

DRAFT COMMENTARY ON
MODEL BILATERAL ARBITRATION TREATY

1. This commentary relates to the draft Model Bilateral Arbitration Treaty (“Treaty”). The commentary should be read in conjunction with the text of the draft Treaty.
2. The Treaty provides a default dispute resolution mechanism – international arbitration - for businesses that are party to defined categories of international commercial disputes. This dispute resolution mechanism will apply where two (or more) businesses, which are incorporated in each of the States that is party to the Treaty have not agreed to an alternative form of dispute resolution or otherwise contracted out of the Treaty. Where applicable, the default mechanism would require businesses to resolve their international commercial dispute by international arbitration, pursuant to specified procedural rules; it would also produce an arbitral award that would be subject to recognition in the States party to the Treaty, and likely elsewhere, under provisions incorporated from the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”).
3. The Treaty as presently drafted contemplates a bilateral relationship between two States. The Treaty could nonetheless be revised for use between more than two States, for example, between members of a regional trade association (e.g., ASEAN). Similarly, although the Treaty is currently drafted as a standalone agreement, the proposed provisions for default mechanism naturally fit in to a preferential trade agreement.

I. BACKGROUND

4. The Treaty seeks to promote international trade and investment, particularly involving small and medium-sized enterprises (“SMEs”). It does this by reducing one of the barriers to international trade and investment for SMEs – the costs and risks associated with dispute resolution.
5. There are several reasons that international disputes and, correspondingly, international dispute resolution in national courts inhibit international trade:
 - a. **Neutrality.** Commercial parties generally mistrust the home courts of their counterparties’ states. A party from State A, contracting with a party from State B, will naturally be reluctant for disputes with that party to be resolved in State B’s courts; that concern is materially heightened in cases involving major domestic or state-owned enterprises.
 - b. **Expertise.** Many commercial parties also mistrust the expertise of foreign courts in international business disputes. In some jurisdictions, courts have limited experience with cross-border commercial disputes and judges are ordinarily assigned to matters randomly, without regard to expertise or experience. Local procedural rules relating to technical matters such as translations, language, time limits and representation by foreign counsel aggravate concerns about local expertise.

c. **Transparency.** Almost all commercial parties also desire a measure of familiarity with, and confidence in, the procedures used in international dispute resolution. Businesses contemplating international transactions are often confronted by foreign systems of law and procedure, including in States in which they do not ordinarily operate, and complex rules of private international law; in many jurisdictions, there are few reliable ways of ascertaining what these rules are, particularly for SMEs with limited resources and foreign experience. The resulting lack of transparency deters businesses from concluding otherwise attractive and productive cross-border commercial undertakings.

d. **Uncertainty and Unpredictability.** Related to the foregoing considerations, many businesses are reluctant to engage in cross-border trade where the outcome of future disputes and proceedings is uncertain and unpredictable. Given the foregoing factors, dispute resolution in international commercial transactions can often be highly uncertain and unpredictable.

e. **Enforceability.** Judgments of foreign courts can seldom be enforced abroad. There are relatively few international treaties providing for the effective recognition and enforcement of national court judgments, and domestic law usually provides inadequate and uncertain grounds for enforcing foreign judgments. Where enforcement is possible, it is often slow, enabling some counterparties to evade their obligations.

f. **Cost and Time Required for Dispute Resolution.** Resolving international disputes can be extremely costly. Most SMEs will, at least in the early stages of a dispute, need to 'layer' counsel: initially consulting local counsel, and then, where the dispute is to be resolved abroad, engaging counsel local to the court in which the dispute is to be heard. The potential for delays and increased costs is significant, because of parallel proceedings (with jurisdictional and forum selection disputes), appeals (in different levels of different national court systems) and difficulties in enforcing judgments.

6. These issues are supported by empirical research and confirmed by anecdotal evidence from businesses. The European Commission recently conducted a study into intra-EU trade by small and medium sized businesses, finding that one third of respondents felt that the resolution of cross-border conflicts stifled their cross-border trade.¹ Similarly, the World Bank and the International Finance Corporation reported in 2012 that efficiency and transparency in dispute resolution were pivotal in encouraging cross-border trade.²

7. Businesses often attempt to address the foregoing concerns by including provisions in their international commercial contracts providing for dispute resolution either by international commercial arbitration or in a specified national court. Where such provisions are included, they can significantly reduce the risks, costs and uncertainties of international disputes.

8. Nonetheless, parties frequently fail to include such provisions, particularly SMEs or parties engaged in transactions without formal documentation. Alternatively, parties not

¹ European Commission, *European contract law in business-to-business transactions: Summary*, 2011.

² The World Bank & The International Finance Corporation, *Doing business in a more transparent world*, 2012.

infrequently include “pathological” dispute resolution provisions, that refer to non-existent institutions or otherwise unworkable mechanisms for dispute resolution. These risks are particularly substantial in transactions involving parties with limited international experience and limited internal legal resources.

