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UKRAINE V. RUSSIA AND PHILIPPINES V. CHINA: JURISDICTION AND LEGITIMACY

PETER TZENG†

On September 16, 2016, Ukraine instituted proceedings against Russia under the United Nations Convention on the Law of the Sea. Commentators have drawn parallels between this case and Philippines v. China, but key differences remain. Through a preliminary comparison of Ukraine v. Russia with Philippines v. China, this Article makes two arguments. First, the Ukraine v. Russia tribunal faces jurisdictional obstacles greater than those faced by the Philippines v. China tribunal. Second, the legitimacy of the Ukraine v. Russia proceedings is greater than that of the Philippines v. China proceedings.

I. INTRODUCTION

On September 16, 2016, Ukraine instituted proceedings against Russia under Annex VII of the United Nations Convention on the Law of the Sea (UNCLOS). Ukraine is requesting that the Annex VII tribunal declare that Russia has violated the Convention by interfering with Ukraine’s rights in maritime zones adjacent to

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Crimea.  

Commentators have drawn parallels between this case and Philippines v. China. In both cases, a less powerful state is suing a permanent member of the U.N. Security Council. In both cases, the less powerful state has brought the case before an Annex VII tribunal under UNCLOS. And in both cases, the tribunal’s exercise of jurisdiction over the dispute arguably implicates issues of territorial sovereignty over which the tribunal does not have jurisdiction ratione materiae.

Key differences, however, remain. Although the Ukraine v. Russia proceedings have only just begun, publicly available information allows for a preliminary comparison of Ukraine v. Russia with Philippines v. China. This Article makes two arguments in this regard. First, the Ukraine v. Russia tribunal faces jurisdictional obstacles greater than those faced by the Philippines v. China tribunal (Part II). Second, the legitimacy of the Ukraine v. Russia proceedings is greater than that of the Philippines v. China proceedings (Part III).

II. THE JURISDICTION OF THE TRIBUNAL

Russia can raise a variety of objections to the jurisdiction of the Ukraine v. Russia tribunal. Two stand out in particular because they were also raised by China in Philippines v. China: (1) the implication of territorial sovereignty issues (Section II.A); and (2) Article 281(1) of UNCLOS (Section II.B). A preliminary examination of these two objections reveals that Russia’s arguments on these two grounds are stronger than China’s arguments were.


A. The Implication of Territorial Sovereignty Issues

Russia can argue that the tribunal does not have jurisdiction because the dispute implicates territorial sovereignty issues. Article 288(1) of UNCLOS defines the jurisdiction of UNCLOS tribunals. It provides that UNCLOS tribunals "shall have jurisdiction over any dispute concerning the interpretation or application of this Convention." As Ukraine has framed the dispute as one concerning rights in maritime zones adjacent to Crimea, the dispute on its face concerns the interpretation and application of provisions of UNCLOS. Nevertheless, in light of Russia’s annexation of Crimea, the dispute also implicates issues of territorial sovereignty, issues that do not concern the interpretation or application of UNCLOS and thus fall outside the jurisdiction ratione materiae of the tribunal. The question, then, is whether the UNCLOS tribunal may still exercise jurisdiction over the maritime dispute. The two UNCLOS cases that have addressed this question—Mauritius v. United Kingdom and Philippines v. China—are not very favorable to Ukraine.

The case of Mauritius v. United Kingdom concerned the Chagos Archipelago, a group of approximately sixty islands in the Indian Ocean. As early as 1980, Mauritius and the United Kingdom had each claimed sovereignty over the islands. In April 2010, however, the United Kingdom unilaterally established a marine protected area (MPA) around the archipelago. Six months later, Mauritius instituted UNCLOS proceedings against the United Kingdom. Mauritius’s first submission was that “the United Kingdom is not entitled to declare [the MPA] because it is not the ‘coastal State’ within the meaning of [UNCLOS].” In essence, Mauritius was arguing that since it had sovereignty over the archipelago (i.e., since it was the relevant “coastal State”), the United Kingdom interfered with its rights by

6. UNCLOS, supra note 1, at 510, art. 288(1).
7. See Ukrainian Statement on Arbitration, supra note 1.
8. UNCLOS contains provisions on States’ rights in their adjacent maritime zones. See, e.g., UNCLOS, supra note 1, pts. II (territorial sea and contiguous zone), V (exclusive economic zone), VI (continental shelf).
11. Phil. v. China, Award, supra note 3; Phil. v. China, Award on Jurisdiction and Admissibility, supra note 3.
13. See Mauritius v. U.K., Award, supra note 10, ¶ 103.
14. Id. ¶ 5
15. Id. ¶ 14.
16. Id. ¶ 158.
declaring the MPA. The United Kingdom, however, argued that the sovereignty dispute was "the real issue in the case" and that the tribunal did not have jurisdiction over this first submission.

The tribunal began its assessment of its jurisdiction by characterizing the dispute, in particular by evaluating "where the relative weight of the dispute lies." In making this evaluation, the tribunal observed:

There is an extensive record, extending across a range of fora and instruments, documenting the Parties’ dispute over sovereignty. Moreover, . . . the consequences of a finding that the United Kingdom is not the coastal State extend well beyond the question of the validity of the MPA.

