

Questions of International Law in respect of Trieste and its Port

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I. Introduction

1. We are asked to advise on the following areas:
 - i) the question of sovereignty over the territory of the Free Territory of Trieste as defined in the Italian Peace Treaty of 1947 (Peace Treaty) by way of general background, and also with reference to the arguments on sovereignty developed in recent decisions in Italian courts;
 - ii) the port and properties of the Free Territory of Trieste as defined in Annex VIII of the Peace Treaty (Free Port questions); and
 - iii) freedom of speech and the legal status of the Free Territory.

Part II below will address the question of sovereignty; Part III, the Free Port questions; and Part IV, freedom of speech and its relevance to the legal status of the Free Territory.

II. The Question of Sovereignty

2. Three international instruments are of direct relevance to the question of sovereignty:
 - The Italian Peace Treaty of 1947;
 - The Memorandum of Understanding of 1954; and
 - The Treaty of Osimo of 1975.
3. We will give some background about these instruments before considering how the question of sovereignty has been approached in recent judgments of the Italian courts.

(A) Peace Treaty (1947)

4. The Italian Peace Treaty was concluded on 10 February 1947.¹ The parties to the Treaty are, on the one part, the Allied and Associated Powers and, on the other part, Italy. The Allied and Associated Powers were The USSR, United Kingdom, United States, China, France, Australia, Belgium, Belarus (Byelorussian SSR), Brazil, Canada, Czechoslovakia, Ethiopia, Greece, India, the Netherlands, New Zealand, Poland, Ukraine (Ukrainian SSR), South Africa, and Yugoslavia.
5. The Peace Treaty contains a number of provisions on Trieste. In particular, Article 21 defines the Free Territory of Trieste; Articles 4 and 22 define the frontiers of the Free Territory of Trieste, and Annex VI of the Treaty sets out a Permanent Statute of the Free Territory of Trieste. The Peace Treaty also makes special provision for human rights in the Free Territory. These provisions may each be considered briefly in turn.

1. *Free Territory of Trieste*

6. According to Article 21 of the Peace Treaty,
 1. There is hereby constituted the Free Territory of Trieste, consisting of the area lying between the Adriatic Sea and the boundaries defined in Articles 4 and 22 of the present Treaty. The Free Territory of Trieste is recognized by the Allied and Associated Powers and by Italy, which agree that its integrity and independence shall be assured by the Security Council of the United Nations.
 2. Italian sovereignty over the area constituting the Free Territory of Trieste, as above defined, shall be terminated upon the coming into force of the present Treaty.
 3. On the termination of Italian sovereignty, the Free Territory of Trieste shall be governed in accordance with an instrument for a provisional regime drafted by the Council of Foreign Ministers and approved by the Security Council. This Instrument shall remain in force until such date as the Security Council shall fix for the coming into force of the Permanent Statute which shall have been approved by it. The Free Territory shall thenceforth be governed by the provisions of such Permanent Statute. The text of the Permanent Statute and the Instrument for the Provisional Regime are contained in Annexes VI and VII.”

¹ Treaty of Peace with Italy, signed at Paris, 10 Feb. 1947, entered into force 15 Sept. 1947: 49 UNTS 3.

7. It is widely understood that the Permanent Statute contained in Annex VI was never implemented. It is true that the Security Council, in SC res. 16 (1947) of 10 January 1947 “record[ed] its approval of ... (1) The instrument for the provisional régime... ; (2) The Permanent Statute... ; [and] (3) The instrument for the Free Port...” However, “approval” of these instruments, while a necessary step toward their implementation, was not sufficient in itself to bring them into effect in the manner originally envisaged. They were in fact never brought into effect in that manner. This, famously, was due to the inability of the Powers to agree on a Governor for the Territory.² Nor was the provisional régime set out in Annex VII implemented.³ As far as it goes, the general understanding thus is accurate: the government of the Free Territory was never completed by action of the treaty powers. However, in face of the circumstances that emerged, the government of Italy improvised certain steps in an attempt to implement the international law disposition even though the winning Powers did not.
8. The provisions of the Permanent Statute confirm that the intention of the Parties was to establish the Free Territory as an independent entity under Security Council guarantee. Article 2 of the Permanent Statute, for example, indicated that “[t]he integrity and independence of the Free Territory shall be assured by the Security Council.” Article 3, para. 1, of the Permanent Statute indicated that the Free Territory “shall be demilitarised and declared neutral.”
9. Article 21, para. 4, stipulates that the Free Territory “shall not be considered as ceded territory within the meaning of Article 19 and Annex XIV.” Article 19 is the provision which addressed nationality of individuals in ceded territory—i.e., territory transferred from one State to another. Annex XIV provided, *inter alia*, for future agreements between Italy and States to which territories were ceded in

² Decision of 10 May 1949, SC 424th mtg., p. 10 (Soviet nominee for Governor not approved: 2-0:9).

³ See, e.g., letter of the USSR to the President of the Security Council dated 12 Oct. 1953 with draft SC res. which, *inter alia*, would have “[brought] the Instrument for the Provisional Regime of the Free Territory [i.e., Annex VII] into effect forthwith.” SC 625th mtg., para. 70; and *Repertoire of the Security Council* (1952-1955) p. 110.

respect of State succession. Other matters relating to State succession, as concerns the Free Territory, were also treated separately from ceded territory.⁴

10. Several observations may be made in respect of Article 21. From the terms of Article 21(2) it is clear that Italy, as at the entry into force of the Peace Treaty, no longer held sovereignty over the Free Territory, “*Italian sovereignty... be[ing] ... terminated upon the coming into force*” of the Treaty. Italy and the Allied and Associated Powers all recognized this new state of affairs and agreed that it shall be “*assured by the Security Council.*”
11. The termination of Italian sovereignty was recognised by some Italian courts in the period immediately following the Peace Treaty. The Court of Cassation, for example, held that Trieste was “*in foreign territory*” and that it was a place “*formerly belonging to national territory which, in consequence of the lost war, had to be ceded to a foreign State*” (Allied Military Government, *Judicial Decisions and Legal Opinions on Matters of Jurisdiction Relating to the Free Territory of Trieste*, 1951, p. 24).
12. Some Italian jurists, however, began to express doubts as to the effects of Article 21(2) once the setting up of the Free Territory ran into difficulties. Professor Cammarata, for instance, argued that “*the cessation of the Italian sovereignty over the area in question was conditioned by the actual setting up of the Free Territory*” (*ibid.* p. 32). The territory thus appears to have become a special international territory under multilateral guarantee and belonging to no State. Similarly, Professor Udina maintained that “[t]here is no cession in a strict meaning, because at the time when such cession should be operative ... the new community does not exist as yet, be it as one of the contracting parties or as a third party benefitting by the provisions concerning it” (*ibid.* p. 43).

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Annex X addressed succession matters for the Free Territory.

13. The UK and the US did not accept this characterisation of the situation. In some documents, the position seems to be not only that Italy had lost sovereignty over Trieste but that “*Her Majesty’s Government and the United States enjoy sovereignty over Zone A in virtue of the Peace Treaty with Italy*” (FCO, 1 May 1952). In other more considered assessments of the legal situation preceding the 1954 London Memorandum, the UK describes its role and that of the US in terms of temporary administration (FCO, Additional Legal Position, 1953).
14. As for the demilitarization and neutrality provisions, these are not conclusive as to the status of the territory. States have demilitarized and declared neutral various territories which belong to a State (see, e.g., Savoy, the Aaland Islands, etc.). And in any case Article 3 of the Permanent Statute never entered into force (the Permanent Statute as a whole never having entered into force). However, the treatment of the Free Territory as a separate unit in the Permanent Statute further indicates that the intention was not to set up a provisional arrangement but, rather, a lasting special regime.

