

Public Lecture by Meg Kinnear: “How International Investors and States Resolve (Many of) Their Disputes – An Overview of the International Centre for Settlement of Investment Disputes”

On Friday, 18th November 2016, Universitas Pelita Harapan Center for International Trade and Investment (UPH-CITI) had the privilege to host a public lecture by Meg Kinnear – Secretary General of International Centre for Settlement of Investment Disputes (ICSID). The public lecture was entitled “How International Investors and States Resolve (Many of) Their Disputes – An Overview of the International Centre for Settlement of Investment Disputes”.

Ms. Kinnear began her lecture with an introduction to ICSID as an institution that forms 5 main branches of the World Bank Group. Established in 1966, ICSID is the only institution designed by States for Investor-State Dispute Settlement (ISDS) purpose. To date, ICSID has administered more than 520 ISDS cases which cover more than 70% of ISDS cases in the world. Ms. Kinnear also stated that the number of ISDS cases is increasing in parallel with the growing number of foreign direct investments and International Investment Agreements (IIAs) which provide the ISDS mechanism in the past 20 years.

Ms. Kinnear also talked about the misconceptions of ISDS. One of them is the notion ‘the investor always wins the ISDS dispute’. Ms. Kinnear clarified this misconception by pointing out the fact that States prevail in more than half of ICSID cases. Furthermore, in cases where the investor prevails, the compensation awarded is much less than the amount claimed. Another misconception is related to transparency, where ISDS is perceived as secret tribunals insulated from public scrutiny. Ms. Kinnear argued that actually ICSID awards are published and some hearings are open to the public. Detailed information about each ICSID case is also available on the ICSID website.

The lecture then continued with a brief explanation of several features of the ICSID, such as jurisdiction, procedural framework, costs, the award and enforcement of the award. ICSID will have jurisdiction only in legal dispute arising directly out of an investment between a Member State, and a National of another Member State where consent in writing exists. In regards to cost, the requesting party should lodge a registration fee of USD \$25,000 when filing a request. The fee is intended to prevent frivolous claim by impecunious party. The fee of arbitrators is capped for USD \$3,000/day and ICSID will also charge administrative fee of USD \$32,000/year which includes hearing facilities, services of the secretariat and other operational costs. However, these costs usually constitute only 10% of the total cost for having a dispute in ICSID, while the other 90% comes from cost of private lawyers, summoning experts and witnesses and any other cost relating to the party’s presentation of a case.

Ms. Kinnear also explained the three possible types of award as the result of a dispute. Firstly, the award where ICSID tribunal dismiss the claim for lack of jurisdiction. Secondly, award based on the merits where the dispute undergoes the process in ICSID Tribunal and concluded by the tribunal. Thirdly, the award can embody settlement of the disputing parties, where the disputing parties reach an agreeable settlement. There is no partial award in the ICSID system and award for compensation can only take monetary form. Ms. Kinnear also emphasized that ICSID awards are binding and parties must comply with them. On top of that, pecuniary obligations can be enforced in any of the 153 Member States of ICSID; and national courts cannot review the award. There are only limited grounds for annulment of ICISD awards. The annulment can be performed for one of these reasons, which are the Tribunal was not properly constituted, the Tribunal has manifestly exceeded its powers, corruption on the part of a Tribunal member, a serious departure from a fundamental rule of procedure, or the award fails to state the reasons on which it is based.

There were more than 80 participants who attended the public lecture coming from different backgrounds, including law firms, embassies, businesses, academics, researchers and students. The discussion continued after the presentation as the participants posed many questions regarding the topic.