9. The Treaty addresses the foregoing issues by:

- a. providing a uniform default dispute resolution mechanism, thus avoiding the costs associated with parties negotiating dispute resolution mechanisms and familiarising themselves with diverse foreign dispute resolution procedures;
- b. providing a default dispute resolution procedure that is neutral and independent from any national legal system, before a neutral arbitral tribunal chosen by the parties or independent arbitral institution;
- c. providing an efficient, expert and enforceable means of dispute resolution, rather than requiring parties to pursue parallel or multiplicitous litigations, before domestic courts with potentially limited international experience, to obtain judgments that are difficult or impossible to enforce;
- d. enabling counsel local to each party to represent that party throughout the dispute, reducing the need for parties to retain (and compensate) multiple counsel;
- e. preserving the parties’ autonomy to contract out of the default dispute resolution mechanism.

10. The Treaty is designed as a self-executing treaty which will apply directly to all international commercial disputes where businesses have not affirmatively opted out of its application, or displaced it by determining some other means by which they will resolve their disputes. As such, the Treaty would not (necessarily) require further implementing legislation, although different States may adopt different approaches to this issue and may, in any event, consider that implementing legislation would be useful in clarifying application of the Treaty in domestic proceedings.

11. A summary of the key differences between international commercial arbitration pursuant to the Treaty and existing procedures for litigation of international commercial disputes is set out in Annex A to this Commentary.

II. ARTICLE 1: DEFINITIONS

12. Article 1 defines a number of terms used in the Treaty, including “**Arbitral Award**,” “**International Commercial Dispute**,” “**Enterprise**,” “**Enterprise of a Party**” and “**Party**.”

13. The Treaty broadly defines “**International Commercial Dispute**” as any dispute arising out of a commercial transaction, contract, or activity between “**Enterprises**” in the States that are party to the Treaty. Sub-part (b) of the definition is drafted expansively, modelled on Article 1(1), note 2, of the UNCITRAL Model Law to cover any one of a list of transactions and any other activities or transactions whose nature or purpose is realization of a profit. In order to ensure a comprehensive and consistent regime, this definition is intended to cover any cause of action, however arising, provided it has some connection with a transaction or activity involving these States.

14. Claims in tort that are related to a commercial contract would therefore fall within the Treaty regime. A dispute that does not arise from or relate to an international commercial transaction would not fall within the Treaty.

15. Some States may wish to exclude certain types of dispute from the scope of the Treaty. To this end, the model definition currently excludes:

- consumer disputes;
- employment or labour disputes;
- domestic relations disputes;
- marital and child custody disputes; and
- inheritance disputes.

16. States are free to omit some or all of these exclusions, or to add additional exclusions to this list, where they consider it desirable or necessary to do so.

17. The Treaty provides a definition of “**Enterprise**” which encompasses any juridical entity that is constituted for a profit, including companies, corporations, partnerships and any similar legal persons, irrespective of the entity’s size, business structure, or form. The model definition does not include natural persons, including entrepreneurs or merchants, although States are free to alter the terms of the Treaty to do so. The model definition includes State-owned and State-controlled entities.

18. “**Enterprise of a Party**” captures any Enterprise organized under the laws of a State that is party to the Treaty. The definition includes branches, divisions and similar parts of an Enterprise, wherever they may operate, provided that the Enterprise in question is organized under the laws of a State that is a party to the Treaty. The definition does not include Enterprises organized under the laws of States not party to the Treaty.

19. “**Arbitral Award**” is defined to mean an award made pursuant to the provisions of the Treaty.

20. “**Party**” means a State party to the Treaty.

21. “**Notice of Arbitration**” is defined as a written notice that commences an arbitration under the Treaty.

22. “**UNCITRAL Arbitration Rules**” refers to the Arbitration Rules of UNCITRAL, first adopted in 1976 and subsequently amended in 2010 and 2013. States could, if they wished, adopt other institutional arbitration rules, such as those of the International Chamber of Commerce, the Singapore International Arbitration Centre or otherwise if they considered this more desirable.

III. ARTICLE 2: ARBITRATION OF INTERNATIONAL COMMERCIAL DISPUTES

23. Article 2 provides the basic dispute resolution mechanism of the Treaty. Article 2 adopts a default rule, subject to variation by the Enterprises party to the dispute under Article 5(1)’s opt-out provisions (discussed below), prescribing the Treaty’s international arbitration mechanism as the means for resolving all International Commercial Disputes – involving any profit-making activity between Enterprises based in the States parties to the

Treaty. Absent an affirmative opt-out, pursuant to Article 5(1), the Treaty's provisions will apply to any "International Commercial Dispute" between Enterprises of States party to the Treaty.

24. The fundamental rationale for the Treaty's default means of dispute resolution is that international arbitration, pursuant to the Treaty's procedures, provides a more neutral, objective, expert, efficient and enforceable means of dispute resolution than national courts. In most instances, International Commercial Disputes are currently resolved in parallel or multiplicitous national court litigations, typically in the domestic courts of the Enterprises party to the dispute, with limited possibilities of recognizing and enforcing resulting judgments. This produces slow, uncertain, expensive, potentially partial and parochial proceedings, whose results are seldom final and enforceable.