2. Territorial provisions in the Treaty

15. The Peace Treaty, under Articles 4 and 22, defined the Frontiers of the Free Territory of Trieste. Article 4 defined the frontiers between the Free Territory and Italy. Article 22 defined the frontiers between the Free Territory and Yugoslavia. Read together, Articles 4 and 22 tend to confirm the conclusion also to be drawn from Article 21: the Free Territory was to be part of neither State.
16. The Treaty separately defined the frontier between Yugoslavia and Italy (Article 3).
17. Article 4, paras (ii) and (iii), read together with Article 22, para. (iv), suggest as well that the Free Territory was conferred jurisdiction over a maritime area extending as far as the high seas.

3. Political and foreign relations provisions in the Treaty

18. Under the Permanent Statute, there would have been a range of political arrangements in the Free Territory. The Free Territory would have had its own organs of government (Annex VI, Articles 9, 11, 12, 13), including an independent judiciary (Articles 14, 15, 16); a flag and coat-of-arms (Art. 8); and a Constitution (Art. 10). The Free Territory would have had its own police force (Annex VI, Article 28).
19. The Permanent Statute envisaged that the Free Territory “*may be or become a party to international conventions or become a member of international organizations provided the aim of such conventions or organizations is to settle economic, technical, cultural, social or health questions*” (Annex VI, Article 24, para. 3). This would have entailed a constraint on the treaty-making power of the Free Territory. The Free Territory would also have been obliged not to enter into any economic union or association “*of an exclusive character with any State*” (Annex VI, Article 24, para. 4). An obligation not to enter into union or association is not incompatible with the independence of a territorial unit for purpose of general international law; a limitation preventing a unit from adopting treaties which address general political matters is less clearly compatible with independence, especially where there is no mechanism for the unit to rescind or amend the provision which establishes that limitation.⁵

4. Citizenship and Human rights protections in the Treaty

20. As noted, the main nationality provisions of the Peace Treaty dealing with the nationality of individuals in ceded territory were not applicable to the Free

⁵ This was the concern of the Council of Europe with the 1918 Treaty between France and Monaco. The treaty constrained Monaco’s international practice to an extent which cast doubt on its independence.

Territory. Nationality for the Free Territory was addressed instead in the Permanent Statute under Article 6 which provided as follows:

1. Italian citizens who were domiciled on June 10, 1940, in the area comprised within the boundaries of the Free Territory, and their children born after that date, shall become original citizens of the Free Territory with full civil and political rights. Upon becoming citizens of the Free Territory they shall lose their Italian citizenship.

2. The Government of the Free Territory shall, however, provide that the persons referred to in paragraph 1 over the age of eighteen years (or married persons whether under or over that age) whose customary language is Italian shall be entitled to opt for Italian citizenship within six months of the coming into force of the Constitution under conditions to be laid down therein. Any person so opting shall be considered to have reacquired Italian citizenship. The option of the husband shall not constitute an option on the part of the wife. Option on the part of the father, or if the father is not alive, on the part of the mother, shall, however, automatically include all unmarried children under the age of eighteen years.

3. The Free Territory may require those who take advantage of the option to move to Italy within a year, from the date on which the option was exercised.

4. The conditions for the acquisition of citizenship by persons not qualifying for original citizenship shall be determined by the Constituent Assembly of the Free Territory and embodied in the Constitution. Such conditions shall, however, exclude the acquisition of citizenship by members of the former Italian Fascist Police (O.V.R.A.) who have not been exonerated by the competent authorities, including the Allied Military Authorities who were responsible for the administration of the area.

21. Interestingly, although – as mentioned above – the Permanent Statute did not enter into force in the manner prescribed under Article 21(3) of the Peace Treaty, there are examples evidencing that Yugoslavia recognised FTT citizenship in official records concerning matters of personal status such as registration of marriage.

22. A range of additional human rights provisions addressed the rights of individuals in the Free Territory. These were also set forth in Annex VI, the Permanent Statute. Article 4 of Annex VI provided as follows:

“Human Rights and Fundamental Freedoms

The Constitution of the Free Territory shall ensure to all persons under the jurisdiction of the Free Territory, without distinction as to ethnic origin, sex, language or religion, the enjoyment of human rights and of the fundamental freedoms, including freedom of religious worship, language, speech and publication, education, assembly and association. Citizens of the Free Territory shall be assured of equality of eligibility for public office.”

23. Article 5 of Annex VI provided as follows:

“Civil and Political Rights

No person who has acquired the citizenship of the Free Territory shall be deprived of his civil or political rights except as judicial punishment for the infraction of the penal laws of the Free Territory.”

24. Article 2, paragraph 2, of Annex VI provided that that the Security Council shall “*ensure the observance of the present Statute and in particular the protection of the basic human rights of the inhabitants.*” It also may be noted that duties of the Governor of the Free Territory were to have concerned human rights as stipulated in Annex VI under Article 17, para. 1; Article 20, para. 1; and Article 22, para. 1.
25. It is unlikely that the fate of the human rights guarantees of the Peace Treaty has any direct legal consequence for individuals in Trieste today, particularly in light of the more extensive human rights guarantees found in the European Convention on Human Rights which are applicable to Trieste. For example, when the UN Human Rights Committee considered Italy’s Fourth Periodic Report under the ICCPR in 1997, notice was drawn, e.g., to the Slovene minority in Trieste and the treatment of the territory of Trieste under Italian legislation but no mention was made of the human rights provisions of Annex VI.⁶ Absence of reference to an international law rule in one transaction does not demonstrate that the rule no longer operates; but it would be telling if no indication of its operation exists in any modern practice.
26. As mentioned, there is no doubt that the guarantees in the European Convention on Human Rights apply to Trieste. Quite aside from the question of sovereignty, this is so by virtue of the fact of Italian effective control there and the resultant international responsibility, and is in line with the settled jurisprudence of the European Court of Human Rights on Article 1 of the Convention.⁷ The guarantees of the European Convention are more robust in substance than those in the Peace Treaty; and they are subject to judicial procedures lacking under the Peace Treaty.

⁶ Consideration of Reports submitted by States Parties under Article 40 of the Covenant, 28 May 1997: CCPR/C/103/Add.4, p. 46, para. 210.

⁷ See *Ilașcu and others v. Moldova and Russia*, ECtHR, Application no. 48787/99, Judgment, 8 July 2004; *Cyprus v. Turkey*, ECtHR, Application no. 25781/94, Judgment, 10 May 2001.

A general point nevertheless may be made: the intended Permanent Statute for the Free Territory did not only address the political status of the territory as a unit; it also addressed the rights of individuals inhabiting that unit; and it set down certain obligations toward individuals subject to multilateral guarantee. The provisions for the Free Territory without doubt went beyond the sorts of arrangements sometimes seen in connection with military basing and other time-limited use rights. This was a legal architecture intended to create an overall juridical situation, specifying not only an international law status for the territory but also a basis for legal relations of individuals in the territory under international law.

