

## LEGAL ADVISORY COLUMN

**Can the Kyrgyz Republic be implicated in international arbitration proceedings organized under the Rules of Arbitration of the International Center for Settlement of Investment Disputes?**

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The International Center for Settlement of Investment Disputes (ICSID) was established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States adopted on 18 March 1965 in Washington.

This Convention has been ratified by the Kyrgyz Republic but for an unknown reason this ratification has never been deposited with the International Bank for Reconstruction and Development which acts as the depositary of the Convention.

Therefore the Convention has never entered into force with regard to the Kyrgyz Republic as article 68 (2) of the Convention states that 'it shall enter into force for each State which subsequently deposits its instruments of ratifications, acceptance or approval 30 days after the date of such deposit.' As a consequence Kyrgyzstan is not a Contracting State pursuant to the Convention.

Because of this the Convention is not applicable to Kyrgyzstan. Article 25 (1) states the following in this regard 'The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.'

Dispute resolution through international arbitration is often foreseen in International Treaties on Investment and in Bilateral Agreements between two states (BIT).

The possibility to submit an arising dispute to arbitration according the ICSID rules is, for instance, provided for in the Energy Charter Treaty (protecting investment interests in the energy

sector) of 1994, ratified by Kyrgyzstan.

A BIT is a treaty concluded between two states in which these states have agreed upon the promotion of mutual investments and certain standards of protection for the investments done by investors who are nationals of one of the contracting states into the territory of the other state.

Kyrgyzstan has concluded several such BITs (with Belarus, Finland, France, Kazakhstan, South Korea, Sweden, Switzerland, Turkey, the United Kingdom and Uzbekistan).

It is interesting to note that all the BITs concluded by Kyrgyzstan contain a dispute resolution clause wherein international arbitration is foreseen and all these BITs refer to the ICSID as one of the possibilities of submitting the dispute to arbitration.

As mentioned above these references constitute a problem as the ICSID as such has no (immediate) jurisdiction for arbitration proceedings involving the Kyrgyz Republic.

This problem is recognized in the BIT of 19 November 2007 (ratified on 23 June 2008) between the Kyrgyz Republic and South Korea, where it is written that an arbitration according to ICSID shall be possible 'at the moment the Kyrgyz Republic becomes a party to this Convention'.

How the Kyrgyz Republic could be implicated in a similar international arbitration through the framework of the Additional Facility offered by ICSID (applicable if only one of the Contracting Parties is party to the ICSID Convention), will be written about in a subsequent article.