ICSID in the Twenty-First Century: An Interview with Meg Kinnear: Introductory Remarks

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ICSID IN THE TWENTY-FIRST CENTURY: AN INTERVIEW WITH MEG KINNEAR

This discussion was convened at 2:30 p.m., Friday, March 26, 2010, by its moderator, David Caron of the University of California, Berkeley Law School, who introduced Meg Kinnear of the International Centre for Settlement of Investment Disputes. Below is a transcript of the session.

INTRODUCTORY REMARKS BY DAVID CARON*

Okay, today we have a treat. The title of this discussion is “ICSID in the Twenty-First Century: an Interview with Meg Kinnear.” Let me point out that it’s co-sponsored by the International Economic Law Interest Group and also by the Women in International Law Interest Group, and I think you will see questions from both aspects. Meg Kinnear, since last June, has been the Secretary-General of ICSID. She’s had time to settle in, she’s had time to shovel out of a terrible winter, and instead of me introducing Meg, we’ll let her do that. Meg, I think we all know that you’re a national of Canada, but in part from the aspect of a woman who has risen to this position, perhaps you can talk a little about your education in Canada, your mentoring, and the career path you went through to get to this point.

REMARKS BY MEG KINNEAR†

Well, I am a national of Canada, born in Montreal, who went to law school at McGill, and then did a master’s degree at the University of Virginia. At that time I thought I’d specialize in administrative law. I did a year there, and I thought Washington was an amazingly wonderful place, but I had promised to head back to Canada for a clerkship, so I said, “I’m going to go back for one year, and that’s it.” That was twenty-five years ago, so it tells you a little bit about career planning and luck.

I did an articling period in Ottawa and became very enamored with domestic litigation and advocacy. I then went to the Department of Justice of Canada, and it was a very exciting period because we were starting to work on what would become the Charter of Rights in Canada, much like the U.S. Bill of Rights. There was all sorts of interesting new work to be done—I got hooked on that and absolutely loved it.

We ended up working on one very big case in Toronto, which was about an hour away. The case, I was told, was going to settle within two to three months at the most. Nonetheless, I ended up in a trial that ultimately would last about two years. I had two young children who grew up through this, and I can remember how difficult that was.

That led me to a decision to leave litigation to be the executive assistant of the Deputy Minister of Justice. I can tell you I thought I would never leave domestic litigation, but ended up doing that, and all of a sudden I realized that there were so many interesting things I could learn—and I really did learn some amazing things. It’s funny what you learn along the way that comes back later. One of the things in that job that was very interesting was learning how to answer press questions and things like that. I thought that would never be relevant again, but it turns out that it is!

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So I learned all these things, and at the end of that, when I started wanting to go back to law, the Deputy Minister at the time said, ‘‘There’s something called the Trade Law Bureau of Canada. I used to be there and you’d love it, it’s fantastic!’’ And I thought, ‘‘Well, I don’t know anything about trade law, but I’m willing to try it.’’

That led me to a very wonderful adventure, a place called JLT, the Trade Law Bureau of Canada. For ten years, we did Canada’s legal work in both the WTO—when I first got there, it was almost all WTO—and something called NAFTA Chapter 11. Because I had a domestic litigation background, about two weeks after I walked in to JLT someone came running into my office and said, ‘‘There’s this new thing called Chapter 11, do you want to do it?’’ I said, ‘‘Well, I don’t know much about it . . . .’’ And he replied, ‘‘It’s okay, none of the WTO litigators want it because there are live witnesses, so take it!’’ So it was, ‘‘Let’s make the new girl do it.’’

Little did I know this was actually a blessing in disguise. It started me on this incredible, wonderful world of investment arbitration, and I absolutely adored it. I’ve always said, quite frankly, that if I knew then what I know now, I would have done things so differently, but in fairness, we were all learning at that point. We often forget how little law there was at the time, so it was really a very exciting time to be involved in Chapter 11.

We, as everybody knows, got a few more cases in Canada. I think Canada now has about sixteen cases, which is surprising to many observers. And we were involved in some very exciting things, including NAFTA notes of interpretation, which was a unique period in NAFTA and for investment arbitration, and also involved in BIT negotiations, which is a fantastic perspective to have on investment obligations. You go from a tribunal, where everyone says, ‘‘Well, the comma’s right here so that’s what it means,’’ to a BIT negotiation, where you realize very quickly the approach is, ‘‘You take Article 1, I’ll take Article 3, we’ll agree to Article 4 and we’ll all go home.’’ There’s the whole imperative to get it finalized; you don’t look at it under a microscope like you would before a tribunal.

In any event, I was very excited about Chapter 11, had wonderful colleagues and thought I would stay forever at JLT, but ended up one day seeing that ICSID was looking for a Secretary General. ICSID had made the decision, along with the World Bank, that the investment arbitration world was busy enough to justify a full-time, stand-alone Secretary General. For those of you who don’t know, the Chief Legal Counsel of the World Bank previously had also worn the ICSID hat, and having done this job since June, I can tell you that this is more than a 24/7, full-time job. I really don’t know how someone wore both of those hats, so my hat is off to them.

In any event, the World Bank advertised for candidates who were interested, and I was extremely fortunate and went to an interview, and was then asked back for a second interview with Mr. Zoellick. And I think I had one of the most interesting interviews I’ve ever had in my life, because Mr. Zoellick had been the US Trade Representative when we’d been working on the Notes of Interpretation (I’d been working on that project for the Canadian delegation).

So it was a wonderful conversation, and the next thing I knew, I was advised that I was fortunate enough to be selected in the process. At that point, your name goes forward to what’s called the ICSID Administrative Council. All of the States have one seat on the Council, and you go through a process of voting. I don’t think this is telling secrets out of school, but every weekend Antonio Parra would call me and would say, for example, ‘‘Well, you got Afghanistan and Romania, but we’re still waiting for China.’’ It was a funny situation for me, because there I was sitting in Ottawa getting reports about what was happening. Ultimately, we got to the two-thirds majority that was required, and I was fortunate enough
to be offered the position, so I loaded up the car, sold the house, put my goods in storage, and here I am!

DAVID CARON

Well, there's a lot there that I think we're going to have some questions about. Have you watched an arbitration since you've been Secretary General? Do you have an itch to be arbitrating, to be counsel? What are you feeling?

MEG KINNEAR

Yes, it's interesting. One of the practices that I started when I first got to ICSID was that when the arbitrations were in Washington and I was in town, I would go to the arbitration, introduce myself to the arbitrators and the parties, and ask their permission to stay at the hearing. I would stay as long as I could, normally about half an hour to an hour. I was very interested in seeing how things worked, but also wanted to make sure that I knew all the people involved well enough so that if they wanted to say something or had a comment, then at least they would know me well enough to pick up the phone. So that was part of it.

