

BITS, BATS and Buts: Reflections on International Dispute Resolution

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The starting point for this Essay is its title - BITS, BATs, and Buts - which calls for a word of explanation. This essay concerns international dispute resolution and, in particular, reflections on the means for resolving international commercial disputes.

More specifically, the title's reference to "BITS" is a reference to bilateral investment treaties - treaties between states which frequently provide mechanisms for the resolution of international investment disputes. In turn, the term "BATs" refers to an instrument that does not yet exist - but which this Essay proposes should be developed. A "BAT" is a "bilateral arbitration treaty," and will be the focus of this Essay. And finally, the "Buts" are all of the various reasons that skeptics may raise by way of objection to the concept of BATs - but which, as explained below, may not in fact be substantial grounds for doubting the wisdom and usefulness of BATs.

Preliminarily, this Essay is intended in significant part as a reflection on international dispute resolution. Readers may fairly doubt the wisdom of the proposed BATs: the Buts may, in their minds, outweigh the arguments in favor of bilateral arbitration treaties. Even if skeptical minds, however, the Essay's proposal is intended to serve as the basis for an exploration of exiting modes of international dispute resolution and reflection on defects, and possible improvements in that system.

A. Bilateral Investment Treaties - BITS

We can begin with bilateral investment treaties, or BITS. It is well-known that there is no universal means for resolution of international investment disputes - disputes between foreign investors and the host states in which they have made investments. International law provides a variety of substantive protections for foreign investors, in the form of guarantees against expropriation, guarantees of fair and equitable treatment and the like.² International law does not, however, provide any general means for resolving disputes arising under these

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² See e.g., R. Dolzer and M. Stevens, *Bilateral Investment Treaties* 58 (1995) ("[I]t is generally accepted that international law requires a minimum of fairness in the treatment of foreigners and foreign investment ... Nearly all recent BITS require that investment and investors covered under the treaty receive 'fair and equitable treatment,' in spite of the fact that there is no general agreement on the precise meaning of this phrase."); R. Dolzer and C. Schreuer, *Principles of International Investment Law* 98, 130 (2012) ("On the level of customary international law, the minimum standard for the protection of aliens came to place limitations on the territorial sovereignty of the host state and to protect alien property."), ("Most bilateral investment treaties (BITS) and other investment treaties provide for fair and equitable treatment (FET) of foreign investments."); R. D. Bishop, J. Crawford and W. M. Reisman, *Foreign Investment Disputes* 10 (2005) ("In many of the BITS, governments make a commitment to provide foreign investors with national treatment (treatment as favourable as that given to other countries' citizens), fair and equitable treatment, full protection and security for the investment, and treatment at least as favourable as that provided by international law.").

substantive standards: there is no generally-applicable treaty providing a forum for resolution of international disputes. Such mechanisms have been proposed, but never adopted.³

What the international legal system has instead developed is a network of bilateral treaties - BITs - which provide dispute resolution mechanisms tailored to particular bilateral relationships (e.g., China and Angola; US and Ecuador; Germany and Pakistan). These bilateral investment treaties provide the principal means of dispute resolution for contemporary investor-state disputes.

There are over 2800 BITs in force currently.⁴ International businesses and governments around the world regularly rely on the mechanisms provided under BITs to resolve their investment disputes. Over the past twenty years, more than 500 publicly-reported disputes,⁵ involving amounts ranging in value from a few hundred thousand to over a hundred billion US dollars have been resolved under BITs.⁶ It is equally clear that the number of investment disputes brought before BIT tribunals has increased dramatically over the past two decades.⁷

Although arbitration of investment disputes under BITs is now routine, this mechanism was, thirty years ago or so, a highly innovative approach towards dispute resolution. Indeed, in some respects, the dispute resolution mechanisms of BITs remain striking.

It is elementary that BITs provide a means by which foreign investors can arbitrate their investment disputes with a host state without a traditional arbitration agreement contained in an underlying commercial contract.⁸ The central innovation of the dispute resolution mechanisms in BITs was that a state would, in the bilateral investment treaty, make an open offer to arbitrate against any foreign investor that fell within a defined category in the bilateral investment treaty.⁹ If a foreign investor believed its rights under the BIT or otherwise had been violated by the host state and wished to commence an arbitration, it had merely to accept the standing offer from the host state; at least on a theoretical level, that "offer" and "acceptance" gave rise to an arbitration agreement between the foreign investor

³ See S.W. Shill, *The Multilateralization of International Investment Law* 31-64 (2009); A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties* 55 (2009) ('Although states have been willing to create a network of IIAs in a piece-meal way, states have been unable agree on investment issues at multilateral level.'). See also, R. D. Bishop, J. Crawford and W M. Reisman, *Foreign Investment Disputes* 317-490 (2005).

⁴ See UNCTAD, *World Investment Report* (2013), at p. 129.

⁵ The total cumulative number of known treaty-based cases reached 290 by the end of 2007. See http://unctad.org/en/docs/iteiia20083_en.pdf.