In light of these two observations, the tribunal concluded that “the Parties’ dispute with respect to Mauritius’ First Submission is properly characterized as relating to land sovereignty over the Chagos Archipelago.” As a result, the tribunal found itself without jurisdiction to address Mauritius’s first submission. The tribunal noted in obiter dictum, however, that if the dispute were properly characterized as an UNCLOS dispute, it would have had the jurisdiction to settle “ancillary” issues of territorial sovereignty.

The case of Philippines v. China concerned China’s maritime claims and activities in the South China Sea. In January 2013, the Philippines instituted UNCLOS proceedings against China, seeking, inter alia, declarations that China’s maritime claims based on its nine-dash line are invalid, and that certain maritime features in the South China Sea are properly characterized as rocks or low-tide elevations. The Philippines asserted that none of its submissions “require[d] the Tribunal to express any view at all as to the extent of China’s sovereignty over land territory.” Although China did not formally participate in the proceedings, its Ministry of Foreign Affairs asserted in a “position paper” that the tribunal did not have jurisdiction because “the essence of the subject-matter of the arbitration is

17. See id.
18. Id. ¶ 164.
19. Id. ¶ 170.
20. See id. ¶¶ 208, 211.
21. Id. ¶ 211.
22. Id.
23. Id. ¶ 212.
24. Id. ¶ 221.
25. Id.
26. See Phil. v. China, Award, supra note 3, ¶ 2; Phil. v. China, Award on Jurisdiction and Admissibility, supra note 3, ¶¶ 4-6.
27. Phil. v. China, Award, supra note 3, ¶ 4; Phil. v. China, Award on Jurisdiction and Admissibility, supra note 3, ¶ 2.
28. Phil. v. China, Award, supra note 3, ¶ 112; Phil. v. China, Award on Jurisdiction and Admissibility, supra note 3, ¶ 99.
29. Phil. v. China, Award on Jurisdiction and Admissibility, supra note 3, ¶ 141.
30. Phil. v. China, Award, supra note 3, ¶ 11.
terриториальной суверенности.”

Like the Mauritius v. United Kingdom tribunal, the Philippines v. China tribunal began its assessment of its jurisdiction by characterizing the dispute. Unlike the Mauritius v. United Kingdom tribunal, however, the Philippines v. China tribunal expressly adopted a two-part test to answer the characterization question. It held:

The Tribunal might consider that the Philippines’ Submissions could be understood to relate to sovereignty if it were convinced that either (a) the resolution of the Philippines’ claims would require the Tribunal to first render a decision on sovereignty, either expressly or implicitly; or (b) the actual objective of the Philippines’ claims was to advance its position in the Parties’ dispute over sovereignty.

Applying this two-part test to the facts of the case, the tribunal held that the resolution of the Philippines’ claims did not require it to first render a decision on sovereignty, and that the actual objective of the Philippines’ claims was not to advance its position in the dispute over sovereignty. The tribunal therefore upheld its jurisdiction over the dispute.

In Ukraine v. Russia, Ukraine, like Mauritius, is asserting “its rights as the coastal state in maritime zones adjacent to Crimea.” Therefore, like Mauritius, Ukraine is in essence arguing that since it has sovereignty over Crimea (i.e., since it is the relevant “coastal state”), Russia has interfered with its rights. If the Ukraine v. Russia tribunal follows the approach of the Mauritius v. United Kingdom tribunal or that of the Philippines v. China tribunal, it will likely find that it does not have jurisdiction over the dispute.

Under the Mauritius v. United Kingdom approach, the tribunal would examine the historical record of the dispute and the consequences of a finding that Russia is not the relevant “coastal State.” The historical record of the dispute would probably show that the dispute has primarily been about sovereignty over Crimea; the question of maritime rights is just an extension of the sovereignty dispute. And a finding that Russia is not the “coastal State,” like a finding that the United Kingdom is not the “coastal State” in Mauritius v. United Kingdom, would have consequences that extend well beyond the dispute concerning Russia’s actions in the waters adjacent to Crimea. Indeed, such a finding would imply that Russia does not have sovereignty over Crimea. As a result, under the Mauritius v. United Kingdom approach, the tribunal would likely conclude that the “relative weight of the dispute” lies in the sovereignty dispute, such that the tribunal would not have jurisdiction.

31. Phil. v. China, Award on Jurisdiction and Admissibility, supra note 3, ¶ 133.
32. Id. ¶ 150.
33. Id. ¶ 153.
34. Id.
35. Id.
36. Ukrainian Statement on Arbitration, supra note 1 (emphasis added).
37. See Mauritius v. U.K., Award, supra note 10, ¶ 158.
38. See supra note 22 and accompanying text.
Under the *Philippines v. China* approach, the tribunal would examine whether the resolution of Ukraine’s claims would require it to first render a decision on sovereignty, and also whether the “actual objective” of Ukraine’s claims is to advance its position in the sovereignty dispute. As for the first question, there is little doubt that the resolution of Ukraine’s claims would require the tribunal to first render a decision on sovereignty over Crimea. After all, under the “land dominates the sea” principle, Ukraine does not have the rights it claims in the maritime zones adjacent to Crimea unless it has sovereignty over Crimea. As for the second question, the “actual objective” of Ukraine’s claims is not as clear. But in light of the fact that the two-part test is alternative rather than cumulative, the tribunal could rely solely on its answer to the first question to conclude that the dispute is most properly characterized as a sovereignty dispute that falls outside the tribunal’s jurisdiction.