I think the other part was that I missed the being "on your feet" part of litigation. However, I don't miss staying up overnight, and I don't miss that anxious feeling in your stomach that you think will never go away, I don't miss those kinds of things. So occasionally I have that moment where I wish that I was on my feet with brilliant advocacy, but it passes pretty quickly. The job that I'm doing now is absolutely fabulous, I feel so blessed to be in this job. So those twangs are very, very minor.

DAVID CARON

You mentioned that this post was different in the past. From the very beginning with Aron Broches, it was one post—General Counsel of the World Bank and Secretary General of ICSID. You point to the plus side, which is that it is a 24/7 job, so it's good that you only have this one job. On the other hand, some people talk about Aron Broches partly thinking that it gave visibility for ICSID within the Bank, it gave a certain sense of some resources that should go to this area. Do you think anything is lost in this separation of the two posts?

MEG KINNEAR

I really don't think anything is lost, quite frankly. We are still right across the street from the Bank, we are still formally one of the arms of the Bank, and I don't think that the relationship has changed in that respect or that there's any prejudice from this position being a full-time position. In fact, if anything, it probably gives it a little more prominence. One of the things that I've been very impressed with since I arrived at the World Bank is the extent to which ICSID is independent of the Bank. Now part of that is what we do. It's so different—we're not developing policy, and we're not doing programs. We have a very specifically designed mandate, so naturally we're not working with other units of the Bank, but we're still very clearly a part of it. So I don't think it's prejudiced ICSID at all.

I guess one of the things that surprised me, because I did think that ICSID was the center of the universe in the Bank, was when I went through the required orientation session. The orientation officer talked about the four parts of the World Bank, and I was reminding her,
"There’s five, there’s five!" I talked to her afterwards, saying, "If you want, I will literally run down the block for each of your orientation sessions and give you two minutes on ICSID, but please just say the name. It may be the only time someone hears it in their World Bank career, but please just say the name!" And I’ve been told by people who have gone to the orientation session subsequently that, yes, they do mention ICSID. But the point of this story is that ICSID is still so different and distinct from the rest of the Bank that I don’t think it’s prejudiced in terms of the most recent events.

DAVID CARON

Let me just tell you how this conversation is going to be structured. Probably seventy-five percent of the people in the audience are investment arbitration aficionados, but there are people new to the field also. So I am going to give Meg a moment to introduce a little bit about ICSID. Then we’ll go back into questions, but probably give her five minutes at the end to recap and recover from all of your questions.

MEG KINNEAR

Much of this is meant to be an introduction for those who don’t have day-to-day work with ICSID or who haven’t worked with us at all. Essentially, what is ICSID? It is the International Center for Settlement—not the settlement—of Investment Disputes. It’s one of the organizations making up the World Bank and was established in 1966 under something called the ICSID Convention, which came with a set of conciliation rules and arbitration rules.

One of the things that always strikes me, and I think this was a very brilliant, novel idea at the time, is the whole theory behind ICSID to provide a neutral facility for dispute settlement. That facility is outside the domestic legal system, and so in turn, foreign investors will have the confidence, should a dispute arise, that they can take it to a facility that is not part of the legal system of the country in which they are suing. The whole idea gets back to basic investment promotion, and it really was quite a forward-looking beast at the time. Also, when I say a "facility," I do stress that. You often hear people say that "ICSID decided" something. But ICSID is a facility—it a place for arbitration to happen and that sometimes get confused with the outcome of awards.

In any event, in 1966 they created the Convention and facilities for arbitration and conciliation. Then in 1978 they added something called the Additional Facility, which had some rules very similar to the Convention rules for arbitration and conciliation, and added fact-finding. The fact-finding capacity has not been used to date, but it’s something I ponder. I think it’s interesting and might be something that could be used in the future that we should think about. It is there and offers a possible role for ICSID to play.

We also have what I call a secondary or complementary role in disseminating knowledge. Many of you have probably seen the ICSID Review—Foreign Investment Law Journal. We also have a treaty series, we give conferences, and David and I will probably get back to it, but there’s a particular conference that we’re going to be giving in June nominally titled "ICSID 101." One of the things that we’re seeing is first-time users or people who are at their first or second case at ICSID, who come and are not ready or not quite sure exactly what they’re dealing with. Our thesis was that if litigants had a good primer on what they’re about to deal with, they will be able to better manage the litigation. To address what we saw as a need, we’ve put together what we’re calling "ICSID 101," and we’re going to be offering it in June of this year. We’ll see how much take-up there is and how useful it is,
and if it’s useful, our thought is that we’ll perhaps be able to offer it in different regions or even when a new country joins ICSID. Maybe we could even go into that country and offer it to the bar and any local state officials that might be interested in it. In any event, there’s that secondary role in knowledge dissemination.

DAVID CARON

You emphasize that ICSID is a facility. Do you feel anxious that an arbitrator or a panel is going to come along and somehow disrupt all of that? That, to me, is implicit when you emphasize facility. It’s sort of the reverse, as ICSID is not responsible for the decision.

MEG KINNEAR

It hasn’t happened, and I don’t think it will. We have terrific arbitrators, and at the end of the day, the role is to give them everything they need, but the net result is that it’s not really our job to write the decision, but to make sure that the arbitrators have the information necessary to make the decision they need to make. To answer the question, I don’t really worry about that, but now I will!

DAVID CARON

It’s only happened a few times!

MEG KINNEAR

Let’s talk about the global reach of ICSID for a moment. Currently, there 144 countries that are members of ICISD. That’s really quite a wonderful and telling statistic. Our most recent members are Kosovo and Haiti. One of the things about joining is that a country is entitled to name four arbitrators and four conciliators to the roster. Also, they each have one vote on something called the Administrative Council.

But the day-to-day operational work is done in the ICSID Secretariat, and that’s my group. There’s the Secretary General, the Deputy Secretary General, and then we have teams of lawyers. All of our tribunal secretaries are lawyers, and they are in teams with senior, mid-level, and junior lawyers, a paralegal, and an administrative assistant. Anyone who’s worked at ICSID will know that its strength, what makes ICSID very, very special, is the amazing people who have such institutional knowledge and experience. I’ve been really impressed by this: the arbitrators will ask the staff for advice, because they really do have the credibility. And they’ve earned the credibility because they know this job really well. That’s what I think makes ICSID very special.