25. The Treaty's default means of dispute resolution improves upon the foregoing. It provides a means of dispute resolution, with which commercial parties have long and positive experiences, that is neutral, expert, efficient and enforceable. This means of dispute resolution is also capable of being tailored by the Enterprises party to the dispute to their individual circumstances. This offers important benefits, of efficiency, expertise and autonomy, that do not exist to the same degree in domestic court proceedings.

26. In the first instance, Article 2(a) provides that an Enterprise seeking to assert claims in an International Commercial Dispute must give written notice to its counterparty of the nature of its dispute identifying the dispute and proposing resolution through good faith negotiations. Only after 30 days may the Enterprise (or its counterparty) refer the dispute to arbitration – the procedure for which is set out in Article 4.

27. Article 2(a)'s "cooling-off" period has important objectives. It imposes an obligation on Enterprises to identify the nature of their disputes and, importantly, then engage in good faith negotiations in an effort to resolve the dispute for 30 days. Relatedly, Article 5(2) of the Treaty also requires recognition of any agreement between Enterprises involved in an International Commercial Dispute to refer the dispute for resolution by mediation, conciliation, or related methods.

28. A cooling-off period of some description is common in both commercial arbitration clauses and Bilateral Investment Treaties (though typically prescribing a much longer period).³ As with the Treaty, these periods are intended to encourage parties to attempt to resolve their disputes amicably and in good faith, including through the use of mediation and conciliation.

29. Article 2(b) of the Treaty permits either Enterprise involved in an International Commercial Dispute to refer the dispute to arbitration, after expiration of the 30 day cooling-off period referred to above. In order to do so, an Enterprise must provide a Notice of Arbitration (as defined) pursuant to the UNCITRAL Rules.

30. The UNCITRAL Rules provide a comprehensive procedural framework for the arbitration (from which the parties to the arbitration are free to depart by agreement). Reference is made to the Rules in Article 2(b) only to set out the notice required to commence arbitration under the Treaty.

³ See, for example, the Ecuador-United States Bilateral Investment Treaty.

31. The Notice of Arbitration given under the UNCITRAL Rules is broadly equivalent to, although generally less detailed than, a statement of claim in many national court proceedings. The Notice outlines at a high level the nature of the claim, the relief sought, and the details of the parties. (A more comprehensive examination of the choice of the UNCITRAL Rules is set out below, beginning at paragraph 39.)

32. Article 2(c) provides, for the avoidance of doubt, that an Arbitral Award made pursuant to the Treaty shall be subject to recognition and enforcement under Articles 6 and 7 of the Treaty. The provision confirms the effects that would be otherwise applicable, under the Treaty, of an award in an arbitration pursuant to the Treaty.

IV. ARTICLE 3: REFERENCE OF INTERNATIONAL COMMERCIAL DISPUTES TO ARBITRATION

33. Article 3 of the Treaty obliges the courts of each State Party (or other judicial bodies within the State) to refer the Enterprises that are involved in an International Commercial Dispute to arbitration at the request of one of the parties involved in the dispute – in effect ousting the jurisdiction of the court. Article 3 parallels the content of Article II of the New York Convention and Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration. The requirement that courts refer the parties to arbitration is central to the Treaty’s dispute resolution process and the efficacy of the arbitral process.

34. As with other elements of the Treaty, Enterprises that are involved in an International Commercial Dispute are free, either after or before the dispute arises, to opt out of Article 3 and the Treaty’s arbitration procedures by agreement.

35. Article 3(2) of the Treaty makes clear that nothing in the Treaty prevents the courts of a State that is party to the Treaty from considering or granting requests for interim relief in aid of an arbitration under the Treaty. This approach generally parallels the provisions of the UNCITRAL Model Law (in Article 17) and authority under the New York Convention, which also recognize the residual authority of national courts to order provisional or interim relief prior to constitution of the arbitral tribunal.

36. As drafted, Article 3(2) does not provide for the issuance of interim relief by national courts once an arbitral tribunal has been constituted under the Treaty. States could amend this approach to permit national courts to grant interim relief in aid of arbitration, in exceptional circumstances, even after constitution of the arbitral tribunal.

V. ARTICLE 4: ARBITRATION PROCEDURES

37. Article 4 of the Treaty sets out the arbitral procedures which apply by default to arbitrations of International Commercial Disputes conducted under the Treaty. These default procedures incorporate the UNCITRAL Rules (as amended in 2010 and 2013) and the Rules’ approach to significant procedural issues in the arbitral process. Each of the provisions of Article 4 is explained in greater detail below.

38. The UNCITRAL Rules are not necessarily the best available framework for all disputes (for example, some parties may desire specialized procedures for some disputes in specialized commercial settings). For this reason, the Treaty permits parties to alter the default procedures applicable to International Commercial Disputes by written agreement.

