Academic Forum on ISDS

Treaties Establishing Dispute Settlement Frameworks

N. Jansen Calamita

Stefanie Schacherer

Facundo Perez-Aznar

Aikaterini Florou

UNCITRAL Academic Forum Working Group 4

Citation: N. Jansen Calamita, Stefanie Schacherer, Facundo Perez-Aznar and Aikaterini Florou, 'Treaties Establishing Dispute Settlement Frameworks', *Domestic Measures Adopted by States to Give Effect to Processes of International Dispute Settlement Vol. 1,* 28. June 2023.

Academic Forum on ISDS Website: www.jus.uio.no/pluricourts/english/projects/leginvest/academic-forum/

EXECUTIVE SUMMARY

The purpose of the present report is to provide an overview and analysis of the measures that States adopt domestically to implement treaties that establish mechanisms for the resolution of international disputes. The report's scope subsumes both treaties that include dispute settlement mechanisms to resolve disputes concerning the substantive obligations contained therein as well as treaties that establish frameworks for dispute resolution *simpliciter* which may be used to resolve disputes arising under a variety of substantive treaties (collectively "international dispute settlement mechanism" or "IDSM" treaties).

The approach of the research contained within this report has been to gather information about State experiences with respect to giving effect to IDSM treaties both at the international and regional levels, giving special attention to a number of recurrent questions: (i) What provisions in IDSM treaties require or implicate the need for States to adopt domestic measures? (ii) What measures do States in fact adopt in domestic law to give effect to IDSM treaties? (iii) What measures do States adopt in order to ensure that the decisions issued pursuant to the dispute resolution mechanisms of an IDSM treaty are given legal effect within the domestic order? (iv) What steps do States take in domestic law to ensure the functioning of the courts, tribunals and other dispute settlement mechanisms established by IDSM treaties, e.g., with respect to funding, appointment of adjudicators, etc.?

The analysis and information contained in this report is intended to serve three purposes. First, it provides guidance with respect to the design and drafting of an instrument establishing a multilateral investment dispute settlement mechanism. Second, it provides guidance for States when considering what types of implementing measures they may need to adopt in order to give effect to the jurisdiction of a multilateral investment dispute settlement mechanism. Third, it provides insights into the kind of capacity building and technical assistance that States may need in order to adopt such measures.

The central findings of this report may be summarised as follows:

1. The effectiveness of international dispute settlement mechanisms relies on the willingness and ability of States to adopt domestic laws and practices to give effect to the jurisdiction of an international dispute settlement process. Therefore, treaties setting up international dispute settlement processes often, but not systematically, requires concrete implementation at the national law level.

2. State practice in giving effect to treaties establishing international dispute settlement mechanisms ranges from the adoption of specific legislation that supports the functioning of the dispute settlement process to ad hoc practices to complete inaction and even resistance.

3. Four fundamental factors explain why State practices differ when implementing treaties establishing international dispute settlement mechanisms: (i) the character of the State's internal legal order (e.g., monist or dualist; civil law or common law), (ii) the provisions of the specific treaty, (iii) internal and external political factors, and (iv) issues of State capacity with respect to the domestic internalisation of international obligations.

4. Treaties establishing international dispute settlement mechanisms have generally left States with broad discretion as to how they will implement the treaties' provisions. In most instances, the treaties do not specify a single way in which they must be implemented. Instead, each contracting State is left to adopt the measures it considers necessary to comply with its international commitments.

5. Sometimes it is not possible to identify implementing regulations adopted by States but rather "practices" with respect to specific issues which arise in connection with IDSM treaties, such as which domestic institution designates adjudicators or panellists to an international court or tribunal, which institution pays for the functioning of the court or tribunal, who represents the State in proceedings before it, etc.

6. The absence of clearly defined obligations for transposition into domestic law, combined with regulatory capacity constraints, appear to contribute to the variable degree to which different IDSM treaties are given effect across States.

7. The great majority of IDSM treaties do not provide for technical assistance or capacity building for States joining the dispute settlement mechanism. As a consequence, available support for States is limited and lacks centralisation.

8. In general, States seem less likely to enact domestic implementation measures with respect to treaties creating jurisdiction for State-to-State claims.

9. In the case of regional economic integration organizations in particular (e.g., EU, ECHR and Mercosur), the implementation of an IDSM treaty may require constitutional amendments, specific legislation and even judicial reform.

10. The implementation of an IDSM treaty generally may require domestic action with respect to matters directly raised by the provisions of the treaty (e.g., enforcement of awards or judgments) and those which are not directly raised by the treaty but otherwise support the State's effective implementation of the treaty (e.g., domestic procedures for funding the State's contribution to the maintenance of the dispute settlement mechanism).

11. Depending upon the treaty and the legal order of a given State, IDSM treaties may require or implicate a need for domestic action on a wide range of issues, including:

    a. Designating judges, adjudicators or panellists for the operation of the dispute settlement mechanism established by the IDSM treaty.

    b. Ensuring that domestic institutions recognise the international jurisdiction created by the IDSM treaty.

    c. Ensuring that rulings of the dispute settlement mechanism established by the IDSM treaty are binding and enforceable in domestic courts.

    d. Establishing mechanisms for the State to effect its compliance with rulings of the dispute settlement mechanism.

    e. Designating government subdivisions, agencies or other entities that may be parties in disputes.

    f. Excluding or including territories from the application of the treaty.

    g. Financing and contributing to the budget of the international dispute settlement mechanism.

h. Establishing processes for State agencies and/or courts to resort to the international dispute settlement mechanism, especially with respect to advisory opinions and preliminary references, but also with respect to brining claims.

i. Establishing requirements for non-State parties to access the international dispute settlement mechanism (e.g., exhaustion of local remedies).

j. Establishing processes addressing the representation of the State in proceedings involving the international dispute settlement mechanism.

k. Establishing processes to monitor the State's implementation of its international obligations and to avoid or prevent international disputes with respect to those obligations.

l. Providing for the privileges and immunities of adjudicators.