In conclusion, in adopting either approach, the *Ukraine v. Russia* tribunal would likely characterize the dispute as a sovereignty dispute, such that it would fall outside the tribunal’s jurisdiction. Nevertheless, this is not at all to say that it is a foregone conclusion that the tribunal does not have jurisdiction over the dispute. There are at least three reasons why the tribunal might still find that it has jurisdiction over the dispute.

First, the tribunal could choose to not follow the methods by which the *Mauritius v. United Kingdom* and *Philippines v. China* tribunals characterized the disputes before them. Indeed, the International Court of Justice (ICJ) has not prescribed a specific method for characterizing disputes; it recently reaffirmed that “[i]t is for the Court itself . . . to determine on an objective basis the subject-matter of the dispute” and “[i]n doing so, the Court examines the positions of both parties, ‘while giving particular attention to the formulation of the dispute chosen by the [a]pplicant.’” In other words, the *Ukraine v. Russia* tribunal could define for itself the best means of characterizing the dispute, tailored to the specific dispute before

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39. See supra note 33 and accompanying text.

41. See supra note 33 and accompanying text.
42. To be precise, under the *Philippines v. China* approach, the tribunal could only conclude that Ukraine’s submissions “could be understood to relate to sovereignty.” Nevertheless, the *Philippines v. China* tribunal appeared to hold that this would likely lead to the conclusion that the dispute falls outside the jurisdiction of the tribunal.
Second, even if the tribunal were to follow the Mauritius v. United Kingdom approach, it might reach a different conclusion with regard to the historical record of the dispute. After all, unlike in Mauritius v. United Kingdom, over the past three years there have been developments concerning the dispute between Ukraine and Russia over the maritime areas adjacent to Crimea.44

Third, and perhaps most significantly, Ukraine could try to assert that there is no legitimate legal dispute concerning sovereignty over Crimea. According to Ukraine, Russia violated the prohibition on the use of force and the principle of territorial integrity in annexing Crimea,45 and, under the principle of ex injuria jus non oritur, “facts which flow from wrongful conduct [cannot] determine the law.”46 Moreover, the U.N. General Assembly,47 the Venice Commission,48 the Chair of the Organization for Security and Co-operation in Europe,49 and many commentators50 have considered the Crimea referendum to be invalid. Under this theory, Ukraine would argue that its sovereignty over Crimea is a factual matter, such that the only relevant legal dispute for the UNCLOS tribunal is whether Russia interfered with its rights in the maritime zones adjacent to Crimea.


47. G.A. Res. 68/262, ¶ 5, Territorial Integrity of Ukraine, U.N. Doc. A/RES/68/262 (Mar. 27, 2014) (“The General Assembly... underscores that the referendum held in the Autonomous Republic of Crimea and the city of Sevastopol on 16 March 2014, having no validity, cannot form the basis for any alteration of the status of the Autonomous Republic of Crimea or the city of Sevastopol...”).


50. E.g., Baiju S. Vasani et al., Crisis in Crimea: Is Your Foreign Investment There Protected By a Treaty?, JONES DAY (Apr. 10, 2014), http://www.jonesday.com/crisis-in-crimea-is-your-foreign-investment-there-protected-by-a-treaty-04-10-2014/ (“The international community, including the United Nations, is likely to continue to see Crimea as part of Ukraine under international law...”); Yaraslav Kryvov & Maria Tsarova, Protecting Foreign Investors in Crimea: Is Investment Arbitration an Option?, CIS Arb. F. (July 29, 2014), http://www.cisarbitration.com/2014/07/29/protecting-foreign-investors-in-crimea-is-investment-arbitration-an-option/ (“There is a strong argument that non-recognition by nearly all states in the world of Crimea’s annexation means that under international law Crimea is not a part of Russia...”).
Although the jury may still be out on whether the tribunal has jurisdiction over the dispute, there is no doubt that the jurisdictional obstacle that the tribunal faces in this regard is greater than that which the Philippines v. China tribunal faced.

B. Article 281(1) of UNCLOS

Russia can also argue that the tribunal does not have jurisdiction, at least over parts of the dispute, because of Article 281(1) of UNCLOS. Article 281(1) provides:

If the States Parties which are parties to a dispute concerning the interpretation or application of this Convention have agreed to seek settlement of the dispute by a peaceful means of their own choice, the procedures provided for in this Part [including compulsory arbitration] apply only where no settlement has been reached by recourse to such means and the agreement between the parties does not exclude any further procedure.\(^{51}\)

Article 281(1) thus imposes two requirements\(^{52}\) for excluding the jurisdiction of an UNCLOS tribunal: (1) the parties must “have agreed to seek settlement of the dispute by a peaceful means of their own choice”; and (2) the agreement must “exclude . . . further procedure[s].” Many UNCLOS tribunals, as well as the Timor-Leste v. Australia conciliation commission, have interpreted and applied Article 281(1),\(^{53}\) but only two cases examined Article 281(1) in depth and are relevant for Ukraine v. Russia: Southern Bluefin Tuna and Philippines v. China.