⁶ Given that a number of treaty-based cases are conducted in confidential ad hoc proceedings, the total number of cases is likely to be higher. See UNCTAD IIA Issues Note: *Recent Developments in Investor-State Dispute Settlement (ISDS) No.1*, May 2013, (UNCTAD/WEB/DIAE/PCB/2013/3), available at http://unctad.org/en/PublicationsLibrary/webdiaepcb2013d3_en.pdf.

⁷ See UNCTAD IIA Issues Note: *Recent Developments in Investor-State Dispute Settlement (ISDS) No.1*, May 2013, (UNCTAD/WEB/DIAE/PCB/2013/3), available at http://unctad.org/en/PublicationsLibrary/Webdiaepcb2013d3_en.pdf.

⁸ See R. D. Bishop, J. Crawford and W M. Reisman, *Foreign Investment Disputes* 10 (2005) ("It should be noted that the consent provided in the treaty may enable a foreign investor to initiate arbitration in an international arbitral forum even if the investor does not have an arbitration clause in its contract with the government or for that matter, even if the investor has no contract with the government at all."); M. Sornarajah, *The International Law on Foreign Investment* 289 (2010) ("[T]he significance of investment treaties is that they do effectively provide a foreign investor with variety of protection in situations requiring dispute settlement, depending on the precise wording of each treaty.").

⁹ See R. Dolzer and C. Schreuer, *Principles of International Investment Law* 257 (2012) ("Most investment arbitration cases in recent years have been based on jurisdiction established through BITs. The basic mechanism is the same as in the case of national legislation: the states parties to the BIT offer consent to arbitration to investors who are nationals of the other contracting party. The arbitration agreement is perfected through the acceptance of that offer by an eligible investor.").

and the host state, pursuant to which the foreign investor was able to pursue claims under the BIT against the host state.

The notion of consent under bilateral investment treaties was correctly understood to be artificial, at least in substantial part. Jan Paulsson coined the frequently-cited, if also not entirely accurate, phrase 'Arbitration without privity'¹⁰ - reflecting the unorthodox character of the putative agreement to arbitrate in a BIT. That description recognized the fact that in many senses the agreement to arbitrate resulting from a BIT was less a traditional example of arbitration by consent and more a generally-available legislative or regulatory regime created by the States party to the BIT for the benefit of foreign investors protected by the treaty. There was a form of consent to BIT arbitration, but it was an attenuated form of constructed consent, derived principally from the legislative framework of the treaty, rather than a traditional contractual relationship between commercial counterparties who negotiate a particular arbitration agreement.

Why did the generation of diplomats and lawyers that introduced bilateral investment treaties adopt this approach towards dispute resolution and the concept of consent to arbitration? International arbitration was, in this context, adopted because it was seen to be the most neutral, most efficient, most objective, most expert and most fair means of international dispute resolution: arbitration was seen as the best available means of resolving international investment disputes - just as international arbitration has for decades been seen as the most efficient, expert and fair means of resolving international commercial disputes.¹¹

It is frequently observed that investment arbitration learned a good deal from international commercial arbitration in other respects. The basic procedural rules in many investment arbitrations, whether conducted under the 2010 UNCITRAL Arbitration Rules ("UNCITRAL Rules") or the ICSID Rules of Procedure for Arbitration Proceedings ("ICSID Rules"), draw substantially on earlier experiences in international commercial arbitration.¹² As others have observed, many of the procedural rules and advocacy techniques that are used in investment arbitration parallel those previously developed in the commercial setting.¹³ Similarly, many of the arbitrators and many of the counsel that appear in investment arbitrations have substantial overlaps with those in commercial arbitration.¹⁴

Other mechanisms for the resolution of international investment disputes might have been adopted - ranging from submission of disputes to local courts, to creation of an international investment court, to submission of all investment disputes to an existing international arbitration institution - but none of these mechanisms was pursued. Rather, the basic approach of virtually all BITs has been to provide individualized arbitral mechanisms in particular BITs. Again, this mechanism was selected because of the benefits - in terms of

¹⁰ Paulsson, *Arbitration Without Privity* 10 ICSID L. Rev. 232 (1995).

¹¹ See below.

¹² See Bockstiegel, *Commercial and Investment Arbitration: How Different are they Today?*, 28 *Arb. Int'l* 4 581 (2012).

¹³ See Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 *Int'l & Comp. L. Q.* 371, 379-380 (2007); Strong, *Discovery under 28 U.S.C. § 1782: Distinguishing International Commercial Arbitration and International Investment Arbitration*, 33 (2013); Levine, *Amicus Curiae in International Investment Arbitration: The Implications of an Increase in Third-Party Participation*, 204 (2011).

¹⁴ See Roberts, *Power and Persuasion in Investment Treaty Interpretation: The Dual Role of States* s AM. J. INT'L L. 179 (2010); Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in Karl P. Sauvant ed., *Appeals Mechanism in Investment Disputes* 39, 41-42 (2008); Van Harten, *The Public-Private Distinction in the International Arbitration of Individual Claims Against the State*, 56 *Int'l & Comp. L. Q.* 371, 380 (2007).

efficiency, neutrality, expertise and enforceability - that it borrowed from experiences with international commercial arbitration and that were considered to provide the best available means of dispute resolution.

