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Jurisdictional implications of non-recognition of illegal territorial acquisition’s obligation in investment treaty arbitration

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List of abbreviations

- ARSIWA – Articles on the Responsibility of States for Internationally Wrongful Acts
- BIT – Bilateral investment treaty
- ECHR – The European Court of Human Rights
- Friendly Relations Declaration – The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations
- ICJ – The International Court of Justice
- ICSID – The International Centre for Settlement of Investment Disputes
- ILC – The International Law Commission
- The non-recognition rule – The rule of non-recognition of illegal territorial acquisitions
- The UN – The United Nations
- UNCITRAL – United Nations Commission on International Trade Law
- VCLT – Vienna Convention on the Law of Treaties
Chapter I – Introduction

Over the last two decades, a number of transfers of territories between states have occurred having legal consequences on the various sets of rights of those affected.\(^1\) In particular, such transfers impact investments and their protection mechanisms as prescribed by international investment treaties. The impact becomes significant in case of territory transfers that are recognized as illegal by the international community. Recent Crimean cases\(^2\) being an example of such transfer\(^3\) provoke, \textit{inter alia}, a question whether tribunals can establish the fact of \textit{de facto} territorial control if a respondent state has resorted to the threat or use of force (hereinafter also referred to as a “\textit{state-wrongdoer}”). It would be an extension of respective international investment treaties’ application to such territories, which is a prerequisite for tribunals’ jurisdiction.

Establishing \textit{de facto} territorial control would mean the recognition of the transfer of the territory to the state-wrongdoer, at least on a temporary basis.\(^4\) In this context,

\(^2\) See e.g. Aeroport Belbek LLC and Mr Igor Valerievich Kolomoisky v Russia (PCA Case No 2015-07) <https://pca-cpa.org/en/cases/123/> accessed 20 May 2019; 
\(^3\) UNGA Resolution 68/262 (27 March 2014) A/RES/68/262
\(^4\) See e.g. Dumberry P, ‘Requiem for Crimea: Why Tribunals Should Have Declined Jurisdiction over the Claims of Ukrainian Investors against Russian under the
the rule of non-recognition of illegal territorial acquisitions (hereinafter also referred to as the “non-recognition rule”) may be relevant for not recognizing illegal transfers of territories and moreover, arguably, not to take any actions that might imply such recognition. Some academics claim that this rule deprives investment tribunals of jurisdiction to hear cases related to illegally transferred territories due to the fact that as a consequence of this rule they cannot acknowledge the *de facto* territorial transfer. Given that the non-recognition rule is a part of customary law, it might come into play when tribunals review jurisdiction *propter motum* or *ex officio* and apply international custom as public international law.

The thesis aims to analyze to what extent the non-recognition rule is applicable in investment treaty arbitration and specifically whether it may constitute a jurisdictional hurdle depriving investors of the opportunity to effectively seek the protection of their investments on illegally acquired territories through investment treaty arbitration.

1.1. Research question

The present research is grounded on the following research question: “*Does the non-recognition of illegal territorial acquisition rule constitute a jurisdictional hurdle for cases dealing with investment disputes related to illegally acquired territories?*”.

1.2. Purpose and delimitations of the topic

The purpose of the thesis is to identify and evaluate the relevance of the non-recognition rule in investment treaty arbitration and answer the research

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5 See Chapter II, Parts 2.1.1, 2.1.2
6 See *e.g.* P. Dumberry, ‘Requiem for Crimea’, p. 532
7 See Chapter II, Part 2.1.1
8 Ibid.
question. To achieve this purpose, a two-step analysis has been conducted as reflected in Chapters II and III. Chapter II encompasses analysis of the two crucial for the general research issues: the nature of the non-recognition rule and the ways how jurisdictional matters can be raised in investment treaty arbitration. The first part deals with the non-recognition rule in the context of public international law, including its origin, customary nature, purpose, and intended addressees. The second part deals with the examination of the tribunals’ powers to review jurisdictional matters without the objections from the respective parties, namely on *ex officio* and *proprio motu* basis. In this context, the line between ICSID and non-ICSID cases is drawn and the relevance of the obligation to render an enforceable award is discussed. The tribunals’ jurisdictional powers issue is of utmost importance for the research due to the fact that the non-recognition rule is not likely to be claimed by either claimants, which wish tribunals to have jurisdiction, or respondents, which would be reluctant to admit the illegal nature of the territorial acquisition. Thus, the non-recognition rule can be expected to be raised solely by tribunals.

Given that Chapter II’s conclusions suggest that the non-recognition rule is indeed part of public international law and that tribunals can raise jurisdictional matters without respective claims of the parties, Chapter III is focused on the analysis whether tribunals should exercise the powers to review jurisdiction on their initiative and conclude that the non-recognition rule constitutes a jurisdictional hurdle. In this regard, there is examination of whether investment tribunals are proper addressees of the non-recognition rule and whether the scope of this rule overlaps with issues that might arise in investment treaty arbitration. Furthermore, an alternative approach is provided in light of the aim of the non-recognition rule and the object and purpose of international investment treaties, along with analysis of possible outcomes of the finding that the non-recognition rule indeed constitutes a jurisdictional hurdle. The analysis is supplemented by a reference to arbitration case law.

The present research is limited to the examination of the non-recognition rule and its possible application in investment treaty arbitration. In this context,
classification of a particular acquisition of territory as illegal from the international law perspective is presumed based on the reaction of the international community, which is primarily reflected in the wording of the resolutions of the United Nations General Assembly and Security Council. In this context, it should be mentioned the present research does not analyze territorial dispute cases, in which states-wrongdoers do not publicly claim territory as their own and whose involvement and attribution of actions under the Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter referred to as “ARSIWA”) is harder to prove (e.g. the Russian Federation’s responsibility for the investments on the territory of Donbas in Eastern Ukraine). Other subsidiary issues, e.g. definition of territory, effective territorial control, succession of treaties, are outside the scope of the research.

1.3. Methodology and sources

The present research is grounded on the basic legal method. Firstly, the issues of the non-recognition rule in the context of public international law and jurisdiction review powers of tribunals are identified as presented in case law and studies of public international law scholars and practitioners. Secondly, there is a presentation why in the course of conducting a jurisdictional review by international investment tribunals the issue of the non-recognition rule may arise. Finally, an analysis of whether the non-recognition rule constitutes a jurisdictional hurdle in investment treaty arbitration is made.

In course of the research, international treaties and their preparatory works, documents of international organizations, case law of both permanent international judicial institutions and arbitral tribunals, and scholarly writings are scrutinized.

1.4. Acknowledgement

This thesis has been produced during my scholarship period at Uppsala University, funded by the Swedish Institute.
Chapter II – Analysis of general issues

In order to conclude whether the non-recognition rule can constitute a jurisdictional hurdle in investment treaty arbitration, an explanation of the content of the rule and the ways how it can be raised in investment arbitration cases should be made. That is why this Chapter deals with the analysis of the nature of the non-recognition rule, its scope, and its aim. Besides, it also provides an overview of the approaches to the powers of arbitral tribunals to raise jurisdictional matters in the absence of respective parties' submissions.

2.1. The non-recognition rule as part of public international law

This sub-chapter is aimed at an in-depth analysis of the non-recognition rule from the public international law perspective. At first, the customary nature of the rule is examined, followed by the examination of the scope of the non-recognition rule. Finally, in order to set boundaries for the application of the non-recognition rule, various approaches to the understanding of the aim of the rule are presented.

2.1.1. The customary nature of the non-recognition rule

The non-recognition rule has a long history stemming from numerous situations when states were called not to recognize the illegal transfer of a territory or refused to do so on their own initiative. Historically, as it will be shown below, this rule has been developing as a part of the rule not to recognize illegal situations as lawful if they are caused by a breach of a *jus cogens*. The reason is that an illegal transfer of territory means either occupation or annexation, which are caused by threat or use of force, the prohibition of which is *jus cogens*. The analysis below provides an overview of the origin of the non-recognition rule and the rule not to recognize illegal situations as lawful if they are caused by a breach of *jus cogens* (hereinafter also referred to as the “**non-recognition as lawful rule**”), which are interconnected.

