

Comment

Sovereignty over Crimea: A Case for State-to-State Investment Arbitration

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INTRODUCTION

Does Crimea now constitute a part of Russia or Ukraine? De facto, the answer is undoubtedly Russia. As early as March 2014, Secretary of State John Kerry conceded that Russia had “complete operational control of the Crimean peninsula.”¹ De jure, the answer is more complicated. Ukraine contends that Russia unlawfully “annexed” Crimea,² while Russia contends that Crimea lawfully declared independence and “acceded” to Russia.³ Although most states⁴ and commentators⁵ have sided with Ukraine, no international court or

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1. Paul Lewis et al., *US Concedes Russia Has Control of Crimea and Seeks to Contain Putin*, THE GUARDIAN, Mar. 3, 2014.

2. U.N. GAOR, 68th Sess., 80th plen. mtg. at 1-3, U.N. Doc. A/68/PV.80 (Mar. 27, 2014) [hereinafter General Assembly Plenary Meeting on Ukraine].

3. *Id.* at 3-4.

4. On March 27, 2014, the United Nations General Assembly adopted a non-binding resolution declaring the Crimea independence referendum invalid. *Territorial Integrity of Ukraine*, G.A. Res. 68/262, U.N. Doc. A/RES/68/262 (Mar. 27, 2014). The vote was 100 to 11, with 58 abstentions. General Assembly Plenary Meeting on Ukraine, *supra* note 2, at 17.

5. E.g., William W. Burke-White, *Crimea and the International Legal Order*, in PENN LAW: LEGAL SCHOLARSHIP REPOSITORY (2014); Robin Geiß, *Russia's Annexation of Crimea: The Mills of International Law Grind Slowly but They Do Grind*, 91 INT'L L. STUD. 425 (2015); Christian Maxsen, *The Crimea Crisis: An International Law Perspective*, 74 HEIDELBERG J. INT'L L. 367, 390 (2014); Anna Stepanowa, *International Law and Legality of Secession in Crimea*, CAMBRIDGE J. INT'L L. & COMP. L. (2014); Antonello Tancredi, *The Russian Annexation of the Crimea: Questions Relating to the*

tribunal has yet to declare whether Crimea today constitutes Russian or Ukrainian territory under international law. This may be about to change.

As of June 2016, Ukrainian investors have instituted at least seven investor-state arbitrations against Russia under the Russia-Ukraine Bilateral Investment Treaty (BIT)⁶ with regards to investments in Crimea.⁷ As a result, at least seven arbitral tribunals may have the jurisdiction to determine whether Crimea constitutes Russian or Ukrainian territory under international law.⁸ Nevertheless, there are strong grounds for questioning the legitimacy of the tribunals' determinations: due to the unique structure of investor-state arbitrations, all parties to the arbitrations—the investors and Russia—have an interest in convincing the tribunals that Crimea is a part of Russian, not Ukrainian, territory. Ukraine will not have a seat at the table in any of the arbitrations, even though its interests are arguably the most at stake.

Ukraine, however, has also instituted proceedings of its own. To date, Ukraine has filed four cases against Russia before the European Court of Human Rights (ECtHR).⁹ In addition, it has expressed its intention to file two claims against Russia before the International Court of Justice (ICJ)¹⁰ as well as a third claim against Russia before a tribunal constituted under the United Nations Convention on the Law of the Sea (UNCLOS).¹¹ Nevertheless, while these judicial bodies may find that Russia has violated international law, they would likely not have the jurisdiction to determine whether Crimea constitutes Russian or Ukrainian territory. Therefore, if Ukraine wishes to obtain an impartial determination of sovereignty over Crimea, it would be in need of an alternative judicial forum.

This Comment proposes that Ukraine institute arbitral proceedings against Russia under the often overlooked state-to-state dispute settlement provision of the Russia-Ukraine BIT. This would give Ukraine a seat at the table, and the tribunal—unlike the ECtHR, the ICJ, and the UNCLOS

Use of Force, 1 QUESTIONS OF INT'L L. 5 (2014); Roy Allison et al., *The Ukraine Crisis: An International Law Perspective*, CHATHAM HOUSE (July 11, 2014), <https://www.chathamhouse.org/event/ukraine-crisis-international-law-perspective>.

