

**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 -**

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**ZHONGSHAN FUCHENG INDUSTRIAL INVESTMENT CO. LTD.**

(THE "CLAIMANT")

**- AND -**

**THE FEDERAL REPUBLIC OF NIGERIA**

(THE "RESPONDENT")

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**STATEMENT OF CLAIM**

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**1 MAY 2019**

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## I. INTRODUCTION

1. This Statement of Claim is submitted on behalf of Zhongshan Fucheng Industrial Investment Co. Ltd. (the "**Claimant**" or "**Zhongshan**"), a company incorporated under the laws of the People's Republic of China ("**China**"), pursuant to the Tribunal's Procedural Order No. 1 dated 19 February 2019. It sets out the factual and substantive legal grounds entitling the Claimant to compensation from the Federal Republic of Nigeria ("**Nigeria**" or the "**Respondent**") for breaches of the Agreement between the Government of China and the Government of Nigeria for the Reciprocal Promotion and Protection of Investments (the "**Treaty**" or "**China-Nigeria BIT**")<sup>1</sup> and international law.

## II. EXECUTIVE SUMMARY

2. This dispute relates to a shocking series of actions by which multiple emanations of the Nigerian State came together to forcibly evict the Claimant from Nigeria and seized its valuable investment. It relates to wrongful acts by Nigeria which are difficult to understand and, at the same time, tragic for the opportunity to which they laid waste. After years of investment and hard work, the Claimant (and Ogun State) had started to see the rewards of the Claimant's efforts. The Free Trade Zone was growing at a remarkable rate, revenues were rising and the future looked bright – even the Economist Intelligence Unit recognised the Claimant's work. Suddenly, without warning, Nigeria's attitude changed completely. Nigeria decided, for reasons which remain unclear, to erase the Claimant from the project – terminating its management of the Free Trade Zone, expropriating its shareholding rights in the Zone management company and forcibly removing and chasing its employees out of the country. It rode roughshod over the Claimant's acquired rights and legitimate expectations and treated the Claimant's investment and personnel in a way which breached multiple provisions of the Treaty and caused the Claimant enormous financial harm. Whilst nothing can truly put right what occurred in 2016, only a substantial award of financial compensation can begin to comply with Nigeria's duty to make full reparation for its wrongful acts at international law.
3. In a little more detail, this dispute arises out of a multi-faceted investment by the Claimant, Zhongshan - a Chinese company which was established by one of the largest and most successful bottling businesses in China - in Ogun State in Nigeria to develop and manage a 10,000 hectare (100 km<sup>2</sup>) free trade zone, known as the Ogun-Guangdong Free Trade Zone (the "**Zone**"). Zhongshan brought together senior business executives who had decades of experience of working in and developing Special Economic Zones ("**SEZs**") in

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<sup>1</sup> 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, done in Beijing on 27 August 2001 (hereinafter "**China-Nigeria BIT**"), **CLA-001**. The China-Nigeria BIT came into effect on 18 February 2010, see Ministry of Commerce of the People's Republic of China, "The China Nigeria Investment Protection Agreement came into effect on February 18, 2010 Bilateral Investment Treaty", 2 March 2010, **CLA-002**; and Ministry of Commerce of the People's Republic of China, "Bilateral Investment Treaty", 31 March 2016, available at: <http://english.mofcom.gov.cn/article/bilateralchanges/201603/20160301287079.shtml> (last accessed on 30 April 2019), **CLA-003**.

China that had historic parallels to the Zone. The Zone is adjacent to Lagos city and in close proximity to Lagos airport and Apapa port. The strategic location of the Zone in Nigeria - Africa's most populous country, which also has the highest Gross Domestic Product ("**GDP**") in the African Continent - is further enhanced by Nigeria being in the Economic Community of West African States ("**ECOWAS**") region.<sup>2</sup>

4. The investment in Nigeria began in June 2010 under the framework of an agreement between the Claimant's shareholder Zhuhai Zhongfu Industrial Group Co., Ltd ("**Zhuhai Zhongfu**") and the Ogun-Guangdong Free Trade Zone Company (the "**OGFTZ Company**") (the "**Fucheng Industrial Park Agreement**").<sup>3</sup> The Fucheng Industrial Park Agreement provided the Claimant, which took over Zhuhai Zhongfu's rights and obligations under that agreement, with the right to develop the Zone, starting with a model area in the heart of the Zone known as Fucheng Industrial Park and with priority rights to develop the remainder of the Zone.
5. The Fucheng Industrial Park Agreement granted the Claimant land use rights in the Zone for 97 years and gave the Claimant the right to land transfer fees as well as to administration fees from tenants in line with those tenants' turnover in the Zone. On the basis of its rights under the Fucheng Industrial Park Agreement, the Claimant made significant investments in Nigeria and registered a subsidiary company, Zhongfu International Investment (NIG) FZE ("**Zhongfu Nigeria**") in Nigeria.<sup>4</sup>
6. In March 2012, the Ogun State Government terminated the joint venture that it had previously entered into in June 2007 with Guangdong Xinguang International China-Africa Investment Ltd. ("**CAI**") to manage the Zone - citing among other issues CAI's bankruptcy and its failure to develop the Zone.<sup>5</sup> On the same day, Zhongfu Nigeria was requested by the Ogun State Government to take over the management the Zone on an interim basis with expectations of Zhongfu Nigeria "*attracting sufficient businesses to the Zone to boost economic activities*" and "*rejuvenating generally the Free Trade Zone to ensure the attainment of its lofty objectives.*"<sup>6</sup> Having already invested significant sums into the Zone under the Fucheng Industrial Park Agreement and faced with the possibility of the Zone

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<sup>2</sup> Member countries making up ECOWAS are Benin, Burkina Faso, Cape Verde, Cote d'Ivoire, The Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo. See Economic Community of West African States, "Member States", available at <http://www.ecowas.int/member-states/> (last accessed on 16 April 2019), **C-001**.

<sup>3</sup> Framework Agreement on Establishment of Fucheng Industrial Park in Ogun-Guangdong Free Trade Zone, 29 June 2010 (hereinafter "**Fucheng Industrial Park Agreement**"), **C-002**.

<sup>4</sup> Zhongfu International Investment (NIG) FZE, "Regulations", 10 October 2010, **C-003**; Zhongfu International Investment (NIG) FZE, "The Enterprise Overseas Investment Certificate", Registration No. 201005944, 13 October 2010, **C-004**; Zhongfu International Investment (NIG) FZE, "Overseas Enterprise Investment Certificate" No. 4400201100286, 6 September 2011, **C-005**.

<sup>5</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Guangdong Xinguang International Group and China Africa Investment Ltd., 15 March 2012, **C-006**.

<sup>6</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Zhongfu International Investment (NIG) FZE, 15 March 2012, **C-007**.

otherwise being shut down or grinding to an effective halt, the Claimant and Zhongfu Nigeria agreed to accept this interim management role in the Zone to protect their investments in Nigeria.

7. In reliance on both the Fucheng Industrial Park Agreement and Zhongfu Nigeria's separate appointment as Interim Manager of the Zone, the Claimant made further investments to develop the Zone. This included the development of significant infrastructure in the Zone including roads, the establishment of a power plant and electrical cables, water supply, sewage and improved telecommunications. Zhongshan also attracted large numbers of international investors, particularly from China, to establish factories and businesses in the Zone.
8. After 18 months of Zhongfu Nigeria's successful management of the Zone as Interim Manager (as judged by the Ogun State Government against its benchmarks), the Ogun State Government decided to make the interim management long-term. Accordingly, the Ogun State Government entered into a joint venture agreement with Zhongfu Nigeria which gave Zhongfu Nigeria additional rights to the development, management and operation of the Zone for over 90 years and the majority shareholding interest in OGFTZ Company (the "**JVA**").<sup>7</sup>
9. Pursuant to the JVA and in the context of further encouragement and assurances from the Ogun State Government, the Claimant continued to make investments in the Zone and attracted major businesses as tenants. This included highly successful companies such as Hong Kong listed China Glass Holding Ltd. ("**China Glass**") as well as a major consortium from Xi'an in China which agreed to invest US\$1 billion to establish and develop a Hi-Tech Industrial Pharmaceutical Park covering a 1,000 hectare (10 km<sup>2</sup>) area in the Zone (i.e., 1/10<sup>th</sup> of the Zone's total land) (the "**Pharmaceutical Park**").
10. The Claimant also progressed plans to raise US\$250 million to expand and enhance the infrastructure in the Zone, working with experts on free trade zones and development finance, First Hectares Capital ("**First Hectares**") and its principals Professor Issa Baluch and Mr. Jon Vandenheuvel. Overwhelmingly positive feedback was received from numerous international and private institutions who were interested in the possibility of providing finance for the infrastructure and supporting the further development of the Zone. This included expressions of interest from the Dubai International Financial Center, the Abu Dhabi Global Market, the World Bank, the African Development Bank and, in the context of a potential listing of Zhongfu Nigeria's business on the Nigerian Stock Exchange, United Capital, part of the United Bank of Africa Group ("**UBA**").

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<sup>7</sup> Joint Venture Agreement between: (1) Ogun State Government; (2) Zhongfu International Investment (NIG) FZE; and (3) Zenith Global Merchant Limited for the Development, Management and Operation of the Ogun-Guangdong Free Trade Zone, 28 September 2013 (hereinafter "**JVA**"), **C-008**.

11. The Claimant's investments, development and management of the Zone became an international success story for foreign direct investment and sustainable development in Africa. Senior members of Zhongfu Nigeria's management team were invited to present about the Zone at international conferences such as at Harvard University and the Massachusetts Institute of Technology ("**MIT**"). Postgraduate students from Johns Hopkins University School of Advanced International Studies ("**Johns Hopkins University**") and from Harvard University were sent to study the Zone in person through university placements. The Economist Intelligence Unit produced a video on the Zone and its success in April 2016, featuring interviews with the Chief Operating Officer ("**COO**") of Zhongfu Nigeria (Mr. Zheng (John) Xue), Nigerian State representatives, World Bank economists and international development academics.<sup>8</sup> In terms of economic success, Zhongfu Nigeria was also going from strength to strength, posting profits of over US\$3 million for the year ending 31 December 2015, more than double the profits that it earned in the previous year.<sup>9</sup>
12. In 2014, a Chinese company New South Group ("**NSG**") alleged that it had acquired CAI's terminated rights in the Zone and that this gave NSG the right to manage the Zone. These allegations were categorically rejected by the Ogun State Government in 2014 and Zhongfu Nigeria received express assurances at that time from the Ogun State Government about Zhongfu Nigeria's standing and rights in the Zone, on which the Claimant and Zhongfu Nigeria relied in continuing to invest in and develop the Zone. However, two years later, the Ogun State Government radically shifted its position. In May 2016, the Ogun State Government purported to terminate the JVA, acting without administrative due process and on grounds that made no sense and were entirely without evidential support. Thereafter, Nigeria - through actions of the Ogun State Government, the Nigeria Export Processing Zones Authority ("**NEPZA**") and the Nigerian police - took over the entirety of the Claimant's rights and assets in the Zone and forcibly evicted Zhongfu Nigeria from the Zone, thereby destroying the entire value of the Claimant's investment in Nigeria.
13. Notably, these actions of the Nigerian authorities were carried out despite the fact that the Claimant and Zhongfu Nigeria had multiple rights in the Zone, including under the Fucheng Industrial Park Agreement and as a tenant in the Zone, in addition to rights under the JVA as the manager of the Zone and majority shareholder in OGFTZ Company. Yet the

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<sup>8</sup> Economist Intelligence Unit Video, "Growth Crossings: Ogun Guangdong Free Trade Zone in Nigeria", 21 April 2016, available at <http://growthcrossings.economist.com/video/zones-of-influence/> (last accessed on 11 April 2019) (hereinafter "**Economist Intelligence Unit Video**"), **C-009**; Transcript of the Economist Intelligence Video, 21 April 2016, **C-010**.

<sup>9</sup> See the expert report of Mr. Noel Matthews, 1 May 2019 (hereinafter "**FTI Report**"), ¶ 5.25.



Nigerian authorities ignored this important point when it was repeatedly made to them, including through Zhongfu Nigeria's lawyers in Nigeria.

14. The draconian actions of the Nigerian authorities included the Secretary to the Ogun State Government directly threatening Zhongfu Nigeria's Chief Executive Officer ("**CEO**") Dr. Jianxin (Jason) Han to "*leave peacefully when there is [an] opportunity to do so, and avoid forceful removal, complications and possible prosecution.*"<sup>10</sup> As if this treatment were not appalling enough, the Nigerian authorities followed through on their threats of physical harm to the Claimant's management team in Nigeria. The police arrested the Chief Financial Officer ("**CFO**") of Zhongfu Nigeria, Mr. Wenxiao (Areak) Zhao, detained him without basis or explanation in terrible conditions and physically beat him on two occasions before releasing him - without any charge - after a week in two jails.
15. Recalling the treatment he received in police custody, Mr. Zhao states:

*"After a while, the police car stopped somewhere that looked like a police station. The police officers asked me to stay outside and then another group of police officers arrived. One police officer in uniform came over to me and slapped me twice on the face with his hand. Then the police officers who brought me there took me to a room where they asked me to sign a piece of paper. They did not say or explain what this paper was or what it said. I refused to sign the piece of paper.*

*The police officers then took my flip flops and placed me in a courtyard with a number of cells surrounding it. It was dark and cold and I was standing at the gate to one of the cells. Then another prisoner came out of that cell and asked why I was taken. I did not speak. There were also some other people who had been brought to the courtyard and the prisoner told us to stand side-by-side and asked whether we had money and why we were there. If someone had no money, he would slap them. Then the prisoner took me aside and asked me to speak. He said that if I did not speak, he would beat me with a club. Then another prisoner joined that first prisoner in intimidating me. Later the second prisoner took me aside and told me not to be afraid. However, the first prisoner came back and threatened me with a club and asked me to speak, which I did not do.*

*[...]*

*On what I think was the third day in the Abuja police station, a lot of people were brought into the office. The police officers moved me to another office. In the new office, two handcuffed men were being forced to hit each other. They were each told that if you hit the other man, you would be released. The two persons were hitting each other, and I could see the blood. After this, the police officer showed me a video of a prisoner eating a rat. The police officer then approached me asking what happened. I did not respond*

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<sup>10</sup> Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**; Email from Jason Han to Elizabeth Uwaifo, 25 September 2016, **C-012**.

*and he hit me twice, first on the neck and the second time on the head with a fist. It was painful and I felt numb."*<sup>11</sup>

16. Fearing for their safety, Zhongfu Nigeria's management team were forced to leave Nigeria. Zhongfu Nigeria tried to take preventive legal steps in the Nigerian courts to preserve their rights but the Ogun State Government, NEPZA and the police orchestrated the complete evisceration of the Claimant's investment in Nigeria.
17. The Solicitor-General of Nigeria warned the Ogun State Government against "*forcibly eject[ing]*" Zhongfu Nigeria from the Zone and "*resort to self help*", stating that "*it has become necessary to remind you that the planned or purported ejection of Zhongfu from the Zone will amount to contempt of court as the matter is subjudice*".<sup>12</sup> This warning was ignored by the Ogun State Government, NEPZA and the Nigerian police who rendered any continued presence of Zhongfu Nigeria personnel in the Zone impossible - including through outright hostility and the taking of physical assets belonging to Zhongfu Nigeria.
18. The Claimant thus had the entirety of its investment in Nigeria taken from it through the actions of the Respondent, for which the Claimant received no compensation. The Respondent even stymied Zhongfu Nigeria's commercial arbitration rights under the JVA through the issuance of an anti-suit injunction in the High Court in Ogun State that was misconceived on any analysis and further aggravated the Respondent's taking of the Claimant's investment.
19. The shocking treatment meted out to the Claimant and Zhongfu Nigeria by the Nigerian State organs, including the Ogun State Government, NEPZA and the Nigerian police, breached Nigeria's international obligations to the Claimant under the Treaty. In particular, the measures taken by the Ogun State Government, NEPZA and the police contravened Nigeria's obligation to provide fair and equitable treatment under the Treaty as well as not to take unreasonable measures and to accord the Claimant's investment continuous protection.
20. Furthermore, the Respondent is responsible for expropriating the Claimant's investment in Nigeria. Since this expropriation was carried out without the payment of compensation, due process and/or a public purpose, it was moreover an unlawful expropriation.
21. In accordance with well-settled principles of international law, the Claimant seeks full reparation for the losses resulting from the Respondent's violations of the Treaty and international law, in the form of monetary compensation such as to wipe out the consequences of the Respondent's wrongful acts.

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<sup>11</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 23-24 and 34.

<sup>12</sup> Letter from Solicitor-General of the Federation and Permanent Secretary to Secretary to the State Government, Ogun State Secretariat, 17 October 2016, **C-013**.

22. As a result of the Respondent's actions, the Claimant has lost the entire value of its investment in Nigeria and is entitled to full compensation for its losses. The Claimant's valuation experts FTI have applied two approaches to value the Claimant's investment at the time it was taken in July 2016. The primary basis is adopting a discounted cash flow ("**DCF**") methodology which calculates the Claimant's losses at US\$1.078 billion before interest. The secondary comparable transaction basis, by reference to a transaction in a free trade zone in Gabon, calculates losses at US\$1.446 billion before interest.
23. This Statement of Claim is accompanied by the Witness Statements of: (i) Dr. Jianxin (Jason) Han, Managing Director of the Claimant; (ii) Mr. Zheng (John) Xue, former COO of Zhongfu Nigeria; (iii) Mr. Wenxiao (Areak) Zhao, former CFO of Zhongfu Nigeria; (iv) Professor Issa Baluch, Chairman of First Hectares and (v) Mr. Jon Vanenheuvel, CEO of First Hectares. It is also accompanied by an expert report prepared by Mr. Noel Matthews, quantum and valuation expert of the firm FTI.
24. This Statement of Claim is structured as follows. Section III describes the relevant facts of the dispute, including Zhongshan's investment in Nigeria. Section IV establishes the basis for the Tribunal's jurisdiction over this dispute. Section V sets out the law applicable to this dispute. Section VI addresses Nigeria's responsibility for actions attributable to it under the Treaty. Section VII provides an analysis of Nigeria's obligations under the Treaty and how Nigeria's actions are in breach of those obligations. Section VIII explains the value of damages suffered by Zhongshan and the compensation owing to it. Section IX sets out Zhongshan's request for relief.
25. Also submitted with this Statement of Claim are the Claimant's factual exhibits numbered C-001 to C-194, and legal authorities numbered CLA-001 to CLA-142.

### **III. FACTS RELEVANT TO THE DISPUTE**

#### **A Zhongshan's Parent Company had a Long History of Operating Successful Businesses in Free Trade Zones in China**

26. From humble beginnings, Mr. Lefu Huang set up a small company in Zhuhai, Guangdong province, China and started to make clothing lining from polyester / polyethylene terephthalate ("**PET**").<sup>13</sup> In the mid-1980s, Mr. Lefu Huang saw an opportunity to expand the business into manufacturing PET bottles as there were few, if any, bottle manufactures

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<sup>13</sup> PET is a thermoplastic polymer resin, which is a common raw ingredient used in the plastic bottling and packaging industries. See Witness Statement of Jason Han, 30 April 2019, footnote 1.

in China at the time.<sup>14</sup> This company, which became Zhuhai Zhongfu, partnered with Coca-Cola in the mid-1980s to manufacture bottles for its beverages in China.<sup>15</sup>

27. The economic environment in which Zhuhai Zhongfu was established and emerged was that of SEZs. The creation of Chinese SEZs was part of Deng Xiaoping's economic liberalisation plan announced in 1979, through which the Chinese Government initially created four prototype SEZs on the coast of South China. These were in Zhuhai, Shenzhen, Shantou in Guangdong province and Xiamen (Amoy) in Fujian province.<sup>16</sup> SEZs provided businesses within the SEZs with, among other advantages, special tax rates, exemptions from import duties, the ability to employ foreign management and simplified entry and exit procedures for foreign personnel.<sup>17</sup> Zhuhai Zhongfu was established in the Zhuhai SEZ (hence the reason for the first part of its name).<sup>18</sup> The Zhuhai SEZ was created in 1980 and was located next to Macau and Hong Kong which allowed access to established ports and a large urban consumer base.
28. As Coca-Cola expanded across China in the 1990s, establishing manufacturing plants, Zhuhai Zhongfu, through its subsidiary Zhuhai Zhongfu Enterprise Co., Ltd. ("**Zhongfu Enterprise**"), set up bottling factories to service Coca-Cola's and other beverage companies' demand for bottles.<sup>19</sup> Over time, Zhongfu Enterprise grew to be the largest producer of PET beverage bottles in China, gaining approximately 60 percent of China's market for PET bottles by the year 2000.<sup>20</sup> Zhongfu Enterprise was listed on the Shenzhen

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<sup>14</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 8.

<sup>15</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 9.

<sup>16</sup> V Sit, "The Special Economic Zones of China: A New Type of Export Processing Zone?", *The Developing Economies*, XXIII-1, March 1985, p. 76, **C-014**.

<sup>17</sup> V Sit, "The Special Economic Zones of China: A New Type of Export Processing Zone?", *The Developing Economies*, XXIII-1, March 1985, pp. 72-73, **C-014**.

<sup>18</sup> By 2015, the Chinese Development Bank estimated that SEZs contributed 22% of China's GDP, 45% of total national foreign direct investment, and 60% of exports. SEZs are estimated to have created over 30 million jobs, increased the income of participating farmers by 30%, and accelerated industrialisation, agricultural modernisation and urbanisation. China Development Bank, "China's Special Economic Zones: Experience Gained", 2015, **C-015**.

<sup>19</sup> See Peking University, Tsinghua University and University of South Carolina, "Economic Impact of the Coca-Cola System on China", August 2000, pp. 58- 60, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.202.2447&rep=rep1&type=pdf> (last accessed on 18 April 2019), **C-016**; Manufacturing News, "PET packaging bottle producer buys 100th Sidel blow molding machine", 5 November 2007, available at <https://web.archive.org/web/20080503194647/http://www.jobwerx.com/news/sidel-biz-949481-871.html> (last accessed on 11 April 2019), **C-017**; Witness Statement of Jason Han, 30 April 2019, ¶ 13-14; Witness Statement of John Xue, 29 April 2019, ¶ 5.

<sup>20</sup> See Peking University, Tsinghua University and University of South Carolina, "Economic Impact of the Coca-Cola System on China", August 2000, p. 59, available at <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.202.2447&rep=rep1&type=pdf> (last accessed on 18 April 2019), **C-016**.

Stock Exchange in 1996<sup>21</sup> and now employs over 4,000 people, with more than 60 subsidiaries and factories in over 30 cities in China.<sup>22</sup>

29. The growth of Zhongfu Enterprise's business took place almost exclusively within the SEZs, free trade zones and industrial parks which were being established across China starting from the 1980s and 1990s.<sup>23</sup> As a result, Zhongfu Enterprise and its management team gained considerable experience working in and developing businesses in SEZs and industrial parks. The industrial parks are zones offering similar incentives to businesses as those granted in SEZs, but are established at a local rather than federal Government level.<sup>24</sup> As SEZs and industrial parks were established across China, Zhongfu Enterprise expanded its business within these zones and industrial parks. At the same time, Zhongfu Enterprise started to lease greater areas of land within SEZs and industrial parks in order to develop the land and sub-lease that land to other enterprises.<sup>25</sup> In effect, Zhongfu Enterprise would develop and manage its own 'zone' within the SEZ or industrial park with a variety of tenants across different sectors of industry.<sup>26</sup>
30. Dr. Jason Han, currently the Managing Director of the Claimant, worked for Zhongfu Enterprise for over 20 years during the expansion of the business. He joined Zhongfu Enterprise in 1991 and eventually becoming the Regional Manager for around 75% of Zhongfu Enterprise's operations across China. Dr. Han was often involved in the management and development of the SEZs and industrial parks in which Zhongfu Enterprise would build its factories. This included managing the construction of roads and infrastructure to support Zhongfu Enterprise's and other tenants' manufacturing facilities.<sup>27</sup>
31. In 2007, the global private equity firm, CVC Capital Partners, acquired a 29% stake in Zhongfu Enterprise for approximately US\$225 million.<sup>28</sup> Following this acquisition and

<sup>21</sup> Bloomberg Company Information, "Zhuhai Zhongfu Enterprise Co., Ltd.", 2 April 2019, available at <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=5684450> (last accessed on 2 April 2019) **C-018**; CVC Press Release, "CVC Announces Investment in China's Largest Beverage Packaging Company", 22 October 2007, available at <https://www.cvc.com/media/press-releases/2007/10-22-2007-123721395> (last accessed on 11 April 2019), **C-019**; Witness Statement of Jason Han, 30 April 2019, ¶ 16.

<sup>22</sup> See Zhuhai Zhongfu, "About Zhongfu", available at <http://www.zhongfu.com.cn/> (last accessed on 2 April 2019), **C-020**; S Tucker, "CVC wins approval for stake in China bottling", *Financial Times*, 22 October 2007, **C-021**.

<sup>23</sup> China Development Bank, "China's Special Economic Zones: Experience Gained", 2015, **C-015**; Witness Statement of Jason Han, 30 April 2019, ¶¶ 14 and 18-19.

<sup>24</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 13.

<sup>25</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 19.

<sup>26</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 19.

<sup>27</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 19.

<sup>28</sup> See Z Ran, "Zhuhai Zhongfu to sell stake to PE firm at higher prices", *China Daily*, 16 April 2007, available at [http://www.chinadaily.com.cn/business/2007-04/16/content\\_851647.htm](http://www.chinadaily.com.cn/business/2007-04/16/content_851647.htm) (last accessed on 18 April 2019), **C-022**; S Tucker, "CVC wins approval for stake in China bottling", *Financial Times*, 22 October 2007, **C-021**; CVC Press Release, "CVC Announces Investment in China's Largest Beverage Packaging Company", 22 October 2007, available at <https://www.cvc.com/media/press-releases/2007/10-22-2007-123721395> (last accessed on 18 April 2019), **C-019**.

injection of capital, Zhuhai Zhongfu began looking to develop opportunities outside of China.<sup>29</sup> This led to Zhuhai Zhongfu establishing Zhongshan (the Claimant) as its subsidiary to make a significant investment in Nigeria.<sup>30</sup>

## **B The Nigerian Government and the Ogun State Government Established the Ogun-Guangdong Free Trade Zone to Encourage Foreign Direct Investment to Nigeria**

32. As part of its efforts to attract foreign trade and investment, starting in the early 1990s the Nigerian Government adopted policies to establish a number of export processing and free trade zones ("**Free Zones**") throughout the country. The Free Zones were subject to special legislative and administrative regimes in order to incentivise foreign investors and exporters by providing exemptions from certain taxes and business regulations.<sup>31</sup> To regulate and administer the Free Zones, the Nigerian Government enacted the Nigeria Export Processing Zones Act 1992 (the "**NEPZA Act**").<sup>32</sup> The NEPZA Act established NEPZA which is the Nigerian Government agency authorised to administer Free Zones.
33. NEPZA was established for the purposes of carrying out various public functions and responsibilities, including: (i) making recommendations to the President of Nigeria for the designation of "*such areas as [the President] thinks fit to be an export processing zone*";<sup>33</sup> (ii) "*the administration of the [NEPZA] and management of all the Export Processing Zones*";<sup>34</sup> (iii) "*the establishment of customs, police, immigration and similar posts in the Zones*";<sup>35</sup> (iv) "*the establishment and supervision of Zonal Administrator for the purpose of managing the Zones and the grant of all requisite permits and licences to approved enterprises*";<sup>36</sup> and (v) to "*prescribe regulations governing the Zone*."<sup>37</sup>

<sup>29</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 27.

<sup>30</sup> See Zhongshan Fucheng Industrial Investment Co., Ltd., "Business License", 7 November 2016, **C-023**; Zhongshan Fucheng Industrial Investment Co., Ltd., "Approved Change of Registration Notice", 16 September 2011, **C-024**.

<sup>31</sup> See Nigeria Export Processing Zones Act 1992, Act No. 63, 19 November 1992, (hereinafter "**NEPZA Act**"), Arts. 8, 11, 12, which provide, *inter alia*, that approved enterprises operating within Free Zones shall be (i) "*exempted from all Federal, State and Government taxes, levies and rates*", (ii) entitled to receive payment for goods and services supplied to customers within the customs territory in foreign currency; and (iii) import "*free of customs duty, any capital goods, consumer goods, raw materials, components or articles intended to be used for the purposes of and in connection with an approved activity, including any article for the construction, alteration, reconstruction, extension or repair of premises in a Zone or for equipping such premises*." It also provides that customs excise will only be payable on dutiable goods when, subject to the prior approval of NEPZA, such goods are transferred from the Free Zone to the Nigerian customs territory, **C-025**.

<sup>32</sup> NEPZA Act, **C-025**.

<sup>33</sup> NEPZA Act, Art. 1(1), **C-025**.

<sup>34</sup> NEPZA Act, Art. 4(a), **C-025**.

<sup>35</sup> NEPZA Act, Art. 4(c), **C-025**.

<sup>36</sup> NEPZA Act, Art. 4(h), **C-025**.

<sup>37</sup> NEPZA Act, Art. 10(4), **C-025**.



34. In 2004, in accordance with Article 10(4) of the NEPZA Act, NEPZA issued the Investment Procedures, Regulations and Operational Guidelines for Free Zones in Nigeria, 2004 (the "**NEPZA Regulations**").<sup>38</sup> The NEPZA Regulations govern, *inter alia*, the designation of Free Zones, the management procedures for Free Zones and the investment, customs and immigration procedures applicable in Free Zones.<sup>39</sup> The NEPZA Regulations provide that approved enterprises within Free Zones shall be entitled to the following incentives and concessions:
- (a) Legislative provisions pertaining to taxes, levies, duties and foreign exchange regulations shall not apply within the Free Zones;
  - (b) Repatriation of foreign capital investment in the Free Zones at any time with capital appreciation of the investment;
  - (c) Remittance of profits and dividends earned by foreign investors in the Free Zones;
  - (d) No import or export licences shall be required;
  - (e) Up to 100% of production may be sold in the customs territory against a valid permit, and on payment of appropriate duties;
  - (f) Rent free land at construction stage, thereafter rent shall be as determined by the Authority or Zone Management;
  - (g) Up to 100% foreign ownership of business in the Free Zones permitted;
  - (h) Foreign managers and qualified personnel may be employed by companies operating in the Free Zones; and
  - (i) The import duty on goods manufactured, processed or assembled in the Free Zones and exported into the Nigerian customs territory, shall be the rate applicable to the raw materials (in the state in which they are originally brought into the Free Zones).<sup>40</sup>
35. In 2007, pursuant to the NEPZA Act and the NEPZA Regulations, the Ogun State Government in Nigeria established the Zone as a Free Zone.<sup>41</sup> The Zone is a 10,000 hectare (100 km<sup>2</sup>) area of land in the Igbesa region of Ogun State in South-West Nigeria,

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<sup>38</sup> NEPZA Act, Art. 10(4), **C-025**.

<sup>39</sup> Investment Procedures, Regulations and Operational Guidelines for Free Zones in Nigeria, 2004 (hereinafter "**NEPZA Regulations**"), **C-026**.

<sup>40</sup> NEPZA Regulations, Part 2, Art. 3, **C-026**.

<sup>41</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 29.

bordering the outer suburbs of Lagos.<sup>42</sup> To put this into context, Paris has an area of 105 km<sup>2</sup>.<sup>43</sup>

36. The Zone is located approximately 30 kilometres from the Lagos International Airport and a similar distance from Nigeria's main shipping port in Apapa, Lagos. The location of the Zone can be seen from the map below:



Figure 1: Map of Zone location. Source: Google and Wikimedia Commons.

37. The Zone is ideally situated only a short distance from the capital of Africa's most populous country, with the fastest growing population of the ten largest countries in the world.<sup>44</sup> By around 2050, Nigeria is projected to become the third largest country in the world, surpassing the USA and behind only India and China.<sup>45</sup> In 2014, Nigeria became Africa's largest economy with GDP of US\$509.9 billion, expected to grow at an average annual rate of 6.6% until 2050.<sup>46</sup> Nigeria's economy has historically been dependent on petroleum and petroleum products.<sup>47</sup> However, notwithstanding the decline in oil prices from mid-2014 onwards, Nigeria's non-oil sector has continued to grow.<sup>48</sup> Among other sectors, the

<sup>42</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 29.

<sup>43</sup> See Encyclopaedia Britannica, "Paris", undated, available at <https://www.britannica.com/print/article/443621> (last accessed on 29 April 2019), C-027.

<sup>44</sup> United Nations, "World Population Prospects", 2015 Revision, 29 July 2015, p. 4, C-028.

<sup>45</sup> United Nations, "World Population Prospects", 2015 Revision, 29 July 2015, p. 4, C-028.

<sup>46</sup> African Development Bank Group, "Nigeria becomes largest economy in Africa with \$509.9 billion GDP", 8 April 2014, available at <https://www.afdb.org/en/news-and-events/nigeria-becomes-largest-economy-in-africa-with-509-9-billion-gdp-12981/> (last accessed on 25 April 2019), C-029; PwC, "The World in 2050, Will the shift in global economic power continue?", February 2015, p. 18, C-030; PwC, "Nigeria: Looking beyond Oil", March 2016, p. 6, C-031.

<sup>47</sup> PwC, "Nigeria: Looking beyond Oil", March 2016, p. 7, C-031.

<sup>48</sup> PwC, "Nigeria: Looking beyond Oil", March 2016, p. 8, C-031.



retail sector is growing rapidly, with consumer spending accounting for around 70% of GDP and Nigeria's young population (with 67% of its population below the age of 30) and growing middle class (representing around 30% of the population) driving an increase in the consumption of consumer goods.<sup>49</sup>

## **C The Fucheng Industrial Park was Established as a Model Area in the Zone**

### **1. Zhuhai Zhongfu, and later the Claimant, Acquired Extensive Rights under the Fucheng Industrial Park Agreement to Develop the Zone**

38. Following the establishment of the Zone, Mr. Lefu Huang, the Chairman of Zhuhai Zhongfu and his son, Mr. Jeffrey Huang, were approached by a former supplier of cardboard boxes to Zhuhai Zhongfu, Mr. Hong. Mr. Hong was one of the first tenants in the Zone, having set up a packaging company called Hewang Packaging & Printing FZE ("**Hewang**") in 2009 with money borrowed from Mr. Jeffrey Huang. Mr. Hong encouraged Zhuhai Zhongfu to invest in the Zone.<sup>50</sup> Messrs. Huang were looking for the right opportunity to utilise their extensive knowledge, experience and capital to make an investment in a suitable country outside of China (as Zhuhai Zhongfu had a non-compete agreement with CVC for a period of five years in China).<sup>51</sup> As Dr. Han explains, Messrs. Huang travelled to Nigeria to inspect the Zone. On their return to China, they told Dr. Han that they saw huge potential to establish a bottling business in the Zone.<sup>52</sup> As Dr. Han recalls from his conversations with Messrs. Huang concerning the Zone:

*"They told me that there were only a small number of tenants in operation in the Zone at that time and very little infrastructure in place. They said that the Zone was located close to Lagos and that the roads in and around it and the relative lack of infrastructure reminded them of Zhuhai 30 years ago before the development of the SEZ changed the area. I recall them also telling me that labour costs in Nigeria were far lower than in China. Jeffrey said that, given Zhuhai Zhongfu's knowledge of the industry and its experience operating in SEZs, the establishment of a facility to sell PET bottles to such a large consumer base as Nigeria and across Africa offered a huge opportunity."<sup>53</sup>*

39. In early 2010, the Zone was being managed and developed by OGFTZ Company. At that time, OGFTZ Company was a joint venture between: (i) CAI, which was a Chinese State-owned company developing and managing the Zone; (ii) CCNC Group Limited ("**CCNC**");

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<sup>49</sup> PwC, "Nigeria: Looking beyond Oil", March 2016, pp. 23 and 25, **C-031**.

<sup>50</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 28.

<sup>51</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 27-28.

<sup>52</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 30.

<sup>53</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 30.

and (iii) the Ogun State Government. Having decided to invest in the Zone, Zhuhai Zhongfu entered into discussions with representatives of CAI responsible for managing the Zone.<sup>54</sup> The General Manager of CAI, Mr. Felix Zhong, explained to Messrs. Huang that CAI no longer had sufficient funds to continue investing in the development of the Zone.<sup>55</sup> Consequently, Mr. Zhong proposed that, given Zhuhai Zhongfu's experience in successfully developing and managing SEZs in China, Zhuhai Zhongfu invest its own capital to develop the Zone with CAI.<sup>56</sup> The proposal was for Zhuhai Zhongfu to provide capital, arrange for the construction of infrastructure and attract tenants to the Zone and for CAI to manage the coordination of administrative issues with Chinese and Nigerian government agencies.<sup>57</sup>

40. Arising out of these discussions, on 29 June 2010, Zhuhai Zhongfu entered into the Fucheng Industrial Park Agreement with OGFTZ Company.<sup>58</sup> Under the Fucheng Industrial Park Agreement, Zhuhai Zhongfu acquired significant rights to develop the Zone. The Zone is defined in the Fucheng Industrial Park Agreement as "*an area of 100km<sup>2</sup> free trade zone constructed and managed by [OGFTZ Company], which is located in the southwest of Ogun State, Nigeria.*"<sup>59</sup>
41. The purpose of the Fucheng Industrial Park Agreement was to develop the Zone and, in particular, to attract Chinese and other international enterprises and investors, initially in a 224 hectares (2.24 km<sup>2</sup>) model area in the Zone (the "**Fucheng Industrial Park**").<sup>60</sup> The Fucheng Industrial Park Agreement also provided that Zhuhai Zhongfu would have "*the priority to invest in and develop other areas in [the Zone] under the same conditions*" as in the Fucheng Industrial Park Agreement.<sup>61</sup> Below is a plan showing the initial model area in the Zone allocated to the Fucheng Industrial Park.

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<sup>54</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 31.

<sup>55</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 31.

<sup>56</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 32.

<sup>57</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 32.

<sup>58</sup> Fucheng Industrial Park Agreement, **C-002**.

<sup>59</sup> Fucheng Industrial Park Agreement, Art. 1.1, **C-002**.

<sup>60</sup> Fucheng Industrial Park Agreement, Art. 1.1 (describing the Fucheng Industrial Park as the "*First Phase Initiation Area in [the Zone]*"), **C-002**; Witness Statement of Jason Han, 30 April 2019, ¶ 32.

<sup>61</sup> Fucheng Industrial Park Agreement, Art. 4.1.7, **C-002**.

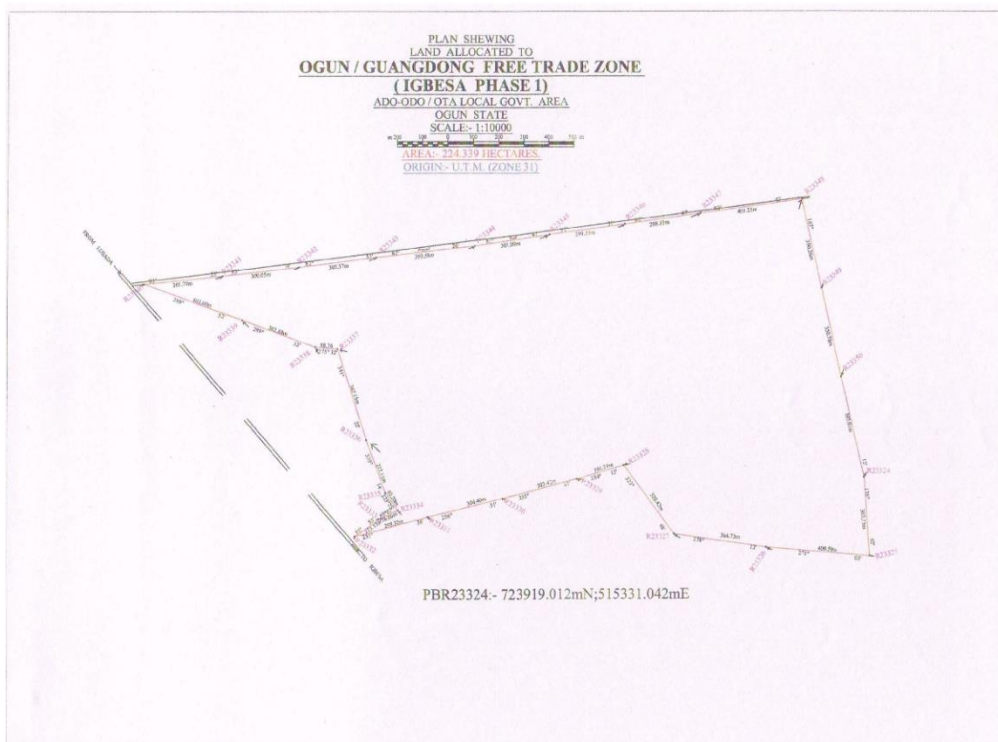


Figure 2: Plan of the model area of the Fucheng Industrial Park. Source: Fucheng Industrial Park Agreement.<sup>62</sup>

42. Under the terms of the Fucheng Industrial Park Agreement, Zhuhai Zhongfu was granted land use rights over the Fucheng Industrial Park for 97 years.<sup>63</sup> Zhuhai Zhongfu had "*full right*" over the "*occupancy, use, proceeds and disposal*" of the land in the Fucheng Industrial Park.<sup>64</sup> These rights enabled Zhuhai Zhongfu to transfer or lease its land use rights in the Fucheng Industrial Park to tenants who would invest in and establish businesses in the Zone. In return for these land use rights, Zhuhai Zhongfu was to pay a "*Concession Fee*" of RMB 10 million to OGFTZ Company<sup>65</sup> (which could be offset by other expenses paid by Zhuhai Zhongfu)<sup>66</sup> and an additional "*Concession Fee*" if Zhuhai Zhongfu transferred its land use right in the Zone to a third party.<sup>67</sup> Zhuhai Zhongfu was entitled to retain all income from a "*Transfer Fee*" after the payment of the additional "*Concession Fee*" to OGFTZ Company.<sup>68</sup>
43. In addition to the land use rights, Zhuhai Zhongfu was granted other rights under the Fucheng Industrial Park Agreement, which included:

<sup>62</sup> Enclosure 2 to Fucheng Industrial Park Agreement, 29 June 2010, **C-032**.

