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ANALYSIS OF THE EFFECT OF TAJIKISTAN'S FUTURE RATIFICATION OF THE NEW YORK CONVENTION

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I. INTRODUCTION

This paper sets forth a detailed analysis of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (“New York Convention”), including:

- An overview of international commercial arbitration
- An overview of the New York Convention
- An analysis of the advantages (benefits) and disadvantages (costs) of Tajikistan ratifying the New York Convention
- A roadmap for Tajikistan’s ratification and implementation of the New York Convention

The analysis set forth below is based on desktop research and interviews with experts and policymakers in Tajikistan.

The text of the New York Convention is set forth in Appendix A.

II. WHAT IS INTERNATIONAL COMMERCIAL ARBITRATION?

International commercial arbitration is a system for resolution of disputes between companies from different countries. It provides a venue for adjudication of disputes that is an alternative to national courts, which may be perceived to have bias in favor of companies domiciled in their country. International commercial arbitration is commonly used by companies engaging in international transactions and agreements.

For international commercial arbitration to work, arbitration awards must be enforceable across borders. If the award is unenforceable in the country in which the losing party has assets and income, the whole process of arbitration is a waste of time. Thus, in 1958, the United Nations established the New York Convention, which establishes an obligation on each signing country to enforce foreign awards and limits the reasons for a state court to refuse to recognize or enforce a foreign arbitration award.

Arbitration is voluntary so it can only take place if the parties agree that their dispute(s) will be resolved in an arbitration tribunal.¹ The New York Convention and the UNCITRAL Model Law on International Commercial Arbitration require that an arbitration agreement be in writing.

International arbitration allows parties to choose the law, venue, and procedures for dispute resolution. It is usually faster than state courts, and it provides the companies with comfort that their dispute will be decided fairly by neutral arbitrator or arbitrators.

In addition to the New York Convention, there are other international laws and agreements that facilitate international commercial arbitration, including: UNCITRAL Model Law; Convention on Settlement of Investment Disputes (ICSID); Convention on Procedure of Settling Disputes in CIS Countries; and the Moscow Convention.

¹ In many countries these tribunals are referred to as arbitration courts.

III. OVERVIEW OF THE NEW YORK CONVENTION

The New York Convention has been signed by 141 of the 192 U.N. member countries. It has worked successfully for 47 years. It has proven to be acceptable and applicable in various different political and economic systems, including those of most of the countries of the Commonwealth of Independent States (CIS).

The New York Convention is based on two main principles: 1) the importance of recognizing arbitration agreements; and 2) any state court review of an arbitration award is limited to specified grounds. The Convention applies to foreign arbitration awards, which are defined as "arbitral awards made in the territory of a state other than the state where the recognition and enforcement of such awards are sought," as well as those that are "not considered as domestic awards" in the state where enforcement is sought.

The Convention sets out limited grounds on which recognition and enforcement of an arbitral award may be refused. ***The New York Convention allows state courts to refuse to recognize or enforce a foreign arbitration award when:***

- ***A party to the arbitration agreement was under some incapacity.*** Incapacity refers to a party's inability to enter into a contract due to a party being bankrupt, a minor or insane, or a government entity that is not allowed to arbitrate.
- ***The arbitration agreement was not valid under its governing law.*** Under this ground for refusal, the arbitration agreement itself must be invalid. This has been applied when a signatory did not have a signing authority or a written power or attorney to conclude the contract,² a government entity did not have permission to enter into the agreement,³ the contract was not validly assigned to the plaintiff,⁴ or there was no clear written agreement to arbitrate.
- ***A party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present its case.*** A mere procedural limitation, like a refusal to grant a continuance of a hearing, is not sufficient to refuse enforcement. The facts must be egregious, e.g. no proper service of the Statement of Claim or the arbitrator's refusal to allow the only available witness testimony or evidence to be presented.⁵
- ***The award deals with an issue not contemplated by or not falling within the terms of the submission to arbitration, or contains matters beyond the scope of the arbitration.*** This ground has been used to refuse enforcement when the arbitration clause was limited to certain disputes and the arbitrator made an award on a different dispute.⁶ It was also used when an award was made against a party that did not sign the arbitration agreement,⁷
- ***The composition of the arbitral tribunal was not in accordance with the agreement of the parties or, failing such agreement, with the law of the place where the hearing took place.*** This has been used to refuse enforcement when the

² Agrimpex SA v. J.F. Braun & Sons, Inc., YB Comm. Arb. IV (1979) p. 269 (Greece No. 5), Areios Pagos.

