Центральный банк Российской Федерации как субъект и «валютный своп» как источник международного валютного права в рамках международных финансовых механизмов

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The Central Bank of the Russian Federation as a Subject and Its Currency Swap Agreements as a Source of International Monetary Law Within the Framework of International Financial Mechanisms

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Аннотация

В статье исследуются изменения полномочий центральных банков, в частности Банка России, в результате распространения международных финансовых механизмов по предоставлению иностранной ликвидности. Данный механизм является неотъемлемой частью экономической и финансовой интеграции государств, так как такая интеграция не может протекать без соответствующих изменений, гармонизации и координации регулирования в сфере денежно-кредитной политики и регулирования и контроля за денежным оборотом как на национальном, так и на международном уровне. А раз эти полномочия переданы центральным банкам соответствующими органами государственной власти в рамках национальной юрисдикции, то данные финансовые институты становятся субъектами международного права, а валютные своп-линии, или соглашения, его источниками. Для того чтобы выявить и изучить этот феномен, статья раскрывает особенности правовой базы и инструментов, которые используются в международных договорах о создании международных финансовых механизмов по предоставлению иностранной ликвидности, такие как Европейский центральный банк, Европейский стабилизационный механизм, а также Договор о создании пула условных валютных резервов БРИКС. Международные финансовые механизмы по предоставлению иностранной ликвидности представляют собой институты, основанные на международных договорах, регулирующих порядок предоставления сторонам необходимой иностранной валюты, т. е. иностранной ликвидности. Основными методами данной работы являются анализ и синтез, путем которых были выявлены необходимые характеристики, позволяющие определить статус центрального банка в международном праве и выявить природу своп-соглашений между центральными банками. Правовая база одного из таких институтов делегировала Европейскому центральному банку полномочия, признанные Судом Европейского совета, которые придают ему международную правосубъектность. Инструментами достижения целей вышеуказанных договоров являются, как правило, валютные своп-соглашения, которые должны, согласно этим договорам, заключаться между центральными банками. Автор приходит к выводу, что раз международные договоры предусматривают передачу полномочий по осуществлению их целей центральным банкам, то это указывает на тот факт, что центральные банки, в том числе и Центральный банк Российской Федерации, приобретают международную правосубъектность, а своп-соглашения между,

например, Банком России и центральными банками других государств – членов БРИКС, являются источниками международного публичного права. Более того, представители центральных банков стран БРИКС участвуют в формировании международных органов в рамках Пула условных валютных резервов с полномочиями принимать решения по предоставлению ликвидности в долларах США в обмен на национальную валюту государств – членов БРИКС.

Ключевые слова: Центральный банк, международное право, международное валютное право, соглашение о валютном свопе, международные финансовые механизмы, Европейский центральный банк, БРИКС, контингентные резервы, международные финансы, международные резервы, валютный союз, финансовая стабильность, регулирование валютного курса.

Abstract

This article evaluates changes in the powers of central banks, in particular the Bank of Russia, as a result of the extensive use of international financial mechanisms for foreign liquidity extension. This mechanism is an integral part of the economic and financial integration of states, since such integration cannot proceed without mutatis mutandis harmonization and coordination of regulation in the sphere of monetary policy and regulation and control of money circulation both at the national and international levels. And since these powers are transferred to central banks by relevant state authorities within the framework of the national jurisdiction, these financial institutions become not only subjects of international law, but also swap agreements between them become sources of this field of law. In order to identify and study this phenomenon, this article reveals features of the instruments used in international treaties to form international financial mechanisms to extend foreign liquidity, such as the European Stabilization Mechanism, where the European Central Bank plays a special role, as well as the Treaty for the Establishment of a BRICS Contingent Reserve Arrangement, which takes a central place in this work. International financial mechanisms for foreign liquidity extension are institutions based on international treaties governing the procedure for providing parties with necessary foreign currency, i.e. foreign liquidity. The core methods of this work are analysis and synthesis, by which necessary characteristics were identified, allowing to determine the status of the central bank in international law and to reveal the nature of swap agreements between central banks. One of these international financial institutions' legal bases granted the ECB powers, which are recognized by the European Court of Justice as marks of international subjectivity of the ECB. The instruments to achieve objectives of the above-mentioned treaties are, as a rule, currency swap agreements, which according to these treaties should be entered into between central banks of the parties in the treaty. The author comes to the conclusion that since international treaties transfer powers to implement their goals to central banks, central banks, including the Central Bank of the Russian Federation, acquire international legal personality, and swap agreements entered into between the Bank of Russia and central banks of other BRICS Member States, being instruments to achieve objectives of the treaty, are sources of international law. Moreover, representatives of central banks of the BRICS countries participate in the formation of international bodies of the BRICS Contingent Reserve Arrangement with the power to make decisions on dollar liquidity extension in exchange for national currencies of the BRICS countries.