In Southern Bluefin Tuna,\(^{54}\) the tribunal considered whether Article 16 of the Convention for the Conservation of Southern Bluefin Tuna (CCSBT) could exclude the tribunal’s jurisdiction under Article 281(1).\(^{55}\) Article 16 provides:

1. If any dispute arises between two or more of the Parties concerning the interpretation or implementation of this Convention, those Parties shall consult among themselves with a view to having the dispute resolved by

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51. UNCLOS, supra note 1, art. 281(1).

52. Note that if one assumes that the requirement that “no settlement has been reached by recourse to such means” includes a requirement for one or both states to genuinely attempt to settle the dispute by recourse to such means, then the jurisdiction of the tribunal could also be excluded if (1) the first requirement is met; and (2) neither state has genuinely attempted to settle the dispute by recourse to such means. Since it is not publicly known whether and to what extent Russia and/or Ukraine attempted to settle any dispute by recourse to any of the means provided for in the relevant treaties, this possibility is not discussed in this Article.


54. Southern Bluefin Tuna, Award on Jurisdiction and Admissibility, supra note 53.

55. Id. ¶¶ 53–59.
negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement or other peaceful means of their own choice.

2. Any dispute of this character not so resolved shall, with the consent in each case of all parties to the dispute, be referred for settlement to the International Court of Justice or to arbitration; but failure to reach agreement on reference to the International Court of Justice or to arbitration shall not absolve parties to the dispute from the responsibility of continuing to seek to resolve it by any of the various peaceful means referred to in paragraph 1 above.

3. In cases where the dispute is referred to arbitration, the arbitral tribunal shall be constituted as provided in the Annex to this Convention...

With respect to the first requirement, the tribunal found that Article 16 constituted an agreement “to seek settlement of the dispute by a peaceful means of their own choice,” even though (1) Article 16 applies only to CCSBT disputes, not UNCLOS disputes; (2) Article 16 provides for multiple (not “a”) peaceful means of settlement; (3) Article 16 is open-ended in also allowing for “other peaceful means of [the parties’] own choice”; and (4) “[n]o particular procedure [among the choices had] been chosen by the Parties.” The first point is perhaps the most critical. In this regard, the tribunal expressly held:

[T]he Parties to this [UNCLOS] dispute . . . are the same Parties grappling not with two separate disputes but with what in fact is a single dispute arising under both Conventions. To find that, in this case, there is a dispute actually arising under UNCLOS which is distinct from the dispute that arose under the CCSBT would be artificial.

With respect to the second requirement, the tribunal held that “the absence of an express exclusion . . . is not decisive.” It found that Articles 16(2) and 16(3) reveal that “the intent of Article 16 is to remove proceedings under that Article from the reach of [the compulsory dispute settlement procedures under UNCLOS].” such that Article 16 “exclude[s] any further procedure” within the meaning of Article 281(1) of UNCLOS. As a result, the tribunal concluded that Article 16 excluded its jurisdiction over the dispute.

In Philippines v. China, the tribunal considered whether multiple instruments could exclude its jurisdiction under Article 281(1): the 2002 ASEAN-China Declaration on the Conduct of Parties in the South China Sea, various China-Philippines bilateral statements, the Treaty of Amity and Co-operation in Southeast

57. Southern Bluefin Tuna, Award on Jurisdiction and Admissibility, supra note 53, ¶¶ 54–55.
58. Id. ¶ 54.
59. Id. ¶ 57.
60. Id.
61. Id. ¶ 59.
62. Id. ¶¶ 59, 65, 72(1).
Asia, and the Convention on Biological Diversity (CBD). The tribunal found that none of these instruments satisfied either of the two requirements, let alone both. It dismissed the ASEAN-China Declaration, the various bilateral statements and the Treaty of Amity on the basis of the first requirement because they did not contain any binding agreement for the settlement of disputes. The tribunal’s rulings on the CBD and the second requirement, however, deserve a closer examination, as they were in tension with Southern Bluefin Tuna.

As for the CBD, the Philippines v. China tribunal held that the CBD’s provisions on dispute settlement were inapplicable because the dispute before it was an UNCLOS dispute, not a CBD dispute. The tribunal agreed with the Philippines’ assertion that “[a] dispute under UNCLOS does not become a dispute under the CBD merely because there is some overlap between the two. Parallel regimes remain parallel regimes.” This notion of “parallel” disputes contrasts with the Southern Bluefin Tuna tribunal’s notion of a “single” dispute. Nevertheless, the two cases may perhaps be reconciled based on the content of the underlying disputes in question.