<sup>63</sup> Fucheng Industrial Park Agreement, Art. 2.6, **C-002**.

<sup>64</sup> Fucheng Industrial Park Agreement, Art. 2.6, **C-002**.

<sup>65</sup> Fucheng Industrial Park Agreement, Art. 3.1.1, **C-002**.

<sup>66</sup> Fucheng Industrial Park Agreement, Art. 3.2, **C-002**.

<sup>67</sup> Fucheng Industrial Park Agreement, Art. 3.1.2, **C-002**.

<sup>68</sup> Fucheng Industrial Park Agreement, Art. 3.1.2, **C-002**.

- (a) An entitlement to charge a "*Comprehensive Administration Fee*" to each enterprise operating in the Zone, equivalent to 3.75% of the enterprise's annual turnover.<sup>69</sup> Zhuhai Zhongfu was to pay 0.75% out of the 3.75% fee to the Nigerian Government, apply approximately 10% of the remaining 3% to management expenses incurred in the Fucheng Industrial Park and share the remaining approximately 2.7% equally between it and OGFTZ Company (the "**Administration Fee**").<sup>70</sup>
  - (b) The exclusive right to undertake infrastructure construction in the Fucheng Industrial Park and the priority right to undertake infrastructure construction in all other parts of the Zone.<sup>71</sup>
  - (c) Administrative rights over enterprises already established in the Fucheng Industrial Park pursuant to contracts or agreements reached by Zhuhai Zhongfu and those enterprises.<sup>72</sup>
  - (d) The right (i) to have transferred to it by OGFTZ Company all contracts executed by OGFTZ Company and enterprises already operating in the Fucheng Industrial Park; and (ii) to the proceeds arising under those contracts in accordance with the Fucheng Industrial Park Agreement.<sup>73</sup>
44. On 30 June 2010, Zhuhai Zhongfu and OGFTZ Company entered into a Supplementary Agreement to the Fucheng Industrial Park Agreement updating and clarifying particular terms in relation to the "*Concession Fee*" and "*Transfer Fee*" payable, as well as other terms including in relation to overdue payments.<sup>74</sup>
45. On 10 October 2010, Zhuhai Zhongfu, OGFTZ Company and the Claimant agreed that Zhuhai Zhongfu's rights and obligations under the Fucheng Industrial Park Agreement were transferred to Zhuhai Zhongfu's subsidiary, the Claimant, which was established on 13 September 2010 for the investment in the Zone.<sup>75</sup>
46. The Fucheng Industrial Park Agreement also provided that the "*actual operation and management organ of Fucheng Industrial Park shall be [Zhuhai Zhongfu's] wholly-owned subsidiary or a company under [Zhuhai Zhongfu's] control established in Nigeria with a*

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<sup>69</sup> Fucheng Industrial Park Agreement, Arts. 3.3 and 4.1.1, **C-002**.

<sup>70</sup> Fucheng Industrial Park Agreement, Art. 4.1.1, **C-002**.

<sup>71</sup> Fucheng Industrial Park Agreement, Art. 4.1.3, **C-002**.

<sup>72</sup> Fucheng Industrial Park Agreement, Art. 4.1.6, **C-002**.

<sup>73</sup> Fucheng Industrial Park Agreement, Art. 6.1, **C-002**.

<sup>74</sup> Supplementary Agreement to Framework Agreement on Establishment of Fucheng Industrial Park in Ogun-Guangdong Free Trade Zone, 30 June 2010, Arts. 2, 3 and 4 (hereinafter "**Supplementary Agreement to the Fucheng Industrial Park Agreement**"), **C-033**.

<sup>75</sup> Supplementary Agreement (II) on Fucheng Industrial Park in Ogun-Guangdong Free Trade Zone, 10 October 2010 (hereinafter "**Supplementary Agreement (II) on Fucheng Industrial Park**"), **C-034**; Witness Statement of Jason Han, 30 April 2019, ¶ 36.

*registered office in Fucheng Industrial Park.*"<sup>76</sup> In accordance with this provision, on 10 October 2010, the Claimant registered Zhongfu Nigeria as a wholly-owned overseas subsidiary with the Chinese authorities.<sup>77</sup> On 24 January 2011, Zhongfu Nigeria was registered by NEPZA in Nigeria as a Free Zone Enterprise within the Zone.<sup>78</sup>

47. In consideration for the land use right under the Fucheng Industrial Park Agreement, as amended by the Supplementary Agreement to the Fucheng Industrial Park Agreement,<sup>79</sup> the Claimant paid the initial land use rights concession fee of RMB 10 million to OGFTZ Company in two instalments.<sup>80</sup> These payments were recorded in a supplementary agreement to the Fucheng Industrial Park Agreement dated 13 April 2013 between the Claimant and OGFTZ Company (the "**Fucheng Industrial Park Fee Agreement**").<sup>81</sup> Under the Fucheng Industrial Park Fee Agreement, OGFTZ Company acknowledged and agreed that Zhuhai Zhongfu and the Claimant "*invested RMB 12,755,574.00 in kind and in cash in [OGFTZ Company] via [Zhongfu Nigeria].*"<sup>82</sup>

## 2. The Claimant Made Significant Investments to Develop the Zone

48. In reliance on the Fucheng Industrial Park Agreement, from mid-2010, the Claimant started to develop the Zone with OGFTZ Company and made significant investments in the Zone.<sup>83</sup> Under the Fucheng Industrial Park Agreement, the responsibilities between the parties were clearly delineated. OGFTZ Company was to play the "*leading role in the Administrative Affairs of Fucheng Industrial Park*" which referred to "*corresponding and coordination affairs with Chinese government and Nigerian government as well as their respective all level departments and the affairs related to industrial and commerce, custom, safety and security, firefighting and construction layout, environment protection, sanitation, visa management, public roads and facilities.*"<sup>84</sup> The Claimant, primarily through its Nigerian subsidiary, Zhongfu Nigeria, was to "*play the leading role in the investment, construction, investment promotion and operation*" which involved the Claimant injecting

<sup>76</sup> Fucheng Industrial Park Agreement, Art. 2.2, **C-002**.

<sup>77</sup> Zhongfu International Investment (NIG) FZE, "Regulations", 10 October 2010, **C-003**; Zhongfu International Investment (NIG) FZE, "The Enterprise Overseas Investment Certificate", Registration No. 201005944, 13 October 2010, **C-004**; Zhongfu International Investment (NIG) FZE, "Overseas Enterprise Investment Certificate" No. 4400201100286, 6 September 2011, **C-005**.

<sup>78</sup> Zhongfu International Investment (NIG) FZE, "NEPZA Certificate of Registration", 24 January 2011, **C-035**.

<sup>79</sup> See Fucheng Industrial Park Agreement, Art. 3.1, **C-002**; and Supplementary Agreement to the Fucheng Industrial Park Agreement, Art. 2, **C-033**.

<sup>80</sup> See Receipt of Ogun-Guangdong Free Trade Zone for payment from Zhongshan Fucheng Industrial Investment Co., Ltd., 25 July 2011, **C-036**; and Supplementary Agreement of the Framework Agreement on Establishment of Fucheng Industrial Park in the Ogun-Guangdong Free Trade Zone, 13 April 2013, (hereinafter "**Fucheng Industrial Park Fee Agreement**"), **C-037**.

<sup>81</sup> Fucheng Industrial Park Fee Agreement, **C-037**.

<sup>82</sup> Fucheng Industrial Park Fee Agreement, **C-037**.

<sup>83</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 41.

<sup>84</sup> Fucheng Industrial Park Agreement, Arts. 2.3 and 1.1, **C-002**.

the majority of capital in the project and being responsible for the commercial development of the Zone.<sup>85</sup>

49. In late 2010, OGFTZ Company was facing pressure from the Nigerian Government to show that progress had been made in the Zone.<sup>86</sup> The then recently elected president of Nigeria, Goodluck Jonathan, had arranged a visit to inspect the Zone. OGFTZ Company did not have the funds to complete the planned works before President Jonathan's visit. The Claimant and Zhuhai Zhongfu invested funds to cover the cost of works on a fence for part of the Zone and the construction of various buildings and a road through the Zone, as well as other expenses such as security uniforms and car hire.<sup>87</sup> President Jonathan's visit in November 2010 was a major event and validation of the Government of Nigeria's support for the Zone at the highest levels. It was reported in the press at the time<sup>88</sup> and a picture of the visit is still on the Chinese Embassy in Nigeria's website today.<sup>89</sup>
50. In early 2011, the Claimant started to implement procedures for the management and operation of the Zone. The procedures included engaging contractors to assist with the operation of the Zone, the collection of the land transfer fees from the tenants and the construction of planned infrastructure works.<sup>90</sup>

**D The Claimant, through Zhongfu Nigeria, Took Over the Management of the Zone, First as Interim Manager and Later as Permanent Manager under a JVA with the Ogun State Government**

**1. The Claimant, through Zhongfu Nigeria, took over the Full Management of the Zone as Interim Manager**

51. In the latter part of 2011, it became public that one of CAI's shareholders, Guangdong Xinguang International Group Co., Ltd ("**GXI**"), was under investigation by the Chinese authorities.<sup>91</sup> GXI and its Board Chairman and General Manager, Mr. Wu Rijing, were accused of misconduct, including misappropriating public funds. This led to Mr. Wu Rijing being arrested and brought before a Chinese court in October 2011.<sup>92</sup>

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<sup>85</sup> Fucheng Industrial Park Agreement, Art. 2.3, **C-002**.

<sup>86</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 42.

<sup>87</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 42.

<sup>88</sup> Brand icon Image, "Ogun Dazzles Mr. President with Projects", 12 November 2010, available at <https://www.brandiconimage.com/2010/11/ogun-dazzles-mr-president-with-projects.html> (last accessed on 27 April 2019), **C-038**.

<sup>89</sup> Historic Pictures of China-Nigeria Relations, 13 November 2010, available at <http://ng.china-embassy.org/eng/zngx/cne/t792194.htm> (last accessed on 11 April 2019), **C-039**.

<sup>90</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 43.

<sup>91</sup> Oriental Morning News, "A state-owned colossus in Guangdong fell down", 10 November 2011, **C-040**.

<sup>92</sup> Oriental Morning News, "A state-owned colossus in Guangdong fell down", 10 November 2011, **C-040**.



52. On 28 November 2011, Mr. Taiwo Adeoluwa, the Secretary to the Ogun State Government, wrote to CAI and GXI in relation to concerns about the management of the Zone.<sup>93</sup> In his letter, Mr. Adeoluwa stated that: (i) CAI "*is facilitator only and neither owns any factory/business nor has any proprietary interests*" within the Zone; (ii) GXI did not have "*approval of the Provincial Government of Guangdong, China to invest or manage investments abroad*" and so its activities were illegal; (iii) GXI was "*now officially bankrupt*" and the government was "*worried about the legal capacity of an undischarged bankrupt to enter into a valid contract or to assume obligations*"; and (iv) GXI and its top officials were alleged to be involved in criminal activity and under investigation for fraud.<sup>94</sup>
53. In early 2012, Mr. Jeffrey Huang had been informed that as a result of issues that had arisen concerning CAI in China and its management of the Zone, the Ogun State Government was considering closing the Zone, but that the Ogun State Government was also impressed with Zhongfu Nigeria's performance developing the Zone.<sup>95</sup> In order to preserve its investment in the Zone, the Claimant agreed with the Ogun State Government to take over the management of the Zone on an interim basis.<sup>96</sup> At the time, the Claimant had little choice but to take over the management of the Zone.<sup>97</sup> It had already invested a considerable amount of its money in the Zone. If the Claimant did not take over management at the time, it was likely that the Zone would fail and it would lose its entire investment.<sup>98</sup>
54. On 15 March 2012, the Ogun State Government sent a letter to CAI terminating the joint venture agreement between the Ogun State Government, CAI and CCNC, and CAI's participation in OGFTZ Company on various grounds, including: CAI's loss of "*capacity to continue to hold shares in [OGFTZ Company] having been declared an undischarged*

<sup>93</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to China Africa Investment Co., Ltd. and Guandong Xinguang International Group, 28 November 2011, **C-041**.

<sup>94</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to China Africa Investment Co., Ltd. and Guandong Xinguang International Group, 28 November 2011, **C-041**.

<sup>95</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 44.

<sup>96</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 44.

<sup>97</sup> At that time, a number of tenants had been attracted to the Zone. See, e.g., Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLC-09001, 11 April 2009, **C-042**; Investment Agreement of Ogun-Guangdong Free Trade Zone Enterprise No. IA-09001, 11 April 2009, **C-043**; Long-term Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLLC-09001, 16 July 2009, **C-044**; Investment Agreement of Ogun-Guangdong Free Trade Zone Enterprise No. IA-09010, 16 July 2009, **C-045**; Investment Agreement of Ogun-Guangdong Free Trade Zone Enterprise No. IA-09007, 22 November 2009, **C-046**; Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLC-09007, 1 January 2010, **C-047**; Long-term Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLLC-10001, 18 April 2010, **C-048**; Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLC-10002, 1 July 2010, **C-049**; Long-term Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLLC-11002, 17 January 2011, **C-050**; Investment Agreement of Ogun-Guangdong Free Trade Zone Enterprise No. IA-11003, 17 January 2011, **C-051**; Investment Agreement of Ogun-Guangdong Free Trade Zone Enterprise No. IA-11006, 14 May 2011, **C-052**; Long-term Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLLC-11008, 18 June 2011, **C-053**; Investment Agreement of Ogun-Guangdong Free Trade Zone Enterprise No. IA-11008, 18 June 2011, **C-054**; Long-term Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLLC-11014, 16 December 2011, **C-055**; Investment Agreement of Ogun-Guangdong Free Trade Zone Enterprise No. IA-11014, 16 December 2011, **C-056**; Long-term Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLLC-11015, 31 December 2011, **C-057**; and Investment Agreement of Ogun-Guangdong Free Trade Zone Enterprise No. IA-11015, 31 December 2011, **C-058**.

<sup>98</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 44.

*bankrupt*"; the illegality of CAI's activities due to it not having *"approval of the Provincial Government of Guangdong, China [...] to invest or manage investments or continue to do so abroad"*; and alleged fraudulent practices on the part of CAI.<sup>99</sup>

55. Also on 15 March 2012, the Ogun State Government sent a letter to Zhongfu Nigeria appointing Zhongfu Nigeria as the *"interim Manager/Administrator"* of the Zone. The letter stated that the *"appointment, which takes effect immediately, shall be for an initial period of three (3) months, subject to a renewal thereof upon satisfactory performance."*<sup>100</sup> The Ogun State Government also stated that it had the following specific expectations from Zhongfu Nigeria regarding the interim appointment:

- (a) *"attracting sufficient businesses to the Zone to boost economic activities"*; and
- (b) *"rejuvenating generally the Free Trade Zone to ensure the attainment of its lofty objectives."*<sup>101</sup>

56. On 10 April 2012, NEPZA sent a letter to CAI confirming the termination of CAI as the manager and operator of the Zone by the Ogun State Government. NEPZA directed CAI to handover immediately all assets and documentation which belonged to OGFTZ Company to Zhongfu Nigeria, as the newly appointed manager of the Zone.<sup>102</sup> On the following day, 11 April 2012, NEPZA sent a letter to Zhongfu Nigeria confirming its appointment as the manager and operator of the Zone.<sup>103</sup>

57. Following the appointment of Zhongfu Nigeria by the Ogun State Government and confirmation by NEPZA, Zhongfu Nigeria became the manager of the Zone on an interim basis. In line with its rights under the Fucheng Industrial Park Agreement, Zhongfu Nigeria continued to have responsibility for attracting investment, undertaking construction and operating the Zone.<sup>104</sup>

58. When Zhongfu Nigeria took over as manager of the Zone, some basic infrastructure had been built - mostly by Zhuhai Zhongfu and the Claimant, such as, a road and a power generation unit.<sup>105</sup> In order to accelerate the development of the Zone, the Claimant began

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<sup>99</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Guangdong Xinguang International Group and China Africa Investment Ltd., 15 March 2012, **C-006**.

<sup>100</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Zhongfu International Investment (NIG) FZE, 15 March 2012, **C-007**.

<sup>101</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Zhongfu International Investment (NIG) FZE, 15 March 2012, **C-007**.

<sup>102</sup> Letter from NEPZA to China Africa Investment Ltd., 10 April 2012, **C-059**.

<sup>103</sup> Letter from NEPZA to Zhongfu Industrial Zone Management Co., 11 April 2012, **C-060**.

<sup>104</sup> Fucheng Industrial Park Agreement, Art. 2.3, **C-002**.

<sup>105</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶ 3.



to hire experienced business professionals from China who had previously worked for or with Zhuhai Zhongfu or Zhongfu Enterprise. The first to arrive in the Zone was Mr. Zhao. Mr. Zhao had worked for Zhuhai Enterprise since 2006 as the HR Director for South West and North West China, having studied business administration and accounting and having worked in the audit department of the Governmental Organisation for Xianyang County, as well as a private beverage company.<sup>106</sup>

59. Mr. Zhao was hired as the CFO of Zhongfu Nigeria and assistant to the Chairman.<sup>107</sup> He arrived in the Zone in around April 2012. His main responsibilities were to manage the finances of Zhongfu Nigeria, administer the collection of fees from tenants and the payment of taxes and charges to government agencies, such as NEPZA and customs, and deal with accounting and human resource matters.<sup>108</sup>
60. Later in 2012, Dr. Han and Mr. John Xue were hired by the Claimant to be the CEO and COO of Zhongfu Nigeria, respectively. Their arrival completed the core management team of the Claimant in the Zone. Dr. Han and Mr. Xue arrived in the Zone in October 2012.<sup>109</sup> Dr. Han had extensive operations and management experience developing businesses in free trade zones and in the fast-moving consumer goods industry. He had worked for Zhongfu Enterprise for over 20 years on many strategic partnership with various major multinational companies, including Coca-Cola and Pepsi.<sup>110</sup> He was previously Zhongfu Enterprise's Regional Manager and was responsible for the development and management of Zhongfu Enterprise's business in eastern, western and central regions of China, representing 75% of its total operations.<sup>111</sup>
61. Mr. Xue was an experienced international business executive who had come out of retirement to help develop the Zone. He gained a masters degree in international management from the American Graduate School of International Management, which is now the Thunderbird School of Global Management in the USA. He spent many years working for Coca-Cola, Pepsi and Jack Daniels in China as a senior executive in various business, sales and marketing roles.<sup>112</sup> In their roles for Zhongfu Nigeria, Dr. Han and Mr.

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<sup>106</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 1-2.

<sup>107</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶ 2; see also Letter of Appointment of Mr. Zhao Wen Xiao as Chief Financial Officer and Board Secretary of Zhongfu International Investment (NIG) FZE, 1 April 2012, **C-061**.

<sup>108</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶ 4.

<sup>109</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 48; Witness Statement of John Xue, 29 April 2019, ¶ 11.

<sup>110</sup> Witness Statement of Jason Han, 30 April 2019, ¶¶ 10-25.

<sup>111</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 24.

<sup>112</sup> Witness Statement of John Xue, 29 April 2019, ¶¶ 1-7.

Xue were jointly tasked with the day-to-day management of the Zone, its development and its promotion to attract investment into the Zone.<sup>113</sup>

62. Following the arrival of Dr. Han, Mr. Xue, and Mr. Zhao (the "**Management Team**"), Zhongfu Nigeria set about professionalising the management of the Zone. This included:
- (a) Surveying the boundary of the area of the Zone;<sup>114</sup>
  - (b) Implementing systems to collect and monitor the payment of customs duties, taxes and fees;<sup>115</sup>
  - (c) Improving security in the Zone;<sup>116</sup>
  - (d) Meeting with the Ogun State Government in January 2013 to discuss plans to develop the Zone, which included modelling the Zone on Shenzhen, China to develop it into a large city with industrial, commercial and residential areas;<sup>117</sup> and
  - (e) The Claimant entered into an agreement for Zhongfu Nigeria to implement and perform the obligations of the Claimant under the Fucheng Industrial Park Agreement.<sup>118</sup>
63. As Dr. Han states in his witness statement:

*"Given the success Zhongfu Enterprise had had in the development and management of industrial parks, we considered that we could adopt a similar approach to that which I had previously been involved with in China. Our plans for the Zone's development involved a number of phases:*

- a) It was necessary to ensure the security of the Zone and implement appropriate policies and working procedures to facilitate the tenants' operations.*
- b) We would concentrate initially on attracting tenants manufacturing fast-moving consumer goods, building materials and household products. John and I had contacts in the fast-moving consumer goods sector as a result of our previous careers in the sector. We identified these sectors as we wanted to encourage tenants involved in low cost but labour-intensive industries that would create jobs in the Zone and the*

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<sup>113</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 49; Witness Statement of John Xue, 29 April 2019, ¶ 13.

<sup>114</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 50; Witness Statement of John Xue, 29 April 2019, ¶ 12.

<sup>115</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 52.

<sup>116</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 53(a).

<sup>117</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 55; Witness Statement of John Xue, 29 April 2019, ¶ 15.

<sup>118</sup> Agreement between Zhongshan Fucheng Industry Investment Co., Ltd. and Zhongfu International Investment (NIG) FZE, 15 January 2013, Art. 1, **C-062**.

*local community. We would then seek to attract tenants involved in the electrical goods, pharmaceuticals and hi-tech products sectors.*

- c) As the Zone was still in its early stages, tenants would be charged a lower land transfer fee. As more tenants entered the Zone and its infrastructure became more developed, we would be able to charge higher land transfer fees due to the increase in land values.*
- d) The Zone would, over time, be redeveloped with the intention of turning it into a sustainable urban development, with industrial, commercial and residential areas."<sup>119</sup>*

64. In respect of the meeting with the Ogun State Government on 16 January 2013, Mr. Xue recalls:

*"During this meeting, we explained that, using the Shenzhen SEZ as an example, we intended to develop the Zone so that it would transform Igbesa, where the Zone was situated, from a small town of 30,000 into a large city encompassing industrial, commercial and residential areas. We received a positive response from the Ogun State Governor who encouraged us to proceed with this plan. While I thought, at the time, that modeling the Zone on Shenzhen was ambitious given the rapid development of Shenzhen over the last 30 years, I could see very clear parallels. Igbesa felt very much like Shenzhen 30 to 40 years ago. For example, Shenzhen was just across the harbour from Hong Kong, which was a developed economic centre with a large consumer population, busy international airport and shipping port. Igbesa had some of the same fundamentals as Shenzhen, being close to Lagos international airport and Apapa shipping port. It was also just over the Ogun River from the city of Lagos - it was not hard to see the potential of this large and developing consumer market."<sup>120</sup>*

65. In addition to improving the administration and operation of the Zone, the Management Team implemented plans to increase investment in the Zone and generate greater revenue. Zhongfu Nigeria promoted the Zone in China in order to attract new tenants. These efforts quickly proved successful and the activity and development in the Zone increased significantly.<sup>121</sup>

66. Zhongfu Nigeria had three sources of income. These were: (i) land lease transfer fees, which were upfront fees from tenants to lease out an area of the Zone;<sup>122</sup> (ii) land rental

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<sup>119</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 53.

<sup>120</sup> Witness Statement of John Xue, 29 April 2019, ¶ 15.

<sup>121</sup> Witness Statement of John Xue, 29 April 2019, ¶ 23-24.

<sup>122</sup> See e.g., Goodwill Ceramic FZE ("**Goodwill Ceramic**") entered into four land lease agreements for the purposes of constructing ceramic production facilities. The first agreement was in the name of Wang Kang Investment Co. Limited dated 16 December 2011 for a period of 94 years for an area of 120,000 m<sup>2</sup> of land and for an upfront transfer fee. The rental area under this agreement was later increased to 140,404.24 m<sup>2</sup>, see Excel table, "Statistical table of Goodwill Ceramic", undated, **C-063**; Long-term Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLLC-11014, 16 December 2011, **C-055**; Agreement Regarding the Long-Term Lease Contract of the Ogun-Guangdong Free Trade Zone Supplemental Agreement, 19 November 2014, **C-064**. Other agreements were

fees, which were fees from tenants who rented out warehouse space in what was called the "incubator" area of the Zone, either on a monthly or an annual basis; and (iii) a portion of the Administration Fee.<sup>123</sup> As Mr. Zhao explains, long-term tenants in the Zone typically entered into a land lease, for which they would pay an upfront transfer fee, and a separate investment agreement, the latter of which entitled Zhonghu Nigeria and OGFTZ Company to receive the Administration Fee.<sup>124</sup>

67. While Zhongfu Nigeria was interim manager, the investments it brought into the Zone included, amongst others: (i) Far East Steel and Consumable Industry FZE (steel piping);<sup>125</sup> (ii) Green Power Utility (Ogun-Guangdong Free Trade Zone) FZE (power plant operator);<sup>126</sup> (iii) Unitech Industry FZE (vehicles) via Shandong Yanmei Kaida Environmental Protection Machinery Co., Ltd.;<sup>127</sup> (iv) Vindax Industries FZE (furniture) via Mr. Wang Jingdong;<sup>128</sup> and (v) Discovery International FZE (furniture) via Mr. Cai Ming.<sup>129</sup> The total area of land leased to new tenants during the period that Zhongfu Nigeria was the interim manager of the Zone encompassed over 59,000m<sup>2</sup>. These land leases generated over US\$6.8 million in land transfer fees over the lease terms. The new tenants were to invest a total of US\$15 million with expected total turnover to reach over US\$13.9 million per year once their manufacturing facilities were operational.

## **2. Zhongfu Nigeria Entered into the JVA with the Ogun State Government to Take Over the Full Management of the Zone Permanently and Become the Majority Shareholder in OGFTZ Company**

68. Following Zhongfu Nigeria's successful performance as interim manager / administrator of the Zone - having satisfied the Ogun State Government's specific expectations of "*attracting sufficient businesses to the Zone to boost economic activities*" and "*rejuvenating*

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entered into in the name of Goodwill Ceramic, see Land Lease Agreement No. LLLC-15001, 2 January 2015, **C-065**; and Land Lease Agreement No. LLLC-15006, 5 September 2015, **C-066**.

<sup>123</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶ 6.

<sup>124</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 7 and 11.

<sup>125</sup> Long-term Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLLC-12001, 21 March 2012, **C-067**; Investment Agreement of Ogun-Guangdong Free Trade Zone Enterprise No. IA-12001, 21 March 2012, **C-068**; Long-term Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLLC-13002, 16 May 2013, **C-069**.

<sup>126</sup> Long-term Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLLC-2012-002, 12 April 2012, **C-070**; Investment Agreement of Ogun-Guangdong Free Trade Zone Enterprise No. IA-2012-002, 12 April 2012, **C-071**.

<sup>127</sup> Long-term Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLLC-12003, 14 July 2012, **C-072**; Investment Agreement of Ogun-Guangdong Free Trade Zone Enterprise No. IA-12003, 14 July 2012, **C-073**.

<sup>128</sup> Long-term Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLLC-12003, 21 July 2012, **C-074**; Investment Agreement of Ogun-Guangdong Free Trade Zone Enterprise No. IA-12003, 21 July 2012, **C-075**.

<sup>129</sup> Long-term Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLLC-13008, 17 August 2013, **C-076**; Investment Agreement of Ogun-Guangdong Free Trade Zone Enterprise No. IA-13008, 17 August 2013, **C-077**.

*generally the Free Trade Zone to ensure the attainment of its lofty objectives*"<sup>130</sup> - on 28 September 2013, the Ogun State Government, Zhongfu Nigeria, and Zenith Global Merchant Limited ("**Zenith**") entered into the JVA for the development, management, and operation of the Zone.<sup>131</sup> The Managing Director and CEO of Zenith was Mr. Abbey Onas, who also became the chief coordinator of the Zone for the Ogun State Government.

69. The JVA provided that the Ogun State Government would partner with Zhongfu Nigeria to develop the Zone into a "*multi-purposes industrial area for industries of [sic.] including but not limited to, residential houses, recreation, ceramic processing, furniture processing, hardware, household appliances, construction material processing.*"<sup>132</sup> The JVA acknowledged that CAI's participation in the Zone had been terminated a year and half earlier on 15 March 2012.<sup>133</sup> It explained that Zhongfu Nigeria "*ha[d] been appointed as the new manager of the [Zone]" and "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.*"<sup>134</sup>
70. The JVA provided that the concession period for the exclusive management of the 10,000 hectares (100 km<sup>2</sup>) of the Zone was 99 years from the date on which the Zone land was transferred to OGFTZ Company and a Certificate of Occupancy over the first phase land was issued to OGFTZ Company.<sup>135</sup> This was in line with the rights for 97 years which the Claimant had under the Fucheng Industrial Park Agreement to the "*occupancy, use, proceeds and disposal*" of the land in the Zone.<sup>136</sup>
71. The JVA recorded that the shareholding of OGFTZ Company was "*adjusted to reflect the new parties*" with Zhongfu Nigeria granted a 60% stake in OGFTZ Company.<sup>137</sup>
72. The Ogun State Government also represented and warranted to Zhongfu Nigeria and Zenith that:

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<sup>130</sup> See Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Zhongfu International Investment (NIG) Ltd., 15 March 2012, **C-007**.

<sup>131</sup> JVA, **C-008**.

<sup>132</sup> JVA, p. 3, **C-008**.

<sup>133</sup> JVA, p. 3, **C-008**.

<sup>134</sup> JVA, p. 3, **C-008**.

<sup>135</sup> JVA, p. 4, **C-008**.

<sup>136</sup> Fucheng Industrial Park Agreement, Art. 2.6, **C-002**.

<sup>137</sup> JVA, clauses 2.1 - 2.2, **C-008**.

- (a) the Ogun State Government was the "*legal and beneficial owner of the [10,000 hectare] Zone Land*";<sup>138</sup>
- (b) the Ogun State Government had "*the right to transfer the Zone Land to OGFTZ [Company] free from any encumbrance under provisions of this Agreement*";<sup>139</sup>
- (c) "*the Zone Land [was] unencumbered and free from any adverse claim*";<sup>140</sup>
- (d) the Ogun State Government had "*the authority to enter into and perform [the JVA]*" and the provisions were "*legal and valid against [the Ogun State Government] and constitute[d] its obligations binding and enforceable against it*";<sup>141</sup>
- (e) the Ogun State Government would "*strictly observe the provision of the bilateral agreements/treaties entered into by and between the Government of the People's Republic of China and the Government of Federal Republic of Nigeria*" and "*provide adequate protection to the investment of the Consortium [Zhongfu Nigeria and Zenith]*" in OGFTZ Company and the Zone;<sup>142</sup> and
- (f) the Ogun State Government would not, within the term of the JVA, in its own capacity or on behalf of the Federal Government of Nigeria, "*appropriate or nationalize for public purpose the Zone Land and/or any construction or structure thereon*".<sup>143</sup> In the event of an expropriation for public purposes by the Federal Government or another Government agency, Zhongfu Nigeria was to be compensated for the value of the property expropriated plus the expected profits until the expiration of the 99-year term of the JVA.<sup>144</sup>

73. Other terms of the JVA included the following:

- (a) The Ogun State Government was to deliver "*unencumbered possession of the Zone Land in phases*" to OGFTZ Company and to "*adopt special policies or administrative measures to ensure*" that OGFTZ Company, Zhongfu Nigeria, and the Zone were "*not affected by any abnormal interference*";<sup>145</sup> and

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<sup>138</sup> JVA, clause 15.1, **C-008**.

<sup>139</sup> JVA, clause 15.1, **C-008**.

<sup>140</sup> JVA, clause 15.1, **C-008**.

<sup>141</sup> JVA, clause 15.1, **C-008**.

<sup>142</sup> JVA, clause 15.1, **C-008**.

<sup>143</sup> JVA, clause 15.6, **C-008**.

<sup>144</sup> JVA, clause 15.6, **C-008**.

<sup>145</sup> JVA, clause 6.1, **C-008**.



- (b) The Ogun State agreed to indemnify OGFTZ Company against "*all costs, claims, demands, losses, damages and expenses*" resulting from the adverse effect on the economic benefits to OGFTZ Company, Zhongfu Nigeria and Zenith of "*any new laws, rules or regulations of any relevant authority within [the Ogun State Government] or the amendment or interpretation of any existing laws, rules or regulations of such relevant authority*" after the date of the JVA.<sup>146</sup>
74. On entering the JVA, the Claimant became entitled to a further income stream, in addition to the three revenue sources it had under the Fucheng Industrial Park Agreement.<sup>147</sup> As the 60% shareholder of OGFTZ Company under the JVA, Zhongfu Nigeria became entitled to 60% of OGFTZ Company's portion of the Administration Fee as well as OGFTZ Company's proportion of the income from the land transfer fees, both as reflected in the Fucheng Industrial Park Agreement.<sup>148</sup>
75. In reliance on the specific commitments embodied in the JVA, together with the subsisting rights under the Fucheng Industrial Park Agreement, the Claimant continued to invest in Zhongfu Nigeria and the Zone in order to develop the Zone.<sup>149</sup> At the start of 2014, the Management Team focused on promoting the Zone to potential tenants in China and attracting investment.<sup>150</sup> The economic potential of the Zone - taking into account its presence in Nigeria and in the ECOWAS region, as well as its particular proximity to Lagos and the fact that it was professionally managed by a private company - was quickly recognised by foreign investors. As a result, the number of tenants entering into land lease agreements and investment agreements to establish businesses in the Zone quickly increased during the course of 2014. At the same time, established tenants in the Zone started to see their investments generate significant income. This resulted in an increase in revenue for customs duties and taxes received by the Nigerian Government.<sup>151</sup> Zhongfu Nigeria recorded a 2014 year-end profit of NGN 227,075,000 (US\$1,232,510).<sup>152</sup>
76. The promotional efforts of the Management Team in China contributed to a number of new tenants moving to the Zone in 2014 to manufacture various fast-moving consumer goods,

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<sup>146</sup> JVA, clause 15.2, **C-008**.

<sup>147</sup> See ¶ 66.

<sup>148</sup> See Fucheng Industrial Park Agreement, Arts. 3.1 and 4.1, **C-002**.

<sup>149</sup> In respect of tenants entering the Zone after Zhongfu Nigeria had been appointed after the JVA and prior to 2014, see e.g. Long-term Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLLC-13009, 22 October 2013, **C-078**; Investment Agreement of Ogun-Guangdong Free Trade Zone Enterprise No. IA-13009, 22 October 2013, **C-079**.

<sup>150</sup> Witness Statement of John Xue, 29 April 2019, ¶ 23; see also Ogun-Guangdong Free Trade Zone Brochure, undated, **C-080**.

<sup>151</sup> See Ships & Ports, "Customs generates N161m at Ogun FTZ in 2014", 9 February 2015, available at <http://shipsandports.com.ng/2015/02/09/customs-generates-n161m-at-ogun-ftz-in-2014/> (last accessed on 11 April 2019), **C-081**.

<sup>152</sup> Zhongfu International Investment (NIG) FZE Auditors' Report and Financial Statements for the Year Ended December 31, 2015, 23 September 2016, **C-082**.

household products and industrial equipment, including: Pearlcoin (Ogun) FZE (hair attachments) via Dongguan Golden Speed Hair Product Co., Ltd;<sup>153</sup> Hua Tai Industry FZE (mosquito nets) via Mr. Fu Xiaoler;<sup>154</sup> CFC Towers FZE (power grid towers) via Qingdao Qiangli Steel Structure Co., Ltd;<sup>155</sup> One Percent Industry FZE (cleaning mops and products) via Ningbo Yinzhou Ocean Meeting Imp & Exp Co. Ltd;<sup>156</sup> First Battery Industry FZE (car batteries) via Shanghai Upworld Industrial Co. Ltd;<sup>157</sup> and Zhuotang Industry FZE (roofing material) via Taizhou Jijui Trading Co., Ltd.<sup>158</sup>

77. On 23 April 2014, Mr. Onas wrote to the Ogun State Government to provide an update on progress made in the Zone and an issue that had arisen. Around that time, an entity called NSG had been holding itself out to tenants as having an interest in OGFTZ Company derived from CAI and purporting to act as the manager and administrator of the Zone, despite CAI's rights having been terminated in March 2012.<sup>159</sup> In Mr. Onas' letter, he said, *inter alia*, that:

- (a) *"I am very pleased to inform you that there has been an immeasurable amount of progress recorded so far under the supervision and management of the new investors, [Zhongfu Nigeria]. As we speak, there are currently about thirty-six (36) Chinese enterprises in the zone and more investors are still interested in coming in the nearest future while the existing ones are looking to expand their businesses."*
- (b) *"I can also confirm that the revenue currently generated from the zone has skyrocketed by over 50% increase compared to what it used to be in the past when irregularities such as smuggling and tax evasion were quite prominent. The [NEPZA] and Nigeria Customs agencies are also on ground at the zone to confirm these claims."*
- (c) *"Apparently, the more we have an influx of investors, the higher the revenue of the Federal Government and stakeholders, particularly the Ogun State government in*

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<sup>153</sup> Lease Agreement of Land and Standard Factory Building No. LLLC-14001, 17 June 2014, **C-083**; Investment and Service Agreement No. IA-14001, 17 June 2014, **C-084**.

<sup>154</sup> Land Lease Agreement No. LLLC-14002, 21 June 2014, **C-085**; Investment and Service Agreement No. IA-14002, 21 June 2014, **C-086**.

<sup>155</sup> Land Lease Agreement No. LLLC-14003, 10 July 2014, **C-087**; Investment and Service Agreement No. IA-14003, 10 July 2014, **C-088**.

<sup>156</sup> Lease Agreement of Land and Standard Factory Building No. LLLC-14005, 10 October 2014, **C-089**; Investment and Service Agreement No. IA-14005, 10 October 2014, **C-090**.

<sup>157</sup> Lease Agreement of Land and Standard Factory Building No. LLLC-14006, 16 October 2014, **C-091**; Investment and Service Agreement No. IA-14006, 16 October 2014, **C-092**.

<sup>158</sup> Lease Agreement of Warehouse and Standard Factory Building No. LLLC-14009, 20 December 2014, **C-093**.

<sup>159</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 60; Witness Statement of John Xue, 29 April 2019, ¶ 18.



*terms of creation of employment opportunities for its people and generation of income and revenue which will undoubtedly boost its profit margin."*

- (d) *"However, there is a vital issue that needs to be looked into... concerning [CAI] and its claims to retake possession of the [Zone]. The report reaching me is that [CAI]... has been creating an air of confusion and chaos among the current investors in the [Zone]."*
- (e) *"[CAI had] misled the current investors in the [Zone] informing them that they have sold their rights to new [sic.] Chinese Company 'New South Group'..."*
- (f) *"On the part of the co-ordinator company, I have had to call several meetings with the existing investors, disapproving all the misconceptions of the new company and dissuading them from getting involved in any way with the new company; and that [Zhongfu Nigeria] is the only genuine and approved investor in charge of the management of the [Zone]."<sup>160</sup>*
78. Mr. Onas requested that Ogun State Government, *inter alia*: (i) "[i]ntervene in the issue... to clear the confusion off [sic.] the air between the investors"; (ii) "[w]rite [to] all the current investors at the [Zone], correcting them on these misleading claims and disapproving the contradicting claims of the 'New South Group' who are posing as new owners"; and (iii) "[f]ormally acknowledge [Zhongfu Nigeria] as the only Chinese investor authorised with approval to be in charge of the management of the affairs of the [Zone]."<sup>161</sup>
79. On 29 April 2014, Zhongfu Nigeria received two letters, both dated 28 April 2014, confirming that CAI's participation in OGFTZ Company had been terminated in March 2012 and Zhongfu Nigeria was the sole manager of the Zone. The first letter, entitled "*Termination of [CAI]'s Participation in [the Zone]*," was from the lawyers for OGFTZ Company, M.A. Banire & Associates, and requested Zhongfu Nigeria to disregard any communications from CAI as "*they have no authority or approval of the [Ogun State Government] to act or do anything in respect of the said Free Trade Zone.*" The letter referred to CAI's interest in OGFTZ Company having been "*long terminated... through a letter dated March 15, 2012 written by the Secretary to the State Government of Ogun State...*"<sup>162</sup>
80. The second letter to Zhongfu Nigeria on 28 April 2014 was from the Ogun State Government directly. In that letter, the Ogun State Government referred to the situation,

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<sup>160</sup> Letter from Zenith Global Merchant Ltd. to Office of the Secretary to the State Government, Ogun State, 23 April 2014, **C-094**.

<sup>161</sup> Letter from Zenith Global Merchant Ltd. to Office of the Secretary to the State Government, Ogun State, 23 April 2014, **C-094**.

<sup>162</sup> Letter from M.A. Banire & Associates to Zhongfu International Investment (NIG) FZE, 28 April 2014, **C-095**.

where CAI "*continued to parade itself as the authentic Manager/Administrator of the Zone.*"<sup>163</sup> The Ogun State Government wrote that:

*"It is pertinent to note that the appointment of [CAI] has been terminated since 15th March, 2012.*

*It must be stressed that Ogun Guangdong State did not at any time sell any portion of the [Zone] to [CAI]. Further, the State Government has no dealing whosoever [sic.] with 'The New South Group', either. Consequently, [Zhongfu Nigeria] is enjoined [sic.] to be pro-active in the Management/Administration of [the Zone] by promptly warding off activities of trespassers capable of causing confusion in the Zone."*<sup>164</sup>

81. On 29 April 2014, Mr. Onas, as co-ordinator of the Zone, also wrote to Zhongfu Nigeria about the "*on-going propagandas and rumours that is [sic.] being spread across the [Zone] in relation to the claims of [CAI] to take possession of the management of the [Zone].*"<sup>165</sup> Mr. Onas referred to a letter from the Ogun State Government to CAI dated 15 March 2012 by which its participation in OGFTZ Company was terminated, and advised that it is in Zhongfu Nigeria's "*best interests to disregard any information indicating that [CAI] is intending to re-take possession of the [Zone] management or had sold its rights in any form to a new company called 'New South Group'.*"<sup>166</sup> Mr. Onas implored "*all investors and stakeholders to please take note of this development which took effect since year 2012 and to avoid any form of contact with the previous managers or their associates as whoever attempts to do so is at their own risk.*"<sup>167</sup> Mr. Onas concluded the letter by stating:

*"And finally, we should ensure that we all work as a team for the best interest of our country, our team as well as our investment and I can assure you that the Ogun State government is willing to continually give its maximum support so far as we comply with the rules, regulations and contract binding on the parties."*<sup>168</sup>

82. On 9 May 2014, the NEPZA representative in the Zone was forwarded the letters from the Ogun State Government, M.A. Banire & Associates and Zenith.<sup>169</sup> In reliance on its rights under the JVA and the Fucheng Industrial Park Agreement and reassured by the express reiteration and confirmation by the Ogun State Government that Zhongfu Nigeria was the

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<sup>163</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Zhongfu International Investment (NIG), 28 April 2014, **C-096**.

