RSM and Millicom: Two African Cases Illustrate the Continued Vitality of Contractual Arbitration Clauses within ICSID

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In the early to mid twentieth century, “investor-state” arbitration was mostly associated with disputes arising under a contract between a state (a state-owned enterprise) and a foreign investor. Known sometimes as “concession” arbitration, this form of dispute gave rise to several important arbitral decisions in the immediate post-war period.1 When in 1965, there was established the International Centre for the Settlement of Investment Disputes (“ICSID”), an international arbitral institution, specializing in investor-state arbitration and governed by a specific treaty,2 many envisaged this as the primary form of future ICSID arbitration.3

Today, however, the vast majority of ICSID cases arise not from concession agreements, but from “bilateral investment treaties” (“BITS”) between states, which give private investors the right to sue foreign governments if they establish they are “nationals” of a BIT contracting state with an “investment” that qualifies for protection under the terms of that BIT. Yet still there remain a respectable number of cases brought before ICSID, based upon an ICSID arbitration clause contained in an investment contract with the host state. Two recent cases, both involving African states and emanating from Paris-based ICSID tribunals, illustrate the continuing significance (indeed, vitality) of contractual arbitration clauses within the modern system of investor-state arbitration.

1. PRE-REQUISITES FOR SECURING ICSID ARBITRATION IN A PRIVATE INVESTOR-STATE CONTRACT

In creating a purpose-built arbitration centre to hear investor-state arbitration disputes, ICSID’s framers created a forum that is not subject to interference by national courts. Under the ICSID Convention, an ICSID award is automatically entitled to the

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same recognition “as if it were a final judgment of a court of [each ICSID Contracting] State,” without the need to institute separate post-arbitral court proceedings to confirm the ICSID award.¹ For a case to qualify for ICSID jurisdiction, however, it must satisfy the jurisdictional pre-requisites set forth in Article 25 of the ICSID Convention. Article 25(1) of the ICSID Convention states:

The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State . . . and a national of another contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

Thus, it must also be shown that the dispute (1) involved an “investment” for purposes of the ICSID Convention (Jurisdiction ratione materiae) (2) that the parties comprise a “Contracting State” and a “national of another Contracting State” (nationality or jurisdiction ratione personae); and (3) that the parties had consented to ICSID arbitration over the dispute. Each of these requirements must be satisfied before an ICSID tribunal will accept jurisdiction.

“Consent” can be expressed in a variety of forms, most typically by:

- a BIT between the host state and the investor’s home state;
- an investment statute enacted by the host state agreeing to submit future investment disputes (or categories of disputes) with foreign investors to ICSID; or
- a direct expression of consent in a specific contract between the investor and the state.

The last of these scenarios is the classic “concession contract” situation where an investor negotiates an investment contract directly with the host state, and the parties expressly agree to submit future disputes to international arbitration. Although such disputes are now overshadowed by a much larger number of BIT arbitrations, “concession” arbitration has a long history before ICSID, and, indeed, up until 2000, a large percentage of ICSID’s cases involved “concession” contracts – many (if not most) between foreign investors and African countries.⁵ The recent cases of Millicom

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¹ ICSID Convention, art. 54(1). ICSID awards are, however, subject to possible post-award annulment by a special Committee possessing limited review powers on such grounds as manifest excess of arbitrator’s power, or “serious departure from a fundamental rule of procedure.” Id., arts. 51-52.