

## Has the U.S.S.R. Foreign Trade Arbitration Commission Reached the Age of Aquarius With the Newly Revised Arbitration Statute of 1975?

On April 16, 1975 the Presidium of the U.S.S.R. Supreme Soviet confirmed by edict a new statute on the "Foreign Trade Arbitration Commission (FTAC) attached to the U.S.S.R. Chamber of Commerce and Industry."<sup>1</sup> This statute replaces the 1932 "Decree of the Central Executive Committee and the Council of People's Commissars of the U.S.S.R. Chamber of Commerce."<sup>2</sup> The purpose of this article will be to discuss the important changes made and also what effect the changes will have in muting the criticisms leveled by numerous Western authorities with regard to the question of the impartiality and independence of the FTAC.

### Criticism of the FTAC under the 1932 Statute and FTAC Rules (as Amended in 1959 and 1967)

There have been numerous criticisms<sup>3</sup> of the communist and foreign-trade arbitration commissions of which the FTAC is representative. One criticism is that the FTAC is attached to the U.S.S.R. Chamber of Commerce.<sup>4</sup> As noted by

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<sup>1</sup>*Vedomosti Verchovnogo Sovieta SSSR* No. (1779) Item No. 269, 23 April 1975. Most of the sections of the statute used and quoted in the article were translated by the author. For a published translation of the whole statute which was also used by the author see XIV INT'L LEGAL MATERIALS 1035, No. 4, July 1975 (Amer. Soc. of Int'l L. translated by William E. Butler, Reader in Comparative Law, Univ. of London).

<sup>2</sup>Collection of Laws of the U.S.S.R., 1932, No. 48, s. 281. U.S.S.R. Chamber of Commerce publication *Foreign Trade Arbitration Commission* Moscow 1968.

<sup>3</sup>See for example Domke, M., *Arbitration of State—Trading Relations*, 24 LAW & CONTEMP. PROB. 317 (1959); Hazard, J., *State Trading and Arbitration*, in INTERNATIONAL TRADE ARBITRATION 96 (M. Domke ed. 1958, reprint 1973); Pisar, S., *The Communist System of Foreign-Trade Adjudication*, 72 HARV. L. REV. 1409 (June 1959); Leff, E.J., *The Foreign Trade Arbitration Commission of the U.S.S.R. and the West*, 24 ARB. J. 1, (1969) and Holtzmann, H.M., *Arbitration in East-West Trade*, 9 INT'L LAW. 77 (Jan. 1975).

<sup>4</sup>Article 1 of the Charter of the U.S.S.R. All-Union Chamber of Commerce states that the

one Western author “. . . a Chamber of Commerce of a Communist country is a creature of public legislation and an integral arm of a monolithic foreign-trade structure, designed to promote the state interest under the express supervision of its Ministry of Foreign Trade.”<sup>5</sup>

Furthermore, under the old statute (1932) the Presidium of the U.S.S.R. Chamber of Commerce<sup>6</sup> “*appointed* for one year” the fifteen members of the Arbitration Commission who were chosen from representatives of “trading, industrial, transport and similar organizations and also from among persons possessing special knowledge in the sphere of foreign trade.”<sup>7</sup> As a result, Western authorities argued:

Because the chambers of commerce are associations of which some members are the foreign-trading corporations themselves, the argument has been made that the *foreign-trading corporations have become judges in their own cause, since they may, acting through the local chambers of commerce, appoint the arbitrators* who will decide the disputes to which they are parties. (Emphasis added.)<sup>8</sup>

Another often-heard criticism has been that the arbitration panel of fifteen members has been composed exclusively of citizens of the Soviet Union. This criticism has two aspects: (1) the individuals selected for arbitration panels are persons<sup>9</sup> active in law, economics, commerce, industry and related fields. Such a composition is normal in commercial arbitration, but:

. . . it acquires a different aspect in the context of total state ownership and planning . . . in the ultimate analysis he (arbitrator) must be regarded as a civil servant employed and paid by the government. It is the State's interest, and in a more remote sense the arbitrator's own interest as a beneficiary of the socialist state, that is invariably involved whenever such a person, *preappointed* through another state medium, is invited to arbitrate a dispute between an alien business enterprise and a state instrumentality. (Emphasis added.)<sup>10</sup>

More striking is the fact that Article 124 of the Soviet Constitution states that

Ministry of Foreign Trade “exercises general supervision” over its activities. However, unlike the Foreign Trade Organizations (FTOs), which may be dissolved by the Ministry of Foreign Trade, the Chamber, being an autonomous “social” (rather than “state”) organization, may be liquidated or reorganized only by order of the U.S.S.R. Council of Ministers. Dissolution or reorganization of an FTO is regulated by Decree of the Central Executive Committee and the Council of People's Commissars of the U.S.S.R. of March 27, 1936, *Sobornie Zakonov S.S.S.R. No. 18, art. 151 (1936)*.

See also Berman, H.J. and Bustin, G.L., *The Soviet System of Foreign Trade in BUSINESS TRANSACTIONS IN THE U.S.S.R.*, R. Starr ed. (Amer. Bar Ass'n 1975) p. 34.

<sup>5</sup>Pizar, S., *The Communist System of Foreign-Trade Adjudication*, 72 HARV. L. REV. 1409, 1426 (1959).