<sup>164</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Zhongfu International Investment (NIG), 28 April 2014, **C-096**.

<sup>165</sup> Letter from Zenith Global Merchant Ltd. to Zhongfu International Investment (NIG) FZE, 29 April 2014, p. 1, **C-097**.

<sup>166</sup> Letter from Zenith Global Merchant Ltd. to Zhongfu International Investment (NIG) FZE, 29 April 2014, p. 1, **C-097**.

<sup>167</sup> Letter from Zenith Global Merchant Ltd. to Zhongfu International Investment (NIG) FZE, 29 April 2014, p. 1, **C-097**.

<sup>168</sup> Letter from Zenith Global Merchant Ltd to Zhongfu International Investment (NIG) FZE, 29 April 2014, p. 2, **C-097**.

<sup>169</sup> Letter from Zhongfu International Investment (NIG) FZE to NEPZA Representative, 9 May 2014, **C-098**.

manager / administrator of the Zone and that Zhongfu Nigeria's rights would be preserved, the Claimant and Zhongfu Nigeria continued to develop the Zone and secure the investment of other enterprises into the Zone.<sup>170</sup>

### **3. Zhongfu Nigeria's Successful Management of the Zone was Widely Recognised and Praised by the Nigerian Government and Internationally**

83. Zhongfu Nigeria made a success of the Zone by attracting new tenants and developing the Zone effectively. The Zone was so successful that it garnered international recognition as a model for foreign direct investment in Africa.<sup>171</sup>
84. Throughout 2014, 2015 and early 2016, Zhongfu Nigeria continued to invest in and develop the Zone and attract new tenants.<sup>172</sup> This involved, amongst other matters, constructing more roads and drainage,<sup>173</sup> arranging for power lines to be built, building around 21,000m<sup>2</sup> of warehouses for "incubator" space and purchasing five new cars to use in connection to the Zone.<sup>174</sup> During this period, Zhongfu Nigeria also arranged for key service providers to provide amenities to tenants in the Zone. This included arranging for the opening of a bank by "First Bank", a supermarket, a larger electrical supplier to increase capacity in the Zone, an increase in gas supply from "Shell" and the installation of a mobile phone tower in the Zone.<sup>175</sup> The Zone was becoming a thriving industrial and commercial precinct.

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<sup>170</sup> Witness Statement of John Xue, 29 April 2019, ¶ 22.

<sup>171</sup> Witness Statement of John Xue, 29 April 2019, ¶¶ 29-33.

<sup>172</sup> See e.g., footnotes 153 to 158 above and Land Lease Agreement No. LLLC-15004, 13 August 2015, **C-099**; Investment and Service Agreement No. IA-15004, 13 August 2015, **C-100**; Lease Agreement of Land and Standard Factory Building No. LLLC-15006, 3 October 2013, **C-101**; Investment and Service Agreement No. IA-15006, 3 October 2013, **C-102**; Land Lease Agreement No. LLLC-15007, 21 October 2015, **C-103**; Land Lease Agreement No. LLLC-16002, 26 January 2016, **C-104**; Investment and Service Agreement No. IA-16002, 26 January 2016, **C-105**; Land Lease Agreement No. LLLC-16002, 10 March 2016, **C-106**.

<sup>173</sup> See Photo of road, drainage and power lines in Zone, undated, **C-107**.

<sup>174</sup> See Photos of Incubator Warehouses, undated, **C-108**; Warehouse Construction Project Report, 22 December 2013, **C-109**; Proforma Invoices from Eastern Harbour International Ltd. to Zhongfu International Investment (NIG) FZE, 6 January 2016, 10 January 2016, 30 March 2016, **C-110**; Commercial Invoice from Ghassan Aboud Cars Dubai, UAE, to Zhongfu International Investment (NIG) FZE, 3 January 2015, **C-111**; Sale Invoices from Lafarge Cement WAPCO Nigeria PLC to Zhongfu International Investment (NIG) FZE, 23-24 April 2015, **C-112**; Invoices from CNC Engineering Co., Ltd. to Zhongfu International Investment (NIG) FZE, 3 February - 3 June 2015, **C-113**; Invoices from Sinotrust International Investment Ltd. to Zhongfu International Investment (NIG) FZE, 14 February - 29 July 2015, **C-114**; and Invoice from Unicontinental International to Zhongfu International Investment (NIG) FZE, 24 March 2015, **C-115**; Cash Credit Invoices and Receipts from Bertola Machine Tool Ltd. to Ogun-Guangdong Free Trade Zone, 20 January and 26 January 2015, **C-116**; Invoice and Delivery Note from Fouani Nigeria Ltd. to Zhongfu International Investment (NIG) FZE, 27 January and 30 January 2015, **C-117**; and Quotations from CFAO Equipment to Zhongfu International Investment (NIG) FZE, 26 January 2015, **C-118**; Construction Materials and Equipment for Hospital Projects Commission Purchasing Contract, 8 October 2015, **C-119**; Construction Materials and Equipment for Hotels and Accommodation Office Areas Commission Purchasing Contract, 8 October 2015, **C-120**.

<sup>175</sup> Witness Statement of Jason Han, 30 April 2019, ¶¶ 69 and 71.



Figure 3: Photo of the Zone, April 2016. Source: Economist Intelligence Unit

85. As a result of Zhongfu Nigeria's work in developing the Zone, it managed to double the tax revenues generated by the Zone from 2013 to 2014 to NGN 161 million.<sup>176</sup> Following a tour of the Zone in early February 2015, the Assistant Comptroller of the Nigerian Customs Service was reported saying he was "*impressed with the level of activities in the [Zone]*" and that Zhongfu Nigeria "*should 'be given a pat on the back' for a job well done.*"<sup>177</sup>
86. By February 2015, there were over 4,000 workers engaged by 15 companies that were operational in the Zone, with a further 25 located there that were in the process of construction.<sup>178</sup> For the year ending 31 December 2015, Zhongfu Nigeria more than doubled its profits from the year before to NGN 620,940,000 (US\$3,123,328).<sup>179</sup> This was an increase of 128% from profits earned by Zhongfu Nigeria in the year ending 31 October 2014.<sup>180</sup> OGFTZ's revenue for the year ending 31 December 2015 was also substantial, bringing in NGN 607,824,000 (US\$3,057,354).<sup>181</sup> By the end of July 2016, the total tenants

<sup>176</sup> Ships & Ports, "Customs generates N161m at Ogun FTZ in 2014", 9 February 2015, available at <http://shipsandports.com.ng/2015/02/09/customs-generates-n161m-at-ogun-ftz-in-2014/> (last accessed on 11 April 2019), **C-081**.

<sup>177</sup> Ships & Ports, "Customs generates N161m at Ogun FTZ in 2014", 9 February 2015, available at <http://shipsandports.com.ng/2015/02/09/customs-generates-n161m-at-ogun-ftz-in-2014/> (last accessed on 11 April 2019), **C-081**.

<sup>178</sup> Ships & Ports, "Customs generates N161m at Ogun FTZ in 2014", 9 February 2015, available at <http://shipsandports.com.ng/2015/02/09/customs-generates-n161m-at-ogun-ftz-in-2014/> (last accessed on 11 April 2019), **C-081**.

<sup>179</sup> Zhongfu International Investment (NIG) FZE Auditors' Report and Financial Statements for the Year Ended December 31, 2015, 23 September 2016, **C-082**.

<sup>180</sup> See FTI Report, ¶ [5.25.

<sup>181</sup> Ogun-Guangdong Free Trade Zone Company Auditors' Report on Special Purpose for the Year Ended December 31, 2015, 23 September 2016, **C-121**.

in the Zone had risen to 37, with 4,500 Nigerian workers and 220 Chinese workers employed within the Zone.<sup>182</sup>

87. Zhongfu Nigeria also attracted high-profile businesses to make very significant investments in the Zone, including China Glass<sup>183</sup> and Xi'an Ogun Construction and Development Ltd. Company ("**Xi'an Company**"). On 30 April 2015 China Glass, through its subsidiary CNG (Nigeria) Investment Ltd., signed a land lease agreement with OGFTZ Company to lease 272,000 m<sup>2</sup> to build a float glass and solar control coated glass production line, together with an Investment and Service Agreement with Zhongfu Nigeria.<sup>184</sup> China Glass, is one of the largest float glass manufacturers in China and is listed on the Hong Kong stock exchange.<sup>185</sup> Its decision to invest in the Zone represented a vote of confidence in the management and trajectory of the Zone and would play an important role in encouraging further Chinese investment.<sup>186</sup> The investment by China Glass was planned to be US\$78,000,000 and its expected turnover per year was US\$100,000,000.<sup>187</sup> This investment alone was expected to generate approximately US\$1,350,000 per year in income for Zhongfu Nigeria under the Fucheng Industrial Park Agreement and another US\$810,000 per year for Zhongfu Nigeria through its 60% shareholding in OGFTZ Company under the JVA.
88. Zhongfu Nigeria also procured a major agreement with the Xi'an Industrial Delegation to invest US\$1 billion over 10 years to establish the Pharmaceutical Park. On 20 January 2016, a memorandum of understanding was signed between OGFTZ Company and the Xi'an Industrial Delegation (the "**MOU**").<sup>188</sup> Under the terms of the MOU, in addition to the investment in the Zone, the Xi'an Company was "*willing to build roads and bridges over Ogun River to connect [the Zone] and Ogun State with Lagos State*" and "*build a harbor*

<sup>182</sup> Excel table, "Operational tenants in Zone in 2016", undated, **C-122**.

<sup>183</sup> See China Glass Holding Ltd., "About Us", available at <http://www.chinaglassholdings.com/en/about.aspx> (last accessed on 18 April 2019), **C-123**.

<sup>184</sup> Land Lease Agreement No. LLLC-15002, 30 April 2015, **C-124**; Feasibility Report of CNG Glass (Nigeria) FZE, 23 July 2015, **C-125**; Investment and Service Agreement No. IA-15002, 30 April 2015, **C-126**. See e.g., under the Land Lease Agreement No. LLLC-15002, 30 April 2015, **C-124**. China Glass Holding Ltd. was to pay an upfront land transfer fee of US\$3,264,000. By September 2015, China Glass Holding Ltd. transferred US\$1,161,265 to Zhongfu International Investment (NIG) FZE, see Payment Receipt from Zhongfu International Investment (NIG) FZE to China Glass Holding Ltd., 8 May 2015, (in the amount of US\$161,290), **C-127**; and Payment Receipt from Zhongfu International Investment (NIG) FZE to CNG Glass, 8 September 2015, (in the amount of US\$999,975), **C-128**.

<sup>185</sup> See China Glass Holding Ltd., "About Us", 18 April 2019, available at <http://www.chinaglassholdings.com/en/about.aspx> (last accessed on 18 April 2019), **C-123**.

<sup>186</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 86; Witness Statement of John Xue, 29 April 2019, ¶ 27.

<sup>187</sup> CNG (Nigeria) Investment Limited, "Application for Registration as an Enterprise in Ogun-Guangdong Free Trade Zone", 23 July 2015, **C-129**; Feasibility Report of CNG Glass (Nigeria) FZE, 23 July 2015, **C-125**.

<sup>188</sup> Memorandum of Understanding between Xi'an Industrial Delegation and Ogun-Guangdong Free Trade Zone on Establishment of Hi-Tech Park in the Zone, 20 January 2016 (hereinafter "**MOU**"), **C-130**; List of Delegation Personnel from Shaanxi to Visiting Nigeria in January 2016, January 2016, **C-131**; Framework Agreement on Establishment of Xi'an Industrial Park in Nigeria Ogun-Guangdong Free Trade Zone, 20 April 2016 (hereinafter "**Xi'an Industrial Park Agreement**"), **C-132**.



*port in Ogun State to develop the goods and materials transfer.*"<sup>189</sup> As an indication of the importance of this deal for the economic development of Nigeria, the President of Nigeria, Muhammadu Buhari, attended a ceremony in Beijing, at the China-Nigeria Forum on Production Capacity and Investment Cooperation on 12 April 2016 (the "**China-Nigeria Forum**"), at which there was the signing of a strategic cooperation agreement to construct the Pharmaceutical Park.<sup>190</sup> To expedite the implementation of the project, the following week, on 20 April 2016, a Framework Agreement on Establishment of Xi'an Industrial Park in Nigeria Ogun-Guangdong Free Trade Zone was entered into between the Xi'an Company and OGFTZ Company.<sup>191</sup>

89. As Mr. Xue explains:

*"Attracting the investment from the Xi'an Delegation, as well as from China Glass, gave us confidence that the Zone was going to be very successful. With these investments, we had the sense that we had reached a tipping point for the exponential growth and success of the Zone."*<sup>192</sup>

90. The Claimant and Zhongfu Nigeria thus developed the Zone effectively and profitably to widespread acclaim. The strong growth attracted positive international recognition. Mr. Xue was invited to international conferences to speak about the success of the Zone.<sup>193</sup> In January 2016, students from Johns Hopkins University visited the Zone to study its success as a model for foreign direct investment in Africa.<sup>194</sup> In April 2016, the Economist Intelligence Unit produced a video on the Zone and its success, citing Mr. Xue, Nigerian State representatives, World Bank economists and international development academics.<sup>195</sup> A link the video is below:

<sup>189</sup> MOU, p. 5, **C-130**; P Adepoju, "China is building \$1 billion pharmaceutical park in Southwestern Nigeria", *Innovation Village*, 14 March 2016, available at <https://innovation-village.com/china-building-1-billion-pharmaceutical-facilities-southwestern-nigeria/> (last accessed on 28 April 2019), **C-133**.

<sup>190</sup> Photo of signing of Memorandum of Understanding between Xi'an Industrial Delegation and Ogun-Guangdong Free Trade Zone on Establishment of Hi-Tech Park in the Zone at the China-Nigeria Forum on Production Capacity and Investment Cooperation, 12 April 2014, the individuals in the photograph are: standing from left to right: (i) an officer from Nigerian Investment Promotion Commission, (ii) Dr. Sina Agboluaje, former Chief Executive Officer of NEPZA, (iii) Mr. Hongbing Ran, Deputy Chief of Xian City Development and Reform Commission, (iv) Mr. John Xue, (v) Mr. Shaoyan Fan, Director of Urban Planning Institute, (vi) Mr. Abbey Onas, (vii) Mr. Geng Xu, Chairman of Shaanxi Bang Sheng Pharmaceutical Co., Ltd., (viii) Mr. N.C. Chan, Chairman of Silk Road Investment Center, Sitting from left to right: (ix) Mr. Jason Han, and (x) Mr. Jianxin Li, Vice President of Shaanxi Pharmaceutical Group, **C-134**; ChinaGoAbroad, "China-Nigeria Forum on Production Capacity and Investment Cooperation Convened", 12 April 2016, available at [http://www.chinagoabroad.com/en/member\\_update/china-nigeria-forum-on-production-capacity-and-investment-cooperation-convenes](http://www.chinagoabroad.com/en/member_update/china-nigeria-forum-on-production-capacity-and-investment-cooperation-convenes) (last accessed on 23 April 2019), **C-135**; A Adeogun, "Buhari's China visit yields multi-billion dollar investment for Nigeria", *New Mail Nigeria*, 15 April 2016, available at <https://newmail-ng.com/buharis-china-visit-yields-multi-billion-dollar-investment-for-nigeria/> (last accessed on 23 April 2019), **C-136**; Xi'an Industrial Park Agreement, pp. 1-2, **C-132**.

<sup>191</sup> Xi'an Industrial Park Agreement, **C-132**.

<sup>192</sup> Witness Statement of John Xue, 29 April 2019, ¶ 27.

<sup>193</sup> Witness Statement of John Xue, 29 April 2019, ¶ 31.

<sup>194</sup> Witness Statement of John Xue, 29 April 2019, ¶ 30.

<sup>195</sup> Economist Intelligence Unit Video, available at <http://growthcrossings.economist.com/video/zones-of-influence/> (last accessed on 11 April 2019), **C-009**; Transcript of the Economist Intelligence Video, 21 April 2016, **C-010**.



91. In parallel to attracting significant tenants to the Zone, the Claimant was also working on plans to accelerate the infrastructure development of the Zone by raising external capital. As part of these efforts, the Claimant started working with Prof. Issa Baluch and Mr. Jon Vandenheuvel of First Hectares. Mr. Xue was introduced to Prof. Baluch when he was invited to present at the Harvard African Development Conference, held at Harvard University on 3-4 April 2015. At this conference Mr. Xue was a speaker on a panel chaired by Prof. Baluch. Prof. Baluch is one of the world's leading experts on free trade zones,<sup>196</sup> having played an integral and longstanding role in assisting the Dubai Government to develop the Jebel Ali Free Trade Zone in Dubai.<sup>197</sup> The Jebel Ali Free Trade Zone is now one of the most prominent and successful Free Trade Zones in the world.<sup>198</sup> Prof. Baluch went on to found the largest (by turnover) "sea-air" freight logistics provider in the Middle East, "Swift", which operated in a number of free trade zones in the UAE.<sup>199</sup> At its peak, Swift had a network of offices and agents in 19 countries in Africa, six in the Middle East, 13 in Asia, 18 in Europe and two in North America.<sup>200</sup> In Nigeria alone, Swift had approximately five offices and 250 distribution centres servicing the country.<sup>201</sup>

<sup>196</sup> Witness Statement of Jon Vandenheuvel, 29 April 2019, ¶ 7. Prof. Baluch is also a consultant advising the Ports, Customs and Free Zone Corporation (a Government of Dubai cooperation) having originally been involved in creating the sea-air combined transport business that operates in the United Arab Emirates. See Letter from DP World re: Issa Baluch, 4 April 2018, **C-137**.

<sup>197</sup> Witness Statement of Issa Baluch, 29 April 2019, ¶¶ 9 and 12; see also Letter from Government of Dubai re: Issa Baluch, 25 October 1989, **C-138**; Letter from Government of Dubai, Department of Civil Aviation re United Nations Procurement & Logistics Base in Dubai, 20 May 2001, **C-139**; Letter from Government of Dubai, Department of Civil Aviation re: Issa Baluch, 9 July 2002, **C-140**; and Letter from Dubai Port, Customs and Fee Zone Corporation re: Issa Baluch, 31 January 2005, **C-141**.

<sup>198</sup> See Jebel Ali Free Zone, "About us", available at <http://jafza.ae/about-us/> (last accessed on 16 April 2019), **C-142**; see also ZAWYA, "Jafza generates over \$83bln in trade in 2017", 15 May 2018, available at [https://www.zawya.com/mena/en/press-releases/story/Jafza\\_generates\\_over\\_83bln\\_in\\_trade\\_in\\_2017-ZAWYA20180515083723/](https://www.zawya.com/mena/en/press-releases/story/Jafza_generates_over_83bln_in_trade_in_2017-ZAWYA20180515083723/) (last accessed on 16 April 2019), **C-143**.

<sup>199</sup> Witness Statement of Issa Baluch, 29 April 2019, ¶ 3; see also Air Cargo News, "IATA's top cargo agents in the Middle East and Africa", 10 November 2005, **C-144**.

<sup>200</sup> Witness Statement of Issa Baluch, 29 April 2019, ¶ 3; See also Swift Freight International Brochure, 22 October 1999, **C-145**.

<sup>201</sup> Witness Statement of Issa Baluch, 29 April 2019, ¶ 3. The Swift business relied on the use of "multi-modal transport" which is where there is a carriage of goods by at least two different modes of transport on the basis of a multimodal transport contract from a place in one country to a place in a different country. See United Nations Conference on a Convention on International Multimodal Transport,

92. As Prof. Baluch explains in his witness statement, when he heard about the rights Zhongfu Nigeria had to develop the 10,000 hectare Zone which was about 30km from both the Lagos International Airport and the Apapa Port / Lagos Port Complex, he immediately saw the enormous potential of the Zone. As Prof. Baluch notes, "[t]he proximity of the Zone to air and sea ports meant that the Zone could expand the distribution model for the whole [ECOWAS] region."<sup>202</sup> In respect of the future prospect of the Zone, Prof. Baluch states that:

*"After spending more time with John and working with Zhongfu Nigeria, I became even more convinced on the very significant value and potential of the Zone and project. Based on what John told me about characteristics of the 10,000 hectare (100 km<sup>2</sup>) Zone and the right to develop it for over 90-years, I considered that the project was worth in the billions of US Dollars. Based on my experience and network, I thought the value add offerings that Zhongfu Nigeria could develop in the Zone, together with professional management by a private company, were excellent. This set the project far apart from all the other free zones I was aware of in Africa."*<sup>203</sup>

93. Prof. Baluch's enthusiasm for the project and the tremendous potential he saw in the Zone led him to become a consultant to OGFTZ Company, together with his business partner, Mr. Jon Vandenheuvel. Through First Hectares, Prof. Baluch and Mr. Vandenheuvel were formally engaged on 1 April 2016 to "*provide services to advance investment design, promotion and mobilization for the [Zone].*"<sup>204</sup>

94. The success of the Zone spurred further development plans and a program to raise external finance to accelerate the growth of the Zone. The Management Team, advised by First Hectares, began to develop strategic plans to turn the Zone into a significant industrial, commercial and residential city.<sup>205</sup> As part of these plans, preparations were started to list Zhongfu Nigeria, or another entity created for that purpose, on the Nigerian Stock Exchange (the "**NSE**"). Positive discussions were held with a number of banks, leading to the drafting of a mandate letter with United Capital, part of the UBA.<sup>206</sup> Following

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Vol I 1981, UN Doc No. TD/MT/CONF/17, **C-146**. In 2008 Prof. Baluch sold the Swift Group to Barloworld Limited, a South African Logistics company which is listed on the Johannesburg Stock Exchange (JSE: BAW), see SENS Archive, "BAW/BAWP - Barloworld Limited - Barloworld Logistics announces significant international acquisitions in US\$70 transaction", 13 March 2008, available at <http://www.profile.co.za/sens.asp?id=117190> (last accessed on 16 April 2019), **C-147**; and Issa Baluch, "Swift Freight Confirms Acquisition by Barloworld", 26 March 2008, available at <http://issabaluch.com/swift-freight-confirms-acquisition-by-barloworld/> (last accessed on 16 April 2019), **C-148**.

<sup>202</sup> Witness Statement of Issa Baluch, 29 April 2019, ¶ 20.

<sup>203</sup> Witness Statement of Issa Baluch, 29 April 2019, ¶ 23.

<sup>204</sup> Letter from First Hectares Capital to the Ogun-Guangdong Free Trade Zone, 30 March 2016, **C-149**.

<sup>205</sup> See Memorandum on Development Plan from First Hectares Capital to Ogun-Guangdong Free Trade Zone, 13 July 2016, **C-150**; Presentation of the Southwest Nigeria Research & Infrastructure Corporation, undated, **C-151**.

<sup>206</sup> See Email from Elizabeth Uwaifo to Oluwatoyin Sanni and John Xue, 17 July 2016, **C-152**; Draft Letter from Zhongfu International Investment (NIG) FZE to United Capital PLC, 17 July 2016, **C-153**.



Zhongfu Nigeria's forcible removal from the Zone (as to which, see further below), these discussions had to be suspended and eventually abandoned.<sup>207</sup>

95. Separately, Dr. Han and Mr. Xue, together with First Hectares, began meeting with international development banks and financial institutions to seek to raise capital to finance the rapid expansion of the Zone.<sup>208</sup> This involved meeting with representatives from Chinese Development Bank and the World Bank in Beijing as well as meetings with various banks in the USA and research institutions, such as Johns Hopkins University (where representatives from World Bank and Brookings Institution were also present), Harvard University and MIT.<sup>209</sup> The progress made with these institutions also had to be abandoned following Zhongfu Nigeria's forcible expulsion from the Zone.<sup>210</sup>

### **E The Respondent Took Over the Claimant's Investment Without Compensation and Forced Zhongfu Nigeria out of Nigeria**

96. Despite the Claimant's and Zhongfu Nigeria's rights under the Fucheng Industrial Park Agreement, JVA and the locally and internationally recognised success of Zhongfu Nigeria's management of the Zone, in the Spring of 2016 the Ogun State Government adopted draconian measures to evict Zhongfu Nigeria from the Zone, took over the Claimant's investment and forced the Management Team of Zhongfu Nigeria to flee Nigeria in fear of their personal safety.
97. On 12 April 2016, the Ogun State Government wrote a letter to Zhongfu Nigeria, entitled "*Replacement of shareholdings owner of China Africa Investment Limited and management rights of Ogun- Guangdong Free Trade Zone*",<sup>211</sup> stating that:

*"the Government of the People's Republic of China, through the Economic and Commercial Section of the Consulate of the People's Republic of China in Lagos has notified that the State owned Assets Supervision and Administration Commission of Guangdong Province, China has directed that Ogun State Government be notified of the transfer of Shareholding interests of China Africa Investment in the OGFTZ to the New South Group. As a result of this development, the Consulate is requesting that the Management Rights over the Zone be given to the new share owners."*<sup>212</sup>

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<sup>207</sup> Witness Statement of John Xue, 29 April 2019, ¶¶ 37 and 45.

<sup>208</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 75; Witness Statement of John Xue, 29 April 2019, ¶ 37.

<sup>209</sup> Witness Statement of John Xue, 29 April 2019, ¶ 40.

<sup>210</sup> Witness Statement of John Xue, 29 April 2019, ¶ 45; Witness Statement of Jon Vandenhevel, 29 April 2019, ¶ 22; Letter from First Hectares to Radix Legal & Consulting, 25 October 2016, **C-154**.

<sup>211</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Managing Director of Ogun-Guangdong Free Trade Zone, 12 April 2016, **C-155**.

<sup>212</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Managing Director of Ogun-Guangdong Free Trade Zone, 12 April 2016, **C-155**.

98. In its letter, the Ogun State Government also bizarrely demanded "*proof that your company, [Zhongfu Nigeria] is legitimately entitled to the shares and management rights over the Zone,*"<sup>213</sup> and claimed that it had been "*persuaded by the argument of the Consulate that the problem Ogun State had with China Africa was as regards management rights and practices, not, shareholding.*"<sup>214</sup> The Ogun State Government further wrote that:

*"if the claims of New South Group be [sic.] substantiated, the implication will be that the MOU and agreement between the Ogun State Government and Zhongfu was premised upon misrepresentation and concealment of facts, and, therefore cannot be allowed to stand."*<sup>215</sup>

99. The Ogun State Government did not explain to what it was referring when it alleged that there might have been a "*misrepresentation and concealment of facts*". Nevertheless, it demanded a response to the letter of the Chinese Consulate (which it did not provide to Zhongfu Nigeria) saying that "*[o]therwise, we shall have no choice but to accede to the request of the Consulate and replace the management of the OGFTZ.*"<sup>216</sup>

100. The letter of the Ogun State Government dated 12 April 2016 was an apparent reaction to a letter sent on 11 March 2016, by the Chinese Consulate in Lagos to the Ogun State Government ("**Note 1601**"), which was not received by the Claimant until 27 May 2016. In Note 1601, the Chinese Consulate wrote:

*"We have been officially notified by State-owned Assets Supervision and Administration Commission of Guangdong Province, China about the replacement of shareholdings owner of China Africa Investment Limited from Guangdong Xinguang International Group to Guangdong New South Group. The shift of shareholdings will legally lead to the replacement of the management rights of the OGFTZ, which is now in the hand [sic.] of Zhuhai Zhongfu Group, to Guangdong New South Group."*<sup>217</sup>

101. It is telling that Note 1601 contained no allegations of wrongdoing or impropriety against the Claimant or Zhongfu Nigeria, notwithstanding this characterisation of Note 1601 by the Ogun State Government. Nor did Note 1601 mention misrepresentation or concealment of facts. It also did not mention the JVA, which granted Zhongfu Nigeria full management rights over the Zone, or make reference to the Fucheng Industrial Park Agreement, which

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<sup>213</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Managing Director of Ogun-Guangdong Free Trade Zone, 12 April 2016, **C-155**.

<sup>214</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Managing Director of Ogun-Guangdong Free Trade Zone, 12 April 2016, **C-155**.

<sup>215</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Managing Director of Ogun-Guangdong Free Trade Zone, 12 April 2016, **C-155**.

<sup>216</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Managing Director of Ogun-Guangdong Free Trade Zone, 12 April 2016, **C-0155**.

<sup>217</sup> Note 1601 from the Economic and Commercial Section of the Consulate General of the People's Republic of China in Lagos to the Ogun State Government, 11 March 2016, **C-156**.

granted the Claimant separate and independent rights in the Zone, including land use rights and the right to a share of Administration Fees.

102. At the time Zhongfu Nigeria received the Ogun State Government's letter of 12 April 2016, Dr. Han and Mr. Xue were travelling in the USA following their attendance at the China-Nigeria Forum.<sup>218</sup> Dr. Han and Mr. Xue were informed about the Ogun State Government's letter by Zhongfu Nigeria staff shortly after its receipt.<sup>219</sup> As Dr. Han and Mr. Xue explain in their witness statements, they initially did not give too much weight to the Ogun State Government's letter and NSG's efforts to again try to take over the Zone.<sup>220</sup> Zhongfu Nigeria had received categorical assurances from the Ogun State Government in 2014 that Zhongfu Nigeria was the rightful manager / administrator of the Zone and was advised to "*disregard any communication by any person purporting to claim through [CAI] as they have no authority or approval of the Ogun State Government to act or do anything in respect of the [Zone].*"<sup>221</sup>
103. Dr. Han and Mr. Xue were travelling in the USA to meet with a number of potential investors in the Zone and research institutions to identify opportunities to develop the Zone.<sup>222</sup> Before Dr. Han and Mr. Xue returned to Nigeria, on 26 May 2016, Zhongfu Nigeria replied to the Ogun State Government's letter requesting a meeting with the Secretary to the Ogun State Government in order to clarify Zhongfu Nigeria's "*legitimate right*" in relation to the Zone.<sup>223</sup>
104. Instead of responding to this meeting invitation to discuss Zhongfu Nigeria's rights, the following day, on 27 May 2016, the Ogun State Government dramatically sent a purported notice of termination of the JVA (the "**Notice of Termination**") enclosing also Note 1601.<sup>224</sup> In this Notice of Termination, the Ogun State Government made a number of unproven and erroneous allegations based on evident mischaracterisations of Note 1601. In particular, the Ogun State Government claimed that Zhongfu Nigeria was "*alleged to have fraudulently converted State assets of the Guangdong Province*" and "*misled Ogun State*

<sup>218</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 97; Witness Statement of John Xue, 29 April 2019, ¶ 40.

<sup>219</sup> Witness Statement of John Xue, 29 April 2019, ¶ 38.

<sup>220</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 97; Witness Statement of John Xue, 29 April 2019, ¶ 39.

<sup>221</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 97; Witness Statement of John Xue, 29 April 2019, ¶ 39; Letter from M.A. Banire & Associates to Zhongfu International Investment (NIG) FZE, 28 April 2014, **C-095**, see also Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Zhongfu International Investment (NIG), 28 April 2014, **C-096**.

<sup>222</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 95; Witness Statement of John Xue, 29 April 2019, ¶ 40.

<sup>223</sup> Letter from Zhongfu International Investment (NIG) FZE to Secretary to the State Government of Ogun State, 26 May 2016, **C-157**.

<sup>224</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Zhongfu International Investment (NIG) FZE, 27 May 2016, **C-158**; Note 1601 from the Economic and Commercial Section of the Consulate General of the People's Republic of China in Lagos to the Ogun State Government, 11 March 2016, **C-156**.

thereby."<sup>225</sup> "Coming directly from the Government of the People's Republic of China vide Diplomatic Note 1601, and, in the absence of new facts" the Ogun State Government said it was "obliged to accept the facts as presented by the Chinese government and act accordingly."<sup>226</sup> These extraordinary allegations were not explained, nor supported with any evidence.

105. The Ogun State Government referred to the "*weighty and criminal nature of the allegations*" against Zhongfu Nigeria in the "*said request*" from the Chinese Consulate. Yet, Note 1601 contained no allegations of that or any type against Zhongfu Nigeria. Indeed, Note 1601 made no comment at all on the actions of Zhongfu Nigeria, the Claimant or Zhuhai Zhongfu.<sup>227</sup> Notwithstanding these blatant mischaracterisations, the Ogun State Government purported to terminate the JVA on 27 May 2016 under clauses 15.7 and 18.1.<sup>228</sup>
106. This purported termination made no sense and was wrongful on a number of grounds, including, but not limited to, the following:
  - (a) The Ogun State Government's allegations and purported basis for terminating the JVA were neither substantiated nor evidenced;
  - (b) Note 1601 made no comment on Zhongfu Nigeria's actions and did not contain any reference to "*criminal allegations*" or "*fraudulent conversion*" as alleged by Ogun State;
  - (c) Zhongfu Nigeria's interest in OGFTZ Company under the JVA was unconnected to CAI's previous interest or shareholding, which had been terminated on 15 March 2012 by the Ogun State Government. Indeed, in the JVA itself, Ogun State Government specifically referenced that the termination of CAI's joint venture agreement had taken place on 15 March 2012.<sup>229</sup> This was over one and a half years before the execution of the JVA on 28 September 2013 and more than 4 years before the Notice of Termination; and
  - (d) The Ogun State Government's Notice of Termination failed even to comply with clause 18.1 of the JVA to which it referred and which provided for a period of 60 days

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<sup>225</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Zhongfu International Investment (NIG) FZE, 27 May 2016, **C-158**.

<sup>226</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Zhongfu International Investment (NIG) FZE, 27 May 2016, **C-158**.

<sup>227</sup> Note 1601 from the Economic and Commercial Section of the Consulate General of the People's Republic of China in Lagos to the Ogun State Government, 11 March 2016, **C-156**.

<sup>228</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Zhongfu International Investment (NIG) FZE, 27 May 2016, **C-158**.

<sup>229</sup> JVA, p. 3, **C-008**.

to remedy any alleged material breach. The Ogun State Government's letter threatening to "*accede to the request of the Consulate and replace the management of the OGFTZ*" had been sent on 18 April 2016, yet the Ogun State Government purported to terminate the JVA on 27 May 2016, far less than 60 days later and remarkably only one day after Zhongfu Nigeria had requested a meeting to "*clarify [its] legitimate right.*"<sup>230</sup> It was clear that the Ogun State Government had no interest in hearing Zhongfu Nigeria clarify its legitimate rights, or to accord it due process. The Ogun State Government had evidently predetermined its course of action against Zhongfu Nigeria.

107. Moreover, and importantly, the Ogun State Government rode roughshod over Zhongfu Nigeria's rights in the Zone pursuant to the Fucheng Industrial Park Agreement. These rights were distinct from and pre-dated the JVA by almost three years.

108. As Mr. Xue states in his witness statement:

*"Jason and I were shocked by the response of the Secretary to the Ogun State Government and by the false allegations contained in the letter that Zhongfu Nigeria had "fraudulently converted State assets of the Guangdong Province" and "misled Ogun State." Note 1601 made no reference to any fraud or misrepresentation as alleged in the letter from the Secretary to the Ogun State Government. I was not sure how we should take this purported termination because it was so clearly based on false accusations and a misreading of Note 1601. I thought that there must be a misunderstanding and which could still be resolved. We had helped make the Zone so successful and had been given repeated assurances; I could not believe we would be evicted from the Zone.*"<sup>231</sup>

109. Following the Ogun State Government's misrepresentations and its extraordinary purported termination of the JVA, Nigeria mounted a campaign to threaten, harass, intimidate and evict Zhongfu Nigeria from the Zone (including the area of the Fucheng Industrial Park) utilising multiple State organs, including the police, NEPZA and officials from the Ogun State Government.

110. On 14 June 2016, the lawyer for OGFTZ Company, Dr. Banire, wrote to the Ogun State Government stating that Zhongfu Nigeria maintained legitimate rights to the Zone and urging restraint by the Ogun State Government.<sup>232</sup> In Dr. Banire's letter, he stated:

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<sup>230</sup> Letter from Zhongfu International Investment (NIG) FZE to Secretary to the State Government of Ogun State, 26 May 2016, **C-157**.

<sup>231</sup> Witness Statement of John Xue, 29 April 2019, ¶ 42.

<sup>232</sup> Letter from M.A. Banire to the Secretary to the Ogun State Government, 14 June 2016, **C-159**; See also Email from Jason Han to Muiz Banire, Abbey Onas, John Xue and others, 9 June 2016, **C-160**.

- (a) The issue on which the termination was based first arose in 2014 and a response was communicated at that time to the Ogun State Government which had "*laid to rest that issue.*"
- (b) The "*participation and management rights of [CAI] in respect of the [Zone] was effectively terminated via [the Ogun State Government's] letter of 15<sup>th</sup> March, 2012, with serial number C.491/124.*"
- (c) Zhongfu Nigeria was "*subsequently appointed the management company of the [Zone] and consequently, a Joint Venture Agreement was signed with [the Ogun State Government] and [Zenith] for the development, management and operation of the [Zone]*".<sup>233</sup>

111. Rumours of the Ogun State Government's purported termination of the JVA started to spread and on 16 June 2016, OGFTZ Company received a letter from Xi'an Company enquiring about the potential change in the management of the Zone.<sup>234</sup> In its letter Xi'an Company stated:

*"We are very deeply impressed by the excellent service and highly effective working spirit of the [OGFTZ Company]. And we decided accordingly to set up the Xi'an industrial park. We now have been [sic.] completed the company setting up and capital raising and we are moving forward to the preparation of foreign investment submitting and review. Recently we heard that there is a possibility that the right of administration of the [OGFTZ Company] would be changed and we are very concerned about that."*<sup>235</sup>

112. On 16 July 2016, the Secretary to the Ogun State Government issued a direct threat to Dr. Han of Zhongfu Nigeria, warning him that he should "*leave peacefully when there is [an] opportunity to do so, and avoid forceful removal, complications and possible prosecution.*"<sup>236</sup>

113. Recalling his reaction to the message from the Secretary to the Ogun State Government, Dr. Han states:

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<sup>233</sup> Letter from M. A. Banire & Associates to Secretary to the Ogun State Government, 14 June 2016, **C-159**.

<sup>234</sup> Letter from Xi'an Ogun Construction and Development Ltd. Liability Co., to Ogun-Guangdong FTZ Management Company, 16 June 2016, **C-161**.

<sup>235</sup> Letter from Xi'an Ogun Construction and Development Ltd Liability Co., to Ogun-Guangdong FTZ Management Company, 16 June 2016, **C-161**.

<sup>236</sup> Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**; Email from Jason Han to Elizabeth Uwaifo, 25 September 2016, **C-012**.



*"I was very scared by this outright threat to me and concerned about the need to protect not only Zhongfu Nigeria's rights under the JVA, but also Zhongshan's rights under the Fucheng Industrial Park Agreement."*<sup>237</sup>

114. On 18 July 2016, Dr. Han, on behalf of Zhongfu Nigeria, visited the Economic and Commercial Section of the Lagos Consulate General of the People's Republic of China in relation to the issues in the Zone.<sup>238</sup> He explained the background to the matter, the tremendous progress Zhongfu Nigeria had made in the Zone and sought assistance to rectify the situation. As Dr. Han explains in his witness statement:

*"[Mr. Xu of the Chinese Consulate in Lagos] stated that they had a received a letter from the State-owned Assets Supervision and Administration Commission of Guangdong Province, but that they were not aware that Zhongshan had rights in relation to the Zone. He suggested that Zhongshan should approach the Ogun State Government to sort out the issue."*<sup>239</sup>

115. On 19 July 2016, Dr. Han was informed by a NEPZA representative in the Zone, Mr. Wilfred Odega, that the Ogun State Government would use security personnel to get Zhongfu Nigeria out of the Zone if he did not leave peacefully.<sup>240</sup> Dr. Han told the NEPZA representative that if Zhongfu Nigeria *"had many assets in the Zone and that if the Ogun State Government wanted to take them they would have to pay for them."*<sup>241</sup> The NEPZA representative responded that *"it was too late and that they would give Zhongfu Nigeria nothing. He told me that I should just leave."*<sup>242</sup>

116. Around this time, Dr. Han received a telephone call from Mr. Onas telling him that if he did not hand over peacefully, the Secretary to the Ogun State Government would send immigration to seize Dr. Han's passport and the Department of State Services would put him in jail while Zhongfu Nigeria would be forcibly removed from the Zone.<sup>243</sup> Mr. Onas also told Dr. Han about a handover meeting that was to take place in the coming days.<sup>244</sup> As Dr. Han states in his witness statement:

*"The repeated threats that I was receiving including about my physical safety and the possibility of being forcibly removed from the Zone made me deeply concerned about what would happen if I stayed in the Zone any*

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<sup>237</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 106.

<sup>238</sup> See Letter from Zhongfu International Investment (NIG) FZE to the Consulate General of the People's Republic of China, 20 July 2016, **C-162**.

<sup>239</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 107.

<sup>240</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 108.

<sup>241</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 108.

<sup>242</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 108.

<sup>243</sup> Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**; Witness Statement of Jason Han, 30 April 2019, ¶ 109.

<sup>244</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 109; Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶ 16.