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One of the first examples of the non-recognition rule’s affirmation through the non-recognition as lawful rule is the statement of the Assembly of the League of Nations with regard to the Manchurian conflict: “it is incumbent upon the members of the League of Nations not to recognize any situation, treaty or agreement which may be brought about by means contrary to the Covenant of the League of Nations or to the Pact of Paris”.\(^{10}\) Acceptance of this statement by states shows the formation of the state practice and opinion juris for the non-recognition as lawful rule, which are two elements of custom.\(^{11}\)

Afterwards, the work on the development of this rule was accelerated, which resulted in explicit wording of the rule enshrined in the Draft Declaration on the Rights and Duties of States of 1949. In particular, Article 11 of this draft declaration provides that “every State has the duty to refrain from recognizing any territorial acquisition by another State acting in violation of Article 9 (author: prohibition of the threat or use of force)”.\(^{12}\) This draft contains a more specific wording with respect to the non-recognition rule as it deals directly with territorial acquisitions. Even though this draft has never been adopted, it formed the basis for the non-recognition’s future developments as part of public international law.

The next step in the development of the non-recognition rule is the work of the Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States.\(^{13}\) The committee presented a draft of

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\(^{11}\) Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993, Article 38(1)(b)

\(^{12}\) UNGA, Draft Declaration on Rights and Duties of States (06 December 1949) A/RES/375 (06 December 1949)

the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations (hereinafter referred to as the “Friendly Relations Declaration”) that was further adopted by the United Nations General Assembly in 1970.\(^1\) The first principle of the Friendly Relations Declaration states the following: “… States shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations”.\(^1\) It also provides that “no territorial acquisition resulting from the threat or use of force shall be recognized as legal”.\(^1\) Such explicit wording of the declaration is evidence of the general acceptance of the binding nature of the non-recognition rule in those times.

Afterwards, a number of other international legal instruments were adopted with the aim to foster international cooperation and strengthen international security, e.g. the Declaration on the Strengthening of International Security of 1970, the United Nations General Assembly Resolution 3314 (XXIX) on Definition of Aggression of 1974, the Helsinki Final Act of the Conference of Security and Co-operation in Europe of 1975, and the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations of 1987.\(^1\) The 1977 First Additional Protocol to the 1949 Geneva Convention, *inter alia*, highlights that: “*Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question*”.\(^1\) Even though the mentioned instruments either deal with specific aspects of the non-recognition rule or just contain general prohibitions of threat or use of force, they contributed the formation of the state practice of condemning non-peaceful territorial actions to the effect to disregard their effects.

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\(^1\) UNGA Res 2625 (24 October 1970) 25\textsuperscript{th} Session Supp 18

\(^1\) Ibid.

\(^1\) Ibid.

\(^1\) Talmon S, ‘The Duty Not to Recognize’, p. 103

\(^1\) Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3
One of the main international documents dealing with the non-recognition rule through the non-recognition as lawful rule is the International Law Commission’s Articles on the Responsibility of States for Internationally Wrongful Acts (hereinafter referred to as “ARSIWA”) Part 2 of Article 41 stipulates that “no State shall recognize as lawful a situation created by a serious breach of an obligation arising under a peremptory norm of general international law”. This provision deals with a general prohibition to recognize as lawful situations caused by a violation of peremptory norms. It enshrines a principle of ex injuria jus non oritur meaning an unlawful act cannot be a source for wrongdoers’ legal rights or defences.

ARSIWA does not contain a definition of a peremptory norm, however, the definition may be found in the Vienna Convention on the Law of Treaties. In particular, the convention defines that a peremptory norm (also called a jus cogens) is “a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character”. As an example of such norms, the International Law Commission (hereinafter referred to as the “ILC”) mentions, inter alia, the prohibition of aggression and the illegal use of force, the prohibition against torture, the prohibitions against slavery and the slave trade, genocide and racial discrimination and apartheid. That is why following the logic of the ARSIWA it can be concluded that acquiring territory through threat or use of force being a violation of the peremptory norm shall not be recognized as lawful.

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19 UNGA Res 56/83 (12 December 2001) 25th Session Supp 10
ARSIWA is generally understood to incorporate codification of customary rules.\textsuperscript{23} Inclusion of the non-recognition rule with a link to peremptory norms in Part 2 of Article 41 of ARSIWA constitutes evidence of the customary nature of the rule. In addition, there is other evidence of customary law. Such evidence includes primarily numerous resolutions of the United Nations Security Council and General Assembly confirming the binding effect of the non-recognition rule in many situations.\textsuperscript{24} Examples of such non-recognition include situations in the Syrian Golan Heights,\textsuperscript{25} East Jerusalem,\textsuperscript{26} and Northern Cyprus.\textsuperscript{27}

The position of the UN Security Council confirms the binding nature of the non-recognition rule. In its Resolution 662 (1990) concerning the situation in Kuwait the Security Council concluded that “that annexation of Kuwait by Iraq under any form and whatever pretext has no legal validity, and is considered null and void”.\textsuperscript{28} Afterwards, the Council called “upon all States, international organizations and specialized agencies not to recognize that annexation, and to refrain from any action or dealing that might be interpreted as an indirect recognition of the annexation”.\textsuperscript{29} The wording of this resolution highlights the explicit prohibition of recognizing annexation of a territory, which leads to no legal validity being null and void.

\textsuperscript{24} See e.g. UNSC Res 662 (9 August 1990) UN Doc S/RES/662 (re the annexation of Kuwait); UNSC Res 497 (17 December 1981) UN Doc S/RES/497 (re the annexation of Golan Heights); UNSC Res 541(18 November 1983) UN Doc S/RES/541 (re the annexation of the Northern Cyprus); UNSC Res 550 (11 May 1984) UN Doc S/RES/ 550
\textsuperscript{26} UNSC Res 478 (02 August 1980) S/RES/478, para. 5
\textsuperscript{27} UNSC Res 541(18 November 1983) UN Doc S/RES/541
\textsuperscript{28} UNSC Res 662 (9 August 1990) UN Doc S/RES/662
\textsuperscript{29} Ibid., para. 2
It is important to note that the obligation to adhere to the non-recognition rule does not stem from decisions of any of the United Nations’ authorities since, as mentioned above, it is a separate rule of international law and the United Nations is not empowered to establish the fact of the illegal transfer of the territory. However, such resolutions of the United Nations’ authorities contribute to the certainty that there the specific transfer of territory is illegal from the international law perspective, namely due to the breach of *jus cogens*. As Ian Brownlie states, the non-recognition rule is to be observed irrespective of the United Nations’ authorities if “*in the careful judgement of the individual state a situation has arisen the illegality of which is opposable to states in general*”.31

The customary nature of the non-recognition rule is also supported by the jurisprudence of the International Court of Justice (hereinafter referred to as the “ICJ”). For example, in the advisory opinion on the *Wall in the Occupied Palestinian Territory* case, the ICJ stated that: “**all States are under an obligation not to recognize the illegal situation arising from the construction of the wall, not to render aid or assistance in maintaining that situation and to co-operate with a view to putting an end to the alleged violations and to ensuring that reparation will be made therefor**” (emphasis added).32 Thus, the ICJ also treats the obligation not to recognize as legal illegal situations as binding, which gives additional support to prove the non-recognition rule’s customary nature.