(B) Memorandum of Understanding (1954)

27. On 5 October 1954, an instrument was concluded in London under the title of “Memorandum of Understanding between the Governments of Italy, the United Kingdom, the United States and Yugoslavia regarding the Free Territory of Trieste.”⁸ According to Article 1 of the Memorandum, “*it... proved impossible to put into effect the provisions of the Italian Peace Treaty relating to the Free Territory.*” Article 1 envisaged the steps taken under the Memorandum to be “*practical arrangements*” in response to the understanding that “[w]hen the Treaty [of Peace] was signed, it was never intended that” responsibilities for the Free Territory “*should be other than temporary.*”
28. It is clear that the Cold War played a crucial role in the adoption of the London Memorandum. The US Ambassador in Rome pressed for a solution favourable to the Italian Government because he was concerned that the “*damaged, shaky and disunited*” Scelba Government could collapse and that, with “*half the Communists in Europe*” based in Italy, “[w]hat are we expected to stop them with here, if not Trieste?” (Amb. Luce to the Secretary of State, 18 March 1954, Luce files, lot 64 F 26, “Letters, 1954”). These considerations would seem to have been fundamental to the decisions of the Powers at the time; they would have ceased to be relevant with the end of the Cold War; but, by then, the changes in the

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235 UNTS 99.

governing arrangement for the Territory had been implemented on the ground in fact.

29. The four governments communicated the Memorandum to the Security Council. The USSR on 12 October 1954 acknowledged the communication and the agreement.
30. As an annex to the Memorandum, the parties adopted a Special Statute. The Special Statute stipulates that Italy and Yugoslavia will implement their “*common intention... to ensure human rights and fundamental freedoms without discrimination of race, sex, language and religion in the areas coming under their administration*” by terms of the Memorandum.
31. The Memorandum terminated UK and US military government in Zone A and transferred Zone A to Italian civil administration; and terminated Yugoslav military government in Zone B and transferred Zone B to Yugoslav civil administration. The boundary between the areas of Italian and Yugoslav civil administration was designated as the same as that between Zone A and Zone B, except for an adjustment in favour of Zone B. The Memorandum did not expressly indicate that sovereignty over Zone A and Zone B was transferred; nor did it make provision for change of nationality of inhabitants of either Zone. Where a change of sovereignty over territory is effected by agreement, questions of nationality arise and, so, the parties to such agreement typically make provision for the settlement of those questions. No such provision was made in the Memorandum, an omission which suggests either that the parties did not believe that the transaction entailed a transfer of sovereignty over the territory; or that they wished to leave the matter open for determination at a later time.
32. The Memorandum also contained provisions on human rights. According to Article 1 of the Special Statute annexed to the Memorandum of Understanding,

“in the administration of their respective areas, the Italian and Yugoslav authorities shall act in accordance with the principles of the Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on 10 December 1948 so that all inhabitants of the two areas without discrimination may fully enjoy the fundamental rights and freedoms laid down in the aforesaid Declaration.”

33. The main concern of the Special Statute was with safeguarding the rights of ethnic groups in the two zones. Article 4 safeguarded the rights of the Yugoslav ethnic group in the Italian-administered zone; and the Italian ethnic group in the Yugoslav-administered zone.
34. Article 7 of the Special Statute provides that the boundaries of the administrative units in the two areas are not to be changed with a view to prejudicing the ethnic composition of the units.
35. Article 8 provided for a Mixed Yugoslav-Italian Committee with the power to examine questions and complaints raised by individuals belonging to the two ethnic groups in respect of the application of the Statute.

(C) Treaty of Osimo

36. Italy and Yugoslavia on 10 November 1975 adopted a Treaty on the delimitation of the frontier for the part not indicated as such in the Peace Treaty of 10 February 1947 (Treaty of Osimo).⁹
37. The Treaty of Osimo, under Article 3, provides for resolution of nationality questions, including the option of persons moving to the State of their ethnic background. The States Parties agreed to “*conclude an agreement on a global*

⁹ 10 Oct. 1975, entered into force 3 Apr. 1977: 1466 UNTS 25.

lump-sum compensation” for Italian natural and juridical persons whose property in territory within Yugoslavia was expropriated (Article 4).

38. Though Article 8 of the Treaty of Osimo envisaged that the Special Statute annexed to the Memorandum of Understanding would cease to have effect, measures taken at the municipal level to implement the provisions of the Special Statute are to remain in force (Article 8).
39. The United States, for one, “recognize[d]” the Treaty of Osimo and indicated that it “understands that the London Memorandum of Understanding of October 5, 1964 [sic] has been superseded.”¹⁰
40. A question might be asked whether the question of Trieste was properly removed from the agenda of the Security Council and, if so, when and by what decision. Amidst the deadlock over the appointment of the territorial governor, the United States at the 641st meeting of the Security Council on 23 November 1953 proposed that consideration of the question of Trieste be postponed; the U.S. proposal was accepted; and then the matter, again on U.S. proposal, was further postponed at the 647th meeting on 14 December 1953.¹¹ This attracted an objection from the USSR, whose representative observed that “this proposal was actually one for the indefinite postponement of the discussion of the Trieste problem... meaning that the Security Council was ‘simply being left out of the question.’”¹² The tabular list of agenda items contained in the Security Council repertory for the period ending 11 November 1968 refers to the Question of the Free Territory as it had been considered at the 344th meeting on 4 August 1948 and shows the last action by the Council to have been the rejection of the Soviet draft resolution on 19 August 1948 (SC 354th meeting). This tabular list—which was current up to 31 December 1968—is the last reference in the Security Council

¹⁰ Note dated 4 June 1977, Embassy of the USA to Federal Secretariat for Foreign Affairs of the SFRY.

¹¹ *Repertoire of the Security Council* (1952-1955), pp. 134-5.

¹² *Ibid*, p. 135, quoting USSR representative at SC 647th mtg, 14 Dec. 1953.

repertory to any action on the question of Trieste.¹³ On 27 May 1977, the Secretary-General issued a statement in connection with a meeting he had had with the Permanent Representatives of Italy and Yugoslavia on the matter of the Treaty of Osimo. The two States had indicated that it was “no longer necessary for the Security Council to remain seized of the two items on its agenda concerning Trieste.”¹⁴ The Secretary-General “welcomed [the] joint demarche” of the two States.¹⁵ On 9 January 1978, the Secretary-General published a summary statement on matters of which the Security Council is seized and on the state reached in the Council’s consideration (S/12520). The Secretary-General stated in the 9 January 1978 statement that the two Trieste items—i.e., appointment of a Government for the Free Territory (S/12269, item 5) and the question of the Free Territory (S/12269, item 13) had, with the consent of the Council, been deleted from the list of matters of which the Council is seized.¹⁶

(D) Italian judgments on sovereignty

41. Italian courts have returned to the question of Trieste in three recent judgments (T.A.R., Friuli Venezia Giulia, n. 00530/13; Consiglio di Stato n. 1350/14; Ordinanza, Sez. Pen., Tribunale di Trieste, 19 March 2014). A number of possible bases for Italian sovereignty have been considered in these cases:
- i) Article 21 of the Peace Treaty was never put into effect and Italy continued to have sovereignty over Trieste in spite of that provision;
 - ii) Italian sovereignty ceased as a result of the Peace Treaty but was reinstated with the 1954 London Memorandum; and
 - iii) Italian sovereignty ceased as a result of the Peace Treaty but was reinstated with the 1975 Osimo Treaty.

¹³ *Repertoire of the Security Council* (1966-1968), p. 42.

¹⁴ *Repertory of Practice of United Nations Organs*, Supp. 5, vol. V (1970-1978), p. 119.