As for the second condition, the Philippines v. China tribunal held that it was not satisfied by any of the instruments because it required a “clear” and “express” exclusion of further procedures, and none of the instruments contained such an exclusion. As the tribunal itself recognized, this holding directly contradicted the Southern Bluefin Tuna tribunal’s holding that, for the second requirement, “the absence of an express exclusion . . . is not decisive.”

In Ukraine v. Russia, Russia can invoke at least three treaties to try to exclude the tribunal’s jurisdiction under Article 281(1): the 1997 Treaty on Friendship, Cooperation and Partnership Between Ukraine and the Russian Federation (the Friendship Treaty), the 2003 Treaty Between Ukraine and the Russian Federation on the Ukrainian-Russian State Border (the Border Treaty), and the 2003 Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of Azov and the Strait of Kerch (the Cooperation Treaty). Although Ukraine can

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63. Phil. v. China, Award on Jurisdiction and Admissibility, supra note 3, ¶ 193–289.
64. Id.
65. Id. ¶¶ 215–19.
66. Id. ¶ 245.
67. Id. ¶ 265.
68. Id. ¶¶ 281–85.
69. Id. ¶ 285.
70. See supra note 58 and accompanying text.
71. Phil. v. China, Award on Jurisdiction and Admissibility, supra note 3, ¶ 224.
72. Id. ¶¶ 222, 246, 268, 286.
73. Id. ¶ 223.
74. Southern Bluefin Tuna, Award on Jurisdiction and Admissibility, supra note 53, ¶ 57.
77. Treaty Between the Russian Federation and Ukraine on Cooperation in the Use of the Sea of
still make a cogent argument that none of these treaties can successfully exclude the tribunal’s jurisdiction under Article 281(1), the issues are more complicated. At the very least, all three treaties are legally binding instruments that contain binding agreements to settle certain disputes in a certain manner. In Philippines v. China, that was only true of the CBD. Below, the Friendship Treaty, the Border Treaty, and the Cooperation Treaty are analyzed in turn. The goal here is not to come to a conclusion on whether they can exclude the tribunal’s jurisdiction under Article 281(1). Rather, the goal is simply to flag the issues that the tribunal will have to deal with.

First, with respect to the Friendship Treaty, Article 37 provides: “Disputes concerning the interpretation or application of this Treaty shall be settled through consultation and negotiations between the High Contracting Parties.” As for the first requirement, there is no doubt that, by virtue of Article 37, Ukraine and Russia “have agreed to seek settlement of [a] dispute by a peaceful means of their own choice.” The tribunal, however, will have to determine whether the dispute in Ukraine v. Russia is a dispute concerning the interpretation or application of the Friendship Treaty. This raises the issue of whether the dispute under UNCLOS and the dispute under the Friendship Treaty constitute a “single” dispute as in Southern Bluefin Tuna or “parallel” disputes as in Philippines v. China. As for the second requirement, there is no express exclusion in the Friendship Treaty, so the requirement would not be met under Philippines v. China. Nevertheless, the Ukraine v. Russia tribunal could, like the Southern Bluefin Tuna tribunal, look for contextual clues to find an implied exclusion.

Second, with respect to the Border Treaty, Article 5 provides: “Questions relating to contiguous maritime waters shall be settled by agreement between the Contracting Parties in accordance with international law.” As for the first requirement, the principal question will be whether the dispute involves “[q]uestions relating to contiguous maritime waters.” If so, then the second requirement once again raises the issue of whether, under Southern Bluefin Tuna, contextual clues may indicate an implied exclusion.

Finally, with respect to the Cooperation Treaty, there are a few provisions that
Russia could invoke as agreements to "seek settlement of the dispute by a peaceful means of [the parties'] own choice." First, the preamble contains the following language: "The Russian Federation and Ukraine,... [c]onvinced that all issues relating to the Sea of Azov and the Kerch Strait must be resolved only by peaceful means jointly or by agreement between Russia and Ukraine;..." The preamble of course does not contain binding obligations. But it may be used to help interpret the articles of the treaty. There are two articles that directly touch on the question of dispute settlement:

Article 1. . . . The settlement of issues related to the Kerch Strait maritime area shall be carried out by agreement between the Parties.

Article 4. Disputes between the Parties related to the interpretation and application of the present Treaty shall be resolved through consultations and negotiations, as well as by other peaceful means chosen by the Parties.

Article 1 by its own terms applies only to the Kerch Strait. As a result, if Article 1 were to exclude the tribunal's jurisdiction under Article 28(1), it would do so only with respect to the Kerch Strait, not the Sea of Azov or the Black Sea. Article 1 appears to satisfy the first requirement because it represents an agreement "to seek settlement of [disputes related to the Kerch Strait] by a peaceful means of [the parties'] own choice," namely by "agreement." Nevertheless, as with the Border Treaty, it is unclear whether this agreement to carry out "[t]he settlement of issues . . . by agreement" excludes UNCLOS dispute settlement. At the very least, if the tribunal follows the Philippines v. China approach, it is not an express exclusion of further procedures.

