6-1-2015

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Recommended Citation
Available at: http://chicagounbound.uchicago.edu/cjil/vol16/iss1/3
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Thomas D. Grant*

Abstract

International law prohibits the acquisition of territory by force. Even so, states have struggled to identify a judicial or arbitral procedure to protect their rights following an unlawful attempted acquisition. With reference to the annexation of Crimea, but with a view to the wider possibilities for judicial or arbitral settlement of territorial questions, the present Article considers three mechanisms—the European Convention on Human Rights (European Convention), the Statute of the International Court of Justice (ICJ Statute), and bilateral investment treaties. Recent decisions of the European Court of Human Rights (ECHR) suggest that its inter-state procedure holds some promise in such a situation. By comparison, attempts by a state to protect its territorial rights before the ICJ—for example, by Georgia against Russia—have encountered serious obstacles. This Article starts by considering the ECHR. It then turns to the ICJ, the jurisdiction of which has extended to territorial questions in some of its best-known cases but, in others, may be of limited use to a state seeking to defend its territorial rights directly. The Article then turns to investment treaties and asks, though they have not been used to address territorial disputes so far, what role they might play.

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I. INTRODUCTION

Situations sometimes arise to which international law rules clearly pertain but for which international law procedures are not clearly available. The international law rule that precludes acquisition of territory by force is one of the clearest rules and undergirds much of the modern system of international law. Yet a state from which another state has seized territory by force does not necessarily have recourse to procedures that will fully vindicate its rights. The present Article is meant to provoke fresh consideration of the possibilities for challenging the unlawful acquisition of territory. It refers in particular to the annexation of the Ukrainian territory of Crimea by the Russian Federation. Some of the considerations set out herein chiefly concern that situation; others may be of wider or general application to territorial questions.

This Article considers dispute settlement mechanisms under three instruments: the European Convention on Human Rights (European Convention), the Statute of the International Court of Justice (ICJ Statute), and the Ukraine-Russian Federation bilateral investment treaty. The point here is not to predict whether a particular court or tribunal would hear a submission seeking to affirm (or to challenge) title to Ukrainian territory, or to any given territory that might be subject to dispute. Justice Holmes said that the lawyer's task is to predict what a court will in fact do;¹ a prediction (preferably accurate) is what the practicing lawyer's client expects. The lawyer writing as an academic, however, may be expected to explore the bounds of what a court might do if, for some reason, it saw fit to interpret or apply a text in a new way.² The questions posed here are meant to be that sort of exploration.

International law clearly prohibits acquisition of territory by force. As the General Assembly expressed it in the Friendly Relations Declaration,

\[ \text{the territory of a State shall not be the object of acquisition by another State resulting from the threat or use of force. No territorial acquisition resulting from the threat or use of force shall be recognized as legal.} \]

The rule has been stated in a number of forms.³ It would appear under modern international law that the rule is self-executory: that is, no particular

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¹ See generally Oliver Wendell Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457 (1897).
determination is needed by an organ of the international legal system to implement the rule when a case of its breach arises. This was Judge Skubiszewski's reasoning in the *East Timor case*;\(^5\) Article 41 of the ILC Articles on state responsibility is consistent with it. The rule, as the Friendly Relations Declaration states it, has two parts: it forbids a state from acquiring territory by force, and it obliges all states to withhold recognition from any acquisition of territory which took place by force. Particularly in light of the second part of the rule, significant practical consequences may arise when a state asserts control over a territory in breach of international law. Even if self-executory, however, the rule will not avail the party against which the breach has been committed if there is no binding determination under the rule that confirms a specific legal right or interest for it to invoke for relief against another (state or non-state) party. States from which territory has been taken by force are likely to seek further concrete measures.

Concrete measures, if the state is to obtain these through a dispute settlement mechanism, must first establish that a mechanism before which it brings the matter has jurisdiction to hear it. As a preliminary matter, the state occupying the territory will seek to dismiss any claim as either inadmissible or beyond the jurisdiction of the court or tribunal. Under a number of jurisdictional instruments, an obvious threshold objection will be that questions of territorial title do not fall within the competence of the relevant dispute settlement body. The subsequent defense—that the self-executory character of the rule already establishes the unlawfulness of the putative acquisition—will provoke the objector to say that "[t]he mere denial of the existence of a dispute does not prove its non-existence";\(^6\) a dispute as to whether a dispute exists is, in this context, just as much a dispute;\(^7\) it remains a dispute over territory; and the objecting party will maintain its objection as to competence just the same.

And the objection, when lodged in respect of territorial questions before certain dispute settlement mechanisms, seemingly has a strong chance of success. In respect of otherwise potent jurisdictional provisions, it has been taken to be so obvious that they would not cover territorial questions that little has been written to say precisely why they would not; and the contrary proposition has been little tested in practice, if at all.

The present Article starts with a brief overview of the situation in Crimea (Section II); and then considers in turn how each of three dispute settlement

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\(^7\) See, for example, *Certain Property (Liech. v. Ger.),* 2005 I.C.J 6, ¶¶ 23–27 (Feb. 1) (citing *inter alia,* South West Africa, Preliminary Objections, Judgment, 1962 I.C.J. 319, 328 (Dec. 21)).
mechanisms might be relevant to claims arising from the situation. Section III considers how the ECHR in recent decided cases has expanded the possibilities for obtaining relief under its inter-state procedure. Section IV considers the ICJ—the organ which states have successfully seized of territorial questions—but the jurisdiction of which does not extend to every territorial question. Georgia’s attempt to submit territorial questions to the ICJ after Russia’s armed intervention in 2008 did not succeed, even though the ICJ would seem the most suitable organ for addressing such questions. The Article turns finally in Section V to investment treaties, a more remote possibility for addressing a territorial dispute but an otherwise potent jurisdictional base and thus one meriting consideration.

II. THE ANNEXATION OF CRIMEA

The Russian Federation enacted a municipal law on March 21, 2014, that purported to incorporate Crimea, an area of Ukraine, into Russian Federation territory. The act of annexation came after a local referendum, the results of which purportedly indicated a preference for separation from Ukraine and annexation by Russia, but the conduct of which was heavily impugned. Problems included, in particular, the “visible presence of armed soldiers under conditions of intimidation of civic activists and journalists, blacking out of Ukrainian television channels and obstruction of civilian traffic in and out of Crimea” (as noted by the Council of the European Union), the public presence of military and paramilitary forces in particular being “not conducive to democratic decision making” and the lapse of only ten days between the decision to call the referendum and the referendum itself being “excessively short” (as noted by the Venice Commission of the Council of Europe). By the

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8 For more on the annexation and its municipal and international legal aspects, see Chapter 1 of THOMAS D. GRANT, AGGRESSION AGAINST UKRAINE: TERRITORY, RESPONSIBILITY, AND INTERNATIONAL LAW 15–42 (2015).


time of the referendum, which was held on March 16, 2014, Crimea was under the effective control of the Russian armed forces. Attention also was drawn to formal deficiencies with the referendum. The Venice Commission said that it was “clear that the Ukrainian Constitution prohibits any local referendum which would alter the territory of Ukraine.”

The Chairman of the Organization for Security and Co-operation in Europe (OSCE) concluded that the referendum was “in contradiction with the Ukrainian Constitution and must be considered illegal.”

The Venice Commission further concluded that the constitutional restrictions on secession referendums under Ukrainian law “[do] not in any way contradict European constitutional standards.”

The annexation of Crimea attracted widespread condemnation. The General Assembly of the United Nations rejected it, as did the Parliamentary Assembly of the Council of Europe. Few states have expressly accepted the annexation as lawful. Most have indicated that it is invalid and not to be recognized.

As of January 2015, no dispute directly concerning the annexation of Crimea had led to a final judgment or award outside the national courts of Ukraine or Russia. Ukraine lodged an inter-state application against the Russian Federation on March 13, 2014, under the European Convention. On the same day, Ukraine submitted a request for interim measures under Rule 39 of the Rules of Court. The President of the Third Section called upon both states

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12 Venice Commission report, supra note 11, ¶ 15.
13 OSCE Chair Says Crimean Referendum in its Current Form is Illegal and Calls for Alternative Ways to Address the Crimean Issue, ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE (Mar. 11, 2014), http://www.osce.org/cio/116313 (referencing statement by Didier Burkhalter, OSCE Chairperson-in-Office for 2014).
14 Venice Commission report, supra note 11, ¶ 17.
15 Laws on Admitting Crimea and Sevastopol to the Russian Federation, supra note 9.
17 See GRANT, supra note 8, at 63–99 (discussing non-recognition in extenso).
19 Article 39 of the Rules of Court provides that the Chamber, or “where appropriate,” the President, either on party request or sua sponte, may indicate “any interim measure which it
parties to refrain from taking any measures, in particular military actions, which might entail breaches of the Convention rights of the civilian population.\textsuperscript{20} The ECHR instructed the parties to keep it informed of the measures they take to implement the Convention.\textsuperscript{21} On June 13, 2014, Ukraine lodged a further interstate complaint against the Russian Federation, this time concerning the abduction of Ukrainian orphans in Eastern Ukraine. The Court adopted interim measures in respect of this matter as well.\textsuperscript{22} The orphans were eventually returned to the territory of Ukraine, and the interim measures in respect of that matter were lifted, while the other interim measures remained in force.\textsuperscript{23}

In June 2014, it was reported that Ukraine was considering instituting arbitration under the Stockholm rules in connection with the seizure by Russia of Chornomornaftogaz, the Ukrainian state oil and gas company's subsidiary based in Crimea.\textsuperscript{24}

To date, there has been no published judicial or arbitral submission directly challenging the unlawful seizure of territory from Ukraine — though the actions just noted likely entail argument on the point. Ukraine made clear in the General Assembly on March 27, 2014, that the referendum and annexation did not effect a lawful transfer of Ukrainian territory to Russia.\textsuperscript{25} In an inaugural address on June 7, 2014, the President of Ukraine said that Crimea "is, was and will be Ukrainian."\textsuperscript{26} In any legal proceedings that arise in connection with Crimea,
Ukraine thus will be concerned with preserving its boundaries as recognized at the time of independence—that is, avoiding any statement or inference that would suggest that Ukraine holds title to anything less than its full territory. In proceedings which Ukraine brings itself, the matter can be addressed by disclaimer. In proceedings brought against Russia by individuals or private juridical persons, the matter is not as urgent; a non-state actor does not have the power to bind the state if the latter has not empowered the actor to do so. Claims by private persons nevertheless might raise questions about Crimea, either directly or indirectly, and thus would be a matter of sufficient concern to merit clarification by Ukraine through the procedures available.