¹⁵ *Ibid*, citing Press Release SG/SM/2451 of 27 May 1977.

¹⁶ *Repertory of Practice of United Nations Organs*, Supp. 5, vol. V (1970-1978), p. 131, n. 796 (with citations).

42. Each of these bases presents problems.
43. The first basis is contradicted by the express terms of Article 21, and by the clear interpretation of this provision which the US and UK gave at the time.
44. The second basis is also contradicted, by the terms of the London Memorandum, as well as various materials found in the archives, which clearly show that administrative power, rather than sovereignty, was transferred under the London Memorandum.
45. The third basis run into a different problem: contrary to the view of the Italian administrative tribunal of Friuli Venezia Giulia, the T.A.R., the Treaty of Osimo, a bilateral treaty, could not have amended the Peace Treaty, a multilateral treaty.
46. In spite of the above problems with the approach of the Italian courts, there is one argument for Italian sovereignty which is not only robust in an analytical sense but also virtually unassailable in a practical sense. This argument is that, at least since the Treaty of Osimo, the Italian exercise of sovereignty over Trieste has been met with no major international protest and, crucially, with no protest from any of the State parties to the Peace Treaty. We were not able to locate any evidence of the British or American Governments even making private protests to the Italian or Yugoslav governments against the Treaty of Osimo. Such protests may have been made at the time but not yet released into the public domain. But this is mere supposition. No less significant is the absence of protest from the international institutions, the Security Council in particular, entrusted with various functions in relation to Trieste.
47. In these circumstances, Italy is able to rely on having exercised sovereignty in an effective and unchallenged manner for at least four decades now, and thus to have

acquired (or re-acquired) title to Trieste through prescription. The principle of prescription has been summarized as follows:

the continuous and undisturbed exercise of sovereignty over [a territory] during such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order.¹⁷

48. The attitude of other States, particularly those with competing claims or legal interests (such as the other State parties to the Peace Treaty in the case of Trieste), is of great importance in cases where one State relies on prescription. The International Court of Justice has emphasized this in the following passage:

Under certain circumstances, sovereignty over territory might pass as a result of the failure of the State which has sovereignty to respond to conduct a *titre de souverain* of the other State or, as Judge Huber put it in the *Island of Palmas* case, to concrete manifestations of the display of territorial sovereignty by the other State (*Island of Palmas Case (Netherlands/United States of America)*, Award of 4 April 1928, RIAA, Vol. II, p. 839). Such manifestations of the display of sovereignty may call for a response if they are not to be opposable to the State in question. The absence of reaction may well amount to acquiescence. The concept of acquiescence 'is equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent...' (*Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America)*, Judgment, I.C.J. Reports 1984, p. 305, para 130). That is to say, silence may also speak, but only if the conduct of the other State calls for a response.¹⁸

49. International law does not offer clear guidance as to the length of time that is required before display of sovereignty acquires full titular force, but it is accepted that the attitude of other States is also relevant to the determination of the period.¹⁹ In the case of Trieste, forty years in the absence of any serious international challenge is no short period. It is certainly arguable that, if one or more State parties to the Peace Treaty had officially protested against the formalisation of Italian sovereignty on the occasion of the conclusion of the Treaty of Osimo (that is, over twenty years after the London Memorandum), those protests would have interfered with the crystallisation of the Italian title of prescription.

¹⁷ *Oppenheim's International Law*, Vol. I, Peace, 9th ed, para 269, p706.

¹⁸ *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)*, Judgment, I.C.J. Reports 2008, p. 12 at para 121.

¹⁹ M. Shaw, *International Law*, 7th ed., p. 365.

50. It is true that where sovereignty over territory has been established clearly under title of a treaty, then that title prevails over *effectivités* (i.e., evidence of actual possession and administration).²⁰ The situation with Trieste however is not simply a contest between one treaty and the long-standing fact of Italian administration. It is also a matter of subsequent treaty practice (the Memorandum and Osimo). More problematic still, this is not a situation in which two States claim a disputed territory/ Here one State claims the territory and there is no other entity organized at the international level to which title could fall in the event that that State's title were impugned.
51. If, *arguendo*, one of the parties to the Peace Treaty (other than the successor States to the former Yugoslavia which are probably precluded from doing so by the Treaty of Osimo) were to raise the question of sovereignty over Trieste tomorrow, the issue could in theory be re-opened on a basis that, in a legal sense, might be described as arguable given the untidy manner in which Trieste was returned to Italy. But, aside from the political prospects of any State making such a move, it is still the case that a State raising this matter after nearly half a century of silence would face considerable criticism and the legal effects of its contentions would no doubt be affected by the lapse of time.
52. Moreover, even if the political difficulties and the problem of lapse of time were overcome, and a State did challenge Italy's possession and title, there still would be a serious further problem of remedies. The remedy in the standard case of a dispute over sovereignty to territory is either (i) confirmation that the current administering State holds sovereignty; or (ii) an award of the territory to the other State and its transfer to that State's administration.²¹ The problem noted two paragraphs above—the absence of an international entity which could effectively administer the territory—further differentiates the situation from the ordinary

²⁰ *Frontier Dispute (Burkina Faso/Mali)*, Chamber Judgment, 22 Dec. 1986, ICJ Rep. 1986 p 554, 586-587.

²¹ For the latter situation, see *Temple of Preah Vihear (Cambodia v. Thailand)*, Judgment, 15 June 1962, ICJ Rep. 1962 p. 6, 37, where see esp. operative para. 1: the Temple did not belong to Thailand, and so it belonged to Cambodia.

territorial dispute. And so a position, i.e. the Italian claim to sovereignty, which possesses at this point very significant analytical merit but is not irrefutable is, in a practical sense, all but watertight. There are examples of States – e.g. Canada in the case of Quebec and the UK in the case of Scotland – agreeing to offer a vote on independence to certain territorial units, but such arrangements, while not contrary to international law, are not required under it either.

III. The Port and Properties of the Free Territory

53. The following issues arise in connection to the Port and Properties of the Free Territory:

- i) As a matter of public international law, what, if any, obligations does Italy have in respect of the Free Port of Trieste?
- ii) Is it in accordance with Italy's international legal obligations to apply Italian municipal law in the Free Port of Trieste?
- iii) Is Italy's conduct in respect of the Free Port of Trieste otherwise in accordance with Italy's international legal obligations?
- iv) What, if any, international dispute settlement procedure are available to challenge Italy's conduct in respect of the Free Port of Trieste?

54. Each will be considered in turn in view of the rights and obligations which they establish or affirm in connection with the Port and Properties.

(A) The Free Port under the Peace Treaty

1. The Free Port provisions: overview

55. According to Article 34 of the Peace Treaty,

“A free port shall be established in the Free Territory and shall be administered on the basis of the provisions of an international instrument drawn up by the Council of Ministers, approved by the Security Council, and annexed to the present Treaty (Annex VIII). The Government of the Free Territory shall enact all necessary legislation and take all necessary steps to give effect to the provisions of such instrument.”

56. The Security Council in resolution 16 (1947) recorded its approval of the instrument—but, as noted above, the implementation of the instrument remained incomplete: the States parties never agreed to execute its provisions that would have completed the constitution of the government of the Free Territory.
57. Goods transiting the Free Port are free from any customs duties or charges “other than those levied for services rendered” (Annex VIII, Article 5, para. 2). Priority for berthing space is to be given to ships of Yugoslav and Italian merchant vessels (Article 3, para. 3) but the port is otherwise a Free Port—i.e., open to ships of all States. Annex VIII, Article 3, para. 2, stipulates that “[t]he establishment of special zones in the Free Port under the exclusive jurisdiction of any State is incompatible with the status of the Free Territory and of the Free Port.”

