logic, though, it could be argued that mere freezing of assets keeps

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58 Ibid; or *No quick EU path to give Ukraine profits on sanctioned Russian assets.* [online]. Available at: <https://www.reuters.com/world/europe/no-quick-eu-path-give-ukraine-profits-sanctioned-russian-assets-2023-12-08/> Accessed: 01.12.2023.

59 There are examples of conviction-based confiscatory measures, for example in the United States, see for example: *US transfers seized assets from sanctions-hit oligarch to send to Ukraine.* [online]. Available at: <https://www.ft.com/content/ef3501bf-c498-4597-bec3-c284daf9ac2b> Accessed: 03.03.2024. Interestingly, the US Justice Department announced that it transferred approximately 500 000 USD in forfeited Russian funds to Estonia for the benefit of Ukraine. See *Justice Department Transfers Approximately $500,000 in Forfeited Russian Funds to Estonia for Benefit of Ukraine.* [online]. Available at: <https://www.justice.gov/opa/pr/justice-department-transfers-approximately-500000-forfeited-russian-funds-estonia-benefit> Accessed: 03.03.2024.

60 *Gabčíkovo-Nagymaros (Hungary v. Slovakia)*, ICJ, Judgement, 25 September 1997, par. 87.

61 DARS, Commentary to Art. 49, par. 9.

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the possibility of lifting the sanction and can thus have at least some impact on decisions of the coerced State, in contrast to confiscation as irreversible measure. This is even more the case in situation where the seized assets or revenues from them are transferred to a third party.[62] Apart from this, the fact that even the revenues from the frozen assets are being considered as part of the frozen property (thus still the ownership of the individual who is on a sanction list) may also be understood as manifestation of a stricter interpretation of the reversibility criterion by States.

For these reasons, the author of this contribution is slightly more in favour of the interpretation that reversibility poses an obstacle to sanctions in the form of confiscatory measures. Similar concerns are shared also by other commentators.[63]

4 Momentum for caution – international investment law

The following section will outline legal issues pertaining quite interesting interconnections between two rather specific fields of international law – the law of countermeasures and the law of foreign investment. Current practice of international sanctions against Russia seems to bring into the scene real cases where investment arbitration will deal with restrictive measures. However, as will be shown, there have already been few investment disputes somehow linked to countermeasures before. International investment law is a field based on nearly three thousands of bilateral investment treaties and trade agreements with investment protection provisions (hereinafter referred to as "BITs"). Foreign investors, nationals of one State party to particular BIT, enjoy protection guaranteed by the BIT in the territory of the host State, the other contracting party. Typical BIT provides for fair and equitable treatment, full protection and security and compensation for expropriation standard and these clauses may be impaired by sanctions.[64] Substantive standards are empowered by investor-State dispute settlement mechanism where foreign investors are entitled to initiate international arbitration against the host State in case of a breach of particular BIT.[65]

As mentioned above, Canada has seized and is working on the redistribution of frozen asset (an airplane) to Ukraine. Interestingly, it has been reported that the owner of the aircraft, Volga-Dnepr company, is contemplating investment arbitration against Canada. The company has already filed a notice of dispute to the Canadian government and invited it to negotiations, which is under the

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62 ANDERSON, Scott R., KEITNER, Chimène. *The Legal Challenges Presented by Seizing Frozen Russian Assets*. [online]. Available at: <https://www.lawfaremedia.org/article/legal-challenges-presented-seizing-frozen-russian-assets> Accessed: 04.01.2024.

63 Ibid.

64 ZRILIČ, Jure. *Are We in for a New Wave of Investment Arbitrations? Russia's Measures Against Foreign Investors and Investment Treaty Implications*. [online]. Available at: <https://verfassungsblog.de/are-we-in-for-a-new-wave-of-investment-arbitrations/> Accessed: 04.02.1992.

65 See for example the Agreement between the Government of Russian Federation and the Government of the Czech Republic on promotion and protection of foreign investments from 1994, hereinafter as "CZ-RU BIT."

