# APPENDIX

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**APPENDIX A**

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 23-7016

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ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT CO. LTD,

*Appellee*

v.

FEDERAL REPUBLIC OF NIGERIA,

*Appellant*

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Appeal from the United States District Court
for the District of Columbia
(No. 1:22-cv-00170)

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Argued April 22, 2024 Decided August 9, 2024

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*Keith Bradley* argued the cause for appellant. With him on the briefs was *ScheLeese Goudy*.

*Jovana Crncevic* argued the cause and filed the brief for appellee.

Before: MILLETT, KATSAS, and CHILDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* MILLETT.

Dissenting opinion filed by *Circuit Judge* KATSAS.

MILLETT, *Circuit Judge*: In 2001, China and Nigeria signed a bilateral investment treaty to encourage investment between the two countries. As part of that

bargain, each country agreed to treat the other country's investors fairly and to protect their investments. The treaty also provided that the countries would arbitrate any disputes with foreign investors.

Appellant Zhongshan Fucheng Industrial Investment then invested in Nigeria, participating in a joint venture with Ogun State, a Nigerian state, to develop a free-trade zone. After years of development and millions of dollars in investments, Ogun State abruptly ended its relationship with Zhongshan, and Nigerian federal authorities ousted the company's executives from the country. Zhongshan initiated arbitration proceedings. An arbitrator found that Nigeria had breached its obligations under the bilateral investment treaty and awarded Zhongshan over $55 million in damages.

Zhongshan now seeks to enforce that arbitral award against Nigeria. The district court held that it had jurisdiction over this case, finding that the Foreign Sovereign Immunities Act's arbitration exception applied because the award is governed by an international arbitration treaty known as the New York Convention.

We affirm.

## I

### A

#### 1

Prior to 1952, the United States granted foreign sovereigns "complete immunity" in courts within the United States as "a matter of grace and comity[.]" *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 486 (1983). For centuries, that rule had been "in harmony with the then-existing general concepts of

international practice." *In re Grand Jury Subpoena*, 912 F.3d 623, 626 (D.C. Cir. 2019) (quotation marks omitted).

Over the course of the nineteenth and twentieth centuries, however, the practice of granting foreign sovereigns complete immunity was called into question. In particular, as foreign governments became more involved in commercial activity, concerns grew over those governments' ability to "manipulate their immunity" to gain unfair advantages in the marketplace over purely private corporations. *In re Grand Jury Subpoena*, 912 F.3d at 626. In response, a growing number of countries began to strip foreign sovereigns of immunity for "private"— typically commercial—acts. *Id.*

In 1952, the State Department's Acting Legal Adviser issued a letter adopting this "restrictive theory of sovereign immunity." *In re Grand Jury Subpoena*, 912 F.3d at 626 (quotation marks omitted). Under that theory, the United States recognized the immunity of foreign sovereigns with regard to sovereign or public acts, but not with regard to private acts. *See Republic of Austria v. Altmann*, 541 U.S. 677, 690 (2004); *Verlinden*, 461 U.S. at 487.

Application of the sovereign–private act distinction, however, "proved troublesome." *Verlinden*, 461 U.S. at 487. After 1952, "the State Department continued to advise courts on a case-by-case basis whether immunity should be granted[.]" *Princz v. Federal Republic of Germany*, 26 F.3d 1166, 1169 (D.C. Cir. 1994). If no advice was given, courts had to independently determine whether immunity was appropriate (that is, whether a foreign state's conduct was private or sovereign). *See id.*

In 1976, Congress passed the Foreign Sovereign Immunities Act ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in various sections of 28 U.S.C.), to "free the Government from the[se] case-by-case diplomatic pressures" and to clarify the standards governing sovereign immunity, *Verlinden*, 461 U.S. 488. To that end, the FSIA contains a "comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities" brought in courts within the United States. *Id.*

Today, the FSIA is the "sole basis for obtaining jurisdiction over a foreign state in the courts of [the United States.]" *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). The FSIA's "terms are absolute": Unless a plaintiff shows that a statutorily enumerated exception to sovereign immunity applies, "courts of this country lack jurisdiction over claims against a foreign nation." *Belize Soc. Dev., Ltd. v. Government of Belize*, 794 F.3d 99, 101 (D.C. Cir. 2015).

2

This appeal involves the FSIA's arbitration exception. That exception provides in relevant part:

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case * * * in which the action is brought * * * to confirm an award made pursuant to * * * an agreement to arbitrate, if * * * [the] award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards[.]

28 U.S.C. § 1605(a)(6). To establish jurisdiction under the arbitration exception, a party must offer "more than a claim invoking an arbitration award." *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 877 (D.C. Cir. 2021). The party must show (1) "the existence of an arbitration agreement"; (2) "an arbitration award"; and (3) "a treaty governing the award[.]" *Id*.

The relevant treaty governing the arbitration award in this case is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *See* Convention on the Recognition and Enforcement of Foreign Arbitral Awards, *opened for signature* June 10, 1958, 21 U.S.T. 2517 ("New York Convention"). The New York Convention is a multilateral treaty that provides for signatory states' "recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought[.]" New York Convention Art. I(1). The United States is a signatory and "appl[ies] the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State." New York Convention, 21 U.S.T. at 2560; *see* New York Convention Art. I(3). Congress implemented the New York Convention in Chapter 2 of the Federal Arbitration Act. *See* 9 U.S.C. §§ 201–208.

In most signatory states, the New York Convention applies to all arbitral agreements, regardless of subject matter. *Belize Soc. Dev.*, 794 F.3d at 103. But the Convention also permits states to adopt a "commercial reservation" that limits the Convention to disputes arising from legal relationships that are "considered as commercial[.]" New York Convention Art. I(3).

The United States adopted the commercial reservation. *See* New York Convention, 21 U.S.T. at 2560; 9

U.S.C. § 202. As a result, the Federal Arbitration Act provides both that (1) "[a]n action * * * falling under the Convention shall be deemed to arise under the laws and treaties of the United States[,]" 9 U.S.C. § 203; and (2) the Convention applies only to an arbitral award "arising out of a legal relationship, whether contractual or not, which is considered as commercial," *id.* § 202.

Neither the New York Convention nor the Federal Arbitration Act defines the term "commercial."

B

In 2001, China and Nigeria signed a bilateral investment treaty ("Investment Treaty") aimed at promoting commercial investment between the two countries.[1] The Investment Treaty requires each country to protect investors from the other country and to treat those foreign investors fairly and equitably. The Investment Treaty also provides for arbitration of disputes between an investor and a treaty signatory. *See* Investment Treaty Art. 9. It separately provides for arbitration of disputes between China and Nigeria. *See* Investment Treaty Art. 8.

In 2007, Ogun State began contracting with Chinese companies to develop the Ogun Guangdong Free Trade Zone near Lagos, Nigeria's most populous city and an economic hub. A free-trade zone is a geographic area in which countries relax trade restrictions to promote economic activity and investment. Nigerian federal law, for example, exempts businesses in free-trade

[1] We take these facts from the arbitrator's findings, which are not challenged here. *Cf. United Paperworkers Int'l Union, AFL–CIO v. Misco, Inc.*, 484 U.S. 29, 38 (1987) ("[A]n arbitrator must find facts and a court may not reject those findings simply because it disagrees with them.").

zones from certain taxes and customs duties. *See* Nigeria Export Processing Zones Act 1992 §§ 8, 12, *available at* https://perma.cc/SE8Z-NHCN.

Ogun State entered into a joint venture agreement with a Chinese company and another company to create the Ogun Guangdong Free Trade Zone Company. The Nigeria Export Processing Zones Authority, a Nigerian federal-government entity that oversees free-trade zones in Nigeria, then delegated control and operation of the free-trade zone to the company.

In 2010, the Ogun Guangdong Free Trade Zone Company contracted with Zhongshan's parent company to develop an industrial park in the free-trade zone. The goal was for Zhongshan's parent company to develop the park and build factories in it for zone tenants to use. Zhongshan's parent company then "effectively transferred its rights" to Zhongshan, which conducted its Nigeria operations through its subsidiary, Zhongfu International Investment (NIG) FZE. J.A. 316. Because the distinctions between the Zhongshan-related entities are irrelevant to the legal issues in this case, we refer to them collectively as "Zhongshan."

Zhongshan invested millions of dollars and significant resources to develop the park. Zhongshan built out infrastructure in the industrial park, including roads and utilities. It also opened services such as a hospital, hotel, supermarket, and bank. The free-trade zone later amended its charter and made Zhongshan a part-owner of the zone. By 2016, businesses had moved into the zone and Nigeria had collected approximately 160 million Nigerian Naira in tax revenue from the

free-trade zone, which amounts to hundreds of thousands of U.S. dollars.[2]

In the first half of 2016, however, Ogun State terminated its agreements with Zhongshan. Ogun claimed that a different Chinese company was legally entitled to Zhongshan's share of the free-trade zone and that Zhongshan had defrauded Ogun.

Things continued to deteriorate. One Ogun official texted a Zhongshan executive urging him "as a friend" to "leave peacefully when there is opportunity to do so, and avoid forceful removal, complications[,] and possible prosecution[.]" J.A. 34. The next month, Ogun issued an arrest warrant for two executives, alleging "criminal breach of trust[.]" J.A. 35. Nigerian federal police arrested one Zhongshan executive at gunpoint and held him for ten days. During that time, the police denied the executive food and water, beat him, intimidated him, and questioned him about the whereabouts of the other executive.

C

Following Ogun's sudden termination of the relationship, Zhongshan filed lawsuits in Nigerian federal and state courts seeking reinstatement of its contractual rights. Those proceedings were discontinued in Spring 2018.

In August 2018, Zhongshan initiated an arbitration proceeding against Nigeria under Article 9 of the

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[2] The arbitrator found that Nigeria collected over 160 million Nigerian Naira in tax revenue. J.A. 60. Using exchange rates from 2016, the year Zhongshan was evicted, that amount is between approximately 450,000 and 815,000 United States dollars. *See Nigerian Naira (NGN) to U.S. Dollar (USD) Exchange Rate History for 2016*, EXCHANGE-RATES.ORG, https://perma.cc/VPC9-5XW7.

Investment Treaty. Nigeria willingly participated in the arbitration proceeding. Zhongshan alleged that Nigeria breached the Investment Treaty in five ways: (1) failure to afford Zhongshan fair and equitable treatment; (2) unreasonable discrimination; (3) failure to protect Zhongshan; (4) breach of contract; and (5) wrongful expropriation of investments without compensation.

In March 2021, an arbitral tribunal in the United Kingdom rendered a final award in favor of Zhongshan ("Final Award"). As relevant here, the tribunal found that Nigeria's actions in 2016 "were plainly designed to deprive, and indeed succeeded in depriving, [Zhongshan] of its rights under the [development agreement] in circumstances where there were no domestic law grounds for doing so," and did so "in a way which involved a combination of actual and threatened illegitimate use of the state's power to achieve that end." J.A. 60. In support of this conclusion, the tribunal identified violations of four separate provisions of the Investment Treaty. *See* J.A. 61–62 (identifying violations of Articles 2(2) (entitlement to "continuous protection" by Nigeria), 2(3) (protection against "unreasonable or discriminatory measures" by Nigeria), 3(1) (guarantee of "fair and equitable treatment" by Nigeria), and 4 (prohibition against expropriation by Nigeria)) (emphases omitted).

Based on these findings, the arbitral tribunal found that Nigeria had breached its obligations under the Investment Treaty and that Zhongshan was entitled to $55.6 million in compensation from Nigeria and

$75,000 in moral damages, along with interest and legal and arbitral fees. J.A. 85–86.[3]

After nearly a year of nonpayment by Nigeria, Zhongshan sued in the district court to enforce the arbitration award under the Federal Arbitration Act. Nigeria moved to dismiss for lack of subject-matter jurisdiction and personal jurisdiction. As relevant here, Nigeria argued that it was immune from suit because no FSIA exception applied to Zhongshan's petition to enforce the foreign arbitral award.

The district court denied Nigeria's motion to dismiss, holding that Nigeria was not immune because the Final Award was governed by the New York Convention, and so fell within the FSIA's arbitration exception.

II

Nigeria timely appealed the district court's denial of its motion to dismiss. We have jurisdiction because a denial of sovereign immunity qualifies for interlocutory appeal under the collateral-order doctrine. *El–Hadad v. United Arab Emirates*, 216 F.3d 29, 31 (D.C. Cir. 2000).

We review the district court's denial of Nigeria's motion to dismiss *de novo*. *Transamerica Leasing, Inc. v. La Republica de Venezuela*, 200 F.3d 843, 847 (D.C. Cir. 2000). When a plaintiff asserts jurisdiction under the FSIA, the defendant foreign state bears the burden of proving that the plaintiff's asserted statutory

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[3] The arbitral tribunal defined "moral damages" to include damages for "injury inflicted resulting in mental suffering, injury to [the claimant's] feelings, humiliations, shame, [and] degradation[.]" J.A. 63–64 (emphasis omitted) (quoting *Lusitania* (*United States v. Germany*), 7 R.I.A.A. 1, 40 (Mixed Claims Comm'n 1923)).

exception to immunity does not apply. *Belize Soc. Dev.*, 794 F.3d at 102.

## III

We agree with the district court that the FSIA's arbitration exception stripped Nigeria of its sovereign immunity in this case.

The FSIA's arbitration exception requires the court to find the existence of three jurisdictional facts: (1) "an arbitration agreement"; (2) "an arbitration award"; and (3) "a treaty governing the award[.]" *Stileks*, 985 F.3d at 877. The first two requirements are not disputed in this case and are plainly established in the record. Nigeria and Zhongshan had an arbitration agreement because Nigeria extended an open offer to arbitrate to all Chinese investors, and Zhongshan was a qualifying investor. *See* Investment Treaty Art. 9; J.A. 44–45. Zhongshan then invoked that agreement to initiate an arbitration proceeding with Nigeria, and the arbitral tribunal rendered a final award in Zhongshan's favor.

Whether the arbitration exception applies in this case therefore turns on whether a treaty—specifically, the New York Convention—governs the Final Award. We hold that it does because the Final Award arose from (1) a legal relationship, (2) that is considered as commercial, and (3) is between persons. *See* New York Convention Art. I(1); 9 U.S.C. § 202.

### A

The Final Award satisfies the Convention's requirements that the arbitrated dispute (1) "aris[e] out of a legal relationship" that is (2) "considered as commercial[.]" 9 U.S.C. § 202.

As for the first requirement, Zhongshan and Nigeria shared a legal relationship because Nigeria owed Zhongshan legal duties under the Investment Treaty.

Two parties share a legal relationship within the meaning of the New York Convention if there is an agreement, whether contractual or not, that (1) "explicitly contemplate[s] which parties it w[ill] obligate"; (2) determines "the extent of the obligations"; and (3) provides "the legal framework to govern the arrangement." *Diag Human, S.E. v. Czech Republic Ministry of Health*, 824 F.3d 131, 135 (D.C. Cir. 2016).

The Investment Treaty fits that bill. First, the Investment Treaty expressly obligates Nigeria to protect investments made by Chinese investors, including those by Zhongshan. *See* Investment Treaty Art. 2(2) ("Investments of the investors of either Contracting Party shall enjoy the continuous protection in the territory of the other Contracting Party."); *see also* J.A. 44–45 (finding that Zhongshan was an investor under the Investment Treaty).

Second, the Investment Treaty lays out in precise terms the duties Nigeria owed to Zhongshan, including protecting Zhongshan's investments in Nigeria and affording Zhongshan the same treatment it would afford to Nigerian investors. Investment Treaty Arts. 2, 3; *see also id.* Art. 5 (providing that signatory states must compensate investors for certain kinds of losses); *id.* Art. 6 (requiring signatory states to ensure that investors can transfer their investments and returns).

Third, the Investment Treaty provides that the signatory states will arbitrate any disputes "connect[ed] with an investment" in the signatory states and

specifies the governing law that the tribunal shall apply. Investment Treaty Art. 9(1), (3), (7).

To be sure, the direct agreement was between China and Nigeria, not Nigeria and Zhongshan. But the Investment Treaty, on its face, committed to protect foreign investors and to treat them fairly. In that way, Nigeria assumed legally enforceable duties to Chinese investors, including Zhongshan.

More specifically, "a treaty is a contract," albeit one entered into between nations. *BG Group PLC v. Republic of Argentina*, 572 U.S. 25, 37 (2014); *Stileks*, 985 F.3d at 879 (quoting *BG Group*, 572 U.S. at 37). As relevant here, contract law has long permitted parties to contract for the benefit of a third party. Such "[a] promise in a contract creates a duty in the promisor to any intended beneficiary to perform the promise, and the intended beneficiary may enforce the duty." *See* RESTATEMENT (SECOND) OF CONTRACTS § 304 (AM. L. INST. 1981).

For that reason, the Supreme Court has "analyzed a similar bilateral investment treaty as if it were a contract between the sovereign and the investor corporation seeking to confirm an arbitral award." *Chevron Corp. v. Ecuador*, 795 F.3d 200, 207 (D.C. Cir. 2015) (citing *BG Group*, 572 U.S. at 33–34).

So too for the Investment Treaty. China and Nigeria negotiated a treaty that was intended to confer specified benefits upon investors. The Investment Treaty expressly guarantees Chinese investors protection of their investments and fair and equal treatment. Investment Treaty Arts. 2–4. Underscoring the point, the duties owed to investors are distinct from those owed to the signatory states. That is evidenced by the fact that the Investment Treaty provides two distinct

dispute-resolution mechanisms: one for investor-state arbitrations, found in Article 9, and one for arbitrations between the signatory states, found in Article 8. If the Investment Treaty did not create rights in third-party investors, there would be no point to the distinct investor-state arbitration provision. Accordingly, as an investor, Zhongshan is an intended beneficiary of the Investment Treaty. Nigeria therefore owes Zhongshan a duty to perform Nigeria's promises, and Zhongshan has the right to enforce those promises through arbitration.

2

As for the second component of the commercial reservation, the legal relationship the Investment Treaty created between Zhongshan and Nigeria is commercial in nature. The relationship exists because Zhongshan made a commercial investment, in a free-trade zone designed to facilitate commerce, under a bilateral treaty aimed at promoting commercial investment and protecting commercial investors.

The Federal Arbitration Act and circuit precedent corroborate that straightforward reading of the Investment Treaty's character. Under the Federal Arbitration Act, the New York Convention applies to an arbitral award only if the award "aris[es] out of a legal relationship, whether contractual or not, which is considered as commercial[.]" 9 U.S.C. § 202.

The requirement that the relationship be considered commercial has a broad scope. A relationship "may be commercial even though it does not arise out of or relate to a contract, so long as it has a connection with commerce[.]" *Belize Soc. Dev.*, 794 F.3d at 104 (quoting RESTATEMENT (THIRD) OF THE U.S. LAW OF INT'L COMM. & INV.–STATE ARBITRATION § 1.1 cmt. e (AM. L. INST.

2012)). That reading of "considered as commercial" maps onto the phrase's "established meaning as a term of art * * * [i]n the field of international arbitration[.]" *Diag Human*, 824 F.3d at 136.

Zhongshan and Nigeria's relationship has at least five commercial features.

First, Zhongshan's investment in a money-making enterprise is itself commercial.

Second, Zhongshan invested in a free-trade zone intended to promote commercial activity.

Third, Nigeria relaxed tariffs in the free-trade zone. Its decision to "forgo[] charging" those "duties" is connected to commerce. *Belize Soc. Dev.*, 794 F.3d at 104.

Fourth, Nigeria collected hundreds of thousands of dollars in tax revenue from Zhongshan's investment. *See* J.A. 60. "The[se] taxes * * * also have a connection with commerce[.]" *Belize Soc. Dev.*, 794 F.3d at 104.

Fifth, the Investment Treaty, under which Nigeria owed duties to Zhongshan, is expressly designed to promote commerce. By its own terms, the treaty is meant to "stimulat[e] business initiative of the investors and * * * increase prosperity in both States[.]" Investment Treaty preamble. In that same vein, the treaty ensures that investors can profit off their investments by guaranteeing them the ability to transfer "returns" on investments—including "profits, dividends, interests and other legitimate income" of a commercial character—back to their home countries. *Id.* Art. 6.

Nigeria does not dispute that the above connections to commerce exist. Instead, Nigeria argues that the commercial reservation limits the New York Convention to arbitral awards arising from direct transactions between a signatory state and a private party. *See*

Nigeria Opening Br. 44–47. Nigeria relies principally on the Federal Arbitration Act's requirement that the parties' relationship be "considered as commercial, including a transaction, contract, or agreement described in section 2 of this title[.]" 9 U.S.C. § 202. Section 2 of the Federal Arbitration Act, in turn, provides that "[a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce" providing for arbitration "shall be valid, irrevocable, and enforceable[.]" 9 U.S.C. § 2; *see AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 344 (2011). Nigeria argues that, since Section 2 requires a "maritime transaction or a contract evidencing a transaction," and the commercial reservation cross-references Section 2, then the commercial reservation must also require a transaction. Because the Investment Treaty itself is not a commercial transaction, and Zhongshan did not directly transact with Nigeria itself, Nigeria argues that the relationship between Zhongshan and Nigeria is not considered as commercial for purposes of the commercial reservation.

Nigeria's proposed reading would artificially and extra-textually confine the commercial reservation to the scope of Section 2 of the Federal Arbitration Act. Specifically, Nigeria would replace the commercial reservation's use of the word "including" with the words "limited to," so that the reservation would read: "An * * * arbitral award arising out of a legal relationship * * * which is considered as commercial, *limited to* a transaction, contract, or agreement described in section 2 of this title, falls under the Convention." *See* 9 U.S.C. § 202.

But that is not what Congress wrote. Because "the use of the word 'includes' indicates that [a statute's] list * * * is non-exhaustive[,]" Congress intended for

the commercial reservation to be broader than Section 2's reference to transactions. *United States v. Philip Morris USA, Inc.*, 566 F.3d 1095, 1115 (D.C. Cir. 2009).

Nigeria's argument also overlooks that Congress used the phrase "considered as commercial," not "considered as transactional." "When a statute uses a term of art" like the word "commercial[,]" "Congress intended it to have its established meaning." *Belize Soc. Dev.*, 794 F.3d at 103 (formatting modified). In the international arbitration context, the established meaning of "commercial" is anything that "has a connection with commerce," whether transactional or not. *Id.* at 104 (quoting RESTATEMENT (THIRD) OF THE U.S. LAW OF INT'L COMM. & INV.–STATE ARBITRATION § 1.1 cmt. e). For that reason, we have held that the commercial reservation is not confined to "state commercial and private acts[.]" *Id.* at 105 (quotation marks omitted). It instead has a "broad compass" and reaches anything with a connection to commerce. *Id.* at 104–105.

Without a foothold in the statutory text or this court's precedent, Nigeria argues that "considered as commercial" must be narrow because otherwise it would have little work to do, given that "[t]he vast majority of treaties are connected to commerce in one way or another." Nigeria Opening Br. 50– 51. According to Nigeria, holding that the Investment Treaty is a commercial relationship covered by the Convention would mean that, "in all those treaties among sovereign nations that involve economic topics, the dispute resolution processes would lead to Convention enforcement." Nigeria Opening Br. 51.

Nigeria is mistaken for three reasons.

First, nothing in this opinion suggests that the Investment Treaty is itself a commercial relationship. Instead, the Investment Treaty created a relationship between Nigeria and the commercial investor Zhongshan to promote commercial development. It is that relationship between Nigeria and Zhongshan that is considered as commercial.

Second, not every treaty contains an agreement to arbitrate. Without a valid arbitration agreement, the FSIA's arbitration exception does not apply. *See Stileks*, 985 F.3d at 877. Countries that do not wish to arbitrate or to be subject to enforcement proceedings in foreign courts do not have to extend to commercial investors a standing offer to arbitrate like Nigeria did.

Third, not every treaty confers enforceable rights upon third parties. *See, e.g.*, *Bond v. United States*, 572 U.S. 844, 850–851 (2014) (The Convention on Chemical Weapons "creates obligations only for State Parties" to ban chemical weapons.). Treaties that do not confer such rights will not create relationships between third parties and foreign sovereigns like the one that Zhongshan had with Nigeria.

Our holding in this case therefore does not, as Nigeria worries, reach "all those treaties among sovereign nations that involve economic topics[.]" Nigeria Opening Br. 51. Rather, our holding is limited to cases involving a treaty that (1) is connected with commerce; (2) confers third-party rights upon commercial investors; and (3) makes a standing offer to those commercial investors to arbitrate disputes involving their third-party rights. In those cases, the treaty creates a legal relationship between the parties that is commercial in nature, and an arbitral award arising from that relationship satisfies the commercial reservation.

B

The remaining requirement for the New York Convention to apply in this case—that the Final Award arise from a dispute between "persons"—is also met. *See* New York Convention Art. I(1). Under the Convention, the term "persons" includes a foreign state that has entered into a bilateral investment treaty under which it assumes treaty obligations owed to third parties that are connected to commerce.

Extensive precedent, from this court and others, has long enforced under the New York Convention arbitral awards involving foreign states charged with breaching investment and commercial treaty obligations. *See, e.g.*, *Tatneft v. Ukraine*, 21 F.4th 829, 832–834 (D.C. Cir. 2021) (affirming confirmation of arbitral award in favor of third-party investor arising from Ukraine's breach of bilateral investment treaty with Russia); *Stileks*, 985 F.3d at 874–876 (affirming confirmation of arbitral award in favor of third-party energy provider arising from Moldova's breach of multilateral treaty); *Chevron Corp.*, 795 F.3d at 202–203 (affirming confirmation of arbitral award in favor of third-party investor arising from Ecuador's breach of bilateral investment treaty with the United States); *Olin Holdings Ltd. v. State of Libya*, 73 F.4th 92, 96–101 (2d Cir. 2023) (affirming confirmation of arbitral award in favor of third-party investor based on Libya's breaches of bilateral investment treaty with the Republic of Cyprus); *Schneider v. Kingdom of Thailand*, 688 F.3d 68, 70–71 (2d Cir. 2012) (affirming confirmation of arbitral award in favor of third-party investor based on Thailand's breaches of bilateral investment treaty with Germany); *cf. BG Group*, 572 U.S. at 28–31 (involving arbitral award in favor of third-party

investor arising from Argentina's breach of bilateral investment treaty with the United Kingdom).

In each of those cases, enforcement was possible only if the breaching state was a "person" for purposes of the Convention. So too here. Nigeria, like the foreign states in each of those cases, signed a treaty and assumed obligations to private, third-party beneficiaries that are connected to commerce. And Nigeria, just like those foreign states, is a "person" under the Convention.

Nigeria argues that the Final Award does not fall within the scope of the New York Convention because "[a] sovereign is a 'person' for Convention purposes only when it engages in private activity." Nigeria Opening Br. 21. Claiming that it "acted solely as a sovereign with respect to Zhongshan[,]" Nigeria Opening Br. 30, Nigeria argues that the Final Award is not enforceable under the New York Convention.

Nigeria's proposed private-act limitation is without basis in the New York Convention's text or precedent, and it contradicts the position of the Executive Branch.

First, the Convention affords no textual footing for including foreign states as "persons" only when acting in a purportedly "private" capacity. The "interpretation of a treaty is like the interpretation of a statute," and so we "first look to the treaty's text." *Rodriguez v. Pan American Health Org.*, 29 F.4th 706, 717 (D.C. Cir. 2022) (formatting modified). Here, the plain text of the New York Convention leaves no room for a private-act limitation. Article I provides broadly that the Convention applies to all arbitral awards "arising out of differences between persons[.]" New York Convention Art. I(1). There is no dispute that the term "persons" includes foreign states, at least when they are acting

in a commercial capacity. *See Report of the Comm. on the Enf't of Int'l Arbitral Awards* ¶ 24, U.N. Doc. E/AC.42/4 (Mar. 21, 1955) ("1955 Report"); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S., Part II Introductory Note (AM. L. INST. 1987) ("The principal persons under international law are states."). And that commercial-activity limitation is expressly provided for in the Convention itself. New York Convention Art. I(3). That commercial reservation accomplishes much of what Nigeria's proposed "private-versus-public" distinction would but, unlike Nigeria's atextual distinction, it does so explicitly.

So Nigeria's position must be that, although the word "persons" encompasses foreign states, it does so only when those states act in a private capacity. Yet nothing in the Convention's text provides for such a bespoke limitation on signatory states' coverage.

The same is true for the Federal Arbitration Act. Section 202 of the Act provides: "An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, * * * falls under the Convention." 9 U.S.C. § 202. Apart from the requirement that the legal relationship be commercial, that provision does not place any additional private-act precondition on the enforcement of an arbitral award against a foreign state.

Nigeria, for its part, has identified no international-law basis for reading its additional private-act qualification into the Convention's text, nor has it pointed to any other signatory state that has asserted that cramped understanding of "persons" in the 66 years since the Convention's ratification. The dissenting opinion, meanwhile, offers dictionary definitions that cut against reading the word "persons" to encompass

sovereigns *at all*. *See infra* at 7. But unwilling to bite that bullet, the dissenting opinion instead urges a non-dictionary reading of "persons" to mean "sovereigns sometimes, depending on how exactly the sovereign is behaving." Absent any explicit textual indication, we hesitate to read such a partially-in and occasionally-out definition into the Convention's single use of the word "persons."

The dissenting opinion asserts that reading the Convention as-written would mean that foreign states "have *no* immunity" for their sovereign acts. *See infra* at 11. Not at all. What the dissenting opinion overlooks is that one essential attribute of sovereign immunity is foreign states' ability voluntarily to consent to a suit or proceeding. *See Franchise Tax Bd. of Calif. v. Hyatt*, 587 U.S. 230, 237–241 (2019) (describing founding-era principles of international law under which states could be sued only with their consent); *see also* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 70 (AM. L. INST. 1965). The Convention applies to the enforcement only of arbitral awards resulting from arbitral proceedings in which the parties have voluntarily contracted to resolve a dispute through arbitration. *See* New York Convention Arts. II, IV(1)(b), V(1)(a).

Consistent with that long-established principle of foreign states' ability to consent to suits, the FSIA's arbitration exception requires that there have been an agreement by the foreign state to arbitrate and a final arbitral award. *Stileks*, 985 F.3d at 877. When those conditions are met, as they are here, then it is the FSIA's arbitration exception—not the Convention—that strips states of their immunity.

Nigeria did not have to agree to arbitrate with investors like Zhongshan. That was its decision to

make. Had it not so agreed, it would be immune to this lawsuit. But Nigeria signed a treaty that expressly obligated it to arbitrate disputes with Chinese investors and arbitrated this dispute with Zhongshan. Nigeria also committed itself via the New York Convention to the enforcement of arbitral awards. While the Convention covers an arbitral award regardless of whether the parties have acceded to the Convention, *see infra* at 13–14, accession to the Convention in part determines whether a state has consented to an award's enforcement in foreign courts. *See Creighton Ltd. v. Government of State of Qatar*, 181 F.3d 118, 123 (D.C. Cir. 1999) (holding that Qatar had not waived its sovereign immunity because it had not signed the New York Convention). Because Nigeria has twice consented to the enforcement of this award, our reading of the New York Convention is consistent with long-established principles of sovereign immunity.[4]

The dissenting opinion also reasons that our reading of the Convention would undercut "[b]ackground principles of espousal[.]" *See infra* at 12. That is incorrect. Espousal requirements generally prohibit private parties from asserting claims arising under international law directly against foreign states (rather than petitioning their own governments to raise the claims state-to-state). *See* RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE U.S., § 174 cmt. b. But that prohibition does not apply where an international agreement expressly provides a mechanism for the resolution of disputes between a government and foreign nationals, or where a government *agrees* to resolve a dispute directly with a private party. *Simon v. Republic of Hungary*, 77 F.4th 1077, 1097 (D.C. Cir.

[4] We do not address whether the district court had jurisdiction under the FSIA's waiver exception.

2023) (citing RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE U.S., § 175); *see also infra* at 12 (Espousal requirements do not apply "where the sovereign itself ha[s] agreed to engage directly with the aggrieved individual.").

This case fits within both of those exceptions. Nigeria signed an investment treaty with China that expressly provided for either state's nationals to directly arbitrate against the other state. And Nigeria stood by that promise by arbitrating with Zhongshan. Enforcing the Final Award is therefore entirely consistent with espousal requirements.

Second, circuit precedent corroborates our straightforward reading of the Convention, as this court has found the New York Convention to be fully applicable to arbitral awards arising from sovereign acts. In *Tatneft v. Ukraine*, 21 F.4th 829 (D.C. Cir. 2021), we affirmed under the New York Convention the confirmation of an arbitral award in favor of a third-party investor arising from Ukraine's breach of a bilateral investment treaty with Russia, *id.* at 832–834. Ukraine's breaching conduct went far beyond any private conduct and involved core sovereign activity. The Russian company that initiated arbitration alleged that "Ukrainian courts, prosecutors, and court officials" had improperly facilitated a Ukrainian conglomerate's acquisition of the Russian company's shares in another company. *Tatneft v. Ukraine*, 301 F. Supp. 3d 175, 193 (D.D.C. 2018) (quotation marks omitted); *see Tatneft*, 21 F.4th at 832–833. Similarly, in *Chevron Corp. v. Ecuador*, 795 F.3d 200 (D.C. Cir. 2015), we confirmed an arbitral award against Ecuador for purely sovereign conduct—violating a bilateral investment treaty by "failing to resolve" lawsuits pending in Ecuadorian courts. *Id.* at 202–203; *cf. BG Group*, 572 U.S. at 28–31

(theory of arbitral award was not based on private conduct, but instead on finding that Argentina had enacted laws that denied company fair and equitable treatment as required by an investment treaty); *Olin Holdings*, 73 F.4th at 96–100 (arbitration award based in part on Libya's expropriation of factory).