A. *The UNCITRAL Arbitration Rules*

39. The UNCITRAL Rules are among the most widely-used and broadly-accepted international arbitration rules. The United Nations Commission on International Trade Law (*UNCITRAL*) adopted the Rules in 1976 following extensive consultation with arbitral institutions, arbitration experts, users and others. The Rules were adopted by UNCITRAL and approved by the U.N. General Assembly with no dissent.

40. The UNCITRAL Rules are often used in ad hoc arbitrations, including purely commercial disputes, investor-state disputes⁴ and state-state disputes. The Rules have also served as a model for institutional rules (for example the Iran-US Claims Tribunal), as well as a comprehensive set of arbitration rules in their own right.

41. The UNCITRAL Rules are truly international; and divorced from national litigation procedures in a way that many other institutional arbitration rules are not. The Rules therefore provide an internationally neutral and widely used set of procedures as the default rules for arbitrations under the Treaty.

42. The UNCITRAL Rules may be unfamiliar to some parties and lawyers involved in international disputes under the Treaty. However, all international arbitration rules will, in most cases, be unfamiliar to some parties and lawyers. The UNCITRAL Rules provide the most neutral and widely known set of arbitral rules,⁵ allowing disputes to be resolved on the most level procedural playing field available. The resulting neutrality is materially fairer than the existing default regime for the resolution of International Commercial Disputes (being proceedings in the home courts of the two parties, with the result that one party is in the unfamiliar home court of its counterparty). Moreover, as arbitrations under the Treaty become more common, lawyers in the States party to the Treaty will develop greater expertise and familiarity with the Rules.

43. Some States may wish to adopt procedural rules other than the UNCITRAL Rules for the default procedures under the Treaty. For example, two States in a particular geographic region (e.g., Southeast Asia, Latin America) might wish to adopt the institutional rules of a regional arbitral institution. States might also wish to provide alternatives for the parties to choose between in particular cases. The Treaty is readily adaptable to either of these approaches.

44. Article 4(1)(a) provides that arbitrations conducted under the Treaty shall be conducted pursuant to the UNCITRAL Rules. By doing so, the Treaty incorporates the UNCITRAL Rules in the same manner that a commercial arbitration agreement or bilateral investment treaty incorporates the Rules, making the Rules part of the parties' agreement to arbitrate under the Treaty. Thus, after an Enterprise commences an arbitration under Article 3, Article 4(1)(a) makes the UNCITRAL Rules applicable in the ensuing arbitral proceedings.

45. All of the provisions of the UNCITRAL Rules are incorporated by reference in Article 4(1)(a). The only exception to this general observation involves the remaining

⁴ After the ICSID Arbitration Rules, which are specially designed for investment disputes, the UNCITRAL Rules are the second most common arbitration rules used in the resolution of disputes under investment treaties (i.e. between states and private individuals - in approximately 30% of investment treaty cases).

⁵ Owing to the widespread use of the UNCITRAL Rules, a wealth of commentary is available to assist parties and counsel.

provisions in Article 4(1), which includes a number of additional provisions (discussed below) that either modify or elaborate on the UNCITRAL Rules. Additional modifications or elaborations to the UNCITRAL Rules could be introduced by States that wished to do so.

46. The Enterprises that are party to particular arbitrations are afforded procedural autonomy to agree upon the conduct of the arbitration. This extends to almost all aspects of the arbitral process, subject only to mandatory requirements, under the UNCITRAL Rules, of equality of treatment and opportunity to be heard. In practice, parties frequently agree to much of the procedure applicable in international arbitration under the UNCITRAL Rules.

47. Where the parties fail to reach agreement on procedural issues, the UNCITRAL Rules provide that the arbitral tribunal has wide procedural authority to conduct the arbitration in the manner considered most appropriate. This includes authority with regard to the number and timing of written submissions, the taking and presentation of evidence, the disclosure of documents and other materials (either ordering or not ordering such disclosure), the conduct of hearings, site inspections and the like. The tribunal is obligated to treat the parties with equality and to ensure the opportunity to be heard, but is otherwise accorded broad procedural discretion.

B. The Permanent Court of Arbitration

48. Article 4(1)(b) specifies the Secretary General of the Permanent Court of Arbitration (“PCA”) as the appointing authority in arbitrations under the Treaty. The PCA’s role pursuant to Article 4(1)(b) is to appoint arbitrators to resolve the dispute (under Articles 8-10 of the UNCITRAL Rules) and to resolve challenges to arbitrators (under Article 13 of the UNCITRAL Rules).

49. The PCA is an experienced and well-regarded appointing authority, both with respect to arbitrator appointments and challenges. It has an impressive track-record in both areas, and its challenge decisions (which are frequently published) are carefully reasoned and sound. The PCA is also an almost uniquely international arbitral institution. Although based in Europe (the Hague), it employs lawyers from around the world, with extensive legal, linguistic and other experience.

