

Putin's Matryoshka: A War Reparations Facility for Rebuilding Ukraine

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This Article addresses a critical, trillion-dollar question: How do we hold Russia accountable for the reconstruction of Ukraine? The nation has been devastated by Russia's brutal war of aggression, with tens of thousands killed, millions displaced and its economy in shambles. The enormity of the problem cannot be overstated.

Existing proposals to support Ukraine, including many from prominent scholars, largely focus on seizing Russian assets, particularly central bank reserves "frozen" by sanctions. Such strategies, however, are legally problematic—likely well beyond the scope of Presidential authority—and financially insufficient. Moreover, while prospective new legislation could expand presidential powers, it risks new challenges, including

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As this Article (which was largely written in mid-2022) goes to print in mid-2023, Russia's invasion of Ukraine remains ongoing, with the situation fluid and outcome uncertain. Correspondingly, the legal, policy, and legislative dimensions regarding the conflict, including reparations for Ukraine, remain subject to active debate across the United States, Europe, and other jurisdictions.

While the Article tries to clearly delineate any associated points of uncertainty, readers should bear in mind that, unless indicated otherwise, the information, data, and figures provided herein are accurate as of approximately late 2022. Certain discussion may be impacted by subsequent developments or new information not available at the time of writing and publication.

significant constitutional considerations and potential violations of international law—risking adverse implications for U.S. foreign policy, as well as the efficacy of global financial infrastructure.

To square this most critical circle, this Article proposes establishing a war reparations facility for Ukraine, modeled on the United Nations Compensation Commission, which paid over \$52 billion to 1.5 million victims of Iraq’s unlawful 1990 invasion of Kuwait, funded by a levy on Iraqi oil sales. The proposal offers numerous advantages, including bypassing legal issues associated with seizing Russian reserves and—most critically—facilitating direct compensation to individual war victims, similarly funded through a Russian oil sales levy.

Though hardly uncomplicated, Russian participation can be incentivized through economic leverage. Due to sanctions, Russian oil trades at a discount, totaling tens of billions annually. As detailed in the Article, that delta can be transposed to fund a reparations facility for Ukraine, in effect collateralized by \$325 billion of Russia’s “frozen” reserves.

Along with an actionable solution—with immediate policy utility—this Article raises significant normative implications, including with respect to critical issues of state responsibility following conflicts. While there is no way for Russia to truly compensate its victims, reparations may provide some modicum of justice and the means to rebuild. It is imperative for policymakers to celeritously implement this critical support for victims of a barbaric war.

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INTRODUCTION

We tell Russia: learn the words “reparations” and “contributions.” You will repay us everything. Everything you did against our state, against every Ukrainian. In full.

– Volodymyr Zelensky, President of Ukraine¹

Russia’s “brutal” and “premeditated” February 24, 2022 invasion of Ukraine has killed tens of thousands²—possibly constituting

1. *President Volodymyr Zelensky Calls on Russia to Get Ready to Pay Reparations and Contributions*, UKRINFORM (Mar. 3, 2022), <https://www.ukrinform.net/rubric-ato/3418898-zelensky-calls-on-russia-to-get-ready-to-pay-reparations-and-contributions.html> [https://perma.cc/MA7M-9735].

2. *Presidential Speeches and Remarks, Remarks by President Biden on Russia’s Unprovoked and Unjustified Attack on Ukraine*, WHITE HOUSE, 2022 DAILY COMP. PRES. DOC. 2 (Feb. 24, 2022) [hereinafter Feb. 24, 2022 Presidential Remarks], [https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/24/remarks-by-president-biden-on-russias-unprovoked-and-unjustified-attack-on-ukraine/#:~:text=Remarks%20by%](https://www.whitehouse.gov/briefing-room/speeches-remarks/2022/02/24/remarks-by-president-biden-on-russias-unprovoked-and-unjustified-attack-on-ukraine/#:~:text=Remarks%20by%20)

genocide³—and displaced over thirteen million, including almost two-thirds of Ukrainian children.⁴ “[W]ar crimes have been committed,” determined the United Nations’ (U.N.) Independent International Commission of Inquiry on Ukraine.⁵

The humanitarian situation is “much worse than anyone can imagine,” explained a top adviser to President Zelensky.⁶ “Medieval” sieges have turned cities to “hell on earth,”⁷ while targeted decimation of critical civilian infrastructure threatens a “humanitarian disaster.”⁸ The pecuniary impact is equally staggering. Ukraine’s economy

20President%20Biden%20on%20Russia's%20Unprovoked%20and%20Unjustified%20Attack%20on%20Ukraine,-Home&text=THE%20PRESIDENT%3A%20Sorry%20to%20keep,%2C%20without%20justification%2C%20without%20necessity. [https://perma.cc/AP8P-R7N8].

3. See generally NEW LINES INST. & RAOUL WALLENBERG CTR. FOR HUM. RTS., AN INDEPENDENT LEGAL ANALYSIS OF THE RUSSIAN FEDERATION’S BREACHES OF THE GENOCIDE CONVENTION IN UKRAINE AND THE DUTY TO PREVENT (May 2022).

4. Pamela Falk, *Almost Two-Thirds of Ukraine’s 7.5 million Children Have Been Displaced in Six Weeks of War*, U.N. SAYS, CBS NEWS (Apr. 11, 2022), <https://www.cbsnews.com/news/ukraine-refugees-millions-of-children-displaced-un-says/> [https://perma.cc/B7YX-YWR5].

5. Erik Møse, Chair of the Comm’n of Inquiry on Ukraine, Update by the Chair of the Independent International Commission of Inquiry on Ukraine (Sept. 23, 2022) (transcript available at <https://www.ohchr.org/en/statements/2022/09/update-chair-independent-international-commission-inquiry-ukraine-51st-session>) [https://perma.cc/6RFM-5ZCG].

6. Chris Giles, Jonathan Wheatley & Colby Smith, *Russia Has Destroyed \$100Bn of Ukraine’s Economic Assets, Says Zelensky Adviser*, FIN. TIMES (Mar. 10, 2022), <https://www.ft.com/content/33df4912-3926-4264-a706-aead38054335> [https://perma.cc/P4RU-WLJB].

7. Natalia Zinets & Max Hunder, *Ukraine Appeals over Worsening Conditions in ‘Medieval Ghetto’ Mariupol*, REUTERS (May 12, 2022), <https://www.reuters.com/world/europe/ukraine-appeals-over-worsening-conditions-medieval-ghetto-mariupol-2022-05-11/> [https://perma.cc/86VV-G72S]. See generally John Reed, *‘It’s Medieval’: Mariupol’s Signal Fades Under Russian Siege*, FIN. TIMES (Mar. 11, 2022), <https://www.ft.com/content/5a365f22-e751-4db6-b111-5c858c8236c7> [https://perma.cc/G7ED-FJSZ].

8. Megan Specia & Andrew E. Kramer, *Russian Barrage Targets Power, Water and Heat for Ukraine’s Civilians*, N.Y. TIMES (Oct. 18, 2022), <https://www.nytimes.com/2022/10/18/world/europe/ukraine-russia-blackout-water.html> [https://perma.cc/4JGH-5TJP]; Marc Santora & Peter Baker, *As The Fighting Spreads, Over 140,000 Residential Buildings Have Been Damaged, Ukraine Says*, N.Y. TIMES (Aug. 2, 2022), <https://www.nytimes.com/live/2022/08/02/world/ukraine-russia-news-war/as-the-fighting-spreads-over-140000-residential-buildings-have-been-damaged-ukraine-says?smid=url-share> [https://perma.cc/8MGH-V9R8] (noting that over 140,000 residential buildings have been destroyed between February and August 2022). See generally Liz Alderman, *As Russia Threatens Europe’s Energy, Ukraine Braces for A Hard Winter*, N.Y. TIMES (Aug. 2, 2022), <https://www.nytimes.com/2022/08/02/business/ukraine-russia-energy-europe.html> [https://perma.cc/4AU5-XVZS].

has been nearly cut in half; the government is running a \$5-billion-a-month deficit, and working through a \$20 billion sovereign debt restructuring⁹—its second due to Russian invasion.¹⁰

“Even if hostilities were to end right now, the recovery and reconstruction costs are already massive,” observed IMF Managing Director Kristalina Georgieva, less than a month into the conflict.¹¹ Ukraine’s government estimates rebuilding costs of at least \$750 billion, while other analyses trend even higher.¹²

Against that backdrop, “[o]ne of the most important political questions on the table,” according to the European Union’s (EU) highest-ranking diplomat, is: “[*W*]ho is going to pay for the reconstruction of Ukraine?”¹³

“Under international law, Ukraine is entitled to full reparations from Russia”¹⁴—a view strongly held by Ukraine, and echoed by the United States, EU, United Kingdom, and other nations.¹⁵ Shortly after Russia launched its “unlawful” war, the United States led a

9. *Zelensky Says Ukraine Faces Growing \$5 Billion Monthly Budget Deficit*, KYIV POST (May 20, 2022), <https://www.kyivpost.com/ukraine-politics/zelensky-says-ukraine-faces-growing-5-billion-monthly-budget-deficit-over-russias-full-scale-invasion-video.html> [<https://perma.cc/756N-5RXS>]; Jorgelina Do Rosario, Rodrigo Campos & Karin Strohecker, *Ukraine’s Creditors Agree 2-Year Freeze on \$20 Billion Overseas Debt*, REUTERS (Aug. 12, 2022), <https://www.reuters.com/markets/europe/ukraines-creditors-agree-two-year-payment-freeze-almost-20-billion-international-2022-08-10/> [<https://perma.cc/Z8U6-4MU2>]; *Ukraine’s Sovereign Debt Freeze to Trigger CDS Payments*, REUTERS (Aug. 19, 2022), <https://www.reuters.com/markets/europe/ukrainres-sovereign-debt-freeze-trigger-cds-payments-2022-08-19/> [<https://perma.cc/4L6H-W74V>].

10. Nell Mackenzie, *Ukrainian Debt Holders Brace for Restructure*, RISK (June 3, 2022), <https://www.risk.net/investing/7949631/ukrainian-debt-holders-brace-for-restructure> [<https://perma.cc/LA5Q-RK2K>]; see Do Rosario, Campos & Strohecker, *supra* note 9 (“Ukraine completed a \$15 billion debt restructuring in late 2015 after an economic crisis linked to a Russian-backed insurgency in its industrial east. The deal left it with a large number of payments due annually between 2019 and 2027, and it returned to international markets in 2017.”)

11. See Giles, Wheatley & Smith, *supra* note 6.

12. See *infra* Section III.B and Appendix.

13. Sam Fleming, *EU Should Seize Russian Reserves to Rebuild Ukraine, Top Diplomat Says*, FIN. TIMES (May 9, 2022) (emphasis added), <https://www.ft.com/content/82b0444f-889a-4f3d-8dbc-1d04162807f3> [<https://perma.cc/L3H8-7FSG>].

14. ANTON MOISEIENKO, WORLD REFUGEE & MIGRATION COUNCIL, *FROZEN RUSSIAN ASSETS AND THE RECONSTRUCTION OF UKRAINE: LEGAL OPTIONS* 4 (2022); Adil Ahmad Haque, *An Unlawful War*, 116 AJIL UNBOUND 155, 155 (2022).

15. See *supra* text accompanying note 1; *infra* Section I.A.

multilateral coalition to punish it with “unprecedented” sanctions,¹⁶ including, as this Article details, “freezing” \$325 billion of Russia’s foreign reserves, about \$40 billion of which are in the United States, with the bulk in Germany, France and Japan.¹⁷

The scale and seeming accessibility of Russia’s reserves has led prominent scholars and policymakers—including Professor Laurence Tribe, former IMF chief economist Simon Johnson, and former World Bank President Robert Zoellick—to urge the United States to seize those assets for Ukraine’s benefit.¹⁸ Indeed, variations of this proposal have appeared in nearly every major publication worldwide.¹⁹

Notwithstanding the enormous normative appeal, as Secretary of the Treasury Janet Yellen aptly noted, this strategy is not “legally permissible in the United States”²⁰—not to mention the six other nations hosting the bulk of Russian reserves.²¹

The critical statutory framework is the International Emergency Economic Powers Act of 1977 (IEEPA), which sits at the

16. Peter Thal Larsen, *Sanctions Shock-And-Awe Reverberates Beyond Russia*, REUTERS (Feb. 27, 2022), <https://www.reuters.com/markets/asia/sanctions-shock-and-awe-reverberates-beyond-russia-2022-02-27/> [<https://perma.cc/8ZNB-Y8WW>].

17. Elena Chachko & J. Benton Heath, *A Watershed Moment for Sanctions? Russia, Ukraine, and the Economic Battlefield*, 116 AJIL UNBOUND (2022); see *infra* Section I.C.

18. See *infra* Section I.B.

19. See *infra* text accompanying notes 81–84.

20. Alan Rappeport & David E. Sanger, *Seizing Russian Assets to Help Ukraine Sets Off White House Debate*, N.Y. TIMES (May 31, 2022), <https://www.nytimes.com/2022/05/31/us/politics/russia-sanctions-central-bank-assets.html> [<https://perma.cc/C3SL-9HGE>]; David Lawder, *Yellen: Not Legal for U.S. to Seize Russian Official Assets*, REUTERS (May 18, 2022), <https://www.reuters.com/world/yellen-not-legal-us-government-seize-russian-central-bank-assets-2022-05-18/> [<https://perma.cc/K3TE-X4AL>] (noting that seizing Russian reserves would “not be legal” under U.S. law).

21. Consistent with a September 2022 Council of Europe Resolution regarding reparations, the EU has been exploring mechanisms to seize Russian reserves. See *1442nd Meeting, 14–15 September 2022: Consequences of the Aggression of the Russian Federation Against Ukraine—Accountability for International Crimes*, COUNCIL OF EUR.: COMM. OF MINISTERS (Sept. 15, 2022), https://search.coe.int/cm/pages/result_details.aspx?objectId=0900001680a8135a [<https://perma.cc/QK5V-69HT>] [hereinafter *Committee of Ministers 1442/2.3*] (“[T]he Russian Federation bears responsibility for the act of aggression against Ukraine . . . and must ensure full reparation for the damage, loss or injury, whether material or moral, caused by Russia’s violations of international law.”); see also Alberto Nardelli, Saleha Mohsin & Stephanie Bodoni, *EU Studies Use of Russian Central Bank Assets to Rebuild Ukraine*, BLOOMBERG (Nov. 3, 2022), <https://www.bloomberg.com/news/articles/2022-11-03/eu-studying-ways-to-use-billions-in-russian-central-bank-assets?sref=OOpRUZ8l> [<https://perma.cc/55QL-AZAL>]; *infra* Section I.B.

“center of the modern U.S. sanctions regime.”²² During times of war or “armed hostilities,” the U.S. President almost unambiguously has the power to seize foreign assets.²³ The salient question is whether, absent those conditions—which President Biden has clearly indicated do not apply—the IEEPA permits the President to seize Russian assets, or merely “freeze” them through sanctions.²⁴ The IEEPA’s language is admittedly “equivocal;”²⁵ the legislative history and Supreme Court precedent, however, indicate that seizing Russian assets is likely impermissible during peacetime.²⁶

Because the existing legal framework is unlikely to allow the President to seize Russian foreign reserves, senior administration officials have expressed support for new legislation that would permit it.²⁷ Such legislative action, however, raises serious constitutional considerations, may violate international law, and risks adverse policy implications for U.S. foreign affairs, as well as the efficacy of global financial infrastructure.²⁸ In other words, even if we *could*, it is not clear that we *should*.

The risks are quite real.²⁹ The IMF has warned that the ferocity of sanctions against Russia “threaten[s] to gradually dilute the dominance of the US dollar,” potentially leading to a “more fragmented international monetary system.”³⁰ Indeed, China has been working to “build a competing financial infrastructure,”³¹ while India is mulling means to ensure the United States “could never do” to them “what it

22. CHRISTOPHER A. CASEY ET AL., CONG. RSCH. SERV., R45618, THE INTERNATIONAL EMERGENCY ECONOMIC POWERS ACT: ORIGINS, EVOLUTION, AND USE 1 (2022).

23. See *infra* Section II.A.

24. See *infra* Section II.A.1.

25. Lee Buchheit & Mitu Gulati, *Alphaville’s Guide to Seizing Russian Assets*, FIN. TIMES (Mar. 29, 2022), <https://www.ft.com/content/50aae1a2-088a-47f9-b936-30fa02cf03de> [<https://perma.cc/J3HR-VZ6S>].

26. See *infra* Section II.A.2.

27. See *infra* Section II.B.

28. See *infra* Sections II.B.1–2.

29. See *infra* Section II.B.3.

30. Jonathan Wheatley & Colby Smith, *Russia Sanctions Threaten to Erode Dominance of US Dollar, Says IMF*, FIN. TIMES (Mar. 31, 2022), <https://www.ft.com/content/3e0760d4-8127-41db-9546-e62b6f8f5773> [<https://perma.cc/DS46-26M6>]; see also SERKAN ARSLANALP, BARRY J. EICHENGREEN & CHIMA SIMPSON-BELL, INT’L MON. FUND, THE STEALTH EROSION OF DOLLAR DOMINANCE (2022).

31. See Joshua Zoffer, *The Dollar and the United States’ Exorbitant Power to Sanction*, 113 AJIL UNBOUND 152, 156 (2019) (discussing “China’s dual efforts to internationalize its currency and build a competing financial infrastructure” following imposition of sanctions against Iran and Russia).

has just done to Russia.”³² Taken together, these trends may weaken the efficacy of future economic measures—potentially increasing the risk of direct confrontation.

The benefits from asset seizure, meanwhile, are limited: The \$40 billion of reserves in the United States are equivalent to perhaps 5% of Ukrainian needs.³³ Correspondingly, discussion regarding seizing U.S.-based Russian reserves is something of a red herring. There is likely only one viable way—as a matter of both legal precedent and practicality—of assembling the level of capital required for Ukrainian reconstruction: Russia’s *future* oil and gas revenues.

Further, even if funding were not an issue, existing proposals’ sole focus on the “asset” side ignores two equally critical dimensions: the nature of the claims and the need for a mechanism to resolve them.

While much of the commentary has implied a homogenous universe of harm suffered by the Ukrainian state,³⁴ the reality on the ground is much more complex, with millions of lives torn apart by the conflict. Russia’s objectives may be geopolitical, but its violence is levied against individuals; any proposal that fails to compensate those most directly hurt is simply no plan at all. At the same time, resolving the voluminous universe of individual claims is a herculean undertaking, requiring significant, carefully-designed legal infrastructure.³⁵

Fortunately, a successful model exists: the United Nations Compensation Committee (UNCC), which awarded \$52.4 billion to 1.5 million victims of Iraq’s unlawful invasion of Kuwait,³⁶ funded by a levy on Iraqi oil sales.³⁷ Aptly described as one of the U.N.’s “few clear success stories,” the UNCC developed cutting-edge

32. Fareed Zakaria, *Biden’s Sanctions Against Russia Are a Double-Edged Sword*, WASH. POST (May 12, 2022), <https://www.washingtonpost.com/opinions/2022/05/12/biden-sanctions-russia-could-erode-dollar-power-financial-economic/> [https://perma.cc/PXB3-Y79U].

33. See *infra* Section II.C.

34. See, e.g., Giles, Wheatley & Smith, *supra* note 6.

35. See *infra* Part III.

36. Press Release, U.N. Compensation Commission, Governing Council of United Nations Compensation Commission Holds Special Session to Mark the Fulfilment of its Mandate, PR/2022/2 (Feb. 9, 2022), <https://uncc.ch/sites/default/files/attachments/Press%20release%20-%2016th%20Special%20Session.pdf> [https://perma.cc/HC4F-4ZLE]; see *infra* Section III.A.1, Figure 3.

37. Raymond Bonner, *A Payoff for Lives Twisted by Gulf War*, N.Y. TIMES, Dec. 17, 1996, at A10, <https://www.nytimes.com/1996/12/17/world/a-payoff-for-lives-twisted-by-gulf-war.html> [https://perma.cc/X8P5-Q92M].

methodologies for addressing mass war claims, with an emphasis on direct reparations for individual victims.³⁸

This Article proposes establishing a similar vehicle for Ukraine—a policy consistent with the Ukrainian government position³⁹ and ongoing international efforts⁴⁰—leveraging core facets of the UNCC approach, including claim classification, damages methodologies and the oil-backed funding mechanism.⁴¹

The critical difference relative to the UNCC—which operated under the U.N. Security Council—is the inability to legally “bind” Russia, which holds a permanent Security Council veto. However, Russian participation can, in effect, be coerced using economic leverage with a combination of measures operable through existing sanctions regimes. While hardly uncomplicated, this approach has the benefit of a transferrable solution that bypasses the Security Council—and the implicit threat of conflict which its power entails.

At present, the pecuniary reality is that sanctions have thinned willing buyers for Russian oil, requiring it to discount each barrel \$20 to \$30—equal to tens of billions annually.⁴² This delta creates room for an integrative solution. As contemplated, Russia could sell its oil at or near market price, subject to a per-barrel levy—without changing its economic position—with the entire transaction collateralized by its frozen reserves, which Russia could eventually see returned, subject to compliance.⁴³

38. Ronald J. Bettauer, *Policy Issues Surrounding the Creation and Operations of the UNCC*, in *WAR REPARATIONS AND THE UN COMPENSATION COMMISSION: DESIGNING COMPENSATION AFTER CONFLICT* 27 (Timothy J. Feighery et al. eds., 2015) [hereinafter UNCC REPARATIONS].

39. See generally Volodymyr Zelensky, President of Ukr., We Urge the Partner States to Recognize that Russia Must Be Held Financially Responsible for the Crimes it Committed (May 20, 2022) (transcript available at <https://www.president.gov.ua/en/news/proponuyemoderzhavam-partneram-viznati-sho-rosiya-povinna-p-75221>) [<https://perma.cc/3M9Q-5UY6>].

40. Such efforts include the International Claims and Reparations Project at Columbia Law School. See *International Claims and Reparations Project*, COLUMBIA L. SCH., <https://icrp.law.columbia.edu/> [<https://perma.cc/TB34-7FDJ>]; Chiara Giorgetti, Markiyana Kliuchkovsky & Patrick Pearsall, *Launching an International Claims Commission for Ukraine*, JUST SEC. (May 20, 2022), <https://www.justsecurity.org/81558/launching-an-international-claims-commission-for-ukraine/> [<https://perma.cc/RR2N-9ZQ2>].

41. See *infra* Section III.B.

42. See *infra* Section IV.A.1, Figures 5–6.

43. This structure is intended to be interoperable with (or without) the oil Price Cap, as defined and discussed *infra* Section IV.A.

In addition to integrative economics, the proposal provides Russia with distinct structural benefits—in many respects paralleling the value a debtor receives from the centralized administrative infrastructure of bankruptcy.⁴⁴ This is particularly significant because, in addition to claims arising from the invasion, Russia is exposed to a host of other liabilities, including a “nightmare” \$40 billion sovereign debt default and high-stakes litigation around the world.⁴⁵ A structured, centralized proceeding can streamline Russia’s otherwise byzantine legal exposure. The alternative may be decades of ferocious, value-destructive litigation—cementing Russia as a “pariah” state excommunicated from the global economy.⁴⁶

The strategy proposed in this Article offers a number of advantages relative to alternatives. First, it bypasses the significant legal and policy challenges associated with seizure of Russian foreign reserves. Second, by leveraging the UNCC’s methodological precedent, it facilitates compensation to *individuals* harmed by Russia’s war. Finally, it provides an integrative long-term solution calibrated towards the complexity, heterogeneity and temporal distinctions of claims through structured cash flows, funded by a levy on Russian oil sales.

At the onset, it is essential to state that there is no way for Russia to truly compensate the victims of its crimes. Dollars do not replace lives; however, they may provide some modicum of justice and the means to rebuild. That consideration fundamentally motivates this Article.

This Article is organized in four parts. Part I provides critical background, presenting damages from war as a set of claims subject to legal remedies, outlining proposals to seize Russian assets, and then taxonomizing those assets—including property of sanctioned individuals, state-owned enterprises, and the central bank. Part II analyzes legal challenges with seizing Russian central bank reserves. It finds existing Presidential authority insufficient absent war or “armed hostilities,” and prospective new legislation unfavorable from a cost-benefit perspective, given constitutional constraints, international law, and highly adverse policy implications. Part III begins with comprehensive background on the UNCC and then presents the Article’s core proposal: a claim resolution facility modeled on that precedent,

44. See *infra* Section IV.B.

45. See *infra* Section III.B.2.b.

46. Harry Robertson, *The White House Says ‘Pariah’ Russia Is Poised to Default on its Bonds, As a Hefty \$100 Million Payment Falls Due and Its Options Run Out*, BUS. INSIDER (May 27, 2022), <https://www.businessinsider.in/investment/news/the-white-house-says-pariah-russia-is-poised-to-default-on-its-bonds-as-a-hefty-100-million-payment-falls-due-and-its-options-run-out/articleshow/91832998.cms> [https://perma.cc/E4T8-MS83].

detailing institutional structure, claim taxonomy, and funding mechanisms, with emphasis on similarities and differences relative to the UNCC. Part IV details reasons for the proposed structure's superiority to potential alternatives, and discusses in detail strategies for incentivizing Russian participation, with an emphasis on economic leverage and structural benefits. The Article concludes by briefly summarizing the advantages of the proposal relative to alternatives.

I. AN "UNLAWFUL" WAR

Russia's February 24, 2022 invasion of Ukraine was swiftly and comprehensively condemned by most nations around the world.⁴⁷ In response, the United States has led a plurality of advanced economies in unleashing a sanctions regime "unprecedented" in "scale and scope" that has effectively excommunicated Russia from the world economy.⁴⁸ These sanctions, as detailed below, have emphasized "freezing" Russian assets around the world, including \$325 billion of its central bank's foreign reserves.⁴⁹

Holding Russia, the aggressor, accountable for damages under international law has come to resemble something of a normative consensus in the United States and similarly-minded nations.⁵⁰ Indeed, most agree on three things: (i) Russia's war is unlawful; (ii) the conflict has caused extraordinary harm to Ukraine and its citizens; and (iii) Russia must be held accountable. The optimal mechanism for achieving this accountability is the salient issue and focus of this Article.

This Part I sets the stage for the Article's broader discussion. It proceeds in three Sections. First, it discusses the damage from Russia's invasion in the context of international law—as legal claims, subject to compensation through reparations. Second, it outlines proposals to seize Russia's central bank reserves for Ukraine's benefit,

47. Press Release, General Assembly, *General Assembly Overwhelmingly Adopts Resolution Demanding Russian Federation Immediately End Illegal Use of Force in Ukraine, Withdraw All Troops*, U.N. Press Release GA/12407 (Mar. 2, 2022); G.A. Res. ES-11/1, *Aggression Against Ukraine* (Mar. 2, 2022); *see also* Feb. 24, 2022 Presidential Remarks, *supra* note 2 (The Russian Federation launched "a brutal assault on the people of Ukraine without provocation [and] without justification," as President Biden aptly put it.).

48. Alan Rappeport, *U.S. Escalates Sanctions with a Freeze on Russian Central Bank Assets*, N.Y. TIMES (Feb. 28, 2022), <https://www.nytimes.com/2022/02/28/us/politics/us-sanctions-russia-central-bank.html> [<https://perma.cc/BCT2-S6WM>].

49. *See infra* Section I.C.

50. *See infra* text accompanying notes 79–92.

put forth by prominent scholars and policymakers, including Professor Larry Tribe and Professor Simon Johnson.⁵¹ Third, it taxonomizes Russian assets “frozen” by sanctions, including property of sanctioned individuals, state-owned enterprises, and the central bank. It then analyzes central bank reserves’ unique legal protections, presents detailed financial analysis regarding reserve composition and geographic distribution, and discusses corresponding implications for asset seizure.

A. Reparations Under International Law

Shortly after Russia’s invasion of Ukraine, the U.N. General Assembly “overwhelmingly adopted” a “resolution demanding the Russian Federation immediately end its invasion” while “[d]eploring in the strongest terms” Russian aggression and violations of the U.N. Charter.⁵² An order from the International Court of Justice (ICJ) calls for Russia to “immediately suspend the military operation.”⁵³

The scale of destruction is almost unimaginable—and extends to not only the government but also millions of individuals.⁵⁴ Ukraine’s economy is expected to contract as much as 45% in 2022—much deeper than the 30% decline America experienced during the Great Depression—with its government running a \$5 billion-a-month deficit and currently undergoing a sovereign debt restructuring.⁵⁵ At present, it is impossible to put a precise value on the claims, but most expect “massive” reconstruction costs⁵⁶ with existing broad-based

51. *See infra* Section I.B.

52. General Assembly, *supra* note 47; G.A. Res. ES-11/1, *supra* note 47.

53. Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Provisional Measures, ¶ 86 (Mar. 16, 2022), <https://www.icj-cij.org/public/files/case-related/182/182-20220316-ORD-01-00-EN.pdf> [<https://perma.cc/Q42M-R48Y>].