6. Agreement Between the Government of the Russian Federation and the Cabinet of Ministers of the Ukraine on the Encouragement and Mutual Protection of Investments, Russ.-Ukr., Nov. 27, 1998, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2233> [hereinafter Russia-Ukraine BIT].

7. The seven publicly known cases are *Igor Kolomoisky and Aeroport Belbek LLC v. Russia*, *Privatbank and Finilon v. Russia*, *Stabil LLC v. Russia*, *PJSC Ukrnafta v. Russia*, *Everest Estate LLC v. Russia*, *Oschadbank v. Russia*, and *Luzgor LLC v. Russia*. See Luke Eric Peterson, *Russia Disputes Round-up: Updates on Status of 11 Known Investment Treaty Claims*, INVESTMENT ARB. REP., Jan. 19, 2016.

8. See *infra* notes 13-17 and accompanying text.

9. Marko Milanovic, *Ukraine Derogates from the ICCPR and the ECHR, Files Fourth Interstate Application against Russia*, EJIL: TALK! (Oct. 5, 2015), <http://www.ejiltalk.org/ukraine-derogates-from-the-iccpr-and-the-echr-files-fourth-interstate-application-against-russia/>.

10. Julian Ku, *Ukraine Prepares Even More International Lawsuits That Russia Will Ignore*, OPINIO JURIS (Feb. 27, 2016), <http://opiniojuris.org/2016/02/27/ukraine-v-russia-where-can-you-sue/>; Gaiane Nuridzhanyan, *Ukraine vs. Russia in International Courts and Tribunals*, EJIL: TALK! (Mar. 9, 2016), <http://www.ejiltalk.org/ukraine-versus-russia-in-international-courts-and-tribunals/>.

11. Julian Ku, *As Ukraine Prepares to Take Russia to UNCLOS Arbitration Over Crimea, I Predict Russia's Likely Reaction*, OPINIO JURIS (Feb. 1, 2016), <http://opiniojuris.org/2016/02/01/ukraine-prepares-to-take-russia-to-unclos-arbitration/>; Nuridzhanyan, *supra* note 10.

tribunal—would have the jurisdiction to determine whether Crimea constitutes Russian or Ukrainian territory.

For the avoidance of doubt, this Comment does not opine on the question of whether Crimea constitutes Russian or Ukrainian territory, as that question has already been thoroughly discussed in the literature.¹² Rather, this Comment discusses the more practical question of how Ukraine can bring Russia before an international court or tribunal with jurisdiction over the territorial sovereignty dispute.

This Comment is organized as follows. Part I discusses the pending investor-state arbitrations against Russia, explaining why the legitimacy of the tribunals' determinations should be questioned. Part II examines the ECtHR, ICJ, and UNCLOS proceedings, explaining why these judicial bodies would likely not have the jurisdiction to determine whether Crimea constitutes Russian or Ukrainian territory. And Part III proposes that Ukraine institute state-to-state investment arbitration proceedings against Russia. The Comment then concludes with some final thoughts.

I. THE PENDING INVESTOR-STATE ARBITRATIONS

Article 9 of the Russia-Ukraine BIT grants Ukrainian investors the right to institute arbitral proceedings against Russia for compensation if Russia expropriates any of the investors' investments on Russian territory (and vice versa with respect to the investments of Russian investors on Ukrainian territory).¹³ Ukrainian investors have instituted at least seven such investor-state arbitrations against Russia with regards to their investments in Crimea.¹⁴

Article 9 does not expressly give the investor-state tribunals jurisdiction to determine who has sovereignty over Crimea. Nevertheless, as a general matter, international courts and tribunals may sometimes make a determination of international law as a matter of ancillary jurisdiction, that is, if such a determination is necessary to resolve a dispute over which they have jurisdiction.¹⁵ This could very well be the case here.