Keywords: Central bank, public international law, international monetary law, currency swap agreement, international financial mechanisms, European Central Bank, BRICS, Contingent reserve arrangement, international finance, international Reserves, Monetary Union, financial stability, FX regulation.

As it is known, the branches of international public law, including its sub-branch – international financial law and international currency law, are based on intergovernmental agreements that form a new character of power for the global community and that can also supervene from the specific branch of national law. However, in the doctrine of public international law, the problem arises when certain powers of a state are delegated to legal entities, and these institutions in different jurisdictions interact with each other within the framework of these delegated powers. The issue under consideration in this article, as a consequence, is to identify those international relations in which central banks (further – CB) act as subjects of public international law, and swap agreements between them – sources of public international law. To achieve this, it is necessary to investigate this problem by methods, such as analysis and synthesis, of both primary sources (international treaties and practice of international courts) and secondary sources (the work of academic lawyers).

Despite the differences in understanding of what constitutes a central bank or even what is international public law in the understanding of legal scholars in Russia and abroad, there are general ideas that the sources of public international law regulate relations between subjects of international law, and the latter, in turn, represents national jurisdictions. This logic is based on the provisions of the 1969 Vienna Convention on the Law of Treaties [23. – Art. 2]. The Federal Law "On International Treaties of the Russian Federation" further states the following:

"International treaties form the legal basis for interstate relations, promote ... the development of international cooperation in accordance with the purposes and principles of the Charter of the United Nations ..." [8. – Preamble].

The same Law states that international treaties are concluded on behalf of the Government of the Russian Federation, federal authorities and on behalf of organizations with appropriate powers. The latter is also entitled to take decisions on the consent to be bound by the treaty. However, when it comes to the central bank, this Federal Law in Article 8 defines for it only power to recommend to state bodies to conclude a treaty [8. – Art. 8].

As example, international financial mechanisms for global financial security can be mentioned. Here the most important intergovernmental organization is the Financial Action Task Force on Money Laundering (further – FATF) where the achievement of its objectives involves the participation of central banks. The FATF recommends that national authorities monitor financial institutions [13]. These powers in Russia are delegated to the Central Bank of the Russian Federation (further – the Bank of Russia) on the basis of the Federal Law "On the Central Bank of the Russian Federation" [10. – Art. 25]. To achieve this goal, Article 51 of the this Federal Law delegates to the Bank of Russia the power to request certain information not only from foreign organizations, but also from foreign state bodies.

The above can be seen in the Agreement on Cooperation between the Central Bank of the Russian Federation (Bank of Russia) and the National Bank of the Republic of Abkhazia in the framework of banking supervision. It is the agreement on providing the parties with certain information necessary for the effective execution of their powers. Another objective of this agreement is to improve the reliable and stable operation of banking systems in both jurisdictions. The reference to jurisdiction (which is a key aspect) is laid down in the formulation that this treaty is consistent with the principles of the recommendations of the Basel Committee on Supervision and Interaction between, what is important, the supervisory authorities. As a consequence, central banks in this Agreement act on behalf of national jurisdictions, agreeing on the interaction in the framework of delegated powers by the respective governments.

The above example, however, affects only one of the activities of CBs. Central banks are also empowered to issue funds, monitor their turnover, establish an exchange rate, control inflation and generally implement monetary policy. On the other hand, these powers' volumes can be changed by agreements on monetary cooperation between central banks. For example, for the purpose of economic integration the countries of the Persian Gulf in the Unified Economic Agreement between the Countries of the Gulf Cooperation have adopted provisions in which CBs of member states should cooperate more closely to achieve the goal of creating a single currency [1. – Art. 22]. The single currency implies restrictions on the powers of the central banks of the countries of the region, since when the member states create a single currency, the CBs are exempted from the regulation of the national currency and from the monetary policy governance. Within the monetary union national central banks are no longer allowed to unilaterally take the initiative to change the exchange rate of the single currency or change the interest rate (or the key rate). Responsibility for the adoption of such decisions rests with the newly established central bank, whose regulatory and supervisory powers extend beyond national jurisdictions, thus acquiring the features of an intergovernmental organization [2. – P. 17–19].