³ Fugerolle SA v. Ministry of Defense of the Syrian Arab Republic, YB Comm. Arb. XV (1990), pp. 515-517 (Syria no. 1) Administrative Tribunal Damascus.

⁴ IMP Group Ltd. v. Aeroimp, YB comm.. Arb XXIII (1998), Russian Fed. No. 8), Moscow District Court.

⁵ Sesostris SAE v. Transportes Navales SA, YB Comm. Arb. XVI (US no. 108) (D.Mass. 1989).

⁶ Tiong Huat Rubber Factory BHD v. Wah-Chang International Co., Ltd., YB Comm Arb. XVII (1992) pp. 516-524 (Hong Kong No. 1), High Court of Hong Kong.

⁷ Fiat SpA v. Ministry of Finance and Planning of Suriname, 88 Civ. 6639 (S.D.N.Y. 1989).

award was made by two arbitrators but the arbitration agreement called for three arbitrators⁸, and when the arbitration was bifurcated into liability and damage phases when arbitration court rules did not provide for bifurcation.⁹ This ground has also been used to refuse enforcement when an arbitrator failed to disclose a conflict of interest.¹⁰

- **The award has not yet become binding upon the parties, or has been set aside or suspended by a competent authority.** There is little guidance as to how to determine that an award is not binding, but it would seem that this means that the terms of the award provide for a time period or condition precedent before an award is binding. An award can be considered to be set aside when it is set aside by a court with jurisdiction to do so.¹¹
- **The subject matter of the award was not capable of resolution by arbitration.** Cases have been found to be incapable of resolution by arbitration based on a statute that states that such a case is not subject to arbitration.¹²
- **Enforcement would be contrary to "public policy".** This ground for refusal is discussed in Appendix B. It appears to be the ground most frequently invoked in resisting enforcement, probably because it is the vaguest ground.

The burden of proving any of these defenses is on the party resisting the award. These grounds have rarely been successful.¹³

Companies in countries that have not ratified the New York Convention cannot enforce arbitration awards rendered in their home countries. The New York Convention, Article XIV states:

“A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it itself is bound to apply the Convention.”

IV. ADVANTAGES FOR TAJIKISTAN IN RATIFYING THE NEW YORK CONVENTION

There are several important benefits to any country that ratifies the New York Convention, mainly increased foreign investment, increased exports, access to foreign capital, and access to foreign technology. These benefits all lead to increased economic growth, more jobs, and higher wages.

International businesses support arbitration, as is demonstrated by surveys of businesses and their lawyers. Governments have gotten this message, as is evidenced by the fact that so many states have ratified the New York Convention. Most large companies include arbitration clauses as a matter of course in contracts with foreign or international companies and expect to be able to enforce awards.

⁸ Rederi Aktiebolaget Sally v. srl Termarea, YB Comm. Arb IV (1979) pp. 294-296 (Italy No. 32), Corte di Appello Florence,

⁹ Swiss Corporation X AG vs German Firm Y, YB Comm. Arb. I (1976) p 200 (Switzerland no. 4), Appellationsgericht Basle-Stadt.

¹⁰ Commonwealth Coatings Corp. v. Continental Casualty Co., 393 U.S. 145 (1968).

¹¹ See, e.g. Omnium de Traitement et de Valorisation v. Hilmarton, YB Comm. Arb. XXII (1997) pp. 696-701 (France no. 45), Cour de Cassation; and contra Claude Clair v. Louis Berardi, YB Comm. Arb. VII (1982) p. 319 (France no. 4 sub 2) Cour d'appel.

¹² See, e.g., Scherk Enterprises A.G. v. Societe des Grandes Marques, Corte di Cassazione (Sez. Un.) 12 May 1977, no. 3989.

¹³ Bishop, Martin, Enforcement of Foreign Arbitral Awards. <http://www.kslaw.com/library/pdf/bishop6.pdf>.

Why is the New York convention important to companies operating internationally? The main reason is that arbitration agreements protect foreign parties from national courts that may be partial to the interests of their co-nationals, heavily politicized, lacking in relevant industry expertise, slow, and expensive. This is particularly true when a company is expanding trade or investment into countries it has not done business with, and even more so in developing countries. Parties to an arbitration can choose their own procedures and their arbitrators either directly or through an agreed upon method. An additional attraction of arbitration lies in the fact that, unlike court proceedings, arbitration hearings are held in *private* and their existence and outcome are confidential to the parties.

