

# YOUNG|ICCA

## UNCITRAL WORKING GROUP II (Arbitration and Conciliation)

### **Report from the 56<sup>th</sup> Session, New York, February 6-10, 2012 by David Kavanagh**

The United Nations Commission on International Trade Law (UNCITRAL) was established by the United Nations General Assembly in December 1966. UNCITRAL plays an important role in developing an improved framework for the facilitation of international trade and investment, and in this regard, pursues its mandate to further the progressive harmonization and modernization of the law of international trade by preparing and promoting the use and adoption of legislative and non-legislative instruments in a number of key areas of international law, including dispute resolution. These instruments are negotiated through an international process involving a variety of participants, including the member States of UNCITRAL, which represent different traditions and levels of economic development; non-member States; intergovernmental organizations; and non-governmental organizations (like ICCA). UNCITRAL has been widely recognized as the core legal body of the United Nations system in the field of international law.

The membership of UNCITRAL is structured to ensure that the various geographic regions and principal economic and legal systems of the world are represented. As of 2002 there are sixty member States of UNCITRAL at any one time. The General Assembly elects members for terms of six years, every three years. The sixty member States include 14 African States, 14 Asian States, 8 Eastern European States, 10 Latin American and Caribbean States and 14 Western European and other States. The first organizational level of UNCITRAL is the Commission itself which holds an annual plenary session in New York. The Commission prepares and adopts a yearly report on its work, which is in turn presented to the General Assembly for consideration. The second level is the inter-governmental Working Group(s), which generate the bulk of the work product of UNCITRAL. These Working Groups carry out UNCITRAL's substantive preparatory work. For example, Working Group II (Arbitration and Conciliation) meets twice yearly in New York and Vienna to work on topics defined by the Commission. The third level is the Secretariat, whose staff is drawn from the ranks of the international trade law division of the

United Nations Office of Legal Affairs. The Secretariat, now based in Vienna, prepares studies, reports and draft texts on matters being dealt with by the Working Groups, as well as performing legal research and administrative assistance in this regard.

UNCITRAL works to produce several different types of legislative text, including conventions; model laws; legislative guides; and model provisions. Within international dispute resolution, the UNCITRAL Model Law on International Commercial Arbitration (2006) is an example of a procedural instrument which States are encouraged to adopt, or incorporate, into their domestic legislation. Furthermore, the UNCITRAL Arbitration Rules (2010) are an example of a set of contractual provisions that parties are free to incorporate into their agreements.

As already mentioned, the Working Groups of UNCITRAL are composed of member States of the Commission, as well as certain international governmental and non-governmental organizations that are invited by the UNCITRAL Secretariat to attend and observe the sessions. The latter are selected based on their organization's experience or international expertise within the relevant field. ICCA is just such a non-governmental organization, and has been invited to send an observer delegate to Working Group II's bi-annual sessions. It was in this representative capacity that I found myself attending the fifty sixth such session in New York from February 6 - 10 early this month.

At the Commission's annual session in New York during June of 2008 it was agreed that Working Group II (Arbitration and Conciliation) would proceed with the work of revising the UNCITRAL Arbitration Rules in their generic form. As well as this, the topic of transparency in treaty-based investor-State was seen by the Commission as "worthy of future consideration, and should be dealt with as a matter of priority immediately after completion of the current revision of the UNCITRAL Arbitration Rules." The Commission agreed by consensus on the importance of ensuring transparency in investor-State dispute resolution.

Working Group II set about the business of revising the UNCITRAL Arbitration Rules, and the finished product, the UNCITRAL Arbitration Rules (as revised in 2010), was adopted by the Commission at its annual session in June of 2010. It was also at this time that the Commission recalled its previous decision to focus on the next issue at hand, namely, a legal

standard on transparency in treaty-based investor-State arbitration. The Commission entrusted the Working Group with this task, and the sessions this February were the fourth time that transparency had been on its agenda.

The fifty-sixth Working Group sessions took place at United Nations Headquarters, housed for the week in one of the large, purpose built, conference halls that can be found in the vast and wonderful complex that hugs the East River in midtown Manhattan. Each delegation sits behind the name of its State or organization, which is found etched into the traditional brown and white name placards used throughout the UN system. Should a delegation wish to make comments from the floor at any time, the delegate will raise up the placard so as to be recognized by the Chairman. While sessions are in progress there are normally a few hundred people present, many of whom listen intently to deliberations, assisted in their efforts by the translation earphones that are provided at each seat. Delegates and observer delegates alike, as well as Secretariat staff and visitors, are seated throughout the room, overseen from above by the team of translators who work in the six official languages of the U.N.

The Working Group member States represent a varied and diverse cross section of the international community, and coupled with the international observer organizations, one immediately begins to understand the sensitivity, delicacy and nuance that is employed in the pursuit of consensus. It is staggering to observe how initially divergent positions move closer together over the course of the week long sessions. For me, this was an example of how mature and reasonable discourse can and does produce tangible results for international States and actors, even when confronted with the difficulty of challenging and complex differences in opinion. Of course, things move slowly in this context, almost inevitably so. However, there is a palpable determination on the part of the Chair, the delegates and the Working Group as a whole to at least move the agenda forward, so that collectively the participants can fulfill the Group's mandate.

