Kluwer Arbitration Blog

Interview with Meg Kinnear, Secretary-General of ICSID

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On January 20, 2022, ICSID concluded a five-year consultative process leading to the publication of a set of amended rules for ICSID and ICSID (Additional Facility) proceedings. On March 21, 2022, ICSID announced that its Member States had approved these amendments. Accordingly, the 2022 ICSID Regulations and Rules will come into effect on July 1, 2022.

To celebrate this milestone, Kluwer Arbitration Blog invited Meg Kinnear, the Secretary-General of ICSID, to discuss the rules amendment process. Ms. Kinnear joined ICSID as Secretary-General in 2009 and was re-elected in 2015 and 2021. Prior to joining ICSID, she worked as a senior official in the Government of Canada. Her past appointments include Director-General of the Trade Law Bureau of Canada (1999-2006) and Executive Assistant to the Deputy Minister of Justice of Canada (1996 -1999).

Ms. Kinnear, welcome to Kluwer Arbitration Blog! We would like to offer our congratulations to you and the whole ICSID team for your efforts to ensure that the ICSID rules continue to reflect the changing realities of investment arbitration. We are looking forward to hearing more about the changes that have been made to the ICSID rules, their likely impact for international investment arbitration, and about lessons learned through the reform process carried out over the last five years.

1. **What, to you, are the most important or innovative changes to be heralded by the new rules?**

Some of the most important changes are provisions aimed at reducing the time and cost of proceedings. We approached this goal from numerous angles. For example, we looked at where procedural timelines could be shortened or regulated, including by establishing firm deadlines for tribunals to render awards and decisions. We introduced a requirement that tribunals convene case management conferences to narrow the issues in dispute. There is also the potential to consolidate or coordinate related cases. And we developed a new set of expedited arbitration rules, which parties are free to opt into to fast-track a case. If fully applied, the expedited rules would shorten the overall timeline by approximately half.

Another goal was to broaden access to ICSID's rules and services. For example, while arbitration and conciliation under the ICSID Convention are only available to member states and their

nationals, the same does not apply to the amended Additional Facility Rules (AFR). Under the updated rules, Additional Facility arbitration and conciliation is available when only one of the disputing parties or neither disputing party is an ICSID member state or national of a member state. We have also opened the AFR for use by regional economic integration organizations, reflecting the recent trend for states to negotiate investment agreements as part of a regional entity.

Two more specific topics that encompassed a lot of discussion are transparency and third-party funding. On the former, there was strong interest in further enhancing the transparency of cases, particularly when it comes to the publication of awards and decisions. While the majority of ICSID awards in recent years have been published, the updated rules provide a better-defined process for the parties to agree on necessary redactions so that awards enter the public domain as soon as possible.

Third-party funding also required significant discussion, as it had not been addressed in the prior rules. As you know, views on third-party funding in the investment arbitration context vary widely. But one point that everyone could agree on was the need to avoid conflicts of interest that may arise out of such funding arrangements. Here, the solution is also transparency in the form of disclosure. Specifically, the new rules require that parties disclose the name and address of any non-party from which they received funding. This is an ongoing obligation throughout the life of the proceeding.

2. **How has the international investment arbitration community engaged with the rules' amendment process? Has the consultation process generated anything unexpected, such as different approaches or rules to what was first envisaged when the project began within ICSID?**

The engagement has been tremendous. We have literally seen hundreds of events, articles, blogs, and videos discussing the amendments, as well as many written submissions sent to the Secretariat directly. This has had a profound—and positive—influence on the process and its outcome. We started with a scoping exercise and asked states and other stakeholders to tell us what they wanted to see changed or introduced in the amended rules. This initiated an iterative process of input shared from states and the public, new proposals developed by the Secretariat, more input received, and so on. The fact that this dialogue has been vigorously sustained for over five years is a testament to how important the ICSID rules are to those in the investment dispute settlement community. It was also crucial to forging consensus on the amended rules.

3. **What were some of the key challenges you faced in coordinating the revision process?**

One of the first priorities was figuring out how best to coordinate with the ICSID membership. The process has required a lot of time and attention from state representatives; individuals who are often engaged in ISDS-reform discussions in multiple forums, in addition to their daily job responsibilities. Our approach was to ask each member state to nominate one or more focal/contact points for the amendment process. That was critical on our side, as we knew who to invite to consultations, send working papers to, etc. For states it meant that they had dedicated experts who were spearheading the process on their behalf and were always aware of the status of the proposals.