2. State practice in regard to the Free Port provisions

58. There is no doubt that various States relied upon the Free Port provisions. For example, there was a bilateral Economic Cooperation Agreement between the United States and Austria;²² and a bilateral agreement between Germany and Greece addressing transshipment of certain cargoes.²³ These were in 1948 and 1952 respectively—i.e., before the London memorandum.

²² 2 July 1948, 20 UNTS 30

²³ Gemeinsames Protokoll über die Besprechungen des gemischten Ausschusses für die deutsch-griechischen Wirtschaftsbeziehungen in Bonn in der Zeit vom 14. Bis 28. July 1952, Anlage 1. 182 UNTS 109, 112:

5) “Die Umfüllung darf nur in den Zollhäfen Sète (Frankreich) Genua (Italien) und Triest (internationales Verwaltungsgebiet) unter ständiger Überwachung durch beamtete Chemiker des Zentraldienstes der Allgemeinen Staatlichen Chemischen Anstalt in Athen, die den in den Zollhäfen zuständigen griechischen Konsularbehörden beigegeben werden, stattfinden.“

[Such trans-shipment may be made only in the customs ports of ... and Trieste... under the constant supervision of official chemists of the State General Chemical Laboratory in Athens attached to the Greek consular authorities in the authorized customs ports.]

59. The Italian authorities also accept that international law rights exist in respect of the use of the Free Port.²⁴
60. Notwithstanding the assumption by various States that the Free Port provisions are operative provisions under international law, and notwithstanding its own practice, Italian compliance with a number of provisions in Annex VIII has been called into question. In particular, it has been argued that Italy fails to observe the provision of Annex VIII, Article 5, para. 2, noted above that goods transiting the Free Port are to be free from any customs duties or charges “other than those levied for services rendered.” Whether the position that Italy is in breach is convincing depends upon establishing the content of specific legal obligations opposable to Italy—and, assuming that such obligations exist, upon establishing the facts of Italy’s (non)compliance with the Free Port provisions over time. The facts in this regard are a matter beyond the scope of the present advice.

(B) The Free Port under the Memorandum of Understanding

61. Article 5 of the Memorandum of Understanding provides as follows:
- “The Italian Government undertakes to maintain the Free Port at Trieste in general accordance with the provisions of Articles 1-20 of Annex VIII of the Italian Peace Treaty.”
62. This is plainly a provision intended to establish an international obligation upon Italy. It is not however precise or very exacting. It refers to precise terms—the terms contained in Articles 1-20 of Annex VIII—but it stipulates only that Italy will maintain the Free Port “in general accordance” with those terms. The phrase “in general accordance” does not confer an unlimited discretion on Italy; but it falls short of saying precisely what Italy shall do to fulfil the obligations under Article 5 of the Memorandum.

²⁴ There are numerous examples of such acceptance which has also been noted by the Italian courts. By way of illustration, see the website of the Trieste Port Authority which states that “il referente normativo primario del regime giuridico del Porto Franco di Trieste è l’Allegato VIII al Trattato di Pace di Parigi del 1947” (“the principal statutory framework for the legal regime applicable to the Free Port of Trieste is Annex VIII of the 1947 Peace Treaty of Paris”) at: http://www.porto.trieste.it/ita/porto/porto_franco

63. The interpretation and application of Article 5 will be in light of the relevant circumstances. Particularly relevant is the failure of the administrative apparatus and legal regime envisaged under the 1947 Peace Treaty ever to come into full operation. It cannot be that Italy is to implement Annex VIII in a vacuum of general law. The original understanding under the Peace Treaty was that the general legal framework would be provided by the Free Territory of Trieste. The Free Territory, in effect still-born owing to the failure of the Powers to come to agreement as to its implementation, never provided the requisite legal or institutional framework. Italy, since 1954 obliged to “maintain the Free Port at Trieste *in general accordance* with the provisions of Articles 1-20 of Annex VIII, is to be expected to provide that framework. This is the answer to the question of whether a legal basis exists for Italy to apply Italian law in the area of the Free Port. Italian law is a substitute for the law of the Free Territory, which never achieved full form.
64. It is true that, if Article 5 of the Memorandum of Understanding of 1954 had obliged Italy to act in full accordance with Annex VIII, then a question would arise as to the accordance of Italy’s conduct with that obligation. The parties to the Memorandum however understood that an obligation of full accordance would have been inoperative. The legal and institutional framework of the Free Territory is tightly interwoven with the Free Port (a point which will be developed further below).²⁵ While the Free Port regime is an extensive regime setting out a range of obligations in respect of the operation of a port (evidently in certain respects on an extra-territorial basis), it is not a complete regime for the administration of a territory. The complete regime was contained in the Permanent Statute of the Free Territory (Annex VI of the 1947 Italian Peace Treaty). The difficulty is that the Permanent Statute was not implemented; the institutions it envisaged as governing the Free Territory were not formed. This does not mean that the substantive obligations of Italy “to maintain the Free Port at Trieste in general accordance with the provisions of Articles 1-20 of Annex VIII” have lapsed; but it does mean that the interpretation and application of the phrase “in *general* accordance with”

²⁵

See below paras. 78-81.

must take account of the legal and institutional situation which in practice after 1947 emerged. We will return to this point below.

(C) Continuation of the Free Port provisions by operation of the Treaty of Osimo

65. Article 7 of the Treaty of Osimo provides as follows:

“On the date of the entry into force of this Treaty, the Memorandum of Understanding signed at London on 5 October 1954 and its annexes shall cease to have effect in relations between the Italian Republic and the Socialist Federal Republic of Yugoslavia.”

66. It follows from general principles of interpretation that this provision could only affect relations between Yugoslavia and Italy: Yugoslavia and Italy are the only parties to the Treaty to which the provision belongs. Indeed, Article 7 in terms indicates that the Memorandum of Understanding “shall cease to have effect *in relations between the Italian Republic and the Socialist Republic of Yugoslavia*”—i.e., Article 7 does not purport to affect the pre-existing treaty relations of other States. This limitation on the scope of Article 7 has legal significance: it supports the conclusion that the provisions in the 1947 Italian Peace Treaty which created the Free Port of Trieste either (i) continue in force or (ii) in any case are not affected by the Treaty of Osimo

67. The ground for this conclusion is that the Free Port provisions of the 1947 Italian Peace Treaty (and of Article 5 of the 1954 Memorandum of Understanding which continued the Free Port provisions) establish treaty rights in other States; they are not provisions limited in their effect to Italy and Yugoslavia. It follows that the Free Port provisions, insofar as those provisions created rights in States other than Italy and Yugoslavia, were not affected by the Treaty of Osimo.

