Kluwer Arbitration Blog

Interview with our Editors: Shane Spelliscy, Chair of UNCITRAL Working Group III on Investor-State Dispute Settlement Reform

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In 2017, the United Nations Commission on International Trade Law (UNCITRAL) initiated a consultative process to consider procedural reform options for investor-State dispute settlement (ISDS). Kluwer Arbitration Blog ran a series on UNCITRAL's reform work in 2020, highlighting several subjects under consideration by Working Group III (WGIII).

To get first-hand insights into the current status of this reform process, we have invited Shane Spelliscy, in his capacity as Chair of UNCITRAL's WGIII, to discuss the Group's work on ISDS reform. Mr. Spelliscy has extensive experience in ISDS. He has been lead counsel for Canada in a number of ISDS cases, has been Canada's representative at UNCITRAL since 2008, and since 2017 has acted as Chair of WGIII. Currently, he is also the Director-General and Senior General Counsel of the Canadian Government's Trade Law Bureau.

Shane, welcome to Kluwer Arbitration Blog! Thank you for accepting our invitation, we look forward to hearing your thoughts on UNCITRAL's reform process and its impact on international investment arbitration.

1. **WGIII has focused on several key topics for reform. In your view, which reform options are likely to prove the most important or innovative for reforming ISDS?**

From my point of view as the Chair of the Group, this is not a question that can be answered in the abstract. There is no objectively "most important" or "most innovative" reform. As a group, we decided by consensus to pursue a number of reforms simultaneously in recognition of the fact that governments feel very different about the answer to this very question. What might be the most important type of reform for one government, might be of a lower priority for another given each of their respective experiences, interests and needs. Ultimately, each government will have its own decision to make as to which reforms, if any, it wishes to adopt and implement. This flexibility for governments is essential, but there is an acknowledgement as well that too much flexibility could lead to further fragmentation. Ultimately, I am hopeful that we can achieve a significant number of reforms that will be deemed important and acceptable by all States, as well as a number of options in other areas that will allow governments to do what they understand to be in the interests of the

stakeholders they represent.

2. **WGIII's mandate omits substantive reforms from consideration. What challenges arose during the discussions leading to the decision to focus only on procedural reforms? Do you think that the procedural reforms being considered have the capacity to impact or complement further (procedural or substantive) reforms in the future?**

I think that it is important to understand as a starting point that the mandate of the Working Group was determined by the Commission, not the Working Group itself. When the project was initiated, the Commission mandated the Working Group to develop reforms to investor-State dispute settlement. As a result, our scope of work does not include consideration of whether to reform all aspects of international investment agreements. Rather, the focus is on dispute settlement. Of course, a significant number of States continue to call for work on reform of substantive standards in international investment agreements as well. While such reforms are outside of the current mandate of WGIII, I have always been clear that the focus of the Working Group on the procedural aspects of investor-State dispute settlement does not diminish in any way the importance of States considering whether the substantive balance achieved in their own investment agreements is the right one. This is an extremely important question, and I have consistently encouraged governments to ask it of themselves.

3. **The Draft Code of Conduct for Arbitrators is an important development emerging from WGIII's work. What challenges were associated with developing such an instrument, and how has the international arbitration community reacted to it so far?**

The development of a new Code of Conduct is a reform initiative that has a significant amount of support. I think all delegations see it as an important and necessary part of the reform effort. However, views do differ on how much change it will bring about in and of itself. Some delegations seem to view the Code as not only necessary, but also as a tool that will bring about much of the needed change in the system. Others recognize its importance, but believe that real change and improvement will come with only more structural changes to how these disputes are resolved between investors and States.

In addition to these differences, we have also seen very different views from delegations on some of the text of the Code. One area where such different views exist is on what has been called "double-"or "multiple" hatting", that is, where in addition to acting as an arbitrator, an individual also acts as a counsel or expert witness in other disputes. Initially, views here were very divergent, but I am hopeful that as we are driving towards the end-game on the Code, a consensus is emerging on how and in what way to regulate this practice.

Another challenge has been enforcement – and here it is interesting because generally there is agreement on the value of an enforceable Code. However, there are a number of questions on how to actually bring that about – particularly in the context of arbitration. As a Working Group, we are still brainstorming ideas on how the obligations in the Code could be enforced – meaning how they could be made legally binding such that violation would bring some sort of sanction.

Now, in terms of the reaction of the community, we make significant efforts to ensure that the

voices of all stakeholders are heard at UNCITRAL, including the voices of the arbitration community. Ultimately, this is a process led by States who must consider diverse interests, but we are certainly open to hearing the views of stakeholders on these issues. In this regard, I think that a number of organizations involved in the existing arbitration community have been very heavily and constructively engaged in our work.

4. **WGIII has been considering alternative forms of ISDS, including investment mediation. How do you think investment mediation will interact with investment arbitration proceedings in the future?**

Pursuant to our work plan, the goal is to bring the work on dispute prevention and mediation to the Commission next year, in 2023. There has been a significant focus on mediation – as the Working Group understands that one of the ways to mitigate the costs and time taken in arbitration is to avoid arbitration altogether. Mediation presents an attractive alternative as a result and a number of delegations have really supported work in this area. My hope is that any reforms that we develop here can contribute to the resolution of disputes before they get to the arbitration stage. In fact, one of the benefits that many delegations have highlighted is that mediation does not destroy the relationship between an investor and a State in the same way as the adversarial process of arbitration. Ultimately, if a not insignificant number of ISDS cases are eventually resolved through mediation, I think that would be an important achievement for the Working Group.