Article 1(1) of the BIT defines "investment" as "all kinds of property and intellectual values, which are put in by the investor of one Contracting Party on the *territory* of the other Contracting Party in conformity with the latter's legislation."¹⁶ As a result, in order to determine whether the Ukrainian

12. See *supra* note 5.

13. Russia-Ukraine BIT, *supra* note 6, art. 9.

14. See *supra* note 7.

15. See Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croat. v. Serb.), Judgment, Merits, 2015 I.C.J. Rep., ¶ 85 (Feb. 3); German Interests in Polish Upper Silesia (Ger. v. Pol.), 1925 P.C.I.J. (Ser. A) No. 6, at 18 (Aug. 25); Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (Ser. A) No. 2, at 28 (Aug. 30).

16. *Id.* art. 1(1) (emphasis added). Most BITs use similar language. States can, however, specify the exact meaning of the word territory in their BITs. For example, Article 1(c) of the Netherlands-Venezuela BIT provides: "the term 'territory' includes the maritime areas adjacent to the coast of the State concerned, to the extent to which that State exercises sovereign rights or jurisdiction in those areas according to international law." Agreement on Encouragement and Reciprocal Protection of Investments, Neth.-Venez., Oct. 22, 1991, <http://investmentpolicyhub.unctad.org/Download/TreatyFile/2094>.

investors' investments in Crimea qualify as "investments" under the BIT, the tribunals must determine whether Crimea constitutes a part of the "territory" of the Russian Federation.¹⁷

Here's the problem: it is in the interest of the Ukrainian investors to convince the tribunals that Crimea is Russian territory because Russia must pay compensation for its mistreatment of investments in Crimea only if Crimea constitutes Russian territory. At the same time, it is also in the interest of Russia to convince the tribunals that Crimea is Russian territory because the value of Crimea to Russia far exceeds the amount of compensation claimed by the investors.¹⁸ As a result, in each of the seven arbitrations, both parties have the incentive to convince the tribunal that Crimea constitutes Russian territory. Moreover, each party has the right under the applicable arbitration rules to appoint one of the three arbitrators on the tribunal,¹⁹ meaning that together the two parties may appoint a majority of the tribunal.²⁰ In light of these facts, there is reason to question the legitimacy of the tribunals' determinations on the question of sovereignty over Crimea. The missing voice at the table is Ukraine, yet under the investor-state dispute settlement mechanism of the Russia-Ukraine BIT, Ukraine does not have a right to participate in the arbitrations.

In theory, the problem could be mitigated in a few ways. First, the tribunals could nonetheless *sua sponte* consider the interests of Ukraine in determining their own jurisdiction, even if all of the parties agree and argue that Crimea constitutes Russian territory. Second, the tribunals could allow Ukraine to make an *amicus curiae* submission to the tribunal. Third, if both parties indeed agree that Crimea constitutes a part of Russia, the tribunals could avoid making a formal determination on the question.

Nevertheless, in practice, these avenues for mitigation are not very satisfying. The reality is that investor-state tribunals regularly choose not to

17. The tribunals could avoid this question in a variety of ways. They could find that they do not have jurisdiction by interpreting Article 1(1) to require that the initial investment be made in Russian territory, by interpreting Article 1(1) to require that the initial investment be in conformity with Russian legislation, or by interpreting Article 9(2) to not constitute an open offer by Russia to arbitrate disputes. They could also interpret Article 1(1) to only require that the investment be in territory under the effective control of Russia. For the purposes of this Comment, however, it is assumed that the tribunals will have to determine whether Crimea constitutes Russian or Ukrainian "territory."

18. Crimea's offshore natural resources alone are valued at seven billion dollars. Jason Bush, *Factbox—Costs and Benefits from Russia's Annexation of Crimea*, REUTERS, Apr. 8, 2014. Although the monetary claims of the pending investor-State arbitrations are not public, it has been reported that Kolomoisky and Belbek Airport claim \$15 million, and Privatbank and Finilon claim \$200 million. See Luke Eric Peterson, *First UNCITRAL Arbitral Tribunal is Finalized to Hear Claim That Russia Is Liable for Harm Befalling Investments in Annexed Crimean Peninsula*, INVESTMENT ARB. REP., July 14, 2015; Luke Eric Peterson, *A Second UNCITRAL Tribunal Is Constituted to Hear Crimea Claims Against Russia, as Tribunal Selection Begins in Three Further Cases*, INVESTMENT ARB. REP., July 14, 2015. Meanwhile, Ukraine has valued Crimea at \$90 billion. Leonid Bershidsky, *Will Putin Pay \$90 Billion for Crimea?*, BLOOMBERG VIEW, June 3, 2014.