<sup>6</sup>“Full members of the U.S.S.R. Chamber may be state, cooperative and public institutions, enterprises and organizations.” See Tuttle, W. H., *Soviet Socialist Foreign Trade Arbitration*. L.L.M. Thesis of U. of California Law Sch. p. 14 (1963) at Columbia Law Library.

<sup>7</sup>Article 2 of the 1932 Soviet Arbitration Statute, Collection of Laws of the U.S.S.R., 1932 No. 48, s. 281.

<sup>8</sup>S. King-Smith, *Communist Foreign-Trade Arbitration*, 10 HARV. INT'L L.J., 34, 39 (1969).

<sup>9</sup>In 1966 the FTAC panel consisted of 12 lawyers and 3 economists. (Members all Soviet nationals.) S. King-Smith, *id.* at 53.

<sup>10</sup>Pizar, S. *supra* note 5, at 1424.

members of the Communist party are to be the "leading core of all organizations, both social and state."<sup>11</sup> As noted by one Western authority:

. . . given strict party control over all aspects of social and economic life, it may be easily supposed that Soviet arbitrators are directly responsible to Soviet national interests as interpreted by the Party leadership.<sup>12</sup>

(2) The second aspect is that because the panel is composed exclusively of Soviet citizens, it is unfair to the foreign party who may be unaware of the qualifications of the members, and would have a hard time in distinguishing who to choose,<sup>13</sup> but more importantly because "the economic outlook of the panelist will necessarily differ from his own, the foreign party is deprived of an opportunity to choose someone even slightly sympathetic to his views."<sup>14</sup>

Furthermore some Western authorities have stated that the FTAC is not in fact an arbitration tribunal but a national court for foreign causes and that the awards of these tribunals accordingly should not be given effect by Western countries where the judgments of Communist courts would not ordinarily be enforced.<sup>15</sup> The practical importance of this criticism has been removed substantially by the signing of the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards by the U.S.S.R. and Western countries including the United States. Article III of the 1958 Convention states that contracting states must enforce foreign arbitral awards that come within the scope of Article I "in accordance with the rules of procedure of the territory where the award is relied upon." Article I states that the 1958 Convention is applicable to "awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." Article IV specifically states that to obtain enforcement, the victorious party must only introduce authentic copies of the award and the agreement under which it was made. There is no need of making any affirmative showing such as that the award is final or binding.

Before proceeding with a discussion of the revisions made in the new statute and the effect, if any, such changes will have on the practice before the FTAC and also the effect such changes may have in muting the often-heard criticisms of the FTAC, it should be noted that these same critics have stated that the decisions of the FTAC have on the whole (with one exception<sup>16</sup>) been fair.

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<sup>11</sup>Berman, H., *The Legal Framework of Trade between Planned and Market Economies: The Soviet-American Example*, 24 LAW & CONTEMP. PROB. 482, 495 (1959).

<sup>12</sup>*Id.* at 495.

<sup>13</sup>King-Smith, *supra* note 8, at 40.

<sup>14</sup>*Id.* at 40.

<sup>15</sup>*Id.* at 40.

<sup>16</sup>Domke, M., *The Israeli-Soviet Oil Arbitration*, 53 A.J.I.L. 767, 799 (1959).

Some even believe that the FTAC has been more than fair in order to foster confidence abroad:

Those nominated by the various communist Chambers of Commerce to serve as arbitrators are in general persons of considerable achievement and high professional and social standing. One cannot lightly assume that such individuals are devoid of intuitive feelings for justice and fair play. . . . To foster contractual discipline at home and confidence abroad, the tribunals may indeed be leaning backward to be harsh with their own.<sup>17</sup>

As noted by a Western critic: “. . . for more than 40 years the decisions of the FTAC have given no indication of any lack of independence. Many of its decisions have gone against the Soviet parties.”<sup>18</sup> This statement is not entirely correct because of the FTAC award against a non-Soviet party in the Israeli-Soviet Oil Arbitration (involving Delek Israel Fuel Corporation, Ltd., an Israeli corporation, and Soyuznefteksport, the Soviet oil export monopoly). In reaching an award favorable to the Soviet party, the FTAC appeared to have departed from customary private international law, in particular from accepted doctrines of the duty to obtain export licenses, impossibility, and *force majeure*. Martin Domke, as did other Western authorities, suggested that the FTAC was less than partial: “(The U.S.S.R. FTAC was comprised solely of) arbitrators bound to uphold an official policy which was implicit in the (Soviet party’s) action.”<sup>19</sup>

On the whole, however, the FTAC has a high reputation. What then, one may wonder, is the fear that makes most of the Western critics and foreign enterprises leery of providing for arbitration before the FTAC in arbitration causes or in submitting an already existing dispute to the FTAC? In the words of one Western critic it is the potentiality of abuse of the FTAC’s independence:

. . . both the FTAC and MAC have an excellent reputation among traders of other countries and their awards are generally recognized and enforced in foreign courts. Nevertheless, the problem of structural independence remains, together with the question of fairness in the legal sense to which it gives rise.<sup>20</sup>

As put by another Western critic:

There remains an open question of its legal capacity for impartiality or, to put it more precisely, the potentiality of abuse of its independence.<sup>21</sup>

<sup>17</sup>PISAR, S., *COEXISTENCE AND COMMERCE* (1970) p. 408. See also Holtzman, H., *Arbitration in East-West Trade*, 9 INT’L LAW. 77, 90 (Jan. 1975).