54. Marc Santora, *A Capital Draped in Darkness*, N.Y. TIMES (Nov. 2, 2022), <https://www.nytimes.com/2022/11/02/world/europe/ukraine-kyiv-power-darkness.html> [<https://perma.cc/8SA2-8XB6>] (“Failing on the battlefield, President Vladimir V. Putin of Russia has stepped up his campaign to break the nation’s resolve by degrading daily life, with strikes aimed at disabling critical infrastructure like electric power.”)

55. *See* Do Rosario, Campos & Strohecker, *supra* note 9; *see also* *Ukraine’s Sovereign Debt Freeze to Trigger CDS Payments*, *supra* note 9.

56. “Even if hostilities were to end right now, the recovery and reconstruction costs are already massive,” observed IMF Managing Director Kristalina Georgieva, less than one month into the war. *See* Giles, Wheatley & Smith, *supra* note 6.

estimates suggesting figures of \$350 billion,⁵⁷ €200–500 billion,⁵⁸ \$750 billion,⁵⁹ and \$1.36 trillion,⁶⁰ all of which may ultimately prove conservative.⁶¹

Russia's invasion is a violation of international law, both *jus ad bellum*, governing circumstances when a war may be pursued, and *jus in bello*, which concerns conduct during the course of war. Under international law, "Russia incurs state responsibility for all the damage caused by its internationally wrongful act of aggression."⁶² Indeed, "[w]hen Russian forces attack civilians, their homes and businesses, their hospitals and cultural sites, these attacks are illegal twice over"—as independently unlawful means to pursue an unlawful end.⁶³

As scholars have pointed out, "the obligation for states to make reparations for breaches of international law is a fundamental tenet of international law"⁶⁴ established in the seminal *Chorzow Factory* case and subsequent decisions, with reparation damages frameworks broadly not dissimilar from U.S. law analogues.⁶⁵ Thus, the destruction unleashed upon Ukraine constitutes a set of operable legal claims that can be pursued under international law; scholars have argued,

57. World Bank Group [WBG], *Ukraine Rapid Damage and Needs Assessment*, at 10, (Aug. 2022), <http://documents1.worldbank.org/curated/en/099445209072239810/pdf/P17884304837910630b9c6040ac12428d5c.pdf> [https://perma.cc/9CGT-SZ7J].

58. TORBJÖRN BECKER ET AL., CTR. FOR ECON. & POL'Y RSCH., *A BLUEPRINT FOR THE RECONSTRUCTION OF UKRAINE* vii (2022) [hereinafter *UKRAINE BLUEPRINT*], https://cepr.org/system/files/publication-files/147614-a_blueprint_for_the_reconstruction_of_ukraine.pdf [https://perma.cc/48NU-J52K].

59. Sam Fleming, *Ukraine Says National Recovery Plan to Cost \$750bn*, *FIN. TIMES* (July 4, 2022), <https://www.ft.com/content/aa657002-2269-433f-a1e3-cbf98b0aec27> [https://perma.cc/G34S-MBLA] ("Ukraine said it would need \$750bn to fund a national recovery plan.").

60. Viktor Tsyrennikov, *A Trillion-Dollar Question: What Russia Owes Ukraine*, *CEPR: VOXEU* (Apr. 6, 2022), <https://cepr.org/voxeu/columns/trillion-dollar-question-what-russia-owes-ukraine> [https://perma.cc/DJA3-LFUM] (applying a top-down econometric analysis to determine economic loss based on trajectory of GDP growth).

61. See discussion *infra* Section III.B.

62. Haque, *supra* note 14, at 155 ("Russia's act of aggression is the sum of all the acts of violence carried out by its armed forces against Ukraine and its people. . . . These attacks violate both the prohibition of aggression and the basic rules of international humanitarian law.").

63. *Id.*

64. Laurie Blank, *War Reparations for Ukraine: Key Issues*, *JUST SEC.* (May 2, 2022), <https://www.justsecurity.org/81341/war-reparations-for-ukraine-key-issues/> [https://perma.cc/R7UZ-RRUL].

65. *Factory at Chorzów (Ger. v. Pol.)*, Judgment, 1927 P.C.I.J. (ser. A) No. 9, at 21 (July 26).

“Ukraine is entitled to full reparations from Russia”⁶⁶—a position held by Ukraine and many other nations.⁶⁷

Notwithstanding “widespread belief” that perpetrators are seldom held responsible for wartime damages,⁶⁸ the concept of war reparations has a “long history” with numerous twentieth-century examples and an evolving associated body of law.⁶⁹

Traditionally, reparations were paid at the sovereign state level. In the period after World War II, however, there was a “steady evolution towards a parallel focus” on direct reparations to individuals in recognition of the significance of the harm suffered.⁷⁰ Examples include reparations from the 1998–2000 Ethiopia-Eritrea war, Uganda’s intervention in the Democratic Republic of the Congo and—critically, as discussed below—Iraq’s invasion of Kuwait.⁷¹

Such reparations schemes have often been effectuated using international claims commissions—“flexible instruments typically established to resolve mass claims arising from international crises.”⁷² More than 400 international claims commissions have been created in “modern times,”⁷³ starting with those established under the 1794 Jay Treaty between the United States and Great Britain following the Revolutionary War.⁷⁴

For purposes of this analysis, the most significant example may be reparations in connection with Iraq’s Kuwait invasion that were facilitated by the UNCC. Amongst other innovations, the UNCC developed cutting-edge methodology for addressing claims of individual victims.⁷⁵ As discussed below, significant aspects of this Article’s

66. MOISEIENKO, *supra* note 14, at 4; Haque, *supra* note 14, at 155.

67. The EU, for instance, recently passed a Resolution focusing on reparations for Ukraine. See *Committee of Ministers 1442/2.3*, *supra* note 21; see also UKRINFORM, *supra* note 1; discussion *infra* Section I.B.

68. Andrea Gattini, *The UN Compensation Commission: Old Rules, New Procedures on War Reparations*, 13 EUR. J. INT’L L. 161, 161 (2002).

69. See Blank, *supra* note 64.

70. *Id.*

71. See discussion *infra* Section III.A.

72. Giorgetti et al., *supra* note 40.

73. *Id.*

74. MARC WELLER, LAUTERPACHT CTR. FOR INT’L L., UKRAINE OPTIONS PAPER: A RUSSIA-UKRAINE CLAIMS COMMISSIONS AFTER THE ARMED CONFLICT ¶ 10 (2022).

75. See generally Bettauer, *supra* note 38.

proposal are largely based on the UNCC's generally successful precedent.⁷⁶

The UNCC's focus on individuals is critical because, unlike much of the commentary implying a homogenous set of damages suffered by the Ukrainian state, the approach reflects the complex reality on the ground. Russia's objectives may be geopolitical, but its violence is levied upon millions of individuals. It is critical that any plan for reparations includes those most directly suffering the impact of Russia's invasion.

B. Asset Seizure Proposals

Thus far, Ukraine has been able to rely heavily on external, U.S.-led support; however, as domestic issues like inflation and elections increasingly take center stage, many increasingly fear "Kyiv's struggle could become yesterday's news."⁷⁷ Because of this, for both the Ukrainian government as well as its individual citizens, financial considerations are growing increasingly critical. Against that backdrop, scholars and policy makers are grappling with the practical and normative dimensions of holding Russia accountable while ensuring a realistic means of rebuilding Ukraine.⁷⁸

"I think it's very natural that given the enormous destruction in Ukraine and huge rebuilding costs . . . that we will look to Russia to help pay at least a portion of the price," observed Treasury Secretary Janet Yellen.⁷⁹ Reflecting this sentiment, as well as the seeming accessibility of Russian reserves "frozen" by sanctions, prominent scholars, commentators, and policymakers have urged seizure of those

76. See discussion *infra* Section III.B.

77. Hal Brands, *Ukraine's Coming Attack Could Win or Lose the War*, BLOOMBERG (Aug. 2, 2022), <https://www.bloomberg.com/opinion/articles/2022-08-02/ukraine-s-coming-attack-will-win-or-lose-the-war-against-russia?srnd=premium&sref=OOpRUZ8I> [<https://perma.cc/LR3C-48NF>]; *Ukraine Needs the West's Help. But Our Polling Shows a Worrying Trend*, THE ECONOMIST (Mar. 6, 2023), <https://www.economist.com/graphic-detail/2023/03/06/ukraine-needs-the-wests-help-but-our-polling-shows-a-worrying-trend> [<https://perma.cc/3ABF-G636>] ("Americans and Europeans are becoming less enthusiastic about Ukrainian aid.").

78. See Fleming, *supra* note 13 ("one of the most important political questions on the table," according to the EU's highest-ranking diplomat, is "*who is going to pay for the reconstruction of Ukraine?*") (emphasis added).

79. In this interview, Treasury Secretary Yellen also clearly stated that seizing reserves is not legally permissible. Rappeport & Sanger, *supra* note 20; see also discussion *infra* Part II.

assets for Ukraine's benefit,⁸⁰ with variations of such proposals appearing in nearly every major publication worldwide.⁸¹

Perhaps most prominently, Professor Laurence Tribe, a preeminent constitutional scholar, argued powerfully in favor of asset seizure, writing in *The New York Times*:

An obvious solution is staring us in the face: President Biden could liquidate the tens of billions of dollars the Russian central bank has parked in the United States as

80. The critical legal question, discussed *infra* Part II, is whether U.S. law permits the President to seize Russian assets—including vesting title—or to merely “freeze” them through blocking sanctions (which has already occurred). See generally Barry E. Carter & Ryan Farha, *Overview and Operation of U.S. Financial Sanctions, Including the Example of Iran*, 44 GEO. J. INT'L L. 903 (2013) (describing how asset freezes represent a core component of economic sanctions). Vesting corresponds to a permanent change in ownership, allowing for liquidation or transfer of assets. A freeze, in contrast, renders the assets temporarily unusable, but does not change ownership, allowing for the assets to be returned. While in theory, assets could be returned after vesting, that would necessitate a second vesting event, in privity between the recipient and original asset owner. See Paul B. Stephan, *Seizing Russian Assets*, 17 CAP. Mkts. L.J. 276, 276–77 (2022); *infra* text accompanying notes 177–188.

81. See *infra* notes 82–92 and accompanying text; see also Adrian Karatnycky, *Use Seized Russian Assets to Defend Ukraine*, WALL ST. J. (Apr. 10, 2022), https://www.wsj.com/articles/seized-russian-assets-defend-ukraine-moscow-sanctions-currency-war-crimes-economy-11649612933?mod=hp_opin_pos_4#cxrecs_s [<https://perma.cc/5GJ6-37DT>] (arguing that Russia's central bank reserves “should be confiscated and given to Ukraine”); Robert Litan, *Russia Can Be Made to Pay for Ukraine Damage Now*, BLOOMBERG (Mar. 16, 2022), <https://www.bloomberg.com/opinion/articles/2022-03-16/russia-can-be-made-to-pay-for-ukraine-damage-now?sref=OOpRUZ8l> [<https://perma.cc/JB6S-HJVK>] (“In effect, reparations for the Ukrainian invasion have been *pre-funded* by Russia itself.”); Jillian Kay Melchior, *Will Russia Pay for Ukraine's War Damage?*, WALL ST. J. (June 28, 2022), https://www.wsj.com/articles/will-russia-pay-for-ukraines-war-damage-explosion-kyiv-analysts-damage-bomb-invasion-11656434219?mod=hp_opin_pos_6#cxrecs_s [<https://perma.cc/54DP-98XN>]; *Seizing Opportunities*, THE ECONOMIST, June 11, 2022, at 69; Anton Moiseienko, *Russian Assets, Accountability for Ukraine, and a Plea for Short-Term Thinking*, EJIL: TALK! (Mar. 5, 2022) [hereinafter Moiseienko, *Russian Assets*], <https://www.ejiltalk.org/russian-assets-accountability-for-ukraine-and-a-plea-for-short-term-thinking/> [<https://perma.cc/2SCK-EMW6>]; Anton Moiseienko, *Politics, Not Law, Is Key to Confiscating Russian Central Bank Assets*, JUST SEC. (Aug. 17, 2022) [hereinafter Moiseienko, *Politics, Not Law*], <https://www.justsecurity.org/82712/politics-not-law-is-key-to-confiscating-russian-central-bank-assets/> [<https://perma.cc/88U5-LP7G>]; Robert B. Zoellick, *Russian Cash Can Keep Ukraine Alive This Winter*, WALL ST. J. (Oct. 26, 2022), <https://www.wsj.com/articles/russian-cash-can-keep-kyiv-alive-putin-war-of-aggression-frozen-reserves-group-of-seven-negotiations-europe-11666790591> [<https://perma.cc/C5FP-SUBH>]. But see FT Editorial Board, *Russian Asset Seizures Must Follow the Law*, FIN. TIMES (June 5, 2022), <https://www.ft.com/content/30d3a780-633e-4b06-b9bc-ed3fc608ff98> [<https://perma.cc/X2ES-DPK4>] (cautioning that while “[t]he moral case for ensuring the ‘aggressor pays’ is powerful . . . [t]o retain the moral high ground . . . the democracies backing Ukraine must follow due process and the rule of law.”).

part of its foreign exchange reserves; by some estimates, those funds may total as much as \$100 billion.⁸²

Former World Bank President Robert Zoellick concurred, writing in a *Wall Street Journal* op-ed: “After granting almost \$60 billion for Ukraine, Congress and the public can reasonably ask why the U.S. shouldn’t transfer Russian money to Ukraine” in the form of reserves.⁸³ In a similar vein, Professor Simon Johnson of MIT, the former IMF Chief Economist, and Professor Philip Zelikow of the University of Virginia have argued that the “Russian central bank and other state-related accounts” represent a “clear and appropriate” source of funding that “should be deployed as compensation for the damage caused by Russian aggression.”⁸⁴ Professors Johnson and Zelikow further argue that while it “may seem like a dramatic proposal . . . this is completely consistent with international norms and rules.”⁸⁵

Josep Borrell, the EU’s top foreign policy representative, echoed the sentiment, describing the use of Russian reserves to fund Ukrainian reconstruction as “full of logic.”⁸⁶ Analogizing the seizure of “frozen” Russian central bank assets to U.S. action in respect of Afghan central bank deposits, Mr. Borrell has argued for a similar approach here: “We have the money in our pockets, and someone has to explain to me why it is good for the Afghan money and not good for the Russian money.”⁸⁷

The head of the European Council, Charles Michel, concurred: “[I]t is extremely important not only to freeze assets, but also to make it possible to confiscate them, to make them available for rebuilding

82. Laurence H. Tribe & Jeremy Lewin, *\$100 Billion. Russia’s Treasure in the U.S. Should Be Turned Against Putin*, N.Y. TIMES (Apr. 15, 2022) <https://www.nytimes.com/2022/04/15/opinion/russia-war-currency-reserves.html> [<https://perma.cc/77QM-TT7B>].

83. Zoellick, *supra* note 81.

84. Philip Zelikow & Simon Johnson, *How Ukraine Can Build Back Better*, FOREIGN AFFS. (Apr. 19, 2022), <https://www.foreignaffairs.com/articles/ukraine/2022-04-19/how-ukraine-can-build-back-better> [<https://perma.cc/XHP9-QPWF>].

85. *Id.*

86. Fleming, *supra* note 13 (noting proposals that “E.U. capitals should consider seizing frozen Russian foreign exchange reserves to cover the costs of rebuilding Ukraine after the war, [Borrell] said”); *see* discussion *infra* Section II.A.3 (discussing Afghanistan reserves).

87. *See* Fleming, *supra* note 13.

Ukraine.”⁸⁸ “The idea has gained support from politicians everywhere from Canada to Germany,” according to *The Economist*.⁸⁹

A joint statement by the Ministers of Finance of Estonia, Latvia, Lithuania, and Slovakia also called for Russia’s frozen assets—including central bank reserves—“to be used as one of the main sources for Ukraine’s post-war reconstruction.”⁹⁰ Ukraine has indicated that it is well on board.⁹¹

Unsurprisingly, Russian Deputy Foreign Minister Alexander Grushko described the proposals as “total lawlessness [and] destruction of the very foundations of international relations,” arguing that seizing Russia’s reserves would “harm the Europeans themselves, the modern financial system and trust in Europe and the west in general.”⁹² “We’re talking about an international act of thievery, in violation of everything,” per Kremlin spokesman Dmitry Peskov.⁹³

C. “Frozen” Russian Assets

A key feature of the sanctions regime promulgated by the United States and its allies⁹⁴ has been an emphasis on “freezing”—or, more formally, “blocking”⁹⁵—Russian assets situated abroad,

88. *Seizing Opportunities*, *supra* note 81; see also Charles Michel, *Interview*, INTERFAX-UKRAINE (May 5, 2022), <https://en.interfax.com.ua/news/interview/829655.html> [<https://perma.cc/3XW9-RUYN>].

89. *Seizing Opportunities*, *supra* note 81, at 69.

90. *Minister of Finance G. Skaistè: Russia’s Frozen Assets Should Be Used For The Reconstruction Of Ukraine*, News, MINISTRY FIN. REP. LITH. (May 24, 2022), <https://finmin.lrv.lt/en/news/minister-of-finance-g-skaiste-russias-frozen-assets-should-be-used-for-the-reconstruction-of-ukraine> [<https://perma.cc/6TLK-HJYE>].

91. See discussion *supra* Part I.

92. See Fleming, *supra* note 13.

93. Nardelli et al., *supra* note 21.

94. The sanctions have been described as the “financial equivalent of ‘shock and awe’ tactics.” Larsen, *supra* note 16. Though less than crystalline, the goals of the sanctions have been, broadly, to punish Russia while also “weakening” its ability to wage war. Olivier Knox, *The United States Has a Big New Goal in Ukraine: Weaken Russia*, WASH. POST (Apr. 26, 2022), <https://www.washingtonpost.com/politics/2022/04/26/us-has-big-new-goal-ukraine-weaken-russia/> [<https://perma.cc/FWY9-8TNU>]. But see Carol E. Lee et al., *When the Secretaries of Defense and State Said Publicly the United States Wants Ukraine to Win and Weaken Russia, Biden Said Tone It Down*, NBC (June 16, 2022), <https://www.nbcnews.com/politics/national-security/secretaries-defense-state-said-publicly-us-wanted-ukraine-win-biden-sa-rcna33826> [<https://perma.cc/NR5E-9X3B>].

95. See *infra* Section I.C.3.b.

particularly in the United States and other G7 nations.⁹⁶ Given the consensus around the illegality of Russia's war and the extent of damages inflicted upon Ukraine, scholars and policymakers have proposed different means of holding Russia accountable, including through reparations funded with Russian assets. The stock of such assets broadly consists of three core categories:

- 1) Oligarch Assets (as defined below) belonging to sanctioned individuals, estimated to total up to \$30 billion;⁹⁷
- 2) Russian State-Owned Enterprises' (as defined below) assets, which, as discussed below, are unlikely to offer much recoverable value; and
- 3) the Russian Central Bank's foreign reserves subject to sanctions, which total about \$325 billion.⁹⁸

Because they represent the largest grouping of assets, Russia's Central Bank reserves are generally the focus of this analysis. The other two categories are briefly presented to highlight key legal distinctions and to illustrate the insufficiency of those assets relative to the scale of Ukraine's needs. As discussed in Part II, the proposals contemplated by scholars require going a step beyond "freezing" to asset seizure, which implicates new and complex legal issues.

1. Oligarch Assets

Along with the Russian state and its instrumentalities, the United States and its allies have sanctioned a significant number of Russian nationals with alleged ties to the Putin regime. Many of these individuals—often referred to as "oligarchs"⁹⁹—built great wealth

96. See *infra* notes 142–146; Haque, *supra* note 14, at 158; Chachko & Heath, *supra* note 17, at 135–36.

97. Fact Sheet, *President Biden's Comprehensive Proposal to Hold Russian Oligarchs and Elites Accountable*, WHITE HOUSE PRESS RELEASES (Apr. 28, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/04/28/fact-sheet-president-bidens-comprehensive-proposal-to-hold-russian-oligarchs-accountable/> [https://perma.cc/UB7G-24E7].

98. See *infra* Figure 2.

99. Greg Rosalsky, *How 'Shock Therapy' Created Russian Oligarchs and Paved the Path for Putin*, NPR (Mar. 22, 2022), <https://www.npr.org/sections/money/2022/03/22/1087654279/how-shock-therapy-created-russian-oligarchs-and-paved-the-path-for-putin> [https://perma.cc/B7QY-9PD4]. H.R. 6930 describes the individuals as "foreign persons whose wealth is derived in part through corruption linked to or political support for the regime of Russian President Vladimir Putin." Asset Seizure for Ukraine Reconstruction Act, H.R. 6930, 117th Cong. § 2(1) (2022), <https://www.congress.gov/bill/117th-congress/house-bill/6930> [https://perma.cc/NC2W-HDLX].

during Russia's turbulent *perestroika* years of the 1990s and began investing heavily in the West (such assets, "Oligarch Assets").¹⁰⁰ Pursuant to sanctions, authorities around the world¹⁰¹ have "frozen" Oligarch Assets with a high-profile haul¹⁰² including yachts "resembling floating fortresses," private jets, and luxury real estate.¹⁰³

Because the assets are private property, the legal considerations involved with seizure are distinct from those concerning assets of the Russian state. In the United States, the primary legal mechanism involved has been civil forfeiture, which allows for pre-judgment confiscation of assets with a sufficient nexus to criminal activity.¹⁰⁴ Vesting of title, however, requires a lengthier judicial process. An initial proposal to expedite matters was quickly shelved after the American Civil Liberties Union (ACLU) deemed it "so unconstitutional that . . . a sanctioned Russian national could win in an American court."¹⁰⁵ Subsequently, the House passed a "mostly symbolic"¹⁰⁶ "sense of Congress" measure encouraging the President to "take all constitutional steps to seize and confiscate" Oligarch Assets under U.S. jurisdiction.¹⁰⁷ Reflecting similar constraints, a number of prominent oligarchs have challenged and sought to reverse EU-issued measures against them, notwithstanding a "high" threshold for sanctions relief.¹⁰⁸

100. Rosalsky, *supra* note 99.

101. Fact Sheet, *supra* note 97.

102. Matthew Goldstein, *Seizing an Oligarch's Assets Is One Thing. Giving Them to Ukraine Is Another*, N.Y. TIMES (May 8, 2022), <https://www.nytimes.com/2022/05/08/business/russia-oligarch-yacht-assets.html> [<https://perma.cc/J89R-8QZT>].

103. Casey Michel, *Seizing Yachts was a Good Start. Here Are Some Other Places Russian Oligarchs Stash Their Cash*, CNN (Apr. 28, 2022), <https://www.cnn.com/2022/04/26/opinions/sanctions-russia-ukraine-oligarchs-michel/index.html> [<https://perma.cc/CR8L-6Q3N>].

104. See MOISEIENKO, *supra* note 14, at 34–38 (describing private asset seizure in various relevant jurisdictions).

105. Jeff Stein, *ACLU Helped Defeat Plan to Seize Russian Oligarchs' Funds For Ukraine*, WASH. POST (Apr. 8, 2022), <https://www.washingtonpost.com/us-policy/2022/04/08/aclu-ukraine-russia-oligarchs/> [<https://perma.cc/T7BH-DS2A>].

106. Catie Edmondson, *House Passes Bill Urging Biden to Sell Seized Russian Yachts to Aid Ukraine*, N.Y. TIMES (Apr. 27, 2022), <https://www.nytimes.com/2022/04/27/us/politics/biden-russia-sanctions.html> [<https://perma.cc/3STZ-YDP4>].

107. Asset Seizure for Ukraine Reconstruction Act, H.R. 6930, 117th Cong. § 2(1) (2022), <https://www.congress.gov/bill/117th-congress/house-bill/6930> [<https://perma.cc/NC2W-HDLX>].

108. Sara Ruberg & Max Colchester, *Roman Abramovich, Other Sanctioned Russian Oligarchs Fight Back in Court*, WALL ST. J. (July 16, 2022),

Beyond legal issues, a practical limitation is that the realized proceeds from these illiquid, idiosyncratic assets are likely to be much lower than the \$30 billion headline figure.¹⁰⁹ Scholars broadly agree that the Oligarch Assets are “insufficient for [the] task”¹¹⁰ of rebuilding Ukraine.¹¹¹

2. State-Owned Enterprises

As a controlled economy, Russia is characterized by significant government involvement in markets, with many large entities exhibiting varying levels of state ownership or control (such entities, “State-Owned Enterprises,” or SoE).¹¹² For example, the Russian government controls the two largest energy companies—natural gas giant Gazprom, and its oil-focused counterpart, Rosneft, each with revenues

<https://www.wsj.com/articles/roman-abramovich-other-sanctioned-russian-oligarchs-fight-back-in-court-11657978210> [<https://perma.cc/4VNG-NP9P>].

109. Thomas Franck, *DOJ Says the U.S. and Allies Have Frozen \$30 Billion of Russian Elites’ Assets, \$300 Billion of Moscow Bank Funds*, CNBC (June 29, 2022), <https://www.cnbc.com/2022/06/29/doj-says-allies-have-frozen-30-billion-of-russian-oligarch-assets.html> [<https://perma.cc/LQF8-3RZU>]. The relatively low recovery is a function of a thin market—in many respects, megayachts are not unlike bespoke monogrammed clothing—and significant upkeep costs including ship brokers, crew wages, shipyards and maintenance. See *JPMorgan Forces Sale of Russian Oligarch’s Megayacht*, CNN BUS. (Aug. 24, 2022), <https://www.cnn.com/2022/08/24/investing/superyacht-russian-oligarch-auction/index.html> [<https://perma.cc/7M2Y-7XLT>].

110. Paul Stephan, *Response to Philip Zelikow: Confiscating Russian Assets and the Law*, LAWFARE (May 13, 2022), <https://www.lawfareblog.com/response-philip-zelikow-confiscating-russian-assets-and-law> [<https://perma.cc/4HET-W926>].

111. This proposition is further reinforced by limited distributable proceeds from the early sales of oligarch assets. For instance, the August 2022 sale of \$75 million Axioma megayacht—believed to be the first such transaction—ultimately fetched just \$37.5 million, and was “not sold for the benefit of the Ukrainian people but for a US investment bank, JP Morgan, which claims [the owner] owes it €20.5m.” Rupert Neate, *Russian Oligarch’s Seized Superyacht Sold for \$37.5m*, THE GUARDIAN (Sept. 27, 2022), <https://www.theguardian.com/news/2022/sep/27/axioma-russian-oligarch-seized-superyacht-sold-gibraltar> [<https://perma.cc/CTF7-QGXP>]. Further, because “the ship broker, crew wages, the shipyard and maintenance would need to be paid ahead of the bank,” any distributable value is likely to be minimal. *JPMorgan Forces Sale of Russian Oligarch’s Megayacht*, CNN (Aug. 24, 2022), <https://www.cnn.com/2022/08/24/investing/superyacht-russian-oligarch-auction> [<https://perma.cc/2LP4-WCUE>].

112. See Alexander Abramov, *State-Owned Enterprises in the Russian Market*, RUSSIAN J. ECON., at 20–21 (2017) (finding that in 2014, Russian SoEs represented 39.3% of market capitalization and 30% of GDP). See generally Hans Christiansen, *The Size and Composition of the SOE Sector in OECD Countries*, (OECD Working Paper No. 5, 2011) (describing methodological and definitional distinctions in characterizing SoEs).

exceeding \$100 billion—as well as the two largest banking groups, Sberbank and VTB,¹¹³ both of which have been sanctioned.¹¹⁴

Notwithstanding their vast size—and potentially firmer legal basis for seizure relative to Oligarch Assets and central bank reserves¹¹⁵—the Russian SoEs are unlikely to yield meaningful recoverable assets. This is because in the years leading up to the invasion, Russia took careful steps to reduce the effectiveness of future sanctions, including amending its debt contracts and paring back the SoEs' foreign exposures.¹¹⁶ For instance, after sanctions were enacted following Russia's 2014 annexation of Crimea, VTB sold its New York-based subsidiary,¹¹⁷ while Rosneft exited its Venezuela operations to avoid running afoul of U.S. sanctions against that state.¹¹⁸

Russia's SoEs have remained more active in Europe, in large part because Russia is the block's largest supplier of energy, and of natural gas in particular.¹¹⁹ However, the SoEs' European subsidiaries

113. *The Global 2000*, FORBES (2022), <https://www.forbes.com/lists/global2000/?sh=c42c87a5ac04> [<https://perma.cc/6YX9-UBMD>] (listing Gazprom and Rosneft as the two largest companies, and Sberbank and VTB as the two largest banks).

114. OFAC Russian Harmful Foreign Activities Sanctions Regulations, Authorizing Transactions Related to Dealings in Certain Debt Or Equity, Gen. License No. 9A (Mar. 2, 2022), https://home.treasury.gov/system/files/126/russia_gl9a.pdf [<https://perma.cc/U8F7-TSGK>]; see also Lev E. Breydo, *Political Default. The Implications of Weaponizing Global Financial Infrastructure*, 56 U.C. DAVIS L. REV. ONLINE 53 (2023).

