

DRAFT MODEL BILATERAL ARBITRATION TREATY

TREATY BETWEEN
THE GOVERNMENT OF [State A]
AND THE GOVERNMENT OF [State B]
CONCERNING THE PROMOTION OF TRADE
AND ENCOURAGEMENT OF RECIPROCAL INVESTMENT

The Government of [State A] and the Government of [State B] (hereinafter the “Parties”);

Desiring to promote greater economic cooperation between them with respect to cross-border trade and international investment involving enterprises of one Party and enterprises of the other Party;¹

Bearing in mind the possibility that from time to time disputes may arise in connection with such cross-border trade and international investment;²

Recognizing the importance of providing means of effectively and fairly resolving disputes with respect to such cross-border trade and international investment;³

Recognizing that a stable legal framework and access to neutral, efficient and fair means of international dispute resolution will promote the rule of law and will maximize effective utilization of economic resources;⁴

Recognizing the benefits of arbitration as a method of settling disputes arising in the context of such cross-border trade and international investment;⁵

Have agreed as follows:

Article 1: Definitions

For purposes of this Treaty:

“**Arbitral Award**” means a decision finally resolving some or all of the claims asserted in an International Commercial Dispute, in writing and signed by an arbitrator or arbitrators, in an arbitration under this Treaty.

“**Claimant**” means an Enterprise of a Party that is party to an International Commercial Dispute and that has initiated or intends to initiate an arbitration under this Treaty.

¹ Adapted from 2012 U.S. Model BIT, Preamble.

² Adapted from the ICSID Convention, Preamble.

³ Adapted from 2012 U.S. Model BIT, Preamble.

⁴ Adapted from 2012 U.S. Model BIT, Preamble.

⁵ Taken from UN GA Resolution 40/72 (11 December 1985), in relation to adoption of the UNCITRAL Model Law on International Commercial Arbitration.

“Court” means any judicial organ, administrative or other government tribunal, or any other body that exercises any adjudicative, judicial, or similar governmental authority delegated to it by a Party.

“Enterprise” means any legal or juridical entity constituted or organized for profit, including a corporation, company, partnership, limited partnership, trust, sole proprietorship, joint venture, association, or similar organization, whether owned by private persons, private or governmental enterprises, or state or governmental bodies or entities.⁶

“Enterprise of a Party” means an Enterprise constituted or organized under the law of a Party, including a branch of any Enterprise, regardless of where that Enterprise is constituted or organized, [carrying out business activities in the Territory of such Party].

“International Commercial Dispute” means a dispute, disagreement, or controversy:

- (a) arising between (1) one or more Enterprises of one Party; and (2) one or more Enterprises of the other Party; and
- (b) arising out of commercial contracts, transactions, or activities, including, without limitation, any: trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture or other form of industrial or business cooperation; mergers or acquisitions; carriage of goods or passengers by air, sea, rail or road; or any other activities the nature or purpose of which is the realization of a profit.⁷ Notwithstanding the foregoing, an “International Commercial Dispute” does not include consumer disputes, employment or labor disputes, domestic relations disputes, marital or child custody disputes, inheritance disputes, or [_____].

“New York Convention” means the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, 10 June, 1958.

“Notice of Dispute” means a notice in writing by any party to an International Commercial Dispute, pursuant to Article 2(a) of this Treaty.

“Notice of Arbitration” means a notice in writing referring a dispute to arbitration pursuant to Article 2(b) of this Treaty.

“Party” means either [State A] or [State B].

“Respondent” means an Enterprise of a Party that is party to an International Commercial Dispute, and is not a Claimant under this Treaty.

⁶ Adapted from 2012 U.S. Model BIT, Definitions, at p. 2.

⁷ Taken from UNCITRAL Model Law, Article 1(1), at fn. 2.

[“Territory” means:

- (a) with respect to [State A], [_____].
- (b) with respect to [State B], [_____].
- (c) with respect to each Party, the territorial sea and any area beyond the territorial sea of the Party within which, in accordance with customary international law as reflected in the United Nations Convention on the Law of the Sea, the Party may exercise sovereign rights or jurisdiction.^{8]}

“**UNCITRAL Arbitration Rules**” means the *Arbitration Rules of the United Nations Commission on International Trade Law* (adopted by GA Resolution 31/98 on 15 December 1976 and revised by GA Resolution 65/22 on 6 December 2010, with new article 1, paragraph 4 adopted by GA Resolution 68/109 on 16 December 2013, and as may be revised in the future).⁹

Article 2: Resolution and Arbitration of International Commercial Disputes

Except as provided in Article 5(1) of this Treaty, all International Commercial Disputes shall be resolved as follows:

- a) an Enterprise of a Party that is involved in an International Commercial Dispute may give notice in writing to any Enterprise of the other Party that is involved in such International Commercial Dispute, identifying the dispute and proposing the resolution of such dispute by good faith discussions for a period of not less than thirty (30) days;
- b) if, thirty (30) days after receipt of a Notice of Dispute, the Enterprises of the Parties that are involved in the International Commercial Dispute referred to in such Notice of Dispute have not amicably resolved such dispute, then any such Enterprise may refer such dispute to arbitration by providing the other Enterprise or Enterprises with a Notice of Arbitration pursuant to the UNCITRAL Arbitration Rules; and
- c) any Arbitral Award in an arbitration pursuant to this Article 2 shall be subject to recognition and enforcement pursuant to Articles 6 and 7 of this Treaty.