Table of Contents

Volume I

"Treaties Establishing Dispute Settlement Frameworks"

Domestic Measures Adopted by States to Give Effect to Processes of International Dispute Settlement Volume I: Treaties Establishing Dispute Settlement Frameworks

N. Jansen Calamita,[*] *Stefanie Schacherer,*[**] *Facundo Perez-Aznar,*[***] *Aikaterini Florou*[****]

UNCITRAL Academic Forum Working Group 4

I. INTRODUCTION

Processes of international dispute settlement, whether in the form of standing courts and tribunals or frameworks for ad hoc arbitration or mediation, reflect specific institutional designs that depend and vary according to the problems they seek to solve. For States, international processes of dispute settlement are a part of strategies to overcome obstacles of cooperation and address failures of collective action. Created by States, the effectiveness of these processes depends primarily on States. Especially, the effectiveness of the decisions of international dispute settlement mechanisms relies on the willingness (and ability) of States to adjust their domestic laws and practices to give effect to the State's decision to make itself subject to the jurisdiction of an international dispute settlement process. Therefore, treaties setting up international dispute settlement processes, along with their statutes often, but not systematically, require concrete implementation at the national law level.[1]

State experience in adopting implementing legislation ranges from specific legislation to support the functioning of an international court or tribunal, to uncoordinated practices, complete inaction and even resistance.[2] There are four fundamental reasons of why State experiences differ when implementing both treaties that include dispute settlement mechanisms to resolve disputes concerning the substantive obligations contained therein as well as treaties that establish frameworks for dispute resolution *simpliciter* which may be used to resolve disputes arising under a variety of substantive treaties (collectively "international dispute settlement mechanism" or "IDSM" treaties): (i) the character of the State's internal legal order, (ii) the provisions of the specific international agreement, (iii) internal and

[*] Head, Investment Law & Policy, Centre for International Law; Research Associate Professor (CIL), Faculty of Law, National University of Singapore. Convenor, Academic Forum Working Group 4.

[**] Assistant Professor, Singapore Management University, Yong Pung How School of Law.

[***] Senior Researcher, Geneva Centre for International Dispute Settlement; Adjunct Professor of International Economic Law, University of Buenos Aires.

[****] Lecturer in International Economic Law, University of Liverpool, School of Law and Social Justice.

[1] For a discussion of the use of "implementation" in the use of the legal and public policy literature, see, e.g., N. Jansen Calamita and Ayelet Berman, *Investment Treaties and the Rule of Law Promise: The Internalisation of International Commitments in Asia* (Cambridge University Press 2022), 9-10.

[2] On the latter point, see e.g., Corte Suprema de Justicia de la Nación (CSJN) [National Supreme Court of Justice], 14 February 2017, "Ministerio de Relaciones Exteriores y Culto s/ informe sentencia dictada en el caso 'Fontevecchia y D'Amico vs. Argentina' por la Corte Interamericana de Derechos Humanos", CSJN 368/1998 (34-M) / CS1, F:340:47 (Argentina). In this case, the judges presented their own interpretation of international law concerning the competence of international courts and tribunals, here the Inter-American Court of Human Rights.

external political factors that can affect the implementation (or not) of their international commitments, and (iv) issues of State capacity with respect to the domestic internalisation of international obligations.

First, the character of the internal legal order (i.e., constitutional system) defines the character of the measures that are necessary to adopt in the domestic legal sphere to make a treaty effective.[3] This explains why common law countries follow, in general, similar practices in requiring domestic legislation to implement international jurisdiction internally, while for other countries the act of ratifying a treaty is treated as implying its incorporation at the domestic level. Second, the provisions of the IDSM treaty itself can affect its implementation. International dispute settlement processes differ in their requirements and design and hence may include different provisions regarding the need for States to adopt implementing measures. In this regard, an important distinction emerges between dispute settlement mechanisms established under a treaty to resolve disputes regarding the application and interpretation of substantive rules provided in that treaty, and treaty-based dispute settlement mechanisms which do not adjudicate disputes regarding the provisions of a particular treaty but rather serve as a framework for dispute resolution of disputes arising under various treaties.[4] Third, there is the political dimension by which internal and external political considerations can affect the degree to which States take steps to implement their commitments regarding IDSM treaties. This dimension can relate to, for example, (i) the national or international political agenda of a country, (ii) the political coalitions that rule a country or have majorities, and (iii) the perceived policy needs of a country at a particular point in time.[5] Fourth, there is the question of capacity, which can affect the degree to which States take steps to implement their commitments under treaties establishing the jurisdiction of international courts and tribunals.[6]

* * *

The purpose of the present report is to provide an overview and analysis of the measures that States adopt internally to implement treaties establishing international court and tribunals and other international dispute settlement mechanisms ("IDSM treaties"). Although this report cannot be comprehensive in its survey of practices across all States, this analysis is intended to be useful in three ways. First, it can be useful with respect to the design and drafting of an instrument establishing a multilateral investment dispute settlement mechanism. Second, it can be useful for States when considering what types of implementing measures they may need to adopt in order to give effect to the jurisdiction of a multilateral investment dispute settlement mechanism. Third, it provides insights into the kind of capacity building and technical assistance that States may need in order to adopt such measures.

[3] Christoph Schreuer, et al., *The ICSID Convention* (2nd ed., Cambridge University Press 2009), 1273.

[4] See UNCITRAL, Note by the Secretariat, Possible Reform of investor-State dispute settlement (ISDS) – Pertinent elements of selected permanent international courts and tribunals. The report notes that a multilateral investment tribunal would most probably follow the second approach. See Point 4.

[5] This can explain why, for example, certain Latin America countries have adopted general legislation addressing compliance with international judgments while others have not. See generally N.J. Calamita and Ayelet Berman, *Investment Treaties and the Rule of Law Promise: The Internalisation of International Commitments in Asia* (Cambridge University Press 2022), 315-322.

[6] See, e.g., Abram Chayes, Antonia H. Chayes and Ronald B Mitchell, "Managing Compliance: A Comparative Perspective", in Edith Brown Weiss and Harold K. Jacobson (eds.), *Engaging Countries: Strengthening Compliance with International Environmental Accords* (MIT Press, 1998), 39; Wade M. Cole, "Mind the Gap: State Capacity and the Implementation of Human Rights Treaties" (2015) 69 *International Organization* 405, 405-6.

The approach of the research contained within this report has been to gather information about State experiences with respect to IDSM treaties both at the international and regional levels, giving special attention to a number of recurrent questions: (i) What provisions in IDSM treaties require or implicate the need for States to adopt domestic measures? (ii) What measures do States in fact take in domestic law to give effect to IDSM treaties? (iii) What steps do States take in domestic law to ensure the funding of their contributions to maintain international courts and tribunals or other bodies tasked with administering dispute settlement frameworks? (iv) What kinds of measures do States adopt in order to ensure that the decisions issued pursuant to the dispute resolution mechanisms of an IDSM treaty are given legal effect within the domestic order?[7] To address these questions, each IDSM treaty is analysed to determine which of its provisions implicate a need or desirability for contracting States to adopt measures to give effect to their rights and obligations. Thereafter, the report analyses the domestic measures adopted (or not) in selected States in connection with the IDSM treaty.