Nigeria's breaching conduct in this case—including its expropriation of Zhongshan's investments—is no less sovereign than Ukraine's conduct in *Tatneft*, or Ecuador's conduct in *Chevron*. Those cases demonstrate that, contrary to the dissenting opinion's view, enforcing the Final Award would not mark a departure from settled norms or expectations. If anything, declining to enforce the Final Award would be a sharp break from past decisions. Notably, Nigeria makes no argument that those prior cases were wrongly decided even though the breaching conduct at issue involved sovereign, not private, acts.

Third, the United States government has agreed that the New York Convention governs the enforcement of an arbitral award even when the breaching conduct arises out of a foreign state's sovereign, rather than private, activities. In *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya*, 684 F.2d 1032 (D.C. Cir. 1981) (table), this court vacated without opinion a district court decision declining to enforce an arbitral award rendered against Libya. *See Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahirya*, 482 F. Supp. 1175, 1179 (D.D.C. 1980). The subject arbitration award had been rendered in favor of the Libyan American Oil Company under an arbitration clause contained in agreements into which the company had entered with Libya in 1955. *Id.* at 1176. Nearly two decades later, Libya nationalized the company's rights under the agreements, along with

some of the company's oil-drilling equipment. *Id.* When negotiations for compensation faltered, the oil company rejected the terms of the nationalization and initiated arbitration proceedings, ultimately securing an arbitration award in its favor. *Id.*

In an amicus brief submitted to this court in *Libyan American Oil*, the United States argued that Libya's Convention-related "objections to enforcement [could] be briefly dismissed." Brief for the United States as Amicus Curiae at 20 n.16, *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, Nos. 80-1207, 80-1252 (D.C. Cir. June 16, 1980). The United States explained that the fact that a party seeks to enforce an arbitral award against a "sovereign state rather than a private party does not affect the enforceability of an award * * * under the New York Convention." *Id*. The government explained that the "negotiating history of the Convention clearly reflects the interpretation that states are legal persons for the purposes of the Convention." *Id.*

In so arguing, the United States endorsed enforcement of the arbitral award against Libya as a covered "person" under the Convention even though Libya's breaching conduct involved sovereign acts committed within its own territory. *See* Brief for the United States as Amicus Curiae at 4, 6–8, *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, Nos. 80-1207, 80-1252 (D.C. Cir. June 16, 1980). The United States also perceived no separation-of-powers concerns with enforcement because enforcement "solely concern[ed] Libya's undertaking to submit disputes under freely negotiated concession contracts to final and binding arbitration outside of its territory, and to honor any ensuing awards." *Id*. at 7. In giving effect to such awards, the United States explained, courts simply

"enforce a judgment to which the foreign state has consented in advance," consistent with longstanding principles allowing litigation in which the sovereign has agreed to participate. *Id*. at 8. That "element of consent, coupled with the neutrality of the arbitral tribunal, removes any concern that domestic courts might venture into the political arena, or hinder the United States' pursuit of foreign policy goals." *Id.*

Given the Executive Branch's constitutional expertise in matters of foreign affairs and diplomacy, we afford the United States' interpretation of the Convention "great weight." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 355 (2006) (quotation marks omitted); *see id.* ("[W]hile courts interpret treaties for themselves, the meaning given them by the departments of government particularly charged with their negotiation and enforcement is given great weight.") (quotation marks omitted).

Fourth, subsequent treaties involving foreign states signatory to the New York Convention have treated the New York Convention as encompassing arbitral awards arising from sovereign acts. For example, the Energy Charter Treaty, *opened for signature* Dec. 17, 1994, 2080 U.N.T.S. 95, is a multilateral treaty that establishes a framework to "promote long-term cooperation in the energy field," Energy Charter Treaty Art. 2. The Energy Charter Treaty includes an arbitration provision for disputes "between a Contracting Party and an Investor of another Contracting Party relating to an Investment of the latter in the Area of the former[.]" *Id.* Art. 26(1); *see id.* Art. 26(2)–(8). The treaty further provides that claims submitted to arbitration under the treaty "shall be considered to arise out of a commercial relationship or transaction for the purposes of article I of th[e New York]

Convention." *Id.* Art. 26(5)(b). While certain disputes between a contracting state and an investor could involve foreign states' private acts, *see, e.g.*, *id.* Art. 10(1) ("Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party."), other covered disputes explicitly involve foreign states acting in their sovereign capacity, *see, e.g.*, *id.* Art. 13(1) (prohibiting signatory states from engaging in certain forms of expropriation and nationalization).

That over 50 of the state signatories to the New York Convention entered a treaty that contemplates that arbitral awards fall within the New York Convention even when they plainly arise from a state's sovereign acts underscores that the Convention does not impose a private-act precondition on a foreign state qualifying as a covered "person." Even if the Energy Charter Treaty did not amend the New York Convention, *see infra* at 25, it evidences "[t]he postratification understanding of other contracting states" that "may * * * serve as an aid to our interpretation of a treaty's meaning[.]" *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. 432, 442 (2020) (quotation marks omitted); *see also* Zhongshan Br. 28 & n.9 (noting that 51 of 53 states signatory to the Energy Charter Treaty are also parties to the New York Convention).

Nigeria's arguments in support of its position that foreign states are "persons" under the New York Convention only when they act in their private capacity do not hold up.

To start, Nigeria contends that, "[a] mere eight years after the Convention, many countries adopted the International Centre for Settlement of Investment

Disputes Convention [("ICSID")] specifically for investor-state disputes." Nigeria Reply Br. 8. Nigeria argues that "[f]or so many Convention signatories to develop a new and different treaty on this point suggests investor-state disputes were not generally subject to the Convention—which would have made the new treaty unnecessary." Nigeria Reply Br. 8–9.

Not so. ICSID promotes international investment by establishing a *dispute-resolution process* for investor-state disputes. *See Valores Mundiales, S.L. v. Bolivarian Republic of Venezuela*, 87 F.4th 510, 513 (D.C. Cir. 2023). The New York Convention, on the other hand, provides for the recognition and enforcement of a broad array of foreign arbitral awards. The two agreements accordingly serve distinct functions in the arbitration of investment disputes. In any event, any supposed redundancy between the Convention and ICSID would persist even under Nigeria's reading: Nigeria agrees that the New York Convention applies to awards arising out of foreign states' private acts, Nigeria Opening Br. 21, even though the ICSID itself covers such awards.

Nigeria also argues that the drafting history (*travaux préparatoires*) of the New York Convention shows that the countries developing the Convention intended the treaty to "appl[y] to government bodies only to the extent they are engaged in the private sphere." Nigeria Opening Br. 22; *see* Nigeria Opening Br. 22–25.

That is incorrect. The "clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories." *Rodriguez*, 29 F.4th at 718 (quotation marks omitted); *cf. Air France v. Saks*, 470 U.S. 392, 399 (1985) ("[I]t is our responsibility to give the specific

words of the treaty a meaning consistent with the shared expectations of the contracting parties."). Here, nothing in the text of the New York Convention even hints at the private-act prerequisite that Nigeria proposes.

In addition, the handful of quotes from a 1955 Report of the Committee on the Enforcement of International Arbitral Awards on which Nigeria bases its *travaux préparatoires* argument does not suggest that the signatories intended that arbitral awards against states be covered only when those awards arise from private state acts.

Nigeria first notes that the 1955 report explained that the New York Convention would "go[] further than the Geneva Convention in facilitating the enforcement of foreign arbitral awards, [while] at the same time * * * respect[ing] the sovereign rights of States." 1955 Report ¶ 14; *see* Nigeria Opening Br. 23. But that broad reference to sovereign "rights" is too general to import a drastic and categorical limitation on enforcement whenever the breaching conduct underlying an arbitral award is sovereign action. After all, the Convention already protects sovereign rights in multiple respects, including by allowing for commercial reservations. In addition, as the United States has explained, sovereign rights are safeguarded where, as here, a sovereign voluntarily joins the New York Convention and then freely consents to arbitrate with third parties, and any subsequent arbitration proceeds before a neutral arbitral tribunal. *See* Brief for the United States as Amicus Curiae at 7–8, *Libyan American Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, Nos. 80-1207, 80-1252 (D.C. Cir. June 16, 1980).

Nigeria next points to language in the 1955 report stating that the New York Convention "does not deal

with arbitration between States[.]" 1955 Report ¶ 17; *see* Nigeria Opening Br. 23. From that, Nigeria reasons that "[i]f sovereign governments were 'persons' for all purposes under the Convention, an arbitration between States would be a dispute between 'persons,' so this statement * * * would have been contrary to the committee's own drafting work." Nigeria Opening Br. 23–24.

Nigeria's argument, however, omits relevant context. The relevant paragraph reads in full:

> The Committee considered that the expression "International Arbitral Awards" used by the International Chamber of Commerce (E/C.2/373) normally referred to arbitration between States. Since this Draft Convention does not deal with arbitration between States, but deals with the recognition and enforcement in one country of arbitral awards made in another country, the Committee adopted the title "Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards" which reflects more accurately the object of the Convention.

1955 Report ¶ 17.

When read in full, then, the language that Nigeria references is indeterminate. It is not clear whether the New York Convention's drafters were explaining that the Convention is not focused on arbitrations between states or were noting that the Convention specifically excludes such arbitrations. We do not resolve that ambiguity here, for there are at least two things that may distinguish arbitration between states and this arbitration between Nigeria and Zhongshan.

For one, as the dissenting opinion points out, there is other evidence from the drafting history suggesting that the Convention does not apply to disputes between states over violations of international law. *See infra* at 14–17.

For another, disputes between states are ordinarily governed by public international law, while disputes between states and individuals are not. *See Federal Republic of Germany v. Philipp*, 592 U.S. 169, 176 (2021); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE U.S. § 487 cmt. f; *id.* § 904 cmt. a. To that point, the arbitration between Nigeria and Zhongshan was governed by "the law of Nigeria as supplemented by international law as provided by article 9.7" of the Investment Treaty. J.A. 40; *see* J.A. 60 (finding Nigeria liable because "there were no domestic law grounds" for Nigeria's actions against Zhongshan); Investment Treaty Art. 9(7) ("The tribunal shall adjudicate in accordance with the law of the Contracting Party to the dispute * * * as well as the generally recognized principles of international law[.]"); *see also id.* Art. 4(1)(b) (prohibiting expropriation by Nigeria and China without "domestic legal procedure"). Nothing in the *travaux préparatoires* bars enforcement of arbitral awards resulting from state–private disputes that are governed in material part by domestic law.

So regardless of whether a dispute between two sovereign states governed purely by public international law falls under the New York Convention, for our purposes, it is sufficient that nothing in the Convention's drafting history establishes that the Convention is categorically inapplicable to an arbitration that implicates a single state's sovereign activity directed at a non-state entity and that is governed, in part or in whole, by domestic law.

Nigeria next points to part of the 1955 report that, in Nigeria's view, "specifically explained what the 'differences between persons' clause means, with respect to governmental bodies." Nigeria Opening Br. 24. In particular, Nigeria notes that Belgium had "proposed that the clause 'should expressly provide that public enterprises and public utilities should be deemed to be legal persons for purposes of this article if their activities were governed by private law.'" Nigeria Opening Br. 24 (quoting 1955 Report ¶ 24). Nigeria then notes that "[t]he Committee was of the opinion that such a provision would be superfluous and that a reference in the [1955 Report] would suffice." Nigeria Opening Br. 24 (quoting 1955 Report ¶ 24). In Nigeria's view, this "'reference' * * * makes clear that governmental bodies can be legal persons but only to the extent they are operating in the private sphere[.]" Nigeria Opening Br. 24.

But Nigeria overlooks other statements in the *travaux préparatoires* that contradict its proposed reading. For example, a 1956 report by the Secretary General about an early draft of the Convention contained the following statement from Austria:

> Since the term 'legal persons' includes States, the draft convention seems admittedly to cover arbitral wards [*sic*] made in their favour or against them in cases of disputes with subjects of private law. Nevertheless, it would be desirable to provide expressly that the convention is also applicable in cases in which corporate bodies under public law, and particularly States, in their capacity as entities having rights and duties under private law, have entered into an arbitration convention for the purpose of the settlement of disputes.

*Report by the Secretary-General on the Recognition and Enforcement of Foreign Arbitral Awards*, at Annex I, 11, U.N. Doc. E/2822 (Jan. 31, 1956).

Viewed from Austria's perspective, the Final Award qualifies for enforcement. Nigeria has "entered into an arbitration convention for the purpose of the settlement of disputes" with private, third-party beneficiaries. *Report by the Secretary-General on the Recognition and Enforcement of Foreign Arbitral Awards*, at Annex I, 11. An arbitral proceeding under that convention resulted in an arbitral award arising from Nigeria's dispute with Zhongshan, a "subject[] of private law." *Id.* Austria's commentary thus refutes Nigeria's claim that the New York Convention excludes arbitral awards arising under arbitration conventions simply because "[a] treaty is obviously a sovereign, not a commercial, act." Nigeria Opening Br. 32; *see* Nigeria Opening Br. 32–33. And nothing in Austria's comment suggests that such awards fall outside of the Convention when the breaching conduct on which they are based is sovereign in nature.[5]

The same 1956 Secretary General report also contains the following statement from the Society of Comparative Legislation:

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[5] The dissenting opinion notes that Austria was not part of the drafting committee that first drafted the New York Convention. *Infra* at 17. But Austria was a member of the committee that drafted the *final* version of the Convention. *See Final Act and Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, at 3, U.N. Doc. E/CONF.26/8/Rev.1 (1958). Indeed, the dissenting opinion cites to materials from the committee of which Austria was a member. *See, e.g.*, *infra* at 17 (citing *Summary Record of the Sixteenth Meeting*, at 5, U.N. Doc. E/CONF.26/SR.16 (June 3, 1958)).

> The following words should be added after the words 'persons whether physical or legal' at the end of paragraph 1: 'this expression to include States, public bodies and undertakings (collectivités publiques), public establishments and establishments serving the public interest, on the condition that the said differences arose out of a commercial contract or a private business operation (acte de gestion privée).'

*Id.* at Annex II, 9; *see id.* at Annex II, 10. This commentary appears to express the broad view that the Convention encompasses arbitral awards involving foreign states so long as those awards are based on disputes arising out of private business operations. It does not, on its face, require that the state itself entered into a commercial contract. And, like the commentary from Austria, it does not require that the breaching conduct be non-sovereign in nature. As such, under the Society of Comparative Legislation's view, the New York Convention would encompass the award at issue here, which involved a dispute related to Zhongshan's private business operations.[6]

In short, contrary to Nigeria's claim, the Convention's drafters did not "plainly" state an "intent[]" to carve sovereign-act breaches against a private entity out of the New York Convention's scope and to categorically constrict the Convention's coverage to private acts. Nigeria Opening Br. 25. The "[c]herry-picked generalizations from the negotiating and drafting history" that Nigeria cites "cannot be used to create a rule that

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[6] Nigeria's other drafting-history arguments—some of which are raised for the first time only in its reply brief, *see, e.g.*, Nigeria Reply Br. 13–16—fail for similar reasons. Each of the passages to which Nigeria points is subject to multiple interpretations, and none announces a categorical private-act limitation.

finds no support in the treaty's text." *GE Energy Power Conversion France SAS*, 590 U.S. at 442 (formatting modified). In the absence of a contrary consensus, the New York Convention's uncabined text controls. *See Rodriguez*, 29 F.4th at 718 ("[T]he clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.") (quotation marks omitted).

Lastly, Nigeria's reliance on non–New York Convention case law does not help its cause. Nigeria marches through a series of cases in which federal courts have interpreted the term "persons" to exclude states acting in their sovereign capacity. *See, e.g.*, Nigeria Opening Br. 21–22, 25–26 (discussing False Claims Act and Sherman Act cases). But the meaning of the term in *domestic* statutes does not provide insight into the "shared expectations" of contracting states regarding the meaning of a term in an *international* treaty. *Air France*, 470 U.S. at 399. Moreover, any domestic-law presumption against treating states as persons fades when a state consents to a suit, like Nigeria did when it consented to arbitration after having already joined the New York Convention. *Cf. Alden v. Maine*, 527 U.S. 706, 755 (1999) (State "sovereign immunity bars suits only in the absence of consent.").

Nigeria's act-of-state-doctrine cases are particularly inapposite. Under the act-of-state doctrine, "the courts of one state will not question the validity of public acts (acts *jure imperii*) performed by other sovereigns within their own borders, even when such courts have jurisdiction over a controversy in which one of the litigants has standing to challenge those acts." *Altmann*, 541 U.S. at 700. Cases invoking that doctrine are of no relevance in a suit to enforce an arbitral

award under the New York Convention because the Federal Arbitration Act specifically provides that "[e]nforcement of arbitral agreements * * * shall not be refused on the basis of the Act of State doctrine." 9 U.S.C. § 15. Although the relevant provision of the Act is not located in the chapter implementing the New York Convention, it applies to actions brought under the Convention unless it is "in conflict" with the Convention as ratified. *Id.* § 208. No such conflict exists. Moreover, in extending that part of the Federal Arbitration Act to the codification of the New York Convention, the Political Branches further evidenced that arbitral awards against foreign states for their sovereign acts— their acts of state—would be enforced in United States courts, including in disputes with private parties. *See Altmann*, 541 U.S. at 700; *see also, e.g.*, *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 439 (1964) (holding, in a dispute between a Cuban government instrumentality and a private party, that the act-of-state doctrine barred a challenge to a Cuban expropriation decree); *Underhill v. Hernandez*, 168 U.S. 250, 253–254 (1897) (holding, in a suit by a private citizen against a foreign state's military officer, that the act-of-state doctrine barred a challenge to the state's military operations).

In sum, this court has repeatedly enforced under the New York Convention arbitral awards arising from foreign states' sovereign acts that breach obligations owed to a third-party investor under an investment treaty. Neither the New York Convention nor the Federal Arbitration Act textually imposes a private-act qualification on the scope of "persons" against whom an arbitral award can be enforced. And both the United States government and subsequent treaties have taken the position that the Convention imposes no such limitation. Against those headwinds, Nigeria

and the dissenting opinion offer only vague and indeterminate passages from the Convention's *travaux préparatoires*. Those passages are insufficient to impose a limitation not found in the New York Convention's plain text or this court's history of enforcing arbitral awards under the Convention.

## IV

For the foregoing reasons, we hold that the Final Award is enforceable under the New York Convention because it arose out of differences between "persons" that share a legal, commercial relationship. The district court therefore has jurisdiction over this case under the FSIA's arbitration exception. The judgment of the district court is affirmed.

*So ordered.*

KATSAS, *Circuit Judge*, dissenting: The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, commonly known as the New York Convention, requires signatory countries to enforce foreign arbitral awards arising out of "differences between persons, whether physical or legal." In its typical applications, the New York Convention governs awards arising from disputes between private parties. This case presents the question whether the Convention also governs awards arising from public-law disputes involving the sovereign acts of governments. In my view, the Convention's reference to "persons" does not extend to states acting in their sovereign capacity. Because my colleagues conclude otherwise, I respectfully dissent.

## I

### A

The New York Convention is a multilateral treaty that was adopted in 1958. It requires state parties to recognize and enforce arbitral awards made in other countries and "arising out of differences between persons, whether physical or legal." N.Y. Convention art. I(1). Its "goal" was "to encourage the recognition and enforcement of commercial arbitration agreements in international contracts." *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974). Parties may limit the Convention to disputes "considered as commercial" under their domestic law. N.Y. Convention art. I(3). Parties also may limit the Convention to awards made in the territory of another contracting state. *See id.* In 1970, the United States acceded to the Convention subject to both reservations. *See* An Act to Implement the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Pub. L. 91-368, 84 Stat. 692 (July 31, 1970).

Before 1976, federal courts deferred to executive-branch determinations of foreign sovereign immunity. *See Ex parte Republic of Peru*, 318 U.S. 578, 589 (1943). Although foreign sovereigns could raise immunity themselves, they often would request the Department of State to file suggestions of immunity. Restatement (Second) of the Foreign Relations Law of the United States § 71(1)–(2) & cmt. a (Am. L. Inst. 1965) (Second Restatement). In the absence of any such suggestion, courts decided whether immunity applied in light of previous executive-branch determinations. *See Republic of Mexico v. Hoffman*, 324 U.S. 30, 34–35 (1945). Making these determinations taxed the State Department, and courts struggled in cases where it was not involved. *See* Restatement (Third) of the Foreign Relations Law of the Unites States Part IV.5.A intro. note (Am. L. Inst. 1987) (Third Restatement).

In 1976, Congress enacted the Foreign Sovereign Immunities Act (FSIA), Pub. L. No. 94-583, 90 Stat. 2891, which requires courts to determine immunity under uniform standards. *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 272 (2023). The FSIA provides that "a foreign state shall be immune from the jurisdiction of the courts of the United States," subject to specific exceptions. 28 U.S.C. § 1604. One of the exceptions addresses arbitral awards. As relevant here, it withdraws immunity in actions brought to confirm awards made under arbitration agreements if "the agreement or award is or may be governed by a treaty ... in force for the United States calling for the recognition and enforcement of arbitral awards." *Id.* § 1605(a)(6). All agree that the New York Convention is such a treaty. So, if the Convention applies to an arbitral award, then the FSIA abrogates sovereign immunity in an action to recognize and enforce the award.

B

This case arises out of a 2001 bilateral investment treaty (BIT) between the Federal Republic of Nigeria and the People's Republic of China. Each country promised to encourage investments in its territory from investors of the other country. *See* Agreement Between the Government of the People's Republic of China and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments art. 2(1) (2001) (Nigeria-China BIT). Each country also made various promises about how it would treat such investments. As relevant here, Nigeria promised to afford "continuous protection" to investments of Chinese investors, *id.* art. 2(2); to refrain from taking "unreasonable or discriminatory measures" against such investments, *id.* art. 2(3); to afford "fair and equitable treatment" to such investments, *id.* art. 3(1); and to not "expropriate" such investments without fair compensation, *id.* art. 4(1). China made reciprocal promises.

The BIT also provided for the arbitration of two categories of disputes. Article 8 governed disputes between Nigeria and China over the interpretation or application of the BIT. It required such disputes to be settled through diplomatic channels or, if diplomacy failed, through arbitration. Nigeria-China BIT art. 8(1)–(2). Article 9 governed investment disputes between one of the signatories and investors of the other. It required disputes to be settled through negotiations or, if they failed, through domestic courts of the allegedly offending state or through arbitration. *Id.* art. 9(1)–(3). Nigeria and China agreed that any arbitral decision would be "final and binding" and that both countries would "commit themselves to [its] enforcement." *Id.* art. 9(6).

C

Ogun State is a Nigerian state, and Zhongshan Fucheng Industrial Investment Co. Ltd. was a Chinese investor in Nigeria. Through various contracts, Ogun State granted Zhongshan's predecessor-in-interest the right to develop and operate a large industrial park. Zhongshan developed the park.

Ogun State and Zhongshan then had a falling out. Ogun State claimed that Zhongshan had not validly acquired any interest in the project. It warned two Zhongshan executives to leave the country or else face "forceful removal, complications, and possible prosecution." J.A. 34 (cleaned up). It asked Nigeria to collect the immigration papers of Zhongshan employees. And it obtained arrest warrants against two Zhongshan executives. *Id.* at 35. One executive was "arrested at gunpoint, ... deprived initially of food and water, intimidated, physically beaten, and detained for a total of ten days." *Id.* Eventually, both executives fled the country.

Zhongshan sued Ogun State and others in Nigerian courts. The defendants never responded, and the courts dismissed the cases. Zhongshan also sought arbitration with Ogun State in Singapore, but the High Court of Ogun State enjoined it.

Zhongshan then sought arbitration with Nigeria under the BIT. A London tribunal unanimously ruled in Zhongshan's favor and awarded it around $70 million plus interest. The tribunal reasoned that Ogun State's sovereign actions were attributable to Nigeria under international law. J.A. 42–44. It concluded that Zhongshan's previous lawsuits did not preclude arbitration, in part because they had raised contract claims, whereas the arbitration rested solely on the BIT. *Id.* at 46–49. The tribunal then determined that

Nigeria's actions—actual and imputed—violated the BIT. *Id.* at 60–62. An English court recognized the award, but Nigeria refused to pay it.

Zhongshan petitioned the district court to recognize and enforce the award under the New York Convention. To overcome immunity, Zhongshan invoked the arbitration exception to the FSIA. Nigeria moved to dismiss and claimed that the Convention did not govern the award.

The district court denied the motion to dismiss. It held that the Convention covered the award because the BIT gave Zhongshan rights against Nigeria and because the award was connected to Zhongshan's commercial investment. *Zhongshan Fucheng Indus. Inv. Co. v. Federal Republic of Nigeria*, No. 22-170, 2023 WL 417975, *8–9 (D.D.C. Jan. 26, 2023). Nigeria objected that the New York Convention applied to contract claims, but not treaty claims, against sovereigns. Rejecting that argument, the court invoked what it called "the common practice of confirming arbitral awards" based on "a sovereign state's violation of a treaty created under public international law." *Id.* at *7.

## II

When interpreting treaties, "we begin with the text of the treaty and the context in which the written words are used." *Water Splash, Inc. v. Menon*, 581 U.S. 271, 276 (2017) (cleaned up). We are further "guided by principles similar to those governing statutory interpretation." *Collins v. NTSB*, 351 F.3d 1246, 1251 (D.C. Cir. 2003) (cleaned up). And "other general rules of construction may be brought to bear on difficult or ambiguous passages." *E. Airlines, Inc. v. Floyd*, 499 U.S. 530, 535 (1991) (cleaned up). Interpreting an old legal

text requires us to "orient ourselves to the time of ... adoption," here 1958. *Bostock v. Clayton County*, 590 U.S. 644, 655 (2020).

Nigeria argues that the FSIA's immunity exception does not apply because the New York Convention does not govern arbitral awards against sovereigns for the alleged violation of treaties or other public international law. In the arbitration, Zhongshan alleged that Nigeria, either directly or through Ogun State, violated the BIT by denying it protection, discriminating against it, denying it fair and equitable treatment, and expropriating its property without fair compensation. The tribunal concluded that the *public*, treaty-violating actions taken by Ogun State were attributable to Nigeria under international law, and Nigeria does not contest that conclusion here. Ogun State also acted in a commercial capacity with Zhongshan, but the tribunal did not attribute Ogun State's *private* acts to Nigeria. Under international law, those private acts would not be attributable to Nigeria absent either an agency relationship or a need to prevent fraud or injustice. *See First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 622, 628–30 (1983). There is no evidence that either of these exceptions applies here. *See AG Abia v. AG Federation*, (2006) 16 NWLR part 1005, 265 (Nigeria) (state and federal governments in Nigeria are "autonomous" and thus "free from direction" by one another). In any event, Zhongshan bore the burden of establishing a basis for attributing Ogun State's private acts to Nigeria, *see GSS Grp. Ltd. v. Nat'l Port Auth. of Liberia*, 822 F.3d 598, 605 (D.C. Cir. 2016), and it expressly disclaimed this point, *see* Zhongshan Br. at 35 n.10.

Because Ogun State's private acts cannot be attributed to Nigeria, the award arises solely out of

Nigeria's sovereign acts governed by public international law. So the immunity question boils down to whether the New York Convention applies to awards based exclusively on such sovereign acts. That in turn depends on whether the term "persons," as used in the New York Convention, includes governments acting in their sovereign capacity under public law. The common meaning of that term, the legal context in which the Convention was written, and its drafting history all indicate that "persons" does not cover governments acting as sovereigns.

A

When the Convention was drafted, the word "person" did not typically include sovereigns. It always included natural persons, sometimes included juridical persons such as corporations or state-created entities like counties, and did not usually include sovereign states themselves. Black's Law Dictionary explained that, as a general matter, a "county is a person in a legal sense, but *a sovereign is not*." *Person*, Black's Law Dictionary 1300 (4th rev. ed. 1968) (emphasis added) (citation omitted). Webster's Dictionary likewise stated that "person" generally includes "any individual or *incorporated group* having certain legal rights and responsibilities"—a formulation that does not encompass sovereigns. *Person*, Webster's New World Dictionary 1092 (College ed. 1960) (emphasis added). And Congress codified a similar interpretive presumption across all federal statutes. It specified that "unless the context indicates otherwise," the word *person* "include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals." 1 U.S.C. § 1; *see* Act of June 25, 1948, Pub. L. No. 80-772 § 6, 62 Stat. 683, 859. That is a long list

of included entities, from which governments are conspicuously absent.

The Supreme Court confirmed this understanding around the time of the New York Convention. In *United States v. United Mine Workers of America*, 330 U.S. 258 (1947), it explained that "[i]n common usage," the word *persons* "does not include the sovereign," so "statutes employing it will ordinarily not be construed to do so." *Id.* at 275. This linguistic usage had settled long before the Convention was adopted, *see*, *e.g.*, *United States v. Cooper Corp.*, 312 U.S. 600, 603–05 (1941); *United States v. Fox*, 94 U.S. 315, 321 (1877), and it has persisted ever since, *see*, *e.g.*, *Return Mail, Inc. v. USPS*, 587 U.S. 618, 626–27 (2019); *Vermont Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780–81 (2000); *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 64 (1989).[1]

That said, "there is no hard and fast rule" excluding sovereigns from the meaning of "person." *Cooper*, 312 U.S. at 604–05. But the presumption against including sovereigns "may be disregarded only upon some affirmative showing of ... intent to the contrary." *Stevens*, 529 U.S. at 781; *see Cooper*, 312 U.S. at 606. Standing alone, the word "person" in a legal text "applies to natural persons, and also to artificial persons," but it "cannot be so extended as to include within its meaning" a sovereign without "an express definition to that effect." *Fox*, 94 U.S. at 321.

The presumption against including sovereigns is strongest for official acts. When sovereigns act in their

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[1] British usage was similar. A prominent legal dictionary explained that in the legal context, "person" presumptively included corporations but excluded the Crown and other official offices. *Person*, Stroud's Legal Dictionary 1463–65 (2d ed. 1903).

private capacity, context is more likely to indicate that they are included in the word "person." *See Georgia v. Evans*, 316 U.S. 159, 161–62 (1942); *see also California v. United States*, 320 U.S. 577, 585–86 (1944). But for public acts, the presumption against including sovereigns is stronger—especially when the statute at issue imposes burdens as opposed to benefits. *Parker v. Brown*, 317 U.S. 341, 351–52 (1943); *see also Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979); *United States v. Knight*, 39 U.S. (14 Pet.) 301, 315 (1840). So, courts sometimes construe words like "person" to cover sovereigns acting in a proprietary capacity but not in a sovereign capacity. For example, the Supreme Court has held that states are "persons" under the Sherman Act when buying goods, *Evans*, 316 U.S. at 161–62, or when conducting "private anticompetitive behavior" and thus not "acting as sovereign," *Goldfarb v. Va. State Bar*, 421 U.S. 773, 790–92 (1975). In contrast, states are not "persons" under the Sherman Act when acting as regulators, *Parker*, 317 U.S. at 351–52, or otherwise "wielding the State's power," *Bates v. State Bar*, 433 U.S. 350, 360 (1977). Likewise, construing the Robinson-Patman Act, the Court has held that states are "persons" when "competing against private enterprise," but has reserved whether they are "persons" when performing public acts. *Jefferson Cnty. Pharm. Ass'n v. Abbott Lab'ys*, 460 U.S. 150, 153–154 (1983); *see also Will*, 491 U.S. at 64 n.5.

My colleagues brush aside this "series of cases" as involving only "*domestic* statutes" rather than treaties. *Ante* at 35–36. But in interpreting treaties, "general rules of construction may be brought to bear on difficult or ambiguous passages." *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 700 (1988). And here, ordinary English usage is particularly relevant because the Convention was drafted in

English and finalized in New York City. Despite invoking the assertedly "plain text" of the Convention, *ante* at 20, my colleagues offer no affirmative textual argument that it uses "persons" in an unusual way to include governments acting as sovereigns. So while legal and historical context may show that the Convention covers foreign states acting in a private capacity—a point addressed below—text strongly indicates that it does not cover foreign states acting as sovereigns.

B

The legal context in which the Convention was adopted, including background international-law understandings of sovereign immunity and espousal, make it especially implausible that the Convention's use of "persons" sweeps in foreign states acting in their sovereign capacity.

