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# A PROPOSED REMEDY FOR THE DILEMMA OF INNUMERABLE FUTURES: UKRAINE, RUSSIA, AND NATO MEMBERSHIP

“Time forks perpetually toward innumerable futures.  
In one of them I am your enemy.”<sup>1</sup>

## INTRODUCTION

In the years following the fall of the Soviet Union, Ukraine has faced numerous political and social challenges as it strives toward self-determination.<sup>2</sup> Many of these hardships can be directly attributed to its tenuous relationship with an imposing geopolitical superpower in neighboring Russia.<sup>3</sup> Efforts to gain independence and foster relationships with Western states have been stymied by what some have called the “Russian Factor” in Ukrainian zeitgeist.<sup>4</sup> What has resulted from nearly twenty years of a new Ukrainian regime is a pastiche of western ideals and Russian nationalism, a nation striving to achieve recognition as an independent force, but continually reverting to its status as a “younger brother” to Russia.<sup>5</sup> In an assertive move toward independence, Ukraine was able to secure promises of territorial integrity and sovereignty when it obtained Russia’s signature on the landmark Treaty of Friendship, Cooperation, and Partnership in 1997 (the “Friendship Treaty”).<sup>6</sup> Now, though, as Ukraine looks to take the next step in Westernizing its defense

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1. Jorge Luis Borges, *The Garden of Forking Paths*, MICH. ALUMNUS Q. R., Spring 1958 (Donald A. Yates trans.), reprinted in *Labyrinth* 19, 28 (Donald A. Yates & James E. Irby eds., 1964).

2. See generally Anka Feldhusen, *The “Russian Factor” in Ukrainian Foreign Policy*, FLETCHER F. WORLD AFF., Fall 1999, at 119; John Morrison, *Pereyaslav and After: The Russian-Ukrainian Relationship*, 69 INT’L AFF. 677, 682 (1993); Philip Chase, Note, *Conflict in the Crimea: An Examination of Ethnic Conflict Under the Contemporary Model of Sovereignty*, 34 COLUM. J. TRANSNAT’L. L. 219 (1994) (discussing the problems caused by Crimea in Ukraine after the fall of the Soviet Union).

3. See Morrison, *supra* note 2, at 682 (“Ukraine’s stake in the outcome of this process of Russian self-definition is much higher than that of the other former Soviet republics.”).

4. See Feldhusen, *supra* note 2, at 119 (arguing that Ukraine is in the process of turning its back on Russia by establishing a view toward Western policies as evidenced by four factors: the relationship with NATO; a stronger position with the Black Sea Fleet; implementation of the Treaty on Friendship, Cooperation, and Partnership; and economic policy).

5. Morrison, *supra* note 2, at 682.

6. Treaty Between the Russian Federation and Ukraine on Friendship, Cooperation and Partnership, Russ.-Ukr., May 31, 1997, U.N. Doc. A/52/174. [hereinafter Treaty of Friendship, Cooperation and Partnership].

mechanisms, many politicians and citizens from both States have raised debate over whether Ukraine's signature on the North Atlantic Treaty would violate its obligations to Russia under the Friendship Treaty.<sup>7</sup> While many writers have focused on the political and social ramifications of NATO membership, this Note aims to explore the legal ramifications as recognized by international treaty law if Ukraine were to accept a bid to join the NATO military alliance.<sup>8</sup> Fundamentally, for the treaties to conflict there must be an established violation of international law.<sup>9</sup> This statement begs the question whether an anticipatory breach<sup>10</sup> of a treaty gives rise to a material breach, and to what extent this breach invalidates an earlier treaty.<sup>11</sup> Relying on the universally accepted treaty law maxim *pacta sunt servanda*,<sup>12</sup> this Note concludes that Ukraine-NATO

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7. *Friendship Between Russia and Ukraine Comes to an End*, PRAVDA.RU, Jan. 1, 2008, [http://english.pravda.ru/world/ussr/23-01-2008/103596-russia\\_ukraine-0](http://english.pravda.ru/world/ussr/23-01-2008/103596-russia_ukraine-0) (Dmitry Sudakov trans.); Oleg Shchedrov, *Russia Warns Its Neighbors over NATO Ambitions*, REUTERS, Jun. 6, 2008, <http://www.reuters.com/article/idUSL0643117820080606>; David L. Stern, *Russian Actions Reignite Tensions over Strategic Port in Ukraine*, N.Y. TIMES, Aug. 25, 2008, at A6; Aleksandr Vatutin, *Dragging Ukraine into NATO Shall Undermine Friendship and Partnership Treaty with Russia*, THE VOICE OF RUSSIA, June 17, 2008, <http://english.ruvr.ru/2008/06/17/198741.html>.

8. See Anatoliy M. Zlenko, *Foreign Policy Interests of Ukraine and Problems of European Security*, 21 FORDHAM INT'L L.J. 45 (1997) (discussing the political development and foreseeable political ramifications of Ukraine in Post-Soviet Europe, as well as Ukraine's developments with NATO); see also *Friendship Between Russia and Ukraine Comes to an End*, *supra* note 7; Shchedrov, *supra* note 7; Stern, *supra* note 7; Vatutin, *supra* note 7.

9. GUYORA BINDER, TREATY CONFLICT AND POLITICAL CONTRADICTION: THE DIALECTIC OF DUPLICITY 28 (1988). Binder's work on the Arab-Israeli conflict and his examination of the various treaty obligations between the United States, Egypt, and the Arab League is an inspiration for much of the reasoning and arguments in this Note. Binder, however, analyzes treaty obligations in light of a theory that a treaty confers an objective property right. *Id.* While this is an intriguing theory, it is not addressed in this Note; meanwhile, the basic tenants of Binder's argument are indeed relevant to this discussion.

10. *Id.* at 160 n.175 ("By anticipatory breach, I mean the doctrine that the formation of a contract obligating one to violate an earlier contract under some future circumstance is a wrong, mandating imposition of whatever sanctions ordinarily attend breach.").

11. DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS 38 (2001) ("International law clearly recognizes the right of a State to terminate a treaty if another party has breached its obligations under the agreement. Customary International law and VCLT [,however, does not allow for termination] unless another party has *materially* breached a provision essential to the accomplishment of the object or purpose of a treaty.") (emphasis in the original, internal quotations and citations omitted).

12. Vienna Convention on the Law of Treaties, *done* May 23, 1969, 1155 U.N.T.S. 331, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith."); MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL

membership would require a renegotiation of the terms of the Treaty of Friendship in order to avoid uncertainties that would arise inevitably in the event of a conflict between Russia and a NATO ally.

Part I of this Note examines the basic theories of international law as purported by legal positivists and political realists. Part II outlines the fundamentals of international treaty interpretation. Part III provides background on the political and legal complications of the relationship between Russia and Ukraine. Part IV analyses the conflicting aspects of the North Atlantic Treaty and the Treaty of Friendship, and juxtaposes the conflict with a prior, similar dispute between Egypt, Israel, and Syria in order to highlight the insufficiency of past efforts and identify remaining shortfalls. Then, finally, Part V evaluates prospective methods for avoiding ambiguous treaty obligations in the future. Ultimately, this Note argues that transparent, preemptive renegotiation of ambiguous obligations is the best path to establishing bright-line alliances between Ukraine and Russia going forward.

#### I. BASIC PHILOSOPHY OF INTERNATIONAL LAW

Treaty law is, for the most part, noncontroversial.<sup>13</sup> By definition, a treaty is a written agreement between states, governed by international law, conferring upon states certain legal rights and obligations.<sup>14</sup> Because treaties are governed by international law, their terms are subject to the hierarchy of international laws of interpretation rather than the municipal and domestic laws of their various member-states.<sup>15</sup> Unlike domestic law, sources of international law are not as readily identifiable.<sup>16</sup> No international legislation or international court exists to issue binding legal rules; the international court, for example, is not bound by the principle

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LAW 9 (3d ed. 1999) (“*[P]acta sunt servanda . . .* express[es] the fundamental principle that agreements, even between sovereign states, are to be respected.”).

13. REBECCA M.M. WALLACE, *INTERNATIONAL LAW* 196 (1986)

14. Vienna Convention on the Law of Treaties, *supra* note 12, art. 2, sec. 1(a) (“‘treaty’ means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments . . . .”); JANIS, *supra* note 12, at 9; WALLACE, *supra* note 13, at 197. *But see* South West Africa (Eth. v. S. Afr.), 1962 I.C.J. 319, 402 (Dec. 21) (separate opinion of Judge Jessup). (“The notion that there is a clear and ordinary meaning of the word treaty is a mirage.”).

15. BEDERMAN, *supra* note 11, at 12.

16. Keith G. Govern & Eric C. Bales, *Taking Shots at Private Military Firms: International Law Misses Its Mark (Again)*, 32 *FORDHAM INT’L. L.J.* 55, 66 (2008) (“The sources of international law are: (1) treaties, (2) customary international law, (3) *jus cogens* principles (“preemptory norms”) recognized by civilized nations, and (4) judicial decisions of the International Court of Justice.”).

of *stare decisis*.<sup>17</sup> Therefore, the binding force of treaties is derived from an implied good faith obligation—*pacta sunt servanda* (agreements are to be respected).<sup>18</sup> Treaty law, then, is largely self-regulating; to resolve construction and interpretation disputes, one must look to other treaties and customs of international practice.<sup>19</sup>

It is crucial to note that treaties have a dual nature.<sup>20</sup> Each is a creature of both political and legal intentions, borne out of a political process to serve as a component of the system of international law.<sup>21</sup> While the legal doctrine of treaty law may be relatively straightforward, myriad social and political factors can blur state obligations and make treaties more difficult to interpret than other types of agreements.<sup>22</sup> In analyzing

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17. WALLACE, *supra* note 13, at 7 (“[O]n the international plane there is neither an international legislature which passes international legislation, nor is there an international court to which all members of the international community must compulsorily submit. Furthermore, the international legal system does not, unlike the majority of municipal legal systems, possess a written constitution.”); see JANIS, *supra* note 12, at 8 (“Unlike a domestic legal order, international law displays little procedural hierarchy. One or another court, one or another agency, one or another diplomatic settlement very often has no accepted primacy over another.”).

18. Vienna Convention on the Law of Treaties, *supra* note 12, art. 26; see MALGOSIA FITZMAURICE & OLUFEMI ELIAS, *CONTEMPORARY ISSUES IN THE LAW OF TREATIES* 3 (2005) (“In principle, treaty obligations comprise those international obligations that arise directly by operation of the general principle of law embodied in the well-known maxim *pacta sunt servanda*.”); JANIS, *supra* note 12, at 9; WALLACE, *supra* note 13, at 203 (“States are charged with performing and fulfilling their treaty obligations which are binding in good faith—*pacta sunt servanda* is the maxim which expresses this basic canon of treaty observance.”).