But these advantages would be meaningless without there being a legally binding means of enforcing arbitration awards wherever in the world the losing party may have its assets. This is the main importance of the New York Convention: even though a party's assets may be overseas and far removed from the claimant, that party cannot ignore arbitration proceedings or awards made against it.

Because of these advantages, ratification of the New York Convention by Tajikistan is likely to lead to the following benefits:

Increased trade. A recent study found that countries that had ratified the convention were able to improve their position in international trade flows.¹⁴ The study demonstrated that ratification of the New York Convention led to an increase in countries' exports of locally manufactured goods, even in countries with weak domestic court systems. This is because ratification of the New York Convention shows a country's willingness to enforce contracts impartially, overcoming the fact that it has a weak court system. This changes trade partners' perceptions of a country and its level of risk. Interestingly, the study also found that ratification of the New York Convention enhances countries' exports of complex (higher value added) goods.

Increased foreign investment. One of the fundamental preconditions for foreign investment is the ability of investors to enforce contracts to protect their investments. Ratification of the New York Convention would send a signal to foreign investors that Tajikistan is committed to protecting foreign investments – and should also send a positive signal to domestic investors. It is clear that foreign investors make investment decisions based in part on regulatory regimes, particularly protection of their property and ability to enforce contracts to protect investments.¹⁵

Lower interest rates and rates of return. The interest rates demanded by lenders and rates of return demanded by investors are directly correlated to the level of risk in a country – real and perceived. Investors, lenders and export credit insurers are likely to regard non-payment risk as lower in a country that has ratified the New York Convention.

Tajikistan companies can enforce contracts in foreign countries. The New York Convention provides a legal basis for enforcement of Tajikistan arbitration awards in other member countries. At this point, since Tajikistan is not a New York Convention state, Tajikistan companies are at a disadvantage because, whereas foreign companies (from New York Convention states) can

¹⁴ David Berkowitz, J. Moenius & K. Pistor, *Legal Institutions and International Trade Flows*, 26 MICH. J. INTL. LAW 15, 35 (2004).

¹⁵ Lamech, Ranjit and Kazim Saeed. 2003. *What International Investors Look for When Investing in Developing Countries: Results from a Survey of International Investors in the Power Sector*. Energy and Mining Sector Board Discussion Paper No. 6 [Respondents ranked the legal framework defining the rights and obligations of private investors as the number one priority in the decision to invest]. Asiedu, Elizabeth. 2003, *Foreign Direct Investment to Africa: The Role of Government Policy, Governance and Political Instability*, University of Kansas [natural resources endowment, large markets, good infrastructure, and an efficient legal framework promote FDI while macroeconomic instability, corruption, political instability, and investment restrictions have the opposite effect]. See also, Fitzgerald, Valpy, *Regulatory Investment Incentives*, OECD, November 20, 2001.

often enforce arbitration awards made in their own country against the assets of Tajik companies held in any other New York Convention state, a Tajik company cannot obtain an arbitration award in Tajikistan and enforce that Award against the foreign party's assets located in many New York Convention states. And it will likely be quicker and easier and even cheaper for Tajikistan companies to obtain an award in an international arbitration court than in a foreign state court or even in a Tajikistan state court.

Improved international image. Ratification of the New York Convention shows that a country is open to participation in the global economy and is serious about attracting foreign investment and engaging in international trade. This is particularly important in developing countries that are not well-known or have state courts with a reputation for bias or arbitrary decision-making. Statements that Tajikistan is business friendly and open to doing business with foreign companies are much less effective than are actions like ratifying an international convention.

More sophisticated commercial law system. Ratification will also enable the courts and arbitral institutions of Tajikistan to develop greater international knowledge and experience. And it will help develop and promote a greater number of international commercial arbitrators from among Tajik nationals.

Competition for investment and trade. When a foreign company is considering a large investment or trade deal, it will usually consider more than one country. Tajikistan is often competing with other CIS countries for investment and trade. To the extent that foreign companies consider dispute resolution as a factor in their investment and trade decisions (and there is evidence that they often do), Tajikistan is at a disadvantage, as is demonstrated by Table I.