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Canada-Russian BIT from 1989 a precondition for initiation of international investment arbitration.[66] But the question of the relationship between investment arbitration and countermeasures is not limited to confiscatory measures at all. It has been reported that Russian entities are contemplating treaty claims over the *mere* freezing of their assets in Europe. This allegedly concerns Russian National Settlement Depository and other Russian entities.[67] One of the countries that may face investment treaty arbitration is Belgium. It has been reported that Belgian Minister of Finances indicated possible existence of claims stemming from asset freezes.[68] This issue is also not related only to the Russian aggression (even though the author expects more cases emanating from it due to the complexity of sanction regimes). In July 2023, it was reported that Iran was preparing to file arbitration against South Korea over 7 billion USD in frozen assets.[69] However, the arbitration will most likely not be initiated. It has been reported that South Korea transferred the frozen assets to the central bank of Switzerland for the currency exchange and transfer to Iran. This was allegedly a part of the deal between the US and Iran in which five US citizens detained in Iran would be released. In fact, these citizens were released only few months ago.[70] Finally, three older cases heard by investment tribunals established on the basis of the North American Free Trade Agreement (hereinafter as "NAFTA") against Mexico demonstrate that this issue traces back already to the beginning of millennium. In these cases (which will be addressed in greater detail), Mexico justified its measures (increase of tax on soft drinks and syrups) as countermeasures responding to previous breach of NAFTA by the United States.

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66 See *[UPDATED] RUSSIAN AIRLINE FILES NOTICE OF DISPUTE OVER CANADA'S DECISION TO SEIZE AIRCRAFT.* [online]. Available at: <https://www.iareporter.com/articles/russian-airline-files-notice-of-dispute-over-canadas-decision-to-seize-aircraft/> Accessed: 01.11.2023; and *Russian firm escalates dispute with Canada over seized cargo plane.* [online]. Available at: <https://www.cbc.ca/news/politics/russia-antonov-plane-pearson-ukraine-1.6939473> Accessed: 01.11.2023.

67 *[UPDATED] RUSSIAN INVESTORS ARE REPORTEDLY CONTEMPLATING TREATY CLAIMS OVER FREEZING OF THEIR ASSETS HELD BY EUROPEAN CENTRAL SECURITIES DEPOSITORIES.* [online]. Available at: <https://www.iareporter.com/articles/russian-investors-are-reportedly-contemplating-treaty-claims-over-sanctions-based-freezing-of-their-assets-held-by-european-central-securities-depositories/> 01.11.2023.

68 *Belgium may face treaty arbitration over sanctioned Russian assets.* [online]. Available at: <https://www.iareporter.com/articles/belgium-may-face-treaty-arbitration-over-sanctioned-russian-assets/> Accessed 04.03.2024.

69 *SOUTH KOREA ROUND-UP: LONE STAR FILES FOR ANNULMENT, IRAN'S CENTRAL BANK TO START ARBITRATION OVER 7+ BILLION USD IN FROZEN ASSETS, AND A LOOK AT THE IMPACT OF RUSSIA'S INVASION OF UKRAINE ON KOREAN BUSINESS.* [online]. Available at: <https://www.iareporter.com/articles/south-korea-round-up-lone-star-files-for-annulment-irans-central-bank-to-start-arbitration-over-7-billion-usd-in-frozen-assets-and-a-look-at-the-impact-of-the-russia-ukraine-war-on-korean/> Accessed: 01.11.2023.

70 *South Korea says Iran's frozen funds transferred to a third country.* [online]. Available at: <https://www.reuters.com/world/south-korea-says-irans-frozen-funds-transferred-third-country-2023-09-18/> Accessed: 01.11.2023.

