SETTLEMENT OF INTERNATIONAL INVESTMENT DISPUTES ACT

Philippe Lortie
Canada

Introduction

[1] In August 1996, the Department of Justice of Canada sought the assistance of the Uniform Law Conference of Canada (ULCC) to prepare a uniform act to implement the *Convention on the Settlement of Investment Disputes between States and Nationals of other States* (the *Convention*), opened for signature in Washington on March 18, 1965. The text of the *Convention* is set out in the schedule of the *Convention's* Uniform Implementing Act (Annex A). The ULCC agreed to the project and decided to include it in its August 1997 Annual Meeting Agenda.

[2] The objective of this report is to describe the *Convention*, the methodology followed to implement it and its clause by clause implementation assessment. This report will lead to a discussion of the *Convention's* Uniform Implementing Act.

I - THE ICSID CONVENTION

A - Description of the ICSID Convention

[3] The *Convention*, which was sponsored by the World Bank in order to facilitate and increase the flow of international investment, was finalised in Washington on March 18, 1965, and came into force on October 14, 1966.

[4] At present, the *Convention* applies in 128 countries, including all members of the G-7 and the OECD with the exception of Canada and in the latter case Mexico and Poland.

[5] The *Convention* establishes rules under which investment disputes between States and nationals of other States may be solved by means of conciliation or arbitration. It also creates the International Centre for the Settlement of Investment Disputes (ICSID or the Centre) to administer the cases brought under the *Convention*. ICSID is an international organisation closely associated with the World Bank.

1 - Jurisdiction of the Centre - Article 25(1)

[6] For the ICSID system to be open to parties to investment disputes, three requirements under Article 25(1) of the *Convention* must be met. First, the dispute must be between a Contracting State (or the constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another State.

[7] Second, the dispute must be a legal dispute arising directly out of an investment. ICSID does not deal with purely commercial disputes or mere conflicts between the parties, such as the desirability of renegotiating an investment agreement. The lack of definition of the term "investment" has allowed the *Convention* to adapt itself to evolving circumstances and to include within its scope new forms of investment dealings which have appeared since it came into force. For example, disputes which have been submitted to date to ICSID have arisen from a variety of agreements relating to the exploitation of natural resources, tourism development, construction of a chemical plant on a turn-key basis and urban development in the form of housing projects.

[8] Third, the ICSID system rests exclusively on the voluntary consent of the parties to an investment dispute. The mere ratification of the *Convention* does not create any obligation on the part of a Contracting State to resort to the ICSID arbitration machinery. Such an obligation would arise only after the State had agreed in writing to submit a specific dispute or class of disputes to ICSID. Once such consent is given, it is irrevocable. The consent to ICSID arbitration, once given, excludes any other remedy except if the parties have stated otherwise or if the Contracting State has required the exhaustion of local administrative or judicial remedies as a condition of its consent.

2 - The Applicable Law - Articles 42(1) & 54(3)

[9] The ICSID system is considered an inexpensive and highly flexible form of international arbitration. Thus, most of the rules in the *Convention* relating to the conditions of arbitration can be modified by agreement of the parties in order to suit their particular needs. Article 42(1) recognises the rights of the parties to choose the law applicable to their investment relationship. The same Article provides that "in the absence of such agreement, the [ICSID] 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". Finally, Article 54(3) provides that the execution of the award shall be governed by the laws concerning the execution of judgements in force in the State in whose territories such execution is sought.

3 - Recognition and Enforcement of the Award - Article 53(1) and Article 54, Paragraphs (1) & (2)

[10] Article 53(1) of the *Convention* provides that an ICSID arbitral award is binding on the parties and shall not be subject to any appeal or other remedy except those under

the ICSID system (i.e. the remedies of interpretation, revision and annulment of an award). Thus, an ICSID arbitral award constitutes a truly international award subject solely to the rules of the *Convention*. Under this self-contained system of arbitration, the exclusive role of domestic courts is one of judicial assistance to facilitate recognition and enforcement of arbitral awards. The ICSID regime is different from the one set out under the *New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards* (the *New York Convention of 1958*) which allows domestic tribunals to refuse the recognition and enforcement of arbitral awards. As the *New York Convention of 1958* can not be used to recognise and enforce ICSID awards it is then necessary to implement the *Convention*.

