



Technical Assistance Report

Project Number: 50114-001
Regional—Capacity Development Technical Assistance (R-CDTA)
November 2016

Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific

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Asian Development Bank

ABBREVIATIONS

ADB	–	Asian Development Bank
DMC	–	Developing member country
OGC	–	Office of the General Counsel
PNG	–	Papua New Guinea
PSDI	–	Private Sector Development Initiative
TA	–	technical assistance
UNCITRAL	–	United Nations Commission on International Trade Law

NOTE

In this report, "\$" refers to US dollars.

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CAPACITY DEVELOPMENT TECHNICAL ASSISTANCE AT A GLANCE

1. Basic Data		Project Number: 50114-001	
Project Name	Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific	Department /Division	OGC/OGC
Country	REG	Executing Agency	Asian Development Bank
2. Sector		ADB Financing (\$ million)	
✓ Public sector management	Subsector(s) Law and judiciary		0.50
		Total	0.50
3. Strategic Agenda		Climate Change Information	
Inclusive economic growth (IEG)	Pillar 2: Access to economic opportunities, including jobs, made more inclusive	Climate Change impact on the Project	Low
Regional integration (RCI)	Pillar 4: Other regional public goods		
4. Drivers of Change		Gender Equity and Mainstreaming	
Governance and capacity development (GCD)	Institutional systems and political economy	No gender elements (NGE)	✓
Knowledge solutions (KNS)	Knowledge sharing activities		
Private sector development (PSD)	Public sector goods and services essential for private sector development		
5. Poverty and SDG Targeting		Location Impact	
Geographic Targeting	Yes	Regional	High
Household Targeting	No		
SDG Targeting	Yes		
SDG Goals	SDG16, SDG17		
6. TA Category:		B	
7. Safeguard Categorization Not Applicable			
8. Financing			
Modality and Sources		Amount (\$ million)	
ADB		0.50	
Capacity development technical assistance: Technical Assistance Special Fund		0.50	
Cofinancing		0.00	
None		0.00	
Counterpart		0.00	
None		0.00	
Total		0.50	
9. Effective Development Cooperation			
Use of country procurement systems		No	
Use of country public financial management systems		No	

I. INTRODUCTION

1. This regional capacity development technical assistance (TA) aims to establish an effective commercial dispute resolution regime in the Pacific developing member countries (DMCs) of the Asian Development Bank (ADB) through international arbitration reform to boost regional and international investor confidence. The lack of a modern commercial dispute resolution and enforcement regime potentially impedes foreign investment in the Pacific DMCs.¹ Arbitration has become an important and preferred method of resolving disputes within the international business community.² The Pacific DMCs can benefit from a well-functioning international arbitration regime that combines well-written national laws on arbitration and membership in the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (NY Convention), along with capacity building for implementing parties and users of the reform. As such, establishing an effective dispute resolution system by promoting international commercial arbitration can create a better investment climate, facilitating more cross-border trade and investment to accelerate growth, reduce poverty and economic disparity, raise productivity and employment, and strengthen institutions in the Pacific DMCs.³ Consultation missions to Tonga and Papua New Guinea (PNG) and discussions with Pacific DMC government officials, the private sector, and development partners have informed the issues and approaches of the TA. The design and monitoring framework is in Appendix 1.⁴

2. The TA closely and synergistically aligns with ADB's highest priorities, including those in ADB's Strategy 2020⁵ and Midterm Review of Strategy 2020,⁶ which reemphasized the importance of private sector development and regional cooperation and integration. It is part of ADB's mandate to provide assistance to less-developed countries that will contribute to the region's economic growth and promote regional cooperation. The TA also aligns with the regional development goals on strengthening the legal framework to support economic development in the Pacific DMCs. In addition, the TA builds upon the private sector assessments of the Pacific Private Sector Development Initiative (PSDI), which recommend updating the Pacific DMCs' legal frameworks to allow for international commercial arbitration and recognition and enforcement of foreign arbitral awards.⁷

II. ISSUES

3. Increasingly, foreign investors have been relying on international commercial arbitration for dispute resolution because it is an effective, fair, timely, and often less-costly way to resolve

¹ "Reforms to [alternative dispute resolution] regimes allow economies to offer a more attractive investment climate to foreign investors." S. Pouget. 2013. *Arbitrating and Mediating Disputes: Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment. Policy Research Working Paper*. No. 6632. Washington, DC: World Bank, p. 23. The lack of an effective dispute resolution regime also affects a country's World Bank's Doing Business rankings.