The report proceeds in three volumes. The current volume, Volume I, begins by providing an examination of international dispute settlement mechanisms such as the ICSID Convention, the New York Convention, and the Singapore Convention. While these mechanisms do not establish international courts or tribunals as such, they do establish mechanisms requiring a grant of jurisdiction by participating States with respect to the matters which come within their scope. Volume II continues by looking at international and regional courts and tribunals, both those which have jurisdiction to hear disputes between States and those which have jurisdiction to hear disputes between States, e.g., the Dispute Settlement Body under the WTO agreements, and non-State actors, e.g., the Seabed Disputes Chamber of the International Tribunal for the Law of the Sea. Volume II also includes an overview of regional dispute settlement arrangements which do not rely upon standing courts and tribunals but instead use arbitration, such as the MERCOSUR dispute settlement mechanism. Finally, Volume III addresses the implementation of regional courts designed to address human rights claims (e.g., the European Court of Human Rights) as well as specialised dispute settlement mechanisms designed to address investor-State disputes under treaties providing substantive protection to investors and their investments (e.g., the Arab Investment Court and the investment court system established under the European Union's recent treaties). Volume III also contains this report's conclusions, providing a final assessment and set of observations on State experience with domestic law amendments when signing onto IDSM treaties.

II. TREATIES ESTABLISHING INTERNATIONAL DISPUTE SETTLEMENT FRAMEWORKS

A. The ICSID Convention

The Convention on the Settlement of Investment Disputes between States and Nationals of other States ("ICSID Convention") was adopted on 18 March 1965. The ICSID Convention creates the International Centre for Settlement of Investment Disputes ("ICSID" or the "Centre") as an intergovernmental institution established to provide an institutional framework that facilitates conciliation and arbitration. The jurisdiction of the Centre is limited, however. The Centre may only address legal disputes arising directly out of an investment between a Contracting State and a national of another Contracting State

[7] This report does not address the fundamental question of how States broadly receive international treaty obligations into domestic law. While this question raises addresses a central issue regarding the interplay between domestic legal systems and international law, given its generality and scope it is not treated in a systematic way in this report. Instead, as noted in the text, this report focuses specifically the measures that States adopt to implement IDSM treaties. For more information, see generally Malcolm N. Shaw, *International Law* (6th ed., Cambridge University Press 2008), 129-132.

in situations in which the parties to the dispute have given their consent in writing to accept the jurisdiction of the Centre.[8]

1. Summary of the Obligations of the ICSID Convention

Different provisions in the ICSID Convention implicate a need or desirability for Contracting States to adopt measures to give effect to their rights and obligations under the Convention.[9] For example,

- Article 13(1) permits each Contracting State to designate four persons for the Panel of Conciliators and four persons for the Panel of Arbitrators.

- Article 25(1) allows Contracting States and nationals of other Contracting States to give consent in writing to submit a dispute to the Centre.

- Article 25(1) and (3) allow Contracting States to designate constituent subdivisions or agencies that may be named as parties in investment disputes, and to notify the Centre as to those constituent subdivisions or agencies for which consent to jurisdiction by the State is not required.

- Article 25(4) allows Contracting States, at any time, to notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre.

- Article 26 allows Contracting States to "require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention."

- Article 54(2) requires each Contracting State to notify the Secretary General of the designation of the competent court or other authority for the purpose of recognizing and enforcing awards rendered pursuant to the Convention.

- Article 69 provides that "[e]ach Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories."

- Finally, Article 70 allows Contracting Sates to adopt measures to exclude from the application of the Convention to territories for whose international relations that State is responsible.

Of these provisions, Article 69 is the broadest, as it establishes an obligation for each Contracting States to adopt necessary measures to make the Convention effective in its territory.[10] An important number of Contracting States have communicated to the Centre the enactment of these type of measures.[11] The

[8] ICSID Convention, Art. 25.

[9] ICSID's Membership database includes a list of notifications made by Member States to implement and apply the ICSID Convention. See https://icsid.worldbank.org/about/member-States/database-of-member-States.

[10] See Christoph Schreuer, et al., *The ICSID Convention* (2nd ed., Cambridge University Press 2009), 1273-1275.

[11] From the 156 contracting States at the time of writing, 65 States have communicated to the Centre measures adopted under Article 69 of the ICSID Convention. These States are the following: Australia, Austria, Belgium, Benin, Botswana, Burkina Faso, Cameroon, Canada, Chad, Comoros, Republic of Congo, Cyprus, Côte d'Ivoire, Denmark, Djibouti, Egypt, El Salvador, Finland, France, Gabon, Germany, Greece, Guinea, Honduras, Iceland, Indonesia, Ireland, Italy, Jamaica, Jordan, Kenya, Korea, Kuwait, Lesotho, Luxembourg, Malawi, Malaysia, Mali,

scope of the notified measures, however, varies considerably, depending on the country. Some States appear to have adopted only measures related to the ratification or approval of the ICSID Convention (e.g., France,[12] Italy,[13] Mexico,[14] and Switzerland[15]), while other States adopted more detailed measures.

2. State Practice Implementing the Obligations of the ICSID Convention

As noted, some Contracting States have adopted detailed provisions on the implementation of the ICSID Convention in their domestic legal orders. These provisions typically address the recognition and enforcement of ICSID awards, the implementation of provisions on privileges and immunities, the exclusion of the review of ICSID awards by domestic courts, and measures designed to facilitate the taking of evidence.

The legislative instruments purporting to implement the ICSID Convention do not normally authorize the giving of consent or contain actual consent as referred to in Article 25 of the Convention.[16] Rather, consent is granted, in general, through international investment agreements, national investment laws or provisions in investment contracts.

The following table describes the issues that are included in the legislative instruments purporting to implement the ICSID Convention in a selected number of countries:

	Recognition and enforcement	Privileges and immunities	Taking of evidence	Representation in proceedings	Territorial application	Designation of Panels	Financing the Centre
Australia[17]	x	x	x	x			
Belgium[18]	x					x	

Mauritania, Mauritius, Mexico, Morocco, Netherlands, New Zealand, Niger, Nigeria, Norway, Papua New Guinea, Portugal, Romania, Rwanda, Saudi Arabia, Senegal, Singapore, Somalia, Sri Lanka, Sudan, Sweden, Switzerland, Togo, Trinidad and Tobago, Tunisia, United Kingdom, United Sates and Zambia. See https://icsid.worldbank.org/about/member-States/database-of-member-States.

[12] Loi No. 67-551 du 8 juillet 1967 autorisant la ratification de la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, du 18 mars 1965. (Off. Gaz. July 11, 1967, p. 6931).

[13] Legge 10 maggio 1970, n. 1093 Ratifica ed execuzione della Convenzione per il regolamento delle Controversie relative agli investimenti tra Stati e cittadini di altri Stati, adottata a Washington il 18 marzo 1965. (Off. Gaz. 8, January 12, 1971, p. 155).

[14] Decreto por el que se aprueba el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de Otros Estados, hecho en la ciudad de Washington, D.C., el 18 de marzo de 1965, Diario Oficial de la Federación 22/06/2018.

[15] Arrêté fédéral approuvant la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats. (Recueil des lois féd., 32, August 9, 1968, p. 1021).

[16] Christoph Schreuer, et al., *The ICSID Convention* (2nd ed., Cambridge University Press 2009), 1275.

[17] ICSID Implementation Act 1990 (Act No. 107 of 1990) and International Arbitration Act 1974.