1

In 1958, countries disagreed about how broadly to grant immunity to foreign sovereigns. The traditional theory was that one sovereign should be immune from the domestic courts of another for *all* of its acts—public and private. *See The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812). The United States took this position, extending "virtually absolute immunity to foreign sovereigns," for more than a century and a half. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). But a few countries—including Belgium and Italy—had already rejected it. They believed that a sovereign should be treated as a private party when it acts as a private party, such as when it engages in commercial transactions. Letter from Jack B. Tate, Acting Legal Adviser of the U.S. Dep't of State, to Acting Attorney General Philip B. Perlman (May 19, 1952) (*Tate Letter*), *reprinted in Alfred Dunhill of*

*London, Inc. v. Republic of Cuba*, 425 U.S. 682, 713 (1976); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614–15 (1992). Yet they still granted immunity for governmental acts—those only a sovereign may undertake, such as operating military or police forces. *See Saudi Arabia v. Nelson*, 507 U.S. 349, 360–62 (1993); *Tate Letter*, 425 U.S. at 711. This view is known as the restrictive theory of sovereign immunity. *See Verlinden*, 461 U.S. at 487.

Throughout the 1900s, as sovereigns increasingly became involved in international commerce, more countries adopted the restrictive theory. *See Tate Letter*, 425 U.S. at 711–14. In 1952, the Acting Legal Adviser of the State Department embraced it. *See id.* at 714–15. Even so, the United States continued in some cases to recognize immunity for the private acts of foreign sovereigns. *See* Third Restatement, *supra*, Part IV.5.A intro. note & n.11 (collecting cases). As late as 1965, this immunity question remained unsettled in U.S. courts. *See* Second Restatement, *supra*, § 69 n.1. And Congress did not adopt the restrictive theory until 1976, nearly two decades after the New York Convention. *See Verlinden*, 461 U.S. at 488.

Other countries lagged farther behind. Many still recognized absolute immunity during the 1950s—including Poland and the Soviet Union, original signatories of the Convention. *See Tate Letter*, 425 U.S. at 712, 714. Only decades later did the Council of Europe and the International Law Commission officially embrace the restrictive theory, in 1972 and 1986 respectively. *See* Third Restatement, *supra*, Part IV.5.A. intro. note.

In sum, when the Convention was drafted, there was an ongoing worldwide debate about whether countries should *always* be immune from the domestic courts of other countries or whether they should be immune

only for their *sovereign* acts. Nobody suggested that states should have *no* immunity. And some countries that still embraced the traditional, absolute theory of immunity also signed the Convention. In this legal and historical context, with no clear text or contemporaneous mention of fundamentally altering the scope of foreign sovereign immunity, mere use of the word "persons" cannot be deemed to reach the governmental acts of foreign sovereigns. Just as Congress does not hide elephants in mouseholes, *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001), neither do treaty negotiators. And if the Convention did have the revolutionary effect that Zhongshan claims, then surely *someone*, from among the many nations and individuals negotiating the treaty, would have at least mentioned it. *See Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 17–18 (1987).

2

Background principles of espousal, like background principles of immunity, are also instructive. Zhongshan posits that the Convention permits enforcement of claims against one sovereign by private parties who are nationals of another. But the "traditional view of international law is that it establishes substantive principles for determining whether one country has wronged another." *Federal Republic of Germany v. Philipp*, 592 U.S. 169, 176–77 (2021) (quoting *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 422 (1964)). Thus, if one sovereign violated public international law and thereby harmed a national of another, it committed a legal wrong *against the second sovereign*. *See id.* The aggrieved private party could have asked its home country to espouse a claim against the offending sovereign, but it could not have pursued any international claim itself. Second Restatement, *supra*,

§ 174 cmt. b; *see also* Bradley & Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 Harv. L. Rev. 815, 831–32 & n.106 (1997), *quoted in Philipp*, 592 U.S. at 176–78. The only exceptions to this general rule—allowing private individuals to raise international claims against offending sovereigns— involved rare instances where the sovereign itself had agreed to engage directly with the aggrieved individual. *See* Second Restatement, *supra*, § 175. Moreover, these rare instances mostly involved early treaties in the discrete area that we now call international humanitarian law. *See Philipp*, 592 U.S. at 177–78; Second Restatement, *supra*, § 175 cmt. b; Bradley & Goldsmith, *supra*, at 831–32 & n.109. They did not involve disputes under BITs or multilateral investment treaties, which did not become common until the 1970s. *See* Azubuike, *The Place of Treaties in International Investment*, 19 Ann. Surv. of Int'l & Compar. L. 155, 161–62 (2013).

Again, Zhongshan's position would hide elephants in mouseholes. By the time of the New York Convention in 1958, there was already support for domestic courts to resolve disputes between private parties and foreign sovereigns under *private* law. But for disputes between private parties and foreign sovereigns under *public* law, applying the Convention would have not only eliminated bedrock immunity protections but also undercut espousal requirements, in broad fields where both would otherwise be required. Again, it is highly unlikely that treaty drafters would have effected such sweeping changes through an unadorned reference to "persons," in a Convention focused mainly on private commercial trade. And it is highly unlikely, if such sweeping changes were under consideration, that none of the negotiating countries, interested parties, or commenters would have even noted the issue.

My colleagues object to this analysis based on what they view as two separate acts of consent by Nigeria—signing a BIT requiring certain disputes to be arbitrated and signing the New York Convention calling for certain arbitral awards to be enforced. *Ante* at 22–24.

As for the Convention, Zhongshan's interpretation requires contracting parties to enforce awards against other sovereigns that have *not* signed the Convention. For covered commercial disputes between covered persons, all that matters is that the award was made outside the territory of the signatory country where enforcement is sought and inside the territory of another signatory country. N.Y. Convention art. 1(1), (3). Because the award here was made in the United Kingdom, which has acceded to the Convention, the fact that Nigeria also has acceded to the Convention makes no difference to the analysis whether the Convention covers Zhongshan's award. My colleagues stress that Nigeria *has* signed the Convention, *ante* at 22–23, but its construction of the treaty would apply regardless. Moreover, even as to signatory countries, Zhongshan construes the Convention to override what would otherwise have been bedrock principles of immunity and espousal in 1958. My colleagues explain that sovereigns *may* waive these basic protections. *Ante* at 22–24; *see also id.* at 36 (any presumption "against treating states as persons fades when a state consents to a suit"). True enough, but they still have no persuasive account of why the Convention's mere reference to "persons" should be understood to have such a dramatic yet unnoticed consequence, despite the strong interpretive presumption against reading that general term to restrict the public acts of governments.

As for the BIT, my colleagues stress that Article 9 reflects Nigeria's consent to arbitrate directly with Chinese investors. *Ante* at 22–24. Again true enough, but an agreement to arbitrate is a far cry from consent to enforcement in the domestic courts of a co-equal sovereign. The same is true for a general commitment "to the enforcement of the award," Nigeria-China BIT art. 9(6), which most naturally means enforcement through diplomatic processes or international tribunals. *See* Third Restatement*, supra*, § 906 & cmt. b.

* * * *

In sum, the relevant historical and legal background cuts strongly against Zhongshan's expansive interpretation of the Convention.

C

Because treaties are agreements, courts may consider "negotiation and drafting history" to determine "the shared understanding" of the parties. *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. 432, 441 (2020) (cleaned up). And while text is of course the best evidence of that understanding, courts should strive to avoid conflict with the "intent or expectations of its signatories." *Rodriguez v. Pan Am. Health Org.*, 29 F.4th 706, 717–18 (D.C. Cir. 2022) (cleaned up). Here, drafting history confirms what text and context strongly suggest—that the Convention does not extend to disputes arising from sovereign acts governed by public law.

Consider the report of the committee charged with drafting the Convention. It included representatives from nine different countries, ranging from Belgium to the Soviet Union and including five of the original 24 signatories. *See Report of the Committee on the Enforcement of International Arbitral Awards*, at 2,

U.N. Doc. E/AC.42/4 (Mar. 21, 1955) (*Drafting Committee Report*). The Drafting Committee decided to change the name of the Convention from one about enforcing "International" arbitral awards to one about enforcing "Foreign" awards, out of concern that "International" might suggest coverage of state-state arbitrations. *See id.* at 5. As the Committee explained, the Convention "does not deal with arbitration between States, but deals with recognition and enforcement in one country of arbitral awards made in another country." *Id.* My colleagues read this statement as possibly meaning that the Convention does not deal *exclusively* with arbitration between States, but *also* deals with the recognition and enforcement of foreign arbitral awards, *see ante* at 30–31, but that reading is surely strained. And if the Convention "does not deal with arbitration between States," then Zhongshan's position must be wrong: There is no colorable basis, in linguistic usage or background legal context, to make one party's personhood under the Convention turn on the identity of the other party. If "persons" extends to governments acting in their sovereign capacity in disputes with private parties, then it also extends to governments acting in their sovereign capacity in disputes with other governments. My colleagues formally reserve the question whether their interpretation would sweep in state-state disputes under public international law. *See id.* at 31–32. Yet that is the clear implication of their position, and it is inconsistent with this drafting history.[2]

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[2] To distinguish state-state disputes, my colleagues characterize the investor-state dispute here as one governed "in material part by domestic law." *Ante* at 31–32. But the claims here arise under the BIT, an international agreement governed by public international law. *See* Third Restatement, *supra*, § 487 cmt. f. To

The report of the Drafting Committee supports Nigeria in another important respect. The Belgian representative on the Committee proposed that the Convention "should expressly provide that public enterprises and public utilities should be deemed to be legal persons ... *if their activities were governed by private law*." *Drafting Committee Report*, *supra*, at 7 (emphasis added). But even the representative from Belgium, which had already adopted the restrictive theory of sovereign immunity, did not seek to extend the Convention to disputes governed by public law. Nor did the Drafting Committee itself. It rejected Belgium's proposal as "superfluous" but decided that a "reference in [its] report would suffice" to note its agreement with Belgium. *See id.*

Other parts of the drafting history reinforce these points. In supporting a different change to the Convention's title, Switzerland pressed its view that the Convention covers "international awards in private law," but *not* "international awards in public law." *See* U.N. Secretary-General, *Recognition and Enforcement of Foreign Arbitral Awards*, at annex I, 8–9, U.N. Doc. E/2822 (Jan. 31, 1956) (*Secretary-General Report*). A representative of Italy—another early adopter of the

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be sure, the BIT itself recognizes that domestic law as well as international law will be relevant to any investor-state dispute. Art. 9(7). But questions of public international law frequently turn in part on domestic public law; for instance, the question whether a government's treatment of aliens violates international law often turns on how the government treats similarly situated citizens. *See*, *e.g.*, *id.* arts. 2(3), 3(2); *Phillip*, 592 U.S. at 176–77. So the fact that domestic law sets the backdrop for the international claims at issue here is hardly unusual. Nor would it distinguish a state-state arbitration under Article 8 of the BIT if China had chosen to espouse the claims that Zhongshan raised here under Article 9.

restrictive theory of immunity—expressed concern that the reference to "disputes between legal persons" could be misconstrued to encompass "a dispute between States." U.N. Conf. on Int'l Com. Arb., *Summary Record of the Sixteenth Meeting*, at 5, U.N. Doc. E/Conf.26/SR.16 (June 3, 1958) (cleaned up). But the President of the Conference at which the Convention was finalized responded that the Drafting Committee "had had no such intention when it had prepared the draft Convention." *Id.* Finally, a representative of the United States stressed the importance of the Convention to the efficient settlement of "private disputes arising out of international trade," suggesting no extension to disputes under public international law. U.N. Conf. on Int'l Com. Arb., *Summary Record of the Second Meeting*, at 8, U.N. Doc. E/CONF.26/SR.2 (May 21, 1958).

Against all of this, including a written report of the Drafting Committee itself, my colleagues highlight a two-sentence comment by Austria, which neither participated on the Committee nor was an original signatory of the Convention, and comments by one private party. *Ante* at 33–35. Neither of these comments produced any response from either the Drafting Committee or any of the contracting parties. In the Convention's overall drafting history, these comments do not count for much. But even on their own terms, the comments help Nigeria more than Zhongshan.

Start with Austria. First, it asserted that the Convention covers awards for or against states made "in cases of disputes with subjects of private law." *Secretary-General Report*, at annex I, 11. The garbled reference to "disputes with subjects of private law" most likely meant private-law disputes, which would simply reiterate that the Convention covers awards against sovereigns arising from their private acts. And

even if "disputes with subjects of private law" meant government disputes with private parties, as my colleagues suggest, that still would not clearly pick up investment disputes between governments and private parties arising from sovereign acts governed by public law—a legal category that would have been unrecognizable in 1958. Moreover, Austria's second sentence confirms that it meant no such thing: "Nevertheless, it would be desirable to provide expressly that the convention is also applicable in cases in which corporate bodies under public law, and particularly states, *in their capacity as entities having rights and duties under private law*, have entered into an arbitration convention for the purpose of the settlement of disputes." *Id.* (emphasis added). Taken as a whole, Austria's comments do not suggest that the Convention reaches sovereign acts regulated by public law. And in any event, we should not "dissect" one garbled phrase from Austria's comment as if it were treaty text. *See Saint Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 515 (1993).

Comments by the Society of Comparative Legislation are also helpful to Nigeria. The Society proposed an amendment to provide that governments are covered persons "on the condition" that the dispute "arose out of a commercial contract or a private business operation." *Society-General Report*, at Annex II, 9. That is consistent with the Convention covering sovereigns acting in a private but not governmental capacity. Moreover, the Society further proposed changing the title of the Convention to cover international disputes "in private law," to make even clearer that it does *not* cover "arbitration in public international law." *Id.* at 4.

Far from ambiguous or messy, the drafting history reveals a consensus that the word "persons" includes governments acting as private parties under private

law but does not include governments acting as sovereigns under public law.

D

My colleagues offer five further arguments based on post-ratification evidence, but none moves the needle.

*First*, my colleagues characterize Nigeria's interpretation of the Convention as novel and unsupported. *Ante* at 21. But many commentators have supported it. *See*, *e.g.*, Third Restatement, *supra*, § 487 cmt. f ("Ordinarily, arbitration of a controversy of a public international law character, such as ... a dispute about the interpretation of or performance under an international agreement ... , is not subject to the New York Convention ...."); *ICCA's Guide to the Interpretation of the 1958 New York Convention: A Handbook for Judges* 85 (Int'l Council for Comm. Arbitration 2011) ("The expression 'persons, whether physical or legal' in Article I(1) of the Convention is generally deemed to include public law entities entering into commercial contracts with private parties. Courts ... frequently invoke the distinction between *acta de jure gestionis* [private acts] and *acta de jure imperii* [public acts] ...."); M. Sornarajah, The Settlement of Foreign Investment Disputes 309–10 (2000) ("The New York Convention was not designed for enforcement of arbitral awards against state parties.... [T]he fact that [a] dispute was caused by a sovereign act, usually an act of nationalization[,] makes enforcement under the Convention highly unlikely.").

In any event, it is no surprise that the question presented has not produced litigated decisions. For many investment disputes between host countries and foreign investors, the New York Convention applies because the host and the investor have a commercial

relationship, and the dispute involves breaches of the governing contracts or other private-law disputes. *See*, *e.g.*, *Diag Human v. Czech Republic—Ministry of Health*, 824 F.3d 131, 132–34 (D.C. Cir. 2016); *TermRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 929–31 (D.C. Cir. 2007); *Creighton Ltd. v. Government of the State of Qatar*, 181 F.3d 118, 120 (D.C. Cir. 1999). Moreover, most investment disputes between host countries and foreign investors are resolved under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *opened for signature* Mar. 18, 1965, 17 U.S.T. 1291 (entered into force Oct. 14, 1966) (ICSID Convention), a multilateral treaty that became effective eight years after the New York Convention. The ICSID Convention established procedures for arbitrating such disputes, *id.* art. 25, and it truncated enforcement issues by granting awards the status of domestic judgments, *id.* arts. 53–54. Over 160 nations have signed the ICSID Convention. Many foreign investors insist on both ICSID dispute-resolution processes and underlying treaty protection against sovereign acts such as discrimination, denial of protection or fair treatment, and uncompensated expropriation. So, because the ICSID Convention requires only that signatory states agree in writing to submit investment disputes to ICSID, *id.* art. 25(1), ICSID arbitrations typically cover claims by an aggrieved investor that a foreign state has breached treaty obligations through sovereign acts. *See*, *e.g.*, *The Loewen Group, Inc. v. United States*, ICSID No. ARB(AF)/98/3, Award at 9–10 (June 26, 2003) (claims under Chapter 11 of North American Free Trade Agreement). In this case, arbitration through ICSID was unavailable because, although Article 9 of the Nigeria-China BIT envisioned ICSID involvement in making any "necessary appointments" to an "ad hoc

arbitral tribunal," art. 9(4)–(5), Nigeria did not give the necessary consent to submit disputes under the BIT to ICSID. In short, the usual availability of ICSID arbitration for disputes like this one—not the novelty of Nigeria's reading on the New York Convention—explains why there is scant caselaw on whether the older, private-focused treaty applies to disputes arising from sovereign acts governed by public law.

*Second*, my colleagues invoke precedent that they say "corroborates" the conclusion that the New York Convention "fully appli[es] to arbitral awards arising from sovereign acts." *Ante* at 24–25; *see also id.* at 19 (Convention cases "involving foreign states charged with breaching investment and commercial treaty obligations"). None of these cases addresses either the scope of the FSIA's arbitration exception or the underlying question whether the Convention applies to awards arising from sovereign acts that violate treaties. And if "a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed." *Ariz. Christian Sch. Tuition Org. v. Winn*, 563 U.S. 125, 144 (2011). Accordingly, the cited cases are not "persuasive, much less binding" on the overlooked issue whether the Convention applies to disputes arising from sovereign acts governed by public international law. *Schindler Elevator Corp. v. WMATA*, 16 F.4th 294, 299 (D.C. Cir. 2021); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) ("We have often said that drive-by jurisdictional rulings ... have no precedential effect.").

For example, consider *Tatneft v. Ukraine*, 21 F.4th 829 (D.C. Cir. 2021) (*Tatneft II*), the case that my colleagues discuss most fully. True, it involved public acts that allegedly breached treaty obligations. *See id.*

at 832–33. But our decision addressed only merits defenses under the Convention: whether the dispute fell outside the governing BIT, whether the district court impermissibly modified the award, whether enforcement would violate United States public policy, and whether the arbitral tribunal was improperly composed. *See id.* at 835–40. An earlier decision in the case, *Tatneft v. Ukraine*, 771 Fed. App'x 9 (D.C. Cir. 2019) (*Tatneft I*), did address jurisdiction and immunity issues under the FSIA. But *Tatneft I* is an unpublished ruling that does not bind this panel. *See In re Grant*, 635 F.3d 1227, 1232 (D.C. Cir. 2011). And in any event, *Tatneft I* did not address whether the New York Convention applies to disputes arising from sovereign acts, thus triggering application of the FSIA's arbitration exception. Instead, *Tatneft I* held only that the FSIA's waiver exception applied because the allegedly breaching sovereign in that case had signed the New York Convention. 771 Fed. App'x at 10. So, even if *Tatneft I* had been a published opinion, it still would not bind us here.[3]

*Chevron Corp. v. Ecuador*, 795 F.3d 200 (D.C. Cir. 2015), is similarly inapposite. There, the arbitral award was based on the failure of Ecuadorean courts to resolve pending contract claims. *Id.* at 202–03. But

[3] The FSIA waiver ruling in *Tatneft I* is especially shaky. In *Process & Industrial Developments Ltd. v. Federal Republic of Nigeria*, 962 F.3d 576 (D.C. Cir. 2020), we specifically noted that because *Tatneft I* "was an unpublished decision," its waiver holding "does not bind future panels." *Id.* at 583–84. Later in the same case, we expressly declined to apply *Tatneft I* after the Executive Branch expressed "significant policy concerns" with the view that merely signing the New York Convention, and agreeing to arbitrate in a signatory country, amounts to a waiver of sovereign immunity. *Process & Indus. Devs. Ltd. v. Federal Republic of Nigeria*, 27 F.4th 771, 775 n.3 (D.C. Cir. 2022).

our decision did not address whether the New York Convention covers awards governed by public law; we explained that Ecuador had agreed to arbitrate the dispute and rejected its various merits defenses to enforcement. *See id.* at 203–09.

Or consider *BG Group PLC v. Republic of Argentina*, 572 U.S. 25 (2013), the Supreme Court decision cited by my colleagues. That case too involved public acts that allegedly breached treaty obligations. *Id.* at 29–31. But it addressed only the question whether an arbitrator had permissibly construed a "local litigation requirement" in the governing BIT. *Id.* at 30– 32. The Court did not address whether the New York Convention applies to public acts that allegedly violate treaties. Nor could that question have even arisen: The arbitration in *BG Group* took place in the United States, which triggered a prong of the FSIA's arbitration exception different from the one at issue here. *See* 28 U.S.C. § 1605(a)(6) (arbitration exception applies to actions to confirm arbitral awards if "(A) the arbitration takes place ... in the United States, [or] (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards").

One final point about our caselaw. Zhongshan heavily relies on *Belize Social Development, Ltd. v. Government of Belize*, 794 F.3d 99 (D.C. Cir. 2015), which construed the commercial reservation in the New York Convention to preserve coverage for "matters which have a connection to commerce." *Id.* at 105. We also declined to construe the reservation as limiting the Convention to disputes arising from acts that would qualify as commercial for immunity purposes. *See id.* at 104–05. Those rulings at least

suggest that the defendant sovereign qualified as a "person[]" under the Convention, though we did not directly address the issue. But the case involved only contract claims: Belize sold real property to a private company to develop a telecommunications facility and promised to give the company tax and regulatory relief. *See id.* at 100. The case thus straddles the boundary of public and private international law, with duties grounded in private contract law but involving public acts. Perhaps private law should govern sovereigns in these circumstances, subject to whatever limits public law may impose on their ability to contract away governmental prerogatives. *Cf. United States v. Winstar Corp.*, 518 U.S. 839 (1996) (breach-of-contract liability for sovereign acts). Regardless, this case is different: Nigeria engaged in *no* private conduct with and had *no* private-law obligations to Zhongshan, which brought a *treaty* claim based *solely* on Nigeria's *sovereign* acts, actual or imputed, for breaching its duties under *public* international law. That falls squarely on the public side of the line, today as well as in the late 1950s.

*Third*, the majority points to a footnote in an *amicus* brief that the government filed some 44 years ago. *Ante* at 25–26. The brief opined that the New York Convention does not prevent enforcement of an arbitral award based on contract claims arising from an expropriation. Brief for the United States as Amicus at 20 n.16, *Libyan Am. Oil Co. v. Socialist People's Libyan Arab Jamahiriya*, Nos. 80-1207, 80-1252 (D.C. Cir. June 16, 1980) (*LIAMCO*). *LIAMCO* is thus similar to *Belize*, with a private-law claim predicated on a public act. So it seems to me unclear what position the United States might take here, where the claim cannot be grounded in any contract governed by private law. In any event, the government filed its amicus brief

22 years after the Convention. And post-ratification conduct "decades after the finalization of the New York Convention's text in 1958" is at best weak "evidence of the original shared understanding of the treaty's meaning." *See GE Energy*, 590 U.S. at 443.

*Fourth*, my colleagues point to the Energy Charter Treaty (ECT), *opened for signature* Dec. 17, 1994, 2080 U.N.T.S. 95, which they say "treated the New York Convention" as covering awards "arising from sovereign acts." *Ante* at 27–28. But the ECT did not amend the Convention. Instead, it decreed that certain claims governed by the ECT "shall be considered to arise out of a commercial relationship" for purposes of the Convention, art. 26(5)(b), thus prohibiting ECT signatories from applying the commercial reservation to covered claims. At most, this provision obligates ECT signatories to enforce ECT arbitral awards *as if* they arose under the New York Convention, which says nothing for non-ECT signatories such as the United States. Moreover, the ECT was not opened for signature until some 36 years after the Convention was adopted. So this post-ratification conduct is of little value "as evidence of the original shared understanding of the treaty's meaning." *See GE Energy*, 590 U.S. at 443.

*Finally*, my colleagues claim support from Congress's command that "[e]nforcement of arbitral agreements ... shall not be refused on the basis of the Act of State doctrine." *Ante* at 36–37; *see* 9 U.S.C. § 15. But the Act of State doctrine affords a substantive rule of decision—United States courts may not "declare invalid the official act of a foreign sovereign performed within its own territory." *W.S. Kirkpatrick & Co. v. Env't Tectonics Corp., Int'l*, 493 U.S. 400, 405 (1990). It can apply in litigation between private parties no less than in litigation between private parties and the foreign

sovereigns themselves. *See id.* at 405–06. So, barring its application does not signal a congressional desire to extend the New York Convention to disputes in which the foreign sovereign itself is charged with violating public international law. In any event, Congress did not enact the provision until 1988. Again, the views of a non-signatory party three "decades after the finalization of the New York Convention's text in 1958," are of little interpretive significance. *See GE Energy*, 590 U.S. at 443.

III

Text, legal context, and drafting history all indicate that the word "persons," as used in the New York Convention, does not include signatory nations acting as sovereigns. I respectfully dissent.

**APPENDIX B**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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Civil Action No. 22-170 (BAH)

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ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT CO., LTD.,

*Petitioner*,

v.

FEDERAL REPULIC OF NIGERIA,

*Respondent*.

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Chief Judge Beryl A. Howell

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MEMORANDUM OPINION

Petitioner Zhongshan Fucheng Industrial Investment Co., Ltd. ("Zhongshan") instituted this suit against Respondent, the Federal Republic of Nigeria ("Nigeria"), to enforce an arbitration award that—nearly two years after issuance—Nigeria has failed to pay. Nigeria now moves to dismiss the petition for lack of subject matter jurisdiction and personal jurisdiction, pursuant to Federal Rules of Civil Procedure 12(b)(1)–(2), on the grounds of sovereign immunity not exempted under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602 *et seq*. *See* Resp't's Mot. Dismiss for Lack of Jurisdiction Under the FSIA ("Resp't's Mot."), ECF No. 24. Petitioner counters that the requirements of the FSIA's arbitration exception are met, and jurisdiction may therefore be exercised. *See* Pet'r's Mem.

Opp'n Resp't's Mot. Dismiss ("Pet'r's Opp'n"), ECF No. 26. For the reasons explained below, petitioner has the better of the arguments under the binding precedent of the D.C. Circuit, requiring denial of Nigeria's motion to dismiss.

## I. BACKGROUND

### A. Nigeria's Seizure of Zhongshan's Assets

The present dispute emerges from a Chinese business investment in Nigeria—once successful enough to have garnered coverage by the Economist Intelligence Unit as an example of "China's economic model in Africa"—that ended in the expropriation of the company's assets, the flight of its executives from Nigeria after one executive was arrested at gunpoint and physically beaten by the police, and, ultimately, a $55-million-plus arbitration award against Nigeria.[1] The locus of the saga is a free-trade zone, called the Ogun Guangdong Free Trade Zone, in Nigeria's southwestern region in Ogun State, not far from Lagos.

As set forth in the arbitral tribunal's findings of facts in its Final Award, ECF No. 2-1, starting in 2007, Ogun State contracted with various Chinese companies, including petitioner, to develop the subject free-trade zone. Specifically, Ogun State entered an agreement with Guangdong Xinguang International China-Africa Investment Ltd. ("CAI") and CCNC Group, Ltd., pur-

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[1] The Economist Intelligence Unit's profile of the Ogun Guangdong Free Trade Zone was referenced by the arbitral tribunal in its final award decision. *See* Decl. of Hussein Haeri Supp. Pet. Recognize & Enforce Foreign Arbitral Award ("Haeri Decl. Supp. Pet."), Ex. A, Final Arbitration Award dated March 26, 2021 ("Final Award") ¶ 127, ECF No. 2-1; Economist Intelligence Unit, Zones of Influence (last accessed January 21, 2023), https://growthcrossings.economist.com/video/zones-of-influence/.

suant to which the three entities would jointly own the Ogun Guangdong Free Trade Zone Company ("OGFTZ") for a period of 99 years, and CAI would lead the development of the Zone, encompassing nearly 8 square miles of land. *See* Decl. of Hussein Haeri Supp. Pet. Recognize & Enforce Foreign Arbitral Award ("Haeri Decl. Supp. Pet."), Ex. A, Final Arbitration Award dated March 26, 2021 ("Final Award") ¶¶ 4–5, ECF No. 2-1. After three years of limited progress, on June 29, 2010, OGFTZ entered an agreement with petitioner's parent company, Zhuhai Zhongfu Industrial Group Co. Ltd. ("Zhuhai"), giving Zhuhai control of developing and operating a fraction of the Zone's area into Fucheng Industrial Park. *Id.* ¶¶ 6–8. That year, Zhuhai effectively transferred its rights to petitioner, which operated in Nigeria through its wholly-owned Nigerian subsidiary Zhongfu International Investment (NIG) FZE ("Zhongfu"). *Id.* ¶¶ 3, 9.[2]

From 2010 until the breakdown of the relationship in 2016, Zhongfu invested substantial assets into developing Fucheng Industrial Park. For example, to attract industrial lessees to the Park, Zhongfu built roads, upgraded communications, sewage, and power systems, and opened community services including a hospital, hotel, supermarket, and bank. *Id.* ¶¶ 21–22. By early 2014, the Park had attracted approximately sixteen businesses. *Id.* ¶ 23. During this period, CAI's management of the overall Zone had apparently broken down, resulting in Ogun State's termination of

[2] The tribunal noted in its Final Award that, although Zhongfu had apparently assumed Zhuhai's interests in the Zone by 2010—as reflected in an October 10, 2010-dated deed entitling Zhuhai to delegate its rights and obligations to third parties—the assignment of interests between Zhuhai and Zhongfu was formalized in a January 15, 2013 document. Final Award ¶ 16, ECF No. 2-1.

the company's participation in the OGFTZ in 2012 and appointment of Zhongfu to take its place as part owner of the OGFTZ in 2013. *Id.* ¶¶ 13–20.

Zhongfu's woes began in April 2016, when the Secretary of Ogun State indicated in a letter to OGFTZ—apparently on the advice of the Chinese Consulate in Lagos—that CAI had been acquired by Guangdong New South Group ("NSG"), and that this transfer may have somehow entitled NSG, rather than Zhongfu, to ownership of the Zone. *Id.* ¶¶ 33–34. Ogun State had received a *note verbale*, a diplomatic note, from the Economic and Commercial Section of the Chinese consulate in Lagos, dated March 11, 2016, which stated that the acquisition of CAI "will legally lead to the replacement of the management rights of the OGFTZ which is now in the hands of [Zhongfu] to Guangdong New South Group." *Id.* ¶ 33.[3] In May 2016,

[3] This detail of the Chinese government's involvement in—if not outright instigation of—Ogun State's ejection of Zhongfu from the Zone did not detain the arbitral tribunal for long, and Nigeria apparently did not call, or even "suggest[]," that any agents of the Chinese government could be identified to provide evidence of the underlying reasons for replacement of petitioner with NSG as manager of the Zone. Final Award ¶¶ 93–94. The tribunal's admitted lack of clarity on this element of the underlying facts is unsettling in light of the whisper in the Final Award's pages that Zhongfu's administration of the Zone might have fallen short of expectations. *See, e.g., id.* ¶ 29 (noting a May 18, 2015-dated letter from the Secretary of Ogun State complaining about Zhongfu's performance); *id.* ¶¶ 115–120 (noting that the parent companies of CAI and Zhongfu signed an "entrustment of equity management agreement" in March 2012, in which CAI's share of the Zone would be "entrusted" to Zhongfu—a detail that the arbitral tribunal apparently found perplexing and about which it "had an initial degree of concern about the accuracy" of Zhongfu's witness's testimony, but that it ultimately found irrelevant). The factual findings by the arbitral tribunal, however, are not reviewable by this Court, nor are they presently challenged by

according to petitioner, Ogun State purported to terminate its 2013 agreement that appointed Zhongfu as part owner of the Zone, and reneged on the 2010 agreement that had given Zhongfu and Zhongshan management rights of the Fucheng Industrial Park. Pet'r's Pet. to Recognize & Enforce Foreign Arbitral Award ("Pet.") ¶¶ 18–19, ECF No. 1. In July 2016, Ogun State's Secretary texted Zhongshan's managing director Jianxin Han, urging him to "leave peacefully when there is opportunity to do so," and the following month, warrants were issued for the arrest of Han and Wenxiao Zhao, who had served as the Chief Financial Officer of the OGFTZ. Final Award ¶¶ 37, 39. Zhao was arrested at gunpoint, physically beaten, and detained for ten days by police before he and Han could flee the country—unceremoniously closing the book on Zhongshan's management of the OGFTZ and Fucheng Industrial Park. *Id.* ¶¶ 39–40.

B. Subsequent Arbitration Proceedings

Petitioner commenced an arbitration proceeding against Nigeria on August 30, 2018 pursuant to a bilateral treaty between Nigeria and China. Pet. ¶ 22–23.[4] The

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Nigeria. *See Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 244 F. Supp. 3d 100, 110 (D.D.C. 2017) (describing courts' deferential standard in reviewing foreign arbitral awards as "allowing vacatur of an award not if 'the panel committed an error—or even a serious error' but 'only when [an] arbitrator strays from interpretation and application of the agreement and effectively dispense[s] his own brand of industrial justice'" (quoting *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 671–72 (2010))).