Another and unambiguous example of central banks' ability to own international legal personality is the creation of the European Central Bank (further – ECB) and the European System of Central Banks (further – the ESCB). A number of countries in the European continent have created a supranational system – the

European Union, which also includes the interaction of central banks within the Eurozone [22. – Prot. 4]. The Treaty on the functioning of the European Union defined the legal status of the European Central Bank as one of its institutions with legal personality [22. – Art. 282. – P. 3]. As a consequence, the ECB does not operate within the framework of a particular constitutional system as classical central banks, and moreover, it does not depend on other institutions like ordinary central banks [12]. Also the political independence of the Central Bank is seen as a guarantee for the implementation of decisions that meet supranational economic interests. This independence, according to the author, is the main reason why the Central Bank is not considered a full-fledged regulator, as a state body. In the case of the European Union, the issue becomes more *"interesting"* because the ECB has international legal personality and is one of the EU institutions on the one hand and is independent within the EU (for example, in the field of price stability regulation) on the other hand [12]. Thus, central banks of the Eurozone have access to the ECB's capital, and the latter benefits directly through its branches within the European System of Central Banks or through its subsidiaries. This isolation from other EU institutions was the consequence of Article 130 of the Treaty on the Functioning of the European Union:

"When exercising the powers and carrying out the tasks and duties conferred upon them by the Treaties and the Statute of the ESCB and of the ECB, neither the European Central Bank, nor a national central bank, nor any member of their decision-making bodies shall seek or take instructions from Union institutions, bodies, offices or agencies, from any government of a Member State or from any other body. The Union institutions, bodies, offices or agencies and the governments of the Member States undertake to respect this principle and not to seek to influence the members of the decision-making bodies of the European Central Bank or of the national central banks in the performance of their tasks" [22. – Art. 130].

Despite this independence, there is a precedent in the public international law of the Court of Justice of the European Union relating to the ECB Regulation 1999/726, where the internal procedures for combating fraud were established. The Commission of the European Union challenged this ECB Regulation, believing that it violated the provisions of the EU Regulation 1073/1999 [19], which authorized the European Anti-Fraud Office (hereinafter: OLAF) to conduct investigative actions for internal supervision of all institutions, establishments and bodies of the Union. By delegating its own authority to combat fraud to an independent institution, such as OLAF, the Commission hoped to improve the fight against fraud, corruption and other illegal activities. The problem was that, from the ECB's point of view, an independent status and effective conduct of monetary policy could be threatened if they were subject to external (albeit independent) investigations. The argument of the ECB was that the balance between the EU institutions would be violated for the ECB in case of administrative bodies' "intervention" in its activities. The ECB based its argument on basic law, stating that the provision on OLAF does not apply to it.

In order to solve this *"inter–institutional"* conflict (what is always under special attention of the Court and where the latter is cautious), the European Court had occasion to recognize the first attempt to restrict the powers of the ECB. The court in a persistent and dedifferentiated manner rejected the view that the ECB could be considered as an autonomous among institutions. The general counsel challenged the arguments made by the ECB in a very detailed form:

"The ECB is subject to the general principles of law that are part of the legislation of the European Community and contribute to the objectives of this Community set forth in Article 2 of the Treaty on the functioning of the EU, establishing the fulfillment of its tasks and responsibilities. Therefore, the ECB can be described as the Central Bank of the European Community: it would be inaccurate to characterize it ... as an organization that "does not depend on the European Community", as a "Community in the Community", as a "new Community" or ... as something that goes beyond the concept of a body established or by the EU Treaty in the Regulation N 10763/1999" [17. – Par. 60].

The court followed the opinion of the Attorney General, recognizing the independence

of the ECB, as the Treaty on the functioning of the EU and the protocols to it consolidated the provisions on its independence, which had previously been the characteristic of the national central banks of the member-states of the European Union before they became members of the Eurozone. Therefore these provisions also required limitation of the CBs' powers to enter the euro area. On the other hand, this independence of the ECB does not mean absolute isolation from other EU bodies. The treaty limits other institutions only from putting pressure on the ECB in the framework of ensuring price stability [17. – Par. 155]. Consequently, the ECB is subject to regulation by the OLAF. Moreover, the main rationale for this decision was based on the interpretation of the functional independence of the ECB, which is not an end in itself. It is an instrument for achieving the goal with protection against political pressure. This independence is aimed only at creating conditions where the ECB could ensure price stability and support the implementation of the EU's economic policy. In other words, the ECB's functional boundary independence is defined as following: interference in its independence is limited to those actions that could undermine the ability of the ECB to execute its power of ensuring price stability [17. – Par. 149–150]. In fact, *"the ECB, subject to the provisions set by the EU Treaty and the status of the ESCB, is subject to various types of Community control, in particular, is subject to jurisdiction by the Court of the EU and to control by the European Accounting Chamber"* [16. – Par. 135].