[18] Loi du 17 juillet 1970 portant approbation de la Convention pour le règlement des différends relatifs aux investissements entre Etats et ressortissants d'autres Etats, faite à Washington le 18 mars 1965. (Off. Gaz. 185, Sept. 24, 1970, p. 9548).

	Recognition and enforcement	Privileges and immunities	Taking of evidence	Representation in proceedings	Territorial application	Designation of Panels	Financing the Centre
Canada[19]	x	x					
Germany[20]	x				x		
Ireland[21]	x						x
Kenya[22]	x	x					
New Zealand[23]	x	x	x				
Singapore[24]	x		x				x
United Kingdom[25]	x	x	x		x		x
United States[26]	x	x				x	
Zambia[27]	x	x					

Latin American countries appear not to have adopted detailed legislation with respect to the implementation of the ICSID Convention, apart from addressing the Convention's ratification or approval.[28] That said, it bears noting that some Latin American States have adopted certain implementing measures years after the ratification of the ICSID Convention addressing specific issues

[19] Settlement of International Investment Disputes Act, S.C. 2008, c. 8, Assented to 2008-03-13. See also Settlement of International Investment Disputes Act, 1999 (1999, S.O., c. 12, Sched. D) (Ontario).

[20] Gesetz zu dem Ubereinkommen vom 18 März 1965 zur Beilegung von Investitionsstreitigkeiten zwischen Staaten und Angehörigen anderer Staaten vom 25 Februar 1969. (Off. Gaz. 12, Part II, March 4, 1969, p. 369).

[21] International Centre for Settlement of Investment Disputes (Designation and Immunities) Order, 1980. (S.I. No. 339 of 1980) and Arbitration Act 2010.

[22] Investment Dispute Convention Act (No. 31 of 22 November 1966).

[23] Arbitration (International Investment Disputes) Amendment Act, 2000. (Act No. 52 of 2000).

[24] Arbitration (International Investment Disputes) Act (Singapore Statutes, 1970 Rev. Ed., Act No. 18, Ch. 17, Sept. 10, 1968, p. 257).

[25] Arbitration (International Investment Disputes) Act 1966.

[26] Convention on the Settlement of Investment Disputes Act, 22 USC §§1650, 1650a (1966). Reproduced in 5 ILM 820 (1966), United States Code: Settlement of Investment Disputes, 22 U.S.C. §§ 1650-1650a (1982), and Executive Order designating certain Public International Organizations entitled to enjoy certain privileges, exemptions and immunities. (Exec. Order 11966; 42 Fed. Reg. 4331 (1977).

[27] Investment Disputes Convention Act (No. 18 of 17 April 1970), cap. 182.

[28] E.g., Argentina, Ley 24353, BO 02-sep-1994 Número: 27967 Página: 2; Chile, Decreto 1304 que Promulga el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados; Peru, Resolución Legislativa 26210, 09/07/1993, Aprueban el Convenio sobre Arreglo de Diferencias Relativas a Inversiones entre Estados y Nacionales de otros Estados.

regarding ISDS, although not with specific reference to obligations created under the ICSID Convention.[29]

B. The New York Convention

The New York Convention on the Recognition of Enforcement of Foreign Arbitral Awards is the most widely subscribed dispute settlement treaty in history. As of the date of this report, there are 173 Contracting States to the Convention.

The New York Convention does not establish an international court or tribunal. Rather, the Convention establishes a framework designed to facilitate the settlement of commercial disputes through arbitration by harmonizing the treatment of foreign arbitral awards (and arbitral agreements) by domestic courts. Although the New York Convention does not establish an international court or tribunal, it is included in this paper because it creates obligations for States which entail domestic implementation, and which bear upon the jurisdiction of domestic courts. Thus, in many ways the obligations created under the Convention are similar to the obligations created under international instruments by which a State agrees to establish an international court or tribunal and confer jurisdiction upon it.

1. Summary of the Obligations of the New York Convention

There are two principal aspects to the Convention. First, it requires the courts of Contracting States to uphold parties' written agreements to resolve their disputes through arbitration. Second, it facilitates the recognition and enforcement of foreign arbitral awards by easing procedural requirements and limiting court involvement and review.

Different provisions of the New York Convention require implementation in domestic legal orders, thereby requiring and/or permitting States to adopt domestic measures in order to ensure its effective operation. A summary of these provisions follows:

- Article I(3): Establishes the power of Contracting States to limit the scope of the Convention's application in their territory through reservations with respect to (a) reciprocity and (b) differences arising out of "commercial" legal relationships.[30]

[29] For example, Argentina, in 2000 (six years after its ratification of the ICSID Convention), adopted Law No. 25,344, establishing the obligation to notify the General Attorney's Office on the existence of lawsuits brought against the national public sector. Decree No. 1116/2000, which regulated different aspects of Law No. 25,344, further delegated to the General Attorney's Office "the power to assume […] the representation or legal sponsorship of the National State, in the processes that take place before judicial or arbitral tribunals and administrative bodies with jurisdictional or quasi-jurisdictional, national, international or foreign powers". Moreover, after the crisis of 2001 and the wave of claims against Argentina, the government enacted Decree No. 926/2003, creating a mechanism for the amicable settlement of investment disputes, although this process has rarely been used. As another example, in 1990 Uruguay established a specific domestic mechanism to address the resolution of investor-State disputes arising under any BIT: Law No. 16,110 of 25 April 1990. The adoption of this mechanism was designed to facilitate the "local litigation requirement" contained in a number of BITs entered into by Uruguay between 1987 and 1992. This legislation was analysed in the *Philip Morris v Uruguay* case but has apparently never been used. See generally Facundo Pérez Aznar, "Local Litigation Requirements in International Investment Agreements", 17 *Journal of World Investment & Trade* (2016) 536.

[30] "… any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration".

- Article II(3): Sets forth the obligations of domestic courts with respect to the judicial treatment of matters covered by a valid arbitration agreement.[31]

- Article III: Sets forth the general obligation of each Contracting State to recognise and enforce arbitral awards within its territory in conformity with the rules of procedure of that State, and in any case not to impose "substantially more onerous conditions" with respect to the recognition and enforcement of a Convention award as compared to a domestic one.[32]

- Article IV: Sets forth the essential procedural requirements for obtaining recognition and enforcement of a foreign arbitral award in the courts of the territory in which the award is relied upon, e.g., the supply of appropriate copies of the award and the arbitral agreement upon which it was founded.[33]

- Article V: Delimits of the power of courts in the territory in which the award is relied upon to refuse recognition and enforcement.

- Article VI: Delimits the power of courts in the territory in which the award is relied upon to adjourn a decision on enforcement of the award and to order security where the award is under consideration for set aside at the place where it was rendered.