19. Arbitration Rules of the United Nations Commission on International Trade Law, G.A. Res. 31/98, U.N. GAOR, 31st Sess., Supp. No. 17, ch. V § C, art. 9(1), U.N. Doc. A/31/17 (1976).

20. Russia, however, has declared that it will not participate in at least one of the arbitrations. Julian Ku, *Is Russia's Boycott of an Arbitration Brought Under Ukraine-Russia Bilateral Investment Treaty a Sign of a Trend?*, OPINIO JURIS (Jan. 11, 2016), <http://opiniojuris.org/2016/01/11/russia-boycotts-arbitration-brought-under-ukraine-russia-bilateral-investment-treaty/>.

examine their own jurisdiction if no objection is raised by a party,²¹ they sometimes reject *amicus curiae* submissions,²² and they are usually quite proactive in answering any legal question over which they have jurisdiction.²³

Therefore, the underlying problem remains: although Ukraine has a strong interest in the determinations of the tribunals over the legal status of Crimea, it does not have a seat at the table.

II. THE ECtHR, ICJ, AND UNCLOS PROCEEDINGS

Ukraine has instituted proceedings against Russia before the ECtHR and has expressed its intention to file cases against Russia before the ICJ and before an UNCLOS tribunal. Nevertheless, these judicial bodies would likely not have the jurisdiction to determine whether Crimea constitutes Russian or Ukrainian territory.

A. *The ECtHR Proceedings*

The ECtHR may exercise jurisdiction over a dispute between two states under Article 33 of the European Convention on Human Rights (ECHR).²⁴ Nevertheless, the dispute must concern an “alleged breach of the provisions of the Convention [or its] Protocols.”²⁵ The Convention and its Protocols only create international obligations to respect the human rights of individuals,²⁶ they do not prohibit states from acquiring the territory of other states. Therefore, the ECtHR would not have jurisdiction to determine the legality of Russia’s acquisition of Crimea.

The ECtHR would also not have ancillary jurisdiction over the question of sovereignty over Crimea. The Convention only imposes obligations on states to respect the human rights of individuals “within [its] jurisdiction,” not within its “territory.”²⁷ Indeed, the jurisprudence of the ECtHR makes clear that Russia would owe human rights obligations under the Convention to individuals in Crimea given Russia’s de facto occupation of the territory,²⁸

21. See, e.g., *Mobil Oil v. N.Z.*, ICSID Case No. ARB/87/2, Findings on Liability, Interpretation and Allied Issues, ¶ 2.9 (May 4, 1989); *Asian Agric. Prod. Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Award, ¶¶ 1, 2 (June 27, 1990); *Santa Elena v. Costa Rica*, ICSID Case No. ARB/96/1, Award, ¶ 11 (Feb. 17, 2000); *CDC v. Seychelles*, ICSID Case No. ARB/02/14, Award, ¶ 6 (Dec. 17, 2003); *Noble Ventures v. Romania*, ICSID Case No. ARB/01/11, Award (Oct. 12, 2005); *World Duty Free v. Kenya*, ICSID Case No. ARB/00/7, Award (Oct. 4, 2006).

22. See, e.g., *Bernhard Von Pezold v. Zim.*, ICSID Case No. ARB/10/15, Procedural Order No. 2 (June 26, 2012); *Border Timbers v. Zim.*, ICSID Case No. ARB/10/25, Procedural Order No. 2 (June 26, 2012); *Apotex v. U.S.*, UNCITRAL, Procedural Order No. 2 on the Participation of Non-Disputing Party (Oct. 11, 2011).

23. Mahnaz Malik, *The Expanding Jurisdiction of Investment-State Tribunals: Lessons for Treaty Negotiators*, INT’L INST. FOR SUSTAINABLE DEV. (2007).

