

Government response to CAVV advisory report no. 48 'Confiscation of foreign State property'

On 20 December 2024 the Advisory Committee on Issues of Public International Law (CAVV) submitted to me its advisory report 'Confiscation of foreign State property' (annexe 1).¹ The government is grateful to the CAVV for this advisory report, which it prepared at my request. CAVV advisory report no. 48 and the government response to it implement the motion submitted by MP Tom van der Lee (36 027 (R2160) No. 12)) seeking a further advisory opinion from the CAVV on the lawfulness of the confiscation of foreign State property in the light of other (legal) regimes than the UN Convention on Jurisdictional Immunities of States and Their Property.

In this advisory report the CAVV considers whether or not the confiscation of foreign State property and less far-reaching measures, such as the use of extraordinary revenues stemming from foreign State property to finance a loan to another State, are permitted under international law. The background to the advisory report is the question as to what scope is available for using Central Bank of Russia (CBR) assets to benefit Ukraine. A more specific question is whether third States, including the Netherlands, are permitted under international law to confiscate Russian State property to assist Ukraine or to effectuate reparation payments owed by the Russian Federation to Ukraine. The government would note in this connection that the Netherlands' determination of a position on this matter will have a limited effect on the actual implementation of such measures: the assets of the Central Bank of Russia are held not in the Netherlands but mainly in Belgium and Luxembourg. The enforcement of such coercive measures would therefore in the first place be a matter for those countries.

In its advisory opinion, the CAVV considered three kinds of coercive measures: seizure of the CBR's assets, the seizure or 'taxing' of extraordinary revenues stemming from the CBR's immobilised assets, and the use of CBR assets as collateral for loans to Ukraine.

The government agrees with the CAVV that the assets of the CBR enjoy immunity under international law (points 1 and 3 of the CAVV's advice). Therefore, all of the measures mentioned, with the exception of an extra remittance by central securities depositories arising from the extraordinary revenues from immobilised CBR assets (point 2 of the CAVV's advice), can only be justified by relying on another rule of international law that warrants violating this immunity. That additional remittance on extraordinary revenues has already been introduced.

The government also agrees with the CAVV's conclusions on possible justifications for the coercive measures discussed in the advisory report. The CAVV identifies three options: (collective) self-defence, counterterrorism and countermeasures. It is also the government's opinion that international law precludes invoking the right to (collective) self-defence or anti-terrorism conventions: the applicable anti-terrorism rules do not apply (to State terrorism) and do not offer any basis for an exception to immunity (point 6 of the CAVV's advice); and the right to self-defence does not offer sufficient scope for non-military and irreversible measures (point 5).

The government understands the CAVV's conclusion that the justification for coercive measures as countermeasures may be 'open to legal challenge' (point 4 of the CAVV's advice) but assesses the risk that such measures could be successfully challenged before an (international) court as less substantial than the CAVV. I will explain this position below. The lawfulness of coercive measures as countermeasures depends on whether the Netherlands has the right to take the measure and whether the measure is implemented in accordance with the rules governing countermeasures. The CAVV reiterates its position, which is supported by the government, that taking countermeasures in the general interest is permissible.² In the opinion of the CAVV and of the government too, the Netherlands is therefore entitled to take the measure. However, this is not a

¹ CAVV advisory report no. 48, 'Confiscation of foreign State property', 20 December 2024.

² On this subject see the letter to parliament of 18 February 2023 on steps in diplomatic relations with the Russian Federation, Parliamentary Papers, House of Representatives 2022/23, 35 373, no. 30, and CAVV advisory report no. 41, 'Legal consequences of a serious breach of a peremptory norm: the international rights and duties of States in relation to a breach of the prohibition of aggression', 17 November 2022.

position that enjoys universal support in the community of States and the UN International Law Commission's draft articles on responsibility of States for internationally wrongful acts³ make provision for this right only indirectly. The government therefore believes it to be desirable to also incorporate other grounds for taking countermeasures in the justification for coercive measures. In order to strengthen the case that other States, including the Netherlands, and the European Union (EU) as a whole, are entitled to take countermeasures, consideration could be given to whether they can be characterised as specially affected States. It could be argued that the aggression by the Russian Federation has particularly injured the EU and therefore the Netherlands too on account of the economic, political and military damage incurred by the EU as a consequence of the aggression against Ukraine, in which connection account can also be taken of the fact that Ukraine is a neighbouring country of the EU. The draft articles on responsibility of States for internationally wrongful acts provide directly for the right of a specially affected State to take countermeasures. This could (also) serve as a basis for those States that do not accept countermeasures in the general interest, which includes some EU Member States.