TABLE I: INTERNATIONAL DISPUTE RESOLUTION IN CIS COUNTRIES

	New York Convention	UNCITRAL Model Law	CIS Dispute Resolution	ICSID Convention
Armenia	1997	No	Yes	1992
Azerbaijan	1999	Yes	Yes	1992
Belarus	1958	Yes	Yes	1992
Georgia	1994	No	No	1992
Kazakhstan	1995	Yes	Yes	2000
Kyrgyz Republic	1995	Yes	Yes	1995
Moldova	1998	No	Yes	1992
Russia	1958	Yes	Yes	No
Tajikistan	No	No	Yes	No
Turkmenistan	No	No	No	1992
Ukraine	1958	Yes	Yes	2000
Uzbekistan	1995	No	Yes	1995

Less crowded courts. Arbitration will take some cases – often very complex cases – from the already full state court dockets. This frees the state courts to more quickly resolve other cases. Arbitration also helps to prevent lengthy disputes about the proper forum for resolving an international commercial dispute and the enforcement of any resulting judgment. It is important to note that most of the arbitral awards are voluntarily complied with by the parties. For instance, over 90% of the International Chamber of Commerce Arbitration Court awards are complied with and do not need to go to state courts for enforcement.

V. DISADVANTAGES FOR TAJIKISTAN IN RATIFYING THE NEW YORK CONVENTION

Loss of Sovereignty. The New York Convention takes away the Government of Tajikistan's ability to resolve disputes with foreign investors or traders or to interfere in projects or transactions after contracts (containing arbitration clauses) are signed. The New York Convention takes away some powers of the courts, although they are still able to review arbitration awards prior to issuing a writ of execution.¹⁶

Advantages to Foreign Firms. With ratification, foreign firms would have the ability to resolve disputes with Tajikistan firms in foreign arbitration courts, while Tajikistan firms with purely domestic disputes would not, and would be forced to use the Tajikistan state courts. But Tajikistan is likely enacting a domestic Third Party Arbitration Law this year, which would lessen or eliminate the advantage.

Advantages to Large Companies. Many small firms cannot afford to arbitrate cases in foreign countries, or even in Tajikistan (although many also cannot afford to litigate cases in Tajikistan state courts).

Domestic companies may have more difficulty avoiding debts. If Tajikistan adopts the New York Convention, some Tajikistan-based companies with most of their assets in Tajikistan would not be able to avoid payment in international disputes, since arbitration awards obtained in international

¹⁶ The International Court for Settlement of Investment Disputes is able to award damages against a country if its courts wrongfully interfere in an arbitration case. See, e.g. Saipem SpA v. The People's Republic of Bangladesh.

arbitration courts could be enforced in Tajikistan courts. In other words, Tajikistan companies cannot utilize state courts to delay or avoid payment of a debt to foreign companies.

Time required to develop legislation. Adoption of the Convention is simple but requires development and enactment of legislation. But Tajikistan has already developed the necessary legislation: there are draft laws on international commercial arbitration and enforcement that have been drafted by experts in Tajikistan and necessary amendments to the Code of Economic Procedure and Code of Civil Procedure have been drafted. The only task left to do is to move the legislation through Parliament.

Time and expense to implement legislation. Adoption of the Convention will require judicial training so that Economic Court judges and enforcement agents know when to enforce foreign arbitration awards. It is unlikely that Tajikistan state courts will have more than 10 cases per year that seek enforcement of foreign arbitration awards, but in early years (for example within two foreign awards) first instance courts should need in concept understanding.

Uncertain benefits. Critics sometimes complain that arbitration does not deliver the savings in time and costs that its proponents promise. Critics also complain about inattentive or sloppy tribunals, blatantly partisan conduct by co-arbitrators and arbitrary, unintelligible, or clearly incorrect awards. It is true that there are instances where arbitration awards are not delivered for months, or years, after final submissions have been made; where the tribunal is unconscionably careless or incompetent in drafting relief or addressing the parties' arguments; or where an arbitrator is manifestly unable or uninterested in devoting serious attention to the proceedings. But our study of arbitration courts in the CIS and Central and Eastern Europe demonstrates that arbitration courts administer cases quickly, ensure neutrality, and have methods for quality control of arbitrators, case proceedings, and awards. In general, it is fair to say that in the CIS and Central and Eastern Europe regions, arbitration is at least as fair and efficient as state courts, especially when one takes into account de novo appeals and retrials, which are generally available in national court proceedings but not in arbitration. Nonetheless, arbitration can be just as complex, time-consuming and expensive as litigation in a first-instance national court. Regardless of the venue, a complicated dispute will usually take a considerable amount of time to resolve in a fair and reliable way.