50. The PCA does not maintain a list or register of arbitrators in the way that some arbitral institutions do (e.g., ICSID, SIAC). Arbitrators appointed in particular cases are chosen at the discretion of the PCA, based on the circumstances of individual cases.

51. It would be possible for States to maintain a register that the PCA could draw from (and impose such an obligation by way of the Treaty), but this presents several issues:

- a. **Cost and Revisions.** Maintaining a register of “approved” arbitrators comes at an administrative cost. That cost is an ongoing one, because registers or lists must be periodically updated; failure to do so can impose very significant costs on the parties, by limiting the choice of active and appropriate arbitrators.
- b. **Acceptability.** Preparing a list or register of arbitrators would require agreement between the States party to the Treaty. This agreement could prove challenging and, at a minimum, costly and time-consuming. Moreover, the task

would likely become more complex if multiple States were party to a single version of the Treaty.

52. The fee currently charged by the PCA for arbitral appointments is €1,500. (The arbitrator's fees and expenses are in addition to this amount.) The €1,500 is a flat fee that normally includes the administration of any challenges to an arbitrator that may arise, except in rare cases where it is expected that it will take an unusually large amount of time to hear and decide upon the challenge, in which case the PCA reserves the right to establish some other fee arrangement.

C. The Number of Arbitrators

53. The default number of arbitrators under the UNCITRAL Rules is three.⁶ Unlike other rules, the UNCITRAL Rules do not allow any discretion as to the number of arbitrators. Other institutional arbitration rules take different approaches, either providing for one arbitrator or granting the arbitral institution discretion to choose the appropriate number of arbitrators.

54. The default position under the Treaty is for disputes to be resolved by one arbitrator, but with an alternative that allows residual discretion on the part of the PCA to appoint three arbitrators in "exceptional circumstances." The Treaty provides for a general default rule of one arbitrator in order to expedite the arbitrations; this is particularly appropriate because disputes under the Treaty are likely, as a broad rule, to involve SMEs and smaller amounts in disputes, where a sole arbitrator is generally more appropriate. The Treaty's default solution also parallels other institutional rules, under which the default position is generally for the appointment of a single arbitrator, except where the complexity of the subject matter, the amount in dispute, or the circumstances of the dispute are sufficient to justify a three-member tribunal.⁷

55. The Treaty is based on the view that the circumstances in which International Commercial Disputes arise are many and varied, and that it would therefore be inappropriate to specify a single solution (e.g., one or three arbitrators). The better approach is to provide for a single arbitrator with the appointing authority retaining discretion to select three arbitrators in "exceptional circumstances." This formula allows the PCA to consider whatever factors it deems necessary in the circumstances and to adjust the number of arbitrators where to do so would be preferable for the parties.

56. As with other provisions in Article 4(1), the Enterprises involved in an International Commercial Dispute would be free to agree upon a different number of arbitrators than the Treaty's default solution would provide. If, for example, the parties wished to have three arbitrators (rather than the default solution of one) or one arbitrator (where the PCA had determined that "exceptional circumstances" warranted appointment of three arbitrators), they would be free to do so.

D. Seat and Place of Arbitration

57. Article 4(1)(d) provides two alternative solutions for the selection of the arbitral seat. First, the choice can be left to the arbitral tribunal on a case-by-case basis. Second, the Treaty can provide a default seat, based upon the identities of the States party to the

⁶ UNCITRAL Rules, Article 7.

⁷ Swiss Rules of International Arbitration (2012), Article 6(2); Singapore International Arbitration Centre Rules (2013), Rule 6.1; Dubai International Arbitration Centre Rules (2007), Article 8.2.

Treaty. The choice between these two options depends on the preferences of the States party to the Treaty.

58. The seat of the arbitration is important to the arbitral process, and where the award is rendered is important for the purposes of the New York Convention. The law of the arbitral seat generally provides the procedural law of the arbitration, governing internal aspects of the arbitral process. The law of the arbitral seat also generally provides the law governing annulment of the arbitrators' award, the law governing appointment and challenges of arbitrators, and a limited number of other matters. Additionally, the law of the arbitral seat governs the availability of local judicial assistance in aid of the arbitral process (for example in taking evidence or granting provisional relief).

59. In most international commercial arbitrations and some investment arbitrations, the arbitral seat is selected by the parties to the arbitration, often in their arbitration agreement. Where the parties' agreement does not select an arbitral seat, most institutional arbitration rules and national arbitration legislation provides default mechanisms, allowing either the arbitral tribunal or an arbitral institution to select a neutral arbitral seat.

60. The seat is distinct from the physical location in which the arbitral hearing take place. Tribunals have the authority, under most national laws and institutional rules, to conduct hearings and deliberations in places other than the arbitral seat, for the convenience of the parties and arbitrators. By doing so, the tribunal does not alter the arbitral seat or procedural law of the arbitration. This general principle would apply equally to arbitrations under the Treaty.

61. Article 4(1)(d) provides that, absent agreement between the Enterprises party to a dispute, selection of the arbitral seat will be made by the arbitral tribunal. This allows individual tribunals to determine a seat that is appropriate given the identities and characteristics of the Enterprises party to the dispute, the nature of the dispute, the location of evidence and witnesses and other factors.

