Kluwer Arbitration Blog

Interviews with Our Editors: Interview with Meg Kinnear, Secretary General of the International Centre for Settlement of Investment Disputes

Crina Baltag (Managing Editor) (Stockholm University) · Sunday, April 15th, 2018

In the midst of challenges to the very legitimacy of Investor-State Dispute Settlement (ISDS), the International Centre for Settlement of Investment Disputes (ICSID) celebrated its 50th anniversary and embarked on the fourth ICSID Rules amendment process in ICSID history. The previous amendment processes brought notable additions to the ICSID Rules, such as enhanced transparency in the arbitral process (including publication of at least excerpts of the ICSID awards), and the development of an amicus curiae provision (used in over forty ICSID cases since 2006).

Kluwer Arbitration Blog invited **Meg Kinnear**, the Secretary-General of ICSID, to discuss these proposed changes to the ICSID Rules, the first 50 years of existence of the Convention on the Settlement of Investment Disputes between States and Nationals of other States (ICSID Convention) and of ICSID, as well as the challenges ISDS is currently facing.

1. Meg Kinnear, welcome to Kluwer Arbitration Blog. It is an honour to have you as our guest before the start of the ICCA Conference in Sydney. ICSID and the ICSID Convention celebrated the first 50 years with an impressive caseload, exceeding 650 cases registered under the ICSID Convention and Additional Facility Rules. How were the first 50 years?

Thank you for the opportunity. I am tremendously proud of the role that ICSID has played in the field of investment law over the last fifty years.[1)] Let me offer a few reflections. One is the ongoing relevance of ICSID's original mandate. As you know, ICSID is housed in the World Bank where a core priority is mobilizing private finance for development. How to unlock finance by putting in place the right economic and policy drivers for investment—this is the conversation that surrounds us. Against this backdrop, the preamble to the ICSID Convention is remarkably prescient. Its emphasis on international cooperation, and the specific role that foreign investment plays in economic development, could well have been written today.

I also think that the drafters of the ICSID Convention, Regulations and Rules were admirably forward-thinking in the design of the institution. The notion of a self-

contained regime that serves to depoliticize international investment disputes—these are qualities that have firmly established ICSID as the preeminent forum for investment dispute settlement. And it is because of this solid foundation that ICSID jurisprudence has made such a wide and deep imprint on international investment law over time.

Finally, it has been a personal privilege to witness the development of the ICSID secretariat. Today we are about 70 individuals from 35 countries, fluent in some 20 different languages, and amongst the most talented people I know.

2. Besides the case administration, the ICSID Secretariat is also involved in other activities, such as the appointing authority function of the Secretary General, training courses etc. How busy is the ICSID Secretariat?

The short answer is 'very'. We have seen a growing demand for our capacity building services, particularly amongst first-time and developing country participants in ICSID cases. Our ICSID 101 training course, which offers member States a deep dive into ICSID arbitration practice, has been delivered in 40 countries so far. The process of amending the regulations and rules has also been time intensive. We have consulted widely, and will continue to do so over the next year. Our goal is to ensure that all interested stakeholders have an opportunity to provide input and respond to proposed amendments. And our website has also developed over the years into a tremendous research and learning tool, and we continue to build and refine it.

I am also pleased that ICSID has been named the registry in recent EU trade and investment treaties, and designated as the appointing authority in the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Both are a significant recognition of ICSID's leading role in investment arbitration.

3. The current debate revolves around the legitimacy of ISDS, the proposal for a new multilateral investment court, accompanied by renegotiations of free trade agreements etc. How are all these reflected on ICSID?

Clearly international investment agreements have evolved significantly over the last couple decades. There is, however, a lag between innovations in treaties and ISDS case law. UNCTAD pointed out recently that virtually all ISDS cases to date have concerned treaties drafted before 2010. In other words, ICSID tribunals have not yet interpreted the latest generation of investment agreements.

In terms of discussions on ISDS specifically, such as a multilateral investment court, our philosophy is to contribute where we can and in ways that are appropriate. A key objective is ensuring that discussions are grounded in the facts. Given that the majority of investment disputes are settled at ICSID, we have a special responsibility to make information on ISDS trends, and on how the system operates in practice, available in ways that are useful and timely.

At the end of the day, policy decisions on the form of ISDS are for States to make. Our role is to administer these cases, and we strive to do that at the highest professional standard. This ultimately is the responsibility we have to our 153-member States and

the investors which elect to bring cases to ICSID, and it doesn't change even as ISDS evolves.

4. Is the amendment process of the ICSID Rules a response to this apparent ISDS crisis?

I would say firstly that the rhetoric of crisis, backlash, etc. does everyone a disservice in many ways. I value the fact that international investment law broadly, and dispute settlement specifically, is a dynamic field. I don't agree with every policy or approach, but change that is brought about by a competitive exchange of ideas is ultimately a good thing. The real crisis would be if investment dispute settlement ossified and was incapable of change.