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4.1 Basics of Investment Protection

Sanctions imposed by the EU and several non-EU States are quite broad in nature, concern many different economic sectors and asset freezes and travel bans target hundreds of individuals and entities. Examples of foreign investors affected by sanctions include not only Russian nationals and entities directly targeted by the EU restrictive measures, but also banks, air carriers or oil companies such as Rosneft or Lukoil.[71] When it comes to the question as to which substantive standards may be breached by imposing restrictive measures on individuals, foreign investors can basically be harmed in at least two different ways. One group of foreign investors are those affected by countermeasures rather indirectly – for example by restricting imports or exports, thus being affected by disruption of trade and investment with the sanctioned State (for example European entities). Another group of foreign investors are those whose assets were frozen, thus being directly affected by the administrative measures of the sanctioning State (for example listed Russian entities with assets frozen in Europe). Depending on many other circumstances, there are several substantive clauses that may be impaired. The fair and equitable treatment clause or non-discriminatory clause can typically be raised.[72] Provisions on free transfer of capital may also be impaired.[73] Freezing of capital and seizure of equipment essential to the activity of the foreign investor can cause that a company representing the foreign investment bankrupts. Therefore, compensation for expropriation clauses might be raised too as freezing of assets being in place for several years could be qualified as an indirect form of expropriation.[74]

In order to benefit from such generous protection, an individual or a company operating in a territory of a State party of a BIT must meet the definition of foreign investor and his business operation must qualify as foreign investment in the sense of the BIT. Foreign investor is typically defined as a natural person having nationality of the other contracting party to the BIT (other than the one to where the investment is situated) or legal person with the place of incorporation of the other contracting party. Foreign investment is typically defined as any kinds of assets that are placed by investors from one contracting party into a territory of the other contracting party in carrying out business or other activities for the purpose of making a profit. Definitions of foreign investments typically include movable

71 For more details, see OLMEDO, Javier, Garcia. The Legality of EU Sanctions under International Investment Agreements. *European Foreign Affairs Review*, 2023, vol. 28, pp. 100–101.

72 See for example Art. 4 of the BIT concluded between Belgium and Russian Federation (Accord entre les Gouvernements du Royaume de Belgique et du Grand duché de Luxembourg et le Governement de l'Union des républiques socialistes soviétiques, concernant l'encouragement et la protection réciproque des investissements, 1989).

73 Art. 6 CZ-RU BIT.

74 Art. 5 CZ-RU BIT. For more detailed analysis, see for example ROBERT-CUENDET, Sabrina. Unilateral and extraterritorial sanctions and international investment law. In BEAUCILLON, Charlotte (ed). *Research Handbook on Unilateral and Extraterritorial Sanctions*. Cheltenham: Edward Elgar, 2021, pp. 214–216.

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or immovable property, shares and other forms of participation in commercial enterprises, intellectual property rights, licenses, rights from monetary claims etc.[75] However, definitions of foreign investors and foreign investment may vary and eventuality of claims depend on the text of the applicable BIT.[76] Quite notably, as definition of foreign investment in particular BIT may include also shares in a company, potential litigants against States imposing or implementing restrictive measures may be also individuals or entities from third countries (including European) that own shares in Russian company listed or affected by sanctions.

It must be noted that the issue of the relationship between the law of countermeasures and foreign investment protection is quite complex and very much depends on several factors. These include primarily the very existence and scope of applicable BIT, the way in which sanction measures impaired investment and other relevant circumstances of the case at hand. There are multiple scenarios with respect to the facts of the case. We may look at (now more from the geographical perspective) legal position of foreign investors in Russia who are experiencing retaliatory measures and restrictions in withdrawal and termination of their business in Russia by the Russian government. Given the quantity of restrictive measures from the western States, another relevant scenario is the eventuality of claims of Russian entities whose assets have been frozen in Europe and other countries. And particularly in this specific scenario, it is relevant to ask whether host States invoking sanctions could not invoke the defence of countermeasures to preclude breach of the applicable BIT.

4.2 Reference to countermeasures as a defence in investment arbitration

Whether a State imposing countermeasures (or implementing sanctions) can rely on secondary-law based countermeasures justifications in investment arbitration seems to be quite challenging question touching upon the foundations and ratio of the relevant fields. The extent to which the rules on State responsibility are applicable to claims brought by non-State actors against States is somewhat still an open question in the doctrine. The DARS offer some guidance, especially through Art. 55 referring to special rules and Art. 49 referring to the rights of third parties.[77]

Art. 55 states that "*articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of a State are governed by special rules of international law*." The ILC Commentary lists WTO dispute settlement mechanism as an example of a regime that displaces more general rules of State

75 See for example Art. 1 par. 2 of the CZ-RU BIT.

76 For more details on the definitions of foreign investors and foreign investments, see for example OLMEDO, c. d., p. 97–100.