The New York Convention has been applied internationally for almost fifty years, its exact meaning has been examined in numerous judicial decisions and its pros and cons discussed in countless articles, books and conference papers. This exhaustive investigation has led to a consensus that its advantages far outweigh its disadvantages.

VI. BUSINESS ANALYSIS OF RATIFYING NEW YORK CONVENTION

The qualitative analysis set forth above indicates that the benefits of ratification of the New York Convention outweigh the costs. As most, if not all, countries that have signed the New York Convention have found, the costs are fairly minimal and the benefits of increasing investment and exports, improving the countries' reputation, and increasing the sophistication of the legal community are significant.

It is difficult to set forth a quantitative analysis of the benefits and costs of ratification of the New York Convention, but an attempt to do so is set forth graphically below. This analysis is based on the study mentioned above that demonstrated a clear correlation between ratification of the New

York Convention and increased exports and improved investor perceptions.¹⁷ However, the estimated benefits are mere estimates and the estimated costs of awards against Tajikistan enterprises are based on a limited review and may have missed some significant arbitration awards, cases, or potential cases.

Benefits	Calculation	Amount
Increase in Foreign Direct Investment	5% above 10% per annum growth trend ¹⁸	\$15 million per year
Increase in Exports	10% above 10% growth trend ¹⁹	\$150 million per year
Costs	Calculation	Amount
Awards enforced against Tajikistan Enterprises	No outstanding awards or cases against Tajikistan enterprises. Potential awards unknown. ²⁰	\$0
Implementation of the Convention	Costs for training, depending on the level of donor support	\$0 to \$10,000
Total Benefit (Cost)		\$155 million per year

We should note that Tajikistan is a party to several bilateral agreements that provide for arbitration of disputes, and Tajikistan is a signatory of the Commonwealth of Independent States (CIS) Charter and the Agreement on the Statute of the Economic Court, which provides for arbitration of disputes between CIS countries. We are informed that at least one international arbitration award (from Russia) has been enforced by a Tajikistan court, but we have not been able to obtain the details.

VII. ROADMAP FOR RATIFYING AND IMPLEMENTING THE NEW YORK CONVENTION

The experiences of all other countries that have ratified the Convention show that ratification and implementation are relatively simple and are not particularly time intensive. The following sections set forth the procedure for ratification and implementation, an estimate of time required for each step, and some potential issues and problems that could arise.

A. Procedure for Ratification and Implementation

The time estimates are set forth in parenthesis. The procedures are not all sequential, i.e. the legislation can be enacted prior to or simultaneous with determination of exceptions, and education can start immediately.

1. Determine which exceptions to apply (one to three months).

¹⁷ Berkowitz, et. al, Legal Institutions and International Trade Flows, supra.

¹⁸ Based on author's estimates. 2004 FDI was \$272 million. Source: World Bank, Tajikistan at a Glance (8/13/06), http://devdata.worldbank.org/AAG/tjk_aag.pdf.

¹⁹ Based on author's estimates. 2005 exports were \$1.23 billion. Source: World Bank, Tajikistan at a Glance (8/13/06), http://devdata.worldbank.org/AAG/tjk_aag.pdf.

²⁰ We were unable to locate any outstanding awards or cases against Tajikistan enterprises (we only located the Hydro Nosk v. TadAZ arbitration case in the London Court of International Arbitration, which was settled by the parties). However, our search was not exhaustive and we have not examined the financial statements of Tajikistan companies to determine whether they have reported any potential liabilities to foreign companies.

The New York Convention allows limitations on ratification: 1) a declaration that the state will apply the convention “to the recognition and enforcement of awards made only in the territory of another Contracting State;” 2) a declaration that the state “will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the state making such declaration.”²¹ Tajikistan will need to determine whether to apply these exceptions. Given the fact that there are only two decisions to make, recommendations to the Government and Parliament could be made quickly by a working group. The working group should probably include representatives of the Ministry of Justice, Ministry of Foreign Affairs, Ministry of Economy, President’s Office, Chamber of Commerce and Industry, Council of Justice, High Economic Court, and State Committee on Investments and Assets,

2. *Parliament approval for ratification of the Convention (two to four months).*

3. *Deposit of an instrument of accession with the Secretary-General of the United Nations (one month).*

At this point the New York Convention would bind Tajikistan and its courts to enforce international arbitration awards, and would supersede any contrary domestic laws.