24. Convention for the Protection of Human Rights and Fundamental Freedoms art. 33, Nov. 4, 1950, 213 U.N.T.S. 222.

25. *Id.*

26. See *id.* art. 1.

27. *Id.*

28. See *Chiragov and Others v. Armenia*, App. No. 13216/05, Eur. Ct. H.R., Merits, ¶ 168 (2015) (Grand Chamber); *Loizidou v. Turkey*, App. No. 15318/89, Eur. Ct. H.R., Merits, ¶ 52 (1996) (Grand Chamber); *Cyprus v. Turkey*, App. No. 25781/94, Eur. Ct. H.R., Merits, ¶ 80 (1994) (Grand

regardless of whether the territory is de jure a part of Russia. Therefore, the ECtHR does not have the jurisdiction to determine whether Crimea is part of the sovereign territory of Russia or Ukraine.

This is not to say that the ECtHR proceedings are insignificant. Ukraine could obtain multiple rulings from the ECtHR that Russia violated its human rights obligations under the ECHR. Nevertheless, Ukraine could not obtain a determination that Crimea constitutes Ukrainian rather than Russian territory.

B. *The ICJ Proceedings*

The ICJ may exercise jurisdiction over a dispute in four principal ways: first, the conclusion of a special agreement by both parties; second, the acceptance of compulsory jurisdiction by both parties; third, the acceptance of jurisdiction *forum prorogatum* by the respondent; and fourth, the existence of a treaty with a compromissory clause conferring jurisdiction on the ICJ.²⁹ As Russia has not accepted the ICJ's compulsory jurisdiction, is unlikely to conclude a special agreement with Ukraine, and is unlikely to accept the jurisdiction of the court *forum prorogatum*, the only possible ground for jurisdiction is a preexisting treaty with a compromissory clause.

Indeed, Ukraine has expressed its intention to file a claim before the ICJ under the International Convention on the Elimination of All Forms of Racial Discrimination (CERD),³⁰ Article 22 of which grants the ICJ jurisdiction over disputes with respect to the interpretation or application of the Convention.³¹ Nevertheless, the Convention primarily concerns racial discrimination; it does not prohibit the acquisition of territory. And like the ECHR, the CERD only imposes obligations on a state within its "jurisdiction," not its "territory,"³² thereby undermining prospects for ancillary jurisdiction. Therefore, the ICJ would not have the power to determine the extent of the "territory" of Russia.

Ukraine has also expressed its intention to file a claim before the ICJ under the International Convention for the Suppression of the Financing of Terrorism (ICSFT),³³ Article 24(1) of which grants the ICJ jurisdiction over disputes concerning the interpretation or application of the Convention.³⁴ As with the CERD, the problem remains that the ICSFT primarily concerns the financing of terrorism; it does not prohibit the acquisition of territory. Admittedly, there is a stronger case to be made for ancillary jurisdiction. Unlike the ECHR and the CERD, the ICSFT not only imposes obligations on a state

Chamber).

29. *Basis of the Court's Jurisdiction*, INTERNATIONAL COURT OF JUSTICE, <http://www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=2>; see Statute of the International Court of Justice arts. 36, 40, June 26, 1945, 33 U.N.T.S. 993.

30. See *supra* note 10.

31. International Convention on the Elimination of All Forms of Racial Discrimination art. 22, Mar. 7, 1966, 660 U.N.T.S. 195.

32. *Id.* art. 3.

33. See *supra* note 10.

34. International Convention for the Suppression of the Financing of Terrorism art. 24(1), Dec. 9, 1999, 2178 U.N.T.S. 197.

with regards to “legal entit[ies] located in its *territory*” (Article 5),³⁵ but also contains territorial requirements as to its applicability (Article 3).³⁶ Nevertheless, as Ukraine’s primary argument under the ICSFT appears to be that Russia itself is financing terrorist activities against Ukraine and/or Ukrainian nationals (be they in Crimea or elsewhere),³⁷ it would not be necessary for the ICJ to determine whether Crimea constitutes Russian or Ukrainian territory.³⁸ So the ICJ could not invoke its ancillary jurisdiction to make a determination of sovereignty over Crimea.