² "Studies find that more than two-thirds of multinational corporations prefer commercial arbitration over traditional litigation, either alone or in combination with other alternative dispute resolution mechanisms, to resolve cross-border disputes." Footnote 1, p. 4.

³ Economists have identified and emphasized the important role of international commercial arbitration in international market integration. A.F.M. Maniruzzaman. 2002. 30 *Int'l Bus. Law* 508. *International Commercial Arbitration in the Asia Pacific, Asian Values, Culture and Context*. United Kingdom: Kent Law School, University of Kent at Canterbury.

⁴ The TA first appeared in the business opportunities section of ADB's website on 6 April 2016.

⁵ ADB. 2008. *Strategy 2020: The Long-Term Strategic Framework of the Asian Development Bank, 2008–2020*. Manila.

⁶ ADB. 2014. *Midterm Review of Strategy 2020: Meeting the Challenges of a Transforming Asia and Pacific*. Manila.

⁷ PSDI is a regional TA facility cofinanced by ADB and the governments of Australia and New Zealand. ADB. 2013. *Technical Assistance for the Pacific Private Sector Development Initiative, Phase III*. Manila.

disputes between private parties.⁸ One advantage of international arbitration is that foreign arbitral awards are easier to enforce worldwide compared with court judgments, provided comprehensive legislation is in place. Other advantages include the finality of the arbitral awards, the parties' right to select a neutral forum, the parties' right to select the adjudicators for their dispute to increase impartiality and subject matter expertise, the ability to choose flexible arbitration procedures, confidentiality, and reduced cost.⁹ Hence, when making investment decisions, international investors often consider whether a country is supportive of international commercial arbitration, including, in particular, if the enforcement of foreign arbitral awards is locally supported, i.e., whether the country has signed on to the NY Convention and has the legal framework to give effect to it.¹⁰

4. The NY Convention is widely recognized as a foundational instrument of international commercial arbitration and provides a globally accepted and well-endorsed method of recognizing foreign arbitral awards in other signatory states.¹¹ It creates a uniform international framework, which enables parties to international commercial arbitration agreements to enforce foreign arbitration awards with relative ease as compared with foreign court judgments. Further, the NY Convention narrowly limits appeals from an award, which makes international arbitration more attractive to parties seeking finality in commercial disputes. Once a party has obtained an award from the tribunal, that award can be enforced in any of the ratifying countries. As of September 2016, 156 of the 193 United Nations member states had adopted the NY Convention; however, the majority of Pacific DMCs have not agreed to it.¹² Moreover, many Pacific DMCs do not have domestic legal frameworks to support the recognition and enforcement of international arbitration awards.

5. Although PNG is one of the Pacific DMCs' larger economies, it is not a contracting party to the NY Convention, and its Arbitration Act of 1951 has not been updated to support the enforcement of foreign arbitral awards and reflect current international arbitration practices. Not being a party to the NY Convention contributes to PNG's difficulty in enforcing contracts and foreign arbitral awards. Additionally, PNG is the only Asia-Pacific Economic Cooperation economy that has not ratified the NY Convention.¹³ While Tonga's reform priorities include private sector development and attracting more foreign direct investment,¹⁴ it does not have a domestic or international arbitration regime. The Government of Timor-Leste is looking to increase foreign investment to diversify its economy, but investment opportunities are hampered by weak contract enforcement and the absence of an effective dispute resolution system. While Fiji made progress by acceding to the NY Convention in September 2010, no amendments have

⁸ Foreign investors view arbitration as a way to mitigate risks by providing legal certainty on enforcement rights, due process, and access to justice. S. Pouget. 2013. *Arbitrating and Mediating Disputes: Benchmarking Arbitration and Mediation Regimes for Commercial Disputes Related to Foreign Direct Investment. Policy Research Working Paper*. No. 6632. Washington, DC: World Bank.

⁹ Further, removing commercial disputes from the state sphere to the private sphere has the added benefit of relieving pressure from the state courts and institutions.

¹⁰ 21 Wis. Int'l L.J. 383 2003. *Membership has its Privileges: The Confidence-Building Potential of the New York Convention Can Boost Commerce in Developing Nations*. Madison.

