



Commencing
Investment Treaty
Arbitration: ICSID v.
Non-ICSID

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Non-ICSID Alternatives

- Main alternatives to ICSID
 - United Nations Conference on International Trade Law (UNCITRAL)
 - International Chamber of Commerce (ICC)
 - Arbitration Institute of the Stockholm Chamber of Commerce (SCC)
- See, e.g., Article 26 of the Energy Charter Treaty

UNCITRAL: 1976 or 2010 Rules?

- Article 1.2 of UNCITRAL Rules 2010
 - “The parties to an arbitration agreement concluded after 15 August 2010 shall be presumed to have referred to the Rules in effect on the date of commencement of the arbitration, unless the parties have agreed to apply a particular version of the Rules.”
 - “The presumption does not apply where the arbitration agreement has been concluded by accepting after 15 August 2010 an offer made before that date.”
- Consent to arbitrate in a BIT = an offer to arbitrate
- Notice of arbitration = acceptance of consent
= arbitration agreement

UNCITRAL 1976: Implications

- No requirement for respondent to file an answer
 - = ICSID system
- Article 4.1 of 2010 UNCITRAL Rules: respondent to file a response within 30 days
 - = ICC Rules (Article 5)

UNCITRAL 1976: Implications (cont'd)

■ Respondent

- BIT disputes arise under a treaty, not a contract
- Access to competent authorities and documents?
- Recruitment of external counsel and experts

■ Claimant

- Putting pressure on the respondent
- Access to key defenses early on in the process

UNCITRAL Arbitration v. ICSID Arbitration

- No secretariat/registry to support the process
 - Cf. ICSID Secretariat
 - In practice: Permanent Court of Arbitration (PCA)
- Law governing the arbitration (lex arbitri): the law of the seat
 - Cf. ICSID Convention
- Publicity
 - Cf. ICSID website
- Constitution of the arbitral tribunal

Conclusion: ICSID v. non-ICSID

- ICSID arbitration offers more robust institutional support (ICSID Secretariat); UNCITRAL is more flexible
- UNCITRAL: the parties can agree on the appointing authority; in ICSID appointments are made by Chairman of the Administrative Council;
- ICSID arbitrations are conducted under public international law (the ICSID Convention); UNCITRAL arbitrations are conducted under local arbitration law and awards are subject to review by local courts
- ICSID arbitrations tend to be more public than UNCITRAL arbitrations: strategic implications