We also have what you might call a “back office” function. There is a lot to be done behind the scenes of an arbitration, as anyone who has ever done an ad hoc arbitration knows. I can remember my first one, actually going and filling the water jugs before you get to the hearing, putting the tables in the right shape, and thinking that I never wanted to do non-administered arbitration again. The back office function includes things like making sure we get the arbitrators’ bills, looking at them to making sure they all make sense, that they add up, that they relate to the hearing dates, and that everything is order. We make sure that the funds are in order, getting the transcribers, paying the transcribers. All of that is what I call the back office function, and there is a lot of it.
We have a really good group; it does take a fair amount of resources to make sure that kind of thing happens and happens well. We are, at the end of the day, quite small. We are thirty-five people and we are very busy, but are a really good group.

**David Caron**

In the beginning of ICSID, when admittedly they had a lot more time, the first Secretary Generals would spend a great deal of time trying to fill in that map of member states. For that remaining number, do you feel you have a role in going out and trying to get those final ratifications? Or is that just so secondary?

**Meg Kinneer**

I don't go out and actively pitch. My idea is that if you provide a really top-notch service, the countries will come and use your service. ICSID is not just for members—we even do non-ICSID arbitrations. Now, most of our arbitrations are Convention arbitrations, but we are a facility, and we see ourselves as providing a service. So the focus to me is just to do the best you can, provide the best service, and the rest will all fall into place.

I often say the story of ISCID is very much like the story of international arbitration and international investment arbitration in the last twenty years. As I said, 1966 is when the Convention came in force. Not much happened until the first case in 1972, and it kind of bumped along with one case, two cases, after that. Then all of a sudden it went up to the two-digit numbers—ten, eleven cases around 1997—then you have a huge increase in the early 2000s. There were the Argentinean cases that came out of the financial crisis. There was also NAFTA, all sorts of NAFTA cases happening, and the whole explosion in BITs. It stands to reason that the more BITs you have with arbitration clauses, the more possibilities there are for arbitration of disputes. Thus, we have exactly that pattern, and the number of cases continued to rise to a record high of thirty-seven in 2007.

Our current predictions are that we are going to maintain about a stable twenty-five to thirty new cases a year. Last year we had twenty-five cases, and I was just looking, we actually had two new cases come in today. Right now, we've had about ten or eleven new cases since January, so I'm wondering if I'm going to have to revise that number upwards. I'm not declaring a trend yet, but it's interesting to see. At any rate, I feel that we'll at least be stable at the twenty-five.

**David Caron**

Do you have a sense of how long a dispute has existed before you get the petition? And what effect do you think the current financial crisis will have on the number of cases ICSID handles?

**Meg Kinneer**

Two things. Our rough estimate (and every case is different) is that it takes a good twelve to eighteen months to get to the point where the claimants decide to file an arbitration case. That includes things like trying to work out whatever the dispute is, or trying an informal negotiation. Maybe they go to their diplomatic representatives and say, "Can you help us work this out?" or maybe they go through conciliation or a cooling-off period. A variety
of things happen. So I would say roughly twelve to eighteen months is a normal gap time before something actually comes to arbitration.

In terms of the fiscal crisis, we don’t know, and because it’s still such a new crisis, I’d probably give another twelve to eighteen months before we’d even be able to see those cases materializing. But I’ve heard arguments on both sides: a lot of people say because this global crisis has been so widespread and because there are still people trying to work their way out of it, that perhaps people are forgoing their legal remedies and just trying to work through the dispute on a pragmatic basis. If that’s successful, maybe you wouldn’t want to resort to arbitration. So I’m not one who says we’re going to have a huge upswing from the fiscal crisis—it’s just too early to say.

At any rate, I’d like to point out that most of our cases fall under the ICSID Convention, eighty-nine percent in total. We also have a number of ICSID Additional Facility cases, which make up nine percent of our case load. And, finally, we handle a small number of conciliation cases, six percent in total.

There’s a conference on Monday at Washington and Lee University to talk about alternate dispute resolution, which seems to be a topic that we’re talking about more often now in investment arbitration. And while there is a conciliation facility at ICSID, there has not been huge take-up on this. I think that, while it was very forward-looking for something designed in 1966, it’s a fairly formal mechanism. It may be that there’s a lot of room to start thinking about other, more flexible, alternate dispute resolution techniques—to take everything that’s been learned in domestic law, such as mediation and arbitration, and maybe there’s some really good lessons we can move into the international investment world. But for now, we have and will keep our conciliation facility, but it hasn’t been used all that often.

DAVID CARON

Do you have a sense of the success rate in the six conciliation cases?

MEG KINNEAR

Ah yes, the raw numbers. I think two were successful, while four were not.

For the life of ICSID, the consent to the cases has come from a variety of areas. Just over twenty-five percent were investment contracts and domestic investment laws with ICSID arbitration clauses. I think the early founders and drafters of the Convention probably expected that that would be one of the main sources of work. And in the beginning, it was mainly those contract-type cases.

But very quickly, the number of cases coming out of BITs and taking their consent from the BIT grew, so much so that BIT arbitration accounts for seventy-three percent of all cases for the life of ICSID. And it’s only increased with the passing of time; as of 2009, BIT arbitration accounts for eighty-four percent of our cases, while the number of non-BIT work has gone down. So really, what that shows you is that the trend is moving toward the work coming out of bilateral investment treaties.

If we can move ahead, I’d like to talk a little about geographic distribution. I wanted to contrast the numbers for the lifetime history of ICSID with our 2009 figures. Over the course of ICSID, roughly thirty percent of our cases were South American, but I suspect these figures are a little skewed from the Argentinean cases. Estimates are that there are forty or fifty Argentinean cases, and ICSID probably had a good thirty to thirty-five of those, so that probably accounts for the large South American number. However, as of 2009, South America
is down to sixteen percent. Last year was the first year that we did not have a new case against Argentina in many years, so I think that tells you that the world is changing. I'd also like to point out that there appears to be a trend in more cases coming from Eastern Europe and Central Asia. The number of cases originating from that part of the world now stands at twenty-eight percent, compared with twenty-two percent historically. But again, cases come from all over: twenty percent of our cases now originate from Central America, with another sixteen percent originating in the Middle East. As I said, no region of the world has a monopoly on this kind of arbitration.

Finally, I'd like to talk about the kinds of industries or economic sectors implicated in the cases. By far, most of our cases come from the oil, gas, and mining sector; that sector alone accounts for twenty-five percent of our caseload. Electric and other energy stands at number two, with roughly thirteen percent. But there is also a variety of other sources, such as agriculture, information, and just about every sector. Even the transportation sector accounts for eleven percent. However, the energy sector is the one that generates a lot of litigation and arbitration. This is likely because they are complicated projects, often lasting for terms of thirty or forty years, and they often involve consortiums or groups of investors from different countries coming together to work on a big project. So I think that's the end of the formal introduction which is meant to give you a snapshot of the type of work ICSID deals with.

