

JSC Tashkent Mechanical Plant and others v. Kyrgyz Republic
(ICSID Case No. ARB(AF)/16/4)

Decision on Bifurcated Preliminary Objections – Partial Dissenting Opinion

V. **PARTIAL DISSENTING OPINION**

1. I fully subscribe to the Tribunal’s decision to uphold jurisdiction on the basis of Article 18 of the Kyrgyz Republic’s Foreign Investment Law and to reject the Respondent’s objection to admissibility of the claims on the basis of an alternative forum. This partial dissent concerns only the separate and independent basis for jurisdiction asserted by the Claimant, which is Article 10 of the BIT between Uzbekistan and the Kyrgyz Republic. The text of Article 10 reads:

Each Contracting Party hereby consents to submit any legal dispute arising between one Contracting Party and an investor of the other Contracting Party in respect to investments carried out by them on the territory of the first Contracting Party to the International Centre for Settlement of Investment Disputes for consideration through conciliation or arbitration in accordance with the “Convention on the Settlement of investment disputes between States and nationals of other States”, which was opened for signature in Washington on March 18, 1965. Investors of one Contracting Party, who were controlled by an investor of the other Contracting Party before the beginning of the dispute, shall, in accordance with Article 25 (2 - b) of the Convention in pursuance of objectives of the Convention, have the same rights as investors of the other Contracting Party.²⁶⁵

2. The meaning of Article 10 is clear and unambiguous: the Contracting Parties to the BIT give their consent to arbitration in accordance with the ICSID Convention. No other form of arbitration is specified in, or contemplated by, Article 10. For the consent to ICSID arbitration to become operational, however, the Contracting Parties also have to be parties to the ICSID Convention. The ICSID Convention contains clear and precise rules that regulate the manner in which a State may accede to that multilateral treaty. At the time the BIT was signed December 1996, Uzbekistan was a party to the ICSID Convention but the Kyrgyz Republic was not. No doubt there was an expectation in December 1996 that the Kyrgyz Republic would take the necessary steps to accede to the ICSID Convention at some point in the future. But that expectation has so far been

²⁶⁵ Agreement between the Government of the Republic of Uzbekistan and the Government of the Kyrgyz Republic on the Mutual Promotion and Protection of Investments, Tashkent, signed 24 Dec. 1996, entered into force on 6 Feb. 1997 [C-0001] (resubmitted).

JSC Tashkent Mechanical Plant and others v. Kyrgyz Republic
(ICSID Case No. ARB(AF)/16/4)

Decision on Bifurcated Preliminary Objections – Partial Dissenting Opinion

disappointed because the Kyrgyz Republic has declined to deposit its instrument of ratification with the World Bank. It is common ground that the Kyrgyz Republic is not, therefore, a party to the ICSID Convention.

3. It is very common in investment treaty practice for States to cater for such an eventuality by stipulating that if ICSID arbitration is impossible because one of the contracting parties to the investment treaty is not or does not subsequently become a party to the ICSID Convention, then the contracting parties also give their consent to arbitration under the Additional Facility Rules or some other form of international arbitration. Consistent with this practice, both Uzbekistan²⁶⁶ and the Kyrgyz Republic²⁶⁷ signed investment treaties with such a contingency mechanism both before and after they signed the BIT.

4. Consent to arbitration in accordance with the ICSID Convention and consent to arbitration under the Additional Facility Rules are mutually exclusive in the sense that if both contracting parties to the investment treaty are parties to the ICSID Convention, then arbitration under the Additional Facility Rules is not available.²⁶⁸ It follows that where investment treaties provide for consent to either arbitration under the ICSID Convention or under the Additional Facility Rules, that consent operates as consent either to one or to the other but not to both simultaneously.

5. Article 10 of the BIT does not have a contingency mechanism to deal with the situation where one of the Contracting Parties fails to become a party to the ICSID Convention, such as the provision of consent to arbitration under the Additional Facility Rules. The question is whether such a contingency mechanism can be read into Article 10 through

²⁶⁶ Before 1996: USA/Uzbekistan BIT (Dec. 1994), Art. IX(3) [RL-0035]. After 1996: Japan/Uzbekistan BIT (Aug. 2008), Art. 16(3)(1) [RL-0033].

²⁶⁷ Before 1996: USA/Kyrgyz Republic BIT (Jan. 1993), Art. VI(3)(a)(ii) [RL-0032]. After 1996: Sweden/Kyrgyz Republic BIT (Oct. 2004), Art. 8(2) [RL-0028].

²⁶⁸ Additional Facility Rules, Art. 2: “The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a State (or a constituent subdivision or agency of a State) and a national of another State, failing 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 a party to the dispute is not a Contracting State...”

JSC Tashkent Mechanical Plant and others v. Kyrgyz Republic
(ICSID Case No. ARB(AF)/16/4)

Decision on Bifurcated Preliminary Objections – Partial Dissenting Opinion

a process of interpretation consistent with Articles 31 and 32 of the Vienna Convention. My colleagues are convinced that it can. I respectfully disagree.

