

LEGAL ADVISORY COLUMN

Kyrgyzstan and
the ICSID additional
facility rules

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In a previous article (The Times of Central Asia, 10 November 2011) it has been set out that the Kyrgyz Republic is not a contracting state with regard to the Convention on the Settlement of Investment Disputes between States and Nationals of other States (Washington 1965), because the Kyrgyz Republic has not deposited its instruments of ratification with the depositary of the Convention. The International Center for the Settlement of Investment Disputes however has elaborated arbitration proceedings in the so-called Additional Facility Rules if only one of the parties is a contracting state to the ICSID Convention.

Pursuant to article 2 of the Additional Facility Rules, the Secretariat of the Centre is authorized to administer proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories: (a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is party to the dispute is not a Contracting State; (b) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State.

The majority of Bilateral Investment Treaties (BITs) contain provisions offering arbitration

to the nationals of one State party to the BIT against the other state party to the BIT.

Some BITs concluded by the Kyrgyz Republic offer the possibility of arbitration according to the ICSID Additional Facility Rules. This is, for instance, the case in the BITs between the Kyrgyz Republic and Kazakhstan, Latvia, Sweden and the United Kingdom.

The clauses on investor-state dispute settlement usually foresee in a consent to arbitrate and mostly stipulate different options: a.o. arbitration according to the ICSID Rules, the ICSID Additional Facility Rules, ad hoc arbitration according to the UNCITRAL Arbitration Rules, etc.

This constitutes a binding offer to consent to arbitration by the host state, although all will depend on the exact wordings of the relevant dispute settlement clause.

This offer can be accepted by the investor-national of the other State party to the given BIT. From the moment this offer is accepted by the concerned investor the arbitration agreement is perfected.

This means that if a BIT between the Kyrgyz Republic and another State contains a dispute settlement clause wherein the possibility of arbitration according to the ICSID Additional Facility Rules is foreseen and this other State is a Contracting State to the ICSID Convention, a national of the latter State can compel the Kyrgyz Republic to an arbitration according to the above mentioned Rules. And this regardless to the fact that the Kyrgyz Republic is not a Contracting State to the ICSID Convention.