# TREATY-BASED CLAIMS AGAINST SUBDIVISIONS OF ICSID CONTRACTING STATES

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## I. INTRODUCTION

This article primarily concerns the juridical personality of States in public international law, how this has changed in the 20th century, and potential consequences of these developments in the field of investor-State arbitration. Specifically, it asks whether a subdivision of a federal State made subject to the jurisdiction of the International Centre for the Settlement of Investment Disputes ("ICSID" or "the Centre") under Article 25 of the ICSID Convention[1] may be responsible as a juridical person independent of its State for violating an investment treaty (e.g., a bilateral investment treaty ("BIT") or the investment chapter of a free-trade agreement ("FTA")) to which that State is party.[2]

Under Article 25(1) of the ICSID convention, the Centre's jurisdiction extends to "any constituent subdivision or agency of a Contracting State designated to the Centre by that State."[3] In addition to this designation requirement, under Article 25(3), "[c]onsent by a constituent subdivision or agency of a Contracting State shall require the approval of that State" unless the State notifies the Centre that it waives this right.[4] Once designated, a subdivision becomes a potential respondent in a claim brought by an investor before the Centre. One UNCITRAL tribunal noted while finding it lacked jurisdiction over a State subdivision the

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1. Convention on the Settlement of Investment Disputes Between States and Nationals of Other States art. 25, Mar. 18, 1965, 575 U.N.T.S. 159 [hereinafter "ICSID Convention"].

2. This article will generically use the term BIT to refer to such treaties as most of them are BITs proper. For the present purposes, the distinction between BIT, free trade agreement investment chapter, and other instruments (e.g., the Energy Charter Treaty) is immaterial.

3. ICSID Convention, *supra* note 1, art. 25(1). For the purposes of this article, the word "subdivision" will be used to mean "constituent subdivision or agency of a Contracting State" within the sense of art. 25(1).

4. *Id.* art. 25(3).

exceptionality of this provision.[5] This opens the questions of whether a claim might be successfully brought against such a subdivision for violating an investor's rights under a BIT despite the State's responsibility for its subdivision's acts.

One can imagine this becoming of practical relevance in situations involving subdivisions of federal States with considerable resources held in their own right under domestic law, making the subdivision an enticing respondent. Examples of such subdivisions currently designated to ICSID are the Canadian provinces of Alberta, British Columbia, and Ontario.[6] Each of these have substantial land holdings. For example, approximately 60% of Alberta is Crown land, belonging to the province in its sovereign capacity.[7] Furthermore, each of these provinces owns the natural resources on their territory.[8] A claimant seeking to attach minerals in these Crown lands to satisfy an award is better off with an award against the province than against Canada itself. Australia's position is similar, as five of its states, the Northern Territory, and the Australian Capital Territory are also designated respondents.[9] Similarly to Canadian provinces, Australian states typically either own minerals because they exist on Crown lands or because the mineral ownership was reserved when the rest of a formerly Crown parcel was first conveyed to private hands.[10] By focusing on the application of BIT standards to subdivisions, this article aims to show that claims against these subdivisions, and thus pursuing their independent assets, are possible.

But this is also of practical relevance to the Contracting States themselves. Traditionally, and as reflected in the International Law Commission's (ILC's) influential Articles on the Responsibility of States

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5. Mytilineos v. Serbia and Montenegro, Partial Award on Jurisdiction, ¶ 173 (Sept. 8, 2006) ("Claims against sub-State entities or constituent parts of a State party to an investment agreement are only exceptionally permissible.").

6. Designations by Contracting States Regarding Constituent Subdivisions or Agencies, at 2, Doc. No. ICSID/8-C (May 2016), *https://icsid.worldbank.org/en/Documents/icsiddocs/ICSID 8ContractingStatesandMeasuresTakenbyThemforthePurposeoftheConvention.pdf*.

7. ALBERTA GOVERNMENT, HANDBOOK OF INSTRUMENTS PURSUANT TO PUBLIC LANDS ACT & PUBLIC LAND ADMINISTRATION REGULATION (PLAR) 6 (Feb. 26, 2013), http://aep.alberta.ca/lands-forests/public-lands-administration-regulation/documents/PLARHandbookInstruments-Feb19-2014A.pdf.

8. DWIGHT NEWMAN, NATURAL RESOURCE JURISDICTION IN CANADA 59 (2013); *see also* Constitution Act, 1867, 30 & 31 Vict., c. 3 (U.K.), *reprinted in* R.S.C. 1985, app. II, no. 5, § 109 (Can.).

9. Designations by Contracting States, *supra* note 6, at 1.

10. Michael Crommelin, *Federal-State Cooperation on Natural Resources: The Australian Experience*, *in* MANAGING NATURAL RESOURCES IN A FEDERAL STATE 296 (J. Owen Saunders ed., 1986).

for Internationally Wrongful Acts (ARSIWA), the actions of subdivisions of States are attributable to the respective State as a consequence of the formers' status as State organs.[11] Central governments have expressed discomfort with their liability for the internationally wrongful treatment of foreign investors by subdivisions acting within their exclusive policy competence.[12] Direct investor claims against subdivisions offer the potential to cut out the central government as middleman when the subdivision itself is, in fact, the author of the wrongful treatment and remove a need for domestic mechanisms to appropriately assign liability to subdivisions.

To successfully claim under a BIT against a subdivision, an investor will need to show that the BIT is applicable law opposable to the subdivision. This article will address two mechanisms for achieving this.[13] Under Article 42(1) of the ICSID Convention, both "the law of the Contracting State party to the dispute" and "such rules of international law as may be applicable" are applicable in the absence of the parties' agreement as to applicable law.[14]

This article will first briefly address the possibility of the application of a BIT to a subdivision by an ICSID tribunal as applicable domestic law. At issue here is not the juridical personality of the subdivision, which typically exists in the domestic law of the parent States. Instead, the threshold question will be whether the applicable domestic law has incorporated the substantive standards in the BIT.

The primary focus of this article will be the application of the BIT as such, an instrument creating obligations of public international law. This raises two questions. First, is a subdivision of a State a person in international law capable of being responsible for its violation? Second, if a subdivision has international legal personality, are treaties into which its

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11. Draft Articles on Responsibility of States for Internationally Wrongful Acts, Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10, art. 4(1) (2001) [hereinafter "ARSIWA"]; *see* JAMES CRAWFORD, BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW 547–48 (8th ed. 2012); *see also* Compañiá de Aguas del Aconquija, S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, ¶ 49 (Nov. 21, 2000) ("Under international law . . . it is well established that actions of a political subdivision of a federal state . . . are attributable to the central government.").

12. Charles-Emmanuel Coté, *Toward Arbitration Between Subnational Units and Foreign Investors?*, COLUM. FDI PERSP., No. 145, Apr. 13, 2015. It a subdivision's exclusive policy competences within a federal context that makes federal subdivisions particularly interesting. These are cases where the parent State, while responsible on the international plane, has limited options to control the subdivision's behavior *ex ante*. For this reason, this dissertation limits itself to questions of federal subdivisions.

13. *See* ICSID Convention, *supra* note 1, art. 42(1).

14. *Id*.

parent State enters opposable to it? This article will show that the answer to both of these questions is positive by examining doctrinal sources, ICSID practice, and the drafting history of the ICSID Convention. It will additionally consider as analogies other internationalized fora where State organs have a measure of juridical personality and have been held responsible for violations of international law, particularly the international criminal tribunals.[15]

In order to concentrate on the application of BIT standards to subdivisions, this article will not address some other questions relevant to a successful treaty-based ICSID claim against a subdivision. The first of these is the question of designation. Under Article 25(1), a subdivision may only be a respondent if its parent Contracting State has designated it as a potential respondent to the Centre.[16] As noted above, some Contracting States, like Australia and Canada, have designated some of their federal subdivisions as ICSID respondents. Others, like the United States and Switzerland, have not.[17] Some, like the United Kingdom, have designated their colonies administered separately from their metropolitan territory, like the Cayman Islands and Bermuda.[18] The designation itself raises issues of whether the procedural form of designation is effective and whether the entity designated is a subdivision or agency within the meaning of Article 25(1).[19] These questions can be complex. For example, in *Niko Resources v. Bangladesh*, the Tribunal held that Contracting States can implicitly designate an agency by allowing the agency to conclude a contract with an ICSID arbitration clause.[20] This article presumes that a given subdivision is capable of designation and has been effectively designated to the Centre.

Additionally, this article will not discuss the process of securing a subdivision's consent to ICSID arbitration. In treaty-based disputes, consent to arbitration is generally established through a State's offer to

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15. The legal order of the European Union also provides an interesting example that can be interpreted as holding non-State persons responsible for violations of treaty, or treaty-based norms. This dissertation will not employ the European Union as an example in light of the continuing disagreement as to whether EU law is international law.

16. ICSID Convention, *supra* note 1, art. 25(1).

17. Designations by Contracting States, *supra* note 6.

18. *Id.*

19. *See* Inna Uchkunova & Oleg Temnikov, *Untying the Knot: Estoppel and Implicit Designation of a Constituent Subdivision or Agency under the ICSID Convention*, KLUWER ARBITRATION BLOG (Sept. 4, 2014), http://kluwerarbitrationblog.com/blog/2014/09/04/untying-the-knot-estoppel-and-implicit-designation-of-a-constituent-subdivision-or-agency-under-the-icsid-convention/.

20. Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, ICSID Case Nos. ARB/10/11 & ARB/10/18, Decision on Jurisdiction, ¶¶ 301–02 (Aug. 19, 2013); Uchkunova & Temnikov, *supra* note 19.

arbitrate in the treaty and the investor's acceptance by bringing a claim.[21] The challenge this presents in an investor-subdivision context is that such treaties generally do not provide for the subdivision's consent as an independent legal person. For example, Article 28(1) of the 2004 Canadian Model Foreign Investment Promotion and Protection Agreement ("Model FIPA") provides that "[e]ach Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement."[22] This provision would establish Canada's consent to investor claims under the Model FIPA and is generally reflected in subsequent Canadian BITs.[23] But it does not speak to the consent of a Canadian province to such arbitration. Similarly, although Australia has no Model BIT, its BITs in force tend not suggest the consent of its states to arbitration.[24] Although this problem is an important one in the context of BIT claims against subdivisions, it remains one for another day.

Finally, this article will assume that neither BITs nor any relevant agreements to arbitrate specify the BIT as applicable law in an investor-subdivision arbitration. Under Article 42(1) of the ICSID Convention, the law that the parties agree is applicable is applicable.[25] It seems straightforward that if the parties to a dispute agree that a BIT provides the substantive rules of decision, it does.[26] However, as Gaillard and Banifatemi note, "a very large number of BITs do not provide for any

21. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 257–58 (2d ed. 2012); *see* Generation Ukraine v. Ukraine, ICSID Case No. ARB/00/9, Award, ¶ 12.3 (Sept. 16, 2003) ("[I]t is firmly established that an investor can accept a State's offer of ICSID arbitration contained in a bilateral investment treaty by instituting ICSID proceedings.").

22. Agreement between Canada and _____ for the Promotion and Protection of Investments art. 28(1), INVESTMENT TREATY ARBITRATION, http://italaw.com/documents/Canadian 2004-FIPA-model-en.pdf (last visited Mar. 10, 2015) [hereinafter "Canadian Model FIPA"]; *see also* Céline Lévesque & Andrew Newcombe, *Canada*, *in* COMMENTARIES ON SELECTED MODEL INVESTMENT TREATIES 111 (Chester Brown ed., 2013). The text of the Canadian Model FIPA is also reprinted in *id.* at 62–128. It is also available upon request from Foreign Affairs, Trade and Development Canada. *Canada's Foreign Investment Promotion and Protection Agreements (FIPAs)*, FOREIGN AFFAIRS, TRADE AND DEVELOPMENT CANADA (Nov. 4, 2013), http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/fipa-apie.aspx?lang=eng.

23. Lévesque & Newcombe, *supra* note 22, at 111.

24. *E.g.*, Agreement between the Government of Australia and the Government of the Argentine Republic on the Promotion and Protection of Investments art. 13(1)(b), [1997] ATS 4; Agreement between the Government of Australia and the Government of Romania on the Reciprocal Promotion and Protection of Investments art. 9(1)-(2), [1994] ATS 10; Agreement between the Government of Australia and the Government of Indonesia concerning the Promotion and Protection of Investments art. XI(1)-(2), [1993] ATS 19.

25. ICSID Convention, *supra* note 1, art. 42(1) ("The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties.").

26. *Cf.* Asian Agri. Prods. Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, ¶ 24 (June 27, 1990).

choice of law."[27] Thus, this article will confine itself to the more common (and interesting) case where no applicable law has been agreed by the parties.

## II. HISTORY OF ARTICLE 25(1): THE INCLUSION OF SUBDIVISIONS IN THE ICSID CONVENTION

As a starting point, the drafting history of Article 25(1) offers insights into the importance of both legal personality and opposability of legal rules to explaining the possibility of ICSID claims against State subdivisions. Throughout the drafting process, concerns over the privity of contract doctrine as applied to State agencies signing agreements with foreign investors led to the inclusion of the provision. These concerns reflect an awareness of the drafters that legal persons other than Contracting States could become involved in investment disputes, that agreements with persons other than Contracting States might not bind those States, and that disputes involving such questions might nevertheless be appropriate to include in the Centre's jurisdiction. Beyond this however also emerges an awareness that Article 25(1) might have broader effects on the international legal personality of agencies and subdivisions in the ICSID context.

The Drafting of the ICSID Convention by the World Bank proceeded in several stages.[28] The compiled preparatory works of the ICSID Convention identify five draft texts.[29] The first was a *Working Paper in the Form of a Draft Convention* ("*Working Paper*") submitted to the Bank's Executive Directors by General Counsel in 1962.[30] In August 1963, the Bank's staff submitted a new *First Preliminary Draft* to the

27. Emmanuel Gaillard & Yas Banifatemi, *The Meaning of "and" in Article 42(1), Second Sentence, of the Washington Convention: The Role of International Law in the ICSID Choice of Law Process*, 18 ICSID REV. 375, 379 (2003).

28. *See generally* Formulation of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [hereinafter "Formulation of the Convention"], *in* CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES: ANALYSIS OF DOCUMENTS CONCERNING THE ORIGIN AND THE FORMULATION OF THE CONVENTION 2–10 (1970) [hereinafter "I ICSID PREPARATORY WORKS"].

29. *Id*.

30. Working Paper in the form of a Draft Convention prepared by the General Counsel and transmitted to the Executive Directors [hereinafter "Working Paper"], *in* II-1 INT'L CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES: DOCUMENTS CONCERNING THE ORIGIN AND FORMULATION OF THE CONVENTION 19 (1968) [hereinafter "II-1 ICSID PREPARATORY WORKS"]; Formulation of the Convention, *in* I ICSID PREPARATORY WORKS, *supra* note 28, at 4.