Despite these similarities between international investment arbitration and international commercial arbitration, the arbitral mechanisms provided by BITs nonetheless have significant differences from traditional international commercial arbitration. In particular, the concept of constructive consent, or "arbitration without privity," was an innovative and creative use of international arbitration outside of the traditional context of arbitration clauses negotiated in contractual settings and included in traditional contractual instruments. As already noted, BITs use international arbitration as a generally-applicable means of dispute resolution, granted by legislative mandate, rather than by negotiated arbitration agreement.

B. Bilateral Arbitration Treaties - BATs

As we have seen, international investment arbitration has learned a good deal from international commercial arbitration. In turn, international commercial arbitration can learn from investment arbitration as, to some extent, it already has on issues such as counsel ethics.¹⁵ In particular, the thesis of this Essay is that international commercial arbitration can, in appropriate circumstances, utilize the concept of constructive consent, or arbitration without privity, developed in BITs, in the context of a bilateral arbitration treaty, a BAT.

The basic concept of a bilateral arbitration treaty, or a BAT, as conceived in this Essay would be that two States, for example, Romania (or Thailand) and Singapore, conclude a bilateral treaty providing that all of a particular category of commercial disputes between their respective nationals shall be resolved - as a default mechanism - by international commercial arbitration. The category of disputes that would be subjected to this default mechanism of international arbitration would be defined by the States in their BAT.

Typically, States concluding a BAT would agree that international commercial disputes - disputes involving business transactions between merchants for the purpose of realizing a profit - would be those submitted to arbitration as a default mechanism under a bilateral arbitration treaty. This definition would ordinarily exclude consumer disputes, employment disputes and similar categories of non-commercial disputes, and be focused entirely on commercial, business disputes. The bilateral arbitration treaty, or the BAT, would provide that whenever an international commercial dispute arose between, in this example, nationals of Romania (or Thailand) and Singapore, those disputes would be submitted to international arbitration for final and binding resolution. Neither State's courts would entertain such disputes (and would instead refer the parties to arbitration) and both States' courts would recognize and enforce the resulting arbitral awards in the same manner as other international arbitral awards.

The BAT could be drafted to apply not only to the nationals of the contracting States but to their government agencies as well. Any dispute between a government agency and an investor from either contracting state that does not fall under the definition of investment of those same States' BIT would fall within the scope of the relevant BAT. In other words, a

¹⁵ See Bishop and Stevens, *Advocacy and Ethics in International Arbitration: The Compelling Need for a Code of Ethics in International Arbitration: Transparency; Integrity and Legitimacy*, 15 ICCA Congress Series 391, 399-401 (2010). See also Kaplan, *Investment Arbitration's Influence on Practice and Procedure in Commercial Arbitration*, *Asian Dispute Review*, 122-124 (2013).

BAT between two States would serve as a default "catch-all" dispute resolution mechanism for all disputes not specifically excluded by the BAT.

Of course, it would be for the States that are party to a BAT to agree upon the scope of disputes that would be subject to arbitration under the BAT and excluded from jurisdiction of the state courts. Contracting States could tailor their BATs to their particular circumstances and needs. States could, as suggested above, exclude consumer, labor and similar types of disputes, such as certain matrimonial, domestic relations and inheritance disputes. States could also exclude from their BATs particular types of commercial disputes, such as those involving some environmental, quasi-criminal or bankruptcy related issues.

Not only could State parties determine the scope of issues that should be submitted to international arbitration, but they could also define the scope of application of such arbitration treaties. For example, States could limit application of the treaties to disputes between merchants, or between corporate entities above a defined size (e.g., US\$ 20 million in assets or revenues).

It is essential to note that, under a BAT, parties to commercial agreements would be entirely free to opt out of this default mechanism. For example, if the parties' original commercial contract contained a different arbitration mechanism (such as an agreement to arbitrate pursuant to ICC, LCIA, or some other institutional rules), or a forum selection clause, choosing the courts of a particular state, then such contractually agreed mechanism would supplant the bilateral arbitration treaty's default mechanism. Only where the parties have not indicated a contrary intention would the BAT's default dispute resolution mechanism apply; Only where the parties have indicated no choice with respect to dispute resolution, would the default mechanism in international commercial transactions be international arbitration under a BAT

The States concluding a BAT could provide for arbitration of covered disputes pursuant to whichever institutional or non-institutional rules they wished - and commercial parties to a particular dispute would be free, by agreement, to alter this choice. A logical choice for a dispute resolution mechanism in many BATs would be the revised 2010 UNCITRAL Arbitration Rules, as these provide a neutral and modern set of arbitration rules.¹⁶ The Permanent Court of Arbitration in the Hague could serve to select an appointing authority for arbitrators and potentially as an administering institution.

The UNCITRAL Rules also contain default mechanisms for multiple issues, including such matters as separability of the arbitration agreement, competence-competence, selection of an arbitral seat, choice of applicable law or rules of law, determination of language or languages of the proceedings, costs and allocation of costs, as well as determination of arbitrators' fees.¹⁷ Other default provisions include those regarding appointment of arbitrators as well as grounds for the challenge of arbitrators.¹⁸ The UNCITRAL Rules also offer a comprehensive set of provisions regulating the conduct of the arbitral proceedings, including the joinder of third parties and interim relief. For all these reasons, the UNCITRAL Rules would be an appropriate set of default rules in many BATs.