This is not to say that ICJ litigation is pointless. The court would have the jurisdiction to determine whether Russia has breached its treaty obligations by supporting racial discrimination and/or financing terrorism. The court, however, would not have the competence to determine whether Crimea constitutes Russian or Ukrainian territory.

C. *The UNCLOS Proceedings*

Ukraine has also expressed its intention to institute proceedings against Russia before an Annex VII tribunal constituted under UNCLOS.³⁹ With respect to this dispute, Ukraine claims, *inter alia*, that Russia has unlawfully exploited mineral, energy, and fishing resources in the continental shelf and exclusive economic zone of Crimea.⁴⁰

Like the ECHR, the CERD, and the ICSFT, UNCLOS does not prohibit the acquisition of territory. As a matter of ancillary jurisdiction, however, the UNCLOS tribunal may be required to make a determination on whether Russia or Ukraine has sovereignty over Crimea. As the logic goes, in order to determine whether Russia’s exploitation of the aforementioned resources is lawful or not, the tribunal would need to determine as a preliminary matter whether Crimea belongs to Russia or Ukraine as a matter of international law. Nevertheless, this sort of decision may lead down a slippery slope: under this logic, almost any sovereignty dispute concerning territory bordering water could potentially be brought before an UNCLOS tribunal for settlement.

It is for this reason that the UNCLOS tribunal in *Chagos Marine Protected Area* held that it did not have jurisdiction to make a determination on a question of territorial sovereignty—even if technically necessary to resolve an

35. *Id.* art. 5 (emphasis added).

36. *Id.* art. 3.

37. *Ukraine Intends in International Court of Justice to Prove Russia’s Involvement in Financing Terrorism – Justice Minister*, INTERFAX-UKRAINE (Aug. 9, 2014), <http://en.interfax.com.ua/news/general/217664.html>.

38. More specifically, there is no question that Russian government entities are entities located in Russian territory, so the Article 5 requirement would not trigger ancillary jurisdiction over the Crimea sovereignty dispute. And since the alleged terrorist activities are against Ukraine and/or Ukrainian nationals, Ukraine could establish its jurisdiction over the alleged offences under Article 7(2), thereby satisfying the territorial requirements as to the Convention’s applicability under Article 3. This is not to say that Ukraine could not, through a careful formulation of its arguments, somehow convince the Court to exercise ancillary jurisdiction over the territorial sovereignty dispute over Crimea. But contemplating the details of such a possibility goes beyond the scope of this Comment.

39. *See supra* note 11.

40. *See supra* note 11.

UNCLOS dispute—if the territorial sovereignty dispute constituted the “real issue in the case.”⁴¹ With regards to Ukraine’s UNCLOS claim against Russia, there is little doubt that the “real issue in the case” is the sovereignty dispute over Crimea. As a result, there is a significant risk—though it is far from certain—that the UNCLOS tribunal will decline jurisdiction, or at the very least refuse to make a determination of sovereignty over Crimea.

III. THE PROPOSED STATE-TO-STATE ARBITRATION

Fortunately, there is a solution to the problem: Ukraine can institute arbitral proceedings against Russia under the state-to-state dispute settlement provision of the Russia-Ukraine BIT.

Although present in the large majority of international investment agreements (IIAs),⁴² state-to-state dispute settlement provisions are very rarely invoked.⁴³ To date, more than 3,300 IIAs have been concluded,⁴⁴ but only four state-to-state investment arbitrations are publicly known.⁴⁵ Some commentators view state-to-state dispute settlement provisions as a unique opportunity to invite the contracting state parties to the table to discuss the interpretation or application of provisions in the IIA, especially in response to changing times.⁴⁶ Nevertheless, other commentators—as best represented by Professor W. Michael Reisman’s expert opinion in *Ecuador v. United States*—consider their scope *ratione materiae* to be very limited.⁴⁷ Article 10 of the Russia-Ukraine BIT provides in relevant part:

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

41. Chagos Marine Protected Area (Mauritius v. U.K.), PCA Case No. 2011-03, Award, ¶ 220 (Mar. 18, 2015) (quoting Nuclear Tests (N.Z. v. France), Judgment, 1974 I.C.J. Rep. 457, ¶ 30 (Dec. 20)).