*longer. John was, at that time, overseas at a conference in the Seychelles. I explained to Areak what had happened and how I was concerned for our safety. I also spoke to Ms. Uwaifo by phone; she told us that we had to get out of the Zone immediately.*

*Areak and I left the Zone in separate vehicles on 20 July 2016 to go to the Oriental Hotel in Lagos, an international hotel that Zhongfu Nigeria employees would use when they were staying in Lagos. In order to seek to carry on Zhongfu Nigeria's business activities, we set up a makeshift office in Areak's hotel room. We would keep in contact with Zhongfu Nigeria employees, who would update us on what had been happening in the Zone."<sup>245</sup>*

117. On 21 July 2016, NEPZA and the Ogun State Government, in conjunction with Zenith and its Chairman, Mr. Onas, as chief coordinator for OGFTZ Company, convened a meeting in the Zone to announce that Zhongfu Nigeria's appointment had been terminated and that new management had been appointed.<sup>246</sup> The same day, the Ogun State Government directed that a handover ceremony would take place for the Zone management the next day, on 22 July 2016.<sup>247</sup>
118. On 22 July 2016, the handover ceremony was held in the Zone.<sup>248</sup> Mr. Onas arrived at the Zone with policemen. He ordered staff of Zhongfu Nigeria to give him access to Zhongfu Nigeria's offices and refused to allow certain staff to leave the premises in a vehicle belonging to Zhongfu Nigeria.<sup>249</sup> People in the Zone felt "*terrorised and fearful*."<sup>250</sup>
119. On 22 July 2016, a NEPZA representative in the Zone, Mr. Odega, wrote to Zone Security stating:

*"Please recall yesterday [sic.] meeting of Ogun State Representative with all enterprises, [Zhongfu Nigeria], all government agencies and NEPZA where the representative of the Governor of Ogun State Mr. Abbey Onas brought to our notice the termination of [Zhongfu Nigeria] as the managers of the zone and appointment of Guangdong New South as new managers."<sup>251</sup>*

<sup>245</sup> Witness Statement of Jason Han, 30 April 2019, ¶¶ 110-111.

<sup>246</sup> Letter from NEPZA to All Free Zone Enterprises (OGFTZ), 21 July 2016, **C-163**; Letter from Ogun-Guangdong Free Trade Zone Co-Ordinator, Zenith Global Merchant Ltd. to Zhongfu International Investment (NIG) FZE, 21 July 2016, **C-164**. On 18 July 2016, a letter from Ogun-Guangdong Free Trade Zone had also been sent regarding this meeting. See Letter from Ogun-Guangdong Free Trade Zone Co-ordinator, Zenith Global Merchant Ltd. to Zhongfu International Investment (NIG) FZE, 18 July 2016, **C-165**.

<sup>247</sup> Letter from NEPZA to All Free Zone Enterprises (OGFTZ), 21 July 2016, **C-163**; Letter from Ogun-Guangdong Free Trade Zone Co-ordinator, Zenith Global Merchant Ltd. to Zhongfu International Investment (NIG) FZE, 21 July 2016, **C-164**.

<sup>248</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 114; Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶ 16.

<sup>249</sup> Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**.

<sup>250</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 114; Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**.

<sup>251</sup> Letter from NEPZA to O/C, Zone Security, Ogun-Guangdong FTZ, 22 July 2016, **C-166**.

120. Following the threats to Zhongfu Nigeria's Management Team and employees, Zhongfu Nigeria's lawyer in Nigeria, Prof. Gbolahan Elias SAN, wrote to NEPZA requesting it to "*restore the status quo, prevent the bullying, oppressive and menacing tactics*" of the Ogun State Government and Mr. Onas.<sup>252</sup> NEPZA had a statutory duty to supervise and coordinate the various public and private sector organisations operating within the Zone and to resolve disputes.<sup>253</sup> However, instead of seeking to maintain the status quo while the situation was resolved, NEPZA wrote to the Nigeria Immigration Service asking it to collect official immigration papers (known as CERPAC) from Zhongfu Nigeria's staff.<sup>254</sup>
121. In the midst of this maelstrom of attacks on Zhongfu Nigeria, approaches were made on behalf of the Management Team to the Governor of Ogun State, Ibikunle Amosun,<sup>255</sup> and the Chinese Consul General, Mr. Cao Xiaoliang,<sup>256</sup> to seek to resolve the situation and restore Zhongfu Nigeria's legitimate rights.
122. However, instead of the hoped for improvement, the situation for Zhongfu Nigeria, its Management Team and its staff deteriorated even further. On 4 August 2016, unbeknownst to Zhongfu Nigeria, the Nigerian authorities issued warrants (referring to allegations of "*criminal breach of trust*" in relation to a civil claim by a former contractor of Zhongfu Nigeria, Mr. Junxiong Wang) for the arrest of both Dr. Han and Mr. Zhao.<sup>257</sup>
123. At around midnight on 17 August 2016, Mr. Zhao was arrested by armed policemen from the Nigerian police.<sup>258</sup> As Mr. Zhao explains, he was forcibly taken in his underwear to a police station with a gun pointed at him in Lagos.<sup>259</sup> He was held outside in the cold and rain and had his flip flops taken from him.<sup>260</sup> He was not told why he had been arrested, nor offered food or water for many hours.<sup>261</sup> Mr. Zhao was later flown to Abuja by an armed

<sup>252</sup> Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**.

<sup>253</sup> NEPZA Act, Art. 4(d), **C-025**.

<sup>254</sup> Letter from NEPZA to the Nigeria Immigration Service, 27 July 2016, **C-167**.

<sup>255</sup> Letter from Radix Legal & Consulting to Office of the Governor of Ogun State, 25 July 2016, **C-168**.

<sup>256</sup> Letter from Zhongfu International Investment (NIG) FZE to Lagos Consulate General of the People's Republic of China, 25 July 2016, **C-169**. Zhongfu Nigeria sought the Consul General's "*immediate intervention in preventing the continued infliction of intimidation, terror and oppression...and the ongoing expropriation of our [Zhongfu Nigeria] investment*". On 3 August 2016, Mr. Han and Mr. Xue also met with Mr. Hongzhao Zang, the attaché to the Economic & Commercial Counsellor's Office of the Chinese Embassy in Abuja. See Letter from Zhongfu International Investment (NIG) FZE to Economic & Commercial Counsellor's Office, Embassy of the People's Republic of China in the Federal Republic of Nigeria, 4 August 2016, **C-170**; Witness Statement of Jason Han, 30 April 2019, ¶ 117.

<sup>257</sup> Federal Capital Territory Judicial Form 4, "Warrant of Arrest of Mr. Jason Han", 4 August 2016, **C-171**; Federal Capital Territory Judicial Form 4, "Warrant of Arrest of Mr. Zhao Wenxiao", 4 August 2016, **C-172**.

<sup>258</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 17-21; Witness Statement of Jason Han, 30 April 2019, ¶ 119; Witness Statement of John Xue, 29 April 2019, ¶¶ 52.

<sup>259</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶ 21.

<sup>260</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 23-24.

<sup>261</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 23 and 26.

police officer and detained for approximately a week - still without knowing the reason for his arrest.<sup>262</sup>

124. While in police custody, Mr. Zhao physically was beaten twice by uniformed members of the Nigerian police force.<sup>263</sup> Mr. Zhao was subsequently released in Abuja on bail without any charge by the Nigerian police.<sup>264</sup> This shocking treatment by the Nigerian police of a member of Zhongfu Nigeria's Management Team was calculated to intimidate and scare Zhongfu Nigeria and the Management Team from remaining in Nigeria.
125. Recalling the treatment he received in police custody, Mr. Zhao states:

*"After a while, the police car stopped somewhere that looked like a police station. The police officers asked me to stay outside and then another group of police officers arrived. One police officer in uniform came over to me and slapped me twice on the face with his hand. Then the police officers who brought me there took me to a room where they asked me to sign a piece of paper. They did not say or explain what this paper was or what it said. I refused to sign the piece of paper.*

*The police officers then took my flip flops and placed me in a courtyard with a number of cells surrounding it. It was dark and cold and I was standing at the gate to one of the cells. Then another prisoner came out of that cell and asked why I was taken. I did not speak. There were also some other people who had been brought to the courtyard and the prisoner told us to stand side-by-side and asked whether we had money and why we were there. If someone had no money, he would slap them. Then the prisoner took me aside and asked me to speak. He said that if I did not speak, he would beat me with a club. Then another prisoner joined that first prisoner in intimidating me. Later the second prisoner took me aside and told me not to be afraid. However, the first prisoner came back and threatened me with a club and asked me to speak, which I did not do.*

[...]

*On what I think was the third day in the Abuja police station, a lot of people were brought into the office. The police officers moved me to another office. In the new office, two handcuffed men were being forced to hit each other. They were each told that if you hit the other man, you would be released. The two persons were hitting each other, and I could see the blood. After this, the police officer showed me a video of a prisoner eating a rat. The police officer then approached me asking what happened. I did not respond and he hit me twice, first on the neck and the second time on the head with a fist. It was painful and I felt numb."<sup>265</sup>*

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<sup>262</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 29, 30 and 36.

<sup>263</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 23 and 34.

<sup>264</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶ 36.

<sup>265</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 23-24 and 34.

126. Following his eventual release, Mr. Zhao explains that:

*"I was extremely traumatised and exhausted after my experiences. It took me several months to recover in a basic sense, but the scars of my mistreatment will remain with me for much longer.*

[...]

*To this day, when I remember events of August 2016, I feel very distressed and traumatised."*<sup>266</sup>

127. Mr. Zhao's detention attracted media attention and was covered by the Nigerian news outlet Newsbreak.<sup>267</sup>

128. The lawyer for the Ogun State Government, Mr. Taiwo Adewlowa, wrote to Elizabeth Uwaifo on 18 August 2016 commenting on the press coverage of Mr. Zhao's arrest. Mr. Adewlowa commented that the *"Ogun State Government, if I must repeat, has no issues with your client, [Zhongfu Nigeria]."*<sup>268</sup>

129. The Claimant's Nigerian Counsel, Prof. Elias, raised the abuse of police power to the Inspector-General of Police and noted that:

*"... men of the Nigerian Police Force have constantly connived and colluded with [the Ogun State Government] to perpetuate its sinister acts against Zhongfu [Nigeria]. The [Ogun State Government]and its allies have used the Police to forcefully eject certain Zhongfu [Nigeria] personnel from the Zone without a court order. The Police are being employed to harass and intimidate employees of Zhongfu [Nigeria]."*<sup>269</sup>

130. Zhongfu Nigeria also appealed to the President of Nigeria, Muhammadu Buhari, in a letter dated 2 September 2016 imploring him to intervene in the dispute and asking him to *"show the world that Nigeria respects law and order by procuring the reversal of the forceful occupation of our property, the forceful removal of our management rights and the withdrawal of the warrants for arrest issued in abuse of legal process."*<sup>270</sup> Despite this

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<sup>266</sup> Witness Statement of Wenxiao (Arek) Zhao, 30 April 2019, ¶¶ 37 and 42.

<sup>267</sup> Newsbreak, "Panic as Police Abduct Chinese Man", 18 August 2016, available at <https://www.newsbreak.ng/2016/08/panic-police-abduct-chinese-man-igs-order/> (last accessed on 26 April 2019), **C-173**. See also Email from Elizabeth Uwaifo to Femi Edun, Jon Vandenheuval, Issa Baluch, Jason Han and others, 18 August 2016, **C-174**.

<sup>268</sup> Email from Taiwo Adeoluwa to Elizabeth Uwaifo, Jason Han, Gbolahan Elias and others, 18 August 2016, **C-175**.

<sup>269</sup> Letter from G. Elias & Co to Inspector-General of Police, 21 September 2016, **C-176**.

<sup>270</sup> Letter from Zhongfu International Investment (NIG) FZE to the President of the Federal Republic of Nigeria, 2 September 2016, **C-177**. See also D Kayode-Adedeji, "Save us from Ogun government, Chinese firm writes Buhari", *Premium Times*, 6 September 2016, available at <https://www.premiumtimesng.com/business/business-news/209899-save-us-ogun-government-chinese-firm-writes-buhari.html> (last accessed on 26 April 2019), **C-178**; D Kayode-Adedeji, "Chinese firm drags Ogun govt to President Buhari over alleged breach of Free Trade Zone contract", *Premium Times*, 7 September 2019, available at <https://www.premiumtimesng.com/regional/210029-chinese-firm-drags-ogun-govt-to-president-buhari-over-alleged-breach-of-free-trade-zone-contract.html> (last accessed on 26 April 2019), **C-179**.

letter being subsequently published in the Nigerian national press, no response was received.<sup>271</sup>

131. On 21 September 2016, the Claimant's Nigerian Counsel again wrote to NEPZA reiterating that Zhongfu Nigeria *"is a valid subsisting registered enterprise and a lawful tenant in the Zone. Even if Zhongfu [Nigeria]'s management rights and participation in the [OGFTZ] Company are in dispute, Zhongfu [Nigeria]'s tenancy and registration as an enterprise in the Zone are not. As such, Zhongfu [Nigeria] cannot be evicted from the Zone."*<sup>272</sup> Indeed, Zhongfu Nigeria's separate right as a tenant in the Zone was implicitly recognised by the purported new managers of the Zone because they issued Zhongfu Nigeria with an invoice to collect management fees on 7 October 2016.<sup>273</sup>
132. Mr. Xue and Dr. Han explain in their witness statements that following the arrest and detention of Mr. Zhao, they feared for their personal safety and security in Nigeria and made arrangements to leave the country. They left Nigeria separately in early September 2016 and mid-October 2016, respectively.
133. As Mr. Xue states in his witness statement:

*"While we were in hiding [following Mr. Zhao's arrest], Jason and I did not know what to do. We knew that it was not safe for us to stay in Nigeria and that we should leave, but we also did not want to abandon our sizeable investment in the Zone, Zhongfu Nigeria's employees and the tenants we had brought to the Zone.*

[...]

*I left Nigeria in early September 2016. I had planned to return, but then we received reports that the situation in the Zone and Nigeria more generally was too dangerous for us. I was very disappointed as the Zone was filled with our accomplishments and dreams. I made further visits to other African countries in 2017, such as Benin Republic and Kenya, but I could not go back to Nigeria."<sup>274</sup>*

134. As Dr. Han states in his witness statement:

*"On 11 October 2016, I left the residence to go to Lagos airport to take a flight to Ghana. I was concerned that I would be stopped passing through immigration and detained by the police. I was relieved when I arrived in Ghana, but hugely disappointed about having to leave Nigeria and the*

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<sup>271</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 129.

<sup>272</sup> Letter from G. Elias & Co. to Managing Director of NEPZA, 21 September 2016, **C-180**. See also Letter from G. Elias & Co. to NEPZA, 21 September 2016, **C-181**.

<sup>273</sup> Invoice for Collection of Quarterly Management Fee from China Africa Investment FZC to Zhongfu International Investment (NIG) FZE, 7 October 2016, **C-182**.

<sup>274</sup> Witness Statement of John Xue, 29 April 2019, ¶ 55 and 56.



*mistreatment which I and Zhongshan received. I had very high hopes for the development of the Zone and we were making significant progress to our goal of creating a sustainable development in Africa which I think would have had a tremendous impact in the region.*"<sup>275</sup>

135. Ogun State and NEPZA continued to use the police to intimidate Zhongfu Nigeria's personnel and to take over its assets.<sup>276</sup> Indeed, on 14 October 2016, policemen assisted NSG employees to forcibly seize tools and machinery Zhongfu Nigeria had stored in the Zone.<sup>277</sup>
136. In the context of lawsuits that were brought in the Nigerian Courts to prevent Zhongfu Nigeria's forcible ejection from Nigeria (as to which, see further below), the Solicitor-General of Nigeria warned NEPZA and the Ogun State Government on 17 October 2016, that it should:

*"refrain from taking any further steps in this matter, particularly in relation to the alleged "resort to self help to forcibly evict Zhongfu [Nigeria] and its personnel from the zone" being planned and/or contemplated by the State Government, NEPZA or any of its representatives or agent[s]. Parties should maintain status quo ante. In this connection, and in line with extant laws, Zhongfu [Nigeria] be [sic.] allowed to exercise its mandate pending the determination of these matters, or any court order made pursuant thereto."*<sup>278</sup>

137. This unequivocal direction of the Solicitor-General of Nigeria to the Ogun State Government and NEPZA to desist from forcibly evicting Zhongfu Nigeria from the Zone and to maintain the *status quo ante* pending court processes was ignored. The Ogun State Government and NEPZA, with the assistance of the Nigerian police, continued to evict Zhongfu Nigeria. A meeting was held on 5 December 2016 at the Area Command Office of the Nigerian Police, Ota, between Zhongfu Nigeria, NSG, relevant federal agencies, the Divisional Police Officer Ota (the "DPO") and the Area Commander to determine the meaning of "*status quo ante*".<sup>279</sup> At the meeting, Mr. Odega and the DPO disagreed with Zhongfu Nigeria's lawyer's interpretation that the *status quo* was the state of affairs that existed before the occurrence of the dispute.<sup>280</sup> According to Mr. Odega and the DPO, the position to be "*maintained*" was the new status of NSG as managers of the Zone. This

<sup>275</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 131.

<sup>276</sup> Report from Steven Allen, 30 March 2017, C-183.

<sup>277</sup> Report by Lisa on CAI seizing assets, 16 October 2016, C-184.

<sup>278</sup> Letter from Solicitor-General of the Federation and Permanent Secretary to the Secretary to the State Government, Ogun State Secretariat, 17 October 2016, C-013; Letter from Solicitor-General of the Federation and Permanent Secretary to NEPZA, 17 October 2016, C-185.

<sup>279</sup> G. Elias & Co., Report of the Meeting with the Divisional Police Officer, Ota Division on 5 December, 6 December 2016, C-186; See also G. Elias & Co., Report of the Meeting with the Divisional Police Officer, Ota Division, 1 December 2016, C-187.

<sup>280</sup> G. Elias & Co., Report of the Meeting with the Divisional Police Officer, Ota Division on 5 December, 6 December 2016, C-186.

was also the position of the Area Commander.<sup>281</sup> This enforced the take-over of Zhongfu Nigeria's assets and ended any hope that its investments in Nigeria would be recovered through due process in Nigeria.

138. The Claimant and Zhongfu Nigeria have now been denied access to the Zone and its physical assets in the Zone, including warehouses, apartments, other buildings, construction vehicles, IT equipment, and other equipment for three years. The Claimant and Zhongfu Nigeria have been prevented from operating or receiving income as manager / administrator of the Zone, or even from the Fucheng Industrial Park. Zhongfu Nigeria's investment in Nigeria has been eviscerated and the value of the Claimant's investment in Nigeria has been destroyed.

**F The Respondent's Judiciary Thwarted the Commercial Arbitration Rights of the Claimant's Nigerian subsidiary, Zhongfu Nigeria, under the JVA**

139. Following the takeover of the Zone by NSG with the assistance of NEPZA and the Nigerian police and at the direction of the Ogun State Government,<sup>282</sup> the Claimant's subsidiary, Zhongfu Nigeria, initiated protective proceedings before the Nigerian courts. The focus of these proceedings was injunctive and declaratory relief to prevent Zhongfu Nigeria's unlawful eviction from the Zone and to preserve the *status quo ante*. In particular:
- (a) On 11 August 2016, Zhongfu Nigeria filed a claim in the Federal High Court of Abuja against NEPZA as first defendant (the Attorney General of Ogun State and Zenith were added as second and third defendants respectively) seeking to prevent the unlawful eviction and forceful removal of Zhongfu Nigeria from the Zone (the "**NEPZA Proceedings**").<sup>283</sup> In particular, Zhongfu Nigeria sought declaratory relief to: (i) remain and conduct its lawful business in the Zone; (ii) declare that NEPZA acted unlawfully or wrongfully by colluding with Ogun State to threaten, harass, intimidate, forcibly evict and/or remove Zhongfu Nigeria and its personnel from the Zone; and (iii) direct NEPZA and its representatives to recognise Zhongfu Nigeria as the manager and operator of the Zone. Zhongfu Nigeria also sought injunctive relief to: (i) restrain NEPZA and its representatives from giving effect to any communications from Ogun State and Zenith (or their representatives) purportedly removing Zhongfu Nigeria as the manager and operator of the Zone; (ii) restrain NEPZA and its representatives from recognising Zenith or anyone else as the manager and operator

<sup>281</sup> G. Elias & Co., Report of the Meeting with the Divisional Police Officer, Ota Division on 5 December, 6 December 2016, **C-186**.

<sup>282</sup> See e.g., Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Zhongfu International Investment (NIG) FZE, 27 May 2016, **C-158**; Letter from Ogun-Guangdong Free Trade Zone Co-Ordinator, Zenith Global Merchant Ltd. to Zhongfu International Investment (NIG) FZE, 21 July 2016, **C-164**; Letter from NEPZA to O/C, Zone Security, Ogun-Guangdong FTZ, 22 July 2016, **C-166**.

<sup>283</sup> See Writ of Summons together with the Statement of Claim, Federal High Court of Nigeria, Suit No. FHC/ABJ/CS/601/2016, as issued on 18 August 2016, **C-188**.

of the Zone; and (iii) restrain NEPZA and its representatives from intimidating, harassing, or removing Zhongfu Nigeria from the Zone.<sup>284</sup>

- (b) On 9 September 2016, Zhongfu Nigeria initiated proceedings in the High Court of Ogun State in Ota (the "**High Court of Ogun State**") seeking, *inter alia*, declaratory relief that it was entitled to possession of the 224 hectares of land granted to Zhongfu Nigeria under the Fucheng Industrial Park Agreement as well as damages for losses (the "**Fucheng Park Land Proceedings**"). This claim was brought against OGFTZ Company as the first defendant and counter-party to the Fucheng Industrial Park Agreement, with Ogun State and the Attorney General of Ogun State being named as second and third defendants respectively.<sup>285</sup>

140. Following the arrest and appalling treatment of the CFO of Zhongfu Nigeria, Mr. Zhao, at the hands of and under the custody of the Nigerian police, Mr. Zhao filed a claim against the Nigerian Police Force, the Inspector-General of Police and the Commissioner of Police for the Federal Capital Territory in Abuja, as well as against a former contractor of Zhongfu Nigeria.<sup>286</sup> This claim by Mr. Zhao sought, *inter alia*, declaratory and injunctive reliefs concerning violations of Mr. Zhao's fundamental right to liberty and to prevent further harassment, intimidation, arrest or detention in addition to damages for "*the unlawful and illegal arrest and detention and the inhuman and degrading treatment*" (the "**Zhao Rights Proceedings**").<sup>287</sup>
141. Notwithstanding Zhongfu Nigeria's attempts to preserve the *status quo ante*, the Ogun State Government and NEPZA continued to act as though Zhongfu Nigeria had no rights in the Zone - whether as tenant, manager, operator or majority owner of OGFTZ Company. Accordingly, the Nigerian lawyers representing Zhongfu Nigeria, G. Elias & Co., wrote to NEPZA on 21 September 2016 explaining that "[e]ven if Zhongfu [Nigeria] were no longer the manager of the Zone, which is denied, you cannot evict it from the Zone. This is because Zhongfu [Nigeria], apart from also being an enterprise in the Zone, is also a lawful tenant of over 224 hectares of the Zone land meant for the development of the Fucheng Industrial Park within the Zone. By law one can be evicted forcibly only pursuant to a court order".<sup>288</sup>

<sup>284</sup> See Writ of Summons together with the Statement of Claim, Federal High Court of Nigeria, Suit No. FHC/ABJ/CS/601/2016, as issued on 18 August 2016, **C-0188**.

<sup>285</sup> See Statement of Claim, High Court of Ogun State, Suit No. HCT/417/2016, 9 September 2016, **C-189**.

<sup>286</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶ 38.

<sup>287</sup> See Originating Notice of Motion, Federal Court of Nigeria, Suit No. FHC/ABJ/CS/703/2016, 9 September 2016, **C-190**. Zhongfu Nigeria also filed a claim against Mr. Wang Junxiong on 9 September 2016 seeking declaratory relief and damages for breach of contract related to his previous role as an independent contractor in assisting with the management of the Zone. See Statement of Claim, High Court of Ogun State, Suit No. HCT/416/2016, 9 September 2016, **C-191**.

<sup>288</sup> Letter from G. Elias & Co. to NEPZA, 21 September 2016, **C-181**.

142. On the same date, G. Elias & Co., wrote to the Managing Director of NEPZA explaining that:

*"We are alarmed that despite the fact that the issues revolving around the purported termination of the management and participation rights of Zhongfu [Nigeria] in the Zone Company are currently subject of litigation in at least 3 suits, the Ogun State Government ("OGSG"), its allies and the NEPZA Administrator at the Zone have continued to restrain Zhongfu [Nigeria] access to the Zone.*

*We have it on good authority that the NEPZA Administrator at the Zone had written to the DPO and other security agencies in the Zone to finally evict the remainder of Zhongfu [Nigeria]'s property and staff from the Zone on Friday September 23, 2016.*

*We need to reiterate once again that Zhongfu [Nigeria] is a valid subsisting registered enterprise and a lawful tenant in the Zone. Even if Zhongfu [Nigeria]'s management rights and participation in the Zone Company are in dispute, Zhongfu's tenancy and registration as an enterprise in the Zone are not. As such, Zhongfu [Nigeria] cannot be evicted from the Zone."<sup>289</sup>*

143. Also on 21 September 2016, G. Elias & Co wrote to the Inspector-General of Police to explain that:

*"... sometime in April 2016, the Ogun State Government ("OGSG") began taking steps towards forcibly and illegally stripping Zhongfu [Nigeria] of its rights in the Zone... Regrettably, men of the Nigerian Police Force have constantly connived and colluded with the OGSG to perpetuate its sinister acts against Zhongfu [Nigeria], even whilst the matter is in court. The OGSG and its allies have used the Police to forcefully eject certain Zhongfu [Nigeria] personnel from the Zone without a court order. The Police are being employed to harass and intimidate employees of Zhongfu [Nigeria]."<sup>290</sup>*

144. No response to G. Elias & Co's letters was received from NEPZA or the Nigerian police.

145. On 17 October 2016, the Solicitor-General of Nigeria wrote to the Secretary to the Ogun State Government explaining that:

*"... it has become necessary to remind you that the planned or purported ejection of Zhongfu [Nigeria] from the Zone will amount to contempt of court as the matter is subjudice... Given the circumstances of the above matter which is contentious in nature, you are hereby advised to refrain from taking any further steps in this matter, particularly in relation to the alleged 'resort to self help to forcibly evict Zhongfu [Nigeria] and its personnel from the zone' being planned and/or contemplated by the State Government, NEPZA or any of its representatives or agent. Parties should maintain status quo*

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<sup>289</sup> Letter from G. Elias & Co., to Managing Director of NEPZA, 21 September 2016, **C-180**.

<sup>290</sup> Letter from G. Elias & Co., to Inspector-General of Police, 21 September 2016, **C-176**.

*ante. In this connection, and in line with extant laws, Zhongfu [Nigeria] be allowed to exercise its mandate pending the determination of these matters, or any court order made pursuant thereto. It is trite that once a court of law is seized of a matter no party has a right to take the laws into his own hands by resorting to self help.*"<sup>291</sup>

146. As explained above, the letter from the Solicitor-General to maintain the *status quo ante* was ignored by NEPZA and the Nigerian police and Zhongfu Nigeria was forcibly evicted from the Zone. Indeed, when Zhongfu Nigeria repeatedly approached NEPZA and the police to seek to maintain the *staus quo ante* in accordance with the Solicitor-General's clear instruction, Zhongfu Nigeria's requests were dismissed and the *ex post* position - with NSG installed as managers of the Zone - was instead recognised and enforced by NEPZA and the Nigerian police.<sup>292</sup>
147. On 1 December 2016, Zhongfu Nigeria initiated a commercial arbitration administered by the Singapore International Arbitration Center ("**SIAC**") under the UNCITRAL Arbitration Rules (the "**Singapore Arbitration Proceedings**") against the Ogun State Government and Zenith concerning breaches of the JVA Agreement.<sup>293</sup>
148. The arbitration clause under the JVA reads as follows:

*"27. DISPUTE AND ARBITRATION RESOLUTION*

*27.1 Where any dispute, question or difference arises between the parties to this agreement in respect of the construction of or concerning anything contained in this Agreement or as to the right, duties or liabilities under it whether during or after the determination of this Agreement, then upon notice to that effect being given to the other party an attempt shall be made by the parties to resolve such issues amicably.*

*27.2 In the event of any dispute, question or difference between the parties to this Agreement arising out of the construction of or concerning anything contained in this Agreement or as to the rights, duties or liabilities under it whether during or after the determination of this Agreement, if it cannot be settled under Clause 27.1, shall upon notice to that effect being given to the other party be referred to arbitration. The parties agree to select Singapore International Arbitration Center (SIAC) to conduct the arbitration. Any dispute, controversy or claim arising out of or relating to this Agreement, or the breach, termination or invalidity thereof, **shall be settled by arbitration in Singapore** under the UNCITRAL Arbitration Rules in accordance with the SIAC Procedures for the Administration of International Arbitration in force at the date of this Agreement. The language to be used in the course*

<sup>291</sup> Letter from Solicitor-General of the Federation and Permanent Secretary to Secretary to the State Government, Ogun State Secretariat, 17 October 2016, **C-013**.

<sup>292</sup> G. Elias & Co., Report of the Meeting with the Divisional Police Officer, Ota Division on 5 December, 6 December 2016, **C-186**; See also G. Elias & Co., Report of the Meeting with the Divisional Police Officer, Ota Division, 1 December 2016, **C-187**.

<sup>293</sup> Judgment of the High Court of Justice of the Ogun State of Nigeria, Suit No. AB/04/17, 29 March 2017, p. 3, **C-192**.

*of the arbitration shall be English. And the arbitral award shall be final and binding on the parties.*

*27.3 The parties hereby agree that this Agreement shall be construed in accordance with the Laws of the Federal Republic of Nigeria and agree to refer to Arbitration any dispute, differences, claim or demand arising out of this Agreement in accordance with Clause 27.2 above.*"<sup>294</sup>

149. On 5 January 2017, Zenith made an application to the High Court of Ogun State for an anti-arbitration injunction alleging that Zhongfu Nigeria had waived its respective arbitration right under the JVA by instituting and taking steps in the NEPZA Proceedings.<sup>295</sup>
150. On 29 March 2017, just over a month after Zenith made the above applications, the High Court of Ogun State in Abeokuta (the "**Ogun Court**") issued a "*forever injunction*" permanently restraining Zhongfu Nigeria "*from seeking and or continuing with any step, action, and or participate directly or otherwise from seeking and or continuing with any step, action and or participate directly or indirectly*" in the Singapore Arbitration Proceedings.<sup>296</sup>
151. In its judgment, the Ogun Court came to extraordinary conclusions, including that:
- (a) The express reference to "*arbitration in Singapore*" in clause 27.2 of the JVA did not mean that Singapore was the seat of the Singapore Arbitration Proceedings. Rather, the Ogun Court assumed jurisdiction by finding that:
- (i) "*Nigeria has a closer and more intimate connection to the arbitration than Singapore, and is therefore the seat of the arbitration, while Singapore is no more than the venue of the arbitration*";<sup>297</sup> and
- (ii) "*the intention of the parties was merely to choose Singapore as the venue and not the seat of the arbitration.*"<sup>298</sup>
- (b) In justifying this conclusion, the Ogun Court made the remarkable assumption that parties to a contract would never choose a neutral forum (unrelated to the enforcement jurisdiction) as the seat of their arbitration. Rather, they would always choose as the seat of an arbitration the forum wherethe parties and/or their assets were based. In particular, the Ogun Court held that:

*"To subject the arbitration to the lex arbitri (external) of Singapore would be absurd in my view, because the courts of Singapore would*

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<sup>294</sup> JVA, 28 September 2013, **C-008**, emphasis added.

<sup>295</sup> Judgment of the High Court of Justice of the Ogun State of Nigeria, Suit No. AB/04/17, 29 March 2017, pp. 1-2, **C-192**.

<sup>296</sup> Judgment of the High Court of Justice of the Ogun State of Nigeria, Suit No. AB/04/17, 29 March 2017, **C-192**.

<sup>297</sup> Judgment of the High Court of Justice of the Ogun State of Nigeria, Suit No. AB/04/17, 29 March 2017, p. 33, **C-192**.

<sup>298</sup> Judgment of the High Court of Justice of the Ogun State of Nigeria, Suit No. AB/04/17, 29 March 2017, p. 33, **C-192**.



*then be called upon to supervise an award which they cannot enforce in Singapore, since the parties and their assets are in Nigeria. **It could never have been the intention of the parties to enter into an arbitration agreement that would produce an award that they cannot effectively enforce.***"<sup>299</sup>

- (c) Leaving aside that the Ogun Court gave no reason for its conclusion that Singapore could not be a suitable jurisdiction to enforce an arbitral award against Ogun State, the Court's conclusion runs diametrically contrary to the orthodox and internationally accepted position that it is possible and indeed common practice for parties to an arbitration agreement to choose as the seat of their arbitration a neutral third jurisdiction. Indeed, that is a particular advantage of international arbitration as compared with local court litigation and is clearly reflected in the JVA by the choice of Singapore as the seat of a contractual dispute under the JVA.<sup>300</sup>
- (d) The Ogun Court held that Zhongfu Nigeria had waived its right to arbitration by commencing proceedings in the Federal High Court in Abuja for declaratory relief in the NEPZA Proceedings. The Ogun Court admitted that, having considered the NEPZA Proceedings, "*nowhere in them is the JVA or the issue of arbitration specifically mentioned.*"<sup>301</sup> Yet the Ogun Court went on nonetheless to conclude that it did not see how the NEPZA Proceedings could be determined without any reference to the JVA and that this meant that Zhongfu Nigeria had somehow waived its arbitration right under the JVA and was culpable of "*oppression and abuse of process*" by trying to uphold its arbitration right.<sup>302</sup>
- (e) As mentioned above, in the NEPZA Proceedings, Zhongfu Nigeria sought declaratory and injunctive relief to preclude its eviction by NEPZA in particular from the Zone. Zhongfu Nigeria did not in the NEPZA Proceedings pursue a damages claim against Ogun State for breach of the JVA, as Zhongfu Nigeria did by contrast in the Singapore Arbitration Proceedings. Furthermore, NEPZA was not even a party to the JVA pursuant to which the Singapore Arbitration Proceedings were commenced. The cause of action in the respective proceedings was clearly different. In the NEPZA Proceedings, Zhongfu Nigeria sought recognition by NEPZA, as a regulatory organ of the State, of Zhongfu Nigeria as the lawful manager and operator of the Zone to prevent NEPZA and others from evicting Zhongfu Nigeria from the

<sup>299</sup> Judgment of the High Court of Justice of the Ogun State of Nigeria, Suit No. AB/04/17, 29 March 2017, p. 33, **C-192**, emphasis added.

<sup>300</sup> See David St. John Sutton, Judith Gill QC, Matthew Gearing QC, Russell on Arbitration (Sweet & Maxwell 24<sup>th</sup> edn 2015), ¶ 1-026, **CLA-004**. Nigel Blackaby and others, Redfern & Hunter: Law and Practice of International Commercial Arbitration (Oxford University Press 6th edn 2015), ¶ 1.21, **CLA-005**, Gary B. Born, International Commercial Arbitration (Kluwer Law International, Second Edition 2014) ¶ 14.02[A][7], **CLA-006**.

<sup>301</sup> Judgment of the High Court of Justice of the Ogun State of Nigeria, Suit No. AB/04/17, 29 March 2017, p. 38, **C-192**.

<sup>302</sup> Judgment of the High Court of Justice of the Ogun State of Nigeria, Suit No. AB/04/17, 29 March 2017, p. 41, **C-192**.

Zone. In the Singapore Arbitration Proceedings, Zhongfu Nigeria sought monetary compensation for contractual breaches committed by Ogun State and Zenith as counterparties to the JVA.

152. The conclusions of the Ogun Court and its gross interference with the Singapore Arbitration Proceedings clearly contravene the New York Convention on the Recognition and Enforcement of Arbitral Awards of 1958 (the "**New York Convention**"), to which both Nigeria and China are State Parties.<sup>303</sup> In particular, Article 2 of the New York Convention provides, in relevant part:

*"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.*

...

*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."<sup>304</sup>*

153. The Ogun Court did not find the arbitration agreement "*null and void, inoperative or incapable of being performed*". Rather, the Ogun Court thwarted Zhongfu Nigeria's commercial arbitration right under the JVA through conclusions that run directly contrary to Nigeria's obligations in Article 2 of the New York Convention. Zhongfu Nigeria challenged the Ogun Court Judgment in the Nigerian Court of Appeal.<sup>305</sup>
154. As regards the respective Nigerian litigation proceedings, Zhongfu Nigeria has taken steps to discontinue them, having lost any confidence given developments in the Nigerian Courts and the actions of Nigeria more generally of obtaining justice in Nigeria.

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<sup>303</sup> The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, a certified true copy taken from the United Nations, Treaty Series, Vol. 330, p. 3, available at: [https://treaties.un.org/doc/Treaties/1959/06/19590607%2009-35%20PM/Ch\\_XXII\\_01p.pdf](https://treaties.un.org/doc/Treaties/1959/06/19590607%2009-35%20PM/Ch_XXII_01p.pdf) (last accessed on 30 April 2019) (hereinafter the "**New York Convention**"), **CLA-007**. See the New York Arbitration Convention, "Contracting States", available at: <http://www.newyorkconvention.org/countries> (last accessed on 30 April 2019), **CLA-008**.

<sup>304</sup> See the New York Convention, Article 2, **CLA-007**.

<sup>305</sup> Notice of Appeal, Nigerian Court of Appeal, Suit No. AB/04/2017, 23 June 2017, **C-193**.

#### IV. THE TRIBUNAL HAS JURISDICTION OVER THIS DISPUTE

##### A Nigeria is Bound by the Treaty and Consented to Arbitration

155. China and Nigeria signed the Treaty on 27 August 2001 and the Treaty entered into force on 18 February 2010.<sup>306</sup> Article 11 of the Treaty provides as follows:

*"Article 11 APPLICATION*

*This Agreement shall apply to investments, which are made prior to or after its entry into force by investors of either Contracting Party in accordance with the laws and regulations of the other Contracting Party in the territory of the latter."*<sup>307</sup>

156. As shown above, the Claimant acquired rights and made an investment in Nigeria starting with the Fucheng Industrial Park Agreement in June 2010 and with further rights acquired pursuant to the JVA in September 2013. Therefore, the Treaty was in force at all relevant times to this dispute.
157. Nigeria expressly consented to resolve investment disputes with Chinese investors through international arbitration by way of Article 9 of the Treaty.
158. Article 9 of the Treaty provides, in relevant part:

*"1. Any dispute between an investor of the other contracting Party and the other Contracting Party in connection with an investment in the territory of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute.*

*2. If the dispute cannot be settled through negotiations within six months, then either Party to the dispute shall be entitled to submit the dispute to the competent court to the Contracting Party accepting the investment.*

*3. If a dispute cannot be settled within six months after resort to negotiations as specified in Paragraph 1 of this Article it may be submitted at the request of either Party to an ad hoc arbitral tribunal. The provisions of this Paragraph shall not apply if the investor concerned has resorted to the procedure specified in Paragraph 2 of this Article."*<sup>308</sup>

159. The Claimant consented to arbitrate this dispute in its Request for Arbitration. As shown below, the Claimant is a protected investor and holds a qualifying investment under the Treaty. The Claimant provided Nigeria with a notice of this dispute on 31 September 2017, in accordance with Article 9 of the Treaty. The notice contained a request to meet at Nigeria's earliest convenience to discuss the terms of an amicable settlement under the

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<sup>306</sup> See Ministry of Commerce of the People's Republic of China, "Bilateral Investment Treaty", 31 March 2016, available at: <http://english.mofcom.gov.cn/article/bilateralchanges/201603/20160301287079.shtml> (last accessed on 30 April 2019), **CLA-002**.

<sup>307</sup> China-Nigeria BIT, Art. 11, **CLA-001**.

<sup>308</sup> China-Nigeria BIT, Art. 9, **CLA-001**.

Treaty. Following Nigeria's failure to communicate a response to the Claimant's invitation to enter settlement negotiations, the Claimant filed the Request for Arbitration on 30 August 2018. Accordingly, the Parties have been unable to settle this dispute amicably within six months and this arbitration has been validly commenced in accordance with the provisions of Article 9(3) of the Treaty.

## **B The Claimant is a Protected Investor under the Treaty**

160. Article 1(2) of the Treaty provides that:

*"2. The term 'investor' include nationals and companies of both Contracting Parties:*

*(a) 'nationals' means, with regards to the other Contracting Party, natural persons having the nationality of that Contracting Party;*

*(b) 'companies' means, with regards to either Contracting Party, corporations, firms and associations incorporated or constituted under the law in force in the territory of the Contracting Party."<sup>309</sup>*

161. The Claimant is a company that was incorporated on 13 September 2010 under the laws of China.<sup>310</sup> The Claimant therefore qualifies as a protected "*investor*" under the Treaty. Zhuhai Zhongfu, the company from which the Claimant acquired the rights and obligations pursuant to the Fucheng Industrial Park Agreement (and which was formerly a majority shareholder in the Claimant), is also a company incorporated under the laws of China.<sup>311</sup>

## **C The Claimant holds Qualifying Investment under the Treaty**

162. Article 1(1) of the Treaty provides that:

*"Article 1 DEFINITIONS*

*For the purpose of this Agreement,*

*1. The term "investment" means 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 in particular, though not exclusively, includes:*

*(a) movable and immovable property as well as any property rights, such as mortgages, liens and pledges;*

*(b) shares, debentures, stock and any other kind of participation in companies;*

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<sup>309</sup> China-Nigeria BIT, Art. 1(2), **CLA-001**.

<sup>310</sup> Zhongshan Fucheng Industrial Investment Co., Ltd., "Business License", 7 November 2016, **C-023**, (referring to the date of establishment of 13 September 2010).

<sup>311</sup> Zhuhai Zhongfu Industrial Group Co., Ltd., "Business License", 2 March 2017, **C-194**, (referring to the date of establishment of 9 July 1986).