68. What States other than Italy and Yugoslavia have (or had) rights under the Free Port provisions will be considered below.²⁶
69. That the Treaty of Osimo did not affect the operation of the Free Port provisions to the extent that those provisions apply to other States is evidently accepted by Italian courts:
- “The only part of the Peace Treaty concerning the Free Territory but not the issue of the boundary between Italy and Yugoslavia, and which therefore concerned countries other than Italy and Yugoslavia was the regime of the Free Port of Trieste which was actually expressly protected by the Memorandum of London of 1954, in Article 5 and implicitly by the Treaty of Osimo, which in its Article 7 annulled the Memorandum of London with regard to the bilateral relations between Italy and Yugoslavia in a way that maintained Article 5 of the Memorandum on the Free Port.”²⁷
70. As mentioned, the continuation of a special legal régime for the Free Port also is acknowledged by the Trieste Port Authority, a public body of Italy.²⁸ According to the Port Authority,
- “The primary instrument governing the legal regime of the Free Port of Trieste is Annex VIII to the 1947 Paris Peace Treaty.”²⁹
71. Italy, as recently as 2012, has notified the EU of the existence of Trieste as a Free Port.³⁰
72. The Port Authority draws attention to the changes which occurred after 1947, especially “Italy’s subsequent assumption of international responsibility for the city and the Port of Trieste under the Memorandum of Understanding signed in

²⁶ See below paras. 82, 90-95.

²⁷ Appeal No. 148 of 2013, Regional Administrative Court of Friuli Venezia Giulia (Division One), Judgment, 28 Oct. 2013, p. 49 (English language translation furnished by TRIEST NGO).

²⁸ See http://www.porto.trieste.it/eng/port_authority/mission:

“The Port Authorities are non-profit public bodies, with administrative, budgetary and financial autonomy, established under the reform of legislation concerning ports enacted in Italian Law 84 dated 28 January 1994. They have legal status under public law and are subject to oversight by the Ministry of Infrastructure and Transport and the Ministry of Economy and Finance.”

²⁹ http://www.porto.trieste.it/eng/port/free_port_area

³⁰ Free Zones in Existence and in Operation in the Community as Notified by the Member States to the Commission: http://ec.europa.eu/taxation_customs/resources/documents/customs/procedural_aspects/imports/free_zones/list_freezones.pdf

London in 1954.”³¹ This evidently has not abrogated the provisions of Annex VIII stipulating a customs regime “unique in the Italian and EU legal system.” The Port Authority indicates as follows:

“As regards the customs regime, the Free Zones of the Port of Trieste enjoy the legal status of customs clearance exemption, which involves a whole series of beneficial operating conditions for the Free Port of Trieste. This is undoubtedly the biggest area of difference between the regulations of the Free Port of Trieste and national and EU ones.”

73. It also appears that a number of other States have assumed the Free Port provisions in respect of customs and tariff treatment to remain in force. For example, treaties with Austria in 1955 and 1985 and with Hungary in 1988 provide for the use of the Free Port.

74. Multilateral practice also may be relevant in this connection. For example, GATT Article XXIV, paragraph 3, provides as follows

“3. The provisions of this Agreement shall not be construed to prevent:

...

(b) Advantages accorded to the trade with the Free Territory of Trieste by countries contiguous to that territory, provided that such advantages are not in conflict with the Treaties of Peace arising out of the Second World War.”

GATT Article XXIV does not refer expressly to the Free Port provisions; but it makes clear that the general trade regime embodied in the GATT did not override the specific regime of trade in respect of the Free Territory.

75. Not all international bodies which might have acknowledged the provisions have done so: e.g., Economic Commission for Europe, Inland Transport Committee, Working Party on Transport Trends and Economics.³² The absence of reference to the Free Port likely would be noted in contentious proceedings.

(D) Possibilities for giving practical effect to the Free Port provisions

76. Unlike the treaty provisions concerning the Free Territory as a whole, the provisions concerning the Free Port have not by express agreement or any other

³¹

Ibid.

³²

Report, 20 July 1995: TRANS/WP.5/R.68.

obvious mechanism ceased to have effect. The Free Port provisions indicate rights to be held by all parties to the Peace Treaty and rights to be held by other States as well. As noted above, Italian courts acknowledge that neither the Memorandum of Understanding of 1954 nor the Treaty of Osimo of 1975 terminated the Free Port arrangements. To the contrary, the 1954 instrument expressly indicates that the Free Port provisions continue in force. The 1975 treaty implicitly accepts the same, or at least it can be credibly argued. Italy or another party, if arguing that the Free Port provisions no longer have legal effect, would have to explain in particular why Italian courts have acknowledged (and as recently as 2013 and 2014) that those provisions have not entirely lapsed or been superseded. The relevant administrative authority—the Trieste Port Authority—also acknowledges a special legal regime for the port. It would be very hard for Italy to disown the Authority's statements in this regard.

77. There nevertheless would be difficulties in establishing a practical effect for the Free Port provisions today. In particular, there is the problem that the Free Port provisions (which at least would seem to remain in force) are tightly connected to the non-self-executing general provisions concerning the Free Territory which the parties never implemented. There is also the problem of identifying a dispute settlement apparatus under which the matter of Italy's management of the port could be challenged; and of identifying a party or parties which could plausibly assert standing to institute proceedings. We will consider below the connection of the Free Port to the Free Territory (1); followed by the possibility that the Free Port provisions could operate independently of those concerning the Free Territory as such (severability) (2); if the former operate independently of the latter, then, in our view, that makes all the more plausible an argument that Italy remains subject to obligations in respect of the Free Port (subsisting obligations) (3). We then turn to the dispute settlement provisions under which a party might proceed in opposing such obligations against Italy, in which connection we will consider the problem of identifying a party with a plausible claim to standing (4).

(1) The problem of the entanglement between the Free Port and Free Territory provisions

78. The Free Port provisions would seem to have survived the expiry of the general provisions concerning the Free Territory. The Free Port and its administration nevertheless are interconnected with numerous provisions concerning the Free Territory. In particular, the administrative apparatus of the Free Port is linked to the Free Territory.
79. Examples of the integral relation between the Free Port and the Free Territory include (but are not limited to) the following:

Under Annex VIII (the Instrument for the Free Port of Trieste)

- Article 2, para. 1: “The Free Port shall be established and administered as a State corporation of the Free Territory...”
- Article 2, para. 2: “All Italian state and para-statal property within the limits of the Free Port which, according to the provisions of the present Treaty, shall pass to the Free Territory shall be transferred, without payment, to the Free Port.”
- Article 3, para. 4: “In case it shall be necessary to increase the area of the Free Port such increase may be made upon the proposal of the Director of the Free Port by decision of the Council of Government with the approval of the popular Assembly.”
- Article 4 (application of Free Territory laws to the Free Port).
- Article 7, para. 2: “Upon the proposal of the Director of the Free Port, the Council of Government may permit the establishment of new manufacturing enterprises within the limits of the Free Port.”
- Article 8 (authorities of the Free Territory as responsible for anti-smuggling regulations in the Free Port).
- Article 9, para. 1 (authorities of the Free Territory as responsible for fixing harbour dues in the Free Port).
- Article 11 (authorities of the Free Territory as empowered for regulating the passage of persons into and out of “the Free Port area”).
- Article 14 (authorities of the Free Territory as empowered to apply health measures “within the boundaries of the Free Port”).

- Various other provisions conferring powers upon the Governor and/or the Council of Government (both of which were organs of the Free Territory) in respect of administration of the Free Port (e.g., Art. 18, para. 1; Art. 20, para. 3; Art. 25).

Under the Peace Treaty (main part)

- Article 13, para. 3 (participation of the Director of the Free Port in Council of Government meetings).
- Article 34.