¹⁶ See Skinner et al., *The UNCITRAL Arbitration Rules 2010*, 7 *Asian Int'l Arb. J.* 76, 76-78 (2011).

¹⁷ See 2010 UNCITRAL Arbitration Rules, Arts 18, 19, 23, 35, 40-42.

¹⁸ See 2010 UNCITRAL Arbitration Rules, Arts 8-13.

Another option for a default set of rules would be the Permanent Court of Arbitration (PCA) Arbitration Rules 2012 (the "2012 PCA Arbitration Rules").¹⁹ The new PCA Rules consolidate four sets of previous PCA procedural rules, and are applicable in disputes that involve states, state-controlled entities, or intergovernmental organizations. Although the 2012 PCA Rules preserve a variety of features commonly associated with public international law disputes, they were modified to follow the main principles incorporated in the 2010 UNCITRAL Rules. The new PCA Rules increase the arbitral tribunal's procedural flexibility and parties' procedural autonomy and include mechanisms for constituting the arbitral tribunal.

The concept of a BAT is a novel one, but only in some respects. As discussed below, providing for (mandatory) arbitration of international commercial disputes, in the absence of a traditional agreement to arbitrate, is a striking, potentially disquieting one. Nonetheless, the concept of a specialized procedural regime for international commercial disputes is not entirely unprecedented.

In 2004, the American Law Institute (ALI) and the International Institute for the Unification of Private Law (UNIDROIT) published the ALI/UNIDROIT Principles of Transnational Civil Procedure, which provide a specialized set of procedural rules for all international commercial disputes. Among other things, these Principles would have permitted some (although limited) document disclosure, witness testimony and examination and specified forms of written submission - which would, in international commercial cases, supplant otherwise applicable procedures in domestic court litigation.²⁰ The Principles were adopted in light of the perceived "need for a 'universal' set of procedures that would transcend national jurisdictional rules and facilitate the resolution of disputes arising from transnational commercial transactions."²¹ This is a broadly similar objective to that of the proposed dispute resolution mechanism in bilateral arbitration treaties. Like the ALI/UNIDROIT Principles, the fundamental rationale for a BAT is that the existing rules and procedures for resolving international commercial disputes in national courts are inadequate. The Principles seek to address those inadequacies by promulgating a specialized, uniform set of international procedures applicable to all international commercial disputes - rather than potentially parochial domestic rules of civil procedure.

A BAT addresses the same fundamental problem but rather than prescribe a one-size-fits-all solution, like the ALI/ UNIDROIT Principles do, BATs would permit case-by-case flexibility; on the one hand, pairs of contracting states could structure their BITs to particular regional, national, cultural, economic and other circumstances, while commercial parties and arbitral tribunals could tailor individual arbitrations to the nature and character of their dispute. The overriding objective, in each case, would be to design the most neutral, least inefficient and most expert means of dispute resolution for international commercial disputes.

Another related forebearer of BATs is the U.N. Convention on Contracts for the International Sale of Goods ("CISG"). The CISG adopts specialized international rules of substantive contract law, which supplant domestic contract law rules for certain international

¹⁹ See Permanent Court of Arbitration (PCA) Arbitration Rules 2012, available at http://www.pca-cpa.org/showpage.asp?pag_id=1188.

²⁰ See ALI/UNIDROIT Principles of Transnational Civil Procedure, available at <http://www.unidroit.org/english%20principles/civilprocedure/ali-unidroitprinciples-e.pdf>.

²¹ The American Law Institute, Publications Catalogue, available at http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=76.

sales contracts.²² The concept, as with BATs, is that these international transactions require a specialized regime, tailored to their international character -albeit a substantive, rather than procedural, regime. For present purposes, however, the important point is that substantive regime is subject to contrary agreement; it is a default regime, designed for international matters, which commercial parties are free to contract out of.²³ The same basic structure applies equally well, and for similar reasons, to the dispute resolution mechanisms for international transactions - subject, of course, to contrary agreement by the parties.

A potential derivation of BATs would take the form of multilateral arbitration treaties. As opposed to a BAT, a multilateral arbitration treaty (or "MAT") would be concluded between multiple states, each agreeing that all commercial disputes between their respective nationals would be resolved through international commercial arbitration. Like BATs, recourse to arbitration proceedings under a multilateral arbitration treaty would be granted on a default basis with an opt-out clause.

MATs would have numerous advantages - an obvious one is reducing transactional costs of drafting numerous BATs. Furthermore, MATs would ensure a uniform and transparent framework of a dispute resolution mechanism in a single region, instead of a potentially disconnected patchwork of BATs among similarly-situated states and economies. Finally, MATs could contribute to regional economic growth and integration among the signatory states.

