



Sovereign immunity and climate lawsuits against central banks and sovereign wealth funds

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Central Banks in Focus



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BRIEFING ROOM

FACT SHEET: Executive Order to Preserve Certain Afghanistan Central Bank Assets for the People of Afghanistan

FEBRUARY 11, 2022 • STATEMENTS AND RELEASES

As part of our ongoing work to address the humanitarian and economic crisis in Afghanistan, President Biden signed an Executive Order (E.O.) to help enable certain U.S.-based assets belonging to Afghanistan’s central bank, Da Afghanistan Bank (“DAB”), to be used to benefit the Afghan people. The E.O. will block property of DAB held in the United States by U.S. financial institutions and require U.S. financial institutions to transfer this property into a consolidated account held at the Federal Reserve Bank of New York. The Administration will seek to facilitate access to \$3.5 billion of those assets for the benefit of the Afghan people and for Afghanistan’s future pending a judicial decision.

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EU Approves Banning Transactions With Russian Central Bank

- Bloc moves to isolate Moscow's economy and financial system
- Russia's central bank has about \$640 billion in reserves



The headquarters of Bank Rossii, Russia's central bank, in Moscow, Russia. Photographer: Andrey Rudakov/Bloomberg

By [Chiara Albanese](#), [John Follain](#), [Jorge Valero](#), and [Jasmina Kuzmanovic](#)

27. februar 2022, 19:36 CET Updated on 27. februar 2022, 20:11 CET



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Central Banks in Focus

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Central banks in Europe exposed to climate litigation on monetary policy

June 22, 2021 | Written by Jamie Woolley | National Bank of Belgium, Bundesbank, European Central Bank

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Andrey Rudakov/Bloom

By Chiara Albane
Jasmina Kuzman
27. februar 2022,

A new [legal analysis](#) has found that central banks in Europe, including the European Central Bank (ECB), are exposed to potential litigation for failing to include climate criteria in their monetary policy decisions. The legal opinion, commissioned by Greenpeace Germany, reveals that climate action is required by all members of the European System of Central Banks (ESCB).

Independence does not grant the ECB unfettered discretion in shaping monetary policy, the analysis shows, and the Bank remains subject to [Article 37](#) of the EU Charter of Fundamental Rights and to the EU environmental principles outlined in [Article 191](#) of the Treaty on the Functioning of the European Union (TFEU). The ECB is also subject to [Article](#)



Gavel and euro money on black table.

The presentation

- Climate lawsuits against states – CB & SWF
 - Litigation against CBs as financial market regulators and supervisors
 - Litigation due to lack of environmental protection requirements in investment programmes/portfolios
 - ClientEarth challenged the validity of the ECB's Corporate Sector Purchase Programme (CSPP) in Belgium courts
 - Litigation for damages made by companies CBs or SWFs invest in
 - Enforcement measures against property of CBs and SWFs
- Central banks (CB) and integrated Sovereign wealth Funds (SWF) protected from law suits and enforcement measures in **foreign courts** → limits

The presentation

1. Central banks' (CB) mandate
2. Immunity, commerciality exception and special treatment of CBs
3. Mål nr Ö 3828-20: Sweedish judgment on immunity from enforcement measures
4. Consequences for CBs, SWF and climate litigation

1. CB mandates

- Mandates vary across time and jurisdictions
- Today, the core of CBs mandate → monetary policy
 - Price stability
 - Moderate long term interest rate
 - Employment
- Monetary policy
 - Setting the interest rate: influencing the money supply
 - Market operations: issuance and purchases of financial assets → influencing the money supply

1. CB mandates

- Central banks' mandates can also encompass
 - Financial stability
 - Guard foreign currency
 - Asset management of sovereign wealth funds

2. Sovereign immunity

- Sources: National and international law
 - US Foreign Sovereign Immunities Act (FSIA) [1976]
 - UK State Immunity Act (SIA) [1978]
 - United Nations Convention on Jurisdictional Immunities of States and Their Property of 2. desember 2004 (UNCI)
 - Not entered into force, partly recognized as customary law cf. *Jurisdictional Immunities of the State* (Germany v. Italy) ICJ Reports 2012, s. 99, para. 66
 - Sweden and Norway → courts limited by international law

2. Sovereign immunity

- Absolute immunity: equal states should not have jurisdiction over each other
- Restrictive approach: avoid injustice towards private actors

If a government department goes into the market place of the world and buys boots or cement – as a commercial transaction – that government department should be subject to all the rules of the market place

Lord Denning in *Trendtex v. Central Bank of Nigeria* [1977] QB 529, 132

2. Sovereign immunity

- Broad agreement on restrictive approach → exceptions & variation of application
- Immunity from **jurisdiction** for governmental acts of a **non commercial nature** (*acta iure imperii v. acta iure gestionis*)
 - US FSIA
 - UK SIA
 - UNCSI
- Immunity from jurisdiction CB activities
 - Decide interest rate → *iure imperii*
 - Regulatory measures → *iure imperii*
 - Purchase and issue financial products in the market → ?