*(c) claims to money or to any other performance having an economic value associated with an investment;*

*(d) intellectual property rights, in particular copyrights, patents, trade-marks, tradenames, technical process, know-how and good-will; and*

*(e) business concessions conferred by law or under contract permitted by law, including concessions to search for, cultivate, extract or exploit natural resources.*"<sup>312</sup>

163. It has been accepted by investment treaty arbitration tribunals construing similarly-worded provisions to Article 1 of the Treaty that the use of the phrase "every kind of asset" is very broad "so as to cover the widest possible economic activities and to encourage economic cooperation between the two countries, as expressly stated in the BIT's Preamble"<sup>313</sup>

164. The activities of the Claimant directly and through its 100 percent owned subsidiary, Zhongfu Nigeria, evidence an investment in Nigeria which is protected under the Treaty. The Claimant's investment which qualify for protection under Article 1 of the Treaty include, but are not limited to:

(a) the Claimant's direct investment in Nigeria by way of the contractual rights and obligations acquired pursuant to the Fucheng Industrial Park Agreement, which corresponds to "claims to money or to any other performance having an economic value associated with an investment" and a "business concession [...] under contract permitted by law";<sup>314</sup> and

(b) the Claimant's direct shareholding in Zhongfu Nigeria, which clearly falls within the definition of "shares" in a Nigerian asset.<sup>315</sup> Zhongfu Nigeria itself owned and/or was entitled to "movable and immovable property as well as [...] property rights," and "claims to money or to any other performance having an economic value associated with an investment" in Nigeria, such as the rights and obligations Zhongfu Nigeria obtained under the JVA, including shareholding rights in OGFTZ Company.<sup>316</sup>

### **1. Direct investment by the Claimant**

165. Previous tribunals have repeatedly found that rights under long-term contracts constitute an investment. For example, in *Flemingo v Poland*, the tribunal accepted that lease agreements to conduct business in a duty free shop in an airport were investments in

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<sup>312</sup> China-Nigeria BIT, Art. 1(1), **CLA-001**.

<sup>313</sup> *Mytilineos Holdings SA v The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, ¶ 108, **CLA-009**.

<sup>314</sup> China-Nigeria BIT, Art. 1.1(c), 1.1(e), **CLA-001**.

<sup>315</sup> China-Nigeria BIT, Art. 1.1(b), **CLA-001**.

<sup>316</sup> China-Nigeria BIT, Arts. 1.1(a), 1.1(c), **CLA-001**.

relation to a BIT with a similarly-worded definition of investment as in the Treaty. The tribunal in that case said:

*"The Tribunal finds - contrary to Respondent's submissions - that the Lease Agreements and the related permits for conducting business in the DFZ of Chopin Airport have to be considered 'investments' under the Treaty."*<sup>317</sup>

166. The tribunal in *Flemingo v Poland* also went on to find that the investments made by the claimant were considered as "*business concessions*". The tribunal said:

*"In this regard the Tribunal is of the view that a business concession does not necessarily need to be a concession for public works or for activities in areas that are key to the State's security, nor does it need to be granted by the State itself - as Respondent incorrectly alleges. The fact that the Lease Agreements must be obtained through a tender to be considered to be a 'concession' under Polish law does not exclude them from being considered 'investments' falling within the scope of the Treaty. The Lease Agreements and permits may therefore also fall within the scope of the Treaty as 'business concessions', as understood in Article 1(1)(e) of the Treaty."*<sup>318</sup>

167. Similarly, the tribunal in *Inmaris v Ukraine* found that a "*Bareboat Charter Contract can give rise to 'claims to performance' within the meaning of Article 1(1) of the BIT's definition of 'investment.'*"<sup>319</sup>

168. Under the Fucheng Industrial Park Agreement, the Claimant acquired the "*full right*" over the "*occupancy, use, proceeds and disposal*" of the land in the 224 hectare (2.24 km<sup>2</sup>) Fucheng Industrial Park.<sup>320</sup> These rights have been held by the Claimant at all relevant times. Under the terms of the Fucheng Industrial Park Agreement, the Claimant had the right to "*incorporate or designate a certain company to perform this Agreement, which shall not be deemed as transfer of Agreement.*"<sup>321</sup> The Claimant incorporated its Nigerian subsidiary Zhongfu Nigeria to perform various obligations under the Fucheng Industrial Park Agreement, but the Claimant retained the rights and claims to performance having an economic value derived from the Fucheng Industrial Park Agreement. These included rights to occupy and develop the Zone, as well as to income from the land lease transfer fees and the Administration Fees.

<sup>317</sup> *Flemingo DutyFree Shop Private Limited v Republic of Poland*, UNCITRAL, Award, 12 August 2016, ¶ 299, **CLA-010**.

<sup>318</sup> *Flemingo DutyFree Shop Private Limited v Republic of Poland*, UNCITRAL, Award, 12 August 2016, ¶ 302, **CLA-010**.

<sup>319</sup> *Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, ¶ 84, **CLA-011**; *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, 8 December 2003, ¶ 65, **CLA-012**.

<sup>320</sup> Fucheng Industrial Park Agreement, Art. 2.6, **C-002**. On 10 October 2010, Zhuhai Zhongfu, Ogun State and the Claimant agreed that Zhuhai Zhongfu's rights and obligations under the Fucheng Industrial Park Agreement were transferred to Zhuhai Zhongfu's subsidiary, the Claimant. See Supplementary Agreement (II) on Fucheng Industrial Park, **C-034**.

<sup>321</sup> Fucheng Industrial Park Agreement, Art. 8.1, see also Art. 2.2, **C-002**.



169. In connection with the Claimant's rights under the Fucheng Industrial Park Agreement, the Claimant held multiple assets as part of its qualifying investment under the Treaty. In sum, these include:

- (a) In relation to a business concession under contract permitted by law, the rights derived from the Fucheng Industrial Park Agreement are a business concession under the Treaty, as well as entailing claims to money or to any other performance having an economic value associated with an investment.<sup>322</sup>
- (b) In relation to movable and immovable property, the following all qualify as investments: the purchase of vehicles and equipment (including cement mixers, payloaders, a crane, road rollers, bulldozers and tipper trucks) for the Zone, the construction of roads, drainage and warehouses and the payment of RMB 12,755,574.00 in kind and in cash.<sup>323</sup>

## 2. The Claimant's Shareholding in Zhongfu Nigeria

170. In addition to the direct investment made by the Claimant in Nigeria in connection with the Fucheng Industrial Park Agreement, the Claimant holds 100 percent of the shares in Zhongfu Nigeria. Zhongfu Nigeria was registered by NEPZA as a Nigerian company and Free Zone Enterprise on or around 24 January 2011,<sup>324</sup> having been registered by the Claimant as its wholly-owned overseas subsidiary with the Chinese authorities on or around 10 October 2010.<sup>325</sup> At all relevant times Zhongfu Nigeria remained 100 percent owned by the Claimant.<sup>326</sup> As such, the Claimant's shares in Zhongfu Nigeria meet the definition of an investment under Article 1 of the Treaty.

171. It has been consistently accepted by investment treaty arbitration tribunals that a shareholding in a locally-incorporated entity is sufficient to have a qualifying investment. For example, the tribunal in *Flemingo v Poland* stated:

*"In fact under investment treaties, investments can just as well consist of a shareholding in a local company, as of the investments made by a local company, controlled by successive intermediate companies. The investor 'steps into the shoes' of the local company and claims for damages suffered*

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<sup>322</sup> See *Flemingo DutyFree Shop Private Limited v Republic of Poland*, UNCITRAL, Award, 12 August 2016, ¶ 302, **CLA-010**.

<sup>323</sup> Witness Statement of Jason Han, 30 April 2019, ¶ 66; see also Section III.E.

<sup>324</sup> Zhongfu International Investment (NIG) FZE, "NEPZA Certificate of Registration", 24 January 2011, **C-035**.

<sup>325</sup> Zhongfu International Investment (NIG) FZE, "Regulations", 10 October 2010, **C-003**; Zhongfu International Investment (NIG) FZE "The Enterprise Overseas Investment Certificate", Registration No. 201005944, 13 October 2010, **C-004**. Zhongfu International Investment (NIG) FZE, "Overseas Enterprise Investment Certificate", Registration No. 4400201100286, 6 September 2011, **C-005**.

<sup>326</sup> See Zhongfu International Investment (NIG) FZE, "Regulations", 10 October 2010, **C-003**; Zhongfu International Investment (NIG) FZE, "Overseas Enterprise Investment Certificate", No. 4400201100286, 6 September 2011, **C-005**.

*by the local company as if it had been inflicted, on a pro rata basis, on itself....*<sup>327</sup>

172. Likewise, in *Siemens v Argentina*, the tribunal held:

*"As regards ICSID case law dealing with the issue of the right of shareholders to bring a claim before an arbitral tribunal, the decisions of arbitral tribunals have been consistent in deciding in favor of such right of shareholders."*<sup>328</sup>

173. Zhongfu Nigeria itself owned and/or was entitled to "*movable and immovable property as well as [...] property rights,*" and "*claims to money or to any other performance having an economic value associated with an investment*" in Nigeria, including under the JVA and regarding Zhongfu Nigeria's 60% shareholding rights in OGFTZ Company.<sup>329</sup> Zhongfu Nigeria and OGFTZ Company also had rights to income under multiple lease agreements and investment agreements with tenants.<sup>330</sup>

### 3. The Claimant's Investment should be Considered as a Whole

174. The overarching investment made by the Claimant in Nigeria should be considered in light of the totality of investment activities undertaken by the Claimant, which is greater than the list of assets that comprises its parts. On this, the tribunal in *Inmaris v Ukraine* stated:

*"It is not necessary to parse each component part of the overall transaction and examine whether each, standing alone, would satisfy the definitional requirements of the BIT and the ICSID Convention. For purposes of this Tribunal's jurisdiction, it is sufficient that the transaction as a whole meets those requirements."*<sup>331</sup>

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<sup>327</sup> *Fleming DutyFree Shop Private Limited v Republic of Poland*, UNCITRAL, Award, 12 August 2016, ¶ 305, **CLA-010**.

<sup>328</sup> *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, ¶ 137, **CLA-013**.

<sup>329</sup> JVA, clauses 2.1 - 2.2, **C-008**.

<sup>330</sup> See, e.g., Investment Agreement of Ogun-Guangdong Free Trade Zone Enterprise No. IA-11014, 16 December 2011, **C-056**; Long-term Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLLC-11014, 16 December 2011, **C-056**; Land Lease Agreement No. LLLC-15001, 2 January 2015, **C-065**; Long-term Land Lease Contract of Ogun-Guangdong Free Trade Zone No. LLLC-13008, 17 August 2013, **C-076**; Investment Agreement of Ogun-Guangdong Free Trade Zone Enterprise No. IA-13008, 17 August 2013, **C-077**; Land Lease Agreement No. LLLC-16002, 10 March 2016, **C-106**; Land Lease Agreement No. LLLC-15002, 30 April 2015; **C-124**; Investment and Service Agreement No. LLC-15002, 30 April 2015, **C-0126**; Land Lease Agreement No. LLLC-16002, 26 January 2016, **C-104**; Investment and Service Agreement No. IA-16002, 26 January 2016, **C-105**.

<sup>331</sup> *Inmaris Perestroika Sailing Maritime Services GmbH and others v Ukraine*, ICSID Case No. ARB/08/8, Decision on Jurisdiction, 8 March 2010, ¶ 92, **CLA-011**. See also *Tenaris S.A. and Talta - Trading E Marketing Sociedade Unipessoal LDA v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/26, Award, 29 January 2016, ¶ 284, **CLA-014**; *Mytilineos Holdings SA v The State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, ¶ 120, **CLA-009**; *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, ¶ 115, **CLA-015**; *Saipem S.p.A. v The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶ 110, **CLA-016**; *Holiday Inns SA v Morocco*, ICSID Case No. ARB/72/1, Decision on Jurisdiction, 12 May 1974, reported in P Lalive, "The First 'World Bank' Arbitration (*Holiday Inns v. Morocco*) – Some Legal Problems," 1980 *British Yearbook of International Law*, p. 159, **CLA-017**.

175. The rights held and funds expended by the Claimant developing the Zone meet the definition of an investment under the Treaty. Accordingly, and for the reasons shown above, the Tribunal has jurisdiction over the dispute.

## V. PRINCIPLES OF TREATY INTERPRETATION AND THE APPLICABLE LAW

### A The Principles of Treaty Interpretation

176. As a treaty, the China-Nigeria BIT falls to be interpreted in accordance with the usual rules of treaty interpretation set out in Article 31–33 of the Vienna Convention on the Law of Treaties (“**VCLT**”),<sup>332</sup> which reflect customary international law.<sup>333</sup>

177. The VCLT Article 31(1) - the basic rule of interpretation - provides that:

*“A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.”*<sup>334</sup>

178. Article 31(1) contains four criteria that are to be taken into account in the process of treaty interpretation: (a) good faith, (b) ordinary meaning, (c) context and (d) object and purpose.<sup>335</sup> The focus of the exercise is on the text of the treaty as the perfection of the parties’ intent. As the International Court of Justice has noted, “[i]nterpretation must be based above all upon the text of the treaty”.<sup>336</sup> However, this canon should not be mistaken as prioritizing ordinary meaning above the other elements of VCLT Article 31: rather, “*the ordinary meaning, the context and the object and purpose should by and large come from the text of that treaty*”.<sup>337</sup>

179. As a general rule, treaties should be not interpreted so as to prioritise the interests of the State over the investor. Rather, the Tribunal is required to interpret a treaty in such a way as to prioritise the needs of neither party, unless such an interpretation is clearly called for.<sup>338</sup> Put another way, tribunals have considered that, with respect to questions of interpretation, “*a balanced interpretation is needed, taking into account both the State’s*

<sup>332</sup> Vienna Convention on the Law of Treaties, 22 May 1969, 1155 UNTS 331 (hereinafter “**VCLT**”), **CLA-018**. The VCLT entered into force on 27 January 1980. See Chapter XXIII, Law of Treaties, available at: <https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf> (last accessed on 28 April 2019), **CLA-019**. Both China and Nigeria are parties to the VCLT: See United Nations Treaty Collection, “Status of Treaties: 1. Vienna Convention on the Law of Treaties”, available at [https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg\\_no=XXIII-1&chapter=23](https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23) (last accessed on 08 April 2019), **CLA-019**.

<sup>333</sup> See e.g. *BIVAC BV v Republic of Paraguay*, ICSID Case No. ARB/07/9, Decision on Jurisdiction, 29 May 2009, **CLA-020**.

<sup>334</sup> VCLT, Article 31(1), **CLA-018**.

<sup>335</sup> R. Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford University Press 2012), ¶ 3.11, **CLA-021**.

<sup>336</sup> *Territorial Dispute (Libya v Chad)* [1994] ICJ Rep 6, ¶ 41, **CLA-022**.

<sup>337</sup> R. Weeramantry, *Treaty Interpretation in Investment Arbitration* (Oxford University Press 2012), ¶ 3.13, **CLA-021**.

<sup>338</sup> See e.g. *Noble Ventures Inc v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005, ¶ 52, **CLA-023**.

*sovereignty and its responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment”*.<sup>339</sup>

That interpretation, moreover, must take “*into account the totality of the Treaty’s purposes*”.<sup>340</sup>

180. On this basis, the best source for determining the object and purpose of a treaty is its preamble.<sup>341</sup> With specific reference to the preamble of the Treaty in this case, this means that the provisions of the Treaty must be interpreted in light of the fact that the Treaty parties:

(a) recognise “*that the reciprocal encouragement, promotion and protection of [...] investments will be conducive to stimulating business initiative of [...] investors and will increase prosperity in both States*”; and

(b) are determined to “*create favourable conditions for greater investment by investors of one Contracting Party in the territory of the other Contracting Party*”.<sup>342</sup>

## **B The Applicable Law**

181. The Claimant’s claims are based on the Treaty provisions and international law. Article 9(7) of the Treaty provides that:

*“The tribunal shall adjudicate in accordance with the law of the Contracting Party to the dispute accepting the investment including its rules on the conflict of laws, the provisions of this Agreement as well as the generally recognized principles of international law accepting by both Contracting Parties.”*<sup>343</sup>

182. As noted, the Treaty, including Article 9(7), must be interpreted in accordance with the VCLT. Article 27 of the VCLT provides that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”<sup>344</sup> Thus, Nigeria cannot use its own internal law to avoid its international responsibility under the provisions of the Treaty, a treaty which is governed by international law.

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<sup>339</sup> *El Paso Energy International Company v Argentine Republic*, ICSID Case No. ARB/03/15, Decision on Jurisdiction, 27 April 2006, ¶ 99, **CLA-024**.

<sup>340</sup> *Plama Consortium Limited v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 24 August 2008, ¶ 167, **CLA-025**.

<sup>341</sup> See *Guinea-Bissau v Senegal*, Arbitral Award of 31 July 1989, [1991] ICJ Rep 53, ¶ 142, **CLA-026** (Judge Weeramantry, diss.: “An obvious internal source of reference is the preamble to the treaty. The preamble is the principle and natural source from which indications can be gathered of a treaty’s objects and purposes even though the preamble does not contain substantive provisions.”)

<sup>342</sup> China-Nigeria BIT, Preamble, **CLA-001**.

<sup>343</sup> China-Nigeria BIT, Art. 9(7), **CLA-001**.

<sup>344</sup> VCLT, Art. 27, **CLA-018**.

183. Similarly, Article 3 of the International Law Commission's Articles on Responsibility of States for Internationally Wrongful Acts (the "**ARSIWA**") provides that:

*"[t]he characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law."*<sup>345</sup>

184. Accordingly, whether Nigerian law allows or prohibits the actions of Nigeria, as a matter of Nigerian law, does not determine whether those actions are lawful or unlawful under the Treaty and as a matter of international law. International law prevails for the purposes of these proceedings. This principle has been repeatedly applied to investment treaty arbitrations.<sup>346</sup>

185. In *Total S.A. v Argentine Republic*, the tribunal, while assessing a very similar BIT applicable law provision to that in Article 9(7) of the Treaty, found that:

*"since Total complains of breaches of the BIT, the Tribunal must apply principally the BIT, as interpreted under international law, to resolve any matter raised. This means that the Tribunal must assess Argentina's responsibility under the BIT by applying the treaty itself and the relevant rules of customary international law."*<sup>347</sup>

186. In *El Paso Energy v Argentina*, the tribunal stated: *"whether a modification or cancellation of such rights, even if legally valid under [the domestic] law, constitutes a violation of a protection guaranteed by the BIT is a matter to be decided solely on the basis of the BIT itself and the other applicable rules of international law."*<sup>348</sup>

187. Likewise, in *Daimler v Argentina*, the tribunal, faced with a similar applicable law provision in the Germany-Argentina BIT as in the Treaty, declared that *"the proper law to be applied is the German-Argentine BIT itself, in concert with the ICSID Convention, as interpreted in the light of the general principles of international law."*<sup>349</sup>

188. This standard has also been applied by a number of other tribunals when assessing BITs with similarly worded provisions to that in Article 9(7).<sup>350</sup> As explained above, it is an

<sup>345</sup> Responsibility of States for Internationally Wrongful Acts, GA Res 56/83, UN Doc A/RES/56/83, 12 December 2001, (hereinafter "**ARSIWA**"), Art. 3, **CLA-027**.

<sup>346</sup> See for, example, *Saipem S.p.A. v People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Award, 30 June 2009, ¶ 165, **CLA-028**; *Total S.A. v Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, ¶ 40, **CLA-029**; *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v Argentine Republic*, ICSID Case No. ARB/09/01, Award, 21 July 2017, ¶¶ 477, 479, **CLA-030**; *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 46, **CLA-31**; *Swisslion DOO Skopje v The Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, Award, 6 July 2012, ¶¶ 261, 262, **CLA-32**.

<sup>347</sup> *Total S.A. v Argentine Republic*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, ¶ 40, **CLA-029**.

<sup>348</sup> *El Paso Energy International Company v Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 135, **CLA-033**.

<sup>349</sup> *Daimler Financial Services AG v Argentine Republic*, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 50, **CLA-031**.

<sup>350</sup> See *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v Argentine Republic*, ICSID Case No. ARB/09/01, Award, 21 July 2017, ¶ 475, **CLA-030**: *"The Treaty is lex specialis between Respondent and Spain, as it governs*

established rule that a State cannot justify non-compliance with its international obligations under an investment treaty by asserting the provisions of its domestic law.<sup>351</sup> Thus, in the present case, Nigeria is precluded from raising its internal laws to avoid the application of, and its liability under, the Treaty and international law.

## VI. NIGERIA IS RESPONSIBLE FOR ACTIONS ATTRIBUTABLE TO IT UNDER THE TREATY AND INTERNATIONAL LAW

189. Customary international law on questions of State responsibility is largely codified in the ARSIWA, as adopted by the International Law Commission (“ILC”) (with commentaries) in 2001.<sup>352</sup> ARSIWA Article 2 provides in terms that:

*“There is an internationally wrongful act of a State when conduct consisting of an action or omission:*

- (a) is attributable to the State under international law; and*
- (b) constitutes a breach of an international law obligation.”*<sup>353</sup>

190. In relation to the present dispute, Nigeria is responsible for the conduct of its State actors which have deprived the Claimant of its investment, including, the Ogun State Government, NEPZA, the Nigerian police, and the Nigerian judiciary. The wrongful conduct of these State organs triggers Nigeria's international responsibility within the meaning of ARSIWA Article 2 because:

- (a) their actions are attributable to Nigeria (**Section A**); and
- (b) their conduct amounts to a breach of Nigeria's obligations under the Treaty (**Section B**).

### A The Framework of Attribution Under the ARSIWA

191. ARSIWA Articles 4, 5 and 8 provide the basic framework for attribution in customary international law. In these proceedings, ARSIWA Articles 4 and 5 - dealing, respectively,

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*investments made by nationals of one State in the territory of the other. The Treaty forms the legal basis for Claimants' claims against Respondent in this arbitration”; Petrobart Limited v Kyrgyz Republic, SCC Case No. 126/2003, Final Award, 29 March 2005, ¶ VII.1.B, pp. 22-23, CLA-034, where the court deemed that the case was “in its entirety a claim under international law and more specifically a Treaty claim”; Daimler Financial Services AG v Argentine Republic, ICSID Case No. ARB/05/1, Award, 22 August 2012, ¶ 88, CLA-031; RosInvestCo UK Ltd. v The Russian Federation, SCC Case No. V079/2005, Final Award, 12 September 2010, ¶ 249, CLA-035.*

<sup>351</sup> *LG&E Energy Corp., LG&E Capital Corp. and LG&E International Inc. v Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 94, CLA-036; Petrobart Limited v Kyrgyz Republic, SCC Case No. 126/2003, Final Award, 29 March 2005, ¶ VII.1.B, p. 23, CLA-034; Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v Argentine Republic, ICSID Case No. ARB/09/01, Award, 21 July 2017, ¶ 477, CLA-030; Merck Sharp & Dohme (I.A.) LLC v Republic of Ecuador, PCA Case No. 2012-10, Second Decision on Interim Measures, 6 September 2016, ¶ 33, CLA-037.*

<sup>352</sup> J Crawford, *Brownlie's Principles of Public International Law* (8<sup>th</sup> edn: OUP 2012) 539–540, CLA-038. International Law Commission, “Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries”, 2001, Vol II Part Two Yearbook of the International Law Commission (hereinafter “**ARSIWA Commentary**”), CLA-039.

<sup>353</sup> ARSIWA, Art.2, CLA-027.



with State organs and parastatal entities - provide the relevant bases for attribution of the numerous specific wrongful acts to Nigeria.

**1. ARSIWA Article 4 - State Organs (*de jure* and *de facto*)**

192. ARSIWA Article 4 provides as follows:

*"1. The 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, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.*

*2. An organ includes any person or entity which has that status in accordance with the internal law of the State."*<sup>354</sup>

193. Article 4 of the ARSIWA covers all organs of a State - being "*the individual or collective entities which make up the organization of the State and act on its behalf*"<sup>355</sup> - irrespective of their function or status within the internal hierarchy of the State. The ILC itself confirmed this in its commentary to Article 4:

*"Thus the reference to a State organ in article 4 is intended in the most general sense. It is not limited to the organs of the central government, to officials at a high level or to persons with responsibility for the external relations of the State. It extends to organs of government of whatever kind or classification, exercising whatever functions, at whatever level in the hierarchy, including those at provincial or even local level. No distinction is made for this purpose between legislative, executive or judicial organs."*<sup>356</sup>

194. The content of Article 4 was confirmed as customary international law in the International Court of Justice's ("ICJ") advisory opinion on *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*. There, the Court said that:

*"[a]ccording to a well-established rule of international law, the conduct of any organ of a State must be regarded as an act of that State. This rule [...] is of customary character."*<sup>357</sup>

195. ARSIWA Article 4 has also been applied in the investor–State context. For example, the provision was cited and relied on in *Ampal v Egypt*, with the tribunal there stating that the

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<sup>354</sup> ARSIWA, Art. 4, **CLA-027**.

<sup>355</sup> ARSIWA Commentary, Art. 4, ¶ 1, **CLA-039**.

<sup>356</sup> ARSIWA Commentary, Art. 4, ¶ 5, **CLA-039**.

<sup>357</sup> *Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights*, Advisory Opinion, 29 April 1999, ICJ Reports 1999, ¶ 62, **CLA-040**. The Court cited the rule now embodied in Article 4 of the ARSIWA, which was then at Article 6. See also, *Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)*, Judgment, 19 December 2005, ICJ Reports 2005, ¶ 213, **CLA-041**.

ARSIWA “*form part of the applicable customary law*”.<sup>358</sup> It was also cited and relied upon - along with the paragraph of the ARSIWA Commentary set out above - in *Mytilineos v Serbia*<sup>359</sup> and *Gavrilović v Croatia*.<sup>360</sup>

196. Where an entity is found to be an organ of the State, all of its acts, irrespective of their character, will be attributed to the State so long as they are done in the entity’s capacity as an organ of the same.<sup>361</sup>
197. State organs will often be recognised as such by the State’s internal legal order - referred to as an organ *de jure*. Thus, in *Eureko v Poland*, the State Treasury was recognized as an organ of the Polish State.<sup>362</sup> However, the fact a particular entity has a legal personality separate from that of the State as a matter of municipal law does not necessarily mean that it cannot be considered an organ for the purposes of Article 4. As the ARSIWA Commentary notes:

*“it is not sufficient to refer to internal law for the capacity of State organs. In some systems the status and functions of various entities are determined not only by law but also by practice, and reference exclusively to internal law would be misleading”. Put another way, “a State cannot avoid responsibility for the conduct of a body which does in truth act as one of its organs merely by denying it that status under its own law”.*<sup>363</sup>

198. Thus, in the *Bosnian Genocide* case, the ICJ recognized the existence of another category of organ - an organ *de facto* - in the following terms:

*“[P]ersons, groups of persons or entities may, for the purposes of international responsibility, be equated with state organs even if that status does not follow from internal law, provided that in fact the persons, groups or entities act in ‘complete dependence’ on the State, of which they are ultimately merely the instrument. In such a case, it is appropriate to look beyond legal status alone, in order to grasp the reality of the relationship between the person taking action, and the State to which he is so closely attached as to appear to be nothing more than its agent: any other solution would allow States to escape their international responsibility by choosing*

<sup>358</sup> *Ampal-American Israel Corporation & Ors v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶ 135, **CLA-042**.

<sup>359</sup> *Mytilineos Holdings SA v State Union of Serbia & Montenegro and Republic of Serbia*, UNCITRAL, Partial Award on Jurisdiction, 8 September 2006, ¶¶ 175–176, **CLA-009**

<sup>360</sup> *Gavrilović & Gavrilović D.O.O. v Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 26 July 2018, ¶ 798, **CLA-043**

<sup>361</sup> ARSIWA Commentary, Art. 4, ¶ 6, **CLA-039**. See further *Alpha Projektholding GmbH v Ukraine*, ICSID Case No. ARB/07/16, Award, 8 November 2010, ¶ 402, **CLA-044**.

<sup>362</sup> *Eureko B.V. v Republic of Poland*, UNCITRAL, Partial Award, 19 August 2005, ¶¶ 127–134, **CLA-045**

<sup>363</sup> ARSIWA Commentary, Art 4, ¶ 11, **CLA-039**.

*to act through organs or entities whose supposed independence would be purely fictitious.*"<sup>364</sup>

199. As Petrochilos observes, the question of whether a separate legal person can be considered a *de facto* organ of the State is answered by reference to that organ's relative independence as matter of fact: "*if an entity has no institutional separateness, it should be considered a state organ*". He adds:

*"Relevant indications will include, notably, the matter in which the relevant body has been established and the manner in which it has been constituted; whether its functions are fully controlled by law (as opposed to being subject to freedom of contract); whether it has prerogatives of power that individuals cannot lawfully exercise; or whether it is funded exclusively by the state."*<sup>365</sup>

200. Thus, in *Flemingo v Poland*, a tribunal concluded that the Polish Airports State Enterprise ("**PPL**"), a State-owned entity managing Warsaw's Chopin Airport, was a *de facto* organ of the Polish state on the basis that, *inter alia*: (a) PPL was owned by the State Treasury; (b) certain of PPL's commercial activities required State Treasury approval; (c) management of an airport was not an activity usually carried out by a private business; (d) PPL performed strategic functions for the existence of the state; (e) PPL's statutory framework allowed the Ministry of Transport control over the PPL's management, including auditing, finances, staff salary and property; and (f) PPL was protected from bankruptcy.<sup>366</sup>
201. Similarly, in *Deutsche Bank v Sri Lanka*, an ICSID tribunal considered that the Ceylon Petroleum Corporation ("**CPC**") was a *de facto* organ of the Sri Lankan State on the basis (*inter alia*) that: (a) CPC was a State-owned entity; (b) it was established by statute for the purpose of conducting government policy; (c) there was significant evidence as to governmental control over CPC's personnel, finances and decision-making; and (d) CPC was required to comply with direct instructions from Sri Lanka's Ministry of Petroleum.<sup>367</sup>

## 2. ARSIWA Article 5 - Parastatal Entities

202. ARSIWA Article 5 provides:

*"The conduct of 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 shall be considered an act of the*

<sup>364</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v Serbia & Montenegro)*, Judgment, 26 February 2007, ICJ Reports p 43, ¶ 392, **CLA-046**.

<sup>365</sup> G Petrochilos, 'Attribution: State Organs and Entities Exercising Elements of Governmental Authority', in K Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (2<sup>nd</sup> edn: OUP 2018) 332, ¶ 14.25, **CLA-047**.

<sup>366</sup> *Flemingo DutyFree Shop Private Limited v Republic of Poland*, UNCITRAL, Award, 12 August 2016, ¶¶ 427–430, **CLA-010**.

<sup>367</sup> *Deutsche Bank AG v Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award, 31 October 2012, ¶ 405, **CLA-048**. See also *Ampal v Egypt*, Decision on Liability, ¶¶ 138–140, **CLA-042**.

*State under international law, provided the person or entity is acting in that capacity in the particular instance.*"<sup>368</sup>

203. This provision is intended to deal with a situation in which a State - via statute or some other mechanism - bestows the power to exercise State powers on an entity that is not its organ for the purposes of ARSIWA Article 4: this is referred to as a "parastatal" entity.<sup>369</sup> As with Article 4, Article 5 has been deemed reflective of custom.<sup>370</sup>
204. By its terms, Article 5 imposes two conditions for an entity's act to be attributed to the State:
- (a) the entity must be empowered by the State to exercise governmental authority; and
  - (b) the act complained of must have been undertaken by the entity in the exercise of that authority.<sup>371</sup>
205. Neither the ARSIWA nor the ARSIWA Commentary purports to define 'governmental authority' for the purposes of Article 5. Rather, the ILC determined that customary international law was reflected in an open-ended test based on the particular characteristics of each State:

*"Beyond a certain limit, what is regarded as 'governmental' depends on the particular society, its history and traditions. Of particular importance will not just be the content of the powers, but the way they are conferred on the entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to the government for their exercise. These are essentially questions on the application of a general standard to varied circumstances."*<sup>372</sup>

206. What is 'governmental' with respect to a particular State may be answered by reference to those functions or powers that the State reserves to itself.<sup>373</sup> This may include a wide variety of functions, including "core" State powers such as police powers, immigration and

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<sup>368</sup> ARSIWA, Art. 5, **CLA-027**.

<sup>369</sup> ARSIWA Commentary, Art. 5, ¶ 1, **CLA-039**.

<sup>370</sup> See e.g. *Ampal v Egypt*, Decision on Liability, ¶ 135, **CLA-042**; *Gavrilović and Gavrilović D.O.O. v Republic of Croatia*, Award, ¶¶ 810–811, **CLA-043**; *Fleming v Poland*, Award, ¶¶ 420–423, **CLA-010**.

<sup>371</sup> Petrochilos, 'Attribution', ¶ 14.35, **CLA-047**.

<sup>372</sup> ARSIWA Commentary, Art. 5, ¶ 6, **CLA-039**.

<sup>373</sup> Petrochilos, 'Attribution', ¶ 14.37, **CLA-047**.

quarantine control<sup>374</sup> or the management or privatization of State-owned assets,<sup>375</sup> as well as ‘non-core’ powers such as airport services<sup>376</sup> or industrial planning.<sup>377</sup>

207. Whether a governmental power is being exercised in a particular situation encompasses not only when the relevant power is exercised directly, but also where the act in question is closely connected to that power so as to amount to an execution of the governmental mandate.<sup>378</sup> Thus, in *Mesa Power v Canada*, contracts for the supply of power into the electricity system were considered to be attributable to Canada<sup>379</sup> on the basis of an authority conferred on a State corporation to manage the supply of electricity.<sup>380</sup> And in *Fleming v Poland*, PPL’s actions with respect to particular commercial leases in Chopin Airport were considered attributable to the state as the relevant leases were terminated in order to fulfil PPL’s statutory mission concerning the construction, extension and maintenance of airport terminals.

## **B Attribution of Acts to Nigeria**

208. In light of these established customary international law rules, the unlawful actions of: (1) the Ogun State Government; (2) NEPZA; (3) the Nigerian police; and (4) the Nigerian courts, are attributable to Nigeria.

### **1. The Actions of the Ogun State Government are Attributable to Nigeria**

209. It is uncontroversial that actions of the federal subdivisions or provinces of a State are attributable to that State for the purposes of ARSIWA Article 4.<sup>381</sup> As was said by the tribunal in *Vivendi v Argentina*:

*“Under international law, and for purposes of jurisdiction of this Tribunal, it is well established that actions of a political subdivision of federal state, such as the Province of Tucumán in the federal state of the Argentine Republic, are attributable to the central government. It is equally clear that the internal constitutional structure of a country cannot alter these obligations.”*<sup>382</sup>

<sup>374</sup> ARSIWA Commentary, Art. 5, ¶ 2, **CLA-039**.

<sup>375</sup> *Helnan International Hotels AS v Arab Republic of Egypt*, ICSID Case No. ARB/05/19, Decision on Jurisdiction, 17 October 2006, ¶ 93, **CLA-049**.

<sup>376</sup> *Fleming v Poland*, Award, ¶¶ 427–430, **CLA-010**.

<sup>377</sup> *Fedders Corporation v Loristan Refrigeration Industries & Ors* (1986-IV) 13 Iran–US CTR 97, 98, **CLA-050**.

<sup>378</sup> Petrochilos, ‘Attribution’, ¶ 14.57, **CLA-047**.

<sup>379</sup> *Fleming v Poland*, Award, ¶¶ 440–447, **CLA-010**.

<sup>380</sup> *Mesa Power Group LLC v Government of Canada*, PCA Case No. 2012-17, Award, 24 March 2016, ¶¶ 367–377, **CLA-051**.

<sup>381</sup> ARSIWA Commentary, Art. 4, ¶ 9, **CLA-039**.

<sup>382</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No. ARB/97/3, Award, 21 November 2000, ¶ 49, **CLA-052**.

210. Ogun State is one of the 36 states of the Federal Republic of Nigeria.<sup>383</sup> Therefore, all the unlawful actions taken by the Ogun State Government towards the Claimant, including the Notice of Termination and eviction from the Zone, are attributable to Nigeria under the Treaty.

## 2. The Actions of NEPZA are Attributable to Nigeria

211. NEPZA is an administrative agency which forms part of the executive branch of Nigeria and is therefore a *de jure* organ for the purposes of ARSIWA Article 4. NEPZA was created by Nigerian Statute - namely the NEPZA Act - to execute functions of the executive branch of government, such as the establishment of customs, police and immigration in such zones.<sup>384</sup> In the alternative, NEPZA clearly meets the criteria - like PPL in *Flemingo v Poland* and CPC in *Deutsche Bank v Sri Lanka* - of a *de facto* organ for the purposes of ARSIWA Article 4. Multiple facts lead to this conclusion, as revealed by the terms of NEPZA's constituent legislation, the NEPZA Act and associated regulations:<sup>385</sup>

- (a) NEPZA is an entity created by statute and wholly owned by the Nigerian State.<sup>386</sup>
- (b) NEPZA was created for an overwhelmingly governmental purpose, namely the supervision and management of Nigeria's Free Zones<sup>387</sup> - including the Zone - as established by the President of Nigeria.<sup>388</sup>
- (c) To that end, NEPZA was granted a wide range of governmental powers including:<sup>389</sup> recommending the creation of Free Zones; approving Free Zone development plans and budgets; establishing customs, police and immigration posts in the Free Zones; supervision and coordination of public and private sector organizations within each Free Zone; resolution of labour disputes, granting of licenses and registrations to operate within each Free Zone; and making regulations for the proper implementation of the NEPZA Act.
- (d) A majority of NEPZA's board is made up of representatives from various government departments (the Ministries of Commerce, Culture and Tourism, Industry and Science and Technology, the Comptroller-General of Customs, the Nigerian Ports Authority and the Central Bank of Nigeria) and appointees of the responsible Minister.<sup>390</sup>

<sup>383</sup> Constitution of the Federal Republic of Nigeria of 1999, Art. 3(1) and First Schedule to the Constitution, **C-195**.

<sup>384</sup> NEPZA Act, s. 4, **C-025**.

<sup>385</sup> NEPZA Act, **C-025**; NEPZA Regulations, **C-026**.

<sup>386</sup> NEPZA Act, s. 2, **C-025**.

<sup>387</sup> NEPZA Act, s. 4(a), **C-025**.

<sup>388</sup> NEPZA Act, s. 1(1), **C-025**.

<sup>389</sup> NEPZA Act, ss. 1(1), 4, 10, 27, **C-025**.

<sup>390</sup> The only non-government-appointed members of the NEPZA board were three representatives from industry bodies: NEPZA Act, s. 3(1), **C-025**.



- (e) The chairman of NEPZA's board<sup>391</sup> and NEPZA's managing director<sup>392</sup> are both appointed by the President.
- (f) The President has the power to fire any NEPZA board member at will.<sup>393</sup>
- (g) NEPZA is required to produce annual estimates and accounts to the relevant Minister and must have the latter audited by a government-approved auditor.<sup>394</sup>
- (h) NEPZA participates in drafting legislation and guidelines concerning trade and tax policy,<sup>395</sup> as well as in relation to immigration<sup>396</sup> and employment matters.<sup>396</sup>

212. In the further alternative, NEPZA is undeniably at a minimum a parastatal entity within the context of ARSIWA Article 5. It has been granted a multitude of governmental powers (set out at paragraph 211(c) above) and the acts complained of were clearly undertaken in the course of them being exercised. This includes - but is not limited to - the following:

- (a) NEPZA exercised governmental authority by calling a meeting on 22 July 2016 at which it oversaw the takeover of Zhongfu Nigeria's rights and investment in the Zone;<sup>397</sup>
- (b) NEPZA exercised governmental authority by requiring in a directive to the Nigeria Immigration Service dated 27 July 2016 that any Zhongfu Nigeria employee that left or travelled from the Zone would be required to submit their original CERPAC to the Nigeria immigrations service (and could only leave with a copy of the original CERPAC) thereby compromising their freedom of movement from the Zone and in Nigeria;<sup>398</sup> and
- (c) NEPZA exercised governmental authority by enforcing NSG's takeover of the Claimant's and Zhongfu Nigeria's rights and investment in the Zone.<sup>399</sup>

### 3. The Actions of the Nigerian police force are Attributable to Nigeria

213. The police, security and intelligence services are - self-evidently - organs of the State. Thus, in *Al Tamimi v Oman*, the arbitral tribunal confirmed that:

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<sup>391</sup> NEPZA Act, s. 3(1), **C-025**.

<sup>392</sup> NEPZA Act, s. 5(1), **C-025**.

<sup>393</sup> NEPZA Act, s. 3(3), **C-025**.

<sup>394</sup> NEPZA Act, s. 23(1), **C-025**.

<sup>395</sup> NEPZA Regulations, Part 6, Art. 1, **C-026**, ("[t]he Authority shall in consultation with the Federal Inland Revenue Service publish agreed guidelines as to the tax implication of transaction between Free Zones and Free Zone Enterprises with entities within the customs territory.").

<sup>396</sup> NEPZA Regulations, Part 6, Art. 2, **C-026**, ("[t]he Authority shall work in consultation with the Nigerian Immigration Service to publish agreed guidelines, procedures and regulations.").

<sup>397</sup> Letter from NEPZA to All Free Zone Enterprises (OGFTZ), 21 July 2016, **C-163**.

<sup>398</sup> Letter from NEPZA to the Nigeria Immigration Service, 27 July 2016, **C-167**.

<sup>399</sup> G. Elias & Co., Report of the Meeting with the Divisional Police Officer, Ota Division on 5 December, 6 December 2016, **C-186**; Report from Steven Allen, 30 March 2017, **C-183**.

*"There is no question that State organs such as government ministries and the State police force operate as arms of the State, and indeed [...] such entities are characterised by their exercise of 'regulatory, administrative or governmental' authority."*<sup>400</sup>

214. Therefore, the actions of the Nigerian police in assisting with, and/or permitting, the seizure of the Claimant's and Zhongfu Nigeria's assets and land rights in the Zone are attributable to Nigeria. Likewise, the wrongful arrest and detention of Mr. Zhao and his mistreatment while in custody by the Nigerian police are also attributable to Nigeria.

#### 4. The actions of Nigeria's courts are attributable to Nigeria

215. It is beyond doubt that, as a matter of customary international law, judicial bodies are considered State organs,<sup>401</sup> as expressly recognised in the text of ARSIWA Article 4. This principle has accepted without question by multiple investment treaty tribunals. Thus, in *Saipem v Bangladesh*, the tribunal stated that "*the courts are 'part of the State' and, thus, their actions are attributable to Bangladesh*".<sup>402</sup> Similarly, in *Azinian v Mexico* it was said that "[a]lthough independent of the Government, the judiciary is not independent of the State: the judgment given by a judicial authority emanates from an organ of the State in just the same way as a law promulgated by the legislature or a decision taken by the executive."<sup>403</sup> And in *ATA v Jordan*, the tribunal attributed the conduct of the host State's judiciary to the State when it found that the extinguishment of the claimant's right to arbitration under an arbitration agreement by the Jordanian Court of Cassation was a breach of the Turkey-Jordan BIT.<sup>404</sup>

216. Therefore, the wrongful conduct of the Nigerian courts in issuing the anti-arbitration injunction,<sup>405</sup> denying the Claimant its right to a fair hearing in the appropriate forum, is attributable to Nigeria.

