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During July-August 2022, the issue of Russia's designation a state sponsor of terrorism by the USA has been one of the top-priorities of the international agenda. After the Ukrainian Parliament recognized Russia as the "terrorist state" by law, the Ukrainian President Volodymyr Zelenskyi made several respective requests to the U.S. State Department to designate Russia as the state sponsor of terrorism. On July 27 the U.S. Senate adopted the non-binding Resolution calling on the Secretary of State to designate Russian Federation as the state sponsor of terrorism as this decision is specifically within his authorities. While Secretary of State Blinken still resists to take this decision, weighing the possible consequences (despite pressure of Senate and House Speaker Nancy Pelosi personally), Parliament of Latvia has already reacted to the Ukrainian call and made the respective statement. However, considering the U.S. global leading position in the world, the tangible consequences for Russia shall occur only after their decision, so Ukraine and its allies are looking forward to it.

This document is a research of advantages and disadvantages of recognizing Russia as a state sponsor of terrorism in context of confiscation of Russian assets. We also described the consequences of such a status for Russia and Ukraine in general context.

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Impact of designation on forfeiture of sovereign assets

The consequences for Russia in case of its designation as the sponsor of terrorism shall be wide-ranging. However, this paper is mostly focused on its impact on Russian sovereign assets and their perspective forfeiture in favor of Ukraine. The main issue in question here is the sovereign immunity of Russia and its sovereign assets in the U.S. courts. According to the general rule, established in the Title 28, Part IV, Chapter 97 of the United States Code by the 1976 Foreign Sovereign Immunities Act (FSIA) (with the subsequent amendments), the foreign states shall have the immunity from the courts of the United States (U.S. federal courts) and from the courts of States, which means overall immunity from adjudication and enforcement of decisions. However, section 1605A imposed by the FSIA establishes the **deprivation** of such immunity **in case of designation of the state a sponsor of terrorism** at the time the "personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources for such an act…" etc. took place provided that such act was "…engaged in by an official, employee, or agent of such foreign state" OR **in case such state was so designated as the result of such act**.Nevertheless, the circle of claimants (victims) entitled to file the lawsuits against the state sponsoring the terrorism is restricted by U.S. nationals, members of the U.S. armed forces, U.S. government employees/individuals working for the government under the awarded contracts within the scope of employment. **This actually means that in case Russia is designated sponsoring the terrorism, Ukrainian nationals as well as nationals of other states (territories) where the actions of Russia-related persons and entities are recognized as terroristic, such as**

Chechnya, Georgia, Syria, Sudan, Libya, shall not be entitled to claim for compensation from Russia according to the existing language of the FSIA.

As for the enforcement of such decisions with regard to the central bank assets, there exists some tricky legal situation. Section 1610 (f) (1) (2) imposed by the FSIA establishes that the property regarding which the financial transactions are prohibited as well as "*...any other proclamation, order, regulation, or license issued ...*" **shall be subject to execution of any court decision regarding which the foreign state is not immune** (which includes deprivation of immunity after finding the sponsor of terrorism). Such acts like Presidential Executive Order of April 15, 2021 prohibiting any financial transactions, transfers, payments, exports etc. of the property of Government of Russia (which in broader sense means also any Russian political institutions including Central Bank), fall in line with the mentioned rule. **In its turn**, section 1611, imposed by FSIA, provides exception **for the central bank's property** and establishes immunities for its execution even if the judgement was made under FSIA "terrorist provision" " *unless such bank..., or its parent foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution...*" which would mean that central bank's activities shall be untouchable and immune from execution by default. **However**, section 201 of the 2002 Terrorist Risk Insurance Act provides that in every case in which a person has obtained a judgment against a terrorist party (which includes state sponsor of terrorism) on a claim based upon an act of terrorism "*... the blocked assets of that terrorist party (including the blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment...*" with direct references to the executive authorities of the President under the **Trading with Enemy Act (TWEA)** and **International Emergency Economic Powers Act (IEEPA)** to freeze and seize assets. The applicability of these provisions to seizure of the central banks assets was indirectly confirmed by the U.S. Supreme Court in *Bank Markazi v. Peterson*. **Therefore, we can make the final conclusion, that in case of designating a state as a sponsor of terrorism, the court decisions taken upon lawsuits of American citizens may be enforced regarding the assets of its central bank but only in case such assets are preliminary blocked by the executive order of the President.**

In order to understand the scale of the problem for Ukraine and Ukrainians in this regard, it would be better to address the figures.