19. WALLACE, *supra* note 13, at 7–8 (noting that the pragmatic response to questions regarding the legal quality of international rules can be answered by looking at Article 38 of the Statute of the International Court of Justice, and that to decide disputes which may come before it, the Court is to apply treaties, customs, and general principles of international law before looking to judicial decisions and teachings); see also BINDER, *supra* note 9, at 1 (discussing the interesting paradox about the nature of international law, where sovereignty of nations is the source of its legitimacy but also its subject of constraint).

20. Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 2004 (2002) (noting that treaties have a dual nature “as instrumental and expressive tools”).

21. SHIRLEY V. SCOTT, *THE POLITICAL INTERPRETATION OF MULTILATERAL TREATIES* 7 (2004); see also Scott M. Sullivan, *Rethinking Treaty Interpretation*, 86 TEX. L. REV. 777, 810 (2008) (“The nature of treaties as legal and political devices means that there are compelling justifications for providing deference to executive judgments as to how they operate and should be interpreted.”).

22. BEDERMAN, *supra* note 11, at 37. One commentator has elaborated on the consequences of the political factors that complicate treaty interpretation:

the scope and application of a treaty, it is helpful to look at the intentions of the parties when they entered into the agreement.<sup>23</sup> However, because treaties are borne of politics and law, it is difficult to separate legal from political obligations.<sup>24</sup> Moreover, further difficulty may arise during this part of the analysis because constructions of legal and political obligations often overlap.<sup>25</sup>

Thus, to understand a given state's intentions with respect to a treaty, it is necessary to understand the two dominant schools of legal philosophy in international law.<sup>26</sup> Throughout the twentieth century, the doctrine of legal positivism has developed significantly,<sup>27</sup> but notions of legal positivism in international law can be traced to the writings of Grotius, who said, "[A]ll things are uncertain the moment men depart from law."<sup>28</sup> The proliferation of international conventions, such as the United Nations, the North Atlantic Treaty Organization, and the World Trade Organization, evince the extent of support for this sentiment in the international arena.<sup>29</sup> Arguably, the driving force behind these organizations is the shared will to create a web of adherence—the desire for feasible enforcement,

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Judicial actions that contravene executive foreign policy can harm national foreign policy and compromise the ability of the Executive to speak with one voice. At the same time, treaties create obligations that are designed to have the force of law with the implicit corresponding responsibility of the Judiciary to provide meaning to that law. Treaties are not unilateral actions by the Executive; rather, they acquire the force of law through legislative review and consent. Unwarranted deference to executive treaty interpretations of instruments purporting to limit executive actions and that are interpreted inconsistently within the Executive Branch compromises separation-of-powers principles . . . .

See Sullivan, *supra* note 21, at 810–11.

23. See SCOTT, *supra* note 21, at 7.

24. *Id.*

25. *Id.* at 5 (“Assumptions that are internal to positivist legal analysis cannot be meaningfully transferred to explain political phenomena. Words take on a particular meaning when used within the sub-system of international law.”).

26. See JANIS, *supra* note 12, at 6 (noting that the two types of international lawyers are positivists and naturalists). In this paper, naturalist and realist are understood to be interchangeable.

27. See generally JANIS, *supra* note 12, at 12; Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278 (2001).

28. MARTIN WRIGHT, FOUR SEMINAL THINKERS IN INTERNATIONAL THEORY 39 (Gabrielle Wright & Brian Porter eds., 2005) (internal citations omitted).

29. See U.N. Charter preamble, para. 3 (“[T]o establish conditions under which justice and respect for the obligations arising from treaties and other sources of international law can be maintained . . .”). See generally John Norton Moore, *Enhancing Compliance with International Law: A Neglected Remedy*, 39 VA. J. INT’L L. 881 (1999) (arguing that the basis of international law relies on compliance among states).

made possible by threats of legal or economic sanctions against noncompliant state parties.<sup>30</sup>

Doctrinally, the philosophy of legal positivism argues that “legal rules are valid only because they are enacted by an existing political authority or accepted as binding in a given society, not because they are grounded in morality or in natural law.”<sup>31</sup> Eschewing the notion of rules grounded in intangible concepts of morality, the theory relies on the belief that legal norms are separable from other norms in society.<sup>32</sup> This feature is an important facet of legal positivism that suggests certain norms exist because they are set in place by a legislature.<sup>33</sup> From there it follows that these legal norms “play a distinctive role in the practical reasoning of citizens,” causing behavior to yield to legally proscribed boundaries.<sup>34</sup> While this might seem obvious, the theory begins to lose force in the international arena.<sup>35</sup> Unlike the sanctions imposed on a speeding motorist, the sanctions imposed on a treaty violator are not easy to predict, and this

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30. With regard to the WTO, see Chios Carmody, *A Theory of WTO Law*, 11 J. INT'L ECON. L. 527, 555–56 (2008). One theory behind WTO law suggest a basic assumption that “the principal purpose of WTO law is to protect expectations, that its subsidiary purpose is to adjust to realities, and that these two purposes interact to promote interdependence.” *Id.*; see also, Daniel C. K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW 52–53 (2008) (“Under the WTO system, . . . dispute settlement bodies have no power to coerce nations to comply with its decisions. . . . The ultimate goal of the WTO is to induce the offending member to bring its measures into conformity with the WTO agreements.”). For the U.N., see sources cited *supra* note 29.

31. BLACK'S LAW DICTIONARY 915 (8th ed. 2004).

32. Leiter, *supra* note 27, at 286.

33. S.G. Sreejith, *Public International law and the WTO: A Reckoning of Legal Positivism and Neoliberalism*, 9 SAN DIEGO INT'L. L.J. 5, 9–10 (2007) (providing an overview of the development of legal positivism. The running thread through all these theories is that law and morality are not connected, and legal validity is determined ultimately by reference to social facts).

34. Leiter, *supra* note 27, at 286. Leiter explains:

[L]egal norms play a distinctive role in . . . [one's] reasoning about what one ought to do. If I say, for example, “Don't go faster than 65 m.p.h. on the highway,” that may give you reasons for acting depending, for instance, on whether you think I am a good driver, knowledgeable about the roads, sensitive to your schedule, and the like. But when the legislatures issues the same proscription—“Don't go faster than 65 m.p.h. on the highway”—that adds certain reasons for action that were not present when I articulated the same norm.

*Id.*

35. Martin V. Totaro, *Legal Positivism, Constructivism, and International Human Rights Law: The Case of Participatory Development*, 48 VA. J. INT'L. L. 719, 723 (2008) (“Legal positivism in international law takes on a peculiar form when compared with Austin and Hart's respective formulations of what law is.”).

uncertainty is magnified when parties agree to ambiguous resolution provisions.<sup>36</sup> In an international forum, the positivist doctrine is not supported by a hierarchy of legitimacy, but rather by a norm of agreeance that the law is to be respected.<sup>37</sup>

In contrast to the positivist doctrine, legal realism adheres to the notion that parties will act in their best interests because legal rules are often indeterminate, and domestic law “is based, not on formal rules or principles, but instead on judicial decisions that should derive from social interests and public policy.”<sup>38</sup> The realist, for example, is in a better position to explain when cases with similar facts have different outcomes.<sup>39</sup> With respect to case law, the realist does not go so far as to suggest that judges are making up law—rather they are free to employ “equally legitimate, but conflicting, canons of interpretation,” which can result in the indeterminacy of the contents of a rule.<sup>40</sup> On an international scale, the legal realist theory often manifests as the political realist—or, *realpolitik*—notion that international law lacks intrinsic power to prevent states from acting when politics suggests a contrary course.<sup>41</sup> Former U.S. Secretary of State Henry Kissinger advocated this school of political thought, arguing that a nation’s foreign policy should reflect its natural

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36. BINDER, *supra* note 9, at 21. Binder refers to, but rejects, a positivist argument that international law loses its legal character due to the absence of an international sovereign, and instead assumes that “international law can function as a legal system in the presence of conditions fulfilling criteria of legitimacy recognizable to such participants.” *Id.*

37. *Id.* at 21–22.

38. BLACK’S LAW DICTIONARY, *supra* note 31, at 915; *see also* Leiter, *supra* note 27, at 289. Leiter follows the “empirical rule skepticism” realist philosophy, as Hart illegitimated the conceptual rule skeptic theory.

39. *See* Leiter, *supra* note 27, at 288–89.

40. *Id.* at 295.

41. Ruti Teitel, *Humanity Law: A New Interpretive Lens on the International Sphere*, 77 *FORDHAM L. REV.* 667, 671 (2008). Teitel points out:

[F]or realists, state power remains the fundamental category for explaining behavior in the international realm. The state continues to be the main actor in international relations and, therefore, realists question the degree to which there may be significant substantive transformation in the relation international law bears to the state-citizen relationship (for example, changes relating to the judicialization of the state) or any other citizen-collective relationship.

*Id.*; *see* SCOTT, *supra* note 21, at 3 (noting that a realist would say, for instance, a treaty is a “mere scrap of paper”); *see also* BINDER, *supra* note 9, at 39 (noting, while not referring to political realism explicitly, that “[a]s a practical matter, nations have rarely accorded much authority to international law”).

interests rather than its moral or legal ideals, should they conflict.<sup>42</sup> To the realist, what defines the scope of a treaty will raise political questions regarding state power and state interests, rather than international legal obligations.<sup>43</sup>

While many of the basic tenets of the realist approach are heavily refuted,<sup>44</sup> one of the important points an international lawyer can take away from it is the understanding that nations, when given the opportunity, will act in their best interest and not necessarily for the betterment of the international society.<sup>45</sup> What the international legal system must strive for, then, is a clear set of obligations that promote compliance and strike against the notion that a nation will act solely in its best interest.<sup>46</sup> Therefore, it is important that countries eliminate conflicting obligations in order to avoid unforeseeable legal consequences when they are called forth to fulfill those obligations as required in the treaty framework.<sup>47</sup> Otherwise, when left free to employ conflicting means of interpretation,

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42. C.G. Schoenfeld, Book Review, 15 POL. PSYCHOL 579, 580 (1994) (reviewing WALTER ISAACSON, *KISSINGER: A BIOGRAPHY* (1992)).