Initially, there was some uncertainty on how the dialogue with member states would unfold. We had not previously requested this level of engagement with our membership outside of cases. But the system we developed worked very well in practice. By having dedicated focal points in place—many of whom were in the role from start to finish—we were able to make steady progress in developing and refining the amended rules.

4. **The amendment process lasted for five years, during which time the world – and arbitration with it – faced many unique challenges and changes. Have these developments impacted or influenced the rules amendment process (either procedurally or as a matter of substance)?**

In some ways, the response to the COVID-19 pandemic fast-tracked changes already envisioned in the amended rules. For example, one of the early proposals was to make electronic filing the default practice and thus stop accepting hardcopy paper filings in most cases. The technology for electronic filing was already in place—and it made sense from an efficiency and environmental perspective. When ICSID's offices moved to home-based work in March 2020, electronic filing instantly became a necessity. But we were prepared for it—in part, because it was planned for in the new rules—which made the transition much easier. Similarly, we were prepared for an increase in online hearings, and the pandemic leapfrogged the use of these platforms.

In terms of the consultative process, we canceled a fourth in-person consultation with our member states that was planned for April 2020. I think the inability to convene in person would have been more challenging had it occurred at an earlier stage. But by that point, we had considerably narrowed down the outstanding issues for discussion and were able to retain the momentum through meetings by videoconference and additional rounds of written comments.

5. **The amended rules propose a set of new mediation rules as well as updated fact-finding rules. What was the main driver leading to the development of these rules? How do you anticipate that mediation or fact-finding proceedings under these rules will interact with ICSID arbitration proceedings?**

States and the private sector showed a lot of interest in ICSID-specific mediation rules tailored to the investor-state context, and they are a natural complement to our existing procedures. They offer parties an even more flexible, party-driven approach than the conciliation rules. As a result, there is tremendous appetite for capacity building on mediation amongst state officials and ISDS practitioners, and over time we expect it will steadily grow in popularity.

We also re-wrote the fact-finding rules from the ground up, with an eye to making it a user-friendly and efficient process. While we recognize fact-finding addresses a very particular situation, it remains a valuable tool in the dispute resolution toolbox, and I hope parties will consider it an asset.

Both mediation and fact-finding will serve parties well as stand-alone provisions, but we have also emphasized that they can be paired with arbitration or conciliation, in parallel or at different times in the process. There is a relatively modest cost to incorporating them into a dispute resolution strategy, and the potential upsides of doing so are significant.

6. **To what extent has ICSID coordinated the revision process with the ongoing discussions in UNCITRAL's Working Group III concerning procedural reform for investor-State arbitration?**

As many of your readers are likely aware, we are working with UNCITRAL on a joint code of conduct for adjudicators in international investment disputes. The goal is to develop a consistent and harmonized approach to standards of adjudicator conduct across different sets of rules. More broadly, ICSID is an observer to UNCITRAL's Working Group III and has regularly shared information—including briefings on the rule amendment process—with the Working Group.

7. **Do you believe that the revision process has addressed all stakeholder concerns? What additional issues do you think could be debated for future reform?**

We certainly addressed all of the major topics that were tabled by states and the private sector. In terms of future reforms—that's a good question. At times during the discussion, ideas were raised that would require changes to the ICSID Convention itself. For example, there were suggestions concerning the Convention's requirements for publication of awards, which I mentioned earlier, or the process for deciding arbitrator challenges. However, amending the Convention was not envisioned for this project. Changes to the Convention require the unanimous support of all ICSID member states, so it's a high bar to clear. But it's something that we would be ready to address if requested by our membership in the future.

The priority now will be ensuring that practitioners are aware of the new aspects of the rules and that they take advantage of the tools provided by the amendments. We will be putting updated materials on our website and offering a number of presentations to guide parties through the amended provisions.

8. **From a personal perspective, are there any memorable aspects of the revision process that you would like to highlight?**

Certainly, the in-person consultations with state officials were memorable for all of us at ICSID. It is rare to have this kind of opportunity to work collaboratively with counsel from all over the world, and to look at a set of rules and think systemically and creatively about what could be done better, and how.

It has also been rewarding to work with colleagues at the ICSID Secretariat. This has been a collective exercise—with everyone playing a role—and we quickly became a fine-tuned rule-amendment machine. From brainstorming, preparing each working paper in three languages, to holding consultations, and ultimately, passing the rules, it has showcased the depth of talent and commitment of the ICSID staff that I am so lucky to work with every day.

Thank you for your time, Ms. Kinnear. We look forward to seeing the revised rules being put

into use in future ICSID proceedings!

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