<sup>400</sup> *Adel A Hamadi Al Tamimi v Sultanate of Oman*, ICSID Case No. ARB/11/33, Award, 27 October 2015, ¶ 344, **CLA-053**. See also *Ivan Peter Busta and James Peter Busta v Czech Republic*, SCC Case No. V 2015/014, Final Award, 10 March 2017, **CLA-054**, ¶ 400.

<sup>401</sup> ARSIWA Commentary, Art. 4, ¶ 6, **CLA-039**.

<sup>402</sup> *Saipem SpA v The People's Republic of Bangladesh*, ICSID Case No. ARB/05/07, Decision on Jurisdiction and Recommendation on Provisional Measures, 21 March 2007, ¶ 143, **CLA-028**. See also *Dan Cake (Portugal) SA v Hungary*, ICSID Case No. ARB/12/9, Decision on Jurisdiction and Liability, 24 August 2015, ¶ 143, **CLA-055** ("*there is no dispute as to the fact that the act of a State court is attributable, under international law, to the State itself.*").

<sup>403</sup> *Azinian, Davitian, & Baca v Mexico*, ICSID Case ARB(AF)/97/2, Award, 1 November 1999, ¶ 98, **CLA-056**.

<sup>404</sup> *ATA Construction, Industrial and Trading Company v The Hashemite Kingdom of Jordan*, ICSID Case No. ARB/08/2, Award, 18 May 2010, ¶¶ 116-125, 127-129, 132, 133(3), **CLA-015**.

<sup>405</sup> Judgment of the High Court of Justice of the Ogun State of Nigeria, Suit No. AB/04/17, 29 March 2017, **C-192**.

## VII. NIGERIA'S ACTIONS ARE IN BREACH OF THE TREATY AND INTERNATIONAL LAW

217. As a result of the actions described above, Nigeria has breached a number of its international obligations under the Treaty with respect to its treatment of the Claimant's investment in Nigeria. Nigeria's breaches of the Treaty include the following:

- (a) Nigeria violated its obligation of fair and equitable treatment (**Section A**);
- (b) Nigeria failed to afford continuous / full protection and security (**Section B**);
- (c) Nigeria took unreasonable measures (**Section C**); and
- (d) Nigeria wrongfully expropriated the Claimant's investments without compensation, or alternatively took measures the effect of which was equivalent to expropriating the Claimant's investment (**Section D**).

### A Nigeria did not Treat the Claimant's Investment Fairly and Equitably

#### 1. The Content of the Fair and Equitable Treatment Standard

218. Article 3(1) of the Treaty provides that:

*"[I]nvestments of investors of each Contracting party shall all the time be accorded fair and equitable treatment in the territory of the other Contracting Party."*<sup>406</sup>

219. When interpreting the meaning and effect of a provision of the Treaty, the Tribunal must do so in accordance with the general rule of treaty interpretation, as set out in Article 31(1) of the VCLT. This article provides that a treaty must be interpreted *"in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."*<sup>407</sup>

220. As explained above, Article 31(2) of the VCLT elaborates that the *"context for the purpose of the interpretation of a treaty"* includes its *"preamble and annexes."*<sup>408</sup> The preamble of a treaty is *"a principal and natural source from which indications can be gathered of a treaty's objects and purposes even though the preamble does not contain substantive provisions"*.<sup>409</sup> As such, the Preamble to the Treaty acknowledges that Nigeria has agreed to the obligations in the Treaty:

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<sup>406</sup> China-Nigeria BIT, Art. 3(1), **CLA-001**.

<sup>407</sup> VCLT, Art. 31(1), **CLA-018**.

<sup>408</sup> VCLT, Art. 31(2), **CLA-018**.

<sup>409</sup> *Arbitral Award of 31 July 1989 (Guinea-Bissau v Senegal)*, Judgment, Dissenting Opinion of Judge Weeramantry, 12 November 1991, ICJ Reports 1991, p. 142, **CLA-026**, citing *Rights of Nationals of the United States of America in Morocco (France v United States of America)*, Judgment, 27 August 1952, ICJ Reports 1952, p. 196, **CLA-057** and *Asylum (Colombia v Peru)*, Judgment, 20 November 1950, ICJ Reports 1950, p. 282, **CLA-058**.

- (a) *"Recognizing that the reciprocal encouragement, promotion, and protection of such investments will be conducive to stimulating business initiative of the investors and will increase prosperity in both States;"* and
- (b) *"Determined to create favourable conditions for greater investment [in its territory]."*<sup>410</sup>

221. It is in this light that the fair and equitable treatment ("**FET**") standard - and indeed all of the obligations - in the Treaty must be interpreted. It follows that the obligation to *"all the time [accord] fair and equitable treatment"* is placed in the context of an obligation to *"promote"* and *"protect"* investments and *"create favourable conditions"* for investments. Similar terms to these have been interpreted to imply a requirement on a host State to adopt proactive conduct *"rather than prescriptions for a passive behavior of the State or avoidance of prejudicial conduct to the investors"*.<sup>411</sup>
222. There is a substantial body of investment treaty jurisprudence which has interpreted the meaning of the *"fair and equitable treatment"* standard.<sup>412</sup> While these interpretations are helpful to guide the Tribunal in the application of Article 3(1) of the Treaty, the ordinary meaning of this provision must prevail. Therefore, the overarching question for this Tribunal is whether, in light of the object and purpose of the Treaty to create *"favourable conditions for greater investment"*, did Nigeria treat the Claimant's investment, including its rights, its property and its employees, *"fairly and equitably"*. As will be shown, Nigeria fell far short of according such treatment.
223. Previous investment treaty tribunals have accepted that the FET standard is *"an autonomous treaty standard, whose precise meaning must be established on a case-by-case basis. It requires an action or omission by the State which violates a certain threshold of propriety, causing harm to the investor, and with a causal link between action or omission and harm."*<sup>413</sup> This threshold must be determined by the Tribunal on the basis of the wording in Article 3(1) of the Treaty. There is a significant body of jurisprudence on

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<sup>410</sup> China-Nigeria BIT, Preamble, **CLA-001**.

<sup>411</sup> See *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 113, **CLA-059**; *Siemens A.G. v Argentine Republic*, ICSID Case No. ARB/02/8, Award, 6 February 2007, ¶ 290, **CLA-121**.

<sup>412</sup> *Joseph C Lemire v Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284, **CLA-060**; *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 602, **CLA-061**; *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 609, **CLA-062**.

<sup>413</sup> *Joseph C Lemire v Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284, **CLA-060**. See also *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 610, **CLA-062**.

the factors which a Tribunal can have regard to when determining whether this threshold has been breached, which include, amongst others:<sup>414</sup>

- (a) whether the host State has denied the investor due process;<sup>415</sup>
- (b) whether the host State failed to act in a transparent manner towards the investor;<sup>416</sup>
- (c) whether the host State has permitted harassment or coercion of the investor;<sup>417</sup>
- (d) whether the host State has acted in a manner that is arbitrary, unfair, unjust or idiosyncratic;<sup>418</sup> and
- (e) whether the host State failed to respect the investor's legitimate expectations.<sup>419</sup>

224. The case law is clear that not all these factors must be present for a violation of the FET standard to be found. Indeed, there will be a violation of the FET standard under the Treaty if any one of these factors is present.<sup>420</sup> In this case, as the Claimant has shown, Nigeria's conduct falls within each one of the factors identified in the previous paragraph.

<sup>414</sup> See e.g., *Técnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154, **CLA-063** ("The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations. Any and all State actions conforming to such criteria should relate not only to the guidelines, directives or requirements issued, or the resolutions approved thereunder, but also to the goals underlying such regulations. The foreign investor also expects the host State to act consistently, i.e. without arbitrarily revoking any pre-existing decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor of its investment without the required compensation.").

<sup>415</sup> *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 609, **CLA-062**; *Waste Management Inc v United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Final Award, 30 April 2004, ¶ 98, **CLA-064**; *Joseph C Lemire v Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284, **CLA-060**.

<sup>416</sup> *Emilio Agustin Maffezini v the Kingdom of Spain*, ICSID Case No. ARB/97/7, Award of 13 November 2000, ¶ 83, **CLA-065**; *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 609, **CLA-062**; *Joseph C Lemire v Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284, **CLA-060**; *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 602, **CLA-061**.

<sup>417</sup> *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, **CLA-066**, ¶¶ 188-290; *Joseph C Lemire v Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284, **CLA-060**.

<sup>418</sup> *Rusoro Mining Ltd. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, 22 August 2016, ¶ 524, **CLA-067**. See also *Casinos Austria International GmbH and Casinos Austria Aktiengesellschaft v Argentine Republic*, ICSID Case No. ARB/14/32, Decision on Jurisdiction, 29 June 2018, ¶ 242, **CLA-068**; *Anglo American PLC v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019, ¶ 443, **CLA-069**; *Joseph C Lemire v Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284, **CLA-060**.

<sup>419</sup> *Occidental v Republic of Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004, ¶ 183, **CLA-070**; *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 609, **CLA-062**; *Anglo American PLC v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019, ¶ 443, **CLA-069**; *Joseph C Lemire v Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 284, **CLA-060**; *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 163, **CLA-063**.

<sup>420</sup> See e.g., *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri AS v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 617, **CLA-062**.



## 2. Nigeria has Denied the Claimant's Right to Due Process in Violation of the FET Standard

225. Investment treaty tribunals have consistently interpreted provisions containing the FET standard to include an obligation of the host State to comply with due process.<sup>421</sup> In particular, arbitral tribunals have accepted that a failure to ensure due process can concern both judicial proceedings, as well as due process in the administrative acts of the State.<sup>422</sup> For example, in *Waste Management v Mexico II*, the arbitral tribunal held that the FET standard is breached where the action of the host State involves a "lack of due process leading to an outcome which offends judicial propriety—as might be the case with a manifest failure of natural justice in judicial proceedings or a complete lack of transparency and candour in an administrative process."<sup>423</sup> When considering whether there was a breach of the FET standard, the arbitral tribunal in *Kardassopoulos and Fuchs v Georgia* stressed the need to give an investor a reasonable chance, within a reasonable timeframe, to claim its legitimate rights and have its claims heard.<sup>424</sup>
226. A number of investment treaty tribunals have also held that the cancellation of a permission or license granted to a foreign investor without meeting due process and procedural requirements can be a breach of the FET standard. These cases have included the refusal to grant a construction permit without giving the investor the opportunity of a hearing<sup>425</sup> and the revocation of a construction license by the relevant governmental authority, without allowing the claimant to respond to the infringements alleged, or opportunity to cure them.<sup>426</sup>
227. Multiple actions taken by Nigeria, have denied the Claimant's right to due process, thereby violating the FET standard in the Treaty. These include, but are not limited to, the following, which considered, either individually or collectively, entail a breach of the FET standard.

<sup>421</sup> *Rumeli Telekom AS and Telsim Mobil Telekomikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 609, **CLA-062**. ("[T]he fair and equitable treatment standard encompasses" the principle that "the State must respect procedural propriety and due process."); *Olin Holdings Ltd v State of Libya*, ICC Case No. 20355/MCP, Award, 25 May 2018, ¶¶ 346-347, **CLA-071**; *Anglo American PLC v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/14/1, Award, 18 January 2019, ¶¶ 461-462, **CLA-069**; *International Thunderbird Gaming Corporation v United Mexican States*, UNCITRAL, Award, 26 January 2006, ¶ 289, **CLA-072**.

<sup>422</sup> SW Schill, "Fair and Equitable Treatment, the Rule of Law, and Comparative Public Law" in WS Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010), p. 166, **CLA-073**.

<sup>423</sup> *Waste Management Inc v United Mexican States ("Number 2")*, ICSID Case No. ARB(AF)/00/3, Final Award, 30 April 2004, ¶ 98, **CLA-064**; *The Loewen Group, Inc. and Raymond L. Loewen v United States of America*, ICSID Case No. ARB(AF)/98/3, Final Award, 26 June 2003, ¶ 131, **CLA-074**.

<sup>424</sup> *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, ¶ 396, **CLA-075**. See also *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No. ARB/03/16, Award of the Tribunal, 2 October 2006, ¶ 435, **CLA-076**; *PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v Turkey*, ICSID Case No. ARB/02/5, Award, 19 January 2007, ¶ 246, **CLA-077**.

<sup>425</sup> *Metalclad Corporation v The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶¶ 91, 101, **CLA-078**.

<sup>426</sup> *Tecnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶¶ 161-162, 174, **CLA-063**.



228. First, the Ogun State Government ran roughshod over Zhongfu Nigeria's rights under both the Fucheng Industrial Park Agreement and the JVA by initially threatening Zhongfu Nigeria to "*leave peacefully when there is [an] opportunity to do so, and avoid forceful removal, complications and possible prosecution*"<sup>427</sup> and then employing the Nigerian police and NEPZA to intimidate and evict Zhongfu Nigeria from the Zone. Eventually, through these, and other actions - such as NEPZA seeking to collect immigration papers (known as CERPACs) from Zhongfu Nigeria's staff<sup>428</sup> and the Nigerian police arresting and physically beating Mr. Zhao - Nigeria forced Zhongfu Nigeria's Management Team to leave the country. The Ogun State Government and NEPZA ignored repeated pleas from Zhongfu Nigeria's legal counsel that Zhongfu Nigeria was a "*valid subsisting registered enterprise and a lawful tenant in the Zone ... As such, Zhongfu cannot be evicted from the Zone.*"<sup>429</sup>
229. Second, the Ogun State Government purported to terminate the JVA without providing Zhongfu Nigeria with an opportunity to respond and have its legitimate rights considered in accordance with due process. Indeed, when Zhongfu Nigeria wrote on 26 May 2016 requesting a meeting to clarify its legitimate rights in OGFTZ Company and the Zone, the Ogun State Government responded the very next day - without providing Zhongfu Nigeria with an opportunity to explain its position - by dramatically purporting to terminate the JVA.<sup>430</sup> Moreover, following the purported termination, the Ogun State Government proceeded to engage the Nigerian police and NEPZA to enforce the purported termination of the JVA and physically take over the Claimant's investment in the Zone.
230. Third, the Ogun State Government and NEPZA ignored the unequivocal and direct instructions from the Solicitor-General of Nigeria to preserve the *status quo ante* in the Zone pending court processes which were commenced to validate the Claimant's rights.<sup>431</sup> The Solicitor-General of Nigeria warned NEPZA and the Ogun State Government on 17 October 2016, that they should:

*"refrain from taking any further steps in this matter, particularly in relation to the alleged 'resort to self help to forcibly evict Zhongfu and its personnel from the zone' being planned and/or contemplated by the State*

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<sup>427</sup> Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**; Email from Email from Jason Han to Elizabeth Uwaifo, 25 September 2016, **C-012**.

<sup>428</sup> Letter from NEPZA to the Nigeria Immigration Service, 27 July 2016, **C-167**.

<sup>429</sup> Letter from G. Elias & Co. to Managing Director of NEPZA, 21 September 2016, **C-180**; See also Letter from G. Elias & Co. to NEPZA, 21 September 2016, **C-181**.

<sup>430</sup> Letter from Zhongfu International Investment (NIG) FZE to Secretary to the State Government of Ogun State, 26 May 2016, **C-157**; Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Zhongfu International Investment (NIG) FZE, 27 May 2016, **C-158**.

<sup>431</sup> Letter from Solicitor-General of the Federation and Permanent Secretary to Secretary to the State Government, Ogun State Secretariat, 17 October 2016, **C-013**; Letter from Solicitor-General of the Federation and Permanent Secretary to NEPZA, 17 October 2016, **C-185**.

*Government, NEPZA or any of its representatives or agent[s]. Parties should maintain status quo ante. In this connection, and in line with extant laws, Zhongfu be allowed to exercise its mandate pending the determination of these matters, or any court order made pursuant thereto."*<sup>432</sup>

231. Far from refraining from taking further steps and allowing Zhongfu Nigeria to exercise its mandate pending the determination of these matters, the Ogun State Government continued to rely on the Nigerian police and NEPZA to enforce the takeover. The disregard of the instructions of Nigeria's own Solicitor-General evidences a manifest failure to preserve the Claimant's and Zhongfu Nigeria's due process rights.
232. Fourth, when Zhongfu Nigeria commenced the Singapore Arbitration Proceedings to have its contractual rights determined pursuant to the arbitration agreement in the JVA, the Ogun Court issued a "*forever injunction*" permanently restraining Zhongfu Nigeria "*from seeking and or continuing with any step, action, and or participate directly or otherwise from seeking and or continuing with any step, action and or participate directly or indirectly*" in the Singapore Arbitration Proceedings.<sup>433</sup> This decision was patently arbitrary and unjust as it failed to accord with the most basic principles of the New York Convention to which Nigeria is a Party. Nigeria's use of its own judiciary to thwart the Claimant's exercise of its legitimate right to have its contractual claims under the JVA resolved by a fair and impartial tribunal is a further clear violation of due process and the Treaty.

### 3. Nigeria has Failed to Act in a Transparent Manner

233. Investment treaty tribunals have consistently held that a State must act consistently and "*transparently in its relations with foreign investors*".<sup>434</sup> A failure on the part of State organs to act in a transparent manner would amount to a breach of the FET standard. Transparency means that the legal framework for the successful initiation, completion and operation of the investor's operations is readily known to the investor, and that any decisions affecting the investor can be traced to that legal framework.<sup>435</sup> In *LG&E v Argentina*, the arbitral tribunal found that:

*"having considered [...] the sources of international law, understands that the fair and equitable standard consists of the host State's consistent and transparent behaviour, free of ambiguity that involves the obligation to grant*

<sup>432</sup> Letter from Solicitor-General of the Federation and Permanent Secretary to Secretary to the State Government, Ogun State Secretariat, 17 October 2016, **C-013**; Letter from Solicitor-General of the Federation and Permanent Secretary to NEPZA, 17 October 2016, **C-185**.

<sup>433</sup> Judgment of the High Court of Justice of the Ogun State of Nigeria, Suit No. AB/04/17, 29 March 2017, **C-192**.

<sup>434</sup> *Tecnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154, **CLA-063**. See also *Emilio Agustín Maffezini v Kingdom of Spain*, ICSID Case No. ARB/97/7, Award (Merits), 13 November 2000, ¶ 83, **CLA-065**; *CME Czech Republic B.V. v Czech Republic*, UNCITRAL, Final Award, 14 March 2003, ¶ 611, **CLA-079**; *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 546, **CLA-080**.

<sup>435</sup> R Dolzer and C Schreuer, *Principles of International Investment Law* (Oxford University Press 2<sup>nd</sup> edn 2012), p. 149, **CLA-081**; *Metalclad Corporation v United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 76, **CLA-078**.

*and maintain a stable and predictable legal framework necessary to fulfil the justified expectations of the foreign investor.*"<sup>436</sup>

234. Similarly, the arbitral tribunal in *Rumeli v Kazakhstan* accepted that a State must "act in a transparent manner"<sup>437</sup> and that the failure to provide the claimant with "a real possibility to present their position" was a breach of the obligation to act transparently under the FET standard.<sup>438</sup> Likewise, in *Teinver v Argentina* the tribunal held that the investor could expect that the host State "would comply with its laws and regulations and act transparently."<sup>439</sup> Put differently, the obligation of transparency requires that the host State, when taking a decision affecting a foreign investor in the exercise of its public administration, has an obligation to engage in "open and frank communication"<sup>440</sup> and must give reasons "clearly and consistently and not deceptively".<sup>441</sup>

235. As the arbitral tribunal in *Al-Bahloul v Tajikistan* explained:

*"The notion of transparency as an element of fair and equitable treatment has been expounded upon in a number of investment treaty arbitration decisions. Interpreting transparency in the context of the NAFTA treaty, the tribunal in Metalclad v. Mexico considered it 'to include the idea that all relevant legal requirements for the purpose of initiating, completing and successfully operating investments made, or intended to be made, under the Agreement should be capable of being readily known to all affected investors of another Party. There should be no room for doubt or uncertainty on such matters.'"*<sup>442</sup>

236. As shown, the actions of Nigeria, through its State organs, demonstrate a failure to act transparently in relation to Zhongfu Nigeria's eviction from the Zone, as well as the arrest and detention of Mr. Zhao and the evisceration of the Claimant's investment.

237. In particular, Nigeria's lack of transparency includes the Ogun State Government's failure to engage with Zhongfu Nigeria's repeated requests to have its rights under the Fucheng Industrial Park Agreement preserved. For example, following the threats to Zhongfu Nigeria's Management Team and employees, Prof. Elias wrote to NEPZA requesting it to "restore the status quo, prevent the bullying, oppressive and menacing tactics" of the Ogun

<sup>436</sup> *LG&E Energy Corp v Argentine Republic*, ICSID Case No. ARB/02/1, Decision on Liability, 3 October 2006, ¶ 131, **CLA-036**.

<sup>437</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 609, **CLA-062**.

<sup>438</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, 29 July 2008, ¶ 617, **CLA-062**.

<sup>439</sup> *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v Argentine Republic*, ICSID Case No. ARB/09/01, Award, 21 July 2017, ¶ 679, **CLA-030**.

<sup>440</sup> *Nordzucker v Poland*, UNCITRAL, Second Partial Award, Merits, 28 January 2009, ¶¶ 83-84, **CLA-082**.

<sup>441</sup> C McLachlan, L Shore, M Weiniger, *International Investment Arbitration* (Oxford University Press 2<sup>nd</sup> edition 2017), ¶ 7.205(b), **CLA-083**.

<sup>442</sup> *Mohammad Ammar Al-Bahloul v The Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability, 2 September 2009, ¶ 183, **CLA-084**.

State Government and Mr. Onas.<sup>443</sup> However, instead of seeking to maintain the *status quo* and engaging with Prof. Elias' communication, NEPZA wrote to the Nigeria Immigration Service and the Nigerian police asking them to collect CERPACs from Zhongfu Nigeria's staff.<sup>444</sup> On 21 September 2016, Prof. Elias again wrote to NEPZA and put it on notice that Zhongfu Nigeria was "*a valid subsisting registered enterprise and a lawful tenant in the Zone.*"<sup>445</sup> Once again, no response was received and the Ogun State Government continued to use the police and NEPZA to intimidate Zhongfu Nigeria's personnel and to take over its assets without communicating the basis for these actions.<sup>446</sup>

238. Similarly, the Nigerian police failed to act in a transparent manner when arresting and detaining Mr. Zhao. Mr. Zhao did not receive an explanation for the reason of his arrest in a language he could understand. As Mr. Zhao explains, while he was detained he was taken to a room by police officers "*where they asked [him] to sign a piece of paper. They did not say or explain what this paper was or what it said.*"<sup>447</sup>
239. The Ogun State Government's allegations and purported basis for terminating the JVA also lacked transparency, being neither substantiated nor evidenced. The Ogun State Government's purported termination failed to comply with clause 18.1 of the JVA to which it referred and which provided for a period of 60 days to remedy any alleged material breach. Instead of accepting Zhongfu Nigeria's request for a meeting, the very next day the Ogun State Government purported to terminate the JVA - completely ignoring the 60-day remedy period in the JVA and demonstrating that the Ogun State Government had no interest in hearing Zhongfu Nigeria's position nor acting in a transparent manner.

#### **4. Nigeria Failed to Treat the Claimant in a Manner that is Free from Coercion and Harassment**

240. The FET standard is breached where a State engages in conduct which involves coercion and harassment of investors, regardless of whether this conduct is undertaken by civil or criminal authorities.<sup>448</sup> It has been recognised that where a measure taken by a host State involves pressure in the form of coercion, there is a breach of the FET standard.<sup>449</sup> In

<sup>443</sup> Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**.

<sup>444</sup> Letter from NEPZA to the Nigeria Immigration Service, 27 July 2016, **C-167**.

<sup>445</sup> Letter from G. Elias & Co. to Managing Director of NEPZA, 21 September 2016, **C-180**. See also Letter from G. Elias & Co. to NEPZA, 21 September 2016, **C-181**.

<sup>446</sup> Report from Steven Allen, 30 March 2017, **C-183**.

<sup>447</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶ 23.

<sup>448</sup> *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v The Argentine Republic*, ICSID Case No. ARB/09/1, Award, 21 July 2017, ¶ 679, **CLA-030**; *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, ¶ 546, **CLA-080**.

<sup>449</sup> *Tecnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 163, **CLA-063**.

particular, coercive conduct in breach of the FET standard has been found where there were threats and arrests of an investor's personnel which resulted in a settlement imposed upon the investor under duress.<sup>450</sup> It has also been found where the terms of a licence were changed, requiring the investor to relocate its investment, since "[u]nder such circumstances, such pressure involves forms of coercion that may be considered inconsistent with the fair and equitable treatment to be given to international investment..."<sup>451</sup>

241. In the present case, the Nigerian authorities engaged in a series of extraordinary actions over a number of months to coerce and harass the Claimant and Zhongfu Nigeria to leave the Zone, and indeed the country. These actions included, amongst other conduct, the following:

- (a) The Secretary to the Ogun State Government directly threatening Zhongfu Nigeria's CEO, Dr. Han: *"My advise [sic.] to you as a friend; leave peacefully when there is opportunity to do so, and avoid forceful removal, complications and possible prosecution."*<sup>452</sup> Around the same time, a NEPZA representative in the Zone repeated a similar threat to Dr. Han.<sup>453</sup> The threats from the Nigerian authorities were of such a threatening nature that they forced Dr. Han and Mr. Zhao to flee the Zone.<sup>454</sup> As Dr. Han recalls, *"I was very scared by this outright threat to me and concerned about the need to protect not only Zhongfu Nigeria's rights under the JVA, but also Zhongshan's rights under the Fucheng Industrial Park Agreement."*<sup>455</sup>
- (b) The Nigerian police assisted the Zone coordinator, Mr. Onas, to conduct a *"handover ceremony"* in the Zone under the directives of the Ogun State Government.<sup>456</sup> This resulted in people in the Zone feeling *"terrorized and fearful"* as Zhongfu Nigeria employees were coerced to give Mr. Onas and the Nigerian police access to Zhongfu Nigeria's offices and were prevented from leaving the Zone in a vehicle belonging to Zhongfu Nigeria.<sup>457</sup>

<sup>450</sup> *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶¶ 151-159, **CLA-067**.

<sup>451</sup> *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, ¶ 163, **CLA-063**.

<sup>452</sup> Email from Jason Han to Elizabeth Uwaifo, 25 September 2016, **C-012**.

<sup>453</sup> See Witness Statement of Jason Han, 30 April 2019, ¶ 108.

<sup>454</sup> See Witness Statement of Jason Han, 30 April 2019, ¶ 111.

<sup>455</sup> See Witness Statement of Jason Han, 30 April 2019, ¶ 106.

<sup>456</sup> Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**.

<sup>457</sup> See Witness Statement of Jason Han, 30 April 2019, ¶ 114; Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**.

- (c) The coercing and harassing nature of the Nigerian authorities was apparent from the need by Zhongfu Nigeria to engage Nigerian lawyers to write to NEPZA requesting it to "*restore the status quo, prevent the bullying, oppressive and menacing tactics*" of the Ogun State Government and the Nigerian police as well as Mr. Onas.<sup>458</sup>
- (d) A further example of Nigeria's actions calculated to intimidate, coerce and harass Zhongfu Nigeria was the arrest and detention of Mr. Zhao. As Mr. Zhao recalls, he was taken from his hotel room by armed Nigerian police at around midnight wearing only a vest, shorts and flip flops.<sup>459</sup> He was held at gun point, repeatedly beaten and held without charge for almost a week. As Mr. Zhao explains: "*I was extremely traumatised and exhausted after my experiences. It took me several months to recover in a basic sense, but the scars of my mistreatment will remain with me for much longer.*"<sup>460</sup> Mr. Zhao's arrest had an immediate and profound effect on the Zhongfu Nigeria Management Team. Aside from the traumatic effects suffered by Mr. Zhao, his arrest shocked Dr. Han and Mr. Xue and was the catalyst for Dr. Han "*decid[ing] that it was time for [him] to leave Nigeria.*"<sup>461</sup>

## 5. Nigeria Acted in a Manner that was Arbitrary, Unfair, Unjust and/or Idiosyncratic

242. It is accepted that the FET standard requires that a State refrain from taking arbitrary measures.<sup>462</sup> The tribunal in *Lemire v Ukraine II* observed that "*the underlying notion of arbitrariness is that prejudice, preference or bias is substituted for the rule of law*".<sup>463</sup> The tribunal in *Lauder v Czech Republic* used the Black's Law Dictionary to define "arbitrary" as meaning "*depending on individual discretion; (...) founded on prejudice or preference rather than on reason or fact*".<sup>464</sup>
243. When considering if a measure is arbitrary, arbitral tribunals will consider whether the host State "*acted not for cause but for purely arbitrary reasons.*"<sup>465</sup> The arbitral tribunal in

<sup>458</sup> Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**.

<sup>459</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶ 21.

<sup>460</sup> Witness Statement of Wenxiao (Areak) Zhao, 30 April 2019, ¶ 37.

<sup>461</sup> See Witness Statement of Jason Han, 30 April 2019, ¶ 128.

<sup>462</sup> *Ronald S. Lauder v The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 221, **CLA-085**; *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No ARB/05/22, Award, 24 July 2008, ¶ 709, **CLA-061**; *EDF (Services) Limited v Romania*, ICSID Case No ARB/05/13, Award, 8 October 2009, ¶ 303, **CLA-086**.

<sup>463</sup> *Joseph C Lemire v Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 262-263, **CLA-060**.

<sup>464</sup> *Ronald S. Lauder v The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, ¶ 221, **CLA-085**. See also *Saluka Investments BV (The Netherlands) v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶¶ 460-461, **CLA-087**.

<sup>465</sup> *Eureko BV v Republic of Poland*, Ad Hoc, Partial Award and Dissenting Opinion, 19 August 2005, ¶ 233, **CLA-045**.



*EDF v Romania*, agreeing with the expert opinion of Professor Christoph Schreuer, described “arbitrary” as a:

*"a. measure that inflicts damage on the investor without serving any apparent legitimate purpose;*

*b. measure that is not based on legal standards but on discretion, prejudice or personal preference;*

*c. measure taken for reasons that are different from those put forward by the decision maker;*

*d. measure taken in wilful disregard of due process and proper procedure".*<sup>466</sup>

244. For example, in *Biwater Gauff v Tanzania*, the arbitral tribunal considered that Tanzania's State organs' seizure of the investor's assets and company in Tanzania, the deportation of the local company's senior management and the installation of a different company to manage the water services granted to *Biwater Gauff* amounted to arbitrary measures breaching the fair and equitable standard of treatment.<sup>467</sup>
245. As shown above, the measures taken by Nigeria fall squarely within the accepted notion of arbitrariness under international law. There was no rational basis for Nigeria to evict Zhongfu Nigeria from the Zone, eviscerate the Claimant's rights under the JVA and Fucheng Industrial Park Agreement and destroy the Claimant's investment. Nor was it reasonable to do so.
246. The Ogun State Government's actions to force Zhongfu Nigeria out of the Zone, with the assistance of NEPZA and the Nigerian police, ignoring Zhongfu Nigeria's rights under the Fucheng Industrial Park Agreement, for example, inflicted damage without serving any legitimate purpose. The Claimant's investment in the Zone had turned the Zone into an internationally recognised success story for foreign direct investment in Africa. Under the Claimant's management, the tax revenues generated in the Zone for Nigeria more than doubled from 2013 to 2014 to NGN 161 million.<sup>468</sup> The Assistant Comptroller of the Nigerian Customs Service acknowledged that Zhongfu Nigeria "*should 'be given a pat on the back' for a job well done.*"<sup>469</sup> The Zone was used as case study by preeminent universities of a successful development project in Africa. The Economist Intelligence Unit

<sup>466</sup> *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 303, **CLA-086**. Also affirmed in *Joseph C Lemire v Ukraine II*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January 2010, ¶ 262-263, **CLA-060**.

<sup>467</sup> *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶ 709, **CLA-061**.

<sup>468</sup> Ships & Ports Article, "Customs generates N161m at Ogun FTZ in 2014", 9 February, 2015, **C-081**.

<sup>469</sup> Ships & Ports Article, "Customs generates N161m at Ogun FTZ in 2014", 9 February, 2015, **C-081**.

produced a video lauding the achievements of the Zone.<sup>470</sup> There was no rational justification for destroying the Claimant's investment in the Zone which it had, and continued to, develop so successfully.

247. Nigeria's action were also, as explained above, arbitrary and idiosyncratic, as evidenced by the fact that the Ogun State Government, NEPZA and the Nigerian police ignored the clear directives of the Solicitor-General of Nigeria.

## 6. Nigeria Failed to Respect the Claimant's Legitimate Expectations

248. Investment treaty arbitral tribunals have repeatedly found that the FET standard also encompasses the legitimate expectations of investors regarding the key terms of their investment and the stability of the host State's legal and business framework.<sup>471</sup> As noted by investment treaty tribunals *"the doctrine of legitimate expectations is 'firmly rooted in arbitral practice' as part of the FET standard"*.<sup>472</sup> In line with this position, the arbitral tribunal in *Arif v Moldova* elaborated that where an investor's *"expectations have an objective basis, and are not fanciful or the result of misplaced optimism, then they are described as 'legitimate expectations'."*<sup>473</sup> The tribunal went on to explain that:

*"an investor's legitimate expectations might be breached not only by a substantive change in policy, but also by the treatment of the investor during the process of the change of policy. It has been said that an investor's legitimate expectations should be treated with transparency, free from ambiguity, consistently, and within a framework of a proper exercise of powers. Consistency by the State in its relations with the investor is an important element of the fair and equitable treatment standard, whether viewed independently or within the context of legitimate expectations."*<sup>474</sup>

<sup>470</sup> Witness Statement of John Xue, 29 April 2019, ¶ 33; Economist Intelligence Unit Video, available at <http://growthcrossings.economist.com/video/zones-of-influence/> (last accessed on 11 April 2019), **C-009**; Transcript of the Economist Intelligence Video, 21 April 2016, **C-010**.

<sup>471</sup> *Olin Holdings Ltd v Libya*, ICC Case No. 20355/MCP, Award, 25 May 2018, ¶ 269, **CLA-071**; *International Thunderbird Gaming Corporation v United Mexican States*, UNCITRAL, Award, 26 January 2006, ¶ 147, **CLA-072**; *Total S.A. v Argentina*, ICSID Case No. ARB/04/01, Decision on Liability, 27 December 2010, ¶ 118, **CLA-029**; *Gavrilović and Gavrilović D.O.O. v Republic of Croatia*, ICSID Case No. ARB/12/39, Award, 25 July 2018, ¶¶ 954-955, **CLA-043**; *Tecnicas Medioambientales Tecmed S.A. v United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154, **CLA-063**; *El Paso Energy International Company v The Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 348, **CLA-033**; *EDF (Services) Limited v Romania*, ICSID Case No. ARB/05/13, Award, 8 October 2009, ¶ 216, **CLA-086**; *Gold Reserve Inc v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 571, **CLA-088**; *Franck Charles Arif v Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 543, **CLA-089**.

<sup>472</sup> *Crystalex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 546, **CLA-090** citing *Yuri Bogdanov and Yulia Bogdanov v Republic of Moldova*, SCC Case No. V091/2012, Final Award, 16 April 2013, ¶ 183, **CLA-091**. See also *Ioan Micula, Viorel Micula & others v Romania*, ICSID Case No. ARB/05/20, Award, 11 December 2013, ¶ 667, **CLA-092**; L Reed, S Consedine, "Chapter 20: Fair and Equitable Treatment: Legitimate Expectations and Transparency", in Meg Kinnear, Geraldine R. Fischer, et al. (eds), *Building International Investment Law: The First 50 Years of ICSID*, (Kluwer Law International; Kluwer Law International 2015) pp. 283 - 29, **CLA-093**.

<sup>473</sup> *Franck Charles Arif v Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 532, **CLA-089**.

<sup>474</sup> *Franck Charles Arif v Republic of Moldova*, ICSID Case No. ARB/11/23, Award, 8 April 2013, ¶ 538, **CLA-089**.

249. This is reflected in the seminal decision of the arbitral tribunal in *Tecmed v Mexico*, as follows:

*"[t]he Arbitral Tribunal considers that this provision of the Agreement [fair and equitable treatment], in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will govern its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations."*<sup>475</sup>

250. In addition to the rights acquired by the Claimant under the Fucheng Industrial Park Agreement and by Zhongfu Nigeria under the JVA, the Claimant relied on specific assurances from the Ogun State Government in relation to its investment. In particular, in April 2014, following rumours circulating in the Zone about attempts of NSG to take over the Zone - claiming NSG had acquired rights from the past manager CAI and that this entitled it to rights in the Zone - Zhongfu Nigeria received explicit assurances from the Ogun State Government that Zhongfu Nigeria was the legitimate manager of the Zone:

*"It must be stressed that OGSF did not at any time sell any portion of the [Zone] to [CAI]. Further, the State Government has no dealing whosoever [sic.] with 'The New South Group', either. Consequently, [Zhongfu Nigeria] is enjoined [sic.] to be pro-active in the Management/Administration of [the Zone] by promptly warding off activities of trespassers capable of causing confusion in the Zone."*<sup>476</sup>

251. Mr. Onas, as co-ordinator of the Zone, also wrote to Zhongfu Nigeria stating:

*"And finally, we should ensure that we all work as a team for the best interest of our country, our team as well as our investment and I can assure you that the Ogun State government is willing to continually give its maximum support so far as we comply with the rules, regulations and contract binding on the parties."*<sup>477</sup>

<sup>475</sup> *Tecnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 154, **CLA-063**. See also *Saluka Investments B.V. v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, ¶¶ 301-302, **CLA-087**, ("The standard of 'fair and equitable' is therefore closely tied to the notion of legitimate expectations, which is the dominant element of that standard."); *Electrabel v Hungary*, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, 30 November 2012, ¶ 7.75, **CLA-094**, ("It is widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor's reasonable and legitimate expectations"); *Gold Reserve Inc. v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/09/1, Award, 22 September 2014, ¶ 570, **CLA-088**; *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile*, ICSID Case No. ARB/01/7, Award, 25 May 2004, ¶ 114, **CLA-059**; *El Paso Energy International Company v Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 348, **CLA-033**.

<sup>476</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Zhongfu International Investment (NIG), 28 April 2014, **C-096**.

<sup>477</sup> Letter from Zenith Global Merchant Ltd to Zhongfu International Investment (NIG) FZE, 29 April 2014, **C-097**.

252. These assurances were consistent with the Preamble to the JVA which specifically acknowledged that CAI's management rights had been terminated by the Ogun State Government on 15 March 2012.<sup>478</sup> The Claimant, therefore, had a legitimate expectation that the Ogun State Government and Nigeria would adhere to those assurances and respect the Claimant's legitimate expectations.
253. Moreover, it should not require stating that the Claimant had a legitimate expectation that it would not be threatened with forcible removal from the Zone and have its employees "terrorised", wrongfully detained and beaten.

## **B Nigeria Failed to Afford Continuous Protection to the Claimant's Investment**

254. Article 2(2) of the Treaty provides that:

*"[i]nvestments of the investors of either Contracting Party shall enjoy the continuous protection in the territory of the other Contracting Party."*<sup>479</sup>

255. BITs use various formulations of "continuous protection", which can be articulated as the "full protection and security", "constant protection and security", or "full legal protection and security". It is generally accepted that such variations in the wording used in BITs do not refer to a material difference in the level of protection that is afforded to an investor's investment.<sup>480</sup> Similarly worded provisions to that of Article 2(2) in the Treaty in other BITs have been held by investment treaty tribunals to refer to the same standard of protection as the "full and protection and security" standard.<sup>481</sup>

256. In *Frontier Petroleum Services Ltd v. Czech Republic* the tribunal held that:

*"[m]ost bilateral or multilateral treaties dealing with the protection of investments contain clauses with the same or similar wording as the full protection and security clause in Article III(1) of the BIT. Some omit the adjective "full", others put "security" before "protection" and some refer to "most constant protection and security", but these variations do not appear to carry any substantive significance."*<sup>482</sup>

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<sup>478</sup> JVA, Preamble, **C-008**.

<sup>479</sup> China-Nigeria BIT, Art. 2(2), **CLA-001**.

<sup>480</sup> See *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Award, 12 November 2010, ¶ 260, **CLA-095**; *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, Egi-Series Investments LLC, and BSS-EMG Investors LLC v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶ 240, **CLA-042**.

<sup>481</sup> See *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, Egi-Series Investments LLC, and BSS-EMG Investors LLC v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶ 240, **CLA-042**.

<sup>482</sup> *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Award, 12 November 2010, ¶ 260, **CLA-095**.

257. Nigeria is therefore bound by the obligation to provide full protection and security to the Claimant's investment.
258. It has been accepted by arbitral tribunals that the standard imposes the duty on States to act with due diligence to take steps to protect and secure investments from damage and must be assessed according to the circumstances of the case.<sup>483</sup> The arbitral tribunal in *Asian Agricultural Products v. Republic of Sri Lanka* quoted with approval Professor Freeman's definition of due diligence as follows:
- "The 'due diligence' is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances."*<sup>484</sup>
259. The due diligence obligation extends to State actions and inactions.<sup>485</sup> The investment treaty tribunal in *Ampal v. Egypt* held that *"the operation of the standard does not depend upon whether the acts that give rise to the damage to the Claimants' investment are committed by agents of State (which are thus directly attributable to the State) or by third parties. Rather the focus is on the acts or omissions of the State in addressing the unrest that gives rise to the damage."*<sup>486</sup>
260. In *Asian Agricultural Products v. Sri Lanka*, the investment treaty tribunal, in finding that Sri Lanka had breached the full protection and security standard, noted that Sri Lanka had an obligation of due diligence that required *"undertaking all possible measures that could be reasonably expected to prevent the eventual occurrence of killings and property destructions."*<sup>487</sup> In that case, the Sri Lankan security forces destroyed the claimant's investment, a shrimp farm, in the course of a counter-insurgency operation.<sup>488</sup> The tribunal further noted that the requirement of due diligence does not require negligence on the part of the host State: *"the violation of international law entailing the State's responsibility has*

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<sup>483</sup> See *South American Silver Limited v Plurinational State of Bolivia*, PCA Case No. 2013-15, Award, 30 August 2018, ¶ 687, **CLA-096**, *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, Egi-Series Investments LLC, and BSS-EMG Investors LLC v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶ 241, **CLA-042**.