77 PARLETT, Kate. The Application of the rules on countermeasures in investment claims. In CHINKIN, Christine, BAETENS, Freya (eds). *Sovereignty, Statehood and State Responsibility. Essays in Honour of James Crawford*. Cambridge University Press, 2015, pp. 390–391.

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responsibility by its own specific rules. It also mentions ECHR as an example of a regime where one aspect of the general law may be modified, leaving other aspects still applicable.[78] The question then is whether the regime of international investment arbitration can be qualified as special regime in relation to the rules of State responsibility. However, despite the specificity of international investment law in many aspects, the author of this contribution inclines to the view that in general terms, BITs do not prescribe their own rules when it comes to invocation of State responsibility and they address only some aspects of it.[79] Example of an aspect modified by BITs could be expropriation provisions which prescribe compensation as a primary remedy.[80] But to the author's view, countermeasures are not per se excluded on the basis of Art. 55 DARS.

Art. 49 par. 1 States that "*An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under part two.*" The ILC Commentary further elaborates that this "*does not mean that countermeasures may not incidentally affect the position of third States or indeed other third parties*" and that *"as a consequence of suspension of a trade agreement, trade with the responsible State is affected and one or more companies lose business or even go bankrupt. Such indirect or collateral effects cannot be entirely avoided.*"[81] Therefore, it seems that restrictive measures can affect position or interests of third parties, but it should not affect rights of third parties.[82] This means that qualifying the nature of foreign investor's rights may be the key question in analysing the permissibility of countermeasures defence in investment arbitration. In fact, many authors addressing the relationship between international investment law and the law of countermeasures actually centre their analysis into the character of investors' rights.[83] The author of this contribution inclines to the view that foreign investors are given direct rights, thus ruling out the possibility for the respondent State to invoke defence of countermeasures.[84]

Particularly at this part of analysis it is appropriate to examine the three NAFTA investor-State arbitrations against Mexico as investment tribunals in these cases also somehow (each one differently) based their analysis on the nature of rights of

78 DARS, Commentary to Art. 55, at par. 3.

79 PARLETT, c. d., p. 392. See also the argumentation of the tribunal in *Archer Daniels Midland Company v. Mexico* mentioned in subsequent paragraph.

80 PARLETT, c. d., p. 393.

81 DARS Commentary to Art. 49, at par. 5.

82 PARLETT, c. d., pp. 397 and 399, referring to *Corn Products International v. Mexico*, par. 163–165.

83 ZRILIČ, c. d.; OLMEDO, c. d., p. 107; PAPARINSKINS, M. Circumstances Precluding Wrongfulness in International Investment Law. *ICSID Review*, 2016, vol. 31, p. 496. See also diverging view in STHOEGER, Eran, TAMS, Christian J. Swords, Shields and Other Beasts: The Role of Countermeasures in Investment Arbitration. *ICSID Review*, 2022, vol. 37, no. 1–2, p. 134.

84 ZRILIČ, c. d.; OLMEDO, c. d., p. 107. There are, however, also diverging views. See for example LOSARI, Junianto, James, EWING-CHOW, Michael. A clash of treaties: The lawfulness of Countermeasures in International Trade Law and International Investment Law. *The Journal of World Investment & Trade*, 2015, vol. 16, pp. 295–303.