In the course of consideration of *Wall in the Occupied Palestinian Territory* case, a number of states have made their statements on the matter of the non-recognition rule in the context of public international law. For example, French representatives submitted that: “**Since it is internationally wrongful, the act of constructing the wall on the Occupied Palestinian Territory also entails legal consequences for third States and international organizations. Inter alia, they are under an obligation not**

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30 Talmon S, ‘The Duty Not to Recognize’, p. 113
32 *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] I. C. J. Reports 2004, p. 64, para. 146
to recognize as lawful the situation created by the route taken by this wall” (emphasis added). Such a statement in conjunction with all the other facts is one of the evidence of the existence of state practice and *opinion juris* with respect to the non-recognition rule, which are parts of international custom. In addition, the customary nature of the non-recognition rule has been also reaffirmed by many academics in the sphere of public international law. For example, James Crawford mentioned that “when the illegality invoked is substantial, and in particular when it involves a peremptory norm of international law, States have a duty under customary international law not to recognize the act as legal” (emphasis added). Christine Chinkin shares this position noting that the custom of non-recognition flows “from the obligations of third states with respect to internationally illegal acts”. However, some scholars even though not undermining the customary nature of the non-recognition rule diminish its importance since, in their view, the rule lacks clarity.

Disregarding the mentioned criticism, it can be concluded that there is a general consensus with regard to the customary nature of the rule that situations created by illegal acts cannot be recognized as lawful. In this context, illegal acts mean a violation of a *jus cogens*. An obligation not to recognize illegal territorial transfers stems from this obligation due to the fact that is caused by threat or use of force, the prohibition of which is a *jus cogens*. The conclusion is supported by the wording

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34 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993, Art. 38 (1) (b)
37 See *e.g.* Talmon S, ‘The Duty Not to Recognize’
of international legal instruments, state practice, including reaction to the resolutions of the United Nations’ authorities, the jurisprudence of the ICJ, and teachings of recognized public international law scholars.

2.1.2. The scope of the non-recognition rule

As it is presented above, nowadays the customary nature of the non-recognition rule is not a matter of doubt. However, the content of the rule itself is subject to the substantial debate due to the inconsistency of views with regard to its scope and its addressees. The problem is that, according to some scholars, “the ILC did not elaborate on this question and international courts and tribunals, as well as the political organs of the United Nations, have been reluctant to develop relevant criteria beyond concrete cases.”

Judge Kooijmans in his separate opinion in the advisory opinion in the Wall in the Occupied Palestinian Territory case stated that: “Article 41, paragraph 2, [of the ILC Articles on State Responsibility] however, explicitly mentions the duty not to recognize as lawful a situation created by a serious breach ... I have great difficulty, however, in understanding what the duty not to recognize an illegal fact involves. What are the individual addressees of this part ... supposed to do in order to comply with this obligation? ... The duty not to recognize amounts, therefore, in my view to an obligation without real substance” (emphasis added). Below an analysis of the various approaches to the scope of the non-recognition rule along with its intended addressees is made.

To begin with, there is a need to identify the limits of the non-recognition rule’s scope. In this regard, some scholars argue for the absolute nature of the rule meaning that it prohibits any action that might be interpreted as recognition of the

illegal acquisition of territory, while others insist on the limited content of the rule meaning that some actions of recognition can comply with international law upon certain conditions.

Those who support the first approach rely on the ILC’s position, where it stated that the rule mentioned in Article 41 (2) of ARSIWA “not only refers to the formal recognition of these situations but also prohibits acts which would imply recognition”. Besides, in the Namibia advisory opinion the ICJ decided that “States Members of the United Nations are under obligation to recognize the illegality of South Africa’s presence in Namibia and the invalidity of its acts on behalf of or concerning Namibia, and to refrain from any acts and in particular any dealings with the Government of South Africa implying recognition of the legality of, or lending support or assistance to, such presence and administration” (emphasis added). The cited paragraph shows that not only formal recognition is prohibited, but also any other actions that may imply recognition of the legality of an internationally illegal act are covered by the scope of the non-recognition rule. However, such a position is subject to criticism due to the extensive amount of jurisprudence as well as other evidence of the limited scope of the non-recognition rule as it is shown below.

The support for the limited scope of the non-recognition rule can be found in numerous cases of various international tribunals. It is important to refer again to the ICJ’s Namibia advisory opinion, where after stressing prohibition of any acts implying recognition of illegal acquisition of territory, as mentioned above, the ICJ

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40 See e.g. P. Dumberry, ‘Requiem for Crimea’, p. 528
made an exception to this rule. In particular, it stated that “the registration of births, deaths and marriages, the effects of which can be ignored only to the detriment of the inhabitants of the Territory” is allowed.\textsuperscript{44} In the East Timor case, Judge Weeramantry also considered the scope of the non-recognition rule and concluded that states enjoy a margin of appreciation in this regard by stating that: “…countries entering into treaty relations in respect of that territory have a range of options stretching all the way from de facto recognition through many variations to the highest level of recognition - de jure recognition”.\textsuperscript{45} Thus, the position of the ICJ is that certain legal facts may be recognized regardless of the non-recognition rule in order not to interfere with the rights of third parties.

The European Court of Human Rights (hereinafter referred to as the “ECHR”) shares the position of the ICJ and has highlighted the limited scope of the non-recognition rule. In particular, in the Loizidou v Turkey (Merits) case the Court referred to the Namibia advisory opinion and reaffirmed the non-absolute nature of the non-recognition rule.\textsuperscript{46} In the Cyprus v Turkey case, the ECHR with a reference to the Namibia advisory opinion confirmed that “the obligation to disregard acts of de facto entities is far from absolute”.\textsuperscript{47} Thus, the practice of international tribunals confirms the limited scope of the non-recognition rule.

Preparatory works of the Friendly Relations Declaration, as an example of an international legal instrument incorporating the non-recognition rule, also show that states do not consider the non-recognition rule to constitute an absolute prohibition of recognition. It is important to note that during the preparation of the declaration attempts to include absolute non-recognition rule were made. For example, Chile’s representatives stressed that: “It shall be expressly declared that contemporary international law in no way recognizes the validity of de facto situations brought

\textsuperscript{45} Certain Activities of Australia with respect to East Timor (Portugal v. Australia) (Judgment, Separate Opinion of Judge Weeramantry) [1995], ICJ Rep 90, p. 204
\textsuperscript{46} Loizidou v Turkey (App No 15318/89) (1995) 20 EHRR 99, p. 14, para. 45
\textsuperscript{47} Cyprus v Turkey (App No 25781/94) (2001) ECHR 2000-IV, para. 96
about by the illegal threat or use of force”. Mexico’s representatives also insisted on the inclusion of the explicit mentioning of the non-recognition rule stating that “territorial acquisitions or advantages obtained by the use of force or other forms of coercion should not be recognized either de jure or de facto”. Nevertheless, because of political reasons and the desire for more flexibility, none of the explicit absolute wordings containing the non-recognition rule were introduced to the final text of the Friendly Relations Declaration.

Hans Blix, a Swedish representative to the ad hoc Special Committee on Principles of International Law Concerning Friendly Relations and Co-operation among States, rejecting the absolute scope of the non-recognition rule stated that: “no formal admission may be made of the legality of a forcible territorial acquisition as described. This would appear to allow States to determine for themselves – in the absence of any collective action by the United Nations – to what extent they would allow practical co-operation and courtesies without any formal admission of the legality of the situation” (emphasis added). Such approach was supported by the UN General Assembly, which led to the adoption of the Friendly Relations Declaration in the version as presented nowadays being silent on the scope of the non-recognition rule and leaving room for interpretation of this rule on a case-by-case basis.

