

Bilateral Arbitration Treaties: An Improved Means of International Dispute Resolution

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I. INTRODUCTION

1. This paper examines the subject of bilateral and multilateral arbitration treaties (or “BATs”) and outlines the benefits that such treaties would provide to States and commercial parties. As discussed below, BATs would establish arbitration as a default mechanism to resolve international commercial disputes between businesses that are located in the States party to the BAT.

2. BATs are a topic of increasing and substantial interest. Proponents of BATs argue that these treaties offer significant benefits to international businesses by providing access to more efficient, expert, and enforceable dispute resolution mechanisms, applying neutral and fair procedures. In doing so, BATs facilitate international trade and commerce, particularly involving small and medium-sized enterprises, while also providing enhanced access to justice. Several States have indicated interest in BATs, and the concept has generated considerable professional interest in legal and business communities, particularly in recent years.

3. This paper considers how the study of BATs would tie into the work of UNCITRAL and the benefits that such a study would bring both to UNCITRAL and the larger international community.³ As discussed below, by supporting a study of BATs, UNCITRAL could ultimately develop a model instrument that forms a precedent for States that wish to conclude BATs with each other. Such a model BAT would stand on the shoulders of some of UNCITRAL’s most successful accomplishments – the UNCITRAL Arbitration Rules and the UNCITRAL Model Law on International Commercial Arbitration (or “Model Law”) and the

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³ The authors have previously published on the novel concept of a BAT. Mr. Born has proposed a Draft Model BAT and Draft Commentary on a Model BAT that have been made available for public comment. See Draft Model Bilateral Arbitration Treaty, https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/News/Documents/Draft-Model-BAT.pdf (last accessed on 29 November 2016); Draft Commentary on Model Bilateral Arbitration Treaty, https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/News/Documents/Explanatory-Note-Draft-Model-Bilateral-Arbitration-Treaty.pdf (last accessed on 29 November 2016); see also Gary Born, “BITs, BATs and Buts: Reflections on International Dispute Resolution” in *Young Arbitration Review* (2011), 6-14. Dr. Butler has examined the potential of such a BAT, specifically for small and medium enterprises (SMEs) in New Zealand. See Petra Butler and Campbell Herbert, “Access to Justice vs Access to Justice for Small and Medium-sized Enterprises: The Case for a Bilateral Arbitration Treaty”, *New Zealand Universities Law Review* Vol. 26, 2014, 186-221.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards (or “New York Convention”), the promotion of which is an integral part of UNCITRAL’s work.⁴

4. Part II of this paper explains how the current shortfalls in international dispute resolution increase barriers to trade and inhibit foreign direct investment (“FDI”) and the role BATs can play to mitigate some of these concerns. Part III explores the deficiencies in international dispute resolution today and the benefits of BATs through the lens of two traditionally disadvantaged groups – developing small States and small and medium sized enterprises (“SMEs”). Part IV draws attention to further areas of research on BATs that UNCITRAL could explore. Part V provides some concluding observations.

5. Attached to this paper is a draft model BAT (Annex A), together with an explanatory commentary that addresses the provisions of the BAT on an article-by-article basis (Annex B).⁵

II. BATS, BARRIERS TO TRADE AND INTERNATIONAL DISPUTE RESOLUTION

A. *Deficiencies in International Dispute Resolution as Barriers to Trade*

6. The current mechanisms for resolving international disputes have not kept pace with the cross-border dimension of business in the 21st century. Doing business globally therefore faces the risks and uncertainties of inconsistent or conflicting national laws; biased, inefficient, inexperienced, or otherwise unsuitable decision-makers; inconsistent dispute resolution proceedings; and severe obstacles to the enforcement of judgments.

7. More specifically, the current risks in international dispute resolution include:

a. **Lack of Neutrality:** Many international commercial disputes are, by default, resolved by litigation in national courts. However, commercial parties frequently doubt that national courts, particularly the courts of the home jurisdiction of their counter-party, will render an unbiased and competent decision.⁶ In many instances, well-documented concerns about corruption and the integrity of national courts further erodes confidence in litigation as a means of dispute resolution.⁷

b. **Lack of Experience and Expertise:** International commercial disputes are often complex. Many such disputes arise in specialized commercial sectors, with complex patterns of business customs and technical issues (e.g., oil and gas disputes; insurance and reinsurance disputes; commodities transactions; M&A disputes). Very few, if any, national courts can consistently provide the specialized expertise

⁴ See United Nations Commission on International Trade Law, New York Arbitration Convention, <http://www.newyorkconvention.org/uncitral> (last accessed on 29 November 2016).

⁵ The draft Model BAT and accompanying commentary are also available online at https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/News/Documents/Draft-Model-BAT.pdf and https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/News/Documents/Explanatory-Note-Draft-Model-Bilateral-Arbitration-Treaty.pdf respectively.

⁶ See Nigel Blackaby, Constantine Partasides, *Redfern and Hunter on International Arbitration*, 16th edition, OUP 2015, at para 1.99 et seq.; Julian D. M. Lew, Loukas A. Mistelis, Stefan Michael Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International 2003, at para. 1-13.