[4] Petitioner, via Zhongfu, initially sought relief through the Nigerian courts, initiating one lawsuit in the Federal High Court in Abuja, Nigeria, against Nigeria's Export Processing Zones Authority ("NEPZA"), the Attorney-General of Ogun State, and another company that was a partner of the OGFTZ, *see* Final

bilateral investment treaty, called the Agreement Between the Government of the People's Republic of China and the Government of the Federal Republic of Nigeria for the Reciprocal Promotion and Protection of Investments ("China-Nigeria BIT"), represents an agreement between the countries to promote bilateral investment by guaranteeing that the other country's investors would be treated equally and protected from the nationalization of their investments. *See generally* Haeri Decl. Supp. Pet., Ex. B, China-Nigeria BIT, ECF No. 2-2. Article 9 of the China-Nigeria BIT provides that, when any dispute arises between one of the countries and an investor from the other country—*e.g.*, a dispute between Nigeria and a Chinese investor—that cannot be resolved by the parties, either party may request that an ad hoc arbitral tribunal settle the dispute with a binding decision. *See id.* at Art. 9.

Petitioner brought five claims against Nigeria for breaches of the China-Nigeria BIT in the arbitral action. First, petitioner claimed that Nigeria violated its obligation of fair and equitable treatment of Chinese investors under Art. 3(1). Pet. ¶ 23. Second, petitioner claimed that Nigeria unreasonably discriminated against it, violating Art. 2(3), and third, that Nigeria failed to provide the "continuous protection" afforded by Art. 2(2). *Id.* Fourth, petitioner claimed

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Award ¶ 42, and another lawsuit in Ogun State High Court against OGFTZ, Ogun State, and the Attorney-General of Ogun State, *id.* The lawsuits sought reinstatement of Zhongfu's management and possession of the Zone based on the 2010 and 2013 contracts, *id.* ¶ 43, but both proceedings "were discontinued" in March and April 2018, *id*. ¶ 44. Zhongfu also began arbitration proceedings in the Singapore International Arbitration Center against, *inter alia*, Ogun State, but that proceeding was enjoined by the Ogun State High Court. *Id.* ¶ 45.

that Nigeria violated its contract with petitioner, violating Art. 10(2). *Id.* Finally, petitioner claimed that Nigeria wrongfully expropriated Zhongshan's investments without compensation, in violation of Art. 4. *Id.*

The London, United Kingdom-located arbitral tribunal rendered its Final Award on March 26, 2021, finding that Nigeria had violated Zhongshan's rights under the China-Nigeria BIT. Specifically, the tribunal determined that Nigeria took actions that were "plainly designed to deprive, and indeed succeeded in depriving, Zhongfu of its rights" under the 2010 and 2013 agreements. Final Award ¶¶ 125–26. In addition, the tribunal found that Ogun State, Nigeria's Export Processing Zones Authority ("NEPZA"), and the police—all state actors—took discriminatory and coercive steps against Zhongfu that resulted in Nigeria taking possession of Zhongfu's investment in the country. *Id.* ¶¶ 125–32. Nigeria was ordered to pay Zhongshan approximately $55.6 million in compensation for the expropriation, $75,000 in "moral damages," $9.4 million in interest calculated between the July 22, 2016-dated expropriation and rendering of the award, approximately $3 million in legal fees and costs related to the arbitration, approximately $430,000 in other costs, and post-Award interest on the preceding sums—a total figure approaching $70 million, and growing. Pet. ¶ 33.[5]

Nigeria has already tried and failed to shirk this arbitration award in the United Kingdom. Approximately

[5] The Award enumerated certain of the damages—namely, the compensation, moral damages, and pre-Award interest on both—in U.S. dollars, and the legal fees and costs related to the arbitration in British pounds. As a result, the Court's calculation of the total figure, which converted all sums into U.S. dollars, is a mere estimate.

one month after the Award's rendering, Nigeria filed an arbitration claim form in the English High Court, collaterally challenging the Award under the English Arbitration Act on the basis that the tribunal lacked jurisdiction. Although Nigeria later discontinued this challenge, petitioner was still not paid the sums awarded by the tribunal. *Id.* ¶¶ 35–41. On December 8, 2021, petitioner commenced enforcement proceedings in the United Kingdom, and the English court issued an order that recognized the Award. *Id.* ¶ 42.

C. Instant Litigation

On January 25, 2022, Zhongshan initiated the instant lawsuit, pursuant to the Federal Arbitration Act (the "FAA"), which provides for confirmation of arbitral awards falling under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, 21 U.S.T. 2517 (the "New York Convention"), *see* 9 U.S.C. § 201–207. *See* Pet. ¶ 1. The FAA provides that the New York Convention is enforceable in the courts of the United States, to which courts a party may apply for an order confirming an arbitral award issued under the Convention. *Id.* §§ 201, 207. In response, Nigeria filed the pending motion to dismiss for lack of subject-matter and personal jurisdiction under the FSIA, contending that no exception to the FSIA applies because the award does not fall under the New York Convention, Resp't's Mot., ECF No. 24, which motion petitioner opposes, Pet'r's Opp'n, ECF No. 26. With briefing now complete, *see* Resp't's Reply, ECF No. 27, Nigeria's motion to dismiss is now ripe for review.

II. LEGAL STANDARD

"Federal courts are courts of limited jurisdiction," *Gunn v. Minton*, 568 U.S. 251, 256 (2013) (quoting

*Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994)), and "have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto," *Johnson v. Comm'n on Presidential Debates*, 869 F.3d 976, 980 (D.C. Cir. 2017) (quoting *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)). To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), plaintiff thus "bears the burden of invoking the court's subject matter jurisdiction." *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). "Where a plaintiff has asserted jurisdiction under the FSIA and the defendant foreign state has asserted 'the jurisdictional defense of immunity,' the defendant state 'bears the burden of proving that the plaintiff's allegations do not bring its case within a statutory exception to immunity.'" *Belize Social Dev. Ltd. v. Gov't of Belize*, 794 F.3d 99, 102 (D.C. Cir. 2015) (quoting *Phoenix Consulting Inc. v. Republic of Angola*, 216 F.3d 36, 40 (D.C. Cir. 2000)). Further, in deciding a motion to dismiss on the basis of the FSIA, courts' subject-matter and personal jurisdictional inquiries often collapse into the same question: "If none of the exceptions to sovereign immunity set forth in the Act applies, the District Court lacks both statutory subject matter jurisdiction and personal jurisdiction." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 485 n.5 (1983). *See also Schubarth v. Federal Republic of Germany*, 891 F.3d 392, 397 n.1 (D.C. Cir. 2018) ("Under the FSIA, personal jurisdiction exists where (1) subject matter jurisdiction has been satisfied, and (2) proper service has been effected." (citing 28 U.S.C. § 1330(b))). Nigeria does not contend that service was improper, so the jurisdictional challenges merge.

When a jurisdictional skirmish "present[s] a dispute over the factual basis of the court's subject matter jurisdiction . . . the court must go beyond the pleadings and resolve" any dispute necessary to the disposition of the motion to dismiss. *Feldman v. F.D.I.C.*, 879 F.3d 347, 351 (D.C. Cir. 2018) (quoting *Phoenix Consulting*, 216 F.3d at 40). In such situations, the "court may properly consider allegations in the complaint and evidentiary material in the record," affording plaintiff "the benefit of all reasonable inferences." *Id.; see also Am. Freedom Law Ctr. v. Obama*, 821 F.3d 44, 49 (D.C. Cir. 2016) ("In considering a motion to dismiss for lack of subject matter jurisdiction . . . we 'may consider materials outside the pleadings in deciding whether to grant a motion to dismiss for lack of jurisdiction.'" (quoting *Jerome Stevens Pharm., Inc. v. FDA*, 402 F.3d 1249, 1253 (D.C. Cir. 2005))). Absent "evidentiary offering[s]," *Feldman*, 879 F.3d at 351, however, courts must seek jurisdictional assurance by accepting as true all material "factual allegations in the complaint and contru[ing] the complaint liberally," and again "granting plaintiff the benefit of all inferences that can be derived from the facts alleged." *Am. Nat'l Ins. Co. v. F.D.I.C.,* 642 F.3d 1137, 1139 (D.C. Cir. 2011) (internal quotation marks omitted).

## III. DISCUSSION

For this Court to have subject matter jurisdiction over a petition to enforce a foreign arbitral award against a foreign sovereign, two inter-related requirements must be satisfied: (1) "there must be a basis upon which a court in the United States may enforce a foreign arbitral award," and (2) the foreign state "must not enjoy sovereign immunity from such an enforcement." *Creighton Ltd. v. Gov't of State of Qatar*, 181 F.3d 118,

121 (D.C. Cir. 1999). Both requirements are addressed in turn.

A. Jurisdiction under the Federal Arbitration Act

The New York Convention is an international treaty ratified by the United States that provides for signatory states' recognition of arbitral awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought." *Process & Indus. Dev. Ltd. v. Fed. Republic of Nigeria ("P&ID")*, 27 F.4th 771, 774 (D.C. Cir. 2022) (quoting New York Convention, art. I(1)). The FAA codified the New York Convention into law, providing that "[a]n action . . . falling under the Convention shall be deemed to arise under the laws and treaties of the United States," and granted district courts original jurisdiction over such actions. 9 U.S.C. § 203.

For an arbitral award to "fall[] under the Convention," two requirements—both optional elements of the New York Convention that the United States adopted at ratification—must be satisfied. *See* Restatement (Third) of the Foreign Relations Law of the United States § 487 cmts. b, f (Am. L. Inst. 1987). First, the arbitral award must be "rendered within the jurisdiction of a signatory country," pursuant to the reciprocity reservation of the Convention. *Creighton*, 181 F.3d at 123. The United Kingdom, where the at-issue arbitration award was rendered, is a member of the New York Convention. *See* New York Arbitration Convention, Contracting States, http://www.newyorkconvention.org/countries (last visited Jan. 22, 2023). Second, pursuant to the Convention's commercial reservation, which the United States adopted as a part of a minority of the Convention's signatories, the award must "aris[e] out of a legal relationship,

whether contractual or not, which is considered as commercial." 9 U.S.C. § 202; *Belize Social Dev. Ltd.*, 794 F.3d at 103. This commercial reservation is the basis for Nigeria's instant motion.

Nigeria argues that petitioner is "precluded from relying on the New York Convention to recognize and enforce the Award in this Court," because the China-Nigeria BIT giving rise to petitioner's arbitral award "does not establish a 'legal relationship . . . which is considered as commercial.'" Resp't's Mot. at 8, 13 (quoting *Diag Human, S.E. v. Czech Republic Ministry of Health*, 824 F.3d 131, 136 (D.C. Cir. 2016)). The FAA does not define the term "commercial," but the D.C. Circuit has interpreted the term expansively. "In the context of international arbitration, 'commercial' refers to 'matters or relationships, whether contractual or not, that arise out of or in connection with commerce.'" *Belize Social Dev. Ltd.*, 794 F.3d at 103–104 (quoting Restatement (Third) of U.S. Law of Int'l Comm. Arbitration § 1–1 (2012)); *see also id*. at 104 (noting the relationship between the "term's broad compass" and "the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power" (quoting *Citizens Bank v. Alafabco, Inc*., 539 U.S. 52, 56 (2003))).

Nigeria's attempts to cast the Final Award as arising from a non-commercial relationship lack support in D.C. Circuit precedent. According to Nigeria, the China-Nigeria BIT is "quintessentially sovereign" and cannot form the basis for a commercial relationship between a private investor and either country. *See* Resp't's Mot. at 13–15; Resp't's Reply at 13–15. Next, Nigeria contends that Zhongshan conceded the non-commercial character of its relationship with Nigeria by litigating initially against Ogun State, as reflected

in the arbitral record. *See* Resp't's Mot. at 15–18; Resp't's Reply at 10–12; *see also supra* n.4. Finally, Nigeria challenges the Final Award as being "unlike other arbitration awards routinely enforced in this Circuit" because this Award did not arise from a business relationship between Nigeria and Zhongshan, but solely from the China-Nigeria BIT. Resp't's Reply at 5.

Each argument is considered in turn and none is persuasive.

1. *The Award's Basis in the China-Nigeria BIT Does Not Render the Parties' Legal Relationship* Per Se *Non-Commercial*

Nigeria asserts the bold argument that, as a matter of law, the China-Nigeria BIT cannot form the basis of an arbitral award that falls within the coverage of the New York Convention's commercial reservation. Resp't's Mot. at 13–15. Nigeria urges a distinction between "certain direct contractual arrangements between sovereigns and investors, which are subject to the New York Convention, and international treaties, which are not." Resp't's Reply at 17. The parties do not dispute that the China-Nigeria BIT is a treaty and, under Nigeria's reasoning, falls in the latter category. *See* Resp't's Mot. at 14 (observing that "the Nigeria-China Treaty is comprehensively focused on regulating state conduct in the protection of investments" and is not "a commercial agreement between Petitioner and Nigeria"). Nigeria claims to derive this hardline distinction from the Restatement (Third) of Foreign Relations Law. Resp't's Reply at 17–18; Resp't's Mot. at 14 ("'international agreements,' like the Nigeria-China Treaty, that involve 'two or more states' and are 'governed by international law' are 'not subject to the New York Convention' because they are not commercial" (quot-

ing, barely, Restatement (Third) of Foreign Relations Law §§ 301, 487 cmt. f)).

Nigeria, however, has cherry-picked the quoted text out of context. The relevant portion of § 487 comment f from the Restatement reads in full as follows:

> Ordinarily, arbitration of a controversy of a public international law character, such as a boundary dispute or a dispute about interpretation of or performance under an international agreement (see § 301), is not subject to the New York Convention, and an award resulting from such an arbitration is not subject to enforcement through civil courts. *See* § 904 and Comment e thereto.

Restatement (Third) of Foreign Relations Law § 487 cmt. f. Nigeria reasons that, as an "international agreement" under Restatement (Third) of Foreign Relations Law § 301, the China-Nigeria BIT is "'not subject to the New York Convention' because [it is] not commercial." Resp.'s Mot. at 14 (quoting Restatement (Third) of Foreign Relations Law § 487). Yet, this comment does not broadly exclude *all* international agreements from the Convention's scope, as Nigeria apparently reads the text. Rather, the comment only excludes controversies "of a public international law character," citing § 904 of the Restatement ("interstate arbitration"), which concerns *only arbitrations between states*. Of course, this arbitration took place between Nigeria and Zhongshan, a private actor—not two states.

Moreover, the remainder of the comment makes clear the extremely narrow scope of the commercial reservation's exclusion, which as noted does not cover *all* arbitrations arising under international agreements. Indeed, earlier in the same comment, the Restatement

expressly advises that "[d]isputes arising out of investment agreements are not excluded by" the commercial reservation. Restatement (Third) of Foreign Relations Law § 487 cmt. f. The Restatement goes on to explain that this reservation merely "excludes arbitration agreements and awards *arising out of matrimonial or custody disputes, disputes concerning succession to property, and labor disputes*, and for the United States also other disputes excluded from the United States Arbitration Act under 9 U.S.C. § 1." *Id.* (emphasis added). *See also Island Territory of Curacao v. Solitron Devices, Inc.,* 356 F. Supp. 1, 13 (S.D.N.Y. 1973) ("Research has developed nothing to show what the purpose of the 'commercial' limitation was. We may logically speculate that it was to exclude matrimonial and other domestic relations awards, political awards, and the like.").[6]

Nigeria's novel argument contradicts U.S. courts' regular confirmation of arbitral awards rendered under similar treaties. According to the logic of Nigeria's argument, any arbitral award rendered pursuant to a sovereign state's violation of a treaty created under public international law would be "*per se* noncommercial," Resp't's Mot. at 17, and fall outside of the New York Convention. *See also* Resp't's Mot. at 15 (arguing that BITs, "as international agreement[s] governed by and applying public international law, fall[] outside

[6] Nor does Nigeria's citation to the Restatement on International Commercial Arbitration support its argument, since this Restatement likewise embraces a broad definition of arbitral agreements, disputes, and awards that are "commercial" in nature. *See* Restatement (Third) of the U.S. Law of Int'l Comm. and Inv'r-State Arbitration § 1.1, cmt. e (Am. Law Inst., Proposed Final Draft 2019) ("[A] dispute or award may be commercial even though one of the parties to it is a sovereign State and even though the dispute arises out of public regulatory acts.").

the ambit of the New York Convention as a matter of U.S. foreign relations law"). The D.C. Circuit has confirmed many arbitral awards in which sovereign nations have been found to breach treaty—rather than contract—obligations. *See, e.g., Tatneft v. Ukraine,* 21 F.4th 829 (D.C. Cir. 2021) (confirming arbitral award rendered pursuant to Ukraine-Russia BIT); *Chevron Corp. v. Ecuador*, 795 F.3d 200, 203–204 (D.C. Cir. 2015) (confirming arbitral award rendered pursuant to BIT between United States and Ecuador); *LLC Komstroy v. Republic of Moldova*, 2019 WL 3997385, *1–2 (D.D.C. Aug. 23, 2019) (confirming arbitral award pursuant to multilateral Energy Charter Treaty); *Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela*, 244 F. Supp. 3d 100, 105–108 (D.D.C. 2017) (confirming arbitral award resulting from Venezuelan expropriation of investments pursuant to BIT between Canada and Venezuela); *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, 146 F. Supp. 3d 112, 118–120 (D.D.C. 2015) (confirming arbitral award rendered pursuant to BIT between Canada and Venezuela). This Court declines to swim upstream against the common practice of confirming arbitral awards rendered pursuant to violations of treaties based on respondent's cherry-picked and partial quotation from a Restatement.

Nigeria attempts to explain away courts' application of the New York Convention in other cases involving treaties similar to the China-Nigeria BIT by arguing that many of those treaties explicitly reference the New York Convention, and that the parties in other cases agreed that the Convention applied to their dispute. *See* Resp't's Mot. at 15. Neither of these scattershot attempts to distinguish those cases is persuasive. First, Nigeria does not explain why a treaty's mere reference to the New York Convention rescues an arbitral award from the treaty's "public

international law character" that Nigeria claims would exclude such a treaty-based arbitral award from confirmation. Referencing the New York Convention, after all, does not transform a treaty into a contract between a state and private actor. This argument is particularly perplexing given that, in one of the cases upon which Nigeria relies as support for this point, the treaty at issue merely refers to the New York Convention to discuss the Convention's requirement that parties agree in writing to arbitration, rather than the Convention's commercial reservation. *See* Resp't's Mot. at 15 (citing *Chevron Corp. v. Republic of Ecuador*, 949 F. Supp. 2d 57, 70 (D.D.C. 2013)); *Chevron Corp. v. Republic of Ecuador*, Case No. 12-cv-1247 (JEB), Decl. of Edward G. Kehoe, Ex. 1, U.S.-Ecuador BIT at art. VI(4)(b), ECF No. 4-1.[7] Second, respondent cites to *Crystallex Int'l Corp.*, 244 F. Supp. 3d at 109, seeming to argue that the New York Convention applied in this case because the respondent did not object to the court's jurisdiction. Resp't's Mot. at 15. This argument ignores that, in *Crystallex,* as here, the applicability of the New York Convention folded into the question of the court's subject-matter jurisdiction and, thus, whether Venezuela consented to jurisdiction is irrelevant since "[i]t is axiomatic that subject matter jurisdiction may not be waived" and "a federal court must raise the issue because it is 'forbidden—as a court of limited jurisdiction—from acting beyond [its] authority.'" *Diag Human S.E. v. Czech Republic, Ministry of Health*, 64 F. Supp. 3d 22,

[7] Further, as petitioner notes, not all arbitral awards that have been confirmed in the D.C. Circuit arise from treaties that expressly reference the New York Convention. *See* Pet'r's Opp'n at 17 (noting that the Russia-Ukraine BIT at issue in *Tatneft,* 21 F.4th 829, "does not mention that the New York Convention applies to enforcements of awards arising under it").

27 (D.D.C. 2014) (quoting *NetworkIP, LLC v. F.C.C.,* 548 F.3d 116, 120 (D.C. Cir. 2008)), *rev'd o other grounds*, 824 F.3d 131 (D.C. Cir. 2016). Nigeria makes no convincing argument to explain away the crush of cases that undercut its theory.

2. *The Arbitration Record Does Not Prove That the Dispute was Non-Commercial*

Nigeria next turns to the record of the underlying arbitration to argue that the dispute was non-commercial, asserting a new distinction between what it calls "Treaty Claims" and "Commercial Claims." In support of this argument, Nigeria recounts that petitioner had initially brought claims in the Nigerian courts and the Singapore International Arbitration Center (SIAC)—the latter pursuant to a clause in the 2013 agreement—alleging breach of contract claims under its series of agreements with Ogun State. *See* Resp't's Reply at 10; *see also* Final Award ¶¶ 43–45. Nigeria describes petitioner's discontinuance of both proceedings as a "tactical[]" decision to "proceed exclusively with the Treaty Claims" and "abandon the Commercial Claims." Resp't's Reply at 10. As a result, as Nigeria's argument goes, the Final Award was based on Nigeria's *sovereign,* rather than *commercial*, conduct—or, by way of analogy to the limits of the Commerce Clause, the country's use of its police power, rather than commerce power. *See* Resp't's Mot. at 15–18; Resp't's Reply at 11–12.

The flaw in this argument stems from predication on a false dichotomy between sovereign and commercial conduct in the context of the New York Convention. A similar argument was considered and rejected by the D.C. Circuit in *Belize Social Dev. Ltd. v. Government of Belize,* 794 F.3d 99, 104–105 (D.C. Cir. 2015). There, Belize argued that, in granting a private telecommunications company tax and duty exemp-

tions pursuant to an agreement, "it exercised 'powers peculiar to sovereigns' as opposed to 'powers that can also be exercised by private citizens,' and thus its actions were not commercial." *Id.* at 105 (quoting *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 614 (1992)). This argument attempted to define the commercial reservation by reference to the FSIA's "commercial activity" exception, 28 U.S.C. § 1605(a)(2), under which a foreign state is only held to "engage[] in commercial activities when it acts in the manner of a private player within the market." *Belize Social Dev. Ltd.,* 794 F.3d at 104. The D.C. Circuit rejected this narrow view of the commercial reservation, holding that "[u]nlike with the FSIA, Congress was not codifying the restrictive theory of foreign sovereign immunity when it ratified and implemented the New York Convention." *Id.* at 105. Instead, because the Convention's "purpose was to 'encourage the recognition and enforcement of commercial arbitration agreements in international contracts' . . . 'commercial' in the context of international arbitration refers to matters which have a connection to commerce." *Id.* (quoting *TermoRio S.A. E.S.P. v. Electranta S.P.*, 487 F.3d 928, 933 (D.C. Cir. 2007)). Accordingly, as Zhongshan correctly posits, "there can be no debate that the multimillion-dollar investment that Petitioner made in Nigeria to develop, manage and operate a free trade zone near Lagos was connected with commerce." Pet'r's Opp'n at 5–6. *See Belize Social Dev. Ltd.,* 794 F.3d at 104 (holding that "taxes Belize levies against a company . . . have a connection with commerce . . . as do the duties Belize charges").

3. *No Underlying Contract Between Nigeria and Zhongshan is Required*

Finally, Nigeria urges that the "Award at issue is unlike other arbitration awards routinely enforced in this Circuit" because "it arose neither from a commercial agreement between Petitioner and Nigeria, nor from a contractual or other business relationship between them." Resp't's Reply at 5. To be sure, nearly every case enforcing an arbitration award against a foreign sovereign in this Circuit has involved an underlying contract or business agreement between the petitioner and foreign sovereign. *See, e.g., P&ID,* 27 F.4th at 772 (describing underlying twenty-year natural gas supply and processing agreement between Irish engineering company and Nigeria); *Diag Human*, 824 F.3d at 135 (describing underlying "Framework Agreement" between arbitration parties Czech Republic and foreign blood plasma company by which company supported modernization of Czech Republic's blood plasma supply and services in exchange for share of the total volume of plasma produced); *Belize Social Dev. Ltd.*, 794 F.3d at 100–01 (involving underlying agreement between Belize and petitioner's predecessor-in-interest, a telecommunications company, pursuant to which company would purchase property from Belize); *Gebre LLC v. Kyrgyz Republic*, 2022 WL 2132481, *2 (D.D.C. June 14, 2022) (foreign company signed series of license agreements with Kyrgyz authorities to mine rare earth elements). In contrast, Nigeria is correct—and petitioner does not dispute, *see* Pet'r's Opp'n at 15 n.8—that the underlying agreements leading to Zhongshan's investments in the Zone and Industrial Park "[were] formed with OGFTZ and Ogun State, not Nigeria." Resp't's Reply at 7 (emphasis in original).

This distinction drawn by Nigeria between the parties involved in the facts underlying the arbitral award at issue (*i.e.*, involving a business arrangement between a private party and part of a sovereign country) versus previous awards confirmed in this Circuit (*i.e.*, involving business arrangements between a private party and a sovereign country), falls short of showing that the instant parties' legal relationship is therefore not commercial. As the FAA provides, a legal relationship need not arise from contract to be commercial, *see* 9 U.S.C. § 202, with the crucial factor being that "the subject matter [of the arbitration] is commercial." *Stati v. Republic of Kazakhstan*, 199 F. Supp. 3d 179, 184 (D.D.C. 2016) (quoting *U.S. Titan, Inc. v. Guangzhou Zhen Hua Shipping Co.,* 241 F.3d 135, 146 (2d Cir. 2001)). Here, the subject matter of the underlying arbitration related to commerce: Zhongshan's status as a foreign investor in Nigeria, pouring millions of dollars into developing the free trade zone, "has an obvious connection to commerce." *Diag Human*, 824 F.3d at 136 (describing "the provision of healthcare technology and medical services" as having "an obvious connection to commerce" based on health care's role in the "global economy").

Notably, Nigeria focuses principally on urging adoption of its characterization of the parties' relationship as non-commercial. *See, e.g.,* Resp't's Mot. at 15 ("The record of the arbitration confirms the *non-commercial nature of the parties' legal relationship* that is the foundation for the Award.") (emphasis added); Resp't's Reply at 14–15 (arguing that petitioner's agreements with Ogun State cannot "dictate whether the extrinsic legal relationship between Nigeria and Petitioner is commercial for purposes of the New York Convention" and urging that "[t]he conditions in question here . . . rendered the legal relationship between Nigeria

and Petitioner fundamentally noncommercial"). Only passingly, in reply, does Nigeria allude to the absence of a direct contractual or business relationship between Zhongshan and Nigeria as precluding the existence a "legal relationship" between the parties—a condition precedent to the requirement that the arbitral award "aris[e] out of a legal relationship, whether contractual or not, which is considered as commercial." 9 U.S.C. § 202; *see* Resp't's Reply at 14 (noting that "no independent legal relationship existed between Nigeria and Petitioner regarding [the latter's] investments" in service of its argument that Nigeria's conduct was "sovereign" rather than commercial).

Regardless, the parties plainly shared a "defined legal relationship, whether contractual or not," *Diag Human*, 824 F.3d at 135, based on the China-Nigeria BIT. In *Diag Human*, the D.C. Circuit held that, even if failing to qualify as a contract, a "Framework Agreement" between a blood plasma company and the Czech Republic created a legal relationship, because the Agreement "explicitly contemplated which parties it would obligate, the extent of the obligations, the remuneration exchanged for meeting the obligations, and the legal framework to govern the arrangement." *Diag Human*, 824 F.3d at 135. The China-Nigeria BIT, too, creates a legal framework "entitling [Chinese investors] to the standards of treatment guaranteed by" Nigeria. Pet'r's Opp'n at 7. Further, the treaty constitutes "an already-binding arbitration contract" between Nigeria and China, with investors from both countries, including petitioner, acting as the equivalent of third-party beneficiaries, *BG Group, PLC v. Republic of Argentina*, 572 U.S. 25, 41 (2014), or at the very least, the treaty operates as Nigeria's "standing offer to all potential [Chinese] investors to arbitrate investment disputes," *Chevron*, 795 F.3d at

206. Nigeria cannot and does not explicitly dispute that the BIT thus creates a legal relationship— even if not a contractual one—between the parties.

B. Nigeria Is Not Immune Under the FSIA.

Having established that this matter falls under the New York Convention, and thereby the FAA, the next question is whether Nigeria is immune from suit under the FSIA. The FSIA is "a comprehensive statute containing a 'set of legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities.'" *Republic of Austria v. Altmann*, 541 U.S. 677, 691 (2004) (quoting *Verlinden*, 461 U.S. at 488). The FSIA "provides, with specified exceptions, that a 'foreign state shall be immune from the jurisdiction of the courts of the United States . . . ." *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 581 U.S. 170, 173 (2017) (quoting 28 U.S.C. § 1604). Accordingly, "subject matter jurisdiction in any [FSIA] action depends on the existence of one of the specified exceptions to foreign sovereign immunity." *Verlinden,* 461 U.S. at 493.

At issue here is the arbitration exception, 28 U.S.C. § 1605(a)(6), which permits U.S. courts to confirm an arbitration award rendered outside of the United States in certain instances.[8] The exception provides, in pertinent part:

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[8] Congress amended the FSIA in 1988 to include the arbitration exception, ensuring that foreign agreements to arbitrate and arbitral awards governed by certain treaties would be enforceable in U.S. courts, even against sovereigns. *See Process & Indus. Dev. Ltd. v. Fed. Republic of Nigeria*, 506 F. Supp. 3d 1, 10 (D.D.C. 2020), *aff'd on other grounds,* 27 F.4th 771 (D.C. Cir. 2022). This exception facilitated the participation of U.S. courts in upholding

> A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case . . . in which the action is brought . . . to confirm an award made pursuant to . . . an agreement to arbitrate, if . . . the agreement or award is or may be governed by a treaty or other international agreement in force . . . calling for the recognition and enforcement of arbitral awards.

28 U.S.C. § 1605(a)(6). For the Court's jurisdiction to attach pursuant to the arbitration exception, "the existence of an arbitration agreement, an arbitration award and a treaty governing the award are all jurisdictional facts that must be established." *LLC SPC Stileks v. Republic of Moldova*, 985 F.3d 871, 877 (D.C. Cir. 2021) (citing *Chevron*, 795 F.3d at 204). As to

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the international arbitration system that has flourished since the post-World War II era, designed to facilitate cross-border investments and business dealings. The conventional wisdom undergirding the international arbitration system is that promising foreign investors an efficient and fair alternative dispute-resolution mechanism outside of potentially biased local courts would encourage foreign direct investment, insulated from the uncertainties created by the host country's domestic politics and law. *See generally* Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITS Really Work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain*, 46 Harv. Int'l L. J. 67, 68–79 (2005) (arguing that arbitration provisions in BITs are a "mechanism that gives important, practical significance to BITs, a mechanism that truly enables these bilateral treaties to afford protection to foreign investment," and that BITs have promoted foreign direct investment in developing countries and the United States); Leonard V. Quigley, *Accession by the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 70 Yale L. J. 1049 (June 1961) (detailing the reasons for the United States' ratification of the New York Convention).

these three requirements, petitioner bears "a burden of production" to support a claim that the arbitration exception applies; "the burden of persuasion rests with the foreign sovereign claiming immunity, which must establish the absence of the factual basis by a preponderance of the evidence." *Chevron*, 795 F.3d at 204.

Petitioner has met its burden of production as to all three requirements under the arbitration exception. First, as to the existence of the arbitration agreement, petitioner has alleged, without dissent from Nigeria, that both parties consented to the arbitration—Nigeria via Art. 9 of the China-Nigeria BIT, which provided that either party may submit a dispute to an *ad hoc* tribunal, and Zhongshan via filing a Request for Arbitration. Pet. ¶¶ 24–25. *See Stati*, 199 F. Supp. 3d at 188 ("All that is required is that the petitioner make a 'prima facie showing that there was an arbitration agreement by producing the [treaty] and the notice of arbitration.'" (quoting *Chevron*, 795 F.3d at 205)). Petitioner has also met its burden as to the second and third requirements by producing the Final Award and referring to the New York Convention. *See* Final Award, ECF No. 2-1; *see also Creighton*, 181 F.3d at 123–24 (describing the "New York Convention [as] 'exactly the sort of treaty Congress intended to include in the arbitration exception'" (quoting *Cargill Int'l S.A. v. M/T Pavel Dybenko*, 991 F.2d 1012, 1018 (2d Cir. 1993))). Nigeria, meanwhile, has failed to discharge its burden of persuasion to establish that this arbitral award falls outside the scope of the New York Convention, for the reasons stated *supra,* in Part III.A. Resultantly, the Court finds that the arbitration exception to the FSIA applies, stripping Nigeria of sovereign immunity and establishing the Court's subject-matter and personal jurisdiction over the case.

## IV. CONCLUSION

For the foregoing reasons, the Federal Republic of Nigeria's Motion to Dismiss is DENIED. An order consistent with the Memorandum Opinion will be entered contemporaneously.