In this decision, the Court denied the ECB's attempt to withdraw its independence beyond its functions [11. – P. 642–643]. Accordingly, the Court defined both the character of the ECB and its institutional role. Moreover, the Court considered the elements of democratic accountability as necessary, which must be respected by the ECB, even though this type of accountability is mainly reduced to participation without the right to vote of the President of the Council and accountability to the European Parliament in the form of reports in the relevant committees of this legislature [12. – P. 9].

Another decision of the Court of Justice of the European Union recognized the European Central Bank's liquidity provision as a political decision that applies to the Eurozone member states [3. – Par. 136]. This was a consequence of the crisis, when the most influential central banks of the world began a process of quantitative easing to increase liquidity in order to prevent the destabilization of financial markets and to overcome the risks of a balance of payments deficit [14]. For this reason, the ECB has become the part of the bailout program in the euro area along with a newly established institution – the European Stabilization Mechanism (further – the ESM). The ESM is one of the international financial mechanisms for providing liquidity, whose member states are members of the Eurozone [16. – Preamble]. This institution participated in lending funds to troubled economies, when after the crisis of 2010 a number of countries in the euro area faced a budget deficit. After a series of joint actions by the ECB and the ESM, the Court of Justice of the European Union had to decide whether the measures taken by the ECM and the ECB were in conformity with the Treaty on the Functioning of the European Union [3; 6]. The EU Court interpreted the activities of the ESM as being based on an international treaty that is not part of the law of the European Union, but found no reason to believe that the ECB's participation in this program is unlawful, since the goals set in the ESM are also directed to the field that is regulated by the European Central Bank (this power is delegated to the ECB by the Treaty on the functioning of the EU) [3; 6. – Par. iii]. Consequently, the ECB and the ECM acted as international bodies regulating financial relations within the Eurozone. In other words, the ECB as the central bank is recognized by the international court as a subject of public international law. Moreover it is also the intergovernmental organisation even it is within the European law.

Finally, the most important example for this paper is the role of central banks in the Treaty for the Establishment of a BRICS Contingent Reserve Arrangement 2014 (further – the CRA), where the goals are achieved through swap agreements between Member-States CBs [21]. Due to the fact that the powers to stabilize the financial system, in particular the monetary system, the emission of ruble and the stability of its exchange rate, and the conduct of monetary policy are delegated to the Bank of Russia by the

Constitution of the Russian Federation [5. – Art. 75. – Par. 1–2], the Bank of Russia's participation in the functioning of the CRA means the performance of its powers to achieve the objectives of the international treaty between the BRICS countries [21. – Art. 6].

In order to combat, prevent and eliminate short-term balance of payments pressures and crises, the BRICS member states decided to create a pool of foreign liquidity reserve by signing on July 15, 2014 in Fortaleza (Brazil) the Treaty that formalized the legal framework for cooperation between its Member States [21. – Preamble; Art 1].

The provisions of the CRA Treaty stipulate that *"the Central Bank of Brazil, the Central Bank of the Russian Federation, the Reserve Bank of India, the People's Bank of China and the South African Reserve Bank shall enter into an inter-central bank agreement setting out the required operational procedures and guidelines"* [21. – Art. 6]. More precisely, if there is a short-term pressure on the balance of payments, then a precautionary instrument is used, and to overcome the possible threat of such pressure – a preventive instrument is used [21. – Art. 4].

To provide the aforementioned assistance, the Treaty entrusts central banks to conclude currency swap agreements so that the Requesting Party can receive liquidity denominated in US dollars. These agreements may also be concluded on the basis of procedures adopted by the Standing Committee [21. – Art. 7].

Article 8 of the Treaty on the BRICS Pool defines the swap transaction and discloses the features of the mechanism in the context of the above-mentioned agreement between the BRICS countries. The Requesting Party (the member state that requests liquidity) concludes swap agreement through its Central Bank in its national currency with the Central Bank of the Providing Party that accepts the national currency of the former in exchange for an equivalent amount in US dollars. The Requesting Party undertakes to repurchase its national currency from the Providing Party by US dollars [21. – Art. 8].