⁷ See Transparency International, *Global Corruption Report 2007: Corruption in Judicial Systems* (2007), at p. xxi (“Corruption is undermining justice in many parts of the world, denying victims and the accused the basic human right to a fair and impartial trial.”).

appropriate for such disputes. Moreover, even disputes with simple factual matrixes often entail significant complexity by virtue of the application of foreign law. Some national courts are well-versed in resolving cross-border disputes, but many are not. Particularly in emerging markets, courts may have limited experience in resolving cross-border disputes or may generally lack experienced commercial judges.

c. **Risk of Parallel or Multiple Litigation:** In practice, cross-border disputes often lead to litigation in multiple fora⁸ – the place of performance, the jurisdiction of the counter-party, the enterprises’ own national courts and jurisdictions where the counter-party has assets for enforcement, with each proceeding potentially involving multiple appellate levels. The complexity of handling a multiplicity of proceedings is compounded by the inevitable risk of conflicting decisions.

d. **Cost and Time to Resolve Disputes:** The very real risk of multiple parallel proceedings in cross-border disputes also leads to prohibitive costs and delays. Parties often have to “layer” counsel, first engaging local counsel and then appointing foreign counsel in each of the various relevant jurisdictions.⁹ Moreover, enforcement of judgments often requires multiple sets of lawyers in different jurisdictions. In many cases, litigation is slow, with proceedings taking many years (or more) to conclude, and then being subject to even lengthier delays for appellate review, followed by yet further delays for enforcement.

e. **Obstacles to Enforceability of Judgments and Forum Selection Provisions:** Different jurisdictions apply different rules (often uncertain national rules) when enforcing foreign judgments and forum selection clauses. Assuming the parties obtain a judgment from a national court, it is often difficult or impossible for the judgment to be enforced abroad, in particular in jurisdictions where the defendant has assets.¹⁰ While there are frameworks for the enforcement of judgments between certain countries, there is as yet no comprehensive mechanism that ensures recognition of a State court’s judgment in most other countries.¹¹ Even where enforcement is possible, the process is invariably slow.

f. **Uncertainty and Unpredictability:** The factors outlined above introduce a significant degree of uncertainty and unpredictability, which in turn has a chilling effect on international business. The risks associated with potential cross-border business drive up the costs of international commerce and may prevent many potential participants from expanding internationally.

⁸ See Petra Butler and Campbell Herbert, “Access to Justice vs Access to Justice for Small and Medium-sized Enterprises: The Case for a Bilateral Arbitration Treaty”, *New Zealand Universities Law Review* Vol. 26, 2014, 186-221, at p. 199.

⁹ See Petra Butler and Campbell Herbert, “Access to Justice vs Access to Justice for Small and Medium-sized Enterprises: The Case for a Bilateral Arbitration Treaty”, *New Zealand Universities Law Review* Vol. 26, 2014, 186-221, at p. 202 et seq.

¹⁰ See James Fawcett and Janeen M. Carruthers, *Cheshire, North & Fawcett: Private International Law*, 14th edition, OUP 2008, at p. 514 et seq.

¹¹ See James Fawcett and Janeen M. Carruthers, *Cheshire, North & Fawcett: Private International Law*, 14th edition, OUP 2008, at p. 514 et seq. The possible adoption of the Hague Convention might, over time, reduce these risks, but this will be a long-term process with uncertain results. At present, the European Union, Singapore, and Mexico have ratified the agreement but widespread ratification does not seem likely in the near to mid-term.

8. In sum, international dispute resolution today, with the default of national court litigation is unsatisfactory, leading to less trade and economic growth on an international scale.¹² The current default system also produces significant obstacles to the fair and objective resolution of claims by private businesses and results in serious unfairness in some cases.

B. Bilateral Arbitration Treaties – Reducing Barriers to Trade and Promoting FDI

9. Various efforts have been undertaken to mitigate the legal risks and uncertainties of cross-border trade and investment, including (i) the wide-spread ratification of international commercial and investment arbitration treaties (notably, the New York Convention and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the “ICSID Convention”)); (ii) the development of institutional arbitration (including through the promotion of institutional arbitration rules, like the UNCITRAL Rules); and (iii) the negotiation of treaties for the recognition of foreign judgments (like the Hague Convention on Choice of Court Agreements (“Hague Convention”)).

10. Virtually all these efforts however assume that international businesses will conclude agreements (pre or post-dispute) to resolve disagreements. The New York Convention, the ICSID Convention and the Hague Convention all require either a valid agreement to arbitrate or a forum selection agreement providing for consensual dispute resolution. Absent such agreement, the default means of cross-border dispute resolution remains litigation in (multiple) national courts, with all the deficiencies detailed above. BATs were conceived as an innovative way of mitigating these deficiencies and the unique risks of international trade and investment.

11. A BAT is a treaty between two or more States that provides for (i) international commercial disputes (ii) between commercial enterprises based in the two State parties to the treaty (iii) to be finally resolved by arbitration.¹³ Commercial parties would be free to opt-out of the BAT regime by (i) selecting another form or forum for dispute resolution (such as mediation or litigation) or (ii) modifying the arbitration procedure provided for under the BAT (including the applicable arbitration rules).¹⁴

12. BATs therefore change the default system of cross-border commercial dispute resolution from cross-border litigation to international arbitration. In doing so, BATs build on the experience of the New York Convention and the UNCITRAL Model Law, and international arbitral institutions, to provide a more expert, efficient, and enforceable means of dispute resolution than currently available in national courts.

13. In practice: If States A and B conclude a BAT, international commercial disputes between enterprises based in States A and B would be resolved by arbitration as provided for in the BAT, unless the commercial parties have agreed to a different mechanism. If a business based in State A attempted to bring a dispute against a business based in State B to a national court in State A or State B, that court would have to refer the parties to arbitration.¹⁵

¹² European Commission, *European contract law in business-to-business transactions: Summary* (2011); World Bank and the International Finance Corporation, *Doing Business 2012* (2012) – both studies found that international litigation poses a significant trade barrier for SMEs and businesses in general.

¹³ Draft Model BAT, Article 2.

¹⁴ Draft Model BAT, Article 5.

¹⁵ Parallel to the functioning of Article II of the New York Convention.