42. IIAs include not only BITs but also multilateral investment treaties (MITs). Examples of MITs include the Energy Charter Treaty, the North American Free Trade Agreement, and the China–Japan–South Korea Trilateral Investment Agreement.

43. Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55 HARV. INT’L L.J. 1, 3 (2014); Frank Berman, *The Relevance of the Law on Diplomatic Protection in Investment Arbitration*, in 2 INVESTMENT TREATY LAW: CURRENT ISSUES 67, 72 (Federico Ortino et al. eds., 2007); Nathalie Bernasconi-Osterwalder, *State-to-State Dispute Settlement in Investment Treaties*, INT’L INST. FOR SUSTAINABLE DEV. 1 (2014).

44. United Nations Conference on Trade and Development, *International Investment Agreements Navigator*, INVESTMENT POLICY HUB, <http://investmentpolicyhub.unctad.org/IIA> (last visited June 17, 2016).

45. These four cases are *Ecuador v. United States*, *Italy v. Cuba*, *Peru v. Chile*, and *In the Matter of Cross-Border Trucking Services (Mexico v. United States)*. Bernasconi-Osterwalder, *supra* note 43, at 1. For brief summaries of the four cases, see Roberts, *supra* note 43, at 7-10.

46. E.g., Bernasconi-Osterwalder, *supra* note 43, at 20-21; Roberts, *supra* note 43, at 68-70.

47. *Ecuador v. U.S.*, Case No. 2012-5, Expert Opinion with Respect to Jurisdiction of W. Michael Reisman (Perm. Ct. Arb. 2012) [hereinafter Reisman Expert Opinion]. The tribunal ultimately did not accept Professor Reisman’s approach. Jarrod Hepburn & Luke Eric Peterson, *Revealed: Fuller Details of the Arbitrators’ Reasoning in the Still-Confidential Ecuador v. USA State-to-State BIT Award*, INVESTMENT ARB. REP., Apr. 28, 2016.

tribunal.⁴⁸

Ukraine could invoke Article 10 to institute proceedings against Russia over the interpretation and application of the word “territory” in Article 1(1) of the BIT,⁴⁹ in particular over whether the word “territory” with respect to Russia extends to Crimea. Although Ukraine would first have to negotiate with Russia for six months before instituting proceedings, it is very unlikely that either state would concede over the course of negotiations. Therefore, Ukraine should be able to institute the arbitral proceedings and finally obtain a seat at the table.

Russia could try to object to the jurisdiction of the tribunal by asserting that no “dispute” exists between Russia and Ukraine, as Article 10 requires. Although this objection may at first sound absurd, a similar objection was raised and accepted in *Ecuador v. United States*.⁵⁰ In that case, Ecuador sought an interpretive agreement with the United States regarding Article II(7) of the Ecuador-United States-BIT, but the United States refused to respond.⁵¹ As a result, Ecuador invoked the state-to-state dispute settlement provision of the BIT, requesting that a tribunal provide an “authoritative” interpretation of Article II(7).⁵² The tribunal, however, held that no dispute existed because (1) there were no “practical consequences” for the states; and (2) the United States had not put itself in “positive opposition” to Ecuador’s claim.⁵³ Commentators have since criticized the award for its overly formalistic approach to the definition of “dispute.”⁵⁴

Nevertheless, even if one were to accept the formalistic requirements of *Ecuador v. United States*, Ukraine would still be able to obtain an authoritative interpretation of the word “territory” in Article 1(1) of the Russia-Ukraine BIT. First, there is no doubt that there are “practical consequences”: determining that Crimea is a part of Russia not only would enable Ukrainian investors to obtain compensation from Russia through investor-state arbitration, but would also mean that Russia may lawfully exercise sovereignty and control over the territory. Second, Russia has put itself in “positive opposition” to Ukraine’s claim that Crimea is de jure still a part of Ukraine. Not only did Russia’s Permanent Representative to the United Nations positively oppose Ukraine’s claim before the General Assembly,⁵⁵ but Russia has formally accepted

48. Russia-Ukraine BIT, *supra* note 6, art. 10.

49. See *supra* note 16 and accompanying text.

50. Roberts, *supra* note 43, at 8-9; Bernasconi-Osterwalder, *supra* note 43, at 10-12; Hepburn & Peterson, *supra* note 47.