A legal policy in response to an unlawful territorial situation is likely to be for the longue durée. It certainly was in connection with Namibia,\(^\text{27}\) lasting as it did through the time of the unlawful continuation of South Africa’s presence there; the legal policy has continued as well in connection with Northern Cyprus since that area’s purported separation from the Republic of Cyprus in the 1980s,\(^\text{28}\) and the policy against Russia’s presence since the early 1990s in the Transdniestria region of Moldova has proved durable too.\(^\text{29}\)

The claims process may be relevant to the legal policy in the mainly incidental and negative way indicated: the process may be managed in order to avoid concessions, express or implied, that otherwise might result from a legal proceeding.

The claims process also may play a more central and affirmative role: a state resisting the unlawful territorial situation may seek through legal proceedings to affirm its rights. In this way, it is possible that courts and tribunals will contribute to solidarity against the unlawful act. The three dispute settlement mechanisms noted in the introduction now may be considered in turn.

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III. THE EUROPEAN COURT OF HUMAN RIGHTS

Article 33 of the European Convention makes provision for states party to institute proceedings against one another in the following terms:

Inter-State cases

Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.  

This provision means that the ECHR, though established principally with a view to adjudicating cases brought by individuals against states, also has jurisdiction over certain cases brought by states against other states. The states, of course, must be parties to the Convention. Moreover, to institute proceedings, a state party must allege a “breach of the provisions of the Convention [or] the Protocols” by another state party. This is not an omnibus jurisdictional clause or an invitation to request advisory opinions; it is not open to a state to institute proceedings simply because it has an unresolved but abstract dispute as to the interpretation or application of one of the substantive provisions. The state must, instead, identify an alleged breach of one of those provisions. Those are provisions concerning individual, not state party, rights, and so an inter-state application, to that extent, is pendant upon an allegation that the respondent State has breached the rights of individuals.

A state party making such an application thus must identify breaches by the respondent within the constraints of the substantive provisions of the Convention. Within those constraints, the recent practice of the ECHR suggests that the possibilities for reparation are nevertheless significant.

A persistent territorial problem concerning use of force by one state against another has been the putative separation of Northern Cyprus from the Republic of Cyprus. Turkey’s armed forces entered Cyprus in July 1974, leading to the division of the country. The division, to date, has remained unmended. The Republic of Cyprus instituted proceedings against Turkey under the European Convention in 1999. The ECHR delivered its principal judgment in 2001, determining that Turkey, whose effective presence continues the de facto separation of the northern zone from the Republic, has jurisdiction in Northern Cyprus for purposes of the Convention. Turkey’s conduct there thus implicated its responsibility under the Convention. This was a significant holding, for it

31 See id.
reconciled what might otherwise have been competing considerations of the general interest in public order and the specific needs of injured parties.

No state but Turkey has recognized the putative state which exists in the northern zone—the "Turkish Republic of Northern Cyprus"; a general obligation not to recognize the putative state applies. 33 If another logic had prevailed in the principal judgment in Cyprus v. Turkey, the incidents of the unlawful presence of Turkey in Cyprus would have had no legal consequence whatsoever: if the presence of Turkish forces had simply been denied and the entity they protected was to be treated as nonexistent, then it would have made no sense to speak of Turkish responsibility for things that that entity did. Such logic of absolute nullity was not adopted. 34 Instead, the Court reasoned—sensibly—that public acts in Northern Cyprus are attributed to Turkey for purposes of international responsibility. The denial of such attribution would have meant that the territory existed in a legal void, a situation that likely would have compounded the difficulties already caused by the unlawful separation. The significance of attribution to Turkey, for purposes of the claims process, was clear: the Republic of Cyprus could proceed against Turkey in connection with the situation in Northern Cyprus 35—at least insofar as it articulated claims under the Convention for human rights breaches which occurred there.

The requirement that an inter-state claim under the Convention be connected to human rights breaches—that is, based upon allegations that the rules of the Convention have been breached—was a central consideration when the Court (after some lapse of time) came to address compensation. The Court adopted a just satisfaction judgment in Cyprus v. Turkey on May 12, 2014. 36 This was the first time that the Court had awarded just satisfaction in an inter-state claim. It had not been a foregone conclusion that a just satisfaction award would be available in such a claim. Article 41 of the Convention makes clear that just satisfaction is available in respect of at least some claims under the Convention:

Just satisfaction


34 As indeed in the Genocide case the ICJ did not adopt it either in respect of the Federal Republic of Yugoslavia's declaration accepting the Genocide Convention, notwithstanding the general position that the FRY had not continued the legal personality of the Socialist Federal Republic of Yugoslavia. The claim to statehood was not accepted on the claimant's preferred terms and yet not all international law acts of the claimant were to be treated as nonexistent. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v. Serbia), 2008 I.C.J. 413, ¶ 115 (Nov. 18).


If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.\textsuperscript{37}

This language, however, does not state explicitly that just satisfaction is available equally to individual claimants and state claimants. The reference to "the injured party" raises a question whether the intention was to limit just satisfaction to the former. References to an injured party in a treaty presumably mean a party injured by a breach of one or more of the rules set out in the treaty. The rules set out in the European Convention are expressed as protections of the rights of individuals. Those rules, if breached, result in an injured individual. It could be argued, as Turkey forcefully did, that the result is not an injured state.\textsuperscript{38} The Court, before 2014, had never said that it was.

The ECHR in the just satisfaction judgment, while finally making clear that Article 41 applies in inter-state cases as well, also made clear that connection to the injured party remains indispensable. The Court referred to Austria v. Italy,\textsuperscript{39} where the Commission had said that a state bringing a case under the inter-state mechanism was not "exercising a right of action for the purpose of enforcing its own rights, but rather ... bringing before the Commission an alleged violation of the public order of Europe."\textsuperscript{40} In both Austria v. Italy and Cyprus v. Turkey, the applicant state credibly alleged that individuals had been the victims of particular violations of Convention rights. The Court in Cyprus v. Turkey admonished that "it must be always kept in mind that, according to the very nature of the Convention, it is the individual, and not the state, who is directly or indirectly harmed and primarily 'injured' by a violation of one or several Convention rights."\textsuperscript{41} Referring to the ICJ’s Diallo compensation phase judgment, the Court also made clear that any just satisfaction given in an inter-state case must be transferred to the individuals whose rights were violated.\textsuperscript{42} This point concerning the procedures to be followed post-judgment further underscores the connection to individual rights.

\textsuperscript{37} European Convention, supra note 30, art. 41.
\textsuperscript{38} For a summary of Turkish argument on that point, see Cyprus v. Turkey, supra note 36, at 12–13.
\textsuperscript{41} Cyprus v. Turkey, supra note 36, at 15 (citing Diallo (Guinea v. Democratic Republic of the Congo), 2012 I.C.J. 324, 344 (June 19), wherein the ICJ said that "the sum awarded to Guinea in the exercise of diplomatic protection of Mr. Diallo is intended to provide reparation for the latter’s injury").
\textsuperscript{42} See Cyprus v. Turkey, supra note 36, at 19.
As noted above, Ukraine on March 13 and June 13 of 2014, lodged inter-state applications with the ECHR against the Russian Federation.\textsuperscript{43} It is clear that the conduct of the Russian Federation towards Ukraine constitutes breaches under general international law. However, to make a successful claim under Article 33, the claimant state must demonstrate that the respondent has breached provisions of the European Convention. It remains to be established what breaches of the Convention Russia’s conduct in Crimea would constitute. In Northern Cyprus, there was the mass displacement of the Greek Cypriot population and the seizure and putative transfer of large amounts of property. There were also forced disappearances of persons on a large scale. Turkey’s conduct entailed a series of acts which gave rise to a large number of individual claims under the Convention. The Court has not yet established whether Russia has displaced people from Crimea, perpetrated forced disappearances, or otherwise violated Convention rights of individuals in Crimea. The initial signs nevertheless were troubling.\textsuperscript{44} By August 2014, credible reports indicated that over 16,000 persons (mostly of Crimean Tatar ethnic background) had been displaced from Crimea.\textsuperscript{45} The Court evidently came to the view that allegations of breach were plausible; it quickly adopted interim measures under Rule 39 with reference to Convention Articles 2 (right to life) and 3 (prohibition of torture). The measures called upon both parties “to refrain from taking any measures, in particular military actions, which might entail breaches of the Convention rights of the civilian population, including putting their life and health at risk, and to comply with their engagements under the Convention.”\textsuperscript{46} Determinations on which interim measures are based are not final.\textsuperscript{47} On the weight of accumulating evidence, however, the breaches seem difficult to deny.


\textsuperscript{44} See, for example, U.N. SCOR, 69th Year, 7144th mtg. at 11, U.N. Doc. S/PV.7144 (Mar. 19, 2014) (referencing remarks of Mr. Errázuriz (Chile)); Report on Recent Developments in Ukraine, supra note 18.


The ECHR, like any dispute settlement mechanism, functions within the constraints of its jurisdictional instrument. Its judges nevertheless understand that its judgments affect wider issues. One group of concurring judges in the just satisfaction phase of *Cyprus v. Turkey* said that the judgment “heralds a new era in the enforcement of human rights by the Court and marks an important step in ensuring respect for the rule of law in Europe.” Judge Pinto de Albuquerque and Judge Vučinić said that the just satisfaction judgment was “the most important contribution to peace in Europe in the history of the European Court of Human Rights.” They identified the Court as a mechanism for responding to war in Europe:

The message to member States of the Council of Europe is clear: those member States that wage war, invade or support foreign armed intervention in other member States must pay for their unlawful actions and the consequences of their actions, and the victims, their families and the States of their nationality have a vested and enforceable right to be duly and fully compensated by the responsible warring State. War and its tragic consequences are no longer tolerable in Europe and those member States that do not comply with this principle must be made judicially accountable for their actions, without prejudice to additional political consequences.

This concurrence may be read with a view to wider circumstances. Whereas the “responsible warring State” in that case was Turkey, the inference to be drawn is that the just satisfaction judgment in *Cyprus v. Turkey* contains findings applicable to Russia’s conduct in Ukraine. Russia’s annexation of Crimea and further incursions into eastern Ukraine constitute a “violation of the public order of Europe,” if any conduct could.