Executive Directors.[31] The *First Preliminary Draft* was quickly superseded by a slightly revised *Preliminary Draft* prepared for consideration at four Consultative Meetings of Legal Experts on the convention.[32] In 1964, after these Consultative Meetings and consideration by the Bank's Executive Directors and Board of Governors, the staff prepared a working paper including a draft convention ("*First Draft*").[33] A specially convened Legal Committee on Settlement of Investment Disputes considered the *First Draft* and government comments.[34] In December 1964 and as a result of this work, the Legal Committee reported a *Revised Draft* to the Bank's Executive Directors.[35] On the basis of the *Revised Draft*, the Executive Directors approved a text of the Convention for submission to the Bank's Members in March 1965.[36]

Reference in Article 25(1) of subdivisions of States was added to the ICSID Convention in the *First Draft* and refined in the *Second Draft*. Earlier drafts refer only to disputes "between a Contracting State and a national of another Contracting State."[37] The idea of extending the jurisdiction of the Centre to subdivisions of States first emerged during the consideration of the *Preliminary Draft* at the regional Consultative Meetings of legal experts. In the third session of the meeting at Addis Ababa, an expert from Tanganyika asked whether the words "Contracting State" included statutory and public-owned corporations, which he noted were often the contractual counterparties of foreign investors in African

31. First Preliminary Draft of a Convention on the Settlement of Investment Disputes Between States and Nationals of Other States [hereinafter "First Preliminary Draft"], *in* II-1 ICSID PREPARATORY WORKS, *supra* note 30, at 133; Formulation of the Convention, *in* I ICSID PREPARATORY WORKS, *supra* note 28, at 4. The Article-by-Article Analysis in the compiled preparatory works generally does not address this draft, referring instead of the subsequent Preliminary Draft, *infra* note 32, that shortly followed it. See Article-by-Article Analysis, in I ICSID PREPARATORY NOTES, *supra* note 28, at 12. Accordingly, the First Preliminary Draft will be omitted from present consideration.

32. Preliminary Draft of a Convention on the Settlement of Investment Disputes between States and Nationals of Other States [hereinafter "Preliminary Draft"], *in* II-1 ICSID PREPARATORY WORKS, *supra* note 30, at 184; Formulation of the Convention, *in* I ICSID PREPARATORY WORKS, *supra* note 28, at 6.

33. Draft Convention on the Settlement of Investment Disputes between States and Nationals of Other States [hereinafter "First Draft"], *in* II-1 ICSID PREPARATORY WORKS, *supra* note 30, at 610; Formulation of the Convention, in I ICSID PREPARATORY WORKS, *supra* note 28, at 6–8.

34. Formulation of the Convention, *in* I ICSID PREPARATORY WORKS, *supra* note 28, at 8.

35. Revised Draft of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States [hereinafter "Revised Draft"], *in* II-2 INT'L CENTER FOR THE SETTLEMENT OF INVESTMENT DISPUTES: DOCUMENTS CONCERNING THE ORIGIN AND FORMULATION OF THE CONVENTION 911 (1968) [hereinafter "II-2 ICSID PREPARATORY WORKS"]; Formulation of the Convention, *in* I ICSID Preparatory Works, *supra* note 28, at 8.

36. Formulation of the Convention, *in* I ICSID PREPARATORY WORKS, *supra* note 28, at 8–10.

37. Working Paper, *supra* note 30, art. II(1); Preliminary Draft, *supra* note 32, art. II(1).

States.[38] Aron Broches, chairperson of the meeting and General Counsel of the Bank, replied that the meaning of "Contracting State" was meant to be straightforward but that the point raised was important.[39]

The question raised by the expert from Tanganyika resurfaced at the other Consultative Meetings. For example, in the third session of the meetings in Santiago, an expert from Jamaica raised the question of extending the Centre's jurisdiction to statutory corporations.[40] An Australian expert raised similar concerns with respect to capital-importing States with federal systems in the first meeting in Bangkok.[41] In Bangkok, the extension of the Centre's jurisdiction received explicit support from experts from Kuwait, Pakistan, and Australia.[42]

Experts at the Consultative Meetings also raised doubts about the need to extend the Centre's jurisdiction to subdivisions. For example, in the fourth meeting in Geneva, an expert from the Federal Republic of Germany questioned whether Contracting States might allow subdivisions to be respondents in an effort to avoid their own responsibility.[43] While Broches replied explaining that the provision was intended to extend the Centre's jurisdiction to State corporations entering into investment agreements with foreign investors, the German expert was not convinced.[44] Similarly, in the third meeting at Bangkok, two Indian experts questioned the usefulness of extending the Centre's jurisdiction.[45]

The concerns raised in the consultative meetings were reflected in the Staff's *First Draft*. Article 26(1) of the *First Draft* provided in relevant part:

> The jurisdiction of the Center shall extend to all legal disputes between a Contracting State (or one of its political subdivisions or agencies) and a national of another Contracting State. . . .[46]

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38. Summary Record of Proceedings, Addis Ababa Consultative Meetings, *in* II-1 ICSID PREPARATORY WORKS, *supra* note 30, at 258.

39. *Id.*

40. Summary Record of Proceedings, Santiago Consultative Meetings, *in* II-1 ICSID PREPARATORY WORKS, *supra* note 30, at 321.

41. Summary Record of Proceedings, Bangkok Consultative Meetings, *in* II-1 ICSID PREPARATORY WORKS, *supra* note 30, at 473–74.

42. *Id.* at 500, 502, 551.

43. Summary Record of Proceedings, Geneva Consultative Meetings, *in* II-1 ICSID PREPARATORY WORKS, *supra* note 30, at 410.

44. *Id.*

45. Summary Record of Proceedings, Bangkok Consultative Meetings, *supra* note 41, at 504, 507.

46. First Draft, *supra* note 33, art. 26(1).

The Staff's comment notes that the change would expand the jurisdiction of the Centre to extend to political subdivisions or agencies of a Contracting State.[47] This text would form the basis of further discussions of the Convention by the legal committee of the Bank's Executive Directors.

The first State response to the text of the *First Draft* was a letter from the Ministry of Finance of the Malagasy Republic.[48] In the letter, the Malagasy Republic raises two distinct concerns with the expansion of the Centre's jurisdiction. The first was interference with States' domestic affairs. As the Malagasy Republic noted, "[b]y providing that dispute involving [subdivisions] could be submitted to the Center, one runs the risk of extending the jurisdiction of the Center to controversies which should rather be solved at the strictly municipal level."[49] While recognizing that Contracting States would be entitled to refuse such jurisdiction, the Malagasy Republic argued that refusals of such consent might damage confidence in the Convention.[50]

The second Malagasy concern raised first addressed the issues of international legal personality created by the Centre's jurisdiction.[51] In the view of the Malagasy Republic, "this principle, to the extent that it grants political subdivisions and agencies an international personality, it is in conflict with the concept of Malagasy public law that the juridical personality granted to political subdivisions and agencies is a personality under municipal law and not international law. At the international level, only the State can represent them."[52] This concern was echoed by the Brazilian member of the Legal Committee in written comments on the *First Draft*, which specifically object to the extension of the Centre's jurisdiction to subdivisions because of their lack of international independent legal personality.[53]

These concerns were not specifically addressed by the other members of the Legal Committee in their discussions of the *First Draft*.[54] The

47. *Id.* art. 26, comment.

48. Letter addressed to the Bank by the Ministry of Finance of the Malagasy Republic on November 7, 1964 [hereinafter "Malagasy Letter"], *in* II-2 ICSID PREPARATORY WORKS, *supra* note 30, at 657.

49. *Id*.

50. *Id*.

51. *See id*.

52. *Id*.

53. Comments by Mr. da Cunha (Brazil) on Chapter II, *in* II-2 ICISD PREPARATORY WORKS, *supra* note 30, at 838.

54. *See* Summary of Proceedings of the Legal Committee Meeting, Dec. 9, Afternoon [hereinafter "December 9 Summary"], *in* II-2 ICSID PREPARATORY WORKS, *supra* note 30, at 856–57;

Working Group assigned to consider the question focused instead on the words to be used to extend jurisdiction to subdivisions, seeking "to cover as wide a range of entities as possible using terminology which could be universally understood."[55] Two proposals for the text emerged from the Working Group.[56] The members from Australia and India recommended language including "a constituent subdivision, such as a State, Republic or Province, of a Contracting State, or any agency of a Contracting State that had been designated to the Center by the Contracting State."[57] The member from Tanzania recommended instead "any body or bodies designated in that behalf by that Contracting State."[58] In response to the *Working Group Interim Report*, the Legal Committee determined that the condition of the Contracting State's consent should apply to both subdivisions and agencies.[59] The Committee additionally decided to adopt the Australian/Indian text, but without the clarifying text referring to States, republics, and provinces.[60] This decision resulted in the final text of the provision, as is reflected in the subsequent *Fourth Interim Report* of the Drafting Committee and the text of the Convention.[61]

The drafting history of Article 25(1) reveals two interesting points about the purpose and meaning of the provision. The first concerns the purpose of the expanded jurisdiction. At the core of States' concerns in allowing subdivisions to be respondents was the privity of contract doctrine. Generally, contracts create obligations between the parties thereto.[62] The drafting history reveals concern among negotiators that a Centre without jurisdiction over subdivisions would be unable to hear claims based on contracts between investors and those subdivisions.[63] This concern was prescient. Multiple ICSID panels have held themselves to be without jurisdiction over claims against States arising from contracts with

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Interim Report on Parenthetical Clause in Article 26(1) [hereinafter "Working Group Interim Report"], *in* II-2 ICSID PREPARATORY WORKS, *supra* note 30, at 867.

55. Working Group Interim Report, *supra* note 54, at 867.

56. *Id.*

57. *Id.*

58. *Id.*

59. December 9 Summary, *supra* note 54, at 857.

60. *Id.*

61. Fourth Interim Report, *in* II ICSID PREPARATORY WORKS, *supra* note 30, at 879; ICSID Convention art. 25(1) ("[O]r any constitution subdivision or agency of a Contracting State designated to the Centre by that State").

62. Anglo-Iranian Oil Co. (U.K. v. Iran), Preliminary Objections, 1952 I.C.J. 93, 112 (July 22); *c.f.* JAN KLABBERS, THE CONCEPT OF TREATY IN INTERNATIONAL LAW 49 (1996).

63. *See supra* notes 38–42 and accompanying text.

subdivisions.[64] For example, *Cable Television of Nevis v. Federation of St. Christopher (St. Kitts) & Nevis* concerned allegations of the violation of an investment agreement between an investor and the administration of Nevis Island, a federal subdivision of St. Kitts & Nevis.[65] St. Kitts & Nevis objected to the tribunal's jurisdiction on the grounds that the claimant's dispute was with Nevis and Nevis was not a designated constituent subdivision.[66] Because designation and the Federation's consent were lacking and because the claim was against Nevis, the tribunal held itself without jurisdiction.[67] Had Nevis been a designated subdivision, the Centre would have been competent to adjudicate the investor's claim against it. The final text of Article 25(1) offers this possibility.

The second is the recognition in the Malagasy and Brazilian comments that extending the Centre's jurisdiction sat uncomfortably with traditional notions of international legal personality. Both reflect a conception that States are and should be the only legal persons on the international plane.[68] The Malagasy Letter reflects a fear that extending the jurisdiction of the Centre to subdivisions and agencies would create a new category of legal personality, the creation of which the Malagasy Republic seemed to oppose for policy reasons.[69] The Brazilian comments reflect a slightly different position, that it is impossible for a subdivision to be a legal person in international law.[70] As will be examined below,[71] these fears are consistent with the then-developing position that a treaty can extend legal personality to new entities and with a concern that Article 25(1) could include subdivisions among them.

## III. APPLYING A BIT TO A SUBDIVISION AS DOMESTIC LAW

Having reviewed the origins of ICSID jurisdiction over subdivisions, this article now turns to possibilities to use this jurisdiction to bring BIT-based claims against them. As noted above, this article assumes a lack of

64. *E.g.*, Impregilo S.p.A. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/3, Decision on Jurisdiction, ¶ 216, (Apr. 22, 2005), 12 ICSID Rep. 245 (2007); Consortium R.F.C.C. v. Royaume de Maroc, ICSID Case No. ARB/00/6, Décision sur la compétence, ¶¶ 68–69 (July 16, 2001); Cable Television of Nevis Ltd. v. Federation of St. Christopher (St. Kitts) & Nevis, ICSID Case No. ARB/95/2, Award, ¶ 2.22 (Dec. 16, 1996), 5 ICSID Rep. 108 (2002).

65. Cable Television of Nevis, ICSID Case No. ARB/00/6, ¶ 2.09.

66. *Id.* ¶ 2.01.

67. *Id.* ¶ 2.33.