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the investor when dealing with countermeasures defence raised by the respondent State. The three cases dealt basically with similar facts: imposition of higher tax by Mexico on high fructose corn syrup which seriously affected US companies operating in Mexico and producing this essence. This led to initiation of three investment arbitrations on the basis of NAFTA (Art. 1102). In these cases, Mexico claimed that taxes were countermeasures responding to violations of NAFTA by the USA. In *Archer Daniels Midland Company v. Mexico*, the tribunal did not accept invocation of countermeasures as circumstance precluding wrongfulness on the basis that they were not supposed to induce compliance by the US and were not proportionate. But it held that countermeasure could in principle serve as a defence for the host State under NAFTA against foreign investor's claim.[85] In fact, the tribunal applied Art. 55 of the DARS and concluded that *"Chapter Eleven of the NAFTA constitutes lex specialis in respect of its express content, but customary international law continues to govern all matters not covered by Chapter Eleven"*[86] and that this chapter "*neither provides nor specifically prohibits the use of countermeasures.*"[87] The tribunal also analysed the nature of rights of foreign investors and held that they do not have substantive rights under investment treaties. According to the tribunal, foreign investors bear only procedural right to bring a claim which, according to the tribunal, is not impaired by countermeasures. In contrast, in *Corn Products International v. Mexico* the tribunal allegedly[88] concluded that countermeasures as circumstances precluding wrongfulness are not applicable to claims under NAFTA because the treaty confers upon investors rights separate and distinct from those of State parties. The tribunal based this conclusion on the text of the treaty from which it derived intention of State parties to confer substantive rights to investors. That means that not only interests but also rights of third party are at stake, therefore countermeasures responding to the alleged internationally wrongful act by another State party cannot affect these rights.[89] Even though structured differently, also the argumentation of the tribunal in *Cargill, Inc. v. Mexico* includes considerations of the nature of the rights of foreign investors. The tribunal rejected countermeasures defence stating that "*Respondent's argument that its actions were countermeasures cannot have the effect of precluding the wrongfulness of those actions in respect of a claim asserted under Chapter 11 by a national of the allegedly offending State.*"[90]

Despite being based on similar facts of the case, each of the tribunal structured its analysis differently. However, the logic seems to be that if one understands rights of foreign investors as direct and not held by States, then countermeasures taken by a State against a wrongdoer State should not alleviate wrongfulness

85 *Archer Daniels Midland Company v. Mexico*, ICSID Case No. ARB(AF)/04/05, Award of 21 November 2007, par. 120–123.

86 Ibid, par. 119.

87 Ibid, par. 120.

88 The author relies on the analysis of the doctrine as award in this case is not publicly available.

89 PARLETT, c. d., pp. 399–400, referring to *Corn Products International v. Mexico,* par. 163–165.

90 *Cargill, Inc. v. Mexico*, ICSID Case No. ARB(AF)/05/02, Award of 18 September 2009, par. 429.

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of measures vis-á-vis foreign investors to whom the host State owes separate obligations. The author of this contribution inclines to the view that BITs typically confer upon investors direct rights.[91] If this hypothesis is not rebutted by the text of a particular BIT at hand, then countermeasures should not preclude wrongfulness of restrictive measures of a host State that affect rights of foreign investors.[92] It could be argued (as the respondent State did in *Cargill, Inc. v. Mexico*) that "*if the rights of investors are not viewed as rights substantially held by the State of the investor, then absurd results follow*" for a respondent State if "*countermeasures possibly could preclude the wrongfulness of its act vis-a-vis the offending State generally, while those very same countermeasures would be "nullified" by the fact that they would have no similar effect on the claims of investors of the offending State.*" But one could object to this argument (as the tribunal in *Cargill, Inc. v. Mexico* aptly did) that there is always some range of possible countermeasures to be adopted.[93]

Applying this conclusion to Russian entities affected by sanctions against Russia, however, requires further analysis. There are several factors different from the old above-mentioned NAFTA cases. First, in case of sanctions against Russia, there are individuals and entities directly affected by countermeasures or sanctions, next to entities affected indirectly by sectoral restrictions (typically by decrease in export of products or import of goods essential for their production). Directly targeted individuals or entities are typically listed for their relationship to the government, approval of the aggression, activities undermining the integrity of Ukraine or for the (mere) significance for Russian war economy.[94] It is a question whether this factor cannot affect their position in investment arbitration. Second, Russia breaches rules which form fundamentals of international law, such as the prohibition of aggression or core human rights obligations. Some of the rules breached by Russia are of *erga omnes* character. Impact of this factor on the previously developed hypothesis (about problematic applicability of countermeasures as a defence in international investment arbitration vis-á-vis foreign investor) also requires further analysis. We may also see some arbitral practice that sheds more light into these issues in light of sanctions against Russia in the near future.[95]

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91 OLMEDO, c. d., at pp. 107–109 and ref. 54 at p. 107.