Writers have suggested the applicability of the European Convention to the situation in Ukraine. Philippe Sands, interviewed in *The Guardian*, said the following about the *Cyprus v. Turkey* judgment of May 12, 2014:

> It’s a strong signal that the passage of time will not diminish the consequences or costs of illegal occupation. It has obvious relevance to the situation in Abkhazia and South Ossetia, which are occupied parts of Georgia, and Crimea, which is occupied Ukraine. I would imagine it opens the door to claims arising from that kind of occupation. It signals that the court will not back off on issues like this over time.

48 *Cyprus v. Turkey*, supra note 36, at 23 (Zupančič, Gyulumyan, Björgvinsson, Nicolaou, Sajó, Trajkovska, Power-Forde, Vučinić, Pinto de Albuquerque, J.J., concurring).

49 *Cyprus v. Turkey*, supra note 36, at 24 (Pinto de Albuquerque, Vučinić, J.J., concurring).

50 Id.

Yet to make clear that the law of state responsibility operates irrespective of whether a claim is brought by an individual or under the inter-state procedure, is not to say that all of the primary rules of public international law are now incorporated into the European human rights system. It is not a system for the general management of inter-state relations. It is not a system for bringing claims for breach of the prohibition against threat or use of force or for the forcible seizure of territory as such. To use the system to challenge an act of aggression, it remains necessary for the state (or individual) to demonstrate the connection to one or more of the applicable protected rights. The judgment may well “open . . . the door to claims arising from that kind of occupation,” but it is necessary to be clear precisely what kind of occupation that is and, more specifically, what kind of breaches occupation has entailed.

Still, that a state may obtain a substantial monetary award for a violation of one or more of its rights under the Convention and the associated Protocols is a significant step; the Court in *Cyprus v. Turkey* awarded €90 million.\(^2\) It may well broaden the remedies that Ukraine might seek against Russia.

A considerable time elapsed between the merits and just compensation judgments in *Cyprus v. Turkey*, and a very considerable time indeed since Turkey had committed the underlying breach—over a decade and forty years, respectively. To be effective against a stubborn violator, international law and its institutions must hold out against the tendency to accommodate facts over time. Earlier, in *Haşçu v. Moldova and Russian Federation*, the Court made clear that a state does not relinquish its jurisdiction over an unlawfully seized territory by relaxing its protests.\(^5\) In *Cyprus v. Turkey*, by making clear that the passage of time does not weaken the potential remedies, the Court provides a further bulwark against the “normative force of the factual”—where the “factual” is an act in fundamental disaccord with the values of the public order to which the human rights system belongs.\(^54\)

### IV. THE INTERNATIONAL COURT OF JUSTICE

Noteworthy International Court of Justice (ICJ) cases have concerned territorial questions, and such questions were also an important part of the work of its predecessor, the Permanent Court (PCIJ).\(^55\) Proceedings to address the

\(^1\) Chicago Journal of International Law

\(^2\) *Cyprus v. Turkey*, supra note 36, at 19.


lawfulness of the use of force also have been instituted before the ICJ,\textsuperscript{56} and a handful of cases have concerned the relation between use of force and territorial status.\textsuperscript{57} In view of the richness of the practice, it might be assumed that the ICJ is the logical starting point for a case concerning unlawful acquisition of territory.

As with any dispute settlement mechanism, however, the availability of the Court is not determined by the general characteristics of the matter which a party would like to bring before it. ICJ jurisdiction depends instead upon whether a provision exists under which it may base its jurisdiction as between the parties in respect of the specific subject matter in dispute. This is the question on which the ICJ's jurisdiction depends in all cases, and so it is the question which must be considered if Ukraine were to seek to institute proceedings concerning Russia's annexation of Crimea.

A. Instituting Proceedings Directly Against the Occupying Power

Because neither Russia nor Ukraine has accepted the compulsory jurisdiction of the ICJ under Article 36, paragraph 2 of its Statute,\textsuperscript{58} instituting proceedings against Russia before the ICJ would be unlikely to produce a result on the merits—unless jurisdiction were established under a treaty in force between the parties containing a compromissory clause applicable in the circumstances.\textsuperscript{59}
The Convention on the Elimination of All Forms of Racial Discrimination (CERD) being a treaty in force between Georgia and Russia,\(^6\) it was the compromissory clause of CERD that Georgia sought to apply in order to establish the jurisdiction of the ICJ following Russia's invasion in August 2008. The ICJ found that Article 22 of CERD did not establish its jurisdiction to entertain Georgia's application because Georgia had not satisfied the requirement of negotiation stipulated under the Convention.\(^6\) Five of the fifteen permanent judges disagreed and apparently would have adjudicated the dispute.\(^6\) \textit{Georgia v. Russian Federation} did not involve the forcible annexation by the respondent state of territory of the applicant, but it did involve the presence of the former in the latter's territory.\(^6\) This was Russia's presence, following the invasion, in the South Ossetia and Abkhazia areas within the internationally recognized borders of Georgia. Georgia requested determinations under a number of the substantive provisions of CERD.\(^6\)

In the Application instituting proceedings, Georgia also requested relief which, if granted, would have entailed the conclusion that the separatist regions continued to constitute territory of Georgia. In particular, Georgia requested that the Russian Federation:

- "immediately cease all military activities on the territory of the Republic of Georgia, including South Ossetia and Abkhazia..."
- "immediately withdraw all Russian military personnel from the same;"
- "not recognize in any manner whatsoever the \textit{de facto} South Ossetian and Abkhaz separatist authorities..." and
- "allow Georgia to fulfil its obligations under CERD by withdrawing its forces from South Ossetia and Abkhazia and allowing Georgia to restore its authority and jurisdiction over those regions[.]"\(^6\)

\(^6\) It is also in force between Ukraine and Russia.


\(^6\) President Owada, Judges Simma, Abraham, Cançado Trindade, and Donoghue would have adjudicated the dispute. Judge \textit{ad hoc} Gaja dissented as well. \textit{See id.} at 141, ¶ 187(2).

\(^6\) Russia's subsequent conduct has suggested however that it intends to annex the two areas of Georgia that it occupied in 2008. \textit{See Statement of the Ministry of Foreign Affairs of Georgia regarding the ratification by the Russian State Duma of the so-called "treaty" between the Russian Federation and its occupation regime in the Abkhazia region of Georgia, A/69/746-S/2015/63, Annex, Jan. 29, 2015.}

\(^6\) \textit{Application of International Convention on the Elimination of All Forms of Racial Discrimination (Geor. v. Russ.), Application Instituting Proceedings, ¶ 82 (Aug. 12, 2008) (citing Arts. 2(1)(a), 2(1)(b), 2(1)(d), 3, 4, 5 and 6 of CERD).}

\(^6\) \textit{Id.} ¶ 83.
As CERD was the basis for jurisdiction Georgia pleaded, Georgia had to connect each of its requests for relief to a provision of the Convention. When it came time to present its Memorial (that is, its written pleading in accordance with Article 45, paragraph 1, of the Rules of Court), Georgia reiterated its requests for relief in respect of the specific provisions of CERD (less a reference to CERD Article 6) but omitted the part of the request for relief quoted immediately above.\(^6\)

Georgia’s claim, as expressed in the pleadings as finally submitted, then, did not ask in terms to affirm the pre-invasion boundaries. That, of course, is what Georgia wanted: an international decision to reinforce its rights against the invader. True, there was an oblique reference to the pre-invasion boundaries: this was the fourth submission, asking that the Court declare “that the Russian Federation is under an obligation to re-establish the situation that existed before its violations” of CERD.\(^6\) The final submissions did not get any closer to the matter than this. The negotiations that had taken place before proceedings began had addressed the territorial question head-on, but that was their fatal flaw: the jurisdictional prerequisite was negotiation in respect of the subject matter of the jurisdictional instrument. Negotiation concerning territorial questions, however pendant or related they might be to CERD, would not suffice.\(^6\)

If the negotiation requirement had been satisfied, and if the ICJ had then adopted a merits judgment granting Georgia’s original requests, then the merits judgment would have entailed an affirmation of the territorial settlement as it existed before the putative separation of South Ossetia and Abkhazia. It would have affirmed the integrity of Georgia within its recognized boundaries. The omission of the territorial questions from the Memorial was presumably deliberate. Georgia likely assumed that the ICJ would not have exercised jurisdiction under CERD in respect of territorial questions if no basis existed to exercise jurisdiction in respect of any core CERD question, and on that assumption omitted the territorial questions. It was certainly sound to reason that jurisdiction was needed over a core CERD question; but it does not so clearly follow that, as a pleading strategy, the territorial questions should have been omitted. What difference would it have made to retain the territorial questions, if the consequential decision was whether jurisdiction existed to address the core CERD questions? The pleading strategy, perhaps, was to avoid


\(^6\) Id. at 408.

drawing too much attention to the territorial questions, in the hopes that this
would increase the chances of the ICJ finding jurisdiction to address the others.
If jurisdiction could be established over the core CERD questions, then it may
have been hoped that the territorial questions could be adjudicated by
connection. A connection between the territorial questions and a core question
under the jurisdictional instrument—the pendency of the former upon the
latter—is what a state proceeding in similar circumstances would likely argue.

The invasion of Georgia in August 2008 was not the start of difficulties in
the region, nor was it the first sign of serious dispute between Georgia and
Russia. Russia’s annexation of Crimea, by contrast, occurred with relatively little
indication beforehand that hostilities might erupt between the parties; this was a
situation which escalated rapidly in the first months of 2014, not an incident in a
long series of difficulties. Where a requirement exists to negotiate—such as
under CERD Article 22—the inquiry will concern the diplomatic record in the
particular case in connection with the dispute itself, not its general antecedents.
Negotiations well may be exhausted over a short timeline; it would be artificial
to apply a requirement of negotiation without considering the circumstances in
which the dispute arose. The rapid escalation of a crisis nevertheless would not
seem to support dispensing with negotiation altogether. Where negotiation is a
jurisdictional prerequisite, it would seem to remain so even in the face of a
sudden eruption of hostilities. Georgia v. Russian Federation illustrates that invoking
a jurisdictional provision in a relatively unorthodox way—even where the court
involved has more experience than any other with disputes concerning use of
force and territorial claims—does not necessarily bear fruit for the state that
invokes it. The probability of achieving a useful result under a given
compromissory clause will depend on the substantive obligations contained in
the treaty to which it belongs and the facts of the case. A crucial matter under an
instrument like CERD will be the diplomatic record of negotiation—not
negotiation in respect of ancillary matters but in respect of the core subject
matter of the instrument upon which the applicant would have the ICJ base its
jurisdiction.