68. Malagasy Letter, *supra* note 48, at 657; *Comments by Mr. da Cunha*, *supra* note 53, at 838.

69. Malagasy Letter, *supra* note 48, at 657.

70. Comments by Mr. da Cunha, *supra* note 53, at 838.

71. *See* discussion *infra* Part IV.A.

choice-of-law provision in the relevant BIT.[72] The default applicable law provision in Article 42(1) of the ICSID Convention governs in such cases.[73] Article 42 of the ICSID convention enshrines a dualist conception of law. It provides that, in the absence of an agreement of the parties on applicable law, a "Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable."[74] The distinction in this text between the law of Contracting States and international law implies the existence of two separate legal orders in which applicable norms might exist. Rules finding their source in treaties can exist both on the international and domestic levels. This chapter briefly addresses the possible application of a BIT to a subdivision of a State as part of that State's domestic law. It will also address the drawbacks of this theory of subdivision responsibility for BIT violations. Particularly, as Chinkin notes, this theory of responsibility is limited by the fact that "[d]ifferences in municipal law prevent any overall conclusions."[75]

Article 42 of the ICSID Convention enshrines the domestic law of the respondent Contracting State as applicable before ICSID tribunals.[76] It is well established that treaties may become incorporated into a State's municipal law and create rights and obligations therein.[77] An early example of this in international practice is the advisory opinion of the Permanent Court of International Justice on *Jurisdiction of the Courts of Danzig*. In that case, at issue was whether Danzig railway officials employed by the Polish Railways Administration were able to rely on provisions of the *Beamtenabkommen*, a treaty between Poland and Danzig, before the courts of Danzig.[78] Noting that "an international agreement cannot, as such, create direct rights and obligations for private individuals," the Court nevertheless reasoned that "the very object of an international agreement, according to the intention of the contracting Parties, may be the adoption by the Parties of some definite rules creating

72. *See supra* notes 25–27 and accompanying text.
73. ICSID Convention, *supra* note 1, art. 42(1)
74. *Id*.
75. CHRISTINE CHINKIN, THIRD PARTIES IN INTERNATIONAL LAW 124 (1993).
76. ICSID Convention, *supra* note 1, art. 42(1).
77. *E.g.*, Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15, at 17–18 (Mar. 3); Foster v. Neilson, 27 U.S. (2 Pet.) 253, 254 (1829). *See also* Thomas Buergenthal, *Self-executing and Non-self-executing Treaties in National and International Law*, 235 RECUEIL DES COURS 303, 315–17 (1992).
78. Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15, at 5 ¶ 1(a)-(b).

individual rights and obligations and enforceable by the national courts."[79] To determine whether a treaty has such effect, the Court considered the Parties' intention "decisive."[80] In the case of the *Beamtenabkommen*, the Court expressed the view that the parties' intention was to create such rights and, therefore, the Danzig officials could rely on the treaty before Danzig Courts.[81]

But this possibility is limited by the domestic constitutional orders of States and their rules determining the domestic effect of treaties.[82] This suggests the first and main drawback of a domestic-law approach, the impossibility of generalization. The domestic treatment of treaties varies widely between legal systems. Domestic legal orders are generally separated into two broad groups, those where treaties acquire domestic status upon ratification, so-called monist States, and those where treaties are not incorporated until a domestic legislative act, so-called dualist States.[83] These categories mask broad variation between domestic systems.[84]

Among monist States, there is variety in both the normative rank of treaties and their domestic effect. In some, such as Uruguay, treaties are treated equally with statutes in domestic law in both rank and effect.[85] As a consequence, domestic courts will recognize claims under BITs.[86] A general challenge emerges, however, because States placing treaties on par with domestic statutes usually resolve conflicts according to the *lex posteriori* rule.[87] If a later statute prevails in domestic law over a BIT, then the BIT will not likely be the basis of a successful challenge against a subsequent statutory measure. In a federalist context, this is less likely to be a challenge if treaties are given precedence over the law of the subdivisions. In the United States, treaties are treated as on the level of federal statutes.[88] Treaties therefore prevail over all enactments of U.S.

79. *Id.* at 17–18.
80. *Id.* at 18.
81. *Id.* at 21.
82. CHINKIN, *supra* note 75, at 124.
83. Buergenthal, *supra* note 77, at 316–17.
84. *Id.*
85. *See id.* at 342.
86. *See* Treaty between the United States of America and the Oriental Republic of Uruguay concerning the Encouragement and Reciprocal Protection of Investment, S. EXEC. REP. NO. 109-17, at 8 (2006) (noting the inclusion of a fork-in-the-road provision in the U.S.-Uruguay BIT to account for the cognoscibility of BIT claims in Uruguayan courts). In addition to domestically enforceable BITs, Uruguayan law also contains a statute establishing standards of protection for foreign investors. *See* Ley Nº 16.906, D.O. 20 ene/998 (Uru.).
87. Buergenthal, *supra* note 77, at 342–44.
88. *Id.* at 344–45.

subdivisions, the several states.[89] Even stronger is the position of treaties in the Russian Federation, as Article 15(4) of the Russian Constitution places treaties above domestic legislation in case of conflict.[90] An ICSID Tribunal facing a claim invoking a BIT as applicable domestic law would have to navigate the intricacies of the status of the treaty in the relevant domestic law to determine the extent to which it would apply in the face of a challenge measure that often takes the form of a domestic statute.

Even if treaties have a favorable rank in the domestic law of a monist State, several such States require that a treaty be self-executing in order to have domestic effect. For example, in the United States, only self-executing treaties are applicable *ipso facto* before domestic courts.[91] A treaty is non-self-executing if it "manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation . . . (b) if the Senate in giving consent to a treaty, or the Congress by resolution, requires implementing legislation, or . . . (c) if implementing legislation is constitutionally required."[92] A further question arises concerning whether a self-executing treaty gives rise to privately enforceable rights. The commentary to the *Restatement (Third) of the Foreign Relations Law of the United States* answers this question generally in the negative.[93] This too depends on the interpretation of the relevant treaty.[94] Similar approaches have been adopted by courts in Switzerland, Austria, and France.[95] For example, in *Bosshard Partners Intertrading AG v. Sunlight AG*, the Swiss Federal Tribunal held that a free-trade agreement was non-self-executing because the programmatic nature of its provisions suggested that directly enforceable rights were not intended.[96] Between each of these States, the willingness of courts to consider treaties self-executing or having direct effect varies widely.[97]

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89. *Id.*; *see also* U.S. CONST. art. VI, § 2.

90. KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 15(4) (Russ.); William E. Butler, *Russian Federation*, in THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY 410–11 (David Sloss ed., 2009).

91. David Sloss, *United States*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT: A COMPARATIVE STUDY, *supra* note 90, at 509–11.

92. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111(4) (1987).

93. *Id.* § 907 cmt. a.

94. *Id.*; *accord* Jurisdiction of the Courts of Danzig, Advisory Opinion, 1928 P.C.I.J. (ser. B) No. 15, at 17–18 (Mar. 3).

95. Buergenthal, *supra* note 77, at 385–90.

96. Bundesgericht [BGer] [Federal Supreme Court] Jan. 25, 1979, 105 BGE II 49, 58–60 (Switz.); *see also* Buergenthal, *supra* note 77, at 386–87.

97. *See* Buergenthal, *supra* note 77, at 390.

To the extent generalization is possible, the questions of self-execution and direct effect raise a second problem. There is evidence in favor of the proposition that BITs do not create directly enforceable rights in domestic law in the form of a consensus on the international nature of the substantive standards established in BITs.[98] As explained above, even in systems where treaties can give rise to substantive rules of domestic law without some act of legislative transformation, domestic applicability of treaties is often a function of the intent of the treaty-makers.[99] This mirrors the PCIJ's assessment of the question in *Jurisdiction of the Courts of Danzig*.[100] A survey of BITs that establish agreement of the parties as to applicable law in arbitration reveals a sense that BIT standards are ones of international law.[101]

For example, discussing BITs that do establish the law applicable in investor-State arbitration, Gaillard and Banifatemi identify several broad groupings of BITs.[102] First are BITs proving for disputes to be resolved according to the BIT "in conjunction with" international law.[103] For example, Article 7(1) of the Mexico-Switzerland BIT annex on investor-State disputes provides the "[u]n tribunal établi en vertu de la présente Annexe statuera conformément au présent Accord et aux autres règles applicable du droit international."[104] The implication of such texts is that the terms of the BIT belong to the set of applicable rules of international law. Second are treaties that refer to the BIT and domestic law.[105] For example, Article 12(6) of the China-Uzbekistan BIT provides that, in the absence of the parties' agreement, "the Tribunal shall apply the law of the Contracting party to the dispute . . . and such rules of international law as may be applicable, in particular, this Agreement."[106] Such texts also imply the inclusion of BIT standards within the set of international-law, rather than national-law, rules. A third group of treaties refers to the treaty and international law. For example, NAFTA Article 1131(1) provides that "[a] Tribunal . . . shall decide the issues in dispute in accordance with this

98. *See* discussion *infra* Part IV.B.1.
99. *See*, *e.g.*, Buergenthal, *supra* note 77, at 383–84.
100. Jurisdiction of the Courts of Danzig, *supra* note 77, at 17–18.
101. *See* Gaillard & Banifatemi, *supra* note 27, at 377–78.
102. *Id.*
103. *Id.* at 377 (internal quotations omitted).
104. Accord entres les États-Unis Mexicains et la Confédération Suisse concernant la promotion et la protection réciproques des investissements, Annexe, art. 7(1), July 10, 1995, 1965 U.N.T.S. 269.
105. Gaillard & Banifatemi, *supra* note 27, at 377–78.
106. Agreement between the Government of the People's Republic of China and the Government of the Republic of Uzbekistan on the Promotion and Protection of Investments art. 12(6), Apr. 19, 2011, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3357.

Agreement and applicable rules of international law."[107] Article 26(6) of the Energy Charter Treaty similarly provides that investor-State disputes are to be decided "in accordance with this Treaty and applicable rules and principles of international law."[108]

Notably, each of the above texts cabins its establishment of the BIT as applicable law to the context of arbitral tribunals, even where the option of pursing a case in domestic courts is present. This confirms a general sense that BIT standards are not intended to become rules of domestic law. This sense is confirmed by practice suggesting that legislators and negotiators do not intend BITs to be directly applicable in domestic courts. For example, the U.S. Senate report on the US-Rwanda BIT notes that the substantive standard of protection in the treaty "do not confer private rights of action enforceable in United States courts."[109]

This sense is further reflected in the general view that a core purpose of BITs is to establish an international remedy for investors in an international forum.[110] Investor-State treaty arbitration emerged in a context where investor remedies were limited to political risk insurance and reliance on diplomatic protection.[111] BIT arbitration moves beyond these options by being a remedy against the host State (unlike insurance) and independently invocable by the investor (unlike diplomatic protection).[112] The centrality of allowing arbitration as a motivator for BITs is also reflected in criticism of BITs. For example, the first concern listed on the European Citizen's Initiative website against the Canada-EU Comprehensive Economic and Trade Agreement and the US-EU Transatlantic Trade and Investment Partnership is the possible expansion of investor-State arbitration.[113] Such arguments serve to confirm the position that BIT rules are often not intended to be ones of domestic law. Because of this, it is doubtful whether a jurisdiction whose courts inquire into the negotiators' intent would find BIT standards to be self-executing or directly applicable in its domestic law. This poses challenges additional challenges in the context of ICSID arbitration, because an ICSID tribunal

107. North American Free Trade Agreement art. 1131(1), Dec. 17, 1992, 32 I.L.M. 289 [hereinafter "NAFTA"].

108. Energy Charter Treaty art. 26(6), Dec. 17, 1994, 2080 U.N.T.S. 95.

109. Investment Treaty with Rwanda, S. EXEC. REP. NO. 111-8, at 11 (2010).

110. *See*, *e.g.*, Susan D. Franck, *Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes,* 55 VA. J. INT'L L. 13, 19–20 (2014).

111. *Id.* at 19.

112. *See id.*

113. *What is the Problem?*, STOP TTIP, http://stop-ttip.org/what-is-the-problem-ttip-ceta/ (last visited May 17, 2015).

considering a domestic-law-based BIT claim would be forced to speculate as to the attitude of a domestic court to BIT incorporation.

Returning to the first drawback, the challenge of generalization, the position in dualist States is clearer. Treaties do not themselves create domestic-law rights or obligations.[114] If there is no domestic statute, there is no domestic law claim based on the BIT. If there is a statute, the domestic-law claim arises under the statute and not under the BIT. Either way, a claim under the BIT is not cognizable in the domestic courts and, therefore, before an ICSID tribunal applying applicable domestic law. This is of particular relevance to the present inquiry as the States which have inspired this article, Australia and Canada, both have such dualist regimes.[115] In both Australian and Canadian law, domestic implementing legislation is necessary to turn standards established in BITs into claims invocable by investors in domestic law. For the two States most relevant to the present inquiry, then, the domestic-law approach to BIT application before and ICSID tribunal is a non-starter.

## IV. APPLYING A BIT TO A SUBDISIVION AS INTERNATIONAL LAW

Because of these barriers to reliance on a BIT against a subdivision as applicable domestic law, a theory relying on the BIT as an applicable norm of international law may be useful, allow for greater generalizability, and offer greater prospects of success. "[S]uch rules of international law as may be applicable" form part of the default law applicable by an ICSID tribunal.[116] This opens the door to the application of a BIT by an ICSID tribunal as international law. But this possibility raises two of its own challenges.

First is the question of the kind of entity a subdivision is in international law. While commentators and courts have accepted the possibility of the responsibility of natural persons, international organizations, and even corporations, discussion of whether subdivisions of States can be responsible for a violation of international law as a

114. Buergenthal, *supra* note 77, at 359 (citing MacLain Watson and Co. v. Dept. of Trade and Industry, [1989] 3 All ER 523, 544–45 (H.L.) (Oliver, L.J.) and Canada (A.G.) v. Ontario (A.G.), [1936] A.C. 326 (P.C.) 347).

115. David Sloss, *Treaty Enforcement in Domestic Courts: A Comparative Analysis*, *in* THE ROLE OF DOMESTIC COURTS IN TREATY ENFORCEMENT, *supra* note 90, at 17; *see also* CHERYL SAUNDERS, THE CONSTITUTION OF AUSTRALIA: A CONTEXTUAL ANALYSIS 104 (2011); PAUL LORDON, Q.C., CROWN LAW 78 (1991).

116. ICSID Convention, *supra* note 1, art. 42(1).

distinct legal person is almost nonexistent.[117] An ICSID tribunal can hold a subdivision responsible for violating a BIT as international law only if the subdivision is an entity capable of international legal violations and responsibility therefor.

Second, if a subdivision can bear international legal responsibility, is the question whether a norm created by a BIT between States is opposable to a subdivision of one of those States before an ICSID tribunal. This question has two parts: first, whether a BIT is applicable international law in the sense of Article 41(1) of the ICSID Convention; second, whether a BIT is opposable to subdivisions of its States Parties. This chapter will address each of these questions in turn.

### *A. The Capacity of Subdivisions for International Responsibility*

The question of subdivisions' capacity for international responsibility is a threshold issue for an international-law theory of their responsibility. This capacity is generally captured by the notion of legal personality or subjecthood.[118] Traditionally, international law has held the parent State responsible for the wrongful acts of its subdivisions.[119] But the experience of international criminal law demonstrates that parent responsibility can coexist with the responsibility of an individual organ.[120] Thus, the question arises whether, in addition to State responsibility, subdivisions are persons capable of being responsible for their violations of international law.

#### *1. Responsibility for Acts of Subdivisions*

As a general rule in international law, parent States have borne responsibility for the acts of their subdivisions. The rule of Parent responsibility was already well established at the beginning of the 20th century. As Oppenheim noted in 1912, membership in the international community as a legal person entails responsibility of the State for its

117. *But see* Côté, *supra* note 12.

118. ROLAND PORTMANN, LEGAL PERSONALITY IN INTERNATIONAL LAW 8 (2010); Jan Klabbers, *(I Can't Get No) Recognition: Subjects Doctrine and the Emergence of Non-State Actors*, *in* NORDIC COSMOPOLITANISM 351–53 (2003).

119. *See*, *e.g.*, ARSIWA, *supra* note 11, art. 4(1).