Date: January 26, 2023

/s/ Beryl A. Howell
BERYL A. HOWELL
Chief Judge

**APPENDIX C**

IN THE MATTER OF AN ARBITRATION PURSUANT TO THE AGREEMENT BETWEEN THE GOVERNMENT OF THE PEOPLE'S REPUBLIC OF CHINA AND THE GOVERNMENT OF THE FEDERAL REPUBLIC OF NIGERIA FOR THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS

BETWEEN:

ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT CO. LTD.

*Claimant*

-AND-

THE FEDERAL REPUBLIC OF NIGERIA

*Respondent*

FINAL AWARD

Arbitral Tribunal:
Mr Rotimi Oguneso SAN, co-arbitrator
Mr Matthew Gearing QC, co-arbitrator
Lord Neuberger of Abbotsbury, presiding arbitrator

Place of arbitration: London, United Kingdom

Date of Award: 26 March 2021

Date of Hearing: 9th to 13th November 2020

FINAL AWARD

A. Introduction

1. The Claimant, Zhongshan Fucheng Industrial Investment Co. Ltd ("Zhongshan"), contends that, in the summer of 2016, entities for whose actions the Respondent, the Federal Republic of Nigeria ("Nigeria"), is liable in international law, deprived it of a substan-

tial investment contrary to the provisions of articles 2, 3 and/or 4 of a Bilateral Investment Treaty ("the Treaty") between (0 the People's Republic of China ("the PRC") and (ii) Nigeria, and that Zhongshan is entitled to compensation from Nigeria to be assessed by an arbitration tribunal pursuant to article 9 of the Treaty.

2. In the next section of this Award, Section B, we explain the basic relevant facts as advanced in this arbitration by Zhongshan on the basis of documents and oral evidence, Then, in Section C, we set out the relevant provisions of the Treaty, In Section D, we describe the relevant procedural history of this arbitration. Following that, in Section E, we address various jurisdictional and preliminary points raised by Nigeria. In Section F, we discuss misrepresentation and concealment arguments raised by Nigeria. Next, in Section G, we address the issue of Nigeria's liability. In Section H, we consider the appropriate level of compensation to be awarded. Section I deals with questions of interest and Section J with costs. Finally, in Section K, we make our award.

3. Before setting out the history as described by Zhongshan, it is convenient to record that Zhongshan's claim relates to rights in the Ogun Guangdong Free Trade Zone ("the Zone"), a substantial area of land in Ogun State in Nigeria, which is owned by the Ogun State Government ("Ogun State") and which is not far from Lagos, Agapa Port and Lagos Airport. The history 'involves three companies in the Chinese-owned Zhuhai Zhongfu Industrial Group Co Ltd group of companies, Zhuhai Zhongfu Industrial Group Co Ltd ("Zhuhai"), Zhongfu International Investment (MG) FZE (Zhongfu") and Zhongshan. The unchallenged evidence of Dr Jianxin Han, the manging director of, and majority shareholder in, Zhongshan, was that

Zhuhai started in the early 1980s as a business manufacturing and repairing fishing nets, then developed a bottle manufacturing business, and finally expanded into operating in Special Economic Zones ("SEZ"s) also known as Free Trade Zones ("FTZ"s), initially in China, and then in other countries. He said that the Group had an excellent record in developing and managing FTZs. He also explained that the private equity firm, CVC Capital, had purchased a 29% stake in Zhonghsan in 2007 for USD225 million. Zhuhai and Zhongshan are and were Chinese registered companies, and Zhuhai is Zhongshan's parent company. Zhongfu was and is a Nigerian company and a wholly owned subsidiary of Zhongshan,.

B. The basic facts as argued by Zhongshan

*The involvement of Zhongfu and Zhongshan in the Zone*

4. The Zone was the subject of a Joint Venture Agreement entered into on 28th June 2007 ("the 2007 JVA") between the Ogun State and Guangdong Xinguang International China-Africa Investment Ltd (also known as 'China-Africa Investment Ltd, and hereinafter "CAI"), and CCNC Group Ltd ("CCNC"). We know that CAI was a Chinese entity but, other than that, the Tribunal was told very little about it. Under the 2007 JVA, the development of the OGFTZ was to be carried out through Ogun Guangdong Free Trade Zone Company ("OGFTZ"), which was to be jointly owned by Ogun State, CCNC and (as to 60%) CAI, for a period of 99 years. The arrangement envisaged by the 2007 JVA involved CAI effectively carrying out the development, marketing and management of the Zone, albeit through OGFTZ. In practice, it appears likely that the management was carried out by CAI, and that OGFTZ was not constituted as envisaged by the 2007 JVA.

5. On 28 September 2007, Ogun State granted to OGFTZ a 99-year Certificate of Occupancy ("the 2007 Certificate") over 2,000 hectares of land in the Zone. On 2 April 2008, the Nigeria Export Processing Zones Authority ("NEPZA"), which has a statutory duty to supervise and coordinate the organisations operating within Nigerian FTZs, signed an agreement granting OGFTZ exclusive concessions to construct, manage, and operate the Zone. On 3 June 2008, OGFTZ was registered as a free trade zone company.

6. Dr Han's evidence was that, by 2010, only limited development had been carried out and CAI was running short of funds, and that, as a result, Zhuhai was introduced to Ogun State as a potential alternative or additional developer and manager. Following discussions, Ogun State and Zhuhai agreed that Zhuhai would effectively take over the development and management of Fucheng Industrial Park ("Fucheng Park"), an area of 224 hectares within the 2,000 hectares the subject of the 2007 Certificate, and enjoy some sort of priority rights over the rest of the Zone

7. On 29th June 2010, Zhuhai and OGFTZ entered into *a "Framework Agreement on Establishment of Fucheng Industrial Park in the Zone"* ("the 2010 Framework Agreement"). This Agreement (of which there was a Chinese version and an English version) gave Zhuhai the right to develop and operate Fucheng Park, within the Zone, which was described *as "an area of 100 km$^2$ constructed and managed [OGFTZ] which is located in the southeast of Ogun State, Nigeria"*. CAI was not a party to the 2010 Framework Agreement.

8. The 2010 Framework Agreement included the following provisions:

a. Paragraph (A) of the preamble, which recorded that OGFTZ was formed by Ogun State and CAI *"to establish and operate"* the Zone and to *"acquire the land use rights"* over it *"for a period of 99 years"* from an unspecified date in 2008;

b. Paragraph (B) of the preamble, which recorded that Zhuhai *"wishes to build up [the] Park",* and to develop on it *"factories and an industrial park";*

c. Clause 2.2, which stated: "*[t]he actual* operation *and management organ of [the] Park shall be [Zhuhai's] wholly-owned subsidiary or a company under [its] control";*

d. Clause 2.6, which stipulated that *"the 97-year land use rights regarding [the] Park shall be in the possession of* Zhuhai, which was *"entitled to exercise its full right for such industrial land's occupancy, use, proceeds and disposal";*

e. Clause 3, which provided for a *"97-year concession fee"* payable by Zhuhai to OFGTZ as well as *an "initial Concession Fee of Land Use Right";*

f. Clauses 4.1 and 4.2, which set out Zhuhai's rights and obligations with regard to the development of Fucheng Park (and in particular the installation of infrastructure) and gave Zhuhai the right:

i. To charge a "Comprehensive Administrative Fee" (clause 4.1.1);

ii. To have *"certain administrative right over enterprises in [the] Park"* (clause 4.1,6);

iii. After it had completed its infrastructure obligations in relation to Fucheng Park, to have "*priority to invest in and develop other areas in*

*[the Zone] under the same conditions"* (clause 4.1.7); and

g. Clause 5, which contained OGFTZ's obligations which were effectively to be supportive of the development of Fucheng Park, and which included an obligation not to develop any other part of the Zone until 80% of Fucheng Park was developed (clause 5.2.7).

h. Clause 6, by which OGFTZ apparently agreed to transfer to Zhuhai the benefit of all existing contracts in respect of businesses already trading in Fucheng Park.

9. Some fifteen weeks after the 2010 Framework Agreement was entered into, another document dated 10th October 2010 ("the 2010 Deed") was entered into by Zhuhai, OGFTZ and Zhongshan. This document, which is in Chinese, whose English translation is a little hard to understand, appears to have the effect of entitling Zhuhai to carry out its obligations under 2010 Framework Agreement through third parties. According to the testimony of Dr Han, the 2010 Deed was treated by Zhongshan and Zhuhai as having the practical effect of transferring Zhuhai's rights and obligations under the 2010 Framework Agreement to Zhongshan (which, as we have mentioned, is a subsidiary of Zhuhai).

10. On 24th January 2011 Zhongfu (which, as we have mentioned, is a subsidiary of Zhongshan) was registered by NEPZA as a Free Trade Zone Enterprise in the Zone,

11. A document ("the 2011 receipt"), which is dated 25th July 2011 and was signed on behalf of Zhongshan and OGFTZ, contains an acknowledgment by OGFTZ that Zhongshan had paid *"the first instalment of the*

*land use rights fees"* under the 2010 Framework Agreement in the sum of RMB 5,455,129.50.

12. On 28th November 2011, Mr Taiwo Adeoluwa, who had recently become the Secretary to the Ogun State Government ("Ogun State") (and remained so until 2019) wrote a letter ("the November 20111 letter) to CAT, referring to earlier correspondence and complaining of *"wanton violation of the terms of the [2007 JVA]", "the unsatisfactory share arrangements"* (presumably with regard to OGFTZ), and *"rampant smuggling"*. The letter then went on to refer to the fact that "*following .... extensive due diligence enquiries in both Nigeria and China", or its parent company, Guangdong Xinguang International Group Co Ltd, "is now officially bankrupt"* and that *"a lop executive is alleged to be involved in criminal activity"*. The letter invited CAT's response to these allegations. If there was such a response, the Tribunal was not provided with it.

13. On 15th March 2012, Mr Adeoluwa wrote two letters on behalf of the Ogun State ("the March 2012 letters"). The first was to CAL It referred to earlier correspondence, including the November 2011 letter, which had contained a number of complaints which Ogun State had made against CAI, based on its *"incompetence and flagrant violation of the terms of the [2007 JVAJ"*. The letter then went on to state that Ogun State was *"constrained to terminate forthwith your participation in the [Zone] in accordance with the terms of that Joint Venture Agreement",* on various grounds including *"that the company has been adjudged bankrupt',* as well as illegality, fraudulent practices, failing to provide a business plan, a Master Plan, or a Phased Design Plan, and failure to contribute to the share capital of OGFTZ.

14. The second letter of the March 2012 letters was to the Managing Director of Zhongfu. It stated that Ogun State had decided to appoint Zhongfu *"the interim Manager/Administrator"* of the Zone (and not just Fucheng Park) for *"an initial period"* of three months, *"subject to a renewal thereof upon satisfactory performance"*. The role was briefly described in the letter *as "attracting sufficient business to the Zone to boost economic activities"* and *"rejuvenating generally the Free Trade Zone"*. It appears that the three months was extended either expressly or implicitly, until the arrangements were placed on a more permanent basis on 28th September 2013 as explained below.

15. The arrangements set out in the March 2012 letters had the approval of NEPZA. On 10th April 2012, it wrote to the General Manager of CAI *"confirm[ing] the termination of your appointment as Manager and operator of the [Zone] by [Ogun State]"*, and requiring CAI to *"handover all assets and documentation which belongs to the Ogun Guangdong Free Trade Zone to the newly appointed Management company [Zhongfu]"*. The following day, NEPZA wrote to Mr Wang Junxiang of Zhongfu *"confirm[ing] the appointment of your organisation as the Managers and operators of [the Zone]*".

16. Meanwhile, on 15th January 2013, by a document ("the 2013 document"), which is in Chinese (and of which we were supplied with an English translation), Zhuhai assigned its interest in the 2010 Framework Agreement to Zhongfu. As we have mentioned, it appears that Zhongshan, the parent company of Zhongfu had already taken over Zhuhai's rights and responsibilities under the 2010 Framework Agreement, at least in practical, if not in legal, terms, some thirty months earlier.

17. There is also a document ("the 2013 acknowledgement") written in Chinese, dated 13th April 2013, which is signed on behalf of Zhongshan and Ogun State, and which (according to the English translation) is an acknowledgment by OGFTZ that Zhongshan had not only paid the sum referred to in the 2011 receipt, but also RMB 4,544,870.50 *"to make up the deficiency of land use transfer fee that should be paid by Zhuhai"*.

18. On 28th September 2013, Ogun State, Zhongfu and Zenith Global Merchant Limited ("Zenith") entered into a *"Joint Venture Agreement For the Development, Management and Operation"* of the Zone ("the 2013 JVA"). The preamble to the 2013 NA recorded, inter alia, that:

> a. The *"participation"* of [CAI] in the Zone *"has been terminated by [Ogun State] vide a letter dated 15th March 2012";* and
>
> b. Zhongfu *"has been appointed as the new manager of the (Zone] has invested in the infrastructure of the /Zone] and has proved its expertise to partner in the development, operation, management and administration of a free trade zone"*.

19. Clause 3 of the 2013 TVA provided that OGFTZ would be the joint venture company, and that it would owned as to 60% by Zhongfu, and 20% each by Ogun State and Zenith. Clause 4 was concerned with the control and running of OGFTZ. Clauses 6 and 12 of the 2013 JVA contained a number of obligations on the parties. They included:

> a. In clause 2.3, an obligation on Zhongfu to contribute to the share capital of OGFTZ, and an obligation on Ogun State to provide *"10,000 hectares of land (in phases) to the goner,* and it was recorded in a Schedule that the *"parties try their best to locate*

*maximum 7,000 hectares as a major land [sic] of the Zone"* and the remaining 3,000 hectares could be *"located in a different place if the cost to be spent in locating the 10,000 hectares in a place is too high for [Ogun State]"*

b. In clause 6.1,

i. an obligation on *Ogun* State to grant OGFTZ a 99-year term in respect of 10,000 hectares;

ii. an obligation on Ogun State together with Zhongfu and Zenith to work to get all necessary licences to enable any contemplated development and occupation to take place;

iii. an obligation on Ogun State to make the 10,000 hectares available to OGFTZ to enable it to *"conduct development and construction activities"* during the 99 years;

c. In clause 6.2, a requirement that Zhongfu prepare a Master Plan, a Phased design Plan and a business plan, and also to begin construction within two months of getting the necessary licences;

d. In clause 12.1, a requirement that Zhongfu carry out development in accordance with the Master Plan;

e. In clause 12.3, an obligation on Zhongfu to instal infrastructure;

f. Elsewhere in clause 12, a number of obligations on Zhongshu with regard to development, managing and marketing;

g. In clause 15.1, the obligation on Ogun State to provide 10,000 hectares of land was effectively repeated, along with other obligations on Ogun State designed to assist the operations of Zhongfu,

and in particular to *"strictly observe the provisions of [the Treaty] ... and provide adequate protection to the investment of [Zhongfu and Zenith] in OGFTZ and the Zone"*.

20. Clause 18 of the 2013 JVA included provisions for early termination by one party if the other party was in breach, became insolvent, or ceased to carry on business. So far as early termination for breach was concerned, it could only be implemented if (1) the breach was material, (ii) a notice specifying the breach had been served; and (iii) the breach was not remedied within 60 days of receipt of the notice. And clause 27 provided that, in the event of any dispute arising under the 2017 JVA, it should first be the subject of an attempt to settle, and if that failed, either party could refer the dispute to arbitration under the UNCITRAL Rules in Singapore under the aegis of the Singapore International Arbitration Centre ("SIAC").

*The development of the Zone*

21. From 2010, Zhuhai and Zhongfu carried out significant work on at Fucheng Park, and this work consisted of developing infrastructure, marketing and letting sites in Fucheng Park ("sites") for development to potential occupiers, and managing Fucheng Park as it ,was developed and occupied. Evidence to this effect was given to us by

a. Dr Han, who visited the Zone in early 2010 and then went there to work more or less full time as Chief Executive Officer and Joint Chief Operating Officer of OGFTZ from October 2012 until June 2016,

b. Mr Zheng Xue, who worked more or less full time at Zone, and principally at Fucheng Park as Joint Chief Operating Officer of OGFTZ from October 2012 until June 2016, and

c. Mr Wenxiao Zhao, who was Chief Financial Officer of OGFTZ from April 2012 until June 2016, and spent almost all his time there in that period.

22. The work carried out by Zhongfu, according to this evidence, included the erection of a perimeter fence round Fucheng Park, the installation or upgrading of roads, the upgrading of the sewerage system, and the upgrading of the power network in Fucheng Park. In addition, Zhongfu negotiated improved communication systems, and the opening of a bank, a supermarket, a hospital, and a hotel in order to assist to draw potential occupiers to Fucheng Park.

23. Dr Han, Mr Xue and Mr Zhao also said that, from 2010, efforts had been made to let out sites in Fucheng Park to occupiers for fixed terms, initially 90 years, but then normally between 10 and 50 years, most commonly 20 years. In 2011, there were, according to Mr Zhang, five occupiers of sites in Fucheng Park (and this is consistent with the documentary evidence, which suggests that agreements were entered into with seven potential occupiers that year). He also said that this increased to around 16 occupiers by early 2014, when much of the work just summarised had been completed. At that point, Zhongfu started to focus more sharply on finding occupiers of sites in Fucheng Park, and of Zenith who had been appointed to act for Ogun State as chief co-ordinator of the Zone, was distributed to occupiers of the Zone.

26. A letter dated 28th April 2014 in similar terms was sent by M.A. Banire and Associates ("Banires"), solicitors acting at that time for OGFTZ, to the Managing Director of Zhongfu, which stated that Ogun State has *"long terminated the interest of [CAI] in the Zone]"* and referred to the letter to CAI of 15th March 2012. Banires' letter went on to explain that

Zhongfu had been appointed to replace CAI under the *"able leadership ofDr Jason Han the Managing Director and Prof John Xue, the Chief Operating Officer",* and asked Zhongfu to disregard any communication from or on behalf of CAI *"as they have no authority or approval of ... Ogun State ... to act or do anything in respect of the Zone"*.

27. Thereafter, at least until 2016, there appears to have been no further intervention in the Zone from CAI or NSG.

28. Meanwhile, Dr Han and Mr Xue were seeking out potential investors and partners for the development of the remainder of the Zone, travelling to China and the United States for this purpose. They were assisted by the fact that Zone was receiving a degree of international recognition. For instance, in April 2016, the Economist Intelligence Unit published a video entitled *"Growth Crossings: Ogun Guangdong Free Trade Zone in Nigeria"*.

29. On 18th May 2015, Mr Adeoluwa wrote to the Managing Director of Zhongfu making a number of complaints about Zhongfu's operations, and stating that, while terminating the JVA was Ogun State's *"initial reaction",* it invited Zhongfu to attend a meeting to *"clear the air"* two days later. It does not seem that this meeting took place. It also appears that, although Zhongfu did not reply to the letter, Ogun State did not pursue the complaints any further.

30. On 20th January 2016, following discussions between Dr Han and a former MBA classmate, a Mr Li, who had 30 years' experience in the pharmaceutical industry, Ogun State and OGFTZ entered into a memorandum of understanding ("the 2016 MoU"), which was written in Chinese and English) with an

entity called Xi'an Industrial Delegation, and which related to the development of a pharmaceutical park ("the Pharmaceutical Park") in the OFGTZ. It was expressed in very general terms, but it referred to *"setting up a Xi'an Hi-Tech Industrial Park with USD1 billion investment on 10 square kilometers of land over 10 years"*. It referred to the *"hope"* that Ogun State would provide the requisite *"information ..., planning materials, personnel support, geographical data, plans etc"*. It also contained a statement that another company in the Xi'an group ("Xi'an") was *"willing to cooperate with [Ogun State] to improve the infrastructure",* including building bridges, roads and a port, for which it needed the *"support"* of Ogun State..

31. This was followed on 20th April 2016 by a *"Framework Agreement"* ("the 2016 Framework Agreement") between OGFTZ and an entity called Xi'an Ogun Construction and Development Limited Company (which the second recital records as having been formed by the Xi'an Industrial Delegation to implement the 2016 MoU). It was signed when President Buhari of Nigeria was on an official visit to China in April 2016, and it set out in rather more detail how the Pharmaceutical Park would be managed and operated. Thus, it envisaged that OGFTZ would provide the infrastructure outside the park necessary to support the Pharmaceutical Park, and that Xi'an would carry out the development of the park. The 2016 Framework Agreement also provided for a slightly different arrangement from the Fucheng Park underleases so far as level of rents and allocation of administrative fees were concerned.

32. Dr Han and Mr Xue also had discussions with Professor Issa Baluch and Mr Jon Vandenheuvel, both of whom gave evidence to us. Professor Baluch is an

experienced businessman with over 35 years involvement in FTZ world. He was one of the principal individuals responsible for the setting up and running of the Jebel Ali Free Zone in Dubai, which he said had been very successful and which he had then used as a model for other FTZ developments. Together with Mr Vanderheuvel, who is his partner in First Hectares Capital ("FHC") and had a background in academia and government, he started advising Zhongfu in autumn 2015. On 30th March 2016, FHC entered into a formal agreement with OGFTZ under which it was to be paid USD 7,500 per month. Together with Dr Han and Mr Xue, FHC started to develop a proposal for raising USD 250m *"to expand infrastructure across the Zone and the southwest region of Nigeria in order to attract new businesses to the Zone",* to quote from Mr Vandenheuvel's evidence. This got as far as the production of a couple of brochures, but they were never finalised, let alone distributed or circulated.

*The events of April to August 2016*

33. The reason that the brochure was not circulated was that Ogun State was challenging Zhongfu's right to any interest in the Zone through OGFTZ. This challenge appears to have been precipitated by a *note verbale* ("Note 1601") dated 11th March 2016 from the Economic and Commercial Section of the Consulate of the PRC in Lagos ("the Consulate") to Ogun State. Note 1601 stated that the Consulate had been *"officially notified" by* a PRC authority *"about the replacement of shareholdings owner of [CAI] to Guangdong New South Group",* which, the Note said, *"will legally lead to the replacement of the management rights of the OGFTZ which is now in the hands of [Zhongfu] to Guangdong New South Group"*. A certificate dated 9th July 2013 from the Guangzhou Notary Public Office

confirmed the fact that 51% of CAI had been acquired by NSG.

34. On 12th April 2016, Mr Adeoluwa wrote a letter ("the April 2016 letter") to the Managing Director of OGFTZ. The letter stated in the first (unnumbered) paragraph, that the PRC government *"through [the Consulate]"* had directed that Ogun State *"be notified of the transfer Shareholding interests of [CAI] in the OFGTZ to the New South Group"* and that *"[a]s a result of this development, the Consulate is requesting the Management Rights over the Zone be given to the new share owners"*. Paragraph numbered 2 said that Ogun State had been provided with *"what appears to be valid Share transfer documents",* and stated that *"Ogun State was carrying out an investigation"*. Paragraph numbered 3 requested that *"you furnish this office with proof that your company, [Zhongfu], is legitimately entitled to the shares and management rights over the Zone",* and suggested that, *"[w]ithout prejudging the outcome of the investigation", "the implication"* could be that the *"agreement between [Ogun State] and Zhongfu was premised upon misrepresentation and concealment of facts, and, therefore cannot be allowed to stand."* Zhongfu was invited to *"clarify the position and respond to the demand of* the PRC government.

35. OGFTZ responded to the April 2016 letter on 26th May, saying that Dr Han and Mr Xue were out of the country, and seeking a meeting. The following day, Mr Adeoluwa wrote a letter to the Managing Director of Zhongfu, referring to the April 2016 letter and saying that *"[t]he allegation against you bothered [sic] on fraud and material misrepresentation"* in that *"you were alleged to have fraudulently converted State assets ... and you misled Ogun State"* and that *"in the*

*absence of new facts, we are obliged to accept the facts as presented by the Chinese government [in Note 1601] and act accordingly"*. The letter then went on to suggest that OGFTZ's letter of 26th May *"deliberately did not address any of the issues, particularly the criminal allegations",* and ended by requiring Zhongfu *"to hand over all OGFTZ assets in its possession to [Zenith] and to vacate the Zone within 30 days hereof"*.

36. On 14th June 2016, Banires, who were by then acting for Zhongfu, responded in a letter apologising for the failure to deal with the issues raised in the April 2016 letter, and saying that the accusations in that letter and the *"termination"* in the May 2016 letter were *"based on some erroneous facts as misrepresented to you by the Chinese Consular"*. Banires' letter then stated that the *"issue on which your letter of termination is based is not just coming up for the first time",* that it had arisen *"first in 2014"* and that Zhongfu's *"response"* at that time *"eventually laid to rest that issue",* and that *"it is now surprising that this issue is coming up again"*. The letter than explained that CAI's rights had been terminated by Ogun State by the first of the March 2012 letters, and Zhongfu had then been subsequently appointed and had entered into the 2013 JVA, and then stated that *"the Chinese Consular misrepresented the facts to you"* but that, if the Consulate wished to persist, CAI *"should institute an action against [Zhongfu]"*. The letter ended by *"urg[ing] your restraint"* and *"plead[ing] for a convenient date for a meeting wherein this issue can be appropriately discussed"*.

37. On 14th July 2016, Ogun State informed NEPZA that it should *"withdraw recognition and stop all dealings with [Zhongfu] with regard to any matter relating or connected to the [Zone]",* and *"implored ...*

*all agencies to step in and fully investigate the activities of [Zhongfu]"*. Two days later, Mr Adeoluwa sent a text to Dr Han, which ended by saying that his advice to Dr Han *"as a friend"* was that he should *"leave peacefully when there is opportunity to do so, and avoid forceful removal, complications and possible prosecution"*. On 19th July, Dr Han said that he visited Mr Odega of the NEPZA who told him that Ogun State would use security personnel to get Zhongfu out of Nigeria. Dr Han also said that Mr Onas informed him in a telephone call around the same time that if he did not hand over the Zone to Ogun State, his passport would be seized and he would be put in jail. Dr Han described himself as *"very scared"* by all this.

38. There was also indirect evidence from Dr Han that, on 21st July, Mr Onas visited Fucheng Park and informed the tenants that Zhongfu's appointment had been terminated, and that a handover to the new manager had been scheduled for the following day. On 22nd July (again based on Dr Han's indirect evidence), Mr Onas again attended at Fucheng Park, this time with a member of the Nigerian police ("the police"), and introduced *NSG* as the new manager, and according to Mr Zhao caused some of Zhongfu's employees to be frightened.

39. There was other evidence about activities and statements made on behalf of Ogun State which are said by Zhongshan to amount to threats to individuals working for Zhongfu, with the apparent aim of getting Zhongfu to vacate the Zone, and its personnel to leave Nigeria. However, it is only appropriate to refer to one or two further aspects. First, on 27th July, NEPZA wrote to the Nigerian Immigration Service asking it to collect the original form of immigration papers (in particular, work permits known as CERPACs) from all

foreign staff, who would not have been able to work in Nigeria without such papers. The letter stated that the staff should only be allowed to leave with copies of the immigration papers. Secondly, on 4th August 2016, warrants citing *"criminal breach of trust"* were issued, apparently at the request of the police, for the arrest of Dr Han and Mr Zhao. Thirdly, on 17th August, Mr Zhao was arrested at gunpoint, and was then deprived initially of food and water, intimidated, physically beaten, and detained for a total of ten days, by the police. During his detention he was shown a copy of his warrant. Mr Zhao's evidence is that when in custody the police repeatedly asked him about the whereabouts of Dr Han. Mr Zhao was eventually freed on bail. He was initially required to deposit his passport with the police but after three visits to the relevant police station he was able to get the passport back and therefore he was able to leave Nigeria.

40. Dr Han was never arrested and was also able to leave Nigeria. Mr Zhao left Nigeria on 2 October 2016. Dr Han left on 11 October 2016. Neither has returned since.

41. We will refer to the oral and written communications from, and the actions of, Ogun State, NEPZA and the police as set out in paragraphs 33 to 39 above as "the 2016 Activities".

*Proceedings in Nigerian courts*

42. On 18th August 2016, Zhongfu started proceedings ("the Federal court proceedings") by way of a writ issued out ofthe Federal High Court in Abuja against NEPZA, the Attorney-General of Ogun State ("the A-G") and Zenith seeking declaratory and injunctive relief, effectively seeking to be reinstated as manager of the Zone. Some three weeks later on 9th September

2016 it started proceedings ("the State court proceedings") by way of a Statement of Claim issued out of Ogun State High Court against OGFTZ, Ogun State and the A-G of Ogun State, seeking possession of the Zone, an injunction, damages (in excess of USD 1 billion) and interest. On the same day, Mr Zhao issued proceedings ("Mr Zhao's proceedings") out of the Federal High Court in Abuja against the police, the Inspector General of Police, the Commissioner of Police for the Federal Capital Territory, Abuja and Wang Junxiong for damages in connection with his mistreatment.

43. The Federal court proceedings essentially relied on the proposition that there had been breaches of (i) Zhongfu's contractual rights as a manager of the *Zone* appointed by the first of the March 2012 letters, as approved in NEPZA's letter of 10th April 2012 confirming the termination of CAI's rights, and (ii) Zhongfu's rights under a *"tenancy"* of Fucheng Park under the 2010 Framework Agreement. In the State court proceedings, the claim was based on Zhongfu's right to possession of Fucheng Park under the 2010 Framework Agreement. The only reference to the 2013 NA in either proceedings was in paragraph 5 of the Statement of Claim in the State court proceedings, where it was stated that *"[t]his action is filed by [Zhongfu] to recover possession of land based on documents existing prior to 2013 and without prejudice to any claims arising pursuant to agreements made by the parties to the [2013 JVA] which claims may be pursued in other proceedings"*.

44. It appears that nothing happened in the Federal court proceedings or the State court proceedings (together "the Court proceedings") or in Mr Zhao's proceedings for a substantial period, and that deadlines

imposed by court rules were not complied with by the defendants, apparently with impunity. In March and April 2018, these three proceedings were discontinued.

45. Meanwhile, Zhongfu began SIAC arbitration proceedings against Ogun State and Zenith pursuant to clause 27 of the 2013 NC, but on 5th January 2017, Zenith applied in the Ogun State High Court for an anti-suit injunction restraining the arbitration. The application was heard by Justice Akinyerni, who gave judgment on 29th March 2017 granting the injunction sought on a permanent basis, essentially on the grounds that Nigeria (not Singapore) had a substantially closer connection to the arbitration and was therefore the seat of arbitration, and that the issue of the Federal court proceedings operated a waiver of the right to arbitrate or otherwise rendered the arbitration abusive or oppressive. On 23 June 2017, Zhongfu appealed this decision, but that appeal was were discontinued in 2018, together with the discontinuance of the Court proceedings.

C. The Treaty

46. The Treaty describes itself as an "Agreement Between the Governments of the PRC and Nigeria *"for the Reciprocal Promotion and Protection of Investments"*. Save where the contrary is stated, all references hereafter to articles are to articles of the Treaty.

47. Article 1(1) defines *"investment" as "every kind of asset invested by investors of one Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter",* and it goes on to identify certain more specific items *"in particularly [sic], but not exclusively", including "(a) any property rights ", (b) shares .... and any other kind ofparticipation in companies ...., (c) claims to*

*money or to any other performance with economic value ..., (e) business concessions ..."*

48. Article 2(2) provides that *"Investments of the investors of either Contracting Party shall enjoy the continuous protection in the territory of the other Contracting Party",* and article 2(3) prohibits a Contracting Party *"[s]ubject to its laws and regulations"* from *"tak[ing] any unreasonable or discriminatory measures against the management, use, enjoyment and disposal of the investments by the investors of the other Contracting Party".*

49. Article 3(1) requires each Contracting Party to accord *"fair and equitable treatment"* to the *"[i]nvestments of investors of [the other] Contracting Party"* in its territory.

50. Article 4(1) prohibits a Contracting Party *"expropriate[ing] against the investments if investors of the other Contracting Party in its territory",* unless it is *"for the public interests", "under domestic legal procedure", "without discrimination"* and *"against fair compensation".* Article 4(2) describes *"fair compensation"* as *"the value of the expropriated investments immediately before the expropriation is proclaimed".* Article 4(2) also stipulates that such compensation is to be paid *"without unreasonable delay",* and that it must *"include interest at a normal commercial rate".*

51. Article 9 is concerned with the *"Settlement of disputes between investors and one Contracting Party",* Article 9(1) provides for amicable settlement *"as far as possible".* Article 9(2) states that, if amicable settlement is unachievable *"through negotiations within six months, the [sic] either Party shall be entitled to submit the dispute to a competent court to [sic] the Contracting Party accepting the investment".* Article 9(3), first

sentence, provides that if *"a dispute cannot be settled within six months after resort to negotiations it may be submitted at the request of either Party to an ad hoc tribunal"*. The second sentence of article 9(3) states that *"[t]he provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in paragraph 2 of this article"*. Article 9(4) provides for the constitution of the ad hoc tribunal, with each party nominating an arbitrator, and the two party-appointed arbitrators appointing a *"Chairman"*. Article 9(5) stipulates that the tribunal *"shall determine its own procedure",* although it goes on to provide that it may take guidance from ICSID' s Arbitration Rules. Article 9(6) states that the tribunal's decisions are to be *"by a majority of votes"* and are to be *"final and binding on both parties to the dispute"*. Article 9(7) provides that the tribunal shall *"adjudicate in accordance with the law of the Contracting Party to the dispute accepting the investment... as well as the generally recognized principles of international law ..."*. Article 9(8) deals with costs.