B. Advisory Jurisdiction

Under other procedures, the field is relatively open to ask questions about
territory as direct questions, not questions pendant upon others. One way in
which the ICJ might be asked to address the annexation of Crimea is under its
jurisdiction to adopt advisory opinions. The advisory opinions are in

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69 This jurisdiction is provided for in I.C.J. Statute, art. 65. See generally Shabtai Rosenne & Yael
themselves not binding in the sense of creating res judicata as between parties to a dispute.\textsuperscript{70} The Russian Federation almost inevitably would oppose the introduction of a question to the ICJ for purposes of an advisory opinion; and it is, to say the least, hard to imagine the Russian Federation agreeing to accept an advisory opinion on Crimea as having binding effect.\textsuperscript{71} Advisory opinions, though non-binding, nevertheless are authoritative statements in respect of the questions they address.\textsuperscript{72} An advisory opinion on Crimea would "carry great legal weight and moral authority" and might have the "peace-keeping virtues" which the ICJ's advisory jurisdiction has been said to embody.\textsuperscript{73}

The authority of the General Assembly to request such an opinion is clear enough. The member states would appear at least disposed to consider a draft request which would bring further scrutiny upon the annexation of Crimea. In GA resolution 68/262 of March 27, 2014, the General Assembly indicated inter alia that the Crimean referendum had "no validity" and that the annexation of Crimea is not to be recognized.\textsuperscript{74} GA resolution 68/262 was adopted with 100 votes in favour to 11 against and 58 abstentions.\textsuperscript{75} A number of the abstaining states expressly disapproved of the annexation. Argentina, for example, had voted in favor of a draft resolution in the Security Council which would have

\textsuperscript{70} See Dharmar Pratap, The Advisory Jurisdiction of the International Court 227–30 (1972); Kenneth J. Keith, The Extent of the Advisory Jurisdiction of the International Court of Justice 195 (1971).

\textsuperscript{71} Prior acceptance by a party or parties to implement an advisory opinion constitutes the means by which advisory opinions can be tantamount to binding. For example, applying art. VIII, section 30 of the Convention on the Privileges and Immunities of the United Nations ("General Convention"), see Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights (Cumaraswamy case), Advisory Opinion, 1999 I.C.J. 62 (Apr. 29) [hereinafter Cumaraswamy case]; and the British-French agreement to refer the subject matter of the Nationality Decrees advisory opinion to arbitration or adjudication: Nationality Decrees in Tunis and Morocco, Advisory Opinion, 1923 P.C.I.J. (ser. B) no. 4, at 8–9 (Feb. 7). In such cases, the "distinction should . . . be drawn between the advisory nature of the Court's task and the particular effects that parties to an existing dispute may wish to attribute, in their mutual relations, to an advisory opinion . . . which, 'as such, . . . has no binding force.'" Cumaraswamy case, supra, at 77, ¶ 25 (quoting Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, 1950, I.C.J., 65, 71 (Mar. 30)).

\textsuperscript{72} See Pratap, supra note 70 at 231–32; Keith, supra note 70 at 196–222. As to the advisory opinions of the PCIJ, see Manley O. Hudson, The Permanent Court of International Justice, 1920–1942 511–13 (1943).


declared the referendum and (then-prospective) annexation invalid, and the president of Argentina described the referendum in Crimea as “worthless.” Nevertheless, a majority assembled in favor of one proposition cannot be assumed to rally behind a further proposition, even when the latter is broadly aligned with the former. The politics may shift, and each party’s decision will depend as well upon the precise terms of what is proposed.

A question to the Court which the General Assembly adopts in the exercise of its power under Charter Article 96(1) may be expressed in a broad range of terms. It is beyond the scope of the present Article to consider the possibilities in depth. A few brief observations in respect of advisory jurisdiction and the questions presented in requests suffice.

Advisory jurisdiction has been used from the time of the PCIJ to address controversies concerning boundaries and territorial status. Thus, to give one of the early examples, the Council of the League asked the PCIJ whether “the question of the delimitation of the frontier between Poland and Czechoslovakia [is] still open; or should it be considered as already settled by a definitive decision.” With respect to Ukraine in 2014, the frontier with the Russian Federation was already settled by a “definitive decision”—indeed, the fixing of the frontier is reflected in a number of treaties. No lawful process has superseded that decision. So a request to the ICJ which suggests that the legal status of Crimea is an open question would either be misleading or without object.

Nevertheless, on a number of occasions the ICJ has exercised its discretion in respect of advisory requests to “broaden, interpret and even reformulate the

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questions put to it." Even a well-formed question, appropriate to the circumstances, might undergo some evolution in the course of advisory proceedings.

Relevant to the circumstances of Ukraine after Crimea's annexation are modern advisory requests concerning unlawful territorial situations. The questions contained in the requests in the Namibia and Wall advisory proceedings may be recalled in this connection. In Namibia, the Security Council, in SC resolution 284 (1970) of July 29, 1970, formulated the question as follows:

What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?

Security Council resolution 276 (1970) of January 30, 1970, had "declare[d] that the continued presence of the South African authorities in Namibia is illegal and that consequently all acts taken by the Government of South Africa on behalf of or concerning Namibia after the termination of the Mandate are illegal and invalid."

It was the General Assembly that requested the advisory opinion in respect of the West Bank wall. The terms of the question in the General Assembly’s request, adopted in GA resolution ES-10/14 of December 8, 2003, were as follows:

What are the legal consequences arising from the construction of the wall being built by Israel, the occupying Power, in the Occupied Palestinian Territory, including in and around East Jerusalem, as described in the report of the Secretary-General, considering the rules and principles of international law, including the Fourth Geneva Convention of 1949, and relevant Security Council and General Assembly resolutions?

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81 Though note the doubt expressed, for example, by Judge Kooijmans as to the existence of a "situation." See Wall Advisory Opinion, supra note 57, at 232, ¶¶ 43–44.


notamment la quatrième convention de Genève de 1949 et les résolutions consacrées à la question par le Conseil de sécurité et l'Assemblée générale.\footnote{Wall Advisory Opinion, supra note 57, at 141.}

As noted, the General Assembly already has indicated that the purported incorporation of Crimea into the Russian Federation is invalid. The illegal character of the act thus is already established in a general way. The question would ask the ICJ to indicate particular legal consequences. It would be natural enough to formulate a question along lines similar to those adopted in respect of Namibia and the West Bank wall. Again, the formulation of the question would be a legal matter subject to the political constraints of a General Assembly majority.

What answer might the sponsors of an advisory request to the ICJ hope to obtain? The Namibia Advisory Opinion, as is relevant for present purposes, first reiterated that the continued presence of South Africa in Namibia was illegal and, following from that, “South Africa [was] under obligation to withdraw its administration from Namibia immediately and thus put an end to its occupation of the Territory.”\footnote{Namibia Advisory Opinion, supra note 27, at 58 (dispositive ¶ 1).} A skeptic might say that this adds little to what was already clear under general international law: that a state present in the territory of another state (or, in the case of Namibia, in a territory the people of which could establish their statehood as of right)\footnote{See Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), U.N. Doc. A/4684 (Dec. 14, 1960).} and lacking permission to be there, must withdraw.\footnote{Note the “in consequence” clause joining the first two dispositive paragraphs (the sovereignty determination and the obligation to withdraw) in the original Temple judgment. See Temple of Preah Vihear (Cambodia v. Thailand), 1962 I.C.J. 6, 36–37 (June 15).} It may be submitted nevertheless that there is value in an express determination by the principal judicial organ of the United Nations. And the ICJ said more than that; the Advisory Opinion also concluded as follows:

[That States Members of the United Nations are under obligation to recognize the illegality of South Africa’s presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration.\footnote{Namibia Advisory Opinion, supra note 27, at 58 (dispositive ¶ 2).}

The first element of this holding—that UN Member States are obliged “to recognize the illegality” of the situation in Namibia—as applied mutatis mutandis to the situation Ukraine would make clear that the minority of states that have remained silent on whether Russia’s presence in Ukraine is illegal would now be under a direction to do so. Acts committed by Russia “on behalf of or
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concerning” Ukrainian territory—for example, acts of the local administration now installed in Crimea or the self-styled republics of Donetsk and Luhansk—would be treated as invalid. Any state not recognizing their invalidity would not be in accordance with the opinion. Courts are organs of the state for purposes of the international conduct of the state; and such an advisory opinion, even though non-binding, would give a persuasive basis for denying the validity of such acts before courts (among other public organs).

Consider also the requirement “to refrain from any acts and in particular any dealings with the Government . . . implying recognition of the legality of, or lending support or assistance to, such presence and administration.” This is the two-branch obligation now expressed in Article 41, paragraph 2, of the ILC Articles on State Responsibility. The first is the obligation of non-recognition; the second is the obligation not to “lend [ ] support or assistance to” the unlawful presence. This second branch has a “separate existence” from non-recognition; it entails a wider scope of mandatory abstention. Transposed to the situation in Ukraine, findings of this character would strengthen the general response against illegality.

A brief word may be added in respect of the findings in the Wall opinion. Because of the absence of a clear act of territorial annexation in that case, its relevance to the Ukraine situation remains more uncertain. This was the source of Judge Kooijman’s puzzlement over the opinion, and perhaps of the limited effects of the opinion on state practice. Nevertheless, the Court’s affirmation there of an obligation “to make reparation for all damage caused” would be relevant to the situation in Ukraine.

Finally, the ICJ’s consideration of obligations correlating to the right to self-determination in the Wall case could prove relevant. To paraphrase the ICJ, acts that “severely impede [ ] the exercise . . . of its right to self-determination” constitute a breach against the people of Ukraine. There is no doubt that the

89 See, for example, Loewen Group v. United States of America, Case No. ARB(AF)/98/3 (Mason, President; Mikva and Mustill, Arbitrators), Award, ¶ 71 (June 26, 2003). For an overview and analysis of arbitral decisions concerning international law breaches constituted by conduct of the courts of States, see generally Michael D. Goldhaber, The Rise of Arbitral Power over Domestic Courts, 1(2) STAN. J. COMPLX LITIG. 373 (2013).


92 As to the limited effects, see Crawford, supra note 55, at 156–57.

93 Wall Advisory Opinion, supra note 57, at 202 (dispositive ¶ C).

94 Id. at 184, ¶ 122.
people of Ukraine exist as a matter of international law. Ukraine’s recognized borders delimit the territorial unit which they govern as of right, and it is not in accordance with the obligations of Russia in respect of that right to separate portions of the territory by force. The law of self-determination is a further area in which an advisory opinion might lend support to the general response to aggression against Ukraine. The invocation of that law by the aggressor further suggests that a clear judicial statement on the matter would be useful.  