2. Sovereign immunity

- Restrictive approach :
 - Immunity from **measures of constraint** → States enjoy a higher level of protection from measures of constraint compared to jurisdiction
 - Express waiver
 - Assets allocated or earmarked for the fulfillment of a claim
 - Property used for commercial **purposes** (not nature. But many nuances...)
 - US FSIA sec. 1610
 - UK SIA sec. 13 (4), cf. 17(1)
 - UNCSI art 19 (c)

2. Sovereign immunity & central banks

- UK SIA sec. 14 (4)
 - Property of foreign central bank may not be the object of measures of constraint. *AIG Capital Partnes, Inc., et al v. The Republic of Kazakstan*
- US FSIA sec. 1611(b)(1)
 - Preassumptio for Immunity for central banks and their property may be rebuttet if 'the funds are **not** being used for central banking functions as such functions are normally understood, irrespective of their «commercial» nature
NML Capital Ltd, et al. V. Banco Central de la Republica Argentina 652 F. 3d 172 2nd Cir. 2011

2. Sovereign immunity & central banks

- UNCSI

- Art 19 c): post-judgment measures of constraint only allowed if the property is specifically in use or intended for use by the State for **other than government non-commercial purposes**
- Art. 21 c): property of the central bank or other monetary authority of the State does not fall under article 19 (c) → enjoys immunity
- Högsta domstolen Mål nr Ö 3828-20 (2021)

4. Mål nr Ö 3828-20 (2021)

- Background:
 - Ascom Group and Terra Raf Trans Trading Ltd (investors) v. Kazakhstan and the National Bank
 - Arbitral decision from 2013 oblige Kazakhstan to pay USD 500 millions to the investors
 - Sought enforcement against financial assets and cash of the SWF/ National Bank kept in the bank SEB (the property)
- Two questions:
 - Is the property protected by immunity from enforcement measures?
 - Does the property belong to the state? - not considered

4. Mål nr Ö 3828-20 (2021)

- Legal starting point: swedish law → international customary law (para. 21)
 - UNCSI partly expresses customary law, cf. ICJ in the *Jurisdictional Immunities Case*
 - Art 19 and 21 express customary law

4. Mål nr Ö 3828-20 (2021)

- Immunity for CB property, cf Art 21 c)
 - No enforcement measures against CB property, including property administered and controlled by the CB
 - Not all CB property is necessarily protected
 - No clear rules in public international law stating CB property not associated with the exercise of monetary policy should enjoy absolute immunity
 - Whether property not connected to the implementation of monetary policy enjoys immunity must be decided in accordance Art 19

4. Mål nr Ö 3828-20 (2021)

- Immunity only for non-commercial **purposes**, cf. Art 19 c) (para 25-28)
 - Sovereign or commercial purpose? → look at actual use of the property
 - Purpose/ actual use of states' investments in international markets is challenging to establish
 - Wish to secure increased revenue and welfare
 - Macro economic considerations - quick spending of revenue may lead to high inflation and low international competitiveness
 - Counter negative consequences of external/ unpredicted events
 - Promote monetary policy considerations
 - The purpose can be reflected in the investment strategy (risk level, horizon and yield requirements)
 - **Long term investments:** aim of increasing future returns, the use is unspecified, tolerance for risk is relatively high (shares) → risk is similar to that of commercial actors
 - **Short term investments:** state will use the resources at an earlier stage, lower risk (government bonds and bank deposits) → less similar to commercial risks

4. Mål nr Ö 3828-20 (2021)

- Does the attached property of the SWF have a connection with the bank's central monetary policy function (Cf. paragraphs 20–24.)
 - SWF a part of the National Bank
 - Purpose of the SWF → stable economic development and accumulate wealth for future generations
 - The property not connected to monetary policy goals
 - UNCSI Art 21 irrelevant

4. Mål nr Ö 3828-20 (2021)

- Is the attached property of the SWF used for commercial purposes cf. Art 19?
 - Property part of the savings portfolio: Active asset management, long term perspective, higher risk than stabilization portfolio → commercial characteristics
 - Despite commercial characteristics, do the property have links to governmental purposes?
 - No concrete use indicated → increased wealth for future generations and transfer to the budget
 - The management could have been placed outside of the National Bank
 - Conclusion: not enough to establish a governmental purpose

4. Mål nr Ö 3828-20 (2021)

- Summary

- UNCSI Art 19 and 21 – international customary law
- Art 21 provide CB with absolute immunity, but only for property related to monetary policy
- Immunity for other property of the CB must be assessed in accordance with Art 19 (State property for non-commercial purposes)

- Comparison enforcement measures against SWF in CB

- **UK SIA** → Immune as long as the assets can be characterized as the property of the CB (*ratione personae*)
- **US FSIA** → exercise of sovereign functions (*ratione materiae*) → function of CBs may vary over time
 - SWF outside of CB less protected

5. Concluding remarks

- CBs not only responsible for monetary policy...
 1. CB market operations and expansion into quantitative easing → the limits between monetary policy, financial stability, foreign exchange management and pure investment can be challenging to draw
 2. COVID-19 & climate crises → central banks role and activities in the market may expand further
 3. Placement of SWFs inside CBs is no guarantee for protection...
- CB are more open for lawsuits and enforcement measures in foreign courts

5. Concluding remarks

- Sovereign immunity and climate lawsuits against states
 - Litigation for damages made by companies the CB or SWF invest in – foreign courts
 - Enforcement measures against property of CBs and SWFs – foreign courts
 - Litigation against CBs as financial market regulators and supervisors – national & International courts
 - Litigation due to lack of environmental protection requirements in investment programmes/ portfolios - national & international courts