Courts in either State also would have to recognize and enforce any awards made by arbitral tribunals under the BAT.¹⁶ Consequently, from the points of view of States A and B and businesses based in these States, the complex and often archaic system of international civil procedure and jurisdiction would be replaced with a modern, efficient and straight-forward mechanism of treaty-based commercial arbitration.

14. States would negotiate the terms of their BATs on a bilateral basis, taking into account their particular needs and the requirements of the relationship with the other treaty State. Individual BATs may take different shades in areas including the scope of their application, the default seat and arbitral process, whether mediation and negotiation should be required prior to arbitration, the degree of transparency of the process and the terms of judicial intervention and enforcement. It can for example be expected that most States would choose to exclude consumer disputes, employment disputes, disputes over matrimonial, domestic and inheritance matters and similar categories of non-commercial disputes from the scope of their BATs. States could also exclude types of commercial disputes, e.g. ones involving certain environmental, quasi-criminal or bankruptcy related issues. At the same time – in the interest of legal certainty – it would be desirable for any BAT to clearly delineate the limited categories of disputes not covered, so that it can otherwise function as a “catch-all” dispute resolution mechanism between the contracting States.

15. While States can and will undoubtedly give their individual touch to the BATs they enter into, such freedom comes at a cost. Businesses engaged in international commerce seldom do business with counterparties in just one other State. Their commercial relationships will therefore be governed by not only one, but many of the BATs entered into by their home State. If these BATs are too different from each other, transaction costs will increase and the full potential of efficiency, simplicity, and fairness inherent in the idea of BATs will not be fully realized. It is therefore desirable for BATs to be built on a common foundation: a Model BAT that provides a sensible and unitary framework that States can fine-tune to their individual needs.

16. Although proposed in the form of a bilateral treaty, the concept of a BAT can be modified into a multilateral arbitration treaty (a “MAT”) between a number of States, for instance, in a geographic region (e.g., ASEAN or the Pacific Islands). The dispute resolution provisions of a BAT or MAT could also form part of a larger free trade agreement (“FTA”), much like the investment chapter of FTAs.

17. The success of UNCITRAL’s creations such as the Model Law demonstrate that such models provide a good compromise: States retain the ability to shape the model to their individual needs by making careful adjustments, but these individual implementations will retain sufficient commonality. This provides considerable international legal certainty and allows businesses to operate with confidence outside of their home jurisdictions – without the need to familiarize themselves with numerous entirely different legal frameworks.

18. Thus with BATs, instead of fearing bias of national courts, parties can trust in neutral decision-makers of their choice.¹⁷ Instead of being limited by the experience and resources of a specific set of national courts, parties can freely choose legal experts appropriate to their

¹⁶ Taking into account the well-established limitations to the recognition and enforcement of arbitral awards that would be modelled after Article III, IV and V of the New York Convention.

¹⁷ See Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International 1999, at p. 1; Nigel Blackaby, Constantine Partasides, *Redfern and Hunter on International Arbitration*, 16th edition, OUP 2015, at para 1.99 et seq.

dispute.¹⁸ Instead of having to conduct multiple proceedings, parties can focus even multi-dimensional disputes in one arbitration.¹⁹ Instead of spending money on numerous different national counsels and having to contend with several appellate layers, arbitration provides a cost-efficient one-shot solution to quickly and efficiently resolve commercial disputes.²⁰ Instead of a judgment that might be worthless wherever the losing party has assets, the claimant will have a widely enforceable arbitral award.²¹

19. BATs in effect capitalize on all the advantages of arbitration that have today made it the preferred choice of dispute resolution for international trade²² – neutrality, efficiency, expertise, finality, and enforceability. By reducing the risks of cross-border dispute resolution, BATs mitigate a significant barrier to trade and will encourage more businesses to engage in Foreign Direct Investment and international trade. As one commentary notes, “[a] BAT would – by directing the resolution of disputes to arbitration – serve to give [MSMEs] greater access to justice in the international space than is available under the status quo.”²³

20. This said, the authors do not posit that arbitration is perfect – no dispute resolution mechanism can and will ever be. The vibrant discussions within UNCITRAL Working Group II on Arbitration and Conciliation / Dispute Settlement demonstrate that the law and practice of arbitration is constantly improving – simultaneously underscoring the need for these improvements. But when it comes to resolving international commercial disputes, arbitration is – by a wide margin – the most expert, most fair, most efficient, and most neutral form of cross-border dispute resolution.

III. BILATERAL ARBITRATION TREATIES THROUGH THE LENS OF DEVELOPING SMALL STATES AND SMES

21. While the pitfalls of international dispute resolution today affect all market participants in international commerce, some players are able to better compensate for built-in deficiencies than others. Larger States have more resources available to maintain an effective judiciary. Large businesses have the knowledge and resources to avoid international litigation by individually tailoring arbitration agreements. In contrast, developing small States and SMEs are less equipped to address the pitfalls of the current default system of adjudicating cross-border disputes, amplifying existing power-asymmetries by putting developing small States and SMEs at a disadvantage. The following sections explore these points and highlight how BATs could alleviate some of these concerns.

¹⁸ See Julian D. M. Lew, Loukas A. Mistelis, Stefan Michael Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International 2003, at para. 1-25; Nigel Blackaby, Constantine Partasides, *Redfern and Hunter on International Arbitration*, 16th edition, OUP 2015, at para 1.71 et seq.

¹⁹ See Petra Butler and Campbell Herbert, “Access to Justice vs Access to Justice for Small and Medium-sized Enterprises: The Case for a Bilateral Arbitration Treaty”, *New Zealand Universities Law Review* Vol. 26, 2014, 186-221, at p. 199.