115. This is because “[s]overeign immunities do not apply to property used for commercial purposes, which means that some Russian state-owned property could be amenable to seizure, such as assets of Russian state-owned enterprises,” if a “sufficient connection to the Russian state” can be demonstrated, which appears highly feasible given Gazprom and Rosneft's well-documented roles as instruments of state power also engaging in commercial activity. MOISEIENKO, *supra* note 14, at 25.

116. Lev E. Breydo, *Russia's Roulette. Sanctions, Strange Contracts & Sovereign Default*, 60 SAN DIEGO L. REV. (forthcoming Winter 2023) (Part II) (describing contractual sanctions defenses).

117. *Russian Bank VTB Sells Its U.S. Business to Its Executives*, REUTERS, (Sept. 3, 2018), <https://www.reuters.com/article/us-russia-banks-vtb/russian-bank-vtb-sells-its-u-s-business-to-its-executives-idUSKCN1LJ1M1> [<https://perma.cc/B6ZS-DQMG>] (“Following the deal . . . there will be no direct VTB's presence in the United States.”)

118. Gabrielle Tétrault-Farber & Olesya Astakhova, *Rosneft Sells Venezuelan Assets to Russia After U.S. Sanctions Ramp Up*, REUTERS (Mar. 28, 2022), <https://www.reuters.com/article/us-russia-rosneft-venezuela/rosneft-sells-venezuelan-assets-to-russia-after-u-s-sanctions-ramp-up-idUSKBN21F0W2> [<https://perma.cc/6Q24-B5T9>].

119. Tom Wilson, *‘There Is Nothing Else Out There’: Why Europe Is Hooked on Russian Gas*, FIN. TIMES (Apr. 7, 2022), <https://www.ft.com/content/20987a87-1b87-4f45-ab00-722f9ddcd2eb> [<https://perma.cc/96XW-HNX2>].

do not appear to hold meaningful assets.¹²⁰ In fact, many, like Sberbank's Austrian unit¹²¹ and Gazprom's large German gas trading subsidiary, have already failed.¹²² Others may require bailouts, including Gazprom's UK business, which provides gas to a fifth of British companies.¹²³

That being said, while unlikely to be a direct source of recoverable assets, Russian SoEs' operations may provide a vehicle for effectuating the proposed reparation structure described in Part III.

3. Central Bank Reserves

Prior to the invasion of Ukraine, Russia built a literal war chest of multi-currency foreign reserves¹²⁴—a stockpile *The Economist* gauged to be “more than enough to weather sanctions.”¹²⁵ As shown in Figure 1 below,¹²⁶ Russia's total reserves peaked at \$640 billion

120. There have been limited exceptions, including Austria seizing storage assets, 11% Gazprom-owned, and Ukraine seizing \$71 million of assets. Marton Eder, *Austria Seizes Gas Storage Space Left Empty by Russia's Gazprom*, BLOOMBERG (July 6, 2022), <https://www.bloomberg.com/news/articles/2022-07-06/austria-seizes-gas-storage-space-left-empty-by-russia-s-gazprom?sref=OOpRUZ8l> [<https://perma.cc/4H9E-FVJ8>]; *Ukraine Seizes \$71 mln of Assets Owned by Russian State Companies*, REUTERS (July 8, 2022), <https://www.reuters.com/world/europe/ukraine-seizes-71-mln-assets-owned-by-russian-state-companies-2022-07-08/> [<https://perma.cc/UET4-HWBH>].

121. Martin Arnold & Nastassia Astrasheuskaya, *Sberbank's Austrian Unit is First Bank to Fail After Sanctions on Moscow*, FIN. TIMES (Mar. 2, 2022), <https://www.ft.com/content/7cc30484-9fc1-4bdf-8fd4-51409f82da1f> [<https://perma.cc/ZK2W-S7HM>].

122. Guy Chazan, Gill Plimmer & David Sheppard, *Seized Gazprom Division to Keep Paying Bonuses After €10Bn German Bailout*, FIN. TIMES (June 29, 2022), <https://www.ft.com/content/3911551b-8472-4d09-9c7a-692cf51d0c90> [<https://perma.cc/4FPA-PEWV>].

123. *UK Government Prepares to Rescue Gazprom's British Energy Unit*, FIN. TIMES (Mar. 21, 2022), <https://www.ft.com/content/63d3d214-bb35-421b-a26c-02d8754566e5> [<https://perma.cc/W4L7-BGKV>].

124. *International Reserves of the Russian Federation*, BANK OF RUSSIA (Feb. 1, 2022), https://cbr.ru/eng/hd_base/mrrf/mrrf_m/ [<https://perma.cc/RQ39-FU9V>].

125. *A War in Ukraine Could Have Global Consequences*, THE ECONOMIST (Jan. 28, 2022), <https://www.economist.com/leaders/2022/01/29/a-war-in-ukraine-could-have-global-consequences> [<https://perma.cc/FHWS-ZD7R>].

126. Based on Russian Central Bank data. See *International Reserves of the Russian Federation*, *supra* note 124.

shortly before the February 2022 invasion, denoted by the red oval, and subsequently declined to about \$586.1 billion by July 2022.¹²⁷

Figure 1. Aggregate Russian Foreign Reserves



Multilateral sanctions have “frozen” about \$325 billion of these reserves, representing the largest category of Russian assets abroad.¹²⁸ The size and seeming availability of these assets has led to widespread calls for seizing Russia’s foreign reserves to provide restitution for Ukraine.¹²⁹

a. What are Central Bank Reserves?

A central bank, such as the U.S. Federal Reserve, represents a nation’s core monetary authority, with primary responsibility for the supply of money and management of short-term interest rates, along with oftentimes secondary prudential and supervisory functions.¹³⁰ Central banks’ economically foundational role has traditionally

127. *Id.* This drop likely reflects a combination of market declines and asset utilization, including debt payments. Most of the holdings of Russia’s central bank are in government securities.

128. *See infra* Figure 2.

129. *See supra* Section I.B.

130. *See generally* Morgan Ricks, *Money as Infrastructure*, 2018 COLUM. BUS. L. REV. 757; DAVID ARCHER, ROLES AND OBJECTIVES OF MODERN CENTRAL BANKS, BANK FOR INT’L SETTLEMENTS (2004), https://www.bis.org/publ/othp04_2.pdf [<https://perma.cc/GQ97-H9S8>].

justified distinctive treatment from regulatory and diplomatic perspectives.¹³¹

For emerging market central banks, like Russia's, foreign exchange reserves are an "integral part of. . . [the] policy toolkit,"¹³² particularly with respect to maintaining currency stability. From that vantage point, central bank reserves can be viewed less as a medium of exchange or a store of value—though, they are those things, too—but fundamentally closer to a set of macroeconomic management tools.¹³³

In the "policy toolkit" context, foreign reserve assets have their highest utility—particularly in respect of currency management—when denominated in different currencies and situated abroad.¹³⁴ Though numerous central banks offer the requisite services,¹³⁵ the Federal Reserve Bank of New York is by far the largest destination,¹³⁶ holding \$3.3 trillion of reserves on behalf of 250 foreign central banks and governments.¹³⁷ The New York Fed's dominance in this particular niche creates significant economies of scale and valuable network effects. In Russia's case, this dynamic also left the reserves unexpectedly exposed to sanctions, as discussed below.

131. By way of analogy, if banks' unique economic role makes them "special" from a regulatory perspective, central banks' economically foundational function means they are far more so. See generally E. GERALD CORRIGAN, *FED. RESERVE BANK OF MINNEAPOLIS, ARE BANKS SPECIAL?* (1983); E. Gerald Corrigan, *Are Banks Special? A Revisitation*, *FED. RESERVE BANK OF MINNEAPOLIS* (Mar. 1, 2000), <https://www.minneapolisfed.org/article/2000/are-banks-special> [<https://perma.cc/DTK3-FL3A>]; Thomas Huertas, *Are Banks Still Special?*, 5 *J. FIN. PERSP.* 2 (2018) (describing central banks as "bankers' banks").

132. Jochen Schanz, *Reserve Management in Emerging Market Economies: Trends and Challenges*, *BANK FOR INT'L SETTLEMENTS*, at 45 (2019).

133. See Breydo, *supra* note 114 (discussing macroeconomic implications of sanctions).

134. "Although a country can hold foreign reserves in its own banks, governments often choose to keep their reserves overseas to avoid costly cross-border transactions and gain direct access to foreign currency and debt markets." See Nicolas Gordon, *Banks Are Stopping Putin From Tapping a \$630 Billion War Chest Russia Stockpiled Before Invading Ukraine*, *FORTUNE* (Mar. 3, 2022), <https://fortune.com/2022/03/03/russia-sanctions-central-bank-ruble-us-eu-foreign-reserves/> [<https://perma.cc/K72B-WLZR>].

135. These include the Bank of England, Banque de France, Bundesbank (Germany), Bank of Japan, Bank of Canada, Reserve Bank of Australia, People's Bank of China, and the Bank of Korea.

136. Ingrid Wuerth, *Immunity From Execution Of Central Bank Assets*, in *THE CAMBRIDGE HANDBOOK OF IMMUNITIES & INTERNATIONAL LAW* 266, 267 (Tom Ruys & Nicolas Angelet eds., 2019).

137. Jonathan Spicer, *Special Report: How the Federal Reserve Serves U.S. Foreign Intelligence*, *REUTERS* (June 26, 2017), <https://www.reuters.com/article/us-fed-accounts-intelligence-specialrepo/special-report-how-the-federal-reserve-serves-u-s-foreign-intelligence-idUSKBN19H198> [<https://perma.cc/79WM-D3H2>].

Because of their geographic disposition and unique functions in international macroeconomics, central bank reserves enjoy a “very high level of protection under the doctrine of foreign sovereign immunity.”¹³⁸ As documented by Professor Wuerth, the “past two decades have been characterized by an overall . . . trend toward more generous immunity from execution for foreign central bank property.”¹³⁹ In the United States, the Foreign Sovereign Immunities Act of 1976¹⁴⁰ specifically protects assets of a central bank “held for its own account,” subject to certain limited exceptions.¹⁴¹

b. Sanctioned Russian Reserves

In many ways reflecting a testament to the strength of global financial infrastructure, despite growing tensions leading up to the invasion of Ukraine, Russia nonetheless felt comfortable leaving over \$300 billion abroad, including \$40 billion in the United States, relying on the special protections afforded to central bank reserves.

On February 28, 2022, the United States and EU issued multi-lateral sanctions prohibiting financial intermediaries from transacting with or on behalf of Russia’s central bank.¹⁴² Because, as a practical and technical matter, utilization of reserve assets held abroad necessitates working with financial intermediaries, this, in effect, precluded Russia’s use of over \$325 billion of foreign reserves held within the

138. Ingrid Wuerth, *Does Foreign Sovereign Immunity Apply to Sanctions on Central Banks?*, LAWFARE (Mar. 7, 2022), <https://www.lawfareblog.com/does-foreign-sovereign-immunity-apply-sanctions-central-banks> [https://perma.cc/5LQ3-8EPE].

139. The United States falls towards the middle of that “spectrum,” protecting the property of a foreign central bank “held for its own account,” but subject to certain limited exceptions. Wuerth, *supra* note 136, at 271.

140. FSIA sets forth the scope of immunity for foreign sovereigns while also providing the primary jurisdictional vehicle for asserting claims against such entities. Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1330, 1391(f), 1441(d), 1602–11 (1976).

141. 28 U.S.C. § 1611(b) (“[T]he property of a foreign state shall be immune from attachment and from execution, if . . . the property is that of a foreign central bank or monetary authority held for its own account.”).

142. The United States also prohibited transactions with respect of Russia’s Ministry of Finance and National Wealth Fund. OFAC Dir. 4 Under Exec. Order 14,024, Prohibitions Related to Transactions Involving the Central Bank of the Russian Federation, the National Wealth Fund of the Russian Federation, and the Ministry of Finance of the Russian Federation (Feb. 28, 2022); *see also* Chad P. Bown, *Russia’s War on Ukraine: A Sanctions Timeline*, PETERSON INST. FOR INT’L ECONS. (May 8, 2023, 1:30 PM), <https://www.piie.com/blogs/realtime-economics/russias-war-ukraine-sanctions-timeline> [https://perma.cc/44AQ-KLBT].

G7.¹⁴³ “The crux of why the Western allies have such leverage comes down to a reality of the modern financial system: Although Russia’s central bank owns the assets, it doesn’t control them.”¹⁴⁴

Because the sanctions operate in respect of financial intermediaries,¹⁴⁵ there is no “privity” between the sanctions and the assets themselves.¹⁴⁶ Because of this, “hindered” or “blocked” is more terminologically accurate than “frozen,” which this Article nonetheless uses for convenience and familiarity.

The table below details Russia’s foreign reserve composition by geography, as of January 1, 2022, the latest date for which the information is available.¹⁴⁷

143. See Claire Jones & Joseph Cotterill, *Russia’s FX Reserves Slip from Its Grasp*, FIN. TIMES (Feb. 28, 2022), <https://www.ft.com/content/526ea75b-5b45-48d8-936d-dcc3cec102d8> [<https://perma.cc/UV2B-NYH6>].

144. Patricia Cohen & Jeanna Smialek, *The West’s Plan to Isolate Putin: Undermine the Ruble*, N.Y. TIMES (Feb. 28, 2022), <https://www.nytimes.com/2022/02/28/business/russia-sanctions-central-bank-ruble.html> [<https://perma.cc/23ZS-M4HE>].

145. *Could Seizing Russian Assets Help Rebuild Ukraine?*, THE ECONOMIST, (June 6, 2022), <https://www.economist.com/finance-and-economics/2022/06/06/could-seizing-russian-assets-help-rebuild-ukraine> [<https://perma.cc/6MAM-QGWL>]; *Seizing Opportunities*, *supra* note 81, at 69–70.

146. *Could Seizing Russian Assets Help Rebuild Ukraine?*, *supra* note 145 (noting that Russia’s reserves are “‘hindered’, not technically frozen: transactions with the central bank are prohibited, but its funds are not legally blocked. That means Western countries are an extra step away from being able to seize the money.”).

147. *International Reserves of the Russian Federation*, *supra* note 124.

Figure 2. Russian Central Bank Reserves: Geographic & Sanctions Summaries

Russian Central Bank Reserves: Geographic Summary (January 1, 2022)

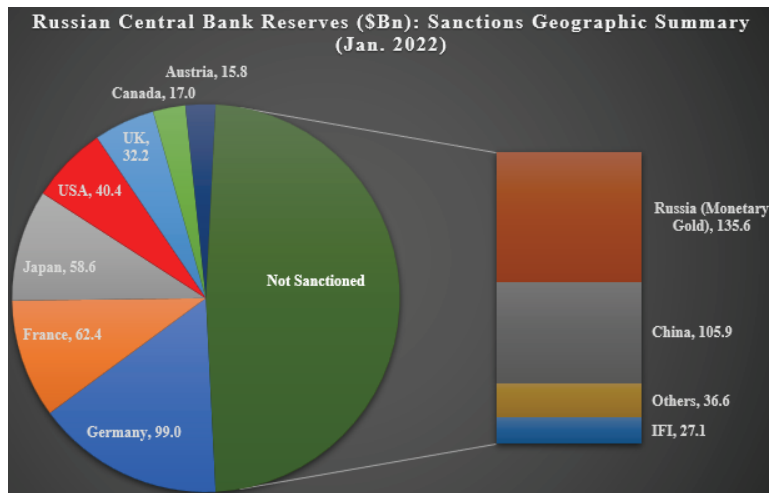
Country	SBn USD	% Total ¹	% Under Sanctions
<i>Non-Sanctioned Foreign Reserves:</i>			
Monetary Gold (Russia)	135.6	21.5%	
China	105.9	16.8%	
Others ²	36.6	5.8%	
International Financing Institutions ³	27.1	4.3%	
Non-Sanctioned Sub-Total	305.2	48.4%	
<i>Sanctioned Foreign Reserves:</i>			
Germany	99.0	15.7%	30.4%
France	62.4	9.9%	19.2%
Japan	58.6	9.3%	18.0%
USA	40.4	6.4%	12.4%
UK	32.2	5.1%	9.9%
Canada	17.0	2.7%	5.2%
Austria	15.8	2.5%	4.8%
Sanctioned Sub-Total	325.4	51.6%	
Russian Foreign Reserves Total⁴	630.6		

¹ Percentage allocations based on Russia Central Bank 2021 Report, published April 2022.

² Conservatively presumed not subject to sanctions given universe of nations effectuating sanctions regime. Switzerland presents one potential exception; however, the amount (if any) of assets held there is unknown.

³ While the IMF has indicated certain limitations on Russia's utilization of Fund membership benefits, the associated assets do not appear subject to formal sanctions.

⁴ Total based on weekly reserves data from Russian Central Bank.



The data above provides three important takeaways. First, slightly over half of Russian reserves are subject to sanctions—a total of about \$325.4 billion, out of \$630.6 billion, as of January 1, 2022.¹⁴⁸ The balance is largely held by Russia domestically, in the form of gold, or in China, which has declined to participate in sanctions against Russia.¹⁴⁹ The size—and seeming availability—of the sanctioned asset base has made the reserves a logical target, leading many commentators to call for seizing the assets for Ukraine’s benefit and reconstruction.¹⁵⁰

Second, the sanctioned assets are situated in seven nations, with Germany, France and Japan holding over \$220 billion, about 67% of the total. Russia’s choice of these three nations is unsurprising, given long-standing energy ties and political relationships.¹⁵¹ Thus, along with the respective nations’ consent, any action to seize Russian reserves would at minimum be subject to the laws of the individual jurisdictions, which vary on both the legality of the matter as well as associated political considerations.

Finally, because of this geographic diffusion, the United States holds, at most, \$40 billion of assets¹⁵²—6.4% of the total and 12.4% of sanctioned assets—not insignificant, but also a far cry from both the

148. Notably, in the years leading up to the invasion, Russia generally rotated out of USD-denominated assets, largely in favor of Yuan-assets.

149. *China Will Not Join Sanctions on Russia, Banking Regulator Says*, REUTERS (Mar. 2, 2022), <https://www.reuters.com/markets/europe/china-banking-regulator-sees-limited-impact-sanctions-russia-2022-03-02/> [<https://perma.cc/7GUQ-9C7U>] (“China, which has refused to condemn Russia’s invasion of Ukraine, has repeatedly criticized what it calls illegal and unilateral sanctions.”).

150. *See supra* Section I.B. These calls, as discussed below, have been less than crystal-line in respect of the specific disposition mechanisms.

151. Notably, in the last six months of 2021—as its troops were massing on Ukraine’s border—Russia shifted a significant portion of its reserves to Germany. While less reliant on Russian energy, France has longstanding political links to Russia, particularly Marine Le Pen’s National Front, the current leading opposition party. *See* Ania Nussbaum, *Marine Le Pen’s Ties To Russia May Come Back to Haunt Her*, BLOOMBERG (Apr. 13, 2022), <https://www.bloomberg.com/news/articles/2022-04-14/marine-le-pen-s-ties-to-russia-may-come-back-to-haunt-her?sref=OOpRUZ8l> [<https://perma.cc/HH5S-B2NB>]; *see also* *Japanese Energy Firms Cling on to Their Russian Assets*, THE ECONOMIST (June 30, 2022), <https://www.economist.com/business/2022/06/30/japanese-energy-firms-cling-on-to-their-russian-assets> [<https://perma.cc/GJK5-6SE3>].

152. Some sources have indicated a slightly lower figure, with *The Economist* citing \$39 billion and the other commentators citing \$38 billion.

oft-cited \$100 billion figure and Ukraine's far larger needs.¹⁵³ That figure is likely even lower today—perhaps closer to \$30–35 billion—due to a combination of market declines,¹⁵⁴ bond payments,¹⁵⁵ and asset rotations out of the United States between January 1, 2022 and the invasion.¹⁵⁶

Putting all that together, while sanctions in the aggregate have had a significant impact on Russian reserves, the geographic distribution limits the practical efficacy of unilateral U.S. action. A prospective multilateral seizure of the full \$325 billion would, of course, be more impactful, but presents a rather tall order given the need to overcome a broad range of complex legal issues across multiple jurisdictions.

This Article generally focuses on U.S. considerations and does not analyze in depth the U.K., EU, or Japanese legal frameworks. However, other scholars assessing asset seizures under U.K. and EU law have generally found “a gulf between political aspirations and available legal tools” in respect of reparations.¹⁵⁷ While, following a Council of Europe Resolution, for EU members the stated “goal is seizing not just freezing” of Russian assets, policymakers including German Chancellor Olaf Scholz have acknowledged that it represents a “very difficult legal question.”¹⁵⁸

153. Melchior, *supra* note 81 (“Russia’s central bank has as much as \$100 billion in foreign-exchange reserves inside the U.S.”); see Tribe & Lewin, *supra* note 82 (noting that “by some estimates, those [central bank] funds may total as much as \$100 billion.”).

154. See *supra* Section I.C.

155. See Breydo, *supra* note 116 (Section II.B).

156. In the months before the invasion, Russia was aggressively rotating out of dollar-denominated assets and geographically shifting its holdings towards China and Germany. See *supra* note 151 and accompanying text.

157. MOISEIENKO, *supra* note 14, at 4 (“The freezing of the assets means Russia cannot use them, but it does not permit their confiscation or handover to Ukraine. This is notwithstanding the recognition by major sanctioning powers, including the US, EU and UK, that it is desirable for these assets to be disbursed for Ukraine’s benefit.”). Canada has notably passed certain legislation potentially allowing for the seizure of Russian state assets. However, as of this writing, it is unclear if Canada has attempted to exercise the authority. *Id.* at 36–39. Canada has attempted to do so in respect of certain “Oligarch Assets,” however. See Tom Blackwell, *Canadian Plan to Confiscate Russian Assets Could Upend Global Economy, Says Moscow Think Tank*, NAT’L POST (Jan. 31, 2023), <https://nationalpost.com/news/canada-confiscate-russian-assets> [<https://perma.cc/AAC4-XF92>].

158. *Expert Conference Under the German G7 Presidency: Donor Platform to Help Rebuild Ukraine*, BUNDESREGIERUNG [THE FED. GOV’T] (Oct. 24, 2022), <https://www.bundesregierung.de/breg-en/news/ukraine-recovery-conference-2129426> [<https://perma.cc/8NAT-CT3H>].

II. LEGAL CHALLENGES WITH SEIZING RUSSIAN ASSETS

Notwithstanding its enormous normative appeal, the prospective seizure of Russian reserves for Ukraine's benefit is deeply fraught with legal, practical, and policy challenges.¹⁵⁹ First and foremost, as Secretary of the Treasury Janet Yellen aptly noted, “[i]t’s not something that is legally permissible in the United States”¹⁶⁰—not to mention the six other nations hosting the bulk of Russian central bank reserves. Second, even if it was legal under U.S. law—or legislation was enacted to make it so—such action raises constitutional considerations, may violate international law, and risks adverse policy implications for U.S. foreign affairs, as well as the efficacy of global financial infrastructure. In other words, even if we *could*, it is not clear that we *should*.

At the same time, the costs of such a move would greatly outweigh the benefits: In return for shouldering these legal, political, and economic risks, the prospective value of such a seizure would total at most \$40 billion—equivalent to perhaps five percent of Ukrainian needs.¹⁶¹ Correspondingly, discussion regarding seizing U.S.-domiciled Russian reserves is something of a red herring. There is likely only one way of assembling the level of capital required for the task: Russia's *future* oil and gas revenues, through an approach largely based on the UNCC structure, as discussed in Parts III and IV.

A. *Insufficient Presidential Authority*

Assessing legal considerations regarding the prospective U.S. seizure of Russian assets requires contextualizing the scope and limitations of Presidential powers in the economic arena. The critical statutory framework is the IEEPA. The IEEPA sits at the “center of the modern U.S. sanctions regime,”¹⁶² providing “the President broad

159. These challenges were recognized at the International Expert Conference on the Recovery, Reconstruction and Modernisation of Ukraine, with leaders observing that because the EU insists on the rule of law, “we must abide by the rule of law.” *Id.*; see also FT Editorial Board, *supra* note 81 (“The moral case for ensuring the ‘aggressor pays’ is powerful. To retain the moral high ground, however, the democracies backing Ukraine must follow due process and the rule of law.”).

160. See Lawder, *supra* note 20 (quoting Janet Yellen stating that seizing Russian reserves would “not be legal” under U.S. law).

161. See *supra* Sections I.A, I.C.3.

162. CASEY ET AL., *supra* note 22, at 51.

authority to regulate a variety of economic transactions following a declaration of national emergency.”¹⁶³

This Section provides background regarding the IEEPA, then discusses the statute’s application to the present circumstance, focusing on scholarly debate regarding the scope of the IEEPA’s vesting power. Finally, it distinguishes this prospective seizure of Russian reserves from prior uses of the IEEPA.

1. The International Emergency Economic Powers Act

The IEEPA “branched” from the Trading with the Enemy Act of 1917 (TWEA), a World War I-vintage legislation¹⁶⁴ which granted the President “an extraordinary degree of control” over international trade, investment, and related matters.¹⁶⁵ Congress later expanded the President’s TWEA powers, allowing for peacetime use during the Great Depression, followed by World War II-era amendments granting the president “‘vesting’ power, which authorized the permanent seizure of property.”¹⁶⁶

During the 1970s—a period marked by Watergate and other national controversies—the pendulum swung back, with Congress increasingly focused on checking the executive branch, and “claw[ing] back” foreign-affairs and emergency powers perceived to have been abused.¹⁶⁷ A bipartisan congressional committee investigating the use of Presidential emergency powers identified the TWEA to be “[a]mong the more controversial statutes,” describing it as conferring the President with essentially “dictatorial powers.”¹⁶⁸ Following that investigation, legislative action sought to pare back perceived abuses by amending the TWEA, limiting its use to wartime.¹⁶⁹ For peacetime,

163. *Id.*, Summary.

164. *Id.* at 2–3 (describing period as characterized by “an unprecedented degree of economic mobilization”).

165. Congress facilitated this through twenty-two statutes, including the TWEA, broadly “empowering the President to take control of private property for public use during the war.” *Id.* at 3.

166. *Id.* at 5.

167. Stephan, *supra* note 80, at 278.

168. The committee also found that the United States had essentially been in an ongoing state of adjacent emergencies for decades. CASEY ET AL., *supra* note 22, at 6–7; *Revision of the Trading with the Enemy Act: Markup Before the Committee on International Relations*, 95th Cong. 5 (1977) (statement of Rep. Jonathan B. Bingham, H. Comm. on Int’l Rels.).

169. Stephan, *supra* note 80, at 279; International Emergency Economic Powers Act of 1977, Pub. L. No. 95-223 §§ 101(a), 102, 103(b), 91 Stat. 1625, 1625 (1977) (“Section 5(b)(1)

Congress enacted the IEEPA, which dovetails closely with the National Emergency Act (NEA), a statute establishing procedures for declaring an emergency.

The IEEPA operates as follows. First, consistent with NEA procedures, an emergency must be declared concerning “any unusual and extraordinary threat, which has its source in whole or substantial part outside the United States.”¹⁷⁰ Following such a declaration, the President may

nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in, or exercising any right, power, or privilege with respect to, 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.¹⁷¹

Because “[u]nlike the [TWEA], IEEPA did not allow the President to vest assets as originally enacted,” at the Bush administration’s urging, Congress passed the so-called Patriot Act Amendments to the IEEPA in 2001.¹⁷² The amendments provided that “when the United States is engaged in armed hostilities or has been attacked,” the President may “confiscate any property, subject to the jurisdiction of the United States.”¹⁷³

of the Trading With the Enemy Act is amended by striking out ‘or during any other period of national emergency declared by the President’ in the text preceding subparagraph (A).”); H.R. REP. NO. 95-459, at 2 (1977); *see* *Regan v. Wald*, 468 U.S. 222, 222 (1984):

Section 5(b) [of the TWEA] was amended in 1977 to limit the President’s power under the TWEA to times of war, but at the same time, the [IEEPA] was enacted to cover the President’s exercise of emergency economic powers in response to peacetime crises, § 203 of that Act granting essentially the same authorities to the President as those in § 5(b) of TWEA.

170. 50 U.S.C. § 1701(a).

171. 50 U.S.C. § 1702(a)(1)(B).

172. CASEY ET AL., *supra* note 22, at 13 (“Unlike the Trading with the Enemy Act (TWEA), IEEPA did not allow the President to vest assets as originally enacted.”); S. REP. NO. 95-466, at 5 (1977) (“Authority to vest property, seize records and regulate purely domestic economic transactions would not be granted.”); H.R. REP. NO. 95-459, at 15 (“This grant of authorities does not include the following authorities . . . (1) the power to vest . . . property.”).

173. 50 U.S.C. § 1702(a). The Patriot Act Amendments, along with other considerations discussed *infra* text accompanying notes 188–196, reinforce that IEEPA as originally enacted was not intended to provide the President with the power to “vest” assets.