At the head of the conference hall sits Salim Moollan, the Chairman of the Working Group. This is an elected post, voted on by the members of the Working Group at the commencement of each bi-annual session. Salim was installed as Chair at the last Working Group session in Vienna, and his tenure was extended by the members in New York last week.

The Chair sits at a raised dais at the front of the hall, joined there by the elected Rapporteur of the session and other high level staff of the Secretariat. It is the Chair's job to lead the agenda, marshal the discussions and debate that ensue, and when impasse is reached on specific proposals, circulate around the hall seeking out and building consensus amongst the delegations. Indeed, discussions will often take place on the margins of the conference hall after a session has been closed; the work of the delegates continuing over lunch and dinner each day. In this context, not only must the Chair have thorough substantive and procedural knowledge of the matters that the Working Group is charged with focusing on, but he or she will inevitably be called upon to exercise sound, sometimes stern, judgment in keeping proceedings on track. In this regard, patience and experience play critical roles.

The topic of transparency in international investment arbitration is of profound importance, and has been much discussed by myriad stakeholders and commentators over the past few years. Significant and substantial questions have been raised in relation to how transparency fits with theories of the consent-based essence of international treaty-based arbitration, political legitimacy, international and domestic justice, human rights, due process and certitude. State actors and foreign direct investors, as well as numerous academics, policy makers, international arbitrators and practitioners, private sector entities and NGOs have all weighed in on the debate. The policy context of their conversations should be understood against the background of the use of foreign direct investment as a tool for long-term sustainable growth in developing countries, the creation of a meaningful opportunity for public participation in international law, as well as the promotion of core ideals such as the rule of law, good governance, due process, fairness and legitimacy. The complexity of the debate increases when one looks at the different concerns that host States have in comparison to those of investor States. Some of the questions that arise alongside increased transparency and public access in international investment arbitration revolve around the form and nature of any legal standard and its scope and applicability, and the substance of issues like confidentiality, public hearings, *amicus curiae* briefing, publication of awards and so on. Diving deeper into the debate, these themes tend to become even more nebulous, or defined, depending on your point of view.

Draft sets of proposed transparency rules have been generated by the UNCITRAL Secretariat since the February 2011 session, and they have been worked on at each session (and in between sessions) by member States and the other delegates. The working text includes eight proposed articles on transparency in the investor-State context, each Article then being subdivided into a number of proposed variants. The eight Articles are entitled as follows; scope of application; publication of information at the commencement of arbitral proceedings; publication of documents; publication of arbitral awards; submissions by a third party; submission by a non-disputing Party to the treaty; public hearings; exceptions to transparency. Indeed, a major debate at the fifty sixth session was over what form the Working Group's transparency rules would take; whether they would be incorporated in a standalone rule format, or whether they would be incorporated into the UNCITRAL Arbitration Rules (2010) as an annex.

During a typical working session, a State will advocate a position on behalf on its preferred variant, oftentimes putting forward revised text on the spot (during the sessions) so as to build consensus and facilitate compromise. Staff in the Secretariat will work hard in between sessions to set down language, based on what takes place in the conference hall, and member States will circulate draft text amongst one another, as well as the Chair and the Secretariat, in order to maximize efficiency during the week long proceedings. The Chair will lead the delegates through each article in turn, and debate will unfold in this way. The outcome of the Working Group session is the adoption of a report of the proceedings that is then presented to the Commission's annual session. This report will normally contain standing orders and instructions to the Secretariat directed at preparing for the next Working Group meeting.

Beginning on the Monday morning, the Working Group wrestled with the difficulty of the challenge presented to it by the Commission. Finding consensus on a legal standard of transparency in international investment arbitration is no easy task, and the room for compromise began to narrow as soon as the delegates began dealing with the issue of scope and applicability of transparency rules. Should the Rules apply to all treaties past, present and future? Or simply future? If the latter, could parties consent to their use in past and present treaties *ex post facto*? Should the rules take an opt -in or opt-out approach (i.e. should the default in international treaty arbitration be that the Rules apply unless the parties say otherwise, or vice versa). These

questions posed genuine policy issues for many member States, and so much of the week was taken up with this form portion of the overall debate.

Through the nimbleness, ingenuity and stamina of the Chair, as well as other deeply proactive member State delegations, a report was finally adopted at week's end, and a roadmap for the Secretariat was drawn up, leading to the fifty-seventh session in Vienna, scheduled for October 1-5, 2012. It remains to be seen how the Working Group reaches consensus on the truly resonant issues of public hearings, publications of awards and what constitutes confidential information in international investment arbitration, though some discussion on these issues did take place in New York. We can all be sure that developing States and the international investment community will continue to take a keen interest in these matters as they move on to be debated on the banks of the Danube.

David Kavanagh, Esq.,

New York City,

February 20, 2012.