²⁰ See Julian D. M. Lew, Loukas A. Mistelis, Stefan Michael Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International 2003, at para. 1-28, 1-30; Nigel Blackaby, Constantine Partasides, *Redfern and Hunter on International Arbitration*, 16th edition, OUP 2015, at para 1.125.

²¹ See Julian D. M. Lew, Loukas A. Mistelis, Stefan Michael Kröll, *Comparative International Commercial Arbitration*, Kluwer Law International 2003, at para. 1-21; Nigel Blackaby, Constantine Partasides, *Redfern and Hunter on International Arbitration*, 16th edition, OUP 2015, at para 1.102.

²² *2015 International Arbitration Survey: Improvements and Innovations in International Arbitration* (Queen Mary University, 2015), at p. 5.

²³ Petra Butler and Campbell Herbert, “Access to Justice vs Access to Justice for Small and Medium-sized Enterprises: The Case for a Bilateral Arbitration Treaty”, *New Zealand Universities Law Review* Vol. 26, 2014, 186-221, at p. 189.

A. *Developing Small States Moving from International Litigation to BATs*

22. Although there are different definitions of what constitutes a small State,²⁴ small States face similar sets of challenges including remoteness and insularity, susceptibility to natural disasters, limited institutional capacity, limited diversification, reliance on external trade and investment, the need to access external capital as well as poverty.²⁵ When it comes to international commercial dispute resolution these challenges include a lack of human (legal) resources²⁶ a lack of financial resources to invest in the legal sector and a developing judiciary.

23. Furthermore, many developing small States lack treaty arrangements on the enforcement of their judgments abroad or the enforcement of foreign judgments domestically (indeed, this is not a problem unique to developing small States, although developed States are better placed and resourced to negotiate such arrangements). As a result, foreign investors face a real risk of substantial delays and ineffective justice in case of a dispute, factors that make such States riskier for business, inhibiting trade and the inflow of FDI.

24. In a number of related ways, default arbitration under a BAT is capable of alleviating some of these pressures.

25. First, from the perspective of businesses operating out of or into developing small States, expert arbitration replaces inexperienced courts. Currently, parties might choose a neutral third-party country's court to resolve their international disputes as an alternative to local courts.²⁷ This is particularly unsatisfactory for developing small States and their businesses. For instance, a judge in Singapore will hardly be familiar with the commercial realities of the fisheries business between Vanuatu and Fiji. Arbitrators are chosen for their individual expertise.²⁸ By providing arbitration as a default mechanism, more disputes can be handled by individuals hand-picked for their familiarity with the relevant region and business sector. Disputes will be handled at a reduced cost in a more expert and efficient fashion.

26. Second, BATs provide businesses with greater certainty in the enforceability of decisions through the New York Convention. Developing small States can therefore assure investors that they will see the fruits of their litigation which will not be rendered a mere paper victory.

27. Third, from the perspective of the State, expenses of maintaining the judiciary will be reduced by relieving docket congestion. National courts can focus on resolving domestic disputes, particularly those of a non-commercial nature and thus strengthening the local rule of law. They can also reduce the need to expend resources on resolving complex international disputes that involve the application of foreign law. At the same time, BATs would provide local lawyers, and indirectly courts, with alternative models of dispute resolution, ultimately enhancing the quality and efficiency of local litigation.

²⁴ See Matthias Maass, "The elusive definition of the small state" in *International Politics* (2009) 46, 65–83, at p. 65. Criteria for smallness include quantitative measures such as GDP, income per capita and population as well as qualitative measures rooted in geography, economics and politics – these are often relational, i.e. measured not in isolation but by a context-dependent reference frame and by how a State fits into the global system.

²⁵ See Report of the Commonwealth Secretariat / World Bank Joint Task Force on Small States, *Small States – Meeting Challenges in the Global Economy* (2000), at p. 5.

²⁶ See Lino Briguglio, "Small Island Developing States and their Economic Vulnerabilities" in *World Development* (1995) Vol. 23, No. 9, 1615-1632, at p. 1617.

²⁷ See Gary Born, *International Commercial Arbitration*, Kluwer Law International 2014, at p. 75.

²⁸ See Gary Born, *International Commercial Arbitration*, Kluwer Law International 2014, at p. 80 et seq.

28. Fourth, BATs could be used to enhance capacity building for the local legal community. The ability to select arbitrators is an essential component of arbitration²⁹ that should not be restrained by BATs; indeed, one of the advantages of default arbitration will be that parties can source counsel and arbitrators globally. Nonetheless, States can consider crafting their BATs to provide for local arbitral institutions and/or local arbitrations (by setting the nationality of arbitrators to be appointed). Capacity building can occur on a regional basis, where small States with a common cultural and legal heritage can jointly develop a regional capacity for enhanced resolution of commercial disputes.

29. This coincides with the desire of parties to choose decision-makers familiar with the cultural nuances of the parties and the place of performance of the agreement. Such local capacity building will also contribute to current on-going efforts of the international arbitration community to expand, diversify and become more representative.³⁰

30. In sum, BATs possess great potential to contribute to the growth of developing small States by making them a more attractive destination to do business. A commitment to international arbitration would assure foreign businesses and investors that their disputes would be resolved fairly and efficiently, and any outcome will be enforceable.

31. No empirical research has as of yet been done on the practical implementation of the novel idea of BATs in developing small States. The time is ripe for serious discussion on how these instruments should be shaped for developing small States to achieve better leverage in international trade. Inclusive supranational institutions, such as UNCITRAL, are needed to encourage and provide a forum for developing small States to voice their needs in the drafting of a universal Model BAT as well as to conduct objective research on these needs.