2. Application to Russian Reserves

In April 2021, President Biden declared an emergency pursuant to the IEEPA and NEA in response to hostile Russian “activities.”¹⁷⁴ Executive Order 14,024 (EO 14024) zeroed in on “efforts to undermine . . . free and fair [U.S.] democratic elections,” “malicious cyber-enabled activities,” and violations of “well-established principles of international law, including respect for the territorial integrity of states.”¹⁷⁵ EO 14024 allowed the Biden administration to enact sanctions against Russia prior to the February 24 invasion of Ukraine—though, the scope and ferocity of post-invasion actions significantly accelerated.¹⁷⁶

In light of proposals to seize Russian foreign reserves, the salient question is whether the IEEPA permits the President to seize Russian assets—including vesting title—or merely “freeze” them through blocking sanctions. The distinction is critical. Vesting corresponds to a permanent change in ownership, allowing for liquidation or transfer of assets; in contrast, a freeze renders the assets temporarily unusable, but does not change legal ownership or title.¹⁷⁷

Broadly speaking, the President has at least two—and potentially three—avenues to seize foreign assets. First, “when Congress has declared war,” the TWEA “authorizes the President to take title to enemy assets.”¹⁷⁸ Second, in “circumstances where there has been an armed attack on the United States”—definitional ambiguities notwithstanding¹⁷⁹—the Patriot Act amendments provide the President “with authority similar” to the TWEA, allowing vesting of assets absent a declaration of war.¹⁸⁰ Third, the area of pertinent ambiguity is IEEPA

174. Exec. Order 14,024, 86 Fed. Reg. 20249, 20252 (Apr. 15, 2021).

175. *Id.* The Order found Russia’s actions “constitute an unusual and extraordinary threat to [U.S.] national security.” Russia’s most recent bond issuance describes the matter as follows: “EO of 15 April 2021 was signed to deter what the U.S. considers as ‘Russia’s destabilizing behaviour,’ (e.g. alleged undermining the U.S. elections, alleged engaging in malicious cyber activities, etc.)” MINISTRY OF FIN. OF THE RUSSIAN FED’N, PROSPECTUS FOR RUSSIAN FEDERATION EUR 500 MILLION BONDS DUE 2027 AND EUR 1BN BONDS DUE 2036 15 (May 25, 2021), https://minfin.gov.ru/common/upload/library/2021/05/main/Russia-2036_EUR_Prospectus_dated_25_May_2021.pdf [<https://perma.cc/8CL9-RE9N>].

176. *See* Breydo, *supra* note 116, at 22–24.

177. *See supra* Section I.B. In theory, assets could be returned after vesting, though that would necessitate a second vesting event, in privity between the recipient and original asset owner.

178. H.R. REP. NO. 107-236, pt. 1, at 62 (2001).

179. *See infra* notes 182–184 and accompanying text.

180. H.R. REP. NO. 107-236.

vesting power with respect to circumstances outside of war or “armed hostilities.” The text of the statute is “equivocal.”¹⁸¹ As a result, prominent legal scholars and policymakers have come to divergent conclusions on this critical question.¹⁸²

Professor Laurence Tribe, a preeminent constitutional scholar and Supreme Court advocate, has argued that “[t]he words of IEEPA are clear”: President Biden “already has ample statutory authority to liquidate Russian assets”¹⁸³ under the statute “without ambiguity.”¹⁸⁴ Indeed, “read literally,” the text of the IEEPA would seem to allow the President to void foreign interests in property located in the United States.¹⁸⁵ Such an approach, Professor Tribe points out, is methodologically consistent with the “current Supreme Court’s repeated insistence on reading the language Congress uses in accord with its ordinary meaning, whatever Congress might have intended or anticipated at the time.”¹⁸⁶

Other scholars have disagreed. Based on the legislative history and jurisprudence,¹⁸⁷ Professor Paul Stephan has argued that while the IEEPA permits the President to freeze foreign-owned assets, it does not permit vesting aside from a “narrow exception” in the Patriot Act amendments.¹⁸⁸

181. Buchheit & Gulati, *supra* note 25.

182. Rappeport & Sanger, *supra* note 20 (noting that despite Yellen’s view that asset seizure was impermissible, “within the Biden administration . . . there was reluctance ‘to have any daylight between us and the Europeans on sanctions.’”).

183. Laurence H. Tribe, *Does American Law Currently Authorize the President to Seize Sovereign Russian Assets?*, LAWFARE (May 23, 2022), <https://www.lawfareblog.com/does-american-law-currently-authorize-president-seize-sovereign-russian-assets> [<https://perma.cc/C9SP-XD7M>].

184. *Id.*

185. See Buchheit & Gulati, *supra* note 25 (“Although the issue could be debated, we think the better view is that IEEPA does not authorize an outright confiscation of frozen Russian property in the absence of actual armed hostilities between the United States and Russia.”).

186. See Tribe, *supra* note 183.

187. Paul Stephan, *Giving Russian Assets to Ukraine—Freezing Is Not Seizing*, LAWFARE (Apr. 26, 2022), <https://www.lawfareblog.com/giving-russian-assets-ukraine-freezing-not-seizing> [<https://perma.cc/CT3T-FSB7>] (arguing that Professor Tribe and others “get current law wrong,” while expressing apprehension regarding “proposals to enact new legislation to bring about their preferred outcome”).

188. Professor Tribe counters that:

[The argument] flies in the face of the settled constitutional principle that a grant of power by Congress—here, IEEPA’s grant to the president of power to “direct and compel” the “transfer, withdrawal” or “exportation” of frozen foreign

For support, Professors Tribe and Stephan have both pointed to *Dames & Moore v. Regan*, a seminal 1981 Supreme Court decision. There, against the backdrop of the Iranian Hostage Crisis, the Supreme Court affirmed the President's power to effectuate a global accord premised on suspending U.S. nationals' legal claims against Iran.¹⁸⁹ The Court held that the IEEPA confers upon the President "broad authority" to act in times of national emergency, but observed in a footnote that it "does not give the President the power to 'vest' or to take title to the assets."¹⁹⁰ A few years later, the Court echoed this finding in *Regan v. Wald*.¹⁹¹

In assessing the prospective seizure of Iranian assets during the crisis—a matter with significant parallels to the present circumstance—the Department of Justice (DOJ) Office of Legal Counsel appeared to reach a similar conclusion, with a 1980 memorandum finding that because the IEEPA

does not authorize vesting of foreign property, and the Trading with the Enemy Act authorizes vesting only in wartime, in the absence of a declaration of war against Iran it would be necessary to seek new legislation in order for the United States to take title to the blocked Iranian assets.¹⁹²

As the DOJ memorandum implies, the conclusion may differ during "wartime," as the President could utilize the TWEA's vesting powers. Absent a Congressional declaration of war, in the event of "armed hostilities," the Patriot Act amendments may be operable, also allowing vesting of assets.¹⁹³ Indeed, Professor Tribe has argued that

funds—can be repealed or cut back only by an express congressional enactment, not by mere implication.

Tribe, *supra* note 183.

189. *Dames & Moore v. Regan*, 453 U.S. 654, 673 (1981).

190. *Id.* at 672–73 & 672 n.5 (also holding that while the President may not vest assets under the IEEPA, "it does not follow that the President is not authorized under both the IEEPA and the TWEA to otherwise permanently dispose of the assets in the manner done here.").

191. *Regan v. Wald*, 468 U.S. 222, 228 (1984) (holding that "[t]he authorities granted to the President by § 203 of IEEPA are essentially the same as those in § 5(b) of TWEA," but also noting "some differences" including that "[t]he grant of authorities in IEEPA does not include the power to vest (i.e., to take title to) foreign assets"); *see also* H.R. REP. NO. 95-459, at 14–15 (1977).

192. *See* Vesting of Iranian Assets, 4A Op. O.L.C. 202, 202 (1980).

193. Andrew Boyle, *Why Proposals for U.S. to Liquidate and Use Russian Central Bank Assets are Legally Unavailable*, JUST SEC. (April 18, 2022), <https://www.justsecurity.org/81165/why-proposals-for-u-s-to-liquidate-and-use-russian-central-bank-assets-are-legally-unavailable/> [<https://perma.cc/2PXG-V7Y5>] (observing the Patriot Act exception, but

Russian cyber activities leading to EO 14024 constitute such an “attack,” allowing President Biden to use the Patriot Act Amendment vesting powers.¹⁹⁴ Professor Stephan, however, has countered that “all recent” administrations have sought to establish that in the absence of “violence,” cyber operations do not constitute “armed attacks,” given the United States’ “proclivity” for similar methods.¹⁹⁵

At the same time, U.S. officials, including President Biden, have taken pains to stress that the United States is not at war with Russia—and does “not seek a war between NATO and Russia. . . . So long as the United States or our allies are not attacked, we will not be directly engaged in [the Ukraine] conflict.”¹⁹⁶

3. Distinctions from Prior IEEPA Cases

While many have pointed to prior instances where the President exercised authority in respect of foreign assets—including, with respect to Iraq in 2003, Iran in 2012, Venezuela in 2019, and Afghanistan in 2022—as detailed below, each case concerned circumstances materially distinct from the proposed seizure of Russian reserves.¹⁹⁷

In 2003, President Bush authorized for \$1.7 billion of Iraqi assets—“frozen” since the 1991 Gulf War—to be “confiscated and vested in the Department of the Treasury,”¹⁹⁸ with the funds earmarked for humanitarian projects in the country.¹⁹⁹ That seizure represented “[t]he first, and to date, apparently only”²⁰⁰ use of the Patriot Act

also noting that “[a]t present, this exception would not be applicable to the Russian central bank assets as the United States is not engaged in armed hostilities with Russia, nor has it ‘been attacked’ by Russia or groups aided by Russia”).

194. See Tribe, *supra* note 183.

195. Stephan, *supra* note 80, at 282; see also Paul B. Stephan, *Big Data and the Future Law of Armed Conflict in Cyberspace*, in *THE FUTURE LAW OF ARMED CONFLICT* 61, 61–82 (Matthew Waxman & Thomas K. Oakley eds., 2022).

196. Joseph R. Biden Jr., *What America Will and Will Not Do in Ukraine*, N.Y. TIMES (May 31, 2022), <https://www.nytimes.com/2022/05/31/opinion/biden-ukraine-strategy.html> [<https://perma.cc/NAW2-9X2L>] (“We do not seek a war between NATO and Russia. . . . [T]he United States will not try to bring about [Putin’s] ouster in Moscow. So long as the United States or our allies are not attacked, we will not be directly engaged in this conflict with Ukraine.”).

197. While some instances involved central bank reserves, they did not have the same macroeconomic implications as the funds had been long-frozen or belonged countries with limited macroeconomic functions, such as Afghanistan.

198. Exec. Order No. 13,290, 68 Fed. Reg. 14,307 (Mar. 24, 2003).

199. *Id.*

200. CASEY ET AL., *supra* note 22, at 14.

amendment—which were in effect because of “armed hostilities,”²⁰¹ illustrating the circumscribed nature of the provision.²⁰²

In 2012, Congress passed legislation making certain frozen Iranian Central Bank assets available to satisfy terrorism-related claims.²⁰³ After the Supreme Court upheld that legislation in 2016,²⁰⁴ Iran appealed to the ICJ, where the matter remains pending.²⁰⁵ Some scholars consider “possible” an ICJ finding that the United States “violated Iran’s rights under international law.”²⁰⁶

In contrast to the present matter, Venezuela and Afghanistan concerned circumstances where the United States declined to give control of central bank assets to governments it “did not recognize . . . as legitimate,”²⁰⁷ rather than liquidation of assets.²⁰⁸

On January 23, 2019, the Trump administration “recognized Juan Guaidó as the interim President of Venezuela and called on Nicolás Maduro to step aside.”²⁰⁹ Reflecting this determination, two days later, Secretary of State Pompeo “certified the authority”²¹⁰ of the Guaidó regime to “receive and control” certain property of Venezuela, including accounts of the central bank.²¹¹ This, notably, did not liquidate the respective assets.

201. The TWEA vesting power was not operable because the Iraq conflict was not formally accompanied by a Congressional declaration of war. Boyle, *supra* note 193.

202. CASEY ET AL., *supra* note 22, at 13–15.

203. Tribe & Lewin, *supra* note 82; Iran Threat Reduction and Syria Human Rights Act of 2012, Pub. L. No. 112–158 § 502, 126 Stat. 1214, 1260 (2012) (codified as amended at 28 U.S.C. § 1610).

204. Wuert, *supra* note 138; Bank Markazi v. Peterson, 578 U.S. 212 (2016); Matt Ford, *What the Supreme Court’s Ruling on Iranian Assets Means*, THE ATLANTIC (Apr. 20, 2016), <https://www.theatlantic.com/politics/archive/2016/04/bank-markazi/479190/> [https://perma.cc/4EWH-5L9X].

205. Certain Iranian Assets (Iran v. U.S.), Press Release (Sept. 23 2022), <https://www.icj-cij.org/en/case/164> [https://perma.cc/HG7B-G4CL].

206. Stephan, *supra* note 187.

207. Rappeport & Sanger, *supra* note 20.

208. See *supra* Section I.B, analogizing Russian reserves to Afghanistan and Venezuela.

209. Developing the Administration’s Approach to Supporting Economic Recovery in Venezuela, 84 Fed. Reg. 55919, 55920 (Oct. 18, 2019). President Trump passed Executive Order 13857 under IEEPA authority to support these determinations. Exec. Order No. 13,857, 84 Fed. Reg. 509 (Jan. 30, 2019).

210. Notably, acting pursuant to Section 25B of the Federal Reserve Act rather than the IEEPA. Federal Reserve Act of 1913 § 25(b), 12 U.S.C. § 632 (1941).

211. Developing the Administration’s Approach to Supporting Economic Recovery in Venezuela, *supra* note 209.

In a similar vein, in February, 2022, the Biden administration declined to turn over \$7 billion of Afghan central bank reserves to the Taliban.²¹² The assets were situated at the New York Fed and left in an “uncertain legal position” following the fall of Kabul, as neither the United States nor any other nation recognized the assurgent Taliban regime.²¹³ Taliban efforts to gain control of the funds did, however, open the path for U.S. litigants to pursue claims in respect of the assets.²¹⁴ To preserve the assets, the Biden administration, pursuant to the IEEPA, facilitated transfer of all U.S.-based Afghani assets to a centralized New York Fed account—followed by the transfer of \$3.5 billion to a third-party trust account, intended for a future Afghani representative acceptable to the United States.²¹⁵ Importantly, while many have posited otherwise, drawing parallels to potential seizure of Russian central bank reserves, the actions did not liquidate the assets, nor transfer them to terrorism claimants.²¹⁶

B. New Legislation Presents New Risks

While the existing statutory framework is unlikely to permit President Biden to seize Russian foreign reserves, senior Biden administration officials have expressed support for new legislation that could accomplish the task. Secretary of State Antony Blinken, for instance,

212. James Politi, *Joe Biden Orders Freeze on \$7Bn of Afghan Assets Within US*, FIN. TIMES (Feb. 11, 2022), <https://www.ft.com/content/9018de5d-540f-479a-ba43-ab7323a4790c> [<https://perma.cc/YU5B-TN2G>].

213. Scott Anderson, *What’s Happening with Afghanistan’s Assets?*, LAWFARE, (Feb. 18, 2022), <https://www.lawfareblog.com/whats-happening-afghanistans-assets> [<https://perma.cc/VWN2-DPKH>].

214. Such claims included a \$6.8 billion default judgement from *Havlish v. Bin-Laden*. *Havlish v. Bin Laden (In re Terrorist Attacks on Sept. 11, 2001)*, No. 03-MDL-1570, 2012 U.S. Dist. LEXIS 110673 (S.D.N.Y. July 30, 2012); Charlie Savage, *Taliban and 9/11 Families Fight for Billions in Frozen Afghan Funds*, N.Y. TIMES (Nov. 29, 2021), <https://www.nytimes.com/2021/11/29/us/politics/taliban-afghanistan-911-families-frozen-funds.html> [<https://perma.cc/3YG2-37W7>].

215. The Biden administration has, perhaps not unintentionally, been less than clear regarding the plan and transfer structure. Anderson, *supra* note 213 (“[N]o one document released by the White House captures the plan in its entirety. . . . This failure in communication no doubt contributed to the confusion that has followed the White House’s announcement.”); 12 U.S.C. § 632.

216. For instance, Josep Borrell, the EU’s high representative for foreign policy, has posited that the United States taking “control” of Afghan central bank funds presents a “logical” precedent in respect of Russia’s reserves, arguing that “[w]e have the money in our pockets, and someone has to explain to me why it is good for the Afghan money and not good for the Russian money.” See Fleming, *supra* note 13.

testified that State Department lawyers were researching “what authorities would be needed, potentially, to seize” Russia’s reserves and “use them” to support Ukraine.²¹⁷

This Section analyzes the key issues and risks with respect to such legislation, including constitutional considerations, international law, and broader policy implications, at both the domestic and international levels.

1. Constitutional Considerations

The prospective seizure of Russian assets implicates at least two constitutional provisions under the Fifth Amendment: the Due Process Clause and the Takings Clause.²¹⁸ Both unquestionably apply to individuals and corporations; the more complex question is whether legislation to seize foreign state property would need to comply with these provisions.

At least in the abstract, if acting pursuant to express Congressional authorization—and thus “supported by the strongest of presumptions and the widest latitude of judicial interpretation”²¹⁹—

217. At an April 28, 2022 congressional hearing, Representative Tom Malinowski inquired whether the same “principle” underlying seizure of oligarch assets could apply to “the much larger amount of money that has been frozen around the world belonging to the Russian Central Bank?” Secretary Blinken responded: “[Y]es . . . this is one of the things that we have asked our own lawyers to look at, which is what authorities would be needed, potentially, to seize those assets” and ‘use them’ to support Ukraine.” *The State Department’s Foreign Policy Priorities and the FY23 Budget Request Before the H. Comm. on Foreign Affs.*, 117th Cong. (2022); Joel Gehrke, *US Wants To Confiscate Frozen Russian Central Bank Assets to Rebuild Ukraine*, WASH. EXAMINER (Apr. 28, 2022), <https://www.washingtonexaminer.com/policy/defense-national-security/us-wants-to-confiscate-frozen-russian-central-bank-assets-to-rebuild-ukraine> [<https://perma.cc/4TDU-Z9XM>]; see also Edmondson, *supra* note 106 (With respect to oligarch assets, U.S. Attorney General Merrick Garland testified to the Appropriations Committee that “[w]e would support legislation that would allow some of that money to go directly to Ukraine.”).

218. The discussion in this Section has benefitted significantly from analysis by Scott Anderson and Chimène Keitner, to whom the author expresses gratitude. See Scott R. Anderson & Chimène Keitner, *The Legal Challenges Presented by Seizing Frozen Russian Assets*, LAWFARE (May 26, 2022), <https://www.lawfareblog.com/legal-challenges-presented-seizing-frozen-russian-assets> [<https://perma.cc/HBU3-STF8>].

219. *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952) (Jackson, J., concurring)):

When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress. In such a case the executive action “would be supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it.”

executive seizure of Russian foreign reserves could likely be made permissible through legislation.²²⁰ Earlier iterations of the TWEA would have allowed it, after all.²²¹ At the same time, while the specifics of the legislation will ultimately drive the scope of issues, structural features can help mitigate concerns, though they may also reduce potential speed of execution.

a. Due Process

The Due Process Clause provides that “no person . . . shall . . . be deprived of life, liberty, or property, without due process of law.”²²² Analytically, the inquiry here is two-fold: first, determining whether due process applies to foreign states; and second, if it does not, determining whether it would apply to instrumentalities of the state, such as the Russian central bank.

Some scholars, including Professor Tribe, have argued that due process does not apply to foreign sovereigns: “Because Russia is surely not a ‘person’ capable, even in principle, of being ‘deprived of life’ or of ‘liberty,’ the principle that words gathered in sequence are likely to have parallel meanings strongly suggests that the term ‘property’ is likewise unavailing to the Russian Government.”²²³ The Supreme Court has not conclusively determined the question, but certain decisions have been interpreted to concur based on parallels the Court has made in dicta in respect of U.S. states,²²⁴ which the Court held are not “persons” for purposes of the Due Process Clause.²²⁵

Professor Stephan, on the other hand, describes the due process questions as “still open,” pointing out that, notwithstanding decisions

220. Professor Stephan noted that “Congress could amend the law to clearly grant the United States the authority to confiscate Russia’s assets, but that doing so was likely to lead to complex legal battles between the two countries.” Rapoport & Sanger, *supra* note 20.

221. See Buchheit & Gulati, *supra* note 25 (noting “express legislative authority from Congress” as one of the options for asset seizure).

222. U.S. CONST. amend. V.

223. Tribe, *supra* note 183.

224. Republic of Argentina v. Weltover, Inc., 504 U.S. 607, 619 (1992).

225. South Carolina v. Katzenbach, 383 U.S. 301, 323–24 (1966) (“The word ‘person’ in the context of the Due Process Clause of the Fifth Amendment cannot, by any reasonable mode of interpretation, be expanded to encompass the States of the Union, and to our knowledge this has never been done by any court.”).

interpreted to the contrary,²²⁶ “many courts apply due process principles nevertheless”—a proposition shared by prominent scholars.²²⁷

In addition, even if due process does not apply to the Russian state itself, as Professor Anderson points out, Russia’s central bank may necessitate a distinct inquiry.²²⁸ This is because courts “distinguish foreign states from their agencies and instrumentalities” with respect to Due Process rights, so long as those entities exhibit sufficient independence.²²⁹ Though a question beyond the scope of this Article, Russia’s central bank²³⁰ may feasibly meet that standard.²³¹

226. *See Republic of Argentina*, 504 U.S. at 619.

227. Stephan, *supra* note 187; *see also* Ingrid Wuerth, *The Due Process and Other Constitutional Rights of Foreign Nations*, 88 *FORDHAM L. REV.* 633, 633 (2019) (arguing that property of foreign sovereigns located in the United States enjoys constitutional protections).

228. *See First Nat’l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 626–27 (1983) (“[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such.”); *see also* H.R. REP. NO. 94-1487, at 29–30 (1976) (“If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary.”).

229. *TMR Energy Ltd. v. State Prop. Fund of Ukraine*, 411 F.3d 296, 301 (D.C. Cir. 2005):

We believe the same analysis must govern whether the SPF is a “person” within the meaning of the due process clause: If the State of Ukraine exerted sufficient control over the SPF to make it an agent of the State, then there is no reason to extend to the SPF a constitutional right that is denied to the sovereign itself.

230. The literature suggests that the Russian central bank’s formal legal independence began to break down following Vladimir Putin’s ascension to power. *See* JULIET JOHNSON, *DOES CENTRAL BANK INDEPENDENCE MATTER IN RUSSIA?* 1 (2012). However, in recent years, there is some evidence to suggest greater central bank independence. *See* Eshe Nelson, *The Woman Steering Russia’s War Economy*, *N.Y. TIMES* (May 9, 2022), <https://www.nytimes.com/2022/05/09/business/elvira-nabiullina-russia-central-bank.html> [<https://perma.cc/A63A-NGUE>] (“In recent years, it was quite evident that all kinds of policy questions in the financial sphere were delegated to the central bank.”); *see also* *Russia’s Central Bank Resisting Calls to Take Over Running of Western Banks’ Local Arms*, *REUTERS* (July 14, 2022, 11:12 AM), <https://www.reuters.com/business/finance/russias-central-bank-resisting-calls-take-over-running-western-banks-local-arms-2022-07-14/> [<https://perma.cc/73GQ-QQ2Z>] (noting Russian central bank was “resisting domestic calls to take over the running of foreign lenders’ local businesses,” despite “mounting pressure” from Russian officials”). Further, some decisions have held central banks reserves to be immune from seizure under the FSIA even if the central bank was not considered independent.

231. Though beyond the scope of this analysis, it is important to note that due process may be satisfied through the central bank’s contacts with the United States, and the State of New York in particular.

b. Takings Clause

The Takings Clause prohibits “private property [from] be[ing] taken for public use, without just compensation.”²³² Professor Tribe has argued that, based on its language, the Takings Clause only applies to “private property, not the obviously *public* and indeed purely sovereign, governmental property” of the Russian government.²³³ A set of 1980 memoranda from the Office of the Legal Counsel concerning the prospective seizure of Iranian assets reached a similar conclusion, finding that “the Constitution does not prohibit the uncompensated seizure of the assets of foreign governments.”²³⁴

On the other hand, with respect to property of U.S. states and their municipalities, the Supreme Court has held that “the same principles of just compensation presumptively apply” as they would with private actors.²³⁵ That conclusion may be buttressed by a finding of legal independence for the central bank, some have argued.²³⁶

Furthermore, even if deemed permissible under the Takings Clause, a seizure of assets may risk international law liability. Indeed, Russian spokesman Dmitry Peskov has asserted that seizure of reserves “would be, in fact, outright theft. . . . Such a decision would be illegal, blatant and, of course, requiring an appropriate response,” suggesting the sovereign would likely pursue expropriation claims.²³⁷ Here, too, it may be possible to structure seizure in a way to mitigate these risks—for instance by “tying it to the enforcement of foreign or international judgments,” as discussed further below.²³⁸

232. U.S. CONST. amend. V.

233. Tribe, *supra* note 183.

234. See Vesting of Iranian Assets, *supra* note 192, at 203 (“We do not think that any domestic constitutional issue arises in the taking of Iranian government property. The Fifth Amendment by its terms applies only to the taking of ‘private property’ without just compensation. Thus, on its face the Just Compensation Clause does not apply.”); see also Congressional Power to Provide for the Vesting of Iranian Deposits in Foreign Branches of United States Banks, 4A Op. O.L.C. 265, 268 (1980) (“[T]he Constitution does not prohibit the uncompensated seizure of the assets of foreign governments. . . . On its face, the textual reference to private property excludes foreign governments from the protection of the Just Compensation Clause.”).

235. *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984).

236. See Anderson & Keitner, *supra* note 218.

237. Courtney McBride, *Effort to Force Russia to Pay Reparations to Ukraine Faces Uphill Battle*, WALL ST. J. (June 11, 2022), <https://www.wsj.com/articles/effort-to-force-russia-to-pay-reparations-to-ukraine-faces-uphill-battle-11654939800> [https://perma.cc/X4S3-9JDL].

238. Anderson & Keitner, *supra* note 218.

2. International Law

Congress may pass legislation that runs counter to international law,²³⁹ however, such action risks giving the Russian government a viable legal claim against the United States, likely for expropriation.²⁴⁰

Protection against asset expropriation is a core tenet of international law. Thus, as a practical matter, seizure of Russian central bank reserves may well constitute *de facto* expropriation. The substantive question then is the applicability of exceptions and defenses, particularly countermeasures, which refer to otherwise impermissible state action that is allowable for the limited purpose of bringing another state into compliance with its international law obligations.²⁴¹

Here, Russia clearly has obligations under international law that it is failing to comply with. The U.N. General Assembly “overwhelmingly adopted” a “resolution demanding the Russian Federation immediately end its invasion of Ukraine” while “[d]eplor[ing] in the strongest terms” Russia’s aggression and violations of the U.N. Charter.²⁴² The ICJ has also issued an order calling for Russia to “immediately suspend the military operation.”²⁴³ Furthermore, although Russia’s actions were taken against Ukraine, the authoritative Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA) provide that international law recognizes third-party nations’ right to enforce measures upon an aggressor state.²⁴⁴

239. *See id.*; *see also* discussion *supra* Part II.

240. Rachel Oswald, *Biden is Exploring Using Russian Money to Rebuild Ukraine*, ROLL CALL (Apr. 28, 2022), <https://rollcall.com/2022/04/28/biden-is-exploring-using-russian-money-to-rebuild-ukraine/> [<https://perma.cc/72AA-4HRY>].

241. *See* MOISEIENKO, *supra* note 14, at 29–31 (describing and discussing application of countermeasures).

242. The final vote on the resolution was 141 in favor, 5 opposed, and 35 abstaining. G.A. Res. ES-11/1, at 3 (Mar. 2, 2022).

243. Though provisional, the ICJ order has “binding effect” and “create[s] international legal obligations” which Russia has failed to comply with. *See* Allegations of Genocide Under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Order, 2022 I.C.J. 182, ¶¶ 5(a), 84 (Mar. 16).

244. ARSIWA Article 48

deals with the invocation of responsibility by States other than the injured State acting in the collective interest. A State which is entitled to invoke responsibility under article 48 is acting not in its individual capacity by reason of having suffered injury, but in its capacity as a member of a group of States to which the obligation is owed, or indeed as a member of the international community as a whole.