<sup>18</sup>Berman H. and Bustin G., *The Soviet System of Foreign Trade*, in *BUSINESS TRANSACTIONS IN THE U.S.S.R.*, R. Starr, ed., (Amer. Bar Ass’n. 1975), at p. 51 fn. 86: Of 44 published cases reported in the Commission during the period 1963-1965, 22 were decided against the Soviet Party—an even 50 percent. It is impossible to say what proportion this may be of all cases decided by the Commission—from *Arbitrazhnaya Praktika: Reshenia Vneshnetorgovoi Arbitrazhnoi Komissii* (Moscow 1972).

<sup>19</sup>Domke, M., *Arbitration of State-Trading Relations*, 24 LAW & CONTEMP. PROB. 317, 326 (1959).

<sup>20</sup>Berman, H. and Bustin, G., *supra* note 18 at 35.

<sup>21</sup>Berman, H., *supra* note 11 at 521.

The question that needs to be answered therefore is whether the new 1975 statute has removed the potentiality of abuse of the FTAC's independence.

### **The 1975 Statute as Compared to the 1932 Statute**

Before proceeding in discussing the changes and additions in the new statute as compared to the old there are two important facts that should be kept in mind. First, the Rules of Procedure of the Foreign Trade Arbitration Commission have not as yet been revised since the enactment of the 1975 statute.<sup>22</sup> This is important because under Article 5 of the new 1975 statute the formation of the arbitration panel's membership, as well as the selection by the parties of a single arbitrator or his appointment, shall be carried out in accordance with the Rules of Procedure of the FTAC. Secondly, it should be noted that rules entitled "Uniform Regulation of the Arbitration Commissions Attached to the Chambers of Commerce of the Member-States of the C.E.M.A." were adopted by the Executive Committee of the C.E.M.A. on February 28, 1974 and recommended to the member countries from January 1, 1975 for disputes between economic organizations of the member countries. It is apparent that the newly enacted statute draws heavily on the recommended "Uniform Regulation." However, the Uniform Regulations are general enough in many instances to allow member countries to formulate more specific regulations, in particular those which would affect arbitration of disputes of member C.E.M.A. parties with non-C.E.M.A. parties. For instance, Article 3 of the 1975 U.S.S.R. statute has been drafted with a definite recognition of the criticisms voiced by numerous Western critics. It is this author's view that the changes contained in Article 3 of the 1975 statute may be the most important changes made in the revision of the old statute and they may open up a new era in the future of the FTAC in the arbitration of East-West trade disputes.

### **The 1975 Statute: Article I**

As is true under the old statute the FTAC is attached ("pru") to the U.S.S.R. Chamber of Commerce. The wording of Article I of the U.S.S.R. statute is almost identical to the recommended Article I of C.E.M.A.'s "Uniform Regulation." The Soviet statute adds that the FTAC shall be a "permanently functioning arbitration tribunal." This phrase also was not present in the old statute. This phrase was added most probably to connote that there will be a permanent panel of arbitrators comprised of members confirmed by the Presidium of the U.S.S.R. Chamber of Commerce for a period of four years. (See discussion re Articles 3 and 5, and FTAC Rules of Procedure. See also Martin Domke's

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<sup>22</sup>According to personal conversations with Martin Domke the Soviet Union is in the process of revising its rules for the FTAC.

comment re the Communist Bloc's insistence on placing the phrase "permanent" tribunal in the U.N. Convention.)<sup>23</sup>

Another change in Article I (which corresponds to Article I of the 1932 statute) is that the new statute specifically provides for arbitration of not only disputes arising out of purely contractual relations but also "other civil-legal relations involving foreign trade and other international economic and scientific . . . technicalities." It should be noted that Rule I of the FTAC Rules of Procedure provided for "arbitration disputes of *every nature* arising from foreign trade contracts." Such a phrase "every nature" in the Rules could be argued to be broad enough to cover the new language allowing arbitration of "other civil-legal relations" in the new statute. Consequently it could be argued that no substantive change was made in the types of arbitration disputes accepted. The new Article I further makes it known that disputes "arising out of international economic and scientific ties" will be accepted for arbitration by the FTAC. One example of such scientific-technical ties is the U.S.-U.S.S.R. Joint Commission on Scientific and Technical Cooperation. (A "Statement of Guiding Principles for Intellectual Property" was approved in 1973 by the U.S.-U.S.S.R. Joint Commission on Scientific and Technical Cooperation and a "Protocol" was adopted in May, 1975.) Disputes could arise for example as to whether revenues were properly apportioned from "Third Country Rights in Inventions Resulting from Cooperative U.S.-U.S.S.R. Research and Development."<sup>24</sup>

Additionally, under the old statute, the FTAC had competence to arbitrate disputes between two non-Soviet parties (and actually did arbitrate such disputes mostly between parties from the Eastern Bloc countries), however the new article's emphasis has been shifted by deleting the reference that the FTAC accepts disputes "*in particular* . . . between foreign firms and Soviet trading organizations" and in its stead the new article emphasizes the FTAC's acceptance of disputes "arising between subjects of *various* countries."