¹¹ Prior to 1958, international arbitral awards and arbitration agreements were rarely enforceable because there was no effective mechanism in place to ensure cross-border recognition and enforcement.

¹² Out of 14 Pacific DMCs, only Fiji, Cook Islands, and Marshall Islands have acceded to the NY Convention. The following Pacific DMCs have not acceded to the NY Convention: Kiribati, Federated States of Micronesia, Nauru, Palau, PNG, Samoa, Solomon Islands, Timor-Leste, Tonga, Tuvalu, and Vanuatu.

¹³ PNG will be hosting the Asia-Pacific Economic Cooperation Leaders Summit in 2018, which will provide opportunities for PNG business. <http://www.businessadvantagepng.com/apec-summit-to-deliver-significant-opportunities-for-papua-new-guinea-businesses/>

¹⁴ Government of Tonga, Ministry of Tourism and Labour. Minister's Foreword. http://www.mcctil.gov.to/?page_id=754.

been made to the country's Arbitration Act of 1965 to give effect to the NY Convention. Accession to the NY Convention alone is insufficient to protect the rights of parties seeking to enforce foreign arbitral awards. Similar business law reforms have been recommended to attract more foreign investment in other Pacific DMCs such as Palau and Samoa.

6. In addition to legal reform, the capacity for international arbitration needs to be strengthened through regional awareness-building and dissemination workshops, and tailored training programs for potential and practicing arbitrators, lawyers, and judges. The workshops will increase the demand and capacity for international arbitration in selected Pacific DMCs. For example, the private sector, as the primary user of the international arbitration reform, will need to be educated on how the reform works. Lawyers and potential and practicing arbitrators will need to be trained in international commercial arbitration practices, and judges will need to be trained in recognition and enforcement proceedings. Over time, the usage of international commercial arbitration for dispute resolution can be increased, along with a new regional network and trained group of regional arbitration practitioners in Pacific DMCs, encouraging regional integration and development in international arbitration.

7. Recently, the governments of PNG¹⁵ and Fiji¹⁶ announced their intention to proceed with the proposed international arbitration reform. Moreover, during a consultation mission in August 2016, the Government of Tonga requested assistance under the TA to draft an arbitration act, accede to the NY Convention, and provide capacity building. The United Nations Commission on International Trade Law (UNCITRAL), as the Secretariat to the NY Convention, also informed ADB that it has been reviewing PNG's Arbitration Act for proposed accession to the NY Convention, and is in discussions with the Fiji government on updating its Arbitration Act of 1965.¹⁷

III. THE CAPACITY DEVELOPMENT TECHNICAL ASSISTANCE

A. Impact and Outcome

8. The impact will be increased foreign investor confidence leading to greater economic development potential in the Pacific DMCs. The outcome will be an effective international commercial dispute resolution and enforcement regime established in selected Pacific DMCs.

B. Methodology and Key Activities

9. The TA impact and outcome will be achieved through the following outputs:

- (i) **Output 1: Deposit of a binding instrument of accession to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958).** This output will assist the selected Pacific DMCs to deposit a binding

¹⁵ The Government of PNG, through the Department of Justice & Attorney General, announced its intention to move forward with accession to the NY Convention at the South Pacific Seminar on Access to Justice for Better Trade in Pacific Small Islands Developing States held in Port Moresby on 19–22 September 2016, supported by the United Nations Commission on International Trade Law's (UNCITRAL's) Regional Centre for Asia and the Pacific and the Ministry of Justice of the Republic of Korea. ADB was represented by its Office of the General Counsel at the seminar.

¹⁶ In September 2016, the President of Fiji announced that the review of the Arbitration Act is on the agenda of the 2016 Parliamentary session. <http://www.fiji.gov.fj/Media-Center/Speeches/H-E-THE-PRESIDENT-SPEECH-AT-THE-OPENING-OF-PARLIAM.aspx>.

¹⁷ Palau has also expressed some interest in acceding to the NY Convention, and may consider this proposed reform after the general elections in November 2016.

instrument of accession with the NY Convention's Secretariat.¹⁸ This output includes liaising with UNCITRAL, as the Secretariat, to assess the relevant Pacific DMC's readiness, encompassing reviewing the national law and its updates or new law for compliance with the basic requirements of the NY Convention, and assisting in the drafting of any policy papers or directives required for government approval of accession (i.e., cabinet approval and Parliament ratification). A team of consultants will advise on accession, from negotiation to deposit of the accession instrument.