Due to the fact that the limited approach to the non-recognition rule is prevailing, as shown above, some scholars suggest distinguishing two types of recognition: de facto and de jure. For example, Sir Hersch Lauterpacht mentioned that “de facto recognition, which takes into account the actuality of power while expressly refusing to admit its legality in the field of international law, is a proper device for combining disapproval of illegal actions with the requirements of international intercourse”. Furthermore, Sir Lauterpacht elaborates that the non-recognition rule “is a legitimate device only so long as we bear in mind that the difference

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48 Proposal of Chile [1966] UN Doc. A/AC.125/L.23
50 Ibid., p. 110
51 Lauterpacht H, Recognition in International Law (CUP, Cambridge 1947), p. 341
between de jure and de facto recognition is one of substance and so long as de facto recognition is not used for the purpose of avoiding any obligation of non-recognition that may have to be undertaken”. 52 Such position by way of highlighting the limited scope of the non-recognition rule gives basis to take some actions that might imply recognition without formally recognizing the illegal situation as legal.

Based on the aforementioned, it can be concluded that the non-recognition rule does not contain an absolute prohibition to recognize situations in breach of *jus cogens* as illegal. Moreover, there is no clear criteria to identify the scope of the rule in terms of specific actions that can and cannot be taken by the rule's addressees. Special attention to the distinction between *de jure* and *de facto* recognition should be paid meaning that *de jure* recognition in situations of breach of *jus cogens* is in all cases unlawful, while some action being an implied *de facto* recognition is possible. Therefore, a case-by-case analysis has to be undertaken by the addressees of the rule taking in mind the aim of the rule.53

Concerning intended addressees of the non-recognition rule, it should be mentioned that initially only states were called upon non-recognition of illegal territorial acquisitions as lawful since all of the mentioned above international legal instruments are addressed to the states, their signatories. However, resolutions of the Security Council54 and the General Assembly of the United Nations authorities constitute an exception as they also refer to international organizations and specialized agencies.55 Besides, some academics also argue that the non-recognition rule binds national courts as well since they are state organs, thus, their actions are attributed to their respective states based on Article 4 of ARSIWA.56 None of the other addressees is covered by the non-recognition rule.

53 See Chapter II 2.1. below
54 E.g. UNSC Res 662 (9 August 1990) UN Doc S/RES/662
55 E.g. UNGA Resolution 68/262 (27 March 2014) A/RES/68/262
56 Happ, Wuschka, ‘Horror Vacui’, p. 255
In conclusion, the scope of the non-recognition rule is not absolute, as it is subject to some exceptions. The non-recognition rule covers the prohibition of recognizing situations of illegal acquisition of territory as lawful, namely, *de jure* recognition. In certain situations, actions implying recognition without providing formal recognition of the illegal action legality are in compliance with the non-recognition rule. Given there are no formal criteria for application of the non-recognition rule, it is concluded that while applying it attention should be paid to specific circumstances of a case at hand. The non-recognition rule is aimed at states, international organizations, and specialized agencies, none of the other potential addressees is mentioned in any of international legal instruments.

### 2.1.3. The aim of the non-recognition rule

Given that there are no clearly defined boundaries of the non-recognition rule’s scope and it has to be applied with due regard to the circumstances of a particular case, it is important to understand the aim of the rule. Scholars have various opinions about it stressing different aspects of the rule.

Nowadays the prevailing view is that the non-recognition rule is aimed at nullifying legal effects obtained from an illegal action and making such action null and void from the perspective of international law. As noted by one scholar, “*the rationale of the obligation of non-recognition is to prevent, in so far as possible, the validation of an unlawful situation by seeking to ensure that a fait accompli resulting from serious illegalities do not consolidate and crystallize over time into situations recognized by the international legal order*”.\(^{57}\) Ian Brownlie also mentioned that the main aim of the non-recognition rule is to vindicate the “*legal character of international law against the ‘law-creating effect of facts’*”.\(^{58}\)

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Thus, according to this view, as noted by Talmon, the non-recognition rule has a “status-denying effect”.

A similar approach has been taken by the ICJ in the advisory opinion in the Wall in the Occupied Palestinian Territory case. In particular, the court stated that: “The Court considers that the construction of the wall and its associated regime create "fait accompli" on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to a defacto annexation”. In this case, the ICJ reaffirmed the non-recognition rule, recognizing that the effects of the construction of the Wall shall be disregarded.

Scholars note that the non-recognition rule does not just eliminate the legal consequences, but it also helps to take away all benefits that a wrongdoing state might get from committing a breach of a jus cogens. The basis for such conclusion is that the underlying principle of the rule is ex injuria non oritur jus meaning that an unlawful act cannot be a source for wrongdoers' legal rights or defences. In this regards, Milano states that the aim of the non-recognition rule contains additionally “the protection of subjective rights of the injured party; the affirmation of a community interest in the protection of fundamental norms; and the need to enforce the legal norms which are being breached”. Consequently, the scope of the non-recognition is to wipe out legal consequences and benefits stemming from a breach of a jus cogens and to protect the interests of those affected.

60 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] I. C. J. Reports 2004, para. 121
61 Ibid., para 146
63 Ibid., p. 264; Factory at Chorzów (Germany v Poland) (Jurisdiction) [1925] PCIJ Series A No 9, pp. 4, 31
64 Milano E, ‘The Non-Recognition of Russia’s Annexation of Crimea: Three Different Legal Approaches and One Unanswered Question’ [2014] 1 Questions Int’l L 37, pp. 54–55
However, there are scholars who support the idea of the punitive nature of the non-recognition rule meaning that its application constitutes a sanction for a state-wrongdoer that has committed a breach of a jus cogens.\textsuperscript{65} Talmon notes that “the obligation of non-recognition does have real substance and may prove a powerful sanction by the international community against the responsible State”.\textsuperscript{66} At the same time, a position of James Crawford should be considered. In particular, he states that the non-recognition rule “is not as such either a method of enforcement or a sanction”,\textsuperscript{67} it is “a precondition for other enforcement action’ such as sanctions”.\textsuperscript{68} The outcomes of the “sanction” approach may entail a broader application of the rule in order to punish the wrongdoer at the same time leading to negative consequences for third parties affected. At the same time, it is should be stressed that third parties should not suffer from the application of this rule, which was confirmed by the ICJ in the Namibia Advisory Opinion: “the non-recognition of South Africa’s administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international Co-operation”.\textsuperscript{69} That is why the position of James Crawford shows that the non-recognition rule forms the basis for relevant enforcement, but as such it is not a sanction.

Summarizing, the non-recognition rule is mainly considered to have a status-denying effect: wiping out all benefits for the wrongdoer. It is a precondition to take further enforcement actions towards the wrongdoer. Due to such aim of the rule, its scope is quite flexible allowing for some margin of appreciation of its addressees. As a result, some exceptions to the rule exist making it possible to act implying the

\textsuperscript{65}Sharma SP, \textit{Territorial Acquisition, Disputes, and International Law} (M Nijhoff Publishers, The Hague 1997), p. 158
\textsuperscript{66}Talmon S, ‘The Duty Not to Recognize’, p. 125
\textsuperscript{67}Crawford J, \textit{The Creation of States in International Law} (OUP, Oxford 2007), pp. 159, 173
\textsuperscript{68}Ibid., p. 160
recognition of the changed status of the territory if circumstances so require. Third parties should not suffer from the application of the non-recognition rule.

2.2. Jurisdictional powers of arbitral tribunals

The issue of the non-recognition rule is not likely to be brought into arbitral proceedings by either claimants, as they have no interest to challenge tribunals’ jurisdiction unless confronted with a counter-claim, or by respondents, who would otherwise not want to admit that they have breached jus cogens by illegally acquiring territory in question. That is why the only practical way for this rule to be raised in the course of investment treaty arbitration is by tribunals’ review of their jurisdiction on their own initiative. In this context, it is worth mentioning that some scholars insist that if a case involves possible violation of jus cogens (e.g. annexation of territory through threat or use of force), tribunals are obliged to review this matter and rule on its jurisdiction regardless of the lack of the parties’ claims in this regard. That is why the analysis of such jurisdictional review powers of tribunals’ is made below.