6. The majority relies on two devices for its interpretation of Article 10, which leads to their conclusion that Uzbekistan and the Kyrgyz Republic have in fact consented to arbitration under the Additional Facility Rules.
7. The first is that consent to arbitration under the ICSID Convention entails consent to arbitration under the Additional Facility Rules because the latter are promulgated by the Administrative Council, which in turn is established by the ICSID Convention. This argument is implausible for several reasons. First, if consent to arbitration under the ICSID Convention really did entail consent to arbitration under the Additional Facility Rules, then the contingency mechanism discussed above that can be found in a great number of investment treaties, and in the Kyrgyz Republic's own Foreign Investment Law, would be redundant. There is a well-established and explicit means to give consent to arbitration under the Additional Facility Rules and it has not been deployed in the BIT. That is important context for the interpretation of Article 10. Second, as already noted, these different types of arbitration are mutually exclusive: it is illogical to postulate that consent to one must encompass consent to the other in circumstances where consent to both simultaneously is impossible. This is the reason that investment treaties and foreign investment laws that provide express consent to arbitration under the Additional Facility Rules invariably preface that option as contingent upon the impossibility of resorting to arbitration under the ICSID Convention. Third, these two types of arbitration are fundamentally different. Arbitration under the ICSID Convention is largely autonomous from domestic laws on arbitration with an internal mechanism for the review of arbitral awards, special enforcement provisions, and so on. Arbitration under the Additional Facility Rules is anchored in the legal system at the seat of the arbitration and entails the submission by the State to the local courts at that seat in respect of matters relating to the arbitration. Given the exceptional nature of arbitration under the ICSID Convention, it cannot be presumed that consent to that form of arbitration encompasses consent to other forms. Fourth, the fact that the

JSC Tashkent Mechanical Plant and others v. Kyrgyz Republic
(ICSID Case No. ARB(AF)/16/4)

Decision on Bifurcated Preliminary Objections – Partial Dissenting Opinion

Administrative Council promulgated the Additional Facility Rules is not a basis for inferring that consent to arbitration under the ICSID Convention extends to whatever the Administrative Council enacts under its powers conferred by Article 6 of the ICSID Convention. The Administrative Council also promulgated the Fact-Finding (Additional Facility) Rules; presumably it cannot be said that consent to arbitration under the ICSID Convention should also be deemed to be consent to this fact-finding procedure as well.

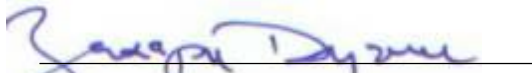
8. The second device adopted by the majority is its reliance on what it describes as the “true or genuine intention” of the Contracting Parties of the BIT to consent to international arbitration. If that intention was somehow frustrated, then the majority considers that Article 10 can be cured of this defect by grafting a contingency mechanism onto the express language of that provision. This approach is reminiscent of how commercial arbitral tribunals have dealt with so-called pathological arbitration clauses but it has no place in treaty interpretation conducted pursuant to the Vienna Convention rules. Article 10 is not a pathological arbitration clause: its meaning is perfectly clear. Its application, however, depends upon a condition subsequent being satisfied, which is for the Kyrgyz Republic to become a party to the ICSID Convention and the path to achieving that was and remains perfectly transparent. Views may differ on whether the Kyrgyz Republic’s decision to halt that exercise with the finishing post in sight was desirable from a policy perspective, but views must surely coalesce around one basic proposition—it is the Kyrgyz Republic’s sovereign right to decline to become a party to a multilateral treaty.
9. Both Contracting Parties were on notice when they signed the BIT in 1996 that Article 10 could not result in binding recourse to arbitration because the Kyrgyz Republic was not a party to the ICSID Convention at that time. Nothing has changed since then. The text of Article 10 cannot be retroactively modified by interpretation today to take account of the undesirable consequences of a situation that existed at the time the BIT was signed and has persisted ever since. And what would happen if the Kyrgyz Republic were to become a party to the ICSID Convention tomorrow? Presumably

JSC Tashkent Mechanical Plant and others v. Kyrgyz Republic
(ICSID Case No. ARB(AF)/16/4)

Decision on Bifurcated Preliminary Objections – Partial Dissenting Opinion

Article 10 would then have to be modified again as meaning only consent to ICSID arbitration and nothing else.

10. The reason that Article 31 of the Vienna Convention does not refer to the “intention” of the parties is that it was thought that the parties’ intention is best divined by regarding the terms of the treaty that they have actually agreed upon. The “true or genuine intention” of the Contracting Parties to the BIT was to submit to arbitration under the ICSID Convention because that is what Article 10 says. Any other approach crosses the line dividing interpretation from amendment.



Prof. Zachary Douglas QC
Arbitrator