- Article XI: Establishes special provisions with respect to the adoption of the Convention in non-unitary States.[34]

2. State Practice Implementing the Obligations of the New York Convention

As noted above, different provisions of the New York Convention require implementation in domestic legal orders, thereby requiring and/or permitting States to adopt domestic measures in order to ensure its effective operation. In 2005, the UNCITRAL Secretariat, in cooperation with the International Bar Association, prepared a questionnaire asking the Contracting States to provide information with respect

---

[31] "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed".

[32] "Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles".

[33] "1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

a) The duly authenticated original award or a duly certified copy thereof;

b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent".

[34] See, e.g., Article XI(b): "With respect to those articles of this Convention that come within the legislative jurisdiction of constituent States or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent States or provinces at the earliest possible moment. . . ."

to their implementation of the Convention.[35] A report compiling the results of the survey was released by the Secretariat in 2008.[36]

The results of the 2008 survey are noteworthy for this report as they catalogue the various ways in which Contracting States have chosen to implement their commitments under the New York Convention. Moreover, the experience of the New York Convention is noteworthy as an illustration of the limits of harmonization when an international treaty provides broad discretion in key aspects of its domestic implementation. In the paragraphs below we note the central findings of the survey. We also identify key issues and trends with respect to domestic implementation revealed by those findings.

a. Giving the New York Convention Force of Law in Contracting States

The ratification of, or accession to, a treaty creates legal obligations at the international level. Depending upon the nature of the State's constitutional order, however, further action may be needed in order to give the treaty domestic application. The New York Convention contains no requirements with respect to the manner in which the Contracting States give the Convention domestic effect.[37] Further, the New York Convention contains no mechanism to provide technical assistance to States with respect to the incorporation of the Convention into their domestic legal orders.

The UNCITRAL survey noted two principal approaches to domestic implementation of the Convention: direct application and positive incorporation. Thus, for States taking a *monist approach* to the relationship between international and domestic law, the Convention has generally been treated as having direct application in the domestic legal order following the State's ratification or accession. No further action thus is necessary by the legislature or executive in order to give the Convention's commitments force of domestic law.

Conversely, for States taking a *dualist approach*, following the State's ratification or accession the adoption of implementing measures is required for the Convention to gain force of law in the domestic legal order. As reported in the survey, in the States in which domestic implementing measures were adopted, those measures took various forms, "such as an 'Arbitration Act, to which the Convention is attached as a schedule', 'the enactment of a special act on Foreign Arbitral Awards', or the 'enactment of a legislative decree'".[38] In some cases it was noted that although the Convention had been duly ratified by the State, the State had not gone on to adopt the necessary implementing measures, thus rendering the legal position of the Convention in doubt.[39]

---

[35] UNCITRAL, Secretariat Note, "Interim report on the survey relating to the legislative implementation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards", A/CN.9/585 (28 May 2005), para. 1. The survey arose out of a decision by the Commission at its twenty-eighth session to undertake a survey with the aim of monitoring the implementation of the New York Convention in national laws. *Id*., para. 2.

[36] UNCITRAL, Secretariat Note, "Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)", A/CN.9/656 (5 June 2008) [hereinafter, "UNCITRAL NY Convention Survey Report"]. The report was based upon survey responses by 108 of the then 142 Contracting States to the Convention.

[37] Article XI may be seen as a small exception. Article XI(b) requires federal governments in non-unitary States to encourage sub-federal units to adopt or enforce the Convention in circumstances in which the federal government lacks the constitution competence to bind the sub-federal units itself.

[38] UNCITRAL NY Convention Survey Report, para. 11.

[39] *Id.*, para. 12: noting, e.g., that in one State although the Convention had been ratified over forty years ago, the Convention was not in force in that State as no legislative act had been adopted.

i. Approaches to the Positive Implementation of the Convention

In States requiring domestic action to give domestic effect to the New York Convention, two principal modalities have been used. The first is by means of a domestic enactment whereby the Convention "stands alone",[40] usually as an annex to enabling legislation. The second is through the integration of the Convention's provisions into a larger piece of domestic legislation, often a civil or procedural code, private international law act, or arbitration legislation.[41]

The UNCITRAL report observed that where States adopted legislation implementing the New York Convention, the text of that legislation differed in a number of cases from the text of the Convention. Those differences included changes of substance, through both additions and omissions. Differences between the text of the Convention and domestic enactments raise a question as to which language should prevail in cases of conflict. While in some cases the issue is resolved directly in the domestic enactment itself, or by operation of the State's general law;[42] in other cases, it is not.[43]

More generally, divergences between the Convention and its domestic enactment raise a question as to whether the differences undermine the harmonizing goal of the New York Convention. That said, in the survey conducted by the UNCITRAL Secretariat, States were asked to self-evaluate the significance of any differences between their implementing legislation and the Convention. Uniformly, States reported that where differences existed between the Convention itself and the legislation used to implement the Convention the differences were "minor".

b. The Implementation of Specific Convention Articles

i. Article I(3): Reservations to the Convention

The Convention identifies two permissible reservations which States may make upon ratification or accession. The "reciprocity reservation" provides a restriction on the application of the Convention by allowing States to limit recognition and enforcement to "awards made only in the territory of another Contracting State". The "commercial reservation" restricts the scope of application of the Convention by permitting States to limit the recognition and enforcement of arbitral awards that pertain "only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration".

---

[40] More than one half of respondents indicated that the Convention as implemented in domestic legislation stood alone. UNCITRAL NY Convention Survey Report, para. 22.

[41] As noted by the Secretariat's report, in a number of instances States mentioned that their domestic incorporation of the New York Convention was based upon hey adopted legislation based on the UNCITRAL Model Law on Arbitration, which differs from the Convention in a number of respects. See UNCITRAL NY Convention Survey Report, para. 23.

[42] For example, one State reported that although its implementing legislation diverged from the text of the Convention, under its general rules of statutory construction "it was assumed that the legislator intended to fulfil rather than break an international agreement so, in cases of doubt as to the meaning of the implementing legislation, the court will, if possible, resolve it in a manner which is consistent with the international agreement. However, where there is no real doubt as to meaning, the courts will give effect to that implementing legislation even if it is not in accordance with the international agreement." UNCITRAL NY Convention Survey Report, para. 20.

[43] For example, one State reported that its law on arbitration gave effect to both the Convention and the UNCITRAL Model Law on International Commercial Arbitration ("UNCITRAL Model Law on Arbitration") and reproduced both texts in a schedule. The legislation did not, however, provide guidance as to which text would take precedence in its application. UNCITRAL NY Convention Survey Report, para. 21.