120. *See* ELIES VAN SLIEDREGHT, INDIVIDUAL CRIMINAL RESPONSIBILITY IN INTERNATIONAL LAW 6–7 (2012); *see also* Prosecutor v. Furundžija, Case N. IT-95-17/1-T, Judgment, ¶ 142 (Int'l Crim. Trib. For the Former Yugoslavia Dec. 10, 1998) ("Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture . . . .").

violation of international law.[121] In Oppenheim's conception of responsibility, States are obligated to make *reparation* for two categories of act: international delinquencies and those acts for which the State is vicariously responsible.[122] International delinquencies are "every injury to another State committed by the head and the Government of a State through violation of an international legal duty."[123] "[A]cts of officials or other individuals which are either commanded or authorised by Governments" can potentially be international delinquencies, but "unauthorized acts of corporations, such as Municipalities, or of officials . . . never constitute an international delinquency."[124] Nevertheless, "States must bear vicarious responsibility for all internationally injurious acts of their organs."[125] Oppenheim's position is consistent with that taken by his contemporaries. For example, a 1900 resolution of the *Institut de Droit international* provides:

> Le gouvernement d'un Etat fédéral composé d'un certain nombre de petits Etats, qu'il représente au point de vue international, ne peut invoquer, pour se soustraire à la responsabilité qui lui incombe, le fait que la constitution de l'Etat fédéral ne lui donne, sur les Etats particuliers, ni le droit de contrôle, ni le droit d'exiger d'eux qu'ils satisfassent à leurs obligations.[126]

Today's doctrine maintains the position that responsibility for the internationally wrongful acts of subdivisions lies with the parent State. In the words of the ILC in ARSIWA Article 4(1):

> The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its

121. L. OPPENHEIM, 1 INTERNATIONAL LAW § 113 (2d ed. 1912).
122. *Id.* § 149-51.
123. *Id.* § 151.
124. *Id.* § 153.
125. *Id.* § 157.
126. Institut de Droit international, Règlement sur la responsabilité des Etats à raison des dommages soufferts par des étrangers en cas d'émeute, d'insurrection ou de guerre civile § 4 (Session de Neuchâtel, 1900) [The government of a federal State composed of a certain number of smaller states, which it represents on the international level, cannot invoke, in order to avoid the responsibility that lies upon it, the fact that the constitution of the federal State gives it neither the right to control the several states nor the right to require them to satisfy their obligation."].

> character as an organ of the central Government of a territorial unit of the State.[127]

The text adopted by the ILC is clear as to the breadth of the general rule; whatever the position of the organ, its parent State is responsible. In the ICSID context, this rule has been confirmed by multiple tribunals. For example, in *Vivendi v. Argentina*, the tribunal wrote that "[u]nder international law . . . it is well established that actions of a political subdivision of a federal state . . . are attributable to the central government."[128]

The commentary to ARSIWA, however, reveals scope for subdivision responsibility.[129] The commentaries raise two possibilities.[130] First is the case of subdivisions entering into international agreements as parties in their own right.[131] In this case, the commentaries note that "the other party may well have agreed to limit itself to recourse against the constituent unit."[132] The second is the presence of a federal clause in a treaty, which may limit the responsibility of a parent State for its subdivisions.[133] The commentaries explain such clauses as *lex specialis* with respect to the general rule of Article 4(1).[134] In each of these examples, parent responsibility can be limited with the consent of a treaty counterparty. The examples thus reinforce a presumption of parent responsibility in international law. Additionally, because both of these exceptions concern only the limitation of parent responsibility, they do not speak to the potential for direct responsibility of subdivisions when parent responsibility remains present.

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127. ARSIWA, *supra* note 11, art. 4(1).

128. Compañiá de Aguas del Aconquija, S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, ¶ 49 (Nov. 21, 2000); *accord* SAUR International S.A. c. République Argentine, ICSID Case No. ARB/04/4, Décision sur la compétence et sur la responsabilité, ¶ 384 (June 6, 2012) ("La République argentine est resposnsable, conformément aux principes du droit internaitonal, des actes exécutés par la Province."); Waste Management Inc. v. United Mexican States, ICSID Case No. ARB(AF)/00/3, Final Award, ¶ 75 (Apr. 30, 2004).

129. *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts with Commentaries, Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001), at 42 [hereinafter "ARSIWA Commentaries"].

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

*2. Legal Personality of Non-State Entities*

While it is clear that a parent State can be responsible for the actions of its subdivisions, the issue of whether international law permits subdivisions to be independently responsible for their wrongs is less clear. As Oppenheim noted, responsibility is among the consequences of international legal personality.[135] In order to establish independent subdivision responsibility, one must thus establish the legal personality of subdivisions such that they are capable of responsibility. This capacity is generally captured by the notion of legal personality or subjecthood.[136]

In domestic legal orders, sets of rules on personality usually establish what kind of entities are capable of holding legal rights and obligations and which legal rights and obligations such entities can hold.[137] It is thus common for domestic legal orders to include either statutes or, in the case of the common law, rules establishing a minimum age beneath which natural persons are conclusively presumed incapable of criminal responsibility.[138] For example, Swiss penal law establishes non-responsibility for those under 10, one regime of criminal responsibility for those between the ages of 10 and 18, and another for those over 18.[139] Similarly, domestic companies law governs when collectives of natural persons are independent legal persons with their own rights and obligations.[140] In many domestic systems, such persons, like infants, also lack the capacity *de iure* to be criminally responsible.[141] These rules of

135. OPPENHEIM, *supra* note 121, § 112.

136. PORTMANN, *supra* note 118, at 8; Klabbers, *supra* note 118, at 351–53.

137. PORTMANN, *supra* note 118, at 7–9.

138. MARK FINDLAY, THE CRIMINAL LAWS OF THE SOUTH PACIFIC 32 (1996); Martin A. Frey, *The Criminal Responsibility of the Juvenile Murderer*, 1970 WASH. U. L.Q. 113, 113; *e.g.*, N.Y. PENAL LAW § 30 (McKinney 2007) (establishing minimum age for capacity for criminal responsibility); LOI FÉDÉRALE RÉGISSANT LA CONDITION PÉNALE DES MINEURS [DPMIN] [LAW ON CRIMES BY MINORS] June 20, 2003, RS 311, art. 3 (Switz.) (establishing lack of criminal penalties for persons under 10 years old); STRAFGESETZBUCH [STGB] [PENAL CODE], May 15, 1871, *as amended*, § 19 (Ger.) ("Schuldunfähig ist, wer bei Begehung der Tat noch nicht vierzehn Jahre alt ist.") [A person who, at the time of the commission of a crime, is not yet fourteen years old is not criminally responsible."]; *see also* Jan Klabbers, *The Concept of Legal Personality*, 11 JUS GENTIUM 35, 39 (2005).

139. DPMIN, *supra* note 138, arts. 3–4; CODE PÉNALE SUISSE [CP] [CRIMINAL CODE] Dec. 21, 1937, R.S. 311.0 (1938), *as amended by* DPMin, June 20, 2003, AS 2006 (2003), art. 44, para. 1 (Switz.) ("Le droit pénale des mineurs du 20 juin 2003 (DPMin) s'applique aux personnes qui n'ont pas 18 ans le jour de l'acte.") [The Juvenile Criminal Law of 20 June 2003 (DPMin) applies to persons who are not yet 18 years old on the day of the act.].

140. PORTMANN, *supra* note 118, at 7–8; *see generally*, *e.g.*, CORPORATE BUSINESS FORMS IN EUROPE (Frank Dornseifer ed., 2005).

141. Susanne Beck, *Corporate Criminal Liability*, in THE OXFORD HANDBOOK OF CRIMINAL LAW 565 (Markus D. Dubber & Tatjana Hörnle eds., 2014) (Listing "Bulgaria, Germany, Greece, Italy, and Latvia" as European jurisdictions refusing corporate criminal liability).

personality are often viewed as "a *conditio sine qua non* for the possibility of acting within a given legal situation[,] a threshold, which must be crossed."[142] International law lacks such clear positive enactments establishing which entities have which legal capacities, that is, which entities are persons or subjects.[143] International law adds the additional complexity that some conceptions of personality or subjecthood entail a legislative capacity, either in the power to make treaties or contribute relevant practice and *opinio iuris* to the formation of customary law.[144]

Because of this complexity, definitions of personality in international law vary. Crawford, writes as an example of a conventional definition "[a] subject of international law is an entity possessing international rights and obligations and having the capacity (a) to maintain its rights by bringing international claims; and (b) to be responsible for its breaches of obligation by being subjected to such claims."[145] But this has not always been the case. In order to determine whether designated subdivisions at ICSID have reached this status, it is useful to consider how international legal personality has opened up over the course of the twentieth century.

### *a. Historical Position*

Historically, only States and a few *sui generis* entities (for example, the Holy See and the Order of Malta) were considered to be international legal persons.[146] Writing in 1912, Oppenheim notes that "sovereign States exclusively are International Persons—*i.e.* subjects of International Law."[147] The roots of this proposition, however, are much older.[148] Writing in 1758, Vattel defines international law as "la science du Droit qui a lieu entres les Nations, ou États, et des Obligations qui répondent à ce Droit."[149] By the early twentieth century, this conception of international legal personality was dominant in the doctrine.[150] For example, in his Hague Academy course, Triepel notes that:

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142. Klabbers, *The Concept of Legal Personality*, *supra* note 138, at 37.
143. *See* PORTMANN, *supra* note 118, at 9–10.
144. *Id.* at 8–9.
145. CRAWFORD, *supra* note 11, at 115.
146. PORTMANN, *supra* note 118, at 42; *see also* CRAWFORD, *supra* note 11, at 124–25; OPPENHEIM, *supra* note 121, §§ 104–07.
147. OPPENHEIM, *supra* note 121, § 63.
148. *See* PORTMANN, *supra* note 118, at 35–38.
149. E. DE VATTEL, 1 LE DROIT DES GENS § 3 (1758) ["The science of the Law which occurs between Nations, or States, and of the Obligations which correspond to this Law."]; *see also* PORTMANN, *supra* note 118, at 35.
150. PORTMANN, *supra* note 118, at 42.

> Le droit international public règle des rapports entre des États et seulement entre des États parfaitement égaux. Les relations entre un État fédéral et ses États membres ne sont point du domaine du droit international parce qu les États-membres sont soumis à l'État fédéral, et les relations entre les individus et les États étrangers, ainsi que les relations entre des individus appartenant à différents États, ne sont point du régime du droit international public, parce que les individus ne sont pas, comme on aime à dire, des « sujets » du droit international.[151]

This conception is confirmed in the judicial practice of the era.[152] The lead example is the decision on jurisdiction of the PCIJ in *Mavrommatis Palestine Concessions*, the Court's second contentious case.[153] In *Mavrommatis*, the Court considered whether a claim based on a Greek national's grievances against the United Kingdom were a dispute between the "Mandatory [United Kingdom] and another member of the League of Nations [Greece]."[154] The Court held that, by exercising diplomatic protection over Mavrommatis's claims, Greece was "in reality asserting its own rights—its right to ensure, in the person of its subject, respect for the rules of international law."[155] The Court thus upheld the traditional, States-only conception of personality in a context which now might be subject to investor-State dispute resolution under a BIT.[156]

History shows, and Oppenheim conceded, however, that the traditional concept that only States are considered legal persons has never been entirely accurate.[157] Oppenheim himself defended the limited legal personality of the Holy See on its maintenance of quasi-diplomatic relations with States and its conclusion of Concordats with States that

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151. ["Public international law governs relations between States and only between States that are perfectly equal. The relations between a federal States and its member States are not within the domain of international law because the member States are subject to the federal State, and the relations between individuals and foreign States, as well as the relations between individuals from diffferent States, are not within the regime of public international law because individuals are not, as they like to say, "subjects" of international law."]. H. Triepel, *Les rapports entre le droit interne et le droit international*¸1 RECUEIL DES COURS 73, 81 (1923); *see also* PORTMANN, *supra* note 118, at 43.

152. PORTMANN, *supra* note 118, at 64–79.

153. Mavrommatis Palestine Concessions (Greece v. U.K.), Jurisdiction, 1924 P.C.I.J. (ser. A) No. 2 (Aug. 30); *see also* PORTMANN, *supra* note 118, at 65.

154. *Mavrommatis*, 1924 P.C.I.J. (ser. A) No. 2 at 11 (citing the compromissory provision of the British Mandate for Palestine); *see also* PORTMANN, *supra* note 118, at 65–66.

155. *Mavrommatis*, 1924 P.C.I.J. (ser. A) No. 2 at 12.

156. PORTMANN, *supra* note 118, at 65–66.

157. *See* OPPENHEIM, *supra* note 121, §§ 63–64.

were treated as treaties.[158] Interestingly, Oppenheim himself allowed the possibility of subdivisions of federal States having limited international legal personality, taking a pragmatic view of the personality of subdivisions.[159] Oppenheim defines a federal State as "a perpetual union of several sovereign States which has organs of its own and is invested with power, not only over the member-States, but also over their citizens."[160] The existence of such federations is based first on a treaty between member States and then a constitution, which effectively transforms the relationship between members from one of international law to one of the newly minted domestic law of the person that is the nascent federation and simultaneously defines the respective competences of the federation and its members.[161] To the extent that the competences of members can include international competences, Oppenheim argued "the member-States of a Federal State can be International Persons in a degree."[162] He styles such persons "part Sovereign States."[163]

Oppenheim proceeds to identify two examples of federal States whose subdivisions were in 1912 part-Sovereign States.[164] For example, the Swiss cantons were part-Sovereign, and therefore enjoyed international legal personality, as a consequence of their capacity to conclude certain international treaties.[165] The German member-states were additionally considered part-Sovereign as a consequence of similar treaty-making powers.[166] Thus, in Oppenheim's view, the maintenance of the legal personality of such subdivisions seems to derive from the maintenance of

158. *Id.* § 106. At the time of Oppenheim's writing, the Holy See did not yet (or again) govern the Vatican City. *See* Lateran Pacts (Holy See-It.) art. 3, Feb. 11, 1929, *available at* http://www.vaticanstate.va/content/dam/vaticanstate/documenti/leggi-e-decreti/Normative-Penali-e-Amministrative/Lateran Treaty.pdf.