92 In this regard, the present author respectfully disagrees with the claim of Olmedo that countermeasures defence is not precluded because in addition to investors, rights conferred in BITs are owed also to State parties as many BITs allow for State-to-State arbitration in parallel to investor-State arbitration. If one contracting party is responsible for internationally wrongful act against the other contracting party, the latter cannot respond in non-performance of BIT obligations in a form that injures foreign investor as his rights are still separate from the rights of his home State, although emanating from the same BIT. See Olmedo, p. 110.

93 *Cargill, Inc. v. Mexico*, par. 428.

94 See designation criteria in Art. 3 of the Council Regulation (EU) No. 269/2014 of 17 March 2014 (amended version).

95 It also cannot be ruled out that investment tribunal in particular case will incline to the view that foreign investors do not posses direct rights (as the tribunal in *Archer Daniels Midland Company v. Mexico* did) and will admit countermeasure defence on this basis.

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But there may be yet another obstacle for the host States to raise countermeasures defence in international investment arbitration, independent on the question of the nature of foreign investor's rights. In particular, there may be a problem with the limited jurisdiction of investment tribunals as assessment whether countermeasures defence is substantiated in fact involves the legal assessment of a third party's conduct.[96] In another words, if tribunal was to accept the host State defence of countermeasures, in assessing their legality, the tribunal has to identify internationally wrongful act on the side of the State against which countermeasures were imposed, as one of the conditions of countermeasures as circumstance that would preclude wrongfulness of a breach of BIT. This third State however is not a party to the proceedings and due to the lack of its consent, jurisdiction of the tribunal to assess its conduct is questionable.[97]

This was indeed an issue the tribunal in *Archer Daniels Midland Company v. Mexico* case addressed. When dealing with the central defence of Mexico that increased tax was a countermeasure on the Unites States for breaching NAFTA, the tribunal examined customary international law requirements for countermeasures. But with respect to the first one – existence of a breach on the side of the Unites States, the tribunal noted that it lacked jurisdiction to decide whether the State committed internationally wrongful act against Mexico justifying countermeasures.[98] Interestingly, the tribunal nevertheless assessed other customary law requirements for countermeasures and, as already mentioned above, concluding that the tax was not a valid countermeasure because it was not adopted to induce the compliance with the NAFTA and it did not meet proportionality test.[99]

4.3 Invocation of investment treaty exceptions as a way forward?

One of the levels where the severity of Russian aggression and threat to regional or even international peace and security may materialise in the loss of investment protection is on the level of substance by invocation of the so-called non-precluded measures clauses (hereinafter as "NPM clauses"). This exception is included in many BITs and it usually states that State parties are not precluded from adopting measures that are necessary for the fulfilment of their obligations with respect to the maintenance or restoration of international peace and security, national security and public order, protection of public health, or other emergency situations in international relations or proception of their own essential security interests.[100] One could argue that in context of sanctions against Russia aiming

96 PAPARINSKINS, c. d., p. 497.
97 STHOEGER, TAMS, c. d., p. 136.
98 *Archer Daniels Midland Company v. Mexico*, par. 131.
99 Ibid, par. 180.
100 See for example BUTLER, Nicolette. The Effect of Unilateral Sanctions on the Foreign Investment Law Regime. In: SUBEDI, Surya P. (ed). *Unilateral Sanctions in International Law*. Hart Publishing, 2021, p. 173; PAPARINSKINS, c. d., p. 496.

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at suppression of aggression against a sovereign country with potential spillover effects, security interests are indeed at stake. In the author's view, the analysis of this particular question made by the tribunals might be different in situations of indirectly injured foreign investors (typically by sectoral sanctions such as import or export bans) and in situations where individual entities are targeted. However, there are some BITs that do not include NPM clauses at all[101] and there is an ongoing discussion as well as inconsistent arbitral practice related to interpretation of NPM clauses in various situations. However, there is no case-law (at least to the author's knowledge) in context of sanction regimes.