Int’l Law Comm’n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 126 (2001); *see also* Philip Zelikow, *A Legal Approach to the Transfer of Russian Assets to*

Because of this, Professor Philip Zelikow has posited that international law permits the United States “to transfer, or vest, title of the Russian assets to” a fund used to support Ukrainian reconstruction²⁴⁵—notwithstanding an expressed “preference” for ring-fencing the assets to allow for their potential return if countermeasures are subsequently lifted.²⁴⁶ Professor Stephan, on the other hand, has argued that countermeasures, per ARSIWA Article 49, are intended to be reversible, which vesting of title would preclude.²⁴⁷

Putting all this together, while the applicability of claims and countermeasures would ultimately depend on the specific facts and circumstances, there appears to be a non-trivial chance that Russia would have a viable international law claim against the United States in connection with the seizure of Russian reserves—which the sovereign would surely assert.²⁴⁸

3. Policy Implications

The seizure of Russian assets—and foreign reserves in particular—presents significant policy risks and challenges at both the international and domestic levels. As *The Economist* observed, if “Western countries ditch the protections they offer to foreign individuals and states . . . the trust underpinning their economies and societies could be endangered.”²⁴⁹

Domestically, the core concern with new legislation is the prospective expansion of Presidential power in respect of asset seizure. This is particularly acute given prior issues with the TWEA, which ultimately led to enactment of the IEEPA.²⁵⁰ Some of the risk could

Rebuild Ukraine, LAWFARE (May 12, 2022), [https://www.lawfareblog.com/legal-approach-transfer-russian-assets-rebuild-ukraine_\[https://perma.cc/B63K-J88V\]](https://www.lawfareblog.com/legal-approach-transfer-russian-assets-rebuild-ukraine_[https://perma.cc/B63K-J88V]); Haque, *supra* note 14, at 155 (“[S]tates are permitted and may be required to provide military assistance to Ukraine and impose economic sanctions on Russia.”).

245. See Zelikow, *supra* note 244.

246. See *id.* (“In the United States case, that might require new legislation to provide the authority to do this.”).

247. See Stephan, *supra* note 81, at 285. The potential exception being a structure with contingent conditional re-vesting to the original owner.

248. Professor Tribe has notably argued that such claims could only be brought in U.S. courts. See Tribe, *supra* note 183 (“Neither Zelikow nor Stephan nor any other legal expert suggests that any non-U.S. judicial forum has the jurisdiction and capacity to enforce against the U.S. government any potential international law claims against our seizure of billions of dollars in already frozen Russian sovereign assets.”).

249. *Seizing Opportunities*, *supra* note 81, at 70.

250. See CSR IEEPA, *supra* note 162 and accompanying text.

be mitigated through tailored, sufficiently narrow drafting. Legislation targeting Oligarch Assets, for instance, was arguably sub-optimal in its breadth and constitutional deficiencies.²⁵¹ Here, tying the vesting power to specific conduct—such as genocide, war crimes or other broadly- or narrowly-defined “unconscionable acts”²⁵²—may ease such concerns but also creates significant interpretive challenges.²⁵³

From an international perspective, the risks appear greater. The “unprecedented” sanctions regime against Russia, while undoubtedly warranted, upended parties’ expectations, including the premise of central bank reserves being off limits, arguably damaging confidence in global financial infrastructure and institutions.²⁵⁴ Prospective seizure of Russian reserves would exacerbate this already fragile dynamic, impacting American standing in global affairs, confidence in global financial infrastructure, and the efficacy of future sanctions regimes.²⁵⁵

251. See discussion *supra* Section I.C.

252. See Blank, *supra* note 64 (“Russia’s atrocities appear to more than satisfy the definition of crimes against humanity as well and raise serious questions about potential genocide or attempted genocide.”).

253. One approach may be to condition the operability of the vesting power on a determination by a third party, such as the U.N., of genocide, war crimes, or other broadly- or narrowly-defined “unconscionable acts.”

While a departure from traditional legislative structure, this approach could have distinctive benefits. Domestically, it would constrain expansion of presidential power while, all things being equal, reducing the probability of viable international law claims or judgments against the United States (as such findings of “unconscionable acts” under international law would likely make countermeasures appropriate and, depending on the facts, could yield U.S. claims against the relevant aggressor nation). From an international policy perspective, the innately embedded multilateralism would mitigate potential backlash against unilateral U.S. action, while the specific nexus to “unconscionable acts” should soothe otherwise legitimate concerns of foreign states that are acting within the bounds of international law.

Some scholars have proposed a broadly similar framework, positing that “further tailoring the reach of such new legislation,” including to (a) “Russia specifically in the current circumstances of a large-scale armed aggression;” (b) “States whose armed activities violate a ruling by the ICJ;” (c) “States engaged in armed aggression that, in the absence of action by the UN Security Council due to a permanent member’s veto, has been denounced by a majority of the General Assembly members;” or (d) “States whose sovereign immunity should be limited based on a resolution by the UNSC, should one be adopted in the future in the context of a conflict not involving a UNSC permanent member.” See MOISEIENKO, *supra* note 14, at 22.

254. Chachko & Heath, *supra* note 17, at 135; see also Larsen, *supra* note 16.

255. I discuss these considerations in greater depth in another paper in this series. See Breydo, *supra* note 114, at 72–77.

First, the seizure of another sovereign's assets could significantly impair "U.S. credibility as an enforcer of international law,"²⁵⁶ especially given long-standing criticism of U.S. unilateral sanctions.²⁵⁷ The optics of newly-passed legislation for this specific purpose would likely be poor, risking a perception of the United States "changing the rules" after the fact. Further, the consequences are exceptionally problematic when foreign reserves are implicated. It is a testament to the strength of global financial infrastructure that Russia—despite years of planning for sanctions²⁵⁸—felt sufficiently comfortable with the "very high level of protection"²⁵⁹ for central bank reserves to leave \$325 billion abroad. That level of trust is not easy to build and harder to recreate.

It is possible that with the "massive freezing" of Russia's reserves we "have already crossed that Rubicon."²⁶⁰ However, at least as of yet, nations do not appear to be rushing to withdraw New York Fed-domiciled reserves, though "[Janet] Yellen and others have argued that [seizure] could make nations reluctant to keep their reserves in dollars, for fear that in future conflicts the United States and its allies would confiscate the funds."²⁶¹ Though these matters have been termed by some as "essentially political concerns,"²⁶² it is worth noting that global confidence in the United States has been key to the Biden administration's ability to assemble a multilateral coalition to support Ukraine; losing this soft power and credibility would not be trivial.

Second, the seizure of assets may further undermine confidence in the global financial infrastructure anchored by the United States, and by extension, the U.S. dollar, which underpins global trade, payments and sovereign debt. The risks are quite real. The IMF has warned that the ferocity of sanctions against Russia "threaten[s] to gradually dilute the dominance of the US dollar," potentially leading to a "more fragmented international monetary system."²⁶³ Indeed, China has been working to "build a competing financial

256. Anderson & Keitner, *supra* note 218.

257. See Peter Harrell, *Is the U.S. Using Sanctions Too Aggressively?*, FOREIGN AFFS. (Sept. 11, 2018), <https://www.foreignaffairs.com/articles/2018-09-11/us-using-sanctions-too-aggressively> [<https://perma.cc/97V5-RZXC>].

258. See Breydo, *supra* note 116 (Section I.C., Appendix I).

259. Wuerth, *supra* note 138.

260. See Zelikow, *supra* note 244.

261. Rappeport & Sanger, *supra* note 20.

262. See Moiseienko, *Politics, Not Law*, *supra* note 81.

263. Wheatley & Smith, *supra* note 30; see also ARSLANALP ET AL., *supra* note 30.

infrastructure,”²⁶⁴ while India is reported to be mulling means to ensure the United States “could never do” to them “what it has just done to Russia.”²⁶⁵

Third, these consequences may weaken the effectiveness of future economic measures; the dollar’s ubiquity is, after all, foundational to America’s “asymmetric economic power” through sanctions.²⁶⁶ That power has helped Ukraine and underpins the broader efficacy of sanctions regimes. A degradation of the dollar’s power may leave the United States and its allies with fewer policy options—potentially raising the risk of direct confrontation in the future.²⁶⁷

Taken together, the adverse policy implications, coupled with constitutional challenges and potential violations of international law, indicate that potential new legislation to seize Russian assets would be a “dramatic move”²⁶⁸ with high costs. The benefits, meanwhile, are rather modest—limited to less than \$40 billion of U.S.-domiciled Russian reserves. While hardly trivial in the abstract, the figure represents a small fraction of Ukraine’s needs, which may well exceed \$1 trillion.²⁶⁹ Further, as discussed below, the “frozen” reserves may well prove more valuable as a bargaining chip to facilitate the broader framework presented in Parts III and IV.²⁷⁰

Multilateral action including Germany, France, and Japan—collectively home to two-thirds of sanctioned Russian reserves—results in a more favorable cost-benefit, but also represents an exceedingly tall order. Thus, as it stands, the prospective seizure of Russian reserves represents a sub-optimal trade-off, particularly given that there are better alternatives available.

264. See Zoffer, *supra* note 31, at 156 (discussing “China’s dual efforts to internationalize its currency and build a competing financial infrastructure” following imposition of sanctions against Iran and Russia).

265. Zakaria, *supra* note 32.

266. David Cohen & Zachary Goldman, *Like it or Not, Unilateral Sanctions Are Here to Stay*, 113 AJIL UNBOUND 146, 146 (2019).

267. *But see* Zoellick, *supra* note 81 (making counterarguments regarding potential dollar dominance degradation based on trade balances and flows, noting that “countries hold dollar reserves for reasons of macroeconomic stability, not so they can invade neighbors. . . . China and other countries hold dollars because they sell more to the U.S. than they buy. If they dump dollars, they will shrink their sales and economies.”).

268. See Fleming, *supra* note 13.

269. See *supra* Figure 2 (detailing composition of sanctioned Russian reserves); *supra* notes 55–59 (providing estimates of damage and aggregate costs); *infra* Appendix (providing Article’s preliminary analysis).

270. Such use of “frozen” assets is also consistent with Supreme Court precedent and guidance. See discussion *supra* Section II.A.

III. PROPOSAL: A CLAIM RESOLUTION FACILITY FOR UKRAINE

Existing proposals for funding Ukrainian reparations are flawed because they are almost exclusively premised on seizing Russian foreign reserves, a legally problematic and financially insufficient strategy. At the same time, the sole focus on the means of funding ignores two equally critical dimensions of the matter:²⁷¹ the nature of the claims and the need for a mechanism to resolve them.

Given the realities of the conflict, the universe of claims is vast, complex and heterogenous, spanning obligations to Ukraine's government, as well as the millions of individuals most directly harmed. Resolving this analytically herculean undertaking in an efficient and equitable manner requires appropriate infrastructure, such as a claim resolution facility, the design of which is a non-trivial task.²⁷²

Claims commissions—"flexible instruments typically established to resolve mass claims arising from international crises"²⁷³—have become increasingly common, with more than 400 created in "modern times"²⁷⁴ starting with those established under the 1794 Jay Treaty between the United States and Great Britain following the Revolutionary War.²⁷⁵

A viable claim resolution facility typically requires three core components: (1) the "front end" (claim side) methodology for assessing claims; (2) the "back end" or asset side, representing sources of funds for payment; and (3) a mechanism for bridging the two (i.e., the "middle"), in respect of resolving claims and making payments. Asset seizure, in contrast, offers at most a partial solution; it can create a pool of assets but supplies no follow-on methods for assessing claims or transferring the assets into the hands of individual claimants.

Fortunately, a successful model exists: the UNCC, which paid victims of Iraq's unlawful invasion of Kuwait over \$52 billion, funded by a levy on Iraqi oil sales. Aptly described as one of the U.N.'s "few clear success stories,"²⁷⁶ the UNCC developed cutting-edge methodology for addressing mass war claims, with an emphasis on reparations

271. See generally Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361 (2005).

272. A claims resolution facility "describe[s] a wide range of entities that process and resolve claims made against a potential funding source." *Id.* at 1361. This proposed architecture bears meaningful parallels to bankruptcy. See discussion *infra* Section III.A.1.

273. Giorgetti, Kliuchkovsky & Pearsall, *supra* note 40.

274. *Id.*

275. WELLER, *supra* note 74, ¶ 10, at 4.

276. Bettauer, *supra* note 38, at 27.

for individual victims.²⁷⁷ Most importantly, the Ukrainian government has broadly endorsed the establishment of a claims commission,²⁷⁸ and has been working with the International Claims and Reparations Project at Columbia Law School on the initiative.²⁷⁹ This Article, in many respects, expands upon and adds specific, empirically-driven considerations to the baseline proposal while offering a concrete funding mechanism based on the UNCC precedent.²⁸⁰ As described below, notwithstanding some important distinctions, including with respect to institutional structure, many substantive dimensions of the UNCC's design and operations are transferable, such as claim taxonomy, payment priority and the novel oil-backed funding model.

This Part III of the Article is divided into two Sections. First, it presents the UNCC, focusing on its organizational structure, claim categorization, and funding mechanism. Second, it discusses application of the construct to Ukraine—the Article's foundational proposal—emphasizing similarities as well as differences. Given the unsurprising challenges regarding funding, Section IV.A of the Article details strategies for incentivizing Russian participation.

A. *The United Nations Compensation Commission (UNCC)*

In 1990, Iraq invaded Kuwait, beginning the Gulf War—a conflict with some eerie parallels to Russia's assault on Ukraine. Iraq, like Russia, was an autocratic petrostate bent on conquering a smaller neighbor, in clear violation of the “rules of international humanitarian and diplomatic law.”²⁸¹ The brutal confrontation killed thousands, caused “widespread damage and loss,” and turned much of Kuwait's

277. Bonner, *supra* note 37.

278. Ukrainian President Zelensky has called for a “multilateral agreement” and “mechanism through which each and every one who has suffered from Russia's actions will be able to receive compensation for all losses.” Zelensky, *supra* note 39.

279. *Columbia Law School to Advise Ukraine on International Claims and Reparations*, COLUM. L. SCH. (May 19, 2022), <https://www.law.columbia.edu/news/archive/columbia-law-school-advise-ukraine-international-claims-and-reparations> [<https://perma.cc/FC9H-3CQ7>]; Giorgetti, Kliuchkovsky & Pearsall, *supra* note 40.

280. The funding structure, see discussion *infra* Section III.B.3, is intended to operate alongside, or independent of, the oil price cap established by the G7, thus incorporating both policy and commercial realities. Lev Breydo, *United States, G7 Plan to 'Cap' Russian Oil Revenue Hits Delays*, BUS. L. TODAY (Oct. 2022), https://businesslawtoday.org/month-in-brief/october-in-brief-business-regulation-and-regulated-industries-2022/#US_G7_Plan_to_Cap_Russian_Oil_Revenue_Hits_Delays [<https://perma.cc/47KM-9TJA>] (describing operation and mechanics of oil price cap).

281. Bettauer, *supra* note 38, at 3.

population into refugees.²⁸² Iraq's war, like Russia's, was also comprehensively condemned by the global community and deemed "unlawful" under international law.²⁸³

Acting pursuant to U.N. Security Council authority, the United States led a 1991 military intervention against Iraq.²⁸⁴ The Security Council Resolutions ending the war explicitly established Iraq's liability for damage from its invasion, and tied the peace accord to reparation payments, which the UNCC was established to facilitate.²⁸⁵ As detailed below in Section III.B. and Part IV, due to the inability to leverage the Security Council, where Russia holds a veto, this Article's proposal utilizes a different structure predicated on economic leverage.

This Section discusses: (i) the UNCC's structure and objectives; (ii) the taxonomy of claims against Iraq; and (iii) the UNCC's novel oil-backed funding model, which guaranteed payment for war victims while mitigating creditor conflicts.

1. UNCC Structure

Though war reparations have a "long history," a distinctive feature in respect of the resolution of the Gulf War was the "groundbreaking agreement" holding Iraq "liable under international law for any direct loss, damage . . . or injury" arising from its "unlawful invasion and occupation of Kuwait."²⁸⁶ Reflecting this sentiment, the Gulf War ceasefire resolution established the UNCC and the U.N. Compensation Fund, an associated sibling entity responsible for making payments to claimants.²⁸⁷ Over thirty-one years between 1991 and January 2022, the UNCC awarded \$52.4 billion to approximately 1.5 million claimants,²⁸⁸ over 99% of which were individuals.²⁸⁹ In the aggregate, the

282. *Id.* (noting that the atrocities included using "civilians as human shield[s]").

283. S.C. Res. 687, ¶ 16 (Apr. 3, 1991).

284. This action was pursuant to Security Council resolutions. *See infra* text accompanying notes 292–293.

285. Bettauer, *supra* note 38, at 9–10.

286. S.C. Res. 687, *supra* note 283, ¶ 16.

287. Organizationally, the UNCC adopted a tripartite structure comprised of (i) a "policy organ" called the Governing Council, (ii) panels of expert Commissioners to review specific claims or groups of claims, and (iii) a Secretariat, headed by an Executive Secretary, to administer the Compensation Fund. Bettauer, *supra* note 38, at 4–6.

288. *Id.* at 26–27 (describing the UNCC as one of the U.N.'s "few clear success stories").

289. The UNCC made its final payment in January 2022 and the claims process was formally completed the following month. *See generally* S.C. Res. 2621 (Feb. 22, 2022).

UNCC processed over 2.7 million claims, with an initial asserted value exceeding \$352 billion—an implied payment rate of about 14.8%.²⁹⁰

The UNCC was structured as an “subsidiary organ” of the Security Council,²⁹¹ the U.N. body able to “authorize the use of force,”²⁹² allowing it to leverage the “binding mechanism” of Chapter VII of the U.N. Charter.²⁹³ As discussed in Part IV, enforcing Russian participation will necessarily be more difficult, requiring focus on economic leverage.

The scale of the UNCC’s task was enormous, given its responsibility for processing, analyzing and paying a vast volume of claims on a highly expedited timeframe. To execute this unique role, the UNCC incorporated elements of both administrative and judicial entities. This disposition has some parallels to bankruptcy settlement trusts,²⁹⁴ from which the UNCC incorporated certain methodological dimensions including valuation, data-driven claim processing,²⁹⁵ and structured funding mechanics.²⁹⁶

Establishing Iraqi liability at the onset meant that the UNCC did not need a traditional, time-intensive adversarial evidentiary process for establishing and addressing claims. Because of this, operationally, the UNCC was largely “a claims adjustment process—deciding what actual losses were directly caused by the invasion and occupation and how they should be valued and paid.”²⁹⁷ The UNCC’s goals were essentially two-fold: (i) establish a process for “a speedy,

290. This is notably distinct from a “recovery rate” in the bankruptcy or commercial context.

291. See Carlos Alzamora, *The UN Compensation Commission: An Overview*, in THE UNITED NATIONS COMPENSATION COMMISSION: THIRTEENTH SOKOL COLLOQUIUM 3, 3–4 (Richard B. Lillich ed., 1995).

292. *United Nations Security Council*, U.N., <https://www.un.org/securitycouncil/> [<https://perma.cc/R9CF-ZMMX>].

293. Bettauer, *supra* note 38, at 5.

294. Traditionally established to consolidate debtors’ mass torts liabilities, such as asbestos, these vehicles evolved towards a strategy for healthy companies, like Johnson & Johnson, to circumscribe certain liabilities. See generally Samir D. Parikh, *Scarlett-Lettered Bankruptcy: A Public Benefit Proposal for Mass Tort Villains*, 117 NW. L. REV. 425 (2022).

295. See generally Arif H. Ali & Marguerite C. Walter, *Principles of Valuation Taken from the UNCC Perspective*, in UNCC REPARATIONS, *supra* note 38, at 81 (discussing valuation methodologies).

296. This also marked a significant contrast to the “historic” reparations model, predicated on “lump sum” payments, based on “punitive intensity and the ability to pay.” See Francis E. McGovern, *Dispute System Design: The United Nations Compensation Commission*, in UNCC REPARATIONS, *supra* note 38, at 29, 31.

297. Bettauer, *supra* note 38, at 10.

fair, and efficient evaluation of the claims made against Iraq”; and (ii) make payments to “claimants from the funds obtained from Iraq” in accordance with Security Council established procedures.²⁹⁸

2. Claim Classification & Methodology

The UNCC’s innovative approach for assessment, classification, priority, and payment of a large volume of complex claims provides meaningful insights transferable to Ukraine.²⁹⁹

One of the UNCC’s most notable features was an emphasis on compensation for *individuals* harmed by the war—an important evolution for a process historically focused on claims at the sovereign state level.³⁰⁰ This, however, resulted in a uniquely complex task, necessitating a “rough justice” philosophy “based on reasonableness and efficiency” given “extreme difficulties of proof and a large number of claimants in need of prompt relief.”³⁰¹

As detailed in the table below, the UNCC created six claimant-based categories, with A through D reserved for individuals, E corresponding to corporate claims, and F for governments and governmental organizations. Categories E and F were further sub-divided; however, priority was generally horizontally uniform for claimants in each category.³⁰² Consistent with an overall flexible structure, the UNCC did not adopt absolute priority³⁰³—instead, individuals’ claims were *generally* recognized and also paid at higher rates, governmental

298. McGovern, *supra* note 296, at 29–30.

299. Professor McGovern identifies “at least” eight architecture variables in respect of a claims resolution process: function, metaphor, authority and funding, size and similarity, organization and implementation, eligibility criteria, damage methodology, and compensation. See McGovern, *supra* note 271, at 1362–75. For sake of relative simplicity, this discussion consolidates some of these variables, which are discussed in greater depth in a current work in progress. See Lev E. Breydo, A Ukrainian War Reparations Facility: Institutional Architecture, Design & Incentives (2023) (unpublished manuscript) (on file with author); see also McGovern, *supra* note 296, at 29.

At the onset, the UNCC demarcated conflict-specific claims from other, non-conflict-related obligations, such as Iraq’s sovereign debt, which proved highly consequential. See *infra* Section III.A.3.

300. See *supra* Section I.A.

301. Arif H. Ali & Marguerite C. Walter, *supra* note 295, at 81–82.

302. A distinctive E/F category reflected overlapping claims involving export guarantees and insurance recovery. Bettauer, *supra* note 38, at 37.

303. Absolute priority is a feature of U.S. chapter 11 predicated on more senior claimants being paid in full before lower tiers receive any compensation. See *infra* Figure 3.

claims³⁰⁴ paid at the lowest level, and corporate claims towards the middle.³⁰⁵

Figure 3. UNCC: Summary of Claims Categories & Recoveries

United Nations Compensation Commission: Summary of Claims Categories & Recoveries									
Category	Claim Description	\$ Value	Evidentiary Requirements	Submitted Claims		Paid Claims		Indicative Recovery	
				Number	Value (\$MM)	Number	Value (\$MM)		
Urgent Claims	A	Displaced individuals and families	\$2.5K to 8K per claimant ¹	"minimal"	923,158	3,500	852,499	3,150	90.0%
	B	Individual/Family injury and death claims	\$2.5K to 10K per claimant ¹	"limited"	5,734	20.1	3,935	13.4	66.7%
	C	Individual/Family "departure, personal injury, death, personal property loss, lost securities, lost income, real property damage, and individual business losses"	up to 100K	"supporting documentation"	1,736,288	11,500	672,452	5,200	45.2%
	D	"Identical" to category C, but larger value thresholds	Over 100K	"sufficient to demonstrate the circumstances" and claim amount ³	13,864	16,500	10,343	3,300	20.0%
	E	Corporate claims ²			6,571	78,700	4,048	26,300	33.4%
	F	Governments and international organizations ⁴			393	236,100	285	14,000	5.9%
E/F	Overlapping claims (export guarantees and insurance)			123	6,150	57	311	5.1%	
Total / Avg.					2,686,131	352,470	1,543,619	52,274	14.8%

¹ Dependent on whether individual or family claims, as well as whether claimant submitting in other claim categories.
² Divided into claims by: (i) E1, oil sector (ii) E2, other corporate or business entities (iii) E3, non-Kuwaiti construction & engineering, and (iv) E4, Kuwaiti private sector (other than oil).
³ Categories D and E used the same evidentiary requirements language.
⁴ Sub-divided into four categories.
Source: Analysis based on UNCC Final Report and UNCC claim database.

One of the UNCC's unique challenges was its highly heterogeneous claimant pool—spanning across destitute refugees and poor migrant workers to global oil companies and governments. To address this, the UNCC incorporated claimant-specific needs into its recovery frameworks through a “two-tiered” grouping to provide expedient redress for most individuals, while also allowing a more thorough

304. Though beyond the scope of this discussion, governmental claims (Category F) were subdivided into four sub-categories, corresponding to different types of claims. One of the four was specific to Kuwait's claim (F3), which was the single largest, at \$63 billion (plus interest), but recovered only \$1.5 billion, in large part due to evidentiary considerations and certain aspects of the claim structure beyond the scope of this analysis. See Bettauer, *supra* note 38, chs. 2, 4. For purposes of this discussion, the key distinction, see discussion *infra* Section III.B, is that Ukraine's financial position is markedly different from Kuwait's with Ukraine likely requiring a significantly higher recovery on a percentage basis.

305. Importantly, evidentiary standards and associated burdens of proof—which as discussed in this Section differed by claim category—played a significant role in paring back some of the larger claims, which were subject to significantly more extensive analysis. This approach reflected the “rough justice” hierarchy of needs in respect of the underlying claimants operating in the UNCC background. See Bettauer, *supra* note 38, chs. 2, 4.

investigation of larger claims.³⁰⁶ Categories A, B, and C were classified as “urgent” claims and paid on an expedited basis, subject to a lower evidentiary standard—but capped at relatively small amounts.³⁰⁷ Categories D, E, and F were uncapped, but subject to higher evidentiary standards, and a correspondingly longer process.³⁰⁸ To ensure that individual victims did not forego compensation due to liquidity needs, claims were “payable cumulatively,” allowing victims to apply through multiple categories “where more than one situation applies with respect to a particular person.”³⁰⁹

Reflecting the UNCC’s “rough justice” utilitarian guiding philosophy,³¹⁰ the claim categories had somewhat distinctive evidentiary and damage recovery frameworks, tailored to both the claims and claimants.³¹¹

306. In part due to volume, claims were submitted by governments on behalf of their citizens, rather than directly. This division of labor also reflected the fact that many of the impacted individuals were foreign nationals working in Iraq, and not Kuwaiti citizens. The UNCC allowed countries to file blocks of claims on behalf of their citizens; the Central Bank of Egypt for instance, filed a consolidated claim on behalf of 800,000 Egyptian workers, expediting the administrative dimensions for all parties. Bettauer, *supra* note 38, at 42.

307. See First Session of the Governing Council of the U.N. Comp. Comm’n, Criteria for Expedited Processing of Urgent Claims, U.N. Doc. S/AC.26/1991/1 (1991).

308. Timothy J. Feighery, *The Jurisprudential Legacy of the UNCC: Legal Issues Common to All Claim Categories*, in UNCC REPARATIONS, *supra* note 38, at 187, 197–98. Bankruptcy trusts for asbestos (and other mass torts) claims employ a broadly similar approach, allowing priority payments for individuals at heightened health risk. See U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-918, ASBESTOS INJURY COMPENSATION: THE ROLE AND ADMINISTRATION OF ASBESTOS TRUSTS 8 (2011). This is consistent with the UNCC borrowing certain methodological elements from the U.S. mass torts context. Eric Schmitt, *Righting Wrongs of War: Billions in Claims Against Iraq*, N.Y. TIMES, Nov. 18, 1994, at B9 (“To handle the vast number of disparate claims, lawyers on the United Nations Compensation Commission are applying arguments and procedures developed in American mass tort litigation, like the asbestos and silicon breast implant cases.”).

309. See First Session of the Governing Council of the U.N. Comp. Comm’n, *supra* note 307, ¶ 13, at 3.

310. There are undoubtedly some inherent elements of arbitrariness involved in determining dollar thresholds associated with unspeakable crimes. However, as is the case with respect to U.S. mass tort bankruptcy cases—from which much of the valuation methodology was borrowed—the streamlined approach offers the distinct benefits of expedited resolution as well as reduced administrative costs. The devil, of course, is in the details with respect to ensuring that the model inputs are sufficiently valid, robust, and equitable.

311. WELLER, *supra* note 74, ¶ 26, at 9:

If States participating in a claims commission process so choose, they can agree that all or certain categories of claims can be processed in a simplified way. This can be done either for individual claims or by taking all individual claims in a given category and making them mass claims.

- Category A claims corresponded to individuals and families displaced by the war,³¹² with a fixed claim amount between \$2,500 and \$8,000,³¹³ and “minimal” documentation requirements,³¹⁴ reflecting the unique circumstances of an armed conflict.³¹⁵ A total of 923,158 Category A claims were submitted and over 850,000 accepted, with total compensation of \$3.15 billion—a rate of about 91%, by far the highest of the six categories.
- Category B “addressed claims for serious personal injury and death,”³¹⁶ and similar to Category A, a fixed claim value between \$2,500 and \$10,000 with “limited” evidentiary requirements.³¹⁷ Category B claims were accepted and paid at the second highest rate of about 66.8%.
- Category C encompassed the “broadest range of claims,” including, amongst other items, “losses relating to personal property, income, real property, and businesses,” capped at \$100,000.³¹⁸ This category proved “the most challenging” for the UNCC because of the heterogeneity and volume of claims, as well as more extensive documentation requirements relative to Categories A and B.³¹⁹
- Category D claims were substantively “identical” to Category C, but encompassed amounts exceeding \$100,000 with correspondingly higher evidentiary standards—requiring that claims “be supported by documentary and other appropriate evidence sufficient to

312. See *supra* note 306 and accompanying text.

313. Category A provided \$2,500 for individuals and \$5,000 for families, which was increased to \$4,000 and \$8,000, respectively, if the individuals were only filing Category A claims. See *supra* Figure 3; see also Bettauer, *supra* note 38, at 36–37.