MATs could be modeled on regional trade agreements, providing that all commercial disputes arising out of or in relation to a free trade treaty, such as the Association of Southeast Asian Nations Free Trade Agreement (AFTA) or the North American Free Trade Agreement (NAFTA), would be submitted to international arbitration. These arrangements would complement the dispute resolution mechanisms for investment protections - as provided under the AFTA and Chapter 11 of the NAFTA - with an international commercial arbitration mechanism.²⁴ A form of a multilateral/regional arbitration treaty could also be included in the current debate over the Trans-Pacific Partnership Agreement (TPPA) which, among other things, is expected to establish an investor-state dispute settlement system within that region.

C. Potential Objections to BATs - The Buts

Skeptics would raise numerous objections to the concept of a BAT (or a MAT). It is important to consider these "Buts" - the reasons that might give us pause in considering this proposal for bilateral arbitration treaties. But, so to speak, these reasons are ultimately

²² See UN Convention on Contracts for the International Sale of Goods, available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

²³ See UN Convention on Contracts for the International Sale of Goods, Article 6, available at <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>.

²⁴ See NAFTA Chapter 11, Art. 1116 et seq., 32 I.L.M. 289 (1993). Chapter 11 of NAFTA establishes a mechanism for the settlement of investment disputes, providing that an investor alleging that a host government has breached its investment obligations under Chapter 11 may at its option, have recourse to one of the following arbitral mechanisms: (1) the World Bank International Centre for the Settlement of Investment Disputes (ICSID); (2) ICSID Additional Facility Rules; and (3) the rules of the United Nations Commission for International Trade Law (UNCITRAL Rules). Alternatively, the investor may choose the remedies available in the host country's domestic courts. Importantly, Chapter 11 provides for enforceability of final arbitral awards in domestic courts. See also AFTA Article 9, which provides that 'Any differences between the Member States concerning the interpretation or application of this Agreement or any arrangements arising therefrom shall, as far as possible, be settled amicably between the parties. Whenever necessary, an appropriate body shall be designated for the settlement of disputes.' Available at <http://www.worldtradelaw.net/fta/agreements/afta.pdf>.

insufficient to dissuade one from further considering the concept of BATs, which offer a distinct improvement on existing means of resolving international commercial disputes.

The most obvious "But" poses the question why States should consider adopting bilateral arbitration treaties. The answer is simple: States should adopt BATs for precisely the same reason that states which concluded bilateral investment treaties use international arbitration as a default mechanism for the resolution of international investment disputes, for precisely the same reason that some 149 States have adopted the New York Convention and precisely the same reason that international arbitration has become the preferred mechanism for resolution of international commercial disputes by businesses around the world. The reason, simply put, is that international arbitration is the least bad mechanism for resolving international disputes.

No dispute is pleasant and no mechanism for dispute resolution is particularly efficient, but when disputes arise they must be resolved and the objective ought to be to resolve them quickly and efficiently, expertly and neutrally. And in all those categories, experience in the context of international business teaches us that international arbitration - and, more specifically, international commercial arbitration - is the least bad alternative.²⁵ Although many of the reasons for preferring international arbitration as a means of resolving international commercial disputes are widely acknowledged, they are worth emphasizing.

Most importantly, international arbitration provides a neutral mechanism for resolving disputes. The Singaporean party need not litigate in Romanian (or Thai) courts and, conversely, the Romanian (or Thai) party need not litigate in Singaporean courts. Rather, a neutral, internationally neutral tribunal selected with the participation of the parties will resolve the parties' disputes.²⁶ That benefits both parties, and their respective home States, by providing a more reliable and fair means of international dispute resolution and by providing greater security for international transactions.

Equally, international arbitration has shown itself, not always perfectly, but nonetheless with a high degree of consistency, to be a more efficient mechanism for resolving commercial disputes than that available in almost all other forums.²⁷ In this case, the reason for the Singaporean and Romanian parliaments to give approval to a BAT would be to provide speedier access to justice for their nationals than would otherwise be available in the respective courts of the contracting States. Similarly, international arbitration would, particularly with the parties involved in selection of the tribunal, permit selection of expert decision makers rather than local judges, often more accustomed to domestic matters. The parties would be free to appoint highly qualified and competent arbitrators, with specific knowledge in a particular field, who are more comfortable with industry-specific issues, and complex economic calculations than many state court judges.²⁸

Equally, international arbitration would offer durable, enforceable results not available from national courts. In most cases, certainly in the case of Singapore and Romania, there would be no bilateral recognition of judgments treaty, no mechanism by which a Singapore judgment could be enforced in Romania or vice versa. An international arbitration would, as it does in other contexts, offer the possibility of a more enforceable, a more

²⁵ See G. Born, *International Commercial Arbitration* 90 (2009).

²⁶ See G. Born, *International Commercial Arbitration* 72-74 (2009).

²⁷ See G. Born, *International Commercial Arbitration* 86 (2009).

²⁸ See G. Born, *International Commercial Arbitration* 78-81 (2009).

effective, final resolution of the parties' dispute, which at the end of the day is the ultimate litmus test for any international dispute resolution mechanism.