B. Small and Medium Enterprises (SMEs) moving from international litigation to BATs

32. As with small States, there is no international consensus on the definition of Small and Medium Enterprises (SMEs). In New Zealand, for example, SMEs are defined as businesses employing fewer than 100 persons.³¹ For the European Union, the European Commission defines SMEs as enterprises employing fewer than 250 persons and having an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million.³² In the United States, SMEs are often defined as businesses with fewer than 500 employees.³³ Again, these definitional challenges do not detract from the fact that many SMEs face similar trading challenges vis-à-vis international dispute resolution.

33. SMEs form a substantial part of the domestic economic fabric, yet they are drastically underrepresented in international trade. For the United States, it has been observed that

²⁹ See Emmanuel Gaillard and John Savage, *Fouchard Gaillard Goldman on International Commercial Arbitration*, Kluwer Law International 1999, at p. 451 et seq.

³⁰ See Susan D. Franck, James Freda, Kellen Lavin, Tobias Lehmann, Anne van Aaken, “International Arbitration: Demographics, Precision and Justice”, in Albert Jan van den Berg (ed.), *Legitimacy: Myths, Realities, Challenges, ICCA Congress Series, Volume 18*, Kluwer Law International 2015, at p. 116 et seq.

³¹ See Ministry of Business, Innovation & Employment (New Zealand), *The Small Business Sector Report* (2014), at p. 10.

³² Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises, 2003/361.

³³ See U.S. International Trade Commission, *Small and Medium-Sized Enterprises: Overview of Participation in U.S. Exports* (2010), at 1-3.

“[m]ost firms are small. By head count, fully 98 percent of all US exporters are small and medium-sized businesses [...], but only 4 percent of the entire population of US SMEs export to global markets. Collectively, these firms accounted for 34 percent of US exports of goods and services in 2012.”³⁴ Similarly, 75 percent of New Zealand firms have never generated overseas income.³⁵

34. According to one study, “[l]imited experience in expanding overseas is the most common barrier to small businesses wanting to export. The most cited barriers revolve around the unfamiliarity of operating in a different country.”³⁶ Studies have found that SMEs are concerned about access to justice when it comes to international litigation.³⁷ Many SMEs are thus unable to engage in beneficial trade and unable to realize their full potential.³⁸

35. Large corporations typically have in-house legal counsel with external law firms on retainer.³⁹ These entities are therefore able to manage international commercial disputes that span multiple jurisdictions and have the financial resources to see such disputes through to the end. Furthermore, large corporations also have the resources to design, draft and negotiate tailor-made arbitration agreements. Nonetheless, given the nature of many commercial sectors, these resources are often not used by major corporations – which fail to include dispute resolution provisions (or valid dispute resolution provisions) in their international commercial contracts.

36. In contrast to major international businesses, SMEs typically lack internal legal teams and have limited resources to expend on external local counsel, let alone in multiple jurisdictions. The cost of legally pursuing or defending against claims in foreign courts is also often prohibitively high for SMEs, with limited resources and legal staff.⁴⁰

37. Furthermore, tailor-making dispute resolution clauses is impractical for most SMEs. Designing contracts takes time, knowledge, experience and resources. Designing effective arbitration agreements can be a failure-prone process – if a dispute over the validity of an arbitration agreement ensues, the dispute might end up in court after all.⁴¹ It is also not uncommon for SMEs to conclude oral contracts instead of a formal document. Where written agreements exist, SMEs may be averse to use legalistic language that foreshadows

³⁴ Carolin Freund, Gary Clide Hufbauer, Euijin Jung, “Enhancing Export Opportunities for Small and Medium-Sized Enterprises”, Peterson Institute for International Economics, Policy Brief 16-7, June 2016, at p. 2.

³⁵ “The Small Business Sector Report”, Ministry of Business, Innovation & Employment (New Zealand), 2014, at p. 8.

³⁶ See Ministry of Business, Innovation & Employment (New Zealand), *The Small Business Sector Report* (2014), at p. 8.

³⁷ Compare: European Commission, *European contract law in business-to-business transactions: Summary* (2011), World Bank and the International Finance Corporation, *Doing Business 2012* (2012).

³⁸ See Petra Butler and Campbell Herbert, “Access to Justice vs Access to Justice for Small and Medium-sized Enterprises: The Case for a Bilateral Arbitration Treaty”, *New Zealand Universities Law Review* Vol. 26, 2014, 186-221, at p. 188.

³⁹ See Petra Butler and Campbell Herbert, “Access to Justice vs Access to Justice for Small and Medium-sized Enterprises: The Case for a Bilateral Arbitration Treaty”, *New Zealand Universities Law Review* Vol. 26, 2014, 186-221, at p. 197.

⁴⁰ See Petra Butler and Campbell Herbert, “Access to Justice vs Access to Justice for Small and Medium-sized Enterprises: The Case for a Bilateral Arbitration Treaty”, *New Zealand Universities Law Review* Vol. 26, 2014, 186-221, at p. 197.