314. See First Session of the Governing Council of the U.N. Comp. Comm’n, *supra* note 307, ¶ 11, at 2 (“In the case of departures, \$2,500 will be provided where there is simple documentation of the fact and date of departure from Iraq or Kuwait. Documentation of the actual amount of loss will not be required.”).

315. *Category A*, U.N. COMP. COMM’N, <https://uncc.ch/category> [<https://perma.cc/7EYF-6U5F>].

316. Feighery, *supra* note 308, at 201–02.

317. *Id.*

318. *Id.* at 204.

319. *Id.* at 204–08.

demonstrate the circumstances and the amount of the claimed loss.”³²⁰ Category D claims were not paid on an “urgent” basis, allowing for a longer evidentiary process.³²¹

- Category E corresponded to claims of corporate and private sector firms and incorporated the same evidentiary requirements as Category D.³²² While Category D included some business-related claims, Category E generally corresponded to larger entities and claims, asserting \$78.7 billion of claims, and recovering \$26.3 billion—just over half of the total awarded by the UNCC.
- Category F reflected \$236.1 billion of claims asserted by international organizations and governments, including \$168 billion of claims from Kuwait, spanning infrastructure damage, national reconstruction, and lost investment income.³²³ Category F was paid out at the lowest rate—about 6% of asserted claims—recovering a total of \$14 billion. This was in large part because Kuwait was in a position to accept a relatively low recovery rate due to its robust fiscal position, which allowed it to fund national reconstruction through its sovereign wealth fund. This represents an important contrast to Ukraine, which is in financially dire straits and will likely need a higher level of compensation, as discussed below.³²⁴

320. Compensation Commission Governing Council Dec., U.N. Doc. S/AC.26/1991/7/Rev.1, ¶ 23 (Mar. 17, 1992). This decision was embodied as Article 35(2) of the Commission’s Provisional Rules for Claims Procedure. Compensation Commission Governing Council Dec., U.N. Doc. S/AC.26/1992/10, Annex, Provisional Rules for Claims Procedure (June 26, 1992).

321. Feighery, *supra* note 308, at 198 n.32.

322. Category E included both Kuwaiti and foreign companies, subdivided as follows: (i) E1, oil sector; (ii) E2, other corporate or business entities; (iii) E3, non-Kuwaiti construction and engineering firms; and (iv) E4, Kuwaiti private sector (other than oil sector). *Id.* at 210–11.

323. *Kuwait Claims More Than \$168 Billion in War Damages from Iraq*, AL BAWABA (Sept. 27, 2000), <https://www.albawaba.com/business/kuwait-claims-more-168-billion-war-damages-iraq> [<https://perma.cc/5UNV-HYEX>].

324. *See infra* Section III.B.

3. Funding Mechanism & Claim Priorities

Based on experience with prior compensation programs, the Security Council determined that the UNCC required a “clear source of funding” to be effective.³²⁵ Correspondingly, the Gulf War cease-fire resolution established that UNCC claims would be paid from a portion of Iraq’s “exports of petroleum and petroleum products” (hereafter, “oil” for simplicity).³²⁶

The mechanics were complex and evolved somewhat over time, but generally were predicated on direct transfers of Iraqi oil sale proceeds to the U.N. Compensation Fund,³²⁷ which made payments to claimants based on the UNCC’s determinations.³²⁸ The recoupment rate was initially set at 30% of oil revenues, but decreased to 25% in 2000, and then to 5% in 2003.³²⁹ This rate was intended to analytically incorporate Iraq’s financial position, including its other obligations and sovereign debt.

The UNCC contemplated “only a limited role” role for Iraq, largely to preclude it from challenging payments or redirecting cash flows.³³⁰ Unsurprisingly, Iraq was initially reluctant to participate. At first, Saddam Hussein, Iraq’s then-leader, simply refused to produce oil, precluding payments but also starving the economy in the

325. WELER, *supra* note 74, ¶ 9, at 4 (“The most important lesson learned from previous claims commissions is that they are most effective if they have an unambiguous mandate, effective procedures and a means of ensuring payment of their awards.”); *see also* Bettauer, *supra* note 38, at 14.

326. S.C. Res. 687, *supra* note 283, ¶ 19.

327. S.C. Res. 692 (May 20, 1991).

328. The mechanics of fund payments varied somewhat over time and can be broadly grouped into three periods. Initially, the U.N. Secretariat in New York supervised the system, which evolved into the “oil-for-food” program. Subsequently, after 2003, oil proceeds were transferred to a Central Bank of Iraq/Oil Proceeds Receipts Account established by the Coalition Provisional Authority Administrator at the New York Fed, “with the funds then further transferred in the appropriate percentages to the Compensation Fund and to the Development Fund for Iraq.” Finally, after the 2011 election of Iraq’s new government, Iraq began making payments from its oil sales directly to the Compensation Fund. *See* Bettauer, *supra* note 38, at 17–19.

329. S.C. Res. 778, ¶¶ 1–4 (Oct. 2, 1992); S.C. Res. 705, ¶ 2 (Aug. 15, 1991); *see also* McGovern, *supra* note 296, at 35.

330. Though consistent with the threshold finding of Iraqi responsibility, this was nonetheless a long-running criticism of the UNCC’s tradeoffs between practical efficiency and institutional legitimacy. *See* Bettauer, *supra* note 38, at 9–10.

process.³³¹ Because of this, frozen Iraqi assets were temporarily used to make payments.³³² Subsequently, Iraq reportedly worked to “slow, if not halt” the “unprecedented” process—yet, the UNCC ultimately moved forward.³³³

Another important feature of the UNCC was the demarcation between conflict-specific and non-conflict claims. This was established through a resolution that Iraq’s other “debts and obligations” would be “addressed through the normal mechanisms” while explicitly holding “null and void” prior Iraqi repudiations of pre-war debts.³³⁴ As a result, non-conflict claims were effectively exogenous from the UNCC perspective, allowing it to focus solely on claims arising from the conflict.

This had two key benefits in respect of the UNCC’s relationship to other creditors. First, as a practical matter, the UNCC’s oil-backed dedicated cash flows provided reparations a level of structural priority.³³⁵ Second, because the money was paid to the Compensation Fund before reaching Iraq, this limited creditor conflicts. Other parties could not assert claims against Iraq for that portion of oil proceeds,

331. Arguably, a potential criticism of the UNCC is that the initial rate was set too high at thirty percent, which appears to have been based in large part on U.S. insistence. It is from that perspective telling that, following the second Iraq conflict, after which the United States assumed significant financial responsibility for the state, the rate was significantly decreased. As discussed *infra* Section III.B, this speaks to the importance of clear goal setting for a claim commission, which in this case corresponds to supporting Ukraine, rather than punishing Russia (which is best for other forums).

332. CSR IEEPA, *supra* note 162, at 28; *see also supra* Part II.

333. Bhushan Bahree, *Iraq Stakes Claim to Funds Earmarked for Compensation*, WALL ST. J. (Aug. 1, 1996), <https://www.wsj.com/articles/SB838846421828338000> [<https://perma.cc/FYH7-ZZYN>]. Examples included threatening to blacklist foreign companies from future oil sector work unless they withdrew valid claims, often totaling billions. *See* Steve Stecklow & Alix Freedman, *Iraq Presses Firms to Forgo Billions in War Reparations*, WALL ST. J. (June 19, 2002), <https://www.wsj.com/articles/SB1024447791845473040> [<https://perma.cc/N7LG-GA3N>].

334. S.C. Res. 687, *supra* note 283, ¶¶ 16–17.

335. This is because, all things being equal, dedicated flows can better insulate a creditor from diversion of funds and horizontal competition amongst parties in respect of dividing claims. For instance, revenue bonds common in the U.S. municipal market utilize a conceptually similar approach. *See* Juliet M. Moringiello, *Municipal Capital Structure and Chapter 9 Creditor Priorities*, BROOKINGS (July 5, 2016), <https://www.brookings.edu/wp-content/uploads/2016/10/moringiello1.pdf> [<https://perma.cc/5GP2-WT8K>] (“The Code treats revenue bonds as secured debt, and when Congress revised the Bankruptcy Code in 1988, it took the needs of the municipal market into account in protecting the security interest created by revenue bonds.”).

precluding diversion of cash flows—which proved critical following Iraq's sovereign debt default.³³⁶

In short, though imperfect, the UNCC was almost remarkably successful in effectuating large-scale reparations for Iraq's unlawful war—particularly to individuals, who represented over 99% of the 1.5 million resolved claims.³³⁷

B. The Ukraine Compensation Commission (UKR-CC)

Given the unambiguous global consensus that Russia's war against Ukraine is “unlawful”³³⁸ under international law,³³⁹ and clear precedent for holding aggressors responsible through war reparations, pursuing such an approach appears apt for Ukraine's circumstances.

To that end, this Article proposes a claim resolution mechanism inspired by the UNCC (henceforth, the “Ukraine Compensation Commission,” or UKR-CC).³⁴⁰ Notwithstanding key differences—most critically, an inability to bind Russia—many facets of the UNCC's approach are transferable, including claim classification, damages methodologies, and funding mechanism. The funding structure, as detailed in Section III.B.3, is intended to operate alongside, or independent of, the oil price cap established by the G7 in December 2022, thus incorporating both policy and commercial realities.³⁴¹

It is essential to reiterate that there is no way for Russia to truly compensate the victims of its crimes: Dollars do not replace lives. However, failing to provide victims with some measure of restitution would represent a far greater injustice. That consideration fundamentally motivates this Article.

This Section presents the proposal, starting with an overview of the contemplated structure, followed by a discussion of the

336. See Simon Hinrichsen, *Tracing Iraqi Sovereign Debt Through Defaults and Restructuring* 15–18 (The London Sch. of Econ. and Pol. Sci. Econ. History Working Papers, Paper No. 304, 2019), <https://www.lse.ac.uk/Economic-History/Assets/Documents/WorkingPapers/Economic-History/2019/WP304.pdf> [<https://perma.cc/A5ES-A4NB>].

337. Bonner, *supra* note 37.

338. See generally Haque, *supra* note 14.

339. This is a view strongly held by Ukraine, and echoed by the United States, EU, and other nations. See *supra* note 1.

340. This acronym is used to distinguish the vehicle from the more common UCC usage in respect of “Unsecured Creditors Committee.”

341. Breydo, *supra* note 280 (describing operation and mechanics of oil price cap).

taxonomy of claims, highlighting similarities and distinctions in respect of the UNCC.

1. UKR-CC Structure

The fundamental UNCC concept of a structured trust facilitating oil-backed war reparation payments is highly compelling for Ukraine's circumstances. Normatively, the UNCC's utilitarian disposition and emphasis on individual victims is well-suited to the situation, and also consistent with the Ukrainian government's stated objectives.³⁴² Descriptively, the claim taxonomy, payment and priority mechanisms, as well as funding structure are also largely appropriate—notwithstanding important caveats, discussed below. At the same time, as detailed in Part IV, the UKR-CC's overarching goal should be supporting Ukraine—rather than punishing Russia, as the latter task is better suited for other forums and processes.³⁴³

A key set of differences between the UNCC and UKR-CC is institutional structure, with associated implications for mechanisms to bind Russia and incentivize participation. This is because, as detailed above in Section III.A., the UNCC was established as part of the broader Gulf War ceasefire, with the U.S.-led coalition able to dictate terms, and pursuant to a Security Council resolution able to leverage the “binding mechanism” of Chapter VII of the U.N. Charter.³⁴⁴ Here, a role for the Security Council is a “non-starter” given Russia's permanent veto power, leaving the UKR-CC without a “natural” institutional home.³⁴⁵ Given situational fluidity as of the time of publication, too nuanced or prescriptive a discussion around UKR-CC institutional structure appears both premature and beyond the scope of this Article.³⁴⁶ However, from a broad-based perspective, a number of multi-lateral institutions could be well suited for the task, with entity choice

342. “Russian money as compensation should reach every affected person, family, business.” Zelensky, *supra* note 39.

343. See generally David D. Carron & Brian Morris, *The UN Compensation Commission: Practical Justice, Not Retribution*, 13 EUR. J. INT'L L. 183 (2002).

344. Bettauer, *supra* note 38, at 5.

345. See Blank, *supra* note 64 (“[T]he absence of either Russian consent or a means to mandate Russian participation . . . [means the] mechanism would face core challenges to its ability to amass the necessary resources and enforce any required payments.”). At the same time, the February 2022 conclusion of the UNCC process may prove serendipitous, given that the UKR-CC would benefit tremendously from inheriting or transitioning, to the extent possible, existing UNCC infrastructure, resources, and staff.

346. This analysis as well as certain additional considerations will be explored in greater depth as part of a forthcoming work in progress. See Breydo, *supra* note 299.

guided by the goals of ensuring legitimacy and facilitating enforcement of the contemplated funding mechanism.³⁴⁷

2. Claim Taxonomy and Classification

Analytically and methodologically, the universe of claims against Russia has similarities to that of the claims against Iraq—however, the scale, heterogeneity, and process complexity are likely to be much higher due to the prolonged nature of the conflict and the inability to legally bind Russia.³⁴⁸

At present, it is impossible to precisely assess the full scope or value of claims, though existing broad-based estimates have suggested figures of €200–500 billion (notably, from relatively early in the

347. Possibilities include U.N. bodies, such as the General Assembly, the ICJ, or a claims commission under international auspices—including potentially the EU. See Blank, *supra* note 64. The EU has notably been actively exploring various mechanisms for utilizing frozen Russian central bank reserves for Ukraine's benefit, including through interest earned on the assets. According to the *Financial Times*, “[u]nder a European Commission proposal, the EU would shift the liquid assets of the Russian state that were frozen under sanctions into a fund, which would be actively managed to generate a ‘stable and fair net return’ to help pay to rebuild Ukraine.” Sam Fleming & Henry Foy, *EU Wants to Use Frozen Russian Assets to Fund Ukraine Reconstruction*, FIN. TIMES (Nov. 30, 2022), <https://www.ft.com/content/a96c3e66-39ab-45d2-a7ff-b6302b1c9284> [<https://perma.cc/A45S-VY3B>].

Ukraine was recently approved to begin the process of joining the EU. Correspondingly, the reconstruction of Ukraine should occur alongside the broader EU membership process, ensuring that development—both physical, and, critically, institutional—follows best practices and ultimately meets the Union's standards. From that perspective, a claim resolution facility under EU auspices may be a reasonable institutional base for the UKR-CC, allowing its governance and operation to work alongside the existing EU architecture. The UKR-CC would likely collaborate with other entities, such as the newly-created Ukraine Solidarity Trust Fund, an EU-based vehicle for supporting Ukrainian reconstruction. See *EU Solidarity with Ukraine*, EUR. COUNCIL (Mar. 16, 2023), <https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/eu-solidarity-ukraine/> [<https://perma.cc/4V6D-QAGS>].

However, given its unique objectives and responsibilities, the entity—at least as contemplated here—should maintain governance and operational independence, which represents a slight contrast to other scholars' suggestions. Zelikow, *supra* note 244 (describing the Ukraine Solidarity Trust Fund as a “suitable” reparations vehicle).

348. Yaroslav Trofimov, *The War in Ukraine Will Be Long. Is the West Ready?*, WALL ST. J. (Jan. 13, 2023), https://www.wsj.com/articles/ukraine-war-long-west-ready-11673571215?mod=hp_lead_pos9 [<https://perma.cc/CM3K-7BED>] (“The war in Ukraine, it's clear by now, won't end soon.”).

conflict),³⁴⁹ \$750 billion,³⁵⁰ and \$1.36 trillion.³⁵¹ Those analyses, however, appear to represent figures methodologically distinct from legal claims—excluding claims specific to individuals and businesses, for instance—which are likely to be much higher in the aggregate.³⁵² To provide a sense of magnitude, the \$352 billion asserted against Iraq (distinct from \$52 billion paid), for instance, is equal to about \$800 billion when adjusted for inflation. By extrapolating UNCC figures from Iraqi reparations to Kuwait—an admittedly simplified, top-down assessment, shown in the Appendix—this Article estimates a total of nearly \$100 billion for refugee claims alone, relative to \$3.15 billion paid by the UNCC.³⁵³

This Section provides a starting taxonomy in respect of claims against Russia, first demarcating them between: (i) claims stemming directly from the conflict (“Conflict Claims”), with an emphasis on similarities and differences relative to the UNCC framework, and (ii) claims not directly tied to the conflict (“Non-Conflict Claims”),³⁵⁴ which, consistent with the UNCC approach, must be separated from Conflict Claims from a priority perspective and otherwise. Both first-level categories can then be further sub-divided with additional sub-categories for specific claim types, detailed below.³⁵⁵

a. Conflict Claims

While much of the commentary has implied homogenous damages suffered by the Ukrainian state, the reality on the ground is much more complex, with a highly heterogenous universe of claims—including millions of directly impacted individuals, as occurred in Kuwait. These individuals must be a key priority for any viable

349. UKRAINE BLUEPRINT, *supra* note 58, at 31.

350. Fleming, *supra* note 59 (“Ukraine said it would need \$750bn to fund a national recovery plan and demanded that the ‘key source’ of funds for reconstruction should be the confiscated assets of the Russian government and its oligarchs.”)

351. Tsyrennikov, *supra* note 60.

352. See *supra* Figure 3; *infra* Section III.B. Some of the figures appear to include elements of forward-looking investment, which may not constitute valid legal claims depending on the circumstances.

353. The computation is based on: (i) the number of Ukrainian refugees; (ii) multiplied by the average UNCC category A claim; (iii) adjusted for inflation. See *infra* Appendix.

354. In some respects, it is difficult to fully demarcate the two sets of claims, as most Non-Conflict Claims—including Russia’s sovereign default—are second-order effects of the conflict. However, from a legal perspective, a sufficient distinction can be made for purposes of this analysis.

355. This is consistent with the UNCC approach. See *supra* Section III.A.

reparations plan. Furthermore, unlike Kuwait, which emerged from the Gulf War in a solid fiscal position, Ukraine's public finances are dire, necessitating unique considerations to ensure that the government is able to continue functioning in order to win the war and then shepherd the rebuilding process.

Given important parallels between the respective circumstances, facets of the UNCC philosophy and approach offer valuable insights for UKR-CC design, including an emphasis on restitution for individual victims and a value-maximizing utilitarian philosophy, as well as methodological components such as claim categorization, relative priority, liquidity-oriented tiered grouping,³⁵⁶ and data-oriented evidentiary processes.³⁵⁷

The UNCC's claim categorization provides a viable starting point, with claimant-specific groupings for: (i) individual victims, divided across multiple categories; (ii) companies and private sector entities; and (iii) governments and intergovernmental organizations (with Ukraine likely requiring its own category).³⁵⁸ The chart below details a preliminary potential taxonomy of UKR-CC claim categories:

356. See *infra* note 372 and accompanying text (discussing ways to provide Ukraine liquidity).

357. As just one example, the UNCC cross-referenced border crossing data to assess validity of refugee claims. The UKR-CC is likely even better positioned for this task given high data quality from EU border crossings, for instance.

358. Because Ukraine must unambiguously be held to the same standards, in the event that Ukraine or its agents take actions that result in harm to Russia or its citizens (as well as to those in occupied or contested territories) that is illegal under international law, the affected parties should be able to pursue claims against Ukraine through the UKR-CC as well. Given the nature of the conflict, however, this contingency is not discussed substantively at this juncture.

Figure 4. UKR-CC: Indicative Preliminary Summary of Claim Categories & Evidentiary Standards

Ukraine Compensation Commission: Indicative Preliminary Summary of Claims Categories & Evidentiary Standards			
Category	Claim Description	Evidentiary Requirements	UNCC Analog?
Urgent Claims	A Displaced individuals and families ¹	"minimal"	Y
	B Individual/Family injury and death claims ¹	"limited"	Y
	C Individual/Family "departure, personal injury, death, personal property loss, lost securities, lost income, real property damage, and individual business losses"	"supporting documentation"	Y
	D "Identical" to category C, but larger value thresholds		Y
Priority Claims	E-1 Ukrainian Corporate claims ²	"sufficient to demonstrate the circumstances" and claim amount ³	Y
	E-2 Foreign Corporate Claims	Comprehensive Evidentiary Process	Y
	F Foreign Governments and international organizations ⁴		Y
Priority Claims	G-1 Ukrainian Government (Liquidity/Priority Claim)	Limited / Supporting Documentation	
	G-2 Ukrainian Government (Main Claim)	Comprehensive Evidentiary Process	
Urgent Claims	H Sexual Assault Victim Claims	Specialized evidentiary process	

¹ UNCC claim recovery varied depending on whether individual or family claims, as well as whether claimant submitting in other claim categories.
² Category may ultimately be sub-divided by industry (UNCC analog category sub-divided between foreign and domestic and by oil sector and others).
³ UNCC Categories D and E used the same evidentiary requirements language.
⁴ Intended to include countries impacted by Russia's invasion, including those hosting refugees.
Source: Analysis based on UNCC Final Report and UNCC claim database.

First, from a legal, policy, and moral perspective, individual victims' claims must be resolved fairly and comprehensively—and here the UNCC precedent provides a viable framework.³⁵⁹ Consistent with that approach, a starting point may be to divide individuals' claims into multiple stand-alone categories, including: (i) displaced individuals and families (Category A above); (ii) personal injury and death (Category B); and (iii) two categories of personal and property damage claims, with one capped but expedited (Category C), and the other allowing for larger claims (Category D). Reflecting the urgency of need—thousands of refugees are forced to return to Russian-controlled territory for work³⁶⁰—the UNCC's tiered priority structure should be adopted with individual claims categories denoted "urgent

359. See *supra* Section III.A.2.

360. "We don't have any choice. . . . We're totally out of money," one refugee explained. Ian Lovett, *With No Work or Money, Ukrainians Return Home to Russian-Controlled Territory*, WALL ST. J. (July 26, 2022), https://www.wsj.com/articles/with-no-work-or-money-ukrainians-are-forced-to-return-home-to-russian-controlled-territory-11658850184?mod=hp_lead_pos5 [<https://perma.cc/37LD-B2NP>].

claims” receiving payments subject to a streamlined evidentiary process.³⁶¹

In addition, given terrifying allegations of systematic sexual violence, an additional category should be created for such victims (denoted “Category H” above).³⁶² These claims must be in a separate category due to the unique nature of the harm as well as the need for evidentiary and claim procedures respectful of victims and circumstances.³⁶³

Second, paralleling Iraq’s destruction of Kuwaiti energy assets, Russia deliberately sought to expropriate or damage businesses in Ukraine, including both domestic and foreign entities, with the agricultural and industrial sectors most affected. Examples range from theft of agricultural assets, including tractors and grain from Ukrainian farmers,³⁶⁴ to artillery damage to domestic and foreign-owned property, including that of multinational giants such as Viterra and Bunge.³⁶⁵ Similarly, industrial groups have alleged both property rights violations and asset seizures; Metinvest, Ukraine’s largest steel producer, filed lawsuits in the European Court of Human Rights seeking “relief for Russia’s blockading, looting, destruction and diversion of grain and metals.”³⁶⁶ With respect to the category of corporate

361. This approach is also broadly consistent with scholarly proposals for a living wage for Ukrainians funded with Russian assets. Simon Johnson & Oleg Ustenko, *A Basic Income for Ukrainians, Paid for with Frozen Russian Assets*, POLITICO (Mar. 2, 2022), <https://www.politico.com/news/magazine/2022/03/02/frozen-russian-assets-humanitarian-relief-00013286> [<https://perma.cc/AUL3-TK2M>].

362. Valerie Hopkins, *After Rapes by Russian Soldiers, a Painful Quest for Justice*, N.Y. TIMES (June 29, 2022), <https://www.nytimes.com/2022/06/29/world/europe/ukraine-russia-rape.html> [<https://perma.cc/UW9J-8XPU>]; Bethan McKernan, *Rape As a Weapon: Huge Scale of Sexual Violence Inflicted in Ukraine Emerges*, THE GUARDIAN (Apr. 4, 2022), <https://www.theguardian.com/world/2022/apr/03/all-wars-are-like-this-used-as-a-weapon-of-war-in-ukraine> [<https://perma.cc/RYC9-THN2>].

363. For avoidance of doubt, Category H is discussed within individual claims given the nature of the claimants, but displayed on its own to reflect its highly distinct evidentiary standard (rather than any reflection or connection to priority of payment).

364. Tristan Bove, *‘This is Criminal Activity’: Russia Is Selling Stolen Ukrainian Grain in Syrian Ports as Putin Holds World Hostage over Food*, FORTUNE (June 17, 2022), <https://fortune.com/2022/06/17/russia-selling-stolen-ukrainian-grain-syria/> [<https://perma.cc/5PXQ-LLUG>].

365. Alistair Macdonald, Bojan Pancevski & Drew Hinshaw, *Russia Hits Grain Terminals in Latest Attack on Ukraine’s Food Infrastructure*, WALL ST. J. (June 22, 2022), <https://www.wsj.com/articles/russian-refinery-set-ablaze-by-drone-crash-11655896950?mod=mhp> [<https://perma.cc/Z8ES-GQNF>].

366. Roman Olearchyk, Sylvia Pfeifer & Max Seddon, *Ukraine’s Richest Oligarch Launches Lawsuit Against Russia*, FIN. TIMES (June 27, 2022), <https://www.ft.com/content/f2a2366e-ea9e-49a2-9d06-db76369e0134> [<https://perma.cc/FR9L-F49D>].

claims (denoted “Category E” above), a tiered structure may also be adopted to allow for faster payouts to smaller domestic companies and a somewhat more informationally intensive process for foreign groups operating in Ukraine.³⁶⁷

Third, Russia’s invasion has economically harmed many countries beyond Ukraine. Neighboring states, such as Poland and Moldova, for instance, have hosted millions of refugees at significant expense. Recognizing this, scholars and commentators have called for Russia to compensate the host nations, with one estimating a \$50 billion figure for a single year.³⁶⁸ Other nations, including the United States and United Kingdom, have provided Ukraine with billions to sustain its government—a financial hole created by Russia’s invasion, potentially warranting claims under international law.³⁶⁹ Akin to the UNCC, nations could submit claims to the UKR-CC for adjudication, estimation, and recovery.

Finally, in an important contrast to Kuwait—where claims were grouped with other governments³⁷⁰—claims of Ukraine’s government warrant a distinct category, which is likely to be the single largest.³⁷¹ At the same time, given Ukraine’s precarious financial position, this category should be divided between a “priority” portion to address acute liquidity needs—as well as a larger claim corresponding to the bulk of damages,³⁷² which is likely to require a larger percentage recovery relative to that received by Kuwait.³⁷³

367. Certain claim-based tiering may make sense here as well, with smaller companies’ claims given a higher priority relative to potential obligations to larger organizations like Viterra and Bunge.

368. Litan, *supra* note 81.

369. Some scholars have argued that Russia’s actions allow third party nations to actively engage in its defense, and through that reasoning that may be what the United States and its allies are doing. *See, e.g.*, Haque, *supra* note 14, at 155 (arguing “that states are permitted and may be required to provide military assistance to Ukraine and impose economic sanctions on Russia”). Some have also proposed using Russian assets in respect of a “claims commission to compensate low-income countries victimized by Russia’s shock to food supplies.” Zoellick, *supra* note 81.

370. *See supra* Section III.A.2. Formally, this was subject to sub-grouping, but nonetheless understood to receive generally similar recoveries.

371. Depending on the circumstances, further subdivision in respect of claims of individual cities and regions may be warranted.

372. Sydney Maki, *Ukraine Downgraded by Fitch as ‘Default-Like’ Process Begins*, BLOOMBERG (July 22, 2022), <https://www.bloomberg.com/news/articles/2022-07-22/ukraine-lowered-to-c-by-fitch-as-default-like-process-begins?srnd=premium&sref=OOpRUZ81> [<https://perma.cc/LXS4-74RX>].

373. The larger required recovery reflects both the broad-based damage across a large geographic area, and Ukraine’s limited financial wherewithal. *See supra* Section III.B.2.

In short, it appears quite clear that the universe of invasion-specific claims against Russia is vast and highly heterogenous. This complexity necessitates a mechanism for assessing and paying claims while ensuring creditor priority consistent with broader policy goals—a particularly acute consideration in respect of individual claimants, who are likely to be ill-situated to pursue complex claims. Thus, it is critical that the claim resolution mechanism ensures procedural and distributive fairness so that those most vulnerable are not wronged for the second time.

b. Non-Conflict Claims

Along with the ever-growing pool of claims arising directly from the invasion of Ukraine, Russia is also exposed to a range of other liabilities, which are important to understand in respect of both magnitude and potential relationship to conflict-related obligations. This interplay is critical because Russia's creditors will, at the end of the day, seek to recover from broadly the same pool of assets as that available to war victims.³⁷⁴ Here the UNCC precedent of demarcating at the onset between conflict and non-conflict claims, while requiring payment of Iraq's other obligations on ordinary terms, proved critical by mitigating creditor conflicts while providing victims' claims a level of structural priority.³⁷⁵

Potential creditor conflicts create two distinct risks in this context. First, there are incentives to aggressively “jump the line” ahead of Ukrainian claims—particularly, those of individual victims—which may be exacerbated by the growing involvement of well-resourced, sharp-elbowed investors.³⁷⁶ Second, Russia in the past has been keen

374. To be clear, this would not necessarily entail priority for claims relating to the conflict, but is simply a recognition of differences between the two groupings.