Article 4 is also limited geographically, since the Cooperation Treaty applies only to the Sea of Azov and the Kerch Strait. Under Southern Bluefin Tuna, the fact that Article 4 provides for multiple (not "a") peaceful means of settlement and that it is open-ended in also allowing for "other peaceful means chosen by the Parties" do not disqualify Article 4 from being an agreement "to seek settlement of the dispute by a peaceful means of [the parties'] own choice." Nevertheless, Article 4 must confront the same question that arises for the Friendship Treaty: can the

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87. UNCLOS, supra note 1, art. 281(1).
89. MAKANE MOYE MBENGUE, Preamble, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 11 (Sept. 2006) ("Generally, in international law preambles are not capable of creating binding legal effects upon parties.").
90. Id. ¶ 3 ("It is widely accepted that a preamble has a very important role in the interpretation of treaties.").
91. Cooperation Treaty, supra note 77, art. 1 (author translation).
92. Id. art. 4 (author translation).
93. Id. art. 1.
94. UNCLOS, supra note 1, art. 281(1).
95. Cooperation Treaty, supra note 77, art. 1.
96. The title, preamble, and all substantive provisions of the Cooperation Treaty refer only to the Sea of Azov and the Kerch Strait. See id. pmbl., arts. 1–3.
97. UNCLOS, supra note 1, art. 281(1).
dispute under UNCLOS and a dispute under the Cooperation Treaty be considered a “single” dispute as in Southern Bluefin Tuna, or are they instead “parallel” disputes as in Philippines v. China?

Finally, one cannot forget the preamble. Although the preamble itself does not contain any legally binding obligations, it perhaps suggests that, in case of ambiguity, Articles 1 and 4 should be interpreted as exclusions of further procedures.

All this is not to say that there is a clear answer to any of these questions. Rather, it is only to say that the jurisdictional obstacles the Ukraine v. Russia tribunal faces under Article 281(1) is greater than that which the Philippines v. China tribunal faced under this article.

III. THE LEGITIMACY OF THE PROCEEDINGS

It is difficult to ascertain the “legitimacy” of a set of international dispute settlement proceedings. This Article does not aim to enter the rich academic debate on defining “legitimacy.” Nevertheless, most would agree that two important factors enhance the legitimacy of a set of proceedings: (1) the equal participation of the parties (Section III.A); and (2) the optics of the impartiality of the tribunal (Section III.B). Based on these two factors alone, this Part argues that, as of the time of writing of this Article, the legitimacy of the Ukraine v. Russia proceedings is greater than that of the Philippines v. China proceedings.

A. The Equal Participation of the Parties

The principle of audi alteram partem provides that all parties to a dispute must be heard. Nevertheless, states have on multiple occasions refused to participate in interstate dispute settlement proceedings. Annex VII of UNCLOS expressly contemplates this possibility. Article 9 of Annex VII provides:

If one of the parties to the dispute does not appear before the arbitral tribunal or fails to defend its case, the other party may request the tribunal to continue the proceedings and to make its award. Absence of a party or failure of a party to defend its case shall not constitute a bar to the proceedings.

This provision is in line not only with the Statute of the Permanent Court of
International Justice (PCIJ)\textsuperscript{102} and the ICJ Statute,\textsuperscript{103} but also with the jurisprudence of the PCIJ\textsuperscript{104} and the ICJ.\textsuperscript{105} It makes practical sense because otherwise a state would be able to halt any set of proceedings instituted against it by simply not participating. Nevertheless, just because the proceedings may continue does not mean that the legitimacy of the proceedings is left unscathed.

There is a large literature on the non-participation of states in interstate dispute settlement proceedings.\textsuperscript{106} Suffice it to say that the non-participation of a party undermines the legitimacy of the proceedings. Only one party presents its arguments to the tribunal, only one party furnishes evidence to the tribunal, and only one party responds to the tribunal’s concerns. For this reason, Article 9 of Annex VII provides that in the case of non-appearance: “Before making its award, the arbitral tribunal must satisfy itself not only that it has jurisdiction over the dispute but also that the claim is well founded in fact and law.”\textsuperscript{107} The PCIJ Statute\textsuperscript{108} and the ICJ Statute\textsuperscript{109} contain similar wording. As the Philippines v. China tribunal explained, “[t]he situation of a non-participating Party . . . imposes a special responsibility on the Tribunal. It cannot, in China’s absence, simply accept the Philippines’ claims or enter a default judgment.”\textsuperscript{110}

In Philippines v. China, China did not participate in the proceedings.\textsuperscript{111} Its Ministry of Foreign Affairs did, however, publish a “position paper” laying out legal arguments against the tribunal’s jurisdiction.\textsuperscript{112} Notably, this approach of filing a short, informal written submission without formally participating in the proceedings has quite a long history. To cite a few examples, Turkey did this in Aegean Continental Shelf,\textsuperscript{113} Iran did this in Tehran Hostages,\textsuperscript{114} France did this in the

\textsuperscript{102.} Statute for the Permanent Court of International Justice art. 53, Dec. 16, 1920, 6 L.N.T.S. 389 (“Whenever one of the parties shall not appear before the Court, or shall fail to defend his case, the other party may call upon the Court to decide in favour of his claim.”) [hereinafter PCIJ Statute].