## Article 2

Article 2 of the 1975 statute follows closely the recommendations of the Executive Committee of C.E.M.A.'s "Uniform Regulation" Article 2. Under the 1975 U.S.S.R. statute, Article 2 provides that disputes "which already have arisen or a dispute which may arise" shall be accepted for consideration. In the old 1932 statute, Articles 2, 4 and 5 referred to submission of disputes to the FTAC without specifying whether both arbitration clause agreements for future

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<sup>23</sup>Domke, M. *supra* note 19 at 327-8.

<sup>24</sup>See Federal Register Notice Oct. 17, 1975 (Vol. 40) No. 202, pp. 48705-6. (The Joint Working Group on Intellectual Property under the Joint U.S./U.S.S.R. Commission on Scientific and Technical Cooperation met in Moscow from May 20-22, 1975.)

disputes and agreements to submit existing disputes were to be accepted. Rule I, paragraph 4 of the FTAC Rules (as amended in 1959 and 1967) is quite clear however that both existing disputes and provisions in contracts for future disputes would be accepted by the FTAC. So, in effect, the new Article 2 of the 1975 statute incorporates the provisions in the Rules. By incorporating provisions in the statute itself it assures that the provisions will be much more permanent, because the Rules could be changed and amended much more easily. Both under the old and presently under the new statute the FTAC Rules of Procedure are subject to confirmation of the U.S.S.R. Chamber of Commerce (Article 8 of the 1975 statute and Article 13 of the 1932 statute). The statute itself however can be revised only by the Presidium of the U.S.S.R. Supreme Soviet. Another provision which the new statute has incorporated from the Rules (Rule I, paragraph 3) is that the agreement shall be "written." What this means is that the agreement has to be "visible" as noted by Martin Domke, and it does not mean that it has to be signed. The new statute adds, however, that an "agreement to refer a dispute for settlement"<sup>25</sup> may also be expressed by plaintiff bringing suit or by respondent through performance of an action testifying to his "voluntary" submission to the Commission's jurisdiction such as "consent" in response to an inquiry by the Commission. This provision as to an alternate method of an agreement to arbitrate was recommended by the C.E.M.A. Uniform Regulation. The important element here is that it is "voluntary," because under the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the Convention is only applicable to arbitration to which the parties have agreed, not to compulsory arbitration. To this author's knowledge there has been no compulsory arbitration forced on a party in a dispute involving foreign trade.

Article 2 further adds a second paragraph providing for acceptance by the Commission for consideration of disputes "which the parties are obliged to refer for its consideration by virtue of international agreements." This provision is entirely new and follows the recommendation of the C.E.M.A. Uniform Regulation. This assures parties that an international agreement which provides for referral of disputes to the FTAC shall be complied with and the dispute accepted for arbitration by the Commission.

### Article 3

In this author's opinion this Article along with Article 5 which deals with the formation of the arbitration panel's membership in accordance with FTAC

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<sup>25</sup>*Supra* note 1. The author of the present article translates "peredache" as "refer," not as "transfer" which appears in the INT'L LEGAL MATERIALS. To "transfer" a dispute may connote a misleading meaning.

Rules of Procedure which are presently in the process of revision (according to conversations Martin Domke has had with the Soviets) may open up a new era in the future of the FTAC in the arbitration of East-West trade disputes. New Article 3 replaces the 1932 Articles 2, 3, and 4.

The most significant change between the 1932 statute and the 1975 statute is that under the 1932 statute the FTAC was to consist of "fifteen members appointed for one year by the Presidium of the U.S.S.R. Chamber of Commerce" (Article 2). Under Article 3 of the 1975 statute all three elements (italicized) have been changed. First, there is no longer a limitation that the arbitration commission consist of fifteen members from which arbitrators can be chosen by the parties. Membership is open-ended. Secondly, the members of the Arbitration Commission are no longer "appointed" by the Presidium of the U.S.S.R. Chamber of Commerce, rather they are now only "confirmed" by the Presidium of the Chamber. Third, the arbitrators will now be members of the Commission for four years instead of one. The three elements of the old statute were constantly under attack by Western critics who argued that it created the potentiality for abuse.<sup>26</sup> Presently under the new provisions of Article 3, the four-year period insulates the arbitrators from control by the Chamber for a relatively long period of time; the elimination of the restriction of fifteen members on the Arbitration Commission gives parties a greater choice of arbitrators from an open-ended membership list. In addition, it opens up the greater possibility that some of the members may turn out to be citizens of Western countries, or at least non-Soviet citizens. This latter belief is encouraged particularly by the other change, that the membership in the Arbitration Commission shall not be "appointed" but rather "confirmed" by the Presidium of the U.S.S.R. Chamber of Commerce. As it stands now under Article 5 of the new statute the formation of an arbitration panel to consider a dispute shall be in accordance with the FTAC Rules of Procedure. Rule 2(d) provides that the claimant must choose a name of the member of the FTAC and appoint him as his arbitrator (or else leave it up to the President of the FTAC) and Rule 6 states that the respondent must inform the FTAC which of the members of the FTAC he chooses as his arbitrator (or else leave it up to the President of the FTAC).