159. OPPENEHIM, *supra* note 121, § 89.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* §§ 89, 108.

165. *Id.* § 89; *see* Bundesverfassung, May 29, 1874, AS 1 [BV 1874] art. 9 (Switz.) ("Ausnahmsweise bleibt den Kantonen die Befugnis, Verträge über Gegenstände der Staatswirtschaft, des nachbarlichen Verkehrs und der Polizei mit dem Auslande abzuschliessen; jedoch dürfen dieselben nichts dem Bunde oder den Rechten anderer Kantone zuwiderlaufendes enthalten.") ["Exceptionally, the Cantons retain the right to conclude treaties with foreign states concerning matters of public economy, neighborly relations and police provided such treaties contain nothing contrary to the Confederation or to the rights of other Cantons."] A. Tschentscher, *Switzerland – Constitution 1874*, International Constitutional Law, http://www.servat.unibe.ch/icl/sz01000_.html (last visited Dec. 27, 2016).

166. OPPENHEIM, *supra* note 121, § 89.

their historical sovereign capacity to enter into treaties that create international legal obligations.[167]

*b. Modern Position*

As international law and the actors participating in it have evolved, so has its conception of legal personality. As a consequence, international law now admits variegated persons having distinct capacities. Categories of international person now include, in addition to States, belligerents, internationally administered territories, international organizations, individuals, national liberation movements, and corporations.[168] Additionally, like the domestic law examples noted above,[169] international law recognizes the possibility for these entities to have unequal degrees of personality.[170] As the ICJ noted in its Advisory Opinion on *Reparations for Injuries Suffered in the Service of the United Nations*, "[t]he subjects of law in any legal system are not necessarily identical in their nature or in the extent of their rights."[171] The question this suggests with respect to a given entity is how to determine its international legal personality and the capacities that personality entails. The ICJ addressed this question with respect to international organizations in the *Reparations* advisory opinion.[172] In *Reparations*, the General Assembly asked the ICJ whether "the United Nations, as an organization has the capacity to bring an international claim" against a government responsible for injuries to a UN agent suffered in the performance of official duties.[173] As the ICJ explained:

> In order to answer this question, the Court must first enquire whether the Charter has given the Organization such a position that it possesses, in regard to its Members, rights which it is entitled to ask them to respect. In other words, does the Organization possess international personality?[174]

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167. *See id.*

168. *See generally* CRAWFORD, *supra* note 11, ch. 4.

169. *See supra* notes 137–41 and accompanying text.

170. *See*, *e.g.*, PIERRE-MARIE DUPUY & YANN KERBAT, DROIT INTERNATIONAL PUBLIC § 30 (10th ed. 2010) ("[I]l peut y avoir des catégories de personnes juridiques différenciées . . . .") ["[t]here may be differentiated categories of legal persons . . . ."].

171. Reparations for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 174, 178 (Apr. 11).

172. *Id.*

173. *Id.* at 175; *see also* G.A. Res. 258(III), (Dec. 3, 1948).

174. Reparations, *supra* note 171, at 178.

The Court answered the question with reference to the international agreement establishing the United Nations, holding that "its Members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed with the competence required to enable those functions to be effectively discharged."[175] The Court thus concluded that "the Organization is an international person."[176] The Court extended its conclusion to the ability to make claims concluding that UN legal personality entailed "capacity to bring international claims when necessitated by the discharge of its functions."[177]

The ICJ opinion in *Reparations* establishes that the international personality of a non-State entity can be deduced from the intent of States in establishing the framework for that person's participation in international affairs. If international personality is thus determined by international law and can consist of some or multiple international legal capacities, the question remains how to demonstrate that State subdivisions have a capacity for international responsibility in the ICSID context. An answer to this question is informed by comparison to other non-State actors having legal personality and the capacity for international responsibility.

*c. Example: International Organizations*

Over the course of the twentieth century, the concept of legal personality of international organizations moved from controversial to well established.[178] The story of how this occurred helps clarify contemporary conceptions of international legal personality. The question of the personality of international organizations first arose in the context of the League of Nations. Earlier international organizations, like the International Telegraph Union, were primarily fora for multilateral negotiation on subjects where international coordination was deemed desirable.[179] The League of Nations was different, both because it exercised more generalized activities on its own behalf and because of its relationship with Switzerland, which, despite playing host State, was not a League member.[180] Writing in 1949, Wright noted that "[t]he problem of whether the League of Nations was a corporate personality, a partnership,

175. *Id.* at 179.
176. *Id.*
177. *Id.* at 180.
178. CRAWFORD, *supra* note 11, at 120–21.
179. *Id.* at 166.
180. *Id.* at 166–67.

or a mere mechanism of interstate relations was much debated and never authoritatively settled."[181] Although the League, a corporate entity, entered into agreements with Switzerland regarding its activities on Swiss territory and supervised the mandate system, consensus never emerged regarding its capacity to be responsible for violations of international law.[182] League agreements with Switzerland, however, can be understood in a similar light to Concordats with the Holy See, as both were agreements between States and non-State entities viewed as creating obligations for both under international law.[183] As a consequence of this capacity, the League must have enjoyed what today could be called a limited legal personality.

The question was forced in a judicial forum by the UN General Assembly's request for an advisory opinion on *Reparations*.[184] The UN Charter contains no provision on the legal personality of the UN Organization.[185] But the competencies given the organization in the Charter made clear that the Organization would have functions in line with an entity that would need international personality.[186] The case arose from the assassination of a UN envoy then present as a mediator on the territory of a non-member State, Israel.[187] Although the envoy was a Swedish national, and thus Sweden could have brought a claim against Israel on his behalf in respect of any obligations owed to Sweden, but not to any privileges enjoyed in virtue of UN envoy status. If such obligations existed, they were owed to the UN. As noted above, it was the grant of UN competencies such as the ability to conduct international affairs on its own behalf that led the ICJ to conclude that the United Nations did enjoy international legal personality.[188]

State and judicial practice regarding the legal personality of the United Nations does not stop at the recognition of its capacity to bring international claims. UN Members and the Court have also addressed the capacity of the organization to be responsible for violating international law. For example, Article VIII, sec. 29(b), of the Convention on the Privileges and Immunities of the United Nations, a treaty between 161

181. Quincy Wright, *The Jural Personality of the United Nations*, 43 AM. J. INT'L L. 509, 510 (1949).

182. *See id.*

183. *See* OPPENHEIM, *supra* note 121, § 106.

184. Reparations for Injuries Suffered in the Service of the United Nations, advisory opinion, 1949 I.C.J. 174 (Apr. 11); *see also* CRAWFORD, *supra* note 11, at 167–68.

185. CRAWFORD, *supra* note 11, at 167.

186. *Id.* at 167–68.

187. *See id.* at 167.

188. Reparations, *supra* note 171, at 179.

members of the United Nations but not the Organization itself, removes claims against the organization from domestic courts and establishes an obligation for the Organization to "make provisions for appropriate modes of settlement" of disputes involving acts by UN officials.[189] This suggests agreement by at least those UN members also party to the Convention that the United Nations can be made responsible for its internationally wrongful acts. From this Convention, the Court has drawn the conclusions that "[t]he United Nations may be required to bear responsibility for the damage arising from [acts of its agents]."[190]

As a result of such developments it is now clear that being an international organization is not a barrier to bearing international responsibility for wrongful acts so long as the organization has the requisite legal personality.[191] As Amerasinghe writes, "[o]nce the existence of international personality for international organizations is conceded, it is not difficult to infer that, just as organizations can demand responsibility of other international persons because they have rights at international law, so they also can be held responsible to other international persons because they have obligations at international law."[192] This is reflected in the work of the International Law Commission on the subject, which codifies this principle in the *Draft Articles on the Responsibility of International Organizations*.[193]

Developments in the legal personality of international organizations are consistent with the concerns raised by the Malagasy Republic and Brazil during the negotiation of the ICSID Convention.[194] The concern raised about the effect of Article 25(1) of the ICSID Convention on the legal personality of subdivisions parallels the process by which the international community has established internationally responsible international organizations. By establishing that some subdivisions can be respondents at ICSID,[195] the Contracting States have shown their intent that such

189. Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, art. VIII, sec. 29(b), 1 U.N.T.S. 15.

190. Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, advisory opinion, 1999 I.C.J. 62 ¶ 66 (Apr. 29).

191. CRAWFORD, *supra* note 11, at 182.

192. C.F. AMERASIGNHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANIZATIONS 239 (1996).

193. *See* Draft Articles on the Responsibility of International Organizations, Rep. of the Int'l Law Comm'n, 63d Sess., Apr. 26- June 3, July 4–Aug. 12, 2011, U.N. Doc. A/66/10; GAOR, 66th Sess., Supp. No. 10, art. 3 (2011) ("Every internationally wrongful act of an international organization entails the international responsibility of that organization."). International organizations are defined as those organizations enjoying international personality. *Id.* art. 3.

194. *See supra* notes 68–71 and accompanying text.

195. *See* ICSID Convention, *supra* note 1, art. 25(1).

subdivisions should have the international personality necessary to act in that capacity. Just as the capacity to bring claims was held necessary for the United Nations in *Reparations*,[196] the capacity to be responsible is necessary to subdivisions to be a respondent.

*d. Example: Individuals in International Criminal Law*

International Criminal Law also provides a useful comparison to demonstrate how the community of States has extended international legal personality to various categories of other actors. Individuals generally have gained a degree of international legal personality over the course of the twentieth century because of the development of international human rights law and investor-State arbitration.[197] International criminal law in particular provides an example of States extending specific juridical capacities to individuals in international law. First, an example of the responsibility of State organs in the form of individual, natural persons can be found in international trials of individuals, where individuals are held responsible under international law for their acts. Additionally, the example of victim participation at the International Criminal Court (ICC) demonstrates the capacity for States to create new forms of international legal personality through treaties.

International criminal law offers a useful analogy between international criminal defendants and subdivisions as ICSID respondents. When the International Military Tribunal at Nuremberg held the first modern international criminal trial, its goal was to make State organs responsible for acts in violation of international law. As Janis writes, "[t]he Charter of the International Military Tribunal at Nuremberg explicitly made individuals subject to international rules relating to crimes against peace, war crimes, and crimes against humanity."[198] Indeed, the Charter of the Nuremberg Tribunal allows prosecution specifically of "crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility."[199] Answering the question whether individuals were

196. Reparations for Injuries Suffered in the Service of the United Nations, advisory opinion, 1949 I.C.J. 174, 180 (Apr. 11).

197. CRAWFORD, *supra* note 11, at 121.

198. M.W. Janis, *Individuals as Subjects of International Law,* 17 CORNELL INT'L L.J. 61, 65 (1984).

199. Charter of the International Military Tribunal art. 6, Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, annex, Aug. 8, 1945, 82 U.N.T.S. 288 (1951) [hereinafter "Nuremberg Charter"]; *see also* Janis, *supra* note 198, at 65.

persons capable of being internationally responsible, the Nuremberg Tribunal elaborated:

> Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.[200]

By the time of the creation of the International Criminal Tribunal for the former Yugoslavia ("ICTY"), international opinion seemed solidly to back this proposition, focusing instead on the question of head-of-state immunity.[201] For example, in his report on the creation of the ICTY, the UN Secretary-General noted:

> [T]he Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations. The Secretary-General believes that all persons who participate in the planning, preparation or execution of serious violations . . . contribute to the commission of the violation and are, therefore, individually responsible.[202]

However, the analogy with international criminal law is not conclusive. There are two difficulties comparing the individuals subject to prosecution before international courts and tribunals. The first is the lack of a limitation of individuals potentially criminally responsible to State organs. The Nuremberg Charter provided that the Tribunal may try the major war criminals of the European Axis countries acting in the interests of the European Axis countries.[203] The Nuremberg Charter thus required an individual-State nexus to bring an individual within its jurisdiction, to make an individual capable of being tried. But developments in international law make clear that this limitation is one on the personal jurisdiction of the tribunal rather than the type of individual capable of being held criminally responsible in international law. As a general rule, the Rome Statute only requires that an individual commit acts within the nationality or territorial jurisdiction of a State Party in order to be responsible before the ICC.[204]

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200. *Judgment*, *in* I TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 223 (1947); *see also* VAN SLIEDREGHT, *supra* note 120, at 18–19.

201. VAN SLIEDREGHT, *supra* note 120, at 19.

202. *UN Secretary-General*, *Report Pursuant to Paragraph 2 of Security Council Resolution 808*, ¶¶ 52–53, U.N. Doc. No. S/25704 (1993).

203. Nuremberg Charter, *supra* note 196, art. 6.

204. Rome Statute of the International Criminal Court art. 12-13, July 17, 1998, 2187 U.N.T.S. 90

The second is the distinction between the relationships between State and natural-person organ and State and subdivision. As Klabbers notes, the act of trying an individual for his individual role in State crimes seems akin to piercing a corporate veil to hold a shareholder liable for fraudulent corporate conduct.[205] This, he writes, "suggests that, whatever the legal niceties, the behavior of human beings is what matters, and not the legal persons in abstraction."[206] This point distinguishes individuals from subdivisions. Individuals have a real existence apart from the States they serve as organs. Subdivisions, by contrast, do not and are defined with reference to the legal order associated with their parent States.[207] A compelling response refers to Oppenheim's thoughts about the persistent sovereignty of subdivisions that predate their federation.[208] If subdivisions are "part-sovereign States,"[209] holding them individually responsible is within the scope of Klabbers's analogy to piercing the corporate veil.[210] This response is incomplete as not all subdivisions predate their federations.[211] Nevertheless, international criminal responsibly serves as an example of the capacity of the international community to extend international legal responsibility to new categories of person by agreement.

A second example from international criminal law that confirms the ability of a treaty to create new forms of international personality is the development of victim participation at the ICC. Under Article 68(3) of the Rome Statute, "[w]here the personal interests of victims are affected, the Court [ICC] shall permit their views and concerns to be presented and

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[hereinafter "Rome Statute"]. Articles 12-13 of the Rome Statute, establish that, unless a situation has been referred to the ICC by the UN Security Council acting under chapter VII, the Court may only hold responsible individuals who are nationals of Rome State parties or who commit crimes on such parties' territories. This is consistent with the two dominant bases for States' prescriptive jurisdiction, nationality and territoriality. CRAWFORD, *supra* note 11, at 457–60.

205. Klabbers, *supra* note 138, at 45; *see also* Sonne v. Sacks, 314 A.2d 194, 197 (Del. 1973) (holding that the purpose of piercing the corporate veil is "to obtain a judgment against individual stockholders or officers, or against other corporations which have received assets without consideration"); AM. JUR. 2D *Corporations* § 47 (2015).

206. Klabbers, *supra* note 138, at 45.

207. *See* ARSIWA, *supra* note 11, art. 4(2) ("An organ includes any person or entity which has that status in accordance with the internal law of the State.").

208. OPPENHEIM, *supra* note 121, § 89.

209. *Id.*

210. *See* Klabbers, *supra* note 138, at 45.