43. See Totaro, *supra* note 35, at 721.

44. BEDERMAN, *supra* note 11, at 9.

*Myth #4: No one obeys international law.* This is the ultimate, *realist* critique of international law and relations. It depends on a utilitarian and rationalist attitude that States and other international actors conduct themselves only out of self-interest. . . .

This myth raises the most fundamental question in international law: what is the basis of obligation in international affairs, or, put even more simply, Why do States obey international law? . . . States and other international actors do, indeed, follow international law norms out of self-interest. But that self-interest is expressed as more than a situational observance of a particular rule at a particular time. Instead, nations have a self interest in promoting a systemic rule of law in international relations, a "culture" of law observance. . . .

Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.

LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (1979).

BEDERMAN, *supra* note 11, at 9.

45. See Moore, *supra* note 29, at 884 ("[T]he greatest weakness of the contemporary international system is not the absence of authoritative norms, or underlying intellectual understanding about the need for such norms, but rather the all-too-frequent absence of compliance.").

46. *Id.* at 884–85.

47. See Christopher J. Borgen, *Resolving Treaty Conflicts*, 37 GEO. WASH. INT'L L. REV. 573 (2005). "The viability of international law, as a legal system, rests largely on the viability of treaties as a source of law." *Id.* at 573.

a nation can justify acts that may run counter to the true purpose of a treaty.

## II. TREATY ANALYSIS

When States enter into treaties and abide universal agreements, conflicts in obligations are inevitable.<sup>48</sup> Having registered the Friendship Treaty with the United Nations,<sup>49</sup> Russia and Ukraine normally would have submitted to the jurisdiction of the International Court of Justice (“ICJ”) for treaty dispute resolutions.<sup>50</sup> However, during negotiations for the Vienna Convention on the Law of Treaties (“VCLT”), the former Union of Soviet Socialist Republics made a reservation about submitting to the ICJ for such resolutions.<sup>51</sup> It is therefore unclear whether post-

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48. *Id.*

49. Russia and Ukraine registered the Friendship Treaty pursuant to Article 102 of the U.N. Charter.

50. Fewer than five cases have ever been brought before the International Court of Justice to determine if a treaty has been breached.

51. Moore, *supra* note 29, at 915–16. The Union of Soviet Socialist Republics included the following reservations and declaration in the instrument of accession to the VCLT:

The Union of Soviet Socialist Republics does not consider itself bound by the provisions of article 66 of the Vienna Convention on the Law of Treaties and declares that, in order for any dispute among the Contracting Parties concerning the application or the interpretation of articles 53 or 64 to be submitted to the International Court of Justice for a decision, or for any dispute concerning the application or interpretation of any other articles in Part V of the Convention to be submitted for consideration by the Conciliation Commission, the consent of all the parties to the dispute is required in each separate case, and the conciliators constituting the Conciliation Commission may only be persons appointed by the parties to the dispute by common consent.

The Union of Soviet Socialist Republics will consider that it is not obligated by the provisions of article 20, paragraph 3 or of article 45 (b) of the Vienna Convention on the Law of Treaties, since they are contrary to established international practice.

. . . [I]t reserves the right to take any measures to safeguard its interests in the event of the non-observance by other States of the provisions of the Vienna Convention on the Law of Treaties.

Accession to the Vienna Convention on the Law of Treaties, USSR, Apr. 29, 1986, 1425 U.N.T.S 441, 441–42. It is important to note that this reservation applies to the Union of Soviet Socialist Republics, and therefore encompasses both Russia and Ukraine today. United Nations Treaty Collection, Vienna Convention on the Law of Treaties. [http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtmsg\\_no=XXIII~1&chapter=23&Temp=mtmsg3&lang=en#EndDec](http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtmsg_no=XXIII~1&chapter=23&Temp=mtmsg3&lang=en#EndDec) (last visited April 8, 2010).

Soviet states would find themselves before the ICJ for treaty interpretation disputes.<sup>52</sup> Regardless, this Note applies rules derived from ICJ decisions in an effort to advance a scholarly approach to resolving this treaty dispute, as ICJ decisions generally reflect the international understanding of treaty interpretation.<sup>53</sup>

In discussing treaty interpretation, the most appropriate place to begin is the VCLT, which is “quite literally, a treaty on treaties.”<sup>54</sup> Treaty interpretation should begin with the default rules set forth in the Convention.<sup>55</sup> The VCLT’s conflict provisions are “applicable when supposedly conflicting treaties are successive and related to the same subject matter.”<sup>56</sup> This gives the VCLT broad jurisdiction, as there are many subjects that a single treaty can affect—the term “subjects” can refer to the “subject matter of the relevant rules or the legal subjects bound by it.”<sup>57</sup> The notion of conflict, then, is interpreted broadly due to the many factors and obligations that affect the scope and application of a treaty.<sup>58</sup> Therefore, the first step is to analyze the legal norms set forth in an agreement

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52. Moore, *supra* note 29, at 915.

53. FITZMAURICE & ELIAS, *supra* note 18, at xiv (“The recent jurisprudence of the ICJ has also contributed to the development and clarification on a number of aspects of the law of treaties.”).

54. BEDERMAN, *supra* note 11, at 26; ARIE E. DAVID, *THE STRATEGY OF TREATY TERMINATION* 159 (1975) (“Thus it is no surprise that the [International Law Commission], in drafting the Vienna Convention on the Law of Treaties, tried to judicialize treaty termination.”); FITZMAURICE & ELIAS, *supra* note 18, at xiii (“Even the functioning of treaties themselves is regulated to a significant extent by a treaty, the Vienna Convention on the Law of Treaties.”); *see* JANIS, *supra* note 12, at 17 (“Since the Vienna Convention is largely, though not entirely, a codification of the existing customary international law of treaties, it constitutes a useful depository of international legal rules even for countries, like the United States, which are not yet parties to it.”).

55. *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, 237 (Nov. 6) (separate opinion of Judge Higgins) (“It is commonplace that treaties are to be interpreted by reference to the rules enunciated in Article 31 of the Vienna Convention on the Law of Treaties, which Article is widely regarded as reflecting general international law.”).

56. *See* Borgen, *supra* note 47, at 603 (internal citations omitted).

57. Int’l Law Comm’n, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, U.N. Doc. A/CN.4/L.682, at 17 (Apr. 13, 2006) (*finalized by* Martti Koskenniemi).

58. Borgen, *supra* note 47; *see also* Int’l Law Comm’n, *supra* note 57, at 19 (“This report adopts a wide notion of conflict as a situation where two rules or principles suggest different ways of dealing with a problem.”); FITZMAURICE & ELIAS, *supra* note 18, at 4–5 (“Treaties are one of the sources which give rise to international legal obligations. . . . [T]here is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character.”) (internal citations omitted); SEYED ALI SADAT-ARKHAVI, *METHODS OF RESOLVING CONFLICTS BETWEEN TREATIES* 5–23 (2003).

as composed of subjects and predicates in order to illustrate what the rule is “about,” and what assertions are made regarding the scope.<sup>59</sup> In defining the scope, one must determine whether or not the norm is mandatory or permissive.<sup>60</sup> Mandatory norms impose an obligation, while permissive norms provide for the freedom to do or to not do something.<sup>61</sup> Once the scope of a norm has been properly delineated, obligations can be seen as either overlapping, completely identical, or disjointed.<sup>62</sup>

Determining the subject matter of a treaty provision can include considerations of sources outside the treaty.<sup>63</sup> Providing guidance for analysis, the VCLT’s treaty-conflict provision includes three theories for treaty interpretation: textualism, intentionalism, and purposivism.<sup>64</sup> Article 31 of the VCLT states:

A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.<sup>65</sup>

Initially, the VCLT prescribes a preference for textualism in the phrase “ordinary meaning given to the terms.”<sup>66</sup> This directs the reader to begin by looking at the words of a provision as they are commonly understood, without taking outside sources into account.<sup>67</sup> The words of the treaty

59. See SADAT-AKHAVI, *supra* note 58, at 14 (diagramming the complex scopes of various norms). For an example, see Int’l Law Comm’n, *supra* note 57, at 17–18:

A treaty on, say, maritime transport of chemicals, relates at least to the law of the sea, environmental law, trade law, and the law of maritime transport. The characterization has less to do with the “nature” of the instrument than the interest from which it is described.

. . . But there are no such classification scheme. . . .

. . . The criterion of “same subject-matter” seems already fulfilled if two different rules or sets of rules are invoked in regard to the same matter, or if, in other words, as a result of interpretation, the relevant treaties seem to point to different directions in their application by a party.

*Id.*

60. SADAT-AKHAVI, *supra* note 58, at 5.

61. *Id.*

62. *Id.* at 17.

63. BEDERMAN, *supra* note 11, at 33–36.

64. WALLACE, *supra* note 13, at 204 (“The Vienna Convention adopts an integrated approach to interpretation, but nevertheless gives emphasis to the ordinary meaning approach.”); BEDERMAN, *supra* note 11, at 34 (noting that there are three “schools” or approaches to treaty interpretation codified into the VCLT).

65. Vienna Convention on the Law of Treaties, *supra* note 12, art. 31, sec.1.

66. *Id.*; BEDERMAN, *supra* note 11, at 34; WALLACE, *supra* note 13, at 204.

67. BEDERMAN, *supra* note 11, at 34.

form the “foundation for the interpretive process,” and an interpreter must give meaning and effect to all the terms of the treaty.<sup>68</sup> However, skillful lawyers can usually assign ambiguity to seemingly straightforward phrases when a state asserts a particular construction to gain advantage in international relations.<sup>69</sup> To assist with the strict reading of the text, subsections (2) and (3) of Article 31 list the specific documents an interpreter may take into account in order to deduce the “meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”<sup>70</sup> The VCLT provides:

2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

- (a) Any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
- (b) Any instrument which was made by one or more parties in [connection] with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

3. There shall be taken into account, together with the context:

- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) Any relevant rules of international law applicable in the relations between the parties.<sup>71</sup>

Additionally, Article 31(4) stipulates that, where parties claim to have assigned a “special meaning” to a term, interpreters shall recognize that

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68. Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, sec. D, WT/DS8/AB/R, WT/DSO/AB/R, WT/11/AB/R (Oct. 4, 1996).

69. James D. Fry, *Legitimacy Push: Towards a Gramscian Approach to International Law*, 13 UCLA J. INT'L L. & FOREIGN AFF. 307, 330 (2008) (“Article 31 . . . leaves the door open for dominant states to push for political interpretations that best serve their own interests.”); BEDERMAN, *supra* note 11, at 34 (2001) (“If words always had fixed and determinable meaning for every circumstance, then one would have no need for interpretation—nor for lawyers, for that matter.”).