Now it may be true as stated by a Soviet writer: "There are no restrictions whatsoever in Soviet law regarding the right of foreigners to be arbitrators."<sup>27</sup>

<sup>26</sup>Berman, H. *supra* note 11 at 496. Under the new statute the first of Berman's three co-existing conditions—"appointment" by the Chamber—has been removed. As stated by Berman:

So long as these three conditions co-exist: (a) they are *appointed* by the All-Union Chamber of Commerce, (b) that the All-Union Chamber of Commerce is under the supervision of the Ministry of Foreign Trade, and (c) that the Ministry of Foreign Trade appoints the heads of the export-import combines—so long will their independence be subject to potential abuse. (Emphasis added.)

<sup>27</sup>Oussenko, *U.S.S.R.*, in *INT'L COM. ARB.* 221 (P. Sanders, ed. 1960).



But as noted above, the Rules provide that the arbitrators must be chosen from a panel of arbitrators who in practice in the past have all been Soviet nationals "appointed" by the Presidium of the U.S.S.R. Chamber of Commerce. (See example of composition of the panel—footnote 9.)

The question now remains if the Presidium of the U.S.S.R. Chamber of Commerce only confirms the arbitrators on the panel, who will do the suggesting and whose suggestions will the Presidium take note of. If the answer is that only the members of the Chamber of Commerce may submit names for confirmation, or if no restriction is made on who can submit names, but in practice the Presidium were to confirm only Soviet nationals, then the changes of an open-ended membership with terms of four years may create a more independent Arbitration Commission, but it may be one that is not sufficiently independent to induce non-Communist country parties to agree to arbitration before the FTAC. In particular this is true for U.S. parties since the 1972 U.S.-U.S.S.R. agreement which the Soviets decided not to put into force because the United States did not extend most favored nation treatment to the U.S.S.R. (Trade Act of 1974). However, the Soviet position on the 1972 Trade Agreement has not affected individual provisions of the agreement that do not require congressional authorization and which do not depend on the existence of a trade agreement. As a result, Article 7—encouragement of third country arbitration—already has been implemented by both sides. During the period between October 1972 and January 1974, of a sample group of fourteen Soviet-American contracts monitored by the American Arbitration Association and the Bureau of East-West Trade of the U.S. Dept. of Commerce, three provided for arbitration in the Soviet Union under the rules of the FTAC.<sup>28</sup> If the Soviet Union would like to see more of the East-West disputes arbitrated before the FTAC it may have to do more to assure the independence and impartiality of the FTAC by including Westerners as members of the arbitration panels. According to one Western author, however:

Appointment<sup>29</sup> of Westerners to the arbitration panels would, at present, be a difficult step for the various chambers of commerce to take, because of the combined jurisdiction of the commissions over the disputes arising both from East-West trade and from trade among the C.E.M.A. countries.<sup>30</sup>

It is the author's opinion that to include Westerners on the FTAC arbitration panel is not a sufficient step, at least not as of May 1975. First of all, the panel's membership is no longer limited to fifteen; it is open-ended. Therefore any argument that could be made by anyone that the overwhelming majority of dis-

<sup>28</sup>Straus, D., *Interim Observations on Arbitration Arrangements in Soviet-American Trade*, 28 *ARB. J.* 105, 108 (June 1973).

<sup>29</sup>As of the enactment of the 1975 statute, arbitrators are no longer appointed, but confirmed.

<sup>30</sup>King-Smith, *supra* note 8 at 43.

putes arbitrated will be between parties from C.E.M.A. countries and that therefore it would be undesirable for a Westerner to undertake to adjudicate C.E.M.A. disputes, since they are governed by a special set of rules (the General Conditions of Delivery), and would not be familiar with their extensive interpretations is not valid because: (1) a sufficient number of Soviet or other C.E.M.A. country nationals could be included on the panel to take care of all C.E.M.A.-related disputes, leaving the few Western arbitrators on the Commission to be available along with the Soviet and other C.E.M.A. nationals (who might also be permitted on the panel if Westerners were allowed) for East-West disputes;<sup>31</sup> (2) the Western arbitrator could say that he is "unable" to take part in the hearing (Rule 11 of the FTAC Rules of Procedure); and (3) even if the Westerner were to sit in on a purely C.E.M.A. dispute the other arbitrators and the umpire would probably be C.E.M.A. nationals because as it stands under the present rules (Rules 8 & 9) if the two party-appointed arbitrators cannot agree on an umpire, the President of the FTAC would appoint an umpire from members of the Commission. And it is this author's view that even though theoretically a Westerner could be elected President, practically speaking because under Article 3 the members elect the President and Vice Presidents and the members are confirmed by the Presidium of the U.S.S.R. Chamber of Commerce, the number of Westerners on the panel would probably never be sufficient to elect a President. As a consequence the President would most likely be a Soviet national who would probably appoint a Soviet national as umpire.