62. Alternatively, Article 4(1)(d) also envisages the possibility of designating a specific arbitral seat in the Treaty, as a default solution subject to alteration by the Enterprises party to a particular dispute. For example, in a Treaty between States A and B, the arbitral seat could be designated as State C – in this hypothetical, a neutral state, in the same geographic region, with a strong legal framework for international arbitration. This approach would provide enhanced predictability and certainty for parties to individual International Commercial Disputes, who would know in advance what the arbitral seat in a future arbitration would be.

63. Ordinarily, the arbitral seat will be in a neutral jurisdiction, being a jurisdiction other than the home State of the parties to the dispute, and will have a robust legal system supportive of international arbitration. Singapore, Zurich, Geneva, London and New York are commonly used seats, but there are numerous other possible choices.

64. Whatever arbitral seat is selected pursuant to Article 4(1)(d), the choice would be subject to contrary written agreement by the parties. This recognizes the central role of party autonomy under the Treaty and in the international arbitral process. It also enables Enterprises to select an arbitral seat best suited to the circumstances of their particular dispute.

65. Nothing in the Treaty prevents arbitral tribunals from conducting arbitral proceedings online, using modern technology to conduct most hearings and meetings. Particularly in smaller or medium-sized cases, with parties in different locations, this may materially reduce the costs of dispute resolution.

E. The Language of the Arbitration

66. Article 4(1)(e) provides for selection of the language of the arbitration. The draft version of the Treaty provides for the choice of English as the default language, subject to contrary agreement by the Enterprises in a particular dispute.

67. The language of the arbitration affects the arbitrators available to hear a dispute, the cost and length of time taken to resolve the dispute if translation of documents is required and the convenience of the parties. Given the widespread usage of English in international commerce, the Treaty proposes English as the default language for proceedings under the Treaty.

68. States might wish to select alternative default languages, including Mandarin, Spanish, French, or otherwise. States might wish either to select a common language (e.g., Mexico and Costa Rica, choosing Spanish) or a neutral language (e.g., Laos and Lebanon, choosing English). An alternative approach would be to permit the arbitral tribunal to select the language of the arbitration; in general, this seems likely to result in undesirable uncertainty, making the choice of counsel and arbitrators unnecessarily difficult.

69. The language of the arbitration will generally affect the language used in all written submissions, correspondence and oral hearings in the arbitration, as well as the language of the tribunal's awards and orders. Additionally, although the tribunal will have discretion in this regard, the language of the arbitration will also generally be required for documentary evidence submitted in the arbitration (requiring that documents in other languages be translated into the language of the arbitration).

F. Time Limit for Making Award

70. Article 4(1)(f) provides that the arbitral tribunal must use its best efforts to make its final award not later than 18 months following the constitution of the tribunal. This is not an absolute requirement, and instead only requires the tribunal's best efforts. The requirement applies to the tribunal's "final award," and is not satisfied by issuance of partial or interim awards.

71. Institutional arbitration rules and arbitration agreements often do not contain any time limit for the making of a final award, in part because it is difficult to prescribe a specific time limit for all disputes. Rather, a time frame for the arbitration is decided as part of a procedural schedule of the arbitration, issued by the arbitral tribunal after consultations with the parties, at the outset of the arbitration.

72. Nonetheless, the Treaty prescribes a best efforts requirement for making a final award within 18 months, in order to maximize the likelihood that arbitral proceedings will be efficient and reasonably expeditious. The 18-month time limit is particularly appropriate because, as noted above, the expectation is that many arbitrations under the Treaty will involve SMEs and small to medium-sized disputes. Where a dispute is complex, or requires lengthier proceedings, Article 4(1)(f) leaves the tribunal discretion to take longer to render an award. It is anticipated that, where a tribunal exceeds the 18-

month time limit, it will do so only to the extent necessary and will advise parties of the revised time limit.

G. Commencement of Arbitration

73. Article 4(1)(g) provides that the date of commencement of the arbitration, and submission of a claim to arbitration, shall be the date on which a Respondent receives the Notice of Arbitration (under Article 2(b) of the Treaty). This date may be relevant for purposes of time limitations and otherwise under national law.

H. Confidentiality

74. Article 4(2) provides that, absent contrary agreement between the Enterprises party to an International Commercial Dispute, arbitrations conducted pursuant to the Treaty shall be confidential. This default position under the Treaty is subject to contrary agreement by the parties.

75. Commercial parties generally consider confidentiality of dispute resolution proceedings to be beneficial for several reasons:

- a. Publicity, particularly in high profile disputes, may result in trial by media, with the result that justice may be undermined.
- b. In many cases, businesses will wish to preserve a working relationship, and each has an incentive to preserve its own reputation; publicity risks exacerbating the dispute.