51. Margie-Lys Jaime, *Relying upon Parties’ Interpretation in Treaty-Based Investor-State Dispute Settlement: Filling the Gaps in International Investment Agreements*, 46 GEO. J. INT’L L. 261, 298-99 (2014); Roberts, *supra* note 43, at 54; Hepburn & Peterson, *supra* note 47.

52. *Ecuador v. U.S.*, PCA Case No. 2012-5, Request of the Rep. of Ecuador, ¶ 14 (Perm. Ct. Arb. 2011); see *id.* ¶ 15.

53. The award is not public but Investment Arbitration Reporter has reported on the award. See Hepburn & Peterson, *supra* note 47; Jarrod Hepburn & Luke Eric Peterson, *US-Ecuador Inter-State Investment Treaty Award Released to Parties; Tribunal Members Part Ways on Key Issues*, INVESTMENT ARB. REP., Oct. 30, 2012.

54. E.g., Jaime, *supra* note 51, at 300-01; Roberts, *supra* note 43, at 54-55; Clovis J. Trevino, *State-to-State Investment Treaty Arbitration and the Interplay with Investor State Arbitration Under the Same Treaty*, 5 J. INT’L DISP. SETTLEMENT 199, 203 (2013).

55. General Assembly Plenary Meeting on Ukraine, *supra* note 2, at 3.

Crimea's accession to the Federation.⁵⁶ Therefore, unlike the tribunal in *Ecuador v. United States*, the tribunal in the proposed state-to-state arbitration between Ukraine and Russia should find that it has jurisdiction.

Whether the tribunal should find on the merits that Crimea constitutes a part of Russia or Ukraine is a separate question on which this Comment does not opine.⁵⁷ Rather, this Comment merely argues that Ukraine has the ability to bring the legal dispute to state-to-state arbitration, which would—unlike the pending investor-state arbitrations—allow Ukraine to have a seat at the table.

CONCLUSION

The proposed state-to-state arbitration would by no means be a silver bullet. Even if the tribunal finds that Russia's territory does not extend to Crimea, the tribunal would not have the power to order retrocession, and even if it did, Russia would very likely not comply. Moreover, it is not immediately clear whether the investor-state tribunals would be bound by the state-to-state tribunal's interpretation of Russia's "territory."

Nevertheless, the interpretation would still be significant: not only would it provide an authoritative interpretation of Russia's "territory," but it would also enable Ukraine to participate in arbitral proceedings that most directly concern its interests in a situation where it currently does not have a seat at the table (but Russia does). Indeed, one could go so far as to argue that state-to-state dispute settlement provisions in IIAs today remain extremely important because of cases just like this one, where a state should—but otherwise would not—have a say in a dispute concerning the IIA in question.

Ukraine's institution of state-to-state proceedings against Russia would not only further its own interests but also support the future of state-to-state dispute settlement provisions in IIAs. The paucity of state-to-state investment arbitrations,⁵⁸ the recent *Ecuador v. United States* award,⁵⁹ and Professor W. Michael Reisman's expert opinion in *Ecuador v. United States*⁶⁰ cast doubt on the continued relevance of state-to-state dispute settlement provisions in IIAs today. Some commentators have argued for a greater role for these provisions, but with very little case law to support their positions.⁶¹ As a result, Ukraine's institution of state-to-state proceedings against Russia—even if Ukraine is ultimately unsuccessful on the merits of its claim—would go a long way toward strengthening support for state-to-state dispute settlement in investment arbitration.

56. The Kremlin, *Agreement on the Accession of the Republic of Crimea to the Russian Federation* (Mar. 18, 2014), <http://eng.kremlin.ru/news/6890>.

57. For commentary on this question, see *supra* note 5.

58. See *supra* note 45 and accompanying text.

59. See *supra* notes 51-54 and accompanying text.

60. Reisman Expert Opinion, *supra* note 47.

61. See *supra* note 54.