

Confiscating Russian Assets: Difficult But Necessary

by Vladimir Milov

The debate around the topic of financing Ukraine's reconstruction through the confiscation of frozen Russian assets is intensifying. More political voices have come forward with proposals to confiscate Russian assets for that purpose (most recently, the U.K. Foreign Secretary David Cameron¹); others warn against political and legal risks of doing so. However, risks or no risks, the need to swiftly find viable sources of funding for Ukraine's reconstruction rapidly becomes such an urgent task with no clear solution available that politicians should find the will to move ahead with the confiscation of Russian assets - however challenging that may turn out to be.

Why there is no alternative to confiscating Russian frozen assets

Financing Ukraine's reconstruction will soon become an immensely necessary and urgent task. The West's ability to provide Ukraine with significant financial aid is currently under pressure, and most of the funds provided are required to be spent on immediate needs, like the supply of weapons and ammunition and the most needed macro-financial assistance. The appearance of a potentially responsible democratic post-Putin Russian government, which may be willing to cooperate on payments of wartime reparations to Ukraine, remains a long-term prospect. While Putin's government is still around, it clearly will not be interested in paying any damages to Ukraine.

At the same time, the amount of money required for the reconstruction of Ukraine is already enormous and growing. Months ago, the World Bank estimated the cost of reconstruction and recovery for Ukraine in excess of \$400 billion²; it is quite clear that this figure will significantly grow due to more damages assessed and newly inflicted by continuing Putin's aggression. According to the author's estimate, based on expert knowledge of industrial and infrastructure systems, the total reconstruction needs may already be reaching \$1 trillion and would most likely exceed that sum in the future.

Western governments simply cannot provide Ukraine with that amount of money; Putin's government will not. Ukrainian economy is in extremely dire condition as a result of Putin's aggression, and investments will not come at a significant scale until Putin's regime remains in power, due to the risk of continuing/new Russian attacks against Ukraine.

The West has been moving ahead with certain palliative solutions, like imposing a windfall levy on frozen Russian assets at Euroclear and beyond, but this simply cannot deliver proceeds even remotely comparable with what Ukraine truly needs for its reconstruction.

Therefore, however challenging from a political and legal standpoint, confiscation of Russian assets abroad remains basically the only viable option to find adequate sources for financing the reconstruction of Ukraine in the intermediate future - like it or not. Ukraine desperately needs that money; the money is available, and their use is fully justified - without any other realistic alternative in sight. Lack of sufficient Western financial aid already threatens disruptions to financial stability³; in the last days of December 2023, Ukraine was forced to cut all of its capital expenditures for the 2024 budget to make ends meet⁴. Total cancellation of capital spending inevitably creates enormous social and economic difficulties for Ukraine in the near future. Ukraine needs funds for reconstruction now, even yesterday - delays until the end of the war are simply implausible.

¹ "U.K. Foreign Secretary David Cameron tells Antony Blinken \$300 billion in frozen Russian assets should be used to rebuild Ukraine and as a 'down payment' on Kremlin reparations", Mail Online, <https://www.dailymail.co.uk/news/article-12838379/Ukraine-Israel-China-David-Cameron-Antony-Blinken-Biden-Russia-Putin.html>

² The World Bank, "Updated Ukraine Recovery and Reconstruction Needs Assessment", <https://www.worldbank.org/en/news/press-release/2023/03/23/updated-ukraine-recovery-and-reconstruction-needs-assessment>

³ The Financial Times, "EU funding delays imperil Ukraine's 'macro-financial stability', says official", November 10, 2023 (<https://www.ft.com/content/b72c7353-b067-4fe6-9d0a-d8fd21c5fcaa>)

⁴ Ukrainska Pravda, "Ukraine's external financing needs for 2024 reduced to US\$37.3 billion", December 20, 2023 (<https://www.pravda.com.ua/eng/news/2023/12/20/7433818/>)

How much worth of Russian assets are there?

Western sources frequently estimate the amount of Russian assets currently frozen abroad as a result of sanctions in the range of \$300 billion - that figure can be heard most often. If that is assumed to be correct, that alone can be a significant contribution to Ukraine's reconstruction. However, that amount appears to be vastly exaggerated - with the actual properly located assets totaling just about one-third of that sum, slightly above \$100 billion⁵.