[11] Article 54(1) of the *Convention* stipulates that each Contracting State has to recognise an ICSID arbitral award as binding and to enforce the pecuniary obligations the award imposes as if it were a final judgement of a court of that State. The procedure set forth in the *Convention* for the recognition and enforcement of an ICSID arbitral award is simple. Article 54(2) provides that any party to an ICSID award may obtain recognition and enforcement of the award by providing the competent court or other authority designated for the purpose by each Contracting State with a certified copy of the award. The Government of Canada will designate, in accordance with Article 54(2), the courts in the provinces and territories which are competent for such matters according to the rules of civil procedure in force in those jurisdictions.

B - Consultation on Canadian accession and implementation

[12] As the *Convention* does not contain a federal state clause, Canada will not accede to it without the support of all provinces and territories. At the moment nine jurisdictions have expressed support in principle. The best scenario would have the consultation finalised by the end of winter 1997-1998.

C - Comments and Answers to Questions Raised by the Provinces and Territories

[13] During the federal-provincial-territorial consultations, the provinces and territories asked the federal government questions in relation to the *Convention*. The federal government replied to the provinces and territories. The comments and answers to those questions guided the work of the ULCC-ICSID Working Group and are included hereafter.

1 - Designation of Constituent Subdivision - Article 25, Paragraphs (1) & (3)

[14] Article 25(1) of the *Convention* provides that a Contracting State is entitled to designate “constituent subdivisions” which may utilise the ICSID mechanism. The Secretary General of ICSID has told the Government of Canada that the provinces and territories will be considered “constituent subdivisions” for the purposes of the *Convention*. Australian practice under the *Convention* bears this out.

[15] Under Paragraph (3) of this Article, a "constituent subdivision" could consent to arbitration without the approval of the federal authorities of the Contracting State provided the latter have notified ICSID that no such approval is required. Some provinces have asked if they could be designated under Paragraphs (1) and (3) of Article 25. The Government of Canada will designate provinces and territories under Paragraph (1) should they so wish. Furthermore, the Government of Canada will notify ICSID under Paragraph (3) that no prior federal approval will be required for designated provinces or territories to consent to ICSID proceedings.

[16] It should be pointed out that the existence of such designations suggests a need to proceed with caution in order to avoid multiple proceedings concerning the same dispute. Investment agreements will need to be carefully drafted to take into account agreements the investor may have with another federal, provincial or territorial government in Canada in respect of the same investment.

2 - Constitutional issues

[17] One province sought clarification as to the application of the *Convention* in areas of shared jurisdiction or areas where the division of powers between the federal and provincial governments may be unclear. For example, an investor might enter into agreements with the federal and provincial governments providing for different dispute settlement mechanisms with respect to the same investment. Two issues are raised by this question.

[18] First, with respect to the need to avoid a multiplicity of proceedings, as indicated in the comment with respect to designations under Article 25, this is essentially a matter that has to be resolved through careful drafting of the arbitration agreements on a case-by-case basis.

[19] Secondly, the possibility that arbitral panels might rule on constitutional issues in disputes between the federal and provincial governments could be avoided by drafting clear arbitration clauses or agreements. In this context, it is important to recall that ICSID's jurisdiction extends to any legal dispute arising directly out of an investment, between a Contracting State, or its designated "constituent subdivisions", and a national of another Contracting State. It does not apply to disputes between the constituent elements of the host State of the investment. Disputes relating to the division of powers in Canada, of course, can be referred to the domestic courts by the parties to the dispute for any binding resolution.

3 - The Applicable Law - Federal-State Interpretation Clause - Articles 42(1) & 54(3)

[20] One province has asked whether it was necessary to include a federal-State interpretation clause in the *Convention* to guide the ICSID Tribunal in the interpretation of any reference in the *Convention* to the law or legislation of a federal State. Clearly, it is the view of the federal government that the laws in force in the province - including both provincial law and federal law - will be applied by the Tribunal. In the light of the circumstances of each case submitted to the Tribunal, it will decide on the applicable law. However, it does not seem that the inclusion of a federal State interpretation clause would be appropriate in this case as the *Convention* does not encompass such a clause. Furthermore, none of the 128 States party to the *Convention* have included such a clause in their Instrument of Ratification.