2.2.1. Can tribunals review their jurisdiction on their own initiative?

While stating that tribunals have to review their jurisdiction on their own initiative, a reference to the principles of competence de la competence and of iura novit curia are made meaning that tribunals have to know the law (in the context of the present research it is the non-recognition rule of customary nature) and apply it while dealing with jurisdictional matters. The link between the principles and jurisdictional issues has been confirmed by the ICJ in the Border and Transborder Armed Actions (Nicaragua v. Honduras) case, where it held that “the existence of jurisdiction of the Court in a given case is . . . not a question of fact, but a question of law to be resolved in the light of the relevant facts.” The reason for such a link

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70 See e.g. P. Dumberry, ‘Requiem for Crimea’, p. 521
71 Ibid.
is that only by “knowing law” and by applying such law to the facts of a specific case, tribunals become able to raise jurisdictional matters on their own initiative and make a relevant decision.

The position that review of jurisdiction by tribunals is their obligation irrespective of parties’ submissions is supported by the finding of the ICSID tribunal in the Metal-Tech Ltd v Uzbekistan case. In the case, the tribunal stated that it “is the duty of a tribunal established on the basis of a treaty to verify its jurisdiction under that treaty, even if the parties have not objected to it” (emphasis added). 73 A similar position has been taken by some academics. In particular, Zachary Douglas noted that “a question relating to jurisdiction can and must be raised by a tribunal proprio motu”. 74 However, it is not clear where this obligation might stem from due to the following.

Nowadays, few legal instruments directly empower arbitral tribunals to examine whether it has jurisdiction to hear a case before it or not. One of such examples is Rule 41(2) of the ICSID Rules of Procedure for Arbitration Proceedings (hereinafter referred to as the “ICSID Rules”), which stipulates that “The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence” (emphasis added). This rule clearly grants ICSID tribunals powers to deal with jurisdictional matters irrespective of what parties claim in this regard.

Special attention shall be paid to the wording of the abovementioned rule. In particular, it uses the word “may”, the ordinary meaning of which is “expressing possibility”. 75 Such a possibility of action from the tribunals’ side emphasizes the

73 Metal-Tech Ltd v Uzbekistan (Award) [2013] ICSID Case No ARB/10/3, para. 123
75 “May | Definition of May in English by Oxford Dictionaries’ (Oxford Dictionaries | English) <https://en.oxforddictionaries.com/definition/may> accessed 20 May 2019
discretionary nature of it and provides a wide margin of appreciation to tribunals. This rule can be understood to fall within tribunals’ *proprio motu* (i.e. on the own initiative) powers, which are a special case of application of discrentional powers.76 Thus, the mentioned Rule 41 (2) grants tribunals *proprio motu* powers to decide on jurisdictional hurdles, which they can exercise according to their discretion.

*Proprio motu* powers of tribunals are not to be confused with *ex officio* powers. As it is stated above, the first ones include a margin of discretion of tribunals, while the latter impose an obligation on tribunals to act in a specific manner and/or take a specific action.77 That is why the scope of possible action in case of *proprio motu* and *ex officio* powers is different.

However, it should be noted that sometimes in public international law the terms “*proprio motu*” and “*ex officio*” powers are confused and interpreted differently. Existence of such situations has been highlighted by Judge ad hoc Kreća in his Separate Opinion in the ICJ’s Legality of Use of Force case, where he stated: “In the practice of the Court the expressions *ex officio* and *proprio motu* are used as interchangeable, although there exist differences in the meaning of these two expressions. The expression “*proprio motu*” implies the discretionary authority of the Court to take action on its own initiative. The action taken by the Court “*ex officio*” is an expression of the duty of the Court by virtue of its judicial function …”78 The cited position deals with powers of the ICJ, however, the same conclusion constituting a general commentary on jurisdictional powers can also be considered relevant for arbitral tribunals. Thus, there is a clear line between discretionary “*proprio motu*” and obligatory “*ex officio*” powers of arbitral tribunals irrespective of the fact that sometimes they are confused with each other.

78 Ibid.
Based on the above-mentioned it can be concluded that in ICSID cases tribunals enjoy *proprio motu* powers to deal with jurisdictional matters and, therefore, can decide to raise jurisdictional issues or not on their own initiative. Such interpretation is supported by some case law, for example, the *Mobil Oil v. New Zealand* case.\(^{79}\) Another example showing non-mandatory nature of the examination of the jurisdiction in ICSID cases is the *CDC Group plc v. Seychelles* case, in which the tribunal skipped examination of the issue whether the claimant satisfied investor requirements given that the respondent did not make any objections in this regard.\(^{80}\)

Nevertheless, there are situations when ICSID tribunals are obliged to review their jurisdiction, namely to exercise their *ex officio* powers. This is the case if respondents do not participate in the respective proceedings. The obligation rests on Rule 42 (4) of the ICSID Rules, which provides in relation to default proceedings that “*The Tribunal shall examine the jurisdiction of the Centre and its own competence in the dispute and, if it is satisfied, decide whether the submissions made are well-founded in fact and in law*” (emphasis added). The rule uses the word “shall”, the ordinary meaning of which is “*expressing an instruction, command, or obligation*”.\(^{81}\) Obligatory wording of the rule shows that in ICSID default proceedings tribunals must act *ex officio* and examine whether they have jurisdiction to hear the case before them.

The logic behind such rule and position is to avoid subsequent annulments of rendered arbitral awards in ICSID cases. Given the clear obligation to review jurisdiction on tribunals’ own initiative, there is no much room for discussion with respect to the nature of this rule in ICSID cases. However, the question of whether such an approach is also applicable in non-ICSID cases absent clear guidance is

\(^{79}\) *Mobil Oil v. New Zealand* (Findings on Liability, Interpretation and Allied Issues) [1989] ICSID Case No. ARB/87/2, para. 2.9

\(^{80}\) *CDC Group plc v. Seychelles* (Award on the Merits) [2003] ICSID Case No. ARB/02/14

\(^{81}\) ‘Shall | Definition of Shall in English by Oxford Dictionaries’ (Oxford Dictionaries | English) <https://en.oxforddictionaries.com/definition/shall> accessed 20 May 2019
disputable due to the following. If a state being properly notified about the proceedings refuses to participate in them, it should bear responsibility for such decision, including responsibility for not raising jurisdictional objections.

With respect to non-ICSID cases, the situation is different because there are no explicit rules granting such powers to tribunals. Nevertheless, non-ICSID tribunals have also reached a conclusion that they can examine jurisdictional matters on their own initiative even without explicit provisions regarding such powers or obligations in relevant legal instruments. Examples of such cases include, inter alia, *Rio Grande Irrigation and Land Company Ltd* (UK v USA) of 1923 and *Young Plan* (Belgium, France, Switzerland & UK v the Federal Republic of Germany) of 1980. At the same time sometimes non-ICSID tribunals go even further holding that they are obliged to check jurisdiction. In particular, in the *United States of America v. The Islamic Republic of Iran* case, the tribunal stated that “the Islamic Republic of Iran has not raised any objections to the Tribunal's jurisdiction over the claims. However, the Tribunal holds that it has to determine *ex officio* whether it has jurisdiction in this case” (emphasis added).

Summarizing, in cases under the auspices of the ICSID Convention tribunals enjoy powers to raise jurisdictional matters on their own initiative. Such powers have discretionary nature, namely *proprio motu* nature, in proceedings when both parties participate. In case of default proceedings, it is the obligation of the respective tribunal to verify whether it has jurisdiction to hear the case before it meaning that such powers have *ex officio* nature.