<sup>484</sup> See *Asian Agricultural Products LTD (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 77, **CLA-097**.

<sup>485</sup> See *CME Czech Republic B.V. v Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 613, **CLA-098**, *Wena Hotels Limited v The Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, ¶¶ 84-89, **CLA-099**, *Waguih Elie George Siag & Clorinda Vecchi v Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶¶ 447-448, **CLA-100**.

<sup>486</sup> See *Ampal-American Israel Corp., EGI-Fund (08-10) Investors LLC, Egi-Series Investments LLC, and BSS-EMG Investors LLC v Arab Republic of Egypt*, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, 21 February 2017, ¶ 245, **CLA-042**.

<sup>487</sup> *Asian Agricultural Products LTD (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 85(B), **CLA-097**.

<sup>488</sup> *Asian Agricultural Products LTD (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶ 77, **CLA-097**.



to be considered constituted by 'the mere lack or want of diligence,' without any need to establish malice or negligence."<sup>489</sup>

261. The due diligence obligation applies to situations where the State breaches its treaty obligations by failing to protect an investment from the infliction of physical damage.<sup>490</sup> In the case of *Tatneft v Ukraine*, the investment treaty tribunal considered the events of the case surrounding the seizure of the Kremenchug refinery and the change in the company's management that followed and held that "*the forceful entry into the premises of the refinery and the retention of certain officials in their offices, just like the carrying of weapons, are all pointing in the direction of a breach of full protection and security in the realm of police protection and physical security*".<sup>491</sup>
262. In cases where investors' employees were harassed, investment treaty tribunals have found that the host States breached the obligation to provide full protection and security. For example, in *Biwater Gauff v Tanzania* the tribunal found that even if no force was used in removing the management from the offices or in the seizure of claimant's premises, these acts were "*unnecessary and abusive and amounted to a violation by the Republic of its obligation to ensure full protection and security*".<sup>492</sup>
263. Moreover, the tribunals in *AMG v Zaire*, *Siag v Egypt* and *Wena Hotels v Egypt* held that the host State cannot rely on domestic laws to detract from its obligation to provide full protection and security, having an obligation of vigilance, in the sense that it must take all measures necessary to ensure the full protection and security of the investments.<sup>493</sup>
264. Not only did Nigeria fail to take measures necessary to ensure the protection of the Claimant's investment as required under the Treaty, Nigeria actively took measures to eviscerate that investment. These measures included:
- (a) Nigerian State organs issuing repeated threats to the physical security to the Claimant's management and its staff. For example, on 16 July 2016, Zhongfu Nigeria's CEO Dr. Han received a direct threat via a text from the Secretary to the

<sup>489</sup> *Asian Agricultural Products LTD (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 27 June 1990, ¶¶ 3, 86, **CLA-097**.

<sup>490</sup> See *Wena Hotels Limited v Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, ¶¶ 84-85, **CLA-099**.

<sup>491</sup> See *OAO Tatneft v Ukraine*, UNCITRAL, Award on the Merits, 29 July 2014, ¶ 428, **CLA-101**.

<sup>492</sup> *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 24 July 2008, ¶¶ 729-731, **CLA-061**.

<sup>493</sup> *American Manufacturing & Trading, Inc. v Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, ¶ 6.08, **CLA-102**; *Waguih Elie George Siag & Clorinda Vecchi v Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 485, **CLA-100**. *Wena Hotels Limited v. The Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2000, ¶ 84, **CLA-099**.



Ogun State Government to *"leave peacefully when there is [an] opportunity to do so, and avoid forceful removal, complications and possible prosecution."*<sup>494</sup>

- (b) On 17 August 2016, the police arrested Zhongfu Nigeria's CFO Mr. Zhao without proper explanation, harassed and detained him in appalling conditions, deprived him of food and water, threatened him with violence and physically beat him.<sup>495</sup>
- (c) Nigerian State authorities, including NEPZA and the Nigerian police, took over the Zone in July 2016 and assisted the NSG to forcibly remove Zhongfu Nigeria. The police and the NSG moreover harassed and intimidated Zhongfu Nigeria's employees. An account from Zhongfu Nigeria's employee Mr. Zhang Bin (Steven), noted *"so many unbelievable and illegal things happened to [him] and our [staff]"*.<sup>496</sup> Steven and his colleague Lisa *"were not allowed to enter the Zone, after talking with police"*, *"were not allowed to get off of the car and... ten local securities [were sent] to stand around the car and harassed [them]"*. Their colleague Desmond *"was stopped by [the] securities from coming close to [Steven's and Lisa's] car."* They *"were treated like prisoners and all the Nigerian Government officers sat in their office without helping or even asking...what happened"*. When Steven tried to visit the Zone in February 2017, the NSG *"refused to allow [him] in [the Zone] and detained [him] at the gate for more than 2 hours"* and then they *"cut off the power and water in [his] room to force [him to] leave"*. They did not *"allow [them] to use [their] company vehicles, [...] to go buy vegetables and food. All [their] construction materials and tools were occupied by [NSG]"*. Since August 2016 NEPZA, in cooperation with the NSG, *"always refused to accept and process the documents submitted [to NEPZA]"*, *"occupied all [Zhongfu Nigeria's] offices and equipment and blocked the corridor with sofa and chairs to [the] financial office. [They] were not even allowed to enter the offices to pick up [their] personal stuff"*, all the office locks were changed, NEPZA used Zhongfu Nigeria's *"dormitories and kitchen without any permission"* *"cracked the lock and entered"*. Zhongfu Nigeria's *"employees were all treated like prisoners in [Nigeria], without...any basic human rights" and received life threats "so many times"*.<sup>497</sup>

265. In recent years, investment treaty jurisprudence has moved on to recognise that the obligation of due diligence extends to a framework that grants administrative and legal

<sup>494</sup> Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**; Email from Jason Han to Elizabeth Uwaifo, 25 September 2016, **C-012**.

<sup>495</sup> See Witness Statement of Mr. Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 10-36.

<sup>496</sup> Report from Mr. Steven Allen, 30 March 2017, **C-183**.

<sup>497</sup> Report from Mr. Steven Allen, 30 March 2017, **C-183**.

security and not just to steps taken to forestall the infliction of physical damage on the investor and their investment.

266. In *Plama v. Bulgaria*, the investment treaty tribunal held that "*the standard includes, in this manner, an obligation actively to create a framework that grants security.*"<sup>498</sup> In *Jürgen Wirtgen and others v. Czech Republic*, the tribunal pointed out that "*the full protection and security standard requires a state to provide a framework that protects an investment from adverse interference.*"<sup>499</sup>
267. In *National Grid v Argentina*, the arbitral tribunal in interpreting the Argentina-UK BIT, noted that "*the phrase 'protection and constant security' as related to the subject matter of the Treaty does not carry with it the implication that this protection is inherently limited to protection and security of physical assets.*"<sup>500</sup>
268. The investment treaty tribunal in *Azurix v. Argentina* stated that "*it is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view.*"<sup>501</sup>
269. As the events described above show, Nigeria failed to protect the Claimant's contractual rights under the Fucheng Industrial Park Agreement by eviscerating those rights through, amongst other actions, depriving Zhongfu Nigeria of the ability to operate effectively in the Zone.

### **C Nigeria Took Unreasonable Measures**

270. Article 2(3) of the China-Nigeria BIT prohibits Nigeria from taking "*any unreasonable or discriminatory measures against the management, maintenance, use, enjoyment and disposal of the investments by the investors of the other Contracting Party.*"<sup>502</sup> The use of the disjunctive term "or" between "unreasonable" and "discriminatory" means that Nigeria will be in breach of its obligations under Article 2(3) of the China-Nigeria BIT through either "unreasonable" or "discriminatory" measures against the Claimant's investment.
271. The tribunal in *National Grid v Argentina* observed, in relation to an almost identical standard as that in Article 2(3) of the China-Nigeria BIT,<sup>503</sup> that the "*plain meaning of the*

<sup>498</sup> *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008, ¶ 180, **CLA-025**.

<sup>499</sup> See *Jürgen Wirtgen and others v. Czech Republic*, PCA Case No. 2014-03, Final Award, 11 October 2017, ¶ 451, **CLA-103**.

<sup>500</sup> See *National Grid PLC v Argentina Republic*, UNCITRAL, Award, 3 November 2008, ¶ 189, **CLA-104**.

<sup>501</sup> See *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 408, **CLA-105**.

<sup>502</sup> China-Nigeria BIT, Art. 2(3) (emphasis added), **CLA-001**.

<sup>503</sup> Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Argentine Republic for the Promotion and Protection of Investments, 19 February 1993, **CLA-106**, Art. 2(2) ("*Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party.*"(emphasis added)).

*terms 'unreasonable' and 'arbitrary' is substantially the same in the sense of something done capriciously, without reason.*"<sup>504</sup>

272. In interpreting Article 2(3) of the China-Nigeria BIT, the Tribunal must consider whether Nigeria's conduct is unreasonable from the objective perspective of what both States Parties to the China-Nigeria BIT would have anticipated in advance of the unreasonable conduct. The tribunal accepted an articulation of the unreasonable measures standard in *CME v Czech Republic* as follows:

*"As with the fair and equitable standard, the determination of reasonableness is in its essence a matter for the arbitrator's judgment. That judgment must be exercised within the context of asking what the parties to bilateral investment treaties should jointly anticipate, in advance of a challenged action, to be appropriate behaviour in light of the goals of the Treaty."*<sup>505</sup>

273. CME, the claimant in this case, entered into a service agreement with the host State which the latter terminated, disrupting the legal and commercial status of the investor's company in the Czech Republic. The tribunal found that the Czech Republic's actions were unreasonable:

*"[o]n the face of it, the Media Council's actions and inactions in 1996 and 1999 were unreasonable as the clear intention of the 1996 actions was to deprive the foreign investor of the exclusive use of the Licence under the [Agreement] and the clear intention of the 1999 actions and inactions was to collude with the foreign investor's Czech business partner to deprive the foreign investor of its investment. ..."*<sup>506</sup>

274. Similarly, in *Siag v Egypt*, the tribunal found that the measures adopted by the Egyptian Minister of Tourism to cancel the contract to develop land and transfer ownership of the land to the government was unreasonable "*in the ordinary meaning of that term*".<sup>507</sup> Such unreasonableness was found to be evidenced in the State seizing control of the investor's investment based on a resolution at time when the claimant's application to enjoin the resolution was pending.<sup>508</sup>

275. As has been demonstrated, the measures adopted by Nigeria in relation to the Claimant's investment were unreasonable in multiple respects. Without repeating each and every action of Nigeria which was unreasonable, it is readily apparent that Nigeria violated its

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<sup>504</sup> *National Grid plc v The Argentine Republic*, UNCITRAL, Award, 3 November 2008, ¶ 197, **CLA-104**.

<sup>505</sup> *CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶158, **CLA-98**.

<sup>506</sup> *CME Czech Republic BV v Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 612, **CLA-98**.

<sup>507</sup> *Waguih Elie George Siag & Clorinda Vecchi v Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 459, **CLA-100**.

<sup>508</sup> *Waguih Elie George Siag & Clorinda Vecchi v Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, ¶ 459, **CLA-100**.

obligation not to take unreasonable measures under Article 2(3) of the BIT including as follows:

- (a) Nigeria, through the Ogun State Government, gave explicit assurances in 2014 to Zhongfu Nigeria that it had the rights to manage and develop the Zone.<sup>509</sup> These assurances were over and above the explicit rights contained in the Fucheng Industrial Park Agreement and the JVA. The Claimant was induced to proceed with its investment under these assurances of Nigeria and it was unreasonable for Nigeria to reverse its position contrary to the assurances it had given and use the police and NEPZA to remove Zhongfu Nigeria from the Zone;
- (b) the Ogun State Government, NEPZA and the Nigerian police harassed and intimidated Zhongfu Nigeria's Management Team and employees; and
- (c) the Ogun High Court issued an anti-suit injunction preventing Zhongfu Nigeria from proceeding to have its contractual rights under the JVA heard through arbitration pursuant to the JVA.

**D Nigeria Wrongfully Expropriated the Claimant's Investment Without Compensation**

276. Article 4 of the China-Nigeria BIT provides that:

*"Neither Contracting Party shall expropriate, nationalize or take similar measures (hereinafter referred to as "expropriation") against the investments of investors of the other Contracting Party in its territory, unless the following conditions are met:*

- (a) for the public interests;*
- (b) under domestic legal procedure;*
- (c) without discrimination;*
- (d) against fair compensation.*

*The compensation mentioned in Paragraph 1 (d) of this Article shall be equivalent to the value of the expropriated investments immediately before the expropriation is proclaimed, be convertible and freely transferable. The compensation shall be paid without unreasonable delay and include interest at a normal commercial rate."<sup>510</sup>*

277. Nigeria's actions, including the forcible eviction of Zhongfu Nigeria from the Zone and the wrongful taking of its property, together with the wrongful taking of the Claimant's rights pursuant to the Fucheng Industrial Park Agreement and the JVA constitute an

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<sup>509</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Zhongfu International Investment (NIG), 28 April 2014, C-096.

<sup>510</sup> China-Nigeria BIT, Art. 4, CLA-001.

expropriation of the Claimant's investment in Nigeria, or at least a substantial deprivation in the value of the Claimant's investment, contrary to Nigeria's obligation in Article 4 of the BIT and under international law.

278. The failure by Nigeria to satisfy any one of the conditions in Article 4 of the China-Nigeria BIT renders unlawful Nigeria's taking of the Claimant's investment. The Claimant has not received any compensation for the expropriation of its investment. It was therefore an unlawful expropriation in violation of Article 4 of the BIT. In addition, the expropriation was not done for a public purpose, nor under a domestic legal procedure. As such, it is also unlawful under these grounds.

**1. Nigeria's actions constitute a "taking" that is unlawful under the China-Nigeria BIT and international law**

279. Expropriation is the deprivation, or "taking", of private property by actions of the State without the owner's consent.<sup>511</sup> As the tribunal in *Metalclad* held, a "taking" may be direct or indirect:

*"[e]xpropriation [...] includes not only, open, deliberate and acknowledged takings of property, such as outright seizure or formal or obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the host State."*<sup>512</sup>

280. Direct expropriation relates to the overt seizure of a foreign investor's property, or the title to such property, by the host State, including cases where "*no explicit attempt is made [by the State] to affect the legal title to the property, and even though the respondent State may specifically disclaim any such intention.*"<sup>513</sup> Indirect expropriation occurs whenever a State takes steps "*that effectively neutralize the benefit of the property for the foreign owner*".<sup>514</sup> For example, this type of expropriation occurs when a host State undertook actions which "*radically deprived [the claimant] of the economical use and enjoyment of its investments, as if the rights related thereto —such as the income or benefits related to the [investment] or to its exploitation— had ceased to exist. In other words, if due to the actions*

<sup>511</sup> Nigel Blackaby and others, *Redfern & Hunter: Law and Practice of International Commercial Arbitration* (Oxford University Press 6<sup>th</sup> edn 2015), ¶ 8.81, **CLA-005**.

<sup>512</sup> *Metalclad Corporation v The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 103, **CLA-078**.

<sup>513</sup> GC Christie, *What Constitutes a Taking of Property Under International Law?*, 38 *British Yearbook of International Law* 307, (1962), p. 309, **CLA-107**.

<sup>514</sup> *CME Czech Republic B.V. v Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, ¶ 604, **CLA-098**.

*of the [r]espondent, the assets involved have lost their value or economic use for their holder and the extent of the loss.*"<sup>515</sup>

281. Pursuant to the China-Nigeria BIT, expropriation extends to the taking of "investment" as defined in Article 1(1) of the BIT, including "*claims to money or to any other performance having an economic value associated with an investment*"<sup>516</sup> and "*business concessions conferred by law or under contract permitted by law.*"<sup>517</sup>
282. Investment treaty jurisprudence supports a wide concept of "property" that includes, for purposes of expropriation and equivalent measures, real property as well as rights acquired by contract or law. For example, the tribunal in *Azurix v Argentina* observed that it "*is widely accepted by the case law and the doctrine*" that "*contract rights may be expropriated.*"<sup>518</sup> Similarly, the *Vivendi II* tribunal stated that: "[t]here can be no doubt that *contractual rights are capable of being expropriated.*"<sup>519</sup>
283. As demonstrated above, Nigeria's actions constitute an expropriation of the Claimant's investment under the China-Nigeria BIT and international law. These actions include, but are not limited to:
- (a) Nigeria depriving the Claimant of its land use rights and economic benefit under the Fucheng Industrial Park Agreement;
  - (b) Nigeria wrongfully evicting and forcibly removing Zhongfu Nigeria from the Zone and from its position as manager / administrator of the Zone through the actions of the Ogun State Government and using the Nigerian police and NEPZA to enforce this decision;
  - (c) Nigeria eviscerating Zhongfu Nigeria's rights under the JVA by taking over the Zone through the actions of the Nigerian police and NEPZA to enforce the Ogun State Government's purported termination of the JVA;

<sup>515</sup> *Tecnicas Medioambientales Tecmed SA v United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, ¶ 115, **CLA-063**.

<sup>516</sup> China-Nigeria BIT, Art. 1(1)(c), **CLA-001**.

<sup>517</sup> China-Nigeria BIT, Art. 1(1)(e), **CLA-001**.

<sup>518</sup> *Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 314, **CLA-105**.

<sup>519</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Second Presentation of the Case, Award, 20 August 2007, ¶ 7.5.4, **CLA-108**. This is a long-standing principle that can be traced back to earlier international authorities such as: *Rudloff Case*, US-Venezuela Mixed Claims Commission, Interlocutory Decision, RIAA Vol IX, 1903 - 1905, p. 250, **CLA-109**; *Norwegian Shipowners' Claims*, PCA Case No 1921-01, Award, 13 October 1922, p. 11, **CLA-110**; and *Certain German Interests in Polish Upper Silesia*, Judgment, 25 May 1926, PCIJ (Series No 7), p. 44, **CLA-111**. See also *Phillips Petroleum Co. Iran v. Iran*, Iran-U.S. Claims Tribunal, Award No. 425-9-2, 29 June 1989, ¶ 76 (the Tribunal held that expropriation gives rise to liability for compensation "*whether the expropriation is formal or de facto and whether the property is tangible, such as real estate or a factory, or intangible, such as the contractual rights involved in the present Case.*"), **CLA-112**.



- (d) Nigeria seizing Zhongfu Nigeria's physical assets, including cars, warehouses and construction equipment (comprising, for example, cement mixers, payloaders, a crane, road rollers, bulldozers and tipper trucks),<sup>520</sup> and
- (e) Nigeria - through NEPZA and the Nigerian police - harassing, intimidating and detaining Zhongfu Nigeria's staff, such that its business could no longer function in Nigeria and rendering the value of the business worthless.

284. The expropriatory conduct was unlawful as Nigeria failed to comply with the requirements in Article 4 of the BIT and international law, which prohibit Nigeria from expropriating investments of Chinese investors unless the measures concerned were for the public interest, under a domestic legal procedure, without discrimination and accompanied by the payment of fair compensation.<sup>521</sup> Through the actions of Nigerian State organs, including the Ogun State Government, NEPZA and the Nigerian police, Nigeria's conduct entailed an unlawful expropriation as it failed to provide the Claimant with any compensation for the taking of the Claimant's property - let alone "fair" compensation as required under Article 4 of the BIT. In addition, Nigeria's expropriation of the Claimant's investment was unlawful as it was not done "*under domestic legal procedure*" nor "*for the public interests*."<sup>522</sup>

**2. Nigeria's taking of the Claimant's investment violates Article 4 of the China-Nigeria BIT because the taking was not accompanied by the payment of fair compensation**

285. Article 4 of the China-Nigeria BIT requires that for an expropriation to be lawful it must, among other things, provide "*fair compensation*" for the investment and such compensation must be "*equivalent to the value of the expropriated investments immediately before the expropriation is proclaimed, be convertible and freely transferable [and] shall be paid without unreasonable delay and include interest at a normal commercial rate*."<sup>523</sup>

286. Previous investment treaty tribunals have found, in relation to provisions similar to Article 4 of the China-Nigeria BIT, that a claimant need only show that just compensation was not provided to prove an unlawful expropriation. In *Funnekotter v Zimbabwe*,<sup>524</sup> Zimbabwe expropriated the claimants' investments in commercial farms under a government land acquisition programme, as well as by means of physical invasions.<sup>525</sup> Zimbabwe accepted

<sup>520</sup> See Witness Statement of Jason Han, 30 April 2019, ¶¶ 66, 72.

<sup>521</sup> See Jennings R., Watts. A., *Oppenheim's International Law* (Oxford University Press 9<sup>th</sup> ed), pp. 920-921, **CLA-113**.

<sup>522</sup> See China-Nigeria BIT, Art. 4, **CLA-001**.

<sup>523</sup> China-Nigeria BIT, Art. 1(1)(e), **CLA-001**.

<sup>524</sup> *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No ARB/05/6, Award, 22 April 2009, **CLA-114**.

<sup>525</sup> *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No ARB/05/6, Award, 22 April 2009, ¶¶ 21-26, **CLA-114**.

that its actions were tantamount to expropriation,<sup>526</sup> but claimed that they were in keeping with Article 6 of the Netherlands-Zimbabwe BIT, and only a state of emergency in the country had prevented them from providing the claimants with compensation.<sup>527</sup> The tribunal, rejecting Zimbabwe's argument, found that the condition of providing just compensation in the BIT had not been met. As a result, the tribunal did not need to consider any of the other conditions in the expropriation provision in order to find that an unlawful expropriation had occurred.<sup>528</sup>

287. In the present case, Nigeria's failure to pay any compensation to the Claimant is sufficient to find that Nigeria's taking of the Claimant's investment was an unlawful expropriation.

### 3. Nigeria's taking of the Claimant's investment violates Article 4 of the BIT because the taking was not for a public purpose

288. Nigeria's expropriation of the Claimant's investment also did not serve any public purpose. The requirement that a lawful expropriation must be made for a public purpose is a rule of international law.<sup>529</sup> For example, in *ADC v Hungary*, the tribunal noted that:

*“... a treaty requirement for ‘public interest’ requires some genuine interest of the public. If mere reference to ‘public interest’ can magically put such interest into existence and therefore satisfy this requirement, then this requirement would be rendered meaningless since the Tribunal can imagine no situation where this requirement would not have been met.”*<sup>530</sup>

289. In *BP Exploration Co v Libya*, the *ad hoc* arbitrator held that the taking of a foreign oil concession was an act of political retaliation and, as such, did not qualify as a public purpose. In that case, the reason for the expropriation was Libya's belief that the United Kingdom had encouraged Iran to occupy certain Arab islands.<sup>531</sup> The tribunal concluded that the taking of the company's property, rights and interests “*violate[d] public international law as it was made for purely extraneous political reasons and was arbitrary and discriminatory in character*”.<sup>532</sup>

<sup>526</sup> *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No ARB/05/6, Award, 22 April 2009, ¶¶ 97, **CLA-114**.

<sup>527</sup> *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No ARB/05/6, Award, 22 April 2009, ¶¶ 102, 106, **CLA-114**.

<sup>528</sup> *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No ARB/05/6, Award, 22 April 2009, ¶¶ 106-107, **CLA-114**.

<sup>529</sup> UNCTAD, *Expropriation: A Sequel*, UNCTAD Series on Issues in International Investment Agreements II (United Nations 2012), pp. 28-29, available at [http://unctad.org/en/Docs/unctaddiaeia2011d7\\_en.pdf](http://unctad.org/en/Docs/unctaddiaeia2011d7_en.pdf) (last accessed on 11 February 2018), **CLA-115** (noting that the taking of property must be motivated by the pursuance of a legitimate welfare objective, as opposed to a purely private gain or an illicit end).

<sup>530</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006, ¶ 432, **CLA-076**.

<sup>531</sup> *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic*, 53 ILR 297, Award, 10 October 1973 and 1 August 1974, p. 315, **CLA-116**.

<sup>532</sup> *BP Exploration Company (Libya) Limited v Government of the Libyan Arab Republic*, 53 ILR 297, Award, 10 October 1973 and 1 August 1974, p. 329, **CLA-116**.

290. In *Siag v Egypt*, the Egyptian Government expropriated the claimant's investment, citing the claimant's inability to fulfil its commitments stipulated in the applicable contract on time, but without reference to a public purpose.<sup>533</sup> The tribunal noted:

*"that because an investment was eventually put to public use, the expropriation of that investment [cannot] necessarily be said to have been 'for' a public purpose..... The Tribunal finds on the evidence that in the present circumstances, [c]laimants' land was not expropriated 'for a public purpose.'"*<sup>534</sup>

291. It has also been recognised by investment treaty tribunals that State measures taken must be proportionate to the public interest. In *Tecmed v Mexico*, the arbitral tribunal noted that:

*"[t]he Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality. Although the analysis starts at the due deference owing to the State when defining the issues that affect its public policy or the interests of society as a whole, as well as the actions that will be implemented to protect such values, such situation does not prevent the Arbitral Tribunal, without thereby questioning such due deference, from examining the actions of the State... to determine whether such measures are reasonable with respect to their goals, the deprivation of economic rights and the legitimate expectations of who suffered such deprivation. There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure. To value such charge or weight, it is very important to measure the size of the ownership deprivation caused by the actions of the state and whether such deprivation was compensated or not."*<sup>535</sup>

292. Nigeria's evisceration of the Fucheng Industrial Park Agreement by expelling Zhongfu Nigeria from the Zone was not even purportedly justified by Nigeria with reference to an alleged public purpose. The same lack of any public purpose applies to the harassment and expulsion by Nigeria of Zhongfu Nigeria's personnel from the Zone and from Nigeria, as well as to the taking of the physical assets of Zhongfu Nigeria.
293. While Nigeria's termination of the JVA was done with reference to Note 1601, it cannot be said to have been for a proper public purpose, nor indeed was it proportionate to the public interest.

<sup>533</sup> *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award, 1 June 2009, ¶ 431, **CLA-100**.

<sup>534</sup> *Waguih Elie George Siag and Clorinda Vecchi v The Arab Republic of Egypt*, ICSID Case No ARB/05/15, Award, 1 June 2009, ¶ 432, **CLA-100**.

<sup>535</sup> *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No ARB (AF)/00/2, Award, 29 May 2003, ¶ 122, **CLA-063**; Affirmed in *Marfin Investment Group Holdings S.A. and others v Republic of Cyprus*, ICSID Case No ARB/13/27, Award, 26 July 2018, ¶ 982, **CLA-117**.

**4. Nigeria's taking of the Claimant's investment violates Article 4 of the China-Nigeria BIT because the taking was not done under a domestic legal procedure, nor in accordance with the standards of treatment provided under the China-Nigeria BIT**

294. Article 4 of the China-Nigeria BIT requires that for an expropriation to be lawful it must be done "*under domestic legal procedure*". This corresponds to the international law principle - which is reflected in many BITs - that expropriation must be done in accordance with "*due process*".<sup>536</sup> This principle has been repeatedly recognised by investment treaty tribunals. For example, the tribunal in *ADC v Hungary* commented on the content of the due process requirement when finding that Hungary breached this obligation:

*"due process of law', in the expropriation context, demands an actual and substantive legal procedure for a foreign investor to raise its claims against the depriving actions already taken or about to be taken against it. Some basic legal mechanisms, such as reasonable advance notice, a fair hearing and an unbiased and impartial adjudicator to assess the actions in dispute, are expected to be readily available and accessible to the investor to make such legal procedure meaningful. In general, the legal procedure must be of a nature to grant an affected investor a reasonable chance within a reasonable time to claim its legitimate rights and have its claims heard. If no legal procedure of such nature exists at all, the argument that 'the actions are taken under due process of law' rings hollow."*<sup>537</sup>

295. Nigeria's expropriation of the Claimant's investment did not follow a legal procedure and a number of Nigeria's actions violated the requirement of due process. This included, among other conduct:

- (a) A failure to acknowledge Zhongfu Nigeria's rights under the Fucheng Industrial Park Agreement, let alone to deal with them in accordance with due process rather than eviscerating them altogether through Zhongfu Nigeria's harassment and expulsion from the Zone and Nigeria;
- (b) A failure to provide Zhongfu Nigeria with an opportunity to respond to the Ogun State Government's arbitrary actions to terminate the JVA and replace Zhongfu Nigeria's management rights in the Zone and shareholding in OGFTZ Company. The Ogun State Government sent Zhongfu Nigeria a letter dated 12 April 2016 (entitled "*Replacement of shareholdings owner of China Africa Investment Limited and Management right of [the Zone]*"). When Zhongfu Nigeria requested a meeting to

<sup>536</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v The Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006, ¶ 435, **CLA-076**.

<sup>537</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006, ¶ 435, **CLA-076**. See also *Ioannis Kardassopoulos v Georgia*, ICSID Case No ARB/05/18, Award, 3 March 2010, ¶¶ 395-408, **CLA-075**; *Olin Holdings Limited v State of Libya*, ICC Case No20355/MCP, Final Award, 25 May 2018, ¶ 172, **CLA-071**.

clarify its legitimate right in OGFTZ Company and the Zone on 26 May 2016, the Ogun State Government responded the very next day - thereby bypassing any discussion with Zhongfu Nigeria - by summarily purporting to terminate the JVA;<sup>538</sup>

- (c) Engaging the Nigerian police to forcibly remove - without legal process - Zhongfu Nigeria from the Zone and taking Zhongfu Nigeria's assets;
- (d) A failure to abide by direct instructions from the Solicitor-General of Nigeria to preserve the *status quo ante* in the Zone and not to remove Zhongfu Nigeria from the Zone; and
- (e) Intimidating and harassing the Management Team and Zhongfu Nigeria employees to leave the Zone and eventually the country.

### VIII. THE CLAIMANT IS ENTITLED TO COMPENSATION FOR ITS LOSSES

296. As a result of Nigeria's breaches of the Treaty, the Claimant is entitled to compensation for the losses it has suffered in relation to its investment in Nigeria. The measures taken by Nigeria have destroyed the Claimant's investment, or alternatively have at least substantially deprived the Claimant of the value of its investment. The Claimant has suffered losses in the form of loss of profits, loss of future profits and loss of assets for which the Claimant is entitled to full compensation. Additionally, the Claimant is entitled to moral damages for the egregious treatment which it suffered at the hands of Nigeria and its State organs. This Section VIII explains the applicable compensation standards (**Section A**), analyses the quantum of compensation owed to the Claimant (**Section B**) and shows that pre-award and post-award interest is applicable (**Section C**).

297. In relation to the valuation of the Claimant's damages for Nigeria's breaches of the Treaty, the Claimant submits the expert report of Mr. Noel Matthews, Senior Managing Director at FTI Consulting ("**FTI**" or "**Mr. Matthews**"), dated 1 May 2019 (the "**FTI Report**"). Mr. Matthews concludes that the value of the Claimant's losses is US\$1,078 million using a DCF method or, alternatively, US\$1,446 million using a comparable transaction method, to which is added interest calculated at one-month US\$ London Inter-bank Offered Rate ("**LIBOR**") plus 2%. Accordingly, Nigeria is obliged to make reparation to the Claimant in these amounts plus compensation for moral damages.

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<sup>538</sup> Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Managing Director of Ogun-Guangdong Free Trade Zone, 12 April 2016, **C-155**; Letter from Zhongfu International Investment (NIG) FZE to Secretary to the State Government of Ogun State, 26 May 2016, **C-157**; Letter from Office of the Secretary to the State Government, Office of the Governor of Ogun State to Zhongfu International Investment (NIG) FZE, 27 May 2016, **C-158**; Note 1601 from the Economic and Commercial Section of the Consulate General of the People's Republic of China in Lagos to the Ogun State Government, 11 March 2016, **C-156**.

**A The Claimant is Entitled to Full Compensation for its Investment which was Unlawfully Taken by the Respondent**

298. In accordance with settled principles of international law, the Claimant seeks full reparation for its losses caused by Nigeria's violations of the Treaty and international law.<sup>539</sup> The duty to make reparation is a fundamental norm which has been affirmed and applied by the ICJ,<sup>540</sup> arbitral tribunals,<sup>541</sup> the European Court of Human Rights<sup>542</sup> and the International Tribunal for the Law of the Sea.<sup>543</sup> As articulated by the PCIJ in the *Chorzów Factory* case:

*"It is a principle of international law that the breach of an engagement involves an obligation to make reparation in an adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself."*<sup>544</sup>

299. Under customary international law, as codified in the ARSIWA, reparation "*shall take the form of restitution, compensation and satisfaction, either singly or in combination*"<sup>545</sup> and "*as far as possible, wipe out all the consequences of the illegal act and re-establish the situation the situation which would, in all probability, have existed if that act had not been committed.*"<sup>546</sup>

300. In the present circumstances, the only practical form of reparation which would wipe out all the consequences of Nigeria's illegal act is for monetary compensation to be paid to the Claimant. In light of the circumstances of the removal of Zhongfu Nigeria from the Zone and the harassment and intimidation of its staff, which resulted in them fleeing Nigeria, restitution would not be an appropriate nor practical remedy.

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<sup>539</sup> ARSIWA, Art. 31(1), **CLA-027**.

<sup>540</sup> See for instance *Case Concerning the Gabčíkovo-Nagymaros Project (Hungary v Slovakia)*, Judgment, 25 September 1997, ICJ Reports 1997, ¶¶ 149-150, **CLA-118**; *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)*, Judgment, 14 February 2002, ICJ Reports 2002, ¶ 76, **CLA-119**.

<sup>541</sup> See for instance *S.D. Myers, Inc. v Canada*, UNICTRAL, Award, 13 November 2000, ¶ 311 ("*The principle of international law stated in the Chorzów Factory (Indemnity) case is still recognized as authoritative on the matter of general principle [payment of a sum corresponding to the value which a restitution in kind would bear.]*"), **CLA-120**; *MTD Equity Sdn Bhd and MTD Chile SA v Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, ¶ 238, **CLA-59**; *Siemens A.G. v The Argentine Republic*, ICSID Case No ARB/02/8, Award, 6 February 2007, ¶¶ 350-351, **CLA-121**; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006, ¶ 494, **CLA-076**.

<sup>542</sup> See for instance *Papamichalopoulos et al. v Greece (Article 50)*, ECHR, Application No 14556/89, Judgment, October 31, 1995, ¶ 36, **CLA-122**.

<sup>543</sup> *The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, ITLOS, Judgment, 1 July 1999, International Legal Materials, vol. 38, p. 1357, ¶ 170f, **CLA-123**.

<sup>544</sup> *Case Concerning the Factory at Chorzów*, Judgment No 8 on Jurisdiction, PCIJ (Series A No 9), 26 July 1927, p. 21, **CLA-124**.

<sup>545</sup> ARSIWA, Art. 34, **CLA-027**.

<sup>546</sup> *Case Concerning the Factory at Chorzów*, Judgment No 13 on Merits, PCIJ (Series A No 17), 13 September 1928, p. 47, **CLA-125**. See also *Petrobart Limited v The Kyrgyz Republic*, SCC Case No 126/2003, Final Award, 29 March 2005, pp. 77-78, **CLA-034**.



## 1. Full Compensation is the Appropriate Standard

301. The obligation of full compensation is reflected in Article 36 of the ARSIWA, which states:

*"1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.*

*2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established."*<sup>547</sup>

302. Therefore, as the tribunal held in *Petrobart v Kyrgyz Republic*, to wipe out all the consequences of the illegal act, the award of damages should place the Claimant in the financial position it would have been in had the breaches not occurred.<sup>548</sup> Accordingly, the Claimant is entitled to full compensation for all of the losses it suffered as a result of Nigeria's unlawful conduct, including the profits which the Claimant would have earned under the Fucheng Industrial Park Agreement for the remainder of the 97-year lease and the value of the Claimant's investment in Zhongfu Nigeria, which include the rights under the JVA for the remainder of the 99-year lease term.

303. The standard of compensation, given the facts and circumstances of this case, is substantially the same regardless of the breach of the treaty provision relied upon as Nigeria has destroyed the Claimant's investment, or at least substantially deprived the Claimant of the value of its investment. As the *Vivendi v Argentina* tribunal observed, it is generally accepted that, "*regardless of the type of investment, and regardless of the nature of the illegitimate measure, the level of damages awarded in international investment arbitration is supposed to be sufficient to compensate the affected party fully and to eliminate the consequences of the state's action.*"<sup>549</sup>

304. As regards expropriation in particular, under international law, a distinction has been drawn between lawful and unlawful expropriation which has recognised that a different standard of compensation potentially applies to each.<sup>550</sup> Article 4(2) of the Treaty specifies that in the case of an expropriation which has been done in accordance with Article 4(1) of the Treaty (i.e., lawfully, in that it was done for a legitimate public purpose, under due process of law, without discrimination and with payment of compensation), then compensation shall be:

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<sup>547</sup> ARSIWA, Art. 36, **CLA-027**.

<sup>548</sup> *Petrobart Ltd. v Kyrgyz Republic*, SCC Arbitration No. 126/2003, Award, 29 March 2005, ¶¶ 77 - 78, **CLA-034**.

<sup>549</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Second Presentation of the Case, Award, 20 August 2007, ¶ 8.2.7, **CLA-052**.

<sup>550</sup> See *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, ¶ 8.3.20, **CLA-052**.

*"equivalent to the value of the expropriated investments immediately before the expropriation is proclaimed, be convertible and freely transferable. The compensation shall be paid without unreasonable delay and include interest at a normal commercial rate."*

305. However, the Treaty does not address the standard of compensation payable in the case of an unlawful expropriation or for breaches of the other treaty protections such as those in Articles 2(2), 2(3) and 3(1) of the Treaty. In the absence of an express standard of compensation in the Treaty for those treaty breaches, the applicable standard of compensation is that under customary international law.<sup>551</sup> This position was recognised by the tribunal in *ADC v Hungary*, finding:

*"[I]n the present case the BIT does not stipulate any rules relating to damages payable in the case of an unlawful expropriation. The BIT only stipulates the standard of compensation that is payable in the case of a lawful expropriation, and these cannot be used to determine the issue of damages payable in the case of an unlawful expropriation since this would be to conflate compensation for a lawful expropriation with damages for an unlawful expropriation [...] Since the BIT does not contain any *lex specialis* rules that govern the issue of the standard for assessing damages in the case of an unlawful expropriation, the Tribunal is required to apply the default standard contained in customary international law in the present case."<sup>552</sup>*

306. As noted above, the standard of compensation under customary international law is full reparation, as articulated by the PCIJ in the *Chorzów Factory* case which has been repeatedly cited, approved, and followed in subsequent decisions of investment arbitration tribunals. For example, in *Kardassopoulos and Fuchs v. Georgia*, the Tribunal stated:

*"the customary international law standard of compensation requires that reparation must, as far as possible, wipe out all the consequences of the illegal act and re-establish the situation which would, in all probability have existed if that act had not been committed...this standard is intended to eliminate the consequences of the wrongful act for which the State is responsible."<sup>553</sup>*

307. The Tribunal in *ADC v. Hungary* also noted that the statement of customary international law from the *Chorzów Factory* case had "subsequently been affirmed and applied in a number of international arbitrations relating to the expropriation of foreign owned

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<sup>551</sup> See *Case Concerning the Factory at Chorzów*, Judgment No 8 on Jurisdiction, PCIJ (Series A No 9), 26 July 1927, p. 21, **CLA-124**.

<sup>552</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No ARB/03/16, Award, 2 October 2006, ¶¶ 481, 483, **CLA-076**.

<sup>553</sup> *Ioannis Kardassopoulos and Ron Fuchs v Republic of Georgia*, ICSID Case Nos. ARB/05/18 and ARB/07/15, Award, 3 March 2010, ¶ 594, **CLA-075**.

*property.*"<sup>554</sup> Further, the tribunal in that case noted that the PCIJ had also "*repeatedly... reconfirmed the validity, indeed the primacy, of Chorzów Factory as the standard of compensation for acts by States unlawful under international law.*"<sup>555</sup>

## 2. Compensation must be Equal to Fair Market Value

308. To calculate the appropriate amount of compensation due to the Claimant, the generally accepted methodology is to determine the fair market value (the "**FMV**") of the Claimant's investment but for Nigeria's wrongful conduct.<sup>556</sup> This method is reflected in the commentary to the ILC's Articles on State Responsibility, where it states that: "[c]ompensation reflecting the capital value of property taken or destroyed as the result of an internationally wrongful act is generally assessed on the basis of the 'fair market value' of the property lost."<sup>557</sup>
309. The tribunal in *Crystallex v Venezuela*, held that a proper assessment of the FMV of an investment ensures that the injured party is restored to the situation it would have been in but-for the internationally wrongful acts:

*"[I]t is well-accepted that reparation should reflect the 'fair market value' of the investment. Appraising the investment in accordance with the fair market value methodology indeed ensures that the consequences of the breach are wiped out and that the situation which would, in all probability, have existed if the wrongful acts had not been committed is re-established."*<sup>558</sup>

310. Investment treaty arbitral tribunals have regularly applied the FMV standard in cases involving both breaches of expropriation<sup>559</sup> and the fair and equitable treatment standard.<sup>560</sup> It has been held by investment treaty tribunals that the FMV standard

<sup>554</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No. ARB/03/16 , Award, 2 October 2006, ¶ 486, **CLA-076**.

<sup>555</sup> *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No. ARB/03/16 , Award, 2 October 2006, ¶ 493, **CLA-076**.

<sup>556</sup> The approach is adopted in any event in Article 4(2) of the Treaty, which refers to the "*value of the expropriated investments*".

<sup>557</sup> ARSIWA Commentary, Art. 36, ¶ 22, **CLA-039**.

<sup>558</sup> *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2, Award, 4 April 2016, ¶ 850, **CLA-090**.

<sup>559</sup> See, e.g., *Metalclad Corporation v The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 118, **CLA-078**; *CME Czech Republic B.V. v Czech Republic*, UNCITRAL, Final Award, 14 March 2003, ¶¶ 496-499, **CLA-079**; *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No. ARB/05/6, Award, 22 April 2009, ¶ 124, **CLA-114**.