76. The obligation of confidentiality under Article 4(2) applies to all documents produced by any Enterprise party to an arbitration under the Treaty, including awards, orders, correspondence with the tribunal or opposing parties, and all documents produced (as evidence or in disclosure) in the arbitration. This obligation is subject to exceptions where disclosure of otherwise confidential materials is required by legal duty or to protect or pursue a legal right, including to enforce or challenge an arbitral award. These exceptions are based generally on the LCIA and SIAC Rules.

77. State parties may wish to dispense with the default position of confidentiality under the Treaty. Possible reasons for doing so include:

- a. Publication of arbitral awards would allow the development of a body of common law authority, in the nature of precedent; alternative means for accomplishing this objective would be to provide for redacted publication of awards without identifying the parties.
- b. The general goal of transparency, which is important in many international and national legal systems, would be better served through non-confidential proceedings.

78. An alternative approach to Article 4(2) would be to omit the provision altogether, leaving the issue of confidentiality to be dealt with by the law of the arbitral seat and the arbitral tribunal's procedural authority. Another option would be to address the issue of confidentiality by permitting or requiring publication of the arbitral award, but maintaining the confidentiality of other documents submitted in the arbitration. A further option would

be to provide the arbitral tribunal with procedural authority to determine the appropriate level of confidentiality in particular cases (including, for example, with regard to commercially sensitive information).

VI. ARTICLE 5: DISPUTE RESOLUTION AGREEMENTS; EXCLUSION OF TREATY

79. Article 5 provides for the exclusion from application of the Treaty any International Commercial Dispute in which the Enterprises that are involved have agreed in writing to exclude its application.

a. Such an exclusion can be achieved under Article 5(1)(a) by providing that the Treaty shall not apply as between the parties to the dispute, but without providing for some alternative means of dispute resolution. Where this is done parties will need to resolve disputes according to the ordinary rules of civil procedure (i.e. through the relevant court or courts of the competent jurisdiction).

b. Alternatively, the exclusion can be accomplished under Article 5(1)(b) by agreeing to refer the dispute to arbitration under a different set of institutional arbitration rules, or according to another procedure that is incompatible with the procedure provided for under Article 4(1) of the Treaty.

c. A third means of excluding application of the Treaty can be accomplished pursuant to Article 5(1)(c), by referring the dispute to a court or other judicial authority in any State (through, for example, a forum selection or choice of court clause).

d. A final alternative for excluding application of the Treaty is available under Article 5(1)(d), which allows reference of a dispute to resolution by expert determination or a similar means of consensual alternative dispute resolution.

80. The exclusion under Article 5(1) must, under any of the foregoing alternatives, be express. Implied submissions to jurisdiction or similar agreements will not override the Treaty's default arbitration mechanism.

81. Article 5(2) makes clear that there is no requirement that an International Commercial Dispute be referred to arbitration under the Treaty until the expiration of the cooling-off period referred to in Article 2(a). Article 5(2) also provides that courts of the States party to the Treaty need not refer Enterprises to arbitration during any period in which the Enterprises have agreed in writing to refer a dispute to conciliation, mediation or any similar pre-arbitration dispute resolution process.

82. Article 5(3) confirms that the Treaty does not restrict the autonomy of Enterprises to agree in writing to refer disputes, after they have arisen, to means of dispute resolution other than arbitration under the Treaty. This reflects the Treaty's basic character, of providing a default mechanism for dispute resolution, and not a mandatory forum.

VII. ARTICLE 6: RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARDS

83. Article 6 provides for the recognition and enforcement of awards made pursuant to arbitration under the Treaty. It guarantees that awards made pursuant to the Treaty shall be

subject to recognition and enforcement in the States party to the Treaty on the same terms as awards subject to the New York Convention; it also seeks to maximize the enforceability of awards under the Treaty in States that are not party to the Convention.

84. Article 6(1) provides the basic rule that courts in the States party to the Treaty shall mandatorily recognize awards made in arbitrations under the Treaty as final and binding and enforce them in accordance with the Treaty. This provision is modelled on Article III of the New York Convention. The presumptive validity and enforceability of awards under Article 6(1) is subject to the exceptions set forth in Article 7 of the Treaty (discussed below).

85. Article 6(2) of the Treaty is also modelled on Article III of the New York Convention. It provides that neither State party to the Treaty shall impose substantially more onerous conditions or higher fees or charges on the recognition of awards made pursuant to the Treaty than applicable to New York Convention awards or national court judgments.

86. Article 6(3) of the Treaty sets out the procedure that a party must follow in order to seek recognition and enforcement of an award made pursuant to the Treaty. It is based on Article IV of the New York Convention and prescribes an expeditious, uncomplicated means of obtaining the recognition and enforcement of awards. Article 6(3)(a) – (c) identifies the documents that must be supplied by a party seeking recognition and enforcement of an award made under the Treaty in order to obtain such recognition and enforcement.