Article 3: Reference of International Commercial Disputes to Arbitration

1. Except as provided in Article 5(1) of this Treaty, each Party, including the Courts of each Party, when seized of an International Commercial Dispute, shall, at the request of one of the

⁸ Adapted from 2012 U.S. Model BIT, Definitions, at p. 5.

⁹ From GA Resolution 68/109, 16 December 2013 (“Arbitration Rules (as revised in 2010, with new article 1, paragraph 4, as adopted in 2013)”); 2012 U.S. Model BIT, Definitions, at p. 6 (“‘UNCITRAL Arbitration Rules’ means the arbitration rules of the United Nations Commission on International Trade Law”).

Enterprises involved in such dispute, refer the dispute to arbitration pursuant to Articles 2 and 4 of this Treaty.¹⁰

2. Nothing in Articles 2, 3(1), or 4 of this Treaty shall prevent the Courts of the Parties from considering or granting requests for interim measures in aid of arbitration prior to the constitution of an arbitral tribunal under Articles 2 and 4 of this Treaty.

Article 4: Arbitration Procedures

1. Except as provided in Article 5(1) of this Treaty, any International Commercial Dispute referred to arbitration pursuant to Article 2(b) or Article 3(1) of this Treaty shall be resolved, unless otherwise agreed in writing by the Enterprises involved in such dispute, as follows:

- a) the arbitration shall be conducted pursuant to the UNCITRAL Arbitration Rules;
- b) the appointing authority for the arbitration shall be [the Secretary-General of the Permanent Court of Arbitration];
- c) the number of arbitrators shall be [one] [unless in exceptional cases the Secretary-General of the Permanent Court of Arbitration concludes that three arbitrators would be appropriate];
- d) the seat of the arbitration shall be [designated by the arbitral tribunal][or, alternatively, a specified location];
- e) the language of the arbitration shall be [English];
- f) the arbitral tribunal shall use its best efforts to make a final award in the arbitration no later than [18 months] following constitution of the arbitral tribunal; and
- g) the arbitration shall be deemed to have commenced, and a claim shall be deemed to be submitted to arbitration, on the date on which the Notice of Arbitration is received by the Respondent or Respondents.

2. Unless otherwise agreed in writing between the Enterprises involved in an International Commercial Dispute, any arbitration pursuant to Articles 2 and 4 of this Treaty shall be confidential, and the Enterprises involved in such dispute shall keep confidential all materials submitted in or created for the purpose of the arbitration, all documents produced by another Enterprise in the arbitration not otherwise in the public domain, and all awards, orders and other communications in the arbitration, save and to the extent that disclosure may be required of an Enterprise by legal duty, to protect or pursue a legal right or to enforce or challenge an award in bona fide legal proceedings before a Court or arbitral tribunal.¹¹

Article 5: Dispute Resolution Agreements; Exclusion of Treaty

¹⁰ Adapted from the New York Convention, Article II(3).

¹¹ Adapted from the LCIA Rules, Article 30.1.

1. Notwithstanding the provisions of Articles 2, 3 and 4 of this Treaty, an International Commercial Dispute shall not be referred to arbitration pursuant to this Treaty if the Enterprises that are party to such dispute have expressly agreed in writing to:

- a) exclude application of this Treaty or arbitration pursuant to this Treaty of such dispute; or
- b) refer such dispute to arbitration pursuant to any institutional arbitration rules or otherwise, unless such agreement to arbitrate is compatible with Article 4(1) of this Treaty; or
- c) refer such dispute to any Court, in either one of the Parties or another State; or
- d) refer such dispute for final resolution to expert determination or any other form of alternative dispute resolution.

2. Notwithstanding the provisions of Articles 2, 3 and 4 of this Treaty, the Courts of a Party shall not be obliged to refer the Enterprises that are party to an International Commercial Dispute to arbitration pursuant to Article 3(1) of this Treaty until the expiration of any period of time during which such Enterprises have agreed in writing to attempt to resolve their disputes amicably, including by negotiations, conciliation, mediation, or any similar process, prior to initiating arbitral proceedings.

3. Nothing in this Article 5 shall restrict the autonomy of the Enterprises that are party to an International Commercial Dispute to refer such dispute to arbitration pursuant to Articles 2, 3 and 4 of this Treaty after such dispute has arisen, regardless whether such dispute would otherwise be subject to arbitration under this Treaty.