Second, my sense, and this comes from speaking daily with our clients, is that the ICSID rules are performing well. There is always room for improvement—which is why we initiated the amendment process—but we are starting from a solid foundation. You may recall that we made some important amendments to the rules in 2006, including strengthened disclosure requirements for arbitrators, expanded transparency provisions, and procedural rules designed to reduce the time and cost of proceedings. The amendment process today continues this tradition of carefully considered change based on a lot of hands-on experience, a solid empirical foundation, and broad consultation.

5. What is the current stage of the amendment process?

I would say that we are a good half-way to the finish line, but let me explain. In terms of scope, I should emphasize that we are focused on amendments to the ICSID Convention Regulations and Rules—but not the Convention itself. Changes to the Convention require endorsement from all member States, whereas changes to the rules can be amended with a two-thirds majority. We currently have 153 members, so that means at least 102 votes of support. Changes to the Convention are part of the overall vision, but do not fall within the scope of the current process.

In 2016 we made three requests to ICSID member States. One, that they suggest topics to be considered for amendment. Two, that they nominate a focal point: someone with knowledge and responsibility for the portfolio and who could contribute substantively and authoritatively on behalf of her government. Third, we undertook a survey of member States on compliance with awards of costs, at the request of Panama. Last year, we also reached out to the broader public for input. To date we have received over twenty written submissions from law firms, NGOs and individuals—all of which are published on our website.

In parallel, we established a rigorous internal process. Working groups of ICSID counsel were tasked with studying specific rules: their history, how they have been applied in practice, and the comments we received on them from States and the public. In a series of weekly meetings, these groups presented their findings and subjected them to often intense debate amongst their ICSID colleagues.

This process of external consultation and internal deliberation feeds into a working

paper, to be released in August of this year, that suggests textual changes to the rules and regulations. We will meet with member States in late September to discuss the proposed amendments, and then embark on a round of meetings at a country and regional level, and with ISDS practitioners and the public, to gather further input.

At the end of 2018 we will take stock. I imagine that some amendments will be easily agreed, others will need further discussion, and others may need to be shelved for another day. Ultimately, a package of amendments will go to the ICSID Administrative Council for a vote.

6. What are the potential areas for amendment? Is the creation of an appellate body still a topic to be considered?

I am glad to discuss what we think will be proposed, but with the caveats that the working paper is not yet final, and, what it will offer are proposals for States and the public to consider and respond to.

That said, a cross-cutting priority is that the rules are simply worded and sequenced in a way that makes them more user friendly. We also want the rules to help reduce the time of ICSID proceedings. So, for example, the working paper recommends that claimants provide more information in their request for arbitration, such as background to the dispute and damages claimed. This would not influence whether a claim is registered, but it would expedite the subsequent proceedings. Also likely is a proposal to allow claimants to ask that their request for arbitration be used as the memorial, which again saves time and might be especially useful in less complex cases.

Once a case is registered, there are other ways in which the rules can quicken the pace of proceedings. For example, by imposing a general obligation on the parties and arbitrators to establish firm time goals for each step in the process. Also recommended is a presumption that all filing is electronic, which not only reduces the time and cost of proceedings, but makes them more environmentally friendly.

I expect that measures to cut down on the time and cost of proceedings—so long as they don't jeopardize due process—are going to be widely welcomed. Other changes require a more delicate balancing of interests. Transparency and access to case-related documents is one of them. In our view one of most important aspects related to transparency is making decisions and awards public. This fosters consistency and coherence in ISDS caselaw, and public confidence in the system more generally. The working paper therefore proposes mandatory publication of awards (or extracts of awards), decisions and orders, while leaving the release of other case-related materials to the discretion of the parties or the obligations in the relevant treaty.

In answer to the last part of your question, no, the working paper will not propose an appeals facility specifically. Indeed, this was discussed as part of the 2006 amendment process, and ultimately did not muster sufficient support amongst member states. It continues to be discussed at UNCITRAL and UNCTAD, but my sense is that states have still not reached a consensus either way.

However, there are a couple aspects related to appointments to keep in mind. One is

that an appeals facility, or other options concerning how or who to appoint, can likely be accommodated by the current rules. In fact, treaties are where—first and foremost—States decide on the primary appointment system. The ICSID rules address appointments in default of a party selection, and so the method selected by the parties is respected.

7. Do you consider that the Administrative Council could play a more active role and issue interpretative resolutions on controversial matters, such as the meaning of the term "investment", the denunciation of the ICSID Convention, among other matters?

No, this would confuse the function of the Administrative Council. It is a governance, not a legal, body—and we are scrupulous about not mixing the governance function with the legal function of a tribunal. Keep in mind that the States which comprise the Administrative Council are the same States which are respondents or have citizens acting as claimants in cases. The ICSID Convention is careful not to politicize the role of the Administrative Council, mindful of the fact that it would hinder the Council's ability to perform its governance function and hurt the legitimacy of ICSID cases.