C. Lateral Attack: A Return to the Black Sea Delimitation

Instituting contentious proceedings against the Russian Federation and requesting an advisory opinion on the annexation of Crimea, notwithstanding their differences, are similar in that both would approach the substance of the problem directly. A lateral approach might also be considered.

In *Maritime Delimitation in the Black Sea*, the ICJ adjudicated the maritime boundary between Ukraine and Romania. In its judgment, the ICJ indicated a maritime boundary between Ukraine and Romania running south to a point near (but short of) where the tripoint would be, if a future maritime boundary were to be agreed or adjudicated between Bulgaria and Romania. In so doing, the ICJ identified a substantial maritime area as subject to Ukraine’s jurisdiction. *Maritime Delimitation in the Black Sea* defines Ukraine’s established rights in the part of the Black Sea between Ukraine and Romania. The case may be relevant to resisting the unlawful claims of the Russian Federation against Ukraine in the following lateral way.

First, implicit in its Judgment is the ICJ’s recognition of Ukraine as the only state having maritime entitlements in the area between the west-facing coast of Ukraine’s Crimean territory and the maritime boundary indicated in the Judgment. This proposition is indispensable and essential to the ICJ’s reasoning, for, if any state besides Ukraine or Romania held maritime entitlements in that area, the ICJ would have lacked jurisdiction to decide the case. The Judgment thus necessarily entails non-recognition by the principal judicial organ of the United Nations of other claims in that area.

The only third-party legal rights or interests involved in the overall part of the Black Sea concerned in the case were protected by the Court in the usual way: the Court carried out a delimitation only in respect of waters over which it was clear that only one or the other party, and no third state, had a potential entitlement. Thus, the “southern limit of the relevant area is a line drawn perpendicular from the mainland coast from the point where the

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95 Regarding Russia’s self-determination arguments, see GRANT, supra note 8, at 23–35.
96 Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 I.C.J. 1, 61 (Feb. 3).
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Bulgarian/Romania land border reaches the Black Sea until a point between the Romanian and Ukrainian coasts where the interests of third States potentially come into play. With the relevant area thus defined, the ICJ was assured that the delimitation between the parties "will stay north of any area where third party interests could become involved." This is another way of saying that the delimitation proceedings involved only two states—namely, the two states present in those proceedings, Romania and Ukraine. The line which the ICJ then identified as the maritime boundary between Romania and Ukraine goes no farther than "the point beyond which the interests of third states may be affected." On its Sketch-map No. 9, the ICJ illustrated the endpoint of the boundary line with its customary notation—an arrow pointing toward the area of sea which might be affected by the interests of a third State. The only third states which were relevant in this way to the delimitation were Bulgaria and Turkey, and no others were mentioned.

It is open to the original parties—Ukraine and Romania—and to the third states—Bulgaria and Turkey—to conclude a *compromis* on terms forming the basis of ICJ jurisdiction to finalize the delimitation between them. The parties to the *compromis* then would bring the case to the ICJ in accordance with Article 40, paragraph 1, of its Statute. The proceedings, at a minimum, would serve (a) to determine the maritime boundary between Romania and Bulgaria and (b) to complete the maritime boundary between Romania and Ukraine by extending the southernmost segment of the boundary (which the ICJ determined in 2009) and joining this at a tripoint with the new Romania-Bulgaria boundary, or a four-way point to include Turkey as well.

The resultant delimitation would, incidentally, affirm the ICJ's judgment as to Ukraine's maritime jurisdiction in the Black Sea, including Ukraine's maritime jurisdiction as generated from Ukraine's Crimean coast. Thus, two judgments would exist that jointly and separately would preclude any doubt about which state has maritime jurisdiction in that part of the Black Sea.

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97 *Id.* at 99, ¶ 108.
98 *Id.* at 100, ¶ 112.
99 *Id.* at 129; ¶ 208; 131; ¶ 218.
100 See *id.* at 133. As to that notation, and tripoints generally, see Alain Pellet, *Land and Maritime Tripoints in International Jurisprudence*, in COEXISTENCE, COOPERATION AND SOLIDARITY: LIBER AMERICORUM RÜDIGER WOLFRUM 245, 259–60 (Holger P. Hestermeyer et al. eds., 2012).
101 In view of the areas concerned, it may be that a tripartite agreement between Ukraine, Romania and Bulgaria would suffice; or it may be necessary to agree to adjudicate a four-way meeting point including Turkey as well.

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The main line of objection to the use of the ICJ for this purpose would refer to *East Timor.* This was the case in which Portugal challenged Australia for having entered into treaty relations with Indonesia as if that state’s presence in East Timor were lawful. The problem was the *Monetary Gold* problem: the ICJ cannot exercise jurisdiction in a case in which the “legal interests [of an absent state] would not only be affected by a decision, but would form the very subject-matter of the decision.” In *East Timor,* Indonesia was the absent state whose legal interest would form the very subject matter of the decision. A strong argument can be made, however, that *East Timor* would not apply to new Black Sea proceedings. The situation among the Black Sea States differs in fundamental ways from that between Portugal, Australia, and Indonesia.

First, a new Black Sea case would concern rights in a maritime area which, as reflected in *Maritime Delimitation in the Black Sea,* the ICJ already understands not to be subject to the maritime jurisdiction or potential maritime jurisdiction of any state other than the states Parties to the *compromise* upon which jurisdiction would be founded. True, boundary lines survive a succession of states; but where and on what basis would the Court establish that a succession of states has taken place since 2009 in the Black Sea?

And second, the case would involve rights of only states, with no question arising as to the legal situation of a Chapter XI territory which possibly—but not clearly—was still the responsibility of the administering power which had all but abandoned it. A Chapter XI territory, by definition, is a territory of unsettled status, its boundaries themselves remaining in question to the extent that these may be affected by the final status eventually chosen by the people. The fundamental problem in *East Timor* was the lack of a clear statement indicating that Portugal was the only state responsible for the maritime area in question; in the Black Sea, a statement that Ukraine is the only state responsible for the maritime area in question already exists. That statement is of the Court’s own authorship.

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106 A Non-Self-Governing Territory is one for which, under art. 73 of the UN Charter, a “Member [ ] of the United Nations . . . [has] or assume[s] responsibilities for the administration” of which and “whose people [ ] [has] not yet attained a full measure of self-government.”
107 The range of status options was indicated in G.A. Res. 1541 (XV) (Dec. 15, 1960); see in particular Annex, Principle VI.
108 See, for example, Roger O’Keefe (ed.), *United Kingdom Materials in International Law,* 80 BRIT. Y.B. INT’L. L. at 718–19 (2009) (statements of the UK government in respect of “the undetermined status” of Western Sahara).
Nor would it be a case like Georgia v. Russian Federation, where the respondent raised serious objections under the jurisdictional instrument itself. A new delimitation case would not so much establish new rights for Ukraine as it would reaffirm existing rights. This would not be a redundant exercise. As against the assertions of the occupying power, it is important to be clear that existing rights are not disturbed by use of force. Not all commentary on the matter has been clear. In this connection, consider a sketch-map attached to a widely noted article of May 18, 2014, in the New York Times. The sketch-map showed the delimited area of the Black Sea as “[s]ea claimed by Ukraine.” To refer to this area as “claimed” by one state is to say that it might, in the better view, belong to another state; it is to say that it might not be Ukraine’s. This is a serious mistake. The area shown as “claimed” by Ukraine is an area allocated to Ukraine definitively under a binding judgment of the highest judicial organ of the United Nations system. It is a maritime area in which Ukraine’s rights are clear and a matter of judicial notice. A reminder of the basic legal rules is in order when wide publicity is given to representations which ignore them. The relevant rule in this situation was set down by the ICJ only five years before in Maritime Delimitation in the Black Sea. No lawful process has changed it.

V. INTER-STATE ARBITRATION

A large number of bilateral investment treaties (BITs) contain provisions for the arbitration of disputes between the parties. The overwhelming majority of arbitral proceedings under BITs are instituted by investors against states; inter-state arbitration has remained a relatively marginal part of the practice under these instruments. The rare cases—for example, Ecuador v. United States, Peru v. Chile, Italy v. Cuba—have been little studied.

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110 Recent empirical research suggests that the legislature (as distinct from the court) “is often intentionally redundant to be certain that it has made its point,” a practice relevant not just to judicial application of the legislated rule but also—and particularly—to “audiences other than courts” whom the legislature may need to address. Abbe R. Gluck & Lisa Schultz Bressman, Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 STAN. L. REV. 901, 935 (2013). The repetition of a legal point for emphasis in order to reach an audience that is functionally important but not formally engaged in the proceedings, would seem a device open to courts as well.


Resort to the inter-state arbitration clause of a BIT is therefore an unusual jurisdictional strategy. To suggest that one party institute proceedings against another in respect of a question of territorial status may seem to lack promise. At a minimum, an inter-state BIT case would seem to require a connection to a question of investment. To address a territorial question, if such a question could be addressed at all under such a jurisdictional instrument, would be to address it concurrently with an investment matter.

Most BITs—including at least one of those relevant in respect of Crimea, that between Ukraine and the Russian Federation—contain provisions concerning the territory of the parties. Territorial provisions most often belong to an article or section concerning definition of terms. It is a supposition behind investment treaties that a state party know where its territory is. It further may be supposed that the parties to such treaties are in agreement as to the delimitation of the boundaries defining each state—though, in instances where this is not the case, the matter has been little considered. The (limited) treaty practice reflecting that an open question exists as to a party's territorial or jurisdictional limits, will be briefly considered in subsection A before examination of the Ukraine-Russian Federation BIT in subsection B.

A. Territorial Disputes in BITs

Territorial scope in most BITs seems to be taken as settled. At any rate, in most BITs the provisions which refer to territory do so only in general terms without giving any specific indication of what territory comprises a state party. In a minority of treaties, the provisions are somewhat more specific; they suggest that one of the parties seeks to protect its position in respect of unsettled territorial questions. The concern here is not with declarations or special treaty provisions specifying in which parts of a state party's undisputed territory the treaty applies (for example, the United Kingdom's instrument ratifying the Energy Charter Treaty and indicating the territorial limits of its application). The concern instead is with treaties which indicate the overall territorial limits of the state.