Recent surveys confirm these features of international arbitration as a dispute resolution mechanism. According to the latest survey undertaken by Queen Mary University Law School (first published in 2006 and annually revised in subsequent years), for the resolution of cross-border disputes, "amongst the surveyed corporations, arbitration continues to be more popular than any of the other options available. Arbitration ranked first more often than any of the other mechanisms (52% of respondents marked arbitration as most preferred)."²⁹ The survey also showed that the principal "reasons for choosing international arbitration are flexibility of procedure, the enforceability of awards, the privacy afforded by the process and the ability of parties to select the arbitrators."³⁰ For all those same reasons - reasons of neutrality, reasons of efficiency, reasons of expertise and reasons of enforceability - the default mechanism of international arbitration would provide a desirable mechanism for the legislators in Singapore and Romania (or Thailand, Ukraine or Switzerland) to make available to their respective nationals.

Moreover, there would be particular benefits to many states, particularly in developing regions, in adopting a BAT. A commitment to international arbitration to resolve commercial disputes would provide assurances to foreign traders considering entering into business with local merchants that future disputes would be fairly and efficiently resolved, and then enforced. Especially in states where national court systems are being reformed or where litigants face substantial delays or similar difficulties, a state's promise of speedy, neutral and expert dispute resolution (especially in disputes against state entities and state-owned companies) would offer substantial incentives to - and reassure - foreign traders.

Additionally, adoption of a BAT would relieve docket congestion in the courts of the contracting states, making those courts more readily available for local citizens in local disputes, not burdening them with the difficulties of foreign trade disputes, and relieving taxpayers from financing sometimes complex and lengthy international disputes. 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. For all these reasons, states should have at least the same incentives to conclude BATs as they had to conclude both the New York Convention, the ICSID Convention and traditional BITs.

Another obvious "But" is the question of party consent and party autonomy. The fundamental basis of international commercial arbitration for centuries has been that of party autonomy.³¹ The foundation for any international commercial arbitration is that of consent, and the fundamental innovation of a BAT is that it does not rest on explicit party consent to arbitrate. In this sense, a BAT would appear to be a fairly radical departure from traditional notions of consent and party autonomy -essentially imposing arbitration on parties who never considered, much less agreed, to such a form of dispute resolution.

²⁹ See Queen Mary; University of London and PwC, Corporate choices in International Arbitration: Industry perspectives - 2013 International Arbitration Survey; available at <http://www.pwc.com/gx/en/arbitration-dispute-resolution/assets/pwc-international-arbitration-study.pdf>. According to the results from the 2006 survey "73% of respondents prefer to use international arbitration, either alone (29%) or in combination with Alternative Dispute Resolution (ADR) mechanisms in a multi-tiered dispute resolution process (44%)."

³⁰ See Queen Mary; University of London and PwC, International arbitration: Corporate attitudes and practices 2006, at p. 2, available at http://www.pwc.be/en_BE/be/publications/ia-study-pwc-06.pdf.

³¹ See G. Born, *International Commercial Arbitration* 90 (2009).

And yet is a BAT really inconsistent with the basic concept of party autonomy? Although BATs may be a step further than the mode of constructive consent in BITs, adopting such treaties are not that much of a further step beyond what we already recognize to be effective consent to international arbitration in BITs. And, insofar as this form of consent is a step beyond past models, it is one that is sensible and justified.

First, as already noted, it is fundamental to the proposed concept of a BAT that it would provide only a default mechanism. It is fundamental that parties would always be free to contract out of the dispute resolution mechanism in a BAT. Parties would be free to agree upon a forum selection clause, to agree upon a different form of arbitration, to agree on expert determination, or to agree simply to opt out of the treaty altogether, leaving undecided a form of dispute resolution. A BAT would not purport in any way to override the parties' express intentions, or even their implied intentions, but merely to provide a default mechanism when no intentions have been expressed. In that sense, party autonomy is preserved.

Of course, there is no express consent to arbitration under the proposed BAT, which is in some tension with the traditional maxim that "arbitration is a creature of consent" and that "without an arbitration agreement, there can be no arbitration."³² But it is again useful to consider the example of consent to arbitration in BITs. As discussed above, that notion of consent is a constructed one - dependent on a prescribed treaty framework, rather than on a negotiated arbitration agreement in a commercial contract. As we have seen, the arbitration mechanism of a BIT is more closely akin to a legislatively-prescribed default solution, rather than a traditional arbitration agreement.

The same considerations that make international arbitration appropriate, despite the absence of traditional forms of consent, in the context of BITs, also make it appropriate as a default mechanism in the context of BATs. Just as arbitration as a default mechanism in bilateral investment treaties involves a form of constructed consent, so arbitration in a bilateral arbitration treaty would involve a form of constructed consent, but one that is nonetheless grounded on the fundamental expectations of the parties for a neutral and independent form of dispute resolution for any disagreement arising out of international commercial dealings.

Indeed, one can take this analysis a step further. If one asks international businessmen or businesswomen how their commercial disputes should be resolved, they say that they want those disputes resolved neutrally, expertly, efficiently and enforceably. They do not know the details of how this occurs, but that is their expectation and desire.

