
Bilateral Arbitration Treaties at the 50th Anniversary of UNCITRAL

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At the 50th anniversary of the United Nations Commission on International Trade Law ("UNCITRAL") Congress, [Gary Born](#), chair of Wilmer Cutler Pickering Hale and Dorr LLP's International Arbitration Group, discussed his proposal for a new form of international arbitration through bilateral arbitration treaties ("BATs").

The discussion in the UNCITRAL—a body that has, over the past 50 years, fostered international trade and investment and conceptualized key arbitral instruments like the UNCITRAL Model Law on International Commercial Arbitration and the New York Convention—reflects the continued importance of BATs in contemporary discourse on international trade and arbitration.

BATs have captured increasing interest since their proposal in 2012. A 2014 report in *Commercial Dispute Resolution* ("Born's BAT gets set to fly," published January 6, 2014) describes Born's proposal as inaugurating what could be a "profound shake-up of commercial law, with states abandoning sovereign rights to commercial dispute litigation in favor of resolution by arbitration."

Born proposes the adoption of BATs, modeled on bilateral investment treaties ("BITs"), to provide a default framework of arbitration for cross-border dispute resolution. As he explains:

"We all know, of course, that investment arbitration has learned a good deal from international commercial arbitration. The basic procedural rules in many investment arbitrations, whether conducted under the UNCITRAL rules or the ICSID rules, draw substantially on earlier experiences in international commercial arbitration. Many of the pleading techniques, the advocacy techniques that are used in investment arbitration parallel those previously developed in the commercial setting. Many of the arbitrators and many of the counsel that appear in investment arbitrations have substantial overlaps with those in commercial arbitration. And I would suggest that international commercial arbitration can learn equally from investment arbitration. In particular, I think where international commercial arbitration can learn is through what I referred to a few moments ago, is the concept of a bilateral arbitration treaty, a BAT, rather than a BIT."

The focus of Born's proposal is on bilateral treaties which would provide for international arbitration,

under the UNCITRAL Rules, as a default mechanism for resolution of international commercial disputes between commercial parties. The proposal would leave parties free to contract out of the BATs arbitration regime, including by agreeing to forum selection clauses or alternative arbitration provisions; absent such agreement, however, the proposed BATs would provide for the resolution of international commercial disputes, between nationals of contracting states, by binding arbitration that results in a binding arbitral award.

Other commentators, and increasing numbers of States as well as UNCITRAL, have also expressed interest in Born's BATs proposal.

The Permanent Court of Arbitration's Deputy Secretary-General, Brooks Daly, calls Born's BATs "a promising and important proposal." "Assuming that they contain a well-designed arbitration mechanism, the proposed bilateral arbitration treaties would assure nationals of signatory states a reliable and fair international arbitration proceeding as a default, while preserving the freedom to choose other forms of arbitration or court adjudication. This offers significant advantages over current means of resolving international commercial disputes." "Since it is so common that one party involved in an international contract does not trust the courts due to home court advantage, there should be an assumed default provision in favour of arbitration [over litigation] even if there isn't an arbitration clause," Jan Paulsson, partner at Three Crowns, told *CDR*. "It is difficult to understand why parties to an international transaction would not have assumed that it would be resolved by arbitration."

The article which forms the basis of Born's speech at the UNCITRAL—*Bilateral Arbitration Treaties: An Improved Means of International Dispute Resolution*—can be accessed [here](#). The text for a draft Model BAT can be accessed [here](#), together with a commentary on the Model BAT's provisions, which can be accessed [here](#). Further details about the Model BAT and its rationale can also be found in an article, which can be accessed [here](#) or in a speech at the University of Pennsylvania Law School by Born, which can be viewed [here](#).

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