113 Empresa Lucchetti SA v. Peru, ICSID Case No. ARB/03/4, Jurisdiction, ¶ 7 (Feb. 7, 2005) (referring to concurrent State-to-State dispute).

114 Republic of Italy v. Republic of Cuba, ad hoc Arbitration, Interim Award, ¶ 4 (Mar. 15, 2005) (rejecting the parties' preliminary objections but reserving the question of competence in respect of the merits); Final Award (Jan 15, 2008) (determining itself to lack jurisdiction in respect of Italy's submissions concerning four investors; rejecting Italy's other submissions on the merits).

The Georgia-Kuwait BIT, to give one example, provides that the definition of “territory” in the case of Georgia means “the territory of Georgia within the state borders, recognized by the international community…” 116 The Georgia-Latvia BIT similarly refers to “the territory recognized by the international community within the state borders of Georgia.” 117 These provisions evidently affirm that Abkhazia and South Ossetia, notwithstanding their purported separation, remain part of Georgia. Georgia has not followed this drafting approach consistently; not all of its BITs expressly affirm the territorial scope of the state. 118 Some of Azerbaijan’s BITs indicate specific places that fall within national jurisdiction. The Azerbaijan-Estonia BIT, for example, refers to “the territory of the Republic of Azerbaijan, including the respective Caspian Sea sector…” 119 Though the situation of Mauritius in respect of the Chagos Archipelago is distinctive, 120 Mauritius’s BITs here are also of interest. For example, the Mauritius-Switzerland BIT defines Mauritius’s territory to comprise, inter alia, “all the territories and islands which, in accordance with the laws of Mauritius, constitute the State of Mauritius.” 121 So the territorial parameters of a state may be more or less specifically indicated in the language adopted in its BITs.

The range of specific territorial indications among different BITs suggests the possibility for questions arising in their application. It seems to follow, at least as a matter of principle, that where a treaty is not specific enough for purposes of resolving a dispute subject to a jurisdiction specified in the BIT, the arbitral tribunal might have a role to play in imparting greater clarity. But still, these are investment treaties, not treaties for the general settlement of disputes under public international law. And even in the core cases arising under BITs—the investor-state cases—awards in increasing number suggest that the nexus

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118 For example, Agreement between the Czech Republic and Georgia for the Promotion and Reciprocal Protection of Investments, Czech-Georgia, art. 1(4)(b), Aug. 29, 2009 (entered into force Mar. 13, 2011).


121 Mauritius-Switzerland BIT, art. 1, ¶ 4, Nov. 26, 1998.
between international investment protection and territory is not essential to the application of the treaty rules. The incorporation into certain BITs of provisions affirming the specific territorial scope of a state’s jurisdiction as against forcible separation has not yet had much, if any, effect in claims practice.

Nevertheless, the era of investment protection has been one of stable territorial relations. If new questions as to the parties’ territorial jurisdiction are presented, then the possibilities will increase that such questions will affect the application of investment law. With that in mind, the territorial provisions of one BIT may be considered.

B. Territory under the Ukraine-Russian Federation BIT

As between many states, a BIT is in force between Ukraine and the Russian Federation. The Ukraine-Russian Federation BIT is principally concerned with (a) stipulating certain obligations owed by each Contracting Party when acting as the host state to investors of the nationality of the other Contracting Party and (b) providing a mechanism under which an investor of the nationality of one Contracting Party may institute arbitration directly against the other Contracting Party in case of a dispute concerning its investment in the other Contracting Party’s territory. Articles 2 through 8 set out a range of substantive rights owed by each Contracting Party to investors of the other Contracting Party. Article 9 is the dispute settlement provision giving investors the right to institute arbitration (subject to the jurisdictional requirements entailed, for example, by the definition of “investment”).

Like many BITs, the Ukraine-Russian Federation BIT also contains an inter-state dispute settlement clause. Article 10, paragraphs 1, 2 and 5, provide as follows:

1. Disputes between the Contracting Parties as to the interpretation and application of this Agreement, shall be resolved by way of negotiations.

2. In the event a dispute cannot be resolved through negotiations within six months as of the notification in writing of the origin of a dispute, then at the request of either Contracting Party, it shall be passed over for consideration, to the arbitration tribunal.

5. The arbitration tribunal shall take a decision by a majority vote. The decision shall be final and binding upon either of the Contracting Parties.

122 See, for example, Renta 4 v. Russian Federation, SCC Arbitration, Preliminary Objections, ¶ 144 (Mar. 20, 2009).

The arbitration tribunal shall determine the procedure of its own work as it 
deems fit.\textsuperscript{124}

Paragraphs 3 and 4 of Article 10 provide for the method of appointment to 
the arbitration tribunal, including an ICJ default reference. So, where the two 
states have a dispute “as to the interpretation and application” of the BIT,\textsuperscript{125} and 
they cannot resolve that dispute through negotiation in six months as of 
notification of the dispute, inter-state arbitration is available. The scope \textit{ratione materiae} of the dispute settlement clause has no obvious limit, other than that 
entailed by the terms of the BIT—that is, \textit{any} dispute concerning the 
interpretation and application of any of the terms is subject to Article 10.

Article 1, paragraph 4, of the BIT provides that “‘Territory’ shall denote 
the territory of the Russian Federation or the territory of the Ukraine and also 
their respective exclusive economic zone and the continental shelf as defined in 
conformity with the international law.”\textsuperscript{126}

Incorporating these provisions into one statement, the following may be 
said:

In the event a dispute [as to the interpretation and application of the terms 
“the territory of the Russian Federation or the territory of the Ukraine and 
also their respective exclusive economic zone and the continental shelf”] 
cannot be resolved through negotiations within six months of the 
notification in writing of the origin of a dispute, then at the request of 
[Ukraine], it shall be passed over for consideration, to the arbitration 
tribunal . . .\textsuperscript{127}

It could be submitted in this way that a dispute exists between Ukraine and 
the Russian Federation as to the meaning of the terms. However, the treaty 
practice and associated dispute settlement mechanism in this regard furnishes 
only scanty indications whether an actual claim would survive jurisdictional 
challenge.

Not all BITs expressly indicate “territory” to include maritime 
jurisdiction,\textsuperscript{128} but even a BIT that does not do so may be argued to include 
maritime jurisdiction in its scope. This is in accord with the trend among

\textsuperscript{124} Id. art 10. 
\textsuperscript{125} Id. 
\textsuperscript{126} Id. art. 1, ¶ 4. 
\textsuperscript{127} Id. art. 10, ¶ 2. 
\textsuperscript{128} See, for example, Agreement between the Government of the Republic of Austria and the 
Government of the Arab Republic of Egypt for the Promotion and Protection of Investments, 
art. 1, Apr. 12, 2001 (entered into force Apr. 29, 2002).
tribunals to give a broad definition to territoriality,129 and it is in accord with the principle that “it is not for tribunals to impose limits on the scope of [the treaties] not found in the[ir] text...”130 Moreover, internal waters and the 12 nautical mile belt of territorial sea certainly belong to a state’s territory in this sense. This follows from the “basic legal concept of State sovereignty,” which “extends to the internal waters and territorial sea of every State.”131 The concept corresponds to “prescriptions of treaty-law” such as the United Nations Convention on the Law of the Sea (UNCLOS), which defines the sovereign rights of states in the exclusive economic zone and on the continental shelf as well.132

There have been instances in which a model BIT did not expressly indicate maritime jurisdiction to belong to the territorial scope of the treaty, but then a revised model incorporated a maritime provision. Commentators take the view that this was to clarify an existing position, not to change the definition of territory for the purpose of the treaty.133 A somewhat anomalous example is the 2008 Japan-Peru BIT.134 Most of Japan’s investment treaties indicate that maritime areas belong to national jurisdiction; and they do so by referring specifically to the UNCLOS maritime entitlements of territorial sea, exclusive economic zone, and continental shelf. The 2008 Japan-Peru BIT refers to Japan’s maritime areas in this specific way135 but to Peru’s only in a generic way. For Peru, the 2008 BIT refers to “the maritime zones,” not the entitlements as provided for under UNCLOS.136 This seems to be because Japan could not agree to Peru’s assertion of a 200-nautical mile territorial sea and so, by omission

129 See, for example, Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/02, Award (Oct. 12, 2012); Fedax NV v. Republic of Venezuela, ICSID Case No. ARB/96/3, Decision on Objections to Jurisdiction, 5 ICSID Rep. 183 (July 11, 1997).
130 Tokios Tokelé’s v. Ukraine, ICSID Case No. ARB/02/18, Decision on Jurisdiction, ¶ 36 (Apr. 29, 2004) (referring to Compañía de Aguas del Aconquija S.A. and Vivendi Universal v. Argentine Republic, Decision on Annulment, ICSID Case No. ARB/97/3, ¶ 115 (July 3, 2002)).
133 See, for example, Rudolf Dolzer & Yun-I Kim, Germany, in SELECTED MODEL INVESTMENT TREATIES 289, 306 (Chester Brown ed., 2013).
135 See id. art. 1(7)(a).
136 See id. art. 1(7)(b).
from the treaty, avoided recognition of that exorbitant claim. It would appear that the significance of the omission in that instance was in its contrast to Japan's other treaties. The others contained the reference; the Peru treaty did not. The Ukraine-Russian Federation BIT, as noted above, refers to the specific maritime entitlements.

What law would a tribunal apply in an inter-State case under that instrument? Not all BITs containing a provision for inter-state arbitration indicate the law to be applied. The Ukraine-Russian Federation BIT does not indicate the applicable law. This by no means has prevented disputes under such instruments from being arbitrated. The applicable law presumptively includes the rules of the BIT and such other international law rules as are accepted by both parties, the interpretation and application of the rules set out in the BIT likely being difficult or impossible in a vacuum.