[21] With regard to the law applied by the ICSID Tribunal to decide the dispute, the Tribunal will refer to the rules of law as may be agreed by the parties or, in the absence of such agreement, to the subsidiary rules set out in Article 42(1), i.e. "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".

[22] As for the laws in force concerning the execution of judgements under Article 54(3), the applicable law will be the law and rules applied by the Courts in the province. This will include mainly the Common Law and provincial Rules of Civil Procedure - the Civil Code and the Code of Civil Procedure in Quebec and will include federal norms in the case of the Federal Court.

4 - Limitation of Classes of Disputes - Article 25(4)

[23] Article 25(4) provides that any Contracting State may notify ICSID of the class or classes of disputes which it would or would not consider submitting to ICSID's jurisdiction. Some provinces suggested that it would be desirable to keep to a minimum the classes of disputes which would not be submitted to the jurisdiction of ICSID. The federal government agrees with this view. Therefore, it would be recommended not to notify ICSID pursuant to this provision. (see paragraphs [45]-[47]).

5 - Exhaustion of Local Remedies - Article 26

[24] A question was raised concerning the ability of a province to invoke Article 26 which provides that "a Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration". According to ICSID's Legal Advisor there is no doubt that a province or territory, which has been designated pursuant to Article 25(1) and whose consent to arbitration does not require in any event the approval of the federal authorities of the Contracting State pursuant to

Article 25(3), could require the exhaustion of local remedies as a condition of its consent to arbitration. The federal government agrees with this opinion.

[25] However, instead of requiring exhaustion of local remedies, provinces and territories designated may wish to consider a provision such as the one used in Article 1121 of NAFTA, which requires investors to waive the use of local remedies if international arbitration is employed - except, as provided for in Subparagraphs 1121(1)(b) and 1121(2)(b), "for injunctive, declaratory or other extraordinary relief, not involving the payment of damages [...]." (see paragraphs [48]-[49]).

6 - Financing ICSID - Article 17

[26] One province asked if it would be required to participate in the financing of ICSID by virtue of Article 17. Only the Government of Canada, as a member of the World Bank, is responsible for the Bank's expenses, including any excess expenditures incurred by ICSID. However, there are fees for the use of ICSID facilities and if a province or territory agrees to refer an investment dispute to ICSID, it would normally pay its share of the costs as set out in the investment dispute settlement provisions of its agreement with the investor of another Contracting Party

7 - Privileges and immunities - Articles 18 to 24

[27] Questions were also raised concerning the privileges and immunities provided by Articles 18 to 24 enjoyed by the members of ICSID and, to a lesser extent, parties to the proceedings. These privileges and immunities will be set out in federal legislation and therefore the Uniform Act will not deal with such.

8 - Place of proceedings - Article 63

[28] No questions were raised concerning this Article, but the federal Government will take all the measures necessary to facilitate arrangements with ICSID, in accordance with Article 63, to hold either conciliation or arbitration proceedings in the arbitration centres established in Quebec and British Columbia if they are interested in making such arrangements. ICSID has already concluded arrangements as envisaged in Article 63 with the Permanent Court of Arbitration at The Hague and dispute settlement centres in Cairo, Kuala Lumpur, Sydney and Melbourne.

D - The Convention - A Priority for Canada

[29] The *Convention* has become a priority since Canada is the only member of the G-7 and along with Mexico and Poland one of only 3 of 29 OECD Members that has not ratified it. The federal government considers that Canada should sign and ratify the *Convention* because it would facilitate the resolution of investment disputes which Canadian investors abroad might encounter in any of the 128 countries party to the