\textsuperscript{103.} Statute of the International Court of Justice art. 53(1), June 26, 1945, 3 Bevans 1179 (“Whenever one of the parties does not appear before the Court, or fails to defend its case, the other party may call upon the Court to decide in favour of its claim.”) [hereinafter ICJ Statute].


\textsuperscript{105.} See id. at 38-77.


\textsuperscript{107.} UNCLOS, supra note 1, Annex VII, art. 9.

\textsuperscript{108.} PCIJ Statute, supra note 102, art. 53 (“The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.”).

\textsuperscript{109.} ICJ Statute, supra note 103, art. 53(2) (“The Court must, before doing so, satisfy itself, not only that it has jurisdiction in accordance with Articles 36 and 37, but also that the claim is well founded in fact and law.”).

\textsuperscript{110.} Phil. v. China, Award on Jurisdiction and Admissibility, supra note 3, ¶¶ 11-12.

\textsuperscript{111.} Phil. v. China, Award, supra note 3, ¶ 11.

\textsuperscript{112.} Id. ¶ 13.


Nuclear Tests cases, and Russia did this in Arctic Sunrise.  

Thanks to China’s position paper, the tribunal and the Philippines were able to at least identify China’s principal jurisdictional objections. Nevertheless, the tribunal and the Philippines still had to consider other preliminary objections that China could have raised, as well as arguments that China could have made on the merits. The fact that China neither presented its arguments in detail (e.g., through formal written and oral submissions), nor furnished evidence to the tribunal, nor responded to the tribunal’s concerns nonetheless harmed the legitimacy of the tribunal. Indeed, at least one commentator has questioned the legitimacy of the Philippines v. China proceedings based on the non-participation of China.

Russia’s record in participating in international dispute settlement proceedings is mixed. On the one hand, it did not participate in the only other UNCLOS Annex VII arbitration filed against it, Arctic Sunrise. It has also refused to participate in at least eight Crimea investor-state arbitrations. At least one commentator has thus surmised that Russia will not participate in Ukraine v. Russia. On the other hand, Russia has participated in virtually all other investor-state arbitrations in which it has been involved, including the $50 billion arbitrations with the Yukos majority.

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117. Phil. v. China, Award on Jurisdiction and Admissibility, supra note 3, ¶¶ 121–22.
118. Id. ¶ 123.
119. Phil. v. China, Award, supra note 3, ¶ 144.
shareholders. Russia also participated in all three prompt release cases before the International Tribunal for the Law of the Sea (ITLOS) in which it was involved, and it participated in Georgia v. Russia before the ICJ, and it is currently participating in the recent case that Ukraine filed against it before the ICJ.

Indeed, Russia has thus far fully participated in the UNCLOS arbitration. It has appointed an arbitrator, attended the first procedural meeting, and has appointed an agent and internationally renowned counsel. If Russia continues to fully engage with the arbitration, the legitimacy concerns that arose in Philippines v. China by virtue of China’s non-appearance will not be relevant for Ukraine v. Russia.

B. The Optics of the Impartiality of the Tribunal

As both Philippines v. China and Ukraine v. Russia have been brought under Annex VII of UNCLOS, the procedure for the constitution of the arbitral tribunal is the same. The applicant appoints one arbitrator, the respondent appoints another, and the parties jointly appoint three additional arbitrators. In cases where the respondent does not appoint an arbitrator and/or the parties cannot agree on the three additional arbitrators, the President of ITLOS makes the appointment(s). If, however, the President is a national of one of the parties to the dispute, the next most senior member of ITLOS who is not a national of one of the parties makes the


129. Id.


131. See UNCLOS, supra note 1, Annex VII, art. 3.

132. Id. at Annex VII, art. 3(b)–(d).

133. Id. at Annex VII, art. 3(c)–(e).
appointment(s).  

In Philippines v. China, the Philippines appointed Judge Rüdiger Wolfrum (Germany).  As China did not participate in the proceedings, the remaining four appointments were left to the President of ITLOS, who at the time was Judge Shunji Yanai (Japan). He appointed Judge Stanislaw Pawlak (Poland), Judge Jean-Pierre Cot (France), Professor Alfred H.A. Soons (Netherlands), and, as presiding arbitrator, Judge Thomas A. Mensah (Ghana).  

Although the tribunal was constituted in complete accordance with Annex VII of UNCLOS, one cannot ignore the optics concerning the lack of impartiality of the tribunal. First, Judge Wolfrum is known for his expansive views on the jurisdiction of UNCLOS tribunals, particularly with regard to UNCLOS disputes implicating issues of territorial sovereignty. Second, Japan itself is involved in territorial sovereignty disputes with China in the East China Sea, and the antagonism between China and Japan is no secret. Third, four of the five members of the tribunal were European, suggesting that the tribunal may not have been able to consider the diversity of perspectives in international law. Indeed, Chinese officials and Chinese media have commented on Judge Wolfrum’s alleged pro-jurisdiction bias, Judge Yanai’s alleged anti-China bias, and the dominance of.