- (ii) **Output 2: Final drafts of new or updated arbitration laws to implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and reflect modern international commercial arbitration standards.** This output will support the drafting of new or updated laws to reflect international commercial arbitration practices (including recognition of international arbitration agreements) and implementation of the NY Convention.¹⁹ Prior to drafting any laws, a diagnostic assessment will be conducted, taking into account the local context, to develop a legal framework for international commercial arbitration in each selected Pacific DMC.²⁰ It is expected that the final draft of the updated or new law will be submitted to the relevant legislative body for approval.
- (iii) **Output 3: Strengthened capacity for international commercial arbitration reform.** This output will strengthen capacity for international arbitration reform through regional awareness-building and dissemination workshops for stakeholders and tailored training programs for parties involved in the implementation of the reforms. Regional awareness-building and dissemination workshops will be for private sector stakeholders as the main users of the reform, government officials, arbitration practitioners, academia representatives, and judges. Lawyers and potential and practicing arbitrators will be trained in updated or new laws and international commercial arbitration best practices, and judges will be trained in foreign arbitral award recognition and enforcement proceedings. The TA will conduct a needs assessment to design tailored in-country and regional workshops and training programs for stakeholders. Additionally, this output will help establish a regional network of arbitrators and arbitration practitioners in the Pacific DMCs to share knowledge and best practices in the region and internationally, and provide training to its members.

10. Depending on the circumstances, a selected Pacific DMC may request assistance under one or more outputs. The risks are (i) a delay in reform enactment because of a lack of political support or change of government, and (ii) the governments' lack of capacity and resources to implement international arbitration reforms (although this risk will be mitigated by output 3).

C. Cost and Financing

11. The TA is estimated to cost \$500,000, which will be financed on a grant basis by ADB's Technical Assistance Special Fund (TASF-V). Pacific DMC governments may provide counterpart support in the form of counterpart staff, office space with furniture, support services

¹⁸ The NY Convention enters into force 90 days after the relevant instrument of accession is deposited.

¹⁹ TA assistance under output 2 may include legislative drafting workshops for selected Pacific DMCs.

²⁰ Output 2 will also consider whether the relevant national arbitration law should be modeled after the UNCITRAL Model Law on International Commercial Arbitration 1985, with amendments adopted in 2006.

for consultants, and other in-kind contributions. The cost estimates and financing plan are in Appendix 2.

D. Implementation Arrangements

12. ADB, through the Office of the General Counsel (OGC), will be the executing agency. OGC will be responsible for the overall TA administration and supervision and will engage the required consultants. OGC will work with the relevant ministries, judiciary, private sector, chamber of commerce, and law society to implement the TA, and will coordinate with ADB's Pacific Department, Pacific Subregional Office, Pacific Liaison and Coordination Office, PSDI, and relevant resident missions. All Pacific DMCs will be eligible for assistance under the TA upon request. However, TA resources will be primarily focused on Pacific DMCs that are committed to international arbitration reform and have the capacity to implement the assistance. The selection of the Pacific DMCs will also be aligned with ADB's Midterm Review of Strategy 2020, the respective country partnership strategy, and the Pacific Regional Operations Business Plan. It is envisaged that the TA will provide assistance to the governments of Fiji, PNG, and Tonga based on initial consultations and discussions with government officials and UNCITRAL.²¹ Other Pacific DMCs may be supported based on demand and subject to increased TA funding.

13. The TA will be implemented from November 2016 through December 2019. A team of consultants will be engaged to carry out the implementation of outputs 1, 2, and 3. The TA will use 18 person-months of consulting services (12 person-months of international inputs and 6 person-months of national inputs).²² Two international consultants will be engaged for 6 person-months each, on an intermittent basis, to implement outputs 1, 2, and 3.²³ For each selected Pacific DMC, a national consultant will be engaged for 1 person-month to provide local law advice, as required. Further, a national project coordinator will be engaged to handle the logistical and administrative arrangements for the workshops and training programs. Additionally, resource persons will be engaged to deliver the workshops and training programs, as needed. Consultants will be recruited as individual consultants under ADB's Guidelines on the Use of Consultants (2013, as amended from time to time). The outline terms of reference for consultants is in Appendix 3. ADB will also collaborate with UNCITRAL Regional Centre for Asia and the Pacific to deliver workshops and training programs under output 3 on a case-by-case basis, and to achieve outputs 1 and 2. The precise implementation arrangements will depend on the selected Pacific DMCs and scope of the assistance request. TA disbursements will be done following ADB's *Technical Assistance Disbursement Handbook* (2010, as amended from time to time).