It should be noted at this point that in a U.S.-U.S.S.R. dispute, for example, even if Westerners were on the arbitration panel, if the U.S. party chose a Westerner and the Soviet party chose a Soviet national and the party-appointed arbitrators could not agree on an umpire the probability is that the umpire appointed by the President of the FTAC would be a Soviet national (for the reasons mentioned above). So the result would be that out of the three arbitrators, two would be Soviet nationals and only one would be a Westerner. Such a composition of the Tribunal is significant because under Rule 30 the Award is made by a "majority vote" and consequently the "potential" for abuse would still be present. To alleviate this problem, it would be desirable if the Soviets want to attract more East-West disputes to be arbitrated before the FTAC that the FTAC Rules (which, as mentioned previously according to conversations with Martin Domke, are being revised) should allow for third country umpires or sole arbitrators. Such a rule could follow the provisions outlined for both sole arbitrators and the umpire (neutral arbitrator) in either the Rules for the ICC Court of Arbitration (Article 2, Section 6):

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<sup>31</sup>*Id.* at 55: Provision can be made in the FTAC Rules as in the rules of the Hungarian Arbitration Commission which specifically authorizes the foreign party to the dispute to appoint a foreign arbitrator if he agrees to pay the arbitrator's expenses.

The sole arbitrator or the chairman of an arbitral tribunal shall be chosen from a country other than those of which the parties are nationals.

or the Commercial Arbitration Rules of the American Arbitration Association (Section 15):

**Nationality of Arbitrator in International Arbitration.**

If one of the parties is a national or resident of a country other than the United States the sole Arbitrator or the neutral Arbitrator shall, upon request of either party, be appointed from among nationals of a country other than that of any of the parties.

Another change in Article 3 is that the arbitrators confirmed to the panel shall be "persons possessing the *necessary special knowledge for the settlement of disputes* accepted by the Commission for consideration." What this change seems to imply is what one Western author has reported in the past: "Soviet and other COMECON practice favors appointing lawyers as arbitrators in virtually all cases."<sup>32</sup> Or as stated by S. Bratus in reporting on the Fourth International Congress on Arbitration in Moscow and describing the Soviet view:

The main consideration in favor of this attitude, which was expressed in the report of the Soviet representative and supported by several speakers from socialist and capitalist countries, was as follows: Any technical conclusions and calculations in support or refutation of proper or improper carrying-out of work undertaken should be given a legal assessment, because they deal with facts confirming, altering or waiving the rights and obligations of the parties.<sup>33</sup>

#### Article 4

Article 4 is a new provision stating that the arbitrators of the FTAC shall be "independent and impartial in the execution of their duties." As noted, this was one of the criticisms leveled by numerous Western authors against the FTAC, namely, that because the FTAC was comprised of only Soviet nationals there was always the potential that the FTAC's independence and impartiality could be abused. Where this article may be important is in enforcement of awards. (See discussion re Article 9.)

#### Article 5

Article 5 replaces Articles 4, 5, 6 and 8 which specifically provided the method of choosing arbitrators. In essence the Rules of the FTAC with respect to selection of arbitrators are: § 2(d) providing for the appointment of an arbitrator from members of the FTAC by the claimant in his "Points of Claim; § 6 which provides for the respondent's appointment of an arbitrator from the members of the FTAC within 15 days of notice from the FTAC that Points of

<sup>32</sup>Holtzman, H., *Arbitration in East-West Trade*, 9 INT'L LAW. 77, 86 (Jan. 1975).

<sup>33</sup>Bratus, S., *The Fourth International Congress on Arbitration*, FOREIGN TRADE, No. 4 (Moscow 1973) p. 48.

Claim have been filed; § 7 in the event the respondent fails to appoint an arbitrator the President of the FTAC appoints an arbitrator from among the members; § 8 an umpire is to be chosen within 15 days by the two party-appointed or chosen arbitrators; § 9 where the arbitrators fail to agree on an umpire, the President of the FTAC appoints the umpire; § 10 provision for the selection of a sole arbitrator, in exceptional cases, by mutual consent of the parties and provisions that the sole arbitrator is either chosen directly by the parties or at the request of the parties is to be appointed by the President of the FTAC; § 11 provision for event where appointed arbitrator is unable to take part in hearing of a case then another arbitrator may be chosen within 15 days—if one is not chosen, the President of the FTAC appoints one; § 12 provision for the event where the umpire is unable to take part—provisions of Rule 8 are applicable; § 12(b) provides for the possibility of a party challenging an arbitrator or umpire. For further discussion of Article 5 in conjunction with Article 3 see discussion re Article 3 above.

### **Article 6**

Article 6 of the 1975 statute replaces Article 7 of the 1932 statute. It incorporates Rule 20 of the FTAC Rules of Procedure stating that the parties may present their cases directly or through duly authorized representatives appointed “at their discretion,” including foreign citizens or “organizations.” What has been added to both the provisions of Rule 20 and old Article 7 is the phrase “at their discretion” to make it clear that it is completely up to the parties as to who may represent them and that the parties may appoint “organizations” to represent them.

The issue that arises under this rule is that although the statute and the Rules seem fair in allowing any foreign citizen or organization to represent them, that foreign citizen may run into problems obtaining a visa. John Hazard noted:

Admission of foreign attorneys to represent their clients before Moscow arbitration tribunals seems to be an absolute minimum to successful commercial arbitration, yet the problem of obtaining a visa is always raised when the issue is faced in a concrete case. . . . The exclusion might be based not upon what such a person might accomplish before the arbitration tribunal on behalf of his clients but rather upon a possible threat to Soviet state security offered by the very presence in the Soviet capital of such a knowledgeable person.<sup>34</sup>

Although it is true that the Soviet Union can exclude any person from entering its country by not issuing a visa, with the increase in East-West trade beginning to develop, the Soviets would be leery of using such means to prevent the entry of a representative of the Western party. The adverse publicity could damage

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<sup>34</sup>Hazard J., *State Trading and Arbitration* from *INTERNATIONAL TRADE ARBITRATION*, ed. Domke, M. (1958, reprint 1973) pp. 97-98.

the fragile East-West increase in trade, harming the Soviets in their economic goals. Such damage to the Soviet economy would be more serious than any possible threat of security posed by the presence in the U.S.S.R. of one knowledgeable person from the West.