134. Id. at Annex VII, art. 3(e).
135. Phil. v. China, Award, supra note 3, ¶ 30.
136. Id.
138. Phil. v. China, Award, supra note 3, ¶ 30.
141. See supra text accompanying notes 135–138.
142. E.g., South China Sea Arbitration Decided by Biased Arbitrators, GLOBAL TIMES (July 19, 2016), http://www.globaltimes.cn/content/995265.shtml.
Europeans on the tribunal.\textsuperscript{145}

In \textit{Ukraine v. Russia}, Ukraine appointed Professor Vaughan Lowe (United Kingdom) and Russia appointed Judge Vladimir Golitsyn (Russia).\textsuperscript{146} It is not publicly known whether Ukraine and Russia agreed on the three additional arbitrators, but it appears that they did not.\textsuperscript{147} Normally, the appointment of those arbitrators would be left to the President of ITLOS.\textsuperscript{148} However, as the President of ITLOS at the time was Judge Golitsyn,\textsuperscript{149} a Russian national, the appointment power fell on the Vice-President of ITLOS,\textsuperscript{150} who at the time was Judge Bouguetaia,\textsuperscript{151} an Algerian national. The remaining three arbitrators appointed to the \textit{Ukraine v. Russia} tribunal, presumably by Judge Bouguetaia,\textsuperscript{152} are Judge Bouguetaia himself (Algeria), Judge Alonso Gomez-Robledo (Mexico), and, as presiding arbitrator, Judge Jin-Hyun Paik (South Korea).\textsuperscript{153}

The optics of the composition of the \textit{Ukraine v. Russia} tribunal are better. First, none of the arbitrators are widely known for pro-jurisdiction tendencies in UNCLOS disputes. Second, there is nothing that immediately suggests that Judge Bouguetaia would be biased in his selection of arbitrators for the dispute. To the contrary, the fact that Algeria abstained from the vote at the U.N. General Assembly calling for the non-recognition of the Crimea referendum\textsuperscript{154} gives an impression of impartiality. Third, the arbitrators are geographically diverse, with one from Western Europe, one from Eastern Europe, one from North Africa, one from Latin America, and one from East Asia.\textsuperscript{155}

Nevertheless, if it is indeed true that Judge Bouguetaia appointed the three

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\textsuperscript{147} The statement by the Ukrainian Ministry of Foreign Affairs revealing the constitution of the tribunal noted: “The Ministry of Foreign Affairs of Ukraine expresses its gratitude to the Vice-President of the International Tribunal for the Law of the Sea for rapid formation of the tribunal.” \textit{Id}. This statement suggests that Judge Bouguetaia, the Vice-President of ITLOS, appointed the remaining three arbitrators. This would be consistent with the procedures for appointment under Annex VII of UNCLOS since the President of ITLOS is a national of one of the parties to the dispute. See UNCLOS, \textit{ supra} note 1, Annex VII, art. 3(e).

\textsuperscript{148} See UNCLOS, \textit{ supra} note 1, Annex VII, art. 3(e).


\textsuperscript{150} See \textit{ supra} note 147.


\textsuperscript{152} See \textit{ supra} note 147.

\textsuperscript{153} Ukrainian Statement on Hearing, \textit{ supra} note 146.


\textsuperscript{155} See \textit{ supra} text accompanying notes 146–153.
additional members of the tribunal,\textsuperscript{156} one cannot omit from this discussion the elephant in the room: Judge Bouguetaia’s self-appointment. There is almost no literature on the propriety of self-appointment in international arbitration.\textsuperscript{157} In another recent UNCLOS case, Enrica Lexie, Judge Golitsyn appointed himself as the presiding arbitrator.\textsuperscript{158} But this instance of self-appointment appears also to have gone under the radar of commentators.

IV. CONCLUSION

This Article concludes that the Ukraine v. Russia tribunal faces jurisdictional obstacles greater than those faced by the Philippines v. China tribunal, even though the legitimacy of the Ukraine v. Russia proceedings is greater than that of the Philippines v. China proceedings. Notably, this Article’s conclusions are comparative. It does not attempt to divine how the Ukraine v. Russia tribunal will rule on its jurisdiction, nor does it make any assertion concerning the absolute legitimacy of either the Ukraine v. Russia proceedings or the Philippines v. China proceedings. Rather, it merely aims to show that there are certain key differences between these two cases.

Much has yet to be seen with regards to Ukraine v. Russia. Will Russia continue to fully participate in the arbitration? Will the tribunal uphold its jurisdiction? In the event of an adverse decision, will Russia comply with the award? This Article obviously cannot answer any of these questions. But it is hoped that the Article has at the very least provided a helpful preliminary examination of some of the key issues in Ukraine v. Russia against the backdrop of Philippines v. China.

\textsuperscript{156} See supra note 147.

\textsuperscript{157} At the present moment, the author’s own blog post on the topic appears to be the only academic writing that addresses the issue. See Peter Tzeng, Self-Appointment in International Arbitration, EJIL: TALK! (June 7, 2017), https://www.ejiltalk.org/self-appointment-in-international-arbitration/.

\textsuperscript{158} The “Enrica Lexie” Incident (It. v. India), PCA Case No. 2015-28, Provisional Measures, Order, ¶ 14 (Apr. 29, 2016).