5. **How have the different legal cultures of UNCITRAL representatives influenced the reform process? What challenges have arisen due to the multilateral nature of the process?**

A multilateral process like UNCITRAL, where we have delegates from over 100 States representing differing legal interests, backgrounds and approaches, offers a number of challenges. Sometimes you see the differences between, for example, common law and civil law lawyers, with the former often more willing to leave things to the discretion of a tribunal. However, for the most part, UNCITRAL offers a forum where we can accept and celebrate such differences rather than letting them derail the process. In seeking to come to consensus, we are not trying to eliminate or mitigate the diversity of perspectives that the delegations bring, but rather to build on them so that the reforms that we develop can be both broadly accepted and widely understood. And here, I would note that the Working Group holds a lot of informal sessions with the goal of explaining and building capacity so as to facilitate the work of the Working Group in coming to a consensus.

6. **Given that the UNCITRAL reform process is largely State-led, what role has WGIII given to the views of ISDS experts, private stakeholders, and civil society in the process? Has the COVID-19 pandemic impacted the capacity of WGIII to consult with observers and other stakeholders?**

I would note first that the State delegations that we have in WGIII are often composed of ISDS experts – either the State counsel who litigate these cases or the negotiators of ISDS provisions. In each session, it is clear that there is an enormous amount of expertise in the room.

In addition, in WGIII we have always attempted to be open and transparent, and our work is supported by an Academic Forum, consisting of Professors and others who extensively study the field of ISDS, as well as a Practitioners Group who represent a number of counsel practicing in the area. In addition, we have active participation in the Working Group III by representatives of civil society, industry, other IGOs and NGOs, bar associations, arbitration centres and arbitration institutions. When we have a session, in all but rare instances – like when we are pressed for time – I will call on delegations in the order in which the "flags" go up, and irrespective of whom the delegation represents. In this way, the Working Group is able to hear and consider a diverse range of views before coming to consensus amongst States on a way forward. The pandemic has, of course, affected the way all of us have had to interact and it has certainly presented challenges, but the overall approach to participation and transparency has not changed. I am looking forward, though, to a return to in-person negotiations once again starting this September.

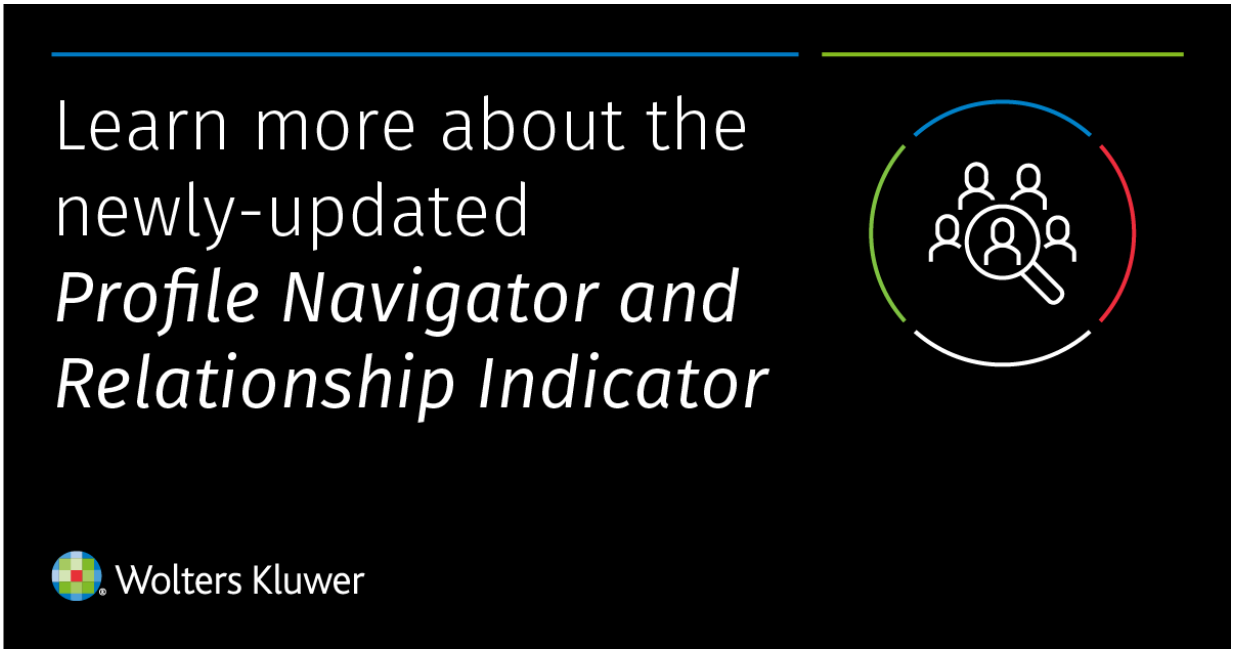
7. **Given that the UNCITRAL reform process remains ongoing, what are your hopes for the future of the process? Has the Group identified any additional matters that could be considered or put forward for reform in either this or separate future processes?**

My ultimate hope for the process remains as it was when we started this work: to find reforms that can be accepted by as many States as possible while preserving some flexibility for States to make their own sovereign choices about what types of reforms will best suit their needs. In terms of any additional matters to be considered, the Group will remain open to the identification of new concerns with ISDS until the end of our work. However, if the question is what comes next beyond this project, then I would stay that with as much as we have on our agenda to complete in the next 4 years, I am focused on the present efforts and not yet thinking about any future processes!

Thank you for your time and insights, Mr. Spelliscy. We look forward to following UNCITRAL's work as it progresses this important reform process!

This interview is part of Kluwer Arbitration Blog's "Interviews with Our Editors" series. Past interviews are available here.

The views expressed by the interviewee do not represent the position of the Government of Canada. The interviewee undertook this interview in his capacity as Chair of UNCITRAL's WGIII.



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