### 2.2.2. Should tribunals review their jurisdiction on their own initiative?

Given that, in case of participation of both parties tribunals are not obliged to review their jurisdiction, the question of whether they should do that arises. Regardless of

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83 *The United States of America v. The Islamic Republic of Iran* (Award) [1984] IUSCT Case No. B-24, 106-B-24-1, para. 12
the non-mandatory jurisdictional review in such cases, some scholars tend to consider such review as mandatory, stating that it is necessary to ensure to the full extent that they have jurisdiction. An example of such situation is the dissenting opinion of Judge Kashani in the *Flexi-Van v. Iran* case, where he stressed that “it is a well-established rule of international law that jurisdiction of an arbitral tribunal, in the absence of a direct agreement to arbitrate between the parties, must be determined on the basis of full certainty as to the person and substance.” 84

As a result of the mentioned above, originally *proprio motu* powers have been converted into *ex officio* ones imposing an obligation to check jurisdictional matters in each case. Whether such a transition is a positive development of practice is a disputable question.

One of the explanations for such development can be found in the tribunal’s reasoning in the ICSID *Mihaly International Corporation v. Democratic Socialist Republic of Sri Lanka* case, where the tribunal stated: “[T]he question of jurisdiction of an international instance involving consent of a sovereign State deserves a special attention at the outset of any proceeding against a State Party to an international convention creating the jurisdiction. As a preliminary matter, the question of the existence of jurisdiction based on consent must be examined *proprio motu*, i.e., without objection being raised by the Party” (emphasis added). 85

In the case cited above the tribunal focused on the importance of consent to arbitration as a reason to convert *proprio motu* review in a “must do” action for tribunals. Such consent is a prerequisite to arbitration; therefore, it is mandatory to examine its existence.


85 *Mihaly International Corporation v. the Democratic Socialist Republic of Sri Lanka* (Award) [2002] ICSID Case No. ARB/00/2, para. 56
This position has logic behind it given that lack of consent can lead to the annulment of a rendered award in ICSID proceedings and the successful challenge of such an award in non-ICSID cases. The fundamental nature of consent to arbitration and the utmost importance of ensuring that consent is present in particular proceedings has been numerously stressed by arbitral tribunals. For example, in the *Chevron v Ecuador* case the tribunal noted that “no arbitration tribunal has jurisdiction over any person unless they have consented. That may be called the consent’ principle, and it goes to the question of the tribunal’s jurisdiction”. Based on that, one may conclude that tribunals have to check the existence of consent to arbitration as part of its jurisdictional analysis irrespective of parties' claims.

Importance of review of jurisdiction even if parties do not raise any objections in this regard also rests on the fact that absent such review there is a risk of annulment / successful challenge of an arbitral award. Under Article 52(1)(b) of the ICSID Convention, an arbitral award may be annulled for manifest excess of powers. As it is noted by Christoph Schreuer, lack of jurisdiction falls within the scope of this Article, so “it will be unwise for a tribunal to depend entirely on jurisdictional objections by a party”.

In conclusion, even though in non-default proceedings tribunals are not obliged to review their jurisdiction on their own initiative, the practice is developing to the direction of treating such jurisdictional discretionary powers as mandatory ones. It is an important element in fulfilling the obligation to render an enforceable award. Verification of whether a particular tribunal is empowered to deal with a case at hand contribute to the development of trust to international investment arbitration as a dispute resolution mechanism.

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86 *Chevron Corporation and Texaco Petroleum Corporation v. The Republic of Ecuador* (Third Interim Award on Jurisdiction and Admissibility) [2012] UNCITRAL, PCA Case No. 2009-23, para. 4.61
Chapter III – Analysis of the non-recognition rule in terms of investment treaty arbitration

As it is presented in Chapter II, the non-recognition rule is a part of customary international law and it covers the prohibition of recognizing the illegal acquisition of territory as lawful. Besides, it is shown that in investment treaty arbitration tribunals are either can (if both parties participate in respective proceedings)\textsuperscript{88} or shall (in case of default proceedings)\textsuperscript{89} examine whether they have jurisdiction to hear the cases.

Due to the fact that applicable law in investment treaty arbitration is public international law,\textsuperscript{90} which includes international custom,\textsuperscript{91} some commentators argue that this rule binds arbitral tribunals.\textsuperscript{92} As a result, they state that if arbitral tribunals accept jurisdiction to hear cases related to illegally acquired territories against state-wrongdoers, they recognize the change of the territory owner at least \textit{de facto} and, thus, breach the non-recognition rule.\textsuperscript{93} Therefore, they conclude that the non-recognition rule constitutes a jurisdictional hurdle leading to tribunals’ obligation to decline jurisdiction in such cases.\textsuperscript{94}

However, not with the aim to undermine the importance of the non-recognition rule it is argued in this Chapter that (1) arbitral tribunals in investment treaty arbitration are not bound by the non-recognition rule and, alternatively, (2) even if arbitral

\textsuperscript{88} See Chapter II, Part 2.2
\textsuperscript{89} Ibid.
\textsuperscript{92} P. Dumberry, ‘Requiem for Crimea’, p. 532
\textsuperscript{93} Ibid., 526-533
\textsuperscript{94} Ibid.
tribunals are bound by the non-recognition rule, they should adopt a limiting approach to the non-recognition rule and sustain their jurisdiction.

3.1. Tribunals are not bound by the non-recognition rule

Notwithstanding the customary nature of the non-recognition rule, it is presented in this Part that arbitral tribunals in investment treaty arbitration are not the intended addressees of the non-recognition rule. Moreover, the scope of the non-recognition rule does not coincide with issues that should be dealt with by arbitral tribunals in such cases while deciding on their jurisdiction.

3.1.1. The non-recognition rule is not addressed to arbitral tribunals

All existing international legal instruments related to the non-recognition rule are addressed primarily to states (e.g. ARSIWA). Some instruments also refer to international organizations and specialized agencies. None of such instruments mentions any other subjects that are bound by the non-recognition rule.

One of the recent examples of illegal acquisition of territory is the Crimean annexation by the Russian Federation, the illegality of which has been confirmed by the European Union and numerous international organizations (e.g. NATO and OSCE). The United Nations General Assembly adopted the Resolution

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95 See Chapter II, Part 2.1.1
96 See Chapter II, Part 2.1.2
99 OSCE, ‘Resolution on Clear, Gross and Uncorrected Violations of Helsinki Principles by the Russian Federation’ (Declaration and resolutions adopted by the OSCE Parliamentary Assembly at the twenty-third annual session, 28 June to 2 July 2014), 17–19
68/262 on Territorial Integrity of Ukraine, where it “calls upon all States, international organizations and specialized agencies not to recognize any alteration of the status of the Autonomous Republic of Crimea and the city of Sevastopol on the basis of the above-mentioned referendum and to refrain from any action or dealing that might be interpreted as recognizing any such altered status”.100 No other subjects have been called upon to refrain from recognizing the change of the status of Crimea and Sevastopol.

Regardless of the explicit reference of the non-recognition rule to states, there is an opinion that the application of the non-recognition rule should be extended to arbitral tribunals. For example, some authors base their position on the fact that arbitral tribunals when deciding investment disputes must always apply international law, including international custom, irrespective of the applicable law chosen in relevant international investment treaties.101 In this context, a reference to Article 31(3)(c) of the Vienna Convention on the Law of Treaties is made stating that in the course of interpretation of international treaties “any relevant rules of international law applicable in the relations between the parties” are to be considered.102 Since the non-recognition rule is part of customary international law,103 tribunals have to apply it.104 Besides, it is argued that it would be against international public policy to accept outcomes of the illegal acquisition of territory, which is caused by the violation of jus cogens of threat or use of force prohibition.105

The mentioned position lacks legal reasoning due to the following. As it is stated above, arbitral tribunals have to apply public international law while dealing with investment disputes that fall within the scope of respective international investment treaties. It is not disputed that the non-recognition rule has customary nature forming part of international law. However, it does not mean that it covers all possible subjects and not only its intended addressees. As it is mentioned above, the

100 UNGA Resolution 68/262 (27 March 2014) A/RES/68/262, para. 6
101 P. Dumberry, ‘Requiem for Crimea’, p. 527
102 Ibid.
103 See Chapter II, Part 2.1.1
104 P. Dumberry, ‘Requiem for Crimea’, p. 527
105 Ibid.
The customary nature of the non-recognition rule means that the two criteria for international custom are met, namely, there is state practice and opinio juris. It means that unless state practice and opinio juris for the non-recognition of illegal acquisition of territory obligation for arbitral tribunals or other subjects is formed, tribunals are not bound by such an obligation. Given that tribunals do not have law creating powers, they must act within relevant existing legal rules and not extend none of such legal rules. Therefore, as the non-recognition rule is not aimed at arbitral tribunals, tribunals do not have to consider themselves bound by this rule.