This is not nothing, but it is clearly insufficient to cover Ukraine's reconstruction needs. But the truth is that there are many more Russian assets harbored in the West than what was seized since the beginning of Putin's full-scale invasion of Ukraine in 2022. According to some pre-invasion estimates, Russia has the world's largest volume of assets syphoned from the country and kept abroad - up to \$1 trillion⁶. This is consistent with the total number of capital flights from Russia since 2008, as reported by the Russian Central Bank - over \$1,2 trillion from 2008-2023, of which \$383 billion was recorded alone in the past three years, 2021-2023⁷. These are probably underestimates; the absolute majority of these finds are harbored in the West.

Many of those assets do not directly belong to the state, but a significant majority of the Russian businesses and oligarchs who nominally own them can qualify as state-affiliated entities and persons. There's almost not one of them which hasn't either a direct affiliation with the Russian state or parastatal entities or has been a major recipient of state aid for their projects, which effectively makes them just another offshoot of Putin's government dressed as private business.

The West needs to acknowledge the fact that currently identified and frozen Russian assets are vastly insufficient for the purpose of financing the reconstruction of Ukraine and launch a massive search for other Russian assets located within the Western jurisdictions, with the purpose of significantly increasing the amount of frozen Russian assets potentially available for confiscation. Russian pro-democracy forces, independent civil society groups, and investigative journalists are ready to provide any necessary assistance in that, including providing legal expertise required for linking the relevant assets with the Russian state. Russian pro-democracy forces, in general, are supportive of Russia's unequivocal admission of damages caused to Ukraine by Putin's unprovoked aggression and believe that swift confiscation of Russian assets abroad for the purpose of financing Ukraine's reconstruction is necessary and politically and legally justified.

If that wide search for new, currently unidentified Russian assets abroad is launched in an organized manner, hundreds of billions of new assets may be potentially located, frozen, and, subsequently, confiscated for Ukraine's needs. That may significantly ease the task of finding sufficient money for Ukrainian reconstruction.

How to overcome obstacles to asset confiscation

Many experts point out the political and legal challenges connected with the confiscation of Russian assets. These challenges do exist, but, to be honest, they do not amount to comparable problems that arise from the unsolved question of funding sources for Ukraine's reconstruction. Demand for Ukraine recovery funds will increase over time; costs will be so high that this burden will be improbable to impose on Western taxpayers and budgets.

For instance, Kimberly Donovan and Charles Lichfield of the Atlantic Council argue that Russia "would almost certainly sue for its money if it were seized. If any court (and there are many to choose from)

⁵ "Where are the Sanctioned Russian Assets Frozen in the West and How Much is actually Frozen?", John Cusack, Financial Crime News, February 23, 2023 (<https://thefinancialcrimenews.com/where-are-the-sanctioned-russian-assets-frozen-in-the-west-and-how-much-is-actually-frozen/>)

⁶ "Defending the United States against Russian dark money", Anders Åslund and Julia Friedlander, Atlantic Council, November 2020, <https://www.atlanticcouncil.org/in-depth-research-reports/report/defending-the-united-states-against-russian-dark-money/>

⁷ Source: Central Bank of Russia, "Balance of Payments of the Russian Federation, third quarter of 2023" (https://www.cbr.ru/Collection/Collection/File/46507/Balance_of_Payments_2023-3_16.pdf), page 4, "Financial account balance" ("Сальдо финансового счета")

rules in its favor, a sympathetic third country could technically recoup U.S. or European funds flowing through its jurisdiction on Russia's behalf⁸."

But even if this hypothetical situation materializes in reality, and some third-country court attempts to recoup some of the Western funds to transfer them to Russia (difficult to imagine serious global players doing so, but) - there will be an ability to challenge such actions through legal and political means, it will not be the end of the story, such third-country behavior should be fought against. After all, there is the U.N. General Assembly Resolution A/RES/ES-11/5, which recognizes Russia's liability to pay reparations and damages arising from its unlawful aggression against Ukraine.

Other counter-arguments are also highly hypothetical. For instance, Christine Lagarde, the ECB president, expressed concern over potential Russian asset confiscation⁹, damaging the image of the Euro and fearing that the risk of asset confiscation may lead investors to dump the European single currency. However, in reality, about 90% of the global reserve currencies are those issued by developed democracies (U.S. dollar, Euro, U.K. Pound sterling, Japanese yen, Canadian and Australian dollars, Swiss franc). If Western democracies act in a coordinated manner, currency market players will have nowhere else to go - not to mention that these actions will be fully politically and legally justified, and the markets will receive a clear signal that asset confiscation follows internationally condemned war of aggression, and not just being used at free will.