70. Vienna Convention on the Law of Treaties, *supra* note 12, art. 31; BEDERMAN, *supra* note 11, at 35.

71. Vienna Convention on the Law of Treaties, *supra* note 12, art. 31.

meaning if “it is established that the parties so intended.”<sup>72</sup> Furthermore, while not explicitly stated, the reference to “object and purpose” has been understood as directing interpreters to employ a “teleological” approach.<sup>73</sup> Teleological interpretation gives relevance to the fundamental reason or problem the treaty was supposed to address.<sup>74</sup> Therefore, after establishing the ordinary meaning of a term, an interpreter should examine the above-referenced documents and consider the overall purpose of the agreement.

If the interpreter has applied the Article 31 framework and the meaning of a term is “ambiguous or obscure” or leads to a result that is “manifestly absurd or unreasonable,” additional documents may be considered to determine the intentions of the parties.<sup>75</sup> Article 32 of the VCLT states that, in order to deduce the parties’ intentions, an interpreter may take into account “supplemental means of interpretation, including preparatory work of the treaty and the circumstances of its conclusion.”<sup>76</sup> The phrase “circumstances of conclusion” is generally understood to permit the examination of the “historical background against which the treaty was negotiated.”<sup>77</sup> While some commentators have called into question the fairness of looking at negotiation history, the use of such documents has “become a constant feature of interpretive disputes over treaties.”<sup>78</sup> As a result, while sources that shed light on the parties’ intentions take a subordinated role to the plain text of the treaty, they are often brought into the interpretive process due to the ease with which a given term can be labeled ambiguous.<sup>79</sup>

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72. *Id.* at art. 31(4).

73. Fry, *supra* note 69, at 70.

74. BEDERMAN, *supra* note 11, at 35.

75. Appellate Body Report, *European Communities – Customs Classification of Certain Computer Equipment*, ¶ 86, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (June 5, 1998); JANIS, *supra* note 12, at 30–31; *see* WALLACE *supra* note 13, at 205 (“If giving the ordinary meaning to the terms of the treaty would lead to an ambiguous or obscure meaning, or would produce a manifestly absurd and unreasonable approach, supplementary means of interpretation may be invoked.”); BEDERMAN, *supra* note 11, at 35.

76. BEDERMAN, *supra* note 11, at 35.

77. *European Communities – Custom Classification of Certain Computer Equipment*, *supra* note 75, at ¶ 86.

78. BEDERMAN, *supra* note 11, at 35.

79. EDWARD SLAVKO YAMBRUSIC, *TREATY INTERPRETATION: THEORY AND REALITY* 171–72 (1987). On brining in other interpretive methods, Yambrusic has said:

The apparent preference for the primacy of text, moreover, reflects the predominant influence of the Continental approach over an Anglo-Saxon view .

...

Ultimately, the aim of analysis is to find not just a conflict between obligations, but one that rises to the level of a material breach<sup>80</sup> per Article 60 of the VCLT:

1. A material breach of a bilateral treaty by one of the parties entitles the other to invoke the breach as a ground for terminating the treaty or suspending its operation in whole or in part.

....

3. A material breach of a treaty, for purposes of this article, consists in:

....

(b) The violation of a provision essential to the accomplishment of the object or purpose of the treaty.<sup>81</sup>

Because a treaty can have multiple purposes, it is well-settled that a breach must offend a main object or purpose of the agreement.<sup>82</sup> Accordingly, a minor breach of a major purpose is likely more significant than a major breach of a minor purpose.<sup>83</sup> All in all, the Convention sets forth an understanding that there are instances where “a degree of such violation [justifies] termination or suspension, and that the touchstone of that degree is that the provision violated should be essential to the accomplishment of the treaty’s object and purpose.”<sup>84</sup>

Once a material breach has been established, it is generally accepted that the other party may repudiate the treaty and unilaterally initiate a

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The International Law Commission, through what appears to be a delicate mixture of *lex lata* and *de lege feranda*, had striven to give legal character to what in judicial experience denotes “historicity of subjectivity.” . . . According to Sir Humphrey, “the concept [of the ordinary meaning] must in his view always be related to the context . . . .

*Id.* (alteration in the original, internal citations omitted).

80. Moore, *supra* note 28, at 885–936. Moore illustrates in a comprehensive review of the drafting history of Article 60 of the Vienna Convention and subsequent legal commentaries that, while it is uncertain what a trivial breach may give rise to, a material breach by either party in a bilateral treaty gives the nonbreaching party the right to terminate the treaty in whole or in part. *Id.*

81. Vienna Convention on the Law of Treaties, *supra* note 12, art. 60; FITZMAURICE & ELIAS, *supra* note 14, at 125–26 (noting that the determination of “object and purpose” of the treaty is the difficult issue in determining whether there has been a material breach for Article 60 requirements).

82. Moore, *supra* note 29, at 920–21.

83. *See id.*

84. Military and Parliamentary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14, 250 (June 27) (dissenting opinion of Judge Oda).

peaceable reprisal.<sup>85</sup> Normally, “[Grounds] for invalidating, terminating, withdrawing from or suspending the operation of a treaty . . . may be invoked only with respect to the whole treaty,”<sup>86</sup> but some legal scholars believe that a state may initiate a peaceable reprisal in the event that a breaching party has materially breached an important portion of the treaty.<sup>87</sup> This notion, though, is much easier to apply with treaties that deal with commerce, and it is difficult to see how one could severally repudiate the Friendship Treaty.<sup>88</sup>

### III. FACTUAL BACKGROUND OF RUSSIAN-UKRAINIAN RELATIONS

In an effort to understand the intent behind treaties between Russia and Ukraine, it is critical to examine the history of agreement between these two nations.<sup>89</sup> The Pereyaslav Agreement of 1654 marks a defining moment in Russia-Ukraine relations that shaped the subsequent three centuries of foreign policy and law between the two States.<sup>90</sup> While history has blurred the details of the agreement, it is understood that Ukraine sought protection from the Poles and turned to Russia for military assistance.<sup>91</sup> After signing the agreement, Ukraine expected to engage in a bilateral military alliance but found itself pledging a unilateral oath of loyalty to the Russian tsar.<sup>92</sup> The years following the agreement were marked by Ukrainian hardship, famine, and oppression, resulting in a general skepticism toward promises from Moscow.<sup>93</sup> While the Pereyaslav Agreement had many longstanding effects on Russian-Ukrainian relations, the most significant is the fear among Ukrainian citizens that “any deal with Russia is a potential trap, however favourable to Ukraine its terms might

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85. T. O. ELIAS, *THE MODERN LAW OF TREATIES* 114 (1974) (“It is generally agreed that the breach of a treaty obligation by one party entitles the other party to retaliate by means of peaceable reprisals.”); *see also* Moore, *supra* note 29, at 910.

86. Vienna Convention on the Law of Treaties, *supra* note 12, art. 44.

87. Moore, *supra* note 29, at 885–93.

88. Treaties that relate to commerce between nations generally have quantifiable subject matter: a ton of barley, or a cargo of wheat. In contrast, a treaty that defines human rights is not so severable. *See* BINDER, *supra* note 9, at 31.

89. Morrison, *supra* note 2, at 677–78.

90. *Id.* at 679.

91. Alexander Biryukov, *The Doctrine of Dualism of Private Law in the Context of Recent Codifications of Civil Law: Ukrainian Perspectives*, 8 ANN. SURV. INT’L & COMP. L. 53, 55 n.5 (2002); *see also* Press Release, Ukrainian World Congress, Pereyaslav Treaty—Statement on Observance of the Pereyaslav Treaty of January 1654 (July 3, 2002), <http://www.artukraine.com/old/historical/pertreaty.htm>.

92. Biryukov, *supra* note 91, at 55 n.5; Morrison, *supra* note 2, at 682.

93. Morrison, *supra* note 2, at 679–80.

appear.”<sup>94</sup> These sentiments continued to manifest throughout the twentieth century under the oppressive rule of Joseph Stalin, reinforcing the Ukrainian inferiority complex with respect to Russia.<sup>95</sup>

However, to regard Russia's relationship with Ukraine as solely oppressive would be to disregard the notion held by many Russian leaders and philosophers that Ukraine is an integral part of the Russian dynasty—a State coexisting with Russia, following the same worldly mission and preserving similar social ideologies.<sup>96</sup> Kiev, for many Russians, was the “birthplace of the Russian nation . . . [where] Russians adopted Christianity.”<sup>97</sup> The notion that Ukraine is a “younger brother” to Russia may be seen as a Russian understanding that the two States coexist, and the boundaries that have developed are purely artificial and evidence of a failure to understand that “Russia is a larger concept than the territory within the borders of the Russian Federation.”<sup>98</sup> From this angle, one can begin to understand the motivation for Russia to enter into agreements where Ukraine garners sovereignty but not total independence; to some Russian nationalists, an “independent Ukraine” would be a contradiction of terms.<sup>99</sup>

After the fall of the Soviet Union, Ukraine found itself in an all too familiar setting. Meeting in the town of Pereyaslav-Khmelnytsky,<sup>100</sup> leaders from Russia and Ukraine set an example for surrounding territories by becoming two of the original parties to the Commonwealth of Independent States (“CIS”).<sup>101</sup> Ostensibly, the document recognized Ukrainian independence and renounced the Pereyaslav agreement, but the years following the signing were marked by Russian influence and

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94. *Id.* at 680.

95. See Morrison, *supra* note 2, at 679; Press Release Ukrainian World Congress, *supra* note 91.

96. John Edwin Mroz & Oleksandr Pavliuk, *Ukraine: Europe's Linchpin*, FOREIGN AFF., May/June 1996, at 52, 52 (“Much of the Russian political spectrum, obsessed with reclaiming great power status and reuniting the former Soviet republics, recognizes that Ukraine is the key to its plans and openly espouses reabsorption.”); see also Morrison, *supra* note 2, at 681.

97. Dmitri K. Simes, *America and the Post-Soviet Republics*, FOREIGN AFF., Summer 1992, at 73, 82.

98. *Id.* at 682.

99. *Id.* at 681.

100. Pereyaslav-Khmelnytsky is the town named after the aforementioned Pereyaslav Agreement and its Ukrainian cosigner, Hetman Khmelnytsky.