Convention. Some of these countries, such as China, were visited by Team Canada and will be the focus of Canadian investors in the near future. Furthermore, some of these 128 countries are not party to the *New York convention of 1958* thus making it impossible to recognise and enforce Canadian investors' arbitral awards in those countries. Signature and ratification of the Convention would bring Canadian policy into line with our OECD partners and would be a logical next step within Canada now that all jurisdictions have arbitration laws in place to implement the *New York Convention of 1958* and the UNCITRAL *Model Law on International Commercial Arbitration*. Finally, the *Convention* is mentioned in both NAFTA, as an optional dispute settlement mechanism for investor-State disputes, and in 15 of the Foreign Investment Protection Agreements (FIPAs) concluded by Canada so far. Canada and Mexico not being parties to the *Convention* it cannot be used in the context of NAFTA as both the State of the investor and the Contracting State party to the dispute have to be parties to the *Convention* in order to use it. On the other hand, the ICSID *Additional Facility* can be used for investor-State disputes between Canada and the United States since the latter has ratified the *Convention*. If Canada was to become party to the *Convention* such disputes could be resolved under the *Convention* and investor-State disputes between Canada and Mexico could be handled under ICSID's *Additional Facility*.

II - IMPLEMENTATION METHODOLOGY

A - Implementation Methods used in Canada

[30] Generally, there are three methods - options - by which international treaties are implemented in Canada.[1]

[31] Option (1) - The treaty can be incorporated in a short act which expressly gives the force of law to the treaty or certain of its articles. Then the treaty or such articles may be set out as a schedule to the act (e.g.: The *Act implementing the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, C.S. c. U-2.4; and, the *Foreign Missions and International Organisations Act*, C.S.C., c. F-29.4, C.S. (1991), c. 41).

[32] Option (2) - The treaty may be implemented by an act which may employ its own substantive provisions to give effect to the treaty, the text of which is not directly enacted or referred to (e.g.: Section 7(2.2) of the *Criminal Code* i.e., the *Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*, done at Rome on March 10, 1988).

[1] Verdon, Christiane, «Le Canada et l'unification internationale du droit privé», (1994) 32 C. Yrbk. Int'l L., pp. 3-37, at p. 30; and, Brownlie, Ian, Principles of Public International Law, 2nd ed., Clarendon Press, Oxford, 1973, 733 p., at p. 50.

[33] Option (3) - Even where the treaty is referred to in the long and short titles of the Act and also in the preamble and schedule for dissemination purposes, the Act may not expressly give the force of law to the treaty. Rather, contents of the provisions will allow the enforcement of the treaty in domestic law as is necessary to comply with the obligations imposed on the State without expressly giving the force of law to the treaty like under option (1). However, the provisions of the act implement the treaty in domestic law (e.g.: *NAFTA* and the United Kingdom and the New Zealand *Arbitration (International Investment Disputes) Acts*).

B - Relation between the ICSID Convention and Domestic Courts

[34] Georges Delaume, former Senior Legal Advisor of ICSID, describes the relation between the ICSID Convention and domestic law and domestic Courts:

> "The *Convention* provides for a truly international arbitration machinery, operating under the auspices of ICSID. Within the framework of the *Convention* and of the Regulation and Rules for its implementation, ICSID arbitration constitutes a self-contained machinery functioning in total independence from domestic legal systems. The autonomous character of ICSID arbitration is clearly stated in Article 44 of the *Convention*, according to which:
>
> > "Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question."
>
> and in Article 26 of the *Convention*, which provides: "Consent of the parties to arbitration under this *Convention* shall unless otherwise stated be deemed consent to such arbitration to the exclusion of any other remedy." By submitting to ICSID arbitration the parties therefore have the assurance that they may take full advantage to [*sic*] procedural rules specifically adapted to their needs and equally important that the administration of these rules will be exempt from the scrutiny or control of domestic courts and states that are parties to the *Convention* (contracting States). In the context of the *Convention* domestic courts must abstain from taking any action that might interfere with the autonomous and exclusive character of ICSID arbitration. In other words if a court in a contracting State becomes aware that a claim before it may call for adjudication under ICSID

> the court ought to stay the proceedings pending proper determination of the issue by ICSID."[2]

[35] Furthermore, as noted above, Paragraph (1) of Article 53 of the *Convention* provides that an ICSID arbitral award is binding on the parties and shall not be subject to any appeal or other remedy except those under the ICSID system (i.e. the remedies of interpretation, revision and annulment of an award). Thus, an ICSID arbitral award constitutes a truly international award subject solely to the rules of the *Convention*. Under this self-contained system of arbitration, the exclusive role of domestic courts is one of judicial assistance to facilitate recognition and enforcement of arbitral awards.