⁴¹ See Gary Born, *International Commercial Arbitration*, Kluwer Law International 2014, at p. 763 et seq.

potential disputes; personal relationships are often valued over the certainty of written terms.⁴²

38. Default arbitration under a BAT could alleviate many of these concerns for SMEs and level the playing field between larger and smaller corporations. As arbitration would be the default, there would be no cost for SMEs in setting up a dispute resolution mechanism – neither for drafting an arbitration agreement nor as part of a bargain when attempting to include a favorable dispute resolution clause in an agreement. A BAT might also provide optional or mandatory means of alternative dispute resolution (e.g. negotiation, conciliation, mediation) prior to arbitration, giving SMEs the opportunity to engage in informal means of dispute resolution.⁴³

39. A first step to better understand the potential of BATs for SMEs has been taken by the New Zealand Institute of Economic Research (“NZIER”). In 2016, NZIER conducted a study “Evaluating the proposed Bilateral Arbitration Treaty” to assess the practical impact of adopting a Bilateral Arbitration Treaty (BAT) on New Zealand SMEs.⁴⁴ The study resulted in a “...broadly positive [response] by the firms in that 66.7% ... preferred arbitration to litigation. The unsure results (30.8%) are symptomatic of the preference for negotiation over litigation or arbitration. Therefore, there is confidence in arbitration as an alternative dispute resolution method.”⁴⁵

40. The study also concluded that “[t]he answers do seem to suggest that a BAT and the proposed benefits could function in [New Zealand].”⁴⁶ Yet, the study highlighted that “...it appears that the greatest barrier to the successful implementation of a BAT in New Zealand is the inexperience firms have with arbitration. The respondents were wary of the implications of a BAT to their businesses. This is evi[de]nced by 70.5% believing that there would be at least a little cost to their firm.”⁴⁷

41. The NZIER study highlights the potential of BATs for SMEs. It underscores a fundamental positive attitude towards commercial arbitration as well as the need for national legislators to thoroughly prepare their business community to the effects of a BAT prior to its implementation. Similar studies in various other parts of the world would allow a more accurate assessment of the attitudes and expectations of SMEs towards BATs, and the ability of BATs to enhance international trade and commerce.

⁴² See in regard to how SMEs contract: Hanneke van Oeveren, “*It hurts my head to think about it*” *SMEs and the Legal Framework for International Commercial Contracts*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2791321 (last accessed 16 Dec 2016). Compare in regard to the costs for UK small business to engage in dispute resolution domestically: Federation of Small Business (UK), *Tied Up- Unravelling the Dispute Resolution Process for Small Firms* (November 2016), at p. 13 et seq.

⁴³ See Article 2(a) of the Draft Model Bilateral Arbitration Treaty, which contains a requirement to negotiate in good faith.

⁴⁴ See New Zealand Institute of Economic Research (NZIER), *Evaluating the proposed Bilateral Arbitration Treaty*, 25 February 2016, at p. 1, 4, see also Georgia Whelan “Could a BAT fly? An Evaluation of the Proposed Bilateral Arbitration Treaty in the New Zealand Context, 2017 Victoria University Law Review [forthcoming].

⁴⁵ New Zealand Institute of Economic Research (NZIER), *Evaluating the proposed Bilateral Arbitration Treaty*, 25 February 2016, at p. 6.

⁴⁶ New Zealand Institute of Economic Research (NZIER), *Evaluating the proposed Bilateral Arbitration Treaty*, 25 February 2016, at p. 7.

⁴⁷ New Zealand Institute of Economic Research (NZIER), *Evaluating the proposed Bilateral Arbitration Treaty*, 25 February 2016, at p. 5.

IV. UNCITRAL, THE PROMULGATION OF A MODEL BAT AND ISSUES FOR FURTHER CONSIDERATION

42. As observers noted on the occasion of the 25-year anniversary of the UNCITRAL Model Law on International Commercial Arbitration, UNCITRAL is “concerned with whether national laws are getting in the way of doing business effectively or where an absence of laws is creating uncertainty.”⁴⁸ As shown above, the current default system of international commercial dispute resolution relies on disparate national procedures with few unifying international mechanisms, creating substantial impediments to effective and efficient international commerce.

43. UNCITRAL is the flagbearer of fostering international trade and investment through, among other things, the harmonization and modernization of the law of dispute resolution. The Model Law together with the New York Convention and the UNCITRAL Arbitration Rules have been described as the principal pillars in the global system of arbitral justice.⁴⁹ The work of experts from more than fifty countries and numerous international organizations, these instruments represent consensus on best international practices.⁵⁰ Their success has exceeded expectations.⁵¹

44. Developing a Model BAT would be a natural evolution of UNCITRAL’s previous efforts. UNCITRAL instruments “are negotiated through an international process involving a variety of participants, including member States of UNCITRAL, non-member States, and invited intergovernmental and non-governmental organizations,” leading to wide acceptance and “solutions appropriate to different legal traditions and to countries at different stages of economic development.”⁵² No other institution offers a comparable process and it would be ideal for a Model BAT to be designed on this basis.

45. Certainly, a BAT is innovative and breaks the mold of the current system of international dispute resolution. But, as the discussion in this paper demonstrates, it is not a change of direction to what exists today. Rather, it is a continuation of a successful path that UNCITRAL has pursued since its inception. It is natural that such an innovation will at first be met with skepticism, but it ought not to be forgotten that the New York Convention would have been of equal novelty 100 years ago. A BAT might at first pass seem new and unorthodox today, yet, it promises similar benefits to the New York Convention, the UNCITRAL Model Law, and the UNCITRAL Arbitration Rules.

46. Paying some heed to potential skeptics, the following part of this paper will outline the likely objections to BATs, highlight why these “buts” to the idea of BATs are

⁴⁸ Timothy Lemay and Corinne Montineri, “Review of the Model Law’s Implementation after Twenty-Five Years”, in Frédéric Bachand, Fabien Gélinas (eds.), *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (2013), JurisNet, at p. 3.

⁴⁹ See Timothy Lemay and Corinne Montineri, “Review of the Model Law’s Implementation after Twenty-Five Years”, in Frédéric Bachand, Fabien Gélinas (eds.), *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (2013), JurisNet, at p. 4.

⁵⁰ See Timothy Lemay and Corinne Montineri, “Review of the Model Law’s Implementation after Twenty-Five Years”, in Frédéric Bachand, Fabien Gélinas (eds.), *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (2013), JurisNet, at p. 5.