IV. THE PRESIDENT'S DECISION

14. The President, acting under the authority delegated by the Board, has approved the provision of technical assistance not exceeding the equivalent of \$500,000 on a grant basis for the Promotion of International Arbitration Reform for Better Investment Climate in the South Pacific, and hereby reports this action to the Board.

²¹ ADB will not finance or conduct any TA activities unless it has received a no objection in writing from each selected Pacific DMC.

²² Lump-sum payments and/or output-based contracts will be considered under the TA when applicable in line with Midterm Review of Strategy 2020 action plan Nos. 2.9.2. and 2.10.2.

²³ International consultants may be recruited on an individual basis directly or through a firm.

DESIGN AND MONITORING FRAMEWORK

Impact the Project is Aligned with			
Foreign investor confidence increased, leading to greater economic development potential in ADB's Pacific developing member countries (DMCs)			
Results Chain	Performance Indicators with Targets and Baselines	Data Sources and Reporting	Risks
<p>Outcome</p> <p>An effective international commercial dispute resolution and enforcement regime established in selected Pacific DMCs</p>	<p>Use of international commercial arbitration by foreign investors increased in the selected Pacific DMCs</p> <p>(Baseline: 0; from October 2016 data)</p> <p>Selected Pacific DMCs' rankings in the World Bank's Doing Business survey improved</p> <p>(Baseline: from October 2016 data)</p>	<p>ADB mission reviews and ADB country reports and assessments</p> <p>World Bank's Doing Business surveys</p> <p>Pacific Private Sector Development Initiative assessments</p> <p>Public news alerts, NY Convention and UNCITRAL websites, and law firm briefings</p>	<p>Enactment of the relevant laws and/or regulations is delayed due to lack of political support and commitment and/or change of government during reform process</p> <p>Governments lack capacity and resources to implement international arbitration reforms</p>
<p>Outputs</p> <p>1. Deposit of a binding instrument of accession to the NY Convention in the selected Pacific DMCs</p> <p>2. Final drafts of new or updated arbitration laws to implement the NY Convention and reflect modern international commercial arbitration standards in the selected Pacific DMCs</p>	<p>1. Accession by the selected Pacific DMCs to the NY Convention increased</p> <p>(Baseline: 0; from October 2016 data)</p> <p>2a. Final draft of laws submitted to Parliament or relevant legislative body for approval in selected Pacific DMCs</p> <p>2b. New or updated arbitration laws adopted or enacted by the selected Pacific DMCs</p>	<p>1. Public news alerts and NY Convention and UNCITRAL websites announcing accession to NY Convention</p> <p>2a–b. ADB review missions and consultants' reports; World Bank, UNCITRAL, and law firm publications; Pacific Private Sector Development Initiative assessments; and international commercial arbitration best practices</p>	<p>Lack of political support and commitment</p> <p>Change of government during reform process</p> <p>Governments lack capacity and resources to implement international arbitration reforms</p> <p>Other priorities trump international arbitration reforms</p>