87. Article 6(4) of the Treaty sets forth the expectation and intention of the States party to the Treaty that any awards made in an arbitration under the Treaty be deemed to be arbitral awards for the purposes of the New York Convention by other States. In particular, the second sentence of Article 6(4) provides that the States party to the Treaty desire and expect that the requirement of Article V(1)(a) of the New York Convention, for a valid arbitration agreement, would be satisfied with respect to awards that were made under the Treaty.

88. The States that are party to the Treaty cannot bind other States to their expectations and intentions with respect to application of the New York Convention to awards under the Treaty; other States might take the view that the Convention's requirements for a valid arbitration agreement are not satisfied by the provisions of the Treaty. Nonetheless, it can be anticipated that other States will accord substantial weight to the expectations and intentions of the States party to the Treaty. Moreover, States that are not parties to the Treaty may elect to enforce awards made under the Treaty, even without formal application of the New York Convention, if they conclude that an award rendered under the Treaty nonetheless satisfies the requirements for recognition of national court judgments or administrative decrees.

89. As bilateral arbitration treaties become more common there will be an incentive for States to recognise and enforce awards rendered under substantially similar treaties even where the recognizing State is not a party to the treaty under which the award was rendered. This incentive can be formalized by an agreement among States party to different bilateral arbitration treaties to recognize and enforce awards made under such treaties in accordance with the terms of the New York Convention.

VIII. ARTICLE 7: REFUSAL OF RECOGNITION AND ENFORCEMENT OF

ARBITRAL AWARDS

90. Article 7 of the Treaty is modelled on Article V of the New York Convention. It provides an exhaustive and limited set of exceptions to the presumptive obligation of courts to recognize and enforce awards made under the Treaty (contained in Article 6 of the Treaty). These exceptions parallel the existing grounds for non-recognition in Article V of the New York Convention.

91. Article 7(1)(a) provides for non-recognition of an award where the arbitration did not arise from an International Commercial Dispute as defined by the Treaty. Article 7(1)(a) permits non-recognition of awards that exceed the scope of the Treaty (which is limited to International Commercial Disputes). Article 7(1)(a) is generally modelled on Article V(1)(a) of the New York Convention.

92. Article 7(1)(b) provides for non-recognition of an award where the Enterprise against which the award was made was not given notice of steps in the arbitral proceedings or was unable to present its case. Article 7(1)(b) parallels Article V(1)(b) of the New York Convention, and authority under the latter should be considered relevant to the interpretation and application of Article 7(1)(b).

93. Article 7(1)(c) of the Treaty provides for non-recognition of an award where it deals with matters not contemplated by or falling within the terms of the submission to arbitration (i.e., where the award exceeds the scope of the arbitrators' jurisdiction). This provision generally parallels Article V(1)(c) of the New York Convention, and precedent under the Convention should also be relevant under the Treaty. Article 7(1)(c) will generally be applicable in unusual cases where an arbitral tribunal issues or grants relief that has not been sought by the Enterprises party to the arbitration. The final clause of Article 7(1)(c) confirms, like Article V(1)(c) of the Convention, that an award can be recognized in part if the parts of the award that exceeds the scope of the arbitrators' jurisdiction can be separated from the parts that do not.

94. Article 7(1)(d) of the Treaty provides for non-recognition of awards where the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the Enterprises party to the arbitration or, failing such agreement, with the procedures prescribed by Articles 2 and 4 of the Treaty. Article 7(1)(d) is modelled generally on Article V(1)(d) of the New York Convention, although it replaces the law of the arbitral seat with the default procedures of Articles 2 and 4 of the Treaty.

95. Article 7(2)(a) provides that an award made under the Treaty may be denied recognition if the subject matter of the arbitration is not capable of settlement by arbitration under the law of the State where recognition is sought. This non-arbitrability exception parallels Article V(2)(a) of the New York Convention. Like Article V(2)(a), it is to be interpreted narrowly.

96. Article 7(2)(b) of the Treaty provides that an award made under the Treaty may be denied recognition if recognition would be contrary to the public policy of the State where recognition is sought. This public policy exception parallels Article V(2)(b) of the New York Convention and, as with Article V(2)(a), should be interpreted narrowly.

97. As with Article V of the New York Convention, Article 7 of the Treaty should be interpreted in a robustly pro-enforcement manner. This is essential in order to ensure that the Treaty's benefits of efficiency, neutrality and finality are fully realized. Authorities

decided under the New York Convention should, in general, be considered relevant to interpretation and application of the Treaty.

IX. ARTICLE 8: SCOPE OF TREATY

98. Article 8 makes clear that the Treaty applies broadly to all “Courts,” defined to include all courts and other bodies exercising judicial, adjudicative or similar functions in either State party to the Treaty. It also extends to any governmental authority or organ of either State.

X. ARTICLE 9: ENTRY INTO FORCE AND TERMINATION

99. The Treaty is intended to continue in force until terminated by one party giving notice, with an initial term of 20 years.

XI. ARTICLE 10: RETROACTIVITY

100. The Treaty would not, under Article 10, apply to any International Commercial Dispute arising out of events which had occurred, or claims that had arisen, prior to the Treaty’s entry into force.