⁵¹ See Timothy Lemay and Corinne Montineri, “Review of the Model Law’s Implementation after Twenty-Five Years”, in Frédéric Bachand, Fabien Gélinas (eds.), *The UNCITRAL Model Law After 25 Years: Global Perspectives on International Commercial Arbitration* (2013), JurisNet, at p. 4.

⁵² United Nations Commission on International Trade Law (UNCITRAL), *A Guide to UNCITRAL* (2013), at p. 1.

unconvincing and provide a blueprint for areas of research that could be further explored by a broader community of academics, practitioners, and governments within UNCITRAL for the further development of a Model BAT.

A. *Consent*

47. The most obvious objection to BATs crystallizes on notions of party autonomy and consent. Arbitration is deeply rooted in party autonomy⁵³ and arbitration is routinely said to be based on the consent of the parties involved.⁵⁴

48. First, a BAT is in no way inconsistent with notions of party autonomy. As discussed above, the BAT's arbitration mechanism is only a default mechanism, which parties are free to contract out of. This can be accomplished by agreeing to alternative forms of dispute resolution (e.g., a forum selection clause or a provision for a particular form of institutional (or ad hoc) arbitration). Alternatively, as with the Convention on the International Sale of Goods, parties could simply opt out of the BAT-provisions entirely, without any alternative form of consensual dispute resolution mechanism.

49. In this sense, a BAT does not compromise party autonomy. Commercial parties remain free to contract for whatever form of dispute resolution they desire (or to simply opt out of the BAT). The BAT merely changes the default form of dispute resolution if the parties do not exercise their autonomy.

50. Second, it is true that a BAT results in arbitration without the historic form of consent to arbitration, but this is not a basis for objection to the BAT's dispute resolution mechanism: the benefits of arbitration also exist where arbitration is used as a default means of dispute resolution, absent party consent, for international commercial disputes. Moreover, there is a substantial argument that the BAT arbitration mechanism is more consistent, not less consistent, with commercial parties' expectations than the current default means of resolving international disputes.

51. The traditional view is arbitration is founded on consent: "[w]ithout an arbitration agreement there can be no arbitration."⁵⁵ In commercial contexts, this arbitration agreement typically takes the form of contractual provision in a negotiated (and written) commercial contract between two (or more) companies. On the face of it, arbitration under a BAT operates without express party consent and therefore appears to run afoul of party autonomy. This might be seen as a radical departure from the status quo: a party that has not chosen arbitration – might not have even considered the possibility of arbitrating future disputes – will be compelled to arbitrate nonetheless.

52. However, a closer analysis demonstrates these concerns are misplaced. Initially, although arbitration has historically been based on contractual arbitration agreements, the benefits produced by international arbitration can be realized even in the absence of a traditional arbitration agreement. In particular, the benefits of efficiency, expertise, evenhandedness and enforceability that result from international arbitration apply equally to arbitration pursuant to a BAT.

⁵³ See Andrea Marco Steingruber, *Consent in International Arbitration*, OUP 2012, at para. 2.04 et seq.

⁵⁴ See Gary Born, *International Commercial Arbitration*, Kluwer Law International 2014, at p. 229.

⁵⁵ Simon Greenberg, Christopher Kee, J. Romesh Weeramantry, *International Commercial Arbitration: An Asia-Pacific Perspective*, Cambridge University Press 2011, at p. 21.

53. Put differently, international arbitration pursuant to a BAT provides a better default means of dispute resolution – even absent party consent – than the existing default system of cross-border litigation in national courts. Arbitration is used in other contexts (such as bilateral investment treaties⁵⁶ and many domestic contexts involving mandatory arbitration regimes⁵⁷) without the requirement for party consent, and there is no reason that arbitration could not be used effectively in the context of international commercial disputes.

54. Moreover, BATs arguably align more closely with the intentions of commercial parties than the current system of international dispute resolution. If one asks international businesspeople how their commercial disputes should be resolved, they would no doubt say that they would want a resolution that is expert, efficient, even-handed and enforceable. This is the very premise of a BAT.

55. Furthermore, once States enter into BATs, they could take steps to ensure that the businesses located in their territory were aware of the BAT's provisions and mechanisms. This would include outreach through chambers of commerce, trade and bar associations, public informational programs and the like. As such, by choosing not to opt-out of BATs parties are arguably indicating their consent (and satisfaction) with the default regime in BATs. This argument is only strengthened over time as parties become more aware of BATs and the arbitral process provided therein.

56. The issue of consent is ripe for further research and would provide a good starting point for UNCITRAL to commence its study on BATs. UNCITRAL could look to the work of various institutional arbitration centers in recent years that have had to address the question of party consent in increasingly attenuated ways when developing new procedural techniques such as the consolidation and joinder of parties, the role of non-disputing parties and the tribunal's powers in relation to third party funders.

B. Access to Justice

57. Another obvious counter-argument to BATs relates to “access to justice.” One might point to violations of constitutional guarantees that stem from BATs (e.g. the due process clause or right to a jury trial in the US Constitution⁵⁸ or Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the “ECHR”). However, this concern ignores the difference between access to *courts* – by no means a guarantee – and the more fundamental right of access to *justice*. Access to independent courts is a more compelling point in the domestic context.

58. In this international context, default arbitration under BATs arguably provides better access to *effective* justice than the current system of international litigation.⁵⁹ As the European Court of Human Rights noted in *Bellet v France*: “For the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an

⁵⁶ See Rudolph Dolzer and Christopher Schreuer, *Principles of International Investment Law*, 2nd edition, OUP 2012, at p 7.