Results Chain	Performance Indicators with Targets and Baselines	Data Sources and Reporting	Risks
<p>3. Capacity for international arbitration reforms in the selected Pacific DMCs strengthened through</p> <p>(i) regional awareness-building and dissemination workshops; and</p> <p>(ii) tailored training programs for arbitrators, lawyers, and judges in international commercial arbitration and recognition and enforcement proceedings under the NY Convention</p>	<p>3a. At least two regional workshops conducted to increase awareness and disseminate information about international arbitration reform, including accession to the NY Convention, with at least 30% female participants for each workshop (Baseline: 0)</p> <p>3b. At least three tailored training programs conducted for lawyers, arbitrators, and judges from the selected Pacific DMCs in international commercial arbitration and recognition and enforcement proceedings under the NY Convention, with at least 30% female participants for each training program (Baseline: 0)</p> <p>3c. A regional network of arbitrators and arbitration practitioners in the Pacific DMCs established (Baseline: 0)</p>	<p>ADB review missions and consultants' reports</p> <p>Participant feedback from workshops and training programs</p>	<p>Lack of interest from Pacific DMCs in attending workshops and training programs</p>
<p>Key Activities with Milestones</p>			
<p>1. Deposit of a binding instrument of accession to the NY Convention in the selected Pacific DMCs</p> <p>1.1 Field inception missions and conduct consultations, dialogues, and meetings to determine readiness for accession to the NY Convention of the selected Pacific DMCs. (December 2016–March 2017)</p> <p>1.2 Work with governments of the selected Pacific DMCs to obtain the legislative or parliamentary approval to accede to the NY Convention (including drafting any policy papers and directives). (January 2017–December 2018)</p> <p>1.3 Prepare accession documents and provide related advice on depositing the instrument of accession with the NY Convention Secretariat for the selected Pacific DMCs. (January 2017–December 2018)</p> <p>2. Final drafts of new or updated arbitration laws to implement the NY Convention and reflect modern international commercial arbitration standards in the selected Pacific DMCs</p> <p>2.1 Conduct consultations, diagnostics, and meetings with government authorities, experts, private sector and judiciary representatives, and other relevant stakeholders, and prepare the diagnostic assessments (including legal review of laws) in the selected Pacific DMCs. (December 2016–December 2018)</p>			

<p>2.2 Submit initial draft amendments to arbitration laws or initial draft of new arbitration laws, along with a written recommendation report, to selected Pacific DMCs. (March 2017–December 2018)</p> <p>2.3 Conduct stakeholder consultations and workshops on the initial draft laws. (March 2017–December 2018)</p> <p>2.4 Submit final draft arbitration laws or amendments for approval to selected Pacific DMCs. (June 2017–December 2018)</p> <p>2.5 Conduct dissemination workshops on final draft arbitration laws for selected Pacific DMCs. (June 2017–December 2018)</p> <p>3. Capacity for international arbitration reforms in the selected Pacific DMCs strengthened</p> <p>3.1 Conduct needs assessments on the training needs of stakeholders, including private sector and academia representatives, government officials, arbitration practitioners, lawyers, and judges, and design tailored training programs. (December 2016–June 2017)</p> <p>3.2 Conduct regional awareness-building workshops on international arbitration reform and accession to the NY Convention, and other impacts of international arbitration reform in the Pacific region. (January 2017–December 2017)</p> <p>3.3 Conduct tailored training programs for stakeholders, including lawyers, arbitrators, judges, government officials, and private sector representatives. (June 2017–September 2019)</p> <p>3.4 Support the establishment of a regional network of arbitrators in the Pacific DMCs. (January 2018–December 2019)</p>
<p>Inputs</p> <p>ADB: \$500,000 Technical Assistance Special Fund (TASF-V)</p> <p>Note: Pacific DMC governments may provide counterpart support in the form of counterpart staff, office space with furniture, support services for consultants, and other in-kind contributions.</p>
<p>Assumptions for Partner Financing</p> <p>Not applicable</p>

ADB = Asian Development Bank; DMC = developing member country; NY Convention = Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958); UNCITRAL = United Nations Commission on International Trade Law.
Source: ADB.

COST ESTIMATES AND FINANCING PLAN
(\$'000)

Item	Amount
Asian Development Bank^a	
1. Consultants	
a. Remuneration and per diem	
i. International consultants	180.0
ii. National consultants	30.0
b. International and local travel ^b	30.0
c. Reports and communications ^c	10.0
2. Workshops and training programs ^{b, d}	200.0
3. Miscellaneous administration and support costs ^e	10.0
4. Contingencies	40.0
Total	500.0

^a Financed by the Technical Assistance Special Fund (TASF-V) of the Asian Development Bank (ADB).

^b Prior approval is required to travel to and from ADB nonmember countries.

^c Includes production of diagnostic assessments, policy papers, recommendations, and other technical assistance (TA) outputs.