375. See *supra* Section III.A.3.

376. A hedge fund is currently suing Ukraine, for instance. See Anna Hirtenstein, *A London Hedge Fund Wants Its Money Back from Ukraine*, WALL ST. J. (July 28, 2022), <https://www.wsj.com/articles/a-london-hedge-fund-wants-its-money-back-from-ukraine-11658956817> [<https://perma.cc/5PQ3-3WVD>] (“Ukraine is fighting for its survival and is desperate for cash, but that isn’t deterring London hedge-fund manager Richard Deitz from demanding money back from an ill-fated investment there.”); Laura Benitez, Sridhar Natarajan & Katia Porzecanski, *Wall Street Is Pouncing on Russia’s Cheap Corporate Debt*, BLOOMBERG (Mar. 3, 2022), <https://www.bloomberg.com/news/articles/2022-03-03/wall-street-is-already-pouncing-on-russia-s-cheap-corporate-debt?sref=OOpRUZ8l> [<https://perma.cc/6SV7-LFYC>].

to pay some claimants, but not others—risking the quasi-equivalent of a “preference,” in bankruptcy parlance, which should be prevented.³⁷⁷

At present, there are broadly three core categories of Non-Conflict Claims: (i) Russia’s \$40 billion of external sovereign debt;³⁷⁸ (ii) pre-invasion legal claims, including a \$50 billion judgement in connection with the alleged expropriation of Yukos Oil; and (iii) post-invasion legal claims, at least a step removed from the conflict, such as potential intellectual property and asset expropriation claims.

Following the expiration of a contractual interest payment grace period, Russia is “formally” in default on its sovereign debt, permitting acceleration of nearly \$40 billion of foreign currency obligations, and potentially \$250 billion of ruble-denominated debt.³⁷⁹ Further complicating matters, certain Russian state-owned enterprises are in financial distress, which could create additional creditor conflicts in the event of default.³⁸⁰

Russia is also a defendant in several ongoing international arbitration and litigation proceedings. Perhaps the most prominent is a long-running case by shareholders of the now-defunct Yukos Oil, alleging state asset expropriation. In 2021, the Dutch Supreme Court set aside a previous \$50 billion Hague tribunal award in favor of Yukos shareholders; the matter is now before the Amsterdam Court of Appeal.³⁸¹ A U.S. court declined to stay domestic facets of that litigation.³⁸² Other claims include a \$165 million award in favor of Chabad in connection with Russia’s refusal to return certain religious texts.³⁸³

377. For instance, Russia went to great lengths in its attempts to make bond payments to creditors, but has for years refused to pay claims awarded to the Chabad organization. See Breydo, *supra* note 114, at 65–68.

378. See Breydo, *supra* note 116 (Part I) (detailing sovereign debt structure).

379. Documentation for Russia’s local currency bonds is not publicly available. See *id.*

380. Mark Weidemaier & Mitu Gulati, *Do Investors Really Prefer Putin’s Booby Trapped Bonds?*, CREDITSLIPS (July 9, 2022), <https://www.creditslips.org/creditslips/2022/07/do-investors-really-prefer-putins-booby-trap-bonds.html> [<https://perma.cc/D7BP-GPNS>].

381. Anthony Deutsch & Bart H. Meijer, *Dutch Court Scraps Record \$50 Bln Payout to Yukos Shareholders*, REUTERS (Nov. 5, 2021), <https://www.reuters.com/business/energy/dutch-court-scraps-50-bln-award-former-yukos-shareholders-2021-11-05/> [<https://perma.cc/RVL3-B9BY>].

382. Jacqueline Thomsen, *U.S. Judge Says Russia Can’t Delay \$50B Yukos Case, Citing Sanctions*, REUTERS (Apr. 14, 2022), <https://www.reuters.com/legal/litigation/us-judge-says-russia-cant-delay-50-bln-yukos-case-citing-sanctions-2022-04-14/> [<https://perma.cc/39ZV-C85W>].

383. Asaf Shalev, *In Trying to Seize Russian Assets, The US Is Taking a Page from Chabad*, TIMES OF ISRAEL (May 21, 2022), <https://www.timesofisrael.com/in-trying-to-seize>

Finally, in response to a broad-based exodus of Western companies,³⁸⁴ Russia has passed legislation allowing domestic companies to “use foreign patents without the consent of the patent holders and without paying royalties”—something scholars have declared “akin to expropriation.”³⁸⁵ Additional proposed legislation would allow de facto expropriation of foreign company assets.³⁸⁶ Consistent with that posture, in early July 2022, Russia took control of the giant Sakhalin 2 energy project, which accounts for four percent of global liquefied natural gas production,³⁸⁷ potentially wiping out stakes of foreign investors including BP, Mitsubishi, and Mitsui.³⁸⁸ Depending on the scale of these efforts, a broad range of foreign companies may have claims against Russia that, depending on domicile, they may be able to pursue through bilateral investment treaties or otherwise.³⁸⁹

3. Funding Mechanisms

Establishing and enforcing a viable funding mechanism represents the UKR-CC's most significant challenge due to both:³⁹⁰

russian-assets-the-us-is-taking-a-page-from-chabad/ [https://perma.cc/34BP-J5VL]; Graham Bowley, *Russia Fined \$44 Million for Refusing to Hand Over Jewish Books*, N.Y. TIMES (Sept. 11, 2015), https://www.nytimes.com/2015/09/12/books/russia-fined-44-million-for-refusing-to-hand-over-jewish-books.html [https://perma.cc/LEZ5-A5CV].

384. Brad Dress, *At Least 47 Top Companies at Risk of Having Russia Seize Key Assets: Report*, THE HILL (July 7, 2022), https://thehill.com/policy/international/3549176-at-least-47-top-companies-at-risk-of-having-russia-seize-key-assets-report/ [https://perma.cc/S7V6-Y8YB].

385. Bruce Love, *Russian Patents Grab Deemed 'Act of War'*, FIN. TIMES (June 15, 2022), https://www.ft.com/content/1ee7a359-8561-4679-bc84-59f55157e9bd [https://perma.cc/CB83-P5P8].

386. John O'Donnell, *Analysis: Russia Prepares to Seize Western Firms Looking to Leave*, REUTERS (May 26, 2022), https://www.reuters.com/markets/europe/russia-prepares-seize-western-firms-looking-leave-2022-05-26/ [https://perma.cc/5JNQ-74WG].

387. Yuka Obayashi, *Russia Seizes Control of Sakhalin Gas Project, Raises Stakes with West*, REUTERS (July 1, 2022), https://www.reuters.com/business/energy/russia-decree-sakhalin-2-project-knocks-mitsui-mitsubishi-shares-2022-07-01/ [https://perma.cc/2WYM-UDKF].

388. Mauro Orru & Jenny Strasburg, *Russia Takes Control of International LNG Project*, WALL ST. J. (July 1, 2022), https://www.wsj.com/articles/russia-takes-control-of-international-lng-project-11656678678 [https://perma.cc/68AR-XERA].

389. Matthias Scherer et al., *Possible Claims Against Russia for Expropriation of Foreign Investments*, LEXOLOGY, https://www.lexology.com/library/detail.aspx?g=57c1d51d-9f8a-47ba-810d-290ebd54227b [https://perma.cc/BCM7-9544].

390. Indeed, a viable funding mechanism has been recognized as critical in the literature, with the lack of dedicated funding a common failing of less successful claims commissions.

(i) Russia's likely unwillingness to compensate victims, as well as the inability to legally bind it; and (ii) the unprecedented scale and complexity of claims administered by the UKR-CC, including the obligations' temporal distinctions (between urgent and non-urgent claims) and class-specific evidentiary process heterogeneity. Because of this, aggregate funding needs will be uncertain at the start of the process, requiring flexibility to calibrate the flow of funds based on ultimate claim adjudications.

With respect to the second issue, as the UNCC approach demonstrated, a levy on oil sales provides consistent, long-term cash flows uniquely well-suited for the financial profile of the UKR-CC's claims.³⁹¹ Oil levy proceeds can be calibrated to address the unique needs of urgent and priority claim categories (detailed above in Section III.B.2), including by providing a structured cash flow that the UKR-CC could borrow against, likely from the United States, EU, or a multilateral organization.³⁹²

With respect to the first issue, as detailed comprehensively below, the funding structure can be made operable through the broader sanctions frameworks in effect against Russia, including a newly established cap on the price of Russian oil.³⁹³ Notwithstanding early market apprehension, the effectiveness of the price cap³⁹⁴ shows the viability of "offensive" economic measures, even against a permanent Security Council member like Russia—in turn, illustrating the realistic prospects for extending the mechanism to effectuate reparations for Ukraine.

IV. INCENTIVIZING RUSSIAN PARTICIPATION

Notwithstanding the UKR-CC's benefits and clear advantages relative to alternatives, the largest challenge will likely be ensuring

391. For simplicity, this discussion largely focuses on oil (and at times uses it as shorthand) as natural gas sales are typically subject to counterparty-specific contracts with bespoke payment and volume mechanics. However, as noted *infra* note 400, certain escrow account mechanics may be operable. Because much of Russia's oil is produced and distributed by SoEs, such entities may be potential conduits for aspects of the mechanism. See *supra* Section I.C.2.

392. Depending on the circumstances and Ukraine's financial needs, portions or the entirety of such loans can be forgiven subject to Ukraine meeting certain milestones, such as EU membership, for instance.

393. See *infra* Section IV.A.1.

394. Based on market dynamics as of this writing in December 2022. See discussion *infra* Part IV.

Russian participation in respect of the funding structure. Indeed, scholars have suggested that a mechanism for Ukrainian reparations would require “Russian consent or a means to mandate[] participation,”³⁹⁵ which the UNCC accomplished through its structure under the Security Council—with the implicit threat of armed conflict.

This Article argues that economic measures can offer an alternative—arguably superior—method of ensuring and enforcing Russian payment. Indeed, the efficacy of sanctions against Russia illustrates the power of economic measures—which can be effectuated outside of the U.N. and the Security Council—over even a large economy and Security Council member. Furthermore, enforcement of reparations through market-based measures instead of the implicit threat of force reduces the chance of conflict and expands the potential utilization of similar economic measures following future confrontations.

Indeed, one may posit that enforcement of war reparations through economic measures represents a natural evolution, consistent with the increased use of economic sanctions more broadly in the twenty-first century.³⁹⁶ Here, those measures, including the Russian oil price cap (defined below), have resulted in a large discount for Russian oil—totaling tens of billions annually—and creating a market delta that can be leveraged to fund reparations for Ukraine. At present, the beneficiaries of that oil discount are buyers of Russian oil; this Article’s proposal would instead transfer those funds to victims of Russia’s war. The economics of the proposal are fundamentally integrative, not only providing for Ukraine, but offering Russia tangible financial benefits to incentivize participation.

Correspondingly, the UKR-CC represents a viable and practical path towards justice for Ukraine and the millions of victims of Russia’s war of choice, not just a theoretically elegant solution.

This Part IV of the Article is organized in two Sections. First, it discusses how economic leverage, made operable through existing sanctions frameworks, can be sufficient to incentivize Russian participation, focusing on oil market measures, technology sanctions, and use of Russia’s frozen reserves as collateral. Second, it discusses the UKR-CC’s likely underappreciated structural benefits from a centralized claim resolution process to which non-conflict claims can be

395. Blank, *supra* note 64.

396. William Mauldin, *U.S. to Press Financial Weaponry in Talks with European Allies on Russia*, WALL ST. J. (June 1, 2014, 8:43 PM), https://www.wsj.com/articles/u-s-to-press-financial-weaponry-in-talks-with-european-allies-on-russia-1401667455?mod=rss_europe_whats_news&utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+wsj%2Fxml%2Frss%2F3_7012+%28WSJ.com%3A+What%27s+News+Europe%29 [https://perma.cc/2PHJ-29G7]; Carter & Farha, *supra* note 80, at 903.

channeled—including through U.S. executive action—increasing the aggregate benefits for victims, claimants, and the Russian sovereign itself.

A. Economic Leverage Against Russia

Existing sanctions regimes provide significant economic leverage against Russia to effectuate reparations for the UKR-CC.³⁹⁷ Such economic measures consist of three interrelated components, intended to operate in tandem towards a comprehensive integrative solution: (i) energy market measures, including the Price Cap (as defined below); (ii) technology export sanctions; and (iii) Russia's \$325 billion of frozen reserves.

Conceptually, the premise is that the existing sanctions regime will fundamentally decimate Russia's financial wherewithal and economic position³⁹⁸ to the point that it has no choice but to sue for "economic peace" and the relaxation of sanctions, even if that required making reparation payments. Some predict this may come as soon as 2024.³⁹⁹

1. Energy Market Measures & G7 Price Cap

Given the UKR-CCC's prospective funding mechanism and petrostate nature of Russia's economy, energy market measures are the linchpin of the structure for effectuating Ukrainian reparations. For relative simplicity, the discussion below largely focuses on crude oil,

397. Because utilizing binding international legal authority against Russia appears impossible, the UKR-CC's vector has to be economic leverage. *See supra* Section III.B.1.

398. Some evidence of this is already emerging, with Russia reporting a record budget deficit for 2022, despite starting the year flush with cash from energy exports. Benjamin Harvey, *Russia's Budget Gap Surges to Record as War Hits Finances*, BLOOMBERG (Jan. 10, 2023), <https://www.bloomberg.com/news/articles/2023-01-10/russia-s-budget-gap-surges-to-record-as-war-pressures-finances?sref=OOpRUZ8l> [<https://perma.cc/AKU4-NWB9>].

399. Olesya Dmitracova, *Russia May Run Out of Money in 2024, Says Oligarch*, CNN (Mar. 3, 2023, 4:35 PM), <https://www.cnn.com/2023/03/03/economy/russia-no-money-deripaska/index.html> [<https://perma.cc/JAW8-2P6E>].

though broadly similar measures can be applied for other energy products, including natural gas,⁴⁰⁰ distillates, and diesel.⁴⁰¹

Energy exports represent the Russian government's most critical source of revenue,⁴⁰² and thus the most compelling economic lever.⁴⁰³ Initially, to avoid further disrupting global energy supplies, the sanctions regime did not target the Russian energy sector to the same extent as other parts of its economy. Combined with the increase in global energy prices—caused by Russia's invasion⁴⁰⁴—this

400. In contrast to oil, which generally trades on a global market, Russian natural gas sales are usually effectuated through long-term contracts with delivery over specifically developed pipeline assets, largely to EU member states. The UKR-CC funding strategy for natural gas could operate through an escrow account structure, where purchasers hold back in escrow a portion of contract-based sales for transmittal to UKR-CC or as collateral against future Russian reparations. Russia has previously contemplated various schemes to amend these contracts, including requiring payments in rubles, making the contemplated escrow less than unprecedented. Arathy Somasekhar & Nina Chestney, *Explainer: Russia Wants Countries to Pay for Gas in Roubles. Will Buyers Comply?*, REUTERS (Apr. 26, 2022, 6:35 PM), <https://www.reuters.com/business/energy/russia-wants-countries-pay-gas-roubles-will-buyers-comply-2022-04-26/> [<https://perma.cc/2B4U-AU6V>]:

In March, Russian President Vladimir Putin said the world's largest natural gas producer would require "unfriendly" countries to pay for fuel in roubles by opening accounts at Gazprombank and make payments in euros or dollars to be converted into roubles. . . . Several buyers have said they will continue paying in euros as their contracts do not allow a change in currency. Some legal experts say it is unlikely Russia can unilaterally change contracts terms.

The scheme could potentially incorporate set off against legal awards before the ICJ, International Criminal Court, or other internationally recognized bodies. See discussion of international legal claims *supra* Section II.B.2.

401. See Andrew Duehren, *U.S., Allies Prepare Fresh Sanctions on Russian Oil Industry*, WALL ST. J. (Jan. 11, 2023), <https://www.wsj.com/articles/u-s-allies-prepare-fresh-sanctions-on-russian-oil-industry-11673432088> [<https://perma.cc/H3X2-YMVY>].

402. Russia's finance minister boasted that increased prices are expected to yield additional revenues of €14 billion, which will be used to fund the war. *Moskau Rechnet mit 13,7 Milliarden Euro Mehreinnahmen* [Moscow Expects Additional Income of 13.7 Billion Euros], TAGESSCHAU [DAILY NEWS] (May 28, 2022), <https://www.tagesschau.de/ausland/russland-mehreinnahmen-oel-gas-101.html> [<https://perma.cc/373T-GH2T>].

403. See Andrew Duehren & Laurence Norman, *United States Floats Tariff on Russian Oil as EU Oil-Sanction Talks Drag On*, WALL ST. J. (May 17, 2022), https://www.wsj.com/articles/u-s-floats-tariff-on-russian-oil-as-eu-oil-sanction-talks-drag-on-11652803552?st=ua8i1z9f98vcmfj4&reflink=desktopwebshare_permalink [<https://perma.cc/BYK4-DC7Z>].

404. Lev Breydo, 'Record' Energy Prices Lead to United States 'Price Gouging' Legislation, U.K. 'Windfall' Profit Tax, BUS. L. TODAY (June 3, 2022), https://www.americanbar.org/groups/business_law/publications/blt/2022/05/mib-bizreg/ [<https://perma.cc/G8EQ-6X9Q>].

dynamic translated to bumper Kremlin revenues of about \$1 billion per day for the first 100 days of the war.⁴⁰⁵

As the conflict continued, however, international sanctions increasingly began to target the Russian energy sector, including through trade restrictions and related measures, with nations shunning Russian imports.⁴⁰⁶ As a result, the pool of buyers for Russian energy thinned out, giving the remaining buyers more bargaining power and requiring it to sell its wares at a discount.⁴⁰⁷ Certain large consumers, such as Chinese and Indian refiners, have picked up the excess production, but drove hard bargains of \$20 to \$30 per barrel—translating to billions in aggregate savings⁴⁰⁸—knowing that Russia has few options.⁴⁰⁹

The chart below shows the price spread between the Russian benchmark Urals oil blend, European Brent, and West Texas Intermediate (WTI), the U.S. grade.⁴¹⁰ Historically, before the invasion (denoted by the red oval below), Urals blend traded roughly at parity with Brent, and about \$5 to \$10 a barrel above WTI. Following the invasion, Russian Urals began to trade at a large discount to both Brent and WTI, with the spread at times exceeding \$30 a barrel and averaging above \$20 through the summer of 2022.⁴¹¹ Multiplied across millions of barrels, this spread represents billions in annual lost revenue for

405. CTR. FOR RSCH. ON ENERGY & CLEAN AIR, FINANCING PUTIN'S WAR: FOSSIL FUEL IMPORTS FROM RUSSIA IN THE FIRST 100 DAYS OF THE INVASION (2022).

406. See *supra* Section III.B.3.

407. *Russian Oil Selling at 30% Discount to Global Benchmark, Data Show*, BLOOMBERG (May 31, 2022), <https://www.bloomberg.com/news/articles/2022-05-31/the-deepening-discounts-on-russian-oil-in-the-country-s-own-data?sref=OOpRUZ8l> [<https://perma.cc/NVQ7-L6YW>]; Chloe Cornish & Benjamin Parkin, *Ambani's Reliance Among Indian Refiners Targeting Diesel Exports Using Cheap Russian Crude*, FIN. TIMES (June 15, 2022), <https://www.ft.com/content/2195e57f-f93f-4cd1-b9a2-dda2ca550c45> [<https://perma.cc/SS8L-9NN7>].

408. An energy consultant noted that he thinks there is quiet support for Indian purchases of Russian oil, with the United States wanting “the oil on the market” but “at a discount to hurt Putin’s revenues.” *Russia Doesn't Have Extra Oil for New Deals with Two Indian Buyers*, CNBC (June 9, 2022), <https://www.cnbc.com/2022/06/09/russia-doesnt-have-extra-oil-for-new-deals-with-2-indian-buyers-reuters-citing-sources.html> [<https://perma.cc/AEW6-2RNG>].

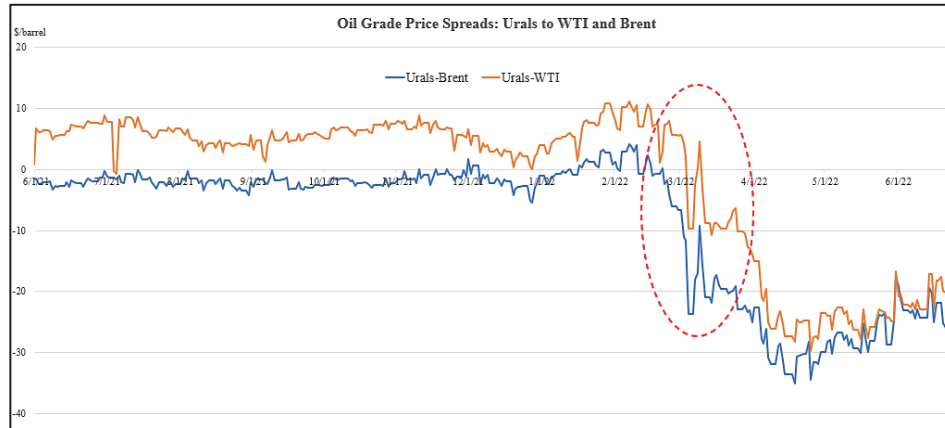
409. Some commentators have remarked that Indian purchases are likely made with at least tacit U.S. consent to avoid taking more supply off the market. *Id.*

410. Data from Investing.com section on commodities. See *Crude Oil Urals Europe CFR Spot*, INVESTING.COM, <https://www.investing.com/commodities/crude-oil-urals-spot-futures-historical-data> (last visited Apr. 1, 2023).

411. The economics have some analogies to “scarlet-lettered” debtor companies facing mass tort claims. See generally Parikh, *supra* note 294.

Russia, and also shows a potential path towards an integrative solution.⁴¹²

Figure 5. Oil Price Spreads Comparison: Urals to WTI & Brent



Yet, notwithstanding the discount—which also began to narrow as the conflict continued and more buyers entered the fold—elevated energy prices translated to swelling revenues the Kremlin used to fuel its war machine, prolonging the conflict in Ukraine.⁴¹³ Correspondingly, reducing Russian energy revenues became a priority for the United States and its allies. Yet, the most obvious option—an embargo on Russian oil, as originally proposed by the EU—risked “significantly rais[ing] oil prices globally,”⁴¹⁴ creating a policy quandary.

To limit Russia’s revenues without constraining global supply, the G7 group of advanced economies adopted a novel solution: a so-

412. It is important to note that due to nuanced oil market dynamics, some factors may not necessarily be reflected in headline market price. For instance, based on analysis of a “unique high-frequency data set,” some scholars have not found “crude oil discounts as large as those reflected in Urals prices.” Nonetheless, even if the case now, as Price Cap enforcement is refined over time, the discount for Russian crude will grow, expanding the larger delta for effectuating the contemplated mechanism. See Tania Babina et al., *Assessing the Impact of International Sanctions on Russian Oil Exports*, CTR. FOR ECON. & POL’Y RSCH. (Apr. 20, 2023), <https://cepr.org/voxeu/columns/assessing-impact-international-sanctions-russian-oil-exports> [<https://perma.cc/YPH8-M4U2>].

413. CTR. FOR RSCH. ON ENERGY & CLEAN AIR, *supra* note 405.

414. Dühren & Norman, *supra* note 403.

called “price cap” on Russian oil (“Price Cap”).⁴¹⁵ Representing one of the “most forceful interventions” in the history of the global oil market, the Price Cap went into effect on December 5, 2022.⁴¹⁶ The cap sets a maximum price of \$60 per barrel at which Russian oil can change hands, with the figure intended to be below prevailing market rates, but slightly above production cost.⁴¹⁷ Mechanically, the Price Cap operates by prohibiting “shipping, financing and insuring” Russian oil not sold in compliance with the Price Cap—i.e., below the specified level of \$60.⁴¹⁸ This design leverages G7-domiciled firms’ near-ubiquitous role in critical support services, including finance and insurance, underpinning global physical energy markets.

The Price Cap’s relative novelty and complexity resulted in wide-spread initial criticism, as “baffle[d]” market participants expressed concern that the cap’s mechanics did not reflect “real world” practices in respect of physical crude oil shipping and transacting. The perception was not helped by a rather rocky roll-out, characterized by a “traffic jam of oil tankers” in Turkish waters following new proof of insurance requirements.⁴¹⁹ However, to the surprise of many commentators and market participants, the Price Cap’s early months exceeded expectations—and, if effective over the long run, the Price Cap could further widen the delta between market prices and Russia’s revenues per barrel, creating room for an integrative solution.

415. David Wessel, *The Story Behind the Proposed Price Cap on Russian Oil*, BROOKINGS (July 5, 2022), <https://www.brookings.edu/blog/up-front/2022/07/05/the-story-behind-the-proposed-price-cap-on-russian-oil/> [<https://perma.cc/KC7B-33KW>].

416. See Breydo, *supra* note 280; see also Wessel, *supra* note 415.

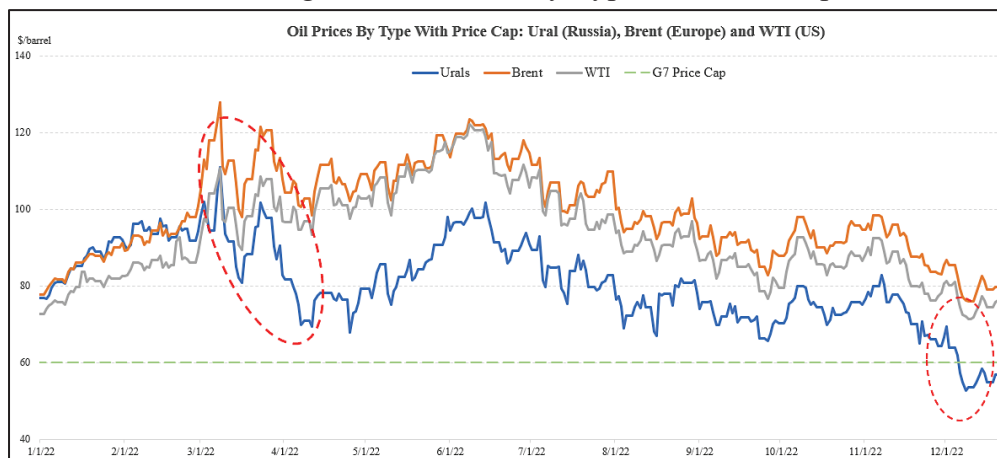
417. Peter R. Orszag & Theodore Bunzel, *Price Caps on Russian Oil Aren’t Ideal. But They’re Our Best Option*, WASH. POST (Oct. 6, 2022), <https://www.washingtonpost.com/opinions/2022/10/06/biden-russia-oil-price-caps/> [<https://perma.cc/J6LE-VY4B>].

418. Andrew Duehren & Joe Wallace, *U.S.-Backed Plan to Cap Price of Russian Oil Hits Delays*, WALL ST. J. (Oct. 28, 2022), <https://www.wsj.com/articles/u-s-backed-plan-to-cap-price-of-russian-oil-hits-delays-11666961846> [<https://perma.cc/X9MN-HB4A>]; Duehren & Norman, *supra* note 403.

419. Tom Wilson et al., *Oil Tanker Jam Forms Off Turkey After Start of Russian Oil Cap*, FIN. TIMES (Dec. 5, 2022), <https://www.ft.com/content/d08d8583-cf2a-43e6-b262-d8eab81c98c8> [<https://perma.cc/3NDU-B498>]. More broadly, the structure has “baffled” oil traders, with market participants observing that the price cap’s mechanics “doesn’t fit with how physical crude shipments are purchased and valued in the real world.” Serene Cheong & Sharon Cho, *Oil Merchants Troubled by Trading Norms that Don’t Fit Price Cap*, BNN BLOOMBERG (Dec. 6, 2022), <https://www.bnnbloomberg.ca/oil-merchants-troubled-by-trading-norms-that-don-t-fit-price-cap-1.1855326> [<https://perma.cc/GB36-Y2EG>]; Irina Slav, *The Oil Price Cap Continues to Baffle Traders*, OIL PRICE (Dec. 12, 2022), <https://oilprice.com/Energy/Energy-General/The-Oil-Price-Cap-Continues-To-Baffle-Traders.html> [<https://perma.cc/W4DQ-HVLA>].