D. This arbitration

52. On 21st September 2017 Zhongshan sent to Nigeria a notice of dispute and request for negotiations ("the 2017 notice"), in which it expressed its willingness to discuss the dispute which had arisen as a result of the actions taken and statements made between April and August 2016 as described above. No response was received.

53. On 30th August 2018, Zhongshan served a Request for Arbitration (a "Request") pursuant to article 9, setting out the history of Zhongfu's involvement in the Zone, and contending that the actions taken between April and August 2016 were in breach of Nigeria's obligations under the Treaty, nominating

Mr Matthew Gearing QC as arbitrator, and claiming compensation, interest and costs.

54. On 7th November 2018, Zhongshan applied to the International Centre for Settlement of Investment Disputes ("ICSID") for the appointment of an arbitrator for Nigeria pursuant to article 9(4). On 8th November, 2018, Nigeria nominated Mr Rotimi Oguneso SAN as its arbitrator, whereupon Zhongshan withdrew its application to ICSID.

55. By a Notice of Appointment dated 5th January 2018, Mr Gearing QC and Mr Oguneso SAN formally appointed Lord Neuberger of Abbotsbury as the Chairman, whereupon the Tribunal was formerly constituted.

56. The Tribunal had its first meeting on 15th January, 2019 via telephone conference. On 23rd February 2019, the Tribunal appointed the Permanent Court of Arbitration to provide support in managing the deposit and in connection with the hearing.

57. Following a series of discussions between the Tribunal and the parties conducted by email, Consolidated Terms of Appointment were agreed and circulated on 24th April 2019, and Procedural Order No 1 ("PO 1") was made on 19th February 2019. PO 1 included a timetable ("the timetable") which, inter alia, provided for Nigeria to make a request for bifurcation by 2 September 2019 and for a hearing starting on 15th June 2020.

58. On 1st May 2019, as prescribed in the timetable, Zhongshan served its Statement of Claim together with the witness statements of the witnesses on whose testimony it intended to rely, including evidence from an expert witness, Mr Matthews, an accountant, on the issue of quantum of compensation.

59. Nigeria requested an extension of time for the date in the timetable (2nd September 2019) for the service of its Statement of Defence and associated witness statements and its Request for Bifurcation, and, following discussions, a revised timetable was directed by the Tribunal on 30th September 2019.

60. In accordance with the revised timetable, Nigeria served (i) its Statement of Defence and associated witness statements, but no evidence from an expert witness, and (ii) Requests (a) for Bifurcation, (b) that the Tribunal determine the law applicable to the dispute, on 14th October 2019.

61. Zhongshan responded to the Request for Bifurcation and the Request for a determination of the applicable law on 28th October 2019. On 7th November 2019, we decided that (i) the proceedings should not be bifurcated, and (as amended by a subsequent email on the same day) (ii) it was premature to determine the applicable law. Pursuant to further representations from the parties, the Tribunal reconsidered its decision (ii) and on 14th November 2019 ruled that the governing law was *"the law of Nigeria as supplemented by international law as provided by article 9.7 of the Treaty"*.

62. Meanwhile, on 5th November 2019, Zhongshan made a Request for Production of Documents, to which Nigeria replied on 19th November 2019, which reply was answered by Zhongshan on 25th November 2019, and Nigeria made a brief further rejoinder on 27th November 2019. The Tribunal gave its ruling on the Request for Production on 29th November 2019. Nigeria thereafter failed to give production of any of the documents which the Tribunal ordered that it produce.

63. On 31st January 2020, in accordance with the revised timetable, Zhongshan served its Statement of Reply together with supporting witness statements. On 3rd February 2019, Nigeria sent corrected versions of a witness statement, and on 2nd March 2020, it served its Statement of Rejoinder, well in time.

64. On 15th May 2020, there was a pre-hearing conference, at which Nigeria applied for (i) an adjournment of the hearing due to start on 15th June 2020 and (ii) permission to amend its Statement of Defence, both of which were opposed by Zhongshan. On 18th May 2020,

a. The Tribunal ruled that, albeit only *"on balance",* application (i) should be granted the start of the hearing would be moved to 9th November 2020, making it clear that "only very exceptional circumstances could possibly justify a further adjournment";

b. The Tribunal also granted Nigeria permission to amend as sought;

c. The Tribunal gave certain other directions.

65. On 12th June 2020, Zhongshan served an amended version of its Statement of Reply to respond to the amendment to the Statement of Defence.

66. On 31st August and 2nd September 2020, Nigeria applied to serve a Further Statement of Rejoinder and to amend its Statement of Defence respectively, to which Zhongshan responded on 11 September 2020, and Nigeria answered on 17th September 2020. The Tribunal ruled on 21st September 2020 that the Defence could be amended but that the Further Rejoinder could not be served.

67. On 2nd October 2020, following submissions from the parties, the Tribunal directed that the hearing due to start on 9th November 2020 should proceed electronically owing to the problems which would be likely to be encountered by the parties' respective representatives, counsel and witnesses in connection with travelling and meeting owing to the continuing Covid-19 emergency.

68. A case management conference took place electronically on 26th October 2020, at which Nigeria applied (i) for the hearing due to start on 9th November to be adjourned, and (ii) to adduce an expert report on the issue of quantum. In a ruling provided on 26th October 2020, the Tribunal rejected both applications on the grounds set out in the ruling, and in particular, that an adjournment of the hearing, which would occur if either application was granted, could not be justified, not least in the light of the fact that Nigeria had already been granted an adjournment over Zhongshan's objection, and had been warned that the Tribunal would require exceptional circumstances before it would consider granting a further adjournment.

69. The hearing took place electronically from and including 9th to 13th November 2020. Zhongshan was represented by Mr Christopher Harris QC, and Mr Hussein Haeri and Ms Emma Lindsay as advocates, Withers LLP, Asato & Co, and G Elias & Co acting, and they called Mr Xue, Dr Han, Mr Zhao, Professor Baluch and Mr Vandenheuvel as witnesses of fact, and Mr Noel Matthews as an expert witness. Nigeria was represented by Mr Chikwendu Madurnere as advocate, supported by Chemezie Ojiabo, Dr Peter Oniemola, Z S Adeyanju, Mrs Maimuna Shiru, Philomena C Uwandu, and Ifeoluwa M Olaweye, and they called Mr

Adeoluwa, Mr Akanni Akinosi, and Mr Olumide Aderemi as witnesses of fact.

E. Nigeria's jurisdictional and preliminary points

*Introductory*

70. Nigeria took a number of points of principle, some of which are jurisdictional in nature, as to why Zhongshan's claim should fail, and it is convenient to consider them before turning to the issues of liability and quantum. The points of principle are as follows:

a. That Zhongshan's complaints are not about the conduct of the Federal State of Nigeria, and therefore there is no claim against Nigeria;

b. That Zhongshan has no claim because it did not hold an *"investment"* within the meaning of article 1(1);

c. The Tribunal has no jurisdiction because the six-month period referred to in the first sentence of article 9(3) had not expired when this arbitration was launched;

d. The Tribunal has no jurisdiction as the Court proceedings operated as a bar in the light of the second sentence of article 9(3) (the "fork in the road" point);

e. Zhongshan's claim should not be adjudicated in the absence of the PRC government being involved in the arbitration;

f In so far as Zhongshan is basing its claim on the Court proceedings and/or the anti-suit injunction, it cannot do so, because of its failure to pursue an appeal;

71. The Tribunal will deal with these contentions in turn.

*No valid claim against Nigeria*

72. We reject the argument that Zhongshan has no valid claim against Nigeria, which is advanced on the ground that none of the actions complained of were carried out by the Federal State (save in connection with the Court proceedings and the anti-suit injunction). We accept that Zhongshan's case is primarily based on actions of Ogun State, although the actions of other entities, namely the police and NEPZA, are also strongly relied on. However, for the purposes of a claim such as this, all organs of the State, including those which have an independent existence in domestic law, are to be treated as part of the State. This is customary international law, and is clear in the light of the Articles on *Responsibility of States for Internationally Wrongful Acts* ("ARSIWA") adopted by the International Law Commission in August 2001. Article I of ARSIWA provides that *"[t]here is an internationally wrongful act of a State when conduct consisting of an act or omission (a) is attributable to the State under international law; and (b) constitutes a breach of an international law obligation."* And article 4.1 of ARSIWA provides that *"[t]he conduct of any State organ shall be considered an act of that state under international law, whether the organ exercises legislative, executive, judicial or any other functions",* and article 9.2 of ARSIWA stipulates that an organ *"includes any person or entity which has that status in accordance with the internal law of the State"*. Article 5 of ARSIWA extends the rule to apply to *"a person or entity which is not an organ of the State under article 4, but which is empowered by the law of that State to exercise elements of the governmental authority"*.

73. The principles which are enshrined in these provisions have been recognised and applied in a

number of arbitral decisions relating to alleged breaches of bilateral investment treaties — see e.g. *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka* ICSID Case No ARB/09/2, Award, 31 October 2012, §§357ff; *Flemingo DutyFree Shop Private Limited v Republic of Poland* UNCITRAL Award, 12 August 2016, §§416ff; *Nissan Motor Co Ltd v Republic of India,* PCA Case no. 2017-37, relating in substantial part to actions taken by the State Government of Tamil Nadu and engaging the responsibility of the Republic of India. Quite apart from legal principle, it would render Investment Treaties almost meaningless if they did not apply to actions of local, as opposed to national, government.

74. Nigeria relied on decisions where a breach of contract by a local authority could not be attributed to the state concerned (e.g. *Compania de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic* ICSID Case No ARB 97/3 Award, 21 November 2000, §§77-82, and *Azinia, Davitian, & Baca v The United Mexico States* ICSID Case ARB (AF)/97/2 Award, I November 1999, §84). However, they were cases where the claim was based on a breach of contract by the local authority, and it was held that a "mere" breach of contract by a local authority could not of itself be attributed to the state. Indeed, it was implicit in the reasoning in those cases that, if the action complained of would otherwise amount to a breach of the treaty in issue, then it would be attributed to the state. And that is clear from decisions such as *Interocean Oil Development Company and Interocean Oil Exploration Company v Federal Republic of Nigeria* ICSID Case No ARB/13/20, Decision on Preliminary Objections, 29 October 2014, §§ 111 and 112, and *Garanti Koza LLP v Turkmenistan* ICSID Case No ARB/11/2019 Award, 16 December 2016, §244.

In *Interocean,* the tribunal stated that *"the existence of contractual claims under the JVA does not preclude the claimants from filing a separate set of claims pursuant to international law"* because *"[t]he substantive claims in this arbitration are not for breach of the JVA per se"*. That is precisely the case here,

75. We therefore conclude that, if and in so far as the 2016 Activities would otherwise amount to a breach of the Treaty, they can and should be attributed to Nigeria.

76. We add that, although we do not rely on this point as it was not argued, we draw comfort from the fact that it appears to have been the intention of the parties to the 2013 JVA, in the light of clause 15.1 thereof, that Ogun State would *"strictly observe"* the terms of the Treaty, thus reflecting an apparent understanding that the actions of Ogun State would be subject to the terms of the Treaty.

*No investment*

77. The contention that Zhongshan did not hold an investment seems to us to be untenable. The more difficult issue is whether the investment should be treated as its ownership of Zhongfu or Zhongfu's indirect 60% ownership of the interests created by the 2010 Framework Agreement and the 2013 JVA ("Zhongfu's rights"). Orthodox legal analysis might suggest that it should be the former approach: Zhongshan was the Chinese party who invested in Nigeria through its ownership of a Nigerian company, Zhongfu. On the other hand, commercial reality can be said to favour the latter approach, in that in economic terms Zhongshan indirectly owned Zhongfu's interests, and the only purpose which Zhongfu had was to hold what were in practice Zhongshan's Nigerian assets. It

is not necessary to decide the point, because, whichever approach is right, the far-reaching definition of "investment" in article 1(1) is wide enough to cover either the shareholding in Zhongfu or Zhongfu's interests — see for instance the discussion in *Mytilineos Holdings SA v The State Union ofSerbia & Montenegro and Republic of Serbia* UNCITRAL Partial Award on Jurisdiction, 8 September 2006, §§101 to 109.

78. It is right to add that, even for the purpose of assessing compensation, it would not in our opinion matter which was the right approach. What would be treated as lost is Zhongfu's rights, and it is they that were valued by Mr Matthews, as we discuss below. In the absence of any suggestion to the contrary in argument, evidence or cross-examination, it seems to us that the natural inference is that the depreciation in the value of Zhongfu as a result of the loss of its interests would have been equivalent to the value of the rights which were lost.

79. As we understood it, Nigeria also argued that Zhongshan could not in any event contend that it held an investment because it had not invested its own money or other assets in the alleged investment. Even assuming that the legal basis for that contention is made out, we would reject it on the facts. We have no reason to think that the 2010 Framework Agreement, the 2011 Receipt, the 2013 Document, the 2013 Acknowledgment and the 2013 WA are anything other than genuine documents, which had the effect which they purport to have. In other words, they demonstrate that Zhongshan paid money, and Zhongfu undertook obligations, which were referable, indeed solely referable, to the acquisition and enjoyment of the rights which Zhongshan says that Zhongfu had. On top of that, there is no reason to doubt the evidence of Dr

Han, Mr Xue and Mr Zhao, supported as it is by documents, that Zhongshan, through Zhongfu, spent considerable sums on works to the infrastructure of the Zone, and in particular Fucheng Park, as well as on marketing and managing Fucheng Park and the Zone. This is supported by the fact that that the audited accounts of Zhongfu and OGFTZ for the calendar year 2015 ("the 2015 Accounts") record expenditure (in rounded figures), respectively, of NON 54m on "road construction" and NGN 297m on infrastructure expenditure (and, to put that in context, in 2015 the exchange rate was around 200 NGN per USD).

*The six-month wait*

80. We also reject Nigeria's contention that this arbitration is ill-founded because Zhongshan failed to allow the six month period referred to in the first sentence of article 9(3) to expire before serving the Request. We are in some doubt whether a failure on the part of Zhongshan to wait six months would necessarily invalidate the Request or this arbitration, particularly if it had become clear that there was no possibility of settling its claim. However, it is unnecessary to decide that point, because Nigeria's contention fails, in our view, on the facts.

81. As already mentioned, on 21s[t] September 2017 Zhongshan sent Nigeria the 2017 notice in which it expressed its willingness to discuss the dispute which had arisen as a result of the 2016 Activities. The 2011 notice specifically described itself as *"a request for negotiations concerning a dispute between [Zhongshan] and [Nigeria] in connection with [Zhongshan's] investments in Nigeria in and through [Zhongfu]."* Nigeria did not even acknowledge this notice. It seems to us both clear as a matter of principle and in accordance with common sense and fairness that in these

circumstances, the six month period referred to in the first sentence of article 9(3) should be treated as running from the date of the 2017 notice. As a matter of simple analysis, Zhongshan started the negotiating process and then nothing happened, and consequently, after six months, Zhongshan was free to initiate arbitration proceedings. So far as common sense is concerned, it would be contrary to justice if Nigeria could rely on its own failure to take up the invitation to negotiate in order to say that Zhongshan had failed to allow for a sufficient negotiating period. We draw support from the reasoning of the tribunal in *Khan Resources Inc, Khan Resources BV and CAUC Holdings Company Ltd v The Government of Mongolia* PCA Case No 2011-09, Decision on Jurisdiction, 25 July 2012, §406, where it was held that the stipulated period for negotiations was triggered by a letter from the claimant expressing *"willingness to discuss the issues"*. Indeed, this case is a stronger one for Zhongshan than that of the successful claimant in *Bayinder Insaat Turizm Ticaret Ve Sanayi AS v Islamic Republic of Pakistan* ICSID Case No ARB/03/29, Decision on Jurisdiction, 14 November 2005, §102.

*The fork in the road*

82. Nigeria contended that the second sentence of article 9(3) precludes Zhongshan bringing this arbitration, on the ground that Zhongfu opted for Court proceedings. Nigeria relies .on both the Court proceedings, but in particular on the State court proceedings where Zhongfu claimed substantial damages, which apparently included loss of income which it would have enjoyed if it had not been effectively deprived of its rights under the 2010 Framework Agreement and the 2013 JVA. In effect, therefore, Nigeria contends that the Court proceedings or either of them consisted

of the submission of *"the dispute to a competent court'* in Nigeria.

83. There are a large number of tribunal decisions where such a fork in the road point has been considered in connection with a provision equivalent to the second sentence of article 9(3), and it is not easy to reconcile the approach adopted in all the decisions on the issue. We mean no disrespect to the various tribunals to whose decisions we were referred, but it does not seen to us that it would be helpful to analyse all the decisions, given that we have resolved that the correct approach on this issue is that adopted by a very distinguished and experienced tribunal in the *Khan v Mongolia* decision, already cited in the last paragraph but one of this Award. At §389, the tribunal identified the two familiar tests, *"the triple identity test"* (which requires the domestic court proceedings to involve the same parties, the same cause and the same object as the treaty arbitration) and *"the fundamental basis test"* (which involves asking whether the basis of the domestic court proceedings was fundamentally the same as the basis for the treaty arbitration). At §390, the tribunal saw *"no reason to go beyond the triple identity test'* for whose application there was *"ample authority"*. In the following paragraph, the tribunal addressed the argument that it would be *"unrealistic to expect all three prongs [of the triple identity test] to be satisfied',* and said that *"the test for the application offork in the road provisions should not be too easy to satisfy, as this could have a chilling effect on the submission of disputes by investors in domestic fara, eve when the issues at stake are clearly within the domain of local law"*. Having made that point, in §392, the tribunal accepted that the triple identity test may nonetheless be *"too strict ... where one only of [its] requirements ... is not satisfied",* but explained that

*"this is not the case here",* as *"not one of* the three requirements was satisfied.

84. We agree with the approach of the tribunal in those passages in *Khan v Mongolia,* and consider that it should be applied here. On that basis, the fork in the road argument raised by Nigeria should be rejected.

85. First, neither of the parties to this arbitration, Zhongshan and Nigeria, was party to either of the Court proceedings. In this connection, we note in particular that article 9(3) refers to the *"investor concerned",* which is a reference back to the definition in article 1(2), so that, in the present context, it refers to the Chinese investor, Zhongshan, not the Nigerian subsidiary, Zhongfu. On that basis alone, the *"investor concerned"* has not commenced any proceedings at all in the Nigerian courts and hence article 9(3) has not been triggered. (We accept that there is a powerful case for saying that this factor alone should be enough to defeat Nigeria's ease on the fork in the road point, but, as we have explained, we consider it more appropriate to look at the issue more widely.)

86. Secondly, in the Court proceedings, the case of the plaintiff, Zhongfu, was based (in the State court proceedings) on alleged breaches of its contractual and possessory rights under the 2010 Framework Agreement and the 2013 JVC, and (in the Federal court proceedings) on alleged breaches of Nigerian domestic public law; whereas Zhongshan's case in this arbitration is based squarely on the Treaty.

87. Thirdly, as to the relief sought, subject to one point, it is different also. In both of the Court proceedings, Zhongfu sought declaratory and injunctive relief, whereas in this arbitration, Zhongshan seeks compensation. The one area of overlap is that in the State

court proceedings, Zhongfu also claimed damages in USD 1,000,797,000. However, we do not consider that this factor justifies not following the approach of the tribunal in *Khan v Mongolia.* First, it is the only overlap; secondly, the claim for damages was very much of a subsidiary claim in the State court proceedings, the principal object of which appeared to be to seek an enforceable determination that Zhongfu was entitled to occupy the Zone and to continue to operate there peacefully and without harassment; thirdly, the State court proceedings got nowhere following their issue, and, particularly, as this does not appear to have been the fault of Zhongfu, it seems inappropriate for Nigeria to invoke those proceedings to justify reliance on the second sentence of article 9(3).

88. Whilst the Tribunal has decided to apply the triple identity test, we consider that the same result would obtain if we had applied the fundamental basis test. Three decisions were principally relied on to support an application of the fundamental basis test. In two of the three decisions there are two obvious differences from the present case, in that the Claimant in the subsequent Treaty arbitration had itself commenced local litigation which it had lost — up to and including the Supreme Court in *Pantechniki v. Albania,* ICSID *case* no. ARB/07/21, §§21-27, and in a local arbitration and in local court proceedings up to the Cairo Court of Appeals in *H&H Enterprises v Arab Republic of Egypt,* ICSID Case no. ARB/09/15, §§373-375. In the present case the Claimant commenced no local proceedings and neither set of proceedings commenced by Zhongfu made any progress at all, as explained above. In the third decision, *Supervision y Control v Costa Rica,* ICS ID case no. ARB/12/4/2017, the local proceedings were commenced by a subsidiary of the Claimant and it was found that those

proceedings must be considered as filed by Claimant (see §329). That is not a conclusion this Tribunal feels able to make in respect of Zhongshan and Zhongfu in this case. However, the *Supervision y Control* decision may also be distinguished by the facts that the Claimant failed to withdraw the local proceeding once it had initiated the arbitration (§330) and the Claimant pursued the local proceedings all the way to the Costa Rica Supreme Court, to a judgment some two years after the treaty arbitration proceedings had commenced (§307). As the tribunal put it *"What, in the end, matters for the application of fork in the road clauses is that the two relevant proceedings under examination have the same normative source and pursue the same aim."* (§330) As we have explained, the Court proceedings did not pursue the same aim as are pursued in this Arbitration.

89. Accordingly, we find for Zhongshan on the fork in the road argument. Before leaving this topic, there are two further points we should mention in connection with this argument.

90. First, we note that (i) the NA expressly referred to the Treaty in clause 15.1, and (ii) Zhongfu did not rely on its rights under the Treaty or even under the 2013 NA in the Nigerian Court proceedings, and specifically reserved its rights under the 2013 *NA* in the State court proceedings. While we have not taken those points into account when arriving at our conclusion on the fork in the road issue because they were not raised, our present view is that they supports Zhongshan's case on that issue. In particular, while we do not suggest that an investor can automatically avoid being defeated by a fork in the road argument automatically by stating in domestic proceedings that it was reserving its other rights, it does seem to us to

be a relevant factor for a tribunal to take into account when considering the issue, and that it could in some cases be decisive.

91. Secondly, we note that the Court proceedings were issued well before the expiry of the six months referred to in article 9(2), and it may therefore be arguable that, quite apart from what we have said in the preceding two paragraphs, neither the Federal court proceedings nor the State court proceedings were capable of falling within the ambit of the second sentence of article 9(3). We doubt that that argument would have succeeded if it had been raised by Zhongshan, and it is unnecessary to address it but we mention it for completeness.

*The involvement of the PRC*

92. Nigeria contends that *"[t]he Tribunal cannot meaningfully engage in a consideration of Nigeria's conduct when another State – whose conduct would necessarily also be in issue – is not present before the Tribunal to explain its position and action",* and in particular the conveying of Note 1601 to Nigeria.

93. It is true that the facts and reasoning behind the existence and contents of Note 1601 are by no means entirely clear and that only a representative of the PRC government or an agency of that government is likely to be able to explain them. However, that does not mean that, in the absence of such evidence, Zhongshan should be precluded from proceeding with this arbitration, or that the Tribunal should be precluded from publishing an award. Zhongshan does not need to rely on such evidence, as its case is based on the existence of Zhongfu's rights in Nigerian law as a result of entering into the 2010 Framework Agreement and the 2013 JVA, and its contention that

Zhongfu was deprived of those rights by the statements and actions of various organs of the Nigerian state between April and August 2016, and that deprivation was a breach of Nigeria's obligations under the Treaty. Note 1601 is irrelevant to that claim, save in so far as its existence or contents provide Nigeria with a defence to Zhongshan's claim — or would provide Ogun State, NEPZA and the police with a domestic law defence to Zhongfu's claim.

94. If Nigeria wished to contend that not merely that the 1601 Note itself, but that the PRC's explanation for the Note, is relevant to Nigeria's case in this arbitration, then it would have been open to Nigeria to call, or at least to seek to call, relevant employees or agents of the PRC government to give evidence to us. No such witness was called by Nigeria and no proof or statement from such a witness was put before us. Indeed, it has not been suggested to us by Nigeria that it has sought to identify, let alone to take a proof of evidence or statement from such a witness or to call such a witness.

95. Accordingly, we can see no ground for accepting Nigeria's argument that the arbitration should not conclude without evidence from the PRC government.

*No reliance on the Court proceedings or the anti-suit injunction*

96. At least on the face of it and in the light of the very limited information we have been provided with, there do appear to have been significant and unjustified delays, and considerable latitude given to the defendants, in the Court proceedings. However, we were not provided with any details as to the steps which Zhongfu took or could have taken to ensure that the proceedings were dealt with more speedily. While we

see the force of the point that the anti-suit injunction was processed very quickly in comparison with the very slow progress of the Court proceedings, we consider that the evidence is insufficiently strong or clear or strong to enable us to conclude that the way in which they were dealt with could represent a breach of the Treaty.

97. As for the anti-suit injunction, although we consider that the reasoning and conclusion of Justice Akinyemi were, with all due respect to him, misconceived, we are disinclined to hold that the grant of the anti-suit injunction amounted to a breach of the Treaty. There was nothing to prevent Zhongfu from appealing the decision, and indeed it did so, although it subsequently abandoned the appeal (when the proceedings were discontinued). Given that there is no reason to think that the grant of the anti-suit injunction by Justice Akinyemi was anything other than simply a wrong decision (at least in our view), Zhongfu's failure to prosecute its appeal, for no apparent reason, and certainly for no compelling reason, should, we think, disentitle it from relying on the decision as an infringement of the Treaty.

98. We have expressed our views in the preceding two paragraphs in somewhat tentative terms, because, as Zhongshan confirmed in argument, if we accept that its claim, based on the 2016 Activities, which are attributable to Nigeria, is well founded, it would not need to rely on the Court proceedings or the anti-suit injunction. For the reasons given in the following section, we do accept that that claim is well founded, and therefore it is unnecessary to reach a definitive conclusion on the issues discussed in those two paragraphs.

*A further point raised by Nigeria*

99. Before we move on from the jurisdictional and preliminary points, we should mention a further point which was raised by Nigeria in its skeleton argument for the hearing and which it mentioned at the hearing with some force (albeit briefly), namely that Zhongfu's investment was not made in accordance with Nigerian domestic law. This was not a point which had been pleaded by Nigeria. Indeed, in our ruling on 21st September 2020, we had refused permission for it to be raised in Nigeria's proposed Rejoinder. Accordingly, it is not a point which Nigeria can rely on, and therefore it is not a point which Zhongshan could have be expected to meet, and indeed, it was not a point on which we were addressed by Zhongshan.

100. While we therefore do not propose to rule on the point, it is, we think, right to say that we are very doubtful whether there would have been anything in the point even if Nigeria could have relied on it. Nigeria's primary argument on this point was that the 2010 Framework Agreement transferred or created an interest in land, and was therefore invalid because it required the consent of the Governor of Ogun State. However, (i) it was the duty of OGFTZ as transferor or grantor, not Zhuhai as transferee or grantee, to obtain the Governor's consent, (ii) Ogun State was a substantial shareholder in OGFTZ, (iii) in reliance on the 2010 Framework Agreement, Zhuhai and its successor-in-title Zhongfu, to the knowledge of Ogun State made substantial investments, and (iv) Ogun State both directly and as a substantial shareholder in OGFTZ benefitted from these investments. Accordingly, even assuming (which seems to us to be open to serious doubt) that the 2010 Framework Agreement did involve the creation or transfer of an interest in land,

we would have thought that Nigeria could not have successfully impugned the Agreement on the basis that the consent of Ogun State's governor was not obtained.

101. Nigeria also wished to argue that the 2010 Framework Agreement violated domestic law because Zhuhai was not registered as a Nigerian company at the time it was entered into, but once again we are very sceptical whether this argument could have succeeded, bearing in mind the points just made, and the fact that the benefit of the 2010 Framework Agreement became vested in a Nigerian registered company within a few months of its execution.

F. Nigeria's case on misrepresentation and concealment

*Introductory*

102. Nigeria contended that Ogun State was wrongfully induced by Zhongfu to enter into the 2013 JVA and that accordingly no claim could be brought against it based on the loss of Zhongfu' s rights thereunder. Essentially, Nigeria's contention was that Ogun State had been induced by what counsel for Nigeria referred to as a *"faudulent misrepresentation and concealment of material facts"* made by Zhongfu to persuade Ogun State to write the March 2012 letters and, eighteen months later, to enter into the 2013 NA with Zhongfu. Nigeria's case was that this misrepresentation and concealment entitled it to invalidate, or, in more technical terms, to rescind, the 2013 NA, on discovering the misrepresentation and concealment.

*The alleged misrepresentation*

103. The misrepresentation was said in Nigeria's Statement of Defence (and effectively repeated in its

opening submissions) to be that "[*i*]*n order achieve its target of securing appointment as substantive manager of the Zone, Zhongfu represented to [Ogun State] that CAI and its parent company have [sic] been liquidated and wound up without successor companies*". It was claimed that this misrepresentation led Ogun State to decide to write the November 2011 letter and the March 2012 letters ("the 2011/2012 letters"), and then to enter into the 2013 JIVA.

104. This contention is strongly denied by Zhongshan, and on the basis of the documentary and oral evidence before us in this arbitration, we are satisfied that Nigeria has failed to make out the contention.

105. First, in his witness statement, Mr Adeoluwa said that, when sending the 2011/2012 letters he had relied on *"mouthwatering representations"* by Zhongfu about its ability to manage the Zone, *"as well as representations concerning and relating to CAI's incapability to manage the Zone and the criminal investigation in China involving its parent company"*. Mr Adeoluwa expanded in his witness statement on the alleged criminal activity of senior members of CAI and parent company, Guangdong Xinguang International Group Co Ltd ("GXIG"), but he did not refer to being told that CAI or GXIG were in liquidation. Mr Akinosi said much the same, albeit rather more concisely. Further, Mr Adeoluwa described himself as having written the 2011/2012 letters because he was *"[s]wayed by the representations of Zhongfu, especially as regards its expertise and experience"*. There is thus no suggestion in the witness statements of anything having been said about CAI being in liquidation or ceasing to exist prior to the 2011/2012 letters having been sent.

106. It is true that the November 2011 letter refers to CAI and GXIG as being *"officially bankrupt"* and Mr

Adeoluwa described that letter describes itself as having been written *"[b]ased on the information given ... by Zhongfu",* but that does not assist Nigeria. It is clear that, even on Mr Adeoluwa's evidence, he did not rely on Zhongfu as the sole source of information for what he wrote in the letter – and it would be astonishing if it were otherwise. Thus, in May 2011, as Mr Adeoluwa accepted in cross-examination (albeit very reluctantly, even though it was in his witness statement), Ogun State representatives had visited the Zone and remarked on the *"low activity"* and *"were not satisfied"* with CAT's management of the Zone. Mr Adeoluwa also confirmed in cross-examination that (as he had said in. the November 2011 letter) he had made enquiries about CAI and GXIG in China, although he was evasive about the extent of the enquiries and as to the identity of his informant.

107. In these circumstances, in relation to the 2011/2012 letters, it seems to us that the misrepresentation case has simply not been made out on Nigeria's own evidence. That evidence instead supports a different statement which has not been pleaded (and anyway has not been shown to be untrue, let alone dishonestly so).

108. Quite apart from this, there are other problems in the way of our concluding that Zhongfu made any misrepresentations about CAI or GXIG. First, Mr Adeoluwa and Mr Akinosi never identified the individuals who had made any alleged representations. Secondly, the November 2011 letter seems to suggest someone in China as the source of the information about CAI's status, and that was, as we have mentioned, confirmed in Mr Adeoluwa's cross-examination (though he was evasive about this and said that he could not remember who the individual

was). Thirdly, the first of the March 2012 letters, addressed to CAI, justified the termination of the 2007 JVA on a number of different grounds, almost all of which concerned CAI's alleged poor performance, in managing the Zone, and, although CAI's bankruptcy is mentioned, it reads as something of an afterthought.

109. Fourthly, there is the fact that Nigeria says that what persuaded Ogun State that Zhongfu had misled it in 2012 was the 1601 Note. While that Note does indicate that the Chinese authorities believed that CAI was still in existence, it also suggests that the Chinese authorities also believed that CAI still had management rights over the Zone, which as Ogun State knew, was wrong, and had been wrong for some four years_ Fifthly, Mr Adeoluwa does not seem to have suggested in either of his letters of 12th April 2016 and 27th May 2016 that Ogun State had been misled in 2012 by Zhongfu into thinking that CAI had been wound up. In the former letter, he said that Ogun State was *"persuaded by the argument of the Consulate that the problem Ogun State had with [CAI] was as regards management rights and practices, not shareholding",* which is, with respect, somewhat opaque, but it is not an allegation that CAI were falsely said to have been wound up. And in the letter of 27th May 2016, Mr Adeoluwa said that what Zhongfu was *"alleged"* to have done was *"to have fraudulently converted State assets ... and ... misled Ogun State thereby",* which again is not an allegation that Zhongfu falsely represented that CAI had been wound up. Sixthly, even as late *as* 18 August 2016, Mr Adeoluwa was emailing Radix Legal and Consulting, who were now acting for Zhongshan and Zhongfu, that *"Ogun State ... has no issues with ... Zhongfu"* and that *"[t]he complaint against them, as you know, came from the Government of the [PRC],* who, he suggested, said in

Note 1601, that NSG *"rather than your clients were the ones who bought the shares of [CAI].* He added that the PRC government had suggested that *"to continue to allow Zhongfu to manage the Zone is afraud on the [PRC].*

110. Finally on this aspect, it had come to the attention of Ogun State and indeed of Mr Adeoluwa, that CAI appeared to be in existence and in business in Spring 2014, as is evidenced by the letters written to and by Mr Adeoluwa on, respectively, 25th and 28th April that year. If he had considered that he had been seriously misled into agreeing to Zhongfu being manager of the Zone by Zhongfu telling him that CM had been wound up, then we consider that Mr Adeoluwa would have raised with Zhongfu the fact that CAI appeared to be very much in existence in April 2014, rather than, as he did, unreservedly supporting Zhongfu as manager of the Zone.