Although many States have taken reservations to the Convention, many States appear not to have taken any steps to incorporate these reservations into their domestic implementation of the New York Convention. Further, in a number of cases in which reservations have been reflected in domestic implementing legislation, the formulation of the reservation by the State on the international level and in its implementing legislation has sometimes differed, "leaving unanswered the question of which text would prevail in case of conflict".[44] In this connection, the UNCITRAL Secretariat concluded in its 2008 report that that States' failure to reflect their reservations in legislation or elsewhere had

> a potentially negative impact upon the harmonizing effect of the New York Convention. If Contracting States choose to make reservations, such reservations should be properly notified when depositing the instrument of accession with the Secretary-General of the United Nations and repeated in the legislation. Any subsequent declaration regarding a reservation or the withdrawal thereof should also be reflected.[45]

ii. Article II: Recognition and Enforcement of Arbitration Agreements

Article II addresses the obligation of Contracting States to recognize arbitration agreements, including, particularly, the obligation of a domestic court to refer litigants to arbitration in a matter in respect of which the parties have made an agreement to arbitrate. Central to the application of Article II is the term "agreement in writing", which Article II leaves largely undefined.

As revealed by the UNCITRAL survey, "[f]or a vast majority of States, the implementing legislation did not specify which arbitration agreements qualified for referral to arbitration under the New York Convention".[46] Indeed, the results of the survey indicated that even in cases in which States had adopted implementing legislation for the Convention, legislators frequently included provisions addressing the enforcement of a foreign arbitral award, but only rarely included separate provisions on the enforcement of an arbitration agreement pursuant to Article II. Further, in the limited numbers of States in which implementing legislation addressed the scope and application of Article II, States varied widely in their approaches.[47]

Comparted to other obligations contained in the Convention, Article II has not received much attention in domestic legislation. Thus, critical issues regarding the application of Article II by domestic courts – such as the scope of the agreements to which Article II applies – have not been addressed in domestic legislation. This absence of domestic treatment of the scope of the Article II obligation, combined with the lack of guidance as to the scope of Article II in the Convention itself, appears to have had a negative impact on the Convention's harmonizing effect.

iii. Article III: Fees and Charges for Enforcing a Convention Award

The New York Convention provides in Article III that each Contracting State shall enforce Convention awards in accordance with the rules of procedure of that State and that "there shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of

---

[44] UNCITRAL NY Convention Survey Report, para. 28. See generally *id*., para. 26-32.

[45] UNCITRAL, Secretariat Note, "Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)", A/CN.9/656/Add.1 (6 June 2008), para. 36 [hereinafter, "UNCITRAL NY Convention Survey Report, Part II"].

[46] UNCITRAL NY Convention Survey Report, para. 42.

[47] See, e.g., examples cited in UNCITRAL NY Convention Survey Report, para. 43-44.

domestic arbitral awards". According to the UNCITRAL survey, few, if any States, have made specific reference to this requirement in their domestic implementation of the Convention. That said, the survey responses "generally confirmed that Contracting States had not imposed more onerous conditions or higher fees or charges for the recognition or enforcement of Convention awards compared to domestic awards".[48] Thus, although Contracting States have not generally made specific reference to the requirements of Article III in their domestic law, it appears that Contracting States, nevertheless, have implemented their obligations effectively.[49]

iv. Article IV: Requirements for Supplying the Arbitral Award and Arbitration Agreement to the Courts of the Enforcing State

Article IV(1) requires that a party applying for recognition and enforcement of an arbitral award shall supply the Courts of the Enforcing State with either "duly authenticated" originals or "duly certified" copies of both the award and the arbitration agreement upon which the arbitration was based. Moreover, Article IV(2) requires that where the award or the agreement are not made in an official language of the enforcing State, the applicant must produce a translation of these documents "certified by an official or sworn translator or by a diplomatic or consular agent".

The absence of definition in the Convention with respect to "authentication", "certified", and "official or sworn translator" has caused divergence in the implementation of Article IV by Contracting States. The meaning of "authentication" in Article IV(1) provides an example of this divergence. According to the UNCITRAL survey, in some States authentication can be established according to the enforcing jurisdiction's own legalization procedures, while in other States authentication is governed by the legalization procedures of the law of the State where the award was made.[50] In still other States, the implementing legislation simply requires that authentication be provided "to the satisfaction of the court".[51] Notably, this divergence led the UNCITRAL Secretariat in its to 2008 report to suggest that the Commission "may wish to consider whether assistance should be provided to avoid uncertainty resulting from such disparity".[52]

v. Article V: Challenging the Recognition and Enforcement of an Award

As set out in Article V, an application for the recognition and enforcement of an award may be refused only if the party against whom it is invoked furnishes proof of certain specified grounds to the "competent authority". Among the issues which arises in connection with the implementation Article V are the identification of the "competent authority" and the incorporation of the specified grounds for refusing recognition and enforcement in the domestic legal order.

- *Identification of the Competent Authority*

Responses to the UNCITRAL survey indicated with respect to the identity of the domestic authority competent to decide on a request for recognition and enforcement "that there was a great variety in the

[48] UNCITRAL NY Convention Survey Report, para. 48.

[49] *Cf.* UNCITRAL NY Convention Survey Report, Part II, para. 40.

[50] UNCITRAL NY Convention Survey Report, para. 51.

[51] UNCITRAL NY Convention Survey Report, para. 53. State implementing legislation with respect to need for a copy of an award or arbitral agreement to be "duly certified" was similarly varied.

[52] UNCITRAL NY Convention Survey Report, Part II, para. 41.

manner in which legislators had regulated this matter".[53] In terms of legislative modalities, the survey found that the determination of the competent authority might be regulated in the code of civil procedure, legislation on private international law, a specialized act on the judiciary or on enforcement, the act implementing the Convention or arbitration legislation more broadly.[54]

- *Grounds for the Refusal of Recognition and Enforcement*

Article V of the Convention sets out the exclusive grounds for refusal of recognition and enforcement of an award. The responses to the survey revealed a number of instances in which the grounds upon which a competent authority (e.g., court) might refuse enforcement of an award set out in domestic legislation deviated from article V of the Convention.[55] Thus, for example, certain States reported having adopted additional grounds for the refusal of enforcement or recognition, while others indicated that there was uncertainty in their laws as to whether the grounds for refusing the enforcement or recognition of domestic arbitral awards would also apply to foreign arbitral awards.

c. The Adoption of Ancillary Measures for the Implementation of Convention Obligations

In addition to enacting domestic measures to address the express obligations of the Convention, States have also enacted measures to address ancillary issues implicated by the Convention's obligations but not directly addressed in its articles. In this section we note two such issues.

i. Time Limit for Applying for the Recognition and Enforcement of a Convention Award

The New York Convention does not prescribe a time limit for applying for the recognition and enforcement of awards, following the provision in article III that recognition and enforcement should be in accordance with the rules of procedure of the territory where the award was relied upon. This silence in the Convention has led to a lack of uniformity in domestic procedures, revealed in the responses to the UNCITRAL survey. As noted in the Secretariat's report:

> A significant number of States responded that there was no time limit for applying for recognition and enforcement of a Convention award. Others distinguished between application for recognition and for enforcement, and indicated that there was no time limit for applying for recognition of a Convention award, but that enforcement was subject to a time limit. Where a specific time limit was indicated for application for enforcement, the periods ranged from three months to thirty years. The most frequently reported periods were three, six and ten years.[56]

Notably, in response to these findings, the Secretariat queried whether the Commission might want "to consider whether it would be desirable to provide assistance aimed at achieving a higher degree of

[53] UNCITRAL NY Convention Survey Report, Part II, para. 1.