<sup>560</sup> See, e.g., *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No. ARB/01/8, Award, 12 May 2005, ¶ 410, **CLA-126**; *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007, ¶¶ 359-363, **CLA-127**; *Azurix Corp. v The Argentine Republic*, ICSID Case No. ARB/01/12, Award, 14 July 2006, ¶ 424, **CLA-104**; *EI Paso Energy International Company v Argentine Republic*, ICSID Case No. ARB/03/15, Award, 31 October 2011, ¶ 702-704, **CLA-033**.

"equates with 'just compensation' that represents the 'genuine value' of the property affected"<sup>561</sup> and has been particularised as:

*"the price, expressed in terms of cash equivalents, at which property would change hands between a hypothetical willing and able buyer and a hypothetical willing and able seller, acting at arms length in an open and unrestricted market when neither is under compulsion to buy or sell and when both have reasonable knowledge of the relevant facts."*<sup>562</sup>

311. Where the investment which is the subject of the illegal measure(s) is a "going concern", the assessment of the FMV of the investment must take future profitability into consideration in order to provide full compensation.<sup>563</sup> Indeed in *Chorzów Factory*, the PCIJ noted that "future prospects," "probable profit" and future "financial results" were factors material to the valuation.<sup>564</sup> Similarly, in the case of *Phillips Petroleum v Iran*, the Iran-US Claims Tribunal explained that:

*"[A]nalysis of a revenue-producing asset... must involve a careful and realistic appraisal of the revenue-producing potential of the asset over the duration of its term, which requires appraisal of the level of production that reasonably may be expected, the costs of operation, including taxes and other liabilities, and the revenue such production would be expected to yield, which, in turn, requires a determination of the price estimates for sales of the future production that a reasonable buyer would use in deciding upon the price it would be willing to pay to acquire the asset."*<sup>565</sup>

312. At the time of Nigeria's unlawful expropriation of the Claimant's investment and other violations of the Treaty, Zhongfu Nigeria was a going concern. Indeed, in its last full year of operation, Zhongfu Nigeria generated a substantial profit of over US\$3 million. In such circumstances, the FMV of the Claimant's investment must take into account the value of the future cash flows that its investment would have generated in the absence of Nigeria's unlawful conduct.
313. The most appropriate way to determine the FMV of going concerns is the DCF method. This method reflects the present worth of the cash flows that the business is expected to generate in the future. The DCF method involves calculating future cash flows and discounting these at an appropriate rate to estimate the present value of a business on a

<sup>561</sup> *CME Czech Republic B.V. v Czech Republic*, UNCITRAL, Final Award, 14 March 2003, ¶ 493, **CLA-079**.

<sup>562</sup> *CMS Gas Transmission Company v The Argentine Republic*, ICSID Case No ARB/01/8, Award, 12 May 2005, ¶ 402, **CLA-126**.

<sup>563</sup> *Walter Bau AG v The Kingdom of Thailand*, UNCITRAL, Award, 1 July 2009, ¶¶ 14.12, 14.12, 14.22, **CLA-128**; *Sistem Mühendislik Inaat Sanayi ve Ticaret A. v Kyrgyz Republic*, ICSID Case No. ARB(AF)/06/1, Award, 9 September 2009, ¶ 161, **CLA-129**.

<sup>564</sup> *Case Concerning the Factory at Chorzów (Claim for Indemnity)*, Judgment on Merits, 13 September 1928, (PCIJ Series A No. 17), pp. 51-52, **CLA-125**.

<sup>565</sup> *Phillips Petroleum Co. Iran v Iran*, Iran-US Claims Tribunal, Award No 425-9-2, 29 June 1989, ¶ 111, **CLA-112**.

given date. It is considered to be the most appropriate approach as it considers the future benefits and risks associated with the ownership of the evaluated asset.<sup>566</sup>

314. International arbitral tribunals have recognised the utility and applicability of the DCF method for measuring compensation. The *Enron v. Argentina* tribunal noted that it had been "*constantly used by tribunals in establishing the fair market value of assets to determine compensation of breaches of international law.*"<sup>567</sup> Similarly, the *Walter Bau v. Thailand* tribunal applied a DCF analysis and said that it is the "*only method which can accurately track value through time*" and "[i]f value and damages must be computed on the basis of what was legitimately expected at any given time, then the DCF method is the most reasonable one to apply."<sup>568</sup>
315. Accordingly, the DCF method is the appropriate method to assess the FMV of the Claimant's expropriated investment in Nigeria. It is the primary methodology that has been adopted in the FTI Report.
316. In the alternative, and as a cross-check, the FTI Report has also calculated the FMV of the Claimant's investment on the basis of a comparable approach. This methodology considers comparable assets to those which were affected by the Nigerian State's unlawful measures to calculate the FMV, in particular with reference to transactions in the Nkok free trade zone in Gabon.

### 3. The Valuation Date

317. Under the full reparation principle, the injured claimant is entitled to full compensation such that the consequences of the State's internationally wrongful conduct is entirely wiped out. This standard of full reparation must be the basis for determining the appropriate date of valuation.
318. Determination of the appropriate valuation date therefore requires the tribunal "*precisely to ensure full reparation and to avoid any diminution of value attributable to the State's conduct leading up to the expropriation.*"<sup>569</sup> Therefore, the valuation date must reflect the

<sup>566</sup> World Bank Group, "Guidelines on the Treatment of Foreign Direct Investment" (1992) Vol 7(2) ICSID Review–*Foreign Investment Law Journal* 297, S. IV, ¶ 6, **CLA-130**, (defining DCF as "*the cash receipts realistically expected from the enterprise in each future year of its economic life as reasonably projected minus that year's expected cash expenditure, after discounting this net cash flow for each year by a factor which reflects the time value of money, expected inflation, and the risk associated with such cash flow under realistic circumstances.*"); Borzu Sabahi, *Compensation and Restitution in Investor-State Arbitration: Principles and Practice* (Oxford University Press 2011), p. 118, **CLA-131**.

<sup>567</sup> *Enron Corporation Ponderosa Assets, LP v Argentine Republic*, ICSID Case No ARB/01/3, Award, 22 May 2007, ¶ 385, **CLA-127**.

<sup>568</sup> *Werner Schneider acting in his capacity as insolvency administrator of Walter Bau Ag (In Liquidation) v Kingdom of Thailand*, UNCITRAL, Award, 1 July 2009, ¶ 14.12; 14.22, **CLA-128**.

<sup>569</sup> *Ioannis Kardassopoulos v Georgia*, ICSID Case No ARB/05/18, Award, 3 March 2010, ¶ 517, **CLA-075**.

situation that would have existed but for the State's wrongful conduct. As set out by the tribunal in *Santa Elena v Costa Rica*:

*"The expropriated property is to be evaluated as of the date on which the governmental 'interference' has deprived the owner of his rights or has made those rights practically useless. This is a matter of fact for the Tribunal to assess in the light of the circumstances of the case."*<sup>570</sup>

319. In light of this, the most appropriate date on which the value the Claimant's investment should be calculated is 22 July 2016, which was the date of the handover ceremony of the Zone, as this is the date on which the Claimant was practically deprived its rights.
320. Furthermore, this valuation date accords with the Treaty. Article 4(2) of the Treaty provides that compensation (albeit for a lawful expropriation) shall be "*equivalent to the value of the expropriated investments immediately before the expropriation is proclaimed*".<sup>571</sup>
321. This date of 22 July 2016 is also appropriate because although some damage had likely already been done to the Claimant's investment by that time, such as by the purported Notice of Termination of the Ogun State Government in May 2016, the position for the Claimant was irretrievable after 22 July 2016 when the Nigerian State, using the instrumentalities of the Nigerian police and NEPZA, physically took over the Claimant's investment in the Zone.
322. Accordingly, the FTI Report has based its assessment of the Claimant's losses on a valuation date of 22 July 2016 ("**Valuation Date**").

#### **4. The Claimant is Entitled to be Awarded Moral Damages**

323. As part of its obligation of full reparation, Nigeria is also liable to pay the Claimant moral damages for the considerable harm done to its employees and agents. It is well known in customary international law, as described in the *Lusitania* case:

*"That one injured is, under the rules of international law, entitled to be compensated for an injury inflicted resulting in mental suffering, injury to his feelings, humiliation, shame, degradation, loss of social position or injury to his credit or reputation, there can be no doubt, and such compensation should be commensurate to his injury. Such damages are very real, and the mere fact they are difficult to measure or estimate by money standards makes them none the less real and affords no reason why the injured person should not be compensated therefor as compensatory damages, but not as a penalty."*<sup>572</sup>

<sup>570</sup> *Compañía del Desarrollo de Santa Elena S.A. v Republic of Costa Rica*, ICSID Case No ARB/96/1, Award, 17 February 2000, ¶ 78, **CLA-132**.

<sup>571</sup> China-Nigeria BIT, Art. 4(2).

<sup>572</sup> *Lusitania (US v Germany)* (1923) VII RIAA 32, ¶ 40, **CLA-133**.



324. In ARSIWA Article 31(2), when describing the principle of full reparation, the ILC stated that an injury in respect of which reparation is owed “*includes any damage, whether material or moral, caused by the internationally wrongful act of a State*”. In the Commentary to that provision, the ILC defined moral damage as including “*such items as individual pain and suffering, loss of loved ones or personal affront associated with an intrusion on one’s home or private life.*”<sup>573</sup>
325. Investment treaty tribunals have long accepted the availability of an award of damage to reflect moral injury. In *Desert Line v Yemen*, the tribunal granted moral damages for the actions of Jordanian authorities, including:
- “[T]he physical duress exerted on the executives of the Claimant, was malicious and is therefore constitutive of a fault-based liability. Therefore, the Respondent shall be liable to reparation for the injury suffered by the Claimant, whether it be bodily, moral or material in nature. The Arbitral Tribunal agrees with the Claimant that its prejudice was substantial since it affected the physical health of the Claimant’s executives and the Claimant’s credit and reputation.”*<sup>574</sup>
326. The tribunal in that case found that the claimant should be granted moral damages, including for loss of reputation, and awarded moral damages of US\$1,000,000.<sup>575</sup>
327. Similarly, in *Funnekotter v Zimbabwe*, the tribunal considered that “*the Claimants must obtain reparation for the disturbances resulting from the taking over of their farms and for the necessity for them to start a new life often in another country*”, and evaluated the damages suffered in this respect for each Claimant at EUR 20,000.<sup>576</sup> Other investment treaty tribunals have similarly made States liable to pay moral damages, such as: CFA 5,000,000 to the investor for damaging its activities;<sup>577</sup> US\$30,000,000 to an investor “*as a result of the damage to its worldwide professional reputation after the Defendants’ abusive cancellation of the important project that they previously approved its establishment and investment, by the Plaintiff, for a period of 83 years, and for the execution of which the Plaintiff had negotiated and entered into contracts with international companies*”;<sup>578</sup> and US\$1,000,000 as moral damages to investors for threats to their safety.<sup>579</sup>

<sup>573</sup> ARSIWA Commentary, Art. 31, ¶ 5, **CLA-039**.

<sup>574</sup> *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶ 290, **CLA-066**.

<sup>575</sup> *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, 6 February 2008, ¶¶ 290-291, **CLA-066**.

<sup>576</sup> *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No ARB/05/6, Award, 22 April 2009, ¶ 138, **CLA-114**.

<sup>577</sup> *S.A.R.L. Benvenuti & Bonfant v People’s Republic of the Congo*, ICSID Case No ARB/77/2, Award, 8 August 1980, ¶ 4.96, **CLA-134**.

<sup>578</sup> *Mohamed Abdulmohsen Al-Kharafi & Sons Co. v State of Libya and others*, Final Arbitral Award, 22 March 2013, p. 369, **CLA-135**.

<sup>579</sup> *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No ARB/10/15, Award, 28 July 2015, ¶¶ 921, 923, **CLA-080**.

328. Moral damages are clearly warranted in the present case. The Ogun State Government issued direct threats to Zhongfu Nigeria's CEO, Dr. Han, to "*leave peacefully when there is [an] opportunity to do so, and avoid forceful removal, complications and prosecution*".<sup>580</sup> These threats alone would warrant moral damages - but precisely what "*complications*" the Nigerian authorities had in mind was to become all too clear in the shocking treatment meted out to Zhongfu Nigeria's CFO, Mr. Zhao.
329. As set out in his witness statement, on the night of 17 August 2016, Mr. Zhao was taken forcibly from his hotel room in Lagos by the Nigerian police.<sup>581</sup> He was threatened and physically abused before being detained in appalling conditions for two days and not offered food and water.<sup>582</sup> On 19 August 2016, he was taken by an armed officer to Ajuba where he received similar treatment, in an apparent bid to persuade him to reveal the whereabouts of Dr. Han.<sup>583</sup> He was finally released on 23 August 2016 in Abuja - but was unable to leave Nigeria for a further month as the police unlawfully retained his passport in a bid to exercise further leverage and discover Dr. Han's whereabouts.<sup>584</sup> As he explains in his evidence, Mr. Zhao remains distressed and traumatised by his experiences to this day.
330. Recalling the treatment he received in police custody, Mr Zhao states:

*"After a while, the police car stopped somewhere that looked like a police station. The police officers asked me to stay outside and then another group of police officers arrived. One police officer in uniform came over to me and slapped me twice on the face with his hand. Then the police officers who brought me there took me to a room where they asked me to sign a piece of paper. They did not say or explain what this paper was or what it said. I refused to sign the piece of paper.*

*The police officers then took my flip flops and placed me in a courtyard with a number of cells surrounding it. It was dark and cold and I was standing at the gate to one of the cells. Then another prisoner came out of that cell and asked why I was taken. I did not speak. There were also some other people who had been brought to the courtyard and the prisoner told us to stand side-by-side and asked whether we had money and why we were there. If someone had no money, he would slap them. Then the prisoner took me aside and asked me to speak. He said that if I did not speak, he would beat me with a club. Then another prisoner joined that first prisoner in intimidating me. Later the second prisoner took me aside and told me not*

<sup>580</sup> Letter from G. Elias & Co. to NEPZA with Note of harassment, threats and intimidation of Jason Han attached, 25 July 2016, **C-011**; Email from Jason Han to Elizabeth Uwaifo, 25 September 2016, **C-012**.

<sup>581</sup> Witness Statement of Mr Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 21.

<sup>582</sup> Witness Statement of Mr Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 22–27.

<sup>583</sup> Witness Statement of Mr Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 28–36

<sup>584</sup> Witness Statement of Mr Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 39–41.

*to be afraid. However, the first prisoner came back and threatened me with a club and asked me to speak, which I did not do.*

*[...]*

*On what I think was the third day in the Abuja police station, a lot of people were brought into the office. The police officers moved me to another office. In the new office, two handcuffed men were being forced to hit each other. They were each told that if you hit the other man, you would be released. The two persons were hitting each other, and I could see the blood. After this, the police officer showed me a video of a prisoner eating a rat. The police officer then approached me asking what happened. I did not respond and he hit me twice, first on the neck and the second time on the head with a fist. It was painful and I felt numb.<sup>585</sup>*

331. Plainly, if there were any case in which moral damages in the *Lusitania* sense - that is, “injury to [a person’s] feelings, humiliation, shame, degradation, loss of social position or injury to his credit or reputation” - were required, it is this one.

## **B Quantum of Compensation**

332. In order to assess the full compensation due to the Claimant in relation to its investment in Nigeria, Mr. Matthews has calculated the FMV of the Claimant's investment as of 22 July 2016, using a DCF analysis as the primary approach and a further valuation method based on comparable transactions in free trade zones as an alternative approach and cross check. In so doing, Mr. Matthews has assessed losses by comparing two financial positions:

- (a) the financial position that the Claimant would have been in with respect to its investment in Nigeria, but for the wrongful actions of Nigeria (the “**But For Position**”). This can be measured by assessing the market value of the Claimant’s investment in the Zone at the Valuation Date, absent the Respondent’s alleged wrongful actions; and
- (b) the financial position that the Claimant is actually in with respect to its investment in the Zone (the “**Actual Position**”). This is equal to the actual market value of the Claimant’s investment in the Zone at the Valuation Date. Since the Respondent’s breaches of the Treaty and take over of the Claimant's investment resulted in the Claimant losing all of its investment in the Zone, this value is nil.

### **1. The DCF Approach**

333. To assess the full compensation due to the Claimant in relation to its investment in the Zone using the DCF approach, Mr. Matthews calculates the FMV of that investment as at

<sup>585</sup> Witness Statement of Mr Wenxiao (Areak) Zhao, 30 April 2019, ¶¶ 39–41.

the Valuation Date. This approach requires a projection of (i) the future revenues that would have been generated from the Zone; and (ii) the costs associated with the development of the Zone and generating those future revenues, as they would have been but for the wrongful actions of the Respondent.

334. Mr. Matthews' assessment of the Claimant's damages in relation to the expropriation of its investment in the Zone using the DCF approach involves the following:

- (a) considering the historical performance of the Fucheng Industrial Park up to the Valuation Date;
- (b) using the documentary evidence available in respect of the Fucheng Industrial Park's historical performance to inform the projections for the overall financial performance of the Zone subsequent to the Valuation Date;
- (c) determining the future revenue that would have been generated from the Zone but for Nigeria's wrongful actions from land transfer fees based on the expected rate of development of the Zone and the expected increase in land value during that time;
- (d) determining the future revenue that would have been generated from the Zone but for Nigeria's wrongful actions from the Administration Fee based on the actual and forecast turnover of existing tenants and the expected rate of development of the Zone;
- (e) calculating the future cash flows due to the Claimant pursuant to the Fucheng Industrial Park Agreement and JVA but for Nigeria's wrongful actions by subtracting from the above-referenced future revenues the expected land and infrastructure development costs, and other running costs associated with the Zone;
- (f) determining the net present value of these cash flows by discounting them using the appropriate discount rate; and
- (g) determining the FMV of the Claimant's investment by subtracting from the net present value any financial debt incurred by Zhongfu Nigeria and OGFTZ Company.

335. In undertaking the above exercise, Mr. Matthews has adopted certain assumptions. This includes: (i) the time it would take for the Zone to be developed and filled with tenants; (ii) the future land transfer fee revenue from tenants; (iii) the future administrative fee revenue from tenants; and (iv) the costs of developing and running the Zone, including the infrastructure development and land development costs.<sup>586</sup>

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<sup>586</sup> FTI Report, ¶ 7.6.

(i) Timeframe for full development of the Zone

336. Mr. Matthews values the Claimant's investment on the basis that, in the But For Position, the concession period for the Zone would have ended on 31 December 2016, in accordance with the terms of the JVA.<sup>587</sup>
337. Mr. Matthews' valuation takes the Fucheng Industrial Park as a "blueprint" for the rest of the Zone and anticipates that it would have been fully developed to its target utilisation, with 60% being leased to tenants and 40% reserved for roads, public utilities and greenery, within 12 months of the Valuation Date.<sup>588</sup>
338. In view of the Claimant's "*priority right to invest in and develop other areas in [the Zone]*" under the same conditions as the Fucheng Industrial Park Agreement,<sup>589</sup> the development of the Zone by the Claimant is anticipated to have followed that of the Fucheng Industrial Park.<sup>590</sup> The remaining area of the Zone, excluding the land to be developed for the Pharmaceutical Park, is anticipated to have reached its target utilisation over a period of 20 years from the Valuation Date.<sup>591</sup>
339. The land leased to the Xi'an Company for the Pharmaceutical Park would have been developed to its target utilisation of 80%, with 20% reserved for infrastructure and non-profit public utilities, over a period of 10 years from 2017 onwards.<sup>592</sup>

(ii) Land transfer fee revenues (excluding the Pharmaceutical Park)

340. The land transfer fee revenue generated from sub-leases by tenants for land within the Zone was received by the Claimant (i) directly under the Fucheng Industrial Park Agreement; and (ii) by virtue of Zhongfu Nigeria's 60% shareholding in OGFTZ Company under the JVA. The land transfer fee is a one-off upfront fee covering the term of the sub-lease and chargeable by reference to the size of the land leased and the duration of the lease.<sup>593</sup>
341. Initially, tenants were offered longer term leases for periods such as 90 years. From 2015, shorter and more flexible lease terms of 10 to 50 years were offered, with 20 year leases

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<sup>587</sup> FTI Report, ¶ 7.13.

<sup>588</sup> FTI Report, ¶¶ 7.5 and 7.17(1).

<sup>589</sup> Fucheng Industrial Park Agreement, Art. 4.1.7, **C-002**.

<sup>590</sup> FTI Report, ¶ 7.5.

<sup>591</sup> FTI Report, ¶ 7.17(2).

<sup>592</sup> FTI Report, ¶ 7.19.

<sup>593</sup> FTI Report, ¶¶ 7.20-7.21.

being the most popular.<sup>594</sup> In 2015 and 2016, the lease agreements show the median and mean land transfer fees as being equivalent to US\$12 per square metre and US\$13.6 per square metre for the duration of a 20 year lease term.<sup>595</sup>

342. Mr. Matthews has valued the revenue arising from the land transfer fees on the basis that, from the Valuation Date up to the date of expiry of the Zone concession period, tenants were continuing the trend of entering into 20 year lease terms for a land transfer fee equivalent to US\$12 per square metre adjusted for inflation.<sup>596</sup> The land transfer fee revenues are calculated on the basis that, upon expiry, the lease agreements would be continuously renewed by the existing tenant or an alternate lease agreement entered into with a new tenant.
343. In addition to the one-off upfront land transfer fees, further revenue was generated through the rental income paid by tenants leasing the workshops in the "*incubator*" warehouse in the Zone.<sup>597</sup> The "*incubator*" tenants would pay a yearly rental fee at a significantly higher rate per square metre to that paid by tenants entering into the longer term land lease agreements.<sup>598</sup> Despite the higher rates paid, as the "*incubator*" yearly rental income represented less than 4% of Zhongfu Nigeria's revenues, it has not been included in the land transfer fee revenue calculation.<sup>599</sup>
344. The valuation of the land transfer fee at US\$12 per square metre for the entirety of the period from the Valuation Date to the date of expiry of the Zone concession period is considered to be conservative given that it does not take into account (i) the increase to the land value (other than for inflation) as the development of the Zone continues and the concomitant increase in land transfer fees that would be charged to tenants upon the future renewal or execution of land lease agreements;<sup>600</sup> or (ii) the higher rates of annual rental income that was generated from the tenants leasing space in the "*incubator*" warehouses.<sup>601</sup>

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<sup>594</sup> FTI Report, ¶ 7.22.

<sup>595</sup> FTI Report, ¶ 7.24.

<sup>596</sup> FTI Report, ¶ 7.28(2).

<sup>597</sup> FTI Report, ¶ 7.29.

<sup>598</sup> FTI Report, ¶ 7.30.

<sup>599</sup> FTI Report, ¶ 7.31.

<sup>600</sup> FTI Report, ¶ 7.28(2).

<sup>601</sup> FTI Report, ¶ 7.31.



(iii) Revenue from land transfer fees in the Pharmaceutical Park

345. Zhongfu Nigeria, as majority shareholder of OGFTZ Company, was entitled to a proportion of the land transfer fees charged to tenants of the Pharmaceutical Park and the land transfer revenue from the lease of land reserved for infrastructure and non-profit public utilities areas, pursuant to the Xi'an Industrial Park Agreement.<sup>602</sup>
346. The benchmark land lease fee for non-infrastructure and public utilities areas under the Xi'an Industrial Park Agreement was set at RMB 75 per square metre, equivalent to US\$11.23 per square metre as at the Valuation Date.<sup>603</sup> The portion of land lease fee revenue due to OGFTZ Company was to be calculated at (i) 20% where the land lease fee was below the benchmark land lease fee; (ii) 30% where the land lease fee was at the benchmark land lease; (iii) 40% of the land lease fees charged between RMB 75 and RMB 150 per square metre; and (iv) where the land lease fees was higher than RMB 150 per square metre, 50% of the land lease fee above RMB 75 per square metre.<sup>604</sup>
347. Land reserved for the infrastructure and public utilities areas would be leased at a rate equal to 20% of the benchmark land lease fee.<sup>605</sup>
348. Mr. Matthews has calculated the revenue arising from the land lease fees under the Pharmaceutical Park Framework Agreement on the basis that the sub-leases for the Pharmaceutical Park would be for a 20 year term at the benchmark rate of US \$ 11.23 per square metre from the Valuation Date and would have been renewed continuously throughout the remainder of the concession period at the same land transfer fee adjusted for inflation.<sup>606</sup>
349. In respect of the land lease fees generated from the infrastructure and public utilities areas, Mr. Matthews had calculated the revenue arising on the basis that: (i) 0.5 square kilometres of that land would be transferred at 20% of the benchmark rate of US\$11.23 per square metre at the beginning of 2017; and (ii) the remaining land would be transferred as the Pharmaceutical Park develop at the same rates adjusted for inflation.<sup>607</sup>

(iv) Revenue from administrative fees

350. The Claimant was entitled to a proportion of the revenue arising from the Administration Fees paid by tenants within the Zone (i) directly under the Fucheng Industrial Park

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<sup>602</sup> Xi'an Industrial Park Agreement, **C-132**

<sup>603</sup> FTI Report, ¶ 7.33.

<sup>604</sup> Xi'an Industrial Park Agreement, clauses 3.4-3.6, **C-132**.

<sup>605</sup> FTI Report, ¶ 7.34.

<sup>606</sup> FTI Report, ¶ 7.35(1).

<sup>607</sup> FTI Report, ¶ 7.35(1).

Agreement; and (ii) by virtue of Zhongfu Nigeria's 60% shareholding in OGFTZ Company, under the JVA.<sup>608</sup> The Zone tenants would generally be granted a grace period of six to twelve months from the date of commencement of operations before the administration fees would be collected.<sup>609</sup>

351. Zhongfu Nigeria, as majority shareholder of OGFTZ Company, was also entitled to a proportion of the revenue arising from administration fees paid by tenants within the Pharmaceutical Park.<sup>610</sup>
352. Based on Mr. Matthews' analysis of the forecast revenues set out in the investment agreements entered into by Zone tenants ranging from US\$127 to US\$4,000 per square metre, the revenue forecast from administration fees up to the date of expiry of the concession period is calculated to be US\$400 per square metre adjusted for inflation each year for the tenants operating in the Zone.<sup>611</sup> Allowing for an average grace period of 9 months from the date of commencement of operations, the administration fees would be collected from the tenants 18 months from the start of the lease period.<sup>612</sup>
353. The forecast revenue from administration fees is considered to be conservative as the actual revenues of tenants for which Mr. Matthews has available data are greater than the forecasts provided in the investment agreements.

(v) Land development costs

354. Land development costs incurred for the construction of roads and connections of utilities to the new tenants' facilities were funded by the upfront land transfer fees paid over by the tenants. Based on Mr. Matthews' analysis, the land development costs are calculated at a ratio of one third of the land transfer fee revenues per square metre.<sup>613</sup>
355. While the land development costs would reduce over time as the roads and utilities connections in the Zone would already be in place prior to the renewal of leases by existing tenants or agreement of new leases, the necessary land development costs are calculated

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<sup>608</sup> FTI Report, ¶ 7.36.

<sup>609</sup> FTI Report, ¶ 7.38.

<sup>610</sup> FTI Report, ¶ 7.37.

<sup>611</sup> FTI Report, ¶¶ 7.41(1) and (2).

<sup>612</sup> FTI Report, ¶¶ 7.41(3) and (4).

<sup>613</sup> FTI Report, ¶ 7.44(1).

at the same ratio for each of the subsequent 20 year lease terms.<sup>614</sup> The forecast land development costs are accordingly considered by Mr. Matthews to be conservative.<sup>615</sup>

(vi) Infrastructure development costs

356. The Claimant engaged in discussions to raise around US\$250 million to fund infrastructure development across the Zone. The capital was to be raised in the form of a municipal bond with the World Bank or a blended debt and equity approach through a listing of Zhongfu Nigeria on the Nigerian Stock Exchange.<sup>616</sup>
357. The future infrastructure development costs have been calculated on the basis that the US\$250 million funding would have been raised by the end of 2017 and subsequently invested into the Zone's development.<sup>617</sup>
358. The development of the Zone's infrastructure would have led to an increase in the land value and, therefore, the land transfer fees. In addition, it was intended that the infrastructure developed using the fund would generate additional income. Credit has not been given in the calculations of the above forecast revenues for the increase to the land transfer fees or the potential additional income. The exclusion of those revenue streams is considered, therefore, by Mr. Matthews to be mean that, all else being equal, his valuation is likely to be understated.<sup>618</sup>

(vii) Other running costs associated with the Zone

359. Costs incurred in 2014 and 2015 for the general running of the Zone included expenses for personnel, wages and salaries, medical insurance, rental expenses, travel expenses, utilities, hospitality and advisory services.<sup>619</sup> These costs increased by 2.1% adjusted for inflation from 2014 to 2015.<sup>620</sup> For the purposes of Mr. Matthews' calculations, the general running costs of the Zone are considered to continue to increase at the same rate up to the expiry of the concession period.<sup>621</sup>

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<sup>614</sup> FTI Report, ¶ 7.44(2).

<sup>615</sup> FTI Report, ¶ 7.44(2).

<sup>616</sup> FTI Report, ¶ 7.45.

<sup>617</sup> FTI Report, ¶ 7.50.

<sup>618</sup> FTI Report, ¶ 7.51.

<sup>619</sup> FTI Report, ¶ 7.52-7.56.

<sup>620</sup> FTI Report, ¶ 7.57.

<sup>621</sup> FTI Report, ¶ 7.59.

(viii) The discount rate

360. In accordance with accepted principles of corporate finance, Mr. Matthews has undertaken a DCF analysis by discounting projected cash flows to the Valuation Date using an estimate of the cost of equity of the Claimant's investment in the Zone.<sup>622</sup> The cost of equity of the Claimant's investment in the Zone, using the capital asset pricing model, has been estimated at 14.3%.<sup>623</sup>

(ix) DCF valuation of the Claimant's investment in the Zone

361. On the basis of the above approach and methodology, Mr. Matthews assess the value of the Claimant's investment in the Zone, arising under the Fucheng Industrial Park Agreement and the JVA, as at the Valuation Date to be US\$1,078 million.<sup>624</sup>

**2. The Comparable Transaction Approach**

362. As a secondary valuation approach and a cross-check for the DCF approach, Mr. Matthews has also considered the value of the Claimant's investment in the Zone by reference to comparable transactions involving shares of other entities holding rights to develop other free trade zones.<sup>625</sup> A comparable transaction identified by Mr. Matthews relates to Olam International Limited's ("**Olam**") investment in the Nkok SEZ in the Republic of Gabon<sup>626</sup>

363. The Nkok SEZ is a free trade zone currently encompassing 600 hectares (with a development capacity for over 1,100 hectares) close to Libreville, the capital of Gabon, with 141 investors from 18 countries.<sup>627</sup> It is owned and operated by Gabon Special Economic Zone, a joint venture company originally established in August 2010 by Olam (60%) and the Republic of Gabon (40%).<sup>628</sup>

364. From the available data on the financial performance of the Nkok SEZ, there are some differences with its revenue model as compared with that of the Zone. As dealt with in detail above, the Zone generates a number of different revenue streams, including the

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<sup>622</sup> FTI Report, ¶ 7.60.

<sup>623</sup> FTI Report, ¶ 7.61.

<sup>624</sup> FTI Report, ¶ 7.65.

<sup>625</sup> FTI Report, ¶ 8.1.

<sup>626</sup> FTI Report, ¶¶ 8.2-8.3.

<sup>627</sup> FTI Report, ¶¶ 3.27 and 8.5.

<sup>628</sup> FTI Report, ¶ 8.4(1).

upfront one-off land transfer and ongoing administration fees. Revenue deriving from the Nkok SEZ appears to be solely, or to a significant extent, from one-off land transfer fees.<sup>629</sup>

365. Mr. Matthews identified two transactions which afforded sufficient information to determine the implied value of the transaction on a per square metre basis.<sup>630</sup> These were: (i) the sale of 20% of Olam's shareholding in Gabon SEZ to the Republic of Gabon for approximately US\$60 million in June 2014;<sup>631</sup> and (ii) the investment by African Finance Corporation of US\$140 million in the Gabon SEZ in exchange for a 21% shareholding in April 2016.<sup>632</sup> On the basis of these two transactions, Mr. Matthews calculated an implied land value of the 2014 and 2016 transaction as US\$26.6 and US\$59.2 per square metre respectively.<sup>633</sup>
366. Mr. Matthews, in principle, considers that the above valuation multiples should be adjusted to take into account the differences between the Zone and the Nkok SEZ, including (i) the state of development of the Nkok SEZ at the time of the transactions; (ii) the prospects for future growth; (iii) the benefits offered for investors; (iv) economic prospects of the countries in which they are situated; and (v) the size of the Zone and the Nkok SEZ and the pace of development.<sup>634</sup> On the basis of that analysis, Mr. Matthews considered the lower June 2014 valuation of US\$26.6 per square metre to be a more appropriate multiple.<sup>635</sup>
367. Mr. Matthews calculated the Claimant's investment in the Zone by reference to the comparison transaction methodology to be US\$1,446 million.<sup>636</sup>

### 3. Conclusion

368. Using Mr. Matthews' DCF primary methodology, the FMV of the Claimant's expropriated investment in the Zone as at the Valuation Date is assessed to be US\$1,078 million. In the alternative, the FMV of the Claimant's investment in the Zone using the comparable transaction approach is quantified by Mr. Matthews as being US\$1,446 million as at the Valuation Date.

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<sup>629</sup> FTI Report, ¶¶ 8.9-8.11.

<sup>630</sup> FTI Report, ¶ 8.12.

<sup>631</sup> FTI Report, ¶¶ 8.4(3) and 8.12.

<sup>632</sup> FTI Report, ¶¶ 8.4(5) and 8.12.

<sup>633</sup> FTI Report, ¶ 8.13.

<sup>634</sup> FTI Report, ¶ 8.16.

<sup>635</sup> FTI Report, ¶ 8.18.

<sup>636</sup> FTI Report, ¶ 8.21.

### C The Claimant is Entitled to Interest

369. In order to receive full reparation under customary international law, the Claimant requests of pre-award and post-award interest at the rate of US\$ one month LIBOR plus 2% to be compounded monthly.
370. The role of interest is to compensate a claimant for the delay between the date of the harm suffered and the award of damages. It is an integral component of full compensation under customary international law.<sup>637</sup> A State's duty to make reparation arises immediately after its unlawful actions cause harm, and to the extent that payment is delayed, the claimant loses the opportunity to invest the compensation.<sup>638</sup> As the International Law Commission's Articles on State Responsibility make clear, "[i]nterest runs from the date when the principal sum should have been paid until the date the obligation to pay is fulfilled."<sup>639</sup> Accordingly, to place the Claimant in the economic position it would have occupied had Nigeria not breached its obligation under the Treaty and taken the Claimant's investment in the Zone, the Claimant requests both pre-award and post-award interest until the date Nigeria pays compensation.
371. There is no bar on a Tribunal to award compound interest.<sup>640</sup> Rather, tribunals have frequently recognised that compound interest is the most accepted and appropriate method to give effect to the rule of full reparation<sup>641</sup> Compound interest ensures that (i) the claimant receives "the full present value of the compensation that it should have received at the time of taking"; and (ii) the respondent State is prevented from "unjustly... enrich[ing]"

<sup>637</sup> *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, ¶ 9.2.1, **CLA-108**; *Maffezini v Kingdom of Spain*, ICSID Case No ARB/97/7, Award, 13 November 2000, ¶ 96, **CLA-065**; *Compañía del Desarrollo de Santa Elena SA v Republic of Costa Rica*, ICSID Case No ARB/96/1, Final Award, 17 February 2000, CLA-25, ¶¶ 96-97, **CLA-132**.

<sup>638</sup> *Metalclad Corporation v United Mexican States*, ICSID Case No ARB(AF)/97/1, Award, 30 August 2000, ¶ 128, **CLA-078**; *Compañía de Aguas del Aconquija SA and Vivendi Universal SA v Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, ¶ 9.2.3, **CLA-108**; *Foresight Luxembourg Solar 1 S. Á.R1., et al. v Kingdom of Spain*, SCC Case No. 2015/150, Award, 14 November 2018, ¶¶ 544-545, **CLA-136**.

<sup>639</sup> ARSIWA, Art. 38(2), **CLA-027**.

<sup>640</sup> *Compañía del Desarrollo de Santa Elena S.A. v Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, ¶¶ 96-107, **CLA-132**; *Metalclad Corporation v The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, ¶ 131, **CLA-078**; *Wena Hotels Ltd. v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award, 8 December 2000, ¶¶ 128-129, **CLA-099**; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v Republic of Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, ¶¶ 250-251, **CLA-059**; *Siemens A.G. v The Argentine Republic*, ICSID Case No ARB/02/8, Award, 6 February 2007, ¶¶ 399-401, **CLA-121**; and *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v Argentine Republic*, ICSID Case No ARB/97/3, Award, 20 August 2007, ¶ 9.1.1, **CLA-108**.

<sup>641</sup> See, for example, *Compañía del Desarrollo de Santa Elena S.A. v Republic of Costa Rica*, ICSID Case No ARB/96/1, Award, 17 February 2000, ¶ 104, **CLA-132**; *Wena Hotels Ltd. v Arab Republic of Egypt*, ICSID Case No ARB/98/4, Award, 8 December 2000, ¶¶ 128-129, **CLA-99**; *Azurix Corp. v Argentine Republic*, ICSID Case No ARB/01/12, Award, 14 July 2006, ¶ 440, **CLA-105**; *ADC Affiliate Limited and ADC & ADMC Management Limited v Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006, ¶ 522, **CLA-076**; *Siemens A.G. v Argentine Republic*, ICSID Case No ARB/02/8, Award, 6 February 2007, ¶¶ 399-401, **CLA-121**; *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No ARB/01/3, Award, 22 May 2007, ¶ 452, **CLA-127**; *BG Group Plc. v The Republic of Argentina*, UNCITRAL, Final Award, 24 December 2007, ¶¶ 456-457, **CLA-137**; *Bernardus Henricus Funnekotter and others v Republic of Zimbabwe*, ICSID Case No ARB/05/6, Award, 22 April 2009, ¶¶ 145-146, **CLA-114**; *Total S.A. v Argentine Republic*, ICSID Case No ARB/04/1, Award, 27 November 2013, ¶¶ 260-261, **CLA-138**; *Karkey Karadeniz Elektrik Uretim A.S. v Islamic Republic of Pakistan*, ICSID Case No ARB/13/1, Award, 22 August 2017, ¶¶ 999-1000, **CLA-139**; *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR and NovEnergia II Italian Portfolio SA v Italian Republic*, SCC Case No V (2015/095), Final Award, 23 December 2018, ¶ 577, **CLA-140**; *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg)*, *SICAR v The Kingdom of Spain*, SCC Case No. 2015/063, Final Award, 15 February 2018, ¶¶ 846-847, **CLA-141**.



itself by reason of the fact that the payment of compensation has long been delayed.”<sup>642</sup> It also “reflects economic reality in modern times” where “[t]he time value of money in free market economies is measured in compound interest.”<sup>643</sup> On this basis, pre-award and post-award interest should be subject to reasonable compounding. The appropriate interval of the compounding until payment is monthly.<sup>644</sup>

372. The Claimant considers that an appropriate interest rate is US\$ one month LIBOR plus 2% per annum on the basis that it represents a commercially reasonable and commonly-used interest rate at which the Claimant would have been able to borrow at the Valuation Date. Modern jurisprudence shows that the use of LIBOR as an appropriate benchmark interest rate has been applied by Tribunals in investment treaty cases.<sup>645</sup>

## IX. RELIEF SOUGHT BY THE CLAIMANT

373. The Claimant respectfully seeks, without prejudice to its reserved right to supplement and/or amend its claims and/or the quantum of its claims and/or the request for relief provided herein, an Award:

- (1) Declaring that the Respondent has breached Article 3(1) of the Treaty by failing to accord the Claimant's investment fair and equitable treatment;
- (2) Declaring that the Respondent has breached Article 2(2) of the Treaty by failing to accord the Claimant's investment continuous protection;
- (3) Declaring that the Respondent has breached Article 2(3) of the Treaty by taking unreasonable measures against the management, maintenance, use, enjoyment and disposal of the Claimant's investment;
- (4) Declaring that the Respondent has breached Article 4(1) of the Treaty by expropriating the Claimant's investment in Nigeria, alternatively by measures having effect equivalent to expropriation of the Claimant's investment in Nigeria;
- (5) Ordering the Respondent to pay the Claimant compensation for its total losses of US\$1,078 million or, in the alternative, US\$1,446 million;

<sup>642</sup> *Compañía del Desarrollo de Santa Elena S.A. v Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, 17 February 2000, ¶ 101, **CLA-132**.

<sup>643</sup> *Continental Casualty Company v Argentine Republic*, ICSID Case No. ARB/03/9, Award, 5 September 2008, ¶ 309, **CLA-142**.

<sup>644</sup> See, e.g., *Foresight Luxembourg Solar 1 S. Á.R1., et al. v Kingdom of Spain*, SCC Case No. 2015/150, Award, 14 November 2018, ¶ 545, **CLA-136**; *Novenergia II - Energy & Environment (SCA) (Grand Duchy of Luxembourg), SICAR v The Kingdom of Spain*, SCC Case No. 2015/063, Final Award, 15 February 2018, ¶¶ 846-847, **CLA-141**.

<sup>645</sup> See, e.g., *MTD Equity Sdn Bhd and MTD Chile SA v Chile*, ICSID Case No ARB/01/7, Award, 25 May 2004, ¶ 250, **CLA-059**; *Enron Corporation and Ponderosa Assets, L.P. v Argentine Republic*, ICSID Case No ARB/01/3, Award, 22 May 2007, ¶ 452, **CLA-127**; *Greentech Energy Systems A/S, NovEnergia II Energy & Environment (SCA) SICAR and NovEnergia II Italian Portfolio SA v Italian Republic*, SCC Case No V (2015/095), Final Award, 23 December 2018, ¶ 577, **CLA-140**.

- (6) Ordering the Respondent to pay the Claimant moral damages in the amount of US\$1 million or such other amount to be determined by the Tribunal;
- (7) Ordering the Respondent to pay pre-award and post-award interest at a rate of LIBOR plus 2% compounded monthly or such other rate fixed by the Tribunal;
- (8) Ordering the Respondent to indemnify the Claimant for all costs and expenses of the arbitral proceedings; and
- (9) Ordering such further and/or other relief as the Tribunal deems just and appropriate.

Respectfully submitted,



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1 May 2019