**DAVID CARON**

Great, we've collected a few questions now, so let me raise a few. These three questions, I think, deal with the efficiency and cost of the process. For example: "ICSID wants to encourage efficiency, economy, and expeditious awards. Members of panels want to minimize the risk of annulment. How do we strike a balance between the two?"

**MEG KINNEAR**

One of the first things I did when I got to ICSID was to make a point of talking to anyone who would talk to me. The questions I asked were: "What can we be doing better, what are we doing well, and what do you need?" One of the universal concerns raised was the time and cost of arbitration, yet at the same time, an awareness that you can't just shove these things through. In particular, investment arbitration can be very complex—not just the law but also the facts. So it is a question of a balance, and it's hard.

But I think there are a lot of things you can do. This is one of the areas where there's room for creative thinking, and you're starting to see a lot of experiments by various institutions, including ICSID. Right now, we're working on some of the things we can do in-house to try and make things work more smoothly without in any way prejudicing the ability to put forward your case and feel that you had a full and fair hearing. We're looking in particular to what we do, such as the registration phase. When you first start an ICSID case there's something called a request for arbitration, and there's an initial screening mechanism. These screenings used to take a varying amount of time, and I think a lot of it depends on how much work there is in the ICSID Secretariat at the time of the request. But we've made a huge effort, so now, on average, they take a month or even less than a month. We've even had one registered in a week, I think. We're able to do that because what we have done is gone back and said, "Is it manifestly without jurisdiction?" And there may be lots of cases that aren't winners, but they're not manifestly without jurisdiction. So instead of
getting too far involved in the case, we’ve said, “Satisfy yourself that it’s not manifestly
outside the jurisdiction, and if that’s the case, then we go to the next stage.” So we’ve been
doing a lot of work in-house to make sure that our systems are not what’s holding up the
process.

Getting to the other issues, they’re a lot harder. When an award is more than a year
outstanding from the last pleading or hearing, I’ve started to make sure that I phone the
arbitrators and say, “Is there anything we can do to help?” At this point, I think it would
be fabulous if we could get all of those decisions rendered in a year from that period. Ideally,
in a perfect world, it would be even less. But realistically, I think that getting awards rendered
within one year would be really doing something quite good. So it’s working on a lot of the
little things, and they all seem to add up, that seems to be what’s going to get us there.

We’re also working on case management and electronic tools. Again, as anyone who’s
done arbitration knows, it tends to be a banker box-laden profession, and we always bring
ten copies of everything, just in case. We’re trying very hard to move things into an electronic
realm. We’ve started asking people now to file things on thumb drives or CDs and to
exchange them automatically while keeping the Secretariat posted, as opposed to literally
seeing couriers rolling out boxes and boxes and then dumping them in the front lobby. So
we’ve started working on that. Gonzalo Flores is the author of what we call the Green
Procedural Order. Basically, it’s ICSID asking new tribunals to include some of these clauses
so that we can use electronic media and not have twenty copies. At this point, it’s all about
persuasion, and we’re hoping it’s going to get us there. These may sound like tiny or obvious
things, but they all add up. So we’re working on a lot of those kinds of issues in terms of
time and cost.

DAVID CARON

You know, I went back recently to talk to Meg at ICSID recently, and it was the first
time I could walk down the corridors. The boxes usually are a major obstacle.

MEG KINNEAR

I made David come into the files room, which is a bunch of cardboard boxes, and I
exclaimed, “Look, isn’t that beautiful!” I think he thought I was a little crazy, but it is
beautiful.

DAVID CARON

I think a number of people have questions about the new appointment process. In particular,
this is something you started in last September, so I was hoping you could describe the
process. For some experts in the audience, I think the real question is: Where is it written
down so that they can read it?

MEG KINNEAR

One of the issues that I think many people have heard and that I heard when I talked to
ICSID users, was the whole question of the rosters. Frankly, with the explosion of cases,
it’s awfully difficult to find enough qualified arbitrators who are available, who are not
conflicted, and are all of the things you would need in an arbitrator. Particularly for us, as
we are usually appointing presiding arbitrators, so on top of all the skills you might expect, we also need people with the skills to preside, to bring their colleagues together, and to advance the case. So you’re asking for a lot of skills in one person, and we’re often going back to this roster. There are also numerous vacancies on the roster or expired nominations, those kinds of issues. So one of the things we heard was that we needed to address the rosters.

We have started addressing the rosters, and we have done that by going to each country one at a time, so it’s a long-term process, talking to States whose nominations have expired and telling them the kind of candidates we need, the qualifications required under the Convention, and asking them to consider replenishing their nominees. We’ve put on our website the most recent nominees, and we’ll keep doing that. That’s a slow process, but a gradual process, and it is happening.

At the same time, because we realize it’s a slow process, we also decided we’d like to see if there are other things we can do. Under the Convention, you’re basically meant to go to the roster for appointments. Where the ICSID Secretary is asked to appoint, we didn’t have the ability to appoint what we would call “off roster” or “off panel.” So we thought about it, and we have a part of the ICSID Convention that says that if there’s consent by the parties, any arbitrator can be named. So we developed a system where, because both parties consented to a non-panel name, we would have the legal authority to appoint. We thought there was a lot to commend this approach, because at the end of the day, having a consensually appointed nominee, even if it’s from a smaller list provided by the Secretariat, is probably a better thing than just imposing an arbitrator on the candidates.

So we came up with a system, and we experimented a little bit in August and September, and we’ve now got a system where, basically, when the request comes to ICSID to nominate, I sit down with my colleagues, and we look at the case. We look to see what the parties need, whether it’s a Spanish or Bulgarian speaker, or even immediate availability—all of the things that you might need. And then you say, “Who are the people out there who might be able and willing to meet those qualifications?” We’ll contact them and say, “Would you be willing to have us propose your name to the parties?” And we always ask specifically, “Are you immediately available?” Because this is one of those time concerns, so this is a very particular issue that we check. We then come up with three possibilities that we think are good possibilities, and we send the names to the parties. We’ve literally reduced it to a check-off ballot, where the parties can check off the names of the arbitrators they’re willing to agree to and send it back to us. The theory here, whether it’s right or wrong, is that there’s an inclination that if one party likes the arbitrator, the other party shouldn’t. So the idea was to take out that psychology. We also have the parties return the ballot quickly, as we give them typically anywhere from five to eight days. If that works, we’ll appoint the party jointly agreed to. If not, we go back to the normal process by picking a candidate from the roster, who we then appoint, absent a compelling objection.