4. *Enact necessary legislation to implement the Convention (three to six months).*

Tajikistan has already developed a draft Law on International Commercial Arbitration that includes provisions of the New York Convention. It needs to be enacted. The Law is consistent with the UNCITRAL Model Law, as set forth in an assessment of the Law by this author. Apparently, an official working group has not been set up by the Government, but perhaps the working group that helped prepare the Law on Third Party Arbitration could also finalize the Law on International Commercial Arbitration (the law has already been extensively discussed with experts and the private sector). The draft Law on Enforcement that has been prepared also needs to be enacted (it is expected to be enacted by the end of 2007).

5. *Educate courts, enforcement officers, and attorneys on application of the New York Convention and Law on International Commercial Arbitration.*

Since international commercial arbitration awards would be enforced in the Economic Court with jurisdiction, the judges and enforcement officers would need to be trained to understand the mechanism of enforcement and denial in enforcement due to Convention. Other courts should also be educated on international commercial arbitration and the New York Convention, since party or parties may apply to by mistake to national court instead of court of arbitration. Attorneys will also need to be educated on arbitration, the Convention, and Law on International Commercial Arbitration. It is likely that a donor (perhaps USAID, DFID, or Soros Foundation) would fund some or all of this training.²²

6. *Possibly develop normative acts and court forms for enforcement.*

²¹ Many countries have made one or both of these reservations. Countries that have made both reservations include Afghanistan, Armenia, and Turkey. Azerbaijan, Kazakhstan, Kyrgyzstan, and Uzbekistan have not many either reservation. Belarus, Ukraine and Russia will apply the Convention to countries that have not ratified the Convention only to the extent to which those countries grant reciprocal treatment.

²² At some point, Tajikistan arbitrators should be trained so that international commercial arbitrations can be held in Tajikistan and Tajik arbitrators can participate as arbitrators on tribunals in arbitration courts outside of Tajikistan. Some training has taken place, and some arbitrators have gotten experience on small domestic arbitration cases in Tajikistan through the Legal Support Centres Arbitrazh. It would be wise for the Chamber of Commerce and Industry (which intends to start an Arbitration Court) to conduct further training and conduct some non-binding arbitration cases.

Normative acts with detailed procedural guidance and court forms for parties to use might help Tajikistan to properly implement the New York Convention. The guidance and forms could help streamline enforcement of international commercial arbitration awards.

7. Monitor implementation.

It would be a good idea for the Ministry of Justice or Ministry of Foreign Affairs to monitor enforcement of foreign awards in Tajikistan, as well as enforcement by foreign state courts of arbitration awards made in Tajikistan. This will allow the Government to ensure that there are no problems on either side.

Based on meetings in Dushanbe, it appears that there is little opposition in Tajikistan to either ratification of the New York Convention or the Law on International Commercial Arbitration. There was some opposition to the draft laws among judges when seminars on arbitration and the two draft laws were conducted in the regions throughout Tajikistan. But once the judges understood the concepts and the fact that arbitration could lighten their caseload, they became supportive. This illustrates the need for further education for judges, lawyers, business, and Government and Members of Parliament. It appears that trainings done by Russian specialists were effective and they would be amenable to returning to Tajikistan to conduct more seminars.

B. Possible Problems in Implementation

After ratification of the New York Convention, there may be problems in implementation caused by courts' failure to properly follow the terms of the Convention and related laws that Tajikistan enacts. Based on other countries' experiences, including the Russian Federation, Ukraine, and China, we anticipate that a party requesting enforcement in Tajikistan may encounter the following obstacles:

Appeals causing delays in enforcement

Lengthy appeals and remands can delay enforcement of arbitration awards, defeating the purpose of the New York Convention. In a number of cases, arbitral awards twice went through the whole court system of Ukraine. Although the Supreme Court of Ukraine had the competence to resolve the case, in most instances it remanded the case to the court of first instance. Thus, it took the parties up to three years to get a final decision on recognizing and enforcing the award.

Confusion between arbitral awards and foreign courts' judgments

The term "arbitration" – *arbitrazh* in Russian – was used to describe the commercial court system in the Soviet Union. In the Russian Federation, this has led to occasional linguistic problems when court decision on commercial issues is taken as arbitration decision and vice versa.