[54] The survey also found that although a court was the competent authority in most jurisdictions, the identity of the courts to which an application might be brought ranged from a lower-level municipal or district first instance court to the Supreme Court. UNCITRAL NY Convention Survey Report, Part II, para. 2.

[55] UNCITRAL NY Convention Survey Report, Part II, para. 20-23.

[56] UNCITRAL NY Convention Survey Report, Part II, para. 8.

uniformity among the Contracting States in respect of time limits for applying for the enforcement of Convention awards".[57]

ii. Procedural Rules for Enforcement

Responses to the UNCITRAL survey indicated that, in general, the procedure for seeking enforcement of an award was set out in the code of civil procedure or similar law relating to foreign judgments and awards, and that it was more rarely defined in the legislation implementing the Convention.[58]

The responses revealed a variety of procedural approaches across States. In some cases, the procedures described led to an easier enforcement procedure and, in others, to a more burdensome procedure where stricter requirements than those expressly identified in the Convention are prescribed.[59] This broad variation across Contracting States led the Secretariat to suggest that the Commission might wish to provide guidance to States in order to lessen some of the lack of harmony in domestic procedures.[60]

C. The Singapore Convention on Mediation

Like the New York and ICSID Conventions, the Singapore Convention on Mediation ("SCM" or "Singapore Convention") does not establish an international court or tribunal. Rather, the SCM is a multilateral treaty which offers a uniform framework for the enforcement and invocation of international settlement agreements resulting from mediation.

Although the Singapore Convention does not establish an international court or tribunal, it is included in this paper because, like the New York and ICSID Conventions, it creates obligations for States which entail domestic implementation, and which bear upon the jurisdiction of domestic courts. Thus, in many ways the obligations created under the SCM are like the obligations created under international instruments by which a State agrees to establish an international court or tribunal and confer jurisdiction upon it.

It warrants noting that the Singapore Convention is a relatively new instrument, concluded in 2018 and opened for signature in 2019. As of the writing of this report, the SCM has been signed by fifty-five States and entered into force for ten. With the third instrument of ratification deposited by Qatar on 12 March 2020, the Singapore Convention entered into force on 12 September 2020.

1. Summary of the Obligations of the Singapore Convention

The SCM applies to international settlement agreements resulting from mediation, concluded by parties to resolve a commercial dispute. Only international commercial settlement agreements resulting from mediation can be enforced under the SCM. Thus, the mediation settlement agreement must be international in character and[61] the mediation settlement agreement must be commercial.[62] Moreover,

[57] UNCITRAL NY Convention Survey Report, Part II, para. 44.

[58] UNCITRAL NY Convention Survey Report, Part II, para. 18.

[59] UNCITRAL NY Convention Survey Report, Part II, para. 11-32.

[60] UNCITRAL NY Convention Survey Report, Part II, para. 45.

[61] Art. 1(1), Singapore Convention.

[62] This excludes disputes arising from transactions by consumers for personal, family, or household purposes, or relating to family, inheritance, or employment law. Art 1(2), Singapore Convention.

the Singapore Convention does not apply to settlement agreements that are enforceable as a judgment or arbitral award.[63]

The Singapore Convention creates two principal obligations with respect to settlement agreements which require implementation in domestic legal orders, particularly by the courts. First, settlement agreements under the SCM must be able to be directly enforced in the competent authority of a Contracting State, in accordance with its rules of procedure and under the conditions laid down in the Convention.[64] Second, the Singapore Convention requires that where a dispute arises relating to a matter which has already been resolved by the settlement agreement, the agreement can be invoked as *res judicata* to prove that the matter has been resolved.[65]

Further, like the New York Convention, the SCM provides a limited number of grounds upon which the competent authority of a Contracting State may refuse enforcement or recognition of a settlement agreement, namely:

i. If a party to the settlement agreement was under incapacity;[66]

ii. If the settlement agreement is not binding, null and void, inoperative or incapable of being performed under the law to which it is subjected, or has been subsequently modified;[67]

iii. If there was a serious breach by the mediator in terms of applicable mediator standards,[68] or failure to disclose circumstances that raise doubts as to mediator impartiality or independence,[69] without which the party would not have entered into the agreement; and

iv. If granting relief would be contrary to the public policy of the Party State.[70]

2. State Practice Implementing the Obligations of the Singapore Convention

a. UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation (2018)

As noted above, different provisions of the Singapore Convention require implementation in domestic legal orders, particularly by the courts. To this end, at the same time as UNCITRAL was developing the SCM, it was concurrently developing the 2018 UNCITRAL Model Law on International Commercial Mediation and International Settlement Agreements Resulting from Mediation ("Model Law 2018"),[71] which includes provisions designed for implementation into domestic law to harmonise

[63] Art. 1(3)(b), Singapore Convention.

[64] Art. 3(1), Singapore Convention.

[65] Art. 3(2), Singapore Convention.

[66] Art. 5(1)(a), Singapore Convention.

[67] Art. 5(1)(b), Singapore Convention.

[68] Art. 5(1)(e), Singapore Convention.

[69] Art. 5(1)(f), Singapore Convention.

[70] Art. 5(2)(a), Singapore Convention.

[71] The 2018 Model Law was effectively an amendment and renaming of UNCITRAL's earlier 2002 Model Law on International Commercial Conciliation ("2002 Model Law"). The principal purpose of the 2018 Model Law was to add a new section on international settlement agreements and their enforcement and invocation.

States' laws on international settlement agreements resulting from mediation in line with the SCM. In particular, the Model Law 2018 includes articles addressing:

- The scope and definition of international settlement agreements resulting from mediation of a commercial dispute;[72]
- Enforceability of mediated international settlement agreements;[73] and
- The requirements for relying on a mediated international settlement agreement, grounds for refusing relief, and parallel claims.[74]

The Model Law 2018 was adopted by the UNCITRAL Commission alongside the Singapore Convention text, with the Commission recommending that all States give favourable consideration to the enactment of the Model Law 2018. To date, however, according to the UNCITRAL Secretariat, only one jurisdiction has adopted legislation based on the Model Law 2018.[75]

d. Other Domestic Implementing Legislation

As of this writing, ten States have ratified the SCM: Belarus, Ecuador, Fiji, the Republic of Georgia, Honduras, Kazakhstan, Qatar, Saudi Arabia, Singapore, and Türkiye. Looking at the way in which these States have implemented their SCM commitments into domestic law, the variety of approaches taken is notable. For example, only one, Singapore, appears to have adopted specialised legislation to address its obligations under the SCM.[76] In another, Fiji, there is no implementing legislation at all.[77] In the remainder of ratifying States, there have either been amendments to existing laws with the SCM in mind[78] or, as in the majority of ratifying States, there has been the suggestion that existing laws as written will apply to settlements under the SCM. Examples of these different approaches follow, based upon information compiled at the Singapore Convention on Mediation website (www.singaporeconvention.org), managed by the Singapore International Dispute Resolution Academy (SIDRA), with the support of Ministry of Law, Singapore.

i. Specialised Legislation: Singapore

Singapore has adopted both primary and subsidiary legislation to implement its obligations under the SCM. On 4 February 2020, the Singapore Parliament adopted the Singapore Convention on Mediation

[72] Art. 16, Model Law 2018.