Furthermore, it should be noted that the non-recognition rule in addition to the legally obliging nature also has a strong political/policy element, which influences the scope of its intended addressees. This explains why the intended addressees of the rule include only those subjects that perform political/policy functions. Since arbitral tribunals’ function is to solve disputes in accordance with relevant rules and applicable law and not to take any political actions, they cannot be considered as addressees of the non-recognition rule.

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106 See Chapter II, Parts 2.1.1, 2.1.2
107 Statute of the International Court of Justice (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 993, Article 38(1)(b)
3.1.2. Investment treaty disputes are outside of the non-recognition rule’s scope

As it is concluded in Chapter II, Part 2.1.2., the scope of the non-recognition rule covers the prohibition of recognizing the illegal acquisition of territory as lawful. Based on that it is suggested that the scope of the non-recognition rule does not cover issues that might arise while tribunals decide on jurisdictional matters.

The suggestion is in line with possible arguments of parties in investment disputes related to illegally acquired territories. For example, in the Crimean cases the position of Ukrainian investors is that the occupation of Crimea is unlawful, but “ultimately effective”. In such type of cases, there is no need to rule on the legality of territorial acquisition unless an international investment treaty forming basis jurisdiction of a specific tribunal requires that. The issue in such cases is more likely to be about the interpretation of the terms “investor”, "investment”, and "territory" in a respective international investment treaty and the question whether a temporarily held territory falls under the scope of those terms. Arbitral tribunals do not make any determination of the legality of a territory possession similar to those made by states and international organizations. They just make a conclusion whether a specific territory satisfies the criteria set in a respective international investment treaty. That is why arbitral tribunals’ recognition of de facto control over a territory by a state does not mean recognition of the territory acquisition as lawful as prohibited by the non-recognition rule.

Given that the jurisdiction of arbitral tribunals stems from an international investment treaty, a respective treaty is the main limit to the jurisdiction. Its object

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and purpose play an important role in setting jurisdiction boundaries. It was confirmed in the *Sanum Investments Limited v. the Lao People’s Democratic Republic* case, in which while deciding on the application of the China-Laos BIT to China’s special administrative region Macao the arbitral tribunal stated “The purpose is twofold: to protect the investor and develop economic cooperation. The Tribunal does not find—and no element has been provided by the Respondent to that effect—that the extension of the PRC/Laos BIT could be contrary to such a dual purpose. In fact, the larger scope the Treaty has, the better fulfilled the purposes of the Treaty are in this case: more investors—who would not otherwise be protected—are internationally protected, and the economic cooperation benefits a larger territory that would otherwise not receive such benefit”.110 The jurisdictional decision of the tribunal was overturned by the High Court of Singapore, however, it was done on other grounds111 having no effect on the tribunal’s determination of the object and purpose of the China-Laos BIT and possibility of its application to Macao. Moreover, afterwards, this decision was reversed by the Singapore Court of Appeal, which confirmed the tribunal’s jurisdiction to hear the case.112 It should be noted that the object and purpose of each particular treaty may differ requiring a case-by-case analysis. However, the cited arbitral tribunal’s conclusion shows that application of international investment treaties with respect to disputed territories is recognized in international jurisprudence.


Moreover, it is generally accepted in international law that states that have illegal *de facto* control over territory have international obligations towards such territories. Recognition of such control and respective obligations is not considered to be a recognition of the lawfulness of the territory acquisition. For example, international humanitarian law (primarily the 1907 Hague Regulations,\(^{113}\) the Fourth Geneva Convention,\(^{114}\) and Additional Protocol I to the Four Geneva Conventions\(^{115}\)) imposes a list of duties on occupying states. Therefore, it can be concluded that recognition of some obligations of states that have illegal *de facto* control over territory with respect to such territory does not contradict with the non-recognition rule.

The conclusion is supported by case law, which recognizes the possibility of holding states liable for breaches of international law on the territories under their control even if such control is unlawful from the international law perspective. For example, in the Namibia Advisory Opinion, the ICJ stated “*By maintaining the present illegal situation, and occupying the Territory without title, South Africa incurs international responsibilities arising from a continuing violation of an international obligation. It [South Africa] also remains accountable for any violations of its international obligations [in occupied Territory of Namibia], or of the rights of the people of Namibia. The fact that South Africa no longer has any title to administer the Territory does not release it from its obligations and responsibilities under international law towards other States in respect of the exercise of its powers in relation to this Territory. Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts*

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\(^{114}\) Ibid.

\(^{115}\) Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 08 June 1977, entered into force 07 December 1978) 1125 UNTS 3
affecting other States”. Thus, the ICJ stresses that the state having physical control over a territory is responsible for actions committed on such territory. In reaching the conclusion the ICJ did not consider itself breaching the non-recognition rule by acknowledging the de facto control of South Africa over the territory in question.

Summarizing, the task of arbitral tribunals in the course of jurisdiction determination is to interpret provisions of a respective international investment treaty, in particular, the terms “investor”, “investment”, and “territory” and to conclude whether a respective treaty’s requirements are met. In most occasions, arbitral tribunals do not have to make any determination of the legality of a territory acquisition from the perspective of public international law as prohibited by the non-recognition rule. At the same time, the fact of illegal possession of territory does not exclude a state-wrongdoer’s obligation towards such territory. Therefore, the scope of the non-recognition rule does not coincide with the scope of issues that are dealt with by arbitral tribunals in cases related to the protection of investments on illegally acquired territories.

3.2. Alternatively, a limiting approach to the non-recognition rule should be applied

Even if one considers that the non-recognition rule is addressed to arbitral tribunals deciding investment treaty disputes and that the scope of the non-recognition rule overlaps with issues dealt with by arbitral tribunals in cases related to the protection of investments on illegally acquired territories, it is argued that the non-recognition rule still does not constitute a jurisdictional hurdle. In particular, it is argued that if the non-recognition rule is applied in such situations, a limiting approach to its scope has to be adopted.

By the limiting approach to the scope of the non-recognition rule, it is meant that non-recognition is to be limited only rights and benefits that a state-wrongdoer might get from the illegal acquisition of territory. At the same time, such a state is to be recognized as a one bearing obligations from respective international investment treaties. This approach suggested by Happ and Wuschka\(^{117}\) is reasonable due to the following.

Denying the application of international investment treaties on such territories due to the non-recognition of the *de facto* control over a territory, arbitral tribunals would preclude any protection of investors by existing international investment treaties leaving investors in “a legal vacuum”.\(^{118}\) Depriving investors of means for the settlement of disputes through the mechanisms provided by international investment treaties would negatively influence the investment climate and be against the object and purpose of international investment treaties, which are generally aimed at enhancement of economic cooperation. For example, the Ukraine-Russian Federation BIT mentions the following object and purpose: “*having the intent to create and support the favorable conditions for mutual investments…, having intent to create favourable conditions for enhancing economic cooperation between the Contracting States*”\(^{119}\). Thus, the creation of legal gaps in the protection of investors is not in line with the object and purpose of international investment treaties.