On initial impression, it may seem exotic to the BIT system to seek to adjudicate a dispute as to the scope of a state's territorial and maritime entitlement under the inter-state dispute settlement provision of a BIT. A teleological approach—it might be said—would reject applying Article 10 and Article 1, paragraph 4, to institute proceedings against the Russian Federation in connection with the unlawful presence of that Contracting Party in Crimea and its adjacent waters. A BIT is not an instrument for purposes of settling territorial


141 Writers who have thought a great deal about BITs in general have assumed that a BIT “tribunal would lack authority to decide the sovereignty dispute” arising under a particular BIT. See Waibel, supra note 115. However, it does not seem that any commentator has said why a sovereignty dispute under an inter-state dispute settlement clause would be unreviewable or beyond the jurisdiction of a tribunal where the settlement of a question relating to the core subject matter of the treaty required that dispute to be addressed.
disputes, much less for regulating international use of force. But there are limits to such a teleological approach. It is all well and good to refer to the broad, general, or systemic purposes of a treaty; but the parties denoted their intentions in the plain language of the treaty as adopted; and that language is the first point of reference when applying the treaty. The Ukraine-Russia treaty, in its plain language, provides for the constitution of an arbitral tribunal with binding powers of resolution in respect of “disputes . . . as to the interpretation and application” of the treaty.\textsuperscript{142} To say that a question relating to the core subject matter of the treaty is inadmissible because a territorial dispute exists between the parties arguably would be at variance with the intention of the parties to submit the question to the tribunal for determination. In the context of investor-state claims, non-exercise of jurisdiction—where not properly grounded—has been a basis for annulment.\textsuperscript{143}

Moreover, as applied to a Ukraine-Russian Federation case, it is far from clear that the teleological approach would defeat a claim under the treaty. Even under an interpretative method that concerns itself more with the system than with the language in the instrument, the Ukraine-Russian Federation BIT makes clear what its purposes are within that system. As noted in the preamble, this is a treaty “to create and maintain favourable conditions for mutual investments.”\textsuperscript{144} It is also a treaty “to create favourable conditions for the expansion of economic cooperation between the Contracting Parties.”\textsuperscript{145} This is not a treaty solely about the convenience of individual investors. And, even if that were the treaty’s sole purpose, it can hardly be claimed that the current situation between the Contracting Parties is conducive to that purpose.

The orderly application of international rules would be difficult or impossible if states did not generally agree as to the geographic contours of their national jurisdiction. In the BIT between Ukraine and the Russian Federation, the parties make clear that the substantive rules of the treaty apply within the territory of the contracting states. It is hard to see how a treaty of this kind could take a different approach. According to UNCTAD:

The geographical scope of an investment agreement is determined . . . by the number and identity of the States that are party to it. It is also determined

\textsuperscript{142} Ukraine-RF BIT, \textit{supra} note 123, art. 10, ¶ 1.

\textsuperscript{143} Malaysian Historical Salvors v. Malaysia, ICSID Case No. ARB/05/10, Decision on the Application for Annulment, ¶ 74 (Apr. 16, 2009).

\textsuperscript{144} Ukraine-RF BIT, \textit{supra} note 123, pmbl.

\textsuperscript{145} \textit{Id.}
by the territorial limits of the States concerned. The definition of the term ‘territory’ is important in this respect.\textsuperscript{146}

Far from being extraneous to the BIT, a dispute as to the meaning of “territory” is integral to it. The “geographical scope of an investment agreement” is “determined by the territorial limits of the states concerned.”\textsuperscript{147} Without a definition of the territory—that is, without a shared understanding of where one party’s territory ends and the other’s begins—it would be difficult, perhaps impossible, to apply a treaty which defines the scope of its application by reference to the territory of its parties.\textsuperscript{148} The treaty system as a whole could not function without that definition.

Also relevant here is that the BIT contains no express jurisdictional exclusion that clearly would extend to the definition of territory as a subject matter for arbitration. States sometimes exclude certain classes of dispute from their dispute settlement agreements. To give an important example, under UNCLOS Article 298, a state may exclude certain cases from the procedures of UNCLOS Part XV, Section 2, including cases where a maritime delimitation is requested.\textsuperscript{149} So the crafting of a limited dispute settlement clause is no dark art. States know how to do it. The dispute settlement provision in the Ukraine-Russian Federation BIT extends to “[d]isputes between the Contracting Parties

\begin{footnotesize}

\textsuperscript{147} Id.

\textsuperscript{148} This holds no less under an investment protection system which acknowledges that investments may have components that exist simultaneously or in succession in more than one State’s territory. If an investment in the territory of a party remains a criterion under the treaty (as it does under the relevant treaties), then a shared understanding of the extent of each State’s territory remains central to application of the treaty. See, for example, SGS Société Générale de Surveillance S.A. v. Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Objections to Jurisdiction, ¶ 99–112 (Jan. 20, 2004).

\textsuperscript{149} Article 298: Optional exceptions to applicability of section 2

1. When signing, ratifying or acceding to this Convention or at any time thereafter, a State may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories of disputes:

(a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles . . .

UNCLOS, supra note 132, art. 298. Arts. 15, 74 and 83 are the provisions relevant to delimitation of overlapping entitlements to territorial sea, exclusive economic zone, and continental shelf, respectively. See id. arts. 15, 74, 83.

\end{footnotesize}
as to the interpretation and application of this Agreement.”\textsuperscript{150} No other provision in the treaty limits the scope of dispute settlement—except in the general sense that the dispute must be as to the interpretation and application of a provision of the treaty. The definition of the territory of the parties is a provision of the treaty.

Also relevant here is that the Ukraine-Russian Federation BIT does not limit the scope of jurisdiction to disputes arising out of alleged breaches of the substantive protections accorded by the treaty to the non-state actors with which it is concerned. Some treaties do limit jurisdiction in that way. The European Convention, as noted above,\textsuperscript{151} is an example. The Convention is a human rights treaty, not an investment treaty, but like most BITs the Convention mainly envisages cases between individuals and states.\textsuperscript{152} Also like many BITs, the Convention nevertheless contains an inter-state clause. Article 33 of the Convention provides as follows: “Any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Party.”\textsuperscript{153}

This is a very different dispute settlement clause than Article 10 of the Ukraine-Russian Federation BIT. To lodge a Convention case against another state under Article 33, the applicant state must allege a “breach of the provisions of the Convention and the Protocols” by the respondent state.\textsuperscript{154} Thus, there is a relatively narrow set of circumstances under which an inter-state proceeding may be brought. It does not suffice that two states parties have a dispute concerning the interpretation and application of the Convention. In order to institute inter-state proceedings, the applicant must allege a breach of the substantive protections which the Convention affords. The right to institute such proceedings under the Ukraine-Russian Federation treaty is not limited in that way. Either party may institute proceedings against the other when a dispute exists as to the interpretation and application of the agreement (and they have not settled the dispute within six months through diplomatic means). This would seem to allow inter-state proceedings to address matters which are independent from particular allegations of substantive breach against an investor. A purely speculative claim—a sort of request for an advisory opinion in the absence of a real dispute—would be objectionable; but here, between Ukraine and Russia, there is certainly a real dispute. It is also doubtful whether a dispute having no connection at all to an investment problem—that is, a dispute

\textsuperscript{150} Ukraine-RF BIT, supra note 123, art. 10, ¶ 1.

\textsuperscript{151} See generally European Convention, supra note 30.

\textsuperscript{152} See, for example, id. art. 34 (“Individual Applications”).

\textsuperscript{153} Id. art. 33.

\textsuperscript{154} Id. art. 33.
decoupled from the investment purposes of the BIT—would readily be entertained by a BIT tribunal; but here there exist a range of problems concerning investors in the occupied territory.

Two considerations may be relevant to why contracting states have not used such dispute settlement clauses in this way before.

First, there is a hesitancy to use treaties to reach beyond the core cases which obviously fall within the dispute settlement provision. Parties certainly are wise to bear in mind Judge Greenwood’s admonition about forcing a “perhaps ungainly foot into a glass slipper of a jurisdictional clause that really is far too small for the case you want to bring.”\(^\text{155}\) But the caution which is a virtue in the judge or arbitrator applying a treaty is not necessarily a virtue in an advocate developing a strategy for a difficult case. It is not unheard of in claims practice to push the limits of the substantive scope of a treaty. And it is not unheard of for the party that pushes the limits to succeed in identifying a jurisdiction which beforehand was not obviously available in the circumstances. Some of the most striking examples have arisen in claims concerning use of force, such as *Military and Paramilitay Activities in and against Nicaragua and Oil Platforms*.

The dispute addressed in *Oil Platforms* arose over armed actions taken by the United States against certain platforms of Iran in the Gulf. It came, by way of counter-claim, to involve Iran’s armed interference with commercial shipping in the Gulf as well. The jurisdiction of the ICJ was limited to that established under the 1955 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States.\(^\text{156}\) For jurisdiction to exist under the 1955 Treaty, there had to be a dispute the parties failed to settle by diplomatic means. Moreover, the dispute had to fall within the jurisdiction *ratione materiae* provided by Article XXI, paragraph 2, of the Treaty, meaning it had to concern “interpretation or application of the present treaty.”\(^\text{157}\)

The ICJ understood the scope of the category “[a]ny dispute . . . as to the interpretation or application of the treaty” to be defined in view of the treaty’s


\(^{157}\) Oil Platforms (Islamic Republic of Iran v. US), Judgment, Preliminary Objection, 1996 I.C.J. 803, 809 (Dec. 12). Article XXI, paragraph 2, of the Treaty, reads as follows: Any dispute between the High Contracting Parties as to the interpretation or application of the present Treaty, not satisfactorily adjusted by diplomacy, shall be submitted to the International Court of Justice, unless the High Contracting Parties agree to settlement by some other pacific means.

284 U.N.T.S. at 134.
object and purpose as a whole. The Court concluded that jurisdiction existed to
to address an alleged breach of one or more of the substantive obligations
expressly provided under the Treaty—but not to address a claim based on
Article I, under which the parties pledged “firm and enduring peace and sincere
friendship.”

This provision, though certainly part of the Treaty, had to be
considered in light of the type of treaty this was. The ICJ, drawing on its
Nicaragua Judgment, said as follows:

It follows that the object and purpose of the Treaty of 1955 was not to
regulate peaceful and friendly relations between the two States in a general
sense. Consequently, Article 1 cannot be interpreted as incorporating into
the Treaty all of the provisions of international law concerning such
relations. Rather, by incorporating into the body of the Treaty the form of
words used in Article 1, the two States intended to stress that peace and
friendship constituted the precondition for a harmonious development of
their commercial, financial and consular relations and that such a
development would in turn reinforce that peace and that friendship. It
follows that Article 1 must be regarded as fixing an objective, in the light of
which the other Treaty provisions are to be interpreted and applied.

This conclusion is in conformity with that reached by the Court in 1986,
when, on the occasion of its interpretation of the Treaty of Friendship of
1956 between the United States and Nicaragua, it stated in general terms
that:

“There must be a distinction... in the case of a treaty of friendship,
between the broad category of unfriendly acts, and the narrower category of
acts tending to defeat the object and purpose of the Treaty. That object and
purpose is the effective implementation of friendship in the specific fields
provided for in the Treaty, not friendship in a vague general sense.”