So this has been, very frankly, a bit of an experiment. It’s not written in the Convention, but it’s very consistent with the Convention. Furthermore, we think it’s consistent with the practice of ensuring that the parties feel that they are getting someone they’ll be happy with. All the feedback I’ve heard has been positive, which makes me quite happy. I can candidly tell you that maybe only about a quarter of the cases actually end in consensus on a ballot nominee, but I don’t think that means it’s a failure; I still think it’s good and worth doing. We’re still going back to just roster candidates probably in about 70 to 75 percent of the cases, but we’ll see if that changes as parties get more used to the ballot system. And we’ve
made sure that it's a very fast system, we haven't let it slow things down. We've said, "Don't tell us your wonderful reasons for objecting, it doesn't matter because the selection has to be on consent." What matters here is a simple "yes" or "no" to see if we can do this in five to eight days.

**David Caron**

Let me get a little feedback from the audience. Of counsel here, how many knew of this process? [Few.] Okay, if you were a counsel, and you reached an impasse on selecting the chair, would you hesitate to ask ICSID to appoint?

**Audience Response**

[Mixed.]

**David Caron**

You'd hesitate, but not for two months.

**Audience Response**

[Probably.]

**Meg Kinnear**

Yes, and that is an issue, particularly with people who represent States. It can be very difficult because States have bureaucracies, different levels, and sometimes different ministries. I get that because I come from one, and I worked as a lawyer for a State. Occasionally, we've been asked if we can extend the deadline by a couple of days, and we don't want to scupper the ballot process for the sake of two or three days. But we also don't want it to drag on endlessly, and we know that at this point the parties have already had some time to try to get to a consensual candidate, so it's not as if they're having their first look at this. I think, as a rough estimate, parties have probably had maybe between two to four months of trying to come to a consensus by the time they are approaching ICSID and asking us to appoint someone.

**David Caron**

Is there any question from the audience, particularly on this point? Yes, Kathleen Paisley? I'll repeat the question: "Is there any ranking in the proposing of the three?"

**Meg Kinnear**

No, it's a yes or a no, and we haven't had the situation yet where two candidates were consensually agreed to. If that was the case, we would probably go back to the parties or pick one depending on their availability, but it just hasn't arisen yet. Also, I should mention that in that first attempt with the ballot, we will put forward both people who are on the roster and those who aren't. We basically try to look at who the arbitrators are who we think
are available, to whom both parties would agree, and who can do the job well—in that sense we put aside the roster. I didn’t want it to seem like we were excluding roster members, as we obviously have some fabulously qualified people on the roster. I just want to make that part clear.

**David Caron**

One final particular question on efficiency, and this is from Professor Lichtenstein. “Have you considered some sort of ‘motion to dismiss’ process?”

**Meg Kinneer**

We thought about it. The ICSID rules had some amendments in 2006, and one of them is Rule 41(5), where a party can very quickly go to the tribunal once constituted and ask for the case to be dismissed because there is no jurisdiction. We’ve only had about two cases, and there’s one further case now dealing with that issue. So there are some tools along that line, but they’re not the same as the civil procedure rules, the motion to strike for want of jurisdiction, lack of merit, or any of those things. But there are some tools along that line, and those kinds of motions are made to tribunals.

**David Caron**

Let’s go in a different direction. This direction concerns the place of considering human rights and environmental concerns, as a part of addressing an investment dispute. So I’ll just read these two questions to you. “Do you see a future for arbitrators in investment disputes actively to consider human rights and environmental concerns?” Also, “in the United Kingdom there is a nongovernmental push for a special tribunal to address violations of human rights in developing countries by businesses. The tribunal is a response in part to criticism that ICSID decisions do not adequately address or consider international human rights law. How do you respond to such criticisms? And what impact do you anticipate such a tribunal would have on ICSID?”

**Meg Kinneer**

It’s interesting. I haven’t thought long and hard about that, so let me caveat my answer. ICSID not only is a facility, but a facility for a very particular area of law—international investment arbitration, considering obligations mostly under a bilateral investment treaty. Frankly, there are probably about five or six main obligations, plus specific obligations in the contract, so it’s very much tied to that area of law. That doesn’t mean that there aren’t obvious linkages to human rights, but we are not a facility that is adjudicating human rights. We’re adjudicating bilateral investment treaties and investment contracts. I think the linkage comes in when tribunals are looking at cases that arise in a certain context, particularly with regards to environmental issues. For example, when a party is claiming the defense to expropriation is police powers. That’s where I think it is more likely to have an overlap between environmental concerns, rather than strictly in terms of applying a different body of law. It’s an area I know people are starting to talk about, but not that much has been done on it. At this point, we’re working on trying to do investment arbitration as best we can.
**DAVID CARON**

What I'm hearing you say is that this is an area where international law is somewhat fragmented.

**MEG KINNEAR**

For sure, I think international law is very fragmented. That's something you hear about often, and I guess we'll have to look to the arbitrators and the tribunals to see if that stays that way or if they start looking to other sources of law. But really, we are applying a fairly distinct set of norms that are international investment laws. That's not a normative judgment about whether you should apply these norms or not, but a descriptive judgment. That's just what we do.

**DAVID CARON**

Is there a follow-up question on that topic?

**ARTHUR ROVINE**

Isn't it true though, Meg, that there is more discussion, including discussion in the cases saying that yes, we are going to look a little more kindly than in previous years at environmental measures, health measures, safety measures, even police power measures, and not call it a compensable taking, but rather a regulatory action that makes perfectly good policy sense? Don't we see more of that now than we did about ten years ago?

**DAVID CARON**

The comment from Arthur Rovine was that isn't it true that recent awards are more recognizing of the expropriation context that police power includes a certain sphere of regulatory concerns, including environment, health, and safety?

**MEG KINNEAR**

First, it really scares me when Arthur starts off with, "Isn't it true?" You can see his cross-examination roots; it has made my blood pressure go up a bit here! All kidding aside, to answer the question—no, this is what's happening in BITs generally; it's not just in terms of arguments being made. I think it's also in terms of treaty design, and all of this is a reaction to us knowing a lot more about international investment law. Historically, we really have not had a body of cases like we've developed in the last ten or fifteen years. We now get what people often call the "second generation of BITs." They are a lot longer, they have treaty carve-outs, reservations, and more explicit descriptions. They're often talking about things that might be considered police power, interaction with the environment, and safety. So this is not just happening on a case law basis, I think it's happening as much or even more in terms of treaty design. And treaty design is probably the best place to have that in the first place.
DAVID CARON

I note that Arthur Rovine proposes further that treaty design is influenced by the cases. I would say that's an empirical question that we do not know the answer to. So let me get to two questions here that are very tough. What we've just heard is a big challenge to ICSID, this question goes to what ICSID is doing. (And while I don't want to target one country unfairly, the example given is the Argentine problem, but it could happen anywhere.) The question is: "Regarding the refusal to pay an award, even after an award survives annulment proceedings: ICSID has been very fortunate over the years to have compliance, but what is your role and what is the Bank's role when there isn't?"