According to the latest official statistics available the amount of assets of Russian Central Bank frozen in the U.S. accounts **is approximately USD 38 billion out of approximately USD 330 billion frozen overseas in general**. In 2020 decision on *Opati vs Republic of Sudan* case, the U.S. Supreme Court confirmed that the punitive damages may be sought retroactively within lawsuits under the FSIA and supported the approach of the first instance court by which it ruled Sudan to **pay almost USD 10,2 billion of compensatory and punitive damages (although the case was not decided finally and remanded for consideration to lower courts).** However, this precedent shows that when such decisions are successfully enforced by the eligible American plaintiffs (and significant amounts of Americans is reported killed in Ukraine as a result of Russian armed aggression), there may not be any assets left to compensate to Ukraine and Ukrainians for their losses and damages. Moreover, as the USA are actually the role model for the other Western states, they may follow such a precedent by establishing preference on using frozen Russian assets to pay to their own nationals (or their families) who suffered from the Russian aggression. As long as such states as France, Japan and Germany hold much more frozen Russian assets than the USA (USD 71 billion, 58 billion and 55 billion respectively), such a tendency may have grave consequences for the interests of Ukraine. Therefore, the efficiency and profitability of designating Russia the state sponsor of terrorism in context of assets' forfeiture seems more than doubtful for Ukraine.

Are there any alternative options?

Recovering frozen Russian assets through the FSIA is certainly not the only option for Ukraine and Ukrainian nationals. International and national prominent experts are rather skeptical regarding the perspectives of claiming Russian compensations through the FSIA mechanism and advise to rely more on establishment of the international mechanism of bringing Russia to liability for grave violations of international law. The international legal responsibility of Russia in form of reparations may be ensured by decision of the International Court of Justice (ICJ) in the pending case upon the Ukrainian claim, however, it may face significant problems with enforcement (even its complete impossibility) as the ICJ with its classic approach, presuming the binding nature of its decision for Russian Federation and restricted by its own case practice, is not likely to invent any alternative means of deducting Russian funds than by direct imposition of the obligation to pay reparations (which certainly will not be performed). Another option will be the establishment of international multilateral mechanism between Ukraine and other states through signing the international treaty and, possibly, foundation of international claims commission.

The precedents of establishing such commissions have already taken place, including the United Nations Compensation Commission (UNCC) the Eritrea-Ethiopia Claims Commission (EECC), and the Iran-United States Claims Tribunal (IUSCT). However, the experience of establishing such commission for Ukrainian interests would be anyway specific and unprecedented, as the last 2 of mentioned claims commissions were established upon consent of all the participating states to recognize the findings of the commissions as binding and make respective payments and the UNCC was established by the UN Security Council Resolution which is binding for all the UN members according to the Chapter VII of the UN Charter. In the present case such a commission will function without participation of Russian Federation and its consent on enforcement of commission's decisions while establishment of the commission under the auspices of the UN looks completely impossible considering the veto right of Russia as the permanent member of the UN Security Council.

This is not the exhaustive list of options available for Ukraine through the means of international law and all them seem more preferrable than the existing FSIA model as they will be primarily implemented within interests of Ukraine and Ukrainian nationals.

Should Ukraine refuse from its call to designate Russia as state sponsor of terrorism?

No, we cannot either state it or recommend such approach. Although, as was mentioned above, such a designation does not seem profitable for Ukraine for the purposes of compensation for damages and losses, the designation of Russia as a state sponsor of terrorism looks extremely important in the broader context which cannot be ignored. The fact of such designation shall cause the consequences, prescribed by the following acts:

- Export Administration Act of 1979;
- Foreign Assistance Act of 1961;
- Arms Export Control Act of 1976;
- Export Control Reform Act of 2018

Such consequences include: **deprivation of the U.S. foreign assistance, ban of defense products' export, intensified financial monitoring of Russian counter-agents etc**. The main argument of the Secretary of State Blinken for not pursuing the process of designating Russia the state sponsor of terrorism is that all the measures which have been already applied by the USA regarding Russian Federation "are absolutely in line with the consequences that would follow from designation as a state sponsor of terrorism…" and "practical effects of what we're doing are the same".