211. For example, while the Belgian State was established in the 1830s, Belgian federalism comprising overlapping sets of regions and linguistic communities was developed in a four-stage process between 1970 and 1993. *See* FRANKLIN DEHOUSSE, INTRODUCTION AU DROIT PUBLIC § 15.2.1-.4 (1995). As noted, *infra* note 253, Belgian regions are active in investment policy and indeed parties to Belgian BITs in their own right.

considered."[212] Article 75 of the Rome Statute additionally establishes an obligation for the ICC to create a framework for victim reparations.[213] Rule 85 of the ICC Rules of Procedure and Evidence, promulgated pursuant to the Rome Statute by the ICC Assembly of States Parties,[214] further establishes criteria for an individual to qualify as a victim.[215] Victims can include both natural persons and certain juridical persons.[216] In establishing the victim category, the Rome Statute sets forth two possibilities. First, the victim category shows the possibility of a treaty creating a form of legal personality that benefits from particular rights. Rome Statute Article 68(3) obliges the ICC to allow victim participation and thus gives victims such a right in an international forum and under international law.[217] In this sense, victims at the ICC are similar to subdivisions in ICSID, their procedural status before a juridical organ having been established by an inter-State treaty. Second, the victim category shows that a treaty can provide guidelines for benefitting from a class of legal personality. In this sense, victims are again like subdivisions, as Article 25(1) of the ICSID Convention establishes limitations on what kind of entities are subdivisions capable of being a respondent before an ICSID tribunal.

### 3. *International Legal Personality of Subdivisions in the ICSID Context*

The examples of international organizations and international criminal law have supported several conclusions about the relationship between the ICSID Convention, international legal personality, and subdivisions of Contracting States. The example of international organizations supports a conclusion that States have the power to grant international personality of new types of entity and that the competencies of such entities can be inferred from the powers granted.[218] The example of international criminal law confirms this conclusion, and also establishes the power of States directly to make new categories of person, particularly ones whose acts

212. Rome Statute, *supra* note 204, art. 68(1).
213. *Id.* art. 75.
214. *Id.* art. 51.
215. ICC Rules of Procedure and Evidence Rule 85, ICC Doc. No. ICC-ASP/1/3 and Corr. 1 (2002); *see also* Gioia Greco, *Victims' Rights Overview under the ICC Legal Framework: A Jurisprudential Analysis*, 7 INT'L CRIM. L. REV. 531, 535 (2007).
216. ICC Rules of Procedure and Evidence, *supra* note 215, Rule 85.
217. *See* Rome Statute, *supra* note 204, art. 68(1).
218. *See* discussion *supra* Part IV.A.2.c.

might also be attributable to States, responsible for violations of international law and to put conditions on the granting of personality to new entities.[219] These conclusions are confirmed by the limited ICSID jurisprudence concerning the legal personality of designated subdivisions and agencies.

The most analogous case in this regard is *Niko Resources v. Bangladesh*.[220] In *Niko Resources*, an ICSID Tribunal considered the personality of two Bangladeshi agencies named as respondents by the claimant.[221] In addition to bringing contract-based claims against Bangladesh, Niko Resources brought claims against Petrobangla, a Bangladeshi statutory corporation, and BAPEX, its subsidiary.[222] Niko argued that Bangladesh was the appropriate respondent despite not being a party to the relevant contracts whose arbitration clauses were the basis for ICSID jurisdiction, arguing that Bangladesh was effectively party to its instrumentalities' contracts.[223] Bangladesh objected, and additionally objected that Petrobangla and BAPEX were not proper respondents, as they had not been designated to the Centre.[224]

On the question of whether Petrobangla and BAPEX were legally distinct from Bangladesh, the Tribunal deferred to domestic law, reasoning that because "Petrobangla and BAPEX are creations of the legal order of Bangladesh[,] [t]heir identity and legal status must be considered first of all under the law of that State."[225] The Tribunal concluded that because Petrobangla was a statutory corporation with Bangladeshi legal personality and because BAPEX was incorporated under Bangladeshi companies law, both were entitled to be viewed as distinct persons despite high levels of government control.[226]

Turning then to consider whether the two companies were properly designated to the Centre, the Tribunal considered the effect of the act of designation.[227] Relying on the text of Article 25(1), the Tribunal considered that the effect of designation was to "enable[] the agency . . . to become party to an ICSID arbitration proceeding."[228] The Tribunal raised

219. *See* discussion *supra* Part IV.A.2.d.
220. Niko Resources (Bangladesh) Ltd. v. People's Republic of Bangladesh, ICSID Case Nos. ARB/10/11 & ARB/10/18, Decision on Jurisdiction (Aug. 19, 2013).
221. *See generally id.*
222. *Id.* ¶¶ 16-17.
223. *Id.* ¶¶ 210–211.
224. *Id.* ¶ 259.
225. *Id.* ¶ 230.
226. *Id.* ¶¶ 231, 235.
227. *Id.* ¶ 277.
228. *Id.* ¶ 280.

two reasons for this. First, it cited the Centre's practice of listing designated entities as "competent to become parties to disputes submitted to the Centre."[229] Second, it noted that "subdivisions and agencies . . . are not normally subjects of international law."[230] It continued, "[i]t was therefore necessary for the Convention to provide expressly for the possibility that constituent subdivisions and agencies, as entities existing under domestic law, could acquire such competence or capacity to become party to ICSID arbitration proceedings."[231] The Tribunal concluded that "[d]esignation of an agency thus has a very important consequence that the distinct legal personality of the agency under domestic law is recognized at the level of ICSID."[232]

*Niko Resources* supports the conclusion that subdivisions enjoy legal personality sufficient to be responsible for violating international law, such as a BIT. Like Petrobangla and BAPEX, subdivisions are established legal persons in the domestic law of their parent States.[233] Cases like *Cable Television of Nevis*, discussed above, confirm that subdivisions enjoy can a separate legal existence in the specific context of subdivisions.[234] More importantly, *Niko Resources* establishes that the possibility and act of designation transform this legal existence into one on the international plane such that subdivisions and agencies are *international* legal persons.[235] Designation makes a subdivision capable of being sued in an ICSID tribunal just as independent activities gave the UN the capacity to bring claims and qualification as a victim gives individuals a right to be heard at the ICC. As the examples of practice confirm, the consequence of this procedural capacity is a substantive capacity to be responsible for the internationally wrongful acts charged against designated subdivisions.

### *B. Opposability and Applicable Law*

Having established that subdivisions of States designated as respondents under Article 25(1) of the ICSID Convention have legal personality in international law to the extent that they can be responsible for its violation, this article now turn to the question of whether a BIT

229. *Id.* ¶ 280 (citing Designations by Contracting States, *supra* note 6).
230. *Id.* ¶ 281.
231. *Id.*
232. *Id.* ¶ 282.
233. *Id.* ¶¶ 231, 235, 277.
234. Cable Television of Nevis Ltd. v. Federation of St. Christopher (St. Kitts) & Nevis, ICSID Case No. ARB/95/2, Award, ¶ 2.22 (Dec. 16, 1996), 5 ICSID Rep. 108.
235. *Niko Resources*, ICSID Case Nos. ARB/10/11 & ARB/10/18, ¶ 281.

creates legal norms applicable to subdivisions as international legal persons before an ICSID tribunal. This turns on two questions, the answers to neither of which are self-evident. First, are BITs as international law applicable before an ICSID tribunal? Second, are the standards elaborated in BITs opposable to subdivisions of their States Parties as their own legal persons? This subchapter addresses each of these questions in turn.

### *1. Applicable Law*

In order for the substantive standards in a BIT to be applicable against a subdivision by an ICSID tribunal, they must form part of the law applicable in the arbitration. The default law applicable before an ICSID tribunal is established by Article 42(1) of the ICSID Convention.[236] While some BITs do establish themselves at the applicable law in investor-party disputes,[237] most do not.[238] As noted above, Article 42(1) provides that both "the law of the Contracting State party to the dispute" and "such rules of international law as may be applicable" apply in the absence of the parties' agreement as to applicable law.[239] The application of a BIT as international law thus depends on whether the BIT forms part of "such rules . . . as may be applicable."[240]

Historically, this proposition was not a given.[241] Writing in 2003, Gaillard and Banifatemi identify two alternative theories of the role of international law in ICSID tribunals which place it in a subsidiary role to domestic law.[242] Consistently with this, in *AAPL v. Sri Lanka*, the first ICSID arbitration where consent to arbitration was based on a BIT,[243] relied on the parties' consent expressed in the pleadings to establish the BIT as applicable law making the default choice-of-law provision of

236. ICSID Convention, *supra* note 1, art. 42(1).
237. See *supra* notes, 102–08 and accompanying text for examples of such BITs.
238. Gaillard & Banifatemi, *supra* note 27, at 379.
239. *Id*.
240. *Id.* at 380.
241. *See* Galliard & Banifatemi, *supra* note 27, at 381–82.
242. *See generally id.* The first of these is that international law applies "in the case of *lacunae*, or should the law of the Contracting State be inconsistent with international law." *Id.* at 381. This approach, while initially excepted, suffers from the serious defect of the need to determine whether domestic law does (or can) contain *lacunae* or is inconsistent with international law rather than simply addressing a problem differently. *Id.* at 394–97. The second approach limits the application of international law to cases where domestic law is inconsistent with *ius cogens*. *Id.* at 400 (citing W. Michael Reisman, *The Regime for* Lacunae *in the ICSID Choice of Law Provision and the Question of Its Threshold*, 15 ICSID REV. 362 (2000)). Gaillard and Banifatemi address this approach by asking why the text of art. 42(1) refers to "such rules of international law as may be applicable" rather than the category of *ius cogens*. *Id.* at 401.
243. Nassib G. Ziadé, *Some Recent Decisions in ICSID Cases*, 6 ICSID REV. 514, 515 (1991).

Article 42(1) inapplicable.[244] Central to the majority's reasoning was the lack of opportunity for the parties (the investor and Sri Lanka) to agree on applicable law prior to the commencement of proceedings.[245] This is a reality of investor-State arbitration; an investor and a State will rarely negotiate an agreement on applicable in a context where consent to arbitration is established by the State's offer in a BIT which an investor accepts by filing a claim. Consequently, *AAPL* highlights the importance that a BIT be applicable under Article 42(1) in case the facts of the case do not support a conclusion of an *ad hoc* agreement in the pleadings.[246]

Through the past two decades of ICSID practice, ample authority has emerged supporting the proposition that a BIT alone can provide the substantive rules of decision in an ICSID arbitration against a State.[247] In the 2002 annulment decision in *Wena Hotels Ltd. v. Arab Republic of Egypt*, the committee, after analyzing the text and history of the ICSID Convention held that it "Article 42(1) allowed for both legal orders to have a role. The law of the host State can indeed be applied in conjunction with international law if this is justified. So too can international law be applied by itself if the appropriate rule is found in this other ambit."[248] The committee continued to hold in this light that the *Wena* tribunal did not exceed its powers in applying only international law to a BIT claim.[249] This approach has been explicitly adopted by several ICSID tribunals since.[250] This practice shows that ICSID tribunals are comfortable applying BITs in cases where claims arise thereunder.

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244. Asian Agri. Prods. Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, ¶ 24 (June 27, 1990).

245. *Id.* ¶ 18-19; *see also* Ziadé, *supra* note 243, at 515.

246. The situation is naturally different in cases where the BIT contains a provision on applicable law to investor-State disputes in its text. In such cases, it seems natural to extend the *AAPL* offer-acceptance logic to the applicable law clause in the BIT.

247. *See* El Paso Int'l Energy Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶¶ 132–41 (Oct. 31, 2011).

248. Wena Hotels Ltd. v Arab Republic of Egypt, ICSID Case No. ARB/98/4, Decision on Annulment, ¶ 40 (Dec. 8, 2000); *see also* Gaillard & Banifatemi, *supra* note 27, at 406–07.

249. *Wena*, ICSID Case No. ARB/98/4, Decision on Annulment, ¶ 46; Gaillard & Banifatemi, *supra* note 27, at 406–07.

250. *E.g.*, *El Paso Int'l Energy Co*., Case No. ARB/03/15, Award, ¶¶ 132–41; Kardassopoulos/ Fuchs v. Georgia, ICSID Case Nos. ARB/05/18, 07/15, Award, ¶¶ 221–23 (Mar. 3, 2010); Sempra Energy Int'l v. Argentine Republic, ICSID Case No. ARB/02/16, Award, ¶ 236 (Sept. 28, 2007); Tokios Tokelés v. Ukraine, ICSID Case No. ARB/02/18, Award, ¶ 140 (July 26, 2007); Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award, ¶¶ 77–78 (Feb. 6, 2007); Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶¶ 65–68 (July 14, 2006); CMS Gas Transmission Co. v. Argentine Republic, ICSID Case No. ARB/01/8, Award, ¶¶ 116–17 (May 12, 2005).

*2. Opposability*

But this guidance offered by Article 42 and ICSID tribunals interpreting it is incomplete. The text of Article 42 is silent on the opposition of the applicable sources of law to subdivisions of States.[251] While the substantive rules elaborated in BITs may be within the set of rules applicable by an ICSID tribunal, this does not entail that such rules bind subdivisions of States Parties to such BITs. This requires consideration of the problem of justifying the application of substantive international legal norms to subdivisions of States. As Klabbers notes in the context of individual responsibility, "[n]o one has hitherto been able to explain why individuals owe allegiance to the international legal system, and to the extent that explanations have been put forward, they invariably arrive at the conclusion that we owe allegiance to international law because our states . . . represent us at the international level."[252] The same can be said in the context of subdivisions as independent legal persons. While some States do include their subdivisions as BIT parties,[253] most federal States do not.[254] Thus, this additionally requires consideration of the interaction between the general rule that treaties do not create obligations opposable to non-parties and the relationship between parent State and subdivision as distinct, but linked legal personalities.

Historically, international legal rules were conceived has creating rights and obligations between identifiable States.[255] As Weil noted:

> Traditionally, every international norm has had clearly specifiable passive and active subjects: it creates obligations incumbent upon certain subjects of international law, and rights for the benefit of others. The principles governing the relative effect of treaties, the opposability of customary rules, and the capacity to present

251. *See* ICSID Convention, *supra* note 1, art. 42(1).

252. Klabbers, *supra* note 118, at 362.

253. For example, Belgian practice is to include the Flanders, Wallonia, and Brussels-Capital regions as BIT parties. *See*, *e.g.*, Agreement between the Belgium-Luxembourg Economic Union and the Republic of Mozambique on the reciprocal promotion and protection of investments, July 18, 2006, 2643 U.N.T.S. 149 [hereinafter "Belgium-Mozambique BIT"]; Agreement between the Belgium-Luxembourg Economic Union and the Republic of Mauritius on the reciprocal promotion and protection of investments, Nov. 30, 2005, 2646 U.N.T.S. 237. Consequently, for subdivisions of Belgium, there is no question of third-party effect. Additionally, such BITs describe investor-State conflicts as "[d]isputes between an Investor and a Contracting Party." *E.g.*, Belgium-Mozambique BIT art. 10.