101. Agreement Establishing the Commonwealth of Independent States, *opened for signature* Dec. 8, 1991, 31 I.L.M. 143 (1992).

reluctance to accept what was widely regarded as an unacceptable, polarizing mandate by then Russian President Boris Yeltsin.<sup>102</sup>

Largely due to the confusion expressed by Russian nationals toward the ramifications of the CIS, Ukraine spent subsequent years advocating a new, more explicit treaty for Russia to recognize borders and Ukrainian independence.<sup>103</sup> Thus, in 1997, the two parties entered into the Friendship Treaty.<sup>104</sup> The Friendship Treaty outlines reciprocal obligations for explicit recognition of Ukraine's sovereignty and self-determination, but there are numerous factors that call into question the true sentiment behind Russia's assent.<sup>105</sup> When the presidents of the two countries met in Kiev, they discussed a number of matters, but the primary Russian objective was to reach a deal on a lease for the naval port in Sevastopol, a Ukrainian municipality located on the Black Sea.<sup>106</sup> Until these negotiations, Russia had continually stalled talks about the Friendship Treaty, and only once the lease was agreed upon did both parties make any progress toward its execution.<sup>107</sup> The importance of the lease is highlighted by its annexation to the Friendship Treaty when it was submitted and registered with the UN.<sup>108</sup>

As early as 1991, relations between NATO and Ukraine began to take shape as the country sought a new identity in a post-Soviet world.<sup>109</sup> However, at the 1997 signing of the Friendship treaty, it was unclear

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102. Feldhusen, *supra* note 2, at 126–28 (noting that later agreements and Russian sentiment muddled the obligations of the Ukraine-Russia relationship in the subsequent years) Morrison, *supra* note 2, at 682, 684.

103. Feldhusen, *supra* note 2, at 126–27 (“President Kuchma compared the signing of the treaty to cutting the umbilical cord between the two countries.”).

104. See Treaty of Friendship, Cooperation and Partnership, *supra* note 6.

105. Feldhusen, *supra* note 2, at 126–28.

106. *Id.* The delays in ratification of the Treaty on Friendship, Cooperation, and Partnership only gave way once Ukraine agreed to ratify the agreements of the Black Sea Fleet. Michael Specter, *Setting Past Aside, Russia and Ukraine Sign Friendship Treaty*, N.Y. TIMES, June 1, 1997, at 1.13 (noting that the negotiations were postponed because of “tensions over the future of the Black Sea Fleet.”); The Secretary-General, *Report of the Secretary-General on Oceans and the Law of the Sea: Law of the Sea*, ¶ 371, delivered to the General Assembly, U.N. Doc. A/52/487 (Oct. 20, 1997) [hereinafter *Law of the Sea*] (“The conclusion of the Agreements resolved the problem of ownership of the former Soviet Black Sea Fleet . . . . These and other agreements made it possible for the Presidents of the two countries to sign a comprehensive Treaty on Friendship, Cooperation and Partnership . . .”).

107. Feldhusen, *supra* note 2, 126–28.

108. *Law of the Sea*, *supra* note 106, ¶ 371–72.

109. North Atlantic Treaty Organization, NATO's Relations with Ukraine, <http://www.nato.int/issues/nato-ukraine/topic.html> (last visited Mar. 17, 2010).

whether Ukraine would continue to pursue NATO membership.<sup>110</sup> Questions about its intentions were answered when Ukraine formally signed the Charter on a Distinctive Partnership in July of 1997, which established the NATO-Ukraine Commission in Kiev.<sup>111</sup> In the following years, Ukraine contributed military forces to NATO-led operations and continued to engage NATO on a yearly basis with updates and reports as it progressed toward satisfying the NATO requirements for membership.<sup>112</sup> In recent years, Ukraine has become the focus of U.S. efforts to increase NATO membership, and, as recently as September 2008, U.S. officials have visited Kiev to affirm that “Washington ha[s] a deep and abiding interest in Ukraine’s security.”<sup>113</sup>

While this Note focuses largely on the legal issues raised by NATO membership, politics and law are often closely intermingled on the international stage,<sup>114</sup> thus it is necessary to illustrate some of the political hurdles as well.<sup>115</sup> In recent years, rifts within Ukraine’s government and general population make NATO membership seem unlikely in the near future.<sup>116</sup>

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110. See Specter, *supra* note 106 (quoting Volodymyr Horbulin, Ukraine’s top military official, as stating, “Ukraine is not going to join NATO now, and there are no conditions for that.”). Note, however, that in an accompanying declaration to the submission of the Friendship Treaty to the United Nations, it was stated that “the Presidents consider that the instruments on relations between the Russian Federation and the North Atlantic Treaty Organization and between Ukraine and the North Atlantic Treaty Organization safeguard the national interests of their countries and contribute to the strengthening of security and stability in European and Atlantic region.” Russian-Ukrainian Declaration, Russ.-Ukr., May 31, 1997, U.N. Doc. A/52/174. While this provision likely opens the door for Ukraine to engage NATO, years of new leadership in Russia have altered the sentiments toward NATO that former President Boris Yeltsin may have held in 1997. Regardless, this Note does not consider whether Ukraine is allowed to join NATO, but whether such a treaty would present obligations that conflict with Ukraine’s present obligations to cooperate in a military effort with Russia.

111. GERALD B. SOLOMON, *THE NATO ENLARGEMENT DEBATE, 1990–1997, BLESSINGS OF LIBERTY* 120 (1998); North Atlantic Treaty Organization, *supra* note 109.

112. Grigoriy M. Perepelytsia, *NATO and Ukraine: At the Crossroads*, NATO REV. (2007), <http://www.nato.int/docu/review/2007/issue2/english/art2.html>.

113. See Judy Dempsey, *U.S. Presses NATO on Georgia and Ukraine*, N.Y. TIMES, Nov. 25, 2008, at A8; Steven Lee Myers & Alan Cowell, *Cheney Pledges Support for Ukraine*, NY.TIMES.COM., Sept. 6, 2008, <http://www.nytimes.com>.

114. See SCOTT, *supra* note 21, at 1–25.

115. *Id.* (noting that focusing solely on the legal aspects of a treaty would mean neglecting its broader application in the international political sphere).

116. Brian Knowlton & Judy Dempsey, *Rice Defends Stance on 2 States’ NATO Push*, INT’L HERALD TRIB., Nov. 27, 2008, at 3 (quoting U.S. Secretary of State Condoleezza Rice as stating, “Georgia and Ukraine are not ready for [NATO] membership . . . . That is very clear.”).

In 2004, democratic elections were held in Ukraine and resulted in the installation of a pro-Moscow regime led by Viktor Yanukovich as Prime Minister.<sup>117</sup> The legitimacy of the election was hotly contested, and the successful Orange Revolution in 2004 took Yanukovich out of power and replaced him with the pro-Western Viktor Yushchenko as President and Yulia Tymoshenko as Prime Minister.<sup>118</sup> Despite the rise of a pro-Western government, however, the President and Prime Minister failed to cooperate in efforts toward NATO membership and engaged in infighting that ultimately stalled progress toward satisfying NATO requirements.<sup>119</sup> Then, with many commentators criticizing the Orange Revolution beneficiaries for poor leadership and ineffective governing, Yanukovich managed to reclaim power in the 2010 presidential election.<sup>120</sup>

While Yanukovich's return to power clearly signals a "pro-Moscow tilt," his campaign focused on refashioning his image as the type of leader who will not only advance the values of the Orange Revolution but also mend ties with the Kremlin.<sup>121</sup> Furthermore, the recent election carries with it a collateral, more important message that Ukraine has persisted as a democracy, moving away from elections that have "hardly been free and fair."<sup>122</sup>

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117. See Clifford J. Levy, *Orange Revolution Parties Will Share Power in Ukraine*, N.Y. TIMES.COM, Oct. 15, 2007, at A3.

118. Clifford J. Levy, *Power Struggle in Ukraine Strains Governing Alliance*, N.Y. TIMES, Sept. 4 2008, at A16.

119. For an indepth look at the Orange Revolution, see generally Natalie Prescott, Note, *Orange Revolution in Red, White, and Blue: U.S. Impact on the 2004 Ukrainian Election*, 16 DUKE J. COMP. & INT'L. L. 219 (2006).

120. Gideon Rachman, *Oranges and Lemons in Ukraine*, FIN. TIMES, at 11 ("Over the past six years, during the Yushchenko presidency, Ukraine has been democratic and pro-western—but badly governed. The average Ukrainian now yearns for better government, which accounts for the backlash against the ineffective Mr. Yushchenko.").

121. Mary Dejevsky, *Ukraine is at Last Throwing off the Shackles of the Cold War*, THE INDEPENDENT, Feb. 9, 2010, at 32 ("But the many different roads of disillusionment with the Orange Revolution do not lead automatically back to Moscow. What has been the most striking, and most hopeful, about the 2010 election is the extent to which it has not been a contest between West and East, either globally, or within Ukraine.").

122. Peter C. Ordeshook, *Constitutions, Elections, and Election Law*, 87 TEX. L. REV. 1595, 1604; see Clifford J. Levy, *For Moscow, Victory with a Catch; Winner of Ukraine vote favors Russia, but Contest Didn't Follow its Script*, INT'L HERALD TRIB., Feb. 10, 2010, at 2. According to Levy:

[Yanukovich's victory] may be a relief to Vladimir V. Putin, but the election was competitive and relatively fair, the kind of race that has not been held in Russia under Mr. Putin.

While [Ms. Tymoshenko, defeated Prime Minister,] might indicate a rejection of the [Orange] [R]evolution, the fact that the country carried out a contentious

Similarly, Ukraine's citizens have divided on the NATO issue.<sup>123</sup> Recent polls show that 52% of Ukrainians would vote against joining NATO, while only 22% would vote in favor of membership.<sup>124</sup> Still, pro-NATO government officials insist that the statistics are not a perfect picture of public sentiment, as much of Ukraine's population is greatly uninformed as to what NATO membership entails (many think, for instance, that NATO membership would involve nuclear weapon deployment on Ukrainian territory), and harsh words from Moscow have swayed many citizens' sentiments.<sup>125</sup> Furthermore, residents of key Ukrainian territories, such as Crimea, have demographics with strong ties to Russia, and these allegiances have stymied NATO progress.<sup>126</sup> While the recent presidential election effectively ousted the Orange government, effective leadership, democratic elections, and a core of pro-Western voters could set Ukraine on a more effective path towards E.U. and NATO membership.<sup>127</sup>

#### IV. IDENTIFYING A CONFLICT

In order for an official "conflict" to exist, the two treaties at issue must have a similar object or purpose.<sup>128</sup> This VCLT rule is reflected in the nonconflict provision of the North Atlantic Treaty:

Each party declares that none of the international engagements now in force between it and any other of the Parties or any third State is in conflict with the provisions of this Treaty, and undertakes not to enter into any international agreement in conflict with this Treaty.<sup>129</sup>

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presidential election that was widely considered fair suggested that the Orange legacy had endured.

