

Recent Developments at the UNCITRAL Working Group III on Investor-State Dispute Settlement Reform

Aakarsh Banyal Professor Yarik Kryvoi

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 UNCITRAL Working Group III's \(WG III\) 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 Work of UNCITRAL WG III

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. Observer states in WG III participate just as frequently as member states, except in the case of voting, whereas observer organisations sometimes might have to cede the floor to states. However, by and large, the negotiations are consensus-driven.

Spelliscy pointed out that UNCITRAL's mandate remains on procedural reforms rather than substantive standards. After last year's conclusion of the Draft Code of Conduct, Spelliscy talked about the significant progress that WG III has already made on the advisory centre for international investment disputes while highlighting funding to be a discussion point that would be crucial for the centre's success.

The next big items on the agenda include discussions on a permanent investment court, appellate mechanisms, various procedural issues in ISDS and cross-cutting issues, such as approaches to damages. The final phase of the WG III mandate would be to decide on a mechanism to implement 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.

Roundtable Discussion

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 can 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, as was evidenced by the agreed work plan of WGIII, the idea was to discuss the development of a standing investment court (which might have one or two tiers) and the development of an appellate mechanism as separate topics. An additional consideration in the context of new standing mechanisms is the potential affiliation of any such 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.

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.

With respect to Sarvarian's point on how to define states in the context of access to and funding of the advisory centre, Spelliscy noted the agreement of WG III to work on categorising states based on their funding ability and access requirements and to 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.

Spelliscy also agreed with Sarvarian's point on the challenging timeframe and specifically flagged as an example the significant number of procedural rules and cross-cutting issues that the WG III aims to engage with in the coming year. These rules include, among many others, consolidation, allocation of costs, reflective loss, third-party funding and damages, some of which are not uncontroversial. He further stressed the need to generate as much consensus regarding these rules as possible in order 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 WG III's mandate, the draft papers it considers and the role of developing countries. He was interested in knowing who prepares the draft papers and whether developing countries' concerns on issues such as counterclaims were being adequately addressed. Spelliscy clarified that it was the UNCITRAL Secretariat that drafts the papers.

With respect to the issue of counterclaims noted by Rajput, Spelliscy clarified that WG III's mandate extends to procedural reforms, and therefore, discussions on this topic would focus on the procedural aspects of counterclaims without seeking to create substantive obligations on investors. Finally, he noted that WG III works in a way that ensures that the views of all states, including developing and least developed countries, are heard and that proposals are considered 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.

Joel Dahlquist (Arnold & Porter) asked about possible ways to ensure the continuation of dialogue amongst states after WG III concludes its work in 2027. Spelliscy replied that WG III is considering various avenues, including the roles of the multilateral treaty implementing the reforms and the advisory centre. Whereas the former could mean that a Conference of Parties might be able to serve as a forum for dialogue, the advisory centre, under its capacity-building pillar, would also be able to serve as a forum that would allow states to share experiences. A regular conference of State Parties, could also help prevent any of the protocols to 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 and protocols would serve to modify existing treaty provisions as long as the state's treaty partners also signed on. He noted that it was often easier to find the political will to sign a single new treaty than it was to find the political will to engage in dozens or hundreds of individual renegotiations.

Spelliscy also addressed Finkel's follow-up question about issues and challenges (in addition to questions of damages) that were likely to arise in the discussion of procedural rules reform. He noted there is an open question amongst delegations about whether damages are part of the mandate, which will have to be resolved in the WG. Other issues he noted were on security for costs and the related difficulties in recovering awards of cost, particularly for States, as well as the issue of third-party funding, which some states saw as acceptable, whereas others saw it as bringing about a fundamental shift in who the states are arbitrating with.

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URL: <https://www.biicl.org/blog/79/recent-developments-at-the-uncitral-working-group-iii-on-investor-state-dispute-settlement-reform>