[36] In summary, the ICSID arbitration rules and process are as remote as possible from both domestic law and courts and only the provisions of the *Convention* relevant to the role of the domestic courts should be implemented in domestic law. Furthermore, these provisions have been checked against the already implemented general arbitration regimes for potential conflicts i.e. the *New York Convention of 1958* and the UNCITRAL *Model Law on International Commercial Arbitration*. As most of the ICSID arbitration process differs from existing regimes, the Working Group recommends including a prevalence provision in the Uniform Act in the event of inconsistency with other Acts.

[37] Thus, it is the recommendation of the Working Group that the most appropriate means of implementing the *Convention* in Canada would be through the method described in option (3) (see paragraph [33]). This implementation method was followed by the United Kingdom and New Zealand to implement the *Convention* in their territories.

C - Implementation Principles Followed

[38] The Working Group adopted the following implementation principles from Professor Ian Brownlie:

> "It is only in so far as the rules of International Law are recognised as included in the rules of municipal law that they are allowed in municipal courts to give rise to rights and obligations. [...] [I]nternational law has no validity save in so far as its principles are accepted and adopted by our own domestic law."[3]

[39] Therefore, where rules of international law established by the *Convention* are not relevant to the limited role of the domestic courts, they will not be implemented in domestic law.

---

[2] Delaume, Georges R., «ICSID Arbitration and the Courts», (1983) 77:4 A.J.I.L., pp. 784-803, at pp. 784-785.

[3] Brownlie, Ian, *Principles of Public International Law*, 4th ed., Clarendon Press, Oxford, 1990, at pp. 47-48

D - Clause by Clause Analysis of the Convention

[40] Unless otherwise stated, the provisions of the *Convention* not discussed below do not require implementation.

1 - Article 17 - Financing the Centre

[41] Payments under Article 17 could be made directly to the World Bank by the Federal Government. The authority to make payments to the World Bank is provided to the Minister of Finance by the *Bretton Woods and Related Agreements Act*. (see paragraph [26]).

- No need for Provincial and Territorial implementation.
- No Federal implementation is necessary. The legislation is already in place.

2 - Articles 18-24 - Immunities and Privileges

[42] These privileges and immunities will be set out in the federal legislation. As some provinces and territories may have existing administrative arrangements with regard to diplomats and consuls in their jurisdiction, such jurisdictions may have to make similar arrangements with regard to individuals in their jurisdiction that will enjoy privileges and immunities under the *Convention*. (see paragraph [27]).

- No need for provincial and territorial implementing legislation. Possible administrative arrangements.
- Federal implementation may be needed. In due time, an implementation assessment will be done in the light of the *Foreign Missions and International Organisations Act*, C.S.C., c. F-29.4, C.S. (1991), c. 41.

3 - Article 25(1) - Jurisdiction of the Centre - "Contracting State" and "constituent subdivision"

[43] Any Province or Territory that wishes to be designated as a "constituent subdivision" will have to bind itself to the Uniform Act implementing the *Convention* and will also have to provide that ICSID awards are enforceable against the provincial Crown or the government of the Territory. A province or territory that does not wish to be designated as "constituent subdivision" will still have to enact the Uniform Act but without binding itself.

- Provincial and territorial implementation of this provision is needed where provinces and territories wish to be designated as "constituent subdivisions" under Article 25(1).
- Federal implementation is required as Canada is the "Contracting State".

4 - Article 25(3) - Consent by a "constituent subdivision"

[44] It is the Government of Canada's intention to notify ICSID under Paragraph (3) of Article 25 that no prior federal approval will be required in order to submit an investment dispute to ICSID between a designated Canadian province or territory and an investor of another State. This provision should not give rise to any rights and obligations in domestic courts. Canada's notification to ICSID is sufficient for ICSID's purposes.

- No need for federal, provincial and territorial implementation.

5 - Article 25(4) - Limitation of the scope of application of the Convention

[45] Paragraph (4) of Article 25 provides that any Contracting State may notify ICSID of the class or classes of disputes which it would or would not consider submitting to ICSID's jurisdiction. As it was recommended earlier, it would be preferable not to notify ICSID according to this provision and to leave the field clear. (see paragraph [23]).