254. *E.g.*, NAFTA, *supra* note 104. Each NAFTA party is a federal State; none of their subdivisions are NAFTA parties.

255. *See generally* CHINKIN, *supra* note 75.

> international claims reflect this individualization of those owing an obligation and those owed a right.[256]

This is particularly well established relative to treaties, where customary international law, the Vienna Conventions, and the *pacta tertiis* general principle consistently provide that treaties do not bind third parties without their consent.[257] The investment protection standards in a BIT create rights that benefit investors and grant such investors standing (or the international legal personality necessary) to invoke the standards in arbitration. The standards are also obligations for the States Parties to the BIT. The question is whether the same standards are obligations for those Parties' subdivisions.

*a. Third-party effect of treaties generally*

As a general rule, treaties cannot create obligations for third parties without their consent.[258] This rule finds its origin in both general principle and international custom.[259] For example, considering the question of whether Poland could have rights under the 1918 Armistice Agreement (to which it was not a party) in *Polish Upper Silesia*, the Permanent Court of International Justice held that "[a] treaty only creates law as between States which are parties to it; in case of doubt, no rights can be deduced from it in favour of third States."[260] The Court reaffirmed this rule by giving Poland the benefit of this doubt in *The Oder Commission*, holding that the provision of the Treaty of Versailles providing that a convention to be "drawn up by the Allied and Associated Powers, and approved by the League of Nations . . . shall apply" to the Oder River was not sufficient

256. Prosper Weil, *Towards Relative Normativity in International Law*, 77 AM. J. INT'L L. 413, 422 (1983).

257. *See*, *e.g.*, Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations art. 34, Mar. 21, 1986, U.N. Doc. A/CONF.129/15 (not in force) [hereinafter "VCLT 1986"]; Vienna Convention on the Law of Treaties art. 34, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter "VCLT 1969"]; MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 467–68 (2009).

258. *See* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 227 (2d ed. 2014). Although this is the general rule, there are exceptions for treaties which establish regimes applicable *erga omnes*. *Id.* at 228–29. Among other examples, Aust considers the treaties regarding the status of Svalbard, the Suez Canal, and the Turkish Straits. *Id.* at 229 (citing Convention regarding the Régime of Straits, Dec. 11, 1936, 173 L.N.T.S. 213; Treaty concerning the Archipelago of Spitsbergen, Aug. 14, 1925, 2 L.N.T.S. 8; Convention respecting the free navigation of the Suez Maritime Canal, Oct. 29, 1888, http://www.suezcanal.gov.eg/ShowTreaties.aspx?show=1).

259. *See* VILLIGER, *supra* note 257, at 467–68; CHINKIN, *supra* note 75, at 25.

260. Certain German Interests in Polish Upper Silesia (Ger. v. Pol.) (merits), 1926 P.C.I.J. (ser. A) No. 7, at 29 (May 25).

to bind Poland to the later convention without Polish ratification.[261] Notably, the Court's general expression of the rule in *Polish Upper Silesia* is positive, speaking to what effects treaties do have.[262] Its further explanation that a treaty on its own entails no consequences for third States is consistent both with the facts of the case and the States-only conception of international legal personality then dominant.[263]

The principle is also codified in part III, section 4, of each of the Vienna Conventions on the Law of Treaties.[264] As formulated in the 1969 Vienna Convention, "[a] treaty does not create either obligations or rights for a third State . . . without consent of that state."[265] The 1986 Vienna Convention repeats the rule, *mutatis mutandis*, with reference to both States and international organizations that are not party to a particular treaty.[266] While neither of these texts explicitly reference subdivisions, both are consistent with the general rule against third-party obligations.

In his third report as ILC Special Rapporteur on the Law of Treaties, Waldock considered the rule's doctrinal origins, particularly as applied to obligations on third States.[267] Waldock identifies two complementary theories underpinning the rule.[268] The first is the general principle *pacta tertiis nec nocent nec prosunt*, a rule derived from Roman law providing "agreements neither impose obligations nor confer benefits upon third parties."[269] Waldock identifies only one publicist, Scelle, objecting to this principle as a theoretical basis for the rule in the law of treaties.[270] However, Waldock also argues that, as a matter of custom rather than general principle, treaties apply only between parties as a consequence of

261. Territorial Jurisdiction of the International Commission of the River Oder (U.K. v. Pol.), 1929 P.C.I.J. (ser. A) No. 23, at 19–22 (Sep. 10); *accord* Free Zones of Upper Savoy and the District of Gex (Fr. v. Switz.), 1932 P.C.I.J. (ser. A/B) No. 46, at 141 (June 7) (holding that the Treaty of Versailles does not bind Switzerland except for such provisions as Switzerland explicitly accepted).

262. *Polish Upper Silesia*, 1926 P.C.I.J. (Ser. A) No. 7, at 29.

263. *Id.*; *see also S.S. Lotus*, 1927 P.C.I.J. (Ser. A) No. 10, at 18 (Sep. 7) ("International law governs relations between independent States."); PORTMANN, *supra* note 118, at 42.

264. VCLT 1986, *supra* note 257, pt. III, § 4; VCLT 1969, *supra* note 257, pt. III, § 4.

265. VCLT 1969, *supra* note 257, art. 34.

266. VCLT 1986, *supra* note 257, art. 34.

267. Special Rapporteur on the Law of Treaties, *Third Rep. on the Law of Treaties*, Int'l Law Comm'n, U.N. Doc A/CN.4/167 and Add.1-3, at 17–26 (1964) (by Humphrey Waldock).

268. *Id*. at 17–18; *see also* Special Rapporteur on the Question of Treaties Concluded Between States and International Organizations or Between Two or More International Organizations, Sixth Rep. on the Question of Treaties Concluded Between States and International Organizations or Between Two or More International Organizations, U.N. Doc. A/CN.4/298, at 120 (1977) (by Paul Reuter).

269. Waldock, *supra* note 267, at 17–18.

270. *Id.* at 17 n.69.

"the sovereignty and independence of States."[271] In support of this conclusion, Waldock cites several cases before international jurisdictions.[272] In addition to the PCIJ cases considered above, Waldock considers the *Island of Palmas* arbitration.[273] At issue in *Island of Palmas* was whether the Netherlands' silence when notified of a treaty between the Spain and the United States purporting to transfer sovereignty over, among other territories, the Island of Palmas, affected the Dutch claim to the island.[274] Sole arbitrator Huber considered it "evident that Treaties concluded by Spain with third Powers . . . could not be binding upon the Netherlands."[275]

Part of the general rule that treaties do not create third-party obligations is the exception that they can should the third party consent.[276] As codified in the VCLTs, an obligation can arise for a third State or international organization "if the parties to the treaty intend the provision to be the means of establishing the obligation" and the third party "expressly accepts that obligation in writing."[277] The requirement of a writing in the VCLTs, however, was not present in the ILC's first draft articles on the law of treaties, which instead require only that the third party "has expressly accepted that obligation."[278] The records of the first Vienna Conference on the Law of Treaties confirm the sense of the international community that written confirmation is not required by customary international law.[279]

While international law, be it by general principle or custom, is replete with authority against a presumption of third-party treaty obligations for

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271. *Id.* at 18; *see also* Draft Articles on the Law of Treaties with Commentaries, Rep. of the Int'l Law Comm'n, 18th Sess., May 4-July 19, 1966, U.N. Doc. A/6309/Rev.1; GAOR, 21st Sess., Supp. No. 9, at 227 (1966) (describing the rule as a "bulwark[] of the independence and equality of States") [hereinafter "Draft Articles on the Law of Treaties"].

272. Waldock, *supra* note 267, at 18.

273. *Id.* (citing Aerial Incident of 27 July 1955 (Isr. v. Bulg.), preliminary objections, 1959 I.C.J. 127, 138 (May 26); Island of Palmas (Neth. v. U.S.), 2 R.I.A.A. 831 (Perm. Ct. Arb. 1928)).

274. *Island of Palmas*, 2 R.I.A.A. at 843.

275. *Id.* at 850.

276. *See*, *e.g.*, VCLT 1986, *supra* note 257, art 34; VCLT 1969, *supra* note 257, art. 34.

277. VCLT 1986, *supra* note 257, art. 35; VCLT 1969, *supra* note 257, art. 35. The texts of these provisions are again, *mutatis mutandis*, identical.

278. Draft Articles on the Law of Treaties, *supra* note 271, art. 31.

279. *See generally* United Nations Conference on the Law of Treaties, Vienna, Austria, April 9–May 22, 1969, *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, U.N. Doc. A/CONF.39/SR.14 (May 7, 1969). The addition was suggested by the Republic of Viet-Nam. *Id.* ¶ 5. In subsequent comments, delegates from the United Kingdom and Brazil expressed the view that this was inconsistent with States' ability at customary international law "to bind themselves otherwise than by written treaties." *Id.* ¶ 6; *see also id.* ¶ 7. The South Vietnamese amendment was adopted by 44 vote to 19, with 31 abstentions. *Id.* ¶ 8.

States, the position is less clear with respect to other persons. As noted above, the international community has recognized the extension of the rule to international organizations which now qualify as subjects/persons in international law.[280] Aust, however, draws a distinction between the rule as applied to third States and as applied to "objects" of international law.[281] Aust writes "[a]lthough some treaties confer important rights on [corporations and individuals], that does *not* make them third parties."[282] This concern is difficult to extend to federal subdivisions of States, however, which can be seen as enjoying some sovereign prerogatives in their own right.[283]

The dual bases for the rule prohibiting third party obligations arising from treaties suggest two different theories justifying the opposition of a treaty to a subdivision consistently with the logic of the rule, one based on the prior consent of the subdivision and a second based on the relative sovereign competencies of the subdivision and its parent State. The first approaches the questions from the bottom up, considering the sovereign acts of the subdivision. The second follows a top-down approach, prioritizing the parent State and its rights to act on behalf of its subdivision.

*b. Consent theory of opposability to subdivisions*

One possibility to support obligations on a subdivision under a treaty to which its parent State is party is a theory of prior consent by the subdivision in their own sovereign right. As noted above, an agreement can create obligations for a third party consistently with the *pacta tertiis* principle and sovereign equality when that third party has consented to the obligation.[284] In its formulation of the rule, the 1969 Vienna Convention further specifies that a third-party obligation can arise "if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing."[285] For the case of non-party international organizations, the 1986 Vienna Convention adds that the organization's acceptance "shall be governed by the rules of that organization."[286] These rules when viewed in light of Oppenheim's

280. *See* VCLT 1986, *supra* note 257, art. 34.
281. AUST, *supra* note 258, at 227.
282. *Id.*
283. *See* OPPENHEIM, *supra* note 121, § 89.
284. *See*, *e.g.*, VCLT 1986, *supra* note 257, art. 34; VCLT 1969, *supra* note 257, art. 34.
285. VCLT 1969, *supra* note 257, art. 35.
286. VCLT 1986, *supra* note 257, art. 35.

theory of the international legal personality of the federal State,[287] suggest a view that federal subdivisions consent to treaties their parent States conclude by forming the parent State with a competence to conclude treaties.

As noted above, Oppenheim views a federal State as "a perpetual union of several Sovereign States" marked by its own organs and a direct legal relationship with the citizens of its subdivisions.[288] In Oppenheim's view, a federation is created first by a treaty between its subdivisions and then by a constitution establishing the federation's domestic legal order.[289] As a consequence of such a constitution, the federal State is granted the power to enact laws binding the subdivisions.[290] It is typically this constitution that establishes the federal State's authority to conclude treaties on the federation's behalf.[291] If such constitutions are viewed as delegations by the subdivisions of their erstwhile sovereign capacity to conclude treaties to the federal State, then the constitutions themselves represent the subdivisions' consent to be bound by whatever treaties the federation makes.

This consent addresses the logic of the *pacta tertiis* general principle by effectively making the consenting subdivisions parties to the treaty. This can be seen by considering the parent State as an agent of its subdivisions in addition to a contracting party in its own right. In both the civil[292] and common law[293] traditions, persons can delegate their authority to enter contracts to agents, whose actions create binding contractual obligations for a principal. By delegating their capacity for treaty-making

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287. *See supra* note 158 and accompanying text.

288. OPPENHEIM, *supra* note 121, § 89.

289. *Id.*

290. *Id.*

291. *See*, *e.g.*, Arts. 21, 75(22), CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.); BUNDES-VERFASSUNGSGESETZ [B-VG] [CONSTITUTION] BGBl NO. 1/1930, as last amended by Bundesverfassungsgesetz [BVG] BGBl No. 65/2012, art. 50 (Austria); 1994 CONST. art. 167 (Belg.) (establishing federal power to conclude treaties on matters of federal competence); CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 49(I) (Braz.); GRUNDGESETZ [GG] [BASIC LAW] art. 32 (Ger.); Constitución Política de los Estandos Unidos Mexicanos, CP, arts. 76(I), 89(X), 133, Diario Oficial de la Federación [DOF] , 05-02-1917, últimas reformas DOF 04-21-2015 (Mex.); KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF] [CONSTITUTION] art. 72(1) (Russ.); U.S. CONST. art. II, § 2, art. VI.

292. *E.g.*, CODE CIVIL [C. CIV] [CIVIL CODE OF FRANCE] art. 1984 (Fr.); BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], *as amended*, § 164 (Ger.); CODE DES OBLIGATIONS [CO] [CODE OF OBLIGATIONS] Mar. 30, 1911, RS 220, ART. 32 (SWITZ.).

293. *E.g.*, Montgomerie v. United Kingdom Mutual Steamship Assn., [1891] 1 Q.B. 370, at 371 (Eng.) ("There is no doubt whatever as to the general rule as regards an agent, that where a person contracts as agent for a principal the contract is the contract of the principal."); RESTATEMENT (THIRD) OF THE LAW OF AGENCY § 6.01 (AM. LAW. INST. 2006).

to a parent State, subdivisions effectively make the parent State their agent. Because of this relationship, treaties made under this authority are opposable to subdivisions consistently with the *pacta tertiis* principle.