*Id.*; see also Dejevsky, *supra* note 121 ("In this election there was no high-profile electioneering by Russia or by the United States. . . . Above all, though, this was an election between Ukrainians, not cold-war proxies, campaigning on Ukrainian issues.").

123. Judy Dempsey, *NATO Examines Ukraine's Readiness to Join—Strong Opposition Seen from Russia*, INT'L HERALD TRIB., June 16, 2008, at 3.

124. *Id.* (statistics from the Independent Democratic Initiatives Foundation in Kiev).

125. Dempsey, *supra* note 123.

126. For an account of the tensions existing between Ukraine and Crimea, see Chase, *supra* note 2.

127. Clifford J. Levy, *For Kremlin, Ukraine Vote Cuts 2 Ways*, N.Y. TIMES, Feb. 8, 2010, A1 ("[W]hile the public ousted the Orange government, . . . it did not want to do away with all aspects of the Orange democracy. [Other analysts] said a backlash would occur if Mr. Yanukovich tried to crack down."); Luke Harding Kiev, *International Observers Hail Ukraine Election as Fair*, THE GUARDIAN, Feb. 9, 2010, at 20 ("Ukraine's chances of joining the EU had been significantly enhanced, the observers noted.").

128. See Vienna Convention on the Law of Treaties, *supra* note 12, art. 30; see also Borgen, *supra* note 47, at 603.

129. North Atlantic Treaty art. 8, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

Meanwhile, this comparable clause is found in the Friendship Treaty:

Each High Contracting Party shall refrain from participating in, or supporting, any actions directed against the other High Contracting Party, and shall not *conclude any treaties with third countries against the other Party*.<sup>130</sup>

Here, there are two explicit scenarios for a conflict. For Ukraine, becoming a party to the North Atlantic Treaty may constitute “conclud[ing] a treaty with third countries” against Russia. This will depend largely on the scope of the phrase “against the other Party” and whether the mere potential for a breach, absent an overt act, would justify repudiation. The second issue is whether the Friendship treaty could constitute an international agreement in conflict with the North Atlantic Treaty. The Friendship treaty describes Ukraine and Russia as neighborly allies maintaining a cooperative front to ward off hostile measures against either state; a role that could be compromised if Ukraine joins a military alliance to which Russia is not a signatory.<sup>131</sup> Therefore, in order to determine if there is a conflict, it becomes necessary to use the VCLT rules of treaty interpretation.<sup>132</sup>

A treaty conflict can occur “when a state concludes a treaty that creates international obligations the performance of which would be inconsistent with the performance of an international obligation to a third state under a previously concluded treaty.”<sup>133</sup> When looking for a conditional breach that can occur in the future, the analysis of a potential conflict aims to identify the presence of an anticipatory breach.<sup>134</sup> On a domestic level, jurisdictions such as the United States have defined procedures for addressing an anticipatory breach.<sup>135</sup> However, on the international level,

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130. Treaty of Friendship, Cooperation and Partnership, *supra* note 6, art. 6 (emphasis added).

131. *See id.*

132. *See supra* text accompanying note 76.

133. BINDER, *supra* note 9, at 7.

134. Borgen, *supra* note 47, at 627–28. Borgen states:

Much attention has focused on whether the law on treaties encompasses a norm of anticipatory breach . . . . Current analysis does not address the problem of treaty conflicts in these terms; as such it is not a developed norm. Based on analogies from the domestic cases of contractual conflicts, however, the idea of anticipatory repudiation is a useful one, as it focuses attention on the underlying goals of each treaty. This, in turn, urges a more systematic inquiry into the interrelationship of treaties.

*Id.*

135. 17A AM. JUR. 2D *Contracts* § 716. For the definition of anticipatory breach in the international context, see BINDER, *supra* note 9.

the issue of whether an anticipatory breach would nullify a treaty has yet to be addressed, and there has been little speculation as to the consequences for two treaties that may breach in the future.<sup>136</sup>

In 1979, two parties were required to resolve a similar issue at the Camp David negotiations over the Arab-Israeli conflict.<sup>137</sup> In that instance, Egypt and Israel began the implementation of a plan that concluded with a treaty of peace, whereby Egypt agreed that Israel would “live in peace within secure and recognized boundaries.”<sup>138</sup> In 1952, though, Egypt sought leadership among Arab nations by “giving voice to a Pan-Arab nationalist movement, at times even proposing to merge with other Arab states.”<sup>139</sup> Egypt’s commitment to the mission of the Pan-Arab world had its foundation in a treaty between Egypt and the Arab League that required Egypt to maintain collective security with Arab governments and advance national aspirations of the Palestinian people.<sup>140</sup> Consequently, at the time Egypt and Israel submitted their treaty to the United Nations for ratification, Egypt was “considered to be under a continuing obligation to join in hostilities against Israel” but also committed to not use force against Israel.<sup>141</sup>

The issue was hotly negotiated among Egypt and Israel, and they eventually submitted a side-letter with the agreement clarifying that each would “exclude the use of force by either party against the other *unless the latter were deemed the aggressor in a conflict with third parties.*”<sup>142</sup> Yet, minutes to the negotiations reveal that the treaty was not intended to abrogate defense obligations already in place for either party.<sup>143</sup> Most

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136. BINDER, *supra* note 9, at 3; *see* Borgen, *supra* note 47, at 627–28.

137. BINDER, *supra* note 9, at 3.

138. Treaty of Peace Between the Arab Republic of Egypt and the State of Israel, Mar. 26, 1979, 18 I.L.M.; Agreement on the Framework for Peace in the Middle East Agreed at Camp David preamble, Egypt-Isr., Sept. 17, 1978, 17 I.L.M. 1463, 1467; BINDER, *supra* note 9, at 3.

139. BINDER, *supra* note 9, at 10 (“Of great symbolic importance in this enterprise was Egypt’s central role in expressing Arab hostility to Israel, in consequence of which it had bore the brunt of every Arab hostility to Israel.”).

140. *Id.* at 3.

141. *Id.* at 11.

142. *Id.*

143. Louis René Beres, *Prosecuting Iraqi Gulf War Crimes: Allied and Israeli Rights Under International Law*, 16 HASTINGS INT’L & COMP. L. REV. 41, 62 n.70 (1992). Beres notes:

A Minute to Article VI, paragraph 5 of the Israel-Egyptian Peace Treaty provides that it is agreed by the parties that there is no assertion that the Peace Treaty prevails over other treaties or agreements or that other treaties or agreements prevail over the Peace Treaty. . . . This means that the treaty with Israel

notably, this would include cooperative military agreements between Syria and Egypt.<sup>144</sup> So, while the side letter ostensibly set forth a standard for determining sides, the letter hardly corrected the problem since “aggression, like beauty, is in the eye of the beholder.”<sup>145</sup> The problem of determining aggression becomes more difficult when one reflects upon the myriad border disputes and entitlements in the Israeli-Arab world.<sup>146</sup>

Despite these problems, the treaty is considered a success in terms of Israeli-Egyptian relations, and still remains in effect today.<sup>147</sup> The treaty failed in other respects, however, as the members of the Arab League responded with a unanimous vote to suspend Egypt from the Arab

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does not prevail over the defense treaties that Egypt has concluded with Syria. Should Egypt determine that Israel has undertaken aggression against Syria it could enter into belligerency against Israel on behalf of Damascus.

*Id.*

144. BINDER, *supra* note 9, at 11. For a description of the Syria-Israel conflict, see discussion *infra* Part IV.

145. BINDER, *supra* note 9, at 13; Louis René Beres, *Preserving the Third Temple: Israel's Right of Anticipatory Self-Defense Under International Law*, 26 VAND. J. TRANSNAT'L L. 111, 125 n.42 (1993). Beres explains:

Although it is generally believed that the peace treaty in force with Egypt constrains that state from joining with other Arab forces against Israel, this belief causes problems. The Israel-Egyptian Peace Treaty provides that the parties do not assert that the Peace Treaty prevails over other treaties or agreements or that other treaties or agreements prevail over the Peace Treaty. This means that the treaty with Israel does not prevail over the defense treaties that Egypt has concluded with Syria, and that Cairo—should it determine that Israel has undertaken aggression against Syria—could enter into belligerency against Israel on behalf of Damascus. Indeed, even if Syria were to commence hostilities against Israel to recover the Golan Heights, Egypt might abrogate its agreement with Israel and offer military assistance to Syria. Shortly after the signing of the Israeli-Egyptian Peace Treaty, then Egyptian Prime Minister Khalil stated that he would regard any attempt by Syria to recover the Golan-Heights as a defensive war, one that would bring into play the Egyptian-Syrian defense treaty despite the existence of the Israel-Egyptian Peace Treaty.

Beres, *supra*, at 125 n.42.

146. See George Anastaplo, *On Freedom: Explorations*, 17 OKLA. CITY U. L. REV. 465, 612 (“[I]t is probably not difficult in the Middle East to invoke longstanding border disputes in the course of the bargaining that any controversy promotes.”).

147. Bernard Gwertzman, 1979: *A Glimmer of Peace*, N.Y. TIMES UPFRONT, Dec. 13, 2004, at 22 (“Remarkably, though, despite continuing tensions in the region, the treaty between Egypt and Israel has held . . .”).

League, having viewed the treaty as a violation of the Arab League's commitments in the Middle East.<sup>148</sup>

Therefore, the conflict between the North Atlantic Treaty and the Friendship treaty remains an exposed doctrinal problem of treaty conflict left largely unaddressed after the Egypt-Israeli Peace Treaty because of Egypt's removal from the Arab League and a stated reservation about the Egypt-Syrian treaty.<sup>149</sup> The potential for conflict is high among the post-Soviet states for reasons that mirror the problems in the Middle East—most notably, the dispute over the entitlement of certain lands and borders.<sup>150</sup> Recently, these problems garnered national media attention when Russia and Georgia engaged in military action over the South Ossetia territory.<sup>151</sup> Like Georgia's dispute over South Ossetia, Ukraine's tenuous relationship with Crimea is troubling given the latter's dense Russian population and strategic location on the Black Sea.<sup>152</sup>

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148. Borgen, *supra* note 47, at 627–28 (“Current analysis does not address the problem of treaty conflicts [in terms of anticipatory breach]; as such it is not a developed norm.”); see also BINDER, *supra* note 9, at 15.