MEG KINNEAR

Well, for obvious reasons, let me give an answer about enforcement of ICSID obligations generally, and it is not an answer related to any particular State or issues that you read about.

One of the unique features of ICSID arbitration has been what people loosely call "automatic enforcement." You have all of your due process rights, and at the end of the day you can go through annulment. But at the end of the day what you also promise as a State is that the award will be paid. And that's a really important thing. As anyone who has litigated knows, you can spend as much or more effort enforcing an award as actually getting to your positive award in the first place.

So it's a very, very key power, and there are a couple things to think about here. Number one: we don't, and I don't think anyone does, have statistics on how many cases are paid, or paid in full, that kind of issue. I think the best you can surmise is that if people holding successful judgments are not coming back to ICSID, they have hopefully in most cases had their judgments realized, but maybe some have given up. Anecdotally, I think most of them have had their judgments realized. Sometimes not in full, as sometimes people will discount for the sake of moving forward. But our best guess, based on the anecdotes that come back to us, the information that comes back to us, is that the vast majority of ICSID awards are honored by states and honored in full.

There are some obviously that aren't, and the question is, what do you do about that? There are not a lot of them, and this is something that we haven't dealt with a lot, fortunately, and I hope we never have to deal with it a lot. But even in my short time at ICSID, I have had people holding judgments coming back and saying that their awards haven't been satisfied, asking us to remind the country at issue of their obligations. And I've sent letters, basically reminding States of their obligations under the ICSID Convention.

Normally, it's interesting which countries will respond, and sometimes you can understand, as there are some really good reasons, particularly with countries that are very, very poor, trying to make good on the judgments. Because they may also have some very key domestic needs, feeding and sheltering people, those kinds of things. And you do see countries saying, "We are trying and starting to pay the award, but it's going to take some time." That, frankly, is reality.

We see things like that, and in some cases, awards have still not been paid and the question is—and this has always been the big question with the Bank—to what extent will the Bank at large get behind the whole issue? I have not had that experience yet. Certainly the Bank as a whole is aware of those kinds of situations at ICSID, and we are trying very hard to find resolutions on a case-specific basis where it's brought to our attention. So it's not that
we walk away, but it is a difficult problem. Enforcement of judgments can be difficult for both the person holding it, as well as the person trying to satisfy the award.

**DAVID CARON**

Another similar question from a different angle. When we had the map up, we saw that coverage and recent states joining. This question is from Professor Jarrod Wong: “Some countries have withdrawn from ICSID recently, while other countries and investors have withdrawn indirectly by electing another forum available under BITs. Is this a trend, and is ICSID concerned? If so, what is ICSID doing to address this?” There are two big questions there, so let’s just take the first one dealing with countries withdrawing from ICSID.

**MEG KINNEAR**

For those who aren’t aware, we’ve had two countries leave ICSID. This is a novelty, as it had never happened before in the history of the Convention. The way we look at it, we offer a service, and it’s a sovereign choice to join ICSID, hence it is a sovereign choice to leave ICSID, so of course we will respect a sovereign choice. The decision to leave ICSID, from my understanding of the two countries that have left, was that it involved a lot of other factors that weren’t about ICSID.

So you may see this as simplistic, but I look at it and I say, “Did they leave because ICSID, as a facility, did not provide something that they needed?” If that’s the case, then I have a concern and I have something to fix. But we have looked very carefully at the two situations involved and are quite satisfied that their leaving ICSID was not about the facility itself and what the facility provided. In fact, if you look at it, a lot of it was more a question about how these countries perceived the whole area of investment arbitration, investment law, and bilateral investment treaty obligations. So it wasn’t about ICSID per se, and as long as I’m satisfied that we’re doing our job, then that’s a sovereign choice that you have to respect. As I say whenever I’m asked, our doors are wide open, and we’d be happy to have them back, but we respect the sovereign choice.

**DAVID CARON**

If I could just play that a little further. You’re saying that, if they were to ask, you would certainly have a discussion with them about ICSID, but that it’s a domestic story for them to work out?

**MEG KINNEAR**

Exactly. And this perhaps addresses the second part of the question—we see ourselves as providing a service. It’s available to those who want it, but we’re not going to force people to come to ICSID. That really does lead into the second question, as there is an increasing number of other institutions where parties may choose to bring their investment arbitration, or parties may choose to go to ad hoc arbitration. Again, there are a lot of considerations that you have when you are counsel to a party about where you want to go. Personally, I think that there a lot of very good things about ICSID arbitration, so I hope and believe it’s attractive to people, but I recognize there are other reasons people go to other places.

I think it’s fair to say that ICSID is probably the most transparent of the arbitration institutions, particularly with the 2006 amendments. ICSID really did make some changes
to encourage and enhance transparency, but there are those who aren't as keen on it, so ICSID might not be the place that they want to arbitrate, and that's fair. I'm not worried about parties not coming to ICSID. I think as long as we provide a really good and efficient service, people will still be attracted to ICSID.

Also, I think we are probably the least expensive in terms of proceedings, and our arbitrators really are great. I hope they don't get upset with me for touting this as an advantage, but our arbitrators' rates are kept at a cap that's $3,000 a day. If there's a request to change it, that has to come to the Secretary-General, so it helps keep it cost-efficient.

We have the enforcement obligation, perhaps not perfect, but that's something no other institution has. We have a lot of things going for ICSID, so I'm not worried about that issue. Quite frankly, at the end of the day, because we're a dispute resolution facility, the best thing for everybody is probably if disputes all get resolved and you're out of business. But we're still in business, and as long as we keep doing a good job, that's really the key.

DAVID CARON

I've heard you say several times that ICSID is providing a service as a dispute resolution facility. The question I have is: What are the special problems, given the fact that you're nested in a public organization unlike all of the others? So, for example, it seems that you have the procurement legislations of the Bank and the employment rules of the Bank. What are the special duties you feel you have? Are there some beyond the ICC, the LCIA, etc?

