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International Arbitration as an Instrument of Economic Development: The Indo-Pacific Case Study

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Historical records indicate that Tuesday, 10 June 1958 must have been a busy day in the corridors of the United Nations.¹⁾ On that day, following the diplomatic conference which had taken place in May and June 1958 as a precursor to the adoption of the [United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards 1958](#) (the “Convention”), 10 states formally signalled their intent to become the first contracting parties to the Convention by becoming the Convention’s first signatories. A further 14 states followed later that year. In subsequent years, all of those original signatories eventually ratified the Convention, but not necessarily with immediate effect.²⁾

It is noteworthy that the initial signatory states represented a diverse cross-section of developing and developed economies. Amongst them, India, Pakistan, the Philippines, Sri Lanka and Egypt joined France and The Netherlands as first adopters on 10 June 1958. Almost 65 years later the [current count of states which are parties](#) to the Convention is 166 out of the 193 states presently represented at the United Nations.³⁾ Whilst that number represents an array of states on all inhabited continents and across the five oceans, it is instructive to consider which states remain to accede to the Convention and why that might be the case.

One area where, *en bloc*, the Convention had gained limited traction was the Indo-Pacific, and in particular the South Pacific. Of the 14 states comprising the South Pacific very few had acceded to the Convention prior to 2018.⁴⁾ That statistic is curious in circumstances where many of those same states which had not acceded to the Convention had in fact acceded to the [ICSID Convention](#), some as far back as the 1970s.⁵⁾

There has been a concerted push in recent years to bring the South Pacific under the umbrella of the Convention. This initiative, led by the Asian Development Bank in cooperation with UNCITRAL has been supported across the academic, institutional and professional arbitration community.⁶⁾ What are the reasons for this reform and why now?

The answer is multidimensional. When a state considers whether to adopt such a reform the underlying policy case for the reform must run deeper than the argument that most states have acceded to the Convention and therefore Pacific states should follow suit. The real case for the reform is founded in the theory of economic development and the role international arbitration can

play in facilitating foreign direct investment. In their *Journal of Law and Economics* article entitled “Does International Commercial Arbitration Promote Foreign Direct Investment?” the authors conducted empirical research on bilateral investment flows and concluded that foreign direct investment followed arbitration reform.⁷⁾ The reasons for this are multi-faceted but prominent amongst them are that investors and the recipients of the investment have a neutral and level playing field, avoid one another’s home jurisdictions and have an enforceable award as a result. This increased foreign direct investment flow appears particularly pronounced in countries with weaker institutions and in relation to larger projects.⁸⁾

The effects of accession to the Convention and arbitration reform across the South Pacific resonate in two principal ways: first, the combination of accession and reform signals to the world that the country is open to business. Second, the effects of increased flows from foreign direct investment have been measured at as high as an 11% increase in gross domestic product for the South Pacific.⁹⁾

In developing economies, where foreign investment inflows are crucial to employment, education, training and infrastructure, and also to current and future climate adaptation and mitigation efforts, arbitration reform alone will not be a magic bullet but rather an important condition precedent to attracting such investment. That investment is needed even more urgently given the impact of COVID-19 which has devastated all South Pacific economies and particularly the many Pacific economies which rely heavily on tourism. For example, the economies of Fiji and Palau have depended on tourism for between approximately 40-55% of their GDP.¹⁰⁾

As to the impetus of the timing of the reform, the Asian Development Bank helped drive the reform by investing ongoing in-country time and resources over a considerable period by assisting governments in developing policy papers, and by briefing all relevant government departments, businesses and the legal community on the potential benefits of the reform. This was in response to the growth of arbitration as the primary means of dispute resolution and the recognition of the potential benefits of foreign direct investment as a development tool which may have been underappreciated in the South Pacific prior to the Asian Development Bank’s involvement.

Following the Asian Development Bank’s technical advisory program, states which have acceded to the Convention and/or enacted arbitration legislation include Fiji, Palau, Tonga, Papua New Guinea and Timor-Leste. The Asian Development Bank has invested significant resources into not only assisting these states with reform but also in capacity building of judiciary, government and the private sector so that there is a sufficient knowledge base to implement the reform and to use arbitration with confidence. As a result, arbitration continues to grow in those states in a concrete sense and there is no reason to believe there is resistance in other states in the South Pacific to adopting similar measures.

The Asian Development Bank’s reform program is ongoing but the single most important factor in whether other states in the South Pacific will elect to undertake arbitration reform is likely to be the ongoing capacity and commitment to on-the-ground engagement which necessarily was curtailed during COVID-19. Personal relationships are highly valued in the South Pacific and ministers and ministerial departments need specialised advice and consultation. Such legislative reform requires considerable bandwidth from politicians and public servants in developing states who have other pressing commitments, takes time to percolate amongst stakeholders through public consultations and is subject to parliamentary sitting calendars and election cycles.

It is positive to note that institutional arbitrations have been filed before such institutions as SIAC and ACICA and arbitration-related proceedings have occurred before various courts in the region under new best practice legislation.¹¹⁾ It is hoped that foreign direct investment will grow concurrently for those states which have engaged in the reform and signalled to the world they are open for business with reliable, predictable and dependable dispute resolution scaffolding in place.


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References

- Gary Born and the author are Expert International Commercial Arbitration Consultants retained
- ?1 by the Asian Development Bank to advise states on accession to the Convention, legislative reform and capacity building.
 - ?2 Pakistan did not ratify the Convention until 2005.
 - ?3 In the South Pacific the Cook Islands is a party to the Convention but is not a Member State of the United Nations.

- The South Pacific states which had acceded included the Cook Islands and the Marshall Islands.
- ?4 Fiji had acceded to the Convention in 2010 but did not enact legislation ratifying until the *International Arbitration Act 2017*.
- ?5 Fiji, Samoa and Papua New Guinea acceded to the ICSID Convention in 1978.
- ?6 Asian Development Bank technical assistance program entitled “*Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific*”.
- Andrew Myburgh & Jordi Paniagua, 2016. “Does International Commercial Arbitration Promote Foreign Direct Investment?,” *The Journal of Law and Economics*, University of Chicago Press, vol. 59(3), pages 597-627.
- ?7
- ?8 Ibid.
- ?9 Jordi Paniagua, “The Economic Impact of International Commercial Arbitration” Third South Pacific International Arbitration Conference, Sydney, 17 March 2021.
- Fiji Market Insights 2021, Department of Foreign Affairs and Trade (Australia) <https://www.dfat.gov.au/sites/default/files/fiji-market-insights-2021.pdf> and World Tourism Organisation for Palau in 2015 https://www.theglobaleconomy.com/Palau/international_tourism_revenue_to_GDP/.
- ?10 See for example **South Pacific Fertilizer Ltd v Allied Harvest International Pte Ltd [2019] FJHC 400; HBC142.2017 (8 May 2019); Stantec New Zealand Ltd v Fiji Roads Authority [2018] FJHC 867; HBC324.2016, HBC227.2017 (14 September 2018)**.

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