Recent Developments at the UNCITRAL Working Group III on Investor-State Dispute Settlement Reform
Aakarsh Banyal Professor Yarik Kryvoi

Now in its seventh year, the UNCITRAL Working Group III (WG III) has made significant headway by focusing on specific reform elements, including Codes of Conduct for Judges and Arbitrators and a Multilateral Advisory Centre. Amid rising concerns about the existing Investor-State Dispute Settlement (ISDS) system, the WG III's mandate has been to identify issues and propose multilateral reform solutions in 2017.

On 13 May 2024, BIICL brought together over 80 representatives of governments, law firms, academics and other experts to discuss the current and future implications of WG III's work. The event's special guest was Shane Spelliscy, Director General and Senior General Counsel at the Trade Law Bureau (Canada) and Chair of UNCITRAL Working Group III on Investor-State Dispute Settlement Reform.

The UNCITRAL WG III's Mandate

Yarik Kryvoi (director of BIICL's Investment Treaty Forum) shared his observations, participating in WG III's work as an observer. He highlighted the challenges of reaching a consensus on many controversial issues between states with different perspectives and interests before giving the floor to Shane Spelliscy.

Spelliscy provided an overview of WG III's mandate and discussed the roles of member states and observers in the process. Observers in the WG III participate just as frequently and on an equal footing as member states except in the case of voting. However, by and large, the negotiations are consensus-driven.

Spelliscy pointed out that UNCITRAL's mandate remains restricted to procedural reforms and methods rather than substantive standards. After last year's conclusion of the Draft Code of Conduct, Spelliscy talked about significant progress on the multilateral investment court. The critical discussion point here remains the source of funds concerning the establishment and working of the investment court.

The next big items on the agenda include appellate mechanisms and various procedural aspects, such as approaches to damages. The final phase of the WG III mandate would be to decide on the implementation of the reform options. He discussed the possibility of negotiating a multilateral instrument as a framework convention with protocols to reflect respective sovereign choices. Alternatives to a multilateral instrument could include model clauses and guidelines.

Interests of Groups of States

Responding to Kryvoi's question on the challenges faced by the WG III in reaching a consensus, Spelliscy indicated that the split between states does not follow traditional lines. Although some might feel that there is a split between developed and developing countries, in his view, the critical dividing factor is a state's lived experience with ISDS. Other contributing factors include the professional and educational background of representatives. For instance, a common law background typically favours giving tribunals interpretive latitude compared to a more prescriptive approach taken by those with civil law backgrounds.

Christophe Bondy (Steptoe International (UK) LLP) posed a question regarding the influence of broader political issues unrelated to ISDS during WG III sessions on matters such as access to the advisory centre. Spelliscy explained that UNCITRAL, being a UN body, operates within a wider geopolitical context. In this sense, political considerations and world events likely influence WG III negotiations.

Joshua Paine (University of Bristol) followed up on the sequence of discussion regarding a standing court and an appellate mechanism. Spelliscy highlighted that, despite contrary views, the initial idea was to discuss the development of a standing investment court followed by an appellate mechanism. A separate consideration is the potential affiliation of the standing body with
an existing institution, including the UN. Due to differences of opinion among states about the structure of the standing mechanism, these issues are open to negotiation.

**WG III's Mandate and Reform Options**

Arman Sarvarian (University of Surrey) spoke about his experience working on WG III reform options as part of Armenia's delegation to WG III. Echoing Spelliscy's view, he observed that a state's fate in a single ISDS case could guide its reaction to ISDS and the reform process. Speaking of the proposed advisory centre, much of the discussion would focus on defining a state to evaluate the priority of access and the issue of funding.

Turning to the Code of Conduct, Sarvarian raised the issue of implementation since it is a user-driven document. He cited a further practical concern regarding varied levels of attendance by states and observers to the WG III sessions, sometimes leading to repetitive discussions and delayed consensus. Relatedly, he remarked that the biggest challenge to the WG III's success is a limited timeframe.

Spelliscy then flagged key procedural rules and cross-cutting issues that the WG III aims to engage with in the future, though it has yet to finalise the scope of these discussions. These rules include consolidation, allocation of costs, reflective loss and third-party funding, some of which are not uncontroversial. He further stressed the need to generate binding consensus regarding these rules to tackle the issue of fragmentation, which could arise, as Bondy remarked, due to increased optionality and states adopting distinct combinations of procedural rules.

Anirudhha Rajput (National Law University Delhi and Withers) touched upon about WG III's mandate, Spelliscy stated that the UNCITRAL Secretariat makes the draft proposals, which may consult with experts over issues such as styling. Over counterclaims, the WG III's mandate extends only to procedural reforms, and therefore, discussions on this topic should focus on the procedural aspects without seeking to modify any of the substantive obligations. Separately, he added that the WG III aims to cater to the specific needs of different states by considering proposals inclusively. He gave examples of mediation guidelines and the advisory centre as reform options that received an enthusiastic push from developing and least-developed countries.

Subsequently, as a way to positively confront the issue of funding the advisory centre, Spelliscy mentioned that it might be well advised to categorise states based on their funding ability and access requirements and move away from a development-based classification. For instance, a first category could cover the states requiring access and services with minimal capacity to fund; a second category could cover the states with more capacity to fund with access requirements; and a third category could cover the donors with the most capacity to fund the centre.

**Reform Implementation and Impact**

Joel Dahlquist (Arnold & Porter) asked about possible ways to ensure the implementation of the proposals after the WG III concludes its work in 2027. Spelliscy replied that WG III is considering various avenues, chief among which remain the roles of a standing mechanism and the advisory centre. Whereas the former would mean that a Conference of Parties may ensure the implementation of the proposals (if a framework convention ties them together), the advisory centre, under its capacity-building pillar, may allow states to share experiences. A regular conference of State Parties would prevent the framework convention from becoming obsolete.

Replying to Katia Finkel's (Evershed Sutherland) related question on the interaction of existing investment treaties with the proposed multilateral instrument, Spelliscy clarified that the multilateral treaty would operate in a way to modify existing agreements. The vision is that a 'single signature' from the relevant state in favour of the multilateral instrument modifies the existing treaty obligations. Notably, this scenario warrants political will across states.

Spelliscy also addressed Finkel's follow-up question about issues and challenges (other than damages) that portend to shape future negotiations. He agreed there is an open question about whether damages are part of the mandate. For others, he turned to the issues of security for costs and the related difficulties in recovering awards of cost. There also remains the challenge of third-party funding and whether this notion brings about a fundamental shift in who the states are arbitrating with.

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