The general terms of Article I were meant as an interpretive device to
which one may resort in order to apply “the other Treaty provisions.” This, in
turn, would imply that the other provisions might not be understood, if it is not
also understood that the parties intended “that peace and friendship constituted
the precondition for a harmonious development of their commercial, financial
and consular relations and that such a development would in turn reinforce that
peace and that friendship.”

It is submitted, respectfully, that understanding

that in truth adds little to one’s understanding of the other provisions. The ICJ’s
interpretation of Article I in Oil Platforms largely reduces that provision to a
recital—which may be all that is to be made of it, even though it is drafted as an

158 Oil Platforms (Islamic Republic of Iran v. US), Judgment, Preliminary Objection, 1996 I.C.J. 803,
814 (Dec. 12).

159 Id. (quoting I.C.J. Reports 1986, p. 137, ¶ 273.).

160 Id.

161 Id.
operative provision. The analysis quoted in Nicaragua comes closer to the point: the “object and purpose is the effective implementation of friendship in the specific fields provided for in the Treaty, not friendship in a vague general sense.”\textsuperscript{162} In other words, the operative provisions of the treaty are those which indicate rights and obligations in respect of “specific fields,” and it is to those provisions that jurisdiction \textit{ratione materiae} is confined.

Whether a similar analysis would apply to a BIT where a party attempted to apply the dispute settlement provision to a problem of territory, would depend on the specific terms of the treaty to be applied and on the relation between the territorial problem and the “effective implementation” of the BIT in its “specific field.” A territorial problem in BIT proceedings in which there is no investment problem would be straining the limits of jurisdiction; investment is the “specific field” of that treaty. Ecuador’s claim against the United States under the U.S.-Ecuador BIT, though not involving a territorial problem, is a test of the possibilities for relatively abstract questions in inter-state arbitration.\textsuperscript{163} Competing views of the possibilities were set out in duelling experts’ reports (Alain Pellet, Stephen McCaffrey, and C.F. Amerasinghe for the Applicant; Michael Reisman and Christian Tomuschat for the Respondent).\textsuperscript{164} Issue was joined in particular over whether \textit{interpretation} of a treaty provision could be subject to jurisdiction where there was no question as such concerning \textit{application} of the provision.\textsuperscript{165} The award in \textit{Ecuador v. United States} was not published, but the result is known: the tribunal dismissed the case for lack of jurisdiction “due to the absence of the existence of a dispute falling within the ambit of Article VII of the Treaty.”\textsuperscript{166} Article VII of the Ecuador-United States BIT is a dispute settlement clause bearing a degree of similarity to Article 10 of the Ukraine-Russian Federation BIT (set out above).\textsuperscript{167} To quote the United States in its pleadings in \textit{Ecuador v. United States}, “[a] ‘dispute’ concerning the interpretation

\textsuperscript{162} \textit{Id.} (emphasis added).
\textsuperscript{163} \textit{See} Trevino, \textit{supra} note 111, at 204–06.
\textsuperscript{165} As to this question, see Trevino, \textit{supra} note 111; see also Dapo Akande, \textit{Ecuador v. United States Inter-State Arbitration under a BIT: How to Interpret the Word “Interpretation”?}, EJIL:TALK! (Aug. 31, 2012), http://www.ejiltalk.org/ecuador-v-united-states-inter-state-arbitration-under-a-bit-how-to-interpret-the-word-interpretation/.
\textsuperscript{167} \textit{See} Ukraine-RF BIT, \textit{supra} note 123.
or application of the Treaty cannot arise in the abstract."\textsuperscript{168} While the situation between Ukraine and Russia is far from abstract, the jurisdictional limitations of the available instrument are real.

But the \textit{Ecuador v. United States} tribunal adopted its award in a particular setting, namely one of essentially stable (even if not felicitous) relations between the parties. This has been the case with investment treaties in general over the history of modern investment law: BITs have been adopted and applied largely in an environment of stable relations. Territorial and boundary disputes have not concerned acts of aggression by which whole provinces are purportedly transferred from one sovereign to another. The emergence of a thriving system of inter-state investment indeed would never have occurred in a world at war. It took an environment of stable relations for nations to adopt so many treaties (there now being thousands of BITs in force) in a field that at the start was stubbornly resistant to legal regulation.\textsuperscript{169} The overall security environment does not in itself tell us how a tribunal, presented with a territorial problem in a BIT framework, would deal with it. That the environment has been relatively hospitable does however suggest why such a problem has not arisen—and why, if it had, there would have been no particular urgency from the standpoint of systemic coherence for a tribunal to address it.

How a tribunal would deal with the problem, again, would depend on the precise characteristics of the dispute and the relevant treaty text. This much can be said: basic stability in the territorial settlement is a prerequisite to the functioning of the investment law system. Perhaps this is no more legally material than the observation that "peace and friendship constituted the precondition for a harmonious development of their commercial, financial and consular relations"—the observation which the Court in \textit{Oil Platforms} said was not enough to subject questions of breaches of "peace and friendship" to the Court's jurisdiction.\textsuperscript{170} But the Iran-United States treaty did not purport to define "peace and friendship." Many BITs define territory. Nor did the Iran-United States treaty say anything more about "peace and friendship" when it came to defining the scope of jurisdiction under the dispute settlement provision or the scope of the substantive protections of the treaty. It was not material to either.


\textsuperscript{169} As to the multiplication of BITs and their effect on the international law of investment, see Stephen M. Schwebel, \textit{A BIT about ICSID}, in \textit{JUSTICE IN INTERNATIONAL LAW; FURTHER SELECTED WRITINGS OF STEPHEN M. SCHWEBEL} 137, 140–41 (2011); Stephen M. Schwebel, \textit{The Influence of Bilateral Investment Treaties on Customary International Law}, in \textit{JUSTICE IN INTERNATIONAL LAW}, supra, at 146.

Most BITs make the definition of territory material both to dispute settlement jurisdiction and to the scope of the substantive protections. When applying investment treaties, it may not always be possible to settle the dispute without knowing what territory is the territory of the relevant state party. In a world with few serious territorial problems, this has no implication for the system as a whole. In a world in which such problems have returned, the system either finds a way to address them, or it accepts that its relevance to dispute settlement is no longer what it was.

VI. CONCLUSION

Solidarity against the unlawful seizure of territory is a policy desideratum. The legal mechanisms which might contribute to such solidarity thus merit consideration. In respect of the situation addressed in the present Article—the annexation of Crimea and forcible separations of territory in eastern Ukraine—it is by no means clear that the full range of legal mechanisms available has been employed. When compared to proposals, for example, that Ukraine refer to the Rome Statute in the hopes of prosecuting members of the Russian Federation security apparatus (and, implicitly, it is assumed that prosecution would be a meaningful response to armed aggression even as it continues), inter-state arbitration against Russia is not a tenuous idea; nor is recourse to the jurisdiction of the ECHR or the ICJ. This does not necessarily exhaust the possibilities; other mechanisms, too, may merit consideration. The sections above have

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171 For a canvassing of jurisdiction ratione loci in investment law, see Waibel, supra note 141, at paras. 142–58.


173 For example, there are the dispute settlement mechanisms under Part XV, section 2, of UNCLOS. Scholars widely believe that those mechanisms cannot exercise jurisdiction over territorial questions—even when directly linked to maritime questions. See, for example, NONG HONG, UNCLOS AND OCEAN DISPUTE SETTLEMENT: LAW AND POLITICS IN THE SOUTH CHINA SEA 54 (2012); Robert Smith, The Effect of Extended Maritime Jurisdiction on Land Sovereignty Disputes, in THE 1982 CONVENTION ON THE LAW OF THE SEA: PROCEEDINGS, LAW OF THE SEA INSTITUTE SEVENTEENTH ANNUAL CONFERENCE 336, 343 (Albert W. Koers et al., eds. 1984); Bernard H. Oxman, The Third United Nations Conference on the Law of the Sea: The Ninth Session (1980), 75 AM. J. INT’L L. 211, 233 n.109 (1981). Whether they can or not is a question posed in the proceedings in Mauritius v. United Kingdom before an UNCLOS Annex VII tribunal (Professor Ivan Shearer, President; Judge Sir Christopher Greenwood, Judge Albert Hoffman, Judge James Kateka and Judge Rüdiger Wolfrum, Members). Mauritius says they can: see Republic of Mauritius v. U.K. (UNCLOS Annex VII arbitration), Reply of Mauritius 197–211 (Perm. Ct. Arb. 2013). In Philippines v. China before an UNCLOS Annex VII tribunal (Judge Thomas A. Mensah, President; Judge Jean-Pierre Cot, Judge Stanislaw Pawlak, Professor Alfred H.A. Soons, Judge Rüdiger Wolfrum, Members), the Philippines was careful to avoid territorial questions: see The Republic
considered each of these three procedures in turn. The main objection to using the procedures would seem to be that they have been little tested in connection with a territorial question such as that now arising. It remains to say, more specifically, why they would be excluded from addressing such a question as a matter of law. It is hoped that the present Article instigates a closer examination of each.

Karl Llewellyn, the legal realist, said that some of the “peak achievements” in law have resulted from employing “a social machinery geared to other ends.” Major developments in the law—even the occasional révolution jurisprudentielle—well may owe to the creative use of procedures which everybody had assumed existed only to serve other, more limited, needs. The procedures discussed in this essay are not the obvious choices for a legal strategy against Europe’s first act of territorial aggression since World War II. But nor was it obvious to many observers, if any, before 2014 that territorial aggression would be committed in Europe in the modern era. A vigorous application of the applicable rules and available procedures can reinforce non-recognition and curb the legal effects of aggression. The full range of applicable rules and available procedures must be considered if the full force of their application is to be achieved.

It is not the aim here to reach a definitive view as to how the procedures considered, applied in the ways suggested, would be received by courts and tribunals. Applying them in practice to a concrete problem would be the way to test them; and that course of action would have all the attendant risk of litigation or arbitration under the most favorable circumstances, as well as the further risk that comes with untried approaches. It is submitted, however, that states seeking to defend the law against extraordinary challenges should consider the range of machinery at their disposal.

175 Consider the shift in approach to reservations to multilateral treaties, about which see Alain Pellet, La CIJ et les réserves aux traités. Remarques cursives sur une révolution jurisprudentielle, in LIBER AMICORUM: JUDGE SHIGERU ODU 481, 482-503 (Ando et al., eds. vol. I 2002).