111. In so fax as the pleaded misrepresentation relates to the execution of the 2013 NA, Nigeria's position seems even weaker, as by that time CAI had been stood down as manager of the Zone for more eighteen months. Again there is nothing in Mr Adeoluwa's witness statement to support the contention that the alleged misrepresentation was made, let alone that Ogun State acted on it when entering into the 2013 NA. The only additional statement attributed to Zhongshan is that its "interim status was negatively affecting its effectiveness". Accordingly, all the points made in paragraphs 105 to 110 above in relation to the 2011/2012 correspondence apply at least equally to the 2013 JVA.

112. Quite apart from this, we are unpersuaded that any statements as to the status of CAI or GXGI played any significant part in Ogun State's decision to

write the 2011/2012 letters or to enter into the 2013 JVA.

113. In the light of the way in which the 2011/ 2012 letters are expressed and in the light of Mr Adeoluwa's testimony, it seems reasonably clear that what really motivated Ogun State into replacing CM with Zhongfu as de facto manager of the Zone was CAI's disappointing performance and the expectation that Zhongfu would do much better. Accordingly, even if we had found that the alleged misrepresentation was made, it nonetheless is apparent that what "swayed" Mr Adeoluwa into writing the 2011/2012 letters was, according to him, Zhongfu's record and promises, as well as CAI's poor performance.

114. Again, that point applies with even more force to the 2013 JVA, By the time it was executed Ogun State had seen Zhongfu in action at Fucheng Park for well over a year, and common sense strongly suggests that Ogun State's assessment of Zhongfu's ability-would have been by far the most important factor in deciding to enter into the 2013 JVA. In addition, having terminated the arrangement with CAI by the first of the March 2012 letters, it seems very unlikely that Ogun State would have been influenced more than a year later by Zhongfu saying that CAI had been wound up, especially as the letter had cited CAI's bankruptcy.

*The alleged concealment*

115. The concealment of material facts relied on by Nigeria arises from the fact (not so far mentioned in this Award) that Zhuhai and GXIG entered into an *"Entrustment of Equity Management Agreement"* ("the Equity Agreement"), on 29th March 2012. This document is written in Chinese, and we have been provided with

a translation into English. Clause 1 stated that GXIG owned 51% of CAI, which owned 60% of OGFTZ. Clause 2 stated that GXIG *"agrees to entrust"* this shareholding to Zhuhai, which is *"willing to accept the entrustment"*. Clause 3 provided for a valuation of the CAI shares, and clause 4 stipulated that (i) the period of entrustment started when the CAI shares are *"transferred to [Zhuhai] or the third party'* (and it is unclear who that is), and (ii) the arrangement could not be terminated unless Zhuhai is in breach. Clause 5 appears to have envisaged that, at least while the Equity Agreement subsisted, Zhuhai would have control and de facto effective ownership rights over CAI's 60% shareholding in OGFTZ, but that it could not *"dispose [of] any major asset of OGFTZ"* without GXIG's consent. Clause 12(3) provided for the consent of Ogun State to the arrangement before it could proceed.

116. On 10th June 2012, GXIG and Zhuhai entered into a Supplemental Agreement to the Equity Agreement (in Chinese, and again we refer to the English translation) to *"entrust"* the 51% shareholding in *CAI "speedy and to promote the Ogun State Government to withdraw the relevant decision"*. Although clause 2 of this Supplemental Agreement refers to a valuation of RMB 33,785,500, clause 3 stipulates that owing to *"the unpredictable situation and uncertainties of the entrusted target",* this *"assessed result shall not he equaled to the final transaction value of the 51% shares",* which should be *"separately assessed or reconfirmed"*. Clause 4 states that Zhuhai should *"manage the entrusted target and operate the Company diligently"*.

117. The Equity Agreement was only executed on 29th March 2012, which was two weeks after Ogun State had written the March 2012 letters dismissing

CAI and appointing Zhuhai as interim de facto manager of the Zone, so it is hard to see how that Agreement could have been said to have been concealed from Ogun State at that stage. Having said that, we accept that it is likely that the Equity Agreement was being negotiated at the time of those letters.

118. Quite apart from this, at least according to the testimony of Dr Han, there is an innocent explanation for the Equity Agreement. He said that he had been told in October 2012 by Jeffrey Huang, the son of the founder of the group of which Zhongshan, Zhongfu and Zhuhai were members, that, earlier in the year Zhuhai had negotiated to purchase GXIG' s shareholding in CAI, because Zhuhai feared that CAI' s involvement in the Zone might be terminated, and Zhuhai wished to preserve the investment it had made since it had entered into the 2010 Framework Agreement. Dr Han was also told by Mr Huang that, although an agreement in principle had been reached with GXIG, the parties could not agree on a price, and in any event the consent of Ogun State had not been obtained (or even, it appears, sought), and so the transaction envisaged by the Equity Agreement (as varied by the Supplemental Agreement) had not proceeded.

119. The Tribunal had an initial degree of concern about the accuracy of this testimony. First, it was not immediately apparent why the Equity Agreement would have been entered into after CAI had been dismissed as de facto Zone manager on 15th March 2012. However, it may well have been thought that CAI could be reinstated (particularly as Zhongfu had only been appointed as manager on an interim basis for three months). Indeed, this was probably what was contemplated by the reference to *"promot[ing] the Ogun State Government to withdraw the relevant*

*decision"* in the Supplemental Agreement. Secondly, at least if read on their own, clauses 4 and 5 of the Supplemental Agreement appear to have been treating the Equity Agreement as if it had *been* completed. However, read in context and bearing in mind that the document has been rather idiosyncratically translated, the clauses appear perfectly capable of applying only when (and if) the Equity Agreement is completed. Further, the fact, mentioned above, that it appears that NSG acquired 51% of CAI in 2013 is plainly consistent with Dr Han's evidence that the Equity Agreement was not implemented. In any event, he was not challenged on the accuracy of his testimony as to the Equity Agreement, and no document or witness called what he said into question. Accordingly, although Dr Han's evidence on the issue was in part based on what he was told by Mr Huang, we accept it.

120. Over and above this, we have some difficulty in seeing on what basis it can be said that the fact that Zhongfu did not inform Ogun State about the Equity Agreement, even if it became effective, amounted to some sort of wrongdoing on the part of Zhongfu. We accept that Ogun State might well have been surprised to discover that CAI and Zhongfu had entered into such an arrangement. However, in the absence of special circumstances, the fact that A is negotiating, or even has negotiated, a contract with B, who is in a contractual relationship with C, is not something which A is legally obliged to reveal to C when negotiating a contract with C, even if the negotiations are related to C's contract with B. In a particular case, there could of course be special facts which would mean that there was an obligation on A to reveal to C that A was having negotiations with B. It has not been suggested that there are such special

facts in this case, and, having considered the facts, we do not consider that there are.

G. Nigeria's liability to Zhongshan

*The relevant facts*

121. Having rejected Nigeria's jurisdictional and preliminary points and its argument based on misrepresentation and concealment, we must now address the central question on liability, namely whether Zhongshan has established that Nigeria wrongly deprived Zhongfu of its rights under the 2010 Framework Agreement and/or the 2013 WA, what we have called "Zhongfu's rights".

122. So far as the facts are concerned, the Tribunal can see no good reason for not accepting as accurate both the documentary evidence, and the oral testimony, adduced by Zhongshan and summarised in Section B of this Award. The genuineness or effectiveness of some of the documents was challenged by Nigeria, but it does not seem to us that there was any basis for those challenges. In particular, Nigeria contended that OGFTZ had not actually executed the 2010 Framework Agreement, and in any event that Ogun State was unaware of it. However, the seal of OGFTZ is visible on the copy of the 2010 Framework Agreement, and it appears to have been signed on behalf of OGFTZ. Further, there is no reason to doubt the genuineness and accuracy of the 2011 Deed, the 2011 Receipt and the 2013 Document, all of which are consistent with the 2010 Framework Agreement being in existence, as is the work carried out by Zhuhai and Zhongfu before the March 20I2 letters were written by Mr Adeoluwa. Quite apart from this, while we are of the view that it is unlikely that Ogun State was unaware of the 2010

Framework Agreement, it would not in any event be invalidated because of such unawareness.

123. Further, Nigeria called no evidence which materially challenged the witness and documentary evidence relied on by Zhongshan. Thus, although Nigeria suggested that the carrying out of infrastructure work to Fucheng Park and the organisation of letting to occupiers of sites in Fucheng Park after the execution of the 2010 Framework Agreement, was effected by CAI, at any rate up to 15th March 2012, Nigeria called no witness to support that contention, or to contradict Zhongshan's documentary evidence and witness testimony which supported the contention that it was Zhuhai and Zhongfu, not CAI, who were responsible for these matters from the time of the 2010 Framework Agreement. The very existence of that Agreement, and the terms of the March 2012 letters also support Zhongshan's case on this.

124. The 2016 Activities, in so far as they involved Ogun State and NEPZA between April and August 2016 and set out above, were clearly aimed at getting Zhongfu and its staff to vacate the Zone and abandon Zhongfu's rights. Whether the actions of the police in that period had that purpose may be thought to be less clear, not least because, unlike Ogun State and NEPZA, the police had no involvement with Zhongfu's management of the Zone and had no legitimate interest in Zhongfu in that capacity. Nonetheless, we are of the view that the police actions were taken to discourage Zhongfu from defending its rights and to discourage its staff from remaining in the Zone. First, no other reason was advanced for the existence, or indeed the timing, of the warrants for the arrest of Dr Han and Mr Zhao, or for the arrest and mistreatment of Mr Zhao. Secondly, the police were involved when

Mr Onas went to the Zone on 22nd July 2016, which suggests that they were parties to the attack on Zhongfu's rights. Thirdly, NEPZA and Ogun State stated that they would get the immigration service and the police to use their powers to put pressure on Zhongfu staff, as Ogun State's letter of 14th July 2016, NEPZA' s letter of 27th July 2016, and Dr Han's evidence as to what he was told on or around 14th July 2016 by Mr Onas and Mr Odega, demonstrate.

*Conclusion on Nigeria's liability*

125. In the light of these conclusions on the facts, it seems clear to us that Zhongshan's claim must succeed. More specifically, we have concluded that the written and oral communications and the actions taken by Ogun State, NEPZA and the police between April and August 2016, namely the 2016 Activities, infringed Nigeria's obligations under articles 2(2), 2(3), 3(1), and 4.

126. The 2016 Activities were plainly designed to deprive, and indeed succeeded in depriving, Zhongfu of its rights under the 2010 Framework Agreement and the 2013 NA in circumstances where there were no domestic law grounds for doing so, and in a way which involved a combination of actual and threatened illegitimate use of the state's power to achieve that end. The Nigerian courts' failure to grant any prompt interlocutory or declaratory order, and granting of the anti-suit injunction, while not enough on their own to constitute breaches of the Treaty, serve to compound the wrongness of these actions and statements.

127. It is not even as if there is any convincing evidence to suggest that Nigeria considered that Zhongfu was doing a bad job in managing the Zone (although, as we have noted, complaints were made in the letter of 18th May 2015 letter, but they do not

appear to have been pursued and no attempt was made by Nigeria to substantiate them in this arbitration). On the contrary: the Zone under Zhongfu's management in 2013 and 2014 resulted in a substantial number of occupiers by 2016, and produced tax revenues for Nigeria of over NGN 160m. We also were referred to an Article published in February 2015 the Assistant Comptroller of the Nigerian Customs Service said that Zhongfu *"should be given a pat on the back for a job well done"*. Further, in April 2016, as already mentioned, the Economist Intelligence Unit produced a video praising the Zone.

128. Article 2(2) was infringed by Nigeria because Zhongfu's interests in the Zone were entitled to "the continuous protection" of Nigeria. This article is normally invoked where the investment has been harmed by someone other than the state, and the state has failed, by action or by law, to prevent or reverse the harm. However, in this case, far from stepping in to prevent or even discourage threats being made to Zhongfu and its staff, the police, whose function it is to prevent and deal with breaches of the law, actually supported those threats and helped carry them into effect.

129. Article 2(3) prevents Nigeria from taking *"any unreasonable or discriminatory measures against the management, ... use, enjoyment ... of the investments by [Chinese] investors"*. The combination of facts that (i) there were no apparently justifiable grounds in domestic law to shut out Zhongfu from the Zone and from its legal rights, and (ii) illegitimate actions, and threats of illegitimate actions, on the part of state bodies, which cannot have been in accordance with domestic public law, were taken or made to achieve that end, means that the actions and threats amounted to *"unreasonable measures"*. The additional fact that

there is no suggestion of other owners or operators were treated in such a way, and indeed that NSG was brought in as manager, suggests that the measures were also discriminatory.

130. The written and oral communications directed and actions taken by Ogun State, NEPZA and the police against Zhongfu and its staff between April and August 2016 also breached Nigeria's obligation under article 3((1) to accord *"fair and equitable treatment'* to Zhongfu's rights under the 2010 Framework Agreement. In this connection, there was a wholesale *"lack of due process leading to an outcome which offends judicial propriety"* as it was put in *Waste Management Inc v United Mexican States (Number 2)* ICSID Case No ARB(AF)/00/03, Final Award, 30 April 2004, §98. The threats to individuals, the peremptory requirements to vacate, and the use of police, in particular in the treatment of Mr Zhao, amounted to *"forms of coercion that may be considered inconsistent with the fair and equitable treatment to be given to international investment",* to quote from *Desert Line Projects LLC v Republic of Yemen,* ICSID Case No ARB/05/17, Award, 6 February 2008, §§151-9. Another way of making the point is that the 2016 Activities were arbitrary in the sense of having been, as it was put in. *Ronald S Lauder v The Czech Republic* UNCITRAL, Final Award, 3 September 2001, §221, *"founded on prejudice or preference rather than on reason or fact"* — or indeed rather than on any domestic legal basis (and see also *Biwater Gauff (Tanzania) Lt v United Republic of Tanzania* ICSID Case No ARB/05/22, Award, 24 July 2008, §709).

131. As to article 4, the actions and statements between April and August 2016 were aimed at, and succeeded in, *"expropriat[ing]",* or involved *"tak[ing]*

*similar measures against",* Zhongfu's Rights. It was rightly observed in *Metalclad Corporation v The United Mexican States* ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, §103, that *"[e]xpropriation includes not only, open, deliberate and acknowledged taking of property, such as outright seizure ..., but also covert or incidental interference with the use of property which has the effect of depriving the owner ... of the use or reasonably-to-be-expected economic benefit of property".* In other words, an action or statement which has the intended effect of enabling the state to take possession of the investment in question can fall within article 4. There can be no doubt that the 2016 Activities had such an intention and effect in relation to Zhongfu's Rights. Nigeria produced no evidence that this expropriation was *"for the public interests", and* there is no reason to infer that it was. It is clear that the expropriation was not effected *"under domestic legal procedure".* As we have observed, the expropriation appears to have been discriminatory. *And* there can be no doubt that there has been no *"fair compensation":* indeed, there has been no compensation. It follows that none of the four requirements of article 4 in relation to an expropriation have been satisfied.

132. Accordingly, we conclude that Zhongshan has made out its case that Nigeria breached its obligations under the Treaty when it effectively deprived Zhongfu of its rights under the 2010 Framework Agreement and the 2013 NC, and that Zhongshan is entitled to require compensation to be paid by Nigeria under article 5. We now therefore turn to the question of the quantum of that compensation.

H. The level of compensation

*Introductory*

133. Zhongshan contended that it was entitled to a sum which was the aggregate of (i) compensation for the loss of its rights under the 2010 Framework Agreement and the 2013 JVA and (ii) what is often called moral compensation or moral damages. We will refer to these two categories of relief as, respectively, (i) "Compensation," and (ii) "Moral Damages".

134. So far as Compensation is concerned, Zhongshan's case is that it is entitled to be awarded a sum equal to the value of its rights under the 20I0 Framework Agreement and the 2013 JVA ("the two Agreements") as at the date those rights were effectively lost, namely 22nd July 2016. In particular, Zhongshan contends that there should be no adjustment for a possible fall in the value of those rights since that date. We consider that that submission is correct. We have concluded that there was more than a single act of expropriation, but we agree with Zhongshan's suggestion that 22nd July 2016 is the right date to select, and it was not challenged by Nigeria. Zhongshan's submission that there be no adjustment for a fall in value (if any) since that date appears to reflect the terms of article 4(1)(d) and 4(2), in which the Treaty requires an expropriation of an investment to be for *"fair compensation",* which is defined as *"the value of the expropriated investments immediately before the expropriation is proclaimed".* Where, as here, the expropriation infringes the Treaty, it would seem wrong if Zhongshan's compensation was less than it should have been if the expropriation had been lawful: Although the Treaty does not expressly state what the basis of the assessment of Compensation should be, we consider that, in respect of all breaches of an Investor-State

treaty, the standard is one of "full reparation" for a claimant's losses. This reflects Article 34 of ARSIWA. Article 36(2) further makes it clear that compensation may extend to loss of profits. There are a number of ICSID tribunal decisions which support this approach – see e.g. *Ioannis Kardassopoulos v Georgia* ICSID Case No ARB/05/18, Award, 3 March 2010, §517, and *Compania del Desarrollo de Santa Elena S.A. v Republic of Costa Rica* ICSID Case No ARB/96/1, Award, 17. February 2000, §78.

135. As to Interest, again article 4 appears to assist Zhongshan's case that it should be paid interest on any Compensation. Further, article 38(2) of ARSIWA provides that *"[i]nterest runs from the date when the principal sum should have been paid until the obligation to pay is fulfilled"*.

136. So far as Moral Damages are concerned, such a head of compensation can be traced back at least to *Lusitania (US v Germany)* (1923) VII RIAA 32 at §40, where the tribunal held that damages could be awarded for *"injury inflicted resulting in mental suffering, injury to his feelings, humiliations, shame, degradation … and such compensation should be commensurate to his injury"*. Such damages have been frequently recognised and awarded where appropriate in investor-state arbitration awards — see e.g. *Desert Line Projects LL C v The Republic of Yemen* ICSID Case No ARB/05/17, Award, 6 February 2008, §§290-291. That decision is also in point because the mistreatment for which moral damages were awarded was of an employee of the claimant.

137. When it comes to the assessment of the Compensation, the Tribunal is in the uncomfortable position of having a fully reasoned and detailed expert report from a qualified expert witness, Mr Noel

Matthews, in support of Zhongshan's primary contention that it should receive Compensation of USD 1,078 million (plus interest) (or USD 1,446 million using an approach based on a comparable transaction), without any expert evidence on behalf of Nigeria in response. This is very unfortunate, and the circumstances in which it comes about are set out in our ruling of 26th October 2020: as explained above, Nigeria failed to instruct an expert when it had the opportunity to do so in accordance with the procedural timetable, and, when it finally applied to do so late, it sought an adjournment of the hearing, which we considered that we could not grant as Nigeria had already been granted one adjournment over Zhongshan's strong and understandable objection, and with a warning that a further adjournment would only be granted in wholly exceptional circumstances.

138. Because of the absence of any expert witness for Nigeria, the Tribunal considered it appropriate to ask Mr Matthews significantly more questions about his evidence than we would have done had Nigeria called an expert witness. Before doing so, we told the parties that we would take that course, and added that we appreciated that this should not be done in a way which would, or would be perceived to, affect our impartiality, and that if either party felt that any questions were inappropriate, they should feel free to object. In the event, there were no objections to our questions, all of which Mr Matthews answered. After the hearing, as explained below, we also asked Mr Matthews to produce some revised calculations. We gave the parties the opportunity to comment on those revised calculations. The Respondent commented briefly and the Claimant did not wish to add anything to its earlier submissions.

*Assessment of Compensation*

139. Mr Matthews is an experienced chartered accountant, a Fellow of the Institute of Chartered Accountants, a Senior Managing Director of FTI Consulting LLP, and a member of the FTI Consulting Inc. Group. He has considerable experience in the quantification of damage, the valuation of shares and businesses, and has given evidence and advice in a large number of investor-state and similar arbitrations involving the loss or depreciation of an asset or a right.

140. His primary assessment of the value of Zhongfu's rights in the figure of USD 1,078 million was principally based on a discounted cash flow, or DCF, exercise, which involved assessing the likely income and outgoings which would have been enjoyed and incurred each year over the term of the Agreements and capitalising the net annual income as at 22nd July 2016. This exercise thus involved assessing each year (i) the likely revenues which would be generated by the Zone and paid to Zhongfu, and (ii) the likely costs which would be incurred in developing and managing the Zone and paid by Zhongfu, and then taking the capitalised value of the difference between those two sets of figures.

141. This DCF assessment exercise involved making a number of assumptions:

a. That the assessment should be based on a period ("the Term") ending in December 2106, the contractual expiry date of the 2013 TVA;

b. As to the development period

i. That Fucheng Park would have been fully developed within 12 months on the basis that Dr

Han said that it *"would have been at full or close to full capacity within six to twelve months",*

ii. That the Pharmaceutical Park would have been fully developed and occupied within ten years from the end of 2017, in light of what was said in the 2016 Framework Agreement and the 2016 MoU; and

iii. That the remainder of the Zone ("the Rest of the Zone") would have been fully developed within about 20 years from the end of 2017, based on the evidence of Dr Han, who described the Zone as *"a long term project expected to be developed over a period of 20 years"*.

c. That full development would involve 60% of the area of the Zone being let off as sites to occupiers on underleases, with *"the remaining 40% of the land being used for road, public utilities and green spaces",* again quoting from Dr Han's evidence, although the figure for the Pharmaceutical Park was 80% according to the 2016 Framework Agreement and the 2016 MOU;

d. That each occupier would have been granted a 20 year underlease of a site, and that those underleases would have been renewed throughout the Term;

e. That the land transfer fee income should be assessed on the basis of the median rent under underleases granted in 2015, USD 12 per square metre (USD 11.23 for the Pharmaceutical Park), adjusted each year for anticipated inflation;

f. That Zhongfu's administrative fee income would be 1.35% (or 1,I% in the case of the Pharmaceutical Park) of the revenue generated by occupiers, which was assessed on the basis of a weighted average of

the forecast income in the underleases, adjusted each year for anticipated inflation;

g. That, while Mr Matthews said that he had *"relatively limited information with which to project the costs of developing land",* Dr Han's evidence that costs *"generally equated to around one-third of the land transfer fees",* should be adopted, although this seemed conservative in the light of other evidence;

h. That the evidence of Professor Baluch, that USD 250m would be raised *"to expand infrastructure across the Zone and the southwest region of Nigeria",* should be assumed to be right, supported as it was by the evidence of Mr Xue that this sum would be used to *"upgrade infrastructure ... within and leading to the Zone, power generating capacity in the South West Region of Nigeria, ... power cables within and around the Zone, sewerage and water treatment facilities to support the Zone and a business centre at Lagos Airport",* and also by the evidence of Dr Han and Mr Vandenheuvel;

i. In addition, that certain other running costs should be allowed for, which Mr Matthews assumed would increase from its 2015 level at a pro rata rate with respect to the increase in developed land;

j. That a discount rate should be applied of 14.3% per annum, as the appropriate figure to take as the cost of equity, being the aggregation of (a) the product of a beta (which measures the volatility of the asset in question against the market) of 0.98 and the aggregate of the risk-free rate of 2.3% and an equity risk premium of 5%, and (ii) a country risk premium for Nigeria of 7.2%.

142. The valuation which these assumptions produced resulted in a figure for compensation in the sum of

USD 1,078 million, and this figure was arrived at on the basis of calculations summarised by Mr Matthews in the following table:

| Estimate of the value of Zhongshan's rights under the Fucheng Industrial Park Agreement (USD million) | | | | |
|---|---|---|---|---|
| | Fucheng Park | Pharmaceutical Park | Rest Of Zone | Total |
| Land transfer income | 1.0 | N/A | 44.9 | 45.9 |
| Administrative fee income | 49.8 | N/A | 625.2 | 675.0 |
| Other running costs | N/A | N/A | N/A | (11.4) |
| Infrastructure investment | N/A | N/A | N/A | N/A |
| Total | 50.8 | N/A | 670.1 | 709.5 |

| Estimate of the value of Zhongshan's rights under the JV Agreement (USD million) | | | | |
|---|---|---|---|---|
| | Fucheng Park | Pharmaceutical Park | Rest Of Zone | Total |
| Land transfer income | 1.8 | 14.0 | 67.8 | 83.5 |
| Administrative fee income | 29.9 | 71.1 | 375.1 | 476.1 |
| Other running costs | N/A | N/A | N/A | (67.5) |
| Infrastructure investment | N/A | N/A | N/A | (123.7) |
| Total | 31.6 | 85.1 | 442.9 | 368.4 |

| Summary of Zhongshan's loss based on my DCF analysis (USD million) | Value |
|---|---|
| **Value of rights under the Framework Agreement** | **709.5** |
| **Value of rights under the 2013 JVA** | **368.4** |
| **Total Value of Zhongfu's Rights** | **1,078** |

143. The use of a DCF calculation as a means of assessing compensation for the loss of an asset has been relied on by claimants in many cases where an income-producing asset has been lost or harmed, including in a large number of investor-state cases. In many decisions on investor-state disputes, tribunals have assessed compensation on a DCF basis. However, even in some cases where it has been adopted, the tribunal has emphasised that DCF should be used with caution. Thus, *in Enron Corporation Ponderosa Assets LP v Argentine Republic* ICSID Case No ARB/01/3 22 May 2007, §385, while explaining that

DCF bad been *"constantly used by tribunals in establishing the fair market value of assets to determine compensation of [sic] breaches of international law",* the tribunal also emphasised that *"it is to be used with caution as it can give rise to speculation".*

144. In many cases where use of the DCF approach was rejected by tribunals, it was because the investment had not really got under way and therefore had little or nothing to show by way of a track record. Decisions show that there is resistance to using DCF where the investment had not been implemented or was at a fairly early stage. Thus, in *Tecnicas Medioambientales Teemed S. A. v United Mexican States* ICSID Case No ARB (AF)/00/2, 29 May 2003, §186 the tribunal refused to adopt a DCF approach because of *"the brief history of operation of the Landfill - little more than two years — and difficulty in obtaining objective data allowing the [DM method on the basis of estimates for a protracted future, not less than fifteen years"* coupled with the fact that the *"future cash flow depends upon investments to be made — building of seven additional cells — in the long term".* Similarly, the tribunal in *Wena Hotel v Arab Republic of Egypt* ICSID Case No. ARB/98/4, 8 December 2000, §124, considered that a DCF approach *"would be too speculative"* where the business had operated for only seventeen months, under a contract which was contractually due to last around between 22 and 25 years. And in the earlier decision in *SPP (Middle East) v Egypt* ICC Award, Case No 3493, 11 March 1983, 22 ILM 752 (1983), one of the reasons for rejecting a DCF approach was, as explained in *Wena Hotel, §123,that "by the date of the cancellation, the great majority of the work had still to be done".*

145. DCF valuations in the context of investment treaty cases were the subject of an article, *DCF.. Gold Standard or Fool's Gold'* in *The Asia-Pacific Arbitration Review 2020,* written by two members of FTI, Mantek Mayal and Alex Davie. The authors consider some of the investment treaty cases, where DCF has been adopted or rejected, and say that *"[p]erhaps the main drawback of DCF analysis is its sensitivity to uncertain inputs"* and that the *"uncertainty of appropriate inputs is compounded in the case of early stage businesses where there is no track record of steady historical cash flow generation"*. The authors suggest that such uncertainty should not lead to a DCF valuation being rejected, but that it justified using *"other valuation methods"* in addition.

146. In this case, we would summarise the information most relevant to the DCF valuation carried out by Mr Matthews as follows:

a. Between mid-2009 and mid-2016, some 37 occupiers were granted underleases of sites totalling about 830,000 square metres or 83 hectares, i.e. somewhat over 0.8 square kilometres, in Fucheng Park;

b. Copies of 32 of those underleases, which show the financial terms agreed with, and the anticipated income of, the respective occupiers;

c. The audited annual accounts for the calendar year 2015 prepared in NGN (the exchange rate in 2015 was around 200 NGN per USD, and on 22n[d] July 2016 it was 295 NGN per USD), including:

i. Zhongfu's accounts, which show negligible expenditure, and profits of NGN 621m (compared with NGN 227m for 2014);

ii. OGFTZ's accounts, which show operating revenue of NGN 607m and a loss after administrative expenses etc of NGN 520m (compared with operating revenue NGN 252m and a loss of 673m for 2014);

iii. The Notes to Zhongfu's accounts, recording that NGN 54m was spent in 2015 on "road construction"; and the Notes to OGFTZ's accounts recording infrastructure expenditure in 2015 of NGN 297m;

d. Witness evidence that USD 250m would be sought for installing infrastructure inside and outside the Zone;

e. Dr Han's statements that Zhongfu had worked on the basis that it would take up to a year to fill Fucheng Park, and 20 years to fill the Zone with occupiers, and that 60% of the gross area of the Zone could be underlet with the remainder used for infrastructure, amenity etc;

f. Witness and documentary evidence that agreements had been entered into by OGFTZ with Xi'an in relation to the development of the Pharmaceutical Park.

147. In the case of Fucheng Park, while one may have doubts about some of the details of the assessment, both the adoption of a DCF valuation, and the general thrust of Mr Matthews's approach to that valuation appear to us to be justified. We conclude that there is a sufficient track record upon which a DCF calculation may be based, albeit caution is needed as regards the appropriate assumptions to be adopted. As at July 2016, around 830,000 square meters of land in that Park had been let by way of sites to occupiers under underleases which were long-term arrangements,

and this had been achieved over some seven years. 830,000 square metres represents around 35% of the total area of Fucheng Park, and around 60% of the lettable land, on the basis of Dr Han' s evidence that about 40% would be given over to infrastructure, amenity land and the like. It also appears that a substantial proportion of those sites which were subject to underleases had been developed by the occupiers. And a not insignificant amount had been incurred on infrastructure at Fucheng Park, as is revealed by the 2015 Accounts. It is true that there were accounts for only two years (although our information about the 2014 Accounts rests solely on the information in the 2015 Accounts), and they do not show a particularly profitable venture – particularly if one looks at OGFTZ's losses.

148. It was not contended by Nigeria that the accounts did not present a true and fair view of the finances relating to the investment for these two years, 2014 and 2015, and we have no basis to doubt their accuracy Despite the limited period covered by the accounts, it is not unreasonable to assume that there was a good prospect, based on the experience of the previous seven years, that Fucheng Park would be fully occupied within a few years or so. There were some 500,000 square metres of lettable area still unoccupied (given that 60% of 2.24 square kilometres is 1.34m square metres, ofwhich 830,000 were occupied).

149. According to Mr Matthews's evidence, the average rate at which space at Fucheng Park had been let between mid-2009 and mid-2016 was 120,000 square metres per year, and between mid-2012 and mid-2016, it was 150,000 square metres per year. During the last eighteen months of that four-year period, the rate was approximately 325,000 square

metres per annum. However, it would not be safe to assume that that rate could have been maintained: for example, it may have reflected a time of high demand in a cyclical market or it may have been a spurt due to temporarily pent-up demand. In that connection, we note that in the last six months of those eighteen months the rate appeared to be falling off.

150. In those circumstances, we consider that, even, taking the most pessimistic end of Dr Han's assessment that it would have taken *"six to twelve months"* to let off the remaining sites in Fucheng Park looks very optimistic, as it would involve letting some 500,000 square metres in a year. On the basis of the past experience summarised in the preceding paragraph, it seems to us that 30 months would be a more realistic assessment. After all, the only evidence as to the likely rate of letting is past performance and a statement by Dr Han, which was simply adopted by Mr Matthews. The basis of Dr Han's assessment was not explained and, in the absence of any convincing supporting evidence, we do not consider that it can be treated as anything more than an aspiration. Accordingly, the only reliable evidence as to the likely rate of letting after 2016 is the past performance summarised in the immediately preceding paragraph, and we have concluded that it suggests that it would be appropriate to assume a letting rate of 200,000 square metres per year. That is more than the average rate achieved in the four years of Zhongfu's stewardship, and, although it is less than the average rate achieved in the last eighteen month period, that rate seems to have been levelling off towards the end of that period.