⁵⁷ See e.g. Queensland Gas Pipeline Access Act, s. 15(1) (providing for mandatory arbitration). See also California Civil Procedure Code, §1141.10 and New South Wales Supreme Court Act 1970, s. 76B (providing for court ordered arbitration).

⁵⁸ See The Constitution of the United States, Article III and the Fourteenth Amendment.

⁵⁹ See Petra Butler and Campbell Herbert, “Access to Justice vs Access to Justice for Small and Medium-sized Enterprises: The Case for a Bilateral Arbitration Treaty”, *New Zealand Universities Law Review* Vol. 26, 2014, at p. 195 et seq. for an analysis of New Zealand law.

interference with his rights.”⁶⁰ In light of the many shortcomings of international litigation⁶¹ – parallel proceedings, lengthy procedures at a high cost and often unenforceable judgments – access to national courts is *not* a suitable realization of access to justice for international disputes. Neutral, efficient, objective, expert and fair arbitration under a BAT, on the other hand, is a realistic avenue to *effective* justice.

C. *Arbitral Procedure*

59. Finally, one might wonder how the details of the arbitral procedure should be fleshed out under a universal Model BAT. Some of the specifics a Model BAT might address are the scope of its application, the seat of arbitration, the arbitral process, whether to include mediation and negotiation, rules on confidentiality or transparency and on judicial intervention and enforcement of awards rendered under the BAT.⁶²

60. One of the authors has previously suggested that a Model BAT could adopt the revised 2010 UNCITRAL Arbitration Rules as the basis for conducting arbitrations under the BAT. The UNCITRAL Arbitration Rules are a neutral and modern set of arbitration rules⁶³ that provide default solutions for all key issues that arise when conducting an arbitration. In fact, it is already common practice to conduct international commercial arbitrations based on nothing more than reference to the UNCITRAL Arbitration Rules – no arbitral seat, no appointing authority, no additional procedural rules, and no choice of substantive law is necessary to successfully resolve such disputes.

61. Drafters of a Model BAT will have to comprehensively assess the “for and against” of providing more detailed rules in a Model BAT. On the one hand, States might have strong interests to include more detailed provisions on how arbitration should be conducted under their BAT. On the other hand, more detailed rules will detract from the universal appeal of a Model BAT and diminish its harmonizing effect on international commercial law.

62. One area that warrants particular attention when considering a Model BAT is the conflict between confidentiality and transparency. Confidentiality is not inherent to arbitration but it is common for parties to agree on confidentiality in their arbitration agreement or by their choice of arbitral rules.⁶⁴ Some States might want to provide for default transparency in the BATs they conclude. Possible reasons for this include the continued development of a body of accessible law, as well as a general interest in transparency.⁶⁵ It should be explored whether a balance between these colliding interests can be struck in a Model BAT – for instance, by providing for the publication of only certain

⁶⁰ ECtHR, *Bellet v France*, Application no. 23805/94, 4 December 1995, at para. 36; compare also *Äärelä and Näkkäläjärvi v Finland* (24 Oct 2001) CommNo 779/1997 (Human Rights Committee) in regard to Art 2 ICCPR.

⁶¹ See above.

⁶² See Draft Commentary on Model Bilateral Arbitration Treaty, https://www.wilmerhale.com/uploadedFiles/Shared_Content/Editorial/News/Documents/Explanatory-Note-Draft-Model-Bilateral-Arbitration-Treaty.pdf (last accessed on 29 November 2016); see in regard to New Zealand: Georgia Whelan “Could a BAT fly? An Evaluation of the Proposed Bilateral Arbitration Treaty in the New Zealand Context, 2017 Victoria University Law Review [forthcoming].

⁶³ See Matthew Skinner, Sam Luttrell, Tom Levi, “The UNCITRAL Arbitration Rules 2010”, in 7 *Asian Int’l Arb. J.* 76, 76-96 (2011), at p. 95.

⁶⁴ See Nigel Blackaby, Constantine Partasides, *Redfern and Hunter on International Arbitration*, 16th edition, OUP 2015, at para. 2.161.

⁶⁵ See for example the debate on transparency in ISDS and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (or “Mauritius Convention”).

awards relevant for the development of the law in a redacted fashion or by providing incentives to parties that agree to the publication of their awards.

D. Other Issues

63. Apart from the issues raised above, BATs raise various other points of academic and practical interest that are worth exploring. To name a few: Will States be comfortable with the extent to which default arbitration will result in the privatization of international legal decision making? Are BATs consistent with constitutional principles of separation of powers? What is the perspective of economic analysis of law on the proposal of BATs? Can empirical studies further illuminate the economic benefits and costs of BATs, especially for currently disadvantaged market participants such as developing small States and SMEs?⁶⁶ Which lessons can be drawn from behavioral economics to design default arbitration as an opt-out mechanism? How would a BAT intersect with existing instruments of arbitration law, including national arbitration laws and the New York Convention?

64. The authors hope that through a study of BATs there will be a robust discussion of such issues, both within the institutional setting of UNCITRAL and beyond.

V. CONCLUSION

65. The current default system of international commercial litigation does not meet the needs of today's cross-border dispute resolution. Bilateral arbitration treaties are a solution that would enable more efficient, more expert, more neutral, more objective, and more fair dispute resolution. BATs would make these benefits available to more market participants, including particularly small States and States with developing economies, as well as SMEs. They would thereby enhance international trade and investment and ensure more complete access to justice and the rule of law in international commercial settings.

⁶⁶ For instance, Victoria University of Wellington and the New Zealand Institute for Economic Research have jointly commenced such empirical research on BATs, including to identify the benefits BATs offer SMEs. UNCITRAL may wish to collaborate with these and other institutions on the empirical aspects of implementing BATs.