The chart below shows prices for Urals blend, Brent, and WTI with the green dotted line corresponding to the G7 Price Cap. In the period between the first oval (representing the start of the conflict) and the second oval (representing the Price Cap going online), the spread between Urals and both Brent and WTI narrowed considerably. However, shortly after the Price Cap became active in early December 2022, the price of Urals actually fell below the \$60 ceiling while Russia's "seaborne crude shipments collapsed."⁴²⁰

Figure 6. Oil Prices by Type with Price Cap



Ukraine, the intended beneficiary of the Price Cap, has been notably underwhelmed, with Zelensky describing it as something less than a “serious[] decision” because it leaves Russia with a “comfortable” budget.⁴²¹ At the same time, despite the clear benefit of reducing Russia's profits, the Price Cap's economics currently represent a wealth transfer to *buyers* of Russia's oil. Indeed, it is this very financial incentive that allows the Price Cap to be successfully enforced. Yet, such an outcome is highly suboptimal from a policy perspective: There is no logical justification for neutral parties, like China and India, reaping a windfall from their willingness to transact with the

420. Julian Lee, *Russia's Oil Exports Collapsed Since G-7 Sanctions Began*, BLOOMBERG (Dec. 20, 2022), <https://www.bloomberg.com/news/articles/2022-12-20/russia-s-oil-exports-collapsed-since-g-7-sanctions-began?sref=OOpRUZ8l> [<https://perma.cc/KX9Y-F3H2>].

421. Matthew Luxmoore, *Ukraine Says Oil-Price Cap Won't Dent Russia's Ability to Fund War*, WALL ST. J. (Dec. 4, 2022), <https://www.wsj.com/articles/ukraine-says-oil-price-cap-wont-dent-russias-ability-to-fund-war-11670152525> [<https://perma.cc/BNA5-H8LL>].

aggressor state. To the contrary, from both normative and policy perspectives, the “excess” funds should be allocated to Russia’s *victims*.

The UKR-CC funding mechanism facilitates this very outcome, and also can be calibrated in light of broader considerations so that it is well-suited to operate through multiple structures—including in conjunction with, or independent from, the Price Cap.

One approach for integrating the UKR-CC funding mechanism with the Price Cap may be to allow sales of Russian oil at either the Price Cap level of \$60 per barrel, or the market price, but with a portion equal to the UKR-CC levy remitted directly to the compensation fund.⁴²² A potential downside of this option structure is that it is exposed to oil prices, as choosing the UKR-CC levy may only be advantageous when oil prices are relatively higher.⁴²³ Though that limitation can be mitigated with a floating, market-adjusted cap, given the challenges of setting the prevailing \$60-a-barrel price, achieving this may prove difficult.⁴²⁴

A second option may be a gradual relaxation and ultimate phasing out of the Price Cap in favor of the UKR-CC levy, in exchange for Russia agreeing to reparations through the UKR-CC—and conditioned on it consistently making the required payments for a specified period of time.⁴²⁵ Particularly in an elevated oil price environment, this may

422. Mechanically, that levy could be remitted by the buyer, or charged to insurance carriers or financial intermediaries, which would then be responsible for implementation and economically incentivized to ensure pass through. A closely-related structure may be to allow Russia to sell oil only through the UKR-CC, with the buyer paying market price and the UKR-CC retaining the levy and remitting the balance to Russia. The primary advantage relative to the first approach is that here the UKR-CC would not need to police the buyer—though it would require a level of buy-in from Russia.

423. Though understandable, the normative tension with effectuating reparations through fossil fuel sales (in light of a broader renewable energy transition) can be mitigated from the perspective that the oil levy functions as a quasi-tax on fossil fuels (making it not inconsistent with renewable energy goals), sales of which are expected to continue several decades into the future. These issues are discussed in greater depth in a subsequent work in progress. See Breydo, *supra* note 299.

424. Alan Rappeport, *What Price Is Right? Why Capping Russian Oil Is Complicated*, N.Y. TIMES (Sept. 16, 2022), <https://www.nytimes.com/2022/09/16/business/russian-oil-price-cap.html> [<https://perma.cc/R7NV-JFR3>].

425. Consistent with the baseline of Russia’s reserves collateralizing the reparations facility, the premise would be to first reduce the aggregate facility under-collateralization (given \$325 billion of reserves against a much larger reparations liability) and subsequently release reserves to maintain a consistent collateral level. In other words, as Russia’s liability decreases through oil-backed payments, the amount of collateral required could (but not necessarily would) also be reduced, with the potential for full release of collateral at a future date, perhaps once a certain threshold of total reparation obligations is met.

yield significant financial value to the Russian sovereign, sufficient to incentivize participation.

Third, if notwithstanding its early success, operation of the Price Cap ultimately proves too difficult, the UKR-CC oil levy could also operate without it. As it stands, Russia is effectively losing out on \$20–30 on each barrel of oil that it sells. If, for illustrative purposes, we assume an average \$20-per-barrel discount, Russia would be financially better off selling at the market price, subject to a \$15-per-barrel UKR-CC levy, for instance.⁴²⁶ In fact, all things being equal, the UKR-CC levy is in many respects simpler to implement than the Price Cap, as it would require neither establishing Russia's cost of production, nor risk a two-tier market for the same commodity, with corresponding incentives for buyers to "cheat."⁴²⁷

While the war remains ongoing, Russia will almost surely decline any proposal involving a transfer of money to its adversary—even if that means losing profits on each barrel. However, once the impact of the Price Cap is further internalized in the market, the discount between where Russia sells and the market price may grow substantially. That widening delta, coupled with increasing strain on the Kremlin's coffers, may create sufficient pressure for a solution—indeed, at a certain point, Russia will have no choice financially.⁴²⁸ Consistent with the baseline of supporting Ukraine (rather than punishing Russia), this Article's proposal allows for a state of the world where Russia—through lessened pressure on its key revenue driver and potential return of \$325 billion of reserves—is ultimately left economically better off by paying the UKR-CC levy to rebuild Ukraine.⁴²⁹

426. Importantly, given the first-order objective of compensating and supporting Ukraine, pricing structures and excise tax levels ultimately accretive to Russia—while normatively sub-optimal—may be acceptable so long as they ensure Russian participation and Ukrainian reparations. *See supra* Section III.B.1.

427. Rappeport, *supra* note 424; David Lawder, *Yellen Says Russian Oil Price Cap in \$60 Range Would Allow Moscow Some Profit*, REUTERS (Oct. 12, 2022), <https://www.reuters.com/markets/europe/yellen-says-russian-oil-price-cap-60-range-would-allow-moscow-some-profit-2022-10-12/> [<https://perma.cc/2SVT-C4DZ>]; Duehren & Wallace, *supra* note 418.

428. *See supra* notes 415–420 and accompanying text, discussing the oil price cap.

429. As discussed *supra* Section III.B.1, this is consistent with the premise of this proposal's core focus on helping Ukraine, rather than punishing Russia—which is likely best suited for other forums and contexts.

2. Technology Sanctions

While perhaps somewhat less publicized, trade export sanctions have been a powerful tool in the sanctions arsenal, badly hurting the Russian economy and its energy sector in particular. These sanctions largely prohibit exports of technology and services from the United States, EU, and other allies, while foreclosing capital market access. The United States first enacted such measures targeting the Russian energy sector following the 2014 annexation of Crimea;⁴³⁰ after the invasion of Ukraine, the sanctions increased in intensity and expanded in scope, prohibiting technology transfers for sectors beyond energy.

As President Putin himself admitted, technology sanctions have caused Russia a “colossal amount of difficulties”⁴³¹ with the challenges particularly acute for the energy sector, which relies on highly sophisticated, specialized software and hardware often sourced through western firms.⁴³² Over time, as existing producing assets run dry, this will degrade Russia’s ability to find replacements while increasing production costs, thus narrowing margins.⁴³³ That, combined with the impact of the Price Cap, will increasingly constrain the profitability of the Russian government’s primary source of cash, pressuring government finances. Correspondingly, potential sanctions relief, subject to heavily-enforced compliance milestones with respect to UKR-CC participation, may provide a powerful economic incentive as the Kremlin’s coffers start to run dry.⁴³⁴

3. Frozen Reserves as Collateral

While, as detailed above, the United States cannot “seize” Russia’s frozen central bank reserves, the assets can nonetheless be effectively and critically deployed as part of the broader reparations

430. Exec. Order No. 13,660, 79 Fed. Reg. 13491 (Mar. 6, 2014).

431. *Putin Says Russia Will Overcome ‘Colossal’ High-Tech Problems Sparked by Sanctions*, MOSCOW TIMES (July 18, 2022), <https://www.themoscowtimes.com/2022/07/18/putin-says-russia-will-overcome-colossal-high-tech-problems-sparked-by-sanctions-a78331> [<https://perma.cc/2Z9N-C6SY>].

432. *See supra* notes 384–389 and accompanying text.

433. Tom Wilson & Nastassia Astrasheuskaya, *Russian Oil And Gas: Headed for Long-Term Decline?*, FIN. TIMES (June 6, 2022), <https://www.ft.com/content/9dd4df75-48ee-4dcd-aaf5-0ecb05eaade4> [<https://perma.cc/8LYA-BLPJ>].

434. Indeed, if more sophisticated technology can reduce Russia’s production cost, an economically logical proposition may be to effectively pay part of the incremental profit in exchange for the benefit.

structure. Because, unlike the UNCC, a prospective UKR-CC could not legally bind Russia, the \$325 billion of central bank reserves can play a particularly critical role in the reparations scheme by collateralizing the contemplated structure, incentivizing Russia towards the proverbial table, and providing incentives to ultimately reach an accord.

Furthermore, unlike divergent views regarding the permissibility of asset seizure, there is comprehensive agreement amongst scholars that the reserves can remain frozen indefinitely, which provides two distinct benefits.⁴³⁵

First, the assets can provide a form of collateral for the above contemplated lending transactions to support urgent claims.⁴³⁶ In the event that Russia defaults on its obligations—including awards through the ICJ, International Criminal Court, or other tribunals, as well as the UKR-CC—set-off against the frozen reserves may become realistically possible,⁴³⁷ which would likely be more palatable from an international law perspective as it becomes legally distinct from an asset seizure implicating a “taking” or expropriation.⁴³⁸

Second, consistent with prior practice and Supreme Court precedent, frozen reserves can be used as a bargaining chip towards effectuating a broader solution and settlement.⁴³⁹ Here, the assets provide essential multi-modal collateral. Over time, the reserves can be returned to Russia, contingent on compliance with its obligations.⁴⁴⁰ Fundamentally, retaining this \$325 billion “carrot” to incentivize and ensure Russia’s UKR-CC participation is critical to the broader economic solution proposed in this Article.

B. Aggregate Structural Benefits

Beyond economic leverage, an additional powerful lever available through this Article’s proposal is the innate value of institutional

435. Certain Iraqi and Iranian assets were frozen for decades, for instance. *See supra* Section II.A.

436. This would be quite similar, but also distinct from the “pre-funding” paradigm some have expressed. Litan, *supra* note 81.

437. *See supra* Sections II.A.2, II.B.

438. *See* UKRAINE BLUEPRINT, *supra* note 58, at 6 (“One possibility would be for the EU to tax Russian energy exports over time, in return for which Ukraine would receive up-front grants from the EU.”); *supra* Section II.B. This in effect, would be a form of litigation credit—an increasingly popular vehicle in the broader alternative litigation finance arena.

439. *See supra* notes 190–191 and accompanying text.

440. Some have argued that this approach is more consistent with the law of countermeasures. *See supra* Section II.B.

architecture from a structured claim resolution process, such as the UKR-CC. That is because, broadly akin to the benefits of a bankruptcy framework, the structure provides unique value to creditors and debtors alike, applicable for both conflict and non-conflict claims. Such benefits include preventing creditor conflicts over limited assets, mitigating coordination and collective action problems, and providing centralized infrastructure to reduce administrative costs of addressing similar claims and issues.⁴⁴¹

Sovereigns, such as the Russian Federation, do not have access to a formal statutory process for adjustment of obligations. Because of this, addressing complex claims is often a contentious, lengthy, and value-destructive process. Following its mid-2022 sovereign debt default and alleged asset expropriations, Russia will be subject to litigation in jurisdictions around the world. Resolving those issues, as well as the Conflict Claims, will require decades of global litigation; the UKR-CC architecture is uniquely able to mitigate these uncertainties and enhance constituencies' overall aggregate welfare.⁴⁴²

1. Conflict Claims

In respect of conflict-specific claims, a claim resolution facility provides distinct benefits to both debtors and creditors from centralization, consistency, and reduced administrative costs. An approximate (albeit imperfect) analogy may be U.S. companies increasingly seeking to “migrate” mass tort claims towards the bankruptcy system, due to its centralized avenue for addressing high volume claims efficiently and uniformly.⁴⁴³

Though distinct from a bankruptcy proceeding, the UNCC offered many similar benefits, with one scholar observing that “UN management of Iraqi war reparations is as much a guarantee of Iraq’s interests as those of the claimants.”⁴⁴⁴ This was because, rather than

441. See Stephen Kim Park & Tim R. Samples, *Towards Sovereign Equity*, 21 STAN. J.L. BUS. & FIN. 240, 245–48 (2016); see also Douglas G. Baird, *A World Without Bankruptcy*, 50 LAW & CONTEMP. PROBS. 173, 184 (1987) (articulating the need for legal mechanisms to address collective action problems in insolvency situations); Nicholas L. Georgakopoulos, *Bankruptcy Law for Productivity*, 37 WAKE FOREST L. REV. 51, 53 (2002) (addressing the productivity aims and collective action solutions in bankruptcy law).

442. See Breydo, *supra* note 116 (Part III) (discussing Russia’s sovereign debt default and associated legal considerations).

443. See *supra* notes 293–296 and accompanying text.

444. Gattini, *supra* note 68, at 164.

punishing Iraq, the UNCC's objective was to address "masses of potentially disruptive claims in an impartial and orderly manner."⁴⁴⁵

A similar dynamic applies with respect to Russia, where liability is largely established—but the process for valuating and resolving claims is not. Without a claim resolution facility, the realistic alternative would be addressing millions of claims on a piecemeal basis in forums around the world. This would create vast and unnecessary administrative costs while risking inequitable outcomes for claimants and, all things being equal, likely increasing aggregate liability for Russia.

2. Non-Conflict Claims

As detailed in Section III.B.2, Russia is exposed to a vast universe of non-conflict claims with the realistic prospect of litigation across essentially all major global jurisdictions complicating any future market reapproachment. For such liabilities, a broad-based solution demarcating obligations and establishing claim procedures can reduce Russia's legal risks, while also ensuring distributive fairness for war victims.

In the context of this Article's proposal, and more broadly, this dynamic creates distinct risks for both Russia's victims as well as the sovereign itself. For conflict claimants, the clear concern is distributive priority, with the risk of well-resourced private actors elbowing their way to the "front of the line," seizing the most valuable assets. The issue, as noted in Section III.B.2, is that notwithstanding distinct substantive claims, as a practical matter, the private sector entities will pursue the same pool of assets as that available to victims of Russia's invasion.

For the Russian sovereign, the critical consideration is that even if sanctions were lifted, it would nonetheless be facing myriad legal claims from well-resourced, sharp-elbowed private sector entities. As a result, it would likely be functionally locked out of the global economy for fear of attachment and asset seizure—akin to Argentina following its 2000s-vintage sovereign debt default.

In fact, some have contemplated that a potential goal of the United States effectively forcing a Russian sovereign default⁴⁴⁶ may have been the "conscripting of private sector lenders into applying

445. *Id.*

446. *See* Breydo, *supra* note 114.

additional pressure on the errant sovereign.”⁴⁴⁷ Indeed, prominent hedge funds have been reportedly purchasing Russian debt at highly distressed prices, with the objective of enforcing repayment—as funds have previously done with sovereigns including Iran,⁴⁴⁸ Peru,⁴⁴⁹ and Argentina.⁴⁵⁰ In addition, a host of private sector entities have claims against Russia, largely concerning alleged asset expropriation, spanning both pre and post-invasion matters, with multi-billion-dollar aggregate claims.⁴⁵¹

The United States can help address both sets of issues through executive action broadly akin to the U.S. settlement with Iran following the Embassy Hostage Crisis and consistent with the *Dames & Moore* precedent.⁴⁵² In that case,⁴⁵³ the Supreme Court upheld the President’s power to: (i) nullify pre-judgment attachments pursuant to the IEEPA, and (ii) as part of the broader settlement agreement, suspend pending claims against Iran in U.S. courts, even without express Congressional authorization.⁴⁵⁴

447. Lee Buchheit & Mitu Gulati, *Forced Sovereign Debt Defaults*, FIN. TIMES (June 1, 2022), <https://www.ft.com/content/75da5a01-12e6-42ae-abea-3fa7a3cc1647> [https://perma.cc/2MQX-DMX7].

448. Robert A. Benoit, *Iran Viewed as Loser in a Debt Default*, N.Y. TIMES (Nov. 24, 1979), <https://www.nytimes.com/1979/11/24/archives/iran-viewed-as-loser-in-a-debt-default-potential-effect-on-trade.html> [https://perma.cc/MK4D-VF5W].

449. Nikhil Kumar, *The Vulture Capitalist Who Devoured Peru – And Now Threatens Argentina*, INDEPENDENT (Nov. 23, 2012), <https://www.independent.co.uk/news/world/americas/the-vulture-capitalist-who-devoured-peru-and-now-threatens-argentina-8347577.html> [https://perma.cc/64CT-C8BX].

450. Alexandra Stevenson, *How Argentina Settled a Billion-Dollar Debt Dispute with Hedge Funds*, N.Y. TIMES (Apr. 25, 2016), <https://www.nytimes.com/2016/04/25/business/dealbook/how-argentina-settled-a-billion-dollar-debt-dispute-with-hedge-funds.html> [https://perma.cc/R3W2-VBVP].

451. See *supra* Section III.B.2.

452. *Dames & Moore* sued Iran, contending that its subsidiary was owed \$3.5 million in connection with a contract, initially successfully obtaining a pre-judgment attachment. See generally *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

453. The Supreme Court upheld these considerations as part of a broader deal involving the release of U.S. hostages, in which Iran reached an agreement with the United States that legal proceedings against Iran would be terminated, already-obtained attachments and judgments would be nullified, and associated future litigation against Iran would be prohibited. Instead, such claims would be channeled and resolved through arbitration under the auspices of a newly-created claim resolution facility: the Iran-United States Claims Tribunal. See *supra* Section II.A; see also Anthony J. Colucci, III, *Dames & Moore v. Regan: The Iranian Settlement Agreements, Supreme Court Acquiescence to Broad Presidential Discretion*, 31 CATHOLIC U. L. REV. 565 (1982).

454. See *supra* Section II.A.

As applied with respect to the UKR-CC, *Dames & Moore* would allow the President to nullify private entities'—such as hedge funds—successful claims against Russia, thus preserving assets for claimants. U.S. executive action can also preclude further claims in tribunals outside of the UKR-CC (or another acceptable forum),⁴⁵⁵ in effect channeling non-conflict claims against Russia towards a single centralized process, creating consistency, and harmonizing processes across claims and claimants, while reducing administrative costs. The alternative for Russia may be years, if not decades, of bitter, costly, and value-destructive litigation worldwide, further impairing its pariah economy.⁴⁵⁶

CONCLUSION: THE UKR-CC IS SUPERIOR TO ALTERNATIVES

Ukraine has been devastated by a brutal, unlawful war, with its economy in shambles, the government near insolvency, thousands killed and millions displaced. Given Russia's clear culpability and scale of damage to Ukraine, proposals to seize Russian foreign reserves for Ukraine's benefit represent a normatively appealing—perhaps even admirable—course of action. However, such strategies are premised on insufficient analysis of the legal considerations, policy repercussions, or practical dimensions.

This Article's proposal—a war reparations facility for Ukraine (the UKR-CC), based on UNCC precedent for effectuating Iraqi Gulf War reparations—addresses these limitations with numerous advantages relative to alternatives.

First and foremost, the proposal offers a comprehensive solution, encompassing not only a funding source through the Russian oil levy, but also a structure for claim assessment and a mechanism to effectuate fair payments. Correspondingly, the proposed UKR-CC vehicle allows for reparations payments directly to individuals—the parties most directly harmed by Russia's invasion—as well as Ukraine's government.

Second, the proposal provides a novel funding mechanism based on market insights—namely, the discount on Russian oil—while utilizing Russian central bank reserves as collateral, rather than seizing the assets, thus avoiding problematic implications under U.S. and international law.

455. This may also be applicable in respect of U.S. allies. However, it raises distinct legal issues.

456. See Robertson, *supra* note 46.

Third, the UKR-CC structure utilizes existing sanctions infrastructure, which operates independently of the U.N. Security Council, where Russia holds a veto. This bypasses significant implementation challenges, while allowing for enforcement through economic leverage rather than the threat of armed conflict implicit in Security Council involvement.

Finally, the proposal provides an integrative financial solution that not only supports Ukraine, but also gives Russia powerful economic incentives to comply with the entirety of its obligations.

Putting all that together, relative to alternatives, this Article's proposal accomplishes far more for the victims of an unlawful war, while mindfully minimizing legal risks and adverse policy repercussions. Along with an actionable solution—with immediate implications for policymakers and practitioners—this proposal has significant normative and prescriptive implications, including with respect to the critical issue of victim compensation following conflicts.

APPENDIX: UNNCC-IMPLIED PRO FORMA PRELIMINARY UKRAINE
AGGREGATE CLAIM ESTIMATE

Ukraine/ UKK-CC Claim Aggregates:

UNCC Category A-Implied, Pro Forma Highly Preliminary Estimate

Displaced Individuals from Ukraine (Millions, since 2/24/2022)

Externally Displaced (to Europe) ¹	5.99
Internally Displaced ²	7.00
Total Ukrainian Refugees	12.99

*UNCC Category A Claim Summary Data*³

Average	\$ 3,742.69
Inflation Adjusted (to 2022)*	\$ 8,444.93
Payment Rate ⁴	91.2%
Net Refugee Claims Recovery Estimate (\$Bn)	98.72
Multiple over UNCC Category A	31.34x
Straight-Line Pro Forma Implied Total Ukrainian Claims (\$Bn)	1,638.26

¹ Based on UNHCR data.

² Based on BBC coverage.

³ UNCC claim database.

⁴ Based on analysis of UNCC claim data.

* Based on Federal Reserve Data. 2022 estimated at 8.8%.

METHODOLOGICAL ANNEX: RUSSIAN CENTRAL BANK RESERVES
ANALYSES AND SOURCES

Overview. This Article analyzes the composition of Russia’s central bank foreign reserves, with particular emphasis on the impact of sanctions and various asset “blocking” regimes. The results are displayed above below in Figures 1 and 2 (in Section I.C.3), and discussed in the accompanying text within the Article. This “Methodological Annex” provides additional detail regarding the underlying calculations and data sources, and also presents additional findings and implications based on the data.

Data Sources. The analyses primarily rely on three sources of data:

- Bank of Russia, International Reserves of the Russian Federation (“Russian Federation Weekly International Reserves”), providing weekly aggregate reserves data;⁴⁵⁷
- Bank of Russia Annual Report, providing reserve composition at calendar year-end;⁴⁵⁸
- Bank of Russia Foreign Exchange and Gold Report (“Bank of Russia FX Report”), providing reserve composition at calendar mid-year⁴⁵⁹

These data sources and results of the findings have been compared to third-party sources and research, with any differences discussed in the footnotes, as applicable.

Analysis. The analyses in this Methodological Annex integrate data from the above sources as well as other research to provide a more comprehensive time series regarding changes in Russia’s reserve composition and geographic disposition, further contextualizing the Article’s analyses. Within the Article, Figure 1 displays weekly data showing aggregate reserves based on the Russian Federation Weekly International Reserves data. Figure 2 presents total reserves by geography estimated based on the Bank of Russia Annual Report and Russian Federation Weekly International Reserves data sets.

457. *International Reserves of the Russian Federation*, *supra* note 124.

458. BANK OF RUSSIA, ANNUAL REPORT 2021 (2022), https://www.cbr.ru/Collection/Collection/File/43443/ar_2021_e.pdf [<https://perma.cc/3U82-64UD>].

459. BANK OF RUSSIA, BANK OF RUSSIA FOREIGN EXCHANGE AND GOLD ASSET MANAGEMENT REPORT (2022), https://www.cbr.ru/Collection/Collection/File/39685/2022-01_res_en.pdf [<https://perma.cc/5FJH-PVW6>].

The analyses in Figure 7 and 8 below provide further detail, showing the composition of Russia's foreign reserves over time by currency (on a six-month basis for the period between June 30, 2020, and January 1, 2022) and by geographic location (on an annual basis for the period between January 1, 2018, and January 1, 2022).

Figure 7. Russia Central Bank Reserves by Currency (in Billions USD)

Russia Central Bank Reserves by Currency										
	6/30/2020		1/1/2021		6/30/2021		1/1/2022		Change (6/30/20 to 1/1/22)	
Euro	29.5%	165.5	29.2%	174.4	32.3%	189.1	33.9%	213.8	4.4%	48.2
Gold	22.9%	128.5	23.3%	139.2	21.7%	127.0	21.5%	135.6	-1.4%	7.1
USD	22.2%	124.6	21.2%	126.6	16.4%	96.0	10.9%	68.7	-11.3%	(55.8)
Yuan	12.2%	68.5	12.8%	76.5	13.1%	76.7	17.1%	107.8	4.9%	39.4
Sterling	5.9%	33.1	6.3%	37.6	6.5%	38.0	6.2%	39.1	0.3%	6.0
Other	7.2%	40.4	7.2%	43.0	10.0%	58.5	10.4%	65.6	3.2%	25.2
Total (SBN)		560.5		597.4		585.3		630.6		70.1

Figure 8. Russia Central Bank Reserves by Geography

Russia Central Bank Reserves by Geography						
Location	1/1/2018	1/1/2019	1/1/2020	1/1/2021	1/1/2022	Change (2018 to 2022)
Monetary Gold (Russia)	17.20%	18.10%	19.50%	23.30%	21.50%	4.30%
China	2.60%	14.10%	13.80%	14.20%	16.80%	14.20%
France	10.10%	14.20%	12.40%	10.20%	9.90%	-0.20%
Japan	1.50%	7.50%	13.20%	12.70%	9.30%	7.80%
Germany	13.60%	14.20%	11.00%	10.80%	15.70%	2.10%
USA	29.90%	9.70%	7.90%	6.80%	6.40%	-23.50%
IFI	3.90%	3.90%	4.70%	5.00%	4.30%	0.40%
UK	7.20%	6.60%	6.40%	4.40%	5.10%	-2.10%
Austria			1.60%	2.30%	2.50%	2.50%
Canada	2.80%	2.30%		2.30%	2.70%	-0.10%
Other (Consolidated)	11.20%	9.40%	9.50%	8.00%	5.80%	-5.40%

Source: Bank of Russia Foreign Exchange and Gold Asset Management Report (2022).

Key Observations and Findings. Broadly speaking, the analyses show that in the years leading up to the invasion, Russia undertook a significant rotation out of USD-denominated assets while moving its reserves out of the United States, largely to China and to a lesser extent Japan. Taken together, the timing, scale, and generally unusual

nature of Russia's financial and contractual dealings⁴⁶⁰ strongly indicate a level of premeditation by the Russian Federation. This finding is highly significant because it further casts doubt on Russia's asserted justifications for the conflict.

As shown in Figure 7, detailing Russian Central Bank reserves by currency, as of June 30, 2020, Russia had approximately 22.2% of its reserves in USD-denominated assets. By January 1, 2022, that figure declined to 10.9%, an 11.3% decrease, and an unusually low level of USD-denominated reserve assets as compared to other emerging market central banks.⁴⁶¹ It appears that Russia's rotation out of USD-denominated assets was largely towards Yuan and Euro assets, which showed respective increases of 4.9% and 4.4% over the period between June 30, 2020 and January 1, 2022.

Figure 8 illustrates Russia's central bank reserves by geography. As of January 1, 2018, Russia had about 29.9% of its foreign reserves in the United States. By January 1, 2022, however, that figure fell to just 6.4%—a 23.5% decline. Following a very sharp drop to 9.7% between 2018 and 2019, Russia steadily pared back its U.S. exposure each year leading up to 2022. Coinciding with that sharp 2018–2019 move away from the United States, Russia transitioned a significant portion of the assets to China, which showed an allocation increase from 2.6% to 14.1% in that short period. Ultimately, it appears that China became the largest recipient of Russian reserves, with a total allocation increase of 14.2% between 2018 and 2022, with Japan the second largest (7.8%), and Russia itself the third largest (4.3%).

460. The foreign exchange moves discussed herein appear consistent with changes to the contractual structure of Russia's sovereign debt, which, began with relatively standard terms but steadily grew unusual—bordering towards lawless—in the period following Russia's invasion of Crimea and associated deterioration in its foreign relations, particularly with the U.S. See Breydo, *supra* note 116 (Part I and Annex I).

461. Hiro Ito & Robert N. McCauley, *The Currency Composition of Foreign Exchange Reserves 2* (Bank for Int'l Settlements, Working Paper No. 828, Dec. 2019), <https://www.bis.org/publ/work828.pdf> [<https://perma.cc/MT5Q-4GDK>] (finding USD-denominated reserve share around 60%).