^d Includes logistic arrangements; venues; travel and any related costs of participants and resource persons, including ADB staff acting as resource persons in TA implementation; per diem and any honorarium for participants and resource persons; and renting of supplies and materials that will be used in workshops and training programs. This will also include representation expenses following ADB (Budget, Personnel, and Management Systems Department and Strategy and Policy Department). 2013. Use of Bank Resources: Regional Technical Assistance and Technical Assistance vs. Internal Administrative Expenses Budget Memorandum.

^e Includes TA administration costs, such as printing and other dissemination and publication costs, and other directly identifiable TA costs.

Source: ADB estimates.

OUTLINE TERMS OF REFERENCE FOR CONSULTANTS

1. The proposed regional technical assistance (TA) aims to establish an effective commercial dispute resolution regime through international arbitration reform to boost foreign investor confidence in the Pacific developing member countries (DMCs) of the Asian Development Bank (ADB). The TA will have three outputs: (i) assisting selected Pacific DMCs in acceding to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) (NY Convention); (ii) drafting new or updated arbitration law to implement the NY Convention and reflect modern international commercial arbitration standards, accounting for the country context; and (iii) strengthening the capacity for international arbitration reforms through regional awareness-building and dissemination workshops, tailored training programs for lawyers, arbitrators, and judges in international commercial arbitration and recognition and enforcement proceedings under the NY Convention, and helping to establish a regional network of arbitrators and arbitration practitioners.

2. Two international consultants with similar expertise and experience in international commercial arbitration and two or three national consultants with relevant legal background, depending on the selected Pacific DMCs, will be engaged to assist in TA implementation. A project coordinator will also be engaged to assist with the logistics and administration for the TA workshops and training programs. Additionally, resource persons will be engaged to deliver the workshops and training programs, as needed. ADB will also collaborate with the United Nations Commission on International Trade Law (UNCITRAL) Regional Centre for Asia and the Pacific to deliver workshops and training programs under output 3 on a case-by-case basis, and to achieve outputs 1 and 2. The precise arrangements will depend on the selected DMCs and scope of the assistance request. The consultants will be selected using the individual consultant selection method following ADB's Guidelines on the Use of Consultants (2013, as amended from time to time).

A. International Consultants

3. **International commercial arbitration experts** (two international experts, 6 person-months each, intermittent). Two international commercial arbitration experts with similar qualifications will support the implementation of outputs 1, 2, and 3 for two or three selected Pacific DMCs.¹ It is expected that each expert will be engaged for 6 person-months, on an intermittent basis, and may work separately or together on the same or different selected Pacific DMCs, based on the assistance requests received. Once the Pacific DMCs are selected, the ADB TA counsels and international commercial arbitration experts will develop a work plan detailing the assistance to the Pacific DMCs and scope of work required under the TA.

4. **Qualifications.** Each international commercial arbitration expert must be an experienced legal practitioner (preferably a barrister or litigator) with demonstrated expertise in international arbitration and at least 10 years' professional experience in international commercial arbitration, preferably in the Asia and Pacific region (including Australia and New Zealand). Each expert will have experience appearing in arbitration proceedings in different capacities and be recognized within the profession as an accomplished international commercial arbitrator and lawyer (demonstrated by membership in arbitration associations and experience in lecturing, teaching, writing, and/or speaking on international commercial arbitration). It will also be advantageous if each expert has contacts within the international commercial arbitration community to locate speakers and presenters for delivering workshops

¹ International commercial arbitration experts may be engaged on an individual basis directly or through a firm.

and training programs under output 3. Each expert must also have strong legal drafting, research, and writing and presentation skills; possess good interpersonal skills; and be fluent in English.

5. **Scope of work.** Detailed tasks will be determined based on the needs of each selected Pacific DMC and will, in part, include the following:

- (i) conduct consultations, due diligence, and diagnostic assessment on the existing policy and legal framework (including any arbitration and related laws) and identify reform areas for meeting international standards and NY Convention requirements, considering the country context (including sociocultural context such as disputes and settlement culture, economic context, political context, the justice system, and appropriate and practical measures) to create an appropriate legal framework for an international commercial arbitration regime in the selected Pacific DMC;
- (ii) take the lead or work with the other international commercial arbitration expert, as applicable, in proposing and drafting a new or updated law and/or policy document(s) in consultation with the selected Pacific DMC, considering international best practices (drawing on experience or case studies from jurisdictions from similar legal systems to the Pacific DMC), country requirements, and legal and policy aspects;
- (iii) submit for review the interim draft of new or updated arbitration law to government officials of the selected Pacific DMC, and conduct stakeholder consultations and workshops on interim draft of new or updated arbitration law at the direction of the ADB TA counsels and government officials;
- (iv) develop final draft of new or updated arbitration law, considering the stakeholder consultations and comments, for submission to and approval by the relevant legislative body of selected Pacific DMCs;
- (v) liaise with UNCITRAL, as NY Convention Secretariat, to assess the readiness of the selected Pacific DMC, by reviewing the national law and updates thereto or new law for compliance with basic NY Convention requirements, and assist in drafting any policy papers or directives that require government approval for accession (i.e., cabinet approval and Parliament ratification);
- (vi) draft instrument of accession to the NY Convention and provide advice from negotiation stage to instrument deposit for the selected Pacific DMC;
- (vii) conduct assessments on the training needs of the selected Pacific DMCs and develop tailored training programs based on the findings to address the capacity constraints of stakeholders, including lawyers, arbitrators, judges, and private sector representatives;
- (viii) develop and organize regional awareness-building workshops, which may include recruiting resource persons as speakers or presenters and, if appropriate, participating as a speaker or presenter;
- (ix) conduct consultations on supporting the establishment of a regional network of arbitrators and arbitration practitioners in the Pacific DMCs, work with the ADB TA counsels and Pacific DMCs in determining the appropriate regional network or framework, and recommend ways to ensure network sustainability;
- (x) field missions to the selected Pacific DMCs and/or ADB headquarters for the delivery of outputs 1, 2, and 3;
- (xi) work with the ADB TA counsels, ADB staff, national consultants, UNCITRAL, government officials, and other stakeholders such as the private sector and chambers of commerce to implement and deliver outputs 1, 2, and 3;

- (xii) prepare, with the other international commercial arbitration expert, a final report on the TA findings to be presented to ADB for publication;
- (xiii) supervise national consultants, as necessary;
- (xiv) report regularly and promptly flag any issues to the ADB TA counsels on the implementation progress of TA activities; and
- (xv) conduct any other activity agreed with the ADB TA counsels and other reasonably related tasks to achieve TA outputs and outcome.

B. National Consultants

6. **National legal experts in selected Pacific developing member countries** (national, 1 person-month each, intermittent). A national legal expert will be engaged for each selected Pacific DMC for 1 person-month, as needed, to advise on national laws and procedures. The national legal experts will work with the international commercial arbitration experts to implement outputs 1, 2, and 3, as necessary.

7. **Qualifications.** Each national legal expert must have a law degree; at least 5 years' professional experience in law and legal drafting, either at a university, legal practice, or in government; and a strong background in research and writing. Good interpersonal and presentation skills and proficient oral and written communication skills in English are required.

8. **Scope of work.** The national legal experts' detailed tasks will be determined under the supervision of the ADB TA counsels based on the needs of each selected Pacific DMC and will, in part, include the following:

- (i) conduct due diligence on the existing policy and legal framework (including any arbitration and related laws), identify areas of reform, and advise on local law issues and constraints (including constitutional requirements and restrictions);
- (ii) assist in research or writing assignments related to the selected Pacific DMCs' legal laws, procedures, and practices; and
- (iii) contribute to the delivery of workshops and training programs under output 3, as needed.

9. **Project coordinator** (national, 3 person-months, intermittent). Under the supervision of the ADB TA counsels, the project coordinator will assist in the necessary logistical and administrative arrangements for the workshops and training programs under output 3.

10. **Qualifications.** The project coordinator must have (i) at least 10 years' relevant work experience; (ii) demonstrated knowledge and understanding of ADB's operational processes, including ADB's consulting guidelines and controller's requirements; (iii) demonstrated ability to take initiative and work independently with limited supervision; (iv) good interpersonal skills; and (v) good oral and written communication skills in English.

11. **Scope of work.** The project coordinator will conduct the following tasks:

- (i) provide logistical and administrative support for workshops and training programs in the selected Pacific DMCs;
- (ii) coordinate with the selected Pacific DMCs, ADB departments, resident missions, and other consultants to deliver the workshops and training programs; and
- (iii) perform other related duties as may be reasonably assigned by the ADB TA counsels.