8. Are there certain areas that are in real need of improvement, so that ICSID is able to move forward as successful as now?

The goal of ensuring the rules make ICSID proceedings more efficient in terms of time and money is really in everyone's interest. That is a lens through which we have viewed all the ICSID rules, and where I am confident that we will see some meaningful improvements.

9. What is the position of the ICSID Secretariat in relation to the non-compliance with arbitral awards rendered under the ICSID Convention based on the allegation that compliance with such arbitral awards are inconsistent with EU law?

The ICSID secretariat needs to be impartial and that means not commenting on legal decisions. We are carefully watching the impact of the decision, and it is being raised by parties in a number of ICSID cases.

10. Third Party Funding is a hot topic in arbitration at this moment and ICSID arbitral tribunals have had the opportunity to express their position on this matter. Should we expect some important amendments of the ICSID Rules to reflect the latest developments on Third Party Funding in investment arbitration cases?

Prohibiting third-party funding is not something we plan to propose. There are a few conceptual and practical reasons behind that decision. First, simply defining third-party funding is difficult. Second, forms of third-party funding are legal in many states, and may be viewed as an access to justice—rather than a conflict of interest—issue. What we do propose is required disclosure by parties of third party funding and by arbitrators of a relationship with a funder to identify, and hopefully avoid, conflicts of interest.

11. The number of challenges of arbitrators sitting on the ICSID panels has increased in recent years, and this is something emphasized by the ICSID Secretariat itself. What are the suggested approaches to this matter envisaged in the new ICSID Rules?

We are working on the exact parameters, but I can say a few things. One suggestion is for a specific timeline for the filing of a proposal for disqualification of an arbitrator. This would replace the current requirement that it be done "promptly", which is not as precise. Another is that a challenge should not automatically suspend the proceedings. Other proposals that we have received—such as modifying the system of having co-arbitrators decide a challenge unless they are especially divided—may be difficult without changes to the ICSID Convention. And changes to the Convention, as I mentioned, are not a part of this current process. However, I should point out that the Convention constraints do not apply to the Additional Facility rules, so here there will be greater scope for change. Moreover, changes made to the Additional Facility could serve as examples down the road for amendments to the Convention.

12. Is there a need for an ICSID Code of Conduct for Arbitrators and Conciliators?

That is a good question. Currently, the ICSID rules require a declaration that arbitrators meet the qualifications spelled out in the ICSID Convention and a continuing duty to disclose throughout the case. The amended rules could entail a more elaborate declaration. The IBA code of conduct, as well as recent investment treaties that feature more detailed codes of conduct, offer guidance in this area. At the same time, we understand that UNCITRAL is mandated to work on a code of ethics, and ideally that code is as close to universal as possible. We will work with UNCITRAL on the elaboration of a code.

13. What are the issues concerning the ICSID annulment procedure identified so far and which are likely to be addressed in the background paper to be published soon?

The working paper will touch on some technical issues related to annulment; for example, addressing cross application in cases where both parties to an arbitration seek the annulment of an award. But generally, the rules on annulment work well. The debate on annulment is primarily focused on the standard of review, and that is a policy question that falls outside the scope of the ICSID rules amendment. It is certainly a discussion worth having, and could provide an interesting alternative to a full appeals court. But it is not a part of ICSID's rules amendment process.

14. We are in a boom-and-bust technological period where new tech can either aid ICSID's operations or expose it to security breaches. There are examples of arbitral institutions being hacked and confidential information being dumped online. How has ICSID responded to these issues?

I am pleased to say that our security systems are first class and benefit from the expertise and technology that exists at the World Bank Group. A dedicated unit, the Office of Information Security, steers the World Bank Group's cyber security risk

management policies and procedures, including those at ICSID. This includes around-the clock security operations in Washington, D.C. and 186 country offices across the world. We have state-of-the-art firewalls, which have been key in preventing any information breach leading to reputational harm. Plus, all ICSID staff are required to take periodic trainings on information security and data protection.

15. Finally, what are you expecting in the next 50 years for ICSID and the ICSID Convention?

Good question! My crystal ball doesn't extend quite that far in the future, but there are two things I would flag in the shorter term. One, as I mentioned we are not proposing amendments to the ICSID Convention itself. However, we do want to plant that seed now and encourage States and users of ICSID to consider changes that would be beneficial so that it will keep evolving to ensure that we meet our mandate.

Second, our clients will be happy to know that we are moving our Washington D.C. offices in 2019. The new building will have dedicated, state-of-the-art hearing rooms, which we are excited about. We will be sure to invite Kluwer to the house warming.

To make sure you do not miss out on regular updates on the Kluwer Arbitration Blog, please subscribe here.

References

↑1 See also *Building International Investment Law: The First 50 Years of ICSID* by Meg Kinnear, Geraldine Fischer, Jara Minguez Almeida, Luisa Fernanda Torres, Mairée Uran Bidegain (Wolters Kluwer/ICSID)

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