149. See BINDER, *supra* note 9, at 15.

150. Zlenko, *supra* note 8, at 45–46. Zlenko explains:

Radical social and political movements in Central and Eastern Europe during the late 1980s and early 1990s . . . , the emergence on the political landscape of several independent states each striving to obtain its own model of social development, and the collapse of the Soviet Union have all drastically altered the geopolitical balance in Europe. . . .

The dramatic events taking place in Europe have raised a number of new issues, the most significant of which are the need to maintain further political balance in the region and the need to ensure the security of the newly independent countries by creating an effective security system throughout the entire Euro-Atlantic region.

*Id.* at 45.

151. Ellen Barry & Alan Cowell, *Ossetia Leader Unclear on Goal for Russia Ties*, INT'L HERALD TRIB., Sept. 12, 2008, at 8; Judy Dempsey, *NATO Envoys Will Offer Their Support in Georgia*, N.Y. TIMES, Sept. 15, 2008, at A12.

152. Crimea is a hot bed for entitlement problems. For more information on Crimea, see Chase, *supra* note 2. There are significant differences, though, between South Ossetia and Crimea. Most significantly, South Ossetia is internationally regarded as a sovereign territory, while Crimea is an autonomous, parliamentary republic of Ukraine. It is not under formal dispute that Crimea is subject to Ukrainian authority. However, similiarities exists due to the territory's proximity to Russia and questions of legitimacy. Some Russian nationalists question whether Crimea was legitimately transferred to Ukraine in 1954. Furthermore, the existence of a large Russian population and the presence of the Port Sevastopol, home of the Black Sea Fleet, make Crimea a volatile territory. For more on the transfer of Crimea to Ukraine, see the International Committee for Crimea, Trans-

The Friendship Treaty imposes on Ukraine a duty to perform according to the principle *pacta sunt servanda*, which dictates that treaties must be performed in good faith.<sup>153</sup> This principle bars parties from concluding agreements that undermine the value of existing treaties on the same subject.<sup>154</sup> To avoid breaching good faith, Parties entering a new treaty must avoid obligations that frustrate or destroy their other treaty-made obligations.<sup>155</sup> Therefore, to conclude a treaty that entails obligations that would foreseeably frustrate the rights of a third party<sup>156</sup> may ultimately be a type of anticipatory breach and, thus, a breach of good faith.<sup>157</sup>

It is necessary, then, to analyze whether the North Atlantic Treaty would frustrate the object and purpose of the Friendship Treaty, and, if so, whether such frustration amounts to a material breach of the Friendship Treaty. The scope of the Friendship Treaty's obligations can be defined by utilizing the interpretative framework established by the VCLT.<sup>158</sup> The text of the Friendship Treaty states in part:

If a situation arises which, in the opinion of one of the High Contracting Parties, poses a threat to peace, violates the peace or affects the interests of its national security, sovereignty or territorial integrity, it may propose to the other High Contracting Party that consultations on the subject be held without delay. The States shall exchange relevant information and, if necessary, carry out coordinated or joint measures with a view to overcoming the situation.<sup>159</sup>

This clause creates an obligatory norm.<sup>160</sup> The right to cooperate must be asserted, as it does not arise automatically when either state has a

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fer of the Crimea to the Ukraine (2005), <http://www.iccrimea.org/historical/crimeatransfer.html>, and see also Chase, *supra* note 2.

153. See Janis, *supra* note 12, at 27. "Every treaty in force is binding upon all the parties to it and must be performed in good faith. The notion of good faith and observance of international agreements is, of course, a fundamental principle of international law." Vienna Convention on the Law of Treaties, *supra* note 12, art. 26.

154. See BINDER, *supra* note 9, at 28 ("Any act which destroys the value of a treaty right is a breach of the obligation to perform a treaty in good faith.").

155. LORD MCNAIR, *THE LAW OF TREATIES* 550 (Oxford Univ. Press, 1961). In discussing the good faith requirement, Lord McNair notes, "In short, the making of regulations by one party which in substance destroyed or frustrated the right of the other party would be a breach of good faith and of the treaty." *Id.*

156. "Third party," here, refers to a third party with whom one has already contracted.

157. BINDER, *supra* note 9, at 28.

158. See *supra* text accompanying note 76.

159. Treaty of Friendship, Cooperation and Partnership, *supra* note 6, art. 7.

160. See SADAT-AKHAVI, *supra* note 58, at 8 (describing situations in which a norm requires an act, while another norm permits a contrary act—two acts that cannot be performed at the same time, but can both be avoided).

claim for a threat to its territorial integrity, but when that right is asserted, the other party “shall” meet and exchange information.<sup>161</sup> Analyzing the treaty as a whole, though, the clause does not just create an obligation to discuss mutual defense possibilities in the time of an attack—rather, it suggests a procedure for the overall intent and purpose of the treaty, stated in the preamble:

Considering that the strengthening of friendly relations, good-neighborliness and mutually advantageous cooperation is in keeping with the basic interests of their peoples and serves the cause of peace and international security . . . .

Desiring to improve the quality of these relations and strengthen their legal basis . . . .<sup>162</sup>

The second and third schools of interpretation—intentionalism and purposevisim—can help in determining the “value” of the treaty when the text is ambiguous or unclear.<sup>163</sup> Due to the broad language used in the Friendship treaty, supplemental information is helpful to define its object and purpose.<sup>164</sup> Interpreting a treaty in a way that acknowledges the fundamental problem the drafters sought to address clarifies the object and purpose of the treaty.<sup>165</sup> For Ukraine, the Friendship Treaty was intended as a declaration of independence and sovereignty—a major step toward achieving self-determination and official recognition by Russia.<sup>166</sup> For Russia, it seems that the drive behind the Friendship Treaty was twofold; while Russia surely wanted to maintain its diplomatic relationship with Ukraine, it also worried about solidifying its position at the strategic naval base in Sevastopol (a Ukrainian municipality located in the Black Sea).<sup>167</sup> The Sevastopol naval base is attractive because its location allows for quick deployment to all the surrounding territories, and, up until the signing of the Friendship Treaty, its status as a Russian-friendly port

161. *Id.*

162. Treaty of Friendship, Cooperation and Partnership, *supra* note 6.

163. Moore, *supra* note 28, at 919. Sir Gerald Fitzmaurice, Special Rapporteur to the International Law Commission, proposed that a fundamental breach “goes to the root or foundation of the treaty relationship between the parties and call[s] in question the continued value or possibility of that relationship in the particular field covered by the treaty.” *Id.* (internal citations omitted).

164. *See supra* text accompanying note 76.

165. BEDERMAN, *supra* note 11, at 35; *see* Vienna Convention on the Law of Treaties, *supra* note 12, art. 60.

166. Specter, *supra* note 106.

167. Feldhusen, *supra* note 2, at 127.

was unclear.<sup>168</sup> Therefore, the object and purpose of the treaty was to increase stability and cooperation in the Eastern European region by fostering diplomatic relations between the two states and fortifying the Black Sea Fleet.

Similarly, the North Atlantic Treaty seeks to maintain security and peace throughout Europe and the Atlantic region, and, if necessary, to guarantee a framework of concerted military action when any of the members suffers an armed attack.<sup>169</sup> In part, it states:

The parties agree that an armed attack against one or more of them . . . [is] an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of an individual or collective self-defense . . . , will assist the Party or Parties so attacked by taking . . . in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.<sup>170</sup>

It seems clear that the object and purpose of these two treaties conflict; both call for cooperative military action or cooperative efforts to defend territorial integrity of their parties.<sup>171</sup> In context, when one requires an act, the other necessarily requires a contrary act.<sup>172</sup> These conflicting obligations “cannot be performed at the same time,” however, “both *can* be avoided.”<sup>173</sup> Potentially, performance of its obligations under the Friendship Treaty could prohibit Ukraine from performing its obligations under the North Atlantic Treaty; but there are numerous scenarios in which

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168. *Id.* at 126; Andrew E. Kramer, *NATO Ships in Black Sea Raise Alarms in Russia*, N.Y. TIMES, Aug. 28, 2008, at A16.

169. North Atlantic Treaty, *supra* note 129, preamble; LAWRENCE S. KAPLAN, *THE UNITED STATES AND NATO, THE FORMATIVE YEARS 1–10 (1984)* (stating that the purpose of NATO was to increase American influence in Europe in order to maintain peace and stability amidst the threat of communism after World War II).

170. North Atlantic Treaty, *supra* note 129, art. 5.

171. Borgen, *supra* note 47, at 580. In regard to treaties that are concerned with the same subject matter for instance:

NAFTA and the General Agreement on Tariffs and Trade (GATT) cover much of the same subject-matter, although GATT covers many other subject as well. Similarly, one can see that the Inter-American Convention on Human Rights and the International Covenant on Civil and Political Rights essentially cover the same subject-matter as well. While a case could be made either way, the stronger argument is that these treaties would meet any reasonable test for “same subject matter.”

*Id.*

172. See SADAT-AKHAVI, *supra* note 58, at 8.

173. *Id.* (emphasis added).

conflict is avoidable.<sup>174</sup> Still, the guidance set forth by the “Successive Treaties” conflict resolution principles in the VCLT does not provide an adequate solution for these types of conflicts.<sup>175</sup> To follow the VCLT strictly, Ukraine would be required to abide the earlier treaty in the event of a conflict, yet commentators have noted that in reality there is no way of determining or preventing the fulfillment of one obligation over the other.<sup>176</sup> We are confronted, then, with the same problems anticipated by political realism. Without a clear framework of obligations, the state will be free to employ realist foreign policy and make choices based on self-interest instead of international legal compliance.<sup>177</sup>

#### V. THE PROPOSED REMEDY

With unsatisfactory procedures in place, it is important for Ukraine and Russia to settle on other means for resolving a foreseeable dispute.<sup>178</sup> Theoretically, there are three tactics Ukraine may employ in order to avoid liability for a breach. First, when the Friendship Treaty expires, Ukraine could terminate the agreement in accordance with its built-in termination clause:

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174. For example, cases where NATO allies and Russia are not involved in a military conflict.

175. Vienna Convention on the Law of Treaties, *supra* note 12, art. 30. In regard to the “Application of successive treaties relating to the same subject matter,” the VCLT merely provides that

When the parties to the later treaty do not include all the parties to the earlier one:

...

(b) as between a State party to both treaties and a State party to only one of the treaties, the treaty to which both States are parties governs their mutual rights and obligations.”