Furthermore, disregarding effective control over a territory due to the non-recognition rule would be against the aim of this rule itself. The non-recognition rule is aimed at wiping out of all benefits for the wrongdoer that might stem from an illegal acquisition of territory.\(^{120}\) Denying jurisdiction based on the non-recognition rule would lead to the reverse effect as a state-wrongdoer would get

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\(^{117}\) Happ, Wuschka, ‘Horror Vacui’, p. 262–63

\(^{118}\) Ibid., p. 255


\(^{120}\) See Chapter II, Part 2.1.3
benefits in the form of avoidance of international liability based on international investment treaties. Therefore, it is against the idea of the non-recognition rule itself to preclude completely application of international investment treaties and bring benefits to a state-wrongdoer.

Denying jurisdiction due to the non-recognition rule can also frustrate the *ex injuria jus non oritur* principle (meaning that an unlawful act cannot be a source for wrongdoers' legal rights or defences). That could be the case since a state-wrongdoer would be exempted from international liability because of its illegal actions. In addition, it can be also argued that such a situation would also be against international public policy by providing benefits to states that breach *jus cogens* by illegally acquiring territory through the threat or use of force.

Because of the mentioned negative outcome of the strict application of the non-recognition rule in form of complete denial of effective territorial control, it is suggested that a limiting approach should be adopted. By such an approach it is proposed to “limit the application of the respective treaty only to the annexing state’s obligations, hence, adhering to the *ex injuria non oritur jus priciple*”. Thus, the fact of the exercise of effective control over territory should be considered to deny rights of states-wrongdoers at the same time recognizing obligations with respect to such territory.

Applying such a limiting approach in the Crimean cases would mean that “... *Russia shall not be permitted to claim that under its applicable BITs Russia is entitled to nationalise or expropriate foreign investments in occupied Donbas if such nationalisation or expropriation are made for a public purpose and subject to*

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123 Happ, Wuschka, ‘Horror Vacui’, p. 264
prompt, adequate and effective compensation. However, it shall not release Russia from its obligations to protect foreign investments in occupied Donbas under Russia’s BITs because Russia is the only state exercising effective control in Donbas and the only state, which has the capacity to protect investments in Donbas” (emphasis added). Consequently, the Russian Federation is to be considered bound by the Ukraine-Russian Federation BIT in the part of its obligations towards Ukrainian investors in Crimea, while its rights with respect to such investors are to be disregarded. Such an approach means that due to the existence of obligations under a relevant international investment treaty, there can be investment disputes based on such a treaty. Hence, there is a basis for tribunals' jurisdiction, which should not be declined because of the non-recognition rule.

Such a limiting approach is in line with the findings of arbitral tribunals dealing with the Crimean cases. As it is reported, in the *PJSC Uknafta v. Russian Federation* and *Stabil LLC v. Russian Federation* cases tribunals reached almost identical conclusions that the BIT's object and purpose are enhancing economic cooperation between the Contracting States and protecting foreign investment. Thus, it would be against the BIT’s purpose to “leave without protection foreign investments on a territory over which a State exercises exclusive control...particularly in circumstances where that State is not only the main beneficiary-State of these investments but also the only State in a position to protect foreign investments”. In such a way, the tribunals confirmed that in case of illegal acquisition of territory rights of investors have to be protected.

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125 Ibid.

Summarizing, if one accepts the position that the non-recognition rule is applied in investment treaty arbitration, this rule should not constitute a jurisdictional hurdle in cases related to the protection of investments on illegally acquired territories. Bearing in mind the aim of the non-recognition rule to deprive states-wrongdoers of their possible benefits resulting from the illegal acquisition of territory, a limiting approach to the rule should be adopted. In accordance with such an approach, states that have illegally acquired territories are to be considered liable for protection of investments on these territories, however, their rights associated with such territories shall not be recognized. Consequently, since in such situations states bear obligations under international investment treaties, their dispute resolution mechanisms are in force empowering tribunals to deal with respective claims of investors. As a result, the non-recognition rule is not a jurisdictional hurdle for cases stemming from relevant international investment treaties.
Conclusions

The non-recognition rule does not constitute a jurisdictional hurdle in cases dealing with investment disputes related to illegally acquired territories. Since illegal territory acquisition in most situations occurs due to the threat or use of force, the prohibition of which is a *jus cogens*, an international custom prohibiting recognition of illegally acquired territories (i.e. the non-recognition rule) has been formed. However, it does not bound arbitral tribunals dealing with investment disputes related to illegally acquired territories. Alternatively, even if arbitral tribunals have to apply it, they should adopt a limiting approach by recognizing obligations of states-wrongdoers and non-recognizing their rights, which would give a basis for jurisdiction in investment disputes.

While the customary nature of the non-recognition rule is not disputed, opinions about its scope and addressees differ. In particular, it is sometimes argued that the non-recognition rule includes an absolute prohibition of any action that might imply recognition of the change of the ownership rights over a territory (including the existence of effective control over such territory) because of an illegal action. Under this approach, it is suggested that given the customary nature of the non-recognition rule, arbitral tribunals must apply it as part of public international law at the jurisdictional stage of proceedings related to the protection of investors on illegally acquired territories. The result of the application under this approach would lead to declining jurisdiction as the opposite decision would constitute an implied recognition of the illegal acquisition of the territory in question. However, the present research shows that even though the non-recognition rule may be relevant in investment treaty arbitration, it does not deprive arbitral tribunals of jurisdiction to hear cases related to illegally acquired territories.

Arbitral tribunals in investment treaty arbitration have a right, which under some circumstances transforms into an obligation, to review whether they have jurisdiction. While doing so in cases related to illegally acquired territories arbitral tribunals might come across the non-recognition rule. However, it is concluded that the non-recognition rule is addressed primarily to states and international
organizations and deals with prohibition of recognition of the illegal acquisition of territory as lawful, namely *de jure* recognition. There is neither legal basis nor reason for its extension to *de facto* recognition and to arbitral tribunals as the latter does not make any recognition of a territory acquisition as lawful in the manner states and international organizations do. In this context, arbitral tribunals' task is limited to the interpretation of a respective international investment treaty in order to rule whether its criteria for jurisdiction are met. Given that the non-recognition rule is political and diplomacy elements, it cannot be addressed to arbitral tribunals whose mandate does not cover such political and diplomacy elements. Thus, the non-recognition rule cannot be a jurisdictional hurdle as arbitral tribunals are not its addressees and they might recognize *de facto* territorial control without recognizing territorial acquisitions as lawful (*de jure*).

The recent Crimean cases, as well as the *Sanum Investments v. Lao People’s Democratic Republic* case, show arbitral tribunals’ support of the position that the fact of illegal acquisition of territory does not preclude them from the jurisdiction to hear the respective cases. Protection of investors’ interests in such situations, in the tribunals’ opinion, corresponds to the object and purpose of the relevant bilateral investment treaties.

Even if one considers that arbitral tribunals are bound by the non-recognition rule, a limiting approach to it should be applied. In particular, states’ obligations regarding the protection of investments under their *de facto* control arising out of international investment treaties are to be recognized, while all rights stemming from such treaties should be denied. Due to the recognition of the obligations, there might be investment disputes that can be settled through respective international investment treaties’ mechanisms providing jurisdiction to arbitral tribunals.

The presented approach is in line with the aim of the non-recognition to deprive states-wrongdoers of any benefits that they might get from an illegal acquisition of territory. The opposite approach voicing for declining of the jurisdiction in such situations based on the non-recognition rule would lead to the defeat of the aim of the rule. Being more specific, it would provide states-wrongdoers with benefits in
the form of possibility to escape from liability under existing international investment treaties.

Besides, the limiting approach is also in line with international investment treaties' objects and purposes, which usually deal with fostering of investment-friendly climate and enhancement of economic cooperation. Given that states-wrongdoers are the only ones having control over a respective territory, it is reasonable to conclude that they are responsible for the protection of investments on this territory.
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