MEG KINNEAR

I suppose there are, being a part of the Bank. You're right, we have the generally applicable labor and procurement rules, those kinds of issues. But for every time those issues are a weakness, those can also be a strength, so I haven't found that those are a difficulty. We are not a "for profit" institution, but hopefully we are not an "operating at a loss" institution. The fact that we're a non-profit institution, I think, enhances the ability to provide a service.

DAVID CARON

Do you feel you have enough resources from either the Bank or the community of users to make this work when you have demands to be more efficient?

MEG KINNEAR

Resources are always an issue, so first you obviously want to do the things that don't call for more resources. Electronic case management is probably the case in point. Yes, you can always use more resources, and there are always a lot of other things you'd like to do, but at this point I'd like just a little bit more in terms of resources. We are staffing up, as some may have seen. We're staffing at the senior, junior, and middle levels, and I think we're going to be fine in terms of resources for that. I'd never turn down more resources, but I also want to balance that against higher costs to users, so we're trying very, very hard to keep that under control.

DAVID CARON

Let me change to a different subject. This question concerns class actions and mass claims. How do you see ICSID responding to situations where there's not an end to a single
investment, but more of a structural event where there’s a blizzard of claims, such as what’s happening in Argentina? Or what if there’s very many small claims coming out of the same legislative action? What is ICSID thinking about that?

**Meg Kinnear**

It’s an interesting one; I’ve actually thought about that a little bit. We do not have a formal consolidation power. NAFTA does have a formal consolidation power under Article 1126, and there are other sets of rules that have consolidation provisions. However, ICSID has been able informally and effectively to consolidate similar cases with the consent of the parties. To date, that has worked. The other thing you will occasionally see are cases where there are ten, twenty, even thirty individual claimants. So while it’s not a class action, it is the kind of situation where numerous individual interests will have one piece of litigation, so hopefully that results in cost and time savings.

I think there are a lot of interesting possibilities. There are possibilities, for example, for a summary process. Would there be a need and an appetite for that, and how would you do it? Would you want to have a class action-type provision? If you do, of course, you get into the whole mechanism of certifying a class and all of that. Do you create more bureaucracy than perhaps is needed and effective? These are all interesting situations to think about, and as you see investment arbitration going frequently to challenges of perhaps a government policy, as opposed to a single situation or a single breach of contract, you perhaps can see more and more situations where numerous individuals are affected. So there may be a call for that, and it’s a really interesting thing. I hope we get a chance to look at it at some point.

**David Caron**

I have two particular questions that perhaps you can give brief answers to. Going back to the map of countries, are you sure India is a party?

**Meg Kinnear**

Good question, I’ll go back and check!

**David Caron**

And the second question is: How is it that Kosovo is able to join without being a universally recognized state? Could other non-states or quasi-states become members?

**Meg Kinnear**

The requirements for membership at ICSID are basically that you are a member in good standing of the World Bank. Kosovo is a member in good standing of the World Bank, so it was able to join ICSID. There is another route for a country to join, which is very technical. If you’re a member of the International Court of Justice and there’s a two-thirds approval, you can join. But I don’t think anyone has ever joined that way—essentially all of our members are there because they’re members in good standing of the Bank. So we do not make that kind of an assessment; the World Bank does that. If the State is in good standing, then it is welcome to join.
I’d like to ask a question based on something that, to me, was very enticing that you said earlier. You mentioned that you’d do things differently if you went back to being counsel. Since so many counsel are in the room, what would you do differently and what have you learned from watching the ICSID secretariat?

Well, I guess there’s a lot that I’m still learning. But what I was thinking of in particular was, first of all, it’s a great privilege to get to know a lot of the arbitrators. Basically, I’m getting a better and different understanding of what is useful to them and what is not. So I think probably my advocacy would be better calibrated, can we put it that way? I would send fewer bankers’ boxes at them and be a little better focused, those kinds of things. It has really been a very valuable experience from that perspective.

The other thing is to have an understanding of everything that happens behind the scenes, which would probably allow me to be more effective in terms of helping the process at large. I don’t say that out of any altruistic interest in particular, but basically because if you do that as individual counsel, you are going to get to a result faster, and probably a better result, at the end of the day. So all of those kinds of exposure would certainly make me a more effective counsel if I went back to that, I think. But I’m very, very happy where I am now, I certainly don’t miss the all-nighters. I’ll stay as long as they’ll keep me!

I have a general question from Bart Legum. “Broadly, for you, what are your principle initiatives for the next two years?”

We at ICSID, towards the end of the summer, pulled together a list of short, medium, and long-term initiatives. I think we have enough for about the next decade, and every time there’s a brilliant idea we put it on this running list. We also decided it was really important to prioritize by picking five things, doing them, then going to the next five, rather than throwing out a new project every day.

So the immediate initiatives that we’re working on include case management and electronic case management. And I’m glad to say that in June of this year we are going to be getting to the first tranche of that. We’re going to be working on that ourselves—it essentially involves the in-house scanning of documents and the ability to put them on the system so that you can work with them.

Once we’ve got that, the next half is a full-blown case management system, including diarizing deadlines and that kind of thing. That will be a tool not just for internal use at ICSID, but also for parties. So the dream, and it will happen, although it may take us a little longer than we want, is that when you have a case at ICSID, you will have a password that takes you to your particular case on the Internet. There will probably be a part that’s just for arbitrators, and a general part for both arbitrators and parties. You’ll be able to file electronically; you’ll be able, while you’re staying up all night, to find out what someone said in a letter dated two years ago, or whatever.
So we’re moving towards that case management, and I think that’s a huge initiative. There’s also just a huge amount of archiving required, but we’ll be better able to find documents and to keep our cases together as our result. We’ve made immense efforts and hired a professional files manager, who has been doing an amazing job with that.

The *Foreign Investment Law Journal* was about two and a half years behind, but we’ve put out two issues since June. We’ve got another issue ready to go to press, and by the end of 2010 we’ll be up-to-date there. So that’s been one of our big initiatives.

Staffing-wise, we had some positions that were unfilled, so we’ve been staffing. Obviously, staffing is key as we need all hands on deck to get all of these things done. I think those are the immediate initiatives, as far as things we’ve been working on.

**DAVID CARON**

A last question concerning legitimacy. The question involves the annulment process. On the annulment process, there are five grounds for which annulment is possible, but they should all be difficult. Yet on petitions for annulments that are rejected, the Committee will say, ‘‘We should reject this because the standard is not met, but, boy, it was darn close!’’ They go one step further and say the award, in some respect, was not that good, or that the behavior was not that good. At the same time, they uphold the award and they undermine the award. Have you noticed that?