Indeed, Russia has already fallen under numerous U.S. sanctions and those, accompanying its designation as the state sponsor of terrorism shall not be new and unexpected to it. **However,** designation of Russia as sponsor of terrorism shall lead to the outstanding economic effect: the persons and companies which still continue economic cooperation and trade with Russian Federation, shall appear under the risk of imposition the **secondary sanctions** because of cooperation with Russia under a bunch of U.S. statutes including the Countering America's Adversaries Through Sanctions Act (CAATSA). Considering the complex peculiarities of the U.S. legislation, the majority of such companies shall avoid **any** relations with Russia or its nationals/entities in order to avoid any possible risks and reputational damages. Moreover, enlisting Russia in the "outcast club" of sponsors of terrorists together with Iran, Cuba, North Korea and Syria may cause fascinating effect on Russian interstate relations as while armed aggression may be allegedly interpreted as preventive self-defense (as Russia did through malicious reference to its enforcement of Article 51 of the UN Charter), the attitude to international terrorism as the global threat which must be fought by all possible means has been enshrined by the UN authorities in the General Assembly and Security Council resolutions and by numerous U.S. internal acts. Thus, any state willing to remain clear of reputational damages and being interested in access to the U.S. markets and exchanges, would not risk it all for trade and cooperation with the Russian Federation. That is why the perspective of designating Russia sponsor of terrorism makes its leaders so angry.

Therefore, designating Russia a state sponsor of terrorism is extremely important for Ukraine in short perspective as it will effectively weaken its enemy economically and speed up the Ukrainian victory. As for the compensations of damages, considering the role of Ukraine in this global crisis and Ukrainian sacrifice, our country certainly has the right to lobby the solution of this issue by the USA through the applicable means in this situation which are amending the effective legislation by allowing to establish the priority of Ukrainian claims and the special procedure for compensating the Ukrainian losses and damages within or outside the FSIA mechanism or adopting the new acts. Such bills already exist and they have been presented to Congress, such as Morelle-Kaptur- Golden bill which calls the President to enter into agreement with other states in order to collect and distribute frozen assets of Russian Central Bank to international financial institution for the purposes of compensating for the Ukrainian damages, Bennet – Portman bill ("Repurposing Elite Luxuries Into Emergency Funds for Ukraine Act") focused on private assets of Russian oligarchs found and seized by the Task Force KleptoCapture and transferred to the "Ukrainian Relief Fund", account established by the Secretary of Treasury.

We should note that these drafts **are not related to the FSIA and pursue alternative ways**. Of course, it would be great if the specific amendments are made to the FSIA as it would help to avoid the possible collissions but it does not look realistic as it would undermine the whole concept of recovering damages by those suffered from acts of terrorism.

To sum up, designating Russia a state sponsor of terrorism bears significant risks and even problems for Ukrainian financial interests in context of compensation for losses and post war restoration as:

- only American citizens are entitled to file lawsuits against a state designated a state sponsor of terrorism and this principle is unlikely to be amended. Therefore, Ukrainians shall get no advantage of this procedure;
- Successful execution of such decisions in favor of American plaintiffs shall dissolve the share of Ukraine and Ukrainian people in the frozen Russian assets (approximately USD 38 bln) which might have been transferred to Ukraine under other alternative mechanisms.

However, the designation of Russia as a sponsor of terrorism has vital importance for us in the broader context in order to weaken our enemy and ensure faster victory. Therefore, Ukraine should insist on designating Russia as sponsor of terrorism but on condition the specific amendments are made to the existing legislation or the new acts are adopted to ensure satisfaction of Ukrainian needs. Moreover, this does not prevent Ukraine and states supporting it from seeking and establishing other legal mechanisms of claiming Russian funds within the tools provided by international law.

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