[46] Notifications under Paragraph (4) are extremely rare. In fact, any notification under that Paragraph would limit Canada's openness to foreign investments and would send negative signals to potential foreign investors interested in Canada.

[47] In order to alleviate the negative impact of a notification under Paragraph (4) of Article 25, governments in Canada could limit the application of the *Convention* on a case-by-case basis by deciding not to include ICSID arbitration agreements in their investment contracts with foreign investors. Furthermore, the governments could also limit the application of the *Convention* by simply deciding not to consent to ICSID arbitration on an as needed basis.

- On that basis, the Working Group recommends that a provision limiting the scope of application of the *Convention* in Canada should not be implemented by any government in Canada.

6 - Article 26 - Exhaustion of Local Remedies

[48] If governments in Canada were to require the exhaustion of local remedies it would seem more appropriate to request that this take place on a case-by-case basis rather than by imposing this condition through the implementing legislation of the *Convention*. In practice, a requirement to exhaust local remedies is extremely rare. Moreover, such a requirement could limit Canada's openness to foreign investments and could send negative signals to potential foreign investors interested in Canada.

[49] Instead of requiring the exhaustion of local remedies, governments in Canada may wish to consider including in their arbitration agreements a provision similar to Article 1121 of NAFTA. (see paragraph [25]).

- On that basis, the Working Group recommends that a provision requiring the exhaustion of local remedies should not be implemented by any government in Canada.

7 - Article 26 - Exclusion of any other Remedy

[50] Article 26 provides that "[c]onsent of the parties to arbitration under this *Convention* shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy." The ICSID Tribunal should be the only one deciding what are the excluded remedies, if there is a dispute to that effect; it is an essential element of the jurisdiction of the ICSID Tribunal. There would be a danger in having competing decisions from an ICSID Tribunal and a domestic Court on such matter. As mentioned earlier, in the context of the *Convention* domestic courts must abstain from taking any action that might interfere with the autonomous and exclusive character of an ICSID arbitration.

- On that basis, the Working Group recommends that Article 26 should not be implement and therefore does not appear in the Uniform Act.

8 - Article 35 - Conciliation - Agreement of the parties to refer in other proceedings to views expressed or statements or admissions or offers of settlement made by the other party in the Conciliation, or the report or any recommendation made by the Commission

[51] It is recommended to implement this provision. The implementation of this provision will provide for the condition set out in the *Convention* regarding the agreement of both parties to use documents or communications from ICSID conciliation proceedings before domestic courts, arbitrators, or otherwise.

- Federal, provincial and territorial implementation is needed.

9 - Article 43 - Tribunal's power to call evidence and visit

[52] Article 43 of the *Convention* and ICSID's *Arbitration Rule* 34(3) that states that "[t]he parties shall co-operate with the [ICSID] Tribunal in the production of the evidence [...]", does not provide for assistance from domestic courts in taking evidence contrary to other arbitration procedures.

- No need for federal, provincial and territorial implementation.

10 - Article 47 - Provisional measures

[53] Article 47 of the *Convention* has to be read with ICSID's *Arbitration Rule* 39(5) which provides that "[n]othing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to the institution of the proceeding, or during the proceeding, for the preservation of their respective rights and interests".

[54] It is important to implement Rule 39(5) in order to override Article 9 of the *Commercial Arbitration Code* which applies whether the place of arbitration is inside or outside Canada. Contrary to Rule 39(5), Article 9 provides that "[i]t is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure". Therefore, if Rule 39(5) was not implemented, a party to an ICSID proceeding could unilaterally request provisional measures without the consent of the other party and thus could infringe an arbitration agreement and would contravene to Rule 39(5). Consequently, Rule 39(5) should be implemented in order to avoid this possibility and to override Article 9 of the *Commercial Arbitration Code* by virtue of the prevalence provision.

- Federal, provincial and territorial implementation is needed.

11 - Articles 50-52 - Interpretation, Revision and Annulment of the Award

[55] These provisions will need to be implemented in order to provide for stay of enforcement proceedings in the domestic courts where enforcement of an award is stayed under the *Convention*.

- Federal, provincial and territorial implementation is needed.