#### Article 7

Article 7 replaces Article 9 of the 1932 statute and remains basically unchanged. The article provides that an amount and form of security for the suit may be established.

#### Article 8

Article 8 replaces Article 13 of the 1932 statute and remains basically unchanged. The article provides that the Rules of the FTAC shall be confirmed by the Presidium of the U.S.S.R. Chamber of Commerce and Industry. One Western author comments on the requirement of confirmation of the Rules by the Presidium of the U.S.S.R. Chambers of Commerce:

It affects the independence of the arbitrators, however, only in that it limits their freedom to decide for themselves exactly how they wish to proceed. . . . the rules of the Communist tribunals are generally fair.<sup>35</sup>

#### Article 9

Article 9 replaces Articles 11 and 12 of the 1932 statute. Furthermore, it follows the recommendations of Article 35 of the C.E.M.A. Uniform Regulations. Two items have been added: that the award shall be executed by the parties "voluntarily" within the period established by the Commission; and that awards not executed within the period specified shall be executed "in accordance with law and international agreements."

Within the U.S.S.R. enforcement of awards for all practical purposes can really be sought only against a Soviet national. Foreign corporations have little if any assets in the U.S.S.R. They must be pursued abroad, if unwilling to comply. According to one Western author the Soviet party has always complied with the award:

It is a striking fact that compliance by the state party is always voluntary and prompt; in no instance has it been necessary to enlist judicial assistance.<sup>36</sup>

Action to enforce the award in the U.S.S.R. against a Soviet party, in the unlikely event that the Soviet party fails to comply voluntarily with an award rendered by the FTAC, may be taken under Section 201 of the Code of Civil

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<sup>35</sup>King-Smith, *supra* note 8 at 42.

<sup>36</sup>Pisar, S., *supra* note 5 at 1468.

Procedure of the R.S.F.S.R. If the time for compliance has elapsed, the party seeking enforcement must file for a writ of enforcement accompanied by a copy of the award and complete record of the hearings.<sup>37</sup> A further fact of importance is that, as was true in the old statute, the awards are final<sup>38</sup> and not subject to appeal. Accordingly the writ of enforcement should be issued promptly.<sup>39</sup>

Enforcement of an FTAC award in the U.S. would be subject to international agreement, for example, under the 1958 U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the U.S. Federal Arbitration Act which includes the implementing legislation of the U.N. Convention.<sup>40</sup> Under Article III the courts of an enforcing country which is a signatory to the Convention must recognize the "valid" award of an arbitration tribunal of another signatory state or an award which involves foreign parties and which was rendered by an arbitral body located within the enforcing country. There are three important grounds which are especially of interest in East-West trade disputes under which enforcement may be refused: (1) that the composition of the arbitral authority or the arbitral procedure is not in accordance with the parties' agreement, or if not specified, the agreement is not in accordance with the law of the country in which the arbitration takes place;<sup>41</sup> (2) that the subject matter of the dispute is not capable of settlement by arbitration under the law of that country;<sup>42</sup> and (3) that the recognition or enforcement of the award would be contrary to the "public policy" of that country.<sup>43</sup> For more detailed information on the enforcement of "foreign" awards in the United States under the Federal Arbitration Act and the U.N. Arbitral Convention, the reader is referred to Martin Domke's article entitled "The United States Implementation of the United Nations Arbitral Convention."<sup>44</sup>

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<sup>37</sup>Gsovski 615. See also Section 202 wherein a party can contest an award during enforcement proceedings within the U.S.S.R. Article 4 of the 1975 Statute can play a role here because under Article 4 the FTAC arbitrators must be "independent and impartial in the execution of their duties."

<sup>38</sup>However, awards of the U.S.S.R. Maritime Arbitration Commission are applicable. The Supreme Court of the U.S.S.R. may cancel the Award and return the case to the Maritime Arbitration Commission—Article 10 of the Maritime Arbitration Commission (Moscow 1968). See also W.E. BUTLER AND J.B. QUIGLEY, JR., eds. and trans. *THE MERCHANT SHIPPING CODE OF THE U.S.S.R.* (1968), Baltimore (1970) pp. 123-131.

<sup>39</sup>Tuttle, W. H. *supra* note 6 at 85.

<sup>40</sup>Pub. L. 91-368 of July 31, 1970, 84 Stat. 692; 9 U.S.C. § 201 added a second chapter to Federal Arbitration Act—U.S.C. §§ 1-14, 61 Stat. 670 as amended, 68 Stat. 1233 (1954). With respect to the U.N. Convention, the United States gave its consent and advice on Oct. 4, 1968. The U.S. made use of two reservations—recognition and enforcement based on "reciprocity" and the U.S. will not recognize awards re noncommercial disputes. Domke, M., *The United States Implementation of the United Nations Arbitral Convention*, 19 AM. J. COMPAR. L. 575 (1971).