Denial of enforcement based on an overly broad interpretation of contravention of public policy

As discussed in Appendix B, the "public policy" ground for a state court to refuse enforcement of an arbitration award is somewhat vague and subject to varying interpretations. Thus it can be misused

as a reason for denying enforcement of an international commercial arbitration award, as Russian courts have done on occasion. In one well-known case, *United World Ltd v Krasny Yakor*, the court denied enforcement of an arbitral award in the amount of approximately \$50,000 on the grounds that its enforcement would lead to bankruptcy of Krasny Yakor and would consequently cause serious damage to the regional economy where the debtor was domiciled and to the economy of Russia, so such damages were in contravention of Russian public policy. In other cases, Russian courts have considered contravention of mandatory Russian rules as contravention of Russian public policy. These interpretations of public policy go beyond the international norms, as discussed in Appendix B.

Denial of enforcement on the grounds of procedural violations

Courts sometimes overreach by denying enforcement of arbitration awards based on inconsistency with state court procedures. In Russia, a state court denied enforcement based on the plaintiff's failure to properly notify the defendant of the time and place of the hearing when translation into Russian of the correspondence between the parties proving proper notification was not notarized. In another case, a mistake in the name of the claimant contained in the award and in the contract caused enforcement to be refused by the Moscow Court and the Moscow Court of Cassation. The courts held that the contract containing the arbitration clause was concluded with Sophocles Star Shipping Co Ltd, whereas the request for enforcement was brought by Sophocles Star Shipping Inc. However, the Russian Supreme Court held that the question of the agreement's validity was beyond the scope of consideration during an enforcement procedure under the New York Convention.

Procedural violations that are a proper basis for denial of enforcement are set forth in the New York Convention, Article V: incapacity of a party, inability of a party to present its case due to improper notice, an award beyond the scope of the arbitration, or the composition of the arbitral tribunal was not in accordance with the agreement of the parties.

Mixture of New York Convention grounds for refusal of recognition and enforcement with those of other treaties

In Ukraine, some courts have not given priority to the New York Convention when dealing with enforcement of foreign arbitral awards. Instead, these courts have applied international treaties that deal with foreign court judgments and not arbitration awards. The standards set out in these treaties are as a rule more onerous than those listed in the New York Convention. Accordingly, Ukrainian courts in a number of cases mixed the provisions of New York Convention with the provisions of other similar international documents.

Invalidation of underlying contracts during international arbitration and over extensive application of "public policy"

Ukrainian courts have in at least two cases invalidated contracts or documents related to arbitration while the foreign arbitration is ongoing. When a party to the arbitration later petitions the court in Ukraine with respect to enforcement of the arbitral award, there is a risk that the court will deny enforcement. In the two cases, the Supreme Court of Ukraine justified its ruling with the "public policy" exception stating that "when the agreement was invalidated by a Ukrainian court the enforcement of an award based on such agreement will contradict Constitution of Ukraine and hence, Ukrainian public policy". However, under the New York Convention, Article II, "each

Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.” And again, the public policy ground for denial should not be used in this situation. Rather, the court should apply New York Convention Article V and determine whether enforcement of the award should be refused because contract was unenforceable due to incapacity of a party, invalidity of the agreement under the applicable law.

Difficulty in execution in regional courts

Despite ratifying the New York Convention in 1986, China has experienced difficulty in enforcing international commercial arbitration awards. Research has indicated that both the location and the size of the award have an effect on the likelihood of enforcement.²³ Applicants are more successful in enforcing in major cities like Beijing, Shanghai and Guangzhou than in other cities: applicants have an 85 percent chance of enforcing an award under \$20,000 in these cities but only 63 percent in smaller cities. When the amount increases to above \$200,000, the prospects of enforcement outside the major cities fall to below 38 percent.

²³ Randall Peerenboom, Enforcement of Arbitral Awards in the PRC, China Business Review (January-February 2001).

APPENDIX A: TEXT OF NEW YORK CONVENTION

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Done at New York, on 10 June 1958.

Further information concerning this Convention, including information concerning ratification, accession and succession and concerning declarations and reservations, may be obtained through the Treaty Section of the United Nations Commission on International Trade Law, web site <http://www.uncitral.org>.