*Id.*; see also BINDER, *supra* note 9, at 3 (“A review of the practice of states and international tribunals in instances of treaty conflict will reveal a pattern of avoiding the question of conflicting treaties.”); SADAT-AKHAVI, *supra* note 58, at 60 (noting that the conflict passages of the VCLT leave many questions unanswered); Borgen, *supra* note 47, at 578.

176. See SADAT-AKHAVI, *supra* note 58, at 64.

177. Borgen, *supra* note 47, at 589. The problem with the interpretation of *pacta sunt servanda* is that, in the event of conflicts where treaties of the same object and purpose conflict, the theory would “thus give the state the choice and risk of beaching either or both treaties depending on the obligations of the treaties and the state’s actions. This opens the door to state responsibility and places the burdens on the potentially breaching state or states to negotiate a solution.” *Id.*

178. *Id.*

This Treaty is concluded for a period of 10 years. It shall subsequently be extended automatically for further 10-year periods unless one of the High Contracting Parties notifies the other High Contracting Party in writing of its desire to terminate it at least six months before the expiry of the current 10-year period.<sup>179</sup>

In doing so, Ukraine may avoid the legal complications presented by signing the North Atlantic Treaty, but Ukraine would also be taking a damaging step backward in diplomatic relations with Russia, a nation with whom Ukraine has a long history and strong social ties.<sup>180</sup> Additionally, Ukraine has a large Russian population,<sup>181</sup> and, amidst the present chaos within Ukraine's government,<sup>182</sup> it is unlikely that any political party would advocate such a strong showing of Russian dissent. Moreover, the object and purpose of the Friendship Treaty was for Russia to explicitly recognize Ukraine's independence and borders; to renounce the document that ostensibly grants such recognition would be counterintuitive for a nation still progressing toward complete sovereignty. Therefore, while this might be an easy legal resolution, the political contingencies make it grossly unattractive.

The second way Ukraine may be able to avoid liability for a breach is by asserting an *ergo omnes* rights defense—Ukraine could claim that since every nation has an interest in self-preservation, and since joining a military alliance furthers this interest, doing so served a fundamentally justifiable priority.<sup>183</sup> The notion of *ergo omnes* was elucidated by the ICJ in the case of *Barcelona Traction*:

When a State admits into its territory foreign investments or foreign nationals, whether natural or juristic persons, it is bound to extend to them the protection of the law and assumes obligations concerning the treatment to be afforded them. These obligations, however, are neither absolute nor unqualified. In particular, an essential distinction should be

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179. Treaty of Friendship, Cooperation and Partnership, *supra* note 6, art. 40.

180. Feldhusen, *supra* note 2, at 119; Morrison, *supra* note 2, at 682.

181. Dempsey, *supra* note 123.

182. Steven Erlanger & Steven Lee Myers, *Bush Adds Drama to NATO Summit*, HOUSTON CHRONICLE, Apr. 3, 2008, at 13.

183. BEDERMAN, *supra* note 11, at 23. Bederman explains:

[T]here are some rules of custom that are so significant . . . that the international community will not suffer States to “contract” out of them by treaty. . . . [S]ome customary international law obligations are so significant that the international community will permit *any* State to claim for their violations . . . . These are *erga omnes* principles.

*Id.* “Erga” and “ergo” are used interchangeably by commentators, but this Note uses “ergo” for simplicity.

drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.<sup>184</sup>

In short, *ergo omnes* obligations are those obligations for which “all States have a legal interest” in fulfillment, “by reason of the importance of their subject-matter for the international community.”<sup>185</sup> The *Barcelona Traction* case singled out slavery, genocide, and racial discrimination as violations *ergo omnes*—violations of preemptory norms that states have a duty to refrain from irrespective of any treaty, because the obligatory duty of compliance is understood as being owed to the international community as a whole.<sup>186</sup> Commentators, though, have found that the notion of the preemptory norm exceeds pure human rights obligations and also includes the right of a state to maintain international peace and cooperation.<sup>187</sup> This includes the right to maintain peace and security on an international scale—a principle that arguably includes a nation’s ability to join a military alliance such as NATO.<sup>188</sup> The VCLT reflects this

184. *Barcelona Traction, Light and Power Company, Limited* (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5, 1970).

185. See SADAT-AKHAVI, *supra* note 58, at 55.

186. Alex Glasshauser, *What We Must Never Forget When It is a Treaty We are Expounding*, 73 U. CIN. L. REV. 1243, 1290 n.289 (2005).

187. J.D. van der Vyver, *Statehood in International Law*, 5 EMORY INT’L L. REV. 9, 73 (1991). Van der Vyver explains:

[Tunkin], on this basis, classified the preemptory norms of general international law under three fundamental principles of the U.N. Charter: The principle of peaceful coexistence; the principle of maintaining international peace, which includes the principle of the non-use of force or the threat of force; and the general principle of international cooperation, which includes the principle of equal rights and self-determination of peoples and the principle of respect for human rights.

*Id.*

188. *Id.* Van der Vyver goes on to note:

Alexidze, took note of a wider range of U.N. practice and consequently included in his classification of preemptory norms of general international law a broader scope of fundamental norms. Those norms entail, according to him:

....

(b) principles defending the peace and security of nations (which include prohibition of the use and the threat of the use of force).

*Id.*

sentiment in maintaining that a treaty is void if it conflicts with a preemptory norm of general international law,<sup>189</sup> but the argument for *ergo omnes* obligations in the present case is attenuated and likely poses an affront to the prevailing international principle that treaties are to be respected.<sup>190</sup> Moreover, the Friendship Treaty does not bar Ukraine from furthering its defense mechanisms; rather, the problem is the foreseeable confusion that would result if a NATO ally were to attack Russia. Therefore, it is unlikely that a court would find that the Friendship Treaty violates a preemptory norm of international law.<sup>191</sup>

Ukraine's third option would be to enter into negotiations with Russia and submit a side letter to the United Nations amending and clarifying the obligations set forth in the current Friendship Treaty.<sup>192</sup> This option seems best, as it would preserve the purposes of the Friendship Treaty on a political level and also help secure the legal obligations of both parties in the future.<sup>193</sup> Furthermore, according to Article 37, this was the method of resolution agreed upon at the ratification of the Friendship Treaty:

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189. Vienna Convention on the Law of Treaties, *supra* note 12, art. 53.

190. Recall that the principle *pacta sunt servanda* requires that treaties be performed in good faith, and in reality, nearly every obligation prohibits a state from exercising its sovereignty in one form or another. See BINDER, *supra* note 9, at 1 ("The modern international legal system rests on a paradox—its legitimacy derives from the sovereignty of nations, yet its function is the constraint of such sovereignty.").

191. Asserting a defense of a breach by relying on an *ergo omnes* obligation seems to require a more significant right. If there is a treaty obligation that bars a state from complying with a universal norm of international law, this would be a better argument for *ergo omnes* violation. See Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 833, 844 (2002) (noting that the discussion of preemptory norms in modern international jurisprudence and arbitration is largely absent, and the main signifier of its presence lies in the VCLT). Here, though, there does not appear to be an explicit bar to Ukraine, but rather a foreseeable situation that would present dual, conflicting obligations. Meanwhile, according to Bodansky:

[T]he commentary and most authors on the subject essentially contend that preemptory rules exist because they are needed, i.e., to "prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values."

*Id.* (internal citations omitted).

192. Vienna Convention on the Law of Treaties, *supra* note 12, art. 39 ("A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.").

193. There will undoubtedly be difficulty in crafting an amendment that is both enticing to the parties and sufficient for all foreseeable outcomes. Similar problems arose in the Camp David negotiations, where crafting language free of manipulative or difficult interpretation was nearly an impossible feat. See BINDER, *supra* note 9, at 13.

Disputes regarding the interpretation or application of the provisions of this Treaty shall be settled through consultations and negotiations between the High Contracting Parties.<sup>194</sup>

While parties have a largely “uncontroversial”<sup>195</sup> prerogative to negotiate amendments to their agreements, the chief foreseeable *problem* is that severe complications will arise nevertheless if the parties fail to engage in negotiations preemptively—that is, *prior* to a dispute actually arising. It would likely make more sense for Ukraine to outline reservations with NATO, eluding an obligation to cooperate in a military effort against Russia in the case of a NATO strike against a Russian territory. This reservation, though, should clearly express Ukraine’s unwillingness to participate in the military effort on either side, as Ukraine would have to abstain from joining efforts with Russia against a NATO ally.

#### CONCLUSION

“Uncertainty is a calculable cost that treaties operate to decrease.”<sup>196</sup> These words echo the positivist warnings first written by Grotius, that “all things become uncertain the moment men depart from law.”<sup>197</sup> As it presently stands, the VCLT is wholly inadequate for dealing with the recent proliferation of treaties as a substantial source of international law.<sup>198</sup> This Note calls on Russia and Ukraine to meet and discuss bright-line conditions for triggering Ukraine’s military cooperative obligations in the event of an action by a NATO ally that threatens Russia’s territorial integrity.

Ultimately, the international legal system needs to develop a framework for dealing with anticipatory breaches of treaties. A foreign policy that promotes clarity and transparency with respect to obligations would further the positivist agenda toward enhancing compliance and respect for international law; this is a necessity *a fortiori* when military action is

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194. Treaty of Friendship, Cooperation and Partnership, *supra* note 6, art. 37. Issues regarding the Black Sea Fleet lease are already starting to arise. See Kramer, *supra* note 168.

195. Michael Bowman, *Towards a Unified Treaty Body for Monitoring Compliance with UN Human Rights Conventions? Legal Mechanisms for Treaty Reform*, 7 HUMAN RIGHTS L. REV. (Special issue) 225, 235 (2007) (“[R]ules governing the revision of treaties are to be found in Part IV of the Vienna Convention (Articles 39–41), which are unlikely to be regarded as controversial.”).

196. BINDER, *supra* note 9, at 31.

197. See WRIGHT, *supra* note 28.

198. Borgen, *supra* note 47, at 578 (“[T]he VCLT’s treaty conflict provisions are neither an accurate description of current state practice, nor are they adequate prescriptions for how states should act.”).

the basis of a dispute.<sup>199</sup> Over time, unforeseeable events can drastically alter the course of international relations. Bright-line obligations are necessary when one's ally has the potential to become an enemy in the future.

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199. BINDER, *supra* note 9, at 31 (“In the realm of politics and war, uncertainty is even more prevalent than in commerce, and its costs may be higher. Nevertheless, treaties may operate like other agreements to provide a measure of diplomatic and military security.”).

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