<sup>41</sup>U.N. Convention, Article V ¶ 1.

<sup>42</sup>U.N. Convention, Article V ¶ 2(a).

<sup>43</sup>U.N. Convention, Article V ¶ 2(b).

<sup>44</sup>Domke, M., *The United States Implementation of the United Nations Arbitral Convention*, 19 AM. J. COMPAR. L. 575 (1971).

## Article 10

Article 10 replaces Article 10 of the 1932 statute. The only difference is that the old statute provided for an amount of the fee to cover expenses of the proceedings not to exceed 1 percent and it was to be fixed at the hearing by the FTAC. The new statute deletes reference to the 1 percent limit and states that the fees shall be calculated and distributed in accordance with the Statute on Arbitration Fees and Expenses and on Costs of the Parties, confirmed by the Presidium of the U.S.S.R. Chamber of Commerce and Industry.<sup>45</sup>

## Other Available Forms of Arbitration in U.S.-U.S.S.R. Trade

In addition to providing for arbitration before the FTAC under its rules in Moscow, there are other forms of arbitration which are available and being used. As noted by one Western author the spectrum of choices in East-West trade includes:

- (a) Arbitration under the rules of the foreign trade arbitration commission at the central chamber of commerce of the socialist country involved.
- (b) Arbitration in the country of the defendant, using the rules of the local foreign trade arbitration commission if the socialist party is defendant, and when the capitalist party is defendant using the rules of an arbitration institution in the defendant's country.
- (c) Arbitration in a third country, under the Rules of Arbitration of the United Nations Economic Commission for Europe (ECE), as recommended in the U.S.-U.S.S.R. . . . Agreements.
- (d) Arbitration in a third country under the rules of the International Chamber of Commerce or other rules. ICC arbitration is not used by Soviet foreign trade organizations but has been agreed to by trading organizations of *some other COMECON countries*.
- (e) Arbitration in a third country with no specification of any rules at all.<sup>46</sup>

If a decision is made to arbitrate in a third country as is encouraged in the U.S.-U.S.S.R. Trade Agreement Article 7 it is recommended that the locale of an arbitration be in a contracting state of the U.N. Convention. As noted by a Western author:

A further legal factor to be considered in determining locale is the applicability of the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958*. That Convention includes a provision that any country, in ratifying the Convention, may declare that "it will apply the Convention to the recognition and enforcement of awards *made only in the territory of another Contracting State*." The United States, the Soviet Union and other COMECON countries which have ratified the Convention, have done so *subject to such a declaration of reciprocity*. Since the

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<sup>45</sup>Under C.E.M.A. "Uniform Regulation Appendix on the Provisions on Arbitral Fees and Expenses, and Costs of the Parties," the breakdown in the amount of the fees is similar to the ICC and AAA. The calculation begins with 3 percent of the amount of suit, with the percentage reduced as the amount of the suit is higher. It should be noted that for higher amounts of the suit, under C.E.M.A. the fees would be higher than in either the ICC or AAA.

<sup>46</sup>Holtzman, H. *supra* note 30 at 81-82.

U.N. Convention clause refers to awards made "in the territory of another Contracting State," it is necessary that the locale of an arbitration be in a contracting state in order to insure applicability of the U.N. Convention in the various countries which ratified subject to a declaration of reciprocity. It is for this reason that the U.S.-U.S.S.R. Trade Pact recommends that the parties specify as the place of arbitration a country that is a party to the U.N. Convention. (Emphasis added.)<sup>47</sup>

### Conclusion

As noted in the discussions above the new statute has gone a great distance in trying to assure the independence and impartiality of the U.S.S.R. FTAC and its arbitrators. Such new provisions where the arbitrators are "confirmed" by the Presidium of the U.S.S.R. Chamber of Commerce (instead of "appointed"); where the arbitrator's tenure has been extended from one year to four years; and where the membership on the arbitration panel is open-ended are definitely a step in the right direction and will do much to tone down the mistrust of the FTAC by Western enterprises. However, doubts and mistrust as to the FTAC's impartiality and independence may still remain, until such time as Westerners are allowed to become members of the arbitration panel. The Soviet Union has the opportunity at the present time, since it is presently in the process of revising the Rules of the FTAC, to include such provisions. If the U.S.S.R. FTAC wishes to attract more East-West disputes to be arbitrated in Moscow, it may be necessary (in particular in light of the other forms of arbitration available) for the Soviet Union to include a provision ensuring the presence of Westerners on the arbitration panel. In the period October 1972—January 1974, of fourteen U.S.-U.S.S.R. contracts studied, only three provided for arbitration before the FTAC in Moscow.<sup>48</sup> In the words of a Western author:

The non-compulsory nature of the FTAC jurisdiction creates a need for the FTAC to persuade Western traders of its reliability; unless this is done, disputes will not be submitted.<sup>49</sup>

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<sup>47</sup>*Id.* at 83.

<sup>48</sup>*Id.* at 89.

<sup>49</sup>Leff, E., *The Foreign Trade Arbitration Commission of the U.S.S.R. and the West*, 24 *ARB. J.* 1, 11-12 (1969).