80. In short, there was the territorial arrangement—the Free Territory which never fully achieved the form provided for under Annex VI—and there is the Free Port, an arrangement which seems in some legal sense to continue but which was integrated with the Free Territory in the treaty instrument that created it. It is hard to see how the administrative apparatus of the Free Port could be made operative today without radically re-configuring the administrative scheme—i.e., decoupling it from the Free Territory provisions.
81. It is clear from the above that the 1947 Italian Peace Treaty was intended under Article 21 to create a special international entity, not part of any State but having a number of the main attributes of independent statehood. And it seems that the authorizations and requirements under the Peace Treaty in connection with that entity were not put fully into effect; they certainly were not self-executing.³³ As such, the lapsing of the status of the Free Territory might be said to have led to a lapsing of the various other provisions which, being non-self-executing, could only have been implemented by acts of the Free Territory. Non-implementation of an obligation certainly does not, as such, remove the obligation; but non-implementation over a long period in the absence of express objection well may have legal effects. It further might be said that, while the rights and obligations connected to the Free Port were never abrogated or suspended, the only organs which could have given those rights and obligations concrete expression do not exist and, their enabling treaty now superseded, are not to be brought into

³³ See James Crawford, *Creation of States*, 2nd edn (Oxford: Oxford University Press, 2006) p. 447, a conclusion which follows from the practice.

existence. This, in any event, is what Italy or another party, if objecting to a claim for the present-day revival of these provisions, would be likely to say.

(2) Severability of administrative apparatus and the obligation of customs-free treatment in the Free Port

82. There is a difference, however, between the provisions that were intended to create parallel, and to the extent noted above entangled, apparatuses of administration for Territory and Port; and provisions specifying obligations in respect of the use of the Port which could be fulfilled by whatever governmental structure might be functioning in Trieste. As noted, Annex VIII specifies that the use of the Free Port is not to be subject to any customs duties or charges “other than those levied for services rendered” (Annex VIII, Article 5, para. 2). This is an obligation that would seem to attach to whomever administers the Free Port and under whatever administrative apparatus. Consistent with the view that the privileged treatment of goods transiting the Free Port is not dependent on the (largely non-functioning) administrative provisions of the Peace Treaty, the Peace Treaty generalizes the privilege: the status of the Free Port as a free zone is for the benefit not only of all the parties to the Peace Treaty but to all Central European States and, indeed, to States generally. The present-day administrative apparatus functioning in Trieste could just as well fulfil an obligation to respect that status as could any effective administration.

(3) Subsisting obligations of Italy

83. The Free Port provisions created obligations owed by Italy to a number of States (and, perhaps, as well as to the inhabitants of Trieste, a point which will be considered further in Part IV below). Distinct from the obligations relating to the administrative apparatus, there is no clear explanation as to how it would be that these obligations have lapsed.

84. Indeed, the Italian port authority seems to understand that Trieste is a port under a special legal régime.³⁴ The recent decisions of Italian courts have already been noted. Such practice (administrative and judicial) would seem to indicate an acceptance, on Italy’s part, of the continued existence of obligations arising

³⁴ http://www.porto.trieste.it/eng/port/free_port_area

originally under the Peace Treaty. Acknowledgement of the existence of an obligation does not amount to accordance with the obligation. Whether there is a breach of the provisions in the Peace Treaty on the port will depend on how Italy at present treats the port.

85. If it can be shown that Italy's conduct has not accorded with the Free Port provisions to the extent that the obligations contained in the Free Port provisions remain opposable to Italy, there would exist continuing breaches capable of attracting Italy's international responsibility.
86. Not every breach, however, is associated with a dispute settlement mechanism through which reparation may be obtained. Next we will consider the possibilities for dispute settlement in respect of the Free Port.

(4) Dispute settlement in respect of the Free Port

a. Article 24

87. Article 24 of Annex VIII of the Italian Peace Treaty (Instrument for the Free Port of Trieste) provides as follows:

“Any dispute relating to the interpretation or execution of the present Instrument, not resolved by direct negotiations, shall, unless the parties mutually agree upon another means of settlement, be referred at the request of either party to the dispute to a Commission composed of one representative of each party and a third member selected by mutual agreement of the two parties from nationals of a third country. Should the two parties fail to agree within a period of one month upon the appointment of the third member, the Secretary-General of the United Nations may be requested by either party to make the appointment. The decision of the majority of the members of the Commission shall be the decision of the Commission, and shall be accepted by the parties as definitive and binding.”

88. An argument could be made that the term “party” in Annex VII, Article 24, means “*party to a dispute relating to the interpretation or execution of the present Instrument*”—not only “*party to the 1947 Italian Peace Treaty*”, even though it most likely would have been two parties to the Peace Treaty between whom disputes would have arisen.
89. The question arises whether recourse could be made to the dispute settlement mechanism of Article 24, and if so then by whom. There is no doubt that, as far as it goes, Article 24 is an operative dispute settlement clause: it provides a full

procedure, including default procedure, for constituting the dispute settlement organ (the “Commission”).

b. Party standing under Article 24 and other mechanisms

90. If invoking Article 24, a party well might be challenged on grounds of standing. The question is who or what entity would have standing to challenge a breach of the Free Port provisions under the dispute settlement provision of Annex VIII, and on what basis?
91. The legal basis for the conclusion that those provisions were not disturbed by the 1975 Treaty of Osimo is that a bilateral treaty cannot affect the rights created to benefit States not party to that treaty. A breach of the Free Port provisions would be a breach of rights belonging to other States parties to the 1947 Italian Peace Treaty (and States, if there were any, which availed themselves of the option under Annex VIII, Article 26, to assume the obligations of the Instrument for the Free Port of Trieste).³⁵ So various States might raise a challenge in case of breach; but there is no clear basis for a non-State entity to do so.
92. Which are the States that might do so? First, there are the parties to the 1947 Italian Peace Treaty. Second, States which availed themselves of the invitation to assume obligations under the Treaty by notification (Article 26) would also seem to be entitled to challenge a breach.
93. Then there are “the States of Central Europe,” which under Annex VIII, Article 1, para. 1, shall enjoy the freedom of transit stipulated under Article 16 and customs treatment under Article 3.
94. A further possibility to be considered are the provisions of the Instrument for the Free Port addressed to all States. In particular, Annex VIII, Article 5, para. 1, provides that...

“Merchant vessels and goods of all countries shall be allowed unrestricted access to the Free Port for loading and discharge both for goods in transit and goods destined for or proceeding from the Free Territory.”

³⁵

Annex VIII, Article 26, provided as follows:

“For the purposes of the present Instrument a State shall be considered as having assumed the obligations of this Instrument if it is a party to the Treaty of Peace with Italy or has notified the Government of the French Republic of its assumption of such obligations.”

It might be argued that this provision created rights in “all countries”—and thus it might further be argued that any country would have standing to challenge a failure by Italy to act in accord with Annex VIII. It would surely be objected that the rights are more limited than that: they are rights for a particular purpose, to be exercised by particular persons—i.e., rights in respect of loading and discharging goods at the Free Port to be exercised by merchant vessels—not rights on the part of States not parties to the Peace Treaty to challenge alleged breaches of the Instrument. But the plain terms of Annex VIII, Article 5, establish a right held by “all countries”; and Article 16, a right held by “the States of Central Europe.”