[73] Art. 17, Model Law 2018.

[74] Arts.18-20, Model Law 2018.

[75] The one jurisdiction to have adopted the 2008 Model Law is the US State of Georgia in 2021. (The US is a signatory to the Singapore Convention but has not ratified it.) The UNCITRAL Secretariat further reports that legislation based on the Model Law 2002 has been adopted in at least thirty-three States. Only one of those States, Honduras, has ratified the Singapore Convention. See https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_conciliation/status

[76] See https://www.singaporeconvention.org/jurisdictions/singapore.

[77] See https://www.singaporeconvention.org/jurisdictions/fiji. In Qatar as well there is no specific domestic implementation of Qatar's SCM obligations. Various draft legislation has been considered but has not yet come into force. See https://www.singaporeconvention.org/jurisdictions/qatar

[78] See Belarus: Law on Mediation (as amended 2021) and Economic Procedural Code of the Republic of Belarus (as amended 2021).

Act 2020 ("SCMA"), which came into force on 12 September 2020, the same day that the SCM entered into force.

In addition, the Singapore Supreme Court of Judicature adopted specialised rules to address proceedings pursuant to the SCMA: the Singapore Convention on Mediation Rules 2020, which also came into force on 12 September 2020. Under Singaporean law, the Rules are subsidiary legislation that sets out the procedural framework for applications and matters under the SCMA.

Among the most significant aspect of the SCMA and the Supreme Court's rules is that they codify and operationalise into Singaporean law the key obligations contained in the Singapore Convention. Thus, the SCMA allows for international mediated settlement agreements to be recorded by the High Court as a court order for enforcement or invocation and allows for settlement agreements to be invoked directly as a defence in existing court proceedings.[79] Further the SCMA clarifies the procedural requirements of Article 4 of the Singapore Convention,[80] supplemented by the requirements set out in the Supreme Court's Rules.[81]

Finally, it bears noting that Singapore has amended a number of pieces of ancillary legislation to encourage mediation in Singapore. In particular,

- The Civil Law Act ("CLA") was amended to permit third-party funding in mediation proceedings related to arbitration proceedings and certain proceedings in the Singapore International Commercial Court.[82] Further amendments to the Regulations, which extended the categories of proceedings for third-party funding, came into effect on 28 June 2021.[83]

- The Legal Profession Act ("LPA") was amended to exempt mediators or foreign lawyers representing a party in mediation from legal profession regulations.[84]

ii. Amendment of Existing Laws: Republic of Georgia

In the Republic of Georgia, the Law on Mediation and the Civil Procedural Code have been amended to implement the provisions of the SCM.[85] In particular, Article 13(1) of the Law of Georgia on Mediation allows the enforcement and recognition of international mediated settlement agreements and designates the Supreme Court of Georgia as the competent authority in charge of enforcing and recognizing international mediated settlement agreements.

Article 363[43](3) of the Civil Procedural Code of Georgia is designed to correspond to Article 4 of the SCM and establishes the documentary requirements of a party wishing to enforce and recognize an international mediated settlement agreement. Article 363[43](3) requires that the original international

[79] Sec. 4 SCMA. Invocation of the settlement must be made through an application to the High Court (or Court of Appeal when being invoked as a defence for proceedings in the Court of Appeal).

[80] Sec. 6 SCMA.

[81] Rule 6.

[82] Sec. 5B CLA read with Reg 3 of the Civil Law (Third-Party Funding) Regulations 2017.

[83] See https://www.singaporeconvention.org/jurisdictions/singapore.

[84] Sec. 35B LPA.

[85] This section is based upon information contained on the Singapore Convention website: www.singaporeconvention.org/jurisdictions/georgia. We have been unable to independently review these materials.

mediated settlement agreement or a certified copy, as well as a certified translation in the Georgian language, and that there be evidence that the settlement agreement is the result of mediation, which can be in the form of the mediator's signature on the settlement agreement, or an attestation issued by the mediator or the administering institution or any other evidence. Notably, these categories of evidence are narrower than those provided in Article 4(b) SCM.[86] Finally, Article 363[44] of the Civil Procedural Code of Georgia prescribes a timeline and procedure for the enforcement and recognition of international mediated settlement agreements.

iii. *Reliance on Existing Laws: Saudi Arabia*

The SCM was given effect in Saudi Arabia pursuant to Royal Decree No (96), issued on 9 April 2020. The decree implements Saudi Arabia's obligations under the Singapore Convention, making international mediation settlement agreements under the Convention directly enforceable in the courts of the Kingdom of Saudi Arabia from 5 November 2020.

With respect to the procedures for enforcing an international mediated settlement agreement in the Saudi courts, it appears that this will need to be done in the same manner as arbitral awards under Saudi Arabia's Execution Law, Royal Decree No (M/53), 3 July 2012. The Execution Law deals generally with the enforcement of certain documents in the Saudi courts. Under the Execution Law, it would appear to be necessary for international mediated settlement agreements to meet the requirements set out under the SCM (e.g., Art. 4). However, international mediated settlement agreements will also need to meet the requirements not contained in the SCM but specific to the Execution Law, e.g., consistency with *Shari'a* principles.[87]

iv. *Reliance on Existing Laws: Ecuador*

The implementation of Ecuador's obligations under the SCM is effected through the existing General Organic Code of Processes (*Código Orgánico General de Procesos*) ("GOCP").[88] Article 103 of the GOCP expressly provides for foreign settlements in Ecuador to have the force granted to them by relevant international treaties and permits courts to order the execution of international mediated settlement agreements (Art. 363 GOCP). The form requirements for the recognition and homologation of settlement agreements are laid out in the GOCP, especially Article 104.[89]

* * *

[86] Article 4(b) SCM allows additionally "[a]n attestation by the institution that administered the mediation" as well as "any other evidence acceptable to the competent authority".

[87] Saudi Arabia Execution Law, Art. 2.

[88] https://ccq.ec/wp-content/uploads/2019/01/Co%CC%81digo-Orga%CC%81nico-General-de-Procesos.pdf

[89] Specifically that (a) the international award complies with the formalities required for it to be considered authentic in the State where it was issued; (b) it is translated if not in Spanish; and (c) and it specifies the domicile of the party against whom the settlement agreement is being enforced.