Unfortunately, in many cases, the businessman (or woman)'s expectation is not the current mechanism for resolving international commercial disputes, where the parties have not agreed upon a forum selection clause or an international arbitration provision. In these instances, parties face the threats of parallel or multiplicitous litigation in different national court systems, often located on one another's home territory, often facing local courts that may have parochial predispositions against one party or the other, and often producing judgments that cannot be effectively enforced. Court litigation also presents other pitfalls,

³² S. Greenberg, C. Kee and J. R. Weeramantry *International Commercial Arbitration: An Asia-Pacific Perspective* 21 (2011) ("Since party consent is the very essence of arbitration, an arbitration agreement is perhaps its most essential feature. Without an arbitration agreement there can be no arbitration."). See also G. Born, *International Commercial Arbitration* 197 (2009).

such as forum shopping, conflicting court judgments, procedural quagmires, corrupt or inept decision-makers and lengthy proceedings that can go on for years.³³

None of this scenario corresponds with parties' underlying, fundamental expectations and preferences that their disputes will be fairly, neutrally and efficiently resolved. In contrast, international arbitration generally does accord with the expectations of commercial parties - which explains the views of international businesses (cited above) regarding the arbitral process. Given that, in international transactions where parties have not agreed upon any form of dispute resolution, there is a serious argument that arbitration would accord better with their genuine expectations and desires than multiplicitous litigation in local courts with unenforceable judgments.

When one looks carefully at national court authorities dealing with the question of international arbitration agreements, one very frequently sees decisions holding that pathological arbitration clauses will be enforced, with courts straining to uphold pathological agreements to arbitrate notwithstanding grievous defects or contradictions, typically on the basis that parties engaged in international commerce can be assumed to have wanted to resolve their disputes by arbitration.³⁴ Those decisions rest in part on an analysis of the parties' intentions, applying general principles of contract law, but they also invoke more generalized conceptions of the forms of dispute resolution that are fair, efficient and neutral as indicia of intent.

Developments in international arbitration over the past several decades also reinforce the case for permitting constructed consent as a default solution. During the past thirty years, leading international arbitration institutions have extensively revised and developed their procedural rules, providing a more reliable and fair procedural framework for international arbitrations.³⁵ Similarly, a growing community of highly-experienced international arbitrators is available, increasingly in all regions of the world, to resolve commercial disputes; counsel in multiple jurisdictions also are gaining substantial arbitration experience.³⁶ Moreover, national courts are becoming increasingly familiar with international arbitration agreements, procedural issues and awards - making the arbitral process more predictable, efficient and enforceable. All of these guarantees of fairness, efficiency and enforceability lend important support to the notion that commercial parties expect and desire the form of dispute resolution provided by international arbitration for their international commercial disputes.

Finally, it is also important to consider the question of consent to arbitration from the perspective of parties after a BAT has entered into force, and how it would shape their conduct and expectations. If businesses, based in states that have signed a BAT, conclude commercial contracts after the BAT has come into effect, they do so with knowledge of the BAT's terms, and its arbitration mechanism. States would ordinarily take steps to publicize the BAT's existence and, in any event, reasonably sophisticated businesses would be informed of their legal rights and obligations. In these circumstances, where parties contracted in

³³ See G. Born, *International Commercial Arbitration* 66 (2009).

³⁴ See G. Born, *International Commercial Arbitration* 676-678 (2009).

³⁵ See G. Born, *International Commercial Arbitration* 90-91 (2009).

³⁶ See e.g., List of ALA arbitrators, available at <http://www.arbitration-adr.org/membership/?a=list&t=arbitrator>

awareness of the BAT's default mechanism, without choosing to contract out of it, the argument for actual consent is particularly strong.³⁷

What other "Buts" might one advance against the suggestion of a bilateral arbitration treaty? The next obvious "But" is that these treaties would deny parties access to justice and to the public court system. In support of this argument, one might rely on constitutional guarantees like the due process clause or right to a jury trial in the United States³⁸ or Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (the "European Convention on Human Rights" or the "ECHR").³⁹ And certainly the notion of access to justice, a guarantee that a party will have access to an independent court that will resolve its disputes neutrally and fairly, is fundamental. In domestic contexts, requiring real consent to arbitration, rather than denying parties access to public justice on the basis of legislative choice, is understandable.

But in the international context, in the Singaporean and Romanian (or Thai) example, access to justice is a more complicated concept. In fact, the question in concrete terms is not one of access to a court but access to multiple courts. Ultimately, the issue is access by the Thai party to Thai courts, access by the Romanian party to Romanian courts, and at the end of the day a dispute resolution mechanism that produces multiplicitous litigation in front of potentially parochial local courts, neither able to produce a definitive resolution of the parties' disputes that is readily capable of enforcement.

There are additional reasons that, rather than ensuring access to justice and fair resolution of international disputes, litigation in state courts can lead to the opposite result. International litigation inevitably raises jurisdictional disputes (with the attendant delays, expense and uncertainty), forum selection disputes (including other doctrines such as *forum non conveniens* and *lis pendens*) and disputes over service of process and taking of evidence.⁴⁰ By the time these procedural and jurisdictional issues are resolved, and (often parallel) litigation on the merits proceeds, many smaller or medium-sized parties will have been exhausted and their disputes left unresolved. That is not access to justice, but the opposite; a genuine and troubling denial of justice.