Article I

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions

or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) The duly authenticated original award or a duly certified copy thereof;
- (b) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the 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 his case; or
- (c) The 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 authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country 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 country; or
- (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 [2] and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 [3] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

- (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
- (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favorable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;
- (c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

- 1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.
- 2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

- 1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
- 2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.
- 3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a) Signatures and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;
- (e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Notes:

[1] In accordance with Article XII, the Convention came into force on 7 June 1959, the ninetieth day following the date of deposit with the Secretary-General of the United Nations of the third instrument of ratification or accession. The following States have deposited their instruments of ratification or accession (a) on the dates indicated:

Israel 5 January 1959
Morocco 12 February 1959(a)
United Arab Republic 9 March 1959 (a)

[2] League of Nations, *Treaty Series*, Vol. XXVII, p. 157; Vol. XXXI, p. 260; Vol. XXXV, p. 314; Vol. XXXIX, p. 190; Vol. XLV, p. 116; Vol. L, p. 161; Vol. LIX, p. 355; Vol. LXIX, p. 79; Vol. LXXII, p. 452; Vol. LXXXIII, p. 393; Vol. LXXXVIII, p. 312; Vol. XCVI, p. 190; Vol. C, p. 211; Vol. CIV, p. 499; Vol. CVII, p. 470; Vol. CXI, p. 403; Vol. CXVII, p. 55; Vol. CLVI, p. 185; Vol. CLXXXI, p. 356; Vol. CLXXXV, p. 372; Vol. CXCIII, p. 268, and Vol. CC, p. 500; and United Nations, *Treaty Series*, Vol. 117, p. 394; Vol. 261, p. 422, and Vol. 325

[3] League of Nations, *Treaty Series*, Vol. XCII, p. 301; Vol. XCVI, p. 205; Vol. C, p. 259; Vol. CIV, p. 526; Vol. CVII, p. 528; Vol. CXI, p. 414; Vol. CXVII, p. 303; Vol. CXXX, p. 457; Vol. CLVI, p. 210; Vol. CLXXXI, p. 389; Vol. CLXXXV, p. 391, and Vol. CXCIII, p. 269; and United Nations, *Treaty Series*, Vol. 122, p. 346; Vol. 134, p. 402; Vol. 269, p. 384, and Vol. 325

APPENDIX B: SUMMARY OF INTERNATIONAL ATTEMPTS TO DEFINE PUBLIC POLICY

[Adapted from International Law Association, Committee on International Commercial Arbitration, Interim Report on Public Policy as a Bar to Enforcement (2000)]

It is very difficult to define the term “public policy,” and lawyers, policy makers, and courts have struggled with descriptions of the concept for centuries.²⁴

In their Laws on International Commercial Arbitration, most countries use the term “public policy” without definition. Other countries’ laws are more specific and define public policy as a ground for refusing recognition of an award when it:

- Is contrary to “international public policy,”²⁵ which is defined in some countries as its own international public policy and in others as universal principles shared by nations often embodied in international conventions.
- Is contrary to “public policy as understood in private international law.”²⁶
- Is contrary to “public policy (or order) and good morals.”²⁷
- Would be clearly incompatible with the national legal system.²⁸
- Goes against “social and public interest.”²⁹

In the context of enforcement of a foreign arbitration award under the New York Convention, definitions by courts include:

- The award is contrary to international public policy.³⁰
- “the award contradicts the German idea of justice in a fundamental way... mere violation of substantive or procedural law is not sufficient to constitute such violation.”³¹
- “where enforcement would violate the state’s most basic notions of morality and justice”³²

Public policy under Moslem Law has been defined as “based on the respect of the general spirit of the Sharia and its sources (the Koran, Sunna, etc.) and on the principle that individuals must respect their contracts unless they forbid what is authorized and authorize what is forbidden.”³³

Although public policy would seem to have the potential to be misapplied by courts to deny foreign arbitration awards, in practice it is rarely used by courts to deny enforcement.³⁴

²⁴ See, e.g. *Egerton v. Brownlow* (1853) 4 HLC 1 [United Kingdom].

²⁵ E.g., France, Portugal, Algeria, Lebanon.

²⁶ E.g., Tunisia, Romania.

²⁷ E.g. Japan, Libya, Oman, Qatar, United Arab Emirates.

²⁸ Sweden.

²⁹ China.

³⁰ Germany, Italy, Switzerland.

³¹ *Bundesgerichtshof*, III ZR 174/89.

³² *Parsons & Whittemore Overseas Co., Inc. v. Societe General*, 508 F.2d 969 (2nd Cir. 1974) [United States]

³³ El-Ahdab, “General Introduction on Arbitration in Arab Countries, International Handbook on Commercial Arbitration, Dec. 1998.

³⁴ Van den Berg, “Refusals of Enforcement under the New York Convention: the Unfortunate Few,” ICC Bulletin 1999)

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