12 - Article 53 - The Award is binding on the Parties - No Appeal - No other Remedy

[56] This provision will need to be implemented in order to (1) provide that the awards are binding on the parties, (2) provide that the awards are final and that they are not subject to any appeal or to any other remedy except those provided for in the *Convention*, and (3) specify that an award shall include any decision interpreting, revising or annulling an award.

- Federal, provincial and territorial implementation is needed.

13 - Article 54 - Recognition of the Award as if it were a final decision of a domestic court

[57] This provision will need to be implemented in order to (1) provide that the awards are binding and enforceable as if they were final judgements of a domestic court (2) provide that the awards are enforceable against the Crown in the same manner and to the same extent as judgements are enforceable against the Crown.

- Federal, provincial and territorial implementation is needed.

14 - Article 55 - State Immunity

[58] Federal implementation of this provision is necessary to ensure that the *State Immunity Act*, S.C. 1980-81-82-83, c. 95, will prevail over the *Convention*'s implementing legislation.

- No need for Provincial and Territorial implementation and therefore will not appear in the Uniform Act.
- Federal implementation is needed.

15 - Article 68(2) - Ratification respective of Constitutional procedures - Coming into force

[59] As the *Convention* will come into force in all 13 Canadian jurisdictions on the same day and only 30 days after the date of deposit of Canada's Instrument of Ratification, it is important that we provide for an effective and simple provision regarding the coming into force of the *Convention*. Therefore, the Working Group does not recommend proclaiming the implementing legislation in force on the day the *Convention* comes into force for Canada because the delay before knowing such date is to short. Instead, the Working Group recommends that the legislation implementing the *Convention* comes into force on Royal Assent, with the understanding that the Act has no effect until the Convention comes into force for Canada.

- Federal, provincial and territorial implementation is needed

E - Other Implementation Issues in relation to the Convention

1 - Miscellaneous issues

[60] Comments regarding other implementation issues appear in the text of the Draft Uniform Act. They include (1) regulation power; (2) Rules of Court; and, (3) appearance of non-provincial Bar members in ICSID conciliation and arbitration proceedings.

[61] As for the appearance of non-provincial or non-territorial Bar members in conciliation and arbitration proceedings, Section 12 of the Uniform Act dealing with regulation powers integrates the language of Section 38 of the *International Commercial Arbitration Act* of British Columbia that handles this question. For information purposes, herewith is the regulation of British Columbia taken to that effect and adapted for the circumstances :

> «A person who is not a member of the Law Society of [name of the province or territory], and appears as counsel or advocate in an arbitration [or conciliation] under the [*Settlement of International Investment Disputes Act*] or gives legal advice concerning that arbitration [or conciliation] is with respect to that appearance or legal advice, exempt from [refer to the necessary provisions of the act governing the legal profession].»

2 - Interpretation Provision

[62] The Working Group had very interesting discussions regarding the interpretation of uniform legislation implementing international conventions. The discussions evolved around the fact that such legislation should be interpreted in a manner that should promote uniform domestic (i.e. across Canada), national (i.e. foreign jurisdictions) and international (i.e. ICSID Tribunals) application of the *Convention*. The Working Group recognised that this matter would need further analysis and attention from the interested Canadian actors in this area. Therefore, it was left out of this drafting exercise.

[63] In applying or interpreting the Convention the Working Group would recommend, in particular, referring to the following documents that can be ordered from ICSID, 1818 H Street, N.W., Washington, D.C. 20433, USA:

- International Centre for the Settlement of Investment Disputes, *Basic Documents*, ICSID/15, Washington D.C., 1985, 107 p.
  Includes:
  - The Convention
  - The Administrative and Financial Regulations
  - The Institution Rules
  - The Arbitration Rules
  - The Conciliation Rules

- International Centre for the Settlement of Investment Disputes, Analysis of Documents concerning the Origin and the Formulation of the Convention, Vol.I, Washington D.C., 1970, 403 p.

- International Centre for the Settlement of Investment Disputes, Analysis of Documents concerning the Origin and the Formulation of the Convention, Vol.II Part I & Part II, Washington D.C., 1970, 1088 p.

- International Bank for Reconstruction and Development, «Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States», (1965) 4 I.L.M., pp. 524-544

- ICSID Review - Foreign Investment Law Journal

III - RECOMMENDATION

[64] That the attached Uniform Act be discussed and adopted.