151. We also consider that taking into account the income and outgoings over 30 years would amount to

unrealistic speculation, particularly given the early stage of this investment and the considerable uncertainties as to infrastructure expenditure. As Mr Matthews fairly accepted, the effect of tarrying out a DCF valuation on the basis of limiting the net income to 20 years rather than his approximately 90 years on the present value of Zhongfu's asset is relatively small. as each successive year's contribution is less than its predecessor. In all the circumstances of this case, it seems to us that 20 years is the right cut-off.

152. Accordingly, we accept Mr Morrison's valuation of Zhongfu's loss insofar as it relates to Fucheng Park, subject to (i) assuming a 30-month period to let off the remaining lettable area, and (ii) limiting the period over which the DCF assessment is carried out to 20 years.

153. The application of a DCF approach to valuing the Pharmaceutical Park and the Rest of the Zone on anything like the assumptions as to the rate of letting which Mr Matthews made, appears to us to be very problematic indeed. No underleases had been granted of any site in those parts of the Zone; no, or very little, infrastructure was in place in those parts of the Zone, and there was not even any finance in place to carry out infrastructure works; further, there were no feasibility or other business plans; no marketing proposals or investigation. Taking the Zone as a whole (i.e. including Fucheng Park) the total amount of land which had been let under underleases by July 2016 was less than 0.9% of the total area of the Zone (according to both the 2010 Framework Agreement and the 2013 JVA). That figure should be almost doubled, because, as just mentioned, we are proceeding on the basis that 60% of the land would be subject to underleases, with the rest being given over to

infrastructure, amenity land and the like. But that makes little difference to the point: 1.5% is a very small proportion of the total lettable land in the Zone. A DCF valuation of the Pharmaceutical Park and the Rest of the Zone in those circumstances on anything like the basis assumed by Mr Matthews appears to us to be unjustifiable – especially when one bears in mind what was said in cases such as *Teemed* and *Wena Hotel.*

154. In such cases, tribunals have sometimes emphasised the desirability of a detailed business plan if a claimant is proposing a DCF valuation, and that must, self-evidently, be particularly true where, as in this case, the investment is at a relatively early stage of development. In his oral evidence, Mr Matthews acknowledged that a business plan *"would obviously be relevant"* and that it would be *"obviously it would be helpful"* to have such a document. Given that such a document does not exist (or at least none was drawn to our attention), it would have been helpful to have an in-depth independent expert assessment of the prospects of letting off units in the Zone and of the nature, extent, costs, and importance of necessary and desirable infrastructure works inside and outside the Zone, the time they would be likely to take and any difficulties they were likely to encounter. As it is, although Mr Matthews was able to draw some support from the underleases granted of sites in Fucheng Park up to mid-2016, when it came to assessing future lettings and future expenses, he was largely reliant on the statements of employees and agents of Zhongfu, which were not the subject of any sort of detailed analysis or justification.

155. The speculative nature of the DCF exercise when applied to the Pharmaceutical Park and the Rest of the Zone is further demonstrated by the fact that

OGFTZ and Zhongfu only have audited accounts for the two calendar years 2014 and 2015. Although they show that Zhongfu made a profit in those two years, it was not a large one when viewed in the context of Mr Matthews's projections, and, according to those accounts, OGFTZ, which was bearing most of the costs of management and the infrastructure costs, made a loss in each year.

156. As with the 20-year estimate for letting the totality of the Zone, the assumptions on which Mr Matthews based his DCF assessment for the Zone involved substantially relying on relatively general statements by directors, employees or agents of Zhongfu, rather than on independent assessments of the required infrastructure, and the expenditure which it would involve and the time it would take to instal. The figure of USD 250m, to which Professor Baluch and Mr Vanderveuvel spoke, was not broken down, and did not appear to be based on any assessment of the specific nature and extent of the works involved, how long they would take, and how much they would cost. If there was such an assessment, we were not told about it. Nor was Mr Matthews, as he was unable to say what such works would involve, although he accepted that *"it matters to have a good infrastructure both outside and inside the Zone",* and he explained that *"underlying [his] valuation is the assumption that the infrastructure is in place inside the Zone and outside the Zone".* The figure of USD 250m derives some credibility from the fact that it is supported by the experienced Professor Baluch and Mr Vanderveuvel, but the fact that we do not know – and the fact that Mr Matthews did not know – what the works would consist of, how, indeed whether, they had been costed, and how long they would take, is a matter of obvious concern. This is

particularly true in relation to the work which it was accepted would have to be carried out outside the Zone, because there could obviously be greater impediments in the way of carrying out such work, given the relative lack of control which OGFTZ and Zhongfu would have over what went on outside the Zone. Nor do we know how serious it would be for the profitability of the Zone, if some of the works outside the Zone could not be carried out, or what the risks of that happening were.

157. The documentation to support the raising of the USD 250m Was scant. It is far from clear how a fund-raising initiative would have been received by potential investors or how easy it would have been to raise the money. While we accept that the evidence of Professor Baluch and Mr Vanderveuvel assists Zhongfu's case on this question, there are obvious grounds for caution as to how easy it would have been to raise the money, given that the market had not been tested and there were apparently no lenders lined up to advance the funds. As Mr Matthews said *"they were still exploring how they were going to raise [the money]",* and there was no formulated or detailed plan to raise the money. When considering the appetite of the market for such an investment, it is, we think, also right to bear in mind Mr Matthews's evidence that *"[i]t appears that many Nigerian FTZ's have not been particularly successful to date"*.

158. In the immediately preceding paragraphs, the Tribunal has been considering both the Pharmaceutical Park and the Rest of the Zone together. Unlike the Rest of the Zone, the development of the Pharmaceutical Park was at least the subject of a written arrangement, namely the 2016 MoU and the 2016 Framework Agreement. However, these documents do not take matters a great deal further, although we

acknowledge that they do show that the projected development of the Pharmaceutical Park was not merely a matter of unsubstantiated hope, and was, at least potentially, ahead of that of the Rest of the Zone. The Pharmaceutical Park is a substantial area, 10 square kilometres, i.e. 10m square metres or 1,000 hectares, which is over four times the size of Fucheng Park. As far as the evidence goes, no development assessment of the Pharmaceutical Park had been undertaken, and, save that the documents contain a reference to USD 1 billion, there was no evidence as to the nature, cost or timing of any infrastructure work. We know nothing about the experience, record, capabilities or financial status of Xi'an, and it appears that the company which entered into the MoU was a Special Purpose Vehicle formed for that purpose. Nor is there any evidence as to the likely level of demand in the pharmaceutical industry for space in the Zone: apparently, there are no pharmaceutical business occupiers of Fucheng Park. Furthermore, it does not appear that there is any commitment from Xi'an to do anything specific under the terms of the 2016 MoU or the 2016 Framework Agreement.

159. Mr Matthews made the point that in a way it was artificial to divide up the Zone into three sectors and value each separately. We see the force of that, but it was the basis on which he decided to carry out his valuation. However, the point does provide some support for the notion that, if one looks at the Zone as a whole, it can be said that the letting history of Fucheng Park means that there was a track record, albeit a very preliminary and limited track record, for the Pharmaceutical Park and the Rest of the Zone, namely the lettings and infrastructure in Fucheng Park.

160. Mr Matthews based his DCF valuation of Zhongfu's rights in relation to the Pharmaceutical Park and the Rest of the Zone on the assumption that it would take 20 years to let the totality of the sites in the Zone: that involves assuming that lettings will be achieved at the rate of just under 3,000,000 square metres per annum (on the basis that the Zone is 100,000,000 square metres, that 60% of the Zone would be lettable, and only a very small proportion, namely most of Fucheng Park, had been let). A letting rate of 3,000,000 square metres per annum is around 20 times the average rate at which sites were let in Fucheng Park between mid-2009 and mid-2016, and around 10 times the rate during the last eighteen months. Yet, the only basis which Zhongshan appears to advance for justifying this remarkably substantial increase in letting rate is Dr Han's description of the Zone as *"a long term project expected to be developed over a period of 20 years"*. But that is an unsubstantiated and unexplained estimate from someone with an indirect interest, who was expressing what Zhongshan, the claimant had expected, and who was not proffered as an expert witness. So far as Mr Matthews was concerned, having explained in his Report that his 20-year assumption was based on Dr Han's view, he said in his oral testimony that he would not otherwise be *"able to benchmark"* his assessment *"to a data point is [sic] the period of time that it would take for the Zone to be developed"*.

161. In the Tribunal's view, in order to justify such a very substantial differences between (i) the assumed future rates of letting of sites in the Rest of the Zone and the Pharmaceutical Park and (ii) the actually achieved rate of letting of sites in Fucheng Park over the preceding seven years, one would expect to have cogent expert evidence based on experience and

examples and containing explanations as to why such a remarkable change could be expected. The unsubstantiated and briefly expressed expectations of a director of the company relying on what he said were "*expected*' future rates falls very far short of such an evidential requirement. Further, the uncertainties we have discussed in paragraphs 152 to 160 above reinforce the point that it would be inappropriate to assume that the letting rate would be significantly higher, let alone very substantially higher, than the letting rate achieved even in the last eighteen months in Fucheng Park.

162. In the light of these conclusions, the correct approach to the assessment of the Compensation other than in respect of Fucheng Park is not easy, particularly bearing in mind the warnings about the risks of speculating and the desirability of having a track record when carrying out a DCF valuation. So far as the Pharmaceutical Park is concerned, we consider that it should be assumed that land would be let off to occupiers at the rate of 200,000 square metres per annum (i.e. at the same rate as for Fucheng Park) on the basis that letting the Pharmaceutical Park will commence when Fucheng park is fully let (i.e. after 30 months). Although it does not actually affect our valuation, we consider that 60% of the Pharmaceutical Park would be lettable: the documents contained a suggestion that the right figures might be more but there was no independent support for this, so, again, we adopt the assumption made for Fucheng Park. This would mean that. 6,000,000 square metres would be available for letting in the Pharmaceutical Park.

163. Of course, if the Pharmaceutical Park turns out, or would have turned out, to be a great success, a letting rate of 200,000 square metres per annum

would very probably seem to be an unduly cautious rate, but it is equally true that if the Pharmaceutical Park did not turn out, or would not have turned out, well, 200,000 square metres a year would very probably be an over-optimistic rate.

164. At 200,000 square metres per annum, and working on the same assumption as to 60% of lettable area, it would take 30 years until the Pharmaceutical Park was fully let. For the purposes of the valuation, we are prepared to take into account 171/2 years of letting activity at this rate (i.e. 20 years less the 21/2 years to let the remainder of Fucheng Park), and this would mean that a total of 3,500,000 square metres would have been let by the end of the 20-year period that we are prepared to consider for valuation purposes.

165. Subject to those adjustments, we would not make any amendment to Mr Matthews's DCF calculations for the Pharmaceutical Park.

166. The concerns we have expressed as to the lack of evidence as to the prospects of the Pharmaceutical Park apply with even more force to the Rest of the Zone. The uncertainty is even greater because OGFTZ and Zhong[f]u did not have the benefit of a development partner such a Xi'an, or the concomitant benefit of an arrangement such as the 2016 Framework Agreement or the 2016 MoU, in relation to the Rest of the Zone. In these circumstances, we think that it would simply be too speculative to take into account any potential development of the Rest of the Zone.

167. In any event, the assumption of a letting rate of 200,000 square metres per year for the unlet part of Fucheng Park and the Pharmaceutical Park means that the Pharmaceutical Park would not be fully let by the end of the 20 years. If the Rest of the Zone was

marketed at the same time as the Pharmaceutical Park, it would involve significant expenditure on infrastructure in both areas at the same time, and would at least potentially render the letting of the Pharmaceutical Park more problematic (in that the two areas might well compete for the attention of potential tenants), and so would justify a reduction in the 200,000 square metre letting rate that we have assumed for the Pharmaceutical Park. That also strongly suggests that it is right to assume that the Rest of the Zone will not be marketed until the Pharmaceutical Park is fully (or nearly fully) let. And the assumption of sequential letting of space in the three areas of Fucheng Park, the Pharmaceutical Park and the Rest of the Zone seems consistent with Mr Matthews's point that they are all part of a single Zone. In those circumstances, particularly in the light of the absence of any evidence as discussed in paragraphs 152 to 160 above, we take the view that we should assume the development of the Rest of the Zone is likely to be postponed beyond 20 years, in which case its prospects as at 2017 or today are very speculative indeed. The prospects are simply speculative for us to be prepared to attribute any value to the Rest of the Zone.

168. We acknowledge that the assumption that the Zone as a whole will be let off at the rate of 200,000 square metres a year effectively implies that we are proceeding on the basis that it would take a very long time indeed to let off the whole of the Zone. But that is the consequence of the Zone extending over such a very substantial area. The size of the Zone seems unlikely to have a substantial effect on the demand for space within it, and, at least in the absence of some convincing expert evidence to support such a proposition, it would seem unjustifiable to conclude that,

because the Zone is very large, the letting rate should be significantly increased beyond what it otherwise would be.

169. We also acknowledge that some of the findings and assumptions we have made in connection with the valuation exercise are somewhat speculative in nature. That is partly because a significant degree of uncertainty and unpredictability is almost always inherent in the exercise of valuing a future income and outgoing stream. But, in this particular case, it is also because the evidential support for the two most important assumptions on which Mr Matthews's valuation was based, the likely rate of letting and the cost, nature and timetable of any infrastructure expenditure, is very thin indeed. This is not a criticism of Mr Matthews, who was plainly honest and competent; indeed it was Mr Matthews who provided the facts on which we have been able to arrive at an assessment of these factors, and without which we may well have had no alternative but to reject any allowance in relation to future lettings.

170. In the event, we have concluded that we can properly base our assessment on a DCF valuation, on the basis that (i) we have the track record of Fucheng Park, which can be relied to support an evidence-based assumption as to annual letting rates (and lettable area), (ii) we should proceed on the basis of a sequential letting policy for the Zone as whole, (iii) we can rely on Mr Matthews's assessment of the likely infrastructure costs based as it is on the Fucheng Park expenditure, and (iv) we should adopt a reasonably conservative but realistic valuation period of 20 years,

171. In these circumstances, we consider that we should assess the Compensation on the following basis:

a. Valuing Zhongfu's rights over Fucheng Park on the DCF basis proposed by Mr Matthews, save that (i) it should be assumed that it would be fully developed after 30 months rather than 1 year, and (ii) the cut-off should be after 20 years;

b. Valuing the Pharmaceutical Park on the DCF basis proposed by Mr Matthews, save that (i) it should be assumed that it would be Jet off at the rate of 200,000 square metres per annum from the end of 2019, as opposed to being fully let within 10 years from some time in 2017, and (ii) the cut-off should be after 20 years, and therefore 3,500,000 square metres would be let after 17.5 years;

c. Disregarding the letting prospects of the Rest of the Zone.

172. Pursuant to a request from the Tribunal at the Hearing, Mr Matthews provided us, a few days after the end of the Hearing, with his spreadsheet containing the figures which he used for his DCF valuations summarised in tabular form above, on the basis that we could change the inputs to arrive at what we considered to be the correct valuation. In the event, only three inputs were variable, namely DCF period, area, and development time. Having provisionally come to the conclusion that we should value along the lines summarised in paragraph 171 above, we realised that the spreadsheet might be insufficiently flexible to enable us to arrive at our valuation. We therefore wrote to the parties on 22nd January 2021 asking for a more flexible version of the document which he had sent us. After we received that more flexible version on 29th January 2021, we gave the parties the opportunity of commenting on it, which resulted in an email on 10th February 2021 from Mr Madumere on

behalf of Nigeria with some concisely expressed comments, which we have taken into account.

173. Our valuation of the Compensation, based on Mr Matthews's primary, DCF, approach amended as described in paragraph 171 above is USD 55.6 million, made up in the-following way:

| Estimate of the value of Zhongshan's rights under the Fucheng Industrial Park Agreement (USD million) | | | | |
|---|---|---|---|---|
| | Fucheng Park | Pharmaceutical Park | Rest Of Zone | Total |
| Land transfer income | 0.8 | N/A | 0.0 | 0.8 |
| Administrative fee income | 42.7 | N/A | 0.0 | 42.7 |
| Other running costs | N/A | N/A | N/A | (4.2) |
| Infrastructure investment | N/A | N/A | N/A | N/A |
| Total | 43.5 | N/A | 0.0 | 39.3 |
| | | | | |
| **Estimate of the value of Zhongshan's rights under the JV Agreement (USD million)** | | | | |
| | Fucheng Park | Pharmaceutical Park | Rest Of Zone | Total |
| Land transfer income | 1.5 | 3.6 | 0.0 | 5.1 |
| Administrative fee income | 25.6 | 10.4 | 0.0 | 36.0 |
| Other running costs | N/A | N/A | N/A | (24.8) |
| Infrastructure investment | N/A | N/A | N/A | 0.0 |
| Total | 27.1 | 14.0 | 0.0 | 16.3 |
| | | | | |
| **Summary of Zhongshan's loss based on the above DCF analyses (USD million)** | | | | **Value** |
| **Value of rights under the Framework Agreement** | | | | **39.3** |
| **Value of rights under the 2013 JVA** | | | | **16.3** |
| **Total Value of Zhongfu's Rights** | | | | **55.6** |

174. We have not so far referred to Mr Matthews's secondary approach to assessing Compensation. This produced a higher figure than his primary assessment of USD1,446 million. As a check on his DCF valuation, Mr Matthews relied on a single comparable transaction, which related to Nkok SEZ ("Nkok") which is a site of 1,126 hectares (i.e. just over 11 square kilometres) near the capital of Gabon, Libreville. His evidence revealed that Nkok had been the subject of

two potentially relevant transactions, in 2014 and 2016. For various reasons, some of which were in his Report, but another of which was vouchsafed (voluntarily) in his oral evidence, Mr Matthews considered the 2014 transaction, which involved the sale of a 20% shareholding in Nkok, more reliable, and we agree. It suggested, he said, a value of 26.6 USD per square metre.

175. The Tribunal finds it very difficult to accept that the 2014 transaction relating to Nkok is of much if any help when assessing the value of Zhongshan's rights in respect of the Zone. Nkok is in a different country, and in the absence of a detailed assessment of the variations between Nigeria and Gabon in terms of economic prospects, political risk, and taxation policy, it appears to us that use of one as a comparable to value the other would be very dangerous even before one considers the differences in physical location. Mr Matthews was well aware of this and did his best to cater for these potential variations, but we are not persuaded that it would be safe to place any significant weight on this comparable. Having said that, we should acknowledge that Mr Matthews acted entirely reasonably in seeking a comparable given what we have said about the DCF approach, and that he appears to have done his best to find one: it is not his fault that Nkok was the best he could come up with.

176. Accordingly, we would award Zhongshan USD 55.6 million by way of Compensation.

*Moral damages*

177. The Tribunal is in no doubt that there were aspects of the 2016 Activities on the part of organs of the Nigerian state which justify an award of moral damages. By far the most significant of those activities for present purposes was treatment of Mr Zhao by the

police in the second half of August 2016. It represented an indefensible and serious infringement of his human rights, and a humiliating and frightening experience, lasting the best part of two weeks. The threats to Dr Han by Mr Adeoluwa and Mr Onas in July 2016,and the fact that Zhongfu's employees were intimidated on 22nd July 2016 reinforce the claim for moral damages.

178. So far as the quantum is concerned, the Tribunal considers that USD 75,000 would be an appropriate sum. It represents around USD 5,000 for each day of Mr Zhao's mistreatment plus a further sum to reflect the other inappropriate behaviour of representatives of Nigeria towards employees and a director of Zhongfu.

I. Interest

179. As already explained, Zhongshan is entitled to interest at least in the absence of a good reason, and we have not been provided with a reason for not awarding interest. As the Compensation has been assessed as at 22nd July 2016, we consider that interest should run from that date. We agree with the Claimant that the rate of interest should be the same both before and after the date of this award. There are two questions which have to be determined, however. The first is the rate of interest and the second is whether the interest should be awarded on a simple or compound basis (and if compounded, the frequency of the compounding).

180. So far as the rate is concerned, Zhongshan has asked for 2% over LIBOR for the time being on the basis that that would represent the likely cost of borrowing. It is a rate which does not seem unreasonable, which has not been challenged by Nigeria, and which has been awarded in other investor-state arbitrations.

Thus, in the *Enron* case referred to above, at §452 the Tribunal considered it right to award interest *"at the 6 month average LIBOR rate plus 2 per cent for each year, or proportion thereof"* and on the basis that *"[i]nterest shall be compounded semi-annually"*. Compound interest has been said to be more normal than simple interest in investor-state arbitration awards – see e.g. the *Wena Hotel* case cited above, at §129, and the *Desarrollo v Costa Rica* decision also cited above, at §§101-104. However, there are still cases where simple interest has been awarded.

181. Many tribunal decisions supporting each side in the compound interest versus simple interest debate were noted by the tribunal in a useful section of the decision in *Tenaris S.A. and Talta-Trading E Marketing Sociedade Unipessoal LDA v. Bolivarian Republic of Venezuela* ICSID Case No. ARB/11/26, 29 January 2016, §§588 to 594. In that case, the tribunal acknowledged that either basis was appropriate, but, quoting from Dozer and Scheuer, *Principles of International Law* (2n$^{d}$ ed, 2008), they recognised that *"the practice of recent tribunals shows a trend towards compounding interest as more in accord with commercial reality"*. In the end, the tribunal decided that the facts of the case justified an order for compound interest, We also note that the majority of the tribunal in *Foresight Luxembourg Solar I Sari v. Kingdom of Spain,* SCC Case No. 2105/150, 14 November 2018, §544 expressed the view that compound interest is the generally accepted standard in international investment arbitration. Even if that is not right, the high-handed and inappropriate way in which Zhongfu was deprived of its rights, and the failure of Nigeria to engage with Zhongshan after the deprivation, persuade us that this is a case for compound interest.

182. Zhongshan cited decisions endorsing the notion that an award of interest should be compounded monthly, including *Foresight Luxembourg Solar,* §545. The Tribunal is satisfied that monthly compounding of interest is a reasonable approach to adopt in this case.

183. Accordingly we award Zhongshan interest on the Compensation and on the moral damages to run from 22nd July 2018 until payment, at the one month USD LIBOR rate plus 2 per cent for each year, or proportion thereof, such interest to be compounded monthly.

184. This produces a figure of USD 9.4 million on the basis that this award is made on 26 March 2021.

185. We add that in respect of the figures we have decided to award by way of Compensation and Interest we have not deviated from the figures rounded to USD millions and one decimal point as produced by Mr Matthews' spreadsheet. We were not given more precise figures and, even if we had been, to produce an award in those terms might convey a degree of precision with respect to the calculations that would be misleading.

J. Costs

186. It is clear that Zhongshan is the effective winner in these arbitral proceedings, in that (i) it has proved that its version of events is accurate, (ii) it has successfully resisted Nigeria's jurisdictional and preliminary objections, (iii) it has established that it has a valid claim against Nigeria under the Treaty, and (iv) it has obtained an award for substantial damages.

187. In these circumstances, we consider that Zhongshan is entitled to recover at least a substantial

proportion of its costs from Nigeria. This arbitration is being conducted according to English law and section 61(1) of the Arbitration Act 1996 states that *"[t]he tribunal may make an award allocating the costs of the arbitration as between the parties, subject to any agreement of the parties"*. The parties are agreed that the UNCITRAL Rules on costs apply, and Article 42(1)of those Rules provides that the *"costs of the arbitration shall in principle be borne by the unsuccessful party or parties",* although the Tribunal can, *"if it determines that apportionment is reasonable, taking into account the circumstances of the case"*. Again, this is consistent with section 61(2) of the 1996 Act.

188. Although a party may have won an arbitration dispute, there may be reasons to deprive it of some, or even all, of its costs. In this case, we consider that there is nothing in the conduct of Zhongshan or its representatives which would justify reducing the costs which it can recover on such grounds, and indeed Nigeria has not made any suggestion that there is any reason for reducing the costs claimed. It is true that we have awarded Zhongshan substantially less than it has claimed, but the size of the claim has not affected the conduct of this arbitration and Nigeria has not protected its position on costs by making a sealed offer.

189. However, that does not mean that we should simply award Zhongshan the entire amount which it seeks by way of costs. The costs payable by a successful party to its legal representatives and expert witnesses in connection with proceedings may well be reasonable as between as between payer and payee, but that does not mean that it would be reasonable to award those costs in full as against the other party to the proceedings.

190. Zhongshan claims a total of £3,012,067.61 for legal costs and disbursements aside from the other

costs of the arbitration and the specific additional amount referred to below. That sum includes £292,035 in respect of the fees of FTI (Mr Matthews). For an investment treaty arbitration claim seeking a substantial sum (and recovering a substantial, albeit significantly lower, sum), it is not excessive for a claimant to incur costs of this order, especially where an international law firm and Counsel are instructed. The Tribunal notes that Nigeria's claim for costs is significantly less, being N450,000,000 (approximately £850,000 at present exchange rates). Although a significant difference is to be expected as Nigeria did not instruct international counsel or solicitors, the disparity is striking.

191. Bearing in mind that a comparative exercise between the costs of the parties is one way of assessing reasonableness, the Tribunal in its discretion applies a reduction of a little over 20% to Zhongshan's claimed figure, and we award Zhongshan £2,400,000 by way of costs (plus the additional amount addressed in the next paragraph of this Award).

192. Zhongshan separately claims £109,789.57 in respect of its costs of dealing with the Amended and Re-Amended Statement of Reply. By its Order dated 18 May 2020, the Tribunal directed Nigeria to pay, irrespective of the outcome of the dispute, *"the costs of and occasioned by the amendment (including the costs of amending the Statement or Reply to deal with the new paragraphs)"*. Zhongshan's claim under this head appears reasonable and is accordingly awarded in full.

193. To the extent it was claimed, the Tribunal does not award pre-award interest on legal and other costs, because it would be unusual to do so and we have not been given the information (as to when amounts were paid) to enable it to do so.

194. The total .of the other costs of the arbitration are £549,655.17, comprised as follows:

a. Tribunal fees: £457,095.86, broken down as follows:

i. Fees of Mr Rotimi Oguneso SAN, co-arbitrator: £130,113.36

ii. Fees of Mr Matthew Gearing QC, co-arbitrator: £118,738.75

iii. Fees of Lord Neuberger of Abbotsbury, presiding arbitrator: £208,243.75

b. Tribunal disbursements: £147.76

c. PCA Fees: £15,996.01

d. Hearing hosting *fees* (Opus 2) paid by Zhongshan: £61,324.76

e. Interpretation fees paid by Zhongshan: £7,067.76.

f. All other expenses (bank costs, currency translation, telecommunication, cancelled court reporting arrangements, interpretation arranged by the PCA, etc.): £8,023.02.

195. The Tribunal decides that Nigeria should bear all of these costs, as the unsuccessful party in the arbitration.

196. Thus far, Zhongshan has advanced £295,000 and Nigeria £195,000, Zhongshan having made a substitute payment of £50,000 on Nigeria's behalf The costs of the arbitration not paid directly by the Parties, in the amount of £481,262.65, shall be deducted from the deposit held by the PCA. The amount of £8,737.35 remaining in the deposit shall be returned to the Claimant, in view of the Claimant having made a substitute payment to the deposit.

197. Bearing in mind the Parties' unequal contributions to the deposit, Nigeria shall pay £286,262.65 in respect of the costs of arbitration paid in the first instance from Zhongshan's share of the deposit and £68,392.52 in respect of the hearing and interpretation fees paid directly by Zhongshan.

K. Conclusion and Award

198. Accordingly, the Tribunal concludes, orders and awards as follows:

a. Zhongshan has locus to pursue a claim for compensation under the Treaty in respect of its rights under the 20I0 Framework Agreement and the 2013 JVA;

b. Nigeria is in breach of its obligations under articles 2(3), 3(1) and 4(1) of the Treaty;

c. Nigeria is ordered to pay to Zhongshan;

i. Compensation for the expropriation in the sum of USD 55.6 million

ii. Moral damages in the sum of USD 75,000;

iii. interest on the aforesaid two sums from 22nd July 2016 at the one month USD LIBOR rate plus 2 per cent for each year, or proportion thereof, such interest to be compounded monthly, until and including the date of the award, in the sum of USD 9.4 million.

iv. in respect of the Claimant's legal and related costs of the arbitration, the sum of £2,509,789.57

v. £354,655.17 in respect of the other costs of the arbitration,

vi. interest on the sums specified on all the amounts specified in sub-paragraphs (i) to (iii) above from the day after this award until payment at at the one month USD LIBOR rate plus 2 per cent for each year, or proportion thereof, such interest to be compounded monthly, until and including the date of payment (and should, for any reason, USD LIBOR cease to be operative while any amount remains outstanding, the interest due shall from that date onward be calculated on the basis of whatever rate is generally considered equivalent to USD LIBOR plus 2%, compounded monthly, until and including the date of payment).

vii. interest on the sums specified on all the amounts specified in sub-paragraphs (iv) and (v) above from the day after this award until payment at at the one month GBP LIBOR rate plus 2 per cent for each year, or proportion thereof, such interest to be compounded monthly, until and including the date of payment (and should, for any reason, GBP LIBOR cease to be operative while any amount remains outstanding, the interest due shall from that date onward be calculated on the basis of whatever rate is generally considered equivalent to GBP LIBOR plus 2%, compounded monthly, until and including the date of payment).

/s/ Rotimi Oguneso
Mr Rotimi Oguneso SAN, co-arbitrator

/s/ Matthew Gearing
Mr Matthew Gearing QC, co-arbitrator

/s/ Lord Neuberger
Lord Neuberger of Abbotsbury, presiding arbitrator

Place of arbitration: London, United Kingdom
Date of Award: 26 March 2021

**APPENDIX D**

UNITED NATIONS CONFERENCE
ON INTERNATIONAL COMMERCIAL
ARBITRATION

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CONVENTION
ON THE RECOGNITION AND ENFORCEMENT
OF FOREIGN ARBITRAL AWARDS

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*UNITED NATIONS*
*1958*

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CONVENTION ON THE RECOGNITION
AND ENFORCEMENT OF FOREIGN
ARBITRAL AWARDS

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*Article I*

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

*Article II*

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

*Article III*

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the

award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

*Article IV*

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(*a*) The duly authenticated original award or a duly certified copy thereof;

(*b*) The original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

*Article V*

l. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

(*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have

subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(*b*) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(*c*) The award deals with a difference not contemplated by or not failing within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(*e*) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arhitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(*a*) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.

*Article VI*

If an application for the setting aside or sus- pension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

*Article VII*

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming hound and to the extent that they become bound, by this Convention.

*Article VIII*

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any

specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

*Article IX*

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary General of the United Nations.

*Article* X

1. Any State may, at the time of signature, ratification or accession, declare that this Con-vention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall he made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps

in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

*Article XI*

In the case of a federal or non-unitary State, the following provisions shall apply:

(a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

*(b)* With respect to those articles of this Convention that come within the legislative jurisdiction of constituent stat.es or provinces which are not, under the constitutional system of the federation, hound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the ex- tent to which effect has been given to that provision by legislative or other action.

*Article XII*

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

*Article XIII*

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. The Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

*Article XIV*

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

*Article XV*

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

*(a)* Signatures and ratifications in accordance with article VIII;

*(b)* Accessions in accordance with article IX;

*(c)* Declarations and notifications under articles I, X and XI;

*(d)* The date upon which this Convention enters into force in accordance with article XII;

*(e)* Denunciations and notifications in accordance with article XIII.

*Article XVI*

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall he equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

I hereby certify that the foregoing text is a true copy of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at Nev York on 10 June 1958, the original of which is deposited with the Secretary-General of the United Nations, as the said Convention was opened for signature, and that it includes the necessary rectifications of typographical errors, as approved by the Parties.

/s/ Carl-August Fleischhauer
Carl-August Fleischhauer

United Nations, New York
6 July 1988

## APPENDIX E

Title 9. Arbitration
Chapter 2. Convention on the Recognition and Enforcement of Foreign Arbitral Awards

### § 202. Agreement or award falling under the Convention

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

# APPENDIX F

Title 28. Judiciary and Judicial Procedure
Part IV. Jurisdiction and Venue
Chapter 97. Jurisdictional Immunities
of Foreign States

## § 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality

is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue;

(5) not otherwise encompassed in paragraph (2) above, in which money damages are sought against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States and caused by the tortious act or omission of that foreign state or of any official or employee of that foreign state while acting within the scope of his office or employment; except this paragraph shall not apply to—

(A) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function regardless of whether the discretion be abused, or

(B) any claim arising out of malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights; or

(6) in which the action is brought, either to enforce an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration all or any differences which have arisen or which may arise between the parties with respect to a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration under the laws of the United States, or to confirm an award made pursuant to such an agreement to arbitrate, if (A) the arbitration takes place or is

intended to take place in the United States, (B) the agreement or award is or may be governed by a treaty or other international agreement in force for the United States calling for the recognition and enforcement of arbitral awards, (C) the underlying claim, save for the agreement to arbitrate, could have been brought in a United States court under this section or section 1607, or (D) paragraph (1) of this subsection is otherwise applicable.

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