When swapping an operation, that current exchange rate of the Requesting Party's currency against the US dollar is used, that prevails in the foreign exchange market at the time of the first transaction (the spot price) [21. – Art. 10(a)]. It is important to note that the same rate is used for the reverse (closing) transaction [21. – 10(b)] – the forward transaction [15]. However, in the forward transaction the CB of the Requesting Party pays the interest accrued (in US dollars) to the CB of the Providing Party, while there is no interest accrued for the Requesting Party's funds [21. – Art. 10]. The interest rate is set at the rate of the generally accepted interest rate for such agreements, taking into account the duration of the agreement and the spread (the difference in the value of currencies over a certain period of time) [21. – Art. 11(a)]. Here it is worth to clarify that the CRA has established a rule where the early forward transaction by the Requesting Party entails a decrease in the interest rate on the basis of how many actual days have passed between the first and the second transactions have been made [21. – Art. 12(f)].

The above provisions are established in the intergovernmental agreement and, consequently, are sources of international law. Moreover, the CRA also establishes other provisions that transfer these powers to the Central Banks of the Parties to the CRA Treaty. The Article 11 states that "*when a preventive instrument is applied for a provided but not used amount, a commission is charged in an amount determined in the agreement between the Central Banks*" [21. – Art. 11(b)].

The procedure for granting foreign liquidity also depends on the Requesting Party's agreement to receive foreign liquidity from the IMF, as defined in the CRA as an IMF-linked Drawing (for example, the date of fulfillment of obligations or the duration of the currency swap date change) [21. – Art. 12]. When speaking about the preventive instrument, where the decision and order are taken by the Central Banks of the member states themselves, the agreement with the IMF grants the Requesting Party an access to the CRA's resources through the one-year swap agreement with a full or partial renewal of this agreement no more than 2 times [21. – Art. 12(d)]. Otherwise, the term of the preventive instrument lasts half a year [21. – Art. 12(e)].

Finally, the Central Banks are also involved in the procedure for sending the request by the Member State to obtain the necessary liquidity or

the use of the preventive instrument. On the basis of Article 14, the Requesting Party must sign and deliver a letter of acknowledgement evidencing the macroeconomic situation and the absence of any debt both to other Member States of the CRA and to other international financial institutions. In addition, the requested access to liquidity should not be done by means of the swap not constituted by other subordinated and secured obligations [21. – Art. 14]. If these criteria are met, the Standing Committee of the CRA may approve the access to liquidity implying an intervention, as a result of which the CBs activate currency swap lines [21. – Art. 13].

Despite the fact that the CRA *"isn't an independent international legal person, cannot enter into agreements, act as a plaintiff and a defendant in a court"* [21. – Art. 19], the CRA Treaty itself is the intergovernmental agreement that's been ratified by the State Duma on May 2, 2015 in Russia [9]. The Federal Law on the ratification of this Treaty gave the Central Bank of the Russian Federation *"the powers to execute the rights and obligations of the Russian Federation under the Treaty for the Establishment of a BRICS Contingent Reserve Arrangement"* [9. – Art. 2(1)]. In addition, the Russian legislation has established a provision that the Ministry of Finance of the Russian Federation must conclude *"an agreement with the Bank of Russia on the procedure for interaction, participation in the governing bodies and the adoption of concerted decisions on the functioning of the BRICS Contingent Reserve Arrangement"* [9. – Art. 2(2)]. Finally, Russia's participation in this Treaty is provided by means that are available to the Bank of Russia [9. – Art. 3]. As a result, the Bank of Russia with the Central Banks of other Member States signed the Operating Agreement within the CRA [4; 20].

Based the above it can be concluded that the Central Bank of the Russian Federation is not only authorized to execute the obligations accepted by the Russian Federation under the Treaty for the Establishment of a BRICS Contingent Reserve Arrangement, but within the framework of this Treaty it is also authorized to make decisions and create standards jointly with the other Central Banks of the Member States. Among them there is adoption by the Member States' CBs of the CRA decisions on the use of a preventive instrument, the defining of the interest rate for not using the allocated foreign liquidity, and adoption of the Operational Agreement to fulfill their obligations under this Treaty.

The result of this analysis also shows the fact that although the (Russian) federal legislation did not give the Bank of Russia the authority to conclude treaties on behalf of the Russian Federation, nevertheless the international monetary system, or more precisely the need for participation in international financial mechanisms for providing foreign liquidity, created the conditions under which CBs, including the Bank of Russia, must act as subjects of public international law. The subjectivity is evidenced also by the legal framework of the FATF and the creation of the European Central Bank, the European System of Central Banks and the European Stabilization Mechanism, where the EU Court in three different decisions recognized the ECB and ESCB and the international institution for providing foreign liquidity (in particular ESM) as subjects of European law. Finally, the analysis also showed that to ensure global financial stability and security, as well as economic integration, international swap agreements among central banks inevitably become sources of public international law. That is, despite the fact that central banks retain some independence, they are nevertheless recognized as regulators in the framework of international financial law and international currency law.

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