Finally, some investment protection treaties may also contain denial of benefits clauses applicable to sanctions.[102]

5 Conclusion

This paper sought to demonstrate that in the background of a tragic turn of events caused by Russian aggression against Ukraine, quite interesting legal questions arose or were revived. The war in Ukraine demonstrated the importance of countermeasures/sanctions for both the system of international law and international relations. They have a strong potential to put pressure on violators of international law. But they can also interact in various subfields of international and trigger specific legal issues. This paper identified, described and provided a brief analysis of some of them. These issues may not necessarily be viewed only as challenges to international law. Depending on the results of analysis, they can happen to materialise in evolution of international law. One such issue is the legality of third-party countermeasures. These are challenged by several authors, but there is an increasing practice of States in adopting them. There are several other issues and areas of law that could be linked to the scheme *momentum for evolution* but which have not been covered by this paper. One such example is development of national laws concerning adoption and implementation of international sanctions. This is especially the case in the Czech Republic which undertaken substantial amendments to its national legislation only few months after the Russian aggression in 2022.[103] Another area where we can witness significant evolution of practice are the EU sanction packages, in particular the measures adopted to prevent circumvention of sanctions (see for example the 11th package).

As a consequence of the gravity and brutality of the aggression, calls for confiscation of frozen assets as part of international sanctions have been voiced

101 Such as the CZ-RU BIT.

102 ALEXANDROS-CĂTĂLIN, Bakos, KABIR, Duggal A.N. *Economic sanctions in International Investment Arbitration*. [online]. Available at <https://jusmundi.com/en/document/publication/en-economic-sanctions-in-international-investment-arbitration> Accessed 05.03.2024, referring to Art. 8.16 of the CETA agreement from 2016.

103 The present author describes details at STEJSKAL, Petr. Sankce v mezinárodním právu ve světle ukrajinské krize – jak fungují, jaké jsou pro ně podmínky a jak se provádí v ČR. *Jurisprudence*, 2022, No. 5, pp. 11–25.

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by representatives of western countries and of the EU already from the spring of 2022. No matter how much one may be in favour of holding aggressor State accountable, as lawyers in international law we can feel that confiscation is a challenging and not very simple issue, representing a *momentum for caution*. More than two years after the beginning of the aggression, confiscations of frozen Russian assets in third States are not happening on large scale. This is in contrast to the political proclamations and calls for confiscatory measures and this may be the evidence of legal uncertainty and difficulties concerning this measure. With respect to the second *momentum for caution* – possible interactions between the law of countermeasures and international investment arbitration, there is probably too little material to consider current sanction regime against Russia as a case-study of the issue.[104] However, we may witness a wave of investment arbitration awards that are directly connected to sanctions in following years. From the analysis provided above, however, it seems that it could be difficult to raise a countermeasures defence by a State imposing sanctions during investment arbitration. What seems to be a key point of this issue is the nature of the rights of foreign investors. However, States could seek to defend themselves by invoking non-precluded measures clauses on the level of primary normativity.

There are also other possible legal constructions to be examined especially in context of Russian aggression, including arguably also the clean hands principle as many individuals and entities listed by the EU and third countries are somehow associated with the Russian regime. There are also other very relevant legal issues that were not addressed by this article. One of them is the question of enforcement of investment arbitral awards on respondent State assets that has been seized (such as the State-owned enterprises or subsidiaries).[105]

104 In contrast to for example the issue of effects of armed conflict and conduct of Russia in Ukraine (and Crimea in particular) on investment arbitration that gave rise to a wave of investor-State investment arbitration proceedings, many of which Russia lost on merits (such as *Ukrnafta* and *Stabil LLC* cases).

105 See for example SILVEIRA, Mercédeh, Azeredo, LEVASHOVA, Yulia. Economic Sanctions, Countermeasures and Investment Claims against the Russian Federation: A Battle on Multiple Fronts. *ICSID Review*, 2023, pp. 7–10.

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