However, the consent theory also addresses the logic of sovereign equality underlying the customary presumption against third-party obligations. It is well established in international law that a sovereign entity can exercise its sovereignty through its delegation to another actor or limitation by treaty.[294] In *Customs Regime*, the PCIJ considered whether Austria alienated its economic independence by entering into a customs union with Germany.[295] The Court held that Austria had not alienated its independence even though the regime required substantial coordination of economic policy with Germany.[296] By establishing or being member of a federated State, a subdivision similarly agrees to harmonize its treaty policy with the other subdivisions through the mechanism of a federal treaty-making power. In doing so, the subdivision exercises its sovereign power to consent to the treaty rather than abandoning it. Thus, the treaty can be opposed to the subdivision despite the fact that the subdivision is not a direct party to the treaty. In doing so, Klabbers's concern cited above is addressed.[297] Instead of relying on a theory of representation to justify the opposition of a treaty to subdivisions, the subdivisions explicitly consent to treaty-making by the parent State as a consequence of the constitutional order of the federation.

One limitation of the consent theory of treaty opposability to subdivisions is its seeming inapplicability to federations operating under Westminster-style constitutions. Absent from the list of constitutions cited in endnote 291 of this article are Australia and Canada, whose particular designations of subdivisions have inspired the present inquiry. The strongest constitutional basis for a Commonwealth treaty-making power in Australia is section 61 of its constitution, which provides that "[t]he executive power of the Commonwealth is vested in the Queen . . . ."[298] This has been interpreted to entail that the making of treaties with other States is a federal competence.[299] In such a case, the consent of the Australian states to federal treaty-making can only be inferred based on an assumption that the States understood that by ratifying section 61, they

294. *See* Customs Regime between Germany and Austria, Advisory Opinion, 1931 P.C.I.J. (ser. A/B) no. 41, at 47 *et seq* (Sept. 5).
295. *Id.* at 47.
296. *Id.* at 52.
297. *See* Klabbers, *supra* note 118, at 362; *see also supra* note 254 and accompanying text.
298. AUSTRALIAN CONSTITUTION § 61.
299. *See* R. v. Burgess (1936) 55 CLR 608, 644 (Austl.).

delegated what treaty-making powers they had to the Commonwealth.[300] The Canadian position is less clear as the Dominion of Canada more gradually gained international affairs competence from London.[301] Doctrinal sources tend to support the position that the treaty-making power is "vested entirely in the Governor General of Canada."[302] In the 1932 *Radio* reference, the Privy Council took for granted the power of Canada to enter into treaties on Canada's behalf.[303] Four years later, in the *Labour Conventions* reference, the Privy Council left the question undecided.[304] It remains so.[305] In light of this and similarly to Australia, the best argument for the provinces' consent to federal treaty-making is their consent to confederation in the 1860s with an implicit understanding that consent to creation of a federation entailed consent to eventual federal treaty-making despite the absence of a provision analogous to Australia's section 61.[306]

### *c. Sovereign competence theory of opposability to subdivisions*

A second related possibility exists to overcome the third-party obligations rule as applied to subdivisions. Under a sovereign competence

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300. *See* AUSTRALIAN CONSTITUTION preamble ("Whereas the people of New South Wales, Victoria, South Australia, Queensland, and Tasmania, humbly relying on the blessing of Almighty God, have agreed to unite in one indissoluble Federal Commonwealth").

301. *See in re* Regulation and Control of Radio Communication in Canada, [1932] UKPC 7, at 3, [1932] A.C. 304, 312 (Can.); LORDON, *supra* note 115, at 77.

302. LORDON, *supra* note 115, at 77; *see also* HENRI BRUN & GUY TREMBLAY, DROIT CONSTITUTIONNEL 561 (4th ed. 2002) ("Au Canada, la conclusion d'un traité international . . . . s'agit d'actes relevant de la prérogative du gouvernement – en pratique du Gouvernement federal, qui s'est réservé le contrôle exclusif des affaires extérieures canadiennes.") [In Canada, the conclusion of an international treaty . . . involves acts within the prerogative powers of government—in practice of the federal Government, which has reserved for itself exclusive control of Canadian external affairs."]. The distinction in wording between the two sources hints at the sovereigntist arguments claiming provincial treaty-making capacity.

303. *In re* Regulation and Control of Radio Communication in Canada, [1932] UKPC 7, at 3, [1932] A.C. 304, 312 (Can.).

304. Canada (A.G.) v. Ontario (A.G.), [1937] A.C. 326 (P.C.) 348-49 (Can.); *see also* Hugo Cyr, Canadian Federalism and Treaty Powers: Existential Communities, Functional Regimes and the Canadian Constitution (May 2007) (unpublished LL.D. thesis, Université de Montréal), at 114–15, *available at* https://papyrus.bib.umontreal.ca/xmlui/bitstream/handle/1866/2644/11957417.PDF;jsessionid=58AC2F62C1464DA6AE53FAF5AF98A5C1?sequence=1. The question of treaty-making competence arises from the well-established principle that the Crown is indivisible between confederation and provinces. *See* LORDON, *supra* note 115, at 30. Thus, while it is uncontested that treaty-making is an executive power exercised by the Crown on the advice of government, it is less clear that Ottawa need be that government. *See id.* at 77.

305. Cyr, *supra* note 304, at 115 n.209.

306. *See* Constitution Act, 1867, 30 & 31 Vict., preamble, *reprinted in* R.S.C. 1985, app. II, no. 5 (Can.) ("Whereas the provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united").

theory, the subordination of subdivisions to a State results in the State's ability to create binding treaty obligations opposable to subdivisions, in addition to other non-State actors. The consent of the subdivisions is immaterial. As Klabbers suggested, one often cited justification for the opposability of international norms to non-State actors is the competence of the State to enter into international legal commitments as the representative of those non-State actors.[307] Thus, as Reuter writes, "the direct effects of a convention for individuals always derive from State authority."[308] This theory suggests that, from the perspective of international law, non-State actors are not truly third parties to a treaty in the sense of the *pacta tertiis* rule because States are solely competent to make laws (including by concluding treaties) on behalf of the persons, natural or juridical, under their jurisdiction. This may be especially true in the case of subdivisions which, as noted above, traditionally have been considered as subsumed into their parent States by international law.

This theory is supported by similar evidence as the consent theory. In the constitutional orders of federal States, the parent State typically is competent to conclude treaties like BITs on behalf of the federation, including all those legal persons within its jurisdiction.[309] As a consequence of such domestic constitutional orders,[310] the only legal person with the capacity to make treaties is the State. Thus, as a matter of international law, the State behaves as representative for all other legal persons within its jurisdiction, including subdivisions. This theory is also more easily reconciled with the constitutional orders of Westminster-style federations. As noted above, federal treaty-making competence in States like Australia and Canada relies on the inherent powers of the Crown in right of the federation.[311] Because the parent State is a sovereign State and

307. Klabbers, *supra* note 118, at 362. While Klabbers himself seems unconvinced, he reports other scholars as being satisfied with this theory. *Id.*

308. PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 101 (José Mico & Peter Haggenmacher trans., 1995). However, the mechanism Reuter foresees for accomplishing this is domestic law, noting "[u]nder international law, therefore, it is up to each State and its Constitution to ensure the correct application of treaties." *Id.* at 22. This is the theory of opposability developed *supra*, Part 0, and is subject to the limitations discussed there.

309. *See supra* note 291 and accompanying text.

310. Of course, exceptions like Switzerland and Belgium, where subdivisions have limited competence to make treaties occur. The sovereign competence theory, however, continues to apply in such cases *mutatis mutantis*. In Switzerland, the question of sovereign competence is resolved by a constitutional provision making foreign economic policy a matter of federal competence. BUNDESVERFASSUNG [BV] [CONSTITUTION] Apr. 18, 1999, SR 101, art. 101 (Switz.). As noted, *supra* note 253, the issue of opposability does not arise in the Belgian context as Belgian regions sign and ratify BITs in their own right.

311. *See* R. v. Burgess (1936) 55 CLR 608, 644 (Austl.).

possesses the powers inherent in that status, the BITs it concludes are opposable to its subdivisions.

An example that supports this theory of opposability is the opposition of a treaty to which a State is party to individuals who are organs of such a State or under its sovereign jurisdiction[312] observed in the practice of international criminal law, particularly the International Criminal Court (ICC). The ICC is both established by and applies as law a treaty ratified only by States, the Rome Statute.[313] The ICC "exercise[s] its jurisdiction over persons for the most serious crimes of international concern."[314] In doing so, under Article 21 of the Rome Statute, the ICC applies against such persons first the Rome Statute itself and certain instruments promulgated pursuant to the Rome Statute, then other rules of international law, then general principles of law.[315] Article 21 thus enshrines the Rome Statute, along with its Elements of Crimes, as the penal code against which the ICC judges natural persons.[316] Both of these instruments can be amended by the ICC States parties regardless of the content of other international legal norms, such as customary international law. ICC jurisprudence has shown that the Rome Statute can indeed be opposed to individuals.[317] Among individuals sought for prosecution at the ICC are several whose acts would be attributable to a State because those individuals are/were State organs.[318] ICC practice therefore shows that international law permits the opposition of treaties to non-State entities.

Because of this, the ICC example supports the opposability of parent States' BITs to their subdivisions. The ICC has much in common with an ICSID tribunal considering a claim against a subdivision arguing responsibility for a violation for international law. First, the forum is created by a treaty between States.[319] Second, in neither case is the person

312. *See supra* text accompanying note 204.

313. Rome Statute, *supra* note 204, arts. 1, 6–8, 21(respectively establishing the ICC, defining the crimes the ICC may prosecute, and clarifying that, in the first instance, the Rome Statute is the law applicable in the ICC).

314. *Id.* art. 1. "Persons" in this sense means only "natural persons". *Id.* art. 25(1).

315. *Id.* art. 21(1).

316. *Id.* art. 21.

317. Prosecutor v. Katanga, ICC-01/04-01/07, Judgment, pp. 658–59 (Mar. 7. 2014) (convicting Germain Katanga of various war crimes and crimes against humanity "under" the Rome Statute); Prosecutor v. Lubanga Dyilo, ICC-01/04-01/06, Judgment, ¶ 1358 (Mar. 14, 2012), *aff'd* ICC-01/04-01/06 A 5, Judgment (Dec. 1, 2014) (convicting Thomas Lubanga Dyilo of war crimes "within the meaning of" the Rome Statute).

318. *E.g.*, Prosecutor v. al Bashir, ICC-02/05-01/09, Second Warrant of Arrest (July 12, 2010). Al Bashir is President of Sudan. *Id.* ¶ 42.

319. *Compare* Prosecutor v. al Bashir, ICC-02/05-01/09, ¶ 1, *with* ICSID Convention, art. 37(1), Mar. 18, 1965, 575 U.N.T.S. 159 (providing for the establishment of arbitral tribunals by the Centre).

charged with violating international law a State. Third, in both cases, treaties between States only are offered as the applicable substantive law.[320] The jurisdictional requirements of articles 12-13 of the Rome Statute connect the application of this law to the sovereign competence of the relevant State party.[321] The example of the ICC therefore shows that international already opposes treaties to persons other than their States parties.

## V. CONCLUSION

Inspired by the designation of several Australian states and Canadian provinces as respondents in the sense of Article 25(1) of the ICSID Convention, this article has considered the possibility of treaty-based claims against subdivisions. Although no such claims have yet been brought before an ICSID tribunal, the possibility is real and stakeholders are interested. As noted above, in both the Australian and Canadian context, subdivisions typically have considerable assets held in their own right, as opposed to the parent State's right, as a matter of domestic law, and thus make enticing respondents to claimants looking forward to the eventual satisfaction of an award. The possibility of such claims is also real. For example, of the six available final awards against Canada under NAFTA Chapter 11, four concern measures taken by provinces.[322]

Beyond the political possibility of treaty-based claims against subdivisions, this article has also set forth an argument in favor of their legal possibility. Based on the default choice-of-law provision in Article 42(1) of the ICSID Convention, two potential theories of applicability were examined. Applying a BIT as domestic law and as international law are both potential routes to holding a subdivision responsible before an ICSID tribunal. Although the domestic-law theory has the advantage of the subdivision's established domestic legal personality, it raises challenges of generalizability and, in certain contexts, whether a BIT has

320. *Compare* Rome Statute, *supra* note 204, art. 21(1), *with* ICSID Convention, *supra* note 1, art. 42(1).

321. Rome Statute, *supra* note 204, arts. 12–13; *see also supra* note 312.

322. *Compare* St. Marys VCNA, LLC v. Canada, Consent Award, ¶ 3 (Mar. 21, 2013) (considering measures taken by Ontario), *and* Gallo v. Canada, Award, ¶ 121 (Perm. Ct. Arb. 2011) (considering measures taken by Ontario), *and* AbitibiBowater Inc. v. Canada, ICSID Case No. UNCT/10/1, Consent Award, ¶ 2 (Dec. 15, 2010) (considering measures taken by Newfoundland), *and* Merrill & Ring Forestry LP v. Canada, Award, ¶ 27 (Mar. 31, 2010) (considering measures taken by British Columbia), *with* Chemtura Corp. v. Canada, Award, ¶ 9 (Aug. 2, 2010) (considering federal measures), *and* United Parcel Serv. Of America II v. Canada, Award, ¶ 11 (May 24, 2007). *AbitibiBowater* also challenges a federal measure. *AbitibiBowater*, ¶ 2.

direct effect in certain domestic legal orders. In the context of dualist States, including Australia and Canada, a BIT does not have domestic effect without implementing legislation. Thus, while a domestic-law theory might be an option in some cases, it is not in the context of the two States most relevant to this inquiry.

Turning to an international-law theory of applicability, which would bypass the concerns about domestic effect of BITs, three barriers to subdivision responsibility emerged. First is the legal personality of subdivisions; are they even the kind of person that can be responsible for violating international law? International law has developed such that subdivisions are as long as States have acted to grant them such a capacity. As examples of international organizations and individuals in international criminal law show, inter-State treaties can either directly or by implication accomplish this. The process of designation has this effect in the ICSID context. Second is the applicability of BITs as international law under the default ICSID choice of law. As ICSID practice in recent decades has shown, this proposition is becoming ever less controversial; a BIT as international law can itself be the basis of an ICSID claim, even when not designated as applicable law by the parties to a dispute. Third is the opposability of a BIT to a subdivision which (typically) is not a party thereto. Two related theories can establish opposability. First, the BIT is opposable to the subdivision because it consented to it by giving the parent State its treaty-making power. Second, the BIT is opposable to the subdivision because the parent State is competent to make treaties binding persons within its jurisdiction. Authority exists to support both, and either theory suffices. Because subdivisions are thus international legal persons capable of being responsible and BITs are both applicable and opposable to them, subdivisions can be held to BIT standards as international law by an ICSID tribunal.

This article shows that that a subdivision can be legally responsible for acts violating investors' rights under BITs before ICSID Tribunals. What remains to be seen is where (or, more likely, when) such claims will emerge and how Tribunals will address them.