Article 6: Recognition and Enforcement of Arbitral Awards

1. Each Party, including the Courts of each Party, shall recognize Arbitral Awards made by an arbitral tribunal pursuant to Articles 2, 3 and 4 of this Treaty as final and binding and enforce them in accordance with the rules of procedure of the Party in which the award is relied upon, under the conditions laid down in Articles 6 and 7 of this Treaty.¹²

2. Neither Party shall impose materially more onerous conditions or higher fees or charges on the recognition or enforcement of Arbitral Awards made by an arbitral tribunal pursuant to Articles 2, 3 and 4 of this Treaty than it imposes on the recognition or enforcement of domestic arbitral awards, arbitral awards subject to the New York Convention, or judgments of any Court.¹³

3. An Enterprise of a Party applying for recognition and enforcement of an Arbitral Award made by an arbitral tribunal pursuant to Articles 2, 3 and 4 of this Treaty shall, at the time of the application, or as otherwise permitted, supply:¹⁴

¹² New York Convention, Article III.

¹³ New York Convention, Article III.

¹⁴ Adopted from the New York Convention, Article IV.

- (a) a duly authenticated original Arbitral Award or a duly certified copy thereof;
- (b) a duly certified copy of the Notice of Dispute referred to in Article 2(a) of this Treaty and the Notice of Arbitration referred to in Article 2(b) of this Treaty; and
- (c) if the said Arbitral Award is not made in an official language of the Party in which the award is relied upon, the Enterprise applying for recognition and enforcement of the award shall produce a translation of these documents into such language, certified by an official or sworn translator or by a diplomatic or consular agent.¹⁵

4. Both Parties declare their mutual desire and expectation that Arbitral Awards made by an arbitral tribunal pursuant to Articles 2, 3 and 4 of this Treaty be subject to recognition and enforcement by the Courts of other States in accordance with the provisions of the New York Convention. For the purposes of such recognition and enforcement proceedings, both Parties desire and expect that the provisions of Articles 2, 3 and 4 of this Treaty shall, subject to Article 5, be deemed to constitute a valid agreement to arbitrate between the Enterprises of either Party that are party to the International Commercial Dispute within the meaning of Articles II, IV and V(1)(a) of the New York Convention.

Article 7: Refusal of Recognition and Enforcement of Arbitral Awards

1. Recognition and enforcement of an Arbitral Award made by an arbitral tribunal pursuant to Articles 2, 3 and 4 of this Treaty may be refused, at the request of the Enterprise of a Party against whom it is invoked, only if that Enterprise furnishes to the Court where the recognition and enforcement is sought, proof that:¹⁶

- (a) where the arbitration was conducted pursuant to Articles 2, 3 and 4 of this Treaty, the Arbitral Award did not arise from an International Commercial Dispute under this Treaty; or
- (b) the Enterprise of a Party against which the Arbitral Award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case; or
- (c) the Arbitral Award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the Enterprises that are party to the International Commercial Dispute, or failing such agreement, was not in accordance with the procedures prescribed by Articles 2, 3 and 4 of this Treaty.

¹⁵ Adapted from the New York Convention, Article IV(2).

¹⁶ Adapted from the New York Convention, Articles V and VI.

2. Recognition and enforcement of an Arbitral Award made by an arbitral tribunal pursuant to Articles 2, 3 and 4 of this Treaty may also be refused if the competent authority in the Party where recognition and enforcement is sought finds that:

- (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that Party; or
- (b) the recognition or enforcement of the award would be contrary to the public policy of that Party.

Article 8: Scope of Treaty¹⁷

A Party's obligations under this Treaty shall apply to:

- (a) the Courts of a Party, including the Courts of any political subdivisions of a Party; and
- (b) any governmental authority or organ of a Party, including any governmental authority or organ of any political subdivisions of a Party.

Article 9: Entry into Force and Termination of Treaty

1. Each Party shall notify the other of the completion of the constitutional procedures required concerning the entry into force of this Treaty,¹⁸ which shall enter into force thirty (30) days after the date of receipt of the final notification.¹⁹
2. Each Party shall take steps, including publication of the terms of this Treaty, to ensure that all Enterprises of such Party are aware of the provisions of this Treaty.
3. The Treaty shall be in force for an initial period of twenty (20) years. It shall remain in force thereafter, unless either Party gives one year's written notice of termination through diplomatic channels.²⁰

[Article 10: Retroactivity of Treaty]

[This Treaty does not create retroactive obligations or responsibilities for either Party,²¹ and the provisions of this Treaty shall not apply to any International Commercial Dispute arising out of events that had occurred, or to claims that had arisen, prior to its entry into force.²²]

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

¹⁷2012 U.S. Model BIT, Article 2(2).

¹⁸Adapted from 2006 France Model BIT, Article 11.

¹⁹Adapted from 2012 U.S. Model BIT, Article 22.

²⁰Adapted from 2006 France Model BIT, Article 11.

²¹Adapted from the IISD Model Investment Agreement, Article 3(D).

²²Adapted from the 2010 UK-Colombia BIT, Article XIII(2).

DONE in duplicate at [City] this [number] day of [month, year], in the English and [foreign] languages, each text being equally authentic.

FOR THE GOVERNMENT OF
[State A]

FOR THE GOVERNMENT OF
[State B]