The Russian post-sanctions experience also proves that it is challenging to find alternatives to Western currencies in international transactions and reserve-building: the absolute majority of the currencies of the countries of the Global South are low-liquidity, high-risk, overregulated currencies, which are often complex, and they cannot, on a broader scale, serve as alternatives to Western currencies, including the Euro. On the other hand, Canada's bold actions aimed at the forfeiture of property of Russian-sanctioned persons have not impacted the positions of the Canadian dollar as a global reserve currency at all - it remains the sixth largest international reserve currency, just slightly trailing the Chinese renminbi. Nor did the E.U.'s actions to freeze Russian assets on a large scale have any impact on investors so far. These fears seem to clearly be overblown.

On the contrary, a group of experienced public international lawyers and practitioners from Belgium, Germany, Japan, the Netherlands, Nigeria, the United Kingdom, and the United States have recently provided a detailed legal justification¹⁰ for the confiscation of frozen Russian assets as compensation for the damage resulting directly from Russia's unlawful conduct. They stress that, in the face of such a blatant violation of a State's international legal obligations as the Russian aggression against Ukraine, international law permits other States to respond with lawful "countermeasures" that are permitted if they are taken against an offending State and are intended to induce the offending state to cease its unlawful conduct, or to comply with its obligation to compensate States that have been injured by that conduct. The published memorandum on "countermeasures" proves that there is clearly a legal pattern forward for the forfeiture of Russian assets to finance the reconstruction of Ukraine.

How to proceed forward

It seems that the best way to move ahead in confiscating Russian assets for the purpose of financing Ukraine's reconstruction is the following:

- The G7 countries (preferably in coordination with other democratic states like Switzerland or Australia) should make a direct inquiry to the Russian Government, demanding that Russia answers by a certain deadline whether it wishes to voluntarily implement the United Nations

⁸ "The West won't seize Russia's reserves any time soon. Here's what it can do with the funds instead", Kimberly Donovan and Charles Lichfield, Atlantic Council, September 21, 2023, <https://www.atlanticcouncil.org/blogs/new-atlanticist/the-west-wont-seize-russias-reserves-any-time-soon/>

⁹ "ECB warns Brussels against windfall levy on frozen Russian assets", The Financial Times, June 16, 2023, <https://www.ft.com/content/4e6499e0-33db-423a-a74b-528118792d22>

¹⁰ Legal Memorandum "On Proposed Countermeasures Against Russia to Compensate Injured States for Losses Caused by Russia's War of Aggression Against Ukraine", <https://united4ukraine.network/wp-content/uploads/2023/12/legal-memo-on-countermeasures.pdf>

General Assembly Resolution A/RES/ES-11/5 by paying damages to Ukraine arising from its illegal war of aggression, or face asset confiscation if it misses the set deadline;

- If the deadline is missed, assets should be seized by the coalition of the willing in accordance with the U.N. General Assembly Resolution A/RES/ES-11/5;
- Third countries should be warned in advance against involvement in any action defending Russian assets and, therefore, assisting Russia in its unlawful war of aggression against Ukraine;
- A massive search for more Russian assets abroad subject to freezing and confiscation should be launched, also in cooperation with Russian pro-democracy forces, independent civil society groups, and investigative journalists willing to assist in that activity.

It will also be helpful if Ukraine develops an official international dossier documenting the specific damages occurring from the Russian aggression beyond just estimates. Work in this regard is already ongoing. For instance, the Council of Europe has established a special register of damage for Ukraine¹¹, which serves the purpose of officially framing the damage assessments into damage claims. However, the international political conversation on this matter may be significantly bolstered, and the search for solutions speeded up if there is a specific claim of damages to be compensated circulating around, with a straightforward question – here is the concrete sum to be paid: who pays for it?

In any case, as said above, there is not just a limited alternative. There is simply no alternative to confiscating Russian assets abroad for the purpose of financing such an urgent and pressing task as the reconstruction of Ukraine. There are risks, but Western policymakers should demonstrate bold leadership in these matters, openly facing risks and challenges but nonetheless finding the necessary funds to rebuild Ukraine after Putin's devastating aggression.

¹¹ "Council of Europe Summit creates Register of damage for Ukraine as first step towards an international compensation mechanism for victims of Russian aggression", Council of Europe, <https://www.coe.int/en/web/human-rights-rule-of-law/register-of-damage-for-ukraine>