95. Even if a State identified in the text of Annex VIII did not have standing as a “party” to institute proceedings under Article 24, this would not necessarily exhaust the possibilities. The absence in the treaty creating a right of a mechanism to challenge a breach of right does not eradicate the right. The right subsists. And mechanisms may exist *outside* the treaty under which the subsisting right could be invoked. Several may be considered briefly.

c. UN Charter

96. It would be open to a State to raise the matter of its rights under the Peace Treaty at the Security Council. As noted, the Council apparently allowed the matter of Trieste to lapse from the agenda. This does not however prevent a State from raising it again.

d. Arbitration under bilateral investment treaties (BITs)

97. The provisions of Annex VIII plainly were intended to guarantee transit freedom, customs treatment, and port access for vessels and goods; these are rights that would be enjoyed by private parties, even as the parties to the Peace Treaty are States. A further possibility for dispute settlement would be for a non-Italian investor who moves goods into or out of Italy through maritime ports in connection with the investment to invoke an applicable bilateral investment treaty (BIT) of Italy.
98. Many BITs—including those of Italy—provide for the settlement of investment disputes by means of arbitration, including by means of arbitration instituted by an

investor of the nationality of one of the States Parties to the BIT against the other State Party. That is to say, the investor may proceed directly against the host State, provided the requirements of standing and jurisdiction are met.

99. Some BITs also have rather far-reaching applicable law provisions. It would be by reference to such a provision that an Italian BIT might be said to require an arbitral tribunal to apply, *inter alia*, the Free Port provisions of Annex VIII. To take one example, Article 12, paragraph 2, of the Italy-Egypt BIT provides as follows:

“Where a matter is governed both by this Agreement and by another international agreement to which both Contracting States are Parties, or general international law, nothing in this Agreement shall prevent either Contracting State, or any of its natural or juridical persons who owns investments in the territory or maritime zones of the other Contracting State, from taking advantage of whatever rules are more favourable to his case.”³⁶

The relatively straightforward case would be where one of the other States Parties to the Peace Treaty has a BIT in force with Italy; and an investor from that other State Party instituted proceedings against Italy on the ground that its investment was adversely affected by a failure on Italy's part to observe Italy's obligations in respect of the Free Port. The loss, which would need to be proven by the investor, might for example derive from the financial detriment caused by customs and other charges levied on goods connected with the investment.

100. Less straightforward, but perhaps arguable, would be the case where an investor is of the nationality of a State not party to the Peace Treaty but having a BIT in force with Italy. The investor would attempt to apply the Free Port provisions by reference to the BIT provision concerning “general international law.” Italy is likely to resist this on the grounds that “general international law” does not include special treaty provisions. It is true that the most obvious case of a “general international law” rule is a rule which has emerged through the process of customary international law formation and is opposable by any State against any other State. Yet a rule which obliges a State to accord certain treatment to “all countries”, especially where the rule was adopted as part of a general peace settlement, is not an ordinary contractual undertaking. As the “general international law” provision quoted above in the Italy-Egypt BIT was incorporated

³⁶

2 March 1989.

into other Italian BITs, the argument would have to be made, if the BIT was to be used in this way.

101. Recent practice indicates the possibility of mass claims under BITs—i.e., combining the claims of multiple claimants under one proceeding. The *Ambiente* and *Abaclat* proceedings against Argentina in particular suggest the possibilities for grouping a class of claimants together to pursue reparation from a respondent State.³⁷ The claimants in *Ambiente* and *Abaclat*, incidentally were bondholders of Italian nationality.
102. The availability of mass claims procedures under BITs presents the possibility that an identified group of investors from one State institute a case against Italy to seek reparation for the losses suffered by the investors as a group.
103. Most BITs, including most or all of those of Italy, require that an investor in dispute with the host State attempt to settle the dispute amicably (i.e., through negotiation) before instituting arbitration. A group of investors—or groups of investors from multiple States having BITs with Italy—well might gain additional leverage if they presented their claims to Italy *en masse* in the spirit of achieving a single global settlement.

e. Conclusions as to dispute settlement

104. The present advice is to furnish an overview of possibilities, not an exhaustive analysis of each. The treatment above of the possibility of invocation of a BIT accordingly is tentative and in summary only. Nevertheless, in our view, invocation of a BIT—or of multiple BITs by multiple investors of different nationalities—well may be the most promising avenue for vindicating alleged violations of Italy's international legal obligations in relation to the Free Port of Trieste where a demonstrable loss is caused to a foreign investor by those violations. Significant defences would be mounted by Italy as respondent. Standing and jurisdiction inevitably would be challenged, and strongly. So too would the merits of a claim (or claims), if the merits were reached. Finally, Italy would resist any significant quantification of injuries: a claimant would have to be prepared to demonstrate precisely how Italy's management of the Free Port caused

³⁷ *Ambiente Ufficio S.P.A. v. Argentina*, ICSID No. ARB/08/8, Decision on Jurisdiction and Admissibility; *Abaclat v. Argentina*, ICSID No. ARB/07/5, Decision on Jurisdiction (2011).

the claimant injury. However, the recent success of claimants in instituting group or mass claims suggests the possibility of aggregating claims against Italy for its conduct in the Free Port over time.

IV. Freedom of Speech and Other Civil and Political Rights

105. We are asked about constraints placed upon speech and other expression by residents of Trieste addressing questions of the status of the territory and Port. The ECHR is willing to accept, to a certain extent, interference in the freedom of expression that is aimed to protect the territorial integrity of the State. This acceptance is expressed through the argument that interference in separatist propaganda is justified in light of the right of the State to preserve its “territorial integrity”. However, interference has been judged unsound when it has been disproportionate and not “necessary in a democratic society”. These points were developed initially in cases brought against Turkey (*Zana v Turkey*, *Ceylan v Turkey*).

106. More recently, in a case concerning independentist political speech in Moldova (*Kommersant Moldovy v Moldova*), the Court held:

b. Legitimate aim

35. The interference could be considered to have pursued the legitimate aims of protecting the national security and territorial integrity of the Republic of Moldova, given the sensitive topic dealt with in the impugned articles and the sometimes harsh language used.

c. “Necessary in a democratic society”

36. The Court considers that the domestic courts did not give relevant and sufficient reasons to justify the interference, limiting themselves essentially to repeating the applicable legal provisions. In particular, the courts did not specify which elements of the applicant’s articles were problematic and in what way they endangered the national security and the territorial integrity of the country or defamed the President and the country.

37. In fact, the courts avoided all discussion of the necessity of the interference. The only analysis made was limited to the issue of whether the articles could be considered as good faith reproductions of public statements for which the applicant could not be held responsible in accordance with the domestic law.

38. In light of the lack of reasons given by the domestic courts, the Court is not satisfied that they “applied standards which were in conformity with the principles embodied in Article 10” or that they “based themselves on an acceptable assessment of the relevant facts” (see *Jersild*, cited above, § 31).

107. A further factor that might assist the expression of independentist political discourse in this case is that the European Convention is a specific regional convention but it nevertheless exists as part of the framework of public international law generally.³⁸ It would be a curious position for the European Court of Human Rights to take if it agreed that Italy, Slovenia or Croatia can prevent individuals on their territory from drawing attention to a situation which in their view amounts to a breach of public international law and which at least in certain respects presents *bona fide* questions.

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28 October 2014

³⁸ *Cyprus v. Turkey*, ECtHR, Application no. 25781/94, Judgment (just satisfaction), 12 May 2014, para. 23:

“[T]he provisions of the Convention cannot be interpreted and applied in a vacuum. Despite its specific character as a human rights instrument, the Convention is an international treaty to be interpreted in accordance with the relevant norms and principles of public international law... [T]he Court has never considered the provisions of the Convention as the sole framework of reference for the interpretation of the rights and freedoms enshrined therein. On the contrary, it must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties.”