In fact, the real way to provide access to justice in international commercial transactions is through a default mechanism of international arbitration of the sort that has just been described under a bilateral arbitration treaty. It is, in fact, a default mechanism of international arbitration that provides real access to justice - not illusory access to justice of the sort that one often encounters when international commercial disputes are resolved in domestic courts.

³⁷ BATs could also include provisions for deemed or compelled consent, such as those that exist in many regulatory contexts. See, e.g., 18 U.S.C. § 3261(a) (by obtaining employment or accompanying U.S. Armed Forces outside of the United States an individual consents to U.S. jurisdiction for criminal matters and the application of U.S. criminal law); 14 C.F.R. § 91.703(a) (by operating an aircraft registered in the U.S. an individual agrees to comply with U.S. aviation regulations, even when within a foreign jurisdiction); 18 U.S.C. § 7(6) (by operating a spacecraft registered in the U.S. an individual submits to U.S. federal jurisdiction, even when in space). These formal provisions do not materially alter the underlying analysis of the legitimacy of the BAT's default provisions.

³⁸ See The Constitution of the United States, Article III, available at http://www.senate.gov/civics/constitution_item/constitution.htm.

³⁹ See Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6, available at http://www.echr.coe.int/Documents/Convention_ENG.pdf.

⁴⁰ G. Born, *International Commercial Arbitration* 65-67 (2009).

A fourth "But" concerns the mechanics and details of the arbitral process. How, absent an arbitration agreement, is the arbitration to be conducted? That objection is easily dispensed with.

The UNCITRAL Rules prescribe default solutions for all of the principal issues arising in the conduct of an arbitration -including choice of arbitrators, number of arbitrators, arbitral seat, arbitral procedures, choice of law rules, arbitrators' compensation and the like.⁴¹ As a practical matter, with the PCA to select the appointing authority, the UNCITRAL Rules would allow for an efficient and effective arbitral process and would guarantee that the process is equally reliable and expeditious as it would have been had all the details been agreed upon between the parties. International arbitrations can be conducted perfectly well - and frequently are - based on nothing more than an agreement to arbitrate under the UNCITRAL Rules. No arbitral seat, no appointing authority, no additional procedural rules and no choice of substantive law is required for the validity, and the practical efficacy, of such provisions. A BAT providing for arbitration under the UNCITRAL Rules, unless otherwise agreed or supplemented, would be entirely workable.

Nor is it so novel to suggest using the UNCITRAL Rules as a default mechanism, absent party agreement. Indeed, that is almost precisely what the Panama Convention does - prescribing the Inter-American Commercial Arbitration Commission Rules ("IACAC Rules"), based almost entirely on the UNCITRAL Rules, as the default rules when the parties have not otherwise agreed in their agreement to arbitrate. The same model would be workable in the context of a bilateral arbitration treaty.

A fifth objection to the concept of BATs involves existing regimes for the enforcement of forum selection clauses and judgments. A good example in Europe is the Brussels Regulation⁴² and, in the United States, the full faith and credit clause and due process clauses of the U.S. Constitution.⁴³ In each of those two jurisdictions there are existing mechanisms which both guarantee access to justice and which also guarantee the effective enforcement of judgments.

Within those jurisdictions in Europe and within the 50 individual states of the United States, there would be substantial difficulties to adopting a BAT. A BAT between Germany and Italy; a BAT between Alabama and California, does not make sense, because of the existing regime, in many ways a domestic regime, that regulates dispute resolution and the recognition of judgments.

One, therefore, needs to carve out within the European and US spaces (and other federal states could be similar examples), the notion of a BAT. But outside of those regimes, in dealings between citizens of the European states and third countries, in dealings between nationals of the United States and third states, dealings between national of other countries, a BAT continues to make good sense.

The final "But" - the one that looms largest and most fearsome - is fear of the unknown. We have all learned the law; learned the international legal system, as existing in a particular construct according to a particular set of rules. We all know that the foundation of

⁴¹ See above.

⁴² See COUNCIL REGULATION (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2001:012:0001:0023:en:PDF>.

⁴³ See The Constitution of the United States, Article IV and the Fifth and Fourteenth Amendments.

international arbitration is consent and that arbitration is consensual. ABAT is innovative; it breaks the mold that we have learned and appears improbable or wrong. But we ought not forget that 100 years ago the New York Convention would have been regarded similarly and that 40 years ago, BITs were as well. They too were bold innovations that were, in a sense, ahead of their times. But they proved remarkably successful and are now parts of the orthodox legal environment.

The fact that bilateral arbitration treaties, and the notion of constructed consent, are new and unorthodox: does not mean that they lack merit or cannot be achieved. The fact that the New York Convention and BITs broke the mold does not mean that further innovations cannot come or offer similar benefits. So let us put that fearsome "But," the "But" of orthodoxy and tradition, away and think instead about what might be, what could be, and how to make it happen.