In assessing whether the implementation of countermeasures is in compliance with international law, the CAVV notes that, in addition to being proportionate, countermeasures must also be necessary. By 'necessity', the CAVV seems to mean that the implementation of a countermeasure must comply with a number of procedural requirements and not to be suggesting, as is customary under other international law doctrines, that a countermeasure should be the only effective and/or available measure. Although the government does of course agree that the procedural requirements for countermeasures must be fulfilled, it does not consider 'necessity' to be the most appropriate term in this context.

The CAVV also rightly notes that in order to be lawful a countermeasure must be intended to induce a State to comply with international law. Although the lawfulness of a countermeasure is not assessed on the basis of whether this effect is actually achieved, a countermeasure that specifically does not have that as its object is unlawful. The CAVV then notes that the proposed coercive measures against the Russian Federation are not solely intended to induce compliance with its obligations, which include the obligation to make reparation to Ukraine. Instead, in the opinion of the CAVV, these measures would give effect to that obligation, by providing the reparation that Russia has failed to provide. The fact that the envisaged coercive measures against the Russian Federation are not exclusively intended to induce compliance does indeed leave them open to legal challenge. Nevertheless, the government does not see this as an insurmountable objection. As long as the measure taken is reversible – in other words, it can be lifted once the Russian Federation does comply with its obligations to Ukraine – and as long as the measure affects the interests of the Russian Federation, the fact that it serves multiple objects does not prevent it from complying with the requirements.

In its commentaries on the draft articles on responsibility of States for internationally wrongful acts, the International Law Commission had already noted that countermeasures are taken at the risk of the State that takes them. The government therefore takes great care in its assessment of the lawfulness of all intended responses to the ongoing aggression against Ukraine and serious violations of international humanitarian law by the Russian Federation. Any confiscation of Russian State property will also have to be assessed with care as to its conformity with international law. In light of the potential for legal challenge discussed above, and given the fact that the measures are to be taken in the general interest, the government will continue to advocate for such measures to be taken collectively, for example in the EU.

In this connection it is relevant that the Netherlands, in cooperation with Ukraine and the Register of Damage for Ukraine, has taken the initiative in establishing an international claims commission for Ukraine. The purpose of such a committee is to assess damage claims entered in the Register of Damage. There are currently 55 countries participating in the process, as well as the EU and the

³ Responsibility of States for Internationally Wrongful Acts, available at: https://legal.un.org/ilc/texts/instruments/english/draft_articles/9_6_2001.pdf.

Council of Europe. In this connection, there are also discussions concerning how claims for damages granted by a claims commission could actually be paid out. One option under active consideration is the establishment of a compensation fund. If agreement can be reached on a legal basis for it, the fund could be comprised of the frozen assets of the CBR.

Finally, the government would note that in its legal analysis of the confiscation of the CBR's assets, the CAVV also refers briefly to a number of financial and economic risks, including risks to the stability of the euro and the potentially limited amount of reparation payments and limited capacity of Ukraine to make repayment.

The government acknowledges some of these financial and economic risks, such as the risks to the euro's status as a reserve currency and Ukraine's limited repayment capacity. At present the government is still examining the full range of financial and economic risks arising from confiscation and considering which mitigating measures could be taken to limit those risks. In the European discussions on this subject, the government is seeking greater clarity about the risks. There are also a number of other risks cited by the CAVV that the government does not acknowledge. For example, the CAVV mentions the risk of the EU passing the financial burden of the EU's share in the Extraordinary Revenue Acceleration (ERA) loans to Ukraine if the extraordinary revenues stemming from the central bank assets fall short. However, these loans are guaranteed by European Union Member States by means of the guarantees given from the headroom available under the Own Resources Decision. The ultimate financial risks will in that case lie not with Ukraine, but with the EU Member States. In any event, the loans will be repaid.

For the government, it is a fact that Russia must ultimately pay for the damage that it is causing in Ukraine. In accordance with several House motions⁴ the government is therefore looking seriously at examining additional options for use of the frozen CBR assets. The government is calling for this at European level and in bilateral contacts. Any additional measures will have to be taken in the context of the EU and G7. Thorough examination of the legal, financial and economic possibilities and risks will remain important in this connection. The government is planning to work with several other EU Member States to establish a technical group at civil service level in order to work out the details.

⁴ Motions submitted by MPs Harmen Krul *et al.*, (Parliamentary Papers 36 410-V no. 65), Sarah Dobbe *et al.*, (Parliamentary Papers 21 501-20 no. 1959) and Ruben Brekelmans *et al.* (Parliamentary Papers 21501-20 no. 203) and the motion submitted by MP Derk Boswijk *et al.* (Parliamentary Papers 21 501-02 no. 2962).