**MEG KINNEAR**

Well, I guess you need to go back to the original design of the ICSID Convention. The States parties decided they wanted some kind of review. On the other hand, of course you don’t want full de novo review. So then you have to calibrate at some point, and set your standard of review. The standard of review set in the Convention was set so that you have to jump a pretty high hurdle, that hurdle being one of the five grounds. That’s a compromise, so I guess you love it if you win, and you can’t stand it if you lose. This is not meant to be cynical. The standard of review is meant to draw a good balance between finality of process, which is key to arbitration, while still offering an appropriate and just result. It’s a very hard line to draw, but after reading the provision, I think it’s appropriately drawn.

**DAVID CARON**

Meg, let’s return to one topic that I think is a concern to a number of people. How do you feel about enlarging the pool of arbitrators? That could be in a particular case, or just in general. What is ICSID’s role in doing that? That could be by geography, by gender, or by any number of dimensions.

**MEG KINNEAR**

First and foremost, when we are asked to name an arbitrator, it is the responsibility of ICSID. It’s a very big responsibility. You want parties at the end of the day to say that we selected good candidates. It might not have been the candidate that they would have chosen, but we want them to feel that they got a very able arbitrator who ran a very fair hearing. That’s what we’re looking for. So first and foremost, it’s a meritocracy.

That said, we’re very conscious that there’s a need for more arbitrators. In appointing them, we have the opportunity to get new people on board, and in some respects, not always
going off the roster is actually an opportunity to put forward some new names, the chance to bring some new people to the attention of parties. If they’re selected, that’s terrific. I have to say that we’re very aware that, because in most cases we’re appointing presiding arbitrators, it’s helpful to know that the person has had some experience as a party-nominated arbitrator first, that they know the process and are ready to jump up to that next additional role as a presiding arbitrator.

So the short answer is, number one, foremost and always, it’s merit. But yes, I certainly hope and look to see if there are candidates from other regions, including women. There are some fabulous candidates who may meet that primary requirement. So yes, it’s important to expand the pools, but obviously never just for the sake of diversification.

DAVID CARON

These last two questions, again, are quite the buzz in general. ‘‘What are your views on arbitrators also serving as counsel? In another matter, obviously, in case there’s any confusion. Is this practice to be discouraged? If it’s to be discouraged, is it somehow reflected in your calculus about who you’re putting as one, two, and three on the list?’’ Also: ‘‘Should there be a special pool of annulment committee members?’’ That certainly was an approach that Mr. Shihata took in his time to try and stabilize the annulment practice. Is that something that’s going to continue? That’s two questions.

MEG KINNEAR

The first one is the whole question of wearing different hats, and this is one of the hottest issues in investment arbitration. There is huge polarization between those who believe that a good arbitrator is one who can wear different hats, changing them readily, and those who feel that you should have a completely separate arbitrator bar. There appears to be very little light between those two views, quite frankly. My thought is that as a whole discipline, everybody involved, we’re going to have a lot more discussion and conversation on this topic. This is one of those things that we follow and that’s going to mature, and I don’t know where we end up.

I look at it more from a very pragmatic basis. First of all, when a conflict question comes to us, I don’t think about whether or not an arbitrator is playing different roles. For me, it’s a question of fact. In this particular case, is there a conflict? That’s the lens that we look through when we are assessing those kinds of things. Frankly, I understand all of the concerns about having arbitrators who wear different hats. But number one, from a pragmatic perspective, I don’t think at this point, with the number of cases at ICSID and elsewhere, that you will have enough qualified, non-conflicted people if you have a bright-line rule against nominating practicing lawyers. And frankly, often these people have incredibly wonderful experience to bear, which is why they are good candidates. So the real key is not, “what are the roles you’ve played,” it’s not about the roles you played yesterday. The key is, “in this particular situation, is there conflict?” That’s how we look at it.

I can also say that we are scrupulous when we are putting forward names. If there’s any hint of conflict, we try to go to other candidates so that the parties feel they have three real, viable choices. I can say that’s one of the things I’ve been learning since we started the ballot system in September. I think one of my early nominations was a candidate who I thought was wonderful and would have been fantastic, but had what you might have considered a waivable orange conflict if you went by the IBA rules. So we put the name forward with
a declaration explaining the conflicts, and both of the parties let us know that they thought it made it almost impossible to choose that candidate. So that was a lesson learned, and we're definitely learning as we go along with this process. So we try very hard to nominate candidates who don't even have those kinds of issues.

And let me just make one thing clear. When we do the ballots, it's not one, two, three in terms of a ranking or anything like that. It's just three lines. I think we even put them alphabetically. So it's not meant to be any kind of disposition pushing you in a certain respect. The other question was about?

**DAVID CARON**

And as to a special pool for annulment committees?

**MEG KINNEAR**

That's another tricky one. At times, there are those who've felt that it would be better to have a certain number of arbitrators who dedicate themselves only to annulment issues. This obviously helps you get around conflict problems, it helps with the availability issues, and it gives you a few individuals who know what the test is and what the jurisprudence is. Those are all very, very legitimate points.

On the other hand, I think there is an equally legitimate argument being put forth by the other side. There has been generally, in investment arbitration, a discussion about putting forward a standing appellate body, something that has been a huge success at the WTO. In 2006 ICSID put forward a proposal about a standing appellate body, but countries rejected it. So States are not ready to have that as a formal option, and I don't think we ought to go indirectly where we were told not to go directly. But certainly the fact that somebody has expertise and experience in annulment makes that person an attractive candidate to us when we're naming a new annulment panel.

**DAVID CARON**

Meg, thank you very much. I promised you the last minute to say where you're going with ICSID.

**MEG KINNEAR**

Well, this really will be two minutes, and fortunately today we already canvassed a lot of the issues we're dealing with at ICSID. I have three main things that I want to leave you with. First of all, I would like to thank those who come to ICSID for their confidence in the organization. We are working every day to make sure that you feel that confidence is justified.

Second, one of the big things to remember is that we are an organization that is very much open to comment and discussion, so the doors are open if anyone has anything they want to talk about, please come and talk to us. The point basically is that we're transparent, not just in our rules, but also in our processes.

The last point is to acknowledge the ICSID staff, and you'll see some of the ICSID staff are here. It is a privilege to work with them. They are fabulous, and I think that any of you who have not yet worked with ICSID or have not had a case at ICSID will find that they
are superb and that they make the difference. So thank you, to them, for giving me the privilege to work with them.

DAVID CARON

I think we can all see why the ICSID staff morale went up dramatically upon the arrival of Meg Kinnear. Meg, thank you so much for joining us today!

MEG KINNEAR

Thank you.